

REAL PROPERTY

Preliminaries

- Proprietary rights, as distinct from *personal rights*, bind third parties (*King v David Allen*)
 - **King:** agreement between King and David Allen for DA to stick posters on theatre wall was a mere contractual licence. The lessee of the theatre from King was not bound to allow DA to stick posters on the wall.
- Proprietary rights, as distinct from *personal rights*, are irrevocable (*Cowell v Rosehill Racecourse*)
 - **Cowell (Latham CJ):** no interest in land created by the contract to which the licence to view the race attaches. **Evatt J dissents**, claiming specific performance might be available to enforce the contract.
- A licence **coupled with** a proprietary interest may take on the protection afford to the proprietary interest (because of the protection given to the proprietary interest) (*Mason v Clarke*)
- **A bare licence** is not a right as such, but a permission to use something. It may be revoked at will. **Examples** include dinner guests, friends staying in your home.
- Courts will not readily recognise novel species of proprietary interest (see *Victoria Park Racing; Yanner*)
 - **Victoria Park Racing** per Latham CJ: **there is no property interest that can be attached to a spectacle.** Denied the grant of an injunction to restrain radio broadcasting of races by someone who had erected a platform outside of the racing park. **Dixon J:** not all intangible elements of value are protected by law and given the exclusiveness of property. **Dixon J:** property rights arise because the intangible or incorporeal right claimed falls within a recognised category to which legal or equitable protection attaches.
 - **Yanner** per Gleeson CJ, Gaudron, Kirby and Hayne JJ: s 7(1) of *Fauna Act* (Qld) did not give authorities a proprietary interest in local fauna. This was because: **(1) difficult to identify** what fauna is owned by the Crown under the grant; **(2) unclear what it means** to have 'full beneficial, or absolute, ownership' of a wild bird; **(3) existence of open season** meant any property right only existed so long as it wasn't hunting season (absurd); **(4) 'property' in the *Act* is a fiction to explain the Crown's capacity to levy**

royalties on the fauna and to regulate their use. It was ‘no more than the aggregate of the various rights of control by the Executive that the legislation created’

Type of interest?

- **Freehold estate**
 - [!] Key feature = **uncertain** in duration
 - **Fee simple?**
 - Largest estate in duration; lasts *forever*
 - **Life estate?**
 - Can be for the grantee's life or can be for the life of another person
 - Note it can be subject to **reversions** (*returns to grantor*) or **remainders** (*transfers to another*) following the end of the life estate term
- **Lease or mere licence**
 - **Test**
 - An analysis of **substance, not form**, of the **contract**, the **surrounding circumstances**, the *objective intention* of the parties, and the **subject matter** of the grant (*Radaich; Swan*)
 - **Certainty of maximum duration** (*Swan*)
 - **Exceptions:** period tenancy; lease for the duration of someone's life (life tenancy) (*Perpetual*)
 - **Right to exclusive possession** (*Radaich; Swan*)
 - Mere use of the word '**licence**' isn't determinative (*Swan*)
 - Landlord may retain a right of limited entry under the lease without disrupting its satisfaction of the exclusive possession requirement (*Radaich; TLA s 67*)
 - **Radaich per Taylor J (is a lease!):** milk bar business acknowledged in preamble of contract could not be carried out in '**reasonable convenience**' without exclusive possession. All window, door keys, locks, when lost or broken, to be paid by tenant. Tenant had control of the premises, and of the persons entering them, at all times!
 - **Radaich per Menzies J (is a lease!):** obligations to occupy the shop; to carry on a business that needs plant and stock; and to give up possession at the end of the term, taken together, imply exclusive possession

- **Radaich per Windeyer J (is a lease!):** reference in deed to 'giving up possession of the said building occupied by her' and 'that the premises are occupied by her' are consistent with exclusive possession. Landlord's **limited right of access (eg to view or repair) not inconsistent** with exclusive possession!
- **Swan per Croft J (is a lease!):** brevity (3–5 nights) doesn't make it not a lease! Airbnb guests don't acquire occupancy of a *lodger* or *hotel guest* (they get exclusive possession). Airbnb listing said: '**I'm leaving to all you to have it all to yourself**'. Retention by the lessor of the apartment as their principal place of residence **irrelevant**.

- **Types**
 - **Fixed term?**
 - A lease for a fixed duration; may be for discontinuous periods; rent can be in-kind
 - **Periodic tenancy?**
 - Unless otherwise specified, the period is implied by rental payment frequency; continues period-to-period until determined by notice
 - Need not have maximum duration (*Perpetual*)
 - **Tenancy at will?**
 - Deemed to expire after 1 year (*LAA* s 13(1). Thereafter becomes **adverse possession**)
 - Generally, no rent is paid; tenant occupies the land until either party terminates the tenancy
 - Doesn't require maximum duration
 - **Statutory lease?**
 - Eg the pastoral lease created in *Wik*
 - **Life tenancy?**
 - Form of fixed term tenancy (with maximum duration = life of lessee)
 - **Tenancy at sufferance?**

- Arises when the tenant holds over at the expiration of a lease without the consent of the landlord
- Not strictly a leasehold estate as there is no agreement or tenure between the parties
- **Easement**
 - May be **registered** (*TLA* s 72); removed due to **abandonment** or **extinguished** (*TLA* s 73(1)). **Abandonment** requires **exclusive continuous and adverse possession** of not less than **30** years (*TLA* s 73A). **Extinguishment** if easement not used or enjoyed for period of not less than **30 years** (*TLA* s 73(3)).
 - [1] **There must be a dominant tenement and a servient tenement** (*Re Ellenborough Park*, applied in *Clos Farming*)
 - Must be sufficient proximity between the parcels of land (*Re Ellenborough Park*)
 - **Re Ellenborough Park:** DT = houses; ST = park onto which the houses fronted
 - [2] **The easement must accommodate the dominant tenement** (*Re Ellenborough Park* (Evershed MR), applied in *Clos Farming* (Santow JA))
 - **Re Ellenborough (easement!):** The easements must be ‘connected with the normal enjoyment of the dominant tenement’
 - **Re Ellenborough (easement!):** That the right increased the value of the dominant tenement relevant, but insufficient, to satisfy this requirement
 - **Re Ellenborough (easement!):** Was contemplated that the park would form a pleasure ground for the houses to be constructed upon the plots. Therefore, ‘the park became a communal garden for the benefit and enjoyment of those whose houses adjoined it or were in its close proximity’
 - **Re Ellenborough (easement!):** was clearly the objective intention of the grant of the ‘full enjoyment of the pleasure ground’ to purchasers of plots that they enjoy this easement
 - **Clos Farming (no easement!):** a right benefitting a trade carried out on the DT may be a valid easement, but only if the trade is a **necessary**

incident to the normal enjoyment of the land (not merely an independent enterprise)

- ***Clos Farming* (no easement!):** easement allowing the appellant to enter the residential lots, control the growing and harvesting of grapes, and sell the produce **failed** this!
- **[3] The owners of the dominant and servient tenements must be different persons (*Re Ellenborough Park*, applied in *Clos Farming*)**
- **[4] The right must be capable of being the subject matter of a grant (*Re Ellenborough Park*, applied in *Clos Farming*)**
 - **Is the right too wide and vague (*Re Ellenborough*)?**
 - ***Re Ellenborough*:** the right must be distinct from an indefinite and unregulated privilege.
 - ***Re Ellenborough*:** this right provided for a **limited number** of houses in a uniform crescent of one single large but **private** garden
 - **Is the right inconsistent with the proprietorship or possession of the alleged servient owners (*Re Ellenborough*)?**
 - ***Re Ellenborough*:** did not amount to joint occupation of the park with its owners; did not exclude the proprietorship or possession of the park by owners
 - ***Clos Farming* (no easement!):** the easement cannot deprive the servient tenement of its **predominant and accepted use and value** — **must not oust** the servient tenement owner
 - ***Clos Farming* (no easement!):** failed this test because agricultural activities were the land's **predominant and accepted use and value**
 - **Is the right a mere right of recreation without utility or benefit (*Re Ellenborough*)?**
 - ***Re Ellenborough*:** sometimes said that an easement 'must be a right of utility and benefit and not one of mere recreation and amusement'

- **Re Ellenborough:** a private garden is an attribute of the ordinary employment of the residence to which it is attached and the right of wandering in it is but *one method of enjoying it*
- **Profit à prendre**
 - Produces a **right to take from the** servient tenement some part of the soil of that tenement, or the minerals under it, or some of its natural produce, or the animals/ferae naturae existing upon it (**Clos Farming**)
 - **Must satisfy the following:**
 - [1] The profit must come from the land itself — insufficient that the user can make a profit out of trading on it (**Clos Farming**);
 - [2] The right must be to take something from the land —a right to tend or grow **cannot be considered a right to take** (**Clos Farming**); and
 - [3] The right must only allow the removal of a crop that does not require attention after initial planting (**Clos Farming**)
 - **Clos Farming (no profit!):** the rights enjoyed by Clos were extensive and highly intrusive, conferring not just limited rights of entry to take away natural property, but including rights to enter and plant and tend the vines and the right to recover payment for the costs associated with such works and the sale of any produce
- **Future interest**
 - **Reversion?**
 - This is the **residue** of the grantor's estate when he or she has granted a lesser portion of the interest to another person
 - Eg if X (fee simple holder) grants a life estate to Y, X has a reversion, a present right to future enjoyment and possession of the property upon Y's death
 - **Remainder?**
 - This is the **grant** of a future interest to a person who was not previously entitled to the land
 - Eg if X grants his fee simple estate to Y for life and then to Z and her heirs, Y has a **life estate** in possession and Z has a **fee simple in remainder**

- **Co-ownership**
 - Joint registered proprietors ***presumed*** to be joint tenants (*TLA* s 30(2))
 - **Note — *TLA* s 30(2):** Two or more persons who are registered as joint proprietors of land shall be deemed to be entitled thereto as joint tenants and in all cases where two or more persons are entitled as tenants in common to undivided shares of or in any land, the Registrar may make any necessary recordings in the Register and may create a single folio for the entirety or separate folios for each of the individual shares, and may produce a certificate of title or certificates of title accordingly.
 - **Joint tenancy?**
 - **Section 30(2) — two or more persons who are registered as joint proprietors of land shall be deemed to be entitled thereto as joint tenants**
 - **But can be tenants in common in equity: if (a) making that intention clear or (b) different contributions to purchase price**
 - **All four unities must be present:**
 - **Possession** — each joint tenant is entitled to possession of the whole of the land
 - **Interest** — interest of each joint tenant must be the same in nature, extent, duration
 - **Title** — interests must derive from the same documents or act
 - **Time** — interests must vest at the same time with the same common event
 - **Right of survivorship** — upon death of one joint tenant, the interest of the joint tenant passes on to the remaining joint tenant(s)
 - **If unclear who died first**, eldest assumed to have died first (*PLA* s 184)
 - Joint tenant can devise their interest *inter vivos*. This **severs** the joint tenancy, and the **transfer** would become **tenant-in-common**. If >1 remaining joint tenants, they **remain** joint tenants
 - **Tenancy in common?**

- Must be words of **severance**, or an act of **severance**, by the parties
 - Eg 'To A and B in equal shares'
- Tenants in common hold **distinct** yet **undivided shares** in the land, which may be equal or unequal
- **Can pass your right during lifetime or by will**
 - Only the unity of possession is required
 - If there's fraud by one TIC, right of rescission arises w/r/t the TIC who has been defrauded
 - There is **no right of survivorship**
- **Adverse possession**
 - [!] Adverse possession cannot be established against the Crown or Council (*LAA* s 7)
 - [1] **Is the owner out of possession?**
 - [2] **Is there someone else in possession?**
 - **[a] Actual possession?**
 - Possession must open, peaceful, continuous, single and exclusive (*Whittlesea*)
 - **[b] Intention to possess?**
 - Intention to **own is not required** (*Whittlesea*)
 - **Admission** by Mrs Abattengelo that she was not the owner did not matter!
 - Must be made clear to the world-at-large (*Whittlesea*)
 - Must be beyond 'mere use and enjoyment of a special benefit' or trespass (*Whittlesea*)
 - Subjective intention of the adverse possessor is **not** determinative, but may be significant when combined with other sufficient objective evidence (*Whittlesea*)
 - Enclosing or fencing is a strong, but inconclusive, indicator (*Whittlesea*)
 - Payment of rates by the adverse possessor *may* be significant if the adverse possessor knows they are paying rates with respect

to the land (*Whittlesea*). Failure to pay rates **not fatal** in ***Whittlesea!***

- No requirement that structures be erected by the adverse possessor (*Whittlesea*)
- No requirement that the adverse possessor's use of the land be consistent with that of the true owner (*Whittlesea*)
- Possessory interest of the adverse possessor can be sold or otherwise devised; can have **cumulative adverse possession** (*Kirk*)
- ***Whittlesea (adverse possession!):*** installed fencing along one boundary of the land and used the land to keep animals and hold social gatherings; maintained trees and vegetation; removed timber from the land; removed an existing fence along the boundary between the Council's land and their own land
- **[3] Is their possession adverse to the owner?**
 - Possession must be taken without the permission of the owner (*Whittlesea*)
 - Where a disposed true owner subsequently devises the land, the *nemo dat* principle requires that the donee be in no better position than the first owner
- **[4] Is the adverse possession continuous and uninterrupted?**
 - **Note acknowledgement or payment by AP to RP restarts the clock: *LAA s 24(1)***
 - Possession must be continuous, with no abandonment (*Whittlesea*)
 - ***Whittlesea (adverse possession!):*** weekly commutes to Geelong were not sufficient to displace the existence of continuous possession
 - The 'adverse possession clock' may be stopped by:
 - **Assertion of right (*Whittlesea*)**— person with cause of action institutes an action to recover land or makes a **peaceable but effective entry** (not merely *formal* entry: *LAA s 16*)
 - **Admission:** person in possession acknowledges title of the person with cause of action, in **writing** and **signed**

o Part payment is also effectively an acknowledgment

- Arises by operation of law — commonly for unpaid purchase price (**vendor's lien**) or non-transferred legal title following payment of purchase price (**purchaser's lien**)
- **Principal remedies** = judicial sale and appointment of a receiver
- **Vendor's lien** — non-possessory (cf common law lien) right to property — vendor has a property right until purchase price paid in full (see *Barry v Heider*)

- **Charge (commonly in form of a Torrens mortgage)?**

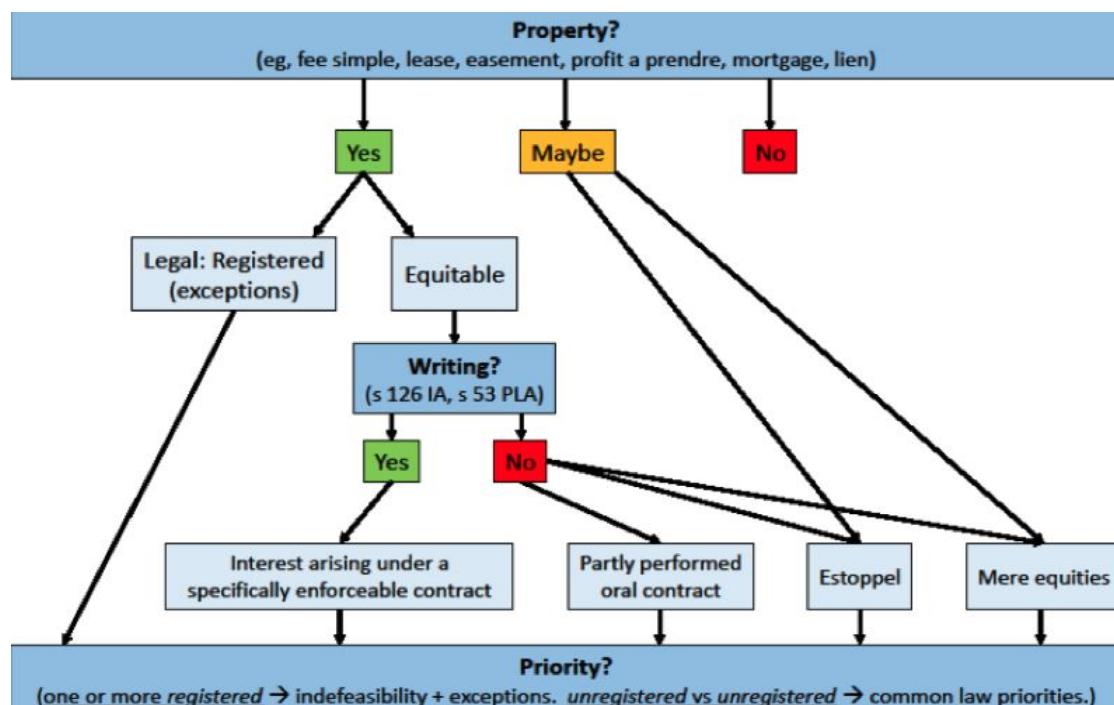
- Created by agreement between creditor and debtor
- No transfer of legal title from mortgagee to mortgagor
- Creditor only gets the right to use the property as satisfaction of the debt
- The size of the security interest equals the size of the loan
- **Torrens mortgages** take this form (if registered, they are **legal** charges, cf *equitable*)
 - **Default remedy** = judicially ordered sale (ie power of sale) (*TLA s 77(1)*)
 - Torrens mortgage retains the right of foreclosure (*TLA s 79(1)*), but there must be an attempt for power of sale to be exercised **first** (*TLA s 79(3)*)
 - **Foreclosure deemed to discharge debt**, and extinguishes right of redemption (*TLA s 79(4)*)
 - The power of sale must be exercised in good faith (*TLA s 77(1); Latec*)

- **Common law mortgage?**

- Involves a transfer of legal title, such that the mortgagee became the legal owner of the land, subject to their obligation to reconvey the land upon repayment of the debt to the mortgagor
- **Equity of redemption** = mortgagor's right to recover the property *after* debt is satisfied
- **Equity of foreclosure** = mortgagee's right to extinguish the mortgagor's right to redeem

- Only the **first common law mortgage is legal**, with subsequent mortgages considered to be equitable
- **Option**
 - Equitable right
 - The option holder decides whether or not to exercise the option (ie buy), and the seller is bound by that decision — eg 'I offer to sell you my house for \$1 million. In consideration for \$200, I will keep this offer open until Sunday.'
 - If the exercise of an option will *produce a specifically enforceable lease or contract of sale*, the option is an **equitable** property right
 - An option cannot be separately registered, though they may be included **as part of a registered lease**
 - Unclear whether the option would amount to a term of the lease for the purposes of indefeasibility
 - Does not count as part of the tenancy in possession exception!
 - Purely serves a **notice** function, with protection of options provided via caveat
 - Can have a conditional option! '**If [X] happens, I have the right to purchase**'
 - [!] **Note right of pre-emption:** holder cannot compel the owner to sell — eg option only applies *if* the holder **decides to sell**
 - **Exception** — right of pre-emption can be an option *iff*:
 - **Grantor** initiates the triggering event **& Grantor** has stipulated the terms and conditions of the sale

How was it created?



Note that adverse possession = an exception to registration/writing requirements — can acquire legal interest that way!

- [1]: Registered (R/UR)?

- No instrument **until registered** shall be effectual to create, vary, extinguish or pass any estate or interest or encumbrance in or over any Torrens land (*TLA* s 40(1))
 - ... **upon registration** the estate or interest or encumbrance shall be created, varied, extinguished or pass in the manner and subject of the covenants and conditions specified in the instrument or by this Act prescribed or declared to be implied in instruments of a like nature (*TLA* s 40(1))
- **If a lease:** The registered proprietor of freehold land may lease it for any term **exceeding three years** by an instrument in an appropriate approved for (*TLA* s 66(1))
- **[!] Exceptions to Torrens registration requirement:** **short-term leases; easements; adverse possession**
 - **Can therefore label these 'legal interests'**, even though the general tendency is to equate **registered with legal interests** and **unregistered with equitable interests**
- **If satisfied, stop here! We have a registered interest.**
- **If not satisfied, continue! We may have an equitable interest.**

- [2]: Written (W/UW)?

- Key provisions = *IA* s 126; *PLA* s 52(1) (see below)
- **All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed (*PLA* s 52(1))**
- An action must not be brought to charge a person upon a special promise to answer for the debt, default or miscarriage of another person or upon a contract for the sale or other disposition of an interest in land unless the agreement on which the action is brought, or a memorandum or note of the agreement, is in **writing signed by the person to be charged** or by a person lawfully authorised in writing by that person to sign such an agreement, memorandum or note (*Instruments Act* s 126)
 - **Must describe the land, identify the parties, detail the transaction particulars (*can take into account oral evidence for interpreting***