

module 1

overview:

- 3 foundational doctrines of Australian land law:
 - tenure - inherited from UK
 - estates - inherited from UK
 - native title - derives from the decision of the HCA in *Mabo v State of Queensland (No. 2)* (1992) 175 CLR 1
- derive from different economic, social and environmental contexts

concepts:

- tenure;
- estate in fee simple;
- life estate;
- native title;
- bundle of rights metaphor;
- inter-subjective rights;
- exclusive possession;
- alienation;
- reversion;
- terra nullius;
- extinguishment

lecture 1A: foundational doctrines

these doctrines provide the structure for our land holding system

foundational doctrines of real property:

- tenure
- estates
- native title

real property defined

- Real property is **land and interests in land**. Real property is subdivided into two further groups:
 - corporeal hereditaments (**tangible** real property, i.e. land) and
 - incorporeal hereditaments (**intangible** interests in land, such as easements, or rights of way).
 - the driveway - is a physical manifestation of the right to cross the land
- not tangible
- hereditament = any property that can be inherited - denotes permanency
- one of the things that characterises land is its **permanence**
- law transported from England (different social conditions) developed centuries ago
- how we live
 - single dwellings on land
 - apartments
 - town houses

- rural allotments
 - farms
 - on country / city / regions
- 3 key doctrines (sets of rules/principles)
 - tenure
 - estates
 - native title

doctrine of tenure

basic principles

- Based in feudalism
- Three principles:
 - **No one owns land absolutely (allodial)**
 - **All land is held of the Crown**
 - every interest in land must come from crown grant (because the crown has given it to us)
 - **No one holds land except of the Crown (ie by grant)**

feudal tenures

- The King owned all land absolutely (william 1066)
- He granted his subjects ('tenants') the right to use the land, not the land itself
- The right granted was an 'estate'
- Derives from the Crown
- In return, the tenant owed the King obligations/services
- There were many types of tenures (differentiated by different types of service) only one was imported into NSW: free and common socage.

reception of british law

- in 1788 - the importation of the doctrine of tenure
- Free and common socage was the tenure imported into NSW on the arrival of the first fleet
- British Imperial Law – legal framework that governed Britain's relations with her colonies
- Law and official policy
- Settled versus conquered colonies
 - **conquered** - legal system already in place capable of adjudicating disputes between british settlers e.g. france, spain, colonies acquired from a european power
 - **settled** - no civilised legal system for british settlers
 - this was not a question of the courts
 - it was a policy decision
 - the colonial office in london managed the colonies and set policy, and determined whether a colony was settled or conquered
 - decided NSW was settled
 - below rule therefore applied

- **An Englishman (sic) brings as much of the common law with them as is relevant to the circumstances of the colony (Cooper v Stuart)**
- was tenure really relevant to the circumstances of the colony? they arose from a feudal structure from normandy in 1066, supporting an aristocratic way of land holding

'Traditional' versus 'new' conceptions of tenure

- Traditional view of tenure in Australia: the importation of feudal law – *Attorney-General v Brown*
- Modern view of tenure in Australia: articulated by Brennan J in *Mabo v State of Queensland (No. 2)*

Attorney General v Brown [1847]

- NSW Supreme Court
- Involved a grant by the Crown of 60 acres of land near Newcastle
- The grant included a reservation (you will see examples of a reservation in the video we asked you to watch for your first assessment).
- reservation = they grant the land but hold something about it back/some of it back i.e. conditional - reserving a right
- The reservation stated: '...we do hereby reserve to ourselves ... and also all mines of silver and of gold, and of coals, with full and free liberty and power to search for, dig, and take away the same...'
- retained to itself the ownership of mines of silver, gold and coal and the right to mine it
- A later clause said that if the reservation was not observed the grant would be void.
- Mr Brown mined for coal
- The Attorney-General brought an information for intrusion
 - this was a mechanism for obtaining satisfaction in damages for personal wrongs committed in the lands or other possessions of the Crown
- So the argument was that Mr Brown had committed a wrong by mining for the coal that belonged to the Crown. I.e. Mr Brown intruded into the Crown's possession of the mines and coal
- Mr Brown made four arguments, of which the third is relevant here.
 - He argued that there is a distinction between the Crown having sovereignty over New South Wales and the Crown having ownership or possession of the land. So the Crown had sovereignty, but not ownership or possession of the land - so there could be no interference with that ownership or possession (without which it could not maintain the information for intrusion)
 - doctrine of tenure didn't work the same way as it did in England
- Unsurprisingly the Court (English trained judges) did not agree.

what is sovereignty?

- the idea of the ultimate authority in a nation
- the crown & cth have sovereignty over Australia
- with it comes the power to make laws about a plenary range of subjects (state) or s 51(cth) - constitution, prerogative powers

- sovereignty & ownership are not the same thing e.g. crown does not need to own something to be able to make laws with respect to something because it is sovereign and has the power to do so (e.g. can make laws about my shoe)

Stephen CJ held that:

- The waste lands (unoccupied lands) of the colony had been in the possession of the Crown since 1788 (all land in the colony as indigenous ownership was not recognised)
- That while it might be a fiction in England that the Crown owned all lands, it was not a fiction in NSW, as this is a newly discovered country
- Waste lands were vested in the Crown
 - unconditional and absolute right to that thing
 - a secure right
- on acquisition of the colony, not only did the crown acquire sovereignty, but all land was vested in the crown (it became owned unconditionally by the crown)
- This had been confirmed legislatively by the Imperial Waste Lands Act 1842
- That all the waste lands of the colony vest in the crown must be the case “for, at any rate, there is no other proprietor of such lands”
- **Ratio**
 - All land of the colony was owned by the Crown
 - As there were no other owners, the Crown owned all land
 - Mr Brown’s action failed
 - Extreme legal significance for Indigenous Australians, indirectly - Crown acquired ownership of the land as there were no other owners (factually wrong, ignored their existence)
 - if the crown owned all land, there was no room for indigenous rights to land
 - confirmed that the doctrine of tenure in aus was the traditional view

Mabo v State of Queensland (No. 2)

- In effect this case raised a similar legal issue to Attorney-General v Brown: what interest did the Crown acquire on taking sovereignty over NSW?
- What was this so crucial in the case?
- What does the doctrine of tenure look like in modern form? is it different from that articulated in the above case?

Key Arguments

- Plaintiffs claimed that an interest in land (native title) had survived the annexation of New South Wales by Great Britain.
- One aspect of this argument was that the Crown had acquired sovereignty but not full (let’s use the word from the case – beneficial) ownership.
- This is essentially the same argument as in Attorney-General v Brown
- Qld gov - traditional understandings of land law, indigenous interests extinguished upon annexation

Conclusions - Brennan J

- the Crown had only acquired sovereignty, not full or beneficial ownership WHERE THERE WERE NO OTHER OWNERS, native title had not been extinguished

- in places where there were other owners (indigenous) the crown had not acquired beneficial ownership
- but if there were no other owners, it had acquired beneficial ownership
- what did he mean by this?
 - physical ownership?
 - native title?
- This was not an entirely unexpected outcome, aboriginal title was already part of common law doctrine in other places
- What was a bit different was the emphasis on the doctrine of tenure
- all this case confirmed was that the crown did not always acquire beneficial ownership and claims to native title could be made

Radical title: Brennan J

- The Crown was treated as having the radical (*ultimate/final/paramount*) title to all the land in the territory over which the Crown acquired sovereignty. **The radical title is a postulate of the doctrine of tenure and a concomitant of sovereignty.** (*radical title accompanies sovereignty*) As a sovereign enjoys supreme legal authority in and over a territory, the sovereign has power to prescribe what parcels of land and what interests in those parcels should be enjoyed by others and what parcels of land should be kept as the sovereign's beneficial demesne. (at para 50).
- **crown acquires sovereignty → doctrine of tenure imported into NSW → radical title accompanies these**
- radical title allows the crown to manage/grant/regulate/take back land
- SUMMARY:;
 - under the traditional english doctrine of tenure, the crown had a notional interest in land
 - but that notial interest assumed the crown owned the land (the kind was the paramount lord)
 - once brennan J decided the doctrine of tenure did not automatically lead to the crown having beneficial ownership of all the land, he felt the need to ensure that in line with the original doctrine, the crown still had an interest. this is what he called radical title to the land.
 - so radical title is NOT ownership of the land
 - examples the crowns interest and powers of the land with respect to sovereignty
 - it explains from where in the common law the crowns power to manage land is derived

Three principles revisited:

- No one owns land absolutely (allodial)
 - because the crown has an interest in all land (known as radical title - not ownership)
- All land is held of the Crown
 - this forces us to ask from where native title derives?
 - if it comes from somewhere other than the crown then this principle is no longer true
- No one holds land except of the Crown (ie by grant)
 - the above comment also applies here

relevance today

- Doctrine of tenure underpins our land holding system
- Necessary to how we think about native title
- Not something you encounter on a day-to-day basis
- modern legislation saying crown owns all land still comes before the courts
- unsettled doctrine

doctrine of estates

- Radical title gives the Crown the power to grant interests in land
- Those interests are called estates
- real estate - person who deals with transactions of estates

What is an estate?

- Estates are different bundles of rights and powers exercisable in respect of land. Eg possession, alienability, right to derive income etc
- So in modern terms, it's the interest we have in the land
- property right that gives you right to use and occupy land

Estates are based on time

- Time distinguishes the types of estates
- The difference between the types of estate is the **time which they endure** – in other words, **how long the estate exists**.
- Therefore the different estates are **classified according to how long they endure**, and **more than one estate can exist at any one time in one piece of land**

Types of Estates

- **Freehold estates**: an estate that has an uncertain duration (don't know when it is going to end) (imported from England) - permanent - the estate endures - could go forever
 - **Fee simple** - most common in NSW (bought, sold, mortgaged, leased)
 - **Life estate**
 - **(fee tail)** - has been abolished
- Leasehold estates: have a certain duration
 - leases - definite maximum duration e.g. 1 year
 - module 6
- Estates in remainders and reversionary estates
 - should be classified as estate in fee simple
- Strata
 - holding of ownership in apartments
 - module 9

FREEHOLD ESTATES:

1. Estate in Fee simple

- most ample form of ownership possible in our system
- Fejo: An estate in fee simple is, "for almost all practical purposes, the equivalent of full ownership of the land" [44]
- if the underpinnings of our land holding system are found in the doctrine of tenure, and the doctrine of tenure says no one owns land absolutely, all land is held of the crown, the estate in fee simple is the closest you can get to full ownership in a system of tenure
- An **inheritable** estate
- Inheritability was indicated in the grant by the use of the term '**heirs**'
- You have full **rights of ownership**: eg alienable; exclusive possession

Creating an estate in fee simple

- At common law, very specific language was needed: To A and his heirs
 - e.g. To Bob and his heirs
- now, under the Conveyancing Act s 47(1), (2): To Alice in fee simple / To Alice forever

Estate in fee simple: Key concepts

- Property is not a thing but a relationship: namely the relationship between persons with respect to a thing.
- The 'relationship' is composed of 'rights'.
- The main way we think about having property (or owning something) is as having a bundle of rights (and duties) vis a vis (against) everyone with respect to something (a cup maybe?).
- Key sticks in the bundle: Alienability and exclusive possession
 - the 2 key sticks in the bundle of ownership that is an estate in fee simple are alienability (can be transferred) and exclusive possession (ability to exclude all others)
 - court will generally restrict the ability of anyone to alienate/transfer property
 - these are indicia of an estate in fee simple - basically indicia to all interests in land

2. Life Estate

- Two types:
 - Life estate
 - life estate pur autre vie (for the life of another)
- Created either by Inter vivos (by living people) or by will (to take effect after death)
- Commonly familial situations
 - e.g. bill has 2 children from his first marriage
 - first wife died and marries chloe
 - bill, in his will wants to ensure that chloe can remain in their house for the rest of her life but the property goes to the children of his first marriage when she dies

- that means chloe has the benefit of the property, all the income derived from the property while she is alive
- but provision is made for the children of his first marriage through the use of a life estate
- Can involve a trust
 - a mechanism whereby one person holds property on trust for another in equity
 - they manage the property for the beneficiary
 - e.g.
 - richard and jill have a special needs child
 - they are concerned that the child is well provided for when they die
 - they may leave the family home as a life estate to the child, but vested in a trust
 - i.e. there is a trustee that will manage the property for the benefit of the child
 - after the child's death, it will go to a more distant relative
- All rights of the holder of an estate in fee simple except inheritability and note doctrine of waste (should not fundamentally change the land)
- the holder of a life estate has all the rights of a holder of an estate in fee simple, except that it is not an inheritable estate (it cannot be left in the will of the person who is the holder of the life estate e.g. maggie below) and have to observe the doctrine of waste (not change the nature of it)
 - although it was not originally possible to leave a life estate in a will (at common law) - statute says it now can be left by will

Two types

- Life estate: To Maggie
 - lasts/endures for as long as the life of the holder
 - e.g. I have an estate in fee simple and I am going to create and grant a lesser estate (a life estate) to maggie
 - maggie is now the holder of a life estate - this is a property right so she has exclusive possession
 - i no longer have exclusive possession - maggie does for the duration of her life
 - maggie also has alienability - she can sell the life estate to billy
 - should billy buy it, he will have the estate for as long as maggie is alive - no one would probably buy this FYI
 - selling it does not change its nature - it is still measured with respect to maggie's life
 - it can be mortgaged for security to a bank
 - she has the right to possess the property, to have the income of the property for as long as her life lasts
 - this is a freehold estate with an uncertain duration - don't know how long maggie will live
 - the life estate will ensure and maggie will hold it as long as she is alive
- Life estate pur autre vie: **To Maggie for the life of Bella**
 - maggie holds a life estate but the length of it is measured by the life of someone else

- i hold an estate in fee simple
- i am creating a lesser estate from that
- i am granting maggie a life estate
- maggie will have that life estate for as long as bella is alive
- when bella dies, maggie's estate will come to an end, regardless of whether maggie herself is still alive

- **A LIFE ESTATE HOLDS ALL OF THE INCIDENTS OF OWNERSHIP - EXCLUSIVE POSSESSION, ALIENABILITY ETC**

no technical language required to create a life estate

- To A for life, to occupy or use or other words showing an intention to create a life estate: generally this is by will and it is a matter of construing the words in context
- all you need is words in your grant that indicate it is a life estate (showing an intention)
- usually by will - courts construe the words in context (broadly) because the person is dead
- the safest words are "for life"

- **another way a life estate is created is: if you fail to correctly create an estate in fee simple**

- at common law that is by missing the word 'heirs'
- but this rule has changed (s 47) then it would be if you failed in your creation of the estate to use words that indicated it was to go on forever

3. Estate in Fee Tail

- estate in fee simple = simple → it can be inherited by anybody
- a fee tail was considered to be cut → only allowed to be inherited by a limited class of heirs (usually eldest male) supporting english aristocrat land holding
- Historical curiosity in NSW
- Limited class of heirs – usually male
- Reverted to the grantor if there was no appropriate heir (get the land back)
- Way of keeping land in aristocratic families
- For the lovers of the tv series Downton Abbey or just the seriously nerdy property law lovers amongst us (that's me), here is a short article on how the whole of Downton Abbey's plot line hangs on the fee tail.

Simultaneous estates

- Estate in reversion
- Estate in remainder

1. estate in reversion

- To Alice for life (life estate)
 - I have an estate in fee simple and I grant Alice a life estate
 - that estate carries possession - alice possesses the land and i no longer do
 - when the life estate ends, the possession reverts to me as the grantor
 - my estate in fee simple is now an estate in fee simple in reversion