

# MLL 325 Land (Exam)

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## 1.0 Interests in Land

### 1.1 Legal Interests in Land

- All legal interests over land **must be in the form of a deed** otherwise not legal: s52(1) PLA
- **Exceptions** to this are set out in s52(2) (variety of orders) AND s54(2) PLA sets out that leases not required to be in writing such as oral leases for 3 years and under
- Applies to all 'conveyances' of land. s18 PLA defines conveyances broadly to include: 'mortgage, charge, lease, assent, declaration etc'
- Conveyance not restricted to formal deed or transfer

### 1.2 What is a Deed?

- CL *Manton v Parabolic*: Ritual/instrument to signify solemnity
- Early times: 'Livery of seisin': vendor removed his battle glove from which he had defended the land and 'vested' the purchaser with it. Vendor then **dug up a sod and handed it to purchaser along with the knife**
- A Memorandum of events subsequently prepared. This Memo came to be known as deed - replaced ancient rituals.
- Deed: **most solemn act a person can perform with respect to a particular property**: *Manton*
  - **Witness account of the piece of land**
- Usually applied to: conveyances, transfers, mortgages, charges and leases of land.
- **Common law requires a deed to be: signed, sealed and delivered.**
- It must be executed by the grantor in **presence of the prescribed number of witnesses, known as instrumentary witnesses.**
- A seal must be affixed to it. Originally, affixing seals made persons parties to the deed and signatures were optional, but most jurisdictions outdated seals, and now the grantor and witnesses signatures are primary
- Statute reinforces this: **s73PLA must sign or place mark – sealing alone insufficient.** s73A PLA: if deed expressed to be sealed shall have the same effect as if it has been.
- TLA s40(2)(now repealed) set out that every instrument – when registered – shall have the same effect as if it were a deed under seal. **Electronic Conveyancing (Adoption of National Law Act) 2012 (NSW) Appendix s9(1)** gives electronically lodged registry instruments the same effect as paper documents

### 1.3 General Law (Old title) and Torrens Title Land: What is the difference?

- General Law (Old Title) Land represents all land grants issued between 1838 and 1862 which have not been brought under the Torrens system.
- General Law is the original form of land ownership. When land was sold or otherwise allocated by the government, a Crown Grant would state that the land described had been given to the person named in the Grant. Each time the property was sold a new deed would be added to the Grant. These would grow into a chain of deeds. To prove ownership, a vendor would have to produce the complete and unbroken chain of titles. These days any general law land that is transferred must be converted to modern Torrens title
- In Victoria the Torrens system first introduced in 1862 pursuant to the Real Property Act (Vic) which is now set out in the Transfer of Land Act 1958 (Vic). Land issued after 1862 was Torrens land OR land converted to Torrens under the 'conversion process' is Torrens land
- In Victoria today, most land is now Torrens title
- Remaining old title land must, where transferred, be brought under the TLA so that eventually all land will be covered
- General law land is evidenced by a 'chain of title'. Torrens title land is evidenced by a CT
- Chain of title dates back to the original grant

#### 1.3.1 "Searching a Chain of Title"

- To verify general law title, s44 PLA sets out only need to search back for the 'good root' of title. This amounts to documentary title apparent in the previous 30 years.
- Purchaser is not affected by any title existing beyond this 30 year period: PLA s44(6)
- Must be aware of titles existing within the 30 year period because will be affected by this.
  - Title before 30 years that have a better title than purchaser does not affect the purchaser
- No guarantee of title with general law interests

### 1.4 Torrens Title Interests

- The *Transfer of Land Act* provides for the Register to be in a variety of forms and on any medium, including parchment (old CT's) and a computer
- The computer title information forms part of the Register and can be updated by registering new dealings on the computer database without having to update any paper title.
- The folio is the original document in the titles office. The certificate of title is the duplicate of the folio (known as the duplicate certificate of title).
- For a computer title, the Certificate of Title is a computer printout
  - Its like an ID for the land
- Computer titles may be created in two ways:
  - directly from newly registered plans of subdivision for lots, roads and reserves on those plans. In this situation there is no paper folio for the land, only the computer folio information
  - through the registration of a dealing affecting a paper folio (title) for which there is computer "search" data available. The registration transforms the data to computer folio data, which can be subsequently updated instead of the paper title
- Computer titles do not contain the breadth of detail as the old paper titles.
- They only contain current information (i.e. not old registered proprietors etc) and they do not contain any detailed diagrams of easements etc
- Verified: *Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW) Appendix – Victorian Act – ss7 (documents may be lodged electronically and s12 (digital signatures)*

- Unlikely that A would renew so R granted Mr and Mrs M an option to purchase (time frame)
- A exercised its option but no formal lease
- R's solicitors fraudulently told them A had exercised option (even though not effective)
- Mr and Mrs M did not exercise their option in time frame
- R then served notice to quit on A and granted Tricon lease an option to purchase
- Mr and Mrs M claimed equity against R on basis of breach of contract
- Competition between prior mere equity of Mr and Mrs Mills and subsequent full equity of Tricon
- Held: TJ Palmer J held Mr and Mrs M held an equity bc R could not take advantage of its own wrong. Classified as a full equity
- Crt of Appeal disagreed: Sheller JA held Tricon did no wrong to Mills. Did not categorize interest of Mills as mere or full equity
- Analogized with Latec – equitable interest of Tricon acquired without notice therefore priority

### 1.12 Revision Questions

Rhonda purchases a fee simple in old title land. She buys the land with the assistance of an old title mortgage. The mortgagee X Co takes the title and puts it into their safe. They subsequently take the title out and accidentally leave it on the desk. The title is 'stolen' and subsequently used to finance a further mortgage in favour of Y Co. Which interest should take priority?

- Northern Counties v Whipp
- Prior title, X Co, legal interest
- Y Co has equitable interest because of nemo dat
- It may be contributory to the leaving the title in their safe

Bob wants to purchase a piece of old title land. He inspects the property and the title documents and decides to enter into a contract to purchase the land. Prior to settlement, Bob discovers that the property is actually subject to a two year fixed term lease. Bob wants to take the property free of that lease. His solicitors assures him that if he 'settles' on the property before the tenancy agreement is sent to him he will not be bound. Advise Bob.

- Old title land
- Equitable because deed hasn't been executed
- Tanwar: equitable lien
- Blackwood: need to have the notice before entering into the contract
- Constructive notice: should have known from inspecting the property

Prue sells her fee simple to her brother Ted. Ted gives Prue the deposit and then, upon settlement, gives her  $\frac{3}{4}$  of the purchase price. Prue, trusting Ted, hands over the executed deed of conveyance and chain of title. Ted then uses that title to finance a mortgage with Z Co. Ted does not pay the mortgage and absconds. Who will take priority between Prue and Z Co?

- Rice v Rice
- Prue passed Ted the deed voluntarily
- Z Co can only take what's theirs, Prue will take the remaining
- Z co will take priority

## 3.0 Basic Elements of the Torrens System

### 3.1 Rights in relation to land

- Four stages of development:

- a. General law w/o a registration system
- b. Deeds Registration system
- c. Torrens system: title by registration
- d. Computerisation - the digital era

### 3.1.1 General Law without registration system

- **Problems with the General law without a registration system:**
  - Transfers were time consuming and expensive
  - Errors occurred and defects were overlooked
  - Title was not secure and bound by previous interest, because:
    - Deeds are missing
    - Deeds may be forged and therefore null and void
    - Bound by equitable interest on the basis of constructive notice
  - Some titles are inherently insecure
    - Equitable interests are defeated by bona fide purchaser of an estate
    - Volunteer's title is always subject to prior equitable interests
- DRS Introduced by legislation in all Australian States
- Under old title, you need to trace to all the title back to the first, but now one need to track back to only 30 years

### 3.1.2 Deeds Registration System (DRS)

- DRS established a centralised register with the aim of recording instruments or dealings over land
- Objective was to simplify the process of searching a particular title
- Aim is to reduce the risk that a person acquire an interest in land without knowledge of an earlier inconsistent interest
- **Two important principles were introduced:**
  - **Publicity:** the system aimed to make land dealings a matter of public record by creating a register, which a potential purchaser could search in public records
  - **Changes priority rules:** where an instrument is executed bona fide and for valuable consideration and it is registered, it will take priority over an instrument which could have been registered but is not or which was registered at a later date

This was the incentive to register dealings with land

- Priority between competing registrable interests is not dependent on the date of execution (creation) of interest, or upon nature of the interest, but rather on the date of registration
  - Prior equitable interest is registered, they will have priority over the land
- Distinction between legal and equitable interests
- Index of vendor's names
- Old law titles are incompatible with a computerised system as it is not based upon a land parcel description
- **Registration was not compulsory:** Failure to register an interest will not render it void
- **The Transfer of Land (Single Register) Act 1998 (Vic)** amended the system and **no further registrations under DRS are possible in Victoria:**
  - **Register is closed** although searches may still be made
  - Registrar under obligation to bring all fee simple estates under the Torrens system
  - Conversion scheme makes conversions possible for entitled persons

#### Problems with DRS

- **It remained necessary to search the chain of deeds to ensure that there were no defects**
  - Just provide an easier way to search, and a way to register their interest
- **A deed was registered and not a title**
- **It did not validate a defective title**

- Such an action cannot be defended by the registered proprietor arguing that his or her title is indefeasible.
- If the registered proprietor is a trustee of the land for another person, that other person, the beneficiary, can probably enforce the trust against the registered proprietor.

## 4.0 Exceptions to Indefeasibility: Statutory Fraud

### 4.1 Statutory Fraud CB 11.18

- An **exception to indefeasibility** in s42(1)
- An **exception to the doctrine of notice** in s43
- The effect of fraud defined in s44(1) – ie it will void against person defrauded and no party privy to the fraud can benefit from it.
  - It will only affect the person who committed the fraud
- Fraud will **not affect a bona fide purchaser for value** s44(2)
- No actual definition of fraud in the TLA
- Mere notice does not constitute fraud: s43
- Fraud must be brought home to the registered proprietor/interest holder to operate

### 4.2 What is Fraud

- Fraud in TLA is broader than CL fraud which requires proof of deceit
- Fraud in TLA more akin to equitable fraud - i.e. Wherever an unfair consequence may arise
- Fraud where: intend to deceive; suspicions are aroused; wilful ignorance: *Assets v Mere Roihi* ‘in circumstances where a registered proprietor intends to deceive, where his or her suspicions were aroused or where he or she abstained from making inquiries for fear of learning the truth’.
- Fraud where act inequitably

### 4.3 Fraud Cases:

#### 4.3.1 *Loke Yew v Port Swettenham Rubber Co* [1913] AC 491 CB 11.19

- Rubber Co bought land from RP and agreed not to disturb LY's occupation of the land;
- Rubber Co then sought to remove LY despite previous assurance
- PC concluded this conduct amounted to statutory fraud. Failure to uphold express assurance was part of overall fraudulent scheme to acquire the land - false representation to induce transfer
- **Change of mind even under equity it is not allowed.**
- **Lord Moulton:**
  - *'Their Lordships therefore find that the formal transfer of all the rights under the original grant was obtained by the deliberate fraud of Mr Glass. He was aware that he could not obtain the execution of a transfer in that form otherwise than by fraudulently representing that there was no intention to use it...'*

#### 4.3.2 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 CB 11.21

- B's sold land to N. N leased back to B's subject to a contractual right in favour of B's to repurchase after three years.
- N sold to T's who agreed to uphold B's contractual right to repurchase
- T's refused to uphold B's right.
- HC per Mason, Dawson JJ held that failure to uphold express assurance was **statutory fraud**.
- **Notice of prior interest plus express assurance = fraud.** Title acquired under false pretences
- **Goes beyond mere notice. Fraud here committed after not before registration**
- **Notice + Express assurance = Fraud (Mere Notice is not enough)**

- Mason CJ and Dawson J:
  - *'...why should the exception not embrace fraudulent conduct arising from dishonest repudiation of a prior interest which the registered proprietor has acknowledged or has agreed to recognize as a basis for obtaining title, as well as fraudulent conduct which enables him to obtain title.'*
  - *'These comments (i.e. immediate indefeasibility) do not mean all species of equitable fraud stand outside the statutory concept of fraud.'*

#### 4.3.3 *Russo v Bendigo Bank* CB 11.23

- **Facts:** Son in law of Mrs R forged mortgage to Bendigo bank
- Ms Gerada – law clerk – witnessed the forged signature but, despite solicitors instructions to the contrary, she was unaware of forgery
- Mrs R argued Bendigo bank fraudulent because Ms Gerada acted as their agent and therefore forgery brought home to bank.
- Ormiston J in Supreme Court **held no fraud by Bendigo bank**
- **Held:** Ormiston J: **Statutory fraud should be actual fraud not equitable fraud;**
- **Must involve a dishonesty brought home to registered proprietor;**
- No moral turpitude or dishonesty by Ms Gerada;
- **Principal did not adopt fraud – just because rely on face of register does not mean that he is 'adopting' a fraud committed by an agent: *Schultz v Corwell* CB 594.**
  - Unless principal knew about the fraud or asked the agent to commit the said fraud only then fraud will be committed against the principal
- Unless actual fraud is committed, the indefeasible title is still available
- **Ormiston J:**
  - *'In the present case it is the conscious impropriety of Miss Gerada which they appellants has failed to make out. It is that element of fraud under the Act which the courts have consistently over the years maintained as essential, that is, "personal dishonesty" or "moral turpitude" that has not been brought home to Miss Gerada in the present case. ...it would be a curious consequence that her behaviour should be characterised for this purpose as fraud, for the very essence of that concept is to relieve people from the consequences of indefeasibility only where their behaviour, or the behaviour of those for whom they are responsible, has that element of dishonesty, of conscious moral turpitude or wickedness as would justify the intervention of a court ..'*

#### 4.3.4 *Bank of South Australia v Ferguson* CB 11.25

- Loan from Bank for purposes of potato farm
- Mr F provided cash flow documents and a 'potato budget'.
- Mr McM from bank forged Mr F's signature on a 'Statement of Position' for loan application.
- Mr T from bank made pencil alterations viz valuation of farm - unbeknown to Mr F
- Trial judge held fraud on bank from alteration, forgery.
- **Held:** High Court: Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ: No fraud by Bank
- Fraud must operate on the mind of the defrauded party to induce detrimental behaviour
- No harm, cheating or dishonesty towards Mr F
- Statement of Position only an internal record
- Forgery had no operative effect on Mr F's decision to enter into mortgage – designed to speed up application only.
- **Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ:**
  - *'...for fraud to be operative, it must operate on the mind of the person said to have been defrauded and to have induced detrimental action by that person. This was not the case with EXD3. Nor had Mr Ferguson given evidence that the contents of ExD3 were inaccurate or otherwise adverse to his interests.'*

- Defeasible if claim same land and it already relates to another folio that somebody else holds registered title over
- Where 2 titles cover the same land – land in previous folio cannot be in new folio
- Any attempt to do so does not confer indefeasibility
- Mistakes/errors may occur due to surveying
  - Fencing situation
  - Doctrine of adverse possession will come into play
- Land boundaries determined by survey pegs or natural features of land where error
- Measurements are intended as a 'picture' but real evidence comes from land survey
- Erroneous description may arise especially where general law converted to Torrens
- Title holder must not be a bfpvwn NOR have derived title from a bfpvwn

## 5.0 Exceptions to Indefeasibility: Paramount Interests and In Personam

### 5.1 Paramount Interests CB 11.61

- Paramount Interests are interests whose enforceability is not affected by the registration of an inconsistent interest
- These interests are 'paramount' because they are 'above' registration
- Paramount interests may be registered but do not have to be as protection is not necessary
- *Forrest v Forrest Pty Ltd v Wilson [2017] HCA 30:*
  - Per Kiefer, Bell, Gageler and Keane JJ at [112]:
  - Government granting a mining lease, mining lease will trump your indefeasible title

*'Paramountcy provisions of Torrens title legislation accord paramountcy to registered title over all unregistered encumbrances, estates and interests, save those specifically delineated in the provisions. Such provisions are not concerned, or at least not directly so, with protecting registered title against impeachment on account of informalities or irregularities in applications for, or in the proceedings previous to, registration.'*

#### 5.1.1 Transfer of Land Act 1958 (Vic)

- S42(2)(a): rights or reservations in Crown grant;
- **S42(2)(b): any rights subsisting under adverse possession;**
- S42(2)(c): public rights of way;
- **S42(2)(d): any easement howsoever acquired**
- **S42(2)(e): interest of a tenant in possession (not option to purchase)**
- S42(2)(f): unpaid land tax

#### 5.1.2 Adverse Possession CB 11.62

- Includes possessory title AND proprietary title once the limitation period has expired
- Does not matter that these rights have not been registered
- Adverse Possessor may register interests under **ss60-62 TLA**.
  - S60: Approved form, plan of survey, 21 days notice, registrar may approved
  - S61: Caveat against granting such title
- **S45D NSW Real Property Act** - comparison. **S45D(1)**: Can seek registration once limitation period is reached - bare possessory title not protected. Must be over whole of the land and title must, at the time of application, have extinguished that of the owner had the TLA provision not applied.

- This section allows for registration of adverse possession but does not recognize it as a paramount interest
- Person claiming AP must wait out the full term

### 5.1.3 Easements CB 11.64

- Easements are accepted as paramount interests in all states
- In VIC - very wide application. Applies to all easements howsoever acquired: s42(2)(d)
- This means that express, implied easements (necessity) by grant or reservation which are legal or equitable
- S42(2)(d) also includes easements by prescription
  - Acquired through continuous use that were not forbidden or blocked
- Comparison with NSW: s42(1)(a1) RPA
- Must establish an omission or misdescription of an easement subsisting before registration
- Omission or misdescription in this context that means 'left out': *Dobbie v Davidson*
  - An easement which existed for 60 years prior to these property being brought in from general law to Torrens Title
- Also includes easements validly created at time of registration or subsequent to it.
- This will include express easements but not prescriptive easements
- *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd*
  - **Facts:** Removal of easement by Registrar. Did the removal amount to an omission
  - **Held:** Omission does not include a deliberate removal by Registrar - only those not registered i.e. A negative rather than a positive reference
- *McGrath v Campbell*
  - **Facts:** Issue: Is the implied common intention easement enforceable against the proprietor?
  - Is it enforceable as a paramount interest OR
  - Is it enforceable as a personal equity under the in personam exception
  - **Held:** Tobias JA Case involved transfer of dominant and servient tenements to different parties. Was transferee of servient tenement bound?
  - **No** - not a paramount interest and not enforceable under in personam exception
  - *'...an implied easement arises out of the common intention of the relevant parties, which is presumed by operation of law. Prescriptive easements arise in a similar way. If prescriptive easements are trumped by the indefeasibility provisions of the RP Act, logic requires that those provisions should apply to implied easements in the same way.'*
  - Paramount Interests
    - Must establish some conduct which would make it unconscionable to allow transferee to assert full registered title (In Personam)
    - If all parties commonly intended - personal equity could be established
    - Mere transfer of title - even coupled with knowledge of right of way by transferee of servient tenement insufficient
    - No personal equity could be raised. No unconscionability and no in personam

### *Easements and Registration*

*Parramore v Duggan* (1995) 183 CLR 633 at 636 per Brennan J:

- Tas has similar wording to Vic legislation
- Easement was there since 1925
- Owner register the land without registering the easement in both general title and Torrens title
- The Certificate of Title easement is registered on the dominant tenement's title.
- Unless the easement is registered on the certificate of that title, or unless the easement falls within one of the exceptions contained in s 40(3), the unencumbered title of the registered

- (4) As soon as practicable after making a vesting order, the Registrar must notify the Council of the municipal district where the land is located.
- (5) In this section, encumbrance includes, but is not limited to, any estate, interest, mortgage, charge, right, claim, demand, caveat, lease, sub-lease, restrictive covenant or statutory charge or an agreement under section 173 of the Planning and Environment Act 1987.

## 6.0 Exceptions to Indefeasibility: Inconsistent Legislation Exception

### 6.1 Inconsistent Legislation Exception

- Title of a Real Property (RP) may be set aside where subsequent legislation overrides or repeals it
- Overriding legislation depends upon statutory interpretation
- Direct inconsistency will render indefeasibility provisions ineffective
- Focus upon effect of interpretation rather than creating categories of 'inherent' exception
- Careful to balance objectives of each act
- Seizure of property, indefeasible title cannot be claimed

### 6.2 Inconsistent Legislation:

#### 6.2.1 *Pratten v Warringah Shire Council (1969)*

- **Facts:** Registered title subsequently came under s 398 Local Government Act - vested title in W Council
- Council did not enter their name on the title
- 3rd party - Pratten - purchases the land + after searching title discovers no interest in W Council
- After P registered, W Council sought to enforce its title per s 398
- During subdivision of land there is a disagreement, Council allowed it but didn't register it. 3rd party wanted to register the land
- **Held:** Street J: Suggested issue determined by considering whether a clear intention in LG Act to allow s 398 to be paramount over the earlier Torrens legislation
- Estate which became registered in W Council 'vacated any further interest in the land' on the part of the rp
- Indefeasibility 'will not avail' where the fee simple is incapable of being called back by reason of an overriding provision vesting title
- Council need to approve whenever land is subdivided. Fee simple will be claimed by the W Council
- **Street J:** Suggests s 398 LG Act automatically applied so that fee simple removed from registration. See also *Calabro* where Balmford J came to a similar conclusion viz the equivalent Vic provision - s 203 LG Act
- But - cf *Quach v Marrickville* - same provision - Young J said section only vested title where that title had been registered and any other interpretation amounts to a 'continuous prohibition on private persons obtaining any interest in the land.'
  - Restrict and narrow down s398 LG stating that Council cannot leave things be and come back when they needed to and claim. Need some certainty in Torrens System. They should have register the title since the beginning

#### 6.2.2 *Horvath v Commonwealth Bank of Australia*

- **Facts:** Cth Bank mortgage over land. RP were a couple and their son. Son a minor
- Mortgage not registered until son older

- Mortgage registered. Son argued mortgage void and s 49(a) Supreme Court Act invalidated mortgages with minor + this inconsistent with Torrens provisions and therefore overrode the bank.
- Buy land in Dandedong, Bank didn't register the mortgage until late.
- **Held: Ormiston JA:** First recognized that the mortgage had been registered. Title is registered and it is indefeasible (Cf *Pratten*)
- Determine level of inconsistency
- This is assessed where two enactments are so inconsistent that they cannot stand together
- If not express - language of later act must necessarily imply a repeal of the prior enactment
- In assessing inconsistency on facts - remember that not asserting the creation of a new interest but denying the validity and enforceability of the mortgage
- Easier to prove inconsistency where later interest created;
- If relief can be given w/o an implied repeal then it should be;
- **Strong presumption that Parliament doesn't intend to contradict itself and so must aim to give effect to Acts within their given spheres**
- Can give RP and Supreme Court Act affect within their own 'spheres'
- If mortgage unregistered it was void and SCA controlled this 'sphere' but once registered, the defect cured and indefeasibility conferred and RP Act controlled this 'sphere' (consistent with *Breskvar v Wall*)
- The only inconsistency which would be relevant is one arising from a provision which directly or indirectly denied consequences of registration. Holding an instrument 'void' does not achieve this

### 6.2.3 *Hillpalm v Heavens Door*

- **Facts:** 1977 Subdivision: Right of way to benefit Lot 1. 1981 Lot 2 further subdivided. Plan of subdivision referred to easement but CT's did not.
- 1998 Heavens Door bought Lot 1. Subsequently, Hillpalm bought on of the subdivision in Lot 2. **Could Heavens Door enforce easement against Hillpalm?**
- High Court: McHugh ACJ, Hayne and HeydonJJ  
Could the subdivision condition (*Environmental, Planning & Assessing Act 1979 NSW*) which recognized the easement be enforced against the RP Act. **HC said no.** Acts operated sequentially.
- **No inconsistency:** consent to the subdivision did not create a right in rem and therefore no inconsistency but would have been a 'real and lively' question if the E,P & Act had done so
- Narrow interpretation avoiding a finding of 'inconsistency' provides 'implicit' support for indefeasibility provisions
- **Held: McHugh ACJ, Hayne and HeydonJJ** reinforced the primary 'canons' of statutory construction:
  - Obedience to the law made later in time;
  - Priority to the law on a subject classified as more specific over one regarded as more general and
  - Precedence to public over purely private rights: public issues in both E,P & A AND RP Act but E,P & A more specific than RP and therefore its provisions would take priority to the extent of any conflict
- The comments of Kirby J (in dissent) in *Hillpalm v Heavens Door* [2004] 220 CLR 472 are also instructive:

*'It is elementary under our system of law, that if a written law is valid, clear and applicable, it must be given effect according to its terms. Where there is conflict between the comments of written laws enacted by the same Legislature, courts endeavour to reconcile the texts. If they cannot do so in other ways in terms of their language, they have resort to established canons of construction. Here, these canons include obedience to the law made later in time; priority to the law on the subject*

## 7.0 Exceptions to Indefeasibility: Volunteers and Assurance Fund

### 7.1 Volunteers

- Do the indefeasibility provisions protect registered interest holders who take w/o having given valuable consideration?
- For a promise to be enforceable in the absence of a deed it must be supported by consideration moving from the promisee
- Consideration need not be 'adequate' i.e. In terms of matching the value however it must be 'sufficient'
- It must provide a real as opposed to nominal benefit upon the promisor, and **moral** obligation is insufficient
- Difference between 'valuable consideration' and 'good consideration' (*Chief Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd* (2005) 221 CLR 496, 505 [24] (Gleeson CJ and Callinan J); *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562, 575 [37] (Gummow and Hayne JJ)).
- *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562 (per Gummow and Hayne JJ) (conclusions)
  - Husband is charge drug trafficking to Australia
  - H owned a house in Sunshine
  - Ms Le wanted a interest in the house
  - H transferred half of his interest to Ms Le
  - DPP tried to confiscate the house (accusing the H to buy the house from drug trafficking)
  - Court allowed her to keep her interest
  - [Conclusion]
    - The DPP has succeeded on this appeal in relation to the grounds of appeal concerning the proper construction of s 52(1) but the wife has succeeded on the grounds relating to the construction of both s 52(1)(a)(iii) and (v). The result is that the appeal should be allowed in part.
    - The orders of the Court of Appeal should be set aside and the orders made by the primary judge should be varied in accordance with these reasons.
  - [37]
    - Equity will not (subject to what appears below) assist what it regards as a volunteer to perfect an otherwise imperfect gift of property.
    - In that regard, it would be insufficient to show "good consideration", being natural affection for family members or moral obligation.
    - However, "valuable consideration" will attract the intervention of equity. Equity regards this as not including a bare covenant under seal but as including not only money or money's worth but a settlement made before and in consideration of marriage or agreed before and executed after the marriage
  - Getting married is good consideration
- Equity will not assist what it regards as a volunteer to perfect an otherwise imperfect gift of property.
- Valuable consideration will attract the intervention of equity.
- Valuable consideration = money or money's worth.
- Valuable consideration = a settlement made before and in consideration of marriage or agreed before and executed after the marriage.
- Valuable consideration does not equal 'good consideration'.
- Good Consideration = Natural love and affection for family members (wife, husband, children etc.)
- Good consideration will result in the recipient being regarded as a volunteer

- Qualification: good consideration will deny the implication of a resulting trust as it supports the presumption of advancement i.e. gift (see *Xiao Hui Ying v Perpetual Trustees Victoria Ltd [2015] VSCA 124* per Dixon AJA)
- **Example:** Father transfers to Son title to and Son becomes registered. Son will not be deemed to hold that title on resulting trust back to the Father. In all other respects Son will be treated as a volunteer.
- Transfers **between spouses** will be exempt from stamp duty: *Duties Act 2000 (Vic), s43* (only applies to spouses within a domestic relationship i.e. marriage or living together irrespective of gender) AND stamp duty exemption applies irrespective of whether the consideration is valuable or good (just needs to be a transfer between spouses)
- Does a person who has given no consideration, insufficient consideration or good consideration (as opposed to valuable consideration) gain the protection of the indefeasibility provisions?
- **Argument:** Did the drafters of the provisions intend the benefits or registration to apply only to bona fide purchasers given the specific protection conferred to such parties in other sections. Is this an implied qualification to the scope of the indefeasibility provisions?

### 7.1.1 Cases:

*King v Smail [1958] VR 273*

- Still good law in VIC

#### Facts:

- A husband and wife (Kings) were registered as the proprietors of land as joint tenants.
- The husband executed a transfer of his half of his interest in the land to the wife by way of gift.
- Before the transfer was registered the husband executed a deed of arrangement under the bankruptcy legislation.
- The trustee lodged a caveat claiming an equitable interest in the land under the terms of the deed of arrangement however the caveat was lodged after the transfer so the transfer to the wife became registered.
- In proceedings by the wife to remove the caveat the question was whether the trustee had an interest which had priority over the registered title of the wife.

#### Held:

- Adam J held that s 42 of the Victorian Act (which is equivalent to s 68) did not give the wife priority because she was a volunteer and the doctrine of indefeasibility only protected bona fide purchasers for value.
- Adam J said, at 276:

*"Although s 42 of the Transfer of Land Act 1954 in itself affords no ground for distinguishing between the volunteer and the purchaser for value and would appear to give paramount effect to registered title in either case, other sections in the Act draw a distinction between the volunteer and the purchaser for value and appear to justify the conclusion that upon the registration of dealings subsequent to initial registration under the Act, it is purchasers for value only who were intended to have the benefit of s 42."*

- **Result:** Wife acquired a legal title but did not receive elevated protection
- Wife did not receive a title free from prior equities. She took subject to the interest of the trustee under the deed of arrangement because she took her legal estate with notice of that interest (i.e. Bona fide purchaser for value w/o notice applied)

*IAC (Finance) Pty Ltd v Courtenay (1963) 110 CLR 550*

#### Kitto J at 572:

## 8.0 Unregistered Interests: Caveat System

### 8.1 Unregistered Interests

- **Unregistered interests** are interests in land which have not been registered in accordance with the provisions of the Torrens system
- An unregistered interest is any **interest**, legal or equitable, which is not registered, whether by choice, mistake or necessity
  - Unregistered interest can be protect by caveat
- The Torrens system does **not** make registration **compulsory**
- Section 40(1) Transfer of Land Act (Vic) seems to **imply** that **unregistered interests are not part of the Torrens system**.
- Section 40(1) TLA states:

“Subject to this Act no instrument until registered as in this Act provided shall be effectual to create, vary, extinguish or pass any **estate** or **interest** or **encumbrance** in, on or over any land under the operation of this Act ...”

  - If title is not registered, does that mean that there is no interest?
- View was held that rights of purchasers prior to registration was **personal** in nature and not proprietary
- In *Barry v Heider* it was, however, decided that:
  - The Torrens system **does not touch the form of contracts**
  - **Obligation** to comply with contract will **depend on law of contract and equity**
  - The provision denying effect of **instrument** until registration does not touch what is behind instrument
  - Parties may have **right** to have instrument **executed** and **registered**
- The Torrens system in all states **recognises** the existence of unregistered interest in a number of ways:
  - First it confers protection upon **‘paramount interests’** against the registration of **subsequent inconsistent interests**;
    - E.g. Lease (not more than 3 years)
  - Second it provides for the **protection** of unregistered interests through the **creation of the caveat system**; and
  - Third it **expressly prohibits** the registration of a particular type of interests
- In all jurisdictions it is expressly provided that beneficial interests arising pursuant to a **trust** cannot be registered by the Registrar
- Unregistered interests may also exist because registration is not **compulsory** or interest is **protected**
- from consequences of registration (example adverse possession; lease or an easement) Interests may be registrable but may remain unregistered due to **mistake** or **error** or the existence of sufficient **protection** (equitable mortgagee holding title documents)
- ECNL recognizes that unregistered virtual instruments will constitute an interest in accordance with general law: s26V(2)(e)

#### *Barry v Heider*

- Barry (registered proprietor) executed a transfer of land. Barry purported to transfer land to Schmidt for 1200 pounds. Transfer remained unregistered. Transfer was **voidable** due to alleged fraud by Schmidt because Barry actually agreed to transfer land to Schmidt for 4000 pounds. Schmidt secured a mortgage over the land from Heider on the strength of the transfer. Heider (mortgagee) provided money in good faith without notice of fraud. The mortgage in favour of Heider also remained unregistered.
- **Barry sought an injunction to prevent registration of transfer to Schmidt** and a declaration that he held the land free from Heider’s mortgage interest

- NSW Supreme Court concluded that the **transfer** could be set aside but Heider had an equitable right to have the loan secured by mortgage
- One of the **issues** on appeal was whether the unregistered transfer (vendor's lien) and the subsequently unregistered mortgage constituted **interests** in land
- Argument: **transfer inoperative** until **registration** and, therefore, no claim can be founded upon transfer except for personal right of action
- The High Court (on appeal) also held that the **transfer could be set aside** but **Heider had a good equitable claim to have her loan** secured on Barry's land (created by representation given by transfer)
- Griffith CJ: The **Torrens system did not intend to completely abolish the equity jurisdiction** (equitable interests to land are recognised):
  - (1) Although **trusts** may not be registered provision is made for **declaration** of a trust and the **deposit** of the trust document with Registrar-General. The notification of trusts constitutes and express **recognition** of the equitable rights/interests declared by the instrument. The Registrar-General has to enter a **caveat** forbidding registration of an instrument not in accordance with a trust
  - (2) The provisions of the Act relating to **caveats** embody a scheme expressly devised for the **protection of equitable rights**
  - (3) The possibility of a registered **proprietor** (ito s44) to bring a suit for **specific performance** against a purchaser amounts to the recognition of equitable rights in a third person. Similarly **specific performance** can be granted against a registered **vendor**
- Held: **equitable claims and interests are recognised by the Real Property Act (in VIC is TLA)**
- Isaac J held that the **suggestion** that no interest in Torrens land can exist until registered was absolutely opposed to accepted notions in Australia with regard to the Transfer of Land Acts
- Isaac J reasoned that the Land Transfer Acts have in all states been regarded as the main conveyancing enactments providing for greater **certainty** to titles of registered proprietors without **destroying** "the fundamental doctrines, by which the Courts of Equity have enforced, as against registered proprietors, **conscientious obligations** entered into by them"
- **S 41 of RPA (NSW)** did not touch whatever rights were behind the instrument
- **Torrens legislation does not effect:**
  - the **form** of the contract,
  - the **right** to have an instrument **executed and registered** and
  - does not **preclude** the creation of an equitable interest in land

#### Comments on *Barry v Heider*

- Unregistered interests can **exist** in the Torrens system, as **equivalent** to equitable interests in general law land
- It was **not necessary** for an interest in Torrens land to be **registered** to be validated
- The Torrens system **never** intended to **abolish** the equitable jurisdiction
- The express **provisions** dealing with caveatable interests embody a scheme expressly devised for the **protection** of and the **validity** of equitable rights (unregistrable interests)
- Equitable interests and claims are **recognised** by the Torrens statutes
- Circumstances that would lead to the creation of an equitable interest under general law land, could also lead to the creation of an unregistered interest in Torrens title land
- **Equitable interest** created under general law land may be created for **valuable consideration** as unregistered proprietary interest in land under the Torrens system
- In many instances an unregistered interest is an **equitable interest**, but not always
- To validly create an unregistered interest, the basic **legal formalities** for creating an interest must be observed

*aware of the prior interest, the failure to caveat, in so far as notice is concerned, will be immaterial.'*  
(at [71])

## 9.0 Co-Ownership

### 9.1 What is Co-Ownership?

- Only applies to Land
- Refers to multiplicity of ownership over single estate
- Basic feature: each co-owner has an equal right to possession over entirety of land
- Distinguish: Ownership of different interests e.g. life estate and remainder
- Distinguish: Trustee/Beneficiary Relationship

#### 9.1.1 What is Joint Tenancy?

- A form of co-ownership that must satisfy pre-requisites and must be specifically created
- Joint Tenants are all seised of the whole. Each joint tenant is severally possessed of an undivided interest.
- Right of Survivorship applies
- Dixon J (*Wright v Gibbons*): 'a thorough and intimate union of interest and possession'
- Must establish 4 unities or no joint tenancy

#### *The Four Unities*

- **Unity of Possession:** A feature of all forms of co-ownership. Each co-owner is entitled to possession. No co-owner is liable for trespass
- **Unity of Interest:** The interest held by each joint tenancy must be identical in nature, extent and duration
- **Unity of Title:** The interest held by each joint tenancy must derive from the same document and the same act
- **Unity of Time:** Each joint tenancy must acquire their interest at the same time
  
- The four unities MUST exist if a joint tenancy is to be created
- If the four unities existed when the joint tenancy was created but one or more have subsequently been removed - this will 'sever' joint tenancy

#### *Right of Survivorship*

- The right of survivorship is an inherent aspect of the joint tenancy
- The right of survivorship means that where on joint tenancy dies, remaining 'inherent' his/her share
- Best to treat survivorship principle as 'freeing interest of deceased joint tenancy from control' rather than an enlargement' as all joint tenancy seised of whole
- Corporation cannot own land due to survivorship principle
- This now altered by s28 PLA - allows a body corporate to own land as a joint tenant in the same way as individuals. s28(2) specifically allows right of survivorship to apply so that property devolves to other joint tenant in body corporate
- Forfeiture Rule - the right of survivorship is subject to a public policy rule known as the 'forfeiture rule'
- No joint tenancy can benefit from killing another
- Where this occurs, right of survivorship applies but joint tenant holds enlarged portion on constructive trust for benefit of deceased estate
- Re Stone: CB 1099 Discusses this

### 9.1.2 Tenancy in Common

- Tenancy in common is another form of co-ownership
- It is the 'base' form of co-ownership
- No need for four unities - only need to establish unity of possession
- If not a joint tenancy AND unity of possession then MUST be a tenancy in common
- Mendes da Costa and Nullagine CB 1100

### 9.2 Creation of Co-ownership

- Where base requirement of 4 unities exist - can create either joint tenancy OR tenancy in common
- Focus on intention
- First consider express words in deed of conveyance or transfer
- If no express reference: implied words i.e. Words of severance which indicate an intention to create proportionate will ALWAYS imply a tenancy in common
- Words of Severance - words indication intention to divide e.g. 'amongst', 'respectively' etc.
- *Robertson v Fraser*: Lord Hatheley concluded '[...] so that C should participate with A and B' codicil - 'participate' was a word of severance
- *'Anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy.'*
- **Creation at Common Law**
  - Where no express or implied words - presumptions will operate
- **Common Law Presumption: Joint Tenancy**
  - **Rationale:** Historical - easier to collect feudal dues from joint tenants
  - Investigation of title easier if a joint tenancy
- **Common Law Presumption ONLY apply where not rebutted by express or implied words of severance**
- *Public Trustee v Pfeiffle*: Property division agreement. What form of co-ownership did parties intend? Common law presumption of joint tenancy held by Ormiston J to be rebutted because of the reference to 'one half interest'. Natural meaning given to words  
Comprehensive overview of creation of joint tenancy under common law and tenancy in common in equity
- Ormiston J: "...it is inappropriate to create a joint tenancy and the totality of the rights of each joint tenant by a limitation or gift granting to each a moiety or half (or other share or interest. A limitation or gift of that kind, or indeed any transaction in those terms which purports to bring into existence concurrent interests in land or other property, is consistent only with the creation of a tenancy in common."
- **Statutory Presumption: TLA s30(2) deems 2 or more registered joint proprietors of land to hold as joint tenants**
- Will only apply where Torrens and where registered
- The exact meaning of the 'joint proprietors' examined in *Aoun Investments*
- *Aoun Investments* examined s100 RPA 1900 (NSW)
  - Held that the wording did not apply to severalty (form of co-ownership in Eng where joint tenants could exclude others)
  - Gzell J concluded meaning of 'joint proprietors' in s100 was obscure
  - Noted the difficulties in NSW context with s26 Conveyancing Act 1919
- **Creation in Equity**
  - Only applies to particular instances where unfair to presume joint tenancy.
  - Operates in equity via the imposition of a trust so that joint tenants at law but beneficial entitlement is held in a different capacity
  - Primarily arises over commercial relationships where investment purpose suggests a proportionate share to be fairer

- (1) In any proceeding under this Division, VCAT may make any order it thinks fit to ensure that a just and fair accounting of amounts received by co-owners in respect of the land or goods occurs.
- (2) Without limiting VCAT's powers, it may—
  - (a) order a co-owner who has received more than the share of rent or other payments from a third party in respect of the land or goods to which that co-owner is entitled to account for that rent or other payments to the other co-owners; and
  - (b) make any order it considers just and fair for the purposes of an accounting by a co-owner who has received more than that co-owner's just and proportionate share to the other co-owners of the land or goods.

## 10.0 Severance of a Joint Tenancy and Partition

### 10.1 Severance of a Joint Tenancy

- Severance involves the **removal of one of the four unities that underpin a joint tenancy**
- Severance can occur at law or in equity
- A severed joint tenancy will **revert to a tenancy in common**
- Different ways of severing a joint tenancy:
  1. Unilateral act by a JT acting on their share;
  2. Mutual agreement;
  3. Course of dealing between JTs;
  4. Severance by equity;
  5. Court order;
  6. Merger;
  7. Unlawful killing; and
  8. Partition

### 10.2 Effect of Severance

- Where there is more than one joint tenant, severance by one joint tenant will not affect the joint tenancy of the remaining joint tenants. Instead the severing joint tenant will hold with the remaining joint tenants as a tenant in common.
- For Example:
  - X and Y are joint tenants of land, and X transfers her interest to Z
    - ***The effect is that Z and Y become tenants in common of half shares***
  - A, B and C hold as joint tenants and A transfers her share to D
    - ***The effect is that D holds a one-third share as tenant in common with B and C, and B and C hold the two-thirds share as between themselves as joint tenants. Thus the survivor of B and C would take the whole of the two-thirds share, but B and C would be unaffected by D's death, and D would be unaffected by the death of B or C.***
  - A, B and C hold as joint tenants. A transfers her interest to B and B transfers her interest to A. C does not participate.
    - ***The effect of the first conveyance (from A to B) is that B held a one-third share as tenant in common, and B and C held the remaining two-thirds share as joint tenants. The effect of the second conveyance - B conveying to A the interest that B held as a joint tenant with C - was to sever the joint tenancy between B and C. Thus A, B and C held equal shares as tenants in common. These were the facts of Wright v Gibbons (1949) 78 CLR 313.***

### 10.2.1 Severance by Unilateral Act/Course of Conduct

One joint tenant alienates his or her share inter vivos, with or without the consent of the other joint tenants.

They can do this by transferring their interest to a third person, to themselves, by declaring a trust over their interest or by transferring the interest to a trustee to hold on trust for someone else or themselves.

### 10.2.2 Severance by Agreement (Mutual Agreement)

- Where all of the parties to a joint tenancy agree between themselves to sever the joint tenancy, **equity will enforce the agreement** although it is **ineffective to sever the joint tenancy at law**. In contract terms, each joint tenant agrees to give up their right of survivorship in consideration for agreement of the others to give up theirs – thus all parties have provided consideration for the agreement. Agreement to sever a joint tenancy can appear in a formal document, an informal document or an oral agreement. The elements of specific performance do not have to be present. As long as equity can distil an intention to sever from the parties agreement, it will enforce the severance.
- The necessary intention to sever from an agreement can be found in agreed terms that demonstrate that the parties were treating the property as if it had distinct and divided shares – which is inconsistent with a continued right of survivorship.
- **Unilateral intention is insufficient: *Hulme v Schaecken*** see esp Austin J at 1254
- **Mutual intention in registered transfer: *Peldan v Anderson***
- Distinguish between mutual intention to create tenancy in common and alienation
- Mutual agreement may create tenancy in common from the outset OR
- Unilateral intention combined with registered alienation can sever a pre-existing joint tenancy

\*Read *Williams v Hensman* (1961) 1 J&H 546

#### *Wright v Gibbins*

- ***Wright v Gibbins* (1949) 78 CLR 313** three sisters, Olinda Gibbons, Ethel Rose Gibbons and Bessie Melba Gibbons were registered as joint tenants in land at Hobart. By a Memorandum of Transfer Ethel Rose Gibbons transferred to Olinda Gibbons her one- third share and Olinda Gibbons transferred to Ethel Rose Gibbons her one-third share in the land. **(Ethel and Olinda transferred the title to each other by Memorandum of Transfer)**
- Upon registration the Certificate of Title was endorsed to show that the three owners were registered as tenants in common in equal shares. Bessie Melba Gibbons who survived both Olinda and Ethel Rose, approached the Court for a declaration that the Memorandum of Transfer did not sever the joint tenancy and that she became solely entitled to the land as proprietor.
- The matter came before the High Court on appeal and the Court held that the **Transfer did effect a severance of the joint tenancy** and that Olinda, Ethel Rose and Bessie Melba were **tenants in common upon registration of the Transfer**.
- **High Court held – Latham CJ: where three joint tenant's A, B and C. A transferred to D, then D owns one third interest as Tenancy in Common with B and C. And B and C hold two thirds as joint tenants. The survivor or B and C takes whole of two third interest but D will not gain or lose under survivorship.** CB 1221 - 1229

#### *Peldan v Anderson*

- Facts: Mr and Mrs Pinna had purchased the property in 1995 and they were registered proprietors as joint tenants.
- In 2003 Mr Pinna **unilaterally severed the joint tenancy**, the result of such severing being that each party was now **a tenant in common with a 50% interest each in the property** rather than a full interest as under joint tenancy.