

## Table of Content

<b>Native title .....</b>	<b>1</b>
Extinguishment of native title .....	2
<b>Fundamental concepts in land law .....</b>	<b>5</b>
<b>Old system title .....</b>	<b>7</b>
Torrens Deposited Plans .....	8
Torrens register and indefeasibility .....	9
<b>Indefeasibility of title .....</b>	<b>11</b>
<b>Exception of Fraud .....</b>	<b>13</b>
<b>Other exceptions .....</b>	<b>16</b>
<b>Exception: overriding statutes .....</b>	<b>17</b>
<b>Caveats .....</b>	<b>18</b>
<b>Co-ownership .....</b>	<b>21</b>
<b>Lease .....</b>	<b>23</b>
Lease Fundamentals .....	23
Solving lease problems .....	25
Assignment of Lease/reversion .....	26
Remedies for breach of lease .....	28
<b>Mortgage .....</b>	<b>30</b>
Mortgage fundamentals .....	30
Mortgagee's remedies .....	30
Remedies of the mortgagor .....	33
<b>Freehold covenant .....</b>	<b>34</b>
<b>Exam Mind map .....</b>	<b>35 -44</b>

### *Abbreviations:*

CA = counter-argue  
CL = common law  
CT = Certificate of title  
NT = native title  
RP = registered proprietor  
POC = privity of contract  
POE = privity of estate

CA = Conveyancing Act  
RPA = Real Property Act

# Lease Fundamentals

## Introduction

- Difference between a sublease and an assignment of lease: whether the period granted by tenant to another is shorter than his own lease? Yes: sub-lease.
- While the lease is running, landlord still has the fee simple interest in land (ie reversion<sup>18</sup>) while he gives possession to the lessee.

## Formal requirements to create lease

1. Contract: s 54A in writing – create a *legally binding* contract/an *equitable* lease
  - 1) For commercial lease – usu start by negotiating the terms; must agree who will be responsible for what
  - 2) For residential lease – not much negotiation over the terms of lease, heavily regulated by the Residential Tenancies Act 2010 (NSW). Landlord **cannot** create leases that are inconsistent with the Act.
  - 3) For retail lease - regulated by *Retail Leases Act 1994*. Any provision in the lease that is inconsistent with the Act is void: s 7.
2. Registration (s 53(1), exception – less than 3 yrs): must fill in the Torrens lease form + lease agreement + CT/CoRD holder consent in case of mortgage

## Implied lease at common law

Common law implies a lease if a tenant is: (1) in possession of premises **and** (2) paying rent on a regular basis, eg weekly, monthly.

- Effect: legal lease.
- Circs: still negotiating but tenant is keen to move in; registered lease expired but stayed on; written lease but not register, etc.
- s 127 CA: all common law implied tenancies from year to year are converted to tenancies from month to month, terminable by either party with one month's notice. “*tenancy at will*”
- If the landlord sells the reversion, implied tenancies at common law bind the new registered proprietor. Because it's implied tenancy from month-to-month – lease for less than 3 years: s 42(1)(d). NOT because it's legal lease.

**Conclusion:** implied tenancy from week to week/month to month; implied tenancy from year to year → converted to s 127 tenancy (from month to month).

## Substantive requirements ( $\Leftrightarrow$ licence)

Requirement 1: certainty of duration

1. **Rule:** leases must be of a duration that is certain or capable of being rendered certain. – look at terms of lease
  - Lease for the duration of the war is uncertain: *Lace v Chantler*.
  - “The right to occupy would last as long as a person owned a parcel of shares” is a licence since no one knows when someone might decide to sell: *Wilson v Meudon*.<sup>19</sup>
  - **Periodic tenancy**<sup>20</sup> is **certain** b/c it is treated as fixed terms for one week, one month etc.

Requirement 2: exclusive possession

1. **Rule:** the tenant must have a right to exclude everyone else from the premises, including the landlord.
  - Determined by the terms of the lease; title of the agreement is irrelevant: *Radaich v Smith*.
  - Licence is a personal permission to enter the land and use it for some stipulated purpose: *Radaich v Smith*.
  - A reservation to landlord of a limited right of entry (eg as to view or repair) is not inconsistent with a grant of exclusive possession.

## Typical covenants in leases

<sup>18</sup> Possession will eventually revert back to landlord when the lease comes to an end.

<sup>19</sup> Company title predates strata title. Company owns the apartment, and when people buy the apt they buy a portion of shares in the company.

<sup>20</sup> Periodic tenancies are leases that continue for specific periods until terminated by a period of notice, eg implied tenancy at common law or under s 127.

## Exam Mind map

### Indefeasibility of title

**Step 1:** who is registered? – legal owner of that interest – once registered, the registered interest is immune from adverse claims; “indefeasible” (*Frazer v Walker*) – bound by interests already on the register (notice irrelevant); not bound by unregistered interests: s 42. (notice of unregistered interest is irrelevant: s 43)

(note: Frazer – register despite forged mortgage instrument)

**Step 2:** exceptions to indefeasibility? (fraud/ volunteer/ short-term tenancy/ rights in personam/ overriding statutes)

**Step 3:** if indefeasible – to what extent?

**Test:** terms are indefeasible if they are integral to the estate or interest vested in the lessee/mortgagee **and they touch and concern the land.** (*Mercantile Credit*)

- Option to renew: (though contractual in nature) affect the term of lease, indefeasible – **the option lease when brought into existence by exercise of option also attracts indefeasibility.** (*Mercantile Credit*)
- Option to purchase: s 53(3) RPA, indefeasible.
- Personal covenants (eg covenant to repay the loan in a mortgage): defeasible.

**!! NOTE:** in exam, in terms of option to purchase, just use s 53(3) RPA; do not cite the *Mercantile Credit* case

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