Topic1: Native title—under NTA

Existence of Native title

Under NTA, claims for recognition of native title rights should be assessed under *s223(1) NTA*, rather than the definition in *Mabo (No.2)*. This view was supported in *Ward's* case, *Yorta Yorta's* case.

S223(1): a) The rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by Aboriginal peoples or Torres Strait Islanders; *b)* The Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and*c)* The rights and interests are recognized by the common law of Australia.

Element 1-s223(1)(a)

1. What are native title rights?

Rights to hunting, fishing, pilgrimage, traveling, gathering, rituals, taking bath in the lake, extract and use minerals;

2. When these rights start? To claim native title, it must be a right from the time of assertion of sovereignty over the claim areas to the times of the present generations. –must exist at the time of sovereignty.

3. What's proof for the existence of the rights? Physical + spiritual

Evidence from anthropologists, archaeologist, linguist. Maybe oral evidence of many witnesses—credible and compelling? Volume of documentary materials; record of event; written materials that recorded observations of aboriginal society after the first European settlers came to the area the subject of the claim; records were descended from those who had occupied the area at the time sovereignty was first asserted; the oral testimony of the witness from the claimant group. Some petitions or action brought in the past about the relevant rights; old stories.

Evidence from the person who has current interests in the land—assess objectively, may advantage and may disadvantage to the group.

Ward: standing alone, the fact of occupation is an insufficient basis for concluding that there was communal title over claimed areas.

4. Content observed or followed as the same as before?

Mabo- Brennan J – May be lost on physical separation from the land or non observance of laws and customs

Yorta Yorta: The high court rejected the 'frozen in time approach'—permitted no alteration of or development in the Aboriginal traditional law or custom in which the claimed native title was said to be based, and which allowed no interruption to the exercise of those rights and interests at any time after sovereignty was first asserted by the British Crown. The native title right does not have to be exactly same, can be substantial same, particularly when the interruption has occurred in response to external pressures. Test: are laws/customs still traditional? Are adaptations of kind contemplated by traditional law/custom?

Yanner v Eaton: the high court was prepared to recognise that a native title right to hunt saltwater crocodiles could legitimately be exercised as a traditional right even with the aid of modern technology.

WA v Sebastain: the court accepted that a change in the way in which rights and interests in land may descend from one generation to the next did not mean that the law and custom was no longer a traditional law and custom.

5. Continuity of acknowledgment and observance—abandonment?

De Rose v SA (No 2): the court held that where a temporary break forced by natural changes was not deemed to extinguish a connection.

Yorta Yorta: the court confirmed that if the laws and customs practised by a society at the time of sovereignty ceased to exist, then ye rights and interests in land which would be occasioned by those practices, would also cease to exist. Even if a later society adopted those laws and customs, it would not be a continuation of the first society, but rather laws and customs rooted in the new later society, and not in pre-sovereignty traditions and customs. Applied in *Gale v Minister for land &Water Conservation (NSW)*.

Element 2—s223(1)(b)

Ward: connection can be proven without evidence of present use of or physical presence upon the claim area by the claimed group—purely spiritual connection

Element 3-s223(1)(c)—CL would not recognise human sacrifice.

If the Aboriginal people meet the criteria, then they can make an application under *s61* NTA, which requires the relevant evidence to be provided to the NNTT. It is possible a connection to the land and possibility of a spiritual connection would be sufficient by itself. Although a spiritual connection was not sufficient in *Yorta Yorta*, while in *Ward's* case, the court held that purely spiritual can be sufficient. Under *s190A*, the registrar must accept the claim if it meets the requirements for the merits of the claim under *s190B*, and complies with the procedural requirements under *s190C*. the merits of the claim under *s 190B* can be assessed with historical, anthropological and archaeological evidence, and probably evidence from an elder and any other respected of sources of local history.

The registrar must be satisfied that:

1) there is a factual basis to support the claim; 2) a prima facie case has been established; 3) the claim includes a member with a current physical connection to the land, or one who would have such a connection but for exclusion . 4) there is compliance with formalities; 5) native title has not been extinguished.6) notice of claim to interested parties—*s66(3)*.

Extinguishment of native title

In *Wik* . it was held that native title was not necessarily extinguished by a pastoral lease. The high court said whether a lease did extinguish native title was subject to a number of considerations:

1) the language of statute under which the lease was granted.

2) the terms of the lease;

3) the activities of the tenant—since Ward, the more popular view is that the determinant factor is consideration should be given to the substantive rights granted by the lease, and not the rights as utilized and enforced by the tenant.

4) the nature of the native title claimed.

If there is inconsistency between the native title rights claimed and the substantive rights granted by the leases, then native title must yield to the rights granted under the pastoral lease, but only to the extent of any inconsistencies.

NOTE: in this case- at common law a lease gives tenant exclusive possession and this would extinguish native tittle. But a pastoral lease is a creature of statute and did not necessarily involve exclusive possession.

Wilson v Anderson, it was established based on the facts, including the history and intention of the legislation, that the perpetual lease granted was deemed to extinguish native title, as it was seem as comparable to a grant of determinable fee simple.

Yarrmir – NT is not extensive to exclusive commercial rights . (which means no exclusive possession)

Yanner- Vesting property of fauna by govt does not extinguish NT.

Discuss different land/area separately

1. The lease/pastoral was granted under which legislation?
2. When was the lease/pastoral granted?
3. What type of act the lease/pastoral falls with?

Pre-*RDA* acts: pre-1975—no compensation.

Past act: from 1975-1993/1994(*NTA*). –1992 *Mabo*.

Intermediate period: *NTA*(1994)—*Wik*(1996)

Future act: 1994-now.—1998 *Native title Amendment Act*

4. Which category of Act it falls within?—any statements provided to show the intention, if no, look the term of lease, then look at the activities of the tenants.
5. Whether two rights can co-exist?—exclusive? Intensive? The purposes of the use of the land.

If that lease /pastoral does not breach *RDA*, it will not be a past act and even cannot co-exist, it will prevail.

6. If extinguished, what legal consequence or alternative remedies the claimant group can choose?

N.B. if a lease or pastoral falls with a period of past act, this does not automatically mean it is a past act. If no breach RDA, still valid, continue to exist, cannot be past.

Extinguishment under legislation

1. Past Act: defined in *s228*. Happening between 1/Nov/1975 (*RDA*) and 31/Dec/1993 (*NTA*). Calling it as a past act coz it breaches the *RDA*, so retrospectively operating.

Categories of past acts (front past , back added intermediate)

1) Categories A: *s229-/232B*: a) freehold interest bef 1/1/1994 and in effect on 1/1/1994. b) agricultural, commercial, pastoral, residential crown lease during same period. c) construction or establishment of public works where commenced or established before the period.

2) Categories B: *s230 -/232C*: crown leases not in A and not a mining lease.

3) Categories C: both NEP for past and inter -*s231-/232D*: mining leases.

4) Categories D: both NEP for past and inter -*s232-/232E*: not one of the above categories.

Effect of past acts

1) A—NT is extinguished s237– compensation: *s17(1)*.

S14 : (1) if a past act is an act attributable to the Cth, the act is valid, and is taken always to have been valid. (2) if a past act validated by (1) is the making, amendment, or repeal of legislation, (1) not validate, unless the grant, issue, or creation is itself a past act attribute to the Cth.

s15: if past act attributable to Cth, category A extinguishes NT. If category B, extinguish to the extent of inconsistency; if category C or D, non-extinguishment principle applies to the act.

2) B—NT is extinguished to the extent of the inconsistency—compensation: *s17(1)*.

3) C&D: non-extinguishment principle applies: *s238*.Native title is not extinguished by the act—If the act is wholly inconsistent with native title the native title will have no effect during the tenure and if partially inconsistent native title can only be enjoyed to extent it is not inconsistent with the act—When the act ceases to operate (eg a mining lease tenure concludes) native title rights will again have full effect ie. they are revived—compensation: *s17(2)*

2. **Intermediate Period Acts**: defined in *s232A*. occurring between 1/1/1994 (*NTA*) and Wik's case (23/Dec/1996). Only applies to B&C&D under the categories.

- can apply the non extinguishment principles s 23B(d) If category c and D
- compensation is here *s22D(1)*

If the Act is exclusive in nature, then completely extinguished the NT.

If the Act is non-exclusive in nature under category B, no native title extinguished. Rather, non-extinguishment principle applies and NT rights are merely suspended to the extent of any inconsistency with the lessee's rights.

3. **Future Acts**: defined in *s223*

s24OA – future act is invalid unless provision in Act states otherwise. . *Div. 3 Part 2 NTA*- allows Nt owners to permit a future act under agreement for consideration and subject to conditions with government.

S24AA validates 'future acts' subject to entry into indigenous land use agreements: These agreements provide for : 1. Surrender of native tittle or authorizing a future act which ill affect native tittle. 2.means by which native title and other interest might cooperate ie in case of non exclusive pastorol lease. (all these are in exchange for compensation)

Future acts and mining-If the future act involves granting a right to mine or renewal of some types of leases the parties must negotiate in good faith before the act occurs in accordance with act. – the parties cannot agree the matter is reffered to an arbitral body including NNTT. The minister may require expedited proceure (s32) or overrule arbitral body on basis of national or state interest (minister can make decision la.)

S24Ga, 24GB (eg moving sheep)– if future act done on a nonexclusive agricultural or pastoral lease relates to normal primary production such as cultivation , **maintaining** breeding or agisting animals they are valid even though technically they may be a future act as they are acts that affect native tittle.

S44A-G- If claim made for Nt and that group can show that at 23 /12/1996 they had regular physical access to the whole or part of lease area they can continue that access. If conflict between lease and access rights the lease prevails- parties may enter agreement re this matter.

Compensation: *S17*:

1.extinguishment case: if act attributable to Cth is A or B, NT holders are entitled to compensation: *s17(1)*.

2. the compensation is payable by Cth: *s17(4)*.

Topic 2: Easement& Profit a prendre

The elements of the Easement:

Re Ellenborough Park established four essential features of an easement:

1. There must be a DT and a ST. DT: property which is benefited by the easement. ST is land which is burdened by the easement.

CL position: easement cannot exist unless identifiable ST and DT-*s82(2)* LTA. So easement in gross is invalid.

Statutory Position: *s89*LTA: can register in gross easements for public utilities for limited purposes. 'public utility provider' and 'public utility' easement defined s81A.

Subdivision of the DT:

Presumption: *Gallagher v Rainbow*: The principle is that 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 the 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.

Rebutting presumption: the effect of the subdivision must not take the use outside the use contemplated in the grant ie if it creates such an increased burden on the ST thereby increasing upkeep costs so as to be considered outside the original grant or effects a change of the type of use.

Jelbert v Davis: change of use from rural activity to 200 lot caravan park—issue of increased intensity not pursued by HC as the subdivision had not occurred at the time of the original action.

2. Easement must accommodate the DT.

1) It must be connected with the normal enjoyment of that tenement and is not satisfied simply by a contractual benefit to a person.

The test is whether the right makes the DT a better and more convenient property.

2) can be satisfied even if DT and ST are not contiguous.

3) argued in *Re Ellenborough Park*, right of enjoyment not sufficiently connected to enjoyment of property to satisfy this test as not relevant to residential use of dominant tenement.

4) there was sufficient connection as seen as common garden for benefit of landowners.

Clos Farming Estate v Easton: a vineyard and farm comprising 80 residual lots provided easement to DT lot 86. DT used it for viticulture and crop farming. Held the easement did not accommodate DT as access over ST is only convenient for business carried on DT - that is not sufficient *Hill v Tupper*: used ST to let boats out for hire on a canal. Held that no connection but an independent business enterprise.

Moody v Steggles: easement for affixing of a commercial sign on the wall of a house on ST to advertise a public house on the neighbouring DT did accommodate the DT.

City Developments Pty Ltd v Registrar General of Northern Territory: easement for use of foreshore and lake for private recreation purposes - accomodation requires benefit to land not just the individual and the right is of such a nature as to run with the land.

3. The DT and ST owners must be different persons

CL Position: you cannot contract with yourself. Easement is a contract in land, so you cannot have a valid contract.

Statutory Position: *s14(3)* of PLA: a person can create an easement over land in favour of other land owned by that person.

S86LTA: easement instrument can be registered, even though the DT and ST owners are the same registered owner.

S87LTA: when DT and ST owners are the same owner, the easement is extinguished only if the registered owner asks the registrar to extinguish the easement or the registrar creates a single one.

S88LTA: easement is not extinguished merely coz the owner of DT acquires an interest, or a greater interest, in ST.

4. Rights must be capable of being the subject matter of a grant.

1) types easement can alter + expand with society – *Ward v Kirkland*

2) rights must be suff defined + not too vague – *Re Ellenborough Park* : really broadened the view of applicable subject matter; *Riley v Pentila* wandering at will or for recreation was too vague. *Clos Farming Estate v Easton*.

3) It must not amount to a claim for joint possession or entire user of ST.

Right to store goods on a wharf - acceptable subject matter of an easement - *Attorney General of Southern Nigeria v John Holt and Co (Liverpool) Ltd* and *Wright v Macadam*. **CONTRAST**:

Easement to store goods in a cellar or to park vehicles in an area awaiting repair - not acceptable - *Grigsby v Melville*

Weigall v Toman: Easement for exclusive use of one of two garages. Held if easement deprives the servient tenement of the reasonable use of his land it is invalid. Four factors were relevant to consider:

a) Proportionality between ST as a whole and that part of it over which the exclusive right is given.

Copeland v Greenhalf and *Lond and Blenheim Estates v Ladbroke Retail Park*: it was a matter of degree to determine whether exclusive use of all or a large part of the ST suggested the easement may breach this criteria.

b). The extent of exclusivity claimed: this factor was rejected by *Moncrieff v Jamieson*—the landowner can grant rights of a servitudal character over his land to any extent he wishes.

c). Whether easement arose by prescription or express grant

d). Practicalities eg the need for access to a property; safety & risk to the community; maintenance requirements and other amenities of life.

Creation of easements

1. registration - *s82* LTA ; *s83A* LTA - (proposed easement)
2. express reservation - *s24* RPA(Am Act 1877)
3. Prescription or lost modern grant - now refer *s178, 198A* PLA

198A Prescriptive right of way not acquired by user:

(1) User after the commencement of this Act(1974) of a way over land shall not of itself be sufficient evidence of an easement of way or a right of way having been acquired by prescription or by the fiction of a lost grant. (2) If at any time it is established that an easement of way or right of way over land existed at the commencement of this Act, the existence and continuance of the easement or right shall not be affected by subsection (1). (3) For the purpose of establishing the existence at the commencement of this Act of an easement of way or right of way over land user after such commencement of a way over that land shall be disregarded.

The Right of the Owners of Subdivided DT to easement

In *Gallagher v Rainbow*, the high court confirmed that there is a presumption that normally all of the portions of the Dominant tenement are entitled to use the easement area on the servient tenement. This is because normally the easement is no mere personal right and it is attached to the dominant land for the benefit of that land.

Rebutted by the language of the easement—whether subdivision is contemplated.

Rebutted where the subdivision creates such an increased burden on ST thereby increasing upkeep costs so as to be considered outside the original grant or effects a change of the type of use.

Jelbert v Davis where agricultural land was entitled to access via an easement, but when that land was developed for 200 caravan sites the increased traffic was held to be outside the terms of what was contemplated originally and was therefore not enforceable.

Principles of Construction

Easements may last for a very long time from a time when technology was different requiring a modern interpretation of what was contemplated; if language of easement is clear it will be enforced ie limiting access to pedestrian traffic.

There might be considered to be four categories of evidence in construing registered easements:

1) the court must look to the express terms of the registered easement, the deposited plans and folio identifiers. This is the primary tool for construction of easement and accepted by *Westfield Management Limited v Perpetual Trustee Company Limited*. 2) extrinsic evidence about what the parties contemplated can no longer be acknowledged as being included as part of the easement covenants. This repudiated in *Westfield* 3) evidence about the physical make-up of the dominant and servient tenements at the time the easement was created, and the nature and dimensions of the easement area, is probably admissible evidence, but this is not specifically stated. Not clear *in Westfield*. 4) the circumstances surrounding the execution of the instrument and the nature of the surface over which the easement is granted for bare easements only but this is obiter in *Westfield*.

St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No2): question was whether a right of way easement included a right to drive vehicles - court preferred a narrow view based on narrowness of easement area. Therefore use by vehicles in that case was not intended.

Elliot v Renner: court considered right of way to pastry cook business included the ability to stop allowing loading and unloading of goods otherwise not much purpose in easement.

SS and M Ceramics v Yeung Yau Kin - access to rear of grocery store - easement registered 40 years ago when there was room at rear of shop for trucks to load and unload on DT- an extension meant this was not possible and part of ST was used for loading and unloading - did right to pass and repass include right to load and unload? Held - cases indicating a right to load and unload dealt with situations where at time of easement being created there was no room in DT for parking and implication was to allow easement to work properly.- considered position at time of grant and as parking was available at that time then loading and unloading implication excluded.

Hoy v Allerton: Easement was granted to allow a neighbour to lay mains, pipes etc for the supply of water and other services for accessing bore on ST but easement document used did not properly make provision for drawing of water from bore. Owner of ST sought to stop drawing of water while DT owner wanted to interpret easement to include drawing of water or as an ancillary right or by modification of easement under *s181* PLA. held that the rights conveyed by an easement are greater than that conveyed on the literal terms of the easement then it may be necessary to consider what was in the contemplation of the parties at the time of the grant. But this is subject to the principle that the grantor cannot derogate from their grant nor is the grantee entitled to more than what is granted.The unexpressed views of a grantee or grantor cannot be implied into the terms of the easement. To hold otherwise would undermine the register. She also held the easement did not give a right to draw water from the ST as an ancillary right as that would allow the DT owner to use the bore and pump owned by the ST owner to draw water and this could not be the basis of an ancillary right.

In *Westfield*, the words 'from' 'to' and 'cross' are wide enough to indicate the intention to provide access to land beyond DT.

Modification or extinguishment of easements

1. *S181* PLA - power vested in Supreme court to modify or extinguish easements.

In the Matter of An Application by Rollwell Australia Pty Ltd: access to water easement but not used for 30 years); ST sought to extinguish: (1) potential for future use made argument of obsolete: failed; (2) 30 years of abandoned: failed; (3) unreas impeded use + no benefit to DT – succeeded \ extinguish, but DT compensated.

Hoy v Allerton: *s181* modify means limit/restrain not amend—to grant application would impose a duty to use equipment and sharing of resources that would be onerous on the ST that could deplete the joint assets. - this would have a substantial impact that has present substance and was not theoretical - no modification made.

Weigall v Toman

2. express surrender - *s90* LTA; 3. merger - *s87,88* LTA

4. implied release or abandonment- *Treweeke v 36 Oosley Road*: DT usually used the next land to ST. ST argued abandonment. In fact, the access was not available coz reason of rock face, installing swimming pool; fence across the way. "a fixed intention never at any time thereafter to assert the right or to transmit that right to anyone else. It is one thing to not assert a right to use an easement and another to assert an intention to abandon." An easement once created is perpetual in nature. 5. Variation of an easement - *s91* LTA

Topic 3: Strata Title

Exclusive use of common property:

1. Lot owners are joint owners of common property as tenants in common in shares proportional to their interest schedule lot entitlement. This means that all lot owners are joint owners of the common property and all have access to it.

2. If there is a bylaw providing exclusive use, using bylaw. But if no bylaw specified in CTS, the by-law in *Schedule 4 of BCCMA* will apply. Lot owner should seek exclusive use of the area under *ss170-178* of *BCCMA*. If exclusive use is not in first CMS, it needs owner consent before body corporate resolution without dissent to lodge new CMS. *S54* of *BBCMA*: CSM can be amended by registering a new statement often requiring a resolution without dissent.

3. The decision of the body corporation: The decision of the committee is the decision of BC unless a 'restricted issue': *s100 of BCCMA*. *S42 of Standard regulation module*: restricted issue relates to fixing or changing contributions; change in rights privileges or obligations or requires resolution of BC. For restricted issues, the applicant has to have a general meeting decision.

4. If the applicant wants to get exclusive use, he has to get a resolution without dissent of the BC with the consent of the lot owners, and may require a new CMS to incorporate the new by-law, and the registration of a new plan demarcating the exclusive use area within the common property area: *s172 of BBCMA*.

The Principles in Contribution Schedule lot Entitlement

1. *s46(7)* of BBCMA: contribution lot entitlement must be consistent with either the equality principle or relativity principle.

2. *s46A(1)*: The principle that the lot entitlements must be equal except to the extent to which it is just and equitable in the circumstances for them not to be equal.—equality principle

3. *s46A(2)*:The principle that the lot entitlements must clearly demonstrate the relationship between the lots by reference to 1 or more particular relevant factors. Eg. a commercial community titles scheme in which the owner of 1 lot uses a larger volume of water or conducts a more dangerous or higher risk activity than the owners of the other lots.—may be unfair if equal.—relativity principle.

4. *s49*: criteria for adjustment of lot entitlement schedule based on equality principle or market value principle. Such as how the community is structed, the nature, features and characteristics of the lot, the purpose for use, the market value etc.

5. Remedies: *s47A*: BC may change ctribt schs lot entm by resolution without dissent requiring new CMS.

S 47AA&48, owner can seek an order for adjustment of contribution sch lot entmt from QCAT or special adjudicator if they consider adjustment is not consistent with deciding principle.

The principles in Interest Schedule Lot Entitlement

1. *s46B*: Lot entitlement for interest schedule must reflect the respective market values of the lots except to the extent to which it is just and equitable in the circum for the individual lot entims not to reflect the respective market values of the lots.

2. Remedies: *s48(1)*: other lots owners in CTS can apply an order of a specialist adjudicator for the adjustment of an interest schedule. Alternatively to seek an order of QCAT for adjustment.

S48(5): the order of the specialist adjudicator or QCAT must be consistent with the market value principle.

S49: see above.

Topic 4 Mortgage

1. Does NCC apply?

This legislation commenced on 1 July 2010 and the current mortgage occurred in [time], therefore this mortgages falls within the scope of the limitations of the NCC. According to *s5* of NCC, to apply this Code, the mortgage has to satisfy following requirements:

1) the debtor is a natural person or a strata corporation; and : *s5(1)(a)* 2) the credit is provided or intended to be provided wholly or predominantly for personal, domestic or household purpose OR to purchase, renovate improve residential property for investment purposes or to refinance credit.: *s5(1)(b)*. 3) the credit provider provides the credit in the course of a business or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.

If satisfied with those requirements, then NCC applies.

S5 (4) For the purposes of this section, the predominant purpose for which credit is provided is: (a) the purpose for which more than half of the credit is intended to be used; or (b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.

S7 of NCC: This Code applies to a mortgage if: (a) it secures obligations under a credit contract or a related guarantee; and (b) the mortgagor is a natural person or a strata corporation.

S88(1) of NCC: to enforce a credit contract, credit provider must not begin unless debtor default + creditor give a default notice allowing the debtor a period of at least 30 days from the date of the notice to remedy the default + default has not been remedied within that period.

S88(2) of NCC: to enforce a mortgage, creditor must not begin proceedings to recover default money or take possession of sell, appoint a receiver for or foreclose the property, unless give a default notice of at least 30 days to remedy +default has not been remedied within that period.

S88(3) of NCC: a default notice must contain default + action necessary to remedy + period for remedy + if not been remedied, the date after which enforcement proceedings about default, and if relevant, repossession of mortgaged property may begin +repossession and sale may not extinguish the debtor's liability +…

S88(4) of NCC: default notice may be combined in one document if given to a person who is both a debtor and a mortgagor.

S88(5) of NCC: no need to wait for such a period, if creditor has reasonable grounds that fraud exists.

S88(6) of NCC: if creditor believes on reasonable grounds that a default is not capable of being remedied, then the default notice need only specified the default + creditor may beign proceedings after 30 days from the notice.

Is a legal or equitable mortgagee?

Mortgage constitutes a charge on the land: *s74* LTA. Legal and equitable title retained by mortgagor subject to encumbrance of mortgage. Torren title mortgage constituted by a) personal covenant by mortgagor to repay; b) a charge on the mortgagor's interest in the land.

1) legal: only created under Torren System by registration in prescribed form: *s72,73* LTA. Mortgaging lot by registration: *s72* of LTA; requirements of instrument of mortgage: *s73*. Registration gives mortgage indefeasibility: *s184(1)* LTA.

2) Equitable: no legal estate vested in mortgagee. Arise where a) in prescribed form but unregistered; b) agreement to grant mortgage; c) ineffective attempt to create legal mortgage; d) deposit of title deeds: *s75*.—part performance under *s6(d)* PLA.

2. Implied obligations of the mortgagor:

1) if has agreement, follow the agreement.

2) no agreement, *s78* PLA: a) to pay principal and interest in accordance with the mortgage; b) to keep all buildings and other improvements in good and substantial repair as at date of mortgage; c) to permit the mortgagee to enter and view the state of repair of building and improvements.

3. Implied powers of the mortgagee:

s78 LTA, when the mortgagor default, the mortgagee has power to: a) to enter possession and receive rents and profits and obtain SC order to that effect; b) foreclose on the mortgage; c) to get an order of the SC for sale of mortgaged property: *s83* PLA.—power of sale, insurance, receiver.

4. Mortgagor's right to redeem: once a mortgage always a mortgage.

S82NCC: ensure the mortgagor has the right to pay out the loan at any time.

1) where mortgage given right to extinguish equity of redemption: in the same documents, one provision says that you have right to redeem, but another provision says that the mortgagee has option to purchase the property. –unenforceable. Void: *Samuel v Jarrah Timber &Wood Paving Corp*.

Exception: if the option is granted to the mortgagee in a separate and independent transaction from the mortgage. A matter of substance, not form. N.B. in separate document is a factor but not conclusive. + considering the transaction is in fact a sale rather mortgage?

2) right to redeem unduly postponed: the postpone is so far that considered illusory.