Native title

Indefeasibility

Exceptions to indefeasibility:
  o Volunteers
  o Fraud
  o *in personam* claims
  o Short-term tenancies
  o Overriding statutes
  o Caveats

Competing equitable interests

Co-ownership

Leases
  o Implied covenants
  o Express covenants
  o Assignment
  o Remedies

Mortgages

Easements

Freehold covenants
FUNDAMENTAL CONCEPTS

Defined proprietary interests:

- **Fee simple** – largest interest you can own in land.
- **Lease** – time-limited interest in land entitling you to possession.
- **Mortgage** – small interest in land owner of the fee simple gives to another. Usually includes a contractual (ie not proprietary) promise to repay – ’suing on the personal covenant’
- **Easement** – a right to do something on someone else’s land. Runs with the land
- **Restrictive/freehold covenants** – right to stop someone doing something on their land

The *numerous clausus* principle means that there are only defined interests in land – you cannot create novels ones. Ie these ^^ are the boxes of proprietary interests, there are no more, you cannot create more.

You can of course create any contractual relationship you like – but this is personal.

**S 54A Conveyancing Act** – contracts for the sale of land OR ANY INTEREST IN LAND (ie easement, lease) need to be in WRITING

- Contract in writing OR “some memorandum or note thereof”
- Meaning the whole contract doesn’t have to be in 1 doc – just the essential terms (as fulfill the basic requirements of contract formation)
- ‘exchange of contracts’ signals intention to be legally bound

Contracts do not grant legal title: they are an agreement to transfer legal title to a property interest to the other party, in return for money, on an agreed date.

- When you put an ‘interest in land’ in writing – that’s a (SPECIFICALLY ENFORCEABLE) CONTRACTUAL PROMISE TO GRANT YOU THAT INTEREST IN LAND – only when it is registered does it become an ‘interest in land’

Legally enforceable contact? You can seek specific performance! You have an equitable interest in land!

**TAKE AWAY POINTS**

- There is a closed list of property interests (*numerous clausus* principle)
- You can create whatever you like in contract law – but these are personal, contractual promises.
- An enforceable s 54C contract is a contractually enforceable agreement to transfer you legal title: it does not transfer legal title – only rego creates legal title.
INDEFEASIBILITY & TORRENS

Indefeasibility of title is a convenient description of the immunity of attack by adverse claim to the land or interest in respect of land – per the Privy Council in *Frazer v Walker* [1967]

Torrens is a system of title BY registration, not rego OF title

If you give someone the appropriate forms and they are registered: it doesn’t matter that they had imperfect title, title is by registration!

Old system had ‘derivative title’: validity of yours depended on the validity of the person who gave it to you!

There is a Torrens form that needs to be lodged for all interests in land. Upon rego, those interests come into existence

You can have interests in land w/o rego, but they are only equitable

- Have all the contracts signed for the transfer of title, but no rego? You have an equitable fee simple
- Have all the contracts signed for creation of easement, but no rego? You have an equitable easement

Registration gives you a Certificate of Title. This is with LPI. The registered proprietor gets a duplicate CT, which they must hand over when they wish to change the register.

s 42 of *Real Property Act 1900*:

- (1) Notwithstanding existence of any interest which but for the Act would be held to be paramount, the registered proprietor of any interest holds that interest subject only to other interests recorded on the Register.
- (2)(d)(i) Registered proprietor holds their title except:
  - A tenant is in possession and the term of the tenancy is not 3 years
  - In the case of fraud.
- (3) s 42 prevails over any other Act or law unless the inconsistency is expressly provided for

*Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) HCA

FACTS: CT obtained by Bursill had the following interest noted on it: “right of way created and more fully set out in Transfer No 7922 affecting parcels X and Y”.

Transfer no 7922 executed in 1872. Guy (Bursill’s predecessor) granted Long (Berger’s predecessor) an extension of right of way, together with all buildings at present erected on the side of the road, the right to pull them down and rebuild others not higher than 12 feet from the ground.

Supreme Court held: Transfer 7922 created an easement. Appeal to HCA.

HELD: Windeyer J →

- Does Transfer 7922 count as being ‘on the register’?
- What is notified by the CT is everything that would have come to his knowledge if they made such searches as ought reasonably to have been made by him as a result of what appears there
- Here
  - A prudent conveyancer would have ascertained what it was that Transfer 7922 referred to on vendor’s CT
  - Yeah be probs would have been surprised by this
But no prudent person, seeing the reference to the right of way on the CT, would neglect to ascertain what exactly was the nature of that right of way.

There’s an easement: Bursill’s title is subject to it

**IN SHORT: WHAT IS ON THE REGISTER INCLUDES WHAT’S NOTED ON A CT.**

**s 43:**

- No person taking a transfer from the registered proprietor of any registered interest is required to inquire about or ascertain the circumstances that the registered proprietor obtained their title in
- No person taking a transfer from the registered proprietor of any registered interest is affected by notice (direct or constructive) of any trust or unregistered interest, any rule of law or equity. Any such knowledge of an existing unregistered interest is not fraud.

**S 43 = IT DOESN’T MATTER IF TRANSFEREE KNOWS ABOUT AN UNREGISTERED INTEREST – THEY ARE NOT BOUND BY UIT.**

**Frazer v Walker [1967]**

**FACTS:** Husband and wife registered proprietors of farm in New Zealand, subject to the mortgage of Bailey.

Wife arranged a 2nd mortgage from Walkers, pretending to act on behalf of her and her husband, but actually the husband didn’t know. Wife then took it to her lawyers. Lawyers clerk witnessed wife’s signature, but saw the signature of husband that wife has previously signed.

Mortgage docs and CT given by husband and wife’s lawyers to the mortgagees, who registered their mortgage. Everyone acted in good faith bar the wife.

Mortgagees exercised their power of sale, farm property sold at auction.

Husband commenced proceedings, saying “I’m the registered proprietor, what the fuck?”, claiming that the signature was a forgery and everything occurred without his knowledge. Sought a declaration that his interest was not affected by the mortgage, that it was a nullity.

**HELD:** Lord Wilberforce →

- It is registration and not its antecedents which vests and divests title
- There is an immunity to attack from adverse claims to a property interest which is registered.
- As registered proprietor, no adverse claims can be brought against them
- Registration is effective to vest and divest title, and to protect registered proprietor from adverse claims
- Indefeasibility in no way denies the right of an *in personam* claim

**Breskvar v Wall (1971) HCA**

**FACTS:** Husband and wife Breskvars were registered proprietors of QLD land.

They executed a memo of transfer for consideration of $1,200, with the transferee name left empty on the form.

*Stamp Duty Act = no transfer is valid unless name of the transferee was written on the form. Any blank transfer form is absolutely null and inoperative.*

The transfer was a mortgage in favour of Petrie, who was given the duplicate CT and the transfer from the husband and wife.

Petrie put his grandson’s name (Wall) on the transfer, THEN registered the transfer doc.
Wall then contracted to sell the land to someone else, transfer was executed (the buyer was acting in good faith).

Husband and wife Breskvars found out Wall was the RP, sought to lodge a caveat. Buyer then couldn’t register their title because of the caveat. Breskvars sought a declaration that the transfer was void.

**WALL IS THE RP, BUYER WANTS TO BE.**

**HELD:** Barwick CJ →

- The conclusiveness of the CT is definitive of the title of the RP
- Registration grants immediate indefeasibility of title
- Torrens is a system of title by registration, not registration of title
- A registration which results from a void instrument is effective – *because it is registered!* It doesn't matter for what reason that instrument is void
- Wall has indefinite title – the requirements of the *Stamp Duty Act* do not impact the conclusiveness of Wall’s title as RP
- **What was the effect on the buyer?**
  - Here, there was fraud – Wall held his title subject to the interests of both the Breskvars and the buyer
  - Both Breskvars and buyers had the right to sue to recover the land and have the register rectified – but these are competing equitable claims, and must be resolved by equitable priority rules
  - First in time prevails, unless there is postponing conduct.
  - Here
    - Breskvars armed Petrie with the means of placing himself or his nominee on the register – they executed a transfer and handed over the duplicate CT
    - Breskvars therefore lose their priority right which they otherwise would have been entitled to

Menzies J →

- In the absence of fraud on the part of the transferee, an indefeasible title can be acquired by a void instrument
- Where there is fraud in obtaining that registration – their title is defeasible
- Here
  - Wall become RP by fraud
  - Breskvar’s giving Petrie the blank transfer means their interests should be postponed

*Mercantile Credits Ltd v Shell Co of Aus Ltd* (1976) HCA

**FACTS:** Lessee of a service station and garage. Mercantile Credits is the mortgagee.

Lease of Shell was registered. Lease contained 2 terms that entitled Shell to renew the term for 3 periods, each of 5 years. The renewal right was exercised, and the lease was extended. Extension was registered 30 August 1969.

A mortgage was executed in favour of Mercantile Credits 2 years later.

Shell gave notice it wanted to exercise its right to renew for another 5 years. Lease in registrable form was executed, but never was.

Owner defaulted on the mortgage, Mercantile wanted to exercise its power of sale. SHELL LODGED A CAVEAT, CLAIMING IT HAS A RIGHT TO HAVE ITS LEASE REGISTERED, FORBIDDING MERCANTILE FROM TAKING ITS INTEREST UNLESS IT WAS SUBJECT TO SHELL’S LEASE.
Mercantile is like: “I can exercise my power of sale free from any leasehold interest, the option to renew is not an integral part of the lease”

HELD: Gibbs J →

- Not in doubt that lease takes priority over the mortgage – it was registered first
- The Act doesn’t make indefeasible something that in no way affects the estate or interest in land which it creates
- Here the right to renew directly affects the nature of the right being granted
- Right of renewal so intimately connected with the term granted to the lessee