MLL325 Land Law

Topic 1: Introduction to Land Law
- Torrens title land
- General law land
- Characterisation of interests in land
  o Legal and equitable interests
  o Registered and unregistered interests
- Formalities/template for creating LEGAL interests in general law land
- Formalities/template for creating EQUITABLE interests in general law land
  o NOTE: Part performance exception per Madison v Alderson
- Boundaries and encroachments

Topic 4: Priority Rules
- Hierarchy of legal and equitable interests in general law land
- Priority rules in general law land
  o (a) Disputes between competing legal interests
  o (b) Disputes between prior legal interest and subsequent equitable interest
    ▪ NOTE: Fraud principle
  o (c) Disputes between a prior equitable interest and subsequent legal interest
    ▪ NOTE: Bona fide purchaser for value without notice rule
  o (d) Disputes between two equitable interests
    ▪ NOTE: Merit analysis
  o (e) Disputes between prior mere equities and equitable interests
- The effect of registration upon priority
- Disputes between a registered and unregistered interest

Topic 5: The Torrens System
- General law
- DRS
- Differences between the Torrens system and the DRS
- Torrens system
  o Objectives
  o Improvement
  o Characteristics
    ▪ (a) The Register
    ▪ (b) Registrable interests
    ▪ (c) ‘No rights prior to registration’ question
    ▪ (d) Indefeasibility of title
      ▪ Elements of indefeasibility
      ▪ Effect of fraud
    ▪ (e) Paramount interests
- Conversion to the Torrens system
  o Entitled persons to bring land under the Torrens system
- Registrar’s Power to Correct Register
Topic 6: Indefeasibility of Title
- Meaning of ‘indefeasible title’
- Paramountcy provisions
  - Section 40: Effect of registration
  - Section 41: Certificates of title are conclusive evidence of title
  - Section 42: Conferral of indefeasible title upon registration
    - NOTE Section 42(1)(a): Same land under prior folio exception
    - NOTE Section 42(1)(b): Wrong description of land exception
    - NOTE Section 42(2)(a)-(f)...
      - NOTE Section 42(2)(a): Crown grants exception
      - NOTE Section 42(2)(b): Adverse possession exception
      - NOTE Section 42(2)(c): Public rights of way exception
      - NOTE Section 42(2)(e): Leases exception
      - NOTE Section 42(2)(f): Unpaid tax exception
  - Section 43: Abolition of the doctrine of notice
  - Section 44: The effect of fraud
    - Section 44(1)
    - Section 44(2)
    - Combined meaning of section 44(1)-(2)
- Deferred indefeasibility
- Immediate indefeasibility (Australian position)
  - Effect of ‘fraud’ upon indefeasibility
    - Breskvar v Wall TEST
    - Gibbs v Messer EXCEPTION: Fictitious persons
  - Relevant ‘fraud’ legislation: section 44(1)
- Extent of indefeasibility

Topic 7: Statutory Exceptions to Indefeasibility
- (1) Fraud
  - Elements of fraud
    - NOTE: See the ‘case summaries’ at the end of the topic for further discussion of the elements!
  - Fraud provision of the TLA
    - Section 42(1) TLA; Russo v Bendigo Bank: A registered proprietor acquires indefeasibility except in the case of actual fraud
    - Meaning of ‘fraud’ in the TLA
  - Categories of ‘fraud’
  - Examples of ‘actual fraud’
- (2) Prior folio or certificate of title
- (3) Erroneous description of land
- (4) Paramount interests
  - Section 42: Estate of registered proprietor paramount
    - Section 42(2)(a): Crown grants exception
    - Section 42(2)(b): Adverse possession exception
    - Section 42(2)(c): Public rights of way exception
    - Section 42(2)(e): Leases exception
    - Section 42(2)(f): Unpaid tax exception
  - Section 88: Restrictive Covenants
    - Meaning of section 88(1)-(3)
  - Section 103 and 106(e) TLA: power of the Registrar to correct the Register
Topic 8: Non-Statutory Exceptions to Indefeasibility

- Rights *in personam*
  - Elements
  - Relationship/difference between actual fraud and rights *in personam*
  - *Barnes v Addy* principle
    - 1st limb
    - Rejected in *LHK Nominees* and *Farah Constructions*
    - 2nd limb
    - Endorsed in *LHK Nominees* and *Farah Constructions*
    - Requirements discussed in *LHK Nominees* and *Farah Constructions*

- Overriding Legislation
  - Presumption of anti-parliamentary contradiction
  - Requirements of inconsistency
    - Express/implied
    - Specific rather than general
    - Directly inconsistent
  - Examples of inconsistent legislation

- Volunteers
  - The Victorian position is that volunteers are not intended to obtain indefeasible title per sections 43 and 44(2)
  - See also *King, Rasmussen* and *Volutin Pty Ltd*

Topic 9: Disputes involving unregistered Interests

- The caveat system
  - Aftermath of *Barry v Heider* (unregistered interests can exist in the Torrens system)

- Types of unregistered interests
  - (c) Interests that are INCAPABLE of registration

- Examples of unregistered interests

- The difference between unregistered and equitable interests

- General points on ‘caveats’
  - Section 89
  - Section 90
  - Section 91
  - Section 91(4)

- Caveatable interests
  - Characteristics of caveatable interests
  - Examples of ‘caveatable interests’
  - Effect of a caveat
  - Elements of a caveatable interest

- Failure to lodge a caveat
  - Preservation of an unregistered interest per *Leros Pty Ltd v Terara Pty Ltd*

- Dealing with an unregistered interest per *Black v Garnock*

- Automatic lapsing of a caveat
Topic 10: Paramount Interests (cont)
  - Section 42(b): Adverse possession exception
    o Section 60-62: An adverse possessor is entitled to register title under provisions of Torrens legislation
    o *Jango v Northern Territory*
  - Section 42(d): Easements
    o Methods of creation
      § (1) By prescription
      § (2) By express grant
      § (3) By implied grant
        • Intended easements
        • Easements of necessity
        • *Wheeldon v Burrows*
  - Section 42(e): Tenancies
    o Requirements
    o What the interest includes…
      § All rights arising under the lease
      § Right of rectification: *Downie v Lockwood*

Topic 11: The Assurance Fund
  - State Guarantee of Title
  - Compensation
    o Victorian compensation and FRAUD; see also *Diemasters*
    o Instances of compensation
      § Section 110(a)-(g) TLA…
    o Exclusion of compensation per section 110(3)(a)
      § ‘Caused or substantially contributed’ to loss; discussed in *Registrar of Titles v Fairless*
      § Volunteer
    o Exclusion of compensation under other statutes
      § *Legal Profession Act 2004*
      § Section 5(1)(d) *Limitations of Actions Act 1958* (Vic)
    o Process of application
      § Against the individual responsible
      § Against the consolidated fund
    o Amount of compensation
Topic 1: Introduction to Land Law

‘Land’

General
- The term ‘land’ in land law is taken to refer to some part of the Earth, which can comprise of physical components such as soil, minerals, vegetation and fixtures
  o Section 4(1) TLA: Land includes “any estate or interest in land but DOES NOT include an interest in land arising under the Mineral Resources (Sustainable Development) Act 1990”
- Cuius Est Solum Rule: Ownership of land extends up to heaven and down to centre of the earth (fanciful phrase subject to limitations); as such, owners are afforded different rights depending on the surface the land is located on…
- There are two types of land…
  o General Law Land
  o Torrens Title Land

Rights In Accordance With the Surface of the Land
- ABOVE Surface: A transient intrusion will not constitute a trespass; only a permanent intrusion will constitute a trespass
- TO Surface: Encroachments
- BELOW Surface:
  o Excavations or tunnels will constitute a trespass
  o Generally, minerals belong to the Crown (in right of the State)
  o It should be noted that statutes can limit ownership beyond a certain depth

Characterisation of Interests in Land
There are two broad categories of interests in land…
(a) Legal and Equitable Interests
  o A legal interest in land is one which constitutes a recognisable common law estate and which is created in accordance with the requisite formalities
  o In Victoria, a legal interest in land is created or conveyed…
    ▪ Section 51(1): By grant; or
    ▪ Section 52(1): Execution of a deed
  o Section 54(2): Creation of leases (taking effect for a term not exceeding three years) NEED NOT to be executed by deed to be valid
(b) Registered and Unregistered Interests
  o Both in General and Torrens title land unregistered interests may occur
  o An interest registered under Torrens system is a registered interest
  o Registered interests are indefeasible
Systems of Land Registration

There are different systems of land registration applicable to general law land and torrens title land. Moreover, priority is given to a registered interest over unregistered interest and interest registered at a later date, provided it was acquired…

1. **Bona fide; AND**
2. **For valuable consideration; AND**
3. **Section 6: Without actual or constructive knowledge**

**Torrens Title Land**

- Torrens Title land includes…
  - Land alienated or granted by the Crown after commencement of Torrens legislation in a particular state; and
  - Old title land converted to Torrens title land

- **Transfer of Land Act 1958 (Vic)** applies to Torrens title land
- Title to Torrens Title land is evidenced by a certificate of title
- Interest is known as a registered interest
- System of title by registration has the twofold effect of…
  - Validating a defective title; and
  - Guaranteeing protection of title

**General Land Law**

- **ALL DEALINGS** relating to old title land must now be registered under the Torrens system necessitating a conversion from old title to Torrens title
  - Many general land ownerships have been converted over the intervening years, but those that remain in the system are still valid proof of ownership…
  - **General law land is governed by the PLA**
- In general law land, legal title can only be transferred by a deed of conveyance; as such, the title was comprised of a series of deeds forming a chain of title representing the history of the land grant
  - The vendor must prove title by searching each document in chain to ensure that link to original Crown grant is unbroken
  - There are a number of statutory limitations within this statutory search…
    - **Section 44(1):** The vendor need only to search title back for 30 years, provided good title can be found during that period
    - **Section 44(6):** Purchaser not deemed to be affected by notice of interest prior to the 30 year period
A legal interest is a recognisable common law estate

- If a **DEED IS EXECUTED** a **legal interest is created** enforceable in the common law
- If **NO DEED** is executed…
  - No legal interest is created; **BUT**
  - An equitable interest may be created provided it is **IN WRITING**

**SUMMARY for Creating a LEGAL Interest in Land**

1. **NOTE** Section 40(2) **TLA**: Registration of instrument in Torrens system has the **same effect as deed**
2. **Section 52(1) PLA**: Do any exceptions to the general rule of conveyance via deed apply?
   - Check if any of the **exceptions in section 52(2)** apply
   - **Section 54(2) PLA**: Check if the conveyance **concerns an oral lease for less than three years**; if so, no formalities apply
3. Have the formalities for the execution of a deed been complied with?
   - **Section 52 PLA**: The document must be **signed by both parties** with the **common intention of operating as a deed and witnessed**
   - “A deed must be intended by the party who does it to be the most solemn indication to the community that he really means what he is doing. The solemn indication is given by sealing a deed which witnesses to what has been done”: **Manton v Parabolic Pty Ltd**
   - In other words the deed must be…
     - **Section 73 PLA**: Person who executes a deed must sign or place mark on deed (i.e. sealing alone is insufficient); **and**
     - Attested by witness not a party to deed; **and**
     - **Section 73A PLA**: It must be sealed; it should be noted that the instrument, which is expressed to be sealed shall operate as if sealed

‘**Conveyance**’

**Section 18 PLA**: A ‘conveyance’ is taken to include…

1. Mortgages
2. Charges
3. Leases
4. Assents
5. Vesting declarations
6. Disclaimers
7. Releases
8. Extinguishment or assurance of property/interest by any instrument (except will)
Section 51
“All lands and all interests therein shall lie in grant and shall be incapable of being conveyed by livery or livery and seisin, or by feoffment, or by bargain and sale”
1. Possession is passed by conveyance of an interest
2. Land/interest in land shall lie in grant
3. Incapable of conveyance by livery, or livery and seisin or by feoffment or by bargain and sale

Section 52: Land/Interest in Land Must be Conveyed by Deed
(1) “All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed”
(2) Exceptions to conveyance by deed include…
   (a) ...
   (b) ...
   (c) Surrenders by operation of law
   (d) Leases or tenancies not required by law to be made in writing (i.e. periodic tenancies)
   (e) ...
   (f) Vesting orders by a court
   (g) Conveyances taking place by operation of law

Section 54: Formalities DO NOT APPLY to oral leases for THREE YEARS OR LESS
“Nothing in the foregoing provisions of this Division shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine”
A legal interest is a recognisable common law estate
- If a **DEED IS EXECUTED** a legal interest is created enforceable in the common law
- If NO DEED is executed…
  - No legal interest is created; BUT
  - An equitable interest may be created provided it is **IN WRITING**

**SUMMARY FOR CREATING AN EQUITABLE INTEREST IN LAND**

1. **Section 53(1) PLA**: Was the equitable interest in land created or disposed **in writing** signed by the person creating or conveying the land
   - **Section 126 Instruments Act 1958 (Vic)**: Any action be brought upon any contract for the sale or other disposition of land or of any interest in land **will be unenforceable**
2. If not, do any exceptions to the section 53 requirement apply?
   - **Section 53(2) PLA**: Did the equitable interest in question concern the creation or operation of a resulting, implied or constructive trust
   - **Section 55(d) PLA**: Were there **sufficient acts of part performance**
     - Use the **Madison v Alderson TEST**, which requires…
       - (1) That the acts of performance unequivocally relate to the agreement alleged; and
       - (2) That the act relied upon must…
         - (a) Have been done on the faith of the agreement; and
         - (a) Resulted in a change of position with respect to the subject matter of the contract such that the person would be unfairly prejudiced if the other party were to take advantage of the absence of any written evidence
     - **NOTE**: Types of acts that constitute part performance per **Regent v Millet** are (a combination of these acts constitutes part performance)…
       - Payment of purchase price; and
       - Depositing of title deeds; and
       - Giving and taking of possession

**Instruments Act 1958 (Vic) Section 126**
"No action shall be brought upon any contract for the sale or other disposition of land or of any interest in land, unless an agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some person thereunto by him lawfully authorised"

- This provision relates to the **enforceability** of all contracts or dispositions (i.e. legal AND equitable interests) relating to land
- Written agreement creating interest, note or memorandum of agreement
- A contract for the sale/ disposition of land/any interest in land is **unenforceable unless it is in writing and signed by the party or representative**
- Not invalid but merely **unenforceable**, unless a written agreement is produced
- Equitable interest can be created orally but to enforce interest it must be in writing
The Trusts Exception to Section 53
- The main provision relevant to the enforceability of equitable interests in land is section 53 of the PLA
- Section 53(1) PLA applies to the creation of all trusts and other express equitable interest but it does not apply to resulting trust or constructive trusts
  - An express trust created by declaration rather than transfer needs only to be evidenced in writing, not created in writing
  - A trust can be created orally and subsequently enforced by evidence in writing or the terms of the trust which have been signed by the settlor
    - Section 53(1)(a) does not overlap with oral trusts coming within the application of subs (b)
    - If a trust over land is orally declared, subs (b) has independent operation
    - Section 53(1)(c) applies to transactions with pre-existing equitable interest
- There are a few types of trusts for the purposes of section 53 PLA...
  - Express Trust: Grantor expressly intends to create a trust and transfer legal title to a third party (trustee) for benefit of a defined party (beneficiary)
  - Resulting Trust: An intention to create a trust is inferred from the circumstances and an act of performance supports the intention
  - Constructive Trust: It is imposed at the discretion of the court where it is concluded that justice and fairness require it

Section 53 PLA
(1) ...
(a) An interest in land can only be created or disposed by writing signed by the person creating or conveying the same, or by will, or operation of law
(b) A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;
(c) A disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing and signed by the person disposing of the same or by will
(2) This section SHALL NOT affect the creation or operation of resulting, implied or constructive trusts
The ‘Part Performance’ Exception
- Despite absence of writing/insufficient writing a contract may still be enforceable under the doctrine of part performance if there are sufficient acts of part performance by plaintiff.
- Equitable interest may arise if a court is prepared to issue a decree for specific performance in circumstances where it would be inequitable not to do so.
- Doctrine of part performance allows for enforcement of an oral contract of sale of an interest in land when the contract has been sufficiently acted upon.

Preconditions for a decree for specific performance are as follows…
1. Valid contract
2. General requirements for contract of sale of land have been met
3. Absence of adequate remedy at law in damages
4. Party seeking enforcement must prove that he has performed or is ready and willing to perform the substance of his contract obligations
5. Contract must be unconditional
6. No bar to award of equitable remedy of specific performance. Relief is refused in case of undue influence, delay or acquiescence
7. Vendor must prove good title or the purchaser has accepted such title as vendor has

Approaches to Part Performance
There are two perspectives as to what constitutes part performance…
- **Stringent Approach (Australian Position):** As per Madison v Alderson (HL), this requires…
  o Acts relied upon must be unequivocally; **AND**
  o In their own nature referable to some agreement alleged
- **Liberal approach:** This requires an act constitute part performance if on the balance of probabilities they indicate that a contract of some kind existed: Steadman v Steadman (HL)

**Madison v Alderson TEST**

The acts of performance must have…
(1) Unequivocally related to the agreement alleged; and
(2) …
(a) Been done on the faith of the agreement; and
(b) Resulted in a change of position with respect to the subject matter of the contract such that the person would be unfairly prejudiced if the other party were to take advantage of the absence of any written evidence
Aquatic Boundaries

General
- **Artificial Boundaries:** These are fixed and artificial in the sense that they are in accordance with reference to specific measurements in Certificate of Title

Tidal Water Boundaries
- With tidal water, the boundary is the mean high water mark
- Averaging out of annual tidal level reached by spring and neaps
- **Land beyond the high water mark (foreshore) belongs to the Crown**
  - NOTE: This applies unless a contrary intention has been set out in Certificate of Title
  - Territorial sea is regulated by state and territory laws, subject to public rights of navigation and fishing
  - Giving an exhaustive list of common law rights of public to tidal waters and foreshore is not possible
  - Rights of public may be abrogated/changed by legislation
  - Private grant possible
  - If high water mark changes over time due to **GRADUAL AND IMPERCEPTIBLE CHANGE**, so does the boundary

Non-Tidal Water Boundaries
- **Ad Medium Filum Aquae Rule:** With non-tidal water, the centre of the water/river is presumed to be divided down the centre of the river by adjoining landowners the centre of water/river, unless abrogated by statute
  - Presumption may be rebutted by proving Crown did not intend equal division
  - Most States have abrogated or modified the rule; for instance, in Victoria, the riverbed remains with the Crown subject to exercise of water rights by landowner

Right to Access Water
- The right to access to water is regulated by statute
- The Crown owns riverbeds, and access depends on legislation
  - Ownership of and entitlements to water is vested in the Crown
  - Water rights are granted pursuant to licences
    - Range of factors to be taken into account when Minister grants a licence
    - Minister may suspend, revoke and cancel licences
  - Unauthorised taking of water constitutes civil liability (Vic)
**Alluvio et Avulsio: Accretion and Erosion**

- **NOTE:** Application of the doctrine may be excluded or modified by grant
- **NOTE:** This rule is **NOT restricted to the action of water**, as accretion by windblown sand is possible: *Southern Centre of Theosophy v South Australia* [1982] AC 706
- **Alluvio et Avulsio RULE:** The operation of this rule takes place in respect of tidal and non-tidal water, whereby land **CAN** be acquired by *alluvio*, but **NOT** *avulsion*; therefore…
  - Natural and imperceptible (NOTE: ‘Imperceptible’ refers to slowness of additions to the soil: *Williams v Booth*) deposits by *alluvio* **WILL PASS** in ownership to the adjoining owner i.e. gradual and imperceptible loss of land by erosion to the sea will pass to the Crown
  - Rapid and perceptible accretion by *avulsio* or flood **WILL NOT** result in passing of ownership to adjoining owner i.e. rapid and swift loss of land to the sea will not result in passing of ownership to the Crown because it amounts to sudden and considerable alluvion or dereliction: *Williams v Booth*

"That," says Gaius "appears to be added to our land by *alluvio*, which a river adds to our land (ager) so gradually that we cannot estimate how much is added in each moment of time; or, as it is commonly expressed, it is that which is added so gradually as to escape observation. But if a river (at once) takes away a part of your land, and brings it to mine, this part still remains your property (*avulsio")"
Non-Aquatic Boundaries

General
- **Natural Boundaries**: These may **shift from time to time** by natural forces e.g. land that abuts water (tidal water)
- **Cuius Est Solum Eius Estque ad Coelum et ad Inferos RULE**: Ownership of land extends upwards **indefinitely and downwards to the centre of the earth** in the shape of an open-ended inverted pyramid
- Ownership rights can only be exercised within the specific dimensions of the land
- Boundary of land title is defined according to survey lines in Victoria

Encroachments
- Encroachment of the **surface, airspace or underground is possible**
- Encroaching buildings upon the land of another **will vest in ownership in the other** owner in terms of the **doctrine of fixture**
- No compensation is available to the encroaching owner, but the other (aggrieved) owner may apply for…
  - Removal
  - Compensation
  - Land transfer
  - Lease
- The Court has broad discretion and take following factors in account…
  - The extent and purpose of the encroachment
  - The knowledge of the encroaching owner
  - How the encroachment affects the value of the encroached land
  - Loss and damage suffered; and
  - Costs associated with the removal of the encroachment.
- Alternatively, an action may be brought by aggrieved owner (land encroached upon):
  - For trespass (impedes proprietary rights); or
  - Nuisance (continuous, unlawful interference with use and enjoyment of land)

Encroachment of Airspace
- Spatial interference may constitute an encroachment
- Structural encroachment may constitute trespass entitling aggrieved owner to seek compensation (damage is not a necessary element of the tort)
- An injunction may be claimed to prohibit further infringement
- Courts are not empowered by statute to refuse injunction

Fence Boundaries
- Fences are usually upon boundary of land
- Upon purchase of land one must ensure that physical boundaries corresponds with legal boundaries set out in title
- As per the **Fences Act 1984 (Vic)**, the **following obligations** are imposed upon adjoining landowners…
  - Adjoining landowners must construct or jointly contribute to **construction of a fence** which is **sufficient for both occupiers**
  - In the absence of such an agreement, a court may determine liability
  - If contribution is sought, a **notice in writing** must be **served upon neighbour** setting out the relevant area and type of fencing necessary