

**REAL PROPERTY
EXAM NOTES
LAWS5012**

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1. Fundamentals of Land Ownership

1. Doctrine of tenure and doctrine of estates (fee simple and life estate)

Conveyancing Act 1919 (NSW)

- S 47 – Words of limitation in fee
 - (1) In a deed it shall be sufficient in the limitation of an estate in fee simple to use the words in fee or fee simple without the word heirs, or in the case of a corporation sole without the word successors, or to use the words in tail or in tail male or in tail female, without the words heirs of the body, or heirs male of the body, or heirs female of the body.
 - (2) Where land is conveyed to or to the use of any person without words of limitation, such conveyance shall be construed to pass the fee simple or other the whole estate or interest the person conveying had power to dispose of by deed in such land unless a contrary intention appears by such conveyance.
 - (3) This section applies only to deeds executed after the commencement of this Act.

Succession Act 2006 (NSW)

- S 38 – Effect of devise of real property without words of limitation
 - (1) A disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property to that person.
 - (2) This section does not apply if a contrary intention appears in the will.

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141

SUMMARY:

- Held that the Aboriginal people had a connection to the land, but they did not hold any proprietary rights
 - It was the court recognising the existence of Aboriginal laws
 - But the court stopped short of overturning terra nullius

2. Legal and Equitable interests

Legal Interest:

- **Torrens Title Land:**
 - Must be registered per RPA s 41
- **Old System Land**
 - Can be transferred by deed per CA s 23B(1)
 - CA s 38: deed must be signed, sealed, attested by one witness not party to the deed
 - CA s 23B(3): This section does not apply to provisions of the Real Property Act (i.e. does not apply to Torrens title land)
- **Legal Lease:**
 - Must be created per CA s 23D(2)
 - Does not need to be in writing
 - Best rent (i.e. market rent)
 - Taking effect in possession
 - Term not exceeding three years (include renewal options)
 - Note: if the requirements of CA s 23D(2) are not met, an equitable lease may arise as below (part performance evidenced by possession).

Equitable Interest:

- **Written and signed instrument** — s 23C(1)(a) CA
- **Contracts for the sale of land** or to grant an interest in land
 - Which are enforceable — s 54A(1), (2);

- **Declaration of trust** — s 23C(1)(b)
 - Must be evidenced in writing
- **Resulting or constructive trust** — s 23C(2)
 - Purchase price resulting trust, presumed (rebuttable) where legal title taken in a manner that does not reflect respective contributions to purchase price
- **Vendor's or purchaser's lien**
 - When someone buys a property and pays for some of it, the vendor will have a lien over the unpaid amount
- **Equity of redemption on grant of a general law mortgage**
 - Right to have the title conveyed back to mortgagor upon repayment of mortgage price
- **Option**
 - If the fee has been paid, the option is a contract for consideration
 - Person exercising the option can restrict the party from acting consistently with the option
 - This is specifically enforceable right on the land

3. General law priority rules

Prior...	Later...	Outcome
EQUITABLE	LEGAL	Earlier interest is defeated by later interest acquired bona fide for value without notice <ul style="list-style-type: none"> • bona fide = without fraud • purchaser for value = consideration; must be sufficient but need not be adequate • without notice = includes constructive notice; search Torrens register or OS title deeds 30 years • extension of protection = Wilkes v Spooner
MERE EQUITY	EQUITABLE	<ul style="list-style-type: none"> • without notice = includes constructive notice; search Torrens register or OS title deeds 30 years • extension of protection = Wilkes v Spooner
LEGAL	LEGAL	Earlier interest has priority unless the holder is guilty of postponing conduct (fraud or gross negligence) <ul style="list-style-type: none"> • legal + legal = nemo dat; nb possibility of partial incompatibility & taking subject to prior interest
LEGAL	EQUITABLE	<ul style="list-style-type: none"> • legal + equitable = may postpone through fraud; gross negligence; agent exceeding authority; arm's length conduct
EQUITABLE	EQUITABLE	<ul style="list-style-type: none"> • equitable + equitable = technically first in time; but really best equity Also need to be a bona fide purchaser etc.

3.1. Prior Equitable Interest & Later Legal Interest

- A prior equitable interest is defeated by a later legal interest where acquired by bona fide purchaser of the legal estate for value without notice- Pilcher v Rawlins (1872)
 - This principle also exists in s 43A of the RPA

3.2. Prior Mere Equity & Later Equitable (or Legal) Interest

- Later equitable interest has priority over an earlier mere equity if the later equitable interest was taken bona fide, for value, and without notice of the earlier equity (Double Bay Newspapers)

3.3. Prior legal v subsequent legal

- This simply involves applying the nemo dat principle
 - Look for exceptions to Nemo Dat

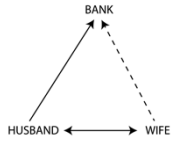
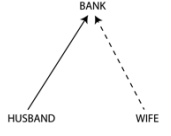
3.4. Prior legal v subsequent equitable

- There are four categories in which a prior legal may be postponed to subsequent equitable:
 - Where the legal interest holder was a party to fraud that led to the equitable interest being created — Whipp
 - Where the legal interest holder was grossly negligent in failing to inquire after, obtain or retain possession of the title deeds, thereby allowing another to pose as the legal owner and create later equitable interests — Walker v Linom
 - Where the legal interest holder entered the title deeds to an agent with limited authority to raise money by giving security, and the agent exceeds this authority — Perry-Herrick v Atwood
 - Where the legal interest holder hands another person a document appearing to give them a beneficial interest, and that other person, so armed, then purported to create an equitable interest in favour of a third person, who took on faith of the document — Barry v Heider

3.5. Prior equitable v subsequent equitable

- Often occurs in the Torrens context, where you have a contest between two unregistered interests
- The rule is technically 'first in time prevails'
 - But courts will tend to seek out the best equity — meaning that if it would be inequitable for the earlier interest to prevail, the holder of the later interest may prevail
- Relevant factors will include (per Heid v Reliance Finance):
 - Nature of the competing interests
 - Manner of their acquisition
 - Whole conduct of the parties

Topic 2 – Torrens Title

Case Name	Summary
Indefeasibility of Title	
<i>Frazer v Walker</i> Sale of a house with a forged signature	<ul style="list-style-type: none"> A forged instrument cannot grant legal title BUT if it is registered, the registration per s 41(1) RPA can grant indefeasibility Even if the instrument is fraud/forged, you can still get an indefeasible interest only if you are not personally guilty
<i>Breskvar v Wall</i> Void and Fraudulent Transfers / Blank Transfer	<ul style="list-style-type: none"> B > Void Transfer > P > Forged Transfer > W > Valid Transfer > A Guilty of postponing conduct No indefeasible title without registration
<i>Casegrain</i> Company to husband and wife 50/50	<ul style="list-style-type: none"> S 118 is applied to find that as Mrs C derived her property from 'a person registered as proprietor of the land through fraud' it was defeasible
<i>Provident Capital v Printy</i> Single Borrower / All moneys & standard mortgage	<ul style="list-style-type: none"> Example case of (1) all money mortgage and a (2) standard mortgage The former was unenforceable because the charge secures nothing and the mortgagor(borrower) is entitled to a discharge The standard mortgage was indefeasible
<i>Van den Heuvel v Perpetual Trustees</i> Husband & Wife / Forged Wife	<ul style="list-style-type: none"> Example case of joint and several mortgages Use this case where it talks about ANY of the mortgagors 
<i>PTV v English</i> Husband & Wife / Forged Wife	<ul style="list-style-type: none"> Example case of joint and several mortgages Use this case where it talks about ALL of the mortgagors The mortgage only catches loan agreements between the bank and BOTH the husband and wife There was no such agreement. 
Assurance Fund Compensation	
<i>Diemasters v Meadowcorp</i> RG questions if there has been loss	<ul style="list-style-type: none"> Windeyer J does not reach a clear conclusion as to what 'loss/damage as a result of the operation of the act' meant. If the plaintiff is worse off under Torrens had they been under old system title, then it would be an indication that there had been a loss under the Act
Unregistered Interests	
<i>Barry v Heider</i> Void Transfer > Mortgage	<ul style="list-style-type: none"> The courts recognise Heider's unregistered mortgage, which had priority because of postponing conduct. Supports equity can give effect to the rights even if unregistered.
<i>Chan v Cresdon</i> Behind in rent	<ul style="list-style-type: none"> an equitable interest does not arise out of the document itself, but rather from the maxim that equity recognises what ought to be done as done. You can't sue a guarantor in equity
<i>Butler v Fairclough</i> Early caveat case	<ul style="list-style-type: none"> Failure to caveat before creation of later interest, where register searched, found the later claim to be superior The failure to caveat can be postponing conduct
<i>Heid v Reliance Finance</i> Classic postponing	<ul style="list-style-type: none"> Mason & Deane JJ present a negligence-based concept of postponing conduct Contrast with <i>Jacobs v Platter Nominees</i> for an estoppel-based concept contrast
<i>Abigail v Lapin</i> L (equity of redemption) > H > A (equitable mortgage)	<ul style="list-style-type: none"> Example case of a Defective chain The failure to search is not fatal in the defective chain cases. In common grantor cases – the failure to search is fatal for the later interest holders.

<i>Jacobs v Platt Nominees</i> <i>Option to Buy</i>	<ul style="list-style-type: none"> Gibbs CJ, Wilson and Murphy JJ based postponing conduct on estoppel Note that this was in Victoria and may not be followed in NSW It is based on very specific family facts
<i>Black v Garnock</i>	<ul style="list-style-type: none"> Obiter in this HCA case suggests that <i>Heid v Reliance</i> should be followed.
Exceptions to Indefeasibility	
<i>Latec Investments</i> <i>Fraudulent sale to subsidiary</i>	<ul style="list-style-type: none"> Fraudulent conduct was exception to indefeasibility
<i>Loke Yew</i> <i>Promise not to kick out occupant after sale</i>	<ul style="list-style-type: none"> Incoming registered proprietor was bound by Loke Yew's interest under the fraud exception to indefeasibility Because they never intended to enter into bona fide transactions to purchase the vendor's rights
<i>Bank of SA v Ferguson</i> <i>Bank manager overvalues land for mortgage</i>	<ul style="list-style-type: none"> No inducement therefore no exception to indefeasibility
<i>Davis v Williams</i> <i>Clerk Fraud ?</i>	<ul style="list-style-type: none"> Clerk's actions were not fraudulent as they did not intend to prejudice the wife. Ask if there was fraud? Agency?
<i>AGC v De Jager</i> <i>Bank officer aware of fraud</i>	<ul style="list-style-type: none"> Yes, the bank had dishonestly misrepresented the state of affairs to the registered proprietor therefore the mortgage was defeasible. Fraud was established per its meaning under s 42
<i>Bahr v Nicolay (No 2)</i> <i>Sale, lease and promise to sell land back</i>	<ul style="list-style-type: none"> There may be a personal equity on the nature of the trust that is enforced in the circumstance A trust was created You don't need to use the word 'trust' to form a trust
<i>Bursill Enterprises v Berger Bros</i> <i>Fee simple over airspace</i>	<ul style="list-style-type: none"> Windeyer J: If a reasonable person would read the instrument, they would have constructive notice, therefore they the instruments would be regarded as registered.
<i>RG v Cihan</i> <i>Prior iterations of the folio</i>	<ul style="list-style-type: none"> Applies Windeyer J from above to find that there was notice
Personal Rights	
<i>Snowlong</i> <i>Unregistered Lease</i>	<ul style="list-style-type: none"> Example of a personal equity arising A personal equity had arisen from the acceptance of rent and the reliance shown by the defendant who spent \$15K on improving the property.
<i>Mercantile Mutual v Gosper</i> <i>Fraudulent increase on mortgage</i>	<ul style="list-style-type: none"> Registration of a forged instrument may be set aside when there is a personal equity enforceable under the general law Where a registered proprietor (mortgagee) breaks its obligations to another registered proprietor (mortgagor) – here by producing the CoT without authority to allow a variation to be registered – a cause of action arises in personam, rather than fraud
<i>Farah Constructions</i>	<ul style="list-style-type: none"> Except where the registered proprietor is guilty of fraud, the knowing receipt did not create in personam rights
Registrar-General's Power of Correction	
<i>Castle Constructions</i> <i>Easement Removed</i>	<ul style="list-style-type: none"> The RG removed some land at the request of a landowner The RG did not have to restore the easement because it was deliberately removed The deliberate removal of an easement cannot be treated as an omission – the easement does not exist if it has been intentionally removed
Overriding Statutes	

<i>Hillpalm v Heaven's Door</i>	<ul style="list-style-type: none"> Landowner was allowed to subdivide the land but did not register the right of way Did the consent condition bind a later registered proprietor of the land to keep the right of way? The HCA held that the consent condition did not override the later land owners indefeasible title because the council had not imposed the consent condition
<i>Canada Bay v Bonaccorso</i>	<ul style="list-style-type: none"> There as some community land that was protected by s 45 of the Local Government Act – meaning the council could not sell the community land The council sold the land and the buyer was now the registered proprietor The court held that s 49 protected the buyer.
Volunteers	
<i>Bogdanovic v Koteff</i>	<ul style="list-style-type: none"> A volunteer / A person who claims land NOT for value can still assert indefeasibility

1. Torrens title: Title-by-Registration

- The Torrens system was devised by Robert Torrens.
- The source of the title only based on the **register**
 - This register is established by s 31B RPA.
 - It is made up of **folios** for each parcel of Torrens land in the state.
 - It also consists of **dealings** such as transfers, mortgages, discharge of mortgages, leases, easements etc...

1.1. Principles

The Mirror Principle

- The folio of the register perfectly mirrors the state of the title

The Curtain Principle

- Because of the above, if you want to find out about the interest, you simply need to look at the register, and everything else is behind the curtain

Insurance Principle

- There is a recognition that the operation of the Torrens system, can produce unjust results e.g. Fraud in indefeasibility

2. What is Being Replaced?

2.1. Certificate of Title

Traditionally a Certificate of Title (CT) was issued by the Registrar-General to duplicate what was found in the register. It would outline any interest held over the land. The CT could be given to someone who held a mortgage over the land as this would prevent the registered proprietor from registering other dealings over the land without the permission from the mortgagor. You need the CT to lodge additional interest on the land.

Now with eConveyancing (such as PEXA), the eCT has been introduced (s 33AAA). The digital folio of the register will specify who has **control of the right to deal** ('CORD'). For example, if a mortgage has been granted to Party X, then the folio will state the Party X will have CORD. Nothing else can be registered until an electronic signature has been given from X.

3. Electronic Conveyancing

3.1. Key Concepts of eConveyancing

3.1.1. Timing of Transition:

- Currently discharges of mortgage, transfers, mortgages, caveats, withdrawal of caveats, priority notices (standalone or in combination) must be lodged electronically.
- From 1 July 2020: class of dealings required to be lodged electronically expanded.

3.1.2. Legislation:

Electronic Conveyancing National Law (NSW) ['National Law']

- S 5
 - (1) The object of this Law is to promote efficiency throughout Australia in property conveyancing by providing a common legal framework that:
 - (a) enables documents in electronic form to be lodged and processed under the land titles legislation of each participating jurisdiction, but
 - (b) **does not derogate from the fundamental principles** of the Torrens system of land title as incorporated in the land titles legislation of each participating jurisdiction, **such as indefeasibility** of title.
 - This is meant to ensure that eConveyancing is done efficiently and does aim to change the substantive law

Electronic Conveyancing National Law (NSW)

- These are the rules that govern eConveyancing

3.1.3. Electronic Lodgement Networks and Electronic Lodgement Network Operators

- The primary body is ARNECC: Australian Registrars' National Electronic Conveyancing Council made up of the State and Territory RGs
- E-conveyancing is done through an ELN: Electronic Lodgement Network
 - These will be conducted by an ELNO: Electronic Lodgement Network Operator, such as PEXA

3.1.4. Subscriber

- This is person authorised to use ENL to complete conveyancing transaction on behalf itself or another
- The subscriber is reasonable for taking reasonable steps to verify the identity of the client and has the right to enter into the conveyancing transaction

3.1.5. Client authorisation

- A document by which party to a conveyancing transaction authorises a subscriber to do things on party's behalf in connection with the transaction so that it can be completed electronically (*National Law, s 10*)
- It must be in required form (*Participation Rules, Schedule 4*)
- Subscriber must take reasonable steps to ensure that Client Authorisation signed by Client or Client's Agent (*r 6.3(e)*)
 - If signed by Client's Agent, Subscriber must take reasonable steps to verify Agent's authority (*r 6.3(d)*)

3.1.6. Verification of identity (Conveyancing)

- This is governed by:
 - **Electronic** (*Participation Rules, r 6.5.1(a)*)
 - **Paper** (*Conveyancing Rules, r 4.1.2*)
- The Subscriber/Representative must take reasonable steps to verify identity of their Client or Clients Agent. (i.e. can't just assume their identity)
 - They must demonstrate that reasonable steps have been taken or;
 - Verification of Identity Standard requires: (*Participation Rules, Sch 8, paras 2, 3*)
 - Face-to-face in-person interview and
 - Provision of original identity documents.
 - Or the subscriber can use a Identity Agent (such as Australia Post) (*Participation Rules, r 6.5.5; Conveyancing Rules, r 4.2.1*)

3.1.7. Verification of identity (Mortgage)

- *RPA s 56C* requires reasonable steps be taken to verify the mortgagor's identity whether or not the mortgagee has engaged solicitors and whether or not the mortgagor is represented.
- *Conveyancing Rules 4.4.2*: For mortgages executed on or after 19 March 2017 (paper and electronic), mortgagee considered to have satisfied RPA s 56C if mortgagee or agent has taken steps set out in the Verification of Identity Standard.
 - See above for the Standard

Real Property Act

- **S 56C – Confirmation of identity of mortgagor**
 - (1) The Mortgagee must confirm identity of mortgagor Before presenting a mortgage for lodgement under this Act...must take reasonable steps to... [ensure the identity of the mortgagor]
 - (2) 'reasonable steps' per the Conveyancing Rules
 - (6) The Registrar-General can de-register a mortgage if:
 - (a) the execution of the mortgage involved **fraud** against the registered proprietor **and**;
 - (b) the mortgagee:
 - (i) **has failed to comply with subsection (1)**, or
 - (ii) had **actual or constructive notice** [regarding the true identity of the mortgagor].

3.1.8. Digital signatures, signing and repudiation of signatures

- 'encrypted electronic data for the exclusive use of a particular person as a means of identifying that person as the sender of an electronic communication or signer of a document' (National Law, s 3)
 - The digital signature is binding on subscriber and any person entering into the relevant client authorisation (s 12(1))
 - This applies regardless of who created the subscriber's digital signature and the circumstances (**including fraud**) in which it was created (s 12(2))
 - A digital signature can be unsigned (s 12(3)) or in limited circumstances repudiated (s 12(4)).

4. Major Elements of the Torrens System

The Real Property Act (NSW)

- **S 31B – The Register**
 - Maintained by the Registrar-General (RG)
 - Is comprised of folios, dealings, instruments etc...
- **S 32 – Folios of the Register**
 - Describes what the land is like
 - Outlines any interests over the land
- **S 33 – Issue of Certificates of Title**
 - Allows the RG to hand out a CoT
- **S 33AAA – Cessation of issue of certificates of title**
 - Makes way for eConveyancing as it allows the RG to stop issuing out paper CoT
 - Also see S 33AB which allows for alternatives to a CoT such as eCT's, electronic consent etc...
- **S 36 – Lodgement and registration of documents**
 - Outlines how the RG should deal with caveats, memorandums and dealings
 - A **caveat** is a type of statutory injunction preventing the registration of particular dealings with real property.

5. Indefeasibility of Title

5.1. Statute

The Real Property Act (NSW)

- **S 41 – Dealings not effectual until recorded in Register**
 - Interest takes effect by registration
- **S 42 – Estate of registered proprietor paramount**
 - (1) The registered proprietor... recorded in the Register shall, except in case of fraud, be absolutely free from all other estates and interest that are not recorded except:
 - (a) A **recorded prior interest**
 - (a1) in the case of omission or misdescription of an **easement** existing before the RPA (i.e. an Old System easement moving into Torrens Title)
 - (b) in the case of omission or misdescription of any **profit à prendre** created in or existing upon any land
 - (c) land that has the wrong description in the Register
 - (d) a **tenancy/tenant with possession** BUT only if:
 - (i) The term of the tenancy is under 3 years
 - (ii) is under 3 years including options
- **S 43 – Purchaser from registered proprietor not to be affected by notice**
 - Notice of unregistered interest is not fraud.
 - See *Cassegrain* where agency could not be established, therefore no fraud – the wife did not authorise her husband to do fraud.
- **S 45 – Bona fide purchasers and mortgagees protected in relation to fraudulent and other transactions**
 - (1) Nothing in this act can **deprive any purchaser or mortgagee bona fide for valuable consideration...**
- **S 56C – Confirmation of identity of mortgagor**
- **S 118 – Registered proprietor protected except in certain cases**
 - (1) Proceedings for the possession or recovery of land do not lie against the registered proprietor except:
 - (a) – (c), enforcement of mortgage, lease etc
 - (d) **Proceedings brought by a person deprived of land by fraud against:**
 - (i) a person who has been registered as proprietor of the land through **fraud**, or
 - (ii) a person deriving (**otherwise than as a transferee bona fide for valuable consideration**) from or through a person registered as proprietor of the land through **fraud** ...”

5.2. Cases

5.2.1. Immediate Indefeasibility

Frazer v Walker [1967] 1 AC 569

F > Forged Transfer > R > Valid Transfer > W

FACTS:

- Mrs Frazer signs a mortgage with Radmonski using her husband's forged signature
- She defaults Radmonski sells the house to Walker who becomes the registered proprietor of the house.

ISSUE:

- Who owns the house?

HELD:

- Walker owns the house
 - Even though Radmonski registered his interest in the house with a void instrument, indefeasible title can still be derived
- Because Walker registered the house free from fraud, he holds an indefeasible title.

- This is per s 42(1) RPA which grants immediate indefeasibility upon registration because the Torrens system is title by registration as per RPA s 41.

SIGNIFICANCE:

- Even if the instrument is fraud/forged, you can still get an indefeasible interest only if you are not personally guilty

Breskvar v Wall (1972) 126 CLR 376

B > Void Transfer > P > Forged Transfer > W > Valid Transfer > A

FACTS:

- In order to secure a repayment of a loan, Breskvar gave Petrie the CT for the land and a transfer in blank
 - This meant that Petrie could fill out the transfer with whoever's details
- Petrie fraudulently secured the registration of Wall as the registered proprietor of the land
 - This made Wall a party to the fraud
- Wall contracted to sell the land to Alban, who had no notice of the fraud
 - This was not yet registered because of a caveat

ISSUE:

- Who had title over the land?

HELD:

- Breskvar was guilty of postponing conduct by handing over the transfers in blank
 - This allowed Petrie to represent himself as the registered proprietor
- Alban does not have indefeasible title because he was not yet registered
 - Therefore, there is a priority contest between Breskvar and Alban
 - Alban equitable interest had priority because the legal interest of Berskvar was postponed.
- *"The Torrens system ... is not a system of registration of title but a system of title by registration."* – Barwick CJ

SIGNIFICANCE:

- Approved in the HCA in Cassegrain v Gerard Cassegrain & Co Pty Ltd 254 CLR 425

5.2.2. Application of s 118

Cassegrain v Gerard Cassegrain & Co Pty Ltd 2015) 254 CLR 425

FACTS:

- Mr C was the director of a company and fraudulently transferred land to himself as his wife as joint tenants (50%:50%)
 - Mr C then transferred his share to Mrs C for \$1, making her the sole proprietor
- Mrs C did not know of the fraud

ISSUE:

- Could the company reclaim the property?

HELD:

- The 50% transferred to Mrs C was defeasible and could be recovered
 - That interest as derived from a person registered as proprietor of the land (as joint tenant) through fraud.
 - **S 118** is applied as:
 - This was an exception to the protection of a registered proprietor (s 118(d)(ii)) as the Mrs C derived her property from 'a person registered as proprietor of the land through **fraud**'
 - Mr C was a registered proprietor through fraud.
- The 50% transferred from the Company to Mrs C indefeasible per s 41 RPA as she was registered without fraud
 - S 118(d)(ii) did not apply because the that share was derived from the company without fraud.

5.3. Extent of Indefeasibility by Registration

- Registration does not validate all the terms and conditions of the instrument, which is registered, there are some limits.
 - It validates those which “*delimit or qualify the estate or interest or are otherwise necessary to assure that estate or interest to the registered proprietor.*” – PT Ltd v Maradona Pty Ltd (1992) 25 NSWLR 643, 679.
 - Other interests, rights, duties arising out of an agreement which are peripheral, are not protected even though they are in the registered document
 - i.e. Not every term in the lease/mortgage is free from attack, it is only the ones that are necessary/core that are protected
 - e.g. a **personal covenant is void**, but proprietary rights remain indefeasible – it is therefore important to separate

5.3.1. Leases

- **Covenants to pay rent** are covered by indefeasibility (Karacominakis v Big Country Developments)
- **Third-party guarantees** are NOT are covered by indefeasibility (Karacominakis)
- An **Option to Renew** is said to be part and parcel of the leasehold interest, thereby granting priority over other interests (because it was registered) (Mercantile Credits v Shell (1976))

5.3.2. Traditional and All Moneys Mortgages (Single Borrower)

- The **registration of a mortgage** will protect both the mortgagee’s interest in the land the mortgagee’s right to sell.
- A **third-party guarantee** is collateral to the mortgage and is NOT are covered by indefeasibility
- A **personal covenant** is NOT covered by indefeasibility
- The effectiveness of a **charge** on land will be based upon the kind of mortgage it is:

<input checked="" type="checkbox"/> Traditional Mortgage	<input type="checkbox"/> All Moneys Mortgage
<ul style="list-style-type: none"> • If the specific amount of money is stated in the document, then indefeasibility will attach as it is a traditional mortgage. • The principle amount is secured in a registered instrument • Indefeasibility will attach (<u>Provident Capital v Printy [2008]</u>) • Will always contains an express obligation to repay the stated sum and the terms of repayment 	<ul style="list-style-type: none"> • The mortgage says it will ‘secure all moneys’ rather than a specific amount, then indefeasibility will not attach automatically • This means that all moneys owed to a lender are secured by the mortgage. The property being mortgaged is not only for the loan but ALSO for any other secured or unsecured loan. • Usually expressed to secure the repayment of amounts advanced from time to time under one or more EXTERNAL loan agreements • Indefeasibility in this case will be based on the construction as the loan agreements themselves are not registered. • The mortgage may be indefeasible, but there is no money actually owing if the loan agreement is a forgery. As the mortgagor has no debts, they can ask the mortgagee to discharge the mortgage

Provident Capital Ltd v Printy (2008) 13 BPR 25

Single Borrower Mortgage

FACTS:

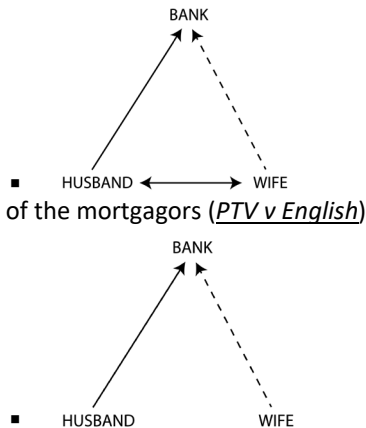
- There was a single borrower under a mortgage:
 - An all moneys mortgage and;
 - A standard mortgage

HELD:

- (1) The **all money mortgage** was unenforceable because the charge secures nothing and the mortgagor(borrower) is entitled to a discharge
- (2) The **standard mortgage** was indefeasible

5.3.3. Joint and Several Mortgagors

- Usually will be a husband and wife scenario where the husband forges the wife's signature
- ? Whether the mortgage binds the defrauded spouse's share of the land depends upon how the all moneys mortgage is drafted
 - If the liability is joint and several, the charge for the amount may be effective over the whole property i.e. despite the forgery, and even where the loan agreement is collateral to the mortgage
- The following two cases show the difference between a loan agreement between the mortgagee and:
 - **ANY** of the mortgagors (*Perpetual Trustees Victoria*)



Van den Heuvel v Perpetual Trustees Victoria (2010) 15 BPR 28,647

Joint and Several Mortgage \ The mortgagee and ANY of the mortgagors

FACTS:

- There is a mortgage that imposes joint and several liability on the husband and wife
 - This means they are both liable for 100% of the loan, but the lender can't recover more than 100%
- The mortgage charges each mortgagor's share in the land with the 100% under the loan agreement
- The husband then forges his wife's signature on:
 - A mortgage
 - A loan agreement

ISSUE:

- Who owes what for the loan agreement and the mortgage?

HELD:

Loan Agreement:

- The husband is liable for the money given to him under this agreement.

Mortgage:

- The wife has charged her interest to secure the repayment of what her OR her husband owes under the Loan Agreement

Outcome:

- Because of the husband's forgery, there is no agreement between the wife and the bank – only the husband and the bank

- In that agreement, the husband has to pay back the money
 - Because of the mortgage, the Wife has to sell her property to pay for her husband's debt to the bank.
- The wife can seek compensation from the assurance fund

SIGNIFICANCE:

- Contrast to a single borrower where the charge secures nothing, but in joint – pending the drafting, the innocent borrow can still lose their interest in the land.

PTV v English (2010) 14 BPR 27,339

The mortgagee and ALL of the mortgagors

FACTS:

- A mortgage secured what was owing under a loan agreement between:
 - The mortgagee **and** all of the mortgagors
- The husband signed with the wife's forged signature

HELD:


- The agreement between the bank and the wife was void because of the fraud of the bank
 - The loan agreement was therefore not enforceable against the wife's share of the land
- The mortgage only catches loan agreements between the bank and BOTH the husband and wife
 - There was no such loan agreement with all 3 parties because the wife did not sign it
 - This meant that the mortgage only attached to the husband's share of the land, and not the wife.

6. The Assurance Fund: Compensation for Loss of Interests in Land

- This section deals with the compensation of the 'loser from the application of indefeasibility

6.1. Statute

Real Property Act

- **S 120 – Proceedings for compensation**
 - (1) Where someone has suffered loss from the operation of the act AND a factor such as
 - (a) fraud
 - (b) any error, misdescription or omission in the Register
 - (c) the land being brought under the provisions of this Act
 - (d) the registration of some other person as proprietor of the land, estate or interest,
 - They can seek damages in the Supreme Court
- **S 129 – Circumstances in which compensation payable**
 - **When is the person entitled to compensation from the fund?**
 - (1) The person **must suffer loss** or damage **as a result of the operation of the Act**. The damage must arise from:
 - (a) An act or omission from the **Registrar-General**
 - (b) the **registration of someone** else as the proprietor of the land
 - (c) any error, misdescription or omission in the Register
 - (e) being deprived of land or interest... from **fraud**.
 - **Defences against payout of compensation:**
 - (2) Compensation is not payable in relation to any loss or damage suffered by any person:
 - (a) to the **extent to which the loss or damage is a consequence of any act or omission by that person** , or
 - (b) to the extent to which the loss or damage:
 - (i) is a consequence of any fraudulent, wilful or negligent act or **omission by any solicitor, licensed conveyancer, real estate agent or information broker**, and
 - (ii) is compensable under an indemnity given by a professional indemnity insurer, or
 - (c) to the extent to which **that person has failed to mitigate the loss** or damage,
 - (d) to the extent to which the loss or damage has been **offset**  by some other benefit
 - (e) where the loss or damage arises because of an error or **miscalculation in the measurement** of land

6.2. Defining 'loss or damage as a result of the operation of the act'

Diemasters Pty Ltd v Meadowcorp Pty Ltd (2001) 52 NSWLR 572

FACTS:

- A company owned land that had a mortgage over it
 - The company wanted to sell the land free of the mortgage and did so fraudulently by:
 - 1. Executing a discharge of mortgage to allow the company to sell the property using fraudulent cheques
 - 2. Lodging a caveat to prevent the registration of other documents
- The purchaser can't get registered free of the mortgage and the purchaser agrees to be subject to mortgage
- The purchaser then applies for compensation under s 129 of the RPA.
- The Registrar-General defended that the purchaser had not suffered loss as a result of the operation of the act nor was there fraud.

ISSUE:

- Is the purchaser entitled to compensation?

HELD:

- Even though the purchaser had an unregistered interest, they had suffered loss because they got an encumbered fee simple instead of the unencumbered fee simple which they had contracted to get

SIGNIFICANCE:

- Windeyer J was unclear as to what 'loss/damage as a result of the operation of the act' meant. He considered:
 - (1) If the loss would not have been suffered under general law priority rules, but it was under indefeasibility - Windeyer J said this comes within operation of the act. Or;
 - (2) If the loss would have been suffered under both the general law priority rules and indefeasibility It could be argued that such loss is not caused by operation of the act, because the same loss would have occurred in the absence of the act.
- Windeyer J did not reach a definite conclusion on the above matter but decided that:
- The fact that the mortgagee's interest continues to subsist on the register and the purchaser is bound by it is an example of the purchaser suffering loss from the Act.
 - If the plaintiff is worse off under Torrens had they been under old system title, then it would be an indication that there had been a loss under the Act.

7. The nature of **unregistered** interests under the Torrens system

- We know that instruments only take legal effect when registered (*RPA s 41*) however, the cases below of *Barry v Heider* and *Chan v Cresdon* show that equity can give effect to the rights even if unregistered.
 - This is further supported by the acknowledgment in the RPA as caveats can be lodged for unregistered interests.

Barry v Heider (1914) 19 CLR 197

Barry > Unregistered Void Transfer > Y > Unregistered Mortgage > Heider

FACTS:

- Barry made an unregistered transfer to Y
 - This was void because of fraud
 - Y remains unregistered, meaning Barry is still the registered proprietor
- Y executes a mortgage in favour of Heider

ISSUE:

- Priority contest between Barry (registered earlier legal) and Heider (unregistered later equitable).

HELD:

- The courts recognise Heider's unregistered mortgage, which had priority because of postponing conduct.
 - The court applies the general law priority rules to find Barry's postponing conduct
 - This means that Barry cannot make a claim under the Assurance Fund because he has not suffered loss due to the Act

SIGNIFICANCE:

- An unregistered interest can exist.

Chan v Cresdon (1989) 168 CLR 242

FACTS:

- A lessor granted a lease for 5 years but was not registered
 - The lessee got behind in rent and the lessor wanted to recover this, so he sued the lessee's guarantor

HELD:

- The payment of rent created a general law periodic lease
 - This was an unregistered equitable interest
 - This was enforceable in equity because it was in writing (s 54A CA)
- Also, you can't sue the guarantors because a guarantee is strictly construed against the beneficiary
 - In this case the guarantor was securing the obligations under this lease.

SIGNIFICANCE:

- Equitable interest can arise out of a contract as evidence by an unregistered instrument.
- But an equitable interest does not arise out of the document itself, but rather from the maxim that equity recognises what ought to be done as done.

8. Caveats and Priority Notices

8.1. Picking Between the Two:

	Caveat	Priority Notice
Subject Matter	Can prevent a larger amount of dealings (s 74H). Any proprietary interest.	A PN will prevent the registration of plans, dealing and writs which are inconsistent with the PN
Lodging	Can be lodged by any person claiming legal or equitable interest or having an unregistered dealing.	Can be lodged by almost anyone
Timing	Until it is removed, or a lapsing notice is issued	60 days (s 74(1)(a)) with an option to extend to 90 (s 74V(1)(b))
Cost	\$100	\$33

8.2. Caveats

- A caveat is a way to protect an unregistered interest by stopping the registration of any further dealings
 - But if the dealing is already lodged, but not registered, the caveat is still not effective.
 - It will only be effective if the unregistered interest is protected by indefeasibility
 - But you have to do it in time.
- Can only caveat to protect your interest while the person who granted the interest is the registered proprietor (*Leros v Terara (1992)*)

8.2.1. Lodging a Caveat

- Per s 74F(1) RPA a person who claims to be entitled to a “legal or equitable estate or interest in land” may lodge a caveat.
 - If you have a registered interest in the land and suspect your interest may be defeated by fraud(s 74F (2)).
- If a party lodges a caveat ‘without reasonable cause is liable to pay compensation to anyone who suffers pecuniary loss (s 74P)
- **Requirements:**
 - Must have a ‘caveatable interest’: an estate or interest in land.
 - It cannot be lodged to protect a mere contractual or personal right; it must be to protect a **proprietary interest**.
 - The caveatable interest must exist at the time of lodgement.
 - For Example: interest of a purchaser under a contract for sale, interest in an equitable mortgage, interest of a lessee under a lease, option to purchase land
- **Process:**
 - To lodge a caveat must comply with the requirements of s 74F (above)
 - If the formalities are complied with, the RG will record the caveat (s 74G)
 - Once lodged, the RG will not be able to lodge any further dealings (s 74H(1)(a))
- **Duration:**
 - A caveat will last until it is removed by one of the methods below:

8.2.2. Removing a Caveat

- With the consent of the person who launched the caveat
- **Lapsing:**
 - If a caveat for a non-caveatable interest is lodged, a lapsing notice can be filed (21 days, s 74I for an interested party or s 74J for the RP) or an application filed directly to court (s 74MA).
- S 74MA – going to the Supreme Court to have the caveat removed.
 - **The SC will look to:**
 - (1) is there a serious question to be tried - is it reasonably arguable that the caveator has the interest claimed?
 - (2) Does the “balance of convenience” lie with the continuation or removal of the caveat?
 - (3) Should the caveator required to give an undertaking as to damages?

8.3. Priority Notice

- These are a cheaper, ‘weaker’ alternative to a caveat
- They can only be lodged electronically (including for 'paper' titles) (*Conveyancing Rules, r 8.1.2*)
- May be lodged by a person who intends to lodge a dealing giving effect to an entitlement to a legal or equitable interest in land (s 74T(1))
- **Duration:** Effective for 60 days from lodgement (s 74(1)(a))
 - Can be extended to further 30 days (s 74V(1)(b))

8.4. Case

Butler v Fairclough (1917)

Failure to caveat before creation of later interest, where register searched

SUMMARY:

- Good was the registered proprietor of some land which was subject to a registered mortgage
 - Good grants a charge to Butler
 - Good sells the land subject to the mortgage to Fairclough
- After settlement, but before Fairclough registration, Butler lodges a caveat
- Fairclough had a better claim because he searched the register before registration – when there was no caveat on the land.

9. Priorities between unregistered interests

9.1. Defective Chain

X → (Defective) → Y → (valid) → Z

- There is a priority contest between the:
 - **Prior registered** interest of X and;
 - **Later unregistered** interest held by Z
- This chain was also seen in
 - Barry v Heider (1914)
 - Barry > Unregistered Void Transfer > Y > Unregistered Mortgage > Heider
 - Heider wins priority because of Barry's postponing conduct
 - Breskvar v Wall (1972)
 - B > Void Transfer > P > Forged Transfer > W > Valid Equitable Transfer > A
 - A's equitable interest wins priority because of Breskvar's postponing conduct

9.1.1. Caveats

- In the following cases, the earlier interest holder **caveated before lodgement** but **after creation of the later interest** (i.e. it stopped registration so a general law priority contest could be decided, but it did not serve as notice of the earlier interest).
- **If caveat is lodged before the creation of the later interest:**
 - This will serve as notice to any later interest holder
 - Disarm postponing conduct by the earlier interest holder regardless of whether they search the register as they will have had constructive notice of the caveat (CA s 164)
- **If caveat is lodged after the creation of the later interest (but before registration):**
 - The caveat will prevent registration
 - Start a general law priority contest
 - If the later interest holder searches the register and finds nothing, THEN a failure to caveat will be postponing conduct (Heid v Reliance Finance; Jacobs v Platt Nominees)
 - A failure of the later party to search the register is not fatal in Defective Chain Cases (Abigail v Lapin)

9.1.2. Cases

Heid v Reliance Finance Corporation Pty Ltd (1983) 154 CLR 326

Example case of postponing conduct

FACTS:

- Heid is the registered proprietor of some land
 - He sells it to Connell Investments and gives them the CT and a transfer that acknowledges that Heid had received all the money – but he did not.
- Connell grants an unregistered mortgage to RFC.

There is a priority contest between Heid's earlier registered interest and RFC's later unregistered interest.

HELD:

- Heid was found to have done postponing conduct and therefore the later equitable interest prevailed

SIGNIFICANCE:

- **Mason & Deane JJ present a negligence-based concept (and therefore reasonably foreseeable) of postponing conduct:**
 - The earlier interest holder's conduct would need to invoke broader notions of unfairness and negligence.
 - Question if it was reasonably foreseeable the actions of the earlier interest holder could lead to the mistaken assumption by the later interest holder the interest didn't exist?
- In this case **Gibbs CJ, Wilson and Murphy JJ based postponing conduct on estoppel**; therefore, requiring representation, detriment and reliance. In this case:

- There was no representation, therefore no estoppel
- Furthermore, Platt would not suffer detriment

Abigail v Lapin [1934] AC 491

L (equity of redemption) > H > A (equitable mortgage)

FACTS:

- Lapin was the registered proprietor and granted a mortgage to Heavener
 - The mortgage was disguised in the form of an absolute transfer
 - This made Heavener the registered proprietor of the land rather than mortgagee; Lapin had an equitable interest in the land (equitable redemption of title)
- Heavener grants an unregistered mortgage over the land to Lapin, which she can do because she is the registered proprietor
- Priority contest between prior interest of Lapin (unregistered equity of redemption) and later interest of Abigail (unregistered equitable mortgage)

HELD:

- The later equitable mortgage was held to have priority
 - “The Lapins are bound by the natural consequences of their acts in arming Heavener with the power to go into the world as the absolute owner”
 - The postponing conduct came directly from Heavener’s actions, but this was enabled by Lapin

SIGNIFICANCE:

- The misrepresentation does not have to come from the priority interest holder, but if it does come from Y, X must have allowed Y to make the misrepresentation
- The failure to search is not **fatal** in the **defective chain cases**.
- In **common grantor cases** – the failure to search is fatal for the later interest holders.