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ENVIRONMENTAL PLANNING LAW 413/512

TORRENS SYSTEM

1. **Old System Land**

Statute of Frauds (Pre 19th Century)

The starting point is the principle that all transactions to land must be in writing (Old English Statute of Frauds) enshrined in s.34 of the Property Law Act 1969.

Owing to the different interests it is possible to have in land, a person who acquires an interest in land would not necessarily know to what extent that interest might be affected by the interests of other people in land.

The concept of "*caveat emptor*" (or "buyer beware") meant that the process of investigating the history of a title became increasingly complex for a person wishing to acquire an interest in land. In principle, the search needed to extend back to the time of grant of title, but that period was significantly modified by the operation of convenient fictions or presumptions.

Note the general principles in this unregulated period, for maintaining an orderly and regulated society. For example, adverse possession or squatting is a recognition that the true owner of land has not taken responsibility for it and that, if another person has taken over responsibility for land for a reasonably long period of time, the law would recognize interest of that person in preference to the original owner and maintain the *status quo*. Essentially, the true owner not having exercised his or her rights to eject the trespasser by an action in ejectment or trespass beyond a certain period and having actual or implied notice of the trespass (that is, the owner had the opportunity to find out about the trespass and do something about it if he or she had wanted to) was regarded as too uninterested in the land to be able to enforce title at a later time, given that somebody else had borne the responsibility and cost of doing so in that person's place.

The expression "possession is 9/10 of the law" arises out of that particular example but the rule really reflects a sensible degree of social regulation in circumstances in which there was no public record of ownership and the rest of the world had no means of knowing who the proper owner of the land was other than through the conduct of an occupier of land.

Increase in Mobility and Frequency of Conveyances (19th Century)

During the 19th Century, with the increasing mobility of populations following industrialisation in Europe and the rise of the middle classes whose lands were purchased rather than inherited under the old feudal system, the volume and

complexity of transactions relating to land meant that a greater degree of formality needed to be adopted to protect owners of land and people who wanted to acquire interests in land.

Deeds Registration System

The first regime in this regard was the various registration of deeds statutes, both in England and Australia.

In Western Australia, the Registration of Deeds Act was passed in 1856. What that statute did essentially was to enable people to voluntarily register their deeds setting out various conveyances. A person who wanted to acquire an interest in land could go to the public register and see what other transactions there might have been relating to the land.

The principal drawback with this system was that registration of deeds was voluntary and not compulsory, although registration brought a greater degree of protection. It was still possible for interests in land to be formally and validly conferred without registration.

Priority (if there was a dispute between interest of one person and another) was decided according to the date of registration and any unregistered instrument would be overridden by any subsequent *bona fide* purchaser for value of a competing interest in the same land. However the principal difficulty remained that registration under the deeds registration system did not necessarily confer a valid title where, for example, an earlier document was void for any reason. If a fraud has been perpetuated at one step in the chain (by registration of a forged deed), notwithstanding that subsequent transactions may have been made and registered in good faith, the earlier fraudulent document could still undermine the title of the later purchasers.

(Show overheads of old system conveyances)

2. Torrens System

Because certainty and security of title could not be assured under the registration of deeds system, and because the problem of searching title was a complicated, extensive and uncertain business, absolute accuracy of the title being conferred could never be guaranteed. Impetus for a different method of conveying land became apparent.

The Torrens system was a new system of public registration which took the registration of deeds system several steps further.

The idea was to have a fully public register of land ownership and assure that all transactions relating to land were made through that public registration system. It would be compulsory, not merely optional, to go through the new system. In general, the types of interest which could exist under the new system would be the same as those that could exist under the general or common law system.

It was simply the means by which title passed in such interests which changed.

The new system was named after Sir Robert Torrens who worked towards the creation in South Australia of the Real Property Act of 1858. In Western Australia the Torrens Statute originally came into operation in 1875 (based on the South Australian Act) although it was re-enacted as the Transfer of Land Act 1893 ("the TLA") and that is the statute under which the administration of conveyances of land in Western Australia currently operates.

You should be aware that not all land in Western Australia is administered under the TLA. There is still a small amount of what is known as general law land or old system land which can only be conveyed under the registration of deeds system, until such time as the owner makes an application to bring it under the operation of the TLA. This would generally be land that was alienated into private ownership prior to 1875 and is generally found in and around the towns of the south west although there are still occasionally lots that can be found in the metropolitan area.

Until recently, the only land that could be brought under the operation of the TLA was land that had been alienated or which has been capable of private ownership.

Amendments to the law have been made, principally in the Land Administration Act 1997 however, to bring Crown Land records under the administration of the TLA, owing to the fact that the Crown often confers interests in Crown Land (such as pastoral leases) that fall short of fully alienating the land into private ownership or ownership in fee simple. The idea of modifying the register is also to acknowledge that, although any claim has yet to be established or recognised, Native Title may also be an interest in various Crown Land areas and such interests should be capable of being easily ascertained on a Crown Land record.

3. **Operation of the Torrens System**

While transactions in land are still required to be in writing, the method of formally conveying or transferring an interest in land is required to be done consistently with the TLA. This means utilisation of the procedures stipulated by the Office of Titles (administered by the Department of Land Information) currently located in Midland. Conveying of interests in land pursuant to the TLA requires conformity with various TLA forms and procedures.

The TLA still recognises that there may be various interests in land which are not capable of registration and those interests may be protected by caveat. (Explain formal requirements such as leases in excess of 5 years ought to be registered, the fact that the TLA will recognize oral leases of less than 3 years duration and the fact that the practice in the WA in general is for written leases to be protected by means of registration of a caveat unless for quite a long duration).

Indefeasibility of Title or Interests in Land

The central feature of the TLA is what is known as the "indefeasibility" or "paramountcy" provision in s.68. Generally, the concept of indefeasibility of title means that if an interest in land is registered, it cannot be defeated by someone who previously had an interest in the land, unless that person's interest is shown or noted in some way on the Title.

Unfortunately, if you have a look at s.68 you will see that there are quite a number of exceptions, such as adverse possession, prescriptive easements, mining tenements, leases and tenancies of less than 5 years and, most importantly, fraud. If a person has acquired an interest in land through fraudulent or dishonest means or with knowledge of the fraud or dishonesty, then that person's title or interest will not be indefeasible.

The great debate over decades since the introduction of the TLA however, has been where a person has innocently acquired an interest in land that was created through somebody else's fraudulent or dishonest act.

In the earlier days of the operation of the Torrens statutes in the various States in Australia, Judges could not escape from the thinking that derived from the general law system that a person should not take as a consequence of a fraudulent transaction, even if that person was to be an innocent party. For example, if an innocent purchaser acquired an interest in fee simple in land from a person, such as a mortgagee who might have had control of the title, who forged the true owner's signature on a transfer, in the 1930s the courts held that that purchaser would not have an indefeasible title, notwithstanding that it was a *bona fide* purchaser for value who took without notice of the fraud.

It was the fraudulent nature of the transaction that the courts considered undermined the validity of the title.

Only if the innocent purchaser who had purchased through the fraudulent transaction then on-sold to another innocent purchaser would the earlier defect be defeated. This was what was termed "deferred indefeasibility". It took nearly 100 years from the inception of the Torrens statutes for that clarification to be made.

In the late 1960s and early 1970s there were Privy Council decisions and subsequently, High Court decisions in Australia which confirmed that provided the purchaser was a *bona fide* or innocent purchaser who paid reasonable consideration and took without notice the fraud, it was the purchaser's innocence that would determine the question of indefeasibility, rather than the emphasis being on the fraudulent element in the transaction.

More recently, the question has been whether or not transactions that are based on statutory breaches would be defeated, notwithstanding registration. For example, where a subdivision was effected in breach of statutory requirements for subdivision, that was not sufficient to stop a person who had purchased one of the subdivided lots from the developer who was responsible for the wrong-doing, from obtaining an indefeasible title immediately.

Accordingly, you can see that the controls imposed under the processes of subdivision are extremely important from the point of view of ensuring that a purchaser of land is bound by all of what we consider to be the relevant planning considerations in the carrying out of subdivision.

Essentially, once the land has been sold it is too late to try and rectify the situation at a later time.

The earlier position (in which the concept of the fraudulent act itself impugning the validity of the transaction) was known as "deferred indefeasibility" (in that indefeasibility or certainty of title would only occur when there was a transaction between 2 sincere people with no element of fraud involved) and the current position (whereby it is the innocence of the person who acquires the interest in the land that is paramount) is known as "immediate indefeasibility". Immediate indefeasibility probably reflects the original intent of the Torrens statutes and best reflects the public policy that certainty in dealing with the register is a paramount consideration.

Recent cases on indefeasibility have strengthened the concept of immediate indefeasibility but as a consequence, increased the obligation of the purchasing proprietor claiming such protection to have acted in good faith. But as planners, you already know that the title cannot tell you everything about what restrictions and limitations there are on land. Apart from registered interests such as mortgages, easements, leases and interests protected by caveat, there are a myriad of ways in which an apparent owner of land might be restricted in using it. Hence, planning controls can be regarded as another layer of administration lying over the issues of regulation of land administration and ownership.

(See *Bradbrook McCallum and Moore "Australian Real Property Law" Chapters 4 and 5.*)

Clements -v- Elliss (1934) 51 CLR 217 (A High Court of Australia case)

Frazer -v- Walker [1967] 1 AC 569 (An appeal in the Privy Council from the Supreme Court of New Zealand)

Breskvar -v- Wall (1971) 126 CLR 376 (A High Court of Australia case)

Sutherland Shire Council -v- Moir (1982) 49 LGRA 114

In *Bahr -v- Nicholay (No. 2) (1988) 62 ALJR 268* (A High Court decision) a complex dispute over a property in Cervantes in Western Australia indicated that in the future, Courts may even be prepared to expand the concept of what would constitute fraud under the Torrens System to include dishonest behaviour which occurs after a transfer has taken place (although that case does not go that far), a minority of the Judges were in fact prepared to make that finding.