

# LAND LAW

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# 1. Native Title

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## Historical Intro

- Land is both an essential and finite resource
- Indigenous Australians – no individual rights to the land, collective rights to large areas of land
  - Contrast with distribution in more fertile lands (e.g. Scottish Highlands)
- Early settlers in Australia → vast holdings to ensure enough production
  - Contrast with small farms in England and public allotments
- LAND = essential for survival
  - Control of land = POWER

## Norman Conquest and feudal land law Development of Oppression

- 1066 invasion of England by William the Conqueror
- William consolidated the feudalism
  - social and political system in which the dominant power allocates land to individuals in return for military and other services, including labour
  - William's change was to become the ultimate owner of all land in England
- William allocated land to his followers and those who pledged allegiance
  - Tenants-in-chief
  - Tenants-in-chief granted to their under-tenants in return for military, labour and other services
  - Under-tenants granted land to others below
  - At the bottom: villeins or serfs
- Feudal system used land to create a political and social system
  - Enforced by military power
  - Channelled by law
- Domesday Book 1086
  - Record of all the tenants-in chief and their under-tenants in most counties of England
  - Recorded:
    - what land they owned and the attached obligations
    - Value of the land
    - Production of the land
- French law influence
  - French origin of words such as property, estate, tenements, chattel, lease, appurtenance (an accessory or other item associated with a particular activity or style of living), encumbrance, tenant and executor
- Upon invasion of Australia (1788), the British acquired sovereignty over Australia
  - Power to deal with land; e.g. land grants
  - No feudal system, but all land owned by the Crown → **doctrine of tenure**

## Doctrine of tenure

- No one has absolute ownership. Rather, landowners hold the land 'of' the Crown as tenants (therefore tenure).
- The genesis of all land titles is theoretically in England or factually (as largely the case in Australia) be traced to an original grant from the crown
- If all land titles come from grants from the crown, no land titles could exist outside that framework
  - i.e. native title – cannot exist outside the doctrine of tenure

## Doctrine of estates

- Legal mechanism to describe possession of the land holding it 'of the King'
  - Feudal law: freehold and leasehold (with a limited duration and originally treated as personal contracts)
- Freehold estates:
  - Fee simple
    - Largest interest in land in Anglo-Australian law
    - Equivalent of full ownership
    - Lasts forever
    - To use the land as they please
    - Allows to sell the land or gift it during their lifetime (*inter vivos*) or after death by will (*mortis causa*)
    - Comes to an end only through compulsory acquisition by the state
- Fee tail
  - Abolished in most of the common law world in early 20<sup>th</sup> century
  - Property rights that the original owner (grantor) had stipulated must pass down a line of particular descendants
    - In the event that the line failed, land would revert to the grantor or grantor's estate
  - Social and financial purpose by protecting family property from dissipation amongst people unrelated by blood
  - Tail male, tail female or special tail (descendants of a particular wife)
  - BUT seriously limited the current entail holder's ability to economically exploit the land – could not mortgage, grant a lease longer than their life
  - Counterintuitive – does not reflect the values of liberalism, modern democracy
    - Individual autonomy and liberty
- Life estate
  - Interest that only existed during the owner's lifetime
  - EG
    - Man leaves his land to his wife 'for life' with a fee simple 'remainder' to his eldest son
      - Wife has a estate in land, a life estate
      - Son has an estate in land, a fee simple (called a remainder while not in possession)
      - Both estates can be dealt with but with their limitations
        - E.g. transfer 'pur autre vie' (i.e. until wife's death) ;
        - E.g. transfer with possession after the wife's death
  - Still useful today for estate planning:
    - e.g. property for the grandchildren with a life estate for the parents
    - e.g. life estate for the second wife with remainder for the children

## Leasehold estates

- Interest in land
- Similar to fee simple – but time limited
- Length must be certain or capable of being rendered certain