

Property Concepts Summary

5: Registration of Estates and Interests in Land

Torrens land title registration

- Public registration of estates and interests
- Replaced English general deeds conveyancing

Key features

- Public register of rights that can be asserted against third parties
- Registration of an interest in land is best evidence that the registered party is entitled to it
- Parties relying on the register are protected against the challenges to the accuracy of the register
- A remedy (monetary compensation) is provided to honest parties who lose their interests in land parcels through the operation of the register

Deeds conveyancing	Land title registration
Private conveyancing	Public system
The chain of title	Central register
Interest in land passes upon execution of the dealings	Interest in land passed upon registration
Nemo dat quad non habet	State guarantees the correctness of the Register
Lengthy and expensive to operate	Cost effective
	Legal certainty

Torrens system

- Land Titles Act 1925 (ACT)
- Computerised system of titles
- Electronic conveyancing system
- Protection for mortgagors against 'third party' fraud

What is registered?

- Mortgage: security interest. Other security interests include charge and rent charge.
- Profit a pendre
- Easements: utility easements, electricity easements. Can be created between private parties.
- Incorporeal hereditaments: intangible - not held in possession e.g. easement
- Corporeal hereditaments: tangible – held in possession

Interests

- Torrens mortgage: s93 Land Titles Act 1925 (ACT)

Mortgage or encumbrance: effect

- Any mortgage or encumbrance under this Act shall, have effect as a security but shall not operate as a transfer of the land thereby charged

Mortgagee's remedies

LTA 1925 (ACT)

- Power of sale s94
- Sale by court order s295A
- Entry into possession s96, 100
- Foreclosure s97
- Entry into rent s99

Profit a pendre

- The right to take some natural product of, or part of the soil from, the land of someone else.

Easements

- A burden on a fee simple (servient tenement) for the benefit of the dominant tenement
- May be registered s103 LTA
- Paramount interest: an exception to indefeasibility s58(1) LTA

Limitations

- Registered interest: legal interest under general law
- Unregistrable interest: equitable interests under general law

Register may not reflect all interests existing in land, interests in the land may exist outside the register, for example:

- Equitable interests (trusts, enforceable contracts)
- Equitable interests created between the transaction and the registration (caveat)
- Exceptions to indefeasibility (express and implied)

Easements - test

Re Ellenborough Park test

1. A dominant and servient tenement
 - The servient tenement gives something: the land that bears the burden
 - The dominant tenement: the land that receives benefit
 - The two tenements must be separate
2. The easement must accommodate (benefiting) to be to be 'appurtenant' (must accommodate or be of 'utility to') the dominant tenement (burdening the servient tenement).
 - The easement attached to and becomes part of the estate which constitutes the dominant tenement
 - The servient tenement (and the easement over it) must accommodate, or 'be of utility' to the dominant tenement
 - Must benefit the dominant tenement
3. Dominant and servient tenements must be distinct
 - E.g. title holders of dominant and servient tenements must be different persons
 - If the servient tenement is acquired by the owner of the dominant tenement, the easement will be extinguished

- Necessary easement: e.g. a right of way where that way is necessary to the use of land which previously had the benefit of the easement, suspended until the possession is separated again
- 4. The right must be capable of forming the subject matter of a grant
 - It cannot be a purely personal benefit: more than a mere right of recreation, requires some element of utility
 - The right must be sufficiently certain, clearly defined
 - Cannot be too extensive

Positive easements: allow to do things e.g. right of way, cross the servient tenement

Negative easements: prevent the occupier of the servient tenement from doing certain things which would otherwise be permitted as part of the normal use and enjoyment of their estate e.g. enjoyment of light and air

Utility easements: lack of dominant tenement (easement in gross) and possession of part of an estate.

How are easements created?

Expressly

- By a deed
- By registration: s103 LTA

Impliedly

- By necessity: without the easement the land is useless e.g. no access to the road
- By long user: but might be something that can be subject of a valid easement e.g. right of way
- Apparent easements: obvious to any reasonable person inspecting the land e.g. entering the servient tenement to maintain a wall on the dominant tenement

Easements are paramount interests

- All types of easements are protected as paramount interests
- S58(1)(b) LTA: 'any right of way or other easement created in or existing upon the same land is not described, or is misdescribed in the relative certificate of title'

Restrictive covenants

Restrictive covenant

- A private written agreement between neighbouring landowners that limit the way the land can be used and developed

Promises under seal

- In a deed

Covenant

- A written agreement or promise usually under seal between two or more parties especially for the performance of some action

Positive covenants

- Require something to be done

Restrictive covenants/negative covenants

- Covenants that restrict the use of land and are enforceable in equity. Also describes as land covenants

Covenantor

- Is a promisor (who is to bear the burden of the covenant)

Covenantee

- A promisee (who is to benefit by the covenant)

Easements v covenants

- They are most similar to negative easements, but an easement is classified as negative according to whether the benefited owner can do something on the burdened land.
- Whereas, a restricted covenant is classified as negative according to whether it disallows/allows any action by the burdened owner

6: Indefeasibility

- Indefeasible (cannot be challenged, overturned, or voided)
- Indefeasibility of title means that you have a registered title over real property. Therefore, a third party cannot challenge your claim over your property because you own it and its legally registered to you.
- Means that you have a registered title over real property. A third party cannot challenge or claim over your property, apart from the exceptions
- If you have indefeasibility of title, and your name is listed as the registered owner on the title records, your claim to the property is indefeasible.
- Essential for determining who has priority or ownership of real property when competing interests exist, like mortgages, leases, easements.
- Even though you have indefeasibility of title, some interests can be registered over your property which will impact what you can do with your property, such as mortgages, leases, easements or caveats.
- Such interests are registered over the title and given priority in the order of their registration.
 - e.g. if I was to purchase a property and enter into a mortgage, the mortgage will be the first priority registered interest after my interest as owner.
- Generally, you cannot challenge the indefeasibility of a title. However, there are some exceptions where a court may consider overruling indefeasibility.

Prevails in Australia according to the case of Breskvar v Wall and Gibbs v Gibbs, The title is considered indefeasible from the moment it is registered