# Week 1 – Introduction to Australian Property Law

## 1.1 Introduction

- While the physical nature of land, topography and climate, are the starting point for property law, as a human invention property law is not immutable; it changes and adapts over time often in response to tech, culture and social changes
- The "enclosure Movement" eradicated property rights to millions of acres of common land, granting them to individual large landowners
    - This process was formalised in Acts of Parliament in the 18th and 19th century
- The Strata Scheme Development Act 2015 (NSW), was enacted to bridge the gap in property law that high rise apartments (separately owned airspace (a 'flying freehold')) created
- Property law develops over time, except in circumstances such as invasion. Specifically, the invasion of England by Norman Duke, William the Conqueror in 1066, and the invasion of Australia by the British in 1788

## 1.2 The Origins of English Land Law- The Norman Invasion

- New laws were imposed, with doctrines that solidified and legitimised the Conquest after the invasion (Norman)

**The Norman Conquest and the doctrine of tenure**

- After the death of Edward that Confessor there were a number of claimants to the English throne. Harold Goodwinson (an Anglo-saxon Earl) was crowned King in Jan 1066, William the Conqueror invaded in late September. Harold was killed in the battle of Hastings and William was crowned in December 1066
- William imposed the feudal system
- Feudalism is a social and political system in which the dominant power allocates land to individuals in return for military and other services
- William installed himself at the top of the feudal pyramid

King
|
Nobility
|
Knights
|
Peasants

- The doctrine of tenure stipulates that all land is ultimately owned by the Crown
- As seen in Mabo v Qld [No 2] (1992) 175 CLR 1, this was long used to justify the denial of Indigenous ownership of land in Australia

**Freehold Estates**

- Fee simple: full ownership of land (lasts forever)
- Fee tail: Property rights that the original owner (the grantor) had stipulated must pass down a line of particular descendants, and in an event that the line failed, the land would revert to the grantor or grantor's estate (if the were dead).
- Life estate: gives one person the right to use land during their own lifetime, but then reverts to fee simple, the much larger interest in land, is given to another, who will be able to enjoy the land absolutely, in the future

**Leasehold estates**

- Time limited, length must be certain or capable of being rendered certain

## 1.3 The Origins of Australian Property Law

**The Reception of English Law in Australia**

- When the British colonised Australia in 1788, they declared it terra nullius - "land belonging to no one"
- As a "settled" colony (as opposed to conquered or ceded), English law was received automatically, but only "so far as applicable to the circumstances" (Blackstone's Commentaries)
- This doctrine meant that the pre-existing laws and customs of Aboriginal and Torres Strait Islander people were ignored, despite the existence of complex, sophisticated system of land tenure
- English concepts of property, ownership, and landholding structures were imposed, displacing Indigenous legal traditions

**Colonial Justifications**

- Colonial authorities claimed Australia had no recognised legal system, justifying the denial of Indigenous land rights
- The terra nullius doctrine erased legal recognition of Aboriginal occupation and usage, despite continuous custodianship and governance of land
- This legal fiction was convenient for establishing British sovereignty without the need for treaties or negotiations, unlike in other colonies (e.g., NZ with the Treaty of Waitangi)

**The High Court Rejects Terra Nullius**

- The landmark case Mabo v Queensland (No 2) (1992) 175 CLR 1 overturned the terra nullius doctrine
- The HC recognised that Indigenous people held native title rights, based on their traditional laws and customs
- This was the first time the common law acknowledged the pre-existing rights of Australia's First Nations peoples.
- Native title could survive colonisation if not extinguished by inconsistent acts of the Crown

**The Native of Native Title**

- Native title is not granted by the Crown but recognised by the common law as existing before sovereignty
- It is communal or group-based, grounded in customary law, and spiritual or cultural connection to land
- If differs fundamentally from fee simple and other estates under English property law
- Recognition depends on continuity of connection with land and observance of traditional laws

**Summary**

- Australian property law is grounded in English colonial legal frameworks, which initially denied the legal systems of Indigenous peoples
- This began to shift in 1992 with Mabo (No 2), which recognised native title and partially decolonised Australian property law
- The origins of Australian property law are thus dual-layered: imported English law and belated recognition of Indigenous law

**Key Cases and Legislation**

- Mabo v Queensland (No 2) (1992) 175 CLR 1 - recognition of native title
- Reception doctrine - English law applied "so far as applicable"
- Terra Nullius - discredited basis for denying Indigenous land rights