

LAWS2017 Land Law

Study Notes — Real Property in NSW

Updated for Semester 2, 2026

Colour key

Frazer v Walker

Case names — plum, italics

s 42 Real Property Act 1900 (NSW)

Legislation — navy

registration confers title, not registration of title

Key principles — teal

NOT indefeasible where the RP is guilty of fraud

Critical points — deep red, soft rose tint

Structure follows the Semester 2, 2026 Learning Guide and Class Schedule (Lectures 1–13). References to the RPA and CA are to the Real Property Act 1900 (NSW) and Conveyancing Act 1919 (NSW).

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Topic 1: Fundamentals of Land Law — Tenures, Estates and Systems of Land Title (Lecture 1)

1. Doctrine of Tenure and Doctrine of Estates (Fee Simple and Life Estate)

Doctrine of Tenure

1. **Historically:** The doctrine of tenure has its **origins in the feudal system** of land ownership which emerged during the middle ages in England. Feudal system represents a **type of society** in which the **primary social force** is the **relationship between the lord and his tenant**.
 - (a) Established on mutual benefit of the tenant and the lord; the lord promised protection and defence of the tenant and the land occupied by the tenant in return for the loyalty and service of that tenant
2. **Doctrine of Tenure:** The High Court in *Mabo v Queensland (No 2)* determined that the English doctrine of tenure applied in Australia in a **modified** form only. While the doctrine in England ultimately bestowed absolute beneficial ownership of all land throughout the kingdom on the Crown, in the Australian context it gave the Crown **only a "radical title"**.
3. **Doctrine of Estates:** Governs the ways in which that title can be fragmented along temporal lines. This is because an estate in the land refers to the duration for which possession of the land may be enjoyed.

Types of Estates

1. **Freehold Estates:** There are 3 of them
 - (a) **Fee Simple:** **Closest to absolute ownership** and is the most extensive in quantum. They are not subject to any controls or restrictions
 - (i) **Determinable interests:** These come to the end of a specific event, i.e. related to use or an external event. Creates the possibility of a reverter interest. "
 - Words used "while", "during", "so long as", "until"
 - (ii) **Conditional estate:** Subsequent conditions the devise which states that the occurrence of some event will allow the grantor to take back the interest, and if there is a breach, then there will be a forfeiture of the interest.
 - Words used "on the condition," "but if", "provided that"
 - (b) **Fee Tail:** A disposition that would only last while the **heirs** of the person would last — if they died out the interest would revert back to heir of their original owner — way of retaining land in family
 - (i) In NSW, estates tail were converted into estates in fee simple by the *Conveyancing Act 1919 (NSW) s 19* (from 1 January 1920).
 - (c) **Life Estate:** **Granted to a person for life** of a person, or for the life of another i.e. "to A for life of B".
 - (i) In either case, when the life tenant died the interest is terminated.
2. **Future Interests:**
 - (a) **Example:** Estates allow in to be granted or the future, e.g. "to A for life and then to B in fee simple". B's estate is a future estate which does not come into being until the death of A
 - (b) **Reversions:** a grant of an estate in possession which **returns** to the grantor, e.g. X grants and life estate to Z hence X is the reversioner
 - (c) **Remainders:** A **grant** of a future interest to **someone who did not have a previous interest** e.g. W for life and then Y in fee simple. Y is the remainder
 - (d) **Vested and Contingent Remainders:** Rules concerning future interests requiring the interest to vest or "fructify" **by a certain time** — if it does not then the interest will fail.

Type of Estates — Interests in Land less than Freehold

1. Leases, easements, profit a prendre, restrictive covenants, mortgages

Conveyancing

1. **Old System Title:** Passing of legal interest in land must be made by deed (*s 23B(1) Conveyancing Act*)
2. **Torrens and OSTL:** No interest in land can be created or disposed unless instruments are in writing (*s 23C(1)(a) Conveyancing Act*)
3. **Torrens and OSTL :** Creation of interest in land by parol (typically leasehold) will only have the effect of interests at will (*s 23D(1) Conveyancing Act*). A legal leasehold interest in land can be provided if it provides the best rent reasonably available, give lessee immediate right to possession and does not exceed three years (*s 23D(2) Conveyancing Act*)
4. **Agreement of Interests:** Agreement of interests in land have to be in writing in order for it to be enforceable (*s 54A Conveyancing Act*)
 - (a) **Exceptions:** Exceptions to create interest in land without writing (*s 23E Conveyancing Act*)

2. Systems of Land Title in NSW: Crown Land, Old System, Torrens and Strata

1. **Three systems:** Land in NSW is held under (1) Crown land tenures, (2) Old System (general law) title — deeds-based, with priority aided by registration of deeds (*Conveyancing Act 1919 (NSW) s 184G*), and (3) Torrens title under the *Real Property Act 1900 (NSW)*. Land law in Australia is fundamentally a creature of statute.
2. **Crown grants:** The colonial *Crown Lands Alienation Act 1861* and *Crown Lands Occupation Act 1861 (NSW)* regulated selection and occupation of Crown land; the *Real Property Act 1863 (NSW)* introduced Torrens title. Crown grants made after the RPA commenced issue under the Torrens system (*RPA s 13*); interests in Crown land can now be recorded in the Register (*RPA s 13G*).
 - (a) **Conditional purchases:** *Davies v Littlejohn* [1923] HCA 64; (1923) 34 CLR 174 at 183 (Knox CJ), 188 (Isaacs J), 196 (Higgins J): land conditionally purchased from the Crown under the Crown Lands Acts — the Crown has no vendor's lien for unpaid instalments, and the instalments are not a charge or encumbrance on the land or the purchaser's interest. Illustrates that interests in Crown land are statutory creations whose incidents depend on the statute.
3. **Crown land today:** *Crown Land Management Act 2016 (NSW) s 1.7* defines 'Crown land'; dealings in Crown land are regulated by the Act (*s 1.15*). Whether a licence or other Crown tenure confers an interest in land depends on the statute (consider whether it confers exclusive possession and whether it is registered or recorded under the RPA).
4. **Strata title:** Under the *Strata Schemes Development Act 2015 (NSW) s 3*, a 'strata scheme' divides a parcel into 'lots' (with defined cubic space) and 'common property'; each lot carries a 'unit entitlement'. The common property is owned by the owners of the lots as tenants in common in shares proportional to their unit entitlements, with the owners corporation acting as agent (*s 28*). A lot owner therefore cannot fence off common property (e.g. a garden) for exclusive use unless a common property rights by-law is made under the *Strata Schemes Management Act 2015*.

3. Old System Title: Nature

1. **Nature:** The nature of Old System title land interest is that the grantee/transferee gets no better title than that of the grantor/transferor which is concerning if there is a defect along the transfer of title.
 - (a) **Forgery voids transfer:** If the signature of the grantor/transferor has been forged (i.e. the purported signature of X was in fact made by Y), the instrument is void. It passes no rights in law or equity
 - (i) Registration of valid instruments affecting Old System land the *Conveyancing Act (s 184G)* gives priority advantages but does not cure any defect (i.e. fraud, mistake, forgery). A registered forged instrument will still not pass any interest title

(b) Executed via fraud effective legally, but not in equity:

- (i) If an instrument has been signed by the grantor/transferor, but the **execution** was **induced** by the **fraud** of the grantee/transferor, the instrument **can be effective to pass a legal interest**
- (ii) **BUT equity** allows the grantor/transferee to have the **instrument set aside**

(c) Mortgage (See 2.2): A mortgage of Old System title land **transfers the interest of the mortgagor to the mortgagee** with the **proviso** that the **mortgage will reconvey** that interest to the mortgagor when the debt is repaid.

- (i) **Example:** Where **X**, the holder of the legal fee simple in Old System title land, grants a first mortgage by deed to **Y** to secure the repayment of a loan **Y** has made to **X**, **Y** holds the legal fee simple and **X** holds an equitable interest (known as the '**equity in redemption**')
- (ii) There can therefore be only one legal mortgage of an interest in Old System title land

4. Conveyancing Act 1919, s 47 — Words of limitation in fee

1. (1) In a deed it shall be sufficient in the limitation of an estate in fee simple to use the words in fee or fee simple without the word heirs, or in the case of a corporation sole without the word successors, or to use the words in tail or in tail male or in tail female, without the words heirs of the body, or heirs male of the body, or heirs female of the body.
2. (2) Where land is conveyed to or to the use of any person without words of limitation, such conveyance shall be construed to pass the fee simple or other the whole estate or interest the person conveying had power to dispose of by deed in such land unless a contrary intention appears by such conveyance.
3. (3) This section applies only to deeds executed after the commencement of this Act.

5. Succession Act 2006 (NSW), s 38 — Effect of devise of real property without words of limitation in WILL

1. (1) A **disposition** of real property to a person **without words of limitation** is to be construed as passing the **whole estate or interest** of the testator in that property to that person.
2. (2) This section **does not apply** if a **contrary** intention appears in the **will**.

Topic 7: Co-ownership (Lecture 7)

1. Types of Co-ownership

1. **Tenancy in Common:** Where two or more persons hold land as tenants in common, each has a **proportionate interest in the land**. It is “**undivided**” – meaning that, though a **distinct share**, it has not been physically divided from the other shares (*Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) at 643-644 per Brennan J)
 - (a) It does not have to be equal
 - (b) Tenant in common may generally deal with his or her undivided share as he or she wishes
 - (c) **No Right of Survivorship:** Interest continues after death and can be transferred to another person either by will or by the rules of intestacy
2. **Joint Tenancy:** Each joint tenant has ownership of the whole, along with the other joint tenants. Each has a **right shared with the others to the whole property**, but no individual right to any particular share in it (*Wright v Gibbons* (1949) per Dixon J at 330)
 - (a) Joint tenants “are not to be treated for all purposes as though they were the one person” (*Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) at [49])
 - (b) **The Four Unities:** To create a joint tenancy **requires the presence of four** unifying characteristics:
 - (i) **Title:** Unity of title requires that all joint tenants **hold their title** to the land under the **same instrument**, or the same deed.
 - **Not:** Conveyer should not attempt to convey a 50% interest in property to A, and then convey the remaining 50% interest to B, as that would make it tenants in common.
 - (ii) **Interest:** Requires that the joint tenants’ interests in the property be **identical in nature, extent and duration**.
 - **One joint tenant notice of earlier interest?:** There is authority to suggest that where A and B acquire land as joint tenants in circumstances where A has notice of an earlier equitable interest held by X in the land but B has no notice of X’s interest, then X’s interest has priority over the interests acquired by both A and B.
 - **However:** This view is now subject to doubt as the HCA has held that **fraud by one joint tenant did not affect the other’s rights**, with the result that the defrauded party could assert rights only against the fraudulent joint tenant (*Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) at [44]-[57])
 - **Not:** For example, a person owning a freehold interest and another owning a leasehold interest; A owns $\frac{3}{4}$ and B owns $\frac{1}{4}$
 - (iii) **Possession:** Unity of possession requires that **each joint tenant** be **entitled to possession of the whole property** – **not exclusively** for himself or herself, but to be enjoyed together with the other joint tenants. A joint tenant **cannot claim possession** of any **particular part** of the land.
 - (iv) **Time:** Interests of all joint tenants vest at the same time.
 - **Not:** For example, if property is conveyed “to A for life, remainder to B’s children”, B’s children all take under the one instrument; but because their interests vest successively as each is born, they cannot be joint tenants.
 - (c) **Right of Survivorship:** The right of survivorship is an **inherent and necessary incident** of a joint tenancy. Without it there can be no joint tenancy (*Re Robertson* (1943) at 105).
 - (i) **Death — survives:** When one joint tenant **dies**, the whole of the **land remains** with the **surviving joint tenants**. Property is freed from the rights of one of its owners. Eventually, the last surviving joint tenant becomes the sole owner.
 - (ii) **Overrides any will:** The right of survivorship will override any will!

(iii) **Operation of Law:**

- **OSTL:** No need for any deed
- **TTL:** Entitlement by survivorship arises before, and independently of, registration (*McCoy v Estate of Caelli* (2008) at [14])

(iv) **Corporations:** All jurisdictions now allow a corporation to hold property in joint tenancy in the same way as if it were an individual (*Conveyancing Act 1919 (NSW)*, s 25(1))

(v) **Identifying Survivors:**

- Determining which of a number of joint tenants survived the other or others may sometimes be **difficult**, as where all are killed in a car crash or bomb blast (*Hickman v Peacey* [1945])
 - **Statute:** Statutory provisions, such as s 35 of the *Conveyancing Act 1919 (NSW)*, now provide that where two or more persons have died in circumstances rendering it uncertain which of them survived, for purposes affecting title to property their deaths are presumed to have occurred in order of seniority, the younger surviving the elder
 - **Disqualifications:**
 - Applies only for “purposes affecting the title to any property”; **it does not apply** where **no question of title arises** (*Perpetual Trustee Co Ltd v Commissioner of Stamp Duties* (1980) at 591)
 - **Presumption** it raises is **rebuttable** by evidence that the deaths occurred otherwise than in order of seniority (*Re Plaister* (1934))
 - Applies only where the fact of the person’s **deaths is known**; it does not apply where one or more is *presumed* to have died under the common law presumption of death which arises where, without apparent explanation, a person has been neither seen nor heard of for seven years (*Halbert v Mynar* [1981])

2. Creation of Co-ownership

1. Historically:

- (a) **Legal interests:** There is a presumption in favour of joint tenancy at common law. However this is rebuttable if:
- (i) (1) if one or more of the four unities was absent;
 - (ii) (2) if the grant or devise contained words of severance (for example: ‘a one half interest to each’);
 - (iii) (3) if there were other indications that a tenancy in common was intended.
- (b) **Equitable interests:** In contrast to common law’s preference for joint tenancy, equity prefers to regard parties as tenants in common. Equity generally looks at the intentions of the parties. There are three situation in particular where equity holds that parties are tenants in common even though they were joint tenants of the legal estate:
- (i) (1) Where purchase money was provided in unequal shares;
 - (ii) (2) where persons advanced money on a mortgage;
 - (iii) (3) where persons in a joint business venture or partnership contributed money towards acquiring land as a part of the business. (Equitable maxim - the right of survivorship has no place among merchants).

2. **Disposition of beneficial interest, 2+ people, Tenants in Common:** Section 26(1) of the CA has **altered the above principles**. It **assumes** that property is held as tenants in common rather than as joint tenants. A deed needs to expressly provide that the property is to be held as ‘joint tenants’ to overcome this statutory presumption.

- (a) **The Statute:** In the construction of any instrument coming into operation after [1 July 1920] a disposition of the beneficial interest in any property **with or without** the **legal estate to or for two or more persons** together beneficially shall be **deemed** to be made to or for them as **tenants in common**, and not as joint tenants (s 26(1) *Conveyancing Act 1919* (NSW))
- (b) **Applies equity as well as law:** Applies not merely to beneficial interests, but to **operate more generally** and reverse the common law presumption in favour of joint tenancies (*Delehunt v Carmody* (1986) at 473 per Gibbs CJ). Where all that is known is that A and B together own the beneficial interest, then in the absence of evidence that they intended a right of survivorship to apply between them, they are tenants in common of that beneficial interest.
- (i) **Should favour tenancies in common more generally:** The New South Wales Court of Appeal held in *Carmody v Delehunt* that s 26 indicates a general legislative favouring of tenancies in common over joint tenancies, and that courts should follow that legislative lead and favour tenancies in common even in situations not precisely within the words of the section.
- **Facts:** The court held that where property was purchased (after 1 July 1920) in A's name alone, but with purchase money supplied equally by A and B, A held the property on trust for A and B as tenants in common in equal shares. The High Court affirmed this decision on appeal, holding that, although s 26 had no direct application to the facts, its **indirect effect** was to **require a trust** in favour of A and B in an **interest of the same kind** as would have arisen had the land been conveyed to them – that is, as **tenants in common** in equal shares (*Delehunt v Carmody*)
- (c) **Does not apply:**
- (i) **Oral:** To dispositions made orally, without instrument
- (ii) **One person:** To dispositions **only one person, even where two or more** persons have **contributed** the purchase price (*Mitchell v Arblaster* [1964-65])
- (iii) **Certain persons:** To persons who by the terms of the instrument are executors, administrators, trustees or mortgagees, **if they are only in that capacity** (s 26(2) *Conveyancing Act 1919* (NSW))
- (iv) **Express:** Instrument “expressly provides” that persons are to take as joint tenants (s 26(2) *Conveyancing Act 1919* (NSW))
- **Plainly clear:** Sufficient for the instrument to indicate “plainly” or “clearly” that a joint tenancy is desired (*Mole v Ross* (1950) at 9102)
 - **Prudent:** Nevertheless, it is **prudent** to use the formula “as joint tenants”, since it is uncertain what other formula will suffice, e.g. devise to persons “as joint legatees” is **ineffective** to create a joint tenancy (*Mole v Ross* (1950))
 - **Look at whole instrument:** In the absence of a sufficiently precise formula, the court can **look to the whole of the instrument**, including what the instrument discloses about the nature of the property and the relationship of the co-owners, to ascertain whether a joint tenancy was intended (*Hircock v Windsor Homes (Development No 3) Pty Ltd* [1979] at 503, 506, 508)
 - **Facts:** Lease of one-bedroom home unit to a **husband and wife** for a term of ten years plus option, with proviso that the lease or any extension of it was to **cease** on the **death** of the survivor of the lessees
 - **Held:** As a matter of construction, the lessees took as **joint tenants**
- (d) **Extreme exceptions:** There may be situations where it is apparent from the instrument as a whole that, despite such contradictory terms, the drafter intended a joint tenancy or a tenancy in common, as the case may be, that intention is given effect (*Daly v Aldworth* (1863)). The terms “joint tenancy” or “tenancy in common” are “amenable to contextual factors”, including the nature of the property and which form of co-ownership best suits its use (*Re Barbour* [1967]).

3. Applies to Old System Title Land

Topic 10: Easements and Profits (Lectures 11–12)

1. Characteristics of Easements

1. Corporate and Incorporeal Interests in Land:

(a) Traditionally it was seen as:

- (i) **Corporeal Rights:** Those things that are tangible, e.g. land
- (ii) **Incorporeal Rights:** Those things that are intangible e.g. easement and other legal rights
 - **However**, the distinction today would be **unsatisfactory**, we would classify both land and easements as “rights”

2. Easements and Other Rights Compared:

(a) **Natural Rights:**

- (i) **2 natural rights incident to land ownership:** the right to support for land in its **natural state**, and the right to the **flow of water**. **Do not need** express creation.
- (ii) Easements are not natural rights.

(b) **Difference to Profits a Prendre:**

- (i) **Does not give right to take part of land:** An easement may give a right to enter another person’s land, but it never gives a right to take away part of that land
- (ii) **Can enter and remove part:** Profit always gives right to enter and always gives a right to remove some part of soil or its produce (such as turf, wood or crops)

(c) **Personal Rights:**

- (i) Not rights which are purely “personal” as personal rights that have no inherent relationship with land. Not rights that are enforceable in contract.

(d) **Lease:** Not a lease as that provides exclusive possession.

3. Nature of Easements:

(a) **Definition:** A right annexed to land to utilise other land of different ownership in a particular manner (not involving the taking of any part of the natural produce of that land or any part of its soil) or to prevent the owner of the other land from utilising his land in a particular manner (*Halsbury’s Laws of England* (4th ed, LexisNexis, London), Vol 14, p 4)

- (i) The land with the benefit of the easement is called the “dominant tenement/land” or “benefited land”. The parcel of land burdened is called the “servant tenement/land” or the “burdened land”.

(b) **Positive or negative:**

(i) **Positive easement:** An easement may be a positive easement - a **right to do something** on someone else's land. Examples of recognised positive easements include:

- The right to place electricity and telephone wires over neighbouring land
- A right of way over a neighbour's land
- The right to discharge water onto neighbouring land from a drain
- The right to fix a signboard on a neighbour's land

(ii) **Negative easement:** An easement may also be negative, which **restricts** what the neighbour can do on his or her land. Examples of recognised negative easements are

- An easement of light to receive light for a certain window;
- An easement of air, to receive air through a defined channel like a ventilation shaft;
- An easement of flow of water, to receive a flow of water along the waterways - ie the neighbouring owner cannot block the flow of water.

4. Essential characteristics of easements: Considered in *Re Ellenborough Park* [1956] 1 Ch 131 at 140

(a) **Dominant & Servient:** There must be a **dominant** and **servient tenement**

- (i) The easement cannot be for the benefit of a person.
- (ii) It must be for the benefit of another piece of land, the dominant tenement, and has to be **annexed** to the land (*Concord Municipal District v Coles* (1906) 3 CLR 96 at 104-105)
- (iii) If the benefit merely flows to a person, then it is a licence, not an easement. Easement binds not only the parties to its creation but also their successors (*Commissioner for Main Roads v North Shore Gas Co Ltd* (1967) 14 LGRA 413 at 422 per Windeyer J)
- (iv) Ascertaining whether or not a right is attached to the dominant tenement or is merely a personal right requires construction of the instrument which created the right (*Rodwell v GR Evans & Co Pty Ltd* (1977) 3 BPR 9114 at 9117-9120, aff'd [1978] 1 NSWLR 448)

(v) **Identifying the dominant tenement:**

- **Use instrument:** Use the instrument to determine
- **Objective extrinsic factors:** If instrument fails, at common law, extrinsic evidence is admissible to identify the intended dominant tenement if the instrument creating the easement fails adequately to identify it (*Re Maiorana and the Conveyancing Act* (1970) 92 WN (NSW) 365 at 372). This involves looking at the “objective” factors, such as the layout of the land and the use of which it was put at the date of the grant of the easement, and does not include evidence of the parties’ actual intentions (*Hamble Parish Council v Haggard* [1992] 1 WLR 122 at 130)

(b) **Accommodate dominant:** The easement must **accommodate** the dominant tenement

- (i) There must be a connection between the easement and the enjoyment and occupation of the dominant tenement. In other words the easement must confer a benefit upon the dominant tenement.
- (ii) The benefit conferred must be **connected to the land of the dominant tenement** and **not just** be a **personal privilege or commercial advantage** accruing to the current owner of the dominant tenement (*Hill v Tupper* (1863) 2 H & C 121; 159 ER 51 at 127(H&C), 53(ER)).
 - **Commercial value ≠ decisive easement:** Enhancing commercial value of land is not decisive of whether an alleged easement “accommodates” land (*Re Ellenborough Park* [1956] Ch 131 at 173-175)
 - **Question of fact:** Whether that connection exists is a question of fact, depending largely on the nature of the land and the nature of the right claimed. Is the easement reasonably necessary for the better enjoyment of the dominant tenement as a parcel of land?
 - **Application — valid easement:** The right of owners of houses near a park to **use the park for recreation** was held to be a right that “accommodated” the houses, since it was connected with the normal enjoyment of the houses as houses (*Re Ellenborough Park* at 174)
 - **Facts:** During WWII the military had occupied the park and then paid the owner of the park compensation for use. Should the owners of the houses (who had long since changed from the original grantees) get some compensation as they had been denied their rights under their easements?
 - **Issue & Finding:** 2 main issues —
 - **Issue 1:** Could a right to a ‘**pleasure ground**’ constitute an easement? Did it ‘accommodate’ the dominant tenement?
 - **Application:** It is not sufficient to show that the right increased the value of the property conveyed, unless it is also shown that it was connected with the normal enjoyment of that property. It appears to us that the question whether this connexion exists is **primarily one of fact**, and

depends largely on the nature of the alleged dominant tenement and the nature of the right granted (Lord Evershed MR at 173 in *Re Ellenborough Park*)

- **Issue 2:** Could the owners of the land **not directly** bordering the park also claim an easement given that they were not directly next door?
- **Application:** The court said **yes** because the park was intended to be a garden for these properties – use of a garden enhances and is connected to the normal use and enjoyment of land – so is capable of forming an easement.
- **Application — valid easement:** See also *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (right to use “swimming pool, golf course ... gardens and other sporting or recreational facilities”; held, valid easement accommodating dominant tenement); **upheld in part** on appeal (as to outdoor recreational facilities **only**): *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238.
 - **There was accommodation:** (at 48) “I consider that In re Ellenborough Park should be taken to have been dispositive of this issue for the purposes of English common law, to this extent, namely that it is not fatal to the recognition of a right as an easement that it is granted for recreational (including sporting) use, to be enjoyed for its own sake on the servient tenement. The question in every such case is whether the particular recreational or sporting rights granted accommodate the dominant tenement”

(iii) Subdivision of dominant tenement:

- **Dominant subdivided, both gets:** If the dominant tenement is later subdivided, the easement is presumed to accommodate the subdivided parts, enabling successive owners of those parts to exercise the easement (*Gallagher v Rainbow* (1994) 179 CLR 624)
- **Rebuttable in 2 situations:**
 - **Does not accommodate subdivided part:** Question of **fact**, the easement does not accommodate the subdivided parts (*Gallagher v Rainbow* (1994) 179 CLR 624 at 633)
 - **Benefit whole, not parts:** A question of **construction of the instrument** creating the easement, the easement was intended to **benefit only the dominant tenement as an entirety** and **not the parts** into which it might later be subdivided (*Gallagher v Rainbow* (1994) 179 CLR 624 at 632, 633)
 - **Facts in *Gallagher*:** Private Road jointly owned by lots 14, 15, 16, 17. Each have $\frac{1}{4}$ ownership and an easement to use the other $\frac{3}{4}$ of the road (cross easements). The owners of 2 of the lots decide to subdivide into 3 smaller lots. The owner of 1 of the lots that was not going to be subdivided brought an injunction to restrain the owners of the lots to be subdivided from using the easement to carry out the subdivision. She argued that the easement only applied to the larger lot and if it was subdivided then it would not attach to the smaller subdivided components. (In this way hoping to prevent the subdivision because she would then refuse permission for the owners of the subdivided lots to use her $\frac{1}{4}$ of the road)
 - **Held:** *Per Brennan, Dawson and Toohey JJ* at 633:
 - **Rule:** An easement is no mere personal right; it is **attached to the dominant land for the benefit of that land**. To the extent that any part of the dominant land may benefit from that easement, the easement will be enforceable for the benefit of that part **unless** the easement, on its proper construction, **benefits the dominant land only in its original form**.

Topic 11: Freehold (Restrictive) Covenants (Lectures 12–13)

1. Introduction

1. Covenants fall into the following 3 **categories**: (1) public law, as exemplified by planning, heritage and environmental laws, (2) government laws due to public interest, (3) private law of torts which prevents certain types of interference with land.
 - (a) Covenants can transcend the limitations of contract law
2. **Made in deed**: A covenant is a **promise** made in a deed. In practice, however, it is an **obligation** affecting a landowner, **regardless** of whether the obligation is **created by deed**.
3. **Positive (to act) or negative (refrain)**: A Covenant may be **positive or negative** (restrictive). A positive covenant requires an **act to be done** - for example, to build a house. A **negative** (restrictive) covenant requires an act **not to be done** - for example, not to build a house.
4. **Covenantor = burden, covenantee = benefit**: The **covenantor** is the person subject to the **burden** of the covenant, the **covenantee** is entitled to the **benefit** of the covenant.
 - (a) **Burden definition**: The burden of the covenant is the obligation to **act or not to act** under the covenant. So if a person bears the burden of the covenant then they are the person who is required or restrained from acting in respect of their land
 - (b) **Benefit definition**: The benefit of the covenant is the **benefit that flows from the other party bearing the burden**. The person who obtains the benefit of the covenant is the 'covenantee' (the person who has sought the promise that the other person will act or not act)
5. Statutory Presumptions such as *Conveyancing Act 1919*, s 70A

2. Running with the Land: Burden and Benefit at Common Law

1. PASSING THE BURDEN AT LAW:

- (a) **Common Law Position — Does not pass to successor**: Generally, under common law, the burden of a covenant did not run with the land (which means positive covenants are unenforceable against subsequent owners) (*Austerberry v Corporation of Oldham* (1885) 29 Ch D 750 at 781-783, 784)
 - **Facts**: The case involved a **private road**. John Elliot conveyed some land to a company for the purpose of building a road. The company covenanted that it **would build the road** and then **maintain** and repair the road at its own expense. The company subsequently **sold** the land to the Corporation of Oldham. The new owner moves in, and says he will not pay (even though he is using the word); New owner argued that he **never agreed** to pay and the other landowners argued that because his land benefitted from the road, that he should pay
 - **Issue**: Was the burden of the covenant between Elliot and the company (the obligation to maintain and repair the road at their own expense) enforceable against the Corp of Oldham?
 - **Held**: The court found that the covenant **did not bind** the Corporation of Oldham. The court said that the Corporation of Oldham was **only bound by a covenant which 'ran with the land'**. The court found that the burden of a covenant does not run with the land
 - i.e., The other landowners could not enforce the burden against the new owner because common law does not permit burdens to be passed in such way
 - Lindley J: 'A mere covenant to repair, or to do something of that kind, does not seem to me, I confess, to run with the land in such a way as to bind those who may acquire it'
- (ii) **TTL**: This is also generally the case under Torrens land (s.70A(1)).
- (b) **Statute DOES NOT circumvent common law rule**: At first glance, s 70A(1) of the *Conveyancing Act 1919* (NSW) might be thought to overturn the common law rule that the burden of a covenant does not run with freehold land. **Section 70A(1)** provides: "A covenant relating to any land of a **covenantor**

or capable of being bound by the covenantor by covenant shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself or herself and the covenantor's successors in title ... and ... shall have effect as if such successors ... were expressed."

- (i) However, the now-accepted view is that s 70A(1) **does not affect** the **common law rule** (*Rhone v Stephens* [1994] 2 AC 310 at 321-322). It merely provides a **legislative presumption** that a covenantor intends to bind successors in title but does not actually say that the covenantor CAN bind successors in title. Common law a covenant cannot bind successors in title even where it purports to do so *expressly*. Therefore a covenant cannot bind successors in title where (in the language of s 70A(1)) it is *deemed* to be made on behalf of the covenantor and his or her successors in title.

(c) **Devices to make the burden run at common law:** Most are technical, and none is entirely satisfactory.

(i) **Personal Covenants:**

- **Each successive purchaser** from the covenantor **contracts with his or her predecessor to comply with the covenant**. This method involves creating a chain of covenants between the original covenantee and covenantor and all their successors in title. The original covenantor always remains liable to the original covenantee – aim is to extend the liability:
 - The first covenantor agrees to ensure that each subsequent purchaser will enter into an identical covenant with the next purchaser. This means that the obligation is recreated in each deed;
 - When the first covenantor sells, the purchaser agrees to be liable under the contract if the original covenant is broken. That purchaser then requires the same promise from the person they sell to and so on. This means that if the covenant is broken and the first covenantor is sued, they can seek indemnity down the chain

(ii) **Granting, or enlarging a long term lease:**

- In general, those rules are far more liberal, allowing benefits and burdens of all covenants that touch and concern the land, whether positive or negative, to be enforceable against and by successors in title as long as "privity of estate" subsists. Accordingly, the grant of a long-term lease of the land, rather than a freehold, is a second device for avoiding the common law rule.
 - This does not happen in Australia as we do not do long-term leaseholds (in England they do)
- **Long term lease — convert to fee simple — "touch and concern":** The covenant is **included in a long-term lease**, which is then **converted into a fee simple** under s 134 of the *Conveyancing Act 1919*. It enables **certain leases granted** for terms of **not less than 300 years**, with not less than **200 years still to run**, to be enlarged into fees simple. By s 134(5), the estate in fee simple so created is **subject to** all the "covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind" to which the lease would have been subject had it not been enlarged. Since covenants in *leases* run to bind the covenantor's successors if they "touch and concern" the leased land, subs (5) seems to **subject the resultant fee simple to all covenants that "touch and concern"** the land. The covenantee could then enforce these covenants against the holder for the time being of the fee simple.

(iii) **Benefit/burden principle:**

- **Definition:** A party who claims benefits conferred by a deed **must also submit to the burdens** imposed by the deed. A person who **accepts** the benefits of a proprietary interest that **"runs with"** land must also accept the obligations imposed under the instrument that created that interest. This obligation comes from the fact, that unlike burdens, benefits **DO** run with the land (**see below**). This widening of the original principle has not gone uncriticised, and the