

Substantive Requirements

What rights does A intend to vest and is there recognition under common law, statute or equity?

- Legal fee simple- a right to exclusive possession of land 'forever', i.e., an uncertain amount of period – close to absolute ownership of land.
- Life estate- a right to exclusive possession for the duration of the grantee's life
- Legal remainder- an interest given to a person that is capable of becoming possessory upon the natural end of a prior estate created by the same instrument (so is a future interest), like where the owner grants a legal life estate to A with the remainder to B.
- Legal contingent remainder- where there is a condition attached to the legal remainder (like graduation with a university qualification), with associated rules against perpetuities
- Lease- a right to exclusive possession for a certain period of time
- Easement- a right accommodating (benefitting) the dominant tenement (land benefitted by an easement) to use or restrain servient land (the land subject to an easement) in a manner that is not inconsistent with the servient owner's continued ownership, where there must be proximity and a benefit connected to the normal use and enjoyment of the land; for example, a right to travel
- Profits à prendre- a right to land in order to take natural resources (including soil, minerals, natural vegetation and wild animals) from the land belonging to another person
- Restrictive covenants- rights to prevent neighbours from using their own land in certain ways
- Pastoral rights- rights to use land for agricultural purposes
- Mineral rights- rights to explore for or remove minerals from another person's land
- Old System mortgage- where a mortgagee (bank) gives a legal mortgage to a mortgagor (homeowner), so that the mortgagee receives legal title and has a right to possession and the mortgagor has an equitable interest, so can demand the return of the land upon the performance of an obligation of repayment, as an 'equity of redemption'
- Torrens mortgage- where the mortgage operates as a 'charge' or encumbrance' so that there is no transfer of legal title and the mortgagee does not receive legal title nor a right to possession (but the mortgagee does have a legal charge through the registered mortgage, i.e., an encumbrance on the mortgagor's right to possession), as provided by s 57(1) of the RPA.
- Trust- a mechanism for the holding and use of property by the trustee for the benefit of the beneficiary, as recognised by equity
- Native title- "the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants", as a common law right from Brennan J in *Mabo* and constituting the basis of the definition in s 223 of the Native Title Act 1993 (Cth).¹

Formal Requirements for Obtaining Legal Interest in Land

Old system land: CA.² – Deed is required: s 23B.

- ✦ Elements of a deed – a mixture of common law and statutory requirements
 - ✓ Must be made in writing on paper (or vellum or parchment).
 - ✓ Must be delivered.
 - ✓ Must be signed, sealed and attested by one witness not a party: s 38(1);
 - ✓ Sealed if signed and attested: s 38(3);
 - ✓ Indenting is not necessary: s 38(2).
- ✦ Exceptions to deed requirement: –No deed is required where
 - ✓ For short-term oral lease or tenancy: s 23B(2)(d)
 - ➔ Short-term lease no more than three years, market payment rent and immediate possession: s 23D(2)
 - ✓ Not apply to Torrens title land: s 23B (3)

Torrens Title land: RPA.³

- Interest passes upon registration: s 41

Formal Requirements for Obtaining Equitable Interest in Land

Order of specific performance

- ✦ The right to specific performance arises only when the right to compensation is regarded in equity as an inadequate substitute for performance of a contract.
- ✦ Equity can help to recognise an interest as proprietary despite the failure of formal requirement by ordering specific performance of a contract because equity regards as done that which ought to be done: *Lysaght*.⁴
- ✦ Element of specifically performance:
 - Substantive requirement must be satisfied.
 - Formal requirement: CA

¹ *Mabo v Queensland (No 2)* (1992).

² Conveyancing Act 1919 (NSW).

³ Real Property Act 1900 (NSW).

⁴ *Lysaght v Edward* (1876).

Formal requirement of specific performance

- ✦ Query whether there is an instrument made in writing? s 23C(1)(a)
 - ➡ Instrument must in writing and signed by the transferor or the lawfully authorised agent in writing, by will or by operation of law.
 - * This section allows creation of an equitable interest in Old System land by a written and signed instrument (not in the form of deed) **even without consideration.**
 - This is because the two fold test in *Corin* may be satisfied in an Old System land.
 - * However, this section does not allow the creation of an equitable interest in Torrens title land by an unregistered written and signed instrument.
 - This is because if the instrument is unregistered, the first limb of the test in *Corin* is not satisfied.
- ✦ If not, then look at whether there is a writing contract – must in writing and signed s 54A(1)
 - ➡ Agreement, memorandum or note in writing and signed by the party or authorised agent.
- ✦ If the writing requirement is not satisfied, query whether there is any exceptions, i.e., no writing requirements
 - Part performance: 54A(2)
 - ➡ Required that the acts relied upon as part performance be **unequivocally referable to such agreement:** *Cooney*.⁵
 - ➡ (e.g., rent + repair the fence=>combined will be enough, but one alone will not)
- ✦ If there is part performance, then there is a **specifically enforceable contract.**
- ✦ Other possible exceptions:
 - s 23D(2) short-term lease
 - Constructive trust: s 23C(2)
 - Equity will not allow a statute to be an instrument of fraud: *Ciaglia*.⁶

Injunction

- An order issued by a court of equity to stop someone from interfering with the rights of another.

Trust

- A trust exists when a person has some right and is required by equity to use it for the benefit of another person or for a particular purpose.

Equity interest Problem Question

- ✦ Contract to transfer fee simple: *Lysaght* – person died before the property transferred.
 - It is unlikely the purchaser can obtain relief under common law because....
 - So equity will decree specific performance of the contract because equity regards as done that which ought to be done: *Lysaght*.
 - **Purchaser's equitable interest arises at the moment the contract becomes enforceable.**
 - Formality requirement.
 - Before the money is fully paid, the beneficial ownership passes to the purchaser and the vendor has a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money and right to retain possession of the estate until the purchase-money is paid.
 - At the moment the money is fully paid, a constructive trust arises – vendor hold the assets as trustee for the purchaser.
 - Risk of damage to the property passes to the purchaser at the moment when he has the beneficial ownership.
 - But vendor must take reasonable care of the land as a trustee and must not wilfully damage the estate.
 - In addition, it matters not either party dies because property rights survive the death of either party.
- ✦ Contract to grant lease: *Walsh* – Landlord request payment of lease in advance as prescribed in the contract.⁷
 - It is unlikely the purchaser can obtain relief under common law because....
 - So equity will decree specific performance of the contract because equity regards as done that which ought to be done: *Lysaght*.
 - Tenant's equitable interest arises at the moment the contract becomes enforceable.
 - Formality requirement.
 - Under equity, the tenant has the same rights and obligation as if the lease had been legally created by a deed.
- ✦ Part performance: *Cooney* – Lots of preparatory acts constituted part performance. Agent not authorised in writing.
 - It is unlikely the purchaser can obtain relief under common law because....
 - So equity will decree specific performance of the contract because equity regards as done that which ought to be done: *Lysaght*.
 - It is not enough that an act done should be a condition of, or good consideration, or preparatory action for a contract: *Cooney*.
 - Therefore, payment alone is not a sufficient act that amounts to part performance, but it may be taken into account in combination with other facts: *Cooney*.
 - Therefore, the act thatmay be regarded as a part performance of the contract because it relates to **possession, use or tenure** of the land, which amounts to a part execution as to change the parties' relative position as to the land. – or say it affects the possession or right to possession of the land, affects the use of the land....etc: *Cooney*.
 - A deposit of title-deed by way of security affects the title to the land, alters the position of the parties as to the land itself: *Theodore*.⁸
 - The laying out money in improvement on the land changes the position of the parties in relation to the use of land.

⁵ *Cooney v Burns* (1922).

⁶ *Ciaglia v Ciaglia* (2010).

⁷ *Walsh v Lonsdale* (1882).

⁸ *Theodore v Mistford Pty Ltd* (2005).

Property Rights v Personal Rights

- ❖ Property rights
 - Property rights are Rights concerning particular things and treated as a bundle of rights: [Yanner](#), including:⁹
 - the right to use and enjoy;
 - the right to exclude;
 - the right to alienate and transfer.
 - Therefore, it can be enforced against a wide range of persons in the absence of a contract.
 - Under some circumstances, property rights is not exclusive, for example: native title rights: [Yanner](#).
- ✦ Personal rights
 - Unlike property rights, personal rights are enforced against particular persons.

Property Rights v Contractual Rights

- ✦ Property rights
 - Property rights can be enforced against person in general.
 - Content of property rights a limited by rights recognised by the common law.
 - Property rights always relate to and depend on the existence of some particular things.
- ✦ Contractual rights
 - Contractual rights can only be enforced against specific person who is a party to the contract, limited by the doctrine of privity.
 - Content of a contractual right is governed by the terms of the agreement.
 - Contractual rights always relate to and depend on the existence of a contract.

- There is a contract between A and B which creates nothing but a personal obligation.
- No proprietary interest has been created because none of the characteristics of the recognised category of proprietary interests is satisfied.
- Not a lease because there is no right of exclusive possession.
- Not a profit a prendre, because there is no taking of natural resources, its just racing club, unlike hunting or fishing club....
- Not an easement, no no benefit seems available to the land, no dominant tenement.
- It is only a licence given for good and valuable consideration: [King v David](#).¹⁰
- Accordingly, B obtain no interest in the estate but can only sue A for breach of the contract .
- And with respect to C, since he is not a party to the contract, he is not bound by the contract and therefore he can exercise his exclusive possession over the land to refuse B's access.

Incorporeal Hereditaments

- ✦ Profits a prendre
 - Profit a prendre refers to rights to take things, such as sand, timber from another person's land.
 - It can be an exclusive right or a shared right.
 - Any one who wrongly interferes with the profit holder's right is guilty of nuisance for interfering with a right to land.
 - However, it is restricted to the taking of the **natural produce of the land**, including soil and minerals, natural vegetation, and wild animals.
 - Therefore, it **cannot be granted with respect to the fruits of industry**, such as farm crops, garden vegetables, or domestic animals.
 - Nevertheless, it is possible to have a profit prendre to harvest trees that were planted by human, as provided by s 88AB of the [CA](#)
 - In addition, a right to take minerals can be a profit prendre: [EQL v COH](#).¹¹
- ✦ Easement
 - Easement refers to rights to use a neighbour's land without possessing it.
 - Easement in gross is usually unavailable except for those rights conferred by s 88A of the [CA](#)
 - There is no requirement that the dominant tenement must be adjacent to the servient tenement, just nearby is sufficient.
 - However, in order to be qualified as an easement, there **must be some benefit** to the dominant tenement.
 - And more importantly, the **benefit must be connected to the normal use and enjoyment of that land**
 - rather than the benefit that is unconnected to the land, – for example, winning profit is insufficient.

Corporeal Hereditaments

- ✦ Fee simple (Freehold estate)
 - Fee simple refers to a right to exclusive possession of land 'forever'.
 - A fee simple creates an estate so long as the tenant and any of her or his heirs survived.
 - While the tenant lives, the estate can be dealt with as he or she pleased.
 - In addition, a fee simple estate will not come to an end when the tenant died without heirs, so long as it passed to a beneficiary of the tenant's will – by virtue of [State of Wills 1540](#) and [Tenures Abolition Act 1660](#).

⁹ Yanner v Eaton (1999).

¹⁰ King v David Allen and Sons, Billposting Ltd [1916].

¹¹ Emerald Quarry Industries v Commissioner of Highways (1976).