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Exam Structure

1. Identify Interest -> Legal or equitable
2. Determine what needs to be done with the interest? Is it indefeasible, or is there a relevant exception. Is it subject to any other interest?

Topic 1 - Fundamentals of Land Law

I. Tenures and Estates

Only interests recognized by law can be registered *Re Ridgeway*

1. Is it a fee simple? (To A and his heirs)

- a. The right of exclusive possession for unlimited duration, it only ends if the owner dies with no next of kin.

2. Is it a fee tail? (To B and the heirs of her body)

- a. Fee tail interests were abolished by *s19 Conveyancing Act*
 - i. The interest passes down the family.

3. Is it a life estate? (To C for life)

- a. Exclusive possession for the period of the life holder, there is no power to grant an interest beyond the holder's lifetime. – needs to have words of limitation *s47(2) Conveyancing Act*
 - i. You can transfer this title however it will end when the life holder dies.
 - ii. The party who receives the land at the conclusion of the life estate is known as the remainder man/woman - they get the 'remainder' interest.
 - iii. If there is no remainder, the interest automatically reverts to the feoffor (reversion).
- b. But you can also have a life interest based on someone else's life (**To D for the life of X**) - Estate pur autre vie

4. Is it a future interest?

- a. Already apparent that estates allow in to be granted for the future e.g. 'to A for life and then to B in fee simple'
 - i. B's estate is a future estate - it doesn't come into being until the death of A
- b. **Reversions** - a grant of an estate in possession which returns to the grantor
- c. **Remainders** - A grant of a future interest to someone who did not have a previous interest e.g. to W for life and then to Y in fee simple - Y is the 'remainderman' or 'remainder'

5. Is it a lease?

- a. A right in possession, provides exclusive possession for a fixed period of time.
 - i. The lessor has a fee simple in reversion.

6. Is it an easement?

- a. A right for dominant land owner to use / restrain use of servient land in a manner not inconsistent with servient owners continuing ownership.
 - i. Positively: shared driveway
 - ii. Negatively: to stop servant owner from doing something like building a tower that blocks light.
- b. Must burden servient land for the benefit of the dominate land
 - i. Must benefit the land (in terms of use / enjoyment) not the landowner *Easton*

7. Is it a profit a pendre?

- a. Right to enter servient land and remove natural produce (as granted by Crown or owner of estate).
 - i. E.g., soil, minerals, minerals lease, vegetation – note it must be naturally occurring.
- b. This is not a right to the things that may be taken, but a property right to the land from which they may be taken.

8. Is it a restrictive covenant?

- a. A restriction on the land

9. Does [Person] own a unit in a strata development?

- a. **Lot** - Means the cubic area shown as a lot on a floor plan but does not include any common infrastructure, unless it is described in the plan, as a part of the lot *s 4 Strata Schemes Development Act 2015*
- b. **Strata Scheme** - The way in which parcels of lands are divided into lots or lots and common property and the way in which unit entitlements are allocated.
- c. **Owner** - The person recorded in the Register as entitled to an estate in fee simple in the lot or entitled to a leasehold estate in the lot.
- d. **Owner's corporation** - The representatives of the collective owners of the lots in a strata scheme.
- e. **Common property** - The owner's corporation holds common property as agents for the owners as tenants in common proportional to the unit entitlement of the owner's lots and cannot be severed from

the owner's lot.

10. Does the Crown own the Land?

- a. Crown Land is regulated under the *Crown Land Management Act 2016 (NSW)* and cannot be occupied, used, sold, leased, licensed, dedicated, reserved or dealt with in any way unless authorised by the act under *s 1.15*. Under *s 13D RPA* the Crown can be recorded as the registered proprietor of the land and the R-G can record any covenants, conditions, terms or reservations under *s 13G RPA*. However normal equitable principles will not apply (*Davies v Littlejohn*)

SEE PCL NOTES IN TERMS OF WHETHER A LEGAL OR EQUITABLE INTEREST IS CREATED

II. Native Title

1. Prima facie, [person] may make an application to the Federal Court for a determination of native title in relation to an area for which there is no approved determination of native title *s 13(1) NTA*. A determination of native title includes a determination of who the persons holding the rights comprising native title are, the nature of those rights, the nature of any other interests in the area, the relationship between those rights and interests, and whether the rights confer possession, occupation, use and enjoyment to the exclusion of all others *S 225 NTA*
2. **Is native title established?** *s 223 Native Title Act 1993 (Cth)* requires certain rights and interests to be recognised by the common law of Australia as native title, having regard to their traditional laws, customs and connection w land.
3. *Mabo (No 2) (1992)*
 - a. Who is claiming NT? NT rights can be possessed only by the indigenous inhabitants and their descendants.
 - b. Has the clan or group **continued to acknowledge the laws, observed the customs** based on the traditions of that group, and **substantially maintained their traditional connection of the land?**
 - c. **If so**, the common law can recognise and protect these native title rights and interests.
 - i. In *Mabo*, strangers were not allowed to settle on the Murray Islands and, even after annexation in 1879, strangers who were living on the Islands were deported. The Meriam people asserted an exclusive right to occupy the Murray Islands, maintained their identity as a people and they observe customs which are traditionally based.
 - d. **If not**, where the **tide of history** has washed away any substantial connection with the land and customs, then there is no native title established.
 - i. E.g. In *Yorta Yorta v Victoria (2002)*, it was held that there was no native title to the Yorta Yorta people in Victoria as while they remained living in the area, they had assimilated to the area significantly and ceased to observe their original laws and customs, lost their language and cultural practices.
 - ii. Distinguish from *Wik Peoples*, where the land in question had been less developed – it was a mere conferral of pastoral leases.
4. **Has native title been extinguished?** In *Mabo (No 2)*, it was held that native title could be extinguished through the exercise of the Crown's sovereign power to grant interests in the land inconsistent with the continuation of native title.
 - a. In *WA v Brown*, a two-part test was established:
 - i. **What were the native title rights?**
 1. *s 223(2) Native Title Act (Cth)* – includes hunting, gathering, fishing rights and interests
 2. In *WA v Brown*, rights (a) to access and camp on the land, (b) to take flora, fauna, fish, water from the land, (c) to engage in ritual and ceremony on land, (d) to care for, maintain and protect from physical harm particular sites of significance to the native title holders.
 - ii. **Objectively, are the rights granted by the crown consistent with the native title rights? I.e. has the extinguishment been done by clear and plain intention by the Legislature?**
 1. A mere regulation of the enjoyment of native title is not sufficient: *Reg v Sparrow (1990)*

Topic 5 - The Assurance Fund - Remedies

1. [GENERAL PRINCIPLE] As *s 118* of the *Real Property Act 1900 (NSW)* precludes actions to recover land from the registered proprietor (except in limited situations) and given the protection that indefeasibility affords, the Act also creates compensation rights in favour of persons who have lost land through two main categories: the right to sue the person who caused the loss (*s 120 RPA*); and the right to recover from the Torrens Assurance Fund: *s 129 RPA*.
2. **What constitutes fraud for the purposes of the Assurance fund?**
 - a. "Fraud" in *ss 120 and 129* includes legal and equitable fraud and is wider than the rest of the Act which is limited to actual fraud or moral turpitude.
 - i. But there is no action available under *s 120(1)* against an innocent person who has become registered through the fraud of a third party for which the innocent person is not legally responsible.
3. **Can proceedings for compensation be brought against the wrongdoer?**
 - a. *S 120 RPA* permits a person who has suffered loss or damage as a result of the operation of the Act in specified circumstances to take proceedings in the Supreme Court to recover damages. These circumstances include:
 - i. Fraud *s 120(1)(a) RPA*
 - ii. Any error, misdescription or omission on the register *s 120(1)(b) RPA*
 - iii. Land being brought under the Act *s 120(1)(c) RPA*
 - iv. Registration of some other person as proprietor *s 120(1)(e) RPA*
 - b. **Has there been material causation?**
 - i. This can be established by showing that the operation of the Act materially contributed to the loss or damage but this does not necessarily need to be the dominant cause.
 - ii. However this may also apply where there is a maintenance on the register of an interest that the claimant thought had been given up
 1. E.g. Registered mortgage remained when claimant believed it to be discharged
Diemasters v Meadowcorp
 - c. **Who can be sued?**
 - i. Under *s 120(2)* proceedings under *s 120(1)* may be taken against:
 1. The wrongdoer whose acts or omissions gave rise to the loss; OR
 2. The Registrar General. Proceedings are under *ss 128-135 RPA*
4. **When will compensation be awarded from the Assurance fund?**
 - a. The availability of a claim against the Registrar General under *s 129* does not preclude a claim against third parties for the same loss *Bebonis v Angelos*
 - b. **Compensation is payable when:**
 - i. [1] **Error by Registrar-General** - An act or omission of the RG in execution or performing their functions or duties under the Act in relation to land (*s 129(1)(a)*)
 - ii. [2] **Registration of another person** - The registration of some other person as proprietor of the land or an interest in the land *s 129(1)(b)*
 - iii. [3] **Error/misdescription** - An error/misdescription or omission in the register *s 129(1)(c)*
 - iv. [4] **Land brought under the Act** - The land has been brought under the Act (*s 129(1)(d)*)
 - v. [5] **Fraud** - The person having been deprived through fraud *s 129(1)(e)*
 1. Partial deprivation is sufficient (e.g. where the holder of a fee simple finds the land encumbered by a registered mortgage) *Franzon*
 - a. However the deprived interest must be one of a present right to enjoyment - a person with a remainder interest cannot be deprived until they come into possession *Finucane*
 - b. A person is **not deprived** by fraud where they willingly hand over a signed transfer but the purchase price has not been paid *Heid v Connell Investments*
 - vi. [6] **Official search** - An error or omission in an official search in relation to the land *s 129(1)(f) RPA*
 - vii. [7] **Recording** - An error or omission in recording details supplied in a notice provided under *s 39(1B) - s 129(1)(g) RPA*

Topic 7 - Leases and Licenses

I. Essential Character of Leases

Leasehold Estates at Common Law

1. Arises where one person is given a legal right to exclusive possession of land, for a period that is certain and **less than** the term the landlord holds the land, **with the intention of giving the tenant an interest in the land** rather than a personal privilege.

2. What is the landlords interest?

a. The landlord has a reversionary interest which denies them possession but means they retain beneficial ownership in fee simple *Wik Peoples v Queensland*

3. Is there certainty of term in the lease?

a. Commencing date?

i. The lease must commence on dates that are certain or capable of determination. This can be a specific date or a date set by reference to some event:

1. When the gas is connected *Terry v Tindale*
2. When the existing tenant vacates *Panucci v Motor Body Assemblers*

b. Duration?

i. Must be obvious from its terms but can be of any length as long as it is capable of being rendered certain and is less than the length of the landlord's estate.

1. Also must be certain **before lease takes effect**

- a. "For the duration of the war" not valid because not capable of being rendered certain before the commencement date *Lace v Chantler*
- b. "Until land is required by Council for road widening purposes" not valid as lease must be limited to a certain-to-occur end date *Prudential Assurance v London Residuary Body*

2. **But if the uncertain external event is attached to a length of time?**

- a. E.g. Duration of 10 years or to the end of the war is valid.
- b. A tenancy from year to year is also valid *Prudential Assurance*

ii. **[Exceptions]** The requirement of a certain term is not one for:

1. Leases for life
2. Tenancies at will (Terminated by landlord at any time)
3. Tenancies at sufferance or periodic tenancies (week to week or month to month tenancies)

4. What rights does the leaseholder have?

a. Right to exclusive possession

i. **[EXCLUSION]** Leaseholder can exclude all others from the land including the landlord, subject to any rights the landlord has by law or under the agreement *Fatac Limited* (e.g. right to enter and view the state of repair).

1. **KEY DISTINGUISHING FACTOR FROM LICENSE** - A license does not create an interest in land compared to a lease.

b. Will the Court consider it a lease or a license?

i. **[General principle]** The leaseholder's interest is not determined by intention but by the rights given. If there is a right to exclusive possession for a set period of time this creates a leasehold interest regardless of the intention *Radaich v Smith*

ii. Does the language support that its a lease?

1. Use of 'lease' or 'exclusive possession' in the terms will mean that Courts generally assume that the parties intended to create a lease. But Courts will still consider whether a right to exclusive possession is conferred *Swan v Uecker*
2. Regardless of the language, the legal effect + rights must be assessed, and a lease cannot be converted into a license simply by calling it one *Radaich v Smith*. The Court may disregard terms if it does not reflect what the parties intended to create *KJRR*

iii. If absent language?

1. Generally absent the language of lease or exclusive possession, Court will assume an intention to create a license but this is rebuttable: