

# NATIVE TITLE

## 1. General

- a. NT cannot be transferred unless consistent with ATSI law/custom or by a person who does not acknowledge those L&Cs
- b. <1975: POL (slight) & Wrongful? Unclear 3-3-1 → minority only recognised inherent right of compensation (Pre-1975) **Mabo**
- c. **RDA 1975**: extinguishment of NT unlawful if ATSI owners treated less favourable than non-indigenous. If they were not compensated or not afforded the same procedural rights as non-NT holders, they could establish unlawful discrimination
- d. **NTA 1993**:
  - i. **s 10** recognises; **s 11** extinguishment cannot be contrary to the Act; **s 223** defines
    1. **(1) Communal group or individual rights & interests of ATSI people in relation to land/water where**
      - a. **(a) Rights & interests possessed under traditional ATSI laws/customs and**
      - b. **(b) The ATSI people by those laws/customs have a connection with the land or waters and**
      - c. **(c) The rights & interests are recognised by CL (NSW 1788) AND Includes hunting, gathering or fishing rights & interests**
    - ii. **s 20** NT holders cannot be treated < favourably – must agree to extinguishment or be compulsorily acquired (compensation)

## 2. Elements (SI of s 223): show **society under whose L&Cs the NT rights/interests are said to be possessed**, has **continued to exist** from (1788 NSW) as a body united by its **A&O of the L&Cs Yorta Yorta**. Continuity between sovereignty & today of:

- a. **Content of L&Cs - whether the L&Cs are traditional L&Cs**: is the change/adaptation of such a kind that it can no longer be said that the rights are possessed under the traditional L&Cs A&O...**must be sufficiently similar Jango**
  - i. **Types** (NB NT is a bundle of rights **Ward**; each right must be proved...vulnerable to extinguishment)
    1. **Exclusive Possession NT – right to exclude**
    2. **Non-exclusive Possession NT – right to take resources, use of enjoyment, protect sacred sites**
      - a. Where you failed to prove that your L&Cs included exclusivity
      - b. Grant extinguished the exclusivity of NTR; **Yarmirr** – NT extinguished for exclusive use but not for all purposes
      - c. possible to have NT over territorial sea? Yes, but only non-exclusive – legislation to fish, pass through seas
  - b. **Continued to observe & acknowledge L&Cs: A&O of those L&Cs that recognise them as possessing rights in land must have continued substantially uninterrupted since sovereignty Yorta**. If break in chain your claim fails & it cannot be revived. **Risk**
    - i. **No need to demonstrate a continuing physical connection to the land De Rose** (but if no physical connection, may mean you haven't A&O **Risk**) (*lower burden bc arid area – nomadic people – not unknown to L&Cs to go elsewhere in search of food*) **De Rose**
      1. **Connection w land does not necessarily require continued use/occupation Ward** (s 223(1)(b)). It can be maintained by the continued A&O of TL&Cs.
      2. E.g. **evidence that traditional practices/ceremonies are maintained by the community insofar as that is possible off the land** and that the ritual knowledge including the knowledge of the Dreamings which underlie the traditional laws & customs continue to be maintained & passed down from generation to generation
    - ii. Inquiry is 'directed to possession of the rights or interests, not their exercise **Yorta Yorta**. proof of activities undertaken pursuant to L/Cs will assist in proving the existence of the right. But evidence of the activity is not necessary. **Pilki**
    - iii. **And those laws & customs provide a connection to the land**: whether the peoples have a connection to land or water by the traditional laws **A&O** traditional L&Cs **De Rose**
  - c. **Society** (normative, not blood related): it must be shown that the **society under whose L&Cs the NTR are said to be possessed, has continued to exist throughout that period** as a body united by its A&Os of L&Cs (generation to generation)
    - i. Evidence that some members have not A&O TL&Cs will not necessarily be fatal - matter of fact & degree whether the community has A&O TL&Cs **De Rose**

## 3. Extinguishment

### a. Methods

- i. **Grant of an Interest to a 3<sup>rd</sup> Party Wik; Fejo; Brown** (sovereignty (radical title) the power to extinguish NTRs (1788)) **Mabo**
  1. Grant of **fee simple extinguishes NT Mabo**; extinguishment occurs upon grant it cannot come back **Fejo**
  2. **CL lease** also extinguishes – exclusive possession
  3. **Pastoral Lease** – depends on the terms – are the terms inconsistent with the ongoing NTR? exclusive possession?
    - a. **Wik** – did not extinguish because no EP
    - b. **Wilson** – It did convey EP

### ii. Legislative Provision

### iii. By Reservation for a Public Purpose Inconsistent with Continuance of NT

### iv. NT can Cede to GOV

- b. **The exercise of a power to extinguish NT must reveal a clear & plain intention to do so by P or E** (can be partial **Ward**)
  - i. Test for extinguishment is **whether the L/E acts are inconsistent with the claimed native title rights and interests Ward**
    1. inconsistency = where the existence of one right necessarily implies the nonexistence of the other **Brown**
    2. objective inquiry **identify & compare 2 sets of rights** – inconsistency of rights (not exercise) **@ time of grant Brown; Wik**
- c. **Cases**
  - i. **Akiba**: the **right can be regulated w/o extinguishment** (licence to fish for commercial purposes). Distinction between right & the actual exercise of the right. **Construe legislation against extinguishing NTR. The prohibition of taking fish for sale or trade without a licence regulated the exercise of the native title right by prohibiting its exercise for some, but not all, purposes without a licence. It did not extinguish the right to any extent.**

- ii. **Brown**: statute did not give EP (could not exclude anyone for no reason). Look at the rights that were granted (*not what the person did – i.e. fenced off & precluded access but only had limited right to mine*), are they inconsistent with the NTR (the **actual rights rather than the exercise of those rights**)
- iii. **Congoo**: possession was confined (could only do certain things) & temporary, they **did not have right to exclude** (*purpose of legislation limits scope of rights granted*). depends on what rights are provided for by the legislation rather than what someone actually does

## FUNDAMENTAL CONCEPTS IN LAND LAW

1. **Possession** is good title against all but the true owner (or person with a better property interest)
  - a. **Lease** = exclusive possession. Rights against the world – can exclude the owner.
  - b. **Licence** = contractual. Can be exclusive. Rights against the contracting party
2. **Interests**
  - a. **Estates** → Freehold (fee simple and life estate), Leasehold
  - b. **Lesser Interests** → PP, Security interests (mortgage, charge), easement, covenant
  - c. **Equitable**: If there a contract w all of the essential terms, & in writing, it will generally be SP E **Bunny Industries; Walsh**
3. **Sale of Land**
  - a. **Exchange** **s 54A applies to all interests in land**
    - i. Valid contract – agreement, consideration, certainty, ICLR
    - ii. **s 54A** – writing + signed by the person to be charged (enforced against)
      1. If you can demonstrate acts of PP you can get around s54A
  - b. **Settlement Period** → Equitable interest – enforce rights against 3<sup>rd</sup> party
  - c. **Settlement** – transfer legal title
    - i. Torrens → Registration
    - ii. OST → Deed (chain of title)
  - d. **Lesser Interests** (same steps (**s 54A**) but often proceed straight to settlement
  - e. **Assignment of Existing Equitable Interests s 23C(1)(c)** (still need **s 54A** because land interest)
4. **Fixtures**: Presumption if attached by > than its own weight; look @ degree & object of annexation – intention to be part of land?

### Confusing s54A and s23C(1)(c) Conveyancing Act 1919 (NSW)

- On 15 May, A signs a contract promising to sell land to B for \$200,000 on 30 June.
- On 1 June, B signs a contract to sell the same land to C for \$300,000 on 20 June.
- On 20 June, B transfers (assigns) her interest in the land to C.

1. Is a contractual agreement to sell land to B. The contract is in writing and specifically enforceable, so B immediately acquires the equitable interest, but NOT because A intended to dispose of/transfer/assign the equitable interest to B, but because equity regards as done what ought to be done.

- s54A applies because it is a contract for the sale of land;
- s23C(1)(c) does NOT apply because there is no disposition of a 'subsisting' (existing) equitable interest. As the sole owner of the land, A does not hold the legal and equitable interest separately (Livingston). They are merged into one, so there is no separate, 'subsisting' equitable interest to be transferred to B.

2. This is also a contract for the sale of land. B only has an equitable interest in land, but if you read s54A closely, you will see that it does not say contracts for the sale of legal interests in land must be in writing, it just says contracts for the sale of land. A contractual agreement to sell an equitable interest in land must be in writing, just like a contractual agreement to sell a legal interest.

- s54A applies to this agreement. Because equity regards as done what ought to be done, C will acquire an equitable interest in the land, but not the whole equitable interest. B must still have some equitable interest because they have only agreed to sell their interest at a later date and they have not been paid.
- s23C(1)(c) does not apply because it is not an attempt to immediately dispose of B's interest, it is a contractual promise to do so in the future, on 20 June.

4. This is the actual disposition of B's equitable interest. It is not the contractual promise to give C the interest at a later date, it is the actual, "right here, right now, I am disposing of my equitable interest to you" and it needs to be in writing in accordance with s23C(1)(c).

1. **General:** Is not a system of registration of title but a system of title by registration **Breskvar**
  - a. Folio/COT which records all necessary info about the land. LPI will not complete new registrations of interest's w/o duplicate COT
  - b. Torrens assurance fund (if you lose money because of a flaw in the system)
2. **Registration**
  - a. **s 42(1) RPA:** RP has **indefeasible (undefeatable) title** (free from all other interests not recorded) immediate against all but fraudulent buyer **Frazer**
    - i. What is notified to a purchaser = everything that would have come to his knowledge if he had reasonably searched (title search referred to a document) **Bursill; s 40(1B) RPA** [assess the instrument itself]
    - ii. **Boundaries of Indefeasibility:** What if a void instrument is registered, how much is cured by registration?
      1. **Lease:** whatever is inherent/core to the property interest & not those personal/subsidiary covenants **Mercantile**
        - a. Right to renew so intimately connected to *term* granted, has priority via original registration **Mercantile** (CF option to purchase)
      2. **Mortgages:** mortgagor's covenant to pay enforceable on registration of void mortgage? **No** (NSW) **Grgic** (only security interest)
  - b. **s 43:** except fraud, **transferee not to be affected by notice of any trust or unregistered interest;** knowledge of any such trust or unregistered interest shall not of itself = fraud (i.e. not bound by unregistered interests)
    - i. Volunteer is not an exception to indefeasibility **Bogdanovic; Farah**
3. **Exceptions**
  - a. Volunteer is not an exception to indefeasibility **Bogdanovic; Farah**
  - b. **s 42 Fraud by Acquirer Breskvar** (earlier E in time unless postponing conduct)
    - i. **Who?** The person whose title you are trying to impeach (fraud must be brought home to the RP)
    - ii. **What? personal dishonesty or moral turpitude Butler;** wilful & conscious violation **Waimiha;** Dishonesty **Russo**
      1. It does not extend to highly negligence, carelessness, stupidity or want of due care **Hilton; Pyramid**
      2. **s 56C:** must take reasonable steps B4 registering mortgage to ensure mortgagor is RP...if actual/constructive notice that mortgagor was not RP = cancel
    - iii. **Where a purchaser is aware of an unregistered interest Loke Yew**
      1. **Knowledge of interest + made false statements to induce the sale** (gave assurances that weren't honoured) **Loke Yew**
        - a. Clear from circumstances *e.g. price paid*
        - b. Awareness of itself is not enough to constitute fraud **s 43**
      2. What if genuine in reps but changed mind later? Not fraud but may fit within in personam (unclear) **Bahr**
      3. Collusion designed to cheat a person out of a known existing right or to dishonestly trick the person not to register the interest **Waimiha**
    - iv. **Where someone had defrauded an earlier registered owner Russo**
      1. If you are aware of the deceitful behaviour = fraud (even if you did not participate in it)
      2. Fraud must be brought home to RP or to his agents...must have **knowledge** (i.e. they themselves or agents doing it) **OR suspicions were aroused** & abstained from making inquiries for fear of learning the truth **Mere Roihi**
      3. **Agency:** two ways the fraud can be brought back to the principal **Schultz**
        - a. **Agent involved in the fraud** → acting within scope of their express or implied authority? (Respondent Superior Test)
          - i. Is this **express or implied OR actual or apparent** authority **Schultz**
        - b. **Agent has knowledge of the fraud** → imputed with actual knowledge **Russo**
          - i. Except if agents own fraud, principal can give evidence to rebut presumption that agent communicated the fraud **Schultz**
      - v. **Where there has been a fraud against the registrar e.g. false attestation**
        1. **Fraud = dishonesty, a wilful & conscious disregard & violation of the rights of other persons Russo**
          - a. *She knew what she said was false but I do not believe that she has been shown to be dishonest...she had nothing to gain from the false statement except saving time/trouble. Nothing to suggest she should doubt the signature – no knowledge that mother had not actually signed. Didn't know the implications (her limited skill set) of what it would lead to. It was not wrongful enough*
        2. **Grgic** – tricked by impersonator, employee had no conscious knowledge of the falsity (or reckless indifference) → no fraud
    - c. **In Personam**
      - i. Examples: CTs, UI/UN, ETs, PPRTs, Contract for sale of land. Not really an exception, it is outside defeasibility...enforcement of personal claims against RP
      - ii. **What?** A claim against the person in law or equity that can defeat(affect) the indefeasibility of their registered title **Frazer**
        1. F vs IP → F (backward looking) is about the transfer process whereas IP can be related to any conduct of the RP
      - iii. **COA:** There must be a COA – legal or equitable (e.g. breach or misrep) – against the RP **Grgic**
      - iv. **With a proprietary remedy** under existing doctrines **Pyramid** (negligence only gets you damages)
      - v. **Unconscionability?** Mixed authority **Vassos, unlikely though White**
      - vi. **Examples**
        1. **Bahr** – *acknowledged option to repurchase, took transfer subject to the obligation & those rights were to be enforceable against them – sold but you hold it on trust subject to the agreement – claim in personam (option to repurchase was equitable). A purchaser who has notice, purchases on terms that he will be bound by the unregistered interest is subject to that interest. E will compel performance*
          - a. Fine difference between knowing of an unregistered interest and undertaking to be bound by one
        2. What happened in **Mercantile v Gosper?**
      - vii. Other