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Abstract
The essential and uncontroversial goals of the Torrens system have been stated by Professor Sackville (now Sackville J) The first is to provide a register from which persons who propose to deal with land can discover all the facts relative to the title...The second object is to ensure that a person dealing with land which is subject to the system is not adversely affected by any infirmities in his vendor's title which do not appear on the register, thus saving the difficulty and expense of going behind the register to investigate the title. Thirdly, the Torrens system aims to provide a guarantee by the State that the picture presented by the register-book is true and complete. If this turns out not to be the case, compensation is to be paid to any person who suffers loss either through the land being made subject to the system or else through the register not disclosing all the facts relevant to the title.

Keywords
legislation, indefeasibility

INTERPRETIVE STRATEGIES IN THE OVERRIDING LEGISLATION EXCEPTION TO INDEFEASIBILITY

SAMANTHA HEPBURN*

I Introduction

The essential and uncontroversial goals of the Torrens system have been stated by Professor Sackville (now Sackville J)

> The first is to provide a register from which persons who propose to deal with land can discover all the facts relative to the title...The second object is to ensure that a person dealing with land which is subject to the system is not adversely affected by any infirmities in his vendor's title which do not appear on the register, thus saving the difficulty and expense of going behind the register to investigate the title. Thirdly, the Torrens system aims to provide a guarantee by the State that the picture presented by the register-book is true and complete. If this turns out not to be the case, compensation is to be paid to any person who suffers loss either through the land being made subject to the system or else through the register not disclosing all the facts relevant to the title.[1]

Despite the enduring pre-eminence of these objectives, established exceptions to the concept of indefeasibility have emerged. A well-established exception is the overriding or inconsistent legislation exception. This exception will arise in circumstances where the subsequent legislation is enacted by the legislature which is deemed to have impliedly repealed the indefeasibility provisions because it conflicts, irreconcilably, with those provisions.[2] The enforcement of this exception has been described as 'a comparatively rare phenomenon' which will not be carried into effect until 'actual contrariety is clearly apparent' and that contrariety cannot be resolved.[3] In essence, the exception is sourced in 'canons of statutory interpretation' which focus upon a purposive assessment of the intention of the legislature and, where a

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1 'The Torrens System – Some Thoughts on Indefeasibility and Priorities' (1973) 47 ALJ 526 at 528, quoting Professor Hinde.

2 *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 per Dixon J at 616. See also *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at [4] per Gibbs J.

3 *Butler v Attorney-General (Vic)* 1961 106 CLR 268 at 275-6 per Fullager J.

conflict is ascertained, established resolution protocols.[4] As outlined by Dixon J in *South-Eastern Drainage Board (S.A.) v Savings Bank of South Australia*,

> If there is an inconsistency between one statute and a later statute, the later statute prevails'; 'if the later enactment contains clear language from which it is plain that its provisions were intended to apply to land under the Act and to apply in a manner inconsistent with the *Real Property Act*, then they must operate according to their meaning. For the later enactment of the legislature must be given effect at the expense of the earlier.[5]

One of the most significant processes underlying the overriding legislation exception is a focused examination of the subsequent enactment, undertaken with the objective of ascertaining, as closely as possible, the intention of the legislature. If, following an examination of the language, purpose and scope of the subsequent legislation, a prima facie conflict with the indefeasibility provisions is raised, the court must then consider whether, as a result of that conflict, the legislature intended to impliedly repeal the indefeasibility provisions.[6] A determination of this issue is not a straightforward endeavour. It demands recourse to fundamental statutory interpretation protocols. Conventional wisdom has long decreed that in interpreting the scope and effect of legislation, a judge should look not only at the text itself, but also at the underlying meaning and purpose that the legislature intended to convey.[7]

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4 Barrett J in *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue* [2003] NSWSC 697 at [111] outlined some of the settled principles in this area. His Honour stated that it can be:

> ... regarded as settled law that the test of implied repeal is the test of contrariety or repugnancy. The covering the field approach taken in cases regarding inconsistency between State and Commonwealth statutes is not relevant in cases regarding inconsistencies between two State statutes. This is because there is a presumption that exists when comparing State statutes - and does not when comparing State statutes to Commonwealth statutes - that the legislature did not intend to contradict itself.

5 (1939) 62 CLR 603, at 616, 625.

6 See generally *Goodwin v Phillips* (1908) 7 CLR 1 at 10 where Barton J (citing Hardcastel and Craies on *Interpretation of Statutes*) stated: 'The court must be satisfied that the two enactments are so inconsistent or Repugnant that they cannot stand together, before they can from the language of the later imply the repeal Of an express prior enactment, ie, the repeal must, if not express, flow from necessary implication.'

7 For an examination of the purposive approach see: W N Eskridge, Jr and P P Frickey, 'Statutory Interpretation as Practical Reasoning' (1990) 42 *Standford Law Review* 321 at 326; J F Manning, 'Textualism and the Equity of the Statute' (2001) 101 *Columbia Law Review* 1; R Weisberg, 'The Calabresian Judicial Artist: Statutes and the New Legal Process' (1983) 35 *Standford Law Review* 213; K Tokeley, 'Trends in Statutory Interpretation and the Judicial Process' [2002] *Victoria University Law Review* 41; Sunstein CR, 'Interpreting Statutes in the Regulatory State' (1989) 103 *Harvard Law Review* 405 esp at 461; Twining W and Miers D, *How to Do things with Rules* (1991) at 321-384.

Purposive interpretation is critically important in assessing whether a subsequent enactment overrides the indefeasibility provisions because often the textual commands are drafted in broad and general terms, providing little guidance as to legislative intent.[8]

This article proposes a framework for categorising the protocols that underpin the overriding legislation exception. It makes a primary distinction between what is described as the 'conflict and implied repeal' response and the 'sequential assessment' response. The 'conflict and implied repeal' response will arise in circumstances where it can be established that the intention and purpose of the legislature in the subsequent act was to verify an interest or a procedure and this verification is found to be directly inconsistent with the indefeasibility provisions and cannot be reconciled. In such a situation, the 'canons of statutory interpretation' will justify a finding that the indefeasibility provisions have been impliedly repealed by the subsequent act.[9] This approach is premised on the finding that the indefeasibility provisions and the subsequent enactment cannot, in the circumstances, be read together. The position was outlined by Gaudron J in *Saraswati v The Queen* in the following way:

> It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other.[10]

The 'sequential assessment' response will arise in circumstances where it can be established that the intention and purpose of the legislature in the sequential enactment was to verify an interest or a procedure and this verification is found to be directly inconsistent with the indefeasibility provisions. In such a situation, the 'canons of statutory interpretation' may justify a finding that both acts have a sequential operation, each being operative within their independent sphere of enforceability, where it is possible, in the circumstances, to read each provision as subject to the other. The 'sequential assessment' response is dependant upon a

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8 See in particular W N Eskridge, Jr and P P Frickey, 'Statutory Interpretation as Practical Reasoning' (1990) 42 *Standford Law Review* 321 at 326.

9 In *Suatu Holdings Pty Ltd v Australian Postal Corporation* (1989) 86 ALR 532 at 546, Gummow J suggested that an 'implied repeal' gives priority to the latter statute as a matter of law. See also *Horvath v Common wealth Bank of Australia* [1999] 1 VR 643 at [29] per Ormiston JA.

10 (1991) 172 CLR 1 at 17. See also see *Butler v Attorney-General* (Vict) (1961) 106 CLR 268 at 276, per Fullagar J; at 290, per Windeyer J.

finding that reading each provision as subject to the other is consistent with the underlying objectives of the subsequent enactment.

The framework for ascertaining how a particular case fits into this basic dichotomy is heavily dependant upon a purposive assessment of legislative intention. This assessment operates at two different levels. At the first and primary level, a court must consider whether the subsequent enactment conflicts with the indefeasibility provisions. Once a basal conflict is established, the court must *then* consider whether reconciliation between the provisions is possible. This reconciliation must, in the absence of a clear and strong intention to effect an implied repeal of the indefeasibility provisions, be effected via a sequential assessment. If a sequential assessment is consistent with the intentions of the legislature, each act will be read as subject to the other. If, however, a sequential assessment is not consistent with objectives of the subsequent enactment and a clear intention to effect an implied repeal of the indefeasibility provisions can be established, the 'conflict and implied repeal' response must be applied.[11] This established methodology is also broadly consistent with the approach set out by Kirby J (in dissent) in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd:*

> It is elementary under our system of law, that if a written law is valid, clear and applicable, it must be given effect according to its terms. Where there is conflict between the commands of written laws enacted by the same Legislature, courts endeavour to reconcile the texts. If they cannot do so in other ways in terms of their language, they have resort to established canons of construction. Here, these canons include obedience to the law made later in time; priority to the law on the subject classified as more specific over one regarded as more general; and precedents to public over purely private rights.[12]

The next section of the paper examines a range of different overriding legislation exception cases with the objective of categorising those cases within the primary dichotomy proposed. Hence, cases and/or determinations are organized according to whether they constitute 'sequential assessment' or 'conflict and implied repeal' responses. This outline encourages further consideration of the factors relevant to courts and individual judges in assessing each of the interpretive responses.

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[11] This methodology accords with the basic statutory construction framework. See generally: *Shergold v Tanner* (2002) 209 CLR 126 at 136-137; *Saraswati v The Queen* [(1991)172 CLR 1 at 17; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 375; *Re Applications of Shephard* [1983] 1 NSWLR 96 at 106-107.

[12] (2004) 220 CLR 472 at [100].

II Cases Illustrative of Sequential Assessment

The sequential assessment response has been applied in a number of different situations involving subsequent enactments that, in the opinion of the court, may be read subject to the indefeasibility provisions. In *Horvath v Commonwealth Bank of Australia,* the Victorian Court of Appeal considered whether the s 49(a) of the *Supreme Court Act 1986*, which provided that loan contracts entered into by a minor were void, effected an implied repeal of the indefeasibility provisions in the *Transfer of Land Act 1958* (Vic). The Court of Appeal dismissed the matter arguing that despite the ostensible conflict between the provisions, reconciliation could be achieved through a sequential assessment so that, in the words of Ormiston JA, both acts were left to operate 'within their respective spheres.'[13] Ormiston JA concluded that in effect, s 49(a) and the indefeasibility provisions could work together. Focusing upon the wording of s 49(a), his Honour noted that the provision said nothing about the effect of registration or the operation of any of the indefeasibility provisions of the *Transfer of Land Act*. Hence, whilst it was clear that an unregistered mortgage would be void and ineffective, it must have been intended that a registered mortgage would be subject to the indefeasibility provisions. His Honour concluded:

> Whatever may have been the position before such registration, the legislature must be treated, subject to the presently irrelevant exceptions as to fraud and the like, as having given an immediately indefeasible title in the land to the respondent bank as mortgagee unless the relief provision should prevail as being relevantly inconsistent. In my opinion the relief provision is not inconsistent in that sense.[14]

Phillips JA agreed noting that to hold otherwise would have the undesirable and clearly unintended effect of impugning the indefeasibility provisions not only with respect to the registered interest of the infant, but also with respect to the third party bank that the infant had dealt with in acquiring the loan.[15]

In *Kogarah Municipal Council v Golden Paradise Corporation,* the New South Wales Court of Appeal considered whether a conflict betweens 5(1) of the *Local Government Act 1993* (NSW) (*LG Act)* and the indefeasibility provisions in the *Real Property Act 1900* (NSW) *(RP Act)* existed and if so, whether an implied repeal of the indefeasibility provisions was intended.[16] Section 45(1) provides that a '*Council has no power to sell, exchange or otherwise dispose of community land*'. The council had sold and transferred community land which, according to s 45(1) it had no power to do. The

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13 [1999] 1 VR 643.

14 Ibid at [34]-[35].

15 Ibid at 652.

16 [2005] NSWCA 230.

purchaser became registered as proprietor. The primary judge in the Land and Environment Court held that a resolution by the Council to reclassify land from community land to operational land was invalid, so that the land remained community land at the time of the transfer. The court made orders requesting (i) that the Council do all things necessary to secure a transfer of the land from the transferee to the Council and (ii) that the transferee do all things necessary to secure that transfer to the Council pursuant to s 676 of the *Local Government Act.*

The Court of Appeal, Tobias, McColl and Basten JJA, held that the first order was ineffective and the Land and Environment Court did not have the power to issue the second order because the transferee was not in breach of s 45(1). Their Honours concluded that the Land and Environment Court did not have the power to make any order against a third party requesting a retransfer of the land pursuant to s 676 of the *Local Government* Act. In this respect, the Court of Appeal approved a similar interpretation by the majority of the High Court in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* with respect to s 123 of the *Environmental Planning and Assessment Act.*[17]

Given these conclusions, their Honours only considered the overriding legislation exception in dicta. Tobias JA (with whom McColl JA agreed) acknowledged the 'force' of the apparent conflict between s 42 of the *RP Act* and s 45(1) of the *LG Act* and the issue of statutory construction which that conflict raised.[18] Ultimately, however, Tobias JA concluded that the conflict could be reconciled by a 'sequential assessment' of the legislative provisions, recognizing the independent 'sphere of enforcement' of each Act. His Honour suggested that s 45(1) of the *Local Government Act* operated to render the transfer null and void where it related to 'community land'. However, once a transfer was registered, the indefeasibility provisions in the *RP Act* operated to vest title to that 'community land' in the transferee absolutely.[19]

Basten JA took a different approach. His Honour noted the 'large questions' that lay at the core of the case but ultimately concluded that it was not possible to confer registered title upon a transfer executed in direct breach of the provisions of the *LG Act.* His Honour felt that it would have been very 'surprising' if, in such a situation, the 'Parliament had withheld from the Council any power to dispose of 'community land' vested in it but, at the same time, enabled a disposal to be effected by means of registration under the *RP Act*. The possibility that this result was not intended invites attention to questions of statutory construction of two laws of the one Parliament.'[20]

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17 (2004) 220 CLR 472 at [41]-[44].

18 Ibid at [61].

19 A reference to the well known conclusions of Barwick CJ in *Breskvar v Wall* (1971) 126 CLR 376 at 385-386.

20 Ibid at [89].

In endorsing the importance of statutory construction in this context, Basten JA drew upon what he described as fundamental 'public policy' issues associated with the protection of public property laws. His Honour felt that it was 'impossible' for private individuals to 'abrogate at will' a law, particularly one relating to the regulation of public property.[21] Hence, Basten JA concluded that the conflict could not be reconciled by sequential assessment and the public interest nature of the legislation, combined with the fact that it was later in time, made it 'at least arguable' that s 45(1) effected an implied repeal of the *RP Act*. [22]

The dicta issues raised by the New South Wales Court of Appeal in *Kogarah* were further developed in *City of Canada Bay Council v Bonaccorso Pty Ltd* where the New South Wales Court of Appeal again considered whether s 45(1) of the *Local Government Act 1993* (NSW) was enforceable in circumstances where a third party transferee had community land transferred to them and the transfer was registered.[23] On the facts, the City of Canada Bay Council sold land, known as 'Chapman Reserve', to the respondent. The court had to consider first, whether the land was 'community land' within the definition of the *LG Act* and second, if it was community land, whether s 45(1) conflicted irreconcilably with the paramountcy provisions in the *RP Act* or whether both provisions could be read sequentially.

The trial judge, Biscoe J, concluded that s 45(1) of the *LG Act* directly conflicted with the provisions of the *Real Property Act* and this conflict could not be reconciled. In reaching this conclusion, Biscoe J expressly noted that if the acts were simply viewed sequentially, there would have been no need to treat the *LG Act* as having impliedly repealed the *RP Act.* Biscoe J, describing the argument articulated by Tobias JA in *Kogarah*, noted that a sequential assessment would result in a situation where the provisions of the *RP Act* would endure until an order to rectify the Register was issued under the *LG Act.* Until the new right was registered, the breach of the *LG Act* would be of no consequence. Once, a rectification order was made pursuant to the provisions of the *LG Act* however, the indefeasibility provisions that applied with respect to that transfer would cease.[24]

Biscoe J made it clear, however, that a sequential assessment was necessarily conditional upon proof that a reconciliation of the conflicting provisions was consistent with the intentions of parliament. Where such legislative intention could not be established, his Honour suggested that the reconciliation might be

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21 Ibid at [98] quoting from *Roach v Bickle* (1915) 20 CLR 663 at 669-670.

22 Ibid at [99].

23 [2007] NSWCA 351.

24 This reasoning was also raised by Kirby J in *Hillpalm Pty Ltd v Heaven's Door* (2004) 220 CLR 472 at [102] which Biscoe J expressly refers to.

'insufficient' in that it did not reflect the true intention of the legislature. Ultimately, in accordance with the broad conclusions of Basten JA in *Kogarah,* Biscoe J raised the 'public interest' focus of the *LG Act* to support his conclusion that the conflict between the provisions could not be reconciled and an implied repeal must have been intended by the legislature. His Honour suggested that the 'special status' accorded to 'community land' was analogous with the special status accorded to national parks under the *National Parks and Wildlife Act 1974* (NSW). In this respect, the duty of the Council to protect community land was similar to the duty to protect and preserve national parks and this 'public interest, combined with the later status of the act, revealed an implied legislative intention to repeal the indefeasibility provisions in the *RP Act.*

In a joint judgement, the Court of Appeal, Mason P, Tobias JA and Young CJ (in Eq), disagreed with Biscoe J. Their Honours agreed that the critical question was whether s 45(1) of the *LG Act*, being a later enactment, should prevail over the *RP Act* but ultimately held that s 45(1) of the *LG Act* could be read sequentially with the indefeasibility provisions in the *RP Act* because the two were not fundamentally irreconcilable.[25] In this respect, their Honours felt that the 'public interest' argument raised by Biscoe J could not be sustained. Following the conclusions of Kirby J in *Hillpalm,* their Honour held that the 'public interest' issue 'afforded little guidance' as public interest was relevant to both the observance of planning laws and to the upholding the indefeasibility provisions within the *RP Act.*[26] Consequently, the 'special status' interpretation that Biscoe J reached should not have been drawn according to their Honours as there was very little legislative evidence of an intention to effect an implied repeal. Rather, in a secondary assessment of the purposive intent of the legislature focusing primarily upon the express wording of s 45(1), their Honours concluded, like Ormiston JA in *Horvath*, that the absence of any express provision applying the prohibition to registered transfers and invalidating or rendering unlawful the acquisition by the purchaser of the title to such land any implied intention by the legislature to repeal the indefeasibility provisions must be denied. This made a sequential assessment response appropriate.[27]

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[25] Ibid at [75].

[26] To this extent their Honours endorsed the conclusions of Kirby J in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472 at [101]. Their Honours implied at [85] that the reliance that Biscoe J had given to the judgement of Kirby J in *Hillpalm* overlooked the fact that Kirby J had suggested that 'public interest' may offer little guidance where a public interest element is present in both legislative provisions.

[27] Ibid at [88].

Similarly, in *Koompahtoo Local Aboriginal Land Council v KLALC Property Investment Pty Ltd*,[28] Giles and Tobias JJA, Young CJ in Eq dissenting, concluded that s 40(2) of the *Aboriginal Land Rights Act 1983* (NSW) was not inconsistent with the *RP Act*, and their honours gave each legislative provision a sequential interpretation. Giles JA noted the dicta conclusions of Basten JA in *Kogarah Municipal Council* concerning the unequivocal nature of s 45 of the *Local Government Act 1993* (NSW) but felt that this interpretation was inappropriate in the context of s 40(2) of the *Aboriginal Land Rights Act* which focused upon invalidating a transfer by the New South Wales Aboriginal Land Council or Local Aboriginal Land Council not in accordance with the requirements of the Act. Giles JA held that where land had been transferred in contravention of s 40(2) and subsequently registered, the registration could confer an indefeasible title because the focus of s 40(2) was upon invalidating the transaction rather than the title obtained by registration of that transaction. His Honour felt that this rationale also lay at the heart of the decision of the Court of Appeal in *City of Canada Bay Council v F&D Bonaccorso Pty Ltd*. This narrow interpretation clearly provides space for the operation and primacy of the indefeasibility provisions at the expense of regulatory restrictions imposed upon transfers of land held by Aboriginal Land Councils. Whilst Giles JA noted the importance of transactional restrictions on the disposal of land by Aboriginal land councils his Honour concluded that this factor could not, in itself, provide any greater purposive basis for regarding s 40 as apt to repeal the indefeasibility provisions.

III Cases Illustrative of the Conflict and Implied Repeal Approach

The 'conflict and implied' repeal response has only been successful in a number of cases, in line with the basic statutory construction principle, that an implied repeal should only be endorsed in circumstances where a clear and cogent legislative intent can be established. In *Travinto Nominees Pty Ltd v Vlattas*, the High Court considered whether a sale of land was to be regarded as subject to an existing lease.[29] The vendor did not disclose that the lease contained an option to renew. The purchaser sought compensation for error or misdescription of the property. The High Court ultimately held that there was no error or misdescription because the lease, and therefore the option, was void pursuant to s 88B of the *Industrial Arbitration Act 1940* (NSW). The High Court further held that the registration of the lease under the *RP Act* (NSW) had not conferred an indefeasible right to renew upon the tenant. Barwick CJ, McTiernan and Stephen JJ decided the case on the conveyancing ground that illegality of the option under s 88B amounted to a bar to a suit by the tenant for specific performance of the option, and so the option to renew did not create an equitable interest in the

[28] [2008] NSWSC 8.

[29] (1973) 129 CLR 1.

land. Gibbs J, however, raised the overriding legislation exception. His Honour started by distinguishing the facts of the case from those in *Breskvar v Wall*, where the High Court had held that a transfer, void by reason of the provisions of s 53 (5) of the *Stamp Act 1894* (Qld), conferred an indefeasible title when registered.[30] In *Breskvar v* Wall, Walsh J raised the overriding legislation exception but rejected it on the basis that the two acts could be sequentially assessed: the *Stamp Act* avoided the transfer but the *Real Property Act* vested the title from that void transfer in the registered proprietor. On the facts of *Travinto* however, Gibbs J found that the *Industrial Arbitration Act* rendered the lease void itself, not just the deed setting up the interest as had been the case in *Breskvar.* Hence, if the *RP Act* were held to have the effect of validating the lease, its provisions would, according to Gibbs J, be fundamentally irreconcilable with those of s 88B of the *Industrial Arbitration Act 1940* (NSW).

The finding of Gibbs J in *Travinto* was a clear example of a statutory interpretation process where a conflict in a subsequent enactment could not be reconciled by a sequential assessment response. Gibbs J focused primarily upon the wording in the provisions which he felt was clear and absolute, providing no rational basis for exempting registered leases. On this ground, His Honour concluded that a proper interpretation of the intention of the legislature, given that the conflict could not be reconciled, was that an implied repeal of the *RP Act* had occurred. His Honour stated:

> There is nothing in s 88B to indicate that it was intended to apply only to leases of land not subject to the provisions of the *Real Property Act* and there would be no rational ground for excepting land under the *Real Property Act* from the application of the section. The provisions of s 88B on their proper interpretation operate to avoid a lease, to which they apply, whether or not the lease is registered under the *Real Property Act*. Effect must be given to the section notwithstanding that under the *Real Property Act* the title of the registered lessee is indefeasible.[31]

Another, more recent example of a 'conflict and implied repeal' case is that of *Calabro v Bayside City Council*.[32] The facts of the case concerned the enforceability of s 203 of the *Local Government Act 1989* (Vic) which operated to vest land needed to establish a public highway in the local council. The issue before the court was whether s 203 overrode the indefeasibility provisions of the *Transfer of Land Act 1958 (*Vic) thereby defeating the registered interests of the plaintiffs. Balmford J made it clear that s 203 was in direct conflict with the indefeasibility provisions in the *Transfer of Land Act 1958* (Vic). His Honour did not, however, find that the conflict could be reconciled

30 (1971) 126 CLR 376.

31 Ibid at [4].

32 [1999] 3 VR 688.

via a sequential assessment. Rather, his Honour suggested that the 'public interest' character of s 203, requiring the Council to maintain public highways for the purpose of public access, was ultimately inconsistent with the private complexion of the indefefeasibility provisions. Balmford J concluded that the cogency of the public interest character of the subsequent enactment, combined with the basic canon of statutory construction, that in the event of a conflict, the later provision prevails, indicated a clear intention to effect an implied repeal of the indefeasibility provisions.[33]

Even more recently, in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd*, the Court of Appeal and Kirby J, in dissent, in the High court, both adopted a 'conflict and implied repeal' approach to subsequent provisions in the *Environmental Planning and Assessment Act 1979* (NSW) which were found to conflict with the indefeasibility provisions in the *Real Property Act 1900* (NSW).[34] On the facts, the court considered whether a council-imposed condition over a sub-division development consent, requiring a landowner to create an easement over land, was capable of binding a subsequent owner of the land. The council condition was not recorded on the Certificate of Title at the time when the appellant acquired title to the land, although the plan did specify a 'proposed right of way'. Section 76A of the *Environmental Planning and Assessment Act 1979* (NSW) prevented a person from carrying out development on land to which the provision of an environmental planning legislation applied unless that development was carried out in accordance with the consent requirements of the instrument. A 'development' was defined in s 4 of the act to include both 'the use of land' and 'the subdivision of land'. The issue for the court was whether the unfulfilled council-imposed consent order was enforceable against the registered title holder.

The Court of Appeal, Meagher, Handley and Hodgson JJA unanimously concluded that the consent order created an in rem right which was enforceable under the *Environmental Planning and Assessment Act 1979* (NSW), creating a conflict with the indefeasibility provisions which could not be reconciled by a sequential assessment. Meagher JA held that the legislative provisions setting up the in rem right conflicted with the indefeasibility provisions in the *Real Property Act 1900* (NSW). His Honour further held that this conflict could not be reconciled because of the combined effect of the public benefit focus of the *Environmental Planning and Assessment Act 1979* (NSW), which gave it 'precedence' over the private focus of the indefeasibility

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33 Ibid at [59]. The principle that in the event of a conflict, the later law will prevail is one of the canons of statutory construction. For its application in this context see: *Goodwin v Phillips* (1908) 7 CLR 1 at 7; *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 33-34 per Gibbs J; *Hillpalm Pty Ltd v Heavens Door Pty Ltd* (2004) 220 CLR 472 at [100] per Kirby J.

34 *Hillpalm Pty Ltd v Heavens Door Pty Ltd* (2004) 220 CLR 472.

provisions, the 'aggressive wording' of the *EPAA* which gave it an almost 'universal force', and its status as a later in time enactment.[35]

The High Court took a different view to that of the Court of Appeal. The majority, McHugh ACJ, Hayne and Heydon JJ, in a joint judgment, did not actually address the overriding legislation exception to indefeasibility as they concluded on the facts that the council had not actually imposed the condition and, even if it had, the unfulfilled condition could not bind a subsequent purchaser. Their Honours held that:

> Whereas here, the subdivision of the land was the relevant development, the subsequent purchaser of a subdivided lot does not 'carry that development out' by occupying, and thus using, one of the lots in the subdivision. It follows that, even if there was a relevant condition of the subdivision concerning the creation of a right of way, the appellant did not contravene s 76A of the EPAA by using the land without creating that right of way. It did not breach s 76A because it did not carry the development of subdivision out on the land.[36]

Hence, according to the majority, it would only have been if the council consent condition related to the continuing *use* of the land, as distinct from the single act of subdividing, that it would have been binding upon subsequent registered proprietors. The majority, in dicta, briefly raised the overriding legislation exception noting at [53]:

> If the consent to the subdivision did create a right in rem, that would be a right or interest in the land not shown on the Computer Folio Certificate. There would then be a real and lively question about how the two statutory schemes (the scheme under the *EPAA* and the Torrens system for which the *Real Property Act* provides) were to be reconciled, and questions of implied repeal or amendment might arise. But those questions are not raised by this matter. That is because it was common ground that the appellant's title was not and is not now subject to any interest of the kind which the respondent asserted it was entitled to have the appellant create in its favour. If the respondent has any such right, it is a right to have an interest in land created and that is said to be a right enforceable by personal action against the appellant, not by any action or application to rectify the Register maintained under the *Real Property Act*. That right, if it exists, is not a right in rem.

The determination by the High Court that the council consent order was an in personam rather than an in rem right meant that no conflict arose because the

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35 Ibid at [14].

36 (2004) 220 CLR 472 at [42]-[43].

existence of in personam rights is entirely consistent with the paramountcy provisions.[37]

By contrast, the minority, Kirby and Callinan JJ in separate judgements, held that the council consent order was in direct conflict with the paramountcy provisions and therefore prevailed against those provisions.[38]

Kirby J began by examining the purpose underlying the operation of both acts. In examining the goals of planning law under both the Local Government Act and the Environmental Planning and Assessment Act, his honour concluded that the objectives of this law was 'fundamentally more important' than the private rights of those with various interests in land because it is concerned with the 'orderly management of land in society so as to protect at once the interests of individuals, the community and the environment.'.[39] In particular, Kirby J focused upon the public utility of planning law, emphasising the chaos that could ensue in circumstances where developments are permitted to occur without planning control and environmental protection. In this respect, his Honour made it clear that the primary focus of planning regulation was the land itself rather than the 'the ephemeral ownership or possession of the land.'[40]

On the other hand, his Honour also concluded that the RP Act was 'one of the most important legal innovations adopted in Australia', whose objectives of 'certainty, efficiency and speed in settlements' and 'being able to rely on the face of the register to discover applicable interests in the land where the land has been brought under the Torrens system' were significant. Any erosion or diminution in the primacy of such objectives was not something which his Honour felt should 'be accepted lightly'.[41]

Once Kirby J had found a conflict between the *RP Act* and the *EPAA Act*, his Honour undertook a secondary purposive assessment to determine whether that conflict

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37 Ibid at [54] per McHugh ACJ, Heydon and Hayne JJ. See also *Frazer v Walker* [1967] 1 AC 569 at 585, per Lord Wilberforce and *Breskvar v Wall* (1971) 126 CLR 376 at 385, per Barwick CJ.

38 Callinan J based his decision purely upon a textual construction of the two provisions noting that the 'unqualified language' of the *Environmental Protection and Assessment Act* was 'decisive'.

39 (2004) 220 CLR 472 at [71]. Kirby J referred to the conclusions of Street CJ in *F Hannon Pty Ltd v Electricity Commission of NSW [No 3]* (1985) 66 LGRA 306 at 313 where, in discussing the underlying objectives of the Planning law, his Honour stated: 'The task of the Court is to administer social justice in the enforcement of the legislative scheme of the Act. It is a task that travels far beyond administering justice inter partes.

40 (2004) 220 CLR 472 at [73].

41 Ibid at [94], [97].

could be reconciled. In this respect, unlike Balmford J in *Calabro,* his Honour suggested that the public interest focus of the *EPAA* was counter-balanced by the public interest focus of the *RP Act.* The public interest 'in the observance of planning laws and consent decisions and protection of the environment' and the public interest 'in upholding the indefeasibility principle of the *Real Property Act* which transcends the private rights of parties expressed in Certificates of Title issued under that Act' ultimately meant the public interest focus of the *EPAA,* in itself, 'offered little guidance'. However, the public interest focus of the *EPAA,* combined with the specific and particular focus and its status as a later in time enactment was, according to Kirby J, sufficient to support the conclusion that the *EPAA* intended to effect an implied repeal of the *RP Act*.[42]

IV The Relevance of the Public/Private Distinction in Establishing a Conflict

An issue increasingly relevant to the 'conflict and implied repeal' interpretive response is that of public interest. In all of the cases raised above, where a conflict was irreconcilable and an implied legislative intention to repeal the indefeasibility provisions could be ascertained, the intention was based, at least in part, upon a public interest argument. This raises a more fundamental question about the nature and relevance of public interest issues in this context.[43] It has been argued that the public/private distinction is ultimately more a product of legal history than any substantive rights based theory of law.[44] The reason for this is that ultimately, as Kirby J suggested in *Hillpalm,* both public and private law is amenable to 'public interest' concerns and to this extent, the public/private dichotomy is essentially illusory.[45] That said, the importance of prioritising the 'public' nature of statutory

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42 Ibid at [101].

43 See P P Frickey, 'From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation' (1992) 77 *Minnesota Law Review* 241 at 251 where the author suggests that judges could 'reach the wrong results by promoting a public policy purpose gleaned from the statute rather than following the true lines of legislative compromise.' See also: J R Macey, 'Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model' (1986) 86 *Columbia Law Review* 223 at 227-233 which describes the 'public' impact of interest groups upon legislative enactments.

44 G Samuel, 'Public and Private Law: A Private Lawyer's Response' (1983) 46 *The Modern Law Review* 558 at 562-563. See also M J Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423.

45 See for example the discussions by J Doyle and J Redwood, 'The Common Law Liability of Public Authorities: The Interface Between Public and Private Law' (1999) *Tort Law Review* 30; A Deegan, 'The Public/Private Law Dichotomy and its Relationship with the

authorities has been emphasised in other areas such as the tortious duty of care where it suggested that 'special factors' relevant to the 'core policy-making' responsibility of statutory authorities must be taken into account in determining the existence of a duty of care.[46]

The nature of the public interest arguments raised in the 'conflict and implied repeal' cases are also instructive. In the *Calabro* decision the public interest arguments were essentially sourced in issues of control. Balmford J felt that in order for the Council to perform its duties of promoting public accessibility over land used for public highways, the Council had to own the land. This objective could not be properly achieved through any other form of legal relationship. Hence, as title was already registered to a private individual, 'public interest' factors reinforced the interpretation that the legislature must, in such an instance, have intended to effect an implied repeal of the indefeasibility provisions.

In *City of Canada Bay Council v Bonaccorso Pty Ltd,* the public interest arguments raised by Biscoe J were essentially sourced around protectionism and preservation of land interests. His Honour suggested that it was not possible for the Council to properly carry out their essential duties of protecting and preserving the land if the indefeasibility provisions were able to overwhelm the prohibition imposed in s 45(1) of the *LG Act.* Community land should not, in any circumstances, be amenable to private indefeasible ownership because of the impact such ownership would have upon the planning and preservation responsibilities of the Council.

In *Hillpalm Pty Ltd v Heaven's Door Pty Ltd*, whilst Kirby J raised public interest arguments for both the *EPAA Act* and the *RP Act,* his Honour spent some time carefully articulating the public interest factors underlying the *EPAA Act* focusing in particular upon the benefits associated with orderly management of land and the environment, and a desire to avoid the 'chaos' that might ensue in the absence of such management. All of these very 'public' concerns are important and may, in a

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Policy/Operational Factors Distinction in Tort Law' (2001) 1 (2) *Queensland University of Technology Law Journal* 214.

[46] See *Crimmins v Stevedoring Committee* (1999) 200 CLR 1 at [79] per McHugh J His Honour concluded at [89] that

> It may be that functions and powers which can be described as part of the 'core area' of policy-making, or which are quasi-legislative or regulatory in nature, are not subject to a common law duty of care.

broad sense, be regarded as transcending the priorities associated with indefeasible ownership of land.[47]

Public interest factors are increasingly important in a world of diminishing resources and therefore continue to play an important and strategic role in the statutory construction process.[48] The promotion of effective land management, protection of diminishing resources and objectives associated with promoting a sustainable environment are of fundamental importance in world increasingly dominated by encroaching private interests.[49] That said, it remains important to ensure that the 'public interest' mantra is not utilised by public authorities in an opportunistic manner or in a broad, non-specific mode, disconnected to the legislative provisions it purports to promote. Hence, in *Planning Commission (WA) v Temwood Holdings Pty Ltd,* Callinan J concluded that the test for validity for a consent condition imposed by a council on a planning or subdivision approval 'is not whether its imposition is in the public interest, but whether the condition is for a planning purpose and reasonably required by, and related to the subdivision, in the light of other relevant considerations such as the changes, burdens and demands that the subdivision will produce.'[50]

V Statutory Rights as 'Discrete and Immune' Categories

There are many instances where legislation confers either public or private statutory rights upon individuals which may impact upon the title of a registered interest holder. These statutory rights may range in nature and scope but will generally constitute inchoate interests in the form of a land charges, statutory easements or even carbon sequestration rights.[51] Not all statutory rights are proprietary and may

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47 See also A Pottage, 'The Originality of Registration' (1995) 15 *Oxford Journal of Legal Studies* 371 at 372 where the author focuses upon the importance of registration as a process of title recognition *and* title protection.

48 See: P P Frickey, 'From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation' (1992) 77 *Minnesota Law Review* 241 at 255.

49 See for example, the discussion by: L A Anderson, 'Takings and Expectations: Towards a Broader Vision of Property Rights' (1989) *University of Kansas Law Review* 529; L K Caldwell, 'Rights of Ownership or Rights of Use? – The Need for a New Conceptual Basis for Land Use Policy' (1975) *Environment Law Review* 409; R H Nelson, 'Private Rights to Government Actions: How Modern Property Rights Evolve' [1986] 2 *University of Illinois Law Review* 1135.

50 (2004) 221 CLR 30 at [121]. See also P Butt, 'Indefeasibility and Council Consent Conditions' (2005) 79 (3) *Australian Law Journal* 143.

51 See for example *Forestry Act 1959* (Qld), s 61J(5) which deems an agreement to confer carbon sequestration rights to constitute a profit a prendre for the purpose of the *Land Title Act 1994* (Qld).

remain unregistrable for this reason, however, where a proprietary statutory interest is created, the legislation may indicate that the holders should avail themselves of the registration process in order to protect their interest.[52] In some situations the effect of not seeking registration has not been properly articulated in the legislation.[53] Where legislation creates a non-registrable statutory right, the courts must be cautious in asserting their independent validity, taking into account the extraordinary capacity of such interests to undermine the objectives of the Torrens legislation.[54]

If a non-registrable statutory right directly conflicts with the indefeasibility provisions in the Torrens legislation, the right should only be prioritised in accordance with the usual statutory interpretation protocols discussed above. Non-registrable statutory rights should not receive independent and presumptive immunity from the indefeasibility provisions.[55]

There are three seminal cases dealing with the enforceability, against a registered proprietor, of non-registered statutory land interests: *South-Eastern Drainage Board (SA) v Savings Bank of South Australia,*[56] *Pratten v Warringah Shire Council*[57] and *Quach v Marrickville Municipal Council.*[58] Each case took a different approach to non-registrable statutory interests. In *South-Eastern Drainage Board*, the High Court held that a first charge created by a statute on Torrens system land in respect of construction and maintenance rates, took priority over a registered mortgage. Dixon J adopted an approach firmly grounded in statutory interpretation. His Honour suggested that as there was no express provision for the enforcement of these statutory charges within the Torrens legislation, the enforceability of the rights being dependant upon a determination of 'whether in the enactments creating the statutory charges such a clear intention is expressed to include land under the *Real Property Act* and to give to the charges an absolute and indefeasible priority over all other interests that, notwithstanding s 6 of that Act, no course is open but to allow the intention so

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52 This issue is discussed by P Butt, 'Indefeasibility and Council Consent Conditions' (2005) 79 (3) *Australian Law Journal* 143.

53 For example, carbon sequestration rights arising from an agreement and constituting a profit a prendre pursuant to s 61J(5) of the *Forestry Act 1959* (Qld) may be registered under the *Land Title Act 1994* (Qld) in order to be protected against defeat by a subsequent registered proprietor.

54 P Butt, 'Indefeasibility and Council Consent Conditions' (2005) 79 (3) *Australian Law Journal* 143.

55 See generally the discussion by P Radan, 'Indefeasibility and Overriding Statutes' (2003) 41 (6) *Law Society Journal* 66.

56 (1939)62 CLR 603.

57 [1969] 2 NSWLR 161.

58 (1990) 22 NSWLR 55.

expressed in the later enactments to be paramount over the earlier *Real Property Act*.'[59]

By contrast, in *Pratten v Warringah Shire Council*, Street J argued that the plaintiff had no title to land of which he was the registered proprietor, due to the fact that the fee simple of the land had, pursuant to s 398 of the *Local Government Act 1919*, vested in the council.[60] This statutory vesting had taken effect almost half a century prior to the registration of the plaintiffs transfer. Section 398 of the *Local Government Act 1919*, by its original terms, set out that '*Where in the subdivision of any land, there has been provision made for a drainage reserve... the land so provided for a drainage reserve is hereby vested in the council in fee-simple for drainage purposes*.' At the time of the decision there was no express provision in the Torrens legislation or in any other act entitling the Registrar-General to make any entry of this statutory vesting in the Register. Street J concluded that s 398 overrode the indefeasibility provisions of the *Real Property Act*. His Honour did not, however, base this conclusion on a detailed evaluation of each statutory provision. Rather, he suggested that it has long been accepted that proprietary rights which do not depend upon registration for their efficacy can exist over Torrens title land. In referring to the decision of the court in *Trieste Investments Pty Ltd v Watson*[61] his Honour concluded that the title of a registered proprietor is 'inherently subject to rights created by overriding statutes.'[62] Consequently, his Honour felt that the fee simple interest acquired by the Council automatically acquired priority to the registered interest of the plaintiff.[63]

This approach does not, as Pam O'Connor has outlined, espouse a methodology sourced in statutory interpretation at all. Rather, it presumptively validates particular statutory interests where they are deemed to constitute 'discrete classes of exceptions' and thereby 'belong to a class of inherent rights' unaffected by the paramountcy provisions.[64] Such an approach is inherently flawed; it overlooks the fact that the overriding legislation exception is forged on the principles of legislative interaction and the protocols of statutory construction. It also ignores the importance of establishing, an 'explicit or implicit contradiction' between two legislative

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59 *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603.

60 [1969] 2 NSWLR 161.

61 (1963) 64 SR (NSW) 98.

62 *Pratten v Warringah Shire Council* [1969] 2 NSWLR 161 at 169.

63 See also J E Hogg, *Australian Torrens System* 1905 at 804 noting that 'resumption acts constitute a class of the general statutes which must be considered as overriding and pro tanto repealing, even the Torrens statutes.' Street J relied heavily on these comments see: *Pratten v Warringah Shire Council* [1969] 2 NSWLR 161 at 166.

64 See P O'Connor, 'Public Rights and Overriding Statutes as Exceptions to Indefeasibility of Title' (1994) 19 MULR 649 at 668.

provisions.[65] A reasoned articulation of the legislative intention underlying this 'contradiction' is the basal requirement for any interference with statutory enactments. There is no room in this framework for presumptive assertions of statutory right.

In *Quach v Marrickville Municipal Council*, Young J reluctantly followed the conclusions of Street J in *Pratten*.[66] The facts of *Quach* like those of *Pratten* involved the creation of a statutory fee simple in the local council for drainage purposes, without the need for registration under the *Real Property Act 1919* (NSW), pursuant to s 398 of the former *Local Government Act 1919* (NSW). Young J felt obliged by authority to hold that s 398 prevailed over the indefeasibility provisions of the *Real Property Act*, however his misgivings were manifestly evident. His Honour stated:

> It is very difficult now to contend that the mainstream indefeasibility provisions, such as s 42 of the Act, operate to defeat the statutory right of the Council. It has been well recognised, both by the textwriters and by the authorities that, although it is the weakest point in the Torrens System, statutory and public rights will override an indefeasible title...[67]

Provisions such as s 398 of the original *Local Government Act 1919* present, it has been suggested the 'greatest single threat' to the operation of the Torrens system.[68] Not only do they undermine the indefeasibility provisions, making it impossible to rely absolutely on the accuracy of the register, their application, especially in the case of *Pratten*, reveal a manifest disregard for the purposive approach to statutory interpretation.[69] The position was appropriately articulated by Young J in *Quach v Marrickville Municipal Council* when he stated:

> ….it is rather difficult to reduce the cost of conveyancing in New South Wales if ordinary members of the community are going to be ambushed by interests such as the present. There would be absolutely nothing to show anybody who

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65 *F & D Bonaccorso Pty Ltd v City of Canada Bay City Council* [2007] NSWLEC 159 at [47] per Biscoe J.

66 (1990) 22 NSWLR 55.

67 *Quach v Marrickville Municipal Council* (1990) 22 NSWLR 55 at 61.

68 See P Butt, *Land Law*, 5th ed, 2006 at para 2090. See also P Radan, 'Indefeasibility and Overriding Statutes' (2003) 41(6) *Law Society Journal* 66.

69 A point made by P O'Connor, 'Public Rights and Overriding Statutes as Exceptions to Indefeasibility of Title' (1994) 19 MULR 649 at 662 where the author notes that the 'interpretation proposed by Young J [in *Pratten*] may be criticised as not promoting the probable intention of Parliament to ensure that land required for drainage purposes be placed under the control of the municipality.'

was purchasing this property that there was a hidden trap left over from a 1908 deposited plan.[70]

VI Conclusion

Whilst the overriding legislation exception has made substantial inroads upon indefeasibility, particularly given the perceived threat it poses to public confidence and reliability in the Torrens system,[71] it remains important to acknowledge that insistence on the primacy of indefeasibility provisions may result in the 'wholesale abrogation'[72] of public interest legislation which Parliament, in clear and cogent terms, has deemed operative.

The indefeasibility provisions in the Torrens legislation in each state purport to describe the scope and effect of registered title. Interpretation of the effect of subsequent enactments on these provisions inevitably varies, both in terms of internal construction and external alignment with other sources of law. In determining the effect of subsequent enactments by the same Parliament, consideration must always be given to the relevance of textualism, purposivism and the 'equity of the statute'.[73] This article highlights the emerging dichotomy in the patterns and protocols of statutory construction in this area. The division between a 'conflict and implied repeal' response and a 'sequential assessment' response is ultimately based upon the priority courts have accorded to individual canons of interpretation. Those that have endorsed an implied repeal of the indefeasibility provisions have generally given primacy to the public interest foundations of the subsequent enactments, the specificity of particular provisions and/or, the foundational principle that a later conflicting statute prevails against an earlier one. By contrast, those that have endorsed a sequential assessment have generally given primacy to the direct textual provisions of the subsequent enactment, highlighting either deficiencies in the scope or expression of the enactment and/or giving primacy to the curative effect of Torrens registration upon transfers that have breached subsequent enactments. In this respect, the sequential assessment decisions highlight, as Giles JA stated in *Koompahtoo Local Aboriginal Land Council v KLALC Property Investments Pty Ltd,* the 'importance of the register in the Torrens system as providing the underlying legitimacy of title to land under that system.'[74]

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70 (1990) 22 NSWLR 55 at 61.

71 Butt, *Land Law* (5th ed) 2006 at [20118].

72 *Kogarah Municipal Council v Golden Paradise Corporation* at [99] per Basten JA.

73 See W N Eskridge, Jr and P P Frickey, 'Statutory Interpretation as Practical Reasoning' (1990) 42 *Standford Law Review* 321 at 326; J F Manning, 'Textualism and the Equity of the Statute' (2001) 101 *Columbia Law Review* 1.

74 [2008] NSWCA 6 at [34].

The purpose of this paper is ultimately procedural. Its primary objective is to revisit the broad interpretive framework connected to the overriding legislation exception and to emphasise the primacy of purposive statutory construction in this area. It does not suggest that any of the interpretive conclusions reached in the cases discussed are necessarily inaccurate. It does, however, highlight the interpretive divisions apparent within some of the emerging cases, and in so doing explores the robust variations between, on the one hand, the strident textualists, unwilling to depart from a statutory text, even in circumstances where the consequences may be inconsistent with the evolution of modern land practices and on the other, the resilient purposivists, upholding what they firmly believe is the manifest sense of a statute, often by resorting to unarticulated 'public interest' directives.