70317 REAL PROPERTY

TOPIC 1: TENURE, ESTATES, AND NATIVE TITLE

TRANSACT IN ESTATES NOT IN LAND ESTATES ARE A BUNDLE OF RIGHTS THERE MAY BE MORE THAN ONE ESTATE IN PROPERTY AT ANY ONE TIME THEY ARE ALL INHERENTLY ALIENABLE ESTATES DO NOT AT ANY GIVEN TIME CONTAIN POSSESSORY RIGHTS TO PROPERTY

Real Property is land and interests in land. Real property is subdivided into two further groups, corporeal hereditaments (tangible real property, i.e. land) and incorporeal hereditaments (intangible interests in land, such as easements, or right of way).

Three key doctrines:

- Doctrine of tenures
- Doctrine of estates
- Doctrine of native title

These three doctrines provide the structure for our land holding system

RECEPTION OF BRITISH LAW

- British Imperial Law – legal framework that governed Britain's relations with her colonies
- Law and official policy
- Settled versus conquered colonies
- An Englishman brings as much of the common law with them as is relevant to the circumstances of the colony → ***Cooper v Stuart***

DOCTRINE OF TENURE

- Based in feudalism
- Three principles:
    - No one owns land absolutely (allodial)
    - All land is held **of** the Crown
    - No one holds land except **of** the Crown (i.e. by grant)

FEUDAL TENURES

- The King owned all land absolutely
- He granted his subjects ('tenants') the right to use the land, not the land itself
- The right granted was an 'estate'
- In return, the tenant owed the King obligations

There were many different types of tenures (differentiated by different types of service) only one was imported into NSW: free and common socage.

TRADITIONAL VERSUS 'NEW' CONCEPTIONS OF TENURE

- Traditional views of tenure in Australia: the importation of feudal law → ***Attorney-General v Brown***
- Modern view of tenure in Australia → ***Mabo v State of Queensland (No 2)***

RADICAL TITLE

- Legal fiction which supports the doctrine of tenure

- Crown did not acquire absolute ownership (we call this beneficial ownership) over all of Australia, because there were other owners (no *terra nullius*)
- Crown acquired radical (or ultimate, final) title, which is the "concomitant" of sovereignty
- This gives the Crown the power to grant rights and interests in land

DOCTRINE OF ESTATES

WHAT IS AN ESTATE?

- **Estates** are different bundles of rights and powers exercisable in respect of land. E.g. possession, alienability, right to derive income etc
- So in modern terms, it's the interest we have in the land

ESTATES ARE BASED ON TIME

- The difference between the types of estate is the time which they endure – in other words, how long the estate exists
- Therefore the different estates are classified according to how long they endure, and more than one estate can exist at any one time in one piece of land

TYPES OF ESTATES

Freehold estates (uncertain duration)

- Fee simple
- Life estate
- (and the abolished fee tail)
- Leasehold estates (certain duration)
- Remainders and reversions

FEE SIMPLE

Fejo: An estate in fee simple is, "for almost all practical purposes, the equivalent of full ownership of the land" [44]

- An inheritable estate
- Inheritability was indicated in the grant by the use of the term 'heirs'
- Rights of ownership: e.g. alienable; exclusive possession

At common law:

- To A and his heirs
- Now can be To A in fee simple/To A forever – *Conveyancing Act s 47(1), (2)*
- Also created by default if you attempt to create a fee tail – ss19 and 19A *Conveyancing Act 1919*

LIFE ESTATE

Two types of Life Estate:

1. Life estate *pur autrie vie*
    - All rights of the holder of an estate in fee simple except inheritability and note doctrine of waste
    - Often by way of trust
    - Commonly familial situations

- To A for life / other words showing an intention to create a life estate / by default if you fail to create an estate in fee simple (s 47(2))

SIMULTANEOUS ESTATES

- To A for life (reversion in the grantor)
- To A for life remainder to B in fee simple

You can have more than one estate with respect to land at any one time → Only one can have possession at any one time

- Fee simple in reversion → At the end of a life estate, possession reverts back to the holder of the fee simple
- Estate in remainder →At the end of the life estate, possession goes to the individual given the remainder (if initial owner dies)

MABO V STATE OF QUEENSLAND (NO 2)

"Native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact according to those laws and customs" at 58 (Brennan J)

- Native title is not an institution of the common law – it is the recognition by the common law of rights and interests that are sourced in a normative system which pre-existed sovereignty

AUSTRALIA: PROVING NATIVE TITLE

- The starting point for any determination of native title is s 223. It is also the substantive rules of proof
- What must be in a determination is in s 225
- Over time, courts have significantly enlarged what must be proven by reading words into s 223 and by giving particular emphasis to particular words
- The most important element arguably now of the test for native title is one which is not in s 223. Nor was the concept in ***Mabo (No 2)***: a society united in and by their acknowledgement and observance of a body of accepted laws and customs
- Never been about exclusive possession
    - Set of usage rights with respect to land

S 223 NATIVE TITLE ACT

(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

FAR WEST COAST NATIVE TITLE CLAIM V SA (NO. 7) (2013) MANSFIELD J

A recognisable group or society that presently recognises and observes traditional laws and customs in the Determination Area

(1) They must be a society united in and by their acknowledgement and observance of a body of accepted laws and customs

(2) That the present day body of accepted laws and customs of the society, in essence, is the same body of laws and customs acknowledged and observed by the ancestors or members of the society adapted to modern circumstances; and
(3) That the acknowledgement and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty and that the society has continued to exist throughout that period as a body united in and by its acknowledgement and observance of those laws and customs; and
(4) The claimants must show that they still possess rights and interests under traditional laws acknowledged and the traditional customs observed by them and that those laws and customs give them a connection to the land

OTHER CHARACTERISTICS

- Inalienable
    - Cannot be alienated
    - Not freely disposable
    - Not leased, mortgaged, sold (except to the Crown)
- Communal
    - Property vests in a community not an individual
    - However, communities largely change. Therefore when there is a native title determination it must be vested in a trust, or a corporation, otherwise it is difficult to identify native title holders → Must be identifiable
    - First step is to show proof: gather evidence, determine definition (Mansfield J)
- Exclusive possession?

EXTINGUISHMENT

Have any interests been extinguished between sovereignty and 1975? (Crown has radical title → ability to take away and provide interest in land) → Extinguishment is a legal test (does not happen because of what you do on the land – happens because of rights granted)

- *Fejo* – Effect of an estate in fee simple – exclusive possession
    - Fee simple = exclusive possession → Grant of exclusive possession permanently extinguishes native title (primacy to exclusive possession)
- *Wik* – Effect of the grant of a pastoral lease – native title 'yields' to the extent of the inconsistency
    - Lease over Crown land that does not have estates in fee simple → for cattle, agriculture, farming, etc (large portion of Australian continent has been a subject of a pastoral lease → lead to issues with native title)
    - HCA decided case was about co-existence → Extinguish native title but ONLY to the extent of the inconsistency
        - Compare rights under pastoral lease and native title (at the moment the grant is given) → Can they co-exist? If they can't co-exist, native title is extinguished
    - Pastoral leases DO NOT CONFER EXCLUSIVE POSSESSION
- Extinguishment is a legal (not factual) test – to be determined at the time of the grant – ***Brown*** **HCA 2014**

MANAGING LAND: FUTURE ACTS

- A future act is basically any activity that occurs on Crown land after the commencement of the provisions of the Native Title Act (Cth) 1993) and which 'affects' native title
- Examples:
    - A legislative act such as the making of or amendment of Acts of Parliament
    - Creation of estates

    - An administrative act such as the issue of a license to use Crown land, the issue of a management plan for a part or reserve, or the sale of Crown land
    - A physical act such as the construction of facilities on a Crown reserve

FUTURE ACTS

- The Native Title Act allows for a range of future acts to occur on Crown land and specifies the level of consultation that must be carried out before the act can occur (I.e. without this procedure it will not be valid)
    - Only Crown acts can affect native title. Not third party actions.
- S 24AA sets out the different kinds of future acts and what has to be done before each is valid. The response might be: → If the Crown does not follow the proper procedures under this Act → Found to be improper and will not hold
    - None
    - Opportunity to comment
    - Negotiation (may include cases where Crown grants exploration license, or mining license)
    - Making of an Indigenous Land Use Agreement (may provide native title holders with some economic benefits → used as leverage to grant employment or a share of royalties)

WHAT DOES GOVERNMENT DO?

- Has native title already been extinguished, for example by a previous freehold grant? Check with NSW Land and Property Information
    - Find out if there is a claim (lodged or finalised): search the NNTT registers: www.nntt.gov.au
        - If there is a native title, a procedure might have to be followed – see Future Act regime – **s 24AA** onwards – what kind of Act do you want to do – what is the procedure that has to be followed?
        - If there is a claim, the Government can become a party. So can third parties, like Telstra – see the joinder provisions in s 84 (Telstra → Wires might come across the land hence their involvement in almost everything)
- In some cases a procedure will have to be followed even if there is a claim but no resolution of it: e.g. grant of an exploration or mining lease – 'right to negotiate' – Part 3, Div 3, subdivision P
    - Crown can make a non-claimant application – s 24FA – protection to do Future Acts