TOPIC 2 – CO-OWNERHSIP

2.1 THE FORMS OF CO-OWNERSHIP THAT EXIST IN AUSTRALIA

- By '*co*-ownership', we mean land whose ownership (title) is concurrently divided between two or more people; for example, two or more people holding an interest in fee simple (which we know is the largest bundle of rights).
- Co-ownership is different from sole ownership (only one person would hold the fee simple) and different from successive ownership (where title to a fee simple interest is taken by A and then at a later point in time the fee simple is transferred by A to B)
- The use of the word tenant rather than owner is a terminological carry over from the common law doctrine of tenure and estates (doctrines which accommodate the fact that the owner of all land comprising the Kingdom in the true sense was the Monarch – so common law had to come up with an answer to the question of what an individual tenant or owner had in respect of land (given that ownership in the true sense was not actually held by any one tenant)
- In Australia, two or more people can take 'title' to land in the following two ways:
    - **As joint tenants** (called a 'joint tenancy')
    - **As tenants in common** (called a 'tenancy in common')
- Both of these phrases mean a joint owner (or an owner in common)

2.2 THE JOINT TENANCY

- The essence of a joint tenancy is captured by the Latin expression '*totum tenet et nihil tenet',* meaning 'he or she holds the whole and yet nothing'.
    - The essential idea captured by this maxim is that two or more persons together hold the entirety of a particular interest in land and therefore do not hold it in any separate or distinct ownership shares
    - This tells us that the idea of distinct ownership of shares (for example a 50-50 or 60-40 split) is conceptual foreign to joint tenancies
    - Helpful to think of people who take title to land as joint tenants, not as separate persons, but rather as a notional single person (together the 2 people hold the relevant interests in the property jointly)
- A joint tenancy has two distinguishing features (distinguish it from tenancies in common):
    - (1) The presence of the 'four unities' ('possession', 'interest', 'title', 'time').
    - (2) The right of survivorship (or '*ius accrescendi*').
- Another very basic difference is that when it comes to a joint tenancy a particular interest is not held in any distinct shares

UNPACKING THE FOUR UNITIES

- The four unities are the 'measures' for determining whether a joint tenancy has (or has not) come into existence.
- That is, only if these unities are present will a joint tenancy exist (will title to property be accepted as having been taken by 2 or more persons as joint tenants)
- It is by application of the four unities that we scrutinise the terms of a particular transfer so as to determine whether a joint tenancy (JT) can come into existence
    - If we have a basis on which one of the unities is not present then there can be no JT

(A) UNITY OF POSSESSION

- Each joint tenant must be entitled to concurrently possess the *whole* of the land parcel (rather than a particular part or section of it).
- The most self-evident of the 4 unities – each hold the whole in a physical/possessory sense
- The key implication of this first unity is that no joint tenant (as a matter of law) can be subject to an action of trespass by any other joint tenant(s).
    - Each tenant is at all times entitled to be on any part of the property
    - By virtue of the unity of possession no joint tenant is capable of excluding another joint tenant from co-owned land (which means that no joint tenant is capable of being a trespasser upon land that they have taken title to vis-a-vee any other joint tenant)

(B) UNITY OF INTEREST

- According to the unity of interest, each joint tenant must hold the same interest in respect of the property

- The particular interest that each joint tenant holds in respect of the land must be the same in the following three key respects:
    i. The **nature** of the interest (i.e. *fee simple* interest, *life* interest, etc).
    ii. The **extent** of the interest (i.e. i.e. no distinct ownership *shares* – concerned with the division of the ownership share in the property).
    iii. The **duration** of the interest (i.e. for the same amount of *time*).
- **Examples involving land being taken by 2 or more people:**
    - X transfers to A for life and to B for 50 years – co-owner A and B cannot be accepted as having taken title as joint tenants – what B and A have received is different
        - X has transferred to B the right to exclusive possession for 50 years (extended leasehold but not a freehold as it is free from Bs hold)
        - X has transferred to A a life interest (just below the fee simple interest in terms of the hierarchy of interests)
        - **Unity of interest in terms of nature is not present as A and B did not receive from X an interest in the land that is of the same nature – cannot be accepted that A and B are joint tenants in respect of a particular interest in this land**
        - This is not to say that A and B, subsequent to the transfer, don't each concurrently hold an interest in the land but they are not joint tenants of anything
    - X transfers to A in fee simple for a 3/4 share, to B in fee simple for a 1/4 share
        - In terms of nature this interest is the same because A and B have both concurrently received the fee simple absolute (rather than one receiving a life interest and one a leasehold)
        - However, we do not have unity in terms of extent because according to the terms of the transfer X has transferred the fee simple interest in such a way that A and B hold it in distinct shares (75% to A and 25% B) – the different extents are conceptually foreign to joint tenancies where each JT 'holds the whole and yet nothing'
        - Yes, they have both received the fee simple absolute but to different extents and for that reason A and B cannot take title to the land as JT's
    - X transfers to A and B for the life of A, remainder to B
        - Here, both parties are receiving a life interest in the property and there is not indication that the extent of the life interest is different for A and B, however, there is issue with the duration of the interest that is transferred to A and B
        - The transfer is operating on the assumption that B will outlive A and that upon A's death B will get the 'remainder'
        - Hence, the duration of A's interest, according to the terms of the transfer, is limited to however long A might live whereas the duration of B's interest is not limited to their longevity
        - The terms of this transfer can not be said to have unity of interest specifically in terms of duration and therefore no JT has come into existence

(C) UNITY OF TITLE

- According to unity of title, each joint tenant (co-owner) must derive their interests from the *same* act of transfer.
- Requires us to look to the very first part of the transfer
- In the 3 examples under unity of interests unity of title is present because the interests (though different in terms of nature, extent, duration) are all derived from the same act of transfer (from X to A and B)
- ***Situation:*** (X) transfers to (A) and (B) in fee simple, then (A) subsequently transfers their interest to (C).
    - There is 2 acts of transfer here:
        - X transferring to A and B
        - And at a later date A transferring to C
    - Unity of title is not present between B and C and therefore do not become JT's of the land in question
    - This is because C receives the property from A from a different act of transfer than the act of transfer by which B received their interest
    - C derives their interest from A's transfer and B from X's

(D) UNITY OF TIME

- Each joint tenant must take their interest at the exact same time.
- ***Situation:*** '(X) transfers to (A) for life, remainder to (B) and (C) when they attain 21 years'.

- Also suppose that, at the time of transfer, (A) is 80 years, (B) is 5, and (C) is 4.
    - Unity of time is not present and therefore after A's death B and C cannot hold the fee simple interest as JT's
    - This is because B will turn 21 12 months before C will, meaning that each JT (or prospective JT) will take their interest not at the same time but at different times (12 months apart)

THE RIGHT OF SURVIVORSHIP (OR THE PRINCIPLE 'IUS ACCRESCENDI)

- The second defining feature of a JT is the right of survivorship – more accurately, this is an unavoidable implication of a JT
- Hence, if you have a JT (because the four unities are present) the implication of this is the right of survivorship
- According to the right of survivorship, when any of the joint tenants die, the entire co-owned interest in the land (be it a fee simple or something less than it) 'survives to' (or is 'absorbed by') the surviving joint tenant(s).
- The expression 'survives to' have deliberately been used and not 'pass to'
- To, therefore, say that the interest of the deceased joint tenant 'passes to' the survivors is not strictly correct.
    - This is because this suggests that the deceased joint tenant originally had something that the other joint tenant didn't – but this is conceptually foreign to the idea of the JT where they both hold the 'entirety of the thing and yet nothing'
    - JT's hold their interests in land as a notional single person – so when one of them dies there is still just one notional single person

THE PROCESS OF SURVIVORSHIP (OR 'ABSORPTION) WHEN A JOINT TENANT DIES

- The formal process by which the right of survivorship takes effect in the event of a JT's death is set out in:
    - s 50 *Transfer of Land Act 1958* (Vic)
- Registration of survivor of joint proprietors of fee simple lease mortgage etc. –
- the death of any person registered with any other person as joint proprietor (JT) of any land the Registrar, on application in an appropriate approved form by the survivor and proof to the satisfaction of the Registrar of the death, shall register the applicant as the proprietor thereof, and thereupon such survivor shall become the transferee of such land and be the registered proprietor thereof.
- **Example:** if there is originally 2 JT's and one dies by application of the procedure under s 50 (producing a death certificate) the surviving JT will become the sole owner at law

WHEN JOINT TENANTS DIES SIMULTANEOUSLY

- The PLA has contemplated the simultaneous death of all JT's under:
    - s 184 *Property Law Act* 1958 (Vic)
- Presumption of survivorship in regard to claims to property –
- [w]here . . . two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall . . . for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.
- **Example:** Husbands and wives generally are the most likely to take title at the outset as JT's so if there was a car accident where husband and wife were killed instantly the younger of the 2 (whoever it happens to be) will be presumed by s184 to have outlived the older
- The practical implication of this presumption is relevant if the JT's have both created separate wills and under their separate wills have appointed their separate airs (unlikely for a married couple)
    - In this case the younger JT's airs will receive the property

CAN A JOINT TENANT DEAL WITH THEIR INTEREST INTER VIVOS?

- That is, can a JT deal with their interest whilst they are alive
- As we know that it is of the essence of a JT that neither co-owner holds a distinct ownership share (unity of interest in terms of extent prevents this), however, with this being said the laws view is that: for the purpose of transfer or sale each JT has a notional share of ownership that is proportionate to the number of people that comprise the JT