

WK 7 - THE TORRENS REGIME: UNREGISTERED INTERESTS, CAVEATS, AND PRIORITY 1
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WK 7 - The Torrens Regime: Unregistered Interests, Caveats, and Priority

Key Terms

Unregistered Interest: a legal or equitable interest in land that exists without being recorded on the Torrens title register.

Under the Torrens system, registration is generally what gives legal title and priority. If an interest is not registered, it may still be valid between the parties, but it is usually more vulnerable than a registered interest.

Examples:

- An unregistered lease,
- An equitable mortgage,
- A purchaser’s interest under a contract for sale,
- A beneficial interest under a trust,
- An unregistered easement or covenant,
- Rights arising through proprietary estoppel.

Why registration matters

Under Torrens legislation – Real Property Act 1900 (NSW), registration generally provides:

- Indefeasibility of title,
- Priority over later unregistered interests,
- Public notice to other dealing with the land.

An unregistered interest does not usually obtain indefeasibility.

Effective against third parties

Whether an unregistered interest bind alter purchasers depends on several factors:

- Notice
- Fraud
- Statutory exceptions
- Whether the interest qualifies as an overriding interest
- Priority rules.

A bona fide purchaser who becomes registered generally takes priority over earlier unregistered equitable interests unless an exception applies.

Legal Authorities

- **Real Property Act 1900 (NSW)**
- **Barry v Heider**
 - Established that equitable interests in Torrens land can exist even if unregistered.
 - Involved competing claims to Torrens title land after an unregistered transaction.
 - HC held – equity still recognises interests arising from contracts and unregistered dealings even though Torrens title legislation says legal title passes only on registration.
- **Breskvar v Wall**
 - Described the Torrens system as a ‘system of title by registration, not registration of title’.
 - HC held - registration conferred title on Wall despite the void instrument, confirming immediate indefeasibility and the principle that Torrens title is “title by registration”.
 - Albans’ equitable interest prevailed because of the fraud conduct by the Breskvars.

Priority Notice: a temporary notice recorded on the Torrens title register that protected a proposed transaction dealing with land for a limited period of time.

It acts as a warning on the register that someone intends to lodge an instrument such as a transfer mortgage or lease and gives that intended dealing temporary priority over later inconsistent dealings.

Purpose of a priority notice

- Preserve the priority of an impending transaction,
- Prevent competing dealings from being registered first,

- Reduce settlement fraud and “double dealing” risks,
- Provide short – term protection between exchange/ settlement and registration.

Example:

- A agrees to sell land to B.
- Before settlement, B lodges a priority notice over the title.
- During the notice period, A attempts to transfer the land to C or register another mortgage.
- The Registrar – General will generally refuse registration of inconsistent dealings while the priority notice is in force.
- This gives B time to lodge the actual transfer instrument.

Key features in NSW

- Does not itself create an interest in land,
- Is temporary,
- Lasts for 60 days,
- May be extended once in some circumstances,
- Only protects the specific dealing identified in the notice.

Distinction from Caveats

- Temporary notice preserving priority,
- Does not claim a proprietary interest,
- Mainly administrative/ protective,
- Short duration.

Caveat: a formal notice lodged on the Torrens title register claiming an interest in land and warning others that the land is subject to that claimed interest.

Caveat - “let them beware”.

A caveat does not create an interest in land. It protects an existing legal or equitable interest by preventing certain dealings from being registered without notice to the caveator.

Purpose of a caveat

- Protect unregistered interests,
- Prevent inconsistent dealings being registered,
- Preserve priority,
- Warn potential purchasers or mortgages that another person claims rights over the land.

Examples

People who may lodge a caveat include:

- A purchaser under a contract for sale,
- A person claiming an equitable mortgage,
- A beneficiary under a trust,
- A person with an equitable interest arising from contributions to property,

- A holder of an option to purchase.

Effects of lodging a caveat

Once lodged, the Registrar – General will generally refuse to register later dealings that are inconsistent with the caveator's claimed interest unless:

- The caveat is withdrawn,
- Lapses,
- Is removed by court order,
- Or the caveator consents.

This means the caveat acts as a statutory injunction over the title.

Caveatable interest

A person cannot lodge a caveat merely because they have a personal dispute or expect future rights.

They must have a caveatable interest, usually a proprietary interest in land such as:

- An equitable interest,
- An equitable lease,
- An equitable mortgage,
- Rights under a contract for sale.

A purely contractual or personal right is generally insufficient.

Distinctions from priority notices

- Claims a proprietary interest,
- Requires a caveatable interest,
- Can block inconsistent dealings,
- Often long term until removed.

Example

- A agrees to sell land to B.
- Before settlement, B lodges a caveat claiming an equitable interest under the contract for sale.
- If A then tries to sell the land to C or register a mortgage, the caveat may prevent registration of those dealings until the dispute is resolved.

Legal Authorities

- **Real Property Act 1900 (NSW)**
- **Barry v Heider**
 - Equitable interests existing in Torrens land;
 - Caveats protecting those interests;
 - Caveats operating similarly to statutory injunctions.
- **Black v Garnock**
 - Importance of lodging caveats
 - A purchaser under a contract for sale only an equitable interest until registration
 - Torrens title priority rules can defeat earlier equitable interests

Registration and statutory recording