

2026 Property B Notes (LAW3402)

Full Topic List:

Topic 1: Co-Ownership

Topic 2: Equitable Interests Arising by Operation of Law

Topic 3: Mortgages

Topic 4: An Introduction to the Enforceability of Property Interests, Systems of Title, the Torrens System and Conveyancing

Topic 5: The Principle of Indefeasibility of Title

Topic 6: Exceptions to Indefeasibility of Title

Topic 7: Unregistered Interests Under the Torrens System

Topic 8: Exam Guide

Topic 3 – Mortgages

This course will only deal with Torrens land (registered) and security interests in land, despite the fact that you can have security interests in other things (but they are unexaminable).

3.1 - The nature and types of mortgages

1. Basic Concepts from Property A

Property A already introduced security interests and dealt with the differences between a mortgage of general law land and a mortgage of Torrens system land.

1. What is the difference between a secured and unsecured debt?

All debts typically involve some form of contractual agreement. However, a secured debt is one where repayment is tied to specific property, with a security interest, or charge, granted over that property. This means if you borrow money and fail to repay it, the lender can enforce a remedy against your property, usually by selling it to recover the debt.

In contrast, an unsecured debt involves a simple loan agreement where you borrow money and promise to repay it without any collateral. Here, the creditor has less security, as they have limited means to ensure repayment. If the borrower becomes insolvent, the creditor may have little recourse, and suing under contract may be futile if the borrower lacks funds to settle the debt.

2. What is the nature of a general law mortgage?

Although not assessed in this course, much of the terminology in property law originates from the general law period. Under a general law mortgage, if I own a house and take out a mortgage from a bank, ownership of the house is transferred to the bank for the duration of the mortgage until the debt is fully paid. During this period, I do not retain ownership of the house. Instead, I hold an "equity of redemption," which is the right to reclaim ownership of the house once the debt is repaid.

3. How is a legal mortgage of general law land created?

The way that an interest is transferred in general law land is a deed.

4. Could you have more than one mortgage of general law land

Cannot have more than one of general law land because that first mortgage involved you transferring your ownership of the land to the lender so you could not do that again for another lender. All you could do was create equitable mortgages – you might give someone else an equitable right, but no more than one legal mortgage.

5. Are there any other ways that equitable mortgages of general law land can be created?

One traditional method of creating an equitable mortgage of general law land did not require a formal mortgage agreement or the formal transfer of ownership. Instead, individuals would deposit their title deeds with their lender. This practice was deemed to establish an equitable mortgage over the property because the title deeds were highly valuable documents, serving as proof of ownership. By handing over the title deeds to the lender, the property owner effectively limited their ability to take further actions with the land, such as selling it or taking out another mortgage. This arrangement provided the lender with a significant level of practical security and an equitable interest in the property.

2. Mortgagor vs mortgagee

Mortgagor:

The mortgagor is **the person who owns the land, generally the borrower** in a mortgage agreement. This is the person or entity that owns the property and has agreed to pledge it as security for a loan. The mortgagor receives the loan amount from the mortgagee to purchase the property or use the funds for other purposes. In the context of the mortgage, the mortgagor has the responsibility to repay the loan according to the terms agreed upon, which includes making regular payments that cover principal and interest, maintaining the property, and ensuring it is insured.

Mortgagee:

The mortgagee is the lender in a mortgage agreement. This could be a bank, a financial institution, or another type of lender that provides the loan to the mortgagor. The mortgagee holds/receives the mortgage on the property, which is the legal document that secures the property as collateral for the loan. The primary role of the mortgagee is to provide the funds for the loan and to receive repayments from the mortgagor, including principal and interest payments. If the mortgagor defaults on the loan, the mortgagee has the right to action a power of sale on the property - sell it and use the proceeds to recover the outstanding loan amount.

3. Legal mortgages of general law land (non-examinable)

- As explained just above, a general law mortgage operates as a transfer of the entire legal interest from the mortgagor to the mortgagee
- The mortgagor retains an 'equity of redemption' (an equitable right for the ownership of the land to be transferred back when the debt was discharged)
- Even though equity of redemption is not even a relevant phrase to the Torrens System, the term still get used to refer to the idea of the right to get the land back when the debt is discharged, which originates from the general law system.

4. Legal mortgages of Torrens System land

In contrast to a mortgage under general law, a registered **Torrens System mortgage grants the mortgagee a charge over the estate or land, which constitutes a legal interest**. However, unlike the general law system, the lender or mortgagee does not become the owner of the land. Instead, they hold a charge, which is a security interest, without the transfer of ownership. This is clearly outlined in Section 74(2) of the Transfer of Land Act (TLA).

This provision clarifies that a Torrens System mortgage in Victoria does not function like a traditional general law mortgage. Instead, it grants the lender a security interest in the land while the mortgagor retains ownership and remains the registered title holder, usually of the fee simple. Although it is technically possible to mortgage a long-term lease, the fee simple is more commonly mortgaged.

The registered proprietor remains the same, while the mortgagee holds a charge or security interest in the land. **When this charge is registered on the title, it becomes a legal mortgage under the Torrens System**, importantly creating a legal interest in the land upon registration.

Section 74(2) TLA: 'Any such mortgage or charge shall when registered have effect as a security and be an interest in land, but shall not operate as a transfer of the land thereby mortgaged or charged.'

5. How is a legal mortgage on the Torrens system created:

S 74(1) of the TLA shows that here is an instrument in approved form, so it's just a standard form whereby the registered proprietor of land (that means the owner of the interest that is being mortgaged) may mortgage the land or charge it with the payment of an annuity (We don't care so much about the payment of annuities in this unit. Just focus on the mortgage) and the registrar may register the mortgage if the mortgagee/lender has signed it and certifies that the mortgagee holds a mortgage granted by the mortgagor and that the mortgage held by them is in the same terms as the one they are trying to register. **So they have to basically lodge a copy of the mortgage with the Land Titles office and that gets it registered which is how you create a legal mortgage of Torrens system land. It is not a legal mortgage until it is registered.** The most fundamental component of this topic is that **a legal interest in Torrens land is created by registration.**

TLA s 74(1):

- (1) By instrument in the approved form, the registered proprietor of any land may—
 - (a) mortgage the land; or
 - (b) charge it with the payment of an annuity.
- (1A) The Registrar may register a mortgage if the mortgagee has—
 - (a) signed the mortgage; and
 - (b) certified that—
 - (i) the mortgagee holds a mortgage granted by the mortgagor; and
 - (ii) the mortgage held by the mortgagee is in the same terms as the mortgage lodged for registration.

6. Can there be more than one legal (registered) mortgage of Torrens land?

The answer is yes. Technically, there is **no limit to the number of mortgages that can be registered on Torrens system land**; they will simply be registered in succession. What we will learn in more detail in a couple of weeks is that interests in the Torrens system take priority based on their date of registration.

While there is no legal limit on the number of mortgages, there is a practical limit. Banks are unlikely to accept additional mortgages on a piece of land if several already exist, as their security interest would be significantly diluted. In the event of default, banks recover their debts in the order the mortgages were registered, making it difficult for later mortgagees to recoup their investment. Therefore, while you can legally register as many mortgages as you can convince banks to provide, the practical limit is determined by the willingness of banks to take on that risk.

7. Can there be equitable mortgages of Torrens System land? How might they arise?

Yes, there can be equitable mortgages of Torrens System land. **These typically arise in situations where the requirements for a legal mortgage, as outlined in Section 74 of the Transfer of Land Act, have not been met.** Until the mortgage instrument is registered, it remains an equitable mortgage. For example, if you go to your bank, sign a contract, complete all the necessary paperwork, and agreements, the mortgage is only equitable until it is properly registered. If the mortgage is never registered, it remains equitable.

Interestingly, there are numerous cases where banks fail to register the mortgage, which is surprising given that registration is in the bank's best interest as it secures their interest in the property. Registration of the mortgage is typically the responsibility of the bank, and failing to do so can lead to complications.

Another common way equitable mortgages of Torrens System land arise is through the deposit of a certificate of title. If you deposit your certificate of title (technically called the duplicate certificate of title) with a bank as security for a loan, this act creates an equitable mortgage. However, this method is less common now due to the shift from paper-based conveyancing to electronic conveyancing.

8. How is a mortgage of Torrens System land discharged?

In the Torrens system, a mortgage is registered as a security interest or charge over the land. When the debt is repaid and the mortgage is to be discharged, it must be unregistered. This is done by registering a discharge of mortgage, which involves completing a specific form. This form, once signed by the bank, gets registered,

effectively removing the mortgage from the property's title. In essence, the discharge of mortgage is a separate formality completed at the end of the mortgage term to ensure the mortgage is removed from the land register, signifying that the debt has been fully repaid.

3.2 – Equity's protection of the mortgagor/borrower

1. What is the equity of redemption?

In light of the nature of general law mortgages (as described above), where the mortgagee became the legal title holder, equity developed a number of principles to protect the right of mortgagors to redeem the land on repayment of the mortgage debt (and thus preserve the nature of the security transaction).

Although a mortgagor of Torrens land does not technically have an equity of redemption, the term is applied to such mortgagors. In this context it refers to the mortgagor's right to have the mortgaged discharged after the debt has been repaid.

2. Clogs on the equity of redemption

- Equity does not allow the mortgagee/lender to clog or fetter or restrict the mortgagor's/borrowers power to deal with the equity of redemption.
- Effectively, this just means that equity ensures that once the mortgagor fulfills their obligations, they should be able to get their property back without any unfair conditions or restrictions imposed by the mortgagee.
- The things that potentially clog the equity of redemption are called collateral covenants, as discussed below.

Collateral covenants principle

Factors to consider when considering whether a term is a collateral covenant (per the cases below)

1. Is it something that effects the value of the property?
2. Would it be considered part of the mortgage or a separate independent condition?
3. Does it actually restrict the mortgagor's/borrowers power to get their property back (does the term only apply during mortgage period or after the period too)

Overview of cases relating to collateral covenants

Many of the cases discussed below are older and pertain to business arrangements where individuals operated businesses and borrowed money from related business entities. For example, some cases involve hotel operators borrowing funds from breweries that supply beverages to their hotels. The concept of "clogs on the equity of redemption" arises in these contracts where the lender attempts to introduce additional criteria or conditions that benefit their business but are not directly related to the mortgage.

We refer to these as collateral covenants because they are terms not essential to the mortgage itself. They are secondary or attached conditions, but not key parts of the mortgage. The essential components of a mortgage include the loan amount, the term, the interest rate, and the security interest in the land. Collateral covenants are additional terms that, while related, are not directly about the mortgage. The primary rule is that such collateral covenants are not permissible if they attach to the mortgaged property and affect it after the mortgage is discharged.