A Conceptual Framework: What the Forgotten History of Victorian Torrens Legislation Tells Us about Priority Disputes involving Paramount Interests

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Abstract

The history of the *Transfer of Land Act 1958* (Vic) can tell us much about exceptions to indefeasibility known as 'paramount interests'. Current case law suggests these interests do not enjoy automatic priority in Victoria. Instead, once a paramount interest is established, the registered interest is effectively stripped of indefeasibility and a priority dispute ensues, with the outcome determined under general law priority rules. In this article I analyse Victorian legislative history to argue paramount interests were legislatively intended to enjoy ipso facto priority over registered interests. I develop a historically based conceptual policy framework to support future purposive interpretations of the Victorian paramount interest provision (s 42(2) of the Act). My insights demonstrate how the paramount interest exception was intended to operate in Victoria, how competing legislative aims were balanced within it, as well as the way in which it interacts with other exceptions to elucidate how priority operates for exceptions to indefeasibility more broadly. Moreover, I outline the vulnerability of other jurisdictions to case law outcomes similar to that which has arisen in Victoria. A deeper understanding of the Victorian legislative history can help prevent a similar folly in those jurisdictions.

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I Introduction

The term 'paramount interests' describes specified unregistered interests in Torrens land protected by legislative provisions. My central argument in this article is that such interests should enjoy automatic priority over registered interests. The reader may wonder why the need to make such an argument. After all, isn't an exception to indefeasibility just that? The answer lies in what some might describe as a Victorian peculiarity.

The *Transfer of Land Act 1958* (Vic) ('*TLA 1958*') s 42(2) protects numerous paramount interests; indeed, often more generously than other Australian jurisdictions.[1] Until 2010, paramount interests were presumed to enjoy automatic priority over registered interests. *Perpetual Trustee Co Ltd v Smith*[2] turned this presumption on its head. Relying on two earlier High Court of Australia decisions, the Full Federal Court of Australia interpreted s 42(2)(e) and held that it did not give tenants in possession automatic priority. Instead, it held that a two-step test applied: first, the registered interest-holder was effectively stripped of indefeasibility vis-à-vis the paramount interest; and second, that priority should then be determined in accordance with general law priority rules ('the *Perpetual* principle').

Perpetual departs from how similar provisions are understood in other Australian jurisdictions. While it only discusses tenants in possession, it sets a dangerous precedent which could be extended to other paramount interests. Additionally, although it concerns Victorian legislation, legislation in other jurisdictions could be susceptible to similar reasoning.

In this article, I review the *Perpetual* principle through the lens of Victorian legislative history to demonstrate how the *Perpetual* principle is contrary to a purposive interpretation that seeks to gives effect to legislative intent. Whether s 42(2) of the *TLA 1958* requires a 'one-step' or 'two-step' approach is a question of legislative interpretation. A purposive approach that takes legislative history into account is preferable,[3] especially where there is uncertainty. A purposive approach was not taken in *Perpetual*, nor was legislative history considered beyond one passing mention in High Court cases upon which *Perpetual* relied.

The importance of this is clear. The *Perpetual* principle leads to uncertainty about priority and reverses outcomes for many paramount interest holders who otherwise benefit from the protection that s 42(2) was previously understood to provide with disastrous effect for those interest-holders. For example, the priority enjoyed by an easement holder against a newly registered purchaser of land must now be doubted. Under the previously understood one-step priority rule for paramount interests, easements were automatically protected by s 42(2)(d) of the *TLA 1958*. However, the *Perpetual* principle requires the easement holder to also establish priority under general law rules. Although the registered owner is treated as notionally 'unregistered' for this purpose, the outcome turns on the general law

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1 *Transfer of Land Act 1958* (Vic) s 42(2) ('*TLA 1958*').
2 *Perpetual Trustee Co Ltd v Smith* (2010) 186 FCR 566 ('*Perpetual*').
3 *Interpretation of Legislation Act 1984* (Vic) s 35.

merits test.[4] This rewinds Victoria's Torrens system back in time to archaic and convoluted general law priority rules; the very rules it sought to overcome with innovations such as abolition of the notice doctrine.[5]

Although largely ignored outside Victoria, the *Perpetual* principle in fact deserves more careful examination in jurisdictions similarly prone to such an approach. The Victorian situation is not as unique as some might argue. A deeper understanding of why the approach is of concern and how it arose in Victoria could prevent the same issue arising in other jurisdictions.

Moreover, the historical analysis below highlights the legislative rationale for priority rules between registered interests and unregistered paramount interests; and to some degree, between registered and unregistered interests more broadly. On this basis, I develop a more cohesive conceptual framework as a means to help resolve more complex priority issues and to reconcile treatment of paramount interests with other exceptions to indefeasibility.

After briefly examining the *Perpetual* principle's origins (Part II), I examine Victorian legislative history to establish legislative intent concerning paramount interest priority (Part III). I then analyse historical policy reasoning behind selection and design of interests within the provision to highlight justifications relied upon by drafters in balancing competing interests (Part IV). I thereby derive a conceptual framework to guide purposive interpretation of the provision, against which the *Perpetual* principle is compared (Part V). In Part V, I also give brief consideration to which other jurisdictions are vulnerable to similar interpretive folly, before concluding (Part VI).

II How the *Perpetual* Principle Arose

The following is a brief overview as to how the *Perpetual* principle arose. A more thorough analysis appears elsewhere for those wishing to delve more deeply into the case law.[6]

A *Perpetual Trustee Co Ltd v Smith*

In 2010, the Full Federal Court of Australia in *Perpetual* determined that tenancies in possession did not enjoy automatic priority pursuant to the *TLA 1958* s 42(2)(e). In so holding, the decision contrasted with the widely held view across Australia that paramount interests had automatic priority over registered interests.

Explored further in another article that I co-authored with Sharon Rodrick,[7] the case arose as a class action concerning reverse mortgage arrangements that

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4 Or arguably 'bona fide purchaser without notice' priority rule, depending on characterisation of interests. See further Lisa Spagnolo and Sharon Rodrick, 'The Perpetual Trustee Co Ltd v Smith Priority Paradox: Just How Paramount Are Paramount Interests?' (2022) 45(2) *University of New South Wales* (*UNSW*) *Law Journal* 839.

5 *TLA 1958* (n 1) s 43.

6 Spagnolo and Rodrick (n 4) 842–53.

7 For details, see ibid 842–3.

permitted retirees to remain within their homes for life. This led to a priority dispute between the registered mortgagee and retiree tenants in possession. At trial, Middleton J had held, in accordance with conventional wisdom, that s 42(2)(e) provided the retirees with automatic priority over the registered mortgages.[8]

On appeal, the Full Federal Court majority also awarded the retiree tenants priority.[9] However, all three judges disagreed with Middleton J and instead held the effect of s 42(2)(e) was merely to strip registered proprietors of indefeasibility for purposes of the priority dispute; thereafter, priority was to be determined by general law rules.[10] The importance of this reasoning is that it effectively converted a one-step priority test into a two-step priority test. Establishing an interest as tenant in possession only satisfied the initial step. Beyond that, under the *Perpetual* principle, tenants in possession must also establish priority under general law rules.

The two-step test in *Perpetual* did not arise in a vacuum. The Full Federal Court relied on two High Court of Australia decisions that also concerned the Victorian provision: *Burke v Dawes* and *Barba v Gas & Fuel Corporation of Victoria*.[11] However, reliance upon them as support for the principle that general law priority rules determine priority for paramount interests was controversial. Upon closer analysis, these cases were actually decided on other grounds.[12]

B *Burke v Dawes*

Burke arose from a Will that devised a life interest to the registered owner's housekeeper (Cummins), who was permitted to continue living on the land by the executor. The executor became registered proprietor and granted a registered mortgage. Cummins claimed priority over the registered mortgagees as tenant in possession pursuant to the predecessor to *TLA 1958* s 42(2), the *Transfer of Land Act 1928* (Vic) s 72 ('*TLA 1928*').[13]

Latham CJ held that s 72 afforded the tenant in possession automatic priority.[14] By contrast, Evatt J concluded s 72 merely deprived the registered proprietor of indefeasibility and general law priority rules determined priority.[15] Both were dissentients in the result. In Evatt J's judgment we find the genesis of the *Perpetual* principle. But how did this view ultimately prevail?

The problem lies with the inaccurate headnote, which states that all judges other than Latham CJ adopted Evatt J's interpretation of s 72. Yet, as explained elsewhere,[16] for the majority of Starke, Dixon and McTiernan JJ, the case turned on

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8 *Haslam v Money for Living (Aust) Pty Ltd* (2008) 172 FCR 301, 330 [83].
9 *Perpetual* (n 2) 587–8 [74] (Moore and Stone JJ).
10 Moore and Stone JJ 585–7 [66]–[74] applied the general law merits test, while Dowsett J applied a separate notice test: at 594–6 [108]–[110].
11 *Perpetual* (n 2) 583 [57], 584 [62], 585 [65], relying on *Burke v Dawes* (1938) 59 CLR 1 ('*Burke*'); *Barba v Gas & Fuel Corporation of Victoria* (1976) 136 CLR 120 ('*Barba*').
12 See further Spagnolo and Rodrick (n 4) 846–50.
13 *Transfer of Land Act 1928* (Vic) s 72 ('*TLA 1928*').
14 *Burke* (n 11) 8.
15 Ibid 25. On the context of Evatt J's reasoning, see Spagnolo and Rodrick (n 4) 849.
16 Ibid 848–9 nn 46–52.

the executor's powers. The devised life estate had never been transferred, thus Cummins was a mere tenant at will,[17] a tenuous interest subject to the executor's power to administer the estate and mortgage the land. At no stage did any majority judge endorse the two-step effect of s 72 espoused by Evatt J, nor did they apply general law priority rules. Indeed, McTiernan J, clarified that s 72 only protected 'such interest as [Cummins] had as a tenant in possession'.[18] Likewise Dixon J (with whom McTiernan J agreed) ultimately determined the matter on the basis that Cummins' possession was still subject to the executor's power to mortgage.[19]

There is little in *Burke* to support the *Perpetual* principle. The majority ratio decidendi determined the tenancy was subject to the executor's powers, and the provision's protection could only ever be as good as the tenancy's scope.[20] In other words, *the scope of the tenancy interest itself* was qualified by a 'carve-out' upon its creation. Properly understood, all judgments (except for Evatt J) in *Burke* were consistent with Latham CJ's view of conferral of automatic priority under the equivalent of *TLA 1958* s 42(2). The latter was the sole judgment to hint at legislative background.[21]

Interestingly, the supposed expression of the *Perpetual* principle in *Burke* went unrecognised by drafters of subsequent legislative amendments, as we shall see below in Part III.

C *Barba v Gas & Fuel Corporation of Victoria*

The respondent in *Barba* ('Gas & Fuel') had obtained an option for an easement over land later sold under a terms contract to the Barbas, who went into possession as tenants at will. Gas & Fuel eventually exercised the option and registered the easement, but the Barbas still refused Gas & Fuel entry and claimed priority due to *TLA 1958* s 42(2)(e).

In the High Court, Gibbs J (Stephen and Jacobs JJ agreeing) held s 42(2)(e) stripped the registered easement of indefeasibility, following what his Honour perceived to be the principle in *Burke*. Gibbs J referred to *Burke* as standing for the proposition that s 42(2)(e) 'does not give to a tenant in possession any greater protection than he would have had if the land were under the general law'.[22] In support, his Honour cited two passages from *Burke*:[23] Dixon J's *hypothetical* analysis of what would have happened had it not been Torrens land,[24] despite Dixon J's ratio decidendi that turns upon the scope of the protected tenancy interest;

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17 *Burke* (n 11) 28 (McTiernan J).

18 Ibid 28. Dixon J considered what the result would be if the *TLA 1928* did not apply (general law), but only as a hypothetical exercise: Spagnolo and Rodrick (n 4) 848 n 49.

19 *Burke* (n 11) 21–2 (Dixon J, McTiernan J agreeing at 27).

20 Ibid 12 (Starke J), 19–22 (Dixon J), 27–8 (McTiernan J).

21 'The section has always been construed as providing that certain rights and interests, even though not mentioned on the certificate of title as encumbrances, are rights and interests to which the title of any registered proprietor is subject.': ibid 9 (Latham CJ).

22 *Barba* (n 11) 140–1, later echoed in *Perpetual* (n 2) 584 [63]. Compare the discussion below in Part III(C)(3).

23 *Barba* (n 11) 141 (Gibbs J).

24 *Burke* (n 11) 18. See also n 18.

and a reference within the judgment of Starke J in which Starke J explains the tenant's interest is subject to the executor's powers,[25] merely reiterating McTiernan J's point that the provision cannot shield a tenant from interests to which their tenancy is subject.[26] Contrary to Gibbs J's assertion,[27] his Honour's express approval of Evatt J's two-step reasoning was not consistent with the *Burke* majority.[28]

However, despite this endorsement, *Barba*'s ratio decidendi resembled that in *Burke*. It too turned on a finding that the scope of the tenancy interest was limited by a carve-out favouring the easement via a special condition in the sales contract.[29] It was for this reason that s 42(2) of the *TLA 1958* could not shield the Barbas from the easement. Thus, reference in *Barba* to Evatt J's two-step approach and general law priority rules can be viewed as obiter dictum.[30]

D *How the* **Perpetual** *Principle Led the Law Astray*

The High Court cases referred to in *Perpetual* that purportedly support two-step priority fall short of doing so. The Court in *Perpetual* simply fell into the same trap as Gibbs J in *Barba*: the mistaken perception that in *Burke* all judges except Latham CJ had endorsed Evatt J's view.[31] As discussed earlier, the dissenting Evatt J was alone in relying upon the two-step approach and general law priority rules; and subsequent endorsement of Evatt J's reasoning in *Barba* is obiter dictum. The ratio decidendi of both decisions actually supports the proposition that s 42(2)(e) of the *TLA 1958* only protects tenancy interests to the extent of their scope.

Each individual judgment in *Burke* and *Barba* relied upon general law, but only to determine whether facts revealed property interests that attracted legislative protection and to identify limitations to the scope of those interests. With the sole exception of Evatt J, no other judgment relied upon general law priority rules. Indeed, none of the majority judgments truly engaged with priority rules at all because their ultimate ratio decidendi of limitations in scope precluded any true conflict between purportedly competing interests.

An automatic priority interpretation of s 42(2)(e) could never permit the tenancy to prevail over an interest benefitting from an embedded condition or carve-out qualifying the tenancy. The provision can protect 'only such interest as [the tenant] had'.[32] *Burke* and *Barba* are arguably consistent with such a one-step interpretation.

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25 *Burke* (n 11) 13.
26 Ibid 28.
27 *Barba* (n 11) 141 (Gibbs J stating that Evatt J's 'views on this point were not in my opinion different from those accepted by the majority').
28 Ibid 141 (Gibbs J), 142–3 (Stephen and Jacobs JJ each agreeing with reasoning of Gibbs J).
29 Ibid 142.
30 See also Robert Chambers, *An Introduction to Property Law in Australia* (Thomson Reuters, 4th ed, 2019) 508 [27.205].
31 *Perpetual* (n 2) 583 [60].
32 *Burke* (n 11) 28 (McTiernan J).

Yet *Perpetual* nonetheless resorted to general law priority rules without a solid basis for that leap. Interestingly, the same outcomes flow from automatic priority in all three cases. The *Perpetual* retirees' leases were unqualified, so they would have obtained automatic priority; the scope of tenancies in *Burke* and *Barba* were qualified, so automatic priority could not protect the tenants.

Regrettably, none of the judgments in *Burke*, *Barba* or *Perpetual* refer to Victorian legislative history (except Latham CJ's brief allusion) to consider which approach would best give effect to legislative intent. Perhaps the elusive threads of history were not presented in argument. Yet a purposive interpretation could have prevented the unfortunate return to general law priority rules the Torrens system sought to avoid.

As discussed in Part III below, drafters were aware possession was generally considered good notice in a general law priority dispute.[33] This was arguably why tenancies in possession were included as paramount interests.[34] However, it does not follow that the legislature intended general law rules to govern their priority. In Part III, I argue that, had legislative history been considered and a purposive interpretation been adopted, Victorian law would not have strayed into the uncertainty of the two-step test.

III History of the Victorian Paramount Interest Provision

Commencing as a hotly contested private member's bill,[35] the *Real Property Act 1862* (Vic) ('*RPA 1862* (Vic)') was introduced by Mr Service, a non-lawyer whose opponents taunted that he could perhaps try to walk the Bill through Parliament 'on the back of a donkey'.[36] The contemporaneous parliamentary debates indicate a vague understanding at best.[37] Between 1862 and 1958 many amendments were made. Historical materials surrounding those amendments reveal far more about legislative intent. One might presume this would confirm the *Perpetual* principle given deferred indefeasibility held sway until 1967. However, such presumption can be rebutted by historical evidence. On balance, this demonstrates automatic priority was intended.

In this section I highlight the legislative intent behind s 42(2) of the *TLA 1958* regarding priority for tenancies in possession and other paramount interests. I draw inferences from textual and structural reforms (Part III(A)), contrast debates on paramount interests with parallel debates on other priority disputes and exceptions (Part III(B)), and examine descriptions by drafters and contemporaneous commentators (Part III(C)).

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33 See below discussion at nn 95, 153.

34 Ibid.

35 Real Property Bill 1862 (Vic) first introduced in 1861.

36 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 March 1862, 762 (Mr Aspinall).

37 Loose remarks by lay politicians when Torrens was still novel should be disregarded, eg, comments that, despite including the completely new concept of indefeasibility, s 39 was 'the same as the existing law': Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 1862, 742 (Mr Service).

A Do Structural Reforms Contraindicate Automatic Priority?

The Victorian paramount interest provision has significantly changed structure over time. Do these changes suggest paramount interests were not intended to automatically prevail over registered interests?

1 *1862–1954: Single Combined Clause*

The contents of the *TLA 1958* s 42(1) ('indefeasibility') and s 42(2) (paramount interest exceptions) were originally located within a single combined clause:[38] the *RPA 1862* (Vic) s 39.[39] The Victorian combined clause, which persisted until 1954,[40] conferred indefeasibility and provided exceptions for fraud, registered encumbrances, claims under prior certificates of title, boundary misdescriptions and easements (the sole paramount interest in the original clause). Exceptions were later added,[41] modified[42] and subtracted.[43]

The original single clause appears to accord equal importance or status to all exceptions. Each was expressed as an 'exception' to indefeasibility. Were differential priority approaches intended one might anticipate signalling language to that effect. Yet none appears. Early cases recognised automatic priority for prior certificate holders.[44] The natural conclusion is that the same priority was intended for easements (later considered a paramount interest).

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[38] A structure retained elsewhere: *Real Property Act 1900* (NSW) s 42(1) ('*RPA 1900* (NSW)'); *Real Property Act 1866* (SA) s 69 ('*RPA 1866* (SA)').

[39] *Real Property Act 1862* (Vic) s 39 ('*RPA 1862* (Vic)'):

> Notwithstanding the existence in any person of any estate or interest whether derived by grant from the Crown or otherwise which but for this Act might be held to be paramount or to have priority the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall except in case of fraud hold the same subject to such encumbrances liens estates or interests as may be notified on the folium of the register book constituted by the grant or certificate of title of such land but absolutely free from all other encumbrances liens estates or interests whatsoever except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act and except as regards the omission or misdescription of any right of way or other easement created in or existing upon any land and except so far as regards any portion of land that may by wrong description of parcels or boundaries be included in the grant certificate of title lease or other instrument evidencing the title of such registered proprietor not being a purchaser or mortgagee thereof for value or deriving from or through a purchaser or mortgagee thereof for value.

[40] *RPA 1862* (Vic) (n 39) s 39; *Transfer of Land Statute 1866* (Vic) s 49 ('*TLA 1866*'); *Transfer of Land Act 1890* (Vic) s 74 ('*TLA 1890*'); *Transfer of Land Act 1915* (Vic) s 72 ('*TLA 1915*'). Contra *Transfer of Land Act 1954* (Vic) ss 42(1)–(2) ('*TLA 1954*'); *TLA 1958* (n 1) ss 42(1)–(2).

[41] See, eg, 1866 additions: reservations, Crown grant conditions and powers, unpaid rates, statutory licences, adverse possession, tenants in possession; 1915 addition: public rights of way.

[42] Description changes: reservations to Crown grants (1954); adverse possession (1954); easements (1866, 1890, 1954); unpaid rates and taxes (1915, 1928, 1954, 1958, 2013, 2017, 2020); and tenants in possession (1954).

[43] Statutory leases and licences were removed in 1954.

[44] *Stevens v Williams* (1886) 12 VLR 152, 158; *Alma Consols Gold Mining Co v Alma Extended Co* (1874) 4 AJR 190. See also discussion in H Dallas Wiseman, *The Law relating to the Transfer of Land* (Law Book Co, 2nd ed, 1931) 99.

2 *1866: 'Proviso' and 'Notwithstanding' By-Line*

By 1866, the exceptions list had grown. An amendment reorganised some exceptions (those later known as paramount interests) within a 'proviso', while others continued as express 'exceptions'. Lacking punctuation per the drafting style of the time, *Transfer of Land Statute 1866* (Vic) ('*TLA 1866*') s 49 stated:

> Notwithstanding the existence in any other person of any estate or interest whether derived by grant from Her Majesty or otherwise which but for this Act might be held to be paramount or to have priority the proprietor of land or of any estate or interest in land under the operation of this Act shall except in case of fraud hold the same subject to such encumbrances as may be notified on the folium of the register book constituted by the grant or certificate of title but absolutely free from all other encumbrances whatsoever except the estate or interest of a proprietor claiming the same land under a prior registered grant or certificate of title and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the grant or certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser **Provided always** that the land which shall be included in any certificate of title registered instrument shall be deemed to be subject to the reservations exceptions conditions and powers (if any) contained in the grant thereof and to any rights subsisting under adverse possession of such land and to any public rights of way and to any easements acquired by enjoyment or user or subsisting over or upon or affecting such land and to any unpaid rates and to any license granted by the Board of Land and Works under the '*Mining Statute 1865*' and also where possession is not adverse to the interest of any tenant of the land notwithstanding the same may not be specially notified as encumbrances on such certificate or instrument.[45]

Separation behind a proviso could hint at an intention to treat paramount interests differently. It certainly caused Victoria to depart from other jurisdictions that continued to style them as 'exceptions'. Collection under the proviso perhaps led to their renaming as 'paramount interests'. However, nothing in the contemporaneous legislative history reveals any intention to alter their status. They remained within the same clause as fraud, notified encumbrances and boundary misdescriptions, which retained the designation of exceptions.[46] As if to counter misconceived perceptions of a new lower status for paramount interests vis-a-vis other exceptions, a further line was added to s 49, immediately following the paramount interests list: 'notwithstanding the same may not be specially notified as encumbrances on such certificate or instrument'.

The 'notwithstanding' sentence arguably seeks to preserve their status as exceptions equivalent to recorded encumbrances.[47] Despite sweeping removal of obsolete wording (particularly in 1954),[48] this reassuring sentence remains today in

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45 *TLA 1866* (n 40) (emphasis added).

46 *TLA 1958* (n 1) s 42(1).

47 By 'equivalent to recorded encumbrances' it is not suggested their priority operates per *TLA 1958* (n 1) s 34, but rather pursuant to Torrens provisions rather than priority rules outside the Torrens system.

48 See consolidations of 1890 (s 74), 1915 (s 72), 1928 (s 72), and 1958 (s 42(2)).

TLA 1958 s 42(2): 'notwithstanding the same respectively are not specially recorded as encumbrances on the relevant folio of the Register'.

Questions remain. Why the proviso? Why were some exceptions relegated to the proviso list and others not? No explanations are offered in contemporaneous legislative history, but a plausible inference is that the proviso was a welcome marker in the increasingly indecipherable clause; a drafting device to break the monotony of numerous exceptions. The 1862 combined clause in s 39 was brief, containing fraud, recorded encumbrances, prior certificate, boundary misdescription and easements. By 1866, the combined clause in s 49 had expanded to include Crown grant reservations, adverse possession, unpaid rates, statutory licences and tenants in possession. It had become an unruly textual monolith; a single sentence with no punctuation, indentations or sub-clauses. The proviso remained until 1954.

3 *1954: The Big Split*

In 1954, a dramatic structural change occurred when the combined clause was split into two subsections. Section 42(1) retained indefeasibility, exceptions for fraud, registered encumbrances, boundary misdescriptions, and prior certificates, whereas proviso exceptions were shifted into s 42(2), where they remain today.

But does this signify that subsection (2) interests were thereafter intended to bear a different character to those in subsection (1)? The legislative history indicates a definitive 'no'. The clear reason for the split was purely to improve the flow of the Act. Even after the 1866 proviso and small concessions to punctuation in intervening consolidations,[49] the *TLA 1928* s 72 was still hard to swallow:

> Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from His Majesty or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same subject to such encumbrances as are notified on the folium of the register book constituted by the grant or certificate of title; but absolutely free from all other encumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered grant or certificate of title, and except as regards any portion of land that by wrong description of parcels or boundaries is included in the grant certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser: **Provided always** that the land which is included in any certificate of title or registered instrument shall be deemed to be subject to the reservations exceptions conditions and powers (if any) contained in the grant thereof, and to any rights subsisting under any adverse possession of such land, and to any public rights of way and to any easements acquired by enjoyment or user or subsisting over or upon or affecting such land, and to any unpaid rates or other moneys which without reference to registration under this Act are by or under the express provisions of an Act of Parliament declared to be a charge upon land in favour of any responsible Minister or any Government department or officer or any public corporate body and to any

[49] Minor punctuations inserted by 1890 and 1915 consolidations remained in the *TLA 1928* (n 13) consolidation.

> leases licences or other authorities granted by the Governor in Council or any responsible Minister or any Government department or officer or any public corporate body and in respect of which no provision for registration is made and also where the possession is not adverse to the interest of any tenant of the land, notwithstanding the same respectively are not be specially notified as encumbrances on such certificate or instrument.[50]

The entire *TLA 1928* was riddled with archaic clauses badly in need of a more digestible format. A major goal of the Transfer of Land Bill 1949 ('1949 Bill') was 'simplification and clarification of the Act'.[51] The Bill's draftsperson, Mr Wiseman, explained that s 72 was 'most confused', thus he had 'split' it into two separate paragraphs and paragraphed the proviso.[52] The 1949 Bill cl 104 was more organised, but rather inelegant.[53] Importantly, Wiseman had explicitly dispelled any suggestion the new structure signalled a change to the provision's effect, which had 'not been altered'.[54]

The Transfer of Land Bill 1954 ('1954 Bill') replaced the 1949 Bill,[55] completely overhauling the Act's entire structure and format. In seizing opportunity for significant restructure, the Assistant Parliamentary Draftsman, Mr Garran, explained that the 1954 Bill was designed to 'bring some sort of order' to the Act's 'haphazard' arrangement and to remove numerous obsolete clauses.[56] It more clearly transformed the combined clause into the now familiar bifurcated format,[57] enacted as *Transfer of Land Act 1954* (Vic) ('*TLA 1954*') s 42:

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50 *TLA 1928* (n 13) (emphasis added; citations omitted).

51 Explanatory Paper, Transfer of Land Bill 1949 (Vic) 1 [4] ('1949 Explanatory Paper').

52 Statute Law Revision Committee, Parliament of Victoria, *Progress Report on the Transfer of Land Bill* (20 September 1949) 18 (Mr Wiseman) ('*1949 SLRC Report*').

53 Transfer of Land Bill 1949 (Vic) ('1949 Bill') cl 104:

> Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from His Majesty or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same subject to such encumbrances as are notified on the folium of the register book constituted by the grant or certificate of title; but absolutely free from all other encumbrances whatsoever, except—
>
> (a) The estate or interest of a proprietor claiming the same land under a prior registered grant or certificate of title, and except;
>
> (b) As regards any portion of land that by wrong description of parcels or boundaries is included in the grant certificate of title or instrument evidencing the title of such propiretor [sic] not being a purchaser for valuable consideration or deriving from or through such a purchaser.
>
> Provided always that the land which is included in any certificate of title or registered instrument shall be deemed to be subject to—
>
> (a) the reservations exceptions conditions and powers (if any) contained in the grant thereof; and
>
> (b) any rights subsisting under any adverse possession of such land; and
>
> (c) any public rights of way; and
>
> (d) any easements acquired by enjoyment or user; and
>
> (e) any unpaid rates and taxes;
>
> notwithstanding the same respectively are not specially notified as encumbrances on such certificate or instrument.

54 *1949 SLRC Report* (n 52) 18 (Mr Wiseman).

55 Transfer of Land Bill 1954 (Vic) ('1954 Bill').

56 Statute Law Revision Committee, *Report on the Proposals contained in the Transfer of Land Bill 1954* (25 November 1954) 9 (Mr Garran) ('*1954 SLRC Report*').

57 1954 Bill (n 55) cl 42 was identical to the *TLA 1954* (n 40) s 42 except subsection (d): see below n 58.

(1) Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are notified on the Crown grant or certificate of title but absolutely free from all other encumbrances whatsoever, except—

(a) the estate or interest of a proprietor claiming the same land under a prior registered Crown grant or certificate of title;

(b) as regards any portion of the land that by wrong description of parcels or boundaries is included in the grant certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.

(2) Notwithstanding anything in the foregoing the land which is included in any Crown grant certificate of title or registered instrument shall be subject to—

(a) the reservations exceptions conditions and powers (if any) contained in the Crown grant of the land;

(b) any rights subsisting under any adverse possession of the land;

(c) any public right of way;

(d) any easements howsoever acquired subsisting over or upon or affecting the land;[58]

(e) the interest (but excluding any option to purchase) of a tenant in possession of the land;

(f) any unpaid land tax, and also any unpaid rates and other charges which can be discovered from a certificate issued under section three hundred and eighty-five of the *Local Government Act 1946* section ninety-three of the *Sewerage Districts Act 1928* section three hundred and thirty-four of the *Water Act 1928* or any other enactment specified for the purposes of this paragraph by proclamation of the Governor in Council published in the *Government Gazette*—

notwithstanding the same respectively are not specially notified as encumbrances on such grant certificate or instrument.[59]

This essentially remains in the consolidated *TLA 1958*.[60] Historical records suggest all structural reforms to the provision were mere drafting improvements. In particular, the 1954 split was part of major structural reform to modernise the Act, rather than to denote any change in character for paramount interests that might suggest a two-step priority approach.

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[58] Final wording of s 42(2)(d) indicated inclusion of implied easements: *1954 SLRC Report* (n 56) 54 (Appendix A). See further below n 217.

[59] *TLA 1954* (n 40) s 42.

[60] *TLA 1958* (n 1) s 42 is almost identical to the *TLA 1954* (n 40) s 42: see above n 59. Although irrelevant for present purposes, amendments since 1954 have made minor changes, eg, *Transfer of Land (Computer Register) Act 1989* (Vic) and updated legislative provisions referenced within them, with the current version now referencing 'section 121 of the *Local Government Act 2020*, section 158 of the *Water Act 1989*': *TLA 1958* (n 1) s 42(2)(d).

B *Do Debates on Other Priority Disputes Reveal Legislative Intent for Paramount Interests?*

Major reforms of 1954 arose from a five-year period of debate within the Statute Law Revision Committee. Paramount interest reforms were not the only proposals debated. The 1949 Bill proposed reform to priority between competing unregistered interests. Ultimately rejected,[61] had it succeeded, unregistered equitable interests would have enjoyed priority inter se in accordance with dates upon which they were caveated.[62] The radical proposal was designed to improve transparency by ensuring unregistered interests appeared on register and to deal with manifest concern over court cases applying general law priority rules in disputes between competing equitable interests which the 1949 Explanatory Paper described as unsatisfactory and causing uncertainty.[63]

Although the 1949 Bill failed, discussions around it are revealing. What is important for present purposes is the stark difference between parallel discussions within the Committee that drafted the *TLA 1954*. The difference reveals how drafters perceived priority between registered interests and paramount interests. It is abundantly clear the Committee, which included many lawyers, understood priority disputes between two unregistered interests in Torrens land were determined by general law priority rules.[64] Indeed, dissatisfaction with this was a catalyst for the 1949 Bill, which would have displaced general law priority rules for those disputes.[65]

Paradoxically, the Committee completely failed to consider the impact of general law priority rules at any point in its lengthy discussions on paramount interests concerning what became s 42(2) *TLA 1958*.[66] Yet it completely overhauled the paramount interest provision and the question of how it should be reshaped took up much space in its 10 reports. Had the Committee understood that general law priority rules determined priority for paramount interests vis-à-vis registered interests, this omission would seem odd. However, if the Committee intended paramount interests automatically to prevail, the omission makes perfect sense.

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[61] Statute Law Revision Committee, Parliament of Victoria, *Report on the Proposals contained in the Transfer of Land Bill 1953* (4 December 1953) 6 [8] adopting Ruoff's view it would enable 'the fast and the smart … to beat the slow and simple', 16–19, 30 (Mr Fox, Law Institute of Victoria) ('*1953 SLRC Report*'); Theodore BF Ruoff, 'An Englishman Looks at the Torrens System: Part 2 — Simplicity and the Curtain Principle' (1952) 26(3) *Australian Law Journal* 162, 165 ('An Englishman Looks at the Torrens System: Part 2'); Statute Law Revision Committee, Parliament of Victoria, *Final Report on the Transfer of Land Bill 1949* (17 July 1951) 31 (Mr Jessup, Registrar-General South Australia) ('*1951 SLRC Report*'); Statute Law Revision Committee, Parliament of Victoria, *Supplementary Report on the Transfer of Land Bill 1949* (19 August 1952) ('*1951–52 SLRC Supplementary Report*') 13 (Mr Ruoff, Assistant Land Registrar, HM Land Registry, England).

[62] 1949 Bill (n 53) cls 224 and 240, echoed in Law Reform Commission of Victoria, *Priorities* (Report No 22, April 1989) 12. See 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(2) *Melbourne University Law Review* 460, 488.

[63] 1949 Explanatory Paper (n 51) 2 [6] (referring to *Lapin v Abigail* (1930) 44 CLR 166).

[64] Ibid 2 [6]; *1951 SLRC Report* (n 61) 31 (Mr Jessup, Registrar-General South Australia), 75 (Mr Fraser), 78 (Mr Rylah); *1951–52 SLRC Supplementary Report* (n 61) 13 (Mr Ruoff, Assistant Land Registrar, HM Land Registry, England); *1954 SLRC Report* (n 56) 40 (Mr Adam).

[65] 1949 Bill (n 53) cl 240; *1953 SLRC Report* (n 61) 15–19; 1949 Explanatory Paper (n 51) 3–4 [6]–[7].

[66] Discussed below in Part IV.

It seems unfathomable that the Committee spent years debating replacement of general law priority rules for disputes between unregistered interests, without any time at all being devoted to why it was nonetheless appropriate to retain those same rules for paramount interests if that was indeed its legislative intent, especially when it focused most attention upon the latter. Even when debating the radical caveat priority proposal for unregistered interests, it was asserted that, by contrast, because they were already 'protected by the Act' paramount interest holders need not caveat nor register.[67] Likewise, the 1949 Bill had omitted tenancies and implied easements from the provision, but the Committee recommended their reinstatement because they 'should not have to protect their rights by caveat'.[68] This suggests paramount interest holders had nothing to gain by caveating. Surely if general law rules had been intended to determine priority for paramount interests, while not strictly necessary, caveats would nevertheless help establish notice under those priority rules, especially for non-possessory interests. However, a five-year Committee led by lawyers overlooked this point.

The overall impression is that the 1949–54 drafters assumed paramount interests simply bound the registered proprietor automatically without recourse to general law priority rules.[69] This explains why the Committee did not stop once to consider how general law priority rules would impact upon the protection it was so carefully crafting for paramount interests, despite the perception that general law priority rules posed a problem of such significance that it warranted a draft Bill to redesign priority between unregistered interests.

Conspicuous absence of reference to general law priority rules during debates reshaping the paramount interests provision stand in complete contrast with debates on general law priority rules in disputes between unregistered interests. This supports the conclusion that the legislative intent of the Committee was that paramount interests automatically prevailed over registered interests and should continue to do so. Moreover, while the Committee referred to cases between unregistered interests, in debates on paramount interests *Burke* was never mentioned, despite being decided 11 years prior. This suggests that the case was not viewed as contrary to the Committee's understanding of automatic priority.

C *Do Descriptions Indicate an Intention General Law Priority Rules Apply?*

1 *Words Describing How Paramount Interests Relate to Registered Interests*

Language describing the relationship between registered interests and paramount interests can provide clues about legislative intent concerning priority. Legislative history consistently confirms the general view registered proprietors took 'subject

[67] *1949 SLRC Report* (n 52) 6–8 (Mr Wiseman), 13 (Mr Wiseman), 19 (Mr Wiseman); *1953 SLRC Report* (n 61) 4 [5] (Committee), 28 (Mr Fox, Law Institute of Victoria), 12–14.

[68] *1953 SLRC Report* (n 61) 14 (Mr Rylah, Chairman).

[69] See above n 47 for clarification on 'equivalent'.

to' paramount interests.[70] Occasionally drafters were more ambiguous: registered title was '*not paramount* to … outstanding rates and taxes';[71] or paramount interests 'can get priority' over registered interests.[72] Stronger expressions were more common; paramount interests deserved to be 'preserved'[73] or 'protected' from indefeasibility.[74]

Vivid descriptions by influential Committee advisors clearly considered paramount interests enjoyed one-step automatic priority. Describing the combined clause as containing '*overriding*' interests, 1949 Bill draftsperson Wiseman summarised paramount interests as 'interests … *overriding the legal title* given by the certificate of title'[75] and explained all interests in the combined clause '*prevail* over the legal estate'.[76] 1954 Bill draftsperson Garran described paramount interests as 'binding'.[77]

Wiseman's 1931 text clearly favours automatic priority.[78] Commenting on *Tuckett v Brice*, which held that registered title '*cannot prevail* against easements existing though not expressed upon it',[79] Wiseman summarised the *only* relevant question: '[d]oes the easement exist?'[80] If so, it prevailed.[81]

Common expressions 'subject to' and 'protection' likely denoted automatic paramountcy since they were also employed to describe priority for fraud, boundary misdescription and prior certificates.[82] Remaining doubt is diminished by the descriptions 'overriding', 'binding' and 'prevailing'.

2 *Indications of Equivalent Status to Other Exceptions*

Another reason for absence of discussion about effects of general law priority rules on the efficacy of the paramount interest provision was that the Committee

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[70] Victoria, *Parliamentary Debates*, Legislative Council, 12 October 1904, 2183 (JM Davies), 2184 (Sir Henry Cuthbert); Victoria, *Parliamentary Debates*, Legislative Assembly, 7 September 1916, 1273 (Mr Lawson, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 22 November 1916, 2620–1; *1949 SLRC Report* (n 52) 19 (Mr Fraser, Chairman).

[71] *1953 SLRC Report* (n 61) 32 (Mr Rylah, Chairman) (emphasis added). See also at 24.

[72] *1951 SLRC Report* (n 61) 7 [18] (Committee).

[73] *Transfer of Land Statute Amending Act 1887* (Vic) s 13; 1949 Explanatory Paper (n 51) 3 [6], 18.

[74] 1949 Explanatory Paper (n 51) 18–19; Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 1954, 625, 629 (Mr Merrifield, Minister of Public Works) ('1954 Second Reading Speech'); *1949 SLRC Report* (n 52) 17–18 (Mr Wiseman), 20–21 (Mr Wiseman); *1951 SLRC Report* (n 61) 7 [18] (Committee), 79 (Mr Voumard, Chief Justice's Committee on Law Reform); *1953 SLRC Report* (n 61) 13–14 (Mr Rylah, Chairman; Mr Wiseman).

[75] *1953 SLRC Report* (n 61) 15 (Mr Wiseman) (emphasis added). See also 39 (Appendix A); *1951–52 SLRC Supplementary Report* (n 61) 12 (Mr Ruoff, Assistant Land Registrar, HM Land Registry, England); Theodore BF Ruoff, 'An Englishman Looks at the Torrens System: Part 1 — The Mirror Principle' (1952) 26(2) *Australian Law Journal* 118, 118–19 ('An Englishman Looks at the Torrens System: Part 1').

[76] *1953 SLRC Report* (n 61) 13 (Mr Wiseman) (emphasis added).

[77] *1954 SLRC Report* (n 56) 17 (Mr Garran).

[78] Wiseman (n 44) 99.

[79] *Tuckett v Brice* (1917) VLR 36, 60 (emphasis added).

[80] Wiseman (n 44), 111. See also *James v Stevenson* [1893] AC 162, 169.

[81] Wiseman (n 44), 111 (on *TLA 1928* (n 13) s 72).

[82] *1953 SLRC Report* (n 61) 13 (Mr Wiseman).

considered paramount interests had a status equivalent to recorded encumbrances or interests affected by fraud. The Committee therefore presumed that paramount interests prevailed by virtue of the Act, rather than at the whim of priority rules external to it.[83]

As early as 1916, Parliament clearly references their status as of equivalent importance to registered encumbrances: 'in addition to the encumbrances which appear on the face or the back of the certificate of title, there are other encumbrances which are not specified, but are made encumbrances by section 72'.[84] This view of early legislators was echoed by Latham CJ's 1938 dissent in *Burke*.[85] It was also itself an echo of the 1867 lament by notable early Victorian Torrens commentator Thomas à Beckett[86] that protection for tenants was 'almost equivalent to registration'.[87]

The 1949 Explanatory Paper made no distinctions between registered encumbrances, paramount interests or other exceptions. It simply listed all the interests protected by cl 104,[88] without hint of difference between operation of priority. In detailed explanations of the 1949 and 1954 Bills, neither parliamentary draftsperson indicated a two-step priority approach applied to some, but not all, exceptions to indefeasibility.[89] Instead, Garran indicated registered interests were paramount except for other registered interests, fraud or interests in cl 42(2).[90] The 1954 Second Reading Speech echoed his words: 'the estate of the registered proprietor is paramount except in the case of fraud or as against registered interests, or as against unregistered leases or easements or interests, referred to in [s 42(2)]'.[91] Discussing unpaid rates, the Committee Chair elaborated they 'would have a priority' over the registered estate in the same way as interests revealed by title search.[92]

The inescapable inference is that priority for paramount interests was intended to work in the same manner as for other exceptions: automatically. Explicit in the 1862 structure, this was intended to continue after 1954.

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83 See also Part III(A)(2) and n 47 for clarification on 'equivalent' in this context.

84 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 November 1916, 2621 (Mr Blackburn).

85 *Burke* (n 11) 9.

86 Thomas à Beckett was a law reporter, barrister, lecturer and judge.

87 Thomas à Beckett, *Introduction and Notes to the Transfer of Land Statute of Victoria* (1867, Baillière) 70.

88 1949 Explanatory Paper (n 51) 18 lists interests protected by combined cl 104:

1. Encumbrances notified in the register book.
2. Estate of a proprietor claiming the same land under a prior grant or certificate of title.
3. Any portion of the land included by wrong description in the grant or certificate of a proprietor not being a purchaser for value or one claiming through him.
4. The reservations, exceptions, conditions and powers (if any) contained in the Crown grant.
5. Rights under adverse possession.
6. Public rights of way.
7. Easements acquired by enjoyment or user.
8. Unpaid rates.
9. Unpaid taxes …

89 *1953 SLRC Report* (n 61) 13 (Mr Wiseman). See also n 90.

90 *1954 SLRC Report* (n 56) 15 (Mr Garran).

91 1954 Second Reading Speech (n 74) 628.

92 *1954 SLRC Report* (n 56) 14 (Mr Rylah, Chairman).

3 *Other References to General Law Priority Rules*

Other historical remarks on general or common law principles in disputes between registered and paramount interests relate to establishing the existence and scope of proprietary interests rather than priority.

In his 1867 text,[93] á Beckett asserted notice of tenants in possession affected purchasers '*in the same way as under the general law*'.[94] However, he was comparing Torrens outcomes with those under (recently superseded but familiar) general law by way of explanation, rather than suggesting old priority rules had a continuing role. Similarly, Mr Fox in 1953 explained tenants in possession were paramount interests because of the old rule that 'the fact [of] possession … is sufficient notice to all the world'.[95] Far from advocating application of general law priority rules, this explained why tenants were protected within the provision; the same rationale had informed older priority rules.

The Committee heard evidence that disputes between parties with competing equities had long been fought out in the courts,[96] and members remarked upon their reluctance to 'disturb the law of equity'.[97] However, these remarks do not pertain to disputes between paramount vis-à-vis registered interests. The discussion involved 1949 Bill cls 104 and 240; the latter being the radical proposal for priority between unregistered interests. It is undoubtedly cl 240 to which these members referred; the Committee contemporaneously mentioned *Abigail v Lapin*[98] and unregistered purchasers.[99] Finally, Ruoff's 1952 remark that Torrens did not rank non-registered interests,[100] also concerned priority between unregistered interests in cl 240.[101]

Nothing in the legislative history indicates any intention for general law principles to determine priority between registered and paramount interests. Instead, it strongly suggests *Perpetual* contradicts the legislatively intended one-step approach to priority. However, history can do more than just indicate *how* priority was intended to operate; it can also suggest *why* this was so, further informing a purposive interpretation of s 42(2) of the *TLA 1958*.

IV Policy behind Design of the Paramount Provision

Why did Parliament select the paramount interests listed in s 42(2) of the *TLA 1958*? The following analysis focuses on individual paramount interests to reveal the careful legislative balancing exercise that determined the extent to which priority

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[93] à Beckett (n 87) 18.
[94] Ibid 70 (emphasis added).
[95] *1953 SLRC Report* (n 61) 30 (Mr Fox). See also *1949 SLRC Report* (n 52) 19 (Mr Wiseman); *1953 SLRC Report* (n 61) 13–14 (Mr Wiseman; Mr Byrnes); Wiseman (n 44) 102, 108, 111.
[96] *1951 SLRC Report* (n 61) 78 (Mr Fraser). See also at 31 (Mr Jessup, Registrar-General South Australia).
[97] Ibid 78 (Mr Rylah).
[98] *Abigail v Lapin* (1934) 51 CLR 58.
[99] *1951 SLRC Report* (n 61) 75–8.
[100] *1951–52 SLRC Supplementary Report* (n 61) 13 (Mr Ruoff, Assistant Land Registrar, HM Land Registry, England).
[101] Ibid; Ruoff, 'An Englishman Looks at the Torrens System: Part 2' (n 61) 165.

was appropriate for various rights protected by s 42(2). From policy considerations inherent within that balance we can derive a conceptual framework to guide purposive interpretation of the provision.

Two fundamental characteristics justified inclusion as paramount interests: their nature as vulnerable private interests or public interests (Part IV(A)). Moreover, historical material demonstrates that the drafters finely balanced priority choices through twin justifications of discoverability and practicability (Part IV(B)).

A *Selection of Interests to be Protected*

All paramount interests are either particularly vulnerable private interests or public interests.

1 *Particularly Vulnerable Private Interests*

The Victorian provision includes private interests vulnerable to elimination by new registrations were it not for the exception: adverse possession;[102] implied or prescriptive easements;[103] and tenancies in possession.[104] Most are vulnerable because they cannot be registered.

Easements were recognised as paramount interests in 1862.[105] Adverse possession followed in 1866.[106] Inchoate titles of adverse possessors or long users would remain vulnerable until elapse of requisite periods,[107] when registration becomes possible.[108] Until then, without s 42(2)(b) and (d) they would be defeated by new registration. Convincing arguments for abolition aside,[109] while they continue to be recognised,[110] they are impossible to register in immature form.

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102 *TLA 1958* (n 1) s 42(2)(b).

103 Ibid s 42(2)(d). See also broad coverage of easements: *Land Titles Act 1980* (Tas) s 40(3)(e) ('*LTA 1980* (Tas)'); *Transfer of Land Act 1893* (WA) s 68(1A) ('*TLA 1893* (WA)'). In other jurisdictions, protection is narrower: providing exception for 'omitted' easements: *Land Title Act 2000* (NT) s 189(1)(c) ('*LTA 2000* (NT)'); *RPA 1900* (NSW) (n 38) s 42(2)(a1); *RPA 1866* (SA) (n 38) s 69(d). See also *Land Titles Act 1925* (ACT) s 58(1)(b) ('*LTA 1925* (ACT)'). Queensland only protects prior easements, previously recorded easements, or those omitted or misdescribed by registrar error: *Land Title Act 1994* (Qld) ss 185(1)(c), (3) ('*LTA 1994* (Qld)'). Narrowing meaning of 'omitted' easements: *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* (2013) 247 CLR 149. Prescriptive easements are not protected or recognised in all jurisdictions: below n 110.

104 *TLA 1958* (n 1) s 42(2)(e).

105 *RPA 1862* (Vic) (n 39) s 39.

106 *TLA 1866* (n 40) s 49.

107 In Victoria, 15 years (adverse possession) and 20 years (prescriptive easement): *Limitation of Actions Act 1958* (Vic) s 8; *Nelson v Hughes* [1947] VLR 227; *Sunshine Retail Investments Pty Ltd v Wulff* [1999] VSC 415 ('*Sunshine Retail*'); *Laming v Jennings* [2018] VSCA 335, [179]–[198] ('*Laming*').

108 *TLA 1958* (n 1) ss 60–2, 72(2).

109 Brendan Edgeworth, 'Adverse Possession, Prescription and their Reform in Australian Law' (2007) 15(1) *Australian Property Law Journal* 1, 23; Victorian Law Reform Commission, *Easements and Covenants: Final Report* (Report No 22, December 2010) 54–5 [4.85]–[4.88].

110 In Western Australia ('WA') and Victoria, prescriptive easements are protected: above n 107; *Maio v City of Stirling (No 2)* [2016] WASCA 45, [72]–[78]; *Maddi Developments Pty Ltd v Perpetual Trustees WA Ltd* [2019] WASC 253, [16]–[20]. Contra in New South Wales ('NSW'): *Williams v State Transit Authority NSW* (2004) 60 NSWLR 286, 297, 299–302. See also Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (Butterworths, 2nd ed, 2000) [11.16];

Tenancies in possession are susceptible to defeat by registration and were protected from 1866.[111] Victorian leases of less than three years cannot be registered.[112] Section 42(2)(e) is uniquely generous in protecting registrable leases and leases of any duration.[113] The 1949 Bill proposed to remove protection, effectively forcing tenants to caveat or register to protect their interests but was quickly abandoned due to their vulnerability. Weekly tenancies were common in Melbourne,[114] and the Committee felt it unfair to expect such short-term tenants to caveat.[115] The 1954 Bill therefore reinstated protection.

2 *Public Interests*

Remaining paramount interests are of a public nature. *TLA 1958* s 42(2) protects governmental interests in reservations in Crown grants;[116] public infrastructure in public rights of way;[117] and rights to unpaid rates and taxes.[118] Arguably existence of inconsistent legislation could sufficiently protect such interests. Indeed, besides Victoria, express protection for such rights is conferred only in Western Australia ('WA'), the Australian Capital Territory ('ACT') and Tasmania.[119] Other jurisdictions rely upon inconsistent legislation.[120] However, two reasons explain why express protection might have been warranted.

The first is abundance of caution. Legislation imposing a charge can override indefeasibility conferred by s 42(1), but the paramount interest removes any doubt. Second, not all unpaid rates and taxes are protected by statutory charge. Parliament

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Peter Butt, *Land Law* (Lawbook, 4th ed, 2001) [2071]. See similar conclusion in NT: Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31(1) *Melbourne University Law Review* 3, 24, 26, 28. Abolishing prescriptive easements unless created before 1975: *Property Law Act 1974* (Qld) s 198A. Doctrine of lost modern grant replaced with legislative statutory easements process: *LTA 1980* (Tas) (n 103) ss 138I–L. Doctrine not applicable in South Australia ('SA'): *Yip v Frolich* (2004) 89 SASR 467, 486 [89].

[111] *TLA 1866* (n 40) s 49.

[112] *TLA 1958* (n 1) s 66(1).

[113] In Victoria, tenancies of any length are protected: ibid s 42(2)(e); *Swan v Uecker* (2016) 50 VR 74 (Airbnb). Protection is more confined elsewhere, with maximum lease terms of 1 year (SA), 3 years (NSW, Qld, Tas, ACT and NT) and 5 years (WA): *RPA 1866* (SA) (n 38) s 69(h); *RPA 1900* (NSW) (n 38) s 42(1)(d); *LTA 1994* (Qld) (n 103) ss 185(1)(b), (2); *LTA 1980* (Tas) (n 103) s 40(3)(d)(ii); *LTA 1925* (ACT) (n 103) s 58(1)(d); *LTA 2000* (NT) (n 103) s 189(2)(b); *TLA 1893* (WA) (n 103) s 68(1A). Only prior leases are protected in SA, WA, the Australian Capital Territory ('ACT') and NSW. In NSW, the registered proprietor must have taken with notice of the lease. Possession is required in Victoria, WA, NT, and SA (Chambers (n 30) 508 [27.205]), but NSW also protects tenants 'entitled to immediate possession': *RPA 1900* (NSW) (n 38) s 42(1)(d). Not requiring possession: *LTA 1994* (Qld) (n 103) ss 185(1)(b), (2); *LTA 1925* (ACT) (n 103) s 58(1)(d). Note limited protection for equitable leaseholders: *LTA 1980* (Tas) (n 103) s 40(3)(d).

[114] *1953 SLRC Report* (n 61) 14 (Mr Byrnes); *1949 SLRC Report* (n 52) 19 (Mr Wiseman, Mr Schilling).

[115] See Part IV(B)(1) (b) and Part IV(B)(2)(c). Considered tenants for the purposes of s 42(2)(e) and therefore protected by it, buyers in possession comprised half of 1953 house sales: *1953 SLRC Report* (n 61) 29 (Mr Fox). See also Spagnolo and Rodrick (n 4) 843.

[116] *TLA 1958* (n 1) s 42(2)(a).

[117] Ibid s 42(2)(c).

[118] Ibid s 42(2)(f).

[119] *TLA 1893* (WA) (n 103) s 68(1A); *LTA 1925* (ACT) (n 103) ss 58(1)(f), (2); *LTA 1980* (Tas) (n 103) ss 40(3)(c), (g).

[120] *Orb Holdings Pty Ltd v WCL (Qld) Albert Street Pty Ltd* [2019] QSC 265, [112]–[126]; *City of Canada Bay Council v F&D Bonaccorso Pty Ltd* (2007) 71 NSWLR 424, 447–8, [84]–[88].

and the Committee recognised relevant Acts required passage of a specified overdue period before charges arose.[121] The *Local Government Act 1989* (Vic) s 181(1)(a) creates a charge only after amounts are three years overdue. Those overdue by a lesser period remain vulnerable and are mere choses in action.[122] The Committee recognised that these could not be protected by caveats.[123] Such rights cannot be registered, or even stand in a priority dispute. Statutory licences occupy a similar position and were protected from 1866 until 1954.[124]

The Committee assiduously protected the public purse.[125] Inclusion of reservations in Crown grants and public rights of way is unusual, although not uniquely Victorian.[126]

B *Balancing Priority between Registered and Paramount Interests*

Having identified grounds for selection, this section explores the extent to which paramount interests were considered worthy of priority; the policy behind balances struck by drafters.

In Victoria, tenancies and easements are generously protected; yet protection for rates and taxes is restricted. This distinction reveals much about policy rationale. Historical records show a balancing process was undertaken to define the degree to which priority was appropriate. That drafters were at pains to precisely balance competing registered and paramount interests belies any intent for a two-step priority system. Were that so, the Committee's five years would have been for naught since balances struck would be undone by general law priority rules.

The following analysis reveals that policy choices for priority between registered and paramount interests rested on the concept that it was fair to expect purchasers (registered proprietors) to make reasonable inquiries. Protection was justifiable where competing paramount interests were easily discoverable, and where it was practicable to expect purchasers to undertake investigations to reveal paramount interests, and/or impracticable for paramount interest holders to register or caveat. Thus protection, and its limits, turned on twin justifications of discoverability and practicability.

1 *Discoverability*

Most paramount interests are easily discoverable. That they were 'expected' or 'obvious' is repeated throughout the historical discourse. This supports the proposition that automatic priority was legislatively intended, because generic

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[121] Victoria, *Parliamentary Debates*, Legislative Assembly, 22 September 1915, 2507 (Mr Snowball); 1949 Explanatory Paper (n 51) 18; *1949 SLRC Report* (n 52) 31–2; *1953 SLRC Report* (n 61) 24 (Mr Fagan, Municipal Association of Victoria), 33–4 (Mr Rylah, Chairman; Messrs Brennan and Banks, Melbourne Metropolitan Board of Works), 39–43 (Appendix A).

[122] *1953 SLRC Report* (n 61) 34–5 (Mr Banks, Melbourne Metropolitan Board of Works; Mr McArthur).

[123] 1949 Explanatory Paper (n 51) 19; *1949 SLRC Report* (n 52) 32 (Mr Fraser).

[124] *TLA 1866* (n 40) s 49 protected mining licences, *TLA 1928* (n 13) s 72 other statutory licences/leases, but these were omitted from the *TLA 1954* (n 40) s 42(2).

[125] Although private rights were more vulnerable: *1953 SLRC Report* (n 61) 14 (Mr Wiseman).

[126] See above n 119.

discoverability can justify deemed (one-step) priority as opposed to a two-step approach reliant upon factual notice.

Ease of discoverability often led drafters to conclude it was fair to expect purchasers to discover the interest because the burden upon them was not too onerous when weighed against vulnerability of competing interests. Discoverability's importance in justifying priority is evident from historical records. The radical 1949 Bill sought to make unregistered interests discoverable by title search,[127] but never proposed paramount interests should be abolished, or registered or caveated to obtain priority (except tenancies).[128] They were considered so 'readily ascertainable' that their special protection remained untouched, although this meant not all unregistered interests could be revealed by title search.[129]

Architects of the 1949 and 1954 Bills explained this special treatment through the rationale of discoverability. Wiseman stated that '[t]he characteristic of all those [paramount interest] provisions is that the rights referred to are capable of fairly easy discovery'[130] and they overrode registered title because they were 'fairly easy to discover'.[131] Garran reasoned that paramount interests were discoverable by search of statutory authority registers or 'fairly obvious' from 'looking at the land itself'.[132] The 1954 Second Reading Speech described them as 'ascertainable' from statutory authority registers or 'inspection of the land'.[133]

Careful design of various paramount interests illustrates legislative preoccupation with discoverability as justification for legislatively deemed priority, perhaps most clearly with rates and taxes.

(a) *Unpaid Rates and Taxes*

Reforms to Victorian protection for unpaid rates and taxes clearly demonstrate drafters' concerns that, to gain priority, paramount interests must be easily discoverable. What began as blanket protection for 'any unpaid rates' in 1866[134] was lengthened in 1915.[135] The 1949 Bill proposed a return to the earlier, open-ended wording, adding only 'taxes'. The Committee rejected this. To ensure that protected rights were 'discoverable',[136] it preferred a more precise balance between protected government interests and burdens on purchasers. A laborious five-year enquiry scrutinised the extent to which amounts owed to statutory bodies were ascertainable and therefore deserving of protection.

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127 1949 Explanatory Paper (n 51) 2 [6].
128 Ibid 3 [6].
129 Ibid 18.
130 *1953 SLRC Report* (n 61) 13 (Mr Wiseman).
131 Ibid 15 (Mr Wiseman). See also Ruoff, 'An Englishman Looks at the Torrens System: Part 1' (n 75) 119.
132 *1954 SLRC Report* (n 56) 15 (Mr Garran).
133 1954 Second Reading Speech (n 74) 628.
134 *TLA 1866* (n 40) s 49.
135 *TLA 1915* (n 40) s 72, wording retained in consolidation: *TLA 1928* (n 13) s 72.
136 1949 Bill (n 53) cl 104(e).

Taxes were uncontroversial. They were 'so well known'[137] and easily discoverable that purchasers were expected to investigate them.[138] Moreover, taxes were certified to purchasers pursuant to legislation.[139] Outstanding rates were harder to discover,[140] but the Committee still considered that purchasers should make enquiries of statutory authorities and noted standard practice was to seek information from municipal councils.[141]

Yet the Committee did not stop there in drawing the line. It investigated exactly which amounts each statutory authority was legislatively required to disclose to prospective purchasers in binding certificates. It expressed concern over gaps in disclosure requirements and alarm that the *Local Government Act 1946* (Vic) s 385[142] did not require inclusion of road construction, paving or other incidentals in binding municipal certificates. Likewise, certificates issued under the *Sewerage Districts Act 1928* (Vic) were not binding.[143] It noted that blanket protection had enabled recovery from a purchaser of charges omitted from a binding municipal certificate.[144]

The Committee reshaped the balance in two ways. First, protection of unpaid rates was reduced to incentivise accurate disclosure by curtailing priority to amounts discoverable by purchasers from certificates issued pursuant to specified statutes, eliminating priority for omitted amounts.[145] Previously blanket protection was limited in s 42(2)(f) in the *TLA 1954*:

> any unpaid land tax, and also any unpaid rates and other charges which can be discovered from a certificate issued under section three hundred and eighty-five of the *Local Government Act 1946* section ninety-three of the *Sewerage Districts Act 1928* section three hundred and thirty-four of the *Water Act 1928* ...

Second, the Committee addressed carelessness in disclosure,[146] by recommending reforms to other statutes to precisely align the newly curtailed protection with binding disclosure responsibilities.[147]

The legislature intentionally reshaped protection according to discoverability via binding certificates.[148] It aimed to tilt the balance of priorities to reduce

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137 *1951 SLRC Report* (n 61) 30 (Mr Jessup, Registrar-General South Australia).

138 *1951 SLRC Report* (n 61) 30 (Mr Jessup, Registrar-General South Australia), 30 (Mr Fraser), 32 (Mr Rylah); *1949 SLRC Report* (n 52) 18 (Mr Wiseman). See also Ruoff, 'An Englishman Looks at the Torrens System: Part 1' (n 75) 120.

139 *1953 SLRC Report* (n 61) 5 [7(d)] (Committee), referring to *Land Tax Act 1928* (Vic) s 96.

140 *1949 SLRC Report* (n 52) 32 (Mr Wiseman); *1954 SLRC Report* (n 56) 15 (Mr Randles).

141 *1949 SLRC Report* (n 52) 31 (Mr Wiseman); *1951 SLRC Report* (n 61) 30 (Mr Jessup, Registrar-General South Australia).

142 *1949 SLRC Report* (n 52) 31 (Mr Wiseman).

143 *1953 SLRC Report* (n 61) 6 [7(d)] (Committee).

144 Ibid 24–5 (Mr Rylah, Chairman; Mr Randles; Messrs Rigby and Fagan, Municipal Association of Victoria) discussing *Shire of Braybrook v Robinson* [1920] VLR 552.

145 *1953 SLRC Report* (n 61) 24–5 (Messrs Rigby and Fagan, Municipal Association of Victoria).

146 Ibid 25 (Mr Rigby, Municipal Association of Victoria).

147 Ibid 6 [7(d)] (Committee), 35 (Mr McArthur).

148 1954 Second Reading Speech (n 74) 628; *1953 SLRC Report* (n 61) 6 [7(d)] (Committee); *1954 SLRC Report* (n 56) 53 [4] (Appendix A).

government protection,[149] and 'make it as easy as possible' for purchasers to ascertain information.[150] Amounts not readily discoverable were no longer protected. This uniquely Victorian formulation[151] essentially remains in *TLA 1958*.[152] Notably, preoccupation to precisely align protection with discoverability clearly demonstrates drafters believed it was *they* who were legislatively deeming where priority lay. Discoverability was key to that balance.

(b) *Tenants in Possession and Adverse Possession*

Treatment of adverse possession and tenancies in possession was consistent with rates and taxes; only discoverable interests deserved priority. The Committee recognised that possession (by tenants or adverse possessors) had been considered good notice at general law.[153] From its inclusion in 1866,[154] Victorian protection for adverse possession was never seriously challenged,[155] perhaps because adverse possession must be overt, thus discoverable.[156]

The 1949 Bill proposed removal of protection for tenancies in possession (and statutory licences).[157] Ironically, it was argued that tenants failed the justificatory principle of discoverability because it was 'very difficult to discover'[158] the identity of tenants, whether they were in possession, and the nature of their rights.[159] The proposal was rejected,[160] and protection for tenants retained in the *TLA 1954*.[161] Notably, in reaching this position, the Committee ignored general law priority rules. Instead, it balanced ease of discovery by purchasers against the burdens on tenants of alternative protective measures.[162] Due to their vulnerability, it was considered unfair to expect weekly tenants to caveat.[163] Given ease of land inspection by purchasers, the Committee concluded that tenants should enjoy priority.[164]

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149 *1953 SLRC Report* (n 61) 24 (Mr Rigby, Municipal Association of Victoria).
150 Ibid 27 (Mr Fagan, Municipal Association of Victoria).
151 Compare *LTA 1980* (Tas) (n 103) s 40(3)(g) ('any money charged on land under any Act').
152 *TLA 1958* (n 1) s 42(2)(f).
153 On tenants in possession, see above n 95. Concerning adverse possession: *1949 SLRC Report* (n 52) 19 (Mr Wiseman).
154 *TLA 1866* (n 40) s 49.
155 Strong objections were raised to reforms permitting registration of title acquired by adverse possession.
156 However, more difficult to discover is partial adverse possession, which might require precise measurement.
157 1949 Bill (n 53) cl 104. Statutory licences were removed: above n 124.
158 1949 Explanatory Paper (n 51) 19.
159 *1949 SLRC Report* (n 52) 19 (Mr Schilling), 20 (Mr Wiseman), 31 (Mr Wiseman).
160 *1951 SLRC Report* (n 61) 7 [18] (Committee), 78 (Mr Voumard); *1953 SLRC Report* (n 61) 4 [5].
161 *TLA 1954* (n 40). See also *TLA 1958* (n 1) s 42(2)(e). Options to purchase were excluded to overcome *McMahon v Swan* [1924] VLR 397: *1954 SLRC Report* (n 56) 16 (Mr Garran); 1954 Second Reading Speech (n 74) 629.
162 See Part IV(B)(2)(c).
163 *1951 SLRC Report* (n 61) 78 (Mr Rylah), 79 (Mr Voumard). See also *1949 SLRC Report* (n 52) 20 (Mr Wiseman) detailing Law Institute of Victoria objections to removing protection for small tenancies.
164 1954 Second Reading Speech (n 74) 629.

Victoria limits protection to tenants 'in possession', a feature also of West Australian, South Australian and Northern Territory ('NT') legislation.[165] This is perhaps influenced by the policy of discoverability. Leases not yet in possession are less easily ascertainable. The exception to tenancy protection further illustrates the delicacy of the balance struck and its rationale. Tenants did not gain priority against registered mortgagees unless their lease pre-dated the mortgage,[166] or the mortgagee's prior written consent was obtained.[167] This remains true today.[168] The exception makes sense given the policy basis for priority of discoverability and the counterbalanced weight of burdens on registered interest-holders. Most registered proprietors are expected to take reasonable steps to discover and prevent paramount interests from arising, but it is less fair to expect this of registered mortgagees that lack possessory rights until default.

(c) *Reservations in Crown Grants*

In Victoria, reservations within Crown grants are paramount interests.[169] These are ascertainable, although costly chain-of-title searches to discover them reinstates a problem that Torrens was designed to eliminate. Drafters lamented undermining this key Torrens aim,[170] but tolerated this nod to *nemo dat non quod habet* since the Crown could compulsorily acquire land in any event.[171] Nonetheless, discomfort over difficulty of discovery lingered. Crown reservations were not always noted on title,[172] and the prevalence of 'special railway conditions' caused great consternation.[173] Multiple attempts to tackle this proved fruitless. A warning clause within standard contractual terms was proposed, but abandoned after legislators realised the warning itself would preclude purchasers from refusing settlement after discovering a reservation.[174] Likewise, an attempt to insert standard warning on certificates of title failed,[175] for comically unrelated reasons.[176]

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[165] See above n 113.

[166] *Perpetual* (n 2); *Balanced Securities Ltd v Bianco* (2010) 27 VR 599 ('*Bianco*'). See *TLA 1928* (n 13) s 72; *TLA 1915* (n 40) s 72; *TLA 1890* (n 40) s 74; *TLA 1866* (n 40) s 49. See Wiseman (n 44) 108.

[167] Prior mortgagees not bound by registered leases without written consent: *RPA 1862* (Vic) (n 39) s 46; *TLA 1866* (n 40) s 75; *TLA 1890* (n 40) s 99; *TLA 1915* (n 40) s 131; *TLA 1928* (n 13) s 131; *TLA 1954* (n 40) s 66(2); *TLA 1958* (n 1) s 66(2). Purchasers from mortgagee under power of sale not bound by subsequent lease without written consent of the mortgagee: *TLA 1890* (n 40) s 118; *TLA 1915* (n 40) s 150; *TLA 1928* (n 13) s 150; *TLA 1954* (n 40) s 77(4); *TLA 1958* (n 1) s 74(4). See also *1949 SLRC Report* (n 52) 17; *1954 SLRC Report* (n 56) 20 (Mr Garran); *Bianco* (n 166).

[168] *TLA 1958* (n 1) s 66(2) and relevant words in s 77(4) removed by *Transfer of Land Amendment Act 2014* (Vic) ss 11, 15(a). See now *TLA 1958* (n 1) s 87C.

[169] *TLA 1958* (n 1) s 42(2)(a): 'reservations exceptions conditions and powers' in Crown grants.

[170] *1949 SLRC Report* (n 52) 21 (Messrs Reid, Wiseman, Schilling and McDonald); *1951 SLRC Report* (n 61) 45–56, especially 46 (Mr Reid; Mr Knight, Secretary to the Law Department; Mr Oldham, Chairman).

[171] Wiseman (n 44) 101; *Chirnside v Registrar of Titles* (1921) VLR 406, 411; à Beckett (n 87) 18.

[172] *1951 SLRC Report* (n 61) 31 (Mr Reid).

[173] Ibid 45 (Mr Reid).

[174] Victoria, *Parliamentary Debates*, Legislative Assembly, 16 September 1914, 1484–5 (Mr Blackburn, Mr Snowball, on Schedule, Table A contract of sale).

[175] Victoria, *Parliamentary Debates,* Legislative Assembly, 7 September 1916, 1273 (Mr Lawson, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 22 November 1916, 2620 (Mr Bailey).

[176] The *Transfer of Land Bill 1916* also dispensed with requirements that title certificates be produced on parchment. The two Houses disagreed on the warning, but parchment became so scarce that the

(d) *Easements and Public Rights of Way*

Normally, public rights of way are easily detected.[177] Unregistered easements less so. Victoria protects implied and prescriptive easements.[178] Inspection may not reveal rights to cross another's land,[179] yet only 'reasonable opportunity' to become aware is required.[180] Fiery legislative debates arose about the unfairness of prescriptive easements and adverse possession, but both interests were thought sufficiently discoverable to remain protected.[181]

2 *Practicability*

Alongside discoverability, historical records reveal that priority in Victoria was also guided by a second justificatory principle: practicability.

(a) *Non-Proprietary Rights*

Non-proprietary paramount interests were vulnerable to indefeasibility: unpaid rates not yet secured by a charge;[182] and (previously protected) mining licences.[183] In Victoria, non-proprietary rights cannot be caveated nor registered,[184] making it impracticable to protect them by other means. Drafters supported their protection to avoid detriment to the public purse.[185] Such rights must logically enjoy automatic priority. It would make no sense to include non-proprietary interests were this not so, since they would have no standing in a priority dispute against the registered interest, even one stripped of indefeasibility.[186] Two-step priority would render any legislatively intended protection worthless.

(b) *Lack of Writing*

The protection of vulnerable interests was often motivated by the impracticability of registration due to absence of evidence in writing.[187] Immature prescriptive easements cannot be registered in Victoria.[188] À Beckett explained their inclusion as

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Legislative Assembly relented, reluctantly discarding the warning: Victoria, *Parliamentary Debates*, Legislative Assembly, 22 November 1916, 2620 (Mr Bailey).

177 But see *Calabro v Bayside City Council* [1999] 3 VR 688, [3], [18]. The Calabros registered title to a narrow strip of land. The land had never been named as a street. Nonetheless the court ultimately held it was a public road.

178 See above nn 58, 107.

179 See, eg, *Sunshine Retail* (n 107) [82]–[86].

180 Ibid [126].

181 See above n 155.

182 *Local Government Act 1989* (Vic) s 181(1)(a).

183 See above n 124.

184 *TLA 1958* (n 1) s 89.

185 *1951–52 SLRC Supplementary Report* (n 61) 12 (Mr Rylah). While not held in the public interest, statutory licences were a source of government revenue.

186 Spagnolo and Rodrick (n 4) 869.

187 The same is true for exceptions such as fraud: Ruoff, 'An Englishman Looks at the Torrens System: Part 1' (n 75) 119.

188 See *Sunshine Retail* (n 107) [8] arguing, although unsuccessfully, that upon court declaration recognising acquisition they would obtain the right to register their prescriptive easement under *TLA 1958* (n 1) s 72(2).

'obvious' because they were 'evidenced by no writing' and 'incapable of registration'.[189] Inchoate adverse possessory rights lacked writing, thus it was considered impractical to require their registration.[190] Lack of writing also influenced protection of tenancies, since leases under three years cannot be registered in Victoria.[191] Originally, statute of frauds legislation required written evidence only for leases of three years or more.[192] The impracticability of registration for short-term oral leases thus further justified their protection.[193] Caveats were a potential solution for interests not evidenced in writing, but were counterproductive for inchoate adverse possession or immature prescriptive easements, as the caveat itself might stir owners into action.

(c) *Relative Practicability: Burden of Alternative Protection*

Another historical concern was the balance of inconvenience; burdens of inquiries expected of purchasers were weighed against burdens of alternative protective steps open to paramount interest holders. The abandoned 1949 proposal to remove their protection would have forced tenants to register or caveat.[194] This was thought unfairly onerous upon tenants due to the impracticality of a lack of written evidence in many cases, and the frequency of caveats for short-term tenants.[195] The 1954 Second Reading Speech recognised that to expect weekly tenancies or those leasing flats or rooms to caveat was impractical,[196] given the cost and effort relative to the modest value of short-term leasehold interests. By comparison, purchasers stood to protect interests of relatively larger value, by means of modest burdens of inspection.

Rates and taxes created a burden upon purchasers to enquire of multiple statutory authorities,[197] but this was appropriate given existing standard practice, such that '[n]o particular difficulty' was created by the requirement.[198] Drafters balanced this against the alternative burden; the recurring nature of rates and taxes would make it 'unreasonable to require a caveat to be lodged' by statutory authorities to guard the public purse were protection removed.[199] Thus, relative practicability justified retention of protection.

(d) *Clutter*

Another justification was avoidance of clutter on the Register.[200] For those interests whose details tended to fluctuate, continued protection was justified simply because

[189] à Beckett (n 87) 46.
[190] Contra, encumbrances 'created by any deed or writing' were registrable: *Transfer of Land Statute Act 1885* (Vic) s 41.
[191] *TLA 1958* (n 1) s 66(1).
[192] à Beckett (n 87) 83.
[193] *TLA 1958* (n 1) s 42(2)(e).
[194] *1951 SLRC Report* (n 61) 30 (Mr Jessup, Registrar-General South Australia).
[195] 1954 Second Reading Speech (n 74) 629.
[196] Ibid.
[197] *1953 SLRC Report* (n 61) 42–3 (Appendix C); *1954 SLRC Report* (n 56) 15 (Mr Garran).
[198] *1949 SLRC Report* (n 52) 31 (Mr Wiseman).
[199] 1949 Explanatory Paper (n 51) 18.
[200] Prompting reconsideration of entire 1949 Bill due to the 'evil' of clutter: Ruoff, 'An Englishman Looks at the Torrens System: Part 1' (n 75) 118; *1951 SLRC Report* (n 61) 32 (Mr Rylah); *1953*

it was 'impracticable to keep a record' of them on title.[201] The impracticability of clutter on the Register was another reason proposed removal of protection for tenants failed; it was 'absolutely impracticable that all tenancies, down to weekly tenancies, should go on [title]' as registered leases or caveats.[202] Likewise, it was 'undesirable to clutter up the Register' with fluctuating rates and taxes by requiring their registration,[203] rather than continued protection as a paramount interest.

(e) *Titles Office Workload*

The removal of some paramount interests threatened 'unreasonable amount[s] of additional work' for the Titles Office.[204] The removal of unpaid rates and taxes protection would have increased registrations or caveats.[205] Fears of worsening Titles Office workloads was further reason for rejection of the radical 1949 proposal to award priority in order of caveat between unregistered interests.[206]

Today, this seems a strange reason for shaping law reform. What has long been forgotten is that by 1949, the Victorian Titles Office was in a chaotic state of utter disorganisation — significant enough to prompt its complete structural overhaul. There were long delays before registration of lodged dealings.[207] In 1951, the Committee remarked on 'deplorable inefficiency'[208] within the Titles Office, such that certificates of title often could not be found and title searches were ineffective to disclose interests because 'months, and even years, elapse before many dealings lodged for registration are completed'.[209] Matters were so bad that it was feared the benefits of the Torrens system had been completely undermined.[210] After investigating causes of the delays,[211] the Committee deferred substantive law reform from 1949 until 1954 to allow for organisational overhaul.[212] By then, average registration time had reduced from five months to three weeks,[213] but any reforms with potential to increase Titles Office workloads were, understandably, deemed utterly impracticable.

SLRC Report (n 61) 19 (Mr Taylor, Registrar of Titles), 39 (Appendix A: Comments by Mr HD Wiseman on Articles by Mr TBF Ruoff in the *Australian Law Journal*).

201 *1953 SLRC Report* (n 61) 15 (Mr Wiseman).

202 *1951 SLRC Report* (n 61) 76 (Mr Rylah).

203 *1953 SLRC Report* (n 61) 5 [7(d)] (Committee).

204 Ibid.

205 Ibid. But see Part IV(B)(2)(a).

206 See 1949 Bill (n 53) cl 240; *1953 SLRC Report* (n 61) 19 (Mr Taylor, Registrar of Titles).

207 *1951 SLRC Report* (n 61) 38 (Mr Rogers, Law Institute of Victoria, citing *Law Institute Journal* articles), 78 (Mr Voumard).

208 Ibid 4 [5] (Committee). See also ibid 15–16 (Appendix: Report by Mr Jessup, Registrar-General of South Australia).

209 Ibid.

210 Ibid.

211 The main causes were the overlapping responsibilities of Registrar and Commissioner of Titles, and unwarranted Titles Office inquiries into potential competing equitable claims and stamp duties: ibid 4 [8], 5 [12], 15 (Appendix), 36 (Mr Rylah), 36 (Mr Fox), 42 (Mr Knight, Secretary to the Law Department); *1951–52 SLRC Supplementary Report* (n 61) 3 [3] (Committee). Mr Knight described the Commissioner as 'brood[ing] over the Department like a clucky hen' during questioning about reasons for 24,000 dealings for which registration was being delayed: ibid 24 (Mr Knight).

212 *1951 SLRC Report* (n 61) 5 [12]–[13] (Committee), 7 [18] (Committee), 79 (Mr Voumard), 82 (Mr Rylah); *1951–52 SLRC Supplementary Report* (n 61) 3 [4] (Committee).

213 1954 Second Reading Speech (n 74) 630.

V A Conceptual Framework for Victorian Paramount Interests and Its Implications

The above discussion identified the historical rationale behind the protection of paramount interests. Drafters consistently considered policy justifications to carefully balance competing interests, including non-proprietary rights, which underscores the inference that Parliament intended all paramount interests to enjoy automatic priority.

Interests identified as worthy of protection were either vulnerable private interests or public interests. Additionally, two principles justifying priority were discerned from historical records: discoverability and practicability. The legislative endeavour sought to determine which party could most efficiently and fairly bear the costs involved, and granted priority accordingly. This demonstrates a legislative search for the 'least-cost avoider' as the apex of an appropriate balance for priority.[214]

Discoverability helped weigh two potential burdens: burdens upon purchasers to investigate; and an alternative burden borne by putative paramount interest holders if protection were withdrawn. The latter were sometimes well-placed to bear that burden efficiently and fairly: such as well-resourced municipal councils could accurately disclose rates; for others, the burdens were too onerous or impracticable: such as requiring weekly tenants caveat every week. Where costs were borne by the particularly vulnerable, or by the public purse, fairness was of heightened importance, especially if discoverability was high, or practicability for putative paramount interest holders low. Balancing these factors gave drafters answers as to who deserved priority.

This represents a conceptual framework of policy justifications that can aid purposive interpretations in future.

A *Implications of Conceptual Framework for Perpetual Principle and Application to other Paramount Interests*

Drafters painstakingly arrived at carefully balanced allocations of relative costs and fairness between competing interests without once alluding to general law priority rules that, if applicable, would often completely reverse the legislatively desired balance. The only plausible conclusion is that the legislature intended paramount interests to enjoy absolute priority over registered interests. If Victorian drafters intended legislatively to deem automatic priority for all paramount interests according to the conceptual framework of policy justifications above, it follows that the *Perpetual* principle runs counter to a purposive interpretation of the *TLA 1958* s 42(2)(e) and is incorrect. Likewise, on a purposive interpretive approach, the *Perpetual* principle should not be extended by analogy to other paramount interests in s 42(2).

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[214] The party with lower costs of avoiding harm is the 'least-cost avoider', to which assignment of liability is more efficient: Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970).

The better approach would be for interpretation of the entire provision to align with legislative purpose. The construction of all s 42(2) paramount interests as automatically paramount in a manner consistent with the conceptual framework would restore internal coherence within the provision, and resolve the illogical differentiation between sub-s 42(2)(e) and the remainder of s 42(2).

Return to a one-step priority rule would also realign Victoria with all other Australian jurisdictions. Nonetheless, it is worth briefly contemplating whether legislation in other jurisdictions is similarly prone to a *Perpetual*-style misstep (Part V(D)).

B *Using the Conceptual Framework to Guide Purposive Interpretation*

The conceptual framework can guide interpretation. The need for this approach was mentioned in *Laming v Jennings*,[215] which queried whether s 42(2)(d) only protected long user periods accumulated after registration, or whether it extended to periods accumulated before a new registration so that long user periods subsisted and survived registration. The conceptual framework supports the latter, given that the policy rationale of protecting 'discoverable' interests vulnerable to elimination via registration was the policy for continued protection of prescriptive easements.[216] The final wording was intended only to clearly indicate re-inclusion of implied easements following the failed 1949 attempt to exclude them.[217] Contrary to conjecture in *Laming*,[218] the wording was not intended to impose temporal limitations on the protection of prescriptive easements.

C *Implications for Other Exceptions to Indefeasibility*

In the above discussion, I have assumed 'automatic' priority operates within other exceptions, and argued that the legislature intended the same approach for paramount interests. Elsewhere, Rodrick and I carefully compare treatment of priority under other exceptions and conclude that a one-step approach applies to them.[219]

However, doubts might be raised in relation to some instances of fraud: where priority has seemingly been determined in reliance on general law rules, despite application of the fraud exception. If so, it could not be said that the fraud exception always attracts one-step priority. False attestation or 'fraud on the registrar'

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215 *Laming* (n 107) [194].

216 Parts IV(A)(1), IV(B)(1)(d).

217 *TLA 1928* (n 13) s 72 words 'easements acquired by enjoyment or user or subsisting over or upon or affecting such land' had encompassed both implied and prescriptive easements. The 1949 Bill proposed 'easements acquired by enjoyment or user' to limit protection to prescriptive easements alone: 1949 Explanatory Paper (n 51) 18; *1951 SLRC Report* (n 61) 6 [17] (Committee). After the 1949 Bill was abandoned, re-inclusion of implied easements was indicated by the proposed wording 'howsoever acquired': *1951 SLRC Report* (n 61) 79–80 (Mr Voumard). The final wording 'any easements howsoever acquired subsisting over or upon or affecting the land' was intended to make this re-inclusion clearer: *1954 SLRC Report* (n 56) 54 (Appendix A).

218 *Laming* (n 107) [194].

219 Spagnolo and Rodrick (n 4) 857–60.

situations are cases in point. In *Hickey v Powershift Tractors Pty Ltd*, the fraud exception applied due to the mortgagee's false attestation, but as Mrs Hickey had wanted the loan and had received the advance, the equitable mortgage was upheld and the mortgagee awarded possession.[220] Similarly, in *Bank of South Australia v Ferguson*, a case involving falsified internal bank documentation, Mr Ferguson had wanted the loan and received the monies.[221] Although fraud was not made out, the High Court speculated that, if it had been, relief would have been conditional upon restitutio in integrum of loan monies.[222]

The question to be resolved is whether these cases buck the one-step approach. On closer inspection, they do not. In both, fraud was not the only exception in play. The equitable mortgages also enlivened the in personam exception, although not expressly mentioned. While each exception would attract the one-step approach in isolation, where multiple exceptions are invoked, one may 'trump' the other to produce a different outcome than might otherwise result.[223] Notably, general law priority rules remain irrelevant.

D *Implications for Other Jurisdictions: Does the* **Perpetual** *Principle Pose a Risk?*

It is easy to discount *Perpetual* as an anomaly sparked by peculiarly Victorian legislation. The Victorian provision is comparatively broad (covering matters omitted in many jurisdictions)[224] and generous (scope of protection for tenants in

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220 *Hickey v Powershift Tractors Pty Ltd* (1999) NSW ConvR ¶55-889, 56,942.
221 *Bank of South Australia v Ferguson* (1998) 192 CLR 248.
222 Ibid 259.
223 Spagnolo and Rodrick (n 4) 857 n 94.
224 The scope of protection for interests of a similar nature to those listed in the Victorian paramount interest provision varies significantly: *TLA 1958* (n 1) s 42(2) (Crown reservations; adverse possession; public rights of way; easements; tenants in possession; unpaid rates and taxes); *RPA 1900* (NSW) (n 38) s 42(1) (easements, tenancies, profits à prendre); *LTA 1994* (Qld) (n 103) s 185(1) (leases, easements, adverse possession, specified statutory access rights such as geothermal tenure); *LTA 2000* (NT) (n 103) s 189(1) (leases, easements); *RPA 1866* (SA) (n 38) s 69 (easements, adverse possession, leases); *LTA 1980* (Tas) (n 103) s 40(3) (Crown reservation, water body rights, public right of way, tenants in possession, easements, statutory charge, adverse possession, compulsory acquisition); *TLA 1893* (WA) (n 103) s 68(1A) (Crown reservation, adverse possession, public rights of way, easements, unpaid rates, statutory mining leases/licences, tenants in possession); *LTA 1925* (ACT) (n 103) s 58(1) (easements, leases, Territory granted licences, unpaid duties, rates and taxes), s 58(2) (reservations in Crown grants). Note the abolition of adverse possession claims in ACT and Northern Territory ('NT'): *LTA 1925* (ACT) (n 103) s 69; *LTA 2000* (NT) (n 103) s 198. Adverse possession is recognised in SA in very limited situations: see Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th ed, 2020) 184–5 [3.400]. In NSW (except old titles converted to Torrens), no exception exists for inchoate adverse possession due to s 45C, although an adverse possessor who has entirely accrued the requisite possession in the period following registration of the fee simple that the adverse possessor seeks to extinguish can register pursuant to *Real Property Act 1900* (NSW) s 45D. Queensland's protection of adverse possession is restricted to matured adverse possessory rights entitled to registration: *LTA 1994* (Qld) (n 103) s 185(1)(d). By contrast, Victoria, WA and Tasmania preserve both inchoate and matured adverse possessory rights against new registered proprietors: *LTA 1980* (Tas) (n 103) s 40(3)(h); *TLA 1958* (n 1) s 42(2)(b); *TLA 1893* (WA) (n 103) s 68(1A).

possession and easements).[225] So far, no *Perpetual*-style cases have arisen in other jurisdictions, but that does not guarantee their legislation is not prone to similar interpretive folly. After all, before 2010, Victorian tenants were widely thought to enjoy automatic priority.

Some legislative wording clearly militates against this possibility. South Australian legislation expressly deems automatic priority for leases of up to one year, since leaseholder's interests 'prevail' over registered interests.[226] By contrast, New South Wales ('NSW'), WA, the ACT and (other than leases) SA merely list paramount interests as 'exceptions' to indefeasibility,[227] or state registered interests are 'subject to' paramount interests.[228] It will be recalled the Victorian s 42(2) also states land is 'subject to' paramount interests. Consequently, none of these jurisdictions are immune.[229]

Wording of Queensland and NT legislation actually specifies that, vis-à-vis paramount interests, registered proprietors 'do not enjoy the benefit' of sections conferring indefeasibility.[230] Likewise, Tasmanian registered proprietors are expressly 'not indefeasible' vis-à-vis listed interests.[231] Such wording appears consistent with the *Perpetual* principle that registered title is stripped of indefeasibility by the exception, leaving a justificatory lacuna for priority. Arguably, this indicates Queensland, the NT and Tasmania could be *Perpetual* prone. Yet their legislative structures suggests that a two-step test that resorts to general law priority rules does not necessarily follow.[232] Tasmanian legislation includes fraud in the same subsection listing paramount interests against which registered title is 'not indefeasible'.[233] As interests affected by fraud undoubtedly attract automatic priority,[234] the words 'not indefeasible' cannot preclude automatic priority for paramount interests. A similar conclusion arises from the Queensland and NT structure, since the subsection listing paramount interest exceptions also restates the in personam exception.[235] Thus, the risk created by more prone legislative wording in these jurisdictions is mitigated slightly by contextual indications which hint that expressions that registered proprietors 'do not enjoy the benefit' of indefeasibility do not necessarily denote two-step priority.

The argument against NSW, SA or ACT being *Perpetual*-prone is stronger. A structural divide exists between NSW, the ACT and SA on the one hand, and WA

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225 Most Australian jurisdictions more narrowly define protected easements and leases: above nn 103, 110 (easements), 113 (tenancies). Conversely, Victoria omits some interests that other jurisdictions protect, eg, mining, geothermal and water rights (Queensland, ACT, WA): above n 224.

226 *RPA 1866* (SA) (n 38) s 69(h): 'the title of the tenant under such lease… *shall prevail*' (emphasis added).

227 Using 'except': *RPA 1900* (NSW) (n 38) s 42(1); *LTA 1925* (ACT) (n 103) s 58(1).

228 Using 'subject to': *TLA 1958* (Vic) (n 1) s 42(2); *RPA 1866* (SA) (n 38) s 69; *TLA 1893* (WA) (n 103) s 68(1A); *LTA 1925* (ACT) (n 103) s 58(2).

229 Except for South Australia, but only in regard to leases of up to one year.

230 *LTA 1994* (Qld) (n 103) s 185(1); *LTA 2000* (NT) (n 103) s 189(1).

231 *LTA 1980* (Tas) (n 103) s 40(3).

232 Conceivably, identical priority might not have been intended for all subsections, but one would anticipate legislative indication were this so.

233 *LTA 1980* (Tas) (n 103) s 40(3).

234 'Automatic' priority for the fraud exception is further discussed above in Part V(C).

235 See, eg, *Tara Shire Council v Garner* [2003] 1 Qd R 556, 564 [23], 585 [90].

and Victoria on the other. As discussed earlier in Part III(A)(3), the Victorian 1954 'big split' shifted exceptions that undoubtedly attract automatic priority (fraud, boundary misdescription and prior certificates) into a different subsection, leaving paramount interests in splendid isolation from their historic neighbours. Western Australian legislation follows a similar split structure to that of Victoria.[236] However, fraud appears within the same subsection as paramount interests in NSW and the ACT,[237] and in the same (undivided) section in SA.[238] Likewise, these jurisdictions retain paramount interests bundled together with exceptions for boundary misdescription and prior certificates.[239] Thus, the structure in these three jurisdictions better preserves the historic connection between these exceptions, providing some protection against a *Perpetual*-style interpretation. While Part III demonstrated it was not intended to signal a two-step priority test, regrettably the Victorian split may have inadvertently contributed to the chain of unfortunate events culminating in the *Perpetual* principle. The same split therefore renders WA particularly vulnerable.

VI Conclusion

Victorian Torrens legislative history provides solid grounds for concluding that paramount interests were intended to enjoy automatic priority over registered interests without resort to general law priority rules. Drafters believed they had deemed when paramount interests were to prevail over registered interests. Rules outside the Torrens system were not intended to play a role in their priority. Instead, the legislative intent was that priority was automatically deemed by s 42(2), and this was justified by balancing interconnected rationales that pinpointed which paramount interests should be protected (vulnerable private interests or public interests), and to what extent (discoverability and practicability).[240] It is contended that this conceptual framework was utilised to identify 'least cost avoiders', and a fair and appropriate division of burdens between competing interests in a way that can still guide interpretation of the provision today.

It follows that *Perpetual* was incorrect. It ignored historical records that would have revealed the two-step priority approach was not intended by the legislature. A purposive approach would have avoided reintroduction of general law

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[236] *TLA 1893* (WA) (n 103) s 68(1) (fraud, registered encumbrances, prior certificate, misdescribed boundaries), s 68(1A) (grant reservations, adverse possession, public rights of way, easements, tenants in possession, unpaid rates, statutory mining leases or licences).

[237] *RPA 1900* (NSW) (n 38) s 42(1) (fraud, prior certificate, easement, profit à prendre, boundary misdescription, and tenancies); *LTA 1925* (ACT) (n 103) s 58(1) (fraud, prior certificate, easements, boundary misdescription, leases, Territory grants (lease/licence), unpaid duties, rates and taxes).

[238] *RPA 1866* (SA) (n 38) s 69 (fraud, forgery/disability, boundary misdescription, easements, prior certificate, adverse possession, leases, and mortgagee's verification failure). But see, regarding adverse possession, n 224.

[239] See above nn 237–8, although grant reservations are separate in s 58(2) *LTA 1925* (ACT) (n 103) (see n 224).

[240] See also Robert Chambers, *An Introduction to Property Law in Australia* (Thomson Reuters, 3rd ed, 2013) 567 [33.205]–[33.210] (concluding that adverse possession and tenants in possession 'readily discoverable' thus justified, but less discoverable easements possibly justified because dominant tenement costs of removal outweigh servient tenement maintenance costs). This is consistent with a least cost avoider approach.

rules in priority disputes involving tenants in possession. Unless otherwise indicated, solutions external to the Torrens system should be avoided lest the 'simplicity of the Torrens System […] be destroyed by the importation … of the esoterics … of the general law'.[241]

Unfortunately, absence of reference to legislative history is not unique to *Perpetual*. Apart from the passing allusion by Latham CJ, legislative history was not drawn upon in *Burke* and *Barba*. In this article, I also contended that the rationes decidendi of those High Court of Australia decisions do not support the *Perpetual* principle in any event.

The Victorian situation stands as a salient tale of woe, and reminder that historical analysis can underpin a purposive interpretation to avoid such interpretive mishaps. Examination of historical intent can even guide a more cohesive and coherent interpretation that aligns with related legislative provisions, and provide a better understanding of how provisions operate in tandem. It is to be hoped that historical perspectives will not be overlooked in future decisions on paramount interests.

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241 Ruoff, 'An Englishman Looks at the Torrens System: Part 2' (n 61) 165.