

MLL327 Property Law Exam Notes

Table of Contents

Week 1 – The Concept and Forms of Property.....	5
Meaning of "Property"	5
Fragmentation of Property	8
Need for Private Property Rights.....	8
Property Rights Distinguished from Contractual Rights.....	9
Distinction between a Lease and a Licence	10
Creation of New Proprietary Interests.....	11
Sources Outside of Private Ownership.....	11
Resources Incapable of Ownership: Moral Boundaries	11
Recourses Incapable of Ownership: Common Heritage of Humanity.....	12
Classification of Property	12
Week 2 – Personal Property, Fixtures and Possession	13
Introduction.....	13
Personal Property	13
Difference Between Real and Personal Property	13
The Doctrine of Fixtures	14
Degree of Annexation.....	15
Object of Annexation	16
Tenants Right to Removal	16
Right of Third Parties.....	16
Possessory Title.....	17
Bailment	17
Seisin	18
Prior Possessory Title	18
Prior Possessory Title and Native Title: Mabo	18
The Finders Keepers Rule	18
The jus tertii Defence	19
Week 3 – Adverse Possession	19
Meaning of Adverse Possession	19
Title Hierarchy.....	20
Nature and Rationale Underlying Adverse Possession	20
The Tests for Establishing Adverse Possession.....	21
Multiple Possessions.....	22
Disability and Fraud.....	23

Consequences of Adverse Possession.....	23
Adverse Possession and the Torrens System	23
Answer Plan.....	23
Week 4 – The Doctrine of Tenure.....	24
Feudal History of the English Property System	24
Tenure and Radical Title.....	26
The Mabo Decision	26
Summary	26
Week 5 – Native Title.....	26
Introduction.....	26
Meaning of Native Title.....	26
Mabo Decisions.....	26
Establishing Native Title	28
Intersection of Native Title and Regulatory Acts.....	29
Extinguishment of Native Title	30
Native Title and Coastal Waters	32
Native Title Legislation.....	33
Summary	35
Week 6 – The Doctrine of Estates.....	35
Creating CL Estates.....	35
Fee Simple Estate.....	35
Fee Tail Estate	36
Life Estate	36
Future Interests.....	37
Statutory Requirements for the Creation of Estates	37
Property Law Act 1958 (Vic)	37
Transfer of Land Act 1958 (Vic).....	38
Instruments Act 1958 (Vic).....	38
The nemo dat quod non habet Rule	39
Vested and Contingent Interests	39
Contingent Legal Remainder Rules	40
Restrictions upon the Right to Alienate	41
Answer Plan.....	43
Week 7 – Leases	43
History of the Lease	43
Terminology.....	43
Types of Leases	44
Fixed Term Lease.....	44

Periodic Tenancy.....	44
Tenancy at Will.....	44
Tenancy at Sufferance.....	44
Formal Requirements for Creating a Legal Lease.....	45
Statutory Formalities.....	45
Exclusive Possession.....	45
Certainty of Duration.....	46
Equitable Leases.....	47
Assignment and Sublease.....	48
Privity of Contract.....	49
Privity of Estate.....	49
Distinction.....	49
Example.....	49
'Touch and Concern' the Land.....	50
S 71 TLA: Sub-leases.....	50
The Rights and Duties of Landlords and Tenants.....	50
Reasonable Habitability.....	51
Landlord's Duty of Care.....	51
Duty to Provide Tenant with Quiet Possession/Duty not to Derogate.....	51
Tenant's Duty to use the Premises in a Tenant-Like Manner.....	52
Miscellaneous Tenant Duties.....	52
Express Contractual Duties.....	52
Remedies for Breach of the Lease.....	53
Right of Re-entry.....	53
Termination and Repudiation.....	53
Week 8 – Equitable Property.....	54
Introduction.....	54
Difference between Equity and CL.....	54
Types of Equitable Interests: Trusts.....	55
Express Trusts.....	55
Resulting Trusts.....	56
Constructive Trusts.....	57
Other Equitable Interests.....	60
Formality Requirements for the Creation of Equitable Interests.....	60
Doctrine of Part Performance.....	61
Enforcement of Equitable Interests.....	62
Mere Equities.....	62
Overview of Equitable Proprietary Interests.....	63

Week 9 – Easements.....	64
Nature of Easements.....	64
Easement Distinguished from Profit a Prendre	64
Requirements for a Valid Easement.....	65
Dominant and Servient Tenement.....	65
Easement must Accommodate the Dominant Tenement.....	65
Dominant and Servient Owners must be Different	66
The Easement must be Capable of Forming the Subject Matter of a Grant	66
Methods of Creating Easements.....	67
Express and Implied Grants	67
Wheeldon v Burrows Doctrine.....	70
Easements by Prescription	71
Construction of Easements.....	71
Infringement and Extinguishment	72
Week 10 – Restrictive Covenants	74
Introduction.....	74
Nature of Covenants	74
Utility of Covenants.....	74
Privity of Contract and Enforcement of Covenants	75
Passing the Benefit under CL.....	75
Benefit and Burden of a Covenant.....	75
Passing the Benefit under CL: The 'Touch and Concern' Test.....	76
Passing the Burden in Equity.....	76
Restrictive rather than Positive	77
Intention to Impose the Burden upon a Knowing Successor in Title	77
Covenant Identifies Benefited Land	78
Passing the Benefit in Equity	78
Assigning the Benefit of a Covenant	79
Assigning the Benefit of a Covenant in Equity.....	80
Building Schemes	80
Mutuality	81
Extinguishment and Modification of Covenants.....	81
Answer Plan.....	82
Summary	83
Week 11 – Mortgages	83
Meaning.....	83
Formality Requirements and Intention	84
Type of Mortgages	84

Old Title Mortgages.....	84
Torrens Title Mortgages.....	84
Equitable Mortgages.....	85
Rights of the Mortgagor.....	87
Equity of Redemption.....	87
Right to Possession.....	88
Right to Assign a Mortgage Debt.....	88
Rights of the Mortgagee.....	89
Power of Sale.....	89
Foreclosure.....	91

Week 1 – The Concept and Forms of Property

Meaning of "Property"

- Property right: right to land or goods
- Personal right: right to another person in terms of a contract
- Right of property (according to Blackstone *Commentaries of the Laws of England*) = "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe"
- The following features can be deduced from Blackstone's definition:
 - (a) Dominion (sovereignty of control = deciding how to use an object/what to do with it)
 - Control exercised by a person over an object (control over disposal)
 - Dominion denotes some legally authorised power
 - "Despotic" denotes an absolute power - power with respect to that object
 - Power concentrated in a specific person/s = "sole"
 - Indigenous rights are concentrated in group - Native Title rights differ from the typical CL notion of property as such rights are vested in a clan/larger group of people rather than a sole person
 - (b) Things of the world
 - Things must be separate and apart from ourselves
 - Physical things (land and chattels) and intangible things (shares and trademarks = things that cannot be touched or perceived by our senses)
 - Must have legal existence
 - (c) Externalised
 - Demarcation of property/boundaries
 - Must be identifiable
 - (d) Exclusion
 - To exclude others from:
 - Enjoying same rights; or
 - Interfering with the exercise of rights
 - Exclusion can have 2 components:
 - Exclusion from interference or use; and
 - Exclusion from ability to take item away
 - Excludable - property consists primarily in control over access: Gray
 - Control over access = can control access to the property - this is the essence of property
 - Criticism:
 - Property is not an absolute concept ("total") - one may interfere with right of others or public property, health and safety
 - The right to exclude is not the only entitlement to the party, as there are other rights, such as the right to use it, the right to transfer ownership, etc.
 - Exclusion is not a characteristic of an Indigenous relationship - connection with land rather than exclusion
 - (e) Enforceability of right against other persons:

- Right *in rem* (operates against the world) = property right: *XZS Industries v AF Dreyer (Pty) Ltd* (2004) (4) SA 186 (W) 196F/G
- Enforceable against a large and indefinite class of people
 - Accepted that the idea of property is enforceable against the whole world/against a whole unidentified group of people
- Continued existence of a thing is required - if there is no thing, there is no longer a property right
- Criticism: rather a consequence or feature of a property right than an identification tool
- Right *in personam* (enforceable against a person, e.g. contractual right that operates between the parties of a contract) = personal right
 - Enforceable against specific person (parties privy to relationship)
 - Not depended on existence of a thing
 - Basis for division between personal rights and property rights
- (f) Transferability of right
 - Property rights are said to be transferable/assignable
 - Criticism:
 - Some property rights are not assignable (non-assignable residential lease)
 - Too wide: most rights are transferable (including personal rights)
 - Native Title rights are not transferable: *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141
- (g) Value
 - Market value
 - Sentimental value
 - Negative value?, e.g. toxic chemicals - dispose or get rid of property
 - Personal rights also have market value
 - Value is not a necessary characteristic of property
- (h) Legal recognition
 - Property rights must be recognised and be legally enforceable, therefore, must be recognised by the legal system
 - 'Property and law are born together and die together. Before laws were made there was no property. Take away the laws and property ceases': Bentham
 - It is a legal construct - there is no property in the absence of a legal system
 - Criticism:
 - Other rights are also recognised by law
 - Contractual rights are also recognised/torts are recognised, therefore, this feature does not always provide a definitive answer as to whether something is property
 - Legal identity of property depends on legal system in which it is enforced: CL, equity, statute
 - Aboriginal rights only recognised if rights have their origin in pre-sovereignty law and custom: *Yorta Yorta*
 - *Mabo*: Native Title rights not to be found in the CL but recognised by the CL only if rights and interests were created before sovereignty
 - Pre-sovereignty rights may encumber title of Crown upon colonisation
 - Post-colonisation Aboriginal rights were destroyed
- *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141: issue: whether Aboriginal customary rights over land qualified as 'property'
 - Blackburn J: 'I think that property in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate. I do not say that all these rights must co-exist before there can be proprietary interests, or deny that each of them may be subject to qualifications'
 - According to the court the following incidents of property were absent:
 - No use and enjoyment - right of clan extended to performance of rituals only
 - Not exclusionary - no right to exclude other members or other clans;
 - Inalienable - no right to alienate the land - Aboriginal custom prohibited transfer of rights
 - Held that due to absence of the above features, there was an absence of property rights to land in Anglo-Aus meaning of the term
- Property (according to Harris (1995) 111 Law Quarterly Review 421) = a social and legal institution
 - More a convention than a form
 - Exists only because it is legally regulated
 - Therefore, private property rights only truly exist where the prevailing legal system protects and enforces such rights
- Characteristics associated with the legal definition of private property:
 - Property refers to the relationship between an individual and an object/right rather than the object/right itself - *Yanner v Eaton*: 'property is a description of a legal relationship with a thing'
 - Property is enforceable *in rem* (it operates against all the world)