

Table of Contents

Terms of Reference

Participants

Submissions

Cataloguing in publication

1. INTRODUCTION

I. The Reference

II. Background to the Reference

A. The Torrens system and compensation for loss

1. Mistakes

2. Deprivation of an estate or interest in land

B. Compensation schemes in New South Wales and Victoria

C. Claims for compensation

1. New South Wales

2. Victoria

III. Outline of this Paper

Footnotes

2. RATIONALE FOR COMPENSATION

I. Original Basis for Compensation

A. Indefeasibility

B. Opposition of legal profession to Torrens system

II. Indefeasibility or State-Guaranteed Title?

III. Need for a State Guarantee of Torrens Title

A. The general Australian view

B. Other jurisdictions

IV. Title Insurance

A. The United States experience

B. The private insurance option

Footnotes

3. THE CURRENT POSITION IN NEW SOUTH WALES

I. The Assurance Fund

II. Compensation Provisions

A. Bases of claim

B. Defendant

C. Complexity of legislation

D. Fraud

E. Claims procedures

F. Time limit for making claims

G. Measure of damages

III. Judicial Interpretation of the Compensation Provisions

A. "In consequence of fraud" in section 126(1)(a)

B. Section 127

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

IV. Administration of the Real Property Act 1900

- A. Administrative perfection or risk management?
- B. The risk management policy in operation
- C. Future areas for application of risk management policy
 - 1. Primary applications (applications to bring land under the Real Property Act)
 - 2. Investigation of possessory titles
 - 3. Survey investigation

Footnotes

4. THE CURRENT POSITION IN VICTORIA

I. The Assurance Fund

II. Compensation Provisions

- A. Bases of claim
- B. Defendant
- C. Fraud
- D. Measure of damages awarded under section 110
- E. Limitation on time for bringing actions

III. Administration of the Transfer of Land Act 1958

- A. Administrative perfection or risk management?
- B. Future areas for practice of risk management policy
 - 1. Investigation of possessory titles
 - 2. Caveats
 - 3. Powers of attorney

Footnotes

5. DOES THE LEGISLATION IN EITHER NEW SOUTH WALES OR VICTORIA ACCORD WITH THE PRINCIPAL IDEALS OF A TORRENS SYSTEM?

I. Principles of a Torrens system

- A. Mirror principle
- B. Curtain principle
- C. Insurance principle

II. Application of the Insurance Principle in New South Wales

III. Application of the Insurance Principle in Victoria

Footnotes

6. OPTIONS FOR REFORM

I. Overview

II. Option 1: Abolition of State Guarantee

- A. The case for abolition
- B. The issue

III. Option 2: Retention of State Guarantee: Elimination of Legislative Deficiencies

- A. Introduction
- B. What types of claims for compensation should be allowed?
 - 1. Reliance on the Register
 - 2. Wrongful deprivation
 - 3. Negligence of claimant's solicitor or agent

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

4. Contributory negligence of claimant
 5. Exhaustion of other remedies
 6. Administrative procedures
 7. Assessment of compensation
 8. Time for making claims
 9. Contribution to the fund on lodgment of dealings
- IV. Option 3: State Guarantee Provided by Private Insurer
- V. Option 4: Title Insurance Arranged by Registered Proprietor

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

Terms of Reference, Participants and Submissions

Terms of Reference

To inquire into and report on:

- (a) the extent to which all or some entries in the Torrens System Register should be subject to a State guarantee, and the extent of this guarantee;
- (b) the operation of the Assurance Fund, established under the Real Property Act 1900, to assess whether it is working as intended and as efficiently as possible;
- (c) any related matter.

Participants

Commissioners

For the purpose of this reference a Division was created by the Chairman in accordance with s12A of the Law Reform Commission Act 1967. The Division comprised the following members of the Commission:

Professor Helen Gamble (Commissioner-in-Charge of Reference)
Mr Keith Mason QC (Chairman)
Ronald Sackville

Honorary Consultants to the Commission

Mr Neville Grace
Mr Bernard Coles
Ms Phillipa Weekes

Executive Director

Peter Hennessy

Research

Rosemary Chandler
Andrew Frazer

Librarian

Ms Beverley Caska

Desktop Publishing

Nozveen Khan

Word Processing

Ms Jane Codey
Ms Joanne Keene
Mrs Nozveen Khan
Ms Nancy Klein
Ms Violet Talijancich

Administrative Assistance

Miss Judith Grieves
Ms Zoya Howes
Mrs Jennifer McMahon

Submissions

The Commission invites submissions on the issues raised in this paper. Submissions and comments should reach us by **30 March 1990** when it is intended that the Commission will begin the preparation of the final Report to the Attorney General.

All inquiries and comments should be directed to:

Peter Hennessy

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

Executive Director
NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001
Telephone: (02) 252 3855
Fax: (02) 247 1054

1. Introduction

I. THE REFERENCE

1.1 On 20 January 1988 the New South Wales Law Reform Commission received a reference to examine the extent of the State's guarantee of title under the Torrens system and the manner in which it is provided.¹ Recent trends in judicial decisions and the size of compensation claims have been the major impetus for the reference.

1.2 The Victorian Law Reform Commission is undertaking a similar reference as part of a major review of land law which was announced by the then Attorney General of Victoria the Honourable J H Kennan MLC on 1 May 1986.²

1.3 The New South Wales reference has been made under the Commission's standing reference on co-operative law reform projects with the Victorian reference in mind. The Commissions plan to produce a joint Report to their Attorneys General. A joint discussion paper was issued on this reference in June 1989. This Issues Paper is intended to supplement and expand on the discussion in NSW.

II. BACKGROUND TO THE REFERENCE

A. The Torrens system and compensation for loss

1.4 A fundamental principle of the Torrens system when introduced into South Australia between 1858-1861 was that title to land was made to depend upon registration and not upon the execution of documents. The execution of the title deeds (eg transfers, leases, mortgages) was to be merely the means of obtaining registration and was not intended to affect the land or pass any estate or interest in it until registration. The concept was summed up succinctly by Barwick CJ in *Breskvar v Wall*³ when he described the Torrens system as a system of "title by registration" rather than a system of "registration of title".

1.5 Once registered under the Torrens system, a *bona fide* purchaser for value has an "indefeasible title" which means that the title cannot be set aside because of some defect which existed prior to the land being brought under the Act. However, "indefeasibility of title" also had the obverse effect that any interest which was not registered on the title was liable to extinction.

1.6 The introduction of the Torrens system made land owners liable to two types of loss:

Loss flowing from the mistakes of Government officials in the registry office in failing to enter interests and estates on the register correctly.

Loss flowing from the deprivation of an estate or interest in land through the operation of the indefeasibility provisions of the Torrens statutes.⁴

1. Mistakes

1.7 Under Old System conveyancing the parties themselves are responsible for the preparation of the deeds and therefore for their validity. Upon execution and delivery these documents convey the legal estate in the land, although registration of copies of the documents may affect priorities. Whilst the parties remain responsible for the preparation of documents under the Torrens system, it is the act of an officer in the Land Titles Office which effects the transfer of title to any registered legal estate or interest. The powers and responsibilities vested in State officials thus give rise to the possibility of loss through mistakes occurring in the Land Titles Office.

2. Deprivation of an estate or interest in land

1.8 Under the Torrens system a purchaser who becomes registered as proprietor by means of a forged or invalid transfer acquires (generally speaking) an indefeasible title, while under the old system the forged or invalid conveyance remained a nullity both before and after registration. Because the operation of the Torrens system makes it possible for the holder of an estate or interest in land to be deprived of that estate or interest by registration of an otherwise invalid instrument, the system has provided a guarantee of monetary compensation for loss in these circumstances.⁵

1.9 The first Torrens title compensation scheme (incorporated in the 1858-61 South Australian legislation) gave a person who had been deprived of land through the operation of the system a right to seek monetary compensation from the person who was responsible for the deprivation in the first instance. Only if the person was unsuccessful in this action was there a right to seek compensation from the Assurance Fund. The Fund was also to be the source of compensation for loss sustained through a Land Titles Office error. The Fund was maintained by a levy on applications made to convert Old System land to the Torrens system and transfers of land following the death of a registered proprietor.

B. Compensation schemes in New South Wales and Victoria

1.10 The 1861 South Australian compensation scheme was the basis of the schemes incorporated into the Torrens legislation enacted by both New South Wales and Victoria respectively in 1862. However, since early

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

1988 neither State has maintained a separate Assurance Fund and compensation payments have been made from consolidated revenue. Compulsory contributions to the New South Wales Fund ceased in 1940, although specific payments continue to be levied for certain types of transactions in Victoria. Apart from these changes, little amendment has been made to the New South Wales scheme since its enactment. The Victorian scheme was changed substantially in 1954, when amendments were made to exclude compensation for loss arising from fraud or the negligence of a claimant's solicitor or agent.

1.11 Both the Transfer of Land Act 1958 (Vic) and the Real Property Act 1900 (NSW) adopt the principle that compensation by the State should provide for:

- losses caused by the registration of another person's interest; and
- losses resulting from mistakes within the Registry or Office.

The main differences between the two enactments lie in their treatment of fraud and in the steps which must be taken before a claim can be brought against the Fund. These issues are discussed in Chapters 3 and 4. While the New South Wales scheme provides compensation for persons sustaining loss by reason of fraud, the procedural requirements imposed by the legislation are restrictive.⁶

1.12 One of the features of an effective insurance scheme is that, subject to suitable verification, claimants have their claims met with a minimum of delay and formality. The procedures laid down in ss126 and 127 of the Real Property Act 1900 (NSW) do not accord with this principle.⁷ Not only must legal proceedings be commenced in order to recover, great care must be taken to select the correct provision under which to make a claim. As demonstrated in the 1974 case, *Armour v Penrith Projects Pty Ltd*,⁸ failure to comply with the correct statutory procedure may result in compensation being withheld.

1.13 The indemnity provisions of the Transfer of Land Act 1958 (Vic) (in particular s110) are superior to those of the Real Property Act 1900 (NSW) and access to the Fund is considerably easier, since the application for compensation is made directly to the Registrar without previous legal proceedings. Nevertheless the Victorian legislation is subject to important restrictions.

1.14 Both the New South Wales and Victorian Acts exclude compensation for loss caused by:

- a registered proprietor's breach of trust, whether the trust is express, implied or constructive;
- the inclusion of the same land in two or more Crown grants; or
- any land being included in the same folio of the Register or certificate of title with other land through the misdescription of boundaries or land parcels, unless the person liable has absconded or is dead, bankrupt, insolvent or unable to pay the full amount awarded as compensation.

In addition, the Victorian Act excludes compensation where claimants, their solicitors or agents caused or substantially contributed to the loss by "fraud, neglect or wilful default". Claimants who derive title without payment of valuable consideration (eg under a will or by gift) are also excluded if the transferor or the transferor's solicitor or agent was guilty of fraud, neglect or wilful default. The onus lies on the claimant to prove that the loss was not caused or substantially contributed to by such fraud or negligence.

1.15 Consequently, claims may be made in New South Wales, particularly where contributory negligence is involved, that cannot be made in Victoria. While the Victorian provisions deprive a claimant of compensation if the claimant or an agent caused or substantially contributed to the loss, there is nothing to indicate precisely what is meant by "substantially contributed to the loss". Presumably, it would cover a case where the claimant negligently lost or gave up possession of the duplicate certificate of title. The Victorian provisions also exclude compensation for fraud or error by solicitors. That type of loss is met separately through the Solicitors' Guarantee Fund and compulsory professional indemnity insurance.

1.16 The Victorian Act also excludes compensation:

- for costs which the claimant has incurred in taking or defending legal proceedings without the consent of the Registrar, except for costs awarded against the Registrar in proceedings in which the Registrar is a party; and
- where the Registrar has not enquired whether a power of attorney was in force at the time something was purportedly done under the power.

C. Claims for compensation

1. New South Wales

1.17 During the 12 year period from 1977-1988 there were 28 claims for compensation against the Assurance Fund. Of these, 17 (61%) were for loss resulting from fraud, while the remainder concerned Departmental error and in one case, a surveyor's error.

Table 1.1: Claims against the Assurance Fund

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

New South Wales 1977-88

Status of Claim	Basis of Claim		
	Fraud	Departmental Error	Surveyor's Error
Settled	7	2	0
Outstanding	10	8	1
TOTAL	17	10	1

Source: Land Titles Office (NSW)

1.18 Nine of the 28 claims have been paid, including seven involving fraud and two instances of Departmental error, with a total payout of \$211,460. A review of the 19 claims outstanding reveals both an increase in the amounts claimed in individual cases and potential for a total payout which far exceeds that of any preceding period. It has been estimated that the value of these outstanding claims is \$1,500,000. The value of damages in compensation claims is usually (but not invariably) based upon the value of the property at the date of trial. The general escalation of property values in recent times may mean that no reliable assessment can be made of the compensation likely to be awarded to successful claimants.

1.19 The estimates of potential claims are less significant when viewed against the total numbers of dealings lodged for registration and the revenue obtained from them. For the period 1977-88 approximately 6,359,000 dealings were lodged for registration. Revenue from these dealings was about \$249.5 million. The total expenditure of the Land Titles Office for the same period was \$199.5 million, leaving a gross profit of \$50 million.

1.20 In considering the total number of claims for compensation for the period 1977-88 the number of *ex gratia* claims paid by the Land Titles Office in clear-cut cases of Office error should not be excluded. There were approximately 50 of these claims of which 25 were paid, but the total payout figure did not exceed \$1,500. Because of their minor nature and the fact that the Real Property Act 1900 (NSW) requires a court order before a payment can be made from the Assurance Fund these claims were paid from general Office funds on an informal basis.

2. Victoria

1.21 A total of 582 claims for compensation were made against the Assurance Fund during the period 1981-87. Unlike New South Wales, the Registrar is specifically authorised by the Transfer of Land Act 1958 (Vic) to receive and assess claims. This specific authority may account for the large numbers of claims made in respect of Office errors. Most of these claims relate to lost documents but others concern errors, delays and computer failure. They have resulted in a total payment of \$292,190.

Table 1.2: Claims against the Assurance Fund

Victoria 1981-87

Status of Claim	Basis of Claim		
	Fraud	Departmental Error	Surveyor's Error
TOTAL	3	579	0

Source: Land Titles Office (Vic)

1.22 The number of fraud claims (including one claim in which \$58,000 was paid) is small in comparison to New South Wales, because loss incurred in consequence of fraud is not a of specific ground for compensation in Victoria and all claims resulting from the fraud or negligence of a claimant's solicitor or agent are excluded.

1.23 As in New South Wales, the number and size of potential claims are less significant when viewed against the total number of dealings lodged for registration and the revenue obtained from them. For the period 1981-87, 3,151,519 dealings were lodged for registration. Revenue from these dealings was \$296 million approximately. The total expenditure of the Land Titles Office for the same period was \$106.5 million (including the functions of the Registrar General) leaving a gross profit of \$189.5 million.

III. OUTLINE OF THIS PAPER

1.24 This Paper, together with the joint Discussion Paper (June 1989) issued by the two Commissions,⁹ examines the Torrens title compensation schemes in New South Wales and Victoria. The principal purpose of this Paper is to explore some of the key issues in more detail. In particular this Paper examines the historical

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

rationale of the compensation system and considers whether there is a case for abolishing the compensation system in either Victoria or New South Wales. This option was not fully explored in the joint Discussion Paper.

1.25 A brief study of the rationale of Government compensation schemes is presented in Chapter 2. An assessment is made of the need for State insurance in historical terms. Detailed accounts of the operation of the compensation schemes in New South Wales and Victoria follow in Chapters 3 and 4. Chapter 5 considers the question of how far the principles of insurance which lie behind the schemes have been applied in the two States. Chapter 6 presents the four possibilities which this Commission believes are the available options for reform of the law and practice in the area.

1.26 This Paper and the Discussion Paper published in June are designed to promote discussion of the issues raised. The Commission is seeking views on both Papers.

FOOTNOTES

1. See page viii for terms of reference.
2. Clyde Croft, "Land Law Horizons" (1986) 60 *Law Institute Journal* 542.
3. (1971) 126 CLR 376 at 381.
4. G W Hinde, D W McMorland and P B A Sim *Land Law* (Volume 1, Butterworths, Wellington, 1978) 206-207.
5. *Id* at 208.
6. Sections 126 and 127 of the Real Property Act 1900.
7. M A Neave, C J Rossiter, and M A Stone *Sackville & Neave, Property Law: Cases and Materials* (4th ed, Butterworths, Sydney, 1988) 400.
8. [1979] 1 NSWLR 98.
9. Law Reform Commission of New South Wales and Law Reform Commission of Victoria *Torrens Title: Compensation for Loss* (VLRC Discussion Paper 16, 1989; NSWLRC Discussion Paper 19, 1989).

2. Rationale for Compensation

I. ORIGINAL BASIS FOR COMPENSATION

A. Indefeasibility

2.1 Sir Robert Torrens explained the significance of compensation as an element in his system of title by registration:

Indefeasibility of the title created by registration follows of necessity as a corollary to the principle of "independent title", and out of this again arises the necessity of providing a fund from which rightful heirs and others may be compensated for the value of land which they are debarred from reclaiming against persons who have acquired title by registration as purchasers, mortgagees, or otherwise through the operation of the law.¹

2.2 This view of the role of the Assurance Fund is confirmed by a number of commentators. Baalman asserted that:

[T]he act of the State in declaring titles to be indefeasible has its concomitant in the provision of State remedies for persons who thereby suffer loss.²

2.3 The right to seek compensation did not appear in the initial drafts of the Torrens legislation in South Australia. It first appeared in the 1857-1858 draft which became law in January 1858. A number of commentators have suggested that the compensation provisions were included following the receipt of a report of the English Commissioners on Registration of Title.³ This Report arrived in South Australia on the eve of the second reading of the legislation in the House of Assembly on 11 November 1857. Torrens denied the influence of this Report, but the first evidence of his interest in the matter appears in a letter dated 14 November 1857 to Anthony Forster, the person who took charge of the Bill in the Legislative Council. In the letter Torrens sought advice on three issues. In the second he queried the need for an assurance scheme:

Shall rightful Users or Owners be assured against loss that may occur to them through Certificate of Title being granted in error or by fraud or misrepresentation, by the public funds being drawn upon to make good any balance that may not be recovered from the person wrongfully or in error registered as owner? ... Should this be affirmed I would propose an assurance fund to be raised by a quarter or an eighth percent to be levied on the value of all land on the first bringing of the same under the Act.⁴

Subsequently, during the Committee stage of the Bill, Torrens produced the clauses which guaranteed individuals either their land or compensation for its loss. The provisions of the Act as first enacted were therefore designed to compensate any person deprived of land or an interest in land by operation of the indefeasibility provisions contained in it.⁵ The provisions were also intended to compensate any person sustaining loss through omission, mistake or misfeasance of the Registrar General or any officers employed in the Land Titles Office.

B. Opposition of legal profession to Torrens system

2.4 Baalman suggests two more reasons for the inclusion of compensation provisions in the 1858 South Australian Act. He suggests, first, that the Fund was created to allay fears which "hostile lawyers had engendered in the public" and, secondly, it was intended

to afford to the administration such a measure of latitude in its approach to conveyancing problems as was considered essential to the smooth and economic flow of business.⁶

The possibility of confiscation of land without redress was one of the chief grounds on which the legal profession opposed the Act.⁷ The inclusion of the compensation provisions in the legislation was therefore intended to give confidence in the new system of title and to overcome some of the opposition to its introduction. In fact, the establishment of the Fund did not change the attitude of the legal profession; nor apparently did it have an impact on the approach adopted to implementation of the Act.⁸

2.5 Torrens also suggested that part of the legal profession's concern lay in self interest. They saw the new system as a threat to their livelihood having acquired great influence and power in the colony by virtue of their ability to manage the complexities of English property law. The other reason Torrens ascribed to lawyers for their opposition to reform was expressed in a quotation he used from Lord Brougham:

They love and revere the mysteries which they have spent so much time in learning, and cannot bear the rude hand which would wipe away the cobwebs, in spinning which they have spent their zeal and their days for perhaps half a century.⁹

The legal profession opposed Torrens' legislation both before its enactment in South Australia in 1858 and afterwards. However, Torrens refused to accede to their attempts to boycott the new titles or to charge enhanced fees for dealing with them.¹⁰ In 1860 he sponsored legislation to create a class of non-lawyer "land

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

brokers" authorised to prepare conveyancing documents for reward. To this day South Australian lawyers, alone among their colleagues elsewhere in Australia, have no monopoly in conveyancing transactions.

II. INDEFEASIBILITY OR STATE-GUARANTEED TITLE?

2.6 The principal feature of the Torrens System is indefeasibility of title. Under this principle, the person whose name is recorded in the Register as proprietor is assured of good title free from unregistered encumbrances. In the remote event that loss is suffered through reliance on the integrity of the Register, the registered proprietor can look to the assurance fund for compensation.¹¹

2.7 The promise of complete immunity from loss for the registered owner has not been fulfilled. Thomas W Mapp points out that use of the term "indefeasible title" is deceptive.¹² As used by Torrens, to describe the curative effect of registration on defects in derived titles, the term has meaning. However, as Mapp suggests, a registered title cannot provide complete protection against errors occurring both before and after its creation. No legislature can work this miracle. Accordingly, Torrens' title is an elusive ideal, subject to errors inherent in any human system. In addition, of course, it is necessary to take account of the exceptions to indefeasibility created by the legislation itself, the scope of which has tended to expand by judicial interpretation over time.¹³

2.8 Indefeasibility of title was described by the Privy Council in *Frazer v Walker*¹⁴ as:

a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. *It does not involve that the registered proprietor is protected against any claim whatsoever; ... there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required.*¹⁵

Thus, Whalan is probably correct in suggesting that the term "indefeasible" is a misnomer, for strictly speaking an indefeasible title would be one which would protect the holder against any claim whatsoever.¹⁶

2.9 Baalman has suggested that:

The greatest threat to certainty of title today comes from the direction of concealed statutory obligations and compulsory acquisitions.¹⁷

An ever-increasing number and variety of statutes derogate from the protection given by registration.¹⁸ The statutory exceptions themselves, particularly those relating to omitted and misdescribed easements, may make the title of registered proprietors more precarious than the register would suggest.

2.10 A more appropriate term to describe the nature of the title conferred by registration under the Torrens legislation is "State-guaranteed" title. This term is apt in view of the important concomitant of the principle of indefeasibility of title: the right to be indemnified by the State against wrongful deprivation of a registered interest.¹⁹ The Torrens legislation in each State of Australia gives recourse to an Assurance Fund (or the Consolidated Revenue Fund) as the source of State guarantees.²⁰

2.11 A basic principle of the State's guarantee of title is that an Assurance Fund will provide adequate compensation for those deprived of rights and interests. This principle has been diluted in New South Wales by the enactment of provisions which require those deprived to first pursue private law remedies before suing the State. The Fund thus becomes a last resort for claimants. In Victoria, the primary action is brought against the Registrar, making the Fund in effect a first option of claimants. The principle of compensation has also been eroded by what one commentator has described as "the quite repulsive tenacity with which some jurisdictions are prepared to resist even valid claims upon the fund".²¹ Some claimants become so frustrated with litigation that they decide to bear the loss themselves.

III. NEED FOR A STATE GUARANTEE OF TORRENS TITLE

A. The general Australian view

2.12 Torrens considered a State guarantee to be an integral part of a system of registration of title. The majority of commentators on the system concur in this view. For example, Sackville and Neave²² are of the view that the State guarantee of the registered proprietor's title is the basis of the Torrens system. They put the view that:

[i]f the goals of the system are to be attained, the State should compensate all person[s] who sustain loss by reliance on the register where it proves to be inaccurate, and should also compensate those who find themselves wrongfully deprived of a registered interest.²³

Nonetheless it is no longer self-evident that the original rationale for providing compensation, to compensate those who suffer loss as a result of the operation of the indefeasibility provisions, continues to apply. Is a State-backed insurance scheme essential to the satisfactory operation of the system of registration of title in the

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

1990s? Or has the time come for registered proprietors to take personal responsibility for insuring against the risk of loss of title?

B. Other jurisdictions

2.13 It is by no means a foregone conclusion that indemnity is essential for the proper working of a system of registered title to land. Several jurisdictions operate registration systems, apparently satisfactorily, without making provision for compensation for loss. These jurisdictions include Malaysia, the Sudan, Fiji, West Germany and Austria. Indeed, the Sudanese legislation, far from providing an Assurance Fund, expressly exempts the Government from liability and declares:

the registration of any instrument or the making of any entry in the register shall not in any case operate as a guarantee by the Government that the transaction ought to have been registered or that the entry was a proper one.²⁴

2.14 It is, of course, very difficult to assess the success of a scheme established in a very different legal, social and economic environment from our own. Yet the legislation in other jurisdictions suggests that a State guarantee of validity of title is not a necessary component of a system of title by registration. On the other hand, in those countries where an Assurance Fund exists, the procedural hurdles for recovery are often so great that the provision of State compensation is an illusion.²⁵

IV. TITLE INSURANCE

A. The United States experience

2.15 Another question which must be examined is whether private title insurance could be substituted for the existing State government guarantees of Torrens titles. A major development in conveyancing in the United States, for example, during the twentieth century has been the movement towards widespread adoption of title insurance. This development was basically a response to the uncertainties and difficulties of establishing title in a system of unregistered land tenure.

2.16 The unregistered system, or the system of "recordation" as it is called in the United States, involves the certification by lawyers or professional title searchers as to the state of the titles searched. In addition to obtaining such certification, a purchaser or mortgagee will usually take out private title insurance for the generally accepted reason that a "certificate of title is only worth as much as the examiner's own pocketbook ... can bear in the event of error in the search".²⁶ While title insurance was introduced to cater for Old System titles, title insurance is now taken out by purchasers and mortgagees of both registered and unregistered land,²⁷ although in the United States the Torrens systems are of relatively minor significance. Thus in the United States private title insurance complements the Torrens state insurance schemes. Private title insurance generally includes a range of risk coverage and a set of transaction-related services that are in addition to indemnification for title-related losses.

2.17 In the few areas of the United States with active Torrens systems, title insurance is used for transactions in registered land as frequently as it is used for transactions in unregistered land. A single premium is paid, and the coverage under an owner's policy lasts indefinitely so long as the owner (or his or her successors) hold the land. The insurance premiums are the same for both land types.

2.18 Mortgagees of registered land generally require title insurance.²⁸ There is apparently a perception amongst lenders that private insurance is a more reliable and accessible guarantee than the State guarantee of title. The demand for private insurance of registered land is also attributed to:

the small amounts of money in the Torrens funds and because of certain limitations and legal uncertainties over the extent of fund coverage.²⁹

In particular:

the Torrens statutory provisions deny compensation for expenses directly connected with defending against an attack on registered property interests. They also (except in Cook County [Illinois]) appear to require court action to perfect a claim. This discourages private settlement and increases the range of non compensable damages.³⁰

2.19 Finally, title insurance companies provide a wide range of services related to the provision of timely and effective execution of real estate transactions. These services are an important feature of the private insurance product, which contributes to its utilisation for both registered and unregistered land.³¹

B. The private insurance option

2.20 The issue for New South Wales and Victoria is whether such optional private title insurance could replace or complement the existing Torrens insurance schemes. If there were to be no government-backed insurance of Torrens titles, individual registered proprietors would need to consider the option of private insurance. As in the United States, it can be assumed that mortgagees would invariably require insurance.

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

The insurance premium would become an additional cost for the purchaser. However, if the policy were to cover only title-related losses, the level of the premium would not be significant in view of the apparently limited risks of the current government backed schemes. A substantially larger premium would apply if private insurance policies covered loss arising from non-title related matters, as is the case in the United States.

FOOTNOTES

1. Robert R Torrens *The South Australian System of Conveyancing by Registration of Title* (Register and Observer General Printing Offices, Adelaide, 1859) 9.
2. J Baalman *The Torrens System in New South Wales* (2nd ed, Law Book Co, Sydney, 1974) 392.
3. Report of English Commissioners appointed to consider the subject of the Registration of Title with Reference to the Sale and Transfer of Land (1857), command paper [2215], referred to in D J Whalan "The Origins of the Torrens System and its Introduction into New Zealand" in G W Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 9; S Robinson *Transfer of Land in Victoria* (Law Book Co, Sydney, 1979) 9.
4. Quoted in D J Whalan "The Origins of the Torrens System and its Introduction into New Zealand" in G W Hinde (ed) note 3, 8.
5. D J Whalan *The Torrens System in Australia* (Law Book Co, Sydney 1982) 346.
6. J Baalman, note 2, 389.
7. D J Whalan, note 5, 8, 14, 345.
8. *Id* at 355-65.
9. Robert R Torrens, note 1, 5.
10. S R Simpson *Land Law and Registration* (Cambridge University Press, Cambridge, 1976) 70.
11. J Baalman *Report on Conversion of Land to the Torrens System* (Unpublished report, Property Law Revision Committee, Sydney, 1957) 156.
12. Thomas W Mapp *Torrens' Elusive Title* (University of Alberta, Faculty of Law, Edmonton, 1978) 66-67.
13. See Real Property Act 1900 (NSW) s42 (a)-(e).
14. [1967] 1 AC 569.
15. *Id* at 580.
16. D J Whalan, note 5, 296.
17. J Baalman, note 11, 157.
18. See D J Whalan note 5, 338 and ff.
19. Peter Butt "Land Law" in [1979] *Annual Survey of Australian Law* 94 at 101.
20. Real Property Act 1900 (NSW) ss126-143; Transfer of Land Act 1958 (Vic) ss109-111; Real Property Act 1861 (Qld) ss126-129; Real Property Act 1886 (SA) ss203, 205, 206, 208-219; Transfer of Land Act 1893 (WA) ss201, 205-211; Land Titles Act 1980 (Tas) ss125, 127, 129-134.
21. S R Simpson, note 10, 18.
22. M A Neave, C J Rossiter and M A Stone *Sackville & Neave, Property Law: Cases and Materials* (4th ed, Butterworths, Sydney, 1988) 398.
23. *Ibid*; see also P B A Sim "The Compensation Provisions of the Act" in G W Hinde, note 3, 138.
24. Land Settlement and Registration Ordinance 1925 (Sudan) s86, referred to in S R Simpson, note 10, 181.
25. See generally Simpson, note 10, 179-183.
26. C D Bostick "Land Title Registration: An English Solution to an American Problem" (1987) 63 *Indiana Law Journal* 55 at 72.
27. B C Shick and I H Plotkin *Torrens in the United States* (Lexington, Heath, 1978) 70-72.
28. Particularly if they are in doubt about the status of the title following a review of the Torrens Certificate or if the new building is to be erected on the land or there is a possibility of the sale of the mortgage on the secondary market.
29. B C Shick and I H Plotkin, note 27, 72.
30. *Id* at 73.

31. *Ibid.*

3. The Current Position In New South Wales

I. THE ASSURANCE FUND

3.1 The Assurance Fund was a vital part of the Real Property Act as originally enacted in New South Wales in 1862. As provided in ss28 and 29 of the Act, the Fund was to be the source of payment for successful compensation claims. It was financed by levies on two types of dealings, namely applications to convert Old System land to the Torrens system, and transfers of land following the death of a registered proprietor.

3.2 Since the consolidation of the Real Property Acts in 1900 the Fund and its administration have undergone considerable change.¹ In 1906 it was combined with the Closer Settlement Fund and in 1970 that Fund was transferred into the Closer Settlement and Public Reserves Fund. Payments from this Fund were continued until it closed in 1988. All payments are now made directly from Consolidated Revenue, and no specific amount is set aside for claims. Compulsory contributions from users ceased in 1940.²

II. COMPENSATION PROVISIONS

3.3 The legislative provisions which regulate the Fund in New South Wales³ are typical of the compensation provisions in most jurisdictions, although, as noted, the Victorian provisions differ in important respects. The language used in the key sections (ss126 and 127) is complex and difficult to interpret, yet has undergone relatively little change since the early days of the Torrens System.⁴

A. Bases of claim

3.4 Section 126(l) of the New South Wales Act allows a person who has been deprived of land or of an interest in land to bring an action for monetary compensation if the deprivation was:

- (a) in consequence of fraud; or
- (b) through the bringing of such land under the provisions of this Act; or
- (c) by the registration of any other person as proprietor of such land, estate or interest; or
- (d) in consequence of any error, omission, or misdescription in the Register.

3.5 Section 127 provides an independent cause of action against the Fund for persons sustaining loss through departmental error or when no remedy is available under s126. To recover compensation under s127, a claimant must:

- have sustained loss or damage;
- as the result of
 - departmental error (omission, mistake or misfeasance);
 - the registration of any other person as proprietor (other than the registration of a possessory title based on adverse possession under s45E); or
 - an error, omission or misdescription in the Register; and
- be unable to pursue other remedies as a result of the provisions of the Act, specifically
 - be barred from an action for possession or other form of recovery of land or an interest in land; or
 - be unable to obtain such recovery because the action or proceeding would be inapplicable; and
 - be unable to obtain damages under the Act (ie s126) because such remedy is inapplicable.

Section 127 duplicates some of the bases of claim in s126, but in other respects is quite different. Unlike s126, which requires plaintiffs to prove that they have been deprived of an estate or interest in land, s127 requires only that plaintiffs have suffered loss or damage. In practice, however, the differences between ss126 and 127 are not regarded as critical, and plaintiffs normally bring proceedings under both sections.

3.6 Claimants must establish not only that they come within the terms of ss126 and 127, but that they are not excluded by s133 of the Act. That section specifies three circumstances in which compensation is not payable. The Fund is not liable if the loss, damage or deprivation is the result of a breach of trust by a registered proprietor. Similarly, if the loss is caused by the same land being included in two or more Crown grants, or by misdescription of title which results in two parcels of land being included in the same certificate of title, the Fund is exempt from liability.

B. Defendant

3.7 The combined effect of ss126 and 127 is that a claimant against the Fund must first pursue available actions against any individual wrongdoer before bringing an action against the Registrar General. The action under s126 is first brought against the person who applied for the erroneous registration, or who acquired the interest or received money through the fraud or error. While the form of the legislation suggests that a proprietor who

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

innocently registers an improper document, say a forged transfer, may be liable to the previous registered proprietor deprived of his or her interest by the registration, in fact the title of the new registered proprietor is immune from attack. Thus, in practice, a person deprived of title by the registration of such a document cannot (and need not) bring proceedings against the person innocently obtaining registration before claiming compensation.

3.8 A claimant may recover from the Fund if the person liable to pay compensation is dead, bankrupt, insolvent, or unable to be found within the State. An action against the Fund may also be brought under s127 if a person has sustained any loss by the registration of another interest and can neither bring proceedings under s126 against the person responsible nor regain legal possession of the land or interest. In addition, s127 allows a claimant to recover compensation for errors made by the Land Titles Office, specifically:

- (a) any omission, mistake or misfeasance of the Office staff; and
- (b) any error, omission, or misdescription in the Register.

The practical effect is that the Real Property Act 1900 (NSW) allows a claimant to recover from the Fund in cases of fraud (including forgery) and departmental error. In the case of fraud, the claimant must first exhaust the remedies against the wrongdoer (but not the innocent registered proprietor) before bringing an action against the Fund.

C. Complexity of legislation

3.9 Due to ungainly drafting it is sometimes difficult to discern the separate functions of ss126 and 127. In his first edition in 1902, Canaway described s126 as "perhaps the most confused in the Act, the ill-draughting [sic] of which has been frequently commented on".⁵ Baalman concurs in this view and says that:

the general impression created by the language of Part XIV is that the draftsman had reached a stage at which he was anxious to see the end of a difficult task.⁶

3.10 In addition to the complexity of the sections, these provisions have not been revised to take account of the judicial acceptance by the Privy Council in *Frazer v Walker and Radomski*⁷ of the theory of "immediate indefeasibility" as opposed to the earlier theory of "deferred indefeasibility". While it was formerly held that a title obtained fraudulently was defeasible until perfected by a subsequent *bona fide* transfer for value, it is now accepted that registration is effective in itself to validate immediately a transfer that was forged or is otherwise void or voidable. The only legislative recognition of the new theory, which was stated by the Privy Council in 1967, has been an amendment to s135 of the Act by the Real Property (Amendment) Act 1970 s17(f).⁸ Section 135 now reads (the underlined words were added by the amendment):

Nothing in this Act contained shall be so interpreted as to leave subject to action for recovery of damages [under s126], or to ... proceedings or action for the recovery of land, or to deprivation of the estate or interest in respect to which he is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration of land ... on the plea that his vendor or mortgagor may have been registered as proprietor, or procured the registration of the transfer to such purchaser or mortgagee through fraud or error, *or under any void or voidable instrument*, or may have derived from or through a person registered as proprietor through fraud or error, *or under any void or voidable instrument*...

The purpose of the amendment was to endorse the policy approved by the Privy Council "by completely removing any ambiguity [then] latent in the section".⁹

3.11 The avenues for claims against the Assurance Fund have been widened since the acceptance of the principle of immediate indefeasibility. Under the previously accepted doctrine of "deferred indefeasibility", an immediate but innocent party to a void transaction (including cases of forgery) could find courts willing to set the transaction aside, leaving that party without a right to compensation. Since *Frazer v Walker*, the innocent parties to a transaction involving registration of a forged dealing should generally speaking not be exposed to a loss. However, in certain circumstances the effect of immediate indefeasibility may be that a person who has lost an interest in land as the result of registration of a void instrument:

can be left in the unenviable position of both losing title to, or an interest in, land and being precluded from the assurance fund.¹⁰

D. Fraud

3.12 In New South Wales, a claimant may obtain compensation for deprivation resulting from fraud, including the fraud of a solicitor or agent. In recent years this provision has been expanded considerably by judicial interpretation. *Parker v Registrar General*¹¹ established that "fraud" in this context is not limited to cases involving forged documents: compensation is also payable where the claimant is tricked into signing a document by a wilfully false representation.¹² Compensation is not, however, necessarily payable for *all* losses caused by fraud.

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

3.13 A registered proprietor whose title is lost when a rogue registers it in his own name prior to making a fraudulent transfer to a bona fide purchaser for value must first seek compensation from the rogue under s126 before claiming from the Fund. It is only if the rogue cannot be sued (because of death, bankruptcy, insolvency, or absence from the jurisdiction) that an action lies against the Fund.

3.14 If the registered proprietor has been fraudulently deprived of land or an interest in land by a rogue who does not obtain registration in his own name as proprietor, no action is available under s126. However a claim may lie against the Fund under s127.¹³

3.15 Following *Parker*, compensation will be payable (assuming other statutory conditions are satisfied) for deprivation of an estate or interest in land resulting from fraud in the wider sense of the term. If a registered proprietor is fraudulently induced to sign a transfer in favour of an innocent third party, a claim for compensation from the Fund would lie under s127.

E. Claims procedures

3.16 The scheme of the New South Wales Real Property Act is that claimants may obtain compensation from the Assurance Fund only after they have pursued the person primarily responsible for the loss, or are unable to fully recover the amount of the loss from the person at fault. In the case of loss attributable to Land Titles Office errors, a court order against the Registrar General is required to enable payment of compensation from the Assurance Fund. However an ex gratia payment by the Registrar General may be made for errors in certain circumstances.

3.17 Both s126 and s127 require legal proceedings to be instituted in order to establish a claim for compensation from the Assurance Fund.¹⁴ However, it is not essential for the matter to have been tried and final judgment given. A claim may be settled without trial and paid from the Assurance Fund provided a consent order is obtained.¹⁵

F. Time limit for making claims

3.18 Section 130(1) of the Real Property Act 1900 (NSW) formerly provided that an action for damages must be brought within six years from the date of deprivation. This section was repealed by the Notice of Action and Other Privileges Abolition Act 1977 (NSW). Thus if a limitation on time now operates it must do so under the Limitation Act 1969. There are two grounds under this Act that may apply to a cause of action against the Assurance Fund, namely:

- a cause of action founded on tort, including a cause of action for breach of statutory duty (s14(1)(b)); and
- a cause of action to recover money recoverable by virtue of an enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture (s14(1)(d)).

3.19 An action arising from s127 may be subject to s14(1)(b) of the Limitation Act if an omission, mistake or misfeasance of the Registrar General, or any of his officers or clerks in the execution of their respective duties under the provisions of the Real Property Act, is held to be a breach of statutory duty. However, the same could not be argued for a cause of action arising under s126. This would appear to create an inconsistency in limitation periods applying to s127 and s126.

3.20 It may be argued that a cause of action under s126 may come within the ambit of s14(1)(d) of the Limitation Act. This, however, depends on the statutory definition of "money". The Limitation Act itself provides no definition nor does the Real Property Act. So if "money" is interpreted to include damages due to deprivation of land then a limitation period may apply to a cause of action arising under s126.

3.21 If the Limitation Act does apply then the limitation period is six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims. Further, under s51, there is an ultimate bar of 30 years.

G. Measure of damages

3.22 The New South Wales legislation does not deal expressly with either the measure of damages or the closely related question of the date at which damages should be assessed. It is, however, accepted judicially that the amount of damages recoverable must be full compensation for the loss actually sustained. The general principle was laid down in *Spencer v Registrar of Titles (WA)*¹⁶ which recognised that a claimant should be put in the same (but not a better) position, so far as money will provide, as if the wrongful act had not occurred. This view was adopted by Mahoney JA in *Registrar General v Behn*.¹⁷ In *Behn*, Mahoney JA also commented that in determining the date for assessing damages, each case must be considered on its own facts. In *Behn*, the appropriate date was the hearing, rather than the date on which the plaintiff had been deprived of the land (as was held by the High Court in *Spencers Case*¹⁸).

III. JUDICIAL INTERPRETATION OF THE COMPENSATION PROVISIONS

A. "in consequence of fraud" In section 126(1)(a)

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

3.23 Until recently, the judicial interpretation of the compensation provisions in New South Wales tended to be restrictive. This approach was reflected in the decision in *Armour v Penrith Projects Pty Ltd*¹⁹ in which the plaintiff's claim was made under s126 of the Real Property Act. The case concerned a person by the name of Long, who improperly obtained possession of a memorandum of transfer to the plaintiff (Armour) who was purchasing from the registered proprietor. Long lodged the transfer at the Land Titles Office and obtained possession of the certificate of title. He then sold the land and forged a memorandum of transfer to the purchaser. The transfer was registered and the certificate of title recorded in the purchaser's name. Needham J indicated that he was bound by the decision in *Registrar of Title (WA) v Franzon*²⁰ and held that there was no "erroneous registration" within the meaning of s126(2)(b).

3.24 In *Franzon's* case it was held that the claim under a section equivalent to s126 of the Real Property Act, whether framed in terms of a deprivation of an interest in land due to "fraud" or in terms of a deprivation due to an alleged "erroneous registration", failed because:

the "fraud" referred to in the section must be read as a fraud for which the person becoming registered is responsible and under the circumstances, the registered mortgagee had been innocent of fraud; and

the registration of the mortgage, lodged for registration by the second mortgagee, could not be described as an "erroneous registration" within the meaning of the section, particularly as there was no inconsistency between the registration and the instrument on which it was based.

3.25 Needham J observed that the effect of *Franzon* as applied in *Armour v Penrith Projects Pty Ltd* is that:

[I]n no case under s126, so far as I can see, could a forger who did not himself take title to the land ever be subject to proceedings under the section. If that is the true purport of the section then it seems to me that it lacks an essential protection to persons who are defrauded in their interests in registered land being taken from them by forgery.²¹

Armour failed because he had elected to claim under s126. His claim would undoubtedly have succeeded under s127.

3.26 This case applies a narrow meaning to the phrase "in consequence of fraud" in s126. If the perpetrator of the fraud does not become registered, there is no claim against the innocent person who becomes registered.²² Also, if a claim is based on an inappropriate section of the Act, the innocent registered proprietor who was the victim of fraud of the type that occurred in *Armour* and *Franzon* will not only have lost the title to or interest in land, but may also be unable to obtain compensation from the Assurance Fund. In each case the plaintiff would have had a cause of action if an alternative basis for claim had been pursued. The Victorian legislation avoids this problem by allowing the primary action to be brought against the Registrar. That legislation is therefore not only more appropriate to the principle of insurance but also avoids the need to exercise such great care in ensuring that the correct basis of claim is chosen.

3.27 The meaning of the phrase "in consequence of fraud" in s126 has been examined more recently in *Parker v Registrar General*²³ which concerned a registered transfer of property from the Parkers to an investment company. It was alleged that the transfer was induced by fraud and that the Parkers (plaintiffs) had not received consideration for the transfer. The company mortgaged the property to an innocent mortgagee. The property remained subject to the mortgage even though the Parkers subsequently obtained an order for a re-transfer. The NSW Court of Appeal held that the "fraud" covered by s126 was not limited (as the Registrar General had argued) to fraud practised on the registration system, such as the forgery of a registrable transfer. According to Mahoney JA:

The categories of fraud are not closed; frauds may take on many different forms. There is no reason why a right of recovery should be limited as against the person responsible for the fraudulent deprivation of land according to whether, eg the fraud involves the voluntary signing of a transfer induced by fraud, the signing of it by mistake, or the forgery of a document ...²⁴

A person could be deprived of an estate in land "in consequence of fraud" where he or she was *induced* by fraud to execute a valid, albeit voidable, transfer in favour of the fraudulent party. Despite his view that s126 embraces all types of fraud "directed to achieving the deprivation of land which occurred", Mahoney JA concluded that in view of the reasoning in *Franzon's* case, "the fraud relied on must be fraud for which the person becoming registered was responsible".²⁵

3.28 *Parker's* case was followed in *Behn v Registrar General*²⁶ which arose from similar facts. In *Behn's* case Holland J at first instance rejected an argument that contributory negligence is a defence to proceedings against the Registrar General under s126(5) to recover losses sustained by the fraud of another party. He reasoned that since the fraudulent party could not have relied on the defence of contributory negligence, the Registrar General could be in no better position. The judgment of Holland J was, in substance, affirmed on appeal.

3.29 The view that "fraud" embraces all frauds within the ordinary legal meaning of that term, including the situation where a registered proprietor voluntarily parts with land under the influence of fraud, is liable to questioning on policy grounds. Do the aims of the Torrens system, specifically the goal of promoting the security

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

of registered title, require that a registered proprietor be compensated if induced to execute a transfer of land by a plausible rogue?²⁷ Why should such a person receive compensation, when the owner of Old System land (or the proprietor of shares or other personal property) who is tricked into executing a conveyance (or transfer) in similar circumstances receives no compensation?

3.30 One view is that in order to promote security of title and to give effect to the principle of immediate indefeasibility, no purchaser of Torrens system land should be required to investigate the history of a vendor's title or to make burdensome or difficult enquiries as to the bona fides of the vendor. Therefore, irrespective of the circumstances surrounding the execution of a transfer by a registered proprietor, the title of a bona fide purchaser for value should prevail. Any other view increases the cost and complexity of all conveyancing transactions, as well as detracting from the goal of security of title.²⁸ This issue is examined in Chapter 6 of this Paper, "Options for Reform".

B. Section 127

3.31 There have been very few cases involving judicial interpretation of s127. The most recent reported case is the decision of Young J in *Northside Development Pty Ltd v Registrar General*.²⁹ The facts of the case (somewhat simplified) are that Robert Sturgess, a director of the company Northside Development Pty Ltd, executed a mortgage to Barclays Credit Corporation over land owned by Northside. The mortgage funds were used for the benefit of companies controlled by Robert Sturgess. The mortgage document was co-executed by Gerard Sturgess, the son of Robert Sturgess, who purported to sign as Secretary of Northside. The son had filed a consent to act as Secretary with the Corporate Affairs Commission but had not been effectively appointed in accordance with Northside's Articles of Association. Barclays, the mortgagee, was not aware of the irregularity surrounding the execution of the mortgage. The mortgage was registered, there was default under it, and Barclays sold the land to a purchaser who became the registered proprietor of the land. Northside then brought an action against the Registrar General under s127 of the Real Property Act 1900 claiming an indemnity from the Assurance Fund. That section, inter alia, gives a cause of action to a plaintiff who has been deprived of land by registration of another person as proprietor, where the remedies under s126 are inapplicable.

3.32 Young J held that the company was entitled to be compensated under s127 and held further that where damages are payable out of the Assurance Fund, the Registrar General has no right of subrogation against the wrong doer to enable recovery of the amounts paid out. Young J found that the mortgage was executed without authorisation and that the indoor management rule (that outsiders have a right to assume that all matters of internal management have been duly complied with) was inapplicable to the facts of the case. The Court awarded damages of \$348,865.31 plus costs.

3.33 The decision in *Northside* raises three important issues: the availability of the defence of contributory negligence to the Registrar General; the applicability of the doctrine of subrogation; and the definition of "fraud". Young J followed the decision in *Behn's* case and confirmed that contributory negligence is no defence to an action under either s126 or s127. The gullibility or carelessness of the plaintiff does not preclude recovery.

Damages given must be full compensation for the loss sustained.³⁰ Young J also confirmed that by virtue of s131 of the Act, the Registrar General only has rights of subrogation in respect of moneys recovered under s126, ie where in the first instance the person liable cannot be found or is insolvent or bankrupt. He was of the view that there would have been no need for a section like s131 if there were a general equitable right of contribution or subrogation.

3.34 Although His Honour did not find that the mortgage was fraudulently entered into, the decision followed the *Parker and Behn* cases³¹ which established that damages can be awarded in circumstances where registered proprietors have voluntarily set in motion the process enabling the fraudulent misrepresentation that results in the loss of title to their land: the fraud need not relate to the mechanism of registration.

IV. ADMINISTRATION OF THE REAL PROPERTY ACT 1900

A. Administrative perfection or risk management?

3.35 Robert Torrens claimed that one consequence of his proposed system of title by registration would be its low cost of administration. It would appear, however, that in a number of jurisdictions the costs of administering the system are exceptionally high. In many respects, the administration of the system ignores the existence of the State guarantee of title or insurance scheme. The work performed in a number of Land Titles Offices is directed towards maintaining the integrity of the Register and at the same time reducing, if not eliminating, claims against the Assurance Fund. This is a more arduous and time consuming process than was ever envisaged.

3.36 It is difficult to see the purpose of a State guarantee of title if the State's resources are to be so heavily directed towards avoiding the necessity for it. According to Theo Ruoff, the basis of the State guarantee of title is the insurance principle, which:

properly understood and fully carried out, involves far more than that an owner's title, that is known to be reasonably sound, is guaranteed by the State. In the widest sense it means not only that registration will be carried on literally as an insurance undertaking but also that it is the privilege of the Registrar ... to cure the title of known defects so far as he possibly can. It implies that the whole business of registration ought to be

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

conducted with such an economy of public manpower, public time and public money that the saving which is achieved far outweighs any payments of compensation for errors or omissions which may become necessary from time to time.³²

B. The risk management policy In operation

3.37 The New South Wales Land Titles Office to some extent already pursues a policy of risk management. It may be that, by adopting a more liberal policy, the Land Titles Office could balance the risk of possible claims with resources required to prevent them and save expense for itself and the community.

3.38 In the context of the principle of risk management, the issue of over-insurance is very real. Over-insurance occurs where the amount of the cover exceeds the value of the interest of the insured. It may be deliberate or accidental. It may arise either by the arrangement of excessive cover through a single insurer or by double insurance, where cover is arranged with more than one insurer and the aggregate of the cover exceeds the value of the insured interest. In both cases the principle of indemnity operates to restrict the insured to recovery of the amount of the loss, irrespective of the amount of the cover, whether single or aggregates.³³

3.39 A claim of excessive cover could be levelled at the State guarantee of Torrens titles. A separate insurance premium is not collected upon the lodgment of a dealing. However, the operating surpluses are usually significant: for example, in 1987-88 there was a surplus of approximately \$10 million (although this sum is presumably regarded as a contribution to general State revenues). The surplus is particularly large when compared with the payments of compensation, which amounted to approximately \$25,000 during the same period. These figures, when viewed together with the possibility of excessive examination by the Land Titles Office in some areas, may lead to a conclusion of excessive insurance. According to Stewart-Wallace, a former English Registrar, the great benefit of the insurance principle is that it enables justifiable risks - not just in one case outspread over the whole field - to be taken in the examination of title by the Land Registry.³⁴ This reduces the cost of investigating titles. The savings thus made from the fee income can go towards an insurance fund sufficient to pay indemnity:

in the rare case where the holding is disturbed, and where an impracticably costly and stringent investigation of title might have revealed the flaw.³⁵

3.40 A good example of the adoption of the risk management approach in the New South Wales Land Titles Office is the relaxation of the checking procedures in relation to dealings executed under a power of attorney. Until 1979 the Registrar General examined all documents executed under a power of attorney to ensure that the relevant power of attorney in fact authorised the execution. In 1979, s36(3) of the Real Property Act was amended to provide that the Registrar General is entitled to presume regularity in the execution of dealings, caveats or other documents executed by persons purporting to act under an authority. This amendment has significantly reduced the examination time for many dealings.

C. Future areas for application of risk management policy

1. Primary applications (applications to bring land under the Real Property Act)

3.41 Primary applications (voluntary applications to bring land under the Act) are the subject of meticulous examination. The relaxation of some aspects of this process might be considered in view of the small number of claims in the area and satisfactory alternative practices in both England and Tasmania. In these jurisdictions, the value of the land determines the degree of examination carried out.

3.42 In England, if the subject land is of low value the Chief Land Registrar is authorised to accept it for registration without any kind of examination whatsoever and without searches being made. The Registrar simply relies on a certificate from the applicant's solicitor that the normal process of investigation has been carried out. Even at high values, the Chief Land Registrar has a discretion (which he is not slow to exercise) to dispense with advertisements and to relax his examination if he is of the opinion that a title is open to objection but that the holding under it will not be disturbed.³⁶

2. Investigation of possessory titles

3.43 Many of the procedures and policies associated with the examination of possessory title applications place a considerable burden of work and correspondence on both the applicant's solicitors and the Land Titles office.³⁷

3.44 The limitation period of twenty years where the possession commenced prior to 1st January 1971 (otherwise 12 years) may itself be unduly onerous. In view of the absence of claims against the Fund in this area, consideration may be given to reducing the limitation period in all cases to 12 years and to reducing the number of stringent evidentiary requirements which must be satisfied before an application for title based on adverse possession is granted.

3. Survey investigation

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

3.45 Considering the limited recognition given to claims to title by adverse possession, a great deal of attention is paid to the accuracy of surveys of registered land. As possessory title applications may only be made in regard to a "whole parcel of land"³⁸ their incidence is quite small.

3.46 It is because of the so-called guaranteed boundary that meticulous checking procedures are undertaken by the Land Titles Office in respect of survey plans. The checking is designed to ensure that the survey information in any one plan is compatible with survey information in related plans and titles and that titles do not overlap. In addition to the investigations by the Land Titles Office, a purchaser will usually obtain a check survey to verify that the boundaries on the ground reflect those on the title.

3.47 The cost to the community of both the checking procedures in the Land Titles Office and the practice of obtaining check surveys cannot readily be quantified, but is substantial. Consideration might therefore be given to greater acceptance of the notion of possessory titles. This would not only result in less stringent checking of survey plans by the Land Titles Office, but would also relieve the purchaser of the need to ensure that occupation and title boundaries coincide whenever there is a sale. To permit all adverse possessory interests (both of whole and part parcels) to override the title would require intending purchasers to identify the land physically but would relieve them of the need to obtain a survey of land, except where the inspection reveals difficulties or where connecting points of boundaries are not identifiable from the title documents. This process would minimise the cost of conveyancing and enable title descriptions to be adjusted to conform with established boundaries. It would also require an intending purchaser to ensure that the vendor is, in fact, in possession of the property or, if not, that the period of limitation has not run.³⁹

3.48 Private surveyors could also bear full legal responsibility for the accuracy of plans of survey lodged in the Land Titles Office. Surveyors are a highly trained group of professionals. The philosophy that a Government agency should either do or check the work of private professionals is no longer appropriate. A claimant seeking compensation for a defective survey plan could bring an action against the Registrar General, who could in turn seek contribution from the negligent surveyor.

3.49 Professional surveyors are aware of their liability for professional negligence and carry professional indemnity insurance. Their concern to reduce their risks would suggest that the examination processes in use in Land Titles Offices could be reversed and that more responsibility for certification of quality could be transferred to the private sector.

FOOTNOTES

1. Sections 28 and 29 became s119.
2. J Baalman, *Baalman & Wells' Land Titles Office Practice* (4th ed, Law Book Co, Sydney, 1980) 23.
3. Sections 124-135.
4. R Stein "The Torrens System In New South Wales" (1981) 51 *Australian Law Journal* 150.
5. A P Canaway *The Real Property Act 1900* (NSW) (Law Book Co, Sydney, 1902) 85.
6. J Baalman *The Torrens System In New South Wales* (Law Book Co, Sydney, 1951) 383; see also R A Woodman & K Nettle *The Torrens System In New South Wales* (Law Book Co, Sydney, 1985) 623.
7. [1967] 1 AC 569; [1967] 1 All ER 649.
8. M A Neave, C J Rossiter and M A Stone *Sackville & Neave Property Law Cases and Materials* (4th ed, Butterworths, Sydney, 1988) at 400, 436.
9. *New South Wales Parliamentary Debates* 26 February 1970, Legislative Assembly, Minister of Justice, the Hon J C Maddison, 366-3.
10. Ian McCall "Indefeasibility Re-examined: Frazer v Walker and Some of Its Consequences" (1969-1970) 9 *University of Western Australia Law Review* 324 at 345.
11. [1977] 1 NSWLR 22.
12. See also *Behn v Registrar General* [1979] 2 NSWLR 46; [1980] 1 NSWLR 589; (1981) 35 ALR 633.
13. *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611; *Armour v Penrith Projects Pty Ltd* [1979] 1 NSWLR 98.
14. Sections 126(5), 127, 129.
15. Land Titles Office *The Assurance Fund of New South Wales* (Unpublished document September 1987) 22.
16. [1908] AC 235.
17. [1980] 1 NSWLR 589.
18. *Spencer v Registrar of Titles* (1909) 9 CLR 641.

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

19. [1979] 1 NSWLR 98.
20. (1975) 132 CLR 611.
21. [1979] 1 NSWLR 98 at 102.
22. D J Whalan *The Torrens System in Australia* (Law Book Co, Sydney, 1982) 349.
23. [1976] 1 NSWLR 342; [1977] 1 NSWLR 22.
24. [1977] 1 NSWLR 22 at 30.
25. *Id* at 29.
26. (1981) 148 CLR 562; (1981) 55 ALJR 541; (1981) 35 ALR 633, affirming [1979] 2 NSWLR 496; [1980] 1 NSWLR 589.
27. Neave, Rossiter and Stone, note 8, 462.
28. *Ibid*.
29. (1987) 11 ACLR 513; (1987) 5 ACLC 642; see also Chapter 1 of this Paper.
30. *Registrar of Titles v Spencer* (1909) 9 CLR 641 at 645.
31. *Parker v Registrar General* [1976] 1 NSWLR 342; *Registrar General v Behn* [1980] 1 NSWLR 589.
32. T B F Ruoff *An Englishman Looks at the Torrens System* (Law Book Co, Sydney, 1957) 33-34.
33. *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 Ch D 569.
34. See Law Commission (England) *Property Law: Third Report on Land Registration* (Law Com No 158, 1987) 47.
35. Law Commission, note 34, quoting J S Stewart-Wallace *Introduction to the Principles of Land Registration* (Stevens, London, 1937) 50.
36. Ruoff, note 32, 35.
37. Circular Issued by the Registrar General reprinted In J Baalman, note 1, 371-374.
38. Real Property Act 1900 (NSW) s45D.
39. Law Reform Commission of Victoria *The Torrens Register Book* (Report No 12, 1987)

4. The Current Position in Victoria

I. THE ASSURANCE FUND

4.1 Until 1982 the Transfer of Land Act 1958 (Vic) incorporated a separate Assurance Fund. The Fund was abolished by the Public Account (Trust Funds) Act 1982. Since that time the assurance scheme has been supported by the Consolidated Revenue Fund. Although contributions in most cases are no longer collected (specific payments continue to be levied for certain types of transactions), a proportion of general fees is normally set aside from consolidated revenue as an insurance contribution by the Registry.

II. COMPENSATION PROVISIONS

A. Bases of claim

4.2 Sections 109, 110 and 111 of the Transfer of Land Act establish the circumstances under which a person may seek compensation. Claimants must establish that they are not excluded by s109(2) and that the facts fall within one of the bases of claim contained in s110(1), many of which overlap.

4.3 Section 109(2) specifies three circumstances in which compensation will not be payable. The Fund is not liable if the loss, damage or deprivation was the result of a breach of trust by a registered proprietor.¹ Similarly, if the loss was caused by the same land being included in two or more Crown grants, or if a misdescription of title has resulted in two parcels of land being included in the same certificate of title, the Fund is exempt from liability.²

4.4 Section 110 allows claimants to obtain compensation from the Registrar if they have sustained any loss or damage through:

- (a) the bringing of any land under the Act;
- (b) a solicitor's failure to disclose in a solicitor's certificate a defect in title or the existence of an estate or interest in land;
- (c) any amendment of the Register Book;
- (d) any error, omission or misdescription in the Register Book, or the registration of any other person as proprietor;
- (e) any payment or consideration given to another person on the faith of any entry in the Register Book;
- (f) the loss or destruction of any document lodged at the Office of Titles for inspection or safe custody, or any error in any official search;
- (g) any omission, mistake or misfeasance of the Registrar or any officer in the execution of his duties; or
- (h) the exercise by the Registrar of any of the powers conferred on him in any case where the person sustaining loss or damage has not been a party or privy to the application or dealing in connection with which such power was exercised.

4.5 Before commencing an action under s110, application for compensation may be made directly to the Registrar.³ The Registrar may admit the claim and authorise payment. If the application is refused, the applicant is at liberty to commence an action.⁴

B. Defendant

4.6 When court action is necessary, s110 permits action to be taken directly against the Registrar as nominal defendant without proceedings first being taken against the party responsible for the loss. The Registrar may join any other person as co-defendant in the proceedings.

4.7 Whalan regards the Victorian approach as superior to the approach taken in New South Wales and other jurisdictions where action is brought against the "wrongdoer" in the first instance.⁵ The concept of bringing the primary action against the Registrar as nominal defendant accords more with the principle of insurance. It also avoids the complications in New South Wales and other systems under which very great care must be taken to ensure that the correct defendant is chosen.

4.8 On the other hand the apparent advantages of the Victorian approach may be somewhat illusory since no compensation is payable under the Act if the claimant (or the claimant's solicitor or agent) causes or substantially contributes to the loss by fraud, neglect or wilful default.⁶ The effect of this provision is that a person sustaining loss or damage in any of these circumstances is required to take a common law action against the wrongdoer.

4.9 Claims against solicitors who have been negligent may be satisfied from the compulsory indemnity insurance held by them, but claims for fraud are not covered by the compulsory schemes. Only if the solicitor sued is insolvent may a claim be satisfied from the Solicitors' Guarantee Fund. In any event difficulties and delays will always occur if the person sustaining loss is obliged to make out a case of negligence or fraud against his or her solicitor.

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

4.10 In the case of a negligent or fraudulent agent who is not a solicitor (or an estate agent) there is no access to an independent fund such as the Solicitors' Guarantee Fund and there may therefore be no recovery. A more satisfactory solution may be to permit a person who, without fault of his own has sustained loss, to recover from the Assurance Fund, but to subrogate the Fund to any of the rights the claimant has against a third party.

C. Fraud

4.11 Section 110 does not specifically include fraud as a category of recovery, although some of the grounds for bringing a claim (particularly the registration of another person as proprietor) would allow a defrauded claimant to recover compensation. In addition, s110 now expressly excludes from compensation those cases in which claimants or their solicitors or agents have substantially contributed to the loss by fraud. To obtain compensation, a claimant must prove that the loss was not caused by such fraud. A specific remedy is provided for fraud in s126(1)(a) of the New South Wales legislation. Given the broad interpretation of the New South Wales provision in *Parker v Registrar General*,⁷ the Victorian legislation affords less protection than the New South Wales compensation provision.

D. Measure of damages awarded under section 110

4.12 Section 110(4) contains restrictions, not found in other Australian jurisdictions, which are difficult to justify. The subsection places limits on the payment of indemnity and stipulates that any indemnity paid in respect of the loss of an estate or interest shall not exceed:

(a) where the Register Book is not amended, the value of the estate or interest at the time when the error ... which caused the loss was made; or

(b) where the Register Book is amended, the value of the estate or interest immediately before the time of amendment.

4.13 Similar limitations are contained in the Land Registration Act 1925 (UK) s83(6). The appropriateness of the provision was examined by the Law Commission of England and Wales in a report published in 1987.⁸ It recommended the repeal of the subsection and provided an illustration of the injustice which may result from the operation of the provision:

Suppose that X, through no fault of his (or of the Registry), is wrongly registered as the proprietor of a piece of land belonging to Y. At the time of registration the land was worth 500 pounds. The error is not discovered for five years, by which time the land is worth 1500 pounds. If rectification of the register is refused, then under [a provision equivalent to Transfer of Land Act 1958 s110(4)(a)] the indemnity payable to the true owner, Y, is restricted to the value of the land at the time of registration, 500 pounds: whereas if rectification has been ordered he would have received back the land, then worth 1500 pounds, and the dispossessed registered proprietor X could be paid indemnity up to the figure of 1500 pounds for the loss of his registered estate.⁹

4.14 Although the point has not been taken in any reported case, these restrictions in Victoria could cause hardship if the value of the estate in land increases significantly after the error is made but before it is discovered and an action is brought,¹⁰ particularly in times of rapid inflation. Moreover, by placing limitations on indemnity, the principles of insurance are being wrongly excluded.

4.15 Neither method of assessing damages is satisfactory, particularly in view of today's climate of ever-increasing property values. This matter will need to be addressed in any legislative amendments. One option is to follow the recommendation of the English Law Commission to repeal the equivalent provision in the Land Registration Act 1925.

E. Limitation on time for bringing actions

4.16 Similarly to New South Wales, Victoria has no specific requirement that an action for compensation be brought within a particular time. However, s5(l)(d) of the Limitation Act 1958 (Vic) may be applicable. This section states that an action "to recover any sum recoverable by virtue of enactment, other than a penalty or forfeiture" must be brought within six years from the date on which the cause of action first accrues.

4.17 If applicable, the general limitation sections in both Victoria and New South Wales may produce extreme hardship, since it is quite possible for a person to be unaware for a considerable period that he or she has been deprived of an estate in land.¹¹

4.18 The decision in *Breskvar v White*¹² is an example of the harshness of the operation of the limitation provisions. The claimants in that case were held to be barred by a limitation provision from claiming against the Assurance Fund since the claim was made more than six years from the date on which the cause of action against the fraudulent party accrued.¹³ This was despite the fact that it did not become apparent to the claimants that their action for damages against the fraudulent parties under the Queensland equivalent of s126 could not be satisfied until after the six year period had expired.

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

4.19 As Sackville and Neave suggest, if the limitation provision is to be retained, the limitation period should commence only when the claimant becomes (or should become) aware of the loss of his interest or when he becomes entitled to proceed directly against the Assurance Fund.¹⁴

III. ADMINISTRATION OF THE TRANSFER OF LAND ACT 1958

A. Administrative perfection or risk management?

4.20 In 1985, Mr K C Taeuber of P A Management Consultants reviewed the operations of the Victorian Assurance Fund. He regarded it as paradoxical that while most of the work in the Titles Office was directed towards maintaining the integrity of the Register Book and minimising claims against the Assurance Fund, recent statistics showed that the overwhelming proportion of successful claims resulted from errors in the processing system itself, and not from deficiencies in registered titles. The Office subjects documents to intense scrutiny at a high cost both to the Office itself and to users of the system. It was doubtful, he argued, that these costs resulting from a system designed to protect the Fund were greatly outweighed by the costs of meeting claims caused by deficiencies in the Register.¹⁵ The Office processes documents on the basis that they are incorrect. In fact, some 16% of documents are stopped for error or requisition and some 35% of surveys are subject to correction or requisition. Mr Taeuber made the general observation that in striving for “administrative perfection” the Office was allocating resources to one aspiration when the resources could have been allocated to a more realistic, achievable objective, such as containing losses resulting from lost documents.

4.21 While the Registrar of Titles disagreed with many of Mr Taeuber's conclusions, he agreed that the Land Titles Office could look into risk management of the insurance scheme. The Office reports that it has progressively moved towards risk management and away from administrative perfection.¹⁶ The Office has abandoned a great many checking processes that were appropriate in more leisurely times when there was less pressure of business. Requisitions on withdrawal of lapsed caveats and checks on signatures and registration of companies have been eliminated.

4.22 The Office could abandon more checking procedures. Unlike New South Wales, it checks that a document is properly executed under a power. A dealing is stopped if a signature contains an extra given name, but if a signature fails to contain a middle name that is on the document, the dealing is not stopped. The irony is that signatures are not generally checked or verified.

B. Future areas for practice of risk management policy

1. Investigation of possessory titles

4.23 Part IV Division 5 of the Transfer of Land Act 1958 (Vic) sets out a detailed procedure for applying for registration of an interest acquired by adverse possession. Central to this procedure is the power of the Registrar to make a vesting order “if satisfied that the applicant has acquired a title by possession to the land”. The evidentiary requirements to be satisfied are stringent and in many cases it is conceivable that, although the merits of the individual case would justify registration of a possessory title, the application may be unsuccessful because insufficient evidence can be produced to support it.

2. Caveats

4.24 Examiners check each caveat to ensure that it reveals a sufficient interest in land to satisfy the Transfer of Land Act. On one view this should be the responsibility not of the Land Titles Office but rather of the solicitor preparing the document, subject to the right of the registered owner to object to the caveat. This would bring the treatment of covenants and caveats into line with each other. The Titles Office no longer stringently checks the particulars of a covenant. If a similar approach were to be taken with caveats, it would fall to the solicitor to check that the claim was sufficient and accurately described.

3. Powers of attorney

4.25 Section 94(2) of the Transfer of Land Act appears to place responsibility on the Registrar to check whether the acts of attorneys fall within the scope of their relevant powers, while ignoring whether the power was in force when the relevant acts were done. The usefulness of the Registrar's check is in doubt if the existence of the power is not confirmed.

4.26 Questions of the existence and validity of powers of attorney should not concern the Registrar. Responsibility to investigate these questions should lie with the solicitor relying on the power of attorney. This would mean that prior to settlement, a buyer's solicitor would check the original power of attorney or some other verification.

FOOTNOTES

1. Transfer of Land Act 1958 (Vic) s109(2)(a).
2. Transfer of Land Act 1958 (Vic) s109(2)(b), (c).
3. Transfer of Land Act 1958 (Vic) s111.
4. D J Whalan *The Torrens System in Australia* (Law Book Co, Sydney, 1982) 357.

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

5. *Id* at 352.
6. Transfer of Land Act 1958 (Vic) s110(3)(a).
7. [1977] 1 NSWLR 22.
8. Law Commission *Third Report on Land Registration*. (Law Com No 158, 1987) 50-51.
9. *Id*, quoting Law Commission *Land Registration (Third Paper)* (Working Paper No 45, 1972) 66.
10. M A Neave, C J Rossiter and M A Stone *Sackville & Neave Property Law Cases and Materials* (4th ed, Butterworths, Sydney, 1988) 402.
11. *Id* at 401.
12. [1978] Qd R 187.
13. Real Property Act 1861 (Qld) s127.
14. Neave, Rossiter and Stone, note 10, 401.
15. K C Taeuber *Victorian Titles Office Review - Guarantee of Title - The State as Exclusive Guarantor* (Unpublished document, PA Management Consultants, July, 1985) 3, 5.
16. Registrar's comments on K C Taeuber *Victorian Titles Office Review - Guarantee of Title - The State as Exclusive Guarantor*. (Unpublished document, 1985).

5. Does The Legislation In New South Wales Or Victoria Accord With The Principle Ideals Of A Torrens System?

I. THREE MAIN PRINCIPLES

5.1 In the words of Theodore B F Ruoff:

[I]t is impossible to do better than repeat the five qualities that Sir Robert Torrens aimed to achieve when inventing the system that bears his name. He sought methods that would be reliable, simple, cheap, speedy and suited to the needs of the community.¹

5.2 Ruoff believes that to determine whether a Torrens system in any particular jurisdiction fulfils these objectives, one must examine the degree to which the local law and the local administration accord with three fundamental principles, namely the mirror principle, the curtain principle and the insurance principle.²

A. The mirror principle

5.3 The basis of this principle is that the register of title is a mirror which reflects accurately and completely the current facts that are material to title. With certain inevitable exceptions (ie exceptions to indefeasibility) the title is free from all adverse burdens, rights and qualifications unless they are mentioned in the register.³ The "mirror" ideal, that the register should reflect *all* facts and matters relevant to the title to a parcel of land has not been fulfilled in any Torrens jurisdiction. All jurisdictions in Australia at least have well developed classes of exceptions to the claimed indefeasibility of titles.

5.4 Perhaps the most significant and deleterious breach of the ideal is caused by the increasing number and variety of statutes which derogate from the completeness of the protection given by registration under the system. There is a group of statutes which set up separate systems of interests or registers which can conflict with the Torrens System and other groups which create, or under the authority of which can be created, interests which do not rely for their efficacy on entry upon a separate register but which can in many cases derogate from the completeness and conclusiveness of the Torrens Register.

B. The curtain principle

5.5 The principle requires that the register is the sole source of information for intending purchasers. As the Privy Council has put it, the main object of the Act:

is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity.⁴

The curtain principle is usually expressed in individual Torrens statutes in terms that no notice of trusts is to be entered in the register book, thereby implying that they are of no concern to a disponee and it is everywhere expressly stipulated that a purchaser is not to be affected by notice of any trust. This does not mean that a fiduciary is allowed to escape from his obligations for, after registration, he holds the land upon the trusts and for the purposes for which the same is applicable by law although these equities are behind the impenetrable curtain of the register book.

C. The insurance principle

5.6 This principle provides that, if through human frailty (in the Registry), the mirror fails to give an absolutely correct reflection of the title and a flaw appears,

anyone who thereby suffers loss must be put in the same position, so far as money can do it, as if the reflection were a true one.⁵

5.7 The insurance principle also involves a curative process. Since it is the State rather than the parties which effects the transaction, registration "sometimes confers a better title than the transferor possessed" so that a purchaser can "acquire an indefeasible right, notwithstanding the infirmity of his author's title". Thus the insurance principle, properly understood and fully carried out, involves far more than that the owner's title is guaranteed by the State. It means:

not only that registration will be carried on literally as an insurance undertaking but also that it is the privilege of the Registrar, or the Commissioner, or other responsible officer, on bringing land under the Act, to cure the title of known defects so far as he possibly can. It implies that the whole business of registration ought to be conducted with such an economy of public manpower, public time and public money that the saving which is achieved far outweighs any payment of compensation for errors or omissions which may become necessary from time to time.⁶

In short, if the Registrar knows that an insurance fund is available and will be utilised on sound insurance principles, he or she can tailor protective requirements to meet only risks of sufficient frequency to justify them.⁷

II. APPLICATION OF THE INSURANCE PRINCIPLE IN NEW SOUTH WALES

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

5.8 A detailed examination of the insurance principle at work in New South Wales was undertaken in Chapter 3. Neither the current legislative provisions nor the interpretation of them by the courts results in a truly effective State-backed compensation scheme.

5.9 The compensation provisions of the Real Property Act are deficient in a number of respects. The bases of claim are narrow (ie a claimant must establish a deprivation of land or an interest in land and not simply that loss or damage has been sustained as in Victoria) and legal action must invariably be commenced in order to recover from the Fund. Great care must also be taken in selecting a defendant as the choice of an incorrect defendant may result in compensation being withheld. Where the basis of a claim for compensation is fraud, the claimant must take action against the fraudulent party in the first instance and only in the event of that party's death, insolvency, bankruptcy or absence from the jurisdiction is action to be taken against the Registrar General.⁸ If, as Stein notes, the funds "have been so protected by legislation that they have become bloated while, at the same time, parties reasonably entitled have been deprived of compensation",⁹ the relevant provisions of the Real Property Act require revision.

5.10 In any event, if recent experience in New South Wales is any guide, where proceedings are commenced against the Registrar General they are likely to be vigorously contested.¹⁰ Simpson speaks of the "repulsive tenacity with which some jurisdictions are prepared to resist even valid claims upon the fund".¹¹

5.11 Similarly, closer scrutiny of the procedures adopted in the Land Titles Office for the examination of a variety of applications or, in other words a more effective implementation of a risk management policy, is required. According to Simpson,¹² in the final analysis the actual form of a system, and even the law which governs it, will matter less than the practical wisdom with which it has been adapted to local needs and the competence with which it is administered. In Baalman's words, Torrens:

did not appreciate the fact that his philosophy might prove to be indigestible to the vast majority of public servants. Otherwise he would have taken the precaution of including more safeguards in order to prevent that which was intended as a public utility from being utilised as a medium for indulging the luxury of making somebody do something.¹³

III. APPLICATION OF THE PRINCIPLE IN VICTORIA

5.12 In many respects the relevant provisions of the transfer of Land Act 1958 (Vic) demonstrate a much more successful attempt at giving effect to the "insurance principle" than the New South Wales legislation. The best example of this, cited throughout the Paper, is the ability under the Victorian legislation for a claimant to take action directly against the Registrar. Alternatively, the Registrar may grant compensation to claimants who are entitled to bring an action for indemnity, without the need for a court hearing.¹⁴ In either case, if a payment has been made the Registrar may recover the amount paid from the person actually responsible for the loss. This approach adopts the principle of subrogation, common in insurance contracts. It allows speedy and uncomplicated settlement of claims without the need for a multiplicity of actions.

FOOTNOTES

1. Theodore B F Ruoff *An Englishman Looks at the Torrens System* (Law Book Co, Sydney, 1957)6.
2. *Id* at 8.
3. *Ibid*.
4. *Gibbs v Messer* [1891] AC 248 at 254.
5. Ruoff, note 1, 13, citing *Registrar of Titles v Spencer* (1909) 9 CLR 641 at 645.
6. Ruoff, note 1, 33.
7. Thomas W Mapp *Torrens' Elusive Title* (University of Alberta, Faculty of Law, Edmonton, 1978) 70.
8. Real Property Act 1900 (NSW) s126(5).
9. Robert Stein "The Torrens System Assurance Fund In New South Wales" (1981) 55 *Australian Law Journal* 150.
10. M A Neave C J Rossiter and M A Stone *Sackville & Neave Property Law Cases and Materials* (4th ed, Butterworths, Sydney, 1988) 401.
11. S R Simpson *Land Law and Registration* (Cambridge University Press, Cambridge, 1976) 181.
12. *Id* at 23.
13. J Baalman, quoted In "Registration of Title in New South Wales" [1960] *Scots Law Times* 129 at 130.
14. Transfer of Land Act 1958 (Vic) s109(3)(a).

6. Options For Reform

I. OVERVIEW

6.1 This Paper has examined the basis for State-backed guarantees of Torrens title and has questioned the appropriateness of such title compensation schemes at the beginning of the 1990's.

6.2 As the discussion of the compensation provisions and their administration in New South Wales and Victoria shows, neither scheme fully accords with the "insurance principle". The question is therefore, whether New South Wales and Victoria should pursue the "insurance" objective and develop more effective compensation schemes, or alternatively, whether the "insurance" objective, or at least the compensation arm of this principle, should be abandoned?

6.3 The following options, some of which have been discussed in the body of the Paper, are put forward for consideration:

Abolition of the State guarantee of Torrens title.

Retention of State guarantee but improvement of the current compensation schemes.

Acceptance by registered proprietors of responsibility for insurance of Torrens titles (either in addition to or in substitution for the present State guarantee).

Continuation of the State's role as insurer of Torrens titles, but with the insurance provided by private insurance companies.

II. OPTION 1: ABOLITION OF STATE GUARANTEE

A. The case for abolition

6.4 The New South Wales Law Reform Commission is of the view that there is a case for abolishing State compensation for losses sustained during the title registration process. The original rationale for the Fund may no longer be sufficient to justify its retention.

6.5 In 1862, provision of a right to seek compensation for loss of title to land was considered an essential part of the Torrens scheme, because it complemented the new concept of statutory indefeasibility and because it was necessary to placate the legal profession which was strongly opposed to the Torrens system.¹ The possibility of confiscation of land without redress was one of the chief grounds on which the legal profession based its opposition to the scheme. However there is no evidence that the concept of indefeasibility has caused significant loss. Even after the acceptance of immediate indefeasibility in 1967 when more claims could have been expected, there has been no significant increase in claims for loss resulting from fraud. The one area where State compensation for loss may be justified concerns losses resulting from staff errors in the Land Titles Office. Even in this area the ordinary common law principles of tort law should provide adequate remedies to the person deprived.

B. The Issue

6.6 To what extent should registration confer the right to compensation on an innocent person who suffers loss in a land transaction? The State does not pay compensation if a title is unregistered, however diligent an innocent purchaser may have been. Similarly the State does not compensate the innocent victim of wrongdoing or mischance in other fields of registration of property eg motor vehicle registration. Why should it do so when the loss is title to land?

III. OPTION 2: RETENTION OF STATE GUARANTEE: ELIMINATION OF LEGISLATIVE DEFICIENCIES

A. Introduction

6.7 Arguments in favour of some form of compensation by the State rest on the changes that the Torrens system has made to the position of those dealing in land. Firstly, compensation is provided for losses which could not have occurred under the common law system of conveyancing but which the Torrens system makes possible, principally through the ease of effecting transactions. Thus, by the introduction of a system in which the Register is crucial and title may be transferred by a relatively simple process, frauds and forgeries are more easily perpetrated. Secondly, an essential aspect of the Torrens system, indefeasibility, means that the effects of forgery, fraud and Land Titles Office errors are far greater than under Old System conveyancing. At common law remedies such as ejectment have been designed to uphold the title of a plaintiff against someone claiming title through a forged or fraudulent transaction. These remedies have been curtailed in the interest of ensuring certainty of title as recorded on the Register. Compensation by the State thus fills a vacuum created by the Torrens system and protects against the potential harshness of the system in operation.

B. What types of claims for compensation should be allowed?

6.8 If it is accepted that the Government should provide compensation for losses arising from the operation of the Torrens system, the circumstances in which compensation is paid need to be identified. It is necessary to consider whether the following ideals of a Torrens system should be pursued, namely:

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

that the Register of title be likened to a "mirror" in that it should reflect accurately and completely all facts and matters relevant to the title to a parcel of land, and that the State should compensate anybody suffering loss as a result of their reliance on the Register; and

that the State should compensate those persons who find themselves wrongfully deprived of a registered interest (eg by the fraud of a third party)?

6.9 Even from the time of the earliest Torrens legislation in South Australia these ideals have not been fulfilled. Certain interests such as equitable rights have been excluded from the Register and no compensation has been payable in respect of them. Similarly there is an ever increasing number and variety of statutory rights which exist quite independently of the Torrens legislation. Even though they override registered interests and do not require registration or notification, no compensation is payable for losses resulting from ignorance of their existence.

6.10 As is clear from the discussion in earlier chapters of this Paper, there are several deficiencies in the existing State guarantee system. The major deficiencies which have been the subject of comment are set out below and tentative proposals are put forward to remedy them.

1. Reliance on the Register

6.11 Should compensation be paid to a person who sustains loss by reliance on the Register when it proves to be inaccurate? This question divides into two subsidiary questions. Firstly, should the Government be responsible for loss caused by the errors of its officers (for example, when through error an easement is omitted from a title or a dealing recorded on an unaffected title)? Secondly, should Government responsibility extend to the losses caused by statutory interests created independently of the Torrens Register?

6.12 It is now accepted that the Government should be responsible for the actions of its employees. It is by no means clear, however, that loss caused by error in the Land Titles Office should be compensated through a specialised compensation system. This type of loss could easily be dealt with under ordinary tort principles. There would, however, be difficulties in grafting such principles to a purely statutory system. Unless the questions of duty and standard of care owed by the State were left completely to the courts to develop (which, considering the relative rarity of compensation claims, might take a long time), they would have to be specified by statute. A purely statutory remedy for compensation, such as presently exists, at least provides security by guaranteeing compensation in specified cases.

6.13 The second question is essentially concerned with those decisions and proposals of government departments and authorities which, whilst not amounting to proprietary interests in land, may affect the value, use or enjoyment of a parcel of land.

Some commentators argue that such decisions and proposals affecting land should be recorded in the Register and compensation paid for loss occurring if they exist but are not recorded. However, the more usual view is that interests of this type are not appropriate for recording in the Register since they amount to neither legal nor equitable interests and would clutter the Register. It is accepted conveyancing practice that a purchaser should conduct numerous enquiries (apart from title) to ascertain the existence of statutory interests affecting the subject property. Aside from the argument of "completeness of the Register" there is little reason why this practice should change and the Government be made liable if this information is not recorded on title but available from other sources.

2. Wrongful deprivation

6.14 Should compensation be paid to individuals wrongfully deprived of their land or an interest in land? The primary source of such loss is the fraud or negligence of a third party. This may occur, for example, where a Certificate of Title is stolen from a private residence and the registered proprietor's signature is forged on a transfer (to a bona fide purchaser for value) and the transfer is registered. The innocent purchaser obtains an *immediately* indefeasible title pursuant to the forged transfer. The effect of a forgery in the Torrens system is therefore prejudicial to the title holder whereas under Old System, an innocent third party acquiring land through a forgery would gain nothing and the owners title would not be affected. As the Torrens system gives the State power to control use of the public Register and all titles recorded on it, it could be strongly argued that the State has a duty to compensate.

6.15 Where a registered proprietor voluntarily signs a transfer under the influence of fraud there is not such a strong case for compensation. In such cases the victim must be assumed to have control over what is occurring. Otherwise, the State might be required to compensate a proprietor who has exercised poor judgment or made an unfavourable bargain. However it would appear reasonable that compensation should be available for loss resulting from mistakes made by the Land Titles Office and for loss by forgery of an interest in land resulting from the registration of another interest.

3. Negligence of claimant's solicitor or agent

6.16 Should there be an exception to the right to compensation in the case of negligence or fraud by the claimant's solicitor or agent? The aim of that exception in Victoria is to provide an incentive to the claimant to exercise care in relation to his or her choice of an agent. The exception gives rise to some anomalies. If the case involves the fraud or negligence of the claimant's solicitor or estate agent, the claimant who fails against the

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

Registrar or Registrar General may ultimately recover from the Solicitors' Guarantee Fund or the Estate Agents Guarantee Fund, or from the solicitor's or real estate agent's professional indemnity insurance. There is no alternative source of recovery in the case of other agents. Moreover, arguments can arise in relation to which fund should provide the compensation. It might be simpler to allow recovery against the Registrar or Registrar General, with these officers having full rights of subrogation against the claimant's solicitor or agent including their guarantee funds. However, having regard to principles of agency law, the negligence of a solicitor or agent may be imputed to the claimant. There is no good reason for making the State responsible where a claimant's loss is totally attributable to his or her own negligence. The tentative proposal is therefore that there should be an exception from the right to compensation in the case of loss totally attributable to the fraud or negligence of a solicitor or agent of the claimant. Furthermore, apportionment of damages should be available in those cases where a solicitor or agent has been partially responsible.

4. Contributory negligence of claimant

6.17 A further issue is whether there should be an exception in the case of contributory negligence by the claimant. A claimant may cause or contribute to a loss in a variety of ways. For example, a vendor may have signed a transfer without first obtaining payment, or may have been negligent in safeguarding the duplicate title. There seems no reason in principle why the Registrar should be required to compensate people who have caused or contributed to their own loss. It would be anomalous to deprive a person of a claim because of an agent's negligence, but to allow a claim where the negligence was by the claimant. Hence it is proposed that there should be an exception from the right to compensation in the case of loss totally attributable to the negligence of the claimant. As with the proposal relating to the situation where a solicitor or agent has been partially responsible, apportionment of damages should occur where both the claimant and the Registrar or Registrar General have been partially responsible.

5. Exhaustion of other remedies

6.18 Should compensation be payable only after remedies have been exhausted against the person primarily responsible? Litigation is time consuming and expensive. A person who had an action against a third party might be unable to afford the risks associated with litigation. This problem would exist only in cases of forgeries by a stranger if the proposal for excluding or reducing claims involving forgery by a claimant's solicitor or agent were accepted. It is therefore suggested that there should be no requirement that other remedies must be exhausted before compensation is payable. Furthermore, in these cases it would be better to adopt a rule of direct liability, allowing the Registrar or Registrar General to join the person or persons primarily responsible or to bring a separate action against such persons by way of subrogation.

6. Administrative procedures

6.19 Should compensation be payable administratively or only in the context of litigation? The New South Wales requirement that an action be brought in the courts against the Registrar General is time consuming and a waste of resources. Like the exhaustion of remedies requirement, it poses a barrier to obtaining compensation. The Victorian method, involving an application to the Registrar, is preferable. This would enable the majority of claims to be dealt with relatively quickly and for those cases presenting some difficulty to the Registrar or Registrar General to be dealt with by the Supreme Court. It would also be preferable if there were a prescribed period within which the Registrar or Registrar General must make a decision.

7. Assessment of compensation

6.20 A further issue is the basis on which damages should be assessed. The flexibility of the New South Wales test (determined judicially) appears preferable to that of the stringent statutory test adopted in Victoria. A claimant should be entitled to recover for actual loss. The amount of damages should therefore be assessed at an appropriate date. In times of rapid inflation the date of payment would be the appropriate date for valuation. On the other hand, if there has been a significant decrease in property values between the date of the actual loss and the date on which the damages are to be assessed, a claimant should not suffer accordingly. Thus the appropriate date for determining loss will depend on the facts of each case. The principle should be that compensation is for the actual loss suffered.

8. Time for making claims

6.21 The final issue concerns the time within which a claim should be made. It is currently unclear whether a 6 year limitation period applies in New South Wales and Victoria by virtue of the general limitation statutes. In any event, in this area it is undesirable that time limitations be framed by reference to the date of the cause of action. There is a significant possibility of latent claims arising from errors and misconduct long in the past. In Victoria, the Land Titles Office has a policy of not using the limitation period as a defence to a claim. This supports the case for reform of the limitation period. It is therefore proposed that the period of limitation should be six years from the date on which the claimant became aware, or, but for his or her own default would have become aware, of the existence of the right to make a claim.

9. Contribution to the fund on lodgment of dealings

6.22 If the State is to continue in its role as insurer of Torrens titles, consideration should be given to reintroducing contributions to the Fund by a levy on dealings. Before this scheme was abolished in 1940, the

Issues Paper 6 (1989) - Torrens Title: Compensation for Loss

Assurance Fund was supported by a levy of 1/2d in the pound (0.2083%) for all transmission applications and primary applications. The contribution would in effect be similar to an insurance premium.

IV. OPTION 3: STATE GUARANTEE PROVIDED BY PRIVATE INSURER

6.23 Option 2, that the State continue in its role as insurer of Torrens titles but with substantial changes being made to the authorising legislation, might be more attractive if the private insurance sector were involved. In other words, instead of the Government acting as its own insurer, perhaps a feasible option is for the State to use the services of private insurance companies in the same way as do local councils. Claims would be processed by the private insurers which would pass the costs of the system on to the Government by way of a premium. This option would have the advantage of setting an independent agency between the claimant and the Land Titles Office. It may also encourage the Registrar General to adopt risk management more widely.

V. OPTION 4: TITLE INSURANCE ARRANGED BY REGISTERED PROPRIETOR

6.24 The option of individual registered proprietors being responsible for insuring against loss of their titles or interests in titles was examined in Chapter 2. The experience with private title insurance in America was also examined. In those limited areas where a Torrens system operates in the United States, finance companies generally require private title insurance in addition to the guarantee provided by the Assurance Fund. Where they co-exist, therefore, the two systems are complementary. Title insurance policies generally exempt coverage for the kinds of risks assumed by an Assurance Fund.

6.25 An option for New South Wales and Victoria is for private insurance, either optional or compulsory, to wholly replace the current State-backed insurance schemes. A variation would be for the State to continue its indemnity for some types of risks (eg Departmental error) while allowing or requiring registered proprietors to insure against loss or damage from fraud, forgeries, surveyors' errors and the like.

FOOTNOTES

1. See Report of the English Commissioners Appointed to Consider the Subject of the Registration of Title with Reference to the Sale and Transfer of Land (1857), command paper [2215] referred to in D J Whalan "The Origins of the Torrens System and Its Introduction Into New Zealand" in G W Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 7-9; J Baalman *The Torrens System In New South Wales* (2nd ed, Law Book Co, Sydney, 1974) 389.