The Australian Torrens system principle of immediate indefeasibility: Is it ‘fit for purpose’ for the 21st century?

Penelope Jane Carruthers
BJuris, LLB (Hons), BA, LLM (Dist)

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ABSTRACT

All Australian jurisdictions have a system of land title registration known as the Torrens system. The principal aims of the Torrens system are to ensure that a person’s registered title to land is secure (‘security of title’) and that purchasers seeking to acquire an interest in land need only search the Register to discover all facts relevant to title (‘security of transaction’). In consensual land transactions, these two aims are achieved. However, in other situations, these aims are mutually incompatible. A person may become the registered proprietor of land unaware that the registration was pursuant to a non-consensual transaction based on a forgery or other defective instrument. As between the former and latter registered proprietor, who is to be entitled to the land? Security of title favours the former, but security of transaction favours the latter. This conundrum is resolved in land title registration systems by the application of rules, referred to in this thesis as ‘bijuralism rules’. The bijuralism rule adopted in the Torrens system is the principle of ‘immediate indefeasibility’: the non-fraudulent registered proprietor obtains an immediately indefeasible title regardless of the fact registration was pursuant to a void instrument.

The application of immediate indefeasibility produces unfair outcomes for the prior registered proprietor who is deprived of his or her land by a non-consensual transaction. The injustice of this outcome inevitably leads one to question the continuing acceptability of immediate indefeasibility as the Torrens system bijuralism rule. This prompts the overarching research question in this thesis: Is the Australian Torrens system principle of immediate indefeasibility ‘fit for purpose’ for the 21st century?

This question is both topical and timely. A number of comparable jurisdictions are currently engaged in comprehensive reviews of their bijuralism rules. In addition, Australia has recently introduced the Electronic Conveyancing National Law (‘ECNL’). Consequently, there is heightened awareness of property law reform, particularly with regards uniform land laws. A comprehensive evaluation of immediate indefeasibility, encompassing both doctrinal and comparative law methodologies, is therefore warranted. Accordingly, this thesis explores the overarching question by seeking answers to three subsidiary questions: How well does the principle of immediate indefeasibility compare with the bijuralism rules of England and Wales? Is immediate indefeasibility always applied consistently and coherently in the case
law? Will the introduction of e-conveyancing affect the ongoing fitness for purpose of the Torrens principle of immediate indefeasibility? These questions are explored in this thesis through a series of 5 published articles.

In light of the comparative and doctrinal analysis and the anticipated benefits of the ECNL, this thesis concludes that yes, the Torrens system principle of immediate indefeasibility is indeed ‘fit for purpose’ for the 21st century.
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Chapter One: Introduction
1.1 Introduction

Laws governing the ownership and transfer of interests in land are critically important to society. Land is, after all, ‘the essential base of all social and commercial interaction’,¹ it is ‘the key to human existence’² and it is finite, ‘we now have as much of this resource as ever will exist’.³ As Edgeworth has commented, ‘[r]ights over land are therefore among the most fundamental of all legal rights, underpinning individual flourishing, the stability of relationships, and broader social cohesion’.⁴ In order to secure and support these rights, an effective land administration system is required.

In all Australian jurisdictions a system of land title registration, known as the Torrens system, has been adopted. One of the main reasons for the introduction of the Torrens system was to overcome the difficulties inherent in both the unregulated private conveyancing system and the deeds registration system. Under the private conveyancing system, whenever a purchaser bought land, he or she was required to search all the documents and deeds making up the chain of title commencing with the original Crown grant. This process was complex, expensive, time-consuming and costly.⁵ Indeed, even with a thorough search of the chain, the purchaser could never be absolutely sure of obtaining the title to the land that was purportedly being sold. A deed in the chain of title may have been void or a deed creating a legal interest in the land may have been removed from the chain. In the former situation, the purchaser would not obtain any title to the land⁶ and, in the latter situation; the purchaser would usually take the land subject to the earlier created interest.⁷ In addition, under the doctrine of constructive notice, a purchaser may also be bound by prior equitable interests of which the purchaser was unaware and which were not revealed by a search of the chain of title.

⁴ Brendan Edgeworth, Butt’s Land Law (Thomson Reuters, 7th ed, 2017) [1.10].
⁵ Anthony Moore, Scott Grattan, Lynden Griggs, Bradbrook, MacCallum and Moore’s Australian Real Property Law (Thomson Reuters, 6th ed, 2016) [4.05].
⁶ Under the principle of nemo dat quod non habet, translated as ‘no one gives what he does not have’.
⁷ Most Australian jurisdictions introduced statutory provisions to reduce the length of the search required of purchasers. See, Moore et al, above n 5, [2.530]-[2.535].
The position for purchasers improved slightly with the introduction of deeds registration legislation which enables deeds and other documents relating to land to be registered. Under this system, provided the purchaser registers his or her document, the purchaser’s interest will have priority over unregistered or subsequently registered instruments. However, registration of a document under the system does not affect the validity of the document. So, for example, if a forged deed of conveyance is registered, the deed remains void and ineffective to pass any interest in the land. A deeds registration system is therefore referred to as a ‘negative’ system: registration does not confer title and the state does not guarantee the accuracy of the register. As with private conveyancing, even with a search of the register, a purchaser cannot be sure that all the registered documents are valid and, once again, the purchaser cannot be assured of obtaining a certain and secure title.

The defects in both the private conveyancing and deeds registration systems were described by Sir Robert Torrens as being due to the ‘dependent nature of titles’. Torrens believed the solution to this problem was to set up registered titles that were independent of previous dealings with the land so that registration ‘would have the effect of making the new holder a fresh grantee holding directly from the Crown’. This system of ‘title by registration’ was first introduced in Torrens’ own state of South Australia in 1858 and similar, though not identical, legislation was adopted in all other Australian jurisdictions during the latter part of the 19th century.

8 New South Wales introduced the first deeds registration legislation: the Registration of Deeds Act 1825 (NSW). Similar registration of deeds legislation was passed in all other States. Ibid, [2.600].
9 Ibid, [2.600]-[2.655].
11 Torrens has been described by Whalan as ‘the most influential person in the introduction of registration of titles to land in Australasia’, Douglas Whalan, The Torrens System in Australia (Law Book Co Ltd, 1982) 3.
12 Sir Robert Torrens, The South Australian System of Conveyancing by Registration of Title (1859), 8, quoted in Whalan, ibid, 14.
13 Whalan, ibid, 15.
14 This expression was used by Barwick CJ in Breskvar v Wall (1971) 126 CLR 376, 385.
15 Real Property Act 1858 (SA).
16 The current Torrens statutes are: Land Titles Act 1925 (ACT); Real Property Act 1900 (NSW); Land Title Act 2000 (NT); Land Title Act 1994 (Qld); Real Property Act 1886 (SA); Land Titles Act 1980 (Tas); Transfer of Land Act 1958 (Vic); Transfer of Land Act 1893 (WA). For convenience, the system of land title registration introduced under the Torrens statutes is referred to in this thesis as the Australian Torrens system, or simply, the Torrens system. Versions of the Torrens model have been adopted in a number of jurisdictions throughout the world; however, these jurisdictions are not discussed in this thesis. See O’Connor, above n 10, for further discussion.
Unlike the registration of deeds system, the Torrens system is ‘a “positive” system ... in which the state warrants that the rights shown on the register are valid and effective according to their terms’.\(^{17}\) It is registration itself that confers and transfers title regardless of the validity of the underlying instrument that is registered. A purchaser may therefore confidently rely on the information contained in the register and is not required to search the vendor’s chain of title. However, positive systems are ‘bijural’ in the sense that they straddle two systems of law: the law set out in the relevant Torrens legislation and the ordinary property law rules.\(^{18}\) In practice, most instruments lodged for registration are valid documents and so bijuralism is not problematic. Difficulties arise, however, where there is a ‘bijural inaccuracy’,\(^{19}\) that is, where the instrument lodged for registration is invalid under the property rules, and therefore ineffective to pass an interest, yet according to the positive title registration system, the instrument is effectively validated. The classic bijuralism scenario is as follows: A is the registered proprietor of land and B, pursuant to an invalid instrument, becomes the registered proprietor of A’s interest.\(^{20}\) Assuming both A and B are innocent, who, of A or B, is to be preferred and entitled to the land?

Resolving this problem is an intractable and difficult bijuralism issue. As Baird and Jackson note, ‘we can protect a later owner's interest fully, or we can protect the earlier owner's interest fully. But we cannot do both’.\(^{21}\) Throughout the world, different title registration systems resolve this problem differently. In negative title registration systems, like Germany, bijuralism is simply not a problem. A bona fide purchaser of land in Germany is protected from defects in the register, a ‘register error’, but not from defects in the deed under which the purchaser is registered, a ‘transactional error’.\(^{22}\) Accordingly in Germany, under the classic scenario, B is removed from the register and A is restored to the register as owner. However, positive title registration systems, as in England and Wales and the Torrens system, need specific rules to resolve bijural inaccuracy. For the purposes of this thesis, the rules adopted by a particular jurisdiction to resolve bijural inaccuracy are referred to as ‘bijuralism rules’. The rules devised in England and Wales are complex and are discussed in detail in

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\(^{17}\) O’Connor, above n 10, 195.

\(^{18}\) Ibid.

\(^{19}\) Ibid, 196.

\(^{20}\) The instrument may be invalid for various reasons including forgery, \textit{non est factum} or lack of capacity.


\(^{22}\) §892 BGB, referred to in Scottish Law Commission, \textit{Land Registration: Void and Voidable Titles} Discussion Paper No 125, 2004 [1.12]. For a discussion of the difference between register and transactional errors, see ibid, [3.16]-[3.17].
Chapter 3. In essence, and at the risk of oversimplification, if an invalid instrument is registered this constitutes a ‘mistake’ and the court, at its discretion, may correct the mistake in favour of the former proprietor unless the proprietor under the mistaken registration has taken possession. In either case, whoever loses title to the land will be entitled to an indemnity from the state.

In contrast to the bijuralism rules in England and Wales, the rule in Australia is strikingly straightforward. In 1971, the High Court in Breskvar v Wall,23 following an earlier Privy Council decision in Frazer v Walker,24 adopted a robust bijuralism rule of immediate indefeasibility: the non-fraudulent registered proprietor, B, obtains an immediately indefeasible title despite the fact registration was pursuant to an invalid instrument. The former proprietor, A, who has been deprived of his or her interest in the land, may seek compensation under the Torrens legislation. Immediate indefeasibility therefore favours ‘dynamic’ security which ‘allows assets to pass securely to new owners’25 and promotes simple, efficient and secure land transactions. However, this is at a significant cost to ‘static’ security that ensures that assets are securely held and that owners are not deprived of their property without their consent.26 On one view, immediate indefeasibility appears very favourable to purchasers. However, a registered purchaser’s title under the Torrens system is itself tenuous. It may at any moment be obliterated by the subsequent registration of a non-consensual and invalid instrument in favour of an innocent purchaser.27 A registered proprietor’s title may also be challenged on the grounds of various exceptions to indefeasibility. These exceptions are discussed in Chapter 2 and include: fraud by the registered proprietor in becoming registered; in personam claims that may be brought against a registered proprietor and statutory provisions that have the effect of overriding indefeasibility.

Recently, a number of countries have been engaged in comprehensive reviews of their title registration systems and, in particular, their bijuralism rules.28 This is not surprising. The

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23 Breskvar v Wall (1971) 126 CLR 376.
24 Frazer v Walker [1967] 1 AC 569. This Privy Council decision was on appeal from New Zealand.
25 O’Connor, above n 10, 198.
26 O’Connor, above n 10, 198.
27 This recognition that the registered purchaser’s title may be destroyed by the registration of a subsequent forged instrument was noted by Warrington Taylor in ‘Scotching Frazer v Walker’ (1970) 44 Australian Law Journal 248, 251-253.
importance of ‘doing justice’ and ensuring a fair and correct balance between static and dynamic security is an ongoing enquiry that is still ‘very much alive’.  

1.2 Research questions

The application of immediate indefeasibility to resolve bijural inaccuracy produces unfair outcomes for the prior registered proprietor who is deprived of his or her interest in land by a non-consensual transaction. The injustice of this outcome inevitably leads one to question the continuing acceptability of immediate indefeasibility as the bijuralism rule for the Australian jurisdictions. Accordingly, the overarching research question posed in this thesis is:

Is the Australian Torrens system principle of immediate indefeasibility ‘fit for purpose’ for the 21st century?

In order to answer this question this thesis seeks answers to three subsidiary questions:

(1) How well does the principle of immediate indefeasibility compare with the bijuralism rules of England and Wales?

(2) Is immediate indefeasibility always applied consistently and coherently in the case law?

(3) Will the introduction of e-conveyancing affect the ongoing fitness for purpose of the Torrens principle of immediate indefeasibility?

These questions are examined through a series of five published articles which are reproduced in this thesis as Chapters 3 to 7 (the ‘published chapters’). The first question is the focus of Chapter 3; the second question is explored in Chapters 4 to 6; and the third question is addressed in Chapter 7. Chapter 2 provides the legal background to examine these questions and Chapter 8 concludes the thesis by linking the separate chapters to form a

Subsequently, The Land Registration etc (Scotland) Act (2012) came into force in late 2014. For a summary of the key features of the new Act, see Andrew Steven, ‘Developments in the Scottish Law of Land Registration’ 22 (2014) Juridica International 37. The New Zealand Government recently updated its Land Transfer Act 1952 and passed the Land Transfer Act 2017 on 10 July 2017. All the provisions of the 2017 Act will be in force by 10 January 2019. See the discussion in the text at 2.4. The United Kingdom Law Commission is presently engaged in updating the land registration system for England and Wales: see Chapter 3, n 245.

29 Law Commission of New Zealand Review of the Land Transfer Act 1952 (NZLC IP 10, 2008), [2.68].
coherent whole and, in so doing, provides an answer to the overarching question posed in this thesis.

1.3 Research Methodologies

The 2014 Special Issue of the Property Law Review was devoted to exploring the range of research approaches and methodologies adopted by property law researchers in various countries. One of the articles in the Special Issue discussed the results of a survey of property law researchers in which respondents were asked to classify their approach to property law scholarship.\(^{30}\) The categories included: property theory; doctrine/black letter for academic audience; doctrine/black letter for practitioner audience; socio-legal; empirical; comparative property law; critical legal studies; and other. The results showed that the most common research approaches in property law were doctrinal (for an academic audience) followed by theoretical, socio-legal and comparative.\(^{31}\) This thesis does not undertake either theoretical or socio-legal research. However, somewhat consistently with the survey results, the main research methodology adopted in this thesis is doctrinal and, in Chapter 3, a comparative law analysis is undertaken of the Torrens system bijuralism rule of immediate indefeasibility and the bijuralism rules of England and Wales.

1.3.1 Doctrinal research

The meaning of ‘doctrinal research’ requires clarification. ‘Doctrine’ has been defined as a ‘synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law. Doctrines can be more or less abstract, binding or non-binding’.\(^{32}\) Doctrinal research is, therefore, concerned with ‘the formulation of legal “doctrines” through the analysis of legal rules’.\(^{33}\) These doctrines systemise formulations of the law and ‘clarify ambiguities within rules, place them in a logical and coherent structure and describe their relationship to other rules’.\(^{34}\) More

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\(^{31}\) The respondents could tick multiple boxes. Ibid, 142.


\(^{34}\) Ibid.
simplistically, doctrinal research has been described as ‘research into law and legal concepts’\(^3\)\(^5\) and ‘the search for what the law is’.\(^3\)\(^6\) Since doctrinal research focusses on the study of legal texts including case law, legislation and secondary sources, it is frequently referred to as ‘black letter law’\(^3\)\(^7\).

However, the doctrinal methodology is not without its detractors and has been the subject of serious criticism particularly by critical legal theorists and interdisciplinary scholars. Eric Posner, for example, has declared that ‘doctrinal research is dead’\(^3\)\(^8\) and others have argued that doctrinalists are perceived to be ‘intellectually rigid, inflexible, formalistic and inward-looking’.\(^3\)\(^9\) Further criticisms are that doctrinalists ‘often focus on unimportant topics, repeat existing knowledge, and fail to connect law to life by assessing the real world consequences of doctrinal frameworks’.\(^4\)\(^0\) For these critics, it may appear that stating ‘what the law is’, is little more than a simple process of rule identification. However, this grossly undervalues the work of a good doctrinal researcher who, in critically analysing the law, is involved in a ‘dissection of the law as is, examining it for consistency and coherence, as well as a critical appreciation of the law in terms of policy-compatibility and future development’.\(^4\)\(^1\) As Dixon has observed, ‘[i]n many cases, the most difficult research question of all is “what is the law?” and those engaged in doctrinal analysis will seek to answer this’.\(^4\)\(^2\)

Richard Posner provides further insights into the challenges confronting doctrinalists,

> The messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement, and critique. These are intellectually demanding tasks,

\(^3\)\(^5\) Hutchinson and Duncan, above n 32, 85.
\(^3\)\(^7\) Chynoweth, above n 33, 29.
\(^4\)\(^0\) Van Gestel and Micklitz, above n 38, 2. The doctrinal researchers, in turn, have their own criticisms of interdisciplinary research claiming such research is ‘amateurish dabbling with theories and methods the researchers do not fully understand’, Vick, above n 39, 164.
\(^4\)\(^1\) Dixon, above n 36, 161.
\(^4\)\(^2\) Ibid.
requiring vast knowledge and the ability ... to organize dispersed, fragmentary, prolix and rebarbative material.⁴³

Perhaps the best statement of the rigours of doctrinal research is to be found in the statement by the Council of Australian Law Deans (CALD):

To a large extent, it is the doctrinal aspect of law that makes legal research distinctive and provides an often under-recognised parallel to ‘discovery’ in the physical sciences. Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials. The very notion of ‘legal reasoning’ is a subtle and sophisticated jurisprudential concept, a unique blend of deduction and induction, that has engaged legal scholars for generations, and is a key to understanding the mystique of the legal system’s simultaneous achievement of constancy and change, especially in the growth and development of the common law. Yet this only underlines that doctrinal research can scarcely be quarantined from broader theoretical and institutional questions. If doctrinal research is a distinctive part of legal research, that distinctiveness permeates every other aspect of legal research for which the identification, analysis and evaluation of legal doctrine is a basis, starting point, platform or underpinning.⁴⁴

The techniques for doctrinal research include deductive, inductive and analogical reasoning. In addition, since legal rules have an ‘open texture’,⁴⁵ that is, they are capable of more than one interpretation; the researcher must also develop strong interpretation (or hermeneutic) skills. As van Hoeke has commented, legal research is ‘a mainly hermeneutic discipline, with also empirical, argumentative, logical and normative elements’.⁴⁶ In addition, there will be occasions when the law is simply indeterminate and judges purport to make decisions according to policy considerations.⁴⁷ Where this occurs, the doctrinal researcher must also

⁴⁵ Chynoweth, above n 33, 32.
⁴⁶ Mark van Hoecke (ed), Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline? (Hart Publishing, 2011) 17. Van Hoecke discusses the debate surrounding the issue of whether doctrinal research ought to be referred to as empirical, see ibid, 5-7. This debate is beyond the scope of this thesis. A similar debate concerns the question of whether doctrinal research ought to be viewed as quantitative or qualitative. See the discussion by Ian Dobinson and Francis Johns, ‘Qualitative Legal Research’, in Mike McConville and Wing Hong Chui (eds) Research Methods for Law (Edinburgh University Press, 2007) 21.
⁴⁷ Chynoweth, above n 33, 34.
have an understanding of policy matters in order to understand and anticipate future judicial decision-making. As discussed below at 1.3.3, many of these doctrinal research techniques are embraced in this thesis.

1.3.2 Comparative research

The second research approach adopted in this thesis is a comparative law methodology. There is a large volume of academic discussion about the nature, purpose and value of comparative law. This detailed discussion is beyond the scope of this thesis. However, some brief general comments regarding the comparative law method is warranted. Akkermans identifies four reasons for using a comparative method, two of which are relevant here. First, ‘to see how other systems solve a similar problem. In other words, it is used to learn from other systems and to see if one’s own system can perhaps be improved or not’.48 Second, ‘there are those who compare legal systems to arrive at an overview of problems or solutions’.49 These reasons resonate with Legrand’s view that comparative law ‘presents a new perspective, allowing one critically to illuminate a legal system – another or one’s own’50 and O’Connor’s view that we undertake comparative analysis to ‘deepen our understanding of our own system’.51

In Chapter 3, the bijuralism rules of England and Wales are examined and compared with the Australian bijuralism rule of immediate indefeasibility. The reasons for undertaking this comparative research were to see how the problem of bijural inaccuracy was resolved in England and Wales and to identify whether our Australian bijuralism rule could be improved. The comparative research process adopted was doctrinal in nature and is discussed in the next section, 1.3.3.

1.3.3 Summary of doctrinal and comparative research process in this thesis

49 Ibid.
The doctrinal and comparative research process for this thesis was undertaken in 4 stages. First, the research question was identified. The research question may arise from: law teaching; discussions with colleagues or post-graduate research students; or recent developments in the case law or legislation. Second, a comprehensive review was undertaken of all primary and secondary material, including case law; legislation; journal articles; law reform publications; and other relevant literature. In the third stage all the primary and secondary material was examined and the fourth and final stage was the writing of the thesis.

More specifically, the third and fourth stages of the research process, as illustrated in the published chapters, involved examining the law with a view to: clarifying the law and developing frameworks to facilitate further analysis; identifying and critiquing problematic cases; dissecting the law and examining it for coherence and consistency; creatively synthesising the law and making connections between disparate doctrinal strands; identifying areas of inconsistency or incompatibility with land law policy; and making suggestions for the future development or reform of the law.

1.4 Significance and originality of thesis

This thesis is significant and original in a number of ways. First, all the published chapters in this thesis are exemplars of the doctrinal methodology. As noted at 1.3.3, these chapters clarify, critique and synthesise the law against a back drop of land law policy with a view to

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52 The stages are very loosely based on Fink’s various requirements for doctrinal and non-doctrinal literature reviews, Arlene Fink, Conducting Research Literature Reviews: From the Internet to Paper (Sage Publications Inc, 3rd ed, 2010), discussed in Dobinson and Johns, above n 46, 22-23, 33.

53 The Torrens and English methodologies for resolving disputes regarding bijural inaccuracy, which are developed in Chapter 3, provide examples of frameworks that enabled the immediate indefeasibility principle in Australia to be compared with the English bijuralism rule.

54 The critique of problematic cases can be seen in Chapter 4, where the Solak series of cases are analysed, and Chapter 5 which provides a detailed critique of Travinto Nominees Pty Limited v Vlattas and Another (1973) 129 CLR 1.

55 This thesis examines a number of areas of doctrinal incoherence including the cases mentioned at n 54, and also the ‘fraud against the Registrar’ cases that are analysed in Chapter 6.

56 Chapter 6, dealing with fraud against the Registrar, is a particularly strong illustration of synthesis and connection of the law, however, this process is also seen in the analysis of the Solak series of cases in Chapter 4 and the discussion of the ECNL, the ‘careless mortgagee’ provisions and ss105(3)-(5) of the Transfer of Land Act 1893 (WA) in Chapter 7.

57 Inconsistency with land law policy is illustrated in the discussion of the compensation considerations in the Solak series of cases in Chapter 4 and in the general discussion of careless mortgagee conduct in Chapter 7.

58 Reform suggestions appear in the discussion of: the Solak series of cases in Chapter 4; fraud against the Registrar in Chapter 6; and the general discussion of careless mortgagee conduct in Chapter 7.
suggesting reform of the law where required. This research is original and provides a sound basis for the future development of the law.

Second, the lengthy comparative law analysis of the bijuralism rules of England and Wales and the Torrens system, discussed in Chapter 3, significantly advances original scholarship in this area.\textsuperscript{59} This is illustrated by quotes from two of the anonymous reviewers who reviewed the chapter when it was submitted as an article for publication in the University of New South Wales Law Journal. The first reviewer commented:

\begin{quote}
The article explains the dilemmas in interpretation and the conflict in the authorities with remarkable clarity, and without oversimplifying. The author takes the factual scenarios of the English cases and discusses how they would be analysed under Australian law. This was very competently and clearly done, and is an excellent example of comparative law scholarship. While the statutory language is different, the underlying policy issues are common to the UK and Australia and the author has done an excellent job of explaining the differences in legislative schemes and judicial approaches in the two countries.
\end{quote}

The second reviewer further confirmed the originality and clarity of the comparative law scholarship:

\begin{quote}
This is an impressive and informative piece and one that I very much enjoyed reading. For me, the great strength of the article is the clear and accessible insight it provides scholars, students and practitioners of Australian property law into the operation of the English system of land registration. In so doing it fills a significant gap in the Australian literature for those who wish to see more comparative work done in relation to the Australian Torrens system. In this respect the article narrows the distance between Australian property scholarship and other areas of Australian private law where such work is more common. I believe that the article would be of significant interest to the readership of the \textit{UNSWLJ} and that it merits publication in this highly regarded forum. \textellipsis The article is well structured, tightly argued and beautifully written. The author has done an outstanding job in explaining and critiquing obviously complex cases in a concise, but also comprehensive, manner.
\end{quote}

\textsuperscript{59} This chapter has been published, see: Penny Carruthers, ‘A Tangled Web Indeed: the English Land Registration Act and Comparisons with the Australian Torrens System’, (2015) 38, 4, \textit{University of New South Wales Law Journal} 1261.
Third, the thesis is significant due to the timing of its publication. As noted earlier, many comparable jurisdictions around the world are engaged in wide-ranging reviews of their title registration systems and their bijuralism rule. In addition, in Australia, all states and the Northern Territory have recently introduced national e-conveyancing legislation. Following on from this, there is heightened awareness of property law reform, particularly with regards uniform land laws. The research developed in this thesis is therefore topical and timely.

Finally, all the published chapters have been widely disseminated through publication as articles and referenced in legal texts and other journal articles. The process for publication in legal journals involves peer review and an assessment that the article is worthy for publication. This further demonstrates the significance of the research.

1.5 Thesis Outline

This thesis has been written and formatted in accordance with the University of Western Australia Doctor of Philosophy Rules and is presented as a series of papers. The rules state that in theses presented as a series of papers, ‘there must be a full explanatory introduction and a review article at the end to link the separate papers and to place them in context of the established body of knowledge’. To this end, Chapter 1 and the concluding chapter, Chapter 8, chart the thesis as a series of publications and explain the logical progression of the papers so as to link them to form a coherent whole for the reader. Each of the published chapters explores different aspects of the operation and application of immediate indefeasibility. Some of these chapters examine problematic areas in the operation of immediate indefeasibility. However, it is beyond the scope of this thesis to consider all areas where uncertainty has arisen in the indefeasibility case law.

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60 See references noted, above n 28.
63 Ibid, 41(4).
64 The author has considered some of these areas in other publications that are listed in Appendix A to this thesis.
In order to investigate whether the principle of immediate indefeasibility is ‘fit for purpose’; it is first necessary to identify the purpose of immediate indefeasibility and to ascertain whether immediate indefeasibility is well suited for this purpose. Since immediate indefeasibility is a bijuralism rule, this latter enquiry entails an evaluation of the suitability of immediate indefeasibility by comparing it with other bijuralism rules. Accordingly, Chapter 2 outlines the purposes of the Torrens system and examines the rival bijuralism rules of deferred and immediate indefeasibility. These two approaches to indefeasibility are evaluated in light of various legal, economic and social considerations. To provide further context to this discussion, this chapter also discusses the recent reform of the New Zealand bijuralism rules.

Chapter 3 compares the English and Australian land title registration systems and examines the way in which each system resolves the problem of bijural inaccuracy.65 To this end, the chapter develops an orthodox Torrens methodology66 for dealing with challenges to a registered proprietor’s indefeasible title. The chapter then analyses the intricacies of the English system and distils from this an English methodology for resolving bijural inaccuracy. One of the principal differences between the two systems is that the Torrens system favours dynamic security whereas the English system prefers static security and the protection of existing owners, particularly owners who are in possession. The comparison of the two systems shows that the current bijuralism rules of England and Wales are complicated and difficult to apply. By contrast, the Torrens methodology to resolve bijural inaccuracy is relatively clear, consistent and certain.

Chapters 4 and 5 address the question: what is the extent to which indefeasibility protects individual terms in registered void documents? The broad answer to this question is uncontentious. Indefeasibility protects all those terms in the registered instrument that are integral to, delimit, or qualify the nature of the interest that has been granted. However, in relation to registered void mortgages and registered void leases the case law has produced inconsistent and, in some cases, unprincipled, decisions.

65 Carruthers, above n 59.
66 In essence, the Torrens methodology is: (1) Identify that the current registered proprietor has an immediately indefeasible title; (2) identify whether an exception to indefeasibility is applicable; and (3) determine whether compensation is available.
Chapter 4 examines the question in the context of a registered forged ‘all moneys’ mortgage.\(^{67}\) The Australian case law reveals two areas of doctrinal inconsistency giving rise to two further questions. First, to what extent does registration validate the personal covenant to repay the debt contained in a forged mortgage? Second, to what extent can terms in an off-register loan document be incorporated into the registered forged mortgage and so achieve indefeasibility? The chapter also explores the operation of the overriding statutes exception to indefeasibility and critiques the role of the Registrar in ensuring compensation is paid to people who are deprived of their land through the operation of the immediate indefeasibility principle.

Chapter 5 focusses on the extent to which indefeasibility protects terms in a registered illegal lease by critiquing the High Court decision in *Travinto Nominees Pty Limited v Vlattas and Another* (1973) 129 CLR 1.\(^{68}\) All members of the High Court concluded that registration of the illegal lease did not validate the option to renew. The chapter analyses the reasoning of the majority judges and argues that the majority failed to apply orthodox Torrens methodology in their judgments. In particular, two questions ought to have been specifically addressed in the majority judgments. First, is an option to renew an integral term in a lease? Second, if it is, is there an applicable exception to the indefeasibility of the registered illegal lease? The majority did not give clear answers to either of these questions and instead focused on the idea that a court would not order specific performance of an option to renew in an illegal lease. However, this is putting the cart before the horse. If the option to renew is integral to the lease, then it is validated by registration of the lease and can be specifically enforced unless an exception is established. What is the exception? Unlike the minority, the majority failed to provide a clear and principled precedent with regards the issue of the extent of indefeasibility for registered illegal leases.

Chapter 6 turns to consider the fraud exception to indefeasibility.\(^{69}\) The two traditional categories of fraud are where (1) a prior registered proprietor or (2) an unregistered interest holder, have been defrauded of their interest by the fraud of the incoming registered

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proprietor. In 1984, in an apparent attempt to ameliorate the harsh operation of immediate indefeasibility, a new category of fraud was developed by the courts, ‘fraud against the Registrar’. The classic illustration of this category concerns the registration of a forged mortgage where the mortgagee has falsely attested the signature of the mortgagor, when in fact, the mortgagee was not present when the mortgagor purportedly executed the document. In this situation, even though the registered mortgagee neither forged the mortgage nor has any knowledge of the forgery, the registered mortgage will not be indefeasible, but defeasible through fraud. The fraud lies in the mortgagee’s misrepresentation to the Registrar that the document is a validly executed and attested document when in truth the mortgagee registering the document knows that this is not the case. This chapter analyses the cases on fraud against the Registrar and argues that the decisions in these cases are artificial, problematic and inappropriate. The introduction of this new category of fraud has placed a strain on the system revealed by inconsistent, unhelpful and unnecessary decisions. The chapter also argues that recent developments in the law on fraud by an agent and in conveyancing requirements and practices across Australia render fraud against the Registrar an increasingly irrelevant complication in the law of fraud under the Torrens system.

Chapter 7 looks to the future and overviews the operation of the Electronic Conveyancing National Law (ECNL).70 Although the ECNL specifies that it does not derogate from fundamental Torrens system principles, such as immediate indefeasibility, it does introduce a dramatic change in conveyancing processes. Parties to land transactions will no longer sign Registry instruments. Rather, ‘subscribers’, typically law firms, conveyancing agents and financial institutions, will do so on the client’s behalf. Clients are protected by safeguards within the ECNL and, in relation to the registration of mortgages; a subscriber acting for a mortgagor must take reasonable verification of identity (VOI) steps with regards the mortgagor. These VOI requirements should go a long way towards eliminating the registration of forged mortgages. However, this chapter argues that a major deficiency in the ECNL is the failure to incorporate ‘careless mortgagee’ provisions akin to those adopted in the Torrens legislation of Queensland, New South Wales and Victoria. The result is that the law in the remaining Australian jurisdictions is uncertain as to the effect of a registered mortgage, which is based on a forged instrument, in favour of a non-fraudulent mortgagee who has failed to undertake mortgagor VOI. In Western Australia the divergence in the law is

even more pronounced by the recent enactment of the curious and baffling provisions in ss 105(3)-(5) of the *Transfer of Land Act 1893* (WA).

Chapter 8 synthesises the discussion from the previous chapters and responds to the research questions. The Torrens system principle of immediate indefeasibility is indeed a harsh doctrine. Occasionally, courts do not apply orthodox Torrens methodology in an apparent effort to ameliorate the harshness of the principle. This produces uncertainty and inconsistency in the case law and places a strain on the system. However, as revealed in the comparison with the English bijuralism rule, in general, the application of the principle of immediate indefeasibility is relatively clear, consistent and certain. Looking to the future, the introduction of the ECNL, with the heightened emphasis on VOI requirements, should see a significant reduction in registrations that are based on invalid instruments.
Chapter Two: The Torrens System and Indefeasibility
2.1 Introduction

The overarching question in this thesis is: Is the Australian Torrens system principle of immediate indefeasibility ‘fit for purpose’ for the 21st century? The Oxford dictionary defines ‘fit for purpose’ as ‘well equipped or well suited for its designated role or purpose’. Accordingly, in order to answer the research question it is first necessary to identify the role or purpose of immediate indefeasibility and to ascertain whether immediate indefeasibility is well suited for this purpose. Since immediate indefeasibility is a bijuralism rule, this latter enquiry entails an evaluation of the suitability of immediate indefeasibility by comparing it with other bijuralism rules. With these comments in mind, this chapter outlines the purposes of the Torrens system, examines the rival bijuralism rules of deferred and immediate indefeasibility and considers the recently reformed bijuralism rule of New Zealand.

2.2 The purposes of the Torrens system

Historically, land tended to remain in the same family for generations and so there was no particular need to develop sophisticated rules to facilitate the transfer of land. However, in the eighteenth and nineteenth centuries land was increasingly viewed as ‘an independent commercial commodity to be bought and sold in the same manner as many other investments’. The principal motivation for the introduction of the Torrens system was, therefore, to provide an efficient system for transferring interests in land. Robert Torrens sought to do this by setting up a system for ‘authenticating a man’s title to his land and recording his dealings with it that would be reliable, simple, cheap, speedy and suited to the social needs of the community.’

This underlying rationale was highlighted in the preamble to the first Torrens legislation in Australia, the Real Property Act 1858 (SA):

Whereas the inhabitants of the Province of South Australia are subjected to losses, heavy costs, and much perplexity, by reason that the laws relating to the transfer and encumbrance of

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1 Oxford Living Dictionaries https://en.oxforddictionaries.com/definition/fit_for_purpose (accessed 31 January 2018). As noted at 1.2, to assist in answering the overarching research question three further subsidiary questions are analysed throughout the five published chapters in this thesis.


freehold and other interests in land are complex, cumbrous, and unsuited to the requirements of the said inhabitants, it is therefore expedient to amend the said laws.

In short, the purpose of the system was to ensure ‘a market for land and in turn economic stability ... without the expense and difficulty experienced under the ‘old system’ of titles’.4 The manner in which the Torrens system achieves this purpose is traditionally analysed in the context of Ruoff’s three interrelated principles: the mirror, curtain and insurance principles.5

2.2.1 The mirror principle and the exceptions to indefeasibility

The mirror principle provides that the register reflects all material facts, it is deemed to be a ‘complete and accurate’6 reflection of title. Accordingly, the person named as the registered proprietor has a title which is said to be ‘indefeasible’, that is, a title that is absolute, conclusive and unimpeachable.7 The mirror principle finds its source in a number of provisions, though chiefly the ‘paramountcy’ provision,8 which provides that a registered proprietor’s title is absolutely free from any estate or interest other than those noted on the register or other specifically named express exceptions. The extent of the express exceptions to indefeasibility reveals, however, that there are numerous cracks in the Torrens mirror. The most significant express exception for present purposes is the fraud exception which applies when the current registered proprietor was guilty of fraud in becoming registered. Fraud, though not defined in the Torrens legislation, has been defined narrowly in the case law to mean ‘actual fraud, i.e., dishonesty of some sort’9 by the registered proprietor or his or her agent.

In addition to the express exceptions, there are four other potential exceptions to a registered proprietor’s indefeasible title introducing yet more cracks into the Torrens mirror.10 Two of

5 Ruoff, above n 3, 118.
6 Ruoff, above n 3, 118.
7 The term ‘indefeasible’ is only defined in 3 of the 8 Australian jurisdictions: the Northern Territory, Queensland and Tasmania. Its meaning has, therefore, been developed through the case law.
8 Land Titles Act 1925 (ACT) s 58; Real Property Act 1900 (NSW) s 42(1); Land Title Act 2000 (NT) ss 188–9; Land Title Act 1994 (Qld) ss 184–5; Real Property Act 1886 (SA) ss 69–70; Land Titles Act 1980 (Tas) s 40; Transfer of Land Act 1958 (Vic) s 42(1); Transfer of Land Act 1893 (WA) s 68.
9 Assets Co Ltd v Mere Roihi [1905] AC 176, 210 (Lord Lindley).
10 These additional exceptions include the in personam and overriding statutes exceptions; the power of the Registrar to correct errors in the register; and, in some situations, a registered volunteer may be denied the benefits of an indefeasible title. This thesis is not concerned with registered volunteers.
these are particularly relevant for this thesis. First, a registered proprietor’s title is subject to the ‘in personam’ exception which acknowledges that the principle of indefeasibility does not deny the right of a plaintiff ‘to bring against the registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant’. The in personam exception includes claims based on contracts or trusts with regards the land or other situations where there is a legal or equitable cause of action that may be enforced against a registered proprietor and which gives rise to a remedy affecting the land. An important limiting factor to the in personam exception is that it cannot be invoked so as to circumvent the principle of immediate indefeasibility.

Second, the Torrens legislation, like all other legislation, is capable of being overridden by a later statute. As noted by Gibbs J in Travinto Nominees Pty Limited v Vlattas and Another, ‘[a]lthough the [Torrens legislation] is of the greatest importance in relation to land titles it is not a fundamental or organic law to which other statutes are subordinate’. The overriding statutes exception is a significant exception to indefeasibility and has been described by Butt as posing ‘perhaps the greatest single threat to public confidence in the Torrens system’. This exception therefore introduces more cracks into the Torrens mirror.

This brief discussion indicates that Ruoff’s ideal of the register as a complete and accurate reflection of title, has not been entirely fulfilled. There are a considerable number of exceptions to indefeasibility. Ruoff’s mirror analogy is therefore a useful, if not entirely accurate, description of the Torrens register.

2.2.2 The curtain principle and the ‘notice’ provision

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11 A more detailed discussion of the in personam exception can be found in Chapters 5 and 7.
14 Travinto Nominees Pty Limited v Vlattas and Another (1973) 129 CLR 1, 34.
15 Peter Butt, Land Law (Thomson Lawbook Co, 5th ed, 2006) 798. One developing area of uncertainty with regards the overriding statutes exception arises in the context of statutory rights, obligations and restrictions imposed on land owners to promote sustainability objectives. For further discussion, see Christensen and Duncan, above n 4, and Pamela O’Connor, Sharon Christensen, Bill Duncan, ‘Legislating for Sustainability: A Framework for Managing Statutory Rights, Obligations and Restrictions Affecting Private Land’ (2009) 35 Monash University Law Review 233. The overriding statutes exception is explored further in Chapters 4 and 5.
The curtain principle provides that the register is the sole source of information and that a proposing purchaser need not ‘look behind it’.16 This principle therefore supports the Torrens system purpose of providing reliable, simple, cheap and speedy conveyancing. The curtain principle finds its source in the ‘notice’ provision:17 a transferee of an interest in land, upon registration, is not to be affected by actual or constructive notice of any pre-existing unregistered interests or trusts and is not required to investigate the circumstances of the registration of any previous registered proprietor.18 This is a significant departure from the ‘old’ private conveyancing system. Under the old system, an intending purchaser was required to search the chain of title and would be subject to any interests of which the purchaser had actual or constructive notice. The effect of the notice provision is to overturn the old system and ensure the incoming registered proprietor enjoys an indefeasible title despite notice of pre-existing unregistered interests.

2.2.3 The insurance principle and its fundamental limitation

The insurance principle provides that if anyone suffers loss in reliance on the register he or she will be ‘put in the same position, so far as money can do it, as if the reflection were a true one’.19 Under the Torrens system, a person may sustain loss or be deprived of their interest in land either through an omission, mistake or misfeasance within the Registrar’s office; or, through the operation of the Torrens principle of immediate indefeasibility. In either of these circumstances, the person sustaining the loss or deprivation is entitled to compensation pursuant to the compensation provisions.20 The general idea behind the compensation provisions is to guarantee against losses which ‘but for the act could not occur’.21

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16 Ruoff, above n 3, 118.
17 Land Titles Act 1925 (ACT) ss 59, 60(2); Real Property Act 1900 (NSW) s 43(1); Land Title Act 2000 (NT) ss 188(2)–(3); Land Title Act 1994 (Qld) s 184(1); Real Property Act 1886 (SA) ss 186–7; Land Titles Act 1980 (Tas) s 41; Transfer of Land Act 1958 (Vic) s 43; Transfer of Land Act 1893 (WA) s 134.
18 Indeed in Australia, even where the registered transferee was aware, prior to registration, that registration would defeat the pre-existing unregistered interest, this too is not fraud. See Kitto J in Mills v Stockman (1967) 116 CLR 61 at 78. Contrast this with the New Zealand position discussed below n 120.
19 Ruoff, above n 3, 118.
20 Land Titles Act 1925 (ACT) ss 143–151, 154, 155; Real Property Act 1900 (NSW) ss 120, 128–135; Land Title Act 2000 (NT) ss 192–196; Land Title Act 1994 (Qld) ss 188–190; Real Property Act 1886 (SA) ss 201-205, 207-219; Land Titles Act 1980 (Tas) ss 127-128, 150-159; Transfer of Land Act 1958 (Vic) ss 108-111; Transfer of Land Act 1893 (WA) ss 201, 205-211.
21 Finucane v The Registrar of Titles [1902] St R Qd 75, 94 per Griffith CJ.
provides a limitation to compensation: if the loss would have occurred regardless of the Torrens legislation, compensation will not be paid.22

This limitation to compensation is best illustrated by an example. In the seminal immediate indefeasibility case of Frazer v Walker,23 Mrs Frazer forged her husband’s signature on a mortgage over their land. The mortgage was registered in favour of non-fraudulent mortgagees. There was default in the repayment of the mortgage and the land was sold to Walker who became the registered proprietor of the land. Mr Frazer sought to be restored to the register as owner. The Privy Council rejected Mr Frazer’s claim and endorsed the principle of immediate indefeasibility of title.24 Of relevance here, are the court’s comments regarding compensation. Although neither Mr Frazer nor the mortgagees claimed compensation in this case, the Privy Council expressed obiter dicta comments that, ‘according as either failed in these proceedings, the former owner ... would, and the purported mortgagees ... would not, be enabled to claim compensation under this section’.25 The reason the mortgagees would not be entitled to compensation was because their loss ‘has not arisen from any fault of the registry, or even from any reliance on them on the registry’.26 That is, the mortgagees’ loss would not have resulted from the operation of the Torrens legislation but rather, from the fact they dealt with a forger.27

2.2.4 Ruoff’s mirror, curtain and insurance principles - conclusion

22 This limitation to compensation appears to be the general position, though there may be exceptions. See the discussion below, n 27.
24 The Privy Council declared, ibid at 584, that ‘registration [of void instruments] is effective to vest and to divest title and to protect the registered proprietor against adverse claims’.
25 Ibid, 582.
26 Ibid, 583.
27 In Victoria, the Torrens legislation was amended to enable the innocent victim of forgery to obtain compensation, Transfer of Land Act 1958 (Vic) s110(1). See the discussion of the amending legislation in Douglas Whalan, The Torrens System in Australia (Law Book Co Ltd, 1982) 302, footnote 41. In contrast to Victoria, in New South Wales the legislation specifically requires that the loss or damage must arise ‘as a result of the operation of the Act’, Real Property Act 1900 (NSW) ss 120(1), 129(1). The New South Wales provisions have been thoughtfully critiqued by Scott Grattan, ‘Forged but Indefeasible Mortgages: Remedial Options’ in Lyria Bennett Moses, Brendan Edgeworth, Cathy Sherry, Property and Security: Selected Essays (Thomson Reuters Lawbook Co., 2010) 177-181, 184-197. Warrington Taylor, in his article, ‘Scotching Frazer v Walker’ (1970) 44 Australian Law Journal 248, 251 prefers the Victorian position and suggests an amendment to the Torrens legislation to allow the innocent victim of forgery to obtain compensation. The recently enacted Land Transfer Act 2017 NZ would allow a mortgagee who has become registered under a forged mortgage to obtain compensation in the event the registered mortgage was cancelled under s 55. See s 59(2)(c) and the discussion below nn 127 and 128.
Ruoff’s mirror, curtain and insurance principles are useful concepts in providing a brief overview of the operation of the Torrens system. However, these principles do not provide a definitive rule for resolving the dispute in the classic bijuralism scenario where A is the registered proprietor of land and B, pursuant to an invalid instrument, becomes the registered proprietor of A’s interest. Who of A or B is to be preferred and entitled to the land? As discussed in Chapter 1, the bijuralism rule adopted in Australia is immediate indefeasibility: provided B was not guilty of fraud in becoming registered, B retains title to the land and A is left with a right to seek compensation. B’s title is effectively validated by registration. However, for many years after the Torrens legislation was first introduced, the Australian courts adopted a bijuralism rule known as ‘deferred’ indefeasibility.

2.3 Immediate and deferred indefeasibility

Under the deferred approach, a person becoming registered pursuant to an invalid instrument obtains a defeasible, not an indefeasible, title and the former registered proprietor is entitled to bring an action to be restored to the register. If, prior to the former owner taking action, the registered proprietor transfers the interest to a third person, this third person obtains an indefeasible title upon registration. It is only at this point that the former registered proprietor loses the right to be restored to the register; however, he or she would be entitled to compensation. Applying the deferred approach to the classic scenario: A is entitled to recover the land from B. However, if B transfers the interest to C, who registers his or her interest prior to A taking action, then C is entitled to keep the land. Under the deferred approach, indefeasibility is deferred and only attaches to the next registration after the registration of the invalid instrument.

The initial uncertainty as to whether the Torrens legislation introduced immediate or deferred indefeasibility is somewhat puzzling. One may well have thought the Torrens provisions would provide a clear answer as to precisely when indefeasibility attaches in the situation of registered invalid instruments. However, this is not the case. The key indefeasibility
provisions are inconsistent.\textsuperscript{32} The paramountcy provision indicates that, except in case of fraud and other specified exceptions, indefeasibility is conferred immediately on the incoming registered proprietor. The paramountcy provision therefore supports immediate indefeasibility. In contrast, the notice provision indicates that the protections accorded in that section are only conferred when the person becoming registered dealt with the registered proprietor who appears on the register. If the incoming registered proprietor did not deal with the registered proprietor but a forger, then the protections in the notice provision are, arguably, not applicable and the registered proprietor’s title is defeasible. Another important Torrens provision, the ‘protection of purchasers’ provision,\textsuperscript{33} also supports the deferred indefeasibility approach. This provision protects a purchaser from actions for ejectment or damages on the ground that the proprietor from whom he or she claims was registered through fraud or error. The protection in this provision is limited. It provides no protection in relation to the immediate transaction under which the purchaser was registered and only provides protection with regards fraud or error in the transactions of predecessors in title.

As noted, it is now well established that this inconsistency is resolved in favour of immediate indefeasibility. The paramountcy provision is viewed as the chief indefeasibility provision and the notice and protection of purchasers provisions are seen as merely explanatory of the general indefeasibility principle.\textsuperscript{34} However, it is important to identify the existence of this statutory inconsistency and to appreciate that the provisions, read together, could be interpreted to support either a deferred or immediate approach to indefeasibility.\textsuperscript{35} As Sackville has commented:

\begin{flushright}
\textsuperscript{32} In this regard, see Whalan, above n 27, 293, and Roy Woodman, ‘The Torrens System in New South Wales: One Hundred Years of Indefeasibility of Title’ (1970) 44 Australian Law Journal 96, 98-99.
\textsuperscript{33} Land Titles Act 1925 (ACT) s 159; Real Property Act 1900 (NSW) s 45(1), (2); Real Property Act 1886 (SA) s 207; Land Titles Act 1980 (Tas) s 42; Transfer of Land Act 1958 (Vic) s 44(2); Transfer of Land Act 1893 (WA) s 202. Compare Land Title Act 2000 (NT) s 188(2)(c); Land Title Act 1994 (Qld) ss 184(2)(b).
\textsuperscript{34} Anthony Moore, Scott Grattan, Lynden Griggs, Bradbrook, MacCallum and Moore’s Australian Real Property Law (Lawbook Co, 6th ed 2016), [4.110].
\textsuperscript{35} As a matter of statutory interpretation, it may be argued that the common law presumptions to resolve ambiguity in statutes support the deferred indefeasibility interpretation. As O’Connor has commented, ‘a court will not take a statute to intend an alienation of vested property rights unless that intention is clearly manifested’: Pamela O’Connor, Security of Property Rights and Land Title Registration Systems PhD Thesis, Monash University, 2003, 169, and 187 footnote 151 <https://figshare.com/articles/Security_of_property_rights_and_land_title_registration_systems/5441161_phd> (accessed 10 January 2017).
\end{flushright}
It cannot be emphasised too greatly that the case for immediate indefeasibility is not based on irrefutable logic, but must depend on value judgments concerning the weight of conflicting policies.\textsuperscript{36} 

Given this lack of ‘irrefutable logic’, it is not surprising that the issue of whether deferred or immediate indefeasibility is preferable has been ‘hotly debated’.\textsuperscript{37} For some, the deferred approach to indefeasibility provides a better balance between static and dynamic security and ensures fairer and more just outcomes.\textsuperscript{38} For others, the certainty, clarity and robustness of the operation of immediate indefeasibility make it the preferable bijuralism rule.\textsuperscript{39} It is beyond the scope of this thesis to canvass in detail all arguments concerning the deferred versus immediate indefeasibility debate.\textsuperscript{40} However, it is useful to consider some of the more important arguments relating to: the objects of the Torrens legislation; and economic efficiency arguments. In considering these arguments, it should be kept in mind that neither approach is perfect. Regardless of which approach is adopted, an innocent person will lose his or her interest in the land.

\subsection*{2.3.1 Objects of the Torrens legislation – register errors and transactional errors}

In \textit{Gibbs v Messer}\textsuperscript{41} (\textit{Gibbs}) the Privy Council described the object of the Torrens legislation as follows:

\begin{quote}
The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author’s title, and to satisfy themselves of its validity.\textsuperscript{42}
\end{quote}


\textsuperscript{38} O’Connor supports deferred over immediate indefeasibility, see O’Connor, above n 35, 242.


\textsuperscript{40} For a comprehensive discussion of the arguments surrounding bijuralism rules, including deferred and immediate indefeasibility, see O’Connor, above n 35.

\textsuperscript{41} \textit{Gibbs v Messer} [1891] AC 248.

\textsuperscript{42} Ibid, 254.
This statement has been repeated with approval in subsequent case law\(^{43}\) and accords with the main purpose of the Torrens system of ensuring ‘a market for land and in turn economic stability ... without the expense and difficulty experienced under the ‘old system’ of titles’.\(^{44}\) Proponents of immediate indefeasibility have relied on this statement of the object of the legislation to support their position. For example Butt, while recognising that immediate indefeasibility is a harsh doctrine, commented, ‘[t]hat is its whole point. Any other approach diminishes the effectiveness of registration and compels that very investigation into the history of transactions and titles that Sir Robert Torrens was at pains to abolish.’\(^{45}\) Similarly, Sackville has argued that ‘the most convincing rationale for immediate indefeasibility lies in the proposition that no purchaser ... should be required to investigate the history of his vendor’s title or to make inquiries that are burdensome or difficult.’\(^{46}\) Each of these arguments for immediate indefeasibility is firmly grounded in the idea that the main purpose of the Torrens system is to facilitate land transactions by removing the requirement for purchasers to undertake expensive title investigations. However, is it correct to say that this purpose can only be fulfilled by adopting immediate indefeasibility, or, can it also be achieved by adopting deferred indefeasibility?

It is helpful at this point to recall the distinction between ‘register’ and ‘transactional’ errors. A register error is one that already affected the register at the time an individual acquired his or her interest\(^{47}\) and a transactional error is an error in the actual transaction by which an individual obtains his or her interest.\(^{48}\) The classic scenario may be used to illustrate these errors. Where A is the registered proprietor of land and B, pursuant to an invalid instrument, becomes the registered proprietor of A’s interest, B’s registration is a transactional error. If B transfers title to a non-fraudulent C, B’s registration is now, from C’s perspective, a register error. In the event of a register error, both deferred and immediate indefeasibility will protect a person in C’s position. C can rely on the register in transacting with B, and C will obtain a secure and indefeasible title on registration. Both forms of indefeasibility will ensure that the main purpose of the Torrens system is fulfilled: C need not investigate B’s title and a speedy, cheap and secure transfer of land is achieved.

\(^{43}\) See, for eg, *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 637 per Wilson and Toohey JJ.
\(^{44}\) Christensen et al, above n 4, 114.
\(^{45}\) Butt, above n 39, 596.
\(^{46}\) Sackville, above n 36, 531.
\(^{48}\) Ibid, [3.17].
Proponents of deferred indefeasibility argue, however, that in the case of transactional errors the position is different. A person in B’s position ought not to obtain an indefeasible title since the problem with B’s registration has absolutely nothing to do with any requirement for B to undertake an historical investigation of A’s title. Rather, the problem arises from the very instrument under which B obtained registration. This particular problem may require B to undertake some form of investigation, for example, to take steps to ensure that A has the power to enter the transaction or that the person B is dealing with is in fact A and not a forger. But this kind of investigation is quite different from the investigation into the history of A’s chain of title that is contemplated in the Gibbs statement. It is submitted that this reasoning, if not the ultimate conclusion, of the deferred indefeasibility proponents is correct. Both deferred and immediate indefeasibility achieve the Torrens object of saving people from the trouble and expense of investigating the history of the vendor’s title. Consequently, the arguments of the proponents of immediate indefeasibility that are based solely on the object of the Torrens legislation cannot be used as a justification to prefer immediate over deferred indefeasibility.

Another argument that supports deferred indefeasibility focusses on the nature of a transactional error. A transactional error occurs when there is an invalidity in the registered instrument. The invalidity may be due to forgery, non est factum, lack of capacity, ultra vires and so on. Essentially, the invalidity relates to the fact that the transaction does not represent the genuine consent of A, the person purportedly granting the interest. The sophisticated common law rules that deem these transactions to be invalid serve important public policy objectives. Deferred indefeasibility, which denies indefeasibility in the case of transactional errors, reinforces these policy objectives by precluding deprivation of property through non-consensual means. Conversely, immediate indefeasibility unreservedly subverts these public policy objectives by validating instruments through the simple act of registration.49

On any view, the effect of immediate indefeasibility on the former registered proprietor is harsh. The former proprietor’s only redress is to argue that the situation comes within one of the exceptions to indefeasibility. As Griggs has noted, ‘attempts are routinely made to either

49 In addition to the common law rules that preclude non-consensual transfers of property there are also international human rights instruments that recognise the rights of people not to be arbitrarily deprived of property. For further discussion, see O’Connor, above n 35, 185-193.
extend the operation of the statutory fraud exception to indefeasibility, or to undermine immediate indefeasibility through application of in personam.'\(^{50}\) The effect of this additional litigation is to create ‘complexity and confusion in the case law’\(^{51}\) and consequently to place a strain on the system.\(^{52}\) In contrast, deferred indefeasibility does not unfairly deprive the former registered proprietor of his or her interest. It operates in tandem with the general common law rules in relation to transactional errors and allows the former registered proprietor to be restored to the register. Accordingly, the strain in the system produced under immediate indefeasibility does not arise with deferred indefeasibility.

In conclusion, the main object of the Torrens legislation is to remove the need for expensive title investigations. This is achieved with either deferred or immediate indefeasibility. In addition, there are sound arguments for preferring deferred indefeasibility on the grounds of both fairness and consistency with the common law. If immediate indefeasibility is to be the preferred bijuralism rule, other justificatory arguments are required.

### 2.3.2 Economic efficiency arguments

A number of academic commentators have sought to evaluate the Torrens system preference for immediate indefeasibility by considering economic efficiency arguments.\(^{53}\) For present purposes, Cole’s definition of ‘efficiency’ will suffice:

\[\text{The term ... refer[s] to relative ‘allocative efficiency’, which means that goods and services are allocated to higher-valued uses over lower-valued uses, so as to promote rather than retard economic growth. Simply put, an outcome of social interaction, whether it is a voluntary exchange or a dispute over entitlements, is ‘efficient’ if social costs are minimised and social benefits maximised.}\] \(^{54}\)

Deferred and immediate indefeasibility are bijuralism rules concerning such ‘disputes over entitlements’, specifically, who, of A or B is entitled to the land. Cole’s definition suggests

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\(^{50}\) Griggs, above n 39, 269.


\(^{52}\) Chapters 4, 5 and 6 of the thesis deal with various aspects of the strain in the system caused by immediate indefeasibility.

\(^{53}\) See for eg, Arrieta-Sevilla and Griggs, above n 39.

the bijuralism rule that more effectively minimises the social costs and maximises the social benefits is the preferable rule. The application of economic efficiency arguments to evaluate deferred and immediate indefeasibility is not, however, straightforward. The particular economic efficiency arguments discussed here are loss avoidance and wealth maximisation arguments.

**Loss avoidance arguments**

It has been observed that, ‘[o]ne of the tenets of post-Coasean law and economics is that, as between transacting parties, the law should allocate the risk of losses to the cheaper cost avoider’. This rule has a dual effect. First, it encourages the risk-bearing party to take precautions to prevent loss. Second, by placing the risk on the cheaper cost avoider, the rule ‘minimises the transaction costs overall’. Applying loss avoidance considerations to evaluate the two rules of deferred and immediate indefeasibility gives rise to the question as to whom, of A or B, ‘can the more easily prevent the registration of a forged or otherwise invalid disposition’? If A is the cheaper cost avoider, then A ought to bear the risk of loss and B ought to be entitled to the land. In this case, immediate indefeasibility is the more efficient rule. If B is the cheaper cost avoider, then the position is reversed and deferred indefeasibility is the more efficient rule.

Sackville has suggested that the courts, in upholding immediate indefeasibility, probably thought it is ‘rather easier for a registered proprietor to protect himself against forgery than for a purchaser to do so’. Further, Sackville commented that ‘a person defrauded by his own solicitor or relatives should suffer to a greater extent than the other innocent party’. These

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55 There are 2 aspects to this difficulty. First, law and economics scholarship is replete with theories and counter-theories that preclude a straightforward application to the bijuralism rules. Second, the scholarship tends to focus on economic efficiency arguments regarding contracts and torts. Yet the problem here concerns situations where there is no contract between A and B and neither A nor B can be described as wrongdoers in a tortious sense. For an overview of law and economic theories as applied to property law see, Thomas Merrill and Henry Smith, ‘What Happened to Property in Law and Economics?’ (2001) 111 Yale Law Journal 357.
56 O’Connor, above n 35, 203 (references omitted).
57 Ibid.
58 Ibid.
59 Sackville, above n 36, 532.
60 Ibid. Registrar of Titles (WA) v Franzon (1975) 132 CLR 611 provides an illustration of a solicitor defrauding his clients.
comments indicate that the former registered proprietor is the cheaper cost avoider. For example, a registered proprietor may be able to lodge a caveat against his or her land to prevent the registration of an unauthorised dealing. A registered proprietor may also take extra precautions to ensure the duplicate certificate of title and other identity documents are kept secure which would reduce the opportunity for an impostor to forge a transaction in relation to the land. If, in most cases, the former registered proprietor is taken to be the cheaper cost avoider, then immediate indefeasibility is the preferable rule.

However, for a number of reasons, this analysis is too simplistic. First, the circumstances in which an invalid registration may arise are too diverse to be amenable to a single loss avoidance rule. For example, the invalid registration may stem from the actions of the incoming registered proprietor, B, in inadvertently exceeding its authority in entering the transaction. Or, the registration may arise through the careless conduct of the former registered proprietor, A, which in turn leads to the unauthorised registration in favour of B. In the first situation B, and in the second situation A, is the cheaper cost avoider.

Second, difficulties arise in the ‘paradigm’ case where the registration of B occurred in circumstances where X, a family member, friend or agent of A, forged A’s signature on a transaction (usually a transfer or mortgage) in favour of B. As noted above, Sackville considered A was the cheaper cost avoider in relation to forgery by friends and relatives. Again, this may be true in some situations, but it will not always be the case. The recent spate

61 However, Sackville conceded that in other situations the cheaper cost avoider may be the incoming registered proprietor. Sackville, above n 36, 532, referred to Boyd v Mayor of Wellington [1924] NZLR 1174 to illustrate this point.
62 In Western Australia registered proprietors may lodge caveats against their land in certain circumstances, see, Landgate, Land Titles Registration Practice Manual (19 May 2016) 4.1.6. The position in the other Australian jurisdictions is discussed in Moore et al, above n 34, [5.40].
63 In some Australian jurisdictions a duplicate certificate of title is automatically issued to the person entitled but in other jurisdictions the duplicate certificate is only issued on the written request of the person entitled. See, Moore et al, n 34, [4.45].
64 For a detailed discussion of the difficulties with loss avoidance analysis: see, O’Connor above n 35, 204-216.
65 This occurred in Palais Parking Station Pty Ltd v Shea (1980) 24 SASR 425 where the Director General (‘DG’) acquired land, in good faith, on the basis of compulsory acquisition powers. However, the DG was mistaken in his belief that he was authorised to acquire the land. Regardless, as the DG was not guilty of fraud, the DG retained an indefeasible title despite his unauthorised acquisition.
66 A variation of the facts of Abigail v Lapin [1934] AC 491 and Breskvar v Wall (1971) 126 CLR 376 illustrates this second situation. In these cases, the former registered proprietors of land executed transfer documents, by way of security only, in favour of a third party. The third party was then in a position to breach the agreement and create unauthorised interests in a subsequent purchaser.
67 O’Connor, above n 35, 206.
of registered forged mortgages in favour of financial institutions illustrates this point. In a number of these cases, the mortgagees were careless in failing to verify that the person with whom the institution was dealing was in fact the registered proprietor. In these situations, the registered mortgagee, B, was the cheaper cost avoider. B could have, relatively easily, averted the risk of forgery by undertaking some obvious steps to verify the identity of the mortgagor. However, despite this careless conduct by the mortgagee, the mortgagee had not been guilty of fraud and so obtained an immediately indefeasible title on registration of the forged mortgage. The effect of immediate indefeasibility in this circumstance is undesirable as it creates a ‘moral hazard’ for mortgagees and diminishes the incentive for mortgagees to take proper care in transacting with mortgagors. In these cases, deferred indefeasibility appears to be the preferable rule particularly in light of the fact that the innocent mortgagor may lose his or her home. As Boyle notes, ‘if compensation is to be paid in these situations, why not give the bank the money and leave the house with the mortgagor?’

A third difficulty is that in a number of situations, neither A nor B is the cheaper cost avoider and instead, the person best able to prevent the registration of the invalid transaction is the transferor’s solicitor or conveyancing agent. As O’Connor has noted, ‘[n]either rule of deferred or immediate indefeasibility gives the transferor’s solicitor (or conveyancer) an incentive to make the enquiries to exclude all ... invalidating defects’. Regulations ought therefore to be introduced to provide solicitors ‘with the incentive to take active precautions

68 The registration of forged mortgages is dealt with in detail in Chapters 4, 6 and 7.
69 See, for eg, Grbic v Australian and New Zealand Banking Group (1994) 33 NSWLR 202; Pyramid Building Society v Scorpion [1998] I VR 188.
70 At a minimum, the verification of identity steps should include a face-to-face interview between the mortgagee and the mortgagor and the production by the mortgagor of original photographic identity documents.
71 The inequities raised by this scenario were the catalyst for the introduction of careless mortgagee provisions in the Torrens legislation of Queensland, New South Wales and Victoria. For further discussion, see Chapter 6 and 7.
72 Pamela O’Connor, in ‘Immediate indefeasibility for mortgagees: A moral hazard?’ (2009) 21(2) Bond Law Review 133, 133, described moral hazard as follows: ‘“Moral hazard” refers to the tendency of a party to take less care to avoid a loss-producing event if the loss is borne by someone else.’
73 The protection of a person’s right to their home is well-recognised in human rights law. See Deborah Rook (ed), Property Law and Human Rights (Blackstone Press, 2001) and the discussion by O’Connor, above n 35, 188-193.
74 Above n 51, 311. As noted, above n 27, the Torrens legislation in most jurisdictions would not allow the mortgagee to obtain compensation. If the mortgagee is to be compensated in these cases, amendments to the legislation would be required. The recently enacted Land Transfer Act 2017 NZ would allow a mortgagee who has become registered under a forged mortgage to obtain compensation in the event the registered mortgage was cancelled under s 55. See s 59(2)(c) and the discussion below nn 127 and 128.
75 O’Connor, above n 35, 210-211.
76 Ibid, 211.
against an invalid disposition’.\(^{77}\) In this regard, O’Connor refers to a provision in the Torrens legislation of New Zealand that requires certification by lawyers as to the ‘correctness of the documentation’.\(^{78}\) Since O’Connor made these comments, all jurisdictions in Australia have introduced legislation that includes significant safeguards to prevent the registration of invalid transactions. The legislation, the *Electronic Conveyancing National Law* (‘ECNL’), is discussed in detail in Chapter 7. In brief, under the ECNL Model Participation Rules (‘MPR’), the solicitor must: enter into a client authorisation before electronically lodging documents on the client’s behalf;\(^{79}\) take reasonable steps to verify the identity of the client;\(^{80}\) and take reasonable steps to verify that the client is a legal person who has the right to enter into the conveyancing transaction.\(^{81}\) The MPR not only provide solicitors with the incentive to take precautions but also impose positive obligations on solicitors (referred to as ‘subscribers’ under the ECNL) so to do. Subscribers who fail to comply with the MPR may have their access to the electronic network restricted, suspended or terminated.\(^{82}\) In addition, the legislation in some jurisdictions imposes penalties where false or misleading information has been provided by a subscriber in relation to verification of identify requirements.\(^{83}\)

In concluding this discussion, it is not possible to provide a universal rule as to whom, of A or B, will be the cheaper cost avoider. In some cases it may be A, in others B and yet in others it may be A’s solicitor who is best able to prevent the registration of invalid instruments. Despite this overall conclusion, there is one particular situation where loss avoidance arguments provide a compelling case for preferring deferred over immediate indefeasibility. This situation, as noted above, is where a forged mortgage is registered in favour of a mortgagee who has been careless in failing to verify the identity of the mortgagor.\(^{84}\)

\(^{77}\) Ibid.

\(^{78}\) Ibid. See the discussion of the current New Zealand position below at 2.4.

\(^{79}\) MPR, cl 6.3(b).

\(^{80}\) MPR, cl 6.5.1(a).

\(^{81}\) MPR, cl 6.4(a).

\(^{82}\) ECNL, s26 and MPR, cl 9.

\(^{83}\) See, for example, *Real Property Act 1886* (SA) s232A and 232B and *Electronic Conveyancing (Adoption of National Law) Act 2013* (Tas), s9.

\(^{84}\) In Chapter 4, nn 9 and 10, the author discusses the egregiously sloppy identification procedures carried out by the mortgagee and its intermediaries in *Solak v Bank of Western Australia* [2009] VSC 82 (*Solak No 1*). At no time was direct face to face contact made between the impersonator of the mortgagor, Mr Solak, and the mortgagee, Bank West, or its intermediaries, Aussie, Kheirs or Mr Kheir. Rather contact was made by telephone or, in relation to the identification and loan documentation, by fax. The impersonator was able to obtain the identification documents, including Mr Solak’s passport, driver’s licence and tax returns, by breaking into Mr Solak’s house while Mr Solak was overseas. These facts highlight that the cheaper loss avoider in this case is clearly the mortgagee who, by the simple expedient of requiring a face-to-face interview and comparison.
Wealth maximisation and transaction costs

A second economic efficiency argument concerns wealth maximisation and the associated theory of transaction costs. Many economists argue that the starting point for measuring economic efficiency in voluntary transactions is the Pareto approach: ‘A Pareto-superior transaction ... is one that makes at least one person better off and no one worse off’. As Posner observed, a Pareto-superior exchange has few applications in the real world since the requirement that no one is worse off, is rarely achieved. Where an invalid instrument is registered in favour of an innocent purchaser, Pareto-superiority cannot be achieved with either deferred or immediate indefeasibility since, under either form of indefeasibility, only one party is entitled to the land and the other party is, therefore, ‘worse off’. In real world situations, where there are gains for some and losses for others, economists apply Kaldor-Hicks criterion, also referred to as wealth maximisation, to determine whether a particular activity is efficient. This may be illustrated in relation to contractual arrangements as follows: Suppose a landowner, Y, values his or her land at $50 and a potential purchaser, Z, values it at $120, then any sale price between $50 and $120 will produce an aggregate benefit of $70. That is, for example, if the land was sold at $100, then Y would benefit by $50 and Z would benefit by $20 giving an aggregate benefit of $70. In wealth maximisation terms this would be an efficient transaction provided any harm done to third parties does not exceed $70. Kaldor-Hicks criterion therefore ‘evaluates the gains and losses as a whole’ and determines that a transaction is efficient if it maximises the aggregated wealth.

As with loss avoidance arguments, the application of wealth maximisation theory in the context of the registration of invalid instruments is not straightforward. First, the Y and Z example discussed above contemplates a voluntary exchange where ‘we can be confident that the shift [in resources] involves an increase in efficiency’. Yet our concern is with the involuntary exchange that arises when an invalid instrument is registered. Posner argues that

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with photographic identity documents, would have been able to avert the identity fraud perpetrated by the impersonator. Further discussion of careless mortgagee conduct appears in Chapters 6 and 7.


Arrieta-Sevilla, above n 39, 210

Posner, above n 85, 15. As Posner notes,’ [t]he transaction would not have taken place unless both parties had expected to be made better off by it’.
in relation to involuntary exchanges, ‘Kaldor-Hicks asks whether, had a voluntary exchange been feasible, it would have taken place’. It is not at all clear to the author how this hypothetical market exchange would apply in the current context. Second, the wealth maximisation theory presupposes an environment where both parties have full information and there are zero transaction costs. Clearly, in relation to the transfer of interests in land, there are transaction costs. These must be taken into account in evaluating the overall gains and losses of deferred and immediate indefeasibility.

Transaction costs are the real world costs of transacting and include, ‘the costs of investigating and appraising rights or resources (“information costs”), bargaining to acquire them (“bargaining costs”) and enforcing the bargain (“enforcement costs”). When the theory of transaction costs is applied to land title systems, it appears that, ‘the title system that reduces information costs to the greatest extent without increasing bargaining and policing costs, in such a way that the exchange of property rights is both swift and reliable, should take precedence’. Arrieta-Sevilla has undertaken an analysis of transaction costs in relation to immediate and deferred indefeasibility, using the language of ‘security of transaction’ and ‘security of title’ respectively. Arrieta-Sevilla recognises the logic and importance of security of title at an ‘individual scale’ and quotes Baird and Jackson, ‘when we already own property, we want to ensure that we can control its disposition – that a new “owner” will not come into existence without our consent’. Despite this, at a ‘collective scale’ and applying Kaldor-Hicks criterion, Arrieta-Sevilla supports security of transaction, that is, immediate indefeasibility. Unlike security of title, security of transaction has reduced information costs as the registered transferee is not required to investigate the transferor’s title and can transact with confidence on the faith of the register. The former owner is protected by a ‘liability
rule’, the payment of compensation, not by a ‘property rule’. Arrieta-Sevilla comments, ‘security of title [deferred indefeasibility] creates a degree of uncertainty that dissuades the markets’ and goes on to say:

This uncertainty affects the real estate market because it reduces the price that a prospective purchaser is prepared to pay, meaning that transactions that would have taken place in conditions of perfect competition are no longer performed. Security of title also undermines the capital market because this market calls for means by which to minimise investment risk and ensure that loans are repaid. The distrust of banks concerning the solvency of debtors or the adequacy of the warranties they present would lead to a rise in the interest rate which would hinder investment.

Sackville, Butt and Griggs also support immediate indefeasibility largely on the basis of economic efficiency and transaction costs arguments. However other Torrens scholars, like O’Connor and Taylor, consider that economic efficiency arguments may also be used to support deferred indefeasibility. According to O’Connor, under wealth maximisation theory, ‘land resources are allocated most efficiently when they pass into the hands of those who value them most highly’. In O’Connor’s view, in measuring value, ‘subjective, emotional and psychological factors’ may be taken into account. Applying this to the classic scenario: if A values the land more highly than B, then deferred indefeasibility would be more efficient than immediate indefeasibility. However, if B values the land more highly, then immediate indefeasibility is more efficient. Since no single bijuralism rule can pinpoint

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100 Ibid, 208. The reference to ‘liability’ and ‘property’ rules is taken from the famous article by Guido Calabresi and Douglas Melamed, ‘Property Rules, Liability Rules and Inalienability: One View of the Cathedral’ (1972) 85 Harvard Law Review 1089. The authors note, at 1092, ‘An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction ... Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule’. Accordingly, under deferred indefeasibility, A is protected by a property rule since A’s title cannot be taken away by non-consensual means. Under immediate indefeasibility, it is protected by a liability rule as a non-fraudulent B may destroy A’s initial title by registering, leaving A with a right to compensation.


102 Ibid.


104 O’Connor, above n 35, 202-228 and Taylor, above n 27, 252.

105 O’Connor, ibid, 217.

106 Ibid. Posner, above n 85, 10, defines the economic value of something as ‘how much someone is willing to pay for it or, if he has it already, how much he demands for parting with it.’ This definition accords with O’Connor’s view and allows subjective, emotional and psychological factors to be taken into account.
the higher valuing owner in all cases, the preferable rule is the one that allocates the land to the higher valuing owner in most situations. In this regard, one of the most relevant factors in owner valuation is the length of time a person has been in possession of the land: the longer the possession, the greater the value. As Oliver Wendell Holmes eloquently put it, ‘man, like a tree in the cleft of a rock, gradually shapes roots to its surroundings, and when the roots have grown to a certain size, can’t be displaced without cutting at his life’.\textsuperscript{107} O’Connor examines this possession factor and others\textsuperscript{108} and concludes that when the subjective, emotional and psychological factors are taken into account, deferred indefeasibility will be more ‘allocatively efficient’\textsuperscript{109} than immediate indefeasibility.

This discussion of wealth maximisation and transaction costs reveals a clear divide in the way Torrens scholars apply economic arguments to determine the preferable bijuralism rule. Cole’s definition of efficiency suggests that the preferable bijuralism rule is the one that more effectively minimises the social costs and maximises the social benefits. Proponents of deferred indefeasibility argue that the social costs of immediate indefeasibility outweigh the benefits. These social costs include the harm and unfairness imposed on individuals through the non-consensual transfer of property rights and the loss of static security for all registered proprietors in the event their titles are subsequently extinguished through the registration of an invalid instrument. Conversely, proponents of immediate indefeasibility argue the social benefits outweigh the costs. Immediate indefeasibility reduces transaction costs for all purchasers and facilitates speedy, cheap and secure land transfers. The social cost of immediate indefeasibility, namely the occasional loss of title through a non-consensual transaction, is ameliorated by the payment of compensation.

\textbf{2.3.3 Immediate and deferred indefeasibility - conclusion}

The author recognises the strengths of both sides of the debate and it may well be, as Sir Anthony Mason suggests, that ‘deferred indefeasibility would generate fairer results’.\textsuperscript{107} Excerpt from a letter written by Oliver Wendell Holmes to William James (April 1, 1907) cited in Thomas Miceli and C F Sirmans, ‘The Economics of Land Transfer and Title Insurance’ (1995) 10 Journal of Real Estate Finance and Economics 81, 83.\textsuperscript{108} O’Connor also discusses the ‘endowment effect’ that holds that ‘the value that an individual places on a commodity increases when it becomes part of the individuals “endowment” or asset position’ and the ‘loss aversion’ phenomenon that ‘refers to the tendency for people to feel losses more keenly than commensurate gains’, O’Connor, above n 35, 219.\textsuperscript{109} Ibid, 223. O’Connor noted, however, that no single rule can reliably allocate the property to the highest valuing owner in every case.
However, Sir Anthony went on to say that ‘one cannot be sure that the benefits [of deferred indefeasibility] would outweigh the detriments of change’.\footnote{Sir Anthony Mason, ‘Indefeasibility – Logic or Legend?’ in David Grinlinton (ed), Torrens in the Twenty-first Century (LexisNexis, 2003) 18.} In addition to the uncertainty that may result from changing the bijuralism rule, there are two other significant disadvantages with deferred indefeasibility that require discussion.

First, arguments in favour of deferred indefeasibility generally fail to adequately address the problem regarding the time limit within which A must bring his or her action against B to recover the land. In the situation where B has taken possession of the land, then, with the passage of time, it will become increasingly unfair for A to have the right to evict B. If a time limit were to be imposed, how long would it be? Would it be at the court’s discretion? In either case, deferred indefeasibility introduces uncertainty that would result in a loss of confidence in the system.

Second, the operation of deferred indefeasibility is not always clear. For example, in some of the Canadian provinces that have adopted deferred indefeasibility, there have been difficulties in its application and ‘it suffers from complexity and a consequent lack of clarity.’\footnote{Law Commission A New Land Transfer Act (NZLC R116, 2010) 2.9.} A simple fact scenario serves to illustrate how difficulties may arise: A fraudster poses as A and sells A’s land to B. The fraudster forges A’s signature to the transfer document. In order to purchase the land, B obtains a loan from C to be secured by a mortgage over the land. The mortgage document is executed by both B and C. Subsequently, the transfer and mortgage are registered on the same day. A discovers the fraud and seeks a return of the land unencumbered by the mortgage. The application of immediate indefeasibility to this problem is crystal clear. Provided that neither B nor C was guilty of fraud in becoming registered, then both B and C obtain indefeasible titles to their respective interests. A’s only right is to seek compensation either from the fraudster or pursuant to the compensation provisions. Under deferred indefeasibility, it is clear that B will not obtain an indefeasible title since B’s registration was pursuant to a void instrument, the forged transfer. A may therefore be restored to the register as fee simple owner. However, will A’s title be subject to C’s mortgage? On one view of deferred indefeasibility, since there was no forgery in relation to C’s mortgage, which was an internally valid instrument, then C ought to obtain an indefeasible title to the mortgage. However, on another view, as C did not deal with the
registered proprietor at the time of entering the mortgage, who at that time was A, then there was no reliance by C on the register and accordingly C ought not to obtain an indefeasible mortgage. The Canadian case law dealing with variations on this kind of scenario is controversial, confused and uncertain.\(^\text{112}\)

In light of the concerns regarding the time limit within which A must bring an action to recover the land and the demonstrated uncertainty in the application of deferred indefeasibility in the Canadian jurisdictions, the author submits that there is no compelling basis for choosing deferred over immediate indefeasibility. However, it is not possible at this point to make a final assessment as to the preferable bijuralism rule. As will be seen in the published chapters of this thesis, the operation of immediate indefeasibility has, itself, produced inconsistency and uncertainty. Accordingly, it is only after taking account of the analysis of immediate indefeasibility in these chapters that one may make a final assessment of these rival bijuralism rules.

### 2.4 The New Zealand bijuralism rule

The South Australian *Real Property Act 1861* was the foundation for the first Torrens legislation enacted in New Zealand, the *Land Transfer Act 1870* (NZ).\(^\text{113}\) Over the years, this original New Zealand legislation has been amended and the current legislation is the *Land Transfer Act 1952* (the ‘1952 Act’). Generally speaking, though subject to some notable exceptions, the interpretation of the New Zealand and Australian Torrens legislation is the same.\(^\text{114}\) In particular, New Zealand, like Australia, has adopted immediate indefeasibility as its bijuralism rule. However, starting in 2007, the Law Commission of New Zealand in conjunction with Land Information New Zealand (LINZ) engaged in a thorough review of the


\(^{114}\) For present purposes, the most significant difference between the Torrens legislation in New Zealand and the Australian jurisdictions concerns the interpretation of the notice provision, discussed in the text at 2.2.2. In New Zealand, the provision is not interpreted as strictly as in Australia. For further discussion see Law Commission, above n 111, 2.35-2.36; Peter Butt, ‘Notice and Fraud in the Torrens System: a Comparative Analysis’ (1977) 13 *University of Western Australia Law Review* 354; Sir Anthony Mason, above n 110, 3; Justice Peter Blanchard, ‘Indefeasibility under the Torrens System in New Zealand’ in Grinlinton, above n 110, 29; Donald McMorland, ‘Notice, Knowledge and Fraud’, ibid, 67.
In relation to indefeasibility of title, the Law Commission investigated four options:

(a) adhere to the immediate indefeasibility principle, subject to clarifying *Gibbs v Messer*;  
(b) provide for limited discretionary indefeasibility, with the presumption of immediate indefeasibility;  
(c) adhere to the deferred indefeasibility principle (but the Law Commission notes this would involve a movement away from transactional certainty in favour of individual justice); and  
(d) adhere to the immediate indefeasibility principle, but provide specific statutory exceptions.

The Law Commission recommended option (b), that is, that immediate indefeasibility ought to be retained, but may be modified by introducing judicial discretion to avoid manifest injustice in particular cases. The Law Commission considered this option provided a better balance between static and dynamic security and should ‘reduce lengthy and expensive litigation in fraud cases, [and] avoid pushing the boundaries of the in personam jurisdiction in Torrens title cases’. This option was also preferred by most of the people who made submissions to the Law Commission (the ‘submitters’).

The Law Commission’s indefeasibility recommendations are now embodied in a number of provisions of the 2017 Act. Section 51 (‘Title by registration’) and s 52 (‘Exceptions and

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115 In 2008, the Law Commission issued a detailed Issues Paper, above n 113, and in 2010 the Law Commission released the Report, above n 111. The Report included numerous recommendations and a draft *Land Transfer Bill*. The Bill was thoroughly scrutinised over a period of six and a half years and on 10 July 2017 the *Land Transfer Act 2017* was passed. See Elizabeth Toomey, *Brookers Land Transfer Act Handbook 2017* (Thomson Reuters, 2017) 2.

116 For an overview of the New Zealand debate concerning immediate and deferred indefeasibility, see the references included in the Law Commission Issues Paper, above n 113, 2.1-2.78.


118 The *Land Transfer Act 2017* does not use the term indefeasibility; see Law Commission above n 111, 2.25. However, for convenience, the Law Commission used the expression when discussing the indefeasibility options.

119 *Gibbs v Messer* [1891] AC 248.

120 Toomey, above n 115. The Law Commission discusses these options in the Report, above n 111, 2.4-2.16.

121 Law Commission, above n 111, 2.11.


123 Ibid, 2.10.
limitations’) are the pivotal sections that confirm the principle of immediate indefeasibility and specify the exceptions and limitations to indefeasibility.\textsuperscript{124} Sections 51(3)(a) and s 52(2) make it clear that the registered owner’s title is subject to the court’s ability to alter the register in the case of manifest injustice. The manifest injustice provisions are included in ss 54-57. Section 54(1) describes the person who may apply to the court for an alteration of the register as follows:

54 Application to court for order for alteration of register

This section and sections 55 to 57 apply to a person (person A) who—

(a) has been deprived of an estate or interest in land by the registration under a void or voidable instrument of another person (person B) as the owner of the estate or interest in the land; or

(b) being the owner of an estate or interest in land, suffers loss or damage by the registration under a void or voidable instrument of another person (person B) as the owner of an estate or interest in the land.

An important limitation on A’s ability to make an application is found in s 54(3) which provides that the application for a court order must be made not later than 6 months after A becomes aware, or ought reasonably to have become aware, of the acquisition of the estate by B.\textsuperscript{125} In addition, under s 56, the court may not make an order if B has transferred the interest to a third person who has acted in good faith. Section 55 is the key provision that enables the court to cancel B’s registration if the court is satisfied that it would be manifestly unjust for B to remain the registered owner. The court must also be satisfied, under s 55(3), that the injustice could not be addressed by the payment of compensation or damages. Section 55(4) provides comprehensive guidance to the court in making a determination:

\textsuperscript{124} In addition, s 51(4) provides that a registered owner obtains an indefeasible title regardless of the fact that he or she (a) was not a purchaser or (b) obtained title from a fictitious person. This section therefore makes it clear that registered volunteers obtain an indefeasible title and the section clarifies the Gibbs v Messer [1891] AC 248 problem concerning dealings with a fictitious registered proprietor.

\textsuperscript{125} It is interesting to see that a time limit has been introduced limiting A’s right to bring an action under the manifest injustice provisions. However, uncertainty is introduced under s 54(3) in relation to when A ‘ought reasonably to have become aware’ of B’s acquisition. On reflection, it may be desirable for the legislation to include an outside limit to be placed on the time within which A must make an application. It is also of interest to note here that the English Law Commission recently recommended the introduction of a 10 year ‘longstop’. The longstop broadly operates to prevent the alteration of the register provided 10 years have elapsed since the mistake in the register occurred, provided the incoming registered proprietor did not cause or contribute to the mistake by fraud or lack of proper care. See the discussion at Chapter 8, 8.2.
(4) In determining whether to make an order, the court may take into account—

(a) the circumstances of the acquisition by person B of the estate or interest; and
(b) failure by person B to comply with any statutory power or authority in acquiring the estate or interest; and
(c) if the estate or interest is in Māori freehold land, failure by a person to comply with Te Ture Whenua Maori Act 1993; and
(d) the identity of the person in actual occupation of the land; and
(e) the nature of the estate or interest, for example, whether it is an estate in fee simple or a mortgage; and
(f) the length of time person A and person B have owned or occupied the land; and
(g) the nature of any improvements made to the land by either person A or person B; and
(h) the use to which the land has been put by either person A or person B; and
(i) any special characteristics of the land and their significance for either person A or person B; and
(j) the conduct of person A and person B in relation to the acquisition of the estate or interest; and
(k) any other circumstances that the court thinks relevant.126

One can see from these factors that many of the more egregious examples of the operation of immediate indefeasibility may be averted under the manifest injustice provisions. For example, B’s title may be cancelled if: A is in possession of the land; or B acquired title in breach of statutory authority; or B is a mortgagee.127 In the event B’s title is cancelled, B may apply for compensation under s 59(2)(c), which is a new ground for compensation introduced by the 2017 Act.128 Each of these examples, in giving the land to A and, if appropriate, compensation to B, is a desirable application of the manifest injustice provisions.

126 In addition, under s 55(5), the court may make an order on any conditions that the court thinks fit (for example, an order relating to possession of the land).
127 Under s 54 (4)(j) the court may take into account the conduct of the mortgagee in acquiring the mortgage. If the mortgagee has, for example, been careless in failing to take reasonable steps to verify the identity of the mortgagor and the mortgage is a forgery, the court may cancel the registered mortgagee’s registration. Under s 59(2)(c) compensation may be payable to a mortgagee in these circumstances, however, in the case where the mortgagee either caused or contributed to the loss, then under s 69, compensation may be reduced or no compensation may be payable at all to the mortgagee. The more detailed compensation provisions are found in ss 58–72 of the 2017 Act.
128 As discussed at 2.2.3 and above n 27, under the 1952 Act there is a limitation on the availability of compensation: if the loss would have occurred regardless of the Torrens legislation, compensation will not be paid. However, s 59(2)(c) provides for compensation in appropriate cases where B’s title is cancelled.
However, when considering the manifest injustice factors overall, it may be argued that they are weighted too heavily in favour of A. Indeed, Thomas argues that the discretionary test ‘is set at such a low level so as to reintroduce the concept of "deferred indefeasibility" leading to uncertainty of title registration, thus increasing conveyancing risk and costs.’\(^{129}\) Thomas goes on to say that ‘[i]n combination, these two issues will erode consumer confidence in land title registration’.\(^{130}\) The Law Commission responded to submitters’ concerns about uncertainty as follows:

> We consider that the interests of justice substantially outweigh transactional certainty in the few cases where discretion would need to be exercised. It is likely that those few cases would be litigated in any event, with uncertain outcome. We also recommend limiting the discretion with specified guidelines ... which should help to allay any concerns about this proposal.\(^{131}\)

The Law Commission and New Zealand legislature are to be commended for grappling with the longstanding problem of the inherent injustice in the operation of the principle of immediate indefeasibility. The solution proposed, namely to retain immediate indefeasibility but to include a judicial discretion to alter the register in the case of manifest injustice, appears to provide an appropriate balance between static and dynamic security. However, one wonders at the practical impact of the manifest injustice provisions. Will there be, as Thomas foreshadows, increased conveyancing risks and costs with consequential erosion in consumer confidence in the system? Will conveyancers for B be required to ‘go behind the register, to check on the title and the bona fides of any transaction’\(^{132}\) to ensure B’s title cannot later be challenged under the manifest injustice provisions? The Torrens system in New Zealand has been ‘extraordinarily successful’.\(^{133}\) It is to be hoped this continues to be the case as the 2017 Act becomes fully operational.

### 2.5 Conclusion

\(^{129}\) Rod Thomas, ‘Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act’ [2011] New Zealand Law Review 715, 716. Later in his article, Thomas argued that any test for judicial discretion should be ‘tightly drawn to preserve the integrity of the Torrens title’ and proposed a test allowing the Register to be altered on two grounds: ‘First, where land is dealt with in contravention to public policy inherent in any statute. Secondly, where extraordinary circumstances exist making it repugnant to justice for a person to remain as the registered owner of the estate or interest’. Ibid, 747.

\(^{130}\) Ibid, 716.

\(^{131}\) Law Commission, above n 111, 2.16.

\(^{132}\) Thomas, above n 129, 734.

The main purpose of the Torrens system is to facilitate simple, cheap and speedy land transactions by removing the requirement for purchasers to undertake historical investigations of the vendor’s title. Both immediate and deferred indefeasibility fulfill this purpose. However, the critical difference between the two rules is how they deal with the question of who is entitled to the land in the event a person, B, becomes registered of an interest in A’s land pursuant to an invalid instrument. Immediate indefeasibility gives the land to B; deferred indefeasibility gives the land to A.

This chapter considers some of the main arguments surrounding the deferred versus immediate indefeasibility debate and, in so doing, identifies a number of persuasive arguments supporting the deferred indefeasibility approach. First, deferred indefeasibility, in denying indefeasibility in the case of transactional errors, recognises the important policy objectives underlying the common law rules that deem non-consensual transfers to be invalid. Second, the additional litigation caused by the unfair operation of immediate indefeasibility has created complexity and confusion in the case law and has placed a strain in the system. Third, economic arguments concerning the cheaper cost avoider support the adoption of deferred indefeasibility for registered forged mortgages and, in relation to wealth maximisation and transaction costs arguments, Torrens scholars are divided. This reflects Sackville’s comment that the preferable bijuralism rule will ‘depend on value judgments concerning the weight of conflicting policies’. The proponents of deferred indefeasibility emphasise the need to take account of the subjective, emotional and psychological factors in assessing the overall social costs. When these factors are taken into account, together with the loss of static security for all registered proprietors, then the costs of immediate indefeasibility are shown to outweigh the benefits. Deferred indefeasibility is therefore the preferable rule. In contrast, proponents of immediate indefeasibility focus on the social benefits of immediate indefeasibility which include reduced transaction costs for all purchasers and speedy, cheap and secure land transfers. For the proponents of immediate indefeasibility, these social

134 Deferred indefeasibility may also produce litigation, though in many cases, particularly where B is a mortgagee, B will be satisfied by the payment of compensation and additional litigation is therefore unlikely. However, as noted above nn 27 and 74, if the mortgagee is to be compensated in these cases, amendments to the Torrens legislation in most jurisdictions would be required.

135 The cheaper cost avoider arguments are inconclusive in relation to transfers, however, in the case of registered forged mortgages, B tends to be the cheaper cost avoider indicating that deferred indefeasibility is the preferable bijuralism rule.

136 Sackville, above n 36, 531.
benefits outweigh the social costs. From the author’s point of view, both deferred and immediate indefeasibility may introduce uncertainty into the system. It is therefore not possible at this stage of the thesis to make a final assessment as to the preferable bijuralism rule.

This chapter also considers an alternative bijuralism rule introduced in New Zealand by the 2017 Act. This rule retains immediate indefeasibility but includes a judicial discretion to alter the register in the case of manifest injustice. The rule appears to strike a better balance between static and dynamic security than either deferred or immediate indefeasibility. However, the inclusion of judicial discretion introduces a level of uncertainty which may erode consumer confidence in the system. Whether this proves to be the case, may only be determined as the 2017 Act becomes fully operational.

The purpose of this chapter is to provide an understanding of immediate indefeasibility by comparing it with deferred indefeasibility and the discretionary immediate indefeasibility introduced by the 2017 Act in New Zealand. With this understanding in place, the remaining chapters of this thesis analyse the operation of immediate indefeasibility with a view, finally, to answer the overarching research question: Is the Australian Torrens system principle of immediate indefeasibility ‘fit for purpose’ for the 21st century?

For the immediate indefeasibility proponents, the social costs are, in any event, ameliorated by compensation.
Chapter Three: A Tangled Web Indeed:
The English Land Registration Act and Comparisons with the Australian Torrens System

This chapter is a journal article: Penny Carruthers, ‘A Tangled Web Indeed: the English Land Registration Act and Comparisons with the Australian Torrens System’ (2015) 38(4) University of New South Wales Law Journal 1261
I  INTRODUCTION

Both England and Wales,¹ and the Australian states and territories,² have positive systems of registered land title under which the state guarantees that the register is conclusive and that the rights and interests shown on the register are valid.³ The systems are also ‘bijural’, ‘in the sense that they straddle two bodies of law – the positive system and the ordinary rules of property law’.⁴ In practice, most instruments lodged for registration are, according to the ordinary property rules, valid documents and so bijuralism is not problematic. However, difficulties arise where there is a ‘bijural inaccuracy’,⁵ that is, where the instrument lodged for registration is invalid under the property rules, and therefore ineffective to pass an interest, yet according to the positive title registration system, the instrument is effectively validated. In relation to any positive system of registered land title the question arises: how is the problem of bijural inaccuracy to be resolved?

A simplified, though classic, bijural inaccuracy scenario occurs where A is the registered proprietor of an interest in land and pursuant to an invalid instrument, B becomes the registered proprietor of A’s interest.⁶ The instrument may be invalid for various reasons including forgery or non est factum. Assuming both A and B are innocent, who, of A or B, is to be preferred and entitled to the land? A further question arises when B, prior to action by A, executes a transfer of his or her interest to C and C becomes registered. Who, of A or C, is to be preferred in this situation?

The answer to these questions will be determined by the extent to which the particular system prefers ‘static’ security, which ‘allows assets to be securely held’,⁷ or

¹ For convenience, the land title registration system in England and Wales will be referred to as the English system. As at 2012, HM Land Registry estimated that over 85 per cent of titles were registered: Martin Dixon, Modern Land Law (Routledge, 8th ed, 2012) 29.
² The Real Property Act (1858) (SA) was the first registered land title legislation in Australia. Over the ensuing years all jurisdictions in Australia adopted similar, though not identical, legislation.
³ A negative system, on the other hand, operates within the general property law rules so that if a void instrument is registered it is not cured by registration.
⁵ Ibid 196.
⁶ B may become registered of A’s full interest or of a derivative interest, eg, a mortgage.
⁷ O’Connor, ‘Deferred and Immediate Indefeasibility’, above n 4, 198.
'dynamic' security which ‘allows assets to pass securely to new owners’. Both these forms of security are desirable; however, ‘they are to some extent antithetical’. In our A-B-C scenario, static security would give the land to A, but dynamic security would give the land to B and C.

Under the system of registered land title in Australia, known as the Torrens system, a land lawyer could, with reasonable confidence, predict the outcome of the A-B-C scenario. Assuming that neither B nor C was involved in fraud in becoming registered, either B or C would be entitled to the land and A would be left to seek compensation.

However, the answer under the English legislation is far from clear. In 2002, the Land Registration Act 2002 (UK) c 9 (‘LRA 2002’) was enacted, largely repealing the Land Registration Act 1925, 15 & 16 Geo 5, c 21 (‘LRA 1925’). The enactment of the LRA 2002 followed an extensive process of consultation and the production of a joint Law Commission and Land Registry report, Land Registration for the Twenty-First Century: A Conveyancing Revolution (‘Report’). Importantly, the Report stated: ‘It will be the fact of registration and registration alone that confers title. This is entirely in accordance with the fundamental principle of a conclusive register which underpins the Bill’.

This notion, that the register is ‘conclusive’, is entirely consistent with the Torrens system and suggests the same outcome for the A-B-C scenario. However, this is not the case. According to recent English case law, the most likely outcome is that A will

8 Ibid.
9 ‘The system must therefore find an acceptable compromise between dynamic and static security; but different systems find the balance at different points’: Elizabeth Cooke, The New Law of Land Registration (Hart Publishing, 2003) 100.
10 O’Connor, ‘Deferred and Immediate Indefeasibility’, above n 4, 198.
11 All Australian jurisdictions have their own Torrens legislation. For present purposes, there are no significant differences and the legislation in all jurisdictions will be referred to as the ‘Torrens system’.
12 This assumes also that there are no other exceptions to indefeasibility with regards to B’s and C’s registered title.
14 Ibid 4 [1.10].
be entitled to the land. For an Australian, the scheme introduced by the English system is complicated and recent conflicting decisions render the system even more confusing. Scholars well versed with the English system have described these recent decisions as ‘disastrous for the integrity of the statute’, and as ‘steadily derailing the orthodox, formalist interpretation of the statute’.

This article explores the English land title legislation and the recent case law dealing with bijural inaccuracy. It is argued that the English courts and adjudicators have increasingly tended to resolve bijural inaccuracy by resorting to general property law rules. Hand-in-hand with this development is the apparent failure of the courts and adjudicators to take a holistic view of three key aspects of the English legislation, namely: the nature of registered title; rectification of the register; and indemnity. This omission has meant the essential interconnectedness of different parts of the legislation has not properly been considered and the apparent intention behind the legislation has been thwarted.

Another main aim of this article is to provide a comparative analysis of the English system with the Australian Torrens system in an attempt to ‘deepen our understanding of our own system’.

Part II of this article provides a brief overview of the key features of the Torrens system. Part III considers in some detail the relevant sections and schedules of the LRA 2002 and suggests a comprehensive ‘LRA 2002 methodology’ for resolving A-B-C disputes. Parts IV and V analyse the recent conflicting English decisions and compare the developing situation in England with the position under the Torrens system.

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15 See, eg, Ajibade v Bank of Scotland plc (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Rhys, 8 April 2008); Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 86 (Ch).
18 Consequently, the English system is becoming increasingly ‘negative’ in nature: see above n 3. A notable exception to this trend is the Court of Appeal’s recent decision in Swift 1st Ltd v Chief Land Registrar [2015] 3 WLR 239 (‘Swift’). For further discussion of this case see Part V.
II THE TORRENS SYSTEM IN OUTLINE

A Indefeasible Title

The Torrens system has been described as a system of ‘title by registration’. Title to land passes on registration of an instrument regardless of any invalidity or defect in the registered instrument. The registered proprietor’s title is said to be ‘indefeasible’. The most emphatic expression of the nature of indefeasibility is set out in the ‘paramountcy’ provision. This provision provides, in essence, that notwithstanding the existence of any estate or interest which but for the Torrens legislation might be held to be paramount, the registered proprietor shall, except in case of fraud, hold the land absolutely free from any estate or interest other than those specifically excepted. Accordingly, indefeasibility applies ‘immediately’ to the non-fraudulent registered proprietor’s title.

The Torrens system, therefore, clearly adopts dynamic security and prefers security of transaction for B and C over security of title for A.

1 Deferred Indefeasibility

For some years an alternative view of indefeasibility, termed ‘deferred’ indefeasibility, had been adopted by the Australian courts. Under the deferred approach, a person becoming registered pursuant to a void document would only obtain a defeasible title and the former registered proprietor would be entitled to bring an action to be restored to the register. However, if, prior to the former owner taking

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20 Breskvar v Wall (1971) 126 CLR 376, 385 (Barwick CJ).
21 See, eg, Land Titles Act 1925 (ACT) s 58; Real Property Act 1900 (NSW) s 42(1); Land Title Act 2000 (NT) ss 188–9; Land Title Act 1994 (Qld) ss 184–5; Real Property Act 1886 (SA) ss 69–70; Land Titles Act 1980 (Tas) s 40; Transfer of Land Act 1958 (Vic) s 42(1); Transfer of Land Act 1893 (WA) s 68.
22 Frazer v Walker [1967] 1 AC 569, 579, 584, 585 (Lord Wilberforce); Breskvar v Wall (1971) 126 CLR 376, 385 (Barwick CJ). The paramountcy provision provides statutory support for the immediate indefeasibility approach.
23 Gibbs v Messer [1891] AC 248; Clements v Ellis (1934) 51 CLR 217. Recent amendments to the Torrens legislation in Queensland, NSW and Victoria have effectively introduced a hybrid form of deferred indefeasibility, referred to as ‘qualified indefeasibility’, in relation to registered forged mortgages: see Real Property Act 1900 (NSW) s 56C; Land Title Act 1994 (Qld) ss 11A(2), 11B(2), 185(1A); Transfer of Land Act 1958 (Vic) ss 87A, 87B.
action, the person who was registered pursuant to the void document were to transfer
the interest to a third person, this third person would obtain an indefeasible title upon
registration.\footnote{For a detailed discussion of the adoption of the deferred approach in overseas Torrens jurisdictions, see O’Connor, ‘Deferred and Immediate Indefeasibility’, above n 4. For a specific discussion of recent developments in Malaysia, see Teo Keang Sood, ‘All Because of a Proviso – A Nine-Year Wait To Right the Wrong’ in Penny Carruthers, Sharon Mascher and Natalie Skead (eds), \textit{Property & Sustainability: Selected Essays} (Thomson Reuters, 2011) 161.}

Arguably, the deferred approach better captures a balance between dynamic and static
security. Provided A brings an action against B before B’s transaction with C, A will
be entitled to be restored to the register. Static security is realised. However, if C is
already registered by the time of A’s action, dynamic security applies and C will be
entitled to remain as the registered owner. In this case, A is restricted to an action
against the wrongdoer, or, provided the requirements are satisfied, to a claim for
compensation against the registrar.

\section*{B Exceptions to Indefeasibility}

\subsection*{1 Express Exceptions}

There is a number of express exceptions to indefeasibility contained in the Torrens
statutes.\footnote{The more standard express exceptions include: registered encumbrances; the interest of a proprietor under a prior registered certificate of title; an interest which has been included in the registered proprietor’s title by wrong description of land; and the interest of a tenant in actual possession under an unregistered lease. The registered proprietor’s title may also be subject to unregistered easements or to an adverse possession claim: see \textit{Land Titles Act 1925} (ACT) s 58(1); \textit{Real Property Act 1900} (NSW) s 42(1); \textit{Land Title Act 2000} (NT) s 189(1); \textit{Land Title Act 1994} (Qld) s 185(1); \textit{Real Property Act 1886} (SA) s 69; \textit{Land Titles Act 1980} (Tas) s 40; \textit{Transfer of Land Act 1958} (Vic) s 42(1); \textit{Transfer of Land Act 1893} (WA) ss 68(1)–(2).}
The most relevant express exception for present purposes is the ‘fraud’ exception. The fraud exception applies where the current registered proprietor, or his
or her agent, was guilty of fraud in becoming registered. ‘Fraud’, though not defined
in the Torrens legislation, has been defined narrowly in the case law to mean ‘actual
fraud, i.e., dishonesty of some sort’ by the registered proprietor.\footnote{\textit{Assets Co Ltd v Mere Rohi} [1905] AC 176, 210 (Lord Lindley).}
This narrow definition of fraud is reinforced by the ‘notice’ provision\footnote{See, eg, \textit{Land Titles Act 1925} (ACT) ss59, 60(2); \textit{Real Property Act 1900} (NSW) s43(1); \textit{Land Title Act 2000} (NT) ss 188(2)–(3); \textit{Land Title Act 1994} (Qld) s 184(1); \textit{Real Property Act 1886} (SA) ss 186–7; \textit{Land Titles Act 1980} (Tas) s41; \textit{Transfer of Land Act 1958} (Vic) s43; \textit{Transfer of Land Act 1893} (WA) s 134.} in the Torrens legislation.
which provides that a registered transferee of an interest in land is not to be affected by actual or constructive notice of any pre-existing unregistered interest or trust. 28

Applying this very narrow definition of fraud to the A-B scenario means that B’s title can only be challenged if B engaged in sufficiently egregious conduct so as to amount to Torrens fraud. The simple fact of becoming registered pursuant to an invalid instrument, by itself, does not amount to fraud, and consistently with the Torrens preference for security of transaction, B’s title is secure. 29

Another potential express exception to indefeasibility, referred to as ‘qualified indefeasibility’, exists in Queensland, New South Wales and Victoria as a result of recent amendments to the Torrens legislation regarding registered forged mortgages. 30

The amendments introduce a requirement for mortgagees to take reasonable steps to verify the identity of the mortgagor. 31 If these steps are not complied with and the mortgage is a forgery, in Queensland the mortgagee will not obtain the benefits of an immediately indefeasible title, 32 and in New South Wales 33 and Victoria, 34 the Registrar-General or Registrar (respectively) has a discretion as to whether to cancel the registered mortgage. 35

2 Other Exceptions

28 Indeed, even where the person who becomes registered is aware that registration will defeat the prior unregistered interest, this too is not fraud: Mills v Stockman (1967) 116 CLR 61, 78 (Kitto J).
29 If the invalid instrument was a forged document and B knew of the forgery, this would give rise to the fraud exception as knowledge of fraud constitutes fraud: Assets Co Ltd v Mere Roihi [1905] AC 176, 210 (Lord Lindley).
30 The amendments came into effect in Queensland in November 2005 as amended by Natural Resources and Other Legislation Amendment Act 2005 (Qld) s 53, in NSW in November 2011 (pursuant to amendments made in 2009) as amended by Real Property and Conveyancing Legislation Amendment Act 2009 (NSW) sch 1 [4], and in Victoria in September 2014 as amended by Transfer of Land Amendment Act 2014 (Vic) s 17.
31 Real Property Act 1900 (NSW) s 56C(1); Land Title Act 1994 (Qld) ss 11A(2), 11B(2); Transfer of Land Act 1958 (Vic) s 87A(1).
32 Land Title Act 1994 (Qld) s 185(1A).
33 The Registrar-General may cancel the recording: Real Property Act 1900 (NSW) s 56C(6).
34 Transfer of Land Act 1958 (Vic) ss 87A–87B. Pursuant to s 87A(3)(b), the Registrar may remove the mortgage from the Register.
35 In addition, in each jurisdiction, the mortgagee is not entitled to compensation from the state for any loss attributable to the failure to comply with the requirement: Real Property Act 1900 (NSW) s 129(2)(j); Land Title Act 1994 (Qld) s 189(1)(ab); Transfer of Land Act 1958 (Vic) s 110(4)(c).
In addition to these express exceptions there are four other potential exceptions to the registered proprietor’s title. A registered proprietor’s title may be challenged on the basis of an in personam claim founded in law or in equity which gives rise to a remedy concerning the land,36 the registrar’s power to correct the register,37 and overriding legislation. In addition, where the registered proprietor did not provide valuable consideration for his or her interest, in some jurisdictions, the ‘volunteer’ registered proprietor will not obtain an indefeasible title and will be subject to the same unregistered interests that affected the donor’s title.38 Accordingly, in these jurisdictions, a volunteer who has become registered pursuant to a void instrument will obtain a defeasible title and the register entry can be set aside.

C Compensation

One of the effects of immediate indefeasibility is that an innocent landowner may be deprived of his or her interest in the land. In all Australian jurisdictions compensation provisions are incorporated into the Torrens legislation to enable a person sustaining loss through the operation of the system to obtain compensation from an assurance fund.39 The compensation provisions are, in the main, poorly drafted and vary across

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36 Frazer v Walker [1967] 1 AC 569, 585 (Lord Wilberforce). The claim may be based on: a contract with the registered proprietor regarding the grant of an interest in the land; an express, resulting or constructive trust over the land (as occurred in Bahr v Nicolay [No 2] (1988) 164 CLR 604) or pursuant to a recognised equitable doctrine that may be enforced against the registered proprietor.

37 The registrar has power to correct obvious clerical errors: see Land Titles Act 1925 (ACT) ss 14(1)(e), 160; Real Property Act 1900 (NSW) ss 12(1)(d), (3)(a)–(d); Land Title Act 2000 (NT) ss 17(1), (3); Land Title Act 1994 (Qld) s 15(3); Real Property Act 1886 (SA) s 220(f); Land Titles Act 1980 (Tas) s 139(2)(a); Transfer of Land Act 1958 (Vic) s 103(2)(a); Transfer of Land Act 1893 (WA) ss 188(1), (3), 189(1). In addition, in all jurisdictions other than Victoria and the ACT, the registrar is said to have a more substantive power to correct the register and instruments: see Real Property Act 1900 (NSW) ss 136–7; Land Title Act 2000 (NT) ss 20, 158; Land Title Act 1994 (Qld) ss 15(2)(b), 19, 160; Real Property Act 1886 (SA) ss 60–3; Land Titles Act 1980 (Tas) ss 163–4; Transfer of Land Act 1893 (WA) ss 76–7. For further detailed discussion of the powers of the registrar in Australia, see Natalie Skead and Penny Carruthers, ‘The Registrar’s Powers of Correction: “Alive and Well”, though Perhaps “Unwelcome”? Part I: The Slip Provision’ (2010) 18 Australian Property Law Journal 32; Penny Carruthers and Natalie Skead, ‘The Registrar’s Powers of Correction: “Alive and Well”, though Perhaps “Unwelcome”? Part II: The Substantive Provision’ (2010) 18 Australian Property Law Journal 132.

38 The jurisdiction that most consistently denies indefeasibility to registered volunteers is Victoria: see King v Smail [1958] VR 273; Rasmussen v Rasmussen [1995] 1 VR 613; Valoutin v Furst (1998) 154 ALR 119. WA and NSW take a contrary view: see Conlan v Registrar of Titles (2001) 24 WAR 299; Bogdanovic v Koteff (1988) 12 NSWLR 472. In Queensland and the NT there are specific provisions granting the volunteer registered proprietor an indefeasible title: see Land Title Act 2000 (NT) s 183; Land Title Act 1994 (Qld) s 180.

39 In most jurisdictions the separate assurance fund has been abolished and claims are made directly against the Commonwealth, territory or state or paid from the Consolidated Fund or the Consolidated Account. However, for ease of reference, the term assurance fund is used in this article.
the Australian jurisdictions. There are two broad models: the ‘last resort”40 and ‘first resort”41 models. Under the last resort model, actions for compensation for deprivation of an interest in land are, in most cases, to be brought initially against the person liable for the deprivation. It is only in limited circumstances that access to the assurance fund may be available. Under the first resort model, a person deprived of an interest in land is entitled to claim directly against the assurance fund.

In essence, under either model, in order for a person to be able to claim compensation, he or she must have been deprived of an interest in land in one of four circumstances: (1) in consequence of fraud; (2) through bringing land under the Torrens system; (3) through any error, omission, or mis-description in the register; or (4) through the registration of any other person as proprietor.

In considering the A-B-C scenario, if A were to lose title through the registration of B and C, in the first resort jurisdictions A would be entitled to claim compensation from the assurance fund. In the last resort jurisdictions A would be entitled to claim against the assurance fund in two circumstances: (1) where the person liable for the deprivation of A’s interest is dead, bankrupt or cannot be found within the jurisdiction;42 and (2) where a person, who has sustained ‘loss’ in one or other of three circumstances,43 is barred by the indefeasibility principle from recovering the land and who is also unable to recover compensation from the person liable for the loss.44

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41 The first resort jurisdictions are the NT, NSW, Victoria, and Queensland: see Real Property Act 1900 (NSW) ss 120, 128–35; Land Title Act 2000 (NT) ss 192–6; Land Title Act 1994 (Qld) ss 188–90; Transfer of Land Act 1958 (Vic) ss 108–11.

42 Land Titles Act 1925 (ACT) s143(b); Real Property Act 1886 (SA) s205; Land Titles Act 1980 (Tas) ss152(7)(8); Transfer of Land Act 1893 (WA) s 201(3).

43 The three circumstances under the ‘loss’ provisions are: (a) through any omission, mistake or misfeasance of the Registrar or any of his or her officers or clerks in the execution of their respective duties under the Act; (b) by any error, omission or mis-description in any grant, certificate of title or any entry or memorandum in the register; or (c) by the registration of any other person as proprietor of land.

44 Land Titles Act 1925 (ACT) s 155; Real Property Act 1886 (SA) s 208; Land Titles Act 1980 (Tas) s153; Transfer of Land Act 1893 (WA) s 205.
It should be noted that although A is prima facie entitled to compensation, fault-based exclusions may preclude recovery from the assurance fund where A, or A’s agent, contributed to the loss by fraud, neglect or wilful default.\footnote{Real Property Act 1900 (NSW) s 129(2); Land Title Act 2000 (NT) s 195(1)(b); Land Title Act 1994 (Qld) s 189(1)(b); Real Property Act 1886 (SA) s 216; Transfer of Land Act 1958 (Vic) s 110(3)(a).}

**D A ‘Torrens Methodology’**

This brief outline suggests the following ‘Torrens methodology’ for dealing with any A-B-C problem in the Torrens system:

1. Identify the general position regarding the nature of the current registered proprietor’s title, that is, that it is indefeasible;
2. identify whether an exception to the registered proprietor's title is available; and
3. in the event a person suffers loss as a result of the operation of the system, determine whether compensation is available.

Doubtless, there may be difficulties in applying the law under the Torrens system to the facts in particular cases. However, the law itself, and the methodology for dealing with the A-B-C problem are clear. As will be seen, at the current time, the same cannot be said for the situation in England.

**III LAND TITLE REGISTRATION IN ENGLAND: THE LEGISLATION**

**A Background to Title Registration in England**

Land title registration in England began in 1862, four years after the enactment of the first Torrens legislation in Australia. In 1875 and 1897, there were two further title registration statutes,\footnote{The Land Transfer Act 1875, 38 & 39 Vict c 87; Land Transfer Act 1897, 60 & 61 Vict c 65.} and in 1925, the *LRA 1925* was enacted.

One of the main features setting apart *LRA 1925* from the Torrens statutes was the greater range of ‘overriding interests’ that existed under *LRA 1925*. Overriding
interests are interests that bind a registered estate even though they are unregistered. The overriding interests under the 1925 Act included certain easements, the accrued rights of squatters, and leases with terms of 21 years or less. These particular overriding interests are similar to some of the express exceptions to indefeasibility under the Torrens system. Importantly, however, there was an additional overriding interest that is not reflected in the Torrens exceptions: ‘The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed’.

Another important distinguishing feature related to the notion of indefeasibility is that, as Cooke says, ‘[i]n so far as we have indefeasibility, it takes the form of a guarantee of an indemnity when title is upset, rather than any principle that registered title is unassailable’. The general position under LRA 1925 was that any event that could affect a title in unregistered land, by making it void or voidable, would have the same effect with registered land. An important qualification, however, was that a registered proprietor who was in possession of the land was protected from an action for rectification of the register. In short, the English system under LRA 1925 adopted neither deferred nor immediate indefeasibility, but afforded particular protection to the registered proprietor who was in possession of the land.

Although the 1925 Act had served its purpose well, the system established was ‘cumbersome’ and ‘the public rightly [sought] a more expeditious and much less

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47 LRA 1925 s 70(1)(a).
48 LRA 1925 s 70(1)(f).
49 LRA 1925 s 70(1)(k).
50 LRA 1925 s 70(1)(g). The operation of this overriding interest was seen in Williams & Glyn’s Bank Ltd v Boland [1981] AC 487.
51 Elizabeth Cooke, ‘E-conveyancing in England: Enthusiasms and Reluctance’ in David Grinlinton (ed), Torrens in the Twenty-first Century (Wellington LexisNexis, 2003) 277, 281. Although these comments were made in relation to the 1925 Act, they continue to be applicable with regards to the 2002 Act.
52 Ibid. However, under LRA 1925 s 69, the registered proprietor was granted the legal estate. Therefore, if, on unregistered land principles, the registered proprietor was not entitled to the land, then the register would need to be rectified.
53 LRA 1925 s 82(3).
55 The LRA 1925 is considered to have ‘operated successfully for more than three-quarters of a century’: Elizabeth Cooke and Pamela O’Connor, ‘Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective’ (2004) 120 Law Quarterly Review 640, 643.
stressful system of dealing with land’. Accordingly, on 13 October 2003 the LRA 2002 came into force. The fundamental objective of LRA 2002 was ‘to create the necessary legal framework in which registered conveyancing can be conducted electronically’. To that end, ‘the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections’.

The unregistered interest of a person in actual occupation of land, however, continues to be protected under the 2002 Act as an overriding interest.

**B  LRA 2002: Registered Title, Rectification and Indemnity**

In order to understand how the English legislation resolves the A-B-C problem, one needs to appreciate that the relevant rules are derived from two different sources: the main body of LRA 2002 and the schedules. As Goymour has said:

> These two sets of rules appear to pull in different directions … In broad terms, the main body of the Act affords B and C titles upon registration; the Schedules then render registered titles potentially defeasible, via their provision for ‘alteration’ of the Register.

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57 Law Commission and HM Land Registry, Report, above n 13, 2 [1.4].
58 In 1998, a joint working group of the Law Commission and HM Land Registry produced a consultative document. In 2001 the joint Law Commission and HM Land Registry Report was published together with a draft land registration Bill which was subsequently passed, virtually unamended, through Parliament: Land Registration Bill (No 48) 2001 (UK); Law Commission and HM Land Registry, Report, above n 13.
59 Law Commission and HM Land Registry, Report, above n 13, 1 [1.1].
60 Ibid 2 [1.5].
61 LRA 2002 sch 1 para 2, sch 3 para 2. Overall, the number of overriding interests has been reduced under LRA 2002. The guiding principle adopted in the Report to reduce the number of overriding interests was that ‘interests should be overriding only where it is unreasonable to expect them to be protected in the register’: Law Commission and HM Land Registry, Report, above n 13, 17 [2.25].
62 Goymour, above n 17, 625.
In discussing the legislation, a straightforward literal interpretation of the statute will be adopted, one that has been referred to as the narrow or ‘orthodox’ approach.\(^{63}\)

1  **The Sections of LRA 2002**

(a)  **B’s ‘Conclusive’ Registered Title**

One of the most significant provisions in determining the nature of a registered proprietor’s title would appear to be section 58(1), headed ‘Conclusiveness’: ‘If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration’.

(b)  **B’s Power To Make Dispositions**

Section 23 (‘Owner’s powers’) and section 24 (‘Right to exercise owner’s powers’) deal with B’s ability to make further dispositions and together provide that a registered proprietor has power to make a disposition of any kind permitted by the general law.

(c)  **The Protection of C**

There are two provisions of interest in considering C’s position. Section 26(1) protects disponees by providing that the exercise of owner’s powers ‘is to be taken to be free from any limitation affecting the validity of a disposition’.\(^{64}\) Sections 29(1)–(2) deal with the effect of registered dispositions on priority.\(^{65}\) Section 29(1) is as follows:

> If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest

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\(^{63}\) Ibid 617. The discussion of the case law that follows in Parts IV and V analyses alternative approaches to interpreting LRA 2002, including the ‘wide’ approach and an unexpected interpretation of s 58.

\(^{64}\) As one may expect, a disponee is not protected from limitations reflected by an entry in the register or imposed by or under the Act: LRA 2002 s 26(2).

\(^{65}\) Section 29 deals with the effect of registered dispositions on the priority of estates and s 30 deals with the effect with regards to charges. The provisions are broadly similar, and for convenience, the terms of s 29 will be discussed here.
under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.

Section 29(2)(a) goes on to provide protection to the priority of certain interests including an overriding interest under schedule 3. The particular overriding interest which is relevant here is the interest of a person in actual occupation. Under schedule 3, the interest is not overriding if the interest-holder failed to disclose the interest upon an inquiry being made, or if the interest belongs to a person whose occupation was not obvious on inspection and the disponee had no actual knowledge of the interest at that time.

(d) Application of the Provisions to the A-B-C Problem

The straightforward literal application of these provisions to the A-B-C problem would appear to be as follows:

1. Prior to registration, B would have no rights to the land as the instrument was void. However, upon registration, ‘statutory magic’ is effected by section 58 and B obtains the legal estate;
2. B, as registered proprietor, has owner’s powers to transfer or mortgage the registered estate to C pursuant to sections 23–4;
3. C, as disponee, is protected since section 26(1) deems owner’s powers to be free from any limitation affecting the validity of a disposition. In any event, C is also ‘deemed to be vested’ of the legal estate by virtue of section 58;
4. provided the disposition to C was made for valuable consideration, then, under section 29, upon registration, C will have priority over unregistered interests existing

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66 Section 29(2)(a) also provides protection to an interest that is the subject of a notice in the register or is a registered charge, and an interest that appears from the register to be excepted from the effect of registration.
67 Another important overriding interest is the interest of a lessee under a lease not exceeding seven years LRA 2002 sch 1 para 1.
68 LRA 2002 sch 3 para 2(b).
69 LRA 2002 sch 3 para 2(c).
70 ‘Statutory magic’ is best understood in the Torrens system as the notion that registration ‘cures’ defects in registered instruments. This kind of expression has been used frequently to describe the effect of s 58: see, eg, Scottish Law Commission, Report on Land Registration, Report No 222 (2010), 19 [3.11]; Knights Construction (March) Ltd v Roberto Mac Ltd (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011) [83], [105], [125]; Goymour, above n 17, 627.
immediately prior to the disposition and which were not protected at the time of registration. However, C will not have priority with regards to the overriding interest of a person in actual occupation of the land.

These provisions in the main body of LRA 2002 tell only half the story – they pull in the direction of affording B and C titles. In order to determine the full rights of A, B and C, schedules 4 and 8, dealing with alteration of the register and indemnities respectively, require examination.

2 Schedule 4: Alteration of the Register

The two substantive paragraphs are paragraph 2, concerning alteration by court order, and paragraph 5 that makes virtually identical provision for alteration by the registrar. The focus here will be on the provisions dealing with court ordered alteration.

Schedule 4 paragraph 2 provides:

(1) The court may make an order for alteration of the register for the purpose of –
(a) correcting a mistake,
(b) bringing the register up to date, or
(c) giving effect to any estate, right or interest excepted from the effect of registration.

An alteration which involves the ‘correction of a mistake’ and ‘prejudicially affects the title of a registered proprietor’ is defined in paragraph 1 to be a ‘rectification’.

Paragraph 3(2) provides a defence to rectification in favour of a proprietor in possession of his or her land. In this situation, the court is not to order a rectification without the proprietor’s consent unless either: the proprietor by fraud or lack of proper

71 The registrar has an additional ‘purpose’ for alteration, namely, to remove a superfluous entry.
care caused or substantially contributed to the mistake; or it would, for any other reason, be unjust for the alteration not to be made.\footnote{In addition, para 3(3) provides that if the court has power to make an order for rectification, it must do so, unless there are exceptional circumstances which justify it not doing so. Given the key word is ‘exceptional’, it is anticipated that exercise of the discretion not to rectify will be rare: Dixon, above n 1, 89.}

\( (a) \) \textit{Application of Schedule 4 to the A-B and A-B-C Scenarios}

The issue here is whether A would be entitled to have the register altered so as to remove B. This depends on whether B’s registration, pursuant to a void instrument, falls within one of the three purposes for alteration specified in paragraph 2(1)(a)–(c).

This issue is itself contentious.\footnote{For an excellent concise discussion of the narrow and wide views of the purposes for alteration, see Goymour, above n 17.} None of the terms in paragraph 2(1)(a)–(c) is defined in \textit{LRA 2002} and so it is not clear whether they are to be interpreted widely or narrowly.\footnote{Goymour comments that, in fact, there are conflicting views as to the purpose of sch 4: Goymour, above n 17, 628 n 59.} The narrow interpretation of the provisions, adopted under the orthodox view, has two aspects. First, a narrow interpretation would treat the purposes in sub-paragraphs (1)(b)–(c) as permitting only administrative changes, that is, changes that do not affect a particular party’s substantive rights.\footnote{An illustration of an administrative change to the register would be, eg, allowing the registration of an overriding interest, which in any event already encumbers the registered estate.} It is only the purpose in sub-paragraph (1)(a), ‘correcting a mistake’, that would allow for a substantive change to the register and potentially permit the removal of B from the register. Secondly, the narrow interpretation construes a ‘mistake’ restrictively, such that a mistake is ‘to be ascertained merely by reference [to] the validity of the preceding disposition’.\footnote{Goymour, above n 17, 629. This is in stark contrast to the Australian position where there is no power to correct the register merely on the basis of an ‘[i]validity of the preceding disposition’: at 629. In this regard, Hayne J in \textit{Vassos v State Bank of South Australia} [1993] 2 VR 316, 332 has strenuously commented that such an argument would ‘[f]ly in the face of indefeasibility’.}

In the A-B scenario, B’s registration is a mistake as B was registered pursuant to a void instrument. Accordingly, the court can alter the register on the ground of ‘correcting a mistake’. Since the correction of this mistake would ‘prejudicially affect’ B’s registered title, an alteration of the register to remove B is classified as a ‘rectification’.

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However, under paragraph 3(2), B may have a defence to rectification if B is in possession of the land, in which case, B’s registered title will be secure. The outcome in this particular circumstance is therefore the same as would be the case under the Torrens system. However, the philosophical and conceptual means by which this outcome is achieved is radically different in the two systems. In England, it is based on a particular preference for protecting a proprietor in possession. In Australia, it is based on the perceived need for public confidence in the system which is said to be dependent on the ‘rock-solid effect’ of registration.\textsuperscript{77}

In relation to C, under the orthodox view, C’s registered title is secure since the instrument by which C became registered is an internally valid document. B was the registered proprietor with the legal estate (section 58) and was empowered to dispose of the estate to C (sections 23–4).\textsuperscript{78}

3 Schedule 8: Indemnities

Paragraph 1(1) provides that a person is entitled to be indemnified by the registrar for loss suffered by reason of: (a) rectification of the register; or (b) a mistake whose correction would involve rectification of the register.\textsuperscript{79}

Where a claimant has suffered loss ‘wholly or partly as a result of his own fraud’,\textsuperscript{80} or ‘wholly as a result of his own lack of proper care’,\textsuperscript{81} no indemnity is payable.

(a) Application of Schedule 8 to the A-B and A-B-C Scenarios

One of the most important points to note here is that payment of an indemnity is dependent on either a rectification of the register or the existence of a mistake whose


\textsuperscript{78} However, as will be seen, under the wide approach, ‘correcting a mistake’ may extend to correcting the consequences of a mistake, in which case C’s title, like B’s, may be subject to rectification.

\textsuperscript{79} There are six other circumstances that give rise to an entitlement to indemnity: see LRA 2002 sch 8 paras (1)(c)–(h). They are not relevant for the purposes of this article.

\textsuperscript{80} LRA 2002 sch 8 para 5(1)(a).

\textsuperscript{81} LRA 2002 sch 8 para 5(1)(b). If the loss suffered was partly as a result of lack of proper care by the claimant, any indemnity payable is reduced, having regard to the claimant’s share in the responsibility for the loss: LRA 2002 sch 8 para 5(2).
correction would involve rectification of the register. If there is an alteration that does not involve a rectification, no indemnity is payable.

If B is in possession of the land, then B has a defence to rectification under schedule 4 paragraph 3(1). The register will therefore not be rectified and B will be entitled to keep the land. A would be entitled to an indemnity under schedule 8 paragraph 1(1)(b) since B’s registration is a mistake (the registration of the void instrument) whose correction, were it to be made, would involve rectification of the register.

If B is not in possession of the land then B is not entitled to the schedule 4 defence and the register would be rectified in favour of A. However, B would be entitled to an indemnity under schedule 8 paragraph 1(1)(a).

In relation to C, under the orthodox view, C’s registered title is secure since the instrument by which C became registered is an internally valid document. However, the question arises, is A entitled to an indemnity? Since C’s title is secure, the register is not to be rectified and so A must rely on schedule 8 paragraph 1(1)(b). But, given that C became registered pursuant to a valid instrument, can it be said that there is a mistake to be corrected? This question is considered further later in this article.

C A Suggested ‘LRA 2002 Methodology’

With this orthodox understanding of the legislation in mind, it is suggested that a possible ‘LRA 2002 methodology’ for resolving an A-B-C problem is as follows:

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82 As noted, a rectification involves the ‘correction of a mistake’ that ‘prejudicially affects the title of a registered proprietor’: see LRA 2002 sch 4 para 1, sch 8 para 11(2).
83 No indemnity would be payable to B if B’s loss arose either as a result of his or her own fraud or wholly as a result of his or her own lack of proper care: LRA 2002 sch 8 para 5. A third possible scenario is that A is in actual occupation and claims an overriding interest under sch 3. In this situation it would appear that B will not be entitled to an indemnity. The alteration may be viewed as ‘bringing the register up to date’ or ‘giving effect to any estate, right or interest excepted from the effect of registration’ and therefore not as the ‘correction of a mistake’. Additionally, since the registered proprietor is subject to overriding interests in any event, it may be argued the registered proprietor has not been prejudicially affected.
1. Conclusive title: the registered proprietor has the legal estate with rights to exercise owner’s powers to make dispositions. The registered disponee for value has priority over prior unregistered interests;\(^{84}\)

2. exceptions: a registered disponee is subject to certain exceptions, in particular, the unregistered interest existing at the time of the disposition, of a person in actual occupation (an overriding interest);\(^{85}\)

3. rectification of register: the register may be altered for the purpose of ‘correcting a mistake’ and this may prejudicially affect the registered proprietor’s estate;\(^{86}\)

4. defence to rectification: the registered proprietor may have a defence if he or she is in possession of the land;\(^{87}\)

5. indemnity: a person who suffers loss by ‘rectification’ of the register, or by ‘a mistake whose correction would involve a rectification of the register’, is entitled to be indemnified.\(^{88}\)

This suggested *LRA 2002* methodology simply provides a broadbrush approach for considering A-B-C problems. As with the Torrens methodology, within each step there may be further issues that require consideration.\(^{89}\) However, with these qualifications in mind, this methodology does at least provide a principled, structured, and holistic approach that should ensure all relevant issues are examined in resolving an A-B-C problem.

### IV THE NARROW AND WIDE APPROACHES: THE CASE LAW

The cases considered in this Part deal with a particular form of the A-B-C scenario arising under the English regime where A is the registered proprietor, B becomes the registered proprietor pursuant to a void or voidable instrument, and B then grants a

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\(^{84}\) The authority for these propositions is *LRA 2002*: s 58, on legal estate; ss 23–4, on owner’s powers; s 29(1), on freedom from prior unregistered interests.

\(^{85}\) *LRA 2002* s 29(2), sch 3.

\(^{86}\) *LRA 2002* sch 4 paras 1–2, 5.

\(^{87}\) *LRA 2002* sch 4 paras 3(2), 6(2).

\(^{88}\) *LRA 2002* sch 8 paras 1(1)(a)–(b), 11(2).

\(^{89}\) For example, in step (2), an unregistered interest-holder in actual occupation will not fall within the exception if, prior to the disposition and upon inquiry, he or she failed to disclose the interest: *LRA 2002* sch 3 para 2(b). Similarly, in step (4), a proprietor in possession will not have a defence to rectification if, by fraud or lack of proper care, he or she caused or substantially contributed to the mistake: *LRA 2002* sch 4 paras 3(2)(a), 6(2)(a).
charge over the land in favour of C who becomes registered. Under the orthodox view, A should be able to recover the land from B in order to ‘correct a mistake’. However, is A bound by the registered charge or can A argue that the register should be rectified so as to remove the charge from the title?

Unfortunately, the decisions are in conflict with regards to this fundamental question. The answer depends on whether a narrow or wide approach is adopted in interpreting the phrase ‘correcting a mistake’.

A  The Narrow Approach

1  Barclays Bank plc v Guy[^90^]

Guy was the registered proprietor of land. Ten Acre fraudulently procured Guy to execute a transfer of the land to Ten Acre. The transfer was registered and subsequently Ten Acre granted an ‘all monies’ charge to Barclays Bank (‘Bank’) to secure debts in excess of £110 million. The charge was registered. Ten Acre defaulted and the Bank sought a declaration that it was entitled to sell the land.

Guy defended the action claiming that, though the transfer had been signed by him, it had been fraudulently procured and was therefore void. Guy also argued that the charge was invalid and that he was entitled to have the register rectified. The Bank argued that as at the date of the charge, Ten Acre was the registered proprietor and the legal estate was vested in it under section 58. As registered proprietor Ten Acre was entitled, under sections 23–4, to exercise owner’s powers and charge the estate to the Bank. Accordingly, the registration of the charge was not a ‘mistake’ and so the power to ‘correct a mistake’ under schedule 4 paragraph 2 did not arise[^91^].

Mowschenson QC, sitting as a deputy High Court Judge, rejected Guy’s claim that the transfer was void, finding instead that it was voidable. His Honour accepted the reasoning of the Bank and declared the Bank was entitled to sell the land free from

[^90^]: [2008] EWHC 893 (Ch) (‘Guy’). This was one of the first cases to consider the nature of the title of a registered proprietor in the A-B-C scenario.

[^91^]: The Bank’s argument was essentially for an orthodox application of the legislation.
any rights Guy may claim to have in the land. Mowschenson QC made his decision on the basis that the transfer to Ten Acre was voidable and that Guy had not avoided the transfer at the time Ten Acre charged the land to the Bank.  

In a subsequent case, Barclays Bank plc v Guy, Guy sought permission to appeal the decision of Mowschenson QC. The Court of Appeal’s decision was delivered by Lloyd LJ who concluded that, if Guy’s allegations concerning the transfer were made out, Guy would be entitled to have the transfer to Ten Acre set aside. In relation to the registered charge, the Court dismissed Guy’s application, noting that Ten Acre was entitled to charge the estate, and that unlike the transfer to Ten Acre, there was ‘nothing intrinsically wrong’ with the charge, which was in proper form and had been properly executed by Ten Acre.  

One year later, in Barclays Bank plc v Guy [No 2], Guy applied to the Court of Appeal for permission to reopen his appeal against the decision of Mowschenson QC. Lord Neuberger, with whom Patten LJ and Black LJ agreed, recognised that ‘the point at issue is of some general interest and importance in the field of land registration law’, however, he rejected Guy’s application in the interests of finality.  

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92 Mowschenson QC expressly stated, ‘I do not need to address the question of whether … the charge, would have been effective if the transfer was void’: Guy [2008] EWHC 893 (Ch) [27]. For a more detailed discussion of the relevance of the void/voidable issue see the discussion of Knights Construction (March) Ltd v Roberto Mac Ltd (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011) in Part IV(B)(2) of this article. In essence, if the original transaction was merely voidable, and had not been avoided at the time of the subsequent transaction, then the right to rectify the subsequent transaction would be lost.  
93 [2008] EWCA Civ 452.  
94 Ibid [14]. Since Ten Acre had, through fraud, contributed to the mistaken registration of the transfer, it could not rely on the defence of a proprietor in possession in LRA 2002 sch 4 para 3(2)(a).  
95 Barclays Bank plc v Guy [2008] EWCA Civ 452, [9].  
96 Ibid [19].  
97 Guy raised a further argument that the Bank had actual knowledge of Ten Acre’s mistaken registration. This argument was not accepted by the Court: Barclays Bank plc v Guy [2008] EWCA Civ 452, [20]–[24].  
99 Guy’s argument centred on the principles in Taylor v Lawrence [2003] QB 528 which, in summary, state that an appeal can only be reopened if the decision is ‘so plainly wrong in principle and unjust in its consequences as to have the effect of corrupting the judicial process’. See Bernadette Hewitt, ‘A Tangled Web: Land Registration and the Facilitation of Fraud – The England and Wales Perspective’ in Carruthers, Mascher and Skead, above n 24, 177, 192.  
100 Barclays Bank plc v Guy [No 2] [2011] 1 WLR 681, 685 [21].
Without using the terms ‘narrow’ and ‘wide’, Lord Neuberger appeared to identify the approach of Lloyd LJ as a narrow approach, namely, that the alleged mistake, though not proven, was the registration of the charge in the charges register. But Lord Neuberger indicated there were two other ways of putting Guy’s case which effectively amounted to adopting a wide approach. It is submitted that if either of these wide interpretations of mistake had been adopted the outcome would be very different for Guy. The charge would be removed on either basis because: (a) to correct properly the mistaken removal of Guy from the register the charge must also be removed; or (b) the charge ‘flowed from’ the mistaken registration of Ten Acre and as it is ‘part and parcel’ of that mistake it must be removed.

Although the decision of the Court of Appeal to refuse to reopen Guy’s appeal was ‘unexceptional’, the consequences for Guy were catastrophic. True, Guy was entitled to have his name restored to the register as proprietor of land worth £35 million. However, that was rather a pyrrhic victory given the fact the land remained liable under the Bank’s charge which secured £110 million. It was also implicit from the decision, and from subsequent actions by Guy, that an indemnity would not be available. In Guy, the Court found that the only mistake was the transfer to Ten Acre. This mistake had been corrected by rectification of the register, and on a narrow approach, registration of the charge itself was not a mistake. As it was the charge that had caused Guy to suffer loss, and since that was not a mistake, Guy would not be entitled to an indemnity.

2 Stewart v Lancashire Mortgage Corporation Ltd

Stewart was the sole registered proprietor of land which she held on trust for herself and her brother, Choat. A forged transfer of the land from Stewart to Choat was registered. Choat borrowed two sums of money from Lancashire Mortgage

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101 Ibid 687 [35].
103 There is a postscript to this story. In Guy v Mace & Jones [2012] EWHC 1022 (Ch), Guy brought a professional negligence claim against his own solicitors and also the solicitors acting for Ten Acre. Guy was unsuccessful.
104 (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010) (‘Stewart’).
105 The Court made no finding as to who was responsible for the forgery.
Corporation Ltd (‘Lancashire’), both of which were secured by charges which were lodged at the registry and treated as registered. Subsequently, Choat was killed in a road traffic accident. At this point, Stewart became aware of the forged transfer to Choat and sought to have Choat’s name removed from the register and her name restored.

Deputy Adjudicator Holland found that Stewart’s name ought to be restored to the register. The main issue to be decided was whether the registrar had power to alter the register by ‘correcting a mistake’ and remove the charges under schedule 4. In dealing with this issue, Deputy Adjudicator Holland noted that he was faced with two conflicting first instance decisions: the decision of Mowschenson QC in Guy and the decision of Deputy Adjudicator Rhys in Ajibade v Bank of Scotland plc, where a wide view of the phrase ‘correcting a mistake’ had been adopted. Ultimately, Deputy Adjudicator Holland decided to adopt the narrow interpretation in Guy. Stewart’s application to rectify the register by removing the registered charges was, accordingly, dismissed.

Deputy Adjudicator Holland’s reasoning was that as Choat was the registered proprietor, he could lawfully charge the property. The registration of the charges could not be viewed as a mistake since it was a ‘fundamental objective of the act that the register should be a complete and accurate reflection of the state of the title to land at any given time’. Importantly, Deputy Adjudicator Holland concluded by saying, ‘[s]ection 58 reflects a balance struck by Parliament which preferred certainty of title

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106 The first charge was entered on the Day List at the registry on 6 June 2008 and the second was entered on 10 June 2008. At the time of the action the charges had not actually been registered, though, as found in the case, the charges were to be viewed as registered: Stewart (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010) [48]–[49] (Deputy Adjudicator David Holland).

107 (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Rhys, 8 April 2008). This case is discussed in Part IV(B)(1).

108 Deputy Adjudicator Holland supported his conclusion by reference to the decisions in Norwich & Peterborough BS v Steed [1933] Ch 116 and Pinto v Lim [2005] EWHC 630 (Ch), both of which had adopted a narrow interpretation of the rectification provision under LRA 1925. Deputy Adjudicator Holland considered these cases on LRA 1925 were still relevant since the intention behind LRA 2002 was that the number of situations where the register could be altered should not to be increased under the 2002 Act: Stewart (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010), [65] (Deputy Adjudicator Holland).

109 Stewart (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010), [73] (Deputy Adjudicator Holland).
over the property rights of those who had been the victims of fraud. They are to have their remedy by way of indemnity under Schedule 8.110

Interestingly, though Deputy Adjudicator Holland, in following Guy, had adopted a narrow interpretation of ‘correcting a mistake’ for the purposes of rectification, he appeared to adopt a wider view of ‘mistake’ for the purposes of indemnity under schedule 8. Paragraph 1(1)(b) allows a person to be indemnified for loss suffered by reason of ‘a mistake whose correction would involve rectification of the register’. Deputy Adjudicator Holland considered the reference to ‘a’ mistake could ‘cover loss caused by the original mistake … even if the subsequent registration of a charge is not a mistake within the statutory definition’.111

The issue of an indemnity for Stewart was not formally determined in this case. However, the clear implication was that as Stewart’s loss (the presence of the charge) was caused by the original mistake in the registration of Choat, this would suffice for the purposes of paragraph 1(1)(b) and Stewart would be entitled to an indemnity.

3 The Torrens Approach to Guy and Stewart

(a) Guy

In Guy, Ten Acre was involved in the fraud by which it became registered. Prior to Guy challenging Ten Acre’s registered title, Ten Acre granted a charge to the Bank, which registered the charge. The Bank was not guilty of fraud in registering the charge and there was no indication on the facts that would give rise to an in personam exception.112 Accordingly, under Torrens, the Bank’s charge would be indefeasible. As in the case itself, Guy would be able to challenge the title of Ten Acre on the basis of the fraud exception and be restored to the register as fee simple owner.

110 Ibid.
111 Ibid [78]. Deputy Adjudicator Holland made this comment in light of the terms of sch 8 para 1(3).
112 In this case, as the Bank’s registered charge was not a forgery, there would be no scope for the operation of qualified indefeasibility as exists in Queensland, NSW and Victoria. See the discussion in Part II(B)(1).
However, a point of significant departure between Guy and the Torrens system concerns Guy’s entitlement to compensation. Under Torrens, Guy was a person who had been deprived of an interest in land (his unencumbered fee simple) through the registration of another person as proprietor (the Bank’s charge). In the first resort jurisdictions, Guy would be entitled to compensation directly from the assurance fund. In the last resort jurisdictions, Guy would be required first to seek compensation from the ‘person liable’, in this case, Ten Acre. Since Ten Acre was insolvent, Guy would be entitled to recover compensation from the assurance fund.\(^\text{113}\)

\((b)\) \textit{Stewart}

In \textit{Stewart}, Choat became registered pursuant to a forged transfer. Prior to Stewart challenging Choat’s registered title, Choat granted charges to Lancashire, which were presented at the registry and treated as registered. Lancashire was not guilty of fraud in presenting its charges for registration and there was no indication on the facts that would give rise to an in personam exception.\(^\text{114}\) Under Torrens, Lancashire would have an indefeasible title to the charges.\(^\text{115}\) Although Choat became registered pursuant to a forged transfer, there was no finding as to whether Choat was involved in the forgery. In Torrens, this would be a crucial issue to determine. If Choat was involved with the forgery, Choat’s title would be defeasible on the ground of fraud. If not, and if there was no valid in personam claim, Choat would have an indefeasible title.

Under the Torrens system, Stewart was a person who had been deprived of an interest in land (her unencumbered fee simple) and would be entitled to compensation, either

\(^{113}\) There may be an argument to say that as Guy had signed the transfer document, he had contributed to his loss and would not be entitled to compensation under the Torrens system. This situation is reminiscent of the facts in \textit{Breskvar v Wall} (1971) 126 CLR 376 where the Breskvars signed a transfer form in blank that was later fraudulently registered. Although the Breskvars ultimately failed in their claim for compensation due to the expiry of the limitation period, they would otherwise have been entitled to compensation despite signing the transfer form: see \textit{Breskvar v White} [1978] Qd R 187, 193–4 (Connolly J).

\(^{114}\) In this case, as Lancashire’s charges were not forgeries, there would be no scope for the operation of qualified indefeasibility as exists in Queensland, NSW and Victoria. See the discussion in Part II(B)(1).

\(^{115}\) Under Torrens, the registration of Lancashire’s charges would date from the time the charges were lodged for registration: \textit{Land Titles Act 1925} (ACT) ss 48(4)–(5); \textit{Real Property Act 1900} (NSW) s 36(5); \textit{Land Title Act 2000} (NT) ss 180–1, 186; \textit{Land Title Act 1994} (Qld) ss 177–8,183; \textit{Real Property Act 1886} (SA) ss 56, 58; \textit{Land Titles Act 1980} (Tas) ss 48(2)–(3); \textit{Transfer of Land Act 1958} (Vic) s 34(1); \textit{Transfer of Land Act 1893} (WA) s 53.
from the assurance fund in the first resort jurisdictions, or from the ‘person liable’ in the last resort jurisdictions. In 

Stewart, it would appear from the comments made by Deputy Adjudicator Holland that, unlike the position in Guy, he would consider Stewart to be entitled to an indemnity.

(c) The Torrens and English Systems Compared

The adoption of a narrow view of ‘correcting a mistake’ in schedule 4 gives the same outcome as would be the case under the Torrens system in Guy, and provided Choat was involved with the forgery in Stewart, the same outcome in Stewart. If Choat were innocent, then under the Torrens system, Choat’s title could not be challenged. However, under the English system, the register would be rectified to remove Choat’s registration on the basis that registration of a void instrument (the forged transfer) is a mistake.

Another point of potential difference between the two systems would arise if either Guy or Stewart had been in ‘actual occupation’ of the land at the time the subsequent charges were created. Both Guy and Stewart had an unregistered interest in their respective lands at the time of the subsequent charges, and accordingly, the subsequent interest-holders (the Bank and Lancashire) would have been subject to the prior overriding interests of Guy and Stewart. In the Torrens system, there is no express exception in favour of an unregistered interest-holder in actual occupation of the land.

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116 In the last resort jurisdictions, if Choat was involved with the forgery, then he would be the ‘person liable’. As Choat was dead, Stewart would be entitled to claim compensation directly from the assurance fund: see Land Titles Act 1925 (ACT) s 143(b); Real Property Act 1886 (SA) s 205; Land Titles Act 1980 (Tas) ss 152(7)–(8); Transfer of Land Act 1893 (WA) s 201(3). See also Part II(C).

117 The simple fact of registration pursuant to a forged instrument is not, of itself, a ground for challenging a registered title: see, eg, Frazer v Walker [1967] 1 AC 569; Vassos v State Bank of South Australia [1993] 2 VR 316.

118 This may be the reason why the Court in Stewart did not find it necessary to make a finding as to Choat’s involvement with the forgery. Either way the result would be the same as the registration of the forged transfer was a ‘mistake’.

119 Section 29(2) of the LRA 2002 protects ‘overriding interests’ which are defined in sch 3 para 2 to include the interest of a person in actual occupation.

120 This unregistered interest arose because the registered proprietor at that time, either Ten Acre or Choat respectively, had obtained their title through a forged instrument, and under LRA 2002, Guy and Stewart had a right to have the register rectified.

121 See, eg, RM Hosking Properties Pty Ltd v Barnes [1971] SASR 100. Under Torrens, in order to challenge the registered proprietor’s title, the unregistered interest holder would have to establish either fraud by the registered proprietor (as in Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491),

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B  The Wide Approach

I   Ajibade v Bank of Scotland plc

Ajibade was the registered proprietor of land. Ajibade had purportedly granted a power of attorney to her sister, Nwaiga, but it was found as a fact that this power of attorney was forged. Nwaiga, in her purported capacity as attorney of Ajibade, executed a transfer of the land to Abiola, Nwaiga’s husband. Abiola became registered and executed a charge in favour of Endeavour Personal Finance Ltd (‘Endeavour’) to secure moneys lent by Endeavour to Abiola. The charge was registered.

On these facts, Deputy Adjudicator Rhys had no difficulty determining that Ajibade ought to be reinstated to the register as owner. The main question for the Adjudicator was whether the register should be rectified so as to remove Endeavour’s charge.

Deputy Adjudicator Rhys accepted Endeavour’s propositions that LRA 2002 section 58 deemed Abiola to have the legal estate at the time the charge was granted and that sections 23–4 granted Abiola owner’s powers entitling him to charge the estate. However, Deputy Adjudicator Rhys rejected Endeavour’s claim that the ‘protection of disponees’ provided by section 26 would apply to protect the charge irrespective of the fact that the registration of Abiola was a mistake.


[123] The Adjudicator made no finding as to whether Abiola was involved in the forgery and simply stated, ‘Mr Abiola, did not respond or object to the application’: Ajibade (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Rhys, 8 April 2008). [1] (Deputy Adjudicator Rhys).

[124] Section 26(1) provides that a person’s right to exercise owner’s powers is to be taken to be free from any limitation affecting the validity of a disposition. Deputy Adjudicator Rhys took the view that the limitations contemplated referred to ‘express or implied limitations which fetter an owner’s powers’: ibid [5]. The provision supplemented ss 23–4 but had no bearing on the power to correct a mistake in the register.
In relation to the correction power in schedule 4, Endeavour argued, consistently with the narrow approach, that the ‘operative mistake’ was the registration of Abiola.\textsuperscript{125} The registration of Endeavour’s charge was not an operative mistake since the legal estate had vested in Abiola and Abiola had owner’s powers to charge the estate to Endeavour.

Counsel for Ajibade adopted a wide approach, arguing that ‘fraud unravels all’.\textsuperscript{126} On this approach, the original mistake, the registration of Abiola, ‘continues to operate’ and is ‘not cured ... until the ... charge is removed’.\textsuperscript{127} Essentially, the charge is the ‘fruit of a poisoned tree’.\textsuperscript{128}

Deputy Adjudicator Rhys, in dealing with the ‘stark choice’\textsuperscript{129} offered by these two opposing arguments, turned to consider the effect of the arguments on the indemnity provisions in \textit{LRA 2002} schedule 8. If the register was rectified to remove Endeavour’s charge, Endeavour would be entitled to be indemnified on a straightforward application of paragraph 1(1)(a). However, if the register was not rectified by removing the charge, the entitlement of Ajibade to an indemnity would not be so straightforward. Ajibade would need to rely on paragraph 1(1)(b), that is, that Abijade was a person who had suffered loss by reason of ‘a mistake whose correction would involve rectification of the register’. However, if Endeavour’s argument was adopted, the registration of Endeavour’s charge was not a mistake. Ajibade would not, therefore, be able to identify ‘a mistake whose correction would involve rectification of the register’ and would not be entitled to an indemnity.

Ultimately, Deputy Adjudicator Rhys adopted a wide interpretation of ‘correcting a mistake’ and concluded that the register should be rectified by removing Endeavour’s charge. Deputy Adjudicator Rhys considered that the focus ought not to be on the word ‘mistake’ but rather on how far the registrar can go in ‘correcting’ that mistake.\textsuperscript{130} Deputy Adjudicator Rhys concluded that:

\textsuperscript{125} Ibid [12].  
\textsuperscript{126} Ibid [9].  
\textsuperscript{127} Ibid.  
\textsuperscript{128} Ibid.  
\textsuperscript{129} Ibid [10].  
\textsuperscript{130} Ibid [12].
It seems … perverse to limit the registrar’s power to rectify the register to the correction of only one consequence of the mistake, leaving uncorrected the other direct consequences of the original mistake.\textsuperscript{131}

Deputy Adjudicator Rhys acknowledged that a rectification power that extended to correcting the consequences of the original mistake could apply to ‘purchasers at several removes from the original fraudster’ and could lead to ‘an undermining of the “sanctity” of a registered title’.\textsuperscript{132} However, for various reasons, Deputy Adjudicator Rhys did not consider this would be a problem in practice.\textsuperscript{133}

The decision in \textit{Ajibade} is strikingly at odds with the decisions in \textit{Guy} and \textit{Stewart}, both of which adopted a narrow interpretation of ‘correcting a mistake’, and therefore found the subsequent registered charges were valid.\textsuperscript{134} These decisions are in direct conflict. It is submitted that conflicts of this kind, dealing as they do with fundamental notions in land law, are unsustainable.

Interestingly however, despite the conflict, the Deputy Adjudicators in both \textit{Stewart} and \textit{Ajibade} were mindful of the interconnectedness of two of the steps in the \textit{LRA 2002} methodology, namely, rectification and indemnity. This holistic consideration by each of the Deputy Adjudicators, despite their different approaches to ‘correcting a

\textsuperscript{131} Ibid [12]. In contrast, Deputy Adjudicator Holland in \textit{Stewart} (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010) [74], rejected the wide approach of Deputy Adjudicator Rhys as he did not consider that the expression ‘correcting a mistake’ in sch 4 could be read ‘so widely’ as to extend to correcting the consequences of the mistake. Deputy Adjudicator Holland also rejected, at [78], Deputy Adjudicator Rhys’s interpretation of sch 8 para 1(1)(b) and the limited way, at [75], Deputy Adjudicator Rhys interpreted the protection for disponees under s 26. Deputy Adjudicator Holland, at [75], considered the words ‘any limitation affecting the validity of a disposition’ in s 26(1) were ‘wide enough to encompass dispositions by forged transfere as well as those made ultra vires’.

\textsuperscript{132} \textit{Ajibade} (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Rhys, 8 April 2008) [13] (Deputy Adjudicator Rhys).

\textsuperscript{133} Deputy Adjudicator Rhys’s reasons were that: (1) under sch 4 para 6, protection is provided to proprietors in possession, and accordingly, it would be likely that a purchaser at ‘several removes’ would be in possession and therefore entitled to protection; (2) under the broader rectification power in \textit{LRA 1925} s 82, confidence in the land registration system had not been undermined; and (3) that in any event the power to rectify would be used sparingly: \textit{ibid}.

\textsuperscript{134} In this regard, \textit{Guy} and \textit{Stewart} give outcomes that are equivalent to applying a deferred indefeasibility approach: \textit{Guy} [2008] EWHC 893 (Ch); \textit{Stewart} (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010).
mistake’, ultimately fostered the possibility of a just outcome for the party deprived of its interest in the land.\textsuperscript{135}

2 \textit{Knights Construction (March) Ltd v Roberto Mac Ltd}\textsuperscript{136}

The facts in \textit{Knights Construction} are somewhat different from those in the cases discussed above. However, the case is important for the extensive review of the existing case law undertaken by Deputy Adjudicator Mark.

The Salvation Army applied for, and obtained, first registration of the Salvation Army Chapel and its grounds. However, the Salvation Army had accidentally included in its application the ‘disputed land’ which was owned by Knights Construction (March) Ltd (‘Knights’). Before this problem came to light, the Salvation Army sold the land to Roberto Mac Ltd (‘Roberto’) which became registered and sought to enclose the disputed land and use it as a car park. Knights became aware of the sale to Roberto and sought to have the disputed land removed from Roberto’s title. Roberto argued on a narrow construction of ‘correcting a mistake’, that the Salvation Army was the registered proprietor at the time Roberto purchased the land, the transfer to Roberto was therefore valid and accordingly there was no mistake with regards to the registration of Roberto.

Deputy Adjudicator Mark noted that the scope of the correction provisions had ‘recently been the subject of considerable debate’\textsuperscript{137} and that there were ‘conflicting decisions’.\textsuperscript{138} In addition, Deputy Adjudicator Mark identified a ‘potential problem’ in the relationship between the rectification provisions and the indemnity provisions ‘in that on one construction’, an innocent ‘party might end up without the land or an

\textsuperscript{135} The question of indemnity for the losing party was not formally determined in either of these cases. In \textit{Stewart}, Deputy Adjudicator Holland considered the charge was valid and it was implicit in his discussion of the indemnity provisions that he considered Stewart would be entitled to an indemnity in relation to the registered charge. In \textit{Ajibade}, Deputy Adjudicator Rhys found that the register should be corrected to remove Endeavour’s charge. The implication was that Endeavour would be entitled to an indemnity. On the other hand, in \textit{Guy}, Mowschenson QC did not examine \textit{LRA 2002} in a holistic manner and the indemnity implications for Guy were not discussed.

\textsuperscript{136} (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011) (‘\textit{Knights Construction’}).

\textsuperscript{137} Ibid [58].

\textsuperscript{138} Ibid.
indemnity’ and this may conflict with ‘Article 1 of Protocol 1 of the Human Rights Convention’.

With these comments in mind, Deputy Adjudicator Mark then proceeded to review the rectification provisions under LRA 1925, the Reports of the Law Commission and the Land Registry, and the case law dealing with LRA 1925. It is very difficult to do justice to Deputy Adjudicator Mark’s extensive analysis. However, a few important points may be made. Deputy Adjudicator Mark supported the wide approach to interpreting ‘correcting a mistake’ adopted by Deputy Adjudicator Rhys in Ajibade and was very critical of the decision of Deputy Adjudicator Holland in Stewart. In Deputy Adjudicator Mark’s view, Deputy Adjudicator Holland failed to appreciate that the decision of Mowschenson QC in Guy was based on the fact that the original transaction, the transfer to Ten Acre, was voidable and not void. In Stewart, the original transaction, the transfer to Choat, was forged and therefore void. Accordingly, Guy could not be used as an authority to support Deputy Adjudicator Holland’s conclusion in Stewart that the second transaction, the charge to Lancashire, could not be rectified.

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139 Ibid [61]; European Convention on Human Rights (entered into force 3 September 1953).
140 Knights Construction (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011) [64]–[68] (Deputy Adjudicator Mark).
142 Knights Construction (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011) [82]–[88] (Deputy Adjudicator Mark).
143 Deputy Adjudicator Mark, in discussing the rectification provisions under LRA 1925, identified a clear distinction in the case law between the registration of void and voidable transactions. If the original transaction was void, and a subsequent transaction was entered into and registered, then, under LRA 1925, the subsequent registration could be rectified. However, if the original transaction was merely voidable, and had not been avoided at the time of a subsequent transaction in favour of an innocent purchaser for value, then the right to rectification would be lost: Knights Construction (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011) [119]. Deputy Adjudicator Mark also considered Deputy Adjudicator Holland was wrong: first, in concluding that Norwich & Peterborough BS v Steed [1933] Ch 116 and Pinto v Lim [2005] EWHC 630 (Ch) supported a narrow interpretation of the LRA 1925: at [121]–[122]; second in failing to recognise that ‘correcting a mistake’ in sch 4 of the LRA 2002 was intended to cover all cases of mistake as were covered in the LRA 1925: at [122]; and finally in adopting an artificial construction of the indemnity provisions of sch 8: at [126]–[128].
Deputy Adjudicator Mark concluded that Knights was entitled to the remedy of rectification by adapting the two wide interpretations suggested by Lord Neuberger in *Barclays Bank plc v Guy [No 2]*:145

(a) the original registration of the Salvation Army was a mistake, and, in order to correct that mistake, … the register should be corrected by removing this part of the land … from the title, or (b) that the registration of Roberto Mac as proprietor of the land flowed from the mistake of including the land in the original title, and therefore should be treated as part and parcel of that mistake.146

In any event, in *Knights Construction*, since the mistake still existed on the title, that is, the mistaken inclusion of excess land, Deputy Adjudicator Mark considered that the application of the narrow interpretation would lead to the same conclusion.147

3 The Torrens Approach to Ajibade and Knights Construction

(a) Ajibade

In *Ajibade*, Abiola became registered pursuant to a fraudulent transfer that had been executed under a forged power of attorney. Prior to Ajibade challenging Abiola’s registered title, Abiola granted a charge in favour of Endeavour, which registered the charge. Endeavour was not guilty of fraud in registering its charge and there was no indication on the facts that would give rise to an in personam exception.148 Accordingly, under Torrens, Endeavour’s charge would be indefeasible, and since Ajibade was a person who had been deprived of an interest in land (her unencumbered fee simple), she would be entitled to compensation, either from the assurance fund in

145 [2011] 1 WLR 681, 685 [21].
146 *Knights Construction* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011) [132]. In addition, Deputy Adjudicator Mark found rectification would also be available if Blackburne J was correct in *Pinto v Lim* [2005] EWHC 630 (Ch) in treating the registration of the second transfer as itself a mistake.
147 *Knights Construction* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011) [132].
148 In this case, as Endeavour’s registered charge was not a forgery, there would be no scope for the operation of qualified indefeasibility as exists in Queensland, NSW and Victoria. See the discussion in Part II(B)(1).
the first resort jurisdictions, or from the person liable for the deprivation in the last resort jurisdictions.

In contrast however, under the wide interpretation of ‘correcting a mistake’ adopted by the Court in *Ajibade*, it was not just the original mistake, but also the consequences of the original mistake, that could be corrected by rectification. Rectification was therefore ordered and Endeavour’s charge was removed from the register.

Although Abiola became registered pursuant to a fraudulent transfer, there was no finding as to whether Abiola was involved in the fraud. In Torrens, this would be a crucial issue to determine. If Abiola was involved with the fraud, Abiola’s title would be defeasible on the ground of fraud. If not, and if there was no valid in personam claim, Abiola would have an indefeasible title. However, Ajibade would be entitled to compensation for the deprivation of her fee simple estate.

*(b) Knights Construction*

In *Knights Construction*, land was mistakenly included in the registered title of the Salvation Army. Under the Torrens system, there is an express exception with regards to land that has, through wrong description, been included in a registered proprietor’s title.\(^{149}\) Accordingly, at the time when the land was still held by the Salvation Army, the Salvation Army would not have an indefeasible title to the wrongly included land. However, there is a limitation to the wrong description exception such that when the wrongly described land is subsequently sold to a purchaser, the exception no longer operates. Accordingly, when the land was sold to Roberto, Roberto would obtain an indefeasible title to the whole of the land and Knights would be left to seek compensation pursuant to the compensation provisions.

*(c) The Torrens and English Systems Compared*

\(^{149}\) *Land Titles Act* 1925 (ACT) s 58(1)(c); *Real Property Act* 1900 (NSW) s 42(1)(c); *Land Title Act* 2000 (NT) s 189(1)(f); *Land Title Act* 1994 (Qld) s 185(1)(g); *Real Property Act* 1886 (SA) s 69(c); *Land Titles Act* 1980 (Tas) s 40(3)(f); *Transfer of Land Act* 1958 (Vic) s 42(1)(b); *Transfer of Land Act* 1893 (WA) s 68(1).
In rectification proceedings in the English system, the court does not appear to be too concerned with identifying whether the registration of the original mistaken transaction involved the fraud of the person becoming registered.\(^{150}\) However, this is not to say that the fraud of a registered proprietor in the English system is irrelevant. The issue of fraud is relevant in indemnity proceedings,\(^{151}\) and also in rectification proceedings where a proprietor is in possession of the land.\(^{152}\) In the Torrens system, it is of critical importance to determine whether the person becoming registered was guilty of fraud. In short: without fraud, indefeasible title; with fraud, defeasible title.

V THE ENIGMATIC SECTION 58: IS BENEFICIAL TITLE CONFERRED?

The suggested ‘LRA 2002 methodology’ includes five steps which, in summary, require a consideration of: (1) conclusive title of the registered proprietor; (2) exceptions; (3) rectification; (4) defence to rectification; and (5) indemnity.

The focus in the cases discussed above was directed to the third step: the question of whether the court or the registrar was able to rectify the register for the purpose of ‘correcting a mistake’. This discussion revealed inconsistent decisions and different views as to whether to adopt a narrow or wide interpretation of ‘correcting a mistake’.

However, in a somewhat surprising twist, recent English case law has turned attention from the third step to the first step and to an examination of the meaning of the ‘conclusive’ title provision, \textit{LRA 2002} section 58. Section 58 presents something of an enigma. There have been profoundly divergent views as to how the section should be interpreted and this, in turn, has grave implications for the outcome in the A-B-C scenario.

\(^{150}\) Presumably this is because registration of a void document, under either the narrow or wide approaches, is a ‘mistake’ and can be rectified regardless of fraud. However, this is subject to the protection provided in \textit{LRA 2002} sch 4 paras 3(2), 6(2) in favour of a proprietor in possession.

\(^{151}\) \textit{LRA 2002} sch 8 para 5(1).

\(^{152}\) In this case, a proprietor in possession who has, by fraud, contributed to the mistake will not be entitled to rely on the sch 4 defence to rectify his or her title.
In 2013, Newey J in *Fitzwilliam v Richall Holdings Services Ltd* \(^{153}\) considered himself bound by a Court of Appeal decision in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* \(^{154}\) that had adopted a particular interpretation of the *LRA 1925* equivalent to *LRA 2002* section 58. However, on 1 April 2015, in *Swift*, \(^{155}\) the Court of Appeal, in a further twist, concluded that *Malory* was ‘wrong’. This Part traces and critiques the evolving interpretation of section 58.

### A Malory

In *Malory*, Malory BVI was the registered proprietor of land. Another company, called Malory Enterprises Ltd, with no connection to Malory BVI, was set up, and by deception, obtained a new land certificate in the name of Malory Enterprises Ltd (‘Malory UK’). Malory UK then sold and executed a transfer of the land to Cheshire which became the registered proprietor in January 1999.

Malory BVI was successful in its claim for rectification of the register and also in its claim that Cheshire’s entry upon the land on and after 17 July 1999 amounted to trespass. Of particular interest here is the Court of Appeal’s discussion of *LRA 1925* sections 69(1), 20(1), which are similar to *LRA 2002* sections 58, 29 respectively.

Lady Justice Arden delivered the main judgment. Her Honour found that, although Malory UK had no title to convey to Cheshire, \(^{156}\) once Cheshire became registered, Cheshire was, pursuant to section 69(1) ‘deemed to have vested in it “the legal estate in fee simple in possession”’. \(^{157}\) Her Honour continued: ‘However, section 69 deals only with the legal estate. Unlike section 5, which deals with first registration, that registered estate is not vested in Cheshire “together with all rights, privileges and

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\(^{153}\) [2013] EWHC 86 (Ch) (‘*Fitzwilliam*’).

\(^{154}\) [2002] Ch 216 (‘*Malory*’).

\(^{155}\) [2015] 3 WLR 239, [45].

\(^{156}\) It is submitted that this cannot be correct. Malory UK had obtained a land certificate issued in its name. As registered proprietor, *LRA 1925* s 69(1) provided that Malory UK ‘shall be deemed to have vested in [it] without any conveyance’ the legal estate.

\(^{157}\) *Malory* [2002] Ch 216, 232 [64].
The effect of this finding was that Cheshire had throughout held the land on trust for Malory BVI. In addition, Arden LJ discussed the application of LRA 1925 section 20(1). In broad terms, this section provided that a disposition for valuable consideration would, when registered, confer on the transferee the estate disposed of, subject to overriding interests, but free from all other estates and interests whatsoever. Leaving aside the issue of overriding interests, as Cheshire had provided consideration for its interest and was registered, this section would appear to grant priority to Cheshire over the interest of Malory BVI. However, in her Honour’s view, since the transfer to Cheshire could not, in itself, be effective in law, it could not constitute a ‘disposition’ for the purposes of LRA 1925 section 20 and therefore could not confer on Cheshire the estate free from all other rights and interests.

Her Honour concluded that, ‘Malory BVI has sufficient standing to sue for trespass even without seeking rectification of the register because it is the true owner and has a better right to possession.’ Her Honour also found that as Malory BVI was in actual occupation, it was entitled to be treated as having an overriding interest by virtue of its right to seek rectification of the register. Her Honour chose to express no view on the submissions concerning indemnity.

1 Malory Critique

158 Ibid 232 [65].
159 Lord Justice Clarke agreed with her Honour and commented that the status of Cheshire as registered proprietor was ‘subject to the rights of Malory BVI as beneficial owner because section 69 of [LRA 1925] only has the effect of vesting in Cheshire “the legal estate in fee simple in possession”’: ibid 237 [85].
160 The provision appears similar in effect to the paramountcy provisions in the Australian jurisdictions.
161 Given that Malory UK was the registered proprietor, it is not clear on what basis her Honour claimed that the transfer to Cheshire was not effective in law. The transfer was, at law, inherently valid as it had been validly executed by the parties.
162 Malory [2002] Ch 216, 232 [65].
163 Ibid 233 [69]. Her Honour concluded that the right to seek rectification arose at the same time as the registration of Cheshire. This right, coupled with ‘actual occupation’ by Malory BVI, gave rise to an overriding interest: at 232–3 [67]–[70]. However, it is submitted that the right for Malory BVI to seek rectification of the register must have first arisen at the time that Malory UK was registered. Malory UK had, by deception, obtained a new land certificate for the land (GM723895) and was registered as proprietor prior to the sale to Cheshire: at 222 [5], [8].
164 Ibid 237 [83].
The decision in *Malory* gave rise to a flurry of academic criticism and comment. One of the most contentious aspects of the decision was the proposition that under LRA 1925 section 69, registration of a void transfer vested only the legal estate in the registered proprietor and beneficial title remained with the former owner. Charles Harpum has described this interpretation of section 69 as one that ‘undermines … the essential structure of land registration without any compensating gains’.

One of the difficulties with the *Malory* interpretation of section 69 is that it implies that prior to the transfer, the former owner was vested with two estates: the legal estate and the beneficial estate. However, conceptually, this is not a correct description of the former owner’s position. As Lord Browne-Wilkinson stated in *Westdeutsche Landesbank Girozentrale v Islington LBC*, ‘[t]he legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title’.

A ‘separation of the legal and equitable estates’ will arise where, according to equitable jurisdiction, there is an express, constructive or resulting trust. However, in the *Malory* situation, there was certainly no express trust and, given the registered proprietor was a good faith purchaser of the legal estate, no circumstances that would give rise to a constructive or resulting trust.

It is true that the language of LRA 1925 section 69 deemed the vesting of only the legal estate. But this should not be interpreted as meaning that where a void instrument is registered, without more, beneficial title remains with the former owner. As noted in *Westdeutsche*, ‘legal title carries with it all rights’ and so specific

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167 [1996] AC 669, 706 (‘Westdeutsche’).
reference to the beneficial title is not required. In any event, the legislation ‘cannot make a generalised assertion about the beneficial ownership of the registered land’ since a registered proprietor may be subject to a trust that has been expressly created or which arises by the operation of recognised equitable principles.

Another contentious aspect of Malory was the decision that a registered forged transfer was not to be treated as a ‘disposition’ for the purposes of LRA 1925 section 20. The broad object of section 20 was to ensure that the registered disposition for value had priority, and the decision in Malory appears to thwart this objective. In this regard, it is worth highlighting the concluding words of the section, ‘the disposition shall operate in like manner as if the registered transferor or grantor were … entitled to the registered land in fee simple in possession for his own benefit’. If a ‘disposition’ is held not to include a void transfer, one wonders what work these concluding words were to do. The words seem to cover a situation where, in fact, the transferor was not entitled to the fee simple – perhaps the transferor is a forger. In which case, the concluding words effectively deem the transferor/forger to be entitled to the estate and able to make an effective disposition.

There was widespread expectation among academic commentators that the decision in Malory ‘should not, and probably would not’ be followed in relation to LRA 2002. The 2002 Act was considered to introduce a change from ‘registration of title to title by registration’ and the adoption of the Malory approach ‘would be to import principles of unregistered conveyancing into registered land and this would wholly contradict the system of registration of title’. However, the assumption that Malory

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170 Cooke, ‘The Register’s Guarantee of Title’, above n 16, 346. Although it is submitted that this criticism of Malory is correct, there are other persuasive academic arguments to the effect that this aspect of Malory is ‘defensible in terms both of intrinsic doctrine and of compatibility with the surrounding legislation’: Simon Gardner, ‘Alteration of the Register: An Alternative View’ (2013) 6 Conveyancer and Property Lawyer 530, 537. See also Hill-Smith, above n 168, 135.
171 There were some exceptions to the priority rule established in LRA 1925 s 20(1): see s 20(1)(a) regarding encumbrances and entries on the register and any charge for capital transfer tax, and s 20(1)(b) which dealt with overriding interests.
173 Ibid (emphasis in original).
174 Dixon, Modern Land Law, above n 1, 44 n 66. This view also seems to have been accepted by the judiciary and adjudicators; see Emma Lees, ‘Richall Holdings v Fitzwilliam: Malory v Cheshire Homes and the LRA 2002’ (2013) 76 Modern Law Review 924, 924.
would not be followed in \textit{LRA 2002} proved to be ‘presumptuous and wrong’,\footnote{Dixon, ‘A Not So Conclusive Title Register?’, above n 172, 321.} and initially at least, the “‘heresy” from \textit{Malory}\footnote{Cooke, ‘Land Registration: Void and Voidable Titles’, above n 165, 486.} continued into the new regime.

\textbf{B Fitzwilliam}

Fitzwilliam was the registered proprietor of land which was transferred to Richall pursuant to a forged power of attorney.\footnote{Richall was not involved in the forgery.} Fitzwilliam became aware of the transfer and brought an application seeking various declarations concerning alteration of the register under \textit{LRA 2002} schedule 4. Fitzwilliam argued, on the basis of \textit{Malory}, that he had retained beneficial ownership despite the transfer to Richall because \textit{LRA 2002} section 58, like \textit{LRA 1925} section 69, only had the effect of vesting the legal estate in Richall.\footnote{\textit{Fitzwilliam} [2013] EWHC 86, [69]. By relying on the much discredited \textit{Malory} decision, Fitzwilliam could avoid the possibility of Richall defending rectification proceedings by asserting the defence of a proprietor in possession under sch 4 para 3(2).} The Court should, therefore, order alteration of the register for the purpose of ‘correcting a mistake’ under schedule 4 paragraph 2(a).

Justice Newey, in considering Fitzwilliam’s argument, acknowledged the ‘considerable force’\footnote{Ibid [76].} in the criticisms of \textit{Malory}. Ultimately, however, his Honour decided that ‘[w]hatever merit the criticisms of \textit{Malory} may have … I am bound by the decision’.\footnote{Ibid.} His Honour did not accept the arguments by Richall’s counsel that \textit{Malory} could be distinguished on the basis that the wording of \textit{LRA 2002} section 58 differed significantly from the wording of \textit{LRA 1925} section 69.\footnote{Ibid [78]–[82].}

His Honour also rejected Richall’s ‘fall-back position’ that the word ‘disposition’ in the context of \textit{LRA 2002} section 29 should be read as extending to a void transfer.\footnote{Ibid [83].} In \textit{Malory}, the Court of Appeal concluded that a transfer that ‘could not in law be of any effect in itself, … [could not] constitute a “disposition”’\footnote{[2002] Ch 216, 232 [65].} for the purposes of
In these circumstances, Newey J concluded that Fitzwilliam remained beneficial owner notwithstanding Richall’s registration, and was entitled to be restored to the register as owner. Despite this conclusion, Newey J went on to state that even had he found that a void transfer could be a ‘disposition’, the overall result in the case may still have been the same. The reasoning here was that Fitzwilliam may have been able to claim he had an overriding interest, pursuant to transitional provisions. However, Newey J was not required to make a final conclusion on these matters since, ‘they do not arise if a void transfer does not constitute a “disposition” for the purposes of section 29 … and it seems to me I must proceed on that basis’.

1 Fitzwilliam Critique

The decision in Fitzwilliam spawned yet further academic commentary regarding the correctness of the Malory decision itself and the correctness of Justice Newey’s view in Fitzwilliam that he was bound by Malory. Interestingly, there was an obvious point of distinction between the two cases that appears to have been missed by Newey J and also in the commentaries on Fitzwilliam. In truth, Malory was an A-B-C scenario and Fitzwilliam was an A-B scenario. In Malory, the fraudster, Malory UK, became registered and then executed a transfer to Cheshire who became registered. The fraud of Malory UK would be the kind of event that would cause it to hold the

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184 Justice Newey appears to approve of Hill-Smith’s conclusion that the Court of Appeal in Malory was wrong in its construction of what constitutes a ‘disposition’: Fitzwilliam [2013] EWHC 86, [84], quoting Hill-Smith, above n 168, 135.
185 Fitzwilliam [2013] EWHC 86, [84].
186 Ibid [85].
187 Justice Newey also found, however, that Fitzwilliam had to reimburse Richall £274 370.98, which represented a portion of Richall’s loan money that was used to pay out a pre-existing mortgage over the land: ibid [108].
188 Ibid [86].
189 Justice Newey commented, on the basis of Malory, that an absolute owner has ‘rights … as beneficial owner’ which can survive the registration of another person as proprietor. Such pre-existing rights may therefore qualify for protection as overriding interests: Fitzwilliam [2013] EWHC 86, [91], quoting Malory [2002] Ch 216, 232 [65] (Arden LJ).
191 Fitzwilliam [2013] EWHC 86, [92].
192 Lees, eg, has argued that by considering LRA 1925 s 20 and LRA 2002 s 29 ‘as part of the bigger picture, we begin to see that the registration system is subtly, but crucially, different under the two acts’: Lees, above n 174, 929.
land on trust for Malory BVI. In *Fitzwilliam*, however, Richall was not guilty of fraud and so, unlike *Malory*, there was no event that should warrant a finding that Richall held on trust for Fitzwilliam.

In order to comment properly on *Fitzwilliam*, it is helpful to reflect on the facts and to consider, briefly, how the case would be resolved by applying the holistic *LRA 2002* methodology.

On this approach, section 58 would vest legal title which, on the basis of reasoning from *Westdeutsche* includes the beneficial title, in Richall. However, as Richall’s registration was pursuant to a void instrument, this registration would be a mistake and would be subject to rectification under schedule 4, unless Richall was in possession of the land. Either way, whether rectification is ordered or not, the losing party would be entitled to an indemnity under schedule 8. As Cooke has pointed out, ‘[t]he availability of an indemnity is thus crucial to the guarantee of title which is the purpose of title registration’. The rectification provisions and the indemnity provisions are thus intimately connected. ‘If there is rectification, B gets an indemnity; if B keeps the land then A gets one’. It is therefore of fundamental importance that the interconnecting provisions of *LRA 2002* are all taken into account in resolving A-B and A-B-C disputes. Indeed, had this occurred in *Fitzwilliam*, the outcome may have been quite different. As one commentator, who had initially considered Newey J to be bound by *Malory* on the basis ‘that the provisions of the two registration statutes do not differ far enough’, later commented:

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193 This distinction may not have been picked up due to the confusing discussion of the facts in *Malory*: see above nn 156, 161, 163.
194 This point of distinction between the two cases has been identified by Dixon, ‘A Not So Conclusive Title Register?’, above n 172, 323, and also picked up in the later case of *Swift 1st Ltd v Chief Land Registrar* [2014] EWHC B26 (Ch), [43] (Sheldon QC).
195 Commentators in England have described this type of approach as a ‘set of rules’ approach: see, eg, Elizabeth Cooke, ‘Chickens Coming Home to Roost’ (2014) 5 *Conveyancer and Property Lawyer* 444, 444.
196 Justice Newey discussed the issue of the date on which a proprietor must be in possession in order to defend an alteration application: *Fitzwilliam* [2013] EWHC 86, [99]–[102].
198 Ibid.
Argument about the consequences of the Malory reasoning for indemnity would have exposed the incorrectness of that reasoning under the 2002 Act, and it would have become clear that the statutory scheme necessitated a different construction of s 58.\(^{200}\)

However, the comprehensive, holistic \textit{LRA 2002} methodology was not the approach adopted in \textit{Fitzwilliam}. In \textit{Fitzwilliam}, section 58 was construed as conferring only the bare legal title on Richall, and Fitzwilliam was regarded throughout as beneficial owner. In these circumstances, counsel for Richall conceded that the register could be altered. Justice Newey did not make it clear on what basis the alteration to the register was made. It is possible the order was made ‘simply to speed up a \textit{Saunders v Vautier} type approach which would allow for Fitzwilliam to call for Richall to transfer the legal title to him’.\(^{201}\)

The difficulty with this approach is that the indemnity provisions in schedule 8 are inapplicable. A person is only entitled to an indemnity if he or she ‘suffers loss’. However, as Richall was considered to be merely a bare trustee, the alteration of the register to reflect that fact caused no loss to Richall. Accordingly, Richall was not entitled to an indemnity.\(^{202}\)

Another problematic aspect of the \textit{Fitzwilliam} interpretation of section 58 is the possibility of treating Fitzwilliam’s ‘pre-existing’ beneficial interest as an overriding interest.\(^{203}\) If the register were to be altered on the basis of an overriding interest, the alteration would not cause the registered proprietor to ‘suffer loss’, since the registered proprietor is, in any event, bound by overriding interests.\(^{204}\) In addition, this kind of alteration is not for the purpose of ‘correcting a mistake’ but rather for...

\(^{200}\) Cooke, ‘Chickens Coming Home to Roost’, above n 195, 447.

\(^{201}\) Lees, above n 174, 932–3, citing \textit{Saunders v Vautier} (1841) 4 Beav 115. Another possibility is that the register was altered for the purpose of ‘bring[ing the register] up to date’ as has been suggested by Cooke, ‘Chickens Coming Home to Roost’, above n 195, 445.

\(^{202}\) Lees has described the consequences of this approach as follows: ‘This means that in the case of all void transfers, indemnity would be unavailable since nothing would be lost on the removal of the registered proprietor from the register. This robs the indemnity provisions of their power as a builder of confidence in the registration system’: Lees, above n 174, 933.

\(^{203}\) Ordinarily in order to claim an overriding interest the interest-holder must be in actual possession. However, pursuant to the transitional provisions, the fact that Fitzwilliam was in receipt of the rents and profits satisfied this aspect of an overriding interest. See above n 190.

\(^{204}\) See Law Commission and HM Land Registry, \textit{Report}, above n 13, 223 [10.16].
‘updating the register’. Once again, the registered proprietor, Richall, would not be entitled to an indemnity.

The indemnity consequences of the acceptance, in Fitzwilliam, of the Malory decision were not considered by Newey J in Fitzwilliam. However, it was inevitable that a future case would have to tussle with this issue. In January 2014, such a case did arise, namely Swift 1st Limited v Chief Land Registrar, and, to use the language of Cooke, ‘[i]n Swift the indemnity chickens came home to roost’.

C Swift 1st Limited v Chief Land Registrar (Swift)

Rani was the registered proprietor of land. Swift received a mortgage application purportedly signed by Rani. After checking identity documents and speaking on the phone to a person purporting to be Rani, Swift agreed to the loan. A legal charge, purportedly executed by Rani, was registered in the charges register and Swift advanced the funds. These funds were never received by Rani. Default having been made on the mortgage, Swift brought proceedings for possession of the land. Rani defended the action on the ground the charge had been forged. Swift accepted that the charge had been forged and discontinued the action. The entry of the charge on the register was removed, and by consent, the Court ordered that the charge was agreed to be void. Swift applied for an indemnity from the Chief Land Registrar (registrar). However, this application was refused.

The registrar argued that, following Malory and Fitzwilliam, there was no rectification as the removal of the charge from the register was simply for the purpose of ‘bringing the register up to date’. Rani, who had remained in actual occupation at all material times, could rely on her right to rectification, or her continuing beneficial ownership, as constituting an overriding interest which prevailed over the registered charge. Accordingly, there was no rectification and without rectification there can be no indemnity.

201[2014] EWHC B26 (Ch).
203 Swift 1st Limited v Chief Land Registrar [2014] EWHC B26 (Ch), [13].
204 Cooke, ‘Chickens Coming Home to Roost’, above n 195, 446; see LRA 2002 sch 8.
1 The High Court Decision in Swift

Swift applied to the High Court for a determination as to whether it was entitled to an indemnity. Sheldon QC, sitting as a Deputy Judge of the High Court, considered himself bound by *Fitzwilliam.* With some doubt, and by adopting an unlikely construction of paragraph 1(2)(b) of schedule 8, Sheldon QC allowed the application and found that Swift was entitled to an indemnity.

*LRA 2002* schedule 8 paragraph 1 provides:

(2) For the purposes of sub-paragraph (1)(a) – …

(b) the proprietor of a registered estate or charge claiming in good faith under a forged disposition is, where the register is rectified, to be regarded as having suffered loss by reason of such rectification as if the disposition had not been forged.

Sheldon QC focused on the concluding words ‘as if the disposition had not been forged’. He considered that by giving effect to those words, the loss suffered was to be determined on the basis that the disposition had not been forged. On that basis, the overriding interest of Rani could not be set up to defeat Swift’s claim.

This resolution of the indemnity problem in *Swift* is ‘highly unsatisfactory’ and ‘wrenches the sense’ of schedule 8 paragraph 1(2)(b). This paragraph was intended to apply so that ‘where the register is rectified’, a person who had, in good faith, obtained a registered interest would be entitled to an indemnity since ‘loss’ would be deemed by the provision. Instead, the provision was construed the other way around such that since ‘loss’ was deemed, then the registered proprietor could be treated as having been ‘prejudicially affected’ and thus the alteration to the register would be

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209 *Swift 1st Limited v Chief Land Registrar* [2014] EWHC B26 (Ch), [32].
210 Ibid [39].
211 Ibid [43]–[44]. Sheldon QC commented, ‘I make this finding with some reluctance but consider that I am bound by *Malory* and *Fitzwilliam.* In the light of those decisions, Swift 1st Ltd’s (Swift) argument is the only way I can see to give meaningful effect to the relevant provisions in Schedule 8′: at [44].
212 Ibid [39].
213 Ibid.
214 Cooke, ‘Chickens Coming Home to Roost’, above n 195, 446; see also *Swift 1st Limited v Chief Land Registrar* [2014] EWHC B26 (Ch), [35].
deemed a rectification. Since there is a rectification and loss suffered by the registered proprietor, indemnity follows.\footnote{215 Cooke, ‘Chickens Coming Home to Roost’, above n 195, 446.}

It is submitted that the more acceptable way to resolve the problem in \textit{Swift} is to adopt the holistic \textit{LRA 2002} methodology. Under section 58, Swift held both the legal and equitable title to its charge. However, since the charge was a forgery and therefore void, the registration of Swift was a mistake and the register could be rectified and the charge removed from Rani’s title. The removal of the charge caused loss to Swift as it no longer had the right to exercise the powers of a chargee. Accordingly, since the register was altered by the ‘correction of a mistake’ that prejudicially affected Swift’s title, Swift would be entitled to an indemnity under schedule 8.\footnote{216 This will be the result provided that Swift had not caused the loss through its own fraud or lack of proper care: \textit{LRA 2002} sch 8, paras 5(1)(a)–(b).} This approach is sensible, fair and recognises the interplay between the rectification and indemnity provisions, thus giving full effect to the words of the legislation itself.

The Chief Land Registrar appealed Sheldon QC’s decision to the Court of Appeal. Before the Court of Appeal handed down its decision a number of academic commentators considered his decision, and in particular, his finding that \textit{Malory} was binding on the Court as confirmed by \textit{Fitzwilliam}. These commentators called for \textit{Malory} and \textit{Fitzwilliam} to be overruled.\footnote{217 See, eg, Cooke, ‘Chickens Coming Home to Roost’, above n 195, 448; Lees, above n 174, 924.} In addition, it was suggested that ‘a thorough examination of the position by a higher court is required’,\footnote{218 Emma Lees, ‘Indemnity and the \textit{Land Registration Act 2002}’ (2014) 73 \textit{Cambridge Law Journal} 250, 253.} or alternatively, and rather more radically, that ‘a new scheme and a different basis of title registration must be contemplated’.\footnote{219 Cooke, ‘Chickens Coming Home to Roost’, above n 195, 449.}

This higher court examination did finally occur in April 2015 with the decision of the Court of Appeal in \textit{Swift}.\footnote{220 \textit{Swift} [2015] 3 WLR 239.}

\section*{2 \textit{The Court of Appeal Decision in Swift}}
The Court of Appeal dismissed the appeal and ultimately agreed with Sheldon QC regarding the interpretation and application of schedule 8 paragraph 1(2)(b).

However, in doing so, Patten LJ, speaking for the Court, commented, ‘I have not found this an easy question and it is certainly an issue which deserves to be considered in the forthcoming review by the Law Commission of the workings of the LRA 2002.’

There is, perhaps, no particular surprise in this aspect of the Court of Appeal’s decision. However, what is particularly momentous about the decision is the Court’s comments regarding Malory. The Court examined Lady Justice Arden’s view in Malory on the ‘beneficial ownership issue’, that is, that registration of a void instrument vests only the legal estate in the registered proprietor and that beneficial title remains with the former owner. The Court noted it would be bound by Malory unless the decision was found to have been decided per incuriam. Ultimately, the Court concluded that Malory had been decided per incuriam and was, accordingly, wrong.

There were two principal reasons for this finding. First, the Court found that Arden LJ did not take account of the earlier Court of Appeal decision in Argyle Building Society v Hammond (1984) 49 P & CR 148, which had decided that LRA 1925 section 69(1) had the effect of vesting title by registration even where there had been a forgery in the transfer. Secondly, the Court in Malory had not had its attention drawn to section 114, which impliedly confirmed the validating effect of section 20 on the registration of forged dispositions for valuable consideration. As noted by Patten LJ in Swift, ‘[i]t is not therefore possible to construe section 20 as having no application to a fraudulent transfer for valuable consideration that is registered’.

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222 Ibid 259 [48].
223 Ibid 257 [42].
224 Ibid 258 [45].
225 Ibid 257 [42].
226 Ibid 257–8 [43]–[44].
227 Ibid 258 [44].
D  The Torrens Approach to *Fitzwilliam* and *Swift*\(^{228}\)

1  *Fitzwilliam*

In *Fitzwilliam*, Richall became registered pursuant to a forged power of attorney. Richall was not guilty of fraud in becoming registered and there was no indication on the facts that would give rise to an in personam exception. Accordingly, under Torrens, Richall’s title would be indefeasible. Fitzwilliam would be entitled to compensation as he was deprived of his interest in land through the registration of another person as proprietor. In contrast, in *Fitzwilliam*, Richall was treated as holding the land on trust for Fitzwilliam and therefore lost its registered legal estate. No comment was made in the case regarding an indemnity.\(^{229}\)

2  *Swift*

In *Swift*, Swift became registered pursuant to a forged charge. Swift was not guilty of fraud in becoming registered and there was no indication on the facts that would give rise to an in personam exception. Accordingly, under Torrens, Swift’s charge would be indefeasible.\(^{230}\) Rani would be entitled to compensation as she was deprived of her interest in land through the registration of another person as proprietor. In contrast, in *Swift*, Swift accepted that the charge was a forgery and a consent order was made under which the charge was removed from the register. Swift was, however, entitled to an indemnity by virtue of an arguably unintended interpretation of *LRA 2002* schedule 8 paragraph 1(2)(b).

VI  CONCLUSION

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\(^{228}\) A discussion of the Torrens approach to *Malory* will not be made here as *Malory* concerned the operation of *LRA 1925*.

\(^{229}\) At the very least, however, Fitzwilliam was required to pay Richall the amount of money that had been used to pay out the pre-existing mortgage.

\(^{230}\) However, pursuant to the qualified indefeasibility provisions in Queensland, NSW and Victoria, Swift would not (Queensland), or may not (NSW and Victoria), obtain an indefeasible title if Swift had failed to take reasonable steps to verify the identity of the mortgagor, Rani. See above nn 30–5 and accompanying text.
All land title registration systems must provide a mechanism for dealing with bijural inaccuracy in A-B and A-B-C scenarios. In Australia, immediate indefeasibility has been adopted and one can say with certainty that, in the absence of fraud, B or C will be entitled to the land and A will be left to seek compensation from the person liable for the loss or from the assurance fund.

Immediate indefeasibility is undoubtedly a harsh doctrine and from time to time the injustice of this approach comes to the attention of the public. But, it is this ‘rock-solid effect of registration’ that gives rise to the system’s greatest strength: its certainty.

The certainty of outcomes achieved by adopting immediate indefeasibility was strikingly highlighted in this article when the Torrens approach was applied to the factual scenarios of the English cases. The brevity of the discussion required in applying the Torrens approach was breathtaking. The reason for this clarity and certainty is due to the fact that the problem of bijural inaccuracy has been worked through by the Australian courts, which consistently resolve bijural inaccuracies in favour of registration law rather than the general law. Quite simply, registration pursuant to a void instrument, of itself, is absolutely and categorically not a ground for challenging a registered proprietor’s title. More is required.

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232 Butt, above n 77, 597.

233 This resolution was finally achieved in 1971 by the High Court, firmly endorsing immediate indefeasibility over deferred indefeasibility in the decision of Breskvar v Wall (1971) 126 CLR 376. See the earlier discussion in Part II regarding the deferred indefeasibility approach. For a recent High Court decision confirming immediate indefeasibility, see Cassegrain v Gerard Cassegrain & Co Pty Ltd (2015) 316 ALR 111 and for a commentary on this case, see Penny Carruthers and Natalie Skead, “Confirming Torrens Orthodoxy: The High Court Decision in Cassegrain v Gerard Cassegrain & Co Pty Ltd” (2015) 24 Australian Property Law Journal 211.


235 In order to challenge the registered proprietor’s title, the claimant must identify either an express exception, eg, fraud by the registered proprietor, or one of the other non-express exceptions.
For an Australian looking at the English system, it does indeed appear to be a ‘tangled web’ and the inconsistent, divergent, and confusing case law is of no assistance in untangling this web. The root cause of the problem is the lack of clarity in the legislation concerning the meaning of ‘correcting a mistake’ and the highly contentious meaning that had been ascribed to LRA 2002 section 58 prior to the Court of Appeal’s historic decision in Swift in 2015.

A Correcting a Mistake

What is meant by ‘correcting a mistake’? Is it intended to cover just the original mistake (the narrow interpretation) or does it also cover the consequences of the original mistake (the wide interpretation)?

The narrow interpretation applies the legislation in an ‘orthodox’ and literal manner, and it fosters dynamic security in the A-B-C scenario by favouring C over A. However, there are downsides. Adopting the narrow interpretation precludes static security for A as against C and runs the risk that A, a perfectly just claimant who has been deprived of his or her interest in the land, is denied the opportunity of obtaining an indemnity.

This concern regarding indemnity was clearly a motivating factor for those adjudicators who adopted the wide interpretation. Under the wide interpretation, both B and C’s registrations could be corrected giving rise to rectification of the register and, provided B and C had not contributed to the loss, they would be entitled to an indemnity. Although static security is fostered with the wide approach, the manifest downsides are that it thwarts dynamic security and it erodes the utility of a registered title. If the ‘consequences of a mistake’ can be corrected, then this can continue to apply to D’s registration and E’s and so on.

The reference to a ‘tangled web’ is taken from Hewitt, above n 99, 177.

On the narrow interpretation, static security is preserved for A in the A-B scenario, since B’s registration pursuant to a void instrument is a ‘mistake’ and can be corrected. However, since C’s registration is pursuant to an internally valid instrument, on the narrow interpretation, it is not a mistake.

In the cases considered in this article, C’s interest was a charge, and so the interest A was deprived of was an unencumbered fee simple estate.

Ajibade (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Rhys, 8 April 2008), [13].
There is no easy answer. As Dixon recently commented, ‘[t]he challenges facing the land registry and the adjudicators … in interpreting the alteration/rectification provisions of the 2002 Act should not be underestimated’.240

B Section 58 of the Act

Prior to Swift in 2015, the sensible and cohesive development of English land law was thwarted by the acceptance in Fitzwilliam of the Malory decision that had decided ‘that the innocent victim of a forged disposition acquired only the legal estate and not the beneficial ownership of the property’.241 The decision in Fitzwilliam lent support to the view that there was a ‘deep-rooted judicial commitment to the fundamental values that inhere in the general law’.242 Fitzwilliam effectively side-stepped the scheme of registered title, rectification and indemnity that had been set up under LRA 2002 and rendered almost meaningless the value of obtaining a registered title.243 This state of affairs with the ensuing uncertainty had been described as ‘unacceptable, and unsustainable’.244

However, the Court of Appeal’s decision in Swift, that Malory was ‘wrong’, is indeed momentous and hopefully ushers in a new era in English land law that sees a movement away from general law principles, and instead refocusses on the scheme of registered title set up under LRA 2002. In any event, the English Law Commission will be undertaking a thoroughgoing review of the 2002 Act during 2015.245 Doubtless the Court of Appeal’s decision in Swift will be significant in the Commission’s deliberations.

242 Goymour, above n 17, 618.
243 If, prior to A being restored to the register, B were to transfer to C, and on to D and so on, each of these subsequent proprietors would, presumably, hold the property on trust for A. The sch 4 defence of a proprietor in possession would not be available to the subsequent proprietors in A’s action to be restored to the register.
244 Goymour, above n 17, 647.
245 Law Commission, Twelfth Programme of Law Reform, Report No 354 (2014). ‘[T]his project will examine the extent of Land Registry’s guarantee of title, rectification and alteration of the register, and the impact of fraud. The project will also re-examine the legal framework for electronic conveyancing’: at 9 [2.16].
Chapter 4: Indefeasibility, Compensation and Anshun Estoppel in the Torrens System: The Solak Series of Cases

This chapter is a journal article: Penny Carruthers, ‘Indefeasibility, Compensation and Anshun Estoppel in the Torrens System: The Solak Series of Cases’ (2012) 20 Australian Property Law Journal 1
Introduction

The recent legal journey of Mr Solak through the Victorian courts has provided some interesting twists, turns, inconsistencies and surprises for observers of the workings of the Torrens system in Australia. The series of cases in which Mr Solak was involved are: *Solak v Bank of Western Australia;¹* *Solak v Registrar of Titles (No 2);²* and *Solak v Registrar of Titles.*³ These cases highlight a number of contemporary issues regarding the operation of the Torrens system.

The central issue in the first proceeding, *(Solak No 1)*, concerned the effect of registration of a forged ‘all moneys’ mortgage, and in particular the question as to whether the personal covenant to pay contained in an unregistered collateral loan agreement was incorporated in the mortgage and protected by indefeasibility. In a number of similar cases in other jurisdictions the courts have found that the personal obligation to pay in an unregistered collateral loan agreement could not be incorporated and therefore the mortgage secured nothing. In *Solak No 1* however, Pagone J found the covenant to pay was incorporated and the mortgage, ‘albeit forged, [was] effective as security.’⁴

Mr Solak, having failed in the first proceeding, then brought the second proceeding, *(Solak No 2)*, which was an action against the Registrar of Titles claiming compensation for loss or damage arising as a result of the Act. In a surprising twist, the Registrar of Titles sought summary dismissal of Mr Solak’s claim based on the principles raised in *Port of Melbourne Authority v Anshun Pty Ltd*⁵ (*Anshun*). The basis of the Registrar’s application was that it was unreasonable for the plaintiff not to have raised his cause of action against the Registrar in the first proceeding. Justice Davies agreed with the Registrar and found the Registrar’s *Anshun* estoppel defence to be well founded.⁶ Accordingly, in a further surprising twist, Mr Solak’s claim for compensation was summarily dismissed.

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¹ *Solak v Bank of Western Australia* [2009] VSC 82; BC200901550 (Solak No 1).
² *Solak v Registrar of Titles (No 2)* [2010] VSC 146; BC201002381 (Solak No 2).
³ *Solak v Registrar of Titles* [2011] VSCA 279; BC201107117 (Solak No 3).
⁴ *Solak No 1* [2009] VSC 82; BC200901550 at [16].
⁵ *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; 36 ALR 3; 55 ALJR 621; BC8100097 (*Anshun*).
⁶ *Solak No 2* [2010] VSC 146; BC201002381 at [17].
In the third proceeding, *(Solak No 3)*, Mr Solak appealed the decision of Davies J. The Court of Appeal in a unanimous judgment, found in favour of Mr Solak and dismissed the Registrar’s application for summary judgment. The Court of Appeal’s judgment is of particular interest as it includes both a rebuke to the Registrar of Titles for the Registrar’s conduct in the case and a recommendation for an amendment to the Victorian Torrens legislation.

Parts I, II and III of this article examine the diverse legal and procedural issues raised by the Solak series of cases. Part IV concludes this article with an examination of the issues of inconsistency highlighted in the Solak cases in the context of the desirability of uniform Torrens laws in the Australian jurisdictions.

**Part I – Solak No 1 – Inde defeasibility of forged registered mortgages**

It is well established that upon the registration of a dealing regarding Torrens system land the non-fraudulent registered proprietor obtains an immediately indefeasible title.\(^7\) Inde defeasibility is conferred regardless of any invalidity or defect in the instrument registered or in the process leading up to registration.\(^8\) This much is clear. However, there are two issues regarding the registration of forged mortgages that has generated considerable academic and judicial comment in recent years. First, to what extent does the protection of indefeasibility apply to individual terms in registered documents and more particularly, the mortgagor’s personal covenant to pay? Second, where the mortgage that has been registered is not a ‘traditional’ or ‘old fashioned’ form of mortgage, but rather an ‘all moneys’ mortgage, what, according to the true meaning and effect of the mortgage, is the debt which it secures? The facts raised in *Solak No 1* provide a useful starting point for consideration of these two issues.

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\(^7\) This concept of indefeasibility is enshrined in the core indefeasibility provisions of the Torrens statutes. The most significant is the ‘paramountcy’ provision: Land Titles Act 1925 (ACT) s 58; Real Property Act 1900 (NSW) s 42(1); Land Title Act 2000 (NT) s 188 and s 189; Land Title Act 1994 (Qld) s 184 and s 185; Real Property Act 1886 (SA) s 69 and s 70; Land Titles Act 1980 (Tas) s 40; Transfer of Land Act 1958 (Vic) s 42(1); Transfer of Land Act 1893 (WA) s 68.

\(^8\) In addition, immediate indefeasibility is conferred regardless of the nature of the instrument registered. However, the efficiency and appropriateness of according immediate indefeasibility to registered mortgages, as opposed to the registered transfer of a fee simple, has recently been questioned. See, E Peterson, ‘Are all Torrens transactions equal? A focus on the efficiency of the indefeasibility accorded to Torrens mortgages’ (2011) 19 APLJ 280 and P O’Connor, ‘Immediate indefeasibility for mortgagees: A moral hazard?’ (2009) 21(2) Bond L Rev 133.
Solak No 1 – Outline of facts

In Solak No 1 a person impersonated Mr Solak and obtained a loan from Bank West. The impersonator forged Mr Solak’s signature to the loan agreement and to an ‘all moneys’ mortgage which was granted over Mr Solak’s land. The impersonator did not deal directly with Bank West in obtaining the loan but rather with intermediaries including Mr Kheir of Kheir Financial Services Pty Ltd (Kheirs) and Aussie Home Loans Ltd (Aussie). Ultimately Bank West acted on the forged loan application that had been sent to it by Mr Kheir and disbursed the loan amount of $560,000. The forged all moneys mortgage was registered without fraud by Bank West. Mr Solak sought an order for the discharge of the mortgage arguing that though the mortgage was indefeasible, indefeasibility in this case did not extend to secure obligations arising from an unregistered collateral loan agreement which was void due to forgery.

Although the focus of the discussion in Solak No 1 concerned the second issue: the extent of protection accorded to a forged ‘all moneys’ mortgage; for present purposes it is also relevant to consider the first issue: the indefeasibility of a mortgagor’s personal covenant in a registered forged mortgage.

Indefeasibility and the mortgagor’s personal covenant in a forged mortgage

The contact was initially with Mr Kheir. At no time was direct face to face contact made between the impersonator and Bank West, Aussie, Kheirs or Mr Kheir. Rather contact was made by telephone or, in relation to the identification and loan documentation, by fax. The impersonator was able to obtain the identification documents, including Mr Solak’s passport, driver’s licence and tax returns, by breaking into Mr Solak’s house while Mr Solak was overseas. See Solak No 1 [2009] VSC 82; BC200901550 at [25]. Kheirs had an arrangement with Aussie Home Loans Ltd (Aussie) to introduce prospective borrowers to Aussie and Aussie in turn had a contract with Bank West to introduce borrowers to Bank West.

There were a number of significant breaches in the identification procedures carried out by Bank West and Mr Kheir. These breaches are discussed in detail in Solak No 1 [2009] VSC 82; BC200901550 at [20]-[34]. Interestingly, Mr Solak did not attempt to rely on these egregiously sloppy identification practices in an attempt to establish fraud by Bank West on the basis of agency fraud or willful blindness. This is not surprising. Apart from mortgagee involvement in false attestations of mortgage documents, as in Australian Guarantee Corporation v De Jaeger [1984] VR 483, claims of fraud against mortgagees are rarely successful. See O’Connor, above n 8, at 142-150. An example of a recent successful challenge to a registered mortgage based on the fraud exception is, Khan v Hadid (No 2) (2008) NSW Conv R 56-210 (mortgagee’s agent became aware there may have been a forgery and hastily registered the mortgage).

Solak No 1 [2009] VSC 82; BC200901550 at [3].
Registration of an instrument does not necessarily ‘… give priority or the quality of indefeasibility to every right which the instrument creates.’\textsuperscript{12} A purely personal right contained in a registered instrument is not rendered indefeasible by registration as it ‘in no way affects the estate or interest in land with which the instrument deals.’\textsuperscript{13} Rather, registration validates those terms which ‘… delimit or qualify the estate or interest or are otherwise necessary to assure that estate or interest to the registered proprietors.’\textsuperscript{14}

These broad statements regarding the effect of registration are, by themselves, uncontroversial.\textsuperscript{15} In the context of a registered forged mortgage the protection of indefeasibility will extend to the mortgagee’s security interest in the land and also to those terms that are necessary to ‘assure the estate or interest’ which would include, for example, the mortgagee’s right to sell the land upon default and the right to preserve the security from deterioration.\textsuperscript{16}

However, the interpretation and application of these broad comments to a mortgagor’s personal covenant to pay in a registered forged mortgage is contentious. Does indefeasibility apply to the mortgagor’s personal covenant even though, as the mortgage is forged, the mortgagor has never personally promised to pay anything? The case law arguably supports three different views as to the protection afforded to personal covenants in registered forged mortgages. These are that the personal

\textsuperscript{12} \textit{Mercantile Credits Ltd v Shell Co. of Australia Ltd} [1975-1976] 136 CLR 326 at 342; 9 ALR 39; 50 ALJR 487; BC7600036.

\textsuperscript{13} Ibid, at CLR 343.


\textsuperscript{15} The statements are also perfectly consistent with the chief indefeasibility provision, the paramountcy provision, which effectively provides that: notwithstanding the existence in another person of an interest which, but for the Torrens legislation may be held to have priority, the registered proprietor of an estate or interest in land shall, except in the case of fraud and other express exceptions, hold the land estate or interest subject only to the encumbrances, estates or interests recorded in the register. This indicates that the extent of the protection provided to the registered mortgagee is limited to protection of the registered mortgagee’s estate or interest in the land itself.

covenant to pay attracts: full indefeasibility; no indefeasibility; or limited indefeasibility.\textsuperscript{17}

The view that the personal covenant to pay attracts full indefeasibility is said to have its origin in \textit{PT Ltd v Maradona Pty Ltd}\textsuperscript{18} (\textit{Maradona}). In that case, Giles J concluded that the personal covenant to repay the moneys secured was ‘so connected’ with the mortgagee’s registered interest that it would attract the benefit of indefeasibility.\textsuperscript{19} A number of other cases have been cited to support the full indefeasibility approach.\textsuperscript{20}

If the mortgagor’s personal covenant to pay is validated by registration, this would enable the mortgagee to sue the mortgagor personally for the debt: either as an alternative to enforcing the charge against the land or to recover any shortfall in the event the sale of the land is insufficient to pay the amount owing. Under this approach, an innocent registered proprietor whose land is subject to a forged registered mortgage may become personally liable for thousands of dollars even though he or she never signed the mortgage and never received the money. This

\textsuperscript{17} Harding identifies these three ‘schools of thought’ in his analysis of the cases, see: B Harding, ‘Under the indefeasibility umbrella: The covenant to pay and the “all-moneys” mortgage’ (2011) 19 APLJ 231 at 234.

\textsuperscript{18} \textit{PT Ltd v Maradona Pty Ltd} (1992) 25 NSWLR 643; [1992] ANZ ConvR 513; (1992) NSW ConvR 55-620 (\textit{Maradona}). Grattan identifies the judgment of Giles J in \textit{Maradona} as the ‘origin’ for the view that registration of a mortgage validates an otherwise defective personal covenant to pay the secured amount. See S Grattan, ‘Recent developments regarding forged mortgages: The interrelationship between indefeasibility and the personal covenant to pay’ (2009) 21(2) Bond L Rev 43 at 46.

\textsuperscript{19} \textit{PT Ltd v Maradona Pty Ltd} (1992) 25 NSWLR 643 at 681; [1992] ANZ ConvR 513; (1992) NSW ConvR 55-620. It is important to note here that though the personal covenant to pay was validated by registration, ultimately the mortgagor was not required to make any payment. The mortgagor’s personal covenant referred to whatever amount was owing by her under an off-register guarantee. As the guarantee was void for \textit{non est factum}, no money was owing by the mortgagor and the mortgagee’s charge secured nothing.

interpretation of indefeasibility does indeed ‘shock ones sense of fairness and justice’.\textsuperscript{21}

The contrary view, that the personal covenant to pay is not protected by indefeasibility, has its ‘genesis’\textsuperscript{22} in \textit{Grigic v ANZ Banking Group Ltd.}\textsuperscript{23} Under this approach the personal covenant to pay is not accorded indefeasibility and accordingly, the mortgagee cannot sue the mortgagor personally. However, the charge over the land is indefeasible and the mortgagee can have recourse to the land to recover the amount secured.\textsuperscript{24} The judgment in \textit{Grigic} did not refer to \textit{Maradona} nor did the court provide any reasoning to support its decision. Despite this, the case has been relied upon in a number of subsequent cases which have adopted the view that indefeasibility does not extend to the personal covenant to pay.\textsuperscript{25}

The third view, that the personal covenant attracts limited indefeasibility, is supported by the New Zealand case of \textit{Duncan v McDonald}.\textsuperscript{26} Under this approach, the mortgagor’s covenant to pay and other supporting covenants in a forged registered mortgage become operative ‘ … to such extent only as is necessary to enable realization of the security and recovery of the advance or part thereof by that means.’\textsuperscript{27} In this case Blanchard J further commented:

\begin{itemize}
  \item \textsuperscript{21} See, C MacDonald, L McCrimmon, A Wallace and M Weir, \textit{Real Property Law in Queensland}, 3rd ed, Thomson Lawbook Co, Sydney, 2010, at [10.195]. It is also inconsistent with principles of statutory construction which would suggest it is ‘unlikely that a statute would be construed in such a way as to impose personal liability on a person for another’s fraud.’ See J Stoljar, ‘Mortgages, indefeasibility and personal covenants to pay’ (2008) 82 ALJ 28 at 30. Stoljar cites the following cases in support of this proposition: \textit{Potter v Minahan} (1908) 7 CLR 277 at 304; 14 ALR 635; BC0800025; \textit{Bropho v Western Australia} (1990) 171 CLR 1 at 18; 93 ALR 207; 64 ALJR 374; BC9002906; and \textit{Coco v R} (1994) 179 CLR 427 at 437; 120 ALR 415; 68 ALJR 401; BC9404609.
  \item \textsuperscript{22} The expression ‘genesis’ or ‘formative case’ has been used by Grattan and Harding respectively in describing \textit{Grigic}. See Grattan, above n 18, at 48 and Harding, above n 17, at 237.
  \item \textsuperscript{23} \textit{Grigic v ANZ Banking Group Ltd} (1994) 33 NSWLR 202 at 204; [1994] ANZ ConvR 334; (1994) NSW ConvR 55-699; BC9405152 (\textit{Grigic}).
  \item \textsuperscript{24} In \textit{Grigic}, the son and daughter-in-law of Mr Grigic Snr arranged for a person to impersonate Mr Grigic Snr in obtaining a loan on the security of Mr Grigic Snr’s land. Ultimately the forged mortgage was registered and the non-fraudulent bank obtained an indefeasible title. During the course of the appeal it came to the attention of the court that the amount secured by the mortgage would likely exceed the sale price of the land. Powell JA, with Meagher JA and Handley JA agreeing, made a declaration at p NSWLR 224 that ‘notwithstanding that the subject property stands charged with the moneys secured by the bank’s mortgage, Mr Grigic Snr is not liable to the ANZ on the personal covenants contained in that mortgage …’
  \item \textsuperscript{26} \textit{Duncan v McDonald} [1997] 3 NZLR 669 (\textit{Duncan}).
  \item \textsuperscript{27} Ibid, at 683.
\end{itemize}
But if the proceeds are insufficient, the mortgagee cannot pursue the mortgagor for the balance in reliance on the forged covenant to pay (Grigic at p 224); nor can the mortgagee prior to any such sale elect to sue the mortgagor personally on the covenant, not seeking to enforce the security, perhaps because it is discovered to be valueless. 28

In short, under this approach, the registration of a forged mortgage gives the mortgagee a right of recourse against the land, for such value as the land may have, but no recourse against the mortgagor personally. 29

Application in Solak No 1

In Solak No 1 it is not immediately clear as to which, if any, of these approaches was adopted by Pagone J. In his judgment, Pagone J referred with apparent approval to the following statement by Hayne J in Pyramid Building Society (in Liq) v Scorpion Hotels Pty Ltd:

It has not been contended that the indefeasibility of the mortgage does not extend to the covenant for payment and it is plain that it does so extend. 30

This reference may support the view that Pagone J adopted the ‘full indefeasibility’ approach such that the personal covenant to pay is protected by indefeasibility and enables the mortgagee to sue the mortgagor personally to recover the debt. 31 However, arguably this is not the case. There is a ‘duality’ to the mortgagor’s personal covenant to pay. As Peterson has noted,

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28 Ibid, at 682-683.
29 There appears to be no difference in reality between the ‘no indefeasibility’ approach in Grigic and the ‘limited indefeasibility’ approach in Duncan. In both cases the mortgagee is entitled to recoup the money owing from a sale of the land, but is not entitled to sue the mortgagor personally. The reason for the apparent difference is the inconsistent way in which the expression ‘indefeasibility’ is used by the courts in analysing the personal covenant. See also the discussion by Peterson regarding the inconsistent linguistics in the present law, Peterson, above n 8, at 316.
31 This interpretation of Justice Pagone’s judgment is accepted by the authors of MacDonald et al, above n 21, at 308, [10.195] and footnote 181. Harding has also commented that the full indefeasibility position appears to have been adopted in Solak No 1: see Harding, above n 17, at 236.
This recognition of the duality of the personal covenant, in defining both the quantum of an interest in land and [the] quantum of personal liability, has been consistently maintained in the NSW discourse. The former is made good by registration, while the latter is not.\textsuperscript{32}

This duality is reflected in the oft quoted comment of Young CJ in Eq that:

\begin{quote}
\ldots the reason why the personal covenant is considered to be part of the package of rights protected by the indefeasibility principle is that it maps out or may map out the extent of the quantum of the interest of the mortgagee in the land and in that sense is closely related to title requiring it to be considered as to limiting the rights.\textsuperscript{33}
\end{quote}

Pagone J, in accepting that indefeasibility extends to the personal covenant, may be acknowledging that the quantum of the mortgagee’s interest in the land is validated by registration (not that the mortgagor is made personally liable for the debt). Support for this view may be found in the comment of Pagone J, ‘Accordingly, the mortgage, albeit forged, is \textit{effective as security}.’\textsuperscript{34} Arguably this indicates that Pagone J is limiting the \textit{effect} of indefeasibility of the personal covenant simply to quantify the extent of the security interest in the land and not to impose personal liability on the unfortunate mortgagor, who is, after all, a victim of forgery. If this is the correct interpretation, then it would appear Pagone J is adopting the limited indefeasibility, rather than the full indefeasibility, approach.

Although all Australian jurisdictions have a reasonably uniform view of the general notion of indefeasibility, there is no uniform approach to this question regarding the extent of indefeasibility of the mortgagor’s personal covenant in a forged mortgage. The current trend of authority in New South Wales is that the personal covenant to

\textsuperscript{32} Peterson, above n 8, at 314 (footnotes omitted). A similar recognition of the dual aspect of the covenant to pay is noted by Harding who considers the adoption of limited indefeasibility provides a more nuanced approach: ‘The limited indefeasibility approach demonstrates the use of [the] personal covenant to pay as [a] function of the mortgage, namely, an identifier of the debt secured by the mortgage, but not as a mechanism for enforcement against the mortgagor personally.’ See Harding, above n 17, at 239.

\textsuperscript{33} Perpetual Trustees Victoria Ltd v Tsai (2004) 12 BPR 22,281; [2004] NSWSC 745; BC200405182 at [17].

\textsuperscript{34} Solak No 1 [2009] VSC 82; BC200901550 at [16] (emphasis added).
pay does not attract the protection of indefeasibility. In Queensland the cases adopt the view that the personal covenant to pay is protected by indefeasibility. The position is less clear in Victoria, South Australia and Western Australia; however, the authorities in these jurisdictions suggest that the personal covenant to pay does obtain the protection of indefeasibility.

Indefeasibility of ‘traditional’ as compared to ‘all moneys’ forged mortgages

The second issue regarding forged mortgages concerns the distinction between a traditional mortgage and an ‘all moneys’ mortgage. A traditional mortgage is one which contains a statement of the principal sum lent and an acknowledgement by the mortgagor that the sum has been lent. Upon registration of a traditional mortgage an indefeasible charge is created over the land to secure the amount stated in the mortgage as having been lent to the mortgagor. This charge is effective even though

37 Pyramid Building Society v Scorpion Hotels Pty Ltd [1998] 1 VR 188 at 196; [1997] ANZ ConvR 361; (1997) V ConvR 54-561; BC9700222. As noted in the text and above n 31, although it has been suggested that Solak No 1 adopts the full indefeasibility approach, this is not necessarily the case.
38 In Public Trustee v Paradiso (1995) 64 SASR 387 at 388; [1996] ANZ ConvR 317; BC9503766 Prior J (with whom Cox and Lander JJ agreed) commented ‘The covenant to repay gains authority from registration: Zafiropoulos v Recchi (1978) 18 SASR 5 at 13, 14.’ This comment reflects the view that the personal covenant to pay attracts indefeasibility. However, see the comments by Stoljar critiquing this aspect of the case, Stoljar, above n 21, at 38.
40 It is beyond the scope of this paper to analyse the competing justifications and rationales for the different approaches. However, the weight of authority, particularly in the NSW and NZ cases, is to reject the full indefeasibility approach and adopt either the limited or no indefeasibility approaches. The justifications for rejecting the full indefeasibility approach include: (1) The indefeasibility provisions limit protection to an estate or interest in land and not to personal obligations that are unrelated to, or exceed, the interest in land; (2) the personal covenants are ‘conceptually and contractually independent’ of the charge; (3) the personal covenant to pay is not the only way to delimit the charge over the land; (4) the mortgagor’s personal covenant to pay does not ‘touch and concern’ the land, see Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Cambelltown) Pty Ltd (2008) 234 CLR 237; 244 ALR 1; [2008] HCA 10; BC200801842; (5) the transfer of mortgage provisions imply that the indefeasibility sections of the Torrens legislation do not confer indefeasibility on the personal covenant to pay; and (6) in the recent High Court decision of Queensland Premier Mines Pty Ltd v French (2007) 235 CLR 81; 240 ALR 234; [2007] HCA 53; BC200709757, Kiefel J commented, at [53], that the decision in Maradona ‘says no more than that the benefit of the personal covenant within a mortgage passes to the assignee upon registration of the transfer of the mortgage.’ Grattan has suggested, above n 18, at 52, that the High Court in French may be, ‘foreshadowing a possible reading down of the import of Maradona in so far as it relates to the indefeasibility of the mortgagor’s personal covenant.’
the mortgage is forged and the money has been advanced, not to the mortgagor, but to the forger.

An all moneys mortgage does not state the particular amount secured but instead purports to secure all moneys owing by the mortgagor to the mortgagee under an unregistered collateral loan agreement. The question that arises with a forged all moneys mortgage is: what, according to the true meaning and effect of the mortgage, is the debt which it secures? It is clear that the mortgagee’s charge is indefeasible, as that is contained within the registered mortgage. However, unless the mortgage effectively incorporates the personal covenant to pay contained in the unregistered and forged loan agreement, the mortgage secures nothing.

Frequently all moneys mortgages include a number of interlocking documents. The registered mortgage itself is silent as to the obligations it secures on the property. However, the mortgage usually includes a term that the mortgagor covenants that the provisions of a registered memorandum are incorporated into the mortgage. The memorandum then provides that the mortgage is security for the payment of the ‘secured money’ as provided for under a ‘secured agreement’. The memorandum defines the term ‘secured money’ as the amount owing to ‘Us’ (the mortgagee) under a ‘secured agreement’ and the ‘secured agreement’ is defined as any present or future agreement between ‘Us’ and ‘You’ (the mortgagor).

In fact, as Grattan indicates, all moneys mortgages may also occur where the mortgage purports to secure all moneys owing by the mortgagor to the mortgagee: ‘(a) for any reason; (b) under any agreement between the parties; or (c) under a particular agreement between the parties.’ See Grattan, above n 18, at 56.

Typically the mortgage includes a term charging the land with the repayment of the secured money. Extraordinarily, in Vella v Permanent Mortgages Pty Ltd [2008] NSWSC 505, Young CJ in Eq at [261] noted that one of the relevant mortgages in the case did not appear to include a charging clause. However, as no one had made any point about this, Young CJ in Eq read the documents in a ‘commercial and sensible way’ though His Honour noted it was ‘rather odd.’


Interlocking documents and terms may be found, for example in Chandra v Perpetual Trustees Victoria Ltd (2007) 13 BPR 24,675 at [22]; Vella v Permanent Mortgages Pty Ltd (2008) 13 BPR 25,343; [2008] NSWSC 505; BC200803886 at [258], [259], [260] and [264]; and Provident Capital Ltd v Printy [2008] NSWCA 131 at [12] and [13].
The difficulty, from the point of view of the mortgagee, is that where the ‘present or future agreement’ is not between ‘Us’ and ‘You’, because the collateral loan agreement has been forged, then there is no ‘secured agreement’ and consequently there is no ‘secured money’ and the mortgage, though indefeasible, secures nothing. This approach has been adopted in a number of recent New South Wales and New Zealand cases with the ultimate result that, as there is no enforceable loan agreement, the mortgage secures no money and the mortgage must be discharged.

**Application in Solak No 1**

In *Solak No 1*, the forged all moneys mortgage registered over Mr Solak’s land was similar to the mortgages considered in the NSW cases. The registered mortgage expressly incorporated the provisions of a registered memorandum of provisions and any annexure to the mortgage. Clause 3.1 of the memorandum provided, ‘You will pay the Amount Owing to the Bank in accordance with the terms of a Bank Document.’ ‘Bank Document’ was defined in clause 1.1 to mean:

… an agreement or arrangement under which you incur or owe obligations to the Bank or under which the Bank has rights against you and includes a guarantee and this mortgage and any other agreement which you acknowledge in writing to be a bank document for the purposes of this mortgage.

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48 For the purposes of this article, the comments regarding all moneys mortgages are restricted to mortgages with a single mortgagor. Where there are joint mortgagors, and only one of the mortgagor’s signatures is forged, then the position is more complicated. If the mortgagors’ liability for the debt is expressed to be joint and several, then, provided the signature of one of the mortgagors on the off register loan agreement is genuine, this may be effective to secure the indebtedness over the whole of the property. For recent cases in this area see: *Perpetual Trustees Victoria Ltd v English* [2010] ANZ ConvR 10-015 and *Registrar General of NSW v Van Den Heuvel* (2010) 15 BPR 28,647; [2010] NSWCA 171; BC201005096. For a discussion of the law regarding all moneys mortgages and joint proprietors see: Lane, above n 44, at 163-166; Peterson, above n 8, at 304-306; Grattan, above n 18, at 62-63; Harding, above n 17, at 253-257; S Schroeder and P Lewis ‘Indefeasibility of title and invalid all moneys mortgages: Determining whether invalid personal covenants to pay are protected under the indefeasibility umbrella’ (2010) 18 APLJ 185; R Low and L Griggs, ‘Immediate indefeasibility – Is it under threat?’ (2011) 19 APLJ 222; and S Schroeder, ‘Forged mortgages and indefeasibility: A minefield for mortgagees’ (2011) 85 ALJ 71.

49 *Solak No 1* [2009] VSC 82; BC200901550, at [12].

50 Ibid, at [12].
Clause 1.1 also defined ‘Amount Owing’ as ‘all money which you owe the bank for any reason.’ 

‘You’ was defined as the person named in the mortgage as the mortgagor.

In line with the NSW cases, Mr Solak argued that registration of a forged mortgage would confer indefeasibility on the personal covenant to pay, provided the covenant was registered on title expressly or by incorporation, but not if otherwise found in a separate document, which, upon a proper construction, secured nothing. The nub of his argument was that the person with the obligations under the mortgage was the real Mr Solak whilst the person with the obligations under the memorandum was the forger as it was the forger who had signed the bank loan contract. As Mr Solak had not assumed any obligation, the obligation to pay had not been made indefeasible by registration.

Justice Pagone rejected Mr Solak’s construction of the documents. In the view of Pagone J, the bank loan contract was intended to come within the definition of ‘Bank Document’ in the memorandum and therefore to be incorporated into the mortgage. Justice Pagone said ‘you’ in the definition of Bank Document was a drafting device connecting the person named in the mortgage with the person named in another bank document as a means of identifying the document. In both cases the ‘you’ was the forger purporting to be Mr Solak. The position would be the same as if the memorandum had described Mr Solak by name.

It is submitted this reasoning is contrary to the generally accepted construction of forged all moneys mortgage documents, which interpret ‘you’ as the registered proprietor. Thus, it is only collateral documents of the registered proprietor that are intended to be incorporated into the registered mortgage.

51 Ibid, at [12].
52 Ibid at [8].
53 Ibid, at [15].
54 Ibid, at [15].
55 In Westpac New Zealand Ltd v Clark [2009] BCL 592 at [48], Blanchard, Tipping, and Wilson JJ state: ‘The “you” in each document is the registered proprietor, not the forger, and it could not possibly have been different if the memorandum had named the registered proprietor.’ Later, at [49], their Honours comment, ‘It is erroneous to interpret the loan contract and then to work backward by transferring that interpretation to the registered documents merely because the language used is
Interestingly, Pagone J considered that his conclusion, that the mortgage was ‘effective as security’, was consistent with the authorities relied upon by Mr Solak since the contrary outcomes in those cases depended on the collateral agreement not having been incorporated in the mortgage.

In his judgment, Pagone J refers extensively to the comments of Hayne J in *Vassos v State Bank of South Australia* that registration of a forged mortgage in favour of a non-fraudulent mortgagee confers indefeasibility and further that the bare fact that a party has not assented to a mortgage does not give rise to an in personam claim. It is submitted that the comments of Hayne J were made in a particular context and should not be extrapolated to apply to the situation in *Solak No 1*.

First, as acknowledged by Pagone J, it does not appear that an argument of the kind advanced by Mr Solak was put to the court in *Vassos*. Second, the robust comments of Hayne J regarding the indefeasibility of a registered forged mortgage were made to counter a claim by the mortgagors that they were entitled to assert an in personam claim against the mortgagee on the sole basis that the mortgage was a forgery and the mortgagors had not assented to the mortgage. In this context, Hayne J, quite correctly, rejected the claim. The bare fact of forgery, without more, does not give rise to an in personam claim and, as Hayne J said, ‘flies in the face of indefeasibility of title.’ However, in *Solak No 1*, Mr Solak was not relying simply on the bare fact of forgery of a registered mortgage to challenge the mortgagee’s indefeasible title, but rather the fact that the mortgage purported to secure obligations of Mr Solak under an unregistered and forged collateral loan agreement. Finally, it must be kept in mind...
that the robust immediate indefeasibility comments of Hayne J were made in a particular temporal context. *Vassos* was decided at a time when the law regarding immediate indefeasibility in Victoria was in turmoil.\(^{62}\)

The decision in *Solak No 1* has not been appealed. It has however, been subject to academic criticism and comment\(^ {63}\) and is inconsistent with the New Zealand and NSW authorities.\(^ {64}\)

**Part II - *Solak No 2* - Compensation and *Anshun* estoppel**

The effect of the decision in *Solak No 1* was that Mr Solak’s land became subject to the mortgage in favour of the mortgagee, Bank West. Accordingly, in *Solak No 2*, Mr Solak brought a claim for compensation against the Registrar,\(^ {65}\) for the loss he suffered through the registration of the mortgage, based on ss 110 (1)(b) and 110 (1) (c) of the *Transfer of Land Act 1958* (Vic) (TLA) which provide:

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\(^{62}\) In *Chasfield Pty Ltd v Taranto* [1991] 1 VR 225; 1990) V ConvR 54-367; BC9000914 (*Chasfield*). Gray J had adopted a particular interpretation of s 44 *Transfer of Land Act 1958* (Vic), a provision unique to Victoria, which supported deferred indefeasibility. The decision spawned considerable critical academic comment. In this context, the decision of Hayne J in *Vassos*, affirming the more orthodox immediate indefeasibility approach, was warmly welcomed. See for example the comments of P Butt, ‘Torrens foundations stabilised’ (1993) *AJL* 535, who referred to *Vassos* as follows, ‘The Victorian decision is at first instance only; but it is to be hoped that it will be followed, so as to bring the law into line with that in other States. In times of pressure for uniformity of laws between the States, it would be unfortunate for divergence to exist over such a fundamental principle as indefeasibility of title.’ See also the comment in, B Edgeworth, C Rossiter, M Stone and P O’Connor, *Sackville and Neave: Australian Property Law*, 8th ed, LexisNexis Butterworths, Sydney, 2008, at 493 where the authors comment, ‘There is broad general agreement among the commentators that the decisions, in Victoria and South Australia, which restored the orthodoxy of immediate indefeasibility, are to be preferred.’

\(^{63}\) See, for example: *Lane*, above n 44, at 162-163; Peterson, above n 8, at 303-304, 310-311; Harding, above n 17, at 250-251, S Schroeder and P Lewis, above n 48, at 195-197 and Low and Griggs, above n 48, at 224-225. One aspect of the commentators’ criticism concerns the apparent irony inherent in: on the one hand, Justice Pagone’s support for the public policy of a land title register which is ‘sufficient of itself to inform those concerned about the nature and extent of any outstanding interest in relation to the land’ (see *Solak No 1* [2009] VSC 82; BC200901550 at [17]); and, on the other hand, the actual decision in the case which required an off register forged loan document to be incorporated into the registered mortgage. As Peterson has commented, ‘To not give effect to a forged off-register document does not speak to the integrity of the off-register document, in that it does not fall within the terms of the on-register interest.’ See Peterson, above n 8, at 311.

\(^{64}\) See the NSW cases mentioned above n 46 and the New Zealand Supreme Court decision in *Westpac Banking Corporation v Clark* [2009] 1 NZLR 201.

\(^{65}\) Under s 110 (2) of the TLA claims for compensation may be brought directly against the Registrar as nominal defendant. The section also provides that the Registrar may be joined as a nominal co-defendant in an action against any other person and the Registrar may join any other person as co-defendant in such proceedings.
Entitlement to indemnity

(1) Subject to this Act any person sustaining any loss or damage (whether by
deprivation of land or otherwise) by reason of –

... 

(b) any amendment to the Register;
(c) any error omission or misdescription in the Register or the registration of any
other person as proprietor;

... shall be entitled to be indemnified.

The Registrar filed a defence\(^{66}\) claiming that he was not bound by the judgment and
orders of Pagone J in Solak No 1 as he was not a party to that proceeding and that:

(a) the instrument of mortgage was void and did not secure payment of any monies to
Bank West;
(b) the mortgage is unenforceable by reason of the Consumer Credit (Vic) Code; and
(c) that the plaintiff is estopped from making his claim against the Registrar on the
Anshun principle.\(^{67}\)

The Registrar also joined Kheirs and Bank West as third parties on the ground that if
Mr Solak were to be successful in claiming compensation from the Registrar, then
under s 109(3) TLA the Registrar has a statutory right to recover the amount of
compensation paid from the person ‘actually responsible’.

However, before Mr Solak’s compensation claim was heard the Registrar sought
summary dismissal of Mr Solak’s claim based on the principles raised in Port of
Melbourne Authority v Anshun Pty Ltd\(^{68}\) (Anshun). The basis of the Registrar’s
application was that it was unreasonable for the plaintiff not to have raised his cause
of action against the Registrar in the first proceeding, Solak No 1.

Principles of Anshun estoppel

\(^{66}\) After filing the defence the Registrar sought to amend the defence. The decision in that matter is,
Solak v Registrar of Titles [2009] VSC 614; BC200911553. The discussion in this article is based on
the amended defence.

\(^{67}\) Solak No 2 [2010] VSC 146; BC201002381 at [14].

\(^{68}\) Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589; 36 ALR 3; 55 ALJR 621;
BC8100097 (Anshun).
An *Anshun* estoppel may operate to estop a party from raising a claim or defence if he or she, through ‘negligence, inadvertence or even accident, has failed to raise that claim or defence in prior proceedings when, given the relevance of that defence or claim, and the identity between the parties, to the earlier proceedings, that failure was unreasonable.’ The estoppel is an ‘analogical extension’ of the doctrines of res judicata and issue estoppel. A party may be considered to have acted unreasonably in failing to plead the matter later relied upon if:

… having regard to the nature of the plaintiff’s claim, and its subject matter it would be expected that the [plaintiff] would raise the [claim] and thereby enable the relevant issues to be determined in the one proceeding.

An important circumstance in determining ‘unreasonableness,’ is the potential for the judgment in the later proceeding to conflict with the judgment in the earlier proceeding. It has been commented that:

By conflicting judgments we include judgments which are contradictory, though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect to the same transaction.

It has also been noted that *Anshun* estoppel can apply even though the subsequent action is against a party who was not a party to the earlier action, as the underlying consideration is the ‘general public interest in the same issue not being litigated over again.’ In *Solak No 2* Davies J said:

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70 *Spalla v St George Motor Finance Ltd (no 6)* [2004] FCA 1699; BC200408888 at [59], referred to by Davies J in *Solak No 2* [2010] VSC 146; BC201002381 at [8].

71 *Anshun* (1981) 147 CLR 589 at 602; 36 ALR 3; 55 ALJR 621; BC8100097.

72 Ibid, at CLR 603-604. Quoted by Davies J in *Solak No 2* [2010] VSC 146; BC201002381 at [10].


The guiding consideration where an action is commenced against a party that was not a party to the earlier action is whether there is such a close connection between the actions, albeit against different defendants, that it would be expected that the claims would all be dealt with in the one proceeding, thereby avoiding multiplicity of legal proceedings and the possibility of conflicting or inconsistent judgments.\textsuperscript{75}

There may, however, be circumstances justifying a party not litigating an issue, in which case no \textit{Anshun} estoppel will arise, for example: expense; the importance of the particular issue; and motives extraneous to the actual litigation.\textsuperscript{76}

\textbf{Application of Anshun principles in Solak No 2}

Mr Solak raised a number of arguments in defence of the Registrar’s application for summary dismissal. First, Mr Solak argued it was ‘not clear’ that a claim against the Registrar could have been made in the earlier proceeding as Mr Solak’s entitlement to compensation from the Registrar depended on whether Mr Solak had sustained any ‘loss or damage’ and that depended on the outcome of the first proceeding and whether the forged mortgage was an effective security.\textsuperscript{77}

Second Mr Solak submitted it was reasonable for him not to have brought his claim against the Registrar in the first proceeding for various reasons including:\textsuperscript{78}

(a) Mr Solak reasonably regarded a determination in the first proceeding as a necessary precondition to bringing a claim for compensation against the Registrar under s 110 (1) TLA;

(b) Mr Solak would be in jeopardy of a costs order under s 110(5) TLA had action been taken against the Registrar in the first proceeding without first establishing the enforceability of the mortgage against Mr Solak.\textsuperscript{79}


\textsuperscript{76} \textit{Anshun} (1981) 147 CLR 589 at 602-3; 36 ALR 3; 55 ALJR 621; BC8100097.

\textsuperscript{77} \textit{Solak No 2} [2010] VSC 146; BC2010002381 at [13].

\textsuperscript{78} Mr Solak’s reasons for not bringing an action against the Registrar in the first proceeding are stated in more detail in \textit{Solak No 2} [2010] VSC 146; BC2010002381 at [13].

\textsuperscript{79} Ibid, at [15]. Interestingly, Mr Solak noted that had the Registrar been joined in the first proceeding, ‘it was entirely possible or likely’ that the Registrar would defend the claim on the basis that it was premature, as he had done in \textit{Vassos}, or because Mr Solak would succeed in obtaining the relief he sought against Bank West.
(c) Mr Solak was not seeking a finding in *Solak No 2* that would be inconsistent with the findings of Pagone J in the earlier proceeding; and finally,
(d) there was no possibility of inconsistent judgments even though the Registrar’s defence included an allegation that the mortgage was unenforceable under the Consumer Credit (Vic) Code (the Credit Code point).80

The Registrar submitted it was unreasonable for Mr Solak not to have joined the Registrar as a party in the earlier proceeding so that all issues going to the extent of loss or damage sustained by Mr Solak could have been fully determined in the one proceeding. In particular,81

(a) the Registrar was bound by the judgment of Pagone J, that Bank West’s mortgage was effective as security, and this finding was the basis on which the Registrar’s liability under s 110 TLA was based, yet the Registrar had not been given an opportunity to be heard;
(b) a decision in favour of the Registrar on the Credit Code point would conflict with the earlier judgment as it would declare rights between Mr Solak and Bank West that would be inconsistent with the rights declared at trial; and
(c) the third parties in the present proceedings82 were parties in the earlier proceeding where their relative culpability was determined by Pagone J. The same parties are required to be before the court in the present proceedings and the same question of their culpability would be re-agitated in determining the ‘actual responsibility’ for Mr Solak’s loss and damage, under s 109 (3) TLA.83

**Decision in Solak No 2**

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80 Ibid, at [15]. Mr Solak submitted that the Credit Code point was bad in law and the Registrar would not be able to establish that it was an ‘unarguably good point’ that would have made a difference to the outcome of the earlier proceeding had it been argued, as required for a successful Anshun estoppel claim.
81 The Registrar’s arguments are stated in more detail in *Solak No 2* [2010] VSC 146; BC201002381 at [16].
82 The Registrar joined Kheirs and Bank West as third parties in *Solak No 2*.
83 Ibid, at [16]. The Registrar joined Kheirs and Bank West as third parties and argued that in the event that Mr Solak were to be entitled to an indemnity from the Registrar, then, pursuant to s 109(3), the Registrar would be entitled to recover the amount paid on the indemnity from Kheirs and Bank West on the ground they were the persons ‘actually responsible’ for the loss.
Justice Davies granted the Registrar’s application for summary dismissal of Mr Solak’s compensation claim. A useful summary of the reasons of Davies J was provided by Warren CJ in Solak No 3 as follows.84

1) Mr Solak’s claim against the Registrar could have been made in the first proceeding.
2) By not joining the Registrar in the first proceeding Mr Solak deprived him of an opportunity to argue the incorporation point.
...
4) The Credit Code point is arguable and gives rise to a possibility of inconsistent judgments.
5) If Mr Solak were to succeed against the Registrar and the Registrar were then to succeed against the third parties, there is a risk that liability will be apportioned differently to how it was apportioned by Justice Pagone in the first proceeding.
6) For these reasons, Mr Solak’s claim gives rise to a possibility of inconsistent judgments.
7) Joining the Registrar in the first proceeding may have exposed Mr Solak to costs if his primary claim against Bank West succeeded but ‘that is a risk of any litigation’.
8) In all the circumstances, it was unreasonable for Mr Solak not to join the Registrar in the first proceeding. Accordingly Mr Solak is Anshun-estopped from bringing his claim.85

Comment – Mr Solak suffers a ‘double whammy’

The decision of Davies J, to dismiss Mr Solak’s claim for compensation on the basis that he was Anshun-estopped, is surprising. The mortgage that was registered over Mr Solak’s land was a forgery and at general law would be void. However, as the mortgage was registered it enjoyed the benefit of indefeasibility.86 The purpose of the

84 The summary of reasons included a third point: 3) Mr Solak’s appeal against the decision in the first proceeding poses a risk of inconsistent judgments if the second proceeding is allowed to continue. Mr Solak’s claim in the second proceeding is contingent upon the mortgage being enforceable. If Mr Solak succeeds in the second proceeding and later succeeds in the appeal against the first proceeding, the two judgments will conflict. However, as noted by the Warren CJ in Solak No 3 [2011] VSCA 279; BC201107117 at [21]-[23], there was no appeal by Mr Solak against the decision in Solak No 1, and accordingly the decision of Davies J was vitiated by an error of fact. The Court of Appeal did not, however, remit the matter but came to its own decision as to the Registrar’s application for summary dismissal.
85 Solak No 3 [2011] VSCA 279; BC201107117 at [20].
86 Note, recent articles have questioned the appropriateness of conferring indefeasibility of title on registered forged mortgages where the mortgagee has failed to carry out appropriate identification checks. See O’Connor, above n 8, and Peterson, above n 8.
compensation provisions is to ameliorate the harsh operation of the principle of indefeasibility and to enable a person sustaining loss or damage through the operation of the system to obtain compensation. Mr Solak is just such a person. Although Mr Solak did not join the Registrar in the first proceeding, there were justifiable reasons for this omission. Further, the authorities establish that a finding of Anshun estoppel should not be lightly made. 87 As noted recently:

The invocation of the Anshun principle is a serious step and a power that should not be exercised without a scrupulous examination of all the circumstances. It is to be applied only in the clearest of cases as it ends a litigant’s right to have the merits of a claim adjudicated and may result in a serious injustice if applied too readily. 88 (Emphasis added).

From the point of view of an objective observer of the Torrens system it may be thought that the combined effect of the judgments in Solak No 1 and Solak No 2 meant that Mr Solak would suffer something of a ‘double whammy’: the ‘serious injustice’ of the harsh operation of the indefeasibility principle as applied to all moneys mortgages in Victoria; 89 coupled with the ‘serious injustice’ of the denial of compensation for the resultant loss and damage. 90

At a more general policy level, Mr Solak is the hapless victim of the ‘moral hazard’ that arises as a result of the application of immediate indefeasibility in favour of registered forged mortgages. Moral hazard refers to ‘the tendency of a party to take

87 Solak No 3 [2011] VSCA 279; BC201107117 at [73].
89 As noted earlier in this article, the general approach to forged all moneys mortgages, as seen in the NZ and NSW cases, is that, as the collateral loan document is forged, there is no secured money and therefore the registered forged all moneys mortgage secures nothing. In all likelihood, had Mr Solak’s claim been decided elsewhere, particularly NSW or NZ, the registered forged mortgage would have been found to secure nothing and an order discharging the mortgage would have been made. See also the discussion below regarding the recent amendments to the NSW and Queensland legislation which require mortgagees to take reasonable steps to identify the mortgagor, failing which the mortgage is either: defeasible (Queensland); or subject to cancellation (NSW).
90 Mr Solak was deprived of an unencumbered interest in his land by virtue of the operation of immediate indefeasibility in validating the forged mortgage in favour of Bank West. As Whalan has said, the purpose of the compensation provisions is to ‘bridge the gap’ that may arise between the security afforded a registered proprietor’s title (Mr Solak) and the security afforded to a bona fide purchaser of an interest in Torrens system land (Bank West). See, D J Whalan, The Torrens System in Australia, The Law Book Co Ltd, 1982 at p 345.
less care to avoid a loss-producing event if the loss is borne by someone else.’91 In the case of mortgagees, provided the mortgagee is not guilty of fraud and there is no applicable in personam claim, the mortgagee will enjoy an indefeasible title. Given the current restrictive interpretations of both these exceptions,92 it becomes clear that the system does not provide a sufficient incentive for a mortgagee to guard against the possibility of fraud, in this case, identity fraud, even though, vis a vis the defrauded mortgagor, the mortgagee is best placed to discover the fraud.93 This concept of mortgagee moral hazard is exemplified in Mr Solak’s case. Despite the egregiously sloppy identification procedures adopted by Mr Kheir and Bank West, Bank West was rewarded with an indefeasible mortgage.

Part III - Solak No 3 – Compensation and Anshun estoppel revisited

Mr Solak appealed the decision of Davies J to summarily dismiss his application for compensation on the grounds he was Anshun estopped. In summary, the reasons of Davies J were that the issues raised in Solak No 2 gave rise to a risk of inconsistent judgments with Solak No 1 and accordingly it was unreasonable for Mr Solak not to have joined the Registrar as a party in Solak No 1.

91 O’Connor, above n 8, at 133. The concept of moral hazard is also discussed by Peterson, above n 8, at 281-283.
92 See the discussion of O’Connor, above n 8, at 142-153, where O’Connor analyses the case law giving rise to the restrictive interpretations of the fraud and in personam exceptions as applied to forged mortgages. O’Connor, at 150, notes that the courts have not treated the ‘sloppy practices’ of mortgagees or their agents as amounting to fraud, but rather due to: ‘naivety, carelessness, inexperience, inadvertence to consequences, stupidity, administrative disorganization, incompetence, and a “gung ho” lending culture among “low-doc” lenders.’ (Footnote references to the relevant cases omitted.) O’Connor, at 152, also notes, in relation to an in personam claim, that even where a mortgagee may be shown to have acted in breach of a duty of care owed to a registered owner, it does not follow that the owner has a remedy against the mortgagee. See Vassos [1993] 2 VR 316 at 333; [1993] ANZ ConvR 39; (1992) V ConvR 54-443, where Hayne J appears to suggest that for an in personam claim to be successful there is a superadded requirement of ‘unconscionable or unconscientious’ conduct.
93 As noted by O’Connor, above n 8, at 141, in forged mortgage cases, the mortgagee is the ‘cheaper cost avoider’. O’Connor referred to the Ontario Court of Appeal decision in Lawrence v Maple Trust Co & Wright (2007) 84 OR (3d) 94; 220 OAC 19; 278 DLR (4th) 698, where the court adopted deferred indefeasibility in a forged mortgage case and at [58] commented, ‘ …the law encourages lenders to be vigilant when making mortgages and places the burden of the fraud on the party that has the opportunity to avoid it, rather than the innocent homeowner who played no role in the perpetration of the fraud.’
The Court of Appeal consisted of Warren CJ, Neave JA and Hargrave AJA. The main judgment was delivered by Warren CJ with Neave JA agreeing. Hargrave AJA agreed with the decision and added a few additional comments.

As a preliminary comment, it should be noted that Warren CJ used two useful shorthand expressions, the ‘incorporation point’ and the ‘Credit Code point’ to describe two different arguments that could be raised in challenging Bank West’s registered mortgage. The incorporation point was essentially the argument made by Mr Solak in Solak No 1, that is, that the registered mortgage merely secured moneys owing under the collateral loan agreement, which was not itself incorporated into the registered mortgage. The loan agreement was forged and therefore the mortgage, though indefeasible, secured nothing. The ‘Credit Code’ point is the argument, not previously raised by Mr Solak though raised by the Registrar in Solak No 2, that if Mr Solak’s signature on the mortgage was forged, the mortgage was rendered unenforceable by the Consumer Credit Code.

There is a difficulty in analysing the judgment in Solak No 3 involving, as it does, an appeal against a decision dealing with a certain area of law; Anshun estoppel; which decision in turn relates back to an earlier decision dealing with another area of law; the effect of registration of forged all moneys mortgages. In an attempt at clarity, the judgment of Warren CJ will be analysed using the following broad headings: (a) Does the beneficial scheme of the TLA exclude the application of Anshun estoppel?; (b) Is the Credit Code point inconsistent with the judgment in Solak No 1?; (c) Is the Credit Code point arguable and does s 38 of the Code constitute an ‘overriding statute’ exception to indefeasibility?; (d) Are the incorporation point and Credit Code point relevant to the loss element of Mr Solak’s claim?; (d) Are the incorporation point and Credit Code point relevant to the Registrar’s defence?; (e) Conclusion – Anshun estoppel is not made out; and (f) Additional comments: the Registrar as a model litigant and suggestions for reform.

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94 Solak No 3 [2011] VSCA 279; BC201107117, at [9].
95 Ibid, at [16].
96 These headings are broadly consistent with the headings adopted by Warren CJ. There were two further matters considered by Warren CJ. The first, discussed in Solak No 3 [2011] VSCA 279; BC201107117 at [60]-[66], deals with the prejudice suffered by the Registrar by Mr Solak’s failure to join the Registrar in Solak No 1. The Registrar was prejudiced as he was denied the opportunity of arguing the Credit Code point and the incorporation point, which, if successful, would render the
Does the beneficial scheme of the TLA exclude the application of *Anshun* estoppel?

Mr Solak submitted that s 110 TLA sets up a beneficial scheme to compensate persons who suffer loss due to the operation of the indefeasibility principle. Accordingly, *Anshun* estoppel is precluded from applying to TLA compensation claims.  

Mr Solak also submitted that s 110 TLA offered a person seeking compensation from the Registrar a choice to either: challenge the enforceability of the instrument said to give rise to the loss; or, sue the Registrar directly. Mr Solak argued it would be ‘anomalous’ for a person to be in a worse position as a result of first challenging the enforceability of the registered instrument, albeit unsuccessfully, than a person who brings the claim directly against the Registrar without first ‘challenging the interest’.

Chief Justice Warren rejected Mr Solak’s arguments for various reasons, noting that it would be difficult to impute to the legislature a blanket intention to preclude the operation of *Anshun* estoppel in relation to a claim for compensation under s 110 TLA.  

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97 Mr Solak would therefore not have suffered loss and would have no claim against the Registrar. Additionally, as the Registrar was not a party in *Solak No 1* he was prejudiced as he had no right to appeal the decision as of right. However, in assessing the prejudice to the Registrar, Warren CJ noted the ability of a claimant for compensation to enter a settlement with the mortgagee, without first consulting the Registrar. The amount paid by the claimant can then be relied upon as establishing the claimant’s loss in the claim for compensation against the Registrar. The effect of a settlement is to deprive the Registrar of the opportunity to make submissions about the enforceability of the mortgage. In this context, Warren CJ, at [66], described the Registrar’s prejudice as ‘modest’. The second matter concerned the question of whether special principles are applicable in a case where the party asserting *Anshun* estoppel was not a party to the first proceeding. This is considered by Warren CJ in *Solak No 3* [2011] VSCA 279; BC201107117 at [67]-[74]. Ultimately, at [71], Warren CJ did not consider it necessary to determine this question, as in her view the test was at least as strict as the test in a case where the parties are the same.

98 Alternatively, Mr Solak argued, if it does apply, the special position of the Registrar as nominal defendant for a claim against a beneficial fund is a ‘special circumstance’ which ought to preclude the operation of *Anshun* estoppel. See *Solak No 3* [2011] VSCA 279; BC201107117 at [24].

99 Mr Solak adopted this course in *Solak No 1* [2009] VSC 82; BC200901550 where he challenged, unsuccessfully, the enforceability of Bank West’s registered forged mortgage.

100 Mr Solak also argued that the former compensation provision, s 246 TLA 1928, required a person seeking compensation to claim first from the person who acquired ‘title to the estate or interest through … fraud error or misdescription’. It was only in the event damages could not be recovered from the private defendant that a claim could be made against the Registrar. The current Act, in allowing a person to claim directly against the Registrar, was setting up a scheme that was ‘more liberal and more beneficial than the old scheme’. See *Solak No 3* [2011] VSCA 279; BC201107117 at [26].

101 *Solak No 3* [2011] VSCA 279; BC201107117 at [27].

Ibid, at [27].
simply on the basis of the beneficial nature of the scheme and the choice it offers to claimants.

Importantly, Warren CJ also commented that the purpose of *Anshun* was not merely to protect defendants: ‘It also seeks to maintain the integrity of and public confidence in the justice system by preventing inconsistent judgments and to conserve scarce court resources by minimising re-litigation of the same issues in multiple proceedings.’102

However, Warren CJ considered that certain aspects of the compensation scheme were ‘highly relevant’ to determining whether an *Anshun* estoppel arose in this case.103

Is the Credit Code point inconsistent with the judgment in *Solak No 1*?

Mr Solak did not raise the Credit Code point in *Solak No 1*. In *Solak No 2* Davies J considered this to be a point in favour of finding that Mr Solak was *Anshun*-estopped as it gave rise to the possibility of inconsistent judgments.104

On appeal, Mr Solak argued that even if the Credit Code point could successfully be argued this would not give rise to inconsistent judgments as *Solak No 1* did not determine generally ‘the enforceability of the mortgage’.105

Mr Solak’s argument was rejected. Chief Justice Warren commented as follows:

The Credit Code point is an argument in support of the proposition that the mortgage is unenforceable. To uphold that argument would be to declare rights “in respect to the

102 Ibid, at [28].
103 Ibid, at [30]. The aspects of the scheme that Warren CJ considered were highly relevant were; the choice the scheme offers claimants and the restrictions on recovery of costs that the scheme imposes.
104 *Solak No 2* [2010] VSC 146; BC201002381 at [23].
105 *Solak No 3* [2011] VSCA 279; BC201107117 at [31]. Mr Solak agued the judgment in *Solak No 1* did no more than determine the question whether indefeasibility conferred by registration under the TLA extended to secure obligations arising from a forged registered instrument where the covenant to pay is not registered or found on the title.
same transaction” that are plainly inconsistent with the outcome of the first proceeding.106

Accordingly, Warren CJ concluded that ‘if the Credit Code point were to succeed, the resulting judgment would be inconsistent with the judgment in the first proceeding.’107

Comment

On the face of it, this finding that the Credit Code point, if successful, would give rise to inconsistent judgments, would appear to weaken considerably Mr Solak’s claim that he should not be Anshun estopped. However, the precise relevance of the Credit Code point to the Anshun estoppel claim needs to be explored. If it turns out that it is not necessary for the court to decide the Credit Code point in considering the issues raised in Solak No 2, then this finding of inconsistency becomes irrelevant.108

It is therefore necessary to consider the court’s views as to the relevance of the Credit Code point and the incorporation point to the issues raised in Solak No 2. The court identified two areas of potential relevance: first, in relation to the loss element of Mr Solak’s claim for compensation; and second in relation to a possible defence for the Registrar to Mr Solak’s compensation claim.

However, as a preliminary matter, Warren CJ first examined the nature, effect and strength of the Credit Code point: the argument that if Mr Solak’s signature on the mortgage was forged, the mortgage was rendered unenforceable by the Consumer Credit Code.

Is the Credit Code point arguable and does s 38 of the Code constitute an ‘overriding statute’ exception to indefeasibility?

106 Ibid, at [32].
107 Ibid, at [33].
108 As it turned out, ultimately, this is precisely the conclusion reached by Warren CJ, ‘ … the Credit Code point and the incorporation point do not need to be decided and therefore do not pose a risk of inconsistent judgments.’ See Solak No 3 [2011] VSCA 279; BC201107117 at [75].
Pursuant to s 38 of the Consumer Credit Code (Code), a mortgage to which the Code applies is not enforceable unless it is signed by the mortgagor. The mortgage in this case was not signed by Mr Solak and therefore the Registrar submitted that if the Code applies, the mortgage is unenforceable even though it is registered under the TLA.\textsuperscript{109}

The Code applies to a mortgage if it secures obligations under a credit contract and the mortgagor is a natural person.\textsuperscript{110} Under s 6(1)(b) of the Code, the Code applies to the provision of credit if, ‘the credit is provided or intended to be provided wholly or predominantly for personal, domestic or household purposes …’ Section 11 of the Code sets out various presumptions as follows:

(1) In any proceedings … in which a party claims that a credit contract, mortgage or guarantee is one to which this code applies, it is presumed to be such unless the contrary is established.
(2) Credit is presumed … not to be provided wholly or predominantly for personal, domestic or household purposes if the debtor declares, before entering into the credit contract, that the credit is to be applied wholly or predominantly for business or investment purposes …
(4) A declaration under this section is to be substantially in the form (if any) required by the regulations and is ineffective for the purposes of this section if it is not.

The thrust of these sections is that the Code will apply if the credit is provided for personal, domestic or household purposes, however, if the debtor makes a s 11(2) Code declaration, that the credit is provided for business or investment purposes, then the Code will not apply. Although the loan documentation in this case included a s 11(2) declaration, the Registrar submitted that the declaration was ineffective as Mr Solak had not signed it. Accordingly, in the absence of the signed declaration, s 11(1) creates a rebuttable presumption that the Code applies to the mortgage.\textsuperscript{111}

\textsuperscript{109} Ibid, at [35].
\textsuperscript{110} Consumer Credit Code, s 8.
\textsuperscript{111} Solak No 3 [2011] VSCA 279; BC201107117 at [37].
Chief Justice Warren identified ‘very serious difficulties’\textsuperscript{112} with the Registrar’s submissions regarding the operation of the Code. The difficulties, although not expressed in this way, concerned the operation of the exception to indefeasibility of title known as the overriding statutes exception. The question that arises is: does s 38 of the Code override the indefeasibility provisions of the TLA? If it does, and assuming the Code applies to the mortgage in this case,\textsuperscript{113} then under s 38 of the Code the mortgage is unenforceable as the mortgage has not been signed by Mr Solak.

It would appear that Warren CJ did not consider that s 38 of the Code constituted an overriding statute exception to indefeasibility. In summary, Her Honour’s reasons were: (1) given the importance of the longstanding doctrine of indefeasibility, it seems doubtful the legislature would abrogate the indefeasibility of fraudulently obtained mortgages without making that intention clear;\textsuperscript{114} (2) the protection of indefeasibility benefits the community by making land transactions cheaper and more efficient, acceptance of the Credit Code point would undermine that protection;\textsuperscript{115} (3) it is doubtful indefeasibility would be abrogated by an Act intended to deal with a mischief of a completely different kind, namely, less than scrupulous lenders in relation to genuine borrowers;\textsuperscript{116} and finally, (4) very strange anomalies would arise if the Code were to apply to fraudulent credit contracts as, in determining whether the Code applies, one needs to determine the intended use of the credit. If the credit contract is fraudulent, the question arises: whose intention is to be assessed – the fraudsters or the borrowers?\textsuperscript{117}

Ultimately, Warren CJ was not required to decide the Credit Code point, since Mr Solak conceded that, for the purposes of the appeal, the Credit Code point should be regarded as arguable.\textsuperscript{118} However, Warren CJ made a finding that the Credit Code

\textsuperscript{112} Ibid, at [38].
\textsuperscript{113} As noted, under s 6 (1) (b) of the Code, the Code will only apply if the credit is provided or intended to be provided wholly or predominantly for personal, domestic or household purposes.
\textsuperscript{114} Solak No 3 [2011] VSCA 279; BC201107117 at [39].
\textsuperscript{115} Ibid, at [39].
\textsuperscript{116} Ibid, at [39].
\textsuperscript{117} Ibid, at [42].
\textsuperscript{118} Ibid, at [43].
point was ‘tenuous’. This finding was relevant to the Registrar’s defence considered below.

Comment – Section 38 of the Code: An overriding statute exception to indefeasibility or not?

Chief Justice Warren did not provide any authority to support her view that s 38 of the Code does not abrogate indefeasibility. In particular, Her Honour did not refer to the NSW decision of Vella v Permanent Mortgages Pty Ltd. This is unfortunate, as it has been suggested by commentators that Vella provides authority for the contrary view, that is, that s 38 of the Code operates as an overriding statute exception to indefeasibility. However, in the view of this author, it is not clear that Vella does in fact provide such authority.

119 Ibid, at [46]. At [44], Warren CJ noted that, ‘ … I am not convinced that this concession [that the Credit Code point was arguable] was rightly made.’ See also the comment of Hargrave AJA on this point at [94], who considered the Credit Code point was wholly without merit. His Honour considered that in addition to the comments of Warren CJ, the Registrar had no factual basis on which to claim that the credit provided was wholly or predominantly for personal, domestic or household purposes. Indeed the only evidence suggested to the contrary. It should be noted here that the Victorian Consumer Credit Code has now been replaced by the National Credit Code (NCC) which is Schedule 1 of the National Consumer Credit Protection Act 2009 (Cth). This legislation came into operation on the 1 July 2010. Accordingly, the principles of statutory construction applied by Warren CJ in Solak No 3 were those applicable to determine an apparent inconsistency between two statutes of the Victorian legislature: the Consumer Credit Code and the Transfer of Land Act 1958 (Vic) (TLA). Different principles of statutory construction are applicable to an inconsistency between a Commonwealth and a State Act. This point should be kept in mind in considering the relevance of Chief Justice Warren’s comments in the context of an inconsistency between the NCC, which is Commonwealth legislation, and the TLA.


121 See Butt, above n 16, at [20 117] where Butt makes the point that the overriding of indefeasibility by a later statute is not lightly to be made, though where reconciliation of the two statutes is impossible, then the later statute must be held to have impliedly repealed the earlier statute. The footnote reference to support this proposition, at footnote 804, is as follows: ‘For example, a mortgage to which the Consumer Credit Code applies is unenforceable unless signed by the mortgagor. This renders a forged mortgage unenforceable, despite its registration: Vella v Permanent Mortgages Pty Ltd (2008) 13 BPR 25,343; [2008] NSWSC 505; BC200803886 at [330].’ Paragraph [330] in Vella is not authority for the point cited by Butt. Paragraph [331] does state, ‘This provision [of the Code] accordingly operates as a statutory exception to indefeasibility.’ However, this is a ‘virtually verbatim’ submission of Mr Vella’s counsel, rather than a conclusion of law made by Young CJ, see Vella, at [329]. See also the comments of P Lane, above n 44, at 152, 155, 166 and 167. In her article, Lane discusses the Real Property and Conveyancing Legislation Amendment Bill 2009 which has the purpose of affirming the principle of indefeasibility. In short, in order for an inconsistent provision of any other Act to prevail over the principle of indefeasibility, the other Act must expressly provide that it is to have this effect. The Consumer Credit Code has not been amended to have this effect. Although Lane does not comment on s 38 of the Code, she comments on s 44 of the Code which prohibits third party mortgages. Lane’s discussion proceeds on the basis that, but for the amendment, the title of a registered third party mortgagee would be unenforceable by virtue of s 44 despite the fact the mortgage is registered.
In *Vella*, Young CJ in Eq considered the effect of the equivalent provisions of the Consumer Credit (NSW) Code on forged mortgages that had been registered over various parcels of land owned by Mr Vella. Mr Vella made a similar submission to that made by the Registrar in *Solak No 2*, namely, that as Mr Vella had not signed the mortgages they were unenforceable under the Code. Young CJ considered submissions regarding the intended purpose of the credit. However, it is not clear that Young CJ positively determined that s 38 of the Code constituted an overriding statute exception to indefeasibility. Indeed, the opposite is suggested by the following comments made by Young CJ:

Submissions were made as to whether, if the Consumer Credit Code submissions had validity they could prevail against a registered instrument and there was discussion as to the Court of Appeal’s recent decision in the *Canada Bay* case. However, in light of my decision on this point, I do not have to deal with this problem.\(^\text{122}\)

Apart from *Vella*, there does not appear to be any other decision dealing with the question of the effect of s 38 of the Code on registered forged mortgages. The recent NSW Court of Appeal case of *Registrar General of NSW v Van Den Heuvel\(^\text{123}\) (Van Den Heuvel)* considered the operation of s 70(1) of the Code in relation to a registered forged mortgage.\(^\text{124}\) Section 70(1) empowers the court to reopen a credit contract or

\(^{122}\) *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343; [2008] NSWSC 505; BC200803886 at [355]. The *Canada Bay* case is *City of Canada Bay Council v Bonaccorso Pty Ltd* (2007) 71 NSWLR 424. This case dealt with the question of the overriding statute exception to indefeasibility. If *Vella* is to be regarded as an authority on the question of whether the provisions of the Consumer Credit Code override the indefeasibility provisions of the Torrens legislation, then it would be highly appropriate for Young CJ to consider the *Canada Bay* case. His comment that, ‘… in light of my decision on this point, I do not have to deal with this problem’ indicates His Honour did not make a final determination on this matter.


\(^{124}\) In *Van Den Heuvel* the husband had forged his wife’s signature to an all moneys mortgage in favour of Perpetual. The mortgage was registered. Subsequently, the wife claimed the mortgage and loan agreement were ‘unjust credit contracts’ and sought to have the transactions reopened pursuant to s 70 of the Code. The wife was described as a ’statutory mortgagor’, meaning a mortgagor who had not willingly entered the mortgage but who became a mortgagor by virtue of the operation of the Torrens system. The question for the court was whether the wife, a statutory mortgagor, could avail herself of s 70. The court was split. Basten JA, at [82], said the wife could rely on s 70 and stated the wife was ‘… seeking to call in aid a statutory power which was capable of operating to qualify or overcome the effects of registration: cf *South-East Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603.’ Young JA, at [187], took the view that s 70 only applies where the mortgagor enters into a contract of mortgage and does not apply to statutory mortgagors. The comments of Young JA are more supportive of the indefeasibility principle and arguably provide support for the view of Warren CJ in *Solak No 3*. 

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mortgage on the grounds the contract or mortgage is unjust. However, it is not clear as to how much guidance can be obtained from this case in interpreting the operation of s 38 of the Code.\textsuperscript{125}

Ultimately, it would appear that this fundamental question of the effect of s 38 on forged mortgages is unresolved.

Are the incorporation point and Credit Code point relevant to the loss element of Mr Solak’s claim?

Mr Solak was required to establish, in his claim for compensation against the Registrar, that he suffered loss and damage by virtue of the registration of the forged mortgage. It appears the Registrar’s submissions in \textit{Solak No 2} proceeded on the assumption that the Registrar would have a complete defence to Mr Solak’s claim if the Registrar could establish that the mortgage was unenforceable as this would establish that Mr Solak did not suffer any loss.

Chief Justice Warren recognised that had the Registrar been a party in \textit{Solak No 1} he could have joined with Mr Solak in challenging the enforceability of the mortgage. If that challenge had been successful, Mr Solak would suffer no loss and his compensation claim against the Registrar would fail. However, the situation in \textit{Solak No 2} was different. The enforceability of the mortgage between Mr Solak and Bank West had been finally determined. At that point Mr Solak had suffered loss. As noted, ‘The Registrar cannot undo that loss by showing in a subsequent proceeding that, as between the Registrar and Mr Solak, the mortgage is unenforceable.’\textsuperscript{126}

Accordingly, the incorporation point and Credit Code point were not relevant to the loss requirement in Mr Solak’s claim.

Are the incorporation point and Credit Code point relevant to the Registrar’s defence?

\textsuperscript{125} In \textit{Smit v Carney} [2010] NSWSC 910 the split decision in the \textit{Van Den Heuvel} case was referred to without deciding which view was to be preferred.

\textsuperscript{126} \textit{Solak No 3} [2011] VSCA 279; BC201107117 at [50]
The court also considered whether the incorporation point and Credit Code point were relevant as possible defences dealing with: ‘causation’, or disentitling conduct under s 110(3)(a) TLA. Section 110(3) relevantly provides:

(3) No indemnity shall be payable under this Act –
   (a) where the claimant his legal practitioner, conveyancer or agent caused or substantially contributed to the loss by fraud neglect willful default or derives title (otherwise than under a disposition for valuable consideration which is registered in the Register) from a person who, or whose legal practitioner, conveyancer or agent has been guilty of such fraud neglect or willful default (and the onus shall rest upon the applicant of negativing any such fraud, neglect or willful default)

On the basis of s110(3)(a) TLA, it was suggested that an argument may be mounted that Mr Solak’s failure to establish that the mortgage was unenforceable in Solak No 1 was due to some defect in the manner in which Mr Solak conducted his case. The incorporation point and Credit Code point may, therefore, be relevant in establishing the possibility of disqualifying neglect under s 110(3)(a).

For the purpose of the appeal, Warren CJ was prepared to assume in the Registrar’s favour that a defect in the conduct of the first proceeding could constitute neglect under s 110(3)(a). However, Warren CJ ultimately considered that even if successful, neither the Credit Code point nor the incorporation point would be capable of substantiating a proposition that Mr Solak was guilty of neglect. The Credit Code point was tenuous and therefore Mr Solak was entitled, in exercising forensic judgment, not to raise this point in Solak No 1. The incorporation point had been raised and fully argued by Mr Solak in Solak No 1. The Registrar could not establish

127 The causation argument relates back to the requirements of s 110 (1) TLA which provide that a person who has sustained loss or damage by reason of the various circumstances listed is entitled to be indemnified. However, where a claimant, in this case, Mr Solak, has conducted the first proceeding in a defective manner, this may constitute a new intervening act that severs the chain of causation between the registration of the mortgage and Mr Solak’s loss. The argument regarding causation is not developed by the court, therefore for the purposes of this article the focus is on the s 110(3)(a) TLA argument. However, for comments on the causation argument, see Solak No 3 [2011] VSCA 279; BC201107117 at [52]-[59].
128 In making this assumption, the court noted the contrary view expressed by the Victorian Court of Appeal in Registrar of Titles v Fairless [1997] 1 VR 404 at 418 per Phillips JA, with whom Tadgell JA agreed, that s 110(3)(a) is concerned with events that make a causal contribution to the registration itself rather than to the loss consequent upon registration. See Solak No 3 [2011] VSCA 279; BC201107117 at [56].
any defect in Mr Solak’s presentation of this point. Accordingly, any argument that Mr Solak had committed neglect with regards either point was ‘doomed to fail’.\textsuperscript{129}

Importantly, these conclusions on the incorporation point and the Credit Code point relate back to the Registrar’s claim regarding Anshun estoppel. The two points are only relevant in considering the possibility of neglect by Mr Solak in relation to causation or under s 110(3)(a). As noted, the neglect argument was doomed to fail even if the Credit Code point and incorporation points were to succeed. ‘Accordingly, the points do not pose a risk of inconsistent judgments.’\textsuperscript{130}

\textbf{Conclusion – Anshun estoppel is not made out}

The gist of the Registrar’s Anshun estoppel argument was that Mr Solak’s claim against the Registrar was so relevant to the subject matter of Solak No 1 that it was unreasonable for Mr Solak not to have joined the Registrar in the earlier proceeding.

As noted earlier, a finding of Anshun estoppel is not lightly to be made. The most important factor going to the existence of Anshun estoppel is the risk of inconsistent judgments. However, as neither the Credit Code point nor the incorporation point needed to be decided in Solak No 2 there was no risk of inconsistent judgments.\textsuperscript{131}

However, in addition to the issue of inconsistent judgments, there were other matters that were relevant to the question of whether it was unreasonable of Mr Solak not to join the Registrar in Solak No 1. These other considerations included: the prejudice to the Registrar and the multiplicity of proceedings as a result of the Registrar not being joined in the first proceeding; and the overall costs implications.\textsuperscript{132}

\textsuperscript{129} Solak No 3 [2011] VSCA 279; BC201107117 at [58].
\textsuperscript{130} Ibid, at [59].
\textsuperscript{131} Ibid, at [75]. Warren CJ also considered the possibility of inconsistent judgments arising between Solak No 1 and Solak No 2 with regards the apportionment of liability between Bank West, Aussie and Kheirs to be of ‘minimal significance’. At [76] Warren CJ justified her view regarding the apportionment argument. Her Honour commented that: the apportionment opinion in Solak No 1 was obiter; the causes of action upon which liability was to be apportioned in the second proceeding were different from those in the first proceeding; and the possibility of inconsistent factual findings (which is akin to an inconsistent apportionment finding) does not provide a basis for Anshun estoppel.
\textsuperscript{132} Ibid, at [81].
After balancing these considerations, Warren CJ found that ‘… far from being a clear case, the arguments in support of Anshun estoppel are unpersuasive.’ Accordingly, Warren CJ concluded that Anshun estoppel was not made out.

At the end of her judgment, Warren CJ took the opportunity to comment on two additional matters.

**Additional comments: The Registrar as a model litigant and suggestions for reform**

*The Registrar as a model litigant*

Warren CJ delivered a stern rebuke to the Registrar for the Registrar’s conduct in *Solak No 2*. The Department of Justice in Victoria has adopted *Model Litigant Guidelines* which require government agencies, such as the Registrar of Titles, to act as a model litigant and to ‘act with complete propriety, fairly and in accordance with the highest professional standards …’. In the view of Warren CJ, the Registrar’s conduct ‘fell short of these high standards.’

The Registrar’s failings were in two areas. First, the Registrar’s argument based on the Credit Code point was, in the view of Warren CJ, so tenuous the Registrar should not have attempted to rely on it. In addition, the Credit Code point, if successful, would have the effect of undermining the indefeasibility accorded to registered mortgages and cut across the policy of the Torrens system.

Second, Warren CJ commented that the Registrar appeared to have ‘forgotten that he is administering a beneficial fund’ the purpose of which is ‘not to accumulate money but to provide compensation to persons who are deprived of an interest in land.

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133 Ibid, at [82].
135 *Solak No 3* [2011] VSCA 279; BC201107117 at [86].
136 Ibid, at [86].
137 Ibid, at [87]. Warren CJ noted that this would have the effect of increasing the risk to lenders who may pass on the cost to borrowers.
138 Ibid, at [88].
by the operation of the indefeasibility provisions. The Registrar’s primary role is not to protect the fund from unmeritorious claims but rather to ensure that persons entitled to compensation receive it. As noted by Warren CJ, quoting from Morley v ASIC the Registrar ‘has no legitimate private interest of the kind which often arises in civil litigation. [He] acts, and acts only, in the public interest’.

A suggested reform to the compensation scheme

Chief Justice Warren considered that Solak No 2 illustrated a defect in the current compensation scheme in Victoria. A person in the position of Mr Solak was faced with an unhappy dilemma, either: join the Registrar in the first proceeding and suffer the potential costs implications; or choose not to join the Registrar and risk the possibility of being Anshun estopped in a subsequent claim against the Registrar for compensation.

The current scheme also disadvantages the Registrar. If a plaintiff chooses not to join the Registrar, then the Registrar is deprived of an opportunity to be heard and from raising additional arguments.

Chief Justice Warren suggested an amendment to the Victorian compensation scheme along the lines of the NSW Real Property Act 1900 which gives the Registrar a right to intervene if the Registrar is ‘of the opinion that the court’s decision in the proceedings could result in compensation becoming payable’ out of the assurance fund. In addition it was suggested by Warren CJ that the scheme could be further

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139 Ibid, at [88].
140 Morley v ASIC (2010) 274 ALR 205; 247 FLR 140; [2010] NSWCA 331; BC201009833 at [716].
141 Ibid, at [88], quoting from Morley v ASIC [2010] NSWCA 331, at [716].
142 Ibid, at [89].
143 Ibid, at [91].
144 Solak No 3 [2011] VSCA 279; BC201107117 at [89].
145 Ibid, at [91], referring to Real Property Act 1900 (NSW) s 126(1).
improved by requiring that the Registrar be given notice of the relevant proceedings. 146

Comment – Justice restored

The decision of the Court of Appeal restores some semblance of justice to the unfortunate Mr Solak. The Registrar’s conduct, in seeking to Anshun estop Mr Solak from seeking compensation, has been, quite justifiably, rebuked. The role of the Registrar is not to jealously guard the compensation fund, but rather to ensure that people entitled to compensation receive it. Mr Solak, being a person deprived of an interest in land by virtue of the indefeasibility principle, is just such a person.

In any event, an Anshun estoppel in this case is not appropriate. In Solak No 1, Mr Solak exercised his forensic judgment and decided not to join the Registrar. Given the case law at the time, that decision was correct. Mr Solak had every reason to be confident that he could successfully challenge Bank West’s registered forged all moneys mortgage, in which case, joining the Registrar would simply add a layer of complexity, costs and delay to the proceedings. In these circumstances, an Ashun estoppel would be unfounded as Mr Solak’s failure to join the Registrar could not be viewed as unreasonable.

Part IV – Conclusion - A uniform Torrens system?

The Torrens system of land title registration has been an undoubted success. 147 Not only has the system been adopted in all the Australian states and territories, but the system has also been exported to a number of other jurisdictions around the world. 148

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146 Ibid, at [91]. Hargrave AJA, at [97], agreed with Warren CJ that the Act required amendment in the way indicated and suggested a further amendment that, in the absence of notice, a claimant could be barred from commencing proceedings against the Registrar without the leave of the court.
147 See for example the comment by the New Zealand Law Commission, in A New Land Transfer Act, June 2010, foreword p iv, ‘The Torrens system of land transfer was one of the great legal reforms of the 19th century.’
148 As noted by Butt, the jurisdictions include: ‘New Zealand, Malaysia, Singapore, Israel, Belize, many African countries …, parts of the Caribbean, and some Canadian provinces.’ See Butt, above n 16, at [20 04]. For a detailed comment on the operation of indefeasibility in Australia, New Zealand,
However, despite the apparent success of the system there has been an ongoing concern as to the lack of uniformity in the Torrens legislation within the Australia jurisdictions. Calls for uniform Torrens legislation can be traced back to 1927, when James Hogg, in a plea for uniformity, commented, ‘For the present, the pressing need is to save the waste of energy of every kind that is involved in the want of uniformity in the statute law.’

This ‘waste of energy of every kind’ is easily established. A lack of uniformity makes it ‘difficult for conveyancers to practice law in more than one jurisdiction and increases conveyancing costs in all transactions involving an interstate element.’ The existence of 8 separate jurisdictions acts as a barrier to interstate and international investment in property. As Hunter has recently commented,

The interstate and international nature of many real property transactions and the essential role of national law firms, companies and organisations mean that unnecessary costs are incurred, and efficiency is compromised by administrative and legal differences between jurisdictions.

The calls for uniform Torrens legislation continue to this day, and if anything have become more insistent. Perhaps the current climate of co-operative federalism will assist in realising this ‘pressing need’ for uniformity in the law of Australia’s Torrens jurisdictions.

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152 Hunter, above n 151, at 203.


154 Excellent recent examples of intergovernmental co-operation in the property law area include the national personal property securities legislation and the ongoing development of the National Electronic Conveyancing System.
In concluding this article it is worthwhile reflecting briefly on some of the important contemporary areas of inconsistency that are highlighted in the Solak cases.

One clear area of inconsistency, illustrated in *Solak No 1*, concerned Justice Pagone’s interpretation and application of the law regarding registered forged all moneys mortgages. Justice Pagone’s decision was consistent with the earlier Victorian decision of Hayne J in *Vassos*, but inconsistent with recent authorities in other jurisdictions.155

Of more relevance here is the lack of uniformity that arises as a result of inconsistent legislation in the Australian jurisdictions. There are two areas of legislative inconsistency highlighted by the Solak cases that require mention: the mortgagee identification provisions; and the compensation provisions.

**The mortgagee identification provisions – Queensland and NSW**

*Solak No 1* concerned the registration of a forged all moneys mortgage in circumstances where the registered mortgagee had failed to carry out standard identification checks. Despite this failing, the mortgagee obtained an indefeasible title. However, if the recent legislative amendments in Queensland and NSW were applied to this fact scenario, the result would almost certainly have been different.

Section 56C of the Real Property Act 1900 (NSW), which commenced operation on 1 November 2011,156 requires a mortgagee to take reasonable steps to ensure that the person who executed the mortgage is the same person as the registered proprietor of the land.157 In the event that the mortgagee fails to take these steps, and the execution

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156 See, clause 2, Real Property Amendment Regulation 2011 (NSW).

157 These ‘reasonable steps’ are set out in the Real Property Regulation 2008 (NSW) Part 3 A which includes clauses 11A-11D. The steps include: obtaining basic information about the mortgagor’s identity (in the case of a natural person, their name, date of birth and address) and then verifying the information from a variety of photographic, non-photographic and secondary identification documents. It is submitted that a defect in these requirements is the failure to require a face to face interview with the mortgagor: See clause 11B(6) of the Regulations. See also, Low and Griggs, above n 48, at 227, where the authors recommend that the verification regime should include a face to face interview with the mortgagor.
of the mortgage involved fraud against the registered proprietor, then the Registrar-General may cancel the recording: s 56C(6). Section 11A of the Land Title Act 1994 (Qld) is to similar effect. However, in Queensland, a failure by a mortgagee to comply with the ‘reasonable steps’ requirement is more significant: the registered mortgagee is automatically denied the benefit of indefeasibility. Unlike the NSW provisions this is mandatory, there is no discretion in the Registrar.

The application of the Queensland or NSW amendments to Mr Solak’s situation in *Solak No 1*, would have provided a more just outcome. Accordingly, it is submitted that, in the interests of uniformity, all Australian jurisdictions should consider adopting this legislation.

**The compensation provisions**

In *Solak No 2*, Mr Solak sought compensation from the Registrar pursuant to the Victorian compensation provisions. As it turned out, the compensation provisions were not discussed in great detail due to the Registrar’s application to summarily dismiss the claim on the basis of *Anshun* estoppel. However, it is worth noting here, that the compensation provisions in the Australian jurisdictions are widely divergent. Perhaps the single most significant difference is between the ‘last resort’ and ‘first resort’ jurisdictions.

In the last resort jurisdictions, actions for compensation for deprivation of an interest in land are, in most cases, to be brought initially against the person liable for the deprivation. It is only if this action is inapplicable that an action may be taken

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158 See s 185 (1A) Land Title Act 1994 (Qld).
159 Under the Queensland provision, the mortgagee would not have obtained an indefeasible title. Under the NSW provision the Registrar-General would have a discretion to cancel the recording of the mortgage. The mandatory Queensland provision is to be preferred.
160 The New Zealand Law Commission in conjunction with Land Information New Zealand has recently undertaken a major review of the Land Transfer Act 1952 (NZ). The resultant report included a draft Land Transfer Bill in plain English. One of the recommendations is to ‘adopt and adapt’ the Queensland provisions such that a mortgagee who fails to take reasonable steps will obtain only a defeasible title if the mortgage was executed by a fraudster. See, New Zealand Law Commission, above n 147, at [2.20]-[2.21].
161 For a detailed discussion of the compensation provisions in the last resort jurisdictions, see, P Carruthers and N Skead, ‘150 years on: The Torrens compensation provisions in the “last resort” jurisdictions’ (2011) 19 *APLJ* 174.
162 The last resort jurisdictions are: the Australian Capital Territory; Western Australia; South Australia; and Tasmania.
against the Registrar. In the remaining jurisdictions, the ‘first resort’ jurisdictions, a person deprived of an interest in land is entitled to bring an action in the first instance directly against the Registrar.

However, apart from this fundamental difference between the jurisdictions there are numerous other significant differences in the legislation. These differences are most notable in the provisions dealing with: the restrictions on payments of compensation; the limitation periods applicable for bringing claims for compensation; and the measure of compensation to be paid.

Given the central role played by the compensation provisions in the Torrens system, it is both remarkable and lamentable that there is not a greater degree of uniformity in these important provisions throughout the Australian jurisdictions.

Conclusion

The purpose of this article has been to examine the workings of the Torrens system by analysing the numerous, diverse and contentious issues raised in the Solak series of cases. However, the Solak cases have also raised a broader concern; the lack of uniformity in our Torrens laws. Accordingly, this article concluded with a brief examination of the issues of inconsistency highlighted in the Solak cases.

163 It is beyond the scope of this paper to consider the numerous differences in the compensation provisions. It is also beyond the scope of this paper to contemplate the position of Bank West, the mortgagee in Solak No 1, had Pagone J found the mortgage not to have been indefeasible. Could a mortgagee in such a situation claim compensation under the compensation provisions? On the particular facts in Chandra v Perpetual Trustees Victoria Ltd (2008) 13 BPR 25,259; [2008] NSWSC 178; BC200801332, a mortgagee, who was unable to recover loans under a forged all moneys mortgage, was successful in claiming compensation. This decision has been criticised, see: S Grattan, ‘Forged but indefeasible mortgages: Remedial options’ in L Bennett Moses, B Edgeworth, C Sherry, Property and Security: Selected Essays Thomson Reuters Lawbook Co., 2010, at 189 and Schroeder and Lewis, above n 48, at 197.

164 All jurisdictions include a standard list of situations where compensation will not be paid. However, there are further restrictions that differ from jurisdiction to jurisdiction. In Victoria, NSW, Queensland and the Northern Territory an important additional restriction is that no indemnity is payable where the claimant or her or his legal practitioner, conveyancer or agent caused or substantially contributed to the loss by fraud neglect or wilful default. This provision does not exist in the remaining jurisdictions. In Solak No 2, the Registrar sought to rely on the Victorian provision, s 110(3)(a) TLA, as a defence to Mr Solak’s claim. Another example of a restriction, which only exists in Queensland, arises under s 189 (1)(ab) Land Title Act 1994 (Qld). A mortgagee will not be entitled to compensation if the deprivation, loss or damage can fairly be attributed to the failure of a mortgagee to take reasonable steps as required under section 11A.
Chapter Five: Rights to Renew and to Purchase in Registered Leases:

Part I - A Case of Bad Timing for Rights to Renew

This chapter is a journal article: Penny Carruthers and Natalie Skead, ‘Rights to Renew and to Purchase in Registered Leases: Part I - A Case of Bad Timing for Rights to Renew’ (2016) 25 Australian Property Law Journal 1

Part II, which is published in a subsequent issue of the Australian Property Law Journal, is not included in this PhD.
1. INTRODUCTION

The High Court of Australia has made a number of pronouncements regarding registered Torrens leases in response to which there has been little judicial challenge and relatively scant academic examination.¹ The pronouncements are:

- Registration of a lease confers on the non-fraudulent registered lessee an immediately indefeasible leasehold estate.
- This applies equally when a void lease is registered: registration cures the defect and validates the leasehold estate.
- This indefeasibility attaches to all the terms in the registered lease instrument that are integral to, delimit, or qualify the leasehold estate.
- A right to renew in a lease is integral to the leasehold estate granted in the lease instrument. Therefore, a right to renew in a registered lease, even if the lease instrument is void, is indefeasible on registration.
- But, a right to renew in an illegal lease prohibited by statute is not validated by registration.
- A right to purchase in a lease is not integral to the leasehold estate. Therefore, a right to purchase in a registered lease is generally not indefeasible on registration unless the right is expressly protected under the particular Torrens legislation.

When we look more closely at the reasoning behind these propositions, their apparent accuracy wanes. Indeed, on examination, a number of fundamental questions emerge. In relation to a right to renew in a registered lease: what is the rationale for saying that such a right in a void lease is indefeasible and can be enforced but not such a right in an illegal lease? In relation to a right to purchase in a registered lease: what is the rationale for saying that, generally speaking, the right is not indefeasible and cannot be enforced against a subsequent registered fee simple owner of the land? Behind

each of these very broad questions lurks a bewildering array of more specific and more narrowly focused questions.

The purpose of Parts I and II of this article is to shed light on these fundamental questions and, in so doing, address the myriad of ancillary questions they elicit. Part I, explores the indefeasibility of rights to renew in void and illegal leases. Part II, which follows, examines the indefeasibility of rights to purchase. For the purposes of this article expressions referring to ‘covenants’, ‘rights’ or ‘options’ to renew or purchase are used interchangeably.

2. THE FOUNDATIONAL CASES

Travinto Nominees v Vlattas

One of the first important High Court decisions to consider the law regarding options to renew in registered leases was Travinto Nominees Pty Limited v Vlattas and Another\(^2\) (Travinto).

The facts

In Travinto, Vlattas and Eliadis (collectively, ‘Vlattas’) were the registered proprietors of land registered under the Real Property Act 1900 (NSW) (RPA NSW) upon which were constructed shops, one of which was referred to as No 204. No 204 was subject to a registered lease in favour of Macri for a term of five years commencing 1 August 1965 and contained an option to renew for a further term of five years. The lease included a covenant by the lessee not to use the premises for any purpose other than as a hairdressing salon and tobacconists shop. This lease had not been approved by either the Industrial Commission of New South Wales, or an appropriate committee, pursuant to s 88B of the Industrial Arbitration Act 1940 (NSW) (IAA NSW). Under this section, ‘any contract’ under which a person ‘leases or agrees to lease’ any premises for the purpose of hairdressing where the contract work

\(^2\) Travinto Nominees Pty Limited v Vlattas and Another (1973) 129 CLR 1.
was covered by an award, was ‘not [to] be entered into’ unless the commission or an appropriate committee had approved the terms of the contract. Under s 88B(3), where the contract was entered into without the approval of the commission or committee then ‘every person who is a party to the contract shall be liable to a penalty ... and the contract shall be void.’

Travinto Nominees Pty Ltd (Travinto) sought to acquire property, including No 204, for redevelopment purposes and on 31 March 1969 Vlattas granted Travinto an option to purchase the property exercisable at any time prior to 30 June 1969. This option noted that No 204 was leased to a hairdresser and stated that full details of the lease would be sent to Travinto’s real estate agent within seven days. These details were never sent. However, prior to the grant of this option to purchase, the solicitors for Travinto had arranged for their articled clerk to obtain a search of the certificate of title for No 204. The clerk became aware of the option to renew in the lease but did not note this detail in the search paper. A further written supplementary option to purchase agreement varied and extended the option to purchase until 30 October 1969 and included clause 3 which acknowledged the lease over No 204 but did not mention the option to renew. Travinto exercised the option to purchase in late June 1969 and in early July 1969 the solicitor for Travinto became aware of the option to renew in the lease. The solicitor wrote to the solicitor for Vlattas alleging that the property had been misdescribed within the terms of clause 8 of the contract for the sale of the land and claimed compensation under that clause. Vlattas’s solicitor denied the claim for compensation and claimed that Travinto had sufficient particulars of the registered lease so as to ascertain full details of the lease and option. Vlattas’s solicitor asserted that Travinto was bound by the option to purchase subject to Macri’s lease and option to renew. The purchase of the property was completed, without prejudice to Travinto’s claim for compensation, and on the same day Travinto commenced an action against Vlattas claiming compensation for misdescription of the property under clause 8. As Travinto required the property for redevelopment, on 18 May 1970, Travinto procured a surrender of Macri’s lease and option by the payment to Macri of $21,000.

The issues
The facts in Travinto gave rise to a number of broad issues that were dealt with differently by Hope J at first instance, the Court of Appeal and the High Court. The issues were: first, whether there was a misdescription of the property under clause 8 of the contract of sale so as to entitle Travinto to compensation; second, did s 88B of the IAA NSW apply to this lease; third, what was the effect of the registration of Macri’s lease; and fourth, was Vlattas estopped as against Travinto from alleging in this action that Macri’s option to renew was unenforceable.

The decision

On the first issue, Justice Hope determined that the reference to the lease in clause 3 of the supplementary agreement was part of the description of the property to be sold, which was a reversionary interest, and that the words ‘error or misdescription’ in clause 8 were not limited to physical misdescription but extended to defects in title. The omission of any mention of the option to renew was a misdescription and any prior knowledge by Travinto of the option to renew did not affect Travinto’s claim for compensation. Justice Hope concluded that, assuming the IAA NSW did not affect the position, Travinto would be entitled to compensation under clause 8 of the contract of sale.

In the Court of Appeal, Mason JA considered the issue in some detail and concluded that, subject to the impact of the IAA NSW, the contract for sale did contain a misdescription within the meaning of clause 8. On appeal to the High Court, the misdescription issue was fully debated. All members of the High

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3 Travinto Nominees Pty Ltd v Vlattas and Another (1970) 92 WN NSW 405.  
4 Travinto Nominees Pty Ltd v Vlattas and Another [1972] 1 NSWLR 24.  
5 Travinto Nominees Pty Ltd v Vlattas and Another (1970) 92 WN NSW 405, 414.  
6 Ibid.  
7 Ibid, 415.  
8 Ibid, 414–417. Vlattas had argued that Travinto, by its agents, knew of the option to renew and that there cannot be a misdescription where the purchaser has prior knowledge of the matter omitted from the description. However, as clause 3 of the supplementary agreement described expressly the lease term and the rental, Hope J found, at 416, that Travinto was entitled to accept Vlattas’s assurance in clause 3 and was not obliged to check that this assurance was correct.  
9 Ibid, 417.  
10 Although a formal submission on the misdescription issue was made by Vlattas on appeal to the Court of Appeal, the issue was not fully argued and Asprey JA, with whom Holmes JA agreed, declined to make a finding on this issue. See, Travinto Nominees Pty Ltd v Vlattas and Another [1972] 1 NSWLR 24, 41.  
11 Ibid, 45.
Court, except Gibbs J, concluded that, on a proper construction of the contract, the subject matter of the contract of sale was the land and a misdescription of the land must relate to the physical subject matter. The omission to refer to the option to renew in the contract was not a misdescription of the physical land and accordingly, there was no basis for Travinto’s claim for compensation.

Justice Hope, the Court of Appeal and the High Court all considered the second issue concerning the application of s 88B of the IAA NSW to Macri’s lease and option to renew. As noted by Hope J, the purpose of s 88B was to protect hairdressers from being denied the benefits of the award by creating another kind of relationship, including, as here, a landlord-tenant relationship. Although in this case there was no suggestion that the lessor, Vlattas, was attempting to avoid the payment of award wages to Macri and his employees, all members of the various courts concluded that s 88B applied to Macri’s lease and option to renew. Since the requisite approval had not been obtained, Macri’s lease was prohibited by s 88B(3) IAA NSW and the option was, therefore, illegal and void.

The third issue concerned the effect of registration under the RPA NSW of Macri’s void and illegal lease on the option to renew. Did registration under the Torrens legislation operate to validate the lease and option? All members of the various courts concluded that, at least so far as the option to renew was concerned, registration did not validate the option.

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12 As Gibbs J found that the lease and option to renew were void and illegal, he did not consider Travinto had a claim for compensation and therefore did not consider it necessary to consider the misdescription issue; Travinto Nominees Pty Limited v Vlattas and Another (1973) 129 CLR 1, 36.

13 Ibid: 15 (Barwick CJ); 26 (McTiernan J); 29 (Menzies J); and 37 (Stephen J). Chief Justice Barwick, at the end of his judgment, 18-26, provided a detailed comment on the reported decisions regarding the question of error or misdescription in contracts for the sale of land.

14 Ibid, 16 (Barwick CJ).

15 Chief Justice Barwick commented that he could see ‘no escape from [this] conclusion’, Travinto Nominees Pty Limited v Vlattas and Another (1973) 129 CLR 1, 16; and Hope J conceded that the application of s88B ‘can have some quite extraordinary and probably quite unintended results’, Travinto Nominees Pty Ltd v Vlattas and Another (1970) 92 WN NSW 405, 419.

16 Travinto Nominees Pty Ltd v Vlattas and Another (1970) 92 WN NSW 405, 417-421; Travinto Nominees Pty Ltd v Vlattas and Another [1972] 1 NSWLR 24, 32 (Asprey JA), 41 (Holmes JA), and 45 (Mason JA); Travinto Nominees Pty Limited v Vlattas and Another (1973) 129 CLR 1, 16 (Barwick CJ), 26 (McTiernan J agreeing with Barwick CJ), 29 (Menzies J), 33 (Gibbs J), and 37 (Stephen J).

17 Travinto Nominees Pty Ltd v Vlattas and Another (1970) 92 WN NSW 405, 422; Travinto Nominees Pty Ltd v Vlattas and Another [1972] 1 NSWLR 24, 41 (Asprey JA), 41 (Holmes JA), and 49-50 (Mason JA); Travinto Nominees Pty Limited v Vlattas and Another (1973) 129 CLR 1, 16-18 (Barwick CJ), 26 (McTiernan J agreeing with Barwick CJ), 29-30 (Menzies J), 35 (Gibbs J), and 37 (Stephen J).
The final issue raised by Travinto was an estoppel argument, namely, that Vlattas had made representations to Travinto that No 204 was subject to a lease and option to renew in favour of Macri\(^\text{18}\) and that Travinto had acted to its detriment in paying out $21,000 for the surrender of Macri’s lease and option. This argument was accepted by Hope J,\(^\text{19}\) but rejected by both the Court of Appeal and the High Court.\(^\text{20}\)

In summary, Hope J found that Vlattas was estopped from denying there was a valid lease and option to renew and the omission of the option in the contract for the sale of the property was a misdescription entitling Travinto to compensation. Although the reasoning of the Court of Appeal and the High Court was not identical, both courts rejected Justice Hope’s conclusion and found that Travinto was not entitled to compensation. The lease and option to renew were illegal and void and had not been validated by registration under \textit{RPA NSW}. Since the option was unenforceable, the omission of the option from the contract for sale could not constitute a misdescription that would entitle Travinto to compensation.

\textit{The reasoning of the High Court}

The High Court’s reasoning in relation to the effect of registration under the \textit{RPA NSW} of the lease and option to renew warrants closer examination. All members of the High Court concluded that registration of the lease did not validate the option to renew. Interestingly, however, there were two distinct approaches in reaching this conclusion: the first approach focused on the question of whether the option to renew would be specifically enforceable; the second approach focused on the question of whether the provisions of the \textit{IAA NSW} overrode the provisions of the \textit{RPA NSW}.

\(^{18}\) Justice Hope considered that the representation must be taken to be that there was a valid lease and option to renew and that the representation should be ‘deemed to extend’ to a representation that ‘in so far as any statutory approval was required for the lease or for the option to renew, that approval had been obtained’: \textit{Travinto NomineesPty Ltd v Vlattas and Another} [1970] 92 \textit{WN NSW} 405, 424.

\(^{19}\) Ibid, 424-425.

\(^{20}\) The members of the High Court essentially adopted the Court of Appeal’s view that the onus of proof was on Travinto to establish it was induced to buy out Macri’s lease on the basis of some representation by Vlattas and this onus was not satisfied: \textit{Travinto NomineesPty Ltd v Vlattas and Another} [1972] 1 \textit{NSWLR} 24, 36.
Chief Justice Barwick adopted the ‘specific performance approach’. This approach was accepted and endorsed by McTiernan and Stephen JJ and is, therefore, the majority view in *Travinto*. At the outset, Barwick CJ pointed out that the RPA NSW confers a ‘conclusive’ or ‘indefeasible’ title in relation to the registered proprietor’s interest in the land. In the case of a lease, the extent of the leasehold estate is not limited to the leasehold term but extends to ‘those terms and conditions of the lease which affect or qualify the interest in the land which the lease purports to create.’ However, Barwick CJ noted that registration does not ensure validity to every term of the lease or enforceability of every covenant and commented, ‘it must depend on the nature of the covenant and its relation to the limitation of the interest created in the land by the memorandum of lease itself.’ In this regard, Barwick CJ referred to a collateral covenant tying the lessee to the lessor in some matter of trade which, his Honour commented, would not be validated simply by registration of the lease: ‘The validity and enforceability of such a covenant will remain a question under the general law.’ Chief Justice Barwick continued:

The same, in my opinion, is true of the option to renew the lease. It does not mark out the extent of the term created by the lease. It is an agreement to grant a new lease contingently on the exercise of the option and the observance during its term of the covenants of the lease. Whether such an agreement creates an immediate though defeasible equitable interest must ultimately depend on the specific enforceability of that agreement.

Chief Justice Barwick agreed with the Trial Judge and the Court of Appeal that the option to renew was incapable of specific performance due to the provisions of s 88B of the IAA NSW. For Barwick CJ, it was not of ‘consequence’ that the statute made the option void, rather, ‘[i]t is the fact that it made it illegal; and therefore incapable of specific performance which is the critical circumstance’.

21 *Travinto Nominees Pty Limited v Vlattas and Another* (1973) 129 CLR 1, 26.
22 Ibid, 37.
23 Ibid, 16.
24 Ibid, 17.
25 Ibid.
26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid. Chief Justice Barwick left to one side the more general question of whether an option to renew that is capable of specific performance forms part of the interest in land that is protected by registration.
Justice Gibbs adopted the second ‘overriding statutes approach’ and this was endorsed by Menzies J. Justice Gibbs commented that ‘[t]here can be no doubt’ the RPA NSW has the effect that upon registration of a lease the lessee obtains title to the interest specified in the lease ‘notwithstanding that apart from registration the lease would be void and ineffective’. The lessee’s title is ‘immune from attack’. However, in this case, the IAA NSW was passed subsequent to the RPA NSW and, according to ordinary principles of statutory construction, where there is an inconsistency between one statute and a later statute, ‘the later statute prevails’. Justice Gibbs commented that as the IAA NSW was intended to apply to all leases, including those registered under the RPA NSW, then ‘[e]ffect must be given to [s88B] notwithstanding that under the [RPA NSW] the title of the registered lessee is indefeasible’.

Justice Gibbs went on to distinguish the facts in Travinto from Breskvar v Wall (Breskvar). In Breskvar, the court considered the position of a registered proprietor who obtained registration pursuant to a transfer that was rendered absolutely void and inoperative by a provision of the Stamp Act 1894 (Qld). Justice Gibbs commented that in Breskvar the Stamp Act 1894 (Qld) and the Real Property Acts, 1861-1963 (Qld) could ‘stand together’:

[T]he Stamp Act avoided the transfer, but the Real Property Act had the result that registration of the void transfer was effective to vest title in the registered proprietor. In the present case the Industrial Arbitration Act renders void the lease itself and not merely some document or transaction from which the title to the lessee was derived.

In his Honour’s view, in Travinto, there was a direct inconsistency, the statutes could not ‘stand together’ and the IAA NSW overrode the inconsistent provisions in the RPA

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31 Ibid, 33.  
32 Ibid, 34.  
33 Ibid. Justice Gibbs cited South-Eastern Drainage Board (SA) v Savings Bank of South Australia (1939) 62 CLR 603, 616 as authority for this point.  
34 Ibid, 34.  
35 Breskvar v Wall (1971) 126 CLR 376.  
36 Travinto NomineesPty Limited v Vlattas and Another (1973) 129 CLR 1, 34.
NSW. Justice Gibbs concluded that both the lease and the option to renew were void.\(^{37}\)

In *Travinto*, the High Court did not consider it necessary to make a final determination as to whether an option to renew is to be regarded as integral to the lease so that on registration of the lease, the option to renew is indefeasible.\(^{38}\) However, three years later, the answer to this question was provided by the High Court in *Mercantile Credits Ltd v Shell Company of Australia Ltd*\(^{39}\) (*Shell*).

**Mercantile Credits Ltd v Shell Company of Australia Ltd**

For the purposes of Part I of this article it is sufficient to note that in *Shell*, while acknowledging that ‘[t]he registration of an instrument does not in all cases give priority or the quality of indefeasibility to every right which the instruments creates’,\(^{40}\) the High Court unanimously determined that a right to renew a lease is ‘so intimately connected with the term granted to the lessee, which it qualifies and defines, that it should be regarded as part of the estate or interest which the lessee obtains under the lease, and on registration is entitled to the same priority as the term itself’.\(^{41}\)

The authors respectfully submit that the clarification by the High Court in *Shell* that an option to renew is integral to, and part of, the lease and is, therefore, rendered indefeasible on registration of the lease, reveals the flaws in the application of Torrens principles to the facts in *Travinto*. This is particularly the case for those justices who adopted the specific performance approach.

### 3. THE REASONING IN *TRAVINTO*

**General principles**

\(^{37}\) Ibid, 35.

\(^{38}\) Ibid, 17 (Barwick CJ), 30 (McTiernan J), 35 (Gibbs J).

\(^{39}\) *Mercantile Credits Ltd v Shell Company of Australia Ltd* (1976) 136 CLR 326.

\(^{40}\) Ibid, 342.

\(^{41}\) Ibid, 345-346.
At the outset, it is useful to provide a backdrop for the analysis of *Travinto* by commenting on some fundamental aspects of Torrens indefeasibility. The Torrens system is a system of title by registration: in the absence of fraud by the registered proprietor, title is transferred on registration regardless of any invalidity or defect in the instrument registered, in the process or dealings leading up to registration, or in the title of the registered proprietor from whom the interest is acquired. Registration cures all defects and renders the title of the non-fraudulent registered proprietor indefeasible and immune from adverse claims. However, this indefeasibility is qualified. A non-fraudulent registered proprietor’s title may be challenged on the grounds of a number of exceptions including the express exceptions to indefeasibility contained in the Torrens statutes and a number of other implied exceptions. Of particular relevance here are the overriding statutes exception, discussed in more detail below, and the *in personam* exception. The *in personam* ‘exception’ is an acknowledgement that the principle of indefeasibility does not deny the right of a plaintiff ‘to bring against the registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant’.

The *in personam* exception includes claims based on contracts or trusts with regards the land or other situations where there is a legal or equitable cause of action that may be enforced against a registered proprietor and which gives rise to a remedy affecting the land.

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42 *Breskvar v Wall* (1972) 126 CLR 376, 385 (Barwick CJ).
43 *Land Titles Act* 1925 (ACT) s 53; *Land Title Act* 2000 (NT) s 33; *Land Title Act* 1994 (Qld) s 56; *Real Property Act* 1886 (SA) s 68; *Land Titles Act* 1980 (Tas) s 39; *Transfer of Land Act* 1958 (Vic) s 27D; *Transfer of Land Act* 1893 (WA) s 63.
44 This concept of indefeasibility is enshrined in the core indefeasibility provisions of the Torrens statutes. The most significant is the ‘paramountcy’ provision: s *Land Titles Act* 1925 (ACT) s 58; *Real Property Act* 1900 (NSW) s 42(1); *Land Title Act* 2000 (NT) s 188; *Land Title Act* 1994 (Qld) s 184; *Real Property Act* 1886 (SA) s 69; *Land Titles Act* 1980 (Tas) s 40; *Transfer of Land Act* 1958 (Vic) s 42(1); *Transfer of Land Act* 1893 (WA) s 68.
45 These exceptions are, in the main, to be found in the paramountcy provision, ibid.
46 A more detailed discussion of the *in personam* claim can be found in P Carruthers and N Skead, ‘Exploring the fundamentals: Indefeasibility, *in personam*, proprietary estoppel and Van Dyke v Sidhu’, (2014) 22 (3) APLJ 187. The comments here regarding the *in personam* exception are abstracted from that article. An *in personam* claim is not, strictly speaking, an exception to indefeasibility. As Low has pointed out, ‘[i]n truth, the [*in personam*] exception cannot fall within the definition of an exception because it does not actually come “within the terms of the rule” – namely, the principle of indefeasibility’. Low notes that indefeasibility does not deny *in personam* claims against the registered proprietor. Accordingly, these claims are not exceptions to indefeasibility but simply fall outside the statutory indefeasibility rule. See K Low, ‘The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities’ [2009] 33 MULR 205, 209-210.
This brief Torrens background suggests a simple approach, referred to here as the Torrens methodology, for analysing cases that challenge the title of a registered proprietor. The registered proprietor is to be viewed as having an indefeasible title and it will only be where the circumstances give rise to one of the recognised exceptions to indefeasibility that the registered proprietor’s title can be challenged.

Following *Shell*, it is now clear that options to renew are considered an integral part of the estate granted to the lessee and accordingly, where a void lease is registered, the option to renew is validated. However, in *Travinto* it was found that an option to renew in an illegal lease was not indefeasible and could not be enforced against a subsequent registered proprietor. Although *Travinto* was decided a mere three years before *Shell*, one senses in the judgments in *Shell* a more mature, developed and refined understanding of the Torrens system and of the notion of indefeasibility. In *Travinto*, as discussed, two different approaches were adopted: the ‘specific performance approach’ and the ‘overriding statute approach’. Each of these approaches is examined against the backdrop of the Torrens methodology.

**Specific performance**

Under the Torrens system, while registration is required to pass a *legal* interest, an *equitable* interest can arise in a number of ways, including by contract. The strength of an unregistered, equitable interest arising by contract is dependent upon the specific enforceability of the contract creating the interest. This principle applies to the equitable interest of a lessee arising under an unregistered lease, and extends to any interest arising pursuant to an option to renew in an unregistered lease: ‘the interest conferred by the [option] is an interest commensurate with the relief which equity would give by way of specific performance’.

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48 *Land Titles Act 1925* (ACT) s 57; *Real Property Act 1900* (NSW) s 41; *Land Title Act 2000* (NT) s 184; *Land Title Act 1994* (Qld) s 38, s 181; *Real Property Act 1886* (SA) s 67; *Land Titles Act 1980* (Tas) s 49; *Transfer of Land Act 1958* (Vic) s 40; *Transfer of Land Act 1893* (WA) s 58.


51 Ibid.

52 *Travinto Nominees Pty Ltd v Vlattas* [1972] 1 NSWLR 24, 40.
Specific performance is a discretionary equitable remedy with both a narrow and a broad application.\(^{53}\) In its narrow, or ‘proper’,\(^{54}\) sense, specific performance ‘presupposes an executory contract as distinct from an executed agreement’\(^{55}\) and ‘is a remedy to compel the execution in specie of a contract which requires some definite thing to be done before the transaction is complete’.\(^{56}\) It is an order requiring a party to do that which is required to be done to complete the contract. In its broader sense, specific performance is a remedy pursuant to which a contracting party is ordered to perform his or her contractual obligations under an executed, or completed, contract.\(^{57}\)

It is not clear in \textit{Travinto} whether the majority judges, in adopting the specific performance approach, were referring to specific performance in the narrow or broad sense. On one hand, if the option to renew is viewed as integral to, and part of, the executed lease then, if the remedy were available, it would be specific performance in the broad sense.\(^{58}\) On the other hand, as the exercise of an option to renew gives rise to a new and distinct leasehold estate, enforcement of the option may be viewed as the enforcement of an executory contract, that is, specific performance in the narrow sense.\(^{59}\) Arguably, though this is by no means clear, the majority conclusion in \textit{Travinto} would be the same whether their Honours were applying specific performance in the narrow or broad sense. The lack of clarity here may relate to the failure of the court in \textit{Travinto} to make a final determination as to the status of an option to renew: is it to be viewed as integral to the lease, or not?


\(^{54}\) J C Williamson Ltd v Lukey (1931) 45 CLR 386, 394.

\(^{55}\) Wolverhampton and Walsall Railway Co v London and North-Western Railway Co (1873) LR 16 Eq 433, 439.

\(^{56}\) J C Williamson Ltd v Lukey (1931) 45 CLR 386, 394.

\(^{57}\) Heydon et al, above n 53, 650.

\(^{58}\) Support for this view is to be found in Muller v Trafford [1901] 1 Ch 54 where Farwell J, at 61, commented that an option to renew must ‘bind the land from its inception, because it would otherwise be an executory interest in land arising in futuro’. Justice Farwell’s comments were referred to with approval by Gibbs J in \textit{Mercantile Credits Ltd v Shell Company of Australia Ltd} (1976) 136 CLR 326, 344.

\(^{59}\) Support for this view may be found in the comments of Mason JA in \textit{Travinto Nominees Pty Ltd v Vlattas} [1972] 1 NSWLR 24, 50.
It is trite law that to be specifically enforceable a contract must be valid at law:60 ‘equity will not … specifically enforce an agreement which is not a valid and binding contract’.61 It follows, therefore, that equity will not grant specific performance in respect of a contract, including a lease and an option to renew in a lease, that is illegal under statute;62 that contravenes a statutory prohibition;63 or, that is void because of fraud or forgery, incapacity, non est factum or any other reason. Stated simply, in the absence of registration, an illegal or void lease, and any option to renew in an illegal or void lease, is not specifically enforceable.

In Travinto, however, the lease was registered. Applying the Torrens methodology to analyse Travinto, leads to the conclusion that on registration of the illegal lease an indefeasible leasehold estate passed to the lessee, Macri. The next step the High Court ought to have taken was to make an express finding that the option to renew, being integral to the lease, was also validated and rendered indefeasible on registration of the lease. Accordingly, the lessee’s registered interest could only be impugned if an exception to indefeasibility could be established. However, this was not the analysis of the various judgments in Travinto adopting the specific performance approach. There were subtle, but important differences in the reasons given in each of the courts as to why the option to renew was not enforceable.

Specific performance of an illegal and prohibited option

According to the Trial Judge, Justice Hope:

[Effect can only be given to the rights which the instrument purports to create by obtaining a decree for specific performance from a court of equity … I think it is going too far to say that a court would lend its assistance to compel the owner of the land to carry out an agreement the very making of which a statute has prohibited. [Macri] would not, in any relevant sense, have an enforceable option to renew, … his only equitable defence [to a claim for ejectment] would be an equitable defence, namely, his

60 Spry, above n 53, 130-1. There is a limited number of exceptions to this general rule. If for example, the contract does not satisfy the stipulated legal writing requirements, it may still be specifically enforceable under the equitable doctrine of part performance: Regent v Millett (1976) 133 CLR 689; ANZ Banking Group Ltd v Widin (1990) 102 ALR 289.
61 Heydon et al, above n 53, 649.
62 Norton v Angus (1926) 38 CLR 523, 534; Pottinger v George (1967) 116 CLR 328, 337.
63 Rees v Marquis of Bute [1916] 2 Ch 64; Brilliant v Michaels [1945] 1 All ER 121.
right to have the option to renew specifically enforced; and this is a right he does not have… [Macri] would have to ask the court to compel the carrying out of an illegal and prohibited transaction, and it is this I do not think the court will do.64

Justice Hope considered that, regardless of the effect of registration on the lease itself, the only way the rights under the option could be enforced was through an order for specific performance which, given the illegality of the transaction, a court would not award. But would that not also be the case were the lease, for example, a forgery? As discussed, the validating effect of registration was confirmed by the High Court in Breskvar in which Barwick CJ noted that ‘[i]t matters not what the cause or reason for which the instrument is void’.65

Following cases such as Beskvar and Shell it is clear that registration of a forged and, therefore, void, lease would cure the invalidity and confer on the registered lessee an indefeasible leasehold interest. This indefeasibility would extend to any option to renew in the forged lease. Justice Hope did not provide an adequate or convincing explanation as to why the position would be different in respect of a lease that is void because it is prohibited by statute. His Honour simply commented that it would be ‘going too far’66 to say that a court would assist in compelling enforcement of an agreement that was prohibited by statute. As noted by Sackville, Hope J appears to ‘beg the question by assuming that a court would be required to lend its aid in the enforcement of an illegal transaction’ but, if the option constitutes part of the indefeasible interest, ‘a court is being asked merely to enforce a valid and subsisting interest in the land.’67

Justice Hope was in an invidious position. In order properly to understand his Honour’s reasoning it is crucial to appreciate that both Breskvar and Shell were decided after Hope J delivered his judgment in Travinto. This was at a time when the Australian judiciary, profession and academy were only beginning to come to terms

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65 Breskvar v Wall [1971] 126 CLR 376, 386. This Torrens orthodoxy, articulated and applied in Breskvar, has since been confirmed in a multitude of High Court decisions including, most recently, in Cassgrain v Gerard Cassegrain & Co Pty Ltd (2015) 254 CLR 425.
66 Travinto Nominees Pty Ltd v Vlattas (1970) 92 WN (NSW) 405, 422.
with the notion of immediate indefeasibility adopted by the Privy Council in *Frazer v Walker*.  

*Breskvar* overturned decades of scholarship and authority, including High Court authority that had denied the immediately validating effect of registration. In addition, *Shell* settled the principle that an option to renew is integral to the lease and, on registration of the lease, enjoys the same protection as the lease term. It is perhaps not surprising, therefore, that Hope J did not grapple at length with the impact of registration of the lease on the validity and enforceability of the option to renew and appears to have been reluctant to overstate the validating effect of registration on a contract prohibited by statute. In light of the strong pedigree of cases that have followed it is suggested that, without more, the correctness of his Honour’s reasoning is now questionable.

*The in personam exception in disguise?*

In the Court of Appeal the analysis of Asprey JA, with whom Holmes JA agreed, suggested a more orthodox Torrens approach. His Honour stated:

> I do not find any provision of the [RPA NSW] which affects any modification or interference with the contractual or other personal relations between the [lessor] and [lessee] … and the court would not lend its assistance to compel the defendants to carry out a contract the very making of which a statute has prohibited.

While not doing so in express terms, Asprey JA appears to be relying on the *in personam* exception in denying indefeasibility to the option to renew. His Honour accepts that, ordinarily, registration will render an estate or interest in land indefeasible. At the same time, however, Asprey JA seems to acknowledge that the principle of indefeasibility does not affect the personal obligations a registered proprietor may have arising out of his or her own conduct. Presumably Justice Asprey’s reasoning here, though not spelt out, was that though Macri may have been the registered proprietor under a lease, including an option to renew, he was personally involved in breaching the *IAA NSW* which provides that ‘every person who is a party to the contract shall be liable to a penalty’. As a party to the illegal

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69 See eg *Gibbs v Messer* [1981] AC 24; *Clements v Ellis* (1934) 51 CLR 217.  
70 *Travinto Nominees Pty Ltd v Vlattas* [1972] 1 NSWLR 24, 41.
lease, and being subject to a statutory penalty for his involvement in the illegality, Asprey JA concluded that a court would not entertain an action by Macri to enforce the option to renew on the basis that registration of the illegal lease rendered it indefeasible.

Although a seemingly more principled approach, aspects of Justice Asprey’s reasoning do not accord with the Torrens methodology. Justice Asprey alluded to the in personam exception. However, establishing an in personam exception required identifying a relevant legal or equitable cause of action against the registered lessee, Macri. In his reasoning Asprey JA did not seek to identify a cause of action that Travinto could assert against Macri. Rather his Honour focused on whether Macri would be able to enforce the option to renew against the lessor. In the authors’ view this effectively reverses the application of the in personam exception and was not a sufficient basis on which to found an in personam exception to Macri’s otherwise indefeasible title. Ideally, Asprey JA should have expressly identified the relevant in personam cause of action. Perhaps his Honour viewed Macri’s conduct as a breach of contract. However, as between Macri and the lessor, there was no breach of contract.71 Perhaps the cause of action was to be found in Macri’s breach of statute. But, this too would be a difficult argument since the courts have been reluctant to find an in personam exception on the basis that a person has, without fraud, become registered in breach of statute. In response to a similar argument raised in Palais Parking Station Pty Ltd v Shea72 Peter Butt commented that ‘[i]t would be unfortunate to let in by a judicial back door a doctrine which had been excluded so deliberately from the house that Torrens built’.73

No indefeasibility for future and distinct estates

71 After the completion of the purchase of the land, Travinto approached Vlattas with a view to ascertaining whether Macri had been in default under the lease, but found ‘nothing to suggest that he had’; Travinto Nominees Pty Ltd v Vlattas (1970) 92 WN (NSW) 405, 412.

72 Palais Parking Station Pty Ltd v Shea (1980) 24 SASR 425. In this case the Director General of Medical Services acquired land on the basis of compulsory acquisition powers. However, the Director General was not authorised to acquire the land. The deprived former owner of the land was unsuccessful in bringing an in personam claim to recover the land.

The decision of Mason JA in the Court of Appeal provided a third rationale for finding that the option to renew was not enforceable despite registration of the lease. His Honour considered the fundamental question to be ‘whether the option to renew is capable of specific performance’ and in answering this question in the negative distinguished between covenants in a lease that have direct application to the term vested in the lessee by registration and which, even if contained in a void lease, would be enforceable on registration of that lease, and an option to renew in a void lease. In relation to the latter his Honour concluded that:

There is no reason why the indefeasibility which arises from registration should extend to a future and distinct estate which has not been registered… In such a case there is no estate unless the exercise of the option given by the covenant is capable of specific performance: because it is void and illegal it is incapable of specific performance. Whatever may be the effect of registration on the lease for its term of five years and the covenants referable to that term, it does not confer an indefeasible title to an option for renewal of the lease.

His Honour appears to have suggested that what was made indefeasible on registration of the illegal lease was the leasehold estate and that the option to renew was a ‘future and distinct estate’ that was not separately registered and, therefore, was not indefeasible. This reasoning was echoed in the judgment of Barwick CJ in the High Court, with whom Stephen and McTiernan JJ agreed. As noted earlier, Barwick CJ was of the view that an option to renew in a lease ‘does not mark out the extent of the term created by the lease. It is an agreement to grant a new lease contingently on the exercise of the option and the observance during its term of the covenants of the lease.’

This statement by the Chief Justice, as well as those of Mason JA in the Court of Appeal and the Trial Judge extracted above, explain the specific performance approach adopted in the Travinto cases. If an option to renew ‘does not mark out’ the lease term and is, therefore, not part of the estate or interest of the lessee created by

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74 Travinto Nominees Pty Ltd v Vlattas [1972] 1 NSWLR 24, 49.
75 Ibid, 50.
76 Ibid, 37.
77 Travinto Nominees Pty Limited v Vlattas and Another (1973) 129 CLR 1, 26.
78 Ibid, 17.
the lease, but is rather a separate, distinct estate, then its enforceability and validity is to be assessed independently from that of the registered lease. It is not rendered indefeasible on registration of the lease and is not separately registrable, making Torrens principles and methodology irrelevant in determining its enforceability.

However, following the unanimous decision in Shell, the reasoning of Barwick CJ, Mason JA and Hope J and, in particular, their Honours’ focus on the specific enforceability of the option to renew, must now be considered incorrect. It is well-established that a right of renewal is an integral part of a leasehold estate and on registration of the lease enjoys the same protection as the lease term itself.\textsuperscript{79} An option to renew in a registered lease can, therefore, only be impugned on the basis of a recognised exception to the registered lessee’s indefeasible title. Justice Asprey hinted at the \textit{in personam} exception, but this does not seem applicable on the facts in Travinto. Justice Gibbs, in a persuasive and compelling judgment, applied the overriding statutes exception.

**Overriding statutes**

It is well established that the Torrens legislation, like all other legislation, is capable of being overridden by a later statute. As noted by Gibbs J in Travinto, ‘[a]lthough the \textit{Real Property Act} is of the greatest importance in relation to land titles it is not a fundamental or organic law to which other statutes are subordinate’.\textsuperscript{80}

The overriding statutes exception is a significant exception to Torrens indefeasibility. Indeed, it has been noted that:

> So substantial are the inroads of overriding statutes into indefeasibility of title that it is imprudent to rely solely on the Register as an accurate mirror of the registered proprietor’s title. To do so invites ambush from unrecorded interests.\textsuperscript{81}

\textsuperscript{79} \textit{Mercantile Credits Ltd v Shell Company of Australia Ltd} (1976) 136 CLR 326, 345.

\textsuperscript{80} \textit{Travinto Nominees Pty Limited v Vlattas and Another} (1973) 129 CLR 1, 34.

\textsuperscript{81} P Butt \textit{Land Law} (Lawbook Co, 6\textsuperscript{th} ed, 2010) [20.118]. In \textit{Quach v Marrickville Council (No 2)} (1990) 22 NSWLR 55, Young J, at 61, noted that overriding statutes represent ‘the weakest point in the Torrens system’. 

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The repeal of indefeasibility by a later statute may be express. 82 It is more usual, however, for legislation to effect an implied repeal which occurs where ‘the only proper implication from the terms of the later statute was that it was inconsistent with absolute and indefeasible title under the [Torrens legislation]’. 83 In either event, whether the repeal is express or implied, it results in rights and interests created by the later statute being enforceable against the registered proprietor even though the registered proprietor ‘did not know of them and in some instances had no means of finding out about them’. 84 The types of provisions that may be held to override the registered proprietor’s indefeasible title are many and varied and include provisions that: create a charge over the land in favour of a rating or taxing authority; 85 divest title from the registered proprietor and revest title in a public authority; 86 or impose conditions, for example obtaining the licence or consent of a Minister or tribunal, as a pre-requisite to acquiring title. 87

Courts are generally reluctant to find that indefeasibility has been overridden by the implied repeal of a later statute. This proposition is perhaps best illustrated by the High Court decision in Breskvar discussed above. While Barwick CJ noted generally that registration of a void instrument is effective regardless of the reason for which the instrument is void, 88 Walsh J in Breskvar was more specific in his discussion of the

83 Ibid, [15].
85 See, eg, South-Eastern Drainage Board (S.A.) v Savings Bank of South Australia (1939) 62 CLR 603 where the High Court held that drainage charges created pursuant to successive South-Eastern Drainage Acts took priority over a registered mortgagee.
86 In Pratten v Warringah Shire Council (1969) 90 WN (NSW) (Pt 1) 134 (Pratten) and Quach v Marrickville Council (No 2) (1990) 22 NSWLR 55 (Quach) legislation later in date than the Torrens legislation (since repealed) purported to vest land, described as a ‘drainage reserve’ in a registered plan, in the local council. In both cases the court held the later legislation vested the land in the local council despite the fact the council’s interest was not noted on the certificate of title for the land. In Calabro v Bayside City Council [1999] 3 VR 688 the Local Government Act 1989 (Vic) (LGA) s203 provided that ‘A public highway vests in fee simple in the Council of the municipal district in which it is located.’ In the case, an unpaved unlit portion of land that had been used as an access way was found to vest in the council although this interest was not noted on the certificate of title. The court, following Pratten and Quach, found that the LGA s203 and the indefeasibility provision in the Torrens legislation dealt with the same subject matter and were inconsistent so the later LGA provision must prevail. 87 Examples of a cases where Torrens indefeasibility was overridden by legislation requiring the registered proprietor to obtain a licence or approval prior to obtaining title include: British American Cattle Co v Caribe Farm Industries Ltd [1998] 1 WLR 1529 (PC); Travinto Nominees Pty Limited v Vlattas and Another (1973) 129 CLR 1. In both cases the failure to obtain the prior approval rendered the registered interest, a fee simple and lease respectively, void. This possibility was also contemplated in The Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd (2008) 37 WAR 498.
88 Breskvar v Wall [1971] 126 CLR 376, 386.
overriding statute argument. His Honour specifically rejected the submission that ‘s53(5) of The Stamp Act should be regarded as effecting an implied repeal pro tanto or an implied amendment’\textsuperscript{89} of the indefeasibility provisions. The reluctance of courts to find an implied repeal can also be seen in the comments of Ormiston JA in \textit{Horvath v Commonwealth Bank of Australia}\textsuperscript{90} (\textit{Horvath}) that ‘ordinarily there must be a very strong basis supporting such implication, for the Parliament is generally presumed to intend both provisions to operate without there being any such implicit repeal or derogation’\textsuperscript{91}

Justice Kirby has also emphasised the endeavour by courts to ‘reconcile the texts’\textsuperscript{92} of potentially conflicting statutes. If this cannot be achieved then courts resort to established canons of construction including ‘obedience to the law made later in time; priority to the law on the subject classified more specific over one regarded as more general; and precedents to public over purely private rights’\textsuperscript{93}

In recent years there has been a flurry of cases concerning the overriding statutes exception. Hepburn has suggested that there is a dichotomy in the interpretive approaches adopted in these cases, namely, the ‘conflict and implied repeal’ response and the ‘sequential assessment’ response.\textsuperscript{94} Both arise in circumstances where the intention of the later statute was ‘to verify an interest or a procedure and this verification is found to be directly inconsistent with the indefeasibility provisions’.\textsuperscript{95} With the former response, the canons of statutory interpretation will ‘justify a finding that the indefeasibility provisions have been impliedly repealed by the subsequent act’ as the two Acts ‘cannot, in the circumstances, be read together’.\textsuperscript{96} Under the latter response the canons of statutory interpretation ‘may justify a finding that both acts have a sequential operation, each being operative within their independent sphere of

\textsuperscript{89} Ibid, 406. His Honour commented, at 407, ‘In so far as the appellants ... base their claim upon the contention that the transfer was rendered void by s 53(5) of The Stamp Act, I am of opinion that the principles stated in \textit{Frazer v Walker} (1967) 1 AC 569 preclude them from succeeding’.

\textsuperscript{90} \textit{Horvath v Commonwealth Bank of Australia} (1999) 1VR 643.

\textsuperscript{91} Ibid, [34].

\textsuperscript{92} \textit{Hillpalm Pty Ltd v Heaven’s Door Pty Ltd} (2004) 220 CLR 472, [100].

\textsuperscript{93} Ibid. For further discussion of the principles to apply in resolving conflict of statutes issues, see Pamela O’Connor, ‘Public Rights and Overriding Statutes as Exceptions to Indefeasibility of Title’ (1994) 19 \textit{Melbourne University Law Review} 649.

\textsuperscript{94} Samantha Hepburn, ‘Interpretive Strategies in the Overriding Legislation Exception to Indefeasibility’ (2009) 21.2 \textit{Bond Law Review} 86.

\textsuperscript{95} Ibid, 88

\textsuperscript{96} Ibid.
enforceability, where it is possible … to read each provision as subject to the other’. 97
Under Hepburn’s framework it must first be determined whether a conflict exists between the two enactments and, if so, whether it is possible to reconcile the two provisions via ‘sequential assessment’. If sequential assessment is not possible, and ‘a clear intention to effect an implied repeal of the indefeasibility provisions can be established, the “conflict and implied repeal” response must be applied’. 98

In Horvath, a sequential approach was adopted. In this case, the appellant argued that a mortgage that had been granted by him when he was a minor aged 15 years was unenforceable on the basis of s49(a) of the Supreme Court Act 1986 (Vic). This section provided that loan contracts entered into by a minor were void (the ‘relief provision’). Justice Ormiston considered that the Victorian Torrens legislation must be treated as giving an immediately indefeasible title to the mortgagee ‘unless the relief provision should prevail as being relevantly inconsistent’. 99 His Honour considered the relief provision was not relevantly inconsistent because both statutes had their own spheres of operation: the relief provision dealt with the binding nature of agreements with minors and the Torrens indefeasibility provisions dealt with the effect and consequences of registration. ‘Neither deals directly with the subject matter in law of the other’ 100 and accordingly each is ‘capable of having effect without any necessary repugnancy or contradiction’. 101 The sphere of operation for the relief provision was in the period of time before the mortgage was registered. During this time the appellant would be entitled to have the loan and mortgage set aside. However, the relief provision ‘says nothing’ 102 as to the consequences of registration. As Ormiston J noted,

Once registered … the mortgage took on the characteristics and had the effect of a duly executed mortgage, not because of its original contractual effects, but because as a matter of policy the Act created an immediately indefeasible interest in the land by way of mortgage in favour of the respondent. 103

97 Ibid, 89.
98 Ibid.
100 Ibid, [35].
101 Ibid.
102 Ibid, [37].
103 Ibid.
In *City of Canada Bay Council v Bonaccorso Pty Ltd* (Canada Bay) the New South Wales Court of Appeal also adopted the sequential approach. In this case the *Local Government Act 1993* (NSW) (LGA) s 45(1) provided that, ‘A council has no power to sell, exchange or otherwise dispose of community land’. The Council had sold community land, Chapman Reserve, to a person who became the registered proprietor. The question arose, did the LGA s 45(1) override the indefeasible title of the registered proprietor? The court accepted the Council’s argument that the two statutes could ‘stand together’ and commented:

Thus we can accept the word “sequential” adopted by Kirby J in *Hillpalm* insofar as the statutes do have effect sequentially, that is, that up until registration the transaction or transfer is null and void but on registration, as *Breskvar v Wall* holds, there is virtually a new Crown grant of the fee simple in the land, so that from that moment the transferee obtains a new clean title … The result is that the transferee's title is wholly derived from the act of registration by the Registrar-General and not upon the transfer or the antecedent transaction which gave rise to the transfer.

**Application of the overriding statutes exception in Travinto**

In contrast to the ‘sequential assessment’ cases is the decision of Gibbs J, with whom Menzies agreed, in *Travinto*. Justice Gibbs applied the overriding statutes exception and concluded that the provisions of the IAA NSW overrode the provisions of the RPA NSW. In coming to this conclusion it was necessary for Gibbs J to overcome the robust reasoning in *Breskvar* that had rejected the argument that the *Stamp Act* provision had overridden Torrens indefeasibility. In this regard Gibbs J commented:

The two statutes there could stand together; the *Stamp Act* avoided the transfer but the *Real Property Acts* had the result that registration of the void transfer was effective to vest title in the registered proprietor. In the present case the [IAA NSW] renders void

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104 *City of Canada Bay Council v Bonaccorso Pty Ltd* (2007) 71 NSWLR 424.
105 Ibid, [81].
106 Ibid, [83].
107 A majority of the court, Barwick CJ, McTiernan and Stephen JJ, did not apply the overriding statute exception. These judges concluded that, due to the illegality of the lease, the option to renew could not be specifically enforced and therefore the option did not create and equitable interest in the land. These judgments are therefore not relevant here in discussing the overriding statutes rationale.
the lease itself and not merely some document or transaction from which the title of the lessee was derived.\textsuperscript{108}

Accordingly, in Justice Gibbs’ view, the distinguishing feature was that in \textit{Breskvar} it was merely the instrument of transfer that was rendered void, whereas in \textit{Travinto} it was the leasehold estate itself that was made illegal and void by the \textit{IAA NSW}.\textsuperscript{109} The interpretive strategy adopted by Gibbs J is an illustration of Hepburn’s ‘conflict and implied repeal’ response. There was nothing in the \textit{IAA NSW} to indicate it was not intended to apply to registered Torrens leases and there was no rational ground for exempting Torrens leases from the operation of the later statute. If the Torrens legislation were to be interpreted to have the effect of validating the lease, ‘its provisions would be irreconcilable with s 88B [of the \textit{IAA NSW}] which declares the lease to be void’.\textsuperscript{110} The provisions were inconsistent and Gibbs J concluded that the later enactment overrode the indefeasibility provisions.

The decision of Gibbs J in \textit{Travinto} provides a principled Torrens methodology approach for resolving the indefeasibility issue that arose in the case. The otherwise indefeasible title of the registered lessee was subject to a recognised exception to indefeasibility, the overriding statutes exception, and accordingly, both the lease and the option to renew were void.\textsuperscript{111}

The adoption by Gibbs J of the overriding statutes approach, as opposed to the specific performance approach, has also been considered to be the ‘preferable conclusion’ by the authors of the classic text on real property law, \textit{Australian Real Property Law}:

[I]t is open to question whether incapability of specific performance should necessarily deny validity procured by registration. Gibbs and Menzies JJ decided the case on the

\textsuperscript{108} \textit{Travinto Nominees Pty Limited v Vlattas and Another} (1973) 129 CLR 1, 34.
\textsuperscript{109} Section 88B of the \textit{IAA NSW} was directed at the contract, stating: ‘the contract shall be void’. Under s 88B(1)(d) of the \textit{IAA NSW}, s 88B applied ‘to any contract under which a person … leases or agrees to lease to any other person any premises’. Justice Gibbs, ibid at 31, considered that the words ‘any contract under which a person … leases or agrees to lease’ could only be given a ‘sensible meaning if the word “under” is used as meaning “by” or “pursuant to”’. Accordingly, his Honour considered the words referred to the lease itself or an agreement to lease and not merely the instrument from which title was derived as in \textit{Breskvar}.
\textsuperscript{110} Ibid, 35.
\textsuperscript{111} Ibid.
basis of overriding statutes – the invalidating statute, being later in time, overrode the Real Property Act 1990 (NSW) and this seems a preferable conclusion.\textsuperscript{112}

Despite this support for the approach adopted by Gibbs J, later cases have been critical of his Honour’s judgment. In Horvath, Ormiston J concluded that the relief provision, which made contracts by minors void, was not relevantly inconsistent with the indefeasibility provisions. Justice Ormiston continued:

Such a conclusion is consistent with the decision which is treated as the leading exposition of the indefeasibility doctrine, namely Breskvar ... In the more recent decision of Travinto ... the majority found no need to examine the issue although Gibbs J. expressed himself in terms that the statutory illegality in that case infected the registered lease ... There the contractual rights were very different, being effectively an option to renew a lease, and, if it were not otherwise distinguishable, I would be inclined, with the greatest respect, to consider Gibbs J.’s observations on this issue as incorrect and inconsistent with Breskvar ... and the later observations on indefeasibility

\textsuperscript{113}

This criticism was taken up by Mason P, Tobias JA and Young CJ in Canada Bay where their Honours commented on the difficulty of reconciling the reasoning of Gibbs J with the High Court’s decision regarding indefeasibility in Breskvar\textsuperscript{114} and noted, ‘[i]f we had to, we would join with Ormiston JA’s observations in Horvath … with respect to the judgment of Gibbs J’s in Travinto’.\textsuperscript{115} Ultimately, their Honours concluded, ‘[w]e put to one side the minority view of Gibbs J in Travinto which, with respect, we regard as irreconcilable with Breskvar’.\textsuperscript{116}

This leaves us with something of a conundrum: Justice Gibbs’ judgment in Travinto neatly applies the Torrens methodology yet his conclusion that s 88B of the IAA NSW trumped Torrens indefeasibility has been soundly criticised. The force of this criticism is recognised and so too is the all-pervasive and persuasive underlying premise of the criticism which is found in Chief Justice Barwick’s words in Breskvar that ‘a

\textsuperscript{112} A Moore, S Grattan, L Griggs, Australian Real Property Law (Lawbook Co 6th ed 2016) [4.170] fn 218. Justice Gibbs’ approach is also preferred by Rossiter, above n 1, 626.

\textsuperscript{113} Horvath v Commonwealth Bank of Australia (1999) 1VR 643, [38].

\textsuperscript{114} City of Canada Bay Council v Bonaccorso Pty Ltd (2007) 71 NSWLR 424, [56].

\textsuperscript{115} Ibid, [57].

\textsuperscript{116} Ibid, [86].
registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void. The issue is perplexing and highlights the difficulty of statutory interpretation and the application of the preliminary enquiry which requires a decision as to whether the indefeasibility provision is relevantly inconsistent with the later statutory provision.

For Gibbs J, the fact that the actual leasehold estate itself, and not just the instrument evidencing that estate, was made void by the later statutory provision was determinative. The provisions were ‘irreconcilable’ and the later provision overrode Torrens indefeasibility.

The authors of this article accept Justice Gibbs’ reasoning. In declaring that ‘it matters not what the cause or reason for which the instrument is void’ Barwick CJ, quite clearly, could not have been intending to deny the right for subsequent legislatures to enact legislation that would have the effect of overriding indefeasibility. It is true that in *Travinto* the New South Wales legislature, in enacting s 88B, did not expressly repeal Torrens indefeasibility. However, arguably the legislature did the next best thing and made its intention to repeal Torrens indefeasibility clear enough by rendering the lease interest in the land illegal and not just void. In addition, Justice Gibbs’ reasoning is supported by the application of the canons of construction: s 88B was later in time; it concerned a more specific matter, the grant of leases to hairdressers, than the indefeasibility provisions regarding interests in land more generally; and it advanced the public interest of the rights of workers to award conditions over the more private interest of an individual’s right to indefeasibility of title.

4. CONCLUSION

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117 *Breskvar v Wall* [1971] 126 CLR 376, 386.
118 *Travinto Nominees Pty Limited v Vlattas and Another* (1973) 129 CLR 1, 35.
119 The authors concede here that the concept of indefeasibility more generally also promotes an important public benefit, namely, the security for all members of society in dealing with the Torrens register and in obtaining an indefeasible title upon registration.
The Trial Judge, Court of Appeal and High Court in *Travinto* unanimously held that a right to renew in an illegal lease prohibited by statute, as opposed to a merely void lease, is not validated by registration. In so finding, most of the judgments adopted the specific performance rationale: a rationale that is both unprincipled and unconvincing.

Perhaps the difficulty for the majority judgments in *Travinto* can be put down to a particularly unfortunate case of bad timing. Bad timing for Hope J in deciding *Travinto* one year prior to the groundbreaking, immediate indefeasibility decision of the High Court in *Breskvar*. Bad timing for Mason JA, Barwick CJ, Stephen and McTiernan JJ for deciding *Travinto* three years prior to *Shell* which unreservedly endorsed the notion that an option to renew is an integral part of the leasehold estate which, when the lease is registered, enjoys the same priority and indefeasibility as the lease itself.

Were it not for this bad timing one wonders if the focus in *Travinto* might have been quite different. The judges, in applying Torrens orthodoxy, may have commenced their reasons with the recognition that the option to renew is part of the leasehold estate and therefore, absent an exception, is validated and rendered indefeasible on registration of the lease. With this as the starting point, a more principled approach to identifying a relevant exception is inevitable. In the authors’ view, Gibbs J does precisely that. The same cannot be said of the members of the various courts who adopted the specific performance rationale. In finding that the option to renew in the registered illegal lease was not capable of specific performance their Honours were, idiomatically speaking, putting the cart before the horse. For, it may well be that the option was incapable of specific performance, but why? What is the relevant exception to indefeasibility? If it is not the overriding statutes exception, it must, presumably, be the *in personam* exception. If it is the *in personam* exception, then, the court should clearly identify the cause of action that can be invoked against the registered lessee. This, the Trial Judge, the judges in the Court of Appeal and the majority in the High Court, singularly failed to do.
Chapter Six: Fraud Against the Registrar – An Unnecessary, Unhelpful and Perhaps, no Longer Relevant Complication in the Law on Fraud Under the Torrens System

This chapter is a journal article, Natalie Skead and Penny Carruthers, ‘Fraud Against the Registrar – An Unnecessary, Unhelpful and, Perhaps, No Longer Relevant Complication in the Law on Fraud under the Torrens System’ (2014) 40(3) Monash University Law Review 821
I INTRODUCTION

It is well established that upon the registration of a dealing regarding Torrens system land the non-fraudulent registered proprietor obtains an immediately indefeasible title.\(^1\) Indefeasibility is conferred regardless of any invalidity or defect in the instrument registered or in the process leading up to registration.\(^2\) One of the most significant express exceptions to a registered proprietor’s indefeasible title is fraud. In order for the fraud exception to apply, the fraud must be ‘brought home to’\(^3\) the registered proprietor or to his or her agent. Despite the significance of this exception, the precise content of what constitutes statutory fraud is unclear. This is probably due to the fact that fraud is not defined in the Torrens legislation and so the meaning to be ascribed to fraud has largely been left to the courts.

The traditional view of the fraud exception is that the fraud must have been practised against the person seeking to set aside the title of the registered proprietor.\(^4\) However, in recent decades the courts have developed an exception to the traditional view such that statutory fraud may also be established where the actionable fraud is said to be a ‘fraud against the Registrar’. Fraud in this sense arises when a person becomes registered pursuant to an instrument and the person has actual knowledge of, or is recklessly indifferent to, the fact that the instrument does not comply with the formalities for the execution and attestation of the instrument. The fraud lies in the misrepresentation to the Registrar that the instrument is a valid document that may properly be acted upon, when in truth the person registering the instrument knows that this is not the case.

\(^1\) This concept of indefeasibility is enshrined in the core indefeasibility provisions of the Torrens statutes. The most significant is the ‘paramountcy’ provision: Land Titles Act 1925 (ACT) s 58; Real Property Act 1900 (NSW) s 42; Land Title Act 2000 (NT) ss 188–9; Land Title Act 1994 (Qld) ss 184–5; Real Property Act 1886 (SA) ss 69–70; Land Titles Act 1980 (Tas) s 40; Transfer of Land Act 1958 (Vic) s 42; Transfer of Land Act 1893 (WA) s 68.

\(^2\) However, as will be discussed in section IV of this paper, the position in New South Wales, Victoria and Queensland is different where a mortgagee, without fraud, registers a forged mortgage instrument and has failed to take reasonable steps to verify the identity of the mortgagor: Real Property Act 1900 (NSW) s 56C; Transfer of Land Act 1958 (Vic) ss87A and 87B and Land Title Act 1994 (Qld) s 185(1A).

\(^3\) Assets Co Ltd v Mere Roihi [1905] AC 176, 210 (‘Assets’).

\(^4\) Munro v Stuart (1924) 41 SR (NSW) 203, 206 (‘Munro’).
The classic situation giving rise to a claim of fraud against the Registrar concerns the registration of mortgages by mortgagees in circumstances where a mortgagee — or more usually the mortgagee’s agent or employee — has falsely attested to having witnessed the signature of the mortgagor to the mortgage document, when in fact the mortgagee was not present when the mortgagor purportedly executed the document. The question arises: does the false attestation by the mortgagee or the mortgagee’s agent or employee constitute fraud so as to render the registered mortgage defeasible through the operation of the fraud exception? As noted, these circumstances have been viewed as possibly giving rise to a defeasible mortgage on the basis of fraud against the Registrar.

It is the thesis of this paper that the notion of fraud against the Registrar is an unnecessary, unhelpful and perhaps, no longer relevant complication in the law on fraud under the Torrens system. In order to explore this thesis, the paper commences with an examination of indefeasibility and the fraud exception and identifies the main categories in which the fraud exception arises. However, the main focus of the paper is twofold: first, to examine critically the cases of fraud against the Registrar to demonstrate that the notion is both unnecessary and unhelpful; and second, a review of recent developments in the law on fraud by an agent and in conveyancing requirements and practices across Australia which together, perhaps, serve to render fraud against the Registrar an increasingly irrelevant complication in the law on fraud under the Torrens system.

II INDEFEASIBILITY AND THE FRAUD EXCEPTION

The Torrens system has been described as a system of ‘title by registration’.\(^5\) Title to land passes on registration of an instrument regardless of any invalidity or defect in the registered instrument.

The robust nature of the indefeasible title conferred on a registered proprietor of Torrens land is most emphatically set out in the ‘paramountcy’ provisions in each of

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\(^5\) *Breskvar v Wall* (1971) 126 CLR 376, 384 (Barwick CJ) (‘*Breskvar*’).
the Torrens statutes.\textsuperscript{6} The broad gist of the paramountcy provisions is that notwithstanding the existence of any estate or interest which, but for the Torrens legislation might be held to be paramount, the registered proprietor shall, except in the case of fraud, hold the land absolutely free of any estate or interest except for certain express exceptions.

‘Fraud’ is, accordingly, an express exception to indefeasibility. One of the early cases to provide a comprehensive definition of fraud was \textit{Assets Co Ltd v Mere Roihi} where the Privy Council commented:

by fraud … [what] is meant [is] actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud … Further … the fraud which must be proved in order to invalidate the title of a registered purchaser for value … must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.\textsuperscript{7}

This definition is revealing. Fraud does not include constructive or equitable fraud,\textsuperscript{8} but entails actual fraud, dishonesty of some sort, which is ‘brought home to’ the...
registered proprietor or his or her agent. Fraud by persons from whom the registered proprietor claims title does not affect the current registered proprietor unless the current registered proprietor or agent had knowledge of the fraud. Failure to make enquiries that may have revealed fraud does not affect the registered proprietor. However, ‘wilful blindness’ as to the existence of fraud, in the sense of failing to make enquiries when suspicions are aroused, may constitute Torrens fraud. Clearly in these latter situations, there is a fine dividing line between a failure to make further enquiries, which is not fraud, and wilful blindness as to the existence of fraud, which is fraud. Some assistance as to the distinction between the two may be derived from the comments of Tadgell J in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* where his Honour described wilful blindness as:

> a form of cognisance which law and equity alike equate to subjective knowledge from which dishonesty may be inferred. ... [which is] more than a failure to see or look … [and] connotes a concealment, deliberately and by pretence, from oneself — a dissembling or dissimulation. In other words wilful blindness connotes a form of designed or calculated ignorance …

These comments regarding fraud suggest a narrow definition of statutory fraud and this view is reinforced by the ‘notice’ provision in the Torrens legislation. The provision provides, in essence, that a registered transferee of an interest in land is not to be affected by actual or constructive notice of any pre-existing unregistered interest or trust. Indeed, even where the person who becomes registered is aware that registration will defeat the prior unregistered interest, this too is not fraud.

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10 *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133, 146.

11 See *Land Titles Act 1925* (ACT) ss 59, 60(2); *Real Property Act 1900* (NSW) s 43(1); *Land Title Act 2000* (NT) s 188(2); *Land Title Act 1984* (Qld) s 184 (2); *Real Property Act 1886* (SA) ss 186–7; *Land Titles Act 1980* (Tas) ss 41(1)–(2); *Transfer of Land Act 1958* (Vic) s 43; *Transfer of Land Act 1893* (WA) s 134.

12 The wording of the notice provision is not clear on its face, however, it has been interpreted to mean that the protection from notice only applies once the transferee has become registered: see *Templeton v The Leviathan Pty Ltd* (1921) 30 CLR 34.

13 As noted by Kitto J in *Munro* (1924) 41 SR (NSW) 203, 206, ‘a purchaser may shut his eyes to the fact of there being an unregistered interest, and need not take any consideration of the persons who claim under the unregistered interest’.
Since the *Assets* case was decided, there have been many more judicial pronouncements as to the meaning of fraud.\(^{14}\) However, for present purposes, there are two particular areas that require further discussion: the concept of immediate and deferred indefeasibility; and the three broad categories that give rise to the fraud exception.

### A The Concept of Immediate and Deferred Indefeasibility

It is now settled that upon the registration of a dealing regarding Torrens system land, the non-fraudulent registered proprietor will obtain an indefeasible title despite the fact the instrument lodged for registration was a forgery. Indefeasibility is conferred on the registered proprietor’s title ‘immediately’.\(^{15}\) The effect of immediate indefeasibility is that a person becoming registered pursuant to a forged instrument is preferred to the prior registered proprietor or unregistered interest holder who has been defrauded of his or her interest.

For some years an alternative view of indefeasibility, termed ‘deferred’ indefeasibility had been adopted by the courts.\(^{16}\) Under the deferred approach, a person becoming registered pursuant to a forged document would not obtain an indefeasible title. Although registered, the title would be defeasible and the former registered proprietor would be entitled to bring an action to be restored to the register as proprietor.

Although the immediate indefeasibility approach is now adopted in the Australian jurisdictions, recent amendments to the Torrens legislation in Queensland, Victoria and New South Wales have effectively introduced a hybrid form of deferred

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\(^{15}\) *Frazer* [1967] 1 AC 569; *Breskvar* (1971) 126 CLR 376. The paramountcy provision provides statutory support for the immediate indefeasibility approach.

indefeasibility in relation to registered forged mortgages. The amendments introduce a
requirement for mortgagees to take reasonable steps to verify the identity of the
mortgagor. If these steps are not complied with and the mortgage is a forgery, in
Queensland the mortgagee will not obtain the benefits of an immediately indefeasible
title and in Victoria and New South Wales the Registrar or Registrar-General
(respectively) may cancel the registered mortgage. This is discussed further in section
IV.

B The Categories of Fraud

The Australian cases on fraud may conveniently be divided into three broad
categories: first, where a prior unregistered interest holder has been defrauded of their
interest; second, where a previous registered proprietor has been defrauded of their
registered interest; and third, cases in which the court has found a fraud has been
committed against the Registrar.

Although largely separate, these categories can overlap. In particular, cases involving
fraud against the Registrar are, by and large, also cases in the second category where
the prior registered proprietor has been defrauded of their interest. Typically cases in
the second category involve those situations where a registered proprietor has
acquired a registered interest pursuant to a forged instrument. If the person becoming
registered or their agent committed the forgery, then the fraud exception is applicable
and the registered proprietor's title will not be indefeasible but rather, defeasible. The
fraud exception will also apply if the registered proprietor or their agent either had
knowledge of the forgery or was wilfully blind as to the existence of forgery.

The fraud against the Registrar scenario arises in cases where the current registered
proprietor has not committed the forgery, yet still is found to be guilty of fraud. The
fraud arises by virtue of the fact the registered proprietor, or his or her agent,
misrepresents to the Registrar that the instrument is a valid document that may
properly be acted upon; when in truth the person registering the instrument knows that
this is not the case. The fraud in such cases is said to have been committed against the Registrar.\textsuperscript{17}

It is this third category of fraud that is the focus of this paper.

\section*{III FRAUD AGAINST THE REGISTRAR — AN UNNECESSARY AND UNHELPFUL COMPLICATION}

By far the least common category of fraud cases are cases of fraud against the Registrar. Recent case law focusing on the requirement of establishing ‘a wilful and conscious disregard and violation of the right of other persons’\textsuperscript{18} before the fraud exception will apply, has resulted in fraud in these cases becoming increasingly difficult to isolate. The authors consider this difficulty, and indeed, this category of fraud against the Registrar, to be an unnecessary and unhelpful complication in Torrens fraud.

It is argued in this article that this third category of fraud be abandoned and that the fraud against the Registrar cases be reconceptualised as simply another form of the second and relatively straightforward category of fraud cases. In short, the authors reject the three-fold taxonomy of fraud cases and submit that all cases of fraud can be properly understood and analysed by reference only to the first two categories: fraud against a previous unregistered interest holder and fraud against a prior registered proprietor.

Supporting this argument is the proposition advanced by Harvey J in 1924,\textsuperscript{19} and endorsed by later courts including the High Court in 1998,\textsuperscript{20} that to render a registered interest defeasible, the relevant fraud must have been against the party seeking to assert an interest against the fraudulent registered proprietor. In other words, the fraud

\begin{footnotesize}
\begin{enumerate}
\item Waimihia Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd [1923] NZLR 1137, 1173.
\item Munro (1924) 41 SR(NSW) 203, 206.
\item Ferguson (1998) 192 CLR 248, 258. See also Davis v Williams (2003) 11 BPR 21,313, 21,316 [17], 21,327 [90] (‘Davis’).
\end{enumerate}
\end{footnotesize}
must have been against the defrauded party who has been deprived, whether partially or totally, of an estate or interest in land and who is seeking the assistance of the court. The Registrar is not such a party. Reconceptualising the cases of fraud against the Registrar as cases of fraud against the prior registered proprietor will not only simplify the law on fraud in the Torrens system, it will promote consistency in the treatment and, therefore, outcome of like cases.

There are five different kinds of fact scenarios that have historically been treated as cases of fraud against the Registrar. These scenarios are where: (1) the registered proprietor or his or her agent did not have a hand in, and was not aware of, the forgery but falsely attested the forged signature;\(^{21}\) (2) the registered proprietor altered the instrument (whether forged or not) after execution but before lodgement for registration;\(^{22}\) (3) the registered proprietor did not have a hand in, and was not aware of, the forgery or the false attestation but caused the forged and falsely attested instrument to be registered;\(^{23}\) (4) the instrument was not forged but it was falsely attested by the registered proprietor or his or her agent; \(^{24}\) and (5) the registered proprietor or his or her agent attested the signature of an imposter.\(^{25}\) The first, fourth and fifth scenarios are situations where there has been a false attestation by the registering party. The second and third scenarios do not involve a false attestation by the registering party, however, may also give rise to a claim of fraud against the Registrar.

An examination of the cases reveals that in each kind of case the moniker of ‘fraud against the Registrar’ is either unnecessary or unhelpful, or both, and is, furthermore, prone to lead to inconsistent and, in some cases, inappropriate outcomes.

### A False Attestation of Forged Signature


The approach of Australian courts to cases where the registered proprietor is not responsible for the forgery itself but, either directly or through an agent, effected the false attestation of the forged signature, is exemplified in the often-cited 1984 Victorian case of De Jager. In this case, Mrs De Jager’s signature to a mortgage over her home in favour of Australian Guarantee Corporation Ltd (AGC) was forged. Mr and Mrs De Jager were the joint registered proprietors of the property. The court made no finding as to who had committed the forgery but did find that AGC was not aware of the forgery. However, an employee of AGC was aware that Mrs De Jager’s signature to the mortgage had not been attested. The employee was also aware that a witness who, of course, did not see Mrs De Jager executing the mortgage, falsely attested her signature. With this knowledge, AGC’s employee/s lodged the mortgage for registration and it was registered. The issue for Tadgell J was whether AGC held an indefeasible mortgage over Mrs De Jager’s interest in the property or whether the mortgage was defeasible and liable to be set aside on the grounds of fraud.

In finding that the fraud exception did apply and, therefore, that AGC could not claim possession of the De Jager’s property, Tadgell J focused on the significance of attestation in the conveyancing process. Quoting Sir John Romilly in Wickham v Marquis of Bath, his Honour noted that attesting a deed ‘means, as I understand it, that one or more persons are present at the time of the execution for that purpose, and that as evidence thereof they sign the attestation clause’. Such an attestation is commonly a prerequisite for the registration of a deed. This was the case in regards to the mortgage in De Jager.

Attestation clauses generally take a fairly standard form. The attestation clause in De Jager is a typical attestation clause: ‘Signed, sealed and delivered by the said … [mortgagor] in the presence of … [the witness]’.

Both the mortgagor and witness sign the deed. At a fundamental level, signing an attestation clause in a mortgage — or any other instrument for that matter — without having witnessed the mortgagor executing the mortgage is an inherently dishonest act. The witness is certifying to all who may care to examine the instrument that it was properly signed in the witness’s

27 Ibid 488.
presence, while knowing full well that, in fact, it was not. This constitutes actual dishonesty. To state it simply, it is a lie.

In De Jager, AGC (through its employee/s) being alive to the proper attestation of the mortgage being a prerequisite to its registration, Tadgell J concluded that:

when AGC presented the subject instrument of mortgage for registration, it was representing to the Registrar of Titles, as against the mortgagors, an honest belief that they, and each of them, had executed the instrument in the presence of a witness who, if it came to the point, could be relied on to prove the execution. To lodge an instrument for registration in the knowledge that the attesting witness had not been present at execution must deprive the lodging party of an honest belief that it is a genuine document on which the Registrar can properly act.28

An analysis of Tadgell J’s reasoning reveals that, in his Honour’s view, the fraud in question lies not in the false attestation itself (despite the inherent dishonesty thereof) but rather in the resultant false representation that is made to the registering authority as to the circumstances in which the instrument was executed. Hence the categorisation of these case as involving fraud against the Registrar.

A compelling fact for Tadgell J, in finding that AGC had committed fraud against the Registrar, was that AGC had no contractual or other relationship with Mrs De Jager. Knowing that Mrs De Jager’s purported signature had not been properly attested must necessarily have raised ‘a suspicion of irregularity’29 and, in Lord Lindley’s words in the Assets case, AGC had ‘abstained from making inquiries for fear of learning the truth’.30

The approach of Tadgell J in De Jager has been adopted consistently in subsequent false attestation cases. In Beatty v ANZ Banking Group31 (‘Beatty’), for example, Mandie J found fraud on the part of ANZ Bank. An officer of the bank, knowing ‘that the subject mortgage was not executed in her presence by the … [mortgagor]’,

28 Ibid 498 (emphasis added).
29 Ibid 499.
31 [1995] 2 VR 301.
nonetheless ‘put the subject mortgage forward on the path to registration without having an honest belief that the subject mortgage was executed by the … [mortgagor] in her presence, whilst appreciating that the lodging of the mortgage would convey a representation to the contrary’.\(^{32}\) The false representation in this case, as in *De Jager*, was held to have been made ‘to the Registrar of Titles’.\(^{33}\)

For many years, treating false attestation cases as instances of fraud against the Registrar seemed an appropriate mechanism for dealing with these difficult cases. Although the later registered proprietor or his or her agent was not involved in, and was not aware of, the forgery, the registered proprietor was nonetheless held responsible for loss sustained as a result of the registration of the forged instrument due to the inherently dishonest conduct in falsely attesting the forged signature.

In 1999, however, the artificial and problematic nature of this taxonomy emerged in the case of *Russo v Bendigo Bank Ltd*\(^{34}\) (‘*Russo*’). Russo was the registered proprietor of property. Her daughter and son-in-law controlled a company which obtained a loan from Bendigo Bank. The loan was secured by a registered mortgage over Russo’s home. Russo was not aware of, and did not consent to, the mortgage. Her signature on the mortgage was forged by her son-in-law. A law clerk, Gerada, who worked for Bendigo Bank’s solicitor, falsely attested Russo’s signature. She did this despite having been instructed in very clear terms by the solicitor never to attest an instrument that was not signed in her presence. The court accepted that neither Gerada nor the solicitor knew the mortgage was forged and the solicitor was not aware of Gerada’s false attestation.

Ormiston JA, with whom Winneke P agreed, found that, notwithstanding the false attestation that Gerada knew ‘contained a false representation that she had been present at the time of [Russo’s] signature’ and ‘accepting what was said in *De Jager*’,\(^{35}\) Gerada had not committed fraud against the Registrar. This was because, in

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\(^{32}\) Ibid 314 (emphasis added).

\(^{33}\) Ibid 315. See also *Hedley* (1984) 3 BPR 9,477; *Sansom* (1994) 6 BPR 13,790, 13798 in which, following an examination of the case law, Rolfe J concluded that ‘[t]hese authorities establish there is fraud, within the meaning of s 42, when a representation is made, contrary to fact, that a person is personally known to the attesting witness and has signed the document in his/her presence’.

\(^{34}\) [1999] 3 VR 376.

\(^{35}\) Ibid 381–2 [22].
addition to actual fraud, personal dishonesty and moral turpitude, there is a ‘final and critical element in fraud, namely … “a wilful and conscious disregard and violation of the rights of other persons”’. Gerada may have been aware that her attestation of Russo’s signature was false and that she was not to falsely attest a signature. However, the court found, being only 19 or 20 years old with only three years’ experience as a law clerk, there was no evidence that Gerada understood the conveyancing process or that the mortgage was to be lodged for registration or, perhaps most importantly, that an attestation clause constituted a representation to the Registrar that the mortgage had been properly executed by Russo in Gerada’s presence. Accordingly, Gerada cannot be said to have ‘wilfully or consciously disregarded’ the Registrar’s right to rely on the attestation clause as verification of the identity of the mortgagor and, consequently, the validity and authenticity of the mortgage. So, while Gerada ‘knew that what she had said was false … she … [had not] been shown to be dishonest’.

The outcome in Russo is somewhat unsettling. If Russo is correct, whether a forged mortgage is enforceable against a defrauded registered proprietor would seemingly depend on an assessment of the age, experience and level of understanding of the person attesting the mortgage on behalf of the registered mortgagee. Basing the success or failure of a registered proprietor’s claim on this arbitrary and highly subjective assessment is both undesirable and unjust. Undesirable because, as suggested by Rodrick, it provides little incentive for mortgagors and their agents to provide training in regards to this crucial aspect of the conveyancing process. Indeed, it provides a compelling incentive not to do so. Further, it perpetuates, perhaps even rewards, ‘the lax approach to attestation that is said to be widespread in the community’. Unjust because a claim of fraud will stand or fall on the basis of the subjective understanding of a person with whom the defrauded claimant may have had no contact whatsoever, as was the case in Russo.

36 Ibid 385 [33], 386 [37], quoting Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd [1923] NZLR 1137, 1173 (Salmond J).
37 Russo [1999] 3 VR 376, 386–7 [39].
39 Rodrick, above n 38, 121.
40 Ibid 122.
As noted by Rodrick, it is not easy to reconcile the reasoning and decision in *Russo* with the previous cases including *De Jager* and *Beatty*. In particular, Rodrick points out, in the previous cases, ‘an appreciation of the consequences of a false attestation requirement was not overtly emphasised by the courts as a separate and independent requirement of fraud in the attestation process’.

The concern and inconsistency is not, however, a result of the emphasis in *Russo* on the subjective element of fraud, requiring a wilful and conscious disregard or violation of the rights of another person. Rather, it lies in the unhelpful and unnecessary, indeed, inappropriate categorisation of these cases as involving fraud against the Registrar and, therefore, focusing the enquiry on whether the false attester appreciated and, consequently, disregarded the rights of the Registrar. As Gerada did not appreciate that the Registrar would rely on the attestation clause as authenticating Russo’s signature and the validity of the mortgage, she could not be said to have disregarded the Registrar’s right to do so. It seems entirely logical and sensible that you cannot disregard a right you do not know exists.

If, as the authors suggest, one focuses the enquiry on the defrauded party who has been deprived of an interest in land and who is seeking the assistance of the court, the outcome may well be different. Gerada may not have appreciated the Registrar’s right to rely on the attestation clause as verifying the identity of the mortgagor and the veracity of her signature. However, given the strict and explicit instructions by her employer not to attest a signature she had not, in fact, witnessed, Gerada surely did understand the right of the mortgagor, Russo, to ‘the protection that proper attestation is designed to provide’. It was this right that Gerada wilfully and consciously disregarded and violated. Therefore, it is arguable that, even if statutory fraud does require an element of subjective wrongdoing as suggested in *Russo*, Gerada’s false attestation did amount to fraud: perhaps not fraud against the Registrar, but certainly fraud against the mortgagor. Whether or not that fraud could then be sheeted home to

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41 Ibid 113.  
42 Ibid 120.
the mortgagee Bendigo Bank, so as to render the mortgage indefeasible, falls to be decided on agency principles — an issue beyond the scope of this article.\textsuperscript{43}

In analysing the decision in \textit{De Jager}, Rodrick argues that Tadgell J expressly recognises that a false attestation amounts to a disregard of a mortgagor’s rights:

Tadgell J was of the opinion that an unwitnessed signature should automatically raise a suspicion of irregularity in the mind of an attesting witness and if that witness proceeds to attest the signature, he or she should be regarded as having consciously disregarded the mortgagor’s rights. … A person who falsely attests a mortgage has told a lie, and even if he or she did not intend the mortgagor to suffer loss, and actually assumed that the attestation was giving effect to the mortgagor’s intentions, the witness still told a lie and that lie amounted to a disregard of the mortgagor’s rights. Portraying the situation in this way does not require the witness to have understood the process of registration.\textsuperscript{44}

The authors endorse this analysis.

Reconceptualising forgery and false attestation cases as simply another form of fraud against the registered proprietor will not only accord with the strong pedigree of cases requiring the fraud to have been against the party seeking to assert an interest against the fraudulent registered proprietor,\textsuperscript{45} but it will also introduce consistency of reasoning and certainty of outcome into this difficult area. In addition, it may go some way to dispelling the unwarranted and objectionable notion that ‘the signature of an attesting witness to a document to be registered under the … [Torrens statutes] is no more than a formality’.\textsuperscript{46}

\textsuperscript{43} Ormiston JA and Winneke P considered that this was ‘the very kind of fraud which ought to have been’ imputed to the bank: \textit{Russo [1999]} 3 VR 376, 391 [50]. Dissenting on this issue Batt JA held that ‘the agent’s employee’s fraud cannot be sheeted home to the agent or his principal’, it being ‘too remote from the registering party to affect that party’: at 392 [55]. A different view from that of Justice Batt’s was adopted by the Supreme Court of New Zealand in \textit{Dollars & Sense Finance Ltd v Nathan [2008]} 2 NZLR 557 (‘\textit{Dollars & Sense}’), where the forgery of a sub-agent, Rodney, for the agent, Mr Thomas, was sheeted back to the registered mortgagee — Dollars & Sense.

\textsuperscript{44} Rodrick, above n 38, 121.

\textsuperscript{45} See, eg, \textit{Munro} (1924) 41 SR(NSW) 203; \textit{Ferguson} (1998) 192 CLR 248. See also \textit{Davis} (2003) 11 BPR 21,313.

\textsuperscript{46} \textit{De Jager [1984]} VR 483, 497.
B Alteration After Execution

The unhelpfulness of treating cases in which a registered instrument has been unilaterally altered after execution, but before registration, as frauds against the Registrar is well illustrated in Beatty.47 Ms Beatty and Mr Hennessy were the registered joint tenants of property in Victoria. They subsequently married. Mr Hennessy sought finance from ANZ Bank for a business venture. ANZ Bank was prepared to loan the money on security of a registered mortgage over Mr Hennessy and Ms Beatty’s property. Ms Beatty did not consent to the mortgage. Indeed, she expressly refused to put the property up as security for the loan.

Undeterred by his wife’s refusal, Mr Hennessy agreed to the terms of the loan offered by ANZ Bank. Although the precise facts at this point are somewhat sketchy, the court accepted that Ms Beatty’s signature to the mortgage was a forgery. It followed that the attestation of Ms Beatty’s signature by the bank officer, Mrs Mills, was false. Following the line of reasoning in De Jager, Mandie J found that, as against Ms Beatty, the mortgage was defeasible on grounds of fraud perpetrated by ANZ Bank:

the bank (whilst having no knowledge of the forgery itself) had falsely represented to the Registrar of Titles an honest belief that the plaintiff had executed the instrument in the presence of Mrs Mills … whereas the bank by its employees knew that this was not the case (or had no honest belief that this was the case).48

That, however, was not the end of the story. In addition to the false attestation of Ms Beatty’s signature, it was also found that the mortgage had been altered materially after execution. The mortgage had been prepared and fraudulently executed in the name of John Joseph Hennessy and Susan Elizabeth Hennessy. However, the Certificate of Title reflected the registered proprietors as John Joseph Hennessy and Susan Elizabeth Beatty. To facilitate registration of the mortgage, the words ‘nee Susan Elizabeth Beatty’ were added to the mortgage after execution and without initialling by the mortgagors. Mandie J found that this alteration, too, was an act of statutory fraud on the part of ANZ Bank. It was, his Honour reasoned,

48 Ibid 315.
a false representation to the registrar that the instruments had been executed by the mortgagors after such alteration or in their altered state, as to which state of affairs no honest belief existed on the part of the relevant bank employees.\footnote{Ibid 316.}

The reasoning of Mandie J would suggest that, even if Ms Beatty’s signature to the mortgage was not a forgery and she had both consented to and executed the mortgage, the alteration would nonetheless, of itself, have been sufficient to render the registered mortgage defeasible. In the authors’ view, this would be a remarkable and inappropriate outcome, albeit, on the reasoning adopted by the court, a correct one. It would be an outcome resulting directly from the unhelpful and unnecessary treatment of the case as one of fraud against the Registrar.

It is true that lodging the mortgage for registration with the subsequent alteration was a false representation to the Registrar as to the circumstances in which the alteration was made. It is, therefore, arguable that in lodging the mortgage with the Titles Office, ANZ Bank wilfully and consciously disregarded the Registrar’s right to rely on that lodgement and the attestation of the mortgage as verifying not only the authenticity of the mortgagors’ signature but also the procedural validity of the instrument. It follows that, even on a Russo analysis, the alteration does constitute statutory fraud against the Registrar.

As noted above, however, to render a registered interest defeasible, the relevant fraud must have been against the party seeking the assistance of the court. In Ferguson, the High Court unanimously considered that ‘for fraud to be operative, it must operate on the mind of the person said to have been defrauded and to have induced detrimental action by that person’.\footnote{(1998) 192 CLR 248, 258 [19].}

Treating this case correctly as a fraud against the party seeking the assistance of the court — Ms Beatty — would provide a far more convincing and palatable outcome. Had Ms Beatty, in fact, consented to the mortgage and executed it in its pre-alteration state, could it truly have been said that she was defrauded as a result of the alteration?
Surely not. The effect of the subsequent alteration was not to deprive her of an interest and was not inconsistent with her intention. She fully intended to grant the mortgage to ANZ Bank. Nor could it be said in those circumstances that ANZ Bank wilfully and consciously disregarded Ms Beatty’s right. The alteration did not in any way alter her rights and obligations under the mortgage, which she had executed. The alteration was simply done to give effect to the parties’ shared intention.

Rather than the alteration being an act of actual dishonesty and moral turpitude on the part of ANZ Bank, at most, in these modified circumstances, it might be said that it constituted an irregularity in the process of registering the mortgage. All Australian Torrens statutes incorporate a provision to the effect that the title of a registered proprietor shall not ‘be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate’.\(^ {51}\) The alteration would therefore not be a basis for declaring the mortgage defeasible whether on grounds of fraud or some other exception to indefeasibility.

This was the reasoning adopted by White J in *J Wright Enterprises*\(^ {52}\) in concluding that an alteration to a mortgage, effected after execution, did not amount to fraud. The alteration was adding the words ‘by Trevor O’Rourke — Director its duly constituted Attorney under Power of Attorney No 70981228’ below O’Rourke’s properly attested signature on the mortgage.\(^ {53}\) His Honour reasoned as follows:

> By adding the words that he did, he conveyed a false impression to the Registrar of Titles but by the time he added those words of capacity he had seen the original power of attorney and he did not act in violation of any other person’s rights … the authorities do not support such exacting standards upon agents of mortgagees with respect to registration, and, it must be emphasised, there were no other rights, for example, of priority, which were disregarded.\(^ {54}\)

\(^ {51}\) *Transfer of Land Act 1893* (WA) s 63. See also *Land Titles Act 1925* (ACT) s 53; *Land Title Act 2000* (NT) s 33; *Land Title Act 1994* (Qld) s 46; *Real Property Act 1886* (SA) s 68; *Land Titles Act 1980* (Tas) s 39; *Transfer of Land Act 1958* (Vic) s 27D.

\(^ {52}\) [2010] QSC 213 (17 May 2010).

\(^ {53}\) Ibid [50].

\(^ {54}\) Ibid [92] (citations omitted) (emphasis added).
While curious in some respects, this statement clearly directs the focus of the fraud enquiry at the mortgagor claimant — the person asserting fraud — rather than the Registrar. It recognises that, if the mortgagor consented to and properly executed the mortgage, then it cannot be said that his or her rights were violated and, it follows, there has been no statutory fraud.

Similar reasoning was adopted by Young CJ in Eq in *Davis*. The Chief Justice acknowledged the (by then) long pedigree of case law treating false attestation (and alteration) cases as cases of fraud against the Registrar. This categorisation did not, however, prove helpful. In deciding that the alteration in question did not constitute statutory fraud his Honour noted:

> Even though anyone who attests a dealing under the Torrens system falsely is in one sense committing fraud against the Registrar General, the cases show that that is not enough … In all cases it must be shown that there was fraud by the person becoming registered or its agent in obtaining registration so that an interest which would otherwise take priority over that interest has been defeated … In the present case, Ms Moore never intended that her action would *deprive any person of any interest in the land*.

By directing the fraud enquiry to the wilful or conscious disregard of the mortgagor’s rights, Young CJ in Eq reached a decision contrary to that of Gzell J who found the alteration to be a fraud against Registrar:

> by altering the instrument and lodging it, the registration clerk falsely represented to the Registrar-General that New South Wales Land and Housing Corporation had transferred the land to the first opponent and her husband as tenants in common in equal shares. The false lodgment [sic] of the altered document was, in my view, enough to constitute fraud.

It is submitted that the approach adopted by White J in *J Wright Enterprises* and Young CJ in Eq in *Davis* is a far more sensible approach to dealing with alteration

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57 Ibid 21,345 [253].
cases. In each case the outcome will turn on the context in which that conduct occurred. If the conduct did no more than give effect to the parties’ shared intention, and the rights of the person asserting fraud were not disregarded, or indeed, affected in a way that he or she did not intend, fraud will not be established. Abandoning the ‘fraud against the Registrar’ tag will enable courts to draw a clearer line between actual fraud and mere irregularities.

C Lodgement of Forged and Falsely Attested Instrument for Registration

An extension of the forgery and false attestation cases above, is the situation where the registered proprietor did not have a hand in, and was not aware of, the forgery or the false attestation, but lodged the forged and falsely attested instrument for registration. *Young v Hoger*[^58] is such a case. Mr and Mrs Hoger were the registered joint tenants of a rural property. A mortgage was executed over this property in favour of the appellants. Neither Mr nor Mrs Hoger had executed this mortgage. Rather, their daughter, Denise, forged both of their signatures. Mr Hoger was unaware of this forgery. Mrs Hoger, on the other hand, was both aware of, and consented to, the forgery. A Justice of the Peace purportedly witnessed the forged signatures. In fact, Denise forged the attestations. Denise returned the forged and falsely attested documents to the appellant’s solicitor, Parker. The appellants conceded that Parker was acting as their agent in dealing with the Hogers and Denise.

At first instance it was found that, in all the circumstances of the case including Parker’s failure to follow his own identification procedures of insisting on receipt of certified copies of the mortgagors’ identity documents, his failure to deal directly with one of the mortgagors (Mr Hoger), and his failure to verify the attestation by the Justice of the Peace, Parker ‘had no factual basis for any honest belief that the mortgage instrument was genuine … His conduct in not ascertaining from Mr Hoger what he, Mr Hoger, knew about the transaction was reckless in the extreme’.[^59] This recklessness amounted to statutory fraud.

[^59]: Ibid [12], quoting judge at first instance.
The Court of Appeal unanimously overturned this decision. In light of all the facts and applying the approach adopted in the *Assets* case, the Court of Appeal considered that it could not be said that Parker had acted dishonestly. Rather than finding that Parker’s suspicions were aroused and that he wilfully abstained from making an enquiry for fear of learning the truth, it was found that he was careless in his belief that Mr Hoger had executed the mortgage. This was insufficient to find statutory fraud against Parker.⁶⁰

Of interest in *Young’s* case is the absence of any reference to the subjective element of fraud requiring a wilful and conscious disregard by Parker of the rights of another. This may be because this case was decided shortly before *Russo* in which this requirement for fraud was highlighted as a critical feature of statutory fraud. It is quite possible that if the Court of Appeal had focused its enquiry on this subjective element, a different conclusion may have resulted. Parker was a solicitor of many years’ experience. He had put in place his own clear procedures for identifying parties to a conveyancing transaction. Unlike Gerada in *Russo*, he clearly had established those procedures knowing the importance of ensuring that instruments headed for registration are properly executed by the parties to be bound. Yet he failed to follow those procedures, thereby facilitating the registration of a forged and falsely attested mortgage.

Construing this case as one of ‘fraud against the Registrar’, it is arguable that although his suspicions as to fraud may not have been aroused, by failing to follow his own identification processes and then putting this mortgage on the path to registration, Parker falsely represented to the Registrar that the identity of the mortgagors had been verified and the mortgage had been properly executed and attested, in circumstances where he had no basis for believing the same. In this sense, Parker might be said to have wilfully and consciously disregarded the rights of the Registrar to rely on Parker’s lodgement of the mortgage as a representation that Parker had verified the

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⁶⁰ See *Hilton* [2007] QSC 401 (13 December 2007) [42]–[44] in which Douglas J on very similar facts to *Young*, and adopting the reasoning in that case, found that while the registered proprietor’s solicitors may have been careless in not following their own internal identification processes, they had not been actually dishonest.
identity of the mortgagors and the mortgage had been properly executed and attested.61

Even if one were to construe this case properly as fraud against the registered proprietor, Mr Hoger, the same result may well ensue. Simply, by failing to carry out his own internal identity checks, Parker wilfully and consciously disregarded Mr Hoger’s right to the lodgement of a properly executed and attested mortgage, a right which Parker fully understood and appreciated.

Analysed from a subjective perspective as suggested in Russo, it is evident that, although adopting the fraud against the Registrar categorisation in this kind of case may not be unhelpful, it is unnecessary.

D False Attestation of Otherwise Valid Instrument

A rare example of fraud against the Registrar arises where, although the prior registered proprietor did, in fact, execute the registered instrument which resulted in him or her being deprived of an interest in land, that registered proprietor seeks to set aside the registered instrument on the grounds that it was falsely attested. The curiosity in this kind of case lies in the fact that the person asserting fraud has in fact, executed the instrument fully intending that it will be registered and enforceable. This registered proprietor then seeks to avoid the legal consequences of the registered instrument by averring fraud on the part of the later registered proprietor or his or her agent. Such an averment of, and reliance on, fraud seems somewhat dubious and less than honest.

Hickey v Powershift Tractors Pty Ltd62 provides a useful illustration of this rare and curious situation. Hickey signed two duplicate originals of a mortgage over her home in favour of Powershift Tractors. Although Birrell witnessed Hickey signing the mortgages, he did not sign as witness. As he was a director of Powershift Tractors, Birrell thought that he was not a competent witness. Birrell handed the signed but

61 See the analogous case of Quest Rose Hill Pty Ltd v Owners Corp — Strata Plan 64025 (2012) 16 BPR 31,387.

unwitnessed documents to a chartered accountant whom he asked to witness the
documents. Hickey sought to avoid the mortgage on grounds that Powershift Tractors
was ‘involved in a “fraud” within the meaning of the Real Property Act in that it
knowingly permitted a document to go forward for registration which it was aware
had not been witnessed in accordance with section 36(1D) of the Real Property Act’, 63
that is; a fraud had been committed against the Registrar.

Bryson J considered the circumstances to be ‘disgraceful to the professional people
involved’. 64 Although his Honour stated that ‘[t]he present case is unusual, perhaps
unique in that the attestation was untrue but the document was in fact executed by the
party as purportedly attested’, 65 his Honour was nonetheless satisfied that Hickey had
established fraud by Powershift Tractors rendering the mortgage defeasible. In so
finding, Bryson J stated ‘there was actual dishonesty for the purposes of s 42, but it
was not directed specifically to dishonestly depriving the mortgagor of her interest in
the property. The advantage gained by fraud was registration, and that advantage is
vitiated’. 66 His Honour continued that ‘[r]egistration is an advantage and a set of facts
known to be false was relied on to obtain registration, and hence there was, in my
finding, actual fraud, involving moral turpitude, with respect to the registration’. 67

Whilst Bryson J found that Powershift Tractors was not entitled to enforce the
mortgage as a registered and, therefore, indefeasible interest in Hickey’s property,
there would be no justice if Hickey were permitted to take advantage of this
irregularity and disavow the effect of the mortgage which she had in fact consented to
and signed. 68 By finding that the vitiating effect of the fraud extended only to the
registration and not the underlying mortgage agreement, Bryson J reached the
conclusion that the agreement was enforceable against Hickey in equity as an
unregistered mortgage. 69

63 Ibid 17,340.
64 Ibid 17,343.
65 Ibid 17,344.
66 Ibid.
67 Ibid.
68 Ibid 17,342-17,343.
69 Ibid 17,344.
Not only are the facts in *Hickey* unusual, the reasoning of the court is, in the authors’ view, unsatisfactory. Being a 1998 case, it is not surprising that the court cited and followed the reasoning in the false attestation cases. In construing this case as one of ‘fraud against the Registrar’, Bryson J was compelled by precedent to find that Powershift Tractors had engaged in statutory fraud. By lodging the falsely attested mortgage for registration and thereby representing to the Registrar that the mortgage had been signed by Hickey in the presence of the chartered accountant when Powershift Tractors, through its officers, knew that this was untrue — or at the very least, had no honest belief that it was true — Powershift Tractors had committed a fraud against the Registrar. Following the reasoning in *Russo*, Powershift Tractors wilfully and consciously disregarded the Registrar’s right to rely on the attestation clause as verifying that the mortgage was properly executed by the mortgagor in the presence of the witness.

Whilst in accordance with precedent, the reasoning in Hickey is unconvincing and, in the authors’ view, the outcome inappropriate. It was the agreed intention of all the parties involved, including Hickey, that Hickey would grant a registered mortgage over her property to Powershift Tractors. She purposed to do this when she executed the mortgage in duplicate in the presence of a witness. Like Birrell, she was aware that the witness was required to, but had not, attested her signature. She acquiesced in Birrell taking the document away to be attested, lodged and registered. She then sought to take advantage of this irregularity by having the mortgage set aside. It is submitted that, in the circumstances, not only should Hickey be bound by the unregistered mortgage agreement, but she should also be bound by the consequences of the registration of the mortgage.

The unsatisfactory outcome in *Hickey* is, once again, a direct result of construing it as a case of fraud against the Registrar. If one construes this case, as the authors propose all these cases ought to be construed, as a fraud against the registered proprietor — Hickey — the outcome may well be different. Bryson J expressly stated that, although there was fraud by Powershift Tractors, ‘it was not directed specifically to dishonestly

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70 Ibid 17,344.
 depriving the mortgagor of her interest in the property'. The fraud related solely to the process of registration. It follows that while there may have been fraud against the Registrar, there was no actual fraud amounting to moral turpitude against Hickey — the person asserting fraud and seeking the assistance of the court.

As noted above, the High Court in Ferguson[72] — decided in the same year as Hickey — stated that ‘for fraud to be operative, it must operate on the mind of the person said to have been defrauded and to have induced detrimental action by that person’. Not only was Hickey not defrauded, she did not act to her detriment as a result of the fraud attestation. The false attestation ‘did not have the effect of harming, cheating or otherwise being dishonest to’ Hickey. To use the language adopted in Russo, Powershift Tractors did not wilfully or consciously seek to violate or disregard the rights of Hickey. Hickey intended to grant an enforceable indefeasible mortgage to Powershift Tractors, and that was the effect of her own conduct as well as that of Birrell, the accountant and Powershift Tractors.

Once again fraud against the Registrar proves an unhelpful and in this sort of case, inappropriate, categorisation.

E  Attestation of Signature of Imposter

Cases involving signature of an instrument by an imposter in the presence of a witness are few and far between. The unanimous decision of the New South Wales Court of Appeal in Grgic v ANZ Banking Group[76] (‘Grgic’) sets out the judicial approach to assessing the existence of statutory fraud on the part of the registered proprietor or his/her agent in attesting the signature of an imposter.

In this case, Mr Grgic Jnr and his wife arranged an overdraft facility with ANZ Bank on security of a mortgage over property owned by Mr Grgic Snr. Mr Grgic Snr did not consent to, and indeed, was not even aware of, this arrangement. Mr Grgic Jnr and his

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71 Ibid.
73 Ibid 258 [19].
74 Ibid.
75 See Equity One [2013] VSC 68 (26 February 2014) [92].
wife arranged for Mr Sierra to attend with them at ANZ Bank, present himself as Mr Grgic Snr and execute the mortgage instrument as if he were Mr Grgic. At the meeting with the bank officer, Mr Sierra produced the duplicate Certificate of Title for the mortgaged property as well as a form of mortgage, possibly executed by Mr Grgic Snr, in relation to a previously proposed loan by a different bank. Mr Sierra’s forgery of Mr Grgic Snr’s signature on the mortgage instrument in favour of ANZ Bank was witnessed by a bank employee.

Mr Grgic Jnr and his wife defaulted on the terms of the overdraft facility and ANZ Bank sought to enforce the mortgage against Mr Grgic Snr. Mr Grgic Snr counter-claimed on the basis that the mortgage was not enforceable against him because it was procured by the fraud of an employee of ANZ Bank. The fraud in question was constituted in an employee of ANZ Bank falsely certifying that (1) Mr Grgic was personally known to him; and (2) the dealing was correct for the purposes of the relevant Torrens statute. These false certifications constituted statutory fraud against the Registrar.\(^77\)

The court rejected this submission. While the court was prepared to accept, with the benefit of hindsight, that the bank officers ‘were less than meticulous than they might otherwise have been in seeking to establish that the person who was introduced to them as Mr Grgic Snr was in truth the registered proprietor of the subject property’ and,

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\text{it being well-established that a person who presents for registration a document which is forged or has been fraudulently or improperly obtained, is not guilty of ‘fraud’ if he honestly believes it to be a genuine document which can be properly acted upon … a less than meticulous practice as to the identification of persons purporting to deal with land … does not constitute a course of conduct so reckless as to be tantamount to fraud.}\(^78\)

This result is a palatable and proper outcome on the facts in \textit{Grgic} and accords with prevailing conveyancing practice at the time. As noted by Rodrick, the bank employee

\(^77\) Ibid 215.
\(^78\) Ibid 221–2; See also \textit{Ratcliffe} [1969] 2 NSW 146, 149.
‘could not be described as having acted dishonestly or with moral turpitude, or as having consciously sought to defeat or disregard the rights of others’. However, in the current conveyancing environment where explicit and rigorous identification processes have been introduced into Titles Office practice as detailed in section IV below, it is possible that such a ‘less than meticulous’ practice could constitute statutory fraud, being a failure to follow mandatory identification processes. This may well be the case regardless of whether such a case is treated as a fraud against the Registrar or a fraud against the prior registered proprietor. Failure to follow clearly articulated identification processes may not only be sufficiently reckless as to the identity of the signatory so as to constitute fraud but, in addition, would constitute a conscious disregard of the registered proprietors’ rights to a properly executed and attested instrument. Once again, resorting to the language of fraud against the Registrar to establish statutory fraud is an unnecessary complication in the analysis of the imposter cases.

IV  FRAUD AGAINST THE REGISTRAR — AN INCREASINGLY IRRELEVANT COMPLICATION

As discussed in section III above, the formulation of a claim of fraud against the Registrar is both unnecessary and unhelpful. However, not only is it unnecessary and unhelpful but, due to recent developments in the law, a claim of fraud against the Registrar is also an increasingly irrelevant complication in the law on Torrens fraud. The challenges to the continued relevance of this category of fraud arise from a number of quarters: (1) the revised and potentially expanded operation of fraud by an agent; (2) the application of indefeasibility to forged ‘all moneys’ mortgages; (3) the potential impact on indefeasibility of s 42 of the National Credit Code; and (4) the introduction of considerably strengthened identity verification requirements for the execution of Torrens documents in the Australian jurisdictions.

A  The Operation of Fraud by an Agent

Rodrick, above n 38, 126.
The Privy Council made it clear in *Assets* that a registered proprietor’s title may be challenged on the basis of fraud, even though the registered proprietor was not personally fraudulent, if it can be established that the registered proprietor’s agent was guilty of fraud or had knowledge of fraud.

The traditional starting point for a discussion of fraud and agency in the Torrens context in Australia is the judgment of Street J in *Schultz* where his Honour identified two alternative situations of fraud by an agent: first where the fraudulent act is committed by the agent; and second where the agent has knowledge of a fraud whereby the previous registered proprietor was deprived of his or her interest.\(^{80}\) In the first situation the general principle of agency law, ‘respondeat superior’, applies such that the fraudulent actions of the agent that were within the agent’s actual or apparent authority will bind the registered proprietor so as to make the registered proprietor’s title defeasible through fraud. Street J referred with approval to *Bowstead on Agency* and commented:

> An act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests. ... But the mere fact that the principal, by appointing an agent, gives that agent the opportunity to steal or otherwise to behave fraudulently does not without more make him liable.\(^{81}\)

The second situation is where the agent has knowledge of fraud with regards the transaction under which the principal, the registered proprietor, became registered. In this case, the law presumes the agent communicates to the principal all information concerning the transaction and imputes the agent’s knowledge of fraud to the principal. However, Street J identified an exception to this general rule, namely, if the knowledge to be imputed is knowledge of the agent’s own fraudulent conduct then the principal is permitted to bring evidence to rebut the presumption of knowledge and to prove ignorance of the agent’s fraud.\(^{82}\)

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\(^{80}\) [1969] 2 NSWR 576, 582.
\(^{81}\) Ibid 583.
\(^{82}\) Ibid 584.
In recent case law and commentaries some aspects of these comments and the decision of Street J in *Schultz* have been criticised. There are two main areas of criticism. First, it has been said that though Street J stated the test for fraud by the agent correctly, he erred in his restrictive application of the test to the facts in the *Schultz* case. Second, it has been argued there is ‘illogicality’ in the exception to the imputation of knowledge where what is in issue is the agent’s knowledge of his or her own fraudulent conduct. In order to explore these criticisms it is worthwhile reviewing briefly the facts of the *Schultz* case and the recent New Zealand case *Dollars & Sense Finance Ltd v Nathan*.  

In *Schultz*, a company, Corwill Properties Pty Ltd, was the registered proprietor of land and Galea — a solicitor — was the company’s secretary. Galea advised Schultz to invest 3000 pounds on the security of a registered mortgage over the company’s property. Schultz advanced the money, Galea forged the company’s execution of the mortgage, the mortgage in favour of Schultz was registered and Galea misappropriated the funds. The question arose: Was the fraud of Galea to be imputed to his principal Schultz so as to make her registered mortgage defeasible? The short answer was no.

Street J held that it was not within the scope of Galea’s actual or apparent authority to forge the execution of the mortgage. Schultz had instructed Galea to obtain a valid mortgage and a safe security for her investment. The forged execution of the mortgage was an ‘independent activity entirely in furtherance of his own interests and in no way done for or on behalf of Mrs. Schultz’.  

There are two main difficulties with this application of the respondeat superior test by Street J. First, Street J narrowly defined the scope of Galea’s authority as limited to obtaining a valid mortgage. In obtaining a forged mortgage, Galea stepped outside

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83 See *Dollars & Sense* [2008] 2 NZLR 557.
85 Butt, above n 9, 803–4 [20.77]. See also *Dollars & Sense* [2008] 2 NZLR 557, 574–5 [43].
86 *Dollars & Sense* [2008] 2 NZLR 557.
87 *Schultz* [1969] 2 NSWR 576.
88 Ibid, 584.
89 Ibid.
90 Ibid.
the scope of his authority and therefore his fraudulent acts could not be imputed to the registered mortgagee, Schultz. This restrictive application of the test implies that a principal would never be liable for the acts of an agent in forging a mortgage since, invariably, the principal would always seek to obtain a valid mortgage and a safe security. In forging a mortgage, the agent would therefore be viewed as acting outside the scope of his or her authority.

The second criticism is the implication that fraudulent actions that are entirely for the benefit of the agent cease to be within the scope of the agency. This view was rejected in *Dollars & Sense* and it is submitted the better view is to consider the fact of the agent’s benefit as ‘a relevant but not a decisive factor’ in the overall enquiry as to whether the fraud was within the scope of the agency.

In *Dollars & Sense*, Rodney Nathan, the son of the registered proprietors, arranged a loan to himself from the company, Dollars & Sense Ltd, using his parent’s property as security for the loan. The solicitor for the company, Mr Thomas, arranged delivery to Rodney of the loan and mortgage documentation. Rodney forged his mother’s signature to the mortgage and returned the documents to the company. The mortgage was registered and the loan monies paid over to Rodney. Rodney defaulted under the mortgage, and the company sought to exercise the power of sale against Mr and Mrs Nathan’s property relying on the registered mortgage and indefeasibility of title. Mrs Nathan argued that her purported signature was forged by Rodney in the course of his agency for the company and, accordingly, the registered mortgage was defeasible by virtue of the fraud of the company’s agent, Rodney.

There were two main questions to be decided. First, did Rodney have the actual authority, either express or implied, to act as agent for the company to procure Mrs Nathan’s signature to the mortgage? Second, if so, was Rodney’s forgery and fraud within the course of the agency? In relation to the first question the court concluded

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91 Ibid.
92 *Dollars & Sense* [2008] 2 NZLR 557, 573–4 [41]–[42].
93 O’Connor, above n 84, 143.
that Rodney was the company’s agent for the purpose of obtaining his parents’ signatures to the mortgage and loan documentation.  

In relation to the second question, the court identified a two stage inquiry: first, what acts has the principal authorised and, secondly, is the agent's act so connected with those acts that it can be regarded as a mode of performing them? The court commented further that:

an act can be within the scope of an agency even when it is the antithesis of what the principal really wanted. ... The true test is whether the tortious act has a sufficiently close connection with the task so that the commission of the tort can be regarded as the materialisation of the risk inherent in that task.

The court determined the authorised acts were obtaining the mortgagors’ signatures to the mortgage and uplifting the duplicate certificate of title. It was Rodney’s task to obtain registrable documents and the court concluded that ‘obtaining execution, even by forgery, was within the scope of that task’. The court noted that Rodney’s fraud took place ‘to achieve the very thing that Rodney was asked to do as agent by Dollars & Sense; that is to obtain a registrable mortgage’. The result of the case was that as the fraud of Rodney was within the task Dollars & Sense had asked Rodney to perform, fraud could be imputed to Dollars & Sense and the registered mortgage was defeasible by virtue of the fraud exception.

A final point to note from Dollars & Sense concerns the ‘exception’ that precludes the imputation of the agent’s knowledge of fraud to the principal where the agent’s knowledge is knowledge of the agent’s own fraudulent conduct. The court rejects the notion that such an exception is appropriate. Accordingly, in cases of fraud by an agent due to the agent’s fraudulent conduct, the principal’s liability should be

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94 Dollars & Sense [2008] 2 NZLR 557, 570–1 [27].
95 Ibid 571 [32].
96 Ibid 576 [46].
97 Ibid 571 [34].
98 Ibid 576 [46], citing Nathan v Dollars & Sense Finance Ltd [2007] 2 NZLR 747, 771 [103].
100 Dollars & Sense [2008] 2 NZLR 557, 574–5 [43].
determined on the basis of the general principle of respondeat superior and the exception precluding imputation of knowledge is inapplicable.

The decision in *Dollars & Sense* considerably broadens the situations in which a registered proprietor’s title may be rendered defeasible by virtue of fraud by an agent. This breadth is seen in the very recognition of Rodney as an agent of the mortgagee, *Dollars & Sense*. Many of the classic Torrens cases where fraud has been raised arguably involve the appointment, by the registering party, of the fraudster as an agent. On reflection, could it be argued that Mrs Frazer, Mr Gosper, Mr De Jager, Mr Halaseh, or Denise and Mrs Hoger were agents for their respective registering mortgagees to obtain registrable mortgage documents such that their fraud in forging the mortgagor’s signature to the mortgage becomes the fraud of the registered mortgagee? It may well be that an agency relationship ought not to be found on the facts of these particular cases, however, there is no doubt that *Dollars & Sense* has opened the door for a revised treatment of this question in future cases.

The other area in which *Dollars & Sense* has broadened the potential application of agency fraud is by rephrasing the question concerning the scope of the agency to ask: are the agent's acts so connected with the authorised acts that they can be regarded as a mode of performing them or as a ‘materialisation of the risk inherent in that task’? If the authorised task is to obtain a registrable mortgage, then obtaining a forged mortgage is both a mode of performing the authorised task and a materialisation of the risk inherent in obtaining a registrable mortgage.

The revised and expanded treatment of agency fraud revealed in *Dollars & Sense* may have the effect that future forgery and false attestation cases will be treated as a

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101 *Frazer* [1967] 1 AC 569.
102 *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32. In this case, the argument was raised that Mr Gosper had been appointed the mortgagee’s agent for the purpose of obtaining Mrs Gosper’s signature to the mortgage. Only the dissenting judge Meagher JA dealt with this argument at 52–3. His Honour did not consider there was any factual basis on which to found the existence of an agency arrangement, but even if such an arrangement had been made, it was for the limited purpose of procuring Mrs Gosper’s genuine signature and the forged execution of the mortgage by Mr Gosper was outside the scope of that agency. These comments are reminiscent of the comments of Street J in *Schultz* [1969] 2 NSWR 576, 584.
103 *De Jager* [1984] VR 483.
104 *Russo* [1999] 3 VR 376.
105 *Young* [2001] QCA 453 (23 October 2001).
straightforward application of the second category of the fraud exception — fraud against the prior registered proprietor — by virtue of the agent’s fraud. This may well have the effect of eroding the continued relevance of the notion of fraud against the Registrar.

B The Applicability of Indefeasibility to Registered Forged ‘All Moneys’ Mortgages

Another recent development in the law regarding Torrens fraud that may diminish the relevance of fraud against the Registrar, is the applicability of indefeasibility to registered forged ‘all moneys’ mortgages. There is a distinction between a ‘traditional’ and an ‘all moneys’ mortgage. A traditional mortgage contains a statement of the principal sum lent, an acknowledgement by the mortgagor that the sum has been lent and an undertaking to repay that sum. Upon registration of a traditional mortgage, an indefeasible charge is created over the land to secure the amount stated in the mortgage as having been lent to the mortgagor. This charge is effective even though the mortgage is forged and the money has been advanced, not to the mortgagor, but to the forger.

An all moneys mortgage ‘does not state that a particular amount is secured, but rather purports to secure all moneys owing by the mortgagor to the mortgagee’ under an unregistered collateral loan agreement or guarantee. The question that arises with a forged all moneys mortgage is: what, according to the true meaning and effect of the mortgage, is the debt which it secures? It is clear that the mortgagee’s charge is indefeasible, as it is contained within the registered mortgage. However, unless the

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106 The discussion that follows concerning all moneys mortgages has been adapted from an earlier article by one of the authors: Penny Carruthers, ‘Indefeasibility, Compensation and Anshun Estoppel in the Torrens system: The Solak Series of Cases’ (2012) 20 Australian Property Law Journal 71.
108 Ibid [13].
109 Scott Grattan, ‘Recent Developments Regarding Forged Mortgages: The Interrelationship Between Indefeasibility and the Personal Covenant to Pay’ (2009) 21(2) Bond Law Review 43, 56. In fact, as Grattan indicates, all moneys mortgages may also occur where the mortgage ‘purports to secure all moneys owing by the mortgagor to the mortgagee: (a) for any reason; or (b) under any agreement between the parties; or (c) under a particular agreement between the parties’ (citations omitted).
110 Typically the mortgage includes a term charging the land with the repayment of the secured money. Extraordinarily, in Vella v Permanent Mortgages Pty Ltd (2008) 13 BPR 25,343 (‘Vella’), Young CJ noted that one of the relevant mortgages in the case did not appear to include a charging clause.
mortgage effectively incorporates the personal covenant to pay the mortgage debt contained in the unregistered and forged loan agreement, the mortgage secures nothing.  

Frequently, all moneys mortgages include a number of interlocking documents. The registered mortgage itself is silent as to the indebtedness it secures on the property. However, the mortgage usually includes a term that the mortgagor covenants that the provisions of a registered memorandum are incorporated into the mortgage. The memorandum then provides that the mortgage is security for the payment of the ‘secured money’ as provided for under a ‘secured agreement’. The memorandum defines the term ‘secured money’ as the amount owing to ‘Us’ (the mortgagee) under a ‘secured agreement’. The ‘secured agreement’ is defined as any present or future agreement between ‘Us’ and ‘You’ (the mortgagor).

The difficulty, from the point of view of the mortgagee, is that where the ‘present or future agreement’ is not between ‘Us’ and ‘You’, because the collateral loan agreement has been forged, there is no ‘secured agreement’ and consequently there is no ‘secured money’. Therefore, the mortgage, though indefeasible, secures nothing. This approach has generally been adopted throughout Australia, and also in New Zealand, with the ultimate result that, as there is no enforceable loan agreement, the mortgage secures no money and the mortgage must be discharged. Notably, this approach has not been adopted in Victoria.

However, as no one had made any point about this, Young CJ read the documents in a ‘commercial and sensible way’ though his Honour noted it was ‘rather odd’: at 25,373 [261].


Westpac New Zealand Ltd v Clark [2010] 1 NZLR 82.

For the purposes of this paper, the comments regarding all moneys mortgages are restricted to mortgages with a single mortgagor. Where there are joint mortgagors, and only one of the mortgagor’s signatures is forged, then the position is more complicated. If the mortgagors’ liability for the debt is expressed to be joint and several, then, provided the signature of one of the mortgagors on the off register loan agreement is genuine, this may be effective to secure the indebtedness over the whole of...
The plethora of recent cases in this area indicate that banks and finance companies have been using all moneys mortgages in place of traditional mortgages. As the registration of a forged all moneys mortgage will have the effect of securing nothing, the practical effect is that the ‘defrauded’ mortgagor is entitled to have the forged mortgage discharged and has no need to resort to a court action based on fraud against the Registrar.

C  The Impact on Indefeasibility of National Credit Code s 42 — Overriding Statutes

A third area requiring discussion concerns the effect of overriding statutes on the principle of indefeasibility. As a general proposition, the Torrens legislation, as with any legislation, may be wholly or partially repealed or amended by later legislation. This may occur directly or may occur indirectly if repeal or amendment is ‘the ordinary and proper implication to be drawn from the later statute’.

Of particular relevance here is the effect of the National Credit Code, which applies to loans made by credit providers to individuals ‘for personal, domestic or


117  Solak v Bank of Western Australia Ltd [2009] VSC 82 (17 March 2009). The decision in this case has been criticised by a number of commentators including Lane, above n 112, 161–3; Lee Aitken, ‘Indefeasibility and the Forged Mortgage’ (2009) 32 Australian Bar Review 253; Carruthers, above n 106.

118  The cases mentioned above n 107, 110 and 113 all involve all moneys mortgages. More recent cases include Perpetual Trustees Victoria v Cox [2014] NSWCA 328 and Ocvirk v Permanent Custodians [2013] NSWSC 1021.

119  This is not to say, however, that the mortgagor suffers no loss. In Chandra (2008) 13 BPR 25,259 the mortgagor sustained loss in the form of legal costs and was held entitled to recover this loss pursuant to the compensation provisions and Real Property Act 1900 (NSW) s 129(1)(a).

120  Bradbrook et al, above n 9, 244–5 [4.325].

121  The National Credit Code is contained in National Consumer Credit Protection Act 2009 (Cth) sch 1 (‘NCC’).
household purposes’ or ‘to purchase, renovate or improve residential property for investment purposes’.\(^{122}\) *NCC* s 42(1) provides that a mortgage must be in writing and signed by the mortgagor, otherwise, according to s 42(4), the mortgage is not enforceable.\(^{124}\) In the event a mortgage is a forgery and has not been signed by the mortgagor, the question arises: is *NCC* s 42 an overriding statutory provision such that indefeasibility is repealed and the registered forged mortgage is unenforceable?

Although the effects of overriding statutes on Torrens legislation have been considered in a number of cases,\(^{125}\) there does not yet appear to be a definitive answer to the question of the impact of *NCC* s 42 on indefeasibility.\(^{126}\) In a recent article, Backstrom and Christensen have argued that s 38 of the *Uniform Consumer Credit Code*, the forerunner to *NCC* s 42, may operate as an exception to indefeasibility.\(^{127}\) As the authors note:

\[^{122}\] *NCC* s 5(1)(d) makes the Code applicable to a credit provider who provides the credit ‘in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction’.

\[^{123}\] Ibid s 5.

\[^{124}\] Ibid s 42 replaces the earlier provision in *Consumer Credit (Queensland) Act 1994* (Qld) app s 38 (‘Uniform Consumer Credit Code’).

\[^{125}\] See, eg, *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1; the Hillpalm litigation concluding with the High Court decision in *Hillpalm Pty Ltd v Heaven’s Door Pty Ltd* (2004) 220 CLR 472; *City of Canada Bay v Bonaccorso Pty Ltd* (2007) 71 NSWLR 424.

\[^{126}\] In *Vella* (2008) 13 BPR 25,343, 25,382–3 [354]–[355], Young CJ effectively avoided considering the question in relation to *Uniform Consumer Credit Code* s 38, the forerunner to *NCC* s 42, on the grounds that, in his view, the Code did not apply as the loan was not for personal, domestic or household purposes. Similarly, in *Solak v Registrar of Titles* (2011) 33 VR 40, 50 [43] (‘Solak’), Warren CJ was not required to come to a definitive conclusion on the ‘Credit Code point’ since Mr Solak’s counsel considered the Credit Code point was a ‘triable issue’ and accordingly the Court of Appeal in *Solak* treated the point as ‘arguable’. Warren CJ stated: ‘I am not convinced that this concession [by Mr Solak’s counsel] was rightly made’ and provided a number of reasons to support the view that *Uniform Consumer Credit Code* s 38 did not abrogate the indefeasibility of a forged registered mortgage: at 50 [44]. In summary, her Honour’s reasons were: (1) ‘given the importance and the long standing of the doctrine of indefeasibility, it seems doubtful that the legislature would abrogate indefeasibility of fraudulently obtained mortgages without making that intention clear’; (2) the protection of indefeasibility ‘benefit[s] … the whole community by making land transactions cheaper and more efficient. Acceptance of the Credit Code point would undermine that protection’; (3) ‘[i]t is … doubtful … that indefeasibility would be abrogated by an Act …[intended] to deal with a mischief of a completely different kind, namely, less than scrupulous lenders in relation to genuine borrowers’; and finally, (4) ‘very strange anomalies would arise if the … Code were to apply to fraudulent credit contracts’ as, in determining whether the Code applies, one needs to determine the intended use of the credit. ‘If the credit contract is fraudulent, the question arises: whose intention is to be assessed?’ Who it be the fraudsters or the borrowers?: at 49 [39], 50,[42]. See also Carruthers, above n 107, 91–4.

\[^{127}\] Michelle Backstrom and Sharon A Christensen, ‘Qualified Indefeasibility and the Careless Mortgagee’ (2011) 19 *Australian Property Law Journal* 109, 123. This article was published prior to the Victorian Court of Appeal decision in *Solak*, which indicated a contrary view. See also the discussion above n 126. It should be noted that decisions dealing with an inconsistency between s 38 of the *Uniform Consumer Credit Code* (UCCC) and the Torrens legislation apply principles of statutory construction applicable to inconsistencies between two Acts of the same legislature. Different principles of statutory construction are applicable to an inconsistency between a Commonwealth and a
It would be inconsistent with the policy of the Consumer Credit Code if an unsigned mortgage could be enforced against a mortgagor or their interest in the land merely because it was registered under the Torrens legislation. ... [G]iven the nature and purpose of s 38, it seems unlikely that it was intended to only apply to mortgages not subject to the Torrens legislation.¹²⁸

In relation to the class of mortgages covered by the NCC, if a future court were to adopt the approach suggested by Backstrom and Christensen and treat NCC s 42 as an exception to indefeasibility, then, once again, the need for reliance on the notion of fraud against the Registrar is rendered redundant.

D The Introduction and Ramifications of Strengthened Identity Verification Requirements

In analysing the cases of fraud against the Registrar in section III, it becomes reasonably clear that the calamity that ensues from the registration of a forged document could have been avoided had the registering party carried out basic identity verification checks of the person whose signature was forged and falsely attested. In recent years there have been, and indeed, continue to be, significant advances in relation to ‘verification of identity’ (VOI) requirements in the execution of Torrens documents. These advances can be seen in amendments to the Torrens legislation of New South Wales, Victoria and Queensland regarding the execution of mortgages; the introduction of VOI requirements in Western Australia and South Australia; and the proposed adoption, throughout Australia of ‘Participation Rules’ pursuant to Electronic Conveyancing(Adoption of National Law) Act 2012 (NSW) app s 23 (‘ECNL’).

The introduction of these more stringent VOI requirements will reduce the opportunity for fraudsters to engage in fraud and forgery. With the fraudsters

¹²⁸ State Act. This point should be kept in mind in considering the relevance of case law concerning s 38 of the UCCC in the context of an inconsistency between the NCC, which is Commonwealth legislation, and the Torrens statutes of the State legislatures. See also Chapter 4, n 119.
² Backstrom and Christensen, above n 127, 123.
thwarted, there is, of course, no fraud, no defrauded registered proprietor and no need to bring a claim of fraud against the Registrar.

1 The Queensland, New South Wales and Victorian Amendments

In November 2005, Queensland introduced ‘careless mortgagee provisions’\(^{129}\) that require a mortgagee to take reasonable steps to ensure that the person who is the mortgagor under the mortgage instrument is the same person as the person who is, or who is about to become, the registered proprietor of the land.\(^{130}\) Under *Land Title Act 1994* (Qld) s 185(1A), a registered mortgagee who fails to take reasonable steps to identify the mortgagor, in circumstances where the registered mortgage is a forgery, does not obtain the benefit of indefeasibility. In addition, the careless mortgagee is not entitled to compensation from the State for any deprivation, loss or damage.\(^{131}\)

Similar provisions were introduced in New South Wales and Victoria and came into effect in New South Wales in November 2011\(^ {132}\) and in Victoria in September 2014.\(^ {133}\) However, in New South Wales and Victoria, if the mortgagee fails to take reasonable steps to identify the mortgagor, then, the Registrar-General in New South Wales\(^ {134}\) or the Registrar in Victoria\(^ {135}\) has discretion as to whether to cancel the registration of the mortgage.

These careless mortgagee provisions introduce a form of hybrid deferred indefeasibility and, it is submitted, the provisions will go a long way to averting mortgage forgery — in particular, the imposter scenario — as mortgagees will be more diligent in ensuring the mortgagor is properly identified. A failure to carry out the appropriate identity checks may affect the enforceability of a forged but registered mortgage.

\(^{129}\) Ibid 110 n 7. The expression ‘careless mortgagee provisions’ appears to have been coined by Backstrom and Christensen to ‘refer to the provisions of the Qld and NSW legislation that remove the benefits of indefeasibility from mortgagees who fail to take reasonable steps to identify the mortgagor’.

\(^{130}\) *Land Title Act 1994* (Qld) s 11A(2). A similar provision applies in the case of a transfer of a mortgage at s 11B(2).

\(^{131}\) Ibid s 189(1)(ab).

\(^{132}\) *Real Property Act 1900* (NSW) s 56C. See also *Real Property Act 1900* (NSW) s 129(2)(j) in relation to compensation.

\(^{133}\) *Transfer of Land Act 1958* (Vic) ss 87A and 87B. These provisions were inserted pursuant to *Transfer of Land Amendment Act 2014* (Vic) s17.

\(^{134}\) *Real Property Act 1900* (NSW) s 56C(6).

\(^{135}\) *Transfer of Land Act 1958* (Vic) ss 87A(3) and 87B(3).
instrument without the need to resort to a claim of fraud against the Registrar. For example, in the recent Queensland case of Commonwealth Bank of Australia v Perrin,\textsuperscript{136} the registered mortgagee conceded that it had failed to adhere to the requirements to take reasonable reasonable steps to identify the mortgagor and, as a result, lost the benefit of an indefeasible mortgage.

Despite the clear advantages of the careless mortgagee provisions there have been some criticisms of the provisions. These criticisms relate to the question of what constitutes ‘reasonable steps’. In Queensland, a mortgagee is considered to have taken reasonable steps if the mortgagee complies with the practice set out in the \textit{Land Title Practice Manual}.\textsuperscript{137} It is suggested that a significant deficiency in the current Queensland provisions is the failure to mandate face-to-face verification of the mortgagor’s identity by the mortgagee. The authors therefore submit that face-to-face VOI should be, as suggested by Low and Griggs, a ‘core’ principle in VOI requirements.\textsuperscript{138}

Recent amendments in New South Wales\textsuperscript{139} and Victoria\textsuperscript{140} have adopted the verification of identity requirements set out in the participation rules of the ECNL. As

\textsuperscript{136} [2011] QSC 274 (19 September 2011).
\textsuperscript{137} See Land Title Act 1994 (Qld) s 11A(3); Registrar of Titles and Registrar of Water Allocations, \textit{Land Title Practice Manual (Queensland)} (Department of Resources, 2009) [2-2005]. In essence, these practices reflect the ‘100 points of identification’ provisions under the \textit{Financial Transaction Reports Act 1988} (Cth) and \textit{Financial Transaction Reports Regulations 1990} (Cth). The verification procedure is specified in regulation 3 and the points value for various checks are contained in regulations 4-9 and 10A and B.
\textsuperscript{139} \textit{Real Property Regulation 2014} (NSW) commenced on 1 September 2014 and replaced \textit{Real Property Regulation 2008} (NSW). Regulation 12 of the 2014 regulations deals with mortgages executed before 1 January 2015 and deems the mortgagee to have taken reasonable steps if the mortgagee either takes the steps set out in \textit{Real Property Regulation 2014} (NSW) clauses 13-15 or complies with the \textit{Anti-Money Laundering and Counter-Terrorism Financing Rules 2007} (Cth) made under the \textit{Anti-Money and Counter-Terrorism Financing Act 2006} (Cth). However, pursuant to \textit{Real Property Regulation 2014} (NSW) reg 16, which deals with mortgages executed after 1 January 2015, the prescribed reasonable steps for confirming the identity of a mortgagor are the steps set out in the ‘Verification of Identity Standard’ which is the standard set out in Schedule 8 to the participation rules of the ENCL (NSW). Importantly, as discussed in more detail below, cl 2.1 of sch 8 requires the verification of identity to be conducted during a face-to-face in-person interview.
\textsuperscript{140} Transfer of Land Act 1958 (Vic) ss 87A(2) provides that the mortgagee is considered to have taken reasonable steps to verify the authority and identity of the mortgagor if the mortgagee has taken steps consistent with any verification of identity and authority requirements (a) determined by the Registrar in accordance with section 106A; or (b) set out in the participation rules within the meaning of the ECNL.
discussed in section 3 below, these verification of identity requirements require a face-to-face interview thus satisfying the ‘core’ principle identified by Low and Griggs.

2 VOI requirements in Western Australia and South Australia

In an effort to reduce the risk of fraud in land transactions in Western Australia, the Western Australian Registrar and Commissioner of Titles issued a ‘Joint Practice: Verification of Identity’ that commenced in July 2012 with full compliance required from January 2013. The VOI Practice is based on the proposed standard of VOI that is being considered for introduction under the National Electronic Conveyancing, and applies only to documents executed on paper. The types of documents to which the Practice applies includes transfers, mortgages, requests for duplicate Certificate of Title, applications for replacement duplicate Certificate of Title, transmission applications, survivorship applications and powers of attorney.

The standard of VOI has two base requirements: (1) the production of identity documents; and (2) visual verification of identity by way of face-to-face comparison between the photograph on the original identity documents and the person being identified. The persons authorised to undertake VOI (the ‘identifier’) include staff at Australia Post, conveyancers, lawyers, mortgagees or agents appointed by the conveyancer or lawyer or mortgagee to undertake VOI. If VOI takes place outside Australia, an Australian Consular Officer is required to undertake the VOI. The Western Australian Title’s Office, Landgate, has included a VOI Statement, to be completed by the identifier, into the new approved Transfer and Mortgage forms. The Statement essentially provides that the identifier has taken all reasonable steps to

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141 Western Australian Land Information Authority, *Land Titles Registration Practice Manual*, 5 December 2014, ch 14 (‘Land Titles Registration Practice Manual’). Another object of the VOI Practice is to reduce the risk of claims against the State under the compensation provisions of the Torrens legislation. The VOI Practice was prompted by the fraudulent sale of the property of Roger Mildenhall in suburban Perth by overseas scammers. The fraud is discussed by Low and Griggs, ‘Identity Verification in Conveyancing’, above n 138; Eileen Webb, ‘Scammers Target WA Real Estate Transaction’ (December 2010) *Australian Property Law Bulletin* 186.


143 See *Land Titles Registration Practice Manual* [14.3].

144 Ibid [14.4.2].

145 Ibid [14.4.2.2].

146 At this stage, it is not compulsory to use the new forms. A verifier may instead, provide the VOI statement on the firm’s letterhead or by way of a statutory declaration.
verify the identity of the person being identified and reasonably believes that the person has been identified and that the person has the authority to deal with the land.

In South Australia, a broadly similar VOI policy to the Western Australian VOI Practice was introduced for documents executed after July 2013. The full compliance with the VOI policy has been required since 28 April 2014.

The full impact of the introduction of the VOI requirements in these jurisdictions is yet to be fully realised. However, one would anticipate that the mandated ‘core’ requirement for a face-to-face, visual identification of the mortgagor, transferor, or other person proposing to deal with the land, will have a significant role in reducing the opportunity for fraud and forgery in land transactions. Once again, this will significantly limit the circumstances in which a defrauded registered proprietor may need to rely on a claim of fraud against the Registrar.

3 The Participation Rules under the ECNL

Pursuant to s 23 of the ECNL, Model Participation Rules have been developed by the Australian Registrar’s National Electronic Conveyancing Council (ARNECC). The Model Participation Rules are to be adopted by the Registrars of Titles in the states and territories. Version 2 of ARNECC’s Model Participation Rules was released in March 2014.

Clause 6.5 of the Model Participation Rules requires a ‘subscriber’ to take reasonable steps to verify the identity of, among others, a mortgagor and any client the subscriber represents. Under cl 6.6.2, compliance with the VOI standard set out in sch 8 of the Model Participation Rules will be deemed to constitute taking reasonable steps to verify identity. Importantly, pursuant to cl 2.1 of sch 8, ‘the verification of identity

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must be conducted during a face-to-face in-person interview between the Subscriber … and the Person Being Identified’.

While it is beyond the scope of this paper to provide a critique of the new Model Participation Rules or to comment on their efficacy in thwarting potential fraudsters in the electronic arena, there is little doubt that they will go some way to inhibiting the opportunities for forgery and fraud in the conveyancing process.149 This benefit is assured by the inclusion in the Model Participation Rules of the ‘core’ requirement of a face-to-face personal interview. Once again, the authors submit that this is a fundamental requirement to ensure an appropriately rigorous and effective VOI standard. It is doubtless that as Australia moves into a new electronic age with regards to conveyancing transactions, new and different opportunities for fraudsters will arise. Whether the opportunities will raise the problem of forgeries and false attestations, and so perpetuate the notion of fraud against the Registrar, remains to be seen. Until then, it would seem this notion may become increasingly irrelevant.

V CONCLUSION

The critical analysis of the case law on fraud against the Registrar undertaken in this paper reveals that this category of fraud is both an unhelpful and unnecessary complication in the law on Torrens fraud. In addition, the examination of recent developments in the law on fraud by an agent and in conveyancing requirements and practices across Australia, demonstrates that this third category in the three-fold taxonomy of fraud is likely to become increasingly irrelevant.

In recommending that the category of fraud against the Registrar be abandoned, echoing the sentiment of Juliet Capulet of William’s Shakespeare’s Romeo and Juliet, the authors would say:

Tis but thy name that is my enemy;
Thou art thyself, though not a … [fraud against the Registrar].
What’s … [fraud against the Registrar]? it is nor … [helpful], nor … [necessary],
… nor any other part
Belonging to … [Torrens fraud]. O, be some other name!
[Be fraud against the prior registered proprietor]150

Chapter Seven: A Law for Modern Times: The ECNL, Forged Mortgages and Immediate Indefeasibility

This chapter is a journal article: Penny Carruthers and Natalie Skead, ‘A Law for Modern Times: The Electronic Conveyancing National Law, Forged Mortgages and Immediate Indefeasibility’ (2017) 7 Property Law Review 4
I Introduction

‘The people must have a law suited to the requirements of modern times.’\(^1\) So said Robert Richard Torrens in 1859 in speaking of the introduction of the new system of conveyancing which now bears his name: the ‘Torrens’ system. At the heart of the Torrens system is the principle of immediate indefeasibility; that is, that a non-fraudulent registered proprietor will obtain an indefeasible title regardless of any invalidity or defect in the instrument registered or in the process leading up to registration.\(^2\) For some years following the introduction of the Torrens system, the courts adopted an interpretation of indefeasibility, termed deferred indefeasibility.\(^3\) Under the deferred approach, a non-fraudulent person becoming registered pursuant to a void instrument would not obtain an indefeasible title. Although title passed on registration of the void instrument, the title was defeasible and the former registered proprietor would be entitled to bring an action to be restored to the register as proprietor. If, prior to the former owner taking action, the person who was registered pursuant to the void instrument transferred the interest to a third person, this third person would obtain an indefeasible title upon registration. This deferred approach to indefeasibility was rejected in 1967\(^4\) and for the past 50 years immediate indefeasibility has been firmly ensconced as the cornerstone of the Torrens system.

Immediate indefeasibility is desirable to the extent that it provides ‘dynamic’ security which ‘allows assets to pass securely to new [registered] owners’.\(^5\) However, it is undoubtedly a ‘harsh doctrine’.\(^6\) The harshness of immediate indefeasibility was most strikingly brought to light in the forged mortgage cases of the 1990s and early 2000s.\(^7\)

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\(^1\) ‘Mr Torrens’s Lecture at Kapunda on the South Australian Real Property Act’ The Adelaide Observer, 21 May 1859, 2 col 8.
\(^2\) This indefeasibility is qualified. A non-fraudulent registered proprietor’s title may be challenged on the grounds of various exceptions. The most relevant exceptions for this article are the fraud and in personam exceptions.
\(^4\) The Privy Council rejected deferred indefeasibility and endorsed immediate indefeasibility in Frazer v Walker [1967] AC 569, a decision on appeal from New Zealand. The High Court also adopted this approach in Breskvar v Wall (1971) 126 CLR 376.
\(^5\) P O’Connor, above n 3, 195.
\(^7\) Many of the recent forged mortgage cases have been dealt with as cases of ‘fraud against the Registrar’ or have involved forged ‘all moneys’ mortgages. Illustrations of the former are Australian
The typical forged mortgage scenario involves a fraudster either impersonating the registered proprietor or purporting to act on behalf of the registered proprietor and approaching a lending institution for a loan. The fraudster is usually a family member or friend of the registered proprietor who has obtained the duplicate certificate of title to the land.\(^8\) The lending institution agrees to lend to the registered proprietor on the security of a mortgage over the land. The fraudster forges the registered proprietor’s signature on the mortgage, the mortgage is registered and the lender advances the loan monies to the fraudster believing that the fraudster is the registered proprietor or is acting on behalf of the registered proprietor.\(^9\) Provided the lending institution, the mortgagee, was not guilty of fraud in becoming registered, the mortgage is indefeasible and, upon default, may be enforced by the mortgagee against the innocent mortgagor’s land. It has been argued that the effect of immediate indefeasibility in this type of scenario is to create a ‘moral hazard’.\(^10\) As Harding notes:

If you were a lending institution, what incentive would you have to conduct adequate checks on whether the proposed mortgagor is in fact the registered proprietor of the land? In the event that a fraud has been committed, you could simply sell up the land to recoup the money you are owed. This means with the fraudster having absconded with the money, and the lender having recourse to the land, it is the innocent registered proprietor who is left ‘holding the can’.\(^11\)

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\(^8\) The cases where the fraudster was a friend or family member include: *Russo v Bendigo Bank Ltd* [1999] 3 VR 376; *Young v Hoger* [2002] ANZ ConvR 237; (2001) Q ConvR 54-557; *Beatty v NAZ Banking Group* [1995] 2 VR 301; *Westpac Banking Corporation v Sansom* (1994) 6 BPR 13,790; *National Commercial Banking Corporation v Hedley* (1984) 3 BPR 9,477 and are discussed in N Skead and P Carruthers, ‘Fraud against the registrar – An unnecessary, unhelpful and, perhaps, no longer relevant complication in the law on fraud under the Torrens system’ (2014) 40(3) *Monash University Law Review* 821. Illustrations of the latter are *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24,675; *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505; *Provident Capital Ltd v Printy* [2008] NSWCA 131 and are discussed in numerous articles, see the references in Moore et al, n 7, [4.45].

\(^9\) This scenario is also discussed in B Harding, ‘Verification of Identity: As Simple as it Seems?’ (2017) 6 *Property Law Review* 195.

\(^10\) O’Connor notes, “Moral hazard” refers to the tendency of a party to take less care to avoid a loss-producing event if the loss is borne by someone else.’ P O’Connor, ‘Immediate indefeasibility for mortgagees: A moral hazard?’ (2009) 21(2) *Bond L Rev* 133, 133.

\(^11\) Harding, above n 9, 196.
The mortgagor’s only realistic course of action is to claim compensation from the State under the compensation provisions of the Torrens statutes.\textsuperscript{12} Not surprisingly, ‘governments did not want to provide compensation for this sort of loss’\textsuperscript{13} and in Queensland, New South Wales and Victoria ‘careless mortgagee’\textsuperscript{14} provisions were enacted requiring mortgagees to take reasonable steps to verify the identity of the mortgagor to ensure the person executing the mortgage document is in fact the registered proprietor of the land. The careless mortgagee provisions apply in circumstances where a fraudster, and not the registered proprietor, executed the mortgage. Although the precise wording of the provisions in each jurisdiction is different, they ‘effectively withdraw the protection of indefeasibility from mortgagees who fail to meet the statutory requirements’.\textsuperscript{15}

\begin{footnotesize}
\begin{enumerate}
\item The provisions regarding compensation are complicated and are not uniform across the Australian Torrens jurisdictions. For example, unlike the other jurisdictions, in South Australia, Western Australia, Tasmania and the ACT a person who has suffered loss must first bring an action against the person liable for the loss. See, P Carruthers and N Skead, ‘150 years on: The Torrens Compensation Provisions in the Last resort Jurisdictions’ (2011) 19 Australian Property Law Journal 174.
\item Harding, above n 9, 196.
\item The expression ‘careless mortgagee’ appears to have been coined by Backstrom and Christensen to ‘refer to the provisions of the Qld legislation that remove the benefits of indefeasibility from mortgagees who fail to take reasonable steps to identify the mortgagor.’ M Backstrom and S Christensen, ‘Qualified Indefeasibility and the Careless Mortgagee’ (2011) 19 Australian Property Law Journal 109. For convenience, this article will use this expression to cover similar provisions that have also been enacted in New South Wales and Victoria.
\end{enumerate}
\end{footnotesize}
As the 21st century unfolds, it remains critical that ‘the people must have a law suited to the requirements of modern times’. In particular, this new law must embrace the digital era and, in relation to land transactions, must provide a system for the electronic lodgment of registry instruments. This new law is embodied in the Electronic Conveyancing National Law (ECNL), first adopted in New South Wales in 2012. The legislation proclaims that it does not derogate from the fundamental principles of the Torrens system, such as indefeasibility of title, and, in a sense, this is true. However, the legislation undoubtedly affects the manner in which conveyancing processes are to be conducted.

This article focuses on the impact of the ECNL with regards to mortgage transactions, exploring the extent to which mortgagees continue to enjoy the protection of indefeasibility. In particular, it considers whether a new species of deferred indefeasibility has emerged to challenge the previously well-nigh invincible position of registered mortgagees.

This article has three main aims. First, to examine the operation of the ECNL, particularly with regards its application to mortgage transactions. Second, to analyse and critique the operation of s105 of the Transfer of Land Act 1893 (WA) (TLA (WA)). This provision was one of a range of consequential amendments to the TLA (WA) following the adoption of the ECNL in Western Australia. It is a somewhat baffling and curious provision that does not appear to have been replicated in any of the other Australian jurisdictions. In order fully to appreciate the ramifications of this provision, the careless mortgagee provisions in the Queensland, New South Wales and Victorian Torrens statutes are discussed and compared. Finally, the article reflects on the potential impact of the ECNL, the careless mortgagee provisions and s105 TLA on three classic mortgage fraud cases with a view to assessing the overall merit and implications of this new electronic system.

II The Electronic Conveyancing National Law (ECNL)

At its meeting in 2008, the Council of Australian Governments supported the development of an ‘efficient national platform to settle property transactions, lodge instruments with land registries and meet associated duty and tax obligations
electronically through a national system’. The reasons for the introduction of the national system were ‘to reduce substantially costs to business through reduced delays and expense associated with transferring title, simplification processes, elimination of costs and complexities of dealing with eight different systems and increased accuracy in transactions’. Subsequently, in 2011, the Governments of the six States and the Northern Territory entered into an Intergovernmental Agreement for an ECNL under which the Australian Registrars’ National E-Conveyancing Council (ARNECC) was established to facilitate the implementation and management of the regulatory framework for national e-conveyancing of real property.

The ECNL governs the operation of e-conveyancing in Australia and is implemented separately in each State and the Northern Territory. New South Wales was the first State to implement the ECNL which appears as an Appendix to its Electronic Conveyancing (Adoption of National Law) Act 2012. The other jurisdictions implemented the ECNL either as application legislation, that adopts the Appendix to the NSW legislation, or corresponding legislation that is essentially the same as the NSW Appendix. The ECNL is relatively brief legislation that is designed to promote efficiency throughout Australia in property conveyancing by enabling documents to be lodged and processed in electronic form under the land titles legislation of each jurisdiction. Part 2 of the legislation deals with electronic lodgment, client authorisations and digital signatures and Part 3 establishes an Electronic Lodgment Network (ELN) to be developed and operated by an Electronic Lodgment Network

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17 Ibid.
19 The membership of the Australian Registrars’ National E-Conveyancing Council (ARNECC) is comprised of the Land Titles Registrars, or their nominees, from each State and Territory that has entered into the Intergovernmental Agreement.
20 The Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW) was proclaimed on 1 January 2013.
22 The ‘corresponding’ jurisdictions are: Western Australia, Electronic Conveyancing Act 2014 (WA) proclaimed on 3 June 2014, and South Australia, Electronic Conveyancing National Law (South Australia) Act 2013 (SA) proclaimed on 21 January 2016.
23 ECNL, s5.
Operator (ELNO) pursuant to Operating Requirements and the Participation Rules. Each of these aspects is dealt with below.

Importantly, the ECNL specifies that the legislation does not derogate from the fundamental principles of the Torrens system, such as indefeasibility of title, and the Registrar in each jurisdiction continues to receive and process instruments in accordance with the relevant land titles legislation. As Thomas et al have noted, ‘the registrar still retains overarching control of registration acceptance to ensure the integrity of the register’.

Currently, Property Exchange Australia Ltd (PEXA) has been approved to operate an ELN to enable transacting parties, such as lawyers, conveyancers and financial institutions, to collaborate electronically in the preparation of registry instruments, the settlement of funds and the lodgment of conveyancing instruments with the land registry. PEXA is regulated by ARNECC. In order to ensure the integrity of the electronic network, ARNECC has developed Model Operating Requirements (MOR) and Model Participation Rules (MPR) with which PEXA and its subscribers must comply.

A Model Operating Requirements and Model Participation Rules

The MOR focus on the requirements for an ELNO including: the eligibility requirements to be an ELNO; the obligations of an ELNO regarding the security and integrity of the network; risk management requirements; and requirements concerning the registration of ‘subscribers’ to the system or their suspension or

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24 ECNL, s5(1)(b).
25 ECNL, s8(1).
28 The Model Operating Requirements (MOR) and the Model Participation Rules (MPR) may be accessed on the ARNECC website <https://www.arnecc.gov.au/> (accessed 25 September 2017). Version 4 is the current version for both the MOR and the MPR.
29 ECNL, s 18 requires the ELNO to comply with the MOR.
30 MOR, cl 4.
31 MOR, cl 7.
32 MOR, cl 9.
33 MOR, cl 14.1.
termination from the system.\textsuperscript{34} The MOR also include powers for a Registrar to suspend or revoke an ELNO’s approval where there is breach of the MOR or for various other reasons.\textsuperscript{35}

Of particular interest for the purposes of this article, are the requirements that the ELNO must not do anything to diminish the overall security and integrity of the Titles Register or public confidence in the Titles Register\textsuperscript{36} and that the ELNO must use reasonable endeavours to ensure the use of the ELN does not result in greater risk of fraud or error in conveyancing transactions than compared with the risk of fraud or error in paper transactions.\textsuperscript{37}

There are numerous academic commentaries regarding the proposed operation of the ECNL and the various issues and risks that might arise under this new system.\textsuperscript{38} It is beyond the scope of this article to examine these potential risks in detail. However, the advantages and disadvantages of the new system within the context of the electronic lodgment and registration of mortgages are analysed. In any event, whether the risk of fraud or error will increase, decrease or remain the same under the ECNL remains to be seen as the ECNL becomes fully operational.

The MPR set out the rules for a subscriber to an ELN\textsuperscript{39} including: the eligibility criteria\textsuperscript{40} and role of subscribers;\textsuperscript{41} their general obligations\textsuperscript{42} and the more specific obligations regarding the security and integrity of the network system;\textsuperscript{43} and the restriction, suspension and termination of a subscriber’s access to the ELN.\textsuperscript{44} A

\begin{itemize}
\item \textsuperscript{34} MOR, cll 14.7 - 14.9.
\item \textsuperscript{35} MOR, cl 20.
\item \textsuperscript{36} MOR, cl 8.
\item \textsuperscript{37} MOR, cl 9.2.
\item \textsuperscript{39} ECNL, s26 requires a Subscriber to comply with the MPR.
\item \textsuperscript{40} MPR, cl 4.
\item \textsuperscript{41} MPR, cl 5.
\item \textsuperscript{42} MPR, cl 6.
\item \textsuperscript{43} MPR, cl 7.
\item \textsuperscript{44} MPR, cl 9.
\end{itemize}
subscriber, typically a law firm, lawyer, conveyancing agent or financial institution, may authorise a ‘user’ to access and use the ELN. If the user is authorised by the subscriber to digitally sign electronic documents on behalf of the subscriber, the user is referred to as a signer. The subscriber must ensure that its users, usually professionals within the firm, are aware of the MPR and the subscriber is responsible for the user’s use of the ELN.45

B The Electronic Conveyancing Process via PEXA

PEXA allows subscribers to develop registry instruments in a digital workspace and then digitally sign the instrument on behalf of the client. Clients will no longer sign registry instruments; rather the subscriber will do so on the client’s behalf. This is a most ‘dramatic’ and ‘significant’ change.46 Griggs has commented:

‘[S]imply said [this change] possibly represents the most fundamental development in the conveyancing process since the introduction of the Torrens system. It raises obvious security concerns, and imposes a significantly higher and more onerous obligation on conveyancing agents to be satisfied as to their client.47

Although the authors recognise Griggs’ concerns, they note that built into the e-conveyancing process are various safeguards. In discussing these safeguards, this article focuses on the electronic lodgment of mortgage instruments.

Before digitally signing an instrument the subscriber must enter into a Client Authorisation48 in which the client authorises the subscriber to digitally sign and electronically lodge the instrument and to complete any associated financial transactions.49 Where the subscriber is a mortgagee or represents a mortgagee, the subscriber must take reasonable steps to verify that the mortgagor is a legal person

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45 MPR, cl 6.1.
47 Ibid, 118.
48 MPR, cl 6.3. The Client Authorisation Form is contained in Schedule 4 of the MPR.
49 ECNL, s10. Under MPR, cl 5.1.2, to the extent that the subscriber digitally signs electronic documents on behalf of the client, the subscriber does so as agent for the client.
and has the right to enter into the mortgage, referred to as the ‘right to deal’. Where the mortgagor does not have a representative, the subscriber must also take reasonable steps to verify the identity of the mortgagor. In order to verify the identity of the mortgagor the subscriber may apply the Verification of Identity (VOI) Standard. If this Standard is complied with, the subscriber will be deemed to have taken reasonable steps for VOI. Alternatively, the subscriber may verify the identity of the mortgagor in some other way that constitutes the taking of reasonable steps. Although not expressly stated, the obligations on the subscriber to verify the mortgagor’s identity and right to deal would appear also to apply to a subscriber for a transferee of the mortgage.

Schedule 8 of the MPR sets out the VOI Standard. Broadly, the standard requires a face-to-face interview between the identity verifier and the mortgagor and the production, by the mortgagor, of a number of original documents as specified in the table of identification documents. Where photographic identification is produced, it

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50 MPR, cl 6.4(b). The verification that the mortgagor has the ‘right to deal’ is an important safeguard in mitigating the risk of fraudulent transactions. For further details regarding the right to deal see the ARNECC Model Participation Rules Guidance Notes 4 https://www.arnecc.gov.au/data/assets/pdf_file/0004/698791/MPR-Guidance-Note4-Right-to-Deal.pdf (accessed 16 October 2017).

51 MPR, cl 6.5.1(b). Note, however, that the Subscriber is not required to take reasonable steps to identify the mortgagor if the subscriber is reasonably satisfied that the mortgagee has taken reasonable steps to identify the mortgagor, MPR, cl 6.5.1(b)(ii).

52 MPR, cl 6.5.2(a).

53 MPR, cl 6.5.6(a). This deemed compliance with the reasonable steps requirement has been referred to as a ‘safe harbour’, see for eg S Christensen, ‘Taking Reasonable Steps to Verify Identity – When are Further Inquiries Necessary to Meet the Standard?’ (2016) 6 Property Law Review 72. The safe harbour will not be available where the identity verifier ought reasonably to have known that the identification was not genuine, MPR, cl 6.5.6 and cl 6.5.3.

54 MPR, cl 6.5.6(b). If a subscriber has identified the mortgagor within the previous 2 years and has taken reasonable steps to ensure it is dealing with the mortgagor, then the subscriber need not re-verify the identity of the mortgagor. MPR, 6.5.4.

55 MPR, cl 6.4 and 6.5 provide that where the subscriber is a mortgagee, or represents a mortgagee, then reasonable steps must be taken to verify the mortgagor’s identity (MPR, cl 6.5(1)(b)) and right to deal (MPR, cl 6.4(b)). The MPR do not exempt from this requirement a subscriber for a mortgagee who is a transferee of the mortgage. The careless mortgagee provisions of Queensland, New South Wales and Victoria make it absolutely clear that the VOI requirements also apply to the transferee of a mortgage. See: Land Title Act 1994 (Qld), ss11B; Real Property Act 1900 (NSW), s56C(8) and Transfer of Land Act 1958 (Vic), ss87B. Ideally, an express clause clarifying this position ought to be included in the MPR.

56 MPR Schedule 8, cl 2.1.

57 MPR Schedule 8, cl 3. The documents produced must be current documents, except in the case of a recently expired (up to 2 years) Australian passport that has not been cancelled. For Australian citizens or residents, the required documents fall within 5 categories. The person whose identity is being verified must produce all the documents in the particular category starting with the first category. If the person cannot produce the category 1 documents, the person must produce all the documents in category 2 and so on.
must bear a reasonable likeness to the mortgagor.\textsuperscript{58} The identity verifier must sight the original documents and retain copies of all the documents produced by the mortgagor.\textsuperscript{59} If the identity verifier knows or ought reasonably to know that the identification is not genuine, the identity verifier must undertake further steps to verify the mortgagor’s identity.\textsuperscript{60} Once the VOI has been completed by the identity verifier, he or she completes the Identity Agent Certification contained in Schedule 9 of the MPR and attaches copies of all the identification documents relied on to establish the VOI. This certification along with copies of the identification documents must be retained by the subscriber for at least 7 years from the date of lodgment of the registry instrument.\textsuperscript{61}

The processes discussed above impose significant obligations on subscribers. In order to provide assistance to subscribers in understanding their obligations under the MPR, ARNECC has published Guidance Notes dealing with retention of evidence, right to deal, verification of identity, and client authorisation.\textsuperscript{62}

The mortgagee, or the mortgagee’s representative (a subscriber who acts for the mortgagee) must: ensure that the mortgagor grants the mortgage on the same terms as the mortgage signed by, or on behalf of, the mortgagee; ensure that it holds the mortgage granted by the mortgagor; and certify that the certifier is reasonably satisfied that the mortgagee has taken reasonable steps to verify the identity of the mortgagor and holds a mortgage granted by the mortgagor on the same terms as the registry instrument.\textsuperscript{63} Where the mortgagee or its representative signs the mortgage, the mortgagee signs only on its own behalf and not on behalf of the mortgagor.\textsuperscript{64} The practical operation of this process is that, ‘following the wet signing of the paper mortgage document by the mortgagor, the mortgagee or the legal practitioner acting

\textsuperscript{58} MPR Schedule 8, cl 2.2.
\textsuperscript{59} MPR Schedule 8, cl 3.3.
\textsuperscript{60} MPR Schedule 8, cl 10.
\textsuperscript{61} MPR, cl 6.6.
\textsuperscript{63} MPR, cl 6.13.1 and Schedule 3, rule 5.
\textsuperscript{64} MPR, cl 6.13.2.
on its behalf electronically lodges a digitally signed mortgage document’.\footnote{65} As noted, the mortgagee or mortgagee’s representative must ensure it holds a valid copy of the paper mortgage and must provide a certification to that effect.

Although the issue as to whether the protections offered under the VOI requirements of the MPR are ‘more apparent than real’\footnote{66} has been questioned, it is the authors’ view that the MPR VOI requirements represent real and significant protections for registered proprietors; protections that are more rigorous and effective than those that exist under the paper conveyancing process. The authors make two comments to support this view.

First, as noted above, there was a plethora of cases in the 1990s and early 2000s where financial institutions engaged in irresponsible and ‘risky’\footnote{67} lending practices in which mortgagees adopted ‘less [than] meticulous’\footnote{68} VOI processes. In these cases, the mortgagee failed to ensure that the purported mortgagor with whom the mortgagee was dealing was in fact the registered proprietor of the land. Instead, the mortgagee was dealing with a fraudster and the mortgage instrument was a forgery. Despite the mortgagee’s careless conduct, as there was no fraud by the mortgagee, the forged mortgage became indefeasible upon registration and enforceable against the hapless and innocent mortgagor.\footnote{69} As discussed in Part IV below, the obligations on the mortgagee and the mortgagee’s representative under the ECNL VOI processes should go a long way to eradicate irresponsible mortgagee behaviour and ensure that the purported mortgagor is, or will become, the registered proprietor of the land.

Second, mortgagees and subscribers will be at pains to ensure they comply with the MPR and the VOI requirements as a failure to do so may result in the Registrar restricting, suspending or terminating the subscriber’s use of the ELN.\footnote{70} In addition,
the legislation in some jurisdictions imposes penalties where false or misleading information has been provided in relation to VOI or the ECNL.\footnote{See, for example, \textit{Real Property Act 1886 (SA)} s232A and 232B and \textit{Electronic Conveyancing (Adoption of National Law) Act 2013 (TAS)}, s9.}

\textbf{C Effect of registration of a forged mortgage under the ECNL}

The authors consider that if, despite the safeguards included within the ECNL, a forged mortgage were to be registered, indefeasibility would still attach to the mortgage provided the registered mortgagee was not guilty of fraud. As noted, the ECNL provides that the legislation does not derogate from the fundamental principles of the Torrens system, such as indefeasibility of title,\footnote{ECNL, s5(1)(b).} and the Registrar in each jurisdiction continues to receive and process instruments in accordance with the relevant land titles legislation.\footnote{ECNL, s8(1).}

However, what if the non-fraudulent mortgagee had not undertaken reasonable VOI steps as required under MPR cl 6.5.1(b)? There is no clear answer to this within the ECNL.\footnote{This is in contrast to the ‘careless mortgagee’ provisions discussed in Part III of this article. Under these provisions, if the registered mortgage is a forgery and the mortgagee failed to take reasonable VOI steps, in Queensland the registered mortgagee will not be entitled to the benefits of indefeasibility and in New South Wales and Victoria the Registrar will have power to cancel the registration of the mortgage.} Clearly, the failure to comply with the VOI rules may result in a termination of the subscriber’s right to use the ELN and penalties may be imposed. But, how is this of assistance to the defrauded mortgagor whose land is subject to an indefeasible mortgage? Is there a basis other than fraud upon which the defrauded mortgagor can challenge the mortgage? Specifically, can the mortgagor claim an \textit{in personam} exception against the registered mortgagee on the basis of the failure to comply with the MPR?

The \textit{in personam} exception allows a claimant to bring a personal action against the registered proprietor. As Lord Wilberforce famously said, the principle of indefeasibility ‘[i]n no way denies the right of the plaintiff to bring against the registered proprietor a claim \textit{in personam}, founded in law or in equity, for such relief
as a court acting in personam may grant'. 75 Traditionally, mortgagors have not been successful in arguing an in personam exception where the basis for the claim is that the mortgage was a forgery and the mortgagee was careless in verifying the identity of the mortgagor. 76 The reason for this relates back to the very narrow way in which fraud has been defined by courts. In Assets Co Ltd v Mere Roihi the Privy Council commented:

The mere fact that he might have found out fraud if he had been more vigilant, and had made further enquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making enquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. 77

It follows that a mere lack of vigilance in making further enquiries is not fraud. It is only where the registered proprietor was wilfully blind to the existence of fraud that ‘fraud may properly be ascribed to him’. This restrictive definition of fraud has, it seems, permeated and informed the way the courts examine an in personam claim that is based on a mortgagee’s failure to verify the identity of the mortgagor. For example, in Grgic v Australian and New Zealand Banking Group, 78 Powell JA conceded that it was possible, with the benefit of hindsight, to say that the mortgagees were ‘less meticulous than they might otherwise have been’ 79 in verifying the identity of the mortgagor. In addition, his Honour was prepared to find that the mortgagees ‘came under a duty to [the mortgagor] to exercise reasonable care in ascertaining that the

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76 See, for eg, Pyramid Building Society v Scorpion [1998] 1 VR 188, Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133, Vassos v State Bank of South Australia [1993] 2 VR 316. On the other hand, in Mercantile Mutual Insurance Co Ltd v Gosper (1991) 25 NSWLR 32, the court found an in personam exception was available to challenge the registered mortgagee’s title. This decision has been much debated and criticised, see Edgeworth, above n 15, [12.880], fn 598.
77 Assets Co Ltd v Mere Roihi [1905] AC 176, 210. This narrow definition of statutory fraud is, at least in part, attributable to the ‘notice’ provision in the Torrens legislation which provides, in essence, that a registered transferee of an interest in land is not to be affected by actual or constructive notice of any pre-existing unregistered interest or trust. Indeed, even where the person who becomes registered is aware that registration will defeat the prior unregistered interest, this too is not fraud. See Kitto J in Mills v Stockman (1967) 116 CLR 61 at 78. The notice provisions are: Land Titles Act 1925 (ACT) ss 59, 60(2); Real Property Act 1900 (NSW) s 43(1); Land Title Act 2000 (NT) s 188 (2); Land Title Act 1994 (Qld) s 184 (2); Real Property Act 1886 (SA) ss 186, 187; Land Titles Act 1980 (Tas) ss 41(1) and (2); Transfer of Land Act 1958 (Vic) s 43; Transfer of Land Act 1893 (WA) s 134.
79 Ibid, 221.
apparent mortgagor was in fact the registered proprietor of the land’. Ultimately, however, Powell JA found that ‘the facts do not establish that [the mortgagees] fell short of exercising the relevant degree of care’ and accordingly, the in personam claim was unsuccessful.

Similarly, in Vassos v State Bank of South Australia, the mortgagors were unsuccessful with their in personam claim against the mortgagee bank. In this case Hayne J focused on the lack of any unconscionable conduct by the mortgagee, commenting:

[I]t may well be that the bank did not act without neglect but there is in my view no material which would show that the bank acted unconscionably. ... Even if by making reasonable enquiries the bank could have discovered the fact of the forgery I do not consider that that fact alone renders its conduct unconscionable. I do not consider that the plaintiffs have any in personam right against the bank.

These cases represent the traditional position: the in personam exception is not established by merely careless mortgagee VOI practices. However, will the introduction of the ECNL and the MPR, which specifically require the mortgagee to take reasonable steps to verify the identity of the mortgagor, make it more likely for a court to find an in personam exception in these cases? This question gives rise to something of a conundrum. It is well established that the recognition of an in personam cause of action must not be inconsistent with the principle of indefeasibility nor have the effect of circumventing the indefeasibility provisions.

The very strict definition of fraud, which precludes a challenge to the registered proprietor’s title on the basis of a failure to make further enquiries, suggests an in personam claim based on a failure to make enquiries would likewise not be allowed. Perhaps Hayne JA had this in mind when he commented, ‘[i]f [the mortgagee] did

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80 Ibid, 223.
81 Ibid.
83 Ibid, 333. In his judgment, Hayne J implies that, in addition to establishing a legal or equitable cause of action, it must also be established that the registered mortgagee has acted unconscionably. The need for a superadded requirement of unconscionability has been rejected in later cases, see for eg, White v Tomasel [2004] 2 Qd R 438 and the discussion in Edgeworth, above n 15, [12.900] and Moore et al, above n 7, [4.355].
85 Ibid, per Wilson and Toohey JJ, 638.
owe the [mortgagor] a duty to take care and if the [mortgagee] breached that duty, that
may give rise to a claim for damages but it was not explained how it gave rise to a
right to have the mortgage set aside’. 86 This view accords with the principle of
coherece which Bant has indicated ‘embraces the requirement that specific private
law rules and doctrines should not be applied in such a way as to undermine or stultify
an overriding legal prohibition or principle of liability’. 87 Arguably, according a wide
interpretation to in personam claims undermines and stultifies one of the main
objectives of the Torrens legislation to provide, in the context of a registered
mortgage, an immediately indefeasible title to a non-fraudulent registered mortgagee.
One might have expected that if the legislature had intended that a failure to take
reasonable VOI steps was to be a basis for impugning the registered mortgagee’s
indefeasible title, whether under an in personam claim or otherwise, there would be
provisions to this effect in the ECNL and/or the MPR. There are no such provisions.

It is difficult to predict how a future court may answer these questions. However, the
authors submit that an in personam claim ought to be available given: (1) the MPR
imposes a statutory VOI duty on mortgagees; and (2) the VOI Standard provides very
clear VOI criteria. Accordingly, breach of the statutory VOI Standard cannot be
regarded as mere ‘carelessness’ 88 and a court would be justified in finding that an in
personam claim is available against the mortgagee. 89

III Careless Mortgagee Provisions and the Curious Case of ss105(3)-(5) TLA
(WA)

In Western Australia, the introduction of the ECNL brought with it consequential
amendments to other legislation. One of these amendments was to s105 of the

87 Elise Bant, ‘Statute and Common Law: Interaction and Influence in Light of the Principle of
possibility of mortgagee negligence giving rise to an in personam claim, see O’Connor, above n 10,
150-153.
89 This possibility would appear to be supported by Bant who considers that allowing an in personam
exception on the basis of a ‘wrong’ committed by the registered proprietor would not ‘generally
undermine the objectives of the [Torrens] statutes’: Bant, above n 87, 376. As noted above and below,
the careless mortgagee provisions specifically provide for the removal of the mortgage from the
Register in the event the mortgage is forged and the mortgagee has breached the VOI duty.
Accordingly, in Queensland, New South Wales and Victoria it is not necessary for the mortgagor to
attempt to establish an in personam claim.
Transfer of Land Act 1893 (WA). This amendment is curious – indeed, baffling. There does not appear to be a corresponding amendment to the Torrens legislation in any of the other jurisdictions. In order to provide a context to the operation of this amendment, it is useful first to consider, and then contrast with s105 (3)-(5) TLA (WA), the careless mortgagee provisions that have been enacted in Queensland, New South Wales, and Victoria.

A Careless Mortgagee Provisions

The principle of immediate indefeasibility means that a non-fraudulent registered mortgagee, who has been careless in failing to verify the identity of the mortgagor, is likely to obtain an indefeasible mortgage even though the mortgage is a forgery. The obvious inequities raised by this scenario were the catalyst for the introduction of careless mortgagee provisions, first in Queensland in 2005, then New South Wales in 2011 and, finally, Victoria in 2014. These provisions apply to both the paper and electronic lodgment of mortgages.

The Queensland provisions require a mortgagee to take reasonable steps to ensure that the person who is the mortgagor under the mortgage instrument is the same person as the person who is, or who is about to become, the registered proprietor of the land. This requirement also applies to the transferee of a mortgage. Under Land Title Act 1994 (Qld) s185(1A), a registered mortgagee who fails to take reasonable steps to identify the mortgagor, in circumstances where ‘the person who was the mortgagor under the instrument of mortgage or amendment of mortgage was not the person who was, or who was about to become, the registered proprietor of the lot or the interest in a lot for which the instrument was registered’ does not obtain the benefit of

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90 Land Title Act 1994 (Qld), ss11A(1) – (3) and s185(1A). A similar provision applies in the case of a transfer of a mortgage, Land Title Act 1994 (Qld), s11B(2).
91 Real Property Act 1900 (NSW) s56C and in relation to compensation, Real Property Act 1900 (NSW), s129(2)(j).
92 Transfer of Land Act 1958 (Vic), ss87A – E.
93 Land Title Act 1994 (Qld), s11A(2).
94 Land Title Act 1994 (Qld), s11B(2).
95 For a discussion of the Queensland requirements regarding the taking of reasonable steps see, Christensen, above n 53 and S Christensen, ‘Can the Carelessness of a Mortgagee’s Lawyer Cause the Mortgage to Lose the Benefit of Indefeasibility?’ (2008) 23(1) Australian Property Law Bulletin 8.
indefeasibility. In addition, the careless mortgagee is not entitled to compensation from the State for any deprivation, loss or damage.\footnote{\textit{Land Title Act 1994} (Qld), s189(1)(ab).}

The New South Wales provisions are broadly similar. If the mortgagee fails to take reasonable steps to verify the identity of the mortgagor\footnote{Under \textit{Real Property Act 1900} (NSW), s 56C(2) a mortgagee is deemed to have taken reasonable steps if the mortgagee has taken the steps prescribed by the regulations. The regulations refer to the VOI Standard of the MPR of the ECNL.} and the Registrar-General is satisfied that the execution of the mortgage involved fraud against the registered proprietor then, under \textit{Real Property Act 1900} (NSW) s56C, the Registrar-General may refuse to register the mortgage or may cancel the registration of the mortgage. The Victorian provisions are similar to the New South Wales provisions: if the mortgagee failed to take reasonable steps to verify the identity of the mortgagor\footnote{\textit{Transfer of Land Act 1958} (Vic), s 87A (2) specifies the requirements for the taking of reasonable steps.} and the registered proprietor of the land did not grant the mortgage, then the Registrar may refuse to register the mortgage or may remove the mortgage from the register.\footnote{For a discussion of the Victorian provision see, Harding, above n 9. Harding discusses the question as to whether the Victorian Registrar’s power to refuse to register a mortgage, or to remove the mortgage from the register, under s87A(3) is discretionary or, is it in fact, mandatory.} As with Queensland, the New South Wales and Victorian provisions also apply to the transferee of a mortgage.\footnote{\textit{Real Property Act 1900} (NSW), s 56C(8) and \textit{Transfer of Land Act 1958} (Vic), ss87B.}

The careless mortgagee provisions may be summarised as follows: (1) The mortgagee must take reasonable steps to verify the identity of the mortgagor; 2(a) If the mortgagee fails to take reasonable steps to verify the identity of the mortgagor, and (b) the registered proprietor of the land did not grant the mortgage; then (3) The registered mortgagee shall, or may, lose the benefits of an indefeasible mortgage.

The introduction of the careless mortgagee provisions in Queensland, New South Wales and Victoria is an entirely sensible and laudable initiative to ‘change the dynamic between a registered mortgagee and the registered owner who has not signed the mortgage’.\footnote{M Backstrom and S Christensen, above n 14, 128.} The provisions effectively ‘transfer the risk of fraud from the
registered owner to the mortgagee, creating a qualified title in the mortgagee’. 102 As noted in the Queensland Parliament during the second reading speech:

[These amendments will prevent unscrupulous lenders from relying on and benefitting from the very feature of the Torrens system which is intended to provide security of title for people holding property interests in Queensland, when the lenders have not even done what would be prudent to minimise their own lending risk. 103]

1 An opportunity missed – incorporation of careless mortgagee provisions throughout Australia

The introduction of the ECNL provided an excellent opportunity for the remaining Australian jurisdictions; Western Australia, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory (‘ACT’), 104 to introduce careless mortgagee provisions into their Torrens legislation. It is regrettable that this opportunity has not, at this stage, been taken up. The introduction of the ECNL was, itself, an outstanding effort to provide uniform laws regarding a national system for the electronic lodgment of registry instruments. The failure of the remaining jurisdictions to adopt careless mortgagee provisions, however, precludes a comprehensive harmonisation of Australian laws with regards the effect of careless mortgagee conduct. 105 Although it is anticipated that the ECNL VOI requirements will dramatically reduce the incidence of forged mortgages, it is doubtful that the risk

102 Ibid.
104 As will be seen in the next section, Western Australia has introduced an amendment to the Torrens legislation that would have the effect of ensuring a mortgage is not valid or binding against a mortgagor if a counterpart of the mortgage was not signed before the mortgage was registered. The authors submit there are grave concerns with the operation of the amendment and suggest careless mortgagee provisions along the lines of the Queensland legislation would not only be more effective than the current amendment but would also support the harmonisation of Australian Torrens laws. To date, the ACT has been excluded from the ECNL due to the leasehold nature of the land tenure system in the ACT.
105 This is indeed regrettable. As Hunter has commented, ‘The interstate and international nature of many real property transactions and the essential role of national law firms, companies and organisations mean that unnecessary costs are incurred, and efficiency is compromised by administrative and legal differences between jurisdictions’, see T Hunter, ‘Uniform Torrens legislation: Is there a will and a way?’ (2010) 18 Australian Property Law Journal 201, 203.
of registered forged mortgages will be entirely eliminated. For those jurisdictions without careless mortgagee provisions, there remains no clear cut answer to the question posed in Part II above as to the effect of a registered forged mortgage in favour of a non-fraudulent mortgagee who has failed to carry out reasonable VOI steps. This problem is solved in Queensland, New South Wales and Victoria via the application of the careless mortgagee provisions. The authors submit it ought also to be solved in the remaining jurisdictions.

B The Curious Case of TLA (WA) ss105(3)-(5)

In 2014, Western Australia implemented the ECNL by way of corresponding legislation in the Electronic Conveyancing Act 2014 (WA) (ECA (WA)). Pursuant to the ECA (WA), and with a view to implementing the ECNL, a series of consequential amendments were made to the TLA (WA). Included in these amendments was the introduction of ss105(3)-(5). Section 105 TLA (WA), deals generally with the creation of mortgages and charges for annuities. Subsections (3)-(5) introduced in 2014 provide as follows:

105. Mortgages and charges for annuities, creating

(3) Subsection (4) applies if —

(a) a counterpart of [a mortgage instrument] … is lodged for registration in accordance with regulations made under this Act …; and

(b) the counterpart … —

(i) purports to be signed by the [mortgagee]; but

(ii) does not purport to be signed by the [mortgagor]; and

(c) a counterpart of the [mortgage] purporting to be signed by the [mortgagor] is not also lodged for registration; and

(d) the [mortgage] is registered.

(4) If this subsection applies, the mortgage … is not valid or binding against the proprietor of the land unless, before the [mortgage] was registered, the proprietor of the land signed a counterpart of the [mortgage].

(5) Subsection (4) overrides s58
Under s4(1CA) of the TLA (WA) a document is a ‘counterpart’ in relation to another document if —

(a) the documents relate to the same conveyancing transaction; and
(b) the documents contain exactly the same data or information, apart from all or any of the following —
   (i) any signature created for or appearing on each document;
   (ii) the details of any attesting witness;
   (iii) the date on which the documents were signed or witnessed; ...

The 2014 amendments to s105 are convoluted and difficult to construe. In essence, they appear to deal with the situation where a mortgage instrument electronically lodged for registration is digitally signed by the subscriber on behalf of the mortgagee but is not also digitally signed on behalf of the mortgagor and, in addition, a counterpart of the mortgage instrument that is digitally signed on behalf of the mortgagor is not also lodged electronically.106 In such a situation, s105(4) provides that, notwithstanding registration of the mortgage, it will not be valid or binding against the proprietor of the land unless the proprietor of the land signed a counterpart of the mortgage prior to its registration. This result is reinforced by s105(5) which expressly excludes the operation of s58 of the TLA (WA) in such circumstances. Section 58 of the TLA (WA) provides, relevantly:

58. Instruments not effectual until registered

No instrument until registered in manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act or to render such land liable to any mortgage or charge …; but upon such registration the estate or interest comprised in the instrument shall pass …

106 As noted by Davies, ‘This will probably be the case for the majority of transactions, in which a subscriber … acts for the mortgagor only in his or her capacity as transferee of the land. In such circumstances, the electronically lodged mortgage document is digitally signed only by the mortgagee or its legal practitioner, and no electronic counterpart is signed or lodged by the mortgagor.’ Davies, above n 65, 331.
Section 105(4) is puzzling. Perhaps the legislature, in enacting the provision, intended to replicate the careless mortgagee provisions of Queensland, New South Wales and Victoria. If this is the case, the legislature has failed. Despite the difference in wording across the three jurisdictions, the broad gist of the careless mortgagee provisions of each is that if the mortgagee fails to take reasonable VOI steps and the registered proprietor of the land did not grant the mortgage then the registered mortgagee shall, or may, lose the benefits of an indefeasible mortgage. It is therefore critical to the application of the careless mortgagee provisions that there is both a failure in the VOI steps and a mortgage that has not been granted by the mortgagor – typically due to the fact the mortgage is a forgery.

By contrast, ss105(3)-(5) of the TLA (WA) have a far broader application than the careless mortgagee provisions. There is a number of points to note in this regard.

First, assuming the pre-requisites in s105(3) have been satisfied, s105(4) comes in to play to invalidate a mortgage if the proprietor of the land did not sign a counterpart of the mortgage before the mortgage was registered. One reason the counterpart may not have been signed by the proprietor is because it was signed by a forger. Under the careless mortgagee provisions, even if the mortgage is a forgery, the mortgage may still be enforceable against the mortgagor if the mortgagee had taken reasonable VOI steps. This is not the case with s105(4). Regardless of whether reasonable VOI steps were taken by the mortgagee, the mortgage is not valid or binding against the proprietor of the land.

Second, the counterpart may not have been signed by the proprietor before the mortgage was registered due to inadvertence on the part of the proprietor, or some other innocent reason. The proprietor may actually be indebted to the mortgagee and the debt may be secured by an agreement by the proprietor to grant a mortgage. Regardless of the genuine intention of the proprietor to grant a mortgage, as the counterpart of the mortgage was not in fact signed, the mortgage is not valid or

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107 This is the wording used in Victoria: Transfer of Land Act 1958 (Vic), ss87A(3). The language used in New South Wales is ‘that the execution of the mortgage involved fraud against the registered proprietor of the mortgaged land’: Real Property Act 1900 (NSW), s56C(6)(a). In Queensland the wording is that ‘the person who was the mortgagor under the instrument of mortgage ... was not the person who was, or who was about to become, the registered proprietor of the lot or the interest in a lot for which the instrument was registered’: Land Title Act 1994 (Qld), s185(1A)(b).

binding against the proprietor of the land. The operation of s105(4) in this situation is particularly far-reaching. Unlike the careless mortgagee provisions, this section does not simply deny the mortgagee the benefits of indefeasibility, or allow the Registrar to remove the mortgage from the register. Section 105(4) goes further and renders the mortgage not valid or binding against the proprietor of the land. So, even though a mortgagee in this situation may, ordinarily, have an enforceable unregistered mortgage,\textsuperscript{108} s105(4) renders the mortgage unenforceable against the mortgagor.

In these first two scenarios a non-fraudulent registered mortgagee who had undertaken reasonable VOI steps would be denied the benefits of an indefeasible, or indeed any, mortgage. It is doubtful it was the intention of the legislature that s105(4) would have such a far-reaching and unjust application.

A third potentially curious application of s105(4) may arise in the event the registered proprietor transfers the land. While s105(4) clearly impinges upon a registered mortgagee’s indefeasible title, it is limited in its terms to invalidating the mortgage as against the ‘proprietor of the land’ at the time the mortgage was registered. On a strict reading of s105(4), should the registered proprietor’s interest in the land be transferred to a third party who becomes registered, the mortgage will be valid and enforceable against such subsequent registered proprietor. Thus analysed, s105(4) would appear to be introducing a very unusual species of reverse deferred indefeasibility into the Western Australian Torrens regime.\textsuperscript{109} This bizarre result would not occur under the careless mortgagee provisions. Unlike s105(4), the careless mortgagee provisions focus on the critical and more relevant issue of whether the registered mortgage was a forgery.\textsuperscript{110} In the event it was a forgery, provided reasonable VOI steps were not taken by the mortgagee, the mortgage may be removed from the register altogether. Once removed, it will be unenforceable against any registered proprietor of the land, whether current or future.

\textsuperscript{108} The unregistered mortgage could arise, for eg, if the mortgagee establishes a specifically enforceable agreement with the mortgagor to grant a legal mortgage. For a discussion of unregistered mortgages in the Torrens system, see Theodore v Mistford (2005) 221 CLR 612.

\textsuperscript{109} The authors concede that in practice it is unlikely a registered proprietor would transfer an interest in the land subject to a registered mortgage. However, it is possible, for eg, in a situation where the land is gifted either \textit{inter vivos} or through a testamentary disposition.

\textsuperscript{110} As noted at n 107, the careless mortgagee provisions use slightly different wording, however, the gist of the provisions concerns the registration of a forged mortgage.
Finally, the amendments to ss105 would also apply to those situations where, although the mortgagor may have signed the counterpart mortgage, the mortgagee is not able to establish this fact. As noted by Davies:

Legal practitioners who lodge documents electronically on behalf of mortgagees will therefore need to develop robust systems for the distribution and retention of copies of paper mortgage documents (consistent with the duty of a practitioner to take reasonable care to ensure that his or her mortgagee client obtains its intended security), especially since many mortgages remain on foot for decades.

With respect to document retention, neither the 7-year timeframe for the retention of documents mandated by both the Rules and the Legal Profession Conduct Rules, nor the 12-year timeframe hinted at in The Law Society of Western Australia’s Ethical & Practice Guidelines, may be sufficient. Instead, mortgage files may need to be retained indefinitely, on the same basis as files relating to wills and estate matters.111

This need to retain a paper copy of the wet signed mortgage is reminiscent of a conveyancing system in which a transferor was required to produce the chain of title to verify their good title.

When considering the potential application and impact of ss105(3)-(5) of the TLA (WA), one is prompted to ask whether these amendments constitute a ‘law suited to the requirements of modern times’ and, moreover, whether they derogate from the fundamental principles of the Torrens system by: denying indefeasibility to an entirely innocent registered mortgagee; introducing a form of reverse deferred indefeasibility; and by marking the return of the paper-based chain of title in relation to all mortgages.

The authors fear that they do and recommend the repeal of these curious provisions.112

111 Davies, above n 65, 333. The Rules refer to 6.6 and 28(3) of the Legal Profession Conduct Rules 2010 (WA). The 12 year timeframe is based on the limitation periods in ss 18, 19, 20, 23 and 24 of the Limitation Act 2005 (WA). Reference is also made to The Law Society of Western Australia (Inc), Ethical & Practice Guidelines Guide, 25 August 2015, [14.7], 48.

112 The authors understand that s105 TLA is under review, however, at this stage there is no publicly available information as to the precise nature of any future amendment to the section.
IV The Impact of the ECNL, Careless Mortgagee Provisions and ss105(3)-(5) 
TLA (WA) on Three Classic Forged Mortgage Cases

In 2012 the authors, together with Galloway, reported on an empirical study on teaching property law in Australia in the 21st century. Respondents in the study identified what they considered to be the 10 most important cases that should be covered in an Australian property law unit. The identified cases included the seminal immediate indefeasibility case of *Frazer v Walker*, a Privy Council decision based on the New Zealand Torrens legislation and involving a forged mortgage. *Frazer v Walker*, together with *Schultz v Corwill Properties Pty Ltd* and *Grgic v Australian and New Zealand Banking Group* provide useful case studies for exploring the potential practical impact of the ECNL, the careless mortgagee provisions and ss105(3)-(5) of the TLA (WA). Given the changed environment brought about by the electronic lodgment of registry instruments, some slight re-imagining of the facts is required when applying the ECNL.

**A Frazer v Walker**

*Frazer v Walker* illustrates the ‘textbook example of the type of fraud that is familiar and prevalent in many common law jurisdictions’ where the fraud is committed by a person in a close personal relationship with the defrauded registered proprietor. In *Frazer v Walker*, Mr and Mrs Frazer were the registered proprietors of property in Auckland, New Zealand. Mrs Frazer forged Mr Frazer’s signature to a mortgage over the property as security for a loan from the second respondents, Mr and Mrs Radomski. Mrs Frazer took the mortgage to the Frazers’ solicitors where a law clerk witnessed Mrs Frazer’s genuine signature and also a signature purporting to be that of Mr Frazer. Upon default, the Radomskis exercised the power of sale, selling the

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114 *Frazer v Walker* [1967] 1 AC 569.
115 *Schultz v Corwill Properties Pty Ltd* (1969) 90 WN (Pt 1) (NSW) 529.
117 For a discussion of how the facts in *Frazer v Walker* would be affected by the New Zealand Law Commission’s proposal to include a judicial discretion to overturn registered title in cases of ‘manifest injustice’, see R Thomas, ‘Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act’ (2011) New Zealand Law Review 715,739-744.
118 Low and Griggs, above n 103, 377.
property to Walker. Walker was registered as proprietor and brought an action for possession of the property.

The court applied immediate indefeasibility and found: first, that the Radomskis had not been guilty of fraud in becoming registered and, therefore, had an indefeasible mortgage enforceable against both Mr and Mrs Frazer; and second, that in purchasing the property from the Radomskis and becoming registered, Walker acquired an indefeasible title to the property.

Under the ECNL, it is quite unlikely that the dispute in *Frazer v Walker* would have arisen. In the ECNL environment, the Frazers’ solicitors may have acted as their representative with regards to the mortgage transaction. As representative, the solicitors were required to obtain a client authorisation (MPR 6.3), ensure the Frazers had the right to deal (MPR 6.4), and must have taken reasonable steps to verify the identity of their clients (MPR 6.5.1). Under MPR 6.5.3, the solicitors may have undertaken the VOI either by applying the VOI Standard or by taking other reasonable steps. For the purposes of this analysis, it will be assumed the VOI Standard is to be applied.\(^{119}\) Alternatively, the Frazers’ solicitors may not have acted as their representative, in which case the Radomskis’ solicitors as the subscriber would have been required to ensure the Frazers had the right to deal (MPR 6.4) and must have taken reasonable steps to verify the identity of the Frazers (MPR 6.5.1). In either case, whether the Frazers’ solicitors acted as their representative or the Radomskis’ solicitors were the subscriber, reasonable steps must have been taken to verify the identity of the Frazers. Under the VOI Standard this would necessitate, at the very least, a face-to-face meeting with both Mr and Mrs Frazer.\(^{120}\) A face-to-face meeting would have brought the proposed mortgage to the attention of Mr Frazer before it was registered. In the circumstances, it is unlikely the mortgage in favour of the Radomskis would have been registered.\(^{121}\) The VOI requirements of the ECNL would have properly fulfilled their function of ensuring that only genuine registry instruments are registered.

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\(^{119}\) Given that the solicitors in *Frazer v Walker* were the Frazers’ personal solicitors; it may be that in practice the solicitors would apply alternative VOI steps rather than the VOI Standard.  
\(^{120}\) MPR Schedule 8, cl 2.1.  
\(^{121}\) As noted in Part II, mortgagees and subscribers will be at pains to ensure they comply with the MPR and the VOI requirements as a failure to comply may result in the Registrar restricting, suspending or terminating the subscriber’s use of the ELN. See ECNL, s26 and MPR, cl 9.
In *Frazer v Walker* the mortgage was lodged for registration by the solicitors for the Radomskis. Two possibilities arise in the ECNL environment: either the solicitors, as subscriber, did undertake reasonable VOI of the Frazers, or they did not. On the facts it is clear that reasonable VOI of Mr Frazer was not undertaken.\(^{122}\) However, as neither the Radomskis nor their agents, the solicitors, were guilty of the fraud, the Radomskis obtained an indefeasible mortgage. Under the ECNL, in the absence of fraud this indefeasible mortgage could only be challenged if Mr Frazer was able to establish an *in personam* exception based on the Radomskis’ solicitors breach of the statutory duty to verify the identity of Mr Frazer. As discussed in Part II, the ECNL does not deal with this critically important issue. In any event, the subsequent registered purchaser, Mr Walker, would obtain an indefeasible title as no claim was made by Mr Frazer prior to Mr Walker’s registration.

Again, as with the ECNL provisions, under the careless mortgagee provisions, it is highly unlikely the dispute in *Frazer v Walker* would have arisen. However, assuming the Radomskis’ solicitors digitally lodged and registered the mortgage in breach of the VOI steps, the position under the careless mortgagee provisions is far more clear cut. The careless mortgagee provisions place the onus of proving that reasonable steps were taken to verify the identity of the mortgagor on the mortgagee. A mortgagee does not discharge this onus simply by appointing an agent to act on its behalf.\(^{123}\) Neither the Radomskis, nor their solicitors, had taken any, let alone reasonable, steps to verify the identity of Mr Frazer as the co-mortgagor who executed the mortgage with Mrs Frazer. Under the Queensland provisions the Radomskis would not be entitled to the benefit of an indefeasible mortgage as against Mr Frazer. However, on the exercise of their power of sale and transfer of registered title in the property to Walker, under a form of deferred indefeasibility introduced by the Queensland provisions, Walker would have acquired an indefeasible title enforceable against Mr Frazer. While the ultimate outcome of the case may be the same as under the ECNL, the reasoning is fundamentally different.

\(^{122}\) Mr Frazer did not attend a face-to-face interview with the Radomskis’ solicitors as required under MPR Schedule 8, cl 2.1.  
\(^{123}\) For a discussion of the liability of a mortgagee where an agent has been appointed, see, Christensen, above n 95.
Similarly, in New South Wales and Victoria, if the mortgagee failed to take reasonable steps to verify the identity of the mortgagor, upon being satisfied that the mortgage was forged, the Registrar may refuse to register the mortgage (in Victoria) or may remove the forged mortgage from the register (in Victoria and New South Wales). If either action had been taken prior to the sale and transfer to Walker, the mortgage would no longer have been registered. As an unregistered forged mortgage, it would have been void and unenforceable. Not only would the Radomskis not have acquired an indefeasible mortgage, they would not have had the power to sell the property on default by the Frazers. This dispute would, therefore, not have arisen. If, however, the forged mortgage was only removed from the register following the sale and registration of the transfer to Walker, once again, while the reasoning may differ the outcome would be the same – Walker would acquire indefeasible title.

Finally, under ss105(3)-(5) of the TLA (WA), as the Radomskis, the mortgagees, would not be able to establish that Mr Frazer signed a counterpart of the mortgage before it was registered, the forged mortgage would not be ‘valid or binding’ against Mr Frazer as the proprietor of the land. This result is similar to the position under the careless mortgagee provisions and different from that under the ECNL. However, as Mr Frazer failed to take any action before the Radomskis exercised their power of sale, Walker was registered as proprietor and the mortgage was discharged. Presumably at this point, Walker obtained an indefeasible title and in seeking to evict the Frazers from the land was not relying on the unenforceable mortgage but on his registered title. Any other interpretation of ss105(3)-(5) of the TLA (WA) would be entirely at odds with the principle of immediate indefeasibility and would be inconsistent with other express provisions in the TLA (WA) that seek to protect a purchaser from a mortgagee from the consequences of an irregular or improper sale.\(^{124}\)

**B Schultz v Corwill Properties Pty Ltd**

\(^{124}\) *Transfer of Land Act 1893* (WA), s108.
Schultz v Corwill Properties Pty Ltd 125 (Schultz) is widely regarded as the seminal Australian case on indefeasibility, fraud and agency. The facts in Schultz were complex. For the purposes of this article, a simplified version of the facts is presented.

In Schultz, Galea was the solicitor for the mortgagee, Schultz. Galea was also the company secretary of the registered proprietor, Corwill Properties (‘Corwill’). Without the knowledge of the directors and shareholders of Corwill, Galea fraudulently negotiated a loan from Schultz to Corwill on the security of a mortgage over one of Corwill’s properties. Galea forged and falsely attested the signatures of the Corwill directors to the mortgage, which was then registered. The uniqueness of Schultz for the purposes of this article lies in the fact that the forgery was committed by the subscriber himself, Galea.

In Schultz, Justice Street identified two circumstances in which fraud by an agent may be imputed to the principal: first, where the fraud is committed by the agent; and second, where the agent has knowledge of fraud.126 In the first circumstance the general principle, ‘respondeat superior’, applies: provided the fraudulent conduct by the agent was within the agent’s actual or apparent authority, that fraudulent conduct will be sheeted home to the principal so as to make the principal’s registered title defeasible through fraud. The second circumstance, where the agent has knowledge of fraud, is governed by a generally irrebuttable presumption that an agent communicates to his or her principal all information concerning the transaction. The agent’s knowledge of fraud is thereby imputed to the principal.127

On the facts, Street J held that, while Galea may have been acting as the agent of Schultz in relation to the registration of the mortgage, it was not within the scope of Galea’s actual or apparent authority to forge the mortgagor’s signature to the mortgage. Schultz had instructed Galea to obtain a valid mortgage and a safe security for the loan. The forged execution of the mortgage was an ‘independent activity entirely in furtherance of his own interests and in no way done for or on behalf of [the

125 Schultz v Corwill Properties Pty Ltd (1969) 90 WN (Pt 1) (NSW) 529.
126 Ibid, 537.
127 In Schultz, Street J identified the exception to this general rule; namely, if the knowledge to be imputed is knowledge of the agent’s own fraud then the principal may bring evidence to rebut the presumption of knowledge and may prove ignorance of the agent’s fraud, see Schultz v Corwill Properties Pty Ltd (1969) 90 WN (Pt 1) (NSW) 529, 539.
As a result the registered mortgage was indefeasible and enforceable against the mortgagor, Corwill.

Under the ECNL, Galea was the forger, the subscriber and the agent of the mortgagee. In these circumstances, it is nonsensical to ask whether the subscriber took reasonable steps to ensure that the mortgagor, Corwill, had the right to deal (MPR 6.4) or had taken reasonable steps to verify the identity of Corwill (MPR 6.5.1). Galea was the fraudster who defrauded Corwill of its previously unencumbered title to the land. However, under MPR 5.1.2, to the extent the subscriber digitally signs electronic documents, the subscriber does so as the agent of the client. That is, Galea was acting as the agent of the mortgagee, Schultz. Surely in these circumstances Galea’s fraud should be sheeted home to Schultz such that the registered mortgage is defeasible through the fraud of the agent? But, as noted in Schultz, Street J considered Galea’s fraud was outside the scope of the agency and therefore Schultz obtained an indefeasible mortgage. Given that the ECNL specifies that it does not derogate from the fundamental principles of the Torrens system, the law regarding the fraud of an agent remains applicable, and under the ECNL, on Justice Street’s analysis, Schultz would obtain an indefeasible mortgage.

It seems, therefore, that in those cases in which the person committing the relevant fraud is the subscriber, the ECNL does little to either prevent the fraud or, applying Justice Street’s analysis in Schultz, protect the mortgagor from the consequences of the fraud. Of course, once the fraud of the subscriber is discovered, doubtless the subscriber’s access to the ELN will be terminated under MPR cl 9, but this will be of little assistance to the defrauded mortgagor.

The authors suggest that a future court may apply the law regarding fraud by an agent differently from the way the law was applied in Schultz. The restrictive application

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129 ECNL, s5(1)(b).
130 The main way in which the ECNL may prevent fraud by a subscriber is to prevent the registration of an unsuitable subscriber in the first place, see MOR cl 14 dealing with subscriber registration and MPR cl 4, dealing with the eligibility criteria for subscribers.
131 The authors concede that in Cassegrain v Gerard Cassegrain & Co Pty Ltd (2015) 254 CLR 425, [40] the High Court approved Justice Street’s comments in Schultz on the law regarding fraud of an agent. However, the High Court made no comment on the accuracy of Justice Street’s application of the law to the facts in Schultz.
of respondeat superior to the facts in *Schultz* has been the subject of considerable academic and judicial criticism.\(^{132}\) As noted in the New Zealand case of *Dollars and Sense Finance Ltd v Nathan* ‘someone who creates an agency in which there is a risk of improper behaviour by an agent ... should expect to bear responsibility where that risk eventuates and loss is thereby caused by the agent to a third party’.\(^{133}\) Provided ‘the wrong can be seen as a materialisation of the risk inherent in the task’,\(^{134}\) the principal ought to be bound by his or her agent’s acts. On the *Schultz* scenario, the question becomes, ought Schultz to be bound by the conduct of her agent Galea? Was his fraudulent conduct a material risk in obtaining for Schultz a registered mortgage? The authors suggest it was.

Once again, the application of the careless mortgagee provisions is much clearer and would arguably result in a different outcome in *Schultz*. If the mortgagee, or under the ECNL and on ordinary agency principles, the subscriber acting on behalf of the mortgagee, has been careless in verifying the identity of the mortgagor, as Galea most certainly was, and if the mortgage was forged, which it was, then under the New South Wales and Victorian provisions, the mortgage may either not be registered at all or, if registered, may be removed from the register thereby depriving the registered mortgagee, Schultz, of the benefits of an indefeasible mortgage. Similarly, although through a slightly different legislative mechanism, under the Queensland careless mortgagee provisions, the forged but registered mortgage will not be indefeasible. There is no question under the careless mortgagee provisions as to the scope of the agent’s authority and the task that the agent is required to perform: the task is to take reasonable steps to verify the identity of the mortgagor. Not taking those steps would be a ‘materialisation of the risk inherent in the task’ and accordingly, the principal, Schultz would bear responsibility for her agent’s omission to undertake reasonable VOI steps and associated fraud.

Much like in *Frazer v Walker*, under the ss105(3)-(5) of the *TLA* (WA), Schultz, the mortgagee, would not be able to establish that the directors of Corwill signed a

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\(^{132}\) See for eg *Dollars and Sense Finance Ltd v Nathan* [2008] 2 NZLR 557; O’Connor, above n 10, 143; Edgeworth, above n 15, [12.690].

\(^{133}\) *Dollars and Sense Finance Ltd v Nathan* [2008] 2 NZLR 557, [48].

\(^{134}\) Ibid, [40].
counterpart of the mortgage before it was registered. Accordingly, the forged mortgage would not be ‘valid or binding’ against Corwill by the mortgagee, Schultz.

C Grgic v Australian and New Zealand Banking Group

The unanimous decision of the New South Wales Court of Appeal in Grgic v Australian and New Zealand Banking Group (Grgic)\(^{135}\) concerned the false attestation by the mortgagee bank of a mortgage signed by an imposter purporting to be the mortgagor. Mr Grgic Jnr and his wife obtained an overdraft facility from the ANZ Bank on security of a mortgage over property owned by Mr Grgic Snr. Mr Grgic Snr did not consent to, indeed he was not even aware of, this arrangement. Mr Grgic Jnr and his wife arranged for Mr Sierra to attend with them at the ANZ Bank, present himself as Mr Grgic Snr and execute the mortgage instrument as if he were Mr Grgic Snr. At the meeting with the ANZ Bank, Mr Sierra produced the duplicate Certificate of Title for the mortgaged property. Mr Sierra’s forgery of Mr Grgic Snr’s signature on the mortgage instrument in favour of the ANZ Bank was witnessed by a bank employee.

The court in Grgic rejected Mr Grgic Snr’s assertion that the mortgage was not enforceable against him because it was procured by the fraud of an employee of ANZ Bank, that fraud being the bank’s employee falsely certifying that; first, Mr Grgic Snr was personally known to him, and, second, that the mortgage was correct for the purposes of the relevant Torrens statute.

As noted above, the court was prepared to accept, with the benefit of hindsight, that the bank officers ‘were less than meticulous than they might otherwise have been’ in seeking to establish that the person introduced to them as Mr Grgic Snr was in truth the registered proprietor of the subject property. But in finding that the registered mortgage was nonetheless indefeasible and enforceable against Mr Grgic Snr, Powell JA considered it a well-established principle that:

a person who presents for registration a document which is forged or has been
fraudulently or improperly obtained, is not guilty of ‘fraud’ if he honestly believes it to
be a genuine document which can be properly acted upon … a less than meticulous
practice as to the identification of persons purporting to deal with land … does not
constitute a course of conduct so reckless as to be tantamount to fraud.136

With the explicit and rigorous identity verification processes introduced by the ECNL
requiring a number of original documents as well as photographic identification, the
forgery in Grgic may have been more difficult to perpetrate and, provided the ANZ
Bank complied with the VOI Standards, the fraud would probably have been
discovered at the time it was committed, or at least, before registration. If, however,
this were not the case, and the forgery went undetected and the mortgage was
registered, it is unlikely the outcome under the ECNL would be different from that in
Grgic unless, as discussed above, the ANZ Bank’s failure to take reasonable steps to
verify the identity of Mr Grgic Snr could be construed as a statutory breach giving rise
to an in personam exception by Mr Grgic against the bank.

The outcome of Grgic might have been quite different under both the careless
mortgagee provisions and ss105(3)-(5) of the TLA (WA). Pursuant to the careless
mortgagee provisions, the bank having been ‘less meticulous’ than they ought to have
been in verifying that Mr Sierra was who he said he was, may well be considered to
have failed to take the reasonable steps necessary to verify the identity of Mr Grgic
Snr, thereby depriving the bank of the protection of indefeasibility, even if the
mortgage was registered. So, too, under the far-reaching provisions of ss 105(3)-(5) of
the TLA (WA), the mortgage, not having been signed by the registered proprietor, Mr
Grgic Snr, would not have been enforceable against him.

V Conclusion

The above analysis of the operation of the ECNL, the careless mortgagee provisions
and ss105(3)-(5) of the TLA (WA), and the potential impact of each on 3 classic fraud
cases demonstrates that these legislative interventions are likely to reduce the risk of

fraud in the conveyancing process and also to ameliorate the potentially harsh operation of the Torrens system in the event of fraud, particularly, mortgage fraud.

The ECNL was introduced to provide an ‘efficient national platform to settle property transactions, lodge instruments with land registries and meet associated duty and tax obligations electronically through a national system’. The system is intended to simplify processes, eliminate the costs and complexities inherent in administering eight disparate conveyancing systems, and increase accuracy in transactions. It is likely that the ECNL has largely achieved, or at least when fully operational will achieve, these objectives. And, it aims to do this without diminishing the overall security and integrity of the Titles Register or public confidence in the Titles Register. This is all to the good. However, the authors submit that a major deficiency in the ECNL is the failure to incorporate, either within the ECNL itself or in consequential amendments to the Torrens legislation, careless mortgagee provisions akin to those adopted in Queensland, New South Wales and Victoria. The introduction of the ECNL provided an excellent opportunity for the sensible and comprehensive harmonisation of Australian laws with regard careless mortgagee conduct. Not only has this opportunity for harmony been overlooked but it leaves the remaining jurisdictions with ongoing confusion as to the effect of a registered forged mortgage in favour of a non-fraudulent mortgagee who has failed to carry out reasonable VOI steps. Perhaps the forged mortgage can be challenged on the grounds of an in personam exception, perhaps not. This lack of harmony and clarity is indeed regrettable.

In relation to s105(3)-(5) of the TLA (WA), the potential reduction in fraudulent mortgages has come at a significant cost – the substantial erosion of the concept of indefeasibility. Of added concern is that this has occurred, seemingly, unwittingly. Discussion of the potential impact of the amendments to s105 of the TLA (WA) received no attention in the parliamentary reading speeches and debates preceding their introduction. Further, there is no public record of consultation with relevant stakeholders such as banks and other credit providers. Yet, the implications for

137 COAG above n 16.
138 Ibid.
139 MOR, cl 8.
banking practice and the enforceability of mortgages are potentially far-reaching. One wonders whether, in an effort to provide ‘a law suited to the requirements of modern times’, the Western Australian legislature has accidentally thrown out the baby with the bathwater.
Chapter 8: Synthesis and Conclusion
8.1 Introduction

Undoubtedly, the application of immediate indefeasibility to resolve bijural inaccuracy may produce unfair outcomes for the prior registered proprietor who is deprived of his or her interest in land by a non-consensual transaction. The injustice of this outcome inevitably leads one to question the continuing acceptability of immediate indefeasibility as the bijuralism rule for the Australian Torrens jurisdictions. Accordingly, the overarching research question posed in this thesis is:

Is the Australian Torrens system principle of immediate indefeasibility ‘fit for purpose’ for the 21st century?

In order to answer this question, it is first necessary to obtain a deeper understanding of the nature of immediate indefeasibility and the reasons for its adoption in the Australian jurisdictions. Chapter 2 of this thesis therefore outlines the purposes of the Torrens system, evaluates the rival principles of deferred and immediate indefeasibility and considers the recently reformed bijuralism rule of New Zealand. The discussion in Chapter 2 establishes that regardless of which approach to indefeasibility is adopted, there will inevitably be some level of uncertainty and insecurity in the application of any bijuralism rule. No bijuralism rule is perfect.

With this word of caution in mind, this chapter turns to answer the overarching research question by synthesising the discussion from the published chapters in response to the three subsidiary research questions.

8.2 How well does the principle of immediate indefeasibility compare with the bijuralism rules of England and Wales?

Chapter 3 provides a comparative analysis of the operation of immediate indefeasibility with the bijuralism rules adopted in England and Wales.1 The English bijuralism rules are complex and this complexity has generated inconsistency and confusion in the case law. It is submitted that the reason for the complexity in the law

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1 For convenience, the land title registration system in England and Wales is referred to as the English system.
is due to the laudable attempt by the English legislature to strike a fair and just balance between static and dynamic security. The legislation does this by providing an ‘impressive array’ of circumstances that allow the register to be altered. It is useful to illustrate the breadth of these circumstances by recalling the application of the alteration provisions of the Land Registration Act 2002 (‘LRA 2002’) to the classic bijuralism scenario where B, pursuant to an invalid instrument, becomes the registered proprietor of A’s interest. Under the alteration provisions, provided B is not in possession, A is entitled to recover the land and B may be entitled to compensation. If B is in possession, A may still be able to recover the land if: (1) B, through fraud or lack of proper care, caused or substantially contributed to the mistaken registration; or (2) for any other reason, it would be unjust for the alteration not to be made. In any event, regardless of whether B is in possession or not, there is a further ‘roving’ discretionary factor that allows the court, in exceptional circumstances, not to alter the register. Given the considerable flexibility in these provisions, until such time as the court makes its order, neither A nor B can be certain as to who is entitled to the land.4

In comparison with the English position, the resolution of this dispute under the Torrens system is clear. Provided B was not guilty of fraud in becoming registered, B obtains an immediately indefeasible title and A may claim compensation. The stark contrast between the operation of immediate indefeasibility and the alteration provisions of the LRA 2002 shows that the English system’s sensitive balancing of static and dynamic security comes at the significant cost of a crystal clear bijuralism rule.5

However, the scenario that has generated the most uncertainty and conflict in the English decisions is where B grants a subsequent mortgage to C and C registers the mortgage. The solution to this in the Torrens system is, once again, clear. Provided C

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5 As discussed below, the English Law Commission has recommended a 10 year ‘longstop’ cut off at which point the registered proprietor’s title becomes indefeasible. This provides a measure of finality; however, as noted by Emma Lees, unresolved issues remain regarding ‘when and how much indemnity is permitted’. Emma Lees, ‘Guaranteed Title: No Title, Guaranteed’ in Amy Goymour, Stephen Watterson and Martin Dixon, New Perspectives on Land Registration Contemporary Problems and Solutions (Hart Publishing, 2018), 115.
6 To adapt Rose’s analogy, it is the ‘substitution of “mud” rules for “crystal” ones’. Carol Rose, ‘Crystals and mud in property law’ (1988) 40 Stanford Law Review 577, 578.
was not guilty of fraud in becoming registered, then C has an indefeasible title. Under the *LRA 2002*, as noted above, provided B is not in possession, A is entitled to recover the land. However, the question of whether A’s land remains subject to C’s mortgage is the subject of considerable debate and will depend on whether the court adopts a narrow or wide interpretation of ‘correcting a mistake’ in the alteration provisions. If a narrow view is adopted, then the mortgage remains; if a wide view is adopted, then the register may be altered to remove the mortgage. Indeed, under the wide view, if C grants an interest to D and D to E and so on, these subsequent registered interests may also be removed from the register as they are all seen as consequences of the original mistake. It is submitted that the wide interpretation of correcting a mistake severely undermines the conclusiveness of the English register and thwarts the apparent intention behind the *LRA 2002*.\(^6\)

The comparison of the English and Torrens system bijuralism rules in Chapter 3 is instructive. It demonstrates the considerable practical difficulties involved in attempting to provide an ideal balance between static and dynamic security. In the author’s view, the English attempt to provide a fair and just balance has come at too high a price. The legislation is complex, the decisions are confused and the law lacks clarity and certainty.

In light of these difficulties with the interpretation and operation of the *LRA 2002*, the English Law Commission commenced a thorough review of the *LRA 2002* in 2014.\(^7\) In its final report, the Law Commission made recommendations for dealing with the classic A-B bijuralism scenario. The proposed new scheme is as follows:

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\(^6\) The narrow approach appears to be the prevailing orthodox interpretation of the legislation. However, some commentators support the wide approach and consider a ‘wrongly ousted’ former registered proprietor ought to be entitled to make a case for recovery of the land. See, eg, Cooper, above n 2, 108. Interestingly, the wide approach has been recommended by the English Law Commission, see the discussion below.

(1) So long as A remains in possession, A should be reinstated as proprietor unless it is unjust to rectify. There is no time limit by which A must seek rectification.
(2) A’s successors in title who take over A’s possession should be treated the same way as A.
(3) A’s position (and that of his or her successors in title) should be unaffected by the passage of time since the mistake, as long as they remain in possession.
(4) If B (or B’s successor in title) is the registered proprietor in possession, then in the ten-year period following the mistaken removal (or omission) of A from the register, B’s title should be protected unless:
   (a) it is unjust not to rectify; or
   (b) the proprietor in possession caused or contributed to the mistake by fraud or lack of proper care.
(5) If B (or B’s successor in title) is the registered proprietor in possession, then ten years after the mistaken removal (or omission) of A’s name, B’s title should become indefeasible (in other words, it cannot be rectified) unless he or she caused or contributed to the mistake by fraud or lack of proper care. We refer to this ten-year period in our proposals as the “longstop”.
(6) If neither A nor B (nor, where relevant, B’s successor in title) is in possession, then for the initial ten-year period from the time of A’s mistaken removal from the register, A’s title should be restored unless there are exceptional circumstances.
(7) After the initial ten-year period, if neither A nor B (nor B’s successor in title) is in possession, then the registered proprietor’s title should become indefeasible unless he or she caused or contributed to the mistake by fraud or lack of proper care.
(8) Alteration of the register should continue to be available, in all situations, by consent of the parties.
(9) Where rectification of the register would be available but for the imposition of the ten-year longstop, entitlement to an indemnity is unaffected.8

The proposed new scheme therefore maintains the protection available to the person, whether A or B, who is in possession. And, interestingly, the recommendations introduce the notion of a 10 year period (the ‘longstop’) which, for present purposes, is relevant in two broad circumstances: first, if neither A nor B is in possession then, for the initial 10 year period after A’s mistaken removal from the register, A’s title

8 The Report, above n 7, [13,36]. The recommendations that embody the new scheme are contained in Recommendations 23 and 24. Recommendation 25 provides that a chargee should not be able to oppose rectification where either the chargee was registered by mistake or where the chargee obtained the charge from a registered proprietor registered by mistake.
should be restored unless there are exceptional circumstances; and, second, if neither A nor B (nor B’s successor in title) is in possession then, provided 10 years have elapsed since the mistaken removal of A from the register, B’s title should become indefeasible unless he or she caused or contributed to the mistake by fraud or lack of proper care.

Another scenario discussed in Chapter 3 that gives rise to significant difficulties in the operation of the LRA 2002, is the A-B-C scenario. That is where, for example, a fraudster steals A’s identity and forges a transfer to B who becomes registered and B then sells or grants a mortgage to C who becomes registered. As C’s registration is based on B’s mistaken registration it is referred to as a ‘derivative mistake’. The problem that has arisen in the case law, discussed in Chapter 3 under heading IV, is that it is unclear as to whether C’s registration is to be viewed as a mistake. If it is, then C’s registration is subject to rectification. If it is not a mistake, it is not subject to rectification. Since C’s registration is pursuant to an intrinsically valid instrument executed by the registered proprietor, B, there is a strong argument for saying that C’s registration is not a mistake. However, in contrast to this argument, the Law Commission has recommended that C’s registration be classed as a mistake. Indeed, where C transfers the estate to D, and D to E and so on, all of these subsequent registrations also qualify as mistakes and may therefore be subject to rectification. Essentially, the Law Commission recommends the adoption of the wide approach. In these cases however, the 10 year longstop will preclude rectification after the initial 10 year period has expired.

A final point to make regarding the Law Commission’s Report and discussed in Chapter 3 under heading V, concerns the decision in Malory Enterprises Ltd v Cheshire Homes (UK) Ltd¹⁴ (‘Malory’). In essence, the effect of the decision in Malory, which was subsequently held to apply to the LRA 2002 in Fitzwilliam v

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⁹ Ibid, [13.119].
¹⁰ This is the approach adopted under deferred indefeasibility – C’s registration is intrinsically valid and C therefore obtains an indefeasible title.
¹² Ibid, [13.136].
¹³ Provided the exceptions to the operation of the 10 year longstop, noted above, are not applicable.
Richall Holdings Services Ltd,\(^\text{15}\) is that where B becomes registered pursuant to a void transfer, equitable ownership remains with A. This argument is referred to by the Law Commission as the ‘Malory 1 argument’.\(^\text{16}\) This view was subsequently criticised as being inconsistent with the wording of s 58(1) of LRA 2002 which provides: ‘If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration’. As noted in Chapter 3, the Court of Appeal in Swift 1st Ltd v Chief Land Registrar\(^\text{17}\) (‘Swift’) concluded that the decision in Malory was wrong. The conclusion in Swift has been endorsed by the Law Commission.\(^\text{18}\)

From this brief summary one can see a concerted attempt by the Law Commission to provide clarity in the law\(^\text{19}\) and, particularly with the introduction of the 10 year longstop, a measure of finality with regards rectification of the register. Despite this, the author maintains the view adopted earlier in this thesis that the English system’s sensitive balancing of static and dynamic security has come at too high a price. Even with the Law Commission’s recommendations, the English system remains complex and difficult to construe. For the Australian jurisdictions, the author prefers the clear bijuralism rule provided by the robust Torrens system principle of immediate indefeasibility.

8.3 Is immediate indefeasibility always applied consistently and coherently in the case law?

Although the principle of immediate indefeasibility is clear,\(^\text{20}\) the courts have not always applied the principle consistently. If the application of immediate indefeasibility generates an unacceptable level of inconsistency, then this is a valid ground for questioning whether the principle is indeed ‘fit for purpose’ for the 21st

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\(^{15}\) Fitzwilliam v Richall Holdings Services Ltd (‘Fitzwilliam’)[2013] EWHC 86.

\(^{16}\) Law Commission Consultation Paper, above n 7, [13.43].

\(^{17}\) Swift 1st Ltd v Chief Land Registrar [2015] 3 WLR 239.

\(^{18}\) See the detailed discussion in the Law Commission Consultation Paper, above n 7, [13.42]-[13.59] and the further reference to this in the Report, above n 7, Chapter 13 n 2.

\(^{19}\) This is seen in the clarification that derivative mistakes are to be classified as mistakes and therefore subject to rectification, that is, adoption of the wide approach, and the confirmation of the rejection of the Malory 1 argument in Swift.

\(^{20}\) The principle may briefly be stated as follows: the non-fraudulent registered proprietor obtains an immediately indefeasible title regardless of the fact that registration was pursuant to an invalid instrument.
century. In light of this, Chapters 4, 5 and 6 analyse a number of cases that have given rise to uncertainty and inconsistency in the operation of immediate indefeasibility.

Chapters 4 and 5 consider the question of the extent to which indefeasibility protects individual terms in registered void documents. The broad answer to this is uncontroversial. Indefeasibility protects all those terms in the registered instrument that are integral to, delimit, or qualify the nature of the interest that has been granted. However, in relation to the terms in registered void mortgages and registered void leases the case law has produced inconsistent and, in some cases, unprincipled, decisions.

Chapter 4 considers this issue in the context of a registered forged mortgage and reveals two areas of doctrinal inconsistency. First, there is uncertainty in the law as to whether the mortgagor’s personal covenant to repay the debt is validated by registration. Three possibilities are evident from the case law: full indefeasibility, no indefeasibility or limited indefeasibility. Under the full indefeasibility approach, an innocent registered proprietor whose land is subject to a registered forged mortgage may become personally liable for the debt even though he or she never signed the mortgage and never received the money. This application of immediate indefeasibility is unjust, unfair and ought to be rejected. In relation to the limited and no indefeasibility approaches, despite the difference in language, there appears to be no real difference between them in practice. In both cases the mortgagee is entitled to recoup the money owing from a sale of the land, but is not entitled to sue the mortgagor personally. In the author’s view, the limited and no indefeasibility approaches are acceptable and are consistent with the principle of immediate indefeasibility.

The second area of doctrinal inconsistency concerns the extent to which contractual terms in an off-register forged loan document may be incorporated into the registered forged mortgage. This question of incorporation is determined by construing the mortgage and the associated documentation. In the case of a single mortgagor,\footnote{21 As noted in Chapter 4, n 48, it is beyond the scope of this chapter to consider the position of two or more mortgagors.} the construction of the documentation has generally led to the conclusion that the loan
agreement, which includes the obligation to repay the debt, has not been effectively incorporated. In these circumstances, the charge created within the registered mortgage is validated by registration but, as the forged loan agreement is off-register and not incorporated into the registered mortgage, it is not validated. The mortgage therefore, though indefeasible, secures nothing. However, in Solak v Bank of Western Australia\textsuperscript{22} (Solak), Pagone J concluded that the off-register loan contract was incorporated within the mortgage and was therefore indefeasible. The decision of Pagone J has been the subject of extensive academic criticism and runs counter to the generally accepted construction of forged all moneys mortgages.\textsuperscript{23}

Indeed in 2015, Hargrave J of the Victorian Supreme Court emphatically rejected Justice Pagone’s view in Solak and described it as ‘plainly wrong’.\textsuperscript{24} Justice Hargrave’s rejection of Justice Pagone’s view and his Honour’s adoption of the New South Wales approach has been described as ‘highly persuasive because of its extensive review of cases in all jurisdictions’.\textsuperscript{25} The author welcomes Justice Hargrave’s approach. Not only does the judgment correct an inconsistency in the law, it also furthers the development of uniformity in the case law across the Australian Torrens jurisdictions.\textsuperscript{26}

The question of the extent of indefeasibility with regards the registration of forged mortgages has produced contradictory decisions and a flurry of academic commentaries. However, despite the inconsistency in the case law the author submits the inconsistency is likely to correct itself and is not so great as to inhibit the continued beneficial operation of immediate indefeasibility. In any event, as discussed in Chapter 7 and below at 8.4, the stringent verification of identity requirements introduced in the Electronic Conveyancing National Law (ECNL) and in the careless

\textsuperscript{22} Solak v Bank of Western Australia [2009] VSC 82.

\textsuperscript{23} The academic criticism of Justice Pagone’s judgment is noted at Chapter 4, n 63. Chapter 4, n 46 and n 47, identify the NSW and New Zealand cases respectively, that support the view that, generally-speaking, off-register forged loan contracts are not incorporated within registered all moneys mortgages and therefore are not indefeasible. The position in NSW has been confirmed recently by the decision of the Court of Appeal in Perpetual Trustees Victoria Ltd v Cox [2014] NSWCA 328.

\textsuperscript{24} Perpetual Trustees v Xiao Hui Ying [2015] VSC 21 (‘Xiao’), at [99] and [103].

\textsuperscript{25} Anthony Moore, Scott Grattan, Lynden Griggs, Bradbrook, MacCallum and Moore’s Australian Real Property Law (Thomson Reuters, 6th ed 2016), [7.75].

\textsuperscript{26} In the conclusion to Chapter 4, the author lamented the lack of uniformity in the law of the Torrens jurisdictions. Justice Hargrave’s decision provides a welcome degree of uniformity in relation to the law concerning the registration of forged all moneys mortgages.
mortgagee provisions of Queensland, New South Wales and Victoria will go a long way to averting registrations based on invalid instruments.\textsuperscript{27}

Chapter 5 considers the extent to which indefeasibility protects an option to renew in a registered illegal lease by critiquing the High Court decision in \textit{Travinto Nominees Pty Limited v Vlattas and Another}\textsuperscript{28} (‘Travinto’). The obvious first step in this enquiry is to make a definitive finding as to whether an option to renew is an integral term in a lease.\textsuperscript{29} If it is, then on registration of the illegal lease, the lessee’s option to renew is validated by virtue of the principle of immediate indefeasibility. The logical next step is to consider whether the lessee’s registered lease is subject to an exception to indefeasibility. If an exception is available, then the lessee’s option is not enforceable. Remarkably, this straightforward approach was not adopted by the majority of the High Court in \textit{Travinto}. Instead, the majority focused on the question of whether a court would order specific performance of an option to renew in an illegal lease in a suit brought by the lessee. The majority determined that specific performance in such a case would not be ordered and therefore found that registration of the illegal lease did not validate the option to renew. But, in the author’s view, the majority’s reasoning effectively puts the cart before the horse. The logical first question must be to determine if the option to renew is integral to the lease.\textsuperscript{30} If it is, then the option to renew is validated by registration and the lessee’s suit to enforce the option relates not to an illegal, but rather to a valid, option to renew.

The author submits that the timing of the decision in \textit{Travinto} is the key to understanding the reasoning of the majority. \textit{Travinto} was decided 3 years before \textit{Mercantile Credits Ltd v Shell Company of Australia Ltd}\textsuperscript{31} (‘Shell’) where the High Court unanimously determined that an option to renew is intimately connected to, and part of, the interest granted to the lessee. Accordingly, an option to renew is rendered

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\textsuperscript{27} Indeed, had the ECNL verification of identity requirements been undertaken in \textit{Solak v Bank of Western Australia} [2009] VSC 82, it is unlikely any mortgage would have come into existence. See Chapter 4, n 9, n 10.

\textsuperscript{28} \textit{Travinto Nominees Pty Limited v Vlattas and Another} (1973) 129 CLR 1.

\textsuperscript{29} If it is not, the case is simple. The option is illegal and therefore not enforceable.

\textsuperscript{30} In \textit{Travinto}, Barwick CJ appears to conclude that an option to renew is not integral to the lease, \textit{Travinto Nominees Pty Limited v Vlattas and Another} (1973) 129 CLR 1, 17. However, in the later case of \textit{Mercantile Credits Ltd v Shell Company of Australia Ltd} (1976) 136 CLR 326, Barwick CJ adopts the contrary view and concludes that an option to renew is not merely a personal covenant (ibid, 338) and it is rendered indefeasible on registration of the lease (ibid, 340).

\textsuperscript{31} \textit{Mercantile Credits Ltd v Shell Company of Australia Ltd} (1976) 136 CLR 326.
\end{footnotesize}
indefeasible on registration of the lease. If this emphatic view of the option to renew had been before the court in Travinto, one suspects the approach of the majority would have been quite different. The focus of the majority would shift to the question of whether an exception to indefeasibility was available to challenge the registered lessee’s validated option to renew. On the facts in Travinto, the two possible exceptions were the in personam exception and the overriding statutes exception. The minority in Travinto found that the overriding statutes exception was applicable and therefore concluded that the option to renew was not enforceable. Unlike the majority’s approach, the approach of the minority was principled and entirely consistent with a Torrens methodology for dealing with disputes regarding interests in Torrens land.

In the author’s view, the majority’s decision in Travinto is regrettable. It does not apply a principled Torrens methodology and nor does it provide a clear rationale as to why an option to renew in a void lease should be treated differently from an option to renew in an illegal lease. However, despite these shortcomings, there is another aspect of Travinto that makes it an important case for the purposes of this thesis. Travinto in conjunction with Shell demonstrate the evolutionary nature of the Torrens system and the continuing development, refinement and improvement of the operation of immediate indefeasibility.

Another area that has generated uncertainty and inconsistency in the case law relates to the fraud exception to indefeasibility and in particular the category of fraud known as fraud against the Registrar. This category of fraud was first introduced into the case law in 1984 in an apparent attempt by the courts to ameliorate the harsh operation of immediate indefeasibility by broadening the scope of the fraud exception. Chapter 6 analyses the five different fact scenarios that may be argued as cases of fraud against the Registrar. In each scenario, the incoming registered proprietor is usually a mortgagee and the question to be determined is whether the registered mortgagee has been guilty of fraud in becoming registered. The analysis of each scenario reveals that the fraud against the Registrar category is not only unnecessary and unhelpful, but it may also produce decisions that are inconsistent and in some cases inappropriate.
The author argues that the preferable approach is to apply the traditional view of fraud. That is, in order for the fraud exception to be applicable, the fraud must be practised against the party who has been deprived of his or her interest through the fraud of the incoming registered proprietor. However, this gives rise to the question: if this is the preferable approach, why have the courts not adopted this approach in these cases? The answer to this relates back to the narrow definition ascribed to Torrens fraud and is best illustrated by considering the paradigm fraud against the Registrar scenario, where a registered mortgagee, without knowledge that the mortgage was forged, falsely attested the mortgagor’s purported signature to a forged mortgage. In these circumstances it seems that the courts are reluctant to find that the registered mortgagee was guilty of ‘actual dishonesty’ or ‘moral turpitude’ or the kind of ‘wilful and conscious disregard’ of the mortgagor’s rights so as to constitute statutory fraud. This reluctance stems from the fact that the mortgagee had no knowledge that the mortgage was forged and only attested the mortgagor’s pre-signed forged signature in the belief it was a genuine signature. The courts therefore feel unable to conclude that the registered mortgagee was guilty of fraud against the defrauded mortgagor. Yet clearly, the mortgagee knows the mortgage is falsely attested. Accordingly, on the fraud against the Registrar reasoning, the fraud lies in the mortgagee’s misrepresentation to the Registrar that the document is validly executed and attested when in truth the mortgagee registering the document knows that this is not the case.

In the author’s view, the correct approach is to reconceptualise all of the fraud against the Registrar cases as cases of fraud against the registered mortgagor. Again, to illustrate this by reference to the paradigm case: where a mortgagee is confronted with the mortgagor’s purported pre-signed unwitnessed signature on a mortgage instrument, this should automatically raise a suspicion of irregularity. If the mortgagee then falsely attests to having witnessed the pre-signed signature, the mortgagee ought to be regarded as having consciously disregarded the rights of the mortgagor. The mortgagee is therefore guilty of fraud against the mortgagor and, quite properly, the registered mortgage is not indefeasible, but defeasible.32

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32 In a subsequent article, Boyle accepts the criticisms of the fraud against the Registrar category outlined in Chapter 6 and argues further that these cases are incorrect. Sam Boyle, ‘Fraud against the registrar: Why the ‘De Jager line’ is incorrect, and how unfairness in the Torrens system caused it to arise’ (2015) 24 Australian Property Law Journal 305.
In addition to arguing for a reconceptualisation of the fraud against the Registrar cases, the author submits this category of fraud is, in any event, becoming an increasingly irrelevant complication in the law on Torrens fraud. The challenges to the continued relevance of this category include: the revised and potentially expanded operation of fraud by an agent;\(^{33}\) the application of indefeasibility to forged ‘all moneys’ mortgages;\(^ {34}\) the potential impact on indefeasibility of s 42 of the National Credit Code;\(^ {35}\) and, most importantly, the introduction of considerably strengthened identity verification requirements for the execution of Torrens documents in the Australian jurisdictions. The latter aspect is discussed in the next section.

Despite the inconsistency and inappropriateness in the decisions on fraud against the Registrar, the author predicts that the number of cases in this category of fraud will become increasingly irrelevant and will, over time, abate. Accordingly, this category of fraud does not pose a threat to the ongoing fitness for purpose of the immediate indefeasibility principle.

8.4 Will the introduction of e-conveyancing affect the ongoing fitness for purpose of the principle of immediate indefeasibility?

\(^ {33}\) Chapter 6 at IV A, discusses the NZ decision of Dollars & Sense Finance Ltd v Nathan [2008] 2 NZLR 557 and notes that this decision considerably broadens the situations when a registered proprietor’s title may be rendered defeasible by virtue of fraud by an agent. Later cases in NZ further support this view of an expanded understanding of the notion of fraud by an agent. See: Zurich v Australian Insurance Ltd v Withers [2016] NZCA 618 and Lowe v Director-General of Health [2017] NZSC 115, particularly at [156]-[166].

\(^ {34}\) The applicability of indefeasibility to registered forged all moneys mortgages is discussed briefly in Chapter 6 at IV B and in more detail in Chapter 4. Importantly, as noted above in the text at nn 24-26, Hargrave J of the Victorian Supreme Court has adopted the New South Wales approach and confirmed that generally-speaking, off-register forged loan contracts are not incorporated within registered all moneys mortgages and therefore are not indefeasible: Perpetual Trustees v Xiao Hui Ying [2015] VSC 21, at [99] and [103].

\(^ {35}\) The forerunner to s 42 National Credit Code (NCC) was s 38 of the Uniform Consumer Credit Code (UCCC). Each of these sections provides that a mortgage to which the Code applies is unenforceable unless it is signed by the mortgagor. On the face of it, these sections may have the effect of overriding the Torrens system principle of immediate indefeasibility with regards a registered forged mortgage. Chief Justice Warren in Solak v Registrar of Titles [2011] VSCA 279 expressed the view, in obiter comments, that s 38 of the UCCC did not override immediate indefeasibility. However, it should be noted that decisions dealing with an inconsistency between s 38 of the UCCC and the Torrens legislation apply principles of statutory construction applicable to inconsistencies between two Acts of the same legislature. Different principles of statutory construction are applicable to an inconsistency between a Commonwealth and a State Act. This point should be kept in mind in considering the relevance of case law concerning s 38 of the UCCC in the context of an inconsistency between the NCC, which is Commonwealth legislation, and the Torrens statutes of the State legislatures. For further discussion see Chapter 4 n 119 and Chapter 6 n 127.
Chapter 7 looks to the future and overviews the operation of the ECNL. The ECNL was introduced into all the States and the Northern Territory to provide an efficient national platform for the electronic lodgement of land registry instruments. Although the ECNL specifies that it does not derogate from fundamental Torrens principles, including immediate indefeasibility, it does introduce a dramatic change in conveyancing processes. Under the ECNL parties to land transactions will no longer personally sign registry instruments. Rather subscribers, typically law firms and financial institutions, will digitally sign land instruments on their client’s behalf. Clients are, however, protected by safeguards within the ECNL. In particular, in relation to the registration of mortgages, a subscriber must take reasonable steps to verify the identity (VOI) of the mortgagor and take reasonable steps to verify that the mortgagor is a legal person who has the right to enter into the mortgage. These dual verification requirements should go a long way towards eliminating the registration of mortgages that are based on invalid transactions.

Notwithstanding these advantages of the ECNL, the author argues that a major deficiency in the ECNL is the failure to incorporate ‘careless mortgagee’ provisions akin to those adopted in the Torrens legislation of Queensland, New South Wales and Victoria. Under these provisions, the protection of immediate indefeasibility is denied to a registered mortgagee who has failed to undertake reasonable VOI in circumstances where the mortgagor did not grant the mortgage. The failure to incorporate careless mortgagee provisions in Western Australia, South Australia, Tasmania and the Northern Territory (the ‘non-careless mortgagee jurisdictions’) means there is an inexcusable gap in the protection available to mortgagors in these jurisdictions. This gap arises in circumstances where a non-fraudulent mortgagee has failed to undertake reasonable VOI and has registered a mortgage that was not granted by the mortgagor. Neither the fraud exception nor the careless mortgagee provisions are available to allow the mortgagor to challenge the registered mortgagee’s title. Arguably, the unfortunate mortgagor may be able to raise an in personam exception. Regardless, the author submits the uncertainty in the law in the non-careless mortgagee jurisdictions, and the lack of consistency and harmony across the Australian jurisdictions, is unwarranted and regrettable. In Western Australia the divergence in the law is even more pronounced by the recent enactment of the curious and baffling provisions in ss105(3)-(5) of the Transfer of Land Act 1893 (WA). These
provisions appear to have been incorporated into the Western Australian Torrens legislation unwittingly and the author anticipates their repeal in the near future.

The author submits that the introduction of the ECNL and the associated verification requirements is likely to reduce significantly the incidence of fraud, forgery and other irregularity in the conveyancing process. The effect of removing these problematic dealings from the register will enhance static security for all registered proprietors and ameliorate the potential for harm in the operation of the principle of immediate indefeasibility.36

8.5 Conclusion: A Torrens system that is fit for purpose for the 21st century

This thesis assesses whether the Torrens system principle of immediate indefeasibility is fit for purpose for the 21st century. This entails examining how well the principle of immediate indefeasibility currently operates and envisaging how well the principle will work in the future.

Chapters 4, 5, and 6 of this thesis assess the current operation of immediate indefeasibility by examining some of the problematic areas in the immediate indefeasibility case law.37 These areas concern the extent to which indefeasibility protects individual terms in registered void documents and the troublesome category of fraud known as fraud against the Registrar. The author adopts a doctrinal methodology in examining these areas so as to clarify the law and develop frameworks for analysis,38 analyse the law for coherence and consistency,39 synthesise...

36 The English Law Commission recommends the introduction of a statutory duty of care on conveyancers and solicitors to take reasonable care to verify the identity of parties for whom they are acting. In the event a conveyancer fails to comply with the identity steps and if a fraud is registered, then HM Land Registry will have a right of recourse against the conveyancer to recover the amount of any indemnity paid out by the Land Registry. See generally Chapter 14 of the Report, above n 7, and Recommendation 31.
37 As noted at 1.5, it is beyond the scope of this thesis to consider all of the problematic areas in the operation of immediate indefeasibility. The author has, however, considered these areas in other publications. See Appendix A for a list of the author’s immediate indefeasibility articles.
38 This is shown in the identification of a ‘Torrens methodology’ and the application of this methodology in the analysis of Travinto in Chapter 5. The development of frameworks is also seen in Chapter 3 in the analysis of LRA 2002.
39 This thesis examines a number of areas of doctrinal incoherence including the discussion in Chapters 4 and 5, and also the analysis of the fraud against the Registrar cases in Chapter 6.
the law and make connections between disparate doctrinal strands,\textsuperscript{40} identify areas of inconsistency with land law policy and make suggestions for the future reform of the law.\textsuperscript{41} The examination of these problematic areas in Chapters 4, 5, and 6 reveals inconsistent and in some cases unprincipled decisions. Despite this, as discussed in the overall analysis of these cases at 8.3, the author anticipates this problematic case law will abate over time through correction and evolution of the law itself or by virtue of the increased verification requirements introduced under the ECNL.

The operation of immediate indefeasibility is also evaluated in this thesis by comparing immediate indefeasibility with other bijuralism rules including deferred indefeasibility, the recently reformed bijuralism rule of New Zealand and the bijuralism rules of England and Wales. This comparison is particularly useful. It demonstrates that there is no perfect bijuralism rule. Each of these other rules also generates inconsistency and uncertainty in the law.

As discussed in Chapter 2, deferred indefeasibility provides improved static security for the registered proprietor and, in many cases, appears to ensure fairer and more just outcomes. Under immediate indefeasibility, a registered proprietor’s title is sacrificed in favour of an incoming non-fraudulent registered proprietor who has become registered pursuant to a non-consensual and invalid instrument. The invalidity may be due to forgery, \textit{non est factum}, lack of capacity, \textit{ultra vires} or breach of statutory duty. Under common law principles, in each of these cases, title would not pass to the putative transferee under the invalid instrument. Underlying the common law principles are an array of important public policy objectives: the prevention of fraud-driven forgeries; the protection of those who mistakenly sign documents that are fundamentally different from the intended document; the protection of infants and those with mental disabilities; and ensuring legal authorities act within the powers vested in the authority.

\textsuperscript{40} Chapter 6 provides a particularly strong illustration of synthesis and connection of the law. This process is also seen in the analysis of the \textit{Solak} series of cases in Chapter 4 and the discussion of the ECNL, the careless mortgagee provisions and ss105(3)-(5) of the \textit{Transfer of Land Act 1893 (WA)} in Chapter 7.

\textsuperscript{41} Examples of inconsistency with land law policy and reform suggestions appear in the discussion of the compensation considerations in the \textit{Solak} series of cases in Chapter 4, fraud against the Registrar in Chapter 6 and the general discussion of careless mortgagee conduct in Chapter 7.
Immediate indefeasibility subverts these public policy objectives by validating instruments through the simple act of registration. In contrast, deferred indefeasibility reinforces these objectives and ensures that a registered proprietor’s title is not sacrificed through the registration of a non-consensual and invalid transaction.\(^{42}\) Further, in many cases, deferred indefeasibility will better protect a person’s right to their home,\(^{43}\) support human rights instruments that preclude the arbitrary deprivation of property,\(^{44}\) and, particularly in the context of registered forged mortgages, operate to place the risk of loss on the cheaper cost avoider – the mortgagee.\(^{45}\)

In light of these powerful arguments supporting deferred indefeasibility, it may seem something of a contradiction to conclude, as this thesis does, that immediate indefeasibility is the preferable bijuralism rule. In this regard, it is important to recall the words of Sir Anthony Mason who commented that ‘one cannot be sure that the benefits [of deferred indefeasibility] would outweigh the detriments of change’.\(^{46}\) Since the High Court’s endorsement of immediate indefeasibility in 1971,\(^{47}\) a body of indefeasibility case law has evolved\(^{48}\) and the Torrens legislation has developed through various amendments.\(^{49}\) Together these developments have the effect of

\(^{42}\) The invalidity in a registered instrument may also be due to breach of a statutory provision. If the statutory provision was enacted after the Torrens legislation, then the provision may override the Torrens principle of immediate indefeasibility. However, as discussed in Chapter 5 under the heading ‘Overriding Statutes’, the courts are generally reluctant to find that indefeasibility has been overridden by the implied repeal of a later statute. If the overriding statutes exception does not apply, then the registration will be immediately indefeasible despite the fact the instrument was invalid by virtue of the statutory provision. This was the situation in *Breskvar v Wall* (1971) 126 CLR 376 where the transfer instrument was void by virtue of the *Stamp Act (1894)* (Qld) yet the transfer was validated upon registration. The objectives underlying statutory enactments are therefore thwarted by the operation of immediate indefeasibility. Once again, it may be argued that deferred indefeasibility, which does not operate to cure defects in registered instruments, better protects the policies underlying statutory enactments.

\(^{43}\) See the discussion in the text in Chapter 2 nn 69 – 74.

\(^{44}\) See Chapter 2, n 49.

\(^{45}\) See the loss avoidance discussion in Chapter 2.


\(^{47}\) This endorsement occurred in *Breskvar v Wall* (1971) 126 CLR 376.

\(^{48}\) Evolutions in the immediate indefeasibility case law are seen, for eg, in: the discussion in Chapter 4 regarding the *Solak* series of cases and the later clarification of the law in *Perpetual Trustees v Xiao* [2015] VSC 21 discussed above at Chapter 8.3; and in the adjustment in the law relating to fraud against the Registrar in Chapter 6 as seen in cases such as *Davis v Williams* (2003) 11 BPR 21,313 and *J Wright Enterprises Pty Ltd (in liq) v Port Ballidu Pty Ltd* [2010] QSC 213.

\(^{49}\) There has been a number of amendments to the Torrens legislation over the years; however, the most significant amendments discussed in this thesis are the introduction of the careless mortgagee provisions discussed in detail in Chapter 7 III A. The introduction of the ECNL, though separate from the Torrens legislation, will effect the most dramatic, and potentially beneficial, changes to the practical operation of immediate indefeasibility.
refining and honing the law regarding immediate indefeasibility and the exceptions to indefeasibility. A switch to deferred indefeasibility at this stage would likely introduce uncertainty and, as Sir Anthony suggests, the detriments associated with a change to the rule may outweigh the potential benefits.

In addition to this pragmatic argument, there are a number of other reasons for preferring immediate indefeasibility. Immediate indefeasibility fosters dynamic security for the incoming registered proprietor and arguably better ensures ‘a market for land and in turn economic stability’\textsuperscript{50} than would occur under deferred indefeasibility. Furthermore, the operation of deferred indefeasibility may itself give rise to uncertainty and confusion in the case law, as noted in the discussion of the Canadian jurisdictions in Chapter 2. Perhaps the most significant concern here relates to the fact that deferred indefeasibility allows the former registered proprietor to recover the land from the proprietor who has become registered pursuant to the invalid transaction. However, there is no clear understanding as to the time limit within which an ousted registered proprietor may seek to recover the land. This produces an unfortunate vacuum, for an unknown period, as to who has the better claim to the land – the current or the ousted registered proprietor.\textsuperscript{51} For all these reasons, a switch to deferred indefeasibility is not desirable. Immediate indefeasibility remains the preferable rule.\textsuperscript{52}

The recently reformed New Zealand rule adopts immediate indefeasibility but gives the court discretion to alter the register in cases of manifest injustice. Arguably, this

\textsuperscript{50} Michelle Backstrom and Sharon A Christensen, ‘Qualified Indefeasibility and the Careless Mortgagee’ (2011) 19 \textit{Australian Property Law Journal} 109, 114.

\textsuperscript{51} The English Law Commission addresses this problem by recommending the introduction of a 10 year ‘longstop’ after which time the current registered proprietor’s title becomes indefeasible. See the discussion above at 8.2. However, even with the introduction of the longstop, the current registered proprietor’s title may still be upset where he or she caused or contributed to the mistake by fraud or lack of proper care. Once again, even with the passage of 10 years, there can be no absolute clarity as the current proprietor may be viewed as contributing to the mistake through lack of care.

\textsuperscript{52} The author concedes an apparent contradiction between this general preference for immediate indefeasibility yet, in the context of the careless mortgagee provisions, discussed in Chapter 7 III A, a preference for deferred indefeasibility. The explanation for this is as follows. The careless mortgagee provisions preclude an indefeasible title for a non-fraudulent mortgagee who has registered a forged mortgage in circumstances where the mortgagee failed to take reasonable steps to verify the identity of the mortgagor. Mortgagees are typically banks and other financial institutions and it ought to be part of prudent and responsible lending practice that the mortgagee checks the identity of the person to whom it lends money – the mortgagor. As noted in Chapter 2, in this situation the mortgagee is invariably the cheaper loss avoider. Loss avoidance arguments provide a compelling case for preferring deferred over immediate indefeasibility in the careless mortgagee situation.
rule strikes a better balance between static and dynamic security than either deferred or immediate indefeasibility. However, this rule also has its disadvantages. The author agrees with the concerns raised by some of the New Zealand commentators that the court’s discretion is too wide and may potentially lead to uncertainty of title registration, increased conveyancing risks and costs and the consequential erosion of consumer confidence in the system.

Finally, the English bijuralism rule, discussed in Chapter 3, attempts to provide a fair and just balance between static and dynamic security. However, in the author’s view, this has come at too high a price. The English legislation is complex, the decisions are confused and the law lacks the clarity and certainty of the robust Torrens system principle of immediate indefeasibility.

Envisaging the future operation of immediate indefeasibility necessarily entails examining the operation of the ECNL. However, to contextualise this examination, it is worthwhile recalling the fundamental problem that arises with the operation of immediate indefeasibility. The problem with immediate indefeasibility is that it allows a non-fraudulent registered proprietor to obtain an indefeasible title despite the fact that the registration was pursuant to an invalid instrument. Typically the invalidity relates to the fact that the transaction does not represent the genuine consent of the former registered proprietor who purportedly granted the interest. The solution to this fundamental problem is therefore clear. One must ensure, before an instrument is registered, that the interest granted under the instrument has in fact been granted by the registered proprietor. The VOI requirements incorporated within the ECNL are specifically designed to achieve this very outcome. The author appreciates that no system is perfect and that, notwithstanding the verification requirements, registrations based on invalid instruments may still occur. Despite this, there can be no doubting that the opportunity for irregular registrations is significantly reduced with the introduction of the ECNL.

In conclusion: Is the Torrens system principle of immediate indefeasibility fit for purpose for the 21st century? In short, yes. This thesis reveals that the problems with

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53 As noted above, the invalidity may be due to forgery, non est factum, lack of capacity, ultra vires or due to breach of a statutory provision.
the principle are not so great as to warrant enduring the increased confusion that would inevitably result from changing the rule. In any event, as the comparative analysis in this thesis shows, alternative bijuralism rules also suffer from some level of inconsistency and confusion in their operation. Finally, given the verification requirements of the ECNL, it seems that not only is the principle of immediate indefeasibility fit for purpose for the 21st century: arguably, it is fitter than it has ever been.
Appendix A

Indefeasibility Articles by the Author
A Articles published during candidature


Skead, Natalie and Penny Carruthers, ‘Rights to Renew and to Purchase in Registered Leases: Part II – A Real or Imagined Distinction?’ (2016) 25 Australian Property Law Journal 115


B Articles published prior to candidature

Carruthers, Penny, ‘Taming the Unruly In Personam Exception: An Examination of the Limits of the In Personam Exception to Indefeasibility of Title’ 62nd Australasian Law Teachers Association Conference (2007)


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Fink, Arlene, *Conducting Research Literature Reviews: From the Internet to Paper* (Sage Publications, 3rd ed, 2010)


Kerr, Donald, *The Australian Land Titles (Torrens) System* (Law Book Co, 1927)


Rook, Deborah (ed), *Property Law and Human Rights* (Blackstone Press, 2001)


Torrens, Sir Robert, *The South Australian System of Conveyancing by Registration of Title* (1859)


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Boyle, Sam, ‘Fraud against the Registrar: Why the “De Jager Line” of Authority is Incorrect and How Unfairness in the Torrens System Caused it to Arise’ (2015) 24 Australian Property Law Journal 305

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Christensen, Sharon, ‘Can the Carelessness of a Mortgagee’s Lawyer Cause the Mortgage to Lose the Benefit of Indefeasibility?’ (2008) 23(1) *Australian Property Law Bulletin* 8


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Hepburn, Samantha, ‘Interpretive Strategies in the Overriding Legislation Exception to Indefeasibility’ (2009) 21(2) Bond Law Review 86


Hutchinson, Terry and Nigel Duncan ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 Deakin Law Review 83


Lees, Emma, ‘Guaranteed Title: No Title, Guaranteed’ in Amy Goymour, Stephen Watterson and Martin Dixon, New Perspectives on Land Registration Contemporary Problems and Solutions (Hart Publishing, 2018)


Low, Rouhshi, ‘Maintaining the Integrity of the Torrens System in a Digital Environment: A Comparative Overview of the Safeguards Used Within the Electronic Land Systems in Canada, New Zealand, United Kingdom and Singapore’ (2005) 11 Australian Property Law Journal 155


Low, Rouhshi and Lynden Griggs, ‘Going Through the Obstruction, the Torrens System Assurance Fund and Contemporary Solutions – A Tale Weaved for a Story of a Nun, a Romantic Triangle and Sibling Corruption’ (2014) 23 Australian Property Law Journal 17


Schroeder, Sam and Patrick Lewis, ‘Indefeasibility of Title and Invalid All Moneys Mortgages: Determining Whether Invalid Personal Covenants to Pay Are Protected under the Indefeasibility Umbrella’ (2010) 18 Australian Property Law Journal 185

Schroeder, Sam, ‘Forged Mortgages and Indefeasibility: A Minefield for Mortgagees’ (2011) 85 Australian Law Journal 71


Steven, Andrew, ‘Developments in the Scottish Law of Land Registration’ (2014) 22 *Juridica International* 37


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*Abjornson v Urban Newspapers Pty Ltd* [1989] WAR 191

*Ajibade v Bank of Scotland plc* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Rhys, 8 April 2008)

*ANZ Banking Group Ltd v Widin* (1990) 102 ALR 289


*Assets Co Ltd v Mere Roihi* [1905] AC 176
Attorney-General v Odell [1906] 2 Ch 47

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Bank of South Australia Ltd v Ferguson (1998) 192 CLR 248

Barclays Bank plc v Guy [2008] EWCA Civ 452

Barclays Bank plc v Guy [2008] EWHC 893 (Ch)

Barclays Bank plc v Guy [No 2] [2011] 1 WLR 681

Barnes v Addy (1874) LR 9 Ch App 244

Barry v Heider (1914) 19 CLR 197

Beatty v Australia and New Zealand Banking Group Ltd [1995] 2 VR 301

Bogdanovic v Koteff (1988) 12 NSWLR 472

Boyd v Mayor of Wellington [1924] NZLR 1174

Breskvar v Wall (1971) 126 CLR 376

Breskvar v White [1978] Qd R 188

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British American Cattle Co v Caribe Farm Industries Ltd [1998] 1 WLR 1529 (PC)

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Calabro v Bayside City Council [1999] 3 VR 688


Chan v Zacharia (1984) 154 CLR 178

Chandra v Perpetual Trustees Victoria Ltd (2007) 13 BPR 24,675

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Findlay v Victoria [2008] VSCA 255

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Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133

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Medical Benefits Fund of Australia Ltd v Fisher (1984) 1 Qd R 606

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National Commercial Banking Corporation of Australia Ltd v Hedley (1984) 3 BPR 9,477
Norton v Angus (1926) 38 CLR 523
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Ocvirk v Permanent Custodians [2013] NSWSC 1021
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