



Law Council
OF AUSTRALIA

Uniformity of Property Laws & Procedures

Law Council of Australia Model Guidelines for a Harmonious System of Torrens Title

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GPO Box 1989, Canberra,
ACT 2601, DX 5719 Canberra

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

19 Torrens St Braddon ACT 2612
www.lawcouncil.asn.au

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Model Guidelines for a Harmonious System of Torrens Title**

A Torrens Title “Table of Contents” by Professor Peter Butt, October 2002	Comments collated from meetings of the Australian Property Law Group and consultation with the State and Territory Law Societies and Law Institute.
<p>Introduction – the purpose of this “table of contents”</p> <p>The Torrens system has now been in operation for almost 150 years. It has been a great success in bringing certainty and legal predictability into land transactions. Its success is evident from the way it quickly spread from South Australia to every Australian state and territory, and then to many overseas countries.</p> <p>However, while its central tenets have remained fairly constant over the 150 years, many of its incidental aspects have diverged from state to state. If anything, as time goes on, that divergence is increasing, not decreasing. This creates many practical difficulties, particularly for organizations with property interests in more than one state or territory. I have written on these problems before; so have other commentators. For information, I attach a copy of a short two-piece article based on a paper I gave to the Australian Legal Convention in 1991. This sets out some of the inconsistencies of approach in the various Torrens Acts regarding leases, easements, adverse possession, and restrictive covenants.</p> <p>To date, attempts to promote uniform Torrens title legislation have achieved little</p>	

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<p>success. But if a uniform Torrens code is politically unrealistic, then at the least we need seriously to consider ways of “harmonizing” the Torrens system throughout Australia.</p> <p>This “Table of Contents” lists various matters that would need to be considered in working towards a harmonised Torrens system. Its aim is to highlight areas that will have to be discussed. (It already takes account of suggestions made at a meeting of the NSW Property Law Committee of the Law Council, on 23 October 2003.) It does not attempt to provide answers to possible differences of approach, nor does it provide any suggestions on how the provisions might be drafted. Its purpose is to facilitate discussion.</p>	

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<p style="text-align: center;">Matters to be covered in Torrens title legislation</p>	
<p>1 <i>Relationship of Torrens title to general legal principles governing land</i></p> <p>1.1 Act is to be read as not overriding general legal principles governing land ownership unless it is clearly inconsistent with those principles. (However, given that most land in Australia is now under Torrens title, the time may have come to develop a unified property statute, dealing with both general principles of property law and registration.)</p> <p>1.2 Act would need to take into account the needs of electronic conveyancing.</p>	<p>1.1 Agreed</p> <p>1.2 Agreed</p>
<p>2 <i>Act to be administered by Registrar of Titles</i></p>	

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<p>3 <i>Powers and functions of Registrar of Titles</i></p> <p>3.1 List the powers and functions (most would be standard: eg, to compel production of documents, give notices, correct register)</p> <p>3.2 In relation to power to correct register:</p> <p> 3.2.1 impose a time limit on exercise of the power? (eg, power to correct is lost against a person who acquires registered interest without notice of the error?)</p> <p> 3.2.2 Specify whether power to correct is discretionary or mandatory.</p>	<p>The Registrar should be obliged to register if the instrument is in registrable form and the transaction is not illegal or misconceived.</p>
<p>4 <i>The contents and availability of the register</i></p> <p>4.1 List the contents of the register (most would be standard: eg, folios, dealings, plans)</p> <p>4.2 The register should be open to the public.</p> <p>4.3 Historic searches should be allowed.</p> <p>4.4 Provision for official searches by R-G.</p>	<p>Practitioners often needed to be able to access a lot of different information when conducting due diligence, and it would be useful to have as much of this information as possible stored on or with the Register.</p> <p>Register should only be used for the recording of proprietorship interests in the land, and other interests could be recorded in a separate database linked to the Register.</p>
<p>5 <i>Registrar’s duty to create folios of the Register and certificates of title</i></p>	<p>5.1 The Registrars should decide how the relevant</p>

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<p>5.1 Separate folio for each parcel of land</p> <p>5.2 Dispense with paper certificates of title (follow the Queensland lead)? Alternatives: optional paper certificates of title; staged dispensing with paper certificates of title.</p>	<p>proprietorship information is displayed and is accessible. However, it must be a system that is simple, accessible, convenient and uniform.</p> <p>5.2 The registrars need to decide on the best practise for deciding how to identify registered proprietors and programs with authority to deal. However, any system must be better and more cost effective than the paper title system if it is to be replaced.</p>
<p>6 <i>What interests can be registered?</i></p> <p>6.1 List interests that can be registered: eg</p> <ul style="list-style-type: none"> • fee simple • leases (see later)? • mortgages • easements • profits à prendre • covenants (see later)? • charges 	<p>6.1 Agreed, although the following should also be registered:</p> <ul style="list-style-type: none"> - future leases - Crown land. The registered should specify whether the Crown land is reserved land and any other relevant particulars such as: the identity of the Crown trustee or committee of management of the land, the purposes of the reservations and any particular conditions of the reservation. <p>6.2 Agreed</p> <p>6.3 Vesting orders will change the Register when they are</p>

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<ul style="list-style-type: none"> • life interests • remainder interests • water rights? • any other? <p>6.2 Transmission applications; notice of death of joint tenant</p> <p>6.3 Vesting orders</p> <p>6.4 Writs</p> <p>6.5 Keep trusts off the Register (as per existing system).</p>	<p>given effect. Nothing further required.</p> <p>6.4 Writs which have not yet progressed to court orders should not be recognised unless they relate specifically to an estate or interest in land. There should be a notice procedure similar to a caveat if the writ relates specifically to an estate or interest in land (assuming that a caveat is not already an appropriate remedy).</p> <p>6.5 There are divergent practices between the jurisdictions regarding recording of instruments which refer to trusts. This causes considerable difficulty especially with finance transactions that cross jurisdiction borders. It should be possible to register documents that refers to trusts so long as a party dealing with the registered proprietor obtains good title notwithstanding notice of the trusts (with the usual exception for fraud).</p>
<p>7 <i>Registration process</i></p> <p>7.1 Retain existing practice of requiring standard forms, to preserve simplicity of system</p> <p>7.2 Documents to be in “registrable form”, but keep requirements of “registrable</p>	<p>7.1 Forms should be uniform, consistent and simple.</p> <p>7.2 Agreed.</p>

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<p>form” simple.</p> <p>7.3 Provision for “incorporated memorandums” to reduce clutter in register</p> <p>7.4 RG be given power to correct “patent errors”</p> <p>7.5 Once documents in “registration queue” and in registerable form, documents proceed to registration in order of lodgement, unless withdrawn.</p> <p>7.6 Caveats cannot prevent registration of dealings already in registration queue</p>	<p>7.3 Agreed.</p> <p>7.4 Agreed.</p> <p>7.5 Agreed.</p> <p>7.6 Agreed.</p>
<p>8 <i>Special attestation requirements (to protect against fraud)?</i></p>	<p>There are divergent requirements in different states and territories witnessing requirements. The processes being prepared for a national system of electronic conveyancing should in time provide a more uniform system.</p> <p>The Victorian Department of Sustainability and Environment had estimated the number of fraudulent transactions in Victoria to be of the order of 1 in 19,000. The ‘100-point’ test and electronic conveyancing initiatives ought to decrease this further.</p> <p>Interestingly, in Queensland and the Northern Territory, where there is currently a paperless title, or an optional paperless title, the requirements for prescribed witnesses do seem to have kept the incidence of fraud at a lower level.</p>

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	<p>However, unless some evidence could be provided of the probative value of qualified witnesses, an ordinary adult person should be sufficient for serving as a witness in all jurisdictions in a paper based systems.</p>
<p>9 <i>The status of unregistered interests</i> 9.1 Continue to recognise unregistered interests? (Sir Robert Torrens thought not; but recognition of unregistered interests now too well-established to be overturned?)</p>	<p>A simple process for removal of caveats should be established. It should also be standard that a lapse period could be nominated when a caveat was lodged, so that it would lapse if not renewed at that time.</p> <p>There should be no problem with allowing any interest to be caveatable if all relevant parties agree to have such a caveat applied</p>

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<p>10 <i>Protection of unregistered interests</i></p>	
<p>10.1 Assuming recognise unregistered interests, protect them by caveat.</p>	<p>10.1 Agreed.</p>
<p>10.2 Define who can lodge caveat and in respect of what interests</p>	<p>10.2 Caveatable interest.</p>
<p>10.3 Liability for lodgement without reasonable cause (and perhaps attempt to define “without reasonable cause”)</p>	<p>10.3 Agreed.</p>
<p>10.4 Caveats should last until challenged by owner of land affected (eg, as per “lapsing notice” provision in NSW)</p>	<p>10.4 Agreed.</p>
<p>10.5 Prohibition against lodging successive caveats based on same interest and same facts, unless court allows or proprietor consents</p>	<p>10.5 Agreed.</p>
<p>10.6 Minimal formal requirements – and court to have power to overlook breaches of formal requirements</p>	<p>10.6 Agreed.</p>
<p>10.7 Who can withdraw caveats</p>	<p>10.7 Caveator.</p>
<p>10.8 Codify principles about failure to lodge caveat? (eg, in NSW failure to lodge caveat almost certainly postponing conduct; in Victoria, maybe not – <i>Platt Nominees</i> case, 1990)</p>	<p>10.8 Not agreed.</p>
<p>10.9 Consider “priority notice” provision, along lines of Tasmania.</p>	<p>10.9 Combine with a caveat system.</p>
<p>10.10 Protect interest of purchaser between completion and registration, along lines of NSW s 43A (and adopt the “old system protection” view of s 43A, as per Taylor</p>	<p>10.10 This is the role of the caveat.</p>

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<p><i>J in IAC Finance v Courtenay).</i></p>	
<p><i>II Effect of registration and the nature of “indefeasibility”</i></p> <p>11.1 Conclusiveness of register</p> <p>11.2 Query: should registration be expressed to be conclusive as to land boundaries (as well as to ownership of interests in land)? [See also below, as to location of boundaries]</p> <p>11.3 Priority by registration:</p> <ul style="list-style-type: none"> • registered interest defeats unregistered • earlier registered defeats later registered • Purchaser not to be affected by notice of unregistered interests (as per current law) <p>11.4 The nature of indefeasibility: “immediate” or “deferred”?</p> <ul style="list-style-type: none"> • Immediate is the current view; • Deferred may produce “justice” in hard cases, but at the cost of confidence in registration system? • Judicial discretion whether to apply immediate or deferred according to 	<p>Immediate indefeasibility of title is preferred to deferred indefeasibility even though this may have practical effects for some financial institutions and individuals. However, certainty of title is to be preferred where the balance is between the party entitled to the land and the party who should be entitled to compensation.</p> <p>It is important that there is a simple rule dealing with the consequences of immediate indefeasibility of title (such as where a subsequent caveat is lodged which may affect a mortgagee's power of sale).</p>

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<p style="text-align: center;">circumstances (as recommended in Canada)</p> <p>11.5 Should “volunteers” have same degree of indefeasibility as purchasers for value? (Conflict on this between (1) NSW and WA [answer “yes”], and (2) Vic [answer “no”])</p>	
<p>12 <i>Exceptions to indefeasibility</i></p> <p>12.1 Registered interests hold subject to:</p> <ul style="list-style-type: none"> • fraud (on part of registered holder) • prior registered interests [standard provision] • existing entries on the register [standard provision] • interests recorded in prior folio for same land [standard provision] • land included in folio by misdescription [standard provision] • omitted easements and profit à prendre [But query whether this is required any longer — why give easements and profits special treatment, especially in states where the court can force the creation of an easement in appropriate circumstances, as in NSW s 88K of <i>Conveyancing Act 1919</i>] • short term leases [eg, not exceeding 3 years] [query: do we need this – see later as to leases] 	<p>Agreed, although an exception to indefeasibility should also apply to adverse possession.</p>

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<ul style="list-style-type: none"> • rights in personam [query: codify, along lines of Qld provision?] • any other? 	
<p>13 <i>Special provisions for co-ownership</i></p> <p>13.1 Separate folios for the separate interests of tenants in common?</p> <p>13.2 Provisions regulating right of joint tenant to sever unilaterally? Options are:</p> <ul style="list-style-type: none"> • preclude right to sever by unilateral disposition • allow unilateral severance only with consent of other joint tenants • require notice before severance, leaving it to other joint tenants to seek injunction to restrain proposed severance. 	<p>The severance of joint tenancies by registration of an instrument for severance by one registered proprietor should be in addition to the existing methods of severance.</p>
<p>14 <i>Leases</i></p> <p>14.1 Must leases be registered (or left unregistered, as in Victoria)?</p> <p>14.2 If leases must be registered, then legislation should provide:</p> <ul style="list-style-type: none"> • registration protects options to purchase (and also options to renew?) • for registration of variation (including provision that variation does not effect a surrender of the lease?) • covenants run with lease and with reversion (as per existing property law 	<p>Leases should be recorded. However, it is not efficient for the Registrar to be required to record short term leases of say 3 years or less.</p> <p>However, the method of registration and the procedure for consent by mortgagees must be made easier, simpler and cheaper. For example, it should be possible to register leases without the mortgagee being required to produce the title and without a mortgagee's consent (but the mortgagee's priority would be maintained). Electronic conveyancing may assist with this process.</p>

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<p>statutes)</p> <ul style="list-style-type: none"> • for appropriate recordings of termination or surrender of lease 	
<p>15 <i>Mortgages</i></p> <p>15.1 Provisions along lines of present legislation:</p> <ul style="list-style-type: none"> • nature of Torrens title mortgage; • variations of mortgage; • postponement of mortgages • mortgagor’s right to inspect title deeds • mortgagor’s and mortgagee’s rights to lease [query: if mortgaged property is leased, codify whether variation of lease binds mortgagee and any purchaser from the mortgagee?] <p>15.2 Provisions regarding default — along lines of present legislation:</p> <ul style="list-style-type: none"> • registered mortgagee’s rights: possession on default, right to demand rents and profits, sale on default, appointment of receiver • query: codify mortgagee’s “duty of care”, along lines of Vic and Qld? • notice requirements • application of proceeds of sale 	<p>Mortgages should be registered. The legislation should only give power of sale and other benefits to registered mortgages. The legislation should authorise a mortgagee to lease the land. The Registrar should have the power to make foreclosure orders.</p>

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<ul style="list-style-type: none"> • protection of purchaser <p>Query: extend these provisions to unregistered mortgages? (at present, generally apply only to registered mortgages)</p> <p>15.3 Foreclosure: RG to have power to make foreclosure “order” (along lines of present NSW provisions)</p>	
<p>16 Easements</p> <p>16.1 Requirement for registration</p> <p>16.2 Query: should we codify position re easements by prescription (20 years’ use) and easements by implication (<i>Wheeldon v Burrows</i>) – in particular, should such easements be enforceable despite non-registration? On one, view, there is no need to protect easements by prescription or by implication in those states where the courts have the power to force the creation of easements in appropriate situation: as in NSW, s 88K of <i>Conveyancing Act</i> 1919.</p> <p>16.3 Query: allow the registration of easements despite common ownership of burdened and benefited land?</p> <p>16.4 Query: provision for removing easements that have been abandoned? (Perhaps give RG the power to remove easements on proof of non-use for 20 years, along</p>	<p>Both dominant and servient tenements of easements should be registered as the general policy position.</p> <p>It is vital that easements are easily identifiable.</p> <p>Easements should be recorded on the register</p> <p>A provision along the lines of Section 88K of the NSW <i>Conveyancing Act</i> should be included in a national model.</p> <p>Registration of easements should be allowable despite common ownership of burdened and benefited land.</p> <p>Provision needs to be included in legislation for removal of easements that have been abandoned (if not already in the legislation).</p>

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<p>lines of NSW and Vic provisions).</p> <p>16.5 Query: if an easement has been “abandoned” in accordance with common law principles, but yet is still recorded on register, should an incoming purchaser of the benefited land be able to enforce the easement? [need to clarify point, in view of <i>Pieper v Edwards</i>]</p>	
<p>17 A place for restrictive covenants?</p> <p>17.1 In some states restrictive covenants can be recorded on title; in other states, they cannot. Uniform approach required.</p> <p>17.2 Suggest that restrictive covenants should be able to be recorded on the title. However, they would be “recorded”, not “registered”, and so liable to be defeated along the lines of the existing general law (as, eg, in NSW)</p> <p>17.3 Query: allow the recording of restrictive covenants despite common ownership of burdened and benefited land?</p> <p>17.4 Query: provision for removing covenants that have been abandoned? (Perhaps give RG the power to remove on proof of non-enforcement of breach for 20 years).</p>	<p>Restrictive covenants should be able to be recorded on title.</p>

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<p>18. Adverse possession</p> <p>18.1 Query: should Act allow principles of adverse possession?</p> <p>18.2 If yes, should Act simply allow adverse possession to be acquired against registered proprietor (as at common law), or [as in NSW] allow application to RG, with no title changing until register is changed?</p> <p>18.3 If adverse possession is in the course of being acquired when registered title changes hands, should new proprietor take free of any claim – ie, does time begin to run anew?</p>	<p>18.1 Yes.</p> <p>18.2 Rights to accrue but not against a third party until the possessory rights are registered as full proprietorship.</p> <p>18.3 No. There should be a relative simple process for changing the title if the requisite evidence is available and is uncontested or is contested and is resolved.</p>
<p>19. Boundaries</p> <p>19.1 Should Act deal with</p> <ul style="list-style-type: none"> • “middle line” rule, and 	<p>The Register should be a conclusive register of boundaries (with the exception of adverse possession).</p>

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<ul style="list-style-type: none"> • principles governing accretion and erosion or leave the general law to operate? <p>19.2 Is register to be conclusive as to boundaries?</p> <p>19.3 Power in R-G to determine disputed boundaries?</p>	
<p>20 <i>Assurance fund</i></p> <p>20.1 Should there be an assurance fund?</p> <p>20.2 If there should be an assurance fund:</p> <ul style="list-style-type: none"> • should its administration be severed from the registering body? • who can claim against the fund? what limitations should there be on claims? • ex gratia payments by Registrar • is the fund one of first resort or last resort? • role of professional indemnity insurance? • amount of compensation? • how to finance the fund? 	<p>The issue of covering full economic and consequential loss requires careful consideration. The users of the system could expect to generally pay for those suffering loss in using the system through the charges made by the system. It is therefore important to ensure that the notional insurance premium costs do not become prohibitive or that payment of consequential losses do not bankrupt the system. However, the strength of the Torrens system relies in its perceived government guarantee and any erosion of it will eventually undermine what has proved to be a very cost effective and important system of government infrastructure</p> <p>There should be no upper limit on payout and there should be compensation for reasonable consequential losses. The principles could follow the general principles which are applied under compulsory acquisition of land.</p>
<p>21 <i>Challenging decisions of the Registrar-General</i></p> <p>21.1 Any person dissatisfied with Registrar’s decision:</p>	<p>21.1 Agreed.</p>

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<p> <ul style="list-style-type: none"> • can ask Registrar to give reasons for decision; and • if dissatisfied with Registrar’s reasons, may seek review in Supreme Court. 21.2 Registrar may state case for opinion of Supreme Court on any matter arising out of administration of the Act </p>	<p>21.2 Agreed.</p>
<p>22 Any other provisions?</p>	<p>The overriding objective should be a uniform design and content of a certificate of title and search statement. Certificates of title and search statements vary greatly as to the information they contain and where the information is placed within the document. Uniformity between the different jurisdictions would be a great step forward. A review of the information contained in certificates of title and search statements and their layout is required for example:</p> <ul style="list-style-type: none"> (a) each interest registered on title should be grouped as to the type of interest. This would alleviate the problem in large developments where multiple leases are registered but an instrument like a mortgage is buried in the middle of the search and difficult to identify; (b) corporate ACNs and ABNs should be used to identify corporations; and (c) the conditions and restrictions in a Crown grant or parent title must be carried forward to subsequent

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	<p>titles with the same wording (or removed if they become redundant).</p>