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## Topic 1: Introduction and Fundamentals of Land Ownership

### 1. Doctrine of Tenure and Doctrine of Estates (Fee Simple and Life Estate)

#### Doctrine of Tenure

1. Historically: The doctrine of tenure has its **origins in the feudal system** of land ownership which emerged during the middle ages in England. Feudal system represents a **type of society** in which the **primary social force** is the **relationship between the lord and his tenant**.
  - a. Established on mutual benefit of the tenant and the lord; the lord promised protection and defence of the tenant and the land occupied by the tenant in return for the loyalty and service of that tenant
2. Doctrine of Tenure: The High Court in *Mabo v Queensland (No 2)* determined that the English doctrine of tenure applied in Australia in a **modified** form only. While the doctrine in England ultimately bestowed absolute beneficial ownership of all land throughout the kingdom on the Crown, in the Australian context it gave the Crown **only a "radical title"**.
3. Doctrine of Estates: Governs the ways in which that title can be fragmented along temporal lines. This is because an estate in the land refers to the duration for which possession of the land may be enjoyed.

#### Types of Estates

4. **Freehold Estates**: There are 3 of them
  - a. Fee Simple: **Closest to absolute ownership** and is the most extensive in quantum. They are not subject to any controls or restrictions
    - i. Determinable interests: These come to the end of a specific event, i.e. related to use or an external event. Creates the possibility of a reverter interest. "
      - 1) Words used "while", "during", "so long as", "until"
    - ii. Conditional estate: Subsequent conditions the devise which states that the occurrence of some event will allow the grantor to take back the interest, and if there is a breach, then there will be a forfeiture of the interest.
      - 1) Words used "on the condition," "but if", "provided that"
  - b. Fee Tail: A disposition that would only last while the **heirs** of the person would last — if they died out the interest would revert back to heir of their original owner — way of retaining land in family
    - i. These were abolished in Australian in 1919.
  - c. Life Estate: **Granted to a person for life** of a person, or for the life of another i.e. "to A for life of B".
    - i. In either case, when the life tenant died the interest is terminated.
5. **Future Interests**:
  - a. Example: Estates allow in to be granted or the future, e.g. "to A for life and then to B in fee simple". B's estate is a future estate which does not come into being until the death of A
  - b. **Reversions**: a grant of an estate in possession which **returns** to the grantor, e.g. X grants and life estate to Z hence X is the reversioner
  - c. **Remainders**: A **grant** of a future interest to **someone who did not have a previous interest** e.g. W for life and then Y in fee simple. Y is the remainder
  - d. **Vested and Contingent Remainders**: Rules concerning future interests requiring the interest to vest or "fructify" **by a certain time** — if it does not then the interest will fail.

#### Type of Estates — Interests in Land less than Freehold

6. Leases, easements, profit a prendre, restrictive covenants, mortgages

#### Conveyancing

7. Old System Title: Passing of legal interest in land must be made by deed (s 23B(1) *Conveyancing Act*)
8. Torrens and OSTL: No interest in land can be created or disposed unless instruments are in writing (s 23C(1)(a) *Conveyancing Act*)
9. Torrens and OSTL: Creation of interest in land by parol (typically leasehold) will only have the effect of interests at will (s 23D(1) *Conveyancing Act*). A legal leasehold interest in land can be provided if it provides the best rent reasonably available, give lessee immediate right to possession and does not exceed three years (s 23D(2) *Conveyancing Act*)
10. Agreement of Interests: Agreement of interests in land have to be in writing in order for it to be enforceable (s 54A *Conveyancing Act*)
  - a. Exceptions: Exceptions to create interest in land without writing (s 23E *Conveyancing Act*)

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## Topic 5: Co-ownership

### 1. Types of Co-ownership

1. Tenancy in Common: Where two or more persons hold land as tenants in common, each has a **proportionate interest in the land**. It is “undivided” – meaning that, though a **distinct share**, it has not been physically divided from the other shares (*Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) at 643-644 per Brennan J)
  - a. It does not have to be equal
  - b. Tenant in common may generally deal with his or her undivided share as he or she wishes
  - c. **No Right of Survivorship**: Interest continues after death and can be transferred to another person either by will or by the rules of intestacy
2. Joint Tenancy: Each joint tenant has ownership of the whole, along with the other joint tenants. Each has a **right shared with the others to the whole property**, but no individual right to any particular share in it (*Wright v Gibbons* (1949) per Dixon J at 330)
  - a. Joint tenants “are not to be treated for all purposes as though they were the one person” (*Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) at [49])
  - b. The Four Unities: To create a joint tenancy **requires the presence of four** unifying characteristics:
    - i. **Title**: Unity of title requires that all joint tenants **hold their title** to the land under the **same instrument**, or the same deed.
      - 1) **Not**: Conveyer should not attempt to convey a 50% interest in property to A, and then convey the remaining 50% interest to B, as that would make it tenants in common.
    - ii. **Interest**: Requires that the joint tenants’ interests in the property be **identical in nature, extent and duration**.
      - 1) One joint tenant notice of earlier interest?: There is authority to suggest that where A and B acquire land as joint tenants in circumstances where A has notice of an earlier equitable interest held by X in the land but B has no notice of X’s interest, then X’s interest has priority over the interests acquired by both A and B.
        - a) **However**: This view is now subject to doubt as the HCA has held that **fraud by one joint tenant did not affect the other’s rights**, with the result that the defrauded party could assert rights only against the fraudulent joint tenant (*Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) at [44]-[57])
      - 2) **Not**: For example, a person owning a freehold interest and another owning a leasehold interest; A owns  $\frac{3}{4}$  and B owns  $\frac{1}{4}$
    - iii. **Possession**: Unity of possession requires that **each joint tenant** be **entitled to possession of the whole property** – **not exclusively** for himself or herself, but to be enjoyed together with the other joint tenants. A joint tenant **cannot claim possession** of any **particular part** of the land.
    - iv. **Time**: Interests of all joint tenants vest at the same time.
      - 1) **Not**: For example, if property is conveyed “to A for life, remainder to B’s children”, B’s children all take under the one instrument; but because their interests vest successively as each is born, they cannot be joint tenants.
  - c. Right of Survivorship: The right of survivorship is an **inherent and necessary incident** of a joint tenancy. Without it there can be no joint tenancy (*Re Robertson* (1943) at 105).
    - i. Death — survives: When one joint tenant **dies**, the whole of the **land remains** with the **surviving joint tenants**. Property is freed from the rights of one of its owners. Eventually, the last surviving joint tenant becomes the sole owner.
    - ii. Overrides any will: The right of survivorship will override any will!
    - iii. Operation of Law:
      - 1) **OSTL**: No need for any deed
      - 2) **TTL**: Entitlement by survivorship arises before, and independently of, registration (*McCoy v Estate of Caelli* (2008) at [14])
    - iv. Corporations: All jurisdictions now allow a corporation to hold property in joint tenancy in the same way as if it were an individual (*Conveyancing Act 1919 (NSW)*, s 25(1))
    - v. Identifying Survivors:
      - 1) Determining which of a number of joint tenants survived the other or others may sometimes be **difficult**, as where all are killed in a car crash or bomb blast (*Hickman v Peacey* [1945])

a) Statute: Statutory provisions, such as s 35 of the *Conveyancing Act 1919* (NSW), now provide that where two or more persons have died in circumstances rendering it uncertain which of them survived, for purposes affecting title to property their deaths are presumed to have occurred in order of seniority, the younger surviving the elder

i) Disqualifications:

1. Applies only for “purposes affecting the title to any property”; it **does not apply** where **no question of title arises** (*Perpetual Trustee Co Ltd v Commissioner of Stamp Duties* (1980) at 591)
2. **Presumption** it raises is **rebuttable** by evidence that the deaths occurred otherwise than in order of seniority (*Re Plaister* (1934))
3. Applies only where the fact of the person’s **deaths is known**; it does not apply where one or more is *presumed* to have died under the common law presumption of death which arises where, without apparent explanation, a person has been neither seen nor heard of for seven years (*Halbert v Mynar* [1981])

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## Topic 6: Easement and Profits

### 1. Characteristics of Easements

#### 1. Corporate and Incorporeal Interests in Land:

- a. Traditionally it was seen as:
  - i. Corporeal Rights: Those things that are tangible, e.g. land
  - ii. Incorporeal Rights: Those things that are intangible e.g. easement and other legal rights
    - 1) **However**, the distinction today would be **unsatisfactory**, we would classify both land and easements as “rights”

#### 2. Easements and Other Rights Compared:

- a. Natural Rights:
  - i. 2 natural rights incident to land ownership: the right to support for land in its **natural state**, and the right to the **flow of water**. **Do not need** express creation.
  - ii. Easements are not natural rights.
- b. Difference to Profits a Prendre:
  - i. Does not give right to take part of land: An easement may give a right to enter another person's land, but it never gives a right to take away part of that land
  - ii. Can enter and remove part: Profit always gives right to enter and always gives a right to remove some part of soil or its produce (such as turf, wood or crops)
- c. Personal Rights:
  - i. Not rights which are purely “personal” as personal rights that have no inherent relationship with land. Not rights that are enforceable in contract.
- d. Lease: Not a lease as that provides exclusive possession.

#### 3. Nature of Easements:

- a. **Definition**: A right annexed to land to utilise other land of different ownership in a particular manner (not involving the taking of any part of the natural produce of that land or any part of its soil) or to prevent the owner of the other land from utilising his land in a particular manner (*Halsbury's Laws of England* (4th ed, LexisNexis, London), Vol 14, p 4)
  - i. The land with the benefit of the easement is called the “dominant tenement/land” or “benefited land”. The parcel of land burdened is called the “servant tenement/land” or the “burdened land”.
- b. Positive or negative:
  - i. Positive easement: An easement may be a positive easement - a **right to do something** on someone else's land. Examples of recognised positive easements include:
    - 1) The right to place electricity and telephone wires over neighbouring land
    - 2) A right of way over a neighbour's land
    - 3) The right to discharge water onto neighbouring land from a drain
    - 4) The right to fix a signboard on a neighbour's land
  - ii. Negative easement: An easement may also be negative, which **restricts** what the neighbour can do on his or her land. Examples of recognised negative easements are
    - 1) An easement of light to receive light for a certain window;
    - 2) An easement of air, to receive air through a defined channel like a ventilation shaft;
    - 3) An easement of flow of water, to receive a flow of water along the waterways - ie the neighbouring owner cannot block the flow of water.

#### 4. Essential characteristics of easements: Considered in *Re Ellenborough Park* [1956] 1 Ch 131 at 140

- a. Dominant & Servient: There must be a **dominant** and **servient tenement**
  - i. The easement cannot be for the benefit of a person.
  - ii. It must be for the benefit of another piece of land, the dominant tenement, and has to be **annexed** to the land (*Concord Municipal District v Coles* (1906) 3 CLR 96 at 104-105)
  - iii. If the benefit merely flows to a person, then it is a licence, not an easement. Easement binds not only the parties to its creation but also their successors (*Commissioner for Main Roads v North Shore Gas Co Ltd* (1967) 14 LGRA 413 at 422 per Windeyer J)
  - iv. Ascertaining whether or not a right is attached to the dominant tenement or is merely a personal right requires construction of the instrument which created the right (*Rodwell v GR Evans & Co Pty Ltd* (1977) 3 BPR 9114 at 9117-9120, aff'd [1978] 1 NSWLR 448)
  - v. Identifying the dominant tenement:
    - 1) Use instrument: Use the instrument to determine

- 2) Objective extrinsic factors: If instrument fails, at common law, extrinsic evidence is admissible to identify the intended dominant tenement if the instrument creating the easement fails adequately to identify it (*Re Maiorana and the Conveyancing Act (1970) 92 WN (NSW) 365 at 372*). This involves looking at the “objective” factors, such as the layout of the land and the use to which it was put at the date of the grant of the easement, and does not include evidence of the parties’ actual intentions (*Hamble Parish Council v Haggard [1992] 1 WLR 122 at 130*)
- b. Accommodate dominant: The easement must **accommodate** the dominant tenement
  - i. There must be a connection between the easement and the enjoyment and occupation of the dominant tenement. In other words the easement must confer a benefit upon the dominant tenement.
  - ii. The benefit conferred must be **connected to the land of the dominant tenement** and **not just** be a **personal privilege or commercial advantage** accruing to the current owner of the dominant tenement (*Hill v Tupper (1863) 2 H & C 121; 159 ER 51 at 127(H&C), 53(ER)*).
    - 1) Commercial value ≠ decisive easement: Enhancing commercial value of land is not decisive of whether an alleged easement “accommodates” land (*Re Ellenborough Park [1956] Ch 131 at 173-175*)
      - a) Question of fact: Whether that connection exists is a question of fact, depending largely on the nature of the land and the nature of the right claimed. Is the easement reasonably necessary for the better enjoyment of the dominant tenement as a parcel of land?
        - i) Application — valid easement: The right of owners of houses near a park to **use the park for recreation** was held to be a right that “accommodated” the houses, since it was connected with the normal enjoyment of the houses as houses (*Re Ellenborough Park at 174*)
          1. Facts: During WWII the military had occupied the park and then paid the owner of the park compensation for use. Should the owners of the houses (who had long since changed from the original grantees) get some compensation as they had been denied their rights under their easements?
          2. Issue & Finding: 2 main issues —
            - a. Issue 1: Could a right to a **‘pleasure ground’** constitute an easement? Did it ‘accommodate’ the dominant tenement?
              - i. Application: It is not sufficient to show that the right increased the value of the property conveyed, unless it is also shown that it was connected with the normal enjoyment of that property. It appears to us that the question whether this connexion exists is **primarily one of fact**, and **depends largely on the nature** of the alleged dominant tenement and the nature of the right granted (Lord Evershed MR at 173 in *Re Ellenborough Park*)
            - b. Issue 2: Could the **owners of the land not directly bordering the park** also claim an easement given that they were not directly next door?
              - i. Application: The court said **yes** because the park was intended to be a garden for these properties – use of a garden enhances and is connected to the normal use and enjoyment of land – so is capable of forming an easement.
        - ii) Application — valid easement: See also *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (right to **use “swimming pool, golf course ... gardens and other sporting or recreational facilities”**; held, valid easement accommodating dominant tenement); **upheld in part** on appeal (as to outdoor recreational facilities **only**): *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238.
          1. There was accommodation: (at 48) “I consider that In re Ellenborough Park should be taken to have been dispositive of this issue for the purposes of English common law, to this extent, namely that it is not fatal to the recognition of a right as an easement that it is granted for recreational (including sporting) use, to be enjoyed for its own sake on the servient tenement. The question in every such