

## [1] THE CONCEPT AND FUNCTION OF PROPERTY

When dealing with property rights, there are three basic questions to ask:

1. What sort of right is it?
2. How was it created?
3. What priority does it have?

### **Important things:**

<u>Creation of proprietary interests</u>	<u>Distinguish</u>	<u>Concept of possession</u>
<p>[1] <i>Essential/substantive requirements</i></p> <ul style="list-style-type: none"><li>• What bundle of rights does grantor seek to invest in grantee?</li><li>• Is this something recognised by law?</li><li>• Based on grantor's intention</li></ul> <p>[2] <i>Formal requirements</i></p> <ul style="list-style-type: none"><li>• Does the law require intention to be manifested in particular way?<ul style="list-style-type: none"><li>○ In document (e.g. deed)?</li><li>○ Granted orally?</li><li>○ Are specific words needed?</li></ul></li></ul>	<ol style="list-style-type: none"><li>1. Legal interests</li><li>2. Equitable interests</li></ol>	<ul style="list-style-type: none"><li>• Physical control</li><li>• Intention to control</li></ul>

## INTRODUCTION TO GENERAL PROPERTY CONCEPTS

### **Property:**

- Right with respect to the real/imaginary thing
- One's ownership of the 'thing' is the property (house is the 'subject matter')
- Legal relationship that exists between a person and a resource
- Legal relationship/**bundle of rights with respect to object** (not object itself)

*Because property is a right (and not a thing), it is a **relationship between people***

- Ability to compel the action/reaction of others
- If person has a right, others may have a duty to comply with the person's right
- Owner has a negative right to stop others from interfering with their enjoyment of the property

**Difference between contractual and proprietary rights (*King v David Allen*):**

	<i>Contractual rights</i>	<i>Property rights</i>
<b><i>Sphere of enforceability</i></b> (who can enforce right/against whom can right be enforced?)	<i>Narrow</i> <ul style="list-style-type: none"> <li>Parties of the k against other party (privity doctrine)</li> <li>Promisee/promisor</li> </ul>	<i>Broader</i> <ul style="list-style-type: none"> <li>Rights enforceable against entire world</li> <li>No doctrine of privity as it relates to property generally (rights 'in rem')</li> </ul>
<b><i>Potential content of the right</i></b>	<i>Infinite number of possible contractual rights</i> <ul style="list-style-type: none"> <li>Governed by the terms of the k</li> <li>Parties can k about anything they wish</li> </ul>	<i>Closed number</i> <ul style="list-style-type: none"> <li>Limited no. of proprietary rights which exist in CL (<i>numerus clausus</i>)</li> <li>Come in a particular form (as enforceable against all thus unfair to expect people to comply with novel forms of proprietary rights)</li> </ul>

**But → principles of equity can bridge divide btw contractual, proprietary rights:**

<ul style="list-style-type: none"> <li>Equity regards as done that which ought to be done (maxim)</li> <li>Equity undermines divide by transmuted purely k rights into property rights</li> <li>If k is <b>one for which equity would grant specific performance, equity regards k</b> (e.g. k to grant an interest in property) <b>as having been performed</b></li> <li><i>Lysaght v Edwards; Walsh v Lonsdale</i></li> </ul>
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**Essential characteristic of property right/rights usually associated with property:**

<i>A property right always</i>	<ul style="list-style-type: none"> <li>Relates to, and depends upon the existence of, some particular thing</li> </ul>
<i>A property right is enforceable not just against specific persons,</i>	<ul style="list-style-type: none"> <li>But, also against wide range of persons</li> </ul>
<i>Right to</i>	<ul style="list-style-type: none"> <li>Use and enjoy</li> <li>Exclude others</li> <li>Alienate/transfer</li> </ul>

<i>Enforceability</i>	The obligation which corresponds to a property right is owed by other members of society; each have a duty not to interfere
<i>Existence of some thing</i>	Property rights relate to things that separate and apart from ourselves
<i>Alienability</i>	Property rights can be sold or given away to others
<i>Excludability</i>	The holder of a property right is able to exclude others from making use of the thing subject to that right
<i>Value</i>	Most, but not all, property rights have value (but not essential trait)

*Economic justification for property:*

- Efficient allocation of resources (measured by WTP) and so maximise total wealth of society
- Right to use, exclude provide incentive to put resources to most productive use
- Right to alienate allows resources to move to more highly valued uses through mutually beneficial exchange

*However, property rights can vary from context to context, depending upon the ends we want property to serve*

**Definitions of property:**

<b>Property</b>	Rights which people have to things (rather than ‘things’ themselves)
<b>Property right</b>	A right to a ‘thing’ which can be enforced generally against other members of society (and not just against specific persons)
<b>Assignable rights</b>	<i>Property means any right that can be transferred from one to another</i> <ul style="list-style-type: none"> <li>• The distinction between personal rights and property rights is based on their enforceability</li> </ul>
<b>Rights in rem</b>	Depends upon continued existence of the ‘thing’ to which right relates
<b>Legal fee simple</b>	<i>An interest in a freehold estate which is potentially of infinite duration</i> <ul style="list-style-type: none"> <li>• Only comes to end if current holder dies w/o will/next of kin</li> <li>• Gives exclusive possession, doctrine of tenure, right to transfer/alienate <i>inter vivos</i> (s 36 Imperial Acts Application Act)</li> </ul>
<b>Legal life estate</b>	<i>Freehold estate and exclusive possession for duration of uncertain period, being the duration of the measuring life (usually life of grantee/duration of 3<sup>rd</sup> party’s life)</i> <ul style="list-style-type: none"> <li>• Can be alienated <i>inter vivos</i> (but still only for duration of original grantee’s life)</li> <li>• Can be passed in will if it is a <i>pur autre vie</i></li> <li>• <i>Historically</i>: fee tail, automatic descent to heirs of dedicated class</li> </ul>
<b>Legal remainder</b>	Right now to enjoy land in the future; vested interest
<b>Legal contingent remainder</b>	<i>Contingent upon a certain event happening (death of another does not count as that will happen anyway) that stands in the way of the right</i> <ul style="list-style-type: none"> <li>• e.g. ‘to A for life, then to B when B graduates from USYD law’</li> <li>• Passes within 80 years if event contingent does not happen</li> <li>• If contingency never occurs, it goes back to the person who granted the interest</li> <li>• e.g. A dies without B graduating within 80 year period, goes back to original owner</li> </ul>

<b><i>Seisin</i></b>	<ul style="list-style-type: none"> <li>• Possession of land pursuant to a freehold interest; overtime action in ejectment – easier than real actions</li> <li>• If have fee simple and lease land to X, still have seisin</li> </ul>
<b><i>'Old system' mortgage</i></b>	<ul style="list-style-type: none"> <li>• Mortgagor grants legal fee simple in writing by deed to mortgagee (<i>s 23B</i>); mortgagor retains contractual right</li> <li>• Mortgagor retains equitable interest</li> </ul>
<b><i>'Torrens' mortgage</i></b>	<ul style="list-style-type: none"> <li>• System of land ownership from 1860s, whereby legal title is recognised through its registration</li> <li>• <i>s 52(1) RPA</i> – torrens mortgage only takes effect by security</li> </ul>
<b><i>Easement</i></b>	<p><i>Two parcels of land – dominant land which has benefit of easement, and the servient land which is burdened by the easement. Do not need to be adjacent, but need to be in reasonable proximity. Easement must benefit dominant land (not just owner)</i></p> <ul style="list-style-type: none"> <li>• <i>Two types:</i> positive and negative. Law more prepared for positive easements to exist in novel situations. Reticent to extend negative (only four types)</li> <li>• <i>Positive:</i> dominant owner can do certain activities on servient land (e.g. land-locked, have right of way to road through servient land). Cannot enjoy dominant land without</li> </ul>
<b><i>Profit a prendre</i></b>	<p><i>Allows person to enter servient land and remove anything naturally occurring/growing on land (e.g. berries, land etc.)</i></p> <ul style="list-style-type: none"> <li>• Anything the profit of human industry cannot be a profit because taking something other than occurring naturally</li> </ul>

## Variable meaning of ‘property’:

### *Yanner v Eaton*

Facts	<ul style="list-style-type: none"> <li>• Y (Aboriginal man), used a traditional harpoon to hunt crocodiles</li> <li>• Crocodiles killed, Y shared meat with other members of his clan</li> <li>• Y charged with taking croc w/o licence contrary <i>Fauna Act</i> (Qld)</li> <li>• Under <i>Native Title Act 1993</i> (Cth), Y would not have been guilty of the offence, if he were exercising native title rights (gives indigenous people exercising rights the right to game even take without license otherwise required by state law)</li> <li>• E (police officer who laid the charge and Cth and various states intervening in the action), argued that any native title rights Y would otherwise have had been extinguished by <i>s 7(1) Fauna Act</i>, which provided that ‘all fauna is property of Crown (right of Qld)’</li> </ul>
Issue	Does this amount to property rights?
Decision	<p><i>If the Crown’s property meant absolute ownership, then any native title rights would have been extinguished</i></p> <ul style="list-style-type: none"> <li>• But, by majority, HCA held this was not the effect of <i>s 7(1)</i></li> <li>• Crown given property rights, but rights did not amount to absolute ownership (‘property’ in <i>Fauna Act</i> ≠ absolute ownership)</li> <li>• <i>Fauna Act</i> only granted Crown limited regulatory powers</li> <li>• Rather, the property of the Crown was such that they could co-exist with Y’s native title rights</li> </ul>
Gleeson CJ, Gaudron, Kirby, Hayne JJ	<p><i>The ‘property’ which Fauna Act and its predecessors vested in the Crown was therefore no more than the aggregate of the various rights of control by the Executive that the legislation created</i></p> <ul style="list-style-type: none"> <li>• So far as now relevant, those were rights to limit what fauna might be taken, how it might be taken, rights to possession of fauna that had been reduced to possession, rights to receive royalty for taken fauna (all coupled with/supported by, prohibition against taking/keeping fauna, except in accordance with <i>Act</i>)</li> <li>• Those rights are less than the rights of absolute, ownership</li> <li>• Taken as a whole, the effect of <i>Fauna Act</i> was to establish a regime forbidding the taking/keeping of fauna except pursuant to licence granted by/under <i>the Act</i></li> </ul>
Gummow J	‘Property’ is used in the sense in <i>s 7(1)</i> as an aggregate of legal relations between the Crown and fauna

*Yanner v Eaton*

Principle  (Gleeson CJ, Gaudron, Kirby, Hayne JJ)	<p><b><u>Property</u></b> usually involves the right to use, enjoy, exclude, alienate etc.</p> <ul style="list-style-type: none"> <li>• But, <b>sometimes</b> law gives a <b>more expansive meaning</b> to property</li> </ul> <p><i>'Property' is often used to refer to something that belongs to another</i></p> <ul style="list-style-type: none"> <li>• But, in <i>Fauna Act</i>, as elsewhere in law, 'property' does not refer to a thing; it is a <b>description</b> of a <b>legal relationship with a thing</b></li> <li>• It refers to a degree of power that is recognised in law as power permissibly exercised over the thing</li> <li>• The concept of 'property' may be elusive</li> <li>• 'Property' does <b>not</b> have a <b>single, fixed meaning</b> (it is flexible)</li> <li>• Usually, it is treated as a <b>bundle of rights</b></li> </ul> <p><i>'Property' is a term that can be, and is, applied to many different kinds of relationships with a subject matter</i></p> <ul style="list-style-type: none"> <li>• Not monolithic notion of standard content and invariable intensity</li> <li>• Property rights differ from contexts to contexts</li> </ul> <p><u><i>'Property' → comprehensive term so it can be used to describe all/any of very many different kinds of relationship between person, subject matter</i></u></p> <ul style="list-style-type: none"> <li>• To say that person A has property in item B invites the question what is the interest that A has in B?</li> <li>• <i>The statement that A has property in B will usually provoke further questions of classification</i> <ul style="list-style-type: none"> <li>○ Is the interest real/personal?</li> <li>○ Is the item tangible/intangible?</li> <li>○ Is the interest legal/equitable?</li> </ul> </li> </ul>
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***Statute vs. common law property rights:***

*King v David Allen*

Facts	<ul style="list-style-type: none"> <li>• K owned land on which a theatre was to be erected</li> <li>• K agreed with D that D would have the <i>sole</i> right to affix posters on the walls of the proposed theatre for 4 years for a yearly sum</li> <li>• Subsequently, K leased the land to a 3<sup>rd</sup> party (L)</li> <li>• Under the lease, L was obliged to erect a theatre, which it did</li> <li>• L did not refer to the agreement between K and D</li> <li>• After theatre erected, D attempted to post bills on theatre wall, as contemplated by its agreement with K, but L refused to allow this</li> <li>• D sued K for breach of k</li> <li>• K argued that k with D created an interest in land that was enforceable against L and thus K was not in breach of k (failed)</li> </ul>
Issue	<ul style="list-style-type: none"> <li>• Is a proprietary right really what he contracted for?</li> <li>• Intention that these rights be enforceable against 3<sup>rd</sup> parties?</li> </ul>

*King v David Allen*

Decision	<p><u>The agreement between K and D created a licence (rights in k only – enforceable against K but not against 3<sup>rd</sup> parties); it did not create an interest in the land (Lord Buckmaster; Earl Loreburn)</u></p> <ul style="list-style-type: none"><li>• There is a k between K and D which creates nothing but a <b>personal obligation</b>. It is a licence given for good and valuable consideration and to endure for a certain time. But, I fail to see that there is any authority for saying that the document creates rights other than I have described. It is unreasonable to attempt to construct the relationship of landlord and tenant/grantor and grantee of an easement out of such a transaction (<i>Lord Buckmaster</i>)</li><li>• Agreement contained an implied term that K would not disable himself from carrying out his contractual obligation. K breached that condition and was liable in damages to D (<i>Earl Loreburn</i>)</li></ul> <p><u>Not a lease (lease gives right to exclusive possession for a period)</u></p> <ul style="list-style-type: none"><li>• <i>D had rights in relation to the land which lasted for a period of time, but, the rights were not exclusive</i><ul style="list-style-type: none"><li>○ D did not have the ability to prevent the use of wall of theatre in any other way (only entitled to post ads on wall)</li><li>○ D did not have the right to exclude leasee (L) of the land from enjoying the theatre</li></ul></li></ul> <p><u>Not an easement</u></p> <ul style="list-style-type: none"><li>• Although D has the right to go onto the land of the theatre and do something, the benefit of that obligation is personal to D,</li><li>• It does not benefit any other land owned by D (cannot have an easement unless there is a dominant tenant)</li></ul> <p><u>HoL construed agreement as containing a personal obligation that K would not do anything to prevent D from exercising/enjoying its rights,</u></p> <ul style="list-style-type: none"><li>• K, by selling the land, had prejudiced the rights of D,</li><li>• Thus, D could sue K in k</li><li>• <i>But, D could not sue L</i><ul style="list-style-type: none"><li>○ Because, D was not a party to that k/3<sup>rd</sup> party and,</li><li>○ D had no proprietary interest in the land</li><li>○ Contractual right thus could only seek contractual remedies</li></ul></li></ul>
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*King v David Allen*

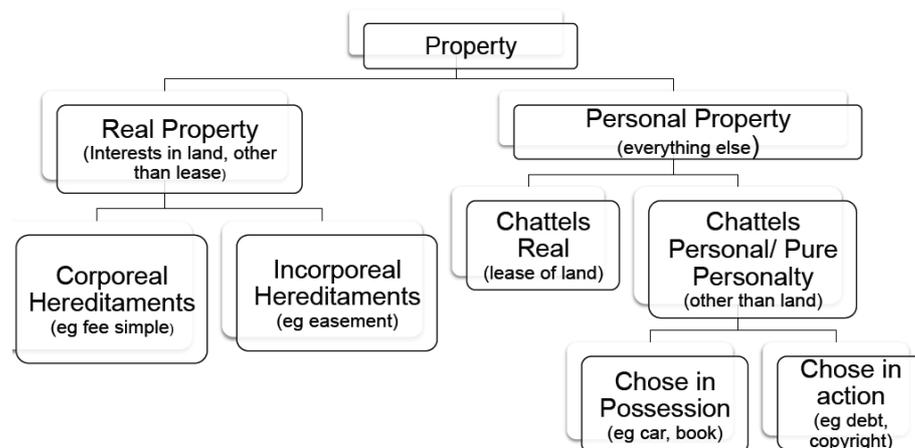
Principle	<p><u>License → confers <b>personal rights and not proprietary rights</b></u></p> <ul style="list-style-type: none"> <li>• Because, license delivers insufficient control over the land</li> <li>• License = k for A to use B's land w/o committing trespass</li> <li>• <b>Personal rights</b> → enforceable against <b>specific persons</b></li> <li>• <b>Proprietary rights</b> → enforceable against <b>3<sup>rd</sup> parties/the world</b> <ul style="list-style-type: none"> <li>○ But, an interest is not proprietary simply because it is enforceable against 3<sup>rd</sup> parties</li> </ul> </li> </ul> <p><u>No proprietary rights are created if the rights granted do not correspond to any <b>proprietary rights recognised by CL</b></u></p> <ul style="list-style-type: none"> <li>• Statute can create whatever forms of property it likes</li> <li>• But, only <b>limited no.</b> of <b>property rights</b> can be created under <b>CL</b></li> </ul>
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**Requirements for creation/transfer of a (particular) proprietary right:**

<p>[1] <b>Essential/ substantive requirements</b></p> <p>(must have)</p>	<p><i>What package of rights has the grantor/transferor intended to create in the grantee/transferee?</i></p> <ul style="list-style-type: none"> <li>• e.g. K intended to create in D the right to post advertising material on the wall, but, this did not correspond with a property right known to CL (<i>King v David Allen</i>)</li> </ul> <p><u>Right must fall within below a proprietary interest → intention to grant a</u></p> <ul style="list-style-type: none"> <li>• <i>Fee simple</i> <ul style="list-style-type: none"> <li>○ Exclusive possession 'forever'</li> </ul> </li> <li>• <i>Life estate</i> <ul style="list-style-type: none"> <li>○ Exclusive possession for the duration of measuring life</li> </ul> </li> <li>• <i>Lease</i> <ul style="list-style-type: none"> <li>○ Exclusive possession for a certain term</li> </ul> </li> <li>• <i>Easement</i> <ul style="list-style-type: none"> <li>○ Right, accommodating <i>dominant land</i> to use/restrain use of, servient land in a manner not inconsistent with servient owner's continuing ownership (e.g. no easement in <i>King v David Allen</i>)</li> </ul> </li> <li>• <i>Profit a pendre</i> <ul style="list-style-type: none"> <li>○ Right to enter servient land, remove soil/natural produce</li> </ul> </li> <li>• <i>Chattle ownership</i> <ul style="list-style-type: none"> <li>○ Exclusive possession 'forever'</li> </ul> </li> <li>• <i>Bailment of chattel</i> <ul style="list-style-type: none"> <li>○ Deliver exclusive possession with obligation to redeliver</li> </ul> </li> </ul>
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<p>[2] <b>Formal requirements</b></p>	<p><i>How must that intention be manifested?</i></p> <ul style="list-style-type: none"> <li>• Must a document be used?</li> <li>• If so, what type of document must be used?</li> <li>• Is a particular form of words required?</li> </ul>
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## Taxonomy of property interests:



### *Interests in land:*

- Corporeal hereditaments (tangible real property)
- Incorporeal hereditaments (intangible real property)
- Chattels Real

### *Historically, the distinction was grounded in the remedy obtained:*

- *Real property* → real remedy (get the thing back)
- *Personal property* → personal remedy (sue for damages)
- Later, the law began to allow real remedy for lease of land

### *Owner of the property died:*

- *Real property* → descended to the heir (eldest son)
- *Personal property* → descended to the next of kin (spouse then kids equally)

## **TENURES, ESTATES AND NATIVE TITLE:**

### **Doctrine of tenure:**

*Mabo v Qld (No 2) (Brennan J)*

*Doctrine of tenure forms part of Australian land law*

- As in the UK, the **land** is **ultimately** owned by the **Crown**, with people holding their interests in the land directly/indirectly from the Crown
- **Person owns their house as a tenant of the Crown**

*UK land law is based on the doctrine of tenure*

- In English legal theory, every parcel of land in England is held either mediately/immediately of the King who is the Lord Paramount; the term 'tenure' is used to signify the relationship between tenant and lord, not the relationship between tenant and land
- It is arguable that universality of tenure is a rule depending upon English history and the rule is not reasonably applicable to the Australian colonies
- The origin of the rule is to be found in a traditional belief that, at some time after the Norman Conquest, the King either owned beneficially and granted, or otherwise became the Paramount Lord of, all the Land in the Kingdom
- It is not surprising that the fiction that land granted by the Crown had been beneficially owned by the Crown was translated to the colonies and that Crown grants should be seen as the foundation of the doctrine of tenure which is an essential principle of our land law
- It is far too late to contemplate an allodial/other system of land ownership
- Land in Australia which has been granted by the Crown is held on a tenure of some kind and the title acquired under accepted land law cannot be disturbed

### **Doctrine of Estates:**

*Mabo v Qld (No 2) (Deane and Gaudron JJ)*

- The **owner of land owns an estate in the land**
- A subject could hold land only as a tenant, directly/indirectly, of the Crown
- The 'estate' which a subject held in land as tenant was itself property which was the subject of 'ownership' both in law and equity
- The primary estate of a subject, the estate in fee simple, became, for almost all practical purposes, equivalent to full ownership of the land itself
- Nonetheless the underlying thesis of UK law of real property remained that the radical title to (or ultimate ownership of) all land was in the Crown and that the maximum interest which a subject could have in land was ownership not of the land itself but of an estate in fee in it
- The legal ownership of an estate in land was in the person/persons in whom the legal title was vested
- Under the rules of equity, the legal estate could be held upon trust for some other person/persons or for some purpose

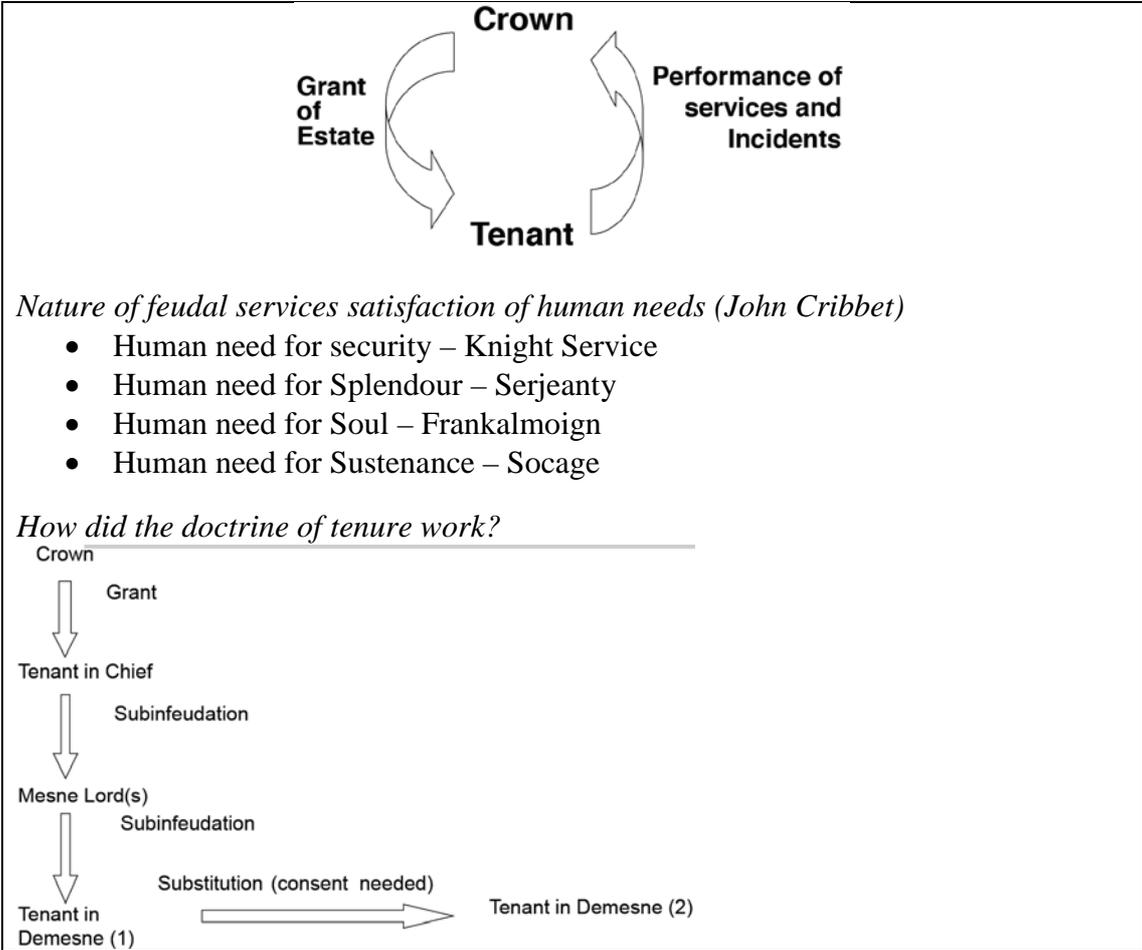
*WA v Ward (North J)*

- Whereas the doctrine of tenure recognised that a no. of persons could have a proprietary interest in one piece of land at same time, by relying on duration,
- The doctrine of estates allowed for the creation of **successive interests, present and future**, in the **same piece of land**
- In essence, the doctrine of estates reflected the idea that a **person** should be able to have an **interest in land** giving rise to a **present right to possession**, while at the same time **other persons** would also have **interests in the land** giving them **future rights to possession**
- A number of persons can have a proprietary interest in the land at same time

**Types of estates in land (grant exclusive possession in land for uncertain period):**

- Fee simple
  - Fee tail (extinct in NSW: *ss 19, 19A Conveyancing Act 1919*)
  - Life estate
- Contrast these with other interests*
- Lease (defined period of time),
  - Easement (rights less than possession),
  - Profit a prendre (right to go onto another's land to remove natural produce)

**Doctrine of tenure:**



## **DECLINE OF TENURE:**

### **Feudal property (Macpherson):**

- Conditional on performance of social obligation
- Limited rights (due to concurrent interests in the same land)
- Not freely alienable
- Link between property and vision of a proper social ordering;
- Entrench power in particular families

### ***Statute of Quia Emptores 1290***

- *Allowed transfer without consent (except tenants in chief)*
  - Previously, the consent of the Lord was necessary
- Prohibited further subinfeudation (feudal chains would shrink)

### ***s 36 Imperial Acts Application Act 1969 (NSW)***

*Give tenants the right to transfer their interests without the consent of the Crown*

- Land held of the Crown in fee simple may be assured in fee simple w/o licence and w/o fine and the person taking under the assurance shall hold the land of the Crown in the same manner as the land was held before the assurance took effect

### ***Tenures Abolition Act 1660***

- Abolition of most feudal incidents
- Conversion of knight service to socage tenure
- Removing tenants obligation to Crown in consideration for the grant of land
- *Later: quit rents*

### ***s 37 Imperial Acts Application Act 1969 (NSW)***

*All tenures created by the Crown by way of the alienation of an estate in fee simple in land after the commencement of this Act shall be taken to be in free and common socage without any incident of tenure for the benefit of the Crown*

- Removing the benefits the Crown receives from being the Lord, making the interests of the tenant more and more unconditional

### ***Abolition of Crown's right of escheat***

- Historically, could not leave property by will, automatically went to your heir

*Formerly s 61B(7) Probate and Administration Act 1898 (NSW),*

*In default of any person taking an interest under (2)-(6), the estate shall belong to the Crown as *bona vacantia*, and in place of any right to escheat*

### ***s 136 Succession Act 2006 (NSW)***

*If an intestate dies leaving no person who is entitled to the intestate estate, the State is entitled to the whole of the intestate estate*

- Escheat does not exist, it is all returned to the Crown