**Priority Disputes**

**Legal vs Equitable vs Equity**

***Legal interests***

1. Must be registered
2. Statutory Protection in absence of fraud

***Equitable interests***

1. Unregistered or unregisterable interests
2. However, still interest which confer proprietary rights
3. Equitable interests include:
4. *Equitable mortgage*
5. *Equitable fee simple*
6. *Equitable lease*
7. *Trusts (resulting and constructive)*
8. *Equity of redemption (the right of a mortgagor to recover seized property upon repayment of a debt)*
	1. *More than a mere equity – an equitable interest in the fee simple.*

***Equity interests***

1. Proprietary interests unenforceable against subsequent purchaser of an equitable interest for value without notice of the equity
	1. A mere equity is a personal right which is not ‘strong’ enough to bind successors in title.
		1. Exceptions? *Breskvar v Wall*
2. Equity interests include:
	1. *Proprietary estoppel*
	2. *Promissory estoppel*
	3. *Equity of rectification*
	4. *Equity transaction to set aside for fraud*

**Priority Rules – General Law Land**

1. ***Prior Legal vs Subsequent Legal***
	1. *First in Time* - Priority is ranked in order of the time at which the interest was acquired.
	2. *If interest co-exist* – The second later interest is subjected to the first interest and if not, then the second interest is removed entirely.
2. ***Prior Equitable vs Subsequent Legal***
	1. *Subsequent legal interest has priority* - over an earlier equitable interest unless the legal title holder has notice (actual, imputed or constructive)
		1. *Invalid if had notice* – If the subsequent legal holder had notice of the prior interest or was a volunteer per *Pilcher v Rawlins*
3. ***Prior Legal vs Subsequent Equitable***
	1. *Prior legal has priority over subsequent equitable unless fraud* – A prior legal will have priority over a subsequent equitable unless there has been fraud
		1. Per *Nothern Counties of England Fire Insurances v Whipp*
4. ***Equitable vs. Equitable***
	1. *When equal, first in time prevails* – The rule from *Rice v Rice* states that the first in time is strongest when the two interests are the same subject to exceptions.
	2. *What are the exceptions?*
		1. ***Rice v Rice***
			1. *‘If equities are in all other respects equal, priority of time gives the better equity’* determined by
				1. Are the interests equal ?

Nature and circumstances of acquisition

The whole of the conduct of each party with respect to the interests

* + - * 1. Which interest arose first?

The earlier interest prevails over any subsequent interest

1. ***Mere Equity vs Subsequent Equitable***
	1. *What is a Mere Equity?*
		1. A personal right is a ‘mere equity’
		2. It is ancillary to a legal estate or interest in land and is binding against a 3rd party with notice (i.e. an equity to rectify a lease in favour of a lessee)
			1. *‘A right in equity that is ancillary to an interest in land and is binding on a third party who has notice of its existence or is a volunteer ... a mere equity gives to a plaintiff a right o an adjustment of rights in relation to a specific property, but ranks lower than an equitable interest’*
	2. *Subsequent equitable takes priority over earlier mere equity unless later party*
		1. Has notice
		2. Fails to provide adequate consideration
	3. What is the Test? (*Latec v Hotel Terrigal per Kitto and Menzies JJ, Breskvar v Wall)*
		1. Is the earlier interest a mere equity?
		2. Is the subsequent interest equitable?
		3. Is there notice?

**Torrens System**

***Prior Legal vs Subsequent Legal***

1. *S42(1) TLA – Registered legal title, typically, is indefeasible by either prior or subsequent interests*
	1. *‘Free of All Encumbrances’* – The registered legal holder is free of all encumbrances of title
2. *S34(1) – Documents are lodged in the order the Registrar receives them.*
3. *S42(2) TLA – An exception to indefeasibility exists such that a prior (or subsequent) unregistered equitable interest is recognised if a valid exception has occurred.*
	1. Is there a statutory exception to indefeasibility?

***Prior Equitable vs. Subsequent Legal***

1. ***Priority dispute between prior equitable and subsequent legal is per s42(1) TLA*** –

*‘A registered interest receives paramount priority and indefeasibility unless fraud or a statutory exception contained within s42(2) is available’*

1. ***Notice?***
	1. S43 removes the doctrine of notice for Torrens Land.
		1. *General Law Land* – purchasers are subject to any equitable interests of which they had prior notice.
			1. *If no notice, legal interest prevails.*
		2. *Torrens Land* – Not subjected to any equitable interest unless there is one of the exceptions to indefeasibility listed in s42(1) and (2)
			1. *Is it a gift* ? Then Volunteer exception
	2. **Is there a statutory exception to indefeasibility?**

***Prior Legal v Subsequent Equitable***

1. **S42(2) TLA** – Registered interest prevail over subsequent unregistered interests
	1. *Barry v Heid*
		1. Equitable interest prevailed over prior legal interest due to *in personam*
			1. ‘*Arming Conduct’*  - provided authority to deal with the land and this was personal conduct which raised an equity against the registered proprietor. Registered Proprietor is estopped from denying any subsequent interest based on a representation made when dealing with the legal title.
	2. *Bahr v Nicolay*
		1. An equitable interest arises to bind the registered proprietor so as to bind them
2. Is there a statutory exception to indefeasibility?

**Unregistered Interests**

***Unregistered Interests where transfer is proceeded by a contract***

1. Equitable mortgage
	1. *Barry v Heider* – Unregistered equitable interest are possible in Torrens system land.
		1. *Barry* was RP who executed transfer and waiting for new Cert of Title and mortgage to Schimdt
		2. *Mrs Heider* not registered anything – equitable mortgage based on s126
			1. *Equitable interest is enforceable* – Barry is stuck with the mortgage

***Unregistered Legal Interests***

1. Intended as a gift
	1. Equity does not assist a volunteer – since no consideration there is no claim
		1. *Corrin v Patton*
			1. Donor needs to do everything only the donor can do
			2. Provide the certificate of title
			3. Execute the transfer
			4. Donee - lodges it for registration
			5. Registrar – files and registers
				1. “Majority judges held that a donee acquires an equitable interest prior to the registration once the donor has done all that is required by the donor to complete the gift (and to place it beyond his recall – Deane J)

***Unregistered Legal Interests***

1. Legal interests typically require registration to be effective
	1. Some legal interests can be created without registration:
		1. Leases taking effect in possession – s54(2) PLA
		2. Some types of easements
		3. Rights acquired by adverse possession
			1. **All of these are paramount interests per s42(2)**

***Equitable v Equitable (unregistered interests)***

1. S42(2) TLA – Two different views govern the determination of priorities between competing interests
	1. ***Notice is a separate and distinct test, subject to postponement***
		1. Is there postponing conduct?
			1. If the holder of the subsequent equitable interest has notice of the prior interest, they cannot acquire priority unless the prior interest holder engages in the postponing conduct
	2. ***First in time prevails unless there is postponing conduct***
		1. The first in time interest prevails unless there is postponing conduct and notice of the subsequent interest is just one circumstance relevant to determining who has the better equity.
			1. Where Equal – earlier interest prevails per *Rice v Rice*

*Summary of Equitable v Equitable* – per *Moffet v Dillon*

1. ***First Unregistered Interest Prevails*** *-* If a second interest holder (B) takes their interest with knowledge of a previous or prior interest (A) they are subject to the first interest (A).
2. ***Is there Notice? is notice?***
	* + - 1. Actual or Constructive Notice?

Actual –

Expressly stated to the later (B) interest holder

Constructive - *Brooking JA* stated that

S199(1) of the PLA

It is within his own knowledge or that of his agent in the transaction or;

Making inquiries so it would come to their attention if they had of made appropriate inquiries

* + - * 1. *Must search the register to see if a prior interest exists*.

NOTE for *Constructive Notice*

If acting for A – *want 1b.*

*i.e. second in time should have made inquiries*

If acting for B – *want 1a.*

*i.e. first should have made them aware of it.*

* 1. *If No Notice, Proceed to 2) as* ***Moffet v Dillon doesn’t apply.***
1. **If notice is NOT established** (Actual or constructive) – **Merits Test**
	1. ***Postponing Conduct*** ­–
		1. **Is there a cavet?**
			1. *Butler v Fairclough* – Failure to cavet can be a reason in itself to postpone the prior interest.
				1. *Just Holdings v Bank of NSW* – Lodging a caveat is not notice, so a failure to caveat does not mean that not interest is claimed. Failure is not itself a basis, rather its a consideration
		2. ***Abigal v Lappin -* First in time unless postponing conduct**
			1. *What is the Postponing Conduct?*
				1. The first equitable interest holder has been guilty of some act or omission which has contributed to a belief on the part of the holder of the subsequent (later) equity, at the time when he acquired it, that the prioty equity interest was no longer in existence per *Moffett v Dillon*.
			2. *Abigal v Lappin* – Holder of earlier interest is estopped from asserting their priority because of a representation made through dealings with their title that their interest does not exist or will not be enforced.
				1. *Apply Tests from Heid v Reliance Finance*

**Estoppel (*Representation& Detriment Cases)***

Representation by the first interest holder or their agent which lead to the creation of the second interest.

Duplicate Certificate of Title?

Blank Transfer?

Evidence of Payment?

**Reasonable foreseeability? (*Interest Cases)***

*Interest Cases* – was it reasonable foreseeable at the time of the relevant conduct that a subsequent interest would be created in the belief that the prior interest did not exist?

*Is it reasonably foreseeable that the first party’s actions lead to the creation of the second party’s interest?*

*Is it a ‘natural consequence’ of the earlier parties conduct that a deception would occur, so that the earlier has ‘armed’ the deceiving party with the ability to falsely represent themselves*? (*IAC Finance v Courtenay)*

* + 1. *Alternative View – 99% always the same as the Abigal view*
			1. *Rice v Rice*
				1. *‘Arming Conduct*’ – The holder of the first equitable interest armed a third party to ‘go into the world under false colours’. The third party then represented himself as an unencumbered owner of the fee simple.
			2. *Osmanoski v Rose (Vic Authority)*
				1. Supports the view that failure to caveat will cause a prior equitable interest to lose priority. However, decision in this case is doubtful in light of *Heid* and *IAC Finance*

***Prior Mere Equity v Subsequent Equitable***

**A prior mere equity and a subsequent equitableinterest** - **the equitable interest will win**: *Latec Investments v Hotel Terrigal*; *Breskvar v Wall*.

1. *Is the earliest interest a mere equity ?*
	1. A personal right is a ‘mere equity’
	2. Rights go 🡪 legal 🡪 equitable 🡪 personal or mere equity
		1. *‘A right in equity that is ancillary to an interest in land and is binding on a third party who has notice of its existence or is a volunteer ... a mere equity gives to a plaintiff a right o an adjustment of rights in relation to a specific property, but ranks lower than an equitable interest’*
2. *Is the subsequent interest equitable?*
3. *Subsequent equitable wins if no postponing conduct -*
	1. *Per Latec Investments (Menzies and Kitto)* - A person who acquires a subsequent equitable interest in good faith for value and without notice of an earlier mere equity will not be bound by the mere equity
		1. A mere equity is of lesser priority than an equitable interest
			1. *Ruthol Pty Ltd v Mills*
				1. Mills held first equitable interest – option to purchase land within a defined period
				2. Mills interest was on condition of another party not exercising their interest. Mills was fraudulently told that the other party didn’t exercise and was sold the property.
				3. In the meantime, another interest was created in favour of Tricon.
			2. ***Outcome?***
				1. Mills first interest was equitable, but after expiry of time period was a mere equity.
				2. Mere equity does not defeat a subsequent equitable interest and Tricon gains priority.
				3. Mills should proceed in breach of contract and specific enforcement.
4. ***If postponing Conduct* –**
	1. *Swanston Mortgage v Trepan Investments* - it was held that a mere equity is not an ‘estate or interest in land’ for the purposes of lodging a caveat under s 89 of the *TLA –* ***‘mere equity is not a cavetable interest in Vic’***
		1. *‘Mere equity’ –* AMortgagors equity of redemption to have an improper sale of mortgage property set aside is a ‘mere equity’ and not an ‘estate or interest in land’ – not a cavetable interest
			1. *This has been heavily critised and in NSW – Patmore v Upton – Underwood J refused to following Swanston mortgages.*
5. *Breskvar v Wall?*
	1. 1st Party borrowed money (vests legal title) in 2nd Party
	2. 3rd Party acquires an equitable interest without notice of 2nd Party’s limited authority.
	3. 1st Party files a caveat on the title to prevent 3rd Party’s registration.
	4. ***Rationale*** – 3rd Party did nothing wrong, whereas 1st Party ‘armed’ 2nd Party.
		1. ***Outcome***?
			1. 1st Party vests equitable title in the trustee
			2. 1st Party then sells property to the 2nd party (provided signed memorandum of transfer with name blank)
			3. 2nd Party sells to a 3rd party without notice
			4. 3rd Party WINS as entitled to assume no prior competing equitable interest whereas 1st party ‘armed’ the 2nd party and was negligent.

***Priority dispute between mortgagor and purchaser from mortgagee?***

1. *How to deal with these?*
	1. **Timing:**
		1. New purchaser (purchaser from the mortgagee generally the bank)
		2. Need to separately consider the post and pre-registration situations
	2. **Once new purchaser has registered?**
		1. New RP is indefeasible unless exception
	3. **Before new purchaser registered?**
		1. There is a priority dispute between unregistered interests.
2. *What interest does innocent purchaser acquire from the mortgagee on registration?*
	1. A (RP) has mortgage to B (Reg Mortgage)
	2. C (RP) purchases and becomes RP
		1. What interest does C acquire from the mortgagee?
			1. TLA - s77(4)
				1. *Discharged from all liability – and they are “free from the mortgage and any encumbrance subsequently registered” EXCEPT:*

*A lease, easement or restrictive covenant to which the mortgage is a party/has consented in writing*

*A mortgage, charge, easement or other right that is for any reasons binding upon the mortgage*

* + - 1. Further, the title of the purchaser shall not be impeachable on the ground that:
				1. No case had arisen to authorise the sale, or that
				2. Due notice was not given or that
				3. The power was otherwise improperly or irregularly exercised
			2. Mortgagee CANNOT get the land – as C is completely innocent and gets clear title – can only get a damages claim against the bank (probably based on contract)
1. *What interest does fraudulent purchaser acquire from the mortgagee on registration?*
	1. A (RP) and has a mortgage from B (Reg mortgage)
	2. C (RP) and mortgage from B (Reg Mortgage) through improper exercise of the power of sale
		1. Conflict between A vs. C
			1. A (RP) must prove fraud
			2. C (RP) must discharge the Mortgage
				1. If the purchaser is held to be defeasible for fraud, the purchaser is treated in equity as having acquired only the *mortgagees* (Banks) interest, not the *mortgagors*
				2. So the purchaser holds the registered title subject to the former mortgagors (original RPs) **equity of redemption** (equitable interest). If mortgagor (original RP) pays the debt, the purchaser must transfer the land to him.
2. *What interest does mortgagor have if the purchaser has registered as a Third Party?*

***Latec Investments v Hotel Terrigals***

* 1. Classifications of HT’s mortgagors Interest
		1. Kitto J
			1. Before Court order setting the sale aside, HT has a **mere equity**; After the order, a full equitable interest.
			2. *“Where a claim to an earlier equitable interest is dependent for its success upon the setting aside or rectification of an instrument, and the Court notwithstanding that the fraud or mistake (or other cause) is established, leaves the instrument to take effect according to its terms in favour of a third party whose rights have intervened, the alleged earlier equitable interest is unprovable against the third party”*
		2. Menzies J
			1. Classification depends on the purpose:
				1. For a priority dispute, it’s a **mere equity**
				2. For the purposes of devising it by will, its an equitable interest (and therefore assignable)
		3. Taylor J
			1. HTs interest is a full equitable interest
			2. Applies the bona fide purchaser for value without notice
			3. Court will not intervene in this sort of situation so it really does not matter how its categorised.

***Mortgage Pre-Registration Summary***

**Summary**

1. The authorities are inconsistent as to how to classify mortgagors interest pre-registration for the purpose of priority dispute:
	1. Mere equity by not proprietary (Swanston)
	2. Proprietary equity (latec)
	3. Full equitable interest (Forsyth, Breskvar)
	4. Legal interest as RP (Forsyth)
2. The inconsistencies cannot be resolved. You just have to learn and accept the different possibilities.

**Interests**

1. Equitable
	1. Equity of redemption per *Abigail*, Kitto J in *Latec*
	2. Vendors Lien
	3. Right to have a transaction set aside for fraud per *Breskvar*; Taylor J in *Latec*
	4. Right to have a transaction set aside for fraud (for the purpose of leaving in a will) per Menzies J in *Latec*
2. Equity (pre-registration)
	1. Right to set aside a transaction for fraud or undue per *Swanston* but not proprietary CAVEAT
	2. Right to set aside for breach of statutory duty Swanston but not Proprietary CAVEAT
	3. Right to set aside a transaction for fraud per Menzies J (for priority dispute) per Kitto J
	4. Equity of acquiescence Inwards
	5. Equity to rectify *Downie*.

***Next page –***

* 1. ***When new purchaser has not registered (pre-registration)***
	2. ***Pre-Registration Priority Dispute***

***When new purchaser has not registered (pre-registration)***

Pre-registration: *Swanston Mortgage v Trepan Investments (1994) 1 VR*

1. T(RP) has mortgage with S(reg mortgage)
2. S (reg mortgage) sale to B (unregistered proprietor)
3. T wanted to get a caveat to protect his interest and stop B from registering
	1. To get a caveat – s89 – an estate or interest in land
4. Pre-registration, the mortgagor has a right to have the sale set aside on the basis that it was conducted in breach of the mortgagees duty under s77(1)
	1. ***Swanston Mortgage***: Vic CA said that this right was not cavetable because it was a personal equity (purportedly following Latec)
		1. This implies that it would be a personal equity for purposes of a priority dispute. This is NOT a proprietary interest.
	2. But *Swanston* was NOT about a priority dispute.
		1. Has been criticised in *Vasiliou v Westpac Banking Corp*
			1. “The *Latec* case was not concerned with the question of whether a mortgagor who had a right to set aside”

***Pre-Registration Priority Dispute***

*Forsyth v Blundell* (1973) 129 CLR

1. B (RP) has a registered mortgage with ASL Mortgagee $125K in March 1968 and $10K in Nov 1968
2. Shell wanted $120K and was not registered and sale is improper
3. B (RP) wants to stop Shell registering **permanent**
	1. *Interlocutory injunction* – there is a serious question to be tried
	2. *Permanent injunction* – have to prove that the requestor will win
4. **Interests:**
	1. Legal vs. Equitable
		1. B is Indefeasible unless exception
		2. Legal wins B as no exceptions
	2. Equitable vs. Equitable
		1. First in time unless postponing conduct by B
		2. Defaulting under the mortgage is not postponing conduct
5. Walsh J treated mortgagor interests as a legal interest (still RP) which prevails over purchasers equitable interest
6. Walsh J said that even if mortgagor was treated as having an equitable interest, he would still win because no postponing conduct
7. B was granted an injunction to restrain the completion of sale.

**Indefeasibility exceptions?**

1. **Who are the parties?**
	1. Party A v Party B
2. **What are their interests?**
	1. Party A Interests –
	2. Party B Interests –
3. **What is the issue?**
	1. One party will need to establish that there is an exception to indefeasibility of the title on registration.
4. **What is the rule?**
	1. S42(2) of the TLA a registered proprietor is indefeasible unless there is a valid exception
5. **What are the exceptions?**
	1. **Paramount Interests**
6. *S42(1)* *– This is the indefeasibility provision*
	* 1. (a) Register makes mistakes and issues to certificates – first in time wins
		2. (b) mistake by area or boundary – subsequent certificate will win, unless the purchaser is purchaser for valuable consideration (innocent)
7. *S42(2) – above is subject to – EXCEPTIONS (paramount interests)*
8. **42(a) crown grant land**
	* + 1. Reverse rights to do something
			2. How to find out about a crown grant ? You cant
9. **42(b) adverse possession**
	* + 1. If someone is in adverse possession, “subsisting” – thus all benefits already conferred pass to adverse possessor – and subject to indefeasibility.
10. **42(c) public rights of way**
	* + 1. Subject to laneways, roads, highways etc
11. **42(d) easements**
	* + 1. The RP is subject to any unregistered easements as they may exist over the property
12. **42(e) interest of a tenant (protected without registration)**
	* + 1. If there is a lease, then the tenant retains an interest and must be in possession.
				1. Long term leases, short term leases
				2. Can register – but if don’t register then still win under this section
				3. *Equity of Rectification* – Tenants equity binds the purchaser *(Downie v Lockwood)* such that lease forms part of the leasehold estate and binds a purchaser of the property.(possibly fatal inconvience if 20 year lease)
13. **S42(f) – Unpaid land tax –**
	1. any unpaid land tax, and also any unpaid rates and other charges which can be discovered from a certificate issued under
		1. s387 of the Local Government Act 1958
		2. s158 of the Water Act 1989;
		3. or any other enactment specified for the purposes of this paragraph by proclamation of the Governor in Council published in the Government Gazette
	2. **Fraud**
		1. ***What is Fraud?***
			1. **Definition -** ‘Actual fraud, wilful blindness or moral turpitude brought home to registered proprietor at the time or just before registration or through an agent’ – *Assets Co v Mere Roihi*
			2. *Must be more than mere notice and must be actual –*
				1. *Mere Notice -* There must be more than mere notice as confirmed in *Bahr v Nicolay*
				2. *No Equitable Fraud* – Equitable fraud is more akin to *in personan* rights per *Bahr v Nicolay*
			3. *Knowledge of an unregistered interest is not of itself fraud* – Mere notice is not fraud. It is not fraudulent to register with notice of a prior unregistered interest, thereby destroying it.
				1. *Pyramid Building Society v Scorpion Hotels*
				2. *S43 TLA –* Subsequent registration will defeat a prior interest even when the registered proprietor has actual notice of that interest.
			4. *Wilful Blindness* – Wilful blindness or recklessness as to someone else’s fraud can constitute fraud (*Pyramid)*
		2. ***When must the Fraud Occur?***
			1. S42 refers to ‘fraud in the acquisition of a currently registered interest’
				1. *Loke Yew -* Meaning BEFORE the acquisition of the registered interest and not after
		3. ***Has fraud actually occurred?***
			1. *Intention to Defraud per Wicks v Bennet* – a mental element of intention must exist on the part of the impugned party for fraud to occur. It is not enough to show that the registered proprietor ‘closed her mind’ to the fact of another unregistered interest.
				1. *Careless Disregard is not sufficient* ***must be dishonesty***

*RM Hosking Properties Pty Ltd v Barnes*

* + - 1. *More than mere negligence* –
				1. *Grgic v ANZ Ltd*

*False Attestation -* Witness signed that the Registered Proprietor was ‘known to him personally’ – despite fact that RP was not there and fraudster was impersonating RP.

*Mere Negligence –* No evidence that bank was attempting to ‘take advantage of RP’ and therefore no intention to defraud.

* + - 1. *Knowledge of fraud can amount to fraud –* Actual or imputed notice of another’s fraud can constitute fraud
				1. *Russo v Bendigo Bank and Reichman*

Solicitor gave specific instructions not to sign anything without being in their presence.

Solicitors clerk signs the attestation clause even though she was not present at the actual signing of the documents

*Decision* – No ‘dishonesty or moral turpitude’ and therefore cannot be fraud. Judge stated for fraud:

Must be wilful and conscious disregard

Must ‘know the consequences of the actions’ of registration (indefeasibility)

Must have the requisite knowledge about the consequences

* + - 1. *Bad Faith* -
				1. In *Latec Investments v Hotel Terrigal* the sale gave rise to the ‘inference that it was made in bad faith and was therefore fraudulent’
			2. *Wilful Blindness (also refer Russo v Bendigo Bank)*
				1. The Registered Proprietor **must have** been aroused to the suspicion but they refrain from inquiry for ‘fear of learning the truth’

*Bahr v Nicolay* –

*‘If it is shown that the RP abstained from making inquiries for fearing of learning the truth, the case is very different and fraud may properly be ascribed to him’*

* + - * 1. *Pyramid Building Society* –

Wilful Blindness is **only fraud** if the failure to inquire amounts to actual dishonesty

*Mere carelessness -* No evidence that Pyramid or anyone acting on its behalf knew that the execution of the mortgage had not been authorised.

*No Actual Dishonesty* – no intent to deceive.

* + 1. ***Who has committed the fraud?***
			1. *Registered Proprietor or Agent -* The Fraud must be that of the registered proprietor or their respective agent. Fraud by another party is not sufficient, even if the registered proprietor is wilfully blind to it per *Pyramid Building Society.*
				1. *Vassos v State Bank of SA* –

The fraud of another party to the instrument is insufficient basis for denying the title of the registrant (*Vassos v State Bank)*

Once registered it cannot be defeated unless the registrant registered it fraudulently or was privy to the fraud per s42.

S44(1) states that the consequences that flow on from this fraud.

* + 1. *Is an Agent or Sub-agent involved?*
			- 1. *Who is acting for the Registered Proprietor?*
				2. *Has this person committed a fraud?*

An agent will be acting fraudulent if he or she **knows of facts** that would make it fraudulent to continue with registration.

*Russo v Bendigo Bank* – Clerk did not purposefully engage in fraud and didn’t know outcome

* + - * 1. *Are they acting in their actual or apparent authority?*

*Actual* – Specific instructions to the agent (i.e. direct instructions from mortgagee to solicitors)

*Loke Yew v Port Swettenham Rubber*

*Apparent* – Matters necessarily incidental to a general direction or instruction, though not specifically mentioned.

*Schultz v Corwill Properties*

The act of an agent within the scope of their actual or apparent authority does not cease to bind the principle because the agent was acting fraudulently in the furtherance of their own interests.

*Respondeat superior* is the presumption that the agent has told the principal what the agent knows and this is the rationale justifying the imputation of knowledge to the presumption.

The presumption *may only be rebutted where the fraud is the agents own fraud, or where the agents knowledge is gained during the course of another fraud*. **If the agent is acting in their own capacity – fraud wont be brought home to the RP.**

**Are they acting ‘on a frolic of their own’**

*Knowledge imputed to employer –*

*AGC v De Jager* – Fraud imputed to the principal because the employees knew that a witness was not present at a signing but witness the document anyway.

Acted within actual or apparent authority

They knew of false attestation but lied to Registered because they abstained from making further inquiries for fear of learning the truth – willfull blindness.

*Bank of SA v Ferguson* –

1. Bank of SA manager fraud was purely internal and did not affect the other party in anyway.
2. Ferguson wanted the mortgage anyway and internal actions of the Bank did induce Ferguson to act to his detriment.
	* + - 1. *Is it an agents sub-agent?*
3. Must be actual fraud on behalf of the sub-agent
4. Can it be “brought home”?
	1. *Russo v Bendigo Society*
		1. ‘two steps of fraud is probably too much’such that it is too difficult to bring home
	2. False attestation is fraud – probably within scope per above authorities.
	3. **Registrars power to Correct**
		1. *No Fraud Provision, must go to Court -* There is no provision that allows the Registrar to correct an entry procured by fraud.
			1. If there is a change, and then fraud – must go to Court.
		2. **S103(1)** – Registrar must make an amendment to register if directed by a court.
			1. S103(1AA) – Register must make amendment if directed by VCAT.
			2. S103(1A) – Reg may correct a patent error in leged doc.
		3. S103(2) – Registrar has discretion (‘may) to correct errors in the register. This is treated as a ‘slip rule’ only (*Frazer v Walker)*
		4. **S103(2)(a)** – Reg may corrects in the register
			1. S103(2)(b) – Correction has effect as if error has not occurred, but without prejudicing any rights accrue from any recording made in the Register prior to the correction.
			2. S106(e) – Registrar power to cancel titles or folios, to create new ones and to amend register “Wherever it is necessary to do so by reason of the operation of this or any other Act”
	4. **Inconsistent Legislation**
		1. The Court prefers to read the statutes together and will also seek do this wherever possible.
			1. However, in the exam – 99% chance there will be a conflict.
		2. Is it about the ***interest*** or the ***instrument?***
			1. *Interest* – Are interests in issue ?
			2. *Instrument* – Is a document invalid or in issue?
		3. *Statutory Interpretation -* If there is a total inconsistency then the most recent will prevail
			1. *Subsequent Legislation may*
				1. Override registered interests
				2. Invalidates registered interests
				3. Creates new unregistered interest to which the Registered proprietor will be subject
				4. Removes land from the operation of the TLA
		4. *S42 can be overridden by a later statute only if the two statutes are inconsistent*
			1. *Interpretation of the Acts* –
				1. Can the acts be read together?

Does the subsequent inconsistent statute render the *whole interest void* / *create a new interest* in someone else OR *does it render the instrument void*?

*Instrument -* If it’s the instrument (document), registration can cure the defect.

*Horvath v Cth Bank*

*‘There is a strong presumption that Parliament does not intend to contradict itself but rather intends both relevant Acts to operate within their given spheres’*

*Interest -* If it is the interest, registration cannot cure the defect and the later Act will usually prevail.

*Calabro v Bayside*

* 1. **Volunteers and Fraud**
1. *What is a volunteer?*
	1. *Volunteer* – property is passed to a party without consideration.
2. ***i*.e. A GIFT**
	1. *Bona fide purchaser*
3. Equity – ‘equity doesn’t assist a volunteer’
4. Corin v Paton – it will assist if you have done everything that is needed to be done
5. ***If you are a volunteer, do you get infeasibility?***
	1. **Vic rejected – Dont get better title** (*Bogdanovic v Koteff – which stated that a registered proprietor takes free of prior unregistered interests )* as it was about a purchaser for value (transaction) not a mere volunteer (a gift). In *Rasmussen v Rasmussen* stated that a RP who takes as a volunteer cannot acquire a title better than the predecessor
6. *Rassmussen -* A registered proprietor, being a mere volunteer, does not obtain a title free from prior equities.
	1. *Considered a wrong decision as per s42 (Below) doesn’t speak of purchaser for value.*
7. *Previous In Personan Claims -* If the previous RP is subject to a personal claim (*in personan)* then the volunteers title is also subject to this interest
8. *Defensible for Fraud -* If the previous RP is defensible for fraud, then the volunteers title is also defensible for fraud.
9. *Farah Constructions* – Upheld the *Koteff* (NSW) decision.
	1. *S42 TLA* – *‘the registered proprietor of land shall except in the case of fraud hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely from all other encumbrances whatsoever’*
	2. *Notice Provision s43* – no reference to purchaser for value, but does not refer to purchase or consideration money
		1. *Dishonest* – the fact that someone’s dishonesty is unknown – it doesn’t affect indefeasibility
	3. S44(2) – Protection of purchasers provision protect *“any bona fide purchaser for valuable consideration”*
		1. As long as you are innocent and you get valuable consideration in the land
		2. *In Victoria* – If you are a volunteer your title is not as good as if you are a proper purchaser
10. *Example*
	1. A is the Registered Proprietor
	2. B commits fraud on A
		1. A wins, B is a party to the fraud and therefore B’s title is defensible due to infeasibility exceptions
11. IF B sells to someone, A looses as immediate infeasibility
12. If B transfers to C, who is a volunteer?
	1. Can A recover from C?
		1. A is a volunteer and is subject to whatever a person who they got title from.
		2. B title’s is indefeasible and therefore a volunteer is subject to whatever there previous title holder was subject too.
13. If C sells to X?
	1. Then A looses title, as X is an innocent purchaser for value without notice – A cannot recover from X.
	2. ***In Personam***
14. ***What is In Personam?***
	1. *An RP is bound by rights which arise out of his/her conduct*
		1. *In Personam* is an equitable exception created by the Courts. Although a RP has paramountcy and typically indefeasible title, they cannot refuse to **perform contractual obligations on such a basis**. (*Grgic v ANZ)*
		2. *It ‘relaxes the rigour of immediate indefeasibility*’ to require that a registered proprietor gives **full effect to their personal obligations**

*“The principle of indefeasibility in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, found in law or in equity, for such relief as the Court acting in personam may grant”-* Lord Wilberforce in *Frazer v Walker* [1967] 1 AC 569

1. ***Is the claim based on ‘know cause of action in law or equity’? (i.e. deceit or undue influence)***
	1. *In Personam* can be based on actions before or after registration (*Bahr v Nicolay)*
		1. The *in personam* exception operates where the registered proprietor purchases land having acknowledged the existence of a prior unregistered interest binding on the vendor *and having expressly (or by implication) agreed to take subject to his rights*
2. ***The claim must be again the person who is the registered proprietor (or his agents or employees)***
	1. The cause of action must give rise to a personal equity to seek equitable relief. There must be something unconscionable in the Registered Proprietors conduct (*Vassos)*
	2. The *In Personam* claim must give rise to an proprietary interest
		1. *Sufficient Argument -* It can be satisfied by subjecting the registered proprietors interest to that of the person bringing the action
		2. *Insufficient Argument -* It is insufficient that a forged signature was placed upon the instrument of transfer or mortgage.
			1. **Note:** In *Mercantile Mutual Life Insurance v Gosper* held that forgery was a sufficient basis for an *in personam*  claim. This decision flies in the face of *Vassos* and *Eade* which are the authorities for the limitation on *in personam* claims that they cannot be founded on a forgery of the relevant instrument. If this were true, all registrations could be impugned on the basis of forged attestations and the RP would be powerless to protect itself.
3. ***Limits on In Personam claims***
	1. *Registrar of Titles v Fairless* –
		1. *S110(3) ­*– No indemnity is provided where claimant or legal practitioner caused or substantially contributed to the loss by fraud neglect or wilful default.
		2. In Vic – get value of property at the time it was lost not at the current that the action is brought to Court.
		3. S110(2): a person entitled under s110(1) may bring action against Registrar as nominal defendant
			1. Registrar entitled to sue “the person actually responsible” s109(3)(a)

**Cavets**

1. **What is a cavet?**
	1. Defined in *J & H Just (Holdings) Pty Ltd v Bank of NSW*
		1. A caveat is a statutory injunction (s89 TLA) to maintain a property *in statu quo* until the caveators unregistered interest has been determined by a Court, or the Caveat is withdrawn or lapses.
			1. ‘*In Essence, a* ***caveat prevents registration of inconsistent interests*** *and allows the caveator time to substantiate their interest’*
	2. Sackville and Neave –

*‘The caveat system thus affords protection to the holders of equitable interests, but usually places the onus upon them to ensure that no dealing inconsistent with their interests is registered’*

1. **What is the procedure for cavets?**
	1. Person claiming an unregistered interest can lodge a caveat against dealings
	2. Cavet is recorded on the title per s89(2) and RP is notified s89(3)
2. **How to show a ‘caveatable interest’?**
	1. *Scope of the Interest –* ***Equitable interests are protectable***
		1. S89(1) – the interest must be an ‘estate or interest in land’
			1. **Legal –**
				1. A registered proprietor cannot normally caveat to protect their own interests (not entirely clear per *Swanston Mortgage v Trepan Investments)*
			2. **Equitable**
			3. **Mere Equities –**
				1. Cannot lodge a caveat to protect ‘mere equities’ in Victoria per *Swanston Mortgage v Trepan Investments*
			4. **Personal Equities**

* + 1. S89(1) – *Any person claiming any estate or interest in land under any unregistered instrument or dealing or by devolution in law or otherwise or his agent may lodge with Registrar a cavet in an appropriate approved form forbidding the registration of any person as transferee or proprietor of and of any instrument affecting such estate or interest either absolutely or conditionally and may at any time by lodging with the Registrar an instrument in an appropriate approved form withdraw the caveat as to the whole or any part of the land.*
		2. A person can lodge a caveat to protect any estate or interest under any unregistered instrument or dealing. The nature of the interest must be specified, but the validity of the claim does not need to be substantiated.
	1. *Unregistered equitable interests*
		1. **Refer equitable v equitable above**
1. **What is the effect of a caveat?**
	1. S91 – The Registrar **shall not record a change in proprietorship** or any dealing which may affect the estate or interest claimed in the caveat.
2. **Can a cavet be removed?**
	1. RP can then make an application to the Registrar to have a caveat removed from the registrar per s89A OR they can go directly to Court per s90(3)
	2. *If RP wins* –
		1. If the Caveat is lodged without reasonable cause – then the registered proprietor can claim for loss suffered by the lodgement and the costs for the application for removal will normally also be awarded against the caveator.
	3. If defeated – cannot lodge another – if withdraw can lodge another
		1. *If the caveat is not challenged* – Then when an inconsistent dealing is lodged for registration the Registrar notifies caveator per s90(1)
		2. *S90* – 30 days
			1. Must provide interest by going to Court or withdrawing
			2. Must establish that a priority exists
3. **What happens once a caveat is registered?**
	1. If not challenged, caveat remains on the register
	2. If RP makes an application to Registrar under s89A, minimum 35 days
	3. If inconsistent transfer/dealing lodged under s90(1) 30 days once notice is given
	4. S118 compensation *Commonwealth Bank v Baranyay* [1993] 1 VR 589

**Registered Mortgages**

1. **Definitions:**
	1. ***Mortgagee*  - Bank – mortgagee**
	2. ***Mortgagor* – Person who is indebted to the financial lender**
2. **What is a mortgage?**
	1. *Form of vendor financing* - Purchaser takes possession before settlement and pays instalments of purchase price plus interest. Vendor hands over transfer after final instalment is paid.
		1. *Regulated by Sale of Land Act*
		2. *This is also a form of credit contract regulated by the Consumer Credit Code*
3. **Equitable Mortages ? Refer *Equitable v Equitable (unregistered interests)***

**Standard Contracts**

1. Mortgagee Equity:
	1. **Clogs on the equity of redemption**
		1. Where mortgage purports to ‘postpone’ / prevent the equity of redemption (concept still applied to TS land) – for example where the mortgage agreement provides that after loan is repaid, the mortgagor may not get property back for 10 years. Invalid.
	2. **Unconscionability**
		1. Equity can set aside transactions where procured by unconscionability (*Amadio* etc)
2. Statutory
	1. Consumer Credit Code – unjust transactions
	2. ASIC Act 2001 – unconscionability misleading and deceptive conduct
	3. Trade Practices Act 1974

**Consumer Credit Code**

1. Applies to mortgages over land if:
	1. The mortgagor is a natural person; and
	2. Credit is provided for personal, domestic or household purpose; and
	3. Credit provided in the course of a business of providing credit
2. S6 and s8
3. If the CCC applies –*basically unconscionability*
	1. S12-20 specific duties regarding full disclosure to the debtor
	2. S70-71 Court can reopen unjust contracts
	3. S72 Court can review unconscionable fees, interest or charges and can annul them
	4. S80 notice and process for enforcing a contract

**Registered Mortgagees Rights on Default**

1. **The Mortgage must be registered per s74 TLA (otherwise refer above)**
2. **Mortgagees duty in exercising power of sale under s77 TLA**
	1. Mortgagee must act in good faith
	2. Mortgagee must have regard to the interests of the mortgagor
3. **Good faith** – judge subjectively has mortgage acted honestly, fairly, without fraud or collusion?
4. **Interest of the mortgagor** – be assess objectively – has the mortgage taken reasonable steps to obtain the best or proper price for the property?
	1. Murphy J in *Goldcel* – need *best price*
	2. Lush J in *Henry* – need proper price
	3. Ashley J in *Guss* – applies best price but does not choose between the 2 standards
	4. *Vasiliou Crt of Appeal* – applies both – get same result
5. **Steps of Tests**
6. **Registered Torren System mortgages**
	1. **TLA - IMPORTANT**
		1. s78(1)
		2. S80(1) - CCC
7. **Power of Sale -**
	1. ***What triggers the power ?***
		1. Depends on agreement but ‘default’ normally relates to
			1. Failure to pay the principal or interest or
			2. Failure to comply with another covenant
		2. **Upon default, the mortgage can exercise a power of sale s77(1)**
			1. Most mortgages expressly confer this power but also covered by legislation where default on payment f principal or interest (TLA, s77)
	2. **A mortgagee is under certain obligations when exercise the power of sale regarding (this is IN ADDITION to the CCC unless mortgage not under CCC)**
		1. **The issue of a valid notice**
			1. S76 -
				1. If a default (normally non-payment( by the mortgagor continues for 1 month, then the mortgagee can serve a notice, in writing, to remedy the default
				2. Must specify:

There has been a default

How to remedy it

* + - * 1. If mortgagor remedies the default then the power of sale cannot be exercised
		1. **If mortgagor doesn’t remedy it**
			1. S77(1)
				1. If 1 month after the s76 notice [so have a default for a month and another month for the notice period[ the mortgagor does not comply, the mortgagee may ‘in good faith and having regard to the interests of the mortgagor’ sell the land or any part of it
			2. S80(2) - CCC
				1. At least 30 days and its not remedied it – they can begin enforcement proceedings
				2. If begin enforcement proceedings before the 30 days are up:

Penalty units are applied

* + - 1. **Can sell the land by public or private auction and**
				1. It can be a cash contract or a terms contract
				2. It can subject to such terms and conditions as the mortgagee thinks fit
				3. The mortgagee may make and sign any transfer to affect such sale
			2. **S77(2) – Registrar is not bound**
				1. Registrar doesn’t have to ask any questions about the sale
				2. When the sale is done, this section specifies how the sale is to be ordered
	1. **Executing the Power of Sale -** *Mortgagees duty under s77(1)*
		1. Two requirements qualify the mortgagees statutory power of sale given by s77(1)
			1. ‘in good faith’
				1. Judged subjectively – has the mortgagee acted honestly, fairly, without fraud or collusion?

*‘if the mortgagee wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith’ – Nolan v MBF Investments* at [101]

* + - 1. ‘having regard to the interests of the mortgagor’ ***(next page)***
			2. ‘having regard to the interests of the mortgagor’
				1. To be assessed objectively – has the mortgagee taken reasonable (implies objective) steps to obtain the best or proper price for the property?

*‘exercising good faith in carrying out the statutory process ... having “regard to the interests of the mortgagor” and other persons, by providing a further measure of protection to the mortgagor on the one hand, and imposing a further measure of responsibility on the mortgagee in the exercise of its power’ - Nolan v MBF Investments* at [101]

* + - 1. *Henry Roach v Credit House*
				1. Obliged to act in good faith and with regard to the interests of the mortgagor, grantor or other persons:

*Duty to take reasonable (objective) steps to obtain a proper price*

*Entitled to give first consideration to his own interests;*

*Entitled to sell at the time of his choice and without waiting for a time which a selling owner might consider more advantageous [can sell in a slump]*

*Must advertise so as to bring the property to the notice of persons likely to be interested and as to bring the notice of possible buyers the potentiality of the property to be sold*

*Rejected later in Vasiliou v Westpac Banking Corp;*

*Not entitled to adopt or accept any arrangement or price merely because it will see him paid out*

*Bound to take reasonable steps to ascertain the value of the property before selling.*

* + - 1. *‘Best or Proper’ Price*
				1. *‘Best price’ - Goldcel Nominees v Network Finance*

Court must assess the actions of the mortgagee and its agents to determine if the tests are satisfied.

* + - * 1. *‘Proper Price*’ – *Guss v Geelong Building Society*

*Vasiliou v Westpac Banking Corp*

* + - * 1. What is the obligation – best price or a proper price?

Lush J *Henry Roach* – proper price

* 1. **Prevention of registration by subsequent purchaser (next page)**
1. **Prevention of registration by subsequent purchaser (next page)**
	1. *Restrain the Power of Sale*
		1. ***Equitable Right of Redemption* –** The right of redemption provides that a sale can be restrained if the mortgagor pays the mortgagee the total amount of the mortgage debt, or the amount claimed by the mortgagee to be due.
		2. **If s77(1) is breached** –
			1. *Mortgagee* is selling the property without any legal title to transfer to the subsequent purchaser.
			2. *Forsyth v Blundell*
				1. If a subsequent purchaser does not have notice of a breach of the mortgagees power of sale after prucashign the property – ***but before the final purchase contract*** – then the mortgagor can challenge the sale

*‘if the sale is not exercised in good faith – there is no reason that can be derived from any general principle for holding that before completion the purchaser gets a good title as against the mortgagor’*

**Note:** If the purchaser has no notice of any impropriety during contract negotiation and at the date competition has occurred – the mortgagor looses ***any right of redemption***.

* + - * 1. *Injunction*

A mortgagor can apply for an injunction – to set aside the contract of sale with the subsequent purchaser - if they establish that the mortgagee failed to exercise their equitable duty of power of sale.

* 1. *Register Cavet to Prevent Subsequent Purchase Registration?* ***No!***
		1. A **mortgagor cannot (in Victoria) register a caveat** if they establish that the mortgagee gave a notice shorter than that of the statutory requirements (*i.e. they failed to properly exercise the power of sale).*
			1. *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd*
		2. *‘Mere equity’ –* AMortgagors equity of redemption to have an improper sale of mortgage property set aside is a ‘mere equity’ and not an ‘estate or interest in land’ – not a cavetable interest
			1. *This has been heavily critised and in NSW – Patmore v Upton – Underwood J refused to following Swanston mortgages.*

**Leases**

1. **What is a lease?**
	1. Gives that person a right to exclusive possession of the land
2. **What is a covenant?**
	1. A formal agreement or primes in a deed or undertaking seal
	2. Contract: A material provision of an agreement
		1. Real property an obligation that relates to the land.
		2. An estate in land given by a land owner another person for a fixed or certain period which
	3. ***What are the types of covenants (assignments)?***
3. ***Express-covenants*** – a lease contract and the parties are generally free (subject to statute to agree on terms of the which will vary from lease to lease – privily of contract)
	* 1. *Allow the Tenant “quiet enjoyment” –* ***test next page***
			1. Not being interfered with from the landlord
			2. Or the landlords agent
			3. Or anyone who has control of the land
		2. *Requiring Landlord to make structural repairs*
		3. *Tenants duties include*
			1. Pay rent
			2. Maintenance and good repair (non-structural)
			3. Give up possession at the end
			4. Restrictions on the rights or assignments (sub-lease)
			5. To use the premises only for specified purposes
	1. ***Implied Covenants*** – leases may also have covenants implied by either statute or common law. These apply **if not expressly contained in the lease contract (see next page)**
		1. *Implied covenants:*
			1. ***Implied by common law by custom or usage*** (terms specific to custom usage of lease involved)
			2. ***Implied in fact to give business efficacy to the contract*** (implied to give effect to the presumed intention of the parties)
			3. ***Implied by common law from the nature of the contract itself*** (no to give effect to the parties intention) implied on all contracts of that class or type (test is necessity)
			4. ***Implied Covenants do not apply if the express covenant deals with the same subject matter \*\*\*(COMMON LAW – unregistered leases)\*\*\****
				1. **Implied obligations of the land include**

***Implied condition of fitness for human habitation at the commencement of the lease***

* 1. ***Distinction between the covenant for quiet enjoyment and the covenant not to derogate from the grant?***
		1. *Non-derogation from grant* – Primarily concerned with use of the retained part which makes the **leased premises less fit for the purpose for which they were let**.
		2. *Quiet Enjoyment* - Primarily concerned with the enjoyment of the premises and any disturbance of such enjoyment –
			1. Very similar and they overlap
			2. *Landlord needs to have awareness of grant*  –Landlord needs to be aware of the **purpose of the lease** – if unknown or unusual – no breach
				1. There is a difference as to timing between quiet enjoyment and the covenant not to derogate from the grant (i.e. as to when the landlord knew)

***Implied covenant required for ‘quiet enjoyment’***

1. Test from *Hawkesbury Nominees P/L v Battik*
2. ***“Quiet Enjoyment” – A Test***
	1. *Substantial Interference -* Breached where the ordinary and lawful enjoyment of the tenant is substantially interfered with by the acts of the landlord or persons of claiming under him
	2. *Acts of the landlord -* Both covenants of quiet enjoyment and non-derogate will be breached where acts of the landlord such as to make the premises leased.
	3. *Landlords obligation is independent* - of the tenants covenant to pay rent.
	4. ***Can only complain which occur after the lease*** - Can complain about things which occur AFTER the lease, but if the particular purpose is known before entering into the lease then it cannot affect quiet enjoyment
3. ***Aside:*** *A tort of nuisance may also be possible if there has been unreasonable interference with a proprietary right which the plaintiff has standing to sure and the defendant is the appropriate person causing the nuisance.*

***Implied covenant not to derogate from the grant (similar but not the same as the above)***

Can’t prevent someone from doing something that is expressly stated in the lease agreement – i.e. obligation on the landlord not to derogate from the lease agreement

1. ***Aussie Traveller P/L v Marklea***
	1. **Test** –
	2. *Cannot render land unfit* - If the grant is made for a particular purpose, the lessor is under an obligation not to use the land retained by him in such a way as to render the land grant “unfit or materially less fit” for the particular purpose for which the grant was made
		1. **– i.e. has there been a substantial interference with the right of occupation so that the premises are rendered substantially less fit?**
	3. *Landlord liable for other tenants -* A landlord can be liable to a tenant for breach of the covenant of non-derogation through the actions of another of his tenants
	4. For the landlord to be liable, the landlord must have the right to stop the interference by the other tenant, and must have failed to do so after being notified of the interference.

***Duty to take reasonable care for the safety of the occupants***

1. *Duty arose in tort to take reasonable care* - *Northern Sand P/L v Harris* (1997) CLR
	* + - 1. There is a duty in tort to take *‘reasonable care’* to avoid *‘foreseeable risk’* to the tenants, members of the tenants household and to third parties who are lawfully on the premises.
2. *There is a duty to take reasonable care in the circumstances to avoid foreseeable risk of injury to T’s, member of the T’s households and other third parties who are lawfully upon the premises* - *Jones v Bartlett* (2000) CLR
3. ***Obligations of the tenant include:***
	* + - 1. Obligations of tenant include:

*To use the premises in a tenant-like manner*

*Duty not to commit waste*

Doctrine of Waste – injury to the land – cannot do it

*To yield up possession on determination (i.e. move out at the end of the tenancy)*

1. **Obligations implied by statute**
	* 1. *TLA*
		2. *Retail Leases Act (RLA) 2003*
			1. Applies to retail leases for more than 1 year
		3. *Residential Tenancies Act (RTA) 1997*
		4. *Landlord and Tenant Act 1958*
			1. Originally applied to all leases but now limited by RTA and RLa
		5. *Consumer protection legislation*
			1. Trade Practices Act 1974 (sections 8.191 – 8.192)
			2. Must be corporation
		6. *Fair Trading Act 1999 (Vic)*
			1. Used for people if TPA cant apply
2. **Covenants implied by Statute:**
	1. ***TLA***
3. *S67 provides for a number of covenants to be implied into leases of more than 3 years and registered*
	* + 1. Rent
			2. Repair
			3. Inspection
			4. Right to re-enter if in arrears (even without formal notice or demand)
			5. Right re-enter if breach or non-observance of covenants
4. *S112 – can contract out of these by agreement* – (privity of contract between the parties)
	1. ***Retail Leases Act 2003***
5. Act applies to a lease of retail premises in Victoria for a term (including renewal or holding over) of one year or longer – s4, s12, s13
6. A lease provision is void to the extent that it is inconsistent with the Act – s94
	* + 1. If it is owned by a company in NSW and exists in Victoria – it is covered by the Act
7. ***Residential Tenancies Act 1997***
8. **A statutory code that generally applies:**
	* + 1. To tenancy agreements of a duration of 5 years or less – s5
			2. Where the premises are used primarily for residential purposes – s7
			3. To protect generally vulnerable tenants
9. *Act is a code* – s15 excludes Landlord and Tenant Act Parts I to IVA; PLA s137, 144, 145, 146 and 150
10. *Act can’t be overridden by agreement or excluded restricted or modified* – s27
11. *But on* ***grounds of hardship to a party*** *VCAT can declare that a provision of the Act doesn’t apply* – s25
12. ***VCAT can declare invalid or vary a term*** *that it considers harsh, unconscionable or inequitable* – s28
13. ***Cannot refuse to let premises to a person on the ground that the persons intends to live on the premises with a child under 16*** *(subject to certain exceptions)* s- 30
14. ***Tennant cannot be required (can obviously offer) to pay more than 1 month rent in advance*** – s40
15. ***Landlord cannot increase rent more than once every 6 months and on 60 days written notice*** – s44
16. ***Rights and Duties of Landlord and Tenants (next page)***
17. ***Rights and Duties of Landlord and Tenants***
18. **Tenants duties:**
19. S59 - ***Tenant must not use premises for illegal purposes***
20. s60 – ***Tenant must******not cause nuisance or interference****.*

*(1) A tenant must not use the rented premises or*

*permit their use in any manner that causes a*

*nuisance.*

*(2) A tenant must not—*

*(a) use the rented premises or common areas; or*

*(b) permit his or her visitors to use the rented*

*premises or common areas; or*

*(c) otherwise permit the use of the rented*

*premises—*

*in any manner that causes an interference with the*

*reasonable peace, comfort or privacy of any occupier of neighbouring premises.*

1. S61 – ***Tenant must avoid damage to premises or common areas***

*(1) A tenant must ensure that care is taken to avoid damaging the rented premises.*

*(2) A tenant must take reasonable care to avoid damaging the common areas.*

1. ***S62 – Tenant must give notice of damage***

*A tenant who becomes aware of damage to the*

*rented premises must as soon as practicable give*

*notice to the landlord specifying the nature of the*

*damage.*

1. ***S63 – Tenant must keep rented premises clean***

*A tenant must keep the rented premises in a*

*reasonably clean condition except to the extent*

*that the landlord is responsible under the tenancy*

*agreement for keeping the premises in that*

*condition.*

1. ***S64 – Tenant must not install fixtures etc without consent***

A tenant must not, without the landlord's

consent—

(a) install any fixtures on the rented premises; or

(b) make any alteration, renovation or addition

to the rented premises.

(2) When tenancy terminates ... (a) must restore to condition they were in before installation (b) pay landlord to restore

1. **L’s duties**
	1. **S65 – *Landlord duty in relation to provision of premises***

(1) A landlord must ensure that on the day that it is

agreed that the tenant is to enter into occupation,

the rented premises are vacant and in a reasonably

clean condition.

(2) A tenant is not required to enter into occupation of

premises which do not comply with sub-section

(1).

* 1. ***S66 landlord must give tenant certain information***

(1) The landlord must on or before the occupation day

give the tenant a written statement in a form

approved by the Director setting out in summary

form the rights and duties of a landlord and tenant

under a tenancy agreement.

* 1. ***S67 –* *Quiet enjoyment***

A landlord must take all reasonable steps to

ensure that the tenant has quiet enjoyment of the

rented premises during the tenancy agreement.

* 1. ***S68 – Landlords duty to maintain premises***

(1) A landlord must ensure that the rented premises

are maintained in good repair.

(2) A landlord is not in breach of the duty to maintain

the rented premises in good repair if—

(a) damage to the rented premises is caused by

the tenant's failure to ensure that care was

taken to avoid damaging the premises; and

(b) the landlord has given the tenant a notice

under section 78 requiring the tenant to

repair the damage.

1. **Consequences of a breach:**
2. S208 – Breach of duty notice

Must give notice of a breach and try and (c)(i) remedy it

1. S209 – Compensation or compliance order for breach of a duty

*If a breach of duty notice is not complied with, the*

*person who gave it may apply to the Tribunal for*

*a compensation order or a compliance order.*

1. S210 – *Application to Tribunal for compensation order on other grounds*

Can apply to tribunal for

(a) the other party failed to comply with tenancy agreement or duties under the act

(b) applicant has paid other party more than the applicant is required to pay

1. **Assignment of the Leasehold or Reversion**
	* 1. ***Landlord to Tenant –***
		2. **Privity of Contract** (between the contracting parties) – can enforce everything in the contract (Between original tenant and landlord)
		3. **Privity of Estate** (the relationship of Landlord and Tenant between the two parties). Can enforce everything which touches and concerns the land and that has a particular meaning
	1. ***What about assignments (covenants)?***
		1. **Assignment by the tenant to third party (Assignee)**
			1. They no longer have an interest – they are giving their entire interest to someone else
		2. **Assignment by Landlord (Reversioner)**
			1. *Reversioner* – Person who gets the landlords interest because the landlord has assigned it.
				1. Buys land subject to a lease – once the lease has finished it “reverts to them”
		3. **Sublease by the tenant t other third party (Subtenant)**
			1. Lease part of their interest to someone else
	2. ***What is the enforceability of Leasehold Covenants?***
		1. **TENANT**
			1. **Is Assignee bound by (and can Assignee enforce) the covenants in the original lease between LL and T?**
2. *No Privity of Contract, There is Privity of estate* - per *Spencers Case* (1583)
3. ***Enforce covenants which touch and concern land***
	* + 1. *How to enforce these things?*
				1. ***Tenant 🡪 Assignee***

Privity of Estate – common law provides authority

Everything that touches and concerns the land (REFER BELOW)

1. ***If Tenant stops paying rent? Can’t sue both – one or the other \*\*\*\*(see iv and v)\*\*\*\****
	* + 1. *LL can sue Tenant as Privity of Contract*
				1. If sue the tenant, tenant has assigned to A and you will want to recover from Assignee

This depends on what is in the contract indemnity clause – ***refer iv.***

If there is an indemnity clause in the contract – (excludes assignees obligations to indemnify the tenant) –

If not provision look to statute – s67(2) TLA

Source of authority to indemnity for the Tenant – to seek indemnity from assignee.

Tenant still liable to the Landlord – but can in turn sue the tenant.

* + - 1. *LL v Assignee* – Privity of Estate
1. ***After assignment by Tenant***
	* + 1. *Is original Tenant still bound by (and can original tenant still enforce) the covenants in the lease?*
			2. Depending on the wording of the covenant in the lease between LL and original T
				1. **If ‘tenant covenants on behalf of himself and successors in title’** then yes
				2. If tenant covenants expressed to **‘continue only wile tenant continues as tenant’** then no

Note – this wording does not affect assignees liability

1. ***Tenants ongoing ability to sue/be sued?***
	* + 1. So after assignment, if there is a breach of covenant LL can choose to sue:
				1. *Original Tenant* – Privity of contract subject to provisos – tenant can seek an indemnity from assignee – implied indemnity in TLA s67(2) (if lease and assignment registered) otherwise PL’s s77(1)(c) (if by deed)
				2. *Assignee* – Privity of estate and subject to provisons – assignee as the party with ultimate control the premises will be primary debtor
2. ***Tenant sub-lease***
	* + 1. LL 🡪 T 🡪 Sub-tenant (ST)
				1. LL 🡪 T – Privity of contract &Privity of estate
				2. T 🡪 ST – Privity of contract & Privity of estate
			2. LL 🡪 ST
				1. Privity of Estate? **NO**

There is no relationship between the sub-tenant and the landlord

The landlord only cares about the tenant – not the sub-tenant

If sub-tenant has an issue, must go through the tenant and not the landlord

**LANDLORD**

1. ***Landlord Assigns to Reversioner***
	* + 1. *Privity of Contract*
				1. LL 🡪 T

*Privity of contract*

* + - * 1. LL 🡪 R

Privity of Contract

Privity of Estate – covenants having reference to the subject matter of the lease after enforcable

S141 PLA - Benefit

142 PLA – Burden

*Davis and Town Properties*

* + - * 1. T 🡪 R

Privity of estate?

* + - 1. *Is reversioner bound by (and can Reversioner enforce) the covenants in the original lease between LL and T?*
				1. There is Privity of estates s141 (benefits to LL) and 142 (burdens to LL) PLA – (Privity of estate was not recognised in the common law)
			2. *Covenants having reference to the subject matter of the leases – like touch and concern: Davis v Town Properties [1903] 1 Ch 797 – thus can enforce covenants which touch and concern land.*
				1. T 🡪 A – C/law Touch and Concern
				2. LL 🡪 R Statute “having referred to” 🡪 Touch and Concern
1. ***Landlord ongoing ability to sue/be sued?***
	* + 1. **After assignment:**
				1. Landlord gives up right to sue for past breaches – vest in Reversioner unless reversed in assignment document (s141)

T v LL 🡪 Privity of Contract

T v R 🡪 Privity of Estate

* + - * 1. ***What if LL sells to R 🡪 now wants to sue lost rent from T?***

There is still Privity of Contract

LL still sold interest in the land

Have they sold right to recover past breaches?

Yes, they have – entire interest – per s141 above

Only reversioner can sue the Tenant

* + - 1. Summary: if there is a breach of covenant LL cannot sue for breaches prior to assignment unless reserved
				1. But LL still liable to T for breaches before and after assignment (still Privity of contract)
				2. So after assignment, if there is a breach of covenant T can sue:

LL (priority of contract – if not excluded by)

A (Privity of estate)

***What covenants “touch and concern” the land?***

* + - 1. *P & A Swift*
				1. Lord Oliver formulate working to rest to apply:

***Is it a benefit only to the reversioner?***

*The covenant benefits only the reversioner for the time being, and if separated from reversion, ceases to be of benefit to the convenatee (i.e. relates to the land)*

***Nature, Quality, Mode of Use or Value?***

*The covenant affects the nature, quality, mode of use or value of the land:*

i.e. obligation to repair – quality, value etc

***Is it personal to the parties ? i.e. LL and Tenant***

*The covenant is not expressed to be personal neither being given only to a specific reversioner nor in respect of an obligation of a specific tenant*

***Covenant to pay money – doesn’t mean its not a covenant***

*The fact that a convenator is to pay a sum of money will not prevent it from touching and concerning the land so long as the 3 foregoing conditions are satisfied and the covenant is connected with something to be done on to or in relation to the land*

**Same test for sufficient connection under PLA s141, 142**

1. ***Covenants that DO touch and concern the land:***
	* + 1. Covenants by the tenant to:
				1. Pay rent
				2. Repair the premises
				3. Not to assign or sublet without the LL’s prior consent
				4. Insure the premises against fire
				5. Use the premises as a private dwelling only
			2. Include covenants by the landlord to:
				1. Renew the lease
				2. Consent to the assignment of a lease
				3. Not build on certain parts of neighbouring property
				4. Supply the rented premises with good water
2. ***DO NOT touch and concern the land***
	* + 1. Include covenants by the tenant to:
				1. Pay rates assessed in respect of other property
				2. Pay a sum of money not reserved as rent to a third party
			2. Include covenants by the landlord to:
				1. Allow the tenant the right to purchase the property
				2. Pay the tenant a fixed sum of money at the end of the lease unless a renewal is offered and accepted
				3. Purchases buildings erected by the tenant
3. **Determination of leases:**
	* + 1. Main ways:
				1. Effluxion of time
				2. Forfeiture
				3. Frustration
				4. Repudiation
				5. Surrender or Merger

**Easements**

1. Servitudes are lesser non-possessory interests in land
2. They give the interest holders particular rights in respect to land which, though less than a few simple, can be none the less powerful rights and enforceable against third parties.
3. Servitudes include the following:
	1. Easements
	2. Profits a prendre

**Purpose of easements**

1. An easement is a right enjoyed by the owner of one piece of land (the dominant tenement) to use or carry out some activity *short of taking possession* (or, less commonly to prevent certain activities) on another person’s land (the servient tenement)
2. Easements, unlike licences, create a proprietary interest with all the benefits that brings
3. Easements, unlike leases, cannot grant exclusive possession

**Checklist for Easements**

1. **Does it fulfil the criteria of an easement/ profit? (assess against the requirements)**
	1. *Riley v Pentilla*
2. **How was it created? (Express grant or reservation? Implied grant or reservation?)**
	1. Was it validity created as an easement?
3. **Can the easement be enforced - ie against a subsequent purchaser of servient land per s42(2)(d)?**
	1. Enforceable as a paramount interest?
		1. Easements are a paramount interest s42(2)(d)
4. **What can the owner of the dominant land do to enforce it against a subsequent Servient purchaser?**
	1. ***Abatement*** – Takes steps to stop interference with the easement
	2. ***Damages or injunction*** – via claim in nuisance through being wrongful interference with use, enjoyment or rights over the land.
5. **Has the easement been extinguished?**
6. **Conclusion**

**What is an easement?**

An easement can be a:

* **Positive easement** – allowing something to be done by the interest holder on the other persons land.
* **Negative easement** – allowing the interest holder to restrain certain activities from being carried out on another person’s land



**Lot A** – The **Dominant Tenement** as it is benefiting from the easement running across Lot B

**Lot B** – The **Servient Tenement** (burdened easement) over which interests are granted.

**‘Right of Way Easement’** – The actual easement providing a ‘right of way’ across Lot B to Lot A

**Characteristics of Easements**

The **four essential characteristics of an easement** as stipulated by Gillard J in *Riley v Pentilla* [1974] VR 547.

1. **There must be a dominant and Servient tenement**
2. **The easement must be for benefit of the dominant tenement**
3. **The dominant Servient tenements may not be owned or occupied by the same person**
4. **The easement must be capable of forming subject matter of a grant**

**Requirement 1 - Dominant and Servient Tenement**

1. **Dominant land** - land that is *benefited by* the easement
2. **Servient Land** – land which is *burdened by* the easement (the land over which easement granted e.g. the land over which the right of way granted)
3. **Right Owner Must Own Dominant** – The person with the right to an easement must own domain tenement (i.e. those who are permitted to reside their such as residents or lessees)
4. **If a right is grant to someone who does not own the land – then it more likely to be a licence only:**
	1. **Licence** - “I give you the right to take a short cut across my land” – this is **licence**
	2. **Easement** - “I give my neighbour the right to take a short cut across my property” - dominant and Servient tenement – therefore this is an easement.
	3. Easements can be created by statute

**Requirement 2 - Benefit resides with Dominant Tenement**

1. **Convenience and Enjoyment -** Easement must be reasonably necessary for convenience and better enjoyment of the dominant tenement (question of fact)
2. **Enhance Property Value -** Relevant that the easement enhances value of the property
3. **Don’t require ‘neighbouring’ but must to ‘close’** - The two tenements need **not be neighbouring** but must be close enough for the Servient to ‘accommodate’ the dominant per *Todrick v Western National Omnibus Co*.
	1. *Clos Framing Estates v Easton* – ‘the nexus must be in a real and intelligible sense’
4. **Subdivision** – If the dominant tenement is subdivided, easement presumed to accommodate subdivided parts
5. **Consolidated** – If the dominant tenement is consolidated with other land, easement only benefits what was dominant tenement
6. **Easement can benefit the land** – An easement may benefit the dominant tenement businesses but it does not mean that it cannot also benefit the land per *Copeland v Greenhalf* but the benefit **must be more** than a ‘simple business benefit’
	1. There must be normal use and enjoyment of the land.

**Requirement 3 - The two tenements cannot be owned by the same person**

1. **Cannot have an easement over own land** – An easement cannot be placed over an individual land owners land as there is no benefit to another party
2. **Same ownership, extinguishes easement** – If the dominant and the Servient tenements come into a relationship which extinguishes separate ownership – then the easement, according to 1 above, is extinguished by the same ownership rule.
	1. *Copeland v Greenhalf –* For 50 years, D stored vehicles on P land – D argued it had acquired easement.
		1. *Held –* The right claimed went ‘beyond’ any normal idea of an easement and amount to joint use of the land, which could only be proved by a successful claim for adverse possession.
3. **Easement does not pass on ownership** – If one of the former tenements subsequently sells their land to another party after the causing of extinguishment, then the easement does not revive – it *remains extinguished*
4. **No occupation, no extinguishment** – Tenements will survive if owned by the same person but not *occupied* by the same person
	* 1. i.e. there is a tenant in possession of one of the dominant or Servient tenements.
	1. *Leasehold will extinguish* – However, if leasehold reverts – then the easement will be extinguished.

**Requirement 4 - Subject matter of a grant**

1. **Interests must be grantable by deed** - Only those interests that can be granted by deed, though the categories of easements are not closed.
	1. ***Attached to the Land*** – In *Re Ellenborough Park*, the deed suggested that the right to use the park was attached to the land and was not merely a personal right.
		1. ***Deed*** – An instrument that has been signed sealed and delivered that passes an interest right or property – creates an obligation binding on some person.
2. **Grant must not be ‘too wide, vague or uncertain’** – The grant must not be ‘too wide, vague or uncertain’
3. **More than mere right of recreation** – The grant of an easement must be for more than *mere right of recreation* – it requires and ‘element of benefit to the dominant tenement’
	1. ***Enhanced Value*** *–* In*Re Ellenborough Park* – the value of the easement increased the value of the lots – this was a *relevant but not decisive factor.*
	2. ***Enjoyment of land* –** In *Re Ellenborough Park* – it had to be established that the right was connected with the normal enjoyment of the land.
		1. *‘We do not think the right to use a garden of the character with which we are concerned ... we think that it must at least be confined to exclusion of rights to indulge in recreations such as horse racing or playing games’*
4. **Cannot confer exclusive possession or exclusive use** – The tenement cannot confer exclusive possession as then it will be a lease/licence and is beyond the scope of any associated easement

**Common Types of Easements –**

*Examples*

1. *Positive Easements –* The **right to do something** on or near the neightbours land
2. *Negative Easements –* The **right to stop something** on or near the neightbours land

**Not Accepted as Easements**

* Right to prospect land (view)
* Overhanging trees
* Hitting cricket balls onto the land (WTF?)

**Accepted Easements**

* Air or light to a defined aperture
* Right to maintain a wall
* Windbreak
* Support Walls
* Drainage and Sewerage
* Use of a lavatory
* Parking space
* Transmission of noise
1. **Right of way** – This is *positive easement*.
	1. *Right to Cross another’s Land*– This can be a general right or a limited right per s72(3) and Schedule 12 of the TLA.
		1. *Gallagher v Rainbow* – The extent and nature of the right of way will be determined by the express terms of the grant ‘*construed in the light of the circumstances’*
		2. *Transit Authority v Australian Jockey Club* – Young J stated ‘ a right of way should generally speaking have a *terminus a quo* and a *terminus ad quem*, a prescriptive easement can be obtained even though there is some fuzziness on the tracks that were used’
	2. *Potential Issues:*
		1. Changes in purpose of the right of way
		2. Obstructions of the right of way
		3. Extent to which the right of way is used
		4. Repair to the right of way – whose duty?
2. **Right to support** – This is a *negative easement*
	1. At common law, rights of support from ones neighbours land are not easements but are natural rights from the land per *Dalton v Angus*.
	2. *Rights to support a building on the land* – can be an express easement per *Dalton v Angus.*
	3. *Rights to support land -*
		1. An excavator will be liable for subsidence that results on the neighbours land – but liability does not extend to the subsidence or ensuing damage to building on the land - *Dalton v Angus*
		2. If it can be established that the land would have subsided independently of the additional weight of the buildings, the neighbour can recover for damage to both – *Dalton v Angus*
3. **Rights to light and air** – This is *negative easement*.
	1. *Commonwealth v Registrar of Titles* **–** HCA recognised the right to uninterrupted access of light and air as an easement, despite the fact that the right was not limited to access to defined apertures in a building.
		1. There is no difference in principle between the right to light and air and an easement for the passage of the suns rays, or an easement entitling the holder to the free passage of moving air.
4. ***Rights to Party Walls***
	1. At common law, where a common owner sold buildings that were mutually supported by a party wall – there would be implied cross-easements as were necessary to carry out the common intention of the parties in relation to the use of the wall – *Richards v Rose*
5. ***Fencing Easements***
	1. *Crow v Wood* – Lord Denning MR stated ‘*it is not an easement strictly so-called because it involves the Servient owner in the expenditure of money ... but it has been treated in practice by the courts as being an easement’*
		1. In Vic – its covered by (Fences Act 1968)
6. ***Other Easements***
	1. ***Right to park cars***– *London v Ladbroke Retail Parks*
	2. ***Right to enter a neighbours land to use a toile****t* – *Hedley v Roberts*
	3. ***Right to enter on land for the purposes of maintaining an external wall and fixtures on the wall***– *Beck v Auerbach*
	4. ***Right to bring goods through a doorway of an adjacent shop* –** *Wilcox v Richardson*
	5. ***Protection from weather ?*** *– Phipps v Pears ­*– Court rejected the notion.

**Creation of Easements**

Creation of easements:

1. **Express Grant** – Servient tenement owner agrees to grant the dominant tenement owner rights over land
2. **Express Reservation** – On the sale of land, a vendor may reserve easement (e.g. right of way) over the respective land granted
3. **Implied Grant** – There are numerous –
	1. *Primary* - where vendor grants a landlocked piece of land access over the land and then later refuses access to this land owner
4. **Implied Reservation** – Not really many categories
5. **“By Long User”** – literally means a ‘longer user of the land’ - a long user of the land consistent with easement in the absence of express or implied grant or reservation (creates new right – does not destroy right)
6. **Statutory** – Various legislation –
	1. Drainage
	2. Sewerage
	3. Gas
	4. Electricity
	5. Solar Power
	6. Telecommunications etc
7. CONVEYANCE –
	1. A conveyance is where the title actually passes
	2. Title doesn’t pass when the contract is concluded – it passes only once on the register or when the deed is passed

***Express Grant or Reservation***

1. Requirements –
	1. **Legal Easements** –
		1. *General Law Land* **-** For general law land there is a requirement of a deed – but could be created by a long user, implied grant and necessity
		2. *Reversing Easement on Sale -* the easement is reserved – rather than being granted it is reserved by the seller.
		3. *Grant –* you already own the land, and give another person right of access.
		4. *Torrens System Land* – The land requires registration per TLA s72
	2. **Equitable Easements** –
		1. An easement not validly created at common law can still be enforceable in equity but it requires:
			1. *The four characteristics of easements* –
				1. There must be a dominant and Servient tenement
				2. The easement must be for benefit of the dominant tenement
				3. The dominant Servient tenements may not be owned or occupied by the same person
				4. The easement must be capable of forming subject matter of a grant
			2. *Enforceable contract*
				1. Evidenced in writing OR
				2. Sufficient acts of part performance
				3. Also estoppel
	3. **Enforceable** –
		1. *Exception to Indefeasibility –*
			1. Legal and equitable easements both exceptions to indefeasibility title under Torrens System Land per s42(2)(d).

***Implied Grant***

1. Requirements –
	1. **Easements of necessity –**
		1. *Landlocked Land* - Per *North Sydney Printing PL v Sabemo Investment Corp P/L* – landlocked land where intention to reserve easement implied from the circumstances
	2. **Common Intention easements –**
		1. Common law implied mutual cross easements of support for a party wall
	3. **Rule in *Wheeldon v Burrows*** –
		* 1. Rule: for implied grant –
				1. **Subdivison and sale of land** - purchasers get all *‘continuous and apparent*’ quasi easements which are necessary for the *‘****reasonable enjoyment of the land*** *and which* ***were at the time of the grant used by the grantor***’ for the benefit of the land purchased.
				2. **OTHERWISE – must expressly reserve it -** Grantor must expressly reserve any right he intends to keep – i.e. does not imply to implied reservation
	4. **General Words** – *quasi easements -* Incorporated into a conveyance by s62 PLA –applies to a transfer of Torrens System land – transfers existing easements without the need for express words
		* 1. ***Per s18(1) PLA definitions*** - s62 only operates to pass an easement when the privilege, easement, right or advantage is exercised by the owner of the land over one part of the land as an incident of his or her ownership of the quasi dominant tenement, and not simply because of his or her ownership of the Servient tenement
			2. *s62 doesn’t transfer easements* where there was only equitable transfer of land or some other interest –
			3. Quasi easements are rights-of-way etc that WOULD be easements, except that one party already owns the land.
			4. *Example*
				1. If I drive over block B to get to Block A, and then I sell block A and transfer legal title
				2. Then the purchaser gets the easement across block B

Cant reserve it

* + - * 1. S62 provides easement to A across B by “general words”
				2. **Simultaneous Conveyances** – Of one of the adjoining blocks of land by one landowner to different purchasers
				3. **Plans of Subdivision** – Easements shown on the plan of subdivision are created when the plan is registered per s98 TLA

Statutorily implied easements under s12(2) *Subdivision Act*

***Implied Reservation***

1. Requirements –
	1. On sale, the easement is reserved – rather than being granted it is reserved.
	2. **Easements of necessity –**
		1. *Landlocked Land* - Per *North Sydney Printing PL v Sabemo Investment Corp P/L* – landlocked land where intention to reserve easement implied from the circumstances
	3. **Intended easements –**
		1. Common law implied mutual cross easements of support for a party wall

***Prescription or ‘Long User’***

1. Requirements –
	1. ***Long User*** – 20 years or more may give rise to an easement by prescription under the doctrine of last modern grant
	2. **Torrens System Land (Vic) –**
		1. Easements of light and air cannot be acquired by prescription per PLA s 195 - 196
	3. **Without Force, Secrecy or Permission –**
		1. Use of the land must be exercised
			1. Without force
			2. Without secrecy
			3. Without permission
	4. **Owner of land must acquiesced it -**
		1. *Must have knowledge* - Owner of Servient land must have *known or had means of knowing* that a person was using their land and they must have
		2. *Must have acquiesced* - Acquiesced (consented) their permission.
			1. *Sunshine Retail Investments Pty Ltd v Wulff*
				1. Residents of cul de sac had shortcut over 91 Toorak for 20 years. Developer bought no. 91 and sought to close access – residents claimed to have acquired right of way under the doctrine of lost modern grant.

**Held:**

Walkway was not merely recreational

However, *neither owner or the Servient tenement nor his agent knew about the user, so no acquiescence*

Easement of long user can only be acquired against an owner in possession of land.

***Easements and Torrens System***

1. ***Enforceable as*** ***Paramount Interest* -** Easements can be registered but even if they are no registered – easements ‘howsoever acquired’ are enforceable against the registered owner as a ‘paramount interest’ under s42(2)(d) TLA

**Remedies for Holder**

1. If there is an easement the holder of the easement can seek the following relief:
	1. ***Abatement*** – Takes steps to stop interference with the easement
	2. ***Damages or injunction*** – via claim in nuisance through being wrongful interference with use, enjoyment or rights over the land.

**Extinguishment of Easements**

1. Requirements –
	1. **Express Release** – The agreement between owners of dominant/Servient tenements with formalities which vary depending on the land and whether the easement is legal or equitable per s73(1).
	2. **Abandonment –** Question of fact combined with the intention to release the right of the user per s73(3) TLA
		1. Must have been abandonment for 30 years before this section arises
	3. **Alterations to Dominant Tenement** – Any alterations to the dominant tenement which will affect the easement (i.e. co-ownership for example) will extinguish the easement
* **Alteration/excessive use**: alteration of DT which substantially changes the easement or increases the burden to the ST may result in extinguishment of easement – *Luttrel’s Case*
* **Separate use**: if element of additional use is separate from the original intended use of the easement, the easement will not be extinguished – *Ankerson v Connelly*
* **INJUNCTION USUAL REMEDY**: usual remedy for excessive use is injunction to restrain alteration – *Hamble Parish Church*
	1. **Unity of the Dominant / Servient Tenements –** Anything which will affect the easement in such a manner that the dominant and Servient tenements are joined.
	2. **Statute –**
		1. **Abandonment** - S73(3) TLA – Where it is proved that is it not used for 30 years or more than it constitutes abandonment
		2. **Planning and Environment Act –** The *Planning and Environment Act* s62.
			1. Same process as below for *Subdivision Act*.
		3. **Subdivision Act –** If the land is subdivided per s36(1)
			1. *When amending a planning scheme or issuing or amending a planning permit, a council may state that the economical or efficient subdivision or consolidation or servicing or access to land requires the owner of land to remove an easement of ROW over the owner’s land or to acquire or remove an easement over other land.*
			2. **VCAT** – The owner may apply to VACT to acquire or remove an easement compulsorily if they have sufficient evidence to support a removal.

**Profit a Prendre**

1. Requirements –
	1. **Definition** – Right to remove natural products from a piece of land that is not owned by the person removing the products.
		1. *Products are natural products*– There is no need for dominant/Servient tenements
			1. Soil
			2. Rock & Minerals
			3. Wild Animals
			4. Natural Produce
	2. **Capable of Ownership** –
		1. Products must be capable of being ‘owned’ at the time of taking – that is – tangible
			1. i.e. Entire water in a stream is not capable of being “removed”
	3. **Cannot ‘use’ land** –
		1. Profit a prendre does not extend to rights of using the land to farm, plant, grow crops or orchards
			1. *Only remove what is there -* Its only purpose is to remove what is already there.
	4. **Can be ‘gross’ –**
		1. A profit can exist in gross such that there is no requirement that it actually benefit the land.
	5. **Torrens Land** –
		1. Profits are not mentioned anywhere in the TLA but they can still exist over Torrens land.
2. **Test for Profit** –
	1. **Does it fulfil the criteria of an easement / profit ?**
		1. The easement must be for benefit of the dominant tenement
		2. The dominant Servient tenements may not be owned or occupied by the same person
		3. The easement must be capable of forming subject matter of a grant
	2. **How was it created?**
		1. Express grant or reservation ?
		2. Implied grant or reservation ?
	3. **Can the easement be enforced ?**
		1. *Example –* Can it be enforced against a subsequent purchaser of Servient land per s42(2)(d)?
			1. What can the owner of the domain land do to enforce it?
	4. **Has the Easement been Extinguished?**

**Rights and Duties of Co-Owners’**

***What is Co-Ownership?***

1. **Definition** - Co-ownership means ownership of an interest in land or personal property by more than one person at the time
	1. Key Points –
		1. More than one person
		2. At the same time
2. *Right of Successorship* – One co-owner dies, other gets full title and all encumbrances.
3. **Subdivision irrelevant –** Co-ownership does not refer to any physical subdivision of the property
4. **Two primary forms –**
	1. **Joint tenants** – They share the same interest in undivided shares
	2. **Tenants in common** – They share the same interest in distinct [aliquot] shares

***Who has a right to possession ?***

1. *Each Co-Owner* – Each co-owner has the right to possess and enjoy the whole part of the land.
2. *Cannot bring action for trespass unless expressly excluded ­*– One co-owner cannot bring an action for trespass against another co-owner unless one co-owner has excluded the other co-owner expressly.

***Joint Tenancy Requires Four Unities (don’t need to if registered)***

The Four Unities include:

1. **Possession** – Each co-owner is entitled to possession of the entire whole of the land.
2. **Interest** – Each has an interest of the same nature, extent and duration.
3. **Title** – Each has acquired title under the same instrument or act.
4. **Time** – The interests have to vest at the same time.

***What are the Rights and Duties of Co-Owners ? (VCAT)***

*PLA* Part IV Division 2

1. s225: A co-owner of land or goods may apply to VCAT for an order for **sale and/or the physical division** of land and goods among the co-owners.
2. s228: VCAT may make any order it thinks fit to ensure that a **just and fair** sale or division of land or goods occurs.
3. s229: **Sale and division** of proceeds is **preferred** to physical division
4. s230 VCAT may divide co-owned land in **proportions** that differ from the co-owners’ entitlements, and may order compensation for any discrepancy.

***Types of Claims***

1. Occupation rent from other co-owner
2. Cost of improvements paid by one co-owner
3. Rents and profits from a third party
4. Sale or Division
	1. Part IV, Div 2
		1. Co-owners can bring an application for an order for **sale or division** co-owned land per s225 and this will act to immediately end co-ownership.
		2. VCAT Order
			1. S228(1) – VCAT can “make any order it thinks fit to ensure that a just and fair sale or division ... has occurred’
5. Compensation
	1. S233(1) Order of Compensation
		1. VCAT can order:
			1. *Compensation or Reimbursement* - be paid or made by a co-owner to another co-owner or other co-owners
			2. *Account –* 223(1)(b)
				1. That one or more co-owners account to the other co-owners in accordance with s 28A (income from third parties)
			3. *Adjustment*
				1. That an adjustment be made to a co-owners interest in the land or goods to take account of amounts payable by co-owners to each other during the period of the co-ownership.

*VCAT Material to Consider when Making a Claim DIVISON OR SALE*

1. VCAT must consider the following per s233(2) PLA –
	1. In determining whether to make an order under s233 VCAT must take into account various things including:
		1. *Improvements* - Whether a co-owner has spent money on improving the property;
		2. *Maintenance -* Whether a co-owner has spent money on maintenance;
		3. *Account* - Whether a co-owner has paid for more than their share of rates, etc.
		4. *Damage* - Whether a co-owner has caused damage to the land;
		5. *Possibility of Rent* - Whether occupying co-owner should pay rent.
2. **For Improvements** *–* ***Common Law*** (as stated above)
	1. Definition - Improvements are expenditures which increase the value of the property – as opposed to maintenance costs (which could not be claimed)
		1. ***Allowance for improvements is the LESSER of***
			1. The cost of the improvements; or
			2. The increased value of the property resulting from the improvements
	2. *Improvements* – *Brickwood v Young* – HCA held that a co-owners right to recover compensation for improvements was a ‘passive equity’ that could only be exercised against other co-owners.
		1. *Not a personal right* – Not a personal right against the co-owner – rather gives rise to an equitable charge attaching to the land
		2. *Doesn’t apply against bona fide* – Not enforceable against bona fide purchasers for value without notice.
			1. *Torrens* – If the land is under the Torrens system, a purchaser who registers an interest in the land against which the charge is enforceable will take free of it.
	3. Summary
		1. Can claim at *sale or division*
		2. VCAT **may** order compensation or reimbursement s233(1)(a)
		3. In making any order, VCAT **must** consider any amount a co-owner has reasonably spent in improving the land or goods s233(2)(a); **must** also consider **maintenance** costs s233(2)(b)
	4. *Example*
		1. A and B are tenants in common in equal shares. 5 years ago, B carried out improvements which cost him $40K. This increased the overall value by $30K. How much can B claim against A for improvements?
			1. Increase is value is $30K is less than $40K by B – so as B is only allowed the “lesser of” – then this is 50% of $30K = $15K from A unless some prior agreement.
3. ***For Rent – Common Law***
	1. VCAT order for the payment of occupation rent
		1. s233(3) No order for occupation rent **unless**
		2. Occupying Co-owner is **seeking** compensation, reimbursement or accounting; **or**
		3. Claimant Co-owner has been **excluded** from occupation; **or**
		4. Claimant Co-owner has suffered **detriment** because it was **not** **practicable** for him or her to occupy the land.
		5. s233(3) *PLA* applies on an application for ***division and/or sale***, ‘notwithstanding any rule to the contrary’
	2. *Henderson v Eason* (1851) held that the statute referred to rents and profits received from a **third** **party** and ***not*** to fruits of co-owner’s own labour.
4. ***Making a Claim for ACCOUNT – VCAT Orders***
	1. Part IV, Div 3
		1. Co-owners can also bring an application for an order for accounting at any time while co-ownership continues per s234 of the PLA
			1. *Account ­*– The Statute of Anne 1705 allowed a co-owner to bring an action of account against the other co-owners (or their personal representatives) for ‘receiving more than comes to [their] just share or proportion’
	2. What can VCAT Order?
		1. What can VCAT order?
			1. VCAT can “make any order it thinks fit to ensure that a just and fair accounting of amounts received by co-owners… occurs” (s234B(1)).
		2. How much does co-owner have to account for?
			1. Co-owner is liable to account for receipt of more than their just or proportionate share (s28A)

***Adverse Possession by a Co-Owner***

1. **Common law unity of possession** – no co-owner’s possession is adverse
2. But position altered by s 14(4) *Limitations of Actions Act*

*When any one or more of several persons entitled to any land or rent as* ***joint tenants or******tenants in common*** *have been in possession or receipt of the entirety or* ***more*** *than his or their undivided* ***share or shares*** *of such land or of the* ***profits*** *thereof or of such* ***rent*** *for his or their own benefit or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them but* ***shall be deemed to be adverse possession of the land****.*

1. *Wills v Wills* [2004] P & CR
	1. G and E married and had 2 properties in joint names.
	2. Separated in 1970 and G married M.
	3. E didn’t return to martial and didn’t receive rent.
	4. G died in 1992 and E claimed properties were hers.
	5. M claimed adverse possession and won as adverse possession was 12 years
		1. G had exclusive possession since mid 1970s and since 1976 had occupied, used and enjoyed the rents as assumed sole owner
		2. Rule of survivorship was irrelevant due to no intent
		3. G’s act were relevant and clearly authoritative.