Class 1A The Concept Of Property 3
Class 1B Origins of Australian Land Law 4
Class 2A Native Title 10
Class 2B Torren's Title & Indefeasibility 20
Class 3A Indefeasibility & Its Implications 28
Volunteers 28
Class 3B Exceptions to Indefeasibility of Title 36
Class 4A Exceptions To Indefeasibility [short term leases, omitted easements, overriding statutes] 58
Class 4B Equitable Interests, Caveats, and Competing Equitable Interests 66
Class 5B Co-Ownership 74
Joint Tenancy 74
Tenancies In Common 75
Creation Of Co-Ownership → Joint Tenancy or TIC? 77
Co-Ownership & Torrens System 78
Rights of Enjoyment Inter Se (Between Co-Owners) 79
Account For Rents & Profits 84
Class 7A Co-Ownership Termination 94
Severance of Joint Tenancy 94
Termination of Co-Ownership 105
Strata Titles Legislation 108
Class 7B Leases 110
Overview 110
Substantive Requirements For Validity 111
Formal Requirements For Creation Of A Lease 117
Implied Covenants 118
Express Covenants 124
Class 8A Leases II 136
Enforceability Of Covenants After Assignment 136
Remedies 142
Class 8B Mortgages 159
Introduction To Mortgages 159
Remedies Of The Mortgagee 167
Class 9A Easements I 185
Introduction To Easements & Profits A Prendre 185
Types Of Easements 185
Requirements For Easements 194
Class 9B Easements II 208
Creation Of Express Easements 208
Creation Of Easements By Court Order 211
Remedies For Interference With Easement 216
Extinguishment Of Easements 217
Restrictive Covenants 224
Class 10A Freehold Restrictive Covenants 233
The Benefit 233
Planning Instruments 245
Boundaries of Land 250

Class 1A The Concept Of Property

Ch 1 paras [1.1] - [1.16], [1.75] - [1.85], and [1.110] - [1.115]

What is Property?

Definition	Legal relationship between persons WITH respect to things (Wily v St George Partnership Banking) Property is not full, exclusive, or beneficial ownership, it is a description of a legal relationship with a thing (Yanner v Eaton)
Theories	● **Felix Cohen:** Essential characteristic is the right to exclude, not necessarily right to use or sell; as you can have use without ownership (singing a song) + ownership without use (corporation owning a copyright) ● **Wesley Hohfield:** Could be physical object, legal interest in it, or a blended, meaningless sense ● **Gray & Gray:** Quantum of socially permissible power exercised in respect of a socially valued resource where multiple people can hold gradations of property in the same resource simultaneously
Three Incidental Traits of Property	**<u>Milirrpum v Nabalco (1971)</u>** 1. Right to use or enjoy 2. Right to exclude others 3. Right to alienate (transfer/sell) Not all three must be present but the more that are absent, the weaker the property claim
Bundle of Sticks	**<u>Yanner v Eaton</u>** Metaphor for property law as it is not a single, absolute right over a thing but a collection of different rights that can be held together or separately with each stick representing a different right eg. right to use, right to exclude, right to sell or transfer, right to lease, right to mortgage, right to destroy Rights can be separated and they exist on a sliding scale Does this person hold enough sticks to warrant legal protection over a proprietary interest? → Is this property?
Public v Proprietary Right	**<u>Property Rights</u>** ● Proprietary rights are **in rem** (enforceable against the world in respect of a thing). ● Personal/obligational rights (contract, tort) are **in personam** (enforceable only against specific persons). **<u>Public Right</u>** The right to fish in the sea / walk in a public park is NOT a proprietary interest → it is shared equally by all of the public + NO individual right over an "estate or interest in land." **<u>Stow v Mineral Holdings</u>** Only persons with a proprietary estate or interest in land (legal or equitable — e.g. freehold, leasehold, easement) have standing to object to mining on adjacent land. A general public right to use Crown land (e.g. a national park) does not constitute an "estate or interest in land," no matter how frequently or passionately one exercises it
Classification of Property	**<u>Real Property</u>** ● Immovable land ● Specifically recoverable at common law with real action ● Corporeal hereditaments (tangible land), incorporeal hereditaments (intangible rights over land such as easements) **<u>Personal Property</u>** ● Movable chattels or intangibles ● Only damages available through personal action ● Real chattels (leaseholds), pure personalty (choses in possession + choses in action such as patents, copyright, shares, goodwill)

Class 7A Co-Ownership Termination

Ch 7 paras [7.52] - [7.86], [5.142] - [5.148]

Severance of Joint Tenancy

Overview

Joint Tenancy

- Joint tenancy must be severed before death to avoid survivorship
- Cannot dispose of interest by will

Methods Of Severance

First three categories were established in **Williams v Hensman**, the starting point for all severance analysis

1. Unilateral Action
2. Agreement Between Joint Tenants To Sever
3. Course of Dealings Showing Intention Treating Joint Tenancy As Ended
4. Order Of The Court
5. Homicide
6. Bankruptcy

Method #1

Unilateral Action

Severance under a unilateral act requires an actual change in legal or equitable title, not mere intention, to be effective

Corin v Patton (1990) 169 CLR 540

Facts

- Mrs Patton and Mr Patton were joint tenants
- Mrs Patton executed a transfer purporting to give her interest in the jointly-owned land to her brother before her death in an attempt to sever the joint tenancy and defeat Mr Patton's right of survivorship
- Transfer not registered before she died

Issue

- Whether Mrs Patton had effectively disposed of a legal or equitable interest in the property before her death
- Whether the joint tenancy had been severed, so that her share would pass under her will / estate rather than to Mr Patton by survivorship

HELD

Unilateral severance requires an actual legal or equitable change in estate

- Joint tenancy not severed
- Mrs Patton had not put Mr Corin (the donee) in a position to secure registration of the transfer without further assistance from her → so no effective equitable assignment/alienation of her interest had occurred
- Severance requires an actual change in the legal or equitable estate (not merely an intention to sever), and no such change has taken place so Mr Patton took the whole property by survivorship
- Three modes of severance —:**Williams v Hensman**
  - 1) Severance requires destruction of one of the four unities (possession, interest, title, time) — as a matter of history and principle (citing Blackstone).
  - 2) Unilateral action can only sever by destroying unity of title — i.e., only where the acting party's title is actually transferred or otherwise legally/equitably affected, resulting in a real change to the legal or equitable estate.
  - 3) A mere statement/declaration of intention to sever, without more, does NOT affect unity of title and therefore does not sever a joint tenancy.
  - 4) REJECTED the English approach (from Burgess v Rawnsley) that a unilateral intention merely communicated to the other joint tenant can sever — Australian law requires something more concrete than communicated intention.
  - ^^ Allowing mere statements of intention to sever would create uncertainty as to who owns what interest in land → there will be no point in keeping "mutual agreement" as a separate, distinct method of severance as the categories would collapse into each other

Equitable trust requires an agreement

- Equity imposes a trust of Torrens land held as joint tenants where the joint tenants actually agree to terminate the joint tenancy
  - Thereafter they hold as trustees for themselves as tenants in common in equal shares. Consideration for such an agreement = each party gives up their survivorship right in exchange for a fixed TIC share.

- Such an agreement can be express, or implied from a course of dealing sufficient to show the parties mutually treated their interests as a tenancy in common: **Williams v Hensman**
    - No such agreement (express or implied) existed here as Mr Patton didn't even know about the transfer until after Mrs Patton's death.
    - UNDECIDED whether equity would impose a trust from conduct falling short of an agreement but still showing a common intention to sever
- Separately, equity can impose a trust for tenants in common where one joint tenant effectively alienates their interest in equity to a third party (an equitable assignment, valid in equity though not at law)
    - This binds all the joint tenants, converting the whole into a tenancy in common in equity, not just a trust of the assignor's own share
    - This did not apply on the facts because Mrs Patton had not gone far enough to complete an effective equitable alienation because she did not put Corin in a position to register without her help

- Joint tenant executed a memorandum of transfer purporting to transfer her interest as a joint tenants to herself as a tenant in common → transfer presumed to bring the tenancy to an end: **McNab v Earle**
    - Memorandum of transfer held by the joint tenant's solicitor and NOT registered prior to her death
    - **HELD:** Transfer UNREGISTERED so no effect in law or equity → no operative effect on the joint tenant share so severance was ineffective

Registration Changes The Outcome

- Registration completes the alienation and once registered, the transfer effects an actual change in the legal estate, satisfying the requirement needed in **Corin v Patton**
    - Severance needs a real change in title, not mere intention
    - Unregistered transfers only ever raise an EQUITABLE question of whether there was an effective equitable assignment
    - Which is why **Corin v Patton** turned on whether Mrs Patton had done enough to make the gift effective in equity despite non-registration
- De facto spouse of joint tenant acquires an interest in the property under constructive trust: **Baumgartner**
    - [UNRESOLVED] If this severs joint tenancy
    - This is flagged as an open/unresolved question in the text, testing whether the Corin v Patton framework (an equitable interest arising in a third party binding the joint tenants as TIC) extends to constructive trusts arising from de facto relationship contributions.

Effective Severance Despite Non-Registration

Wilson v Dillon [2019] VSC 211

Facts

- Husband + wife were joint tenants
- Husband, acting on his OWN behalf and under the power of an attorney for his wife, signed transfers of the land
- Transfers never registered. Husband died before the wife and then she died after

HELD

- Transfers were effective to sever the joint tenancy in EQUITY, even though unregistered
- Because both parties' estates were in a position to seek registration of the transfers
- Nothing remained outstanding that depended on further cooperation from a third party or from one of the joint tenants personally

DISTINCTION FROM CORIN V PATTON

In **Corin v Patton** the donee still needed further assistance / authority from someone else to complete the registration

Perfect Gift Requirement

Costin v Costin (1997) 7 BPR 15,167

Facts

- Father and one of his sons were joint tenants of a property

- Father wanted to transfer his share to his other son
- Father executed transfer of interest + signed authority to his solicitors for the direction to produce certificate of title for registration
- Solicitors refused to produce the certificate without the authority of the first son (co-joint tenant)

HELD

- Gift was not perfected as the donee still required the authority of the other joint tenants to be in a position to secure registration
- **Ratio.** A gift/transfer is not perfected in equity if the donee still needs the authority of another person (e.g. a co-joint tenant, mortgagee, or solicitor as bailee of the title certificate) to secure registration
- Where the bailee of the certificate of title (whether acting as mortgagee, co-joint tenant, or solicitor) refuses to release/produce the certificate, the gift remains imperfect in equity
    - Because the donee cannot yet secure registration without further assistance from someone else.

Subsequent Application

A clearly established intention to make a gift is NOT determinative of whether a gift has been perfected: **Stone v Registrar of Titles**

- Reinforces the **Corin v Patton** principle that intention alone (even if it is clear) is not enough → must be an ACTUAL STEP TRANSFERRING THE INTEREST
- Requirement of actual change in legal / equitable estate, not just mere intention to sever

Torrens System

- NSW permits severance of Torrens title land by the unilateral act of a joint tenant via registration mechanism
- Bypasses the equitable difficulties illustrated in Corin v Patton and Costin v Costin, because the statute itself provides the "actual change in title" that severance requires.
- **Real Property Act s 97**
    - A joint tenant may now register a transfer to themselves in order to sever the joint tenancy.
    - The Registrar-General may require (i) the names and addresses of all joint tenants, and (ii) a statement that the severing joint tenant is unaware of any limitation on the right to sever (e.g., a private agreement not to sever): **s 97(2)(b)**
    - The Registrar must notify all other joint tenants of the lodgment of the transfer: **s 97(5)**

97 Severance of joint tenancy by unilateral action

(1) Registration of a transfer by a joint tenant of the joint tenant's interest in the land that is the subject of a joint tenancy to himself or herself severs the joint tenancy.

(2) If a joint tenancy is proposed to be severed by unilateral action by one joint tenant, the Registrar-General may require the person who proposes to sever the joint tenancy to provide the Registrar-General, before recording the instrument that severs the joint tenancy, with—

(a) the names and addresses of the joint tenants or, if the addresses are unknown, evidence of the efforts made by the person to locate the addresses of the joint tenants, and

(b) a statement that the person is not aware of any limitation or restriction on his or her capacity or entitlement to sever the joint tenancy (arising, for example, from the capacity in which the person holds an estate or interest in the land concerned or from a private agreement).

(3) The Registrar-General may require the person who proposes to sever a joint tenancy to provide additional information concerning—

(a) other persons who may be affected by the severance of the joint tenancy, and

(b) any limitation or restriction on the capacity or entitlement of the person to sever the joint tenancy, and

(c) any other matter that the Registrar-General considers appropriate.

(4) The Registrar-General may require any information provided for the purposes of this section to be provided by statutory declaration or verified in a way approved by the Registrar-General.

(5) The Registrar-General must give notice of the lodgment of a dealing for registration or recording that may sever a joint tenancy to all joint tenants in the joint tenancy (other than any joint tenant who executed the dealing, or on whose behalf the dealing was executed). Section 12A (2) and (3) applies to and with respect to a notice given under this section.

(6) Despite subsection (5), the Registrar-General is not required to give notice of the lodgment of a dealing for registration or recording that may sever a joint tenancy to a joint tenant in any of the following circumstances—

> (a) if the proposed severance is to arise from the recording of a court order made in proceedings to which the joint tenant is a party,
>
> (b) if the proposed severance is to arise from the registration of a transfer pursuant to a writ in respect of an interest of any of the joint tenants,
>
> (c) if the dealing concerned is witnessed by the joint tenant and the dealing indicates that the joint tenancy is to be severed,
>
> (d) if the dealing is accompanied by a written acknowledgment by the joint tenant that he or she has received legal advice as to the effects of the severance of the joint tenancy,
> (e) if the proposed severance is to arise out of registration following an application under section 90.

Operation of Section 97

Anderson v Anderson (2017) 94 NSWLR 591; [2017] NSWCA 131

Facts

- Minnie and Norrie Anderson purchased land as joint tenants but divorced, where Minnie remained living in the home under divorce settlement terms
- Norrie later married Marilyn (R1) + had three children, including Natalie (R2)
  - Norrie gave power of attorney to R1 as a primary attorney and R2 as a substitute attorney if R1 was unwilling or unable to act
  - R2 exercised the power of attorney to execute an instrument of severance under **RPA s 97**
  - Instrument of severance was registered, severing the joint tenancy
  - Resulted in Norrie and Minnie holding holding as tenants in common in EQUAL SHARES → not joint tenancy anymore
- There were three irregularities in R2's actions:
  - As the secondary (substitute) attorney, Natalie had no authority to act as there was no evidence Marilyn was actually unwilling or unable to act.
  - The power of attorney was dated 28 March 2006, but Natalie did not accept the appointment at that time; she backdated her acceptance in 2012.
  - She made two false statutory declarations accompanying the instrument of severance: (a) that Minnie's residential address was the jointly-held property, when Natalie knew Minnie had already vacated; and (b) that she knew of no legal impediment to acting as attorney — false, given point 1.
- Norried died before Minnie
- Stephen (appellant), as executor of Minnie's estate, sought a declaration that:
  - Instrument of severance was of no effect → so Norrie's interest ceased on his death
  - Minnie's right of survivorship made her the sole owner of the property

Issue

Whether the defective/fraudulent execution of the instrument of severance by an unauthorised attorney meant the severance was ineffective, such that Minnie's right of survivorship (as the surviving "joint tenant") could still operate to give her — and thus her estate — sole ownership.

Outcome

Appeal dismissed. Although Natalie acted improperly, Minnie had no personal legal right capable of supporting a cause of action to undo the severance

HELD

- A joint tenant has no right to insist the joint tenancy remain intact
  - Under RPA s 97, either joint tenant has the power to sever the joint tenancy unilaterally
  - Therefore, Norrie possessed the legal power to sever
  - Minnie was subject to a corresponding liability that her interest could be severed
  - This was simply an inherent feature of owning land as joint tenants
- Relying on Wesley Hohfeld's framework of legal relationships, rather than saying Minnie had a "right" to preserve the joint tenancy, it was more accurate to say that:

Class 8A Leases II

Ch 9 paras [9.118] - [9.133]

Enforceability Of Covenants After Assignment

Overview

The Problem

Enforcing the covenants that appear in a lease is straightforward between the original landlord and tenant — ordinary contract principles apply.

- However, leases regularly get assigned → landlord may assign the reversion or tenant may assign the lease or sublet
- Once that happens, enforceability becomes more complex and is governed by two distinct legal concepts:
  - **1 Privity of contract** → the contractual relationship between the original parties.
  - **2 Privity of estate** → the relationship arising from the parties' respective proprietary interests in the land at any given time.
- Always separate these two questions in an assignment problem:
  - **Who is bound in contract** (privity of contract — usually the original parties, regardless of later assignments, depending on wording)?
  - **Who currently holds the proprietary relationship** entitling them to sue/be sued on covenants that run with the land (privity of estate — shifts with each assignment)?
- A landlord or tenant may have both, either, or neither basis available against a given party — you need to check both.

Privity of Contract

Rule

Privity of contract exists between original parties to the lease and continues even after assignment by either side, so the original landlord + original tenant remain contractually bound after assignment unless released by the lease or a later agreement

- It does not depend on either party still holding an interest in the land — it survives regardless.
- Does not matter whether L assigns the reversion or T assigns the lease

Original Tenant

- The original tenant has ongoing liability depending on the construction of the covenant
  - If the tenant covenants on behalf of themselves and successors in title, they remain liable for future breaches by assignees.
  - If liability is expressed to continue only while they remain tenants, liability ends upon assignment.
- An original tenant who remains contractually bound under the lease continues to be liable on the lease covenants even after the assignee exercises an option to renew the lease: **Baker v Merckel**
  - The original tenant assigned the lease, and the assignee later exercised an option to renew.
- An original tenant who remains liable under privity of contract is liable for rent as varied under a valid rent review clause, even though the increase occurs after assignment: **Picton-Warlow v Allendale Holdings**
  - Following an assignment, rent was increased under a rent review clause during the assignee's tenancy.
- Whether the original tenant remains contractually liable for breaches occurring after assignment depends entirely on how the lease covenants are worded:
  - If T covenants "on behalf of himself/herself and successors in title" to observe the lease → T remains contractually liable to L for future breaches by the assignee or later successors. Reasoning: as a matter of construction, T has promised the covenants will be observed throughout the whole lease term, regardless of whether T remains tenant.
  - If T's obligation is expressed to continue only while T remains the tenant → T's contractual liability ceases on assignment. Reasoning: as a matter of construction, T only promised to be liable for breaches occurring during their own tenancy.
- This is a pure question of construction — read the actual wording of the tenant's covenant before concluding whether liability survives assignment.
- Original tenant liability is far-reaching and "extreme cases" are useful when arguing the position is harsh on original tenants: **Warnford Investments**
- **Reform.** In England, the Landlord and Tenant (Covenants) Act now provides that a tenant's liability on the covenants ceases after a lawful assignment — a significant reform not generally adopted across Australia
  - QLD has reformed under **PLA s 144 (Qld)** → where a lessee assigns to an assignee, and that assignee later assigns to a subsequent assignee, the original lessee is released from liability to the lessor for breaches by the subsequent assignee, despite any contrary agreement
  - For exams, can compare the general AU common law position without statutory reform where liability persists x QLD reform (releases OG tenant only from the point of a second / subsequent assignment) x England reform (full release of the tenant on first lawful assignment)

Requirements For Easements

Characteristics Of Easements

Four Substantive Requirements For A Right To Be An Easement

ALL MUST BE SATISFIED for a right to be an easement, **Re Ellenborough Park** is the leading case setting out the criteria

#	Label	Requirement
1	**Dominant & servient land**	There must be a dominant and a servient tenement
2	**Accommodation**	The easement must ‘accommodate’ the dominant tenement
3	**Diversity of ownership/occupation**	The dominant and servient tenements must not be owned AND occupied by the same person
4	**Capable of grant**	The right must be capable of forming the subject matter of a grant

Foundation Case Establishing Criteria

Re Ellenborough Park [1956] Ch 131

Facts

- In 1855 D and W owned a large estate and subdivided it into building lots.
    - An inner area, ‘Ellenborough Park’, was to be kept as a pleasure ground for the enjoyment of purchasers of the surrounding plots.
- Each purchaser's conveyance granted an easement to use the park as a pleasure ground, subject to paying a share of maintenance costs.
- During WWII the park was requisitioned by the War Office, which paid compensation rent to the trustees who then held the park.
- The trustees sought clarification whether the surrounding house owners had an enforceable right to use the park (and therefore a share of the compensation money).

Issue

Whether the right to use the park as a communal garden amounts to a valid easement, in particular did it satisfy the 'accommodation' and 'capable of grant' requirements?

Outcome

Yes, the adjoining owners had valid legal easements to use the park

Rule / Ratio

- Adopted the four conditions from Cheshire's Modern Real Property as the definitive test for an easement (set out in the table above).
- **Dominant Tenement.** A right of 'pure recreation' can still accommodate a dominant tenement if it is connected with the normal enjoyment of the houses to which it is annexed — the park was, in substance, a shared garden for the houses around it.

Application

- The court distinguished a right to enjoy a 'communal garden' (connected to normal enjoyment of a house as a home)
    - From a right to attend a cricket ground or zoo for free (which, though valuable, has nothing to do with occupying the house as a home).
- Selling part of a house and granting the purchaser a right to use the garden in common with the vendor — the garden right is closely connected to the enjoyment of the house sold.
- Increase in value of the land alone is not decisive — there must additionally be a real connection with normal enjoyment of the dominant land.

Exam Use

- **Analogy.** For whenever the facts involve a recreational space (parks, gardens, pools) attached to residential lots
    - Argue by analogy that the right “accomodates” the houses because it functions as their garden
    - Use the 'cricket ground' hypothetical as the counter-example when arguing a right does NOT accommodate the land (i.e., where the benefit is personal enjoyment unconnected to use of the house as a home).

#1

Dominant & Servient Tenement

Requirement #1

- There must be an identifiable piece of land that benefits (dominant tenement) and an identifiable piece of land that is burdened (servient tenement).
- A right cannot exist 'in gross' (i.e., detached from any benefited land) except where statute permits it.
- **Tenement.** Any permanent property, like land or buildings, that is held by an owner, as well as rights tied to that property

Where No Dominant Tenement Is Identified In Instrument

Gas & Fuel Corporation of Victoria v Barba [1976] VR 755 – Supreme Court of Victoria

Facts

- Plaintiff corporation was building a gas pipeline and negotiated with V (registered proprietor) for an easement for the pipeline.
- V signed an option agreement referring to 'the dominant tenement' but never identified the corporation's benefited land.
- Defendants then bought the servient land from V, aware of the proposed easement, but later refused the corporation entry.

Issue

Whether the option created a valid easement (equitable interest in land), given no dominant tenement was expressly identified in the instrument

Outcome

Yes — an equitable interest was created; extrinsic evidence could identify the dominant tenement (the corporation's gas distribution land), so this was not an invalid 'easement in gross'. The corporation was entitled to registration and relief

Rule / Ratio

- **Requirements.** An easement must be appurtenant (attached, belonging or legally annexed) to an identifiable dominant tenement (land that benefits from the easement), and burden an identifiable servient tenement (owner must allow the dominant to use their land)
- **Easement In Gross.** An easement that directly benefits an entity, rather than a nearby dominant landholding
  - An easement in gross is **INVALID** at common law (cannot have an easement in gross) as there must be a dominant tenement
  - This means there cannot be an easement that exists merely for the personal benefit of an individual or corporation without benefiting identifiable land
- **Extrinsic Assistance In Identification.** Failure to identify dominant tenement in the instrument is not necessarily fatal if extrinsic evidence can identify the land intended to benefit from the easement

Legal Test / Application

1. **Is there a servient tenement?** The land over which the easement is granted must be identifiable
   a. D's land over which the pipeline was to pass was clearly identified
2. **Is there a dominant tenement?** There must be identifiable land that receives the benefit of the easement; benefit must attach to the land itself, not merely to the owner personally (not an easement in gross)
   a. The easement document referred only to the "dominant tenement" without identifying it
   b. The plaintiff corporation owned the land containing its central gas distribution facilities which is the [anchoring] land for the easement, however it was not specified in the instrument
3. **Can the dominant tenement be identified, even if omitted from the instrument?** Court may admit extrinsic evidence to identify the land intended to benefit; if the evidence establishes the intended dominant land with sufficient certainty, the easement is valid
   a. Here, the corporation owned land forming part of its gas distribution facilities where the land was used as a central hub for collecting and distributing natural gas through its PIPELINE system
   b. The proposed pipeline across D's land would connect directly to that system and was not an isolated pipe, but formed part of the corporation's existing network
   c. The corporation already had pipeline easements over neighbouring land and had previously acquired rights over other properties to lay pipelines, demonstrating the proposed easement was ONE link is a continuous network

4. **Does the easement benefit the use and enjoyment of that land?** The right must enhance the utility or enjoyment of the dominant land, rather than confer a purely personal or commercial advantage
    a. AND the easement was intended to benefit the corporation's land, as it would enable its gas distribution operation
    b. [It benefits the corporation's land itself, rather than merely conferring a personal commercial advantage on the corporation]

Result. The dominant land could be identified from the surrounding evidence, so the easement was NOT an invalid easement in gross

Key Takeaway

- The dominant land does not always need to be expressly named in the grant.
- Courts may use extrinsic evidence to identify the dominant tenement.
- An easement remains invalid if no dominant land can be identified, because that would amount to an impermissible easement in gross.

Exam Use

→ USE WHERE AN INSTRUMENT IS AMBIGUOUS / SILENT ABOUT WHICH LAND BENEFITS

→ EXTRINSIC EVIDENCE CAN SAVE THE GRANT

- A reservation of a right of way to the vendor did not refer to any dominant tenement.: **Gapes v Fish**
    - **HELD:**: This was an attempted **easement in gross**, which is INVALID
    - It only created a personal licence for the vendor.
    - **Contrast.** Same defect as **Gas & Fuel**, having no identified dominant tenement → except HERE, it was FATAL, because there was no other evidence to save it
- The court had regard to surrounding circumstances (not just the document) to identify the intended dominant tenement and decide if an easement was validly created: **Re Maiorana**
- A dominant tenement may comprise both corporeal and incorporeal property: **Re Salvin's Indenture**
    - Eg. a water authority's easement to lay pipes can be appurtenant to both its land and its existing easements.

1.1

Creation of Easements

Creating Easements Under Torrens (Formal Requirements)

- Easements over Torrens land are expressly granted/reserved by registering an instrument in the approved form on the certificate(s) of title of the dominant and/or servient land.
- On registration, the easement becomes indefeasible (subject to statutory exceptions to indefeasibility).
- An easement is NOT enforceable against a person interested in the servient land (who was not a party to its creation) unless the instrument clearly identifies the benefited and burdened land and whose consent is needed to release/vary/modify the easement: **CA s 88(1)**
- Ref **CA s 88B** for easements created on registration of a plan of subdivision

88 Requirements for easements and restrictions on use of land

(1) Except to the extent that this Division otherwise provides, an easement expressed to be created by an instrument coming into operation after the commencement of the Conveyancing (Amendment) Act 1930, and a restriction arising under covenant or otherwise as to the user of any land the benefit of which is intended to be annexed to other land, contained in an instrument coming into operation after such commencement, shall not be enforceable against a person interested in the land claimed to be subject to the easement or restriction, and not being a party to its creation unless the instrument clearly indicates—

(a) the land to which the benefit of the easement or restriction is appurtenant,

(b) the land which is subject to the burden of the easement or restriction—

Provided that it shall not be necessary to indicate the sites of easements intended to be created in respect of existing tunnels, pipes, conduits, wires, or other similar objects which are underground or which are within or beneath an existing building otherwise than by indicating on a plan of the land traversed by the easement the approximate position of such easement,

(c) the persons (if any) having the right to release, vary, or modify the restriction, other than the persons having, in the absence of agreement to the contrary, the right by law to release, vary, or modify the restriction, and

(d) the persons (if any) whose consent to a release, variation, or modification of the easement or restriction is stipulated for.

(4) Subsection (1) does not apply to an easement without a dominant tenement acquired by or for a prescribed authority referred to in section 88A, nor to any restriction on the use of land in relation to any such easement.

[exceptions listed in s 88A(1) → these will be enforceable without a dominant tenement]

Easements In Gross

- An 'easement in gross' has no dominant tenement
- It exists purely for the benefit of a person or entity, not attached land.
- At common law this is NOT permitted.
- However, all Australian jurisdictions now allow statutory exceptions, mainly for utility/service easements (e.g. pipes, cables, wires) in favour of the Crown, public/local authorities, or prescribed corporations.
- The same dominant-tenement identification problem arose for utility/service providers needing pipeline/cable easements — part of the reason legislatures created statutory easements in gross: **Harada v Registrar of Titles**

88A Easements in gross

(1) In this section— [these are the exceptions that are enforceable without a dominant tenement]

prescribed authority means—

(a) the Crown, or

(b) a public or local authority constituted by an Act, or

(c) a corporation prescribed by the regulations for the purposes of this section.

(1A) An easement without a dominant tenement **may be created in favour of a prescribed authority**, and any such easement may be assured to a prescribed authority.

(1B) However, an easement without a dominant tenement may only be created in favour of, or assured to, a corporation prescribed by the regulations for the purposes of this section if the easement is for the purpose of, or incidental to, the supply of a utility service to the public, including (but not limited to)—

(a) the supply of gas, water or electricity, or

(b) the supply of drainage or sewage services.

(1C) Nothing in subsection (1B) prevents the creation by a corporation prescribed by the regulations for the purposes of this section of an easement for the purpose of, or incidental to, the provision of rail infrastructure facilities.

(2) In an instrument which—

(a) takes effect on or after 15 June 1964 (the commencement of the Local Government and Conveyancing (Amendment) Act 1964),

(b) purports to create a right-of-way or drainage easement without a dominant tenement, and

(c) purports to create or assure such a right-of-way or drainage easement in favour of or to a prescribed authority,

the expressions “right of carriage way”, “right of footway”, “easement to drain water” and “easement to drain sewage” have the same effect as if there had been inserted in lieu thereof respectively the words contained in Schedule 4A.

(2A) In an instrument which takes effect after the commencement of Schedule 1[5] to the Property Legislation Amendment (Easements) Act 1995 and purports to create or assure an easement without a dominant tenement of the following kind in favour of or to a prescribed authority, the following expressions have effect as if the words attributed in Schedule 4A to those expressions were inserted instead—

easement for repairs

easement for drainage of sewage

easement for drainage of water

easement for electricity purposes

easement for services

easement for water supply

right of access

For Old System (General Law) Title

Easements are created at law by deed OR in equity via doctrines such as proprietary estoppel: **Fenwick v Wambo Coal**

#2

Accomodation Of The Dominant Tenement

Meaning Of Accommodation

- The right must be connected with the normal enjoyment of the dominant land — not merely convenient, and not merely valuable.
- It is a question of FACT, depending on the nature of the dominant tenement and the nature of the right granted.

- Increasing the value of the dominant land is relevant but NOT decisive on its own.
- A right that serves a business/commercial use of the dominant land CAN accommodate it in limited circumstances — but pure commercial convenience is not enough.
- Does the right improve the land in the way it is meant to be occupied and enjoyed (Regency Villas), or does it simply make the owner's business easier (Clos Farming)?

Test For Accomodation

Clos Farming Estates v Easton (2002) 11 BPR 20,605; [2002] NSWCA 389

Facts

- A vineyard estate was subdivided into lots, each with a residential part (Part A) and a farming part (Part B).
- A registered restriction ('Easement for Vineyard') let the owner of Lot 86 (Clos Farming) enter every other lot, grow and harvest grapes, sell them, and deduct harvest costs from proceeds.
- Clos lodged a caveat over Lot 27 to protect this right. When the contractual scheme lapsed, the Lot 27 owners sought removal of the caveat and a declaration the 'easement' was invalid.
- **DOMINANT TENEMENT.** Lot 86, owned by Clos Farming
  - Servient tenements were all the other lots in the estate, including Lot 27, owned by Eastons
  - Lot 86 easement to servient tenements Lots 1 - 85, including Lot 27

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        DOMINANT TENEMENT
             Lot 86
      (Owned by Clos Farming)

Claimed benefit:
• Enter neighbouring lots
• Perform viticulture works
• Harvest grapes
• Sell grapes
• Deduct harvesting costs
               |
               | Easement
               ▼
      SERVIENT TENEMENTS
Lots 1–85 (including Lot 27)
```

Issue

Whether the easement provided a real benefit to the dominant tenement (Lot 86) or merely benefited Clos Farming's business.

Outcome

- Not a valid easement
- **TLDR.** Clos Farming argued that "this makes Lot 86 a better place to run the vineyard business" but the court replied "No, it makes YOUR business easier, not your LAND better"

Rule / Ratio

- Accommodation of the dominant tenement requires a "real and intelligible" connection between the right and the normal enjoyment of the dominant land (benefit to the land itself)
- Insufficient if the connection is merely a 'convenient incident' to exercising the right [must be more than mere convenience]
- NOT merely a benefit to the owner or the owner's business
- Facilitating a business/commercial use of the dominant land may in limited circumstances be sufficient
- BUT pure commercial interest in extracting economic value from the right, without more, is not enough and may even count against finding an easement.
- **TLDR.** An easement accommodates the dominant tenement only where it provides a real and intelligible benefit to the DOMINANT land itself;
- A mere commercial or administrative advantage to the owner, or the use of the dominant land as a convenient base for business operations, is insufficient.

Legal Test / Application

1. **Does the easement benefit the dominant land itself?** Does it improve the use, enjoyment, value or utility of the land? Or does it merely make the owner's business easier?
   a. The Court found that the easement did not benefit Lot 86 AS LAND because there was nothing special about it as any other lot could have been chosen as the management lot (it was just one of the many lots that could have been chosen)
   b. Nothing about it made it the natural base for management and it was simply a convenient administrative base
   c. The easement existed to allow Clos Farming to operate its vineyard business, NOT to improve the use or enjoyment of Lot 86 itself

Questions

Published

87 of 100

Section 1: Question 1 (1) — Marks: **51** out of **60**

Number	Response	Question type	Maximum marks	Marks	Question weight
1	Answered	Essay	60.00	51.00	100 %

Section 2: Question 2 (1) — Marks: **36** out of **40**

Number	Response	Question type	Maximum marks	Marks	Question weight
2	Answered	Essay	40.00	36.00	100 %