PPSA 1999

Definitions

Part 2 or general

- Receivership = one of the creditors (usually the bank) puts in a manager to manage the company to get it's debt repaid (if they are seriously defaulting on their payment obligations). Usually the receiver goes in and sells of the major assets of the company or the whole business.
- Personal Property: Includes chattel paper, documents of title, goods, intangibles, investment securities, money and negotiable instruments).
    - Consumer Good = acquired for personal or household use. Hire purchase agreement of fridge needs to be registered because if the buyer uses fridge as security for something else seller would lose out.
    - Inventory = Enter a general security agreement (GSA) for the loan over all assets of the business.
    - Equipment = finance company takes out retention of title clause. They have to register this, because if they put security on equipment to someone else they may lose out.
- Lease for a term of more than 1 year = lease or bailment. Can replace the word lease/leesee/leesor with bailment/bailee/bailor
    - It includes
        - A lease (or bailment) for an indefinite term
        - A lease for a term of 1 year or less that is automatically renewable or that is renewable at teh option of 1 of the parties for 1 or more terms, where the toal terms, including the original term, may exceed 1 year.
        - A lease for a term of 1 year or less where the lessee retains uninterrupted or substantially uninterrupted possession of the leased goods for longer than a year after the day they acquired possession of the goods, with consent of the lessor.
    - Does not include
        - A lease by a lessor who is not regularly engaged in the business of leasing goods.

INTRO to PPSA

Pre-PPSA

- New Zealand's system for registration of charges over personal property before the PPSA was complex
- Lacked cohesion - created uncertainty
- Scattered throughout different pieces of legislation - depended on the nature of the debtor (e.g. company or ordinary person), nature of the property over which security was given and the form of documentation (express as a charge, hire/purchase, lease).
- Different law for different security devices.
    - Chattel mortgages
        - Have to be registered under Chattel Transfers Act
    - Charges
        - Some charges would have to be registered under the Companies Act
    - Pledges
    - Retention of title clauses
        - No registration required.
    - Finance leases
        - Strong party could choose which type they wanted to adopt to suit their interests.
    - It would also make a difference if it was on a hire purchase system.
- Expensive.
- Needed fundamental reform.

Polymer Systems (1999) Ltd v Montgomerie and Ferguson

Facts

- Contractor agreed with counsel to build a water track. P agreed to supply pipes to CML, but legal and equitable ownership of the goods remains with P until full payment has been made (retention of title clause). CML could on-sell them but the sale proceeds had to go into a trust account for P. Security was now over proceeds in trust account.
- In April 2000 CML went into liquidation and then receivership (odd order).
- In June 2000 council paid $135,000 to CML and put proceeds of sale of pipes in trust account for P.? Receivers wanted to use that money to pay other debts, P wants the proceeds of sale of the pipes in the trust.

Issue

- It was not possible to tell what part of the money was attributed to the pipes. Can't have charge over the actual pipes because they are now affixed to the land.
- Liquidators = P lost their rights because it was not registered on the company register.
- P = they didn't create a charge because the goods didn't become property until they were paid for, so don't need to register under the Companies Act.

Held

- $25,000 was held on trust for P.
- Public Policy: contractual intention was clear, P should not be punished because of the form of the agreement.
- Found that P lost because they had not registered their charge under the Companies Act.
    - S 103: Non-registration makes security interest void against liquidators.
    - They came within the Companies Act because it was more than a mere retention of title clause, it had created a charge over the amount due from the council held on trust.
    - It is a charge over amounts owing.

This case illustrates the difficulties and confusion over where and what to register.

Now retention clause is expressly mentioned as a security interest that can be registered. It does not matter if title to the goods has passed to the debtor or not.

PPSA Creates

- Set of uniform rules - brings all kinds of security interests under the same category.
- Mechanism for perfection of security interest - Register that is computerised central registry.
- Comprehensive set of priority rules
    - S 66 Rules.
    - But also things like PMSI for temporary perfection priority, or s 95 for particular circumstances.

Objectives of PPSA

- Create a system that is:
    - Consistent
    - Easily understood
    - Inexpensive to maintain
    - Gives creditors and debtors freedom to regulate their affairs.
- Determine when an arrangement will give rise to a security interest.
    - A proprietary interest that is greater than the contractual obligation/personal right to be repaid.
- Facilitate the provision of credit to business, by enabling security to be given.
    - Lot of businesses need to borrow, but people won't lend if they just get a personal right to sue if they aren't paid back. Having a property right in the goods encourages lenders to lend because they feel more comfortable that they will be paid back.
- Protect innocent purchasers who buy goods from a retailer and want to be sure that the bank that has charge over all the business's assets can't take the goods back.
    - GSA: General Security Agreement.
    - Bank will commonly take a GSA charge over all of the assets of a business (present and after-acquired property) that included leased property e.g. stock, cash flow, money owing, equipment.
- Create a clear system of priorities if there is more than one creditor with security over the same goods.
    - For certainty and to ensure the system works smoothly.
- 1988 Report
    - All secured transactions, regardless of their legal and technical form, should be regulated in the same manner. (Consistency/Certainty)
    - Any purchaser in good faith of personal property should not be deprived of title because of the existence of a security interest of which the purchaser was unaware and did not have any means of becoming aware.
    - To ensure such purchasers can become aware of a security interest, and conversely secured parties can protect their secured interest, a simple and cheap registration and information system should be established.

What is a security interest?

- Not security in investment law - Financial Markets Conduct Act (you can invest in this interest).

- Security interest = granting someone, usually a creditor, a interest/security over personal property that the debtor has, such as a car, to secure repayment of a loan. This gives the creditor a property right in the debtor's personal property, so that if the debtor fails to pay off the debt the creditor can take the car and sell it to help pay debt.
    - Security over goods that a manufacturer gives to a retailer when the stock is not paid for up front.
    - Where a bank takes security over all the equipment and inventory of a business as security for making a financing facility available to the business.
- Creditor can have resource to the property itself because it is a property right, as opposed to just damages from a personal right.

Section 17 Definition

- An interest in personal property created or provided for by a transaction that <u>in substance secures payment or performance of an obligation</u>, without regard to the form of the transaction and the identity of the person who has title to the collateral.
    - It is about the substance of the agreement, rather than how they expressed their arrangement.
    - It is not the same as a common law interest, it is a statutory security interest.
    - It is a proprietary right because it gives the holder of the interest access to the secured property.
    - Every transaction that creates an interest in personal property to secure payment or performance of an obligation.
    - They do list some types that are security interests, but it does not limit what it can be.
        - Includes any interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, and a commercial consignment (whether or not the transfer, lease or consignment secures payment or performance of an obligation).
        - A person obligated under an account receivable may take a security interest in that AR under which person is obligated.
        - Fixed charge, floating charge, chattel mortgage, conditional sale agreement (e.g. retention of title sale), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, assignment, or a flawed asset arrangement that secures payment or performance of an obligation.
            - Romalpa clause and floating charge would also fall under PPSA. (Old language)
    - Must be consensual and must relate to personal property = collateral (definition is very broad).

<u>*J S Brooksbank and Co (Aust) Ltd v EXFTX Ltd*</u>

Facts

- B supplied wool to Feltex carpets. F went into receivership in 2006. Receivers took control of the wool and wanted to sell it to meet the banks debt. The wool had been supplied by Brooksbank and had not been paid for.
- Brooksbank had entered into the agreement being aware of F's financial difficulty. So the agreement provided that F had to pay for the wool before there was delivery, to get title. Due to human error, one of the Brooksbank team dispatched the wool before it was paid for. $130,000 value.
- Should Brooksbank have registered a security interest? Have they lost out in their security?

Held

- There was no security interest. It was clear F could not have possession of the wool unless B had received payment. SI wasn't necessary. F only had wool because of an error, and that wasn't contemplated in the agreement at all. It did not grant B a right to security if payment wasn't made.
- It has to secure payment or performance of an obligation. Mistake of delivery did not transform it into a security interest. PPSA does not apply.
- Wool should be returned to Brooksbank as it was never F's property that B could have an interest over.

<u>Farrar O'Regan Report to the Law Commission</u>

- Reform through PPSA was based on Art 9 of the Uniform Commercial Code (US) and the Canadian legislation based on Art 9.
- The touchstone of Art 9 is that all forms of security interest have the same fundamental purpose, namely to secure the debtor's promise to pay or perform an obligation. It is about form, not substance.
- Notion of who has title to goods is now irrelevant. You can have an interest in personal property if the agreement secures performance of an obligation even if the goods are not the debtors/title has not passed.
- Debtor can grant security agreements over goods they do not have title.
    - EX: If a seller uses a retention of title clause, this doesn't mean they have priority to goods over everyone else because they retain title. It is just a security interest under the PPSA that is subject to the priority rules. If they haven't registered the retention of title clause = lose out to another creditor.

Relevance to Insolvency Law

- PPSA is relevant if a business goes insolvent because that will affect their ability to pay debts, so there is a fight amongst creditors of who has a priority interest/ first claim to goods. Usually there is not enough money to pay all creditors, so it matters who gets priority to pay off debt.
- Unsecured creditors are the last in line (they only have a personal claim to company to pay debts). Creditors will want to claim against the personal property of the debtor.

How to give effect to Security Agreements under the Act

Personal Properties Securities Register

- The financing statement is registered, not the actual agreement.
- The register is electronic and searchable.
  - This means the debtor or secured party can look at this register in relation to their security interest, or for any person for the purposes of establishing whether personal property they are looking at dealing with is subject to a security interest.
- Timing is important for determining priorities.

Attachment

- When a security agreement "attaches" to a secured property, so security can be enforced against property.
- If issue is whether there is a security over property by one creditor, and there are no competing claims, the creditor just needs to establish attachment to have an effective security interest.

Section 40(1)

- **Level 1 attachment - if one creditor**
- A security agreement attaches to collateral when:
  - value is given by the secured party and
    - Value = Consideration = anything that supports a contract for consideration.
  - the debtor has rights in the collateral and
    - If a debtor holds property under a lease or on conditional sale terms (ie only has a possessory interest) that is enough to allow a prior granted security interest to attach to that property.
  - except for the purpose of enforcing rights between the parties to the security agreement, the security agreement is enforceable against third parties within the meaning of section 36.
    - (This means if there is only one credito claiming an interest in property this part is not needed).

Section 36(1)

- **Level 2 attachment - if more than one creditor.**
- A security agreement is only enforceable against a third party if:
  - The secured party has possession of the collateral or
    - This is less common, may occur with possession of chattel papers e.g. possession of the physical hire/purchase agreement.
  - The debtor has signed or assented to the security agreement that contains an adequate description of the collateral or a statement that it covers all present and after acquired property.
- Essentially agreement must be **in writing** and **signed by the debtor** to be enforceable against other creditors.

Perfection

- Tells us who has priority when more than one person has an interest in the property.

Section 41

(1)

- The security interest is attached to the property and
- A financing statement is registered in relation to this security interest or
- If the secured party, or another person on the secured party's behalf, takes possession of the security interest (except where possession is a result of seizure or repossession because the debt has been defaulted).

(2)

  - It doesn't matter which order attachment and perfection occurs.

Priority Rules

Section 66

- If more than one creditor registers a security interest on the security register, and debtor goes bankrupt or into receivership or liquidation, then we have to follow priority rules.

Rule 1: (a)

- A perfected security interest has priority over an unperfected security interest in the same collateral.

Rule 2: (b)

- Priority between perfected security interests in the same collateral (where perfection has been continuous) is to be determined by the order of whichever of the following first occurs in relation to a particular security interest.
  - The registration of a financing statement
  - The secured party, or someone on their behalf, takes possession of the collateral (except where possession is due to seizure or repossession)
  - The temporary perfection of the security interest in accordance with this Act
    - E.g. PMSI.

Rule 3: (c)

- Priority between unperfected security interests in the same collateral is to be determined by the order of attachment of the security interests.

Section 95

- (1)A creditor who receives payment of a debt owing by a debtor through a debtor-initiated payment has priority over a security interest in the funds paid or the intangible that was the source of payment or a negotiable instrument used to effect the payment.
  - Commercial practicality = debtor will have to pay creditors in ordinary course of business. Creditor gets good title to fund.
- (2)This applies whether or not the creditor has knowledge of the security interest at the time of the payment.
- (3)Debtor initiated payment = a payment made by the debtor through the use of a negotiable instrument, or an electronic funds transfer, or a debit, transfer order, authorisation, or a similar written payment mechanism executed by the debtor when the payment was made.

Stiassny v CIR

Facts

- Debtor was put into receivership by a bank.
- The receiver wanted to sell all the assets of the business to a partnership in Cayman Island companies for $621 million US. GST $127.5 million NZD was generated by the sale.
- The receivers were concerned that under goods and services tax act they would be personally liable for payment of GST, and they could be liable for penalty tax etc. Receivers decided to pay GST and then seek to recover it if they could establish they had no liability.
- The bank had a charge over all of the businesses assets, and this was registered.
- In reality, the receivers would not be personally liable. Because the money was only held on bare trust for the secured creditor, the money was the banks money. There was no way IRD could take the money.
- The bank said it had a prior claim to the amount received for sale, INCLUDING the GST component.
- IRD argues that despite the banks better claim, because of s 95 they get to keep the payment, as it was a debtor-initiated payment received on good faith, and in accordance with s 25.

Issue

1. Does the payment to IRD come under s 95, as a debtor-initiated payment?
2. Did the IRD act in good faith?

Held

Issue 1

- Priority rules in the PPSA overruled common law rules (Trust law), so it did not matter that the receivers only held the money on bare trust for the secured creditors, the IRD got good title to it.
  - Equitable title the bank might have had outside of the PPSA no longer matters.
  - If you have an interest that comes within the scope of the PPSA, the Act ascribes priority between different security interests and between SI and any other interest in collateral.
    - This supports purpose of statute. Long title = act to reform law in this area, and to provide determination of priority between security interests and other types of interests.
- The priority rules apply even though the debtor only has property on bare trust.
  - S 24: Title being in secured party rather than the debtor does not affect the application of the act.
  - Priority rules are unaffected by the level of indebtedness. Doesn't matter that if the bank got the money, the debt would not be satisfied.
  - All rules around bare trusts are overruled.
  - The IRD comes within s 95 because it is a creditor who has received a debt owed to them through a debtor initiated payment. S 95 gives them priority over the banks perfected security interest.

- Policy: Many debtors would be unable to pay their creditors and security interests would have a suffocating affect on the ability of the debtor to carry on it's business e.g. creditors would not accept incumbent funds as payment of a debt. Further, if secured creditors could reclaim payments made by the debtor, it would be difficult for the debtor to get credit in the first place.

Issue 2

- Section 25: all rights duties and obligations must be exercised in good faith.
- The court rejected this argument. A creditor is not prevented from claiming priority under s 25 simply because it had knowledge of a competing security interest. (s 25(2))
- IRD would have to have actual knowledge or notice that payment was in breach. IRD did not have actual knowledge here.

Conclusion

- IRD gets to keep the money, receivers lost the bank 127 million.
- If IRD didn't get paid, they would have been an unsecured creditor with no money because secured creditor ranks ahead.
- This case shows that PPSA is a law unto itself. Any secured creditor has an interest whose priority is determined by rules.

What if we changed the facts?

- If receivers use some of the cash to pay an electricity bill? But the money is subject to the charge of the bank. Would this be covered by s 95?
    - No unless it is paid under electronic mechanism.
    - But it would be covered under s 94.
    - S 94: a holder of money takes the money free of a perfected security interest if the holder
        - Acquired the money without knowledge of the security interest; or
        - Is a holder for value, whether or not the holder knew of the security interest at the time the holder acquired the money.
            - This covers take money paid in cash.
    - Issue if they are not a holder for value.
        - Electricity = holder for value because they gave electricity.
        - Harder to show this for IRD.

Structure

1. Does this arrangement constitute a security interest? (Section 17)
2. Has the security interest attached to the property, otherwise creditor only has a perosnal claim against debtor and no claim against property? (Section 40)
    a. Value have to be given by creditor
    b. Debtor must have rights in the property
        i. But having a right in possession will be enough
    c. If there is more than one creditor, security agreement must be enforceable (Section 36)
        i. In writing
        ii. Signed by the debtor
        iii. Contain an adequate description of the property
3. Have they perfected their security interest?
    a. Must register on security register or take possession of property.
    b. Priority Rules - S 66
        i. Rule - if both perfected, first in time = priority.
4. Section 45: If x has the priority security interest, their security interest will follow with the goods sold AND attach to the proceeds.
    a. Exceptions
        i. S 45 - "unless the secured party expressly or impliedly authorised the dealing"
        ii. S 53 - sale in OCB, unless buyer had actual knowledge the sale was in breach of the security agreement.
        iii. S 95 - debtor initiated payment.
            1. Exceptions to these rules: Section 25: all rights duties and obligations must be exercised in good faith
                a. S 25(2): if they had actual knowledge of the breach, not enough if new SI existed.

<u>How can security interests attach to something someone doesn't own?</u>

Pre-PPSA

- It was important to work out who had title of the property.
- *Nemo dat* rule: Person can only give what they have. If you only have a possessory right in something, you can only pass that possessory right to someone else.

PPSA

- Title is not determinative of who's security interest has priority. Doesn't matter the identity of the person who has the security interest either.
- If a bank has a GSA over all present and after-acquired property, as soon as the company enters into a hire/purchase agreement for a new machine and takes possession, the machine becomes subject to the GSA of the bank.
- *Nemo dat:* If you have a possessory right to something, that creates a statutory right under the PPSA that is like a proprietary right. So person with that statutory right can pass their statutory right to someone else, which is a greater right than just a possessory right.

Section 40(3)

- (The debtor has rights in the collateral requirement): A debtor has rights in goods that are leased to the debtor, consigned to the debtor, or sold to the debtor under a conditional sale agreement (including an agreement to sell subject to retention of title) no later that when the debtor obtains possession of the goods.

Graham v Portacom New Zealand Ltd

Facts

- Shortly after personal properties act came into force.
- P had some portable buildings and they leased them. They were personal property because they weren't fixtures.
- NDG needed buildings, so took 5 portable buildings under a lease.
- Bank had lent money to NDG prior to the leases under a charge (all present and after-acquired property) and registered a financing statement as soon as the PPSA came into effect. Portacom registered nothing.
- NDG went into receivership by the bank. Both bank and portacom claimed they had a right to take the portable buildings in satisfaction of the debt owing.
- Common Law - they

Issue

- Did the lease create a security interest? If it didn't, then the act didn't apply.
- Did the Banks security interest attach to the portable buildings?

Held

- Is it a security interest?
  - S 17: includes a lease for a term of more than one year. This includes indefinite terms and sometimes can include for a term of less than one year (in definition).
    - It falls within the deeming provision because the leases were for an indefinite term.
  - But it also could have been an arrangement to ensure performance of an obligation. Lease finances someone into ownership of a thing.
  - Therefore, portacom had a security interest in the building, and the buildings can be subject to the act, so subject to the bank's security interest.
- Did SI of bank attach to portable buildings?
  - Common law NDG cannot give what they don't have. Could only give the bank a possessory interest in the buildings.
  - S 40: NDG has a possessory right in the building as a lessee for goods of a term of more than one year that is enough of an interest in the leased buildings to allow PPSA to confer a statutory proprietary right in the buildings onto NDG. (essentially gives them apparent ownership as if it were a hire purchase agreement). They could pass on the right to the bank that would have priority over portacom. NDG is essentially treated as the owner of the leased goods. It doesn't matter that title remains with the lessor.
  - The charge was expressed to be over all present and future assets. As soon as NDG entered into a lease for portable buildings and took possession, it has a possessory right in the buildings that = statutory right under PPSA. Therefore, banks security agreement attaches to buildings.
  - Portacom tried to argue the wording of the banks charge did not have clear wording as per s 36 that the security interest was taken in all present and after acquired property.
    - But the court said saying "the charge was over all of NDG's assets" was close enough wording.
- Who has the priority security interest?
  - Bank had registered a financing statement, so had perfected their security interest.

        - Portacom did not register their security interest, so their interest was unperfected, and did not take priority to the banks perfected security interest.

What does this tell us about the effect of the PPSA?

- Sort of sucks for the leasee, they got their property taken away from them even though they had title, seems unfair.
- But at the same time, it will encourage people to secure their security interests which is better.

If it had not been a lease for more than one year e.g. lease for less than a year?

- This would mean 1) portacom would not be subject to the rules.
- But also it would mean NDG would not have a sufficient interest in the goods to grant a security interest to the bank over those goods, because it wouldn't give NDG the same degree of apparent ownership. It would not be within the kind of thing that could be granted as a security interest.

Rabobank NZ Ltd v McAnulty

Facts

- Syndicate owned a racehorse at the end of it's career. Sydancite arranged for it to go to a stud farm (SBL).
- Syndicate didn't receive any money from SBL for having the horse/from the arrangement. SBL just looked after the horse, and some of proceeds from mating the horse etc would go to Syndicate. Syndicate was profiting off the horse.
- SBL had entered into a financing arrangement with its bank before the arrangement with the horse. It was a GSA and rabobank registered that on PPS register. Syndicate registered nothing.
- SBL defaulted on repayment obligations to the bank. Bank appointed a receiver. Bank wants to take the horse. Syndicate took the horse back.

Issue

- Was the arrangement between syndicate and SBL a lease for a term of more than one year, so that the agreement was a security interest subject to the PPSA? (In which case, syndicate would lose priority to the bank as they did not register their SI)
- Or was it not a security interest at all so syndicate could keep the horse?

Held

- What was the arrangement?
    - It did not secure performance or payment of an obligation. Syndicate did not give them to horse, in exchange for payment. It was just a bailment [voluntary possession of another person's goods, with agreement to give it back at some point with an obligation that bailee will take care fo the goods]
    - Was it under one of the deeming provisions?
        - Lease for a term of more than one year?
            - It wasn't a lease, it was a bailment bc there was no rental or lease payment payable.
            - But it was for a period of 3 years.
        - What is definition of lease for a term of more than one year, and can bailment come under that definition?
            - (a) means a <u>lease or bailment</u> of goods for a term of more than 1 year.
                - So it can include a bailment.
                - Judge held that it wouldn't make sense not to read in bailment into the rest of the definition. So can replace bailment into the entire definition of lease for a term of more than one year.
            - **(c) does not include a lease by a lessor who is not <u>regularly</u> engaged in the <u>business</u> of leasing of goods**.
                - Business:
                    - It has to be a lease by a lessor who is intending to profit from the arrangement.
                    - Syndicate was not in the business of bailing goods, it's business was to profit from the horse, and bailment was incidental to that. They aren't intending to profit from the bailment arrangement itself.
                    - Australian PPSA says that a bailment for which a bailee did not provide value would not be a security interest. - Suggests same idea.
                - Regularly:
                    - It was a single one off transaction. Even if it has been in the business of bailing goods, it was not regular enough.
                    - Australia/Canada: Regular = if it is part or a component of their business, whether or not it happened on more than one occasion regularly. Not about frequency.

            - New Zealand - it has to be done more than once, it is an issue of frequency.
- Why are leases for more than one year a security interest and not all leases?
    - PPSA tries to capture financing leases.
    - Law Commission
        - Conditional sale contracts or hire/purchase agreements are security interests. Commercial leases are not that different because they create the same degree of apparent ownership. It often serves for financing the acquisition of the asset/ financing someone into owning something.
        - But a short term or operating lease will entail a lesser degree of apparent ownership, so not like those agreements.
    - The legislation could have said all leases that are financing leases are security interests but this would create uncertainty.
    - Bailments are included as well as leases because over long term periods it can have that same effect, but the exclusion if the lessor or bailor is not in the business of leasing or bailing goods will protect people particular in bailment situations when they are bailing something without intending to profit, as many people will enter into gratuitous bailments.
    - Court drew on canadian authority to support these arguments.
- The PPSA did not apply. There was no security interest in the bailment, so it could not be an unregistered security interest that lost to priority rules under the Act.
- SBL only had an interest as a bailee in the horse, and that did not give the bank the right to take a security interest over the horse. Ownership was still in the syndicate, and SBL could not grant a security interest over the horse itself (that would come under the banks GSA) so the bank did not get the horse, they could only grant a security interest over their right to bail.
    - "If the syndicate does not have a security interest in the horse, it is a third party holding title to the horse, and Rabobanks security does not attach to the horse but only to the rights held by SBL in the horse which are the rights of a bailee only under the terms of the agreement."

Purchase Money Security Interest

Issue with title

- Who is going to want to sell a machine to a company on credit/under a conditional sale agreement when they know that the bank can just take it if the company goes insolvent?
- The PPSA recognises a PMSI (commonly where a piece of property is sold to the debtor and money is left owing). A PMSI takes priority over prior registered non-purchase money security interest if registered in time.
- E.g. a conditional sale agreement could take priority over the banks prior GSA.

Part 2 Definition of PMSI

- A security interest taken in collateral by a seller to the extent that it secures the obligation to pay all or part of the collaterals purchase price; or
    - Pay back to seller over time.
- A security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights; or
    - Get money from a third party financier. Common with cars.
- The interest of a lessor of goods under a lease for a term of more than 1 year
- Does not include a transaction of sale and lease back to the seller.

Priority of PMSI

- Section 73: A PMSI in collateral or it's proceeds, other than inventory and intangibles, has priority over a non-PMSI in the same collateral given by the same debtor if PMSI is perfected no later than 10 working days after the debtor, or another person at the request of the debtor, obtained possession of the collateral.
- Section 74: A PMSI in inventory has priority over a non-PMSI if the PMSI is perfected at the time the debtor obtains possession (same day).

Balancing Objectives of PPSA

Three Fundamental Objectives

Basis of a sound system of regulation in personal property securities

1. Apply to all secured transactions regardless of their legal and technical form.
2. A purchaser in good faith should not be deprived of title because of a security interest they were not aware and did not have any means of becoming aware.

3. There should be a simple and cheap registration system to allow purchasers to be aware if there is a security interest over those goods.

Sections that reflect objective 2

- Section 45: Security follows the goods, unless the secured party has authorised the sale, in which case the security interest does not continue in the property (but does attach to the proceeds of sale).
- Section 53: whether or not the secured party consents to the sale, a buyer of goods sold in the ordinary course of business takes the goods free of any security interest, unless the buyer knows that the sale was in breach of the security agreement.
    - Buyer knows: this has to be actual knowledge of the agreement, and how buying the good would be in breach. If the purchaser is aware that a security interest may be in place, and makes no inquiries, they would not be said to know the sale was in breach.

The court are balancing the interests of buyers and the bank.

- **S 53 has to meet the objectives of continuing commerce without unfairly depriving a person of security over goods.**
    - If we didn't have this provision, it would be too incumbent on every consumer as they would have to check for security interests before purchasing. All inventory is inevitably financed, so it would happen everywhere. This would stifle everyday business because it would discourage purchasing.
        - This provision allows buyers to assume that any charge over assets sold would attach to the proceeds.
        - Normally, the sale by the trader will have been contemplated by the security agreement anyway. E.g. lender wants trader to be able to sell to make money to pay back debts. Proceeds of sale become subject to the financing arrangement = Circulating nature of assets.
        - But this provision still imposes risk on the lender that the debtor will sell goods that come within OCB, that was not contemplated by the agreement or sales that are not of inventory. In this way, the interests of buyers are preferred to that of lenders.
    - But on the other hand, lenders require protection from sales that are not in the ordinary course of business because that will often be when a company is going insolvent, and they are desperately selling stock to get money. The lenders won't get security in the proceeds of the sales because the money will go to another creditor or into a project that fails. Without protection, lenders would be disincentive to lend, which is not good for the flow of commerce.
        - This is protected by how the courts interpret "ordinary course of business"
            - If we adopt a broad definition of OCB, then when secured parties reliance on that covenant to prevent sales outside of the OCB is the strongest, the restriction of debtors ability to dispose of assets disappears. Benefits the buyer too much, and the lender not enough.
            - So we would adopt a more strict definition, to ensure security follows when sales are outside OCB.
        - Also s 45 - proceeds still continue to have SI attached to them. If sale in OCB, cash won't just disappear so lenders interests are protected. Lenders want sale in OCB bc that will give businesses $ to pay debt.
        - If purchaser is being deceitful bc they have actual knowledge of the breach, s 53 would not apply so SI would follow with the goods.
- S 95: Also protects objective of protecting flow of business, businesses need to be able to pay debts without SI following. Otherwise people would not want to provide services necessary for their business (e.g. electricity bills), businesses need to be able to deal with each other and have guarantee that they can keep money they are paid.

StockCo v Gibson

Facts

- Debtor was group of farms. In debt to bank. They buy land, convert it into dairy farms. Bank provided money and took security over all the livestock and property of the farms.
- The group wanted to sell cows to buy some more lands, and drought meant it was hard to feed all the cows they had.
- StockCo said they would be 4,000 cows and lease them back to help the group generate funds to buy a new farm. The bank had to give its consent to release the cows, because bank would lose security over cows but get security over the new farm.
- The bank started asking questions, so the group decided to not sell the cows. However, they needed cash to buy the farm, because they would lose their deposit.
- N farms was not subject to the bank's security interest because they were not part of the group. So, the group give 750 cows to N. N provides services to farm, N would sell the cows to StockCo and StockCo would lease the cows back to N, so the group would have cash to buy the land.
- When the group sells to N, no money changes hands because N buys it and the Group gives loan to N.

- The cows were never moved at all.

Issue

- Was sale of cows in the ordinary course of business, meaning that they took the cows free of any security interest?

Held

- PPSA must be interpreted in light of it's purpose.
    - Imposing on the bank the risk that the debtor will sell goods in OCB in contravention of the security agreement, to protect the purchaser, unless the purchaser was actually aware that it was in contravention of the security agreement.
        - No suggestion that StockCo new it was acting in breach of the security agreement.
    - But bank is protected in sale s that are outside of the OCB, particularly when debtor teeters on brink of insolvency to divest cash.
    - Can't take too broad of a definition of OCB to balance these interests/two commercial objectives of lenders and purchasers.
- Two stage test for OCB
    - **What was the ordinary course of the debtor's business?**
        - Debtor's business was to run a farm and sell stock, so sale makes sense under that.
    - **Was this particular sale in the ordinary course of that business? Para [77]**
        - *Where was the sale agreement made? E.g. ordinary business premises = OCB*
            - Normally on farms, this was conducted through lawyers.
        - *Who was the purchaser? E.g. Consumer = OCB*
            - Normally it was a consumer, buyer was a provider of finance.
        - *What was the quantity of goods sold? E.g. smaller amount = OCB.*
            - 4,000 cows = 15% of their herd. This is a lot, unusual.
        - *What was the price? E.g. Discounted price = Not OCB*
            - Discounted price suggests OCB.
            - Not clear here.
        - *Was it conducted by manager or senior staff? E.g. Done by higher ups = OCB*
            - Here the sale required a directors resolution, so not OCB.
        - *What was the reason for the transaction? E.g. Suspicious circumstances or in response to financial difficulties = not OCB.*
            - The group was in desperate circumstances to pay off the new farm.
            - They had already tried the transaction, which had been blocked by the bank.
            - It all happened on one day.
            - The cows never moved.
        - *Are the parties at arms length or related? E.g. Arms length = OCB.*
            - StockCo was at arms length, so probably neutral on facts.
        - *Frequency of the transaction? E.g regularly it is probably in OCB, one off less likely.*
            - This was a one off.
    - Overall, this sale was not in the ordinary course of business because of the unusual features of this particular transaction.
        - They raised funds in a unique manner
        - The way the transaction was implemented and negotiated was odd.
        - The money went through a lawyer's trust account.
        - The advancing of proceeds of sale to En was not in the economic interest of the group.
        - Lease back of cows gave no benefit to farm group, only N profited.

PPSA in Insolvency Situations

What is a mortgage?

- Mortgage is a different kind of agreement from the bank than a loan. A loan agreement you just have to pay the bank back with interest, and the bank has a personal right to sue if you don't pay. A mortgage agreement allows the bank to have a security interest over your house, so they have a property right in your house and can sell it to recover the loan.
- This encourages banks and financiers to take the risk and lend money to allow people to develop their businesses/grow the economy.

- However, mortgages only become relevant to PPSA, or have issues, when the borrower or debtor goes insolvent. Insolvency gives rise to these questions.

"Insolvency law is the root of commercial and financial law because it obliges the law to choose. There is not enough money to go round and so the law must choose who to pay. The choice cannot be avoided. The law must decide who is to bear the risk so that there is always a winner and a loser. On bankruptcy it is difficult to split the difference. That is why bankruptcy is the most crucial indicator of the attitudes of a legal system and arguably the most important of all commercial legal disciplines." - Philip R Wood

- Core principle: Pari Passu = All creditors should be treated equally. Each creditor should bear an equal portion of the loss.
- The secured creditor can stand outside this principle because they have direct rights in relation to the assets they have a security over.

Processes

Receivership

- Remedy only available to secured creditors under a contractual right entered into under the security agreement. Clause = if you default we can appoint a receiver.
- Receiver's role is to recover funds for the appointing creditor. Receiver has duties to the creditor, they are agents of the creditor, and they are subject to the Receiverships Act.

Liquidation

- Statutory process under the Companies Act.
- Liquidator generates funds to distribute to unsecured creditors. They aren't necessarily appointed by a creditor.
- Liquidator can challenge transactions leading up to insolvency that may defeat interests creditors have in the company.

Voluntary Administration

- Companies Act

Statutory Management

- For systemic situations e.g. if a bank goes insolvent.
- It will have systemic relevance to the country.
- This is less common.

Principles of the Credit Market

Money makes the business world go round

- All businesses have funding requirements
- All businesses (and people) face common commercial realities in relation to debt.
- Debt providers need to manage the risk of non-payment.

How do creditors get comfortable with credit risk they are taking?

- Some have many small debtors, that don't owe a lot. They would do less investigation on each debtor because the risk of large loss is less likely.
- Banks who lend a lot will do more investigation of credit position, revenue streams/cash flow, management personal, the industry generally, business balance sheet.

Basic business structure

- Assets, liabilities plus equity.
- Finance team focuses on the liability piece of the balance sheet.

Balance Sheet

- Want each side to be balanced by $$.

Assets = things you own. Have paid for somehow. - Cash - Receivables (future money) - Buildings = $$	Liabilities = borrowing, obligation to pay someone else. - Bank - Payables Equity = residual ownership interests in your assets. Contribution owner has made. - Paid up capital = $$

- Creditors want to know what the assets are (we can take good security over that), but until you look at the liabilities/equity you don't know if they actually have loose assets.
- Equity is the buffer that protects creditors from losing their money. If asset value goes down, it is equity that suffers that loss first. This protects the creditor.

- Ex 1: if customer goes insolvent, so receivables of business is less, the liabilities will stay the same and the equity is reduced.
- Ex 2: If there is no receivables, and equity has run out, the equity will go into negatives. This means even though balance sheet is equal, there is only x amount of assets, and what is owed is more.

- Some creditors aren't comfortable just relying on the equity buffer, so they take a security over the goods as it gives them direct rights to the assets and gives them an advantage over other creditors.
    - In Ex 2: bank would take $650 of what remains, they don't need to share it with other creditors. May have some distribution amongst creditors e.g. employees, holiday pay, sometimes tax does get priority. But if a creditor is not secured, they may not get anything if they try distribute it amongst all the creditors, so even if there is still a shortfall, secured creditors are still getting the absolute maximum you can get.

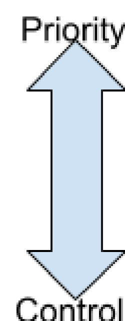
Debt v Equity

Debt	Equity

- Fixed term (have to pay on a fixed date)
- Have to pay interest that is a specified amount - that must be paid
- Fixed claim - must be paid to avoid insolvency
- Claims limited to amount due - no right to profits or residual assets
    - The bank can't get more than what they agreed if you are not going insolvent.
- No automatic control right - must be contracted & usually 'negative'.
	- E.g. shares in company
	- Perpetual/no fixed term - no date in which company has to repay a share. End date is when company gets wound up.
	- Dividends get paid instead of interest.
	- Dividends are not fixed in amount and depend on performance of the company.
	- Dividends are not obliged to be paid at any time or frequency.
	- Residual/contingent claim - must meet solvency test for any distribution.
	    - They can't pay dividends if the company goes insolvent because the money should go to creditors.
	- Entitled to entity's residual assets after fixed claims met.
	- Positive control through voting and appointment of directors.
	    - More risk involved, but it can pay off.
	    - Because of risk they get these rights.
	- Highest risk because it takes the first loss.
	    - If you want someone to give you an equity investment, you would want a higher return.

Capital Instruments

- The cost, risk and other characteristics of funding elements arise largely from their place in the capital structure.
- You have to pay everyone in the first level before you move onto the next.
- It is a priority v control paradigm. Top priority secured interest holders have less control rights compared to shareholders with less priority/security.



1. Secured debt: any senior debt may be secured by agreement
2. Senior debt (Bank lending, trade suppliers, factors): senior unsecured debt (pari passu) is the default setting. Any amount owed is in this bucket unless specifically agreed otherwise.
3. Sub debt/RPS: Primarily relevant for VC, financials, property
4. Retained earnings: profits that are not distributed.
5. Paid in share capital: usually, but not necessarily, in the form of cash.

Relevance to the PPSA

- The PPSA gives secured creditors a clear way to get maximum priority over other creditors.
- Even an unperfected security interest can put a creditor in a better position than if there were no security interest at all.
- PPSA also deals with how security interests rank at each level, e.g. of those with a secured debt who has priority?
    - Some of the rules you learn around PMSI ensures that credit can be available to debtors so they can run their business and keep the economy going.

To do

Native Title

Distinction between NZ and AUS

- Colonial NZ was not a place of forgetfulness concerning native title like Australia, although there have been undoubted shifts in judicial and legislative approaches across time.
- In the first decade of Crown colony administration from 1840, native title was situated within a larger context of jurisdiction, rights of government and sovereignty.
    - James Stephen - grappled with questions of how to relate pre existing indigenous ideas like hapu, and with new people bringing their own legal norms and assumptions. He notes there is a persistence of continuity of legality within Māori communities. There is a challenge as to extent of crown asserting sovereignty across the islands vs. the survival and potency of continuing indigenous authority in a material sense.
    - Memorandum by Justice Chapman - if the tribunals cannot have knowledge or awareness of these indigenous rights exercised over the land, does this take legislative activity to do so. *Symonds* did not believe in the existence of native title.
- Unlike Australia, NZ had a familiarity with considering the idea of native title in legal terms.
- Australian decision of Mabo was occuring within the colonial system. Native title is one way to recognise or reconcile indigenous presence and rights with the colonial regime.
    - Noel Pearson 1993: "With *Mabo*, the colonial system is saying: yes, we do recognise Aboriginal law in certain circumstances relating to land, but our law also says that there has been legal extinguishment of Aboriginal title in many circumstances"
    - This creates a strategic challenge: "If this is the situation - that Aboriginal law has restricted recognition and there is little prospect for an extension of that recognition through agitation of the common law - what strategies can we pursue to make Aboriginal law have consequence for our colonial condition?"

Mabo v State of Queensland (No. 2)

Objective

- Focus on reconciling a doctrine of tenure under English common law with indigenous proprietary interests, vulnerabilities of native title in terms of recognition and extinguishment.

Facts

- The claim was in relation to several islands in the torres strait. In particular, Mer, Dauar, and Waier.
- May depend on the date of when sovereignty was ceded.
    - When do we think of assertion of sovereignty in NZ. That will affect how we think of the status of indigenous proprietary interest.
    - *State owned enterprises v Lands 1987* - COA held that the effective date of sovereignty in these islands was when the proclamations of 21 May 1840 were published officially in the public gazette.

Issue

Para 19: Core issue in dispute was whether the legal consequences of annexation of the Murray Islands to the colony of Queensland (effective from 1 August 1879): whether the following claim on the part of the defendant was accurate: had the effective of 'vesting in the Crown absolute ownership of, legal possession of and exclusive power to, all land in the Murray Islands'.

- The crown itself is the owner of those islands to the exclusion of other parties, thus setting up the crown as the source of all subsequent rights and interest in or to land.
- The crown is seen as a distributive entity in terms of it's transfer of interests or creation of interests in third parties.
    - The case also references 1788 - when british arrived in port jackson, and references to the swan river settlement in 1829. These dates are important for assertion of sovereignty bc issue is what the status of preexisting rights are.

Held

Core principles

- Majority upheld a claim by the Meriam people to rights of possession, occupation and enjoyment of the Murray Islands under a communal native title sourced in their pre-sovereign laws and customs.
- Native title rights and incidents derive from a different normative system or regime. Common law provides recognition, but the rights derive somewhere else.
    - Like a venn diagram. Where the two circles meet is the form of recognition common law gives the rights and interests from the other circle.

        - Majority struggled with the fact that it was a story of non-recognition before the case. Recognition does not always persist, and neither does non-recognition.

Status of land within the Australian continent - Brennan J

- Para 42: Argument of the defendant (State of queensland): The rights that reside in the murray island are those of the crown as absolute proprietor.
    - Using *AG (NSW) v Brown 1847:* one decision amongst a trilogy of cases cited in support of the proposition that the crown became the absolute beneficial owner in possession of all colonial law - on first settlement, the event of which conferred sovereignty on the Imperial Crown.
- Para 43: He says there is a distinction between the Crown's title to a colony and the Crown's ownership of land in the colony.
- Para 45: With the arrival of common law in Australia, the basic doctrine of the land law is the doctrine of tenure, to which Stephen C.J referred to in *AG (NSW) v Brown 1847,* and it is a doctrine which could not be overturned without fracturing the skeleton which gives our land law its shape and consistency.
- Para 25: Tenure is the skeletal principle within common law and Australia. HC Australia is now the preeminent interpreter of what the common law is (just like how NZSC is in that position now too).
    - In discharging its duties to declare the common law of Australia, this court is not free to adopt rules that do not accord with contemporary notions of justice and human rights if their adoption would fracture the skeletal principle which gives the body of law its shape and internal consistency.
    - Australian law is not only a historical successor of but developed from law of England. But since the Australia Act 1986 the law is free of imperial control. Common law of this country may develop individually of English precedent.
        - Brennan J is starting to weave an argument that goes against English common law and what was said in *AG (NSW) v Brown 1847,* which was a strong assertion that the crown is a source of distributing title to others.
            - *AG (NSW) v Brown 1847:* "We are of opinion, then, that the waste lands of this colony are, and ever have been, from the time of its first settlement in 1788, in the Crown; that they are and ever have been, from that date, without office found, in the Sovereign's possession; and that, as his or her property, they have been and may now be effectually granted to subjects of the crown".

Radical Title

- Brennan J's device of radical title reconciles the crowns title to a colony without requiring that the crown's title effectively established proprietorship to the land within the colony.
    - reconciles the notion of the crowns assertions to sovereignty, whether in 1788, 1840 or 1879, and the presence of indigenous populations that were politically active and exerted material influence over landscapes.
    - coordinates the proprietary relations or interactions of the crown with such populations and the predicate of the doctrine of tenures that the crown is the source of proprietary title.
        - Ensuring that the crown becomes the preferred purchaser of interests in land that indigenous populations might possess.
        - If crown = preeminent purchaser, it can be in the position to grant titles to others onwards.
- Para 48: 'But it is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired the absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants.'
    - Brennan is distancing their view from *Brown.*
- There can be some variations to the rule, even if they might be hard to locate:
    - Para 48: if the land were desert and uninhabited, truly a terra nullius, the Crown would take an absolute beneficial title (an allodial title-land w/o other owners) to the land for the reason given in *Brown:* 'there would be no *other* proprietor'.
- Concept of recognition
    - Para 48: Tenure applies to every crown grant of an interest in land to third parties, but not rights and interest that do not owe their existence to a crown grant. Common law merely clothes native title rights in recognition, but their existence comes from elsewhere.
- Para [63] - Brennan J acknowledged that any pre-existing native title might be 'surrendered on purchaser or surrendered voluntarily, whereupon the Crown's radical title is expanded to absolute ownership, a *plenum dominium,* for there is no other owner"
    - Crown replaced previous owners with themselves.
    - Once this situation obtains, the Crown may then grant to others.

- Para [50] - Radical title is consistent with recognising native title, for radical title is a "logical postulate required to support the doctrine of tenure (where the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary power of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory)".
    - Once the crown has arrived, it can exercise through sovereign acts to enter into purchase transactions for indigenous territories. When this is valid, the radical title of the crown expands to become a form of absolute proprietorship.

Issues of non-recognition historically
- Para [57] - This allows court to say that sovereignty does not in and of itself extinguish native title to land.
    - The same reasoning in NZ might apply.
- Para [57] - Native title = interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged and the traditional customs observed by the indigenous inhabitants"
    - Are not derived from common law, just provides portal between one system and another.
- Para [62] - Brennan J acknowledges that since the intrusion of European settlement, numerous indigenous communities have experience disruption, have been physically separated from their traditional land/lost connexion.
- Para [62] - Once traditional native title expires, crowns title expands. Continuities have been interrupted because connexion has been so severed by disruption to communities by settlement.

Nature and incidents of native title - Pg 125 Materials
- Native title is effective against the state of Queensland and against the whole world unless the state, validly exercising its legislative or executive power, extinguishes the title.
- 'Native title to particular land, its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people, who by those laws and customs, have a connexion with the land.
- But Native title is vulnerable to extinguishment. It can be quieted or extinguished by various acts.

Extinguishment
- Para [70] - Extinguishment requires a clear and plain intention to extinguish Native title, by legislature or the executive.
- Para [76] But it doesn't require an express, subjective intention to extinguish native title or expressly phrased intention. So it may be held to be a clear intention by interpreting the implications of an instrument or legal transaction e.g. crown grants which vest 'in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title'. Or lands reserved for public purposes e.g. schools or hospitals would be inconsistent with the continuing of native title interests.
    - Important thing about mabo was non recognition of native title, there would never be actual words expressly extinguishing native title.
    - Have to analyse the degree to which native title would continue to exist despite the provision/grant etc.

Dissent: Dawson J

Consequences after the decision
- Led to Native Title Act 1993
- Mabo (No. 2) has a life in NZ case law, cited and referenced in cases like *Ngati Apa.*

Attorney-General v Ngati Apa 2003 (COA)

Background
- Background of the case is Te Ture Whenua Māori Act 1993, it is based behind a statutory regime, not common law.
- 5 judge bench case - important to deal with status of the *90 Mile Beach* case 1963 - authoritative on how crown saw foreshore and seabed in relation to any customary interests determined by a 3 judge bench. More judges on the bench to authoritatively overrule that case.
- Enacted in the context of other areas aquaculture issues between crown and different iwis.

Facts

Litigation was commenced in 1997 by eight Marlborough Sounds iwi who were dissatisfied with the management of local marine farming activities.
- They applied to the Māori Land Court in 1997 for orders declaring the land below mean high-water mark in the Marlborough Sounds, out to the limits of the territorial sea (12 nautical miles), to be Māori customary land, as that term is defined by Te Ture Whenua Māori Act 1993. "Wet part" of the beach. Land covered and uncovered, and then out 12 nautical miles from high water mark.
    - They applied for this under the Te Ture Whenua Maori Act- Pg 7. - s 129.2.A.
    - Not a common law action

Interim decision of Māori Land Court by Judge Hingston 1997 *Re Marlborough Sounds:*

- "I am of the opinion that a sovereignty title of similar import and characteristics to the radical title of the common law passed and the customary rights [to or in the seabed] (if any) still remain".
    - Same principle from *Mabo* is being constructed here.
- The Māori land court couldn't overrule *90 Mile Beach.* In regards to the impact of that case, the Judge said:
    - "When the Marlborough sound Māori were separated from their customary lands adjacent to the foreshore by purchase, the customary rights to the foreshore not included in the sales or not having been expressly extinguished since sale by an Act or other statutory instruments still remain"
        - He didn't accept the view that *ninety-mile beach* stood for the principle that just because land is sold to water mark, that the adjacent foreshore and seabed title was also extinguished.

The case came to the COA but there was no evidence/facts to establish.

- View of parties could save time by posing a set of abstract questions of law through a case stated procedure, so the ordinary courts would knock out some of the higher level abstract questions.
    - Para [6]: In reality, majority of the court didn't need to answer any question beyond question 1.
        - They did leave much undetermined.
        - But this technique is not without precedent.
    - Para [5]: Dissatisfaction with this procedure. The questions are not helpful and it is impossible to solve the legal points in them without the facts. When considering questions of customary property abstract questions are of little assistance and are often misleading.
    - Para [124]: The appeal should be allowed by the iwi parties, I agree only the first question should be answered, and the matter should be moved on with.

Issue

- Question 1: What is the extent of the Māori land courts jurisdiction under Te Ture Whenua Māori Act 1993 to determine the status of foreshore and seabed and the waters related thereto?
    - Status - language of s 129 of TTWM Act.

Background understanding

Thinking about property in Native Title Cases

- Property as a power relationship= about relationship vis-a-vis landscapes, things or other resources. It's a way of coordinating who has authoritative status to determine what can happen in relation to that space.
    - Accords certain decision making entitlements, including your entitlement to slice the property into portions of time interests that you give to others e.g. a lease.
    - A story of violence of disruption of power and politics. Conception of property as how we organise access to space. Who can speak to that space in an authoritative way.
    - Coordinating power relations relative to landscapes and resources, people (others generally or others in different capacities or with different affinities), through decision-rights concerning use and occupation.
    - Main questions are:
        - Who gets to determine those power relations?
        - And by which legal-policy mechanisms and/or institutional settings?
    - Tipping J: Property itself is subject to regulatory oversight. E.g. Resource Management Act is a regulatory overlay.
- *Te Arawa Lakes Settlement Act 2006, s 11:* crown retained crown ;stratum' which means the space occupied by water and the space occupied by air above the lake bed. Te Awara Lake Trustees/Iwi had Te Awara lake beds.
    - Issue: if someone was going to construct a jetty, they would have to ask for permission from the trustees and the crown, for the parts that touch the lake bed and the parts to traverse the water of the lake.

Te Ture Whenua Māori Act

- Elias CJ phrased native title as a common law issue when it is a legislative issue.
- It is incorrect to assume Māori customary land has no potency in it's status legally.
- All land in NZ can have 1 of 6 statuses
    - Maori freehold land, crown land, general land etc.
- S 129.2.A - land that is held by Māori is accordance with tikanga Maori shall have the status as Māori customary land.
- S 4: Tikanga Maori = Maori customary values and practices.
- S 145: No person has the capacity to alienate any interest in Māori customary land or to dispose by will of any such interest.

- S 144: deems Māori customary land to be Crown land within the meaning of the Land Act 1948 for certain purposes, such as 'preventing any trespass or other injury to the land or recovering damages for any such trespass or injury'.
    - Shows it isn't insignificant in giving power to determine who can occupy/traverse the space.
    - This resonates with the view that the crown had an underlying title interest in Māori customary land. (Similar to *Mabo)*.
- Alienation defined broadly in section 4 to ensure it is reserved from transfer, but contemplates in relation to Māori land, certain specific time bound 'alienations' (licenses and leases) e.g. forms of purchase are prohibited.

COA didn't engage with jurisdictional practice of land court in dealing with applications.

- Court didn't enter into questions/inquiries about the quality of one's physical connection with the land or whether the landscape permitted property interests at all/whether interests corresponded to a possessory title in or to the land itself.
    - The crown is making these kind of arguments to show the iwi do not have an interest in foreshore and seabed.
- Para 14: Māori land is jurisdictional: it is subject to the specialist statutory jurisdiction of the Māori land court. There way of application is very different from the high court because of application of tikanga Māori.
- How might the test of 'held by Māori in accordance with tikanga Māori' be applied given the above?
    - Counsel for the iwi referred to *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board*
        - The application concerned determination of title in favour of the Aotea Māori Tribal Committee to all islands and rocks off the coast of Aotea (Great Barrier Island) for which no title had ever been issued; and the ownership of a 4 acre island in Mangaiti Bay.
        - 1998: Māori land court said that under the 1993 act tikanga is contemporary rather than ancient. That the Act should remove this previous qualification of "tikanga" is consistent with the evolution of te reo Māori to meet modern circumstances and the acknowledgement of changes in social environment, for example, the broadcasting of cases in the COA and the Waitangi Tribunal"
            - Central issue is the identity of the people with the place. Māori concepts of whakapapa, whanaungatanga, tikanga, knowledge of practice to traditions, aroha. Relationships through marriage to a place, voyaging, occasional ritual battle war-ing.

Colonial system

- Our court is recognising indigneous rights in a colonial context, it is not an indigenous story.

The Crown's arguments

- Crown acknowledged that there are authorities to suggest colonial NZ is not a place for forgetting proprietary interest
- Para [50]: But it contended that the foreshore and seabed was to be seen as a special juridical space arising out of common law, legislation and different qualities of the space. Essentially, the legal assumption of native title over the surface of NZ has always ended where the land ends the sea begins.
    - This was the argument in *Ninety Mile Beach:* there is a presumption against private ownership of land on the margins of the sea or the land covered by it, and in favour of crown ownership. The court did not accept the contention in relation to foreshore land, and solicitor general here is content to limit it here to seabed land.
    - It arises because of the different qualities of land, and the public interest of recreation, navigation, and other use which makes private property interests unthinkable.
    - Crown argues: seabed was not a place for recognition of native title, relying on *Ninety Mile Beach.*
        - Conceded that foreshore was a place of recognition but applied *Ninety Mile Beach* reasoning to argue the Native land court process of investigating parcels of dry land on the other side of the high water mark had the effect of extinguishing any customary interests in the seaward side of the highwater mark.
- Para [48]: TTWM Act when talking about all land in NZ was only talking about dry land. To read the statute correctly we have to limit application/definition of land.
    - She expresses concern that if this was the case, there would be two jurisdictions for NZ. MLC would have statutory jurisdiction to recognise Maori customary land, but if interests to foreshore emerge that would have to go to HC, but if tikanga issues came up the HC would have to refer to MLC for guidance. This doesn't make sense.
    - Elias CJ holds that land under the act includes lakes, river and seabed.
- The crown supported these arguments with Australian case law. *Commonwealth of Australia v Yarmirr (2001)*
    - 4 out of 7 judges of HCAUS talked about fundamental inconsistency between continued existence of the exclusive rights and interest claimed and common law public rights to navigate and to fish. Goes against skeletal principle of the common law.
        - Order in Yarmirr surrounds very specific activity based rights like access, fishing, hunting etc.
    - Non-recognition thesis?

        - Minority Kurby J: said skeletal principle was not disrupted by claiming exclusive rights of title in foreshore and seabed. Exclusivity was qualified subject to public access to rights and fishing = reconcile the claim. Aboriginal laws and customs would supply the necessary traditional element as to what constitutes exclusive control and possession of sea country.
        - But this was never mentioned in the COA judgement.
- The decision of the three-judge bench in *Re the Ninety-Mile Beach* was directly in contention before the five judge bench in *Ngati Apa* concerning the effect of purchases on adjacent foreshore frontage land but also much more broadly.
    - Because most of NZ's dry land had been investigated by the MLC, any adjacent foreshore and seabed was implicitly extinguished by virtue of that investigation.
- Interests less than interests in the seabed itself might be recognisable, e.g. customary interests in fisheries. But these were not regarded as demonstrable of an interest in the land itself.
    - If we said there was native title in seabed, that would include sub-soil, space above the seabed covered by the water column (but not the water itself) and some of the airspace.
    - It would also allow the ability for trespass action to be taken, and you can't alienate customary land e.g. licenses, leases, easements and mortgages.

Held

Key Points:
- Māori Land Court has jurisdiction to determine the status of the foreshore and seabed...
- Para [37]: New Zealand was not a place of forgetfulness as to the presence of indigenous proprietary rights upon the arrival of the Crown in 1840 AND Para [19] and [34]: These rights continued until extinguished.
- Para [63] and [76]: Extinguishment implies an expropriating effect that abrogates pre-existing proprietary rights (not for instance a mantling regulatory effect).

Extinguishment
- Para [148]: Extinguishment to be evidenced by a clear and plain intention: the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain.
    - Para [161]: It need not be expressed explicitly or precisely - to be approached interpretatively. (Same as *Mabo)*. Critical difference between vesting of crown under territorial sea legislation and act line the Coal Mines Amendment Act in 1903.
    - CMAA - "save where the bed of a navigable river is or has been granted by the crown, the bed of such river shall remain and shall be deemed to have always been vested in the crown, and, **without limiting in any way the rights of the crown thereto**, all minerals, including coal, within such bed shall be the absolute property of the crown"
        - Not just commenting on radical title by vesting, but the absolute proprietorship/ownership.
        - These rights continue today by the s 354(1) RMA.
    - What is a navigable river?
        - River is continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks.
        - Or to the public for the purposes of navigation by boats, barges, punts or rafts.
            - May have some dry spells as long as it is navigable sometimes that is fine.
            - Doesn't have to be super deep for navigation threshold.
    - 2006 Te Awara Lakes Settlement retained the crown stratum - space occupied by water and air, but the trustees would control the lake bed.
        - The reason for this decision was because of the Native Land Amendment and Native Land Claims Adjustment Act 1922 that claimed the lakes of Rotorua/Rotoiti for the crown. It stated:
        - "The beds of the lakes mentioned in the Second Schedule to this Act, together with the right to use the waters of the said lakes, are hereby declared by the property of the Crown, freed and discharged from Native Customary Title, if any"
            - This is clear intention to extinguish title.
            - If any = crown disagreed that Māori had claim to lakes. This settled a dispute.
- Para [47] - What is of significance in the current appeal is the NZ legislation has assumed the continued existence at common law of customary property until it is extinguished. It can be extinguished by sale to the Crown, through investigation of title through the Maori land court and subsequent deemed crown grant, or by legislation or other lawful authority.

        - Subsequent deemed crown grant: The Native Land court had a process of identifying and ascertaining proprietary interests in land, and issuing a crown grant to identify proprietors for that land, so it was a way of transforming what had been Maori customary land into crown land.
        - Legislation: *Coal Mines Act Ammendment Act,* and *1922 Lake Legislation.*
- Para [48] - It is accepted by the Solicitor-General in his submissions that in NZ the Crown had no property in "ordinary land" (land above the high water mark) until it first validly extinguished the proprietary interests of Māori. It was only when native proprietary interests were extinguished that the land became part of what Martin CJ in *R v Symonds* called "the heritage of the whole people". It is argued, however, that the position is otherwise in relation to foreshore and seabed lands. (Go to crown arguments section, at Para [50])

<u>The chief justice holds the Māori land court does have jurisdiction to determine whether foreshore and seabed up to 12 nautical mile limit can be characterised as having the status of Māori customary land under the TTWM Act.</u>

<u>How does she construct a narrative to show they do have jurisdiction?</u>

- Para [37]: First, a foundational historical perspective predicated on specifically identified precedents to which Her Honour returns in subsequent cases e.g. *Tamihana Korokai v Solicitor-General*
    - "The Crown has not assumed that land could be taken or kept by the Crown from the Natives unless the Natives ceded their rights to the Crown"
    - The case concerned the status of Lake Rotorua - submerged land (lake beds) not unlike the foreshore and seabed - and the case queried whether 'the Native Land Court has jurisdiction to inquire whether the bed of the lake in Native customary land in respect of which a freehold order can be made by the Native Land Court"
    - They held the Native Land Court did have jurisdiction. From 1918, the Native Land Court receives a number of applications seeking the court's determination of the status of land in those lakes. But 1922 legislation ends that native title in the lakes.
    - Para [68] - She gathered passages from this case: "Stout CJ described how from the beginning of the colony it has been recognised that the lands in the Islands not sold by the Natives belonged to the Natives' and that "all the hold authorities are agreed that for every part of land there was a Native owner".
- Secondly, findings as to the content and extent of proprietary interests in the foreshore and seabed were held to be contingent on evidence yet to be produced:
    - Para [9], [8] and [10]: Whether or not the applicants will succeed in establishing in the Maori Land Court any customary property in the foreshore and seabed lands claimed and the extent of any interest remains conjectural (based on incomplete information).
    - Para [34]: The extent of any customary property in foreshore and seabed is not before us… Property rights may be abrogated or redefined through lawful exercise of the sovereign power.
        - Purchase transactions by the crown, or the crown promoting through the HOR legislation.
    - Para [49]/Para [129]
- Thirdly, the statutory language of 'vesting' in the Crown need not suggest anything more than the stating of rights of sovereignty and radical title e.g. in the Territorial Sea legislation of 1965 and 1977.
    - Does not mean all proprietary interests are nullified.
- Fourthly, the CJ weaves a specific common law interpretative tale of NZ's colonial regime, differing from the Crown's arguments in key respects, and overcoming earlier precedents that weren't consistent with the narrative she was trying to tell.

<u>Radical Title</u>

- Elias CJ observes the significance of radical title to the Court of Appeal's approach, like Brennan J is *Mabo.*
- Para [30]: the radical title of the Crown is a technical and notional concept and is not inconsistent with common law recognition of native property.
- Cites Brennan J's reference to 'radical title' as a '"logical postulate required to support the doctrine of tenure (where the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary power of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory)".
    - Māori customary land did not rely for it's existence on the crown, it predated the arrival of the crown and continued after it's arrival.
- Out to 12 nautical miles is all a place of radical title. All vesting that occurred were not expropriatory, they did not purport to nullify customary interests.
    - [Para 160]: do the provisions in the territorial see acts extinguish that land if it did exist?

        - That seabed vested in the crown is not inconsistent with the continued existence of Maori customary property, the vesting in the crown is of the radical title. Merely vesting in the crown does not extinguish.

<u>Addressing the Ninety Mile Beach Argument</u>

    - In this case the question was if you are investigating title that is adjacent to the foreshore, is that tile that's adjacent extinguished as well?
    - Para [157]: The Majority disagreed with Gault P. Overruled *Re the Ninety-Mile Beach* decision - conveyancing presumptions ought not to be given a wider impact.
        - This is saying you are applying a conveyancing transaction presumption, and using that as a way of removing rights held in accordance with Tikanga Maori.
        - Para [205]: Tikanga Māori is the key factor. Have to look at how that provides, you can't assume the courts investigatory process is sufficient to remove any adjacent customary interests.
    - Para [88] - Critical paragraph in Her Honour's assessment.
        - It is conceivable that valuable tribal resources e.g. foreshore were not susceptible to sub-divided ownership, where as land of cultivation was. Māori land court would have to decide this as a question of custom and usage. An approach which precludes investigation of the fact of entitlement according to custom because of a presumption that custom is displaced because of sovereignty or because the sea was used as a boundary for individual titles on the shore is wrong in law.
            - This echoes Elias' arguments as counsel in the *Whanganui River Report 1999*
            - She notes that with a riverbed if the native land court were to investigate the river side of the river, you couldn't assume the customary interests to the river bed adjacent to those parcels of land were also extinguished. Hesitant to rely on non-evidential assumptions of law.
    - Para [85]: Elias CJ makes clear that the common law in England is not the same as the common law in NZ. <u>Local circumstances displaced any English common law presumption of Crown ownership of the foreshore and seabed pursuant to prerogative right.</u> This presumption was rebuttal by the presence of indigenous communities with their own legal regimes and entitlements to proprietary interests.
        - Para [88]: Just as an investigation by the MLC to the title of customary land could not extinguish any customary property in contiguous (adjacent) land on shore beyond its boundaries, I consider that an investigation and grant of coastal land cannot extinguish any property held under Māori custom in lands below high water mark.
        - If there is a proprietary interest in foreshore it is at first instance a question of tikanga.
        - On the facts, it may be that where the sea was described as the boundary for land sold or in respect of which a vesting order was obtained, an inference can be drawn that the customary interest of the seller or grantee is exhausted.
        - It's possible that the hapu community may have a greater interest than the greater proprietors of the parcel of land being investigated by MLC. Greater collective community interest may have not regarded it's proprietary interests as having passed, or been transferred, when they have?
    - Elias CJ: *Ninety Mile Beach* is wrongly decided because it was premised on the idea that when crown got sovereignty of NZ they got ownership of all the land (absolute beneficial title).
        - This case confused radical title with ownership.
        - It was decided based off precedent from *Wi Parata* which Elias says is bad law, and was inconsistent with other precedent which recognised native title.

<u>Addressing the argument that foreshore and seabed is a special juridical space with it's own legal norms</u>

- Para [55]: Elias CJ said as a matter of language (as opposed to legal treatment of property) I am unable to draw a distinction between lake beds or river beds and seabed. Both lake beds and river beds have been the subject of claims to the MLC without jurisdictional impediment.
- Why should seabed and foreshore be treated separately under MLC? It may be property interests of Māori are harder to show for seabed, compared to foreshore.
    - This phraseology is important here. Test of declaration of Māori customary land is held in accordance with Tikanga Māori. But phraseology is important for how the government uses some of the phrases to explain and justify it's legislative responses.
        - "Just as it may be easier to establish occupation and exclusion of others in relation to dry land than to foreshore"

        - "But properties in both are not considered to be unthinkable by Fenton CJ. He was able to identify areas below the low water mark in respect of which property interests might be established as a matter of Māori custom."
- 'Land' under the TWMA 1993 - for jurisdictional purposes the definition of land under the act contemplates submerged lands. Cannot draw a distinction between seabed, foreshore, lakebed and riverbed land.

Elias CJ relies for her account on *Regina v Symonds 1847*

- It cannot be too solemnly asserted that Native title is entitled to be respected, that it cannot be extinguished otherwise than by the free consent of the Native occupiers.
- Important factors of Symonds is the argument before the SC specifically relied on the treaty of waitangi, in saying that the second article of the treaty in the maori land version did not require the crown to be placed in a pre-eminent position of exclusive purchaser by virtue of preemption.
- But the Judge side-stepped the Treaty of Waitangi. Chapman J: "It follows from what had been said, that in solemnly guaranteeing the Native Title, and in securing what is called the Queen's pre-emptive right, the TOW does not assert either in doctrine or in practice anything new and unsettled".
    - Mashing of common law and the treaty that survives in how judicial officers interpret it today.
- Problem that law does violence to history:
    - Courts fashioning an idea that if colonial officials had interpreted the law correctly there would have been less disruption in terms of colonial settlement.
    - James Belich: Legal scholars skirt close to the edge of two intellectual traps. A determinism centred on one's own field of expertise, in their case legal, and the retrospective utopianism of reform by appeal to a mythical golden age. It is not the law itself which is at fault, the argument runs. It was fine until led astray by legal positivism and its agent Prendergast. All we need to do is to repair the damage. understand the law better, and it will solve our problems for us.
    - This is not a sustainable idea given how the colonial apparatus worked.
- This comes up in the appellants own arguments
    - We are talking about Tikanga Māori under TTWMA, we are not talking about common law legal doctrines.
    - Under the TTWMA, customary land status is not insignificant. It has legal force. You can't alienate Māori customary land, or dispose by will such interest, and you can take trespass action through the crown.
        - Alienate = includes "the making or grant of any lease, license, easement, profit, mortgage, charge, encumbrance or trust over or in respect of Māori land", it does not include "the granting for a term of not more than 3 years (including any term or terms of renewal), of a lease or license over or in respect of Māori land or any interest in Māori land"
    - This was the statutory regime under challenge through the reasoning of the ordinary courts.

Dissent: Gault P

- He agreed with the crowns view of *Ninety Mile Beach.* It is impractical to think Native Land processes would have left foreshore and seabed untouched because it was set up to investigate all land in NZ, and to accord it's status recognition.
- Para [121]: "It does not seem open now to find that there could have been strips of land between the claimed land bordering the sea and the sea that were not investigated and in which interests were not identified and extinguished once Crown grants were made. If there should be any residue...it must be regarded as having been reserved out of the grant, in which case the radical title would remain, now no longer subject to any Maori customary claims".

Implications of the case

The series of questions without evidence

- Court said it was unhelpful, would have been better to have evidence.
- They only answer one question. Yes, MLC does have jurisdiction.
- The abstract nature of the case revealed certain assumptions in the COA as to Māori customary land that did not appear to align with the breadth of the statutory jurisdiction in TTWMA 1993.
    - The court uses common law vocab throughout which does not assist.
    - Para [129]: the questions do not identify the nature of customary land at issue or any incidents in which status is determined
    - Para [46]: It is not clear to what extent the new jurisdiction equips the Maori Land Court to recognise interests in land according to custom which do not translate into fee simple ownership. In NZ, the common law recognition of property interests in land under native custom is little developed.
- In 2003, policy makers contemplated this reasoning in a way that was probably not what the judges anticipated.

Effect on law of property

- Firstly, there was an assumption that customary proprietorship in NZ was a diminishing category in public policy within NZ but cases like *Ngati Apa* showed this was not the case, this was a misapprehension.
    - It poses a reinterpretation of foreshore and seabed (2003-2004, 2011) but other landscape features or natural resources e.g. rivers (2012, 2014), flowing freshwater, ports, infrastructure issues. Water = common law assumption is no one owns flowing water. Do local circumstances in NZ displace such a presumption?
- Secondly, the context of customary property has driven certain legislative design with public law significance eg avoiding proprietary rights language, as with 'non-ownership' or certain Treaty settlements using 'legal personality' (with proprietary attributes)
    - MCAA 2011 - no one owns foreshore and seabed.
- Thirdly, crown started to promote legislative regimes that contained narrower statutory portals of recognition, which have mattered more than non-statutory or common law modes of recognition. The general policy preference has been to enclose the legal recognition and expression of 'customary title' or rights within a purely statutory framework e.g. Foreshore and Seabed Act 2004, Marine and Coastal Area (Takutai Moana) Act 2011.
    - Rather than saying "held in accordance with tikanga maori", now we have very precisely termed provisions that require attendance and consciousness of Tikanga Māori when going through a process of evidence of proof.

What happened after the decision

- Foreshore and Seabed Act 2004
    - COA decision came out June 2003.
    - Decision to propose a legislative solution, 18th August 2003 in response to Ngati Apa.
    - Released into public through cabinet policy decisions, December 2003.
    - Urgent hearing in the Waitangi Tribunal in Wellington in Jan 2004.
    - Waitangi Tribunal Report on *The Crown's Foreshore and Seabed Policy*
    - Foreshore and Seabed Bill, April 2004
    - First Reading, 6 May 2004
    - Royal Assent, 24 November 2004
- Maori Commercial Aquaculture Claims Settlement Act 2004
- Marine and Coastal Area 2011
    - In part because of nationals coalition with Maori Party, this party was formed from MPs splitting from labour due to labour's decision.
- Te Arawa Lakes Settlement Act 2006
    - Political settlement
    - No waitangi tribunal report - direct negotiations and non-comprehensive.
    - Important idea for *Ngati Apa* that you cannot distinguish submerged lands from where they are. The principles obtain across landscapes e.g. lakes, riverbeds, foreshore and seabed out to territorial sea limits.

Foreshore and Seabed Act 2004

Section 13

(1) On and from the commencement of this section, the full legal and beneficial ownership of the public foreshore and seabed is vested in the Crown, so that the public foreshore and seabed is held by the Crown as its *absolute property*.

- [Example of trying to be as clear as possible using linguistic tools to demonstrate extinguishment]]

(2) Subsection (1) replaces all previous statutory vestings in, and acquisitions of title by, the Crown in respect of any area of the foreshore and seabed.

(3) Subsection (1) does not affect customary rights that are able to be recognised and protected under Part 3 or Part 4.

- [It allows the continuity of certain rights but not others].
- Rights of public access, navigation and fishing rights are allowed to be recognised.
- Shows how one should conceive the foreshore and seabed differently from dry land.

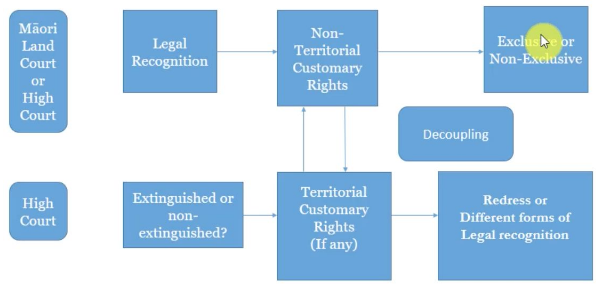
(4) The Crown does not owe any fiduciary obligation, or any obligation of a similar nature, to any person in respect of the public foreshore and seabed.

Comparison with Yarmirr

- As above, majority order was focused on allowing continual use of the land for activities and access. Minority believed the qualified ownership would not interfere with this, and that aboriginal laws would identify what constitutes exclusive control and possession of sea country.
- The Act's policy clearly started to slice those rights up.

Non-territorial Customary rights and Territorial customary rights/Customary Marine Title

Non-territorial rights (not unusual in NZ: *Te Weehi v Regional Fisheries Officer)* - Activity based, or use rights for specific purposes. - Not attaching to the land itself. - Right to extract natural material	Territorial customary rights (Customary marine title under Marine Coastal Area Act 2011) - Customary Marine Title and protective customary rights as well in applications under the Act. - Interest in and to the land itself, whether covered by water or not. Exclusive use and occupation.



Customary Rights

- S 13(3) - Non-territorial customary rights and exclusive or non-exclusive rights still have legal recognition/were protected
- Act decoupled those rights from territorial customary rights.
- High court given jurisdiction in relation to territorial customary rights, and MLC given jurisdiction for non-territorial customary rights (or sometimes High Court)

Section 32

Principal test for whether there are territorial customary rights

- Territorial customary rights in relation to a group, means a customary title or an aboriginal title that could be recognised at common law and that
    - Is founded on the exclusive use and occupation of a particular area;
    - Entitled the group, until the commencement of this part (November 2004) to exclusive use and occupation of that area.
        - It is not saying held in accordance with tikanga Māori. Using the phrase of exclusive use and occupation, similar to Canada.
        - Int'l cases might help determine what exclusive use and occupation might mean, and then challenge for courts is how NZ courts should apply this given our circumstances.

Vesting absolute property in the crown under s 13(1) means that if there were any possible territorial customary rights in the land, they are extinguished.

Canadian Legislation

- Elias CJ mentioned some of the canadian cases in passing.
- But policy makers used the reasoning to help justify the legislative response to *Ngati Apa.*
- *Tsilhqot'in Nation v British Columbia:* exclusivity should be understood in the sense of intention and capacity to control the land. Whether the claimant group had that at the time of sovereignty depends on fact and various factors like characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Regular use without exclusivity may give rise to usufructuary Aboriginal rights, but for aboriginal title the use must have been exclusive. If there is present occupation there needs to be shown a continuity between present and pre-sovereignty occupation.

Evidential issues

- Relationship of groups to land compared to other groups. Shows legislative regime change.
    - Section 32(3): they stated that mere spiritual and cultural association with the area, unless manifested in a physical activity or use related to the resource could not be considered.
    - Public rights of navigation are not inconsistent with exclusive use and occupation: no mention of public rights of fishing…
    - Section 32(5): if the area of the public foreshore and seabed over which a group claims a right to exclusive use and occupation was at any time used or occupied by persons who did not belong to the group, the right must be regarded as having been terminated unless those persons
        - Were expressly or impliedly permitted by members of the group to occupy or use the area; and
        - Recognised the group's authority to exclude from the area any person who did not belong to the group.
- Non-commercial fishing was allowed to be taken into account.

By extinguishing everything and allowing certain rights to continue the act becomes very specific about those rights that continue. This common with most acts in this area now.

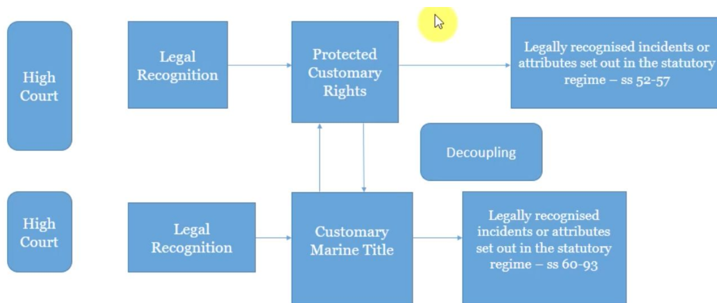
There was some doubt whether it actually meant the extinguishment of Māori customary rights, but Helen Clark clearly said "the negotiations means the Government accepted those iwi would have a strong common law claim for customary title had their rights not been extinguished by the legislation".

Section 96

- Ability of AG to enter into a recognition agreement for territorial agreement that would have existed but for the act.

Marine and Coastal Area Act 2011

- This act accords some specific statutory recognition for indigenous rights and interest in the coastal marine area.
- Waitangi Tribunal kaupapa inquiry into the Marine and Coastal Area (Takutai Moana) Act 2011 accorded priority in 25th August 2017. Questions by Tribunal:
    - To what extent, if at all, are the MACA Act and Crown policy and practice inconsistent with the Treaty in protecting the ability of Māori holders of customary marine and coastal area rights to assert and exercise those rights?
    - Do the procedural arrangements and resources provided by the Crown under the MACA Act prejudicially affect Māori holders of customary marine and coastal area rights in Treaty terms when they seek recognition of their rights?
- Status of these interests = not of the state. Non-governmental rights and interests. Private interest.
- Helen Clark 2017 - issue is about relationship of public rights and private rights. How do we reconcile public rights, which the state is a custodian of, and the possibilities of non-public rights residing in communities that aren't state communities?
    - Being able to have foreshore and seabed as public land is a essential part of being a NZer. People came to NZ to get away from class-ridden England.
- Currently 202 active applications for a High Court order for recognition of marine and coastal customary rights and marine title under the Act.



- Both types of rights are under the jurisdiction of the high court.
- Call territorial customary rights = customary marine title.
- Call non-territorial customary right = protected customary rights.

Section 6

- Any customary interests in the common marine and coastal area that were extinguished by the Foreshore and Seabed Act 2004 are restored and given legal expression in accordance with the Act.
- Any application under this Act for the recognition of customary interests must be considered and determined as if the Foreshore and Seabed Act 2004 had not been enacted.

Section 11(2)

- Neither the Crown, nor any other person owns, or is capable of owning, the common marine and coastal area, as in existence from time to time after the commencement of this Act.
    - This in effect accords with radical title even though the name is not used.
    - We don't need to have something like section 96 from 2004 act. We have the possibility of those rights being recognised, but the way in which those rights can be exercised are statutorily contained in a way that is different to how we would conceive customary title under the TTWMA.

Section 9

- Defines marine coastal area
    - on the landward side by the line of mean high-water springs
    - On the seaward side by the outer limits of the territorial sea (12 nautical miles)
    - Includes beds of rivers that are part of the coast, and includes airspace above, and the water space e.g. suboil, bedrock but not the water.
- Common marine and coastal area, is any area other than
    - Specified freehold land

        - Any area owned by the crown e.g. conservation/national park/reserve etc.
- 1993 TTWMA took this into account
    - Land = crown land that is on the landward side of mean high water springs, Maori freehold land that is on the seaward side of mean high water spring, but does not include the common marine and coastal area.
- Issue with who has rights to what because of where rivers start and end etc. It's like a mosaic.

Paki v AG

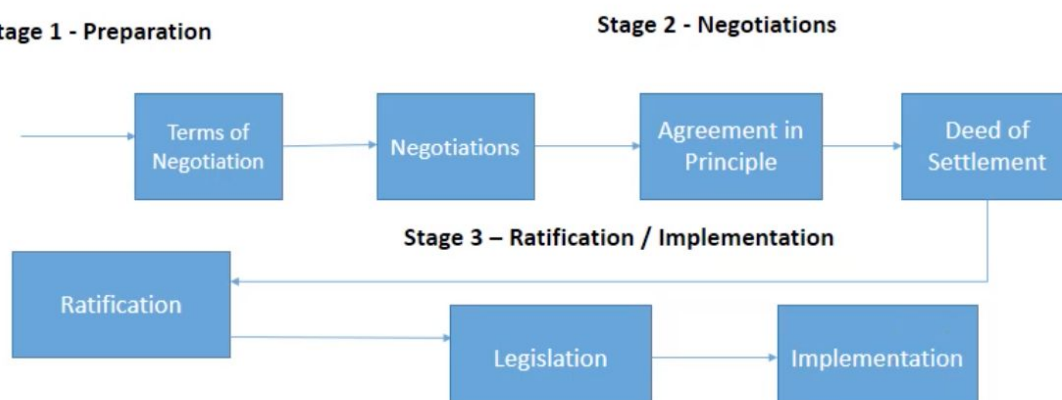
Facts
- The crown had ownership of some land next to the Whanganui river.
- If the water wasn't navigable, then it is there's under the Coal Mines Act.
- The parties were in agreement that the Crown obtained with the riparian lands title to the adjacent stretch of river to the middle of the flow, in accordance with a presumption of the common law (ad medium filum).
- It was also agreed, the impact of s 14(1) of the Coal-mines Act Amendment Act 1903. If it was navigable river, they own that part.
- Many power stations are along this river, in control of SOE, which created more issues of who was the successful claimants of the river.

Issue
- Is this is a navigable part of the river?
    - Do you segment rivers into navigability or do you look at the entire river? Or from a certain point it is non-navigable anymore.
    - What is included in the definition of navigable river? (talked about above)
    - Was it used for public benefit of transport?
- Can ad medium filum apply in NZ?

Held
- The segmented approach was appropriate. This part of the river could not be treated as navigable under the definition.
- There is no evidence of through traffic along the river from the part concerned. Only maybe some use for pleasure, and this wasn't extensive.
- Why does this matter?
    - Para [68] - cession of sovereignty to queen of england did not affect property of Māori. Stout CJ: this has been recognised that all land had a native owner until lawfully extinguished by the Crown.
    - Common law presumption is able to be rebutted by such circumstances. You cannot rely on ad medium filum. The parties were the wrong parties to claim an interest in the river.
- Issue of courts coming up with innovative/inventive causes of action which have the effect of rendering irrelevant other statutory areas of concern.
- The iwi's claim in Paki that the crown has a fiduciary obligation to them, a claim does not confuse the role of the courts with the waitangi tribunal. Waitangi Tribunal are not legally forceable. Claims of property rights are properly brought to the court.

Context - Policy

Treaty settlement process



Tenure and native title

Concepts

Tenure = common law historical concept. The crown has absolute beneficial title over the land. All title can be traced back to the original crown grant over the land. Tenure describes the relationship between the crown and the subsequent people in possession who are holding that land.
Estate = describes the relationship between the person who "owns" the land and that land. Estate is the interests/rights a person has in that land e.g. freehold (all rights less than the crown) or less than freehold. Estate doesn't give full rights of ownership.
Native title = rights that indigenous people had to the land before colonisation.

Common Law - What is the position of the common law?

- Mabo
    - Brennan J:
        - Sovereignty brings with it the common law, including the doctrine of tenure.
        - Judges cannot fracture the skeletal principles of the common law like tenure, because the whole system of land is based around that idea.
        - Australia
    - Dawson J (dissent):
- Ngati Apa
    - Elias CJ:
        - Sovereignty brings with it the common law, including the doctrine of tenure.
        - But the doctrine of tenure must be adapted to local circumstances.
        - The Māori were here first and owned the land for native title.

Tenure - Can native title exist with tenure?

- Mabo
    - Brennan J:
        - When you get sovereignty that doesn't mean you get absolute ownership over all the land.
        - Native title continued in the land sovereignty being vested in the crown.
        - Sovereignty does not give the crown absolute beneficial title over all of Australia.
        - Sovereignty gives the crown radical title = the first right of purchase or extinguishment of native title. At any time the Crown can extinguish native title in a fair and valid way.
        - Radical title only gives automatic ownership of land where there is no other proprietor.
        - This does not conflict with tenure because all land (gained by the crown) still extends from the crown in a crown grant. But tenure does not apply to rights that do not owe their existence to a crown grant (native title rights that existed before).
    - Dawson J (dissent):
        - Sovereignty brought with it the common law, including the doctrine of tenure. Because of this when the crown acquired sovereignty the crown became the absolute owner of the land, and all native title was extinguished. Any rights in the land must be derived from the crown, and any rights must be less than absolute ownership.
- Ngati Apa (Elias CJ)
    - Adopts idea of radical title gained upon sovereignty, like Brennan J.

Native Title - What is the position of native title?

- Mabo
    - Brennan J:
        - Native title exists without recognition of the crown because it has always existed.
        - If the Crown wants to extinguish native title they have to do so expressly and with plain intention, in a legal way or with the consent of the native people e.g. by purchase.
        - Once the crown has taken ownership of the land in this way, radical title becomes full ownership, the land is subject to the doctrine of tenure and all this land extends from crown grants.
    - Dawson J:
        - Native title rights can only exist if the crown actively recognises them, otherwise they are extinguished by the mere fact of the crown not recognising them. This fits with tenure because all rights come from the crown.
        - The recognition may be passive by allowing the continued occupation of the land by the indigenous inhabitants.
- Ngati Apa (Elias CJ)
    - Native title exists without needing to be formally recognised by the crown.

- Native title must be expressly extinguished by the crown as discussed by Brennan J.
- All land in NZ extends form a Crown grant except Māori customary land which still holds native title that hasn't been extinguished. (Most land has been extinguished by having been taken expressly by the crown).
    - When land is returned to Māori it is Māori freehold land because it was given from the crown, subject to rules of tenure.

Terra Nullius/Common law precedent

- Mabo
    - Brennan J:
        - Terra nullius - the land was empty when it arrived, no proprietors.
        - Enlarged terra nullius - racist conception that people on the land were so backwards they don't have a proprietary interest in the land because they don't cultivate the land, or use it in a way understood by colonisers.
        - We should reject this concept of enlarged terra nullius. International law no longer allows classification of land as terra nullius if there are people there. Just because terra nullius was the basis on which the crown imposed sovereignty over NZ does not mean we have to let it dictate the consequences of sovereignty.
            - Enlarged terra nullius view supports the view that sovereignty makes the crown the absolute beneficial owner of all the land.
            - Therefore, we can say that sovereignty gave the Crown radical title, and tenure does not extinguish native title.
    - Dawson J (dissent):
        - He didn't say anything explicitly about terra nullius, but his position accepts this doctrine.
- Ngati Apa (Elias CJ)
    - NZ does not have to deal with issues of terra nullius because the crown did not gain sovereignty on that basis.
    - Issue in NZ is common law precedent. Is the idea of the radical title consist with precedent?
        - *Wi Parata* - Prendergast J's view that Māori had insufficient social organisation on which you could found proprietorship. Therefore, native title didn't exist. Suggested when crown gained sovereignty over NZ they gained ownership of all the land.
        - Elias rejects this case as it is bad law. We should not follow it. There is precedent against following it.
            - Before *Wi Parata,* there were cases that had recognised native title as existing despite sovereignty.
            - After *Wi Parata,* some cases followed this cases but other cases continued to recognise native title.

Intro to Land Law

The scope of land law (in a property law course)

What are the kinds of interests that can exist in terms of land?

- Basic, incomplete list of property rights that can exist in relation to land
- This list of rights are all lesser interests in land than having title. We have to ask what is the nature of these things, and what bundle of rights do you get from these things, to determine whether there is ownership?
  - Can use Honore's list of rights.
  - Lease is a fairly large bundle of rights because you get to use, manage, shut the door on the landlord. But you can't make significant changes to the house.
  - An easement is more like one right from the bundle.
    - Raises questions of who should pay to maintain the road, the owner of the land or the person with the right of access through an easement.
    - What happens if the person with the easement uses the land is a reckless or excessive way? Can the owner of the land vary or cancel an easement?

Titles

- Title could be another way of saying does someone have ownership. The idea of title is mediated through historical conceptual ideas of tenure and estates.

Mortgage

- Bank lends money, they take security over the house, you have to pay back the mortgage. If you fail to make payments, they can take the house and sell it to repay debt owed.

Lease

- Much of the bundle of rights that you have are not drawn from basic concepts of land law, but they have been codified in the residential tenancies act.
- Get away from common law baseline.

Easements

- *Escrow Holdings* - example: ability to grant access.
- Easement is granted when you want to give a right of access to another person across your land. E.g. grant owners of back section rights over your driveway so they can get access to their land. Whereas Covenants are promises about that land, what you do on the land.

Covenant

- A covenant is a promise between two people about land, it can be either a personal or proprietary right. It's personal when two people have made a promise. It becomes a property right when it's registered on the land register. Once it is a property right you enforce it against third parties. So if A and B sell their land, the right still continues to be attached to the land. If B sells to C, A can enforce the property right against C.

License

- It's not a property right in the common law's concept of a property right. It's just a permission to be on somebody's land.
- Different to a lease. A license has a different effect on third parties, and previously it would affect regulation. Regulatory system of protection of when landlord can cancel the lease because functioning of business is so important. If landlord wanted to avoid that regulation they could just grant a lease instead.

Ownership

- Need to ask what is the physical ownership of land? Where do rights extend to?
- We don't need to know much about the details of ownership because prima facie it is an exclusive right to do what you want with the land, except where ownership rights are regulated by legislation or common law e.g. Resource Management Act, Criminal Law, Nuisance.

Land law in the legal system

Common law

- Tort law, Contract, Public Law, Family and succession, Trusts, Environment

Statutory Regime

- Property Law Act 2007
  - It amends and regulates basic concepts of land law.
    - Example: Used to only be able to have an easement if you owned land nearby, so that a right of way would give some benefit to the other land. You couldn't have an independent free standing right. PLA got rid of this. You can have an easement in gross (without dominant land).

        - The act presupposes that you know the basic common law concepts.
- Land Transfer Act 2017.
    - Completely changes the basis of ownership of land that existed at common law.
    - Introduces the Torrens registration system
        - Before: Ownership of land is derived from a private transaction (e.g. hand over title, make your own K). Individuals are creating the property right. Derivative title comes from some private possessor of the land.
        - Now: You cannot own land unless you register your interest on the state register. You can have a contract of sale, but the purchaser cannot get legal ownership until registration.
        - Exceptions to this rule: Māori customary interests, the crown can own land outside of the system, small amounts of land not held under the LTA.
    - Section 3 - Aims
        - Security in ownership
        - Clear and accessible because it facilitates easy transfer (will know if other people have interests in it)
        - If you lose your interests you'll get compensation from the government.

Māori customary tenure

Land - Real property

Land is different than personal property
- It is permanent (mostly)
- Unique (location)
- Scarce as it is not interchangeable.
- Valuable.
- Has capacity for multiple uses.

How are property rights to land different than property rights to personal property?
- Have to register rights in land before they kick it.
    - Different way of registering security interests for personal property from the PPSA.
    - Land register. Don't have a priority system, just clear person with title, and people with lesser rights.
- The way you have to demonstrate possession is different, a bit harder to show e.g. been there for a certain amount of years, as opposed to physical possession.
- There are more interests that can exist in relation to land like mortgages, easements, covenants etc.
- Ownership - you cannot own the land itself, you can only own an estate because the crown has beneficial ownership (from tenure).
- We have a registration system because:
    - it is one of the most expensive assets someone will ever own. We want to ensure secured ownership e.g. know we are buying from the real owner, and that we are the true owner, so no one can appear and take the land away.
    - We also want to know what property rights bind the land e.g. easements.
    - While there are transaction costs, the importance of its role for certainty pays off.
- Personal property - possession is more crucial, because ownership is registered does NOT determine ownership.
- With personal property, title is more secure because it's harder for the original owner to know that you have possession.
- You can't abandon land in the same way that you can abandon personal property.
    - Personal property - as soon as it is abandoned someone can take it
    - Real property - have to go through a more complex process, and the passage of time is required so that the original owner loses their right (as per Limitation Act)

Personal actions v real actions
- Real actions:
    - When someone has a property right to a unique thing they have a unique remedy e.g. give me the thing, not damages. Land is valuable, unique and can't be replaced with money so you have a remedy to the land in its particular location with its particular benefits/specific performance.
- Personal property:
    - The remedy is damages of the value of the chattel or another chattel that is substitutable.

Tenures

Property Law Act 2007 - Current Law.

- s 57(1) - "A crown grant of land, or a certificate of title or computer register having the force and effect of a Crown grant of land, whether issued before, on, or after 1 January 2008, for an estate in fee simple confers on the person named in the Crown grant or the certificate of title or computer register a right of freehold tenure (free and common socage) without any incident of tenure for the benefit of the Crown"
- You don't owe services to the crown like you had to before (incidents of tenure), and you don't have to make socage payments to the crown.
- S 57(2) you also have a right to transfer land, without asking the crown.
- S 57(3) - you cannot have subinfeudation. If you are passing on or alienating your estate, they don't owe you anything.
- S 58(1)(a) - Fee tail estates are abolished, but this does not prevent a person from setting up a trust and nominating particular beneficiaries in the trust.
- S 58(1)(c) - You can't pass an estate just by handing over possession (certain interests in the land)
    - Transfer of possession where current owner and future owner exchange dirt, with witnesses, this is abolished.
    - You can't pass title to an estate for sale and purchase of land - estate passes once you register title.
- S 59 - there can be continuance of future interests or present or existing rights to possession of the estate e.g. if someone has a life estate and someone else gets granted a fee simple estate later, once the first person dies, the second person gets a title. The second person has a "future estate" that is valid. This right can be assigned.
- S 61: the life estate can only last as long as a leasehold estate does.

Concepts

Looking at what is ownership and in what ways we own land, brought by the English system, as opposed to how other interests can burden ownership.

- Tenure and estates = You don't really own land, you own an estate of the land because of tenure.
    - Leasehold title = Lease gives a kind of ownership right because you get to use the land and keep out everyone else for a time.
    - Freehold title = buying a house = a stronger sense of ownership than a lease because ownership is indefinite
- The landlord and the tenant have a relationship.
- Freeholder is holding the land from the crown.

Can you 'own land'?

Allodial = own land

Tenure = hold land

- In theory, no one owns land. The crown owns all the land, directly or indirectly, on one or other of the various tenures, and they grant you an estate from the crown. No subject can hold land allodially.
- The mode of holding land is derived from feudal times, so it is quite dated, but we still need to talk about these concepts to understand the basis of our land law.
    - One commentator argues we should get rid of these concepts because it leads property of land to be an abstract right rather than a physical source.

Historical Origins of Tenure

Feudal Society

- Rights to land are based on personal relationships of reciprocal obligation between lords and their subjects, with the lord protecting and granting access to land, and the subject's loyalty and service.
    - Lords to surf, it is a politico-socio economic structure. People declare their allegiance to someone higher up for protection, and they will give services to their lord for that protection.
- Norman conquest of 1066 creates a 'perfect' feudal system over the whole of England, with all lands ultimately held from one lord - King William I.
    - Some historians say England had feudalism beforehand, but William unified all of England. He specified the feudal pyramid which used to end with the top lords in each place, but now ended with him since he was the lord of all lords. He had the ability to pass out feudal rights in England.
    - He didn't displace the existing feudal patterns, but took control of them and granted continuing rights to rule over their territory.
    - It is as much political and it is economic, because the system is about paying homage to your superior, the king.

System of Tenure

- **King → Tenant in Chief → Mesne Lords → Tenant in demesne → (Villeins)**
- All land is held of the King, in return for continuing service rendered.

- Those who hold from King - tenants in chief (lords)- may themselves set up feudal relationships called ‘subinfeudation’.
    - If one transferred the land you are substituting yourself with that person in the pyramid. This meant a change in political relationship so a fine had to be paid.
- Subinfeudation adds another rung to the feudal ladder, so that there may be multiple relations of lord and tenant, down to the ‘tenant in demesne’ who is in actual possession of land and who has ‘villeins’ who actually work the land for him.
    - Tenant in demesne are the lowest people, other that villeins who are essentially slaves.
    - Villeins don’t have any title to the land.
- There is no restriction to the layers of subinfeudation, could have many Mesne lords of lower ranks below other Mesne lords.
- 1920 subinfeudation was abolished in England, so you could only substitute ownership for the land. But the theory still exists and infiltrates our law and concepts.

Classification of tenures

Unfree tenures
- Have to stay for their entire life, basically slaves.
- “Tenure in villeinage” or “copyhold”

Free Tenures
- Spiritual - helping the lord in a spiritual way.
- Military - to maintain William’s military might in England and against others in UK or France. Provide certain amount of knights.

Non-military
- Agricultural tenure
- Free socage, “freehold”

Incidents of tenure:
- Aids - if lord is taken for ransom, have to pay that for your your lords.
- Wardship - if heir is not old enough to look after the land, the lord will act as a ward and do it for them in the meantime, but you have to pay them above usual services.
- Relief
- Escheat - if you don’t have any heirs who can take your place in the pyramid the lord can choose someone else to take your place.
    - Early on, many tenures were converted to socage. Inflation occurred, so then incidents of tenure became the valuable thing for the lords.

Tenure in NZ - Its place and its effects.

R v Symonds 1847
- Common law flows in with taking of sovereignty by the British.
- Feudalism exists in NZ as well.
- All titles must have come from the crown.

Reality
- The idea of tenure is important as a conceptual matter to make sense of old concepts in the Property Law Act. But tenure itself doesn’t really mean anything legally. People own their land.
- Kirby J: Tenure is already a fiction in England.
    - It had been for many years, including in their law because incidents, socage and subinfeudation was abolished. As people die without heirs the rungs of the ladder go away and eventually people just hold directly from the crown.

Law Commission
- They recommended we could get rid of the ideas of tenure all together. Just say that everyone is the allodial owner.
- Key reason: people don’t understand this language. It isn’t necessary and it confuses people.
- But you would need to update all the acts, and it’s quite difficult to convert the theory of tenure or allodial concepts. Would need new language for things. It doesn’t have any practical effect, so not really worth changing it.

Native Title Rights and Interest
- *Mabo* - debate about what tenure means for native title.
    - They quote Salmond J - there is a difference between imperium and dominion/radical title and absolute beneficial title.
    - Tenure is about radical title, it is not about absolute beneficial ownership.
    - This can coexist with native title.
- *Ngāti Apa* - Para [27] - they finish full quote by Salmond J

    - He says that the distinction between territorial sovereignty and ownership is to some extent obscured by the feudal characteristics of the British constitution. In legal theory grantees are merely tenants of the crown, the legal ownership of the land remaining vested in the crown. So when new colonial possession is acquired by the Crown and is governed by English law, the tile so acquired is not merely territorial, but also proprietary. When NZ became a British possession, it became not merely the Crown's territory, but also the Crown's property, *imperium* and *dominium* being acquired.
    - Native title being a political obligation had been extinguished by the idea of tenure.
    - Elias CJ: says Salmond was wrong, and other people understood tenure as about creating a relationship between the crown and tenants, not automatically being absolute beneficial ownership.
- Reinterpretation of tenure has been important to allow recognition of native title rights. Reinterpretation because for a long time AUS/NZ had a view that is was about absolute beneficial ownership.
    - Law Commission: What would doing away with tenure do to the recognition of Māori customary rights? Would it place other people higher than Māori customary owners? How would we recognise Māori as having an allodial title?
- To understand some of the language and arguments to do with native title we still need to understand the idea of tenure, but it doesn't have any practical significance and technically we could do away with it.

<u>Estate</u>

Intro
- The doctrine of estates described the relation between the tenants and the land itself.
- What was the nature of the interests each person on the feudal ladder had in the land?
- They had an 'estate' in the land, which existed alongside all the other tenants' own estates
- That estates was basically <u>temporal,</u> defined by the 'time in the land' that it gave the tenant.
    - A slice of time that you have the land for.
    - "Property rights in land are projected on the plane of time".

Classification of Estates according to the Duration
1. Estates
    a. Freehold: uncertain duration
        i. Fee simple
            1. Unlimited amount of time. Current owner of estate, when they die it goes to the heir.
            2. This could be destroyed through <u>escheat</u> for treason, or if you died without an heir.
            3. Now, administration act will find someone to give it to, and if not it will go back tot eh crown but this is unlikely.
        ii. Life estate
            1. I give this land to X for life. Limited duration of estate to that person's life, but this is indefinite bc don't know when they will die.
        iii. (Fee tail)
            1. Instead of being inherited by anybody, it can only be inherited by linear heirs. If there is no son, and the linear line runs out, that fee tail comes to an end.
            2. Why do we have this?
                a. Want to tie up land in a dynastic fashion within a family, indefinitely, don't want people to be able to alienate it, sell it off.
            3. Can we have this today?
                a. Only exists in equity if you set up a trust in land. But nobody really does that.
                b. Can't have this as a legal right on the register.
        iv. Stratum Estate
            1. Similar to a fee simple estate.
            2. Unit Titles Act
                a. Complicated scheme of providing for the ownership of shared buildings.
                b. Makes it easy to parcel out particular apartments in a 3D manner.
    b. Less than Freehold: date of terminate is fixed or can be fixed.
        i. Leasehold/Periodic Tenancies
            1. Estates with a particular determinate period of time.

Kinds of estates on the land register

- Fee simple, life estate, stratum estate and leasehold estate could get written on the register.
- Fee tail could be set up in a trust structure, but they are bound to hold that property in equity for the benefit of certain persons within the concept of a life estate because a trust says that is what is supposed to happen.
- Most people will have fee simple on the register to keep the land title simple.
    - Could do anything through a mechanism of trust e.g. life estate, determinable fee simple, conditional fee simple (end upon an event).
    - Even though these things could be noted as legal conditions on the title, it is more common they would be set up as a trust, and the land register just says fee simple. But usually you would set this up as a trust.
        - If someone has a life estate as a beneficiary under a trust, the person who holds fee simple title is bound by the trust to give effect to the life interest.

Possession and Adverse Possession

What role does possession play?

- Ownership of land is recorded under the land transfer act, you get title there.
- But LTA is not everything for ownership of land or ownership interests in the land. There are ways to get ownership of land outside of the land transfer system.
    - Common law position: Title gives right to the possession of land. Possession is a root of title. Relativity question of who has better title?
- However, possession will not bind the owner of the land under the LTA (some exceptions).

Asher v Whitlock

Facts

- Tom Williamson has enclosed land.
- In his Will, he leaves his wife a life estate: as long as she lives, or until she remarries after.
    - When you create a complex form of property, you need to figure out what happens to the rest of the rights or if the estate does not apply anymore.
    - Reversion: if you give son the land, and son dies, the land would go back to you.
        - This wouldn't work for Williamson because the life estate came into effect after he died.
    - Remainder: Daughter would get the fee simple estate once his wives interest was gone (until she dies or remarries).
- Whitlock marries the wife before the daughter dies, so the wife loses her interest to the estate. However, Whitlock had lived on the land with the wife, so had possession of the land.
- Daughter specified that her fee simple estate would go to Asher upon her death.
- The daughter dies, and the wife dies.
- Asher argues the land is theirs because of the remainder of the estate.
- Whitlock argues he has earlier possession, so has better title to the land.

Held

- Of course, possession creates title.
- Whitlock has created his own possessory title that's good against the world, except the person that can show a better title/title earlier than the current possessor. (This is just like relativity of title question).
    - The fact of possession is prima facie evidence of a fee simple estate.
- But while you can generate title this way, you can generate title that you can transfer to others and they can use that title. Asher's title is derived from the daughter, but also her father Tom Williamson, who derived his title from possession of the land.
- Tom Williamson had prior possession to Whitlock.
    - Why can't we just use feudal system? Look at the lords?. This system collapsed in terms of practical reality, all titles eventually was held from the crown. But we don't have all the records of the crown grants. So we have to assume presumably the person who has current possession was granted the land, has the estate from the crown. But this language is a fiction, possession is still protected, and it is similar to possession of chattels.

Title on possession

Hinde McMorland and Sim - Land Law

- Because of the existence of the land transfer system, the principles in relation to ownership of land in common law are not relevant often. The register determines who is the owner and concepts of possession are mostly put to the side.
- However, the land transfer system is superimposed on the common law system, and it doesn't replace those common law concepts.

- E.G. If a squatter is on the land, they maintain possession against anyone except for the registered owner. The person who is taking possession is a kind of owner, because they can say to anyone else other than people with better title to keep out, can sue.

Rights under possessory title

- In *Asher* someone was the true owner, but they don't come forward. It's a question of two people who had possession. Whitlock can't say to Asher you are claiming a title from someone who dispossessed the true owner, you can't sue me. Unless true owner turns up, it is between them to work out who has best title.
- Mostly privately held land is under the LTA in NZ. The true owner is whoever is written down on the register. BUT unless there is action between them and someone who has taken possession, it doesn't matter who the true owner is on the LTA, the current person who has possession is the owner.

Actions as a possessory owner

- If you do take possession of the title, you could transfer the title, sell it. What are they buying in those circumstances, and are you going to find a buyer for what you are selling?
- There is a danger if your title is based on possession, that there is a chance the true owner would turn up.
    - You can sell your possessory title, you can't sell the land transfer title so that their name would be on the register. How much can you sell this for really?
    - You would have to show your chain of title is a good one that goes back to early possession, so the buyer can trust that no one else will turn up and say they have better possession.
- Land register: The point is that this will say who the true owner is. We can find out. Further, no one can turn up and just say they have better title.
- One way to solve this issue is through <u>adverse possession.</u>

Adverse Possession

If you take possession, you can also exercise your possessory right against someone who has better title. (Action of recovery of land or ejectment)

- Base line rule is that the earlier possessor/owner or whoever's name is on the register has best title.

Limitation Act: Statutes of Limitation

- As soon as you take possession, someone with better title can eject you from the land. But if the person who has the better right does not take that action, the law will eventually say your ability to take that action has been limited. Have to sue within a certain time because people need to get on with their lives.
    - We need a way to recognise a person who has had long uninterrupted possession as the true owner.
    - Economic justifications: want to keep land in ownership of people who are actually using it.

Do we need adverse possession today? J A Pye

- When we first got the registration system, a registered proprietor would have no issues. It doesn't matter how long you wait to sell because we know who is the true owner. The Limitation Act did not apply.
    - This was because adverse possession was justified on the grounds that it avoids uncertainty as to where title to land lay. This isn't an issue if we have a registration system.
    - If we allowed adverse possession, this is a bad result, because it means the party gaining title get land for free, basically stole it. There should be some compensation to the person who previously owned the land. Anyone could have found out who owned it.
- But this was inconvenient. People would claim parcels of land and take possession, but they could never extinguish registered title holders title. People may have been there for 30 years, possessory wants to move on and sell the land but they can't because they aren't the person registered on the register. Rule was too stubborn.
    - Issue: You can't abandon land in the same way that you can abandon personal property. Because person on register will always be able to usurp their rights. Adverse possession/limitations acts limit how long you can sit on your rights, so that your rights may be extinguished, which in effect allows for recognition of rights where land has been abandoned.

New Zealand Adverse Possession Rules

1. Have to show you had possession for 20 years.
2. Apply to the registrar
3. Registrar has to figure out who is the person on the register, do they have any heirs, who else could possibly have an interest in the land?
    a. If registered owner turns up, it is effective to deny possessory title even if the possessor has been there for 20 years.

Australia Adverse Possession Rules

1. If a certain amount of time passes, that person gets the best title to the land.
2. They must apply to get on the register as owner of title.

Buckinghamshire County Council v Moran

What is possession? It's just like possession of chattels. You need:

1. Factual Control
    a. Do things with the land that show you are in control e.g. live there, control what happens to and on the property, gates that you shut or doors.
2. Intention of possess
    a. Actions that show you intend to exclude all the world, including any true owner.

Facts

- Mr Moran occupied council land which had a future use of being a road. He used it as his garden, and acted this way for many years.
- He purchased off some people who also treated it as their garden, he had it for 9 years.
- His understanding was if they don't use it to make a road, he has a right to use the land in the meantime, and an option to purchase the land if they don't use it as a road.
- He locks the gate, locking in the garden.
- A tennis club needs to lay a drain from the road to the tennis club to the west of the council land.
- Moran talks to council because of this request, and says until you build the road this is my garden.
- Council tells Moran that he has never had any rights over that land from them to do anything on that land, but does nothing else about the situation.
- 1985 - Council finally makes proceedings.
    - Issue: Limitation Act, no special protection for registered owner, after 12 years of having a right to sue someone who had taken your land, the owner loses that right.
    - By 1985, Council has lost it's right to sue.

Issue

- Was Moran in possession?
- Was M's possession adverse possession?
    - If you have been given a right to be there, your possession will not be adverse. There is no right for the owner to sue you to take back possession.

Held

- Was his possession adverse?
- Argument 1 by Council: If you are in possession but are not doing anything inconsistent with that future use of the land, we will imply permission from the owner to possess the land/imply a license.
    - Possession is never adverse if it is adjoined under a lawful title.
        - This would destroy any claim of adverse possession. Limitation Act can't start running until you've got a right to kick them off, but if we imply a license they have permission to be there = there could be no adverse possession.
    - Court rejects this argument
        - The courts have stopped doing this implied license after some point bc of issues with lack of evidence by basing it on behaviours, and it was abrogated by legislation.
- Related but slightly different argument: If you as the possessor know of a future use that is inconsistent with the land, then we won't say that they have any intention to possess as against the owner.
    - Intention to possess = I exclude everyone, including the true owner.
    - Council argues he could not have intended to possess the land because the occupier knows of the future intended use. Their actions are not consistent with the idea that they can form an intention to possess.
    - Some courts had suggested it would be impossible to show you had intent to exclude the true owner if you weren't doing something inconsistent with the future use you knew they wanted to make of it.
        - The courts bend over backwards to reject the councils arguments.
            - It's not going to apply as a bar on possession.
        - Slade J: If in any given case the land in dispute is unbuilt land and the squatter is aware that the owner, while having no present use for it, has a purpose in mind for its use in the future, the court is likely or require very clear evidence before it can be satisfied that the squatter who claims a possessory title has not only established factual possession of the land, but also the requisite intention to exclude the world at large, including the owner with the paper title, so far as is reasonably practicable and so far as the

processes of the law will allow. In the absence of such clear evidence to exclude the title holder, the court is going to say you didn't have intention.
        - Mr M knows about the future use, he isn't doing anything inconsistent with the future use.
        - So has he shown clear intention to possess, to exclude all the world?
    - This argument doesn't work. They will look at possession in terms of every aspect of property.
        - Was there physical control? Yes
        - Was there intention to possess? Yes because he had a gate and locked it.
        - Usually if they had clear knowledge of the future use you would need clear evidence of intention to possess but it isn't that clear on the facts, especially due to the correspondence between M and the council.
- Problem for council in making these arguments.
    - They wanted to use the letter to show that he didn't have an intention to possess, so there was no adverse possession.
    - But in the letter he says that he has gained rights from the council.
    - The court couldn't rely on the letter to say he had no intention to possess but also that he doesn't have adverse possession.

Critique
- Is Moran excluding all the world?
    - He is treating it like his garden, excluding most people, but is he treating the council (true owner) like that?
    - According to him, the council is going to get the land back.
    - He admits he has some rights, but only the kind which he could get from the council.
    - He says if you built the road, he can have it back.
        - The court interprets Moran's letter as saying he will relinquish possession. He would give the right back to them. But this is not completely clear.

Main points
- It has to be adverse, not from the true owner.
- It has to include intention to exclude all others, including the true owner.

Physical Dimensions/Boundaries of Land

What is land?

What rights to physical space go into the bundle of rights in respect of land?
- Two dimensions of the space - surveying.
- Land information NZ is government agency responsible for both 'mapping' physical space and overseeing legal rights to land.
- Land records held online: landonline system
- Cadastral survey plans (specifying property location and boundary dimensions) included in register of title.

What are the boundaries and dimensions of land?
- We have to show where the land is, can't just be an abstract idea of land.
- Three dimensions: "whoever has the soil, also owns to the heavens above and to the centre beneath". "Cujus est solum"

Airspace
- *Bernstein of Leigh v Skyviews:* Some kind of right in three dimensions, but it has to be a reasonable height.
- S 97 Civil Aviation Act 1990 - makes it clear that you can't sue commercial planes. No trespass "by reason of flight".
- Limits on building height in RMA91 and district council plans.
- Cranes - will be committing torts if they don't have permission to go into your airspace. Control overland might be abrogated by someone building a house using a crane.
    - *Anchor Brewhouse v Berkley House.*
    - *Bendal v Mirvac Projects*
    - Entry onto neighbouring land ss 319-320 PLA.

Soil and under
- Can't drill below the land but limits on how far that goes.
- *Star Energy Weald Basin v Bocardo*

Things attached to the land
- Trees, crops, objects, buildings.
- Can have ownership of things into and on the land like these.

Chattels on land in certain circumstances
- *Parker, Flack* - e.g. finders.

Minerals
- No ownership because crown prerogative right to gold and silver.
- Crown took ownership of other minerals by statute e.g. petroleum and uranium.
- Crown has been reserving minerals when granting fee simple since 1892.
- Australia - all minerals vested in crown (to facilitate mining industry).

Limitations
- Removal of trees and structures under certain circumstances - Someone can get a court order to cut down one of your trees.
- Misplaced and encroaching buildings - can get a court order if i've misplaced a building on your land and the court is going to give me some of your land for compensation (so boundaries eaten away at).
- Nuisance/RMA controls what you can within the boundaries of your land. Encroachment of others people's rights into what you can do on your physical space.

Buildings and fixtures

Fixtures = things that become part of the land or are affixed to the land e.g. buildings, walls etc.
- Fixtures transfer with land on sale unless contrary stipulation, are part of the security in any mortgage over the land, and will become part of the lessor's realty when added by a lessee.
- When you sell a house, you will have a section in the sale and purchase agreement for fixtures and chattels, to list all things being sold with the property. Some are not necessary because they are part of the land by being affixed, while other chattels are not necessarily a part of the sale unless specified. Normally they list everything because sometimes it can be hard to tell what is a fixture and what is a chattel.

Holland v Hodgson: Basic test: is it "affixed"?
1. Prima facie characterisation
    a. If attached, the thing is prima facie a fixture and the onus is on the person claiming thing is chattel.
    b. If not attached, the thing is prima facie a chattel, and the onus is on the person claiming thing is a fixture.
2. Challenging prima facie characterisation
    a. Circumstances that show that, in light of the degree and object of annexation, that the object was intended to be a chattel or a fixture?/Or does the degree and object of annexation show that the prima facie analysis (chattel or fixture) is wrong?
        i. Degree of annexation
            1. How fixed is the thing to the land?
        ii. Object of annexation
            1. Why was the thing fixed to the land?
                a. To permanently increase the utility and value of the land, as part of the land?
                b. Or to ensure that the thing can be better used for the time being, that thing remaining a chattel that may be removed in the future?
    b. The intention must be evident in the visual appearance of the object.

Lockwood Building Ltd v Trust Bank Canterbury Ltd

Facts
- It's a lockwood show home.
- Lockwood didn't own the land. THe owner was erecting lockwood show homes. He was a franchisee. Lockwood would sell the show home and the owner would assemble the show home.
- He had given a mortgage to trust bank, but the owner went insolvent.
- Lockwood takes away the show home, because it was still theirs, they still owned it.
- Trust Bank Cantebury says that the lockwood show home is part of their security because it was a fixture on the land, so was part of land.

Held
- Prima facie: is it fixed or not?
    - It is part of the land because it is a building on the land.
- Degree of annexation?
    - It is like a house, a building. There are piles that the house is stuck onto.
    - But you could take it away, it isn't completely affixed. But a lot of houses you can move.
    - But really it is quite well fixed.

- Object of annexation?
    - Dealings between parties say that it wasn't meant to be affixed bc it was only meant to be there for 12 months, but subjective deal doesn't matter. It is an objective test.
    - Does the fact that it is a show home suggest that it isn't affixed? It has to be something a third party would understand or believe.
        - Objectively - Intention is not to benefit the land permanently, but to use the house as a chattel. It is clearly a show home. Lockwood will sell this one somewhere, and put a new one there. They have to be somewhat attached to be safe, but it was never meant to be there permanently. Objective person would realise the business model of a show home is that it is not permanent
- Held that it was a chattel, not a fixture. Haven't proved that the prima facie characterisation was wrong.

Lakes Edge v Kawarau Village

Facts

- If you put rock bolts into the land is that a fixture.
- Long thick bits of steel, and concrete stuff is put there. It's drilled into the land, and it is meant to prevent a landslide.
- If it's chattel, Lakes Edge wants to sue for trespass. It's going through two adjoining land owners.
- Kawarau is arguing this is a fixture, it's just part of the land. None of their property is touching your property.

Held - COA

- Those things are not fixtures, not part of the land. They are still a chattel that Kawarau is trespassing.
- Prima facie: it seems fixed.
- Degree of annexation?
    - Very fixed, you cannot get it out
- Object of annexation?
    - Was it put their to increase the value of the land or to use the thing?
    - We are putting it there to benefit the land, to be a permanent part of the land, and make it stable.
    - The COA said: it must have been intended that the rock anchors would be a permanent part of the land. Objectively - not temporary. Required by council as a condition of resource and building consents. '

Formatilites and 'ways around' formalities

Substance

- We have an ability to change our legal relations with other people in respect of land.
- What is the substance of the rights you need to give or secure, looking at the document/instrument that is supposed to create the right for you?
    - Substantive things needed to be satisfied in order to give someone a property right.

What is formality?

- Within the property law system, the basic function of a formality rule is to regulate a party's power to give another party a right. A formality rule achieves that function by requiring that a party's exercise of his power to give another a right must be expressed or recorded in a particular form - McFarlane.
- Formality is something which is external or added to the transaction, rather than a constituent, substantive part of it
    - You may have in substance transferred your rights, but you haven't transferred it because you haven't followed formalities.
    - Regulates a party's power to give another party a right.
    - Requires a party to exercise their power to give a right in an express or recorded form.

Why do we have formalities?

Overarching: Prevent frauds

- If you can pass property rights just orally, there is a fear that people will make fraudulent claims that a transaction has occurred. Without complying with formality of having to write down and record transfer or power, sign with witnesses etc. fraudulent claims cannot be successful.
- If someone claims more rights than they were given, you can refer to evidence in written document to deduce rights.
- Certainty, deliberateness and visibility of formalities are what helps prevent fraud.

Certainty

- We can know what the property rights actually is because it is written down, and there is evidence of this.

Deliberateness

- We know the person intentionally entered into the transaction.

- The formality process promotes caution - If you have to write it down, sign it, it brings to people's mind the consequences of their actions.

Visibility/Publicity

- Old times: delivery of possession was a public event, clear formality of a transfer of land e.g. ceremony.
- Now: writing or witnessing the transaction is a form of publicity, but the most common kind of publicity is registering it on the land register. This allows us to know who has an interest in what, and what kind of interest that is.

Problems

- Frustrated expectations: expectations that you will get a property right but you don't because you didn't make out the formalities.
- Transaction costs - more expensive. But we have to weigh the benefits against the cost.

The registration formality

LTA s 24(1) Regime of Indefeasibility: An instrument has no effect to create transfer of land until the instrument is registered. Takes from instruments any force the common law might have given them.

LTA s 51(1): upon registration, instrument has the effect of transferring the estate. You get full property rights in the estate/paramount rights.

LTA s 51(2): will not be bound by property interests that are not registered or cannot be registered.

- Common law: conveyancing private bargains being struck and then formalities, this is effective, state is not involved.
- The only way you can own property in NZ is if your ownership is recognised by an ect of the state.
    - Instrument = document that creates a new lease or a sale of land.
    - Instrument may be binding in equity, so you may have an equitable right. But you won't have a legal right.

How does this meet formality objectives?

- Certainty = Know who the original owner is, who the purchaser is and new owner is.
- Deliberateness = have to take action to register it, ensures intention.
- Prevent frauds = It is very public.
- Registration can bring down transaction costs because instead of taking ages to decipher who the owner is, the register just says so, and to know if there are other binding property rights over the land.

Exceptions

- Short term leases s 207-209 PLA.
    - Unregistered lease that has a term that commences not later than 20 working days after the date of the contract to lease and that is a lease for a term of 1 year or less or a periodic tenancy for periods of 1 year or less.
    - Can be made orally or in writing. This is a legal interest in the land but can be defeated by registration of an inconsistent interest in the land.

Registration of equitable interests

- Where there has not been registration the interest is 'unregistered' and is in that way 'informal'
- Unregistered interests cannot be legal, but may be binding in equity. (they might have been bound in common law before too).
    - You can enforce a right to lease under equity as an in personam matter against a certain person
    - Enforce that right against third parties if those third parties had been transferred the property subject to the lease and they knew about this informal transaction (they are bound just as the previous owner).
    - Can enforce that right if subsequent owner was given the land for no consideration, as a gift, they will be bound even if they didn't know about the equitable interest that was binding on the transferor.
    - Equity will not protect people where there is a bona fide purchaser for value of a fee simple estate, and they didn't know anything about the equitable lease.
        - E.g. if estate has been transferred to a third party for value who doesn't know about the equitable lease, then equitable right will not bind them, bc it doesn't affect their conscience.
        - But since it isn't legal, there is a danger someone will turn up who is not bound by the equitable interests.
    - But if you have an equitable lease, you can say live up to your obligations and comply with the formality to register.
- Unregistered interests may also be protected by lodging a caveat against the title to the land.
    - Caveat = BEWARE. Flag put on register that there is an unregistered interest in this land, lodged by equitable interest owner, for the owner and any third party to be aware of.
        - It will prevent any dealings in the land that would destroy your unregistered interest e.g. sale to a enw owner who doesn't know about your interests.

        - Equitable interest owner could sue unless you create a legal lease for them. Ask court to tell them to specifically perform the lease.
        - This is a powerful way to make an unregistered equitable right be protected.

Binding in equity
- Equitable interests will bind the parties.
- They will not be binding against inconsistent registered legal estates or interests.
- Exceptions within land transfer system to requirement for registered rights
    - Registered proprietors will not be protected from *in personam* claims - relating to their own conduct - such as for specific performance under contracts or estoppel, or trust obligations.
        - so that even if you didn't have a property right you can enforce a claim against somebody.
    - Registered proprietors will not be protected in cases of fraud.

Equitable interests based on *Walsh v Lonsdale*
- If there is a contract where a court will in equity order specific performance of - which it will usually do where the contract pertains to land - the parties should be treated as between themselves as if the interest in the contract had actually been granted.
    - Because land is special, land is normally specifically enforceable.
    - This is how you get an equitable lease that is binding between the parties.
    - The interest effectively exists in an equitable form.
    - "A contract for a lease is as good as a lease"
        - Might use it to insist on certain rights you have under the lease e.g. possession, might use it to look for a performance obligation that the person gives you a legal lease, but until then it isn't a property right and it could lose its value if a third party buys the estate in the land.
    - But it doesn't give you a legal lease.
- "A tenant holding under an agreement for lease of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed...That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if the lease had been granted"
    - This will apply to e.g sale and purchase agreements, agreements for leases, mortgages and easements.
    - These equitable interests are defeasible - they an be defeated by registration (without fraud) of an adverse interest - for example sale of the fee simple estate.
    - However, these equitable interests can be protected by lodging a caveat against the title - preventing adverse registration.

Informal Contract
- Need registration to have a legal right.
- But there is also a contractual formality requirement for disposition of land aside from having to register.
    - S 24 PLA: You need to make that person you want to enforce contract against sign a written instrument that records your transaction.
    - You have to have done this to get an equitable version of the lease/right.
- Exception to this formality: s 26 PLA leaves in place the doctrine of part performance that is not excluded by these formality requirements.

Part Performance
- Part performance is an equitable doctrine that arose soon after the first major writing formality requirement, the Statute of Frauds 1677.
- The contracts were not void, but unenforceable, and so the courts of equity felt able to step in and prevent the statute itself from being an 'engine of fraud'.
    - Ie prevent people from entering into real contracts, getting a benefit, and then failing to live up to their side of the bargain because the contract was unenforceable.
- This exception to the formality rule is consistent with the statute because if there is part performance of the K by the parties seeking to enforce it against another party, this is kind of like evidence that the K actually exists.
- *T A Dellaca Ltd v PDL Industries Ltd* : Tipping J was skeptical of the formality requirements for K of land.

Doctrine operates where
1. There is a sufficient oral contract that would be enforceable but for the writing requirement
2. The person seeking to enforce the contract has done something in part performance - taken a step to perform obligation or exercise right under contract, done on the footing that a contract relating to land was in existence.

    a. Acts of part performance cannot just be acts in reliance on the existence of the contract that causes the plaintiff detriment: “the contract [must] have been carried into effect at least in part by the party seeking to enforce it in such a way that it is unconscionable for the other party to rely on the Act” - Tipping J
        i. E.g. taking possession under the K, lessor permitting occupation, accepting rent at a new rate.
    b. However, it can include the person having done something under their rights of the K, they don’t have to have performed something.
        i. It has to be clear that what is done is actually a right under that specific K and not something else (*Dellaca)*
3. In the circumstances, it would be unconscionable for the defendant to rely on the Act to prevent enforcement of the contract.

Salt of the Earth v Finer

Facts

- There is an oral agreement to create a right of way easement between 211 and 213. The party at 213 dies before signing written documentation, so while both parties thought there was an easement, it was not on the register, or written anywhere.
- The respondent executors for 213 refuse to grant an easement.
- Applicant lodges caveat and applies for caveat not to lapse.
    - Takes legal action so 213 has to give legal effect to the easement, and in the meantime any new purchaser will know the equitable easement exists because of the caveat.
- Claim that there is an equitable easement by way of contract, and the estate must honour it.

Issues

- Was there a K for an easement?

Held

- To have an equitable easement by way of contract, there needs to be an easement granted (essential characteristics), valuable consideration (for a K to exist), and either writing or part performance.
- There was an oral agreement that can be an equitable version of the right, so the applicant can bind 213 to the agreement (although not other third parties).
- Part of the deal was not just to give an easement, but that 211 will get a survey and organise the legal process for that to happen. Getting this done was part of their obligations under the K.
- As 211 did undergo a survey and preparation of the easement documents, they took a step in the performance of their obligations under the contract, which was done on the footing that the K was in existence.
- It was unconscionable to rely on the Act
    - Capacity? (because he was 90) Not enough evidence to show incapacity.
    - Consideration: was it good enough, equal? 213 says it wasn’t fair because they didn’t need the right of way, and it increased the value of 211 by $120,000. But Judge says there is an increase in value for 213 too because they couldn’t get up that driveway with a car either without going over some of 211’s land. But is it worth as much for 213 as 211. No because 211 has another driveway. 213 probably should have gotten more consideration for the easement agreement in addition to the survey work and legal work. BUT the judge says there is no evidence that the additional value to 213 is so much less than the 211 that it is unconscionable.

Consequences

- There was an equitable easement.
- The caveat was properly registered on the title because it has an equitable right that can create a K.
- 211 settles with 213.
- But it could have gone to court to get the equitable form of a right transformed into a legal version.

Dellaca

Facts

- The party seeking to enforce the K has spent money on the land, and took possession of it.
- PDL said that the agreement sent was just an offer.
- Nothing was signed. There was an oral agreement.
- But they can’t just act in reliance on there being a contract in existence. The thing you do has to be a performance of an obligation or exercising a right.

Issue

- Was the taking possession of the land and spending money on it to alter it performance of an obligation under the K to constitute part performance that could overcome to absence of formality requirement?

Held

- You can't enforce s 24 formality unless you can show you did something that was in compliance with an obligation you had to perform or you exercise a right you had under the K, that shows you thought the K existed.
- Spending money on the land to alter the building, and taking possession of the land was not an exercise of a right under the K.
- The reason they took possession was because of the sub-lease. What they did was not an exercise of a right under that K, when they did take possession it was under another set of rights they had taken from another party completely.
- Tipping J - lists all the other things that might have been done that would be an exercise of a right of K. But this action was not clearly amongst this list.
  - It has to be clear that what is done is actually a right under that specific K and not something else.
  - If there hadn't been the sublease,then it would have been a right under the K.

Proprietary Estoppel/Unconscionability

What is it?

- Even if you don't have a contract, you might be able to stay the equitable doctrine of estoppel gives me a right.
- Can say to legal owner of land you can't exercise your rights in a way that causes me deterimen
- Equity stepping in to prevent a person insisting on their legal rights.
- This is a personal claim so only enforceable against the owner, but may result in the court ordering a transfer of a proprietary rights.

Requirements

- Plaintiffs mistake as to rights over the land.
  - *Dellaca?* Yes.
- Expenditure or detriment
  - Do acts not because of rights in exercise of the contract, but in reliance on the K that cause you a detriment.
  - *Dellaca?* Yes, they spent money improving the property and gave up another lease they had.
- Defendant's awareness of own rights and knowledge of plaintiff's mistake
  - *Dellaca?* It knows about the rights, maybe had knowledge of the mistake?
- Encouragement or acquiescence (accept without protest) in detriment. Does the other party know about the detriment that the plaintiff has done?
  - *Dellaca?* Does it know Dellaca has started work on the building or given up the lease on another building? No.
  - Their conscience is not affected.
  - If you did know, you cannot deny they had the ownership right.
- "The question comes down to whether in the particular circumstances it would be inequitable for a party to be allowed to deny what he knowingly or unknowingly had allowed or encouraged the other party to assume to his detriment" - Tipping J from *Westland Savings Bank v Hancock.*

Effect of equitable estoppel

- Between the parties, what will equity require? Could range from discretionary remedies.
  - Damages
  - Specific performance
  - Injunction
  - Transfer of an estate or interest in the land
  - Charge over the land. Property right given in law to the claimant.

Process for formalities

1. Formality 1: Have you registered the estate/interests under the registration system? LTA s 24(1)
   a. If yes, then you have a legal interest.
   b. If no, then…
      i. Exception: can you make a proprietary estoppel claim?
         1. If yes, then you can get an equitable remedy that is flexible (from a legal interest through to monetary compensation)
         2. If no, then you have no equitable rights under proprietary estoppel.
      ii. Exception: Do you have a contract for the interest?
         1. If yes, then move on.
2. Formality 2: Do you have a contract for the interest that complies with s 24 of PLA, having a written and signed contract with person who contract is being enforced against?
   a. If yes, then you have an equitable interest (*Walsh v Lonsdale*/specific performance)

b. If no, then…
    i. Exception: Can the doctrine of part performance apply from s 26 of the PLA?
        1. If yes, then it is an equitable interest. (*Walsh v Lonsdale*/specific performance)
        2. If no, you have no equitable rights under *Walsh v Lonsdale.*