

## 1. Is there a proprietary interest (what is property)?

'Property' including right in a definable object

Interest in land or licence?

If interest not created in the five ways AND not a recognised category of property (numerus clauses) → licence (*King v David Allen, Cowell*)

## 2. How does the proprietary interest arise?

Topic 3 Acquiring legal interests in land (inc through adverse possession)

### 2.3 possession + 3.2 adverse possession

Legal possession requires factual possession and intention to possess, both of which are objectively assessed (*Powell*). Possession includes the immediate right to possession and a right to recover possession (or injunction) (*Powell v McFarlane*). Owner is deemed to be in possession (rebutted by evidence) (*Powell*)

1	<p><b>Factual possession (objective):</b> The Court will consider all facts and circumstances.</p> <ul style="list-style-type: none"><li>• Factual possession entails sufficient exclusive and physical control, dependent on the nature of the land and the manner in which it is usually used (<i>Powell</i>)</li><li>• Current and historical use (<i>Powell</i>), position</li><li>• How would the owner treat the land (<i>Powell, Abbatangelo</i>)</li><li>• Zoning</li><li>• Multiple facts per se inefficient viewed tgt can be sufficient (<i>Abbatangelo</i>)</li><li>• Does not require inconsistent use by AP (<i>Abbatangelo</i>)</li><li>• No implied licence: curtail possession can go to animus but not permission (<i>Abbatangelo</i>)</li></ul> <p>Examples: fence, bathtub, grazing, council rate (or lack thereof), gate, erection (not decisive), grazing itself (may be sufficient in some cases)</p>
2	<p><b>Intention to possess</b> (animus possidendi) (<b>objective</b>) (<i>Powell</i>)</p> <ul style="list-style-type: none"><li>• Subjective belief is persuasive but not decisive (<i>Kirk</i>)</li><li>• Intent goes to physical control/factual possession. Not ownership (<i>Abbatangelo</i>)</li><li>• Owner is presumed to have animus (<i>Powell</i>)</li><li>• Multiple facts per se inefficient viewed tgt can be sufficient (<i>Abbatangelo</i>)</li><li>• Not depend on if AP does their best, test is whether exercise control for APer's own benefit (<i>Abbatangelo</i>) affirmative and clear animus clear to the world to exclude the owner and the world at large (<i>Powell</i>). Casual trespass NOT satisfy</li></ul> <p>Examples: prima facie fencing (for what? <i>Abbatangelo</i>), lock</p>
3	The above two elements are made out, legal possession is established. (maintain an action of trespass?)
4	Is there constructive possession? <ul style="list-style-type: none"><li>• Boss through agent</li><li>• Physically controlling a part of a clearly fenced property, may claim to constructively possess the whole<ul style="list-style-type: none"><li>○ (animus only to the actually possessed part)</li></ul></li></ul>
<b>'adverse' possession</b>	
5	<p><b>'adverse': needs to be open, not secret, peaceful and not by force, subjective consent is irrelevant (<i>Kirk</i>)</b></p> <ul style="list-style-type: none"><li>• open, not secret (fraud will delay the begin of limitation period)</li></ul>

	<ul style="list-style-type: none"> <li>peaceful, not by force</li> <li>adverse: NOT by consent (objective) of the true owner (Bowen CJ <i>Mulcahy v Curramore Pty Ltd</i>)             <ul style="list-style-type: none"> <li>subjective consent irrelevant (<i>Kirk</i>)</li> <li>consent requires <b>outward demonstrable act</b> (Adverse possessor does not need knowledge)</li> <li>if overstays consent (eg fixed term tenancy) → AP</li> </ul> </li> </ul>
6	<p><b>Owner/prior possessor's remedy</b></p> <ul style="list-style-type: none"> <li>Action to recovery of the land (remedy = order of possession)</li> <li>Sue in trespass to land</li> <li>Self-help remedies (<i>Cowell</i>) – if succeed limiting other remedies but can seek mesne profits before ejectment (eg market rent)</li> <li>Compensation from the government (<i>Perry v Clissold</i>)</li> </ul>
7	<p>Action accrues if there is</p> <ol style="list-style-type: none"> <li>an adverse possessor in whose FAVOUR the limitation period can run (s 14(1)) <b>AND</b></li> <li>someone AGAINST whom the limitation period will run</li> </ol> <p>**equitable estate holders can bring an action for recovery of the land (LAA s 11)</p> <p><b>Current interest ss 9 + 14(1)</b></p> <ul style="list-style-type: none"> <li>s 14(1): there must be someone Aping</li> <li>ss 9(3), 10(3): transferring/selling the estate does not restart the limitation period</li> </ul> <p><b>Future interest ss 10 + 14</b></p> <ul style="list-style-type: none"> <li>s 10(2): if prior interest holder is not in possession when it ends, the new interest holder has the longer of 6 years after their interest is vested in possession, or 15 years after the AP begins</li> <li>s 10(1) applies to a fixed-term lease: owner's right accrues when the lease end and APer is still there</li> </ul> <p><b>Some tenancies</b></p> <ul style="list-style-type: none"> <li>s 13(1) TAW: deemed to accrue after 1 year (+ s 14(1))</li> <li>s 13(2) periodic tenancy (period &lt;= 1 year: deemed to accrue after first period or the last rent date)</li> <li>s 13(3) rent AP (=AP reversion): deemed to accrue when first wrongful rent payment             <ul style="list-style-type: none"> <li>s 13(3)(a) yearly rent &gt;= 2 dollars; lease in writing</li> <li>s 13(3)(c): no rent received by the true owner</li> </ul> </li> </ul> <p><b>Mortgagee</b></p> <ul style="list-style-type: none"> <li>s 15: if mortgagee in possession for 15 years, mortgagor's action to redeem/compel discharge of mortgage is barred (subject to ss 24-5)</li> </ul>
8 Modif y the clock ?	<p><b>No extension</b></p> <ul style="list-style-type: none"> <li>Formal entry does not restart the limitation period unless other extension (s 16 LAA)</li> <li>Inherit or sale of the land (ss 9(3), 10(3))</li> </ul> <p><b>Classic extension</b></p> <ol style="list-style-type: none"> <li>Commence an action to a court: <b>reset</b> the clock</li> <li>Permission by the original possessor through an outward demonstrable act inferable by a reasonable person (becomes TAW/regular lease), requiring (stops the clock):             <ul style="list-style-type: none"> <li>Overt action so that inference can be made about the permission (A Possessor's awareness is irrelevant)</li> </ul> </li> </ol>

	<ul style="list-style-type: none"> <li>○ reasonable person would appreciate that the purported AP was with the permission of the landowner</li> </ul> <p>(3) <b>Retake possession:</b> 2 elements pause the clock for the period of re-possession (s 16 formal re-entry not enough)</p> <p>(4) <b>Discontinue or abandonment</b> of AP (if APer can abandon): <b>reset</b></p> <ul style="list-style-type: none"> <li>○ Mature AP cannot be abandoned (<i>Kirk</i>), True owner cannot abandon!</li> <li>○ Discontinue breaks continuity of possession (<i>Nicholas v Andrew</i>) (Not made out in <i>Abbatangelo</i>, furniture still there? Based on the nature of the land)</li> </ul>
	<p><b>LAA extension</b></p> <p>(1) <b>Fraud or mistake:</b> limitation period does not start until the fraud is reasonable discoverable or the true owner discover (s 27)</p> <ul style="list-style-type: none"> <li>○ Exception: bona fide purchaser after the adverse possessor (TLA? s 44(2))</li> </ul> <p>(2) <b>Acknowledge of possessory title written and signed</b> (s 24–6): <b>reset</b> the clock SO if an adverse possessor acknowledges another's superior title, but that acknowledgment is <u>not</u> in writing AND signed by the AP, s 24 does not apply, and the limitation period keeps running ...</p> <p>(3) <b>There is disability</b> for the true owner/registered proprietor when AP begins. They have as long as 6 years after the disability ceases or the true owner dies; or 15 years after the AP started (s 23(1)).</p> <ul style="list-style-type: none"> <li>○ 'disability' in s 3(2): For the purposes of this Act a person shall be deemed to be under a disability while he is a minor or of <u>unsound mind</u>.</li> <li>○ S 23(1)(a): does not apply if right accrue before disability</li> <li>○ S 23(1)(b): no further extension if the first owner dies under a disability, and the second owner is under disability</li> <li>○ S 23(1)(c): in any event, the limitation cannot be longer than 30 years after the date the right of action first accrued (to the original owner). (can restart if the first disabled owner recovers, pass to the next disabled owner?)</li> </ul>
9	<p>If the <b>limitation period expires:</b></p> <ol style="list-style-type: none"> <li>1) a statutory limitation period on the right of a person to bring an action to recover land (<b>LAA s 8</b>)</li> <li>2) the person who did not bring an action to recover the land: their title is <b>extinguished</b> (<b>LAA s 18</b>)! (de facto the APer is the owner)</li> </ol> <p>*AP interest separate from registered</p> <ul style="list-style-type: none"> <li>• Mature AP interest can be sold/transferred, cannot be abandoned</li> </ul>
10	<p>To be registered:</p> <ul style="list-style-type: none"> <li>• application to the Registrar under <b>TLA s 60</b> for a vesting order, applying to both Torrens and general law land (<b>TLA s 9</b>)</li> <li>• another person with a superior interest to AP may lodge a caveat (<b>TLA s 61</b>)</li> <li>• register (<b>TLA s 62</b>) by registrar</li> </ul>

## Topic 4 Acquiring Equitable Interests in Land

### 4.3 NT Proof

**The proof of native title (NT) rights depends on s 223(1) of the Native Title Act (NTA). The onus of proving is on Indigenous claimants (*Yorta Yorta*). Para (a) and (b) may have same evidence but different enquiries (*Ward*).**

1	<p>Question of fact</p> <p><b>S 223(1)(a):</b> NT rights possessed under (derive from) traditional laws and customs practised or observed by Indigenous people (content of rights and interests)</p> <ul style="list-style-type: none"> <li>• <b>Traditional</b> = law and customs practised or acknowledged at the time of Crown sovereignty and continuing observance and acknowledgement of this <b>normative</b> system is not substantially interrupted (Majority, <i>Yorta Yorta</i>)           <ul style="list-style-type: none"> <li>◦ Law and customs exist in ‘normative society’ that continued to exist since sovereignty</li> </ul> </li> <li>• Courts cannot <b>disregard interruption</b> because it was due to colonisation (Majority, <i>Yorta Yorta</i>) → Indigenous petition used to prove interruption</li> <li>• Identity of group ceases if no observance (notwithstanding new group) (Majority, <i>Yorta Yorta</i>)</li> <li>• <b>claimants</b> to identify the rights (<i>Ward</i>)</li> <li>• not necessarily communal (<i>Ward</i>)</li> <li>• NT must trace back to traditional laws and customs (<i>Ward</i>)</li> <li>• Some changes are not fatal if the new customs have origins pre-sovereignty (rule of change, Hart?) because there is NO parallel law-making power in AU (Majority, <i>Yorta Yorta</i>)</li> </ul>
2	<p>Question of fact</p> <p><b>S 223(1)(b):</b> These Indigenous people, because of traditional laws and customs, have a connection with the land or waters</p> <ul style="list-style-type: none"> <li>• Physical connection is not required but may be easier for proof (Majority, <i>Yorta Yorta</i>)</li> <li>• Connection preserved since sovereignty (Majority, <i>Yorta Yorta</i>)</li> <li>• Distinguished rights in land vs right with respect to other people (<i>Akiba</i>)</li> <li>• Ritual rights (akin to spectacle?) not connection to land (<i>Ward</i>)</li> <li>• Causal link between the law and custom in (a) and the connection between land/waters and Indigenous people (Majority, <i>Yorta Yorta</i>)</li> </ul>

### 4.5 Extinguishment

**S 11 operates in relation to native title extinguishment. This answer will assume that the deemed extinguishment regime does not add or amend the common law extinguishment principles. Common law principles are relevant to the definition of Native Title under s 223(1)(c). The s 223(1)(c) enquiry is a question of law.**

1	<ul style="list-style-type: none"> <li>• Operative section is <b>s 11</b>: only extinguishment under the NTA is extinguishment           <ul style="list-style-type: none"> <li>◦ CL: is relevant in recognition in s 223(1)(c)</li> <li>◦ Statutes: There may be deemed statutory regime of extinguishment</li> </ul> </li> </ul>
2	<p>Identify the <b>traditional</b> law and customs and rights arising from it (proved, <i>Yorta Yorta</i>)</p> <ul style="list-style-type: none"> <li>• Courts likely characterise the NT rights broadly (vertical underlying right, right to fish, <i>Akiba</i>), including commercial or non-commercial purposes</li> </ul>
3	<p>Identify the act and interests under <b>ss 226–7</b>: statutory interpretation, such as ‘lease’ (legislation).</p> <p>The ‘act’ by the Commonwealth is _____</p>

	<ul style="list-style-type: none"> <li>• S 226: affect meaning of act in reference related to NT, including a series of conduct by the Crown or any other persons <ul style="list-style-type: none"> <li>○ Legislation or reservation by Parliament or Crown</li> <li>○ Legislation/exe action granting third parties interest in land or waters</li> <li>○ Legislation/exe action conferring full beneficial ownership or other interests on Crown (<i>Congoo, Yanner</i>)</li> </ul> </li> </ul> <p><b>S 227: Act affects NT if it extinguishes NT wholly or partly inconsistent (not degree!)</b></p>
4	<p><b>objective inquiry (<i>Ward</i>):</b> Compare these two interests (if there is a conflict, how to resolve it): <b>The test of inconsistency of incidents of rights at the <i>existence</i> level (cf exercise of rights), and extinguishment requires a logical antinomy at the time of the grant (<i>Ward, Brown</i>)</b> (one cannot exist with the other one exist)</p> <ul style="list-style-type: none"> <li>• Even if 'possession' may not be logical antinomy, need stat interpretation (<i>Congoo</i>) <ul style="list-style-type: none"> <li>○ Obligation to use land inconsistent with NT?</li> <li>○ Criminal offence whatsoever?</li> </ul> </li> <li>• <b>Statutes will be interpreted to affect and regulate the exercise of rights (for a particular purpose) rather than existence of NT rights (<i>Akiba</i>)</b>. Regulating affirms the existence of NT rights (<i>Yanner</i>).</li> <li>• <b>Degree of inconsistency is NOT relevant (<i>Ward</i>)</b>. Extent of consistency (per stick) may be relevant (<i>Ward</i>)</li> <li>• Pastoral leases = not possessory (<i>Wik</i>)</li> <li>• some rights cannot be proven without the performance of a further act, but <b><i>Brown</i> is not the case.</b></li> </ul>
4	<p>(if extinguished, SAY <b>assuming I am wrong</b>)</p> <p><b>Is there an operational inconsistency (practical impossibility) regarding <i>exercising</i> the rights (<i>Brown</i>)?</b></p> <ul style="list-style-type: none"> <li>• Yes → NT <b>yields</b> BUT NOT suspended or extinguished (s 237A, extinguishment is permanent subject to <b>s 238</b> statutory exceptions to the permanent extinguishment rule) (<i>Brown</i>)</li> <li>• After the statutory rights end, NT holders can come back to exercise the right</li> <li>• <b>s 211</b>: if no extinguishment, prohibition re hunting/fishing falls away for non-commercial purposes</li> </ul>
6	If extinguishment → CL withdraws recognition under NTA, connection not severed Compensation will be available if the NT rights are extinguished
7	Common law lease ( <i>Wik</i> ) and registered/legal fee simple ( <i>Fejo</i> ) extinguishes NT.

#### 4.6 Compensation

The NTA validates acts done before NTA commencement (Past Acts) and after the RDA operation (December 1975) which may be discriminatory and invalidated by the RDA. Compensation is governed by **s 50(1)**, and it should not exceed compensation payable of a compulsory acquisition of a freehold estate (**s 51A(1)**).

1	<p><b>Economic loss (physical) (<i>Griffith</i>)</b></p> <ul style="list-style-type: none"> <li>• assessed on the date of extinguishment act, and the maximum is the value of a fee simple.</li> <li>• <b>Spencer test: what will a willing but not anxious vendor sell the rights for?</b></li> <li>• Disregard inalienability, but evaluate the sticks in the bundle</li> </ul>
2	<p><b>Economic loss – interest (<i>Griffith</i>)</b></p> <ul style="list-style-type: none"> <li>• Simple interest and not compound interest supported by law</li> </ul>

	<ul style="list-style-type: none"> <li>• No reason to believe the claimants will invest the compensation for profits if it were paid</li> </ul>
3	<p><b>Cultural loss (<i>Griffith</i>)</b></p> <ul style="list-style-type: none"> <li>• More than CL solace compensation, solatium did not capture the full depth of loss (holistic understanding of cultural loss). It is theological and ontological worldview.</li> <li>• Hurt feelings can have evidentiary values although not the only consideration</li> <li>• ‘translate’ into compensation</li> <li>• Test = <b>compensation is what the Australian community at the judgment time think is an appropriate award for the act of extinguishment and what is and appropriate, fair, or just compensation.</b></li> </ul>
4	<p>Intermediate Acts are also validated (1/1/1994-Wik) in the same way. If states extinguish, states pay, if Cth extinguish, the Cth pays (<b>s 23J</b>).</p>

## Topic 5 Acquiring Equitable Interests in Land

### 3.1 + 5.1

Is there an interest in land created and enforceable?	
1	Registered
2	Any exceptions apply? <ul style="list-style-type: none"> <li>• Fraud (s 42)</li> <li>• Easement (s 42(2)(d))?</li> <li>• Tenant in possession except for option to buy (s 42(2)(e))?</li> <li>• In personam: Part performance, Proprietary estoppel, resulting or constructive trust, equitable fraud and discretionary bar?</li> <li>• Verification of identity by mortgagee?</li> <li>• Volunteer + in personam/fraud?</li> </ul> **even if complying with PLA, equitable interest <b>NOT</b> elevated to legal interests
3	S 126 applies and no discretionary bar?
4	Other equitable principles (topic 5) and no discretionary bar?

Usually registered > legal > equitable, statutory interests depends on the terms > NT

1	<b>Formalities:</b> can I establish that there have been <b>acts in writing that satisfy the formalities requirements</b> that apply to creation of legal rights in land? (IA, PLA, TLA; note exceptions!) <ul style="list-style-type: none"> <li>• Express trust (declared or settled)</li> </ul>
2	<b>If not:</b> is there a <b>validly executed contract</b> that I can argue should be specifically enforced? (note issues with availability of specific performance of contracts – <i>Lysaght; Bunny, Tanwar</i> ) <ul style="list-style-type: none"> <li>•</li> </ul>
3	<b>If not:</b> are there <b>sufficient acts of part performance</b> that are unequivocally referable to a contract such as the one I want to allege should be specifically enforced? ( <i>Regent; ANZ; Pipikos</i> )
4	<b>If not:</b> can I argue that <b>a trust has otherwise arisen by operation of law (institutional – resulting trust; common intention constructive trust)</b> or that <b>a trust should be imposed as a remedy (remedial – unconscionability/joint endeavour constructive trust)</b> ?*
5	<b>If not:</b> can I argue that the facts are such that the defendant is <b>estopped in equity</b> from insisting on their legal rights, <b>and</b> that only a proprietary remedy is adequate? ( <i>Inwards; Crabb; Waltons; Giumelli</i> )
6	<b>Adverse possessory interest (mature or otherwise)</b>

### 5.3 S 126 specifically performable agreement

**Equitable interest can exist in Torrens land through recognised equitable principles (Issacs J in Barry v Heider). X can argue that there is a specifically performable agreement fulfilling requirements of s 126 of the Instruments Act. There must be an agreement or memo or note signed by the party to be charged (s 126 Instruments Act).**

1	<b>The agreement/memo/note</b> <ul style="list-style-type: none"> <li>• can refer to additional documents if the signed document refers to another (ANZ)</li> <li>• may adduce oral evidence to clarify the cross-reference only if the signed document refers to the transaction (ANZ)</li> <li>• subject matter of the transaction (writing, not oral evidence to property): signed by both, parties identified, nature of the transaction, consideration, identification of property (ANZ)</li> </ul>
2	<b>Purchaser's interests are</b> <ul style="list-style-type: none"> <li>• beneficial <b>interest commensurate with availability of specific performance (SP) (+inj) (Bunny)</b></li> </ul>