Historical Origins and Doctrine of Estate (Week 1)		
The Doctrine of Tenure (Feudalism)		
Meaning	Refers to the mode of holding land whereby one person (the tenant) holds land from (or of) another subject to the performance of certain obligations. In this system, there are overlapping rights over the same parcel of land. Those in the bottom of the pyramid provide services to those above. ● King/Queen – Crown had paramount lordship over land ● Tenant in chief – right of use and possession in return for services to the Crown ● Mesne Lord – both a tenant and lord. Can further carve out property for tenant in demesne (subinfeudation). ● Tenant in demesne – right of occupation only	
Significance to Australia	Doctrine of tenure has no practical significance to Australia. However its influence remains. 1) No person can 'own' land as all land is held by the Crown as all land titles originate from Crown grants (*Mabo v Queensland* (1992)) 2) The modern landlord-tenant relationship bears some resemblance to the early tenurial relationship. 3) The doctrine of tenure operated to obstruct recognition of Native Title (until *Mabo*)	
The Doctrine of Estate (Temporal fragmentation)		
Estates		
Meaning	Estate – fullest sets of rights in relation to the enjoyment of land.	
Time	*Western Australia v Ward* (2000)	Doctrine of estates allows property interests to be fragmented and carved out on the basis of time. The doctrine recognizes future interests.
Freehold estates		
Meaning	Uncertain in duration. Allows for ownership and possession.	
Fee simple	*Gumana v NT* (2007)	'[F]or almost all practical purposes the equivalent of full ownership of the land and confers the lawful right to… all rights of ownership save to the extent… right has been… varied by statute, by the owner… or be predecessor'
	Wik v Queensland (1996)	Fee simple affords the 'widest powers of enjoyment… advantages derived from land itself and… anything found on it'.
Fee tail	Similar to fee simple but the right of disposition is usually limited to descendants.	
	Conveyancing Act 1919 (NSW) ss19 and 19A	Can no longer be created and existing interests were converted to fee simple estates.
Leasehold estates (Less than freehold)		
Meaning	Duration is certain or capable of being rendered certain.	
Fixed term	A lease for a fixed term which expires automatically at the end of the period.	
Periodic	A lease that does not terminate until notice is given.	
Tenancy at will	*Landale v Menzies* (1909)	Both parties may terminate the lease at any time (subject to packing-up period).
Tenancy at sufferance	*Anderson v Bowles* (1951)	Tenant takes lawful possession of land pursuant to a lease but continues to wrongfully possess it after termination.
Native Title		
Indigenous land rights		
Initial land grants-statutory land rights	*Aboriginal Land Rights Act (Northern Territory) 1976* (Cth)	Following the Woodward Commission's recommendations, the Act authorizes grants of interests in land, typically in the form of fee simple, to traditional owners of the land by the state. --created by parliament --the use mainstream forms of property rights
Native title—① potential for success of a claim		
Broad principle for Native title	*Mabo v Queensland (No 2)* (1992)	Generally, it rejected the terra nullius, modified the doctrine of tenure, and confirmed that the Indigenous inhabitants had a system of traditional law and customs in place prior to the British settlement. *Mabo* merely recognised the native title and interests rather than granted new native title rights or interests.

		1. The Crown acquired radical title over all territory it assumed sovereignty ● Radical title allows the Crown to deal with the land as it chooses and to alienate the land by granting interests to itself or others. ● Upon colonisation or settlement, the Crown obtained absolute beneficial title only on unoccupied land ● But Native title survived the Crown's acquisition of sovereignty and radical title ● Native title exists as a burden on the radical title of the Crown 2. Where native title continues to exist, the traditional laws and customs of the Indigenous people who have the connection with the land or water decide and regulate the rights and interest under native title. But native title cannot be bought or sold. It can be transferred by traditional law or custom, or surrendered to government, in return for compensation or a grant of freehold. 3. If native title is extinguished, the Crown assumes absolute beneficial ownership ● Native title is a fragile interest that could be easily extinguished ● Native title disappears when traditional law or customs are lost. ● In fact, extinguishment generally does not attract compensation except between 1975 to 1993 due to *Racial Discrimination Act 1975.* Following the decision of *Mabo*, the Commonwealth Parliament enacted the NTA, which recognises the existence of native title to land that stands outside the doctrine of tenure. But the native title rights of a particular group will be contingent on whether its specific variances have met the criterion in the legislation
Statute	*Native Title Act 1993* (Cth)	According to *Mabo (No 2)*, native title is defined by traditional laws but needs to be recognised by the common law. Section 223 gives that **recognition**. **223 Native title (Definition)** (1) The expression native title or native title rights and interests means the communal group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters. They will only succeed if (a) the rights and interests are possessed under acknowledged traditional laws, and the observed traditional customs, by the Aboriginal peoples or Torres Strait Islanders; and (b) those laws and customs must have a connection with the land or waters; and (c) the rights and interests must be recognized by the common law of Australia Ascertaining native title is a **matter of fact** by reference to those laws and customs (*Mabo (No 2)*).Here, the clan seems to have maintained strong physical ties (*De Rose v South Australia* (2003)) and spiral connection (*Western Australia v Ward* (2002)) with the claimed areas where …despite ….at this stage there does not produce any difficulty in establishing their practice of traditional law and customs (*Yorta Yorta*) and continued presences and connection with the claimed land. but further evidence regarding Hunting, gathering and fishing covered (2) Without limiting subsection (1), rights and interests in that subsection includes hunting, gathering or fishing, rights and interests. **225** A ***determination of native title*** is a determination whether or not native title exists in relation to a ***particular area*** (the *determination area*) of land or waters and, if it does exist, a determination of: (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and (b) the nature and extent of the native title rights and interests in relation to the determination area; and (c) the nature and extent of any other interests in relation to the determination area; and (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of

		this Act); and (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease--whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others. **20** entitlement to compensation: Native title holders cannot be treated less favorably than other interest holders of land **61** Those affected may apply to the Federal Court of Australia
Nature and incidents of native title		
Content	*Mabo v Queensland (No 2)* (1992)	Brennan J: 'native title has its origin and given its content by the traditional laws… and the customs… The nature and incidents of native title must be ascertained as a **matter of fact** by reference to those laws and customs'.
Range of rights	*Wik people v Queensland* (1996)	The content of native title ranges from case to case. It may comprise 'personal or communal usufructuary rights' (e.g right to access area for hunting). At the opposite extreme, the degree of attachment may be so strong that a legal or equitable estate arises. ● The pastoral lease here did not confer exclusive possession on the pastoralist ● The leases did not necessarily extinguish all native title rights and interests. ● Where native title rights and interests can coexist with the statutory rights of pastoral lease, native title rights and interests survived, subject to the extent of any inconsistency.
Ascertaining native title	*Western Australia v Ward* (2002)	223(1)(a) – A **question of fact.** It requires identification of rights and interests in relation to land or waters possessed under **identified traditional laws and customs**. 223(1)(b) – Requires that **connection with land or waters** be 'by those laws and customs' (a) and (b) indicate native title is derived from traditional laws and customs and not the common law. 223(1)(c) – Requires right and interests must be **recognized by the common law**. This means some laws and customs might meet the criteria in (a) and (b) but 'clash with the general objective of the common law of the preservation and protection of society as a whole' (no case law examples) ● A 'spiritual' connection does not equate with common law rights and interests. ● However, s 223 of the Act requires courts to make exactly that connection. ● The native title rights in s 223 are derived from traditional laws and customs, not from the common law. The statute recognises these rights and interests, but case law cannot elaborate on this, as it is founded in a wholly different culture.
'Traditional' definition -break-connection was lost generations ago	*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002)	**Pre-sovereign rights** – Native title rights can only arise from pre-sovereign rights (prior to colonization). When it ceases to exist, so the rights and interests established under those laws and customs would also cease to exist. If a later society adopted after sovereignty those same laws and customs, it would not be a continuation of the previous society. Instead, those new rights must be based on the legal order of the sovereign power (Australia). The British 'monistic view' meant no recognition of any parallel systems of law. Here, according to the history of the clan, there is/is not a **break in customs** which may end their claimed entitlement. **Evidential Burden** – Claimants need to overcome high evidential burdens in order to establish that their 'traditional' law could establish native title. They must satisfy all elements of the definition of native title based on history, anthropology, linguistics and genealogy research. Two prerequisites 1) Required claimants to prove that their **law was 'traditional'** which is more than its passed from generation to generation. Claimants' law and customs must have existed pre-sovereign and were substantially uninterrupted since British arrival. 2) Upon British acquisition of sovereignty, Indigenous law could not adapt and create new rights under a