LAWS2200 EXAM NOTES
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1. Introduction to Australian Property Law

a) English Land Law: Norman Conquest of 1066

➢ **Doctrine of tenure**: all land is ultimately owned by the Crown; no one holds absolute title, they hold 'of the Crown'. Little practical significance today but was historically used to deny Indigenous land ownership (Mabo).
➢ **Estate**: a right to possession of land (not absolute ownership). Arises from doctrine of tenure.
➢ Bc of doctrine of tenure, ppl don't 'own' land absolutely: they hold an 'estate', being a right to possession of land. 2 categories: freehold & leasehold
➢ **Inter vivos**: a transfer made during the owner's lifetime (as opposed by will)

The Estates System: Freehold estates (uncertain/indefinite duration)		
Fee simple	Largest interest; lasts forever; freely sellable/inheritable	Status: alive, most common in Aus today
Fee tail	Passed down a specific bloodline (tail male vs tail female); couldn't mortgage or lease beyond holder's life	Status: abolished under *CA 1919* (NSW): antithetical to capitalism & liberal democracy
Life Estate	Right to possess for holder's lifetime only; ceases on death; remainder goes to fee simple holder	Status: still exists; rarely used
Leasehold Estates (certain duration): Time-ltd right to possession.		

b) Australian Land Law: development of modern Aus via land grants

➢ **Squatting**: occupying & abandoned, disused, or unoccupied property w/o owner's permission or a lease agreement.
➢ **Pastoral lease**: a long-term lease (commonly up to 14 yrs under *Australian Colonies Waste Lands Act 1846*) limiting use to depasturing stock; still covers 40% of Aus land mass

2. Native Title

When the British invaded in 1788, all land was owned by Indigenous ppl w systems of property law across 250+ tribes & many clans. Indigenous ppl fought to retain land from 1788, staying on Country wherever possible, on unalienated Crown land, pastoral leases & reserves.

Millirrpum v Nabalco Pty Ltd (1971) – **'Gove Land Rights Case'**
- Yolngu ppl claimed communal native title to prevent bauxite mining by Nabalco
- Blackburn J found: Yolngu ppl had a sophisticated, "subtle & elaborate system" of law
  - BUT held that the rights were not 'property' bc they lacked the Western hallmarks (i.e. right to use & enjoy, right to exclude, & right to alienate)
- Hands tied by precedent (Attorney-General v Brown (1847) Legge 312: all land vested in Crown on settlement).
- First major native title claim; lost.
- Critique: using English property law as the baseline is like saying bus isn't transport bc it's not a car → every society has law, they're different

a) Mabo v Queensland (No 1) (1988) 166 CLR 186

➢ QLD passed the Queensland Coast Islands Declaratory Act 1985, pre-emptively declaring islands 'freed from all other rights, interests & claims of any kind whatsoever' w/o compensation → intended to defeat native title claims
➢ Eddie Mabo & James Rice challenged this
➢ Held: invalid. contravened s10 *Racial Discrimination Act 1975* (Cth): indigenous ppl had a lesser enjoyment of property rights than other Aussies
  ○ Under s109 Aus Const., a state law inconsistent w a Cth law is invalid to the extent of the inconsistency ⇒ Cth law prevails
➢ S10 *RDA*: persons of a particular race must enjoy property rights to the same extent as others → prohibits racially discriminatory deprivation of property

cb) Mabo v Queensland (No 2) (1992) 175 CLR 1

➢ Murray Islands in the Torres Strait
➢ Meriam ppl are devoted gardeners w individual plots passed patrilineally
➢ Britain annexed the islands via Letters Patent from Q Victoria (1877) → formalised by *QLD Coast Islands Act 1879*.
➢ Mabo sought a declaration of ownership under their own laws & customs
➢ QLD relied on *Attorney-General v Brown* (1847) & *Randwick Corporation v Rutledge* [1959] HCA 63 → held that all land vested in Crown on sovereignty
➢ Mabo didn't challenge acquisition of sovereignty but challenged the domestic legal consequences of that acquisition:

New South Wales v. The Commonwealth (1975) 135 CLR, at p 388 – **Seas & Submerged Lands Case**
- "The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state."

Colony Type	How Acquired	Domestic Legal Consequence
Conquered	Won by force/war	Pre-existing local law continued until altered by the conqueror
Ceded	Treaty signed (e.g. Treaty of Waitangi, NZ)	Pre-existing law continued; Crown's authority limited by treaty terms
Settled ('Terra Nullius')	Land deemed 'uninhabited' — people too 'primitive' to have law	English law immediately became law of the territory as settlers' 'birthright'; no pre-existing law recognised

➢ Aus classified as '*settled*' → not bc land was empty but bc Indigenous Australians were "so low in the scale of social organization" that it was "idle to impute to such people some shadow of the rights known to our law" (Southern Rhodesia [1919] AC 211, Lord Sumner)
  ○ Rooted in social Darwinism

c) Native Title Act 1993 (Cth) ('NTA')

➢ *NTA s11(1)*: *Native title can now only be extinguished in accordance w NTA*
➢ *NTA s 223*:
- (1) The expression native title or native title rights & interests means the communal, group or individual rights & interests of ATSI ppl in relation to land or waters, where:
  - (a) the rights & interests are possessed under the traditional laws acknowledged, & the traditional customs observed, by the ATSI; and
    - '*Or individual*': individual native title claims are possible (DeRose v South Australia)
  - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws & customs, have a connection with the land or waters; and
    - 'Land & waters': sea country claims are possible (Akiba v Commonwealth (2013))
  - (c) the rights & interests are recognised by common law of Australia.

The impact of the *NTA*

➢ Validates past Crown grants that may've been invalidated bc of Mabo & RDA
➢ Established the **Native Title Tribunal** → mediates claims, determines future acts, maintains registers of claims, Indigenous Land Use Agreements. (ILUA)
  ○ ILUAs can be between registered native title holders, claimants, representative bodies, govts, companies etc
➢ Future acts: where govt proposes to grant mining/exploration licenses over native title land, native title holders have a right to *negotiate* (not veto)

d) Compensation: Northern Territory v Mr A. Griffiths [2019]

First HCA case to consider compensation for the extinguishment of native title.

Type of Native Title Affected	Compensation
Exclusive use native title	Equivalent to freehold fee simple value of land
Non-exclusive native title (shared w others)	50% of freehold value
Spiritual/cultural loss: loss of connection to Country, spiritual sustenance loss	$1.3 million (solatium: 'what society would rightly regard as appropriate')
Total compensation (127 hectares)	$2,530,350

e) Wik v Queensland – continuation of native title

- ➢ Wik & Thayorre Ppls, Cape York Peninsula
- ➢ Two pastoral leases at issue (Mitchellton & River Pastoral Leases)
- ➢ Issue: did the pastoral leases necessarily extinguish all native title?
- ➢ Reasoning: pastoral leases are **sui generis** (i.e. a unique statutory creature of Aussie conditions).
- ➢ Outcome: pastoral leases do NOT necessarily extinguish native title → coexistence is possible.

Western Australia v Ward (2002) – **coexistence of titles: pastoral lease & native title**

- HCA: Native title rights inconsistent w pastoral lease rights are permanently extinguished (not merely suspended)

Fejo v Northern Territory [1988] – **permanent extinguishment of title**

- Facts: Fee simple grant in 1882, later resumed by the govt in 1927
- HCA: Although the land returned to the Crown (1927), the 1882 fee simple permanently extinguished native title
  - It cannot revive once extinguished by fee simple grant

Western Australia v Brown (2014) – **mining lease vs native title**

- HCA: mining lease did NOT extinguish native title bc it only granted rights to mine & carry out associated works – not exclusive possession of the whole area
- Thus, native title (eg: camping, ceremony, caring for sites) rights could coexist
- It is not the exercise of rights on the land that extinguishes native title, but the terms of the grant.

Akiba v Commonwealth (2013) – **legislation regulating land**

- Legislation = second way after a land grant that can extinguish native title
- Facts: sea country in the Torrens Strait disputed
- Issue: How much did legislation regulate fishing, which requires a commercial fishing licence, extinguish native title?
- TSI claimed: native title rights incl. right to take resources for any purpose
- QLD & Cth argued: legislation requiring commercial fishing license extinguished native title right to fish commercially
- HCA: legislation that regulates a native title right does NOT extinguish it. The legislation only regulates the exercise of fishing, so natives would just have to also get a license to fish commercially.

g) Summary: When is native title extinguished?

TEST: what rights were actually granted by the instrument/legislation, & are those rights inconsistent w the continued exercise of native title?

Grant / Act	Extinguishment?	Authority
Fee simple	YES — always; permanent even if land later resumed	Mabo [81]; Fejo [1998]
Ordinary lease (e.g. to London Missionary Society)	YES — lessee acquires possession; Crown acquires reversion; on expiry → plenum dominium	Mabo [81]
Pastoral lease	NOT necessarily — depends on terms of instrument; co-existence possible where no exclusive possession	Wik (1996); Ward (2002)
Mining lease (no exclusive possession)	NOT necessarily — co-existence possible; rights to mine ≠ right to exclude everyone	WA v Brown (2014) 507
Legislation merely regulating use (eg licence)	NO — regulation ≠ extinguishment	Akiba (2013); Mabo [76]
Crown reserves land for Indigenous ppl	NO — merely regulates	Mabo [76]
Crown appropriates land to itself (eg defence)	YES — clear & plain intention	Mabo [75]
Performance of conditions on lease (eg building infrastructure)	YES — at specific locations where physically inconsistent	Wik (Gummow J on Holroyd lease)
Post-1975 extinguishment without compensation	Invalid under RDA s10 or requires compensation on just terms	Mabo No 1; NTA

3. Fundamental Concepts in Land Law

- ➢ Statute > common law > equity
- ➢ Property = private law

In rem rights	Property rights = enforceable in rem (against the land/thing itself – i.e. the whole world).
In personam rights	Contract rights = enforceable in personam (only against other party to contract). KEY difference.
Equitable interest	an interest equity recognises even without those formalities/legal title — e.g., because a contract is specifically enforceable ("equity regards as done what ought to be done"), or through estoppel/constructive trust
Legal interest	created by properly complying with the law's formal requirements (e.g., a signed written contract, or completed transfer of title). Eg: 4yr lease contract (s54A) but no registration

a) Numerus clausus principle

- ➢ 'The closed list' = Landowners cannot create new or novel property rights: Rights must fit into the **recognised interests in land**.
- ➢ This protects the market value of property, provides economic viability etc.

Recognised interests in land (the closed list):

Interest	What It Is	Key Features
Fee Simple	Largest interest in land — full ownership	Lasts forever. Freely sellable, giftable, inheritable. Ends only by compulsory acquisition. 66% of Australians own the fee simple in their home.
Lease a.k.a. Leasehold	Time-limited right to possession	Tenant gets exclusive possession (to the exclusion of the world including the landlord). Landlord retains the 'reversion' (fee simple subject to lease). Can be assigned or subleased. Must have certain duration.
Mortgage	Small interest in land given by owner (mortgagor) to lender (mortgagee) in return for money	Mortgagee can sell the land if not repaid — takes what is owed, gives surplus to mortgagor. Makes lender a 'secured creditor'. Also includes personal covenant to repay. Mortgage is given by the borrower to the lender (not the other way around).
Easement	Right to do something on someone else's land	E.g. walk, drive, run pipes/wires across land. Requires a dominant tenement (benefited) & servient tenement (burdened). Runs with the land — enforceable by/against whoever owns those parcels. Key case: Brierley v Elenbrough Park (UK).
Freehold/ Restrictive Covenant	Right to stop someone doing something on their land	E.g. prevent building above 2 storeys, prevent subdivision. Burdens & benefits land — runs with the land. Usually affects multiple parcels in a subdivision.
Profit à Prendre	Right to gather naturally occurring materials from another's land	E.g. quarry stone, cut timber, shoot rabbits.
Charge / Lien	Limited interest in land = amount of money owed to holder	Holder paid from proceeds of sale. Like a mortgage but holder cannot sell the land themselves. Charges created expressly; liens arise by operation of law (e.g. vendor's equitable lien if purchase price unpaid but title transferred).

b) Fixtures vs chattels

- ➢ 'Land' = land & everything attached to it
- ➢ **Chattel**: items (personal property) movable of property, not a part of the property. A chattel that's only resting on the land w its own weight, is presumed to be a chattel.