

MLP716 - Land Law & Policy

Week 1 — Introduction to Land Law and Policy

What land law does.

It defines estates and interests in land, allocates priority between competing claimants, and provides systems to create, transfer and secure interests.

Policy aims include certainty, simplicity, marketability of title, and fairness between claimants. Torrens registration implements those aims via title by registration, not registration of title.

Foundational vocabulary.

- Estate: scope/duration of a person's rights (e.g., fee simple).
- Interest: a right falling short of full ownership (easement, mortgage).
- Fixtures vs chattels: what is attached to land is generally fixture; policy reason is certainty of the land parcel.
- Registrable instrument vs registrable interest: Torrens registers the instrument that creates/transfers a registrable interest; purely contractual/personal promises do not gain indefeasibility by registration.

Two systems and why they matter.

- Deeds (old system): priority depended on notice and bona fide purchaser rules; vulnerable to hidden equities.
- Torrens: paramountcy provisions (*TLA (Vic) ss 40–44*) give a registered proprietor a guaranteed statutory title, subject only to registered encumbrances and limited exceptions. Notice is irrelevant; nemo dat is displaced by registration.

Authorities and how to use them

- *Frazer v Walker*: defines “indefeasible title” as immunity from attack for the registered proprietor; central to Torrens policy language when framing answers about certainty. Use to anchor policy justifications for registration.

Exam tip. When asked a “what/why” introduction, tie back to policy: Torrens is designed to replace complex equitable priority contests with simple register-backed certainty; exceptions exist but are narrow and principled.

Week 2 — Deeds Registration System (Old System)

Core idea.

Under the deeds system, priority is a function of time and notice. A prior equitable interest can bind a later taker with notice; the bona fide purchaser for value without notice prevails. The system is derivative: title chains through previous deeds and is vulnerable to defects and hidden equities.

Why this still matters.

You may meet residual old-system titles (or concepts informing Torrens paramount interests and in personam reasoning). Understanding notice and equitable priorities helps with Torrens problems where parties rely on unregistered rights, or where registration has not yet occurred.

Priority logic (Old System).

- First in time normally wins unless later party is a bona fide purchaser for value without notice.
- Actual, constructive or imputed notice defeats the later taker's claim to protection.
- Litigation often turns on whether the claimant is volunteer (no value) and whether notice can be proven.

Authorities and how to use them (Week 2)

- Use old-system discussion as context only. Your materials focus authorities on Torrens; invoke Week 2 concepts to contrast notice vs indefeasibility when stepping through chronology.

Exam tip. If a problem starts “before registration” or “under old title”, run a notice-based priority analysis first. Then, once registration occurs, switch to Torrens and its paramountcy/indefeasibility logic. State clearly when the system changes in your answer.

Week 3 — The Torrens System

- The Torrens system was introduced in the mid-19th century to simplify conveyancing and overcome the complexities of the Old System (deeds registration).
- It aims to provide certainty, efficiency, and security through a state-guaranteed register that centralises ownership and interests in land.
- Title is conferred by registration itself, not by the instrument of transfer.
- The register is conclusive of ownership, forming the basis for the doctrines of indefeasibility and state assurance.

Key Objectives

- Simplicity: Removes the need to investigate historical chains of title.
- Certainty: Register is the single source of truth; purchasers can rely on its accuracy.
- Security: Backed by state guarantee and compensation for loss.
- Speed: Streamlines transactions.
- Economic efficiency: Lowers costs and increases confidence in land dealings.

Registration means recording your ownership or interest on the government's central register. Under the Torrens system, the register itself is the proof of ownership — not the pile of deeds.

Fundamental Torrens Principles

Mirror Principle

- The register should accurately and completely reflect the current state of title.
- Dealings may proceed in reliance on the register without checking prior history.
- Interests not on the register generally cannot bind bona fide purchasers.

Curtain Principle

- There is no need to investigate behind the register.
- The register acts as a “curtain” shielding purchasers from undisclosed equitable interests.
- Investigations are unnecessary except for recognised exceptions (e.g. fraud, paramount interests).
- Insurance (Indemnity) Principle
- The State guarantees the accuracy of the register.
- If the system deprives a person of an interest, they are entitled to compensation from the assurance fund, subject to statutory limits.
- This underpins confidence and finality in the Torrens system.

Paramountcy Provisions (TLA (Vic) ss 40–44)

These provisions confer indefeasibility by providing that:

- Title arises by registration, not by the instrument itself.
- Registered title is conclusive despite prior defects.
- Registered interests take priority over unregistered interests.
- Notice of unregistered interests is irrelevant.
- Nemo dat is displaced by registration.

- Title is subject only to:
 - Registered encumbrances; and
 - Recognised statutory or non-statutory exceptions (e.g. fraud, paramount interests, prior folio errors).

Key Features of the Torrens System

- Title by registration: Registration itself creates legal title.
- Single, centralised register: Maintained by the state; guarantees ownership.
- Indefeasibility: Registered proprietors are protected except for narrow exceptions.
- Reliance on the register: Purchasers need not investigate beyond it.
- State compensation scheme: Provides indemnity for loss caused by system errors or operations.

Comparison with Old System

Old System	Torrens System
Title derived from chain of deeds.	Title derived from registration.
Purchasers must investigate historic deeds.	Register provides conclusive proof of title.
Vulnerable to fraud, missing documents, uncertainty.	Centralised and secure.
No state guarantee.	State guarantee and compensation scheme.

Scope of Indefeasibility

- Registrable land interests (e.g. fee simple, leasehold, mortgage) and their lawful incidents (e.g. mortgagee's power of sale) are protected.
- Purely personal or contractual promises attached to a registrable instrument do not gain indefeasibility by mere registration.
- *Mercantile Credits v Shell* illustrates this distinction between proprietary and collateral personal undertakings.
- Precision is essential in exams: distinguish between a lease (which gains indefeasibility, including options to renew) and rights of pre-emption (which do not).

Electronic Conveyancing

- E-conveyancing does not alter the fundamental Torrens principles.
- Once an interest is registered, it receives the same indefeasibility as in paper conveyancing.
- Verification of Identity (VOI) checks and procedural safeguards protect the process but do not affect the legal consequences of registration.

Displacement of Common Law Doctrines

- Doctrine of notice is abolished: purchasers are not bound merely because they know of unregistered interests.
- *Nemo dat quod non habet* is displaced: registration can give good title even from someone without valid title (subject to exceptions).
- Reflects a fundamental shift from Old System conveyancing toward certainty and reliance on the register.

Registration and Creation of Title

- Registration is constitutive — it creates legal title.
- Prior to registration, transferees hold equitable rights only.
- Upon registration:
 - Proprietors obtain indefeasible title.
 - Prior unregistered interests are generally defeated.
- Reflected in s 40 TLA: instruments are not effective until registered, but equitable interests can still arise in equity.

Policy Justifications

- Certainty and efficiency: Reduces complexity and encourages transactions.
- Finality: Supports reliance on the register as the ultimate source of title.
- Risk allocation: Shifts risk from purchasers to the state.
- Economic development: A secure and efficient land system underpins investment.
- Litigation reduction: Fewer disputes over historical chains of title.

Key Authorities

Case	Principle / Use
Mercantile Credits v Shell	Clarifies scope of indefeasibility — distinguishes proprietary rights (protected) vs collateral promises (not protected).

Exam Tips

- When identifying interests that may (or may not) gain indefeasibility, be precise.
 - Ask: is it a registrable land interest or a personal collateral promise?
- Use Mercantile Credits v Shell to argue whether an undertaking is protected by registration.
- Be clear on the three Torrens principles and how they work together:
 - Mirror: register reflects ownership.
 - Curtain: no need to look behind the register.
 - Insurance: state guarantee backs the system.
- Link to paramountcy provisions when discussing indefeasibility foundations.

Key Takeaways

- Torrens system replaces investigation of title with reliance on registration.
- Three core principles — mirror, curtain, insurance — underpin the system.
- Title arises by registration, displacing notice and nemo dat.
- Indefeasibility applies to proprietary interests, not collateral promises.
- E-conveyancing preserves, rather than alters, these rules.
- The system balances certainty for purchasers with compensation for those who lose interests.

Week 4 — Indefeasibility of Title

Meaning of Indefeasibility

- On registration, the registered proprietor (RP) acquires unassailable rights to the estate or interest in land.
- These rights are subject only to:
 - Conditions and covenants in the instrument;
 - Encumbrances recorded on the register; and
 - Recognised statutory and non-statutory exceptions.
- Common law doctrines displaced:
 - Doctrine of notice no longer applies.
 - Nemo dat quod non habet (no one can give what they don't have) is displaced.
- Registration gives security of tenure and enables reliance on the register's accuracy.

Indefeasibility = your registered ownership can't be defeated (taken away) by earlier hidden claims, except for a few narrow exceptions (like fraud).

Once you are on the register, the law gives you strong protection — even if someone else had a better claim before, but didn't register it.

Statutory Provisions (Vic)

s 40 TLA – Effect of Registration

- Instrument not effective until registered.
- Unregistered interests can exist (e.g. *Barry v Heider* (1914) 19 CLR 197).
- Registration creates title but is not compulsory — benefits of indefeasibility arise only upon registration.
- Three types of title: registrable, unregistrable, possessory.

s 41 TLA – Indefeasibility

- Title is indefeasible and not impeached by pre-registration irregularities or informalities.
- Nemo dat abolished — registration cures defects in prior dealings.
- Folio of the register is conclusive evidence of proprietorship.
- Purchasers can rely on accuracy of the register.

s 42(1) TLA – General Rule

- RP acquires state-guaranteed title.
- Title is subject only to:
 - Registered encumbrances;
 - Paramount interests (s 42(2));
 - Fraud by the RP; and
 - Prior folio / wrong description of land.
- Common law priority rules abolished — priority determined by registration.

s 42(2) TLA – Paramount Interests

Registered title is subject to:

- Reservations/conditions in Crown grants;
- Rights under adverse possession;
- Public rights of way;
- Easements;
- Tenant in possession's interest;
- Unpaid rates and land tax.

→ These are protected regardless of registration.

s 43 TLA – Notice

- Doctrine of notice abolished.
- Dealing parties not affected by notice of unregistered interests.
- RP need not investigate prior dealings or consideration given.
- Acquisition with notice does not constitute fraud.
- Exception: where fraud is committed by or brought home to the RP.

s 44 TLA – Statutory Fraud

s 44(1)

- Title is void against a defrauded person where fraud is by or brought home to the RP.
- Fraud must induce detrimental action by the victim.

s 44(2)

- Protects a subsequent bona fide purchaser for value even if their predecessor was fraudulent.
- Combined reading:
 - Fraudster's title is defeasible.
 - Later bona fide transferee obtains indefeasible title upon registration.

Paramountcy Provisions – Overview

- Registration creates a new title, not a derivative one.
- Title is subject only to recorded encumbrances and recognised exceptions.
- Paramount interests survive registration and bind subsequent proprietors.
- Examples: Crown reservations, adverse possession, easements, tenancy rights, rates/taxes.
- Register accuracy can be relied upon; security of tenure is enhanced.

Immediate vs Deferred Indefeasibility

Meaning

- Concerns when indefeasibility is conferred if prior instrument or transfer is void/defective.

Immediate Indefeasibility

- Protection arises immediately upon registration, even if instrument was void (absent RP fraud).

- This is the Australian rule.
- **Frazer v Walker (UKPC)**: forged mortgage; mortgagees not fraudulent → obtained indefeasible title upon registration.
- **Breskvar v Wall (HCA)**: void instrument due to blank transferee; registration vested title despite voidness.
- **Perpetual Trustees Victoria v English (NSWCA)**: “the starting point in Australia is immediate indefeasibility.”
- Rationale: protects reliance on the register; prioritises certainty over investigating defects.

Deferred Indefeasibility

- Protection deferred until a subsequent bona fide purchaser acquires the interest from a fraudulent or void dealing.
- Historically applied (e.g. **Gibbs v Messer**), but no longer followed in Australia.
- **Gibbs v Messer (UKPC)**: fictitious proprietor; mortgage from a non-existent person could not be indefeasible.
 - Treated as a narrow fictitious proprietor exception.
 - Does not apply to forgeries by real persons.

Scope of Indefeasibility

- Indefeasibility extends to land interests, not collateral personal covenants.
- Protected:
 - Lease and right of renewal.
 - Mortgage incidents (e.g. power of sale).
- Not protected:
 - Mere personal contractual rights.
 - Rights of pre-emption.
- **Mercantile Credits v Shell (1976) 136 CLR 326**: Torrens system concerns registrable instruments, not unregistrable personal interests.
- Electronic conveyancing does not alter the principles — indefeasible title still conferred on registration.

Fee simple is the strongest form of land ownership in common law countries.
It basically means “full ownership forever”, subject only to the government (the Crown).

So, if you own land in fee simple, you can sell it, lease it, mortgage it, or leave it to someone in your will.

An interest is any legal right over land, short of full ownership.

Examples:

- Easement → a right to cross someone’s land (e.g. a shared driveway).
- Mortgage → bank’s interest when you borrow money to buy a house.
- Lease → tenant’s interest for a certain time.
- Fixtures = things attached to land (become part of the land).
- Chattels = movable items (not part of the land).

Key Authorities

Case	Principle
Frazer v Walker	Registration cures instrument defects absent RP fraud; supports immediate indefeasibility.
Breskvar v Wall	"Title by registration" – even void instruments confer indefeasible title upon innocent registration.
Gibbs v Messer	Fictitious proprietor exception; no indefeasibility for dealings by non-existent persons.
Perpetual Trustees v English	Confirms Australian starting point is immediate indefeasibility.
Mercantile Credits v Shell	Scope limited to registrable interests; collateral covenants not protected.

Conclusion / Exam Tips

- Upon registration, RP obtains immediate indefeasibility in Australia.
- Title is subject to:
 - Registered encumbrances;
 - Paramount interests;
 - Fraud (by/brought home to RP);
 - Prior folio / misdescription.
- Notice and nemo dat rules displaced.
- Always identify:
 - Who is fraudulent (and how fraud is brought home);
 - The moment of registration;
 - Whether the instrument was void or defective.
- Apply:
 - Frazer / Breskvar for immediate indefeasibility.
 - Gibbs only for fictitious proprietor situations.
- Scope: check whether the interest is registrable.
- Remember: registration, not the instrument, creates title.

Week 5 — Statutory Exceptions to Indefeasibility

Overview of Indefeasibility and Exceptions

Upon registration of a right or interest, an indefeasible title is normally acquired. However, the Torrens system recognises specific exceptions where indefeasibility can be defeated. These arise from:

- Statute — exceptions expressly set out in the Torrens legislation;
- Courts — judicially developed exceptions; and
- Subsequent legislation — statutes enacted after the paramountcy provisions that may be inconsistent with them.

Where a statutory exception applies, the registered proprietor's title is defeasible, and the title can be set aside.

The three principal statutory exceptions are:

1. Fraud
2. Prior folio / erroneous description of land
3. Paramount interests (easements, adverse possessions etc inc.)

Fraud Exception

Meaning and Legislative Basis

- The fraud exception is recognised in all Australian jurisdictions but undefined in Victoria.
- **Section 42(1) of the Transfer of Land Act (TLA)** sets out the fraud exception.
- **Section 43** clarifies that mere notice of an unregistered interest is not fraud.
- **Section 44** explains the consequences of fraud.
- Courts have defined fraud by reference to both legal and equitable principles.

Judicial Interpretation

- Common law requires **proof of deceit**.
- Courts generally adopt one of two approaches:
 - **Limiting fraud to** actual fraud — dishonesty or moral turpitude; or
 - Extending to include certain forms of equitable fraud.
- Examples include:
 - **Registration of a forged document.**
 - Lodging a document with **wilful blindness or reckless failure** to inquire whether it is forged.

Fraud must be brought home to the registered proprietor — i.e. the **fraud must involve or affect their state of mind and must** induce detrimental action **by the defrauded party**. Wilful blindness or recklessness may satisfy this requirement.

Modern Context and E-Conveyancing

- While electronic conveyancing has reduced some traditional risks (e.g. forgery of paper documents), it has introduced new avenues for fraud, such as identity theft, email interception, and fraudulent mortgage or transfer.

- Mortgagees are expected to take reasonable steps to verify identity; in Qld, NSW, and Vic, failure to do so can result in loss of indefeasibility.

Prior Certificate / Erroneous Description of Land

This exception applies where two certificates of title cover the same land. In such cases, the earlier folio prevails, and the later registered proprietor does not obtain indefeasible title.

Similarly, where land is included by erroneous description, the title is defeasible. This typically arises during conversion from Old System title to Torrens title.

Erroneous description = The land title (or “folio”) in the register contains a **mistake in the way the land is described**, so that it **covers land it shouldn’t**, or **doesn’t match the true physical boundaries**.

Key points:

- Survey evidence is decisive where there is doubt. Boundaries are determined by survey pegs or natural features, not just measurements in title documents.
- Protection is afforded to purchasers for value; they should not be penalised for administrative mistakes.
- The Registrar may correct errors under **s 103 TLA**, provided no substantive prejudice is caused.

Paramount Interests

Certain interests survive registration and bind the registered proprietor, even if they are not noted on the register. These are called paramount interests.

Scope

The exact list of paramount interests varies by jurisdiction, but in Victoria (**s 42(2) TLA**), registered land is subject to:

- (a) Reservations, exceptions, conditions and powers contained in the Crown grant.
- (b) Rights subsisting under adverse possession.
- (c) Public rights of way.
- (d) Easements (howsoever acquired) subsisting over the land.
- (e) The interest of a tenant in possession (excluding options to purchase).
- (f) Unpaid land tax, rates, and charges.

Crown Grants and Adverse Possession

- Land remains subject to reservations and conditions in favour of the Crown (e.g. mineral rights).
- Adverse possession is protected despite registration.
 - In Victoria: adverse possession is fully protected during possession and after the limitation period is complete.
 - In NSW: protection only arises upon registration after the full limitation period, with no accumulation of time.

- A person who is **not the legal owner** of a piece of land can **become the legal owner** by **possessing it for a long period of time** — *without the true owner's permission* — and meeting strict legal conditions.

Easements

- Easements are protected across all states, but the extent differs.

An easement is a legal right to use someone else's land in a specific, limited way, without owning it.

- Victoria offers the widest protection — legal or equitable easements, whether created expressly, impliedly, or by prescription, are covered.
- NSW provides narrower protection (**Castle Construction Pty Ltd v Sahab Holdings Pty Ltd**).
 - Only validly created easements are protected.
 - Prescriptive or implied easements are not automatically covered (**Williams v State Transit Authority of NSW**).
 - Some implied easements may fall under the in personam exception, but not paramount interests (**McGrath v Campbell**).

Legal Structure of an Easement

Every easement involves two pieces of land:

Dominant tenement

→ The land that benefits from the easement.

Servient tenement

→ The land that is burdened by the easement (i.e. must allow the use).

Requirements for a Valid Easement

(From the famous English case **Re Ellenborough Park (1956)**)

For an easement to legally exist, four things must usually be true:

- There must be two separate pieces of land — dominant and servient.
- You can't have an easement over your own land.
- The easement must benefit the dominant land, not just a person.
- The right must attach to the land itself, not be purely personal.
- The dominant and servient owners must be different people.
- The easement must be capable of being the subject matter of a grant.
- Basically: it must be a clear, definable right (e.g. right of way), not something vague like "right to a nice view."

Easements Under Torrens

Under the Torrens system, easements can be:

- *Registered* → **and then they get indefeasibility.**
- *Unregistered but existing at law* → **some are protected anyway as paramount interests (TLA s 42(2)(d)).**

In Victoria, easements (howsoever acquired) — whether created by registration, implication, or prescription — are paramount interests.