

# ***REAL PROPERTY SUMMARY NOTES***

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# TENURE, ESTATES AND NATIVE TITLE

## DEFINITIONS:

Allodial System	Where land holding is absolute
Tenurial	Where land is held 'of' another party
Real Property	Land, and interest, made up of: - Corporeal hereditaments; and, - Incorporeal hereditaments
Estate	An interest of land, held 'of' the Crown, entitling the holder to a parcel of rights
Free & Common Socage	Land ownership without periodic payment or military service
Terra Nullius	Land belonging to no one
Reservation Clause	A limitation on the rights enjoyed by the holder of estate in fee simple
Fee Simple	Unrestrictedly inheritable indefinite title to land
Radical Title	A beneficial right the Crown holds to grant and manage land
Sovereignty	The right to make laws with respect to something eg. sovereignty
Alienable	Able to be sold
Intestate	Without will

## TENURE:

The system of tenure is where land is held "of" the crown

- The crown holds all land, and people have interest in land via grants
- The interest you may hold of the crown is called an "estate"

## **Transmission to NSW:**

The common law of England was brought to Australia with settlement (settled as opposed to conquered because the English considered it Terra Nullius):

- An Englishman brings as much of the common law with them as is relevant to the circumstances of the colony (Cooper v Stuart)
- We imported the feudal law of tenure (Attorney-General v Brown)

## **Tenure Cases:**

### Attorney-General v Brown

Brown finds coal in his land; the Crown argues that it belongs to the Crown as the land was granted to him. Crown were within their rights as sovereigns to create a reservation clause.

### Gove Land Rights Case (1971)

Court held that there was no *Native Title* as the Indigenous concept of land had differed to that of Western ideology.

### Mabo (No 2)

P argued that the traditional rights to the land survived the Crown's coming to Australia. BRENNAN J expressed that 'to abolish tenure would fracture the skeleton

of common law' thus overrule the decision made in *AG v Brown*. An outcome of the creation of *Radical Title* came about whereby the Crown has beneficial interest in all lands and could not extinguish Aboriginal land rights, unless the power to grant was exercised.

### **ESTATES:**

Estates are the bundle of rights that proprietor holds "of" the crown

- Estates are, generally, alienable
- Estates give you respect to physical land (rather than actual ownership)

### **Types of Estates:**

Estates may be created by the government (grants) or by people (subdivision).

- **Freehold Estates:**
  - Fee simple (pl. fees simple)
    - This has the most rights out of any estate and can be passed on.
    - At Common Law, given and denoted by:  
"to A and his heirs".
    - Now under *Conveyancing Act* s 47(1), may be given by  
"to A forever" or "to A in fee simple".
  - Life Estates
    - An estate for the life of the person granted (after their death, the estate in fee simple falls back on the remainder-man).
    - At Common Law, it is created by:  
"to A for the life of A or B in the case of *pour autre vie*."
    - It is now required under the *Conveyancing Act* s 47(2) to show an intention to create a life estate.
  - Leasehold Land (certain duration eg. 99 years of lease purchased).
- **Simultaneous Estates:**
  - Reversion
    - "To A for life; reversion to grantor" (where the grantor has a fee simple in reversion).
  - Remainder
    - "To A for life, remainder to B in fee simple".
  - Alienability
    - Where one can sell reversionary interest but cannot grant possession.
- **Estates as a Bundle of Rights** – where real property is not ownership of a thing, but a bundle of rights with respect to the land:
  - These rights are a set of inter-subjective rights exercisable against the world with respect to a particular thing (*in rem*).
    - As oppose to an *in personam* right – exercisable against a particular person.

### **NATIVE TITLE:**

*Native Title* is a Western ideology and reflects upon such concepts with respect to land.

There are numerous International cases which reflected on *Native Title*.

- Johnson v Macintosh (1823) in the US.
- Sao v Gerber in the PNG, *NT* found and was heard in the HCA.

*Native Title* derive from origins in the traditions of Aboriginal Law (*Yorta Yorta*). However, as it was passed down orally through the generations, with varying customs, it is problematic to find a conclusive central custom.

The effects of *NT* are that it is an inalienable right (cannot be sold), it is communal and it is a bundle of rights, not fixed and based on culture.

An 'Aboriginal Person' is as stated in Mabo, a membership based on biological descent and recognition of the group. In WA v Ward, an ancestral connection is required between the original *NT* holders and the present claimants.

### **Mabo (No 2):**

QSC found that the land was considered 'appropriate', productive in the definition of *Locke's Labour Theory* in contrast to 'adverse possession'. It is crucial that the P and subsequent Ps demonstrate that *NT* was not extinguished.

### **Native Title Cases:**

#### **WA v Ward**

*NT* is the recognition of Aboriginal rights and interests to the land, rather than the creation thereof.

→ *ELEMENTS FOR NT*:

1. Ongoing and substantially uninterrupted connection to the land.
2. Customs and traditions (Yanner v Eaton).
3. Intellectual property is held outside of *NT* (Bullan Bullan).

#### **Fejo case**

The creation of an estate in *FS* was seen as extinguishing *NT*.

#### **Wik case**

Pastoral Lease is still a lease conferring exclusive possession – Brennan J. Thus if a pastoralist right cannot coexist with a *NT* right then it is extinguished.