

INTRODUCTION

DIVISION OF PROPRIETARY INTERESTS IN LAND	Property	A bundle of rights (the proprietary interest) exercisable against others
	4 main interests	<p>The PI in an object may be held by one person or a group of persons at any given time. The elements of the interest may be divided up among a number of persons in a variety of ways:</p> <ol style="list-style-type: none"> 1. Doctrine of tenure: interests in land divided <i>spatially</i> 2. Doctrine of estates: fragmentation of interests on a <i>temporal</i> basis 3. Doctrine of trusts: fragmented according to <i>jurisdiction</i> 4. Native title: <i>systemic</i> division of proprietary interests in land
DOCTRINE OF TENURE <u>Spatial</u> fragmentation of proprietary interests	Doctrine	<p>Roots of the doctrine lie in the economic and political interstices of the feudal system.</p> <p>Mode of holding land where one person (the ‘tenant’) holds lands from (or ‘of’) another subject to the performance of certain obligations; different tenants have a range of entitlements tied to particular parcels of land.</p> <p>Created system of proprietary rights: all those below the Crown had limited rights to the land and owed obligations/services to the party immediately above them in the pyramid. E.g. King > Tenant in Chief > Mesne Lord > Tenant in Demense</p> <p>“Tenure connotes fragmentation in a spatial dimension [as] it allowed for a number of overlapping rights to subsist over one particular parcel of land”</p>
	Current significance	<p>No practical significance in contemporary Aus land law, however:</p> <ul style="list-style-type: none"> • Still formally part of Australian law: the idea that land is formally held by the Crown; all land titles originate from a Crown grant (Mabo (2)) • Modern landlord-tenant r’ships resemble earlier tenurial r’ships • Until Mabo (2), doctrine of tenure operated to obstruct recognition of NT
DOCTRINE OF ESTATES <u>Temporal</u> fragmentation of proprietary interests	Definition	Allows multiple people to have an interest in land for different times (e.g. leasehold: tenant has a present right to possession, landlord has future right)
	Fee simple	<p>The greatest interest in land recognised by CL.</p> <p>“An estate in fee simple is for almost all practical purposes, the equivalent of full ownership” (Gumana v NT). Estate continues indefinitely, can be passed on/sold by owner</p>
	Fee tail	Similar to fee simple but can only be passed down to specific heirs; abolished in NSW.
	Life estate	<p>Interest in land granted to a person for life; terminates upon their death. Upon estate holder’s death, interest is transferred to remainderman, who receives a fee simple estate.</p> <p>A life tenant can alienate their rights, but only for the duration of their life (once they die, their interest reverts to the remainderman, regardless of whether someone has bought it)</p>
Leasehold estates (Personal property)	<p>Fixed-term lease: lease for a fixed period; expires automatically</p> <p>Periodic tenancy: does not terminate until appropriate notice is given</p> <p>Tenancy at will: no defined duration; either party may terminate</p> <p>Tenancy at sufferance: tenant takes possession pursuant to a lease but wrongfully remains in possession after lease is terminated</p>	

	<p>Interests in land which are not estates</p>	<p>Easements</p> <p>Profits à prendre</p> <p>Restrictive covenants</p> <p>Mortgages</p>
<p>CROWN GRANTS</p>	<p>1788</p>	<p>Capt. Phillip proclaimed colony of NSW; under English law, all ‘colony land’ became ‘crown land’ belonging to King George III.</p> <ul style="list-style-type: none"> • ‘Political assertion’, land legally/factually belonged to ATSI • Non-Indigenous legal system did not recognise ATSI land rights until 1992: <i>Mabo (2)</i>
	<p>1788 – 1992</p>	<p>Colonial and State govts made thousands of crown grants (urban areas: freehold fee simple; rural areas: long-term leases) which are the original source of most legal titles to land in NSW. Made on the assumption all land belongs to the crown.</p> <p>Once a crown grant is made, citizen with land title can deal with the land as they please; land enters the open market and can be used for title holder’s personal/economic benefit</p>
	<p>Now</p>	<p>Crown can only get title back via “compulsory acquisition” (formal legislative process requiring Crown to compensate title holder on ‘just terms’: Constitution s. 51(xxxi))</p> <p>NSW govt not subject to these constitutional constraints; no obligation to pay compensation; but govt. still pays via Land Acquisition (Just Terms Compensation) Act 1991 (NSW). Usually only for purpose of improving infrastructure.</p>

FUNDAMENTAL CONCEPTS

POSSESSION	Definition	<p>Entitlement to be in control of land, and use and occupy it.</p> <p>Not common to rely on possession to prove ownership under the Torrens system, however, remains theoretically and sometimes practically important.</p>
	Limitation of actions and Limitation Act (1969) NSW	<p>Statutory time limit on the right to bring an action to enforce proprietary rights: 12 years, otherwise a plaintiff is 'statute-barred' under the Limitation Act (1969) NSW.</p> <p>Ensures people do not 'sleep on their rights'.</p> <p>The possessory owner requires absolute title (Perry v Clissold) and must demonstrate actual possession, intention to possess, and an unbroken chain for possession for 12 years (s. 38 Limitation Act (1969) NSW)</p> <p><i>Adverse possession</i>: a person without title is in possession of land without title, adversely or contrary to the rights of the plaintiff, who wants it back.</p>
<p>RECOGNISED INTERESTS IN LAND</p> <p>Only a small number of interests in land are recognised as 'property'</p>	Numerus clausus principle	<p>There are only a certain number of 'types' of property rights which are recognised.</p> <p>A person will have a PI if their right falls into one of the established categories.</p>
	Fee simple	Largest possible interest. Entitles the owners to possession of the land for an indefinite period, subject only to govt acquisition and regulation by planning and other laws.
	Lease	<p>Time-limited interested in land.</p> <p>Lessee/tenant is entitled to possession, exclusive to everyone else, including the landlord, who still owns the fee simple but has <i>carved out</i> a smaller interest in land and given it to the lessee.</p> <p>While the lease is running, the landlord's interest is <i>the reversion</i>. They have a <i>reversionary interest</i> (a right to land at a future date when the lease ends)</p> <p>The lease is an interest in land that <i>belongs to the lessee</i>, who can sell it, give it away, or carve out a shorter interest: a <i>sub-lease</i>.</p>
	Mortgage	<p>A small interest in land that the owner of a fee simple or lease (<i>mortgagor</i>) gives to a bank etc. (<i>mortgagee</i>) in return for money.</p> <p>A mortgagee has not immediate right to use and enjoy the land, but they have the right to <i>sell</i> the land if they are not repaid, taking whatever they are owed from the sale price and giving the rest to the mortgagor.</p> <p>A mortgage is a <i>contractual promise</i> to repay all money borrowed, but it is better and more secure than mere contractual promises to repay, because mortgagees can access a specific piece of land to satisfy the land.</p>
	Easement	A right to do something on another's land (e.g. a right of way). The right is <i>annexed</i> to the land, and survives changes in ownership.
Restrictive/freehold covenants	<p>A right to <i>stop</i> someone from doing something on their own land (e.g. covenant preventing neighbours from building above 2 storeys and blocking a view).</p> <p>Commonly used to plan residential subdivisions; affects <i>multiple</i> parcels of land (e.g. covenant not to further subdivide)</p>	

	Profit à prendre	Right to gather naturally occurring things from another's land (e.g. quarry, hunt, gather timber)
	Lien/charge	A small proprietary interest which acts as security for payment. The person holding the lien/charge doesn't have a right to possess/sell land, but has a right to be paid directly out of the proceeds of the sale of the land
PROPERTY VS. CONTRACT	<i>In rem vs. in personam</i>	Not all rights in relation to property are <i>proprietary</i> , some are <i>contractual</i> (e.g. a licence). Property rights: <i>in rem</i> (enforceable against everyone) Contractual rights: <i>in personam</i> (enforceable against other party to contract)
	Licences	Contractual licences do not come within the class of recognised PIs to exclude others (Georgeski), and are therefore not enforceable against third parties (King v David Allen)
FIXTURES	The boundary between chattels and land	"Land" = actual land + everything permanently attached to it. Chattels, therefore, may change from <i>personal</i> to <i>real</i> property by virtue of their annexation to the land. A chattel affixed to the land becomes a fixture. Transfer of ownership of land will include transfer of ownership of fixtures. Unless specified in the contract for the sale of land, look to the surrounding circumstances and intentions of parties to determine whether something is a fixture of chattel (Belgrave Nominees)
CONTRACTS AND LAND LAW	Writing: s. 54A Conveyancing Act 1919 (NSW)	Requirements for a valid contract for sale of land: 1. Offer/acceptance 2. Consideration (usually deposit of 10% of purchase price) 3. Intention to conclude a formal contract (usually 'exchange' of contracts between purchaser and vendor, exchanging signed contracts shows intent to be bound) 4. Certainty (usually satisfied by use of standard form contracts) 5. Writing (all contracts in relation to the sale of land must be in writing, unless the test for part performance is satisfied): s. 54A CA <ul style="list-style-type: none"> Entire contract need not be in one formal document. There must be written documents containing all essential terms (property, parties, purchase price, etc.) which can be linked to each other + signature
	s. 54A applies to all contracts that relate to land	s. 54A applies not only to sale, but also to leases, mortgages, sales of equitable interests in land, etc. Immediate <i>assignment</i> of an equitable interest in land still needs to be in writing: CA s. 23(1)(c) It is an offence to advertise a residential property for sale without a prepared contract available for inspection: CA s. 66R Look at what the parties have actually agreed, see whether the rights intended to be granted fit in one of the <i>numerus clausus</i> PIs. If they do, it's a contract in relation to land and writing will be needed under s. 54A .
	Contracts do not transfer legal title	Contracts in relation to land are an agreement by one party to transfer legal title to a PI, to the other party, in return for consideration (money), <i>at some point in the future</i> .
	Specific performance	If requirements for a valid contract for the sale of land are satisfied, the agreement will generally be <i>specifically enforceable</i> , and give the purchaser an <i>equitable interest</i> in the land

EQUITY AND TRUSTS AND LAND LAW	Basically	<ul style="list-style-type: none"> Equity relates to some parts of contract law. Equity relates to some parts of land law Equity relates to all trusts. Trusts always include property, either personal or real.
	Client's rights or remedies are inadequate	<p>Equitable remedy of specific performance: The legal remedy of damages may be inadequate, land is unique, client would want vendor to be ordered to transfer legal title</p> <p>Equity will be used to supplement the law</p>
	Client has not acquired any legal rights or remedies	<p>Common intention, or reliance and detriment.</p> <ul style="list-style-type: none"> The party without any legal interest in the land has an equitable interest (e.g. equitable life estate in <i>Ogilvie</i>, a co-owned equitable fee simple in <i>Baumgartner</i>, an equitable charge or lien in <i>Giumelli</i>). Legal owner must then respect this interest. <p>Part performance</p> <ul style="list-style-type: none"> If a party has done acts that are “of their own nature referable to the kind of contract that is alleged”, an equity is raised in that party's favour and will give them rights
	Client could never acquire any legal rights or remedies	<p>E.g. beneficiaries under a trust, which are the concern of equity.</p> <ul style="list-style-type: none"> Trusts only exist in relation to personal or real property, the subject matter is held on trust by the trustee for benefit of beneficiary, e.g. fee simple is vested in the trustee, equitable fee simple in the beneficiary
CONTRACT, LAND LAW, AND EQUITY	Contracts for the sale of land	<p>A legally complete contract for the sale of land + in writing = the purchaser gets an equitable interest in land (applies to all interests, i.e. easements, mortgages, restrictive covenants, leases, fee simple)</p> <p>E.g.:</p> <ul style="list-style-type: none"> a specifically enforceable contract to sell someone the legal fee simple gives them the equitable fee simple (<i>Bunny Industries</i>); a specifically enforceable agreement to grant someone a lease will give them an equitable lease (<i>Walsh v Lonsdale</i>) <p>The equitable interest acquired is a proprietary right.</p>

TORRENS TITLE

TORRENS SYSTEM	The Torrens system	<p>System of land registration used in all states. NSW: created/regulated by RPA, introduced 1/1/1863, entirely replacing Old System conveyance by deeds.</p> <p>Scheme where state authoritatively sets up a register for land title, controls register, guarantees person named as proprietor with perfect title subject only to encumbrances specifically notified on the register (accessible by public)</p> <p>The conclusiveness of the register = principle of indefeasibility.</p>
	Central ideas	<ul style="list-style-type: none"> • Title by registration (not registration of title) • Conclusiveness of the register: publicly accessible government register that definitively records who owns that parcel of land and who else may have rights to it • Indefeasibility of title by registration (with exceptions) – immediate, not deferred • All parcels of land ('lots'), have had their boundaries defined by a professional, accurate survey
	Design	<p>Old System: transfers of land occurred through deeds, the only way a person could verify title was through tracing the history of the dealings (a big task). The inadequacy of Old System title deeds system was the dependent nature of titles – one weak link in the chain could destroy/impair title.</p> <p>Torrens system designed to create certainty and security in relation to land title. Addresses two main problems with Old System title:</p> <ol style="list-style-type: none"> 1. Who owns the land? Look to the deposited plan (DP) 2. What is the land? Look to register
	Benefits	<ul style="list-style-type: none"> • Accuracy in relation to physical boundaries; • Certainty of land and registered owner; • Register always complete and up to date; • Save time – don't have to look beyond the register.
	Objectives	<p>Provide a register from which persons who propose to deal with land can discover all the facts relative to the title</p> <p>Ensure a person dealing with land is not adversely affected by any infirmities in the vendor's title which do not appear on the register, saving the time and expense of going behind the register to investigate the title</p> <p>Provide a guarantee by state that the picture of the register book is true and complete</p>
REGISTRATION	<p>s. 42 RPA: Registration effects the transfer of interest in land + creates legal title.</p> <p>Priority and s. 36(9) RPA: Dealings registered with respect to, or affecting the same estate or interest shall, notwithstanding any notice (whether express, implied or constructive), be entitled in priority the one over the other according to the order of registration thereof and not according to the dates of the dealings.</p> <p>Only bound by what is on the register: <i>Perpetual Trustee v Westfield</i></p> <p>Register records current owner of the fee simple + any encumbrances affecting the land (e.g. mortgage, lease, easement).</p> <p>If something is mentioned on the certificate of title and register, purchaser has been given 'constructive notice' of the burden, required to conduct their own searches about the burden: <i>Bursill Enterprises</i></p>	

INDEFEASIBILITY

<p>PRINCIPLE OF IND.</p>	<p>Defined</p>	<p>RPA s. 42(1) gives a RP an ‘indefeasible’ (i.e. unbeatable/undefeatable) interest in land. A central concept in the Torrens system, providing both security of title and security of transaction</p> <p>Applies to any estate or legal interest in land (not just fee simple) recorded in a folio of the Register</p> <p>“a convenient description of the immunity from attack by adverse claims to the land or interest in respect of which he is registered, which a registered proprietor enjoys” (<i>Frazer v Walker</i>)</p>
<p>TORRENS PRIORITY RULES</p>	<p>The new priority rules</p>	<p>Introduction of Torrens system created new priority rules different to Old System</p> <p>s. 42 eradicated the <i>nemo dat</i> rule</p> <ul style="list-style-type: none"> • Then: <i>nemo dat</i> rule (you can’t give what you haven’t got) to adjudicate between earlier and later legal interests • Now: s. 42 creates a system of title <i>by</i> registration, not registration <i>of</i> title <p>s. 43 eradicated the <i>BFP</i> rule</p> <ul style="list-style-type: none"> • Then: <i>BFPFV</i> without notice to adjudicate between earlier equitable interests and later equitable interests • Now: s. 43 states no transferee will be affected by “notice direct or constructive of any trust or unregistered interest, any rule of equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.” • A new owner who knows about an <i>unregistered</i> (almost always equitable) interest will not be bound by it
<p>IND. PROVISIONS (RPA)</p>	<p>s. 40</p>	<p>Manual folio is to be considered conclusive evidence of both title and the fact that the land has been duly brought under the RPA.</p> <p>Primarily an evidentiary provision designed to assist in relation to proof of title</p>
	<p>s. 40(1B)</p>	<p>Where the folio refers to something else (e.g. another document), the thing that is referred to is deemed to be part of the folio (<i>Bursill v Berger Bros</i>)</p>
	<p>s. 41</p>	<p>Dealings not effective until recorded in register. Only instruments registered under the RPA will be effective for an interest in land</p>
	<p>s. 42(1)</p> <p>The key indefeasibility provision</p> <p>Registration creates title</p>	<p>Gives registered proprietors “indefeasible” (i.e. unbeatable) title to land.</p> <p>Refers to “<i>any</i> estate or interest in land recorded in a folio of the Register”, therefore, mortgage, easements and leases can be indefeasible, not just fee simple interests.</p> <p>s. 42(1) – Fraud s. 42(a1) – Omission or misdescription of an easement s. 42(1)(d) – short term tenancy (less than 3 years)</p>
	<p>s. 43</p> <p>Register not impeded by notice</p>	<p>Purchaser from a registered proprietor is not to be affected by notice of any trust or unregistered interest (except in the cause of fraud), also notice of unregistered interest ≠ fraud</p>

	<p>s. 45</p> <p>Protection of purchasers provision</p>	<p>A BFP purchaser/mortgagee registered by a void instrument (via fraud or error) nevertheless obtains indefeasible title immediately</p> <ul style="list-style-type: none"> • Protects BFPFV where vendor's title was registered fraudulently • The defrauded party (original owner) has an equitable interest and can cancel the registered title of the fraudulent party before the title is transferred to the BFP <p>Nothing in the RPA is to be interpreted so as to leave a BFP for value open to an action for recovery of land/damages on the ground that the vendor may have gained their title through fraud or error (immediate indefeasibility)</p> <p>NB. Protection applies to volunteers who gained their title from someone who gained theirs through error/something <i>other</i> than fraud (<i>Bogdanovic v Koteff</i>)</p>
<p>DEFERRED VS IMMEDIATE IND.</p>	<p>Immediate and deferred</p>	<p>Immediate: Good indefeasible title is transferred to the BFP immediately on registration of the forged instrument (protects purchasers) (<i>Frazer v Walker</i>)</p> <ul style="list-style-type: none"> • Promotes “dynamic security”/“ease of transaction” • Protects reasonable expectations of purchasers that they will acquire good title • Facilitates easy and cheap transfers (no need to investigate) and ease of transaction • Encourages people to buy assets <p>Deferred: The title of a BFP who registers a forged instrument is ‘defeasible’ (so can be set aside by a court), <i>unless</i> the purchaser has <i>already passed the title along</i> to a subsequent purchaser, at which point, <i>the title becomes defeasible</i></p>
	<p>Current position</p>	<p>Applies where a person (“the forger”) forges the signature of the real RP on a transfer and sells the property to an innocent purchaser.</p> <p>RPs have immediate indefeasibility. Therefore, RPs who acquire their interest under a void/flawed transaction still have indefeasible title (RPA s. 45; <i>Frazer v Walker</i>)</p> <ul style="list-style-type: none"> • “A registration which results from a void instrument is still effective according to the terms of the registration” (<i>Frazer v Walker</i>) • Not confined to instruments void for forgery (<i>Story v Advance Australia Bank</i>) <p><i>Frazer v Walker</i></p> <ul style="list-style-type: none"> • Reg creates title even if the vendor is fraudulent but the purchaser is BF. Title of BFPFV = indefeasible • Reg of a void instrument by a BFPFV = effective, creates indefeasible title • Reg of a title obtained by fraud by the fraudulent party = defeasible • The title is subject to defeasible title of the defrauded vendor • The fraud creates an equitable interest on the part of the defrauded (original owner), legislation allows an exception for fraud allowing them to cancel the registration of the fraud • Nb. s. 43 RPA now settles the priorities dispute: protection as to notice of person purchasing the land before registration
	<p>Volunteers (NSW)</p>	<p>Volunteer gains indefeasible title upon registration of their interest (<i>Bogdanovic</i>) (cf. position in Vic where volunteer gains same quality of title as a donor: <i>Rasmussen v Rasmussen</i>)</p> <p>However, a person deprived of title through fraud can bring action for recovery against a volunteer who gets their title from the person who defrauded them (RPA s. 118(1)(d)(ii))</p>