

# LAWS2012 PROPERTY – PROBLEM QUESTION SCAFFOLDS

## Table of Contents

TOPIC 1: CONCEPT AND FUNCTIONS OF PROPERTY AND INTRODUCTION TO REAL PROPERTY	5
1. GENERALLY	5
a. Definitions	5
b. Nature of Agreement	5
c. Validity of Agreement – Formalities	5
d. Fixtures	5
e. Native Title	5
2. Definitions	6
a. Property	6
b. Rights in Rem	6
c. Rights in Personam	6
d. Real Property	7
e. Personal Property	7
3. Nature of Agreement	7
a. Numerus Clause principle	7
b. Ownership	7
c. Lease or Licence	7
4. Validity of Agreement – Formalities	8
a. Identification of Parties	8
b. What is the Nature of Interest?	8
c. Has a Legal Interest Been Created?	9
d. Is There Fraud?	16
5. Equitable Interests	19
a. Broadly	19
b. Immediate Disposition of an Equitable Interest via Declaration of Trust	19
c. Creation of an Equitable Interest via an Enforceable Agreement	20
d. Overcoming Formalities	24
6. Fixtures	31
a. Terms of Agreement	31
b. Is it a Fixture?	31
c. If it is a Fixture, can it be Removed?	33
d. Fixtures Obtained Under Hire-Purchase/Security Agreements	34

e. Conclusion .....	34
7. Native Title.....	34
a. Broadly.....	34
b. Can Native Title Rights be Established?.....	34
d. Has Native Title Been Extinguished .....	36
TOPIC 2: PERSONAL PROPERTY – INTRODUCTION TO CHOSSES IN POSSESSION.....	39
1. GENERALLY.....	39
a. Definitions.....	39
b. Types of legal interests.....	39
2. CHOSE IN POSSESSION .....	40
a. [STEP 1] Establishing a Chose in Possession .....	40
b. [STEP 2] Identify the Legal Interest in Choses in Possession.....	40
3. TRANSFER OF OWNERSHIP.....	45
a. Transfer Type 1 – Losing and Finding.....	45
b. Transfer Type 2 – GIFT.....	49
c. Transfer Type 3 – DONATIO MORTIS CAUSA.....	54
d. Transfer Type 4 – SALE OF GOODS ACT.....	56
4. BAILMENT.....	64
a. STEP 1 – IS THERE A CONTRACT FOR SALE OF GOODS .....	64
b. STEP 2 – IS THERE A BAILMENT?.....	64
c. STEP 3 – IS THERE A SUB-BAILMENT?.....	66
d. STEP 4 – WHAT DUTY OF CARE IS OWED? .....	67
e. STEP 5 – HAS THE STANDARD OF CARE BEEN BREACHED .....	68
f. STEP 6 – CONCLUSION.....	68
TOPIC 3: PERSONAL PROPERTY – INTRODUCTION TO CHOSSES IN ACTION .....	69
1. GENERALLY.....	69
a. Legal Choses in Action .....	69
b. Equitable Choses in Action .....	69
2. Legal Choses in Action .....	70
a. Identifying the Chose in Action .....	70
b. Can the Chose in Action be Assigned? .....	70
c. Is the Chose in Action Precluded from Being Assigned?.....	70
3. Equitable Choses in Action .....	77
a. Identify the Equitable Chose in Action .....	77
b. Interests Arising Under a Trust .....	77

c.	Comparing Trusts against Other Legal Relationships .....	80
d.	Livingston Rights – Interests Arising Under an Unadministered Deceased Estates .....	89
	TOPIC 4: ASSIGNMENT AND DISPOSITION OF INTERESTS .....	95
1.	GENERALLY.....	95
a.	General Framework.....	95
2.	HAS THERE BEEN A LEGAL (STATUTORY) ASSIGNMENT?.....	96
a.	Real Property (Land).....	96
b.	Chose in Possession .....	96
c.	Chose in Action.....	96
d.	Shares .....	97
3.	CAN THERE BE AN EQUITABLE ASSIGNMENT WHERE LEGAL ASSIGNMENT FAILS? 98	
a.	LAND .....	98
b.	Chose in POSSESSION .....	101
c.	Chose in ACTION .....	102
d.	Shares .....	105
4.	TRUSTS.....	108
a.	Creation of Trusts .....	108
b.	Agreement to Declare Trust .....	110
c.	Disposition of Trusts .....	110
5.	Assignment of Future Property .....	117
a.	Does the assignor have a mere expectancy of an interest in future property OR present property? <b>(Norman)</b> .....	117
b.	Has there been a Valid Assignment? .....	118
	TOPIC 5A: Priority Regimes.....	121
1.	Generally.....	121
a.	Priority Contest in Goods.....	121
b.	Priority Contest in Land .....	121
2.	Is There a Contract for the Sale of Goods .....	122
a.	What is a Good? .....	122
3.	Does the Nemo Dat Principle Apply? .....	122
a.	Principle.....	122
b.	Characterisation: .....	122
4.	Do the Exceptions Apply? .....	122
a.	Estoppel.....	122

b.	<b>Mercantile Agent</b> .....	125
c.	<b>Sale Under Voidable Title</b> .....	126
d.	<b>Seller in Possession</b> .....	127
e.	<b>Buyer in Possession</b> .....	128
5.	<b>General law priority rules: Contests between legal and equitable interests [LAND]</b> .....	129
a.	<b>STEP 1: Identify the competing interests</b> .....	129
b.	<b>Intermediary Step – Are the Interests Actually Competing?</b> .....	131
c.	<b>STEP 2 OPTION A: Prior Legal v Subsequent Legal</b> .....	131
d.	<b>STEP 2 OPTION B: Prior Equitable v Subsequent Legal</b> .....	131
e.	<b>STEP 2 OPTION C: Prior Legal v Subsequent Equitable</b> .....	132
f.	<b>STEP 2 OPTION D: Prior Equitable v Subsequent Equitable</b> .....	134
g.	<b>STEP 2 OPTION E: Prior Mere Equities v Later Equitable</b> .....	135
h.	<b>STEP 2 OPTION F: Prior Equitable v Subsequent Mere Equity</b> .....	136
i.	<b>STEP 3 Conclusion:</b> .....	136
	<b>Topic 5B: Commercial Dealings as Security Interests over Property</b> .....	137

# **TOPIC 1: CONCEPT AND FUNCTIONS OF PROPERTY AND INTRODUCTION TO REAL PROPERTY**

## **1. GENERALLY**

### **a. Definitions**

- i. Rights in rem
- ii. Rights in personam
- iii. Real Property
- iv. Personal Property

### **b. Nature of Agreement**

- i. **Lease?**
  1. Exclusive possession?
  2. Certainty and Duration

- ii. **If not, licence?**

- iii. **Formalities**

### **c. Validity of Agreement – Formalities**

- i. **Has a legal interest been created?**

1. **Freehold** – title, mortgage
2. **Non-Freehold** – leases

- ii. **Is there fraud?**

1. Forgery – null and void
2. Fraud – voidable

- a. Three situations of fraud – **(1)** Fraudster register title for themselves, **(2)** fraudster register title for themselves and then on-sells to a 3<sup>rd</sup> party, **(3)** Fraudster does not register title for themselves, immediately on-sells to 3<sup>rd</sup> party

- iii. **Equitable Interest Created?**

1. Document written and signed
2. Executory Agreements if issue with writing/signature or oral agreement
3. Overcome if there is part performance
4. Can be overcome if there is fraud

### **d. Fixtures**

- i. **Terms of agreement** – is object part of property?
- ii. **Is it a fixture?**
- iii. **If fixture, can it be removed?**

### **e. Native Title**

- i. **Definition**
- ii. **Can NT rights be established?**
- iii. **Have NT rights been extinguished?**

## 2. Definitions

### a. Property

- i. Rights to things – whether a right can be assigned (transferred) to another purpose
  1. E.g. when someone dies, most rights for estate gets transferred to executor and distributed according to law
- ii. **Features**
  1. **Existence of something** – Must relate to things which are separate and apart from ourselves
    - a. Personal attributes (eg. Like a lock of hair) can be transformed *into* property, but when they're attached they're not
  2. **Enforceability** – The corresponding obligation to a property right is a right owed by *society at large* not a particular person. But, generally the 'thing' which must exist is the most important part of a property right, NOT the Hohfeldian view of property rights as being like an indefinite number of corresponding rights/obligations
- iii. **Other Defining Features**
  1. **Alienability** – Property rights can be sold or given away to others—they are considered *disposable* – the thing is only contingently connected and can be given away or have the connection severed (even without explicitly transferring the right.).
    - a. E.g. a tenant w a non-assignable lease can surrender it and vacate dwelling
  2. **Excludability** – Able to exclude others from making use of the thing which is subject to that right (there are still property rights that are NOT excludable thought – e.g. when land has a right of way attached)
  3. **Value** – Most, but not all, property rights have some market value attached. **NOT a defining/mandatory characteristic**

### b. Rights in Rem

- i. Rights people have concerning particular things and depends on continued existence of thing to which it relates
  1. E.g. If I borrow a book and promise to return to you, you continue to own the book and have a **right in rem**
    - a. Because it depends on continued existence, destruction may give right *in personam* but brings end to right *in rem*

### c. Rights in Personam

- i. Rights enforced against particular persons without much regard to the things they might have
  1. E.g. If you borrow \$20 and promise to repay, then you owe \$20
    - a. **Do not expect to get same note back** – instead have personal obligation to pay which corresponds to **personal right to be paid \$20**
    - b. Right *in personam* regardless of what has become of the \$20 not borrowed

#### d. Real Property

- i. Legal interests protected by actions in rem to establish or vindicate the title to land recognised by the common law
- ii. Equitable Interests were protected by remedies issued by the Chancellor (injunctions, specific performance and declarations) which were rights enforced *in personam* because against the owner at common law

#### e. Personal Property

- i. **Choses in possession** (chattels/goods) – right to possession of goods
  1. Legal interests (ownership or possession) in chattels are protected by remedies in tort – trespass, conversion and the specific relief of detinue
- ii. **Choses in action** – right to intangible thing
  1. Enforced by taking action, whether at law or in equity

### 3. Nature of Agreement

#### a. Numerus Clause principle

- i. The law only recognises a limited class of rights as proprietary interests
  1. *As such, X's agreement with Y must constitute a [lease/licence]*
- ii. If the rights conveyed does not fall within these classes then there is no property (**King v David Allen**)
  1. **King v David Allen** facts – Cinema owner had an agreement with a billposting company to put posters on the wall for four years.
    - a. Owner then leased the building to a new tenant, who refused to let them put posters up
    - b. Licence did not create an interest in land, but merely a personal obligation owed to DA by King, King liable in contract

#### b. Ownership

- i. Fee simple – highest right the law recognised wrt land; life estate
  1. The ability to exercise lawful exclusive control over property and to assert complete rights over it, including destruction and disposition
  2. *X has a fee simple interest in land, which is the maximum interest in which a person could have in land as they have the right to exclusive possession* (**Mabo (No 2)**)
- ii. Life Estate
  1. *X has life estate in land, which is a proprietary interest conveying exclusive possession for the duration of measuring life*

#### c. Lease or Licence

##### i. Lease

1. *Agreement is likely a lease since [party] holds a degree of control over the property e.g. holds keys* (**King v David Allen**)
2. **Exclusive possession?** (**King v David Allen**)
  - a. *The [agreement] is likely a lease since it confers a right of exclusive possession*

##### b. Factors of consideration:

- i. Nature of premises

- ii. Where use of premises is shared
- iii. Restrictions on nature of permitted use
- iv. Possession of whole or part of property
- v. Fixed term of use and certainty of duration (**King v David Allen**)

3. **Certainty and Duration**

4. **If fails the test → licence**

ii. **Licence**

- 1. Licence creates no estate or interest in the land nor an easement (**King v David Allen**)
  - a. *[Party] has a licence to enter the land and use or occupy the [other party's] land for X purpose, which would otherwise be a trespass to land*
- 2. This **does not confer legal or equitable interests in the land and is not a proprietary right** ie. no compensation if anything goes wrong – merely creates personal rights between the licensee and licensor that is enforceable in contract

4. **Validity of Agreement – Formalities**

a. **Identification of Parties**

	<b>Old System Title</b>	<b>Torrens System Title</b>
<b>Title Transfer</b>	Purchaser and Vendor (then work out who is the titleholder/freeholder/has the fee simple)	Purchaser and Vendor (party who holds the registered title is referred to as the registered proprietor)
<b>Mortgage</b>	Mortgagor (lender and titleholder) and Mortgagee (original owner, has money and equity of redemption)	Mortgagor (has a security interest - charge) and Mortgagee (registered proprietor and titleholder)
<b>Life Estate</b>	Feofor (original owner) and life tenant and possible remainderman/woman	
<b>Lease</b>	Leaseholder/tenant and landlord	
<b>License</b>	Licensee (holder of the licence) and licensor (granter of the interest)	
<b>Easement</b>	Servient owner and the dominant owner	
<b>Others</b>	Third party or contracting party	

b. **What is the Nature of Interest?**

i. **Freehold interests: Freehold title transfers/disputes and mortgage problem questions:**

- 1. **Fee simple** – proprietary interest conveying exclusive possession “forever”
  - a. *X has a fee simple interest in land, which is the maximum interest in which a person could have in land as they have the right to exclusive possession. Registration of the interest under the Torrens system of s 41(1) RPA generates indefeasible title under s 42 RPA (**Breskvar v Wall; Fraser v Walker**).*
  - b. **If the facts say that another party has become the registered proprietor of the land, assume this is valid and analyse from the perspective that they have the legal fee simple**
  - c. A certificate of title is evidence of proprietorship of the fee simple

2. **Life estate** – proprietary interest conveying exclusive possession for the duration of measuring life. Life estates are registered in **Torrens systems and appear on the registered title**.
  - a. *X has life estate in land, which is a proprietary interest conveying exclusive possession for the duration of measuring life*
  - b. The interest attracts **indefeasibility**. The life tenant can transfer this interest during the life estate (including mortgages), however the estate ends when the life tenant dies. The party who receives the land at the conclusion of the life estate is known as the remainderman/woman – they get the ‘remainder’ interest. If there is no remainder, the interest automatically reverts to the feofor (reversion)
3. **Fee tail** – estate restricted to line of heirs. Cannot be created in NSW anymore: **Conveyancing Act 1919, ss 19, 19A**

ii. **Non-freehold interests: Lease, licence, easement, chattels problem questions**

1. **Lease** – requires right to exclusive possession and a defined term.
  - a. *X obtains a lease interest in land given that X has been given exclusive possession, for a limited period of time. To be a valid lease, there are formality requirements that have to be satisfied either to create a legal lease or an equitable lease. (Torrens/Old Systems)*
2. **Easement** – a right to use, or restrain the use of, the land of one party (the servient owner) for a specified purpose which is exercised by a second owner (the dominant owner). Must be in a manner not inconsistent with servient owner’s continuing ownership. It is only an easement if the two pieces of land are next to each other: dominant owner is using an adjoining piece of land to benefit their land.
  - a. It will be an easement if it benefits one parcel of land and burdens another
3. **Profit a prendre** – right to enter servient land and remove the soil or its natural produce – must be naturally occurring (usually wheat, flowers, certain minerals).
4. **Chattel ownership** – exclusive possession of chattels “forever”
5. **Bailment of chattel** – delivery of exclusive possession with an obligation to redeliver

c. **Has a Legal Interest Been Created?**

i. **Has a Legal Interest Been Created? – FREEHOLD (title, mortgage)**

1. **OLD SYSTEMS TITLE** – Under Old System Title **s23B(1) Conveyancing Act** requires a deed to transfer or create a legal interest in land (common law)
  - a. **Deed** – most solemn act that can be done in respect to property (**Manton v Parabolic, Young J**)
  - b. **Requirements** – Deed must be:
    - i. Written document on paper, parchment or vellum (**s 23C(1) CA**)
    - ii. Signed, sealed and attested by one witness that is not a party – no particular form of words shall be requisite for the attestation (**s 38(1) CA**)
      1. Indenting is not necessary (**s 38(2) CA**)

2. Deemed sealed if expressed to be an indenture, deed, or to be sealed as long as it is still signed and attested (**s 38(3) CA**)
  3. *Note* – only needs to be signed by the person conveying the interest if a sale; if a lease, needs to be signed by both parties (as mutual obligations)
- iii. Delivered
1. Need not be physically delivered but must merely perform act evidencing intention to be bound (**Ansett Transport Industries**)
  2. Delivery may be conditional on some event e.g. payment of purchase price (**Ansett Transport Industries**)
  3. Can be electronic (**s 38A CA**)
- iv. Registration - creates priority advantages (**s 184G CA**) BUT does not cure defect
1. It **does not validate defective instruments** or correct errors in execution, formalities, or substantive legal issues → must be rectified through legal action
- v. **What if the word ‘deed’ is not used?**
1. *[XX] must have undertaken the most solemn act they could in accordance with the particular type of land concerned* (**Manton v Parabolic**)
    - a. On the facts, it clearly appears on the face of the document that the parties must have been endeavouring to transfer an interest in property by the execution of a statutory form (**Manton v Parabolic**)
- c. **Is it a Title Transfer (fee simple)**
- i. *Assuming substantive requirements made out per above, then the legal interest in the property is transferred under s23B(1) and the purchaser becomes the holder of the fee simple.*
  - ii. **Rights:** The holder of the fee simple has a proprietary interest in the land which evinces rights of...
    1. Exclusive possession
    2. Use/enjoyment (right to use)
    3. Alienation and transfer (right to move property rights through title transfer, leases, easements, etc)
2. **OLD SYSTEM MORTGAGES** – Mortgages under Old Systems involves conveyance of the interest (**Coroneo**)
- a. **Principle** – An executed deed allows the mortgage interest to be created under **s 23B(1) CA** and the mortgagee (lender) becomes the holder of the legal fee simple
    - i. Interest of the **mortgagor (original owner)** is transferred to the **mortgagee (lender)** with the proviso that the mortgagee will re-

convey that interest to the mortgagor when the debt is repaid (mortgagor retains an equity of redemption) (**Figgins Holdings**)

1. **Legal fee simple is burdened by the mortgagor's equity of redemption**
2. *[Party] holds an equity of redemption, not a legal interest.*
- ii. **Rights of the mortgagee and mortgagor**
  1. **#1 Right to possession:** However, it is usual for the deed of mortgage to give the mortgagor right of possession until he or she defaults on repayment
  2. **#2 Power of sale of the property:** This is contingent on the mortgagor defaulting on the mortgage
  3. **#3 Keep/sell the property:** If the loan is not repaid, they may keep or sell the property in satisfaction of the debt
- iii. Mortgagor (original owner) has equitable interest ('equity of redemption') – if all relevant obligations under the mortgage are met, then he/she will get her property back
  1. Operates as security
- b. **Cannot have more than one mortgage in the land itself because the first mortgagee becomes the holder of the legal fee simple**
  - i. Any subsequent mortgage will be equitable mortgage → every other bank holding a mortgage has an equitable interest
  - ii. Only 1 bank holds **legal interest** – every other bank holding a mortgage has **equitable interest**
3. **TORRENS SYSTEM TITLE – s 41 Real Property Act 1900 (NSW)** requires registration to pass a legal interest
  - a. Per **s 41(1) RPA**, legal interest in land under the Torrens system is granted by registration of the instrument which creates a state-guaranteed title (**Breskvar v Wall**)
    - i. For an interest in land to be created or disposed it must be in writing (**s 23C(1) CA**)
  - b. The purchaser becomes the registered proprietor of the fee simple in land, obtaining an indefeasible title immediately upon registration (**Frazer v Walker; Breskvar v Wall**)
    - i. *On the facts, given [Property] is Torrens land, [X] is registered as proprietor of [Property]. Hence, a legal interest was created and [x] becomes the registered proprietor of the fee simple in land which creates a state-guaranteed title (**Breskvar v Wall**)*
      1. **Torrens title is not a system of registration of title but a system of title by registration – registration which results from a void instrument is effective according to the registration**
  - c. **Effect**
    - i. Until registered, no legal interest able to pass or be created (**s 41 RPA**)

- ii. Once registered, it has the same legal effect as a deed **(s 41 RPA)**
- iii. Registered interest indefeasible except in the case of fraud **(s 42(1) RPA; Breskvar v Wall)**
- iv. A registered interest is subject to other registered encumbrances on the folio **(s 42(1) RPA)**
  - 1. An encumbrance is any interest that exists in a person other than the owner of land, and impairs the transfer of the land or lowers its value
  - 2. E.g. another registered interest on the land, such as a registered lease, easement or mortgage

#### 4. TORRENS SYSTEM MORTGAGES

- a. Pursuant to **(s 57(1) Real Property Act)**
    - i. **Mortgagor (original owner/borrower)** retains the **legal fee simple** and remains the registered proprietor of the land **(s 57(1) RPA)**
    - ii. **Mortgagee (lender)** receives a **legal security interest in the form of a statutory charge** – permitted to sell land to recoup indebtedness out of proceeds of sale of land in event of default
      - 1. Right to possession for mortgagee on default of mortgagor is granted by statute **(ss 57(2) and s 58 RPA)**
      - 2. Permitted to sell land to recoup indebtedness out of proceeds of sale of land in event of default **(s 58(3) RPA)**
    - iii. *Here, [owner] remains the owner and has a legal interest in the property*
  - b. Upon registration under the Torrens system **(s 41(1) RPA)**, the interest immediately becomes indefeasible **(Frazer v Walker; Breskvar v Wall)**
    - i. For an interest in land to be created or disposed it must be in writing **(s 23C(1) CA)**
    - ii. Thus, the mortgagee cannot have his interest defeated by an unregistered interest.
  - c. There can be **two or more legal mortgages** over Torrens Title land, because the mortgagor retains the legal fee simple **(Figgins)**
    - i. If registered - bank has legal interest
    - ii. If not registered – equity **(see below)**
  - d. A **forged memo** of mortgage is void at law but enlivened by registration **s 41 RPA**
- ii. **Has a Legal Interest Been Created? – NON-FREEHOLD (Leases)**
- 1. **Lease Generally**
    - a. **Is the agreement a lease or a licence?**
      - i. *The issue is whether [X] has an equitable/legal interest in [property] as a lessee, or only a contractual interest in personam as a licensee*
      - ii. One must read and understand the contract to work out the intention of the parties and the contract **(King v David Allen)**
    - b. **Is it a lease?**

- i. **Element 1 – Exclusive Possession**
    - 1. **Definition:** A lease grants exclusive possession of the land (**King v David Allen**)
    - 2. **King v David Allen** – the licensees had permission to affix posters on walls outside the cinema (Defendant) but then leased building to new tenant who refused to let licensees put poster up. **But it was a licence as the right to affix posters gives right to contractual right, NOT proprietary right, no exclusive possession of the wall**
      - a. HOL held licence could not be enforced against new tenant
        - i. Termination of lease by either party would also terminate possession of any licence granted by the tenant to another
        - ii. Contractual licences are personal, non-proprietary rights which do not inure the land
    - 3. **Facts of consideration:**
      - a. Nature of premises
      - b. Where use of premises is shared
      - c. If there are restrictions on nature of permitted use, then it is probably a licence
      - d. Possession of whole or part of property
  - ii. **Element 2 – Certainty of Duration**
    - 1. Principle: Fixed term of use and certainty of duration (**King v David Allen**)
  - iii. **Conclusion:**
    - 1. It is a lease and [x] is conferred a property right (in rem) that can be enforced against ‘the world’ OR
    - 2. If it fails the test → licence
  - iv. **Rights:**
    - 1. Exclusive possession (right to stop other people using the property)
    - 2. Use/enjoyment (right to use)
    - 3. Possibly transfer (right to transfer the lease)
  - v. **Remedies:**
    - 1. Equitable remedies are available, including specific performance (land is unique); injunction, equitable damages etc.
- c. **Is it a Licence?**
  - i. **Definition:** When an agreement merely creates an in personam contractual ‘licence’ between A and B (**King v David Allen & Sons**)

1. **King v David Allen** – Rent reserved and a term of years granted to prevent other people having competing interests meant that this was simply a licence for fixed term of years → not exclusion possession
  - ii. **Principle:** License creates no estate or interest in the land nor an easement ie. no compensation if anything goes wrong (**King v David Allen**)
    1. [Party] has a licence to enter the land and use or occupy the [other party's] land for X purpose, which would otherwise be a trespass to land
  - iii. **Remedies:**
    1. Therefore, [x] only has a contractual interest in personam, which can only be enforced against the owner (parties to the agreement)
    2. Remedy for breach is limited to contractual damages (no specific performance)
2. **OLD SYSTEM** – lease in the form of a deed (**s 23B (1) Conveyancing Act**)
- a. **Lease must be in the form of a deed**
  - b. **Requirements** – Deed must be:
    - i. **A written** document on paper, parchment or vellum (**s 23C(1) CA**)
    - ii. **Signed, sealed and attested** by one witness that is not a party – no particular form of words shall be requisite for the attestation (**s 38(1) CA**)
      1. Indenting is not necessary (**s 38(2) CA**)
      2. Deemed sealed if expressed to be an indenture, deed, or to be sealed as long as it is still signed and attested (**s 38(3) CA**)
      3. *Note* – only needs to be signed by the person conveying the interest if a sale; if a lease, needs to be signed by both parties (as mutual obligations)
    - iii. **Delivered**
      1. Need not be physically delivered but must merely perform act evidencing intention to be bound (**Ansett Transport Industries**)
      2. Delivery may be conditional on some event e.g. payment of purchase price (**Ansett Transport Industries**)
      3. Can be electronic (**s 38A CA**)
    - iv. **Registration** - creates priority advantages (**s 184G CA**) BUT does not cure defect
      1. It **does not validate defective instruments** or correct errors in execution, formalities, or substantive legal issues → must be rectified through legal action

v. **What if the word ‘deed’ is not used?**

1. [XX] must have undertaken the most solemn act they could in accordance with the particular type of land concerned (**Manton v Parabolic**)

a. On the facts, it clearly appears on the face of the document that the parties must have been endeavouring to transfer an interest in property by the execution of a statutory form (**Manton v Parabolic**)

3. **TORRENS SYSTEM LEASE**

a. Per **s 41(1) RPA**, a formal lease under the Torrens system is granted by registration of the instrument which generates an indefeasible title (**Breskvar v Wall**)

i. For a transfer to occur it must be in writing (**s 23C(1) CA**)

ii. Torrens title is not a system of registration of title but a system of title by registration – **registration which results from a void instrument is effective according to the registration**

b. **Effect**

i. Until registered, no legal interest able to pass or be created (**s 41 RPA**)

ii. Once registered, it has the same legal effect as a deed (**s 41 RPA**)

iii. Registered interest indefeasible except in the case of fraud (**s 42(1) RPA; Breskvar v Wall**)

iv. A registered interest is subject to other registered encumbrances on the folio (**s 42(1) RPA**)

1. An encumbrance is any interest that exists in a person other than the owner of land, and impairs the transfer of the land or lowers its value

2. E.g. another registered interest on the land, such as a registered lease, easement or mortgage

4. **Lease via Parol (ORAL)**

a. **Principle:** A general law lease can be created if it satisfies the requirements of (**s 23D(2) CA**)

b. **Requirements** – Does not have to be in writing if they are (**s 23D(2) CA**)

i. At the best rent that can be reasonably obtained (market rent); and

ii. Not exceeding three years (including extension options); and

iii. Right to immediate possession i.e. not with a future commencement date

c. **If you have above 3 factors you can still have a lease even if there is no writing – oral leases exist if satisfied**

d. **Rights**

i. A general law legal lease is not indefeasible (**s23D(2) CA**)

- ii. Will only have the force and effect of interests at will only **(s23D(1) Conveyancing Act)**
    - 1. *Interests at will* – interest that can be terminated by either party at any time
  - iii. **Does not apply to:**
    - 1. (a) wills,
    - 2. (b) any interests before 1930,
    - 3. (c) rights to acquire an interest in land by virtue of taking possession, or
    - 4. (d) affect the operation of the law relating to part performance **(s 23E CA)**
5. If **NO LEGAL LEASE** has been created **IS THERE AN EQUITABLE LEASE?**
- a. *X does not have a legal interest in [Property] as a lessee. The issue is whether the formalities for creating an equitable interest in [Property] as a lessee has been satisfied*

#### d. Is There Fraud?

##### i. Old Systems

##### 1. Forgery – null and void

- a. Persons cannot give what they do not have (*nemo dat quod non habet* principle) **(Manton v Parabolic)**. Given this, if the signature of the grantor/transferor was forged then nothing is transferred.
  - i. *On the facts, the signature of the grantor has been forged, thus the instrument is void. It passes no rights in law or equity*
  - ii. In turn, even if the buyer is totally innocent, they get nothing
  - iii. Will have a claim against the forger though (but not the purported seller)
- b. Registration of instruments under **s 184G CA** creates priority advantages but does not cure defects

##### 2. Fraud – voidable

- a. If signature of grantor/transferor induced by fraud of the grantee/transferee, the instrument can be effective to pass a legal interest (as it is still the owner who is passing it)
  - i. Fraud = deception involving dishonesty, moral turpitude etc per **Latec Investments**
- b. However, equity allows the grantor/transferee to have the instrument set aside
  - i. Registration of valid instruments **under s 184G CA** creates priority and defeats everything, even if there is fraud. This does not cure defect

##### ii. Torrens Title

- 1. **Broadly** – immediate indefeasibly now the accepted view (**Frazer v Walker**)
  - a. It is registration, not the instrument that passes title, so defects in the instrument (from fraud) can't affect the registered title

## 2. Forgery

- a. A forged instrument registered in accordance with **s 41 RPA** is **indefeasible (not subject to adverse claims)**, **except** where the holder is **personally guilty of fraud (s 42(1) RPA; Frazer v Walker)**
- b. Knowledge that a trust/unregistered interest exists is not in itself fraud **s 43(1) RPA**
  - i. This is because Torrens is a system of title by registration, not registration of title **(Breskvar v Wall per Barwick CJ)** ie. need **ACTUAL fraud, not just suspicion**
- c. **Result**
  - i. **If actual fraud** – defeasible title – interest passes but it is defeasible
  - ii. If 3<sup>rd</sup> party didn't know – indefeasible title

## 3. Actual Fraud

- a. Under **s 42(1) RPA**, registered title can only be set aside in cases of actual fraud
  - i. Only actual fraud is sufficient to set aside indefeasible title; direct or constructive notice
  - ii. is not sufficient **(s 43(1) RPA)**
- b. Actual fraud requires **personal dishonesty** (actual acts/knowledge of fraud) **rather than mere notice or constructive knowledge or suspicion of fraud**
- c. **Has the rogue (landlord or tenant who acts illegally) registered the title for themselves?**
  - i. Interest passes, but **defeasible due to the holder's actual dishonesty (Frazer v Walker)**
- d. **Situations of Actual Fraud**
  - i. Fraudster **registers title for themselves** and then on-sells to a 3<sup>rd</sup> party. **Was the 3<sup>rd</sup> party also guilty of fraud (i.e., did they know/suspect the transfer to rogue was forged or fraudulent)?**
    1. If no:
      - a. If 3<sup>rd</sup> party registers title, third party has indefeasible interest. Owner can claim against Torrens insurance fund.
      - b. If 3<sup>rd</sup> party has not yet registered title (e.g., because of original owner placing caveat on register), **the rogue's interest is able to be set aside** (defeasible due to fraud) and **3<sup>rd</sup> party enters priority contest with owner (Breskvar v Wall)**
    2. If yes:
      - a. If 3<sup>rd</sup> party registers title, interest passes but defeasible **(Frazer v Walker)**

- b. If 3rd party doesn't register title, rogue's interest set aside (defeasible – fraud). Third party has unregistered interest enters priority contest with owner (which they will lose) **(Breskvar v Wall)**

### 3. Laws of Priority

- a. Since Owner had earlier equitable interest, the laws of priority mean that they would prevail over the Third Respondent UNLESS their conduct helped encourage the Third Respondent's false assumption (that title vested with First Respondent)
  - b. **Conduct Encouraging False Assumption** – *However, the Owner executed a blank transfer document and handed over duplicate certificates of titles. That conduct helped encourage the Third Respondent's false assumption, and therefore they lose the priority*
- ii. Fraudster **does not register title for themselves**, immediately on-sells to 3rd party: **Was the 3rd party also guilty of fraud (i.e., did they know/suspect transfer to rogue was forged or fraudulent)?**
- 1. If no:
    - a. If 3rd party registers title, 3rd party has indefeasible interest **(Frazer v Walker)**
    - b. If 3rd party has not yet registered title, owner still has indefeasible title.
  - 2. If yes:
    - a. If 3rd party registers title, interest passes to 3rd party, but defeasible by original owner's claim **(Frazer v Walker)**
    - b. If 3rd party has not yet registered title, owner still has indefeasible title

## 5. Equitable Interests

### a. Broadly

- i. *X does not have a legal interest in [Property]. The issue is whether the formalities for creating an equitable interest in [Property] has been satisfied*

### b. Immediate Disposition of an Equitable Interest via Declaration of Trust

- i. **s 23C(1)(a) CA** – no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by the person's agent thereunto lawfully authorised in writing, or by will, or by operation of law
  1. Allows for creation of an equitable (not legal) interest in OLD SYSTEM land by a written and signed instrument (not in the form of a deed) even without adequate consideration.
  2. Does NOT allow for the creation of an equitable interest in Torrens Title land by an unregistered written and signed instrument (even if in registrable form) without the provision of consideration. Real Property Act 1900 (NSW), s 41; *Corin v Patton* (considered in Topic #4)
- ii. Under **s 23C(1)(b) CA**, an equitable interest can be created via declaration of trust
  1. **S 23(1)(b)** requires evidence of the existence of the declaration of trust in the form of signed writing by the grantor of the trust
    - a. *Here, the trust itself was written/signed = easily satisfies s 23(1)(b)*
  2. Applies to both Old System Title and Torrens Title
- iii. Is it an express trust or constructive trust?
  1. Express trust (**DKLR Holdings**) – certainty of intention, subject matter and beneficiary
  2. Constructive trust (see below)
- iv. **S 23C(1)(c) CA** – a transfer of an equitable interest or trust subsisting at the time of the transfer, must be **in writing signed** by the person disposing of the interest/trust or by the person's will, or by the person's agent thereunto lawfully authorised in writing
  1. Allows for the transfer any equitable interest via a written and signed document by the grantor
  2. Applies to both Old System Title Land and Torrens Title Land
- v. **S 23C(3) CA** – Electronic documents and electronic signatures are valid.
- vi. *Since on these facts there is evidence of the declaration of trust in the form of signed writing by Owner, X is the beneficiary of an enforceable trust of land*

### c. Creation of an Equitable Interest via an Enforceable Agreement

- i. Under s (XX), an equitable interest can be created
  1. **s 23C(1)(a)** – interest in land created or disposed of
  2. **s 23C(1)(c)** – disposition of equitable interest or trust subsisting at the time of the disposition
  3. The first issue is whether there was an intention to make an agreement to create a future interest as an agreement such that **s 54A CA** applies or there was a grant as an executed agreement such that **ss 23C and 54A CA** applies (**Ciaglia**)
    - a. **S 54A** applies to promises – agreements to create interests in the future (executory agreements) e.g. seeking specific performance
    - b. **S 23C** applies to grants – the transfer or creation of equitable interests which might be in performance of an agreement (executed promises) – (**Baloglow v Konstandindis**)
    - c. X may be recognised as holding a lease in equity if there is a binding and specifically enforceable contract for the grant of the lease (**Walsh v Lonsdale**)
- ii. **Method to determine whether EXECUTORY or EXECUTED (taken from papers)**
  1. **Lease**
    - a. **If oral** – regardless of possession, as there is no writing, **both s 23C and 54A** applies
      - i. Ambiguity meant that it was appropriate to discuss if **s 54A** (if there was an agreement) or **s 23C** (if there was an intention to make a grant) applied
      - ii. Note – if X has also entered into possession, which may suggest that X has orally granted the lease, it is still ambiguous
    - b. **If written** – needs to be clear whether it is a memorandum for agreement OR a purported immediate grant
      - i. **If memo for agreement** → **s 54A**
      - ii. **If grant** → both **s 23C and 54A**
      - iii. **If ambiguous** → both **s 23C and 54A**
  2. **Mortgage**
    - a. **If registered** – no further legal document to be executed → apply **s 54A and 23C** as it is an executed agreement
      - i. To grant interest in land you need to (1) register the mortgage or (2) make an absolute transfer as in **Ciaglia**
      - ii. **N.B** for (2) – can be an intention to grant a mortgage upon immediately handing over certificate of title (**Theodore**)
    - b. **If not registered** – A needs to register the mortgage/make transfer even if the other party has loaned them the money
      - i. **Therefore A is making a promise for the future and the agreement is executory (only s 54A applies)**

iii. **IS IT AN EXECUTORY CONTRACT? (A will grant X to B)**

1. *Here, the lease constitutes an executory agreement as it appears the parties contemplate the doing of some further act which will involve the grant of the interest in land*
2. Per White J in **Ciaglia v Ciaglia** (citing **Baloglow v Konstanidis**), only **s 54A CA** is engaged by an executory agreement to determine whether the agreement is enforceable
  - a. **N.B.** Typically, a mortgage as that found in Ciaglia where the act of paying back the loan (not the receiving of the loan from another party) and having title reconveyed, is an executory contract
    - i. Also look to whether language is suggesting a document is to be registered – i.e. did A make promises for the future – this is usually indicative of an executory agreement
3. Is **s 54A(1) CA** satisfied?
  - a. Requires the agreement, or memorandum/note, to be in writing and signed by the party to be charged for the agreement [the registered proprietor – party against whom the contract is sought to be enforced] to be enforceable
    - i. **s 54A (4) CA** – Electronic documents and electronic signatures are valid
    - ii. If it is a lease:
      1. Requires essential terms of **(Equus Corp v Antonopoulos)**:
        - a. The property to be leased
        - b. The rent payable
        - c. Name of the parties
        - d. Commencement date
        - e. Maximum duration of the term
        - f. Court must be satisfied the contract is intended to be final
    - iii. Not satisfied if:
      1. In the execution of a future lease, before it is held to be enforceable in equity, the court is not satisfied that the future lease will embody the terms already agreed upon **(Walsh v Lonsdale)**
      2. An agreement containing the phrase ‘subject to contract’ – indicates parties’ intention to hold further negotiation **(Masters v Cameron)**
4. **Conclusion**
  - a. **NO** – Given the agreement was only made orally / not in writing, the agreement is not enforceable per **s 54A(1) CA**
    - i. Nevertheless, even though the facts do not suggest compliance with the formalities of **s 23C(1)** (a, b or c), this can be overcome through **constructive trust, part performance (s 23E CA) and fraud on the statute** → **go to scaffolds below**

b. YES

i. **Transfer for all estates other than leaseholds**

1. **There is an enforceable contract** and a court would decree specific performance as damages are inadequate due to the unique nature of property/land (**Lysaght v Edwards**)
2. As equity regards as done that which ought to be done, seller retains legal title but buyer gains equitable right (**Lysaght v Edwards**)

ii. If it is a **leasehold estate**

1. There is a grant of lease in equity AND there is an availability of specific performance (**Walsh v Lonsdale**)
  - a. **Walsh v Lonsdale** – leased a mill for 7 years and defendant did not pay in advance and didn't pay for a year's rent, and argued the agreement did not create a legal lease BUT there was a grant of lease
2. For leasehold interests, same principle applies (**Walsh v Lonsdale**) – seller retains legal title but buyer gains equitable right

iv. **IS IT AN EXECUTED AGREEMENT? (by virtue of the agreement between A&B, B now holds X)**

1. *Here, the lease constitutes an executed agreement as no further legal instrument needs to be executed*
  - a. **Ciaglia v Ciaglia** – *The agreement was that (what was in substance) a general law mortgage existed between the parties; the parties were not agreeing that an additional document be entered into that would create a mortgage.*
  - b. The fact that additional obligations had to be performed under the (existing) mortgage – such as payment and transfer back of security – did not make the agreement executory
    - i. One party has to perform all of their own obligations under the contract
2. Per White J in **Ciaglia v Ciaglia** (following **Khoury v Khouri**): both **s 54A CA** and **s 23C CA** are engaged by an executed agreement to determine whether the agreement is enforceable
  - a. **N.B.** Typically, a mortgage as that found in Ciaglia where the act of paying back the loan (not the receiving of the loan from another party) and having title reconveyed, is an executory contract
    - i. Also look to whether language is suggesting a document is to be registered – i.e. did A make promises for the future – this is usually indicative of an executory agreement
  - b. **Overlap of ss 23C and 54A** – where agreement is caught by **s 54A** but has subsequently been performed
    - i. **Ciaglia**

1. Robert transferred half share of land to Pasquale as an **absolute grant**, pursuant to oral promise
  2. Although Pasquale would be the owner, the **transaction was merely a loan and Robert would get his share back once the loan from Pasquale was repaid**
  3. Robert repaid Pasquale amount and Pasquale died – **widow** to whom Pasquale’s interest passed as executor resisted Robert’s claim, saying the transfer was absolute
  4. Robert was making **two claims**
    - a. Pasquale had not performed promise to transfer property back (**s 54A CA**)
    - b. Absolute transfer was really a grant of a mortgage (**s 23C**)
  5. **Held – agreement could be enforced under both s 54A and 23C**
- ii. There was an agreement and sufficient acts of part performance within **s 54A(2) CA**
    1. Robert could rely on doctrine of part performance as repayment of so-called purchase money was **unequivocally referable to the existence of a loan agreement**
  - iii. Creation of a mortgage by transfer also applied under **s 23C(1)(a) CA**
    1. While failing writing requirement, s 23C(2) operated because **performance of the loan agreement** (repayment of money) gave rise to **constructive trust**
  - iv. There was nothing left of the agreement to mortgage for Robert to perform – Pasquale held on constructive trust to reconvey
3. **Is ss 54A and 23C CA satisfied?**
    - a. **s 54A CA** – Requires the agreement, or memorandum/note, to be in writing and signed by the party to be charged for the agreement [the registered proprietor – party against whom the contract is sought to be enforced] to be enforceable
      - i. **s 54A CA** arises at the stage of agreement of the contract to create or dispose of interest in land
    - b. **s 23C(1)(a) and (c) CA** – requires the agreement to be in writing and signed by party creating or conveying the land [the registered proprietor – party against whom the contract is sought to be enforced] must be authorised in writing for the agreement to be enforceable
      - i. **s23C(1) CA** – concerned with creation or dispositions of interests
      - ii. **s23C(3) CA** – Electronic documents and electronic signatures are valid
      - iii. Note: a signed written note of an oral agreement would suffice for **s 54A**, but not for **s 23C**

#### 4. Conclusion

- a. **NO** – On the facts, the agreement was only made orally / not in writing, so the agreement is not enforceable under **s 23C(1) CA** or **s 54A(1) CA**.
  - i. Nevertheless, even though the facts do not suggest compliance with the formalities of **s 23C(1) (a, b or c)**, this can be overcome through **constructive trust, part performance (s 23E(d) CA)** and **fraud on the statute** (go to scaffold)
- b. **YES** – There is an enforceable contract and a court would decree specific performance such as an injunction or equitable damages as damages are inadequate due to the unique nature of property/land (**Lysaght v Edwards**)

iii. Where there is a mortgage/loan and someone hasn't fulfilled obligations, analogise to **Ciaglia**

#### d. Overcoming Formalities

- i. **Part Performance** – **s 54A and s23C** can overcome formalities if there is **part performance** (per CA **s54A(2), s23E(d)**, **Ciaglia v Ciaglia, Cooney v Burns**)
  1. *Given the agreement is not in writing (oral), [plaintiff] may assert that the [lease/title/mortgage] is still enforceable under equity if part performance is satisfied under (s23E(d) and S54A(2) CA; Ciaglia)*
    - a. Court in **Ciaglia v Ciaglia** held that part performance was an exception to the formality requirements in both **s 54A(1) and s 23C**
      - i. Under **s54A(2)**, can have **oral** agreement
  2. **Test** – The acts must be **unequivocally**, and in their own nature, **referable** to some agreement that is alleged (**Cooney v Burns; Maddison v Alderson**)
    - a. Acts authorised by the agreement must be performed by the party seeking to enforce the agreement (or both together) (**ANZ v Widen**)
      - i. **Begin with the acts and ask if they are referable to a contract of the sort that the plaintiff is alleging (Pipikos)**
    - b. Unequivocal: If there is any other (plausible explanation for the conduct (other than the existence of 'some such agreement') then the plaintiff will fail at this point
    - c. When acts fulfilling the conditions expressed above have been proved, evidence becomes admissible to prove a **parol agreement (Frame v Dawson)**
      - i. The previous question as to the sufficiency of the part performance must be settled before the construction and operation of the unwritten contract can be legitimately approached (**Maddison v Alderson, per Lord O'Hagan**)
- d. Must establish by clear evidence the agreement alleged by him, and it must appear that the acts relied on as acts of part performance were done for the purpose and in the course of performing that agreement and with no other view or design than to perform it
- e. The agreement sued on must be of such a nature that the Court would have jurisdiction to enforce it specifically if it had been in writing

### 3. Sufficient Part Performance

- a. **Entering into possession of property and undertaking works to repair or improve it (*Cooney v Burns*)**
  - i. *Maddison v Alderson* – Woman had possession, but not exclusive possession as she cohabited with the titleholder. This act was accompanied by love and affection, the court held that this was equivocal.
  - ii. *Nunn v Fabian* – the plaintiff's alteration of his shop-front that cost more than 100 pounds at the defendant's request, was not part performance, as the parol agreement was silent to this, HOWEVER the payment of the new rent and the plaintiff's continuing possession was part performance
- b. **Deposit of Title Deeds (Old System) or Certificate of Title (Torrens) (*Theodore v Mistford*)**
  - i. A valid *equitable mortgage cannot be created by a mere parol agreement to give a legal mortgage if the deeds remain in the possession of the proposed mortgagor*
  - ii. A valid equitable mortgage *can be created by a mere parol agreement to give a legal mortgage if deeds have been handed over to the proposed mortgagee* where his possession of the deeds cannot be otherwise explained (*Russel v Russel; James v Rice*)
  - iii. An equitable mortgage can be made by deposit of title deeds/certificate of title where the land was to be security for payment of a debt
    1. *Theodore v Mistford* - Theodore trying to secure mortgage for purchase of business, vendor wanted extra security, his mother gave title documents for land she owned to solicitor and orally agreed → **created equitable mortgage**
    2. **Consider other reasons for title documents**
      - a. E.g. safekeeping (bank/lawyer), mistake about what doc was or unequivocal to existence of agreement to create mortgage
    3. **Intention of party handing over** (if to secure interests, equitable mortgage created)
- c. **Transfer of Land coupled with repayment of moneys paid with interest (*Cooney v Burns*)**
  - i. Even though the money was paid by 3<sup>rd</sup> party on Plaintiff's behalf, this was sufficient as there was an acknowledgement by defendant that loan had been repaid

- d. **Carrying out repairs and renovations to property with the knowledge of the defendant (*Cooney v Burns*)**
    - i. Principle: laying out of money in improvements on the land changes the position of the parties in relation to the use of the land (*Cooney v Burns*)
    - ii. Even if they are acts NOT done in performance of the contract, it is still part performance if it is in reliance on it → applicable only for improvements made to property after taking possession (*Ciaglia v Ciaglia [89]*)
      - 1. *Ciaglia v Ciaglia* – Doing work on the property i.e. repairing the roof, laying a new driveway, excavating foundations for retaining walls
      - 2. *Pembroke v Thorpe* – pulling down a house and taking away the materials to use
  - e. **Acts that are sufficient in the context of leases (*Van Schaik Organic Soils & Bark Supplies Pty Ltd v Woakwine Industries*)**
    - i. Handing over of keys
    - ii. Payment of a security deposit
    - iii. Making of mortgage payments
    - iv. Entry into possession
      - 1. From 2024 paper – note whether the person entered into possession of the property as a result of the lease or another factor
        - a. *A remained in possession of the land despite the lease*
    - v. Payment of rent
    - vi. Handing over of the lease documents, and the preparation of the assignment and notices resulting in the plaintiff expending money or incurring liability (*Cooney v Burns*)
4. **Not-Sufficient Part Performance**
- a. Mere payment of money is unlikely to be sufficient as part performance, as it is **referable to many possible relationships**
    - i. *Ciaglia v Ciaglia* – repayments of principal and interest can be considered acts of part performance...but by itself, and without colour from the surrounding circumstances...cannot be unequivocally referable to an agreement for sale ([96])
    - ii. *Cooney v Burns* – money was paid but it was unclear what for on its own
  - b. Acts preparatory to performance even if they involve expenditure eg. inspection of lease documents, incur legal expenses (*Cooney v Burns*)
    - i. Inspection of lease documents – handing over the lease purely for inspection purposes and for the limited purpose of preparing an assignment (*Cooney v Burns*)
      - 1. This was merely considered a ‘step towards the performance’ (*Pembroke v Thorpe, Lord Hardwicke*)

2. Also considered 'merely ancillary to the agreement' (*Whitbread v Brockhurst, Lord Thurlow*)
- ii. Taking inventory of the pub – not part of an agreement, nothing to do with right of ownership, merely preparatory (*Cooney v Burns*)
- iii. Incurred legal expenses – did not affect possession but was preparatory
- c. Love, affection and gratitude - acts need to be performed for no other reason (*Maddison v Alderson*)
  - i. *Maddison v Alderson* – Woman cared for man and did housework on promise of life estate. Court said acts might have been for love and affection, not solely because of the agreement.
  - ii. *Regent v Millet* – the court doesn't assume 'love and affection' motivation just because it is a family. Here court enforced an equitable mortgage granted to Regent's daughter and son-in law (part performance acts were mortgage repayments, taking possession and making repairs)
- ii. **Statute of fraud** – formalities can be overcome if there is fraud
  1. *Note: fraud here is different to earlier sections*
  2. However, equity does not permit statute to be used as an instrument of fraud (*Theodore v Mistford, Ciaglia*)
    - a. Statute (**s 23C and s 54A**) cannot be used to dishonestly deny what the true intentions of the parties were re the transaction (*Ciaglia v Ciaglia*)
      - i. Where one party has been permitted by the other to act upon a parol agreement, it is considered as a species of fraud in the latter to insist upon the statute as a bar to a specific performance of the whole agreement" (*Hawkins v Holmes*)
    - b. *Facts suggest that what A did would be unconscientious. Here, reliance on the statute would enable the defendant to escape the consequences of assurances or agreements under which the person acquired the property* (*Ciaglia v Ciaglia*)
      - i. Analogue to *Ciaglia*
        1. **Facts** - P and brother were joint tenants of Torrens. Oral mortgage between brothers, B gave mortgage loan to P. Brother paid off mortgage, other brother died and widow refused to give back the title, claiming the oral mortgage was not effective.
          - a. Widow claimed that the oral agreement was not enforceable because of **s23C and s54A**
        2. **Held** - Unconscionable if B gets loan repayment and title to land, had interest as mortgagee only → had to transfer title back
    - c. **2022 paper**, merely not carrying through on a promise might not be enough to amount to an undertaking as to bind A's conscience → potentially need more facts

d. **Applications**

i. (1) Oral evidence used to invoke the exception

1. **2024 paper** – *If B was to deny the lease after the fee simple had been transferred to B on the basis of the creation of the lease, B would use the failure of meeting the writing requirements to effect a fraud and A would invoke oral evidence to evidence this.*

ii. (2) Oral evidence is admissible to establish the true nature of the transaction

iii. (3) Limited to situations where people enter into a legally valid transaction for transfer of legal fee simple contingent on some other thing

e. **Scenario 1:** Where a primary transaction complies with formalities but not the secondary transaction (**Ciaglia v Ciaglia**)

f. **Scenario 2:** Oral mortgage agreement

g. **Examples:**

- i. **Ciaglia v Ciaglia** - *B gave mortgage loan to P. Brother paid off mortgage, other brother died and widow refused to give back the title, claiming the oral mortgage was not effective. NSWCA emphasised the wrongfulness of the widow insisting upon the validity of the primary transaction but denying the validity of secondary transaction which was unconscionable and attracts court intervention in its equitable jurisdiction.*

- ii. **Theodore v Mistford** – *The bank completed a sale contract with Glen Theodore (primary transaction) on the faith of the provision of the duplicate certificate of title from his mother to create a security interest (secondary transaction). Mother refused to hand over the certificate of title. it would have been fraud for Theodore's mother to set up the lack of writing as a defence, as her son would have received the benefit of the loan by then*

h. **Conclusion:** As per **Ciaglia v Ciaglia**, where there is such unconscionable conduct in relation to a contract, this will attract the intervention of the court in its equitable jurisdiction to determine that the contract is enforceable and decree specific performance. Consequently, the interest contracted for will be granted in equity.

iii. **Constructive Trust Exception (Enforceable contract, executed in writing)**

1. *[Plaintiff] may assert the existence of a constructive trust (**Lysaght v Edwards**) to overcome the writing requirement of s23C(1)(a, b or c) because of the constructive trusts exception in s 23C(2).*
2. **Principle:** Declared by the court as a remedy in respect of breach of trust or unconscientiousness conduct by the holder
  - a. **Ciaglia v Ciaglia** – there was nothing left of the agreement of mortgage for Robert to perform, and so Pasquale held on constructive trust to reconvey. If there is a mortgage, it would be unconscientious or

fraudulent in an equitable sense for Pasquale to refuse to reconvey the property since he was already paid back.

### 3. Application

- a. Applies when the contract has been executed but the title has not been transferred – created from the moment you have a valid contract for sale → so compliance with **s 54A** is required (***Lysaght v Edwards***)
  - i. Hence, a fully performed agreement leads to a constructive trust (***Ciaglia v Ciaglia***)
  - ii. **S 54A(1)**: No action or proceedings may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or proceedings is brought, or some memorandum or note thereof, is **in writing**, and signed by the party to be charged or by some other person thereunto lawfully authorised by the party to be charged.
- b. If the contract is executory (binding but not yet performed) proving a constructive trust is difficult (***Tanwar Enterprises***)
- c. Constructive trusts need NOT be in writing

### 4. Rights

- a. *Since the contract complies s 54A (a necessary requirement) and is valid, the vendor is considered a trustee in equity for the purchaser, meaning beneficial ownership shifts to the purchaser*
  - i. Legal title to the land won't pass until the execution of a deed occurs (transferring the fee simple)
    1. **BUT EQUITY says that** as soon as the parties enter into the contract, the vendor becomes constructive trustee for the purchaser.
  - ii. This requires that there be an enforceable contract of sale, so **s 54A CA** must be satisfied but falls outside the scope of **s 23C(1) per s23C(2) CA**
- b. **Doctrine of conversion**: in equity, the purchase money becomes part of the personal estate of the vendor, and the land forms part of the real estate of the purchaser
- c. Vendor
  - i. Becomes in equity a trustee for the purchaser of the estate sold
  - ii. Has a right to the purchase-money, a charge or lien on the estate for the security of that purchase money,
  - iii. Has a right to retain possession of the estate until the purchase-money is paid
  - iv. Has a duty to take reasonable care of the possession and can't treat the property as his own
- d. Purchaser:
  - i. Attains beneficial ownership
  - ii. But they bear the risk

5. **Result** – Thus, the buyer will have an equitable proprietary interest enforceable against third parties and seller retains legal title
  - a. *There is an enforceable contract and a court would decree specific performance as damages are inadequate due to the unique nature of property/land (Lysaght v Edwards)*
- iv. **Equitable Lease (Enforceable contract, executed and in writing) – Scenario (old system)** – Lease was in writing but not in a deed form
  1. [Plaintiff] may assert the existence of a **Walsh v Lonsdale** equitable lease to overcome the writing requirements in the **CA**
  2. Importantly, there is compliance with **s 54A** because on the facts, the lease was in writing but for some reason did not satisfy all the formalities requirements.
    - a. This requires that there be an enforceable contract of sale, so **s 54A CA** must be satisfied but falls outside the scope of **s 23C(1) per s 23C(2) CA**
  3. There must be an agreement to lease in writing which does not satisfy all the formalities requirements
    - a. The parties must have reached final agreement on the essential terms of the lease, property to be leased, rent payable, names of parties, commencement date and max duration
  4. **Result – the buyer will have an equitable proprietary interest enforceable against third parties and seller retains legal title**
    - a. *There is an enforceable contract and a court would decree specific performance as damages are inadequate due to the unique nature of property/land (Lysaght v Edwards)*
- v. **Conclusion** – *Therefore, part performance under s54A(2) is likely established since the acts of XYZ are “unequivocally referable] to X agreement (Maddison v Alderson, Cooney v Burns). The court would therefore order specific performance to enforce this agreement so that the parties “hold the same terms in equity as if a lease has been granted” (Walsh v Lonsdale)*
  1. This is prima facie the outcome for land cases **(Lysaght v Edwards)**
  2. NB. If regarding leasehold estate, availability of **specific performance is irrelevant (Tottenham Hotspur Football; Walsh v Lonsdale)** – generally have specific performance for land since land is unique **(Lysaght v Edwards)**

## 6. Fixtures

### a. Terms of Agreement

- i. Check the terms of the agreement – is there anything in the contract/lease etc that says the object is **part of the property**
  1. Any such agreement would be conclusive between A and B (**2023 midsem feedback**)
  2. **In the absence of any agreement** – facts raise issue of whether chattel was a fixture under common law test → go to **next step**

### b. Is it a Fixture?

- i. NOTE: Check the terms of the agreement – is there anything in the contract/lease etc that says the object is **part of the property**
  1. You cannot contract out of a fixture – e.g. even if contract says ‘this will remain a chattel’ does not affect objective intention (**Melluish v BMI**)
- ii. Fixtures are **choses in possession** (chattels) that have been **joined to land and thereby become part of an estate**, losing their legal identity as separate objects (**Reid v Smith**)
  1. **If it is a fixture, then it passes with title to land** (**Wake v Hall**)
- iii. **Presumption** (say prima facie test and burden of proof, and primary test of objective intention → see further below at iv)
  1. **Objects attached to land** (however slightly - e.g., by just four bolts) are presumed to be fixtures (**Cancer Care, Belgrave Nominees**).
    - a. **Onus of proof on person who asserts it is a chattel to prove that the objective intention was not to make it part of the land**
    - b. *Here, the [item] is connected to the land by... (e.g. cemented to the ground/concrete/bolted) such that it exceeds the low threshold for a fixture being a ‘slight fixing’ (Bellgrave Nominees). Therefore, Y who asserts the object is a chattel, bears the onus of proof for proving that the intention was not to make it part of the land.*
    - c. *As the [Item] is cemented to the ground, it is clearly attached by more than its own weight and thus prima facie a fixture under Belgrave Nominees*
  2. **Objects resting by own weight** are only presumed as **chattels** (although n.b. that it is fairly easy to rebut if **object of annexation made out**) (**Coroner**)
    - a. **Onus of proof on person who asserts it is a fixture to prove that the objective intention was to make it part of the land**
    - b. *Here, [item] is freestanding as.... And not attached by more than its own weight (Bellgrave Nominees) Therefore, it is prima facie a chattel. This places the onus of rebuttal on the fixture advocates (AKA THE PEOPLE WHO WANT THE ITEM WITH THEIR LEASE/LAND).*
  3. [For PQ] *As a preliminary matter, like/unlike the machines in Cancer Care, [object] does/does not have a “separate and independent viability” and exists as a composite whole. Since the [object] is fixed by X, it is prima facie a fixture and [party] has the onus of proof to assert otherwise. There is a high degree of annexation as X is set in Y and would be difficult to remove, X suggests a permanent, not temporary fixing (Cancer Care)*

iv. **Can the Presumption be Rebutted by Substantive Principles**

1. *The test of objective intention of the chattel's owner, X, at the time of fixation is applied [see above]*
  - a. I.e. if the block sings down, it does not matter (**Cancer Care**)
  - b. *In ascertaining the objective intention, consideration must be had to the degree of annexation and object of annexation*
2. **Step 1 – What is the degree of annexation ie. permanence?**
  - a. **Is there a strong degree of fixation?**
    - i. **Cancer Care** – could move the machine from place to place and removal **would not destroy/damage**
      1. *The X and Y are separate things as each thing has a separate viability*
      2. *The shed was cemented into the ground indicating a strong degree of affixation to the land, where removal would cause substantial damage. This is analogous to **Cancer Care** where the steel frames cemented into the floor were **held as fixtures***
  - b. **Was it there to be permanent?**
    - i. *The cementing of the shed also likely shows that affixation was for the reason that it would remain there permanently*
    - ii. *Greater the degree of physical attachment, more likely to be fixtures*
  - c. **Would removal destroy the item on land?**
    - i. **If the chattel is so securely fixed that ‘it cannot be detached without substantial injury to the object or to what is attached’ – evidence that it was intended to be permanent fixture (**Belgrave Nominees**)**
      1. **Belgrave Nominees v Barlin-Scott Airconditioning** – air conditioning plant installed on roof of building, would cause substantial damage if removed
      2. *The item is easy to remove and unlikely to leave much damage other than XYZ*
        - a. *The item is difficult to remove and will cause a great deal of damage*
    - ii. **Examples of Fixtures**
      1. **Cancer Care** – steel frame to support radiotherapy equipment was cemented into slab floor – **strong mode of annexation**
        - a. *Equipment + frame not a single time + could be used separately*
        - b. *Can separate objects into component parts (frame vs item itself) if installed and used separately or each part has ‘separate and independent viability’ (steel frame was a fixture, radiotherapy equipment was not a fixture)*

2. **Belgrave Nominees** – air conditioning unit connected by pipes to the building's water system = very attached to building + remove it would involve ripping out pipes
  - a. **NB** – If connection is just plugged to electrical wall – not a fixture
  - b. **NB** – In **Belgrave** platforms were constructed to hold air conditioners BUT still connected to water pipes

iii. **Example of Chattel**

1. **NH Dunn** – *Electronic unit attached to wall and floor with nails, screws, plugs – could be removed with little difficulty and expense + not damaging to remove*

3. **Step 2** – What is the **object of annexation?** (**Cancer Care**)

a. **Was it joined to the land for its better use as a chattel or for the improvement of the land**

- i. *[Object] was joined to the land for the purpose of better enjoying the land (then fixture) or the item (then chattel). Intention must exist at the time the goods were brought onto the land*
- ii. Does not depend on what anyone was actually thinking when thing was joined to the land – **it is the apparent purpose for joining something to land, as revealed by observable circumstances**

1. **What would a bystander, with knowledge of the relevant facts, assume was intended?**

- b. **Leigh v Taylor** - *tapestries tacked onto canvases and nailed into wood, nailed onto walls. Could remove without damage*
  - i. This was the only practical way to enjoy tapestries → **not a fixture, it was a chattel**
- c. **Belgrave Nominees v Barlin-Scott Airconditioning** - *air conditioning plant installed for purpose of permanent improvement of land*
- d. Nature of the property (**Belgrave**)
  - i. If made by owner, more likely to be a fixture (**Belgrave**)

c. **If it is a Fixture, can it be Removed?**

i. **For TENANT's fixtures** – Is the item installed **for trade, domestic or ornamental purposes?** (**Cancer Care**)

1. **Objects affixed by a tenant for trade, ornamental or domestic purposes may be removed at the end of the tenancy**, even if removal causes damage, but the tenant must make good the damage
  - a. In **Cancer Care** – item is clearly for a trade purpose and can be removed
2. Tenant has a **reasonable time to remove**, and if not removed, the landlord may either keep them or dispose of them at the tenant's expense
3. Must **not have been so firmly attached** that removal would **destroy their essential character or value**, or cause **substantial damage to the realty** (**Spyer**)

4. If the fixture attached to tenant's leasehold estate rather than landlord's freehold estate **then removable** (within, or within a reasonable period of the end of the lease (**Ebbage**))
  - a. If the tenant installs something they can take it – assumed that tenants don't intent to make gifts to their landlord (**Spencer**)

#### d. Fixtures Obtained Under Hire-Purchase/Security Agreements

- i. Where chattels obtained under security agreements that convey contractual right to enter land and take back item then become annexed as fixtures, the creditor obtains an equitable property right in the land to enter and remove them if the hirer defaults.
- ii. This equitable right takes precedence over rights of 3rd parties, incl to fixtures (e.g., on default of property mortgage) (**Kay's Leasing Corp**)

#### e. Conclusion

- i. *Therefore, [object] has become a part of the estate since it is likely to be a fixture, and X party is not entitled to remove it. OR*
- iv. *Therefore, [object] is unlikely to be a fixture and X party is entitled to remove it.*

## 7. Native Title

### a. Broadly

- i. Native title is the 'interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under traditional laws acknowledged, and the traditional customs observed by, indigenous inhabitants' (**Mabo No 2**)
  1. May be 'proprietary or personal and usefuntary in nature'
  2. Cannot be to choses in possession or choses in action (independently of their existence on subject land) (**Yanner v Eaton**)
- ii. Acquisition of sovereignty grants the Crown 'radical title'; however, does not grant it 'absolute beneficial ownership' as these rights burden the Crown's title (**Mabo No 2**)
  1. Crown has the right to (1) appropriate the land for its own use and (2) alienate the land to grant it to others; merits of the Crown doing so cannot be questioned by the Courts (only legality) (**Mabo No 2**)
  2. If land was truly terra nullius then Crown acquires both radical title and full beneficial ownership

### b. Can Native Title Rights be Established?

#### i. BROADLY

1. **ATSI person/group had traditional right to land under traditional laws/customs prior the Crown's acquisition of sovereignty**
  - a. *[Name of ATSI group] may establish that native title rights recognised by the common law pursuant to s 223(1) Native Title Act 1992 (Cth) ('NTA'), namely that traditional laws and customs with respect to the land, have been substantially maintained (**Mabo No. 2**).*
  - b. *Native title will nonetheless be wholly or partially extinguished if its asserted incidents are inconsistent with the rights granted by the Crown under X licence*

#### c.

- i. To **PROVE ELEMENTS** required by the **Native Title Act**, claimants must show laws or customs were **(Yorta Yorta v Victoria)**
  1. **Traditional, in that they had their origins in pre-colonisation society (Yorta Yorta v Victoria);** and
  2. **The ATSI person/group has maintained that traditional connection to the present day (Mabo No 2);** and [HIGH THRESHOLD]
    - a. Have continued to acknowledge traditional laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained (question of fact) **(Mabo (No 2) Brennan J)**
      - i. **Yorta Yorta**
        1. Yorta Yorta felt connected by the laws of the people but they failed to show in the view of the HC that the laws adhered to were ‘traditional’, that they had their origin in pre-colonisation society
        - ii. Traditional – must be continuously observed without break
    - b. Where physical presence is impractical, spiritual connection may be enough **(WA v Ward)**
      - i. Consider traditions, customs and practices of the group claiming the right **(Wik Peoples v Queensland)**
    - c. It is immaterial that laws and customs have undergone some change, provided that the general nature of the connection remains **(Mabo (No 2) Brennan J)**
  3. **These laws and customs have been passed down by traditional means**
- ii. **Native Title HAS NOT SURVIVED Where**
  1. The “tide of history” has “washed away” any real acknowledgment of traditional law and any real observance of traditional customs, NT has been extinguished **(Yorta Yorta v Vic)**
    - a. **Yorta Yorta** – HC majority upheld FC decision but this led to general disappointment as appellant argued trial judge erroneously adopted ‘frozen in time’ approach, failing to recognise laws and customs can change
  2. Abandoning of laws and customs based on tradition means native title cannot be revived for contemporary recognition **(Mabo (No 2))**
  3. Title will be lost even if the connection is lost due to forcible expulsion from the land **(Yorta Yorta)**
- iii. **Conclusion**
  1. **If Native Title Established:**
    - a. *The traditional connection with the land has been substantially maintained and therefore Native Title rights are effective against the world at large (Mabo No 2).*
    - b. *However, this is limited to traditional uses and can only be possessed by indigenous inhabitants and their descendants - it may not be transferred except to the Crown (Mabo No 2)*

## 2. If Native Title Not Established:

- a. Once connection lost, 'cannot be revived for contemporary recognition'; Crown's radical title expands to full beneficial title (**Mabo No 2**)
- b. Will be lost even if connection lost due to forcible expulsion from land (**Yorta Yorta**)

## d. Has Native Title Been Extinguished

- i. NT is extinguished to the extent of the inconsistency where Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with native title, or appropriated land to itself and the appropriation is wholly or partially inconsistent with native title (**Mabo No 2**)
- ii. **GENERALLY: Is there an inconsistency of rights?**
  1. Native title cannot be deliberately extinguished by state law; a state law purporting to do so is inconsistent (**Constitution s 109**) with **Cth Racial Discrimination Act 1975** (**Mabo No 2**)
    - a. If a grant of interest was before 1975, and thus before the enactment of the **Racial Discrimination Act**, native title **would be extinguished to the extent of the inconsistency**
  2. However, Native Title is extinguished to extent of the inconsistency where Crown has validly alienated land by **granting an interest or appropriation of land that is wholly or partially inconsistent with native title** (**Mabo No 2**)
  3. **Test: At the time of their creation, were the rights granted inconsistent with native title rights?** (**WA v Brown; Wik Peoples v Qld**)
    - a. I.e. logically inconsistent such that the existence of one necessarily implies the non-existence of the other?
      - i. **Can have native title:**
        1. Pastoral leases
        2. Mining Leases
      - ii. **Cannot have native title where:**
        1. **There is a legal fee simple** (**Fejo v NT**)
          - a. Grant in fee simple are rights that are inconsistent with the native title holders
        2. Lease with exclusive possession (but check terms of the lease) (**Wik, WA v Brown**)
        3. State appropriates to build roads, railways, buildings etc then incompatible
- iii. **Does the land grant by Statute (e.g. mineral lease, licences) give exclusive possession?**
  1. Matter of construction as to whether statutory leases are inconsistent
    - a. If language suggests limited use then may be compatible with NT (e.g., 'grazing purposes only'). *Here, language suggests X*
      - i. **BUT** If it gives right to control access to land then will amount to exclusive possession (**Wik Peoples**)
    - b. If grant/appropriation gives lesser interest (= compatible), any practical clash between NT and the grant/appropriation rights will be resolved in favour of the latter; however, when this use ceases the NT rights and

- interests are revived (**WA v Brown** - mining leases coexisted w native title)
- c. Extinguished by development (**WA v Brown** - mining leases didn't provide that all land must be used and developed)
2. **Pastoral leases:** create of statute, not a common law lease
    - a. **Wik Peoples** – phrase 'grazing purposes only' showed it was not exclusive possession, not absolute property rights. Nothing in the statute expressly extinguished NT interests
  3. **FOR PQ:** While a licence implies non-exclusive rights to use the land, statutory leases and licences do not necessarily conform with their common law counterparts and further facts about the actual nature and scope of the grant are required (**WA v Brown**). As **s 248 NTA** defines pastoral leases as a permission to use the land for maintaining animals, the X licence is likely similar to the pastoral licence in Wik which did not confer the right to exclusive possession. Therefore, the X licence will therefore extinguish any exclusive right to possess and use the land, but not any rights to access, engage in ritual and ceremony and seek sustenance on the land (**WA v Brown**).
- iv. **Doctrine of Tenure**
1. Exclusive possession:
    - a. Rule: Native title is extinguished by grants of estates of freeholds or leases
      - i. Fee simple – extinguished NT completely
      - ii. Common law lease
    - b. Since grants of these interests confer a right of exclusive possession, they are legally inconsistent with continuation of NT
  2. Non exclusive possession
    - a. Principle: Native title is not extinguished by grants of lesser interests
    - b. Grant of rights to use land for particular purpose (pastoral, mining, construct infrastructure) is not necessarily inconsistent with NT as long as there is no grant of a right to exclude others from the land (**WA v Brown; WA v Ward**)
      - i. Pastoral leases – pastoral leases have less than full rights of the full lease (**Wik Peoples v Qld**) so NT not extinguished
      - ii. Mining leases – only confers right to go onto the land and retrieve iron ore. Not exclusive possession to exclude anyone and everyone (**WA v Brown**)
    - c. Grants do not confer a right to exclusive possession and thus no legal inconsistency
      - i. **Mabo** – grant to national park is consistent
- v. **Through Exercise of Plenary Power**
1. **Rule:** Native title is extinguished if there is legal inconsistency with a valid appropriation of land to the crown
  2. **Application:** If the land is appropriated for a purpose which is inconsistent with the continuation of native title, native title is extinguished. If the purpose is consistent, native title is not extinguished (**Mabo (No 2)**)

- a. **Mabo No(2)** – inconsistent when the land was appropriated for ‘roads, railways, post offices and other permanent public work’
- b. **Mabo (No 2)** – consistent when land was set aside as a national park, authorities to prospect for minerals
- c. **WA v Brown** – Mineral lease authorised the joint venturers to extract iron ore and to build a town, roads and railway. Town of over 200 houses was constructed, together with roads, shopping centre, school, clubs, sporting facilities, medical centre, police station etc. Covered about one-third of area subject to one of the leases. After cessation of mining, the town was closed and removed → NT was extinguished in areas where mines, town sites and infrastructure were built BUT full exercise of native title became available after the ceasing of operations in 1982

vi. **Conclusion:**

1. Since rights are inconsistent, Native Title is extinguished to the extent of the inconsistency and cannot be revived OR
2. Rights are not inconsistent and therefore Native Title stands

vii. **Native Title Act s 56**

1. **s 56(2)** – The Federal Court is to take the following steps in making the determination:
  - a. (a) First, it must request a representative of the persons it proposes to include in the determination of native title as the native title holders (the common law holders) to indicate whether the common law holders intend to have the native title held in trust by:
    - i. (i) Nominating, in writing to the Federal Court within a specified period, a prescribed body corporate to be trustee of the native title; and
    - ii. (ii) including with the nomination the written consent of the body corporate; and
  - b. (b) Secondly, if the common law holders give the nomination within the period, the Federal Court must determine that the prescribed body corporate is to hold the rights and interests from time to time comprising the native title in trust for the common law holders; and
  - c. (c) Thirdly, if the common law holders do not give the nomination within the period, the Federal Court must determine that the rights and interests are to be held by the common law holders.
2. **Native title held in trust**
  - a. **s 56(3)** – On making of a determination under (2)(b), the prescribed body corporate holds, in accordance with the regulations, the rights and interests from time to time comprising the native title in trust for common law holders.