

# PORPERTY LAW EXAM NOTES

## Contents

PORPERTY LAW EXAM NOTES.....	1
What is the property interest.....	3
Licenses.....	3
1. Bare license (non-proprietary).....	3
2. Contractual license (non-proprietary).....	3
3. OR a license coupled with a proprietary interest? .....	4
Estate: Freehold estates .....	4
Fee simple estates.....	4
Life estate.....	4
Future interests .....	4
Estate: leasehold estates .....	5
Establishing a lease: substantive and formal requirements.....	5
types of leases.....	7
lease covenants .....	8
Possession.....	9
Security interests .....	9
mortgage.....	10
Easements.....	13
Profits a prendre .....	17
Options .....	18
Mere equities.....	18
Statutory interests.....	18
Native title.....	18
New category of interests? .....	19
1. Construe the right - precise nature of the right claimed:.....	19
2. Determine whether the person has various rights in the ‘bundle’ - the right to possess, exclude, alienate?.....	19
3. Analogise to case law .....	19
4. Argue in the alternative.....	19
How does the interest arise?.....	21
Legal interest.....	21
Formalities.....	21
Exception to formalities: Informal Lease .....	21
Exception to formalities: Possession .....	22
Equitable interest.....	28
Overview .....	28
Introduction .....	29
Specifically enforceable contract.....	31
Part performance .....	35

Trusts .....	37
Equitable estoppel/proprietary estoppel .....	37
Mere equities .....	39
Priority Disputes.....	40
SUMMARY.....	40
General law land.....	40
Torrens land.....	41
Indefeasibility.....	42
Exceptions to indefeasibility .....	44
Statutory exceptions .....	44
mortgagee and identity verification (VOI) .....	45
Fraud exception .....	46
In personam exceptions .....	49
volunteer exception .....	51
Unregistered vs Unregistered .....	53
Conflicts between unregistered interests .....	53
Mere equity vs Subsequent unregistered interest .....	57
Caveat regime.....	60
Compensation for loss flowing from the register .....	62
Statutory interest.....	64
mining interests .....	64
Juukan Gorge case study .....	66
Native title .....	68
Establishing native title under s223(1) .....	68
Extinguishment of Native Title.....	71
Compensation .....	74

# How does the interest arise?

## Legal interest

### Formalities

<p><b>General law land</b></p> <p><b>Agreements/contract</b></p> <ul style="list-style-type: none"><li>• Agreements must be “in writing” and “signed” by the person to be charged or their agent (<b>s 126 IA</b>).</li></ul> <p><b>Estates</b></p> <ul style="list-style-type: none"><li>• Conveying/creating <b>legal estate</b> requires a deed (<b>s 52 PLA</b>).</li></ul> <p><b>Interest</b></p> <ul style="list-style-type: none"><li>• Conveying/creating interest in land must be “in writing” and “signed” by the person conveying/creating the interest or by their agent (<b>s 53(1)(a) PLA</b>).</li><li>• Effect of non-compliance<ul style="list-style-type: none"><li>○ <b>S54(1) PLA</b>: interests created via oral agreement – take effect <b>ONLY</b> as an interest at will (can be revoked any time).</li></ul></li></ul> <p><b>Exceptions to the formality requirements</b></p> <ul style="list-style-type: none"><li>• Wills: <b>s55(a)</b></li><li>• Legal interest:<ul style="list-style-type: none"><li>○ Informal leases: taking effect in possession; three years or less; at best rent available - <b>s52(2)(d); s 54(2) PLA</b></li><li>○ Legal possession: <b>s55(c) PLA</b></li></ul></li><li>• Equitable interests:<ul style="list-style-type: none"><li>○ Part performance – <b>s55(d) PLA</b></li><li>○ Resulting, implied or constructive trusts – <b>s53(2) PLA</b></li><li>○ proprietary estoppel – <b>s 53(1)(a) PLA “by operation of law”</b></li></ul></li></ul>
<p><b>Torrens Land</b></p> <p><b>Registered interests</b></p> <ul style="list-style-type: none"><li>• <b>S40 TLA</b> - Instruments not effectual until registered</li><li>• <b>S41 TLA</b> - Certificate to be conclusive evidence of title</li></ul> <p><b>Exception to indefeasibility</b></p> <p>[NOTE also see Part 3 priority disputes]</p> <ul style="list-style-type: none"><li>• Tenants in possession: <b>TLA s42(2)(e)</b></li><li>• Easements: <b>TLA s42(2)(d)</b></li><li>• Adverse possession: <b>TLA s42(2)(b)</b></li><li>• Fraud: <b>TLA S42(1)</b></li></ul>

### Exception to formalities: Informal Lease

<p><b>General law land</b></p> <ul style="list-style-type: none"><li>• Informal leases: <b>taking effect in possession; three years or less; at best rent available -</b></li></ul>
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*s55(2)(d); s 54(2) PLA*

**Torrens land**

- ***S 42(2)(e) TLA***: the **interest (but excluding any option to purchase) of a tenant in possession** of the land [NB: given that leases exceeding 3 years could be registered (s66 TLA), only unregistered leases with a term of three years or less are seen as legal (as opposed to equitable) interest]

**Exception to formalities: Possession**

- Possession of land is a proprietary right of its own accord (*Asher*). Possessory right can be sold or devised by will (*Asher*) and gives entitlement to compensation on just terms (*Perry v Clissold*).
- X's possessory right is good against the world, except someone with a better right (*Asher; Perry*).
- X can establish possession if X has: (1) a sufficient degree of physical control and (2) the requisite intention to possess (*Powell v McFarlane*).

**1. Factual Possession**

- X must demonstrate that they have “an appropriate degree of physical control”, which in turn depends upon the ‘nature, position and characteristics’ of the land and the manner in which the land is commonly enjoyed (*Abbatangelo; Powell*).
- Must be shown that: “dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so” (*Powell, Slade J*).

FACTORS INDICATING FACTUAL POSSESSION:

- **Erecting a fence!!!**
  - o Example — Abbatangelo installed, and maintained a fence on 3/4 of the land (*Abbatangelo*)
  - o Example — Hawley erected a fence, and it was immaterial whether he would not have allowed Buchanan into it (*Kirk*)
- **The erection of structures**
  - o Example — installing a bathtub (*Abbatangelo*)
- **Grazing animals on land**
  - o Example — Sheep, horses, goats, chickens, with at least one horse always on the land from 1975-2007 (*Abbatangelo*)
- **Constant visits**
  - o Example — visiting the land almost every weekend (*Abbatangelo*)
- **Regular use and maintenance of the land**
  - o Example — having BBQ parties on the land; maintaining trees and vegetation, mowing grass, removing weeds and timber (*Abbatangelo*)
- **Other people's perception**
  - o Example – the neighbours' longstanding belief that the Abbatangelos were the owner of the land also played a role in the judge's decision (*Abbatangelo*).

FACTORS INSUFFICIENT:

- **Mere use falling short of possession or mere enjoyment of a “special benefit” (such as occasional grazing of cattle; occasional sporting activities, etc).**

- Casual acts of trespass and/or mere use of land that may amount to enjoyment of a “special benefit” would not suffice as factual possession (*see discussion in Abbatangelo*).

**2. requisite intention to possess (animus possidendi)**

- A true owner would be readily assumed to have the requisite intention and thus slightest acts done would suffice (*Powell*).
- However, for a trespasser, a reasonable observer must conclude that X intended to exclude the world at large including the owner with paper title, so far as is reasonably practicable (*Powell; Kirk; Abbatangelo*).
- An objective inquiry: **subjective** intention of the trespasser may be relevant (*Abbatangelo*), but not decisive (*Kirk*).
- It is NOT an intention to own; or to acquire ownership; or a **conscious** intention to exclude the true owner; it is an intention to exercise exclusive control, in one’s own name and on one’s own behalf (*Abbatangelo*).
- The intention must be made clear and unequivocal to the world (*Abbatangelo; cf Powell*).
- A number of acts could be considered **collectively**, to unequivocally evidence the requisite intention (*Abbatangelo*).
- Enclosure by itself *prima facie* indicates the requisite animus possidendi (*Kirk; Abbatangelo*)
- There is **no separate requirement that the use to which the land is put ... be inconsistent** with the paper owner’s present or future intended use of the land (*Abbatangelo*).

**3. “adverse” possession**

First, there must be someone in whose favour the limitation period can run

- The possession must be “adverse” i.e. without consent of the owner (*LAA s14(1)*).
- The possession must also be “open, not secret; peaceful, not by force” (*Mulcahy v Curramore*).

**4. limitation period**

Second, there must be someone AGAINST whom the limitation period can run. The limitation period in Vic is generally 15 years (LAA s8). When time starts depends on the nature of their interest.

*Exceptions*

No title by AP against the crown (s7); rail authorities (s7A) , water authorities (s7AB), councils (s7B) or common property (s7C).

*Current possessory interests – s9*

- if person in current possession & while entitled, was dispossessed - accrues on the date of dispossession (*LAA s9(1)*).
- Current possessory interests include —
  - Fee simple in possession
  - Life estate in possession
  - Possessory rights
  - General tenancy: Note — The time will begin running against the tenant, but not against the title holder until the lease expires.
- person recover land of deceased person & deceased person was in possession on date of death → accrues on the date of his death: *LAA s9(2)*.