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Curial Discretion in the Drafting of Caveats: Is it Preserving the Integrity of the Register?

Abstract
The role of unregistered interests in the Torrens system has always attracted controversy. On the one hand, the inclusion of provisions such as s 41 of the Victorian Transfer of Land Act 1958, (and its equivalent in other jurisdictions) may have led to no recognition of any estate or interest outside of the register. However early in the history of Torrens jurisprudence, the existence and enforceability of interests outside of the register was accepted, despite their non-appearance on the official government record, (though one may speculate whether this recognition in 1914 would have occurred if immediate indefeasibility had been foreshadowed or adopted prior to the decision of Barry v Heider). Even more explicit than this early common-law recognition were provisions within the legislation allowing for the protection of unregistered interests, the primary illustration being the caveat. Notwithstanding this legislative and curial espousal of the proprietary interest outside of the official record, the exact role for the caveat has long been a matter of debate. However, the recent High Court decision of Black v Garnock has graphically highlighted the importance and contemporary role of the caveat. Accordingly, the purpose of Part 1 of this paper is, first, to consider the decision in Black v Garnock and highlight its ramifications for conveyancing practice. In Part II there will be consideration of the jurisprudence surrounding the judicial discretion to remove, amend, or allow a defective caveat to stand. Given the uncertainty surrounding the capacity to amend a defective caveat, (and the High Court in Black emphasising the importance of the caveat) this analysis is critical. After this examination, the question is whether the substantive and procedural law on caveats serves to enhance the integrity of the Torrens register. If not, and accepting for the moment that there needs to be some mechanism for the pre-emptive protection of unregistered interests, what changes can easily be made (and which don't involve a fundamental re-evaluation of the underlying precepts) to enhance the Torrens system

Keywords
curial discretion, caveats, torrens system

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CURIAL DISCRETION IN THE DRAFTING OF CAVEATS: IS IT PRESERVING THE INTEGRITY OF THE REGISTER?

LYNDEN GRIGGS*

I Introduction

The role of unregistered interests in the Torrens system has always attracted controversy. On the one hand, the inclusion of provisions such as s 41 of the Victorian *Transfer of Land Act 1958*, (and its equivalent in other jurisdictions)[1] may have led to no recognition of any estate or interest outside of the register. However early in the history of Torrens jurisprudence, the existence and enforceability of interests outside of the register was accepted, despite their non-appearance on the official government record, (though one may speculate whether this recognition in 1914 would have occurred if immediate indefeasibility had been foreshadowed or adopted prior to the decision of *Barry v Heider)*.[2] Even more explicit than this early common-law recognition were provisions within the legislation allowing for the protection of unregistered interests, the primary illustration being the caveat. Notwithstanding this legislative and curial espousal of the proprietary interest outside of the official record, the exact role for the caveat has long been a matter of debate.[3] However, the recent High Court decision of *Black v Garnock*[4] has graphically

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1 'Subject to this Act no instrument until registered as in this Act provided shall be effectual to create vary extinguish or pass any estate or interest or encumbrance in on or over any land under the operation of this Act, but upon registration the estate or interest or encumbrance shall be created varied extinguished or pass in the manner and subject to the covenants and conditions specified in the instrument or by this Act prescribed or declared to be implied in instruments of a like nature.'
Transfer of Land Act 1958 (Vic), s 40(1). For equivalent provisions see *Real Property Act 1900* (NSW) s 41(1); *Land Title Act 1994* (Qld) (no equivalent provision); *Real Property Act 1886* (SA) s 67; *Transfer of Land Act 1893* (WA) s 58; *Land Titles Act 1980* (Tas) s 49(1); *Land Titles Act 1925* (ACT) s 57(1); *Land Title Act* (NT) (no equivalent provision).

2 *Barry v Heider* (1914) 19 CLR 197.

3 The importance of caveats can be illustrated by the vast array of written academic and judicial commentary on the topic. See the list of articles cited at B Edgeworth, C Rossiter and M A Stone, *Sackville and Neave Property Law Cases and Materials,* 8th edition, LexisNexis Butterworths, Pyrmont, 2008, [5.152].

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highlighted the importance and contemporary role of the caveat. Accordingly, the purpose of Part 1 of this paper is, first, to consider the decision in *Black v Garnock* and highlight its ramifications for conveyancing practice. In Part II there will be consideration of the jurisprudence surrounding the judicial discretion to remove, amend, or allow a defective caveat to stand. Given the uncertainty surrounding the capacity to amend a defective caveat, (and the High Court in *Black* emphasising the importance of the caveat) this analysis is critical.[5] After this examination, the question is whether the substantive and procedural law on caveats serves to enhance the integrity of the Torrens register. If not, and accepting for the moment that there needs to be some mechanism for the pre-emptive protection of unregistered interests, what changes can easily be made (and which don't involve a fundamental re-evaluation of the underlying precepts) to enhance the Torrens system.

II Part I: *Black v Garnock*

The facts can be summarised:

- (17/9/2004): Black obtains judgment against the registered proprietor for $288,000.
- (15/7/2005): The registered proprietor contracts to sell land to Garnock for $1ml. Garnock pays a deposit of $100,000.
- (19/8/2005): Solicitors for the registered proprietors advise Black's solicitors that settlement will occur on August 24, 2005. However, there will not be any proceeds left over to pay the money owing to Black.
- (24/8/2005): Settlement - the following events occur:

  9am: Garnock's solicitors undertake a search of title, and only discover encumbrances already known.

  9.20am: Black's solicitors call Garnock's solicitors and indicate that they intend to prevent the sale going ahead. They advise that settlement should not proceed. In addition, they inform Garnock's solicitors that they have obtained a charging order against the deposit as well as instituting bankruptcy proceedings. Following this phone call, Garnock's solicitors confirm the existence of the charging order, but find no mention of a bankruptcy notice on the official records.

  11.53am: Recording of the writ of execution is completed, but Black does not advise Garnock of this.

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4 (2007) 230 CLR 438; 237 ALR 1; 81 ALJR 1338.

5 *Midwarren Estates Pty Ltd v Retek and Stivic* [1975] VR 575; *Elliott v Blanshard* (1970) 17 FLR 7; Re CM Group Pty Ltd's Caveat [1986] 1 Qd R 381.

2pm: Settlement takes place without a further title search. Garnock pays balance of purchase price.

- (8/0/2005): Garnock's solicitors receive advice that the registration of the transfer cannot occur because of the presence of the writ of execution. An attempt to lodge a caveat by Garnock is unsuccessful. The purchasers having paid the full purchase price are unable to have the title registered.

Despite the simple facts, the issue was one that divided the High Court 3:2, and the New South Wales Court of Appeal 2:1, with the High Court upholding an appeal from the lower court. The resolution of the case depended on an answer to the following: should the equitable interest created first in time pursuant to the contract prevail over the later interest, registration of which occurred with notice and knowledge of what had gone on earlier. The majority in the High Court and the minority in the New South Wales Court of Appeal were clear. The registered writ prevailed. By contrast, the majority in the New South Wales Court of Appeal allowed an injunction by Garnock forbidding the sheriff from executing the writ for 60 days, with this operating to preserve the interest of Garnock from elimination by statutory sale. Despite the polar opposition in result (which can be appreciated was ultimately catastrophic for Garnock), the bifurcation between the majority and the minority judges centered on the purpose and role of the caveat provision. The majority (Gummow and Hayne JJ. jointly; Callinan J. separately) considered that once the writ of execution was recorded on title, (of which all States except Western Australia appear to have somewhat similar provisions)[6] the legislation operated to provide the Sheriff with a protected period by which he or she could sell the property. To grant an injunction against the Sheriff was contrary to the intent and direction provided by the legislation. The view of the majority was that the purchaser had the arsenal available to protect their own position. They could have caveated. Gummow and Hayne JJ. ask this very question – 'If before the writ was recorded on the register, the purchasers had lodged caveats on the titles to the land, claiming an interest as purchasers of the land, how would the relevant provisions of the [Torrens legislation] have operated.'[7] The answer to this was clear: '[I]f caveats had been lodged and particulars of the caveats entered on the register, and if the sheriff then sought to sell the land in execution of the writ, a purchaser at the sheriff's sale would not have been able to obtain registration of a transfer of the land so long as those caveats remained

[6] *Transfer of Land Act 1958* (Vic), s 52; *Real Property Act 1900* (NSW) s 105; *Land Title Act 1994* (Qld) s 117; *Real Property Act 1886* (SA) s 110; *Transfer of Land Act 1893* (WA) (no equivalent provision); *Land Titles Act 1980* (Tas) s 61; *Land Titles Act 1925* (ACT) s 170; *Land Title Act* (NT) s 133.

[7] *Black v Garnock* (2007) 230 CLR 438, [42].

in force.'[8] According to their Honours, the construction of the legislation demanded this conclusion.[9] However, this construction by the majority is open to criticism. Practically what would have occurred if lodging of the caveat occurred before the recording of the writ? One could suggest that not only would the caveat have prevented the Sheriff's sale from proceeding, but also the purchasers would similarly have been unable or unwilling to complete the transfer. Both parties would have stood 'toe to toe' with each other, with the likely outcome some form of compromise depending on the financial imperatives facing each party. 'The drafters of the legislation appear to have overlooked these practical consequences – a classic example of seeking to address a perceived ill without full consideration of the conveyancing problems likely to occur.' [10]

Whereas Gummow and Hayne JJ. spoke directly to the wording of the legislation, the judgement of Callinan J. resonated with an appeal to the policy of Torrens and the practices of prudent conveyancers. His Honour began his judgement lamenting the failure of present practitioners to lodge caveats in favour of registrable dealings in pre-emptive protection of their clients' interests,[11] and noting that: 'The questions raised in this case would be unlikely to have arisen had those salutary practices not fallen into disuse, whether by reason of electronic recording of dealings or otherwise, although it is difficult to understand why some comparable prudent practice would not equally, and perhaps more easily, have been adopted there to accommodate electronic lodgement, searching and recording.'[12] Significantly, Callinan J. expressly questions, and disagrees with the earlier reasoning of the High Court in *J & H Just Holdings v Bank of New South Wales*[13] as to the purpose and role of a caveat. In *Just* the registered proprietor had executed a mortgage in favour of the Bank of New South Wales. The bank did not register the mortgage, nor did they lodge a caveat.

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8 *Black v Garnock* (2007) 230 CLR 438, [43].

9 *Black v Garnock* (2007) 230 CLR 438, [44]-[50].

10 DKL Raphael, *Black v Garnock: A Practitioner's Perspective,* (2007) 81 *ALJ* 851, 851-852: 'One could, with a little respectful cynicism, suggest that, had a caveat been lodged on the purchaser's behalf before the writ was recorded, a 'standoff' would have followed. Not only would the caveat have prevented the transfer executed at a sheriff's sale from being registered, but as a practical matter the purchasers would not have completed their transfer without paying the amount of the judgement debt, as well as mortgages and other charges affecting the title of the registered proprietor. The drafter of the legislation appears to have overlooked these practical consequences – a classic example of seeking to address a perceived ill without full consideration of the conveyancing problems likely to occur.'

11 *Black v Garnock* (2007) 230 CLR 438, [52].

12 *Black v Garnock* (2007) 230 CLR 438, [53].

13 (1971) 125 CLR 546.

However, they retained possession of the duplicate certificate of title. Three years later the appellant obtained a mortgage over the land. Again, registration did not occur, the appellants were satisfied with the registered proprietor's explanation that the duplicate certificate of title was merely with the bank for safekeeping. No encumbrances were discovered on a search of the register. J & H Just Holdings sought a declaration that its mortgage was entitled to priority over the bank's mortgage. In holding in favour of the bank, Barwick CJ. stated that:

> To hold that a failure by a person entitled to an equitable estate or interest in land under the *Real Property Act* to lodge a caveat against dealings with the land must necessarily involve the loss of priority which the time of the creation of the equitable interest would otherwise give, is not merely in my opinion unwarranted by general principles or by any statutory provision but would in my opinion be subversive of the well recognised ability of parties to create or to maintain equitable interests in such lands.[14]

In directly responding to this, Callinan J. in *Black v Garnock* was equally adamant that:

> What is much more likely to be subversive of the whole of the scheme of the Torrens system is that a person interested in, or entitled to deal with, land, who has not acted fraudulently, might suddenly and unexpectedly be saddled with, or postponed to, an equitable estate or interest in land which could have been, but was not, made the subject of protection by prompt lodgement of an instrument or the filing of a caveat pending the lodgement.[15]

The minority judges, (Gleeson CJ and Crennan J. in separate judgements) disagreed with the approach taken by the majority. Specifically Crennan J. saw the issue in the following terms: '[T]he question on the appeal to this court was whether the purchasers were entitled to an injunction, before a sale to any other purchaser, to restrain the judgement creditors and the sheriff from execution of the writ which was recorded on the register, after the purchasers had acquired an interest in the land, but

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[14] (1971) 125 CLR 546, 554. Contrast Menzies J (at 557) where his Honour, whilst agreeing with the other members of the Court noted that the 'The reason for such an entry [of a caveat] must be to give notice of the caveat.' See also Windeyer J (at 558) who considered that [T]he fact that a caveat discoverable by a search of the title is 'notice to all the world' of the interest does not mean that the absence of a caveat is a notice to all and sundry that no interest in claimed. To say that it would, it seems, be to equate the noting of a caveat in the register book with the registration of a dealing: it would make competing equitable interests depend not upon the priority of creation in time and other equitable considerations, but upon priority of the lodgement of caveats.'

[15] *Black v Garnock* (2007) 230 CLR 438, [80].

before they had registered that interest.'[16] In her Honour's view the provisions allowing for the Sheriff to have a protected period was designed to give priority to a purchase from the Sheriff during this period against any transactions conducted by the registered proprietor. In this instance, the judgement debtor had contracted to sell prior to the commencement of the protected period.[17] The lodging of the writ created the interest, not the failure to lodge a caveat[18] and it was for another day the resolution of the interaction between the caveat provisions and the legislative provisions dealing with the recording of writs.[19]

III Implications post *Black v Garnock*[20]

There is no doubt that *Black v Garnock* could, and in this writer's view should, alter conveyancing practice. Specifically, the implications of this important decision are as follows:

(i) In those jurisdictions where prudent conveyancing practice does not involve the lodgement of a priority (Tasmania) or a settlement (Queensland) notice, it may well now be professionally negligent not to lodge a caveat in protection of a client's interest pending settlement;[21]

(ii) The decision may promote the use of stay orders in Victoria,[22] or Western Australia;[23]

(iii) Conveyancers should seek to ensure that registration is not delayed unduly, and that the protection to the purchaser is extended until settlement occurs;

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16 *Black v Garnock* (2007) 230 CLR 438, [119].

17 *Black v Garnock* (2007) 230 CLR 438, [124].

18 *Black v Garnock* (2007) 230 CLR 438, [131], per Crennan J.

19 *Black v Garnock* (2007) 230 CLR 438, [131].

20 See also T Cahill, 'Caveats – current issues', (2008) 16 *APLJ* 87, 100-103.

21 See the comments by P Butt, *Land Law*, 5th edition, LawBook Co, Pyrmont, 2006, 755 who notes that it is not the case that purchasers would routinely lodge caveats – but only do so in circumstances where there is a delayed settlement, a purchase off the plan, release of deposit, or perceived unusual risk.

22 *Transfer of Land Act 1958* (Vic), ss 92-93.

23 *Transfer of Land Act 1893* (WA), s 148 – for a discussion of this provision, see M. Calzada, 'The Stay Order Procedure in Victoria and Western Australia: Deadletter Law or Negligent Disregard of Available Provisions', (1998) *APLJ Lexis* 43. He comments (at 4 of online version) that: 'It is remarkable that those in other States most at risk, namely banks and other finance providers, seem to choose to expose themselves to potentially substantial losses and particularly so in Victoria and Western Australia where the statutes already make provisions that substantially mitigate the risks.'

(iv) Searches of the register should be undertaken as close to settlement as is feasible, and preferably at the office of the Recorder;[24]

(v) Legal practitioners will need to consider how to protect the risk undertaken by a purchaser in an 'off the sale' plan. These routinely prevent the lodging of a caveat by a potential purchaser pending the issue of title. Purchasers will need to be appraised of this risk, and consideration given as to mechanisms by which the deposit may be protected;[25]

(vi) Financial institutions will need to work with the purchaser's solicitors or conveyancing agents to ensure protection of the mortgagees interest;

(vii) The decision promotes the use of title insurance. The Garnock's, if they had title insurance, may well have been compensated for their loss;

(viii) The result may lead to legislative amendment. At the time of writing, the New South Wales Law Society is considering putting forward amendments to provide for priority to purchasers in the position of Garnock. Similarly, the Victorian Law Institute has submitted to the Law Council of Australia[26] that Land Registry fees have priced the lodging of caveats out of the market and that Queensland and Tasmanian practices of settlement and priority notices may provide a cheaper and more administratively efficient solution to this dilemma. This comment was made after noting that one of the main categories of solicitors' professional negligence claims is for failure to lodge a caveat;

(ix) Finally, in those jurisdictions where the caveat is the only pre-emptive protection offered for the purchaser, careful consideration of its wording is

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[24] *Black v Garnock* (2007) 230 CLR 438, [49] per Gummow and Hayne JJ., and [52]-[53] per Callinan J – though this latter suggestion of settlement at the Recorder may well have significant practical restrictions (i.e. absence of settlement rooms).

[25] One possibility may be the establishment of a Quistclose Trust: *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567; Re Australian Elizabethan Theatre Trust; *Lord v Commonwealth Bank of Australia* (1991) 30 FCR 491.

[26] Letter of January 7, 2008.

required. In order to save costs, it may be necessary to have the caveat drafted so that withdrawal is unnecessary prior to settlement.[27]

IV Part II: Curial Discretion in the Drafting of Caveats

With *Black v Garnock* foreshadowing an even greater role for caveats, attention will focus on the role that the courts should have when determining the validity of a caveat. Each jurisdiction establishes its own formal requirements for caveats.[28] Generally, these require the specification of the nature of the estate, a description of the land and the facts specifying the basis of the caveat.[29] Over reliance on these formal requirements has attracted a number of critics,[30] with some suggesting the value of the caveat provisions has been compromised by pedantic attention to the legislative direction.[31] As to whether the quantum must be stated is a matter of some divergence between jurisdictions.[32] However, with New South Wales having specific legislation permitting the waiving of the formal requirements,[33] and courts in other jurisdictions being prepared to overlook technical difficulties, the question becomes one of isolating the process in which the discretion will be utilised, and more broadly speaking, whether some other form of protection is needed for the creation and protection of unregistered interests. The matter is of some practical importance given the court's power to amend defective caveats is unclear with Aristei noting the inconsistency in the cases.[34] For example, in a series of cases analysed by Underwood

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27 See the comments by D L A Phillips Fox, 'From the Ground Up – Legal updates for the New South Wales Built Environment', 13 December 2007, 4/6 of online version – accessed July 3, 2007 <http://www.dlaphillipsfox.com>.

28 *Transfer of Land Act 1958* (Vic), s 89(1); *Real Property Act 1900* (NSW) s 74F(5); *Land Title Act 1994* (Qld) s 121; *Real Property Act 1886* (SA) s 191(a); *Transfer of Land Act 1893* (WA) s 137; *Land Titles Act 1980* (Tas) s 133(1); *Land Titles Act 1925* (ACT) s 104(2); *Land Title Act* (NT) s 137.

29 *Sullivan v McMahon* [1999] WASC 83; *Re Jones* (1935) 35 SR(NSW) 560; *Re Whalley's Caveat* [1975] QD R 111; *George v Biztole Corp Pty Ltd* (1995) V ConvR 54-519; *Vandyke v Vandyke* (1976) 12 ALR 621.

30 *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* (1990) 21 NSWLR 459, 467-468; *Gasiunas v Meinhold* (1964) 6 FLR 182.

31 *Buddle v Russell* [1984] 1 NZLR 537, 539.

32 *Kerabee Park Pty Ltd v Daley* [1978] 2 NSWLR 222; *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* (1990) 21 NSWLR 459. In Tasmania, it has been doubted as to whether the quantum must be specified *Smith v Longden* (1997) 7 Tas R 194; *Four Oak Enterprises Pty Ltd v Clark* [2002] ANZ ConvR 440.

33 *Real Property Act 1900* (NSW) s 74L.

34 A J Aristei, 'Recent Developments in the law of caveats', (2008) *APLJ* 62, 67.

J in *Patmore v Upton,*[35] one view was that the amendment power was largely unconstrained, with the following comment in *Hooper v Australia and New Zealand Banking Group Ltd*[36] illustrative of this:

> In my opinion, the nature and purpose of a caveat is such that technical deficiencies in its form and content should not be allowed to deprive a bona fide claimant from obtaining the advantage and breathing space that prompt notification of his claim to the Registrar should, in principle, permit him to achieve. This does not mean that a fallacious claim should be allowed to clog the title or that imprecision or obfuscation should be rewarded, but if Stout CJ was correct in *Plimmer v St. Maur* [37]when he said:
>
>> In my opinion the caveat cannot be set aside unless the claim appears to be without any validity. If there is a reasonable question to argue the court should not remove the caveat, but permit the matter to be litigated.
>
> (and, with respect, I think he was) the Court should not destroy or impede bona fide claims either by declining to amend an arguably deficient caveat or by removing it from the Register.

Contrasting with this, Underwood J. in *Patmore v Upton*[38] did recognise that cases that are more recent highlighted a more restrictive approach. This line of authority[39] summarised in the following words from *Multi-Span Constructions No 1 Pty Ltd v 14 Portland Street Pty Ltd*:[40]

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35 [2004] TASSC 77; BC200404615. The cases being: *Hooper v Australia and New Zealand Banking Group Ltd* (1996) 5 Tas R 398; *Dean v Dean* [1999] TASSC 15; *Queensland Estates Pty Ltd v Co-Ownership Land Development Pty Ltd* [1969] Qd R 150; *Elliott v Blanchard* (1970) 17 FLR 7; Re The Victorian Farmers' Loan and Agency Co Ltd (1897) 22 VLR 629; *Veloudos v Young* (1981) 56 FLR 182; *Porter v McDonald* [1984] WAR 271. See also *Andel Pty Ltd v Century Car Care Pty Ltd* (1989) Q ConvR 54-315, 58,333; *In the Marriage of Stevens* (1991) 15 FAmLR 51, 53; *Hayes v O'Sullivan* (2001) 24 WAR 40.

36 *Hooper v Australia and New Zealand Banking Group Ltd* (1996) 5 Tas R 398, 404.

37 (1907) 26 NZLR 294.

38 [2004] TASSC 77, [73]-[81].

39 Cases such as *Midwarren Estates Pty Ltd v Retek* [1975] VR 575; *Depsun Pty Ltd v Tahore Holdings Pty Ltd* (1990) ANZ ConvR 334; *Multi-Span v Portland* [2001] NSWSC 696, BC200104865; *Professional Services of Australia Pty Ltd v Mila Properties Pty Ltd* [2004] WASC 30; *Goodwin v Gilbert* [2000] WASC 309; *New Zealand Mortgage Guarantee Co Ltd v Pye* [1979] 2 NZLR 188. See also *Hanson Construction Materials Pty Ltd v Vimwise Civil Engineering Pty Ltd* (2005) 12 BPR 23,355; *Circuit Finance Pty Ltd v Crown & Gleeson Securities Pty Ltd* (2006) NSW ConvR 56-143; *Mellish v Fetoza Pty Ltd* [2007] NSWSC 790.

40 [2001] NSWSC 696; BC2000104865, [127].

> A caveat is not an ambulatory or flexible means of maintaining a blocking position in aid of whatever interest, if any, the caveator may have from time to time…The ineffectiveness of a caveat to do more than provide protection, by way of notice, commensurate with the extent of the notified estate or interest is emphasised in decided cases and which are of long standing and are discussed by John Baalman in 'The Drafting of Caveats', (1957) 31 ALR 17. It is beside the point that the caveator may have some estate or interest capable of supporting a caveat which is not itself claimed in the caveat. This is borne out by the following statement in *Ruptash v Zawick* (19560 2 DLR 145 quoted by Baalman :
>
>> The purpose of filing a caveat is to give notice of what is claimed by the caveat against the land described. If an unregistered document in fact gives a party thereto more rights than one in a parcel of land and such a party sees fit to file a caveat claiming one only of such rights, it appears to me that any person proposing to deal with the land is entitled to assume that the claim expressed is the only one made. Expressio unius et exclusio alterius.[41]

Butt[42] attempts to rationalise these two conflicting positions by suggesting that where the caveat merely misdescribes the interest claimed, amendment of the caveat can occur. However, where the caveat discloses no caveatable interest, even though the caveator may have one, amendment of the dealing is not possible. The authorities,[43] which that learned author admits,[44] do not support such a distinction.

With this ambiguity as to whether a defective caveat can be amended, the discretion utilised by a court in deciding whether to allow a non-compliant caveat to remain against title becomes critical. If the resolution is that the power to amend is restricted, and that defects cannot be overlooked, a person lodging a caveat that fails to meet the specific jurisdictional technical requirements may find, at a subsequent and no doubt inconvenient time, that the caveat has been ineffective. To overcome this, NSW has legislatively provided in s 74L of the *Real Property Act 1900* (NSW) that:

> …If in any legal proceedings a question arises as to the validity of a caveat lodged under a provision of this Part, the court shall disregard any failure of the caveator to comply strictly with the requirements of this Part, and of any

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41 The Latin translates to: 'The express mention of one thing excludes all others.'

42 P Butt, *Land Law*, 5th edition, LawBook Co, Prymont, 2006, 749.

43 See *Kang v Kwan* [2001] NSWSC 624; *Deabel v V'Landys* [2002] NSWSC 438; *Jones v Baker* (2002) 10 BPR 19,115.

44 P Butt, above n 42.

> regulations made for the purposes of this Part, with respect to the form of the caveat.

Despite this direction, NSW authorities display no consistency as to the operational breadth of the provision. For example in *Windella (NSW) Pty Ltd v Hughes and Others*[45] Santow J., in applying the decisions of *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd*[46] and *In Marriage of Stevens*[47] was of the view that s 74L was not to be restricted to the curing of technical defects, and that with s 74L operative, there was no necessity for the relodging of the caveat with the non-compliant parts omitted or substituted.[48] By contrast, Palmer J in *FTFS Holdings Pty Ltd v Business Acquisitions Australia Pty Ltd*[49] considered that s 74L could not be used where the caveat failed to address the very nature or type of the estate or interest claimed. Similarly, Gzell J in an ex tempore judgement, *Sama Zaraah Pty Ltd v 888 Projects Pty Ltd* stated that: '[Section 74L] only applies to defects of form and does not deal with matters of substance. It does not empower the court to amend the provisions defining the interest claimed.'[50] However, this again can be compared with the earlier decision of Austin J. in *Deabel v VLandys*[51] where his Honour noted that: 'The court usually exercises its power in the light of s 74L, so as to give effect to the caveat if the caveator has a caveatable interest, despite even gross defects such as the failure to state the interest being protected or even the failure to state the maximum amount secured by the mortgage.'

In summary, no practitioner in New South Wales could be confident that the provisions of s 74L of the *Real Property Act 1900* would rescue a poorly drafted caveat. With the regulations imposing detailed requirements as to the form and content, and the Registrar-General having a duty to ensure that a caveat complies with the legislation, 'as a practical matter, caveators should attempt to comply with the requirements…'[52]

No other jurisdiction has a similar legislative direction to ignore defects in caveats. Rather, what we see is the Bench relying on its general discretionary powers to make

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45 (1999) 49 NSWLR 158.

46 (1990) 21 NSWLR 459.

47 (1991) 105 FLR 459.

48 (1999) 49 NSWLR 158, [27]-[28].

49 (2006) 12 BPR 23, 517.

50 *Sama Zaraah Pty Ltd v 888 Projects Pty Ltd* [2007] NSWSC 1041.

51 *Deabel v V'Landys* [2002] NSWSC 438; BC200203496, [8]; citing Young CJ in *Jones v Baker* (2002) 10 BPR 19,115.

52 P Butt, *Land Law,* 5th edition, Thomson LawBook Co, Prymont, NSW, 2006, 741-742.

any order that it sees fit (a legislative direction available in all jurisdictions),[53] or, as was done in Western Australia, reliance on interlocutory injunctive relief to provide analogous remedial relief.[54] For example in *Connector Park Pty Ltd v RV Pty Ltd*[55] Crawford J. considered that even if there were drafting difficulties with the caveat, there was no doubt that the respondent did have a caveatable interest and that technical deficiencies in the form and content of the caveat would not be allowed to deprive a good faith claimant from the benefits of protection provided by the caveating system.[56]

V Where to From Here

The question remains, and if integrity of the register is placed at the forefront, as I suggest it should, which approach, if any achieves this aim. The caveat provisions have undoubtedly played a critical role in the history of Torrens legislation. Alongside indefeasibility, they are probably the most discussed area, and would represent, in pure numbers, the most litigated part of Torrens legislation. However, there is no doubt that at a practical level, abuse of the use of caveats occurs, and any unrestrained freedom to lodge capricious caveats can only exacerbate that abuse.[57] Perhaps it is this practical reason, as much as slavish adherence to the prescriptive requirements of the legislation that has led to, for the most part, a strict compliance-

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53 *Land Titles Act 1980* (Tas) s 135(2). All other jurisdictions also have a similar broad power, see *Transfer of Land Act 1958* (Vic), s 89A(7); *Real Property Act 1900* (NSW) s 74MA; *Land Title Act 1994 (Qld)* s 127(2); *Real Property Act 1886* (SA) s 191(e); *Transfer of Land Act 1893* (WA) s 138(c); *Land Titles Act 1925* (ACT) s 107; *Land Title Act* (NT) s 143.

54 *Midland Brick Company Pty Ltd v Welsh* [2006] 32 WAR 287, [417]. 'I am of the view that in circumstances where the statutory procedure to protect an unregistered equitable interests in the subject land may not be sufficient to protect that interest owing to a defect in the form of the caveat a restraining order by way of injunction should be made in favour of Midland Brick as a means of holding the defendant to what I have found to be her bargain.'

55 [2006] TASSC 9. See also *Hooper v Australian and New Zealand Banking Group Ltd* (1996) 5 Tas R 398; ANZ ConvR 400.

56 Applying the earlier decision of *Hooper v Australia and New Zealand Banking Group Ltd* (1996) 5 Tas R 398. See also *Four Oak Enterprises Pty Ltd v Clark* [2002] ANZ ConvR 440.

57 L Aitken, 'Many shabby manoeuvres – the use and abuse of caveats in theory and practice', (2005) *ABR Lexis* 16, 3 of online version: A cavea, captiously or capriciously lodged, permits the person lodging it to wring the withers of the registered proprietor with a claim which ultimately proves baseless. It will necessarily take time, effort and expense to remove the caveat; once removed, there may be little to recover by way of damages for the loss sustained while there was a blot on the title.'

orientated approach to the caveat provisions. Perhaps it may also hark to a concern about the operation of unregistered or equitable interests in a system of title by registration.

> It must be said that equity embodies the Aristotelian ideal that the law must be rectified where it falls short by reason of its universality. From this, it can be seen that there is an instant philosophical and practical tension between the Torrens system's universality and equity's specificity….Equitable interests cannot be discovered by looking at the register (unless a caveat has been lodged). Therefore, equitable interests undermine the conclusiveness of the register because the 'mirror' of title can no longer provide an accurate reflection if there are interests which cannot be recorded.[58]

Given this, and with an appreciation that equitable interests have prospered, rather than fallen into disuse, the time for equity and Torrens to find some form of homology has arrived. Perhaps *Black v Garnock* is the beginning of this, the failure to caveat arguably now elevated to the stature of professional negligence, and the inherently practical effect of notice to someone searching now recognised. With caveats for the most part operating as the singular mechanism to warn of the presence of an unregistered interest, the line of authority suggesting that the function of a caveat is *only* to protect the interest holder, must now come into question.[59] Contemporary thinking may well see the purpose of a caveat as a means to prevent dealing with the land by the registered proprietor in a manner that is inconsistent with the rights of the caveator. As noted by Hughson, Neave and O'Connor, this approach is preferable:

> It emphasises the protective function of the caveat procedure, and allows any kind of proprietary interest to be caveated. It also allows a caveat to fulfil different functions depending upon the circumstances. Thus, the caveator might proceed to litigation if appropriate in the circumstances, or the caveator might be required to lodge a registrable instrument, or the caveat might be allowed to remain on the register indefinitely to protect it from being overridden by registration.[60]

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[58] K Barnett, 'The mirror of title crack'd from side to side? The amazing half-life of the equitable mortgage', (2007) APLJ Lexis 4, p 4 of online version.

[59] *Jacobs v Platt Nominees* [1990] VR 146; *Avco Financial Services Ltd v Fishman* [1993] 1 VR 90; *J & H Just Holdings Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546; *Person to Person Financial Services v Sharari* [1984] 1 NSWLR 745.

[60] M A Hughson, M Neave and P O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders', (1997) 21 *Melbourne Uni L R* 460, 465.

Black v Garnock may also have more far-reaching effects. The line of authority[61] that suggests that the equitable interest created first in time will prevail over a later created equitable interest, despite a failure to caveat, must now be questioned. There are of course, obvious dangers with this. Equitable interests under the Torrens system arise out of two mechanisms. The first deriving from agreement between the parties, such as equitable mortgages[62] and equitable leases[63] for which it may be expected that caveats could be lodged in protection.[64] The second category deriving from operation of law, and which sees the recipient unaware of any proprietary interest until resolution by the Court – these, for example, resulting out of unconscionable conduct[65] or equitable estoppel.[66] In addition to this, if the role of caveating is now more significant, the next question becomes the exercise of the discretion by the judiciary. If the significance is raised, does this serve as a message that more caution should be exercised in the drafting and acceptance of caveats, or will the compensation provisions existing in a number of jurisdictions be used to stamp out vexatious and frivolous additions to the register.[67] If greater caution is to be used, should the discretion be exercised as with a statutory provision in New South Wales, or by reliance on the inherent discretionary powers to make any order the court sees fit. Another alternative may be to use the analogous precedent offered by the voluminous litigation on the power of a court to order the removal or extension of a caveat – this asking whether there a serious question to be tried and determining where the balance of convenience lies.[68] It is submitted that the approach

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61 For some of the case law on this issue, see *J & H Just Holdings Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546; *Australian Guarantee Corp (NZ) Ltd v CFC Commercial Finance Ltd* [1995] 1 NZLR 129; *Double Bay Newspapers Pty Ltd v AW Holdings Pty Ltd* (1996) 7 BR 14,858; *Abigail v Lapin* [1934] AC 491; *Heid v Reliance Finance Corporation Pty Ltd* (183) 154 CLR 326.

62 *ANZ Banking Group Ltd v Widin* (1990) 26 FCR 21; 102 ALR 289.

63 *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242; 89 ALR 522.

64 See Barnett, above n 58, p21 where similar comments are made.

65 *Baumgartner v Baumgartner* (1987) 164 CLR 137.

66 *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

67 *Transfer of Land Act 1958* (Vic), s 118; *Real Property Act 1900* (NSW) s 74P; *Land Title Act 1994* (Qld) s 130; *Real Property Act 1886* (SA) s 191(j); *Transfer of Land Act 1893* (WA) s 140; *Land Titles Act 1980* (Tas) s 138; *Land Titles Act 1925* (ACT) s 108; *Land Title Act* (NT) s 146.

68 There is a huge range of litigation on this topic pertaining to the decision to remove or extend a caveat. Just some of the recent authority to discuss this are as follows: (NSW): *Antar v Fairchild Development Pty Ltd (recs and mgrs apptd) (in liq)* [2008] NSWSC 638; *Country Law Services Pty Ltd v Duff* [2007] NSWSC 1509; *Buchanan v Crown & Gleeson Business Finance Pty Ltd* [2007] 13 BPR 2, 513, NSW ConvR 56-173; (Vic) *Graham v Gameday Enterprises Pty Ltd* [2008] VSC 140; *S & D International Pty Ltd v Malhotra* [2006] VSC 280; *Sarandal Pty Ltd v Nameplan Pty Ltd* [2007] VSC 568; *Riverview Projects Pty Ltd v Elleray*

in New South Wales has much to favour it. The establishment of a specific legislative power to ignore irregularities expressly allows a basis on which to permit a claim to remain known and sees the Register becoming closer to the ideal of a mirror or photo of the title. This legislative power, combined with a stated framework for analysis, could include the following criteria (with these criteria developed from established authority on comparable areas (such as the power to extend a valid caveat):

(i) The strength of the claim of the caveator;[69]

(ii) The availability of an alternative remedy for the caveator;[70]

(iii) That the caveat is being lodged in good faith and not for an ulterior purpose – for example in the Victorian decision of *Goldstraw v Goldstraw*[71] counsel conceded that the caveat was lodged as a 'practical and well used method in order to get something to the bargaining table.'[72] The response of Dodds-Streeton J was that such a practice 'would undermine the operation of an essential feature of the Torrens system';[73]

(iv) The consequences for the registered proprietor, and whether there is some other mechanism by which the economic value of the caveator's interest can be protected (e.g. payment into court);[74]

(v) Compensation linked to improper lodgement.[75]

[2007] V ConvR 54-738; *Aircon Heating and Airconditioning Pty Ltd (in liq) v Crane Distribution Ltd* [2006] V ConvR 54-179; (Qld) *AB v IJ* [2008] QSC 046; BC200801470; *Landlush Pty Ltd v Rutherford* [2003] 1 Qd R 236; *Global Capital Industries Pty Ltd v Dela Property Developments Pty Ltd* [2006] 1 Qd R 501; *Jedhar Pty Ltd v Grosse* [2004] Q ConvR 54-606; (WA) *D&M (Australia) Pty Ltd v Crouch Developments Pty Ltd* [2008] WASC 160; *McGiveron v Stanton-Bovis* [2007] WASC 240; BC200709171; *Police and Nurses Credit Society Ltd v Weber* [2003] 1 BFRA 21. See S Jackson, 'Removal of a Caveat – How Convenient', (1996) *APLJ Lexis* 5.

69 *Country Law Services Pty Ltd v Duff* [2007] NSWSC 1509; *Union Finance Pty ltd v Rateki Pty Ltd* (No 2) [2007] SASC 11; BC200700253.

70 *D&M (Australia) Pty Ltd v Crouch Developments Pty Ltd* [2008] WASC 160.

71 [2002] VSC 491; BC200208479.

72 [2002] VSC 491, [36].

73 [2002] VSC 491, [42].

74 *D&M (Australia) Pty Ltd v Crouch Developments Pty Ltd* [2008] WASC 160; *Marinkovic v Pat McGrath Engineering Pty Ltd* (2004) 61 NSWLR 150; *Jean-Pierre Cosmetics Pty Ltd v Garrty Trustweel & Associates Pty Ltd* (1994) 6 BPR 13, 497; *Australian Security Estates Pty Ltd v Bluecrest Holdings Pty Ltd* (1999) 9 BPR 17,533.

75 All jurisdictions presently provide for this: see (ACT) *Land Titles Act 1925*, s 30(3); (NT) *Land Title Act 2000*, s 146; (NSW) *Real Property Act 1900*, s 74P; (Qld) *Land Title Act 1994*, s

By this legislative mechanism and common law reflection on the stated criteria, a body of law would quickly formulate the parameters around the lodging of caveats. Practitioners would have a better understanding and appreciation of when caveating could occur and the litigation that currently surrounds unregistered interests may well be reduced.

VI Conclusion

The unregistered interest continues to bedevil the Torrens system. It appears as though we have traveled too far to adopt the original idea of Torrens that there be a reduction in the quality of equitable interests to a mere contractual or personal right.[76] Indeed once Sir Robert Torrens became Registrar-General, it appeared as though he even recognised that equitable interests may well exist, and be protected by, for example, possession of the certificate of title.[77] Many suggestions have been made for reform, with perhaps the most notable being the Canadian model of recording the interest with priority determined by time of recording,[78] based on the Registration of Deeds legislation.[79] McEniery also suggests that there be a dedicated means of giving notice of the existence of an unregistered interest – simpler, cheaper, and more easily compliant than the caveat mechanism.[80] However, these ideas, worthy as they are of consideration, involve more fundamental changes to the Torrens system and perhaps with the mooted introduction of the National Electronic

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130; (SA) *Real Property Act 1886*, s 44; (Tas) *Land Titles Act 1980*, s 138; (Vic) *Transfer of Land Act 1958*, s 118; (WA) *Transfer of Land Act 1893*, s 140.

[76] See the comments by M A Hughson, M Neave and P O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders', (1997) 21 *MULR* 460, 461.

[77] South Australian Parliamentary Papers 1858, No 161, p3; South Australian Parliamentary Papers 1859 No 151, p5; South Australian Parliamentary Papers 1860, p4, cited in Barnett, above n 58, fn 27.

[78] See L McCrimmon, 'Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title', (1994) 20 *Mon. LR.* 300.

[79] Eg *Conveyancing Act 1919* (NSW); *Property Law Act 1974* (Qld); *Registration of Deeds Act 1935* (SA); *Registration of Deeds Act 1935* (Tas); *Property Law Act 1858* (Vic); *Registration of Deeds Act 1856* (WA); *Registration of Deeds Act 1957* (ACT).

[80] B McEniery, 'A Dedicated Means of Giving Notice of the Existence of Unregistered Interests under Torrens', (2006) 12(3) *APLJ* 244.

Conveyancing System in 2010[81] the time may be opportune for a national approach to the substantive law. Prior to this nevertheless, the suggestion is that the taking of the following steps would reduce the complexity, cost and litigation surrounding the unregistered interest in the Torrens system of land registration – all of which do not involve a significant departure from what presently occurs.

(i) All jurisdictions should include the use of settlement[82] or priority notices[83] to preserve the place in the queue for the unregistered interest pending a standard settlement. This method of protection is considerably cheaper and easier to initiate than a caveat;

(ii) The lodging of a caveat should be recognised as the giving of notice to the world of an unregistered interest;

(iii) To support the importance of the caveat, the establishment within legislation of a rebuttable presumption that would see the failure to lodge a caveat as leading to loss of priority.[84] The judiciary would have the opportunity to craft the limited circumstances in which the failure to lodge would lead to a loss or priority (such as the exceptional factual considerations in *Jacobs v Platt Nominees*[85], where the proprietary interest arises by operation of law, and an exception for fraud) make it understandable that no caveat would be lodged;

(iv) That there should be an express legislative direction, based on stated criteria to allow judges to ignore defects in the drafting of caveats. Uniformity between jurisdictions would allow the quick establishment of a depth of authority as to how these provisions would operate.

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81 See www.necs.gov.au.

82 *Land Title Act 1994* (Qld), ss 138-152.

83 *Land Titles Act 1980* (Tas), s 52.

84 This idea is not new. In 1989 the Victorian Law Reform Commission recommended that caveats should determine priority. See Victorian Law Reform Commission, *Priorities,* Report No 22 (1989). See also M A Hughson, M Neave and P O'Connor, *Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders,* (1997) 21 *Melbourne ULR* 460, 482-489.

85 [1990] VR 146. The failure to lodge a caveat did not lead to a loss of priority as the daughter in that case thought that her interests would be protected by her mother (who would need to sign off on any changes), the fact that she did not want to upset the relationship with her father, and she had no reason to believe that a fraud would occur involving the sale of the land to another party. Contrast *Mimi v Millenium Developments Pty Ltd* [2004] V ConvR 54-687.

Perhaps the argument as to whether land law or equitable principles should prevail has become passé. In this age of supposed cooperative federalism, we should no longer look to see who occupies the higher position, but whether Torrens and equitable principles can marry and consummate that relationship in the spirit of mutual respect that arguably fusion of law and equity was intended to deliver.