TOPIC 6 — CO-OWNERSHIP

TOPIC 6 — CO-OWNERSHIP 1
LECTURE-DIRECTED CLASSIFICATION FORMULA 2
PART A — CLASSIFY THE CO-OWNERSHIP 3
STEP 1 — Is there concurrent ownership of the same property? 3
STEP 2 — Apply the four unities: is joint tenancy legally possible? 3
Mandatory four-unities application 3
STEP 3 — Apply the instrument and statutory classification rules 4
A. Tenancy in common 4
B. Joint tenancy 5
STEP 4 — If joint tenancy exists, what does survivorship do? 6
PART B — CREATION AND BENEFICIAL SHARES 7
STEP 5 — Do the legal and beneficial interests differ? 7
STEP 6 — Does a purchase-money resulting trust determine the beneficial shares? 7
Acquisition-contribution calculation 7
STEP 7 — Is the contribution presumption rebutted? 8
STEP 8 — Does a commercial acquisition point away from survivorship? 8
PART C — SEVERANCE OF JOINT TENANCY 9
STEP 9 — Has severance occurred and what is its effect? 9
STEP 10 — Severance by legal transfer or alienation 9
STEP 11 — Equitable severance by contract, trust or completed gift 10
A. Specifically enforceable contract 10
B. Declaration of trust 10
C. Voluntary transfer or gift 10
Completed-gift checklist 10
STEP 12 — Severance by agreement 11
STEP 13 — Severance by mutual course of dealing 11
STEP 14 — Does a mortgage, lease, charge or other dealing sever? 11
STEP 15 — Severance through court order, statutory sale or other event 12
NARROW SEVERANCE TRIGGERS — SKIP UNLESS RAISED 12
PART D — RIGHTS, PAYMENTS AND EQUITABLE ACCOUNTING 13
STEP 16 — Start with the baseline rights between co-owners 13
STEP 17 — Has one co-owner paid more than their share of a joint debt? 14
STEP 18 — Has one co-owner made improvements or lasting repairs? 14
Improvement checklist 14
STEP 19 — Is occupation rent or an occupation fee payable? 15
A. General rule 15
B. Agreement 15
C. Ouster or wrongful exclusion 15

TOPIC 9 — EASEMENTS AND PROFITS

TOPIC 9 — EASEMENTS AND PROFITS 1
PART A — TORRENS TITLE AND STATUTORY EXCEPTIONS 2
STEP 1: Start with the Register 2
STEP 2: Is there an omitted or misdescribed easement? 2
STEP 3: Does another statute burden or invalidate the title? 3
STEP 4: Is the claim based only on a plan notation or planning condition? 3
PART B — IS THE RIGHT CAPABLE OF BEING AN EASEMENT? 4
STEP 5: Characterise the asserted right 4
STEP 6: Apply all four essential characteristics 4
6A. Dominant and servient tenements 4
6B. Does the right accommodate the dominant land? 4
6B(1). Subdivision, third-party users and added land 5
6C. Diversity of ownership or occupation 5
6D. Is the right capable of grant? 5
Supporting case compass 6
STEP 7: Does the right impermissibly confer possession? 6
STEP 8: Does the right improperly require positive services? 7
PART C — WAS THE EASEMENT VALIDLY CREATED? 7
STEP 9: Express creation over Torrens land 7
Easement created over land in the same ownership 8
Creation through a lease 8
STEP 10: Creation by plan under s 88B 8
STEP 11: Are the statutory particulars satisfied? 8
STEP 12: Express creation over old-system land, if relevant 9
Express reservation 9
General words — old-system land only 9
Existing appurtenant rights on transfer of Torrens land 9
Mixed-title land 9
STEP 13: Easements in gross and public-authority rights 9
STEP 14: Court-imposed easement under s 88K 10
STEP 15: Implied easement — common intention or business efficacy 10
Land conveyed as abutting a private road — narrow trigger 11
STEP 16: Easement of necessity 11
STEP 17: Wheeldon v Burrows 11
Torrens consequence for implied rights 11
STEP 18: Prescription or proprietary estoppel — use only if raised 12
PART D — PROFITS À PRENDRE 12
STEP 19: Is the right a profit? 12

STEP 20: Was the profit created?..... 13
STEP 21: Forestry and carbon rights..... 13
Extinguishment of profits.....13
SHORT CONCLUSION TEMPLATE.....14

PART A — TORRENS TITLE AND STATUTORY EXCEPTIONS

STEP 1: Start with the Register

- **Rule:** A registered proprietor holds the recorded estate or interest subject to interests recorded on the folio and the statutory exceptions, but otherwise free from unrecorded estates and interests (**Real Property Act 1900 (NSW) s 42(1)**).
- **Application:** Search both the alleged dominant and servient folios and inspect the registered instrument or plan. Do not infer an easement merely from physical use, a planning approval or the word “proposed” on a plan.
- **Conclusion:** If the easement is validly recorded, proceed to its validity and construction. If it is absent or misdescribed, go to Step 2.

STEP 2: Is there an omitted or misdescribed easement?

- **Rule:** Indefeasibility is subject to the omission or misdescription of an easement that either subsisted immediately before the land came under the Act or was validly created thereafter under the RPA, another NSW Act or a Commonwealth Act (**Real Property Act 1900 (NSW) s 42(1)(a1)**).
- **Rule:** “Omission” presupposes a continuing valid easement that is improperly absent from the Register; it does not revive an easement deliberately removed under the statutory alteration procedure (**Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd (2013) 247 CLR 149, 155–165**).
- **Rule:** An easement created under the RPA ordinarily comes into legal existence by registration; defective covenant-style wording that was never registrable cannot become a valid easement through the omission exception (*Jea Holdings (Aust) Pty Ltd v Registrar-General of NSW* [2013] NSWSC 587).
- **Rule:** Under the former registration scheme, recording the easement on the dominant folio could validly create it even though it was not also carried onto the servient folio, allowing the continuing easement to engage the omission exception (*Registrar-General v Jea Holdings (Aust) Pty Ltd* [2015] NSWCA 74).
- **Application:** Identify why the right is absent. Accidental failure to carry forward or record an otherwise existing easement may qualify. Deliberate cancellation does not.

PART B — IS THE RIGHT CAPABLE OF BEING AN EASEMENT?

STEP 5: Characterise the asserted right

- **Rule:** An easement is a proprietary right annexed to dominant land to use servient land in a defined way, or restrain a defined use of it, without taking possession or removing its soil or natural produce (**Re Ellenborough Park [1956] Ch 131, 163–164**).
- **Rule:** A right to enter and remove soil or natural produce is ordinarily a profit à prendre rather than an easement (**Clos Farming Estates Pty Ltd v Easton (2002) 11 BPR 20,605, 20,611–20,613**).
- **Application:** Identify the exact act authorised, the land benefited, the land burdened, the persons entitled to use it and whether anything is taken from the land.

STEP 6: Apply all four essential characteristics

- **Rule:** A valid easement requires: (1) dominant and servient tenements; (2) accommodation of the dominant tenement; (3) different ownership or occupation; and (4) a right capable of forming the subject matter of a grant (**Re Ellenborough Park [1956] Ch 131, 163–164**).

6A. Dominant and servient tenements

- **Rule:** At general law an easement must be annexed to identifiable dominant land and cannot exist merely for the personal benefit of its holder (**Re Ellenborough Park [1956] Ch 131, 163–166**).
- **Rule:** NSW legislation permits easements in gross for the Crown, a public authority or a prescribed corporation despite the absence of dominant land (**Conveyancing Act 1919 (NSW) s 88A**).
- **Supplied-notes proposition:** An easement granted for the benefit of a leasehold interest cannot endure beyond the lease from which the dominant interest is derived.
- **Application:** Name each parcel. If no dominant land exists, determine whether s 88A or another statute authorises the right in gross.

6B. Does the right accommodate the dominant land?

- **Rule:** The right must benefit the dominant land in its normal use or enjoyment and have a sufficient connection with that land, rather than merely benefit the current owner personally or commercially (**Re Ellenborough Park [1956] Ch 131, 169–176**).
- **Rule:** Contiguity is unnecessary, but the parcels must be sufficiently proximate for the asserted benefit genuinely to enhance the dominant land (**Re Ellenborough Park [1956] Ch 131, 170–176**).

- **Rule:** Recreational rights may accommodate residential or holiday land where they objectively enhance its ordinary use and are not merely personal pleasures (**Re Ellenborough Park [1956] Ch 131, 175–176; Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2019] AC 553, [65]–[75]**).
- **Rule:** A comprehensive right that primarily advances the grantee's business, rather than the use of the alleged dominant parcel as land, fails the accommodation requirement (**Clos Farming Estates Pty Ltd v Easton (2002) 11 BPR 20,605, 20,609–20,614**).
- **Application:** Ask why the location and characteristics of the dominant land make this right useful. Increased value is relevant but not conclusive.
- **Application plug-in:** "The right [does/does not] accommodate [dominant land] because it objectively facilitates [residential access/recreation/use of premises], rather than merely advancing [P]'s personal preference or business."

6B(1). Subdivision, third-party users and added land

- **Rule:** An easement may accommodate dominant land even though visitors, customers or members of the public connected with that land also exercise it (*Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2019] AC 553).
- **Rule:** On subdivision of dominant land, each part capable of enjoying the easement receives its benefit unless the grant, properly construed, benefits the dominant parcel only in its original form (*Gallagher v Rainbow* (1994) 179 CLR 624, 633).
- **Supplied-notes proposition:** Consolidating dominant land with another parcel does not ordinarily extend the easement's benefit to the added land unless the grant, properly construed, permits that use.
- **Application:** Ask whether the user is connected with the dominant land and whether the use genuinely serves that land rather than collateral land.

6C. Diversity of ownership or occupation

- **Rule:** At general law a person cannot hold an easement over land in the same ownership and occupation as the dominant land, although statutory plan creation can occur despite common ownership (**Re Ellenborough Park [1956] Ch 131, 163; Conveyancing Act 1919 (NSW) s 88B(3); Real Property Act 1900 (NSW) s 46A**).
- **Application:** Identify ownership and occupation at creation and whether the right was created under a statutory mechanism that displaces the common-law rule.

6D. Is the right capable of grant?

- **Rule:** The nature, area, purposes and users of the right must be sufficiently certain to be expressed in a grant, and the right must not confer possession or proprietorship of the servient land (**Re Ellenborough Park [1956] Ch 131, 176–187**).
- **Rule:** Positive easements may adapt to modern land use, including defined garden and recreational uses, provided the four essential requirements remain satisfied (**Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2019] AC 553, [76]–[81]**).

PART A — CONSTRUING THE REGISTERED EASEMENT

STEP 1: Identify the controlling registered material

- **Rule:** An easement originates in grant and constitutes a proprietary attribute of the dominant land rather than a merely personal permission (**Re Ellenborough Park [1956] Ch 131, 163–164**).
- **Supplied-notes proposition:** A registered easement ordinarily continues for its stated duration, commonly perpetually, unless released, abandoned, merged or extinguished by statute or court order.
- **Rule:** A Torrens easement is construed principally from the folios, registered instrument and registered plan because successors and third parties must be able to ascertain its content from the Register (**Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528, [37]–[45]**).
- **Rule:** Private negotiations, subjective intention and an inaccessible factual matrix cannot enlarge dominant land, authorised users, purposes or burdens omitted from the registered grant (**Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528, [37]–[45]**).
- **Rule:** Technical evidence may explain a registered surveying expression or abbreviation, but it cannot contradict or enlarge the registered words (**Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528, [39]–[45]**).
- **Application:** Quote the operative words. Identify the parcels, route, termini, users, vehicles or activities, time limits and incorporated plan or memorandum.
- **Plug-in:** “Because this is a Torrens easement, its scope must be ascertainable from [folio/instrument/plan]. Evidence that the original parties privately contemplated [X] cannot add [land/purpose/user] absent from the registered grant.”

STEP 2: Apply the whole instrument

- **Rule:** Broad expressions such as “for all purposes” take their meaning from the grant as a whole and do not authorise every later commercial advantage desired by the dominant proprietor (**Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528, [46]–[53]**).
- **Rule:** Words such as “to and from” and “across”, together with the registered route and termini, may confine the destination and prevent use as a throughway to other land (**Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528, [46]–[53]**).
- **Rule:** Maintenance, insurance, indemnity and contribution provisions may confirm the intended scope by revealing which land, owners and burdens the instrument allocates responsibility for (**Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528, [50]–[53]**).

- **Application:** Read every operative clause together. A construction imposing extra traffic or cost on a person omitted from the maintenance and indemnity structure is less plausible.

STEP 3: Can observable physical characteristics assist?

- **Rule:** Broad, reasonably enduring physical characteristics of the dominant, servient and surrounding land that were reasonably ascertainable by a third party at the date of grant may assist construction, but fine details, inaccessible material and private intention cannot supply a right absent from the instrument (*Theunissen v Barter* [2025] NSWCA 50, [108]; *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528, [44]–[45]).
- **Application:** Use width, surface, slope, structures and visible connections to interpret general language. Do not use them to contradict a precise route, destination or limitation.

STEP 4: Changed or intensified use of dominant land

- **Rule:** A change in the dominant land's use does not cut down an express grant unless the instrument, route or physical limits impose the restriction; the court gives the grant its natural meaning rather than freezing use at the date of creation (*White v Grand Hotel, Eastbourne Ltd* [1913] 1 Ch 113).
- **Rule:** An express easement is not frozen to the dominant land's exact use when created; development and intensified use are permitted where they remain within the language and purpose of the grant (**Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528, [46]–[53]**).
- **Rule:** Intensification cannot be used to convert the easement into a different right or impose a burden serving land outside the registered grant (**Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528, [46]–[53]**).
- **Application:** Distinguish a quantitative increase within the same authorised purpose from a qualitative change in destination, users or burden.
- **Supplied-notes proposition:** Unless excluded by the grant, an easement may adapt to technological change—for example, passage may evolve from older transport methods to modern vehicles—provided its essential purpose and burden remain within the grant.
- **Rule:** A carriageway acquired for horse-drawn vehicles may extend to mechanically propelled vehicles because the mode of exercise can adapt with technology while the essential right remains passage (*Lock v Abercester Ltd* [1939] 1 Ch 861).
- **Supplied-notes proposition:** References to owners, servants, visitors or similar users may be illustrative rather than exhaustive; the issue is whether the user's activity is genuinely connected with enjoyment of the dominant land.
- **Plug-in:** "The proposed increase from [old use] to [new use] is [a permissible intensification within the registered purpose/a qualitative enlargement beyond the grant] because [facts]."

- **Supplied-notes proposition:** Planning approval inconsistent with a covenant does not by itself establish obsolescence or compel judicial modification under s 89.

STEP 16: Apply *JEA Holdings*

- **Rule:** Planning override turns on whether the creating agreement, covenant or similar instrument actually restricts authorised development; classification of the resulting proprietary interest as a positive easement is relevant but not conclusive (*JEA Holdings (Aust) Pty Ltd v Registrar-General of NSW* [2024] NSWCA 255).
- **Rule:** Ordinary development consent does not override private property rights; s 3.16 and an implementing EPI clause are exceptional express displacement and operate only to the extent required for the authorised development (*JEA Holdings*; **Environmental Planning and Assessment Act 1979 (NSW) s 3.16**).
- **Consequence:** The interest is suspended pro tanto for the development rather than necessarily extinguished and may revive if the operative consent ceases.

STEP 17: Public regulation versus proprietary title defect — skip unless raised

- **Rule:** An Aboriginal object must itself constitute physical evidence bearing witness to Aboriginal habitation; a modern memorial merely asserting that history is not enough (**National Parks and Wildlife Act 1974 (NSW) s 5**; *Carter v Mehmet* [2021] NSWCA 286).
- **Rule:** Statutory Crown “property” in an Aboriginal object may confer regulatory control rather than an estate in surrounding fee simple and does not automatically create a title defect (*Carter v Mehmet* [2021] NSWCA 286; **National Parks and Wildlife Act 1974 (NSW) s 83**).
- **Application:** Separate classification of the object, the nature of Crown control, proprietary effect on title, and additional practical constraint on proposed land use.