

Real Property

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Concepts of Property

- Property does not refer to a thing alone; it refers to the description of a legal relationship with a thing (*Yanner v Eaton (1999)*)
- Property denotes two concepts:
 - 1. Things
 - The object itself which can be owned and dealt with
 - 2. Rights in things
 - The relationship between the persons in respect of a thing
 - Rights enforceable against the world at large - *in rem*
 - Rights enforceable against a specific person - *in personam*

Real Property

Real Property	
Land	Land, including interests in land.
Fixtures	Things attached to land with an intention of remaining fixed. <ul style="list-style-type: none">- Indestructible, immovable, unique, affixed with the intention to remain affixed to the land
Incorporeal Hereditaments	An intangible item of property which can be inherited <ul style="list-style-type: none">- e.g. mortgage.
Fructus Naturales	Natural fruits of the land.

Tenure and Estates

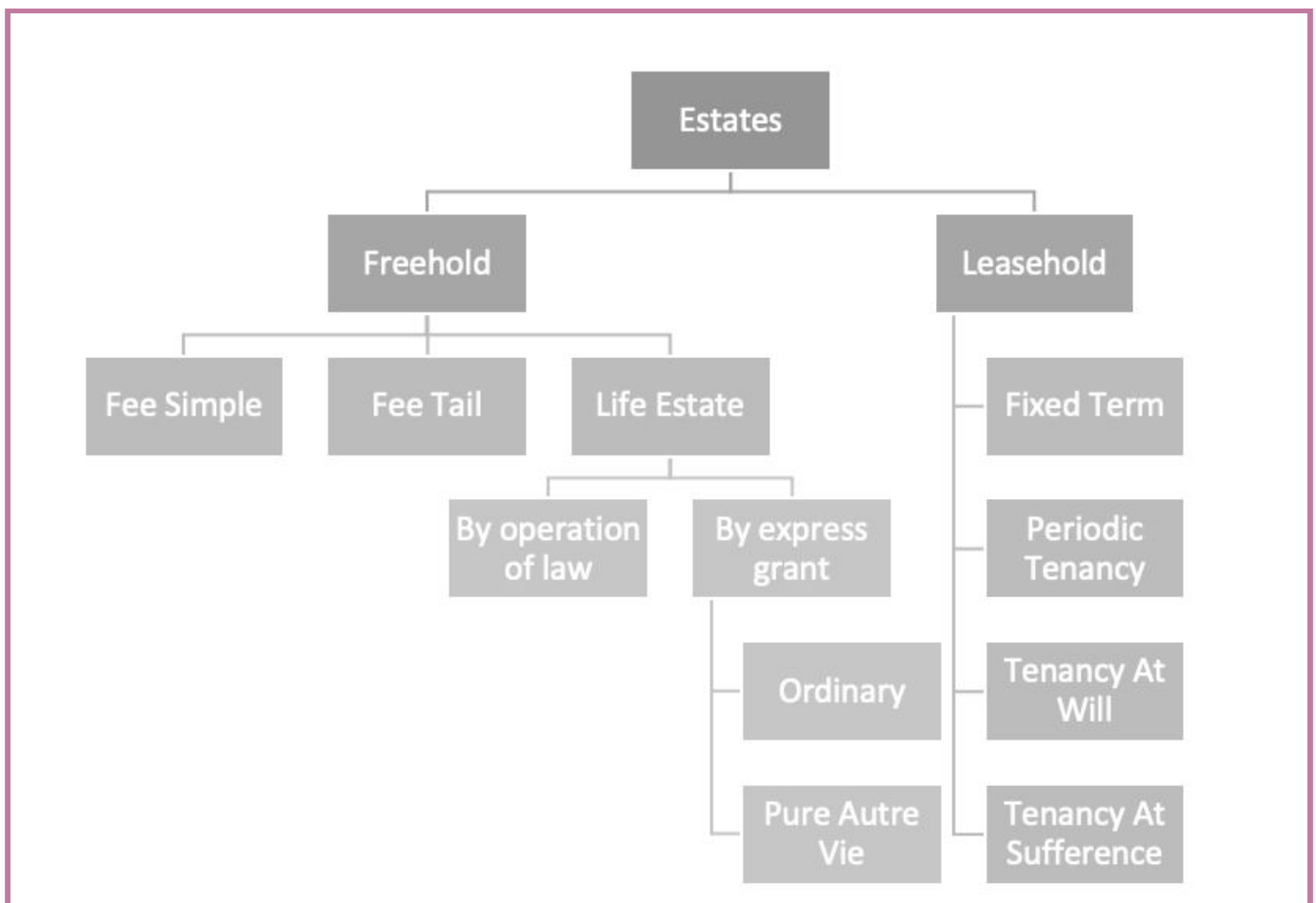
- In Australia only the Crown owns land → the most that an individual can own is an 'estate' in land
 - Where native title can be proven → the Crown holds 'radical title'
- Doctrine of tenure → on what terms is this land held?
- Doctrine of estates → for how long is this land held?

Doctrine of Tenure

- Doctrine of tenure was inherited from English common law and became part of Australian common law in 1788 (*AG v Brown, Mabo (No 2) (1992)*)
 - Under the English feudal system → anyone who held an interest in land did so as a tenant of the King

Doctrine of Estates

- The Crown owns all land but can create legal interests in the land by way of a grant to an individual (the grant = the estate)
- An estate gives the holder the right to use, enjoy, possess and alienate that land according to the terms and rights set out under the grant



Freehold Estates Estates of an indefinite duration.		
Fee Simple Estate	<ul style="list-style-type: none"> - Most extensive rights an individual can hold (for almost all practical purposes, fee simple is the equivalent of full ownership of the land (<i>Fejo</i>)) <ul style="list-style-type: none"> - Fee → the interest is inheritable - Simple → not restricted in ANY way (as to who can inherit) - Indefinite duration - Can be fully alienated by the current holder of the interest <ul style="list-style-type: none"> - Can be sold to another person - Can be left by the current owner in their will to any person - If the current fee holder dies without a will (<i>dies intestate</i>) the estate goes to the next of kin or if there is no next of kin → the estate reverts back to the Crown (<i>bona vacantia</i>) - Presumption that any grant by the Crown will create a fee simple estate <i>unless</i> contrary intention is shown in the grant (<i>CA s47</i>) 	
	Determinable Fee Simple	Conditional Fee Simple
	Determinable fee simple occurs when the interest determines upon the happening of a specified event. <ul style="list-style-type: none"> - E.g. interest in land granted 'To Ottilia and her heirs until the death of her aunt' If the specified event occurs, then the interest in land (the estate) reverts back to the original grantor. <ul style="list-style-type: none"> - Reversionary estate 	A conditional fee simple sets out the condition of the grant in the grant itself. <ul style="list-style-type: none"> - E.g. 'To Ottilia, provided that the property is not used for a commercial purpose' In the event that the condition is breached, the original grantor can bring the interest to an end and the fee simple returns to the original grantor. <ul style="list-style-type: none"> - Reversionary estate
Fee Tail Estate	<ul style="list-style-type: none"> - Estate which restricts grants to a tenant's lineal descendants - NO LONGER USED <ul style="list-style-type: none"> - Previously existed so that estate owners could keep land within the family - All existing fee tail estates have been converted into fee simple estates (<i>CA s19</i>) 	
Life Estates	<ul style="list-style-type: none"> - An estate which comes to an end when the life specified in the grant ends - Under common law a life estate is not capable of being inherited (difference to a fee estate) 	
	Life Estate Granted Sa Vie	Life Estate Granted Pur Autre Vie
	Estate which will exist for the life of the person to whom the estate is granted. <ul style="list-style-type: none"> - E.g. 'To Ottilia, for life' 	Estate which will exist for the life of a third person, other than the grantee. <ul style="list-style-type: none"> - E.g. 'To Ottilia, for the life of Claudia'

Leasehold Estates Estates of a definite duration.	
Fixed Term Lease	A fixed term lease is a lease for a fixed period of time. <ul style="list-style-type: none">- The maximum period of the lease is certain- The lease automatically expires on the expiry of the fixed term- E.g. 'To Ottilia, for 10 years'
Periodic Lease	A lease which does not come to an end automatically at the end of the initial lease period. It must be ended by the giving of notice by one of the parties to the lease. <ul style="list-style-type: none">- E.g. residential lease (rent is paid on a weekly, monthly etc. basis and it continues until notice is given)
Tenancy at Will	A tenancy at will arises whenever a lessee is allowed to occupy the land of a lessor on the basis that either party can determine the lease at any time. <ul style="list-style-type: none">- No definite duration and no notice is required for termination- Lease is ended immediately upon the provision of notice- Example: where a fixed term lease has expired and there is no agreement as to the payment of rent, a lessee continues on in possession of the leased premises after the expiry of the initial period as a tenant at will
Tenancy at Sufferance	In a tenancy at sufferance, after the expiry of a fixed term or periodic lease, the lessee remains in possession without the consent of the lessor. <ul style="list-style-type: none">- The lessee 'holds over in possession' and can be ejected by the lessor at any time without notice

Other Interests in Land	
Future Interest	<p>An interest in land where title is immediately vested, but possession is not deferred until a future date.</p> <ul style="list-style-type: none"> - Not a freehold estate because there is no immediate right to possession (but is expected to become a freehold estate when possession eventually vests) - What happens to land following the expiration of a non-freehold estate (lease) or a life estate depends on the types of future interests which apply <p>On the expiration of a lease or life estate there are 2 scenarios:</p> <ol style="list-style-type: none"> 1. The grantor expressly sets out that the land is to pass onto a third party 2. In the absence of the grantor expressly setting out what is to happen, the land will automatically revert back to the grantor
Remainder Interest	<p>A remainder interest arises where a grantor expressly creates it by expressly holding that the remainder of an estate is to pass to a designated third party.</p> <ul style="list-style-type: none"> - E.g. "To Ottilia for life, remainder to Claudia" <ul style="list-style-type: none"> - Ottilia acquires the life estate <i>sa vie</i> and Claudia will acquire a fee simple remainder which will vest in possession when Ottilia dies - A remainder interest can be a fee simple or a life estate (depending on the express words of the grantor)
Reversionary Interest	<p>A reversionary interest presumes that full title to the land is to revert back to the original grantor on the expiration of an estate.</p> <ul style="list-style-type: none"> - Arises presumptively where the grantor has not specifically dealt with the remainder of the estate or where the primary estate has expired - A reversionary interest must always be consistent with the estate held by the original grantor (if the grantor held a fee simple prior to granting the life estate, the interest that reverts is a fee simple) <p>E.g. Ottilia holds a fee simple over land. Ottilia grants Claudia a lease of the land for 2 years. During those 2 years Ottilia holds a fee simple reversion which will vest in possession when the lease expires.</p>

Torrens Title

- System of title *by* registration NOT registration *of* title (*RPA s42, Breskvar v Wall (1971)*)
 - The Torrens system involves *'cutting off the retrospective or derivative character of the title upon each transfer or transmission so that each freeholder is in the same position as a grantee direct from the Crown'*

Torrens Register

- Register is comprised of individual folios of land on which the Registrar records interests that affect each particular parcel of Torrens land
- Curtain principle → The Register is the **definitive** record of all land interest (the RP is immune to all claims contrary to this register (*Frazer v Walker (1967)*)
 - There is no need to go beyond the register to find interests (*Waimiha Sawmilling Co v Waione Timber Co [1926]*)
- Registered proprietor = person who holds an interest in the land
- Registrable interests (*s31(1)(a)*) = fee simple estates, life estates, long-term leases, mortgages and easements

The Indefeasibility Principle

- Under the principle of indefeasibility, the interest of the registered proprietor is paramount
- Registered proprietor is subject only to such estates and interests are recorded on the Register
 - The RP takes their estate / interest in Torrens land free of any interest / estate which is not recorded on the Register (*RPA ss41-43*)
 - Indefeasibility principle protects the purchaser → EVEN IF the purchaser becomes the registered proprietor by means of a forged transfer (*Mayer v Coe*)
 - Volunteers can gain indefeasibility on registration (*Bogdanovic v Koteff (1988) (NSW)*)
- If there are no exceptions → *on the facts, [party] is the registered proprietor and therefore maintains indefeasibility*

Indefeasibility Principle in the Real Property Act 1900 (NSW)	
S41	<p><i>Dealings not effectual until recorded in the Register</i></p> <ul style="list-style-type: none"> - Title by registration - Dealings are ineffectual until recorded on the register - A forgery is void and ineffective (defeasible) pre-registration but is indefeasible post-registration (<i>Mayer v Coe</i>) <ul style="list-style-type: none"> - Title cannot be set aside on the grounds of a defect existing in the title before the interest was registered
S42	<p><i>Estate of registered proprietor is paramount</i></p> <ul style="list-style-type: none"> - If Title is registered, the Title is indefeasible - Indefeasibility is immediate and not deferred under <i>s42 (Frazer v Walker 1967; Breskvar v Wall (1971))</i>
S43	<p><i>Purchaser from register proprietor is not to be affected by notice</i></p> <ul style="list-style-type: none"> - Presumption of correctness of the register

Limits to the Indefeasibility Principle

Fraud

- Fraud is an exception to indefeasibility (s42(1))

Elements of Fraud	
1	The fraud must be brought home to the registered proprietor.
2	It must be actual fraud within the statutory meaning.
3	The fraud must have occurred before registration.
4.	The fraud must have been against the party claiming an interest or the registrar-general.

Who has to be fraudulent?

- The fraud must be brought home to the RP (*Assets Co v Mere Roihi* [1905])
 - The fraud must be committed by the current RP who is claiming indefeasibility
 - **NOTE:** fraud in earlier transactions by previous RP's is not relevant
- Fraud may also be committed by the RP's agent (e.g. real estate agent or solicitor)
 - If the agent is acting within their actual or apparent authority when they commit the fraud then the principal is bound by the fraud (*Schultz v Corwill*)
 - Passive recipients of a transaction and joint tenants are not agents (*Cassegrain*)
- Volunteers who commit fraud are also subject to the exception (s118(1)(d)(ii))

What will constitute fraud?

- Fraud for torrens = statutory fraud as per s42-43
 - Must be actual fraud → dishonesty of some kind (*Assets Co*)
 - Actual knowledge of fraud or wilful blindness = fraud on the RP's behalf (*Assets Co*)
 - Consciously dishonest act and moral turpitude (*Stuart v Kingston*)
 - Notice of fraud and deliberate statements of dishonesty (*Loke Yew*)
 - Notice and sufficient conduct to constitute fraud (*Breskvar v Wall* (1971))
- Certain types of equitable fraud in which there is an element of dishonesty or moral turpitude on the part of the registered proprietor (*Grgic v ANZ* (1994))

What does not constitute fraud?

- Common law definition does not include constructive or equitable fraud
 - NOT FRAUD to purchase land with notice of an unregistered interest and then, on becoming registered as proprietor, to invoke indefeasibility of title to defeat the unregistered interest and acquire good title (*Friedman v Barret* [1962])

When must the fraud have occurred?

- The fraud must have occurred PRIOR to registration to be an exception (*Bahr v Nicholay*)

Who must the fraud be against?

- The fraud by the RP must have been committed against the party which is seeking to assert an interest (that indefeasibility does not apply to the RP's title)
- Also sufficient for s42 if fraud was against the Registrar General in order to obtain a registration

In Personam Rights

- Rights *in personam* are an exception to indefeasibility (*Frazer v Walker* [1967])
 - A plaintiff can bring a claim “*against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant*”
 - Registration does not extinguish the legal or equitable obligations incurred by a RP
- The *in personam* exception involves an action, or a right of action, against a specific person
- The exception may arise out of:
 - The unconscionable conduct of the registered proprietor
 - Conduct of agents or employees that the registered proprietor is responsible for
- Conduct which gave rise to the *in personam* right can predate or postdate registration (*Mercantile Mutual Life v Gosper* (1991))

Known Cause of Action

- The in personam exception requires a known cause of action (*Bahr v Nicolay*)
 - AND the elements of that cause of action can be established
- Must be a known cause of action which can be enforced against the RP
- **Examples:**
 - Breach of a trust (*Bahr v Nicolay*)
 - Breach of contract → **e.g. contract of sale!** (*Mercantile Mutual v Gosper*)

Statutory Exceptions

- **RPA** prescribes statutory exceptions to the indefeasibility principle (s42(1)(a)-(d))

Prior Folio

- Applies where an earlier title has already been created for the same interest in land (s42(1)(a))
 - Administration error
 - E.g. 2 folios for same land (can occur if parcels of land are subdivided into 2 and the previous folios are not removed from the register → end up with 2 for same land)
- **PRIOR FOLIO WILL PREVAIL**

Omitted and Misdescribed Easements

- Applies when an easement has been omitted from / or misdescribed on the folio (s42(1)(A1))
 - RP holds the land subject to certain easements that do not appear on the folio → must submit to the exercises of an easement even if it has not been registered
- **Very narrow exception**

When can this arise?

- 1. Easement subsisted immediately **before** the land was converted from old system title to the new Torrens title system
- 2. Easement was **validly created** by the RPA or any other Act at either the time of conversion or after that time