Where the question goes

OPEN	Real Property Act 1900 (NSW); Conveyancing Act 1919 (NSW); Succession Act 2006 (NSW) s 38; Native Title Act 1993 (Cth); Sale of Goods Act 1923 (NSW); PPSA 2009 (Cth); the judgments.
SOURCE	the Real Property and ICPL notes; statutes read live (date in each footer).

ROUTER · THE QUESTION INVOLVES → PAGE

What estate or interest a grant creates; native title	CA ss 19, 47; Succession Act s 38; NTA	**PROP · 1 Estates; native title**
Legal or equitable interest? No writing; part performance; statute and fraud	CA ss 23B–23E, 54A	**PROP · 2 Creating interests**
Two interests in old system land: which has priority?	judgments	**PROP · 3 General law priorities**
A registered proprietor; fraud; a forged instrument	RPA ss 40–43, 118, 124	**PROP · 4 Indefeasibility**
An exception: in personam, volunteer, short lease, easement, overriding statute; forged mortgage; correction	RPA ss 12, 42, 56C	**PROP · 5 Exceptions**
Unregistered interests; caveats, priority notices; assurance fund	RPA ss 74F–74P, 129	**PROP · 6 Caveats; priorities**
A lease or a licence; a lease without writing	CA ss 23B, 23D, 127; RPA s 42(1)(d)	**PROP · 7 Leases and licences**
A mortgage: creation, redemption, clogs	RPA s 57; CA s 93	**PROP · 8 Mortgages (1)**
The lender enforces: sale, possession, foreclosure	RPA ss 57–61; CA ss 106–112	**PROP · 9 Mortgages (2)**
Co-owners: joint or in common; improvements, occupation, rent	CA ss 26, 66F, 66I	**PROP · 10 Co-ownership (1)**
Severance; one co-owner wants a sale	CA ss 66G–66H; RPA s 97	**PROP · 11 Co-ownership (2)**
An easement: valid? how created?	CA ss 88, 88B, 88K; RPA s 42(1)(a1)	**PROP · 12 Easements (1)**
How far an easement goes; ending it; profits	CA s 89	**PROP · 13 Easements (2)**
A covenant binding a later owner	CA ss 70A, 88, 89	**PROP · 14 Freehold covenants**
Fixtures; goods found, given or bailed	judgments	**PROP · 15 Personal property (1)**
Debts, shares and other choses in action; assignment; future property	CA ss 12, 23C	**PROP · 16 Personal property (2)**
Two claims to goods; security interests	SGA ss 26–28; PPSA	**PROP · 17 Personal property (3)**
Which case to cite	the judgments	**PROP · 18– Cases in the exam**

THE ANSWER, IN ORDER (EVERY PAGE)

1	The property and the parties	The land or thing, the system (old system or Torrens), each party's claim.
2	Nature of each interest	Legal or equitable; registered or unregistered; how it was created.
3	The rule or provision	State it with its elements, from the page.
4	Apply; exceptions	Apply each element; then any exception, priority rule or statutory limit.
5	Outcome; remedy	"[Party]'s interest [prevails / binds / is defeated]", with the remedy.

Estates; tenure; native title CA s 47; NTA s 223

USE THIS PAGE WHEN	a grant "to A" without words of limitation; a fee tail; a native title claim over granted land.
OPEN	Conveyancing Act 1919 ss 19, 47; Succession Act 2006 s 38; Native Title Act 1993 ss 10, 11, 223; the judgments.
FIRST QUESTION, ALWAYS	what interest did the grant create, and what rights existed before it?

RELATED PAGES · PROP·2 · PROP·7.

estate
whole estate

A deed or will "to A", no words of limitation; a grant "to A and the heirs of his body"

→ A conveyance without words of limitation passes "the fee simple or other the whole estate or interest the person conveying had power to dispose of … unless a contrary intention appears" (CA s 47(2)); a will passes "the whole estate or interest of the testator" (Succession Act s 38(1)). A limitation that would create an estate tail creates a fee simple (CA s 19(1)).

tenure
radical title

Who holds the land at the base of title?

→ On sovereignty "the Crown acquired a radical title to the land …, but native title to that land survived" (Mabo [No 2], via Yorta Yorta [37]); those rights "owed their origin to a normative system other than the legal system of the new sovereign power" (Yorta Yorta [37]).

Yorta Yorta v Victoria: Gleeson CJ, Gummow and Hayne JJ; McHugh J, Callinan J concurring; Gaudron and Kirby JJ dissenting; not on the list
‣ a claim along the Murray in NSW and Victoria

exists
traditional

Does native title exist? Ceremony, camping, hunting today

→ Prove the s 223(1) elements: rights "possessed under the traditional laws acknowledged, and the traditional customs observed", a "connection with the land", recognised by the common law. "Traditional" laws must have "had a continuous existence and vitality since sovereignty" ([47]), observed "substantially uninterrupted" ([87]). Connection "is not directed to how Aboriginal peoples use or occupy land" (Ward [64]).

Yorta Yorta v Victoria · NTA s 223: as above
‣ the trial judge found that observance had ceased

ends
inconsistent

A later Crown grant: freehold, a lease, a reserve; compensation

→ Native title "is not able to be extinguished contrary to this Act" (NTA s 11(1)). "[C]lear and plain intention" is not subjective; it is "an objective inquiry which requires identification of and comparison between the two sets of rights" (Ward [78]). "Two rights are inconsistent or they are not" (Ward [82]), judged as the rights "stood at the time of the grant" (Brown [37]). Compensation: exclusive title "equates to the objective economic value of an unencumbered freehold estate"; non-exclusive there "50 per cent of the freehold value", plus interest and cultural loss (Griffiths [3], joint reasons; not on the list).

Western Australia v Ward · NTA: Gleeson CJ, Gaudron, Gummow and Hayne JJ; McHugh, Kirby and Callinan JJ separately
‣ the Miriuwung-Gajerrong claim in the East Kimberley

coexist
exclude

A mining or pastoral lease over claimed land

→ A grant to use land for purposes, without a right "to exclude any and everyone from that land for any reason or no reason at all" ([45]), "is not necessarily inconsistent with, and does not necessarily extinguish, native title rights" (Wik and Ward, via Brown [55]). "Any competition between the exercise of the two rights must be resolved in favour of the rights granted by statute" ([64]).

Western Australia v Brown: French CJ, Hayne, Kiefel, Gageler and Keane JJ
‣ iron ore mineral leases at Mount Goldsworthy (WA State Agreement Act)

property
relationship

A statute vests "property" in the Crown; a hunter takes fauna

→ "'[P]roperty' does not refer to a thing; it is a description of a legal relationship with a thing" (Yanner [17]); Crown "property" in fauna was "a fiction expressive in legal shorthand" of regulatory power ([28]), so native title hunting survived.

Yanner v Eaton: Gleeson CJ, Gaudron, Kirby and Hayne JJ; Gummow J concurring; McHugh J, Callinan J dissenting
‣ a man harpooned two juvenile crocodiles without a licence (Qld Fauna Act)

DECIDE

Estate

1 Words of limitation in the deed or will? →

YES apply them (CA s 47(1); s 19(1) for an estate tail)
NO whole estate passes unless a contrary intention (CA s 47(2); Succession Act s 38)

Native title

1 Rights under traditional laws and customs observed substantially uninterrupted since sovereignty, with a connection to the land (NTA s 223(1); Yorta Yorta [47], [87])? **NO** → no native title

YES ↓

2 A grant inconsistent with those rights, compared objectively at the time of grant (Ward [78], [82]; Brown [37])? →

YES extinguished to the extent of inconsistency (Ward [82]); compensation → 3
NO coexists; statutory rights prevail in competition (Brown [64])

3 Compensation: were the extinguished rights exclusive (Griffiths [3])? →

YES the economic value of an unencumbered freehold, plus interest and cultural loss
NO a lower share of freehold value (50 per cent in Griffiths), plus interest and cultural loss

SAY

The grant to A passed the fee simple / the grantor's whole estate, there being no contrary intention. (CA s 47(2); Succession Act s 38) Group holds native title if its rights are possessed under traditional laws and customs observed substantially uninterrupted since sovereignty, with a connection to land. (NTA s 223(1); Yorta Yorta [47], [87]) The grant conferred rights; compared objectively, they are / are not inconsistent with native title right. (Ward [78], [82]; Brown [37]) Without a right to exclude, the lease was not inconsistent with native title right and did not extinguish it; where the rights compete, the lessee's rights prevail. (Brown [45], [55], [57], [64])

The statute regulates activity; it does not vest full ownership, so the native title right to hunt survives. (Yanner [17], [28])

MARKS LOST

1. Words of limitation required in a modern deed or will (CA s 47(2); Succession Act s 38).
2. Treating the Crown's radical title as full beneficial ownership (Yorta Yorta [37]).
3. Connection tested by present use (Ward [64]).
4. Looking for the legislature's subjective intention (Ward [78]).
5. Judging inconsistency by later use, not rights at the grant (Brown [37]).
6. Treating every lease as extinguishing native title (Brown [55]).
7. Treating statutory "property" as full ownership (Yanner [17], [28]).
8. Valuing non-exclusive native title at full freehold value, or omitting cultural loss (Griffiths [3]).

Creating legal and equitable interests CA ss 23B–23E, 54A; RPA s 41

USE THIS PAGE WHEN	an oral deal over land; an unsigned or unregistered lease, mortgage or transfer; a party relies on the lack of writing; money paid or possession taken.
OPEN	Conveyancing Act 1919 ss 23B–23E, 54A; Real Property Act 1900 s 41; the judgments.
FIRST QUESTION, ALWAYS	was the interest legal, equitable or only at will, and is there signed writing?

RELATED PAGES · PROP·3 · PROP·6 · PROP·7.

legal
deed

A transfer, lease or mortgage not by deed, or not registered
→ Old system: "No assurance of land shall be valid to pass an interest at law unless made by deed" (CA s 23B(1)). Torrens: "No dealing, until registered …, shall be effectual to pass any estate or interest" (RPA s 41(1)); s 23B does not apply (s 23B(3)).

writing
signed

Nothing signed; an oral grant or declaration of trust
→ "[N]o interest in land can be created or disposed of except by writing signed" by the grantor or an agent "lawfully authorised in writing" (s 23C(1)(a)); trusts and dispositions of equitable interests likewise ((b), (c)); constructive trusts are unaffected (s 23C(2)). An oral interest has "the force and effect of interests at will only" (s 23D(1)).

parol
three years

An oral lease of up to three years
→ Valid at law if "at the best rent which can reasonably be obtained without taking a fine taking effect in possession for a term not exceeding three years" (s 23D(2)).

contract
memorandum

A contract to sell, lease or mortgage; signed by an agent
→ No action unless the agreement "or some memorandum or note thereof, is in writing, and signed by the party to be charged" or an authorised person (s 54A(1)). A contract to create a new interest is a "disposition" (Khoury, Handley JA [4]). Under s 54A "the signing agent need not be authorised in writing"; s 23C does not apply "if there is no more than an agreement to assure property in the future" (Baloglow, Giles JA [162], [191]).

Baloglow v Konstantinidis: Giles JA, Mason P agreeing ([3]); Priestley JA same result via s 23C(2)
‣ a partners' buy-out agreed through solicitors, including a Manly property

equity
specifically enforceable

An agreement for a lease, no lease registered; a sale not completed
→ If specifically enforceable, the agreement creates an equitable lease, distinct from a legal lease (Walsh v Lonsdale; Chan v Cresdon, via Eureka [10]–[11], Leeming JA); "introduce the third party and then you will see the difference" (Maitland, via Eureka [9]). A purchaser's interest is "commensurate with the availability of specific performance"; Lysaght's trust and mortgage analogies "are no longer accepted" (Tanwar [53]).

Transport for NSW v Eureka: Leeming JA, White JA, Preston CJ of LEC; not on the list
‣ an agreed service-station lease extension never registered

part
referable

Possession taken, money paid under an oral deal
→ Part performance survives the writing rules (s 23E(d); s 54A(2)). Acts must be "unequivocally and inherently referable to a transaction for the sale or other disposition of the land" ([50]); referable to "some contract of the general nature of that alleged" (Gibbs J in Regent v Millett, via [40]; not on the list). Maddison v Alderson "is unshaken" ([44]); relaxation "must be rejected" ([6]). Payments alone do not suffice (Khoury [89]–[90]).

Pipikos v Trayans · Law of Property Act 1936 (SA) s 26: Kiefel CJ, Bell, Gageler and Keane JJ; Nettle and Gordon JJ agreeing; Edelman J concurring for different reasons ([125])
‣ a brother-in-law claimed an oral half-interest

fraud
instrument

A party relies on the lack of writing to keep a benefit
→ Courts "would not allow the Statute of Frauds to be made an instrument of fraud" (Hope J in Last v Rosenfeld, quoted in Theodore [31]); "s 54A cannot be used as an instrument of fraud" (Ciaglia [63]).

Theodore v Mistford · Property Law Act 1974 (Qld): the Court (five judges)
‣ a mother's certificate of title handed over as security

DECIDE

Legal or equitable?

1 By deed (old system) or registered (Torrens) (CA s 23B(1); RPA s 41(1))?
- **YES →** legal interest

NO ↓

2 Signed writing, or an oral lease within s 23D(2) (CA ss 23C(1), 23D)?
- **YES →** equitable interest (or legal parol lease)

NO ↓

3 Acts unequivocally referable to such a contract, or reliance on the statute would be fraud (Pipikos [50]; Theodore [31])?
- →
  - **YES** equity enforces the equities arising from part performance (Pipikos [49])
  - **NO** interest at will only (s 23D(1)); no action (s 54A(1))

SAY

P has no legal interest: the lease / mortgage was not by deed / not registered. (CA s 23B(1); RPA s 41(1)) Without signed writing the interest is at will only, unless a lease within s 23D(2) / a constructive trust. (CA ss 23C, 23D) The contract is evidenced by document signed by party or agent, so s 54A is satisfied. (s 54A(1); Baloglow [162])

P's possession / improvements are unequivocally referable to a contract of that kind, so equity intervenes to enforce it. (Pipikos [40], [49], [50])

D cannot rely on the lack of writing to keep benefit; that would make the statute an instrument of fraud. (Theodore [31]; Ciaglia [63])

MARKS LOST

1. A legal interest found in Torrens land without registration (RPA s 41(1)).
2. Missing the three-year parol lease (s 23D(2)).
3. Requiring the agent's authority under s 54A to be in writing (Baloglow [162]).
4. Applying s 23C to an agreement to assure in the future (Baloglow [191]).
5. Treating an agreement for a lease as binding third parties like a legal lease (Eureka [9]); calling the vendor a trustee for the purchaser (Tanwar [53]).
6. Payment alone treated as part performance (Khoury [89]–[90]).
7. Reading Pipikos as relaxing Maddison (Pipikos [6], [44]).