

Protection of Equitable Interests Under the Torrens System: Polishing the Mirror of Title

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I. INTRODUCTION

Sir Robert Torrens believed that the defects of the English law of real property could be traced back to a common source, namely the dependent nature of titles.¹ By eliminating the need for costly retrospective investigations of a vendor's title to land, bona fide purchasers, 'can see at a glance the precise state of the title, without having to search a register or to call in professional aid'.² To achieve this objective, a statutory scheme of indefeasibility of title was incorporated into the original Torrens statute.³

Under a Torrens system, indefeasibility of title is accomplished by

providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.⁴

Therefore, it is a fundamental principle of the Torrens system that, 'title to land and to interests in land depends upon registration and not upon instruments *inter partes*'.⁵

While the object of eliminating the need to investigate the history of a registered proprietor's title has been substantially achieved,⁶ the object of the register book as a 'mirror' reflecting all facts material to a registered proprietor's title to land,⁷ has not. In this article the protection of equitable interests under the Torrens system, with particular reference to the caveat provisions contained in the Torrens statutes in force in Australia, is discussed. The article concludes with an analysis of the recording and registration provisions contained in the Canadian *Model Land Recording and Registration*

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¹ R R Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859) 8.

² *Id* 34.

³ *Id* 43.

⁴ *Gibbs v Messer* [1891] AC 248, 254.

⁵ D Kerr, *The Principles of the Australian Lands Titles (Torrens) System* (1927) 9.

⁶ For a recent example, see *Leros Proprietary Limited v Terara Pty Ltd* (1991) 174 CLR 407.

⁷ See T B F Ruoff, 'An Englishman Looks at the Torrens System' (1952) 26 ALJ 118, 118, wherein it is noted:

The Torrens system seems to rest upon three main principles, all closely inter-dependent. The first of these is the *mirror* principle under which the register book reflects all facts material to an owner's title to land. Nothing that is incapable of registration and nothing that is not actually registered appears in the picture but the information that is shown is deemed to be both complete and accurate . . .

Act (hereafter '*Model Act*').⁸ It is suggested that the initiatives contained in the *Model Act* provide the foundation whereby the 'mirror' of a Torrens title can be polished to reflect more accurately the true state of the registered proprietor's title.

II. TORRENS vs EQUITY: THE SCOPE OF THE BATTLE

There is little question that Torrens was 'bitterly critical of the Court of Equity and its interference with common law titles'.⁹ This passage from the preface to his book, *The South Australian System of Conveyancing by Registration of Title*, alerts us to a recurrent theme which permeates his writings:

Twenty-two years have now elapsed since my attention was painfully drawn to the grievous injury and injustice inflicted under the English Law of Real Property by the misery and ruin which fell upon a relation and dear friend who was drawn into the maelstrom of the Court of Chancery, and I then resolved some day to strike a blow at that iniquitous institution.¹⁰

Fox informs us that Torrens' friend was an officer in the Indian Army who purchased a tract of reclaimable land in his native country. After expending upwards of £20 000 in buildings and improvements, a flaw was discovered in the title of the person from whom the officer purchased.¹¹ The legal title was in order; however, in equity the title was invalid due to the existence of an equitable right of which Torrens' friend was held to have constructive notice.¹²

One 'blow' Torrens struck was to include in his Bill a provision which was intended to abolish the equitable doctrine of notice.¹³ A similar provision is to be found in the Torrens statutes currently in force in all of the Australian States and Territories.¹⁴

It is clear, however, that the abolition of equitable interests in land was never advocated by Torrens. This is evidenced by the fact that the *Real Property Act 1857-1858* (SA) contained provisions permitting the registration of trusts.¹⁵ Further, Torrens incorporated into the Act, 'holus bolus the caveat

⁸ Contained in Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Recording and Registration Act for the Provinces and Territories of Canada* (July 1990).

⁹ P M Fox, 'The Story Behind the Torrens System' (1950) 23 ALJ 489, 490.

¹⁰ Torrens, *op cit* (fn 1) v-vi.

¹¹ Fox, *loc cit* (fn 9).

¹² *Ibid.*

¹³ Clauses 41, 66 and 67 of the Bill tabled on 4 June 1857 contained such a provision: see S Robinson, 'Claims in Personam in the Torrens System: Some General Principles' (1993) 67 ALJ 355, 358 fn 23.

¹⁴ *Real Property Act 1925* (ACT), s 59; *Real Property Act 1900* (NSW), s 43; *Real Property Act* (NT), ss 71B, 72; *Land Title Act 1994* (Qld), s 169(2); *Real Property Act 1886* (SA), ss 72, 186 and 187; *Land Titles Act 1980* (Tas), s 41; *Transfer of Land Act 1958* (Vic), s 43; *Transfer of Land Act 1893* (WA), s 134.

¹⁵ *Real Property Act 1857-1858* (SA), ss 56-58. See also D J Whalan, 'The Origins of the Torrens System and its Introduction into New Zealand' in G W Hinde (ed), *The New Zealand Torrens System Centennial Essays* (1971) 1, 5.

provisions contained in a Bill introduced by Hanson, the Attorney General of the day'.¹⁶ Dr Robinson notes that 'ever since, the Torrens legislation of the States has contained a provision abolishing the doctrine of notice and another permitting a person claiming (not having) an estate or interest to lodge a caveat'.¹⁷

Under a perfect system of registration, all interests held in a parcel of land would appear on the Register. Ideally a prospective purchaser should be able to search the Register and find all interests to which the land is, or may be, subject. That the reflection is inaccurate, 'principally due to the existence of statutes which override the Register',¹⁸ is beyond dispute. What is of concern is the extent to which equitable interests are recognised under the Torrens system, and the protection afforded to such interests by the caveat provisions.

III. RECOGNITION OF EQUITABLE INTERESTS UNDER THE TORRENS SYSTEM

Following the introduction of Torrens title registration legislation in South Australia, the issue arose as to whether the Torrens statute abolished the distinction between legal and equitable interests in land. In *Lange v Rudwolt*,¹⁹ Gwynne J, sitting as the primary judge, held that the ability to register an interest determined whether such an interest, 'is within the sphere of the new system'.²⁰ He noted that an equitable estate or interest could not be registered. From this he concluded that such an estate or interest was one which the Act did not recognise.²¹

The decision of the primary judge was unanimously affirmed on appeal.²² Gwynne J, sitting with Hanson CJ and Wearing J, took the opportunity to expand on his judgment rendered at first instance. He noted that

it seems clear to my mind that it was not the intention of the Legislature, as respects lands brought under the new [Torrens] system, to continue the distinction which we make between the estate at law and the estate in equity. In my opinion it was intended to make the registry the sole depository and evidence of title, so that what did not appear on its face for the purposes of the law should have no existence, and that the title which did appear on the register was to be an indefeasible one. It follows that a "registered title" and an "indefeasible title" thus become convertible terms. But inasmuch as instruments which under the old system create trusts or equitable estates cannot be registered, they cannot confer the characteristics of indefeasibility, therefore cannot confer any title at all under the new system.²³

¹⁶ Robinson, *op cit* (fn 13) 358.

¹⁷ *Ibid.*

¹⁸ D J Whalan, *The Torrens System in Australia* (1982) 19.

¹⁹ (1872) 6 SALR 75.

²⁰ *Id* 83.

²¹ *Ibid.*

²² (1873) 7 SALR 1.

²³ *Id* 13-14.

The South Australian Supreme Court had the opportunity to reconsider the issue in *Cuthbertson v Swan*.²⁴ Stow J delivered the judgment of the Court.²⁵ After reviewing the provisions of the *Real Property Act 1861 (SA)*,²⁶ and earlier decisions from Victoria, New South Wales and New Zealand,²⁷ he concurred with those decisions that held that the Torrens statute protected 'persons taking conveyances from registered proprietors, but does not protect registered proprietors from being compelled by Courts of Equity to fulfil their contracts'.²⁸ In other words, the court recognised the right of the holder of an unregistered interest to enforce that interest *in personam* as against the registered proprietor. Thus, the Court expressly overruled its earlier decision in *Lange v Ruwoldt*.

The reasoning adopted by the Court in *Cuthbertson* was, as has been noted above, being applied quite independently by the courts in the other Australian colonies. In *Re Wildash and Kenneth Hutchinson, Insolvents; Ex Parte Miskin*,²⁹ for example, Lilley J of the Queensland Supreme Court, after reviewing the provisions of the *Real Property Act 1861 (Qld)*, noted that 'there is nothing in the Act to lead me to the conclusion that equitable estates and interests cannot be created and exist in land outside the Act'.³⁰

Any lingering doubts were put to rest by the High Court in *Barry v Heider*.³¹ In that case the appellant argued that the Torrens statutes recognise no interests legal or equitable except in the registered proprietor. The response of Isaacs J is clear and unequivocal:

Such a contention is absolutely opposed to all hitherto accepted notions in Australia with regard to the Land Transfer Acts. They have long, and in every State, been regarded as in the main conveyancing enactments, and as giving greater certainty to titles of registered proprietors, but not in any way destroying the fundamental doctrines by which Courts of Equity have enforced, as against registered proprietors, conscientious obligations entered into by them.³²

Similar sentiments were expressed by Griffith CJ,³³ with whom Barton J concurred.

The recognition of equitable estates and interests under the Torrens system was reaffirmed by the High Court in *Butler v Fairclough*.³⁴ The Court clearly held that equitable estates and interests existing in Torrens title land will be recognised unless such recognition is expressly prohibited by the Torrens

²⁴ (1877) 11 SALR 102.

²⁵ The court consisted of Way CJ and Stow J, 'Gwynne J being absent from the colony': id 105.

²⁶ Id 119–20.

²⁷ Id 109, namely: *Maddison v McCarthy* (1865) 2 WW & A'B (Eq) 151 (Victoria); *Robertson v Keith* (1870) 1 WA'B & W (Eq) 11 (Victoria); *Paoro Torotoro v Sutton* (1875) 1 NZ JR (NS) 57; *Lampit v Jarvis* 6 NSW (Eq) 8.

²⁸ *Cuthbertson v Swan* (1877) 11 SALR 102, 109.

²⁹ (1877) 5 Qd SCR 46.

³⁰ Id 49.

³¹ (1914) 19 CLR 197.

³² Id 213.

³³ Id 208.

³⁴ (1917) 23 CLR 78.

statute. Griffith CJ observed that such recognition 'is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings'.³⁵

The affirmation in *Barry v Heider*, reiterated in *Butler v Fairclough*, that equitable estates and interests are recognised under the Torrens system has never been subsequently challenged.³⁶ What has perplexed the courts is the role the 'scheme of caveats' play in the application of equitable principles.

IV. CAVEATS AND THE PROTECTION OF EQUITABLE INTERESTS

Griffith CJ highlighted the fact that caveats can be used to temporarily protect equitable estates and interests in Torrens title land.³⁷ Caveats have been aptly characterised as 'an anomalous and hybrid creature, the child of statute but sustained in equity'.³⁸ The Torrens statutes provide for a number of different classes of caveats,³⁹ however it is the caveat against dealings with land under the system which is of particular relevance to the present discussion.

A. Caveats Against Dealings: The General Scheme

A caveat against dealings is sometimes referred to as a 'private caveat'⁴⁰ in recognition of the fact that it provides private individuals with a temporary means of protecting their equitable estates and interests in Torrens title land. All of the Torrens statutes in force in Australia make provision for such caveats.⁴¹ Section 74F(1) of the *Real Property Act 1900* (NSW) is a typical provision:

Any person who, by virtue of any unregistered dealing or by devolution of law or otherwise, claims to be entitled to a legal or equitable estate or interest in land under the provisions of this Act may lodge with the Registrar-General a caveat prohibiting the recording of any dealing affecting the estate or interest.

Whalan notes that a caveat against dealings has a twofold purpose. It warns those dealing with the registered proprietor that an unregistered estate or interest in the property is being claimed. It also alerts the caveator to any

³⁵ Id 91.

³⁶ R T J Stein and M A Stone, *Torrens Title* (1991) 32.

³⁷ *Butler v Fairclough* (1917) 23 CLR 78, 91.

³⁸ K A Palmer, 'Caveats and their Effect on Equitable Priorities', in G W Hinde (ed), *The New Zealand Torrens System Centennial Essays* (1971) 79, 119.

³⁹ Generally see Whalan, *The Torrens System in Australia*, op cit (fn 18) ch 19; Stein and Stone, op cit (fn 36) 116-41.

⁴⁰ For example, see R A Woodman and K Nettle, *The Torrens System in New South Wales* (looseleaf, orig pub 1985) 524/15.

⁴¹ *Real Property Act 1925* (ACT), s 104; *Real Property Act 1900* (NSW), s 74F; *Real Property Act* (NT), s 191; *Land Title Act 1994* (Qld), s 124; *Real Property Act 1886* (SA), s 191; *Land Titles Act 1980* (Tas), s 133; *Transfer of Land Act 1958* (Vic), s 89; *Transfer of Land Act 1893* (WA), s 137.

dealings lodged for registration. If a dealing is lodged for registration, notification of the dealing will be sent to the caveator.⁴²

To facilitate the provision of notice to the caveator, the statutes provide that the status quo is to be preserved until the caveat lapses, or until such time as the competing rights of the parties are determined either by litigation or by agreement.⁴³ Hence, a caveat operates as a statutory injunction to the Registrar, prohibiting the recording of any subsequent dealing which may affect the estate or interest claimed in the caveat without notice being given to the caveator.⁴⁴

The marketability of a registered proprietor's title can be seriously affected by the lodgment of a caveat. Presumably it is for this reason that the South Australian *Real Property Act* 1857–1858⁴⁵ put the onus on the caveator to take proceedings to establish his or her alleged estate or interest within three calendar months from the date of lodgment. If such action was not taken the caveat lapsed. The recently enacted *Land Title Act* 1994 (Qld) preserves this provision.⁴⁶ In all other jurisdictions the caveat remains in force until one of the statutory methods designed to secure its removal is employed.⁴⁷ It is submitted that the operation of a caveat against dealings as a statutory injunction, coupled with the failure to accord priority from date of lodgment, seriously weakens the use of the caveat as a means of protecting equitable estates and interests. These points will be addressed in greater detail below.

B. The Caveat as Notice

It has been noted that

the word caveat has long been used in law to describe a notice given to an official not to take some step without giving the caveator an opportunity to

⁴² Whalan, *The Torrens System in Australia*, op cit (fn 18) 226. But cf *J and H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546.

⁴³ Stein and Stone, op cit (fn 36) 123.

⁴⁴ Id 127. See also *Eng Mee Yong v Letchumanan* [1980] AC 331; Woodman and Nettle, op cit (fn 40) 524/31.

⁴⁵ *Real Property Act* 1886–1858 (SA).

⁴⁶ See s 126(5). This provision, read in conjunction with s 129 of the *Land Title Act* 1994 (Qld), abrogates the anomaly which existed under the *Real Property Act* 1877 (Qld), s 39. Any protection afforded to the registered proprietor under the *Real Property Act* 1877 (Qld) was, to an extent, illusory given the interpretation of sections 39 and 40 in *Re Leighton Properties (Qld) Pty Ltd* [1990] 2 Qd R 230 (FC). In that case the Queensland Full Court held that a caveat against dealings may be withdrawn prior to the expiry of the three month period and relodged. The Court held that the withdrawn caveat had not 'lapsed' under s 39, and therefore, when relodged, it was not another caveat lodged, 'on directly or substantially the same grounds upon which the caveat so lapsed . . . was lodged', within the meaning of s 40 *Real Property Act* 1877 (Qld); id 231. Section 129 of the *Land Title Act* 1994 (Qld) addresses this situation by providing that leave of the Queensland Supreme Court is required before a lapsed or withdrawn caveat can be relodged by a caveator.

⁴⁷ Whalan, *The Torrens System in Australia*, op cit (fn 18) 226; Woodman and Nettle, op cit (fn 40) 524/31.

oppose it. According to the Oxford English Dictionary that sense of the word goes back to 1654.⁴⁸

A review of the case law indicates that the scope of the notice attendant upon the lodging of a caveat extends far beyond the office of the Registrar. In *Abigail v Lapin*,⁴⁹ Lord Wright quoted with approval the following passage from the judgment of Griffith CJ in *Butler v Fairclough*:

A person who has an equitable charge upon the land may protect it by lodging a caveat, which in my opinion operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat.⁵⁰

Equally clear, however, is the fact that notice to the world is a beneficial by-product the caveator receives as a consequence of the lodging of a caveat. In *J and H Just (Holdings) Pty Ltd v Bank of New South Wales*, Barwick CJ opined that the primary purpose of a caveat against dealings is to provide a statutory injunction to the Registrar to prevent the registration of dealings with the land until notice has been given to the caveator.⁵¹ In the words of Barwick CJ,

the purpose of the caveat is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator's estate or interest though if noted on the certificate of title, it may operate to give such notice.⁵²

This distinction is important. If the court took the position that the primary purpose of lodging a caveat against dealings is to give notice to the world of the existence of the caveator's alleged estate or interest in the land, an argument could be made that the absence of a caveat on the register constitutes a representation to a person dealing with the registered proprietor that no such estate or interest is in existence. The Australian courts have repeatedly declined to take this position.⁵³

The effect of the failure to lodge a caveat on the priority of unregistered equitable interests has been dealt with in detail elsewhere.⁵⁴ The current

⁴⁸ *J and H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546, 558 per Windeyer J.

⁴⁹ (1934) 51 CLR 58, 66.

⁵⁰ (1917) 23 CLR 78, 91.

⁵¹ *J and H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546, 552.

⁵² *Ibid.*

⁵³ See *J and H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546, 556 per Barwick CJ, and 558 per Windeyer J; *Godfrey Constructions Pty Limited v Kanangra Park Pty Limited* (1972) 128 CLR 529, 537 per Barwick CJ; *FNCB-Waltons Finance Ltd v Crest Realty Pty Ltd* (1987) 10 NSWLR 621, 631 per Waddell J; *Kerabee Park Pty Ltd v Daley* [1978] 2 NSWLR 222, 228 per Holland J; *Jacobs v Platt Nominees Pty Ltd* [1990] VR 146, 159. It should be noted that Australian courts have taken this position notwithstanding that the Torrens statute under consideration in *J and H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546, namely the *Real Property Act 1900* (NSW) (as amended to 1970), did not require the Registrar-General to enter a notation of the caveat on the relevant certificate of title, although Barwick CJ acknowledged that this was usually done 'in practice': id 552.

⁵⁴ P Stubbs, 'Equitable Priorities and the Failure to Caveat' (1989) 6 *Auck Univ L Rev* 199.

position is accurately summarised in the following passage from the High Court decision in *Heid v Reliance Finance Corporation Pty Ltd*.⁵⁵

The mere failure of the holder of a prior equitable interest in land to lodge a caveat does not in itself involve the loss of priority which the time of the creation of the equitable interest would otherwise give (*J. & H. Just (Holdings) Pty. Ltd. v. Bank of N.S.W.*), notwithstanding that the person acquiring the later interest had, before acquiring that interest, searched the register book and ascertained that no caveat had been lodged. It is just one of the circumstances to be considered in determining whether it is inequitable that the prior equitable owner should retain his priority.⁵⁶

That this can lead to some rather anomalous results is illustrated clearly by the decision in *Jacobs v Platt Nominees Pty Ltd*.⁵⁷ The salient, and somewhat unusual, facts may briefly be summarised.

The appellant, Mrs Lucy Jacobs, paid \$500 000 to Platt Nominees Pty Ltd for an option to purchase a motel property for \$16 million. The appellant did not lodge a caveat evidencing the equitable interest created by the grant of the option to purchase. The sole directors and shareholders of Platt Nominees were Mr and Mrs Platt, who were Mrs Jacobs' father and mother. While the appellant's relationship with her father was strained, she had a good relationship with her mother.

The appellant was aware that her father had been negotiating with a director of Country Comfort Management Pty Ltd (which was managed by the second respondent, Perpetual Trustee Company Ltd) for the purchase of the motel. However, at the time of acquiring the option to purchase, these negotiations had, to her knowledge, been terminated. Subsequent to the grant of the option, Mr Platt resumed negotiations and a contract of sale at \$16.5 million was reached with Perpetual as purchaser. Prior to exchanging parts, the solicitor for Perpetual carried out a check search of title which, of course, did not disclose the appellant's equitable interest. The contract of sale was concluded and a deposit was paid by Perpetual to a stakeholder pending confirmation of registration. Prior to registration, the appellant learned of the sale and lodged a caveat.

The trial judge accepted the appellant's evidence that she did not lodge a caveat earlier because she felt that 'to lodge a caveat would be an affront to her father's business integrity and so an unnecessary source of aggravation to him'.⁵⁸ Further, the appellant relied on the fact that, as a director, Mrs Platt was required to sign any written contract into which the company might enter for the sale of land. Mr Platt, knowing that his wife would 'not knowingly sign a contract for the sale of the land whilst their daughter still held her option to purchase',⁵⁹ duped Mrs Platt into signing an authority to enable her son to act in her stead. The son, as agent for Mrs Platt, signed the contract for the sale of

⁵⁵ (1983) 154 CLR 326, 342.

⁵⁶ *Ibid.* See also *Clark v Raymor (Brisbane) Pty Ltd* [1982] Qd R 790; *Jacobs v Platt Nominees Pty Ltd* [1990] VR 146, 150.

⁵⁷ [1990] VR 146.

⁵⁸ *Id.* 148.

⁵⁹ *Ibid.*

the land to Perpetual. In the words of the Court of Appeal, 'the circumstances of the Platt family — as a family — and their interrelationship with the business interests of each of them were, to say the least, exceptional'.⁶⁰ This notwithstanding, the trial judge held that the appellant's earlier equitable interest was postponed to Perpetual's subsequent interest.

Mrs Jacobs' appeal was successful. After reviewing the arguments of counsel, the Court of Appeal noted that

the primary purpose of a caveat is, as was said in *Just's Case* to provide protection for the caveator not to give notice to the world. The practice of lodging caveats is at best that and not a duty, much less a duty to the world at large.⁶¹

Jacobs v Platt Nominees represents an extreme example of a court's willingness to devalue the effect of a failure to lodge a caveat when such a failure is considered in light of the other 'circumstances [that may] be considered in determining whether it is inequitable that the prior equitable owner should retain his [or her] priority'.⁶² It illustrates graphically that, prior to the actual registration of the interest acquired, the position of a person dealing with a registered proprietor is rife with uncertainty. Further, a search of the register prior to the acquisition of the interest may be of little benefit.

It is equally clear that the lodgment of a caveat, of itself, does not confer priority. In *FNCB-Waltons Finance Ltd v Crest Realty Pty Ltd*,⁶³ Waddell J agreed with the submission that 'the lodgment of a caveat does not add to rights, it merely protects rights from being destroyed by registration. In particular, the lodgment of a caveat confers no priority'.⁶⁴ A similar opinion was expressed by Windeyer J in *J and H Just (Holdings) Pty Ltd v Bank of New South Wales*.⁶⁵

While the caveat against dealings provisions achieve the twofold purpose enunciated by Whalan,⁶⁶ the above-noted decisions illustrate clearly that the courts are reluctant to give the provisions a wider interpretation. Two questions arise from this. Can the caveat provisions be modified to achieve the objects of a registration statute, or is a fundamentally different mechanism required? If the caveat provisions cannot be modified, what alternative mechanism should be considered? These two questions will be considered in turn.

⁶⁰ Ibid.

⁶¹ Id 159.

⁶² *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326, 342.

⁶³ (1987) 10 NSWLR 621.

⁶⁴ Id 631.

⁶⁵ (1971) 125 CLR 546, 558.

⁶⁶ Footnote 42 supra.

V. CAN THE CAVEAT PROVISIONS BE MODIFIED TO ACHIEVE THE OBJECTS OF A REGISTRATION STATUTE?

Deeds Registration vs Torrens Title

In Australia, freehold land not held under the provisions of a Torrens statute is held under the provisions of a deeds registration statute.⁶⁷ In *Munro v Didcott*⁶⁸ the Privy Council had an opportunity to consider the objects of a deeds registration statute. Lord Atkinson noted that

the objects of all registration are, among other things, to afford to the public the means of knowing to whom the ownership of the land of a country belongs, *what are the interests carved out of it, and what are the charges upon and incumbrances affecting it*, so that these owners may discharge the liabilities ownership entails, that *those who deal with them may be protected*, and, in many cases, that the transfer to others of their proprietary interests may be easily and inexpensively effected.⁶⁹

In an article entitled 'An Englishman Looks at the Torrens System', T B F Ruoff suggested that the Torrens systems rests upon three closely interdependent principles. He metaphorically referred to these as the 'mirror', the 'curtain', and the 'insurance', principles.⁷⁰ Ruoff maintained that the Torrens system could be likened to a mirror, because the

register book reflects all facts material to an owner's title to land. Nothing that is incapable of registration and nothing that is not actually registered appears in the picture but the information that is shown is deemed to be both complete and accurate . . .⁷¹

At first blush it would appear that the objects of the deeds registration system and of the Torrens system are the same, with the exception that the Torrens system goes further by conferring indefeasibility on the interests registered. However, Ruoff's 'mirror principle' is too broad. The suggestion that the 'register book reflects all facts material to an owner's title to land'⁷² is, as Ruoff acknowledges,⁷³ incorrect. Trusts are but one example of an equitable interest that cannot be registered.⁷⁴ Hinde, McMorland and Sim set out a more accurate enunciation of Ruoff's 'mirror principle' when they suggest

⁶⁷ Deeds registration provisions are contained in the following statutes: *Conveyancing Act 1919* (NSW), Pt 23; *Property Law Act 1974* (Qld), Pt XVIII, Div 3; *Registration of Deeds Act 1935* (SA); *Registration of Deeds Act 1935* (Tas); *Property Law Act 1958* (Vic), Pt 1; *Registration of Deeds Act 1856* (WA); *Registration of Deeds Act 1957* (ACT). Generally, see M A Neave, C J Rossiter and M A Stone, *Sackville and Neave: Property Law Cases and Materials* (5th ed, 1994) 440-3.

⁶⁸ [1911] AC 140.

⁶⁹ Id 149 (emphasis added).

⁷⁰ Ruoff, op cit (fn 7) 118.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Id 119.

⁷⁴ See also Law Reform Commission of Victoria, *Priorities*, Discussion Paper No 6 (May 1988) 7, wherein the authors note that 'in fact, the [Torrens] system was not designed to register all interests in land. Interests which are unregistered are generally dealt with by rules of equity'.

that, under a Torrens system, 'everything which can be registered, and is registered, should give, in the absence of fraud, an indefeasible title'.⁷⁵

But what of the caveat against dealings provisions? Can an argument be made that, through their use, a register which accurately reflects the estates and interests 'carved out' of the registered proprietor's title can be maintained? The answer is no. Such caveats, as has been noted above, are designed to provide temporary protection in anticipation of legal proceedings. They do not provide a means whereby estates and interests in land can be permanently protected.

Further, while the caveat provisions facilitate the temporary notification on title of the existence of unregistered interests, the price to be paid is reduced facility of transfer. Torrens envisioned that the *Real Property Act* 1857-1858 (SA) would establish a system whereby 'dealings in land are transacted as expeditiously as dealings in merchandize or cattle'.⁷⁶ By operating as a statutory injunction, the caveat against dealings provisions currently in force fail to satisfy this objective.

The Torrens system can be modified to fulfil its role as, in the main, a conveyancing enactment⁷⁷ under which a register that reflects most facts material to an owner's title to land is maintained. To achieve this objective a procedure that allows for the recording of all private interests in land must be implemented. A mechanism that warrants consideration is that contained in the *Model Land Recording and Registration Act* proposed by the Canadian Joint Land Titles Committee.⁷⁸

VI. A MODEL RECORDING/REGISTRATION STATUTE

In the common law provinces of Canada,⁷⁹ the statutory provisions for the registration of interests affecting real property can be divided into two general classes: those based on the English deeds registration model, and those based on the Australian Torrens model. The prairie provinces of Alberta, Saskatchewan and Manitoba have adopted the Torrens model, whereas the provinces of Newfoundland, Nova Scotia, New Brunswick, Prince Edward Island and Ontario have adapted the deeds registration model. British Columbia has developed a system 'peculiar to itself',⁸⁰ but incorporates, in part, the indefeasibility principle.⁸¹

The fundamental difference between the two models rests upon the concepts of indefeasibility and of notice. This difference can be explained through Oosterhoff and Rayner's classification of 'race statutes' and 'race-notice statutes'. Torrens statutes, which rest upon the foundation of indefea-

⁷⁵ G W Hinde, D W McMorland and P B A Sim, *Introduction to Land Law* (2nd ed, 1986) 48 (emphasis added).

⁷⁶ Torrens, *op cit* (fn 1) 43.

⁷⁷ *Barry v Heider* (1914) 19 CLR 197, 213 per Isaacs J.

⁷⁸ Joint Land Titles Committee, *op cit* (fn 8).

⁷⁹ Which excludes the province of Quebec which has a civil law system.

⁸⁰ J Hogg, *Registration of Title Throughout the Empire* (1920) 14.

⁸¹ V Di Castri, *Registration of Title to Land* (looseleaf, orig pub 1987) 1-18.

sibility, fall within the purview of the former. The first person to register his or her interest gains priority over other interests, and notice is unimportant.⁸² Statutes based upon the English deeds registration model fall within the purview of the latter. As between competing interests, the holder of the subsequent interest will only take priority over a prior interest if the subsequent interest is recorded first, and the holder of the subsequent interest does not have either actual or constructive notice of the prior interest.⁸³

The provisions of the Torrens statutes in force in the provinces that have adopted the Torrens model are not uniform.⁸⁴ This compounds the problems that arise from the operation of two different systems. The caveat provisions provide an excellent example. In Alberta, s 145 of the *Land Titles Act*⁸⁵ provides that 'registration by way of caveat . . . has the same effect as to priority as the registration of any instrument under this Act'. A similar provision is found in the Manitoba *Real Property Act*.⁸⁶ The Saskatchewan statute, by contrast, does not contain such a provision. As Di Castri notes, this difference raises an obvious question:

Is a caveat viewed in Saskatchewan as a warning, a notice and a prohibition that creates no new rights but prevents new ones arising in others thereafter, and intended strictly to preserve the *status quo*, or does the filing of a caveat put the caveator in the same position as if his interest has been created by a registrable instrument and that instrument had been duly registered?⁸⁷

A detailed discussion of this question and of its derivatives, for example the effect of the holder of the prior interest's failure to lodge a caveat, is beyond the scope of this article.⁸⁸ What the above discussion illustrates, however, is that similar problems to those faced by the Australian courts have also plagued the Canadian courts.

In an attempt to bring the land registration legislation of the common law Provinces and Territories under one umbrella, the Canadian Joint Land Titles Committee released its proposals for a *Model Land Recording and Registration Act*. The Joint Committee was comprised of representatives from every region of Canada, with the exception of the civil law province of Quebec. The Committee's report is aptly entitled *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada*. Unlike Torrens' initiatives in South Australia in the middle of the last century, the Joint Land Titles Committee's proposals do not represent a 'totally different land law'.⁸⁹ The proposed *Model Act* renovates, rather than replaces, the house that Torrens built.

The proposals contained in the Committee's report warrant consideration.

⁸² A H Oosterhoff and W Rayner, *Anger and Honsberger Law of Real Property* (2nd ed, 1985) Vol II, 1594.

⁸³ *Ibid.*

⁸⁴ A similar situation exists in Australia: see P Butt, 'A Uniform Torrens Title Code?' (1991) 65 ALJ 348.

⁸⁵ RSA 1980, c L-5.

⁸⁶ RSM 1988, c R30, s 155.

⁸⁷ Di Castri, *op cit* (fn 81) 14-84.

⁸⁸ Generally see *id* 14-73 to 14-92. See also Butt, *op cit* (fn 84) 348.

⁸⁹ *Haji Abdul Rahman v Mahomed Hassan* [1917] AC 209, 216.

One commentator has noted that 'in the light of the considerable similarity between the title systems of Australia and the Canadian Provinces represented on the [Joint Land Titles] Committee, the Report contains much of interest and relevance to Australia'.⁹⁰ In the remainder of this article, the Committee's recommendations for the protection of equitable interests in land will be considered.

A. Nature of the System Proposed by the Model Act

The *Model Act* is essentially a hybrid statute which embodies the benefits of registration under a deeds registration (race-notice)⁹¹ statute, and title by registration under a Torrens (race)⁹² statute. As has been noted above, the primary benefit to be gained from the former is that, in the absence of notice, priority is determined by the date of the registration of the deed, not by the date of its execution and delivery. In the latter the primary benefit is, of course, the indefeasibility of title which is conferred upon the entry of the instrument in the register book.⁹³

This distinction is embodied in the definition section of the *Model Act*. In that section, recording is defined as 'the administrative process which, under this Act, secures priority of enforcement for an interest by means of entries in a register',⁹⁴ whereas registration is defined as, 'the administrative process which, under this Act, affects, confers, confirms or terminates interests by means of entries in a register'.⁹⁵ The Committee notes that

the difference between the legal consequences of "recording" and "registration" is thus that recording confers priority only, while registration confers both priority and ownership.⁹⁶

1. The Recording Provisions

In the Australian context, the interest-recording system proposed by the *Model Act* corresponds to the existing caveat against dealings provisions contained in the Australian Torrens statutes. However the *Model Act* goes further by conferring priority on the first to record their estate or interest, provided the interest recorded is valid. This concept should be familiar to Australian lawyers. The *Model Act* simply incorporates priority of registration which is the primary benefit to be gained by registration under old system title.⁹⁷ Further, this concept has been advocated by the Law Reform Commission of Victoria. The Commission recommended that

caveats should determine priority. Lodgment of a caveat before another

⁹⁰ Butt, *op cit* (fn 84) 351.

⁹¹ Oosterhoff and Rayner, *op cit* (fn 82) 1594.

⁹² *Ibid.*

⁹³ As to when indefeasibility is conferred, see *Paramount Life Insurance Co v Hill* (1987) 34 DLR (4th) 150 (Alberta CA).

⁹⁴ *Model Land Recording and Registration Act*, s 1.1(j).

⁹⁵ *Model Land Recording and Registration Act*, s 1.1(l).

⁹⁶ Joint Land Titles Committee, *op cit* (fn 8) 8.

⁹⁷ For an example, see *Property Law Act 1974* (Qld), s 246. Generally, see A J Bradbrook, S V MacCallum and A P Moore, *Australian Real Property Law* (1991) 122-3.

person lodges a caveat or seeks registration should give priority to the caveator. Failure to lodge a caveat before another person registers or protects their interest should postpone the interest.⁹⁸

It follows that a person dealing with the registered proprietor will take subject to the interest recorded, provided the interest is one that is recognised under the general law. The *Model Act* defines an interest as 'any estate or right in, over or under land recognized under law'.⁹⁹ Like a caveat, a recording under the *Model Act* does not give an assurance that the estate or right is legally valid, or that it is 'owned' by the claimant who records it.¹⁰⁰ Further, a termination of the recording does not extinguish the interest. It continues to be enforceable *in personam* as between the parties, although it may become subordinated to a subsequent interest that is recorded or registered.¹⁰¹ Finally, if the recording does not constitute an 'interest' as defined in the *Model Act*, namely an interest in land recognised by the general law, any purported recording is, pursuant to s 4.1, void.

The interest-recording provisions in the *Model Act* also differ from the caveat against dealings provisions in that the recording of an interest under the *Model Act* is not temporary, and the recording does not operate as a statutory injunction to the Registrar. Hence, the interest-recording provisions facilitate, rather than hinder, the transferability of interests in land, while at the same time establishing a register that more accurately reflects 'what are the interests carved out of [the land], and what are the charges upon and the incumbrances affecting it'.¹⁰²

To effect a recording under the *Model Act* a document or copy thereof, in the prescribed form that incorporates the document on which the interest is based, is lodged with the Registrar.¹⁰³ Alternatively, a document that summarises the transaction on which it is based may be lodged.¹⁰⁴ Anyone dealing with the land is alerted to the existence of the recorded interest, and, through a search of the recorded document, is provided with the means to ascertain the legal effect of the interest recorded.

The *Model Act* also contains provisions for the removal or cancellation of a recording.¹⁰⁵ The Registrar will cancel recordings when requested to do so by the claimant, or when ordered to do so by the court. Part 8 of the *Model Act* provides a mechanism whereby a person may object to a recording, or to the cancellation of a recording. The basis of such objections would be analogous to the existing Australian law pertaining to an action to remove a caveat.

To alleviate the administrative burden that could accompany the implementation of such a recording system, the Joint Land Titles Committee has recommended that the certificate of title be replaced with a parcel register.

⁹⁸ Law Reform Commission of Victoria, *Priorities*, Report No 22 (April 1989) 12.

⁹⁹ *Model Land Recording and Registration Act*, s 1.1(e). For a discussion of what constitutes a caveatable interest, see Woodman and Nettle, *op cit* (fn 40) 524/19–524/23.

¹⁰⁰ Joint Land Titles Committee, *op cit* (fn 8) 15–16.

¹⁰¹ *Id* 16.

¹⁰² *Munro v Didcott* [1911] AC 140, 149.

¹⁰³ *Model Land Recording and Registration Act*, s 4.2(1)(a).

¹⁰⁴ *Model Land Recording and Registration Act*, s 4.2(1)(b).

¹⁰⁵ *Model Land Recording and Registration Act*, s 4.7.

This parcel register will set out, inter alia, the name of the registered proprietor, the identifiers of recorded documents,¹⁰⁶ and the documents creating registered interests. In addition, abolition of the duplicate certificate of title has been proposed.¹⁰⁷ The result, according to the Committee, is an Act that 'will be found functional for any form of record-keeping, from quill pen to electronic'.¹⁰⁸

2. The Registration Provisions

In an attempt to achieve the objective of an indefeasible title,¹⁰⁹ the Torrens statutes establish a statutory scheme whereby, 'it is in fact the registration and not its antecedents which vests and divests title'.¹¹⁰ Put another way, the act of registration confers both priority and ownership of the interest set out in the document registered. This fundamental precept of Torrens theory forms the basis of the registration provisions of the *Model Act*.

The advantages to be gained by acquiring an interest that can be registered, as opposed to one that can only be recorded, are enunciated by the Joint Land Titles Committee:

Because title registration confers or confirms both priority and ownership of interests, it not only enables a person to acquire an interest in land free of prior interests not reflected in a register, but makes it unnecessary for the person acquiring the interest to investigate the adequacy of the instruments necessary to the transferor's title. It may go even further and make it unnecessary to investigate the adequacy of the instrument which confers the interest being acquired. Title registration thus increases facility of transfer, and does so to a greater extent than does an interest recording system.¹¹¹

A policy issue arises as to whether all interests in land should qualify for the extensive protection registration confers. This question attains even more importance in jurisdictions, such as the Australian States, where the doctrine of immediate indefeasibility governs.¹¹² The Joint Land Titles Committee suggests that there are three practicable answers to this question:

¹⁰⁶ The term 'identifier' is not defined in the *Model Act*, however it would appear to be the form of identification assigned by the Registrar to the parcel of land, and to the recorded interests in the land. See ss 3.1(5), 3.2 of the *Model Act*.

¹⁰⁷ Joint Land Titles Committee, op cit (fn 8) 11–12.

¹⁰⁸ Id 6.

¹⁰⁹ Whalan notes that, as a consequence of the numerous exceptions to the indefeasibility of a Torrens title, the use of the word 'indefeasible' is a misnomer. However he notes that the word 'indefeasible', 'has become so embedded in Torrens decisions, literature and practice that one would advocate its eradication in vain': Whalan, *The Torrens System in Australia*, op cit (fn 18) 296–7.

¹¹⁰ *Frazer v Walker* [1967] AC 569, 580.

¹¹¹ Joint Land Titles Committee, op cit (fn 8) 19.

¹¹² See *Frazer v Walker* [1967] AC 569; *Breskvar v Wall* (1971) 126 CLR 376; *Leros Proprietary Limited v Terara Pty Ltd* (1991) 174 CLR 407. The applicability of the concept of immediate indefeasibility has been called into question in Victoria as a result of the Supreme Court decision in *Chasfield Pty Ltd v Taranto* [1991] 1 VR 225 (Gray J). The reasoning of Gray J has been questioned in subsequent cases. See *Vassos v State Bank of South Australia* [1993] 2 VR 316; *Eade v Vogiazopoulos* (unreported, Supreme Court of Victoria, 22 December 1992, Smith J). See also J Schultz, 'Judicial Acceptance of Immediate Indefeasibility in Victoria' (1993) 19 *Mon LR* 326; G Teh, 'Deferred Indefeasibility in Victoria' (1993) 19 *Mon LR* 326.

1. register only estates in fee simple absolute;
2. register estates in fee simple absolute plus a list of the most common and best understood interests in land;
3. register all interests in land except any which should be excluded from registration by some valid public policy.¹¹³

The second option is the one preferred by the majority of the Committee.¹¹⁴ This is reflected in s 5.1 of the *Model Act* which provides that the following interests may be registered: a fee simple, life and leasehold estate, a servitude, a profit à prendre, a security interest, and an interest under a postponement agreement.¹¹⁵ The Committee also proposes that an option to acquire a registered interest, and the interest of a purchaser under an agreement to purchase land, may also be included in the list of registrable interests. In addition to easements, servitudes include utility interests and restrictive covenants.¹¹⁶

Arguments can be made that the list of registrable interests is too wide or, conversely, too narrow. For example, the ability to register a restrictive covenant is not treated uniformly under the present Torrens statutes in force in Australia,¹¹⁷ and policy arguments both for and against the various positions can be advanced. What interests should or should not be capable of registration is a policy decision. The importance of this decision is diminished if the statute allows for the recording of the interest. The primary object is the protection of the interest. Conferring indefeasibility through registration is simply icing on the cake.

B. Advantages of a Recording/Registration Statute

The primary advantages of the recording/registration provisions of the *Model Act* are fivefold, namely:

- (1) they provide a mechanism whereby owners of *all* private interests in land may protect their interests;
- (2) a party dealing with the land is notified of the existence of the interest which makes the parcel register a more accurate reflection of facts material to a registered proprietor's title to the land;
- (3) recording of an interest does not operate as a statutory injunction to the Registrar which facilitates the transferability of the title;
- (4) holders of interests in land will be encouraged to record their interests to take advantage of the priority recording confers;

sibility of Title in Victoria?' (1991) 17 *Mon LR* 77. For a general discussion of the distinction between immediate and deferred indefeasibility see G W Hinde, 'Indefeasibility of Title Since *Frazer v Walker*' in G W Hinde (ed), *The New Zealand Torrens System Centennial Essays* (1971) 33, 41; R A Woodman, 'The Torrens System in New South Wales: One Hundred Years of Indefeasibility of Title' (1970) 44 *ALJ* 96, 96-7.

¹¹³ Joint Land Titles Committee, op cit (fn 8) 19.

¹¹⁴ Id 21.

¹¹⁵ Pursuant to s 1.1(i) of the *Model Act*, the word 'postponement' means either, (i) the process of subordinating the enforcement of one interest to another, or (ii) the document effecting a postponement': id 45.

¹¹⁶ Id 21.

¹¹⁷ Generally, see Bradbrook, MacCallum and Moore, op cit (fn 97) 695-7; Stein and Stone, op cit (fn 36) 79-81.

(5) the primary benefit of registration, namely indefeasibility of title, is provided for in the *Model Act*.

The Torrens statutes currently in force in Australia provide for the 'shield of indefeasibility',¹¹⁸ however, as the previous discussion has illustrated, they fail to achieve the other advantages enumerated above. Protection of equitable interests in land through the use of the caveat against dealings hinders the transferability of the title, and the register's reflection of the interests 'carved out' of the title is very dim indeed. Failure to accord priority to those who lodge a caveat, coupled with the courts' willingness to subordinate the failure to lodge a caveat to the 'other circumstances' that may be considered when determining priority between two equitable interests, does not encourage the use of the caveat procedure.

VII. CONCLUSION

If the 'mirror' of title is to provide a more accurate reflection, the existing scheme must be modified. The proposals contained in the *Model Land Recording and Registration Act* provide the foundation for such modification. They build on concepts that are familiar to Australian property lawyers and they can be adapted to suit the needs of Australians. Admittedly their implementation would require a major overhaul of the existing legislation, but such an overhaul is long overdue.

This is not to suggest that the *Model Act* is a panacea for all of the faults in the current system.¹¹⁹ However the recording/registration provisions contained in the *Model Act* do warrant serious consideration by the Australian State and Territory legislatures. By rationalising the advantages of a more accurate register with the benefits of indefeasibility, the Joint Land Titles Committee has proposed a system that can be adapted to serve the people of Australia as we move into the next century.

¹¹⁸ Some might suggest that it is a somewhat porous shield. For example, see Whalan, *The Torrens System in Australia*, op cit (fn 18) 297.

¹¹⁹ For example I have questioned the Committee's compensation provision proposals elsewhere. See L A McCrimmon, 'Compensation Provisions in Torrens Statutes: The Existing Structure and Proposals for Change' (1993) 67 ALJ 904.