

University of Western Australia
PLANNING AND GOVERNANCE COURSE

LAND AND LAND LAW
The Land Law Perspective

- AIM:**
1. To give a brief introduction to the complex laws relating to land and dealings with land.
 2. To familiarize students with the land-law terms they will most commonly encounter in planning practice.
 3. To introduce some important land-law interests and principles.
 4. To enable students to place Environmental Planning Law into the traditional land law perspective.

LECTURE OUTLINE

1. What is Land?

- (1) Definition
- (2) Nature of Property
- (3) Buildings
- (4) Improvements
- (5) Fixtures

2. Possession, Ownership and Title

- (1) Definitions
- (2) Freehold estate and life estate
- (3) Co-Ownership
- (4) Leasehold
- (5) Licence
- (6) Adverse Possession
- (7) Prescriptive rights
- (8) Equitable Interests

3. Native Title

4. Function of Torrens System of Land Title Registration

5. Common Dealings

- (1) Sale and conveyance/transfer
- (2) Settlement
- (3) Mortgage
- (4) Lease.

6. Other Interests in Land

- (1) Restrictive Covenants
- (2) Easements

7. Significant Notifications

- (1) Caveat
- (2) Planning Act S.12A Notification
- (3) TLA S.70A Notification.

8. Law of Trespass

Adverse possession.

9. Statutes

- (1) Statutes of Frauds
- (2) Transfer of Land Act 1893 (note s.34 Property Law Act 1969 in W.A.)
- (3) Land Administration Act 1997
- (4) Strata Titles Act 1985
- (5) Property Law Act 1969
- (6) Sale of Land Act 1970
- (7) Limitation Act 1935.

10. Land Administration Act 1997

1. WHAT IS LAND?

(1) Definition of "Land"

- (a) "Land comprehendeth any ground, soile, or earth whatsoever. It legally includeth also all castles, houses and other buildings; also water." (Coke).
- (b) "'Land' includes land or any tenure and mines and minerals whether or not they are held apart from the surface of the land, a building or part of a building, whether the division of the building is horizontal, vertical or made in any other way, and other corporeal hereditaments, and also includes a rent and other incorporeal hereditaments and an easement, right privilege or benefit in, over or derived from the land and an undivided share in land."
(Property Law Act 1969 (as amended) (s.7)).
- (c) See also TLA s.4 and TP&D Act s.2.

(2) Definition of "Property"

- (a) Cohen, "Dialogue on Private Property" (1954), *Ritgers Law Review* 357, 359-374 (quoted in Sackville and Neave).
- (b) "'Property' includes real and personal property and any estate or interest therein and any thing or chose in action."
(Property Law Act (s.7)).
- (c) Examples of personal property.

(3) **“Real Property” and “Personal Property”**

The distinction between real and personal property broadly corresponds with the factual distinction between land and movable objects, with one exception, namely, leasehold interests in land. Leaseholds were regarded as personal property since the early law did not permit the dispossessed leaseholder to recover the land itself. He was limited to an action for damages, mainly because leases were seen as personal commercial arrangements outside the rigid feudal structure of landholding. In time, the leaseholder was enabled to recover the land itself (as he now can), but by then the anomalous classification of leaseholds as personal property was too well established to be overturned. In any event, the classification had considerable advantages - for example leaseholds, being personal property, could be bequeathed by will long before it was possible to devise real property. (Sackville and Neave p.89 - (1971) (1st Edition).

(4) **The Doctrine of Fixtures**

Personal property can merge into real property. The doctrine of fixtures deals with the merging of personal property into real property. When an object has become a fixture to land, it is regarded as part of the land. The test is generally considered to have the two parts -

- (a) Degree of annexation; and
- (b) Object of annexation.

"Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even lightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel ...". **Holland v. Hodgson** (1872) LR 7 CP 328 per Blackburn, J.

(5) **Key Points for Planners**

- (a) Transaction involving land relates also to all buildings etc. and fixtures on land;
- (b) The distinction between real and personal property is important because remedies in respect of personal property are generally "personal" only, e.g. damages; whereas remedies in respect of real property may be "specific" e.g. recovery of land, or an order that a vendor transfer land to perfect a contract of sale.

2. POSSESSION, OWNERSHIP AND TITLE

The purpose of this topic is to touch upon some basic terms and concepts which are fundamental to reading in and understanding land law.

(1) **Definitions of the Terms**

(a) Possession:

"Possession" has two elements -

- (i) The *corpus*, or the thing possessed; and
- (ii) The *animus possidendi*, the intention to appropriate to oneself the exclusive use of the thing possessed.

Possession is prima facie evidence of ownership. "Possession is 9/10ths of the law", means that possession is good against all the world except the true owner. Possession ripens into ownership by effluxion of time. Adverse possession of land for 12 years destroys the title of the owner and vests it in the possessor. Note combination of principles from the law of trespass and the laws for limitation of actions.

(b) Ownership:

"Ownership" is the right to the exclusive enjoyment of a thing (Austen). It denotes the relation between a person and any right that is vested in him (Salmond). Ownership is absolute or restricted. Absolute ownership involves the right of free, as well as exclusive enjoyment, including the right of using, altering, disposing or destroying the thing owned. Absolute ownership is of indeterminate duration. (Land is in strictness not subject to private absolute ownership because it cannot be destroyed, and because of the theory that all land is ultimately held of the Crown). Restricted ownership is ownership limited to some extent; as, for example, where there are several joint owners, or a life tenancy, or where the property is charged with the payment of a sum of money, or subject to an easement. Beneficial ownership is the right to the enjoyment of a thing as contrasted with the legal or nominal ownership.

(c) Title:

"Title" is the right to ownership of property: "A vestitive fact" (Salmond).

(2) **Freehold Estate and Life Estate**

- (a) Under the feudal system land was held by "military tenure" and "socage tenure", which were freehold tenures, being held in return for services which a free man might not think it derogatory to perform. In 1660, military tenure was abolished and the subject land became socage tenure.

"Fee Simple" is an estate of freehold. It is an estate of inheritance, being the most extensive interest that a person could have under the Monarch.

(b) Life Estate:

A "Life Estate" arises by grant or operation of law for the benefit of a person for the rest of the person's own life. It is not an estate of inheritance. Note the doctrine of waste. A tenant for life is entitled to the rents and profits of the lands during the person's life, but is not entitled to commit voluntary waste unless made unimpeachable for waste. The life tenant is not liable for permissive waste, unless under an express duty to repair. A tenant for life

unimpeachable for waste, has no right to commit equitable waste, unless expressly authorized by trust instrument (Property Law Act s.17).

(3) **Co-Ownership**

- (a) Tenancy in Common - Where 2 or more persons are entitled to land in such a manner that they have undivided possession but several freeholds; that is, no one of them is entitled to the exclusive possession of any part of the land, each being entitled to occupy the whole in common with the others. It is distinguished from joint tenancy by the fact that on the death of any one of them the deceased's share passes, not to the survivors, but to the deceased's heir or devisee, who then becomes tenant-in-common with the survivors.
- (b) Joint Tenancy - The ownership of land in common by several persons where there is a right of survivorship; i.e. where on the death of one joint owner the land as a whole vests in the survivors, and can only be disposed of by will by the last surviving owner. The 4 unities of joint tenancy which must exist, for the tenancy not to be a tenancy in common, are:
 - (i) Possession - each joint tenant must be entitled to the possession of the whole of the land;
 - (ii) Interest - each joint tenant must have the same estate or interest in the land;
 - (iii) Title - each joint tenant must have the same title, i.e. take by virtue of the same instrument;
 - (iv) Time - each joint tenant must have an estate for the same time.

Generally see The Right of Survivorship PLA, ss.29 & 120; TLA, ss.61 & 62.

- (c) Severance - May be by agreement, or by an action for partition (Property Law Act ss.126-129).

(4) **Leasehold**

Historically personalty. Importance of exclusive possession. Premises; rent; term; implied covenants.

(5) **Licence**

Distinguished from lease by absence of exclusive possession. Flexibility. Wide range of forms and application of licence rights.

(6) **Adverse Possession**

Relationship to trespass. Basis for possessory title. Importance of possession.

(7) **Prescriptive Rights**

Prescription Act in W.A. Importance in law relating to easements.

(8) **Equitable Interests**

Status under Torrens System.

3. NATIVE TITLE

In 1992 the High Court in *Mabo v. Queensland* recognized the existence of native title in Australia. This form of title encompasses rights which are significantly narrower than those bestowed by other forms of title. In addition native title can be extinguished by valid legislative or executive Acts which are inconsistent with the continued right to enjoy native title. It is important to note that since 1975 s.10 of the *Racial Discrimination Act (Commonwealth)* has effectively required that any extinguishment of native title should be adequately compensated. Difficulties arise in determining the extent of native title and to this end the Commonwealth Government has established the Native Title Tribunal.

Note: Native Title Act 1993 (Cwth);
Title Validation Act 1995 (W.A.);
Wik Decision;
Dealing with Native Title claims;
Dealing with land subject to Native Title claim.
State of WA and Ors v. Ward and Ors (2002) 191 ALR 1

4. FUNCTION OF TORRENS SYSTEM OF LAND TITLE REGISTRATION

The purpose of this topic is to explain briefly how the Torrens system of land title registration fits into the context of land law, and planning practice in W.A. The topic will be dealt with in more depth later in the course.

Crown Grant; Certificate of Title; Duplicate C/T; Encumbrances; Caveats; Commissioner of Titles; Indefeasibility; Fraud or Error; Insurance Fund. Subdivision; Survey; Plan/Diagram of Survey; WAPC Approval; Inspector of Plans and Surveys; New C/T.

5. COMMON DEALINGS

The purpose of this topic is to introduce the 4 most common land transactions.

- (1) Sale and conveyance/transfer: Transferor/transferee; land description; consideration; encumbrances; strict compliance with form to secure registration.
- (2) Settlement: Closing of the transaction; importance of the duplicate C/T and mortgage finance; who lodges documents?
- (3) Mortgage: Mortgage/mortgagor; mortgages after the first; equity of redemption/charge; power of sale/foreclosure/mortgagee in possession; importance of duplicate C/T.
- (4) Lease: Lessor/lessee; exclusive possession; rent and renewal; term; assignment and subletting; lease of part lot for more than 10 years.

6. OTHER INTERESTS IN LAND

Besides the commonly encountered interests created by the major transactions in land mentioned in the previous topics, persons dealing with land in W.A., and particularly

planners, must deal with and have a good knowledge of related interests created by restrictive covenants and easements.

- (1) Restrictive covenants: *Tulk v. Moxhay*; dominant/servient tenements; restrictive and negative; binding successors in title; running with the land; encumbrance on title; estate covenants; extinguishment and variation; attachment to easement in gross.

Note: s.129BA TLA : Restrictive Covenants in Gross for the benefit of local govt./public authorities

In a recent LRC report it was suggested that TPAT be vested with the power to extinguish restrictive covenants.

- (2) Easements: Dominant/servient tenements; varieties of easements; encumbrance on title; 4 methods of creating; s.167A of TLA – lots appurtenant to ROW; extinguishment and variation; extinguishment by scheme; easement in gross, ss. 195 and 196 of LA Act 1997 – anomalous restriction to easement of access.

7. LAW OF TRESPASS

The law of trespass is a bolster to the laws relating to possession and ownership of land, and is at the basis of the law relating to adverse possession and possessory title.

8. SIGNIFICANT NOTIFICATIONS ON TITLE

(1) **Caveat**

Protects unregistered interests in land. Must be an interest in land.

- (a) Absolute Caveat – forbids registration of dealings; methods of removal: 14 day notice where interest ceases to exist (s.141A TLA); 21 day notice requiring Supreme Court action to support caveat (s.138B TLA); lodgement of dealing; withdrawal.
- (b) Subject to Claim Caveat – gives notice of prior interest; use of the above removal methods.
- (c) Use of charge and caveat as a planning control tool.

(2) **Memorial under s 165 of P&D Act**

Use by WAPC in subdivisions; relates to hazards or other factors seriously affecting the use or enjoyment of land. e.g. UXO; proximity to poultry farm or mosquito breeding area, or quarry, or airport noise.

(3) **Notification under s.70A of TLA**

- (a) Notification of a factor affecting use or enjoyment of land; use by planning authorities; e.g. absence of potable water supply; existence of Bush Fire Management Plan; Scheme or ODP in course of preparation, and other purposes similar to s 165 memorial, but available to any local government or public authority, and not specific to subdivision. Must be consent of landowner.

- (b) Compare use of charge and caveat.

9. STATUTES

An acquaintance with some of the statutes dealing with land and interests in land is useful for planners and others whose business is land.

- (1) Statutes of Frauds.
- (2) Transfer of Land Act 1893.
- (3) Land Act 1933; Land Administration Act 1997.
- (4) Local Government (Miscellaneous Provisions) Act 1960, s.295 subdivisional roads. Now P&D Act s 168.
- (5) Strata Titles Act 1985.
- (6) Property Law Act 1969.
- (7) Sale of Land Act 1970.
- (8) Limitation Act 1935.

10. LAND ACT 1933 AND LAND ADMINISTRATION ACT 1997

The Land Act 1933 until 1998 governed the administration of Crown Lands in W.A. Its application was restricted to lands falling within the definition of "Crown Lands", which was defined in s.3(1) as follows:

"'Crown Lands' means and includes (subject to section 4(2)) all lands of the Crown vested in Her Majesty, except land which is, for the time being, reserved for or dedicated to any public purpose, or granted or lawfully contracted to be granted in fee simple or with the right of purchase under this Act or any Act hereby repealed, and includes all lands between high and low water mark on the seashore and on the banks of tidal waters, and includes, for the purposes of sections 116 and 118A, all lands below low water mark on the seashore and on the banks of tidal waters and all lands being the beds of water-courses."

The provisions of the Land Administration Act 1997 ("LAA") entail substantial amendments to the administration of Crown Lands. This new Act was proclaimed to come into operation in March 1998. The LAA applies to all Crown Land in the State, including Crown Land which is dedicated, reserved, set apart or vested under another written law. The LAA provided a single registration system for all land in W.A. and there were substantial complementary amendments to the TLA. The system of Crown Grants is abolished in favour of one whereby all dealings, interests, rights and powers affecting Crown Land must be lodged with the Registrar of Titles. Those interests must be registered against Certificates of Crown Land Title issued in the name of the State of W.A. and created under the LAA for each parcel of Crown Land.

Note s.55 and other significant provisions relating to roads.

See also s.295 of the Local Government (Miscellaneous Provisions) Act 1960 in relation to the creation of subdivisional roads; role of the Inspector of Plans and Surveys under s. 295(5). Note s. 20A of the TP&D Act.

Now in place of s 295 see P&D Act s 168.
In place of s 20A see P&D Act s 152.