TORRENS TITLE — ARISE THE REGISTERED AND UNREGISTERED, BEFALL THE LEGAL AND EQUITABLE

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I INTRODUCTION

> *'[T]he continued advantage of identifying principles as legal or equitable must be open to question.'*[1]

> *'[L]awyers will cease to enquire whether a given rule be a rule of equity or rule of common law.'*[2]

Property Law is consistently faced with the dilemma of competing claims to real property by people who can be designated as innocent parties. As noted by Hughson *et al*

> [t]here are two main ways of resolving such conflicts. One approach is to protect the holder of an interest by preventing the transferor from passing a title which he or she lacks....The alternative approach, typified by systems of registration of title, is to protect innocent purchasers of interests, regardless of whether or not the transferor has a good title.[3]

In this context consider the facts of *Gibbs v Messer*.[4] A solicitor forged the signature of a client to an instrument that transferred land to a fictitious person. The solicitor purporting to act for this fictitious person obtained a loan on the security of a mortgage to one McIntyre. In this case, should the innocent client of the solicitor or the mortgagee later prevail? The contest was between two innocent parties. Whilst the Privy Council held that the mortgage should be removed from the register, a decision which may not apply

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[1] LBC, *Laws of Australia*, vol 28 (as at 29 July 1999) 28 Real Property, '28.1 Principles of Real Property' [101].

[2] Frederic Maitland, *Equity: A Course of Lectures* (2nd ed, 1947) 20.

[3] Mary-Anne Hughson, Marcia Neave and Pamela O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders' (1997) 21 *Melbourne University Law Review* 460, 461.

[4] [1891] AC 248.

today,[5] the critical aspect to note is that whatever result, an innocent party would have been deprived of an interest in land.

The solution in the case of registered or Torrens title land has been to protect, in the main, the innocent purchasers of title. This has permitted a conveyancing system which is relatively inexpensive, quick, and for the most part, accurate, to flourish. The philosophy behind this system is the provision of a conclusive title, a registration process that the state guarantees as a mirror of the title.[6] Purchasers simply need inquire as to registration and to ascertain what that contains:

> The registration scheme must be so comprehensive as to provide procedures for handling every kind of interest possible... It must be possible to register any legitimate interest or claim, so that *the moving question is whether the claim is or is not registered.* If the claim is properly registered, it is effective; if it is not registered, it is ineffective.[7] (emphasis added)

Under a registration system, then, the question of entitlement has been subjugated in many cases to the issue of whether the interest is legal and registrable, or legal but not registrable, equitable (possibly registrable, possibly not), a mere equity coupled with or without a proprietary right, or a personal equity. This paper will argue, by way of appeal to history, case law and academic support, that the law of property should be prepared to dispense with a determination of priorities by the nature of the interest, and instead turn to a system whereby Parliament mandates the registration of certain interests, the availability of caveating for those interests that cannot be registered and for priority to be resolved by the date of registration or lodgment of the caveat. In this respect the policy of the law must be to encourage the registration of interests, to have a title which truly mirrors the interests attaching to the land to determine priority, not by a system of priority rules introduced to deal with a division of interests into law or equity, but by the first to register their interest. To this extent, the paper does not attempt the more ambitious argument that legal and equitable interests should be abolished completely, rather it seeks to advance the submission that the general law priority rules, based as they are on the division between law and equity, should be substituted by a system of priority by caveating.[8]

There is no doubt that the goal of Sir Robert Torrens (as the architect of the land registration system which bears his name) was to protect the purchaser and to override the interests of those holding what traditionally would be considered equitable interests.

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[5] Given the acceptance of immediate indefeasibility in Australia - see *Breskvar v Wall* (1971) 126 CLR 376. The case has been restricted by subsequent authority – see for example *Garofano v Reliance Finance Corporation Ltd* (1992) 5 BPR 11,941; *Wicklow Enterprises Pty Ltd v Doysal Pty Ltd* (1987) 45 SASR 247.

[6] As noted by Dent Bostick, 'Land Title Registration: An English Solution to an American Problem' (1987) 63 *Indiana Law Journal* 55, 60-61 '[t]he ideal system substitutes registration for any inquiry into actual or constructive notice of facts about ownership...the registration system will function so that one registration card, clearly and simply arranged, will mirror exactly the state of a title at any given moment.'

[7] Ibid 61.

[8] The argument that legal and equitable interests should be abolished completely is beyond the scope of this paper. Issues that would be raised by this question include the creation of interests (if we abolish the distinction between law and equity – what reference is there to say that an interest exists). Similarly, at present, the remedies available can depend on whether the interest is categorised as legal or equitable.

These were to be regarded as mere contracts.[9] Indeed the influence of the Court of Chancery on land titles was a point of criticism by Torrens.[10] Today there is a range of equitable interests recognised by the courts in relation to land transactions - but it is this very range and the continued renaissance of equity in Australia[11] that demands a reconsideration of the manner in which we resolve disputes between innocent parties in relation to land. As stated extra-judicially by Sir Anthony Mason,[12] equity 'has extended beyond old boundaries into new territory where no Lord Chancellor's foot has previously left its imprint.'[13] It is this very extension of equity that has brought the ideas of fairness and good conscience (the foundations of equity jurisdiction) so sharply into conflict with the processes of Torrens title. The Torrens form of land transfer necessitates a level of certainty and 'determination which is, in many ways, directly oppositional to the approach taken by equitable principles of fairness.'[14]

The purpose of this article is to outline the equitable interests that can be raised in relation to land, to question whether the division between law and equity need be maintained in a post Judicature Act world (particularly in the case of Torrens title land) and to consider the historical, academic and case law basis for dispensing with the division between legal and equitable and to substitute a demarcation between registered and unregistered, specifically in the case of priority disputes. The disputes that arise from the present division between law and equity will be discussed to illustrate the advantages of dispensing with the current regime.

This article will be structured in the following manner. After a brief review of the current state of equitable interests available, part III outlines the historical derivation of equitable jurisdiction which is then followed by a consideration of the consequence of separation between law and equity – the priority rules. This will be followed by a critical analysis of the continuing relevance of the division between law and equity (and the division within equity itself). I will conclude with a plea for a radical rethinking of the concepts of law and equity for priority disputes by calling for a revised division between registered and unregistered interests.[15]

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[9] Hughson, Neave and O'Connor, above n 3, 461.

[10] See the comments by Les McCrimmon, 'Protection of Equitable Interests Under the Torrens System: Polishing the Mirror of Title' (1994) 20 *Monash Law Review* 300, 301.

[11] See the comments by Hughson, Neave and O'Connor, above n 3, 462.

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

[13] Ibid.

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

[15] As pointed out by Edward Sykes and Sally Walker, *The Law of Securities* (5th ed, 1993) 452 there are certain interests which although legal in nature at general law cannot be registered on a Torrens title register - implicitly providing support for the idea that the division between law and equity, for purposes of resolving priority disputes, need not necessarily be maintained. See generally W N Harrison, 'Indefeasibility of Torrens Title' (1952) *University of Queensland Law Journal* 206.

II THE RANGE OF EQUITABLE INTERESTS ACCEPTED BY COURTS TODAY

The principal equitable interest is that of the beneficiary under a trust. This form of relationship results where ownership of the property is divided between the trustee (holding the legal interest) and the beneficiary (holding the equitable interest). An express trust is occasioned by the legal owner intentionally conferring a benefit upon another, thus dividing the ownership of the property.[16] By contrast, a resulting trust is implied in circumstances where the law accepts that the legal owner is not to enjoy the beneficial interest in the property. For example, this may arise where an individual purchases property, but has the property registered in the name of another. The circumstances may indicate that this is not a gift to the latter person, but an intent for that individual to hold the legal interest for the benefit of the purchaser.[17] A constructive trust is imposed without regard to the intent of the parties, but in line with what the court views as conscionable conduct.[18]

Contracts for the sale of land also impose an equitable interest on the putative purchaser.[19] Thus, in some circumstances, the property is at the risk of the purchaser from the date of signing the contract and before settlement. Equity has also recognised interests such as informal leases,[20] the agreement for a lease,[21] interests arising from the doctrine of part performance,[22] informal mortgages,[23] the equity of redemption[24] and restrictive covenants.[25] Equity also recognised a category of interests somewhat less than the equitable interest - equities arising out of proprietary estoppel[26] and ancillary equities which permit the holder to complain of misrepresentation, fraud, undue influence and mistake.[27]

Arguably what we have failed to achieve or recognise in Australia is that with the enactment of a wholly new system brought on by the Torrens legislation, the division

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[16] For a discussion of the origins and nature of a trust see *DKLR Holding Co Pty Ltd (No 2) v Commissioner of Stamp Duties* [1980] 1 NSWLR 511('DKLR Holding'). As for the formalities for the creation of an express trust over land see Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Property Law Cases and Materials* (1996) [4.5].

[17] See *House v Caffyn* [1922] VLR 67; *Wirth v Wirth* (1956) 98 CLR 228; *Carkeek v Tate-Jones* [1971] VR 691.

[18] See *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Muschinski v Dodds* (1986) 60 ALJR 52, 64-66 (Deane J).

[19] See *Lysaght v Edwards* (1876) 2 Ch D 499.

[20] See *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242.

[21] See *Walsh v Lonsdale* (1882) 21 Ch D 9.

[22] See *Francis v Francis* [1952] VLR 321; *Thwaites v Ryan* [1984] VR 65; *Australia and New Zealand Banking Group Ltd v Widin* (1991) 102 ALR 289.

[23] See *Stubbs v Slater* [1910] 1 Ch 632.

[24] See *Knightsbridge Estates Trust Ltd v Byrne* [1939] 1 Ch 441; *Noakes & Co Ltd v Rice* [1902] AC 24.

[25] See *Tulk v Moxhay* [1848] 2 Ph 774; 41 ER 1143.

[26] See *Olsson v Dyson* (1969) 120 CLR 365.

[27] See *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265; *Barclays Bank plc v O'Brien* [1994] 1 AC 180; *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183; *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* [1994] 1 VR 672.

between law and equity should have been abandoned for priority disputes. As stated by Duncan and Willmott

> [t]he enactment of the Torrens system legislation throughout the several colonies of Australia, as they then were, should have presaged a change in attitude for lawyers dealing with interests under the new statutes. However, for some time, the ghosts of the old system continued to haunt the interpretation of the new Torrens statutes.[28]

III HISTORICAL BASIS FOR EQUITY[29]

The equitable jurisdiction arose out of the inadequacies of the common law,[30] and in relation to land the inadequacies in the systems of tenure and estates. The common law proscribed an individual from passing an estate in land by way of will;[31] identity of the owner was critical to the imposition of feudal dues;[32] and there were strict requirements for the passing of an interest in land.[33] In response to these restrictions the Chancellor, on behalf of the King, and in the exercise of the residual power of the Monarch, heard complaints that could not be dealt with at common law:

> The Chancellor's jurisdiction was confined to situations where the common law could not act because, for example, there was no recognised writ the plaintiff could use for the type of damage the plaintiff had suffered. Equity did not attempt to destroy the rules of common law but only to affect the way in which they operated.[34]

In the context of land law the critical development was the instigation of the 'use' to overcome the problems of the common law restrictions on land ownership, imposition and transferability and it was the acceptance by the Court of Chancery of this arrangement[35] that led to the creation and acceptance of the equitable interest. From this initial development the courts of equity have continued to expand and develop the range of equitable interests. Further, equity had the capacity to permit the creation of interests unattainable at common law. The creation of the estate contract and the mortgagor's equity of redemption are early examples of equity being used in such a fashion. A more

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[28] William Duncan and Lindy Willmott, *Mortgages Law in Australia* (2nd ed, 1996) 2. See also the comments of Cockle CJ in *Trust and Agency Co v Markwell (No 2)* (1874) 4 QSCR 50, 52 where his Honour indicated that the 'old system' in relation to mortgages was no longer operative.

[29] For a discussion of the basis for equitable jurisdiction, and in particular, the origins and nature of the trust see *DKLR Holding* [1980] 1 NSWLR 511.

[30] As stated by Bradbrook, MacCallum and Moore, above n 16, [4.1] 'the development of the equitable interest in land law began primarily as a result of the many fetters the common law placed on the holders of freehold estates.'

[31] LBC, above n 1, [73].

[32] See the *Statute of Mortmain 1279.*

[33] Edward Burn, *Modern Law of Real Property* (14th ed, 1988), 40.

[34] LBC, above n 1, [76].

[35] Of course, the King instigated the passage of the *Statute of Uses 1535* to protect his revenue. Ultimately the change in social conditions and the decline of the doctrines of tenures and estates led to the acceptance of the use upon a use in *Tyrrel's Case* (1557) 2 Dyer 155a; 73 ER 336.

recent example is that of the restrictive covenant - an interest in land that is purely equitable.[36]

Notwithstanding this, in the context of priority disputes concerning title to land by registration, what is the relevance and importance of the division of interests between law and equity? Whilst it is critically important to remember that the development of the Torrens system of land registration was a later development than the initial musings of equity, systems of land registration have dated from 3000 BC.[37] Given this, the opportunity to rethink the role of Torrens title, its method of recordation of interests and the resolution of competing disputes is important. In this sense, what is being suggested here is more in the way of a reclamation of historical beginnings and an opportunity to correct those facets which were not considered at the time of the initial systems of land registration.[38]

After the establishment by the Court of Chancery of equitable interests, the problems created by the division between common law and equity became all too apparent. The common law courts of Common Pleas, Exchequer and Queens Bench heard matters arising out of common law; equity was confined to its own jurisdiction and to remedying those perceived defects of the common law. In terms of land law, this development saw the creation of different interests, their enforcement by different measures and their termination in different circumstances.[39] The difficulties that this caused led to the unification of the principles of common law and equity by the *Judicature Acts 1873* (UK).[40] After this, courts were invested with both equitable and legal jurisdiction, claims from either base could be brought in the one matter, and remedies from either jurisdiction could be sought. Whilst the procedure was fused, it is generally accepted that the principles were not.[41] Accordingly, disputes between legal and equitable interests, and between equitable interests and mere equities, were destined to plague Property Law. However, in this post-*Judicature Act* world and in recognition of a system of title by registration,[42] maintaining any division between law and equity for the determination of priority disputes has no place. Support for this can be sought from this very system of priority rules currently in force, as these are applied to resolve disputes between interests of the nature of legal, equitable and mere equities. It is therefore necessary to turn to a brief discussion of the priority rules.

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[36] See LBC, above n 1, [84].

[37] See the historical discussion in Timothy Hanstad, 'Designing Land Registration Systems for Developing Countries' (1998) *The American University International Law Review* 647, 647-649.

[38] Not surprisingly given that the division between law and equity was not yet apparent.

[39] See the comments by Joycey Tooher and Bryan Dwyer, *Introduction to Property Law* (3rd ed, 1997) 41.

[40] This was accepted in most Australian States shortly thereafter (eg. in Victoria in 1883 - the one exception to this was New South Wales, which did not unify until 1973).

[41] For a discussion of what is known as the fusion fallacy see Fiona Burns, 'The 'Fusion Fallacy' Revisited' (1993) 5 *Bond Law Review* 152.

[42] It can be noted that both the *Judicature Acts* and the system of Torrens title date from a similar time. The original *Judicature Act* dates from 1873, the original Torrens titles Act, the *Real Property Act* (SA) from 1857-1858.

IV LAW, EQUITY AND PRIORITIES

The consequence of the retention and classification of interests as legal, equitable, a mere equity, a personal equity or an equity coupled with a proprietary interest is that the courts were required to develop a system of resolution of disputes. At the outset, it is important to note that there was recognition that a system of registration, where priority is determined by the date of registration, was perceived to be advantageous over reliance upon pure common law principles. In Australia, all States now have legislation that provides for the registration of instruments affecting common law or 'old title' land.[43] In New South Wales, Queensland, Tasmania, and Victoria priority is accorded by date of registration.[44] In South Australia, the legislation does not expressly provide priority to the first registered, though the first registered in all probability will obtain priority.[45] In Western Australia, priority is accorded to those first registered, but in respect of those unregistered instruments - they shall be invalid against any purchaser in good faith and for valuable consideration.[46]

These registration procedures dovetail into the common law principles of priority disputes. The very fact of the existence of a multitude of common law principles adopted in relation to disputes surrounding old title land – principles such as priority between legal interests determined by the date they came into operation;[47] an equitable interest created in first in time will override the later equitable interest provided the merits are equal;[48] that an equitable interest will prevail over an earlier mere equity provided the equitable interest is obtained for value and without notice;[49] that an earlier legal interest will prevail over a later equitable interest;[50] and that a later legal interest will prevail over an earlier equitable interest if acquired for value, in good faith and without notice of the earlier equitable interest[51] – is evidence enough of the need to rethink the manner in which the competing claims of two 'innocent' parties are considered. These principles,

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[43] *Conveyancing Act 1919* (NSW); *Property Law Act 1974* (Qld); *Registration of Deeds Act 1935* (SA); *Registration of Deeds Act 1935* (Tas); *Property Law Act 1958* (Vic); *Registration of Deeds Act 1856* (WA).

[44] *Conveyancing Act 1919* (NSW) s 184G; *Property Law Act 1974* (Qld) s 246; *Registration of Deeds Act 1935* (Tas) s 9; *Property Law Act 1958* (Vic) s 6.

[45] On this see Sykes and Walker, above n 15, 414.

[46] See *Registration of Deeds Act* 1856 (WA) s 3.

[47] Application of the principles that *nemo dat quod non habet:* a person cannot convey an interest which they do not have.

[48] *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326 ('*Heid*'); *Phillips v Phillips* (1861) 4 De GF & J 208; 45 ER 1164; *Rice v Rice* (1853) 2 Drewry 73; 61 ER 646; *Cave v Cave* (1880) 15 Ch D 639. All property law practitioners would be aware that the maxim has many permutations and combinations - for example is it a principle of first or last resort? See Henry Long, 'Finding the Better Equity: the Maxim Qui Prior Est Tempore Potior Est Jure and the Modern Law Relating to Equitable Priorities' (1996) 3 *Deakin Law Review* 147; A J Oakley, 'Judicial Discretion in Priorities of Equitable Interests' (1996) 112 *Law Quarterly Review* 215. Similarly there are many exceptions, eg. beneficiaries under trusts - *Shropshire Union Railways and Canal Co v The Queen* (1875) LR 7 HL 496.

[49] *Latec Investments Ltd v Hotel Terrigal Pty Ltd (In Liq)* (1965) 113 CLR 265.

[50] In accordance with the maxim 'where the equities (the merits of the case) are equal the law prevails'. Many exceptions apply to this maxim: see *Northern Counties of England Fire Insurance Co v Whipp* (1884) 26 Ch D 482; *Barry v Heider* (1914) 19 CLR 197; *Walker v Linom* [1907] 2 Ch 104; *Perry Herrick v Attwood* (1857) 2 De G & J 21; 44 ER 895.

[51] *Pilcher v Rawlins* (1872) LR 7 Ch App 259. See also the doctrine of *tabula in naufragio* - *Wortley v Birkhead* (1754) 2 Ves Sen 571; 28 ER 364; *Blackwood v London Chartered Bank of Australia* (1874) LR 5 PC 92.

devised to resolve disputes in 'old system' title have largely been extrapolated for use in relation to Torrens land, though modified with the particular practices relevant under that system - in particular the concept of caveating.[52] Given this background to the creation and resolution of disputes between legal and equitable interests, the next part of the article will examine the continuing relevance of legal and equitable interests within the Torrens system of land registration.

V THE CONTINUING RELEVANCE OF LEGAL AND EQUITABLE INTERESTS IN TORRENS SYSTEM LAND

Torrens felt that prior to registration, interests under contracts should not be classified as property rights. He

> seems to have given little consideration to the situation of holders of unregistrable interests, though it would have been consistent with his general philosophy to regard such interests as enforceable only *inter partes*.... The development of equitable remedies this century has widened the class of unregistered/unregistrable interests. This raises the question as to whether and to what extent provision should be made for the recognition and protection of such interests within the Torrens system.[53]

I would argue that given the primacy of the register in Torrens title land[54] and the importance of indefeasibility, (an idea very much at the core of what Torrens was proposing), that the question very much at the epicentre is what interests can/should be registered and of those remaining, which should be protected by caveat. In this discussion, two aspects must be noted at the outset. First, the purchaser is obtaining title by registration, the conferring of ownership results from the procedures of the system; second, the system has the opportunity to accord priority by virtue of the date of registration. In essence registration will permit what the lay person would describe as ownership to those interests which Parliament dictates should have that 'title'; whilst the caveating provisions can operate to afford priority to those interests worthy of protection in this manner. Flowing from this would be the recognition that, for priority purposes, interests need not be categorised as legal or equitable (and in this context it is important to note that it is impossible to categorise all equitable rights as mere equities or equitable

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[52] Some of the better known decisions in this area include: *Heid* (1983) 154 CLR 326; *Butler v Fairclough* (1917) 23 CLR 78; *Person-to-Person Financial Services Pty Ltd v Sharari* [1984] 1 NSWLR 745; *Jacobs v Platt Nominees Pty Ltd* [1990] VR 146; *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546; *AVCO Financial Services Ltd v Fishman* [1993] 1 VR 90; *IAC (Finance) Pty Ltd v Courtenay* (1963) 110 CLR 550. See also Hughson, Neave and O'Connor, above n 3.

[53] Hughson, Neave and O'Connor, above n 3, 462-3.

[54] On this point see the judgment of Barwick CJ in *Breskvar v Wall* (1971) 126 CLR 376, 385-6 where his Honour states 'the Torrens System of registered title...is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor.'

interests for all intents and purposes);[55] similarly the nexus between the common law 'old system' title and Torrens title would be ended. On this aspect, it can be noted that there are interests that, although considered legal under the general law system of title, would be unregistrable on the title of Torrens land.[56] Along these lines, the Victorian Law Reform Commission[57] and the Alberta Law Reform Institute[58] have both suggested that a system of registration and prioritisation of interests can be accommodated within the Torrens system. As stated by the Victorian body

> [c]aveats should determine priority. Lodgment of a caveat before another person lodges a caveat or seeks registration should give priority to the [earlier] caveator. Failure to lodge a caveat before another person registers or protects their interest should postpone the interest.[59]

Indeed, in a number of jurisdictions the principle that lodging of the caveat determines priority is well established.[60]

The issue, however, is not finalised by the adopting of a provision that caveats should determine priority. The process must go further and recognise that in the case of Torrens title land the continuing relevance of a distinction between legal and equitable interests for determining property disputes cannot be maintained. As indicated some legal interests cannot be registered;[61] similarly equitable interests cannot be precisely categorised;[62] the myriad of priority rules and the numerous exceptions; for these reasons alone this distinction between law and equity could be abandoned. However, it is also appreciated that to abandon the distinction between law and equity for the resolution of priority disputes will need to be justified. Accordingly the next part of this article will consider the case law, academic and historical justification for an abandonment of this division.

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[55] See the comments by David Wright, 'The Continued Relevance of Divisions in Equitable Interests to Real Property' (1995) 3 *Australian Property Law Journal* 163, 168. Wright questions the continuing relevance of the division between equitable interests, mere equities and personal equities.

[56] As stated by Sykes and Walker, above n 15, 452 'there are certain interests, which, without being expressly excepted or mentioned, fall outside the scheme of the Act in the sense that, although under the general law they would be legal in character, they are incapable of being placed on the register.' Examples provided include certain types of implied easements, certain types of interests created by will and short term tenancies. Questions have also surrounded the position of volunteers: see *King v Smail* [1958] VR 273; *Bogdanovic v Koteff* (1988) 12 NSWLR 472; *Medical Benefits Fund of Australia Ltd v Fisher* [1984] 1 Qd R 606; *State Bank of New South Wales v Berowra Waters Holdings Pty Ltd* (1986) 4 NSWLR 398. Hughson, Neave and O'Connor, above n 3, 469 also provide a list of legal and equitable interests that are incapable of registration. These include builders' charges, equitable charges, interests under a constructive trust, vendors' liens, purchasers' liens and the right of a registered proprietor to caveat against his or her own title.

[57] Victorian Law Reform Commission, *Priorities,* Report No 22 (1989) ('*Priorities*').

[58] Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta,* Report No 69 (1993).

[59] *Priorities*, above n 57, [25].

[60] See the comments by Hughson, Neave and O'Connor, above n 3, 488. Reference there is made to a number of Canadian provinces and to Singapore.

[61] See the comments by Sykes and Walker, above n 15, 452. Also Hughson, Neave and O'Connor, above n 3, 469.

[62] See the comments by Wright, above n 55.

To do this will finally accord weight to the view of Maitland that 'lawyers will cease to inquire whether a given rule be a rule of equity or...common law.'[63]

VI JUSTIFICATIONS FOR THE ABANDONMENT OF THE DIVISION BETWEEN LAW AND EQUITY

A *Case Law Justification*

The difficulties in the application of the categories of legal and equitable interests has been recognised by the High Court:

> there is no neat equation between legal and equitable interests on the one hand and unregistered instruments on the other. An instrument of transfer is not effectual of itself to vest in the transferee either a legal or equitable estate in the land.[64]

Similarly, in the context of priority disputes, the Court has recognised the conceptual confusion in determining the basis on which relief is provided.[65] Some judges have proceeded along the line of estoppel,[66] others have preferred an examination for the better equity,[67] whereas Murphy J. has considered that provided there is a causal link between the conduct of the first interest holder and the loss suffered by the second party then the second party will prevail – in essence a form of strict liability.[68]

This lack of consistency in what is or is not a legal or equitable interest, and the failure to have a common theoretical basis presents an opportunity to rethink this area anew. That is, it is time to recognise the real focus of the Torrens system – that its aim is to present a mirror of the title and provide recognition to those interests deemed worthy of registration. Other interests can be 'protected' by a method of caveating. To adopt this rule would allow the search, not for the better equity, nor for the representation relied upon to someone's detriment, but to focus on who registered or lodged his or her caveat first.[69]

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[63] Maitland, above n 2.

[64] *Corin v Patton* (1990) 169 CLR 541, 588 (Toohey J).

[65] See the judgment of the High Court in *Heid* (1983) 154 CLR 326, 339-40 (Mason and Deane JJ) that 'the theoretical basis for granting priority, in such circumstances, to the later interest has been the subject of debate. Some have found the basis in the doctrine of estoppel; others have identified a more general principle that a preference should be given to what is the better equity on an examination of the circumstances, especially the conduct of the owner of the first equity.'

[66] See the judgment of Gibbs CJ, with whom Wilson J agreed, in *Heid* (1983) 154 CLR 326, 335.

[67] Mason and Deane JJ in *Heid* (1983) 154 CLR 326, 341.

[68] See *Heid* (1983) 154 CLR 326, 346.

[69] It would also have the advantage of lessening litigation over disputes in this area. For example, the issue of priorities has been considered in a large number of cases. For a sample of some of the more recent see: *Bacon v O'Dea* (1989) 88 ALR 486; *Depsun Pty Ltd v Tahore Holdings Pty Ltd* [1990] 5 BPR 11, 314; *Classic Heights Pty Ltd v Black Hole Enterprises Pty Ltd* [1994] V ConvR ¶54-506; *Crampton v French* [1995] V ConvR ¶54-529; *George Biztole Corporation Pty Ltd* [1995] V ConvR ¶54-159; *Avco Financial Services Ltd v White* [1977] VR 561; *Chiodo v Murphy* [1995] V ConvR ¶54-531; *Troncone v Aliperti* [1994] 6 BPR 13,291.

Whilst the case law obviously does not provide explicit support for disregarding legal or equitable interests, what it does provide is implicit recognition of the unsatisfactory state of the present authorities. If the theoretical basis is shaky, the rationale for the manner in which present matters are considered must be seriously re-examined and questioned.

B *Academic Justification*

The principal academic support for the argument that is being tendered centres on the idea of the use of the caveat procedure as a means to resolve priority disputes. The disputes surrounding priorities have been described as 'plagued by anomalous rules and by exceptions to them,'[70] as an area where the judiciary has been left to resolve the guiding policy for themselves,[71] where there is an urgent need for uniform principles relating to caveats and the effect of failure to lodge them,[72] and which 'will often involve two innocent third parties, for whom the time-based rules of priorities can have an arbitrary operation.'[73]

The ethos reflected in these comments is that the present system has failed to deliver the promise ascribed to it by Sir Robert Torrens.[74] A better system will deliver both registration (and thus in the layperson's eyes, ownership) and priority for the myriad of interests that can attach or be associated with land.[75] Thus, in the context of priority disputes, we must divorce the idea of separate bodies of law and equity and search for the interests that should be registered and those which should be protected by caveats. In doing this, it is imperative that consideration of legal and an equitable interests form no part of our thinking. To do this will only lead a retreat back into the morass of the competitive pressures between legal and equitable interests and their classification.[76]

C *Historical Justification*

Law and Equity were developed from two separate court systems. Without wishing to enter an argument surrounding the fusion debate[77] it is reasonable to suggest that the *Judicature Acts* were designed, for all courts, to combine the features evident in the common law and the equitable courts. The Torrens system, which predated the *Judicature Acts,* was designed as a conveyancing system which

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[70] Tooher and Dwyer, above n 39, 56.
[71] Hughson, Neave and O'Connor, above n 3, 495.
[72] Marcia Neave, 'Towards a Uniform Torrens System: Principles and Pragmatism' (1993) 1 *Australian Property Law Journal* 114, 128.
[73] T D Castle, 'Caveats and Priorities: the Mere Failure to Caveat' (1994) 68 *Australian Law Journal* 143, 146. On this issue also see McCrimmon, above n 10, 301.
[74] See Robert Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859). He wanted to have land transacted as quickly as dealings in merchandise or cattle.
[75] On this see generally McCrimmon, above n 10.
[76] As to what should be registered or protected by caveating is a question beyond the scope of this paper. For a discussion of how the number of interests affecting land was reduced in England see Bostick, above n 6.
[77] On this topic see Burns, above n 41.

> was more reliable and efficient and less expensive than that provided by the general law or by the general law as modified by the registration of deeds legislation. The originators of the Torrens system believed that the defects of the older system sprang from two major causes: its reliance upon chains of title deeds and the operation of the doctrine of notice. Accordingly, the Torrens System substituted a register book for the chain of title deeds and, in favour of persons who registered their interests, it abolished the doctrine of notice.[78]

In the context of resolving priorities, if one is to take the features of a combined legal system resulting from the *Judicature Acts* and mix that with a new conveyancing system which was intended to be very different from its predecessors, the end result is surely a system of registration, not of legal or equitable, but simply of interests. By continuing this separation between legal and equitable through to priority disputes, we have allowed the goal of a cheap, safe and quick conveyancing system to be adultered by historical divisions between law, equity, personal equities, mere equities, and equities coupled with a proprietary interests – divisions which are not consistent and need not be maintained.[79]

D *Practical Aspects*

As a final point of justification for abandoning the division, computerisation of land title systems can allow the lodgment and immediate registration of interests created. This will permit the registration and recording system to operate more effectively and, interestingly, more in line with the objectives that Sir Robert Torrens envisaged in the 1860's.[80] Indeed a move to electronic conveyancing would necessitate in many respects the bringing about of many of the reforms suggested here.[81]

VII CONCLUSION

> *Since Torrens did not foresee the continuing vitality of equitable interests, his scheme gave little thought to how to reconcile the principle of the conclusive register with the need to protect holders of unregistered interests. In consequence, judges have been left to resolve the conflict and to determine the guiding policy for themselves.*[82]

A new land registration policy should be adopted to resolve priority disputes. The policy should be the abandonment of the distinction between legal and equitable interests (at

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[78] Tooher and Dwyer, above n 39, 66.
[79] See generally Wright, above n 55. On the issue of personal equities and the Torrens system see *Snowlong Pty Ltd v Choe* (1991) 23 NSWLR 198; *Cottee Dairy Products Pty Ltd v Minad Pty Ltd* [1997] 8 BPR 15,611.
[80] Though as noted recently in *Imperial Bros Pty Ltd v Ronim Pty Ltd* [1999] Q ConvR 60,211 there are some dangers with an electronic conveyancing system when the computer system fails; noted by A Stickley, 'Unreliable Computers and Conveyancing: the Implications' (1999) 19 *The Queensland Lawyer* 173.
[81] A point implicitly recognised in the United Kingdom: see United Kingdom, *Land Registration for the Twenty-First Century* (Cmnd 4027, 1998) 250 ('*Land Registration*').
[82] Hughson, Neave and O'Connor, above n 3, 495.

least for the purposes of registered land) and to provide two forms of interests, registered and unregistered. Priority would be determined by the date of registration, or in the case of unregistered interests, by the date of caveating. This is supported by the recent report into Land Registration in the United Kingdom.[83] However it will only occur through legislative reform.

Much has been written about the aims[84] of the Torrens system,[85] but for our purposes we must consider what principles should now dominate current conveyancing practice. These can be identified as follows:

1. The title must be accurate, so that any purchaser can discover all facts that relate to the title and which may impinge upon the quality of title. In essence, there must be a mirror of title. However, in seeing this mirror we must ensure that the potential of the Torrens system is not undermined by the restrictions of past practices.

2. The conveyancing practice must be convenient and inexpensive, so that the trade in land can be easily completed – it should be no more complex than trade in securities on the Stock Market.[86]

3. An individual relying on a title should not be affected by any defects in the vendor's title and should not be required to search beyond the title.

4. The system must provide for compensation for those innocent parties affected by its operation.

In essence these principles are the same as those that prompted Sir Robert Torrens to devise the land registration system that bears his name. However, in the renaissance of equity we have seen an undermining of the objectives and policies of a system of title by registration. By recognising that the case law justification for the present resolution of priority disputes is unclear, that the academic view is that the caveating system can provide the rules to resolve contestability between unregistered interests, that the historical focus of the *Judicature Acts* was to provide for fusion of law and equity and finally, that computerisation permits the immediate lodgement and recording and registration of registered or unregistered interests, it can be seen that the time is ripe for an overhaul of the system. As we approach the millennium it is time to dispense with the notions of what is a legal or equitable interest in priority disputes, and provide instead for two categories of registered and unregistered (the latter being protected by caveat) and to

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[83] *Land Registration*, above n 81. This report considered that it is inevitable that there will be a system of electronic conveyancing introduced and flowing from this, it will not be possible to make transfers of land or to create rights in or over land except by registering them.

[84] See Neave, above n 72; Susan MacCallum, 'Uniformity of Torrens Legislation' (1993) 1 *Australian Property Law Journal* 135.

[85] On this topic see Hanstad, above n 37.

[86] Which can be completed electronically through the CHESS (Clearing House Electronic Sub-register System) though it is arguable that the checks necessary to ensure good 'title' to land are more detailed. In relation to land it may be necessary to undertake searches of the relevant council, mines department, bankruptcy records, corporate registers as well as the titles department, requisitions issued and finally, clarification of unregistered interests.

resolve these issues by the date of registration or recording. If this is to occur the conveyancing practice introduced with promise and hope will finally fulfil its role.