

LLAW3221 Real Property Law Exam Notes

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INDEFEASIBILITY AND PRIORITIES

1. **Categorise interests – who has legal and who has equitable**

IF RP PURCHASED THE PROPERTY

_____ is the registered proprietor. As they have registered their interest and are a bona fide purchaser for value, they have a legal and indefeasible interest under s67 and 69 of the Real Property Act ('RPA'). Indefeasibility is not defined in the RPA but has been defined by case law as immunity from adverse claims against the registered property (*Frazer v Walker; Breskvar v Wall*). It is immediate (*Frazer v Walker*).

IF RP DID NOT PURCHASE THE PROPERTY:

_____ is the registered proprietor. As they have registered their interest, they have a legal interest under s 67 RPA. However, as they did not purchase the property and thus are not a bona fide purchaser for value, they are a volunteer, and do not have an indefeasible interest under s 69 RPA (*Peck v Peck*). Indefeasibility is not defined in the RPA but has been defined by case law as immediate immunity from adverse claims against the registered property (*Frazer v Walker; Breskvar v Wall*).

_____ has an equitable interest under the Torrens Title system; their interests are not registered, and unregistered interests are equitable interests (*Barry v Heider*).

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(If lease – term is 1 year or less and unregistered)

_____ has a legal interest in the form of their one-year lease; RPA s 119 creates legal interests in unregistered leases of one year or less.

(OR term is over 1 year and unregistered/option to renew is unregistered)

_____ has an equitable interest in their lease/option to renew their lease as it is unregistered, and unregistered interests are equitable interests (*Barry v Heider*).

(Only where needed) _____ only has a mere equitable interest. This is as

Other jurisdictions		
NSW; NT; QLD	Volunteers get indefeasibility	<i>Bogdanovic v Koteff; ???</i>
Everywhere else	NO	

2. **Claim to property**

A) Do any exceptions to indefeasibility exist?

In personam

The in personal exception will defeat indefeasibility if it is established. For *in personam* to be established, the current RP must have created an expectation through their conduct before, during or after obtaining the property that the agreement would be upheld (*Bahr v Nicolay*). Furthermore, there must be a recognised cause of action (*Vassos*).

Claimant can/not argue that RP conducted themselves in a way/said something that created an expectation that the agreement would be upheld (*Bahr v Nicolay*).

_____ Notice of equitable interest = yes, important but needs other stuff too (*Tulk v Moxhay*).

The established cause of action is promissory estoppel/misrepresentation/misuse of power (*Barry v Heider*)
If the *in personam* exception applies, RP's right to the land will be subject to claimant's interest.⁵⁹

IN PERSONAM OFTEN OVERLAPS WITH FRAUD! IF YOU THINK IT DOES – PRESENT THE WEAKER ONE IN THE ALTERNATIVE!!

Fraud

The fraud exception will defeat indefeasibility if it is established. For fraud to an exception to indefeasibility, there must be actual fraud (*Assets Co*) involving moral turpitude (*Wicks v Bennett*). This fraud must be by the current RP (RPA 69(a)) in the course of obtaining the property (*Assets Co*). Notice/knowledge of an earlier interest alone will not be enough to constitute fraud (s 72 RPA); there must be notice/knowledge in addition to dishonesty (*Lake Yew*).

_____ can argue that RP's conduct/speech of

EASEMENTS

An easement is a right enjoyed by the owner of one piece of land to carry out some limited activity without profit (w/o taking anything) on another piece of land.

Eg – a right of way = a positive easement; a right of access to light and air by means of restricting building on another person’s land = negative easement. The law is very reluctant to create new negative easements (*Phippes v Pears*) however there is no authority to reject the creation on new and novel negative easements (*Cth v Registrar of Titles*).

Types of easements:

Right of way: may be general or limited (eg only at night), eg ‘vehicular traffic only’ excludes pedestrians (*Barry v Fenton*)/=. If a right of way is given using the phrase ‘free and unrestricted right of way’, it will have meaning given to it by Schedule 5 of the RPA (RPA s 89).

A full and free right and liberty to and for the proprietor or proprietors for the time being taking or deriving title under or through this instrument, so long as he or they shall remain such proprietors, and to and for his and their tenants, servants, agents, workmen, and visitors, to pass and repass for all purposes, and either with or without horses or other animals, cart, or other carriages.

Right of support: a natural right attached to the land and based on CL (*Public Trustee v Herman*). Basically the right for the land on one side to be supported ie by a retaining wall. In the case of party walls, the property in the wall follows the property in the land upon which it stands (*Walsh v Elson*).

Easement of light: can only be made by an express grant (*Cth v Registrar of Title*).

Easement of air: can be established by longstanding customary use (*Webb v Bird*) or by an express grant.

Does an easement exist?

For an easement to exist:

1. There must be a dominant and servient tenement;
2. The easement must accommodate the dominant tenement;
3. There must be no common ownership between the two pieces of land; and
4. The easement must be capable of forming the subject matter of a grant – the right cannot be too wide, vague or indefinite.

1. Is there a dominant and servient tenement?

2. Does the easement accommodate the dominant tenement?

The easement must give a practical benefit to the dominant land Being beneficial to ppl other than the dominant tenement doesn't detract from the benefit on the dominant tenement (<i>Re Ellenborough Park</i>)	
The easement must be necessary for the enjoyment of the dominant tenant Convenience is not sufficient (<i>Akroyd v Smith</i>). If it is just for convenience, it is a personal privilege that is not connected with the land	
OTHER NOTES DT + ST don't have to be right next to each other, but have to be approximately close (<i>Re Ellenborough Park</i>) An easement may accommodate the subdivided parts of the DT (<i>Gallagher v Rainbow</i>)	

3. Is there must be no common ownership between the two pieces of land?

4. Is the easement be capable of forming the subject matter of a grant – the right cannot be too wide, vague or indefinite (*Re Ellenborough Park*)?

Furthermore, an easement needs to have been created legally or equitably.

Has an easement been created?

General law system: legal easements must be created by deed (LPA s 28), and easements that are not are equitable easements (*Walsh v Lonsdale*).

NATIVE TITLE

1. Does Native Title exist?

No need to discuss this if the facts already state that Native Title has been granted!!

At settlement in 1886, the Indigenous peoples of Australia were considered not to have a recognised legal system (*McDonald v Levy*) but instead only 'superstitious customs' (*R v Murrell*), and thus were subject to the laws of Australia as the land was owned by the crown (*A-G v Brown*).

Now, Native Title is recognised as per **s 223** of the *Native Title Act 1993* (Cth) (NTA):

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

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

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

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

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

Native Title does not render a fee simple right; is not alienable and not frozen at the moment of contact with Europeans. It is its own category of property: 'sui generis'.

Native Title is recognised as long as it fulfils the following requirements:

<i>NTA s223(1)(a)</i>	Are they an identifiable community/group?	
<i>NTA s223(1)(b)</i> <i>Mabo (No 2) for both</i>	Did they have a traditional connection with or occupation of the land based on their Indigenous peoples' laws/customs at the time of settlement?	
<i>Yorta Yorta</i>	Has this connection/occupation been substantially maintained/continued uninterrupted up until the claim was made? No requirement for exclusivity – land (<i>Mabo 2</i>); sea including past Australian coastal boundaries (beyond 12 nautical miles off AU) (<i>Yarmirr</i>)	

Extinguishment of Native Title:

Furthermore, the Native Title must not have been extinguished at any time by the Crown. Extinguishment requires clear and plain intention by the Federal Government and is subject to compliance with the Racial Discrimination Act 1975 (Cth) (*Mabo (No 2)*). No compensation is required (*Mabo (No 2)*). Native Title can only be extinguished under s 11 of the NTA. Once NT is extinguished, it is permanent and cannot be revived (S237A NTA).

TO EXTINGUISH NT:		
<i>Mabo (No 2)</i>	Clear and plain intention by the Federal Government? Subject to compliance with the Racial Discrimination Act 1975 (Cth)? No compensation required	
<i>4 key ways:</i> <i>NTA s 23B</i> <i>NTA s 23F</i>	1. Confirmation of past extinguishment – those from 1975-1992 <i>'Previous exclusive acts'</i> 3 categories: a scheduled interest, freehold estate or certain leases (s 23B(2)(c)) Must be valid (23B(2)(a)) Must be prior to Dec 23 1996 (s 23B(2)(b)) <i>'Previous non exclusive acts'</i> – the grant of a non-exclusive pastoral lease Will extinguish NT to the extent of any inconsistency (s 23A(3)) Must be valid (s 23F(2)(a)) Must be prior to Dec 23 1996 (s 23F(2)(b))	
<i>NTA ss 228-232E</i>	2. Validation of 'past acts' and 'intermediate acts'	