In personam claims – developments and thoughts

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In 1967, the Privy Council commented in *Frazer v Walker*, that the principle of indefeasibility 'in no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant.' Subsequently Australian judges and commentators have assumed not only that this principle accurately states the law but that within the Torrens system ancient doctrines and principles were neither weakened nor destabilised.

It will be contended that when the Privy Council made this statement it did not fully appreciate the 19th century influences that helped to shape the Torrens system and ultimately affect modern rights *in personam*. The intellectual environment of political economy and utilitarianism challenged the legal order of the 19th century and a perusal of Torrens' proselytising works bear some of the hallmarks of these challenging ideas. Moreover, the Australian colonists, including Torrens, recognised that their egalitarian social and economic conditions were different from those existing in England and accordingly required a different approach to property law. Finally, Torrens not only discussed Chancery's procedural mess, but also challenged equitable notions of notice and fraud.

Despite Torrens' contention that the law of property would not fundamentally change under his system, it will be argued that there was a seismic shift in the nature and substance of rules governing property transactions, that this shift has had a significant impact upon *in personam* liability and Torrens did not consider these possibilities in his writings. For example, under the Torrens system legal title is acquired by a hard-edged registration process, constructive notice and equitable fraud have been formally removed from the system and it is possible for an innocent transferee to acquire legal title under forged documentation. The caveat system has further shifted the onus onto non-legal or unregistered interest holders to take protective action.

It will be contended that the seismic shift in the nature and substance of the rules in the Torrens system has had three important effects. First, the changed and reformulated rules are not necessarily coherent. Second, equity's emphasis on conscience has been diluted. Third, the law in relation to the registered proprietor's *in personam* liability has become fractured, lacking a meaningful justification except in the most general terms. Judges and commentators alike have grappled with the difficult task of working out the appropriate nature of *in personam* claims in the Torrens system. For example, some have supported a high threshold in view of indefeasibility of title, while others have preferred an approach infused with equitable notions of conscience. Indeed, some of the decisions have been quite surprising and there can be no doubt that in relation to *in personam* claims the law is at an important cross-road. Cases from a variety of areas will be discussed including those dealing with trusts, non est factum, mistake and void transfers of private land to government instrumentalities.