

LAWS204 – LAND LAW

Table of Contents

1 LAND LAW	6
Brief Intro into Land Law	6
Division 2 - Legal Profession Uniform Law (NSW)	6
Section 5(1) - Legal Profession Uniform Admission Rules 2015	6
Schedule 1 Part 2 - Legal Profession Uniform Admission Rules 2015	6
Background – Crown Land	6
Old System Land	7
Continuing Old System Land ---.....	7
Background – Torrens Title land	7
Torrens Title System - The Register.....	8
• Section 40 Real Property Act 1900 (NSW).....	9
• Section 41 Real Property Act 1900 (NSW).....	9
• Section 42 Real Property Act 1900 (NSW).....	10
• Section 43 Real Property Act 1900 (NSW).....	10
• Section 45 Real Property Act 1900 (NSW).....	11
Indefeasibility of Title – Deferred or Immediate?	11
Gibbs v Messer [1891] AC 248	11
Frazer v Walker [1967] 1 AC 569	11
Breskvar v Wall (1971) 126 CLR 376.....	12
The Ambit of Indefeasibility	12
Fels v Knowles (1906) 26 NZLR 604.....	12
Kotell v Bogdanovic (1988) 12 NSWLR 472	12
State Bank of New South Wales v Berowra Waters Holdings (1986) 4 NSWLR 398.....	13
Perpetual Trustees Victoria Ltd v Xiao & Anor [2015] VSC 21	13
2 EQUITY	13
Torrens Title and Land Registration Equitable Interests	13
Equitable Jurisdiction	14
Equitable Title.....	14
Resulting Trusts	14
Case: Muschinski v Dodds	16
Background Facts	16
o The parties were a de-facto couple.....	16
Case: Baumgartner v Baumgartner	16
Case: Giumelli v Giumelli.....	17
Personal/Mere Equity	17
Case: Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)	17
The Personal (Mere) Equity	18
National Provincial Bank Ltd v Ainsworth [1965] AC 1175 (House of Lords)	18
Summary of Equities	18
Equitable proprietary interests	18
Personal/Mere Equities.....	18
Difference between mere equity and equitable interest:	18

3 PRIORITY RULES.....	19
Priority between equitable interests.....	19
Summarise Key Terms	19
estate of freehold.....	19
Leashold estates.....	19
Prior legal interest v later legal interest – Old system title.....	19
Equitable Interests Old system	20
Prior legal interest v later equitable interest Old System	20
Prior equitable interest v later legal interest Old system	21
Prior equitable interest v later legal interest Tabula in Naufragio – A plank in a shipwreck.....	22
Prior equitable interest v later legal interest Rule in Wilkes v Spooner	22
Prior equitable interest v later equitable interest - Old System	22
Prior equitable interest v later equitable interest - Old system– Postponing conduct	23
 4 LEASES.....	26
NATURE OF A LEASE	26
TERMINOLOGY	27
DIFFERENT SOURCES OF LAW	27
BASIC STATUTORY REQUIREMENTS	28
Creation of leases	28
CERTAINTY OF DURATION	28
EXCLUSIVE POSSESSION	28
EXCEPTIONS TO EXCLUSIVE POSSESSION.....	28
FORMAL REQUIREMENTS.....	29
Agreement for a Lease	29
Other Tenancies.....	29
Implied Periodic Leases	30
Tenancy by Estoppel	30
Concurrent v Reversionary Leases	31
Concurrent:	31
Reversionary leases – Two meanings.....	31
Covenants.....	31
QUIET ENJOYMENT/DUTY NOT TO DEROGATE	31
FITNESS FOR HABITATION/KEEP IN REPAIR	32
REASONABLE CARE FOR THE SAFETY OF OCCUPANTS.....	32
TO USE THE PREMISES IN A TENANT-LIKE MANNER AND YIELD UP POSSESSION	32
IMPLIED BY STATUTE - CA	33
IMPLIED BY STATUTE – RTA.....	33
BY NECESSARY IMPLICATIONS.....	33
Express covenants.....	34
COVENANT TO REPAIR	34
COVENANT AGAINST ASSIGNMENT OR SUBLetting	34
COVENANTS AS TO USER/TO PAY RENT	35
Assignment of Lease	35
PRIVITY OF CONTRACT AND PRIVITY OF ESTATE.....	35
PRIVITY OF CONTRACT	36
PRIVITY OF ESTATE	36
Forfeiture by landlord	37
Enforcement of the right of re-entry.....	37

No right to forfeit if breach waived.....	37
Relief against forfeiture	37
Forfeiture and Subleases.....	38
Remedies Of Landlord And Tenant In Contract.....	38
Repudiation, Notice and Relief Against Forfeiture	38
SET OFF.....	39
Bonds	39
5 EASEMENTS AND PROFITS À PRENDRE.....	40
NATURE OF EASEMENT	40
NATURE OF AN EASEMENT RENTCHARGE	41
RENT OF AN EASEMENT – PROFITS A PRENDRE	41
ESSENTIAL ELEMENTS OF AN EASEMENT	41
Essential elements of an Easement.....	41
DOMINANT AND SERVIENT TENEMENT	41
Essential Elements of an Easement –	42
ACCOMMODATION OF DOMINANT TENEMENT	42
DOMINANT AND SERVIENT OWNERS MUST BE DIFFERENT	43
CAPABLE OF FORMING THE SUBJECT MATTER OF A GRANT	43
Easement Grant/Easement Reservation	44
Nature of an Easement –	44
POSITIVE EASEMENT	44
NEGATIVE EASEMENT	44
NATURAL RIGHTS, PERSONAL RIGHTS AND LEASES.....	44
Express Easements and Statutory Powers	45
Nature of an Easement.....	45
EASEMENTS.....	45
Creation of Easements	45
IMPLIED	45
Easements created by implication	45
Easements of Necessity.....	46
EASEMENTS OF NECESSITY: EXAMPLES	47
Different Forms of Easement – Easements of necessity	47
Common Intention Easement	47
Continuous and Apparent Easements	47
Easements created by implication – Generel words – Old System.....	48
Easements created by implication from a description of the property	48
Non Derogation from Grant	48
Easements created by implication – <i>Wheeldon v Burrows</i> (1879) 12 Ch D 31	48
Non Derogation from Grant	48
Easements arising from construction	49
Prescriptive Easements	49
Construction of Easements.....	50
Extinguishment and Modification of Easements.....	51
Extinguishment of Easements – ABANDONMENT.....	51
Extinguishment of Easements.....	52
STATUTORY EXTINGUISHMENT.....	52
Express Easements and Statutory Powers	53
Nature of an Easement.....	53
EASEMENTS.....	53
NATURAL RIGHTS, PERSONAL RIGHTS AND LEASES.....	53

Easements Answer Plan – HEPBURN.....	54
6 RESTRICTIVE COVENANTS	55
Nature of the Covenant.....	55
COMMON LAW Benefit of a Covenant	55
Annexation	55
INTENTION TO BENEFIT LAND OF COVANTEE	55
COVENANT MUST TOUCH AND CONCERN THE LAND	56
BENEFITED LAND MUST BE IDENTIFIABLE	56
EXPRESS ASSIGNMENT OF THE BENEFIT AT LAW	56
ENFORCEABILITY OF COVENANTS AND s36C CA	56
ENFORCEABILITY OF THE BURDEN OF A COVENANT AT LAW	57
ENFORCEABILITY OF THE BURDEN OF A COVENANT AT LAW - CIRCUMVENTING AUSTERBERRY	57
Circumventing Austerberry – Annexation of Rentcharge	58
Enforceability of the burden of a covenant at Law - Circumventing Austerberry.....	58
Enforceability of the burden of a covenant – In Equity	59
Covenant must be negative in substance	60
The purchaser must have notice of the covenant	60
The Covenant Must Benefit the Covenantee's Land	60
The covenant must be intended to run with the covenantee's land	61
Enforceability of the benefit of a covenant in Equity	61
Benefit of the covenant was annexed to the land	61
Benefit of the covenant was expressly assigned to them	61
Building Scheme	62
Requirements of scheme:	62
Freehold Covenants and Torrens	62
Formal requirements for the creation of freehold covenants.....	62
Passing the Burden in Equity: Enforcing a Restrictive Covenant	63
Extinguishment and Modification of Covenants	63
Stanhill Pty Ltd v Jackson.....	63
IN SUMMARY.....	64
Created:.....	64
Common Law.....	64
Equity.....	64
Remedies.....	64
7 MORTGAGES.....	65
Mortgages under old system title	65
An equitable mortgage must be:	65
An equitable mortgage may be:.....	65
Equity	65
The Equity of Redemption.....	65
Foreclosure.....	66
Early discharge of a mortgage.....	66
Penalty Provisions and Clogs on the Equity of Redemption	67
Early Repayment.....	68
Torrens Title	69
Foreclosure under Torrens Title.....	69

Penalty Clauses.....	69
Remedies available to a mortgagee:	70
1. To sue on a personal covenant.....	70
2. Right to Possession.....	71
3. Right to appoint a receiver.....	71
4. Right to lease	71
5. Right to expend money	71
Power of Sale.....	71
Power of Sale Requirements	72
Requirements in the Statutory Notice to Remedy the Default	72
The obligation on the mortgagee when selling.....	73
1. The mortgagee must take reasonable care to obtain the best possible price	73
2. The mortgagee must act bona fide and not recklessly (i.e. the good faith test)	73
Forsyth v Blundell (1973)	74
Bangadilly Pastoral Co Case (1978)	74
Mortgages – cases.....	74
1. Commercial and General Acceptance Ltd v Nixon (1981).....	74
2. State Bank of New South Wales Ltd v Chia (2000)	74
3. Gomez v State Bank of New South Wales Ltd (2002).....	74
Remedies available to a mortgagor complaining of an improper sale.....	75
Allfox Building Pty Ltd v Bank of Melbourne Ltd (1992)	75
Remedies available to a mortgagor complaining of an improper sale, as against the purchaser	76
Legislative Protection to a Purchaser from a Mortgage	77
Priorities between mortgagees where there have been further advances.....	77
A.	77
B.....	77
C.....	78

LAND LAW LECTURE 1

- Background – Crown Land, Old System Land and Torrens Title
- Torrens Title System – The Register
- Torrens Title System – Indefeasibility

Brief Intro into Land Law

Division 2 - Legal Profession Uniform Law (NSW)

To obtain the compliance certificate required for admission to practice, an applicant must have ‘attained the academic qualifications specified under the Admission Rules for the purposes of this section’ [s.17(1)(a)]

Section 5(1) - Legal Profession Uniform Admission Rules 2015

For the purposes of section 17(1)(a) of the Uniform Law, subject to these Rules, the specified academic qualifications prerequisite is successfully completing a tertiary academic course in Australia, whether or not leading to a degree in law, which ... (c) the Board determines will provide for a student to acquire and demonstrate appropriate understanding and competence in each element of the academic areas of knowledge set out in Schedule 1, or otherwise determined by the Admissions Committee after consulting each of the Boards.

Schedule 1 Part 2 - Legal Profession Uniform Admission Rules 2015

Property

Either the following topics –

1. (a) Meaning and purposes of the concept of property
- (b) Possession, seisin and title
- (c) Nature and type (i.e. fragmentation) of proprietary interests
- (d) Creation and enforceability of proprietary interests
- (e) Legal and equitable remedies
- (f) Statutory schemes of registration
- (g) Acquisition and disposal of proprietary interests
- (h) Concurrent ownership
- J (i) Proprietary interests in land owned by another
- (j) Mortgages;

or

topics of such breadth and depth as to satisfy the following guidelines –

The topics should provide knowledge of the nature and type of various proprietary interests in chattels and land, and their creation and relative enforceability at law and in equity. Statutory schemes of registration for both general law land and Torrens land should be included. A variety of other topics might be included, e.g., fixtures, concurrent interests and more detailed treatment of such matters as sale of land, leases, mortgages, easements, restrictive covenants, etc.

Background – Crown Land

- European land settlement commenced in 1788 – land vested in the name of the Crown – ‘Crown Lands’
- 1791-1793 – free grants of land to encourage settlement evidence by ‘Crown Grant’
- 1809-1821 – Governor Macquarie – leasing of lands
- 1825 – system of selling land introduced
- 1831 – free grants of land abolished – land sold at public auction
- Robertson Act 1861 (NSW) – selection of Crown land
- Crown Lands Occupation Act 1861 (NSW) – leasing - could select up to 320 acres of rural land and purchase the freehold – opened up squatter-held lands for selection.
- Crown Lands Alienation Act 1861 (NSW) – sale of land – sale of town and urban land by public auction

- Crown Land Acts 1884 (NSW) - grazing licences, homestead leases, conditional leases, pastoral leases, wharf and jetty permits, division of NSW Crown land into divisions.
- Crown Lands Consolidation Act 1913 (NSW) – consolidated legislation
- Now Crown Lands Act 1989 (NSW)
- Crown Lands in NSW are managed by the Department of Primary Industries. LAWS204 does not focus on Crown Land.

[Old System Land](#)

- 1788-1802 – No system for recording land transactions – no documentary evidence of transfer or maybe the particulars of sale written on back of land grant
- 1802 – ‘Old Register’ – Judge Advocate: brief record only
- 1817 – Governor Macquarie – Office of the Judge Advocate registration of deeds relating to land (also part of the ‘Old Register’)
- 1823 – Charter of Justice – office of Judge Advocate abolished and Supreme Court constituted
- Registration of Deeds Act 1825 (NSW) – register Deeds in Supreme Court – any Deed or instrument executed bona fide and for valuable consideration takes priority according to date of registration, not execution’ ‘Vendors Index’
- Registration of Deeds Act of 1843 (NSW) - Office of the Registrar General est. - Register for sworn, complete copy of deed . Existing records transferred to Registrar General
- 1849 - Office abolished - responsibilities went back to the Supreme Court.
- 1856 – Office of the Registrar General established (B,D & M plus Torrens) and from 1857 responsibility for registration of deeds.
- 1896 - Purchasers Index for Old System land established. Based on English Common Law – separate deed each time land was sold, mortgaged, leased etc – not mandatory until 1961 – needed to examine ‘chain of title’
- The Registers
 - Grant Registers (1792 to 31.12.1862)
 - The Old Register (1802 to 1825)
 - Purchasers Index
 - Miscellaneous Register
 - Index to Instruments Evidencing Change of Name (1875 to 1967)
- Greater ability to know about land. Greater (but not total) protection.
- Purchasers take subject to: – unregistered interests which have not been documented – unregistered instruments which ought to have discovered
- Purchasers title is still dependant on the chain of title* and the risk that a prior interest may be invalidated breaking the chain of title and destroying the purchaser’s interest
- Chain of title was fraught with complexity – to prove title, it was necessary to trace title back through an unbroken chain of events and documents, perhaps as far as the Crown grant.
- (English courts later ruled that it needed to go back only 60 years. Then Conveyancing Amendment Act 1930 (NSW) reduced this period to 30 years.)

[Continuing Old System Land ---](#)

- Search of Old System land - Deed
- Interested to know more about Registration of Old System Title? See this link for examples of Old System documents and explanation of the system

Background – Torrens Title land

- Old System Land – Confusing?
- Robert Richard Torrens (Sir Robert Torrens) devised the “Torrens Title” system of land registration. Had worked previously in shipping and emigrated to SA in 1840 to take up the position of Collector of Customs.
- Torrens system based on merchant shipping registration system. Single document for each parcel of land – a Certificate of Title – on which is recorded all dealings relating to that parcel. Original plus copy. Central Register able to be searched.
- The objective of the Torrens System ‘is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author’s title, and to satisfy themselves of its validity.’ Gibbs v Messer [1891] AC 248, 254 (Lord Watson for the Lord Chancellor, Lords Watson, Hobhouse, Herschell, Macnaghten, Morris and Shand)
- The purposes and objects of the Torrens system of title were to simplify conveyancing, to introduce a greater assurance, indeed certainty, of title and in consequence to reduce the expense of establishing and protecting title under the old land titles system. Black v Garnock (2007) 230 CLR 438, 461 (Callinan J)
- The ideas enshrined in the Real Property Act 1858 (SA) were highly controversial at the time but the system has now spread across Australia , Malaysia, New Zealand, Singapore, Israel, Belize, parts of USA and Canada, parts of Caribbean and of Central America
- The Torrens Title System is now ‘enshrined’ in the Real Property Act 1900 (NSW)

Torrens Title System - The Register

“The cardinal principle is that the Register is everything” Fels v Knowles (1906) 26 NSWLR 604, 620.

Section 31B RPA – (1) The Registrar-General shall cause a Register to be maintained for the purposes of this Act.

(2) The Register shall be comprised of:

- (a) folios,
- (b) dealings registered therein under this or any other Act,
- (c) the record required to be kept pursuant to section 32 (7),
- (d) instruments of a prescribed class, and
- (e) records required by the regulations to be kept as part of the Register.

(3) The Register may be maintained in or upon any medium or combination of mediums capable of having information recorded in or upon it or them.

(4) The Registrar-General may, from time to time, vary the manner or form in which the whole or any part of the Register is maintained.

S 3 RPA

- Dealing—Any instrument other than a grant or caveat, including an electronic form of that instrument, being an instrument:
- (a) that is registrable or capable of being made registrable under the provisions of this Act, or
- (b) in respect of which any recording in the Register is by this or any other Act or any Act of the Commonwealth required or permitted to be made.
- **Charge**—Any charge on land created for the purpose of securing the payment of an annuity, rent-charge or sum of money other than a debt.