

SAMPLE ONLY

REAL PROP EXAM NOTES:

1. Native title:

Annexation; vested absolute title (Letters patent 1978; vested absolute ownership in the crown)

Can native title coexist with this? NO

Justice Brennan; The HC cannot challenge a sovereign act of the crown (the act of acquisition)

Rather, look at the effect of this acquisition. The notion of terra nullius was overturned, this focuses on a different concepts of title. The crown acquired radical title when they colonised. As a result, there can be a pre-existing native title. Radical title does not preclude native title, whereas absolute title would have.

Requirements for native title:

- Members of an indigenous group
- Who are claiming to hold land communally
- Native title is about a bundle of rights; differs to fee simple rights
- Notably, communal title passes on through the family, not with sale of land
- Must have a pre-existing set of laws and customs before colonisation
- These practices must have continued on after colonisation
- (pre-existed and continued)
- Where a clan or group has continued to acknowledge their laws and customs so far as is practical, where this connection has been substantially maintained, along with a connection to the land, they may have native title claim

No native title:

- No customs linked to the land
- Native title expires over time, and cannot be revived
- Bundle of rights; each of the estates in land grants a bundle of rights, if the native title carries with it certain rights that do not conflict another estate in land, they can co-exist.
- *Eg. A farmer can have a right to land, alongside a native title. If there is a conflict of rights, the native title is extinguished*
- Where the crown grants fee simple ownership, then nobody else has rights to that land
- Free hold estate: extinguishes native title by the grant of sovereign power

Native Title Act 1993:

- Recognises native title
- Validates past acts
- Set down procedure for native title claims
- Consider use of land in terms of economic development, to allow for land agreements (eg between native title and developers)
- Native title tribunal

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Wick v Queensland 1996:

- Pastoral leases do not extinguish native title
- Native title can coexist
- HC; the grant of pastoral lease by the crown does not extinguish native title

This led to people attempting to protect their land eg Puffin Billy

Commonwealth native title act

- Secured some land from native title claims

Yorta Yorta

- Traditional attachment to land laws and customs test
- The court looked at positive v normative value systems
- Normative value system must be proven, and the connection to the land
- Justice Olney ruling that the *'the tide of history has indeed washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs.'*

Mabo v Queensland (no.2) (1992)

- HC rejected the notion of terra nullius in favour of aboriginal title

- Native title is not tenure
- Crown has radical title and can allot land to people
- Recognised native title