

Topic 1: The Torrens System

Outline of the Torrens System

The Transfer of Land Act 1958 (Vic)

Definitions: s4	'Land' - "includes any estate or interest in land..." 'Proprietor' - means any person seized or possessed of or entitled to any estate or interest in land..." 'Registered Proprietor' - "means a person registered in the Register... as the proprietor of any estate or interest in land"
The Register: s27	• "The registrar must keep a Register of land which is under the operation of this Act": s 27(1) • "The Register consists of folios of the Register": s 27(4) • Each fee simple estate gets its own folio in the Register • Each folio is allocated a distinctive identifying reference: s27(6)(b) • Each folio contains: ss 27(6) and (7) ○ A description of the parcel of land in which the estate is held; ○ A description of the holder for the time being of that estate; ○ Particulars of other interest (if any) affecting the estate; and ○ Other information (if any) that relates to the estate and is required by the TLA or any other Act to be recorded on the folio.
Certificates of title: s27B	• On the creation of a folio of the Register, the Registrar also produced a "certificate of title" for that folio and provided it to the person entitled to it: ss 27B(7)(a) and (6). • The certificate of title is "a document in writing" containing the information on the folio as at the date of production of the certificate of title: s27B(1) • Usually the certificate of title for a folio needs to be lodged at the Land Titles Office along with the instrument effecting a dealing in order for the land Registrar to make a recording in that relevant folio.
Registration of Land dealings	TLA Part IV deals with registration of land dealings TLA s 45 (1) A registered proprietor may transfer his estate or interest in land by an instrument in an appropriate approved form (2) Upon the registration of the transfer the state or interest of the proprietor as set out in such instrument... with all rights powers and privileges thereto belonging or appertaining, shall pass to the transferee; and such transferee shall thereupon become the registered proprietor therefor." TLA ss 66 & 71 - registration of lease & sublease TLA s74 - registration of mortgage TLA s72 - recording of easement

The Indefeasibility Principle

'Indefeasibility of title' = "cannot be defeated" (conclusive evidence: s 41)

- The Register acts as both a 'curtain' and a 'mirror'
- An innocent purchaser is offered a positive and negative guarantee as to their title: ss40-44
- Once registered an innocent purchaser:
 - Gets good title despite any irregularities in the transaction (positive guarantee)
 - Has title unencumbered by certain older un-registered interests (negative guarantee)

The Positive Guarantee

"The Torrens System of registered title.. Is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor"

"Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void."

(Breskvar v Wall [1971] HCA 70 Per Barwick CJ)

The Negative Guarantee

Section 42 TLA

(1) Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from His Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely free from all other encumbrances whatsoever, except -"

Exceptions to indefeasibility

- Fraud (s42(1) TLA)
- Interest of person claiming under prior folio of register (s42(1)(a) TLA)
- Land included in a folio by wrong description (s42(1)(b) TLA)
- Reservations exceptions conditions and powers (if any) contained in the Crown grant of the land (s42(2)(a) TLA)
- Any rights subsisting under any adverse possession of the land (s42(2)(b) TLA)
- Any public rights of way (s42(2)(c) TLA)
- Any easements howsoever acquired subsisting over or upon or affecting the land (s42(2)(d) TLA)
- Interest (but excluding any option to purchase) of a tenant in possession of the land s42(2)(e)
- Any unpaid land tax and also any unpaid rates and other charges that can be discovered [in specified ways] (s42(2)(f) TLA)
- A couple of others recognised by courts though not expressly stated in TLA

The Notice Provision

S43 TLA

"Except in the case of fraud no person... dealing with... the registered proprietor... shall be required... to... ascertain the circumstances under Which such proprietor or any previous proprietor... was registered... or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the **knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.**"

Acquisition of Legal Interests in Land

Formal creation and acquisition

TLA s40

"(1) 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, but upon registration the estate or interest or encumbrance shall be created varied extinguished or pass in the manner and subject to the covenants and conditions specified in the instrument or by this Act prescribed or declared to be implied in instruments of a like nature."

Informal/disorganised creation and acquisition

- Adverse possession
- Prescriptive Easements

Inter Vivos Gift

Donative Intention

- For valid *inter vivos* gift of a proprietary interest, alleged donor must have had the intention to make a gift, i.e. must have intended to confer a benefit on the alleged donee by:
 - Divesting themselves of the proprietary interest;
 - Vesting that interest in the alleged donee
- Relevant intention is the intention of the alleged donor inferable from words and actions *at the time of the alleged gift*.
- Burden of proof is on the person alleging that a gift was made.

Formalities

Paper Conveyancing - Grantor executes the transfer document and hands it to the grantee together with the certificate of title (or where applicable, authorises the certificate of title to be made available to the Land Registry to enable registration of the transfer). Legal title passes on registration

E Conveyancing - Grantor provides their PEXA representative with written authorisation to digitally sign the transfer on their behalf and authorises the certificate of title to be made available to the Land Registry to enable registration of the transfer. Legal title passes on registration.

Testamentary Disposition (Personal Representatives)

- **TLA s 49; Registration of Personal Representatives**
- **Administration and Probate Act 1958 (Vic) s 41(10)**

Acquisition of Equitable Interests in Land

- Formal Creation and acquisition
 - Express Trusts (Equity and Trusts)
- Informal/disorganised creation and acquisition
 - Informal or incomplete transfers
 - Resulting, Constructive etc Trusts
 - Estoppel etc.