

## PART VII – THE TORRENS SYSTEM

### I *Land Management*

#### A *Introduction*

Approximately 26 countries have systems of land administration. Some, like the African system of community titles, embody non-tenure based principles of land management. By contrast, common law countries reflect principles of private land ownership. In Australia, the Torrens system is the dominant land management structure. In addition to administering private land tenures, it is also a legal product exported to other legal environments around the world.

Land administration may be thought of in several contexts. Broadly, these are conceptual, administrative, and geographical:

- Conceptual (a mental understanding of and relationship with land)
- Administrative (in government administration, law, economics, and public policy)
- Geographical (surveying, GPS, GIS, mapping, satellite images, remote sensing, aerial photos, orthophotos, Google Earth)

Land administration is a product of both environmental and political factors. It formalises values about land occupation, use and development, and interacts with the legal system to create a framework for recognising and enforcing recognised interests.

*Land administration involves the process of determining, recording and disseminating information about the tenure, value and use of land when implementing land management policies.<sup>1</sup>*

Proper land administration accelerates wealth: it enables land to be used to develop markets, investment, private holdings and sustainable development:

*What creates capital in the West is an implicit process buried in the intricacies of its formal property systems. ... Legal property thus gave the West the tools to produce surplus value over and above its physical assets.<sup>2</sup>*

One example of land administration is the cadastre, a type of map which identifies logical parcels of land rather than physical land holdings. It has its origins in Napoleonic France, where it was used to record land boundaries and tax land owners. It is now used throughout the world, even in poorer countries (though not England or the United States). As concepts of land ownership changed, and formal methods of administration developed, the cadastre has become a primarily technical instrument. It is now mostly used by surveyors. This development highlights the relationship between mechanisms of land administration and technological and political factors.

Most countries lack even basic land administration systems. From the perspective of the international agencies, there exist four major land administration and land policy issues:

- 1 Urban land tenures
- 2 Native and other community titles
- 3 Methods of improving centralised land administration

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<sup>1</sup> United Nations, *European Commission for Europe* (1996).

<sup>2</sup> Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000) 39-43.

#### 4 Methods of cataloguing and enforcing restrictions over land

The Torrens System offers one — particularly efficient — way of resolving these issues.

### B *Torrens Land Management*

The phrase ‘Torrens system’ describes the registration component of Australia’s land administration system. It may be contrasted with general law land, which is subject only to deeds registration.

The basic principle of Torrens land registration is that an interest must be registered to be cognisable in law. For a registration-based system of land management, Torrens has one of the strongest registration requirements: most land holdings, with several notable exceptions, will be of no legal effect until formally registered.

The Torrens system has several components:

- 1 Certificates of title (describing the interests of owner and any other restrictions)
- 2 Maps and surveyors’ plans (noting boundaries and allotments)
- 3 Electronic land title systems (cataloguing titles and plans)

**Key principle:** Torrens registration creates title.

Any Torrens system will visibly interact with three different types of titles:

- Registrable (titles capable of being recorded on the register)
- Equitable (informal interests recognised by courts of equity)
- Possessory (ad hoc interests; eg, of adverse possessors)

In any given property, there may be both registered, equitable and possessory claims on foot simultaneously. For example, a property, owned by a registered proprietor X, who is trustee for a beneficiary Y, may subsequently lease to Z, who occupies as tenant. Such interaction may be further contrasted with civil code systems of land management. These systems envisage only one absolute owner, rather than many contemporaneous ones.

### C *Torrens Worldwide*

Australia has contributed two internationally acknowledged innovations to global property law:

- The Torrens system; and
- Strata titles.

Strata titles are now almost universally used to vertically divide urban land holdings. They were first introduced in New South Wales around 1962.

The Torrens system was first introduced to the Colony of South Australia in 1858, followed shortly after by Victoria (1862). Its adoption was catalysed by widespread dissatisfaction with lawyers and informal conveyancing practices. The response of lawyers was predictable: in 1893, one lawyer had the following comments to make about the notion of land registration:

*Barely plausible and utterly impractical idea, the outcome of a bureaucratic and free hunting administration working on the fanciful enthusiasm of well-meaning but mistaken and visionary faddists.*<sup>3</sup>

Most probably, lawyers were just reacting to the prospect of reduced fees as conveyancing became more efficient.

Today, the Torrens system has been adopted by the following countries:

- Australia;
- New Zealand;
- Canada (only certain provinces);
- Africa (in certain regions); and
- United States (only certain states)

Similar systems have been introduced to:

- England;
- Israel;
- Philippines;
- Malaysia; and
- Thailand.

Land registration systems based on civil law operate in:

- Europe; and
- Japan.

Deed registration systems operate in:

- United States (using the English model);
- France; and
- French colonies.

#### D *Procedural and Ideological Tensions*

Two competing views about land management are at work in present formulations and interpretations of Torrens legislation: practical objectives (simplicity, efficiency and certainty), and established traditions (English property law and conveyancing practices).

This tension is exhibited by early case law, which largely reflects the traditional view that deeds of title are more important than acts of registration. Even today, many courts introduce equitable and personal notions into their construction of Torrens legislation, often to combat its occasionally harsh operation.

Practitioners, too, exhibit bias towards traditional deeds conveyancing systems. Conveyancing practices continue to be influenced by old ways: search of title, exchange of contract, requisitions on title, and the like. At various times, one or other of these views has been dominant. The present trend is towards registration, as reflected by recent English legislation.

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<sup>3</sup> R T J Stein and M A Stone, *Torrens Title* (1991) 15.

## E *Forms of Land Organisation*

Most systems of land registration may be classified into one of four different theories of land tenure:

- Private ownership
  - Commonly justified on economic grounds: prevention of a ‘tragedy of the commons’ (Hardin) by making individuals economically responsible for sustainable land use
  - Land rights typically entail
    - Freehold
    - Leasehold
    - Sharecrop
    - Mortgage
- Public ownership
  - Eg, communist societies
- Common ownership
  - Eg, indigenous or agrarian societies
- Open access
  - Eg, medieval (pre-enclosure) England

## F *Land in Australia*

There exist approximately 10.2m parcels of land. Most are private (alienated) holdings, though there are also unalienated Crown reserves, and various tracts subject to native title. However, the vast majority of alienable land is privately owned freehold and leasehold from the Crown.

Crown leases and licences are mostly administered outside Torrens system in Victoria. The Victorian Land Registry records about 3.2m titles (though this figure somewhat exceeds the number of saleable properties).

It is important to understand the distinction between parcels of land and properties. The term ‘properties’, colloquially, describes the visible object of proprietary rights: a building or area in which people operate in relation to land. However, in law, a given physical structure may be classified as any number of individual parcels of land, each the subject of proprietary rights. In other words, land management thinks in terms of cadastres (parcels), not addresses. Consequently, there are roughly 20 per cent more parcels than there are properties.

## II History

### A Pre-Registration

Prior to the introduction of Torrens legislation in Australia, title to land was 'very insecure'. Early attempts by colonial Governors to regulate the sale of land proved unsuccessful. Transactions involving land were performed with 'casualness and informality'.

The colonies were host to several views concerning conveyancing:

- Traditional English view (high degree of formality using a written system)
- Governors' view (a different kind of formality)
- Civil courts' views (allowed informal sales despite Governors' Orders and common law)

By the time the ill effects of informal conveyancing practices began to be felt, the custom 'was already entrenched and could not [easily] be overturned.' And so it continued: New South Welshman dealt with land orally and on scraps of paper, and courts continued to accept their claims. 'In this way, popular views of legitimacy were imposed on the civil court.'

Principally responsible for the informal approach to land dealings was the culture of the yeoman, an independent owner/occupier class of farmers:

*'Yeoman' is an antiquated British term for a farmer of middling social status who owned his own land, and often farmed it himself. The yeomanry shared attributes with both the upper and working classes, though had little in common with the urban middle class. A yeoman could be equally comfortable shovelling manure on his farm, educating himself from books, or enjoying country sports such as shooting and hunting. By contrast, members of the landed gentry and the aristocracy did not farm their land themselves, but let it to tenant farmers. Yeomen and tenant farmers were the two main divisions of the rural middle class in traditional British society. Isaac Newton was a famous member of the yeoman class, inheriting a small farm which paid the bills for his academic work. (Wikipedia)*

The strength of such views about law and land was enhanced by various historical factors:

- Roughly half of the populace was illiterate
- Chains of title were difficult to trace, especially given the 'casual' record-keeping
- Whenever a title was cancelled or forfeited, it was possible for the same land to be granted twice; this led to clashes between the successors in each chain of title, turning on the validity of the cancellation of the first grant
- Courts gave effect to this informal system of conveyancing, avoiding injustice in the short term but compounding the problems caused by common practices
- Judges did not acknowledge the legal basis on which the transactions were given effect to (no mention of equity or part performance, etc)

Several consequences stemmed from these practices:

- Notice of interests had to be given in the *Sydney Gazette*
- Land interests were uncertain and thus had very little value: horses and crops were often worth far more than land

Land was seen initially as having only a use value: cultivation, grazing and, occasionally, occupation. However, 'as the value of land increased so did the number of notices in the *Sydney Gazette* telling prospective buyers of a prior interest in it and warning off trespassers. Land

gradually became an integrated part of capital and not merely a place on which to build a house or grow crops.' Additionally, South Australia was a colony of free settlers (as compared with New South Wales, which was comprised by penal colonists), and the emerging Australian middle class of free settlers developed estates and other interests in land.

The situation in the colonies was still radically different to that in England. Land had little of the value and few of the social and political implications which it had in England:

*Where tradition and aristocratic interests combined to create a labyrinthine land law in England, the obscurity of titles in New South Wales was based on an egalitarian approach to land law. Land which had only a low value was dealt with casually, and bought and sold as easily as a horse, sometimes much more cheaply. This, combined with high levels of illiteracy, the lack of a large-scale legal profession, and a willingness to disregard official Orders, led to local ways of doing things. (at 130)*

As early as 1814, the law governing colonial land transactions had — despite its English origins — developed into something quite different.

## B Introduction of Torrens Legislation

The colonial administration wanted to formalise land transactions for several reasons:

- To promote settlement
- To promote economic development through yeomanry
- To reduce enforcement costs
- To reduce the citizenry's dependence upon lawyers in matters of conveyancing

The need for reform was clear: by 1857 there were over 40 000 titles to land in the colonies, of which deeds three quarters had been lost and at least 5 000 impossible to trace or else defective. Purchasers, and particularly mortgagors, lived in fear that their titles would be challenged by some unexpected deed, the effect of which would be to render them liable for fraud and forfeiture of their livelihood.

The early titles were basically receipts issued by the Commissioner of Public Lands. However, even when descriptions of the parcels were appended to them, they were often meaningless. For example, they often referred to land in highly approximate terms ('about seventy paces from the northwest corner...') by reference to long since demolished landmarks, or departed or deceased persons. The chaos is best illustrated by some buyers' mistaken purchases of land already belonging to them.<sup>4</sup>

Dr Ulrich Hübbe, a Hamburg-born lawyer, effectively invented the Torrens system. However, it was simply unfeasible to pass legislation in terms set forth by a German. From its inception, then, the Torrens system was a German system masked as Australian for local popularity. A Mr RR Torrens 'popularised reform', which is to say, he is alleged to have stolen the idea of title by registration from Hübbe.

Initially, lawyers were opposed to the introduction of the system, thinking their monopoly on conveyancing would be removed. The drafting and legislative process was carefully orchestrated to prevent 'professional tyranny' from being exercised.

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<sup>4</sup> Real Property Law Commission, *Report* (1861) 17.

On 2 July 1858, the system came into operation with RR Torrens as Registrar. The legal profession generally accepted the system, though one was heard to remark that the newly-passed *Real Property Act 1858* (SA) was 'foolish, unworkable and a most pernicious measure'.

Despite the new system, its first test in court was unsuccessful: a registrant lost possession with their certificate of title, despite being the registered proprietor (*Hutchinson v Leeworthy*). This was quickly rectified by legislative amendment. However, the Act's next application was hardly more successful, with the plaintiff's appeal being struck out before it could reach the Supreme Court on the grounds that Payne had become a lunatic (*Payne v Dench*).

Predictably, the Act faced further opposition from Boothby J, leading to what some termed as a 'judge hunt'. Judge Boothby took great delight in finding local institutions and acts of Parliament void or repugnant. This was put a stop to with the passing of the *Colonial Laws Validity Act 1865* (Imp). From this point forwards, the newly-established Land Titles Office grew in stature and acceptance, and confidence steadily grew in the new Torrens system of registration.

### C Real Property Law and Women

The development of land registration throughout the 1800s saw the what Golder and Kirkby describe as the 'democratisation of land ownership among the non-indigenous inhabitants'. However, they also note tension within the colonial liberalist movement between objectives of settlement (essentially conservative) and economic growth (essentially progressive). The latter imperative sought to commoditise land and establish a free market.

This development was marked by several limitations upon a married woman's capacity to buy and sell property. The doctrine of coverture meant that, upon marriage, a wife's properties were subsumed within the estate of her husband, limiting her ability to alienate property without her husband's consent.

Reciprocally, the common law right of dower entitled a woman to the lands of her husband upon his death, including lands alienated prior to the husband's death. This was understandably problematic for third parties, who may be unknowingly subject to a dower claim.

In short, Torrens reform inadvertently catalysed reforms beneficial to women. Torrens' reforms sought to make land more marketable, with the unintended side effect that married women and their land were brought within its boundaries and made it simpler and more feasible to transact with a married woman's property.

Torrens' reforms have been described by Kercher as 'Australia's legal gift to bourgeois land owning', perfecting as they did the commoditisation of land and increasing the egalitarian and individualistic properties of private land ownership. Thus, encumbrances such as dower were required to be inscribed upon the certificate. The *Real Property Act* also granted express recognition, in some circumstances, to the right of a wife to be issued with a certificate of title. However, the husband was still primarily responsible for dealings with land: women were 'passive recipient[s]' (at 215).

However, the result of these reforms was to reduce certainty associated with dower and coverture, reducing hesitance to deal with married women. Wives were able to dispose of land 'in the same manner as any other proprietor'. Women could be included on the register as co-owner. Some women were even listed as sole owners on the register. However, most of these changes were the result of 'minor housekeeping of the Torrens system' (at 217).

## D Evaluating the Success of Torrens

**Issue:** does the Torrens system meet its objectives?

The Torrens legislation and its interpretation by courts represents one way of balancing the competing imperatives of certainty, security and efficiency on the one hand, and fairness to holders of unregistered interests and defrauded parties on the other.

- Certainty?
  - Security and simplicity of dealings with land was the primary objective
- Mirror/Completeness?
  - The state of the register was to accurately and precisely reflect the interests held in each parcel land
  - However, it gives no indication whatsoever as to the existence of many interests, including easements and equitable rights
  - Many of those rights are caveated, but not all; incentive not provided since non-lodgement is not fatal in a priority dispute
  - Knowledge of those interests irrelevant unless fraudulent, because of indefeasibility; so the fact that they are recognised does little to undermine completeness of claims of *ownership*
- Curtain?
  - The idea that nothing behind the Register (curtain) can affect the registered proprietor's title
  - Indefeasibility is immediate which prevents the purchaser from needing to enquire about the proceeding transaction
  - However, *in personam* exception means that a new registered proprietor will be subject to the personal duties of the old
  - But Torrens was never about exempting a party from their personal obligations upon registration; recognition of these obligations does not substantially undermine the register's completeness because the obligations are owed only to one party: the registered proprietor
    - Further, *in personam* is confined to recognised legal and equitable causes of action and not a broad and amorphous concept like unconscionability
    - This makes it reasonably straightforward for the party most likely to be affected by an *in personam* claim (the registered proprietor) to ascertain and fulfil their obligations
- Cost?
  - Proportionate to the value of a transaction, the cost of establishing a mortgage and transferring land has reduced
- Number of contested transfers?
- Number of extinguished unregistered interests?
- Dominance of lawyers?
  - Conveyancing clerks can perform basic tasks, but haven't wholly removed the monopoly of lawyers over land transactions



- Fairness?
  - Several commentators are concerned that the Torrens system does not deliver just outcomes to victims of fraudulent transfers, where such transfers are subsequently registered
  - Some degree of flexibility and discretion is needed to accommodate all circumstances
  - A purely statutory system — regardless of the precise balance it strikes — cannot, strictly applied, hope to achieve fairness in all cases
  - Instead, recognition and judicial accommodation of equitable interests, subject to the proper recognition of ordered legislative processes, represents the best compromise between certainty and fairness
  - In the absence of a better legislative system having been implemented in *any* jurisdiction, and the minimal (if any) practical detriment that can be shown to result from such a compromise, it should rightfully be regarded as both warranted and viable

### E      *Torrens in an Electronic Age*

- Improved speed and efficiency
- Impersonal, abstract, non-physical
- Online fraud or computer error
- See below Part IX

### III **General Law Registration**

#### A *Basic Features*

Deed registration attempted to reform the general law land system by making it more efficient to show good title. It differs to the Torrens system in that the old general law system, which was based on chains of title deeds, was still retained.

Today, the Torrens system forms the primary method of land management. Indeed, since 1 January 1998, instruments affecting land in Victoria may no longer be registered under the deed registration system. However, the general law registration system is still important:

- Large tracts of Australian land continue to be regulated by the deed registration system;
- Although automatic conversion of general law land to Torrens title is provided for by statute, this will still take decades to complete;
- Priorities between conflicting general law interests are still resolved according to the general law rules;
- Section 6 of the *Property Law Act 1958* (Vic) still determines some priority disputes according to general law rules

Deed registration sought 'to reduce the risk that a purchaser might acquire an interesting land without knowledge of an earlier inconsistent interest. It did so by allowing all instruments affecting land to be registered, except leases for less than three year durations. Instruments that were so registered, and executed in good faith for value were afforded priority over interests which could have been registered, but weren't, or which were registered later. However, failure to register an interest did not avoid it.

#### B *Priorities under the General Law*

Order of priority:

- 1 **Registered deeds, first in time**  
Instruments registered first in time, executed in good faith and for value
- 2 **Registered deeds, second in time**  
Instruments registered second in time, executed in good faith and for value
- 3 **Registrable deeds**  
Registrable but unregistered instruments
- 4 **Non-registrable deeds**  
Unregistrable instruments

If the grantee of an instrument procured their interests by fraud or with actual or constructive knowledge of a prior unregistered interest, they are said not to be acting *bona fides*.

## IV **Characteristics of the Torrens System**

### A **Overview**

The Registrar of Titles ('the Registrar') maintains a written register of land holdings. Each folio details the people holding interests in that parcel. Certificates of title are essentially just copies of a folio. Not all interests are recorded in folios:

- Registered interests
  - Mortgages
  - Leases over three years
  - Title
  - Transfers
  - Easements
  
- Unregistrable interests
  - Interests incapable of registration but have priority
  - Tenant in possession (less than three years)
  - Adverse possession
  - Equitable titles
    - These are normally protected by means of caveats

The Registered Proprietor ('RP') is the party named as holder of an interest in land described by a given folio of the register. The RP is able to deal with land as owner, and may transact to sell, lease, sublease, and mortgage their interest in ways provided for by the statutes.

The Registrar has various discretionary powers, including an ability to request documents and require parties to give evidence.

Registered interests arise upon registration. In this sense, registration confers legal title. However, some unregistrable interests may still be legal (and not equitable) in nature, despite not being registered (eg, a short term lessee's legal lease). Most unregistered but registrable interests are equitable, however.

Because unregistered and unregistrable interests can (and, indeed, do) exist off the register, it can never be an entirely complete record. Indeed, the Torrens legislation appears to acknowledge this inevitability quite explicitly in its provisions for the lodgement of caveats. Caveats are designed to protect unregistered interests.

In general, however, the Torrens system partakes of the following characteristics:

- **Voluntary**  
Interests need not be registered; registration is voluntary
  
- **(Largely) Conclusive**  
Only valid interests are placed on the register; all registered interests are so recorded
  
- **Certain**  
Registered titles are certain and valid, so there is no need to look beyond the register to determine good root of title; unregistered interests always cede priority, except in case of fraud, etc

- **Indefeasible**  
Bona fide registration confers unimpeachable title
- **Compensable**  
For those suffering loss as a result of the register, an assurance fund offers compensation (though not specific performance)

**Guiding questions:** what is the scope of unregistered equitable interests within the Torrens system? Can it deal with them adequately? What is the position of mere equities?

## B Contents of the Register

The Torrens Register manages principally private interests in land. Each folio contains two kinds of data:

- **Legal text**  
Alphanumeric information about the parcel, interests in it, and the identity of parties holding same
- **Spatial information**  
Maps, plans, other geographical and surveying information

In order for the system to be certain and conclusive, both pieces of data must be accurate and reliable. In most jurisdictions, certainty is provided by effectively guaranteeing accuracy of legal text on the register. However, spatial information is not legally guaranteed. Victoria, for example, adjusts plans to suit occupation, so adversely possessed boundaries are held as occupied and title is updated to reflect the changed dimensions. By contrast, New South Wales adjusts boundaries to suit plans; this means that a surveyor must check the boundaries after an auction.

The Torrens register updates its contents on the basis of textual records provided by banks, lawyers, conveyancers, and individuals. It receives spatial information primarily through surveyors.

The register does not record several important aspects of a parcel of land:

- Buildings (type, footprint, value, use) except as boundaries in strata or subdivision titles;
- Land values, zoning, rates, heritage classification, business approvals; or
- Roads (councils typically record these on a separate register).

Theory suggests that a land administration system should manage all rights, restrictions and responsibilities relating to a parcel of land. However, current tenure-based systems, including Torrens, focus only on organising *rights*.

The register is able to successfully and efficiently record land transactions and changes in land ownership (whether by operation of law, as by probate, administration of intestate estates, bankruptcies, and court orders, or by voluntary dealing). It can do so because of the simple fact that, without registration there is no change in actual legal ownership. Registration brings the change to the attention of the registry, allowing it to be recorded.

However, the Registrar typically does not actively seek out changes to land ownership. Parties must generally bring such changes to the Registrar's attention. Because an interest registered first in time wins, this can sometimes lead to what is known as a 'race to the Register'.

Due to the efficiency and certainty provided by Torrens land registration, there exists high public confidence in the land registry and its Registrar.

### C Basic Torrens Principles<sup>5</sup>

- Mirror
  - The register reflects accurately and completely the current interests held in a parcel of land
  - A title is free of adverse claims or burdens unless they are mentioned on the title
  - No claims are possible outside the register
    - This is presently the dominant interpretative principle
    - However, there are several important exceptions
- Curtain
  - The current certificate of title contains all the information about the title
  - A historical search to verify the root of title is unnecessary
  - The registry is conclusive so there is no need to look beyond it, in general, even if the purchaser is aware of the facts giving rise to an unregistered interest
    - In general, 'don't ask'
  - This principle is not always applied consistently
- Insurance
  - Compensation for loss of rights is available from the assurance fund established by the legislation in each jurisdiction
  - The register is guaranteed to reflect the correct status of land
  - If, through human error, a flaw appears, the loss suffered is corrected by compensating the party
    - However, this is often criticised as inadequate, both in terms of quantum (compensation is often minimal) and significance (land is arguably irreplaceable)
    - There is also often substantial inconvenience and delay
    - In many circumstances, parties suffering loss choose instead to sue their lawyer

The register offers both *positive warranties* (as to ownership, boundaries, and interests held) and *negative warranties* (that there are no *other* interests that could have priority).

**Note:** significant tension exists between the objective of completeness (ie, nothing exists beyond the register) and fairness (ie, unregistered equitable interests should be recognised where it would be against conscience not to do so. It has been accepted that unregistered interests in land can be created since *Barry v Heider*. Completeness is thus by degree only.

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<sup>5</sup> See generally Theo Ruoff, *An Englishman Looks at the Torrens System* (1957).

## D Central Legislative Provisions

'Land' is defined broadly and recursively.

**Section 4 — Definitions:**

<b>Crown grant</b>	the grant by Her Majesty of land whether in fee or for years;
<b>electronic instrument</b>	means an instrument that is an electronic communication within the meaning of the <i>Electronic Transactions (Victoria) Act 2000</i> ;
<b>electronic lodgement network</b>	means the electronic lodgement network referred to in section 44B;
<b>encumbrance</b>	in respect of any land includes any estate interest mortgage charge right claim or demand which is or may be had made or set up in to upon or in respect of the land;
<b>folio of the Register</b>	means a folio of the Register under section 27;
<b>instrument</b>	includes every document registered or capable of registration under this Act or in respect of which any recording is, by this Act or any other Act, directed, required or permitted to be made in the Register;
<b>land</b>	includes any estate or interest in land but does not include interest in land arising under the <i>Mineral Resources Development Act 1990</i> ;
<b>registered proprietor</b>	means any person appearing by the Register (other than an identified folio) or by any registered instrument to be the proprietor of any estate or interest in land;

Registration creates title.

**Section 40 — Instruments not effectual until registered:**

- (1) No instrument until registered .. shall be effectual to create vary extinguish or pass any estate or interest or encumbrance ... but upon registration .. The estate or interest or encumbrance shall be created varied extinguished or pass ....
- (2) Every instrument when registered shall be of the same efficacy as if under seal .....

The legal text of folios is guaranteed to be accurate.

**Section 41 — Certificate to be conclusive evidence of title:**

No folio ... shall be ... defeasible by reason ... of any irregularity in ... an instrument; every folio ... shall be received in all courts as evidence of the particulars recorded in it ... and be conclusive evidence that the person named ... as proprietor or having an estate or interest, or power to appoint to dispose ... is seised or possessed of that estate or interest or has that power.

In this way, the folio is conclusive. Registered titles mirror (at least in theory) interests actually held, thus obviating the need to search behind the register in order to determine whether inconsistent interests exist (curtain principle).

E *Torrens in Practice*1 *A standard conveyance*

A typical sale transaction involving Torrens land consists of the following:

- Prior to purchase, search the register to locate the relevant title and verify the identity of owner and purchaser
- Visually inspect the land, identifying any rights of way, tenants, or relevant third parties
- As soon as the auction is complete, use caveats to protect the purchaser's equitable interest in completion
- Obtain a duplicate certificate of title before handing over the funds (never hand over money before that)
- Register the certificate of transfer as soon as humanly possible

Performing these steps with speed and accuracy makes it very likely that the purchaser will prevail in a Torrens priority dispute.

2 *Comparison with deeds conveyancing*

In a deeds system, judges established strict conveyancing standards, forcing people to search all the title history, even behind the formal documents.

Torrens is a public register protecting last registered interest. Simple search. Conveyancing standards are different, and they remain vital to the integrity of the register. Note effect of legal education in deeds given to HCA judges sitting in the late 20th century; influenced their treatment of the Torrens statutes

3 *International standards*

Torrens is considered international best practice for land registration in a land administration system. It provides:

- Jurisdiction-wide coverage (a register);
- Currency (information that is up to date and complete);
- Guarantee (positive and negative warranties, priority guarantees); and
- Indemnification (compensation in the event of system failure).

In addition, Torrens is simple to administer, cheap and efficient to run. However, it can be expensive to establish (though not in Australia, where there was little in the way of existing recognised tenures).

For these reasons, the Torrens system is much better than a deeds system. It is arguably the best land registration system in the world. Although its interaction with equitable and adverse possessory interests is not entirely satisfactory (see below), the system produces a just outcome in the vast majority of cases (certainly a greater proportion than under a deeds system).



## IV *Indefeasibility*

### A *Definition*

Indefeasibility of title 'is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys' (their Lordships in *Frazer v Walker*). Indefeasibility is conferred by registration. It is, in essence, a statutory guarantee against retrospective invalidation of title, subject to several exceptions (see below Part VII).

As Windeyer J noted in *Breskvar v Wall*, indefeasibility is 'the very essence of the Torrens system'.

#### 1 *Interests rendered indefeasible*

Some documents are a simple one page transfer of land and result in an immediate change in the owner of the interest when registered. Others are more complicated; for example, many mortgages contain personal and proprietary covenants. Other documents may refer to a memorandum or standard form provisions.

**Issue:** are all these secondary provisions and interests created thereby also registered and, hence, indefeasible when the primary instrument is registered?

#### ***Mercantile Credits Ltd v Shell Co of Australia Ltd (1976) HCA:***

##### Facts

- A lease is registered (now an unusual practice in Victoria)
- It included a covenant allowing tenant to renew
- The land owner had a mortgage to MC and defaulted on repayments
- MC wanted to sell the land with vacant possession

##### Issue

- Can Shell renew the lease?

##### Reasoning

- The renewal covenant is proprietary and runs with the land

##### Decision

- The High Court allowed the protection of registration to encompass proprietary covenants contained within the lease

*Mercantile Credits* suggests that mortgages and leases that create covenants will be binding upon new owners of land to the extent that the rights created are proprietary (and not personal).

#### 2 *Registrable instruments*

Issues occasionally arise as to whether a given instrument is registrable (capable of registration). For example, are plans of sub-division 'instruments' capable of registration? In a sub-division, proprietary rights are often created by changes to the plan, not individual transfers.

## 3 Statutory provisions guaranteeing indefeasibility

If the instrument is registrable, *bona fide* registration confers *prima facie* indefeasibility, subject of course to certain exceptions (see below Part VII):

**Section 42 — Estate of registered proprietor paramount:**

- (1) ... the registered proprietor shall, except in case of fraud, hold land .. subject to encumbrances recorded, but absolutely free from all other encumbrances except —
- ..... included in prior folios ...  
wrong description.
- (2) But land remains subject to —  
(overriding or paramount interests)

Even if the registrant has actual or constructive notice of a prior unregistered interest, subsequent registration will not be fraud, even though it has the effect of denying those earlier rights.

**Section 43 — Persons dealing with registered proprietor not affected by notice:**

Except in case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor shall be required ... to ascertain the circumstances .. under which such proprietor or any previous proprietor was registered .. or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and knowledge of such trust or unregistered interest... shall not of itself be imputed as fraud.

However, all this is subject to the exception that certificates fraudulently registered will be invalid. This exception does not extend to subsequent *bona fide* purchasers dealing on faith of the register, such that a further transaction to a third party will escape invalidation.

**Section 44 — Certificate ... void for fraud:**

- (1) Any folio procured by ..fraud shall be void as against any person defrauded or sought to be defrauded and no party to the fraud shall take any benefit ..
- (2) But nothing... shall be interpreted so as to leave subject to ...ejectment or ... damages or deprivation of the estate or interest in respect of which he is registered proprietor any bona fide purchaser for valuable consideration of the land on the ground that the person through whom he claims was registered through fraud ...

**Note:** some interests (eg, trusts) cannot be registered (recorded on the register). These can be protected using caveats. However, most interests can be placed on the register.

## B Scope of Indefeasibility

### 1 Current position: immediate indefeasibility

‘According to the theory of immediate indefeasibility, upon registering a transfer or other instrument, a person obtains an immediate title to the estate or interest transferred or created by that transfer or other instrument, even if it is void. The proprietor on becoming registered pursuant to a void transfer is protected against action by the previous registered proprietor so long as the newly registered proprietor has acted without fraud and has given valuable consideration for the transfer.’<sup>6</sup>

### 2 Competing theories

**Issue:** at what point is an indefeasible title conveyed? Who should be given protection? All people who register without fraud, only some registrants?

At first, deferred indefeasibility was favoured on the basis of an interpretation of *TLA* s 44. According to this view, only second and subsequent registrations are protected by indefeasibility, and only if they are themselves *bona fides*. Protection is ‘deferred’ to the second dealing.

By contrast, immediate indefeasibility is now favoured on the basis of *TLA* s 42. Registrations obtained without fraud are protected immediately.

The object of indefeasibility is to save purchasers from ‘the trouble and expense of going behind the register’. This is achieved by protecting any *bona fide* purchaser for value from adverse claim where they purchase on faith of the register. Such a purchaser acquires an indefeasible right of ownership ‘notwithstanding any infirmity in the title.’<sup>7</sup>

### 3 Historical development

The initial position favoured deferred indefeasibility, reflecting a deeds system interpretation of Torrens legislation:

*the justification for destroying a legal estate ... is only to protect someone who deals on the faith of the register ...*

Dixon J in *Clements v Ellis* (1934)

According to Sir Anthony Mason, what Dixon J in *Clements v Ellis* did was to invest the Torrens statute with ‘many of the characteristics of the existing law of real property and equity’. It is ‘obvious’ that Torrens is not wholly self-contained.

<sup>6</sup> Sir Anthony Mason, ‘Indefeasibility — Logic or Legend’ in David Grinlinton (ed), *Torrens in the Twenty-first Century* (2003) 3, 5.

<sup>7</sup> *CN and NA Davies Ltd v Laughton* [1997] 3 NZLR 705, 712–13 (Thomas J).

'This controversy has centred on the concept...of "indefeasibility", what it means or was intended to mean and whether it should now be modified so as to permit just outcomes in a wide variety of circumstances.'

'The Privy Council settled this conflict in *Frazer v Walker* in favour of immediate indefeasibility.'  
 'Frazer v Walker decided that, on registration of an instrument that is merely void by a purchaser for value without fraud, the purchaser has an indefeasible title. *Frazer v Walker* distinguished *Gibbs v Messer* and did not overrule it. So it still stands as authority for the proposition that registration of a forged instrument in favour of a fictitious or non-existent person does not confer an indefeasible title.'

### ***Frazer v Walker* (1967) Privy Council (appeal from NZ):**

#### Facts

- Mrs Frazer forged Mr Frazer's signature of a mortgage of the farm to Radomski
- She is paid the 300 pounds, and she discharges an earlier mortgage, but she does not make payments and defaults under the mortgage
- Radomski exercises powers of sale as mortgagee and sold the farm to Walker
- Walker then sought to eject Frazer

#### Issue

- Is the transfer valid?
- Does Radomski have 'good' title as derived title from forged instrument?
- Can Mr Walker obtain a declaration that his interest in the land was not affected by the mortgage or subsequent transfer?

#### Reasoning

- Radomski, the first mortgagee —
  - Forged instrument void at common law
  - Could not pass the title at common law
  - Court applies *Boyd* to hold indefeasible title may be derived from registration of void instrument
- Section 63 (our s 42) protects the registered proprietor (Radomski) except where he (not Mrs Fraser) is guilty of fraud
  - This is 'immediate' rather than deferred indefeasibility
  - Court distinguished *Gibbs v Messer* as 'fictitious person': confined to factual circumstances
- Even though there is a forgery, it is possible to derive good title from the mortgagee; the title is indefeasible at that point and there is no need to engage in a second, subsequent transaction
- No fraud on the part of Radomski
- Mr Frazer relied in *Gibbs v Messer*: rejected by the Privy Council
  - Confined to its facts about dealing with a fictitious person
- Note s 183 of NZ Act: "nothing shall render subject to ... deprivation of the estate ... of which he is registered ... any *bona fide* purchaser for value on ground that the previous person was registered through fraud or void or voidable instrument...'
- '[Indefeasibility] is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys.'

#### Decision

- The sale is valid and Radomski's title indefeasible

More recently, the High Court of Australia has confirmed that immediate indefeasibility is the correct approach:

*Torrens is not a system of registration of title but a system of title by registration.*

Barwick CJ in *Breskvar v Wall* (1971)

#### 4 Future approaches

The modern trend suggests that the most recent act of registration is, and will continue to be, determinative. Previous conduct is generally ignored. Note, however, that each Australian jurisdiction has differing provisions in relation to indefeasibility, and different bodies of case law have grown out of each.

### C Old View: Deferred Indefeasibility

'According to the deferred indefeasibility theory, the person registering a void instrument does not necessarily secure protection from challenge by a second person seeking to set aside the registration even if the first person has acted without fraud. Indefeasibility ensures only in favour of a party who purchases in good faith from the registered proprietor, acts on the faith of the register, and registers a valid instrument executed by him.'<sup>8</sup>

Deferred indefeasibility may be viewed as an attempt to alleviate the occasionally harsh operation of the (at this point) new Torrens system.

#### ***Gibbs v Messer* (1891) Privy Council:**

##### Facts

- Mrs Messer overseas, leaving power of attorney with her husband
- Husband leaves certificate of title with her solicitor
- The solicitor inserts a fictitious person on the transfer, which is registered
- The solicitor executes a mortgage from the fictitious person to the MacIntyres, and is registered
- Messer discovers the forgery and now seeks to be entered on the register again, free of the mortgage
- MacIntyres argue that their interest is indefeasible

##### Issue

- Can Messer be restored as registered-proprietor?
- Must the MacIntyres' mortgage interest be recognised and the land owned subject to that interest?

##### Reasoning

- Privy Council – protection by statute is limited to those who actually derive title from, and deal with, a registered proprietor
  - MacIntyres dealt with a fictitious person – could not derive good title from the

<sup>8</sup> Sir Anthony Mason, above n 6, 5.

forged instrument

- The mortgage, though registered, was invalid because of fraud
- The protection is limited to those who deal with and derive title from the registered proprietor
  - They couldn't derive good title from a fictitious proprietor
  - This reflects a deeds-based approach to title
    - (ie, title dependant upon predecessor's validity)
  - Cf Torrens: title, once registered, is effective regardless of previous chain of title
- If there had been a second transaction from MacIntyres to a third party, the transfer would have been valid
  - ie, must be one step away from the fraud: indefeasibility 'deferred' to the second transaction
- If you're on the register and deal with land, the purchaser is entitled to treat you as owner

Decision

- Court held Messer restored as RP w/o mortgage

'The view of Dixon J in *Clement v Ellis* ... invest the statute with many of the existing characteristics of the existing law of real property and equity. Just how much of that law and equity should be imported into Torrens Title jurisprudence has always been a matter of debate. It was, of course obvious that the system was not wholly self contained.'

Note – week one article by Justice Gummow probing how far equity should be imported into the operation of the Torrens system.

Note view that 'Recognition of equitable estates and interests lying beyond the state of the register has proved an uncontroversial matter' (Mason at 6)

## D      *Current View: Immediate Indefeasibility*

Acceptance of Immediate Indefeasibility in Australia: unregistered interests [equitable] interests are vulnerable to registered interests, ie the registered interest is 'paramount'; the title is - in the absence of exceptions – indefeasible. *Breskvar v Wall* required the High Court to consider the range of authorities. Endorses the notion of immediate indefeasibility; ie registration vests title in the proprietor.

### ***Breskvar v Wall* (1971) HCA:**

#### Facts

- Breskvars were registered proprietors in fee simple of a vacant two acre parcel of Torrens land at Acacia Ridge, Queensland
- They borrow money from Petrie for 12 months
- To secure the loan the Breskvars gave Petrie their duplicate certificate of title plus a transfer with the name of the purchaser left blank

- Execution of a blank transfer was a breach of s 53(1) of the *Stamps Act 1984* (Qld)
  - Breskvar signed the transfer in lieu of a mortgage
- Petrie inserts his grandson's name (Wall) and had the transfer registered
  - Wall knew of and is found to collude in the fraud
- Wall becomes the registered proprietor (though his title is defeasible for fraud)
  - Wall registers in grandson's name, registers and sells to Alban
- Petrie then sells the land to Alban
- Alban's solicitor searched the register before signing the contract and finds no evidence of earlier interests
  - Alban completes the sale
- Before Alban registers, the Breskvars discovered the fraud and lodged a caveat which prevented Alban getting registered
- Alban wants to be protected on the basis of reliance on the register

#### Issue

- Is defeasibility deferred or immediate?
  - Either way, the Breskvars will lose
  - Although the Breskvars could have recovered their land for fraud at the time of Wall's registration, once Alban purchased on the basis of Wall's purported owner, the third party is protected

#### Reasoning

- Barwick CJ
  - '...except in and for the purpose of such excepted proceedings, the conclusiveness of the certificate of title is definitive of the title of the registered proprietor.'
  - 'That is to say, in the jargon which has had currency, there is immediate indefeasibility of title by the registration of the proprietor named in the register.'
  - 'It is really no impairment of the conclusiveness of the register that the proprietor remains liable to one of the excepted actions any more than his liability for "personal equities" derogates from that conclusiveness. So long as the certificate is unamended it is conclusive and of course when amended it is conclusive of the new particulars it contains.'
  - 'The Torrens system of registered title ... is not a system of registration of title but a system of title by registration.'
  - 'Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void.'
  - 'The situation therefore immediately after the registration of the [memorandum], by the endorsement of a memorial on the certificate of title was that the fee simple in the land was vested in [Wall]'
  - However, that transfer was procured by the fraud of the transferee; 'Consequently, although the registered proprietor in whom the fee simple was vested, [Wall] did hold his estate subject to the rights of the [Breskvars]. He did not hold it on trust for the [Breskvars] but as between themselves and [Wall] they had a right to sue to recover the land and to have the register rectified'
  - 'such a claim is an equitable claim enforceable by reason of the principles of the Court of Chancery' (it is not clear whether his Honour means to describe it as a mere equity or otherwise)
  - 'If there had been no transaction by [Wall] with [Alban], the [Breskvars] would have been entitled to succeed against [Wall]'
  - 'But the purchase by [Alban] bona fide for value and without notice intervened, before that equitable right of the appellants was fulfilled. The third respondent thus acquired an equitable interest in the land. The ability to create and the

validity of an equitable estate in land the title to which is under the Torrens system were fully established in *Barry v Heider...*'

- McTiernan J
  - Wall's registration confers good against the whole world except the Breskvars
  - Therefore they had good title in relation to third parties dealing with him on faith of the register
  - The decision in *Frazer* requires this conclusion
  - In this case, the register (which reported Wall as the registered proprietor) was relied upon by Alban
  - Therefore Wall passed an interest in land to Alban by memorandum of transfer (equitable interest)
  - Conduct of parties must be taken into consideration in order to determine the better equity and the Breskvars were estopped from relying on their prior equity because of their behaviour
  
- Menzies J:
  - Upon registration, Wall became registered owner and the Breskvars ceased to be registered owners
  - The Breskvars' interest became a right to impeach the defeasible title of Wall
  - The signed transfer that the Breskvars gave Petrie was not valid, and therefore could not be regarded as a good source of equitable rights
  - But the transfer held by Alban was from the registered proprietor and as such a transferee; his rights fall to be determined by s 48 which gave it an equitable interest as unregistered purchaser of land
  - Alban should have priority, not because the Breskvars armed Wall or because that transfer was not capable of creating any interest, but because such a transfer is in breach of the *Stamps Act* and it was this breach of law that enabled Wall to become registered
  - '*Frazer v Walker* is important here in establishing that, if and to the extent that earlier decisions were to the effect that an indefeasible title cannot be acquired by the registration of a void instrument, they have lost their authority. **It must now be recognised that, in the absence of fraud on the part of the transferee, or some other statutory ground of exception, an indefeasible title can be acquired by virtue of a void transfer...** [but] where there is fraud ... a transferee does, by registration of a void transfer, obtain a defeasible title'
  
- Walsh J:
  - Prior to *Frazer* the result may have been different
  - However, while this case differs, the principles laid down in *Frazer* are very important
  - No longer open to Breskvars to argue that the registration of wall as proprietor was absolutely void and inoperative
  - Effect of immediate indefeasibility is to pass title to Wall upon registration
  - Effect of fraud was to give the Breskvars rights against Wall and as against Wall, the Breskvars were entitled to be restored as registered proprietors
  - Right is equitable right which enables court to provide a remedy as against Wall
  - However, as against A, the question was whether that interest was one that should take priority over A's interest which arose out of the contract of sale and the completion of the contract including their holding a transfer
  - Not necessary to determine whether the Breskvars' interest was a mere equity or an equitable interest because Alban had no notice and the Bs had armed Petrie and Wall with the transfer and certificate of title (postponing conduct)



- General comments:
  - Here Wall was a party to the fraud of Petrie (his grandfather) because he knew about it
  - So here Wall's registration was procured by the actual fraud of the registered proprietor, so therefore he held his title 'subject to the rights of the appellants' (the Breskvars); ie, defeasible
  - Consequently, the issue of deferred indefeasibility vs immediate indefeasibility did not arise on the facts because Alban had not become registered
  - However, *Frazer v Walker* was cited with approval as authority for the proposition of immediate indefeasibility ('registration by a void instrument is effective' to pass title — an endorsement of immediate indefeasibility)

#### Decision

- Immediate indefeasibility is adopted: the Breskvars' right to set aside the sale to Wall for fraud is postponed to that held by Alban as purchaser under a specifically enforceable contract
  - Barwick CJ uses registration to protect a person not yet registered (Alban) who bought from Wall, after Wall registered through Wall's and Petrie's fraud
  - The Breskvar's did something 'very silly' from which no court could protect them
- *Ratio*: Never sign and hand over a blank transfer and the certificate of title to secure a loan, or, if you do, lodge a caveat immediately (before any third party dealings can take place)
  - Legal estate had passed to Wall on registration
  - Thereafter, the Breskvars had either an equitable interest in land or an equity to have the land retransferred to them (equity of rectification)
  - Alban acquired the right to be registered as proprietor of the legal estate in fee simple b/c it acquired an equitable interest at the point it acquired a transfer in registrable form.
  - Alban's right to be registered had priority over the right of the plaintiff.

There are two aspects to the doctrine of immediate indefeasibility —

- 1 When you become the registered proprietor, you take the interest free from all other interests that are not recorded in the register
  - For example, if there is a mortgage over the land which is not recorded in the register, generally speaking the registered proprietor does not take the land subject to it
  - The interest cannot be enforced against the registered proprietor, even if the registered proprietor had notice of the interest: *TLA* s 43
  - Unless there has been fraud or another exception applies: ss 42, 44 *TLA*
- 2 **Registration cures defects in title**
  - Further, an indefeasible title means that the registered proprietor has a title that cannot be set aside on the grounds that there was a defect in the title (such as a void instrument due to forgery) before registration
  - *Vasso*: the title is not historical or derivative; it is the title which registration itself has vested in the proprietor that is relevant
  - *Breskvar*: it matters not what the cause or reason is for which the instrument is void (eg, for non-compliance with the *Stamps Act*)

What if the description of the interest on the relevant folio is wrong?

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

- The Registrar-General recorded a transfer on folio 7922
- He described the nature of the interest as an 'easement'
- This transfer occurred between the two predecessors of title: Guy, Bursill's predecessor, granted to Long, Berger's predecessor, in addition to rights to a building over a roadway

Issue

- Was the title burdened by an easement (as the relevant folio of the register appeared to suggest) or did Transfer 7922 operate according to its terms by including rights to a building?

Reasoning

- Per Windeyer J
  - The grant of the building rights was not an easement but a conveyance
  - Thus the issue was whether the rights in relation to the building were noted on the register
  - If so, then Bursill holds land subject to that right
  - Otherwise, did transfer 7922 operate according to its terms granting rights to the building?
  - The NSW legislation provided that the RP's title was 'subject to such encumbrances as may be notified on the folium of the register book'
  - This holding was based in part on the view that '... prudent conveyancers would have ascertained what it was that transfer 7922, referred to on the vendor's certificate of title, in law effected.'

Decision

- Court held that as transfer 7922 was noted on title the rights to the building were 'notified on the folium of the register book constituted by ... the certificate of title within the meaning of s 42.'
- The interest is therefore enforceable against Bursill
- Essentially, this case erodes the curtain principle: a 'prudent conveyancer' would look beyond the register to the transfer

**E      *Effects of Void Instruments at Common Law and under Torrens Legislation***

A void instrument is a conveyancing document not legally valid because it is fraudulent (eg, a forgery). At common law, void instruments will be ineffective to transfer any interest.

However, under the Torrens system, because it is registration that confers title, not the instrument under which the transfer is made, void instruments can, upon registration, nevertheless give rise to an enforceable legal interest. Thus, once registration occurs the new registered proprietor has title to land, that title will be indefeasible regardless of the fact that that registration relied on an instrument void for fraud or some other deficiency. (However, if the registered proprietor was the fraudster or forger, then title will be defeasible as against the previous owner.)

The rationale for this treatment is to render it irrelevant whether or not there was a defect in the transaction that led to the registration. This supports the 'curtain' principle.

**Deed system**

A → B → C  
 Deed Deed Deed  
 (title) (title) (title)

A → B → C  
 Deed Forged Nemo dat  
 (title) deed (No passing of title)  
 (no title)

**Frazer v Walker**

Mr and Mrs F → R → Walker  
 Farm (registered) (seeks to eject F from farm)  
 Joint tenants Mortgage Registered

(A→B→C) [Registration] RP → E people deal on faith of register  
 (no need to check) *Curtain* D (mirror) conclusive register

**Breskvar v Wall**

B → P → W → Alban  
 Transfer Forges || Contract of sale  
 || (equitable interest: specifically  
 || enforceable contract; *Tanwar*)  
 || Indefeasible title  
 Has CT  
 Equitable claim agst RP registered (defeasible) fraud  
 W to set aside on basis of fraud (mere eq? *Latec*)

Postponing conduct: by handing over a blank transfer deed, signed, the Breskvars allowed Petri and Wall to present themselves as registered proprietors, representing such to Alban. Therefore, the Breskvars' mere equity or equitable right is postponed to Alban.

**F The Nature of Indefeasibility**

In *Mills v Stockman*, Kitto J observed that registration of an interest under Torrens legislation will confer upon the registrant indefeasibility as from existing unregistered interests, even if such person has actual knowledge of the prior interest. This will not constitute fraud.

**Mills v Stockman (1967) HCA:**Issue

- Is Stockman's equitable profit à prendre defeated by Mills' registration of title over the subject land?

Reasoning

- Barwick CJ:
  - The agreement between Mills and Stockman did not create any new rights, and Stockman's equitable interest continues
- McTiernan J:
  - Mills took title to the land in 1963, by which time she must have seen Stockman removing slate from the land and learnt of his right to enter the land for same
  - Mills was therefore not a purchaser for value without notice at common law
- Kitto J:
  - However, for the portion of the land upon which the slate is situated which falls under the provisions of the *Real Property Act*, 'I think the position is different'
  - Mills, having become the registered proprietor, 'is unaffected by any interest not on the register, even though she took with notice of it. It the case were one of fraud it would be otherwise; but **merely to take a transfer with notice or even actual knowledge that its registration will defeat an existing unregistered interest is not fraud**'
  - By contrast, if Mills had merely taken possession at common law, she would have been bound by her actual notice of a prior equitable interest
  - Knowledge of an unregistered interest and subsequent registration in order to suppress it is not fraud

Decision

- Barwick CJ and Taylor J: dismiss the appeal
- McTiernan J: dismisses the appeal but allows a further trial of the issue of authority
- Kitto J: makes a declaration that Mills is the owner of the land, including the pile of dross, and her interest prevails over Stockman's equitable right to quarry the slate, and dismisses the appeal
- Taylor J: dismisses the appeal but makes new declarations

**G Policy Issues****1 Hypothetical**

Consider the following situation:

*Mrs A owned a farm, inherited from her father and in her family for three generations. Her parents' ashes were scattered over the rose garden at the front door. Her pet dogs were buried under the poplar trees her grandfather planted along the drive. Her son, Z, was born in the second bedroom.*

*One day Z took the title from her locked file drawer and 'sold' the farm to B. B searched the title and found that Mrs A was registered. Upon making a visual inspection, he saw her doing the farming.*

*At settlement, the son gave B the certificate of title and a transfer with a forged signature of his mother. B registered the transfer. Z went to the casino and squandered the money.*

*B now sues to eject Mrs A.*

According to Barwick CJ, B must win on the basis of immediate indefeasibility. Mrs A loses her farm. Though she may be able to obtain compensation (to the value of the land at the time of the fraud) from the government, this is still an arguably unsatisfactory result given Mrs A's strong emotional connection with her land.

## 2 Possible reforms

The current approach to indefeasibility is said to be arrived at and justified by principles of statutory construction. As Sir Anthony Mason notes, it 'is not based on a considered assessment of the comparative benefits and detriments associated with each of the two version of indefeasibility'. Despite this lack of policy evaluation, it may nevertheless be desirable to depart from present understandings of indefeasibility if it would result in more justiciable outcomes.

### a) Return to deferred indefeasibility

It is sometimes thought that deferred indefeasibility yields more satisfactory results in cases involving void instruments. As the experience of Canada demonstrates, it is a workable solution. No significant problems have been raised by its adoption there.

In the view of Sir Anthony Mason, deferred indefeasibility would generate fairer results. However, it is unclear whether such benefits would outweigh the detriments of change. How would the change affect security of title, the cost of administering the system, and the speed with which interests are registered? Would it move closer to achieving the goals of the Torrens system (certainty, conclusiveness, etc)?

### b) Equitable relief

Any reform must effectively balance security and certainty of title (from the purchaser's perspective) against the rights (and emotional attachment) of the original vendor. At present, courts face the unenviable task of choosing between two 'innocent' (ie, non-fraudulent) parties.

There may be a role for equitable remedies in some cases. According to Sir Anthony Mason:

*There was a traditional opposition to too much equity and an idea that excessive equitable relief would be destructive of the objects of the Torrens system. This opposition seems to misunderstand the nature of the indefeasibility for which the statutes provided. The opposition seems to have been based on an idea that the register was supposed to contain all estates or interests in land — as if there was an obligation on a person claiming an estate or interest in land to register it. ... relief against a registered proprietor ... should be available so long as it does not trench upon the principle of indefeasibility. The availability of such relief is an essential element in doing justice under the Torrens system. If such relief were unavailable, the registered proprietor would be in an extraordinarily preferred position. It was never the object of the system to protect the registered proprietor against such claims.<sup>9</sup>*

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<sup>9</sup> Sir Anthony Mason, above n 6, 16.

Defeasibility is too rigid a rule. Deferred or discretionary indefeasibility may deliver fairer results. Equitable remedies may undermine certainty to an insufferable degree.

c) Discretionary indefeasibility

This involves giving discretion to the Court in cases where a void instrument is registered. It may either order that the former registered proprietor be restored to the register, or declare the subsequent registrant's title to be indefeasible.

The Victorian Law Commission prefers prima facie deferred indefeasibility, with a backup discretionary power to be employed in cases of 'undue hardship'.

Such an approach may also allow the court to consider whether any party to the transaction would better be satisfied by compensation. New purchasers, for example, have less of an emotional connection with land than an existing but defrauded vendor.

The Canadian Joint Titles Committee proposed several factors to determine whether the discretion should be exercised:

- (a) Nature of ownership and property use by each party (eg, commercial, residential occupation, etc);
- (b) Circumstances of the transaction;
- (c) Special characteristics of the property;
- (d) Willingness of a party to receive compensation;
- (e) Ease of determining compensation; and
- (f) Other circumstances 'which, in the opinion of the Court, may make it just and equitable for the Court to exercise or refuse to exercise its powers.'<sup>10</sup>

The primary problem with discretionary defeasibility is that it would increase uncertainty. A high degree of confidence in the system is necessary for it to work properly. That confidence cannot be maintained unless it performs as expected. If indefeasibility depends on discretionary normative judgments, this aspect of the land registration system may be undermined.

d) Petition the Registrar in exceptional cases

Current legislation in some jurisdictions (eg, South Australia, New Zealand) permits the Registrar to make alterations to the register where it is appropriate to do so. While this arguably generates more uncertainty than a judicially determined approach to indefeasibility, it remains another option.

For example, in the United Kingdom, the *Land Registration Act 2002* (UK) permits the register to be altered in special circumstances. However, something greater than fraud is required.

e) Improve compensatory measures

Compensation is generally agreed to be inadequate. It could be increased, and the procedures for obtaining it streamlined.

f) Take steps to prevent fraudulent dealings

<sup>10</sup> Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Recording and Registration Act for the Provinces and the Territories of Canada* (1990).

Prospective mortgagors could be forced to provide evidence of their identity. Witnesses to transfers could be burdened with more onerous duties of supervision and warranty. Various types of written, electronic and in-person confirmation could be required by parties registered on a certificate of title.

Of course, no anti-fraud measure can be completely effective. For this reason, the legal approach to indefeasibility remains of considerable importance to those parties who are inevitably defrauded.

## V **Miscellaneous Dealings**

### A **Gifts of Land**

For an effective gift of Torrens land in law, the property must be delivered and the titled vested in the donee. If this were general law land, the conveyance would be by deed. Under the Torrens system, however, registration is the relevant vehicle for vesting title. Thus, for a complete gift under the Torrens system, there must be registration.

**Issue:** if the gift is not complete in law, can it be complete in equity?

Relevant equitable principles:

- Equity will not assist a volunteer;
- Equity will not perfect an imperfect gift.

What must be done and by whom?

#### **Re Rose (1952) UK:**

##### Reasoning

- Where the donor has done everything necessary to be done by the donor
- Even if the step of registration remains to be carried out by the company
  - This is a step that the donee must carry out
- The rule that equity will not assist a volunteer requires qualification:
  - A gift will be complete in equity where the donor has done everything necessary to be done by the donor to transfer the legal title

*Re Rose* is a qualification on the maxim that equity will not assist a volunteer. Of course, the assistance is here not provided to the volunteer (donor) but to the donee who has not yet been registered as owner.

In *Brunker v Perpetual Trustee Co*, Dixon J treats the traditional *Milroy v Lord* principles (of equitable gifts) as completely inapplicable to Torrens land.

#### **Brunker v Perpetual Trustee Co (1937) HCA:**

##### Reasoning (Dixon J)

- These principles do not apply to Torrens title land
- A gift is complete only upon registration (or upon obtaining a right to registration)
- This is most consistent with Torrens' intention that title is to be conferred by the act of registration alone

*Brunker* represents a strict view of the Torrens system. This position was relaxed slightly in *Corin v Patton*, which rejected *Brunker* (Brennan J dissenting).



**Corrin v Patton (1990) HCA:**Facts

- Mrs and Mrs Patton joint RP of land
- Mrs Patton wanted to sever the joint tenancy (had to do it whilst she was alive owing to survivorship)
  - Must have been severed *inter vivos* (while she was alive)
- She executed a transfer of her share in favour of Corin (her brother) as trustee for her or as directed
- The transfer was handed to her solicitor with instructions to complete the transfer
- The certificate of title was held at the Bank of New South Wales as unregistered mortgagee; no arrangements had been made for the Bank to produce the duplicate certificate to allow for registration

Issue

- When did severance occur?
  - That is, when was the gift complete?

Reasoning

- Mason CJ, McHugh J:
  - *Milroy v Lord* principles applicable to determine whether there was an effective gift in equity ie whether interest passed
  - Donor must have done everything necessary to render the gift binding
    - Must sign transfer with intention to make a gift
    - Deliver possession of the transfer document to donee
    - Make arrangements for production of duplicate certificate of title
  - Mrs Patton needed to have done everything necessary to be done by the donor to render the gift binding for severance to take place *inter vivos*
  - On the facts, she did not arrange for delivery of the certificate of title thus not all steps were complete
- Deane J:
  - Agreed with reasoning of Mason CJ and McHugh J
  - *Milroy v Lord* principles are applicable
  - The gift must be beyond recall
- Brennan J (dissenting)
  - Dixon J in *Brunker* was correct: a donee does not acquire an equitable interest in land prior to registration, but may acquire a right to obtain registration
- Toohey J (dissenting)
  - On the facts the transaction was not a gift, so declined to apply *Milroy v Lord* principles

According to *Corin v Patton*, then, general equitable principles from *Milroy v Lord* do apply to incomplete gifts of Torrens land. *Corin v Patton* suggests that donees will obtain an equitable interest prior to registration. It might be argued (as Brennan J did) that this is inconsistent with the principle of title by registration (*Breskvar v Wall*).

However, in reality the position is very similar to what would occur if the dealing was a sale. The purchaser would obviously have an equitable interest arising under the contract of sale prior to registration (equitable interest in fee simple; tenancy in common: *Barry v Heider*), so proprietary rights can clearly be created in equity prior to registration:

*The ability to create and the validity of an equitable estate in land the title to which is under the Torrens system were fully established in Barry v Heider...*

(*Breskvar v Wall* at 387 per Barwick CJ)

Both of these results may be contrasted with the actual intention of Sir Robert Torrens, who did not intend proprietary rights to arise until registration.

## B Analysing the Torrens System

### 1 Accommodation of informal interests

Bradbrook, MacCallum and Moore observe (at 1–2) that

*The only interests that can exist in relation to Torrens System land are those recognised by the system. Nonetheless, the system does recognise interests that are not set out in the central register so that there are both registered and unregistered interests.*

One of the primary aims of the Torrens system was that only registered interests are recognised. Clearly this is not the case.

The current rules represent a balance between two competing policy goals: fairness for holders of unregistered interests and economic efficiency (by conclusiveness of title). The result is a system in which secure title is readily alienable, whilst informal dealings remain capable of recognition in a majority of cases.

Hughson, Neave and O’Conner observe of the interactions between law and equity in the Torrens system, that:

*There is an inherent tension between the emphasis which equity places on enforcing obligations of conscience and Torrens’ goal of protecting purchasers of interests. This tension can be discerned in the very conception of Torrens reform of general land law. Torrens’ intention appears to have been that no interest in land should come into existence prior to registration. (at 461)*

See further Justice Gummow at 61–5.

Was Equity shut out of the Torrens System? Clearly not: note complexities and tensions that have arisen as a result:

*Those principles had to operate alongside provisions such as s 41 [TLA] to the effect that until registration of an instrument a transfer is ineffectual to pass an estate or interest in the land.*

The answer was that this prohibition did not touch whatever rights were behind the instrument, a proposition derived from *Barry v Heider* itself.

**Query:** would Robert Torrens be happy with this analysis?

- Originally envisaged a simple, pragmatic system
- Objectives of his original system ‘muddled by the Chancellor’s foot’

Torrens’ view was a strict conception of how interests should be acquired and transferred:

*Instruments when executed are merely personal contracts between the parties upon which action for damages may be raised but they do not bind the land. The entry on the folium of the Register alone passes the property, creates the charge or lesser estate, discharges or transfers it.*

Absolute adoption of this view would have entailed 'abandonment of the principle that a specifically enforceable contract passes an equitable interest in land.' However, it has been accepted that a specifically enforceable contract passes an equitable interest in land (*Barry v Heider*, *Bunny Industries*; *Bahr v Nicolay*).

Interactions between registered and unregistered title in the Torrens system include:

- The system of equitable estates and interests in relation to land, which continue to be held over Torrens land (*Barry v Heider*)
- The caveat system (which affords some measure of protection for equitable interests: TLA ss 89–91)
- The exercise of the Court's general jurisdiction to enforce common law rights and equitable obligations and duties by *in personam* remedies
- Paramount interests (TLA s 42(2))
- Incomplete gifts (*Corin v Patton*) which equity would recognise as complete prior to registration (treating as done that which ought to be done)

Indeed, equitable rights are sometimes critical to commercial certainty: that an interest arises under a contract prior to registration affords some measure of confidence to the buyer of land that the transaction will proceed to settlement and enables them to order their affairs on that basis. Thus, where A sells to B but B is not yet registered (prior to settlement), there is an equitable interest held prior to registration (*Tanwar*, *Bunny Industries*).

Gifts:

*Their honours [in Corin v Patton] pointed out that the Torrens legislation was silent as to the supposed right, and that statutes provided scant support for the notion of a personal right apparently ... All that can be said is that the legislation enables a donee to secure registration ... and that power stems not from statute but from the principles of equity.* Justice Gummow at 61.

The courts' treatment of incomplete gifts highlights the tension between Torrens title by registration and giving effect to equitable relief:

*Where a donor, with the intention of making a gift, delivers to the donee an instrument of transfer in registrable form with the certificate of title so as to enable him to obtain registration, an equity arises, not from the transfer itself but from the execution and delivery of the transfer and certificate of title in such circumstances as will enable the donee to procure the vesting of the legal title in himself. Accordingly, s 41 does not prevent the passing of an equitable estate to the donee under a completed transaction.* (Gummow at 62)

### 3 Does the Torrens system achieve its objectives?

Torrens is a modern statutory system designed to avoid some of the problems inherent in the general law system. It was designed to be more reliable, efficient and cheaper than general law conveyancing.

Problems with the original system:

- Reliance upon **chains of title deeds**
- Operation of the **doctrine of notice**
- So, accordingly, the Torrens system substituted a **public register [book]** for the private chain of title deeds; and
- **It abolished the doctrine of notice in favour of people who registered their interests in the register [book].**

How successful has the Torrens system been in meeting its aims and achieving a balance between commercial efficiency and fairness?

- *Courts are the vigilant guardians of certainty*  
Fraud and in personam exceptions interpreted strictly to minimise the scope of the statutory exceptions; indefeasibility is broad and immediate

Critics of the recognition that is presently afforded to equitable interests and personal remedies would do well to recognise that threat posed to the objectives of the Torrens system by overriding statutory interests. Far from being 'free from all encumbrances', title is increasingly burdened with onerous planning and environmental obligations, which arguably cause far greater inconvenience to purchasers and incompleteness of the register than do equitable rights.

#### 4 *What policy choices are inherent in its rules and mechanisms?*

##### *Indefeasibility of title*

- Deferred / immediate indefeasibility
  - When does the registered title become indefeasible?
  - What is the effect of registering a void instrument?
- Example
  - Abigail is RP
  - Sally is Abigail's solicitor
  - Sally forges Abigail's signature on a transfer and transfers to Beatrice. Beatrice becomes registered
  - Beatrice purchased the fee simple in good faith and does not know of the fraud
- What is the effect of registration of the transfer?
  - Beatrice obtains indefeasible title against Abigail on the basis of immediate but not deferred indefeasibility
  - Will Beatrice obtain an indefeasible title as against Abigail?

##### *Deferred indefeasibility*

- Registration of the void transfer will not give Beatrice an indefeasible title against Abigail
  - If Beatrice sells to Candice, Candice will have an indefeasible title
  - Indefeasibility is deferred until one transaction away from the void dealing
  - Emphasis on provisions of the TLA that protect third parties dealing with the RP especially TLA s 43, 44
- Cases supporting deferred indefeasibility
  - *Gibbs v Messer* [1891] AC 248
  - *Clements v Ellis* (1934) 51 CLR

##### *Immediate Indefeasibility*

- The primary means of protecting purchasers: title is created upon registration and is immediately capable of passing good title (subject to exceptions)

- Beatrice is not involved in the fraud herself and so will have an indefeasible title against any claims by Abigail
- Emphasis on the provisions of the TLA protecting the person obtaining registration- especially paramountcy provisions TLA s 42
- Early cases supported deferred indefeasibility, this is no longer the case- immediate indefeasibility is clearly supported
- Immediate indefeasibility favours the later purchaser/ security interest holder by allowing immediate immunity from challenge. Leaves earlier interest holder to seek compensation [if available] as they will not be able to recover the land.

**Note:** tension between fairness to previous RP and certainty title for purchaser. How can the unfairness caused by immediate indefeasibility be justified to an RP who loses out?

- *Frazer v Walker* [1967] 1 All ER 649
  - Immediate indefeasibility based on 5 aspects of the legislation
  - Instruments must be registered in accordance with the Act (s 40) subject to right of Registrar to correct
- RP protected from claims unless exception to indefeasibility (s 42)
- certificate of title is conclusive evidence that the person has the registered interest (s 41)
- Power of Registrar to correct register (s 103(2))
- Position of RP altered by abolition of doctrine of notice (s 43)
- Indefeasibility subject to
  - exceptions including fraud
  - The right of the plaintiff to bring an action against the RP in personam founded in law or equity for such relief as a court acting in personam may grant

***Breskvar v Wall*:** what is the effect of registration of a void instrument?

- Despite being void at common law, registration is effective to create the interest
- Even if Wall's interest was defeasible as against the Breskvars because of fraud- did registration give him any interest in the land?
- Whilst the register is unamended it is conclusive evidence of the particulars on the register (Barwick CJ) (equivalent of TLA s 41)
- Could Wall create an interest in the land in Alban? Alban purchaser on faith of register
- Alban acquired an equitable interest – right to be registered thus eventually would be RP

Function of caveats within Torrens system

- What is the function of the caveat provisions of the Transfer of Land Act?
- Are they to freeze the register to allow regularisation of an unregistered instrument.
- Are they to allow the caveator the opportunity to substantiate their claim.
- Are they intended to operate as a statutory injunction preventing the Registrar from registering inconsistent interests?
- Are they intended to provide for a means of giving notice to others of interests in land that the caveator claims?

5      *How has it altered the broader context of land management in Australia?*

Bradbrook, MacCallum and Moore note (at 1):

*The essence of Australian real property law is the Torrens system. This system should be seen as changing the nature of interests in land. The system is one where title to land is*

*derived from registration- it is a system of title by registration and not one of registration of title*

In the particular conditions of Australia, the shortcomings of the general law deeds conveyancing system were exacerbated.

## C *Hughson, Neave and O'Connor: 'Reflections on the Mirror of Title'*

### 1 *Introduction*

- Purpose of caveat: 'to prevent the registered proprietor from dealing with the land in a manner which is inconsistent with the rights of the caveator' (at 465)
- Reasons why this approach is to be preferred:
  - Broad; should encompass all equitable interests
  - Protective function
  - All categories of interest able to be caveated
  - Flexible function dependent on circumstances
- Note discussion of what constitutes estate or interest in land (at 467–74)

### 2 *Mere equities and caveats*

- If we accept that there is a difference between equitable interests and mere equities, is a mere equity sufficient to support a caveat?
  - Are mere equities 'interests in land' within the meaning of TLA s 89?
  - According to current authority they are not: *Swanston Mortgage*
- Can a RP caveat to protect its own registered title?
  - *Swanston Mortgage v Trepan Investments*: no, unless and until he or she has an interest in the land that is separate and distinct from his or her title as registered proprietor
  - See Hughson at 475–6
- Should we recognise and protect equitable interests?
  - 'The financial and personal value of the properties protected by equitable interests make them worthy of protection under the current system of property law in Australia...'
- Permitting the holders of unregistered interests to caveat would provide them with some protection without undermining the aim of protecting purchasers transacting on the faith of the register who themselves become registered.' (at 477)
- Law and economics argument:
  - Notice of interest is another way of gathering all information about title into the register
  - Protecting more interests more strongly acts as an incentive for the lodgement of caveats

### 3 *Adjudication of priority contests between unregistered interests*

- Torrens' intention that no interest should pass until registration but if recognise equitable interests under Torrens Title
  - However, this raises the need to resolve priority conflicts between unregistered interests
- Priorities rules:
  - Better equity test, if equities equal

- First in time unless postponing conduct
- Postponing conduct: estoppel or broader reasonably foreseeable test: at 477–8

#### 4 *How should general priorities apply to Torrens title land?*

*It would have been possible for courts to adapt equitable principles to the goals of the Torrens system, by permitting postponement on the ground that the holder of the first interest has not made use of the statutory mechanisms provided to protect it, ...[for example] by lodging a caveat. (at 479)*

This approach was adopted in the early cases (see, eg, *Butler*). Later cases increased the emphasis placed upon protecting the first in time interest holder rather than those who deal on faith of the register.

#### 5 *Trends in priorities cases*

- Discussion of arming cases and disarming by via caveats: 479–82
- Effect of trends to favour first in time interest holder
- Removes incentive to caveat
  - First in time interest holder is cheapest loss avoider: costs of notice are lowest for them (easier for holder of equitable mortgage to put it in the register than a purchaser trying to discover the interest, since the holder knows of the interest already: cf notice doctrine: costly and inefficient)
  - If failure to bring interests into the system by registration or lodging a caveat will make that party lose priority, this encourages registration and lodgement of caveats, which in turn contribute to mirror and certainty
- Does the current approach facilitate the aims of the Torrens system?
  - No, it discourages noting unregistered interests on the register

*The view that the effect of positive ‘arming’ conduct can be undone by using the statutory mechanism for the protection of an equitable interest [a caveat] is quite consistent with the notion that the register should mirror the state of the title. (at 481)*

- *Just* shows that a failure to caveat is not of itself a reason to postpone but the effect of mere failure is still unclear
- Note conflicting views (eg, *Sharari*; cf *Avco*).

*Perhaps the most important reason for conferring priority on the person who caveats is that this creates an incentive to do so. (at 488)*

- Contributes to accuracy of register
- Cheaper more efficient system as first in time ‘cheaper loss avoider’
- General trend is to implicitly apply common law priorities rules to favour the first in time interest holder, regardless of whether they lodged a caveat.

#### 6 *Reforms*

See 488.

#### 7 *In personam claims*

- Principle of indefeasibility is the linchpin of the Torrens scheme for protection of purchasers who transact in reliance upon the register
- Yet it is still recognised that individuals can bring a claim against the registered proprietor in their personal capacity
- Is this consistent with Torrens objectives?
  - These claims are based on the personal legal or equitable liability of the registered proprietor
  - *Frazer v Walker*: the Torrens system does not deny the 'right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant'
  - 'Neither ... section [42 or 43] nor the principle of indefeasibility preclude a claim to an estate or interest in land against a registered proprietor arising out of the acts of the registered proprietor himself': *Bahr v Nicolay [No 2]*

## 8 Form and substance

- Judicial discourse treats *in personam* claims at two levels (at 490)
  - *Formal level*  
Exception poses no conflict with indefeasibility as the remedy does not operate upon the registered title directly (not *in rem*, just a personal equity)
  - *Substantive level*  
In personam enforceable against the person of the registered proprietor by requiring him to deal with the property in accordance with the Court's directions
    - Eg, specific performance of contract of resale in *Bahr*
- The formal level downplays inconsistency between indefeasibility and *in personam* claims
  - Certain claims would undermine indefeasibility
  - 'The scope for substantive inconsistency with ... [the] Torrens scheme assumed greater importance following the endorsement of immediate indefeasibility' (at 490)
  - 'Cognisant of the potential for *in personam* to outflank indefeasibility, courts have restricted the class of claims...'
- See *Kenworthy*
  - *In personam* has the tendency to outflank indefeasibility: although action is brought against the person, it may lead to a court order directing a party to perform their contract and resell the land (eg, *Bahr v Nicolay*).
  - Judges at once accept *in personam* claims whilst denying any inconsistency with Torrens objectives
  - Courts don't allow broad spectrum claims for *in personam*: forgery in transaction is insufficient, rather there is emphasis on claims from the dealings or conduct of the registered proprietor
  - Claims are limited to specific equitable causes of action
- *In personam* claims relate to the personal conduct of registered proprietor; the trend has been to narrowly interpret the exception:

*The courts are concerned to exclude claims, which though seeking an in personam remedy do not arise from some transaction or conduct attributable to the registered proprietor personally.* (at 489)

- One of the questions that arises is:
  - 'Are the objectives of the Torrens system compatible with the recognition of the *in personam* exception?'
  - It is not possible to know 'from the face of the register' if the registered proprietor is affected by *in personam* claim



9        *Conclusions*

- A central objective of the Torrens system was to provide a conclusive public register to promote greater simplicity and certainty in land dealings; this was largely supposed to be for the benefit of purchasers dealing on the faith of the register
- The scope of equity within the Torrens system has gradually been expanded to afford greater recognition to holders of unregistered interests
- Some adaptations of the Torrens system have been made to accommodate equity (eg, the caveat system)
- Some equitable principles from general law have been displaced (indefeasibility of title replaced the equitable creation of the *bona fide* purchaser)
- The statutory scheme is arguably not self-sufficient because it requires recourse to equity
- Do we have a cheap, efficient and secure title system?
  - Yes in most instances but with flexibility to accommodate a wide range of interests; however, there are some anomalous policy aspects
  - Efficient and commercially viable/certain
  - Exported across the world — some measure of its success
  - Note issues: tensions between competing goals and substantive fairness