Week 1: Doctrine of Tenure
Topic 1: Tenure

Definition of real property

Real property *is land and interests in land. Real property is subdivided into two further groups,* ***corporeal hereditaments (tangible real property, ie land****) and* ***incorporeal hereditaments (intangible interests in land, such as easements, or rights of way).***

- Any property that is inherited
- Denotes permanency
- Rights are incorporeal
- Easements → right to cross

How we live

- Single dwellings on land
- Apartments
- Town houses
- Rural allotments
- Farms
- On county/city/regions

Three key doctrines → for structuring the land holding system

1. Doctrine of tenure
    a. Based in feudalism
    b. Three principles:
        i. **No one owns land absolutely (allodial)**
            1. One owns land absolutely
        ii. **All land is held of the Crown**
            1. Every interest comes from the Crown
        iii. **No one holds land except of the Crown (ie by grant)**
2. Doctrine of estates
3. Doctrine of native title

Feudal tenures → system of land holding in France

- The King owned all land absolutely
- He granted his subjects ('tenants') the right to use the land, not the land itself
- The right granted was an 'estate'
- In return, the tenant owned the King obligations
    - There were many types of tenures (differentiated by different types of service) but only one was imported into NSW: free and common socage.

Reception of British Law

- British Imperial Law – legal framework that governed Britain's relations with her colonies
- Law and official policy
- Settled versus conquered colonies
- No sufficient legal system at the time

- An Englishman (sic) brings as much of the common law with them as is relevant to the circumstances of the colony (See Cooper v Stuart)

Traditional vs new conceptions of tenure

- Traditional view of tenure in Australia: the importation of feudal law – *Attorney-General v Brown*
- Modern view of tenure in Australia: *Mabo v State of Queensland (No. 2)*

Attorney-General v Brown (1847) → in banko, all judges are on the bench

Facts	• Involved a grant by the Crown of 60 acres of land near Newcastle • The grant included a reservation • The reservation stated: '...we do hereby reserve to ourselves ... and also all mines of silver and of gold, and of coals, with full and free liberty and power to search for, dig, and take away the same...' • A later clause said that if the reservation was not observed the grant would be void. • Mr Brown mined for coal. • The Attorney-General brought an information for intrusion • this was a mechanism for obtaining satisfaction in damages for personal wrongs committed in the lands or other possessions of the Crown • So the argument was that Mr Brown had committed a wrong by mining for the coal that belonged to the Crown. Ie Mr Brown intruded into the Crown's possession of the mines and coal • Mr Brown made four arguments, of which the third is relevant here. ○ He argued that there is a distinction between the Crown having sovereignty over New South Wales and the Crown having ownership or possession of the land. So the Crown had sovereignty, but not ownership or possession (without which it could not maintain the information for intrusion)
Decision	Unsurprisingly the Court did not agree <u>Stephen CJ</u> • The waste lands of the colony had been in the possession of the Crown since 1788 • That while it might be a fiction in England that the Crown owned all lands, it was not a fiction in NSW • This had been confirmed legislatively by the Imperial Waste Lands Act 1842 • That all the waste lands of the colony vest in the crown must be the case "for, at any rate, there is no *other* proprietor of such lands' • Sovereignty → ultimate power

Mabo v State of Queensland (No. 2)

- In effect this case raised a similar legal issue to *Attorney-General v Brown*: what interest did the Crown acquire on taking sovereignty over NSW?
- What does the doctrine of tenure look like in modern form?

Facts	• On 20 May 1982, Eddie Koiki Mabo, Sam Passi, David Passi, Celuia Mapo Salee and James

	Rice began their legal claim for ownership of their lands on the island of Mer in the Torres Strait between Australia and Papua New Guinea. ● HCA required the Supreme Court of Queensland to determine the facts on which the case was based but while the case was with the Queensland Court, the State Parliament passed the Torres Strait Islands Coastal Islands Act which stated 'Any rights that Torres Strait Islanders had to land after the claim of sovereignty in 1879 is hereby extinguished without compensation'. ● The challenge to this legislation was taken to the High Court and the decision in this case, known as Mabo No. 1, was that the Act was in conflict with the Commonwealth Racial Discrimination Act of 1975 and was thus invalid. It was not until 3 June 1992 that Mabo No. 2 was decided. ● By then, 10 years after the case opened, both Celuia Mapo Salee and Eddie Mabo had died. Six of the judges agreed that the Meriam people did have traditional ownership of their land, with Justice Dawson dissenting from the majority judgment. The judges held that British possession had not eliminated their title and that 'the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands' <u>KEY ARGUMENTS</u> ● Plaintiffs claimed that an interest in land had survived the annexation of NSW by UK ● One aspect of this argument was that the Crown had acquired sovereignty but not full (lets the use the word from the case – beneficial) ownership. ● This is essentially the same argument as in *Attorney-General v Brown*
Decision	● Following the High Court decision in Mabo No. 2, the Commonwealth Parliament passed the Native Title Act in 1993, enabling Indigenous people throughout Australia to claim traditional rights to unalienated land. ● the Crown had only acquired sovereignty, not full or beneficial ownership, the plaintiffs argued, native title had not been extinguished ● This was not an entirely unexpected outcome, aboriginal title was already part of common law doctrine in other places ● What was a bit different was the emphasis on the doctrine of tenure <u>Brennan J → Radical title</u> ● Did not have full beneficial ownership over the land → traditional Indigenous land ● The Crown was treated as having the radical title to all the land in the territory over which the Crown acquired sovereignty. The radical title is a postulate of the doctrine of tenure and a concomitant of sovereignty. ● As a sovereign enjoys supreme legal authority in and over a territory, the sovereign has power to prescribe what parcels of land and what interests in those parcels should be enjoyed by others and what parcels of land should be kept as the sovereign's beneficial demesne (at para 50). ○ Radical → ultimate or final ○ Existence of something

	○ Enables people to take land, grant it and give it back ○ Crown would still need an interest which is necessary

Doctrine of Tenure Revisited
Three principles

- No one owns land absolutely (allodial)
- All land is held **of** the Crown
- No one holds land except **of** the Crown (ie by grant)

Does it still matter/relevant

- Doctrine of tenure underpins our land holding system
- Necessary to how we think about native title
- Not something you encounter on a day-to-day basis

Topic 2: Estates

Doctrine of estates → partner to tenure → agent is transacting estate

- Radical title gives the Crown the power to grant interests in land
- Those interests are called estates

What is an estate

- Estates are different bundles of rights and powers exercisable in respect of land.
    - Eg possession, alienability, right to derive income etc
    - Property right to use land
- So in modern terms, it's the interest we have in the land

Estates are based upon time

- The difference between the types of estate is the time which they endure – in other words, how long the estate exists.
- Therefore the different estates are classified according to how long they endure, and more than one estate can exist at any one time in one piece of land

Types of estates

1. Freehold estates
    a. Fee simple
        i. Most common estate
        ii. Has an uncertain situation, do not know where it is going to rendition
        iii. Someone inherits it and gives it to someone and continuing to sell it, permanent, has an uncertain dura
        iv. Includes a fee
        v. Full rights of ownership
        vi. Alienable and have exclusive possession
    b. Life estate
        i. Less common

    c. (fee tail)
        i. Abolished
2. Leasehold estates
    a. Certain duration
    b. A lease
    c. Know of maximum duration before it ends
3. Estates in remainders and reversionary estates
4. Strata
    a. Holding of ownership in apartments

Estates in fee simple

- *Fejo*: An estate in fee simple is, "for almost all practical purposes, the equivalent of full ownership of the land" [44]
- An inheritable estate
- Inheritability was indicated in the grant by the use of the term 'heirs'
- Rights of ownership: eg alienable; exclusive possession

Creating an estate in fee simple

At common law → to A and his heirs → NOW s47(1),(2) Conveyancing Act (To A in fee simple/To A forever)

- Now do not need as specific language

Key concepts of estates:

- Property is not a thing but a relationship: namely the relationship between persons with respect to a thing.
- The 'relationship' is composed of 'rights'.
- The main way we think about what having property (or owning something) is as having a bundle of rights (and duties) vis a vis everyone with respect to something (a cup maybe?).
- Key sticks in the bundle: Alienability and exclusive possession

Life estates

- Two types:
    - Life estate → to Maggie (uncertain duration as long as she is alive)
        - Giving exclusive possession
        - Alienability → can sell the life estate she wants to
        - If someone buys it they will have it as long as Maggie is alive
    - Life estate pur autre vie → to Maggie for the life of Bella (until Bella dies)
        - For the life of another
- *Inter vivos* or by will
    - Between lives → transaction happens between many people
    - Or taking effect after the death of someone
- Commonly familial situations
- Can involve a trust

- All rights of the holder of an estate in fee simple except inheritability and note doctrine of waste

Creation of a life estate

- To A for life, to occupy, use or words showing an intention to create a life estate: generally this is by will and it is a matter of construing the words in context
- Or if you fail to correctly create an estate in fee simple

Fee tail → cut down on a fee simple

- Historical curiosity in NSW
- Limited class of heirs – usually male
- Reverted to the grantor if there was no appropriate heir
- Way of keeping land in aristocratic families

Simultaneous estates

- Possible to have more than one estate at the same time

1. Estate in reversion →
    - To Alice for Life
    - Having a fee simple
    - What happens when A dies
    - Reverts to the grantor
    - Grantor has a fee simple in reversion
    - The grantor an Alice has simultaneous estates
    - Holds possession until she dies
    - Estate in fee simple in reversion
        - Reverts at the end of the life of the state
        - Estates exist at the same time
        - Grantor creates second existing estate
        - Do not have possession - Alice but hold same factors
    - They both exist at the same time
    - Alice's estate is in possession
2. Estate in remainder →
    - To Dorothea for the life, remainder to Jessica
    - Jessica has a fee simple in remainder
        i. Referring to a future interest in land
        ii. Inheriting the property after D dies
        iii. Can sell
    - Dorethea and Jessica have simultaneous estates, they both exist at the same time. Dorethea's estate is in possession

Estates in practice

Topic 3: Native Title

Getting to Mabo (no 2)

- *Attorney-General v Brown* and following cases
- *Milirrpum v Nabalco* (1971) 17 FLR 141

    - Recognition of customary title
    - Failed in facts and a matter of law
    - Facts → had customs
- *Calder v AG*
- *Statutory Land Rights Schemes*

Mabo being used as a test case

- Why was Mabo a test case
- Facts of Mabo were important
    - Market gardeners
    - Individual plots
    - Primarily economic relationship with the land

Native title Act (1993)

- Drafted by the Keating Government
- Keating's Redfern Speech
- Established the National Native Title Tribunal and the National Native Title register
- Confirmed past grants up to 1975 – see *Racial Discrimination Act*
- Put in place a process for claims (Federal Court)
- Put in place restrictions on extinguishment of native title
- Was intended that 'native title' would continue to be developed by the common law

What is native title

Brennan J

- Native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact according to those laws and customs." at 58
- Native title is not an institution of the common law – it is the recognition by the common law of rights and interests that are sourced in a normative system (we would now say another sovereign system I think) which pre-existed British sovereignty

Factors of native title

- Rules on proving native title
- Content is variable
- Depends on the facts
- Evidence to determine the laws and customs are individual to each case
- 'Continuous connection'
- Communal not individual
- Not an institution of the common law

Who is providing evidence in providing native title

- Traditional owners – elders

- Anthropologists
- Archaeologists
- Historians
- (and also drawn from government departments, such as Crown Lands or NSW Land Registry Services)

What happened as a result of the Mabo case → legal significance

- Amendments to the Act 1998 (now over 400 pages)
- Long-drawn out claims
- Key High Court decisions
- Federal Court complicating the proof requirements
- Transformation of resources sector

Topic 4: Native Title Act

Proving Native Title

- *The elements required at common law are in Brennan J's definition of native title (and a few other parts of the judgement).*
- *But two problems emerged:*
    - *Some elements needed fleshing out. Eg what is a continuous connection?*
    - *And what was the relationship between the common law definition and s 223 of the* NTA?

Section 223 of the NTA *→ came to have meaning*

- Chapeau

Far West Coast Native Title Claim v SA (No. 7) (2013)

Mansfield J [38]

- A recognisable group or society that presently recognises and observes traditional laws and customs in the Determination Area.
    - (1) they must be a society united in and by their acknowledgement and observance of a body of accepted laws and customs;
    - (2) that the present day body of accepted laws and customs of the society, in essence, is the same body of laws and customs acknowledged and observed by the ancestors or members of the society adapted to modern circumstances; and → adapted to modern circumstances
    - (3) that the acknowledgement and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty and that the society has continued to exist throughout that period as a body united in and by its acknowledgment and observance of those laws and customs; and
    - 4) The claimants must show that they still possess rights and interests under the traditional laws acknowledged and the traditional customs observed by them and that those laws and customs give them a connection to the land.