THE SCOPE OF PROTECTION FOR LEASES UNDER THE VICTORIAN TRANSFER OF LAND ACT

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Introduction

In Victoria, a high level of protection is given to leases by the Transfer of Land Act 1958 (hereafter referred to as 'the Act'). Pursuant to s. 42(2)(e), leases are a statutory exception to the principle of indefeasibility of title. This paragraph reads:

> (2) Notwithstanding anything in the foregoing the land which is included in any Crown grant certificate of title or registered instrument shall be subject to —
>
> . . .
>
> (e) the interest (but excluding any option to purchase) of a tenant in possession of the land.

Another form of protection for leases is registration of the instrument of lease. This can be achieved under s. 66(1), which states that the registered proprietor may lease it for any term exceeding three years by an instrument in the form or to the effect of the Tenth Schedule.[1] On registration, the lease will take priority over competing unregistered instruments.[2] Any tenant who cannot or does not register his lease and who falls outside the scope of the statutory exception to indefeasibility in s. 42(2)(e) can protect his interest against any subsequent dealing with the land by lodging a caveat.[3]

Several issues relevant to the treatment of leases under the Act have been considered in the past by other writers. These include the registrability in Victoria of leases not exceeding three years in duration,[4] the meaning of the requirement in s. 42(2)(e) that the tenant must be 'in possession' before he can fall within the scope of the exception to indefeasibility,[5] the impact of the Residential Tenancies Act 1980 on the Transfer of Land Act,[6] and the effect on a registered lease of legislation rendering the lease void.[7]

This comment will consider an important issue which appears to have received very little academic discussion in the past, namely, the scope of the protection given to leases by the Torrens legislation in Victoria. The issue arises in two legally separate but analogous contexts: first, the protection given to unregistered

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1 *Cf.* Real Property Act 1900 (N.S.W.) s. 53(1); Real Property Act 1877 (Qld) s. 52; Real Property Act 1886 (S.A.) ss 116–7; Transfer of Land Act 1893 (W.A.) s. 91; Land Titles Act 1980 (Tas.) s. 64(1); Real Property Ordinance 1925 (A.C.T.) s. 82. In Victoria, s. 66(1) does not state whether it is possible to register a lease for a term of three years or less. The practice of the Titles Office is to refuse to register such leases. See Bradbrook, A.J., MacCallum, S.V. and Moore, A.P., *Residential Tenancy Law and Practice — Victoria and South Australia* (1983) 594.

2 Transfer of Land Act 1958 (Vic.) s. 40(1).

3 The caveat provisions are contained in Transfer of Land Act 1958 (Vic.) ss 89–91.

4 See Robinson, S., *Transfer of Land in Victoria* (1979) 269; Bradbrook, MacCallum and Moore, *op. cit.* 161, 594.

5 Robinson, *op. cit.* 201; Bradbrook, MacCallum and Moore, *op. cit.* 595.

6 Bradbrook, MacCallum and Moore, *op. cit.* 596–9.

7 See, *e.g.*, *Travinto Nominees Pty Ltd v. Vlattas and Another* (1973) 129 C.L.R. 1. *Cf. Pearson v. Aotea District Maori Land Board* [1945] N.Z.L.R. 542.

leases by the exception to indefeasibility in s. 42(2)(e), and secondly, the protection given to registered leases by the combined effect of ss. 66(1) and 40(1).[8] Although these issues involve different statutory provisions, in both instances the core of the dispute centres around the meaning of the word 'lease'. This word is used specifically in s. 66(1). It does not appear in s. 42(2)(e), but the use of the phrase 'the interest . . . of a tenant' clearly presupposes the existence of a lease. How far does the protection given by the Torrens legislation to a 'lease' (whether registered or unregistered) extend? Is it confined in its scope to the term created, does it include all the covenants and conditions which form part of the lease, or does it extend even further to encompass any equitable interest incident to the lease? There are a number of cases directly relevant to this issue, the most recent being *Downie v. Lockwood*[9] and *Mercantile Credits Ltd v. Shell Co. (Australia) Ltd.*[10] As the following discussion of these cases will show, the issue has considerable importance for the continuing development of the Torrens system, which was originally established for the purpose of ensuring that a bona fide purchaser of land is not bound by interests which cannot be ascertained from an examination of the register.

The Scope of the Statutory Exception to Indefeasibility

The decision of Smith J. of the Supreme Court of Victoria in *Downie v. Lockwood*[11] is the current leading authority on the scope of the statutory exception to indefeasibility in favour of leases in s. 42(2)(e). The relevant facts were as follows. The registered proprietor of land, one Tovell, leased the property to the plaintiff in June 1961 for a term of five years. The lease form contained an option to renew the lease for a further five-year period. The lease was never registered. In 1962 the defendants purchased the land from Tovell's executrix and became the registered proprietors. The plaintiff brought an action claiming that the unregistered lease should be rectified by amending clause 3 of the document, which itemised various charges which were the responsibility of the tenant to pay, by deleting references to certain rates and insurance premiums. The defendants counterclaimed for possession of the premises, arguing that the plaintiff, by failing to pay the rates, had breached a term of the lease.

Smith J. held that the plaintiff was entitled at general law, as against Tovell, to have the lease rectified, and that this equity of rectification could be enforced against the defendants. His Honour accordingly gave judgment for the plaintiff and dismissed the defendant's counterclaim.

Smith J. used as a starting point for his analysis the High Court decision in *Burke and Another v. Dawes and Another.*[12] This case concluded that the

[8] Section 40(1) reads:
> Subject to this Act no instrument until registered as in this Act provided shall be effectual to create or 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 or 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.

[9] [1965] V.R. 257.

[10] (1976) 136 C.L.R. 326.

[11] [1965] V.R. 257.

[12] (1938) 59 C.L.R. 1.

forerunner to s. 42(2)(e)[13] should be construed widely, and according to Dixon J. (as he then was) produces the result that 'any person in actual occupation of the land obtains as against any inconsistent registered dealing protection and priority for any equitable interest to which his occupation is incident, provided that at law his occupation is referable to a tenancy of some sort, whether at will or for years'.[14] Having rejected the defendants' argument that the plaintiff's right of rectification was not itself an 'interest' within the meaning of s. 42(2)(e),[15] Smith J. analysed the nature of the equitable interest claimed by the plaintiff, and concluded that the plaintiff was entitled to an equitable interest in the land by virtue of his entitlement, as against Tovell's executrix, to specific performance of the contract between himself and Tovell.[16] His Honour continued:

> The incidents of that interest were determined by the form in which specific performance would have been enforced: *Walsh v. Lonsdale* (1882) 21 Ch. D. 9. And the cases of *Craddock Bros Ltd v. Hunt* [1923] 2 Ch.136; [1923] All E.R. Rep. 394, and *United States v. Motor Trucks Ltd* [1924] A.C. 196, have made it clear that immediately before the defendants contracted to buy the land the plaintiff was entitled to specific performance in the form of a decree or order requiring Tovell's executrix to sign and deliver to the plaintiff a registrable lease of the land upon terms imposing no obligation on him to pay rates or premiums and giving no power of re-entry for non-payment thereof.[17]

Smith J. concluded that the plaintiff's interest, immediately before the defendants obtained registration, was an equitable leasehold interest upon terms which did not impose on him any obligation to pay rates or premiums nor confer any power of re-entry for non-payment.[18] He accordingly held that the plaintiff's equitable interest, being first in time, was entitled to priority over that of the defendants.

The major significance of this case is that it shows that the statutory exception to indefeasibility contained in s. 42(2)(e) is not limited in scope to the term of the lease, nor even to the total contents of the lease, but extends further so as to include any equitable interest to which a person's occupation is incident, provided that the occupation is referable to a tenancy. In so doing, it confirms earlier Victorian cases which decided that s. 42(2)(e) protects the equitable interest of a purchaser under a contract of sale,[19] the equitable life estate of a devisee under a will,[20] and an equitable life interest claimed by a wife under an unsigned separation agreement made with her husband.[21]

Does the protection given to tenants under s. 42(2)(e) also include mere equities? While this point did not form part of the *ratio* in *Downie v. Lockwood*, Smith J. suggested *obiter* that the probable answer was in the negative.[22] His

13 Transfer of Land Act 1928 (Vic.) s. 72.
14 (1938) 59 C.L.R. 1, 17.
15 [1965] V.R. 257, 259.
16 *Ibid.* 259, citing *Lysaght v. Edwards* (1876) 2 Ch.D. 499; *Coatsworth v. Johnson* (1885) 55 L.J.Q.B. 220.
17 *Ibid.* 259. *Cf.* the reasoning in *Smith v. Jones* [1954] 2 All E.R. 823, which Smith J. stated (at 260) had no application to the facts of *Downie v. Lockwood*. Unfortunately, his Honour did not explain the basis for his opinion in this point.
18 *Ibid.* 261.
19 *Robertson v. Keith* (1870) 1 V.R. (E.) 11; *Sandhurst Mutual Permanent Investment Building Society v. Gissing* (1889) 15 V.L.R. 329; *Commercial Bank of Australia Ltd v. McCaskill* (1897) 23 V.L.R. 10.
20 *Burke and Another v. Dawes and Another* (1938) 59 C.L.R. 1.
21 *Black v. Poole* (1895) 16 A.L.T. 155.
22 [1965] V.R. 257, 260.

Honour cited with approval the general law principle in *Latec Investments Ltd and Others v. Hotel Terrigal Pty Ltd (in liquidation) and Others*[23] that a mere equity, as distinct from an equitable interest, is not binding upon a subsequent purchaser for value taking an equitable interest in the subject matter of the earlier transaction, if he takes without notice of the equity, but concluded on the facts that in the present case this doctrine had no application:

> What the plaintiff was entitled to at the time the defendants' contract was made was not an equitable interest involving an obligation to pay rates and premiums, coupled with a mere equity to have the engrossment rectified. It was an equitable interest upon terms which, because equity would have specifically enforced the true bargain between the parties, did not impose an obligation to pay rates or premiums.[24]

Section 42(2)(e) has been widely criticised for being unnecessarily broad.[25] The interpretation given to this paragraph in *Downie v. Lockwood* has given it an even broader scope beyond that which might reasonably have been contemplated by the legislature at the time of the enactment of the provision.

There are two further difficulties with the decision in this case, however. First, the decision produces a result which is unfair to the purchaser of the freehold land and is contrary to the philosophy and purpose of the Torrens statute. However diligent the purchaser may have been in *Downie v. Lockwood*, he could not have discovered from an examination of the register the existence of the plaintiff's right of rectification. Section 42(2)(e) clearly requires a purchaser to ascertain the existence of any tenancy in respect of the land, and if a tenant is discovered to be in occupation of the land, it is arguably reasonable for a court to hold that the tenant's protection extends to the covenants and conditions contained in the lease, as these can be ascertained on enquiry. However, it is submitted that for the court to go further and to hold the purchaser bound by rights which would not necessarily be discovered on enquiry is not reasonable. Smith J. sought to justify this position by adopting the general law rule that the defendants had notice of the plaintiff's equitable interest, since a tenant's possession has been held to give notice of every interest that he has in the land, including extensions of interest by subsequent agreements.[26] While the principle of constructive notice is clearly enshrined in the general law, the whole purpose of the Torrens system is to avoid the need for purchasers to make further enquiries beyond an examination of the register. Although this principle has well-recognised exceptions, including the case of leases, this does not necessarily justify granting priority to all rights incident to a tenancy which could not be ascertained from an examination of the instrument of lease. In this regard, the decision appears to contradict the principle in s. 43, which reads:

> Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any land shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual or constructive of any trust or unregistered

[23] (1965) 113 C.L.R. 265.
[24] [1965] V.R. 257, 260.
[25] See, *e.g.*, Robinson, *op. cit.* 198.
[26] *Barnhart v. Greenshields* (1853) 9 Moo P.C. 18; 14 E.R. 204; *Hunt v. Luck* [1902] 1 Ch. 428; *Green and Another v. Rheinberg* (1911) 104 L.T.R. 149; *Reeves v. Pope* [1914] 2 K.B. 284; *Goody v. Baring* [1956] 2 All E.R. 11.

interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.[27]

Secondly, the decision appears to be inconsistent with the High Court decision in *Mercantile Credits Ltd v. Shell Co. (Australia) Ltd.*[28] This case concerned the scope of the protection afforded by the Torrens legislation to registered leases, as the following discussion shows.

Indefeasibility and Registered Leases

In *Mercantile Credits Ltd v. Shell Co. (Australia) Ltd,* [29] the registered proprietor of the land was Celtic Agencies Pty Ltd. This company leased the land, on which was located a service station and garage, to the respondent company for a five year term. The lease was registered under the Real Property Act 1886 (S.A.). The lease contained two covenants, which entitled the tenant upon notice to renew the lease for three successive periods each of five years. The respondent company had previously exercised the right of renewal so as to extend the term of the lease to 1 March 1974. This extension had been registered on 30 August 1969. Celtic Agencies Pty Ltd later mortgaged the land in favour of Mercantile Credits Ltd. This mortgage was registered on 3 August 1973. The following February, the respondent company exercised its right to renew the lease for a further term, and in April 1974 Celtic Agencies Pty Ltd executed an extension of the lease in registrable form. Prior to the registration of this instrument, however, Celtic Agencies defaulted on the mortgage, and on 31 May 1974 the appellant gave notice of its intention to exercise its power of sale. The respondent later lodged a caveat to protect its interest under the extension of lease by forbidding the registration of any subsequent dealing with the land unless the dealing was stated to be subject to the renewed lease. The appellant sought a declaration that the extension of lease was not binding on it as mortgagee, and that the mortgage took priority over the unregistered extension of lease.

There was no doubt in this case that the lease was entitled to priority over the mortgage, as the lease was registered first. The Torrens statute in all States gives priority to instruments according to the order of lodgment for registration.[30] The issues in doubt concerned whether the right of renewal, which was not registrable, was an integral part of the lease. Thus, the court was required to consider whether priority was limited to the term of the lease, or extended beyond this to include the covenant to renew contained in the lease.

The competing arguments were clearly stated by Gibbs J. The argument for the respondent was that the right of renewal is an integral part of the estate vested in the tenant, and upon registration obtains the same protection as the term itself.

[27] *Cf.* Real Property Act 1900 (N.S.W.) s. 43; Real Property Act 1877 (Qld) s. 109; Real Property Act 1886 (S.A.) ss186, 187; Transfer of Land Act 1893 (W.A.) s. 134; Land Titles Act 1980 (Tas.) s. 41; Real Property Ordinance 1925 (A.C.T.) s. 59.

[28] (1976) 136 C.L.R. 326.

[29] *Ibid.* This case was followed by the Queensland Supreme Court in *Medical Benefits Fund of Australia Ltd v. Fisher* [1984] 1 Qd. R. 606 and *Davies v. Wickham Properties Pty Ltd* [1988] A.N.Z. Conv. R. 218.

[30] Transfer of Land Act 1958 (Vic.) s. 34(1); Real Property Act 1900 (N.S.W.) s. 36(9); Real Property Act 1877 (Qld) s. 12; Real Property Act 1886 (S.A.) s. 56; Transfer of Land Act 1893 (W.A.) s. 53; Land Titles Act 1980 (Tas.) s. 48(5); Real Property Ordinance 1925 (A.C.T.) s. 48(3).

The argument for the appellant was that the tenant in substance was seeking to have priority according to the new lease which came into existence as a result of the exercise of the right of renewal, and that the new lease was not itself registered and gained no priority by virtue of its origin in a right conferred by a registered instrument.[31]

The High Court unanimously affirmed the decision of Sangster J. of the Supreme Court of South Australia[32] that the respondent was entitled to registration of the extension of lease. Gibbs J. justified this decision, *inter alia*, on the basis that it would be unjust and inconvenient if a right to renew contained in a registered lease could be defeated by the subsequent registration of a mortgage, and that it was not the intention of the legislature to produce this result.[33] Stephen J. focused on the question of notice, and stated that the existence of rights of renewal will be apparent upon any inspection of the register.[34] This enables those people who deal in the land to learn of the extent to which the reversion is thereby contingently affected. Barwick C.J. decided the case on the basis that a covenant giving a right of renewal of the term forms part of the tenant's total interest in the land.[35] This is because the right of renewal, when exercised, creates a specifically enforceable agreement for a further term in the land, thus amounting to a present interest in the land. By virtue of the Real Property Act 1886 (S.A.), s.67 (the equivalent of the Transfer of Land Act 1958 (Vic.), s.40(1)), upon registration of the instrument of lease, the 'estate or interest specified in such instrument' passes to the tenant.[36]

Perhaps the most important aspect of the *Mercantile Credits* case was not the decision itself or the *ratio*, but certain *obiter* statements by Gibbs and Stephen JJ. concerning the extent of the indefeasible right obtained by a tenant upon registration of a lease. Despite his decision in favour of the tenant on the facts of this case, Gibbs J. stated that the registration of a lease does not in all cases give priority or the quality of indefeasibility to every right which the instrument creates.[37] He continued:

> Speaking generally, the [Torrens legislation] would not appear to be intended to render indefeasible a personal right created by a covenant which, although contained in a registered instrument, in no way affects the estate or interest in land with which the instrument deals.[38]

In similar vein, Stephen J. stated:

> What will be registered, and protected by that registration, is a right conferred by covenant which touches and concerns the land and runs with the land . . .; it is an incident of the lease creating an interest in the land and forming a part of the lessee's interest in the land. To accord it the protection afforded by registration is thus in no way inconsistent with the tenor of the legislation and gives rise to no anomalies.[39]

It thus appears from the *Mercantile Credits* case that the indefeasible right obtained by a tenant on registration is not limited to the term of the lease, but

31 (1976) 136 C.L.R. 326, 345.
32 *Mercantile Credits Ltd v. The Shell Company of Australia Ltd* (1975) 11 S.A.S.R. 409.
33 (1976) 136 C.L.R. 326, 346.
34 *Ibid.* 352.
35 Barwick C.J. relied on *Muller v. Trafford* [1901] 1 Ch. 54, 61 for this proposition.
36 (1976) 136 C.L.R. 326, 337–8.
37 *Ibid.* 342.
38 *Ibid.* 343. Gibbs J. cited as an illustration a covenant of guarantee contained in an instrument of mortgage: *Consolidated Trust Co. Ltd v. Naylor* (1936) 55 C.L.R. 423.
39 *Ibid.* 352.

extends to certain (although not all) covenants and conditions contained in the instrument of lease. If Stephen J. is correct, the test which is to be applied to determine which covenants and conditions obtain protection on registration is whether the covenant or condition 'touches and concerns' the land. This will turn on the facts of each case. In determining this issue, the courts will presumably have regard to the meaning of the 'touching and concerning' test first propounded by the Court of King's Bench in 1583 in *Spencer's* case,[40] where it was held that upon assignment of a lease the burden and benefits of the tenant's covenants which touch and concern the land pass to the assignee of the tenant. In the context of assignment of leases, it was stated by Scott L. J. in *Breams Property Investment Co. Ltd v. Stroulger and Others*[41] that the test which determines whether a covenant touches and concerns the land is whether the covenant affects the landlord *qua* landlord or the tenant *qua* tenant.[42] In other words, as expressed by Cheshire and Burn, the covenant must affect the landlord in his normal capacity as landlord or the tenant in his normal capacity as tenant.[43] In *Mercantile Credits*, Gibbs J., unlike Stephen J., did not refer specifically to the touching and concerning test,[44] although it may be inferred that he was effectively applying the same test when he referred in his judgment to the fact that a personal covenant created by a covenant would not obtain indefeasibility.

A Critique of the Law

What message do *Downie v. Lockwood* and *Mercantile Credits Ltd v. Shell Co. (Australia) Ltd* give us regarding the scope of indefeasibility for leases in Victoria? Unfortunately, the message appears to be confused. In respect of unregistered leases seeking protection under the statutory exception to indefeasibility, it was held in *Downie v. Lockwood* that the scope of the protection is very broad, extending not only to the contents of the lease, but also to any equitable interest to which the tenancy is incident. In respect of registered leases, the *Mercantile Credits* case held that the scope of the protection extends to some (but not all) covenants contained in the lease, and that to achieve protection the covenant must touch and concern the land.

It is readily conceded that the issue of priority for registered leases and the scope of the statutory exception to indefeasibility are legally quite distinct. This

40 (1583) 5 Co. Rep. 16a; 77 E.R. 72.

41 [1948] 2 K.B. 1, 7.

42 For illustrations of cases which have been held to 'touch and concern' the land, see *Parker v. Webb* (1693) 3 Salk. 5; 91 E.R. 656; *Williams v. Earle* (1868) L.R. 3 Q.B. 739; *Boyer v. Warbey* [1953] 1 Q.B. 234; *Moss Empires Ltd v. Olympia (Liverpool) Ltd* [1939] A.C. 544; *Regent Oil Co Ltd v. J.A. Gregory (Hatch End) Ltd* [1966] Ch. 402; *Manchester Brewery Co. v. Coombs* [1901] 2 Ch. 608; *Lewin v. American & Colonial Distributors Ltd* [1945] Ch. 225; *Goldstein v. Sanders* [1915] 1 Ch. 549; *Cohen v. Popular Restaurants Ltd* [1917] 1 K.B. 480; *Malmsbury Confluence Gold Mining Co. Ltd v. Tucker* (1877) 3 V.L.R. (L.) 213; *White v. Kenny* [1920] V.L.R. 290; *Re Rakita's Application* [1971] Qd. R. 59; *Davies v. Wickham Properties Pty Ltd* [1988] A.N.Z. Conv. R. 218. For illustrations of cases which have been held not to 'touch and concern' the land, see *Mayho v. Buckhurst* (1617) Cro. Jac. 438; 79 E.R. 374; *Gower v. Pattison* (1808) 10 East 130; 103 E.R. 725; *Re Hunter's Lease* [1942] Ch. 124; *Lee v. Close* (1870) 10 S.C.R. (N.S.W.) 86; *Cheyne v. Moses* [1919] St. R. Qd. 74; *Hua Chiao Commercial Bank Ltd v. Chiapua Industries Ltd* [1987] A.C. 99. See Redfern, M.J. and Cassidy, D.I., *Australian Tenancy Practice and Precedents* (1987) I, paras 1009–10.

43 Cheshire, G.C. and Burn, E.H., *Modern Law of Real Property* (13th ed. 1982) 430.

44 Barwick, C.J. also referred to the 'touching and concerning' test: (1976) 136 C.L.R. 326, 336.

explains in part why the High Court in the *Mercantile Credits* case did not refer to *Downie v. Lockwood*. Nevertheless, a strong parallel exists between the two issues. In each case, a later purchaser of the land wishes to discover the extent to which an existing lease will take legal priority over his interest. As a matter of logic and common sense, one would expect the law to produce the result either that the scope of legal protection is the same for both registered and unregistered leases, or that the fact of registration should give a registered lease greater protection than an unregistered lease. Although the present law is not entirely clear, on one analysis it can be argued to produce the perverse result that greater priority is given to unregistered than to registered leases. With regard to unregistered leases, *Downie v. Lockwood* makes it clear that legal protection extends beyond the covenants and conditions in the lease to include all equitable interests incident upon a lease. In relation to registered leases, based on *Mercantile Credits* it can be argued that as the court held that only some covenants and conditions are legally protected,[45] *a fortiori* equitable interests not referred to in the instrument of lease will be unprotected. While the High Court did not specifically advert to this issue, this conclusion appears to follow from the logic of both Gibbs J.'s and Stephen J.'s judgments.

The current state of the law is clearly unsatisfactory. Four suggestions for change can be made:

1. There should be judicial recognition of the fact that the issues of the scope of the legal priority given by the Act to registered and unregistered leases are interrelated. To date, there is no such recognition, as evidenced by the failure of any of the High Court judges in the *Mercantile Credits* case to refer to the relevant authorities concerning the scope of the statutory exception to indefeasibility for leases.
2. Judicial clarification is required of the scope of the legal priority, under the Torrens system in Victoria, of both registered and unregistered leases. This clarification must include a recognition of the fact that the scope of priority for unregistered leases should be no broader than that for registered leases, and that s. 42(2)(e) should be limited to protect only the term of the lease and those covenants in the lease which touch and concern the land (as in the *Mercantile Credits* case).
3. In the absence of any such judicial clarification in the near future, the legislature should intervene in order to make the necessary clarification. This could be achieved by amendments to s. 66(1) and s. 42(2)(e) of the Act.
4. There must be some incentive for tenants to register long-term leases. Although s. 66(1) of the Act authorises the registration of leases for a term exceeding three years, very few leases are ever registered because of the wide-ranging scope of s. 42(2)(e).[46] It is only the small category of tenants not in possession of the land (within the meaning of s. 42(2)(e)) for whom the

[45] Those covenants and conditions which touch and concern the land: see *supra*, n. 42 and accompanying text.

[46] Only 37 leases were registered during the 1985–86 financial year: Law Reform Commission of Victoria, *The Torrens Register Book*, Discussion Paper No. 3, 1986, 14.

expense and inconvenience of registration is worthwhile.[47] The responsibility appears to lie with the current wording of s. 42(2)(e). While it can be argued that short-term leases are validly included within the statutory exceptions to indefeasibility because of their large number and limited duration, this justification does not extend to long-term leases. The Victorian legislation in this regard is inconsistent with that of the other States, all of which severely restrict the scope of the statutory exception to indefeasibility by limiting it to leases of less than a maximum specified duration.[48] The current state of the Victorian law can be argued to undermine the principle on which the Torrens system is based, that purchasers should not be required to undertake further enquiries beyond the register. The amendment of s. 42(2)(e) to reduce its scope should be viewed as the minimum change necessary to make sense of the law relating to the indefeasibility of leases in Victoria.[49]

[47] For a discussion of the requirement that the tenant must be in possession, see *Barba v. Gas and Fuel Corporation* (1977) 12 A.L.R. 649. See also McNicol, S., 'Constructive Notice of a Spouse in Actual Occupation' (1981) 13 *M.U.L.R.* 226, 242–6.

[48] *Cf.* Real Property Act 1900 (N.S.W.) s. 42(1)(d) (limited to leases not exceeding three years); Real Property Act 1877 (Qld) s. 11 (leases not exceeding three years or from year to year); Real Property Act 1886 (S.A.) s. 69VIII (leases not exceeding one year); Transfer of Land Act 1893 (W.A.) s. 68 (leases not exceeding five years); Land Titles Act 1980 (Tas.) s. 40(1)(d) (periodic leases, leases not exceeding three years, and equitable leases (in certain circumstances)); Real Property Ordinance 1925 (A.C.T.) s. 58(d) (leases not exceeding three years).

[49] *Cf.* the recommendation of the Law Reform Commission of Victoria in its Report No. 12, *The Torrens Register Book*, 1987, 11, that 'The interests of tenants in possession should continue to override the title. However, a right to rectify a lease should not override the title.'