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**THE PERPETUAL TRUSTEE CO LTD V SMITH PRIORITY  
PARADOX: JUST HOW PARAMOUNT ARE  
PARAMOUNT INTERESTS?**

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*The purpose of this article is to explain and critique how courts have interpreted the paramount interest provisions in Torrens system legislation. The discussion pivots around Perpetual Trustee Co Ltd v Smith (‘Perpetual’), which concerned ‘the interest of a tenant in possession’ in the Transfer of Land Act 1958 (Vic) section 42(2)(e), an exception to indefeasibility recognised in all Australian jurisdictions to varying extents. We analyse the two High Court cases upon which the Court in Perpetual relied and critically compare the ‘two step manner’ in which the Court analysed priority under section 42(2)(e) with the ‘one step manner’ in which priority is dealt with in other exceptions to indefeasibility. Proceeding on the assumption that the interpretation of section 42(2)(e) adopted in Perpetual is correct, we consider whether the judges characterised the parties’ interests correctly and whether Perpetual’s approach to section 42(2)(e) could, and should, be taken to other paramount interests.*

## I INTRODUCTION

All Australian jurisdictions regard the registered proprietor of an interest in Torrens system land as obtaining an indefeasible title immediately upon registration.<sup>1</sup>

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1 Earlier in the history of the Torrens system, deferred indefeasibility was considered to be the correct approach: *Gibbs v Messer* [1891] AC 248; *Clements v Ellis* (1934) 51 CLR 217. Deferred indefeasibility enjoyed a brief

Courts consistently affirm that it is ‘registration and not its antecedents’ which ‘is effective to vest and to divest title and to protect the registered proprietor against adverse claims’.<sup>2</sup> Such protection is afforded upon registration even where a prospective purchaser fails to inquire or ascertain the circumstances in which the registered proprietor with whom they are dealing became registered, or takes with notice of a trust or prior unregistered interest, notwithstanding that the rules of law or equity may have provided to the contrary.<sup>3</sup> Indeed, abolition of the doctrine of notice was one of the main and distinguishing features of the Torrens system.<sup>4</sup>

However, Torrens system statutes in all Australian jurisdictions contain statutory exceptions to indefeasibility, and courts have recognised two further exceptions, one that arises from the personal actions of the registered proprietor or their agent (the *in personam* exception)<sup>5</sup> and another that results from a longstanding law of statutory interpretation (the inconsistent legislation exception).<sup>6</sup> The statutory exceptions include a list of paramount interests, which are interests<sup>7</sup> to which Torrens system land is expressed to be subject.<sup>8</sup>

This article is concerned with the statutory paramount interest exceptions, and will focus on the Victorian legislation. Although not the primary focus of this article, the arguments developed below may also bear relevance to the interpretation of the Torrens legislation in other jurisdictions within Australia, to the extent that they protect similar interests, should similar interpretive questions arise. Our analysis has been prompted by cases that interpret the Victorian provisions, and therefore concentrates primarily upon Victorian legislation. Legislative differences naturally warrant that an appropriate degree of caution be exercised in applying our analysis to the interpretation of Torrens legislation in other jurisdictions.

Section 42(2) of the *Transfer of Land Act 1958* (Vic) (*TLA*) contains the paramount interest list for Victoria. It provides:

Notwithstanding anything in the foregoing the land which is included in any folio of the Register or registered instrument shall be subject to –

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

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renaissance in Victoria following the decision in *Chasfild Pty Ltd v Taranto* [1991] 1 VR 225, but it was short-lived: see *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188.

2 *Frazer v Walker* [1967] 1 AC 569, 580, 584 (Lord Wilberforce for the Board) (*‘Frazer’*).

3 *Land Titles Act 1925* (ACT) s 59 (*‘ACT TLA’*); *Real Property Act 1900* (NSW) s 43(1) (*‘NSW RPA’*); *Land Title Act 2000* (NT) s 188(2) (*‘NT TLA’*); *Land Title Act 1994* (Qld) s 184(2) (*‘QLD TLA’*); *Real Property Act 1886* (SA) ss 186–7 (*‘SA RPA’*); *Land Titles Act 1980* (Tas) s 41 (*‘Tas TLA’*); *Transfer of Land Act 1958* (Vic) s 43 (*‘Vic TLA’*); *Transfer of Land Act 1893* (WA) s 134 (*‘WA TLA’*).

4 The principles upon which the Torrens system rests are succinctly summed up by Ruoff as the mirror and curtain principles: Theodore BF Ruoff, ‘An Englishman Looks at the Torrens System Part I: The Mirror Principle’ (1952) 26(2) *Australian Law Journal* 118 (*‘Mirror Principle’*); Theodore BF Ruoff, ‘An Englishman Looks at the Torrens System Part II: Simplicity and the Curtain Principle’ (1952) 26(3) *Australian Law Journal* 162.

5 Some Australian jurisdictions now expressly provide for the *in personam* exception in their Torrens legislation: see *NT TLA* (n 3) s 189(1)(a); *QLD TLA* (n 3) s 185(1)(a).

6 See, eg, *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603; *Calabro v Bayside City Council* [1999] 3 VR 688 (*‘Calabro’*).

7 As explained below, not all of these paramount interests are proprietary in nature.

8 *ACT TLA* (n 3) s 58; *NSW RPA* (n 3) s 42(1); *NT TLA* (n 3) s 189; *QLD TLA* (n 3) s 185(1); *SA RPA* (n 3) s 69; *Tas TLA* (n 3) s 40(3); *Vic TLA* (n 3) s 42(2); *WA TLA* (n 3) s 68(1).

- (b) any rights subsisting under any adverse possession of the land;
- (c) any public rights of way;
- (d) any easements howsoever acquired subsisting over or upon or affecting the land;
- (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 121 of the *Local Government Act 2020*, section 158 of the *Water Act 1989* 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 recorded as encumbrances on the relevant folio of the Register.

Since the land itself is expressed to be subject to these paramount interests, all registered proprietors are subject to them, not only registered proprietors of the fee simple.<sup>9</sup>

The purpose of this article is to explain and critique how courts have interpreted and applied the paramount interest provisions. The discussion pivots around *Perpetual Trustee Co Ltd v Smith* ('*Perpetual*'),<sup>10</sup> which concerned 'the interest ... of a tenant in possession' in section 42(2)(e) of the *TLA*. Such an exception to indefeasibility for tenancies is recognised in all Australian jurisdictions to varying extents, with Victorian legislation providing the most expansive protection.<sup>11</sup> *Perpetual* purported to follow two earlier High Court decisions, which were also concerned with tenants in possession. The approach taken by these cases to the interpretation of section 42(2)(e) is outlined in Part II of this article and analysed in Part III. Part IV critically compares the manner in which these cases analysed priority under section 42(2)(e) with the manner in which priority is dealt with in other exceptions to indefeasibility. Proceeding on the assumption that *Perpetual* approached section 42(2)(e) in the correct manner, Part V questions whether the judges characterised the interests of the parties correctly under general law. Finally, Part VI considers whether the *Perpetual* approach to section 42(2)(e) could, and should, be taken to all the other paramount interests listed in section 42(2).

9 However, timing constraints (discussed below) and other issues may preclude or qualify the impact of a paramount interest. In addition, some paramount interests might not directly affect registered proprietors of certain types of interests. This may follow from the nature of the rights involved (proprietary, non-proprietary; possessory, non-possessory), since in some situations there may be no real 'competition' between them. For example, the rates and taxes exception might not directly affect the holder of a registered easement.

10 (2010) 186 FCR 566 ('*Perpetual*').

11 In Victoria, tenancies in possession of any length are protected: *Vic TLA* (n 3) s 42(2)(e). Elsewhere, protection is more confined. The maximum term for protected leases in the other jurisdictions is one year (South Australia ('SA')), three years (New South Wales ('NSW'), Queensland ('Qld'), Tasmania ('Tas'), the Australian Capital Territory ('ACT') and the Northern Territory ('NT')) or five years (Western Australia ('WA')): *SA RPA* (n 3) s 69(h); *NSW RPA* (n 3) s 42(1)(d); *QLD NTA* (n 3) s 185(1)(b), (2); *Tas LTA* (n 3) s 40(3)(d)(ii); *ACT LTA* (n 3) s 58(1)(d); *NT LTA* (n 3) s 189(2)(b); *WA TLA* (n 3) s 68(1A).

## II THE PARAMOUNT INTEREST LANDSCAPE: DECISIONS ON TENANTS IN POSSESSION

### A *Perpetual Trustee Co Ltd v Smith*

#### 1 *The Facts*

The case concerned a reverse mortgage facility known as the ‘Money for Living’ Scheme, whereby retirees would use the equity in their home to generate an income stream during their retirement. To that end, Money for Living Property Holdings Pty Ltd (‘MFL’)<sup>12</sup> arranged to buy houses from a number of retirees in return for a package comprised of the following benefits: payment to the retirees of a lump sum, payment of an annuity in monthly instalments for a fixed period, and the right to remain in their homes for the duration of their lives or until they had vacated the property for a period exceeding six months. To fund its purchase of the retirees’ properties, MFL entered into loans with Perpetual, secured by registered first mortgages over the homes. The agreement under which each vendor retiree was permitted to continue occupation as a tenant after purchase of the home by MFL was entered into ‘before execution of the mortgage to Perpetual, before payment under the mortgage, and before registration of the transfer and the mortgage’.<sup>13</sup> In most cases, registration of the transfers to MFL occurred on the same date as registration of the mortgages to Perpetual.

When MFL subsequently defaulted on the mortgages and Perpetual sought to exercise its power of sale, numerous retirees issued class action proceedings to protect their interests. Most settled, but the remaining retirees claimed that they each had a lease for life and an equitable vendor’s lien securing the unpaid balance of the purchase price, and that Perpetual’s registered mortgages were subject to both these interests. In respect of the leases, they argued they were ‘tenants in possession’ for the purposes of section 42(2)(e) of the *TLA*<sup>14</sup> at the time Perpetual acquired its interest as a mortgagee, and that this provision gave them absolute priority over the mortgages. For its part, Perpetual argued that it had an indefeasible title to its mortgages, and thus it was not subject to the leases or the vendors’ liens. Accordingly, it was entitled to sell the properties with vacant possession.

The Federal Court of Australia, both at first instance and on appeal, held that the retirees’ vendors’ liens were independent of their tenancies,<sup>15</sup> such that section 42(2)(e) did not render them an exception to indefeasibility.<sup>16</sup> Accordingly, the liens did not have priority over Perpetual’s registered mortgages. This aspect of the case is irrelevant to paramount interests and will not be considered further in this article.

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12 Although not relevant for present purposes, the scheme was operated by Money for Living (Australia) Pty Ltd and Money for Living Property Holdings Pty Ltd (‘MFL’).

13 *Perpetual* (n 10) 578 [36] (Moore and Stone JJ).

14 The case at first instance concerned properties in Victoria and Tas but all of the properties relevant to the appeal were located in Victoria: *Perpetual* (n 10) 578 [37] (Moore and Stone JJ).

15 That is, the liens were not part of the retirees’ interests as tenants in possession.

16 *Perpetual* (n 10) 588 [79] (Moore and Stone JJ), citing *Haslam v Money for Living (Aust)* (2008) 172 FCR 301, 335 [106] (Middleton J) (‘*Haslam*’).

The Court then considered the retirees' status as tenants in possession. This raised two broad issues: the meaning and ambit of the phrase 'tenant in possession' in section 42(2)(e), and the timing of the retirees' leases vis-a-vis Perpetual's mortgages.

## 2 Meaning of 'Tenant in Possession' in Section 42(2)(e)

Perpetual argued that the retirees could not be 'tenants' because a lease for life has an indefinite term and is therefore void for uncertainty under *Lace v Chantler*, which requires that a valid lease must be for a certain term.<sup>17</sup> The Court rejected this argument and affirmed that the retirees had valid leases for life which fell within the protection afforded by section 42(2)(e).<sup>18</sup> The Court adopted the reasoning of the trial judge who said:

I see no reason to depart from the views expressed by Gobbo J in *Greco v Swinburne Ltd* [1991] 1 VR 304 that a lease for life or lives is not void for uncertainty. Whilst the essential characteristic of a fixed term lease is that it must be of a specified maximum duration, this rule may not apply to periodic leases or leases for life ...<sup>19</sup>

This aspect of the decision was consistent with the longstanding, generous interpretation given to the phrase 'tenant in possession' in section 42(2)(e). Previous cases had affirmed that the phrase 'tenant in possession' is 'not intended to apply merely to a tenancy as commonly understood',<sup>20</sup> but should be construed widely to include 'any person in actual occupation of the land ... provided ... his occupation is referable to a tenancy of some sort, whether at will or for years'.<sup>21</sup> Thus, the provision has been held to protect both a purchaser granted possession by the vendor and therefore only a tenant at will,<sup>22</sup> and 'a vendor who remains in possession until the purchase price is paid: he is a tenant "whatever might be the legal denomination of the tenancy"'.<sup>23</sup> Holders of life estates have also been held to fall within the definition.<sup>24</sup>

17 [1944] KB 368, 370 (Lord Greene MR).

18 *Perpetual* (n 10) 581 [50] (Moore and Stone JJ).

19 *Haslam* (n 16) 317 [23] (Middleton J).

20 *Australian Securities Investment Commission v Money for Living (Aust) Pty Ltd (admin apptd) [No 2]* (2006) 155 FCR 349, 355 [24] (Finkelstein J) ('*Money for Living [No 2]*').

21 *Downie v Lockwood* [1965] VR 257, 259 (Smith J) ('*Downie*'), quoting *Burke v Dawes* (1938) 59 CLR 1, 17 (Dixon J) ('*Burke*').

22 *Money for Living [No 2]* (n 20), 355 [24] (Finkelstein J), citing *Robertson v Keith* (1870) 1 VLR(E) 11. Such a purchaser is protected in respect of their equitable ownership.

23 *Money for Living [No 2]* (n 20), 355 [24] (Finkelstein J), citing *The Commercial Bank of Australia Ltd v McCaskill* (1897) 23 VLR 10, 12 (Hodges J). In the latter case, the purchaser had managed to obtain the certificate of title to land even though he had not paid the balance of the purchase monies and was not due to do so for some time. In the meantime, the vendor remained in possession of the property and was held to be a tenant in possession pursuant to the predecessor to section 42(2)(e). As such, the vendor's interest had priority over the mortgage that the purchaser had given to the bank by way of deposit of title deeds.

24 *Money for Living [No 2]* (n 20), 355 [24] (Finkelstein J), citing *Black v Poole* (1895) 16 ALT 155, which 'held that an equitable life estate prevailed over a subsequent registered interest'. At first instance, Middleton J was also prepared to construe the retirees' tenancy agreement 'as though it were a grant of a freehold life tenancy': *Haslam* (n 16) 317 [24] (Middleton J).

### 3 Timing Qualification

There was a further issue as to whether the retirees' leases came into existence prior to the creation and registration of Perpetual's mortgages. This was relevant for two reasons: whether the retirees enjoyed the protection conferred by section 42(2)(e) and, if so, how the priority dispute between their leases and Perpetual's mortgages was to be resolved.

As regards the first aspect, it might be arguable that section 42(2)(e) would only apply if the retirees' leases had pre-dated Perpetual's mortgages. Unlike provisions in South Australia, Western Australia, the Australian Capital Territory and New South Wales, which expressly adopt a timing qualification in relation to leases,<sup>25</sup> this notion is not explicit in the Victorian provision, which simply states the land is subject to the paramount interest without stipulating that the lease must arise before the registered interest in order to attract the statutory exception. There are two reasons why such a timing qualification might be appropriate for paramount interests. The first is that a timing qualification would recognise that the registered proprietor should have had an opportunity to discover the paramount interest, eg, because the tenant was in possession when the registered proprietor took their (subsequently registered) interest. This would imply that tenancies should already be in existence to gain protection, and that tenancies arising after the owner becomes registered are not protected.<sup>26</sup> This rationale is explored below in Part IV(B).

A second and more specific reason applies only to competitions between a lease or easement (or, not relevantly for present purposes, a restrictive covenant) on the one hand, and a registered mortgage on the other.<sup>27</sup> Section 87C of the *TLA* provides that the creation of a lease or easement (or restrictive covenant) in respect of land subject to a mortgage will not be valid or binding against the mortgagee unless the mortgagee's prior written consent was obtained.<sup>28</sup> The purpose underlying this section

25 Only prior leases are protected in SA, WA, ACT and NSW: *ACT LTA* (n 3) s 58(1)(d); *NSW RPA* (n 3) s 42(1)(d); *SA RPA* (n 3) s 69(h); *WA TLA* (n 3) s 68(1A). In NSW, the registered proprietor must also have taken notice of the lease.

26 *Perpetual* (n 10) 590 [85] (Dowsett J). This is not necessarily true of all of the interests that make up the interest of a tenant in possession, such as an equity of rectification: *Downie* (n 21).

27 See *Haslam* (n 16) 322 [46]–[47] (Middleton J).

28 Section 88A of the *Vic TLA* (n 3) provides that the mortgagee may apply to remove a subsequent registered lease created without the mortgagee's consent. However, presumably a tenant with a registered lease would not seek to rely on section 42(2)(e). Sections 88A and 87C of the *Vic TLA* (n 3) were inserted in 2014. Prior to this, the former section 66(2) rendered registered leases created without the mortgagee's written consent invalid and not binding on the mortgagee. The *Transfer of Land Amendment Act 2014* (Vic) ('*TLAA 2014*') section 11 repealed section 66(2) and *TLAA 2014* section 17 transferred its content into the newly inserted section 87C: Explanatory Memorandum, Transfer of Land Amendment Bill 2014 (Vic) clause 11 ('Explanatory Memorandum'). However, section 87C appears to capture both registered and unregistered leases, unlike the former section 66(2). Moreover, previously, purchasers from a mortgagee sale were released from any potentially binding effect of (registered or unregistered) leases, easements or restrictive covenants obtained without the mortgagee's consent: *Vic TLA* (n 3) former sections 77(4)(a)–(b). These paragraphs were also repealed by the 2014 amendments: *TLAA 2014* (n 28) s 15(b). Strangely, clause 15 of the Explanatory Memorandum describes section 77(4) of the *Vic TLA* (n 3) as having been replaced by sections 88A and 88B (which were inserted by *TLAA 2014* (n 28) section 19) to achieve clarity about when such interests bind the mortgagee. In fact, sections 88A and 88B merely (albeit, quite clearly) outline the process for removal of registered leases, easements or restrictive

is presumably to permit mortgagees to make the call on how best to protect their security, given they may in future need to exercise their power of sale upon default.<sup>29</sup> In the absence of consent or other basis for binding the registered mortgagee, this means that subsequent tenancies or easements (or restrictive covenants) cannot bind registered mortgagees, whereas prior tenancies in possession or easements may gain paramouncy pursuant to section 42(2)(d) or (e).<sup>30</sup>

At first instance, Middleton J held that the retirees' leases predated the mortgages.<sup>31</sup> On appeal, Perpetual argued that its mortgages arose from the time it contracted with MFL, rather than when they were registered. As a consequence, the mortgages predated the leases, with the result that section 42(2)(e) did not apply. However, Moore and Stone JJ held that if the mortgages arose from the time Perpetual contracted with MFL, then the leases must also have arisen when the retirees entered their contractual arrangements with MFL.<sup>32</sup> Moreover, the mortgages were dependent on the retirees' contracts of sale with MFL, without which MFL could not mortgage the land. Moore and Stone JJ reasoned that the contracts between the retirees and MFL were 'logically and chronologically' antecedent to the mortgage contracts between MFL and Perpetual.<sup>33</sup> Thus, the registration of the transfer to MFL 'must logically precede the registration of the mortgage to Perpetual', 'even if only by an instant'.<sup>34</sup>

Dowsett J agreed that, for priority purposes, Perpetual's mortgages were created on their execution dates,<sup>35</sup> it was the dates of the retirees' interests that troubled his Honour. While the retirees' interests also dated from their creation, Dowsett J emphasised that only tenants *in possession* obtain the benefit of section 42(2)(e). Accordingly, his Honour thought it at least arguable that the critical date for the priority dispute was the date the retirees ceased to be in possession as owners and went into possession *in their capacity as tenants*. This occurred on the date of settlement of the contracts of sale, not when the contracts were entered into.<sup>36</sup> Consistent with the first hypothesised reason for a paramount interest timing qualification mentioned above, Dowsett J's emphasis on the capacity in which

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covenants, but do not deal with unregistered interests as the former sections 77(4)(a) and (b) did. Despite the confusion, as explained, section 87C makes leases, easements and restrictive covenants invalid and not binding on registered mortgagees without consent.

29 For example, the fact that the property is leased might be advantageous to the mortgagee, particularly if the property is commercial in nature. Alternatively, the mortgagee may take the view that a sale with vacant possession is likely to attract more interest.

30 Since there is no paramount interest exception in favour of restrictive covenants, they are irrelevant for the purposes of this article.

31 *Haslam* (n 16) 323 [50].

32 In all cases 'the agreement as to the continuing occupation of the vendor as tenant after the purchase by MFL was entered into before execution of the mortgage to Perpetual, before payment under the mortgage, and before registration of the transfer and the mortgage': *Perpetual* (n 10) 578 [36].

33 *Ibid* 581–2 [51].

34 *Ibid* 582 [55] (Moore and Stone JJ).

35 *Ibid* 589 [84].

36 *Ibid* 590 [85] (Dowsett J). Ultimately Dowsett J remitted this matter to the primary judge 'for reconsideration of the priority question' and thus did not 'express a final view concerning the effective priority dates of the retirees' equities': at 590 [85].

possession was held revolved around whether the mortgagee had reasonable opportunity to discover the tenancy.<sup>37</sup>

Given that the majority regarded the tenancies as ranking first in time, section 42(2)(e) was enlivened. It was then necessary to consider its effect. Dowsett J also proceeded on this basis for the purpose of further discussion. At first instance, Middleton J had held that section 42(2)(e) gave absolute priority to the tenant in possession, and that no comparison of the competing equities was required.<sup>38</sup> Accordingly, the retirees' leases automatically prevailed over Perpetual's mortgages, notwithstanding that the latter were registered. On appeal, all three judges disagreed with the reasoning of Middleton J on this issue, though not necessarily with his Honour's ultimate conclusion. That is, the Full Federal Court did not regard section 42(2)(e) as giving the retirees' tenancies automatic priority over Perpetual's mortgages.<sup>39</sup> Rather, the provision had to be interpreted and applied in accordance with two High Court decisions which rejected the notion of *ipso facto* paramountcy. We now turn to these cases.

### B *Burke v Dawes* ('*Burke*')<sup>40</sup>

Waller was the registered proprietor of land. His housekeeper, Emily Cummins, was living on the land prior to Waller's death. In his will, Waller devised a life interest to Cummins and she continued to live there after his death with the permission of Dawes, the executor of his estate. Dawes obtained probate shortly after Waller's death, but did not become the registered proprietor (in his capacity as executor) for eleven years. Six years after he became registered as proprietor, Dawes borrowed money from the Burkes and gave them a registered mortgage over the land. When Dawes defaulted under the mortgage, the mortgagees sought possession.

Cummins argued that she was a tenant for life, and that because the mortgage was granted after she was already a tenant in possession, the mortgagees took subject to her interest by virtue of section 72 of the *Transfer of Land Act 1928* (Vic), the predecessor to section 42(2)(e) of the *TLA*. Section 72 provided:

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37 Even so, it was at least arguable that, due to the nature of the MFL scheme, Perpetual's interest was effectively made subject to that of the tenants in possession; in other words, it was part and parcel of the scheme that the mortgages would be subject to the leases. Similarly, in the case of *Barba v Gas & Fuel Corporation of Victoria* (1976) 136 CLR 120 ('*Barba*'), the Barbas took subject to a contractual condition which anticipated the creation of the Gas & Fuel Corporation's easement which was subsequently created but which was contingent at the time the Barbas' interest was created. The latter case is discussed in detail in Part II(C) of this article. In the judgments of Moore and Stone JJ in *Perpetual* (n 10), evidence about this aspect was explored only in relation to the question of whether Perpetual took their mortgages with notice. Dowsett J did not refer to the *Barba* case at all.

38 *Haslam* (n 16) 330 [83]. Notwithstanding his conclusion about the operation of section 42(2)(e), Middleton J proceeded to consider the question of conflicting equities in the event that he was wrong in his view that section 42(2)(e) conferred absolute and automatic priority on the retirees: 330 [84]. His Honour appeared to decide the priorities not on the basis of the notice test laid down in *Moffett v Dillon* [1999] 2 VR 480, but by applying the merits test. On the merits test see below n 102.

39 *Perpetual* (n 10) 583 [57] (Moore and Stone JJ).

40 *Burke* (n 21).

[T]he 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 and 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 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 specially notified as encumbrances on such certificate or instrument.

The case ultimately came before the High Court. Latham CJ, in dissent, held that section 72 was ‘a positive provision to which full effect should be given’.<sup>41</sup> His Honour said: ‘[t]he 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.’<sup>42</sup> Accordingly, Latham CJ held that the tenant in possession automatically prevailed over the registered interest, and that the Burkes’ mortgage was subject to Cummins’ interest as an equitable tenant for life.

Evatt J agreed with the result reached by Latham CJ, but took an entirely different view of section 72. Evatt J considered the statutory effect of this provision was to deprive the registered proprietor (here, the registered mortgagees) of an indefeasible title, leaving the competition between the tenant in possession and registered proprietor to be resolved by the application of general law principles:

In my opinion the effect of the exception in favour of every tenant of the land is to deprive the proprietor of the registered interest of the paramouncy which registration would normally confer. It follows that, in determining the competition between the tenant and the proprietor of the registered interest, the latter must be regarded as having been stripped of the benefit conferred by the fact of registration and as having been remitted to the position of holding an unregistered interest. This hypothesis is made solely for the purpose of determining the priority of the tenant’s interest. If such question is determined in the tenant’s favour, the proprietor of the registered interest still holds an interest which is valid and effective and registered; but which must yield priority to the interest of the tenant.<sup>43</sup>

On Evatt J’s view, since registration no longer created indefeasibility vis-a-vis the unregistered interest of the tenant, the resulting competition was analogous to any other competition between two unregistered interests in the same land. Applying these principles, Evatt J held that Cummins’ interest as a tenant in possession prevailed over the mortgage because her possession meant the mortgagees knew, or should have known, of her interest. It was beside the point that they had dealt with an executor.<sup>44</sup>

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41 Ibid 9.

42 Ibid.

43 Ibid 25.

44 Ibid 27.

Although the headnote states that all judges other than Latham CJ adopted this interpretation of section 72, the judgments themselves do not bear this out.<sup>45</sup> Starke, Dixon and McTiernan JJ held that the mortgagees' interest prevailed. For these judges, the case turned on the nature and extent of the executor's powers. Although Cummins inherited a life estate under Waller's will, that estate had never been formally transferred to her. This meant that she derived her right to possession as a tenant at will from the registered executor, not the testator; that is, she was there with Dawes' consent.<sup>46</sup> As such, her interest was subject to the rights and duties of the executor, including his power to mortgage the land for the purposes of administering the estate.<sup>47</sup> The mortgagees had dealt with the executor in good faith, and had no actual or constructive notice that he was not acting bona fide in performance of his duties.<sup>48</sup> Whilst Starke, Dixon and McTiernan JJ mentioned section 72, they did not endorse Evatt J's view of its operation, nor did they apply general law priority rules.<sup>49</sup> McTiernan J, who agreed with Dixon J, stated it was irrelevant whether the registered mortgagees took with notice of the tenant in possession; the two relevant questions were whether they knew the mortgage had not been taken out for the purposes of administration and whether, at the time the mortgage was created, Cummins held possession subject to exercise of the executor's powers. In respect of the first question, McTiernan J could not find that the mortgagees had dealt with the executor otherwise than in good faith (without fraud). The second question was answered in the affirmative. Section 72 could only protect 'such interest as [Cummins] had as a tenant in possession of the land with the executor's consent'.<sup>50</sup> Her interest was subject to the executor's statutory

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45 Thus, Gibbs J refers to the decision in *Burke* (n 21) as supporting the view that section 42(2)(e) of the *Vic TLA* (n 3) 'does not give to a tenant in possession any greater protection than he would have had if the land were under the general law': *Barba* (n 37) 140–1. In support, his Honour cites Dixon J in *Burke* (n 21) 18, where Dixon J engages in what appears to be a *hypothetical* analysis of what would have happened if the land were not Torrens land (see below n 49), rather than an application of general law rules. Dixon J's analysis ultimately turns on the fact that Cummins' possession was subject to the executor's powers. Gibbs J also cites Starke J for this proposition: *Barba* (n 37) 141, citing *Burke* (n 21) 13. However, Starke J simply states that '[i]n my opinion the section affords no protection to Emily Cummins. She takes and is in possession as a beneficiary under the will, and her interests rise no higher. They are and must be subject to the rights and duties of the executor': *Burke* (n 21) 13. This arguably states no more than was explained by McTiernan J, namely, that section 72 could only protect 'such interest as [Cummins] had' and not more: *Burke* (n 21) 28. In other words, McTiernan J reasons that the section cannot protect a tenant from an interest to which their tenancy is subject, whether by reason of a condition upon which it was granted (as in *Barba* (n 37)), or as a result of the nature of their interest (as in *Burke* (n 21)). Nowhere does McTiernan J endorse the methodology of Evatt J.

46 *Burke* (n 21) 28 (McTiernan J).

47 The court rejected Cummins' argument that Dawes had become a bare trustee of the property, as the will made no provision for the fee simple. Hence, Dawes had ongoing duties in relation to the estate.

48 Dawes had misused the proceeds of the mortgage by not applying them for the purposes of the estate.

49 At one point, Dixon J engages in a hypothetical exercise, and considers what the result would be 'if the land were under the general law and not under the *Transfer of Land Act*': *Burke* (n 21) 18. It can be argued that by this, his Honour intended to apply general law priority rules. However, the hypothetical nature of the exercise renders this unclear, and nowhere does his Honour refer to, or engage with, the notion put forward by Evatt J of stripping the registered interest of indefeasibility. Ultimately, Dixon J determines the matter on the basis that Cummins' possession was still subject to the administration of the estate under probate law: at 21–2.

50 *Burke* (n 21) 28 (McTiernan J).

power to ‘mortgage the land for any purpose of administration and was liable to be set aside by the exercise of that power’.<sup>51</sup> Once the mortgage was granted, section 72 could not keep Cummins’ interest alive.<sup>52</sup>

The ultimate outcome in *Burke* is not intrinsically important for present purposes. It is the principle enunciated by Evatt J that is directly on point. Effectively, the judgment of Evatt J<sup>53</sup> sets out the rule which would be elaborated in later cases, namely, that where section 42(2)(e) applies, the priority dispute between the earlier tenant in possession and the later registered interest will stand not as a priority dispute between an unregistered and registered interest, but as a dispute between two unregistered interests.

Before considering subsequent cases, we should pause to consider the context in which *Burke* was decided. At the time, deferred indefeasibility held sway in Victoria and elsewhere within Australia. Indeed, the decision which shifted our Torrens system toward immediate indefeasibility – that of the Privy Council in *Frazer v Walker*<sup>54</sup> – would not take place for another 30 years. This may have led to a greater willingness to cast aside indefeasibility for the purposes of priority disputes, and to revert to old general law priority rules. The concept of stripping indefeasibility for the purposes of the priority dispute arguably bears the era’s hallmark deference and reversion to general law priority rules.

### C *Barba v Gas & Fuel Corporation of Victoria* (‘*Barba*’)<sup>55</sup>

The Gas & Fuel Corporation of Victoria (‘G&F’) was granted an option for an easement over land which, if exercised, would give it the right to construct, maintain and operate a gas pipeline through land owned by Craigie (Clays) Pty Ltd (‘Craigie’). Craigie subsequently sold the land to the Barbas under a contract of sale signed on 15 August 1975. Payment of the purchase price was to occur over a period of two years and six months. Since it was a terms contract of sale, Craigie remained registered proprietor of the fee simple, and the Barbas went into possession on 3 November 1975 as tenants at will. On 29 November 1975 and 2 December 1975, the Barbas refused to allow G&F’s workers onto the land to do preliminary work for the construction of the pipeline. G&F sought an injunction to restrain the Barbas from preventing it from doing so, as well as damages. G&F was initially successful but lost in the High Court because the option had not been exercised at the time it was prevented from entering the land.<sup>56</sup> Accordingly, G&F had no right to enter. On 17 December 1975, the option was duly exercised. The easement thereby brought into existence was registered on 12 January 1976. For present purposes, it is the position of the parties following the creation and registration of the easement that is relevant. The Barbas argued that, as purchasers

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51 Ibid.

52 Ibid.

53 This is despite the fact that the principle is attributed to Starke, Dixon and McTiernan JJ in the headnote.

54 *Frazer* (n 2).

55 *Barba* (n 37).

56 Ibid 135–8 (Gibbs J).

in possession prior to settlement, and therefore as tenants in possession under section 42(2)(e), their rights prevailed over G&F's registered easement.

The High Court adopted the reasoning of Evatt J in *Burke*. The Barbas became 'tenants in possession' under section 42(2)(e) from the time they entered into possession on 3 November 1975, and the effect of section 42(2)(e) was that G&F was deprived of the paramouncy that its easement would have ordinarily attracted by virtue of its registration. Accordingly, Gibbs J (with whom Stephen and Jacobs JJ agreed) held that priority should be determined in accordance with the principles laid down in *Burke* without reference to the registered status of G&F.<sup>57</sup> Ultimately, the Barbas lost priority to G&F because their contract of sale with Craigie contained a special condition 8, which stated that the vendor proposed to create an easement (being the easement that G&F subsequently registered) and would be entitled to the compensation paid by G&F when it was granted, and this was made clear to prospective purchasers at the auction.<sup>58</sup> Although special condition 8 did not explicitly state that the sale was subject to the anticipated easement, it did so implicitly, as the condition would be 'meaningless if the rights of the purchasers prevailed over the easement when it was created'.<sup>59</sup> Accordingly, the tenant in possession implicitly waived the right to cut down the registered interest created by the vendor.<sup>60</sup>

In sum, *Barba* treated the priority dispute as one between a tenant in possession and unregistered easement, despite the easement's registration. Although the easement holder prevailed, this was not due to its indefeasible status, but because the tenants in possession had effectively taken their interest subject to the contingent easement interest.

Timing may have played a part in *Barba*. Arguably, the tenant came into possession before the easement was created. Yet the tenancy postdated the contingent easement. Ultimately, the fact that the tenants knew or ought to have known of G&F's contingent interest was influential.<sup>61</sup>

### D Returning to *Perpetual Trustee Co Ltd v Smith*

As noted above, at first instance, Middleton J rejected Perpetual's argument that a comparison of the competing interests was required once section 42(2)

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57 Ibid 140–1. The authors have argued above that, despite the view taken of *Burke* (n 21) by Gibbs J, the majority judges in *Burke* did not adopt the reasoning of Evatt J (who dissented in the outcome). See above nn 45, 49.

58 Gibbs J recounted the findings of the trial judge:

[A]t the auction there was available for inspection a copy of a printed draft of the Creation of Easement, to which copy survey plans were attached showing the area proposed to be subject to the easement ... [T]he auctioneer had marked out the measurements of the proposed easement on an outline sketch of the land on his copy of an advertising brochure, which was held up for those present to see; it was doubtful whether what was marked on the sketch could be seen, but the auctioneer described the width and depth of the proposed easement, and read out the substantive part of the draft Creation of Easement. He read also the special conditions from the draft contract of sale that had been prepared by the solicitors for the vendor ... and upon which the sale was to take place, including special condition 8: *Barba* (n 37) 128.

59 *Barba* (n 37) 142 (Gibbs J).

60 See also *Chesterfield v Pitisano* [1964] VR 709, 713 (Smith J).

61 See above n 58.

(e) was enlivened.<sup>62</sup> Perpetual had posited that section 42(2)(e) gave tenants in possession no greater protection than if the land was under the general law.<sup>63</sup> Middleton J disagreed and proffered two reasons for this conclusion. The first was that in *Downie v Lockwood*,<sup>64</sup> Smith J did not undertake a comparative examination of the equities.<sup>65</sup> Secondly, his Honour perceived that *Barba* turned on special condition 8:

*Barba*, in reliance on comments in *Burke v Dawes*, merely decided that effect had to be given to special condition 8, and to that extent the application of the general law applied, and the person claiming to come under the exception to indefeasibility could have no greater rights than he or she would have under the general law. It will be recalled that special condition 8 made the sale subject to the easement to be granted, which special condition the High Court gave effect to by applying the general law.<sup>66</sup>

By contrast, on appeal, all three members of the Full Federal Court understood *Burke* and *Barba* to require comparison of the competing interests under the general law. Nonetheless, there were some discrepancies between their views as to whether section 42(2)(e) invalidates the registered proprietor's *registration* or whether it merely deprives the registered proprietor of *indefeasibility*.

In their joint judgment, Moore and Stone JJ observed that section 42(2)(e) 'does not invalidate registration, it merely deprives the registered proprietor of indefeasibility'.<sup>67</sup> Their Honours summarised their interpretation of the effect of section 42(2)(e) in the following propositions:

- (a) the interest of a tenant in possession does not, merely by virtue of the tenant being in possession, take priority over a subsequent registered proprietor;
- (b) a registered proprietor in competition with a tenant in possession, cannot rely on the indefeasibility of title that would, were it not for s 42(2)(e), otherwise accrue to the registered proprietor.<sup>68</sup>

Since the provision deprives the registered proprietor of the indefeasibility otherwise accorded to it, Moore and Stone JJ held that the competition between the registered proprietor and tenant in possession must be resolved by application of common or general law principles *as if* it were a dispute between two unregistered interests. Their Honours thus applied the merits test, which is used to resolve disputes between competing equitable interests.<sup>69</sup> They held that, given the nature of the 'Money for Living' scheme, Perpetual must have had, at the very least,

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62 *Haslam* (n 16) 330 [83].

63 *Ibid* 327 [69].

64 *Downie* (n 21).

65 *Haslam* (n 16) 330 [83] (Middleton J).

66 *Ibid*.

67 *Perpetual* (n 10) 585 [65]. It is not evident from their joint judgment that Moore and Stone JJ regarded themselves as adopting a different interpretation of what section 42(2)(e) invalidates than Dowsett J. In fact, we believe it is likely that they meant that the registered proprietor would be stripped of their registration.

68 *Ibid*.

69 See, eg, *Abigail v Lapin* [1934] AC 491 ('*Abigail*'); *Heid v Reliance Finance Corp Pty Ltd* (1983) 154 CLR 326 ('*Heid*'); *Jacobs v Platt Nominees Pty Ltd* [1990] VR 146.

constructive notice of the capacity in which the retirees were in possession, thereby rendering their claim less meritorious.<sup>70</sup>

However, if simply stripped of indefeasibility but not registration (as Moore and Stone JJ suggested), then arguably Perpetual should have been treated as having a *legal* interest, on the basis that *TLA* section 40(2) (at the time) provided that every instrument, when registered, ‘shall be of the same efficacy as if under seal and shall be as valid and effectual to all intents and purposes as a deed duly executed and acknowledged’.<sup>71</sup> Yet Moore and Stone JJ resolved the dispute via the merits test, which at general law resolves disputes between competing equitable interests, rather than the bona fide purchaser for value without notice test, which applies to competitions between prior equitable and subsequent legal interests.<sup>72</sup> By contrast, Dowsett J stated:

The operation of s 42 deprives the appellant (Perpetual) of the benefit of *registration* of its mortgages. As a result we must consider the respective priorities of each of the interests held by the ... retirees ... as against the respective competing interests held by Perpetual pursuant to its *notionally unregistered mortgages*.<sup>73</sup>

In a similar vein to Evatt J in *Burke*, Dowsett J was likely conveying the notion that registration is ignored only for the purpose of the priority dispute. In Evatt J’s words, the hypothesis ‘is made solely for the purpose of determining the priority of the tenant’s interest ... [and] the proprietor of the registered interest still holds an interest which is valid and effective and registered’.<sup>74</sup> By extrapolation, this arguably means that, to the outside world, the interest remains registered, and section 40(2) (as it was) continues to perform its function. It is only for the purposes of the priority dispute that the fact of registration, including its conferral of status as a legal interest (or deed), is suspended.

70 *Perpetual* (n 10) 587 [72] (Moore and Stone JJ).

71 *Vic TLA* (n 3) section 40(2) has since been repealed. In the repeal of this provision, which was effected by the *TLAA 2014* (n 28) section 10, it seems the potential consequential effects on priority disputes involving paramount interests under the approach in *Perpetual* may have been overlooked. The Explanatory Memorandum (n 28) acknowledges the following in clause 10: (1) that *Vic TLA* (n 3) section 40(1) provides that registration gives effect to instruments; (2) that the *Property Law Act 1958* (Vic) section 52(1) requires all conveyances of land to be by deed; (3) that instruments registered under the *Vic TLA* (n 3) are not usually deeds; and (4) *Vic TLA* (n 3) section 40(2) deemed registered instruments to be deeds. It then explains the basis of the reform as follows: ‘It is believed that section 40(2) was included to cure any perceived defect in a registered instrument. However, as section 40(1) provides that registration gives effect to the instrument, it is considered that section 40(2) is unnecessary and could cause confusion.’ It therefore appears that the only potential effect contemplated by the legislature was the usual situation whereby registered interests enjoy indefeasibility, and that the situation under present discussion, being where the ‘*Perpetual* principle’ is applied to strip an instrument of its registered status for the purposes of the priority dispute with a paramount interest, has been perhaps rendered more complex by the 2014 reform.

72 *Pilcher v Rawlins* (1872) 7 LR Ch App 259 (‘*Pilcher*’). Presumably, the retirees would be deemed to hold an equitable lease, pending execution of the tenancy agreement.

73 *Perpetual* (n 10) 589 [84] (emphasis added). Dowsett J did not appear to appreciate that this approach was different to that taken by Moore and Stone JJ, as he referred to Moore and Stone JJ as having ‘demonstrated that s 42(2)(e) deprives Perpetual of the protection of registration’: at 590 [88].

74 *Burke* (n 21) 25.

If Dowsett J is correct, and Perpetual was to be regarded as stripped of registration, then on the particular facts of the case,<sup>75</sup> Perpetual's interest could only be equitable and a resolution using the notice and merits tests would be consistent with his Honour's reasoning.

Notably, Dowsett J was troubled by the fact that the trial judge, Middleton J, did not appear to apply the notice test.<sup>76</sup> The trial judge resolved the dispute upon comparison of the merits, rather than whether Perpetual took with notice of the retirees' leases pursuant to the test in *Moffett v Dillon*.<sup>77</sup> Had a notice test been applied, Dowsett J observed that the capacity of the retirees as tenants would not have been obvious, since a competing interest holder would have reasonably presumed the retirees to have been continuing in possession in their capacity as vendors until settlement.<sup>78</sup> This would be relevant in ascertaining whether Perpetual took with notice of the retiree's interest *as tenants*, a matter not explored by the trial judge. Dowsett J also found that relevant issues of fact had not been addressed in the application of the merits test and remitted the matter back to the trial judge for a reconsideration of the priorities question. By contrast, Moore and Stone JJ did not apply the notice test separately but considered issues of notice within their merits test analysis.

We return to this issue in Part III.

### III ANALYSIS OF THE DIVERGENT APPROACHES TO SECTION 42(2)(e) AND THEIR IMPLICATIONS FOR OTHER PARAMOUNT INTERESTS

#### A To Whose Interest is the Notion of Paramountcy Directed?

One reason which may possibly lie behind a preference for either the 'automatically paramount' approach of Latham CJ in *Burke* and Middleton J in *Haslam*, or the 'revert to general law priority rules' approach taken by Evatt J in *Burke*, by all judges in *Barba* and by all Full Federal Court judges in *Perpetual*, is a difference in perception as to whom the concept of 'paramountcy' is directed.<sup>79</sup>

In *Burke*, Latham CJ considered that the 'paramountcy' notion related to the status of the tenant in possession. His Honour therefore gave literal and positive effect to section 42(2)(e), such that the tenant in possession automatically prevailed over the registered interest. By contrast, Evatt J in *Burke* effectively regarded the concept as directed to the registered proprietor, and perceived that it operated negatively to deprive them of the otherwise paramount effect of registration. That

75 In some cases, the putatively registered interest would, even without registration, be considered legal in nature at general law, for example, a prescription easement, or title pursuant to adverse possession.

76 See *Perpetual* (n 10) 590 [86]. Middleton J applied the merits test as a fall-back position in case he was held to be wrong in his interpretation of section 42(2)(e): *Haslam* (n 16) 330 [84].

77 [1999] 2 VR 480.

78 *Perpetual* (n 10) 594–6 [108]–[110].

79 The word 'paramountcy' is not used in section 42(2), but it has become the descriptor for this group of exceptions.

is, his Honour framed the effect of section 42(2)(e) as a deprivation of the registered proprietor's erstwhile paramouncy, rather than a conferral of paramouncy upon the tenant in possession.<sup>80</sup>

### B Arguments For and Against the 'Automatic Paramouncy' Approach<sup>81</sup>

While both approaches detract from the general principle of the Torrens system – that registration confers on the proprietor an unassailable title – the automatic paramouncy approach has the advantage of not cluttering the situation by reintroducing general law concepts such as notice. It therefore does the least damage to the first principles of the Torrens system outlined in Part I of this article. Accordingly, why not just let paramount mean paramount? Although not worded as clearly as the legislation in South Australia, which states that the tenant 'shall prevail',<sup>82</sup> the plain, literal meaning of section 42(2)(e) suggests a tenant in possession automatically takes priority over the interest of the registered proprietor, meaning that the land is automatically subject to the tenancy without the need to resort to any general law principles (the phrase 'shall be subject to' seems tolerably clear). Indeed, Moore and Stone JJ acknowledged that the plain meaning of the section might be thought to have this effect.<sup>83</sup> Undeniably, the benefit of the 'automatically paramount' approach is that it gives effect to the plain wording of section 42(2)(e) of the *TLA*.

Another compelling argument in favour of the 'automatically paramount' view is that this approach is amenable to application in the same way to all interests listed in section 42(2), not just those which are proprietary in nature. It should be recalled that some paramount interests are not proprietary, such as unpaid rates and taxes.<sup>84</sup> Internal coherence within section 42(2) is clearly a desirable attribute which would enhance clarity of the law and its jurisprudential underpinnings.<sup>85</sup> This is discussed further in Part VI below.

The downside of the 'automatically paramount' interpretation, which may give pause to its proponents, is that in some circumstances it would be fairer to allow the registered interest to prevail. This might be so where the tenant had notice of a forthcoming registered interest and waived priority by agreeing to take subject to it. In such cases it might be fairly contended that tenants in possession should not automatically attain priority over the registered interest simply by virtue of their inclusion in the list in section 42(2).

80 Notably, Dixon J stated that all incidents of tenancy in possession received, by virtue of the forerunner to section 42(2)(e), 'protection and priority': *Burke* (n 21) 17. For discussion on the legislative intent, see Part IV(B) of this article and below n 116.

81 Further arguments for and against the automatic paramouncy approach are considered in Part IV(B) of this article.

82 The *SA RPA* (n 3) section 69(h) states that 'the title of the tenant under such lease ... shall prevail' (emphasis added).

83 *Perpetual* (n 10) 583 [57].

84 *Vic TLA* (n 3) s 42(2)(f).

85 One of the main forms of doctrinal reasoning within private law is internal coherence: Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press, rev ed, 2012) 8–16 <<https://doi.org/10.1093/acprof:oso/9780199665815.003.0001>>.

However, section 42(2)(e) cannot overreach in this way, even if automatic paramountcy applies. This is because the scope of the tenant's interest that receives protection from section 42(2)(e) cannot be expanded by virtue of that protection. Thus, where the tenant takes their tenancy subject to a contractual term binding the tenant to observe a contingent equitable interest, such as an easement which is subsequently registered, the tenant's lease, although 'paramount', is nonetheless, on its own terms, subject to a carve out in favour of the easement that later becomes registered. The paramountcy cannot fill a gap in the rights of the tenant where that gap arises from the lease itself. Indeed, this was the view that Middleton J took of the decision in *Barba*, stating that it turned on the effect of special condition 8. The same point can be made in relation to the tenancy interest in *Burke*.<sup>86</sup>

Aside from situations where automatic paramountcy is attenuated by carve outs in the scope of the relevant paramount interest, one might still query whether automatic priority reflects the justificatory principles underlying the statutory exception. For example, if automatic paramountcy were to apply, should only pre-existing paramount interests receive priority, due to a presumption that the registered interest holder ought to have been aware of the paramount interest? Moreover, is priority in time sufficient justification for automatic paramountcy in every instance, or are there situations in which this could be manifestly unfair, or even open to abuse?

### C Arguments For and Against Reverting to General Law Priority Rules<sup>87</sup>

The main benefit of an approach favouring application of general law rules to determine priority between the registered interest and the paramount interest is that it does not pre-empt the result but, rather, allows the court to take account of unique circumstances to reach a more nuanced, and therefore a potentially fairer, result. Factors which would be considered include: whether one party took their interest with notice of the other's interest; whether there was a failure to caveat, lodge a priority notice or retain title deeds or electronic certificate of title ('e-CT') control; whether a title search was performed; and whether the land was inspected to determine who was in possession and in what capacity.<sup>88</sup> These factors might justify different outcomes in the interests of justice than the outcome attained under the automatic paramountcy approach.

Whilst this appears logical for some paramount interests, a strong argument against reversion to general law priority rules is that not all paramount 'interests' listed in section 42(2) are truly proprietary in nature. Section 42(2)(f) favours the rights of government to recover unpaid rates and taxes,<sup>89</sup> as do similar exceptions

86 The tenant Cummins' possession was by its nature (as a tenancy at will by consent of the executor in administration of a deceased estate) subject to the executor's powers being exercised in favour of the mortgagee, and therefore subject to the mortgage. See above n 45.

87 Further arguments for and against reverting to general law priority rules are considered in Part IV(B) of this article.

88 Notably, legislative drafters were keenly aware of the general law rule that possession was considered good notice of the interest pursuant to which the possessor held. See below n 117.

89 It will be recalled that similar rights reserved to government were protected under the predecessor to section 42(2), being section 72 of the *Transfer of Land Act 1928* (Vic).

in Western Australia, the Australian Capital Territory and Tasmania.<sup>90</sup> Application of general law priority rules does not sit comfortably with unpaid rates and taxes which have not yet led to a statutory charge on the land. However, arguably the purpose of their inclusion in section 42(2) itself provides for enforcement of government rights as security interests in the nature of ‘liens’ prior to overdue periods specified in relevant legislation, the expiry of which creates statutory charges and empowers relevant authorities to sell land to recover rates and taxes.<sup>91</sup>

Another undesirable consequence of reverting to general law priority rules is that it requires the court to overlook the plain words of section 42(2) and to read far more into the provision than it actually states. It is not apparent on the words of the provision itself that a more complex analysis must be undertaken before priority is determined. As explained above, the plain words of section 42(2) literally state that the land itself is ‘subject to’ the listed paramount interests. The Statute Law Revision Committee which drafted the *Transfer of Land Act 1954* (Vic), which became consolidated as the 1958 *TLA*, also used the words ‘overriding’, ‘binding’ and ‘prevailing’ to describe paramount interests.<sup>92</sup>

A downside of any nuanced approach is lack of predictability and certainty. The *Perpetual* principle treats paramount interests as involving a complex ‘two-step’ analysis: the first, to determine whether the registered interest should be stripped of its status due to the unregistered interest falling within the list of paramount interests under section 42(2); and the second, to determine priority between the two interests by application of the appropriate general law priority rule.

A final shortcoming of this approach is that it resurrects the very general law priorities which the Torrens system was designed to avoid and effectively revives the doctrine of notice. Indeed, the very first Torrens statute in South Australia remarks in its Preamble on the undesirable ‘perplexity’ of ‘cumbrous’ general laws.<sup>93</sup>

#### **IV SHOULD THE METHOD OF ALLOCATING PRIORITY FOR OTHER EXCEPTIONS TO INDEFEASIBILITY DIFFER TO THE METHOD USED FOR PARAMOUNT INTEREST EXCEPTIONS?**

The ‘two-step analysis’ of paramount interests advocated in *Perpetual* arguably marks the paramount interests exception out as different to almost all other exceptions to indefeasibility in terms of how it operates. In this Part we

90 *ACT TLA* (n 3) s 58(1)(f) (unpaid duties, rates and taxes charged on land under any Act); *Tas TLA* (n 3) s 40(3)(g) (any money charged on land under any Act); *WA TLA* (n 3) s 68(1A) (unpaid rates).

91 See, eg, *Local Government Act 1989* (Vic) s 181 (‘*Vic LGA*’) which imposes a charge after rates are overdue by three years.

92 For discussion of the descriptions used throughout the legislative history of the *Vic TLA*, see Lisa Spagnolo, ‘A Conceptual Framework: What the Forgotten History of Victorian Torrens Legislation Tells Us about Priority Disputes Involving Paramount Interests’ (2022) 44 *Sydney Law Review* (forthcoming) Part III(C).

93 *Real Property Act 1858* (SA) Preamble. The dissatisfaction with the application of general law rules to priority disputes between unregistered interests, and the failed attempts to overcome this in the *Transfer of Land Bill 1949* (Vic) (‘1949 Bill’) are discussed in Spagnolo (n 92) Part III(B).

argue that this creates an undesirable lack of consistency between this exception to indefeasibility and other statutory and common law exceptions to indefeasibility.

For the purposes of Part IV, we assume that the two-step approach taken in *Perpetual* to tenants in possession under section 42(2)(e) is applicable to all paramount interests. Whether this is feasible or desirable is also explored further below.

## A The Method of Allocating Priority for Other Exceptions to Indefeasibility

Where the fraud exception applies, it generally operates in favour of the defrauded party and no other.<sup>94</sup> The defrauded party is given priority because the fraud is brought home to the registered interest holder, either personally or via their agent.<sup>95</sup> As ‘bringing it home’ to the registered proprietor (or their agent) is part of the definition of statutory fraud in the cases interpreting the Torrens fraud provisions, it could be said that there is only one step in the application of the exception, that being the finding of statutory fraud, and that this single step allocates priority without further analysis.

94 We note that there are cases in which the actionable fraud was held to be fraud against the registrar, although the party defrauded of their interest in the land as a result of the fraud was able to have the registration set aside. These cases concern situations where documents were lodged for registration despite knowledge on the part of the lodging party of non-compliance with the requisite formalities, usually the attestation of signatures. In such cases the actionable fraud was held to be against the registrar, as the lodging party misrepresented to the registrar that the document was one on which the registrar could properly act. See, eg, *Australian Guarantee Corp Ltd v De Jager* [1984] VR 483; *Beatty v Australia and New Zealand Banking Group Ltd* [1995] 2 VR 301. For an argument that the notion of fraud against the registrar is unnecessary and unhelpful, see Natalie Skead and Penny Carruthers, ‘Fraud Against the Registrar: An Unnecessary, Unhelpful and Perhaps, No Longer Relevant Complication in the Law on Fraud under the Torrens System’ (2014) 40(3) *Monash University Law Review* 821.

We also note that there are cases where an improper attestation resulted in the mortgagee being deprived of the advantage of indefeasibility ordinarily conferred by registration, and yet the underlying agreement between the parties remained valid and enforceable. For example, in *Hickey v Powershift Tractors Pty Ltd* (1999) NSW ConvR 55-889, the deception pertaining to the witnessing of the mortgagor’s signature was held to be actual fraud involving turpitude – with the result that the mortgagee could not rely on the advantage of registration, namely, an indefeasible title – but the mortgage was nevertheless found to be a true written agreement executed by the mortgagor to mortgage the land to the mortgagee upon the security of which loan monies were advanced. As such, it was enforceable in equity despite the irregular attestation of the mortgagor’s signature: at 56-940 (Bryson J); and judgment was given to the mortgagee for possession: at 56-942 (Bryson J). Although not articulated as such, the court was essentially enforcing an *in personam* right of the equitable mortgagee against the registered owner. Thus, although the fraud exception was enlivened, the usual ‘automatic’ priority did not follow because another exception dictated otherwise. An overlap situation in which two exceptions apply means there are two potential ‘automatic priority’ situations, with the result that one might trump the other.

The same reasoning is found in *Bank of South Australia Ltd v Ferguson* (1998) 192 CLR 248 at 259, where the High Court held that even if Ferguson had succeeded in proving the registered mortgage was subject to the fraud or *in personam* exceptions (Ferguson’s *in personam* claims included, inter alia, negligent misrepresentation and breach of contract), there was

no reason to deny the application of the requirement of *restitutio in integrum*. It is scarcely to be supposed that the land might be relieved of the burden imposed by the registered security and the creditor be left not only unsecured but with an irrecoverable loan.: at 259 (Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ).

95 *Assets Co Ltd v Mere Roihi* [1905] AC 176; *Schultz v Corwill Properties Pty Ltd* [1969] 2 NSW 576.

Where an *in personam* exception is made out, no further step requires the court to weigh up whether the party with the cause of action has the more meritorious interest. The very reason for the existence of this exception is to ensure that a person cannot hide behind their registration to escape the consequences of their own actions where these give rise to legal or equitable causes of action in another.<sup>96</sup> Again, as observed with the fraud exception, the *in personam* exception allocates priority in favour of the party with the cause of action and no other. It makes sense for both exceptions that no second step is required to determine who should lose priority, since the registered proprietor (or their agent) was responsible for the fraud or situation giving rise to the cause of action.<sup>97</sup>

It could be argued, however, that for *in personam* exceptions, even after an equitable cause of action is made out, the court must still exercise discretion as to the appropriate remedy. Consequently, it will balance the prima facie remedy against equitable ‘bars’, such as the claimant’s conduct (clean hands) and the impact of remedies on innocent third parties (for example, a court might decline a remedial constructive trust in favour of equitable compensation, a charge or a lien).<sup>98</sup> This exercise of discretion bears some semblance to the application of a general law merits test, or at least involves a second-step test. However, it still falls short. Exercise of the discretion does not determine priority; it simply determines which available remedy is most apt to be awarded to the party which has been accorded priority.<sup>99</sup>

Only inconsistent legislation comes close to a nuanced analysis approaching the complexity of the two-step analysis for paramount interests. Wherever possible, courts strive to find that the two statutes can operate within their own respective spheres such that there is no inconsistency, due to a strong presumption that Parliament does not intend to contradict itself.<sup>100</sup> Where this presumption is rebutted and an inconsistency is found, this may or may not affect the registered title. The general principle is that the most recent legislation will prevail, all else being equal.<sup>101</sup> If all else is not equal, the earlier statute might be held to prevail. In determining whether ‘all else is equal’ the court will consider a range of matters, including preference for protection of public interests over private, preference accorded to specific over general legislation and other public policy principles.

96 *Frazer* (n 2) 585 (Lord Wilberforce for the Board); *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 638 (Wilson and Toohey JJ).

97 The cause of action must have a nexus with the property, eg, breach of a contract of sale for the property, rather than breach of an unrelated contract. However, this qualification simply delineates the nature of the relevant causes of action for the exception to operate at all; it does not operate as a priority rule.

98 See, eg, *Giumelli v Giumelli* (1999) 196 CLR 101; *Sidhu v Van Dyke* (2014) 251 CLR 505.

99 It may, of course, sometimes lead to a lesser remedy than a proprietary interest. In particular, the operation of proprietary estoppel comes to mind. However, this might be more a function of the structure of the cause of action, rather than priority rules per se. Unfortunately, an exploration of the borderline between institutional and remedial structures lies outside the scope of this article.

100 *Butler v Attorney-General (Vic)* (1961) 106 CLR 268, 275–6 (Fullagar J), 290 (Windeyer J); *South Australia v Tanner* (1989) 166 CLR 161, 171 (Wilson, Dawson, Toohey and Gaudron JJ); *Horvath v Commonwealth Bank of Australia* [1999] 1 VR 643, 657 (Ormiston JA) (*‘Horvath’*); *Calabro* (n 6) 700 (Balmford J).

101 *Horvath* (n 100) 656 (Ormiston JA); *Calabro* (n 6) 700 (Balmford J).

There are obvious parallels between the general principle of ‘the later legislation prevailing unless all else is equal’ and the *Rice v Rice* formulation of the priority rule applied to disputes between two equitable interests, that priority is accorded to the better equity but, if all else is equal, to the earliest in time.<sup>102</sup> Nonetheless, despite the comforting similarity, these principles exist to achieve different ends. The priority rule deals with conflicts between proprietary interests in the same land, whereas the determination of which legislation prevails is an exercise in statutory interpretation, which can indirectly affect proprietary interests regulated by Torrens statutes but which is of far broader application, since it also resolves legislative inconsistencies that have nothing to do with property rights.

Consequently, the nuance evident in interpreting statutes is more properly categorised as a singular inquiry into which Act should prevail.<sup>103</sup> Once it is held that another Act prevails as a question of legislative construction, the priority otherwise enjoyed under the Torrens legislation by the registered proprietor yields to the beneficiary of the prevailing inconsistent legislation and no other. Thus, ultimately, the ‘exception’ created by inconsistent legislation involves a singular question, with no secondary step.

Finally, Victorian law still (arguably) recognises an exception to indefeasibility regarding registered proprietors who are volunteers.<sup>104</sup> This position has been reversed by legislative provisions in some States, and does not represent the common law position in New South Wales.<sup>105</sup> It was commented upon in obiter dicta in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* in a five way joint judgment, in which the High Court expressed a preference for indefeasibility of volunteers.<sup>106</sup> The policy reasons and future of this exception are beyond the scope of the present article.<sup>107</sup> However, it is instructive to consider the manner in which this exception operates by comparison with the paramount interest exception.

Should a registered proprietor take as a volunteer, the exception would automatically accord priority to the unregistered interest provided the latter bound the donor. Essentially, the volunteer is considered to stand in the shoes of the former registered proprietor and is regarded as bound by any interests which would have bound the donor, such as those applicable under the *in personam* exception. The volunteer alone would be bound by such interests, but no others. The nexus is the registered proprietor’s lack of consideration in taking from the donor. It might be argued that this reflects the general law priority rule which deprives a legal interest holder of priority on the basis that they are not a ‘bona fide purchaser for value

102 *Rice v Rice* (1854) 61 ER 646. See also *Heid* (n 69). But see *Abigail* (n 69), which accords prima facie priority to the first in time and places the onus on the later interest holder to demonstrate that, due to the prior interest holder’s conduct, the prior interest should be postponed.

103 The inquiry into inconsistency simply determines whether a conflict exists, just as the priority rules do not come into play unless and until a finding is made that there are in fact two proprietary interests.

104 *King v Smail* [1958] VR 273; *Rasmussen v Rasmussen* [1995] 1 VR 613. But see *Zekry v Zekry* [2020] VSCA 336.

105 *Bogdanovic v Koteff* (1988) 12 NSWLR 472.

106 (2007) 230 CLR 89, 172 [198] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). The Court proffered no explanation for its preference.

107 The policy behind the exception is discussed at length in Elise Histed, ‘Fraud and the Volunteer: Harmonisation of Principle in Australia’ (2007) 11(1) *Journal of South Pacific Law* 116.

without notice'.<sup>108</sup> Indeed, the policy basis justifying the exception is that, vis-a-vis those who gave consideration to acquire their interests, volunteers have a less meritorious claim to priority and should not be accorded any better position than their predecessor in title.<sup>109</sup> However, these arguments merely explain the policy basis for the exception. They do not impose a second step of analysis to determine who has the better equity. Once it is found that the registered proprietor has taken as a volunteer, priority automatically flows to unregistered interests which bound the donor.

In sum, all other statutory and common law exceptions to indefeasibility employ a 'one-step' analysis to determination of priority. Thus, only the 'automatically paramount' approach to the paramount interest exception operates in a manner consistent with other exceptions to indefeasibility. The 'two-step' analysis is clearly out of step with the methods of establishing priority for the other exceptions. Accordingly, the question must be asked: is there anything unusual about paramount interests compared with interests protected by other exceptions which explains and justifies the need for a two-step approach?

## **B Justifications for Two-Step and One-Step Approaches to Paramount Interests**

There are reasons why paramount interests might justifiably be treated differently to other exceptions to indefeasibility. One matter which arguably sets paramount interests apart from other exceptions is that the registered interest holder frequently has little or nothing to do with the creation of the paramount interest in question. In fact, this will often be the reason the competing interest holder must rely on the paramount interest exception; the fraud and *in personam* exceptions cannot assist where the paramount interest did not arise as a result of the conduct of the registered proprietor or their agents. One might argue that volunteers have also not created the interests to which they are bound; however, the volunteer's relationship to the donor could amount to a justificatory nexus to interests created by the donor or otherwise binding on them.<sup>110</sup> An analogy can be drawn to a registered principal being bound by interests created by their agent.<sup>111</sup>

By contrast, putting inconsistent legislation to one side, for every other exception, one reason why priority can be 'automatically' accorded via a 'one-step' analysis is the existence of a causal nexus between the registered proprietor and the creation (or imposition) of the competing interest. A causal nexus arguably provides a normative rationale based on the notion of corrective justice, whereby

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108 *Pilcher* (n 72).

109 Other justifications for the exception are beyond the scope of this article. See further Histed (n 107).

110 There are other convincing justifications for the volunteer exception. One is fairness. Victorian courts have taken the view that a person who has received an interest for no consideration should not be able to destroy an unregistered interest that has been purchased. Moreover, if volunteers get indefeasibility, registered proprietors could transfer their interest to a volunteer as a means of destroying an unregistered interest provided the registered volunteer was not privy to the fraud.

111 Obviously, the situations are vastly different in terms of authorisation and policy justifications.

the priority rule can be justified on the basis of correlativity, as a form of reparation for changes to the pre-existing status quo caused by actions or omissions of the registered proprietor, or those exercised on their behalf.<sup>112</sup> This corrective justice rationale supplies the juridical basis for the exceptions of fraud, *in personam* and, arguably, volunteers. A further rationale for the latter exists, namely, the absence of any juridical basis for the volunteer's retention of the registered interest, especially consideration. This arguably leads to a correlative injustice, whereby, without the exception, the registered proprietor would receive a benefit at the expense of the donee's competing interest through indefeasibility.<sup>113</sup>

The same cannot be said of paramount interests. Each paramount interest noticeably lacks any *necessary* causal nexus between the registered proprietor and competing interest. Given this difference, one can appreciate why a court might query why a registered proprietor should be subjected to an interest in whose creation they played no part. Without a causal nexus and corresponding corrective justice rationale to justify shifting priority away from the registered proprietor, it seems natural to suppose that perhaps some other external reason must be found to justify a decision to protect the unregistered interest from the registered one. On this view, the paramount interest exception simply opens the door as the first step, leaving a second step vacuum within which justification must be found to grant priority. General law priority rules can fill this vacuum by supplying the missing external reasons to justify allocation of priority in either direction.

But is this the right approach? It can be posited that Parliament has already taken the view that there is an external justification for according 'automatic paramountcy', even without a causal nexus. As argued elsewhere, there is weighty historical evidence to support this view of Parliament's intent.<sup>114</sup> This begs the question: what were the external justifications for paramount interests? Four possibilities have been propounded: discoverability, practicability, protection of vulnerable private interests and the public interest.<sup>115</sup>

In the case of section 42(2)(e), a legislative policy favouring protection of the tenant's reliance interest in their possessory rights could arguably justify automatic protection. This posits a justification that Parliament simply considered that tenants in possession *should* prevail because their occupational security is at stake, combined with the high likelihood that the registered proprietor would have actual knowledge – or at least constructive notice – of their interest. Indeed, this policy was significant in the Victorian Parliament's reasons for retaining the

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112 Weinrib (n 85) 8–16. Note, however, that this notion might not be reflected in the *extent* to which the priority rule may deprive the registered proprietor of their interest, often in toto.

113 Note that an 'absence of juridical basis for retention' rationale of corrective justice does not involve any reliance upon wrongdoing by the party that receives a benefit at the expense of the other party. Compare the treatment of unjust enrichment in Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2016) 185–229.

114 Spagnolo (n 92) Part III.

115 *Ibid* Part IV.

paramount interest exception for tenants in possession in 1954.<sup>116</sup> In other words, Parliament intended to set in place a rule which ossified the general law rule attributing constructive notice of a prior interest as a basis for allocating priority.<sup>117</sup> This indeed makes sense of the interpretation accorded to section 42(2)(e) that the tenant must be *in possession* for the tenant to attain paramountcy; a leaseholder not yet in possession will not be protected in Victoria.

Notably, possession is not a universal prerequisite for protection of tenants in all jurisdictions. Like Victoria, possession is required in Western Australia, Northern Territory and South Australia.<sup>118</sup> New South Wales more generously extends protection to both tenants in possession and those ‘entitled to immediate possession’.<sup>119</sup> Legislation in Queensland and Australian Capital Territory does not expressly demand possession.<sup>120</sup> The Tasmanian position is more complex and depends on whether the lease is legal or equitable.<sup>121</sup> Thus, a jurisdictional distinction must be made with regard to possession, reliance and constructive notice as justifying automatic priority for tenants.

Possession, reliance and constructive notice also makes sense as a rationale for protection of adverse possessors under section 42(2)(b).<sup>122</sup> In fact, for most

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- 116 The matter was a point of significant deliberation by the Statute Law Revision Committee 1949–54 because of a proposal in the 1949 Bill (n 93) to abolish the paramount interest exception for tenants in possession. See, eg, Explanatory Paper, Transfer of Land Bill 1949 (Vic) 19; Statute Law Revision Committee, Parliament of Victoria, *Final Report from the Statute Law Revision Committee on the Transfer of Land Bill 1949 Together with an Appendix and Minutes of Evidence* (Final Report, 17 July 1951) 7 [18]; Statute Law Revision Committee, Parliament of Victoria, *Report from the Statute Law Revision Committee on the Proposals Contained in the Transfer of Land Bill 1953 Together with Minutes of Evidence and Appendices* (Report, 1952–53) 4 [5] (‘1953 SLRC Report’); Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 1954, 629 (Samuel Merrifield, Minister of Public Works). For further discussion, see Spagnolo (n 92) Part IV.
- 117 Moreover, it was frequently remarked that the general law rule in relation to possessory interests had always been that possession (by a tenant or adversely) was good notice of whatever interest the possessor had: *1953 SLRC Report* (n 116) 30 (Philip Morelin Fox); Statute Law Revision Committee, Parliament of Victoria, *Progress Report from the Statute Law Revision Committee on the Transfer of Land Bill Together with Minutes of Evidence* (Report, 20 September 1949) 19 (Hubert Dallas Wiseman); *1953 SLRC Report* (n 116) 13–14 (Hubert Dallas Wiseman and Sir Percy Thomas Byrnes). Prior to 1949, the difficulty of discovering a tenant was considered irrelevant. In *Sandhurst Mutual Permanent Investment Building Society v Gissing* (1889) 15 VLR 329, the Court held that it is not to be recognised as a ‘principle of law that mere negligence [can] deprive a tenant of his statutory rights under this section’: at 332 (Higinbotham CJ for the Court). See also *National Bank of Australasia Ltd v Joseph* [1922] SRSA 578, 584.
- 118 As to the question of the timing of tenants in possession under section 42(2)(e), see discussion above at Part II(A). For Victoria, WA, NT and SA, tenants must be ‘in possession’ or have ‘actual possession’: *NT LTA* (n 3) s 189(1)(b); *SA RPA* (n 3) s 69(h); *Vic TLA* (n 3) s 42(2)(e); *WA TLA* (n 3) s 68(1A).
- 119 *NSW RPA* (n 3) s 42(1)(d).
- 120 *ACT LTA* (n 3) s 58(1)(d); *QLD NTA* (n 3) ss 185(1)(b), (2).
- 121 In Tasmania, the legislation protects a lease taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent that can be reasonably obtained without taking a fine, but also protects equitable leaseholders who are not in possession, except against *bona fide* purchasers for value without notice of the lease who have lodged a transfer for registration: *Tas LTA* (n 3) s 40(3)(d).
- 122 Victoria’s approach to adverse possession is not universal. Victoria, WA and Tas preserve the right of both inchoate and matured adverse possessory rights against new registered proprietors: *Tas LTA* (n 3) s 40(3)(h); *Vic TLA* (n 3) s 42(2)(b); *WA TLA* (n 3) s 68(1A). Qld only protects matured adverse possessory rights, that is, the interests of adverse possessors who would be entitled to registration: *QLD LTA* (n 3) s 185(1)(d). Similarly, in NSW, common law acquisition by adverse possession is curtailed by legislation:

paramount interests (easements, tenants in possession, adverse possession, and outstanding government charges), there is a high probability that the registered proprietor had the means to discover their existence before acquiring their own interest, even though the registered proprietor themselves did not create the paramount interest. It may seem counterintuitive to require purchasers to look ‘behind the curtain’ from a Torrens perspective, but inspection of the land would usually reveal an adverse possessor, a tenant in possession or an easement, although the latter might be more difficult to detect.<sup>123</sup> Relevant searches will usually uncover Crown reservations and public rights of way. The presumed ease of ‘discoverability’ of paramount interests is one of the major reasons why they were singled out for legislative protection in Victoria.<sup>124</sup>

New paramount interests remain ‘discoverable’ even after registration has occurred, through exercise of ordinary prudence by the registered interest holder. Whilst in Victoria section 42(2)(b) provides for paramountcy even if adverse possession commences after the registered proprietor becomes registered,<sup>125</sup> inchoate adverse possessory rights can easily be quashed by a reasonably observant and diligent registered proprietor, either by retaking possession or commencing proceedings for possession before the expiry of the limitation period.<sup>126</sup> An ordinarily prudent registered proprietor would likewise ensure taxes and charges are paid rather than accrued and, by regular inspection of the land, ensure that any easements by prescription are thwarted by preventative action.

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*NSW RPA* (n 3) s 45C(1). Thus in NSW subsequently registered proprietors are unaffected by an immature prior adverse possession (except over old title land converted to Torrens system: s 45C(2)). The only protection offered for adverse possession is where the requisite possession period is entirely accrued following the registration of the fee simple that the adverse possessor seeks to extinguish. In that case, the adverse possessor can apply for registration pursuant to *NSW RPA* (n 3) section 45D. In the ACT and NT adverse possessory rights are abolished: *ACT LTA* (n 3) s 69; *NT LTA* (n 3) s 198. On the very limited situations in which adverse possession might be recognised in SA: see Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th ed, 2020) 184–5.

123 Notably, the originator of the ‘curtain’ principle, Mr Ruoff, acknowledged that ‘overriding’ paramount interests were inevitable: Statute Law Revision Committee, Parliament of Victoria, *Report on the Transfer of Land Bill 1949 Supplementary Report 1951–2* (Report, 19 August 1952) 12 (Theodore BF Ruoff); Ruoff, *Mirror Principle* (n 4) 118–19. On discoverability of easements: see also Victorian Law Reform Commission, *Easements and Covenants: Final Report 22* (2010) [4.61] (‘*Vic Easements and Covenants Report*’). In WA and Victoria, prescriptive easements are covered by the respective paramount interest provisions: *Vic TLA* (n 3) 42(2)(d); *WA TLA* (n 3) s 68(1A). See also *Laming v Jennings* [2018] VSCA 335 (‘*Laming*’); *Di Masi v Piroballi* [1980] WAR 57; *Maio v City of Stirling [No 2]* [2016] WASCA 45; *Maddi Developments Pty Ltd v Perpetual Trustees WA Ltd* [2019] WASC 253. However, prescriptive easements are not protected in the more narrowly worded NSW provision: *NSW RPA* (n 3) s 42(1)(a1); *Williams v State Transit Authority NSW* (2004) 60 NSWLR 286, 297, 299–302 (Mason P, Sheller and Tobias JJA agreeing). They have been abolished in Qld (unless created before 1975): *Property Law Act 1974* (Qld) s 198A. Tas legislatively abolished the doctrine of lost modern grant and replaced it with a statutory process: *Tas LTA* (n 3) ss 138I–138L. In SA, the doctrine of lost modern grant has been held inapplicable: *Yip v Frolich* (2004) 89 SASR 467, 486 [89] (Bleby J, Perry and Gray JJ agreeing).

124 Spagnolo (n 92) Part IV(A).

125 The position would be similar in WA and Tas. In Qld, the registered proprietor would only be affected once the adverse possessor has accumulated the limitation period following the registered proprietor’s registration. See above n 122.

126 The limitation period varies between the States and Territories. In Victoria, a 15 year period applies: *Limitations of Actions Act 1958* (Vic) s 8.

These considerations militate against the idea that timing qualifications should apply to paramount interests generally.<sup>127</sup>

However, registered mortgagees are a somewhat different case to registered fee simple holders. Whilst it is relatively easy for the latter to ensure possession is not subsequently acquired by a tenant or adverse possessor, this is far more difficult for a registered mortgagee. From the perspective of the ‘discoverability’ rationale, it therefore makes sense that protection vis-a-vis registered mortgagees should only extend to *pre-existing* tenants in possession, easements and restrictive covenants, a position bolstered by *TLA* section 87C and its predecessor.<sup>128</sup> Hence, the confinement of the timing qualification to instances expressly provided for by the particular legislation at hand makes more sense. Notably, Torrens legislation in many jurisdictions other than Victoria expressly impose timing qualifications on certain paramount interests.<sup>129</sup>

A second rationale for identification of paramount interests by the Victorian Parliament was ‘practicability’. It was considered impracticable to require small and fluctuating interests or rights to clutter up the register with frequent registrations or caveats, such as short-term leases or annual council rates owed, especially where the costs of recording the interest on the register would be out of all proportion to the value of interests to be protected.<sup>130</sup>

Parliament appears to have identified as paramount interests rights it considered particularly vulnerable, for example: inchoate adverse possession; unregistered, implied or prescriptive easements; and short-term leases.<sup>131</sup> Although Victoria protects all leases, the fact that all other jurisdictions protect only short-term leases is telling.<sup>132</sup> Provisions protecting Crown reservations, public rights of way and unpaid taxes and charges appear to have been justified as protecting the public interest.<sup>133</sup> The rationale of protecting the public purse underlies sections 42(2) (a), (c) and (f). Arguably, the same outcome could arise from the inconsistent legislation ‘exception’ due to the imposition of statutory charges for outstanding rates;<sup>134</sup> however, the Victorian and West Australian provisions protect rates and

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127 It will be recalled that two possible bases were advanced for timing qualifications in the discussion above at Part II(A)(3) of this article.

128 See above n 28.

129 For example, only prior leases are protected in WA, SA, the ACT and NSW: see above n 25. See also the significant variance in approaches to adverse possession: above n 122.

130 This rationale is discussed in detail in Spagnolo (n 92) Part IV(B). Similar observations can be found for failure to register implied easements or easements by prescription: *Vic Easements and Covenants Report* (n 123) [4.44], [4.80].

131 Spagnolo (n 92) Part IV(A) (explaining assessments of vulnerability within the Torrens system, due to the likelihood that such interests would be destroyed by registration despite being easily discoverable).

132 See above n 11.

133 Spagnolo (n 92) Part IV(A). An analogy can be drawn to general principles of statutory interpretation discussed above, that is, where all else is equal, public rights should prevail over private rights.

134 See, eg, *Vic LGA* (n 91) s 181. Note that some jurisdictions simply rely upon inconsistent legislation to protect unpaid rates and taxes, while others have specific paramount interest exceptions to varying degrees, such as Victoria, ACT, Tas and WA: *ACT LTA* (n 3) s 58(1)(f) (‘unpaid duty, rates, taxes or other moneys which are expressly declared by any Act or law to be a charge upon land’); *Tas LTA* (n 3) s 40(3) (g) (‘any money charged on land under any Act’); *Vic TLA* (n 3) s 42(2)(f); *WA TLA* (n 3) s 68(1A) (‘any unpaid rates’).

taxes even before the land is charged.<sup>135</sup> Moreover, government taxes and charges, Crown reservations and public rights of way were considered ‘discoverable’ through purchaser enquiries of statutory bodies.<sup>136</sup>

The high likelihood that such interests could be easily discovered and the need to protect vulnerable private interests and the public purse justified automatic, one-step paramountcy, especially where there was no other practical method to protect such interests under the Torrens system.<sup>137</sup> The most efficient and fair rule was to simply grant priority to identified interests where the burden of discovering their existence could more fairly be placed upon registered proprietors.<sup>138</sup>

This explains why one-step paramountcy for all paramount interests in section 42(2) was justified, despite the absence of a causal nexus. The common thread is ‘discoverability’ and ‘practicability’, overlaid with a desire to safeguard vulnerable interests and the public purse. The rationale explains the wide time span of protection accorded to Victorian paramount interests, arising both before and after registration except in relation to registered mortgagees.<sup>139</sup> On this basis, it can be argued that the two-step test drawing on general law priority principles is misguided, and that automatic priority should be accorded because Parliament has determined that registered interests should be ‘subject to’ the paramount interests listed in section 42(2).

It is also possible that each paramount interest could have its own disparate rationale. Even so, courts applying a second step could still effectively be undermining legislative intent. However, the above framework provides a coherence that otherwise might be perceived as lacking by comparison with other exceptions to indefeasibility. Consequently, it supplies the missing juridical rationale to fill the void which courts have thus far sought to fill by resort to general law principles.

The ‘discoverable and practicable’ rationale is not without difficulties. The extent to which each paramount interest is discoverable is inconsistent. This becomes increasingly problematic when applied to easements, which might not be acquired for value and may not be easily discoverable, such as implied or prescriptive easements. Nonetheless, legislative history appears to indicate that the Victorian Parliament intended automatic priority.<sup>140</sup>

Despite this, if one were to accept that paramount interests lack a corrective justice rationale, then one might still question whether general law priority rules are capable of supplying the missing juridical basis for priority allocation for paramount interests. Can general law rules adequately fill the void? This, and the manner in which general law priority rules should be employed for this task, are explored further in Part V and VI below.

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135 See above n 134.

136 A great deal of time was spent from 1949–54 redrafting what is now *Vic TLA* (n 3) section 42(2)(f) to ensure that protected interests would correspond with what was discoverable by ordinary enquiries: Spagnolo (n 92) Parts III(B), IV(B).

137 *Ibid* Part IV.

138 The legislature engaged in identification of the ‘least cost avoider’ by balancing these issues: see Spagnolo (n 92) Parts IV(B), V(A), VI.

139 As noted earlier, protection does not extend in both temporal directions in relation to all paramount interests in other jurisdictions. See, eg, above n 25.

140 Spagnolo (n 92) Parts III, IV.

## V ASSUMING A TWO-STEP APPROACH TO SECTION 42(2)(e) IS JUSTIFIED, DID THE FULL FEDERAL COURT PROPERLY CHARACTERISE THE NATURE OF THE INTERESTS?

Assuming for the purposes of discussion that the Full Court of the Federal Court in *Perpetual* was correct to interpret section 42(2)(e) as requiring it to apply general law priority rules to resolve the priority dispute between the retirees' leases and Perpetual's mortgages, then, in the interests of parity and accuracy, it needed to characterise them both in a consistent manner with what the position would have been under the general law.

### A Characterisation of the Unregistered Interest Seeking Paramountcy

If section 42(2) requires that courts utilise general law priority rules, then the unregistered interest seeking paramountcy should assume its general law character, whether that be legal or equitable. In the context of section 42(2)(e), leases that comply with section 54(2) of the *Property Law Act 1958* (Vic) ('PLA') will be legal. Similarly, within section 42(2)(d), implied easements and easements of long user based on the notion of a lost modern grant are legal, not equitable, in nature. Likewise, adverse possession is a legal, not equitable, doctrine.

### B Characterisation of the Registered Interest Seeking Priority

As explained above, Moore and Stone JJ took the view that for the purposes of section 42(2)(e), Perpetual was stripped of its indefeasibility but not its registration.<sup>141</sup> If so, it is arguable that they should have treated Perpetual as having a legal mortgage, given that the general law counterpart of a registered interest under the Torrens system is a legal interest. Being subsequent in time, Perpetual's legal mortgage interest should have been pitted against the retirees' prior equitable tenancy for life<sup>142</sup> with the result that Perpetual's mortgage would prevail if Perpetual was a bona fide purchaser for value without notice. However, Moore and Stone JJ stated that 'our conclusion as to the priority of the retirees' interests does not depend on whether ... Perpetual's interest is legal or equitable'.<sup>143</sup> They proceeded to characterise the dispute as one between two equitable interests and thus applied the merits test to resolve it. While the ultimate outcome may have been the same, the process by which the dispute was resolved was different. Although the joint judgment purports to provide reasons as to why it made no difference whether Perpetual's interest was legal or equitable, in fact it never does.

In our view, on Moore and Stone JJ's analysis, Perpetual's mortgages should have been characterised as legal and should have been pitted against the retirees' leases using a priority rule cognisant of its proper characterisation at general law.

141 We do not believe that Moore and Stone JJ appreciated the distinction, but we will nevertheless analyse the situation on that basis: see above n 67.

142 It might be argued that, because the retirees were in possession, they additionally held pursuant to a common law implied tenancy. However, this would not have advanced their position, since it lacked the security of tenure they sought.

143 *Perpetual* (n 10) 585 [65].

This would ensure Perpetual was not at a disadvantage just because the land was Torrens land. It also recognises that registered instruments concerning Torrens land were (at the time) deemed to take effect as a deed under the former section 40(2) independently of the operation of indefeasibility, and this is necessary because *PLA* section 52 still applies.<sup>144</sup> The wording of section 40(2) of the *TLA* is important here (although it has since been repealed). Registered interests may be either legal or equitable under the general law, but was the inapplicability of section 40(2) a consequence of stripping Perpetual of indefeasibility? We argue that it does not necessarily follow that merely because Moore and Stone JJ disregarded Perpetual's indefeasibility, their Honours should also have ignored section 40(2)'s effect of conferring the status of a deed upon registration. Our interpretation is also consistent with section 3 of the *TLA*, which preserves the operation of the *PLA* and general law principles to the extent unaltered by the *TLA*.<sup>145</sup>

Dowsett J took a different view. As explained above, his Honour regarded section 42(2)(e) as stripping a registered proprietor of their registration, not merely their indefeasibility.<sup>146</sup> His Honour was therefore more consistent than Moore and Stone JJ in proceeding to treat Perpetual's mortgages as equitable and pitting them against the retirees' equitable life tenancies. Nevertheless, there is an objection to this approach. To treat the interest of Perpetual as equitable, though it was in fact registered, is to put it on the same plane as if, having entered into specifically enforceable contracts for mortgages, Perpetual had not lodged the mortgages for registration. The same objection could be made if the registered fee simple holder were treated as someone with a specifically enforceable contract of sale who had not taken steps to complete the contract. This may work an injustice. Why, having procured registration and thus a legal estate by the only means available in the Torrens system, should the purchaser not be treated as having a legal interest? After all, the registered proprietor had no choice other than to comply with the formalities for registration (rather than have taken a deed of conveyance, which would have been the means of acquiring the legal interest under the general law).

### C The Consequences of Characterisation

The manner in which the paramount interest holder's interest and the registered proprietor's interest is characterised will impact the resolution of the priority dispute, as it will trigger different priority rules which may, in turn, produce different outcomes.

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144 See above n 71 regarding the repeal in 2014 of *Vic TLA* (n 3) section 40(2).

145 *Vic TLA* (n 3) s 3(1):

Except so far as is expressly enacted to the contrary no Act or rule of law, so far as inconsistent with this Act, shall apply or be deemed to apply to land under the operation of this Act; but save as aforesaid any Act or rule of law relating to land, unless otherwise expressly or by necessary implication provided by this or any other Act, shall apply to land under the operation of this Act whether expressed so to apply or not.

146 *Perpetual* (n 10) 589 [84].

### 1 *If the Paramount Interest is Characterised as Legal*

If the paramount interest is classified as legal, then the outcome of the two-step test will depend on whether it arose first or second in time. If the paramount interest is a prior legal interest, it will ordinarily prevail over a subsequent putatively registered legal interest. If the subsequent putatively registered interest were classified as equitable, the prior legal paramount interest would be postponed only in the event of fraud or gross negligence.<sup>147</sup>

On the other hand, if both interests were characterised as legal but the paramount interest arose second in time, then the opposite result would arise. The subsequent legal paramount interest would lose priority to the earlier putatively registered legal interest. However, if the prior putatively registered interest were instead an equitable interest, then a subsequent legal paramount interest would only succeed if it was acquired bona fide for value without notice of the former. This is unlikely, unless the registered status of the prior putatively registered equitable interest were also entirely disregarded for the purposes of the notice test,<sup>148</sup> an imaginative feat which would approach new heights of legal fiction!

### 2 *If the Paramount Interest is Characterised as Equitable*

Again, different results would ensue, depending on timing. If the paramount equitable interest came first in time and the subsequent putatively registered interest is regarded as legal (either on the basis that it is stripped of its indefeasibility but not its registration, or is stripped of both but should nonetheless be properly characterised as legal under the general law), the putatively registered legal interest will prevail if the holder is a bona fide purchaser for value without notice of the prior paramount interest. Alternatively, if a paramount equitable interest was second in time,<sup>149</sup> then if the prior putatively registered interest is regarded as legal it will prevail unless the holder is guilty of fraud or gross negligence.<sup>150</sup> Finally, if the putatively registered interest is earlier but equitable, the merits test (or notice test) will apply.

As can be seen from the above analysis, outcomes under general law have multiple permutations and are highly unpredictable by comparison with automatic priority.<sup>151</sup> Moreover, as mentioned, some general law priority rules are difficult to apply within the Torrens context, eg, does registration (even after being stripped) still imply constructive notice?

147 *Northern Counties of England Fire Insurance Co v Whipp* (1884) 26 Ch D 482 ('Whipp').

148 It is unclear how the notice test would be resolved in this scenario. Is it possible for a paramount interest holder to acquire without notice of the registered interest? It may be that although registration is to be disregarded for the purposes of classification of the interests in the dispute, it may retain its relevance for this aspect of the test, rendering the entire exercise redundant.

149 With the exception of paramount interests being tenants in possession or easements created subsequently to a registered mortgage in Victoria: see *Vic TLA* (n 3) s 87C, discussed above n 28.

150 *Whipp* (n 147).

151 The uncertainty of general law rules in relation to priority disputes between unregistered interests was a source of dissatisfaction which spurred the 1949 Bill (n 93) and ultimately led to a lengthy review of the nature and role of paramount interests now found in *Vic TLA* (n 3): Spagnolo (n 92) Part III(B).

On the other hand, if a two-step method must be applied, then rather than reintroduce the complexities of the general law rules, it could be argued that all unregistered interests should be characterised the same in this context in order to ensure consistent treatment. If so, the equitable versus equitable analysis undertaken in *Perpetual* is at least justifiable, even if technically incorrect.

## **VI COULD (AND SHOULD) THE APPROACH ADOPTED IN *PERPETUAL* APPLY TO ALL PARAMOUNT INTERESTS?**

If we again assume for the purposes of discussion that the Full Court in *Perpetual* took the correct approach to section 42(2)(e) by applying a two-step approach, including application of general law priority rules, then the question arises whether this approach should apply to all paramount interests. There are a number of reasons to suggest it should not.

### **A Paramount Interests Are Not All Proprietary**

Firstly, not all paramount interests are proprietary in nature. The interests listed in section 42(2)(f)<sup>152</sup> have no independent proprietary status, at least until a statutory charge is imposed on the land to secure unpaid rates, which may not occur until amounts are overdue by a period of three years.<sup>153</sup> Non-proprietary paramount interests presumably enjoy automatic priority since there is no means of doing otherwise.

Since the *Perpetual* principle can sensibly operate only in respect of interests that are proprietary, its application to such interests means that section 42(2) must operate differently for different paramount interests. The one-step approach creates no such disparity, which is a further reason why we argue that it best serves the public interest.

### **B General Law Rules Are Not Always Needed to Resolve Priority**

Secondly, the competition between those paramount interests that *are* proprietary in nature and the registered interest may sometimes be resolved without resort to general law priority rules. Adverse possession is the prime example. If the requisite limitation period has elapsed (15 years in Victoria), the title of the registered proprietor is simply extinguished and application of priority rules is unnecessary. The registered owner, by dint of section 18 the *Limitation of Actions*

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152 A similar argument could be raised in relation to section 42(2)(a) (rights reserved in Crown grants) and section 42(2)(c) (public rights of way). There is insufficient space in this article to explore this matter. However, it is likely that reservations in Crown grants can be considered as proprietary. They were certainly treated as proprietary by early commentators. In any event, compulsory acquisition rights render the question redundant. Ownership of public rights of way relating to roads are deemed to be vested in either the Crown or local municipal council by legislation: see, eg, *Road Management Act 2004* (Vic) sch 5, cls 1(1), (4). For a holding that common law private dedications of public rights of way fall within the definition of ‘road’: see *Anderson v City of Stonnington* (2016) 217 LGERA 179.

153 See above n 91.

*Act 1958* (Vic) and its counterpart in other jurisdictions,<sup>154</sup> is more than just stripped of their indefeasibility or registration; they are stripped of their interest in the land by the operation of inconsistent and specific legislation.

Conversely, if the 15 years have not elapsed, general law does play an important part. In Victoria, Tasmania and Western Australia,<sup>155</sup> unless and until the registered owner takes action to stop time running, they are subject to the inchoate possessory rights of the adverse possessor due to the general law of adverse possession. The latter therefore controls which interest holder has priority, not the fact of registration. This is because of the combined effect of section 42(2)(b) of the *TLA*,<sup>156</sup> stripping the status of the registered proprietor, and the general law. General law even determines whether the registered owner has stopped time from running. However, prior to expiry of the limitation period, the function of general law is to simply define adverse possessory rights, not to allocate priority per se.

### C The Timing Qualification Does Not Apply to All Paramount Interests

As discussed earlier, a tenancy in possession or easement must predate the registered mortgage interest for section 42(2)(d) or (e) to apply to protect the leaseholder or easement holder. It is argued in this section that the timing qualification is not transposable, either under section 42(2)(d) or (e) to registered interests other than mortgages, nor, more importantly, to other paramount interests beside tenancies in possession or easements.<sup>157</sup> For example, after the current proprietor registers, the Crown could designate the land as a public right of way, which would bind the current registered owner. Likewise, a registered proprietor will be subject to government taxes and charges whether accrued before or after registration. Similar to Western Australia and Tasmania, Victoria has no timing qualification for adverse possession in section 42(2)(b).<sup>158</sup> Take a registered fee simple owner who is dispossessed by an adverse possessor. At that point in time, the owner's registration predates the adverse possession, but if the owner transfers their title during the 15 years period of adverse possession, the interest of the adverse possessor will predate the interest of the new registered owner, who will take subject to the inchoate possessory rights. This is not necessarily true in other jurisdictions.<sup>159</sup>

The position in respect of easements of long user is unsettled. In *Laming v Jennings*, an issue arose as to whether, for the purposes of section 42(2)(d), 'an easement can be held to have been subsisting over a servient tenement at the time a person became its registered proprietor even though the period of 20 years of uninterrupted use was completed after the time of registration'.<sup>160</sup> The Victorian Court of Appeal noted that the issue was a complex one, on which there

154 On the status of adverse possession in various jurisdictions, see above n 122.

155 Victoria, WA and Tas are the only jurisdictions which protect inchoate adverse possessory title: *Tas LTA* (n 3) s 40(3)(h); *Vic TLA* (n 3) s 42(2)(b); *WA TLA* (n 3) s 68(1A). On other jurisdictions: see above n 122.

156 See also *WA TLA* (n 3) s 68(1A); *Tas LTA* (n 3) s 40(3)(h).

157 As discussed above, this is now due to *Vic TLA* (n 3) section 87C.

158 Inchoate adverse possession rights are protected by an exception in these jurisdictions: see above n 155.

159 The same would be true in WA and Tas: see above n 155.

160 *Laming* (n 123) [188] (Kyrou, McLeish and Niall JJA).

was no authority. The Court refrained from expressing a final view but identified considerations that would ‘inform the resolution’ of the question, including:

[T]he differences in the wording of s 42(2)(b) and (d) of the *TLA* might support a different analysis of the circumstances in which an unregistered easement arising from long user binds the registered proprietor of the servient tenement compared to the circumstances in which title by adverse possession binds such a proprietor. The phrase ‘any rights subsisting’ in s 42(2)(b) may more readily be construed as rights that are continuing to accrue through user compared to the phrase ‘any easements howsoever acquired *subsisting*’. The latter phrase might indicate that an easement must have already crystallised as distinct from continuing to accrue at the time a person becomes the registered proprietor of the servient tenement.<sup>161</sup>

However, consistently with the above conclusion regarding timing qualifications on paramount interests, it has been suggested that the phrase was indicative only of a legislative desire to ensure implied easements were included within section 42(2) (d), rather than to indicate a temporal limitation.<sup>162</sup> As already mentioned, the timing qualification in relation to tenants in possession and easements only arises in the context of registered mortgages, a position explicable on the basis of section 87C. In terms of the coherent justificatory framework discussed above, it is ‘impractical’ to expect registered mortgagees, who lack possessory rights in the absence of default, to ‘discover’ the creation of leases or easements. This makes the registered mortgage the more ‘vulnerable’ of the two interests, consistently with the justificatory framework. By contrast, a registered owner in possession *is* subject to the rights of subsequent tenants in possession or easement holders, since they either created the competing interest (possibly also raising the *in personam* exception) or presumably could have discovered it and taken action to prevent it from arising or persisting.

Can the above coherent justificatory framework assist in the quandary identified in *Laming v Jennings*?<sup>163</sup> Would it support an interpretation favouring different treatment for an immature as opposed to a crystallised prescriptive easement vis-a-vis a subsequently registered proprietor? Interestingly, the Court of Appeal expressly mentioned the ability of the outgoing registered proprietor to ‘observe the user and take steps to stop it’ in contrast to the comparative lack of opportunity of the incoming registered proprietor to do the same, especially if their registration only occurred in the final weeks of the 20 year period.<sup>164</sup> This is consistent with the coherent justificatory framework above. The latter reminds us that the provision provides counterbalancing protection of ‘vulnerable interests’; that prescriptive

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161 Ibid [189] (emphasis added). Some of the other considerations listed by the Court also pointed to such a construction, including: the centrality of indefeasible title to the Torrens system and the consequent need to ensure that the scope of the statutory exceptions ‘remains within the intended statutory limits’: at [190]; the legislative history of s 42(2)(d): at [191]–[194]; the diminution of the historical rationale for legal fictions: at [196]–[197]; and at [195], the potential of the doctrine of lost modern grant to operate unfairly in respect of a person

who becomes the registered proprietor of the servient tenement during the period of 20 years of uninterrupted use compared to a person who has remained the registered proprietor for the entire period.

This is because the former person has less opportunity to observe the user and take steps to stop it, particularly if he or she becomes the registered proprietor in the last weeks of that period.

162 Spagnolo (n 92) Part V(B).

163 Notably absent from the discussion in *Laming* (n 123) was any resort to general law priority rules.

164 *Laming* (n 123) [195] (Kyrou, McLeish and Niall JJA). See above n 161.

easements cannot be registered until the period of long user has passed was the likely reason that Parliament maintained protection for them in Victoria.

Absent express words indicating otherwise,<sup>165</sup> the above analysis suggests there should be no limitations on the temporal operation of section 42(2) and that paramount interests arising before or after the registered interest should benefit from the exception. This appears to accord with the structure of the provision and with the legislative intent.

## VII CONCLUSION

This article has explored the *Perpetual* principle, that is, that paramount interests are not afforded automatic priority over registered interests, but rather, that registered interests are stripped of their indefeasible status and general law priority rules applied to determine priority. It has demonstrated that this cannot be true of all paramount interests, either because some lack a proprietary nature or because, in some instances, the application of general law priority rules is either an unnecessary or inappropriate mechanism. It also considered the High Court authority upon which the *Perpetual* principle was purportedly based.

Victorian paramount interests are not all subject to the timing qualification applicable to registered mortgagees, whereby tenants in possession and easements will not gain paramountcy through section 42(2) unless they arose prior to the creation of the mortgage interest or had prior written consent of the mortgagee. However, issues relating to difficulties in classification of competing interests and problems with the application of general law priority rules in a Torrens context raise serious questions about the suitability of general law rules to resolve priority disputes for paramount interests vis-a-vis registered interests under the method we have termed the '*Perpetual* principle'. Moreover, it is highly probable that the Victorian legislature did not intend a two-step process to apply to paramount interests, but rather, intended to adopt the one-step priority method that applies for all other exceptions to indefeasibility.

The cohesive justificatory framework outlined in this article<sup>166</sup> explains the rationale for paramount interests by supplying a juridical basis for them in the absence of the causal nexus that provides the corrective justice basis for other exceptions to indefeasibility. That framework explains the basis of paramount interests by reference to the fact that each is 'discoverable' or necessary because alternative protection is 'impracticable' and is justified further by its nature as a 'vulnerable' private interest or public interest. Finally, the framework illustrates why there is no need to resort to the two-step process employed in *Perpetual*; instead, there is good reason to adhere to the likely Parliamentary intention that paramount interests should gain 'automatic paramountcy'.

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165 Such express words are present in relation to some interests in other jurisdictions. Only prior leases are protected in WA, SA, ACT and NSW: above n 25.

166 For full discussion of the historical basis for this framework: see Spagnolo (n 92).