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INDIGENOUS ISSUES

What is native title?	**(1) Native title overview** Native Title refers to the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to **land or waters** (**s 223 of Native Title Act**). Fundamentally, Native Title is a "recognition concept". As the HC emphasised in **Mabo**, Native Title is not a common law title. Rather, it is a title recognised by the Common Law. Theoretically, it describes the space between the common law and Indigenous law, which is recognised in particular circumstances. Those circumstances are whether or not there is a spiritual connection with the land which is acknowledged and possessed under "traditional" laws and whether it has been extinguished. **(2) Bundle of rights metaphor** In recent years, the metaphor "bundle of rights" has been used to describe native title (**Western Australia v Ward**). Indeed, in **Ward**, the majority stated how the "bundle of rights" metaphor appropriately highlights how there may be more than one native title interest in contention and that several kinds of rights and interests in relation to land can exist under traditional law and custom. Furthermore, the court also made reference to the fact that not all rights and interest may be capable of full or accurate expression as rights to control what others may do on or with the land (**Ward**). When understood in light of a number of Indigenous cases and the principles which govern Native Title, the metaphor "bundle of rights" appears apt. • Firstly, it arguably recognises the complex intersection between Native Title and Common Law. Whilst the CL and native title are two separate systems of law, the CL of Australia does recognise and protect Indigenous

	law and custom in cases where native title has not been extinguished. Thus, rights (such as the right to land or water) may be recognised at both common law and through native title. Nonetheless, upon extinguishment, those rights are no longer afforded common law protection. • [SEE NOTES FOR ADDITIONAL REASONS] **(2) Criticisms** [**SEE NOTES]** **(3) Relationship to extinguishment** Since it is a "bundle or rights", the metaphor aptly highlights how these rights may be extinguished by the Crown. Native title does not expressly

MODERN PROPERTY LAW PRINCIPLES

Why is land law important? **Justifications for the strict approach taken towards land**	Land law is an important and fundamental area in our legal system. In modern society, property plays an important role in **defining a legitimate social order**. Property law is not a jumble of archaic rules, nor is it an aggregation of individual entitlements. Rather, property law is a **regime providing obligations, externalities and duties of attentiveness**. The very act of owning property is to deny it to another. [SEE NOTES FOR FURTHER]
Numerus clauses principle	Perhaps the most important concept underlying modern property law is the **numerus clauses principle**, which provides a "closed list" of property rights which are worthy of being enforced. Academic focus on this principle has primarily focused on the principle as a means and method of rationalising property interests. Unlike contract law, landowners are NOT at liberty to customise land rights. Rather, any new rights must fit firmly within the established pigeonholes, and of which the law will only permit a small and finite number. Arguably, this **restrictive view** is justified by the fact that **property interests are enforceable both *in personam* and *in rem* (against third party)**. It would be a great detriment to modern property rights and significant confusion would arise if parties were allowed to invent new modes of holding and enjoying real property. **<hence the strict rules for creating new land rights, such as *novel easements* (4 conditions – "accommodation" and "subject matter") or *restrictive covenants* (4**

	conditions – Tulk v Moxhay) → in a sense, the numerus clauses principle provides justification for these strict rules> There are great benefits with adopting the numerus clauses principle and limiting the number of instruments which can validly create an interest in land. • First, the numerus clausus principle helps ensure the **economic efficiency** of land. It **avoids the shackling of the use of land** by a myriad of contractually based agreements which might otherwise bind subsequent owners of land. Arguably, parties should not be free to dream up new ways to restrict the usages of land by agreement which are capable of binding successors in title indefinitely. Doing so may impair or sterilise the use of that land for future generations. • [**SEE NOTES FOR FURTHER REASONS**]

Strict rules justified by:

1) the fact that land has a special significance in our law → it is a finite and valuable resource

2) the numerus clauses principle → and the fact that we don't want to shackle the land

3) private citizens being able to control others through quasi-legislative powers

TORRENS DOCTRINE / INDEFEASIBILIY

Overview of Torrens	The **Torrens system of land registration** is perhaps the most significant development in NSW land law. Introduced in 1863, it has largely superseded 'general law' or the old system of deeds registration, which relied on a "chain system" of conveyance. The Torrens system overcomes many of the problems that arose under "old system law", including uncertainty, unreliability, complexity and cost. Under Old system, it was all about the "quality" of the title, that is, the title was good as long as no one else could not claim a better title. Evidence was the mort important aspect of the process, since chain of title was proved by creating a new deed when there was a dealing with the land. Torrens improves this process significantly. By creating a register with authoritative records stating title to land, it creates a "reliable, simple, cheap and speedy" means of registering and investigating proprietary interests and title. Importantly, Torrens is a system of title by registration, not registration of title (**Breskvar v Wall**). This enables it to overcome the weak links in deeds. **[SEE NOTES FOR BENFITS OF TORRENS]**
Deferred VS immediate defeasibility	**Immediate or deferred indefeasibility** A contentious issue in Australia regarding indefeasibility is whether we should be adopting a system of immediate or deferred indefeasibility. It is clear that post **Frazer v Walker**, the consensus now in Australia is that there is very much immediate indefeasibility, subject to exceptions in the Act (**s 42**). However, this remains an interesting policy issue. In comparison to other jurisdictions with Torrens based systems, Australia is indeed in the minority of systems that use immediate indefeasibility. The concept of deferred/immediate defeasibility essentially deals with a **Frazer v Walker** situation, that is, where a purchaser or mortgagee, acting without fraud, registers an instrument (transfer or mortgage), to which the signature of the registered proprietor has been forged by another. In such a situation, there are two innocent parties, those being the original owner (whose signature may have been forged) and the innocent third party purchaser (would be keen to retain title). The issue is how we should allocate loss between 2 innocent parties – the Owner and the bona fide purchaser – when the transaction is affected by fraud of a Fraudster third party? **Deferred defeasibility** [DEFINITION AND EXAMPLES PROVIDED HERE] **Immediate defeasibility**

	On the other hand, immediate defeasibility is linked to concept of **dynamic** security' and provides incentive to acquire assets and use them productively. The concept works to protects the 'reasonable' expectations of purchasers that they will acquire a good title free from general defects and unknowns. [FURTHER DEFINITION AND EXAMPLES PROVIDED HERE]
Good vs Bad consequences of Torrens rules of indefeasibility	**GOOD** **(1) Simplifies priority disputes** One of the fundamental benefits of the Torrens system is that it simplifies the priority disputes which may arise in a land law context. This is because "old system" priority rules that relate to *legal* interests do NOT apply at all. Registration replaces deeds, and upon registration, the title is indefeasible (except if there has been fraud on the person claiming the benefit of registration). Thus, the only two relevant rules that remain are: (1) ***earlier equitable interest v later equitable interest*** – the earlier prevailed unless there was 'postponing conduct' – Rice v Rice) (2) ***earlier mere equity v later equitable interest*** – the later equitable interest would prevail if taken for value and without notice of the earlier mere equity – Latec). **[MORE]** **BAD** **(1) Problems with the fraud exception** In Sixty-Four Throne, Macquarie Bank ("MB") was not guilty of fraud. The court held that although the bank acted wilfully blind and reckless, they were not dishonest. In that case, Macquarie approved a $40m loan, despite Kandy offering up property belonging to his parents-in-law. MB did not seek any proof that Kandy had a right to deal with the property, nor did they question their solicitors, who failed to realise that the mortgage had been fraudulently signed by Kandy (rather than his parents-in-law). Arguably, the only reason why MB was not fraudulent themselves was because they **closed their eyes to the possibility of fraud**. Whilst their suspicions may have been aroused, they did not inquire further for fear of learning the truth. Ultimately, this meant no fraud could be imputed on MB. The bank thus got a valid indefeasible mortgage. **[SEE NOTES FOR A MUCH DEEPER ANALYSIS AND CRITICAL COMMENTARY / CASE NOTE – USEFUL CASE TO DISCUSS IN AN ESSAY]**

	• The decision in **Cassegrain** also demonstrates how the NSW approach to volunteers has the potential to produce undesirable consequences. In **Cassegrain**, Claude was the director of a company who transferred property to his wife (Felicity). Three arguments were raised. In relation to Felicity's half interest, the court firstly held that title could not be defeated by the agent principal, since Claude's fraud could NOT be imputed on Felicity as the principal. It was outside of the scope of authority that Felicity conferred on Claude. Second, title could NOT be defeated under joint tenancy. Since Felicity acquired title where she hadn't been fraudulent herself, the joint title could NOT be challenged. Felicity's half interest was only defeated upon the application of **s 118(1)(d)(ii)**. Since Felicity was a volunteer who had not provided valuable consideration, and had received the gift through fraud, her title could be defeated. [**SEE NOTES FOR CRITICAL COMMENTARY AND DEEPER ANALYSIS – USEFUL FOR ESSAY]**

PRIVATE PLANNING LAWS

Introduction	Private planning regimes (such as covenants, easements, strata and community title legislation) are a highly complex and controversial concept within the Australian land law context. They are often described as a **double-edged sword**. For example, they recognise that individuals can dream up "weird" and peculiar things to do with their own land compared to the government. The law should be enforcing this, particularly because it can lead to a progressive society and innovative new ideas. On the other hand, these planning regimes present a form of "private legislation", enabling developers and landowners to quite seriously ***intrude*** into the conduct of others and their ability to live, enjoy and use their land. As such, the law has devised a number of complex rules for when private promises (such as covenants) will take effect as proprietary interests and run with the land.
Arguments FOR and AGAINST against freehold covenants	Freehold covenants are an interesting form of private planning law and a notoriously difficult area of land law. As evidenced in the development of case law following **Tulk v Moxhay**, courts are extremely reluctant to allow obligations to be imposed on freehold land. Recognition of freehold covenants can have significant ramifications from both an economic and social perspective. [**SEE A 1000 WORD ESSAY PLAN IN FULL NOTES FOR THIS ISSUE]**
Why do people use private agreements	**Overcoming technical limitations** Private planning agreements, in the form of **strata and community title legislation**, provide a means by which the technical limitations of the common law

	or equity can be overcome. For instance, **Sherry** has argued that the sole insurmountable impediment to freehold development in Australian law has been the consistent judicial recognition that **covenants must be negative in nature**. Whilst this problem has been avoided in England with the adoption of long-term leasehold title, the fact that developers cannot compel positive obligations in freehold development has had fundamental significance for high-rise buildings, apartments and suburban estates with facilities. [FURTHER ISSUES OUTINED]
Ways in which a private planning instrument may be invalid and legally unenforceable	**(1) Conflict between private law and public law** In **Cumerlong v Dalcross**, Dalcross operated a private hospital and wanted to extend that activity to an adjoining land. However, the adjoining land was burdened by a private covenant which stated that "no part of the lot was to be used for the purposes of a hospital". Following rezoning of the land in 2004, public planning law became operational over that land. **Clause 68(2)** of the ordinance operated to **suspend restrictive covenants** in the municipality in order to facilitate development. On the basis that **s 28(2)** of the **EPA** allows legislation to override regulatory instrument (such as restrictive covenants), the council approved a DA application to extend the hospital. The HC broadly construed **s 28**. **[SEE FURTHER ANLAYSIS IN NOTES]** .