

**NEW SOUTH WALES LAW REFORM COMMISSION
DISCUSSION PAPER 19 (1989) - TORRENS TITLE: COMPENSATION FOR LOSS**

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Participants

New South Wales

For the purpose of this reference a Division was created by the Chairman in accordance with s 12A of the *Law Reform Commission Act 1967*. The Division comprised the following members of the Commission:

Chairman:	Mr Keith Mason QC
Commissioner-in-Charge:	Professor Helen Gamble
Division Member:	Mr Ronald Sackville
Honorary Consultants:	Mr Neville Grace Mr Bernard Coles Ms Phillipa Weeks
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Victoria

Chairman:	David St L Kelly
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I. Introduction

The reference

1. A major review of Victorian land law is being carried out by the Victorian Law Reform Commission. One of the matters being considered is the compensation scheme that applies to the land registration system in the *Transfer of Land Act* 1978 (hereafter called the *Victorian Act*). On 20 January 1988, the New South Wales Commission received a similar reference covering the land registration system in the *Real Property Act* 1900 (NSW) (hereafter called the *New South Wales Act*).

2. Trends in judicial decisions and the size of compensation claims were the major impetus for the New South Wales reference which was made under the Commission's standing reference on cooperative law reform projects with other Law Reform Commissions. The Commissions intend to produce a joint Report to their Attorneys General making similar recommendations.

The Torrens system and the compensation scheme

3. Compensation was a principal feature of the South Australian *Real Property Act* 1861 which was the model for all Torrens systems in Australia. It was included to ensure that individuals would be compensated for any loss that they sustained as the result of a certificate of title being granted in error or through fraud or misrepresentation. It was assumed that the conversion of old system land to the Torrens system of registered titles would almost certainly cause loss through interests accidentally omitted from the register or titles procured by fraud.

4. Provision of a right to seek compensation removed one of the main objections to the registration system - the expectation that people would lose existing interests in land through mistakes in bringing land on to the Register. The original South Australian scheme provided for payment of compensation to people who suffered loss of that type as well as for other types of losses caused by errors in the registration process, and losses suffered as a result of fraud. Although provision was made for State compensation, claimants were required to seek compensation from the person responsible for the loss before claiming from the State.

5. The compensation schemes originally included in the New South Wales and Victorian legislation introduced in 1862 closely followed the scheme of the earlier South Australian legislation. The New South Wales scheme remains unchanged. The Victorian scheme was substantially amended in 1954 to exclude State compensation for loss arising from fraud or negligence of a claimant's solicitor or agent.

II. The Present Systems

Nature of fund

6. Originally, both the New South Wales and Victorian schemes were based on compulsory insurance schemes, the 'premiums' being paid into a separate fund. In New South Wales, the 'premiums' were charged on the conversion of deeds titles to the Torrens system, and on the transfer of land following death of a registered owner. In Victoria, the 'premiums' were charged for particular types of transaction which are viewed as carrying risk: for example, conversion of deeds titles to Torrens titles, the vesting of trust property, and the registration of titles based on adverse possession.

7. The separate Assurance Fund was abolished in New South Wales in 1906 when it was absorbed by the Closer Settlement Fund. Payments continued to be made from this fund until it was closed in 1988. All payments are now made directly from consolidated revenue, and no specific amount is set aside for claims. Compulsory contributions ceased in 1940. The Victorian fund was abolished in 1983, although a proportion of general fees is still notionally set aside from consolidated revenue as an insurance contribution by the Registry. Specific payments continue to be levied for certain types of transactions.

What claims are covered?

8. Both the Victorian and the New South Wales Acts adopt the view 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 Land Titles Office.

The main differences between the two pieces of legislation lie in their treatment of fraud and in the steps which must be taken before a claim can be brought against the Fund.

New South Wales

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

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

10. An action under section 126 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. A person responsible for the erroneous registration ceases to be liable under section 126 once the land or interest is sold in good faith. This is not the case if he or she signed a fraudulent or erroneous document which caused the deprivation.

11. Where the person held responsible for the erroneous registration has sold the land for value and in good faith, the claimant may recover compensation from the Assurance Fund under section 126. Similarly, where the person liable is dead, bankrupt, insolvent or unable to be found within the State, a claimant may recover from the Fund. An action against the Fund may also be brought under section 127 if a person has sustained any loss by the registration of another interest and can neither bring proceedings under section 126 against the person responsible, nor regain legal possession of the land or interest. In addition, section 127 allows a claimant to recover compensation for errors made by the Land Titles Office, specifically:

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

12. In practice, therefore, the *New South Wales Act* 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 sue the wrongdoer, or be unable to do so, before bringing an action against the Fund.

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Victoria

13. Section 110 of the *Victorian Act* allows claimants to obtain compensation from the Registrar if they have sustained any loss or damage through:

- a) bringing 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 of an interest in land;
- 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;
- 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.

The Act does not specifically include fraud as a category of recovery although some of these grounds for bringing a claim (particularly the registration of another person as owner) would allow a defrauded claimant to recover compensation.

Fraud

14. Originally, both States made specific provision for a claimant to obtain compensation for the loss of an interest in land as a consequence of fraud. The 1954 amendments to the *Victorian Act* removed this provision, although it may still be possible for a defrauded person to bring a claim under one of the remaining provisions of section 110 of that Act. In addition, section 110 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.

15. In New South Wales, a claimant may still obtain compensation for loss suffered through fraud, including the fraud of a solicitor or agent. In recent years, this provision has been expanded considerably by judicial interpretation. *Parker's Case*¹ 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. However, compensation is not payable for all losses caused by fraud. The facts of the case will determine whether a claim for compensation will lie.

16. A registered owner 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 section 126 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.

17. If the registered owner has been fraudulently deprived of land or an interest in land by someone who does not become registered as proprietor, no action is available under section 126. However, a claim may lie against the Fund under section 127.² Following *Parker*, compensation will always be payable for loss 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 section 127.

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What exceptions are there?

18. Both the New South Wales and the 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
- 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.

19. In addition, the *Victorian Act* excludes compensation where a claimant, or his or her solicitor or agent, causes or substantially contributes to the loss by 'fraud, neglect or wilful default'. A claimant who derives title without payment of valuable consideration (for example, under a will or by gift) is also excluded if his or her transferor, or 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 this fraud or negligence.

20. Consequently, there are claims that would be payable in New South Wales, particularly those involving contributory negligence, that are not payable 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 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.

21. *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 where the Registrar has not enquired whether a power of attorney was in force at the time something was purportedly done under the power.

Claims procedures

22. The scheme of the *New South Wales 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.

23. In Victoria, a different approach is adopted. The legislation creates a direct right of action against the Registrar. There is no requirement that a claimant must first exhaust any remedies against the person responsible for the loss. A claimant may bring action against the Registrar as defendant or co-defendant. The Registrar is entitled to join any other person as a co-defendant and the Registrar may recover, against the person responsible for the loss, any amount paid from Consolidated Revenue.

24. In addition, section 111 of the *Victorian Act* allows the Registrar to pay a claim for compensation without the need for legal action to be commenced. The New South Wales legislation contains no equivalent provisions. Section 129 of the *Real Property Act 1900* implies that final judgment must be obtained before money can be paid out of the Assurance Fund. However, compensation for a loss attributable to a mistake by the Land Titles Office is sometimes made as an *ex gratia* payment by the Registrar General.

Time limit for making claims

25. The Torrens legislation in both States has no specific requirement that an action for compensation be brought within a particular time. However, the Limitation Acts of both States may apply. Section 5(1)(d) of the Victorian *Limitation of Actions Act 1958* 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

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accrues. This would normally be the date on which the loss or deprivation occurred. Section 14(1)(d) of the New South Wales *Limitation Act* 1969 is in similar terms.

Measure of damages

New South Wales

26. The New South Wales legislation does not deal with either the measure of damages or the closely related question of the date at which damages should be assessed. It is, however, accepted 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)*³ which recognised that a claimant should be put in the same position, so far as money will provide, as if the wrongful act had not occurred - but not in a better position. This view was adopted by Mahoney JA in *Registrar General v Behn*.⁴ Mahoney JA also made comment on the date for assessing damages in *Behn*. It was his view that each case must be considered on its own facts. In the case before him, the appropriate date for valuation of the land was set at the date of the trial and not the date at which the plaintiff was deprived of the land as had been held by the High Court in *Spencer's case*.

Victoria

27. In Victoria, a more restrictive approach is adopted in the legislation itself. Section 110(4) states that the indemnity provided from Consolidated Revenue is not to exceed the value of the estate or interest assessed either at the time of the relevant conduct or when the relevant amendment is made to the register book.

28. Although the point has not been taken in any reported case, these restrictions in Victoria could cause hardship if the value of the land increased significantly after the error was made, something which is likely to happen in times of high inflation.

Types and numbers of claims

New South Wales

29. During the 12-year period from 1977-1988, there were 28 claims for compensation from the Assurance Fund. Of these, 17 (75%) were for loss resulting from fraud; the remainder concerned departmental error and one case of surveyor's error.

**Table 1.1: Claims against the Assurance Fund
New South Wales 1977-88**

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

Source: Land Titles Office (NSW)

30. 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 (based on fraud or departmental error) reveals both an increase in the amounts claimed in individual cases, and a potential for the total payout to far exceed those of any preceding period. It is estimated that the value of these outstanding claims is \$1,500,000. The amount of damages is usually based upon the value of the property lost as at the date of the trial. Because property values have escalated in the past two years, this estimate of claims cannot be regarded as reliable.

31. The numbers 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 1977-88, approximately 6,359,000 dealings were lodged for registration. Revenue from these dealings was \$249.5 million approximately. The total expenditure of the Land Titles Office for the same period was \$ 199.5 million, leaving a gross profit of \$ 50 million.

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32. 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 from general office funds for 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* requires a court order before a payment can be made from the Assurance Fund, these claims were paid on this purely informal basis.

Victoria

33. 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* 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 one insignificant computer failure. They have resulted in a total payment of \$292,190.66.

**Table 1.2: Claims against the Assurance Fund
Victoria 1981-87**

	Basis of Claim		
	<i>Fraud</i>	<i>Departmental Error</i>	<i>Surveyor's Error</i>
TOTAL	3	570	0

Source: Land Titles Office (Vic)

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

35. Again, 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. 3,151,519 dealings were lodged for registration for the period 1981-87. 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.

FOOTNOTES

1. [1977] 1 NSWLR 22; *Behn v Registrar General* [1979] 2 NSWLR 496; [1980] 1 NSWLR 589; (1981) 35 ALR 633.

2. *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611; *Armour v Penrith Projects Pty Ltd* [1979] 1 NSWLR 98.

3. [1908] AC 235.

4. [1980] 1 NSWLR 589.

III. Should the Compensation Scheme be Retained?

Arguments for abolition of Compensation Scheme

36. In 1862, provision of a right to seek compensation for loss of title to land was considered an essential part of the Torrens scheme to complement the new concept of statutory indefeasibility and 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 of their opposition to the scheme.

37. 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.

38. The extent to which registration should confer the right to compensation on an innocent person who suffers loss in a land transaction is open to question. 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, for example, motor vehicle registration. Why should it do so when the loss is title to land?

Arguments for retention of Compensation Scheme

39. 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. First, compensation is provided for losses which could not have occurred under deeds conveyancing but which the Torrens system makes possible, principally by making transactions easier. A system in which the register is crucial and which allows title to be transferred by a simple process, permits frauds and forgeries to be more easily perpetrated. Second, because registration confers indefeasibility, the effects of forgery, fraud and Land Titles Office errors are far greater than under deeds conveyancing. At common law, remedies such as ejectment were available to a plaintiff against someone claiming title through a forged or fraudulent transaction. The Torrens system curtails these remedies 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 provides protection against its potential harshness.

40. The New South Wales Law Reform Commission is of the view that there is a case for abolishing the State compensation scheme for losses arising from operation of the Torrens system. Comments on this view are sought.

FOOTNOTES

1. 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* (1971) at 7-9; Report of the Commissioners Appointed to Consider the Subject of the Registration Of Title with Reference to the Sale and Transfer of Land (1857); J Baalman, *The Torrens System in New South Wales* (2nd ed 1974), 389.

IV. If The Compensation Scheme Is Retained, How Should It Be Improved?

What are the principles of compensation?

41. If it is accepted that the State should provide compensation for losses arising from the operation of the Torrens system, the principles governing payment of compensation need to be identified. There are two conflicting principles -

the scheme should compensate anybody suffering loss as a result of their reliance on the register and reinforce the concept of the register of title as a 'mirror' which reflects accurately and completely all facts and matters relevant to the title to a parcel of land.

the State should compensate those persons who find themselves wrongfully deprived of a registered interest, for example, by the fraud of a third party.

42. Even the earliest Torrens system in South Australia did not fulfil these ideals. Certain interests, such as equitable rights, have been excluded from the register and no compensation was ever payable in respect of them. Similarly, there is an ever increasing number and variety of statutory rights which exist quite independently of the Torrens system. 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.

Reliance on the Register

43. 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. First, should the State be responsible for loss caused by errors of its officers? (For example, when an easement is omitted from a title or a dealing is recorded on an unaffected title through error.) Second, should State responsibility extend to losses caused by statutory interests created independently of the Torrens register?

44. It is now accepted that the State 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 onto 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.

45. The second question is essentially concerned with those interests and proposals of government departments and authorities which, whilst not amounting to proprietary interests in land, may affect the value, use or enjoyment of land. Some commentators argue that these interests should be recorded in the register and compensation paid if loss occurs because they exist but are not recorded. However, the more usual view is that interests of this type are not appropriate for recording since they amount to neither legal nor equitable interests and would clutter the register. It is accepted conveyancing practice that buyers and sellers of land should make 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 State be made liable if this information is not recorded on title but available from other sources.

Deprivation of interests in land

46. Should compensation be paid to individuals wrongfully deprived of their land? The primary source of such loss is the fraud or negligence of a third party. For example, a certificate of title is stolen from a private residence; the registered proprietor's signature is forged on a transfer to a bona fide purchase for value and the transfer is registered. The innocent purchaser obtains an *immediately indefeasible* title when the transfer is registered, even though it is a forgery. The effect of a forgery in the Torrens system is therefore prejudicial to the title holder. In contrast, under the deeds conveyancing system an innocent third party acquiring land through a forgery gains nothing and the owner's title is not affected. As the Torrens system gives the State power to control use of the public register and all titles recorded on it, it can be strongly argued that the State has a duty to compensate.¹

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47. 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.

Proposal

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.

Negligence of claimant's solicitor or agent

48. 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 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 individuals having full rights of subrogation against the claimant's solicitor or agent including a guarantee fund. 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, nor is there any reason why the State should be responsible for the negligence of a solicitor or agent.

Proposal

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. Apportionment of damages should occur in those cases where a solicitor or agent has been partially responsible.

Contributory negligence of claimant

49. 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 is no reason in principle why the Registrar or Registrar General 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 that of the claimant.

Proposal

There should be an exception from the right to compensation in the case of loss totally attributable to the negligence of the claimant. Apportionment of damages should occur where both the claimant and the Registrar or Registrar General have been partially responsible.

Exhaustion of other remedies

50. 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. In these cases, it would be better to adopt a rule of direct liability, allowing the Registrar or Registrar General to join the person primarily responsible or to bring action against that person by way of subrogation.

Proposal

There should be no requirement that other remedies be exhausted before compensation is payable. The Registrar or Registrar General should be able to join other persons as co-defendants or bring a separate action by way of subrogation.

Administrative procedures

51. 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 wastes 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 permit those cases which present difficulty to the Registrar or Registrar General to be dealt with by the Supreme Court.

Proposal

Compensation should be payable on application to the Registrar or Registrar General. A decision should be required within a prescribed period.

Assessment of compensation

52. A further issue is the basis on which damages should be assessed. The flexibility of the New South Wales test (determined judicially) is clearly 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, a claimant should not suffer if there has been a significant decrease in property values between the date of the actual loss and the date which the damages are to be assessed.

Proposal

Compensation should be for actual loss and it should be the value of the land at the date of the loss or at the date of the claim, whichever is the greater.

Time for making claims

53. The final issue concerns the time within which a claim should be made. It is currently unclear whether a six-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.

Proposal

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 his or her right to make a claim.

FOOTNOTES

1. In Report No 12, *The Torrens Register Book*, the Law Reform Commission of Victoria recommended that the deregistered victim of a forgery should be returned to the title and the purchaser should be compensated for loss. Either way, there should be compensation available to the party who loses the land.

V. Risk Management

54. The analysis of the claims for compensation in both New South Wales and Victoria indicates that most claims are based on clerical errors in the Land Titles Office. There are very few claims for incorrect registration of interests in land through legal defects in documents. Considerable efforts are made by the Registrar General and Registrar respectively to check for legal defects in the documents which are submitted for registration. The Registrar in Victoria has assured the Victorian Commission that the level of checking of documents has little, if anything, to do with the fear of claims for compensation. It is based, instead, on the need to maintain the integrity of the Register Book and to avoid giving legal effect to defective documents for the benefit of the public. Even so, the level of resources consumed in that process is a source of concern. A study in 1985 drew attention to the problem and suggested the gradual implementation of a risk management policy to reduce the cost of checking documents. It might be more efficient to divert resources away from the checking of documents to preventing claims that are showing actual difficulty for the registration system.

55. On the other hand, it could be argued that the absence of claims is largely due to the stringent checking procedures and administrative requirements of the Land Titles Offices. Even on this view, when one takes into account the large profit made by each Land Titles Office in contrast to the amounts of compensation claimed, there is still a strong case for an assessment to be undertaken of Land Titles Office procedures.

Proposal

The Registrar and Registrar General should engage an independent expert to undertake a cost-benefit analysis of the present checking procedures in each Land Titles Office with a view to establishing optimum levels for checking activities.