LECTURE 3– Native Title

Reading

***Native Title Act 1993* (Cth)**

10 Recognition and protection of native title

Native title is recognised and protected by this Act

11 Extinguishment of native title

1. Native title **cannot be extinguished** except in accordance with this Act

   Effect of subsection (1)

2. If legislation (Cth, State, or Territory) is made, amended, or repealed on or after 1 July 1993, it can only extinguish native title in one of three ways:
   a. In accordance with:
      - Division 2b of Part 2 (confirmation of past extinguishment), or
      - Division 3 of Part 2 (future acts and related matters); or
   b. By validating past acts or intermediate period acts in relation to native title.

13 Approved determinations of native title

Applications to Federal Court

1. An application can be made to the Federal Court under Part 3:
   a. for a determination of native title over an area where **no approved determination** already exists; or
   b. to **revoke or vary** an approved determination of native title, but only on the grounds in subsection (5).

Native title determinations when deciding compensation

2. If:
   a. the Federal Court is making a **compensation determination** under Division 5; and
   b. there is **no approved determination of native title** for the area (or part of it);

   then the Court must also make a **current determination of native title** for that area (i.e., as at the time of the compensation decision).

Note: A compensation application must include the same information that would be required for a native title determination application (see s 62).

Approved determinations of native title

3. Subject to (4), the following count as approved determinations:
   a. a determination made by the Federal Court under (1)(a) or (2);
   b. an order, judgment or decision of a recognised State/Territory body that involves a determination of native title within its jurisdiction.

Variation or revocation of determinations

4. If an approved determination is **varied or revoked** under subsection (5) by either:
   a. the Federal Court (on an application under Part 3); or
   b. a recognised State/Territory body;

   then:

   c. if varied → the **varied determination** replaces the original as the approved determination;
   d. if revoked → it is **no longer an approved determination**.

Grounds for variation or revocation

5. The only grounds are:
   a. events have occurred since the determination making it no longer correct; or
   b. the **interests of justice** require variation or revocation; or
   c. the determination relates to an area covered by a **47C(1)(b) agreement** (where extinguishment of native title rights and interests is disregarded, e.g., in relation to certain national parks).

Subdivision B — Acts attributable to the Commonwealth

22A Validation of Commonwealth acts

If an intermediate period act is attributable to the Commonwealth, it is valid, and is taken always to have been valid.

22B Effect of validation on native title

Subject to s 24EBA(6), if an intermediate period act is attributable to the Commonwealth:

a. If it is a **category A intermediate period act** under s 232B(2), (3) or (4) (e.g. grant/vesting of freehold estates or certain leases) — the act **extinguishes all native title** over the land/waters.
b. If it is a **category A intermediate period act** under s 232B(7) (public works):
    i. native title is extinguished over the land/waters where the public work is located (once completed); and
    ii. extinguishment is taken to have happened when construction/establishment began.
c. If it is a **category B intermediate period act** that is inconsistent with native title — the act extinguishes native title **to the extent of the inconsistency**.
d. If it is a **category C or D intermediate period act** — the **non-extinguishment principle** applies.

Note: this section does not apply if s 23C or 23G applies.

22C Preservation of beneficial reservations and conditions

If:

a. the Commonwealth act contains a reservation/condition benefiting Aboriginal or Torres Strait Islander peoples; or
b. the act affects other (non-native title) rights/interests of those peoples (whether under legislation, common law, equity, or usage);

   then s 22B does not affect that reservation/condition or those rights/interests.

22D Entitlement to compensation

1. If an intermediate period act is attributable to the Commonwealth, the native title holders are entitled to compensation.
2. The Commonwealth pays the compensation.

22E Where "just terms" invalidity

1. This section applies if an intermediate period act attributable to the Commonwealth was invalid (ignoring s 22A) because it was an acquisition of property under s 51(xxxi) of the Constitution **otherwise than on just terms**.
2. The person whose property was acquired is entitled to compensation under Division 5, and if that is insufficient, additional compensation from the Commonwealth to ensure it is on just terms.

22EA Requirement to notify: mining rights

1. Applies if:
    a. the Commonwealth
        i. created,
        ii. varied (area), or
        iii. extended (time) a **right to mine**
    b. between 1 Jan 1994 and 23 Dec 1996 (other than under an existing option/right of renewal); and
    c. before the act, either:
        i. a freehold estate or lease (not mining lease) had been granted over the land/waters; or
        ii. a public work had been constructed/established on the land/waters;

       then the Commonwealth must, within 6 months of this section commencing:
    d. give notice (with details in (2)) to any registered native title body corporate, claimant, and representative Aboriginal/Torres Strait Islander body for the land/waters affected; and
    e. notify the public in the determined way.
2. Details to be given:
    a. the date of the act;

FACTS: Whether a *Western Lands Act 1901* (NSW) s 23 "lease in perpetuity" gives the lessee a right of exclusive possession (so as t be a previous exclusive possession act under the NTA, with resulting extinguishment of any native title), or not (so that only inconsistency-based partial extinguishment/suspension occurs, à la Wik).

ISSUES:

1. Are the **incidents** of a statutory lease in perpetuity **exhaustively defined by statute**, or may common-law leasehold incidents supplement them? ([18]–[20]).
2. Proper characterisation of a **Western Lands Act "lease in perpetuity"**: does it confer **exclusive possession** (and thus effect **extinguishment** under the NTA/State Act), or is it akin to a **non-exclusive pastoral lease** (so that **Wik** inconsistency analysis applies)? ([109]–[119], [163]–[168], [200]–[205]).

HELD: By majority (Gleeson CJ; Gaudron, Gummow & Hayne JJ; Callinan J with **McHugh J agreeing**) — **the Western Lands Act "lease in perpetuity" confers a right of exclusive possession**; it is treated (for NTA) as a **previous exclusive possession act**, and **native title is extinguished from the grant** ([109]–[119], [200]–[205]; cf Kirby J [163]–[168]).

REASONING

Gleeson CJ

- Statutory "leases" can carry **common-law leasehold incidents** unless statute displaces them: "the mere fact that it also exists under a statute will not confine its incidents exclusively to those contained in the statute" ([18], quoting McPherson); **Theosophy** supports applying **common-law doctrines** (accretion) to statutory perpetual leases where not excluded ([19]–[20]).
  Point: Approach characterisation **with caution post-Wik**, but incidents are **not necessarily exhausted** by the Act ([19]).

Gaudron, Gummow & Hayne JJ (joint) — Majority

- A **s 23(1)(a) "lease in perpetuity"** is a **creature of statute** within a **special Crown lands regime**, historically crafted to give settlers an asset with **"all the advantages and essence of a freehold"** while retaining **statutory controls** ([109]–[113]).
- Numerous conditions (residence, grazing-only use, consent limits on alienation, inspection/entry, soil conservation, minerals, stock routes etc) are **compatible** with what is "in substance … a freehold"; forfeiture ≈ **right of re-entry** on breach of condition subsequent to a **determinable fee simple** ([114]–[118]).
- **Conclusion:** On the proper construction, the grant confers **"the essence of a freehold, including a right of exclusive possession"**, falling within **s 23B(2)(c)(iv) & (viii) NTA**, so **State Act s 20 mandates extinguishment** from the grant ([119]).
  - "Save where statute otherwise provided, that essence denied to anyone else the enjoyment of any right or interest in respect of the land … includ[ing] a right … of exclusive possession" ([116]; see also [119]).

Kirby J — Dissent

- No **total exclusion** of Indigenous people "in the sense reflected in **Mabo [No 2]**": "there is nothing in the statute or grant that should be taken as a **total exclusion** of the indigenous people from the land" (quoting **Wik**) ([163]).
- Proper NTA pathway: characterise as a **previous non-exclusive possession act** (likely, given **grazing-only** clause), then apply **inconsistency of incidents** to define **partial extinguishment/suspension** ([165]–[168]).
  - "The lease did **not** include a right of exclusive possession" ([163]); painstaking inconsistency analysis is required ([168]).

Callinan J (McHugh J agreeing) — Majority

- Reservations of entry etc **do not negate** exclusive possession; such reservations are **compatible** with ordinary leaseholds/freehold ([203]).
- A **lease in perpetuity** can retain **exclusive possession** despite unusual reversionary features: it is a **statutory lease** adapted to local conditions but keeping core **common-law lease** characteristics ([204]).
- **Conclusion:** Distinguishable from **Wik**; the lease **does confer exclusive possession within the NTA meaning** ([205]).
  - Reservations "are entirely compatible with ordinary leaseholds and also with freehold titles" ([203]); the lessee in perpetuity should not be "in a worse position" than a term lessee ([204]).

PRINCIPLES

1. **Characterisation of statutory "lease in perpetuity" (NSW WLA):** A statutory tenure may carry **common-law lease incidents** unless displaced; historically designed to give **"essence of a freehold"**, including **exclusive possession** ([18]–[20], [112]–[119]).
2. **Reservations/conditions ≠ negate exclusivity:** Extensive statutory **reservations of entry/controls** are **compatible** with exclusive possession; they are **conditions** attached to what is substantively a freehold-like grant ([114]–[118], [203]–[204]).

Lecture

Constitutional + Statutory Foundations

Race power — s 51(xxvi) Constitution

- Commonwealth power to make laws *"with respect to any race for whom it is deemed necessary to make special laws."*
- Basis for the **Native Title Act 1993 (Cth) (NTA)**.

NTA, s 223 — Definition of "native title/rights and interests"

- **Communal, group or individual** rights/interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
  (a) possessed under **traditional laws** acknowledged and **traditional customs** observed;
  (b) by those laws/customs there is a **connection** with the land/waters; and
  (c) **recognised by the common law of Australia**.
- **s 223(2)** confirms hunting, gathering and fishing can be native title rights.
- **Key qualifier:** rights must be **recognised by the common law of Australia** → drives the case law.

"Common law of Australia" notion

- Emphasis that our courts speak of the **common law of Australia** (not of England), crystallising especially after **1986** when the **final appeals to the Privy Council were abolished** (Australia Acts 1986).
- Re-reading of earlier authorities may therefore differ in the modern, post-1986 frame.

Pre-Mabo Baseline: Colony Categories

Cooper v Stuart (1889) 14 App Cas 286 (PC)

- Distinguished colonies:
  1. **Conquest or cession** with existing "settled law"; vs
  2. **"Practically unoccupied"** territories without settled inhabitants or law → English law applied **so far as applicable**.
- Australia was assumed to be in category (2), feeding into *terra nullius* thinking.
- Not about native title (about perpetuities), but its taxonomy framed later debates.
- **What it did not consider:** whether the **common law could accommodate interests of the Indigenous inhabitants** despite assumptions about "settled law".

Mabo — Foundational Turn

Mabo v Queensland (No 2) (1992) 175 CLR 1 (HCA, **4:3**)
Facts: Murray (Mer) Islands in Torres Strait; claims by Islander community.
Three seminal propositions:

1. **Rejection of "practically unoccupied"** in 1788: Australia was **occupied**; *terra nullius* denied.
2. **Reception of English common law** in 1788 **qualified** by **native title** — the common law **recognises** native title according to traditional laws and customs.
3. **Meriam people's title recognised** to **possession, occupation, use, enjoyment** of the Murray Islands.
   Extinguishment principles emerging:

- **Grant of a fee simple** confers **exclusive possession** and **extinguishes native title** to the extent of inconsistency.
- **Valid legislation** (e.g., State Acts) can **extinguish or impair** native title (subject to constitutional constraints and inconsistency with Commonwealth law).
  Policy aftermath: NTA enacted in **1993** to create a national framework.

Extinguishment by Freehold: Permanence

Fejo v Northern Territory (1998) 195 CLR 96 (HCA, **unanimous**)

- **Scenario:** Fee simple granted in **1882** over land near Darwin (then in the Colony of South Australia). In **1927**, the Commonwealth **compulsorily acquired** the land for a quarantine station. In **1996**, Traditional Owners sought recognition of native title.

- Personal equity against A does not bind later innocent RP B (*Ong v Luong* (1991) NSW Conv R 55-597; *PT Ltd v Maradona* (1992) 25 NSWLR 643 at 675).
- Equity-holder can restrain A's registration pending protection (*Silovi v Barbaro* (1988) 13 NSWLR 466).

Overriding Statutes

- Torrens indefeasibility not immune to **later inconsistent legislation**.
- May override expressly or by implication.
- Examples:
  - Rating/taxing statutes imposing charges (e.g. *Local Government Act 1993* (NSW) s 550).
  - Statutes creating overriding interests without provision for registration (*South Eastern Drainage Board v Savings Bank of SA* (1939) 62 CLR 603 at 625).
  - Divesting statutes: land vested in councils/authorities despite register (*Pratten v Warringah Shire Council* (1969) 90 WN (Pt 1) 134; *Quach v Marrickville Council* (1990) 22 NSWLR 55).
  - Planning legislation overriding Torrens: *Hillpalm v Heaven's Door* (2002) 55 NSWLR 446; HCA appeal (2004) 220 CLR 472 — issue of consent conditions.
- **RPA s 42(3)** (inserted 2009): s 42 prevails unless later Act expressly overrides. But Parliament may still override without formula (*South Eastern Drainage Board*).

Unregistered Interests

Status

- s 41(1) RPA: unregistered dealings ineffective to pass estate/interest until registered.
- But courts recognise rights from the underlying transaction → **equitable (or quasi-equitable) interests** (*Barry v Heider* (1914) 19 CLR 197; *Brunker v Perpetual Trustee* (1937) 57 CLR 555).
- Supported by s 74F(1): caveat may protect interest arising "by virtue of unregistered dealing … or otherwise".

Priority

- Registered > unregistered (*Leros v Terara* (1992) 174 CLR 407).
- Unregistered extinguished by later registration, unless RP promises to respect interest (*Snowlong v Choe* (1991) 23 NSWLR 198; *Ryan v Starr* (2005) 12 BPR 22,803).
- Between unregistered: equitable priority rules apply — *qui prior est tempore potior est jure*.
- Some unregistered interests may be **legal**, not equitable:
  - Unregistered lease ≤3 years complying with s 23D(2) Conveyancing Act 1919 (NSW) (*R v Kontos* [1966] 2 NSWR 38 at 44).
  - Tenancy at will implied by statute.
  - Life estate under pre-1890 wills.
  - Implied easements (though debate if equitable only).
  - Adverse possession.

Caveats under the Real Property Act 1900 (NSW)

Nature of Caveats

- **s 74F(1) RPA**: a person ("caveator") claiming a **legal or equitable estate/interest** in Torrens land (via unregistered dealing, devolution of law, or otherwise) may lodge a caveat prohibiting registration of dealings affecting that interest.
- No need for threat to interest; only requirement = caveator has the interest (though penalties exist for lodging without reasonable cause).
- Caveat effective on lodgement → occurs when Registrar-General allocates reference (s 36(1B)) (*Ginger Development Enterprises v Crown Developments* (2003) 12 BPR 22,607 at [35]).
- Lodging a caveat does not prevent caveator seeking injunction/equitable relief simultaneously (*Walsh v Alexander* (1913) 16 CLR 293 at 304, 306; *Hamdan v Widodo* [2004] WASC 123).
- Other statutory caveats:
  - s 74F(2): RP may lodge if fearing improper dealing (e.g. mortgagor fearing improper mortgagee sale: *Sinclair v Hope Investments* [1982] 2 NSWLR 870).
  - s 74F(3): caveat where land subject to possessory application.

- s 74F(4): caveat re land under delimitation plan ("limited title").
- s 74B: caveat where land subject to primary application.

- Registrar-General may lodge caveats: s 12(1)(e), (f), e.g. error in description, to prevent fraud, protect disabled persons, trusts (s 82(3)).

Caveatable Interests — Requirement of Proprietary Interest

- Must be **proprietary** (legal or equitable interest).
  - Cannot caveat for mere contractual/personal right (*Simons v David Benge Motors* [1974] VR 585; *McMahon v McMahon* [1979] VR 239).
  - Must exist **at time of lodgement** (*Martin v Official Trustee* [1990] Tas R 65). Future interests not yet arisen = not caveatable, unless they arise simultaneously with lodgement (*Murphy v Wright* (1992) NSW Conv R 55-652).
  - Statute-barred interests cannot support caveat (*Verebes v Verebes* (1995) 7 BPR 14,408).
- Construction of instrument must show intent to create interest (*Nguyen v Kaha* [2008] NSWSC 794).

Common caveatable interests:

- Purchaser under contract (even conditional): *Jessica Holdings v Anglican Property Trust* (1992) 27 NSWLR 140.
- Mortgagee, including equitable mortgage (deposit of deeds/agreement): *Re Elliot* (1886) 7 LR (NSW) 271.
- Chargee (*Avco Financial Services v White* [1977] VR 561).
- Unitholder in unit trust (*Costa & Duppe Properties v Duppe* [1986] VR 90).
- Beneficiary of restrictive covenant (*Midland Brick v Welsh* (2006) 32 WAR 287).
- Lessee/tenant (*Antar v Fairchild Development* [2008] NSWSC 638).
- Contributor to purchase price (constructive trust) (*Marling v Marling* (1992) 16 Fam LR 161).
- Option to purchase (call/put): *Laybutt v Amoco* (1974) 132 CLR 57; *Allam Homes v Vocata* (2004) NSW Conv R 56-090.
- Right of pre-emption: not caveatable until crystallises on owner deciding to sell (*Walker Corp v Pateman* (1990) 20 NSWLR 624).

Non-caveatable interests:

- Family Law Act / Property (Relationships) Act claims by themselves (*Bethian v Green* (1977) 3 Fam LR 11,579; *Ryan v Kalocsay* [2009] NSWSC 1009).
- Work performed on land (*Dolroy v Civilco Constructions* [2007] NSWSC 1263).
- Beneficiaries of discretionary trust (*Walter v Registrar of Titles* [2003] VSCA 122).
- "Mere equities" (e.g. to set aside transaction) generally not caveatable, but some cases allow (e.g. fraud misrep option-holder: *Ruthol v Mills* (2003) 11 BPR 20,793).

Agreement to Grant Caveatable Interest

- Contract may create proprietary interest (e.g. charge over land), supporting caveat (*Griffith v Hodge* (1979) 2 BPR 9474; *Troncone v Aliperti* (1994) 6 BPR 13,291).
- Courts construe "right to lodge caveat" clauses as implying creation of charge (unless facts show otherwise: *Taleb v NAB* (2011) 82 NSWLR 489).
- BUT: mere contractual right/unsecured loan repayment not caveatable (*Nguyen v Kaha* [2008] NSWSC 794).

Agreement Not to Lodge Caveat

- NZ: enforceable, not against policy (*Landco Albany v Fu Hao* [2006] 2 NZLR 174).
- Aus: does not remove statutory right to caveat (*Lintel Pines v Nixon* [1991] 1 VR 287), but breach of contract may influence court in extension/removal applications (*Australian Property & Management v Devefi* (1997) 7 BPR 15,255).

Need for Registrable Interest?

- Earlier dicta (PC in *Miller v Minister of Mines* [1963] AC 484) suggested caveat required registrable instrument.

- If Sheriff sells after expiry:
  - If no competing dealing → transfer registered (s 105A(7)(a)).
  - If other registered proprietor for value → Sheriff's transfer not registered (s 105A(7)(b)).
  - If competing dealing awaiting registration → Sheriff's transfer not registered (s 105A(7)(d)).
  - If voluntary dealing lodged → Sheriff's transfer registered, voluntary dealing cancelled (s 105A(8)).

Indefeasibility

***Real Property Act 1900* (NSW)**

41 Dealings not effectual until recorded in Register

1. No dealing has effect to pass an estate/interest in land under this Act, or make the land liable as security for money, until it is **registered**. Once registered:
   - The estate/interest in the dealing passes, OR
   - The land becomes liable as security,
   - subject to the covenants, conditions, contingencies in the dealing, or those implied by this Act.
2. *Repealed.*

42 Estate of registered proprietor paramount

1. Despite any other person having an estate/interest that would otherwise be paramount, the registered proprietor of an estate/interest in a folio holds it:
   - Subject to the estates/interests and entries recorded in that folio,
   - But otherwise **absolutely free** from all unrecorded estates/interests, **except**:

   a. An estate/interest recorded in a prior folio where another proprietor claims the same land.

   a1. An omitted/misdescribed **easement** that existed before the land came under this Act, or was validly created after.

   b. An omitted/misdescribed **profit à prendre**.

   c. Any portion of land wrongly included in the folio/registered dealing by description of parcels/boundaries, unless the proprietor is a purchaser/mortgagee for value (or deriving from such).

   d. A **tenancy** where the tenant is in possession or entitled to immediate possession, and an agreement/option for a further term where the registered proprietor had notice of it and was not protected—provided that:
      i. the tenancy term does not exceed 3 years, and
      ii. the agreement/option would not extend beyond 3 years in total with the original term.
      iii. *Repealed.*
2. Reference to "estate/interest in land recorded in a folio" includes estates/interests in a registered mortgage, charge, or lease identifiable from the folio.
3. This section overrides inconsistent laws unless the other law expressly says it applies despite this section.

43 Purchaser from registered proprietor not to be affected by notice

1. Except in fraud, no purchaser/mortgagee/dealer with the registered proprietor:
   - Needs to inquire into how/why that proprietor (or prior ones) became registered.
   - Needs to check application of purchase money.
   - Is affected by notice of trusts/unregistered interests, even if aware of them.

   Mere knowledge of a trust/unregistered interest does not = fraud.
2. Subsection (1) does not defeat claims based on a **subsisting interest** under Part 4A (qualified folios).

45 Bona fide purchasers and mortgagees protected

1. Except where this Act expressly provides otherwise, nothing deprives a bona fide purchaser/mortgagee for value, who is the registered proprietor, of their estate/interest.
2. No proceedings for damages or recovery of land lie against such a purchaser/mortgagee merely because:

***Frazer v Walker* [1967] 1 AC 569**

FACTS: Mr and Mrs Frazer were joint registered proprietors of land (farm in Auckland). Land was mortgaged to Bailey (£1,732 owing). In 1961, Mrs F, without authority from Mr F, arranged a loan of £3,000 from mortgagees (second respondents), secured by mortgage over the land. She forged Mr F's signature on the mortgage; it was nonetheless registered on 21 July 1961. No repayments were made → mortgagees exercised power of sale. Property sold at auction to Mr Walker (first respondent) for £5,000 who became registered proprietor on 29 Nov 1962. All mortgagees and purchasers acted in **good faith** without knowledge of the forgery. Mr F counter-claimed, alleging forgery, and sought declarations that the mortgage and subsequent transfer were void and his title be restored.

ISSUE: Whether registration of a forged mortgage and subsequent transfer could confer an **indefeasible title** on mortgagees and purchaser. Specifically: could the registered mortgagee and bona fide purchaser rely on indefeasibility provisions despite forgery?

HELD: Appeal dismissed. Both the mortgagees and Walker (purchaser) obtained **indefeasible title by registration**. Registration, not validity of instrument, is the source of title. Frazer's claim against both the mortgagees and Walker was barred by the Land Transfer Act 1952 (NZ).

REASONING Lord Wilberforce:

Registration confers title, not the underlying instrument

- Even if there was non-compliance with statutory requirements (forged signature), "registration once effected must attract the consequences which the Act attaches to registration whether that was regular or otherwise" ([1967] 1 AC 569 at 580).
- It is the **fact of registration**, not the validity of antecedent dealings, that vests and divests title.

Indefeasibility of registered proprietors

- Sections 62 and 63 confer protection: registered proprietor holds land "absolutely free" from encumbrances except fraud, and is protected from actions for recovery except specified cases.
- These protections amount to **"indefeasibility of title"**, i.e. immunity from attack by adverse claim ([1967] 1 AC 569 at 581).
- Fraud exception is limited to **actual fraud by the registered proprietor or their agent** (*Assets Co Ltd v Mere Roihi* [1905] AC 176).

Conclusiveness of certificate of title

- Section 75 makes the certificate "conclusive evidence" of the registered proprietor's estate/interest ([1967] 1 AC 569 at 581).

Court's limited power to cancel

- Court's cancellation power (s 85) arises only in proceedings not barred by s 63. Since Frazer's claim was an action for recovery of land barred by s 63, no power to cancel ([1967] 1 AC 569 at 582).

Position of mortgagees (second respondents)

- Mortgage = estate/interest in land. Frazer's action against mortgagees was for recovery of land, barred by s 63.
- No fraud by mortgagees → indefeasible title as mortgagees ([1967] 1 AC 569 at 583).

Position of Walker (first respondent purchaser)

- Claim against him also barred by s 63.
- Even if not, s 183 protects a **purchaser bona fide for value** against deprivation of title "on the ground that his vendor or mortgagor may have been registered ... through fraud or error, or under any void or voidable instrument ... or otherwise howsoever" ([1967] 1 AC 569 at 585).
- Section extends to mortgagee exercising power of sale: "it extends to the case of a mortgagee who is 'proprietor' of the mortgage and who has power of sale over the fee simple" ([1967] 1 AC 569 at 586).

Distinguishing Gibbs v Messer

- In *Gibbs v Messer* [1891] AC 248, title was derived from a fictitious person, not a real registered proprietor. That case does not apply where claim is against a real registered proprietor ([1967] 1 AC 569 at 584).

In personam actions

Recognition that indefeasibility does not exclude actions in personam: "plaintiff may bring against a registered proprietor a claim in personam ... for such relief as a court acting in personam may grant" ([1967] 1 AC 569 at 585).

PRINCIPLES:

- s 100 deems joint tenants "entitled as joint tenants", but doesn't merge them into a single legal person for fraud purposes.
- Indefeasibility requires fraud to be "brought home" to specific registered proprietor.
- Innocent joint tenant's title remains indefeasible: Schultz v Corwill Properties [1969] 2 NSWR 576 applied.

Section 118 RPA

- s 118(1)(d)(ii) extends fraud exception: proceedings can be brought against a person **deriving from or through** a fraudulent registered proprietor unless transferee is bona fide purchaser for value.
- Claude was registered "through fraud" ([55]–[57]).
- Felicity derived her half share from him in 2000; she gave only $1 → not bona fide purchaser.
- Thus her later sole title defeasible as to Claude's half.

Keane J's dissent

- Joint tenancy = one estate: "vis-à-vis outside world, one single owner" (*Wright v Gibbons* (1949) 78 CLR 313, 330).
- Registration of both = registration through fraud, infecting both.
- Felicity's whole title defeasible, even though she wasn't personally fraudulent.

PRINCIPLES

- **Fraud exception requires personal dishonesty** of proprietor or their agent; mere receipt of benefit not enough.
- **Joint tenancy under Torrens:** Fraud by one does not taint innocent joint tenant; s 100 does not impute fraud.
- **Section 118(1)(d)(ii):** Extends fraud exception → subsequent transferee from fraudulent proprietor not protected unless bona fide purchaser for value.
- Thus: Innocent joint tenant's initial registration is safe; but later transfers from fraudulent co-tenant may be defeasible if not for value.
- Confirms **title by registration** principle: registration itself vests/ divests title (Breskvar v Wall (1971) 126 CLR 376, 385 per Barwick CJ).

The Register

***Real Property Act 1900* (NSW)**

3A Application of Act to electronic form plans and other documents

1. This section applies to:
    a. plans lodged under this Act, and
    b. other documents that must, under this Act or another Act, be lodged with those plans.
2. In this Act:
    a. a "plan" or "document" includes an electronic data file of the plan or document,
    b. "lodging" includes electronic lodgment in a form approved by the Registrar-General,
    c. a "sheet" of a plan or document in electronic form means a sheet that would appear if the document were printed in hard copy without re-pagination.
3. If a plan is lodged electronically, then all required accompanying documents must also be lodged electronically in an approved form, unless excepted by:
    a. regulations under this or another Act, or
    b. the Registrar-General.
4. Any signature, seal, certificate, consent or approval needed to authenticate or authorise registration of an electronic plan must be placed on an **approved signature form**. That form must also be lodged electronically in a Registrar-General–approved form.
5. This Act applies to electronically lodged plans and documents in the same way as to hard-copy documents, subject to any modifications set out in this Act, the Conveyancing Act 1919, or their regulations.

31B The Register

1. The Registrar-General must maintain a Register for this Act.

(c) evidence of right to enter the Transaction;
(d) VOI evidence; and
(e) evidence of compliance with Prescribed Requirements.

6.7 Compliance with laws and Rules
Comply with applicable laws (including Privacy Laws) of the relevant Jurisdiction and these Participation Rules.

6.8 Compliance with directions
6.8.1 Comply with any reasonable direction of the Registrar.
6.8.2 Comply with any direction of the Registrar, or of an ELNO at the Registrar's direction, given in response to an ECNL emergency, in the manner and timing stated.

6.9 Assistance
Provide reasonable assistance to the Registrar, the ELNO and each other Subscriber to enable compliance with the ECNL and Land Titles Legislation for a Conveyancing Transaction.

6.10 Protection of information
Take reasonable steps to protect information received from other Subscribers, Clients, the Registrar or an ELNO from unauthorised use, reproduction or disclosure.

6.11 Information
Take reasonable steps to ensure all information supplied for a Conveyancing Transaction is, to the Subscriber's knowledge, information and belief, correct, complete and not false or misleading.

6.12 No assignment
Do not assign, novate, transfer or otherwise deal with the Subscriber's ELN subscription.

6.13 Mortgages
6.13.1 Where a mortgagor (as mortgagor) is not a Subscriber or represented by a Subscriber, the mortgagee or its Representative must:
(a) ensure the mortgagor grants a mortgage on the same terms as the mortgage signed by/on behalf of the mortgagee; and
(b) hold the mortgage granted by the mortgagor; and
(c) provide Certification 5 of the Certification Rules; and
(d) for a transfer of mortgage, ensure the transferee mortgagee (or its Representative) holds the mortgage granted by the mortgagor.
6.13.2 Where the mortgagee or Representative signs the mortgage, the mortgagee signs only for itself, not for the mortgagor.

6.14 (Deleted)

6.15 Conduct of Conveyancing Transactions
The Subscriber must:
(a) comply with the laws of the relevant Jurisdiction on who can conduct a Conveyancing Transaction; and
(b) take reasonable steps to ensure a Signer complies with those laws for conducting a Conveyancing Transaction and Digitally Signing electronic Registry Instruments and other electronic Documents.

<u>Schedule 3 — Certification Rules</u>
For each Registry Instrument/Document, the Certifier certifies:

1. They have taken reasonable steps to verify the identity of the relevant party (e.g., transferor, transferee, mortgagor, mortgagee, caveator, applicant, covenantor, covenantee, encumbrancer/encumbrancee, grantor/grantee, lienor, lessor/lessee, receiving/relinquishing party) or their administrator/attorney.
2. They hold a properly completed Client Authorisation for the Conveyancing Transaction (including this Instrument/Document).
3. They have retained the evidence supporting this Instrument/Document.

- **Enforceable only on termination/appropriate proceedings** — "**defensive/passive**" right (*Brickwood* 395, 401; *Squire v Rogers* (1979) 39 FLR 106, 125).
- Operates like an **equitable charge**, **runs with the land** (subject to priority/notice; defeated by bona fide purchaser or Torrens registration of transferee of burdened share): *Brickwood* 396, 399; *Ruptash v Zawick* (1956) 2 DLR (2d) 145.

Quantum

- **Lesser of**: (1) **amount expended**; **or** (2) **present enhancement value** at termination/proceedings date; **zero** if no added value (*Re Jones* [1893] 2 Ch 461, 479; *Squire v Rogers* 125–126; *Forgeard* 223)
- **No inflation uplift**; **no borrowing costs/interest** on funds for improvements (*McMahon*; *Houghton v Immer (No 155)* (1997) 44 NSWLR 46, 57).
- If using **contractor**, include **materials + labour**; if **DIY**, **materials only** (no labour): *Squire v Rogers*; *Cardinaels-Hooper* (1995) 7 BPR 14,435 at 14,441.
- **Interest** on allowance is discretionary (*Re Dugac*; *Forgeard* (trial)).

How to calculate/distribute

- Two equivalent methods on **sale** of equal shares:
  - (i) pay allowance **off the top**, then split balance equally; or
  - (ii) split equally, then **debit** one share by **½ of allowance** and pay to improver (*Re Jones*; *Re Cook's Mortgage* [1896] 1 Ch 923).

Occupation Fee (aka occupation rent)

General rule

- Each co-owner has a **right to occupy** the **whole** with others; **no occupation fee** merely for exercising that right (common law & equity): *Luke v Luke* (1936) 36 SR (NSW) 310; *Jones v Jones* [1977] 1 WLR 438; *Forgeard* 223; *Segal v Barel* (2013) 84 NSWLR 193.

Exceptions — fee is payable if:

1. **Agreement** to pay (creates liability): *Cowper v Fletcher* (1864) 6 B & S 464.
2. **Ouster** — wrongful exclusion/denial of title (e.g., changing locks; violence/threats; obstructive "constructive ouster"): ejectment/mesne profits historically; must amount to denial of title (*Biviano v Natoli* (1998) 43 NSWLR 695; *Dennis v McDonald* [1982] Fam 63; *Paraz v Paraz* [2010] QSC 203).
3. **Relationship breakdown — "no-fault ouster" principle (NSW/UK line):** where domestic relationship **breaks down**, it is **impractical/unreasonable** for both to remain; the one remaining **may owe** an occupation fee **even without ouster** (*Callow v Rupchev* (2009) 14 BPR 27,533 [35], [46], [59]–[60], [71], following *Dennis v McDonald*; *Re Pavlou*).
   - Not universal: **SA** rejected liability **absent** improvements/mortgage contribution claim (*W v D* (2012) 115 SASR 61 [73]–[74]).
   - **Victoria statutory solution: Property (Co-ownership) Act 2005 (Vic) → PLA (Vic) s 233(3)**: court **may** order occupation rent on relationship breakdown if the applicant **"has suffered a detriment"** → broader **discretion**.

Set-off against improvements claim

- If an **occupying** co-owner claims **allowance for improvements/lasting repairs (incl. mortgage payments)**, must **set off** an **occupation fee** (cannot exceed allowance): *Teasdale v Sanderson* (1864) 33 Beav 534; *Brickwood*; *Ryan v Dries* [71]; *W v D* [73]–[74].
- **Convenience approach:** treat **interest** portion of mortgage instalments as **proxy** for occupation fee, credit **capital** only (not mandatory): see above.

Calculating the fee

- Start with **market rent**, then apply **proportionate interest** of which exclusive occupation enjoyed (½ for equal TIC/JT; ⅔ if 1 of 3 occupies; adjust for unequal shares): *Biviano* 703–704; *Ryan v Dries* (43%).
- **Adjustments** possible:

- “From 1 Jan 2006” usually excludes it so term begins 2 Jan (*Ackland v Lutley* (1839) 9 Ad & El 879; 112 ER 1446).
- These are presumptions only and can be displaced by context.

Implied commencement:

- No express date, but:
    - Entry into possession and payment of rent implies start date at possession (*Jopling v Jopling* (1909) 8 CLR 33 at 39; *Jenkins v Harbour View Courts Ltd* [1966] NZLR 1 at 16, 31).
    - Courts aim to uphold, not destroy bargains (*Darling Point Securities Pty Ltd v Industrial Equity Pty Ltd* (1991) NSW Conv R 55-589 at 59,325).

5.3 Duration

- Maximum duration must be certain or capable of being rendered certain when the lease takes effect.

Invalid examples:

- “For the duration of the war” (*Lace v Chantler* [1944] KB 368).
- “Until end of peanut crop/harvest period/as otherwise agreed” (*Bishop v Taylor* (1968) 118 CLR 518 at 523).
- “For as long as lessee holds shares” (*Re Lehrer and the Real Property Act* [1961] SR (NSW) 365 at 377).
- “Until completion of new premises” (*Mangiola v Costanzo* [1980] ANZ Conv R 331).
- “Until land required for road widening” (*Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386).
- “Until X ceases trading” (*Birrell v Carey* (1989) 58 P & CR 184).
- “Until 14 days after registration of subdivision” (*Pemberton v Dimitrijevic* [2001] NSWSC 54).

Valid where maximum certain but determinable early:

- “20 years or sooner ending of the war” (*Prudential Assurance* at 395).
- “21 years, determinable if tenant ceases to live on premises” (*Doe d Lockwood v Clarke* (1807) 8 East 185; 103 ER 313).

Exceptions to certainty:

1. Tenancies at will.
2. Tenancies at sufferance.
3. Periodic tenancies (each period certain; tenancy rolls on).
4. Leases for life:
    - Do not offend certainty (*Haslam v Money for Living (Aust) Pty Ltd* (2008) 172 FCR 301; *Greco v Swinburne Ltd* [1991] 1 VR 304).
    - *Berrisford v Mexfield Housing Co-operative Ltd* [2012] 1 AC 955 applies old English trick of treating uncertain grants to individuals as life leases then converting to 90-year terms.
    - Australian courts generally still strike down uncertain term leases and have not clearly adopted *Berrisford* (*Re Lehrer*; *Wilson v Meudon Pty Ltd* [2005] NSWCA 448 at [65]).

Statutory overrides:

- Statutes can relax certainty, eg “perpetual” Crown leases, residential tenancy regimes.

5.4 General points

- Void for uncertainty but tenant in occupation paying rent:
    - Statutes may treat as tenancy at will/periodic tenancy (*Conveyancing Act 1919* (NSW) s 127; *Property Law Act 1974* (Qld) s 129; *Property Law Act 1969* (WA) ss 71–72).
- No retrospective vesting at common law:
    - Term cannot start before date of grant, eg “7-year term from one year ago” gives only 6 years from today (*Cadogan (Earl) v Guinness* [1936] Ch 515 at 518; *Bradshaw v Pawley* [1980] 1 WLR 10 at 14–15; *Lee v Perno Holdings Pty Ltd* (1993) 33 NSWLR 404 at 409).
- Parties can:

- If tenant pays all arrears (and usually landlord's costs) within a reasonable time, relief is often granted, subject to statute and factors like persistent default, prejudice and overall conduct.

Merger, Surrender and Frustration

A. Merger

A.1 Common law vs equity; statutory position
Common law

- If reversion and leasehold vest in same person, the lesser interest (lease) merges in the greater (reversion) and is destroyed, regardless of intention (*Rye v Rye* [1962] AC 496 at 505, 513).

Equity

- Merger is a question of intention:
  - If holder of both interests intends to keep them separate, there is no merger (*Belaney v Belaney* (1867) LR 2 Ch App 138; *Capital and Counties Bank v Rhodes* [1903] 1 Ch 631; *Re Attkins* [1913] 2 Ch 619).
  - Focus is whether person intended to keep both interests alive (*Budget Rent-A-Car System Pty Ltd v BS Stillwell & Co Pty Ltd* (1989) V Conv R 54-336 at 64,203).
- Intention is usually in instrument acquiring second interest, but can also be proved by words or conduct before or after (*Reading v Fletcher* [1917] 1 Ch 339 at 342).
- NSW: s 10 *Conveyancing Act 1919* (NSW) picks up equitable rule, so intention generally governs.

A.2 Torrens title

- For Torrens land with registered lease:
  - Lease remains on foot until Registrar-General records merger in Register (*Cooper v FCT* (1958) 100 CLR 131 at 142; *Shell Co of Australia Ltd v Zanelli* [1973] 1 NSWLR 216 at 220–221).
- In equity:
  - Once freehold and leasehold vest in same person, merger can occur (if intended) before recording; an interested party can compel an appropriate recording (*Buchanan Borehole Collieries Pty Ltd v NSW Coal Compensation Tribunal* (1997) 9 BPR 16,253 at 16,255).

B. Surrender

B.1 Nature and effect

- Lease can end by surrender:
  - Express; or
  - By operation of law.
- Surrender:
  - Ends future obligations under lease (*New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569).
  - Does not release liability for past breaches (*Richmond v Savill* [1926] 2 KB 530 at 543–544).
  - Can be as to part only of premises (*Penny v Craber* [1967] 1 NSWR 683; *Allen v Rochdale Borough Council* [2000] Ch 221 at 232–233).

B.2 Express surrender
Old system land

- Surrender of an interest in land must be by deed to be effective at common law: s 23B(1) *Conveyancing Act 1919* (NSW).
- Exception: surrender by operation of law preserved: s 23B(2).

Equity

- Writing is sufficient: s 23C *Conveyancing Act 1919* (NSW).

- For leases of uncertain duration (for example tenancy at will) or determinable on short notice (for example weekly tenancy) where fixtures cannot reasonably be removed before termination, tenant may remove within a reasonable time after term ends (*Smith v City Petroleum Co Ltd* [1940] 1 All ER 260 at 262A).

Contractual limits

- Leases often regulate time:
  - Removal only during term; or
  - Within specified period after expiry (*Australian Airport Services Pty Ltd v Commonwealth* (1976) 10 ALR 167; *Vopak Terminal Darwin*).
- Example: short form covenant 22 in Sch 4 *Conveyancing Act 1919* (NSW) limits removal to "at or prior to the expiration of the lease"; after that, removal is barred unless estoppel operates (*Harper v Gaynor* (1893) 19 VLR 675; *Vopak Terminal Darwin*).

Beyond explicit terms – historic views

- Common law had four views:
  1. No right after expiry.
  2. Right continues while tenant remains **lawfully** in possession.
  3. Right continues while tenant remains in **actual** possession.
  4. Right continues for a reasonable time after expiry, even after vacating.
- Recent English and Australian authority favours (2):
  - Tenant loses right if they vacate without removing fixtures (abandonment).
  - Tenant who remains lawfully in possession (for example holding over with consent, or under new lease) may remove fixtures for as long as lawful possession continues.
  - No right to remove as trespasser (*New Zealand Government Property Corp v HM & S Ltd* [1982] QB 1145; *D'Arcy v Burelli Investments Pty Ltd* (1987) 8 NSWLR 317 at 322).
- Some cases still recognise a reasonable grace period after expiry, suggesting a modern trend (*McMahon's (Transport) Pty Ltd v Ebbage* [1999] 1 Qd R 185 at 198; *Kyriacou v Manakis* [2006] NSWSC 804 at [25]–[29]).

D.9 Intervention of third parties

- Generally, tenant's right to remove fixtures cannot be exercised against:
  - A mortgagee of land, whether fixtures attached before or after mortgage (*Re NSW Co-operative Ice and Cold Storage Co* (1891) 7 WN (NSW) 122).
  - A later tenant, except where:
    - Right of removal is drafted as legal interest binding successors; or
    - New tenant agrees (expressly or impliedly) to allow removal (*Shell Co of Australia Ltd v Bailey* [1980] WAR 233 at 245–246).

D.10 Agricultural fixtures –
Agricultural Tenancies Act 1990
(NSW)

- At common law, tenant's right to remove did **not** extend to agricultural fixtures (*Elwes v Maw* (1802) 3 East 38; 102 ER 510).
- s 10 *Agricultural Tenancies Act 1990* (NSW):
  - Applies to tenants of a "farm".
  - Tenant may remove fixtures they installed and for which they do not claim and are not entitled to claim compensation.
  - Removal must occur:
    - Before tenant leaves farm; or
    - Within reasonable time after leaving: s 10(1).
  - Tenant must:
    - Give owner reasonable notice of intention to remove: s 10(3).
    - Allow owner to elect to purchase fixtures: s 10(4).
    - Comply with obligations and avoid or repair damage to farm or other fixtures: s 10(5).

- Young JA:
  - Whole picture must be considered, including effect on servient land and that the necessity was self-created.
  - Even if access seems necessary “considered by itself”, the court may refuse because of disproportionate impact on servient owner and discretionary factors.

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4. Implied easements

General idea

- Implied easement arises where the law implies a **grant or reservation** of an easement into a conveyance, even though not expressly granted.
- Based on **presumed intention** of parties at time of transaction.
- Common situations:
  - Abutting private road.
  - Common intention easements.
  - Non-derogation from grant.
  - Continuous and apparent easements (Wheeldon v Burrows doctrine).
  - Easements of necessity.

4.1 Abutting private road

- Where land is conveyed/leased and is described as **abutting a private road** owned by the vendor, an easement to use the road is implied.
- Applies to Torrens land but is of limited modern importance due to few private roads remaining.

Dabbs v Seaman
(1925) 36 CLR 538

- Land under RPA. Plan showed land bounded by a “20 feet lane” which was part of transferor’s land.
- Isaacs J:
  - Where A transfers part of their land described as bounded by a 20 ft lane on the retained land, and transfer is registered, then B (transferee), in absence of contrary provision, is entitled:
    1. To have land marked “20 feet lane” preserved as such.
    2. To a right of way over the lane.
- Later case *Cowlisaw v Ponsford* (1928) SR (NSW) 331 at 336 limited application to situations where the road is also Torrens land.

4.2 Common intention easements

- Where parties to a grant **share a common intention** as to the use of the land and an easement is **necessary** to give effect to that intention.
- *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634 is the classic authority.

Examples:

- *Richards v Rose* (1853) 9 Ex 218:
  - Sale of one of two adjoining houses sharing a common support wall gave an implied right of support.

Courts are cautious

- Grantor should usually make express grant.
- Common intention easements are only implied where necessary to give effect to the clearly intended use.

4.3 Non-derogation from grant

- A grantor must not **derogate from their grant**.

9.1 Express release

- Easement may be extinguished by:
  - Deed of release (old system), or
  - Appropriate dealing and registration (Torrens).

9.2 Abandonment

- Requires **intention to relinquish** the right.
- **Non-use alone is insufficient**; must be coupled with conduct indicative of intention to permanently give up the easement.

Treweeke v 36 Wolsely Road Pty Ltd
(1972) 128 CLR 274

- Two Double Bay blocks, subdivided in 1927.
- Block A (dominant, later flats) granted 3 ft right of way over Block B (servient) to access water.
- Over 40 years:
  - The path became impassable (bamboo, retaining wall, fence, swimming pool).
  - Occupiers used alternative routes.
- High Court held:
  - Fence construction did not prove intention to abandon; fence can be removed or gated.
  - Non-use over long period is evidence but must be explained.
  - Here, non-use explained by dangerous rock face and poor condition, not intent to surrender.
  - Easement not abandoned.

9.3 Statutory extinguishment – s 89 CA, s 49 RPA

- **CA s 89**:
  - Court may modify or extinguish obsolete restrictions or easements, including where:
    - Land has changed such that easement no longer confers practical benefit.
    - Beneficiaries have agreed in writing to modify/extinguish (s 89(1)(b)).
- **RPA s 49**:
  - After 20 years non-use, Registrar General may treat easement as abandoned for administrative purposes, but this does **not** change common law requirements for abandonment.

Pieper v Edwards
[1982] 1 NSWLR 336

- Express easement for carriageway registered on folio; Pieper bought dominant land in 1979; right of way was blocked by fence and gully pit.
- He was told easement still existed.
- In 1970, previous dominant owner had entered agreement with servient owner to release the easement, but transfer had never been registered.

Issue

- Servient owner Edwards applied under s 89(1) to extinguish easement based on prior agreement.
- Pieper argued:
  - He had indefeasible title to easement as recorded on Register.
  - Extinguishing it would undermine confidence in Torrens Register.

Held

- Court held s 89 assumes existence of a **registered** easement which may be subject to modification/extinguishment.
- If the Register were treated as conclusive and immune from s 89, the section's purpose would be defeated.
- Therefore, state of Register is not conclusive in these applications.

Powell JA

- **Obsolete?**
  - Purpose: protect views and privacy of main house and garden.
  - Still being fulfilled; not obsolete.
- **Reasonable use?**
  - Some medium density nearby, but not all; many houses remain.
  - Land has been used as single dwellings for over 70 years; still reasonable to use in that way.
  - Character of neighbourhood still consistent with detached dwellings.
- Result: no modification; Reed restrained from breaching covenants.

Environmental Planning & Assessment Act s 28 and covenants

Section 28(2)–(3) EP&A Act 1979

- s 28(2): an environmental planning instrument (EPI) may provide that, to the extent necessary to enable development in accordance with the EPI or a consent, a specified **regulatory instrument** (e.g. a covenant) does not apply or applies with modifications.
- s 28(3): such provision only has effect if the **Governor** has approved it before the EPI is made.

Key idea

- An LEP (or similar instrument) can, if properly drafted and Governor-approved, "switch off" or modify private covenants to allow development consistent with planning policy.

Case: Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd [2011] HCA 27

- Facts:
  - Properties in Werona Avenue and Stanhope Road, Killara.
  - Dalcross Hospital next door.
  - Cumerlong's land benefitted by a restrictive covenant preventing use of neighbouring land for hospital purposes.
  - Development consent granted under an LEP for hospital use.
  - LEP engaged s 28(2) by providing that, to enable development under it, the covenant would not apply.
  - However, the LEP had **not been approved by the Governor** under s 28(3).
- High Court:
  - Within s 28(2), LEP 194 is an EPI which purports to specify that the restrictive covenant shall not apply to the land to be developed.
  - But LEP 194 **cannot have that effect** because the Governor's approval required by s 28(3) was not given.
  - So the covenant **continued to bind**, despite the LEP and consent.

Textbook Ch. 10

Covenants affecting freehold land – exam notes (from extract)

[10.10] Land use & where covenants fit

- Owners with a freehold estate & exclusive possession can in principle do what they like on their land, but this is limited by:
  1. **Public law controls**
     - Planning, heritage, environmental laws, based on public interest.
  2. **Private law of torts**
     - Prevents certain non-consensual interferences (eg nuisance; see Ch 2).
  3. **Private law agreements about land use**
     - **Covenants / easements / leases** between individuals.

    - Unclear what happens to the **reversion**; if it disappears, device may only bind successors as against original covenantee.
    - It is "conveyancing virtuosity", largely **untested**.

[10.80] 3. "Benefit and burden" / conditional benefits principle

- Old principle: person taking the **benefit under a deed** must accept its **burdens** if they **knowingly accept** the benefit.
- Modern form (endorsed in *Rhone v Stephens* [1994] 2 AC 310 at 322):
    - Where:
        - Enjoyment of the benefit is **conditional** on assuming the burden; and
        - Benefit and burden are **genuinely reciprocal**
    - Then a successor who **uses the benefit** must also satisfy the burden.
- Classic case: *Halsall v Brizell* [1957] Ch 169
    - Lot owners got easements over estate roads and sewers and covenanted to contribute to their maintenance.
    - Successors in title who used the roads could be required to pay maintenance contributions.
    - Sometimes called the **"conditional benefits"** principle: the obligation is an "intrinsic part" of the right acquired (*Tito v Waddell (No 2)* [1977] Ch 106 at 296–299).
- Limits:
    - Successor must be **free to accept or reject** the benefit; if they do not use it, the burden does not arise (*Thamesmead Town Ltd v Allotey* (1998) 79 P & CR 557 at 563–565).
    - There must be **real reciprocity** – the burden must be **relevant to** the benefit (*Rhone v Stephens* [1994] 2 AC 310 at 322).
    - The burden won't extend to **every** obligation in the deed, only those closely linked to the benefit (*Thamesmead*; *Wilkinson v Kerdene Ltd* [2013] EWCA Civ 44).

[10.90] 4. Essential fabric of an easement

- Idea: certain obligations to maintain or repair the subject-matter of an easement can be seen as part of the **"essential fabric"** of that easement and so run with it.
- *Frater v Finlay* (1968) 91 WN (NSW) 730:
    - Covenant by owner of **benefited land** (dominant) to contribute to maintenance of the easement held to bind successors as incident to the easement.
- Distinction:
    - Covenant by the **grantor/servient owner** may be treated as **inherent to the grant**, part of the essential fabric (*Clifford v Dove* (2003) 11 BPR 21,149 at [66]).
    - Covenant by the **grantee/dominant owner** is harder to characterise that way and may not run (*Rufa Pty Ltd v Cross* [1981] Qd R 365 at 370–371).

[10.100] 5. Rentcharge securing performance

- **Rentcharge**: periodic payment charged on land and payable by the landowner (see Ch 11).
- Device:
    - Draft rentcharge so that the amount equals the **cost of complying** with the covenant. Amount may vary but must be objectively calculable (*Beachway Management Ltd v Wisewell* [1971] Ch 610).
- Effect:
    - Rentcharge **runs with the land** and is enforceable against successors (*Clem Smith Nominees Pty Ltd v Farrelly* (1978) 20 SASR 227 at 231).
    - Remedies include entry into possession and, for Torrens land, sale.
    - Instrument can also confer a right to **enter, carry out works** and charge the cost to the owner.
- Limits:
    - Cannot be created in Qld: PLA 1974 (Qld) s 176.
    - Rare in Australia generally, but can be **registered under Torrens** in some states.
    - Sometimes used where Torrens legislation does **not** allow direct registration of covenants, to indirectly force compliance.

(2) This section does **not apply** if the Registrar-General has received an **application under this Part** to extinguish the covenant and has **not rejected** the application under Division 2 or 3.

81K Cancellation of recording of restrictive covenant
(1) If the Registrar-General decides to **grant an application** to extinguish a restrictive covenant, or otherwise decides to **extinguish** a restrictive covenant, the Registrar-General **must cancel the recording** of the restrictive covenant in the Register.
(2) A restrictive covenant is **extinguished when its recording is cancelled** in the Register.

81L Effect of extinguishment
(1) If a restrictive covenant is extinguished under this Part, the covenant is **not enforceable** and is **of no effect**.
(2) The extinguishment of a restrictive covenant under this Part is **binding on all persons**, whether of full age or capacity or not, who are interested in enforcing the covenant, **whether or not** they have had **notice** of its proposed extinguishment.

Environmental Planning and Assessment Act 1979 **(NSW)**

1.5 Meaning of "development"
(cf previous s 4)

1. For this Act, **development** is any of the following
   a. the **use of land**
   b. the **subdivision of land**
   c. the **erection of a building**
   d. the **carrying out of a work**
   e. the **demolition of a building or work**
   f. any other **act, matter or thing** that may be **controlled by an environmental planning instrument**
2. However, **development does not include** any act, matter or thing that is **excluded by the regulations**, either
   - generally for this Act, or
   - only for specified provisions of this Act.
3. For this Act, **carrying out development** means **doing** any of the acts, matters or things in subsection (1).

Note
There are the following **categories of development** under this Act
(a) **exempt development**
Development that is exempt from the **assessment** and **consent or approval** requirements of this Act.
(b) **development requiring development consent under Part 4**, including
(i) **complying development**
Development that meets **pre-determined development standards** and needs consent in the form of a **complying development certificate** by a **consent authority** or **registered certifier**.
(ii) development that requires consent by a **council or other public authority** specified as the consent authority (including by a **local planning panel** or **delegated council staff** on behalf of a council).
(iii) **regionally significant development**
Development that requires consent by a **Sydney district or regional planning panel**.
(iv) **State significant development**
Development that requires consent by the **Independent Planning Commission** or the **Minister**.
(v) **designated development**
Development (other than State significant development) that requires an **environmental impact statement** for a consent application.
(vi) **integrated development**
Development that also requires **approvals under other legislation**, which are integrated under **general terms of approval**.
(c) development that is an **activity** requiring **environmental assessment under Division 5.1** before

Key takeaway for exams
A registered restrictive covenant under s 129A *TLA* (WA) that meets *Tulk v Moxhay* requirements (negative, benefits identified land, touches and concerns that land) will bind successors to the burdened land. The parties can **limit who can enforce** the covenant (for example, exclude tenants) without destroying its character as a *Tulk v Moxhay* covenant. The decisive question in equity is **intention** as shown in the covenant's terms [30]–[33].

***JEA Holdings (Aust) Pty Ltd t/as Miller Shopping Centre v Registrar-General of NSW* [2024] NSWCA 255**

- The court is interpreting **cl 1.9A(1) of the Liverpool LEP** (read with s 3.16 EP&A Act).
  - That clause suspends an "agreement, covenant or other similar instrument that **restricts the carrying out of development**" approved under the Act.
- **Key question** in the extract
  - Whether the **transfer creating an easement** (right of way + car parking + use restrictions on Lot 4) is an "agreement, covenant or other similar instrument" that **"restricts the carrying out of development"** within cl 1.9A, so it can be suspended.
- **Positive vs negative easements**
  - JEA tried to argue: this is a *positive* easement, like a right of way, not a restrictive covenant, so it does not "restrict" development.
  - The court says: the real test is not "positive vs negative", but whether the **instrument itself**, on its terms, **operates (expressly or by necessary implication) to restrict development** [68].
  - The character as positive/negative may be relevant, but it is not decisive.
- **Breadth of "restricts" in cl 1.9A**
  - Some instruments (like in *Cracknell*) use narrower language, requiring something that "**purports to impose restrictions**".
  - By contrast, cl 1.9A Liverpool LEP (like Woollahra LEP in *Wu*) is broader: it picks up anything that **"restricts the carrying out of development"** [69].
  - On its terms, the transfer here, with **express limits on how Lot 4 can be used**, falls within that phrase [69]–[70].
- **Why this easement/transfer is caught**
  - The transfer did more than define the scope of Lot 5's rights.
  - It **restricted Lot 4's own development potential**, eg the ground floor could only be used for car parking [70], [73].
  - So it is the **easement instrument itself** that "restricts" development under the LEP, not just zoning working in the background [73].
- **s 3.16 and planning vs property rights**
  - JEA argued this logic would let development consents effectively **override even court-imposed s 88K easements** without compensation.
  - The court says: not always, it depends on the terms of the easement and the planning instrument, but **the statute does allow planning controls to override property rights**.
  - That is recognised expressly in **s 3.16(6)**, which gives **primacy to planning principles over real property rights** [71].
- **Position on Wu / Cracknell**
  - JEA said *Wu* should not be followed and that *Cracknell* should control.
  - The court rejects that.
  - Preston CJ LEC in both *Cracknell* and *Wu* simply applied the **actual wording** of the relevant LEP clause to the instrument in question.
  - Since cl 1.9A Liverpool LEP is **identical** to cl 1.9A in *Wu*, that reasoning fits directly [69], [75].

Exam-style takeaway of the extract:
For cl 1.9A-style clauses, the question is: **does the instrument (including an easement created by transfer) in substance "restrict the carrying out of development" approved under the EP&A Act?** If yes, it can be suspended, even if the interest is an easement (including one that looks "positive") rather than a classic restrictive covenant, because s 3.16 and cl 1.9A give **planning controls priority over property rights**.

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A. Electronic Conveyancing

STEP 1 — Spot the trigger

Look out for facts that mention:

- PEXA workspace, e-settlement, electronic lodgment.
- "Subscriber" acting for client (usually solicitor/conveyancer).
- Digital signature, USB key, two-factor token.
- Client Authorisation form.
- Verification of Identity (VOI) — face to face with docs, Schedule 8 categories.
- Right to Deal — authority checks, CoRD consent.
- eCT (electronic Certificate of Title) or CoRD holder consent.
- A dealing lodged electronically despite fraud/forgery.

If you see any of these, **go to this scaffold first**, then segue into Indefeasibility/Fraud/Mortgages depending on facts.

STEP 2 — Framework

Write (paste)

NSW e-conveyancing is governed by the **Electronic Conveyancing National Law (ECNL)** (as applied by the *Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW)*) and the **Participation Rules (ARNECC/NSW)**.
Dealings are lodged electronically through an **Electronic Lodgment Network (ELN)**, currently PEXA.
A "Subscriber" (law practice/conveyancer/ADI) signs electronically on behalf of the client. Their signature binds the client for registration purposes, but only if **Participation Rules** are complied with.

STEP 3 — Core obligations

3.1 Verification of Identity (VOI)

- **Participation Rules r 6.5 + Schedule 8**.
- Subscriber must take **reasonable steps** to verify the identity of each client/mortgagor/party.
- **VOI Standard (Sch 8)** = face-to-face meeting, sighting originals, checking likeness.
- Categories 1–6 for individuals (passport, licence, etc); body corporates require ASIC searches.
- Attorneys: verify PoA details + identity of attorney (Sch 8 items 6–7).
- Records must be kept 7 years (r 6.6).

Paste line:

VOI: Subscriber must apply the **Schedule 8 VOI Standard** or otherwise take "reasonable steps" (**r 6.5.2, 6.5.6**). Failure may amount to negligence or support fraud allegations if dishonesty/wilful blindness is shown.

3.2 Right to Deal

- **r 6.4**: must take reasonable steps to verify the client is entitled to enter the transaction (legal person; RP; attorney with registered PoA).
- Possession of CT ≠ proof. CoRD consent may be needed from first mortgagee.

Paste line:

Right to Deal: Subscriber must confirm the client is the RP or otherwise entitled (r 6.4). CoRD consent typically provided by 1st mortgagee.

3.3 Client Authorisation

- **r 6.3**: Subscriber must obtain signed Client Authorisation from client (form approved by ARNECC).
- Covers signing, lodging, financial settlement.
- If acting under PoA, Registrar can demand registration of PoA (RPA s 36(2)).

Paste line:

Client Authorisation: Subscriber must hold a signed form authorising them to sign, lodge, and settle electronically (**r 6.3**). Without it, signing is unauthorised and exposes Subscriber to liability.

3.4 Certifications (Schedule 3)

s 56C imposes a front-end diligence duty. If execution involved fraud **and** the lender failed reasonable steps or had notice, the **R-G may cancel** the registration (s 56C(6), (8)). False/negligent certifications also expose the certifier (s 117(4)).

STEP 3 — Fraud or no fraud? (very short check)

- **Knowingly false attestation / wilful blindness** → **fraud** (C scaffold; *De Jager*; *Mere Roihi*).
- **Just careless VOI** → **not fraud** (*Davis v Williams*).
- If **agent within scope** forged to "get execution" → fraud **attributed** to mortgagee (*Dollars & Sense v Nathan*).
- If no fraud proven → the mortgage **stays registered**, but **ask "for what?"** (Step 4).

STEP 4 — "Indefeasible for what?" (interpret the mortgage)

Always classify the mortgage **by what the registered dealing itself says**.

Branch A — Fixed-sum / amount stated on the face

Spot: Registered dealing (or incorporated memorandum **on-register**) states "secures $X + interest".
Write (paste):
Registration perfects the **charge** for the **stated sum** even if a personal covenant was forged. The mortgagee can enforce **against the land** (s 57–58). (*Small v Tomassetti* [9], [15].)
Consequences:

- Power of sale available upon default **in the mortgage**.
- **No personal action** on a forged covenant against the innocent RP.

Branch B — "All-moneys" mortgage (debt lives in a separate loan agreement)

Spot: "Secured Money = all moneys owing under any Loan Agreement between mortgagor and mortgagee," and the **Loan Agreement is forged/void/off-register**.
Write (paste):
Where the mortgage's "Secured Money" depends on a **separate forged/void loan**, the mortgage can be an **empty shell**: there is **no default in a covenant "in the mortgage"**, so **no s 57 power of sale**. Courts look only to what is **recorded on the Register**; they will not patch with off-register terms (*Provident Capital v Printy* [26], [30], [37], [50], [52]; *Deguisa* [88]). A printed "receipt" in the dealing is **prima facie only** and may be rebutted (*Ippin Textiles*, Leeming JA [74]).
Relief to seek (paste):
Declaration that no "Secured Money" exists under the mortgage; **injunction** restraining sale; **order for discharge** or notation that the mortgage "secures nil" (Printy model).
Notes to apply:

- The **covenant must be "in the mortgage"** (s 57(2)(a)); off-register loan terms usually won't be read in.
- Registration still gives an **indefeasible charge**, but **it secures nothing** if no debt can be shown **under the mortgage** itself.

Branch C — Joint & several structure; one signature forged

Spot: Mortgage/terms say each owner charges their interest for sums "owed by **either** of them" (joint & several). One spouse signed genuinely; the other signature is forged.
Write (paste):
On construction, a joint-and-several charge can bind the **whole security** via the **genuine mortgagor's** liability, even if the co-owner's signature was forged (cf *Van den Heuvel v Perpetual Trustees* (2010)). Still check **fraud** and what is "in the mortgage".

STEP 5 — Enforcement mechanics (don't skip)

- **Default** needed: **"default in the observance of any covenant in the mortgage"** (s 57(2)(a)).
- **Notice / process** per statute/instrument; then **power of sale** (s 57–58).
- **Proceeds** go to discharge the **secured sum**; **deficiency** can **not** be recovered from an innocent RP on a **forged personal covenant** (registration protects the charge, not the personal promise: *PT Ltd v Maradona*; see also forged-covenant reasoning in *Printy* line of cases).

G. Assurance Fund & Wrongdoer Damages (NSW RPA Pt 14)

CHECKLIST

- Have you tried **s 118 recovery** first (against fraudster/volunteer)?
- Have you sued the **wrongdoer** (**s 120**) / notified **PI**?
- Can you pin your loss to **s 129(1)** and the **operation of the Act** (registration/indefeasibility)?
- Did you deal with **exclusions** (**s 129(2)**) and **mortgagee limits** (**s 129B**, **s 56C**)?
- Is your **valuation** at the **award date** and have you shown **mitigation**?
- Do you need **interlocutory** relief while the Fund claim runs?

Authorities

- **Frazer v Walker / Breskvar v Wall** — why you can't unwind against a **BFP** (hence Fund).
- **Provident Capital v Printy (NSWCA)** — forged **all-moneys** mortgage may be an **empty shell**; owner not in default **"in the mortgage"**; relief via **declaration/injunction** and, if deprived by sale, **compensation**.
- **Ippin Textiles v Eastwood / Deguisa v Lynn** — courts won't **patch** mortgages with **off-register** terms; look **only** to what's on the Register.
- **Diemasters v Meadowcorp** (use for the proposition that deprivation can include being kept out of an **unencumbered estate**; material-contribution test).
- **AGC v De Jager** — fraud by mortgagee's **agents** defeats indefeasibility (if you can prove that, you might recover land; otherwise Fund).
- **Cassegrain** — **volunteer** through a fraudster can be sued for the land (**s 118(1)(d)**); if that fails (BFP), **Fund**.

STEP 0 — When to use this scaffold

Fact triggers (tick any):

- ☐ **Forgery/fraud** caused someone else to become **registered**; you **can't** recover the land because the current RP is innocent/BFP.
- ☐ **Registered forged mortgage** (esp. **all-moneys**) has burdened the land or been exercised.
- ☐ **R-G error** (wrong folio, misdescription, wrong recording) caused loss.
- ☐ **Registration despite caveat** / forged **withdrawal of caveat**.
- ☐ Owner has been **deprived** of land or an **interest**, or kept out of an **unencumbered estate**.
- ☐ Mortgagee asking "can we recover from the Fund?" (watch **s 56C** and **s 129B** limits).

If you can still **recover land** (e.g., s 118(1)(d) against a **registered fraudster** or a **volunteer** through them), do that first (see **B/C**). If not, come here.

STEP 1 — Core propositions (paste)

Compensation is available **"as a result of the operation of this Act"** where the claimant suffers loss through defined events (Pt 14; **s 129(1)**). Causation requires a **material contribution** by the Torrens system's operation (not necessarily the sole cause). **Recovery of land** is tightly limited by **s 118**; when that's blocked by **indefeasibility**, the **Fund** is the safety net.

STEP 2 — Recovery vs Compensation — quick fork

Ask in this order:

1. **Can I sue for the land?**
   - **s 118(1)(d)**: proceedings by a person **deprived by fraud** against (i) the person registered **through fraud**, or (ii) a person **deriving otherwise than as a transferee BFP** from or through that fraudster (e.g., **volunteer** donee).
   - **s 118(1)(f)**: **prior folio** cases; **s 118(1)(e)** misdescription cross-boundary cases.
   - If **yes** → pursue land (plus consequential loss).
   - If **no** (BFP in the way / innocent RP) → go to **Fund**.
2. **Sue the wrongdoer** as well (**s 120**) — deceit, breach of trust/fiduciary duty. Do this **in parallel** with (or before) Fund claim; the Fund may be **subrogated**.

L. The Register & Certificates of Title (quick references you can paste)

Mesh with other modules

- Use **L** to **anchor** your register-centric propositions in **B (Indefeasibility)**, **C (Fraud)**, **D (Mortgages)**, **E (Caveats)**, and **F (Priorities)**.
- If the issue is really a **clerical slip** → pivot to **I (R-G correction powers)**.
- If someone tries to bind via **off-register** material → invoke **Deguisa** here, then continue with your main module (usually **B** or **J**).

STEP 0 — When to use this scaffold

Fact triggers (tick):

- ☐ Argument turns on **what's recorded** (or not) on the **folio**.
- ☐ Opponent says you were **on inquiry** beyond the Register.
- ☐ You need to anchor "**title by registration**"/"**subject to entries recorded**" and **form of dealing** points.
- ☐ You must **interpret a registered dealing** (mortgage/lease/transfer) by looking at the Register and the instrument.

STEP 1 — Core statutory anchors (paste)

- **s 31B RPA**: The **Register** may be kept in **any medium** (electronic).
- **s 32 RPA**: A **folio** states **land description**, **estate/interest**, **proprietor**, and **encumbrances/notations**.
- **s 33, 33AA, 33AAA, 33AB RPA**: Certificates of Title (CTs) regime & **CoRD** (consent by the CoRD holder). (Modern practice: **no paper CTs**; **CoRD/e-consent** instead.)
- **s 36 RPA**: Dealings; R-G's recording power; **time of recording**; **s 36(9)** → **priority by time of registration**; **s 36(11)** → registered dealing has **effect of a deed**.
- **s 39(2)–(3) RPA**: **Registration despite patent error** (R-G may still record and later correct).
- **s 41 RPA**: **No dealing passes an estate/interest until registered** ("title by registration").
- **s 42(1) RPA**: RP holds subject **only to estates/interests and entries recorded** on the folio (plus listed statutory exceptions) — **"but absolutely free"** of others.

Case pillars to quote:
Breskvar v Wall (1971) 126 CLR 376, 385–386, 397 (title **by** registration).
Frazer v Walker [1967] 1 AC 569, 580–581, 584 (immediate indefeasibility).
Bursill v Berger (1971) 124 CLR 73, 78 (a **sufficient memorial** of a registered instrument binds; "subject to what's recorded").
Deguisa v Lynn [2020] HCA 39 [69], [88] (purchasers are **not on open-ended inquiry** beyond what is **notified on the folio** or by **express cross-reference to another registered instrument**).

STEP 2 — How to read a folio quickly (checklist)

1. **Edition no. / search date** (context).
2. **Proprietorship (1st schedule)** — who is the current RP?
3. **Encumbrances / notifications** — mortgages, leases, easements, covenants, restrictions; note **dealing numbers**.
4. **Notations** — caveats (recorded), dealings lodged/unregistered notices.
5. **Cross-references** — does the folio **expressly refer** to another **registered** instrument (e.g., plan, s 88B instrument, memorandum)? If **yes**, you can rely on it; if **no**, **Deguisa** says don't roam off-register.

STEP 3 — What is "recorded" enough to bind (Bursill / Deguisa)

Use this if someone says "the folio wording is sparse so it doesn't bind"
Write (paste):
Rule: A **sufficient memorial**/recording of a registered instrument on the folio makes the RP **subject** to the **interest created by that instrument** (Bursill v Berger, Barwick CJ 78). It's **not** about **notice** but the **operation of the statute** (s 42: "subject to such interests as are recorded").
Limit (Deguisa): A purchaser is **not** obliged to make an **open-ended inquiry** beyond the folio; to bind successors, the folio must **notify** the right or **expressly cross-refer** to another **registered** document that contains the detail (HCA

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CO-OWNERSHIP (JT vs TIC, RIGHTS BETWEEN CO-OWNERS, SEVERANCE & S 66G)

0. ONE LINE TO START ANY CO-OWNERSHIP ISSUE

Use this whenever land is held by more than one person, or the problem mentions "joint tenants", "tenants in common", "our house", "the property we bought together" etc.

Co-ownership arises where two or more persons are simultaneously entitled to an interest in the same parcel of land at the same time, a horizontal division of ownership distinct from successive (vertical) interests such as life estate and remainder. The key questions are what form of co-ownership exists (joint tenancy or tenancy in common), what incidents follow (especially survivorship), and whether that form has been altered or brought to an end by later dealings, severance or statutory trusts for sale.

Template
Here, [A] and [B] hold [PROPERTY] together. Co-ownership is a horizontal fragmentation of rights over the same land, not a temporal succession. The first issue is to identify whether they hold as joint tenants (with the four unities and right of survivorship) or as tenants in common (distinct undivided shares with no survivorship), and whether that position has been changed by any subsequent dealings or court orders.

[Soft prompt: always write this at the top of any co-ownership issue to frame the rest.]

PART A – IDENTIFYING THE FORM OF CO-OWNERSHIP

A1. IS IT JOINT TENANCY OR TENANCY IN COMMON?

Use this when:

- The facts use words like "joint tenants", "in equal shares", "share", "interest", "joint proprietors", or the parties dispute survivorship.

(1) Start with the express words and four unities

Core rule sentence
At common law, a conveyance of the same interest to two or more persons together presumptively creates a joint tenancy, provided the four unities of title, interest, possession and time are present, subject to any words of severance or statutory modification.

Checklist

1. Look at words of the instrument (transfer, will, declaration of trust etc).
2. Check for four unities:
    - Unity of title: same instrument or act.
    - Unity of interest: same nature, extent and duration.
    - Unity of possession: each entitled to possess the whole.
    - Unity of time: interests vest at the same time (with modern exceptions).
3. Identify any "words of severance".

Template
The conveyance here is ["to A and B" / "to A and B as joint tenants" / "to A and B in equal shares"] of [ESTATE]. At common law, a grant of the same legal interest to two or more together presumptively creates a joint tenancy if the four unities are present: they must take under the same instrument (unity of title), with identical interests in nature, extent and duration (unity of interest), with a right to possession of the whole (unity of possession), and with their interests vesting at the same time (unity of time) (*Wright v Gibbons* (1949) 78 CLR 313, 330; Blackstone, *Commentaries* vol 2, 182).

(2) What counts as "improvements" vs maintenance

Core rule sentence
Only lasting improvements or substantial repairs that add value attract an allowance. Routine maintenance and ordinary outgoings do not, although they may be relevant under contribution principles.

Authorities: *Leigh v Dickeson*; *McMahon* 204; *Forgeard* 224–225; *Ryan v Dries* [66]; *Houghton v Immer (No 155)* (1997) 44 NSWLR 46, 57.

Template
"Improvements" means work that adds lasting value to the land, such as structural renovations or capital works, not ordinary maintenance like regular painting or pest control (*Leigh v Dickeson*; *McMahon*). On these facts, [describe works]. [To the extent they were structural and increased value, they qualify as improvements. Ordinary expenses like [insurance, routine pest treatment] are maintenance and do not attract an allowance, although they may be considered when adjusting equities under a statutory discretion as in *Ryan v Dries* and *Forgeard*.]

(3) Mortgage instalments and rates

Core rule sentence
Payment of joint mortgage instalments and rates by one co-owner is generally treated as discharging a joint debt, giving rise to an equitable right of contribution, rather than as "improvements", although some cases treat them as increasing equity and therefore as akin to improvements.

Authorities: *Albion Insurance v GIO* (1969) 121 CLR 342; *Friend v Brooker* (2009) 239 CLR 129; *Lavin v Toppi* (2014) 308 ALR 598; *Forgeard* 224–226; *Ryan v Dries* [74]–[75]; *Callow v Rupchev* (2009) 14 BPR 27,533; *Re Gorman* [1990] 1 All ER 717; *Callow*; *Dinsdale v Arthur* (2006) 12 BPR 23,509.

Template
Mortgage instalments and council and water rates are usually joint liabilities of co-owners or joint debtors, so if [A] alone pays them, they may recover contribution from [B] for [B]'s proportionate share, independently of co-ownership principles (*Albion Insurance*; *Lavin v Toppi*; *Forgeard*). In *Forgeard v Shanahan* the Court of Appeal treated allowances for mortgage principal and rates as arising from equitable contribution between joint debtors, not from the law of co-ownership itself. In *Ryan v Dries*, the Court recognised that the paying co-owner was entitled to contribution for both principal and interest.

Here, [A] paid [$X] towards the joint mortgage and [$Y] in rates that [B] was equally liable for. [A] is entitled in equity to recover from [B] [B]'s share of those payments, generally one half in the case of equal co-owners, subject to any equitable adjustments such as occupation fees.

(4) Quantification and DIY work

Core rule sentence
The allowance is limited to the lesser of expenditure and enhanced value; there is no uplift for inflation or borrowing costs and no payment for the improver's own labour, although contractor labour and materials are included. Interest on the allowance is discretionary.

Authorities: *Re Jones*; *Squire v Rogers* 125–126; *Cardinaels-Hooper*; *McMahon*; *Houghton v Immer*; *Re Dugac* (Fed Ct, 6 Feb 1987).

Template
In quantifying the allowance, the court will award the lesser of the amount expended and the amount by which the improvements enhance the property's value at the date of sale or accounting; if there is no enhancement, there is no allowance (*Re Jones*; *Squire v Rogers*). Costs of contractors, materials and associated expenses are included, but there is no recompense for the improver's own labour (*Squire v Rogers*). There is generally no uplift for inflation or the

Leases

RUN IN THIS ORDER (AND ONLY USE WHAT YOU NEED):

1. **Spot statutory regimes and Torrens**
    - Use the "Things to look out for" checklist: is this residential, retail, Torrens, Old System.
    - Flag RTA / RLA / Torrens early so you know what overlay you might need later (E and J).
2. **Lease or licence or statutory tenancy?**
    - Go to **A1** and run the **exclusive possession** test.
    - If exclusive possession looks odd because of family, employee or purchaser in possession, run A2.
    - If it is residential or retail and EP is fuzzy, run **A3** to pick up **statutory tenancy** even if no lease at general law.
    - → Output: "This is a [lease / licence / residential tenancy / retail lease]".
3. **If you have a lease, identify the type of tenancy**
    - If term clearly fixed with dates, use **B1** (fixed term).
    - If the occupier is just paying rent periodically with no end date, use **B2** (periodic tenancy).
    - If it is transitional or "you can go at any time" with consent, use **B3** (tenancy at will) and **B5** (statutory tenancy at will under s 127).
    - If they are just holding over and landlord is silent, use **B4** (tenancy at sufferance).
    - If landlord's title is dodgy but they have both acted like landlord/tenant, consider **B6** (tenancy by estoppel).
    - If there are overlapping leases or future leases, mention **concurrent / reversionary leases**.
4. **Check certainty of term if the wording looks vague**
    - If the term is "for the duration of X" or "until land required for Y" etc, jump to **C**.
    - Decide if the term is void for uncertainty and, if so, fall back to **B2/B3/B5** (implied periodic tenancy or statutory tenancy at will) as in **C2**.
5. **Creation and formalities - legal or equitable, Old System or Torrens**
    - For Old System:
        - If term and rent are short (≤3 years, no fine, in possession), use **D1** (legal parol lease under s 23D(2)).
        - If long (>3 years) or outside s 23D(2), use **D2** (must be by deed under s 23B).
    - For equitable leases: go to **D3/D4** (Walsh v Lonsdale + part performance) if there is only an agreement or defective formality.
    - For Torrens land: use **D5** with **s 53 RPA** to classify as:
        - registered legal lease with indefeasibility, or
        - unregistered lease giving only equitable rights.
6. **If Torrens and priority / purchaser issues, go to J**
    - Run **J1** to see if the unregistered lease fits **s 42(1)(d)** (short term tenancy exception, total term including options ≤3 years, plus notice and possession).
    - Use **J2** for the timing of notice (United Starr-Bowkett).
    - Use **J3** for in personam / contract protection (Snowlong v Choe) where lease falls outside s 42(1)(d).
7. **If the problem is really about statutory tenant protections, run E**
    - Use **E1** if the premises are retail, **E2** if residential.
    - Then explain that the Act overlays or displaces the general law analysis above.
8. **If the problem is about obligations during the lease, use F and G**
    - Use **F1/F2** for implied covenants (quiet enjoyment, non-derogation, fit for habitation, repair).
    - Use the s 84 CA and Proudfoot line where repair standard is in issue.
    - Use **G1/G2/G3** where the dispute is about assignment, subletting, Airbnb, or unreasonable refusal of consent.
9. **If the problem is about assignment / who can sue, use H**
    - **H1** for privity of contract vs estate.
    - **H2** for covenants running with the leasehold (Spencer's Case, ss 70, 70A).
    - **H3** for assignment of the reversion and Torrens ss 51–53 RPA.
10. **If the problem is about breach, termination and possession, use I**
    - **I1** for menu of landlord remedies, including possession and mesne profits.

Indicators of lease vs licence

- Lease indicators (mention those that fit)
  - Words like "lease", "tenancy", "demise", "exclusive possession"
  - Rent reserved; covenant for quiet enjoyment; repair obligations
  - Landlord's right of re-entry, inspection, non-assignment, etc (presuppose a lease)
- Licence indicators
  - Clauses reserving possession/control, or power to relocate to other rooms (*Shell-Mex*; *Interoven* type cases)
  - Short-term concession/franchise in heavily controlled premises (*KJRR*; *Isaac v Hotel de Paris*)

Template sentence
The presence of [QUIET ENJOYMENT / REPAIR COVENANTS / NON-ASSIGNMENT CLAUSE] suggests the parties contemplated a leasehold estate. There is no genuine clause reserving possession or a power to relocate [OCCUPIER], unlike the franchise-style licences in *KJRR* and *Isaac*. On balance, this points to a lease.

A2. Exceptions: exclusive possession but no lease

Rule
Even with exclusive possession, there is no lease where there is no intention to create legal relations (eg family/social arrangements) or where another legal relationship explains occupation (employee, beneficiary, purchaser in possession): *Radaich*; *Booker v Palmer*; *HA Warner*.

Template
Even if [OCCUPIER] appears to have exclusive possession, the arrangement will not be a lease if there is no intention to create legal relations, or if occupation is explained by another relationship such as employment or a contract of sale. Here, [OCCUPIER] is [e.g. a family member living rent free / an employee required to occupy to perform duties / a purchaser in possession pending completion], which suggests [a mere licence / rights under the sale contract] rather than a lease.

Prompts

- [Family/friends, no rent, informal → probably licence]
- [Employee accommodation strictly tied to job → usually licence]
- [Purchaser in possession pending settlement → contract of sale, not lease]

A3. Statutory regimes where exclusive possession not essential

Residential tenancies – s 13 RTA
For residential premises, s 13 *Residential Tenancies Act 2010* (NSW) defines a "residential tenancy agreement" as any agreement under which a person occupies premises as a residence, whether or not there is exclusive occupation, and whether oral, written or implied. So even if [OCCUPIER] lacks full exclusive possession, they may have statutory rights as a residential tenant.

Retail leases – s 3 RLA
Similarly, s 3 *Retail Leases Act 1994* (NSW) defines a "retail shop lease" broadly, including agreements granting a right to occupy premises as a retail shop whether or not the right is one of exclusive occupation, and regardless of whether the agreement is oral or written. If [PREMISES] are used predominantly for [BUSINESS] falling within Sch 1 or located in a retail shopping centre, [OCCUPIER] may have a statutory retail lease.

Template
Therefore, even if [OCCUPIER] does not have a lease at common law, [he/she/they] may have statutory tenancy rights under [RTA / RLA], which will govern many of the parties' rights and obligations.

B. TYPES OF TENANCIES

A clause stipulating a higher rate of interest on default may be characterised as a penalty if it imposes a detriment out of proportion to the mortgagee's legitimate interests (Wallingford; AMIEV-UDC Finance v Austin). In Funding v Patane an increase of 4 per cent on default was upheld where it reflected a genuine assessment of increased risk. Here, the increase from [X]% to [Y]% on default appears [modest and linked to increased risk / excessive and not referable to anticipated loss]. It is therefore [likely enforceable / likely to be struck down as a penalty], with interest continuing at the non-default rate.

C2.3 Whole principal and future interest due on default (Wanner v Caruana)

- If one missed instalment causes all principal plus future interest to the end of the term to become immediately due, this typically gives the mortgagee more than its actual loss and is a penalty (Wanner v Caruana [1974] 2 NSWLR 301).
- However, if the debt is truly due in full from the outset, with an indulgence to pay by instalments, courts may treat it differently (Protector Endowment Loan v Grice (1880) 5 QBD 592; O'Dea v Allstates Leasing (1983) 152 CLR 359).

Template
A clause providing that, on default in one instalment, the whole principal plus all interest to the end of the term becomes immediately payable will usually be treated as a penalty, because it places the mortgagee in a better position than performance would have done (Wanner v Caruana [1974] 2 NSWLR 301 per Street CJ). In substance, such a clause rarely constitutes a genuine pre-estimate of loss. Only where the contract truly makes the entire debt presently owing from the outset, with an indulgence to pay by instalments, is it likely to avoid the penalty characterisation (Protector Endowment v Grice; O'Dea v Allstates Leasing). On these facts, [describe clause and its effect] so it is likely to be [unenforceable as a penalty / valid as a present debt with instalment indulgence].

C3. Setting aside or relieving against mortgages

C3.1 Non est factum

- Court may set aside a deed where signer fundamentally misunderstood the nature of the document and was not careless (Gibbons v Wright (1954) 91 CLR 423).
- Not just misunderstanding technical terms; must think document is something essentially different.

Template
Non est factum is available in narrow circumstances where a person signs a document of a fundamentally different character from what they believed, without negligence (Gibbons v Wright (1954) 91 CLR 423). If [MORTGAGOR] merely misunderstood the legal effect or failed to read the mortgage, the doctrine will not assist. Only if they believed they were signing something wholly different, such as a simple guarantee rather than an all-monies mortgage over their home, and were not careless, could the mortgage be avoided on this basis.

C3.2 Undue influence

Actual undue influence

- Mortgagor must prove that the mortgagee (or third party) exerted pressure or influence that overbore their will (Johnson v Buttress (1936) 56 CLR 113).

Presumed undue influence

- Arises from certain relationships of trust and confidence: parent–child, guardian–ward, trustee–beneficiary, solicitor–client, religious adviser–follower, medical adviser–patient (Royal Bank of Scotland v Etridge (No 2) [2002] 2 AC 773 at [18]).
- Husband and wife is **not** a presumed category (Yerkey v Jones (1939) 63 CLR 649).
- Once established, the burden shifts to the stronger party to show the transaction was the result of free, informed judgment, often via independent advice (Barclays Bank v O'Brien [1994] 1 AC 180).

Template

The key question is whether the rights “substantially deprive [SERVIENT OWNER] of proprietorship or legal possession” so as to be inconsistent with ownership (Theunissen v Barter [2025] NSWCA 50, [140]). Factors include:

- The proportion of [SERVIENT LAND] affected
- The extent of [DOMINANT OWNER]’s control and permitted uses
- What residual rights [SERVIENT OWNER] retains (to pass, build over/under, use at some times or for some purposes).

Here, [RIGHT] gives [DOMINANT OWNER] [continuous parking / gardening / storage / balcony use]. [SERVIENT OWNER] still may [access the area at times, build above/below, install services, use for limited activities], so although the burden is heavy, it does not amount to a complete transfer of possession (cf Harada; Clos; compare Evanel; Jea Holdings; Stolyar; Theunissen; Dickson). This supports the view that the right is a valid easement rather than a lease.

3. Step 3 – creation of easements

Once you have decided it *can* be an easement, ask how (if at all) it was created.

3.1 Express grant or reservation – old system land

Rule

- Legal easements over old system land must be created by deed (Conveyancing Act 1919 (NSW) s 23B).
- Equitable easements can arise where there is a written agreement or memorandum satisfying ss 23C, 54A, or part performance (ss 23E, 54A), or a specifically enforceable agreement to grant an easement (Walsh v Lonsdale principle).
- When the owner sells part of their land and “reserves” a right over it for the retained land, this operates as a grant back from the purchaser.
- CA s 44A validates reservations contained in a transfer, so a properly drafted reservation in the transfer can create the easement without a separate deed.

Template

On old system land, a legal easement requires a deed of grant (CA s 23B). If [PARTIES] executed a deed granting [RIGHT] over [SERVIENT LAND] in favour of [DOMINANT LAND], that creates a legal easement. If formalities for a deed were not satisfied, there may still be an equitable easement if there is a sufficient written agreement or acts of part performance pointing to such a grant (CA ss 23C, 54A; Walsh v Lonsdale).

Where [TRANSFEROR] sold part of their land but purported to “reserve” rights over the part sold, this can operate as an easement by reservation, now validated by s 44A CA.

3.2 Express grant – Torrens title

Rule

- Under the RPA, easements are created by registrable dealing: s 46.
- Registration and notation on both dominant and servient titles gives indefeasible title to the easement: ss 47, 51.
- Easements can also be created by registration of a plan and s 88B instrument (CA s 88B).

Easements in gross (Torrens)

- CA s 88A allows certain easements to be created in gross (no dominant land) in favour of authorities/utilities.
- These are still created and protected by registration under the RPA but sit outside the usual “dominant/servient” structure – useful to mention if facts involve electricity, water or telecoms providers.

Template

For Torrens land, an easement is created by executing and registering an approved easement dealing (RPA s 46) or by registration of a plan with a s 88B instrument (CA s 88B). Upon registration, the easement is noted on the folios for [DOMINANT LAND] and [SERVIENT LAND] and acquires indefeasible status, even if the underlying dealing was

- **Dabbs v Seaman**: Purchaser bought a lot described as "bounded by a 20-foot lane" on the vendor's retained land; court held the purchaser got a right of way over that lane because you do not sell land "up to a lane" then deny access along it.

Rule

Where land is conveyed or leased as abutting a private road or lane owned by the grantor, the grantee is generally entitled to use that road as a right of way, by estoppel or implication (Dabbs v Seaman (1925) 36 CLR 538).

Template

If [LAND] is described as bounded by a "20 feet lane" lying on [GRANTOR]'s retained land, the grantor is estopped from denying a right of way over that lane for access, absent contrary provision (Dabbs v Seaman). Thus, even without express grant, [DOMINANT OWNER] can argue that a right of way was implied or arises by estoppel because they bought land described as abutting the lane.

3.6.3 Common intention easements

Use when:

- Both parties clearly contemplated a specific use of the land (eg factory, timeshare, overhanging building) that can only work if a certain right exists.

Look for:

- Strong evidence of shared, specific purpose at the time of grant; easement is necessary (not just handy) to give effect to that purpose; often building / infrastructure fact patterns.

Examples:

- **Pwllbach Colliery v Woodman**: Land leased in the context of a coal mining operation; both sides knew the land would be used for coal related works that produced fumes and dust, so an easement / right to emit was argued from that specific, shared intention.
- **Kitching v Phillips**: Subdivision where both parties contemplated a particular building layout / access arrangement; common intention relied on to support implied rights needed for that layout to function.

Rule

Where grantor and grantee share a common intention as to a particular use of the land, and an easement is necessary to give effect to that intention, a grant (or reservation) of an easement may be implied (Pwllbach Colliery v Woodman [1915] AC 634). Courts are cautious, especially about implied reservations.

Template

A common intention easement arises where both parties contemplated that [DOMINANT LAND] would be used in a specific way (eg as [a mill / a building with overhang / access via a particular route]), and a right over [SERVIENT LAND] is reasonably necessary for that use (Pwllbach; Kitching v Phillips [2011] WASCA 19). Here, the parties clearly intended [eg an encroaching building / shared services / specific commercial use], and without a right to [discharge fumes / project eaves / repair and access] the common intention would be defeated. That supports an implied grant (or in the case of retained land, implied reservation) of such an easement.

3.6.4 Non-derogation from grant

Use when:

- Grantor sells/leases land for a particular purpose, then uses retained land in a way that sabotages that purpose.

Look for:

- "You sold/leased me land as a [home/shop/factory], now you've blocked my access / light / support / quiet"; interference making land unfit or materially less fit for the granted purpose.

Examples

obligations are forestry covenants under s 87A and s 88EA of the *Conveyancing Act 1919* (NSW). Unlike ordinary positive covenants, these covenants run with the forestry right and bind successors to the original covenantor (s 88EA(4), s 88F). They persist only so long as the forestry right continues in force (s 88EA(8)).

C3. Creation of forestry rights and covenants over Torrens and old system land

- Over **Torrens land**, forestry rights are created by **transfer** under ss 46, 47 *Real Property Act 1900* (NSW).
- Forestry rights may also be created over both old system and Torrens land via **registration of a plan** under s 88B *Conveyancing Act 1919* (NSW).
- Forestry covenants over Torrens land are created by an **instrument recorded on the Torrens register**, which may be the same transfer that creates the forestry right (ch 12.390).

Template
Because [LAND] is under the Torrens system, the forestry right in favour of [PARTY] must be created by a registered transfer under ss 46 and 47 of the *Real Property Act 1900* (NSW), or by a s 88B instrument in a deposited plan. The associated forestry covenants are recorded on the register, often in the same instrument, and thereby bind successors in title. Over old system land, an appropriately executed instrument and, if used, s 88B registration will create the forestry right and covenants as interests in land.

C4. Carbon sequestration rights – s 87A, s 88AB

A forestry right can include a **"carbon sequestration right"** (s 87A).

A carbon sequestration right is defined as a right to the **legal, commercial or other benefit (present or future) of carbon sequestration** by an existing or future tree or forest on the land after 1990. "Carbon sequestration" is the process by which a tree or forest absorbs carbon dioxide from the atmosphere (s 87A). A carbon sequestration right is treated as a **profit a prendre**: s 88AB(2).

These provisions were introduced in 1998 to facilitate trading in carbon credits by bodies such as the Forestry Commission and electricity generators (Carbon Rights Legislation Amendment Bill 1998 (NSW), EM and Second Reading Speech; Hepburn, "Carbon Rights as New Property" (2009) 31 Syd L Rev 239).

For Crown land, the Minister and lessee may grant carbon sequestration rights (ss 59B–59C *Crown Lands Act 1989* (NSW); ss 35W–35X *Western Lands Act 1901* (NSW)). Other States have their own carbon rights legislation.

Template
Here, [PARTY] is granted the benefit of carbon sequestration from trees on [LAND], including the right to create and trade carbon credits. Under s 87A, that is a carbon sequestration right, defined as the legal or commercial benefit of carbon sequestration by trees or forests established after 1990. Section 88AB(2) treats this carbon sequestration right as a profit a prendre. If the land is Crown land, the grant must comply with ss 59B–59C of the *Crown Lands Act 1989* (NSW) or ss 35W–35X of the *Western Lands Act 1901* (NSW). The right operates as a statutory profit that can be transferred and enforced as an interest in land, supporting carbon credit trading.

PART D – TORRENS AND INDEFEASIBILITY: OMITTED OR MISDESCRIBED PROFITS

D1. s 42(1)(b) RPA – omitted or misdescribed profits

Section 42(1)(b) of the *Real Property Act 1900* (NSW) makes a registered proprietor's title subject to the "omission or misdescription" of any profit a prendre "created in or existing upon" the land.

Two key propositions:

1. **Old system profit omitted on conversion**:
    - Where a profit was created over servient land under old system title but is left off the Torrens title when the land is brought under the system, it is an **"omitted"** profit and remains enforceable against registered proprietors of the servient land, regardless of whether it was created by express grant or prescription (*Dobbie v Davidson* (1991) 23 NSWLR 625).

Freehold Covenants

(Use this as your “engine” for any covenant / subdivision / s 88B / s 89 / EP&A s 3.16 problem)

0. ONE LINE TO START A FREEHOLD COVENANT ISSUE

Use whenever you see a promise about how freehold land can be used, usually in a transfer, deed, plan or “restriction as to user”.

A freehold covenant is a contractual promise that regulates the use of land, typically recorded in a deed or transfer, where the covenantor undertakes to do or not do something on their land for the benefit of another’s land. The key questions are whether the covenant is positive or negative, whether its burden and benefit run with land at law or in equity, how it interacts with Torrens indefeasibility and planning laws, and whether it can be modified or extinguished by statute or the Registrar.

Template
Here, [COVENANTOR] has promised in [INSTRUMENT] to [OBLIGATION, e.g. “not build above one storey” / “pay for road maintenance”] in relation to [BURDENED LAND], for the alleged benefit of [COVENANTEE / BENEFITED LAND]. A freehold covenant is a promise that regulates land use for the benefit of another’s land. The issue is whether this covenant is properly characterised as [positive / restrictive], whether its burden runs at common law or only in equity, whether the benefit has been annexed or otherwise passed to [PLAINTIFF], and whether Torrens and planning legislation or s 89 / Part 8A have modified or extinguished it.

[Soft prompts:
- [If “not to build / not to use as”: think restrictive covenant and Tulk v Moxhay.]
- [If obligation to repair / pay / build: think positive covenant and Austerberry problem.]
- [If subdivision plan with “restrictions as to user”: think s 88B, schemes of development and Torrens.]
- [If DA and LEP clause: think EP&A Act s 3.16 and JEA / Wu / Lennard.]]

1. EXAM ROADMAP – RUN IN THIS ORDER

Use this checklist to structure any covenant problem.

1. **Characterise the right and the land**
   - Is this a freehold covenant, easement, profit, lease, licence, rentcharge, or statutory condition?
   - Is it positive or negative in substance?
   - Is land Torrens or old system?
2. **Identify the covenant(s) and parties**
   - What is the exact obligation?
   - Who is covenantor and covenantee?
   - What land is burdened and benefited?
3. **Burden – can [SUCCESSOR] be bound?**
   - Common law: Austerberry rule, s 70A – generally “no”.
   - Equity: Tulk v Moxhay – negative only, benefits land, intention, notice.
   - Statutory or structural workarounds: s 88BA, s 88D–E, rentcharge, re-entry, “benefit and burden”, essential incident of easement.
4. **Benefit – can [PLAINTIFF] enforce?**
   - Common law: “touches and concerns” + intention + annexation (s 70, Ballard, Federated Homes, Forestview).
   - Equity: annexation, assignment, building scheme, s 70 plus s 88(1).
5. **Formal validity and Torrens / s 88(1) / s 88B**
   - Does the instrument clearly indicate benefited and burdened land, and any variation powers, per s 88(1)?
   - Is it on a plan under s 88B, or recorded under s 88(3)?
   - Any common building scheme (Elliston, Re Louis, Hosking)?
6. **Interaction with Torrens indefeasibility**

2. It benefits identifiable land of the covenantee.
3. The original parties intended the burden to run with the covenantor's land.
4. The successor took with notice of the covenant (subject to Torrens and statutory recording).

This is the *Tulk v Moxhay* doctrine, refined by *Haywood v Brunswick*, *Rhone v Stephens*, *Forestview Nominees* and others.

Checklist – "Can I bind [SUCCESSOR] in equity?"
Ask:
1. Is the covenant negative in substance (no positive expenditure)?
2. Does it protect the value or amenity of land owned by the covenantee at the time of creation?
3. Is there intention that the burden bind successors (wording, s 70A)?
4. Did [SUCCESSOR] have actual, constructive or imputed notice, or is the covenant recorded as an affecting interest under Torrens?
5. Is there any Torrens indefeasibility obstacle?

5.2 Template – "Is the burden enforceable in equity against [SUCCESSOR]?"

Rule paragraph
In equity, the burden of a freehold covenant may run with the covenantor's land and bind successors who take with notice if the covenant is negative in substance, benefits identifiable land of the covenantee, and was intended to bind successors (*Tulk v Moxhay*; *Haywood v Brunswick* 8 QBD 403; *Rhone v Stephens*; *Forestview Nominees* (1998) 193 CLR 154). Equity confines this to restrictive covenants to avoid flat contradiction with the common law rule against positive burdens running (*Rhone v Stephens*).

Application template
Here, [COVENANTOR] covenanted in [YEAR] that [describe restrictive obligation]. This is negative in substance because [OWNER] can comply simply by [not building / not using land for specified purpose], without expenditure, similar to the covenant to keep Leicester Square "uncovered with buildings" in *Tulk v Moxhay*. The covenant was entered into when [COVENANTEE] owned [BENEFITED LAND] and clearly protects that land's [views / amenity / trading position], so it benefits the land rather than merely [COVENANTEE] personally (*Forestview Nominees* 193 CLR 154, 162). The instrument expresses that the covenant binds the covenantor's "heirs and assigns", and s 70A(1) deems it made on behalf of successors, indicating intention that the burden run in equity. [SUCCESSOR] acquired [BURDENED LAND] with [actual / constructive] notice because [the covenant is recorded on the folio under s 88(3) / the covenant appears on the old system title deeds], so they are bound in equity to observe it unless Torrens indefeasibility intervenes. Therefore, subject to any statutory override, the burden is enforceable against [SUCCESSOR] in equity.

[NB: For Torrens, remember: a properly recorded restriction as to user is an "interest" protected by s 42 RPA via s 88(3)(c), so notice is supplied by the register rather than general equitable notice.]

6. BENEFIT AT COMMON LAW – TOUCH AND CONCERN, INTENTION AND s 70

6.1 Rule and checklist

Rule
Common law allows the benefit of a covenant, whether positive or negative, to run with the covenantee's land so that successors can enforce against the original covenantor, provided:
1. The covenant "touches and concerns" the covenantee's land.
2. There is intention that the benefit run with that land, often supplied by s 70.

"Touches and concerns" means the covenant affects the mode of occupation or value of the land as land, not just the personal position of the covenantee (*Rogers v Hosegood*; *Smith & Snipes*; Butt [10.150]).

Checklist – "Does the benefit run at common law?"
1. Does the covenant enhance enjoyment or value of the covenantee's land?

identify the benefited land, *Re Martyn* suggests that the scheme cannot be enforced against successors whose title is guaranteed by the register.

11. PUBLIC POSITIVE COVENANTS AND FORESTRY RIGHTS – s 88D–E, 88EA, 88AB

Very short section – just to tick the statutory boxes if relevant.

- **s 88D CA** – allows prescribed authorities (Crown, statutory bodies, councils) to impose restrictive and public positive covenants over land vested in them. Once recorded, both positive and negative obligations bind all successive owners as if each had personally covenanted, without needing a dominant tenement.
- **s 88E CA** – similar power over private land, by memorandum or deed executed by the authority, the landowner and others to be bound. Positive maintenance or development obligations can thus run with land in favour of an authority.
- **s 88EA, 88AB CA** – allow restrictive and "forestry covenants" over land subject to forestry rights, including carbon sequestration rights; forestry rights are treated as statutory profits à prendre.

Template
If [COUNCIL / AUTHORITY] relies on a positive covenant requiring [OWNER] to [maintain works / limit development], it may have been created under s 88D or s 88E of the Conveyancing Act. Once properly recorded, such a public covenant binds successors as an "interest" on the Torrens register, overriding the general rule that positive covenants do not run and that burdens must benefit identifiable land (*Commissioner for Main Roads v BP Australia*; CA ss 88D–E, 87A).

12. PLANNING OVERRIDE – EP&A ACT s 3.16 (ex s 28) AND JEA / LENNARD / WU / CRACKNELL

12.1 Rule – suspension of "regulatory instruments"

Rule
EP&A Act s 3.16 (formerly s 28) allows an environmental planning instrument (EPI), such as an LEP, to provide that, to the extent necessary to enable development in accordance with the EPI or a consent, a "regulatory instrument" including any covenant, agreement or similar instrument does not apply or applies with modifications. The clause must be approved by the Governor and, where relevant, the responsible Minister (*Cumerlong Holdings*). This gives planning controls priority over private covenants and easements to the extent specified.

In *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* (2011) 243 CLR 492; [2011] HCA 27 the owner of a lot was given development consent pursuant to the local environmental plan by the local council. The proposed development was an extension of a hospital onto a lot subject to a restrictive covenant that prohibited such buildings. The relevant planning instrument allowed suspension of such restrictions. As the Governor's approval was not given, the plan, and therefore the suspension, was ineffective.

Template – "Does the LEP / EPI suspend the covenant or easement?"

Rule paragraph
Under s 3.16 of the EP&A Act, an environmental planning instrument may provide that, to the extent necessary to permit development under that instrument or a consent, a regulatory instrument such as a covenant or agreement does not apply or applies with modifications, provided the Governor has approved the clause. Clauses such as cl 1.9A in LEPs can therefore suspend private covenants that restrict land use, reflecting the policy that planning control is a public function that can override private bargains (*Lennard v Jessica Estates*; *Coles Supermarkets v Minister*; *Wu*; *JEA Holdings v Registrar-General*).

Application template
Here, [DEVELOPMENT] has been approved under [LEP] and DA [NUMBER]. Clause [1.9A] of the [LEP], made with the Governor's approval, provides that any "agreement, covenant or other similar instrument that restricts the carrying out of development" does not apply to the extent necessary to allow development carried out in accordance with the Act. The covenant/easement in [TRANSFER / S 88B INSTRUMENT] restricts [use of Lot X to carparking / prohibits

Rule
Section 89 CA permits the Supreme Court to modify or wholly or partially extinguish easements and restrictive covenants where specified criteria are met, typically because the covenant is obsolete, unreasonably impedes reasonable use without practical benefit, has been abandoned, or its modification will not substantially injure beneficiaries. Courts emphasise that s 89 is to remove rights that have lost practical utility, and applicants must bring themselves clearly within one or more limbs (*Re Mason*; *TZ Developments v Rickman*; *Post Investments*; *Perella v Otvosi*).

Checklist – s 89

1. Is the covenant obsolete due to change in neighbourhood or land use?
2. Does it unreasonably impede reasonable use of burdened land without practical benefit?
3. Have beneficiaries agreed, abandoned or waived?
4. Will modification cause no substantial injury?
5. Discretion – conduct, planning context, "thin end of wedge".

Template – "Should the covenant be modified or extinguished under s 89?"
Rule paragraph
Under s 89 of the Conveyancing Act the Court may modify or extinguish a restrictive covenant where, because of changes in the use of land or the neighbourhood, the covenant has become obsolete, or its continued existence would impede the reasonable use of the burdened land without securing practical benefit to the entitled persons, or where those persons have agreed or effectively waived their rights, or where modification/extinguishment will not substantially injure them. The power is discretionary and is used to remove rights that no longer have real utility (*Re Mason*; *Post Investments v Wilson*; *Perella v Otvosi*).

Application template
Here, [OWNER OF BURDENED LAND] seeks modification or extinguishment of the covenant restricting [USE / BUILDING HEIGHT] over [BURDENED LAND]. Since the covenant was created, the neighbourhood has changed from [low-density residential] to [mixed medium-density development], with many nearby properties developed inconsistently with the original scheme. However, the covenant still protects [views / privacy / detached character] for [BENEFITED LAND], as in *Post Investments*, where medium-density zoning did not render a one-storey covenant obsolete. The restriction may impede [OWNER]'s preferred development, but if detached dwellings remain a reasonable use, the Court may find that the covenant neither obsolete nor unreasonably impeding reasonable use. Unless [BENEFICIARIES] have clearly agreed or abandoned the covenant, and unless the proposed modification would cause no substantial injury to their amenity or land value, the Court is likely to refuse the application, especially where [DEVELOPER] acquired with knowledge of the covenant and took a commercial risk.

Quick s 89 paragraph for "developer wants out of covenant"

Use when they clearly bought burdened land with eyes open and you just need to show why s 89 probably fails (or succeeds) without running every limb separately.

Template – "Short s 89 CA analysis"
[DEVELOPER] seeks to modify or extinguish the covenant under s 89 of the Conveyancing Act, arguing that it is now obsolete or unreasonably impedes reasonable use of [BURDENED LAND]. However, s 89 is directed to removing rights that have lost practical utility and requires the applicant to show that, because of changes in land use or the neighbourhood, the covenant no longer provides practical benefit, or that its continuation would unreasonably impede reasonable use without such benefit, or that beneficiaries have agreed or waived their rights, and that no substantial injury will be caused (Re Mason; Post Investments; Perella v Otvosi). Here, although zoning has changed to [R3 / B4] and there is more intensive development nearby, the covenant still protects [views / privacy / low-density character] of [BENEFITED LAND], as in Post Investments where a one-storey covenant remained useful despite medium-density zoning. Given that [DEVELOPER] purchased with notice and can still make reasonable use of the land within the restriction, it is unlikely the covenant will be treated as obsolete or unreasonably impeding reasonable use, and an application under s 89 is unlikely to succeed.

14.4 Registrar-General extinguishment – Part 8A RPA (ss 81A–81L)