REFLECTIONS ON THE MIRROR OF TITLE: RESOLVING THE CONFLICT BETWEEN PURCHASERS AND PRIOR INTEREST HOLDERS

MARY-ANNE HUGHSON,* MARCIA NEAVE† AND PAMELA O'CONNOR‡

[Robert Torrens' reforms were premised on the view that property law gave too much protection to prior interest holders at the expense of purchasers. He sought to promote the protection of purchasers in order to simplify land transactions and restore value to land devalued by doubtful titles. The resurgence of equitable remedies, unforeseen by Torrens, has presented courts with the problem of resolving the conflict between the protection of unregistered interests and the protection of purchasers who deal on the faith of the register. This article reviews the approach of the courts to resolving these competing interests in three areas: (i) the delineation of the class of caveatable interests; (ii) adjudication of priority contests between unregistered interests; and (iii) fixing limits to the kinds of actions which may be brought against a registered proprietor in personam. *We conclude that there are practical solutions for the further protection of purchasers which would not place undue burdens on prior interest holders.]*

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* BA, LLB (Hons) (Melb); Barrister and Solicitor of the Supreme Court of Victoria; Tutor and Research Associate, Faculty of Law, Monash University.
† LLB (Hons) (Melb), FASSA; Barrister and Solicitor of the Supreme Court of Victoria; Professor of Law, Monash University.
‡ BA, LLB, MBA (Monash), LLM (Melb); Barrister and Solicitor of the Supreme Court of Victoria; Lecturer in Law, Monash University. The authors acknowledge the assistance of Associate Professor Susan MacCallum in the planning of this article.

I INTRODUCTION

Any system of property law requires rules for the resolution of competing claims between innocent parties.[1] There are two main ways of resolving such conflicts. One approach is to protect the holder of an interest by preventing a transferor from passing a title which he or she lacks. This is reflected in the common law *nemo dat quod non habet* principle. The alternative approach, typified by systems of registration of title, is to protect innocent purchasers of interests, regardless of whether or not the transferor has a good title. Such systems facilitate dealings with property by making it unnecessary for a purchaser to undertake an investigation of title which goes beyond inspection of the titles register. This was Robert Torrens' goal. By allowing registered proprietors to take free even of prior equitable interests of which they had notice, Torrens sought to introduce a 'cheap, simple, expeditious and accurate system of transfer of land' which would restore 'to its intrinsic value a large amount of property depreciated or unmarketable through defective evidence or technical imperfection in title.'[2]

There is an inherent tension between the emphasis which equity places on enforcing obligations of conscience and Torrens' goal of protecting purchasers of interests. This tension can be discerned in the very conception of Torrens' reform of general land law. Torrens' intention appears to have been that no interest in land should come into existence prior to registration. In *A Handy Book on the Real Property Act of South Australia*, Torrens commented that:

> Instruments when executed are merely personal contracts between the parties, upon which action for damages may be raised, but they do not bind the land. The entry on the folium of the Register alone passes the property, creates the charge or lesser estate, discharges, or transfers it.[3]

According to Stanley Robinson, Torrens' aim was that land registration 'could not be overridden by the demands of bankers.' Hence transactions creating equitable interests were to be 'mere contracts'.[4] Implementation of this goal would have required abandonment of the principle that a specifically enforceable contract passes an equitable interest in land. Consistently with Torrens' dislike of equitable interests, he gave little policy guidance as to how, if at all, such

[1] Anthony Duggan, 'Personal Property Security Interests and Third Party Disputes: Economic Considerations in Reforming the Law' in Michael Gillooly (ed), *Securities over Personalty* (1994) 234, 235.

[2] Robert Torrens, *A Handy Book on the Real Property Act of South Australia* (1862) 11.

[3] Ibid 8.

[4] Stanley Robinson, *Equity and Systems of Title to Land by Registration* (PhD thesis, Monash University, 1973) iii. Ironically, it has been the banking practice of granting equitable mortgages which has given rise to many of the priority disputes discussed below.

interests might be accommodated within this new scheme, though his initial scheme made provision for the protection of equitable interests arising under express trusts by use of the mechanism of the Registrar's caveat.[5]

Any system of title registration requires consideration of the extent to which interests outside the register should be protected. Such interests may arise either as the result of transactions which will eventually give rise to a registrable document, such as the interest of a purchaser under a contract of sale (unregistered interests), or as the result of transactions which cannot do so (unregistrable interests). Because the Torrens legislation prohibits entry of equitable interests on the register, equitable interests which do not have a legal equivalent, such as an unpaid vendor's lien, or do not give their holder the right to call for transfer of a legal interest to them, fall into the latter category. To the extent that a system of title registration recognises interests arising outside the register, through either statutory or case-based exceptions, it necessarily erodes the protection conferred on purchasers who rely on the state of the register.

Torrens believed that unregistered interests arising under contracts should not create property rights prior to registration. He seems to have given little consideration to the situation of holders of unregistrable interests, though it would have been consistent with his general philosophy to regard such interests as enforceable only *inter partes*. His omission left the early courts guessing as to how the Torrens statutes should be interpreted.[6] This lack of guidance led to inconsistencies in the application of equitable principles within different areas of operation of the scheme. Consequently, some of Torrens' important and sensible policy objectives have been obscured. In other areas, developments in equitable remedies unforeseen by Torrens demand adjustments to his scheme.

Despite many attacks by the legislature on the use of equitable doctrine throughout history,[7] and the general expectation at the time of the passing of the Judicature Acts that equitable principles might wither away, equity is now in the midst of a renaissance in Australia. Equitable concepts and remedies have 'extended beyond old boundaries into new territory where no Lord Chancellor's foot has previously left its imprint.'[8] As a result of the resurgence of equitable principles and remedies in the Australian legal system, which could not have been foreseen by Torrens, there is a need to make appropriate adjustments to the scheme within the genius of Torrens' original idea. To make the adjustments

[5] See, eg, Les McCrimmon, 'Protection of Equitable Interests Under the Torrens System: Polishing the Mirror of Title' (1994) 20 *Monash University Law Review* 300, 301. McCrimmon notes that ss 56–8 of the original *Real Property Act* 1857–1858 (SA) contained provisions permitting the registration of trusts. In Torrens' own writings there is a clear intention that caveats are the appropriate mechanism for the protection of trusts: 'No notice of trusts can be entered on the register, but a proprietor desiring to settle his estate through the instrumentality of trustees, may deposit in the registry for safe custody and reference any instrument declaratory of trusts executed by the Trustees to whom he transfers the property, and by caveat prohibit the registration of any dealing.': Torrens, above n 2, 9.

[6] See especially McCrimmon, above n 5, 303–5.

[7] See, eg, LBC, *Laws of Australia* (at 9 October 1997), 15 Equity, '15.1 The History and Nature of the Equitable Jurisdiction' [5].

[8] Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 238.

requires policy choices to be made between protecting the holders of interests (including the holders of equitable interests) and protecting purchasers who rely on the register.

The development of equitable remedies this century has widened the class of unregistered/unregistrable interests. This raises the question as to whether and to what extent provision should be made for the recognition and protection of such interests within the Torrens system. Interests arising from the availability of equitable remedies assert themselves in the form of *in personam* claims and as unregistered interests seeking protection via the caveat system. This paper critically examines how the courts have sought to accommodate equitable interests and claims within the framework of the Torrens system in three areas: in Part II, the delineation of the class of caveatable interests; in Part III, the adjudication of priority contests between unregistered interests; and in Part IV, the fixing of limits to the kinds of actions which may be brought against a registered proprietor *in personam*.

II UNREGISTRABLE INTERESTS AND THE RIGHT TO CAVEAT

Although the Torrens legislation forbids the entry of equitable interests on the register,[9] the caveat provisions provide a means by which the holders of such interests can obtain some protection. Of the three areas examined in this paper, the body of law which examines the nature of caveatable interests is possibly the one most fraught with confusion. There is a well settled body of property law determining the caveatability of specific interests.[10] However, recent cases have provoked debate as to the nature of the interests which give rise to a caveat and the proper purpose of the caveat procedure. The caveat, described by one commentator as 'an anomalous and hybrid creature',[11] bridges both the worlds of statute and equity, and thus it is not surprising that this debate has arisen around its operation.

Torrens' first Bill[12] contained 'no mechanism to protect inchoate claims to estates and interests', or unregistered interests.[13] Torrens later incorporated the caveat provisions from a Bill introduced by Attorney-General Hanson.[14] Doctrinal purists, who support Torrens' original conception of a simple system uncluttered by equitable interests, argue that it is inappropriate to permit the

[9] In some jurisdictions, restrictive covenants may be noted on the certificate of title of the burdened land: *Transfer of Land Act* 1958 (Vic) s 88; *Transfer of Land Act* 1893 (WA) s 129A; *Land Titles Act* 1980 (Tas) ss 102–4; *Conveyancing Act* 1919 (NSW) s 88(3)(a).

[10] See, eg, Shannon Lindsay, *Caveats Against Dealings in Australia and New Zealand* (1995) 89; Douglas Whalan, *The Torrens System in Australia* (1982) 223–4; Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (2nd ed, 1997) 4-57; Roy Woodman, *The Law of Real Property in New South Wales,* (1980) vol 1, 216–8.

[11] Ken Palmer, 'Caveats and Their Effect on Equitable Priorities' in G Hinde (ed), *The New Zealand Torrens System Centennial Essays* (1971) 79, 119.

[12] Torrens' Bill was originally entitled 'a Bill for amending the law relating to the Transfer of Real Property': South Australia, *Parliamentary Debates*, House of Assembly, 4 June 1857, 201–2.

[13] Stanley Robinson, 'Claims in Personam in the Torrens System: Some General Principles' (1993) 67 *Australian Law Journal* 355, 358.

[14] Hanson's Bill was cited as the *Real Property Act* 1857: ibid.

holder of an unregistrable interest (as opposed to an interest which will ultimately be registered) to caveat.[15]

Critics of this view argue that the caveat system could provide a means of protecting a broad range of unregistrable interests without impairing Torrens' original goal of protecting those who search the register and themselves become registered. They argue that a narrow view of caveatability is both commercially inconvenient and potentially damaging in some cases where innocent third parties are involved, and that many problems giving rise to complex litigation could be avoided by the lodgment of caveats in such circumstances.[16]

In part, this debate is based on a difference of view about whether caveats should be seen as having only the short term function of protecting interests prior to their registration, or as a means of accommodating all types of equitable interests within the system. The vast majority of judicial determinations on this point support the broader view which does not require that the interest be registrable.

A *What is the Purpose of a Caveat?*

The Torrens statutes in all jurisdictions contain provisions which allow persons claiming an estate or interest in land to lodge a caveat to prevent inconsistent dealings affecting the interest claimed.[17] The language of the statutes granting the right varies slightly from jurisdiction to jurisdiction, although the differences in wording probably do not vary the nature of a caveatable interest.[18] The procedure of lodging a caveat against registration of inconsistent dealings is widely regarded in commercial spheres as the only manner in which holders of equitable interests may protect themselves against inconsistent dealings. It protects unregistered interest holders by prompting them to act to validate their interests once an instrument is lodged for registration. It also protects purchasers by alerting them to the fact that there are existing interests over the land.[19]

The widespread practice of lodging a caveat to protect unregistered interests has led many commentators to take issue with the description of the purpose of the caveat procedure by the Privy Council in *Miller v Minister of Mines*.[20] Lord Guest states:

15 Robinson argues that, as the Torrens system is founded on the concept of a conclusive register, '[t]his involves the acceptance that all rights (including equitable interests) not appearing on the register are rights *in personam* properly so called, the doctrine of notice is inapplicable and general law priority rules have no place.': Robinson, *Equity*, above n 4, ix. See also Stanley Robinson, *Transfer of Land in Victoria* (1979) 357.

16 Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Property Law: Cases and Materials* (1996) 5.27, fn 4.

17 *Transfer of Land Act* 1958 (Vic) s 89(1); *Real Property Act* 1900 (NSW) s 74F; *Land Title Act* 1994 (Qld) ss 122, 124; *Real Property Act* 1886 (SA) s 191; *Transfer of Land Act* 1893 (WA) s 137; *Land Titles Act* 1980 (Tas) s 133; *Real Property Act* 1886 (NT) s 191; *Land Titles Act* 1925 (ACT) s 104(1), (1A).

18 Lindsay, above n 10, 58.

19 Bradbrook, MacCallum and Moore, *Australian Real Property Law*, above n 10, 4-55.

20 [1963] AC 484 ('*Miller*').

> The caveat procedure is an interim procedure designed to freeze the position until an opportunity has been given to a person claiming right under an unregistered instrument to regularise the position by registering the instrument.[21]

Many different views of the functions of caveats have been expressed by judges and commentators. Lindsay suggests that there are three possible views of the purpose of the caveat procedure, the first being the approach taken by Lord Guest in *Miller*.[22] The other two possible purposes are:

- to freeze the position until the caveator has an opportunity to establish his or her claim by litigation;
- to prevent the registered proprietor from dealing with the land in a manner which is inconsistent with the rights of the caveator.[23]

The first approach expounded by Lord Guest fundamentally confuses the purpose of the caveat procedure with the process of registration. As noted earlier, there is a widespread practice of lodging caveats to protect interests which cannot be noted on the register. A further consequence of this narrow view is that only instruments which are in registrable form, or are ultimately registrable, will support a caveat. Unless caveators are able to 'regularise' their position by registering interests protected by caveats, the caveats will lapse.[24]

The second approach has the disadvantage of requiring the caveator to instigate proceedings to protect the estate or interest which he or she claimed. This amounts to a disincentive for unregistered interest holders to use the caveat procedure, thus obscuring the important aim of the procedure to reveal to any purchaser existing interests over the land.

The third approach is the preferable one. It emphasises the protective function of the caveat procedure, and allows any kind of proprietary interest to be caveated. It also allows a caveat to fulfil 'different functions depending upon the circumstances.'[25] Thus, the caveator might proceed to litigation if appropriate in the circumstances, or the caveator may be required to lodge a registrable instrument, or the caveat might be allowed to remain on the register indefinitely to protect it from being overridden by registration.[26]

In most situations, the caveat procedure is to be preferred to the alternative of requiring an unregistered interest holder to obtain an injunction to restrain persons from dealing with the land or to restrain the Registrar from registering dealings with the land.[27] The caveat procedure is more expeditious and less expensive than obtaining an injunction, as the interlocutory hearing for the granting of an injunction generally requires the instigating party to provide

[21] Ibid 497.
[22] Lindsay, above n 10, 1–3.
[23] Ibid.
[24] Subject to the time limits set by the various statutes.
[25] Lindsay, above n 10, 2–3.
[26] Ibid.
[27] The injunction may be a more appropriate procedure for subsequent unregistered mortgagees trying to stop completion of sale after a mortgagee's sale. See, eg, *Commonwealth Bank of Australia v Baranyay* [1993] 1 VR 589. In *Hooper v ANZ Bank Ltd* (1996) 5 Tas R 398, 403, Wright J took the view that there was little difference in the principles to be applied in deciding whether a caveat could be sustainable and granting an interim injunction.

security for costs. Additionally, the caveator does not have to deal with the registered proprietor.[28] The caveator is not required to instigate any court action, and the caveat remains noted on the Register until an inconsistent dealing is lodged for registration, or proceedings are instigated by another interested party seeking to remove the caveat.[29]

Adherents to the view that caveats should be restricted to a more limited range of dealings would argue that a broad view may encourage improper and vexatious lodgment of caveats, creating unnecessary expense and inconvenience for the registered proprietor. To prevent abuse of the caveat procedure, a tightening of safeguards may be necessary. Provision against such abuse has been made in various States which require that compensation be payable to any person who has suffered loss because of the lodgment of a caveat without reasonable cause.[30] In a claim under s 118 of the *Transfer of Land Act* 1958 (Vic), the onus is on the plaintiff to show that the caveator acted without reasonable cause. It is insufficient to prove the caveator had no caveatable interest. Often the court will be able to find reasonable cause if the caveator had an honest belief in his or her entitlement on reasonable grounds.[31]

Statutory provisions can prevent abuse of the caveat procedure. For example, s 91(2A) of the *Transfer of Land Act* 1958 (Vic) provides that a registered mortgagee who has lawfully exercised his or her power of sale will not be frustrated in registration of the transfer by a caveat protecting a second unregistered mortgage.[32] A further safeguard is provided by the wide discretion granted to the court under s 90(3) of the *Transfer of Land Act* 1958 (Vic) which gives any person who is adversely affected by any such caveat the right to bring proceedings in the court against the caveator for the removal of the caveat. The court has a wide discretion under the subsection to make any appropriate orders.[33]

28 See, eg, Lindsay, above n 10, 3–5.

29 This is not the case in Queensland where the *Land Title Act* 1994 s 126(4) states that the caveat will lapse and the Registrar will remove the caveat if the caveator does not start a proceeding in the Supreme Court to establish the interest claimed within the stated time frame. In South Australia and the Northern Territory, the registered proprietor may apply to have the caveat removed and the caveator has 21 days in which to obtain an extension of time by court order. If the caveator takes no action, the caveat lapses. In all other jurisdictions, the Registrar must notify the caveator that a dealing has been lodged for registration, and time runs against the caveator from the time of notice to either register the dealing (if the instrument is in registrable form or would potentially be in registrable form), or to begin a proceeding in the Supreme Court to have his or her interest validated: Bradbrook, MacCallum and Moore, *Australian Real Property Law*, above n 10, 4-55, 4-63.

30 *Transfer of Land Act* 1958 (Vic) s 118; *Land Title Act* 1994 (Qld) s 130; *Land Titles Act* 1980 (Tas) s 138, *Land Titles Act* 1925 (ACT) s 108; *Transfer of Land Act* 1893 (WA) s 140. Cf *Real Property Act* 1900 (NSW) s 74P; *Real Property Act* 1886 (SA) s 191X; *Real Property Act* 1886 (NT) s 191(X), which require that the caveat must be lodged 'wrongfully and without reasonable cause' for compensation to be payable. See further Bradbrook, MacCallum and Moore, *Australian Real Property Law*, above n 10, 4-59.

31 See, eg, *Commonwealth Bank of Australia v Baranyay* [1993] 1 VR 589. The issue as to whether the agreement for lease relied upon by the defendant was in registrable form was left open by the court: ibid 596.

32 There are similar provisions in other jurisdictions: see, eg, Bradbrook, MacCallum and Moore, *Australian Real Property Law*, above n 10, 4-61–4-62.

33 See, eg, *Commercial Bank of Australia Ltd v Schierholter* [1981] VR 292. In this case a caveat lodged by a subsequent equitable mortgagee was removed by the court so that the purchasers of

B *What Constitutes an 'Estate or Interest in Land'?*

Caveats may only be lodged to protect proprietary interests in land.[34] The conflict in authority as to whether that interest must arise under either a registrable instrument or under a transaction which can give rise to a registrable instrument, or in an unrestricted manner, raises issues that go to the heart of the policy foundations of the Torrens system. Exponents of both sides of the debate have argued that their reasoning is in accordance with Torrens' original intent.

The conflict of authority is well represented by the two recent Victorian Supreme Court decisions in *Classic Heights Pty Ltd v Black Hole Enterprises Pty Ltd*[35] and *Crampton v French.*[36] In the former case Batt J adopts the doctrinal approach expounded by Robinson, while in the latter case Harper J's approach to the interpretation of s 89(1) of the *Transfer of Land Act* 1958 (Vic) exemplifies the flexible approach of a court of equity.

1 *The Narrow View* — Classic Heights

Classic Heights Pty Ltd was the registered proprietor of commercial premises in Flinders Street, Melbourne. It had granted a lease to Black Hole Enterprises Pty Ltd over the second floor of the building. The lease was not in the prescribed form and could not be registered, as s 66 of the *Transfer of Land Act* 1958 (Vic), like most other Torrens statutes, only permits the registration of leases exceeding three years. Property consultants who acted for Classic Heights approached Black Hole Enterprises offering a lease over the third floor. The lessee claimed that the offer constituted an agreement for lease and lodged caveats in respect of each lease. The lessor instituted proceedings seeking orders for the removal of the caveats.

Section 89(1) of the *Transfer of Land Act* 1958 (Vic) provides:

> Any person claiming any estate or interest in land under any unregistered instrument or dealing or by devolution in law *or otherwise* or his agent may lodge with the Registrar a caveat in an appropriate approved form forbidding the registration of any person as transferee or proprietor of and of any instrument affecting such estate or interest either absolutely or conditionally and may, at any

land under the first mortgagee's sale could complete the sale. See also *Wright v Bridge Wholesale Acceptance Corporation (Australia) Ltd* [1993] 1 VR 502.

34 *Woodberry v Gilbert* (1907) 3 Tas LR 7, 10; *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* [1994] 1 VR 672; *McMahon v McMahon* [1979] VR 239; *Re Pile's Caveats* [1981] Qd R 81; *Sinclair v Hope Investments Pty Ltd* [1982] 2 NSWLR 870; *Miller* [1963] AC 484. There is some academic debate as to whether the language of the statutes in Western Australia, the Australian Capital Territory and Queensland actually requires that the caveatable interest be proprietary in nature: Bradbrook, MacCallum and Moore, *Australian Real Property Law*, above n 10, 4-56. See the argument advanced by Sandra Boyle in 'Caveatable Interest: the Common Lore Distinguished' (1993) 1 *Murdoch University Electronic Journal of Law* 11, 12–13, where the author states that according to the wording of s 137 of the *Transfer of Land Act* 1893 (WA), a proprietary interest is not necessary to establish a caveatable interest. See also *Kuper & Kuper v Keywest Constructions Pty Ltd* (1990) 3 WAR 419, where the right of the caveator was upheld, even though it was based on an inchoate claim.

35 [1994] V ConvR 65,791 ('*Classic Heights*').

36 [1995] V ConvR 66,287.

> time, by lodging with the Registrar an instrument in an appropriate approved form, withdraw the caveat as to the whole or any part of the land.[37]

Batt J considered whether, in order to support a caveat under the subsection:

> a) [the caveator must] have an instrument which can be registered on the register for the land the subject of the caveat and which, upon being registered, will register an estate or interest in the land as claimed by the caveat; or
> b) [it is] sufficient that the caveator have a right arising from the transaction giving rise to the alleged caveatable estate or interest to compel the registered proprietor to deliver an instrument as aforesaid; or
> c) [it is] sufficient that the caveator otherwise has an estate or interest in land as claimed in the caveat.[38]

Applying the views of Robinson in *Transfer of Land in Victoria*[39] and Lord Guest in *Miller*,[40] Batt J held that there are only two categories of interest that are caveatable, apart from statutory exceptions. These two categories are set out in paragraphs (a) and (b) above.

Classic Heights clearly stands for the proposition that a caveator may only lodge a caveat if she or he holds an instrument in registrable form, or is entitled to call for an instrument in registrable form. This, Batt J states, is 'consistent with the nature and purpose of the legislation.'[41] Batt J declined to follow Gillard J in *Avco Financial Services Ltd v White*[42] and held that the term 'otherwise' used in the sub-section is:

> apt to comprehend 'class 2' interests, that is, interests arising from transactions under which the caveator has a right to call for a registrable interest. For such interests are caveatable and are not covered by the words 'under any registered instrument or dealing by devolution in law'. If, then, 'otherwise' can do this work, it should not, in my opinion, be treated as extending to interests which in principle and on other authorities are not caveatable.[43]

Batt J consequently held that the interests under the leases were not sufficient to give rise to a right to caveat and made orders for the removal of the caveats.

While *Classic Heights* is a single judge decision which is unsupported by the weight of Australian authority, it represents more than a mere aberration. The decision supports a particular position on unregistered interests under the Torrens system which has strong doctrinal and policy foundations and thus remains open for argument. Additionally, the similarity in the wording of the various State and Territory provisions makes the decision of more than local relevance. If a higher

37 Emphasis added.
38 [1994] V ConvR 65,791, 65,793.
39 Robinson, *Transfer of Land in Victoria*, above n 15, 357–61.
40 [1963] AC 484, 496–7.
41 [1994] V ConvR 65,791, 65,796.
42 [1977] VR 561. See below, nn 60–64 and accompanying text.
43 [1994] V ConvR 65,791, 65,797.

court were to follow the reasoning in *Classic Heights*,[44] several commercially important legal and equitable interests in land, which are incapable of registration, would be at risk of defeat by registration of a subsequent interest. These include:

- unregistered leases of less than three years duration;[45]
- builders' charges over land worked on to secure payment of the moneys owing under the contract;[46]
- equitable charges arising under loan agreements;
- interests arising under constructive trusts;
- vendors' liens (where the vendor transfers property to the purchaser without receiving full payment);
- purchasers' liens (where the purchaser, having paid a percentage of the purchase money, is granted a lien once he or she enters into the specifically enforceable sale contract);
- the right of a registered proprietor to set aside a transaction for fraud or failure to comply with the requirements for exercise of a power of sale (which may be classified as an equity, rather than an equitable interest).

It is also unclear whether a registered proprietor can caveat to prevent misuse of a duplicate certificate of title which has been lost or stolen.

One of the few Australian cases following the *Classic Heights* approach is *George v Biztole Corporation Pty Ltd.*[47] Biztole claimed against George for breach of fiduciary duty, as beneficiary under a constructive and resulting trust between the caveator as beneficiary and the registered proprietor as trustee. The breach of duty was alleged to arise out of the supply of labour and materials for the property being worked on. Biztole lodged a caveat. One issue dealt with by the court was whether the interest claimed was capable of giving rise to a right to caveat. Without disagreeing with Batt J in *Classic Heights*, Smith J held that it is possible to assert a caveatable interest even if its existence requires judicial determination, as long as the interest will ultimately result in registration. An *immediate right* to call for registration is not necessary.[48]

[44] Although the facts of *Classic Heights* concerned the caveatability of two leases, similar logic might be used in relation to other common conveyancing practices which, until *Classic Heights*, had been regarded as creating caveatable interests: Russell Cocks, 'Caveatable Interest' (1995) 3 *Australian Property Law Journal* 89, 90.

[45] Michael Redfern, 'Caveats and Unregistered Leases Under the Victorian Transfer of Land Act' (1995) 3 *Australian Property Law Journal* 83, 84. According to the decision in *Classic Heights*, leases of less than three years duration do not have any protection (although in a number of Torrens statutes leases of short duration are protected as an exception to indefeasibility where the tenant is in possession). Redfern suggests that the Act should be amended either to allow the registration of leases which do not exceed three years, or to allow a caveat to be lodged to protect the interest of a tenant in such a lease: ibid 87.

[46] Note, however, ss 7D, 16DD in the *Home Building Act* 1989 (NSW) (inserted by the *Building Services Corporation Legislation Amendment Act* 1996 (NSW)) which give building contractors a caveatable interest in the land for the purposes of the *Real Property Act* 1900 (NSW) where they have a judgment or an order of a court or Tribunal against another party to a building contract.

[47] [1995] V ConvR 66,138.

[48] Ibid 66,143.

2 *The Broad View* — Crampton v French

By contrast to the *Classic Heights* decision, the majority of Australian cases support the proposition that the manner in which a caveatable interest arises is unrestricted and all types of legal and equitable interests should be afforded the protection of a caveat, whether registrable or not.[49] The reasoning in *Crampton v French*[50] typifies this broad approach. In this case, the loan agreement provided:

> In the event that the borrower defaults under this agreement the borrower authorises the lender to lodge any necessary caveat against [relevant property] to better secure the amount outstanding including any interest.[51]

Harper J held that it was evident from the clause that the parties intended that the property should constitute a security in the form of an equitable charge. Under the legislation, an equitable charge is not capable of giving rise to a registrable interest.[52] Nevertheless, Harper J held that, contrary to the authority in *Classic Heights*, an equitable charge is capable of supporting a caveat. In his Honour's opinion, any other conclusion would be a 'strange result'[53] and there was nothing in the literal wording of the statute to suggest that unregistrable equitable interests should be excluded.

> The submission [of the plaintiffs] seems to me to amount to an assertion that the words of the sub-section should be read down so as to exclude from its sphere of operation long recognised and frequently created interests in land which, according to the ordinary meaning of the words, fall squarely within it.[54]

In his Honour's view, the statement of the Privy Council in *Miller* to the effect that caveats were intended to fill the gap between the acquisition of an interest and its registration[55] was an 'inadequate' statement of the purpose of the system of caveats and did not provide an exhaustive description of the purposes of the caveat procedure.[56] More importantly, he suggested that it was inappropriate to regard a single statement from the Privy Council as sufficient to 'suddenly pension off' unregistrable instruments 'despite centuries of useful life and despite every indication that they still have valuable work to do.'[57]

Authorities prior to and after *Classic Heights* support this reading of the language of the caveat provisions. In *Butler v Fairclough*,[58] the High Court appears to have assumed that equitable estates and interests in land are not only recognised by the Torrens system, but that such interests may be protected by the lodgment of a caveat. Griffiths CJ commented:

[49] Cf *Bacon v O'Dea* (1989) 88 ALR 486, 496–7, where the Federal Court endorsed the Privy Council in *Miller*.
[50] [1995] V ConvR 66,287.
[51] Ibid 66,288.
[52] Ibid 66,291.
[53] Ibid.
[54] Ibid 66,292.
[55] [1963] AC 484, 497.
[56] [1995] V ConvR 66,287, 66,295.
[57] Ibid.
[58] (1917) 23 CLR 78.

> It must now be taken to be well settled that under the Australian system of registration of titles to land the Courts will recognise equitable estates and rights except so far as they are precluded from doing so by the Statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights the Courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts. ... *A person who has an equitable charge upon the land may protect it by lodging a caveat.*[59]

In *Avco Financial Services Ltd v White,*[60] the Supreme Court of Victoria relied on *Butler v Fairclough* in support of its conclusion that a person claiming an equitable charge has the right to lodge a caveat. Gillard J drew attention to the 'generality of the language' used in s 89(1) of the *Transfer of Land Act* 1958 (Vic), stating that, having regard to the language, it was difficult to understand how 'a grantee of an equitable mortgage or charge did not have sufficient estate or interest in land to protect by lodging a caveat.'[61] His Honour noted that the 'use of the word "otherwise" [in the sub-section] should not be limited in its connotation except by other provisions of the *Transfer of Land Act*, or by the law of property.'[62] Marks J in *King v AGC (Advances) Ltd*[63] agreed with the reasoning of Gillard J in *Avco*.[64]

Some recent cases have gone even further in their willingness to find an interest capable of supporting a right to caveat. The approach of the courts in these cases has been to assume the correctness of the broad approach and thereby provide security for informal commercial arrangements. In *Murphy v Wright,*[65] the New South Wales Court of Appeal analysed a clause in a loan agreement which contained an express right to lodge a caveat in the event of default. The right to attach the debt to the real or personal assets of the guarantor also arose on default. Priestley and Handley JJA (Sheller JA dissenting) held that the option to attach security to the debt upon default created an equitable charge which was caveatable.[66] *Murphy v Wright* probably stands for the proposition that where an equitable charge over land is accompanied by an agreement that the chargee may lodge a caveat, a right to lodge a caveat to protect that interest will arise.

In *Chiodo v Murphy,*[67] the trustees lodged caveats over two properties. The loan agreement contained the right to attach the debt due to any of the assets of the guarantor and contained an express right to lodge a caveat against any of the

[59] Ibid 91 (emphasis added). See also *Wolfson v Registrar-General of New South Wales* (1934) 51 CLR 300, 308 (Rich and Evatt JJ).

[60] [1977] VR 561 ('*Avco*').

[61] Ibid 567.

[62] Ibid.

[63] [1983] 1 VR 682, 686 (Young CJ and Murray J agreeing).

[64] *King v AGC* was held by Harper J in *Crampton v French* to be 'compelling authority' for the proposition that the grantee of an equitable charge has a sufficient interest to lodge a caveat, whether or not the grantee is entitled to execute a registrable mortgage: (1995) V ConvR 66,287, 66,293.

[65] (1992) 5 BPR 11,734.

[66] Ibid 11,738–9.

[67] [1995] V ConvR 66,300.

guarantor's property in the event of default. Ashley J applied the authorities in *Murphy v Wright* and *Troncone v Aliperti*[68] and held that this clause conferred an equitable charge and a caveatable interest. As to whether the charge gave rise to a right to lodge a caveat, Ashley J argued that the view of the Privy Council in *Miller*[69] 'presented an incomplete picture of the circumstances in which a caveatable interest may be established; and too narrowly stated the purpose of a caveat.'[70] His Honour followed the body of law which suggests that an equitable charge does give rise to a caveatable interest, even in the absence of a right to require a mortgage, and held that the word 'otherwise' in s 89(1) of the *Transfer of Land Act* 1958 (Vic) should not be narrowly construed.

In *Composite Buyers Ltd v Soong*,[71] the relevant guarantee contained a charge of 'all freehold and leasehold interests in land which we ... now have or ... may acquire'. Hodgson J followed the authorities in *Murphy v Wright*, *Troncone v Aliperti* and *J & H Just (Holdings) v Bank of NSW*[72] in preference to *Classic Heights*, agreeing that 'any equitable interest in land is sufficient to support a caveat, even if the caveator does not have a registrable instrument, and even if the caveator may not be entitled to an instrument which will lead to a recording in the Register.'[73] Hodgson J held that:

> what is necessary is that there be an interest in respect of which equity will give specific relief against the land itself,[74] whether this relief be by way of requiring the provision of a registrable instrument, or in some other way giving satisfaction of the interest claimed by the caveator.[75]

The court in *Troncone v Aliperti*[76] went a step further than the courts in the above cases as the relevant clause, whilst granting a right to caveat, contained no words of charge. The court was nonetheless willing to find an interest capable of supporting the right to caveat without defining its precise nature.[77] The court applied a principle of construction that, unless there is evidence to the contrary, 'whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect'.[78] A caveat cannot be entered against land unless the caveator has the relevant proprietary interest in the land. Under s 74F(1) of the *Real Property Act* 1900 (NSW), this is 'a legal or equitable estate or interest in the land'. Without contrary evidence, the grant of authority to lodge a caveat carries with it such an estate or interest in land as was necessary to enable that authority to be exercised. The court held that it was not necessary to determine

68 (1992) 5 BPR 11,734.
69 [1963] AC 484.
70 [1995] V ConvR 66,300, 66,307.
71 (1995) 38 NSWLR 286.
72 (1971) 125 CLR 546 ('*J & H Just*').
73 (1995) 38 NSWLR 286, 288.
74 Citing Mahoney JA in *Troncone v Aliperti* (1994) 6 BPR 13,291.
75 (1995) 38 NSWLR 286, 288.
76 (1994) 6 BPR 13,291.
77 Ibid 13,292–3. The clause stated: 'The Debtor authorises the Creditors to lodge a Caveat on any property owned by the Debtors [*sic*] to protect his interest.': ibid 13,291.
78 Ibid 13,292.

the precise nature of the interest implied in the grant, as long as it was the type of interest capable of supporting a caveat under s 74F(1) of the *Real Property Act*. *Troncone v Aliperti* is a clear indication of the courts' willingness to presume the correctness of the broad approach and facilitate informal commercial arrangements.[79]

3 *The Broad View — Some Problem Areas*

(a) Constructive Trusts

The approach which is taken to the issue of caveatability will have important implications for the protection of constructive trusts. Since the early 1970s it has been clear that a de facto spouse may be able to establish that she or he has an interest in land in which the other spouse holds legal title. Such an interest arises by virtue of a constructive trust, which is imposed to prevent the party with legal title resiling from a common intention upon which the claimant spouse relied to his or her detriment.[80] In *Baumgartner v Baumgartner*,[81] the High Court extended the availability of the constructive trust, by holding that such a trust could be imposed even in the absence of a common intention, in order to prevent a person unconscionably retaining the benefit of contributions made in the context of a joint venture.

It is clear that no right to caveat arises from mere cohabitation or an agreement to marry,[82] or on the basis of a claim under legislation permitting the reallocation of property rights of de facto partners on a just and equitable basis,[83] since in these situations the claimant does not have any property interest.[84] Presumably an interest arising under a resulting trust arising from contributions made at the time of purchase would support a caveat.

Recent decisions extending the circumstances in which equity will grant the remedy of constructive trust have not altered the general understanding that the beneficial interest arises when the defining factual circumstances occur. Deane J in *Muschinski v Dodds* endorsed the dominant American opinion that there does not have to be 'a curial declaration or order before equity will recognize the prior

[79] For a further example of the 'broad approach', see *Wilson v Graham* (Supreme Court of New South Wales, Santow J, 30 April 1997). For comment on the decision, see Peter Butt, 'Developments in Caveats' (1997) 71 *Australian Law Journal* 585, 586.

[80] *Ogilvie v Ryan* [1976] 2 NSWLR 504.

[81] (1987) 164 CLR 137.

[82] *Gangell v Airlie* (Supreme Court of Tasmania, Wright J, 7 May 1993); noted at [1993] ACL Rep 355 Tas 1. See also Lindsay, above n 10, 98–9.

[83] See, eg, *De Facto Relationships Act* 1984 (NSW) s 20; *Property Law Act* 1958 (Vic) s 285; *De Facto Relationships Act* 1996 (SA) s 10; *Domestic Relationships Act* 1994 (ACT) s 15; *Domestic Relationships Act* 1991 (NT) s 18.

[84] In *Morling v Morling* (1992) 16 Fam LR 161, 163 Powell J stated:

> If the truth of the matter were that the Defendant's 'claim' depended upon the making of an order under the provisions of the De Facto Relationships Act 1984, the caveat could not be supported, for such a 'claim' is merely a claim to exercise a mere right of action, and does not give rise to an equitable interest in the subject property (see, for example, *Bethian Pty Ltd v Green* (1977) 3 Fam LR 11,579; *Ioppolo v Ioppolo* (1978) 5 Fam LR 2023; see also *Hammon v O'Brien* [1990] DFC 95-091; *Dykstra v Dykstra* (1991) 22 NSWLR 556).

existence of a constructive trust.'[85] He maintained that this view is consistent with the existence of a curial discretion to direct that the consequences of the declaration of constructive trust are operative only from the date of the declaration 'or from some other specified date'.[86] Some commentators have taken this to mean that no equitable interest arises until it is declared by the court.[87] This may be inconsistent with the view of Deane J that judicial scope to mould the remedy does not, in his Honour's view, derogate from the proposition that the trust arises prior to the administration of the remedy.[88] In accordance with this view, a constructive trust is an interest capable of supporting a caveat once the defining events occur. Nevertheless, it would be helpful for the legislature to make it clear that a person claiming an interest under a constructive trust can caveat.

(b) Equities Coupled with a Proprietary Interest

The right to bring an action to obtain equitable relief (such as the right to have a transaction set aside on grounds of unconscionability), commonly known as a 'mere equity', is a right which, according to current Victorian authority, will not support a caveat. However, where the courts have found that the equity is attached to a proprietary right, the interest becomes enforceable against third parties.[89]

There has been some contention in Australian authority as to whether the registered proprietor's right to set aside a mortgagee's voidable transfer is an interest which will support a caveat. The Appeal Division of the Victorian Supreme Court held in *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd*[90] that the right of the mortgagor to set aside for breach of the mortgagee's duty was, for the purposes of the right to caveat, an equity and not an equitable interest in the land. Until equitable relief was granted no equitable interest vested in the mortgagor.[91] The Appeal Division relied in its reasoning on its interpretation of the High Court's decision in *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)*.[92] The finding that the registered proprietor's equity to set aside a sale

[85] (1985) 160 CLR 583, 614.

[86] Ibid. See also *Baumgartner v Baumgartner* (1987) 164 CLR 137.

[87] Craig Rotherham, 'Proprietary Relief for Enrichment by Wrongs: Some Realism About Property Talk' (1996) 19 *University of New South Wales Law Journal* 378, 400; Judith Levine, 'Does Equity Treat as Done That Which Ought to be Done?: The Consequences Flowing from the Timing of the Imposition of a Constructive Trust' (1997) 5 *Australian Property Law Journal* 74, 77; *Re Osborn* (1989) 25 FCR 547, 553–4; *Re Popescu* (1995) 55 FCR 583, 589–90.

[88] *Rawluk v Rawluk* (1990) 65 DLR (4th) 161, 185 (McLachlin J); Donovan Waters, 'The Constructive Trust in Evolution: Substantive *and* Remedial' (1991) 10 *Estates and Trusts Journal* 334; Emily Sherwin, 'The Constructive Trust in Bankruptcy' [1989] *University of Illinois Law Review* 297, 310; Pamela O'Connor, 'Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust' (1996) 20 *Melbourne University Law Review* 735, 750–3.

[89] As, for example, with the equity of acquiescence found by the court in *Inwards v Baker* [1965] 2 QB 29.

[90] [1994] 1 VR 672, 678 ('*Swanston Mortgage*').

[91] Ibid.

[92] (1965) 113 CLR 265 ('*Latec*').

was not proprietary in nature has been criticised,[93] and there is authority supporting the proposition that the mortgagor has an equitable interest in the land, at least until the purchaser has become registered.[94] It is also strongly arguable that the High Court decision in *Latec* is distinguishable on the ground that the subsequent purchaser had become registered by the time that the mortgagor sought to set the sale aside. It appears that the Appeal Division inaccurately equated characterisation of the interest for the purpose of resolving a priorities conflict with its characterisation for the purpose of determining caveatability.

Notably, the focus of the cases has been on whether the right to set aside for improper sale is proprietary in nature. No issue as to whether the interest is in fact registrable, or will give rise to a right to registration has ever been contemplated in these authorities, which implicitly assume the correctness of the broad approach.

(c) Can a Registered Proprietor Caveat His or Her Own Title?

The Appeal Division in *Swanston Mortgage*[95] held that the registered proprietor could not lodge a caveat to protect its own interest on the basis of its legal title. The court's reasoning was supported by a line of authorities which have held that the registered proprietor cannot be said to claim an estate or interest as registration confers an indefeasible title, the highest estate in land.[96] As registration of itself does not give rise to the right to lodge a caveat, some additional *proprietary* equitable interest must be shown.[97] The Appeal Division held in *Swanston Mortgage* that as the mortgagor's right to have the transaction set aside was a non-proprietary equity, it would not support a caveat.

Aside from the legal objections raised by commentators, there are no convincing policy reasons why the registered proprietor should be without protection in cases where the certificate of title has been lost or stolen, or where the registered proprietor has become aware of a forged instrument. Amendments to the New South Wales and Queensland legislation reflect this policy by expressly allowing the registered proprietor to lodge a caveat against his or her own title.[98]

C *Proposals for Reform*

Common practice indicates that people in the commercial and domestic spheres have continued to create equitable interests in the expectation that the interests would attract the protection of the law. Under the current system of registration

[93] See, eg, David Wright, 'Does the Registered Proprietor Have a Caveatable Interest?' (1995) 69 *Australian Law Journal* 935; Bradbrook, MacCallum and Moore, *Australian Real Property Law*, above n 10, 3-31.

[94] *Breskvar v Wall* (1971) 126 CLR 376, 387–8 (Barwick CJ); *Forsyth v Blundell* (1973) 129 CLR 477; *Sinclair v Hope Investments Pty Ltd* [1982] 2 NSWLR 870.

[95] [1994] 1 VR 672.

[96] *Barry v Heider* (1914) 19 CLR 197; *Sinclair v Hope Investments Pty Ltd* [1982] 2 NSWLR 870, 872; *Re an Application by Haupiri Courts Ltd [No 2]* [1969] NZLR 353.

[97] See also *Re an Application by Haupiri Courts Ltd [No 2]* [1969] NZLR 353, 357 (Richmond J), which was followed in *Swanston Mortgage* [1994] 1 VR 672, 681–2.

[98] *Real Property Act* 1900 (NSW) s 74F(2); *Land Title Act* 1994 (Qld) s 122(1)(c).

by title, holders of such interests have had no option but to engage in the practice of lodging caveats where they are threatened with inconsistent dealings.

The financial and personal value of the properties protected by equitable interests make them worthy of protection under the current system of property law in Australia. Although there is some judicial and historical support for the purist approach taken by Batt J in *Classic Heights*,[99] there are no convincing policy arguments as to why such a doctrinaire approach is to be preferred. Permitting the holders of unregistrable interests to caveat would provide them with some protection, without undermining the central aim of protecting purchasers transacting on the faith of the register, who themselves become registered. While a higher court may ultimately settle the debate about caveatability, it would be desirable for Torrens legislation to be amended to place the caveatable status of unregistrable interests beyond doubt. Ideally the legislation would make specific provision for the types of unregistrable interests examined in this paper, together with a more general recognition of the right to caveat to protect equitable interests generally. In this way any new interests recognised by equity could be assimilated within the broad aims of the Torrens system.

III Adjudication of Priority Contests Between Unregistered Interests

As noted above, Torrens' intention was that no interests in land should pass prior to registration.[100] However, once courts decided to recognise equitable interests in Torrens land it became necessary to determine how to resolve priority conflicts between competing interests.

Neither Australian nor New Zealand Torrens legislation contains any provision which deals explicitly with competition between competing equitable interests in land under the Torrens system, except where the equitable interest is contained in a document which has been lodged for registration.[101] Lodged instruments must be registered in the order of their lodgment, but this does not determine priority between the interests prior to registration, since it is only on registration that a person gains indefeasible title.

Three jurisdictions, New South Wales, the Australian Capital Territory and the Northern Territory, attempt to protect a person with a registrable dealing from taking subject to prior interests by providing that '[f]or the purpose only of protection against notice' that person's estate or interest in land is deemed to be a legal estate.[102] It appears that the purpose of these provisions was to extend the

99 [1994] V ConvR 65,791.

100 Above Part I.

101 Cf s 52 of the *Land Titles Act* 1980 (Tas), which permits the lodgment of 'priority notices' to reserve priority for dealings in land. According to Michael Dixon, '[t]he primary purpose of a priority notice is to establish priorities, whereas a caveat simply acts as notice of an equitable interest and enables the interested party to take action in the Supreme Court to protect that equity should it be threatened by dealings lodged for registration': Michael Dixon, 'Priority Notices' (1995) 3 *Conveyancing Australia* 32, 32–3.

102 *Real Property Act* 1900 (NSW) s 43A(1). See also *Land Titles Act* 1925 (ACT) s 60; *Real Property Act* 1886 (NT) s 71B.

protection against equitable interests which is obtained by a registered proprietor back to the time when a person receives a registrable dealing.

However, these sections have been interpreted more restrictively. Because the interest is 'deemed to be a legal estate', rather than deemed to be a registered interest, equitable interest holders do not receive the protection which the legislation gives registered proprietors against equitable interests of which they have notice. Thus a person who takes a registrable document with actual or constructive notice of a prior equitable interest is not protected from it prior to registration.[103] It follows that Torrens' goal of protecting purchasers of land from being subjected to prior equitable interests is not satisfied until the purchaser actually becomes registered. Even lodging an instrument for registration confers limited protection.

Because the legislation does not contain provisions regulating priority conflicts between equitable interests, it would have been possible for courts to develop new principles to resolve such conflicts based upon the policy goals of the Torrens system. Rather than taking this approach, courts have generally relied on general law priority principles, which were developed long before the introduction of systems of title registration.

A *General Law Rules for Resolving Priority Contests*

The maxim *qui prior est tempore potior est jure* is usually treated as the starting point for resolving a competition between equitable interests. *Rice v Rice*[104] is often incorrectly cited as authority for the application of the *qui prior est tempore* maxim. In that case Kindersley VC actually took the view that it was incorrect to accord prima facie priority to the earlier equitable interest. Rather, the court should compare the merits of the competing interests, taking account of their nature and extent, the circumstances and manner of their creation and the conduct of both of the parties. Only if the equitable interests were in all other respects equal should the first in time principle prevail.

In subsequent cases courts have sometimes begun by comparing the merits of the competing interests, but they have more frequently treated the first equitable interest as prevailing, unless there are factors justifying its postponement.[105] Meagher, Gummow and Lehane comment that '[w]here the competition is between two equitable claimants, the usual rule is that the claims rank in order of temporal priority.'[106]

By giving prima facie priority to the *earlier* interest, this principle emphasises protection of the *holders* rather than later *purchasers* of equitable interests. In

[103] *IAC (Finance) Pty Ltd v Courtenay* (1963) 110 CLR 550, 585 (Taylor J); *Meriton Apartments Pty Ltd v McLaurin & Tait (Developments)* (1976) 133 CLR 671, 676 (Barwick CJ, Mason and Jacobs JJ).

[104] *Rice v Rice* (1853) 2 Drewry 73; 61 ER 646.

[105] See *Abigail v Lapin* [1934] AC 491, 504 (Lord Wright); cf *Heid v Reliance Finance Pty Ltd* (1983) 154 CLR 326, 333 (Gibbs CJ), 339 (Mason and Deane JJ); *Clark v Raymor (Brisbane) Pty Ltd [No 2]* [1982] Qd R 790, 795 (Thomas J).

[106] Roderick Meagher, William Gummow and John Lehane, *Equity: Doctrines and Remedies* (3rd ed, 1992) 226.

effect this means that a person acquiring an equitable interest must ensure that the person with whom they deal has not created any earlier interest. The Torrens system was designed to protect purchasers of legal rather than equitable interests. However, in a broad sense the notion that an earlier equitable interest has prima facie priority is inconsistent with the philosophy of protecting purchasers. Admittedly a person who acquires the later interest can gain protection by registration. However, if the holder of the later interest is unable to register they run the risk that their interest may be wholly or partially defeated by an earlier interest, even though they may have dealt with the registered proprietor and despite the fact that there may have been no way for them to discover that the prior interest had been created. The fact that the holder of the later interest had no notice of the prior interest does not give him or her priority.

Meagher, Gummow and Lehane identify ten types of situations in which equity was likely to hold that an earlier equitable interest in general law land had been postponed to a later interest.[107] The situations likely to be most relevant to a competition between equitable interests in land under the Torrens system concern dealings with title or title documents. If the holder of the first interest failed to take possession of title documents to which they were entitled,[108] thus enabling the creation of the later interest, the prior interest would normally be postponed to the later one.[109]

Similarly, if a person passed legal title to a third party (other than an express trustee) or handed title documents to a third party to enable that person to deal with the property, for example by creating a later equitable interest, and the third party exceeded their authority by raising a loan for a larger amount, that 'arming behaviour' was regarded as sufficient to justify loss of priority of the earlier equitable interest holder.[110] This principle did not normally lead to postponement of an equitable interest held by the beneficiary of an express trust or the client of a solicitor simply because the trustee or solicitor had custody of title documents which were fraudulently misused to create the later interest.[111] Presumably this exception reflected the view that a person should be entitled to rely upon their solicitor or trustee and not be required to take precautions against the fraud of a fiduciary.[112]

107 Ibid 228–37.

108 Apparently the principle did not apply where for reasons outside the control of the first equitable interest holder the title deeds could not be handed over: see *Union Bank of London v Kent* (1888) 39 Ch D 238 where there was an agreement to mortgage leases which were to be granted to the mortgagor.

109 *Farrand v Yorkshire Banking Co* (1888) 40 Ch D 182 (applying the approach of Kindersley VC); *Perry Herrick v Attwood* (1857) 2 De G & J 41; 44 ER 895.

110 *Brocklesby v Temperance Building Society* [1895] AC 173.

111 Cf a situation such as that which existed in *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326, where the person believed to be a solicitor (though he was not) was an employee of the purchaser/mortgagor, to whom the unpaid vendor had handed over the transfer and his duplicate certificate of title.

112 *Rice v Rice* (1853) 2 Drewry 73, 61 ER 646; *Cave v Cave* (1880) 15 Ch D 639; *Taylor v London and County Banking Co* [1901] 2 Ch 231, 261 (Stirling LJ). For a recent example, see *Cash Resources Australia Pty Ltd v BT Securities Ltd* [1990] VR 576, 581.

B *How Should the General Law Priority Rules be Applied to the Torrens System?*

How should these general law principles be applied to transactions in land under the Torrens system, where legal interests in land are passed by registration, rather than by execution of a deed, where purchasers do not have to examine a chain of title but can ascertain from a title search whether the person dealing with the land is the registered proprietor and whether a caveat has been lodged claiming an equitable interest in the land, and where caveats provide a mechanism by which the holders of equitable interests can protect their interests by registration of an inconsistent interest?[113]

It would have been possible for courts to adapt equitable principles to the goals of the Torrens system, by permitting postponement on the ground that the holder of the first interest had not made use of the statutory mechanisms provided to protect it, for example by asserting the right to obtain a registrable instrument and becoming registered or, where this was not possible, by lodging a caveat. This approach was taken in some of the earlier cases,[114] but in later cases courts began to place increasing emphasis on protection of the holder of the first equitable interest, rather than on protection of purchasers of later equitable interests who dealt on the faith of the register.

The effect of this approach has been to remove some of the incentive for people to caveat to protect their interests. It is argued below that it is time to reconsider the principles governing competition between equitable interests, in order to provide greater encouragement to those dealing with land to register or, where this is not possible, to caveat. Such principles could provide adequate scope for recognition of equitable interests within the Torrens system without detracting from Torrens' original aim of developing a register which mirrors the state of titles.[115]

1 *The 'Arming' Cases — The Significance of a Failure to Caveat*

Case law has identified some situations in which it is clear that an earlier interest will or will not be postponed to a later interest. If the holder of an earlier equitable interest does an act which positively 'arms' someone with the ability to represent that they have an unencumbered interest in the land, as the result of which a later interest is created, the later interest will take priority over the earlier one. One example of the application of this principle is the decision of the Privy Council in *Abigail v Lapin*,[116] where the Lapins' equity of redemption was postponed to Abigail's later unregistered mortgage because the Lapins had executed transfers of their property and handed over their duplicate certificates of

[113] See generally Peter Stubbs, 'Equitable Priorities and Failure to Caveat' (1989) 6 *Auckland University Law Review* 199.

[114] See, eg, *Barnes v James* (1902) 27 VLR 749; *Butler v Fairclough* (1917) 23 CLR 78, 92 (Griffith CJ).

[115] See especially Theodore Ruoff, *An Englishman Looks at the Torrens System* (1957) 8. Ruoff's 'mirror principle' describes one of the major aims of the Torrens reforms — that the register should accurately reflect all the burdens and interests that affect the title.

[116] [1934] AC 491; see also *Breskvar v Wall* (1971) 126 CLR 376.

title to their mortgagees, thus enabling one of the mortgagees to become the registered proprietor of an unencumbered fee simple interest and to mortgage the land to Abigail.

Another example is the decision of the High Court in *Heid v Reliance Finance Corporation Pty Ltd*[117] where Heid's unpaid vendor's lien and equitable mortgage were postponed to later equitable mortgages because Heid had handed over a transfer acknowledging receipt of the purchase money, the duplicate certificate of title and an executed mortgage to an employee of the purchaser/mortgagor whom he believed to be a solicitor, thus enabling the purchaser to use these documents to raise money on the security of the land.[118]

Because courts have focused on the protection of the holder of the first equitable interest, it has been necessary for them to find a theoretical basis for postponement. Sometimes this is said to be estoppel.[119] However, as Mason and Deane JJ pointed out in *Heid,* the problem with an estoppel analysis is that the holder of the earlier interest rarely, if ever, makes a direct representation to the holder of the later interest. Rather, the earlier interest holder usually puts a rogue in a situation where he or she is able to create later interests. It is only by adoption of the legal fiction that the rogue was acting with the authority of the holder of the prior interest that estoppel can be made to provide the justification for postponement.[120]

For this reason Mason and Deane JJ preferred to base postponement on the court's power to decide whether in 'all the circumstances' the conduct of both parties, including any negligence of the prior claimant which enabled representations to be made by a third party, leads to the conclusion that 'in fairness and in justice, the earlier interest should be postponed to the later interest'.[121] In examining the conduct of the first interest holder it is necessary to consider whether it was reasonably foreseeable that such acts would enable the rogue to create the later interests.

The arming cases can be compared to situations at general law where the holder of the earlier interest was postponed because he or she handed over the chain of title or gave someone the authority to deal with the property. It seems appropriate to apply such principles in the Torrens context as well. It is quite consistent with a system which has the goal of protecting purchasers and simplifying conveyancing to accord priority to a later equitable interest holder who dealt with the registered proprietor (as in *Abigail v Lapin*)[122] or with a person who held the duplicate certificate of title and a registrable transfer and is proceeding to registration (as in *Heid*).

[117] (1983) 154 CLR 326 ('*Heid*').

[118] For a case in which this principle was applied to a priority conflict relating to company shares see *Meth & Co Pty Ltd v Commercial Banking Company of Sydney Ltd* [1977] ACLC 29,204.

[119] See, eg, *Heid* (1983) 154 CLR 326, 335 (Gibbs CJ).

[120] See also Meagher, Gummow and Lehane, above n 106, 231.

[121] (1983) 154 CLR 326, 341; see also *Cash Resources Australia Pty Ltd v BT Securities Ltd* [1990] VR 576, 586.

[122] [1934] AC 491.

Case law also indicates that the holder of an earlier equitable interest who takes reasonable steps to 'disarm' a third party who would otherwise be in a position to create interests in the property (for example because he or she is the registered proprietor) will not be postponed to a later interest. The High Court applied this principle in *J & H Just (Holdings) Pty Ltd v Bank of New South Wales,*[123] where it was held that the bank, which had taken possession of the duplicate certificate of title to protect its equitable mortgage, was not postponed to a later mortgagee which had advanced money without demanding production of the duplicate certificate of title.

An equitable interest holder who has lodged an instrument for registration may also be seen as having 'disarmed' the registered proprietor from creating a later inconsistent interest. Thus, in *IAC (Finance) Pty Ltd v Courtenay,*[124] where a transfer of land to the plaintiff purchasers and a mortgage back to the vendor had been lodged for registration by the mortgagee's solicitor, the plaintiffs were not postponed when the solicitor wrongly uplifted the documents thus enabling the acquisition of an equitable interest by a later purchaser.

In some cases the 'arming' effect of an act which, standing alone, would lead to postponement, may be undone by subsequent acts of disarming. If an equitable interest holder allows a third party to become registered, but at the same time lodges a caveat to prevent them from dealing with their registered interest, it is unlikely that the first equitable interest would be postponed. For example, if the Lapins had lodged a caveat to protect their equity of redemption immediately after giving the transfer and duplicate certificate to their mortgagees, their interest would have taken priority over that of Abigail.

The view that the effect of positive 'arming' conduct can be undone by using the statutory mechanism provided for the protection of an equitable interest, namely lodging a caveat, is quite consistent with the notion that the register should mirror the state of title (though strictly speaking the lodgment of a caveat is not equivalent to registration). It is more debatable whether equitable interest holders who take possession of the duplicate certificate should take priority over a later equitable interest, where they had the option of protecting their interest either by caveating, or (where this is possible) taking a registrable instrument. It is arguable that the integrity of Torrens registration would be better served by requiring people to follow statutory procedures or to otherwise risk postponement, rather than giving them the option of using other practices to protect their interest. Admittedly, we are concerned here with equitable interests, which cannot be entered on the Torrens register, but it would be broadly consistent with Torrens' goal of simplifying conveyancing to provide an incentive for those who could do so to register their interests or to caveat, rather than relying on other means of protection.

A contrary argument is that the cost of requiring an equitable interest holder to caveat (or where possible lodge an instrument for registration), may be dispro-

[123] (1971) 125 CLR 546.
[124] (1963) 110 CLR 550.

portionate compared with the value of the interest to be protected. Presumably, this is the reason that banks lend money on the security of mortgages by deposit of title deeds, which may be granted to secure small overdrafts for short periods of time. While courts have not explicitly taken such costs into account, perhaps their refusal to postpone an earlier equitable interest holder who has taken possession of the duplicate certificate reflects the pragmatic view that it is desirable to provide a low cost conveyancing option for mortgagors and mortgagees. This view is also reflected in s 78 of the *Land Title Act* 1994 (Qld), which explicitly recognises mortgages by deposit of title deeds.

The difficulty with this argument is that it ignores the effect on the conveyancing system as a whole, of encouraging people to engage in transactions outside the system. Requiring the holder of the first interest to caveat would not involve significant costs. However, as the law stands, it appears that holders of an equitable interest can protect themselves by taking possession of the duplicate certificate. In the future, the computerisation of title registers and the consequent removal of duplicate certificates will require courts to rethink this issue.

2 *The Effect of 'Mere' Failure to Caveat*

The principles relating to 'arming' and 'failure to disarm' are now relatively clear. By contrast, there is still uncertainty about whether a prior equitable interest holder who has not done *positive* acts enabling the registered proprietor to create later interests, such as handing over the duplicate certificate of title, should be postponed because of 'mere' failure to caveat. It is not intended to discuss the facts of familiar cases in great detail. One typical situation, illustrated by the Victorian case of *Osmanoski v Rose*,[125] arises where the purchaser under a contract of sale fails to lodge a caveat and a later person enters into a contract to purchase the land. Another typical situation, exemplified by *Person-To-Person Financial Services Pty Ltd v Sharari*,[126] is where a person obtains an equitable mortgage over property but neither takes possession of the duplicate certificate nor lodges a caveat, thus enabling the registered proprietor to grant a later mortgage to a mortgagee who is unaware of the earlier mortgage.

In situations of this kind there is an apparent conflict between the view most commonly attributed to Griffith CJ in *Butler v Fairclough*[127] (though there is also other authority for it)[128] and that expressed by Barwick CJ in *J & H Just (Holdings) Pty Ltd v Bank of New South Wales*.[129] In the former case Griffith CJ took the view that a failure to caveat, which had the effect of allowing a person to represent that he or she had a clear title, was equivalent to giving them possession of the title deeds under the general law. The effect of a caveat was to give notice to subsequent purchasers of the claimant's interest. Thus a person with an equitable charge who failed to lodge a caveat notifying others of the existence of

125 [1974] VR 523.
126 [1984] 1 NSWLR 745.
127 (1917) 23 CLR 78, 92.
128 Ronald Sackville, 'Competing Equitable Interests in Land Under the Torrens System' (1971) 45 *Australian Law Journal* 396.
129 (1971) 125 CLR 546.

the interest should be postponed to the holder of a later equitable interest who had advanced money relying on the state of the register.[130] Griffith CJ's view on the effect of failure to caveat was not based on an analysis of the original purpose of the caveat provisions, but rather on the effect of the existence of caveat procedures on sensible conveyancing practice. His approach focuses attention on the position of a purchaser of Torrens land, rather than on the position of the holder of the prior equitable interest. The effect of his reasoning is to encourage equitable interest holders to caveat, thus ensuring that prospective purchasers of interests in land can ascertain whether or not such interests are claimed. While lodging a caveat is not equivalent to registration, the postponement of an equitable interest holder who has failed to use the statutory means of protection broadly reflects the idea that it should be unnecessary for purchasers to go outside the register.

In contrast, the alternative approach, expressed by Barwick CJ in *J & H Just* focuses attention on the position of the holder of the earlier equitable interest. In *J & H Just* the High Court held that a first mortgagee bank should not be postponed to a later equitable mortgagee simply because of its failure to caveat. There is no difficulty in reconciling the outcomes of *Butler v Fairclough* and *J & H Just*, because in the earlier case the bank had actually protected itself by taking possession of the duplicate certificate of title. However, Barwick CJ was critical of the approach taken by Griffith CJ in *Butler v Fairclough.* Barwick CJ suggested that it was wrong to regard the caveat as a notice to others of the claimant's interest. Rather, the purpose of a caveat was to 'act as an injunction to the Registrar-General'[131] to prevent registration of dealings until the caveator had been notified. For this reason it was wrong to treat failure to lodge a caveat as necessarily postponing the prior interest.

> 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.[132]

> To hold that a failure by a person entitled to lodge a caveat against dealings with the land must necessarily involve the loss of priority which the time of creation of the equitable interest would otherwise give, is not merely in my opinion unwarranted by general principles or statutory provision but would in my opinion be subversive of the well recognized ability of parties to create or maintain equitable interests in such land.[133]

This statement goes beyond recognising that equitable interests can exist in Torrens land and places primary emphasis on protecting the holders of equitable interests, rather than on protecting those who deal on the faith of the register.

[130] Note that Gavan Duffy and Rich JJ did not consider the effect of the plaintiff's failure to lodge a caveat and decided the case on other grounds. Isaacs and Barton JJ agreed with Griffith CJ on this issue: (1917) 23 CLR 78, 93 (Barton J), 97 (Isaacs J).

[131] (1971) 125 CLR 546, 552.

[132] Ibid.

[133] Ibid 554.

Further, it assumes that the effect of failure to caveat is determined by the original purpose of the caveat provisions (which in any case is debatable) rather than by the effect of these provisions on the behaviour of persons dealing with Torrens land. Under the general law, the purpose of the chain of title was to provide evidence of the holder's title, but this did not prevent negligent dealings with it resulting in postponement of an earlier interest. Similarly, the existence of a means by which the holder of an earlier interest can protect him or herself against later dealings with the land should not be regarded as irrelevant to the determination of priorities.

If the legislature provides a means by which a person can be prevented from representing that they have unencumbered title, failure to take those precautions should surely have great significance in determining priorities. As Isaacs J commented in *Butler v Fairclough,* 'the protection [provided by the caveat] is coupled with the price of diligence in guarding others against loss arising through ignorance of the transaction.'[134]

Barwick CJ's suggestion is that because there is always the possibility that a registered proprietor will be subject to equitable interests, a purchaser from a registered proprietor cannot safely assume that the absence of a caveat establishes that such interests do not exist. This approach gives primacy to those interests rather than to the protection of purchasers. It makes Torrens' hostility to the survival of equitable interests seem justified. In practice there is no way in which the purchaser of an interest can be assured that the registered proprietor has not created an earlier equitable interest. By contrast, the caveat provisions give the holder of a prior interest a simple and relatively cheap means of protecting their interests against later purchasers. The view of Barwick CJ protects equitable interest holders at the cost of increased uncertainty for all purchasers of later interests.

In *J & H Just,* Menzies J apparently agreed with the view of Griffith CJ in *Butler v Fairclough*,[135] but the other members of the court[136] agreed with Barwick CJ's reasoning. Windeyer J suggested that postponing an earlier equitable interest holder for failure to caveat would be 'to equate the noting of a caveat ... with the registration of a dealing.'[137] Barwick CJ's judgment has been criticised for its misleading description of *Abigail v Lapin*[138] as 'a case ... of an agent exceeding the limits of his authority but acting within its apparent indicia.'[139] However, *dicta* in several later High Court decisions have generally supported Barwick CJ's approach.[140]

134 (1917) 23 CLR 78, 97.
135 Ibid 91.
136 Windeyer and McTiernan JJ.
137 (1971) 125 CLR 546, 558.
138 [1934] AC 491.
139 (1971) 125 CLR 546, 554.
140 *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326, 342 (Mason and Deane JJ); *Leros Pty Ltd v Terara Pty Ltd* (1992) 174 CLR 407, 419 (Mason CJ, Dawson and McHugh JJ); *Breskvar v Wall* (1971) 126 CLR 376.

The conflict between these two approaches has not yet been resolved. Over the past 15 years both the New South Wales Supreme Court[141] and the Queensland Supreme Court[142] have held that the holder of an equitable interest under a contract of sale or equitable mortgage may be postponed to a later interest as the result of failure to lodge a caveat. In *Person-To-Person Financial Services v Sharari*, McLelland J criticised an earlier decision of Needham J in *Ryan v Nothelfer*[143] which had held that an unregistered second mortgagee was not postponed to a later mortgage for failure to lodge a caveat.[144] He commented that contrary decisions had not been cited to the judge in that case and that statements in *Heid* and *J & H Just* to the effect that failure to lodge a caveat would not 'of itself' lead to postponement, simply meant that it would not 'necessarily' do so.[145]

The clear implication of McLelland J's judgment was that a failure to caveat will postpone a prior equitable interest where the holder of the prior equitable interest took no other precautions to protect it. In reaching this conclusion he emphasised that it was 'the settled practice of competent solicitors in New South Wales' acting for mortgagees, to ensure either prompt registration of the mortgage or lodgment of a caveat.[146] Similarly, in *Australian Guarantee Corporation (NZ) Ltd v CFC Commercial Finance Ltd*,[147] the New Zealand Court of Appeal held that a first mortgagee who had not lodged a caveat for five days after the mortgage was created and had also failed to take possession of the duplicate certificate, was postponed to a later mortgagee (who interestingly had also taken five days to lodge a caveat).

Initially a similar approach was taken in Victoria. For example, in the 1974 case of *Osmanoski v Rose*,[148] Gowans J distinguished *J & H Just*[149] and followed the judgment of Griffith CJ in *Butler v Fairclough*[150] to hold that earlier purchasers under a contract of sale were postponed to a later purchaser who had entered the contract before the first purchasers had caveated. Gowans J justified his decision by referring to differences between the New South Wales legislation considered in *J & H Just* and the Victorian legislation. In his Honour's view, the lodging of a caveat in Victoria operated as a 'cloud' or a 'blot' which would present an obstacle to a registered proprietor proposing to deal with the land.[151]

141 *Person-To-Person Financial Services v Sharari* [1984] 1 NSWLR 745; *Finlay v R & I Bank of Western Australia Ltd* (1993) 6 BPR 13,232.
142 *Clark v Raymor (Brisbane) Pty Ltd [No 2]* [1982] Qd R 790.
143 (Supreme Court of New South Wales, Needham J, 18 February 1983); noted at [1983] NSW ConvR [55-119]; [1983] ANZ ConvR 165.
144 [1984] 1 NSWLR 745, 748.
145 Ibid.
146 Ibid. See also *Double Bay Newspapers Pty Ltd v AW Holdings Pty Ltd* (Supreme Court of New South Wales, Bryson J, 8 May 1996).
147 [1995] 1 NZLR 129.
148 [1974] VR 523 ('*Osmanoski*').
149 (1971) 125 CLR 546.
150 (1917) 23 CLR 78.
151 [1974] VR 523, 528.

In light of the distinction drawn between the New South Wales and Victorian provisions in *Osmanoski* it is ironic that the Victorian Supreme Court has subsequently shown considerable reluctance to postpone an earlier interest holder because of failure to caveat. In its 1990 decision in *Jacobs v Platt Nominees Ltd*,[152] the Appeal Division held that Mrs Jacobs' option to purchase land registered in the name of a family company controlled by her father and mother took priority over a purchaser under a later contract of sale. Mrs Jacobs had not caveated, because she did not want to offend her father, with whom she had a difficult relationship, although her solicitor had told her that he 'normally' lodged caveats to protect purchasers. Mrs Jacobs had relied on the fact that her father could not sell the land without the consent of her mother, who she believed would protect her interests. She had not been aware of the fact that her mother had been deceived into signing an authority enabling her son to act as her agent. The brother and the father had executed the contract of sale.

Unlike Gowans J in *Osmanoski*, the Appeal Division in *Jacobs* declined to distinguish *J & H Just* on the basis of differences between the New South Wales and Victorian legislation. Although the trial judge had found that it was 'normal and accepted practice'[153] to caveat to protect an option to purchase, the court declined to hold that Mrs Jacobs was postponed because of her failure to do so. In their view it was 'not reasonably foreseeable' that Mrs Jacobs' failure to lodge a caveat would expose herself or others to the risk of a sale, presumably because she believed her mother was 'on her side' in the family conflict.[154] The case could be regarded as turning on its particular facts, so that a different result could be reached where it was not reasonable for an equitable interest holder to assume that the land could not be sold. The court commented that '*Just's Case* does not exclude the possibility that mere failure to lodge a caveat may suffice providing all other relevant circumstances are considered.'[155] Despite this concession, the court placed little emphasis on the failure to caveat, choosing rather to emphasise the protection of the holder of the prior interest.

Estoppel was the alternative basis for the trial judge's decision in *Jacobs*. It has been seen that estoppel is sometimes relied on to justify postponement of an earlier equitable interest to a later one, although the better view is that such priority conflicts between equitable interests require courts to decide which is the better equity. In *Jacobs*, the Appeal Division held that the second purchaser could not rely on estoppel because it was necessary to show that it had suffered a detriment. Here there was no detriment as the second purchaser would be entitled to rescind its contract and obtain return of its deposit. Where a registered proprietor creates competing equitable interests, the later interest holder will almost always have contractual rights against the registered proprietor. But the ability to recover damages has never been regarded as relevant to the priority issue which is concerned with entitlement to the land. If this principle were

[152] [1990] VR 146 ('*Jacobs*').
[153] Ibid 158.
[154] Ibid 160.
[155] Ibid 151.

applied, a second equitable interest could rarely prevail over the earlier interest, regardless of the conduct of the first interest holder.

Jacobs was followed by Tadgell J in *Avco Financial Services Ltd v Fishman*.[156] In that case Tadgell J held that the State Bank's unregistered second mortgage over the Fishmans' land took priority over the plaintiff's unregistered third mortgage. Before granting the loan, the plaintiff had searched the Fishmans' title and was aware of the bank's registered first mortgage. The plaintiff had written to the bank asking whether the bank would consent to the registration of the second mortgage. When this letter was not answered, the plaintiff had a telephone conversation with a bank employee, and was informed of the Fishmans' liability under the first mortgage, but was not advised that the bank had lent the money on security of a second mortgage.

Tadgell J held that the bank's second mortgage was not postponed because of its failure to caveat, since the bank had adequately protected itself by taking possession of the duplicate certificate of title. He expressed doubt about whether *Osmanoski* was correct in light of the Full Court's decision in *Jacobs*, but in any case regarded it as distinguishable. In his view the plaintiff had been misled not by the absence of a caveat, but by its reliance on information provided by the bank in a telephone conversation, which he characterised as evidence of 'sloppy informality in commercial dealings'.[157] Again his judgment emphasised the protection of the holder of the earlier interest rather than the protection of the purchaser.

C *Reform Proposals*

An examination of the rules dealing with competition between equitable interests in Torrens system land reveals considerable uncertainty. While it is clear that a positive act of 'arming' may lead to postponement of an earlier equitable interest to a later one, the effect of a 'mere' failure to caveat is not yet clear. Recent Victorian cases suggest that courts are placing more emphasis on the protection of the holder of the earlier interest than on ensuring the protection of purchasers who transact on the faith of the register. What principles should govern priority conflicts between unregistered interests? In its report on priorities the Victorian Law Reform Commission recommended that:

> [c]aveats should determine priority. Lodgment of a caveat before another person lodges a caveat or seeks registration should give priority to the [earlier] caveator. Failure to lodge a caveat before another person registers or protects their interest should postpone the interest.[158]

This principle is consistent with Torrens' original goals, though it provides greater recognition to equitable interests than he may have originally intended. Robert Torrens was an early economic rationalist. His reforms were designed to encourage the purchase and sale of land by reducing the cost of real estate

[156] [1993] 1 VR 90.
[157] Ibid 95.
[158] Victorian Law Reform Commission, *Priorities*, Report No 22 (1989) 12.

transactions. Perhaps the most important reason for conferring priority on the person who caveats or registers is that this creates an incentive to do so. In turn this contributes to the accuracy of the register and may reduce the extent to which registered proprietors can behave dishonestly. It is likely to be cheaper to require an earlier equitable interest holder to caveat, than to require all persons purchasing interests in land to ensure that no prior interest has been created. In law and economics parlance, the holder of the earlier interest is the cheaper loss avoider.[159]

The Law Reform Commission's recommendations amount to a proposal for the caveat system to be converted into a system of interest recording similar to the deeds registration schemes which are still used to register instruments relating to land not under the operation of the Torrens statutes.[160] As noted by the Alberta Law Reform Institute, an interest recording system which confers only priority can co-exist in the Torrens scheme with a registration system which confers both ownership and priority.[161] Registration serves those interests in respect of which the state can guarantee title, while the interest recording or caveat system allows the holders of other interests to protect their priority. In several Canadian jurisdictions the principle is well-established that lodgment of caveats determines priority, and the Singapore *Land Titles Act* 1993 includes a provision to the same effect.[162]

If the Law Reform Commission's recommendations were implemented, a number of subsidiary issues would arise. First, it would be necessary to provide an exception to this principle to deal with cases of fraud.

Secondly, the question would arise whether there should be any exceptions to the principle that priority should be decided by reference to the order in which parties caveat in all circumstances. There is a relationship between the approach taken on this issue and the approach taken to the definition of caveatable interests. The suggested priority principle could only operate fairly if a broad view were taken of the nature of caveatable interests along the lines recommended in Part II above.

Thirdly, even if caveatable interests were defined broadly, there would be some cases where it might be regarded as inappropriate to determine priority by the order of caveating. The most obvious example is where the holder of the earlier interest had no practical opportunity to caveat, for example because he or she was not aware of existence of their interest. This difficulty is likely to arise in the context of constructive trusts based on common intention or on the *Baumgartner*

159 Duggan, above n 1, 247–8.

160 *Conveyancing Act* 1919 (NSW) Pt XXIII; *Property Law Act* 1958 (Vic) Pt 1; *Property Law Act* 1974 (Qld) ss 241–9; *Registration of Deeds Act* 1935 (SA); *Registration of Deeds Act* 1856 (WA); *Registration of Deeds Act* 1935 (Tas).

161 Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta*, Report No 69 (1993) vol 1, 33.

162 *Land Title Act*, RSBC 1979, c 219, s 31; *Real Property Act*, RSM 1988, c R30, s 155; *Land Titles Act*, RSA 1980, c L-5, s 145. Section 49(1) of the Singapore *Land Titles Act* 1993 (Cap 157) provides that: '[e]xcept in the case of fraud, the entry of a caveat protecting an unregistered interest in land under the provisions of this Act shall give that interest priority over any other unregistered interest not so protected at the time when the caveat was entered.'

principle.[163] In such cases there is tension between providing individual justice through the application of equitable principles and maintaining a cheap, simple conveyancing system which protects purchasers. The question is whether the policy goal should be to protect third parties dealing with land, or to protect de facto partners or spouses with interests under constructive trusts (who will often be women who have made substantial indirect contributions to family resources). For the purposes of this paper it is sufficient to identify the problem without resolving it. One way of protecting potential claimants under constructive trusts would be to create an exception to indefeasibility covering the interests of spouses or de facto partners in occupation of land with their partners. This would require purchasers to protect themselves by ensuring that the spouses of registered proprietors are parties to all dealings with the land.

Finally, it would also be necessary to decide whether, in a conflict between equitable interests, failure to caveat should result in postponement only if the later interest holder can prove that he or she has been misled by the inaction of the holder of the earlier interest. In our view, this matter should not be regarded as relevant. Simplicity of conveyancing will only be assured by a clear priority rule, which obviates the need to examine the conduct of the holder of the later interest.

IV THE *IN PERSONAM* EXCEPTION TO INDEFEASIBILITY

The principle of indefeasibility is the linchpin of Torrens' scheme for the protection of purchasers who transact in reliance on the register. It has long been recognised that prior interest holders may nevertheless assert their claims by bringing suit against the registered proprietor personally.[164] The courts have found it necessary to impose limits on the types of claims that may be brought *in personam*, to ensure that purchasers retain a reasonable measure of protection against prior interests.

In setting the limits on the types of *in personam* claims to be allowed, courts have placed weight on evaluation of the registered proprietor's personal conduct. This approach has not produced in the operation of the *in personam* exception the degree of inconsistency seen in the adjudication of priority contests between unregistered interests. In the priorities area, evaluation of the merits of competing interest holders is complicated by differences of judicial opinion on the function of caveats and the precautionary steps expected of prudent purchasers and interest holders. In the case of *in personam* claims the issue is simpler. The courts are concerned to exclude claims which, though seeking an *in personam* remedy, do not arise from some transaction or conduct attributable to the registered proprietor personally.

[163] *Baumgartner v Baumgartner* (1987) 164 CLR 137: see further above Part II(B)(3)(a).

[164] *Boyd v Mayor of Wellington* [1924] NZLR 1174; *Barry v Heider* (1914) 19 CLR 197, 214 (Isaacs J); *Tataurangi Tairuakena v Mua Carr* [1927] NZLR 688, 702; *Frazer v Walker* [1967] 1 AC 569.

A *Is the* In Personam *Exception Inconsistent with the Principle of Indefeasibility?*

Judicial discourse on the relationship between indefeasibility and the *in personam* exception is conducted at two levels, reflecting a distinction between form and substance. At the formal level, the exception poses no conflict with the indefeasibility principle, for an *in personam* remedy by definition is not one which operates upon the registered title directly. Only if fraud can be proved against the registered proprietor is the claimant entitled to seek rectification of the register.[165] Rectification is a remedy *in rem*, operative against the property itself.[166] It differs from an *in personam* right which is enforceable against the person of the registered proprietor, requiring him or her to deal with the property in accordance with the court's directions. The court may order the reconveyance of the property to the claimant, but until the certificate is amended the title of the registered proprietor is good against the world.[167]

A classic statement of the formal approach to inconsistency is the following passage from the judgment of Barwick CJ in *Breskvar v Wall*:

> It is really no impairment of the conclusiveness of the register that the proprietor remains liable to one of the excepted actions any more than his [*sic*] liability for 'personal equities' derogates from that conclusiveness. So long as the certificate is unamended it is conclusive and of course when amended it is conclusive of the new particulars it contains.[168]

The formal approach plays down the potential for inconsistency by focusing on the indirect manner in which the title is impeached. Its inadequacy lies in its failure to recognise that to admit certain kinds of *in personam* claims against a registered proprietor would seriously undermine the security of registered titles generally.

The scope for substantive inconsistency with the policy of the Torrens scheme assumed greater importance following judicial endorsement of the principle of immediate indefeasibility. The competing theories of deferred and immediate indefeasibility presented the courts with a choice between providing security of title to the 'rare forgery victim'[169] or maintaining the security of all registered titles.[170] Under a regime of deferred indefeasibility, purchasers acquiring a title

165 Harrison suggests that rectification may be available only where the fraud is such as to make the dealing void on general law principles. Where the dealing is merely voidable, an *in personam* order is appropriate: W Harrison, *Cases on Land Law* (2nd ed, 1965) 613.

166 Rosemary Langford, 'The *In Personam* Exception to Indefeasibility' in Rosemary Langford and Julie Dodds Streeton, 'Aspects of Real Property and Insolvency Law' (Research Paper No 6, Adelaide Law Review, 1994) 91, 121–2.

167 Ibid. It makes no difference that a court enforcing an *in personam* right may make an order vesting title in the claimant, in default of the registered proprietor's compliance with an *in personam* order: *Breskvar v Wall* (1971) 126 CLR 376, 384–5 (Barwick CJ). On the difference between proceedings *in rem* and *in personam* see *Wik Peoples v Queensland* (1994) 120 ALR 465 (Fed Ct). The formalist distinction between *actions in rem* and *in personam* has produced a considerable degree of confusion in this area.

168 (1971) 126 CLR 376, 385.

169 Warrington Taylor, 'Scotching *Frazer v Walker*' (1970) 44 *Australian Law Journal* 248, 251.

170 Ronald Sackville, 'The Torrens System — Some Thoughts on Indefeasibility and Priorities' (1973) 47 *Australian Law Journal* 526, 531.

without fraud remained at risk of having their title impugned until the moment they transferred it to a new purchaser who in turn became registered.[171] To guard against the risk of some hidden defect that could be used to impeach their title, purchasers would have to make extensive inquiries.

But these consequences would frustrate an important objective of the Torrens system — that purchasers should be relieved of the need to undertake costly and time-consuming investigations.[172] For policy reasons courts preferred the doctrine that a purchaser innocent of fraud enjoyed upon registration a title that could not be impeached even if it were procured by means of a void transaction or instrument. Better to leave the 'rare forgery victim' to pursue monetary compensation than to place all registered titles at perpetual risk.[173]

The adoption of a regime of immediate indefeasibility would little avail purchasers if their title could be impeached by *in personam* actions founded on nothing more than the invalidity of the instrument or underlying transaction. The practical effect of admitting such claims would be similar to that produced by deferred indefeasibility. A registered proprietor would have to make enquiries to eliminate the possibility of any defect that might invalidate the transfer. This would increase the costs and delays of conveyancing transactions, and leave the registered title insecure.

B *Restricting the Class of Admissible Claims*

Cognisant of the potential for the *in personam* exception to outflank the principle of indefeasibility, courts have restricted the class of claims that may be invoked against a registered proprietor. *In personam* claims are admitted where they arise out of a transaction entered into by the registered proprietor, or seek to enforce obligations arising out of the registered proprietor's own conduct. But judges have steadfastly refused to admit 'broad spectrum' claims — those claims potentially able to be maintained against anyone who happens to register an interest in the land. The common element in these claims is that they are alleged to arise from the invalidity of the underlying transaction rather than from conduct or dealings attributable to the registered proprietor personally.

The implication is that not all claims known at general law may be maintained against a registered proprietor.[174] Were it not for the limitations imposed by the Torrens statutes, an *in personam* claim could conceivably be constructed in virtually any case where a claimant has been deprived of his or her title through registration of a forged or otherwise void instrument. Robinson points out that at general law a forged or void instrument was ineffective to vest and divest title, and equity had no need to intervene to provide a remedy.[175] Despite the lack of a general law remedy to set aside a forged instrument, he argues that under the

[171] G Hinde, 'Indefeasibility of Title Since *Frazer v Walker*' in G Hinde (ed), *The New Zealand Torrens System Centennial Essays* (1971) 33, 41.

[172] This objective was expressed in *Gibbs v Messer* [1891] AC 248, 254 (Lord Watson).

[173] Sackville, 'The Torrens System', above n 170, 531.

[174] *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, 43–4 (Mahoney JA).

[175] Robinson, *Transfer of Land in Victoria*, above n 15, 36–7.

Torrens scheme a divested owner has a statutory right to bring an action *in personam*. The cause of action arises from the fact that it is the administrative act of the Registrar that confers and takes away title.[176]

Another possible line of argument is that registration of a void instrument was effective to transfer only the legal estate, leaving the equitable estate vested in the former registered proprietor. The newly registered proprietor would hold as constructive trustee for the other, and be subject to equitable intervention to compel the retransfer of the legal estate.[177]

These arguments, while supported by general law principles, are foredoomed because they are founded solely on the invalidity of the transaction. A number of authorities have held that the fact that registration was procured by a forged instrument does not suffice to found an *in personam* claim enforceable against a registered proprietor.[178] In *Vassos v State Bank of South Australia*[179] the plaintiffs sought declaratory and other relief against a bank that had in good faith registered a mortgage bearing the forged signatures of the plaintiffs. Having found no fraud on the part of the mortgagee, Hayne J proceeded to reject the plaintiffs' *in personam* claim against the mortgagee for the following reasons:

> If, as the plaintiffs contended, the fact of lack of assent of the mortgagor gives an *in personam* right to a discharge, then every mortgagor whose signature was forged would be entitled to compel the mortgagee to discharge the mortgage on the basis that the mortgagee was not entitled to demand any more than had been agreed to be paid and the 'mortgagor' had never agreed to pay anything. That flies in the face of indefeasibility of title for without any fault of any kind on the part of the mortgagee he [*sic*] could always be compelled to discharge his security and his title obtained by registration could always be set aside at the suit of the defrauded party.[180]

It is respectfully submitted that this reasoning is correct. The plaintiffs' contention was a 'broad spectrum' claim that could potentially deprive any hapless purchaser or mortgagee of the security conferred by the doctrine of indefeasibility. *In personam* relief under the Torrens system should be confined to actions arising from transactions entered into by the registered proprietor (eg a contract for the sale of the land) and obligations imposed upon him or her by reason of personal conduct (eg a constructive trust founded on an undertaking to recognise and protect unregistered interests of a third party). To confine the exception in this way serves to reassure all purchasers that their title will not be defeasible unless they act in breach of a personal obligation. At the same time it allows for

[176] Ibid. This line of reasoning found favour with Gray J in *Chasfild v Taranto* [1991] 1 VR 225, 235–6, although the plaintiff actually succeeded under the fraud exception.

[177] Langford, above n 166, 153–4.

[178] *Mayer v Coe* [1968] 2 NSWR 747, 754 (Street J); *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, 45 (Mahoney JA), 51–2 (Meagher JA); *Vassos v State Bank of South Australia* [1993] 2 VR 316, 332 (Hayne J); *Story v Advance Bank Australia Ltd* (1993) 31 NSWLR 722, 739 (Mahoney JA); *Garofano v Reliance Finance Corporation Ltd* (1992) 5 BPR 11,941, 11,942 (Mahoney JA; Priestley and Meagher JJA concurring); *Grgic v ANZ Banking Group Ltd* (1994) 33 NSWLR 202, 222 (Powell JA; Meagher and Handley JJA concurring). Cf *Chasfild v Taranto* [1991] 1 VR 225, 235–6.

[179] [1993] 2 VR 316 ('*Vassos*').

[180] Ibid 332. See also *Public Trustee v Paradiso* (1995) 64 SASR 387.

equitable intervention to prevent registered proprietors making unconscientious use of title to escape their legitimate obligations.

C *An Unwarranted Extension: The Public Authority Cases*

The refusal to admit claims based on the fact of invalidity has been extended to cases where a public official or authority becomes registered as the owner of land pursuant to an unlawful exercise of statutory power. Courts have generally followed *Boyd v Mayor of Wellington*,[181] declining *in personam* relief on the assumption that to allow the claim would frustrate the operation of immediate indefeasibility. In *Palais Parking Station Pty Ltd v Shea*,[182] a public official had obtained registration by a purported exercise of powers of compulsory acquisition. In fact the official was mistaken in his belief that he was authorised by statute to acquire the land. The deprived proprietor unsuccessfully sought to raise an *in personam* claim, arguing that it was unconscionable for the official to retain the land once he became aware of the invalidity. King CJ observed that to admit such a claim would render the doctrine of immediate indefeasibility 'virtually meaningless'.[183]

The refusal of *in personam* relief in this class of case has been criticised by several commentators.[184] The arguments are finely balanced. An *in personam* claim brought by the deprived proprietor will usually be founded on the invalidity of the administrative action that preceded registration. To allow the claim would appear to circumvent the principle that registration is effective to confer title even if procured by a void instrument. In this respect the claim is open to similar objections to those expressed by Hayne J in *Vassos* against admitting *in personam* claims based purely on the fact of forgery or lack of assent.

Beyond that point the analogy with the forgery cases breaks down. Hayne J drew the line at allowing *in personam* relief against a faultless purchaser who unwittingly registers a forged instrument. This objection is not relevant in cases where the *in personam* claim arises from a wrongful action perpetrated by the registered proprietor itself.[185] It is not the invalidity of the instrument but the wrongful expropriation of property through an illegal exercise of power that founds an *in personam* claim against the public authority.

The forgery case can also be distinguished on policy grounds. To allow *in personam* relief against a title procured by an *ultra vires* action would not threaten the security of registered titles generally. The risk is confined to regis-

[181] [1924] NZLR 1174.

[182] (1980) 24 SASR 425.

[183] Ibid 430 (Williams J concurring).

[184] Bradbrook, McCallum and Moore, *Australian Real Property Law,* above n 10, 4-46, fn 256; Hinde, above n 171, 75; Douglas Whalan, 'The Torrens System in New Zealand — Present Problems and Future Possibilities' in G Hinde (ed), *The New Zealand Torrens System Centennial Essays* (1971) 258, 277; Langford, above n 166, 147–54.

[185] An argument used by Mahoney JA in his dissenting judgment in *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537, 564, seeking to distinguish *Boyd v Mayor of Wellington* on the ground that the invalidity of the proclamation there was not attributable to an act of the registered proprietor. The majority dismissed the claim on the ground that there was no invalid exercise of power.

tered proprietors who happen to be public authorities who procured their title by an exercise of administrative power. Any purchaser from the public authority would take free of the *in personam* claim.[186] As Whalan points out, there is nothing in the legislative scheme that should prevent the restoration of title to a proprietor deprived of it by unauthorised statutory action.[187] The arguments from public policy all indicate the opposite conclusion. To allow a public authority to retain property obtained by an unauthorised exercise of power offends restitutionary principles of unjust enrichment and administrative law principles of accountability and the rule of law.[188]

D *Conclusions on the* In Personam *Exception*

The formal approach to inconsistency serves a useful purpose in explaining how the principle of immediate indefeasibility can coexist with the exception for claims allowed by the courts. Its utility is limited unless supplemented by a recognition of the potential for substantive inconsistency between the general principle and its exception. While some judges still incline to formalism,[189] recent statements by the High Court in *Bahr v Nicolay [No 2]*[190] have reaffirmed that the *in personam* jurisdiction must not be allowed to circumvent the legislative policy of the Torrens statutes.

Some *in personam* claims can readily be identified as inconsistent with the statutes. For example, any claim based wholly or substantially on general law doctrines of notice would conflict with the clear legislative intent expressed in the 'notice' provisions. As a second example, to allow a deprived former proprietor to bring an action in ejectment against an innocent purchaser whose registered title was procured by forgery would contravene the 'ejectment' provisions.[191]

The identification of inconsistency is more subtle where the conflict is one of substance rather than form. Any test of inconsistency between the Torrens provisions and the *in personam* exception must be founded on an understanding of the policy of the scheme. Courts have generally recognised that it would be subversive of the indefeasibility provisions to allow an innocent purchaser's

186 Robinson, *Transfer of Land in Victoria*, above n 15, 40–1.

187 Whalan, above n 10, 277.

188 The rule of law is a multi-faceted concept, one aspect of which is the requirement that any public authority interfering with the rights of citizens must be able to point to some lawful authority for its action: Margaret Allars, *Introduction to Australian Administrative Law* (1990) 14–15. It finds expression in various administrative law grounds of review, eg review for *ultra vires* action and want of jurisdiction. Accountability for the exercise of power is one of its concomitants: ibid 18.

189 See, eg, *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, 45 (Mahoney JA).

190 (1988) 164 CLR 604, 613 (Mason CJ and Dawson J), 637–8 (Wilson and Toohey JJ), 652–3 (Brennan J).

191 *Frazer v Walker* [1927] 1 AC 569, 585 (Lord Wilberforce). Cf *Chasfild v Taranto* [1991] 1 VR 225, 235–6 suggesting that an action in ejectment might be available against a registered purchaser who had gone into possession.

registered title to be threatened by *in personam* actions founded on nothing more than the fact that the registration was procured by forgery.[192]

The test of substantive inconsistency is a necessary one, but has been incorrectly applied in the 'public authority' line of cases. The security of registered titles generally would not be threatened by allowing *in personam* actions against public authorities whose registered title was obtained by unlawful administrative action. The exception for *in personam* claims injects a necessary element of discretionary flexibility into the indefeasibility regime, and is a safeguard against the oppressive or unconscientious use of registered title.[193] To deny relief without sufficient policy justification is as grave an error as to allow enforcement of general law rights that conflict with the legislative scheme.

V RECONCILING TORRENS' GOALS WITH EQUITY — A SUMMARY

Since Torrens did not foresee the continuing vitality of equitable interests, his scheme gave little thought to how to reconcile the principle of the conclusive register with the need to protect holders of unregistered interests. In consequence, judges have been left to resolve the conflict and to determine the guiding policy for themselves. In the area of caveatable interests some judges have taken a doctrinaire approach, assuming that the policy of the scheme denies the protection of a caveat to unregistrable interests. Uncertainty about the purpose of the caveat system has also led to disagreement about whether failure to lodge a caveat should postpone the holder of a prior unregistered interest to the holder of a later one.

We have proposed that a practical approach should be taken to resolving these issues. We have argued that the extension of caveat protection to unregistrable interests can be justified on grounds of fairness and commercial convenience, avoiding the need for more costly methods of securing interests and facilitating negotiated settlement of potentially litigious claims. To encourage a more widespread use of the caveat procedure for both registrable and unregistrable interests would promote the 'mirror principle', giving purchasers a truer picture of the state of the registered proprietor's title. Consistently with this enhanced role for the caveat system, failure to caveat an unregistered interest should generally lead to postponement in favour of later interests. These proposals adjust the balance in favour of protection of purchasers by demanding that the holders of unregistered interests use the available statutory facility to protect themselves.

Unregistered interests also present themselves in the form of *in personam* actions against the registered proprietor. Courts have found it easier to strike a balance here by admitting only those actions which arise from some transaction or conduct attributable to the registered proprietor personally, while excluding

[192] In *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, 44–5 Mahoney JA would have preferred to take a different view, but conceded that the proposition had been authoritatively established.

[193] Samantha Hepburn, 'Concepts of Equity and Indefeasibility in the Torrens System of Land Registration' (1995) 3 *Australian Property Law Journal* 41, 50.

those which are in substance founded on nothing more than the invalidity of the transaction or instrument by which registration was procured. While this approach has generally worked well, it should not be extended to cases where a public authority procures registration by an *ultra vires* exercise of statutory power. The protection of persons transacting on the faith of the register is not promoted by an immunity which is available only to public authorities misusing their powers.