SECURITY OF PROPERTY RIGHTS AND LAND TITLE
REGISTRATION SYSTEMS

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DEDICATION

This work is dedicated to the memory of my sister, Angela Mary Lawson, born 24 March 1958, died 29 April 2003
Throughout the world, many countries are introducing or extending systems of land title registration (LTR), to provide the security of property rights needed to support an efficient market economy. The objects of LTR systems are to promote dynamic security (security of acquisition) and static security (security of existing ownership against non-consensual deprivation of rights after they have been securely acquired). Both forms of security are necessary for LTR to fulfil its function of making property rights to land secure and safely transferable.

The thesis of the work is that these two objects are to some extent antithetical, and that the tension between them underlies some persistent legal dilemmas in formulating decision rules to resolve property disputes under LTR systems. In practice, the law must often choose between a rule that makes existing ownership secure, and one that protects the reasonable expectations of purchasers. LTR may be understood as a set of risk management strategies for reducing the tension between the two forms of security.

Using a comparative and functional approach, the thesis analyses the causes of two major security dilemmas in LTR, and evaluates different approaches to them. The first is the problem of unauthorised registrations procured by forged or otherwise defective instruments. A rule of dynamic security, known as the principle of immediate indefeasibility, denies the possibility of setting aside the unauthorised registration except under strictly limited exceptions for fraud and enforcement of in personam rights. Other possible decision rules aim to balance dynamic and static security in different ways. The alternative rules evaluated in this work include the principle known as deferred indefeasibility, and the English approach of allowing rectification on wide grounds, except against a blameless registered owner in possession.

The second security dilemma discussed is the problem of how to protect unregistered interests within a system that seeks to promote facility of transfer. Like instrument registration systems, LTR uses a strategy of publicity to reduce the incidence of
conflicts of property rights. Unlike instrument registration, LTR only allows a limited class of property rights to be registered. Most LTR systems therefore incorporate some form of interest recording to protect the unregistered property rights of prior owners. Several jurisdictions are considering ways to formalise and articulate the dual system of registration and interest recording, using a common 'publicity' rule for determining the priority of interests. This promotes the strategy of publicity by encouraging a more complete public record of interests.

Since it is not possible for a system to assure legal security to all the interest holders, many LTR systems incorporate a statutory indemnity scheme. This is meant to provide economic security to those denied legal security through a registry error or through the operation of the system’s decision rules. It mitigates the friction between dynamic and static security by ensuring that a party denied enforcement of his or her interest is at least compensated for the loss. The work identifies gaps and deficiencies in some LTR indemnity schemes, and considers whether private title insurance can enhance the economic security provided by the systems.

Certification by candidate

I, Pamela Anne O’Connor, certify that

1. to the best of my knowledge, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis;

2. it has not been prepared by or in conjunction with a person for whom I am or have been the supervisor; and

3. it does not contain any work which I or any student supervised by me has presented or will present for another award of the university or any other tertiary institution.
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Acknowledgements

In the course of preparing this thesis, I had the advantage of presenting papers at three international conferences. I am particularly grateful for the opportunity to present a paper at the Fourth Biennial Conference on Property Law organised by the Centre for Property Law, University of Reading, in March 2002, and for the hospitality extended to me by the Centre. The informative comments that I received on my paper from the Centre's Director, Professor Elizabeth Cooke, provided me with the confidence to write in a comparative vein on the English and Torrens systems of LTR. Professor Cooke provided me with considerable guidance in my efforts to understand the English LTR system. She provided comments on several of my papers and clarified many points for me. She also generously provided me with copies of an unpublished paper and two chapters of her forthcoming book, *The New Law of Land Registration*.

While in the UK, I met with Mr Chris West, Solicitor to HM Land Registry, London, and Mr Jeremy Donaldson, Case Review Team Leader. Mr West and Mr Donaldson provided me with useful information on the practical workings of the English land registration system.

I was fortunate that during the later stages of writing this thesis, the Faculty of Law, University of Auckland convened a major international legal conference on LTR, the first held for many years. I obtained a valuable collection of papers from the conference, a selection of which are to be published in D P Grinlinton (ed), *Torrens in the Twenty First Century* (LexisNexis Butterworths, forthcoming in 2003).

I am also grateful to many of my academic colleagues at Monash University who provided comments on drafts of papers, referred me to relevant materials, and discussed the subject with me. These include Professor Marcia Neave, Ms Elspeth McNeil, Dr Elise Histed, Professor Graeme Hodge, Ms Sharon Rodnick, and Dr John Mee, a visitor from the University of Cork. Ms Lisa Smith and Ms Poh York Lee, law librarians at Monash University, helped me to locate reference materials. Ms Kaye Tucker made my job much easier by instructing me in the use of the Endnote bibliographic program.

This thesis could not have been written without the wholehearted support of my husband, Campbell Duncan. Campbell supported me through the isolation and obsession that is the lot of a PhD candidate, acted as a sounding board to test arguments and ideas, provided technical assistance with formatting the thesis, and freed me from child care and domestic duties at precious moments when the task of writing gained momentum.
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This table lists the statutes cited in the text of the thesis, including historic statutes.

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- **Supreme Court Act** 1986 (Vic)

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- **Land Title Act**, RSBC 1996, c 250 (British Columbia)
- **Real Property Act**, RSM 1988, c R30 (Manitoba)

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- **Land Transfer Act** 1952
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- **Land Registration Act** 1925 (UK)
INTRODUCTION

The World Bank estimates that in most countries, land resources account for between one half and three quarters of the nation’s wealth. Most of this wealth is in private hands. Economists say that the main value of land assets lies not in the satisfaction that they give their present owners, but in their potential to generate new wealth. The collective economic welfare is advanced when land is used as a factor in production, or as collateral for credit to finance new investment and business activity. According to this dynamic conception of property, most new wealth comes from existing assets. For this to occur, assets must be able to circulate through the market. The process of voluntary exchange will allocate the resources to those who value them most highly. If the market is operating efficiently, land assets will tend to find their way into the hands of those who can make best use of their economic potential. The function of markets is to facilitate such wealth-maximising exchanges.

For markets to operate efficiently, economists say that assets must be both securely held and easily transferable. They must be well-defined and clearly allocated, so that prospective acquirers can be assured of receiving a good title. If the rights to the assets are unclear or the ownership is disputed, those who hold the assets for the time being will have little incentive to invest in improving them or bringing them into production. The assets will also be less readily transferable to purchasers, because the insecurity of the rights increases the cost of acquiring them. Purchasers will incur transaction costs in investigating the seller’s title, searching for prior inconsistent rights, and self-insuring the residual risk.

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Since the collapse of most of the socialist command economies, the establishment of efficient markets has been hailed as the surest path to economic development and growth. Throughout the developing world, and particularly in the former socialist

countries, governments are investing in the establishment of systems of land title registration (LTR), with substantial funding assistance and technical support from international aid and donor agencies. The international development agencies see LTR as a government program that supports the operation of a market economy, by enhancing the security of property rights in land and lowering the costs of exchange. Many developed countries are also committing resources to establishing, extending or improving LTR systems, in many cases converting from deeds registration to title registration. Their activity is prompted by the need (a) to reduce transaction costs through better use of information technology, and (b) to improve government land information and management, by linking land title registers to other land-related databases or cadastres.

Land title registration (LTR) is an authoritative public record of the legal rights in a specified land unit vested in particular persons at a given point in time. It is a system under which the state itself confers title and guarantees the validity of all registered estates and interests in land. It also gives purchasers a high degree of protection against third party rights and encumbrances not shown on the register (although this feature is not unique to LTR). In Britain, LTR is known as ‘land registration’, although international usage applies this term to both LTR and deeds registration. In Australia, New Zealand, the United States and some other countries, LTR is known generically as the ‘Torrens system’, although the name is also used more specifically to designate LTR systems whose registration statutes are derived, directly or indirectly, from Sir Robert Torrens’ Real Property Act 1858.

A. Thesis: The dilemma of legal security

The thesis of this work is that the system of LTR incorporates two objects which are to some degree antithetical, and that this conflict is the root cause of a number of legal problems experienced in the title registration law of many countries. The two objects of LTR are, first, to make existing property rights secure, and secondly, to make the rights more securely tradeable. The second object is often expressed as facilitating the transfer of rights, or making conveyancing quicker, cheaper and simpler, but these are merely the consequences of enhancing the security of transfer and acquisition. If purchasers are unsure that they are dealing with the true owner and that nobody else has prior rights to the land, they will expend time and resources on title investigations in an attempt to resolve the insecurity. Remove the insecurity, and the problems of cost, delay and complexity fade away.

Both of the above objects are essential to the enterprise of LTR. For land assets to be used productively, existing owners must be sure that they will not be deprived of their property. They require what René Demogue called ‘static security’ – the security that property rights, once acquired, cannot be taken from them without their consent. Without static security, there would be little incentive to invest in improving land or bringing it into production. This is the first object of LTR. Owners and purchasers also need what Demogue called ‘dynamic security’, or...
security of acquisition. Purchasers need to be sure that the law will uphold their reasonable expectations that they are acquiring a title free of prior hidden claims. Long after acquisition, they continue to require dynamic security. If they are to invest in the land, they must be confident that no challenger will step forward in the future to assert a prior claim to the land. This is the second object of LTR.

The second object may alternatively be described as the reduction of transaction costs. These are the costs that purchasers incur in finding out about the titles offered on the market, negotiating with the vendor, and enforcing their rights. As Ronald Coase has shown, transaction costs inhibit the operation of markets in allocating land assets to their most effective use. It follows that the reduction of transaction costs is an important object of LTR as a market-supporting institution. We can therefore say that the second object of LTR is to reduce transaction costs (thereby making conveyancing easier, simpler, quicker, etc), by providing dynamic security. Accordingly, the two objects of LTR are to provide static security and dynamic security.

It is often impossible for the legal system to provide both dynamic and static security in relation to disputed property rights. Situations commonly arise in land law, as in the law of personal property, where the rights of a prior owner conflict with those of a later acquirer. Since the asset can be allocated to only one of the contenders, the law must provide an adjudicative rule to determine which claim is to be preferred.

The problem arises because of the nature of property as a right in rem. Security of property has both an assertive and a defensive dimension. My property right to land is legally secure to the extent that I am assured that (a) I can assert or enforce it against anyone at all who comes into a relationship with my land, and (b) nobody else has a superior right to the land, inconsistent with mine, that they are able to enforce against me. If security is measured by the enforceability of my right and my immunity from enforcement action by other owners, it follows that my security can only be assured at the expense of the other owners.

Once a conflict of rights arises, it is not possible for the law to provide complete legal security for both owners. It must often apply a rule that prefers one owner, at the cost of the other. It must create a winner and a loser. In the context of LTR, the dilemma may arise in the following way. Assume that P, a purchaser for value, has acquired title to an interest in land by registering in good faith an instrument of transfer from the prior registered owner, O. It turns out that the transfer was forged by X, who has absconded with the proceeds of the transaction. X is liable to criminal and civil action for the fraud, but will rarely be worth suing. In any case, action against X does not solve the problem if, as is usually the case, both O and P1 want their title.

The law must provide a decision rule for determining who gets the land in such cases. A rule that awards the land to O promotes static security. It assures existing owners that they cannot be deprived of their land through a forgery. But this rule ipso facto diminishes dynamic security, for purchasers can no longer be sure that they will get a clear title if they take an instrument for value and register it in good faith.

Alternatively, the law might adopt a rule that awards the land to P. This promotes dynamic security, by upholding the reasonable expectations of purchasers that they will gain an indefeasible title if they register an instrument in good faith and without knowledge of the forgery. Owners of land are now at risk of losing their title to land as a result of registration of a forged instrument. P will be happy that the rule enables him to acquire his title more securely, but must then live with the risk that he could lose his title through a new act of forgery committed after his registration.

Thomas Mapp summed up the dilemma of security as follows:

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7 Thomas Mapp observed that security of title is an elusive ideal for 'to whatever extent [a registered owner] can acquire an interest from a predecessor through error, he is vulnerable to losing that interest to a successor through the same error': Thomas W Mapp, Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens System (Alberta Law Review, University of Alberta, Edmonton, Alberta, 1978), 66-8; see also Douglas J. Whalan, The Torrens System in Australia (Law Book Co., Sydney, 1982), 296-7.

8 Mapp, ibid, 49.
Security of ownership and facility of transfer are inherently inconsistent. Society can opt for either of two legal regimes concerning land ownership: hard to come by, hard to lose; or easy come, easy go. More likely, some rough balance will be sought.

Finding acceptable criteria to guide the choice of a decision rule in such cases is an intractable problem for the law. Whichever rule is adopted will inflict a catastrophic loss upon one of two innocent owners. It is tempting to seize upon some minor fault, omission or want of care on the part of either P or O, and use this as a ground to award title to the other. The problem with this approach is that it does not justify the infliction of losses which are disproportionate to the lapse. Demogue cautioned that it could also be destructive of security:

This system, sufficiently rigorous when the fault is serious, becomes less and less satisfying as the negligence committed grows slighter. All security is lost if the owner of a right incurs what may be a heavy responsibility for a slight fault, for as the fault grows less everyone feels himself less able to avoid committing it and to give the attention necessary to that end.

The conflict between static and dynamic security runs as a leitmotiv through the law of transactions, affecting both real and personal property, under common law and civil law systems. Like Mapp after him, Demogue thought it was better to strive for a balanced approach, since owners need both types of security. He proposed two methods by which the law could at least minimise the incidence of conflicts between owners and acquirers. The two methods are publicity and insurance.

The Strategy of Publicity

Publicity is a risk prevention strategy. A system that publicly records all interests in land enables purchasers to discover the existence of prior interests before acquisition, and to take steps to avoid a conflict of rights. They might, for example, purchase the prior inconsistent interest, obtain the prior owner’s consent to a re-ordering of priorities, seek an additional warranty from the grantor, or take subject to the prior rights with an abatement of the purchase price.

All systems of land registration, whether of deeds or titles, incorporate the strategy of publicity as a means of avoiding conflicts of rights. Publicity can also provide a rule for resolving disputes when they do arise. The rule is that registered interests prevail over unregistered interests, and that registered interests rank for priority in the order of their date of registration. In effect, the rule creates a race to the register, with priority awarded to the person who registers first. This provides an incentive for parties to register their interests, so making the information in the register more complete.

The Torrens and English systems of LTR adopt a race system for fixing the priority of registered interests vis-à-vis unregistered interests (other than overriding interests). Race systems tend to be unstable in common law systems, because they create a moral hazard for purchasers. Later acquirers sometimes take advantage of the rule to defeat prior unregistered interests, the existence of which was (or should have been) known to them when they acquired their own interest. To discourage such unconscientious behaviour by purchasers, courts have a tendency to reinstate the doctrine of notice by implying it into the statute. This allows them to deny priority to purchasers who disregard the rights of prior interest-holders.

International experience with deeds registration systems shows that race rules tend to evolve into ‘race-notice’ systems. This is a system in which a later acquirer gains

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9 This approach was articulated by Ashurst J in *Lickharrow v Mason* (1787) 2 TR 63: ‘Wherever one of two innocent persons must suffer loss by the acts of a third, he who has enabled such person to occasion the loss must sustain it’. P S Atiyah says that this much-quoted dictum ‘has been dissented from more often than it has been followed’: P S Atiyah, *The Sale of Goods* 8th ed, (Pitman, London, 1990), 353.

10 Demogue, above n 5, 434.

11 Demogue illustrated the dilemma of security with an example drawn from provisions of the French Civil Code dealing with negotiable instruments: ibid 430.

12 Ibid 439-44.

13 Ibid 431-33.


15 Examples of this are given in Chapter 7.
priority over an earlier interest only if he or she registers first, and without notice of the existence of the earlier interest. Carol Rose gives an account of this development in terms of the natural history of bright line or crystalline rules in property law. Such rules are formulated ex ante in an attempt to shape behaviour, but courts baulk at imposing them post hoc if they lead to undeserved or disproportionate loss of property rights. Rose sees the US Torrens statutes as an attempt to reimpose the crystalline race rule of some deeds recordation statutes, which had become muddied by judicial reintroduction of the doctrine of notice. She claims that the Torrens race rule has predictably met the same fate as its predecessors. Under the Torrens statutes of the US, there is judicial authority that a purchaser takes subject to an unregistered prior notice of which he or she has actual notice.

In other jurisdictions, the race rule has produced doctrinal inconsistency and uncertainty. Most of the Torrens statutes include a ‘notice provision’ which states that knowledge of the existence of an earlier unregistered interest is not of itself to be imputed as fraud. This begs the question of what circumstances additional to the fact of knowledge will be deemed fraud. Is it fraud if the purchaser takes with notice, knowing that his or her registration will defeat the unregistered interest? If that is not enough to amount to fraud, does it make any difference if the purchaser knows that the holder of the interest has not consented, and will be prejudiced by the registration of the purchaser’s interest? Is it fraud if the purchaser takes on the basis that he or she will honour the prior interest, then changes his or her mind after registration? In many jurisdictions, the relationship between notice and fraud remains opaque, and it is often difficult to deduce consistent principles from the cases.

In Australia, where the courts have construed the notice provision strictly, stresses produced by the race rule manifest themselves in the development of vague concepts of ‘supervening fraud’, and in personam rights. These judicial concepts allow the judges to avoid applying the race rule in hard cases. The rule seems to cause fewer stresses under the English and Irish statutes, which exempt an important subset of unregistered rights from its operation. Interests of persons in actual occupation of land override registered title, without any requirement that they be registered or recorded in any way. This concession has not been adopted outside the British Isles, because it derogates from the strategy of publicity by weakening the incentive for occupiers of land to record their interests (by entry of a caution, caveat or other protective entry).

The Strategy of Insurance

Demoghe’s second strategy was insurance. Many systems of LTR incorporate a scheme of social insurance for indemnifying the losing party. In some countries, private title insurance can also provide cover against loss of legal security. Legal

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16 Ibid.
17 Ibid, 218-221. M P Thompson observes that ‘[t]here has always been a tendency not to give effect to the clear provisions of registration statutes’: M P Thompson, ‘Registration, Fraud and Notice’ (1985) 44 Cambridge Law Journal 280, 301.
18 Ross, above n 14, 208.
19 County Collector v Olsen 362 NE 2d 1335, 1340 (1977) (Ill App Ct); South Harlem Ltd v Moore 77 Ill 2d 212 (1979); Cunningham, Sloobuck and Whitman, The Law of Property (2nd ed, Mimm, 1993) 885; John McCormack, ‘Torrens and Recording: Land Title Assurance in the Computer Age’ (1992) 18 William Mitchell Law Review 61, 89-91, 95-96. This is disputed in ‘Comment: A Comparison of Land and Motor Vehicle Registration’ (1939) 48 Yale Law Journal 1238, at 1244 and note 40, where it is asserted that ‘[s]trict construction of the statutes has usually given priority to registered interests despite notice of prior unregistered conveyances’.
20 This refers to the controversial proposition that it is fraud, within the meaning of the Torrens statutory exception to indefeasibility, to acquire a registered interest with the intention of honouring a prior unregistered interest, and then, after registration, to change one’s mind and dishonestly repudiate the interest, relying on the indefeasibility of one’s registered title. See, eg, Sutton v O’Kane [1973] 2 NZLR 304 (NZCA) (Turner P) (NZCA); Bahr v Nicolay (No 2) (1988) 164 CLR 604, (Mason CJ and Deane J).
21 Explained in Chapter 5.
22 Land Registration Act 2002, Sched 3, para 2; of the predecessor provision in Land Registration Act 1925, s 70(1)(g). The Irish and Northern Irish LTR statutes each include a provision identical to s 70(1)(g): Registration of Title Act 1964 (I), s 72(1)(j); Land Registration Act 1970 (NI), Sched 5, Pt 2, para 15. The provisions are interpreted consistently with the English s 70(1)(g): Brendan Fitzgerald, Land Registry Practice 2nd ed., (Round Hall Press, Dublin, 1995), 223-26.
practitioners' professional indemnity insurance has also played an important role in indemnifying losses in land transactions.

Insurance can be considered a provision for economic security, meaning that the value of the asset is secure even if the title is not. It does not prevent a conflict of rights occurring, nor avoid the need for the law to apply a rule of static or dynamic security. It softens the dilemma of legal security by reducing the disparity in outcome for winners and losers, ensuring that the latter at least recover the economic value of the land asset.

B. AIMS, METHODS AND APPROACH

Aims of this study
The main aims of this work are as follows:

1. to provide a theoretical explanation of why legal systems seek to promote security and transferability of property rights in land;
2. to assess how well the system of LTR serves those ends;
3. to show how the conflict between the dual objects of LTR creates a dilemma for the law in devising rules for the adjudication of ownership disputes;
4. to formulate options for dealing with the problems, having regard to approaches used by different jurisdictions and other possible approaches not yet tried;
5. to consider how the advent of electronic conveyancing/registration and private title insurance extends the range of techniques for managing the problems or affects their efficacy; and
6. to propose and apply a set of broad normative criteria for evaluating the different approaches.

23 Arrufiada distinguishes between legal security (the security that the property right will be legally enforceable) and economic security, which takes the form of compensation for deprivation of legal security: Benito Arrufiada, 'A Transaction-Cost View of Title Insurance and its Role in Different Legal Systems' (2002) 27 The Geneva Papers of Risk and Insurance 582, at 596.

The choice of the subject for study
Although LTR is practised in both common law and civil law systems, the focus of this work is on the former. LTR systems operate against a background law of juristic 'companion principles', which mediate the impacts of the system's rules. Common law-based LTR systems share distinctive problems arising from the equitable recognition and enforcement of unregistered interests.

In all countries, LTR systems in the common law countries fall into two main families, albeit with a degree of hybridisation. The two families are the Torrens system, which derives from Sir Robert Torrens Real Property Acts 1858-61 of South Australia, and the English system, based on a series of English statutes commencing in 1862. The two systems developed by a process of parallel evolution from common sources, commencing in the middle decades of the nineteenth century. British colonial administrators carried the Torrens system to many of the British dominions, because it was judged to be better suited to colonial conditions than the English model. The terms 'English' and 'Torrens' can only be applied in a loose sense today, as the statutes in the common law world draw upon multiple sources and are quite diverse.

Method and approach
The principal method of all comparative law study is the comparison of functionality. This work endeavours to explain features and rules of LTR systems in functional terms that can be generalised across jurisdictions. This requires some degree of simplification of models and standardisation of terminology, transcending local doctrinal differences.

The causative analysis of the problems draws primarily upon economic theories of wealth maximisation and transaction costs, since these are found to have the

24 Murray Raff, German Real Property Law and the Conclusive Land Title Register (PhD thesis, University of Melbourne, 1999), 149-60.
25 Simpson, above n 2, 77.
greatest force in explaining a transactional system such as LTR. Economic theories can be used to formulate options for managing the problems, and to predict how a particular rule may affect the incentives that influence human behaviour. Beyond that, there are limits to the role that economics can play in guiding policy choices. The normative implications of wealth-maximising theories of property do not provide an adequate framework for evaluating different approaches to the problems. Economic theory can provide no sufficient justification for a rule that inflicts loss on one owner in order to make another's title secure, even if it can show that one rule is more efficient than another. The choice of rule must therefore be grounded in a wider normative framework, drawn from philosophical, behavioural and ethical perspectives, as well as comparative law and human rights.

The need for a broader approach

Until recently, the analysis of the problems has been largely parochial (ie, confined to how they present in the LTR system of a particular jurisdiction), and the method of study has been primarily formal-doctrinal. Understandings and solutions have been sought mainly by reference to established principles of law, with limited evaluation of approaches practised in other countries.

There has been a paucity of international comparative commentaries on LTR systems in recent decades, despite the pioneering work of James Edward Hogg, who in 1920 published a major comparative analysis of 21 LTR systems in what was then the British Empire. Other multi-jurisdictional comparative studies of LTR

27 Weber distinguished formal doctrinal reasoning from consequentialist reasoning. The former seeks to justify a legal rule by appeal to some overarching principle of law, or by an analogy with other legal principles. It is based on the assumption that sufficient justification can be found within the system of law. Consequentialist reasoning evaluates a legal rule by its effects: see generally, J W Harris, 'Legal Doctrine and Interests in Land' in Eekelaar and Bell (eds), Oxford Essays in Jurisprudence, 3rd series (OUP, Oxford, 1987) 167-197, at 169.

28 J E Hogg, Registration of Title to Land Throughout the Empire, Sydney, 1920.
registered land should be kept in tandem with the law relating to unregistered
land. Now that the registration of land is almost complete in England and Wales, the
enactment of the Land Registration Act 2002 marks the abandonment of the
policy. The imminent demise of the unregistered system has prompted some
English property lawyers to reflect on how LTR transforms the concept of
ownership and the nature of the conveyancing process.
American legal theorists, who have made outstanding contributions to the theory of
property and the economic analysis of law, have largely ignored LTR, a system
widely regarded in US legal circles as a failed experiment. The most voluminous
contribution to LTR scholarship in the common law world comes from Australia
and New Zealand. In those countries, the accumulated weight of case law and the
diversity of the statutes have prompted legal scholars to focus mainly upon doctrinal
exegesis, largely at the cost of broader perspectives.

The limits of historical research
In recent decades, there has been an extraordinary flourishing of historical research
into the nineteenth century reform movements that led to the establishment of the
Torrens and English LTR systems. Most of this research was undertaken by
lawyers rather than historians. In part, its purpose was to establish the provenance
of ideas, so that credit for them might be correctly attributed. A deeper purpose
was to gain a better understanding of the policy choices that underlie particular
features of the LTR systems that we have inherited. Researchers sought to
reconstruct the founders' visions for the systems, and to discover documents,
speeches and minutes that might clarify particular legislative provisions and
lacunae.

Despite their number and high quality, the recent historical studies have made only
a modest contribution to resolving the system's contemporary legal issues. It seems
that many of the current problems were not foreseen by the systems' nineteenth

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36 UK Law Commission, Third Report on Land Registration, No 158 London,
1987) [1.2], [2.5]; Charles Harpum, Megarry and Wade: The Law of Real
Property 6th ed., (Sweet & Maxwell, London, 2000), para [6.004]; City of
London BS v Flegg [1988] AC 54 at 84; Abbey National BS v Cano [1991] 1
AC 56 at 77.
37 Megarry and Wade ibid.
38 See, eg, the writings of Alain Pottage and Elizabeth Cooke. Pottage argues
that by excluding beneficial interests from the registration of property because it
transforms the proof of title, from a negotiated proof based on contract and
historical devolution, to standardized and 'tabular' proof based on the register:
Pottage, 'The Originality of Registration', above n 35; see also Alain Pottage,
'Evidencing Ownership' in Bright and Dewar (eds), Land Law: Themes and
Cooke argues that registration is hostile to fragmentation of property because it
tends to imply a unitary conception of ownership. It privileges registrable
interests while marginalizing other ownership rights: E Cooke, 'The Land
Registration Act 2002 and the Nature of Ownership' (Paper presented at the
Hudson, ed, New Perspectives on Property Law: Human Rights and the
Family Home (Cavendish)).
39 For an explanation of the history and causes of the failure of most of the US
Torrens systems, see Garro, above n 4, Ch 9.
40 The impressive historical research into LTR in the past thirty years includes
the following works: Stanley Robinson, Equity and Systems of Title to Land
by Registration in England and Australia (PhD thesis, Monash University,
System and Its Introduction into New Zealand' in Hinde (ed) New Zealand
Torrens System: Centennial Essays (1971) 1-12; Robert Stein, 'Sir Robert
Australiana 119; Douglas Whalan, 'Immediate Success of Registration of
Title to Land in Australasia and Early Failures in England' (1993) 3 Bond Law
Review 416; Alan Dowling, 'Of Ships and Sealing Wax: The Introduction of
Front Registration in Ireland' (1993) 44 Northern Ireland Legal Quarterly
369; Jean Howell, 'The Doctrine of Notice: An Historical Perspective' [1997]
61 The Conveyancer 431; J S Anderson, Lawyers and the Making of English
Land Law 1832-1940 (Clarendon Press, Oxford, 1992); Rosalind F Atherton,
'Donees, Devisees and Torrens Title: The Problem of the Volunteer Under
the Real Property Acts' (1998) 4 Australian Journal of Legal History 121,
134-57; Stuart Anderson, 'The 1925 Property Legislation: Setting Contexts' in
Bright and Dewar (eds), Land Law: Themes and Perspectives (Oxford
41 For example, Robinson and Raff found that the contribution of Ulrich Hübbe,
and the debt that the Torrens system owed to the Hanseatic system of LTR,
had both been largely ignored: Robinson, ibid; Raff, ibid.
Some features may have resulted from the process of compromise, so that what was enacted does not reflect anybody's vision for the system as a whole. The reasons for the inclusion of some provisions were never recorded, or the contemporary records are not available. Stanley Robinson found that Sir Robert Torrens espoused conflicting policies at different times, lacked an adequate grasp of legal principles, and had no complete conception of how his scheme was to operate. The historical research casts doubt upon the value of 'originalist' approaches to resolving current problems in the LTR systems.

The nineteenth century proponents of LTR were liberals who sought to promote the wider ownership of land, to end monopolistic practices among conveyancing intermediaries, and to provide the security of property needed by the developing land market. They were practical people who sought empirical solutions to real life problems. While they were right about the problems and how to solve them, their theoretical framework was, by today's standards, underdeveloped.

The benefits of an inter-disciplinary approach

Disciplines outside the law can provide a more coherent explanation for the objects and methods of LTR than the conventional legal or historical sources. Ronald Coase, and the scholars of law and economics who followed him, have developed conceptual frameworks that can be used to explain the objects and methods of LTR. Coase has explained the process by which transaction costs and risk-bearing depress prices and diminish opportunities for wealth-maximising exchange. Law and economics can also explain why many countries are investing in LTR systems in the expectation that this will make property rights more secure and tradeable. Theories of risk management and insurance can be used to explain the specific methods used to achieve the goals of LTR, such as multiplicity for rights, insurance or indemnity and the transfer of title assurance functions to the state.

While legal scholars have been focussing on legal and historical issues, other disciplines have laid claim to the subject area of LTR. In the nineteenth and early twentieth century, the debate over the establishment of LTR systems was a battleground contested by lawyers, politicians and, in the US, the title assurance industry. The support, or at least the forbearance, of the legal profession was often a critical factor in the decision to implement LTR in an area. By the latter half of the twentieth century, the key decisions about the structure, establishment and implementation of LTR were beyond the lawyers' veto. As land registers came to be embedded in multi-purpose cadastres or land information systems, LTR ceased to be seen primarily as a legal institution. It became a part of the national economic and administrative infrastructure. Lawyers became marginal players in the implementation and design of LTR systems. The new gatekeepers of LTR are economists, development aid and donor agencies, cadastral experts, surveyors, planners and land administrators, title registrars, information technology systems engineers - a group that Dale & McLaughlin describe collectively as 'the land information management community'. Two parallel and discrete bodies of scholarship have developed. The land information management community conducts international conferences, and publishes articles and monographs on the economic, administrative, informational and technical aspects of LTR. This broad group has the ear of national governments and the international policy and development agencies which make the crucial decisions about the design and implementation of LTR systems. In the meantime, lawyers continue to discuss the legal aspects of LTR, largely ignorant of the contributions of the other disciplines. This impoverishes legal scholarship, and marginalises its contribution to the wider field of LTR.

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42 For example, it seems that neither the Torrens group nor the 19th century English reformers anticipated the need to provide rules for adjudicating the priority of competing unregistered interests in registered land.
44 Ibid 124-25.
45 Robinson, above n 40, 22-23.
46 Coase and the other theories are discussed in Chapter 1.
47 Dale & McLaughlin, above n 3, 2.
Significance of the Study

This work seeks to bring a broader approach to the analysis of security problems in LTR, drawing upon comparative law, theories of property, contextual, critical and inter-disciplinary material. It is hoped that a more diverse perspective will shed new light on the deeper causes of the persistent legal problems, expand the range of approaches for managing the problems, and provide a broader normative framework for evaluating possible solutions. The work is also intended to make a contribution towards bridging the communication gap between law and other disciplines involved in the study of LTR. Since law has no distinctive methodology of its own, it has much to gain by engaging with disciplines external to it. These can inject new insights, conceptual frameworks and critical perspectives into the analysis and resolution of legal problems.

C. CHAPTER OUTLINE

The issues outlined above are examined in the chapters of this work, as follows:

Part I is entitled 'The purpose, objects and methods of LTR'. Chapter 1 addresses the question: what is the theoretical justification for governments expending public resources to establish systems of land registration for the benefit of private property owners? This prompts an evaluation of various philosophical and economic theories that seek to justify the institution of private property. Economic theories of wealth-maximisation and transaction costs are found to be the most useful in providing a rationale for government programs of land registration.

Chapter 2 seeks to define what can reasonably be claimed as the economic benefits of LTR. It reviews the now-extensive body of empirical research that attempts to verify and quantify the economic benefits of land registration projects. Most of the studies evaluate LTR or 'titling' projects, although the economic development literature makes little distinction between deeds registration and LTR systems. The objects of the titling projects are derived from the theories of wealth maximisation and transaction costs examined in chapter 1, translated into evaluative criteria that are capable of being tested empirically. The chapter overviews the findings of a number of evaluative studies of land registration projects commissioned by international aid and development agencies. The findings from this research have prompted the agencies to qualify their expectations of LTR projects, and to adjust the nature and scope of their policy interventions.

Chapter 3 examines the methods by which LTR promotes security of title and ease of transaction, or static and dynamic security. It starts by explaining why conflicts of property rights occur, and why the conventional rules developed by English law were found by nineteenth century reformers to be unsuited to the needs of the developing market economy. Demogee's antithetical concepts of dynamic and static security are introduced, their interdependence explored, and their relevance to legal problems in LTR explained. The chapter concludes with an analysis of how the particular methods used by LTR incorporate different elements of a comprehensive risk management strategy, including risk avoidance, risk transfer and distribution.

Chapter 4 introduces and compares the two English and Australian systems of LTR, being the parent systems of the two main 'families' of LTR in the common law world, the English and the Torrens. The chapter compares the responses of the two systems to a broad range of common issues, such as the persistence of unregistered interests, certification of land boundaries and grounds for rectification. The principal difference found is that the two systems balance the elements of dynamic and static security differently. The Australasian Torrens systems emphasise dynamic security, while the English system puts more weight on protecting existing owners, particularly those in possession, whether their interest is registered or not. This chapter has been published in E Cooke, Modern Studies in Property Law Vol 2 (Hart Publishing, Oxford, 2003), Chapter 5.

Part II 'Security dilemmas in LTR', examines some perennial legal problems experienced under LTR systems in the common law countries. It is argued that the persistence of the problems stems from the conflict in the objects of LTR, namely, the tension between dynamic and static security.

Chapters 5 and 6 deal with a problem that is perhaps the most important and intractable security dilemma in the law of LTR. This is the choice of a decision rule to adjudicate between two owners, a former or subsisting registered owner (called 'O'), and a current registered owner (called 'P1'). The dispute arises because O has
been deprived of her registered title, or her registered title has been encumbered, through the registration of a forged or otherwise void disposition in favour of PI. It is assumed that PI is a purchaser for value in good faith who registered his disposition without fraud. This is called the problem of unauthorised registrations.

Chapter 5 introduces three options for the choice of a decision rule to resolve disputes arising from unauthorised registrations. Two of the options are the rules known in the Torrens jurisdictions as ‘deferred’ and ‘immediate’ indefeasibility. The third is the English approach, which allows rectification on any ground that would render an instrument void or voidable under general law, but protects a blameless proprietor in possession against having his or her title upset, unless it would be unjust not to rectify. The latter part of the chapter evaluates the rule of immediate indefeasibility in terms of its consistency with general principles of law and public policy, including the rule of law and human rights norms.

Chapter 6 proposes and applies a set of criteria for comparing and evaluating the options for a decision rule to adjudicate cases of unauthorised registration. The criteria are drawn from a wide range of sources, including economic concepts of allocative and administrative efficiency, loss avoidance analysis, the normative implications of behavioural studies documenting the phenomena of loss aversion and the endowment effect, and liberal theories of property. The latter part of the chapter compares and evaluates reform proposals from several countries, and considers options for qualifying decision rules by the addition of judicial discretions.

Chapter 7 deals with a different security dilemma; viz, how to provide for the security of unregistered interests in a system that seeks to facilitate the transfer of land. The strategy of publicity is meant to protect both the prior interest and the purchaser, but most of the common law LTR systems lack the right machinery and incentives to ensure that all vulnerable interests are recorded on the register. The preferable solution is found to be a system of interest recording, accompanied by a ‘race’ rule of priority to encourage complete recording. Several models for this are compared and evaluated, including the extended provisions under the Land Registration Act 2002 (UK) for protecting interests by entry of a unilateral ‘notice’.

a Canadian proposal for interest recording based on the role of the caveat in the prairie provinces, and Australasian proposals for a ‘caveat with priority’.

The chapter concludes with a discussion of how the introduction of electronic conveyancing may enable more complete implementation of the strategy of publicity. Security dilemmas presented by the use of a ‘race’ rule of priority are also examined. This chapter is a revised version of a paper presented to the conference ‘Taking Torrens into the 21st Century’, Auckland, 19-21 March, 2003. It has been accepted for publication as a book chapter in D P Grinlinton (ed), Torrens in the Twenty First Century (2003, LexisNexis Butterworths), forthcoming.

Part III turns to the provision of economic security, or monetary compensation, to those whose legal security is destroyed by the operation of the rules of the LTR system, or by a registry error. If the strategy of publicity fails to avert a conflict of rights, the law must prefer one property holder’s right to another. Without insurance, the loss to the losing party could be catastrophic. Insurance can be provided through a public indemnity scheme of social insurance, as under the English and most of the Torrens systems. Or it could be provided through a private title insurer, an option that did not exist when the systems were first established.

For many years, title insurance was practically unknown in most systems of LTR. In recent years, title insurers have found it worthwhile to market policies to holders and purchasers of registered titles, in the US and abroad. Chapter 8 considers the implications of this development for the Australian Torrens system. The development of the title insurance industry has prompted a debate as to whether the state should continue to be in the business of providing an indemnity, or whether the government’s role as a risk taker should now be ‘privatised’. It also directs attention to the gaps in the risk cover, and the procedural hurdles imposed on claimant by the statutory indemnity schemes. The existence of a more comprehensive private alternative provision provokes an inquiry as to why some of the statutory schemes should be so restrictive. If a compelling argument exists for maintaining the public indemnity scheme, should the scheme be reformed to operate more like a private insurer? Chapter 8 has been published in (2003) 3 QUT Law & Justice Journal 141-67.
Chapter 9 pursues the question of what private title insurance can add to the economic security provided by the Australian Torrens system. It reviews in detail the terms of the homeowner's policy offered by the two title insurers currently operating in Australia. It analyses the perils covered by the policies, and considers what the policy adds to the risk cover provided by the statutes. Like the previous chapter, Chapter 9 focuses on one country. This is because title insurance policies vary markedly from one country to another, as do the terms of the LTR statutes. To determine precisely what additional security a title insurance policy can add requires a detailed comparison of the terms of the policies with the terms of the indemnity cover under the particular statute. This chapter has been published as an article in (2003) 10(2) Australian Property Law Journal 120-39.

In this thesis the law is stated as at 1 June 2003.

1 THE PUBLIC INTEREST IN SECURITY OF PROPERTY

Throughout the world, governments are investing substantial public resources in establishing, improving and automating land registration systems. The objects of the systems are twofold: to make existing property rights in land more secure, and to facilitate the creation of new rights in land through market exchange. This chapter seeks an answer to a question posed by Stuart Anderson – why should the state invest in administrative and legal registration facilities for the benefit of private owners? Is there a public interest in facilitating the accumulation of private wealth? To be sure, there are benefits for the state in having better records of land ownership, but the primary beneficiaries of land registration systems are private owners and purchasers.

Philosophers have long pondered what, if anything, the institution of private property contributes to the welfare of society. The problem is not only that wealth, and the power and influence that it buys, are unequally distributed. Property imposes a burden on others, because the holder’s rights can be enforced against third parties, ie, persons who are under no personal or contractual obligation to respect the rights. The problem is more acute in the case of real property, for land ownership can be fragmented into many estates and interests enjoyed concurrently by different people. Some of the interests created may be abstract, non-possessory or otherwise difficult to discover. Persons wishing to acquire an interest in the land must search for prior interests that may be enforceable against them after acquisition. The possible existence of undiscovered prior interests creates risks and costs for purchasers. An explanation is therefore needed of why legal systems enforce property rights in land against third parties.

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A. PROPERTY RIGHTS AND THE BURDEN ON THIRD PARTIES

Rights in Rem and Rights in Personam

Both civil law and common law systems distinguish between rights that are enforceable against persons generally, and rights that only affect specified persons or a specified group of persons. According to the conventional legal conception, property rights, or rights in rem, are rights in relation to a ‘res’ or thing, and are enforceable against third parties. It is not necessary that they be capable of enforcement against all the world. It is sufficient if they bind third parties who acquire an interest in the thing.

Property rights attach to the thing and are enforceable against other persons only insofar as they have a relationship with the thing. This distinguishes them from rights in personam (or personal rights) which are rights enforceable against one or a small number of identifiable individuals, and usually arise out of a contract, wrongdoing or other personal obligation. While rights in personam may arise out of dealings in respect of a thing, the right is enforceable against them personally, and is not contingent upon the continued existence of the thing.

Both types of right can exist in relation to the same thing. For example, the mortgagee of freehold land has a property right claimable against the land itself. The right is enforceable against a purchaser from the mortgagor (assuming that the mortgage is not discharged at the time of the sale). It entitles the mortgagee to sell the land if the debt is not paid, notwithstanding that the land has changed hands.

The traditional distinction between rights in rem and rights in personam has been challenged by conceptions of property advanced by legal realists, based upon the contribution of Wesley Hohfeld. According to Hohfeld, rights in rem are not rights in a ‘thing’, but jural relations (rights and duties) between persons. In personam rights are enforceable against one or a few identified individuals while rights in rem give the holder rights enforceable against ‘a very large and indefinite class of people’. From Hohfeld’s work, legal realists developed the ‘bundle of rights’ metaphor, expressing the idea of property as variable clusters of rights, powers and duties applying between persons.

Hohfeld’s conception has been criticised by analytic legal philosophers such as A J Honore and J E Penner for blurring the difference between rights in rem and rights in personam. Honore argues that while property rights are enforceable as claims against persons, they are best understood as rights to things. Penner adds that by reducing property to bundles of in personam rights, Hohfeld obscured its distinctive character as a right in respect of a thing. According to Penner, rights in rem and


Thomas W Merrill and Henry E Smith, The Property/Contract Interface’ (2001) 101 Columbia Law Review 773, 780. At note 15 the authors observe that the civil law distinction between absolute rights and relative rights is functionally similar to the common law’s distinction between rights in rem and rights in personam.


The distinction between rights in rem and rights in personam is often elusive in practice. Personal rights may become property rights if courts or legislatures are prepared to enforce them against third parties. For example, a contract for the purchase of land is deemed by equity to give rise to a property right once it becomes specifically enforceable.

6 Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal 710. In this article, less well known than his 1913 article of the same title, Hohfeld discussed the distinction between rights in rem and rights in personam.

7 Ibid 718.


9 Penner, ibid, 23; Honore, ibid; Merrill & Smith, The Property/Contract Interface, above n 3, 786-88.
rights in personam are conceptually distinct. Personal rights are rights in the behaviour of a specified person or persons, while rights in rem attach to persons by virtue of their relationship to a thing.\textsuperscript{10}

On one point, Hohfeld and his critics agree. A key feature of property rights is their capacity to bind a large and open-ended class of third parties. This is what makes property rights more valuable to their owners than contractual or personal rights. It provides legal security for the owners, but imposes costs on third parties. Rights in rem generally bind any person who uses the thing or acquires a right in it. Since the rights are invisible, anyone wishing to have a relationship with the thing must expend resources in searching for them. Merrill & Smith argue that property rights generate significantly greater information costs for third parties than do personal rights.\textsuperscript{11} Rights in personam arise out of specific relationships and affect only one or a few known individuals. The persons affected can generally be expected to know about the rights through their past dealings.\textsuperscript{12} Property rights differ in being both impersonal and general in application. The challenge for the law of real property is to protect the legal security of owners, while limiting the information costs that property rights impose upon third parties.\textsuperscript{13}

\textbf{B. WHY CONFLICTS OF PROPERTY RIGHTS ARISE}

\textbf{Fragmentation of ownership}

In democratic States, constitutional and political constraints limit the power of governments to interfere with private property. In these societies, the main threat to the legal security of property arises from conflict with another property right. Conflicts of rights arise because modern legal systems allow multiple interests to exist in the same thing. Fragmentation of ownership is greatest in the case of land, because its scarcity, permanence, unique spatial location and high value create the need to allow specialised and concurrent uses.\textsuperscript{14} For example, a plot of land may be cultivated by A under an agricultural lease, occupied as to part by B who leases a dwelling, held as security for a mortgage debt by D, fished or logged for timber by E, and used as a right of way by F to access his own land. By allowing various incidents of land ownership to be divided among different people, fragmentation enhances the productivity of land. It promotes the generation of wealth by facilitating specialisation (the division of labour) and exchange.\textsuperscript{15}

In the common law tradition, the allocation of different use and security rights in land is conceptualised through the doctrine of estates. English law recognises no absolute beneficial ownership of land that has been alienated from the Crown.\textsuperscript{16} Even the freehold title, which the layman calls ‘ownership’, is no more than an estate in fee simple. Bentham observed that is by an ellipsis of speech that we refer to land as being ‘owned’ by someone – we substitute the land itself for the legal object of the property right.\textsuperscript{17} It is natural to do so, for an estate in land is practically equivalent to ‘ownership’ in the lay sense, consisting of an open-ended set of use rights.\textsuperscript{18}

More limited use rights in land are known as ‘interests’. They include rights to use the land of another (easements and profits), rights of security (mortgages, liens), rights to control the use of another’s land (restrictive covenants) and rights to purchase land (options to purchase, specifically enforceable contracts).\textsuperscript{19} The legal

\textsuperscript{10} Penner, ibid, 25-31.
\textsuperscript{11} Merrill & Smith, \textit{The Property/Contract Interface}, above n 3, 776.
\textsuperscript{12} Ibid 797.
\textsuperscript{13} Ibid 795.
\textsuperscript{16} Gray & Gray observe that the absence of any concept of absolute ownership is the most distinctive feature of English law: above n 14, 65. Even the ultimate or ‘radical’ title of the Crown in English law is not equivalent to beneficial ownership, except where the land has no other owner: \textit{Mabo v Queensland (No 2)} (1992) 175 CLR 1, 48-51 (Brennan J).
\textsuperscript{18} Bright, above n 4, 528.
\textsuperscript{19} Ibid, 534.
distinction between estates and interests is of little relevance to this work, so the term ‘interests’ will include both interests and estates unless the context requires otherwise.

The conceptual value of the doctrine of estates is that it allows us to think of land not just as its physical manifestation, but as a source of use rights that can be split among people in various ways. An interest in land is an abstraction separate from the land itself, a representation of the economic and social benefits to which the holder is entitled. It is a legal construct that allows us to share the economic potential inherent in land.

We can therefore think of each interest in the land as being ‘owned’ by someone. While ‘ownership’ is not a legal term of art, it is consistent with legal usage to say that a mortgage, lease, easement or any other interest in land may be ‘owned’. Lawyers also use ‘purchaser’ in a similarly extended sense, to mean a person acquiring or intending to acquire any interest in land by means of a transaction. ‘Title’ is often used to mean ownership, although it may refer more specifically to the legal requirements to qualify for ownership of a particular interest. An owner of the fee simple, a mortgagee, a lessee or the benefit of an easement can each be said to have a ‘title’ to their respective interest.

The information burden on purchasers

In a world of perfect information, the fragmentation of property would pose no threat to anyone’s security. A person seeking to acquire an interest in land would know of all prior rights. The purchaser would then exercise a choice - to take subject to the prior rights (perhaps with an abatement of the purchase price), to obtain the consent of their owners, or to forgo the transaction. Owners of prior (earlier-acquired) interests in the land would know that an interest was about to be acquired, and could take steps to forestall the transaction if it would affect their rights. Persons disposing of an interest in land (grantors) would be unable to conceal prior interests from the purchaser in order to extract a higher purchase price. New interests would be acquired only with the consent of the affected prior interest holders, or expressly subject to the prior interests. The legal system would enforce the most recent interest, on the assumption that the consent of earlier interest holders had already been obtained.

Most countries now conduct the process of land transfer under a system of land registration, in which either deeds or titles are recorded in a public register. These systems reduce the incidence of conflict between property rights, by providing publicity for interests. Owners of prior interests can give notice to the world of their rights, and purchasers can discover from the register what rights in the land have already been allocated. In practice these systems do not provide perfect information or complete security for holders of existing interests or for purchasers. The reasons for this are explained in the following chapters. For present purposes it is sufficient to note that, in the real world of imperfect information, purchasers cannot be sure that they have discovered the existence of all prior rights that are potentially enforceable against them.

C. THEORIES OF PROPERTY AND THEIR RELEVANCE TO LTR

Property rights in land impose a significant burden on third parties. Their enforceability against strangers who may not even know of their existence, their capacity to sterilise land from other uses, and their unequal distribution are matters that require justification. The benefits of a regime of private property are far from self-evident. For centuries, scholars have debated the justification for property. According to Bruce Ziff’s taxonomy, a theory of private property may deal with one

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20 Hernando De Soto, The Mystery of Capital (Black Swan, London, 2000), 49. Fragmentation of property is also found in civil law systems, although the lesser interests are conceptualised as subtractions from the owner’s dominium or absolute ownership rather than as part of a hierarchy of estates and interests: J Getzler, ‘Roman Ideas of Land Ownership’ in Bright and Dewar (eds), Land Law: Themes and Perspectives (Oxford University Press, Oxford, 1998) 81-106, 82-84.

21 Gray & Gray, above n 14, 63-64.


or more issues in a hierarchy of three. First-order theories provide a general justification for the institution of private property, as opposed to other regimes such as communal or state ownership. Second-order theories start from the assumption that private property is justified in principle, and give an answer to the question 'which resources should be privately owned'. Third-order theories also assume the existence of private property, and propose norms for the specific allocation of property rights. They seek to resolve the question 'to whom should the resources be allocated'.

Land registration systems are premised on the assumption that there is a public interest in supporting the regime of private property. First-order theories may provide a justification for that premise, and answer the question: What public purpose is served by a government program to improve the security and transferability of private property rights in land? Second-order theories are of limited relevance, since land registration is superimposed upon the existing law of property, which defines the interests in land that can be privately owned. Third-order theories may assist in formulating and evaluating specific rules of land registration systems, which may have the effect of reallocating entitlements.

Property theories may for present purposes be grouped into two broad categories. 'Individualist' theories focus on the benefits that private property provides for the individual owners and, through them, for society overall. These theories generally reflect a view of property rights as given and static, a resource for the enjoyment of the current owner. 'Instrumental' theories emphasise the role of secure ownership in enabling people to realise the economic potential inherent in property. Property is regarded not just as something to be enjoyed in its present form, but as a store of dormant value that can be used to produce new wealth and to contribute to aggregate welfare. This group therefore express a 'dynamic' conception of property.

D. INDIVIDUALIST THEORIES

Individualist theories are a highly diverse group, representing the whole spectrum of political opinion. Their common premise is that property rights over things are empowering, or necessary for the individual's fulfilment as a human being. Most of them equate property with a private zone of individual autonomy, making a connection between property, privacy and liberty.

Personality/attachment theories

Based upon Kant's abstract idea of the person as a free and rational holder of rights, Hegel maintained that individuals achieve self-realisation by projecting their autonomous will upon an external object and appropriating it as their own. Without engaging in a property relationship with a thing, a person cannot become fully developed. The institution of private property, as an expression of human will, is essential for the realisation of liberty.

Hegel's idea of property as an expression of self was based on a highly abstract conception of how individuals constitute and differentiate themselves as persons. Building upon some of Hegel's ideas, Margaret Jane Radin has advanced a more empirically-based 'intuitive personhood' theory of property. Radin maintains that things external to ourselves become essential to our personhood when we define ourselves as persons, through our relationship with them. Certain objects become bound up with our sense of self, our personal histories, hopes and plans for the future, while other objects are held for their use or exchange value. The former she counts as 'personal' property, the latter as 'fungible' property. The connection that we have with our 'personal' property, and the pain that would be caused by its loss,

27 Radin, ibid 35.
29 Hegel ibid, section 45, cited in Radin, ibid, fn 41.
30 Radin, ibid.
give us a prima facie right to have it protected when it conflicts with the fungible property rights of other people.31

Radin’s theory of personhood is not a first-order theory like Hegel’s. Radin proposes that it be used as a normative basis for specific legal rules allocating property in cases where the rights of different persons conflict.32 In Ziff’s hierarchy, this is a third-order issue.33 For example, the theory might be used to justify a rule of land title registration that gives homeowners in possession of their home better enforcement of their right than a mortgagee or investor, where the rights conflict.34

Psycho-social attachment to specific property underlies the ‘cultural survival’ rationale for common law recognition of indigenous land rights.35 The attachment of an indigenous group to particular land or waters is no abstract Hegelian conception but a matter of empirical fact, established by anthropological and historical evidence. Where it is found that the attachment is constitutive of the group and essential to its social and cultural survival, a strong case can be made that the group’s claim should be recognised as a communal property right.36 This rationale for recognition of indigenous land rights has raised awareness of the general psychological and social significance of property, and given added prominence to personhood theories.37 For example, in a recent Australian native title case a judge observed that a claim to property in land is to assert that one has ‘some significant, self-constituting, self-realising, self-identifying connection with the land; that the land is, in some measure, an embodiment of one’s personality and autonomy’.38

 Locke’s labour theory and natural rights

The connection between the person, property and liberty is a theme common to different political traditions. Schlatter observes that eighteenth century liberals elevated the rights to ‘life, liberty and property’ into a ‘sacred trinity of natural rights’ which governments were bound to observe and protect.39 Private property was understood as a claim to protection against the demands of oppressive governments.40

This philosophy had its source in Locke’s labour theory of property. In his Second Treatise of Government, Locke asserted that people have a natural right to property, based on the idea that things belong to those who expend their labour upon them.41 If we own our own bodies, Locke reasoned, it follows that we own our own labour and so, the products of our labour.42 This was an attempt to explain how resources originally in communal ownership could be appropriated as private property without consent. In a nation undergoing industrialisation, Locke’s theory was inadequate to justify why much existing property was not held by those who had laboured to produce it.43 The theory could be used to demand the redistribution of property from the capitalist classes and the gentry to the working people. This did not suit the liberal agenda. Conceptual and political difficulties with the theory led

31 Ibid, 36-38, 71.
32 Ibid.
34 See the argument used below, in Chapter 6.
37 Ziff, above n 25, 28.
38 Western Australia v Ward (2000) 170 ALR 159, 355 (North J) (overturned on appeal on a different point); Gray & Gray, above n 14, 113, fn 12.
40 Ibid, 155-56.
42 Ibid, paras 27, 32-34
43 Schlatter, above n 39, 252, 278
nineteenth century liberals to discard the natural rights justification for property in favour of utilitarianism. 44

Ziff suggests that labour theory is more useful as a third-order theory, since it provides a justification for allocating property rights to specific people. 45 For example, it may be used to justify court rulings that accord equitable co-ownership of the family home to spouses or domestic partners who contributed to its acquisition or improvement through their labour. 46

Taken as a group, the individualist theories provide no argument for the State to undertake public land registration projects. The first-order general justifications for private property are essentially claims to negative freedom, or demands for abstention, so far as government is concerned. Property rights are assumed to be given and unchanging, requiring no active intervention by the State in the mechanics of transfer. The influence of the individualist theories in land registration is greatest when third order issues arise regarding the specific allocation of property rights. They contribute to shaping ideas of what constitutes 'fairness' in the rules for adjudicating disputes between rival claimants.

E. INSTRUMENTAL THEORIES

The provision of land registration programs are more readily supported by reference to 'instrumental' theories that emphasise the role of property rights in the production of new wealth. They differ from the individualist theories in their claim that private property is justified by its contribution to the material welfare of society as a whole. The principal theories in this group are utilitarianism and the economic theories of efficiency and wealth-maximisation.

The theories have both positive and normative aspects. Positively, they seek to explain actual phenomena, such as the principles upon which markets operate. They are also used to predict how a proposed action, rule or policy may affect behaviour by affecting incentives. Normatively, they imply an onus on governments and judges to take certain action to protect the security of property rights.

Utilitarian theories

Since ancient times, philosophers have reasoned that property rights perform a necessary function in overcoming human inertia and motivating people to bring their resources into production. This idea is present in the writings of Aristotle, Blackstone, Hobbes and Locke among others.

The link between secure property rights and increasing national product was developed by Jeremy Bentham and other utilitarian writers of the 18th and 19th centuries. Locke had based his argument on man's natural right to appropriate common property by mingling his labour with it. For Bentham, the justification of property was not natural rights but utility. An action has utility if it tends to produce a net gain in human happiness, taking into account both the pleasure and pain it causes. 47 Wealth is an important measure of happiness, for it enables us to satisfy our material wants. Without property rights, there is no guarantee that a sufficient level of production will be sustained to provide for society's material wants. This is best assured, not by commanding production, but by protecting the security of expectation that encourages productive activity. 48

Bentham thought that both security and equality were conditions for human happiness. Laws protecting property rights promoted security, but were more difficult to reconcile with equality. He did not advocate interference with the existing allocation of property, for any unpredictable redistribution would disrupt the security of expectation upon which production depends. 49 The creation of new wealth was for him a higher priority than the equitable sharing of existing wealth. Bentham's resolution of the conflict between security of property and equality was

44 Ibid, 239, 252.
45 Ziff, above n 25, 33-35.
46 Ibid 34.
47 J Bentham, The Principles of Morals and Legislation, above n 17, ch 1 ('Of the Principle of Utility').
49 Ibid 41-43, 57.
to assume that rising prosperity would eventually reduce disparities in wealth. His conclusion was that laws protecting security of property were imperative for reasons of utility.

Another aspect of utilitarian thinking is sometimes invoked as a justification for third-order rules regarding specific allocation of property rights. The notion of utility imports a calculation in which gains and losses are weighed to assess the net effect. This implies that a rule of property law that causes pain to a person or persons may nevertheless promote utility if it gives ‘greater’ satisfaction to others, or to society as a whole. Critics of utilitarianism have challenged the ethical premise of inflicting pain on some people in order to advantage others, and have questioned how the satisfactions of different people can be compared without a common metric.

A second objection to the utility criterion is that the more hardline versions of utilitarianism set no limits on the types of satisfactions that are included in the computation of pleasure, nor to the kind or intensity of harms that may be inflicted in pursuit of the greater good. Some utilitarian theories would allow satisfactions such as greed or self-aggrandizement to enter the equation. Bentham saw no need to place restraints on the actions that legislators could take in pursuit of the greater good. Later utilitarians have proposed modifications to remedy this ‘moral monstrousness’, as Posner calls it, such as ruling out actions that violate human rights, or substituting preference ranking for satisfaction as the measure of utility.

Economic efficiency and wealth-maximisation

Problems in measuring and comparing satisfaction have led neo-utilitarians to draw upon economic concepts of efficiency. The simplest measure of efficiency used by economists is the Pareto approach. One outcome is said to be Pareto-superior to another if it makes at least one person better off (in his or her own estimation) and nobody worse off. Where a potential allocation of resources is Pareto-superior to the present allocation, there is scope for a mutually beneficial exchange to occur. A given allocation is said to be efficient if it is impossible to move to an alternative allocation without making someone worse off.

Posner observes that the Pareto concept is of limited use in evaluating alternative courses of action, for the condition that no-one be adversely affected is rarely satisfied. To evaluate alternative actions or allocations that will produce gains for some and losses for others, economists use the concept of wealth maximisation, or the Kaldor-Hicks criterion. A change that brings gain to group A and loss to Group B is said to be a potential Pareto improvement if Group A’s gain is large enough to enable it, in theory, to compensate Group B for its loss and still retain some of the gain for itself. If Group A actually compensates Group B, the change is an actual Pareto improvement, for Group A is made better off and Group B is no worse off.

50 Ibid 58.
51 Ibid 53.
54 Ziff, above n 25, 18.
56 Ziff, above n 25, at 18, 20.
57 Posner, The Economics of Justice above n 53, 54.
58 Ibid 54-55.
60 Posner, The Economics of Justice above n 53, 55.
worse off. Property rights are allocated efficiently when no re-allocation will produce a further gain in aggregate wealth. Wealth-maximisation is the concept of efficiency most often used by scholars of law and economics to evaluate legal rules.

The wealth-maximising or Kaldor-Hicks measure of efficiency is a refinement of the cost-benefit analysis proposed by the utilitarians, and is open to similar ethical objection. The maximisation of aggregate wealth is an insufficient justification for moving to a rule or allocation that causes loss to somebody, unless the gainers actually compensate the losers. The notion of a 'potential' Pareto improvement incorporates a fiction that blurs the ethical difference between compensating the losers and leaving them to bear the loss without compensation.

Posner's proposed resolution of this normative problem is that the implied consent of the losers be substituted for their actual consent. According to Posner, consent to a wealth-maximising social institution (eg, a rule) that produces uncompensated losses can be implied if we can give an affirmative answer to the hypothetical question 'whether, if transaction costs were zero, the affected parties would have agreed to the institution'. Miceli says that this idea of implied consent underlies much economic evaluation of legal rules. Economists assume that one of the functions of law is to second-guess the rules that affected parties would have agreed to if they could have negotiated ex ante with perfect foresight, but without knowing how they as individuals would fare under the rule. John Rawls has proposed a contract-based approach to the choice of rules and social institutions that involves a similar device of simulated negotiation among the affected persons.

Ackerman suggests that the best use of the concept of efficiency in law is to remind us that, unless a proposed rule or action is Pareto-superior to all the alternatives, some compelling normative argument is needed to justify making somebody worse off. The assumption that an action is sufficiently justified if it maximises aggregate wealth has been called the 'smuggled normative' implicit in some economic analyses of law. Hirsch counsels that economic theory offers important insights when used as a first step in legal analysis, but can lead to erroneous judgments if treated as the touchstone of policy. Even Posner, who claimed that wealth maximisation was a more ethically satisfying criterion than utility, acknowledged that efficiency should not be the sole consideration in decision-making.

While acknowledging its normative limitations, it is possible to use the wealth-maximising concept of efficiency in positive analysis of law without giving it determinative weight in the formulation of policy. Carol Rose points out that it offers a powerful explanatory framework for understanding how the institution of property contributes to increased national product. It can also provide a basis for assessing the size and distribution of losses and gains that may be expected to flow from a proposed change in the legal rules. At the very least, it may assist us to

62 Ibid, 5-6.
63 Miceli, above n 23, 10.
65 Miceli, above n 23, 6-7.
66 John Rawls, A Theory of Justice (Clarendon Press, Oxford, 1972), discussed in Ch 5, below. Rawls' model is more elaborate, as it adds conditions for the simulated agreement.

67 Ackerman, above n 52, xiii.
72 Ackerman, above n 52, xiv.
judge whether the objects of the change are aligned with its expected economic effects.\textsuperscript{73}

Economic theory, as expounded by Posner, holds that resources will tend to be used efficiently and to maximise wealth if property rights are universal, exclusive and transferable.\textsuperscript{74} Universality means that, in principle, all resources in scarce supply should be owned, that diverse forms of ownership should be allowed, and that ownership should be widely distributed. For economists, exclusivity is the defining feature of a property right, distinguishing private ownership from 'the commons'. The right to exclude others gives owners security of expectation that the fruits of their labour will not be appropriated by others.\textsuperscript{75}

Transferability (or alienability) is essential for ensuring that land assets are able to find their way into the hands of those who will best use them to increase production. To unlock the economic potential inherent in land requires investment, labour, skill and initiative. The existing distribution of land may not place resources in the hands of those who possess the means to use them most productively.

Suppose, for example, that O uses Blackacre as a lavender farm, which yields her a net annual income of $5000. P thinks Blackacre would be a suitable location on which to build a restaurant, which would generate an income for him of $20,000 per year. P's highest demand price is based on capitalisation of the net income stream generated by his proposed use of Blackacre, discounted by a risk premium for contingencies that might reduce the expected earnings.\textsuperscript{76} As O's present value is based on her earnings stream which is lower than P's projections, there is a possibility for mutually beneficial exchange to occur. If we assume that O values the land at $100,000, P values it at $300,000 and transaction costs are zero, the sale of the land to P produces a 'co-operative surplus' of $200,000. This represents the increase in the aggregate wealth of the parties resulting from the land moving from a lower-valued use to a higher-valued use.\textsuperscript{77} The co-operative surplus will be distributed between the parties in accordance with the bargain struck between them.

If a restaurant is the most valuable use to which Blackacre can be put at the time, the new allocation is efficient according to the Kaldor-Hicks criterion. Frank Michelman has exposed the tautology in this notion of efficiency.\textsuperscript{78} The theory assumes that a resource is allocated efficiently when it passes to the person who values it most. Value is measured by P's highest demand price, if he acquires the resource, or O's lowest sale price, if it remains with her. Posner assumes that the parties' respective values will be based on the projected earnings stream associated with their actual or proposed use of the land. In reality, subjective or non-monetary satisfactions may affect the parties' determination of value. If O cherishes her lifestyle as a lavender farmer so highly that the lowest price at which she is willing to sell exceeds P's highest demand price, she will spurn his offer. Blackacre will continue to generate only $5,000 per year, yet this allocation is now deemed efficient because O's is the higher valued use. Tom Bethell finds that the concept of efficiency is biased in favour of the existing distribution of property, and that whatever parties do with their property can be called efficient.\textsuperscript{79}

\textbf{Coase and the theory of transaction costs}

The germ of the wealth-maximisation theory was present as early as 1817 in the writings of David Ricardo, who noted that security of property promoted exchange that would direct property 'into the hands of those who will employ it in increasing

\begin{itemize}
\item \textsuperscript{73} Ibid.
\item \textsuperscript{74} Posner, \textit{Economic Analysis of Law}, above n 61, 36ff.
\item \textsuperscript{75} The economists' demands for exclusivity and universality are strongly challenged by communitarians, who argue that private ownership of resources is not necessarily more wealth-enhancing than communal property: Rose, above n 71, 3.
\item \textsuperscript{76} Posner, \textit{Economic Analysis of Law}, above n 61, 36-39. Economists assume that the price that a buyer is willing to pay for land approximates 'the capitalized value of the stream of incomes (or residential services) which it provides': Cerveron Feder and Akihito Nishio, 'The benefits of land registration and titling: economic and social perspectives' (1999) 15 \textit{Land Use Policy} 25: 27.
\item \textsuperscript{77} Cooter & Ulen, above n 59, 72-74.
\item \textsuperscript{78} Frank Michelman, 'A Comment on Some Abuses of Economics and Law' (1979) 46 \textit{University of Chicago Law Review} 307, 310.
\item \textsuperscript{79} Bethell, above n 15, 319-20.
\end{itemize}
the productions of the country."\(^8\) The modern elaboration of the theory owes much to the writings of Nobel laureate, Ronald Coase. In 1960, Coase published his much-cited article "The Problem of Social Cost".\(^8\) This article, which demonstrated the use of economic theory in the analysis of law, was the foundation piece for the law and economics movements which emerged in the 1960s and 1970s.

Coase's principal contribution to the economic analysis of property rights, his theory of transaction costs, was actually incidental to his purpose. His article proposed a method for resolving disputes caused by social costs or "externalities"\(^2\), such as the emission by a factory of smoke that has harmful effects on neighbours. Coase sought to refute the views of other economists such as Pigou, that the government should control the externality by making the polluter pay for the harm to the neighbours through a rule of civil liability, or the imposition of a tax on pollution. The ideas and methods of analysis in his article are not confined to the problem of externalities, but can be applied more generally to the question of how to bring about an efficient allocation of rights, including property rights.

Coase set out to show that private bargaining is usually a more efficient method of allocating rights than government regulation. If the law allocates rights to person A, and person B values them more highly than A, B will buy out A's rights if the market operates as it should. If they can do so without cost, the parties will bargain with each other and arrive at a Pareto-superior allocation of rights through private agreement. Coase's startling conclusion was that the ultimate allocation after successful bargaining will be efficient regardless of how the rights are assigned at the outset, provided that transaction costs are zero. This conclusion, known as the Coase theorem, is now one of the basic principles of economics.\(^3\)

Coase does not suggest that legal rules that allocate rights are immaterial. Even in the scenario of zero transaction costs, legal entitlements set the baseline for the re-arrangement of rights to occur through exchange. The parties need to know who owns which rights before they can start bargaining for a superior outcome. The initial allocation of rights may also affect the way in which the co-operative surplus is split between the parties, by influencing the prices that are paid for the rights.\(^4\)

The way that the law assigns the rights at the outset is more important in cases of bargaining failure. If there are obstacles to successful bargaining, the initial allocation of rights will prevail by default. It should therefore be as close as possible to what the parties would have negotiated if bargaining were possible.\(^5\)

Obstacles to bargaining may arise where there is only one buyer or only one seller in the market, and that party engages in strategic behaviour to capture the whole of the potential co-operative surplus for himself or herself.

Bargaining can also be obstructed by positive transaction costs - the costs of investigating and appraising rights or resources ("information costs"), bargaining to acquire them ("bargaining costs") and enforcing the bargain ("enforcement costs").\(^6\)

If the transaction costs are high enough to absorb the whole of the potential co-operative surplus, there will be no scope for mutually beneficial exchange to

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\(^{2}\) Externalities are costs that are ignored in the user's decision-making process, because they are borne involuntarily by somebody external to the transaction.

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\(^{8\text{3}}\) Merrill & Smith, 'What Happened to Property in Law and Economics?', above n 2, note 45.

\(^{8\text{4}}\) Cooter & Ulen, above n 59, 105.

\(^{8\text{5}}\) Ziff, above n 25, 92. At least one school of post-Coasean economics, the so-called 'tort perspective', is dedicated to finding the wealth-maximising rule or allocation that the parties would have agreed upon, if they could negotiate without cost: Merrill & Smith, 'What Happened to Property in Law and Economics?', above n 2, 375, 378.

\(^{8\text{6}}\) Coase explains the concept of transaction costs in *The Problem of Social Cost* above n 81, 15.
occur. In such a case, the market will not operate to shift the right or resource to a more highly valued use. The foregone transaction represents a 'dead weight' loss in aggregate wealth.

The Coase theorem is based on the express assumption that the parties can bargain without incurring cost. In the latter part of his article, Coase acknowledged that in market transactions, transaction costs are positive and often exceed the potential gains from re-arranging legal rights. His analysis showed how transaction costs limit the transferability of rights. He also demonstrated that rules of law, through their effect on transaction costs, affect the ability of the market to achieve a wealth-maximising allocation of rights.

From this positive analysis Coase derived normative implications for the role of law. The law ought to facilitate private bargaining and the transferability of rights by reducing transaction costs. Cooter and Ulen call this the Normative Coase Theorem. Coase insisted that the initial allocation of rights through legal rules should be clear, and the rights well-defined. Transferability of rights depends on rules and procedures that make it clear precisely who owns which right. Poorly defined and insecure property rights will carry higher transaction costs on transfer. This may prevent them finding their way to new owners who would use them more productively.

A further normative implication is spelled out from Coase's conclusion that, in the real world of positive transaction costs, there is no guarantee that the market will operate to shift resources to their most valuable uses. Law and economics scholars generally agree that the law should allocate rights as efficiently as possible, replicating the outcome that the parties themselves would arrive at if the market worked as it should. As Miceli puts it, 'this means that the assignment of the rights should be chosen to reflect who would have paid the most for them if bargaining were possible.' Coase proposed that even where bargaining is possible, the courts should make decisions that allocate resources efficiently, in order to reduce the need for further transactions.

The normative Coase Theorem functions as a third-order theory of property in ZTs's scheme, providing a criterion for the specific allocation of property rights. Bethell notes the paradox, that a theory that was intended to challenge the argument for government regulation of externalities finishes by putting a case for active government intervention in the assignment of property rights.

The normative proposition that legal rules should be designed for allocative efficiency provides the evaluative criterion for much economic analysis of law. Posner took this a step further, arguing that many existing common law rules are actually efficient. In his book *The Economic Analysis of Law*, he posits that judges, even if untutored in economic principles, tend to arrive at efficient solutions to legal problems. He suggests that the common law judges display an intuitive sense of efficiency, which they are more likely to express in terms of doing justice. Posner's claim is not that every common law rule is efficient, but that the common law as a system is best understood as a wealth-maximising institution.

Posner's efficiency theory of the common law is inherently conservative. The enterprise of finding a latent economic rationale for existing doctrines tends to privilege them from criticism. Frank Michelman charges that there is something

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90 Ibid 19.
91 Cooter & Ulen, above n 59, 101-02.
94 Miceli, above n 23, 10.
96 Bethell, above n 15, 320.
97 Above n 67.
98 Ibid 27.
untestable, counter-intuitive and empirically doubtful about the theory. Since unmeasurable, non-monetary satisfaction affects what people are willing to pay for a good, the claim can easily be made ex post facto that a judicial ruling awarded the good to the party who valued it most. Posner’s efficiency criterion has an ambulatory character that offers no firm basis for assessing whether a legal rule is efficient.

Indirectly, Coase clarified the relationship between security of title (or security of property rights) and transferability. A property right in land is insecure if its ownership is actually or potentially disputed or difficult to prove, if its scope or incidents are poorly defined, or if its enforcement against third parties is limited by conflict with another person’s superior right. These insecurities increase the information burden on purchasers, who must undertake costly investigations in order to appraise the right. It had long been understood that the insecurity of property rights in the hands of their current owner imposes costs on purchasers and reduces the market value of the rights. Coase introduced the concept of transaction costs into economic analysis, and showed how the costs impede the ability of markets to direct resources into wealth-maximising uses.

It follows that insecurity of title and its effect upon transaction costs are problems not just for the current owner and purchaser, but for society as a whole. If we want to make the ‘pie’ of aggregate wealth bigger, we need to make the rights of individual property owners secure. Security of property facilitates wealth-maximising exchange by reducing transaction costs. The insecurity of property rights that impedes transfer can be thought of as an item of transaction cost.

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100 Posner, The Economics of Justice above n 53, 60.

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Risk and transaction costs

The inclusion of risks in transaction costs is associated with one of the schools of post-Coasean economics, the so-called ‘new institutional economics’. The school examines the ways in which the institutions of a country, including its legal and political system, technology and culture, affect the costs of exchange and the efficiency of resource allocation. It also studies the role of transaction costs (including risk-bearing) in shaping and transforming institutions by influencing the choices and actions of economic actors. Scholars from this school have sought to elucidate the role of property institutions in promoting the efficient allocation of resources.

The idea of risk-bearing as a transaction cost was developed by a member of this school, Otomunde Johnson. Coase had said that a prerequisite for the efficient allocation of rights through exchange was that the rights must be well-defined and carry predictable legal consequences. Applying this to property rights, Johnson said that the rights must be clearly established and allocated to specific persons, be easy to ascertain and authenticate, and have ‘both legal and tenure certainty’. He defined ‘legal certainty’ to mean ‘that the rights will be protected against the lawful acts of others and that the results of legal actions are [sic] easy to forecast’. Tenure security is undefined, but appears to mean security from eviction. This type of
security does not necessarily depend upon any form of documentary title, but may be assured by occupation alone.

Johnson showed how insecure property rights inhibit exchange by reducing the marginal value of the rights in the estimation of a potential purchaser. This price-lowering results from two factors: the purchaser’s expenditure on title investigations, and the ‘risk premium’ for the uncertainty that remains after the investigations. A potential purchaser, P, will undertake inquiries to ensure that the owner, O, is able to pass a good title and that no rival rights exist. P wishes to avoid being punished for using land that turns out to belong to somebody else. P also wishes to avoid the disappointment of finding that the rights that he has acquired rights from O cannot be enforced against everybody else.

The cost of P’s investigations reduces his demand price for the property right. This may be explained by saying that the cost of P’s investigations reduces the co-operative surplus - the difference between O’s lowest sale price and P’s highest demand price. Assuming that O values the property right at $5000 and P values it at $6000, the potential co-operative surplus is $1000, representing the increment in the aggregate wealth of the parties when the property moves to a more valuable use. If we assume that P’s investigations, together with other transaction costs, amount to $750, his demand price will fall by the same amount, to $5250.

In a world of imperfect information, P’s investigations are unlikely to assure him that no defect in O’s title exists, and that nobody will ever step forward with a prior claim. It is notoriously hard to prove the non-existence of a fact. Even if definitive proof were possible, P will not want to expend the resources required to attain it. Title investigations are subject to the economic logic of diminishing marginal returns. In theory, an optimal title search ends when the marginal benefits of added certainty exceed the marginal cost of further inquiry. Baker et al have shown that even with the benefit of a deeds registry, an optimal title search will not establish ownership with certainty.

In the absence of a risk-taker such as a private title insurer or a State guarantee of registered title, P is left with a residual uncertainty after optimal search. The uncertainty relates to the possible existence of an undiscovered title defect or rival property right. If these risks materialise, they will reduce, perhaps to zero, the stream of earnings that P expects to generate from the property. P will adjust his demand price by applying a risk premium to discount the expected flow of income. The discount rate will depend upon the dimensions of the risk. In the example above, transaction costs have already reduced the co-operative surplus to $250. If the risk premium reduces P’s demand price by $250 or more, P’s marginal valuation of the land will fall below O’s. No room will remain for a mutually beneficial exchange between P and O.

Johnson spells out two further implications. First, the more uncertain are property rights, the fewer investments will be undertaken. Secondly, uncertainty of property rights biases investment decisions towards the short-term. The greater the uncertainty, the higher the discount rate, and the higher the present value of short-term investments relative to long-term ones.

Johnson’s theory establishes that risk-bearing has the same effect as transaction costs in impeding an efficient allocation of resources. We can therefore include it as an item of transaction costs. Johnson also reveals the correlation between uncertainty of property rights on the one hand, and the purchaser’s search costs and discount rate for risk on the other. This accounts for why the demand price of a

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112 See Cooter & Ulen, above n 59, 72-74. Johnson did not use the concept of co-operative surplus in his article.

113 Johnson, above n 88, 261.


115 Baker et al, ibid, 139, 158.

116 Johnson, above n 88, 262-63.

117 Ibid.

118 Ibid 262.
potential buyer is lower, the more uncertain the property right offered for sale. Finally, he demonstrates why uncertain property rights inhibit investment, particularly long-term investment, in the productive use of land resources.

F. CONCLUSION

The establishment of land registration systems by the State requires a rationale. What public interest is served by registration programs to improve the security and transferability of private property? Several theories of property have been examined, to see if they can be used to explain and justify the interventions by government in the property system. Individualist theories call upon the state to respect property rights and to forbear from interfering with them, but give no rationale for active government measures. The main use of the theories in the law of registration is to provide evaluative criteria for determining third-order rules for the specific allocation of property.

Economists and utilitarians share a dynamic conception of property. The principal justification for property rights is not the satisfaction they give to their present owners, but their function in generating new wealth for society overall. Bentham and the utilitarians emphasised the incentive effects of property - the idea that legal protection for property rights provides the security of expectation that owners require before they will put their resources to productive use. Economic theory added that the resources themselves must be allowed to circulate through the market, so that they will fall into the hands of those who are best able to utilise their economic potential as factors of production. Coase showed that, in the presence of transaction costs, there is no guarantee that the market will allocate property rights to their best economic use. The theory can be used to justify robust measures intended to improve security of property and to reduce transaction costs. It can also be used in the law of land registration to determine third-order rules of specific allocation, based on wealth-maximising solutions.

2 SECURE PROPERTY RIGHTS AND ECONOMIC DEVELOPMENT

The previous chapter reviewed a variety of theories about the social and economic benefits of secure rights to private property. Private property had a bad press for much of the twentieth century. Marxist writers criticised it as an institution that entrenched inequalities of resources and power. With the failure of socialism in the late 20th century, liberal theories of private property are now resurgent.1 Many programs of development assistance throughout the world are now premised on the idea that secure property rights are an essential foundation for economic development in a market economy.

The new institutional economics has directed attention to the role of legal rules in creating the institutional framework for economic development. Insecure property rights, and particularly the insecure land tenures of the poor, have been hailed as a major cause of the poor economic performance of many developing and post-socialist countries. We now hear that the poor are the major beneficiaries of laws that make property rights secure. Development agencies have rediscovered the links between private property, prosperity and freedom asserted by liberal theories of property. ‘Titling’ programs to upgrade the insecure land titles of the poor in developing countries are increasingly linked to initiatives to strengthen civil institutions, democracy and the rule of law.

This chapter reviews the theories of economic development that have prompted an enormous investment in land titling projects by aid and development agencies and national governments throughout the developing world. The latter part of the chapter evaluates the findings of empirical studies on the results of titling programs, and the lessons for development experts regarding the complex relationship between secure land titles and economic development. These studies and findings

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represent the best available evidence as to the economic and social benefits of land titling programs.

A. WHAT SECURITY OF PROPERTY MEANS

Formal Title and Legal Security

A property right is legally secure to the extent that we are assured of being able to obtain legal enforcement of our rights and privileges of ownership. Legal enforceability means that we are able to exercise the rights of use, alienation and control that are the normal incidents of the particular property right, and that we can count on the legal system to protect us against unlawful actions by others that infringe our rights.

Ownership of any legally enforceable property right is a ‘title’. Although we also use the word ‘title’ to refer to the evidence that proves the right, documentary proof of title is not in all cases a prerequisite for legal security. Some types of property rights in land may be created without any written evidence or formalities at all. Even a mere squatter has a possessory title that the law will enforce against any person who cannot show a better right. For example, if B goes into occupation of A’s land without A’s permission, no-one but A (or a person deriving title from or through A) can evict B. If C, a stranger to A, comes along and evicts B, B can get a court order to recover possession of the land. C will not be permitted to defend the suit by arguing that A is the true owner. As between B and C, B has the better right as the prior occupier. B’s title is legally enforceable against C even though it is held informally.

The law prescribes certain formalities for the express creation or transfer of an interest in land. For example, there may be a requirement for a written disposition (instrument of transfer); the use of a prescribed form; execution by the parties; attestation of the parties’ signatures by witnesses; delivery of the instrument to the transferee; stamping of the document and registration in a public register. Failure to comply with a formality usually carries a prescribed sanction. In some cases a breach will invalidate the transfer, denying it any legal effect. Alternatively, the law might provide that the disposition is valid but that the interest it conveys is unenforceable against certain parties. For example, if A fails to register his disposition before B registers a disposition giving her a competing interest in Blackacre, the law might provide that A’s interest is unenforceable against B.

Formalities are usually required by law for good reason. They commonly serve one or more of the following purposes:

1. providing evidence of the transaction in order to resolve or prevent disputes;
2. protecting third parties by giving publicity to the existence of the property right;
3. ensuring that the parties act deliberately and advisedly, by making them realise that their actions will have legal effect;
4. clarifying and defining the specific type of interest that is being transferred;
5. minimising the opportunities for fraud, duress and undue influence, and
6. facilitating the collection of property data or revenue by the state.

A major disadvantage of formalities is that the sanctions for non-compliance may tempt a party to behave opportunistically towards another, by taking advantage of the breach or even engineering it.

In common law systems, courts of equitable jurisdiction have a long history of giving proprietary effect to informal transactions. Equity acts where the conscience of a party is affected. One of its maxims is that it will not allow a statute to be used as an instrument of fraud. It will impose a constructive trust on a party who takes or keeps property while unconscientiously reneging on his or her obligations of conscience. That party is then deemed to hold the title as trustee for the other party, the beneficial or ‘true’ owner in the eyes of equity. The legal failure of informal transactions is the genesis of many ‘equitable interests’ - property rights recognised only in equity.


Ibid 526-27.
Security of Title and Security of Tenure

Land administrators and economists commonly distinguish between 'security of title' and 'security of tenure', when referring to the rights of persons in occupation of land. Security of title exists if the landholder's right to possession is protected by law (including equity). It is synonymous with legal security. Occupiers enjoy security of tenure if they believe themselves to be safe in their holding of the land for a given period, whether that security derives from the protection of law or from an extra-legal source. Security of title is a matter of law, while security of tenure is a matter of subjectively perceived 'fact'. Tenure security can exist in the absence of legal title. The possession of legal title does not necessarily improve security of tenure, if property rights are not clearly defined and protected by law.

Palmer's composite security model

Security of property rights is not solely a matter of legal protection and enforcement. David Palmer has proposed a model of security as a composite quality deriving from four sources, which he calls 'community', 'polity', 'legal' and 'coercive organisation'.

(i) Community

A community can provide security where neighbours recognise and enforce each other's claims to land. Communal protection of rights is an important source of security of tenure where whole neighbourhoods hold their land outside the formal legal system. For example, mining communities enforced communal norms regarding the allocation of mining rights during the Californian gold rush, before US federal law established a system for administering mining claims. Robert Ellickson has also shown how communities devise informal norms for ordering property in the absence of formal regimes. In poor countries, and in some poor neighbourhoods within rich countries, community solidarity provides an important source of security of tenure for people living in informal settlements.

(ii) Polity

The polity or state may provide security against forcible eviction or expropriation of property rights. Where people occupy land in illegal settlements on public land, their security of tenure depends upon the forbearance of government. In poor countries, governments commonly tolerate illegal settlements, particularly once they achieve a certain size or longevity. When the government acts to provide some utilities or services to squatter townships, residents have some security that it does not intend to evict them.

(iii) Legal

Legal security exists where landholders' rights are legally recognised and enforceable. Some of the land administration literature seems to assume that informal land titles are not legally enforceable, but this does not necessarily follow. As explained above, many legal systems protect occupiers against eviction by anyone who cannot show a better title. In common law systems, interests acquired

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4 S R Simpson, Land Law and Registration (Cambridge University Press, Cambridge, 1976), 8-9; Tim Hanstad, 'Designing Land Registration Systems for Developing Countries' (1998) 13 American University International Law Review 647, 653, 659. This use of the term 'security of tenure' is different from its legal meaning. To a lawyer, 'security of tenure' refers to the provision of additional legal rights to a tenant as added protection against the landlord's power to evict: Peter E Nygh and Peter Butt (eds), Butterworth's Australian Property Law Dictionary (Butterworths, Sydney, 1997), 226.

5 Hanstad, ibid 659, fn 36.


without the required legal formalities may be enforceable in equity, at least against certain persons.  

(iv) Coercive organisations

Fourthly, coercive organisations such as political dissident groups or criminal gangs may take on the role of enforcing property rights in communities beyond the reach of effective state control. This occurs more often in poor countries with weak government, but is not unknown in developed countries like the US, where criminal gangs have at times been able to prevent the civil authorities from policing local neighbourhoods and evicting squatters.

Palmer’s ‘composite security’ model allows us to analyse the security of property rights by reference to the four sources. Suppose, for example, that a landlord exercises his power to raise the rents on all leases in an apartment block. The tenants collectively organise a rent strike in protest. One tenant is evicted, and the landlord re-lets to a new tenant at the higher rental. The old tenants agree to use force if necessary to prevent the new tenant moving in. The new tenant enjoys high legal and polity security in Palmer’s terms, but low community security. Taking another example, if the tenants join together to prevent the landlord from evicting a tenant pursuant to an eviction order from a court, we would say that the tenant has low legal and polity security but high community security. The tenant may also enjoy high ‘coercive organization’ security if the tenants are able to call in aid a local criminal gang capable of out-facing the bailiff.

Landholders’ rights are most secure when the legal and extra-legal sources operate in tandem. In developed countries where property rights are well-defined and protected by law and there is a strong rule of law, a person who enjoys legal security is likely to enjoy polity and community security also. If the government is also in effective control, there is no role for coercive networks in providing or denying security. Where these conditions exist, security of tenure is practically co-extensive with legal security.

B. THE PROBLEM OF INSECURE TENURE

Palmer’s analytic model describes a world in which many people lack security of title and are compelled to rely upon extra-legal guarantees of security of tenure. Peruvian economist Hernando De Soto maintains that in many developing countries and post-communist countries throughout the world, informal land-holding is the norm. His Institute for Liberty and Democracy, an economic think-tank supported by the US Agency for International Development (USAID), found that in Peru, 53% of city-dwellers and 81% of people living in rural areas occupied their dwellings without a documented legal title. Projecting data collected by the Institute from five countries, De Soto estimates that in the developing and post-communist countries of the world, as much as 85% of urban land parcels, and between 40% and 53% of all rural land parcels, are held by people lacking formal legal title.

How informal tenures arise

Informal landholding can arise in a variety of ways. It may stem from invasion of public land, breach of land use controls (eg illegal subdivision), from long-established occupation which confers a right of ownership that has yet to be brought within the formal title system, or from customary, aboriginal or traditional land...
tenure. For example, in Mexico, much urban settlement has taken place on communal (ejidal) land acquired from communities who lacked the legal right to sell it. Informality can also occur where a title that was originally formal has been sold to successive owners without observing the formalities required by law to effect a transfer.

The high incidence of informal landholding, De Soto suggests, is due to the excessive costs and delays of completing the formalities required to obtain formal tenure. In Lima, for example, the process of obtaining a legal title to illegally occupied state land could take 15 years, cost $US2000 and involve hundreds of steps required by 14 different government agencies. Significant costs and delays in obtaining legal title are recorded in many other developing countries. Even if land parcels are registered and titles issued, subsequent transactions may be completed without legal formalities if the costs of compliance are too high, or if administrative bottlenecks result in long delays. If the costs of obtaining formal title exceed the benefits, people may choose not to formalise their transactions, relying instead upon extra-legal sources of tenure security.

Informal tenures and the poverty trap

De Soto argues that insecure property rights trap people in poverty because they result in under-capitalisation. Without legally secure, formal title, poor people cannot obtain credit upon favourable terms to improve their housing or to invest in businesses or new technology. The problem of underdevelopment, as De Soto sees it, is not that people in Third World countries lack assets, but that their assets are largely held in deficient forms which renders them ‘dead capital’.

Even in the poorest nations, the poor save. The value of savings among the poor is, in fact, immense—forty times all the foreign aid received through the world since 1945... But they hold these resources in defective forms... Because the right to these possessions are not adequately documented, these assets cannot readily be turned into capital, cannot be traded outside the narrow local circles where people know and trust each other, cannot be used as collateral for a loan and cannot be used as a share against an investment.

Insecure titles squander the vast economic potential of land. In its World Development Report for 1989, the World Bank estimated that ‘in most countries, real estate accounts for between half and three-quarters of national wealth’.

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In the UK, for example, real estate has been estimated to make up 57% of the nation’s wealth in 1997. In the same year, the value of real estate in Bangkok alone accounted for at least 45% of Thailand’s GDP. Because of its potential use in generating capital, land is an important source of new wealth. Land has unique attributes that make it a highly desirable form of collateral for loans: it cannot be moved or concealed, is indestructible and of high value.

In the developed world, secure titles enable people to mobilise their land resources to generate capital for improvements and investment. The Australian aid organisation, AusAid reports that ‘in some developed countries, 70% of properties are mortgaged for productive purposes’.

17 Gilbert, above n 9, 7.
19 Ibid; De Soto, The Mystery of Capital, above n 7, 18-23.
20 Palmier, above n 6, 87.
Constraints on access to credit

Lack of legal documentation of title constrains the ability of landowners to obtain long-term investment capital on favourable terms. Financial institutions will more readily lend on the security of a documented legal title to land, because it reduces their information and enforcement costs. It provides assurance that the borrower is the true owner of the land, and that the lender will be able to take possession of the land and sell it in case of default. Undocumented property rights may give their owners security of tenure, but it is more expensive for lenders to appraise the collateral and to enforce their rights to it.

Secure legal title is commonly demanded as collateral for investment loans from formal credit providers such as commercial banks and government credit programs. Borrowers who lack a documented title to land are likely to be relegated to the informal credit sector (e.g. private moneylenders), where they can expect to pay much higher interest rates.

Loans available through informal lenders are typically limited to smaller amounts and shorter terms, which is not conducive to larger investments with extended payback periods.

As Palmer's composite security model shows, occupiers of land who lack security of title may still enjoy security of tenure, through community solidarity, political influence, and 'coercive networks'. While informal property rights can be transferred, it is difficult for purchasers to assess the security provided by the extra-legal sources. This inhibits the opportunities for a transfer of property rights to strangers from outside the local community. Closed or limited exchange networks for land constrain the ability of landowners to realise their assets, to rent them out or to move in search of work or business opportunities.

Informal landholders whose tenure security is based on occupation risk losing their land if they move. Studies from Ecuador and Venezuela found that untitled landholders were reluctant to let their properties, for fear of difficulties in recovering possession from the tenants. Landlords in Ecuador reported a concern that the tenants would acquire occupation rights against them.

Informal titles may be associated with higher incidence of land disputes. Ownership and boundaries are more likely to be contested in the absence of documentary proof. The UN Economic Commission for Europe warns that land disputes are costly to the affected parties, 'and all too often lead to a breakdown of law and order'. De Soto found that in Lima, 13% of informal titles were in litigation. In Indonesia, land disputes make up 65% of all disputes before the
In Sri Lanka, where a deeds-based system of land registration broke down around 1970, land disputes are rife. The bilateral aid donor agency, AusAid, reported in 2000 that there were 140,000 land disputes before the courts in Sri Lanka, with many disputes dating back for generations. Considerable areas of land were sterilised from sale or productive use because their ownership was in dispute, and many propertied families had been reduced to poverty. Land disputes were associated with serious crimes, including a high proportion of murders.

C. THE REDISCOVERY OF PROPERTY

It is now well-accepted that secure property rights and access to markets alleviate poverty and promote economic growth. Many development assistance programs throughout the world are premised upon this connection. The link between property, markets and economic development was not always so clear to policymakers. The initial model of development economics adopted after World War II emphasised industrialisation as the key to development. It was assumed that poor farmers in rural areas of the developing world operated in a subsistence economy and did not require access to markets. Research in the 1960s and 1970s challenged this assumption. It was found that even so-called 'subsistence' farmers adjust their output in response to price signals from the market.

For decades after World War II, the importance of secure property rights in promoting economic development was given little emphasis by economists. Tom Bethell argues that academics largely ignored the institution of private property for a century, from the time of Marx until the collapse of the Soviet command economy. Marxists dismissed private property as an instrument of oppression, a feature of the capitalist stage of development that was destined to pass into history. From 1917 until 1950, countries representing one third of the world's population rejected the market economy and private property, putting their faith in central planning and state ownership of resources. Until as late as the early 1980s, the apparent economic success of the socialist system seemed to demonstrate that a state could achieve economic development without private property or markets.

In the West also, centralised planning and government regulation were key prescriptions for economic development. Developing countries were advised to establish strong central planning agencies, which received significant transfers of capital from aid donor and lending agencies. Advocates of the planned economy could point to the apparent success of the Marshall Plan for the reconstruction of Europe, and the reputedly impressive results achieved by planning agencies in the Soviet Union and China. The idea that government should take control of the economy was also supported by the new field of welfare economics, which highlighted the costs of market failure.

Disillusionment with planning set in during the 1980s when it was discovered that the socialist economies had stalled, and that the Soviet Union had for many years been issuing misleading statistics that exaggerated its economic results. It was also recognised that the capital transfers to public agencies in the Third World had done little to promote development, and that many state enterprises were highly inefficient. Disappointing results in countries that had followed the prescriptions

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40 The Bar Association reportedly attributes 75% of murders to land disputes: ibid
42 Ibid 4.
of development economists contrasted starkly with the success of the trade-oriented development model pioneered by Japan and followed by Hong Kong, Taiwan, Singapore and the Republic of Korea. The value of this model was confirmed by the way these 'Dragon' economies rebounded from the 1982 debt shock.

The neo-classical resurgence

In the early 1980s, a different set of prescriptions for economic development emerged, promoted by politically conservative leaders like US President Ronald Reagan and Britain's Margaret Thatcher. John Williamson called it 'the Washington consensus', because the new model was embraced by the Washington-based development agencies such as the IMF, the World Bank and USAID. Following the failure of Latin American structuralism, the model gained wide international acceptance across the political spectrum. It demands rigorous macroeconomic structural adjustments, including fiscal discipline, abolition of price controls, keeping exchange rates competitive, partial liberalisation of financial markets, broadening the tax base and reducing marginal tax rates, removing barriers to the entry of foreign businesses, privatisation of state enterprises, removal of unnecessary regulatory controls on business, and the safeguarding of property rights.

The recrudescence of neo-classical economics called into question the premises of development economics. There was a shift in the focus of development strategies, from planners and policy-makers to market actors. Under the new approach, the key to economic growth and the alleviation of poverty was to encourage people, particularly the poor, to participate in markets. It was necessary to provide a model for bringing this about in the Third World and in the former socialist countries which, after 1989, were in transition from command economies to market economies. The problem was that, while economists understood how markets worked in the developed world, they had enjoyed little success in their attempts to promote the development of market economies elsewhere.

De Soto's 'popular capitalism'

A model for this was advanced by Hernando De Soto, who synthesised and popularised ideas that scholars of law and development had been formulating since the mid 1960s. In his first book, The Other Path: The Invisible Revolution in the Third World, first published in Spanish in 1986 and in English in 1989, he argued that the poor slum-dwellers of Lima, Peru and other developing countries were trapped in poverty because they were unable to use their assets to create new wealth. In order to liberate the economic potential of their assets, governments needed to reduce costs and delays to facilitate their entry into the formal sector. This required governments to bring the country's laws and procedures into alignment with the values, customs and other informal practices by which people regulate their dealings in the informal sector.

De Soto's message was enthusiastically received by the Washington development community and by the Fujimori government in his native Peru. His prescriptions seemed to offer a concrete program for action that suited the neo-classical economic world view. With a US$37 million loan from the World Bank in 1997, Peru launched its Urban Property Rights Program which, by August 2000, was reported...
to have assisted some seven million Peruvians to upgrade from insecure to secure land titles.\footnote{Gilbert, above n 9, 5.}

In his second book, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*,\footnote{Above n 7.} De Soto elaborated upon his thesis. He commenced by pondering why Western capitalism had proved so difficult to replicate in the developing world. He concluded that economists had overlooked the importance of security of property as the key to economic development. The West had failed to impart this message to the developing world, for it had ‘never preserved a blueprint of its own evolution’.\footnote{Bethell, above n 43, 200, (quoting De Soto in a personal interview with the author).} Western economists had taken for granted the institutional settings that they found in their own environment.\footnote{See also, ibid 98.} They had neglected to specify the legal and political framework that should be in place for their economic prescriptions to work.\footnote{Ibid, 27, 98, 324; R H Coase, 'The Institutional Structure of Production' (1992) 82 American Economic Review 713, 717.}

How Western property laws promote capital formation

Pursuing his idea that the West invented capitalism without knowing how, De Soto maintained that Westerners have little awareness of the dynamic role of property rights in generating new wealth. He suggested that the reason for this inadvertence is that the laws that define and enforce property rights were originally introduced for another, more static purpose - to protect the rights of existing owners.\footnote{De Soto, *The Mystery of Capital*, above n 7, 44.} He identified six ways in which the property law systems of the West facilitate the generation of capital through market exchange of property rights.

1. A title to an interest in land fixes the economic use rights to which the holder is entitled. This enables the holder to convert the title more readily into capital.


3. The possibility that the law will deny enforcement of property rights promotes responsible behaviour by parties to property transactions. In common law systems, equity uses this sanction to uphold standards of conscientious behaviour, eg, by preventing a landowner enforcing his or her property rights against a third party where the landowner has misled the party into believing that the rights did not exist or would be waived.

4. By converting the physical reality of land into representations of particular economic use rights, property law makes land assets more flexible. It allows people to purchase particular incidents or combine them in various ways. It also enables them to compare the value of similar use rights in different parcels of land.\footnote{Bethell, above n 43, 22.}

5. A secure legal title to land allows landholders to transact with strangers. It gives them access to larger markets and a broader class of buyers.

6. The registry systems of the West facilitate transactions by providing records of ownership that reduce purchasers’ information costs, that is, the costs of finding out about the rights and who owns them.

De Soto proposes that in order to transform into a market economy, developing countries need to follow the examples of the West by formalising property rights, establishing boundaries and documenting land titles, and integrating informal norms
into a single system of property law. He claims that this is necessary to transform the ‘dead capital’ of the Third World into economically productive ‘live capital’.

While De Soto’s ideas have had an enormous influence on the international development agencies, his analysis and reform agenda have been criticised as simplistic, conservative and overly prescriptive. Solomon Greene argues that De Soto overemphasises the lack of formal property regimes in explaining the persistence of poverty in the Third World. This lets world leaders ‘off the hook’ by ignoring her causes of underdevelopment. According to Greene, De Soto places the onus on leaders of the developing countries to establish property law systems that are functionally similar to those of the West. He fails to consider what the countries may lose by replacing customary and informal norms and tenures with formal ones.

Influence of the new institutional economics

De Soto directed the attention of policy makers to the role of property law as an institution that supports the development of markets. Until the early 1990s, many economists had regarded laws as mere ‘superstructure’, or institutions shaped in response to underlying economic forces. The idea that legal rules and other institutions could affect economic performance had received much less attention, although it had not been entirely ignored. Coase had shown that, in the real world of positive transaction costs, the rules of law that allocated rights and duties had a profound and even a controlling effect on the operation of the economy.

In 1973, economic historians Douglass North and Robert Thomas, had linked the rise of Western affluence to the development of market-supporting institutions, such as those that allowed businesses to achieve economies of scale (eg, the joint stock company), encouraged inventors to share their innovation (eg, the patent laws), or reduced market uncertainty through better management of risks (eg, insurance).

In the early 1990s, some economists were saying that standard economic theory had overlooked the importance of institutional arrangements in the process of exchange. Speaking in 1993 on the occasion of receiving the Nobel Prize in Economics, Douglass North said that economists had ‘ignored the incentive structure embodied in institutions’, which are the key determinants of economic performance.

Standard economic models assumed zero transaction costs, but in the real world of positive transaction costs, institutions affect economic performance. Ronald Coase said in 1992 that economists had operated at an abstract theoretical level, largely ignoring the institutional factors that actually govern the process of exchange. It made little sense to study the operation of markets without examining the institutions which affect the incentives to produce and the costs of transacting.

A new post-Coasean school of economics emerged, devoted to studying the interaction between a country’s cultural, legal and political institutions and its economic performance. Oliver Williamson called this school ‘the new institutional economics’, to express the idea that mainstream economics (the ‘old’ institutional economics) had overlooked the importance of institutions in explaining economic phenomena. Instead of the standard economic assumption of zero transaction costs, the new school studies the operation of markets and economies with positive transaction costs. The new institutional economics has profoundly influenced development policy by analysing the complex interplay between institutions, transaction costs and economic performance. By the end of the 1990s, it was

68 Greene, above n 55, 454-55.
69 Ibid. See also, Gilbert, above n 9, 22.
70 Bethell, above n 43, 314.

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Ibid 360.


understood that economic development required a broad and complex process of institutional adaptation.

**Formal and informal institutions**

Markets depend upon complementary institutions to provide incentives, to discipline the parties and to generate confidence. Institutions are broadly defined as 'the rules, organizations, and social norms that facilitate coordination of human action'. They can be either formal (eg laws, regulations, courts, government agencies) or informal (eg trust, personal networks, shared values). As societies become more complex, people have more contact with strangers and tend to rely less upon informal institutions. For example, before the 18th century when much of Europe's commerce was conducted by Jewish and Quaker merchants, shared family and religious networks imposed a common discipline that ensured reliability. A merchant who breached the informal norms risked exclusion from future dealings. When the markets became more diverse and impersonal, informal standards and sanctions were no longer sufficient to ensure fair dealing. Formal institutions based on law supplemented or replaced informal standards and enforcement mechanisms.

Formal institutions like laws work best when they are consistent with the informal norms of the society. Informal norms change only gradually. This means that transplanting the laws and formal institutions of the West to developing countries may not produce the intended effects. The failure of such experiments prompted economists to abandon the quest for a 'best practice' model of institutional design. By the late 1990s it was accepted that effective institutions take highly diverse forms in different countries. It is not the form of the institution that matters, but its effectiveness in performing one or more of the following functions: (1) improving the flow of market information; (2) defining and enforcing property and contractual rights; or (3) facilitating or regulating competition in markets.

**D. SECURITY OF PROPERTY AND DEVELOPMENT PROGRAMS**

**Land title registration or 'titling'**

An essential part of economic development is the creation of institutions to define and enforce property rights. Improving the security of property rights in land is now a high priority for development assistance. The main vehicle for this is the establishment of 'titling' systems, also known as land registration. Land registration is 'the process of recording rights in land either in the form of registration of deeds or else through the registration of title to land'. Since development assistance agencies no longer advocate 'best practice' institutional models, they avoid expressing any prescriptive preference for either deeds-based or titles-based land registration. Developing and transition countries with no prior history of successful land registration generally opt for the system of title registration, because it provides guaranteed (and therefore more reliable) information about ownership. In other cases, it may be more cost-effective to revive and improve a neglected deeds registration system than to start afresh with a new system. This is consistent with the current approach of development agencies,
which emphasises the value of building upon existing national institutions if they enjoy the confidence of the market. 84

Land administration and cadastral projects

In developing countries, land registration is often introduced as part of a broader land administration project. Land administration is the process of recording and utilising information about the ownership, value and use of land, for the purpose of managing a country’s land resources. Where the information is geographically referenced by specific land units or ‘parcels’, the land information system is called a ‘cadastre’. 85 A land parcel is a unit of land held by a specified individual, individuals or groups. The cadastre includes a geometric description of each parcel and allocates it a unique code or parcel identifier, such as co-ordinates or a lot number on a plan of survey. 86 Since many, if not most, land information systems are parcel-based, the ‘cadastre’ provides the essential core of the land administration system. 87

The original French cadastre was established by Napoleon for taxation purposes, like the Domesday Book established by William I of England, but a cadastre can also serve purposes such as conveyancing, land use planning and land reform. 88 A cadastre of the legal or ‘juridical’ type records ownership information, geographically referenced to maps and surveys. Most modern cadastres are multi-purpose and record different attributes of land parcels, such as ownership, value and land use. 89 Other data can be linked through parcel identifiers and cadastral index maps, such as demographic statistics, utilities and communications, mineral and water rights. 90 A land information system provides an inventory of the nation’s land resources. It may also provide information to private parties, such as parties to conveyancing transactions.

A number of countries have linked the legal land register to the cadastre, to allow a complementary operation. The legal register provides the ownership data that defines the cadastral parcel, and the cadastre provides survey and spatial data that can be used to delimit land parcels and provide a unique land identifier. 91 Establishment of a cadastre or a land administration system with a land registration component is regarded by development experts as an indispensable element of a nation’s economic infrastructure. 92 Its main purpose is to support the operation of markets by making property rights secure so that they can be safely and cheaply traded. To do so, it must clearly identify and record all property rights affecting the parcel and any subsequent changes of ownership. Cadastral systems also support a range of administrative activities including facilities management, value assessment and equitable property taxation, land use planning, land reform, delivery of services, environmental impact assessment and monitoring economic development.

The United Nations and the European Union (EU) have long been active in promoting cadastral and land administration programs. 93 In 1996 the United Nations Economic Commission for Europe established a meeting of Officials of Land Administration (MOLA) which issued a set of guidelines on land

86 FIG, Statement on the Cadastre, above n 16, 2.
88 FIG, Statement on the Cadastre, above n 16, sec 2.
90 FIG, Statement on the Cadastre, above n 16, sec 2.
91 Larsson, above n 89, 25.
92 Larsson, ibid; Hanstad, above n 4, 652; AusAid, above n 25, xv; FIG, above n 16; Dale & McLaughlin, above n 82, 15; Bogaerts, above n 87; UNECE, above n 36, (iii).
administration for countries in transition to the market economy. The guidelines were formulated to assist countries seeking accession to the EU, for whom a functioning market economy is a prerequisite for membership. Through its PHARE programme, the EU has provided financial and technical assistance to a number of Eastern and Central European countries undertaking land administration reforms.

The guidelines issued by MOLA recommended that countries should establish or improve a land administration system including some form of land registration to guarantee titles and provide security for credit. MOLA advised that while the establishment of a new land administration system could cost millions of dollars and take 5-10 years to complete, developing and transition countries should regard it as a long-term investment in sustainable economic development. Once established, the costs of maintaining the system could be recovered through fees charged for subsequent transactions with registered land.

This is consistent with the experience of many countries that have established LTR systems. While title registries require public subsidy in the establishment phase, in the longer term they are significant profit centres for government, provided that fees are set at a realistic level. For example, the UK Land Registry reported in 2001-02 that its dividend to the Consolidated Fund for that year was £18.1 million, and that it had paid dividends totalling £95.489 million since 1993/94.

In the period 1981-87, the Victorian registry made a gross profit of Au$189.5 million (equal to 64% of its gross revenue). The New South Wales registry earned revenues of Au$249.5 million for the period 1977-78, of which $50 million (equal to 20%) was gross profit.

E. EVALUATION OF LAND REGISTRATION PROJECTS

Supporting land administration systems in developing countries has become a high priority for development donors and lenders, as it is thought that few development projects can claim such a high and wide-ranging potential development impact. In conjunction with national governments, development assistance agencies such as the World Bank, the Inter-American Development Bank, the Asian Development Bank, USAID, AusAid and the European Union (EU) are supporting land administration and land registration projects in many countries.

The number of such projects, and the resources devoted to them, are very substantial indeed. In 1996 Lynn Holstein, a consultant with the World Bank, estimated that the World Bank was supporting at least 13 projects with a total value of over US$550 million, and more were planned. As at June 1997, the World Bank was supporting land registration projects in eleven former Soviet bloc countries. AusAid reported in 2000 that it had supported around 23 projects in land administration and titling over the previous 15 years in the Asia-Pacific region, all co-financed with the World Bank. The EU has since 1982 committed...
substantial resources to support land administration and cadastral projects in Central European countries.\textsuperscript{107}

The Feder & Nishio conceptual framework

Development agencies require that their project outcomes be evaluated against objectives. A conceptual framework proposed by World Bank economists Gershon Feder and Akihito Nishio has been used to guide empirical studies evaluating the impacts of land registration projects in developing countries.\textsuperscript{108} Feder & Nishio hold that secure titles contribute to economic growth by raising the productivity of land. This effect is mediated through three main linkages:\textsuperscript{109}

(i) The land tenure security and investment incentives linkage

Formal proof of title improves security of tenure by reducing the risk that the holder's property right will be challenged. Improved tenure security gives the landholder greater certainty of being able to reap the benefits of his or her investment. This increases investment, and boosts demand for variable inputs including labour and credit. Higher investment increases the productivity of land.\textsuperscript{110}

(ii) The land title, collateral and credit linkage

By removing a constraint on the ability of landholders to access formal credit, secure titles may enable them to obtain more and cheaper credit for longer terms. This allows landholders to increase investment and complementary inputs, leading to higher productivity of land. The unit price of land increases, because the price approximates the capitalised value of the higher stream of income that the land now provides.\textsuperscript{111} Increased use of credit can also stimulate the development of financial markets and institutions.\textsuperscript{112}

(iii) The land markets, transactions and investment efficiency linkage

Land registration enables clearer definition and allocation of property rights. By providing publicity for the rights, it reduces the information asymmetries that create uncertainty and inflate transaction costs. Property rights become more marketable, able to be traded more securely and at lower cost. This allows markets to perform their function of moving assets from less to more efficient uses. Persons who can use the land more productively than its current owner will value it more highly, reflecting the higher income stream that they expect the land to provide. With lower transaction costs and higher ownership security, land assets can more readily pass to those who will use them most productively. A more efficient allocation of property leads to higher productivity and economic growth.\textsuperscript{113}

The three linkages indicate that empirical studies assessing the economic impacts of land titling projects should look for the following outcomes: increased use of formal credit by newly titled landholders, greater investment, more use of inputs, higher output per unit of land, higher incomes, increased volume of land transactions, increased land prices after titling or higher prices for titled land than for comparable untitled land. These outcomes are used as indicators in the evaluation of titling projects.

Evaluation of empirical findings – country studies

The Thai titling project

An earlier version of the model was first used by Feder et al in 1988 to evaluate the economic impacts of a titling project in rural Thailand, co-financed by the World Bank.\textsuperscript{114}

\textsuperscript{106} AusAid, above n 39, xiii. Over 70% of the funds went to titling projects in Thailand, Laos and Indonesia.

\textsuperscript{107} Bogaerts, above n 87.

\textsuperscript{108} Feder & Nishio, above n 30; Barnes, above n 104, 95; AusAid, above n 39, 28.

\textsuperscript{109} The titles used for the three linkages are taken from Byamugisha, above n 22.

\textsuperscript{110} Feder & Nishio, above n 30, 27.

\textsuperscript{111} Ibid.


\textsuperscript{113} Feder & Nishio, above n 30, 27-8.
Bank and AusAid. Using econometric analysis, the study compared two groups of farmers in different areas: one group with legal titles, and the other group occupying land without legal titles. The two groups were carefully selected, to control for factors other than titling that could influence economic performance. It was found that the titled farmers had access to 52-521% more credit from formal sources than those without. Compared to the untitled group, the titled farmers used more inputs, undertook more land investments, produced more agricultural output, and had incomes 14.5 to 20.8% higher. Land prices were 25 to 132.6% higher for the titled land. Feder & Nishio attribute the higher revenues and land prices to the increased access to formal credit.

The effect of titling as a stimulus to markets was measured by an increase in land market activity. The volume of land transactions after titling was greater in the project area than in the non-project area. The study also found much higher rates of participation by households in the land market. The results of the Thai rural titling project were widely reported, and provided a significant impetus to undertake further projects in other countries.

Empirical studies in other developing countries

There is now an impressive body of world-wide empirical research that assesses the economic effects of secure property rights and registered titles. A number of country-specific studies focus on one linkage in a single economic sector following a titling project or pilot study. The linkages demonstrated in the Thai study by Feder et al have been supported by evidence from Latin America, the Caribbean and Asia, while studies in some African countries have returned more mixed results. Frank Byamugisha summarised the effect of numerous studies as follows:

Some related empirical studies reviewed by Feder and Nishio (1998) found that land registration led to: higher land values in Thailand, Philippines, Indonesia, Honduras, Brazil and Peru; higher investments in land in Costa Rica, Brazil, Honduras, Jamaica and Ghana; and higher output and income in Costa Rica, Brazil, Equador and Paraguay. However, empirical studies done in some rural areas of Kenya, Ghana, Rwanda and Somalia on the economic effects of land registration have found no statistically significant linkages between land registration on the one hand and investment and land productivity on the other.

Analysis of empirical findings internationally

Impact on land values

One of the clearest conclusions of Feder & Nishio’s review of the empirical studies is that land values are increased after titling. Purchasers will pay a premium for security of tenure and transferability. Higher prices for titled land are attributed to two factors. First, the economic benefits of being able to use a title as collateral for credit are capitalised into the market price of land. Land is worth more to purchasers if they are able to use it to access formal credit. Secondly, insecurity regarding ownership and tenure raises the transaction costs of land transfers. Transaction costs reduce demand for land and lower the price that purchasers are willing to pay. In effect, purchasers demand a price discount to cover their cost of self-insuring the risk of loss. By reducing risks and transaction costs, titling allows the price of land to rise to a level that better reflects its present value.

According to Feder & Nishio, higher prices for titled land than for untitled land with comparable attributes have been documented in Davao, Philippines (58%
higher), Jakarta, Indonesia (10.6% - 28.5% higher) and rural Thailand (25 to 132.6% higher), and the Brazilian state of Pará (45-189% higher, increasing with proximity to the market centre). In a study of two villages in Andra Pradesh, India, untitled land that could not be transferred except to heirs was worth 15% less than titled, transferable land. In this case the capitalisation of credit access was thought to play little part in the difference in value, because formal credit was rarely available in the affected areas.  

**Findings on access to credit**

Access to more, cheaper and longer term formal credit is a crucial linkage between secure titles and economic growth, and is therefore an important indicator that titling is achieving its objects. The link between titling and formal credit was documented in the 1988 rural Thailand study by Feder et al, and in a 1996 evaluation of a USAID-funded land titling project in Honduras reviewed by Feder & Nishio. The Honduras study found that newly titled farmers invested more than twice as much money as a comparable group of untitled farmers. The titled farmers received more than four times the amount of credit, with 85.3% of the difference attributed to the amount of formal credit received. The untitled farmers experienced no increase in credit in the decade to 1993, while titled farmers received twice the amount at the end of the decade that they had received in 1983.

Despite the good results for Thailand and Honduras, empirical evidence that titling increases the supply of formal credit is patchy. A 1996 study in rural Paraguay found that after land titling, larger producers benefited from increased access to formal credit, while other factors like credit constraints put it out of the reach of small farmers. A 1996 study of smallholder households in Zimbabwe’s Manicaland province reported that the grant of long-term leases that could be upgraded to freehold title had significant positive effects upon farmers’ investments in long-term improvements, and upon their agricultural outputs. The researchers found no statistically significant effect upon the farmers’ use of credit, which remained rare. A 1991 comparative study of agricultural regions in Ghana, Rwanda and Kenya found no evidence that land registration had any impact on farmers’ access to credit.

The *World Bank Development Report 2002* acknowledges that titles have been found to have negligible effects on access to formal credit in very poor parts of Africa, India and Latin America. This is attributed to three factors. First, titling does not improve access to credit in areas where formal credit institutions are not available or underdeveloped. Secondly, lenders may not accept titles as collateral if legal or social constraints prevent lenders from selling the land in case of default. Thirdly, formal lenders may find it unprofitable to offer services to poor farmers, because their transaction costs are high in proportion to the small loans sought by this clientele. Where complementary institutions such as formal credit and agricultural input markets are lacking, the Bank recommends that the first policy interventions should be directed to those areas.

**Failures of land registration**

The problem of access to formal credit is not confined to landholders in rural areas. Alan Gilbert argues that evidence from self-help housing urban settlements in Bogota, Colombia and other parts of the developing world shows that ‘possession of a formal title makes little or no difference to the availability of formal finance’. Newly titled landholders may be refused formal credit because their incomes are too low or irregular, they have no credit rating or history, their proposed investments fall outside the institution’s lending guidelines, or their land...
Formal titles do not guarantee that lenders will be able to sell the collateral in the event of default. Land markets are localised and segmented. Legalised self-help housing settlements in developing countries are “rarely recognised as desirable locations”, and the market for established homes in such areas is flat or non-existent.

Alan Gilbert argues that titling alone does little to create a healthy secondary housing market or to provide access to formal credit. He fears it may actually harm the poor, by exposing them to property taxes, registration fees and higher rents, and by dispossessing women when family holdings are registered solely in men’s names. In his view, development agencies have placed too much faith in De Soto’s simplistic ‘myth of popular capitalism’ – his theory that giving land titles to the poor will enable them to become successful capitalists and generate new wealth. The danger that Gilbert perceives is that policy makers may think ‘that they need to do little more than offer title deeds and leave the market to do everything else’.

Mounting evidence that titles do not improve access to credit in many urban and rural parts of the developing world presents a challenge to the rationale for titling programs. The proposition that titles promote higher investment and productivity by improving access to formal credit is crucial to the ‘land title, collateral and credit’ linkage in Feder & Nishio’s model. The availability of formal finance also underpins the ‘land markets, transactions and investment efficiency’ linkage. Surplus value is created when land assets pass to those who can use them more productively. This will not occur unless the more efficient producers are able to obtain the capital needed to buy the land.

World Bank review of land titling projects

It is now recognised that land registration is no panacea, and may not always be the most effective way to promote security of tenure. Secure property rights are a necessary but not a sufficient condition for the efficient operation of markets. The linkage between land registration and economic growth is mediated through formal credit, investment incentives, inputs and higher productivity. The expected economic benefits from titling may be undermined by market distortions produced by government policies, underdeveloped or absent formal credit markets, credit rationing, transaction costs, legal or social restraints on the enforcement of collateral, and many other factors.

Findings from empirical research led the World Bank to review its 1975 Land Reform Policy Paper, which had recommended the conversion of communal tenure systems to individual freehold titles in order to increase productivity. By 1999, the Bank was saying that under certain conditions, it may be more cost-effective in the medium term to support and complement communal tenure systems than to convert them to individual freehold titles. It recognised that some customary land ownership systems may provide social and economic benefits, such as risk-spreading, that offset any efficiency losses.

The Bank proposed guidelines for identifying the conditions under which land registration is likely to be worthwhile. Evidence that communal tenure systems are weak, that land disputes are increasing, or that land transactions with people outside the community are common, may indicate that formal institutions are needed to define and enforce property rights. Titling may also be desirable when formerly remote communities are connected to markets through improved communications.

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135 Ibid 15.
136 Ibid 22.
137 Ibid 8-9.
138 Ibid 22.
139 As the World Bank points out in its World Bank Development Report 2002, above n 27, 35.
140 Deininger et al, above n 112, 248.
141 Ibid 248, 269; Feder & Nishio, above n 30, 37.
142 Deininger et al, ibid 258.
The Bank also recognised that titling projects need to be formulated with close attention to the specific environment. There was a need to identify the institutional preconditions for achieving project objectives. For example, land registration systems depend upon the general laws that define and allocate property rights. If the laws are underdeveloped, as they are in some former socialist countries that have only recently permitted private ownership, titles will do little to make property secure or easily transferable.\(^{145}\)

The comprehensive development framework

Land administration and titling projects have become integrated into a broader process of institution-building. In 1999 the World Bank adopted a new, holistic approach to poverty alleviation, which it calls the "comprehensive development framework".\(^{146}\) The approach is premised upon the crucial importance of institutions in development, and their complex interdependence. For example, since property rights are normative, they depend upon institutions that uphold the rule of law. These include competent, impartial and incorrupt administrators to record land ownership, and a judiciary with similar attributes to enforce the rights and transactions.\(^{147}\)

Development agencies are supporting many programs to strengthen the judiciary, public administration and democratic political institutions in developing countries. Secure property rights, in turn, promote respect for the rule of law, by giving people a stake in protective institutions.\(^{148}\)

Security of property and the rule of law are mutually reinforcing. At the same time, the rationale for land administration and titling projects has been broadened from market and economic objectives to include environmental objectives. The development literature links insecure property rights to environmental degradation and unsustainable use of resources.\(^{149}\) It is said that people who have insecure rights to land and environmental resources are likely to over-exploit them. If they cannot be sure that they will still have the resources tomorrow, they will harvest them today.\(^{150}\) Secure tenure gives people an incentive to husband the resources and to use them in more sustainable ways.

F. CONCLUSION

In the 1990s, economists and development agencies gained a new appreciation of the role of private property in promoting economic growth through market exchange. The laws that make property secure were acknowledged as key institutions that support the market economy, the rule of law and democracy. After decades of experimentation with land reform and planning, the liberal conception of property was once more in the ascendant. But now it was more than just a normative theory. The linkages between property and prosperity were reduced to indicators that could be tested empirically. Development agencies and national governments were prepared to invest heavily in upgrading insecure tenure to legally secure titles, if it could be proved that this was an effective way to promote economic growth.

A growing body of research has returned some promising findings on the economic impacts of land administration and titling in developing countries. Early results from rural Thailand appeared to demonstrate the linkages through multiple indicators - increased investment, access to credit, productivity and land prices. Unfortunately, the evidence from some areas of the developing world indicates that titling alone does little to improve the access of the poor to formal credit. Failure of credit supply can short-circuit key linkages between security of property and economic growth.

Development agencies have responded to these findings with policy adjustments. Titling and land administration projects remain a high priority for development.


\(^{149}\) Deininger et al, above n 112, 250.

assistance, but guidelines have been developed to identify the preconditions for success. It is recognised that policy interventions may be needed to develop complementary institutions, such as formal credit and input markets, before titling can achieve its economic objects. The goals of land registration have been broadened, to include an emphasis on environmental and social objectives. Land administration and titling projects are no longer isolated technical interventions, but part of a broader process of institutional change. It is understood that markets need to be supported by legal and economic institutions, and that these are underpinned by appropriate political institutions.

We still have no complete theoretical framework to guide the overall process of economic transformation. Managing the development process is a more complex and uncertain task in the post-planning era. Economic growth in a market economy is a product of the choices made by a multitude of individual market actors over time. Development interventions seek to provide the preconditions for successful markets, by building institutions that lower transaction costs and create incentives to produce. Security of property rights is firmly established as one of the most important of the preconditions, and land registration as the principal vehicle for achieving it.

3 THE DILEMMA OF SECURITY AND LTR

In the last chapter I argued that wealth maximization theory and the Coase theorem provide a rationale for government intervention in the private property system to reduce transaction costs and insecurity of property rights. The purpose of this chapter is to explain why governments in many countries have found it necessary or desirable to establish systems of LTR. Why did the historic law of real property not provide sufficient security to owners and purchasers? Why do conflicts of rights arise? By what methods do systems of land registration seek to improve security and reduce transaction costs? How does LTR differ from deeds registration, and why is there an international trend to move from the latter to the former?

A. WHY CONFLICTS OF PROPERTY RIGHTS OCCUR

The essence of a property right is that it is enforceable against persons other than the grantor. The law does not permit other persons to interfere with a property right without the consent of the owner. This 'property rule' is an essential condition for security of title, or legal security. According to the distinction coined by Calabresi and Melamed, the protection of a right by a 'property rule' ensures that nobody can force a non-consensual exchange upon the owner. If the law wants to allow a coerced exchange, it will use a 'liability rule', which allows the wrongdoer to take and retain the benefit without consent, subject to compensating the owner. While this distinction overextends the concept of property, it also draws attention to a truism that lawyers take for granted - that the law enforces property rights by requiring the owner's consent to any transfer.

1 This of course does not deny the power of the State to take property without consent eg under powers of compulsory acquisition, or to enforce judicial decrees.
3 Calabresi and Melamed apply the term 'property rule' to describe a mode of enforcing entitlements, whether the entitlements are property rights in the sense of rights in rem, or contract rights. Merrill & Smith argue that this extends the meaning of property beyond its core meaning of a right in a thing, enforceable

151 North, above n 71, 361.
All Western legal systems allow multiple interests in the same land to be created. The existence of concurrent interests does not produce a conflict, provided that later interests are acquired with the consent of earlier owners, or later owners acquire their interests expressly subject to earlier interests. Take, for example, a case where O gives M a legal mortgage over Blackacre and then sells to P. There is no conflict if M consents to the transfer to P, or if P buys on the understanding that M's mortgage has priority. In both cases, P gets the enforcement he bargained for. The interests will conflict only if P completes his purchase without finding out about the mortgage and without obtaining M's consent. In that event, P's security of title is diminished, because he finds himself unexpectedly bound by M's security interest in the land.

If P wishes to ensure that the rights he is acquiring will be fully enforceable, he must ensure that he knows about all existing interests that conflict with his own. P's problem is that he cannot count on the grantor, O, to disclose all the earlier interests. She may deliberately conceal the existence of one or more interests, in order to induce him to offer a better price for the land. If he is deceived and suffers loss, he has contractual or personal remedies against her at law, but may still be bound by the earlier interests. Even if O is honest, she may not be aware of all the prior rights affecting the land. Documents evidencing earlier interests may have been lost, forgotten or suppressed by an earlier grantor. A deed from which O's title derives may turn out to be forged or to have some other invalidating defect, so that O is not the true owner. O may also be unaware of interests that are created by informal means, without documentation. Interests can arise informally by various means, including by implication of law (eg, an implied easement), through possession and prescription (eg, rights acquired by adverse possession), or through the operation of equitable principles (eg, the constructive trust).

Due to this information gap, there is plenty of scope for actual conflicts between earlier and later interests. Where this occurs, it is not possible for the law to fully enforce all the competing rights. If, for example, O has entered into a specifically enforceable contract to transfer an unencumbered fee simple estate to P and then mortgages the land to M, it is not possible to give full enforcement of rights to both P and M. The law must set rules for determining which interest takes priority. If the rules give priority to P's equitable interest under the contract of sale, P will take his interest free of M's mortgage, and M's property right will be wholly defeated. If M gets priority, P's title will be encumbered by M's mortgage.

**B. THE HISTORIC PRIORITY RULES AND LEGAL INSECURITY**

A number of rules are possible for resolving conflicts of property rights. The law might adopt a rule denying validity to a later interest which conflicts with an earlier one, on the basis that the grantor cannot derogate from rights already granted. This rule would protect prior owners, but it would preclude the law from recognizing subsequent interests, even where the conflict is only partial. By limiting the scope for creating multiple interests in land, the rule would inhibit specialized, concurrent uses of land, reduce the economic potential of land, and restrict opportunities for market exchange. For this reason, Western legal systems generally treat each successive disposition as valid and effective to create an interest in land. Conflict between the interests is then resolved as a separate question, by applying 'priority rules' that provide for the ordering of competing interests.

The historic priority rules of English law have been modified or partially abolished by statute in many jurisdictions, but often have a continued operation in the gaps between legislative rules. The purpose of examining the rules is to expose the causes of the insecurity and high transaction costs that prompted governments to introduce land registration programs. It will also reveal the dilemma of legal insecurity — the difficulty that legal systems face in providing legal security to both existing owners and purchasers.

**Common law priority rules**

The historic priority rules are complicated by the existence of the dual jurisdictions of common law and equity, each with its own set of property rights and priority rules. Since
legal interests are enforceable against all the world, the common law adopts a strictly chronological approach to priority. The interest that was created first in time prevails over the later interest. Thus, for example, where the grantor, O, conveys a legal fee simple estate to P1, and later purports to convey the same estate to P2, P1's interest prevails. In this case the two interests are wholly inconsistent, so the conveyance to P2 is ineffective. If O instead conveys a legal easement to P1 and then conveys a fee simple estate to P2, the inconsistency is only partial. Both interests are legally effective. P2 will take the fee simple estate subject to P1's easement.

The common law rule that awards priority to the earlier interest is reversed only where the earlier interest holder has been fraudulent, or grossly negligent in failing to keep custody of the title deeds, and this conduct has induced the creation of the later interest. Otherwise, no allowance is made for the difficulties that a purchaser may face in finding out about all extant legal interests. The common law allocates to the purchaser the entire information cost, and the entire risk of loss should the purchaser acquire a later legal interest without discovering the existence of a prior legal interest. The holder of the earlier legal interest enjoys complete legal security, barring fraud or gross negligence on her part.

Equitable interests and priority rules

Operating alongside the common law, equity recognised a wide class of proprietary interests in land. The genesis of the interests was that equity would grant remedies against a party in personam to compel performance of conscientious obligations relating to the passing of an interest in land. As the rules for the grant of equitable remedies became more settled, equity was prepared to anticipate the grant of the remedy by deeming the entitled party already to possess the interest. This was expressed in the maxim that equity deems to be done that which ought to be done. In this way, equity transformed contractual rights into proprietary rights by making them enforceable against third parties. For example, restrictive covenants were elevated from mere contractual rights to equitable interests once equity was prepared to enforce them by injunction against a successor in title of the burdened land. Equity was also prepared to enforce informal agreements and understandings relating to the passing of interests in land where the grantor's conscience was affected. This gave rise to additional categories of equitable property rights such as implied, resulting and constructive trusts.

Equity developed its own priority rules for resolving conflicts between equitable interests, and between equitable and legal interests. Its historic priority rules place considerable weight on the temporal order of creation, but this factor is not always decisive. In a priority contest between equitable interests, 'first in time, first in right' is effectively the default rule, to be applied after considering the circumstances in which the later interest was acquired and the conduct of the each of the contending parties. The relative weight of these factors in cases of competing equitable interests is obscure. Equity has regard also to the ranking of each of the interests in the hierarchy of legal, equitable or 'mere equity', and whether an interest was acquired gratuitously or for value. A dominant element in equity's ordering of priority is the requirement of good faith. This

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6 Subject to the effect of the limitation of actions statutes. The statutes bar actions by persons claiming under an earlier grant, if someone has been in exclusive possession of the land adversely to the claimant for the whole of the relevant limitation period.


8 *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143.

includes the absence of notice of a prior interest, but may encompass a broader conduct standard.  

The bona fide purchaser rule

An equitable interest is not enforced against a bona fide purchaser of a legal estate who has given valuable consideration and had no notice of the prior interest. The historical origins of this 'bona fide purchaser' rule lie in principles developed by the Court of Chancery for the enforcement of uses (the forerunner of the modern trust). The Court would enforce a use against persons whom it considered conscientiously bound by it. Holdsworth records that the doctrine of notice originated as a solution to the problem of proving the mental element of fraud. Its function was to define objectively verifiable circumstances from which fraudulent intent could be inferred. A person who took with notice of a use was deemed fraudulent, in the extended equitable sense of acting contrary to good conscience. The question of notice became an important question in many areas where equity was asked to enforce a right against a third party.

From the 17th century, equity developed rules relating to constructive notice. This was prompted by a perceived need to give purchasers an incentive to seek out information about prior interests. The rationale for constructive notice is that if purchasers are affected by notice only of matters which have actually been brought to their (or their agents') attention, they will take care to avoid acquiring such information. Purchasers were expected to show due diligence in searching for prior interests. If they failed to do so, they would be deemed to have constructive notice of prior interests that they should have discovered. The corollary was that if they made the inquiries that a reasonably prudent purchaser would make in the circumstances, they were protected against any prior interest that they failed to find. The onus of proof lay on the purchasers to show that they did not have notice of the interest.

Questions of conscience apart, there is a practical justification for setting a limit to purchasers' search costs. Because of their mode of creation, some equitable interests may be exceedingly difficult for purchasers to discover. Equitable interests are less likely to be evidenced in documentary form or by possession than legal interests. Equity gives proprietary effect to certain transactions before the legal formalities have been completed. Wholly oral transactions can give rise to equitable interests in land under doctrines such as part-performance, estoppel and constructive trust. Informally created interests often leave no paper trail for a purchaser to follow.

Posner has sought to explain the bona fide purchaser rule consistently with his theory that many judge-made rules actually promote the efficient use of resources. He argues that the original owner is the 'lower cost avoider' of mistake. The 'mistake' is the acquisition of a later interest in the belief that it conflicts with no earlier interest. The cause of the mistake is a deficiency of information about the earlier interest. The theory of wealth-maximisation holds that resources should be allocated to those who value them most, and social costs allocated to those who can prevent them with the least expenditure of resources. Posner appears to be saying that the bona fide purchaser rule creates an incentive for the earlier owner to take steps to avoid the mistake because she can do so more cheaply than the purchaser.

It is difficult to see why this should be so. In the absence of land registration, an interest-holder has few means of alerting third parties to her rights, unless she is in possession of the land or the title deeds. Many interests in land give no immediate right to possession,...

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10 Midland Bank Trust Co Ltd v Green [1981] AC 513, 528; see generally, Gray & Gray, above n 5, 116.
12 Ibid.
nor an entitlement to hold the chain of title deeds. If a grantor is about to create an interest inconsistent with hers, the earlier owner is unlikely to know about it unless notified by someone. In these circumstances, it is the purchaser who can avoid the mistake more cheaply, by making the usual inquiries. Posner's theory assumes that the bona fide purchaser rule allocates the information cost to the earlier owner. It would be more accurate to say that the costs are split between the earlier owner and the purchaser, with the purchaser bearing the lion's share. The earlier owner bears the risk of loss only if her equitable interest is one that would not be revealed by the usual inquiries.

C. THE PROBLEM OF DERIVATIVE TITLE

It is not just the legal and equitable priority rules that impose transaction costs upon purchasers. Priority rules only operate where valid but conflicting interests have been created. The possibility of a void disposition in the chain of title poses a risk to purchasers, quite apart from the effect of priority rules.

The historic English conveyancing law is premised on a devolutionary or derivative concept of title. Title devolves from previous owners through a chain of successive valid dispositions. A void disposition in the chain disrupts the transmission of title, so that subsequent dispositions are ineffective. Suppose, for example, that the fee simple owner, O, grants a legal lease of Blackacre to T. O derives her title from a purported conveyance from J. It turns out that the conveyance from J was a forgery. Since a conveyance duly executed by the grantor is required to pass a legal estate, the forgery nullifies the purported conveyance. It is void and ineffective to pass any interest to O. The true owner is J (or her heirs), the last owner before the break in the chain of valid dispositions. Under the principle of nemo dat quod non habet, the lease to T is also ineffective. O cannot convey to T a better title than she herself possesses.

The same applies if the void disposition is further back in the chain of derivative title. The rights of the true owner or her heirs can be enforced at any time, until her right to recover the land is extinguished by the expiry of the statutory limitation period. The length of this period has varied across jurisdictions and over time.

A purported disposition may be void for various reasons, including forgery, duress, the principle of non est factum, legal incapacity of the grantor, non-delivery, lack of compliance with other required formalities, certain types of mistake causing lack of consent, ultra vires dispositions by a statutory body, and an illegal disposition made void by statute. If a disposition is void for any reason, it is ineffective to pass any interest in land, and title remains with the grantor. It makes no difference that the purchaser had no notice of the defect and could not reasonably be expected to discover it.

Void dispositions are to be distinguished from those that are merely voidable. Certain types of defect do not make the disposition void, but entitle the grantor to terminate it at her option and reclaim the interest. For example, a disposition by a minor can be repudiated within a reasonable time after the grantor attains the age of majority. A transferee who holds an interest under a voidable disposition can transfer it to a third party. The third party will receive a valid interest. If the grantor subsequently exercises her right to reclaim her interest from the third party, the dispute will be resolved in accordance with the equitable priority rules.

The purchasers' burden of inquiry

Under the historic rules, purchasers also had to check each disposition in the chain to ensure that it was legally effective to do what it purported to do. Drafting errors could deny a disposition its intended legal effect. For example, a conveyance may have mis-described the land, incorrectly identified a party, or used words of limitation that were

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18 See generally, Alain Pottage, 'The Originality of Registration' (1995) 13 Oxford Journal of Legal Studies 371, arguing that the Land Registration Act 1925 (UK) and its successor, the Land Registration Act 2002 (UK) modify the derivative concept of title so far as title to registered land is concerned.

ineffective to convey the intended interest.\textsuperscript{20} The defects would attract the operation of the \textit{nemo dat} rule, so that subsequent dispositions were also ineffective.\textsuperscript{21}

The historic rules of English conveyancing placed a heavy burden of inquiry upon purchasers, who had to investigate the title offered by checking each deed in the chain for validity and effect, inspecting the land and making inquiries of all found in occupation. No matter how thorough the purchasers' inquiries, there was no guarantee against hidden defects in the chain of title (such as an undiscovered forgery) or the existence of an undiscovered prior interest. These costly inquiries had to be repeated for each transaction affecting the land, since purchasers were not protected by relying on previous searches by others.

Effective proof of title was virtually impossible under this system. Not even the most thorough investigations could definitively rule out the possibility of a defect or adverse interest. The historic rules placed most of the residual risk upon the purchaser. In contrast to common law, equity at least made some allowance for the information gap faced by purchasers. By satisfying the standard of inquiry demanded by the doctrine of notice, purchasers could shift to earlier owners the risk of any undiscovered equitable interests. It was sometimes unclear what purchasers had to do to meet that standard. Much depended on the circumstances of the transaction, and on local conveyancing practices that determined what inquiries were 'usual'.

It emerges from the above analysis of the historic rules that the legal system had to trade off competing interests. Rules that made existing ownership fully secure imposed substantial information costs and risks on purchasers in transactions. In limited circumstances, purchasers could take free of prior interests, for example, under the bona fide purchaser rule, where the purchaser was not affected by with notice of a prior equitable interest. In such cases, the purchaser enjoyed better security of title, but that of the prior equitable owner was correspondingly diminished.

D. DEMOGUE'S DYNAMIC AND STATIC SECURITY

In his 'Fundamental Notions,' first published in 1916,\textsuperscript{22} the rationalist French philosopher, René Demogue, identified two different conceptions of security in the law that regulates the interests of individuals in real or personal property. He applied the term 'static security' to rules that protect the interests of existing owners at the expense, if necessary, of purchasers. Static security is based on the idea that "when a person is entitled to a right it should not be possible for him to be legally deprived of it by the act of a third person".\textsuperscript{23} This preserves the "property rule" that a property right can pass only by a consensual transfer. This type of security is 'static' in the sense that it preserves the existing allocation of property.

Opposing this is a principle that protects the interests of purchasers at the expense of owners who have not sought publicity for their prior claims in the prescribed manner. Demogue called this principle 'dynamic security' because it provides an incentive to those who would invest more, produce more and satisfy more varied needs. "The security thus assured is a leaven of activity, a bounty given to active individuals."\textsuperscript{24} Dynamic security is premised on a principle of publicity. It protects the reasonable expectations of purchasers that a third party may not assert a prior right against them unless public notice has been given of it by a prescribed means.\textsuperscript{25}

Dynamic security corresponds to what De Soto calls 'security of transaction', as opposed to 'security of ownership'.\textsuperscript{26} It facilitates transfer because it reduces or eliminates the risk that the purchaser's title will be subject to unknown prior claims or title defects. This limits purchasers' transaction costs by limiting the inquiries that they need to make, and by reducing their risk-bearing (residual uncertainty after inquiry).


\textsuperscript{21} Ibid.


\textsuperscript{23} Ibid 428.

\textsuperscript{24} Ibid 427-28.

\textsuperscript{25} Ibid 425.

\textsuperscript{26} Hernando De Soto, \textit{The Mystery of Capital} (Black Swan, London, 2000), 61.
It is tempting but misleading to equate dynamic security with protection of purchasers, and static security with protection of owners. The question is not who is protected, but against what risk. Static security protects owners and purchasers against the risk that they will be deprived of their title, post-acquisition, by a transaction without their consent. Today’s purchaser is tomorrow’s owner. The risk of post-acquisition loss affects purchasers even before they become owners, because it increases the cost of enforcing their rights (a component of their transaction costs).

Dynamic security protects owners and purchasers against the risk that their title will be defeasible by someone with a prior claim. An owner may be dispossessed years after acquisition if a prior claim or title defect comes to light. An example given by Sir Robert Torrens in his speeches is that of a friend of his, who invested his life savings in the purchase of land on which he built a mansion and established a plantation. Instead of enjoying the rewards of his investment, he found himself worsted in a Chancery suit brought by a rival claimant. The unfortunate man lost the land and the purchase money, together with the value of the improvements that he had made. Foss inferred that the adverse claim ‘must have consisted of some equitable right of which [Torrens’] friend was held to have constructive notice’.

The relationship between dynamic and static security

Bentham and Coase assumed that laws that make the titles of existing owners secure also enhance the transferability of titles. According to Coase, well-defined and clearly-allocated property rights facilitate market exchange. Property rights are more tradeable, the more secure the rights of existing owners. We might infer that laws that make present owners more secure are Pareto-efficient, since aggregate wealth is maximized and nobody is worse off.

Some later law and economics scholars have recognized the tension between the present owner’s interest in preventing non-consensual transfers, and the purchaser’s interest in being able to rely on the appearance of regularity when acquiring property from others. In an influential article published in 1984, Douglas Baird and Thomas Jackson observed:

In a world where information is not perfect, we can protect a later owner’s interest fully, or we can protect the earlier owner’s interest fully. We cannot do both.

The authors give the example of a forgery in the grantor’s chain of title. The law can adopt a rule that nobody may derive a title under a forged conveyance. This nemo dat rule protects present owners against losing their title through a disposition to which they have not consented. Their security is assured at the expense of higher transactions costs for purchasers, who must check all documents in the chain and bear the risk of undiscovered forgeries.

Alternatively, the law could adopt a rule that protects good faith purchasers against unknown forgeries in the chain. This rule reduces the information cost of acquiring ownership, but makes all owners vulnerable to losing their titles through a forged conveyance. Protection for purchasers can only be bought at the expense of existing owners, but as today’s purchasers are tomorrow’s owners, the security that they expect after acquisition is reduced. This is the dilemma of legal security. Demogue expressed it as follows:

We see the idea of security turning against itself. Shall we prefer the security of owners of rights or of those who acquire them? At bottom the struggle is more ineradicable than it seems, for the owner of today is the acquirer of yesterday. If article 2279 of the [French] Civil Code favours me when I acquire an instrument to bearer, from one not the owner, it becomes a menace when I confide that instrument to a banker or depositary who may sell it.

The converse is also true. Measures that improve the static security of owners and purchasers reduce their dynamic security. The historic rules of English conveyancing provided a high measure of static security. They substantially protected owners against

29 Demogue, above n 22, 430.
losing their title after acquisition, through acts of third parties performed without their consent. The main exception was the vulnerability of an equitable interest to a later legal interest acquired bona fide for value without notice. The high degree of protection for present owners brought a commensurate loss in their dynamic security. At any time, a hidden defect in their title might be discovered, or a prior claimant with a better title might turn up unexpectedly, as in the example of Torrens’ friend.

The dichotomy between owners and purchasers obscures their common interests. Most owners are at some time purchasers, purchasers aspire to acquire ownership rights that are fully enforceable, and owners need to assure title to purchasers when the time comes to sell. At any given time in the purchaser-owner life cycle, people want both dynamic and static security.

Priority rules alone cannot perform this magic. Rules that attempt to strike a balance, such as equity’s bona fide purchaser rule, are playing a zero-sum game. The priority rules can be adjusted to allocate the perils of conveyancing in various ways, but this in itself does little to reduce the total risk. Every option creates winners and losers. While economists commonly assume that the law can arrange matters so that we have both security of ownership and security of transaction, in reality, legal security is, as Thomas Mapp said, ‘an elusive ideal’. 30

The shift to dynamic security

The tension between dynamic and static security does not become evident before the emergence of a market for land, at a certain stage of economic development. The historic priority rules suited a pre-industrial England, in which a static conception of landownership prevailed, and transferability was not a desideratum. Land mainly changed hands vertically, by inter-generational succession, rather than horizontally, through market exchange. 31

Until the late 19th century, land ownership in England was concentrated in the hands of the aristocracy, 32 for whom landownership provided dynastic continuity and status. Their priority was to ensure that the estate would remain in the family for generations to come, no matter what reduction in circumstances might befall the family. They achieved this through the use of strict settlements, a mode of landholding that restricted the powers of heirs to dispose of interests in land to persons outside the family succession. Aristocratic landowners were not interested in dynamic security, since they had not acquired their land through purchase and had no intention of selling it.

Even when market transactions in land started to become more common, informal institutions were able to moderate the purchaser’s risk and inquiry costs. In the early stages of development, markets were small and localized. At a time when most people still lived in settled rural communities with little personal mobility, local knowledge of land dealings might be considerable. Prior inconsistent interests or disputed dispositions were more easily discovered by purchasers through local inquiries.

The demand for dynamic security grows as markets develop, and risks associated with change of ownership increase. In larger and less localized markets, transactions between strangers are more common. Transacting parties are less able to rely on informal institutions such as trust, reputation and shared personal networks. The information gap between sellers and purchasers becomes greater, as purchasers are less able to access local knowledge about prior interests and defects in the seller’s title.

Information asymmetries create moral hazards for sellers, who may be tempted to take advantage of the purchasers’ ignorance. 33 The risk of opportunistic behaviour is greater in land transactions, since most sellers are not repeat players in a market. As such, they


32 Based on corrected figures from the ‘New Domesday Book’ of 1875, it has been estimated that four-fifths of the land in England was owned in 1975 by a landowning population numbering between 4,000 and 7,000: Douglas Whalan, ‘Immediate Success of Registration of Title to Land in Australasia and Early Failures in England’ (1993) 3 Bond Law Review 416, endnote 72, citing as his sources: Brodrick, English Land and English Landlords (1886), 163-64, and Scrutton, Land in Fetters (1886), 144-45.

33 There is evidence that fraudulent concealment by grantors of prior interests was a serious problem in 18th century England: Howell, above n 14, 434.
are not subject to the same informal market discipline as merchants, who know that they may lose future sales if they acquire a reputation for untrustworthiness. Grantors who engage in double selling, mislead purchasers about prior interests, or suppress evidence of previous disposition are liable to be sued for damages, but in many cases the purchasers' legal remedies are futile. By the time the law takes its course, the fraudulent grantor may have absconded or disposed of the proceeds.

The informational disadvantage of purchasers increases their inquiry and enforcement costs and risk-bearing. Increased transaction costs lower the demand price for assets, and constrain the opportunities for exchange. As commerce develops, so too does the demand for reform of legal rules to protect the reasonable expectations of the good faith purchaser. In nineteenth century England, the perceived need to facilitate transactions led to the selective extension of the principle of dynamic security to several rules of personal property law. Exceptions to the *nemo dat* rule were made with respect to negotiability of bills of exchange and promissory notes, provisions of the *Sale of Goods Act* 1893 dealing with sales in market overt, and provisions of the *Factors Act* 1889 with respect to third party dealings by a mercantile agent (factor) in possession of goods with apparent authority to dispose of them. Nineteenth century reformers also proposed a registration system to provide more dynamic security for land transactions.

**E. DEEDS REGISTRATION AND LTR**

The essential challenge facing any market economy is how to ensure that existing rights are secure, while also facilitating the creation of new property rights. Internationally, two solutions to this problem are in use: registration of deeds (called ‘deeds recordation’ in the US, and ‘instrument recording’ or ‘the registry system’ in Canada) and LTR (known in the US, Australasia, Canada and a number of other countries as ‘the Torrens system’). Collectively the two systems are known as ‘land registration’, although in Britain, the term is legislatively reserved for LTR. Either system can be used in conjunction with a common law, civilian or hybrid system of property law.

Under registration of deeds, the state provides a facility for registering the transaction so that prior holders of property rights may publicise their claims, and prospective purchasers can discover what rights in the land have already been allocated. A deeds or instrument registry is a public depositary for conveyances and other instruments purporting to create or pass interests in land. The registrar records only the documentary evidence of title, from which purchasers must draw their own conclusions. The state does not warrant the efficacy of an interest shown in the register. That is, it gives no assurance that the interest claimed is one recognised by law, that it is validly created, that it belongs to the person who claims it, nor that it affects the land referred to in the instruments.

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36 A person who receives a negotiable instrument for value and in good faith gets a title that is unaffected by earlier defects. For example, if a cheque given by A to B and payable to ‘the bearer’ is stolen by C who gives it to D in payment of goods, D is the holder in due course and can enforce payment on it even though C had no title to it. The principle of negotiability was adopted by the common law in the law merchant and incorporated in the *Bills of Exchange Act 1882*.

37 This was the rule that a purchaser in good faith who bought goods in an open market (market overt), without notice that the seller was not the true owner, acquired title to the goods. The rule has since been abolished in England and some other jurisdictions.


39 Land registration has been defined as ‘the process of recording rights in land either in the form of registration of deeds or else through the registration of title to land’: United Nations Economic Commission for Europe, *Land Administration Guidelines* (UN. New York & Geneva, 1996), glossary, 91.

Under the system of LTR, the register is an authoritative public record of the legal rights in a specified land parcel vested in particular persons at a given point in time. In a system of LTR, the registrar, on behalf of the state, undertakes the function of examining the proofs of title and establishing the parcel boundaries. This is what Paul Norman calls a 'positive' system of land registration. The registration of an instrument acts as a warranty by the state that person shown on the register is the lawful owner of the relevant interest.

In theory, deeds registration systems are 'negative' or merely evidentiary systems. The registrar's role is passive, and instruments are not examined for validity. In practice, Norman says that it is common to find that a deeds registrar examines instruments to check that they are in order before registering them, and may requisition applicants to furnish additional proof. Where this occurs, the register may be accorded a superior evidentiary status. In some deeds registration systems, the reliability of the register is so high that registered instruments are accepted as proof of ownership and practically never rebutted. This reliability is enhanced in civil law systems that use the notarial system for transferring land, such as most of continental Europe, Latin America, Quebec and Louisiana. The notary is a quasi-judicial officer who records the appearances of the transacting parties before him or her, verifies identities and signatures, and checks that the conveyance is voluntary and consensual.

Distinguishing features of LTR

Five features are commonly claimed to characterize systems of LTR:

(a) Instruments affecting title are registered with reference to the parcel of land that they purport to affect.

It is a necessary feature of all LTR systems that the register is parcel-based, and that instruments are registered with special reference to the parcel record. Each land parcel has a unique identifier and its own folium, a kind of proprietary balance sheet showing the ownership interests currently held in the land. When the register is updated by the entry of an interest, all spent entries are removed. For example, if an instrument of discharge of mortgage is registered, the mortgage is removed from the register. The title information on the register is simplified and standardised.

Under deeds registration, instruments are registered simply as instruments executed by the owner. They are not registered by reference to a land parcel, and redundant entries are not removed when a new instrument is registered.

(b) Registration is the sole means by which a transaction concerning land can be fully valid and effective against third parties.

Hogg says that this is 'perhaps the feature most frequently insisted upon when title and deeds registration are contrasted inter se', even though it is not unique to LTR. Some instrument registration schemes make registration a precondition for the passing of any property right in land. These systems are said to be 'dispositive'. In common law:

45 J E Hogg, Registration of Title to Land Throughout the Empire, Sydney, 1920, 1. This is so even though some jurisdictions have introduced parcel indexes (known as 'tract' indexes in the US) as well as the usual grantor-grantee indexes: Simpson, above n 34, 97.
46 Hogg, ibid 4.
47 Ibid, citing the systems of South Africa, Scotland (Register of Sasines) and Cyprus which, Hogg said, 'must for other reasons be classed as deeds registration systems'. Henry VIII's Statute of Enrolments 1535 (27 Hen 8 c 16) was an early example of this type. It provided that that no freehold estates should be bargained and sold by conveyance unless the conveyance was 'enrolled' or registered in the court. Hogg points out that the essential difference between these statutes and LTR is that under LTR, the interest passes upon registration. Under the deeds registration statutes, it is the duly registered instrument that passes the title: J E Hogg, The Australian Torrens System (William Clowes & Sons, London, 1905), 10-11. The point is illustrated by Simpson, above n 34, 19-21.
based systems, registration may be required to pass title to a registrable estate or interest, but equity continues to recognize proprietary rights arising from contracts and personal obligations. These systems are only weakly dispositive.

(c) The state warrants the validity of all registered interests, so that the registration of an interest bars prior claims. Hogg called this the 'affirmative' aspect of the state warranty, meaning that the state declares authoritatively that title of the owner is as stated on the register. It is the feature that most clearly distinguishes LTR from instrument registration. As Hogg points out, no system of deeds registration warrants that a purchaser obtains a good title by registration, or relieves the purchaser of the need to investigate the seller's title. This essential difference has been expressed as follows:

48 Cooke, above n 44.
49 Barry v Heider (1914) 19 CLR 197 (HCA); Great Western Permanent Loan Co v Friesen [1925] AC 208 (PC); Abigail v Lopin [1934] AC 491, 500-02 (Lord Wright (PC); Breskvar v Wall (1971) 126 CLR 376, 387 (HCA, Barwick CJ); Ruptash v Zawicki [1956] SCR 347, 356 (SCC); Re Universal Management Ltd [1983] NZLR 462 (NZCA); Chua Eng Khong v Malayan Banking Bhd [1998] 2 MLJ 97 (Fed Ct Malaysia); Victor Di Castri, Registration of Title to Land (Carswell, Canada, loose-leaf orig 1987), Vol 1, para [242]; G W Hinde and D W McMorland, Butterworths New Zealand Land Law (Butterworths, Wellington, 1997), para [2.045]. Israel presents an interesting study of the persistence of equitable interests. Israel received English common law and the Torrens system while under British administration. By its 1969 Land Law, it sought to abolish equitable property interests. But Israeli judges were prepared to enforce the contractual obligations underlying unregistered transfers. Wiseman said that a new class of Israeli equitable property rights was being created, 'no different in their essential nature from English equitable rights': J Wiseman, 'The Land Law 1969: a Critical Analysis' (1970) 5 Israel Law Review 379, 387.

50 Hogg, above n 45, 96. The terminology of affirmative and negative conclusiveness is also used by Simpson: ibid, 176.
52 Hogg, ibid.
53 Minnesota ex rel Douglas v Westfall, 89 N.W. 175 (Minn, 1902) per Stuart CJ. Whalan points out that to describe LTR as a register of conclusions and instrument registration as a register of evidence overstates the benefits of both systems. The basic principle of this system [the Minnesota Torrens system] is the registration of title to land instead of registering, as the old system [deeds recording] requires, the evidence of such title. In the one case, only the ultimate fact or conclusion, that a certain named party has title to a particular tract of land is registered, and certificate thereof delivered to him. In the other case, the entire evidence from which the proposed purchasers must at their peril draw such conclusion, is registered.

All LTR statutes allow the register to be rectified to remove an entry in specified circumstances, such as where the entry was procured by the registered owner's fraud. Allowing for the possibility of rectification, Hogg qualified this feature of LTR as follows. He said that 'registration ... acts in some degree as warranty of title in the person registered as owner and as a bar to adverse claims' [emphasis added].

(d) All interests affecting the land and capable of enforcement against third parties are recorded in the register. Unregistered interests, except those given overriding status, cannot be enforced in rem against a registered owner.

In Hogg's terminology, this is the 'negative' aspect of the state warranty - that the title is unaffected by any adverse claims not shown in the register. This is subject to overriding interests, which take priority over the registered title without any requirement that they be registered.

This negative warranty is a feature that the system of LTR shares with deeds registration schemes, all of which give purchasers some degree of protection against unregistered interests. Mapp says that it is often overlooked that a LTR system must borrow this element of deeds registration if it is to achieve its objects.

The conclusiveness of registered title is subject to significant exceptions, and instrument registries do not purport to provide all the evidence relevant to the title: Douglas J. Whalan, The Torrens System in Australia (Law Book Co., Sydney, 1982), 13.

54 Hogg, above n 45, 2.
55 Ibid, 96 (although Hogg did not include this element in his list of the characteristics of LTR; at 2-3); Simpson, above n 34, 176.
56 Mapp, above n 30, 45.
executive act under statutory authority calls for the provision of compensation. LTR systems which allow interests to be extinguished by first registration without making provision for compensation generally need to adopt more rigorous, and therefore more costly, adjudication procedures.

The overlap between deeds registration and LTR

In theory, there is a bright line separating LTR and instrument registration, but in practice the dividing line is opaque. Hogg found that any classification of the world’s land registry schemes by reference to the two categories must be to some extent arbitrary.

There are some hybrids that are difficult to categorise. For example, under the South African scheme, deeds are registered under the parcels which they affect, and the registrar checks that the deeds are in order before registering them. No disposition of an interest in land has legal effect unless it is registered. Despite these features, Simpson classified the South African scheme as instrument registration because legally, it is the deed (once duly registered) rather than the act of registration that vests title.

The greatest overlap between LTR and deeds registration relates to the negative aspect of Hogg’s title warranty. Both systems use a ‘publicity’ rule of priority for determining the

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57 The schemes in England & Wales, Australia, New Zealand and Canada all operate assurance funds, although the barriers to successfully obtaining compensation in some jurisdictions are often formidable: Simpson, above n 34, 181. Jurisdictions which operate LTR without an assurance fund include Israel, Fiji, Germany, Austria, Sudan, Malaysia and British Honduras: ibid.

58 This seems to have been Hogg’s view: Hogg, above n 45, 2, 384 (stating that the provision for indemnity was complementary to the warranty of title). See also Whalan, above n 53, 146.


60 Arruñada, above n 4, 28.

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62 Adjudication is the process of ‘official ascertainment of rights’ undertaken by title registrars when accepting a title for registration: Simpson, above n 34, 188. An important function of compensation provisions is to allow the registrar to take a risk management approach to adjudication, enabling him or her to complete the process more expeditiously: T B F Ruoff, An Englishman Looks at the Torrens System, Sydney, 1957), 34, Ch 5 passim. In explaining the failure of Lord Westbury’s Land Registry Act 1862, Anderson said the consequence of offering warranted title without provision for indemnity, was that the proof of title required for registration was set too high: J S Anderson, Lawyers and the Making of English Land Law 1832-1940 (Clarendon Press, Oxford, 1992), 113.

63 Hogg, above n 45, 2.

64 Simpson, above n 34, 105.

65 Ibid, 21, 105.
priority of registered interests. Under this rule, interests rank for priority by their date of registration rather than by their date of creation, and registered interests prevail over unregistered interests. By being first to register, a bona fide purchaser of later interest can gain priority over an earlier interest. This publicity rule is applied with different degrees of rigour, depending on whether a purchaser who registers with notice of an earlier unregistered interest obtains priority over it. The publicity rule improves dynamic security and facility of transfer by assuring purchasers that they will take free of unregistered claims, at least if the purchasers have no off-record notice of the claims. This limits the purchaser’s transaction costs.

The publicity rule assumes that unregistered interests can exist under the registration system. In the civil law countries, some LTR statutes (eg Germany), and some deeds registration statutes (eg the Netherlands) provide that, with limited exceptions, no property right in land can be created or pass unless registered. Civil law systems can apply this rule more strictly because they do not have equitable interests. In common law systems, unregistered interests are effective in equity. It is impractical to require all interests to be registered. LTR statutes provide for only a limited list of estates and interests in land to be registered, typically much fewer than under deeds registration statutes. Registration imposes costs on the registry, which must examine instruments and assure titles. It is not cost-effective to provide this service other than for the most valuable, common and standard estates and interests.

If unregistered interests are to exist under LTR, the system must provide a means of publicity for them, and rules for determining their priority. Many LTR systems are actually hybrids of LTR and deeds registration, registering guaranteed titles and also recording claims that have not been adjudicated by the registrar. Devices for recording claims without a guarantee may be called ‘caveats’, ‘restrictions’, ‘notices’ or ‘inhibitions’. The statute may provide that the use of a particular device to record a claim has one of more of the following effects:

1. to serve as notice to purchasers (registered or unregistered), who take subject to recorded claims under a ‘notice’ rule of priority;
2. as a ‘tripwire’, to prompt the registrar to forewarn the claimants of any impending registrations that may conflict with their rights, giving them time to institute judicial proceedings to stop the registration of the competing interest;
3. to reserve priority for the recorded claim as against any interest not registered or recorded at all, or only recorded or registered later;
4. to notify the registrar of restrictions on the power of the registered owner to deal with trust property.

There is considerable diversity in the types and legal effects of protective entry permitted under different statutes. In this work, the term ‘registration’ is reserved for an entry in a register that carries an affirmative warranty of title. The term ‘recording’ is used to designate an entry in the register that confers no affirmative warranty but may affect the priority of the interest. It is conceded, however, that there is no semantic distinction between ‘recording’ and ‘registering’, and the statutes often use the terms interchangeably.

Strategies for risk management

The two systems, deeds registration and LTR, may be compared in terms of their techniques for managing title assurance risks. The theory of risk management provides

66 Arrufaïda, above n 4, 40.
67 Cooke, above n 44, Ch 9.
68 See above, n 49.
generic strategies that might be applied to improve legal security. David Palmer summarised them as follows:72

1. avoidance of actions that give rise to risk of loss;
2. reduction of the frequency of losses occurring, and reduction of the magnitude of losses should they occur;
3. transference of risks either by distributing them through insurance pools, or shifting them directly to others; [and]
4. risk assumption or retention.

Land registration systems employ these strategies through various measures. Both deeds and title registries use publicity as a risk avoidance strategy. A system in which interests are recorded in a public register can protect owners' rights against third parties, while also protecting the reliance of purchasers on the appearance of ownership.73 By reducing information asymmetries between owners and purchasers, publicity enables purchasers to avoid the mistake of acquiring interests that will conflict with the property rights of others. This reduces the frequency of losses arising through such mistakes.

Most registration systems require purchasers to assume or retain the risk of loss if they did not transact in good faith, i.e., in the belief that they were dealing with the true owner in a consensual transfer. The strategy of risk assumption is used here to provide purchasers with an incentive to behave conscientiously in land transactions.

LTR deploys a wider range of risk management techniques than deeds registration. First, LTR allows purchasers to transfer some legal security risks to the state. By examining titles presented for registration, the state takes over from purchasers the lion's share of the title assurance function (the task of providing the purchasers with information that assures them that they are acquiring a good title). Purchasers no longer needed to

investigate the history of the transferor's title.74 They can rely on the state's affirmation that the person named in the register is the true owner, able to pass them a good title.

Secondly, the state's risk is distributed through a pool of insured persons through a contributory scheme of social insurance, often known as the assurance fund or indemnity scheme. This enables the state to provide monetary compensation to back up the risk of title assurance that it has taken upon itself. This arrangement for the transfer and distribution of risk is the basis of the 'state guarantee' of registered title.

In title registration systems that lack provision for an indemnity scheme, the risk of loss through registry errors and omissions may be transferred to registry officials personally via principles of tort or contract law.75 The officials may in turn transfer the risk to a professional indemnity insurer. Deeds registration systems usually do not incorporate provision for transfer of risk, although private title insurance often performs that function in the US recording systems.

Under both deeds and titles systems, parties can transfer some risks to conveyancing professionals, who are answerable for losses arising from their negligence. The professionals may in turn transfer their risk to a professional indemnity insurer, or to a title insurer. The possibility of risk transfer to conveyancing intermediaries is not unique to land registration. It also exists under the system of private conveyancing, where no public register is used.

The shift to LTR

There has long been overwhelming agreement among legal commentators that LTR is, in principle, the land registration system better able to provide security of title and to

73 Demogue, above n 22, 432-33; Baird & Jackson, above n 28.
74 This has been identified as 'the object of the Torrens system': Gibbs v Messer [1891] 1 AC 248, 254 (Lord Wright) (PC), although it might be better regarded a means of attaining the system's object of providing dynamic security.
facilitate the trading of interests in land. Recognising these advantages, many jurisdictions introduced LTR on a voluntary basis in the 19th and 20th centuries. But history has shown that LTR does not displace instrument registration unless it is made compulsory for landowners to register their titles. This is because the costs of registration fall upon today's landowners, while the benefits accrue to their successors. Faced with the widespread failure of LTR schemes to attract applications from landowners to register land, jurisdictions could either opt for compulsion or admit defeat. Compulsory registration is usually opposed by vested interests, and can be politically costly. It is a measure that governments are reluctant to adopt in the absence of a pressing need.

Many countries are now faced with the new demands on their legal land registries, and high costs in implementing cadastral and electronic conveyancing projects. Jurisdictions which have long operated instrument and title registries in tandem on a 'freedom of choice' basis are faced with the practical necessity of choosing one system to automate. The need to fund automation projects has put a price on government equivocation over the choice of a land registry system.

Automation has not only ended government procrastination in many jurisdictions. It has also shifted the balance of considerations decisively in favour of LTR. LTR is better suited for electronic technology and for integration with other land information systems. Title registries organise information by reference to the land object or parcel, while instrument registration is organised by party. Usually, LTR systems establish the parcel location and boundaries by survey. Parcel-related title information is more readily integrated with other land databases, many of which index data by the cadastral parcel. LTR also provides title information of higher quality, because it is clearer and more authoritative than that provided by an instrument registry, and lacks the redundant information found on deeds registers.

The province of Ontario has been a world leader in establishing automated systems to support electronic title searching and conveyancing. In preparation for this initiative, the Ontario Law Reform Commission conducted the most rigorous comparative study of the province's dual LTR and instrument registry schemes in accordance with five criteria: protection of reasonable expectations, speed, cost, comprehensibility and potential for improvement. Its conclusion was that 'a land titles system is superior to an instrument registry system in almost every material respect in which comparison can be made at present.' The Commission's recommendations, which have since been substantially implemented, were to convert the province's instrument registry to a title registry and to extend registration compulsorily by area to include the whole province.

Other jurisdictions have reached a similar conclusion. Associated with the global trends in cadastral reform, the FIG (International Federation of Surveyors) reported in 1998 the existence of an international trend to the introduction of land title registration systems (LTR) in substitution for deed registration systems. By the end of the 20th Century, many jurisdictions across the globe were introducing, or considering the introduction of, title registries for the first time, displaying new-found resolve to extend the compulsory registration of land, revamping moribund LTR statutes and registries or statutorily converting their deeds registries to title registries.

The USA notably defied the trend by continuing the process of dismantling its vestigial Torrens systems, but the USA has no cadastral survey as such and has only a weak and

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76 Garro above n 76, 91; Tim Hanstad, 'Designing Land Registration Systems for Developing Countries' (1998) 13 American University International Law Review 647, 673-76; John McCormack, 'Torrens and Recording: Land Title Assurance in the Computer Age' (1992) 18 William Mitchell Law Review 61, and see bibliography at fn 122; (conceded by McCormack, who himself argues against its extension in the USA.


78 The English LTR system uses 'general boundaries'. Simpson explains that the location of the parcel is identified by reference to physical features such as party walls, roads and hedges, but the exact boundary lines are undefined: Simpson, above n 34, 134-35. The general boundaries rule is preserved in Land Registration Act 2002, s 60, although the section provides for the making of rules to determine when and how boundaries are to be fixed.

79 Ontario Law Reform Commission, above n 77, 23.

incomplete land information system. Despite an attempt in the 1970s by the US Department of Housing and Urban Development and Veterans Affairs to boost the uptake of Torrens titles by experimenting with a cheaper administrative process for initial registration, the Torrens system is widely perceived to have failed in the US. Most US commentators agree that there is no reasonable prospect that it will be revived or extended. That does not prevent US development agencies from actively supporting LTR and cadastral projects in other countries in the developing world.

F. CONCLUSION

The problem of legal insecurity derives from a conflict of objects underlying the institution of private property. First, we wish to recognize property rights in land that are enforceable in rem. This is necessary to provide the 'security of expectation' that will induce people to invest in improving land and putting it to productive use. Secondly, we need to create multiple property rights in the same land parcel, in order to facilitate specialized economic activity in an environment of scarce land resources. The

Gerhard Larsson, Land Registration and Cadastral Systems: Tools for Land Information and Management (Longman Scientific and Technical and Wiley, Harlow; New York, 1991), 26. Garro offers the opinion that the lack of accurate, large-scale maps in the USA would have precluded the successful establishment of LTR in that country: above n 76, 91

Looking for ways to reduce settlement (conveyancing) costs, the Department funded a research project into a cheap and quicker way of completing initial registration. The new method consisted of registering possessory titles, and providing for them to become absolute after a period of time. By allowing the limitation statutes to clear stale claims, this method avoided the constitutional requirement for a judicial process to adjudicate the claims. Hennepin County, Minnesota was a test site for this research. The project was not successful in attracting increased applications for initial registration. On the research project and its outcomes, see Richard J Patterson and Sandra J Alexander, 'Land Titles Records Modernization: An Update on the RESPA Section 13 Research' (1981) 16 Real Property Probate and Trust Journal 630; McCormack, above n 76, 85-89.

McCormack, ibid, 65; Garro, above n 76, 91 and fn 64.

For example, USAID has assisted in the establishment of title registries in a number of developing and transition economies, including Kyrgyzstan, Armenia, Vishgorod, Ukraine among many others. For more details of USAID titling programs, see <http://www.usaid.gov/about_usaid/>
J E Hogg, the finest comparative scholar of land title registration systems in the common law world, once observed that, as well as the Australian Torrens system, "there is now an English Torrens system, a Canadian Torrens system and an American Torrens system". Hogg was using the term "Torrens system" to mean a system of land registration in which it is the title itself, and not just the documentary evidence of title, that is registered. The title is authoritatively established by the government’s warranty that the person named in the register is the owner of the interest specified, subject only to stated encumbrances and qualifications. In this generic sense, the Land Registration Act 2002 (UK) and its predecessors are fine examples of the Torrens system.

English lawyers usually do not apply the term "Torrens system" to their own systems. They use the term in a genealogical sense, to refer to a family of land title registration systems that derive, directly or indirectly, from statutes enacted in South Australia in 1858-60 at the instigation of Sir Robert Torrens. This includes most of the statutes of the rest of the Commonwealth and the United States, and many other jurisdictions.

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2 Hereafter the 'LRA 2002'. The Act, which replaces the Land Registration Act 1925, does not apply in Scotland and Northern Ireland.
3 Sir Robert Torrens was granted, by letters patent from the Crown, the right to link his name with the system he initiated: V Di Castri, Registration of Title to Land (loose-leaf, orig. Carswell, Canada, 1987) Vol 1, para [13], (citing Smith (1901), 54 Cent. L J 285).
4 J E Hogg, Registration of Title to Land Throughout the Empire (Sydney, Law Book Co, 1920) discussed the origins of registration of title statutes in 22 jurisdictions of what was then the British Empire.
Although the influence of the English and Torrens systems upon each other is sometimes acknowledged, English texts generally regard their system as home-grown, a parallel but independent development.

The term “Torrens system” is therefore an ambiguous one. In several countries, including the United States, Malaysia, New Zealand and Australia, it is most often used generically to mean a system that registers land titles as opposed to a system that registers deeds or instruments of title. In Canada, which has title registration systems of both English and Australian origin, the term is used in both its generic and its genealogical sense, according to the context. For the sake of clarity, I propose to use the term only in its genealogical sense, consistently with English usage, and to employ the term “registration of title” or cognate forms where the generic meaning is intended.

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6 Listed in A M Garro, *The Louisiana Public Records Doctrine and the Civil Law Tradition* (Paul M Herbert Law Centre Publications Institute, Baton Rouge, La, 1989) at 75-6, fn 5.

7 E.g., K and S F Gray, *Land Law* (London, Butterworths, 1999) at para 9.7 states that the Torrens legislation “was in many ways, the inspirational force behind the LRA 1925”; see also S R Simpson, *Land Law and Registration* (Cambridge, CUP, 1976) at 78.

8 E.g., T B Ruoff, *An Englishman Looks at the Torrens System* (Sydney, Law Book Co, 1957), at 6: “Modern land registration was invented almost simultaneously and quite independently in both England and South Australia”.


10 Simpson, above n 7, at 78; Garro, above n 6, at 76 and fn 6.

11 The registration of title legislation of Alberta, Saskatchewan, Manitoba and the Northwest Territories and Yukon is based closely on the Australasian model, British Columbia has a modified form of the Torrens system. Ontario and Nova Scotia followed English legislation: Hogg, above n 4, at 14; V Di Castri, above n 3, at paras [12]-[16].

12 This accords with the usage in the land administration literature. For example, the United Nations Economic Commission for Europe defines “registration of title” as “a system whereby a register of ownership is maintained based upon the parcel rather than the owner or the deeds of transfer”. “Land registration” is used as a broader term to mean “the process of recording rights in land either in the form of registration of deeds or else through the registration of title to land”: *Land Administration Guidelines* (UN, New York and Geneva, 1996), glossary, at 91.

13 Ruoff, above n. 8 at 1

14 Ibid.
transfers, while Jackson criticized English courts for ignoring relevant Torrens case law. The failure to pool ideas and experience impoverishes both systems. The problem lies partly in over-generalisation about foreign registration systems. Some commentators speak of "the Torrens system" as if it were a monolithic institution that operates uniformly in all the jurisdictions of the Torrens "family". We should be wary of generalisations about "the Torrens system" that refer to more than one country or legislative unit. While they may have a common ancestor, today's much-amended "Torrens" statutes draw inspiration from multiple sources, and are modified by reference to local needs and experience. The six Australian states and two territories each have their own registration of title statutes, by no means uniform. The statutes, and the judicial interpretations of them are, however, sufficiently similar that it is feasible to group them together as one system for purposes of an international comparative study. The statutes of Australia, New Zealand, and the prairie provinces and territories of Canada share a number of similar provisions, a factor which has enabled them to develop, to some extent, a common jurisprudence. This case law has also influenced the development of registration law in other Torrens jurisdictions such as Malaysia and Singapore.

The aim of this chapter is to provide a foundation for the comparative study of English and "Torrens" systems of title registration. The chapter offers a theoretical framework for comparative analysis, highlighting those rules that have a substantive effect on the rights of individuals. While many of the observations relating to the Australian system can be applied to other Torrens jurisdictions, I have selected a single comparator from the Torrens group to avoid the risk of over-generalisation. In the latter part of the chapter, I will explore the reasons for the misconception that the systems are fundamentally and originally distinct, and advance my own theory of the essential differences between them. As both the English and Australian are mature systems that have virtually completed the registration of eligible land parcels, the focus of this comparison will be on dealings following first registration.

B. THE OBJECTS OF REGISTRATION OF TITLE

The objects of systems of LTR are to improve security of title and to facilitate the transfer of interests in land. As explained in the Introduction to this thesis, the "security of title" object refers to static security, and the "case of transfer" object means dynamic security. The challenge for the law is to balance these partly contradictory objects.

As explained in the last chapter, the law of private conveyancing was based on the principle of static security, which protects the rights of existing owners at the expense, if necessary, of purchasers. This was achieved through rules such as nemo dat quod non habet, the preference of both law and equity for the interest first in time when adjudicating the priority of competing interests, and the doctrines of notice and

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15 D C Jackson, 'Security of Title in Registered Land' (1978) 94 Law Quarterly Review 241 at 247-54
18 Many commentators have observed that the objects of land title registration are to make ownership of property secure, and to facilitate the transfer of rights in land. See eg, J E Hogg, The Australian Torrens System (William Clowes & Sons, London, 1905), 1; Hogg, above n. 4, at 100 and fn 32 (citing numerous case authorities); Thomas W Mapp, Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens System (Alberta Law Review, University of Alberta, Edmonton, Alberta, 1978), 59-60; Elizabeth Toomey, 'Fraud and forgery in the 1990s: Can our adherence to Prater v Walker survive the strain?' (1994) 5 Canterbury Law Review 424, at 4.37; Victor DiCastri, Registration of Title to Land (Carswell, Canada, loose-leaf orig 1987) Vol 2, at para [756]; Martin Dixon, Principles of Property Law 3rd ed., (Cavendish, London, 1999), 67. The two objects are also found in the preamble to the very first English registration of title statute, the Land Registry Act 1862, which began: "Whereas it is expedient to give certainty to the title of real estates and to facilitate the proof thereof and also to render the dealing with land more simple and economical".
equitable fraud. By the mid-nineteenth century, England and Australia were developing market economies, in which value is captured through exchange. The old conveyancing rules inhibited exchange of land by imposing high transaction costs upon purchasers, and exposing them to the risk of acquiring defective or subordinate titles.

The enactment of registration of title legislation decisively shifted the conveyancing law towards the opposing principle of dynamic security. Dynamic security is served by legal rules that protect the reasonable expectations of those who purchase in good faith. It facilitates exchange by reducing or eliminating the risk that the purchaser's title will be subject to unknown prior claims and title defects.

How registration of title improves dynamic security

The key elements of a system of registered title are designed to relieve purchasers of the risks of unwittingly acquiring a defective or subordinate title. These "dynamic risks" created by the old law of private conveyancing left purchasers with the following problems, arising from risks to dynamic security:

1. determining the validity of all the instruments through which the grantor derived title;
2. determining the validity of the immediate conveyance from the grantor to the grantee;
3. the possible existence of unknown legal interests granted by the grantor or a former owner; and
4. the possible existence of unknown prior equitable interests or equities that are enforceable against a grantee, unless he or she is a bona fide purchaser for value without notice.

Dynamic risks (3) and (4) relate to the priority of competing interests in land, and can be solved by deeds registration or interest recording schemes. These are schemes that establish a public register of instruments or interests and rules for determining priority between them, usually by reference to the date of registration. The system of registered title relieves against risks (3) and (4) by providing that, except in case of fraud or acquisition by a volunteer, the priority of registered interests inter se is determined by their date of registration (or lodging for registration).

Dynamic risks (1) and (2) do not raise a question of priority but arise from the operation of the common law principle nemo dat quod non habet. Under this principle, a purchaser does not obtain a good title if the transfer from seller to purchaser is void, or if any of the instruments through which the seller's title devolves are void. Interest recording statutes alone cannot eliminate risks (1) and (2), although the American solution is to insure privately against the risks that flow from them.

The principal remedy that registration of title systems use against all four dynamic risks is the concept of State-guaranteed title. This has, as Hogg explained, a dual operation:

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19 Di Castri, above n 3, Vol 1, para [6]
20 Willett uses the term "dynamic losses" to mean the losses arising from change of ownership, and "dynamic risks" to mean the risk of such losses: A H Willett, The Economic Theory of Risk and Insurance, (Illinois, Richard Irwin, 1951), at 13-22.
21 This exposition of the problems is based on the analysis of Mapp, as simplified in the report of Canada's Joint Land Titles Committee: Mapp, above n 18, Ch 2 and summary at p 41-2; Canada. Joint Land Titles Committee, Renovating the foundation: proposals for a model land recording and registration act for the provinces and territories of Canada (The Committee, Edmonton, 1990), at 6.
22 With respect to problem (3), there is a debate as to whether the law's preference for first in time is a priority rule or an application of nemo dat quod non habet. The latter view is supported by A J Bradbrook, S V McCallum and A P Moore, Australian Real Property Law (2nd ed, Sydney, LBC, 1997), at para [3.06]; M Neave, C J Rossiter and M A Stone, Sackville & Neave's Property Law: Cases and Materials (6th ed, Sydney, Butterworths, 1999), at para [5.2.6].
23 Mapp, above n 18, at 56.
24 Not all jurisdictions make an exception for volunteers, as explained below under the heading 'registered volunteers'.
The warranty of title given by the statutory conclusiveness of the register operates in two ways, and the register has two functions - affirmative and negative respectively. Affirmatively, the register warrants that the title of the owner is as stated on the register; and negatively, the warranty is that the owner’s title is not affected by anything that is not stated on the register. This is equivalent for many purposes to a warranty that the owner’s legal title is as it appears to be on the register, and that there are no equitable interests enforceable against the owner, other than any actually notified on the register.

The conclusiveness of the register finds its counterpart in the concept of the ‘indefeasibility’ of registered title, as it is called in the Torrens jurisdictions. The term should not be taken literally. Torrens titles are no more absolute than the English concept of ‘absolute title’.

The affirmative aspect of the conclusive register overcomes dynamic risk (1) by curing prior title defects. It substitutes for the chain of title a single status indicator - a registered title, affirmed by the state. Except as allowed by statute, it cannot be challenged by reason of a defect in the chain of instruments and transactions through which the previous owner derived title.

The affirmative operation of the register can also overcome dynamic risk (2), which is the risk that the immediate conveyance from the previous registered owner to the purchaser is void or voidable. The extent to which the system should relieve against this risk is perhaps the most important policy question in registration law. As I will explain below, the Australian system goes further to eliminate dynamic risk (2) than the English.

The negative aspect of the conclusive register reduces dynamic risks (3) and (4). It protects registered owners from being affected by notice of prior interests, it reinforces the rule that interests rank in priority by their date of registration. In both the English and Australian systems, even actual notice of a prior unregistered interest does not per se make it enforceable against a purchaser who registers. All the Australian statutes have a “notice” provision that states that a transferee is not affected by actual or constructive notice of any unregistered interests and is not required to inquire into the circumstances under which the transferor or the previous proprietor was registered. As in England, difficult questions have arisen concerning the dividing line between “mere notice” and conduct amounting to fraud or lack of good faith on the part of the transferee.

The combined negative and affirmative operation of the title register gives registered owners a degree of dynamic security that could not be achieved under the law of unregistered conveyancing. It facilitates the transfer of land by reducing dynamic risks and transaction costs. It is, however, subject to various qualifications and exclusions, as detailed below.

C. QUALIFICATIONS TO THE NEGATIVE WARRANTY

Overriding interests

As in England and Wales, all the Australian registration of title statutes provide for a list of “overriding interests” that bind the registered owner whether shown on the register or not. The list varies from one jurisdiction to another, commonly including

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25 Above n. 4, at 96. All Australian statutes embody this principle in the ‘indefeasibility’ provision, e.g. Transfer of Land Act 1958 (Vic), s 42. The LRA 1925 followed a similar format: ss 20(1) and 23(1), C.F. the LRA 2002, s 58 (affirmative operation of registration) and negative operation: (ss 11, 12 and Sched 1; ss 28-30 and Sched 3).

26 Mapp says that the epithet ‘indefeasible’ is deceptive, and notes that Torrens statutes generally do not use the term: Mapp, above n 18, at 66-67.
short term occupation tenancies, rates and taxes, public rights and certain easements. The term "overriding interest" does not designate a homogenous group of interests. It is best understood as a legislative device for subjecting registered titles to interests that are deemed worthy of "passive" protection, in circumstances where the persons entitled to the benefit of the interests cannot reasonably be expected to enter them on the register.

Some of the Australian statutes, like the 1925 English Act, treat the interests of squatters as an overriding interest. While recognition of squatters\' rights detracts from the completeness of the register as a mirror of title, there is a practical need to reconcile the register with the change of possession on the ground. In an attempt to resolve the dilemma, legislatures have experimented with various measures for dealing with possessory rights in a system of title by registration. This has produced some instability and variation in the rules of the various jurisdictions.

30 For a summary of the exceptions to the indefeasibility of registered titles in each of the Australian jurisdictions, presented in tabular form, see Neave, Rooster & Stone, above n 22, at 494-95
31 LRA 1925 (UK), s 70(1)(f). The provision has not been replicated in the 2002 Act, but squatters\' rights will be protected as overriding interests for three years under the transitional provisions: Sched 12, paras 7,11.
32 Victoria, Queensland, Western Australian and Tasmania: see generally Bradbrook, McCallum & Moore, above n 22, at paras [16.82]-[16.85].
33 The United Nations Economic Commission for Europe recommends that the law should 'permit flexibility in reconciling the possession of land with its ownership': above n. 11, at, 21
34 For example, statutes may exclude the doctrine of adverse possession from applying to registered land in general, or make it fully applicable, or make the registered title subject to the inchoate rights of a person in adverse possession, or allow possessory claims to be made only in respect to whole parcels, or provide for the limitation period to start running afresh upon registration of a new owner. A number of jurisdictions have experimented with a series of different measures.

None of the Australian statutes provide a wide exception for the interests of a person in actual occupation of land, like that found in the English legislation. The English provision protects the static security of persons occupying land under informal agreements, who may be unlikely to appreciate the need to protect their interests by an entry in the register. As interpreted by the House of Lords in Williams & Glyn\'s Bank Ltd v Boland, the provision in the 1925 Act has been criticised for the dynamic risks (or burden of inquiry and risk) that it places on purchasers and mortgagees.

In Australia, such interests would be destroyed by registration of a later interest, unless the unregistered claimants took timely action to enter a caveat or to assert their rights in court. Neither the English nor the Australian approach is entirely satisfactory, but there seems to be no middle course. Either the unregistered interests are extinguished by a purchaser\'s registration, or they override it. Faced with this invidious choice, the 1925 English Act prefers the static security of the occupying owners, while Australia opts to maximise dynamic security.

Voluntary transfers

The negative operation of registration of title enables purchasers to take free of prior unregistered interests, even if they have notice of them. In England and Wales, this operation benefits only purchasers for value. In Australia there are two views about

35 LRA 2002, Sched 3, cl 2 (c.f. s 70(1)(g) of the 1925 Act) and similar provisions in the Registration of Title Act 1964 (Ir), s 72(1)(j) and the Land Registration Act (NI) Act 1970, Sched 5, pt 1, para 15.
38 Property Law: The Implications of Williams & Glyn\'s Bank Ltd. v. Boland ("the Boland report") (1982) Law Com, No 115, esp. at para 28; but see (1987) Law Com, No 158, at para 1.3 as to subsequent developments. The Commission resiled from its recommendations in the Boland report, and found that practitioners had come to terms with the implications of the court\'s decision: para 2.7.
39 LRA 2002, ss 28-30 (c.f. LRA 925, s 20(1)(4); s 23(1), (5)).
whether the same protection should be extended to a registered volunteer (a transferee who did not give valuable consideration).

On one view, the dynamic security provided by the registration system should benefit only those who have acquired their titles for value in the market. A registered volunteer should take subject to earlier interests that affected his or her predecessor in title, but can confer a good title on a purchaser for value. This is the solution adopted in the 1925 English Act, and in a line of Australian cases represented by the Victorian Supreme Court decision in King v Smail. The contrary view, represented by the decision of the New South Wales Court of Appeal in Bogdanovich v Koteff, holds that a registered volunteer takes free of prior equities that affected his or her predecessor in title. The latter approach has found favour in Western Australia, and has been legislatively adopted in Queensland and the Northern Territory.

The conflict in the Australian authorities is partly due to equivocation in the statutes, but also to competing policy arguments. In Australia and Canada, all law reform bodies who have examined the question in recent years have concluded that registration should afford volunteers the same protection from prior equities as it does to purchasers for value. The principal arguments for extending dynamic security to registered volunteers are that it provides the security of expectation that an owner requires to invest in improvements, and that it is not in the interests of general economic welfare to allow the titles of volunteers to remain clouded.

D. QUALIFICATIONS TO THE AFFIRMATIVE WARRANTY

Rectification of the register

Dynamic risk (2) is the risk that a purchaser will not get a good title if the immediate conveyance from the previous owner is void or voidable for any reason, e.g., forgery, fraudulent misrepresentation, illegality or breach of mandatory statutory procedures. The extent of protection from this risk depends on whether the statute allows rectification of the register adversely to the purchaser's registered title.

The original Torrens statutes gave conflicting indications on whether rectification could be ordered against a registered title obtained without fraud on the basis of a void instrument. As a result, this important question was left to the judges to decide. After decades of conflict in the judicial authorities, the High Court of Australia decided in 1971 that a title obtained by registration of a void instrument was not liable to rectification in the absence of fraud. "Fraud" means actual fraud by the applicant.

42 A registered owner who had taken under a will was held to have an indefeasible title and was not subject to an equitable interest created by the previous registered owner. In Rasmussen v. Rasmussen [1995] 1 VR 613 (Supreme Court of Victoria), Coldrey J doubted the correctness of this decision.
43 Coulan v Registrar of Titles (2001) 24 WAR 299.
44 Land Title Act 1994 (Qld), s 180; Land Title Act (NT), s 183.
46 R F Atherton, "Donors, Devisees and Torrens Title: The Problem of the Volunteer Under the Real Property Acts". (1998) 4 (2) Australian Journal of Legal History 121. at 157-9; Mapp, above n 18, 124-28; and see Law Reform reports, ibid.
47 Neave, Rossiter & Stone, above n 22, at paras [6.3.27]-[6.3.32]. Whalan says that no distinction has been made in the cases between void and voidable instruments, since the central question is whether it is registration or the instrument that confers title: D Whalan, The Torrens System in Australia (Sydney, LBC, 1982), at 319-20; P Butt, Land Law (4th ed, Sydney, Law Book Co, 2001), at 298, fn 25.
48 Breakvar v. Wall (1971) 126 CLR 376; [1972] ALR 205, following Frazer v Walker [1967] 1 AC 509; [1967] 1 All ER 649, on appeal to the Privy Council from New Zealand; Adorna Properties Sdn Bhd v Boonsom Boonyanit @Sun Yon Eng [2001] 1 MLJ 241 at 246 (Malaysia) and Administration of the Territory of Papua New Guinea v Blaust Sripunia [1971-72] PNGLR 229 (Papua New Guinea). However, Di Castri says that the majority of Canadian decisions on the subject of forged instruments do not accept the principle; Di Castri, above n 3, vol 2, at para [758].
The adoption of this principle of immediate indefeasibility dramatically reduced dynamic risk, but this came at a cost to static security. As Mapp observed:

'To whatever extent C [a purchaser] can acquire an interest from a predecessor through error, he is vulnerable to losing that interest to a successor through the same error repeated after his registration.'

The English system devised a compromise that substantially protects registered 'proprietors in possession', but not mortgagees, against dynamic risk. The register may be rectified, without the consent of a registered owner, to correct a mistake, to bring the register up to date or to give effect to an estate, right or interest excepted from the effect of registration.

There is, however, a mile-wide immunity from rectification for a 'proprietor who is in possession.' Proprietors in possession who have not been fraudulent or careless are at little risk of losing their land through rectification. It is mortgagees who bear the brunt of the wide rectification provisions. Even a mortgagee who is actually in possession is not a 'proprietor in possession' for the purposes of the Act. The mortgagee will, however, be entitled to payment of indemnity in the event of rectification.

The rationale for the different treatment of mortgagees and proprietors in possession seems to be that mortgagees, as capital investors, are more likely to regard full monetary indemnity as an adequate substitute for their interest in land. Di Castri suggests that the State guarantee of title may have a different meaning for registered mortgagees and encumbrancers:

'50 Assets Company Ltd v. Mere Roihi [1905] AC 176.
52 LRA 2002, Sched 4, cl 2
53 LRA 2002, Sched 4, cl 3 and s 131.
54 LRA 2002, s 131(2)(b).
55 LRA 2002, s 103 and Sched 8, cl 1(a).

It may be that [they] conceive their statutory protection, not in terms of indefeasibility, but in terms of guaranteed titles ensuring pecuniary compensation. Perhaps this is all that is required with respect to these interests.'

In Australia, actual fraud on the part of the registered owner or his or her agent is the only ground upon which the register may be rectified adversely to a registered owner who took bona fide and for value.

Fraud may have a narrower scope under the English rectification provisions, where it has been held to mean a fraud practised on the registry in order to obtain registration.

In the more usual case where the fraud is practised on the former registered owner, the remedy in England might be an in personam action.

Rectification of boundaries

It is sometimes assumed that boundaries are guaranteed in Australia, but this requires qualification. All the Australian statutes provide that the registered owner does not obtain indefeasible title to any portion of land that may have been included in the certificate by wrong description of parcels or boundaries. This exception allows
rectification of surveying mistakes, but not (except in Queensland) where the proprietor is a purchaser or mortgagee for value.

This means that, except in Queensland, registered owners or mortgagees may resist rectification of their title with respect to boundaries, so long as they obtained the title bona fide, but they may be liable to compensate the person who suffered loss by reason of the error. Where they obtained the title bona fide from an owner already on the register, they will escape both rectification and personal liability. For transferees in this category, boundaries are guaranteed subject to the rights (if any) of a person in adverse possession or entitled to relief under encroachment of buildings legislation.

In personam remedies

The English and Australian systems recognise that the conclusive effect of registration does not prevent the assertion of claims against the registered owner personally (e.g., arising from a contract or a trust obligation incurred by the proprietor). These claims can lead to an order against the registered owner in personam for the transfer of a title.

As opposed to cases of double or conflicting registrations, or registration of a person who in fact has no title to the property.

The general scheme of the Australian statutes is that claimants must first avail themselves of their statutory remedies against the person responsible for the loss; the statutory indemnity being a last resort: see generally, Bradbrook, McCallum & Moore, above n 22, at para [4.131]; Whalan, above n 48, at 362

Some Australian jurisdictions have enacted special legislative schemes for dealing with encroachment of buildings by neighbours, while others rely on the general law of adverse possession. See further, Bradbrook, McCallum & Moore, above n 22, at para [15.77].

Ziff suggests that claims for proprietary relief should be termed inter se rather than in personam: Bruce Ziff, Principles of Property Law (3rd ed, Scarborough, Ont, Carswell, 2000) at 431.

Courts have occasionally used the device of a constructive trust to deem the registered owner to take subject to a prior interest in cases where the registered owner had expressly or impliedly agreed to do so. In England and in Australia, commentators have cautioned that "the trusteeship concept must be very carefully and sparingly used in the context of indefeasibility" lest it undermine the objects of the registration system.

E. PROTECTION OF UNREGISTERED INTERESTS

The general scheme of the English and Australian statutes is to allow registration only of estates and interests that existed as "legal" interests under the general law. Trusts and other equitable interests are excluded from the register in the interests of simplicity and ease of transfer. In England, trusts are protected by the entry of a restriction, a device broadly similar in function to the registrar's caveat used in some Australian jurisdictions.

In both systems, unregistered interests take effect in equity, and are liable to be destroyed by the registration of another disposition unless they are protected under the provisions of the Act. In Australia, protection is available through the entry of a caveat against dealings. The function and operation of the caveat is similar to that of


LRA 2002, s 27

LRA 2002, ss 40-46

E.g., in New South Wales, the caveat forbids the registration of an instrument not in accordance with the terms of the trust: S Colbran and S M Jackson, Caves (Melbourne, FT Law & Tax, 1996), at [3.2.2].
the caution against dealings under the Land Registration Act 1925 (UK), s 54(1). It
halts the registration of a subsequent adverse dealing until the person who lodged the
caveat has been notified and has been given the statutory interval in which to
commence court proceedings before the caveat lapses.4

Priority between unregistered interests

Like the caution under the 1925 English Act, the Australian caveat does not confirm
or affect the validity of the interest claimed by the person who lodged it.5 For so long
as it remains on title, the caveat prevents the registration of a dealing that affects the
interest of the caveator.6 If the caveator chooses to assert his or her claim in court, the
matter is disposed of as a priority contest between the caveator and the person whose
application for registration has been stopped.

Priority disputes involving unregistered interests in registered land have produced
more litigation in Australia than in England,7 although the rules for their adjudication
are the same as under the 1925 English Act. The disputes are resolved under the rules
that determine the priority of equitable interests in unregistered land.8 The interest
created first in time prevails, unless its holder's conduct warrants postponement to the
later interest.9 The Australian courts tend to the same view that the English courts
took under the LRA 1925, namely that failure to protect a minor interest by
registration of a caveat/caution is not per se conduct justifying loss of priority to a
later interest.10

Introduction of interest recording

Caveats and cautions were not designed to confer priority on unregistered interests,
but to give claimants an opportunity to challenge an adverse disposition before it is
registered. In England,11 Australia12 and Canada,13 there are proposals to replace these
devices with interest recording.14 Under this system, recording an interest on the title
register gives it no greater operation than it had under the instrument or transaction
that created it, but confers priority upon the interest for whatever it is worth. Interest
recording schemes vary as to the interests that may be recorded and the extent of the
priority conferred.

73 Stein, above n 70 at 618.
74 Lerox Pty Ltd v. Terara Pty Ltd (1991) 174 CLR 407 at 419; c.f. LRA 1925,
s56(4); Ruoff & Roper, above n 60, at 824
75 Clark v. Chief Land Registrar [1993] Ch 294; LRA 1925, at s56(4), 102(2);
Harpum, above n 27, at para [6-090]; Ruoff & Roper, above n 60, at 824
76 The statutes do authorise the registrar to register certain dealings adverse to the
caveator's interest. See generally, Bradbrook, McCallum & Moore, above n 22,
at paras [4.88], [4.89]. The effect of the caveat is interdicting registration is the
same as that of the caution under the LRA 1925: Willies-Williams v. National
77 While it is beyond the scope of this chapter to evaluate the reasons for this
difference, factors contributing to the lower rate of litigation in England,
including different conveyancing practices, the protection for persons in actual
occupation, and the role of the Chief Land Registrar in settling disputes.
78 Ibid, para 5.2; Bradbrook, above n 22, at para [4.80]; Colbran, above n 72 at
[11.6]. R Sackville, "Competing Equitable Interests in Land under the Torrens
System" (1971) 45 Australian Law Journal 396.

79 Abigail v. Lapin (1934) AC 491; Heid v. Reliance Finance Corporation Pty Ltd
Mortgage Corporation Ltd v. Nationwide Credit Corporation Ltd [1994] Ch 49
at 56; Ruoff & Roper, above n 60, at 143; Harpum, above n 27, at para [6-095].
80 J & J H Just (Holdings) Pty Ltd v. Bank of New South Wales (1971) 125 CLR
546 at 554 per Barwick CJ; c.f. Mortgage Corporation Ltd v. Nationwide Credit
Corporation Ltd [1994] Ch 49 at 56; Freeguard v. Royal Bank of Scotland
(1998) 95/13 L S Gaz 29; P Stubbs, "Equitable Priorities and the Failure to
Caveat" (1989) 6 Auckland University Law Review 199; T D Castle,
"Caveats and priorities: the 'mere failure to caveat'" (1994) 68 Australian Law
Journal 143.
82 Victorian Law Reform Commission, Report No 22 Priorities (1989), rec 10; S
Colbran and S M Jackson, Caveats (FR Law & Tax, Melbourne, 1996) at 536-7;
Hughson, above n. 69, at 487-9.
83 Canada, Joint Land Titles Committee, above n. 21, at 13-18, and Part 4 of the
Model Act.
84 Interest recording is effectively deeds registration, but applies to registered land,
and operates as a parallel system within the title register.
England already has a limited form of interest recording, in the provisions of the LRA 1925 for registration of notices. Under the LRA 1925, notices can only be entered with the consent of the registered owner or pursuant to an order of the court. They record a re-ordering of priorities that has been already agreed by the parties or decreed by a court.

The LRA 2002 extends this provision to protect disputed interests, by allowing claimants to enter a notice unilaterally, without consent. The entry of a notice to protect an unregistered interest will confer priority on the interest but will not validate it. An interest protected by notice on the register will prevail over a subsequently registered disposition.

Notices will not determine priority as between unregistered interests. The equitable priority rule, that 'where the equities are equal, the first in time prevails' will continue to apply, but its area of operation is expected to diminish. It is anticipated that, when electronic conveyancing is fully implemented, it will no longer be possible to create interests in land by formal means without either registering them or entering a notice. When the creation of an interest becomes simultaneous with the entry of a notice, the register will be conclusive as to priority, except as against interests created by informal means.

This differs from the rule proposed by Canada's Joint Land Titles Committee - that the recording of an interest confers priority against a subsequently registered interest, and also any unregistered interest not already recorded on the register. The Canadian Committee's proposals leave no room for equitable priority rules, and establish a common rule for both registered and recorded interests - priority by date of entry in the register.

The Canadian Model Act has yet to be implemented by the provinces and territories, and Australian proposals for interest recording have not been developed to the stage of a draft Bill. Overseas jurisdictions will study the English initiative as an alternative model for how such a scheme might be implemented.

The Indemnity Scheme

The English and Australian registration of title statutes provide for payment of an indemnity to persons who suffer loss caused by certain prescribed events. The list of losses for which indemnity is payable in Australia usually include the following seven categories: loss in consequence of fraud, loss through the first registration of the land, loss through the registration of another as owner, loss sustained by reliance on the register, loss of documents in the registry or from an error in an official search, loss arising from the exercise of the registrar's powers and loss in consequence of any error, omission or misdescription. Notwithstanding that the indemnity provisions are remedial legislation, the courts and the Registrars have generally interpreted these grounds restrictively.

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85 LRA 1925, s 52
86 LRA 1925, s 48(1), (2)
87 LRA 2002, s 34(2)
89 LRA 2002, ss 29, 20
90 LRA 2002, s 28; Lord Chancellor’s Dept, Explanatory Notes to Land Registration Act 2002 HMSO, at para 69
91 Explanatory Notes, ibid, paras 67-68.
92 LRA 2002, s 93 authorises the making of rules prescribing dispositions to which the requirement of simultaneous registration will apply.
93 Explanatory Notes, above n. 90, at para 68.

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94 This is the effect of the provisions of s 4.5(2) and 5.3(3)-(6) of the Model Act; Canada, Joint Land Titles Committee, above n. 21, (see commentary at 15-18)
95 See generally, Ziff, above n. 49, at 438-39.
F. THE ORIGIN OF THE PERCEPTION OF DIFFERENCE

This comparative overview of the English and Australian registration of title systems has demonstrated that they are quite similar in their essential features and operation. Why then has the misconception persisted that they are fundamentally distinct and unrelated? Simpson suggests that it arose from the early success of the Australian statutes and the contemporary failure of voluntary registration of title schemes in England. During the latter half of the 19th century and most of the 20th century, the Torrens system as practised in Australia and New Zealand was the preferred model for other jurisdictions proposing to adopt registration of title.

The example of New Zealand was instructive. Having experienced the complete failure of its first title registration statute which was based on Lord Westbury's 1867 English Act, New Zealand had immediate success when, a decade later, it adopted Torrens' South Australian Real Property Act 1861. Thereafter, proponents of registration of title statutes promoted their schemes as based upon the successful Australian or "Torrens" model rather than the failed English one. From this pragmatic distinction developed a popular conception that there were two fundamentally distinct species of registration of title in common law countries, the English and the Torrens system.

The theory of difference is reinforced by the general belief that the two systems were invented quite independently in Australia and England. The claim of spontaneous local invention has been questioned, so far as Australia is concerned, by recent findings that Sir Robert Torrens' reforms were strongly influenced by the centuries-old Hanseatic system of registration of title, and the Hamburg system in particular. Raff has identified the common elements as including the parcel-based concept of the conclusive register, priority by date of registration, the exclusion of notice as an exception to the conclusiveness of registered title, the hypothecary mortgage by registered charge and the caveat to protect unregistered claims.

The resemblance of Torrens' scheme to German registration of title schemes was noted long ago, but the agency for this influence was long overlooked. Research has revealed the crucial contribution of Torrens' colleague, Dr Ulrich Hübbe, a German immigrant who was an authority on the Hamburg registration of title system.

Although English scholars have yet to examine the influence of German models on their scheme, we do know that English reformers studied the German registration of title systems. Coincidence is an unlikely explanation for the similarity of the

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98 Simpson, above n 7, at 76-7. For an explanation of the different experience of the two countries, see D Whalan, "Immediate Success of Registration of Title to Land in Australasia and Early Failures in England" (1967) 2 NZULR 416.
100 Simpson, above n 7, at 77
101 Simpson, above n 7, 76-7; S E Dowson and V L O Sheppard, Land Registration (2nd ed, London, HMSO Colonial Research Publications No 13, 1950), 73
103 Although this idea was not entirely new, being an aspect of deeds and other instrument registration schemes.
104 Because of its Roman law origins, Raff argues that the Torrens mortgage is the clearest evidence of a transplant from Germany: Raff, above n 102, at 116
105 M Raff, "The True Meaning of the Torrens System and Environmental Responsibility" (paper delivered at the Real Property Teachers' Conference, Melbourne, February 2001), at 7. (copy on file)
106 J Dumas, Registering Title to Land: A Series of Lectures Delivered at Yale (Littleton, F B Rothman & Co., 1985), at 76; Hogg, above n 1, at 5
107 Raff, above n 102, at Part I; Robinson, above n 102, at Ch 1; Kelly, above n 102.
108 Raff, above n 105, at 1, fn 1; Hogg, above n 1 at 5 and fn 19, referring to information about the continental systems in the Appendices to the Second Report of the Real Property Commissioners, 1830, Appendix to the First Report of the Registration and Conveyancing Commissioners in 1850, and to J W Probyn (ed), Systems of Land Tenure in Various Countries (London, Cassell, 1881). C F Brickdale, a Chief Land Registrar who influenced the design of the English legislation, studied and wrote on the Prussian schemes: C F Brickdale,
elements common to the English, Torrens and German systems. It would not be surprising if English researchers were to find that the English and Torrens systems, far from being independent inventions, are the offspring of a common but unacknowledged German parent.

G. CONCLUSION

Despite their striking similarity, the English and Australian systems differ in the way they balance dynamic and static security. English law protects the static security of occupying owners by giving overriding status to the rights of holders of unregistered interests who are in actual occupation of land. Australia allows the interest of a non-fraudulent purchaser to prevail over such unregistered interests unless they are protected on the register, or there are additional circumstances that place the purchaser in the position of a constructive trustee for the prior interest holder.

The English concession to static security is also evident in the wider grounds for rectification allowed by the English statute, although the difference narrows significantly where the registered owner is a 'proprietor in possession'. Australia pursues dynamic security more unequivocally, through its rule of immediate indefeasibility. Under this rule, the registered interest of a purchaser for value, including that of a mortgagee, cannot be adversely affected by rectification of the register unless the registered owner is personally or vicariously guilty of actual fraud. Some Australian jurisdictions even extend immediate indefeasibility to registered volunteers, provided that they are not party to fraud.

The Australian approach recognises the economic function of law in providing security for transactions, but economics provides no clear guidance as to how much dynamic security is actually required to ensure an efficient land market. English law has probed these limits empirically through ongoing review and reform, and has discovered that it can preserve some elements of static security without appreciable adverse impact on the market. The result is a more finely-tuned balance of dynamic and static than the Australian system.

On the other hand, the long-term trend of the English system appears to be in the direction of more dynamic security. The English rectification provisions were amended in 1977 to protect proprietors in possession from losing their titles simply on the ground of an innocent error, omission or mistake. The amending Act also repealed a provision that allowed rectification where the immediate disposition to the proprietor was void. Roger Smith noted that these legislative reforms paralleled the 1971 shift in the Australian case law towards the principle of immediate indefeasibility, and offered the following comment on the direction of the changes:

'It may be that as registration systems develop, so one becomes more ready to accept the current state of the register as conclusive, one becomes more registration-minded.'

It is beyond the scope of this chapter to evaluate the English and Australian systems in detail, or to propose methods for resolving the conflicts between interests and policies. What I have sought to show is that the distinctive way in which each system seeks to balance dynamic and static security provides the key parameter for comparing the English, Australian and other 'Torrens' systems of registration of title.


The LRA 2002 has abolished the protection for owners of interests in receipt of rents and profits.

See, e.g., how the Law Commission initially rejected the wide interpretation of LRA 1925, s 70(1)(g) in Roland, but changed its mind after finding minimal market effects: (1987) Law Com No 158, at para 2.7.

Amendments to the LRA 1925, s 82(3)(a), as amended by the Administration of Justice Act, 1977, s 24.

LRA, 1925, s 82(3)(b).

Smith, above n 14, at 188.
5 INDEFEASIBILITY AND UNAUTHORISED REGISTRATIONS

In the Torrens jurisdictions, the term most commonly used to describe the quality of a registered title is 'indefeasibility'. Commentators on the English land registration system rarely speak of indefeasibility of title, and there is some debate as to whether the concept can meaningfully be applied to titles registered under that system.\(^1\) The core meaning of 'indefeasibility' is legal security, or security of title, in the special context of registered title. As explained in Chapter 2, my title to an estate or interest is legally secure to the extent that (a) I can enforce it against all the world, to the maximum extent consistent with an estate or interest of its type, and (b) nobody else is entitled to enforce an inconsistent estate or interest against me unless I have consented. The first aspect, enforceability, is the affirmative or positive element aspect of legal security, and the second, priority over adverse claims, can be considered its negative or defensive aspect.\(^2\)

Under a system of registration of title, the state guarantees legal security only to registered interests. The guarantee of legal security is commonly described as the indefeasibility of registered title, although registered titles do not enjoy this security in an absolute sense. Anything that derogates from the legal security of a registered title is considered an 'exception to indefeasibility'. So the concept of indefeasibility, like that of legal security, is a referent or starting point for

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\(^2\) Cf Hogg's distinction between the affirmative and negative operation of the statutory warranty of title under land title registration systems: J E Hogg, Registration of Title to Land Throughout the Empire, Sydney, 1920, 96.
measuring the quality of a registered title. Since indefeasibility is a special sense of legal security, it too has both an affirmative and a negative operation.3

The legal security of a registered estate or interest depends upon the fact of registration. A registered interest may lose legal security in two ways: first, if the entry of my interest in the register is reversed without my consent (a process that I will call ‘rectification’, although the statutory terminology varies). Rectification usually occurs because of a defect in the way that the registered interest was acquired or the entry made. The possibility of rectification to remove my interest from the register can therefore be considered a threat to my dynamic security.

The second way that my registered interest can lose its legal security is if somebody subsequently registers an estate or interest against my certificate of title without my consent, and I am not permitted to have the register rectified to remove it. This can be considered a threat to my static security because, having securely acquired my registered interest, I then suffer a total or partial loss of legal security due to a subsequent non-consensual transaction.

While a registered interest may be ‘defeasible’ in either of these dynamic or static senses, the term ‘indefeasibility’ conventionally refers only to the dynamic aspect. So when I say that my registered title is indefeasible, I mean (a) that I enjoy legal security of title by force of registration, subject only to the usual statutory and common law exceptions (if applicable), and (b) that my registered title is not liable to rectification. Indefeasibility of title does not mean that the register cannot subsequently be altered to record an estate or interest that is inconsistent with mine.4

3 In Frazer v Walker [1967] 1 AC 569 at 580-1, Lord Wilberforce emphasized the negative operation when he said that ‘indefeasibility of title’ is ‘a convenient description of the immunity from attack by adverse claims to the land or interest in respect of which he is registered, which a registered proprietor enjoys’. Ruoff’s definition embraces both positive and negative aspects: ‘The notion of indefeasible title, or conclusive evidence of the existence and character of his entitlement, is usually expressed as a holding free from all but specified and ascertainable incumbrances, rights, estates and interests’; T B F Ruoff, An Englishman Looks at the Torrens System, Sydney, (1957), 17.

4 ‘Indefeasibility’ is a shield which will ward off most attacks on title, but which will be pierced, with fatal results to the title which it guards, by the concept of indefeasibility has a more limited application to the English land registration system. Under that system, registered titles are much more freely rectifiable for errors and defects in the processes leading to registration, and the person who loses out by rectification is compensated to the extent that he or she is not at fault. In other words, registration is more often a guarantee of economic security than legal security. But even under those systems, there are situations where a registered title is not rectifiable against the interests of a proprietor in possession, even if the registration was procured by a forged or void disposition. Those registered titles that are immune from rectification can be said to be ‘indefeasible’ in the sense explained above.

The quality of a registered title, or the degree of legal security that it provides, depends upon two things: first, the extent to which it is liable to rectification, and secondly, the other interests which take priority over it as ‘exceptions to indefeasibility’. The former measures the affirmative aspect of legal security, and the latter determines its negative operation. This and the following chapter are concerned solely with the affirmative legal security of registered titles. The negative aspect of indefeasibility is examined in Chapter 7.

The key question in determining the extent of affirmative legal security, or indefeasibility, of a registered title is: in what circumstances is the title liable to be defeated by rectification of the register? The answer to this turns on two further questions: how broad are the grounds for rectification, and against which classes of registered owner can rectification be ordered? Different answers to these questions are possible. This chapter explains the significance of the issue, outlines three different rules and models, and explores the policy rationale for the rules known as immediate indefeasibility. In the next chapter, some criteria for evaluating the different models are proposed and applied.

A. THE PROBLEM OF UNAUTHORISED REGISTRATIONS

Under systems of registration of title, the execution or the delivery of an instrument of disposition (eg, a transfer, mortgage or lease) may be effective to pass an interest in equity, but legal title is conferred only by registration. The purpose of the instrument is to authorise the making of an entry in the register that will create or discharge an interest.

It may happen that the instrument, or the underlying transaction, is subject to some defect that would make it void or voidable under the general law. For example, the instrument might bear the forged signature of the registered owner, O, who has not consented to the disposition. Or it may be that O lacks legal capacity to dispose of the interest, or is acting under a mutual or unilateral mistake of a kind that would invalidate the disposition under the general law. It could also be void for breach of a statutory requirement, such as non-compliance with procedures for subdivision.

If the disposition is defective in this or some other way, it means that the registration is not properly authorised. If a void instrument is registered, O suffers either a total loss of her registered title, or a partial loss, if the new registered interest is only partly inconsistent with her own (eg a mortgage encumbering her fee simple estate). If the inconsistency of interests is total (eg where P1 is registered with a fee simple estate), O's title is extinguished, and she becomes a former registered owner. If the inconsistency is only partial, she is a subsisting registered owner whose title is encumbered by P1's registered interest.

Of course, if the holder of the new registered interest, whom I shall call P1, has been fraudulent, policy dictates that the register should be rectified to remove P1's interest. This and the next chapter are concerned solely with the situation where P1 does not obtain his title fraudulently. The law must devise a rule to determine which of two innocent parties, O or P1, gets the disputed interest in land. There may also be a 'second party' who caused the loss - a forger or accomplice, or someone who induced one or both parties to make a mistake in entering the transaction. This person is liable to civil or even criminal action, but this does not solve the problem of conflicting interests. O wants her registered title restored free of P1's interest and P1 wants to keep his registered interest. Since it is usually not possible to satisfy both, the law must prefer one to the other.

The choice of a decision rule to resolve such disputes is the most difficult security issue in the law of registered title. The issue becomes even more complicated where P1 disposes of an interest to a subsequent purchaser for value (or mortgagee), P2. If O is to be permitted to rectify the register against P1, should she also be permitted to rectify the register to remove the subsequent registered interest of P2?

This chapter examines the three dominant rules currently used in title registration systems in the common law countries. The first is that of the English system, which the Law Commission for England and Wales has been dubbed 'qualified indefeasibility' for the proprietor in possession. The second and third are used in Torrens jurisdictions, and are called 'immediate indefeasibility' and 'deferred indefeasibility'. Other rules are also possible, and some additional options will be discussed in chapter 6.

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5 See Barry v Heider (1914) 19 CLR 197, where Griffith CJ was of the view that the equitable interest arises because the purchaser holds an unregistered instrument, while Isaacs J said it arises from the contract that lies behind the instrument; Whalan, ibid, 281-84.

6 The common law regarded very few types of mistake as sufficiently fundamental to vitiate the intention to transfer title and render the transaction void. There is some authority that a mistake about the substance of what is being transferred will invalidate the transfer ab initio. See, eg, Associated Japanese Bank (International) Ltd v Credit du Nord (SA) [1989] 1 WLR 255 at 268 per Steyn J; Craig Rotherham, Proprietary Remedies in Context (Hart Publishing, Oxford, 2002), 126-28.

7 See, eg, s 34(8) of the Local Government Act 1936 (Qld) (since repealed), considered in Bonnar Properties Pty Ltd v Mukaka [1996] 1 Qu R 578. (Land could not be subdivided without provision for the opening of a road, unless the lodged plan bore a special notation by the local authority).

B. THE ENGLISH APPROACH: 'QUALIFIED INDEFEASIBILITY' FOR OWNERS IN POSSESSION

England and Wales

I explained above that the affirmative legal security afforded by a registered title is a function of the grounds for rectification and the category of persons whose titles are liable to be rectified. The English legislation takes a broad view of the former, and a narrow view of the latter. The Land Registration Act 1925 allowed the court, at its discretion, to order rectification of the register effectively for any defect that would render a disposition void or voidable under the general law rules applying to unregistered conveyancing. The successor Act, the Land Registration Act 2002, is intended to codify the practice under the old Act without substantially altering the scope of the grounds for rectification. The 2002 Act allows rectification, inter alia, for the purpose of 'correcting a mistake'. The Act does not define 'mistake', but it is apparently intended to cover the registration of a forged instrument as well as registrations made under an innocent error.

While the grounds for rectification are very broad, the Act provides a qualified immunity for the proprietor of a registered estate in possession of the land. Mortgagees, beneficiaries, tenants and licensees can never be proprietors in possession, even if they are in possession in fact. Their titles, and those of other non-occupying owners, are defeasible by rectification. If an application is made to rectify their titles and grounds for rectification exist, the court or registrar must grant the application unless there are exceptional circumstances. The owner who suffers loss by rectification is entitled to be indemnified by the registrar. An issue that is presently unsettled is whether under the English system, the deprived registered owner, O, can rectify against P2, a registered successor in title to P1. If P2 is the proprietor of a registered estate in possession, he enjoys the 'qualified indefeasibility' outlined above. In other circumstances, it is unclear whether rectification against successors in title has been little explored in England: Smith, above n 9, 237-38. The question of rectification against successors has sometimes been conceived in terms of whether rectification is retrospective to the date of the unauthorized registration: Freer v Unwins Ltd [1976] Ch 288. See generally, K and SF Gray, Elements of Land Law 3rd ed., (Butterworths, London, 2001), 1078-80. The Land Registration Act 2002, Sched 4, para 8 now provides that rectification of the register can affect the priority of derivative interests, but only prospectively.
whether O’s right to rectify continues or terminates when PI is succeeded on the register by P2, or even P3. It is difficult to extract any clear and consistent principle from the few decisions on this point given under the 1925 Act. The provisions of the 2002 Act are worded differently to the predecessor Act, and are replete with ambiguity.

Several jurisdictions have adopted the English approach of allowing rectification on broad grounds with a qualified immunity for the proprietor in possession. These include Northern Ireland, Scotland, Singapore and New Brunswick.

**Northern Ireland and Scotland**

Northern Ireland’s *Land Registration Act (NI) 1970* is based on the English model. Section 69 provides for the register to be rectified to correct any error in the register. Cooke says that this has been interpreted to include the registration of void and voidable dispositions. Section 69(3) restricts the power of the court to rectify against a registered owner in possession, save where the court is satisfied it would be unjust not to rectify.

The current Scottish title registration statute is the *Land Registration (Scotland) Act 1979*. Section 9(1) provides that the Keeper of the register may rectify any inaccuracy in the register. Cooke says that ‘inaccuracy’ has been interpreted widely and includes the registration of a forged disposition. Section 9(3) protects the proprietor in possession from rectification except where the inaccuracy has been caused by his fraud or carelessness.

**Singapore**

Singapore’s *Land Titles Act 1993*, s 160(1) states the general rule that the court may order rectification on the ground, inter alia, that it is satisfied that the registration or notification of an instrument has been obtained through fraud, omission or mistake. Subsection 160(2) then narrows the rule, stating that the register may not be rectified so as to affect the registered estate or interest of a proprietor who is in possession ‘unless that proprietor is a party or privy to the omission, fraud or mistake in consequence of which the rectification is sought, or has caused that omission, fraud or mistake or substantially contributed thereto by his act, neglect or default’.

**Canada – New Brunswick**

New Brunswick’s *Land Titles Act, 1981*, c L-1.1, s 70 allows the court to order rectification of an entry in the register ‘obtained, made or omitted by fraud, 20

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18 Cooke, ibid 170, referring to H Wallace, *Land Registry Practice in Northern Ireland* (Belfast, SLS Legal Publications (NI), 1987), Ch VIII, in which the English authorities are relied upon. Cooke notes that the scope of rectification has received little attention from commentators on the Northern Irish legislation.

19 Under the 1925 Act, some ground for rectification are couched in terms that suggest that they could be raised against successors in title, eg, s 82(1)(k). The rectification provisions of the 2002 Act, which are worded differently, await judicial interpretation. For a discussion of the alternative possible interpretations, see Cooke, above n 9, 122-29.
wrongful act or mistake. This general rule is subject to section 71, which provides that rectification is not to affect detrimentally the title of a registered owner who is in possession, unless any one of three conditions is satisfied. Two of these are virtually identical to the English provisions quoted above, but the third condition considerably narrows the protection given by the section. Section 71(b) provides that the register may be rectified adversely to the owner in possession if the immediate disposition to him was void, or if he obtained title as a volunteer from a transferor who took under a void disposition.

C. THE TORRENS JURISDICTIONS: IMMEDIATE AND DEFERRED INDEFEASIBILITY

Immediate and deferred indefeasibility compared

The Torrens jurisdictions have for the most part taken a different approach to the problem of unauthorized registrations. Two competing decision rules are used to resolve property disputes arising from the registration of void or voidable instruments, where the person deriving title from the registration has not been fraudulent. Under the rule known as ‘immediate indefeasibility’, a purchaser (P1) who registers a disposition of an estate or interest in land obtains an immediately indefeasible title to the estate or interest, even if the instrument is void or voidable at common law. So long as P1 gave valuable consideration for the disposition and has acted without fraud, he is protected against any action by O, the previous registered owner, to rectify the register or to recover possession of the land.

Under the alternative rule known as ‘deferred indefeasibility’, P1 does not get an indefeasible title by registering a void or voidable instrument, even if he acted without fraud. O can take action to rectify the register and restore her title, or to eject P1 from the land. But O’s proprietary remedies are lost once a subsequent purchaser in good faith, P2, purchases from P1 and registers a valid disposition from him. The rule gets its name from the idea that indefeasibility does not arise on the first registration to P1, but is ‘deferred’ until the subsequent registration of P2’s interest. The effect of the rule is that only P2, a purchaser for value in a subsequent transaction one step removed from the void disposition, gains an indefeasible title.

It is common ground under both rules that P2, a purchaser for value in good faith who obtains a valid disposition from P1 and registers it, obtains an indefeasible title. This is not so clear under the English system, where P2 may be at risk of losing his title unless he is in possession.

The two Torrens rules differ from the English rule in another respect. They apply to all registered owners and purchasers regardless of the type of registered estate or interest, and regardless of whether the owner of the interest is in possession or not. The English rule discriminates between (a) owners of registered estates in possession, and (b) other owners of registered estates and interests. The owners in

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22 The Act was assented to on 1 July, 1981 but registration was only extended province-wide in 2000-01.

23 See text accompanying n 16, above.

24 The English Land Registration Act 1925 used to have an equivalent ground of rectification in s 82(3)(b), which was repealed in 1977, pursuant to recommendations made by the Law Commission in WP No 45 Land Registration (Third Paper) (1972), paras 82-86; see also Roger J Smith, Forgeries and Land Registration (1985) 101 Law Quarterly Review 79, 81-84.

25 This rule was asserted in Boyd v Mayor of Wellington [1924] NZLR 174; Fraser v Walker [1967] 1 AC 569; Besharov v Wall (1971) 126 CLR 376, among many other authorities. Whalan says that no distinction has been made in the cases between void and voidable instruments, since the central question is whether it is registration or the instrument that confers title: above n 5, 319-20.

26 This rule was asserted in Gibbs v Messer [1891] AC 248; Clements v Ellis (1934) 51 CLR 217 (Dixon and McTiernan JJ), among other authorities.

27 In Gibb v Aeser [1891] AC 248, 254-5 the Privy Council drew no distinction between the indefeasibility enjoyed by a registered transferee and a registered mortgagee. See also Fraser v Walker [1967] 1 AC 569 (holding that a mortgagee derived an immediately indefeasible title on registration). Di Castri says that it is not clear that the Canadian Torrens statutes confer indefinite title on registered mortgagees, as the indefeasibility provisions are worded differently: Victor Di Castri, Registration of Title to Land (Carswell, Canada, loose-leaf orig 1987), Vol 2, para [744].
group (a) get something very like immediate indefeasibility, provided that they have not caused or contributed to the mistake, and in the absence of circumstances making it unjust not to rectify. The group (b) owners do not get indefeasible title, and even their successors may not enjoy indefeasibility unless they are in possession.

The English rule will not be further considered in this chapter, which from this point focuses on the competing Torrens rules. The debate over the two Torrens rules can be summarised as follows: as between two non-fraudulent parties, a prior registered owner (O) and a purchaser for value (P1) who holds a registered interest, who should hear the risk that the purported disposition from O to P1 is void or voidable? Compared with the common law position that applies to unregistered land, deferred indefeasibility leaves the risk of loss with P1, while immediate indefeasibility re-allocates it to O. Deferred indefeasibility can therefore be considered a rule that promotes static security, because it protects the property rights of existing owners against non-consensual transfers after they have acquired their title. Immediate indefeasibility is a rule of dynamic security, because it protects the reasonable expectation of the good faith purchaser that he or she will acquire a good title in the first place.

Both rules provide dynamic security to the subsequent purchaser, P2, provided that he purchases in good faith and for value from P1 and registers a valid disposition. This means that a purchaser for value can rely on the conclusiveness of the register, and has no need to investigate his transferor’s derivative or historical title (that is, the chain of instruments and registrations through which the title devolved upon the present registered owner). Both rules are therefore consistent with ‘the object of the Torrens System’ as formulated by Lord Watson in Gibbs v Messer:28

28 Volunteers are in a different position as, in most jurisdictions, they take a title subject to any equities that affected their transferor. Some Australian jurisdictions have extended immediate indefeasibility to registered volunteers, either by legislation or by judicial interpretation. The cases that say this rely on arguments of statutory interpretation: Bogdanovic v Kotelf (1985) 12 NSWLR 472 (NSW CA), Conlan v Registrar of Titles (2001) 24 WAR 299 (Sup Ct WA, Owen J). Some law reform bodies and commentators have advanced policy support for this approach, arguing that registered volunteers

The object 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. This end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and eners his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author’s title.

This statement was made in the course of giving the advice of the Privy Council endorsing the deferred approach to indefeasibility. Although Gibbs v Messer was distinguished by the Privy Council in Frazer v Walker, Lord Watson’s dictum continues to receive judicial endorsement in Australia and New Zealand after the acceptance of immediate indefeasibility.30

Regardless of which rule applies, a bona fide purchaser for value has no need to investigate his transferor’s derivative title.31 Immediate indefeasibility holds that the purchaser’s title is indefeasible by force of registration alone, regardless of any prior defects. Under deferred indefeasibility, the purchaser acquires no interest or

require the security of indefeasible title to undertake expenditure on improvements: see Chapter 4, text accompanying n 47. An alternative approach would be to provide a statutory avenue to apply to a court for compensation or other relief where a person has made improvements to the land of another under a mistake as to the ownership of the land: see, eg, Property Law Act 1974 (Qld), s 196, Property Law Act 1969 (WA), s 123(1).


31 But see, contra, the view of Peter Butt that, while immediate indefeasibility is a harsh doctrine, ‘any other approach diminishes the effectiveness of registration and compels the very investigation into the history of transactions and titles that Sir Robert Torrens was at pains to abolish’: Peter Butt, ‘Indefeasibility and Sleights of Hand’ (1992) 66 Australian Law Journal 596, at 596.
estate by registration if the instrument from his transferor ('the immediate disposition') is void. If the purchaser takes under a voidable disposition, he takes a title that is defeasible at the election of the transferor, but can still provide a good root of title to a bona fide purchaser for value who purchases from him and registers a valid disposition.\(^{32}\) So, under deferred indefeasibility, the risk to the purchaser arises from the immediate disposition, not from his transferor's derivative title.

**Immediate indefeasibility and rights in personam**

In most of the Torrens statutes based on the Australian model, the indefeasibility of the registered owner's title is provided for by an affirmative statement that is known as the 'paramouncty' or 'indefeasibility' provision.\(^{33}\) Most of the statutes reinforce this statement with a 'protection' provision (or provisions), which bars any action against a registered owner for recovery of land or possession, except in the cases specified. The exceptions usually include fraud and the exercise of a mortgagee's power of sale.\(^{34}\) Fraud is an express exception to the indefeasibility of the registered owner. For the fraud exception to apply, the registered owner, or his or her agent, must have either committed the fraud, or known that a third party had committed a fraud in the transaction.\(^{35}\)

The courts soon realised that it would not do to read the protection provisions too literally. A wide immunity from suit would undermine the ability of registered owners to enter into enforceable contracts or to undertake trust obligations relating to the land. Accordingly, the courts decided in the early days of the Torrens system that the indefeasibility of registered title does not preclude the courts acting in personam to enforce trusts and contracts undertaken by the registered proprietor in relation to the plaintiff.\(^ {36}\) An in personam claim is brought against the registered owner personally, arising from agreements, undertakings, wrongdoing or other conduct directly attributable to him or her.\(^ {37}\) It differs from a claim in rem, which is a claim in respect of the land itself and is brought against whoever happens to be in possession of the land for the time being.\(^ {38}\)

If an in personam claim is successful, a court may award whatever equitable remedy is appropriate. This may be a proprietary remedy that results in a re-allocation of property rights in the land. For example, in a case where a registered disposition from O to P conveys more land than the parties had agreed, and it would be unconscionable in the circumstances to allow P to retain it, O can bring an action in personam against P. The court may order P to retransfer the excess land to O, notwithstanding that, under the rule of immediate indefeasibility, registration of the transfer vesting an indefeasible title in P.\(^ {39}\) In default of P's compliance, the court


\(^{33}\) Eg, Land Transfer Act 1952 (NZ), s 62 states that notwithstanding the existence in any other person of an estate or interest, the registered proprietor shall, except in the case of fraud, hold the land subject to any incumbrances notified on the register but absolutely free from all other incumbrances, subject to the specified exceptions ('overriding interests', which vary from one jurisdiction to another).

\(^{34}\) Eg, Transfer of Land Act 1958 (Vic), s 44(2).

\(^{35}\) Assets Co Ltd v Mere Rolini [1905] AC 176, 201 (Lord Lindley) (PC).

\(^{36}\) See, eg, Cuthbertson v Swan [1877] SALR 102; Taitapu Gold Estates v Mua Carr [1927] NZLR 688, 702 (Skerrett CJ); Boyd v Mayor of Wellington [1924] NZLR 1174, 1223 (Adams J). These are just some of the many authorities.

\(^{37}\) Taitapu Gold Estates Ltd v Prouse [1916] NZLR 825 (actions giving rise to the in personam action must be attributable to the registered owner).

\(^{38}\) Peter Birks explains the distinction between rights in rem and rights in personam as corresponding to the legal distinction between property and the law of obligations: Peter Birks, 'Before We Begin: Five Keys to Land Law' in Bright and Dewar (eds), Land Law: Themes and Perspectives (Oxford University Press, Oxford, 1998) 457-486, at 473.

\(^{39}\) Tutt v Doyle (1997) 42 NSWLR 10 (NSW CA) (a case of unilateral mistake); Lukacs v Wood (1978) 19 SASR 520 (a case of common mistake); Taitapu Gold Estates Ltd v Prouse [1916] NZLR 825. In other cases, the courts have not been consistent in allowing an equity arising from mistake to be enforced against a registered owner who has not given consideration for the benefit received: eg, State Bank of New South Wales v Berowra Waters Holdings Pty Ltd [1986] 4 NSWLR 398. For a recent discussion of the conflict in the authorities, see Lynden Griggs, 'Indefeasibility and mistake – the utilitarianism of Torrens' (2003) 10 Australian Property Law Journal 108-19.
may make an order vesting the interest in O and requiring the registrar to make the
appropriate entry on the register.40

In other circumstances, a court may grant an equitable proprietary remedy by
deeing P to hold his title under a constructive trust. For example, if P had bought
the land from O on an implied agreement to take subject to the rights of T, the
holder of an unregistered interest granted by O, a constructive trust may be imposed
to prevent P from unconscionably ejecting T.41 If the agreement to respect T’s
interest was express rather than implied, then P may hold on an express trust.42

As a matter of formal legal doctrine, the bringing of a claim against the registered
owner in personam is not incompatible with the principle of indefeasibility, even if
the result may be to upset the registered owner’s title.43 In functional terms, in
personam actions operate as an exception to indefeasibility and are commonly so
described.

While the concept of in personam rights predates the adoption of immediate
indefeasibility in Australia and New Zealand, its role has been considerably
enhanced by that development. The liability of registered owners to in personam
claims is a significant qualification to the indefeasibility of registered title. It
enables the courts to maintain a strict line on immediate indefeasibility and on the
scope of the statutory fraud exception, while preventing registered owners from
using their indefeasible titles to avoid obligations of conscience.

In Frazer v Walker, Lord Wilberforce said that the principle of immediate
indefeasibility ‘in no way denies the right of a plaintiff to bring against a registered
proprietor a claim in personam, founded in law or in equity, for such relief as a
court acting in personam may grant’.44 Their Lordships gave no guidance as to the

40 Brashkvar v Wall (1971) 126 CLR 376, 384-85 (Barwick CJ)
43 Frazer v Walker [1967] 1 AC 560, 585 ; Brashkvar v Wall (1971) 126 CLR
376, 384-85 (Barwick CJ)

scope of the claims that may be brought against a registered proprietor in personam,
or the kinds of remedies that may be granted, save that the actions specifically
excepted by ss 62 and 63 of the Land Transfer Act (the indefeasibility and
ejection provisions) may not be maintained. As the law developed, it became
clear that in personam actions against a registered proprietor could arise from
transactions and conduct that occurred either before or after registration.45 This
means that the in personam exception to indefeasibility derogates from the
registered owner’s dynamic security, not just his or her static security.

Where an in personam action arises from the transaction that led to the registration,
there is potential for the grant of a proprietary remedy to undermine the dynamic
security provided by the indefeasibility and ejectment provisions. Courts have
cautionsed that an in personam action will not succeed if its enforcement would
circumvent the principle of indefeasibility.46 These warnings are at odds with other
judicial statements that the rule of immediate indefeasibility does not preclude the
enforcement of rights against the registered owner in personam.47

The operation of the in personam exception is tightly confined, so that its effect is
very different to that of deferred indefeasibility. Under deferred indefeasibility, the

45 Logue v Shoalhaven Shire Council (1979) 1 NSWLR 537, 563 (Mahoney J, in
dissent); Bahr v Nicolay (No 2) (1988) 164 CLR 604 (HCA), 538 (Wilson
and Toohey JJ), 613 (Mason CJ), 638 (Dawson J); Grgic v ANZ Banking
46 Frazer v Walker [1967] 1 AC 560, 613, 637-38, 652-53; Mercantile Mutual
Life Insurance Co Ltd v Gosper (1991) 5 NSWLR 32, 42, 45-46 (Mahoney
JA), 37 (Kirby P); Fassas v State Bank of South Australia [1993] 2 VR 316, 332
(Hayne J); Bahr v Nicolay (No 2) (1988) 164 CLR 604, 637 (Mason CJ
and Dawson J), 638 (Wilson and Toohey JJ), 638 (Brennan J); Palais Parking
Station v Sheen (1980) 24 SASR 425, 430 (King CJ, with whom Williams J
concurred). A major effect of this inconsistency principle has been to inhibit
restitutory in personam claims against the registered owner. On the
underdevelopment of restitutionary principles in the Torrens system, see
Robert Chambers, ‘Indefeasible Title as a Bar to a Claim for Restitution’
47 See, eg, the statement of Lord Wilberforce in Frazer v Walker cited above,
44, and reaffirmed by the Privy Council in Oh Hiam v Than Kong (1980) 2
BPR 9451.
deprived former owner, O, is entitled to rectification of the register simply on the basis that the transfer from her to P was forged, or that it was void or voidable for any other reason. Under immediate indefeasibility, these grounds would not be sufficient unless O can prove that P is party to fraud within the meaning of the statute. If P has not been fraudulent, O may attempt to bring an in personam action against him seeking a proprietary remedy (i.e., an order that will result in P giving up all or part of his registered interest). O would need to bring her claim within an established legal or equitable cause of action based upon P's personal undertakings or conduct.48

Relief will not be granted against a registered owner in personam merely on the ground that the transfer from O to P was void or voidable.49 To allow an in personam claim on those grounds would be inconsistent with the principle that registration of a void or voidable instrument confers upon P an immediately indefeasible title in the absence of fraud. For an in personam action to succeed against a registered owner, O would need to show that P has acted unconscionably in obtaining or retaining his registered interest.50 This sets a very high threshold for obtaining proprietary relief by means of an in personam action.

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48 Grgic v ANZ Banking Group Ltd (1994) 33 NSWLR 202; Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133; Duncan v McDonald [1997] 3 NZLR 705 (NZCA); An action for deceit is an example of a legal cause of action that may give rise to a personal equity enforceable against the registered owner: Garafano v Reliance Finance Corporation Ltd (1992) NSW ConvR 55-640, 59,662-63 (Meagher JA).

49 Vassos v State Bank of South Australia [1993] 1 VR 316; Story v Advance Australia Bank of Australia Ltd (1993) 31 NSWLR 722 (NSWCA); (not enough to show that P was registered pursuant to a forged instrument); Harwood v Commonwealth Bank of Australia [1990] 1 VR 643 (Vic CA) (transfer executed by a minor).


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5. THE CHOICE BETWEEN IMMEDIATE AND DEFERRED INDEFEASIBILITY

The choice between immediate and deferred indefeasibility the two rules is a live issue for many of the Torrens jurisdictions. The merits of the competing rules are therefore a matter of international interest and significance.

Canada

The choice of rule has not been authoritatively settled in the Torrens provinces of Western Canada and the territories, with the exception of Saskatchewan where, in 1987, the Court of Appeal adopted immediate indefeasibility in Hennanson v Martin.51 Di Castri and Neave agree that 'the majority of Canadian decisions on the subject of forgery indicate a preference for deferred indefeasibility'.52

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51 [1987] 1 WWR 439 (Sask Ct of Appeal); John Lee, Case Comment: Registrar of Regina Land Registration District v Hennanson et al (1988) 52 Saskatchewan Law Review 303. The Alberta Law Reform Institute expressed the view in 1990 that immediate indefeasibility is probably the law in Alberta: Alberta Law Reform Institute, Proposals for a Land Recording and Registration Act for Alberta, Rep No 69 (2 vols) (1993), Vol 1, at 16. See also Ziff, above n 46, 426, fn 79. However, the Hennanson decision has never been followed. In Beneficial Realty Ltd v Bae (1996) 82 AR 356 (Alta QB), Master Breitkreuz giving judgment on an interlocutory application, distinguished Hennanson on grounds that indicated that he did not regard that decision as adopting a general rule of immediate indefeasibility.

52 Di Castri Vol 2, above n 27, para [758], Marcia Neave, 'Indefeasibility of Title in the Canadian Context' (1976) 25 University of Toronto Law Journal 173, 178, stating that '[i]n the Canadian context, the principle of deferred indefeasibility appears to have been accepted with little criticism' both in the Torrens jurisdictions and those that are based on the English model. Neave's article was published almost a decade after Fraser v Walker. Di Castri says that it remains to be seen whether the Canadian courts will endorse the rule of immediate indefeasibility: para [16]. The Canadian authorities are summarised in Ziff, ibid. 426 fn 79. See also, Robert White, 'The Elements of a Torrens Title' (1973) 11 Alberta Law Review 392, 408; François Bouchu, 'Le Systeme Torrens et la Publicite Fonciere Quebecoise' (2002) 47 McGill Law Journal 625, 643.
Some Canadian provinces have legislated to clarify the matter. British Columbia’s *Land Title Act*, it appears to indicate that deferred indefeasibility is the rule in that province. Nova Scotia has recently legislated for deferred indefeasibility, alleviated by a judicial discretion to confirm the unauthorized registration where it is ‘just and equitable’ to do so. The rectification provisions of New Brunswick’s *Land Titles Act* follow the English model in form, but their substantive effect is closer to a rule of deferred indefeasibility, so far as owners in possession are concerned. Under s 71(b), a registered owner in possession who takes under a void instrument acquires no interest in the land by registration of the instrument. Apart from the case of the registration of a discharge of mortgage in error, Di Castri assesses as ‘remote’ the chances that the courts in British Columbia will accept immediate indefeasibility in any unqualified way: above n 52, para [762].

The Act does not state whether a subsequent purchaser for value (P2) is protected from registration if he is not in possession. It appears that he is not protected, for s 72(2) deems rectification to have effect retrospectively to the date of the unauthorized entry. *Cf* Freer v Unwins Ltd [1976] Ch 288.


The United States of America

Nine US States still have Torrens statutes on the Australian model. The main users of the Torrens system are Hawaii, and certain counties in Minnesota, Ohio and Massachusetts. Due to limited use of the system, Torrens jurisprudence in the US is sparse and moribund. The little authority that exists suggests that deferred indefeasibility is the preferred interpretation. The principal authorities predate the acceptance of immediate indefeasibility in Commonwealth jurisdictions.

Although the US courts have in the past consulted Commonwealth authority for assistance in construing their Torrens statutes, the chances of their adopting immediate indefeasibility are remote. In the US, the debate is not whether deferred and immediate indefeasibility should prevail, but whether registration should be effective to pass title in forgery cases, even to the limited extent required by the rule of deferred indefeasibility. In a country where Torrens titles make up a tiny proportion of all land titles, the Torrens system has been criticized for departing from conventional principles of US real property law, and for exposing owners to the risk of losing their titles through fraud. Charles Szypszak discerns in the US
cases a judicial uneasiness with the risk that the Torrens system will allocate title to the wrong party, through fraud or registry error.

New Zealand and Australia

New Zealand authority shifted towards immediate indefeasibility in *Assets Co Ltd v Mere Roihi* and in *Boyd v Mayor of Wellington*, despite the decision of the Privy Council in *Gibbs v Messer* which appeared to adopt the contrary rule. In 1967, in the landmark decision of *Frazer v Walker*, the Privy Council decided that immediate indefeasibility was the law in New Zealand. After a long period of uncertainty, during which deferred indefeasibility was assumed to be the law, the High Court of Australia followed the Privy Council in 1971, adopting the rule of immediate indefeasibility in *Breskvar v Walt*. Australia is a federal state, with many variations in its Torrens statutes, but the appellate courts have generally tended to take a uniform approach so far as the wording of the statutes permits.

While the shift to immediate indefeasibility was received favourably enough at the time, some disquiet has recently been expressed, prompted by an increase in fraud and forgery cases in the 1980s and 1990s, and by concern about the hardship caused by the rule. In 2003, a former Chief Justice of Australia, Sir Anthony Mason, expressed his provisional view that ‘deferred indefeasibility would generate fairer results’. But in the absence of an up to date survey of the experience of the two rules in different jurisdictions, Sir Anthony was unsure whether ‘the benefits would outweigh the detriments of change’.

Papua New Guinea

Papua New Guinea, which enacted Torrens legislation on the Australian model, followed the Australian rule change. John Mugambwa reports some judicial dissatisfaction with the consequences of the rule of indefeasibility in that country. This concern relates, in part, to the effect of the principle of indefeasibility in extinguishing prior unregistered interests, including the customary rights of indigenous owners. This results from the negative operation of indefeasibility, so is not directly relevant to the choice between immediate and deferred indefeasibility.

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60 Ibid. See, for example, the fault-based explanation offered by the US Supreme Court for its decision in *Eliason v Wilborn* (1929), 167 NE 101, 68 ALR 350 (aff’d 281 US 457 (1930) (US SC), above n 58.
62 [1924] NZLR 1174 (Sup Crt NZ).
63 [1891] Ac 248 (PC).
64 [1957] 1 AC 569 (PC).
65 The High Court of Australia was evenly divided on the choice of rule in *Clements v Ellis* (1934) 51 CLR 217, so that the decision of the trial judge (which was in favour of deferred indefeasibility) prevailed. For a summary of the Australian authorities, see Whalan, above n 5, at 302, fn 41.
66 (1971) 126 CLR 376.
68 Ibid.
69 The Torrens system was introduced into Papua by the *Real Property Ordinance* of 1889, and into New Guinea by the *Land Registration Ordinance* 1924. The current legislation is the *Land Registration Act* (Ch No 191), and is modeled on the Australian Torrens statutes. See generally, John Mugambwa, ‘Transportation of the Torrens System to Developing Countries’ (Paper presented at the Taking Torrens into the 21st Century Conference, Auckland, NZ, 19-21 March, 2003), 10-12.
71 Mason, above n 68, 25.
72 Ibid.
73 The Administration of the Territory of Papua and New Guinea v Blasius Temu and others (In re Panapaloa and Wirek Land) [1971-72 PNGLR 229 (HCA); Mudge and Mudge v Secretary of State for Land (1985) PNGLR 387 (Sup Crt PNG, Platt J); Mugambwa, ibid, 13-18.
74 Ibid, 19-22.
75 Ibid, 12-29. The negative operation refers to the effect of registration in conferring priority over prior unregistered interests. For a case study from New Zealand showing how the negative operation of indefeasibility can cause catastrophic loss to indigenous customary landowners, see Richard Boast, ‘The Implications of Indefeasibility for Maori Land’ (Paper presented at the
The second source of concern arises from cases of irregular grants or cancellation of state leases by government officials in circumstances that raise a suspicion of corruption. The fraud exception does not provide a remedy in such cases, because of the difficulty of proving that the purchaser was complicit. Even if the action of the officials can be shown to be *ultra vires*, registration confers an immediately indefeasible title upon the purchaser. Mugambwa argues that a rule of immediate indefeasibility is not suited to the present circumstances of Papua New Guinea, and that it should be replaced by deferred indefeasibility.

Malaysia

Malaysia legislated to incorporate deferred indefeasibility into its Torrens statute, the *National Land Code 1965*, s 340. However, in 2001, a full bench of the Federal Court interpreted the Malaysian provision as incorporating immediate indefeasibility. It is expected that the decision will be set aside on the ground that the court was not properly constituted, one of the judges in coram having already retired at the date the court delivered its decision. Until the validity of the decision is determined, and the Federal Court re-determines the case, it is unsettled whether deferred or immediate indefeasibility is the law in Malaysia.

Other Torrens jurisdictions

Many other countries throughout the world have adopted land title registration statutes on Australasian models, particularly in Asia, Africa, the Caribbean and the South Pacific. The judiciary in those countries can expect sooner or later to be called upon to determine whether those statutes should be read consistently with either deferred or immediate indefeasibility. For example, Uganda’s *Registration of Titles Act 1924* is closely modeled upon the Victorian *Transfer of Land Act 1915*. The Ugandan courts have yet to determine whether immediate indefeasibility is the law in their country. Other countries that adopted the Torrens statutes will find it instructive to examine the Australasian jurisprudence and experience.

The other Torrens jurisdictions will observe that, more than three decades after *Frazer v Walker*, Australia and New Zealand stand almost alone in having adopted the rule of immediate indefeasibility. The High Court of Australia introduced it into the law of Papua New Guinea before independence. There is some evidence that it is not operating satisfactorily in that country. Since independence, the courts have limited the ambit of the rule to prevent its use as a cloak for corruption. Malaysia has recently adopted the rule as a result of an unexpected interpretation placed upon s 340 of the *National Land Code* by the Federal Court. This change in the law may not endure if the decision of the Court is set aside for the reasons explained above. The Saskatchewan Court of Appeal’s decision in *Hermanson v Martin* is consistent with immediate indefeasibility, but it remains to be seen if the decision will be

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77 Ibid, referring to *Emas Estate Developments Pty Ltd v Mee* (1993) PNGLR 727; *Steamship Trading Company Ltd v Minister of Lands and Physical Planning and Garamut Enterprises* (No OS 552 of 1999, unreported, National Court, Sheehan J), and *Hi Lift Company Pty Ltd v Mit Sato, MBA, Secretary for Agriculture and the State of Papua New Guinea* (N2004, unreported, National Court, 16 and 17 November 2002). In the *Emas* case, the Minister purported to forfeit Mee’s registered Crown lease. He then leased the land to Emas Estate, which registered its lease. The court held that Mee’s lease had been unlawfully terminated, and ordered its reinstatement. Emas Estate argued that its lease was indefeasible, as no fraud had been proved against it. By a majority, the Supreme Court dismissed Emas’ appeal, refusing to apply the principle of indefeasibility in this case. Salika J said that the principle was not appropriate to a case where registered title was procured ‘under the influence of position of power and money’: (1993) PNGLR 227 at 227-228.

78 Ibid, 22-27. Mugambwa argues that corruption is systemic in the public sector of PNG and ‘in a corrupt environment the Torrens system is apt to facilitate fraudulent land deals because of the difficulty of proving fraud against a registered proprietor’: at 22.


81 Mugambwa, above n 73, 1-7.

taken as adopting the rule, and followed in later cases. It is only in Australasia that the doctrine has been received with any enthusiasm.

Conflicting indications in the Torrens statutes

Although the choice between deferred and immediate indefeasibility is fundamental to the operation of the Torrens system, most of the statutes leave the matter unresolved, and legislatures have generally been content to allow the courts to determine which rule applies. Apparently, Sir Robert Torrens and other drafters of the early statutes failed to appreciate the significance of the issue, as the statutes derived from the South Australian Real Property Acts 1857-61 provide conflicting indications. It has taken considerable legal ingenuity to reconcile the conflicting statutory provisions with either deferred or immediate indefeasibility. Douglas Whalan suggests that ‘few would disagree’ with the observation of Salmond in his dissenting judgment in Boyd v Mayor of Wellington that the Torrens provisions relating to indefeasibility are so poorly drafted that it is difficult to harmonise them so as to extract the meaning intended by the legislature.

The ambiguity is complex, but a simplified explanation may be offered as follows. The ‘paramountcy’ provision in the statutes states that except in case of fraud, the registered proprietor holds the land subject only to incumbrances noted on the register and the specified overriding interests. The ‘notice’ provision states that except in the case of fraud, no person dealing with the registered proprietor shall be required to ascertain the circumstances under which such proprietor or any previous proprietor was registered. One interpretation of the provisions is that, in order to gain an indefeasible title, a person registering a disposition must have dealt with the previous registered owner on the faith of the register. So a purchaser (P1), who in good faith registers a forged disposition from an imposter, would not get an indefeasible title because he has not dealt with the registered owner. So long as P1 remains on the register, a purchaser (P2) who takes a disposition from him and registers it in good faith obtains an indefeasible title, for P2 satisfies the condition of having dealt with a registered proprietor on the faith of the register. This produces a rule of deferred indefeasibility.

The above interpretation effectively reads the ‘notice’ provision as limiting the protection conferred on the registered owner by the ‘paramountcy’ provision. Proponents of immediate indefeasibility argue that this inverts the proper relationship between the provisions. It is the ‘paramountcy’ provision that defines the quality of the registered owner’s title. The ‘notice’ provision serves the more limited purpose of protecting a person dealing with the registered owner from the effect of notice of trusts and unregistered interests.

Most explanations offered by judges for one rule or the other seek to show that their preferred rule is correct as a matter of statutory interpretation. These explanations are unsatisfying, because the provisions of the Torrens statutes are sufficiently ambiguous to give the higher courts a leeway of choice. Although immediate indefeasibility now prevails in Australia and New Zealand, eminent jurists including Sir Owen Dixon and Sir John Salmond have in the past spelled out a rule of deferred indefeasibility from the same or similar provisions. Yet the appellate courts have generally refused to acknowledge that the indefeasibility provisions are capable of more than one interpretation, nor have they had resort to the presumptions that are used to resolve ambiguity in statutes.

See above, n 51.

For a discussion of these conflicting indications, see Marcia Neave, C J Roseriter and M A Stone, Sackville & Neave’s Property Law: Cases and Materials 6th ed., (Butterworths, Sydney, 1999), [6.3.27]-[6.3.32]; Whalan, above n 5, 293-96; W N Harrison, ‘Indefeasibility of Torrens Title’ (1948-54) 1 Queensland University Law Journal 209.

Whalan, ibid at 293, citing [1924] NZLR 1174, 1211 (Salmond J).

83 See above, n 51.
84 For a discussion of these conflicting indications, see Marcia Neave, C J Rosseriter and M A Stone, Sackville & Neave’s Property Law: Cases and Materials 6th ed., (Butterworths, Sydney, 1999), [6.3.27]-[6.3.32]; Whalan, above n 5, 293-96; W N Harrison, ‘Indefeasibility of Torrens Title’ (1948-54) 1 Queensland University Law Journal 209.
85 Whalan, ibid at 293, citing [1924] NZLR 1174, 1211 (Salmond J).
86 See, eg, the view of Dixon J in Clements v Ellis (1934) 51 CLR 217, 237.
87 See generally, Sackville & Neave, above n 84, paras [6.3.27]-[6.3.32]
88 Clements v Ellis (1934) 51 CLR 217, 237 Il.
90 Such as the common law presumption discussed in note 151, below.
A recent example of this judicial blindness to ambiguity is found in the decision of
the Federal Court of Malaysia in Adorna Properties Sdn Bhd v Boonsom Boonyanit
@ Sin Yok Eng. In a third party dispute arising from the registration of a forged
transfer to a bona fide purchaser for value, Malaysia's highest court was called upon
to interpret s 340 of the National Land Code 1965. This provision had long been
thought to embody a principle of deferred indefeasibility. The Federal Court
unanimously ruled that the provision conferred an indefeasible title upon the
purchaser immediately upon registration of the forged transfer. It arrived at this
conclusion by interpreting a proviso to s 340(3) as qualifying the main clause, s
340(1). The alternative interpretation, to read the proviso as qualifying only s
340(3), would have been consistent with a rule of deferred indefeasibility. The
court failed to acknowledge that more than one interpretation was possible. Had it
done so, it might have reasoned that it was unlikely that the legislature intended to
introduce immediate indefeasibility without providing an indemnity scheme to
compensate registered owners deprived of their titles by the operation of the rule.

The approach of courts in the Torrens jurisdictions to the interpretation of the
indefeasibility provisions is textual and only narrowly purposive. Yet the higher
courts in Australia evidently regard immediate indefeasibility as a principle of
sufficient importance to require a national approach, notwithstanding differences in

91 [2001] 1 MLJ 241 (Full Court of the Federal Court). This was the first
decision of Malaysia's highest court on the question of indefeasibility in a
case of forgery: Teo Keang Sood, 'Demise of Deferred Indefeasibility under
403, at 403.
92 Keng, above, n 79, 87; Butt, Land Law, above n 50, para [2016], fn 79 and
sources cited therein.
93 Several commentators have argued that this alternative interpretation was
preferable, both as a matter of textual interpretation and also as a matter of
policy: Keng, ibid; Moosdeen, above n 80; Sood, above n 91; P K Nathan,
'Nightmare for Registered Owners of Landed Properties' (2002) 31 INSAF:
The Journal of the Malaysian Bar 78.
94 The Malaysian Torrens system lacks an indemnity scheme.

the wording of the State and Territory statutes. This suggests that there is an
unarticulated policy basis for their adoption of the rule.

The formal doctrinal justification for immediate indefeasibility

The most commonly cited justification for immediate indefeasibility is that
registered title is established by the act of registration, not by the validity of the
registered instrument. The principle was enunciated in Fraser v Walker as
follows: 'It is in fact the registration and not its antecedents which vests and divests
title'. Both Hogg and Simpson acknowledged this formal legal difference
between deeds registration and LTR, although neither author attached any
functional significance to it. Barwick CJ expressed the principle as follows:

The Torrens system ... is not a system of registration of title but a
system of title by registration. That which the certificate of title
describes is not the title which the registered proprietor formerly had,
or which but for registration would have had. The title which it
certifies is not historical or derivative. It is the title which registration
itself has vested in the registered proprietor. Consequently, a
registration which results from a void instrument is effective
according to the terms of the registration.

95 Breskvar v Wall (1971) 126 CLR 376, 386-87 (Barwick CJ); Schultz v Corwill
Properties Pty Ltd (1969) 90 WN (NSW) (Pt 1) 529; Pyramid Building
Society (in liq) v Scorpion Hotels Ltd [1998] 1 VR 188; Kooroostang
Nominees Pty Ltd v ANZ Banking Group Ltd [1998] 3 VR 16; Whittem v
Acords (1992) 59 SASR 57. Some of these cases disapproved of earlier
decisions of trial judges in other cases, who had found the wording of their
State statutes to be inconsistent with immediate indefeasibility: see Sackville
& Neave, above n 84, para [6.3.42], dealing with the South Australian cases,
and [6.3.52], on the Victorian cases.

This was stated in Assets Co Ltd v Mere Ruthi [1905] AC 176; Boyd v Mayor
of Wellington [1924] NZLR 174; Frater v Walker [1967] 1 AC 569, Mayer v
Coe [1968] 2 NSWR 747; Breskvar v Wall (1971) 126 CLR 376, among the
relevant authorities.

97 [1967] 1 AC 569, 580 (Lord Wilberforce).
1905), 10-11; S R Simpson, Land Law and Registration (Cambridge
what matters is whether the system is dispositive or not.
Windeyer J expressed the same point by saying that it is the fact of registration which is the source of title and that registration is not merely a 'retrospective approbation of [title] as a derivative right'.

The link between dispositive registration and immediate indefeasibility

The 'title by registration' rationale above explains why registration of a void instrument is effective to pass title. It does not satisfactorily explain why an unlawfully procured entry should not subsequently be rectified, if O applies to have her title restored. The two propositions are not inconsistent, as the following comparative law analysis shows.

In civil law countries, where there is no concept of equitable interests, many, but not all, land registration systems are strongly dispositive. The German system, the parent of many of the world's LTR systems, is of this type. With limited exceptions, a property right in land cannot pass by agreement between the parties unless it is registered. Elizabeth Cooke remarks that

'[the dispositive nature of registration is far more powerful than it can be in the English and Torrens systems, for there is no possibility of a property right existing in equitable form if it remains unregistered.]

Although Germany practices the strong form of dispositive registration, it does not have immediate indefeasibility. It has a rule that is functionally equivalent to deferred indefeasibility. If, for example, a void or voidable disposition from O to P1 is registered, P1 does not get an indefeasible title. O can apply to set aside the registration of P1's interest. But if O fails to act until after P2, a successor to P1, obtains an interest in good faith, O's right is extinguished. To gain the benefit of this protection, P2 must acquire his interest without knowledge that P1's registered title is defective.

Zweigert & Kötz explain the juridical basis of the German system as follows:

The legal doctrine known as the principle of abstraction (Abstractionsprinzip) holds that title passes by registration, independently of the validity of the underlying transaction. While common law systems do not speak of a principle of abstraction, we can recognise it as functionally equivalent to our doctrine of 'title by registration', as expounded above. Zweigert and Kötz observe that a legal system that lacked the principle of abstraction would say that no title passed to P1 when he registered a void instrument. Both the English and the Torrens systems regard title as having passed, subject to the possibility of rectification.

German law adds a rider to the principle of abstraction. If P1 has obtained registration pursuant to a void transfer, O may claim back her title from P1 on the ground of unjust enrichment. This is what we would call an in personam claim. Murray Raff argues that some of the problems experienced by the common law-based Torrens systems of LTR would not have arisen if they had borrowed the juristic companion principles of German law, along with the system of LTR that Torrens adapted from the Hanseatic model. He lists unjust enrichment among those

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100 (1971) 126 CLR 376 at 400.
101 Cooke, above n 9; 175-77; Gleiss, et al., 'Germany' in Hurndell (ed.) Property in Europe: Law and Practice (Butterworths, 1998) Ch 7, 219. The German system has been adopted in many European countries. The Japanese system is derived directly from it, the South Korean indirectly: Murray Raff, German Real Property Law and the Conclusive Land Title Register (PhD thesis, University of Melbourne, 1999), 5-6. It, and its Hanseatic predecessors, were an important influence on the developing English and Torrens systems: Raff, ibid ch 1.
102 Bürgerliches Gesetzbuch or BGB (German Civil Code), para 873: Cooke, ibid, 175.
103 Ibid.
principles. One may speculate that the debate over deferred and immediate indefeasibility would not arise if English law had a more developed doctrine of unjust enrichment.

As the German example shows, there is no necessary correlation between whether a system is dispositive, and which rule of indefeasibility it employs. The German LTR system is strongly dispositive and has the principle of abstraction (or title by registration), but the net result is functionally equivalent to that of deferred indefeasibility.

In her study of selected European systems of land registration, Cooke finds that ‘dispositive registration is by no means pervasive and is not co-extensive with title registration’. The German system of title registration is dispositive, the Polish system is not, but both practise deferred indefeasibility. Finland has non-dispositive title registration, while the Netherlands has a deeds registration system that is dispositive. Both countries have a similar indefeasibility rule. In the Netherlands, if a disposition that is forged or not authorised by O is registered, O can recover her title from P1 or from a good faith successor to P1. But if the defect in the disposition to P1 was of a less serious kind, eg a mistake, P2 is protected. In effect, there is deferred indefeasibility if the defect is one that, in our system, would render the disposition voidable rather than void. Finland uses a very similar rule. None of these European systems practises immediate indefeasibility.

Comparative law does not support the proposition that a weakly dispositive system of title registration, such as the common law-based Torrens system, necessarily requires a rule of immediate indefeasibility. The concept of title by registration, like its civilian counterpart, the principle of abstraction, requires only that an entry in the register should be effective to pass title, even if procured by a void instrument. It does not necessarily follow that the entry should be irreversible on any ground except fraud.

The proposition that registered titles are non-derivative

Barwick CJ said that registered title is not historical or derivative, and that its legal effect is independent of the invalidity of the instrument from which it results. Both propositions are true in a formal legal sense, but do not reflect the functionality of the system. Systems of title registration are established to register historically derived titles, that is, interests that devolve by the lawful exercise of statutory powers, by succession, or by consensual and lawful dispositions from prior owners. If the registrar were intentionally to confer registered title upon someone who was not so entitled, the action would be an arbitrary and unlawful deprivation of property rights.

Every entry in the register must be duly authorised in accordance with the law. As explained above, the role of the instrument of disposition under a system of title registration is not to pass or divest title, but to authorise the alteration of the register. It was never intended that dispositions that are forged or void for any other reason should achieve registration. The rules of the system, the attestation and certification requirements, and the protocols and screening procedures put in place by the registry, are all designed to prevent the registration of invalid dispositions.

Since many of the defects are difficult or even impossible to detect, it is inevitable that the occasional defective instrument will slip through to registration. Where this occurs, it is always the result of an error, or a malfunction of the system. As Benito Arruñada put it, the registration of an unauthorised disposition is a breach of the


112 See above, n 46 and associated text.

113 Cooke, above n 9, 193.

114 This is made possible by the fact that the Netherlands also has the principle of abstraction, as does South Africa, which received the Roman-Dutch law of property: Hanri Mostert, 'The Diversification of Land Rights and its Implications for a New Land Law in South Africa' in Cooke (ed.) Modern Studies in Property Law (Hart Publishing, 2003) 3-25, at 5. This emulates the ‘title by registration’ feature of LTR, and makes registered interests more reliable than under most deeds registration statutes.
custodianship role of the registrar, to whom registered owners entrust their titles.\(^{115}\)

In principle, an error in the administration of the system should be rectifiable. Most LTR statutes provide the court or registrar with the power to set aside an entry procured by unlawful means.

**Immediate indefeasibility and the Registrar’s power of correction/cancellation**

The Torrens statutes do indeed make provision for errors in the register to be corrected. For example, s 81(1) of the Land Transfer Act 1952 (NZ) expressly empowers the registrar to cancel or correct any grant, certificate, instrument, entry or endorsement that has been fraudulently or wrongfully obtained or retained. This power is in addition to a separate ‘slip’ provision which empowers the registrar to correct errors in certificates of title or the register and supply omitted entries.\(^{6}\)

Speaking of the New Zealand provision, Lord Wilberforce in *Frazer v Walker* described the registrar’s power of correction as ‘significant and extensive’.\(^{117}\)

The section could be read as empowering the registrar to cancel at any time a registration procured by a forged or void instrument. But this interpretation was ruled out because it did not fit with immediate indefeasibility. It would also vest too much adjudicative responsibility in an official, if the registrar could rectify an entry to the prejudice of a registered owner without a hearing or other due process.\(^{118}\) It was therefore judged necessary to read down the scope of the registrar’s power. Lord Wilberforce said that s 81 should be read subject to the ‘protection of purchasers’ provision in s 183, with the result that the registrar’s power of correction can only be exercised in the period before a bona fide purchaser acquires a registered title.

Despite this restrictive interpretation, the wide terms in which the power of correction is expressed do not sit comfortably with immediate indefeasibility.\(^{119}\)

Judges and academic commentators have described the power as an ‘anachronism’,\(^{120}\) cautioned registrars against exercising it to adjudicate disputes over substantive issues,\(^{121}\) and called for it to be amended. The survival of the provision is an embarrassment to those who contend that immediate indefeasibility is the correct interpretation of the statutes.

**E. WHY IMMEDIATE INDEFEASIBILITY NEEDS A POLICY JUSTIFICATION**

Ronald Sackville, who supported the adoption of immediate indefeasibility, pointed out that the Privy Council’s advice in *Frazer v Walker* lacked any serious analysis of the policy arguments for and against the two theories of indefeasibility.\(^{122}\) He added: \(^{123}\)

> It cannot be emphasized too greatly that the case for immediate indefeasibility is not based on irrefutable logic, but must depend on value judgments concerning the weight of conflicting policies.

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\(^{116}\) Eg, s 80 of the Land Transfer Act 1952 (NZ), described by Lord Wilberforce as ‘little more than a slip section and not of substantive importance’: *Frazer v Walker* [1967] 1 AC 560, 581. The provisions of ss 80 and 81 discussed in the case derive from the South Australian Real Property Acts 1858-61, which were the model for many of the Torrens statutes.

\(^{117}\) Ibid, 531.

\(^{118}\) Although procedures consistent with procedural fairness could be implied into the statute. Since *Annett v McCann* (1990) 170 CLR 586, Australian courts consider themselves free to supplement statutory procedures that fall short of the common law requirements of natural justice.
The choice between deferred and immediate indefeasibility is a policy issue. In the policy debate, proponents of immediate indefeasibility should bear the heavier onus of justification, for two reasons. First, the rule undermines the effectiveness of legal sanctions that the general law has imposed to promote other important policy interests. Secondly, the rule makes irreversible a non-consensual deprivation of vested property rights more often than does the alternative rule. That is, it is more likely to bring about a permanent deprivation of property. These consequences are explained below.

Inconsistency with the policy of the general law

Common law rules protecting the consensual nature of transfers

If the law prescribes that an instrument or transaction is void for breach of a rule, it is generally because the rule serves an important object of public policy. Some common law rules are designed to prevent transfers of property rights without the real consent of the owner. For example, the common law deems void any transfer on which a party's signature has been forged, or materially altered after execution so as prejudicially affect a party who has not consented to the alteration, or executed by a person who is entitled to raise the plea of non est factum. The invalidity of the instrument is a consequence imposed by the common law to protect the consensual nature of transfers. Under immediate indefeasibility, these defects do not prevent the vesting and divesting of title as soon as a bona fide purchaser registers the instrument without fraud.

The public policy interests served by the common law rules of invalidity are subverted if a non-consensual disposition confers an immediately indefeasible title upon registration. For example, a rule of the common law allows a minor to avoid a contract before or within a reasonable time after attaining his or her majority. Its purpose is to protect vulnerable minors who are presumed to be unable to form a prudent intent. The operation of the rule has been substantially eroded by the principle of immediate indefeasibility, in cases where the minor's contract was followed by a disposition that has been registered. In the absence of fraud or a right against the registered owner in personam, avoidance of the contract by the minor will not defeat the title conferred by registration.

This was established in Horvath v Commonwealth Bank of Australia. A bank advanced money to a married couple and their son on the security of a mortgage
that was later registered. Unknown to the bank, the son was a minor at the time the mortgage was given. After attaining his majority, the son unsuccessfully sought an order that the mortgage be set aside, relying on s 49 of the Supreme Court Act 1986 (Vic), which provided that loan contracts entered into by minors were void. The Victorian Court of Appeal held that even if the mortgage was void as against the son, the bank had obtained an indefeasible title immediately upon registration. Since fraud was not alleged, and the son had no in personam claim against the bank, he was not entitled to have the registration of the mortgage set aside. This outcome defeats the protective purpose of the legislative rule.

Ultra vires government transactions and the rule of law

Immediate indefeasibility applies to unauthorised government acquisitions and dispositions by virtue of judicial statements that the curative effect of registration extends to void instruments generally. The rule has demonstrated its potential to undermine the rule of law as it applies to the accountability of public officials for the exercise of power. In Boyd v Mayor of Wellington, a proclamation purporting to vest part of the appellant's land in the Wellington Corporation for public purposes had been registered. The appellant argued that the proclamation was void for ultra vires. By a majority, the New Zealand Court of Appeal held that even if the proclamation was void, registration had conferred an indefeasible title upon the local authority, there being no evidence of fraud. This ruling was followed in Palais Parking Station v Shea, a case in which the Director-General of Medical Services, a public official, had caused himself to be registered as the owner of land pursuant to a purported notice of acquisition. He acted in good faith but was mistaken in his belief that he had the power compulsorily to acquire the land. Since his action was unauthorised by statute, the notice of acquisition was void. The deprived former owner sought to raise an in personam claim, arguing that it would be unconscionable for the official to retain the land after becoming aware of the invalidity. The Full Court of South Australia held that registration conferred an indefeasible title upon the official. By a majority, the court found that there was no claim in law or equity that the deprived former owner could bring against the official, who had become registered proprietor in good faith.

It is difficult to find a principled justification for the outcomes in the Boyd and Palais Parking cases. A rule that allows a government agency to retain property acquired compulsorily and unlawfully from subjects undermines the rule of law. John Mugambwa's study of the operation of immediate indefeasibility in Papua New Guinea demonstrates the dangers inherent in a rule that disables the courts from rectifying an ultra vires disposition. This over-extension of the rule weakens a fundamental legal protection against corruption. Courts in Australia and New Zealand have not yet been called upon to apply it in a case such as Emus Estate Developments Pty Ltd v Men, where an ultra vires disposition had been registered in suspicious circumstances, and the fraud could not be 'brought home' to P1. If such a case should arise, the courts would have to consider excepting at least some categories of ultra vires dispositions from the operation of the rule.

132 Fraser v Walker [1967] 1 AC 569, 584; Beshkvar v Wall (1971) 126 CLR 376, 385-86 (Barwick CJ).

133 [1924] NZLR 1124.


136 Hughson, Neave and O'Connor, ibid. The rule of law requires that government agencies should be accountable for the lawfulness of their actions.

137 See above, n 77 and accompanying text.

138 (1993) PNLGR 227; See above, n 77.
The application of immediate indefeasibility in the government cases does nothing to promote dynamic security and ease of transaction. Agencies exercising coercive powers of acquisition are in a very different position from purchasers transacting in reliance on the register. They are both transferor and transferee. If their titles were made defeasible at the suit of the deprived former owner, this would not threaten the security of registered titles generally, nor would it add to purchasers’ burden of inquiry. Any purchaser for value in good faith who takes a registrable disposition from the agency while it remains on the register would obtain an indefeasible title, under either deferred or immediate indefeasibility.

Judicial approach to invalidity arising from other statutes

The courts do not weigh the policy served by invalidity rules against the policy objects of the Torrens system. The matter is approached by asking if there is a conflict between the indefeasibility provisions of the Torrens statute and the statute that imposes the rule of invalidity. The courts have found no necessary inconsistency between a law that makes an instrument void for breach of a requirement, and a rule of the Torrens system that registration of a void instrument vests an indefeasible title. The two are capable of standing together, because the Torrens statutes do not purport to validate the deed made void by the other statute.

The latter deal with a different subject matter, viz, the effect of registration of the deed.

139 Hon’ath v Commonwealth Bank of Australia [1999] 1 VR 643 (Vic CA); Breskvar v Wall (1971) 126 CLR 376 (where the High Court of Australia apparently found no inconsistency between the provision of the Stamp Act 1894 (Qld) invalidating the transfer, and the indefeasibility provisions of the Torrens statute, which were held to confer an indefeasible title on registration of the transfer without fraud).

140 Hon’ath v Commonwealth Bank of Australia [1999] 1 VR 643. An option or covenant to renew which is made illegal by another statute does not become enforceable on registration, although if it is merely void (as opposed to illegal) the defect is cured by registration, according to the theory of immediate indefeasibility: Travinto Nominees Pty Ltd v Vlatis (1973) 129 CLR 1; Mercantile Credits Ltd v Shell Co of Australia Ltd (1976) 136 CLR 326: Whalan, above n 5, 117-19.

This narrow, formal doctrine of consistency masks a substantive conflict of legislative objects. The rule of immediate indefeasibility gives bona fide purchasers who register their interests a blanket exemption from the invalidity of disposition imposed by common law rules and non-overriding statutes. This has the perverse effect of weakening the force of other laws and detracting from the achievement of their objects. The authors of Sackville & Neave ask whether the decision in Breskvar v Wall (1971) 126 CLR 376 frustrates the legislative policy of the provision in the Stamp Act 1894 (Qld). The provision invalidated any transfer in which the transferee’s name was omitted at the time of execution: above n 84, para [6.3.50]. See also, Benmar Properties Pty Ltd v Makscha [1996] Qd R 578 (a lease registered in breach of controls on subdivisions required by s 34 of the Local Government Act 1936 (Qld) was held not defeasible).
property rights. Equity's bona fide purchaser rule has a destructive effect on prior transaction costs. This inadvertence may arise from a perception that indefeasibility is not substantially different from the historic priority rules, which sometimes divest property rights. Equity's bona fide purchaser rule has a destructive effect on prior equitable interests. Once a bona fide purchaser for value (P1) has acquired a legal estate without notice of the interests, they do not revise to be asserted against a subsequent purchaser (P2), even if P2 takes with notice of their prior existence.\footnote{Wilkes v Spooner [1911] 2 KB 473 at 487-88; Lowther v Carlton (1741) 2 Ark 242; 26 ER 549 at 550 (Lord Hardwicke); Nottingham Patent Brick and Tile Co v Butler (1886) 16 QBD 778; K and SF Gray, Elements of Land Law 3rd ed., (Butterworths, London, 2001), 1121-22.}

The rule of immediate indefeasibility takes the destructive effect much further by preventing the rectification of certain errors in registration. Neither the historic priority rules nor the deeds registration statutes allow an interest to be divested through a forged or otherwise void disposition, (except in rare cases of estoppel). The owner of unregistered land can recover possession by action of ejectment, even against P2 or his successors in title. Under the Torrens system, it is the registration, not the instrument, which vests and divests title. It is therefore the act of registration, coupled with the barring of O's remedies against the registered proprietor, which brings about an irretrievable deprivation of property. In the example given above of the registration of the forged transfer from O to P1, O's interest has been divested, and P1's interest created, through a malfunction of the conveyancing system. Immediate indefeasibility says that this state of affairs cannot now be undone. Deferred indefeasibility says that it can be undone so long as nobody with a better right than P1 has succeeded him on the register. Only the advent of P2 on the register makes the error irreversible.

The Torrens statutes expressly recognise that the registration system may result in the destruction of interests. Most of the statutes specify 'deprivation of an interest in land' as an event that entitles a person to seek damages from the state, or compensation from the statutory indemnity scheme, as the statute provides.\footnote{In the US, the Torrens statutes ran into problems with the 'takings' provision of the constitution. In Ohio v Guibert, 47 NE 551 (1897), the Ohio Supreme Court said that the scheme was objectionable because an erroneous registration amounted to a taking that was not for a public use, and the owner is entitled to compensation rather than to specific recovery of the asset.}

\footnote{Assunahda, ibid.}

\footnote{Lynden Griggs, 'Torrens Title in a Digital World' (2001) 8 E J Law - Murdoch University Electronic Journal of Law, <http://www.murdoch.edu.au/elaw/issues/vol6/issue3/griggs83_text.html>, para 14. The distinction between property rules and liability rules derives from the article by Calabresi and Melamed, one of the foundation works of law and economics: Guido Calabresi and Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089. If a right is protected by a property rule, the owner cannot be deprived of it unless he or she consents. If it is protected by a liability rule, the owner is entitled to compensation rather than to specific recovery of the asset. Arrunada, ibid.}

\footnote{No-one shall be arbitrarily deprived of his property'. The UDHR was adopted and proclaimed by a resolution of the General Assembly of the United Nations on 10 December 1948. This is not a treaty but is widely regarded as a statement of customary international law. As such it is not formally binding on states but cannot be ignored. Some Torrens jurisdictions have their own constitutional or statutory protection against arbitrary}

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Convention on Human Rights147 (now incorporated into the law of the United Kingdom by the Human Rights Act 1998 (UK). A deprivation of property must not to be ‘arbitrary’. It must be justified as being a measure taken in the public interest, and there must be reasonable proportionality between the measure and the object that is sought to be achieved. In determining the proportionality of the measure, it is relevant to consider the adequacy of the compensation provided.148

The argument that immediate indefeasibility effects an arbitrary deprivation of property is more debatable where the rule allocates dispute property between private parties. A ‘deprivation of property’ is not confined to a taking by the state for the benefit of the state. It may also occur when legislation provides for a compulsory transfer of property from one private party to another.149 It is arguable that in its application to private parties, the rule of immediate indefeasibility is a law that defines the legal effect of a registered estate or interest, rather than one that deprives a person of a property right. Charles Harpum argues that if a state

deprives a person of a property right. Charles Harpum argues that if a state

147 Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’ Note that ‘possessions’ is taken to mean property generally, including land. A deprivation of possessions normally means that the rights of the subject are extinguished by a transfer of ownership. Deborah Rook (ed.) Property Law and Human Rights (Blackstone Press, London, 2001), 62-63.


149 Harpum, ibid at 33; James v United Kingdom (1986) 8 EHR 123.

legislates for a property right to terminate in certain circumstances, the legislation should be read as defining the incidents of the property right rather than as authorizing a forfeiture of property.150 Otherwise, as he says, any change to the rules of property law might be characterized as a deprivation of property.

In choosing immediate indefeasibility over deferred indefeasibility, courts in Australia and New Zealand have opted for the decision rule that will more often bring about a deprivation of prior property rights.151 Deferred indefeasibility gives the deprived former owner, O, an opportunity to reverse the erroneous registration before the next purchaser along, P2, gets onto the register, while immediate indefeasibility cuts off O’s remedies as soon as P1’s instrument is registered. Under this rule, O’s right to recover her land may be lost before she even learns of the unauthorized transaction. This could also happen under deferred indefeasibility, if the second disposition from P1 to P2 follows quickly or at least before O discovers P1’s registration, but it is more likely that the two transactions will be separated by a significant time interval. In the general run of cases, deferred indefeasibility gives O a greater window of opportunity to recover her title than the other rule.

One might have expected the courts to justify their choice of the more destructive rule by showing that the resulting deprivation of property is necessary to serve an important public interest. But in the leading decisions in which appellate courts endorsed immediate indefeasibility, we find no reasoned analysis of the merits of the competing rules, no discussion of the public policy interest that requires that some people be deprived of vested property rights, no consideration of the adequacy

150 Ibid 30. See contra, Jean Howell’s argument that any provision which requires registration of an interest on pain of losing it is a ‘deprivation of possession’: Howell, supra n 148, 303-05.

151 Given the ambiguity of the statutes as to whether the rule is one of immediate or deferred indefeasibility, one might have expected the courts to have regard to rule that a court will not take a statute to intend an alienation of vested property rights unless that intention is clearly manifested: American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd (1981) 147 CLR 677, 683 (Mason J); Potter v Minahan (1908) 7 CLR 277 at 304.
of compensation provided for the latter, and no attempt to trace the real world impacts of the rule.

Immediate indefeasibility and protection for the home

There has also been no consideration in the Australasian cases of whether the application of a rule that deprives a person of her home is compatible with human rights instruments to which the state has signified its adherence. The loss of O's home might occur through total deprivation of her registered interest as, for example, where PI is registered as proprietor in fee simple and obtains an immediately indefeasible title. It could also occur where PI is a registered mortgagee, and exercises its power of sale. If PI registers without fraud, its partial deprivation of her interest, entitling her to compensation under the Torrens immediately indefeasible title. It could also occur where PI is registered as proprietor in fee simple and obtains an immediately indefeasible title.

The registration of the mortgage as an encumbrance against O's title amounts to a partial deprivation of her interest, entitling her to compensation under the Torrens statutes. However, PI may exercise its power of sale before O can access the

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152 In *Frazer v Walker* [1967] 1 AC 569, at 582-83, Lord Wilberforce said the availability of compensation to the losing party was irrelevant to their Lordships' choice of a decision rule on indefeasibility. It is arguable that in jurisdictions where the statutory indemnity is a last resort and is hedged with procedural obstacles and delays, the compensation provided is inadequate to support the adoption of immediate indefeasibility.

153 *Duncan v McDonald* [1997] 3 NZLR 669 (CA); *PT Ltd v Maradona Pty Ltd* (1991) 25 NSWLR 463; *Russo v Bendigo Bank Ltd* [1999] 3 VR 376; *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202 at 224. The question of what, if anything, is secured by a forged mortgage received very little consideration before the 1990s. See generally, Blanchard, above n 89, 21-23; Struan Scott, 'Indefeasibility and the Forged Mortgage' [1998] New Zealand Law Review 531 (arguing that registration of a forged mortgage does not secure any debt for which the mortgagor is not personally liable under the covenants of the mortgage).

154 *Finucane v Registrar of Titles* [1902] QSR 75, 94 (Qld SC); *Registrar of Titles v Franzon* (1975) 50 ALJR 4 (HCA); *Di Castri*, above n 27, para [977].

155 In *Frazer v Walker* [1967] 1 AC 569. See also, *Beardsley v Registrar of Titles* [1993] 2 Qd R 117. B's husband forged her signature on an instrument of mortgage. She sued him, as she was required to do before she could sue the Registrar for the statutory indemnity. Her husband was declared bankrupt, and shortly thereafter the mortgagee sold the land. B then sued the Registrar as nominal defendant but her action was held to be out of time, so she went uncompensated.

156 This 'last resort' model of compensation still operates in the Torrens provinces of Western Canada, under all the extant US Torrens statutes, and in half the Australian jurisdictions: see *Di Castri*, above n 27, para [990]; *Bradbrook, McCullum & Moore*, above n 121, para [4.129]. It commonly leads to long delays in recovering compensation.

157 In Australia, it is presently unsettled whether the mortgagor's personal covenant to pay is enforceable against the defrauded mortgagor separately from the mortgagee's right of recourse to the land. In *Grgic v ANZ Banking Group Ltd* (1994) 33 NSWLR 202, the New South Wales Court of Appeal held that although the registered mortgage secured the mortgage debt against the land, the defrauded mortgagor was not liable to the bank on the personal covenants for any shortfall realised on a mortgagee's sale. Other Australian authorities suggest that the registration of a transfer of a mortgage renders the mortgagee's right of recourse to the land. In *Grgic v ANZ Banking Group Ltd* (1994) 33 NSWLR 202, the New South Wales Court of Appeal held that although the registered mortgage secured the mortgage debt against the land, the defrauded mortgagor was not liable to the bank on the personal covenants for any shortfall realised on a mortgagee's sale.
interpreting the rights, the courts are required by s 2 to take into account the ECHR.

In compatibility with the convention rights, so far as it is possible to do so. 161

of the Act now obliges the courts to interpret all legislation in a way that ensures its compatibility with the convention rights, so far as it is possible to do so. 161 In interpreting the rights, the courts are required by s 2 to take into account the ECHR

sought permission to file a defence. Master Brokens'z discharged the order nisi, distinguishing Hermansson v Martin [1987] 1 WWR 439 (Sask CA). Had he followed Hermansson and applied the rule of immediate indefeasibility, the order nisi would have been made absolute and the owners would have suffered foreclosure. 159

See, eg in Chafslid Pty Ltd v Toronto (1991) 1 VR 225, 236, where Gray J said: 'It would be surprising and, perhaps, disappointing if the state of the law in Victoria allowed the defendants to be dispossessed of their own home by the registration of a forged mortgage'. The defendants were an immigrant couple who had been defrauded by their solicitor and another rogue. Gray J refused the mortgagee's claim for possession, finding that 1954 amendments to s 44 of the Victorian Act were inconsistent with the rule of immediate indefeasibility. His Honour's reasoning was disapproved in later cases: see above, n 96. This case, and the decision in Beneficial Realty Ltd v Roe (see previous note) perhaps indicate that judicial resistance to immediate indefeasibility is greatest when a registered owner is at risk of eviction as a result of a forged mortgage. James Gordley suggests that rules leading to forfeiture of property are inherently unstable in our law, due to judicial antipathy to forfeiture: James Gordley, 'Equality in Exchange' (1981) 69 Columbia Law Review 1587, at 1609-12, 1525; Carol Rose, 'Crystals and Mud in Property Law' in Carol Rose, Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership (Westview Press, Boulder, Colo., 1994), 215-16.

This statement appeared in a draft of Chapter 6 of Cooke's book, above, n 9. Professor Cooke has confirmed that he omitted the statement from the chapter as published does not indicate any change in her opinion: personal communication by E Cooke, 10 October, 2003. 160

Section 6(1) makes it unlawful for a 'public authority' to act in a way that is compatible with a convention right. A court or tribunal is a 'public authority' for this purpose: s 6(3)(a). This means that English courts will be obliged to develop the common law in ways that are compatible with the convention: Harpum, above n 148, 9.

jurisdiction developed by the European Court of Human Rights and the Commission at Strasbourg.

Protection for the home is afforded by Article 8 of the ECHR, paragraph 1 of which states that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'. This largely corresponds to Article 17, paragraph 1 of the UN International Covenant on Civil and Political Rights (ICCPR), which provides that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.' Australia, New Zealand, Canada and many other Torrens jurisdictions are among the 145 countries that are States Parties to the ICCPR. 162

Deborah Rook reports that the Strasbourg jurisprudence recognises that the respect for the home in Article 8 of the ECHR encompasses a right of occupation of the home, and a right not to be expelled or evicted from the home. 163 It also recognises that the Article imposes not merely a negative duty on the state to restrain from interference with the home, but may import a positive obligation to protect the home. 164 The scope of the positive duty is presently unsettled.

The UN Human Rights Committee (HRC) has said that an interference with the right protected by Article 17 of the ICCPR is 'unlawful' if it is not authorised by a law which is sufficiently circumscribed and conforms to the terms of the Convention. 165 An interference that is 'lawful' in this sense may nevertheless be 'arbitrary'. The HRC interprets this to mean that any interference with the right

160 For a list of the states that have ratified the CCPR, see the list of ratifications on the website of the OCHR at http://www.unhchr.ch/pdf/report.pdf>.


162 Ibid, 106-07.

must be proportional to the end sought and be necessary in the circumstances of any given case'.

Unlike Article 17 of the ICCPR, Article 8, para 2 of the ECHR specifies the conditions under which the state is entitled to interfere with the right of the individual to respect for his private and family life, his home and his correspondence. A public authority is bound by the right 'except such as is in accordance with the law and is necessary in a democratic society'. Para 2 includes a list of legitimate aims that may justify an interference with the right. These include 'the economic well-being of a country'. Rook says that this aim has been given a wide scope and is much cited by states as a justification for their interference with the right. To establish that an interference is 'necessary in a democratic society', a state must show a 'pressing social need' for the measure. It is not enough that the measure be 'merely desirable or convenient'.

The nature of the interference must also be proportionate to the social need that it serves. In assessing proportionality, it may be relevant to consider whether compensation is provided.

It is not clear that a decision rule of indefeasibility that resulted in the ejection from her home of a former or subsisting registered owner would offend Article 8 of the ECHR, or Article 17 of the ICCPR. It depends on whether one thinks that the rule is justified in accordance with the above criteria. Elizabeth Cooks may be right in thinking that the justification for interference with the home would probably fail in England. There has never been much support in England for the view that dynamic security and ease of conveyancing are so important to the nation's economic well-being as to justify the eviction of a proprietor in possession who has lost her title through a registration 'mistake' that was not her fault. The English registration statutes balance the elements of dynamic and static security in a way which gives much greater weight to protecting owners in possession. This is demonstrated not only in the rectification provisions, but also in the overriding status given to unregistered interests of persons in actual occupation.

The policy considerations might be weighed differently in Australia or New Zealand, where a more uncompromising approach to indefeasibility prevails. Such a debate might take place if the highest courts for each country were to acknowledge the ambiguity of their Torrens statutes on the question of indefeasibility. To resolve an ambiguity in a statute, the courts would be entitled, but not obliged, to have regard to the international human rights norm of protection for the home expressed in Article 17 of the International Covenant on Civil and Political Rights. To determine whether the interference with the human right is justified, a court would have to evaluate the justifications for the rule of immediate indefeasibility and weigh its impacts. The policy basis for the rule would no longer be privileged from judicial scrutiny.

166 Tooone v Australia (488/92), cited in Joseph et al, ibid, para [16.13].
167 Rook, above n 163, 119.
171 Ibid 125; Howard v UK (1987) 9 EHRR 91 (compensation was relevant in a case involving the compulsory purchase of a home).
173 Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273; 128 ALR 353 at 362 (Mason CJ and Deane J), favouring a construction of an ambiguous statute that accords with the nation's obligations under an international treaty. Their Honours said that there were strong reasons for rejecting a narrow conception of ambiguity in this regard.
F. POLICY JUSTIFICATIONS FOR IMMEDIATE INDEFEASIBILITY

The need to compensate the losing party

A possible justification for the Privy Council's adoption of immediate indefeasibility in *Frazer v Walker* is the need to ensure that the party deprived of his or her interest in land at least receives compensation. Many of the Torrens statutes provide that indemnity is payable to an applicant 'who is deprived of any land or encumbrance or of an estate or interest therein'. Under the general law, a forged instrument passes no title to the purchaser, and registration of the forged instrument confers no title if the rule of deferred indefeasibility applies. So if O succeeds in having the register rectified and ejects PI, the latter is not entitled to indemnity on the ground of deprivation. He never held an estate or interest in land of which he could be deprived, the purported disposition being a nullity.

When this argument was successfully raised against an applicant for indemnity under the 1897 English Act in *Re Odell*, the successor Act of 1925 provided a new rule to extend the indemnity. Section s 83(4) provided that a registered proprietor claiming in good faith under a forged disposition is deemed to have suffered loss where the register is rectified against him, and is entitled to an indemnity. In some Torrens jurisdictions, the grounds for compensation were extended so that it was not necessary for an applicant to establish deprivation of a vested estate or interest in land. For example, s 110(1) of Victoria's *Transfer of Land Act 1958* was amended to provide that for an indemnity to be payable to 'any person sustaining loss or damage (whether by deprivation of land or otherwise)' by reason of specified causes [emphasis added].

Many of the Torrens statutes have not been amended to avoid the need to establish deprivation of an estate or interest. This creates a problem for the courts. If they applied the rule of deferred indefeasibility, PI would lose his registered title, would probably be unable to recover the valuable consideration he had paid to the fraudulent party, and would also be denied compensation because he never had an estate or interest in the land of which he could be deprived. If the courts instead adopted the rule of immediate indefeasibility, PI would keep his registered title and O would be compensated. This was a much more palatable outcome.

The Privy Council in *Frazer v Walker* was well aware of the gap in the compensation provisions of the New Zealand Act, but their Lordships felt that they could not properly take this into account as an indication of which indefeasibility rule the legislature intended. It might have been intended by the legislature that PI, who had innocently registered a void instrument, should bear his own loss instead of it falling upon 'the taxpayers of New Zealand'.

Although the Privy Council was at pains to deny that it was influenced by the operation of the compensation provisions, it has been suggested that the need to compensate the losing party 'may have been a factor that led the courts to adopt the

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174 Di Castri, above n 27, para [973], fn 22. There are other specific grounds for payment of indemnity, but this is the principal one relevant in cases of forgery.


176 (1906) 2 Ch 47, 74-5 (Vaughan Williams J); 82 (Cozens Hardy J); Stirling J expressing doubt, and refusing compensation on an alternative ground, viz, that the applicant was not entitled to indemnity because he had 'caused or contributed to his own loss' by bringing a forged transfer to registration: ibid at 81.

177 This corresponding provision in the successor *Land Registration Act 2002* is found in Sch 8, para (2)(b).

178 For a history of the amendments to this provision, see Whalan, above n 5, at 302, fn 41.

179 Leaving aside other specific grounds for indemnity such as errors and omissions by the registry.

180 Except in the rare case of the 'fictitious transferee', such as arose in *Gibbs v Messer*. On this point, see Sim, above n 175, 149.

181 [1967] 1 AC 569, at 582-83 (Lord Wilberforce).
By allowing the innocent victims of forgery to lose their registered titles without compensation, the alternative rule would inhibit the ability of purchasers to transact in reliance on the register. This seems to be the most convincing explanation for the adoption of immediate indefeasibility in Frazer v Walker, despite their Lordships' protestations.

Dynamic security arguments

Ronald Sackville, who wrote a thoughtful defence of immediate indefeasibility, found the most convincing justification for rule to be that a purchaser of registered land should not be required to undertake onerous or difficult title investigations. Conveyancing would be too costly and complicated if purchasers had to verify at their peril that they were dealing with the registered owner, and that there were no other facts or circumstances that could invalidate the instrument.

Sackville recognized that this security for purchasers would come at a cost to the security of existing owners, because of the risk of loss through registration of a forged instrument. It is implicit in his argument that the insecurity of registered titles is a price worth paying to achieve the benefits of cheaper, safer conveyancing. Better that a few registered owners should lose their titles than that all purchasers should have to make costly title investigations and bear the risk of acquiring a defective title.

The utilitarianism inherent in this argument is ethically unsatisfying. As Ackernan points out, additional normative justification is needed for a rule that makes some people worse off in order to make others better off. The normative arguments for immediate indefeasibility would need to justify the operation of the rule in bringing about a forced transfer of property from an earlier to a later registered owner.

An ethical justification for immediate indefeasibility may be derived from John Rawls' "social contract" theory of justice, which he called "justice as fairness". According to Rawls, unequal treatment of individuals under collective arrangements may be just, provided that the arrangement is one that would command the agreement of every member of a group of free and rational persons. He hypothesized that such a group would agree to a departure from the equal assignment of rights and duties only upon two conditions:

(a) that every person has the chance to achieve the status to which differential treatments attach, and

(b) that the arrangement of inequality can reasonably be expected to work out better for each member in the long run.

Applying the first of Rawl's two conditions, one can argue that most owners are purchasers at some time, and stand to benefit from the preferential treatment that immediate indefeasibility confers on purchasers. Owners also benefit when they sell the property. More dynamic security reduces purchasers' transaction costs and increases their demand price for the land. This benefits owners by increasing their opportunities for market exchange.

As to Rawls' second condition, it is arguable that at least under some conditions, all participants in land transactions are better off in the long run with a rule of immediate indefeasibility. The argument requires a comparative assessment of costs and benefits of each rule over the entire life-cycle of purchaser-owner-seller. Would a group of rational, self-regarding participants think that the benefits of greater dynamic security and ease of transaction outweigh the risk of post-acquisition loss through the registration of a void disposition? Or would they agree

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183 Sackville, above n 122, 531-2.

184 Ibid.


187 The two principles are introduced at Ibid, 60. Michelman applies Rawls' theory, by analogy, to the problem of 'takings' and just compensation under the US constitution: above n 185, 127-9.
with Warrington Taylor, that they are better off having to take extra pains to ensure the validity of their disposition, and enjoying static security for the whole period of their ownership.\textsuperscript{188}

At bottom, the question is whether market participants are better off in the long run with more dynamic security or more static security, if a choice must be made. Advocates of immediate indefeasibility tend to assume that dynamic security is the more important.\textsuperscript{189} After all, the system of registration of title is designed to improve ease of transfer, in order to facilitate exchange. But the market requires both dynamic and static security. What use is a title that can be securely transferred, but is forever vulnerable to loss after acquisition? As Mapp points out:\textsuperscript{190}

> It is obvious ... that every error resolved in favour of indefeasibility for \([B]\)'s registered title becomes a condition of defeasibility for \([A]\)'s formerly registered title...Torrens' \textsuperscript{115}\textsubscript{4} is an elusive ideal ... To whatever extent \([B]\) can acquire an interest from a predecessor through error, he is vulnerable to losing that interest to a successor through the same error repeated after his registration.

Recognising this problem, Demogue advised legislators to provide no more dynamic security than is necessary to achieve the desired effect on the behaviour of market actors. 'Where possible, this point should not be passed, for there are in face of this interest others not less important'.\textsuperscript{191}

Deferred indefeasibility represents an attempt to balance the two conceptions of security, as Demogue recommended. Bona fide purchasers for value have dynamic security to the extent that they are protected against historic or derivative defects in their transferor's title. They bear only one species of dynamic risk, namely the risk of an invalidating defect in their immediate transaction, but the corollary is that they are protected against losing their title after acquisition through a non-consensual transfer.

The question whether purchasers and owners are better off with more dynamic or more static security is a complex one. The next chapter is devoted to seeking an answer to this question.

G. CONCLUSION

Land title registration systems generally protect purchasers against loss of legal security arising from defects in their transferor's title. The Torrens system has made this its principal object. The main remaining threat to purchasers' dynamic security arises from defects in the immediate disposition from their transferor. Under a title registration system, the purpose of the disposition is not to pass title, but to authorize the alteration of the register. It is the act of registration which passes or divests title. Where a purchaser, \(P_1\), registers an invalid disposition, the registration of his or her interest is not properly authorized.

If \(P_1\) did not register in good faith, nobody would disagree that the register should be rectified to remove his interest. The problem case is where \(P_1\) registers an invalid disposition in good faith and for value. \(P_1\)'s registered interest extinguishes that of the previous owner, \(O\), if the inconsistency of interests is total; otherwise, it encumbers \(O\)'s title. Should the law allow \(O\) to have the register rectified to remove \(P_1\)'s interest, and reinstate her title? What if \(P_1\) has in the meantime transferred to

\textsuperscript{188} Taylor, above n 182, 253.

\textsuperscript{189} For example, John Baalman argued that deferred indefeasibility confers no protection on a purchaser until he no longer requires it because he has disposed of it to a subsequent purchaser: John Baalman, \textit{The Torrens System in New South Wales} 2nd ed., (R A Woodman & P J Grimes (eds), Law Book Co., Sydney, 1974), 176. See also G W Hinde, 'Indefeasibility of Title since Frazer v Walker' in Hinde, \textit{Centennial Essays}, above n 175, 71. Such arguments focus on the cost to dynamic security, while ignoring the loss of static security under their preferred rule.

\textsuperscript{190} Mapp, above n 128, at 67; Taylor, above n 188; Douglas Baird and Thomas Jackson, \textit{Information, Certainty and the Transfer of Property} (1984) 13 \textit{Journal of Legal Studies} 299, 300; Arruñada, above n 115, 34.

P2, who has registered a subsequent interest in good faith? Should O be allowed to recover the property from P2?

Any system of title registration needs a decision rule to resolve the competition between O and P1, or O and P2. Provision of compensation to the loser alleviates the problem, but does not solve it. Each party wants the property free of the other's interest. It is not possible for the law to satisfy both parties.

There are various options for a decision rule. The law could provide that O is entitled to recover the property from P1, or any successor to P1, if the disposition is void under general principles of law. This resembles the nemo dat rule that applies to transfers of unregistered land, with the important difference that registration is effective to pass title until the register is rectified. The antithesis of this is a rule that P1 gains by registration an immediately indefeasible title, which cannot be set aside even if his disposition is found to be void. Alternatively, the law might adopt a compromise, allowing O to recover her land from P1, but barring her rights once P2 has succeeded P1 on the register. This is known as the rule of deferred indefeasibility. The English legislation allows O to rectify the register against P1 and his successors for anything that would render the disposition void or voidable under the general law, subject to protection for the blameless proprietor in possession.

The options multiply if a role is allowed for judicial discretion. One might, for example, have no general rule, and leave it to the courts to do justice as they see it in each case. Or we could take one of the rules above, and give it presumptive force, allowing the judges a discretionary power to depart from the rule to avoid hardship in individual cases.

In the Torrens jurisdictions which based their statutes on the early Australasian models, it has generally been left to the judiciary to determine the decision rule. The statutes give conflicting indications, so that they can be read as consistent either with deferred or immediate indefeasibility. In most jurisdictions, deferred indefeasibility is the preferred rule. Starting with New Zealand in the early 20th century, the judicial hierarchies of Australia and New Zealand have decided that their statutes should be read as spelling out immediate indefeasibility. This development has implications for other countries, such as Papua New Guinea, that have Torrens statutes based on Australasian models. These countries commonly look to Australasian jurisprudence and commentaries when interpreting their own legislation.

This chapter has raised some questions concerning the legal and policy justifications for the Australasian courts’ adoption of immediate indefeasibility. Even at the point of making the doctrinal shift from deferred to immediate indefeasibility, the courts failed to acknowledge that the ambiguity of the statutes gives them a leeway of choice. The choice of rule is a policy matter, but the courts have avoided discussion of the policy considerations.

Two main justifications for the rule have been advanced in the cases. The ‘title by registration’ argument holds that the invalidity of the disposition is irrelevant once it is registered, since it is the act of registration that passes title. This formal legal doctrine begs the question of why an unauthorized registration that has deprived O of her property should not be reversed. The ‘dynamic security’ argument points out that immediate indefeasibility improves ease of transaction, and enables purchasers to be legally secure in their acquisition of property. The question left unanswered is whether the gain in dynamic security outweighs the commensurate loss in static security. The next chapter proposes some criteria for answering this question and evaluating the competing rules.
6 EVALUATING DEFERRED AND IMMEDIATE INDEFEASIBILITY AND OTHER OPTIONS

The previous chapter identified a number of difficulties with the rule of immediate indefeasibility, which is currently preferred by judicial authority in Australia, New Zealand, Saskatchewan, Papua New Guinea and (possibly) Malaysia, among the Torrens jurisdictions. This chapter attempts a comparative evaluation of the policy arguments for and against the competing rules of deferred and immediate indefeasibility. The arguments are discussed under two broad headings: economic efficiency considerations and arguments based upon fairness. The latter part of the Chapter examines other models and options. Law reform bodies in New Zealand, Canada and Victoria have put forward proposals for 'discretionary indefeasibility', under which a general rule of either deferred or immediate indefeasibility is combined with a judicial discretion to depart from the rule in special circumstances. Also discussed is the English rule, which protects only proprietors in possession from rectification, and gives economic security to other registered owners.

A. EFFICIENCY CONSIDERATIONS

In making a policy choice between deferred and immediate indefeasibility, two efficiency criteria should be considered. The first is that the risk of loss resulting from the registration of an unauthorized registration should fall upon the party who can prevent the risk with the least expenditure of resources ('the cheaper cost avoider').

The second efficiency consideration is premised on the following assumptions:

a) that, as between O and P1, one party will obtain an enforceable title and the other will have to settle for monetary compensation in lieu; and

b) that the person in possession of the land is less likely than the other party to regard monetary compensation as an adequate substitute for the land, even if it is paid promptly and in an amount equal to the value of the loss.

Loss avoidance considerations

One of the tenets of post-Coasean law and economics is that, as between transacting parties, the law should allocate the risk of losses to the cheaper cost avoider. Such a rule will have two effects. First, the party that bears the risk has an incentive to take the precautions that are most likely to prevent the loss. Secondly, by placing the risk on the party that can take preventive steps at least cost, the rule minimizes the transaction costs overall. Loss avoidance arguments are commonly invoked in support of rules of the registration system, such as rules that preclude the payment of compensation, or reduce the amount payable, to a claimant who has wholly or substantially caused the loss through his or her want of care. The rules are intended to provide an incentive to claimants to take what precautions they can to avoid losses.

The theory suggests that we should evaluate the two rules of deferred and immediate indefeasibility by which of the two parties, O or P1, can the more easily prevent the registration of a forged or otherwise invalid disposition. (As explained in the last chapter, O is the earlier registered owner, and P1 is the purchaser or mortgagee who has registered a void or voidable instrument without fraud).

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Note that this choice is not always available under a regime of deferred indefeasibility, as some of the statutes do not provide indemnity to the purchaser whose registered title is rectified.

Difficulties with loss avoidance analysis

(i) Deriving a common rule for factually diverse circumstances

There are two principal difficulties with using loss avoidance analysis to choose between the rules. First, the invalidity of a disposition may result from a wide variety of factual circumstances, yet the courts insist that all these cases should be covered by a single rule. Identification of the cheaper cost avoider requires a factual analysis of how the risks actually arise, and how they might be prevented. The answer will be contingent on specific facts that vary from one type of risk to another. To illustrate this point, we can compare two scenarios involving registration of a void or voidable instrument.

In the first scenario we have a local authority which registers an instrument in purported exercise of its statutory powers of compulsory acquisition. The action is void because the authority is in breach of a mandatory procedure required by statute, or is mistaken as to the extent its powers. In this case, O is powerless to prevent the mistake that led to the registration of the void instrument. Only the local authority can prevent it. It follows that the authority (who in this case is both transferor and transferee) is the cheaper cost avoider.

Secondly, at the other end of the spectrum we have a scenario in which O gives a signed instrument of transfer in blank, together with her certificate of title, to X as security for a loan advanced to her by X. X fraudulently uses these documents to sell the land to P1, a bona fide purchaser for value, and inserts P1’s name in the instrument as transferee. P1 registers the instrument in good faith. In this case, O’s carelessness in handing over a signed blank transfer and certificate of title has ‘armed’ X with the means to commit the fraud. Loss avoidance analysis suggests that in this case, O is the cheaper cost avoider.

The different conclusions in the two scenarios demonstrates the methodological unsoundness of generalizing loss avoidance considerations across a diverse range of risk-producing events. Neither deferred nor immediate indefeasibility can be justified by loss avoidance considerations in all types of cases to which the rule is applied.4

Subject to that caution, it is probably fair to say that in most situations where a void or voidable instrument has been registered by a non-fraudulent PI, the circumstances that produce the invalidity emanate from O’s side of the transaction. For example, if O has purported to execute a disposition but lacks legal capacity and is entitled to raise the plea of non est factum, is a minor, is acting under undue influence or duress, or is defrauded by someone to whom she has (however reasonably) entrusted her certificate of title, or to whom she has given power of attorney, the invalidating circumstances arise from O’s side, and there is little that P1 can do to prevent the risks. It does not necessarily follow that O is the cheaper cost avoider. She may not be able to do much to prevent the risks. The law itself recognizes that O requires protection against such violations of her ownership rights. The rules that invalidate the transaction are intended to provide the required protection. It would be inconsistent with the policy of the law to expect O to prevent the wrongful actions of which she is the primary victim.5

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4 Levmore used the contingent nature of loss avoidance analysis to explain the variety in the rules used by different legal systems to resolve disputes between deprived owners and innocent purchasers of stolen goods. He attributes the diversity in the rules to different evaluations of what precautions each party can take and their respective costs, and the difficulty of assessing the behavioural impact of the rules: S Levmore, 'Variety and Uniformity in the Treatment of the Good-Faith Purchaser' (1987) 18 Journal of Legal Studies 43.

5 The suggestion that a person who executes a disposition under the influence of fraud could be assumed to have control over what occurred was rejected by the NSW Law Reform Commission: New South Wales Law Reform Commission, Torrens Title: Compensation for Loss, Rep No 76 Sydney, 1996 Registrar of Titles v Fairless [1997] 1 VR 404 (VCA); Parker v Registrar-General [1977] 1 NSWLR 22, 30 (Mahoney J) (NSW CA).
The second difficulty with using loss avoidance analysis to select between the two rules is that in the most familiar scenario, it is not clear whether O or PI is better placed to prevent the risk. The paradigm case is one in which X, an agent, family member or confidant of O uses his position of trust to gain access to her certificate of title, forges a disposition (a transfer or, more usually, a mortgage), in favour of an innocent purchaser for value (PI), who takes and registers the disposition. X is liable to O for his wrongdoing, but has typically disposed of the proceeds of the fraud and it would be futile to pursue him.

Could O have prevented the risk? She could have taken greater precautions by keeping the certificate in her exclusive custody, or by making a more prudent choice of agent. In practice, however, it would be difficult, if not impossible, for O to assess the honesty of her agent. The forger, X, is likely to be a person with no prior criminal history, and may also belong to a regulated and trusted profession such as legal practitioner. Or X may be a co-owning spouse who is entitled to joint access to the certificate.

Some jurisdictions have either dispensed with the issuance of certificates of title, or issue them only if the registered proprietor requests it. Although this change is usually introduced to ‘modernise’ the registry rather than to prevent fraud, there is some reason to suppose that it may reduce the incidence of forgery by persons known to the registered owner. Under such a system, O can reduce the risk of forgery by not requesting the registry to issue a certificate of title.

In a few jurisdictions, O may be able to lodge a caveat against her registered title to prevent unauthorized dealings. Otherwise, the only precaution that O can take is not to entrust her certificate to another. This means that she must personally attend to the registered owner are ‘extremely rare’. In these cases, the fraudulent transaction is usually preceded by an application to the registrar by the wrongdoer for the issue of new certificate to replace one allegedly lost or destroyed. This is a complex and risky procedure that is rarely attempted by imposters. Hammond found that the ‘overwhelming majority’ of identity frauds were committed by persons who had access to the defrauded person’s certificate of title through a position of trust or intimacy, such as spouses and other family members, solicitors, mortgage brokers and financial advisors: Celia Hammond, ‘The Abolition of the Duplicate Certificate of Title and its Potential Effect on Fraudulent Claims over Torrens Land’ (2000) 8 Australian Property Law Journal 115.

In the bailment cases where the owner’s agent has dishonestly sold goods to a bona fide purchaser, Weinberg argues that loss avoidance analysis points to the owner being the more efficient loss avoider: Weinberg, above n 2, 583-89.
If PI is to prevent the loss, he must take steps to detect the forgery or fraud. The cost of taking precautions varies according to whether PI is an institutional mortgagee or not. If PI is a non-institutional purchaser or mortgagee, there are few effective precautions that he can take to verify that he is dealing with O. He will have little information about O other than what he is given by X or can obtain from public records. He can inspect the land and make inquiries of anyone he finds in occupation, but this may reveal nothing if O is not in possession, or if X arranges for the inspection to take place when O is absent. PI is unlikely to have any expertise in detecting forgeries, and may have no opportunity to arrange for an expert to examine O’s signature on the instrument. He will not see the forged signature on the instrument of transfer until it is handed over at settlement, and will have no authenticated specimen of O’s signature with which to compare it.

If PI is a bank or financial institution taking a registered charge, it will be better able to take precautions. The institutional PI will be able to require the party it is dealing with to provide information, which it can compare with the profile of O held by credit reporting agencies. It can summon O to attend in person at its premises to sign the instrument of mortgage. It has the opportunity to check the authenticity of O’s signature on the instrument of mortgage before it disburses the loan funds, and has the expertise to do so. PI will be able to pass the costs of these inquiries to the borrower through its administrative charges.

As between O and PI, PI is the cheaper cost avoider if he is an institutional mortgagee. Where PI is any other kind of purchaser or mortgagee, it is not clear that he can avoid the risks more cheaply than O. If we adopt the rule that favours O (deferred indefeasibility), this will impose upon a non-institutional PI a peril which he can do little to avoid by taking precautions. If we adopt the rule that favours PI (immediate indefeasibility), O faces a risk of loss through forgery that she may be unable to prevent. So far, the loss avoidance analysis yields no clear justification for either rule. Each rule simply selects a different ‘hapless victim’. The calculus is altered when the position of the institutional PI is considered, for this PI is able to take effective precautions to deter and detect forgery.

This qualified answer to our loss avoidance analysis presents a dilemma for the law. The decision rule to be selected must be one that suits the generality of cases. Neither deferred nor immediate indefeasibility provides an option for allocating risks selectively to institutional mortgagees. The English rectification rule comes closer to a selective result. It allows rectification for ‘mistake’ (which includes registration of a forged disposition), but the register cannot be rectified against the interests of a proprietor of a registered estate who is in possession of the land, unless he is at fault or it would be unjust not to rectify. A registered mortgagee does not benefit from this protection against rectification, as it is not the registered owner of an ‘estate’. Furthermore, even if it is in possession of the land, its possession is deemed to be that of the mortgagor.

The net effect of the provisions is that in most cases, a registered owner in possession gets an indefeasible title, while a mortgagee whose registered charge derives through a forged or void instrument gets a defeasible title. Mortgagees are entitled to indemnity for loss suffered by reason of the rectification of the register to correct a mistake, but this can be reduced if they have contributed to their loss through their fraud or lack of proper care. The English rule gives mortgagees an incentive to take precautions to ensure that their instrument is valid in all respects.

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14 In England and Wales, A’s interest will prevail against B if she is in actual occupation, because she has an overriding interest: Land Registration Act 1926, s 70(1)(g). There is no equivalent provision under the Torrens statutes.

15 If B arranges a mortgage to finance his purchase, at an attended settlement the executed transfer is collected by B’s mortgagee. Even if B detects the forgery by examination after settlement, it will be too late to prevent the loss to him.


17 Land Registration Act 2002, s 131(2)(b).

18 A person is entitled to be indemnified by the register if he suffers loss by reason of a rectification of the register: Land Registration Act 2002, Sched 8, para 1(1)(c). For this purpose, the proprietor of a registered estate or charge claiming in good faith under a forged disposition is deemed to suffer loss on rectification: para 1(2)(b).

19 Land Registration Act 2002, Sched 8, para 5(1), (2).
The result, so far as mortgagees are concerned, is more consistent with what is indicated by our loss avoidance analysis.

One difficulty with the English rule is that it makes no distinction between institutional mortgagees, and private investors lending under a mortgage arranged by a solicitor. Many of the forgery cases have arisen from mortgages arranged by solicitors for private clients. The risk to this vulnerable category of investors requires a more targeted regulatory response. This could include rules of professional conduct that that restrict the ability of solicitors to act for both mortgagor and mortgagee, and the regulation of solicitors' mortgage practices as finance brokers. The abolition of duplicate certificates of title will also reduce the temptation and the opportunity for solicitors to misuse certificates entrusted to their custody. Where no such cover is provided, it may be desirable to require solicitors acting for both parties to a mortgage transaction to advise non-institutional investors to purchase a lender's title insurance policy.

(iii) Where neither party is an efficient loss avoider

If the object of the choice of rule is to encourage effective precautions, other methods might serve the purpose better than either deferred or immediate indefeasibility. In many situations where a disposition is void due to forgery,

20 See, eg, *Mayer v Coe* [1968] 2 NSWR 747; *Gibbs v Messer* [1891] AC 248; *Dallas v Toronto Gen Trusts Corp* [1936] 3 WWR 219 (Mac KB); *Schulz v Corwill Properties Pty Ltd* [1969] 90 WN (Pt 1) (NSW) 529; *Registrar of Titles v Franzon* (1975) 132 CLR 611; *Changlid Pty Ltd v Toronto* (1991) 2 VR 316. These are just a few of the cases where registered owners have been defrauded by their solicitors.

21 In Victoria, the Torrens statute excludes indemnity where the applicant, his solicitor or agent caused or substantially contributed to the loss by his fraud or wilful default. *Transfer of Land Act 1958* (Vic), s 110(3)(a). The Legal Practice Act 1996 (Vic), s 208(3) precludes claims against the Legal Practitioners Fidelity Fund for a solicitor's defalcation relating to contributory mortgage activities and investment activities that are merely incidental to legal practice. The net result is that mortgagees defrauded by their solicitors may miss out on indemnity, if the solicitor has absconded or is insolvent.
out more explicitly in the new certification requirements in s 164A of the Act, introduced in anticipation of the new 'eDealing' regime.\(^{24}\)

One further conclusion to be drawn from the loss avoidance analysis is that the rule of immediate indefeasibility gives the institutional mortgagee little incentive to adopt procedures to prevent forgeries, identity frauds and other invalidating defects in mortgage documentation. Under the rule, mortgagees gain an indefeasible title to their registered charge, provided that no knowledge of or participation in fraud can be proved against them, their agents or employees. The threshold of wrongdoing required for statutory fraud has been set high by the courts, particularly in Australia.\(^{25}\) Sharon Rodrick has documented the lax identity-checking and attestation procedures on the part of lending institutions revealed in mortgage fraud cases coming before the Australian courts in recent years.\(^{26}\) She points out that the courts have not required lenders to take any positive steps to check that they are dealing with the registered owner or to verify the signatures.\(^{27}\)

The extension of immediate indefeasibility to mortgagees has created a moral hazard for mortgagees, by diminishing their incentive to take care.\(^{28}\) This may be a contributing factor in the growing number of cases coming before the courts in Australia and New Zealand arising from mortgage frauds.\(^{29}\) It is reasonable to assume that institutional lenders would adopt more effective anti-fraud procedures if a registered mortgage procured by a forged instrument were defeasible and the indemnity reducible for want of proper care, as it is in England.

To the extent that lenders have tightened their documentation procedures, this has been prompted by the development of the in personam exception to indefeasibility. Under this exception, a mortgagee may be prevented from enforcing its security, notwithstanding that it has an immediately indefeasible title. To protect themselves against claims of the kind that succeeded in Garcia v National Australia Bank,\(^{30}\) mortgagees may no longer allow a borrower to take the mortgage documents home and return with a signature purporting to be that of his or her co-owning spouse. The lender must either advise the spouse as to the effect of the document, or ensure that the spouse has received competent independent advice.\(^{31}\) This has the incidental effect of making it much more difficult for a borrower to forge the spouse's

\(^{24}\) See also, Land Transfer Regulations 2002 (NZ), r 16 which prescribes the witnessing requirements for paper instruments, and Forms 27 and 28. The Property Law Section of the New Zealand Law Society has issued recommendatory guidelines to its members indicating the types of evidence of identity that should be obtained. John Greenwood and Tim Jones, 'Automation of the Register: Issues Impacting upon the Integrity of Title' (Paper presented at the Torrens conference, ibid) para 119, fn 9.

\(^{25}\) See, for example, Russo v Bendigo Bank Ltd & Reichmann [1999] 3 VR 376 (Vic CA). An agent of the mortgagee who knowingly made a false attestation was held not to be fraudulent because there was insufficient evidence that she knew, that by her false attestation, she was putting the mortgage on the path to registration. See also, Macquarie Bank Ltd v Six-Fourth Throne Pty Ltd [1998] 3 VR 133 (Vic CA); Pyramind Building Society (In Liq) v Scorpion Hotel Ltd [1998] 1 VR 188 (Vic CA). In both cases, the mortgagee's agents had conducted company and property searches and failed to notice that the affixing of the company seal was attested by persons who were not directors of the mortgagee companies. Both mortgages were held not to be defeasible for fraudly; Bank of South Australia v Ferguson (1998) 192 CLR 248 (HCA) (a bank manager who forged the registered proprietor's signature on a loan application form was held not to have committed statutory fraud because the forgery did not operate on the mind of the person defrauded or induce detrimental action by him). For criticisms of the high threshold of wrongdoing required to amount to statutory fraud, see James McConville, 'Equity in the Torrens System' (2000) 8 Australian Property Law Journal 191; Sharon Rodrick, 'Forgeries, False Attestation and Impostors: Torrens System Mortgages and the Fraud Exception to Indefeasibility' (2002) Deakin Law Review 5.

\(^{26}\) Rodrick, ibid, 126-27.

\(^{27}\) Ibid, text accompanying fn 105-110 and conclusion.

\(^{28}\) 'Moral hazard' is an insurance term referring to the tendency of parties to take less care to avoid a loss-producing event if they are insured against it.

\(^{29}\) Anecdotal evidence from property lawyers and title insurers suggests that the reported cases represent only the tip of the iceberg of a very substantial problem of mortgage fraud in Australia.

\(^{30}\) (1998) 194 CLR 395. Although the bank was not guilty of fraud, it was not permitted to enforce its registered mortgage against O because it had constructive notice that, as a wife, she may repose trust in her husband in matters of business, and that consequently her husband might not explain the effect of the transaction to her properly.

signature on the mortgage documents. The alacrity with which mortgage lenders changed their documentation practices in response to Garcia demonstrates the powerful incentive effect of a change in the rules that allocate losses.

Conclusions on loss avoidance analysis

In sum, loss avoidance analysis of the traditional forgery scenario under paper-based conveyancing involving the fraudulent use of a certificate of title suggests the following conclusions. First, the effective precautions available to either O or PI to prevent or detect forgeries are quite limited, leaving aside the case where PI is an institutional lender. It is possible for forgeries to result in registration in circumstances where neither O nor PI could reasonably be expected to prevent the fraud. Since it is not clear which is the cheaper cost avoider in the majority of cases, loss avoidance considerations do not provide a firm basis for the choice of either immediate or deferred indefeasibility.

Secondly, loss avoidance analysis suggests that the cheaper cost avoider may be neither O nor PI, but conveyancing professionals, institutional lenders and registry officials who are better able to check the identity of the persons purporting to deal. This has been increasingly recognised in recent years, as the introduction of electronic conveyancing has prompted analysis of the fraud risk and the development of preventive strategies. Some jurisdictions have moved to impose tighter certification requirements on conveyancing professionals acting for the transferring party. The requirements include the obligation to take positive and specified steps to check the identity of the party purporting to deal as registered owner, or the identity and authority of anyone purporting to deal as her agent. This may include requiring the production of identity documents bearing the person’s photograph and signature, such as a driver licence or passport, as well as documents confirming the person’s address, such as insurance or rate certificates. In effect, conveyancing professionals are required to take on some functions performed by notaries under the European systems.

Thirdly, cases occasionally arise where either O or PI, or both, has contributed to the commission of the fraud by engaging in risky behaviour or failing to take proper care. For example, O might act foolishly in entrusting her certificate of title and an instrument of transfer signed in blank to a trickster. Or PI may take a risk in buying O’s title from a plausible stranger in a bar, at a price discounted for immediate cash settlement. (This would not necessarily amount to fraudulent conduct on the part of PI). These are exceptional cases, which should not shape the general decision rule. As Anthony Duggan observes, to formulate a general rule, we must make assumptions about which elements are most likely to be found across a whole class of cases, and disregard possible exceptions.

The existence of such exceptional cases has troubled law reformers. Since forgery is so difficult to detect and prevent, it is necessary to discourage risky or careless behaviour. This could be done by laying down a general rule of either deferred or immediate indefeasibility, coupled with a judicial discretion. The court might, for example, be empowered to vary the allocation of property rights if the party entitled under the general rule has in some way contributed to the fraud.

The combination of a general rule and discretionary judicial override is found in the Land Registration Act 2002 (UK) and its predecessor, in the provisions dealing with rectification of a mistaken entry against the interests of a registered proprietor in

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32 Lynden Griggs concluded that the registry is better placed than registered owners to prevent the risk that forged instruments will be registered, and should therefore be liable through the indemnity scheme: Lynden Griggs, 'The Assurance Fund - Government Funded or Private?' (2002) 76 Australian Law Journal 250, 254-57.

33 See, eg, New Zealand Law Society recommendations, above n 24.

34 Raff argues that much of the fraud problem experienced under the Torrens system could have been avoided if the German system of notarization of land transfers had been adopted. He suggests that legal practitioners for the parties are increasingly required to take on some of the functions of notaries, through the imposition of duties to verify the identity of transferees and due execution of dispositions: Murray Raff, German Real Property Law and the Conclusive Land Title Register (PhD thesis, University of Melbourne, 1999), 426, citing Eade v Vogiazopoulos [1993] V ConvR 54-458 (SCV) (imposing a common law obligation on solicitors to establish the identity of parties and to verify their understanding of the transaction).

35 Duggan, above n 2, 250.
possession. The general effect of the rule is similar to immediate indefeasibility, but the registered title of the proprietor in possession may be rectified if 'he has by fraud or lack of proper care contributed to the mistake', or if it would be unjust not to rectify. Canada's Joint Land Titles Committee proposed its mirror image—a general rule of deferred indefeasibility with a judicial discretion to vary the result if it is 'just and equitable' to do so, having regard, inter alia, to 'circumstances of the invalid transaction'.

Which party values the land more highly?

The mud or the money

A second efficiency consideration relevant to the choice of rule is whether one party values the land or the interest in land more highly than the other, assuming that one will get the title and the other will receive its monetary value. Under a rule of immediate indefeasibility, PI keeps his registered title, while O must settle for monetary compensation. Under deferred indefeasibility, O is entitled to have her registered title restored to her free of PI's registered interest or charge, provided that PI has not been succeeded on the register by P2, a purchaser for value who is innocent of fraud.

Whether PI is entitled to compensation for the loss of his title depends upon the statutory provisions. In the previous chapter, it was noted that under some of the Torrens statutes, PI is not entitled to compensation if the register is rectified against him, because he is not considered to have suffered a 'deprivation of an estate or interest in land'. The reasoning is that PI's void instrument passes no title, and registration of the void instrument is not effective to vest title in him. Some of the statutes have extended the grounds for indemnity so that it is no longer necessary to demonstrate that PI has lost a vested property right. For the purpose of the

following analysis, it will be assumed that PI is entitled to be indemnified if his registered title is defeasible under a rule of deferred indefeasibility, although some of the statutes would need to be amended to provide for this. It will also be assumed that the compensation is promptly paid and is equal to the full monetary value of the lost interest at the date of the claim.

Allocative efficiency

According to the wealth-maximisation theory discussed in Chapter 1, land resources are allocated most efficiently when they pass into the hands of those who value them most highly. Since market exchanges of property rights are consensual, value is measured by the highest price that a person would be willing to pay to acquire the asset if she does not have it, or the lowest price at which she would be willing to sell it if she already owns it. The measure of value allows for subjective, emotional and psychological factors that influence a person's asking or selling price. This means that if person A values the land more highly than person B because of a psycho-social attachment, law and economic theory holds that it is more efficient to allocate the land to person A than to person B. If it is possible to devise a rule that will usually allocate the land to person A in the event of a third party dispute with person B, it follows that the rule will be more efficient than a rule that has the opposite effect.

We have as yet no economic studies comparing the allocative efficiency of the rules of deferred and immediate indefeasibility. However, some useful observations can be drawn from a 1995 study by Thomas Miceli and CF Sirmans. The authors use the theory of transaction costs to compare the efficiency of two decision rules used to resolve third party property disputes, which they attribute respectively to the Torrens systems of the US and the system of deeds recordation. Deeds recordation systems use the common law rule which denies legal effect to forged or

36 Land Registration Act 2002 Schd 4 paras 3(2), 6(2). The predecessor provision is s 82(3) of the Land Registration Act 1925.
37 Joint Land Titles Committee, Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada, Edmonton, 1990, 24-26, and ss 5.6(3), (4) of the Model Act annexed to the report.

38 See Radin's personhood theory, Chapter 1.
non-consensual transfers, and restores the land to R, the 'last rightful owner' (i.e., the last owner before the break in the chain of valid and consensual transfers). The current owner, C, is not indemnified by the system, but commonly insures privately against the risk and is compensated by the insurer in the event of loss. The authors assume that a Torrens system allocates the property right to C, who is assumed to be in possession of the land, and indemnifies R, who is out of possession. That is, they assume that the Torrens system applies a rule of immediate indefeasibility (although they do not use the term). 41

On the assumption that each rule awards the land to one party and that the other receives compensation, the authors ask: 'which system is better at promoting the efficient exchange of land?' 42 They postulate that C's subjective valuation of the land grows the longer he or she is in occupation of it, while R is subjectively indifferent as between recovering the land or receiving compensation equal to its market value. However, R rationally prefers the land to the compensation, because the higher value placed on the land by C creates the possibility of a co-operative surplus. If R is awarded the land, he or she can sell it to C at a price above his or her own valuation and extract some of the surplus for himself.

The authors argue that if transaction costs are low or zero, both systems are efficient. The land will end up in the hands of C, whether through the initial allocation made by law or as a result of bargaining between the parties. But in the usual scenario of positive transaction costs, the more efficient rule is the one that allocates the land to C. This is because it minimises the transaction costs required for the land to pass to C. The authors provisionally conclude that the rule they call 'the Torrens system' is more efficient than the deeds recordation system because it allocates the land to C.

This amounts to an argument that the most efficient decision rule is one that allocates the land to C, who is presumed to be in possession of the land (and who values it more highly), and compensates the other party who is out of possession.

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41 This assumption is rather curious, as the authors have in mind the US Torrens system, which does not use the rule of immediate indefeasibility.
42 Miceli & Sirmons, above n 39, 82.

Behavioural findings: endowment effect and loss aversion

Miceli and Sirman's assumption that a person in occupation of land under colour of ownership is likely to value the land more highly than other claimants is supported by evidence from behavioural studies. Many studies based on both simulated exchange experiments and observations of actual behaviour have found that people demand a higher amount of compensation to give up what they already have than they are willing to pay to acquire it in the first place. 43 These evaluation disparities are both 'pervasive and large', and cannot be explained by transaction costs or strategic behaviour on the part of the participants. 44 The phenomenon, known as the 'endowment effect', contradicts the standard assumption of economics that people value assets independently of whether they already own them. 45 It holds that, on the contrary, the value that an individual places on a commodity increases when it becomes part of the individual's 'endowment' or asset position. 46

A related phenomenon, known as 'loss aversion' refers to the tendency of people to feel losses more keenly than commensurate gains. 47 David Cohen and Jack L Knetsch summarise the studies as showing that people's present ownership position serves as the point of reference from which they evaluate gains and losses, and that they tend to evaluate losses from this position more highly than gains. 48 The implications for the law, they argue, is that 'it is a matter of efficiency, as well as

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44 Cohen and Knetsch, ibid, 743-44.
47 Prentice and Koehler, ibid, 601.
48 Cohen and Knetsch, above n 43, 743. This effect is also observed when a person (e.g., a juror) is asked to place a monetary value on losses and gains experienced by another person.
fairness, to adopt presumptive legal rules which do not direct non-consensual transfers of wealth.49

Implications for the choice of rule

These findings about human preferences have implications for the economic efficiency and the fairness of decision rules to resolve competing claims to land. Firstly, owners in possession of land are likely to regard monetary compensation at market value as an inadequate substitute for the enforcement of their property right. Market value represents the cost of acquiring the property, which is likely to be less than the value placed on it by the owner who presently enjoys it. In theory, the compensation could be raised to the landowner's valuation, but "this amount is unobservable and owners would clearly have an incentive to overstate it."50

Secondly, an owner in possession facing ejectment from her land is likely to feel the pain of her lost endowment more intensely than the satisfaction experienced by a non-occupying owner whose recent acquisition is confirmed.

This analysis suggests that the better rule is the one which will most often award the property right to the owner in possession, who is presumed to value the land more highly. Miceli and Sirman's assume that that person is C, the person whose interest is most recently registered (corresponding to our PI). This assumption will rarely hold good in the cases of forgery and other unauthorized registrations.51 Usually the dispute arises when PI seeks to eject the earlier registered owner, O, or to enforce his rights against her while she is still in possession of the land. If O is usually in possession, it follows that the more efficient rule is the one that allocates the property right to her, ie, the rule of deferred indefeasibility.

Identifying the owner with the higher valuation: possessor or prior owner?

In the most common scenario, O, the earlier registered owner, is in possession of the land when the dispute arises, and PI is a purchaser or mortgagee for value who has subsequently registered a void instrument in good faith. Under a rule of immediate indefeasibility, PI's registered title either extinguishes O's title if the two are wholly inconsistent, or encumbers it if the inconsistency is only partial. In the latter case, O suffers a partial deprivation of her interest, which is usually compensable under the Torrens indemnity provisions.52 The existence of a registered mortgage to PI will not of itself cause O to lose her registered title, but if the mortgage is in default and O fails to act, an exercise of the mortgagee's remedies may lead to her eviction by the mortgagee, or by a purchaser from the mortgagee.53

Applying the reasoning of Miceli and Sirman, and assuming that O is usually in occupation of the land, deferred indefeasibility emerges as more allocatively efficient than immediate indefeasibility. The rule enables O to be restored to the register, free of PI's registered interest, so long as no subsequent bona fide purchaser for value has registered an interest in the meantime. Immediate indefeasibility awards the title to PI, who is usually out of possession and would therefore be more likely to be satisfied with monetary compensation, particularly if he is a mortgagee who never intended to occupy the property.

Occasionally a case may arise where PI, not O, is in possession at the time the dispute arises. This could occur where, for example, X fraudulently takes advantage of O's short-term absence from her home to sell to PI, who enters into possession of the property. In this scenario, it is likely that O will value the property more highly than PI, because an owner's valuation of her property tends to

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49 Ibid, 738.
50 Miceli, Economics of the Law, above n 50, 139.
51 Arruañada and Garoupa point out that the conclusions of Miceli and Sirman's study will be reversed if the party in possession is the "true owner" (O) rather than the "current owner" (PI), as they assume. Benito Arruñada and Nuno Garoupa, "The Choice of Titling Systems in Land", Economics and Business Working Paper No 607, Universitat Pompeu Fabra, Barcelona, Spain, available online on Professor Arruñada's homepage <http://www.econ.upf.es/-arrunada/eng/> 14.
53 See chapter 5.
be greater the longer she is in occupation. A temporary absence undertaken with
the intention of returning would be unlikely to diminish her valuation.

In such a case, the rule of deferred indefeasibility may be more efficient than the
English rule that protects the proprietor in possession. Deferred indefeasibility
protects the static security of the prior registered owner, O, whether she is in
possession or not. The English rule protects the owner in possession, who happens
in this case to be P1. Although P1’s registration is a ‘mistake’ because it was
procured by a forged or otherwise void instrument, the register cannot be altered
to correct the mistake without P1’s consent, unless he has contributed to the mistake
or it would be unjust not to rectify. The fact that O was a long-term occupier who
has recently been deprived of her possession may be an exceptional circumstance
that would lead a court to hold that it would be unjust not to rectify.

On the other hand, deferred indefeasibility may restore a registered title to an owner
or mortgagee who has never been in possession, eg, a lender whose mortgage has
been fraudulently discharged, or the reversionary title of a lessor. If this happens
at the expense of an owner in possession, P1, who values the disputed interest more
highly than O, deferred indefeasibility may be less efficient than the English rule
which allocates the interest to P1.

Conclusions on allocative efficiency

This analysis suggests that both deferred indefeasibility and the English rectification
rule are more allocatively efficient than immediate indefeasibility, but that neither
reliably allocates the property to the owner with the higher valuation in every case.
Deferred indefeasibility uses prior ownership, and the English rule uses present
possession, as proxies to identify the party who values the property more highly.
Based on the behavioural findings that persons in possession tend to value the land
more highly than competing owners, the English rule is more likely to produce an
efficient allocation of property than the rule of deferred indefeasibility. No single
rule can more accurately pinpoint the higher valuing owner without incorporating
an element of discretion, to enable case by case assessment.

Administrative cost considerations

One measure of the efficiency of the rules is whether they tend to reduce third party
disputes. The objects of land registration systems include the reduction of land
disputes, which are both an indicator and a cause of legal insecurity. Anthony
Duggan proposes that when choosing a rule to resolve third party property disputes,
one criterion of the efficiency of a role is the cost of administering and enforcing
it.

Crystal vs mud rules

Economists prefer clear-cut or ‘crystalline’ rules that allow market actors to predict
with confidence how the law will allocate the gains and losses from their
transactions. Such rules provide a clear baseline for Pareto-efficient exchanges to
occur. They also allow people to settle disputes ‘in the shadow of the law’

52 Miceli and Simians, above n 39, 83. The authors cite Oliver Wendell Holmes
who explained the relationship between long occupation and attachment as
follows: ‘Man, like a tree in the cleft of a rock, gradually shapes his roots to
his surroundings, and when the roots have grown to a certain size, can’t be
displaced without cutting at his life’: O W Holmes, ‘The Path of the Law’

53 ‘Mistake’ for the purposes of Land Registration Act 2002, Sched 4, is
undefined, but is apparently intended to include forgery: see chapter 5.

54 Land Registration Act 2002, Sched 4, paras 3(1), (2), 6 (2).

55 In Shultz v Corwill Properties Pty Ltd (1969) 90 WN (Pt 1) (NSW) 529, a
forged discharge of mortgage was held indefeasible on registration. See also
State Bank of NSW v Borowra Water Holding Pty Ltd (1986) 4 NSWLR 398
(registration of a discharge of mortgage by mistake extinguished the
mortgage).

58 Duggan, above n 2, 249-51.

59 Carol Rose, ‘Crystals and Mud in Property Law’ in Rose (ed) Property and
Persuasion: Essays on the History, Theory, and Rhetoric of Ownership

60 Douglas Baird and Thomas Jackson, ‘Information, Certainty and the Transfer
of Property’ (1984) 13 Journal of Legal Studies 299; Robert Cooter and
Thomas Ulen, Law and Economics (Harper Collins, US, 1988), 100; Rose,
without needing to litigate. Many judicially created rules are not crystalline but 'muddy', which means that they are fuzzy, ambiguous or discretionary.61 Frank Easterbrook suggests mud rules are often created by judges to resolve existing disputes rather than to guide future action.62 As he puts it, they are formulated from an *ex post* rather than an *ex ante* perspective.63

Both deferred and immediate indefeasibility are crystalline rules, although each gives way to mud rules in certain special cases. The first arises under deferred indefeasibility, where the defect in the immediate disposition is one that makes it voidable at O's election. Certain defects make a disposition voidable rather void, which means that it passes only a defeasible title to P1. O can rescind or avoid the transaction at her election, if the court permits. A disposition may be voidable at common law or in equity on the ground that it was induced by fraud, misrepresentation, fundamental mistake, duress, undue influence or an unconscionable bargain.64 Until the disposition is set aside, O has an equity to have the register rectified.65

So long as P1 retains his title and has not passed an interest to P2 (a subsequent bona fide purchaser for value), O can exercise her right to set aside the transaction and have the register rectified to restore her title. Until O acts, P1 can pass a valid title to P2. Once P2 succeeds P1 on the register, O's right is lost.

So far, the rules are crystalline. The problem case is where O exercises her right after P2 has acquired his interest but before he registers it. This produces a priority contest between O's equity to seek rectification of the register and any equitable interest held by P2.66 The conflict will be adjudicated under equitable priority rules. These are mud rules, for they are discretionary and the outcome depends on the court's *ex post facto* evaluation of the conduct of the parties.

Even immediate indefeasibility gives way to mud in one situation. Equitable priority rules are used when P1's registered title is defeasible for fraud on his part, and P2 holds an unregistered interest which conflicts with O's equity to seek rectification.

Allowing for these special cases, it is fair to say that both indefeasibility rules are crystalline in their application to the majority of situations arising from registration of a void or voidable transfer. The need to resort to equitable priority rules is expected to diminish under electronic conveyancing, as the gap between acquisition of an interest and its registration will be reduced or eliminated.

If either rule was coupled with a judicial discretion to depart from it in cases of hardship, the rule would be muddier and therefore more costly to administer. This is the price of achieving a rule that is fairer or more efficient in individual cases. Sir Anthony Mason has suggested that the price may be too high, at least in the short term:67

The problem with discretionary indefeasibility is that, for a significant period of time at least, there would be uncertainty as to how the courts would exercise the discretion. I doubt that court decisions would bring sufficient certainty in the short term. And title to property is the area par excellence where a degree of certainty is expected.

61 ibid, 209. Some scholars associated with the Critical Legal Studies movement argue that crystalline rules in law reflect an assumption of self-seeking individualism, and that they mask the domination of the weak by the strong: see, eg, Duncan Kennedy, 'Form and Substance in Private Adjudication' (1976) 89 Harvard Law Review 1685, at 1773.

62 ibid.

63 ibid, 10 ff; Rose, above n 59, 220.

64 For a discussion of the scope of these grounds, see Craig Rolherham, *Proprietary Remedies in Context* (Hart Publishing, Oxford, 2002), 129-30.

65 *Brennan v Wall* (1971) 126 CLR 376. Under unregistered conveyancing, O would have an equity to rescind the transaction; *Phillips v Phillips* (1862) 4 De GF & J 208; 45 ER 1164; *Latec Investments Ltd v Hotel Tervigal Pty Ltd* (1965) 113 CLR 265.


Acceptability of the rule to the losing party

A further factor that affects the cost of enforcing a rule is the extent to which people are willing to accept an adverse outcome. If a party perceives the rule as unfair or unacceptable, he or she is likely to use any available legal means to avoid it. This may increase the incidence of legal disputes. If O, an owner in occupation, values the land above its market value, she will be more likely to resist a rule that awards the disputed title to P1.68

We might therefore expect that a system which uses the rule of immediate indefeasibility will experience more litigation than a system which allocates the title to O and compensates P1 (ie, the outcome consistent with deferred indefeasibility).69 If P1 does not occupy the land, he is more likely to regard compensation at market value as an adequate substitute for his title. He therefore has little reason to challenge the application of the rule that converts his property right into a right to monetary compensation.

It has been observed by the authors of Ruoff and Roper, a leading English text that the Torrens jurisdictions of Australia 'produce far more litigation than the English system'.70 The Australasian systems undoubtedly experience many more lawsuits under the fraud and in personam exceptions to indefeasibility.71 Under the English system, the grounds for rectification are broader, and there is less need to test the limits of the fraud ground, or to seek proprietary relief against the registered owner in personam. In Australia and New Zealand, these represent, in most cases, the only possible grounds on which O can seek to recover her title from P1. They are the grounds that O is likely to invoke if she is determined to resist the loss of her title and eviction from her land through the operation of immediate indefeasibility.

Not all lawsuits engendered by the rule of immediate indefeasibility will present as a claim to be excepted from the effect of the rule. They may arise under other rules of the system, such as an indemnity suit against the registrar or the State,72 or a priority dispute between O and P2, as resulted in Breskvar v Watt.73 But even allowing for the difficulty in categorising legal proceedings, it appears that frequent resort to litigation in the Australasian jurisdictions is a systemic problem that is not confined to disputes arising from the indefeasibility rule. For example, the Australasian systems have a long history of priority disputes between unregistered interests, far in excess of what is reported under the English system. The great majority have nothing to do with rectification or indefeasibility. Moreover, the general level of litigation under the Australasian systems was already high before the authoritative adoption of immediate indefeasibility. It is possible that this development did not increase the incidence of disputes but merely channelled them into particular legal forms.

The authors of Ruoff and Roper thought that the strictly limited grounds for rectification under the Australasian systems should have resulted in less litigation than in England.74 They found it strange that the evidence was to the contrary, and set out to explain the difference in the litigation rates between the two systems. They identified the following contributing causes, without ranking them for

68 The character of Daryl Kerrigan, in the 1997 comic Australian movie 'The Castle' (directed by Rob Sitch), is the archetype of the owner in possession, scornful of compensation and determined by all means to resist a rule of law that threatens to deprive him of his home.

69 Cf Roger Smith's observation that a system that fails to protect the rights of occupying owners can expect more litigation under the fraud exception to indefeasibility: Roger J Smith, Property Law 3rd ed., (Longman, Harlow, Essex, 2000), at 233.


71 Roger Smith suggests that 'relatively few' orders for rectification are made under the English system, judging by the small number of claims for indemnity following rectification: Smith, above n 69, 242.


73 (1971) 126 CLR 376.

74 Ruoff and Roper, above n 70, para [2.04].
importance. Firstly, the English registrar has special administrative and quasi-judicial powers which enable him or her to settle or determine many disputes without the need for parties to resort to litigation. These outcomes are not systematically reported. Secondly, the requirement of Torrens jurisdictions that boundaries be authoritatively established tends to engender more neighbour disputes. Thirdly, they point out that the English indemnity scheme is administered more as a system of insurance, without the need to bring court proceedings against the registrar and/or the party primarily responsible for the loss, as in many of the Torrens jurisdictions.

The hypothesis, that immediate indefeasibility engenders more lawsuits than the alternative rule because of its unacceptability to occupying owners, is not one that can be proved empirically. Litigation rates have multiple causes, making it extremely difficult to quantify the contribution of any one factor. The most that can be said is that the continuing high rate of litigation in Australia and New Zealand gives no assurance that title registration operates more smoothly with a rule of immediate indefeasibility.

B. FAIRNESS CONSIDERATIONS

Fairness and efficiency compared

When lawyers and law reform bodies debate the merits of deferred and immediate indefeasibility, they are more likely to couch their arguments in terms of fairness than economic efficiency. Efficiency is an ex ante consideration which rule-makers take into account when they are concerned to alter future behaviour. Fairness is an ex post consideration that judges and lawyers use when adjudicating an existing dispute on the basis of events and conduct that have already occurred. As judges and lawyers are primarily concerned with justice in individual cases, they are disposed to evaluate the rules from an ex post perspective. Economists prefer an ex ante approach because they are concerned with the effect of the rule upon the framework of incentives which affects the behaviour of market actors generally.

Richard Posner has said that many fairness arguments are inarticulate proxies for efficiency arguments, or at least that there is no necessary contradiction between them. This has been contradicted in some areas of law, but in the debate over indefeasibility rules, it is striking how the fairness arguments parallel the efficiency considerations. For example, it is sometimes said that the loss resulting from registration of a forged instrument should fairly be borne by the party whose lack of care provided the opportunity for fraud. This fairness argument assumes an ex post evaluation of the circumstances in which an actual fraud occurred, and the attribution of contributory fault. The economic efficiency analysis asks, ex ante, which decision rule will give the lower cost avoider an incentive to prevent the fraud.

To give another example of the symmetry between fairness and efficiency arguments: efficiency is served by a rule that allocates the real property to the party with the higher valuation and compensates the other. The same rule can be justified by fairness, since the person who values the land above its compensation value will suffer the greater hardship from its loss. According to M J Radin's 'personhood' theory, individuals invest 'personal' assets with their sense of self, while other 'fungible' assets are held merely for their instrumental value. She argues that legal

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75 Ibid. 76 Ibid. In 2001, 66 matters were set down for hearing at HM Land Registry, London. Only 16 proceeded, and the rest were settled. Over 75% of the cases involved an adverse possession issue: personal communication to the author in an interview with Mr Chris West, Chief Solicitor to HM Land Registry, and Mr Jeremy Donaldson, Agency Case Review Team Lawyer, London, 27 March 2002. These figures suggest that there is no hidden 'iceberg' of indefeasibility disputes dealt with internally by the registrar. The Land Registration Act 2002, Part 11 provides for a new office of Adjudicator to determine contested applications to the registrar.

77 Richard Posner, *Economic Analysis of Law* 5th ed., (Aspen Law & Business, New York, 1998), 26-29; Cooter & Ulen have also observed that it is surprising how often lawyers defend as just the same rule that economists defend as efficient: above n 60, 5. Criticisms of this view are discussed in Chapter 1.

78 Eg, Eliason v Wilborn (1929), 167 NE 101, 68 ALR 350 (aff'd 281 US 457 (1930) (US SC); Abigail v Lapin [1934] AC 91 (PC).

79 See Chapter 1.
rules for the specific allocation of property should acknowledge the priority of claims to personal property over merely fungible claims.

**Fairness and the discretionary application of the rule**

In recent years the debate over deferred and immediate indefeasibility has been examined by law reform commissions in New Zealand, Canada and Victoria, Australia. The primary concern expressed in all three reports is that courts should be empowered to achieve fair outcomes in every case. The reports provide an indication of the fairness considerations that the three bodies thought were relevant to a just outcome in third party disputes. These are expressed as discretionary factors that courts should be required or permitted to take into account in adjudicating disputes.

*The Canadian Joint Land Titles Committee proposals*

The most detailed list of the factors is found in the report and Model Act of Canada's Joint Land Titles Committee. The Committee proposed that deferred indefeasibility should be the norm, but that the court should have discretionary power to depart from the rule if it considers it more 'just and equitable' to do so. Section 5.6(3) of the Model Act sets out the general rule, that where PI has innocently procured registration through a void transaction, and O's subsisting or previous registered title has been prejudiced by the registration, O is entitled to have the register revised to nullify the unauthorised transaction and PI is entitled to be compensated for his loss. The general rule is subject to s 5.6(4), which empowers the court to confirm PI's registration and direct that O be compensated for her loss if, having regard to the statutory criteria, the court considers it 'just and equitable' to do so. The criteria are:

a) the nature of the ownership and the use of the property by the either of the parties,
b) the circumstances of the invalid transaction,
c) the special characteristics of the property and their appeal to the parties,
d) the willingness of one or both of the parties to receive compensation,
e) the ease with which the amount of compensation for a loss may be determined, and
f) any other circumstance which, in the opinion of the Court, may make it just and equitable for the Court to exercise or refuse to exercise its powers under subsection (4).

The Committee's report indicates that it regards both the general rule, and the discretionary factors in s 5.6(4), as expressing considerations of fairness. In support of the general rule, it said:

As the facts are likely to come to light fairly soon, O, as the displaced owner, is statistically likely to have a closer connection with the land, and to suffer loss which will be harsher, as well as greater and less easy to quantify, than will be the loss of PI, as a recent acquirer of

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82 Above, n 37.

83 CJ Nova Scotia's *Land Registration Act* 2001, RSNS Ch 6, s 35. The Act was proclaimed on 24 March, 2003. Section 35(1) provides that, where a "revision" or entry in the register that was not authorized by law has prejudiced another registered owner, application may be made to the court for a determination of the rights of the parties. Subsection 35(3) provides that the court shall determine the rights of the parties, having regard to the following principles. It may rectify the register to nullify the unauthorized entry, but any rectification shall preserve the interest of a successor. It may confirm the unauthorized revision where it is just and equitable to do so, having regard to a list of criteria set out in s 35(5). The criteria are virtually identical to those in s 5.6(4) of the Model Act. By comparison to the Model Act, the Nova Scotia Act weakens the general rule of deferred indefeasibility, by reducing it to one of the relevant considerations.

84 Above, n 37, 25.
the interest... However, circumstances vary. In a particular case, it may be less harsh, less difficult or less expensive to return the land to the displaced registered owner.

Each of the criteria mentioned by the Committee and listed in s 5.6(4) are fairness considerations that parallel the efficiency considerations. The criteria in paras (a), (c), (d) and (e) of s 5.6(4) are factors that are likely to cause a party’s subjective valuation of the title to exceed its market value, while para (b) allows the court to consider a party’s contribution to the circumstances that led to the unauthorized registration. The general rule is based on a balancing of the considerations *ex ante*, while the discretionary power in s 5.6(4) allows them to be re-evaluated from an *ex post* perspective in individual cases.

A similar approach was proposed in a 1987 report by the Victorian Law Reform Commission. It recommended that in a case where PI has registered a forged instrument without knowledge of the forgery, the general rule should be that O’s title prevails against PI (i.e., a rule of deferred indefeasibility). The court should have power to reverse this result in the case of ‘demonstrated hardship’ to PI. The reason for the discretion, the Commission said, is that while PI is more likely than O to be satisfied with monetary compensation, there will be cases where the reverse applies.

The New Zealand Committee’s proposals

New Zealand’s Property Law and Equity Reform Committee also thought that fairness required a flexible rule. It proposed that the general rule should be immediate indefeasibility, coupled with a discretionary power to depart from the rule. In every case where a registration has been innocently procured by a void instrument, the court should have the discretionary power either to confirm the registration or to order that O’s title be restored as before. The Committee proposed that detailed guidelines for the exercise of the court’s discretion should be set out in amending legislation. It mentioned the following factors that it thought relevant to the exercise of the discretion, although the list was not exhaustive:

- a) whether either of the parties has been negligent
- b) whether the land was vacant, or had a house on it
- c) the length of time that the party who registered the void instrument had been in possession
- d) relative hardship.

Some further indication of what the Committee considered to be the fairness considerations may be gleaned from two contrasting forgery scenarios to which it applied the rule of immediate indefeasibility. In scenario A, the rule was deemed by the Committee to produce an unsatisfactory result, while in scenario B, the outcome indicated by the rule was pronounced satisfactory. The main differences between the two cases are:

- (a) the actual and intended duration of O’s absence at the time the forgery and registration occur
- (b) whether the land is O’s home or a building lot
- (c) whether PI has improved the land
- (d) how long PI has been in possession of the land before O discovers the forgery.

Each of these factors can be expressed either as fairness or as efficiency considerations.

Fairness and *ex post* assessment

The difference between fairness and efficiency considerations lies not in the type of impacts that are examined, but in the perspective from which they are evaluated. The economic efficiency of a rule is assessed *ex ante*, focusing upon its expected effects on the future behaviour of market players. The fairness of a rule is assessed by its effect in individual or exceptional circumstances, as well as in the general run of cases. Fairness evaluated *ex post* may, in special cases, require an outcome different to that indicated by a rule arrived at by an *ex ante* assessment.

Efficiency arguments tend to lead us towards clear-cut general rules that send clear signals to the market, and allow people to anticipate the legal consequences of their

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85 VLRC Rep 12, above n 80.
86 Ibid, para 16.
87 Ibid, paras 19-23.
transactions. Such crystalline rules are suited to well-defined and homogenous classes of cases. None of the available rules reliably produces fair and efficient outcomes across the whole spectrum of unauthorized registration cases. The identification of the cheaper cost avoider, the party with the higher evaluation of the land or the party that contributed to the 'mistake' through carelessness depends upon a highly variable matrix of facts. The factual diversity is greater than any single rule of crystal can accommodate. Each rule will sometimes allocate the land to the 'wrong' party, and imposes considerable hardship on the deprived party.  

From an economic perspective, the occasional harsh result may be a price worth paying for a crystalline rule that is efficient in the generality of cases. From a fairness perspective, a rule that deprives a person of a vested property right without just cause in the individual case is unacceptable, even if it produces the right result in most cases and is cheaper to administer.

Approaching the choice of rule from the vantage point of fairness, the Victorian, Canadian and New Zealand law reform committees saw a need to incorporate a discretionary element in the rule. The approach favoured by all three committees was to combine a general or presumptive rule with a discretionary power to reach a different outcome in individual cases. For Victoria and Canada, the general rule would be one of deferred indefeasibility, although Victoria proposed this only for forgery cases. The New Zealand committee recommended that immediate indefeasibility should be retained as the general rule. The Canadian and New Zealand committees proposed that the discretion be structured by a non-exhaustive list of statutory criteria. The Victorian Commission appears to have envisaged that the discretion would be unstructured by statute. Presumably, the courts would in time develop their own criteria for assessing whether the general rule would produce 'demonstrable hardship'.
b) in all other cases, indefeasibility is 'deferred' until a registered proprietor in
possession, who has not contributed to the 'mistake', succeeds PI on the
register. Even then, the court has a discretionary power to order rectification
against the proprietor in possession if it would be unjust not to rectify.

The English rule and subsequent non-occupying owners

Rule (b) is inconsistent with the object of the Torrens system as stated in Gibbs v
Messer, which is to protect the bona fide purchaser for value from the need to
investigate his transferor's derivative title. In theory, a purchaser for value of a
non-possessory interest under the English registration system would need to
investigate the dispositions under which the current registered owner, O, derived
her title, to ensure that there were no unauthorized registrations in the chain.

In practice, Elizabeth Cooke finds that the lack of indefeasibility for subsequent
purchasers has no implications for English conveyancing practice. Since PI or P2
get indefeasible title if they are in possession, the risk of defeasibility falls mainly
on mortgagees and investors. These purchasers use a strategy of risk assumption,
rather than risk avoidance by investigation of title. Investigation of derivative title
is impracticable in any event, because original documents are not routinely made
available for searching once they have been registered. Even if a purchaser were
able to inspect the original dispositions, he or she would have little chance of
detecting a forgery or other invalidating defect in an earlier transaction. Most such
defects are either discovered at or shortly after the transaction, or not at all.

The rule that denies indefeasible title to non-possessing registered owners has never
been controversial in England, in the way that deferred and immediate
indefeasibility are controversial in the Torrens jurisdictions. The English legal
community does not consider it to be necessary or desirable that landlords, lenders
and other investors should be guaranteed legal security in the event of an
unauthorized registration, at the expense of the owner in possession. For non-
possessory registered proprietors, the State guarantees only economic security. This
means that the monetary value of their investment is secure, but their title is not.
Since this rule might occasionally cause hardship, it is subject to a discretionary
override. In special cases where it would be unjust not to rectify the register, the
court is empowered to order rectification against the interests of the proprietor in
possession.

The rule is acceptable to investors because the English indemnity scheme is
operated more as an insurance business than are its counterparts in most Torrens
jurisdictions. There is no requirement that claimants first pursue legal action
against other parties responsible for causing the loss. Claims are dealt with
administratively, and rarely result in court proceedings. This reduces the costs and
delays of accessing compensation. Where the claimant's loss arises through
rectification of the register, the amount of the compensation is based on the value of
the interest at the date of rectification. The claimant is also compensated for costs
and expenses incurred in the matter with the registrar's consent.

The result is that English investors are prepared to accept the risk that their title will
be defeasible if the registration turns out to have been unauthorized. For most non-
possessory registered proprietors, the State guarantee of compensation provides

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93 Elizabeth Cooke, 'E-Conveyancing in England- Enthusiasms and Reluctance'
(Paper presented at the Taking Torrens into the 21st Century Conference,
94 Elizabeth Cooke, address to the Taking Torrens into the Twenty-First Century
Conference. Auckland, 21 March 2003. The statement does not appear in her
conference paper but Professor Cooke has advised me that it will appear in the
published version of the conference proceedings.
95 The Land Registration Act 2002, § 69, provides that the registrar may, on
application, provide information about the history of a registered title. This is
not intended to be part of a routine title search: see Law Commission for
England and Wales and H M Land Registry, Land Registration for the

96 Land Registration Act 2002, Sch 4, paras 3(2); 6(3).
97 Since 1925, only 3 indemnity claims have proceeded to trial: personal
communication to the author in an interview with Mr Chris West, Chief
Solicitor to HM Land Registry, and Mr Jeremy Donaldson, Agency Case
98 Land Registration Act 2002, Sch 8, para 6(a).
99 Land Registration Act 2002, Sch 5 para 3. The requirement of consent does
not apply where the costs must be incurred urgently and it is no practicable to
apply for the registrar's consent: para 3(2).
sufficient security to make the investment worthwhile. There is no evidence that
the defeasibility of investor's titles has any discernible adverse effect upon the
nature or level of investment activity in the English real estate market.

Do non-occupying owners need indefeasible title?

Perhaps the Australasian systems provide too much legal security for non-
possessory registered owners, such as mortgagees and lessees. If investors are
satisfied with monetary compensation, why guarantee them security of title,
particularly if it comes at the expense of a proprietor in possession who will be
satisfied with nothing less than the reinstatement of her registered title? In the
Torrens jurisdictions, mortgagees and investors would probably not be satisfied
with the degree of economic security provided by the statutory indemnity scheme.
In most jurisdictions, applicants for compensation encounter delays and costs in
pursuing their remedies, which reduces the adequacy of the compensation. Lenders
and investors may also find that compensation is either refused, or paid in a reduced
amount, if they are found to have caused or substantially contributed to their loss
through their own lack of proper care.

It is likely that investors would require additional risk cover, if the legal security of
their registered titles is no longer guaranteed. Larger bank lenders may choose to
self-insure, spreading their losses across a high volume of transactions. Smaller
financial institutions would be likely to insist on a lender's title insurance policy,
paid for by the borrower. A lender's policy covers the mortgagee, on a no-fault
basis, against loss of enforceability of their security.

100 Di Castri queries whether mortgagees need indefeasible title, as opposed to a
right to compensation for deprivation of title: Victor Di Castri, Registration of
Title to Land (Carswell, Canada, loose-leaf orig 1987), Vol 2, para [980].

101 Benito Arrunada, 'A Transaction-Cost View of Title Insurance and its Role in
582, 594-5 (suggesting that the market for title insurance in Europe is much
smaller than in the US because European financial institutions are large and
are better placed than those in the US to self-insure against the risk of loss of
security for mortgage lending).

Such a requirement by lenders could increase the cost of borrowing, although
competition between insurers would be likely to keep the increases modest. In
Australia and New Zealand, in 2002-3, residential lender's policies started at about
$125, with a discount if a homeowner's policy is purchased at the same time. One
title insurer was offering to process residential mortgage-only transactions for a fee
starting at $295, inclusive of the title insurance premium. Insurers can offer
mortgage processing services very cheaply because they can omit some procedures
and self-insure the risk. For example, they can dispense with attendance at
settlements and rely on undertakings with respect to the provision of
documentation. If mortgage lenders insist on a title insurance policy, the main result
may be to marginalize the role of solicitors and licensed conveyancers in settling
mortgage transactions.

D. SUMMARY AND CONCLUSION

In this and the previous chapter, I have argued that the rule of immediate
indefeasibility is seriously flawed. Firstly, by conferring effect upon non-consensual
and other unauthorised transactions, it undermines what Mapp calls 'the rules of
public policy embodied in the general law'. This result can sometimes be
avoided by applying the in personam exception to indefeasibility, although the
scope of this exception has introduced much uncertainty. Secondly, it causes a
deprivation of vested property rights more often than the contrary rule, by making
an unauthorised registration irreversible as soon as it occurs. In cases where it
prevents the courts from setting aside an unlawful taking of property by the state,
the rule may offend the human right not to be arbitrarily deprived of one's property.

Thirdly, the rule tends to allocate the disputed interest to the non-occupying party,
and to award compensation to the party in occupation. Since the latter is usually the

102 See chapter 9.

103 Thomas W Mapp, Torrens' Elusive Title: Basic Legal Principles of an
Efficient Torrens System (Alberta Law Review, University of Alberta,
Edmonton, Alberta, 1978), 64.
party with the higher evaluation of the land, this allocation is both inefficient in the Pareto sense and 'unfair' in the lawyer's sense. In cases where the rule leads to the eviction of the occupying owner from her home, it is challenged by the international human rights norm of respect for the home. The perceived unfairness of the rule may also prompt more litigation by occupying owners, although the association is difficult to prove.

Even these considerable disadvantages might be acceptable if a pressing social or economic need for the rule of immediate indefeasibility could be demonstrated. The courts have made no attempt to provide a reasoned policy justification, preferring to treat the rule as an unequivocal expression of the legislative will. The choice between deferred and immediate indefeasibility has no effect upon attainment of the object of the Torrens system identified in Gibbs v Messer, which is to obviate the need for purchasers to investigate the registered owner’s derivative title. The principal justification for the rule is that it relieves purchasers of the risk of a forgery or other invalidity in the immediate disposition, thereby making their titles more secure. But as Mapp, Taylor and others have shown, the gain in the new owner’s dynamic security is offset by a commensurate loss in their static security.

Loss avoidance considerations provide no clear justification for either rule, as neither O nor PI can do much to prevent the unauthorised registration in the generality of cases. The exceptional case, where either O or PI contributes to the ‘mistake’ by their carelessness or recklessness, is best dealt with by a discretionary power to depart from the general rule. Loss avoidance analysis suggests that the cheaper cost avoider in many cases is neither O nor PI, but the conveyancing professional acting for the transferring party (who may not be O). A rule of immediate indefeasibility will not provide the professional with the incentive to take positive steps to prevent unauthorised registrations. To achieve that result, direct regulation of conveyancing practice is needed.

If immediate indefeasibility is flawed in principle and cannot be justified by any pressing social need, which of the alternative rules is preferable? The fairer and more efficient rule is the one that most reliably allocates the title to the party who values the property most highly. Given the endowment effect and loss aversion, this will usually be O, the owner of the earlier registered interest who has been wholly or partly deprived of her title by the unauthorised registration to PI. O will usually be in possession at the time the dispute arises.

Assuming that PI has not been succeeded by P2, a rule that allows O to rectify the register to remove PI’s interest (deferred indefeasibility) is likely to allocate the interest efficiently most of the time. The English rule that usually allocates the property to the owner in possession is possibly more efficient than deferred indefeasibility, since possession is a better proxy for the owner with the higher valuation.

Either rule will occasionally allocate the interest to the party with the lower valuation. For example, deferred indefeasibility may restore the title of O, an absentee investor, and evict PI, who is living in the land as his home. The English rule may prevent O from recovering her title, lost through the registration of a forged disposition to PI during O’s temporary absence on an overseas trip, if PI is in possession at the time the dispute arises. These exceptional cases can be accommodated by allowing a judicial discretion to depart from the rule. No doubt this approach is more costly to administer than an invariable rule. But unless ex post adjustment is allowed, each of the available rules will occasionally produce unacceptable outcomes. The judicial discretion should be structured by non-exhaustive statutory criteria. This may reduce the cost of administering the rule, by indicating the factors that might warrant exceptional treatment.

A difficulty with the English rule is that O’s right to rectify the register can be asserted not just against PI, but also against his successors, P2, P3 etc, until the title passes to the owner of a registered estate who is in possession of the land. This represents a major loss to dynamic security, and to the object of the Torrens system identified in Gibbs v Messer. While English experience suggests that investors, lessors and mortgagees may be willing to assume the risk of loss of legal security, the Torrens compensation arrangements may not provide sufficient economic security. The resulting gap would create a need for private insurance.

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104 See chapter 5.
For the Torrens jurisdictions, deferred indefeasibility, with a structured judicial discretion to depart from the rule, is the fairer and more efficient rule. For jurisdictions considering the adoption of title registration or a major reform of their current system, the English rule has much to commend it, provided that it is accompanied by an adequate indemnity scheme of first resort. Perhaps the optimal rule is the English one, modified so that O's right to rectify ends once P2 acquires an interest in the land in reliance on the register (whether P2 is a proprietor in possession or not). The recommended approach is protection of the registered owner in possession, subject to a discretion to rectify in cases where it would be unjust not to do so, and limited by a principle of deferred indefeasibility to protect good faith purchasers subsequent to P1. The latter requirement is not clearly established in the present English system, but Cooke suggests that English law may need to develop in that direction if it is to harmonise English land titles with those of other EU member states.105

7 THE STRATEGY OF PUBLICITY AND THE PROBLEM OF UNREGISTERED INTERESTS

Over the past decade, the resources and energies of land title registries in New Zealand and overseas have been dominated by two major information technology projects. The first is the integration of title registry information into a land information network.1 This will link title registries to other land databases containing information such as digitised cadastral spatial data, valuation and fiscal records, land use and planning controls. The second project is the introduction of a paperless system for processing land transactions.2 Governments expect that electronic data storage, data retrieval and processing of transactions will bring considerable savings in the costs of administering the registry, as well as stimulating productive investment by reducing the costs of land transactions.

Some commentators have assumed that the automation projects will not lead to substantial changes in the content or operation of the legal rules of land title registration.3 The idea that the technology will change only the machinery of conveyancing gained currency during the first stage of automation (in which title records are converted from paper to digital form). Legislative amendments at this stage consisted mainly of changes to terminology and to the provisions governing the format, storage and

1 Land Information New Zealand's Landonline project is outlined in Tony Bevin, "Cadastre 2014 Reforms in New Zealand" (Paper presented at the New Zealand Institute of Surveyors & FIG Commission 7 Conference, Bay of Islands, NZ; Commission 7 FIG (International Federation of Surveyors), Statement on the Cadastre (FIG Publication 11, 1995) <http://www.fig.net/figtree/commission7/reports/cadastre/statement_on_cadastre.html>
2 'Computerization ... is a practical matter which does not affect legal principles and rules': Joint Land Titles Committee, Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada, Edmonton, 1990), at 6; Adrian Bradbrook, Susan V MacCulm and Anthony P Moore, Australian Real Property Law 3rd ed., (Lawbook Co, Sydney, 2002), at para [4.08].

105 Cooke, above n 70, 193-94.
searching of registry records. In the second stage, land transactions will be completed and simultaneously lodged for registration, or even directly registered, by authorised conveyancing practitioners. This will entail much more than a change of medium from paper to digital data. Electronic registration promises to transform the land transfer system and conveyancing services in ways that will redefine the legal rules. Law reformers are beginning to recognise the potential of the new technology to contribute to the solution of long-standing legal problems.

One of the major problems of title registration systems, in New Zealand and overseas, is the incomplete nature of the information that they are able to provide about interests in land. Both the Torrens and the English systems shared the ideal of the conclusive land register that had long been the ‘central theoretical plank’ of the German system of title by registration. In theory, the register should provide a complete, accurate and authoritative record of all information relevant to the title capable of affecting a purchaser. Ruoff called this the ‘mirror’ principle.

Hogg analysed the concept of the conclusive register into two components—affirmative and negative. Title registration systems generally perform better in the affirmative than in the negative operation. It is safer to assume that a person registered as owner is in fact the owner than it is to transact on the basis that the title is unaffected by anything not shown on the register. All systems permit exceptions and qualifications to the negative aspect of the conclusive register. This chapter focuses on two of the most significant.

First, many systems allow a diverse class of rights to bind a purchaser, even upon registration, whether they appear on the register or not. These overriding interests run with the land, and in some cases are practically undiscoverable by a purchaser. Secondly, the negative warranty does not operate for the benefit of purchasers from the moment they acquire their interest in equity, but only from when they register it. This creates a hiatus, the ‘registration gap’, in which purchasers may lose priority to another unregistered interest under equitable priority rules. Once the other interest has been enforced against them, purchasers take subject to it on registration.

This chapter seeks to answer the following questions: what role does the provision of title information play in achieving the objects of land title registration? Why do the systems allow significant departures from the principle of the conclusive register? Would interest recording (similar to deeds registration) for unregistered interests solve the problem of overriding interests and the registration gap by providing publicity for unregistered interests? How would such a system differ from the Torrens caveat system as it presently operates in New Zealand? How will the new information processing capabilities promised by the automation projects affect the economic feasibility of interest recording?

A. INFORMATION AND THE AIMS OF LTR

It was the Nobel Prize-winning economist Ronald Coase who first demonstrated that property rights are rendered more valuable by legal rules
that facilitate finding out about them, acquiring them and enforcing them. Modern economists use wealth-maximisation as the basic criterion for measuring the efficiency of legal rules. The system of land title registration promotes the creation of new wealth by reducing transaction costs, and improving the security of owners and purchasers. Its principal method is to generate and provide simple, timely and reliable information about the allocation of property rights in land parcels, which the purchaser is entitled to treat as conclusive for many purposes. The way in which title registration reduces transaction costs through the provision of information is explained below.

Fragmentation of property and conflicts of rights

All modern property law systems allow for the fragmentation of property rights in land. As Benito Arrúeda explains: '[i]t is often efficient to allocate physical possession and legal ownership to different persons, and to define other abstract rights in order to exploit the collateral value of the land.' This facilitates specialisation, the division of labour and market exchange, which Adam Smith said were the keys to the 'wealth of nations'.

10 R H Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics 1. This is now one of the basic principles of law and economics.

11 Scholars of law and economics assume that it is the basic function of law is to adopt rules that maximize wealth through the creation or alteration of incentives: Richard A. Posner, The Economics of Justice (Harvard University Press, Cambridge, Mass, 1981), 75.

12 See Chapter 4, fn 18.


16 Ibid at 4, 7, 11-12

17 Susan Bright argues that the defining feature of a property right is that it is enforceable against a successor-in-title to the land: Susan Bright, 'Of Estates and Interests: A Tale of Ownership and Property Rights' in Bright and Dcwar (eds), Land Law: Themes and Perspectives (Oxford University Press, Oxford, 1998) 529, 538.

18 Peter F Dale and John D McLaughlin, Land Information Management: An Introduction with Special Reference to Cadastral Problems in Third World Countries (Clarendon, Oxford, 1988), at 22. That fraudulent concealment of prior interests is a significant problem under private conveyancing is evident from the 'mischief' statements...
contract to sell the land to two different purchasers, or mortgage the land successively to two different lenders, without disclosing the prior transaction. Each transaction is valid and creates a proprietary interest. This produces a conflict of property rights, which the law must adjudicate. The absence of public records under private conveyancing makes it difficult for purchasers or lenders to discover the existence of a prior interest, unless the holder is in possession of the land or the title deeds. If the grantor fraudulently conceals the existence of the prior interest, the purchaser may have contractual remedies against the grantor, but will commonly take subject to the rights of the prior interest-holder.

**Priority rules and the problem of insecurity**

All legal systems have priority rules for determining which interest prevails in the event of a conflict between property rights. Older laws generally prefer the owner of the interest created first in time. As developing capitalism increased the volume and complexity of transactions between strangers, priority rules favouring prior owners imposed a heavy burden of inquiry. The high cost of inquiries, and residual uncertainty about the possibility of undiscovered title defects and adverse claims, spelled high transaction costs. This reduced the value of land and hindered productive exchange and investment.  

Nineteenth century reformers realised that reform of priority rules cannot alone solve the problem of insecurity of title. Where a grantor has created conflicting interests, the legal system is confronted with an invidious choice between the interests of two innocent parties. Whatever priority rule it applies, it will create a winner and a loser. By subordinating one interest to the other, a priority rule impairs the security of all interest-holders who may potentially find themselves in a similar position. As Demogue explained, the problem of insecurity is an intractable one because of the tension between two opposing conceptions of security. We can have a priority rule that protects prior ownership, or we can protect the reasonable expectations of purchasers, but neither rule makes owners or purchasers fully secure. The problem is that ‘the owner of today is the acquirer of yesterday’, so a rule that favours purchasers over prior owners increases the purchaser’s risk of loss post-acquisition.

Demogue proposed two methods of reducing the tension between the two conceptions of security. The first is insurance, which provides economic security (compensation for loss) to those denied legal security (enforcement of their interest) by the priority rules. Many title registration systems, like New Zealand’s, incorporate an element of insurance, in the form of an indemnity fund for losses resulting from the operation of the system. The second method proposed by Demogue is to provide a means of publicity by which owners can tender public proof of their claim, and purchasers can discover whether competing prior interests exist.

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23 Demogue, above n 21, at 430; ibid at 300-01.
24 Ibid; Mapp, above n 12, at 68.
25 Demogue, above n 21, at 432-33
26 The distinction between legal and economic security is taken from Aruahada, ‘A Transaction Cost View of Title Insurance’, above n 9, at 596
Priority rules and the incentive to register

Modern systems of land registration, whether based on deeds or titles, do more than passively provide a public clearing-house for title information. They actively promote the generation and use of title information, by creating incentives for owners to record their interests and for purchasers to search the register. They achieve this by substituting a new ordering principle for ranking the competing interests. Under private conveyancing, the basic rule is that the priority of interests follows the date order of their creation: 'first in time, first in right'. Arrunada calls this a 'contract' rule of priority. Title registration systems, and most modern deed registration systems, substitute a rule that interests rank in priority according to the order of their creation: 'first in publicity, first in right'. This is a 'publicity' rule of priority.

The strictest application of the publicity rule is the 'race' system of registration, so called because priority is awarded to the interest-holder that wins the 'race' to the register. It makes no difference that the person first to register had off-register notice of an earlier unregistered interest. If the system provides for a right to be registered, it cannot be enforced against a purchaser unless it is registered. Without registration, it is merely a personal or contractual right. The race system gives the owner of the right a strong incentive to register, to ensure enforceability. The New Zealand Torrens operates as a race system, so far as the priority of registered interests is concerned.

The second type of registration system is the 'race-notice' type, in which the publicity rule has a qualified operation. A recorded interest takes priority over an earlier one only if recorded first and without off-register notice of the earlier interest. Deeds registration systems in New Zealand and some Australian States, like their English and Irish precursors, are of this type. Some deeds registration statutes that may have been intended to operate as race systems mutated into race-notice systems through judicial resistance to the exclusion of off-record notice. To prevent the race system for

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28 Arrunada, 'Property Enforcement', above n 13, at 4. The rule is subject to exceptions, such as the rule that a prior equitable interest is not enforceable against a bona fide purchaser for value of the legal estate who takes without notice: Pilcher v Rawlins (1872) LR 7 Ch App 259.

29 Ibid, at 36.


31 Ibid, at 40.


34 G W Hinde and D W McMorland, Butterworths New Zealand Land Law (Butterworths, Wellington, 1997) (cited as 'Hinde, McMorland & Sim'), [2.012], [2.013].

35 Deeds Registration Act 1908 (NZ), still in force but practically obsolete.

36 In New South Wales, Tasmania and Victoria, a registered instrument takes priority over an unregistered or subsequently registered instrument if made and executed bona fide and for valuable consideration. But where the holder of a registered instrument takes with actual or (arguably) constructive notice of a prior unregistered interest, a court may find an absence of bona fides: Sydney & Suburban Mutual Permanent Building & Land Investment Association v Lyons (1897) 18 LR (NSW) 250; Marsden v Campbell (1897) 18 LR (NSW) (Eq) 23; Bradbrook, McCallum & Jooste, above n 3, at paras [3.64]-[3.68]; Sykes & Walker, above n 8, at 411-12.


38 Philbrick, above n 32; Simpson, above n 15, at 95-98; Ziff, above n 6, at 421; Howells, ibid at 379; Hon Justice W M C Gunmow, 'Equity and the Torrens System Register' (Paper presented at the Taking Torrens into the 21st Century Conference, Auckland, NZ, 19-21
registered interests becoming 'muddied' in this way, the Torrens and English title registration statutes expressly abrogate the doctrine of notice. Under both race and race-notice systems, the use of a publicity rule serves a dual function. First, it limits the purchaser's inquiries, and mandates searching the register, by fixing the admissible proofs of title. Secondly, it generates information by giving owners an incentive to register, to avoid losing priority if another interest is registered first. Race systems serve these functions best, for purchasers are not affected by off-record notice, and owners who neglect to record their interest are not saved by the purchaser having such notice.

Weakest of all is the third type of registration system, the 'notice' system, in which recording of an interest simply gives notice of it, and the publicity rule does not operate at all. An earlier interest prevails, whether registered or not, if the later interest was acquired with notice of it. The notice may be either on-register or off-register. Since the doctrine of notice undermines the incentive to register, notice systems suffer from incomplete registration. It will be shown below that New Zealand's caveat system effectively operates as a registry of the notice type.

How publicity reduces transaction costs and insecurity

By providing information about the state of the vendor's title, title and deeds registries reduce the purchasers' inquiry costs and enforcement costs. Property rights are more valuable than contractual or personal rights precisely because they are enforceable against third persons (that is, persons other than the grantor) who have some relationship with the land. The better the enforcement of the rights, the more secure - and the more valuable - they are. According to Arruñada, the purpose of deeds registries is to enable the purchasers to purge the title of prior interests that might otherwise be enforceable against them, by collecting consents from the prior owners. Purchasers incur inquiry costs before acquisition, in order to reduce their enforcement costs after acquisition.

Title registries lower purchasers' transaction costs more effectively than deeds registries. They reduce the purchaser's inquiry costs by providing better and more reliable title information. Deeds registries simply record instruments of title, from which purchasers must draw their own conclusions. Title registries provide, in a simplified and standard form, positive conclusions about title that are guaranteed by the State. In some systems, such as New Zealand's, the title warranties are backed by an indemnity scheme that covers losses arising from registry errors in the process of assuring title. In systems that lack a statutory scheme to indemnify errors, the registrar is commonly liable for his or her errors and may carry professional indemnity insurance.

Title registries also reduce purchasers' enforcement costs by relieving them of the need to purge the title. Purchasers for value are guaranteed enforcement of their registered interests against earlier interests not

39 Eg, Land Transfer Act 1952 (NZ), s 182; cf Land Registration Act 1925 (UK), ss 59(6) and 74. The historical reasons for the policy to exclude notice from the registration system are discussed in Jean Howell, 'The Doctrine of Notice: An Historical Perspective' [1997] 61 The Conveyancer 431.

40 Arruñada, 'Property Enforcement', above n 13, at 25.

41 Simpson says that 25 US States have a notice type of statute: above n 18, at 96. Rose says that only 2 States apply a race system with any rigour. In all the rest, a purchaser who takes with notice of a prior claim does not get priority by registration. Rose, above n 32, 207.

42 Arruñada, 'Property Enforcement', above n 13, at 24

43 See text below, associated with n 94.

44 Arruñada, 'Property Enforcement', above n 13, at 24.


46 Ibid, at 6.

protected on the register, except for overriding interests. By providing better information and enforcement, title registration reduces both the inquiry and enforcement components of transaction costs. Since interests are secure to the extent that they are enforceable against third parties, it follows that title registration also improves the security of purchasers' titles.

Information and the methods of title registration

We can now assess the role of information in title registration systems. Title registration is a government program to provide better enforcement for existing property rights, and to facilitate the generation of wealth through the creation of new property rights. It facilitates market exchanges by reducing transactions costs and insecurity of title, particularly for purchasers. It uses three principal methods to achieve its ends.

First, it reverses the *nemo dat quod non habet* rule of property law - that one cannot pass a better title than one has. Abrogation of the *nemo dat* rule is a precondition for the affirmative operation of the title warranty. Under title registration, a bona fide purchaser for value who registers an interest acquires a good title, notwithstanding any defect in the transferor's title. Some systems go further, guaranteeing a registered title against a vitiating defect in the transaction or instrument under which the purchaser obtained registration, so long as the purchaser is not a party to fraud. The strongest form of this is found in New Zealand where the principle of immediate indefeasibility operates. The principle denies rectification of the register to remove an interest registered on the basis of a void instrument or transaction, unless the owner of the interest was fraudulent.

Secondly, title registries, like deeds registries, use publicity to reduce the asymmetry of information that facilitates grantor fraud. This reduces the incidence of disputes, and the losses that inevitably result whenever the law has to adjudicate between competing interests. The effectiveness of the strategy of publicity depends on the reliability and completeness of the information in the register. Title registries provide guaranteed information that is highly reliable so far as it goes.

Thirdly, title registration uses a publicity rule to fix the priority of registered interests. This rule promotes the strategy of publicity by providing incentives to generate and use information in the register. It also reduces purchasers' transaction costs by assuring the enforceability of their interests, and limiting the need for title investigations.

The ideal of the conclusive register represents the realisation of the strategy of publicity. The achievement of this ideal would lower transaction costs, and promote the objects of the title registration system. Yet title registration systems allow enforcement of real rights against a purchaser despite the absence of prior publicity. In the next Part we examine the reasons why legal systems allow departures from the ideal of the conclusive register.

B. EXCEPTIONS TO THE CONCLUSIVE REGISTER

Overriding interests

Title registration systems allow various exceptions and qualifications to the negative warranty of title. Certain rights can be enforced without any publicity, even against a purchaser for value who has acquired a registered interest. These rights are collectively called 'overriding interests'.

There is no general criterion for determining when a right should override registered title. Legislators are prompted by several considerations when they grant an interest overriding status. One group of exceptions appear to...
provide a safeguard against errors by the registry when a parcel of land is first registered.\textsuperscript{51} for example, omission of easements, misdescription of parcels and the inclusion of the same land in more than one certificate of title. These provisions are transitional; in jurisdictions with mature title registration systems, their effect is mostly spent.

Another group of overriding interests arises from specific Acts that create rates, taxes, charges, or other liabilities in favour of public agencies or privatised utility companies. Enforcement without publicity may be authorised for reasons of administrative convenience, for example, to avoid burdening the administering agency and the registry with the need to register and discharge the interests.

Peter Butt has suggested that obligations arising from overriding statutes ‘pose perhaps the greatest single threat to public confidence in the Torrens system’.\textsuperscript{52} It is likely that automation will significantly reduce this threat in the future. The Law Reform Commission of Victoria anticipated in 1987 that the integration of title registry information into a fully digitised land information system would eventually provide more information about statutory obligations attaching to particular land parcels.\textsuperscript{53} It envisaged that rates, taxes and charges that run with the land and all rights of recovery enforceable against the owner for the time being should be recorded on the centralised land information network, linked to the title register. The Commission proposed that the information in the linked cadastral databases should not be deemed to be part of the register,\textsuperscript{54} but should be guaranteed by the agency responsible for administering the rate, tax or charge.\textsuperscript{55}

\textbf{Should the interest be registered?}

Other categories of overriding interest exist because the legislature has formed the view that the interests should be enforceable against a purchaser, but that it is not reasonable or necessary to require them to be registered.\textsuperscript{56} Title registration systems limit registration to those categories of interest for which the benefits of registration outweigh the costs.\textsuperscript{57} Registration imposes transaction costs on the parties and on the registry, which must undertake title assurance functions and risk assessment in relation to the interest. For this reason, title registration systems register a much more restricted range of interests than deeds registries, which do not undertake title assurance functions.

The benefits of registration are greater for more valuable interests, for long-term interests, for interests that are bought and sold frequently, and for non-possessory interests that are less likely to be discovered by a purchaser.\textsuperscript{58} Many title registration statutes protect short-term occupation tenancies as overriding interests, because the costs of registration are disproportionate to the benefits of registering them.\textsuperscript{59} Rights created by operation of law are sometimes protected on the ground that it would be inconvenient or unreasonable to expect people to register them, because they were created informally (for example, by estoppel or constructive trust),\textsuperscript{60} are public rights exercisable by anyone (for example, highway rights), or arose from

\begin{itemize}
  \item[\textsuperscript{52}]{Peter Butt, \textit{Land Law} 4th ed., (Lawbook Co, Sydney, 2001), at para [2090]}
  \item[\textsuperscript{53}]{Law Reform Commission of Victoria, \textit{The Torrens Register Book}, Report No 12 Melbourne, 1987) at para 19.}
  \item[\textsuperscript{54}]{Ibid, at para 24.}
  \item[\textsuperscript{55}]{Ibid, at para 18.}
  \item[\textsuperscript{56}]{LC 254, above n 51 , at para 4.17; LC 271, above n 4, at para 8.6}
  \item[\textsuperscript{57}]{Robert Chambers, \textit{An Introduction to Property Law in Australia} (LBC Information Services, Sydney, NSW, 2001), 431-32.}
  \item[\textsuperscript{58}]{Ibid; see also Baird & Jackson, above n 22, at 304.}
  \item[\textsuperscript{59}]{VLRC, Report No 12, above n 53, at para 15. The publicity provided by the tenant’s possession is a factor that reduces the benefits of registration.}
  \item[\textsuperscript{60}]{Peter Birks says that overriding interests 'represent the attempts of the legislator to anticipate the most obvious instances of problems endemic in formality': Peter Birks, 'Before We Begin: Five Keys to Land Law' in Bright and Dewar (eds), \textit{Land Law: Themes and Perspectives} (Oxford University Press, Oxford, 1998) 457-486, at 484-85.}
\end{itemize}
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events which have become obscure with the passage of time (for example, customary and prescriptive rights). 61

The cost-benefit analysis assumes that interests are liable to be defeated by a purchaser unless they are either registered or have overriding status. This presents legislatures with an invidious choice. If interests are denied both registration and overriding status, they have no protection against a purchaser who acquires a registered interest. Alternatively, if the interests are given overriding status, purchasers take subject to them without publicity, and even without notice. The latter rule gives the purchasers less security than they had under the old doctrine of notice, which at least protected a purchaser who made reasonable inquiries. 62

Gaining publicity without registration

There is another way to provide publicity for overriding interests without requiring registration. Some Torrens statutes presently make special provision for covenants to be protected by entry on the register without registration. For example, s 126A of the Land Transfer Act 1952 (NZ) provides that both restrictive and positive covenants may be noted on the title of the servient tenement. The section expressly states that notifying the covenant on the title does not give it a greater operation than it has under the instrument creating it. Notification of the covenant brings it within the protection of s 62 of the Act, which provides that the registered proprietor holds the registered estate or interest subject to "such interests as may be notified on the folium of the register".

Whalan notes that this is a form of deeds registration. 63 Notification of a covenant on the register gives it priority over registered estates and interests.

but confers no validity or operation on the covenant. As Douglas Whalan put it, notified covenants are protected only 'for what they are worth' under the general law of property. 64 There was a pressing need to make such provision for covenants, which are of long duration, unregistrable and non-possessor. Other unregistered interests could be protected by s 62 or some similar device, but this possibility has been overlooked.

In Part 3 of this chapter I will review two proposals for recording interests with priority, which could provide the required publicity for overriding interests.

Insecurity of purchasers' interests during the registration gap

In its negative operation, the conclusive register assures purchasers that no third party rights can be enforced against them unless the interests appear on the register. It appears to have been Torrens' intention that purchasers dealing with the registered owner would be protected against enforcement of unregistered interests from the moment that they acquired their interest.

Under the general law of property, a specifically enforceable contract for the creation or transfer of an interest in land is effective to create or pass the interest at equity, even before the legal formalities for disposing of an interest in land have been complied with. 65 Torrens envisaged that under his system, registration would become the sole means of passing or creating

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61 LC 254, above n 51, paras 4.5-4.9.
62 Harrison said that the standard required by the doctrine of notice is "that of the reasonable (sometimes the reasonably prudent) buyer, of the kind to be anticipated as the buyer of that property, in the actual circumstances": Reziya Harrison, Good Faith in Sales (Sweet & Maxwell, London, 1997), 241.
63 Douglas J. Whalan, The Torrens System in Australia (Law Book Co., Sydney, 1982) at 97, referring to the similar Australian provisions.
64 Whalan, ibid at 111.
65 Lysaght v Edwards (1876) 2 Ch D 499; Walsh v Lonsdale (1882) 21 Ch D 9; Hinde, McMorland & Sim, above n 34, at 1.052.

Simpson exposed as a fallacy the conventional idea that deeds registration and title registration are mutually exclusive systems: S R Simpson, Land Law and Registration (Cambridge University Press, Cambridge, 1976), at 19. Title registration statutes commonly incorporate ancillary systems of deeds registration to confer priority on unregistered interests, such as New Zealand's land transfer journal for instruments awaiting registration: Arrunada, 'Property Enforcement', above n 13, at 19.
estates and interests in land. Contracts and unregistered instruments would no longer be effective to pass property rights in equity.

The recognition of unregistered interests as equitable interests

Torrens, whose proposals were heavily influenced by a civil law model of title registration and by the Merchant Shipping Act, did not fully consider the implications of reducing equitable interests to mere contracts. He intended to create a race system in which the register would be truly conclusive. He was also anxious to rid conveyancing of the complications of equity and the 'maelstrom of Chancery suits'.

Robinson finds that Torrens espoused at different times contradictory positions on whether interests could pass without registration, and that his public utterances do not reveal that he had a 'scheme of title to land by registration that was complete in itself'. In particular, he failed to consider how the race system would apply in two-stage land transactions where contract and disposition commonly represent two distinct stages separated by an interval of time. The contradictions in Torrens' thinking are reflected in his legislation. The statutes contained a 'sterility' provision to the effect that no instrument until registered in the manner prescribed is to be effective to create, extinguish or pass any interest in registered land or render it liable as security. This was inconsistent with other provisions that appeared to contemplate that equitable interests could exist in registered land. For example, the statutes expressly acknowledged that trusts of registered land could be declared, and provided a system of caveats against dealings for the protection of unregistered interests.

Interpretation of the sterility provision posed a dilemma. The statutes allowed only restricted classes of estates and interests to be registered – for the most part, those that were 'legal' interests under the general law. If these were the only property rights capable of existing in registered land, the sterility provision would introduce a new and more restrictive numerus clausus (catalogue of recognised property rights) than for unregistered land. In the face of legislative ambiguity, the courts chose not to interpret the sterility provision as abolishing equitable property rights in registered land. It was read as denying proprietary effect to unregistered instruments, but not to the contracts and obligations that lay behind them. Since nothing in the statutes took away the equitable jurisdiction of the courts to enforce conscientious obligations by granting proprietary remedies, it followed that equitable property rights could exist in registered land.

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67 'Instruments when executed are merely personal contracts between the parties, upon which action for damages may be raised, but they do not bind the land. The entry on the folium of the Register alone passes the property, creates the charge or lesser estate, discharges, or transfers it': Robert R. Torrens, *A Handy Book on the Real Property Act of South Australia* (Advertiser, Adelaide, 1862), 8.

68 Ibid at 22-23.

69 Ibid at 22-30.

70 Ibid at 22.

71 Ibid at 29.

72 Eg Land Transfer Act 1952, s 41(1).

74 *Barry v Heider* (1914) 19 CLR 197, *Abigail v Lapin* [1934] AC 491, at 501-02 (per Lord Wright).

75 Robert Stein, 'The "Principles, Aims and Hopes" of Title By Registration' (1983) 9 Adelaide Law Review 267, at 271. Second and subsequent mortgages can be registered, although they could only exist as equitable interests under the general law. This change results from the replacement of the general law mortgage with the hypothecary mortgage by registered charge.

76 *Barry v Heider* (1914) 19 CLR 197 per Isaacs J; *Brunker v Perpetual Trustee Co Ltd* (1937) 57 CLR 555 at 581; *Re Universal Management* [1983] NZLR 462 (CA). The authors of Hinde, McMorland & Sim consider that the view of Griffith CJ in *Barry v Heider*, that the equitable interest arises from the unregistered instrument, does not represent the law in New Zealand: above n 34, [2.045], fn 17. The controversy is yet to be finally resolved in Australia: see Marcia Neave, C J Rossiter and M A Stone, *Sackville & Neave's Property Law: Cases and Materials* 6th ed., (Butterworths, Sydney, 1999), [6.3.135]).

77 *Barry v Heider* (1914) 19 CLR 197; *Butler v Fairclough* (1917) 23 CLR 78.
Priority rules in the registration gap

Since Torrens did not anticipate that rights would be enforceable without registration, his statutes provided no rules to resolve priority disputes between unregistered interests. The courts therefore turned to the priority rules of unregistered conveyancing – the same complicated and unsatisfactory rules that the Torrens statutes had sought to overturn. A conflict between unregistered equitable interests is adjudicated under the rule that applies to competing equitable interests in unregistered land. This begins with Arruñada’s contract rule of priority – that the interest created first in time prevails – but equity allows the court to depart from the rule in certain circumstances. Among the relevant factors, courts consider whether the later interest was acquired in the mistaken belief that the earlier interest did not exist, and whether the earlier interest-holder contributed in some way to that misapprehension. It appears that notice will generally be decisive against the later acquirer, although its precise significance is unsettled.

The courts could have granted purchasers greater protection against unregistered interests than was provided by the old priority rules. The Torrens statutes provided a means to protect purchasers against the operation of the doctrine of notice, in the form of a ‘notice’ provision, like s 182 of the Land Transfer Act. This section provides that a person dealing with the registered owner shall not, except in case of fraud, be affected by notice of any trust or unregistered interest, and that knowledge of any trust or unregistered interest shall not of itself be imputed as fraud. On a literal interpretation, the provision could be read as protecting the purchaser from the effects of notice from the date of settlement, or even from the date of contract. But the courts in Australia and New Zealand interpreted the provision as providing protection only from the date of registration. This makes it more difficult for purchasers to challenge the presumptive priority of an earlier unregistered interest.

Hinde, McMorland & Sim conclude that the position of purchasers pre-registration is ‘one of the least satisfactory features of the Land Transfer system in New Zealand’. The use of the old priority rules in the registration gap undermines the objects and methods of the title registration system. Before registration, the priority of interests generally follows the date order of their creation: after registration, a publicity rule of priority applies. Before registration, purchasers are affected by the doctrine of notice; after registration, they are not. Title registration relieves the duty of inquiry upon purchasers, in order to reduce transaction costs; the priority rules that apply during the registration gap re-impose the duty. Purchasers must either search for prior interests as if the land were unregistered, or

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78 The English Land Registration Act 1925 also failed to provide a priority rule, although the continued existence of equitable interests (or ‘minor interests’ as they are called in the Act) was expressly provided for in ss 2(1), 101(3), 3(xv): LC 254, above n 51, at para 7.1
79 Butler v Fairclough (1917) 23 CLR 78; Abigail v Lapin [1934] AC 491.
80 Abigail v Lapin [1934] AC 491; Australian Guarantee Corporation (NZ) Ltd v CFC Commercial Finance Ltd [1995] 1 NZLR 129 at 137.
81 Abigail v Lapin [1934] AC 491, 501-02 (Lord Wright).
83 Hinde, McMorland & Sim, above n 34, at para [2.055]; Whalan, above n 63, at 270-71
84 Solicitor-General v Mere Tini (1899) 17 NZLR 773; Templeton v The Leviathan Pty Ltd (1921) 30 CLR 34; Webb v Hooper [1953] NZLR 111.
85 Above n 34, at para [2.127]. The delay between settlement and lodgment may be beyond the control of a purchaser, where the mortgagee takes charge of the transfer at settlement. In New South Wales, 23% of transfers are lodged more than 28 days following settlement, while in the ACT, 16% of transfers are lodged more than one month after settlement: Registrar-General’s Office, ACT, Land Titles Customer Bulletin, 4 December 2001, 2. In Victoria, it was reported in 2001 that the average delay between settlement and lodgment is 20 days: Russell Cocks and John Barry, ‘Electronic Conveyancing: Challenges for the Torrens System’ (2001) 8 Australian Property Law Journal 270, 271.
assume the risk of losing priority to an undiscovered prior interest during
the registration gap. The loss will not be compensated by the statutory
indemnity scheme, unless it arises from a registry error or omission such as
an error in a search certificate. 86

**Caveats and the protection of unregistered interests**

The Torrens statutes provide a warning device for the protection of
unregistered interests, in the form of the caveat against registration of
dealings. A person claiming an estate or interest in land can, by lodging a
caveat, interdict the registration of an instrument inconsistent with the
interest claimed. In most jurisdictions the caveat lies dormant until action is
taken under the statute to remove it, or until an instrument inconsistent with
the claimed interest is lodged for registration. 87 The caveat then lapses or is
removed unless the caveator brings proceedings in a court to enforce the
interest claimed, or the lodging party agrees to take subject to the caveator's
interest. While it stands, the caveat stops the lodged instrument from
becoming registered, 88 so the conflict is adjudicated under the equitable
priority rules that apply as between unregistered interests.

In New Zealand, the lodgement of a caveat does not determine priority, nor
does the publicity rule apply. 89 Purchasers cannot assume that they will take
free of an earlier unregistered interest that is not protected by a caveat.
There is no rule that the failure to lodge a caveat spells loss of priority. 90 It

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86 It is now possible to insure privately against the risk.
87 An exception is s 126(5) of the Land Title Act 1994 (Qld), which
gives only temporary force to caveats.
88 Land Transfer Act 1952, s 141. Note the exceptions to this rule in s
141(2)-(3).
89 Butler v Fairclough (1917) 23 CLR 78 at 84; J & J H Just (Holdings) Pty Ltd v Bank of New South Wales (1971) 125 CLR 546; Australian
Guarantee Corporation (NZ) Ltd v CFC Commercial Finance Ltd
(1995) 1 NZLR 129 at 138. The English 'caution', under the Land
Registration Act 1925 (UK), has the same effect: Clark v Chief Land
90 J & J H Just (Holdings) Pty Ltd v Bank of New South Wales (1971) 125 CLR 546 at 554. The principles relating to the effect of caveats on
equitable priorities are summarised in Hinde, McMorland & Sim,
above n 34, at [2.149].

It is merely one of the circumstances that may lead a court to conclude that the
holder of the earlier interest has allowed another person to acquire an
unregistered interest in the mistaken belief that no such prior interest
exists. 91 The courts' approach is consistent with the view that it is not the
purpose of the caveat to generate information for the benefit of purchasers. 92
It is a trip-wire to prevent the automatic defeat of unregistered interests. It
gives the caveator an opportunity to enforce his or her claim against a
purchaser in court, before the purchaser's interest becomes indefeasible
upon registration. 93

The caveat has a secondary purpose of providing notice of the interests
claimed. 94 To that extent, it resembles the notice type of deeds registration
system. As in a notice system, failure to record an interest by caveat does
not necessarily lead to loss of priority, if a later interest is acquired with off-
record notice. 95 We have already seen that notice systems provide the
weakest incentives to register, so we would expect the New Zealand caveat
system to be of limited use in generating publicity for unregistered interests.

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91 Heid v Reliance Finance Corporation Ltd (1983) 154 CLR 326 at
342; Peter Stubbs, 'Equitable Priorities and the Failure to Caveat'
92 J & J H Just (Holdings) Pty Ltd v Bank of New South Wales
(1971) 125 CLR 546 at 554, 558. Cf the view taken by the English courts
that the holder of an unregistered interest should not lose priority on
the ground that he or she has failed to protect the interest by entry of a
caution: Mortgage Corporation Ltd v Nationwide Credit Corporation
Ltd [1994] Ch 49.
93 Barry v Heider (1914) 19 CLR 197 at 221 per Isaacs J
94 Melville-Smith v Attorney-General [1996] 1 NZLR 596 at 603;
Australian Guarantee Corporation (NZ) Ltd v CFC Commercial
Finance Ltd [1995] 1 NZLR 129 at 137. The Australian courts,
however, have taken the view that the purpose of the caveat is to
protect the caveator's interest rather than to give notice: J & J H Just
(Holdings) Pty Ltd v Bank of New South Wales (1971) 125 CLR 546
at 552, 556 per Warwick CJ. See generally, Hinde, McMorland & Sim,
avove n 34, at [2.142]; McCrimmon, above n 33, at 305-6.
95 Eg, where the purchaser has actual or constructive notice because the
prior interest-holder is in possession of the land or the certificate of
title.
Caveats are more effective in preserving an investor’s presumptive priority than in overturning it. A party who acquired a later interest when an earlier interest did not exist. Purchasers can therefore use caveats to ensure enforcement of their interest against an inconsistent interest of later date. Yet, despite the exhortations of professional indemnity insurers, caveats are not lodged as a matter of course to protect purchasers’ interests in the registration gap. In an era of competition following the lowering of entry barriers to conveyancing professionals, there is consumer resistance to any additional step that increases fees and costs.

Proposed solutions to the problem of the ‘registration gap’

Proposals to resolve the problem of the registration gap generally advance one or both of two solutions. The first is to provide a simpler, cheaper or more effective method for maintaining or reserving the priority of purchasers’ interests in the registration gap. A number of the statutes now include a provision that enables purchasers to obtain a guaranteed pre-settlement title search and to reserve priority for their instrument for a specified period after settlement. These procedures tend to be under-utilised in many jurisdictions. It is likely that the procedures are omitted

96 IAC (Finance) Pty Ltd v Courtenay (1963) 110 CLR 550 at 590.
97 Hinde, McMorland & Sim say that the registry would be over-taxed if caveats were lodged to protect every purchaser: above n 34 at [2.655]. In the State of Victoria, the ratio of lodged caveats to transfers in 2001-02 was less than 1 to 9. Allowing for the fact that not all caveats are lodged in respect of transfers, the figures indicate very low usage of caveats to protect purchasers’ interests pre-registration in that State: (information provided to the author by Land Registry, Victoria on 17 September, 2002 and held on file with the author).
98 See, eg, the Queensland provisions for settlement notices in Land Title Act 1994 (Qld), ss 138-152. Section 182 of the Land Transfer Act 1952 (NZ) does not guarantee priority, but gives a right to compensation if loss is caused by the registration, within two months of settlement, of an adverse disposition not disclosed in the guaranteed search: s 172A.
99 Bradbrook, McCallum & Moore, above n 3, [4.116].

for the same reason that caveats are often omitted – people do not see the benefits as justifying the additional costs.

The second solution is to replace the caveat with a system of recording interests with priority – effectively a deeds registration system based on the publicity rule of priority. Some Torrens statutes have already transformed their caveat in this way. For example, s 49 of Singapore’s Land Titles Act, ch 157, 1993 provides:

(1) Except in the case of fraud, the entry of a caveat protecting an unregistered interest in land under the provisions of this Act shall give that interest priority over any other unregistered interest not so protected at the time when the caveat was entered.


101 Provisions giving priority effects to caveats are also found in some Canadian Torrens statutes: Land Title Act, RSBC 1996, c 250, s 31 (British Columbia); Real Property Act, RSA 1988, c R30, s 135 (Alberta); The Ontario Law Reform Commission recommended a similar role for the caution under the Ontario statute: Ontario Law Reform Commission, Report on Land Registration, Dept of Justice (Dept of Justice, Ontario, 1971), at 26, 30-31.
(2) Knowledge of the existence of an unregistered interest which has not been protected by a caveat shall not of itself be imputed as fraud.

The provision uses a publicity rule of priority, undiluted by notice - the same rule that the Torrens statutes use to determine the priority of registered interests. This allows the title registration system as a whole to function as a race system, for an interest must be either registered or recorded to be enforceable against third parties.

Considerations of economic efficiency support the use of a publicity rule for unregistered interests. First, it would reduce the incidence of disputes by generating more complete information about the existence of prior interests. Fewer purchasers would acquire interests in land without knowing of the prior interests. Secondly, it would reduce administrative costs by providing a clear *ex ante* rule for determining the priority of competing interests. The equitable rules of priority are costly to administer because they require courts to examine the actual conduct of the parties *ex post*. The variable and uncertain outcomes of the *ex post* approach encourage resort to litigation. Thirdly, the publicity rule allocates the risk of loss to those who are best placed to avoid the loss. Prior owners can prevent the risk of loss with less expenditure of resources than purchasers, simply by registering their interest. This is less costly than the inquiries that purchasers would have to make to exclude the possible existence of prior interests.

In the next Part, I examine two detailed proposals for a race system for unregistered interests in registered land, and show how these reforms might contribute to solving the problems of overriding interests and the insecurity of purchasers' interests in the registration gap. The older proposal emanates from Canada's Joint Land Titles Committee, and does not anticipate the electronic processing of data by title registries. The newer proposal, from the Law Commission for England and Wales and HM Land Registry, is contingent upon the introduction of electronic conveyancing, which is expected to reduce substantially the costs of registry transactions.

C. INTEREST RECORDING: ENGLISH AND CANADIAN PROPOSALS

In 1990, Canada's Joint Land Titles Committee issued a set of recommendations and a model statute designed to harmonise the title registration statutes of Canada. All the provinces and territories of Canada except Quebec took part in the project. A central feature of the Committee's Model Land Recording and Land Registration Act was the proposal for a system of interest recording to be incorporated in the title register, which would be conclusive as to the priority of unregistered interests.

Interest recording is broadly synonymous with deeds registration. Although the terms 'registration' and 'recording' are semantically identical, the Committee proposed that, to avoid confusion, it would use the term 'recording' to mean an entry in the register that confers and confirms priorities, and 'registration' to mean an entry that confers and confirms both priorities and ownership. The term 'interest' was substituted for 'deeds', as the Committee proposed that the interests to be recorded should not be confined to those created by a deed or other instrument.

The Law Commission and HM Land Registry proposed a two-tier scheme of title registration and interest recording similar to that developed by the Joint Titles Committee, although they appear to have developed their model without reference to the Canadian report. The Law Commission produced four reports on reform of the registration system between 1983 and 1988 before it realised that electronic registration would expand the range of

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102 See Duggan's analysis of the efficiency advantages of registration system in terms of market considerations, loss avoidance considerations, and administrative cost considerations: Duggan, above n 20, at 247-48, 252.

103 Above, n 3.

104 Nova Scotia has recently enacted a title registration statute that incorporates key elements of the Joint Land Title Committee's proposals with respect to interest recording: *Land Registration Act*, RSNS 2001, c 6, which commenced on 24 March 2003.

105 Joint Land Titles Committee, above n 3, at 8-9.
available solutions. In its consultative document No 254 and revised recommendations published in No 271, both prepared jointly with HM Land Registry, it unveiled its vision for a real property regime in which all land will be registered, and all dispositions effected by electronic registration. The Commission’s proposals were embodied in the Land Registration Act 2002, to commence in October 2003. In the meantime, the Land Registration Act 1925 remains the operative title registration statute for England and Wales.

Corresponding to the Canadian dichotomy of ‘registration’ and ‘interest recording’, the English report distinguishes between (a) ‘registration’ of registrable estates and charges, and (b) the protection of other interests by ‘an entry on the register’ in the form of a ‘notice’ or a ‘restriction’. The former confers a title warranty and priority, the latter confers only priority. Unfortunately, the 2002 English Act uses the term ‘registered’ to refer to both registration, and to the entry of a notice or restriction in respect of an interest. Since this invites ambiguity, I shall use the terms ‘registration’ and ‘interest recording’ in the sense defined by the Canadian committee, even when discussing the English reforms.

D. INTEREST RECORDING AND RULES OF PRIORITY

Like the Canadian model Act, the Law Commission’s reforms extend the publicity rule of priority to recorded interests. The application of the rule is considered in relation to six types of conflicts between interests:

(a) An interest in registered land conflicts with an overriding interest

Under s 62 of the New Zealand Land Transfer Act 1952, registered owners take subject to overriding interests. The 2002 English Act subjects both recorded and registered dispositions to the same set of overriding interests. The Canadian Model Act takes this one step further: overriding interests take priority over all other interests.

(b) A registered interest obtained bona fide and for value conflicts with an interest that is unregistered and unrecorded.

All title registration systems apply the rule here, although not all require that the registered interest be obtained for value. The Canadian Committee...

106 LC 254, above n 51; LC 271, above n 4.
107 Scotland and Northern Ireland each have their own land registration statute, and are also committed to universal registration and electronic conveyancing.
108 Replacing both the unilateral ‘caution’ and the consensual ‘notice’ mechanisms provided in the 1925 Act.
109 A restriction is ‘an entry to regulate the circumstances in which a disposition of a registered estate or registered charge may be the subject of an entry in the register’: Land Registration Act 2002, s 40(1). It allows dispositions to be registered provided that certain constraints are observed, and is commonly used to protect trusts.
111 Note that the Land Registration Act 1925, s 52 already provides that the entry of a notice in respect of an interest makes the interest binding upon all subsequent transferees from the registered owner, to the extent that the interest is valid and effective. The Land Registration Act 2002 considerably extends this limited provision for interest recording by allowing notices to be entered unilaterally, without the consent of the registered owner: s 34(2).
112 Land Registration Act 2002, ss 29(2)(ii), 30(2)(ii), Sched 3. Note that a ‘registered disposition’ includes both registered and recorded dispositions: see definition of ‘registered’ in s 132(1).
113 Joint Land Titles Committee, Model Act, above n 3, s 6.1
114 For example, the Land Title Act 1994 (Qld), s 180 extends the negative warranty of title to registered volunteers, see also Land Title Act 2000 (NT), s 183.
recommended that the requirement of value be dropped. The 2002 English Act retains it.

c) A disposition lodged for registration conflicts with an interest already recorded

The New Zealand and Australian Torrens Systems presently use the equitable priority rule to adjudicate between an unregistered interest protected by caveat, and a disposition lodged for registration that has been stopped by the caveat. The 1925 English Act uses the same rule where a lodged disposition is stopped by a caution (the functional equivalent of the New Zealand caveat against dealings). Both the English and Canadian proposals extend the publicity rule to this case, allowing the disposition to proceed to registration subject to the priority of the recorded interest. Alternatively, the owner of the registrable interest can challenge the claimant to substantiate the claim on which the recording is based.

d) Two recorded interests conflict, or a recorded interest conflicts with an unrecorded interest

The Canadian model applies the publicity rule here. The English reforms take an indirect route to the same approximate end. Priority between unregistered interests will no longer be governed by the equitable priority rule, but by a contract rule. The priority of an interest will be determined solely by its time of creation. But once electronic conveyancing is implemented, it will no longer be possible to dispose of an interest by formal means other than by simultaneously registering or recording it. When that occurs, the time of creation will coincide with its registration or recording. The contract rule will become, de facto, a publicity rule.

e) A recorded interest conflicts with an unrecorded interest that arises informally, without express grant or reservation

The Canadian model makes no distinction between this and case (4) above. The English reforms apply the contract rule, which gives priority to the interest that came into existence first. Electronic conveyancing will not change the operation of the rule, for the requirement of simultaneous disposition and recording will not apply to interests created without express disposition, such as interests arising by prescription or by implied grant, under a constructive or resulting trust, or arising from the operation of estoppel. An interest that is exempt from the requirement will not be defeated by a subsequent recorded disposition. If the owner of the unrecorded interest is in actual occupation of the land, the interest will be

115 Joint Land Titles Committee, above n 3, at 36-37, and Part 5 of the Model Act. The Committee proposed, however, that interest recording should confer priority only upon an owner who had given value: ibid; s 4.5(2)(b)(i) of the Model Act.
118 Land Registration Act 2002, ss 29, 30; Joint Land Titles Committee, above n 3, at 15-17 and Model Act, s 4.5(2), 5.3(3)-(6).
119 Model Act, ibid, s 4.10; Land Registration Act 2002, s 36(1).
120 Joint Land Titles Committee, above n 3, at 15-17 and Model Act, s 4.5(2).
121 Land Registration Act 2002, s 28 provides that, with certain exceptions, the priority of an interest (whether registered or unregistered) affecting a registered estate or charge is not affected by a disposition of the interest or charge: see Lord Chancellor’s Dept, Explanatory Notes to Land Registration Act 2002 (London; HMSO, 2002) at para 69; LC 271 at para 5.5.
122 Explanatory Notes, ibid, paras 67-68; Land Registration Act 2002, s 93 authorises the making of rules prescribing dispositions to which the requirement of simultaneous registration will apply.
123 Ibid.
124 Land Registration Act 2002, s 28: see above, n 121.
125 Law Com No 254, above n 51, para 11.12. The particular categories of transactions will be specified by rules under s 93, and may be different to the examples given in the Report.
protected as an overriding interest. As such, it prevails over both registered and recorded interests.  

(f) Two unrecorded, unregistered interests conflict

The Canadian Model Act makes no provision for this situation, which is likely to be rare. Courts will probably apply the equitable priority rule, perhaps taking a firmer line against the earlier owner who fails to record. The English Act of 2002 applies an absolute contract rule, which could operate unfairly against the later interest. Rules made under s 93 will remedy this, by denying proprietary effect to unrecorded and unregistered dispositions, except those discussed below.

Protection for interests created without express disposition

A principal difference between the English and Torrens systems of land title registration is that the equitable interest of a person in actual occupation of land is enforceable against a subsequent registered owner as an overriding interest. In New Zealand, a purchaser takes free of the interest upon registration, irrespective of notice. This makes it imperative for the owner of the unregistered interest to protect it by lodging a caveat. The caveat buys the owner an opportunity to assert priority under equitable priority rules before the purchaser gains the privileged status of registration. The caveat facility can be considered 'active' protection because it requires the owner of the interest to take an affirmative step to protect the interest. The English system provides passive protection that requires no action on the part of the person in actual occupation.

The English Act of 2002 extends the passive protection, so that the unrecorded interest of the person in actual occupation is protected against recorded as well as registered interests. The Canadian Model Act has the opposite effect of increasing the vulnerability of unregistered interests. It provides for recorded as well as registered interests to take priority over unrecorded interests.

The argument for providing passive protection for interests is linked to the justification for recognising the interests. In many common law countries, courts have developed legal norms that allow them to re-allocate property rights upon the breakdown of intimate relationships where one partner has contributed, directly or indirectly, to assets held by the other in the expectation that the benefits would be shared. Even when intervening to redistribute entitlements between the partners, courts commonly use rhetoric to maintain the fiction that they are enforcing a pre-existing property right created by informal means. Rotherham argues that the courts' intervention to adjust property rights is justified, because parties to intimate relationships cannot reasonably be expected to bargain for a share of the assets, or to take action to safeguard their separate interests. Women in particular are likely to enter intimate relationships without planning for separation, and to make contributions of a kind that cannot be traced directly to the assets.

If recognition of the rights is based on a policy of preventing economic exploitation of partners who cannot be expected to maximise their own welfare in the relationship, it would be inconsistent to require them to protect their interest on the register. Entry of a caveat or caution during cohabitation might damage the spirit of co-operative sharing on which

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126 Land Registration Act 2002, sch 3, cl 2. The priority of an overriding interest is protected against both registered interests and interests protected by the entry of a notice: s 29(2)(a)(ii), 30(2)(a)(ii).

127 It was not until the decisions of the English Court of Appeal and House of Lords in Williams & Glyn's Bank Ltd v. Bowland [1981] AC 487 (HL), [1979] Ch 312 (CA) that Land Registration Act 1925, s 70(1)(g) was held to protect the equitable co-ownership interest of a person in occupation of land. This magnified the importance of the provision.

128 "The law pragmatically recognizes that some rights can be created informally, and to require their registration would defeat the sound policy that underlies their recognition." LC 254, above n 51, at para 5.61.


130 Ibid, at 198-229.

intimate relationships depend. This can be avoided by providing passive protection through the device of an overriding interest.

Against this must be weighed the danger that passive protection poses for purchasers. This issue has been controversial in England, although the Law Commission found little support among conveyancing practitioners for proposals to remove the overriding status of the interests of persons in occupation, or to deny legal effect to the rights unless registered. English conveyancing law and practice has evolved various mechanisms to limit the risk to purchasers.

While the policy arguments are too complex to be analysed here, it is worth briefly mentioning three additional matters that would need to be considered when evaluating the English approach to protection of occupiers' interests: first, to grant overriding status to a wide range of interests of occupiers weakens the recording system. It undermines the incentive to record them, as recording does not enhance their enforceability. The second matter is Roger Smith's argument that registration systems that do not accord paramount status to unregistered interests of occupiers can expect to experience higher levels of litigation under the fraud exception to indefeasibility. The third is that the courts may be more reluctant to adjust property rights between cohabitants if the interest awarded is enforceable against third parties as an overriding interest.

Implementation of interest recording in England

England faced two issues in implementing its scheme. The first was to ensure that all property rights could be either registered or recorded. The second was to ensure that all interests affecting the title were in fact registered or recorded promptly as soon as they were created, so that the register is a 'complete and accurate reflection of the state of the title to the land'.

Provision for registering or recording all interests

The Land Registration Act 2002 seeks to ensure that as many interests as possible are either registered or recorded, and that the number and types of overriding interests are reduced. First, the Act extends the category of registrable interests, to permit some additional rights to be registered. Secondly, the Act also clarifies the question of which interests are capable of being protected by interest recording. It is intended that any proprietary interest in land may be recorded, but the boundary is fuzzy between rights enforceable in rem and those enforceable only in personam. To resolve a current classification controversy, s 116 deems an equity by estoppel and a mere equity to be interests capable of binding successors in title.

Thirdly, the Act seeks to reduce the number of overriding interests by removing that status from some categories of interest, reducing the scope property rights on the breakdown of intimate relationships may be understood in the light of the Torrens provisions that deny passive enforcement of the interests against subsequent registered owners: Rotherham, above n 129, at 242, and Ch 10, comparing the approach of the English courts with their counterparts in the other jurisdictions.

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133 See Gray & Grav, above n 110, at 1007-1013. Smith cites Law Society estimates that enquiries as to occupiers in conveyancing transactions add, on average, only £4.50 per file: Smith, above n 82, at 122. Smith cites Law Society estimates that enquiries as to occupiers in conveyancing transactions add, on average, only £4.50 per file: Smith, above n 82, at 122. Smith cites Law Society estimates that enquiries as to occupiers in conveyancing transactions add, on average, only £4.50 per file: Smith, above n 82, at 122.


135 Rotherham suggests that the greater willingness of courts in New Zealand, Australia and Canada to depart from 'private ordering' of Rotherham suggests that the greater willingness of courts in New Zealand, Australia and Canada to depart from 'private ordering' of Rotherham suggests that the greater willingness of courts in New Zealand, Australia and Canada to depart from 'private ordering' of

136 LC 271, above n 4 at para 1.5.

137 For example, leases of between 7 years and 21 years in duration: s 4(c). Short leases were not registrable under the 1925 Act because of the burden of transactions that this would have placed on the Registry. For example, leases of between 7 years and 21 years in duration: s 4(c). Short leases were not registrable under the 1925 Act because of the burden of transactions that this would have placed on the Registry. For example, leases of between 7 years and 21 years in duration: s 4(c). Short leases were not registrable under the 1925 Act because of the burden of transactions that this would have placed on the Registry.

138 For example, obligations to repair the chancel of a church, rights acquired or being acquired by adverse possession: see LC 271, above n 4 at para 8.75. The Act also phrases in a new approach to adverse possession: see chapter by Les McRimmon in this book.
of others, and providing for interests to be recorded whenever their existence comes to the attention of the registry. Section 71 authorises the making of rules requiring a person applying for registration of a disposition to notify the registry of overriding interests. The Registrar is empowered to enter a notice in respect of the interest, which then ceases to be an overriding interest. Interest recording will make an important contribution to reducing the problem of overriding interests.

Eliminating the registration gap

The second practical issue is how to ensure that all interests affecting the title are registered or recorded promptly at or after their creation. The strongest incentive for recording is a rule that denies proprietary effect to a right until it is recorded or registered. This was Torrens' ideal, and has also been identified as a goal for the English system of land registration. It has long been assumed to be impractical, because of the time delay between the acquisition of an interest and its registration.

The Law Commission and HM Land Registry concluded that the introduction of electronic conveyancing will provide a solution to the registration gap, by enabling many interests to be registered contemporaneously with their creation. A shared data file will take the place of an instrument in writing, execution will be done by way of electronic signature, usually by a conveyancing professional as agent, electronic documents will be released rather than physically delivered at settlement, the release of funds at settlement will occur through electronic funds transfer, and registration will be effected contemporaneously with the settlement. To enable this to occur, electronic conveyancing will be conducted through a secure registry intranet, to which only authorised and trusted conveyancing practitioners and registry staff will have access. As in Stage 2 of New Zealand's Landonline e-dealing project, it is envisaged that conveyancers and solicitors will be able to alter the register if authorised under a network access agreement. The Commission and Registry say that the sharing of Registry functions is essential if registration is to become the sole means of passing an interest. The Registry proposes no change to the rule that all registered interests are guaranteed, and accepts that the Registry will remain liable for losses arising from errors made by conveyancers and solicitors in carrying out its functions. To guard against the losses the Registry proposes, first, that only persons with a 'proven record of conveyancing competence' will be authorised to register interests. Secondly, dispositions submitted for registration will be checked by intelligent software and will not be accepted until the errors have been corrected.

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139 Such as short leases and the interests of persons in actual occupation. ibid at paras 8.58, 8.14, 8.9, 8.50, 8.54.
140 Land Registration Act 2002, s 37(1)
141 Land Registration Act 2002, s 29(2), (3), 30(2), (3); LC 271, above n 4 at para 8.95
142 LC 271, above n 4 at para 12.76.
143 The Commission and Registry said that, given the time interval between the making of a disposition and its registration, '[i]t would be wholly unacceptable for the transfer or grant to have no legal effect in that interim period': ibid at para 1.7.

145 Ibid at paras 4.1.5, 8.6.
146 None of the Australian jurisdictions is currently proposing to allow this. Responsibility for alteration of the register will remain with the Registrar. Instruments will be lodged in electronic form and examined by the registrar: see generally, Cocks and Barry, above n 85, at 273.
147 Ibid at 287; LC 271, above n 4, at paras 13.36-37.
148 LC 271, ibid at para 13.41.
149 Ibid at para 13.44.
150 H M Land Registry, consultation paper, above n 144, at para 3.4, Annexure A, p 83. In its Partial Regulatory Impact Assessment, HM Land Registry outlines expected savings through reduction in errors in documentation and data transference, but gives no assessment of the
The goal of the conclusive register requires that all interests affecting the title be registered or recorded, even those of a transient or minor nature. Before the era of electronic conveyancing, title registries would have struggled to cope with the volume of work required to record all interests and to remove spent entries. Electronic conveyancing lifts the economic constraints by making it possible for solicitors and conveyancers to make and remove the entries themselves.

The English reports propose that, once electronic conveyancing is implemented, rules will be made rendering it impossible to create or pass any interest in land by formal means except by registering or recording it. Registrable interests will have to be registered in order to produce real effects. Even transient interests such as contracts for the sale of land will have to be recorded in order to be enforceable as property rights. Recording will cease to be an optional additional step that may be omitted to save cost.

The requirement that interests be registered or recorded before they are enforceable in rem is described by the Commission and Registry as "the single most important technical principle in the Bill." It also requires a significant normative shift, for it challenges the "widely-held perception that it is unreasonable to expect people to register their interests in land." This attitude contrasts with the civil law concept of property which emphasises social responsibilities, including the obligation to register one's interest.

Once recorded, the interests will be enforceable even against the holder of a subsequent registered interest. Simultaneous disposition and recording of formally-created interests, coupled with a clear publicity rule of priority, is expected to eliminate many, if not most, priority disputes.

E. CONCLUSION

It has long been a goal of both the Torrens and the English systems that the title register should provide a complete and accurate record of all information relevant to the state of the title. A conclusive land register would lower transaction costs by reducing the purchaser's search and enforcement costs. It would also improve security of title, by reducing the risk that conflicting interests may be created in ignorance of previous transactions. Making private rights public, and providing reliable information about them to the market as cheaply as possible, are the basic methods by which title registration systems pursue these objects.

In 1998, Coase predicted that the digital revolution could be expected dramatically to reduce information costs, which he identified as a major component of transaction costs. The goal of the complete register has been imperfectly achieved, due in large part to the limitations imposed by our information processing capabilities. We are now on the threshold of an era of electronic conveyancing and the integration of title registry data with other land information databases. England has already legislated to implement a new vision of how the complete register may be achieved, by harnessing the potential of electronic conveyancing to introduce a system of interest recording within the title registration system.

Law reform bodies in England and Canada have independently arrived at a similar conclusion. What is needed to improve the negative operation of the conclusive register are parallel systems of title registration and interest

151 LC 271, above n 4, at para 13.53.
152 Ibid para 1.9; LC 254, above n 51, at para 1.14.
153 Raff, above n 5, at 151, 163, 429. In Germany, the German Civil Code, the BGB, enforces the obligation to register on pain of total loss of the interest: ibid at 429.
154 LC 271, above n 4, at para 13.77; See also the view of the Victorian Law Reform Commission that "[i]f interests were brought onto the register as soon as they were created, most priority disputes would be eliminated": VLRC, Report No 22, above n 100, at para 9.
recording for the same registered parcels. Both systems would use a publicity rule, ensuring that interests take priority according to their chronological order of registration or recording. Off-record notice would be irrelevant. This would enable the title registration system as a whole to operate as a race system. This will end the inconsistency in applying a race system to registered interests while allowing the English caution and the Torrens caveat to function as a notice system for unregistered interests. A unified race system would promote the strategy of publicity by making registration or recording necessary for enforcement against third parties.

Proposals for interest recording are not new but have gained impetus from projects to enhance the information processing capabilities of title registries. Prior to electronic registration, it was too costly to record all interests, particularly those of a minor or transient nature. Electronic conveyancing could substantially reduce the costs and delays of registry transactions, enabling the registry to handle the volume of entries required to register or record every interest simultaneously with its disposition. Creative use of this potential might see significant progress towards achieving the ideal of the conclusive register.

8 TITLE INSURANCE AND THE TORRENS SYSTEM

Problems in the operation of the Torrens indemnity scheme have received more attention from law reform bodies in Australia in the past decade than any other aspect of the Torrens System of land title registration. While some progress has been made in relaxing procedural obstacles to the payment of compensation, governments have shown little inclination to extend the risk cover of the Torrens indemnity schemes. On the contrary, several jurisdictions have legislated to exclude or restrict the right to indemnity, effectively shifting certain risks to claimants, their agents and solicitors.

In 1989 the New South Wales and Victorian Law Reform Commissions issued a joint discussion paper and an issues paper for a review of 'the extent of the State guarantee of Torrens titles and the manner in which it is provided'. The issues paper indicated that the two Commissions proposed jointly to consider, inter alia, 'whether private title insurance could be substituted for the existing State guarantee of Torrens titles', and also whether it could complement the existing statutory Torrens indemnity schemes. Public submissions were invited on these and other matters. The Victorian Commission was disbanded before it could complete its reference. The New South Wales Commission continued alone and delivered its final report in 1996.

In the end, the contribution that private insurance could make to the operation of the Torrens System received scant consideration from the Commission, which recommended instead that the State's statutory scheme should be remodelled with a greater focus on insurance principles. The Commission's dismissal of a role for private insurance is not surprising. There was at the time no

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2 NSWLRC IP 6, NSWLRC DP 19 and LRCV DP 10, above n 1.

3 NSWLRC IP 6, above n 1, para 2.15.

4 Ibid para 2.20.

5 NSWLRC, Report No 76, above n 1, Recommendation 1 and para 5.1.
private title insurer in Australia to put submissions for the industry, and no standard title insurance product on the Australian market for the Commission to cost and evaluate.  

An important development occurred too late to be considered by the Commission. Shortly after the Commission delivered its report, the largest of the international title insurers, the First American Title Insurance Company ("First American") established an Australian subsidiary that was licensed as a general insurer in late 1996, trading under the name First American Title Insurance Company of Australia Pty Ltd ("First Title") and commenced offering title insurance in Australia in 1998.  

As in the US and other countries, title insurance policies are of two kinds: lender’s policies and owner’s (including purchaser’s) policies. Lender’s policies insure the security interest that the title is other than as stated in the policy document. First Title commenced operations by offering a lender’s policy for residential properties, and proposes to launch an owner’s policy in late 2002.  

It also proposes to extend its policies to commercial properties. Based on the experience of Canada and England, it is likely that its overseas competitors will be quick to follow the international market leader’s expansion into the Australian and New Zealand markets.  

Given that a title insurer is now operating in Australia and New Zealand, it is timely to reconsider how private title insurance may affect the Torrens System. Will it contribute to achieving the twin objects of the Torrens System: to provide security of title, and to facilitate transactions by making them quick, cheap and safe? Along with the opportunities we must also consider possible threats:  

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6 Arrunada says that in countries where title insurers do not have a business office, insurance is available on a transaction by transaction basis. Where they establish direct operations, they offer standard policies tailored to the local market: Benito Arrunada ‘A Transaction-Cost View of Title Insurance and its Role in Different Legal Systems’ (2002) 27 The Geneva Papers on Risk and Insurance 582, 590.  


8 Ibid. The company launched its owners’ policy in New Zealand in September, 2002.  

9 Ibid.  


11 As to these objects, see J E Hogg, Registration of Title to Land Throughout the Empire (Sydney, Law Book Co, 1920) 100 and fn 32 (citing numerous case authorities); Thomas Mapp, Torrens’ Elusive Title: Basic Principles of an Efficient Torrens System (Edmonton, Alberta Law Reform Institute, 1978), 59-60; Victor Di Castri, Registration of Title to Land (loose-leaf, orig. 1987, Carswell, Canada), Vol 1, [756].  

will the establishment of a private title insurance industry or the marketing of its products harm our State-administered system of registration of title, or the quality of our conveyancing services?  

This chapter commences by explaining the nature and origins of title insurance. It then examines the potential for title insurance to cover the residual risks of the Torrens System, focussing on four problem areas: first, the lack of security and indemnity for purchasers of interests in registered land in the pre-registration period; secondly, the lack of security and indemnity for losses resulting from the existence of overriding interests not shown on the register; thirdly, fault-based exclusion or redefinition of indemnity in some jurisdictions; and fourthly, the costs and procedural hurdles in accessing indemnity payments from the Torrens assurance funds. The chapter concludes with an assessment of possible impacts of the title insurance industry on the administration of the Torrens System.  

A. WHAT IS TITLE INSURANCE?  

Title insurance originated in the United States, as a market response to the uncertainties inherent in a conveyancing system based on registration of deeds rather than titles. The provision of an insurance policy, often paid for by the vendor or borrower, emerged as a means of assuring title to the purchaser or lender. In the US, where title insurance is purchased in 85% of residential purchase and sale transactions, 12 insurers also investigate titles, produce title reports and settle real estate transactions. The vertical integration of title assurance services enables them to adopt a strategy of risk avoidance, clearing existing title defects and preventing new risks arising from errors in the immediate transaction.  

Title insurance also includes an element of casualty insurance for residual risks that cannot be prevented or are uneconomic to eliminate.  

In recent decades, title insurers have adapted their product and found new markets in insuring registered titles. Several US title insurers entered the English market in the mid 1970s, initially meeting with limited success. Their market was boosted by the expansion of mortgage refinancing transactions in the 1980s, as they found ways to interest mortgage lenders. Several of the larger US title insurers are building markets in Canada and England, writing policies in respect of both  

12 Arrunada, above n 6, 583  
13 Ibid 6-7.  
14 Ibid 7. Casualty insurance means that the insurer assumes the risk and charges a premium based on actuarial calculation of the risk.  
16 Ibid.
registered and unregistered land, while the leading English title insurer, London & European, has expanded its operations into France (which has a deeds registry system) and Spain (which registers titles). 17

Since there is at present only one title insurer operating in Australia, the following discussion of the nature of title insurance is based on First Title’s Home Ownership Protection Policy 0601 of 2001 (‘the owner’s policy’) and Residential Loan Protection Policy RLPP 0300 of 2000 (‘the lender’s policy’), copies of which have been provided to the author by Mr Ron Zucker, First American’s Vice President, Underwriting, Asia-Pacific Region. 18 It is anticipated that other title insurers entering the local market will offer similar policy terms, since the US market has seen a degree of similarity in the risks covered by most policies. 19 If this assumption proves false, my analysis of First Title’s policies will at least provide a point of reference for comparing the policies offered by other title insurers.

The Evolution of Title Insurance

Title insurance originated as a contract of indemnity that covers the insured person against loss or damage arising out of existing title defects or encumbrances other than those specifically excepted. 20 This conventional understanding of title insurance is no longer adequate, as the nature of the product has broadened in recent years. The direction of its evolution has made it more attractive to persons dealing in Torrens System titles.

The first change is that indemnity now commonly extends beyond losses due to title defects and encumbrances, insuring against risks that affect the insured’s use and enjoyment of the land. 21 For example, the owner’s policy covers the following risks: that the insured lacks a legal right of access to and from the land, 22 that the insured is required to remove an illegally-constructed or encroaching building (other than a boundary wall or fence), and that the insured’s use of the land as a home is prevented or impaired because it contravenes a zoning law or a grant, exception or reservation recorded on the title. 23 These risks are unlikely to attract compensation under the Torrens statutes.

The second extension to the nature of title insurance is that the indemnity is no longer confined to losses arising from defects, encumbrances and other risks in existence at the policy date (ie, the date of settlement of the contract). Traditionally, title insurers covered only pre-acquisition risks arising from events that occurred before the policy date. 24 The risk of losses arising after settlement could be covered only by special endorsement. The extension of indemnity to post-acquisition risks is a recent development in title insurance. It was pioneered by First American in the USA in 1997, and quickly adopted by other title insurers. 25 Since title insurers cannot prevent risks arising after the policy date, insurance for these risks is provided on a casualty basis. 26

The extension of the indemnity to cover post-acquisition risks makes title insurance more attractive to holders of Torrens titles, since judicial acceptance of the principle of immediate indefeasibility 27 has reduced their security in the period following registration. Under the previous rule of deferred indefeasibility, registered owners deprived of their interest by the registration of a forged or otherwise void instrument were entitled to be restored to the register. This right was subject only to the rights of any third party who had acquired a subsequent interest in reliance on the unrectified register and had registered the interest without fraud. 28 The doctrinal shift improves the security of purchasers, while increasing the risks that owners may be deprived of their titles after registration through the wrongful act of another. 29 In effect, it shifts risks from the pre-acquisition to the post-acquisition stage.

What does the insurer agree to do?

The owner’s policy insures against actual loss resulting from the covered risks for up to 200% of the purchase price of the land (to allow for capital appreciation during the period of ownership). 30

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17 Arauñada, above n 6, 593.
18 On file with the author.
19 Morgan, above n 15, 170.
20 Ibid, 169.
21 Admittedly, this is a rare problem in Australia due to legislation regulating the registration of plans of subdivision. Zucker cites Batey v Gifford (1998) ANZ ConvR 330 as an example of such a problem resulting in litigation; Zucker, above n 7, 14.
22 Home Ownership Protection Policy 0601 of 2001, clause 1.5(k), (n), (r), (l).
24 Rieger, ibid.
25 Arauñada, above n 6, 583-86.
26 In Breskvar v Wall (1971) 126 CLR 376, the High Court of Australia followed the Privy Council in Fraser v Walker [1967] 1 AC 569, adopting the principle that a person who takes and registers a forged instrument without being party to fraud gains an immediately indefeasible title upon registration.
27 Gibbs v Messer [1891] AC 248; Clements v Ellis (1934) 51 CLR 217.
29 Home Ownership Protection Policy 0601, cl 1.4.
The lender's policy indemnifies the lender against actual loss up to 125% of the principal sum secured under the insured mortgage. In addition, under both policies the insurer undertakes to cover the costs, legal fees and expenses it incurs in defending the insured's title. The costs incurred by the insurer in defending the insured's title do not reduce the amount of the indemnity for loss payable under the policy.

The insurer in effect guarantees that the insured's title is as stated in the policy, and undertakes to defend that title against adverse claims based on an insured risk. Although the contract is one of indemnity, the insurer may at its discretion settle a claim by clearing an encumbrance or defect from the title, and restore the insured's title to that stated in the policy. Zucker says that his company generally attempts to rectify title problems. If it cannot do so, it compensates the insured.

What will it cost?

Unlike most other forms of insurance, the premium is a once-off payment made on purchase of the policy. The policy continues to provide cover so long as the insured can suffer loss. Insured owners are covered so long as they own or retain an interest in the land or are liable under any title warranties they give to a purchaser. While the owner's policy is not assignable, the lender's policy benefits the lender and certain assignees until the loan is fully repaid.

First Title is proposing to set a premium in the order of AU$200 for most owner's policies offered to homeowners in Australia, and NZ$200 for a similar policy in New Zealand. An increment to this flat rate will be payable for properties above a certain threshold value, set well above the value of the average home. Most lender's policies for residential properties will cost a single premium of AU$100 in Australia, or SNZ$100 in New Zealand, and a discount may be available if an owner's and a lender's policy are purchased at the same time. The rate for the lender's policy includes the cost of processing the mortgage, while the owner's premium is for risk cover only. It remains to be seen whether these premium rates, which are considerably lower than in the US, are sustainable in the longer term.

A purchaser will be able to take out a cover note before entering into a contract of purchase, but is required by the policy to disclose to the insurer any risks actually known to him or her as at the policy date (defined as the date of settlement). Special endorsements to insure against known risks (such as easements and encroachments that may affect the marketability of the land on resale, mortgage or leasing) may be negotiated for an adjusted premium. This is known as 'defective title' insurance.

How will title insurers market their policies?

Overseas experience suggests that lenders will embrace title insurance more readily than owners. In jurisdictions like Western Canada and England, where titles to most residential properties are registered, the principal market for title insurers has been lenders' policies purchased in connection with mortgage refinancing. These are secondary financing transactions where the mortgage is not taken to finance the purchase of the land, but for other purposes such as debt consolidation, business financing or renovations.

Owner's policies are much more difficult to market under title registration systems. In the US, where an owner's policy is the nearest a purchaser can get to a guaranteed title, the benefits are
profession in Ontario responded by extending its professional indemnity scheme to cover some risks covered by title insurance policies.\(^47\)

First Title appears to have learned the lessons of its sister company's acrimonious debut in Canada,\(^48\) adopting a strategy that is less likely to bring it into conflict with the legal profession in Australia and New Zealand. Instead of offering conveyancing services in competition with them, it will market its policies to lawyers and lending institutions. To relieve the concerns of lawyers that it will enforce their professional liability to the insured, the company is offering to provide a written waiver of its subrogated rights to sue them for losses arising from their errors and omissions made in good faith.\(^49\) The company's marketing strategy will seek to persuade lawyers that purchasing title insurance for their clients will serve both their interests and their clients' interests. Lawyers will be able to shift to the insurer some of the risks presently borne by them and their professional indemnity insurers.\(^50\) Their clients will benefit by obtaining protection against a range of risks, and in some cases by a lowering of transaction costs.\(^51\)

**Risk assumption as a strategy for lowering transaction costs**

Title insurers know that it is not the additional risk cover per se that will induce purchasers and lenders to buy title insurance, since the risk of losses not covered by the Torrens guarantee is small. First Title's marketing emphasizes the saving in transaction costs made possible by the ability to transfer risks to the insurer. As an example, Zucker points out that in Canada, title insurers made considerable progress in the mortgage market when they agreed to accept the risk of lenders not obtaining updated identification reports. For a $200 premium, lenders could save up to $800 in survey costs.\(^52\)

Cost saving through risk transfer will also figure prominently in the company's strategy for marketing lender's policies in Australia and New Zealand. According to Zucker:

> A lender under one of our insured mortgage programs does not require a borrower to undertake any searches or enquiries in relation to either a purchase or a refinancing transaction. We accept the risk that if done, the result of those searches may be adverse and cause loss ... either because of the existence of statutory liens or because of affectations or proposals which are discovered when the power of sale is exercised.\(^53\)

The owner's policy does not require any searches to be made other than a Land Registry search.\(^54\) A conveyancing solicitor whose client is insured and who has received a written waiver from the insurer may decide to omit some searches and enquiries that prudence would otherwise require, so long as the client is willing to accept monetary indemnity as a substitute for a clear title.

The insurers' strategy of risk assumption could result in increased claims upon the Torrens indemnity fund, by reducing standards of due diligence in conveyancing. If changed conveyancing practices induced by title insurance adversely impact upon the fund, it is likely that governments will propose measures to shift the risks back to the insurers. Legislatures will bar title insurers from exercising the subrogated rights of the insured to claim from the fund,\(^55\) and exclude claims on the fund by privately insured persons for losses covered by their policies. Provided that insurers are made to bear the added risk that they have agreed to accept, any reduction in search costs made possible by title insurance will promote the 'ease of transaction' object of the Torrens System.

Apart from the direct effect of title insurance in reducing transaction costs, competition from title insurers may prompt lawyers to adopt more efficient conveyancing practices, as shown by recent developments in Canada. In the Prairie Provinces, the Torrens statutes do not reserve the priority of a mortgage that has been lodged and subsequently withdrawn for amendment following requisitions

\(^{44}\) Derek Lundy, 'Ont. lawyers provide warm welcome to TitlePlus system' 17: 29 The Lawyers Weekly Butterworths Canada, December 5, 1997; Arruñada, above n 6, 592.

\(^{45}\) In Canada, a subsidiary of First American trades under the name 'First Canadian'.

\(^{46}\) Ron Zucker expressed this as follows: 'Frankly, I don't see how I can convince a lawyer to use our policy if we simply replace the client as a potential litigant. If the lawyer acts honestly and in accordance with the procedures we provide, we will waive subrogated rights even if there has been negligence': R Zucker, personal communication to the author, 24 August 2002.

\(^{47}\) Zucker, above n 7, 4.

\(^{48}\) Whether the reduction in transaction costs is passed on to the clients of lawyers depends on the competitive state of the local market for conveyancing services.

\(^{49}\) Zucker, above n 7, 11-12; see previous footnote.

\(^{50}\) Zucker, ibid 11.

\(^{51}\) Ownership Protection Policy O601, cl 2.3(a) excludes claims for losses resulting from covenants, easements, restrictions and rights of way that are recorded or otherwise noted on the title as at the Policy Date.

\(^{52}\) NSW has a legislative precedent for this. The Real Property Act 1990, (NSW) s 133(1) bars professional indemnity insurers from exercising subrogated rights to claim upon the fund.
from the registrar.\textsuperscript{55} In the meantime, another dealing could be lodged and take priority over the mortgage. Because of this risk, lenders would not release the loan funds until the mortgage was actually registered. Purchasers had to arrange bridging finance for the registration gap, adding significantly to their costs.\textsuperscript{56}

Faced with competition from title insurers who were willing to accept the lender’s risk, the law societies of Alberta, Saskatchewan, Manitoba and British Columbia launched the Western Law Societies Conveyancing Protocol in February, 2001. The protocol enables lawyers acting for lenders to disburse the loan funds once the lawyer provides a short-form opinion on the title. The lawyers’ professional indemnity insurer then assumes the risk of any losses. This cover enables lenders to release funds at settlement, avoiding the need for bridging finance.\textsuperscript{55} It is doubtful that this saving is transaction costs would have occurred without the competitive challenge posed by title insurers.

\section*{B. DEFICIENCIES IN THE LEGAL SECURITY OF TORRENS TITLES}

The Torrens System promises legal security to registered owners, and economic security to those whose property rights are suppressed by the system’s rules. Legal security means the enforceability of an interest as a right \textit{per se}, against others, and economic security means that the holder of an interest as a right would be compensated for the loss of his or her property right pursuant to this rule. All Australasian Torrens statutes provide for an indemnity scheme or assurance fund,\textsuperscript{57} administered by the registrar\textsuperscript{58} or other government official, and funded through contributions levied on registry transactions. Legal security and economic security are the complementary elements of the State guarantee of registered title, in theory providing comprehensive security for owners and purchasers. ‘Under the Torrens system, a man is to have either his interest in the land or adequate monetary compensation therefor.’\textsuperscript{59} In reality, there are gaps in the coverage provided by the State guarantee. The gaps, and the extent to which title insurance can remedy them, are discussed below.

\subsection*{Vulnerability of interests in the registration gap}

The Torrens System does not guarantee the validity or the priority of interests in registered land until they are registered, nor does it compensate their owners for their loss.\textsuperscript{60} At most the statutes provide an indemnity for unregistered interest holders who suffer loss as a result of certain registry errors, such as an error or omission in a search certificate or omission to register a caveat. The statutes also provide, through the caveat facility, a means by which owners of unregistered interests can get early warning of an application to register an adverse interest and dispute its priority. The lodgment or omission of a caveat is not \textit{per se} determinative of priority between unregistered

\begin{itemize}
  \item Ibid.
  \item Ibid.
  \item Arruñada, above n 6, 596.
  \item In Queensland and the Northern Territory, this is expressed in the legislation: \textit{Land Titles Act 1984} (Qld) s 180; \textit{Land Title Act (NT)} s 183. In Western Australia and New South Wales the rule is of judicial origin: Conlan \textit{v Registrar of Titles} (2001) 24 WAR 299; Bogdanovitch \textit{v Koteff} (1988) 12 NSWLR 472. However since 2000, gratuitous transferees in NSW are no longer protected against proceedings for recovery or possession of land if their grantor was registered through fraud: \textit{Real Property Act 1990} (NSW), s 115(1)(d).
  \item The latter proposition is true only in jurisdictions where the judiciary have accepted the principle of immediate indefeasibility, explained above in text accompanying note 26.
  \item The scheme is often called the ‘Assurance Fund’, even in jurisdictions where the separate fund has been transferred to Consolidated Revenue and claims are paid thereout. In insurance parlance, ‘assurance’ strictly refers to cover against events that are certain to occur at some unknown time (eg the death of a person), while ‘insurance’ referred to cover against eventualities that may never occur. However the two terms are often used interchangeably: J L Hanlon, \textit{A Dictionary of Economics and Commerce} 5th ed ed., (Macdonald & Evans, Plymouth, 1977).
  \item Since the nomenclature of the land titles registry and the official in charge varies from one jurisdiction to another, the terms ‘registry’ and ‘registrar’ are used by the author in a generic sense.
  \item Douglas J Whalan, \textit{The Torrens system in Australia} (Law Book Co., Sydney, 1982), 346.
  \item NSW LRC, DP 19 and LRCV, DP 16, above n 1, para 38; NSW LRC, IP 6, above n 1, para 6. The Victorian statute recognises that a compensable loss or deprivation may occur through a payment or consideration given to another person on the faith of a recording in the Register: \textit{Transfer of Land Act 1958} s 110(1)(d).
\end{itemize}
interests, although an interest protected by caveat is generally assured of retaining its first-in-time priority over a later interest.

The inadequate protection for purchasers in the ‘registration gap’ between acquisition of an interest and registration is one of the major problems facing the Torrens system. During this hiatus, the general law rules of priority apply, and can lead to the loss or postponement of a purchaser’s interest. The rules are uncertain in their application, and this encourages litigation. Australia has a high incidence of priority disputes between holders of unregistered interests in registered land, compared to England where such cases are rarely reported.

The incidence of priority disputes could be reduced if conveyancers might be persuaded to make more use of caveats to protect interests before registration, and to take advantage of the provisions that allow purchasers and lenders to reserve the priority of their interests for a specified period before settlement.

In recent years more radical proposals have been advanced for the introduction of a ‘race’ system that confers priority on unregistered interests according to their date order of entry in the register. In

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64 Whether this is on the basis that the later acquirer has ‘notice’: Moffett v Dillon [1999] 2 VR 480 (Brooking JA, Buchanan JA concurring), or because the lodgement of a caveat neutralises any ‘postponing conduct’ on the part of the first-in-time owner: Adrian Bradbrook, Susan McCallum & Anthony Moore, Australian Real Property Law (3rd ed, Lawbook Co, Sydney, 2002) [4.104]-[4.112].

65 Ibid [4.113]. The general law rules are modified in New South Wales by Real Property Act 1990, s 43A.


67 England and Wales have perhaps a dozen judicial decisions adjudicating priority disputes between unregistered interests under the Land Registration Act 1925, although over 80% of all land parcels are registered: see generally, Kevin Gray and Susan Francis Gray, Elements of Land Law (3rd ed, Butterworths, London, 2001), paras 9.29-9.30.

68 Lodgement statistics provided to the author by Land Registry Victoria on 17 September, 2002 indicate that the ratio of lodged caveats to transfers in 2001-02 was less than 1 to 9. Allowing for the fact that not all caveats are lodged in respect of transfers, the figures indicate very low usage of caveats to protect purchasers’ interests pre-registration in that State: details on file with the author.

69 For a discussion of the provisions (variously called settlement notices (Qld), priority notices (Tas), stay orders (Vic and WA), and the reasons for their limited use, see Bradbrook, McCallum & Moore, above n 64, [4.116].

70 In 1990 Canada’s Joint Land Titles Committee published its Model Land Recording and Land Registration Act, a central feature of which was its proposal to replace the caveat with a system of interest recording. The Committee proposed that the recording of unregistered interests would not guarantee their existence or efficacy but would, in the absence of fraud, ensure their priority over unrecorded or later recorded interests. The Law Commission for England and Wales has proposed a similar system, under which the priority of unregistered interests would be determined by the date of entry of a ‘notice’ in the register, and the general law rules of priority would no longer apply. The Commission’s proposals have been enacted in Part 3 of the Land Registration Act 2002, which is expected to commence operation during 2003.

71 If combined with a ‘race’ system that awards priority by date order of entry in the register, this system could virtually eliminate priority disputes, at least so far as formally created interests are concerned. What might emerge is a two-tier interest registration and interest recording system,
similar to that proposed by Canada’s Joint Land Titles Committee. Certain classes of interests, such as
legal fee simple and major leasehold estates, would be registered with a full State guarantee, as at
present. Lesser interests, including many that are presently unregistrable, would obtain priority
upon being recorded in the register, but would not attract a State guarantee. This is because it is
uneconomic for registries to examine and assume the risk of interests that are of short duration or
are variable in their incidents. Interests that are recorded without guarantee would enjoy priority
only for what they are worth under the general law of property. The owners of recorded interests
would still bear the risk that their interest might prove to be void, unenforceable or not effective
according to its terms.

Pending these reforms, can title insurance improve the economic security of purchasers and lenders
in the pre-registration period? The owner’s policy provides cover for the following title risks
occurring before registration:

- Someone lodges a dealing after settlement which prevents your interest in the land
  from being registered.
- Someone else owns an interest in the Land or has an easement or right of way that
  affects title to the Land.
- Other persons have rights to the Land arising out of a lease, contract, option, right of
  possession or access order.
- Fraud, forgery, duress, incompetency or incapacity results in a defect in the title to the
  Land.
- Any other defect exists which affects the title to the Land.

The cover is subject to general exclusions for risks that are disclosed in the contract or purchase or
are actually known to the insured, but not to the insurer, on the date of settlement of the purchase,
unless they appear in public records. The date of settlement is the relevant date for determining
whether the categories of registrable instruments should be extended: LC 254, above n 72, paras 3.7-3.76.

Overriding interests

Once the purchaser attains registration, the indefeasibility of their title is subject to a number of
exceptions to indefeasibility, also known as overriding interests. These may be specified in the
Torrens statutes or under other statutes that modify the operation of the indefeasibility provisions.
Overriding interests are enforceable against the registered owner as rights in rem without any
requirement that they be recorded on title. It has long been recognised that the existence of the
category of overriding interests derogates seriously from the ‘mirror principle’, which holds that
purchasers should be able to rely on the register as an accurate and complete record of all matters
affecting the title. Despite this concern, the categories of overriding interests have been
maintained, for what governments deem to be sufficient policy reasons.
Title insurance can improve economic security for purchasers, lenders and owners if it provides indemnity for loss suffered through 'an error, omission or misdescription in the register'.

Courts have not always been willing to take a liberal approach to the interpretation of the provision. In *Trieste Investments v Watson*, a majority of the New South Wales Court of Appeal held that the loss suffered by the plaintiff due to an unrecorded resumption order was not due to an 'error, omission or misdescription', since the Registrar was under no duty to note the resumption on title. On this reasoning, there would be no entitlement to indemnity for loss arising from an unrecorded legal interest, for its absence from the register can be said both to be an 'omission' and to cause the register to 'misdescribe' the state of the title. On this view, the absence of an overriding interest from the register is a loss for which a statutory indemnity is payable.

Title insurance can improve economic security for purchasers, lenders and owners if it provides cover against the risk of losses caused by overriding interests not discovered by the insured before settlement. This is not an area where title insurers have performed well overseas. Arrunada says that in the US, standard policies exclude the claims of persons in unrecorded possession, defects that would have been discovered by accurate survey and unrecorded easements.

It is therefore surprising that provisions in the lender's and owner's policies appear to cover a number of the risks posed by exceptions to indefeasibility. The exceptions, and the extent of the cover available, are outlined below.

(a) Unregistered easements, rights of way and tenancies

All the statutes give overriding status to particular unregistered easements, and to certain unregistered leases or tenancies. The exception for tenancies appears to be based on the view that it is unreasonable to expect tenants of short duration to be registered, and that tenants' claims are sufficiently advertised by their possession. One problem with this exception is that the protection for the tenant's interest may extend to incidental interests that are not reasonably discoverable. In *Downie v Lockwood*, the tenant's overriding interest was held to extend to equity to rectify the lease, an interest that was not discoverable by inspecting the property or reading the lease.

While the terms of the exception for easements vary from one jurisdiction to another, Sackville & Neave summarise the position as follows:

> The end result is that in all states a bona fide purchaser of Torrens system land is exposed to the risk of being bound by interests the existence of which cannot be ascertained from the register or, in some cases, from any other source at the time of the purchase.

The owner's policy insures the owner against the risk that 'someone else owns an interest in the land or has an easement or right of way that affects the title to the Land'. It also covers the risk that 'other persons have rights to the Land arising out of a lease, contract, option, right of

unrecorded legal interests enforceable in rem'.

All the statutes provide for an indemnity for loss suffered through 'an error, omission or misdescription in the register'.

Overriding interest, for the registrar is under no general duty to record them on title. The New South Wales Law Reform Commission agreed with this limitation, recommending that statutory interests not be provided in respect of these interests generally.'
possession or access order'.\(^{97}\) These provisions cover purchasers for losses arising from unregistered easements, rights of way and tenancies that existed prior to registration, provided that their existence was not actually known to the Insured at the date of settlement or disclosed in the contract for the purchase of the land.\(^{98}\)

Lenders only suffer loss by reason of such interests if their existence renders the property unmarketable, or diminishes its value so that the lender recovers on sale an amount less than the sum secured. Accordingly, the lender’s policy covers the risks that the title to the Land is ‘unmarketable’, or that ‘the use of the Land for residential purposes is adversely affected or impaired because it contravenes . . . any easement, right of way, covenant, restriction, lease, grant, exception or reservation affecting the title to the Land’.\(^ {99}\) Lenders are also covered against loss if ‘improvements on the Land . . . interfere with, encroach on or contravene the terms of an easement or right of way affecting the title to the Land’.\(^ {100}\)

(b) Adverse possession

In several jurisdictions, the registered owner’s title is subject to the rights of a person in adverse possession of the land.\(^ {101}\) This creates the risk that a purchaser or lender may take an interest from a registered owner whose title has been extinguished by adverse possession under the Limitation Act or who, in Tasmania, holds on trust for the adverse possessor.\(^ {102}\)

Title insurance is available to cover this risk. The lender’s policy insures the lender against the risk that it has taken its charge from someone other than the true owner of the land.\(^ {103}\) The owner’s policy contains a corresponding provision covering the owner against the risk that the owner of the estate or interest in the land is other than the Insured named in the policy.\(^ {104}\) Claims by owners will often be excluded by their actual knowledge of the fact that a person is in adverse possession.

\(^{97}\) Ibid, cl 1.5(b).

\(^{98}\) Ibid, cl 2.2(b)(c).

\(^{99}\) Residential Loan Protection Policy RLPP 0300 cl 2.3(a), (c).

\(^{100}\) Ibid, cl 2.4(b).

\(^{101}\) Transfer of Land Act 1958 (Vic), s 42(2)(b); Transfer of Land Act 1893 (WA), s 63; Land Titles Act 1980 (Tas), s 40(3)(b); Land Title Act 1994 (Qld), s 185(1)(d); see generally, Sackville & Neave, above n 94, [6.3.164]; Bradbrook, McCallum & Moore, above n 64, [16.85]-[16.88].

\(^{102}\) Land Titles Act 1980 (Tas), s138T-ZA; discussed in Bradbrook, McCallum & Moore, ibid [16.86].

\(^{103}\) Residential Loan Protection Policy RLPP 0300 cl 2.1(a).

\(^{104}\) Home Ownership Protection Policy 0601, cl 1.5(a).

Although the policy does not require the insured to make any enquiries or inspections to find out who is in occupation of the land.

Many adverse possession claims arise from boundary encroachments by neighbours. The lender’s policy includes broad coverage against ‘an adverse circumstance relating to the boundaries of or improvements to the Land that would have been disclosed by an accurate identification survey’.\(^ {105}\)

The Company’s commentary states that this could include unlawful occupation of a section of the land by a neighbour or the misplacing of a fence.\(^ {106}\) No similarly wide coverage is provided in the owner’s policy. In cases where a neighbour’s structure (other than boundary walls or fences) encroaches onto the insured’s land, the owner’s policy covers the insured in the event that another person refuses on account of the encroachment to complete a contract to purchase the land, to grant a mortgage or to comply with their obligations under the lease. Cover is excluded if the insured had actual knowledge of the encroachment at the date of settlement.\(^ {107}\)

(c) Rates, taxes and statutory encumbrances created by overriding legislation

Unpaid rates and taxes are express exceptions to indefeasibility in the Torrens statutes of Victoria, the Australian Capital Territory and Western Australia,\(^ {108}\) but elsewhere their overriding status depends on the terms of other statutes.\(^ {109}\) Exceptions to indefeasibility created by other statutes that override the Torrens statutes have been called ‘perhaps the greatest single threat to public confidence in the Torrens system’,\(^ {110}\) because they may be practically undiscoverable by a purchaser, and the resulting loss may attract no right to an indemnity.\(^ {111}\)

Insured lenders are indemnified under the lender’s policy for loss caused when an encumbrance, charge or lien takes priority over the insured mortgage.\(^ {112}\) This would include a prior statutory encumbrance to secure rates, taxes and charges, if it prevents the lender from recovering on sale the full amount secured.

\(^{105}\) Residential Loan Protection Policy RLPP 0300, cl 2.4(d).

\(^{106}\) The Residential Loan Protection Policy Commentary and Explanatory Information, 2.4(d).

\(^{107}\) Ibid, cl 2.2(c). In this event, cover might still be available by way of special endorsement.

\(^{108}\) Transfer of Land Act 1958 (Vic) s 42(2)(f); Land Titles Act 1925 (ACT) s 58(1)(f); Transfer of Land Act 1893 (WA) s 68.

\(^{109}\) Bradbrook, McCallum & Moore, above n 64, [4.61].

\(^{110}\) Butt, above n 83, 759, Whalan, above n 61, 338; Bradbrook, McCallum & Moore, ibid [4.65].

\(^{111}\) Trieste Investments v Watson (1963) 64 SR (NSW) 98, 107; Bradbrook, McCallum & Moore, ibid [4.67].

\(^{112}\) Residential Loan Protection Policy RLPP 0300 cl 2.2(a).
The owner's policy insures against 'an encumbrance, writ, charge or lien on the title to the Land because of a mortgage, judgment, unpaid rates, taxes or sums due to local or public authorities'. 113 Coven is provided only for encumbrances existing at the date of registration that were neither mentioned in the contract nor actually known to the Insured at the date of settlement. 114

**C. DEFICIENCIES IN THE ECONOMIC SECURITY OF TORRENS TITLES**

**Purpose of the Torrens indemnity scheme**

An indemnity scheme, in the form of a statutory scheme of social insurance 115 administered by the registrar, is an original feature of most, but not all, systems of land title registration. 116 This is a departure from the general law of unregistered conveyancing, which concerned itself only with questions of legal security. The New South Wales and Victorian Law Reform Commissions questioned the need to provide an indemnity scheme for land. 117 In its final report, the New South Wales Commission noted that commentators had offered a variety of justifications for the existence of the indemnity scheme, ranging from marketing strategy to arguments based on fairness and government accountability. 118 It ultimately recommended retention of the State guarantee with a new emphasis on insurance principles, 119 but without reaching any clear view as to the purpose of the indemnity.

The purpose is best understood from an economic perspective. The objects of the Torrens System are themselves economic: to promote security of title and ease of transactions, in order to support the operation of efficient land and capital markets. The insurance scheme contributes to the objects by providing economic security to those denied legal security, thereby reducing risk and transaction costs. The scheme also reduces the cost of administering the title examination functions of the land registry.

**How the indemnity scheme reduces risks and transaction costs**

Under the Torrens System the State assumes the responsibility for assuring title. It examines title instruments and investigates titles, guaranteeing those that it accepts for registration. This substantially improves the legal security of registered owners, who enjoy better enforcement of their rights. It also reduces the legal insecurity of purchasers, who do not have to investigate the quality of their grantor's title. But while the system significantly reduces risk, it does not eliminate all the risks. Where interests conflict, the system must provide rules specifying which interest has priority. The legal security enjoyed by the owner of the priority interest is bought at the expense of the security of the other owners. 120

The existence of legal insecurity detracts from the objects of the Torrens System. Security of title is both an end in itself, and a means to achieving the system's 'ease of transaction' object. According to Willett, the objective existence of risk associated with an activity gives rise to subjective uncertainty, a disagreeable state of mind which deters risk-averse people from engaging in the activity. 121 Purchasers respond to uncertainty about title outcomes by investigating the title, which increases transaction costs and delays in completing land transfers. It was to overcome such notorious difficulties under the old conveyancing law that the Torrens System was introduced by 19th century reformers. Any mechanism for reducing residual risks contributes to the objects of the system both by improving security and by reducing the need to incur transaction costs.

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112 Home Ownership Protection Policy 0601, cl 1.5 (g).
113 Ibid, cl 2.2 (b), (c).
114 The following definition of 'social insurance' is based upon that provided by the [US] Commission on Insurance Terminology: 'A device for the pooling of risks by their transfer to an organisation usually governmental, that is required by law to provide pecuniary . . . benefits to or on behalf of covered persons upon the occurrence of certain pre-designated losses under all of the following conditions [so far as relevant]: coverage is compulsory by law in virtually all instances; eligibility for benefits is derived, in fact or in effect, from contributions having been made to the person by or in respect of the claimant . . . ; the method for determining the benefits is prescribed by law; the benefits for any individual are not usually directly related to contributions made or in respect of him but [often redistribute income]; and the plan is administered by the government': P Mehr and E Cannack, Principles of Insurance 5th ed (1972, Homewood, Ill, Richard D Irwin Inc), 378-90.
116 NSWLRC, DP 19 and LRCV, DP 16, above n 1, paras 36-40. In its Issues Paper and Discussion Paper, the New South Wales Commission suggested that there was a case for abolishing the indemnity: ibid and NSWLRC, JP 6, above n 1, paras 6-4.6-6. The Victorian Commission expressed no opinion on the question.
117 NSWLRC, Report 76, above n 1, 4.2-4.10.
118 Ibid, recommendation 1.
119 Ibid, 5-7, 11-12.
Insurance reduces risk through transfer and distribution.\(^{122}\) The insured transfers the risk to an insurer, in consideration of a premium. Through the pooling of contributions, a fund is accumulated that allows losses to be distributed among the group. Risks experienced by individuals as random and unpredictable become quantifiable when transferred to insurers, as Carter explains:

Risk for insurers is of a different nature. By combining a large number of individual exposure units, insurers enjoy the advantages expressed in the law of large numbers in that their actual results more closely approximate to expected results. It is the process of risk transfer, and thus of risk reduction, which constitutes the primary function of the insurance industry and is the source of its main contribution to the welfare of society.\(^{123}\)

Mapp observed that the risks of registered conveyancing are eminently suitable for transfer and distribution through insurance.\(^{124}\) The risks are capable of actuarial measurement, and a large group of persons is subject to the same definable peril which strikes randomly and rarely, causing disastrous loss to individuals.\(^{125}\) Risk-averse purchasers and lenders would, if they were aware of the risks, be willing to pay a premium to transfer the risk to an insurer.\(^{126}\) This indicates the need for an insurance scheme that will enable transacting parties to transfer a broad range of risks.

### How the scheme reduces title registry costs

As the indemnity scheme includes cover for registry errors and omissions, the registrar is able to bring a risk management approach to the examination of titles. Title investigations are subject to a law of diminishing returns, as more particular and costly inquiries are required to eliminate residual small risks, known to insurers as 'fly specks'. The registrar's responsibility for claims administration enables him or her to weigh the costs of further investigations against the risk of a claim against the fund.\(^{127}\) The scheme allows the registrar to adopt a mixed strategy of risk prevention with selective risk assumption, similar to the way that private title insurers operate in the US.

Title insurance can improve upon the protection provided by the Torrens indemnity by giving greater coverage against risk and improved enforcement of rights.\(^{128}\) While the indemnity provisions of the Torrens statutes vary, in all jurisdictions the right to indemnity from the fund is subject to exclusions and restrictions, and the enforcement of rights to indemnity is subject to procedural difficulties.

#### Fault-based restrictions on indemnity

The trend of recent legislative change has been to restrict rather than to extend right to indemnity, by introducing or extending fault-based exclusions. Governments have become increasingly unwilling to indemnify for losses caused wholly or partly by the fraud or negligence of agents and professionals acting for the claimant, or by the claimant's own want of care.\(^{129}\)

All the Australasian Torrens statutes originally included a provision indemnifying those who suffered loss through fraud and errors in the registration process. Fault-based restrictions have since narrowed the scope of the Torrens indemnity provisions in several jurisdictions:

1. In 1954, the Victorian Act was amended to exclude indemnity where the claimant, the claimant's solicitor or agent caused or substantially contributed to the loss by 'fraud, neglect or wilful default'.\(^{130}\) The provision also places the onus on the claimant to prove that the loss was not caused by such fraud or negligence.

2. In 1983, South Australia introduced an amendment providing that, in an action for compensation from the fund, the court must reduce the amount of the compensation by such amount as is just in view of any contributory negligence on the part of the claimant or a person through whom he claims.\(^{132}\)

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\(^{122}\) Ibid, 62-68. Willett argues that insurance reduces the cost of production and promotes capital formation by reducing the uncertainty that deters the assumption of risks: 63, 87.

\(^{123}\) R L Carter, Economics and Insurance, (Stockport, undated), 24.

\(^{124}\) Mapp, above n 11, 69-70.

\(^{125}\) Ibid; Registrar-General of Land v Marshall [1995] 2 NZLR 189 at 194.

\(^{126}\) Mapp, ibid.

\(^{127}\) Ruoff, above n 81, p 34, Ch 5 passim.

\(^{128}\) Aminada, above n 6, 583.

\(^{129}\) Stein criticised fault-based exclusion of indemnity on the basis that it was inconsistent with insurance principles, Stein, above n 116, 155; for a similar criticism of the introduction of fault-based reduction in the UK, see also Roger Smith, 'Land Registration Reform - The Law Commission’s Proposals' [1987] The Conveyancer 334, 344.

\(^{130}\) S 110(3). In Registrar of Titles v Fairless [1997] 1 VR 404 the Victorian Court of Appeal held that s 110(3)(a) only disentitles a claimant to indemnity under s 110(1) for his or her neglect where the neglect was the sole cause of the loss or made a considerable, large or big contribution to the loss.

\(^{131}\) Transfer of Land Act 1958 (Vic), s 110(3)(a). This amendment predates the acceptance of immediate indefeasibility in Victoria. Previously, indemnity was available for loss caused by fraud.

\(^{132}\) Ruoff, above n 81, p 34, Ch 5 passim.
3) New South Wales legislated in 2000 to provide that the Assurance Fund is not liable to the extent that the loss is "a consequence of any act or omission" by the claimant. It also excludes liability to the extent that the loss is a consequence of any fraudulent, wilful or negligent act or omission by any solicitor, licensed conveyancer or real estate agent and is compensable under an indemnity given by a professional indemnity insurer. This introduces a scheme for reduced indemnity from the fund on the basis of an apportionment of responsibility.

4) Queensland legislated in 1994 to exclude indemnity if the claimant, a person acting as agent for the claimant, or a solicitor covered by indemnity insurance acting or purporting to act for the person caused or substantially contributed to the loss by fraud, neglect or wilful default. The Land Titles Act (NT) adopts the Queensland provision.

The fault-based exclusions apply to risks arising before or after registration, but are more likely to affect claims for post-registration losses. Since the judicial adoption of immediate indefeasibility, owners are at risk of losing their registered interest, or losing priority to another interest or charge, if a forged or otherwise void instrument is registered against their title by a non-fraudulent victim. Fraudulent persons usually abscond with the money or are unable to compensate their victims, and governments have not been willing to implement more effective methods for preventing identity fraud. Instead, some governments have sought to protect the assurance fund by shifting losses back to the victims, if they or their agents can be said to have contributed to the loss by their conduct. It has even been suggested that the conduct of victims in permitting a wrongdoer to defraud them is a contributing cause of the loss.

In some instances there may be something that the claimant could have done to prevent the risk. They may have unwisely parted with a signed instrument or certificate of title (in jurisdictions where the certificates still serve as proof of the right to transact), or have executed an instrument without reading it. Governments wish to encourage owners to take what precautions they can to prevent the risks. Fault-based exclusions are intended to control the problem known to insurers as 'morale hazard' - the tendency of persons to take less care to prevent risks if they are insured against them.

It is questionable whether the exclusions will reduce risky behaviour if, as seems likely, purchasers and owners are generally ignorant of both the exclusions and the risks. The New South Wales Commission thought that the exclusion for losses caused by the fraud of a solicitor or agent was intended to encourage owners to exercise care in selecting an agent. It concluded that the

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133 Real Property Act 1900 (NSW) s 129(2)(b). The amendments were inserted by the Real Property Amendment (Compensation) Act 2000.

134 Real Property Act 1900 (NSW) s 129(2)(b). Note that the Minister has a discretion to grant ex gratia compensation notwithstanding the exclusion: s 130.

135 A similar principle of apportionment for contributory fault was implemented in England and Wales by the Land Registration Act 1925, s 83(5)(a) and 83(6), as substituted by Land Registration Act 1997. The change was made on the recommendation of the Law Commission and H M Land Registry, Transfer of Land: Land Registration LC 235 (1995), paras 4.4-4.6.

136 Land Title Act 1994 (Qld) s 189(1)(b) and (2), discussed in Carmel McDonald, Lcs McCormon and Anne Wallace, Real Property in Queensland (Sydney, LBC Information Services, 1998), 430-34.

137 Section 195(1)(b) and (2), enacted in 2000. The Torrens assurance fund was abolished upon the Territory attaining self-government in 1978, but indemnity was paid by the government under an ex gratia scheme on the same terms as under the repealed legislation: Land Law Review Committee of the Northern Territory, Guarantee of Torrens Title in the Northern Territory, Discussion Paper (August, 1990) paras 3.3-3.7.

138 Real Property Amendment (Compensation) Bill 2000, Second Reading Speech, Legislative Council Hansard, NSW, 31 May 2000, 6141. This view was rejected by the NSW Law Reform Commission: NSWLRC, Report 76, above n 1, para 4.27, and has also found judicial disfavour: Parker v Registrar-General [1977] 1 NSWLR 22, 30 (Mahoney J); Registrar ofTitles v Fairless [1997] 1 VR 404, 418-21.

139 The NSW Law Reform Commission thought that the shift to immediate indefeasibility could potentially result in increased claims on the fund. Under deferred indefeasibility, the former registered owner was entitled to be restored to the register, and the person whose title was rectified had no claim on the fund because the person was deemed to have had no interest in the land. The Commission's researches, however, found no evidence that immediate indefeasibility had had any significant impact on claims: NSWLRC, Report 76, above n 1, paras 3.24-3.26.

140 Carter, above n 123, 30-31, distinguishing this phenomenon from 'moral hazard', which refers to the risk that the insured will engage in opportunistic behaviour, actively seeking to bring about or to inflate the loss.

141 The Commission suggested that this was the purpose of the Victorian exception: NSWLRC, IP 6, above n 1, para 6.16.
exclusion was unsound, for it was unfair 'to assume that citizens have any ability to make accurate assessments of their agents' honesty and skills', and 'to force them to bear the consequences of the unauthorised acts of their agents'.

The exclusion of indemnity for losses caused by the claimant's solicitor has been justified by the argument that professionals and their insurers, rather than the Torrens assurance fund, should pay for their failings. This policy could, as the New South Wales Commission observed, be achieved without the exclusion. It would be sufficient to give the Registrar a right of recourse against the professional to recover the amount of the indemnity paid by the fund. The New South Wales legislature enacted the exclusion against the Commission's recommendation.

Fault-based exclusion and title insurance

Title insurance indemnifies an insured owner or lender on a no-fault basis, and contributory negligence does not typically reduce entitlement. Under the owner's policy, the insured is covered for the risk, post-registration, that 'someone else claims to have an interest in or an encumbrance, charge or lien on the title to the land because of an act of forgery or fraud'. The lender's policy covers mortgagees against the risk of a post-registration forgery that 'discharges, varies or adversely affects' the mortgage, or causes it to lose priority to another encumbrance, charge or lien.

The standard policies impose no conditions on owners or lenders with respect to custody of certificates of title or identity documents. The only relevant standard exclusion is for risks that the insured creates, allows or agrees to at any time. The insurer's commentary to the lender's policy indicates that this refers to an intentional act by the insured which causes loss, such as where a lender lends money to a person, knowing the person to be intellectually handicapped and the mortgage is later set aside on that ground.

While title insurers bear the losses caused by the insured's own carelessness, they are subrogated to any right of action that the insured has against a third party. Arruñada finds that where title insurers operate under title registration systems and do not generate title information, they can be expected to enforce the professional liability of conveyancing intermediaries such as legal practitioners and surveyors. This enforcement role tends to antagonize the legal profession, making it more difficult to market title insurance to their clients. First Title's offer to waive its rights of recourse against conveyancing lawyers who buy its policies for their clients is intended to reduce the profession's opposition to its products.

Administration of Claims

A major benefit of title insurance is that it offers better enforcement of claims. The insured is entitled to payment of the indemnity without any necessity to bring a legal action against the insurer or any other person who caused the loss.

The Torrens statutes vary considerably in their provisions for enforcement of remedies. In four jurisdictions, the Torrens indemnity still operates as a fund of last resort. In South Australia, Western Australia, Tasmania and the Australian Capital Territory, in most cases claimants must first exhaust their remedies against the person who was responsible for the loss or who has benefited by the error. This prerequisite to a claim on the fund does not apply if the bringing of an action would be futile or impossible for reasons such as the death or bankruptcy of the defendant, or if the defendant ceases to be liable to compensate the claimant.

NSWLRC, Report 76, above, n 1, para 4.34. In Registrar of Titles v Fairless [1997] 1 VR 404 the exclusion in s 110(3)(a) for losses caused by the fraud of the claimant's agent was held not to apply where the loss was caused by the agent's fraudulent acts outside the scope of his authority.


Also overturning the decision in Behn v Registrar-General [1979] 2 NSWLR 496, holding that contributory negligence is not a defence to a claim for fraud, or to proceedings upon a statutory right of action. The Commission recommended in its final Report that indemnity should be denied only where the claimant was wholly responsible for the loss. It was also recommended that the scheme should indemnify losses caused by fraud or negligence of the claimant's agent: Rep No 76, ibid, recommendations 4.9, and paras 4.28-4.34.


Home Ownership Protection Policy 0601, cl 1.6(b).

Residential Loan Protection Policy RLPP 0300, cl 2.7(a), (b).


Arruñada, above n 6, 597.

Bradbrook, McCallum & Moore, above n 64, [4,129]; McCrimmon, above n 144, 911.

For example, because he or she has transferred the title bona fide and for value.
The hardships caused by the 'last resort' model of indemnity are well known. The provisions creating remedies against third parties are so complex that in some cases claimants have had difficulty identifying the right person to sue, and the right remedy to pursue. The requirement to sue other defendants, even where the chances of obtaining and enforcing a judgment are remote, delays eventual recovery from the fund and inflates the loss. The limitation period for bringing an action against the Fund can expire while claimants vainly pursue litigation against 'the person primarily responsible'. The costs incurred in obtaining a judgment and attempting to execute it delays eventual recovery from the fund and inflates the loss. The limitation period for bringing an action against the Fund can expire while claimants vainly pursue litigation against 'the person primarily responsible'.

Courts have tended to construe the indemnity provisions narrowly against claimants and have been reluctant to attribute liability to the Territory or registrar as nominal defendant. The proceedings may be defended in an adversarial manner, with the registrar pleading all available defences.

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The limitations period for bringing an action against the fund requires a claim to be made by commencing court action against the State, Territory or registrar as nominal defendant. The proceedings may be defended in an adversarial manner, with the registrar pleading all available defences. Courts have tended to construe the indemnity provisions narrowly against claimants and have been reluctant to attribute liability to the registrar for errors. 160

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The difficulties caused by the 'last resort' model of indemnity are well known. The provisions creating remedies against third parties are so complex that in some cases claimants have had difficulty identifying the right person to sue, and the right remedy to pursue. The requirement to sue other defendants, even where the chances of obtaining and enforcing a judgment are remote, delays eventual recovery from the fund and inflates the loss. The limitation period for bringing an action against the Fund can expire while claimants vainly pursue litigation against 'the person primarily responsible'.

157 The costs incurred in obtaining a judgment and attempting to execute it against a 'wrongdoer', are generally not recoverable from the fund. In some cases, a claim against the fund requires a claim to be made by commencing court action against the State, Territory or registrar as nominal defendant. The proceedings may be defended in an adversarial manner, with the registrar pleading all available defences. Courts have tended to construe the indemnity provisions narrowly against claimants and have been reluctant to attribute liability to the registrar for errors.

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See, eg, the case of Registrar-General v Harris (1998) 45 NSWLR 404, where the Registrar-General for New South Wales opposed a claim against the fund on the ground that the claimant was required to sue the wrongdoer, despite the fact that the latter was unable to pay his debts. The Registrar unsuccessfully argued that the wrongdoer was not 'insolvent' for the purposes of the Act unless he had actually been adjudged bankrupt.

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This occurred in Breekvär v White [1978] Qd R 187; Boardshier v Registrar of Titles [1992] Qd Conv R 54-440; McCormlin, above n 94, 112; Sackville & Neave, above n 94, [6.3.117].

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Land Titles Act 1925 (ACT), s 145, 154(1), (2); Real Property Act 1900 (NSW), s 132(1), subject to s 131.

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Di Castri says that the purpose of requiring claims to be instituted by proceedings against the registrar is to enable the registrar to raise all available defences to protect the fund. Di Castri, above n 11 [990].

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NSWLRC, Report 76, above n 1, para 2.5-5-2.56; Sackville & Neave, above n 94, [6.3.121]. There are some recent indications that the courts may be more willing to give to the indemnity provisions a beneficial interpretation consistent with their remedial purposes: see eg. Registrar-General v Harris (1998) 45 NSWLR 404, para 7, where Mason P remarked that 'the subject matter of s 126 clearly qualifies it for a beneficial interpretation, however much the statutory purpose of requiring claims to be instituted by proceedings against the registrar is to enable the registrar to raise all available defences to protect the fund. Di Castri, above n 11 [990].

The requirement to institute a claim by court action has been relaxed in all jurisdictions except the Australian Capital Territory. All the other statutes now provide that, where a claim lies against the State, Territory or registrar, the claim can be made administratively without the necessity for the claimant to apply to the court. Court proceedings will still be necessary if the registrar does not settle the claim. In New South Wales, the Registrar-General's power to settle claims administratively is limited to the amount of compensation that he or she may award.

D. WILL TITLE INSURANCE PROMPT A RESTRUCTURE OF THE TORRENS SYSTEM?

The Torrens System is a government program undertaken to support the operation of an efficient market in land and landed securities. Title insurance originated in the unregulated US market, as part a market response to the same economic imperatives. There are functional similarities between a State guaranteed title backed by a statutory indemnity, and a representation of title backed by an insurance policy. In an era when State and Territory governments are keen to privatise government services, will the establishment of a title insurance industry in Australia and New Zealand prompt a reassessment of the role of government in managing the risks of registered conveyancing?

Incorporating Title Insurance into the Torrens System

The different roles that title insurers could play in a restructured Torrens System were canvassed by the New South Wales Law Reform Commission. In an issues paper, the Commission originally identified two options: first, 'whether private title insurance could be substituted for the existing State guarantee of Torrens titles'; and second, whether it could complement the existing statutory Torrens indemnity schemes.

In its final report the Commission refined these alternatives as follows. The option to have the State guarantee provided by a private insurer was modified to a proposal that the State would out-source the claims administration while itself remaining the underwriter. The Commission impliedly...
rejected this option in recommending that the insurance scheme remain under the administration of
the Registrar-General. The Commission stated that the submissions received on this option
generally rejected it, and cited three arguments raised against it: first, that it would compromise
public confidence in the administration of the Torrens system; second, that it would make claims
administration more costly; and third, that a private insurer would be less publicly accountable to
the Parliament. The Commission expressed no opinion on these arguments, although it appears to
have dismissed the option from further consideration.

The second proposal considered by the Commission was that 'optional private title insurance could
replace or complement the existing Torrens insurance schemes'. In its final report this was
reformulated as a proposal that ‘private insurance, either optional or compulsory, could replace the
State guarantee’. Taken together, the two formulations encompass at least four discrete options,
as follows:

1. the abolition of the State guarantee for all losses other than those due to registry error, with
   registered owners purchasing optional private title insurance;
2. as per (1) above, but with compulsory purchase of private title insurance;
3. retention of the State guarantee to the extent that it already exists, with optional title
   insurance for the risks not covered by the statutory scheme (i.e., the option discussed in this
   paper);
4. as per (3) above, but with compulsory title insurance for the excluded risks.

The Commission appears to have rejected each option, stating simply that it ‘[did] not support the
introduction of a system of private insurance’. It gave no reasons of its own, but impliedly
adopted the two arguments that it had received in the submissions. The first was that it ‘would be
too costly for the registered proprietor’. The report gives no cost estimate and cites no evidence
for this conclusion. The second argument was that holders of Torrens title do not need a title
insurance product that was designed to compensate for deficiencies in the American system of

166 Ibid, recommendation 2.
168 NSWLRC, Report 76, above n 1, para 4.13.
171 The Commission said that this was the main argument advanced by all the submissions that
   considered the question: ibid at 4.14. The Commission received no submissions from the
   insurance industry or from economists.

The argument assumes that title insurers would not adapt their products to the
different risk profile of a system of registered titles. The assumption is not supported by overseas
experience. The Commission showed foresight in considering how title insurance and insurers might contribute
to the operation of the Torrens System but, lacking the data to evaluate the options, it refrained from
expressing concluded opinions on them. The issues and options it raised require further
consideration in the light of new information about title insurance products in the Australian
market.

Some property lawyers will see a Trojan Horse in any proposal to give title insurers a role in the
Torrens System. The suspicion stems from the role played by the US title insurance industry in
lobbying for more than a century against the Torrens System in America. In Australia and New
Zealand, which have mature Torrens Systems, there is no risk of reversion to unregistered
conveyancing. In these jurisdictions, the concerns relate to possible erosion of the social insurance
model, with its broad risk cover, its compulsory and universal application, and its complementary
 provision of legal and economic security through the mechanism of State guaranteed title.

The social insurance model

The present model of social insurance was adopted at a time when there was no private alternative.
The entry of title insurers into the local market will prompt debate as to whether the statutory
scheme should be abolished or pared back, leaving optional private insurance to fill the gap.
Governments looking for ways to cut costs and risks will be attracted to proposals to outsource
services, and to shift risks from the State to the transacting parties who can now insure privately.
While it is beyond the scope of this chapter to examine the options in detail, it is worth briefly
noting two advantages of the social insurance model.

173 Amnindro, above n 6, 590-91, 595-96.
174 Some US commentators have been critical of the role played by title insurers, abstract
companies and attorneys in organising and funding opposition to the Torrens system in the
US: Ted J Fiflis 'Land Transfer Improvement: The Basic Facts and Two Hypotheses for
Reform' (1966) 38 University of Colorado Law Review 431-75, 432, J V B II, 'Comments:
Yes Virginia – There is a Torrens Act' (1975) 9 University of Richmond Law Review 301,
320-21; Barry Goldner, 'The Torrens System of Title Registration: A New Proposal for
doubts that opposition from title insurers played a significant role in the failure of the US
Torrens Systems: McCormack, above n 146, 63-64.
First, the universal coverage of social insurance facilitates the distribution of the risk by maximising the pool of insured persons. This would be difficult to replicate under a regime of private insurance, for governments are unlikely to compel people to purchase insurance. The compulsory nature of the social insurance scheme is accepted because of its long history, and because the contribution to the fund is regarded as an integral part of the cost of obtaining a State-guaranteed title. Public acceptance of compulsion might not survive the uncoupling of insurance from the State guarantee.

Many people would opt to save the premium and assume the risks themselves, and a few would accept the pool of insured persons. This would be difficult to replicate under a regime of private insurance. The extension of cover to non-contributors insures the registrar against liability for losses arising from registry errors and omissions. This enables the registrar to contain administrative costs by adopting a risk management strategy in conducting title investigations. If the social insurance model is abandoned in favour of optional private insurance, alternative provision would be required to insure the registrar. This might be done by setting aside a component of the registry fees to provide a fund for compensating losses caused by registry error – in effect, a compulsory contribution to an indemnity fund.

E. CONCLUSION

As recently as 1996, the New South Wales Law Reform Commission pondered whether private title insurance and insurers could make a useful contribution to the Torrens System. The arrival of a private risk-taker enlivens that discussion by expanding the options for managing conveyancing risks.

The Commission identified the options as being, first, that title insurance will complement the Torrens indemnity, providing optional extra risk cover. The second option is to abolish or scale back the cover provided by the statutory indemnity, leaving owners, lenders and purchasers to insure privately. Under a variant of this option, the purchase of title insurance would be compulsory, at least for certain risks. The third option is for a public-private partnership in which the statutory scheme and compulsory contributions to the fund would be retained, with the administration of claims outsourced to private insurers.

This chapter has focussed on the first option, and concluded that private title insurance can contribute to the attainment of the economic objects of the Torrens System. Insurance can promote the ‘security of title’ object to the extent that it enables owners, purchasers and lenders to transfer to an insurer certain risks that the Torrens System leaves with them, namely:

1. loss in the pre-registration period arising from a matter that renders the interest void or unenforceable, or from loss of priority to a competing interest;\(^{176}\)
2. that the insured’s title will be subject to certain types of overriding interests;
3. that the insured will suffer loss through the fraud, forgery or negligence of his or her solicitor, or agent, or through a loss to which the insured has contributed through his or her own negligence, and that in some jurisdictions, indemnity will be excluded or reduced on ‘fault’ grounds.

The primary effect of title insurance is to improve economic security by providing compensation for losses. To the extent that title insurers actually clear the title of adverse claims,\(^{177}\) it also improves legal security.

Title insurance is useful even for risks that are covered by the Torrens indemnity, because it offers a quicker, easier and cheaper claims process. Claims under a title insurance policy are subject to no requirement that the insured must first sue a ‘wrongdoer’, or institute legal proceedings against the insurer. The insured’s position after indemnification is likely to be better under title insurance than under the Torrens indemnity, which does not cover the insurer’s legal costs.

Title insurance can also contribute to achieving the ‘ease of transaction’ object of the Torrens System. By reducing risks, title insurance has the dual effect of improving the insured’s economic security and reducing the costs of conveyancing transactions. Some conveyancing expenditures, such as identification surveys, are undertaken to prevent specific risks. If the risks can be transferred to an insurer, purchasers and lenders enjoy new possibilities for reducing their costs.

The extent of the saving depends on local conveyancing practices and costs, and the willingness of

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\(^{176}\) The Torrens System has a partial remedy for the priority risk in the form of caveats and priority notices, but title defects arising from the instrument or transaction are cured only upon registration.

\(^{177}\) See above, text accompanying n 34.
purchasers to accept economic security as a substitute for assurance of a clear title. If the saving is less than the amount of premium, title insurance will be more difficult to sell.

While title insurance compensates for some of the deficiencies of the State guarantee, the benefits are enjoyed only by those who buy a policy. Private insurance does nothing to promote systemic reform, and may even retard it by masking the deficiencies in the public scheme and by creating an expectation that it is imprudent to rely on the State guarantee.

State and Territory governments, ever anxious to shift their risks and shed costs, will be receptive to arguments that private title insurers are better able to manage insurance risks and to administer claims than the registrars. Their response may include further restrictions on the scope of the Torrens indemnity, exclusion of subrogated claims by title insurers, and exclusion of claims against the fund by privately insured persons in respect of insured losses.

Whether title insurance proves a boon to the Torrens System will depend largely on how governments react to it. In the best scenario, it could complement the system by improving economic security, lowering transaction costs, and modelling the insurance approach that the New South Wales Law Reform Commission recommended for the Torrens fund. It could also provide a catalyst for reform by focussing attention on the gaps in the security provided by the Torrens System. The worst scenario would see governments abandoning universal social insurance in favour of optional private insurance, many people opting to go without cover and the occasional person suffering disastrous loss without recourse to compensation.

9 TITLE INSURANCE AND THE PERILS OF CONVEYANCING

In 1996, after a lengthy inquiry into the adequacy of the compensation provisions of the State’s Real Property Act 1900, the New South Wales Law Reform Commission concluded that it did not support the introduction of private title insurance in relation to land under the Torrens system. Apparently nobody told the Australian Prudential Regulatory Authority (APRA), which later in the same year licensed the first title insurance company to operate as a general insurer in the Australian market. The largest of the US title insurers, the First American Title Insurance Company (‘First American’) established its wholly owned Australian subsidiaries, First American Title Insurance Company of Australia Pty Ltd and First Australian Title Company Pty Ltd, trading jointly under the name ‘First Title’. First Title commenced offering title insurance policies for residential mortgage lenders on the local market in 1998. In March, 2003, Stewart Title Ltd, a subsidiary of the large US-based company Stewart Title Guaranty Co, was the second title insurance company to be licensed by APRA as a general insurer.

Until now, the local conveyancing market has been relatively unaffected by the forces of globalisation. We now have the prospect of two of the largest international title insurers competing to offer title insurance products and property services in the Australian market. Lawyers and licensed conveyancers will have to consider how to respond to the new competitive environment, and how the availability of title insurance will affect their strategies for managing the risks of conveyancing.

Both companies propose to market home owner’s and residential lender’s policies through lawyers, for purchase on behalf of clients. First Title is also packaging title insurance for mortgage lenders with a document processing, settlement and registration

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178 It is assumed that lenders will readily accept full monetary indemnity as a substitute for their interests, but purchasers and owners facing eviction may have different preferences: see chapter 6.

179 Goldner suggests that, in the US, title insurance impedes reform of the recordation system by compensating for the system’s inadequacies: above n 174, 661.
service, for a fee from $295 inclusive of the insurance premium. By April, 2003 the company was selling about 3000 lender's policies per month in Australia, the rate having doubled in the previous six months. Stewart Title does not propose to undertake documentation and settlement of either lending or conveyancing processes. It will operate as a wholesaler, selling insurance policies to legal practitioners. In the future, both companies plan to introduce commercial policies for purchasers/developers and lenders.

The insurers are hoping to establish a close and co-operative business relationship with the legal profession. Lawyers are likely, at least initially, to be wary and sceptical of the insurers and their products. As they examine the offerings, lawyers will be looking for the catch. Are the premiums too high, or unsustainably low? Do the policies cover real and substantial risks, or notional perils that hardly ever eventuate? What risks are excluded by the fine print? Are the title insurers free-riding on the security provided by the Torrens system, with its State guarantee of registered title? Is the insured sum too low to provide adequate cover? Will the insurers actually pay up, promptly and without a quibble, when a valid claim is made? Will they exercise their subrogated rights as insurer to sue the insured's lawyer when things go wrong in a conveyancing transaction? What conditions or controls will they seek to impose upon lawyers who conduct title-insured conveyancing?

This chapter does not purport to answer all these questions, but focuses on a basic question about title insurance - what can it usefully add to our present systems and strategies for managing the risks of conveyancing? The starting point is to explain what title insurance is and what risks are covered by a standard owner's policy of the kind likely to be marketed in Australia by the two title insurers. Attention then shifts to an evaluation of what an owner's policy adds to the security provided by the Torrens guarantee of registered title. The chapter therefore focuses on the products to be offered, as opposed to the insurers and their business plans.

A. THE TITLE INSURANCE INDUSTRY

Title insurance is a contract of indemnity based upon an agreed representation of the state of the title as at the policy date. The policy date is the date of settlement, and the representation is the title that the insured expects to acquire in the conveyancing transaction. Under the 'recordation' or deeds registration systems of the US, the representation as to title is provided in the form of an attorney's opinion, based upon search and examination of title documents. For Torrens system land, the representation is based on the title search of the land registry, adjusted for any other title information actually known to the insured before the policy date.

Title insurance has two effects. Firstly, it entitles the insured to an indemnity if the title as represented in the policy document proves to be wrong, and actual loss results. Secondly, the insurer is under a duty to defend the title as represented in the policy.

Title insurance indemnifies against risks that existed at the policy date, but were unknown to the insured and did not cause a problem until after settlement. In this respect it differs from property/casualty insurance, which indemnifies against future risks, that is, risks arising from events after the policy date. Casualty underwriters rely on actuarial assessment of risk to set premiums at a level to match expected losses. Title insurers adopt a very different risk management strategy. Since the insurance covers existing but unknown risks, title insurers spend considerable resources in detecting and eliminating risks.

In some US States, title insurers are involved at every stage in the conveyancing process - conducting title searches, preparing title opinions and settling real estate transactions.

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3. This is the fee, as at April, 2003, for processing a security over a single property. Higher fees apply for additional securities.

4. Personal communication to the author by Denise Caffrey, Manager, Legal and Underwriting, First Title, 8 April, 2003.

5. Personal communication to the author by Marcus Cann, Managing Director, Stewart Title Ltd, 10 April, 2003. Neither company proposes to sell policies through real estate agents.


9. Ibid at 3-4.
By managing the conveyancing process, they seek to resolve existing risks before they trigger claims, and prevent new risks arising from errors in the transaction. This emphasis on generating title information and eliminating risks explains why title insurers seek to “vertically integrate” their underwriting business with conveyancing services. Ziff cites a 1997 study by Michael Braunstein which reports that, of the 40 US States that responded to his survey, in only eight States was it usual for lawyers to ‘close’ or settle real estate transactions. In the other 32 States, closing services were handled by real estate agents, title insurers, a corporate closing company or an escrow agent.

Given their long history of involvement US conveyancing, American title insurers naturally expected to operate in the same way when they expanded into other countries. When First Title's sister company, First Canadian, entered the Ontario market in 1995, it moved into the conveyancing business in competition with lawyers. It established 'home closing centres', based upon the US model of escrow agents, which provided title-insured residential conveyancing services.

The Law Society of Upper Canada responded to this competitive challenge by moving into the title insurance business. In 1997 the Law Society established a title insurance company, TitlePlus, based upon the American model of bar-affiliated title insurance companies. TitlePlus offers title insurance policies through a re-insurance arrangement with a US-based title insurer, Chicago Title, and also provides cover for errors and omissions by lawyers in conveyancing transactions. TitlePlus has been successful in Ontario, and is expanding its services into other Canadian provinces. In the meantime, First Canadian abandoned its home closing centres, which had not been a success. It is my understanding that First Title has no proposal to repeat the experiment in Australia.

The distinction between title insurance and property/casualty insurance has blurred in recent years. Since 1998, title insurance policies offered by US insurers commonly include casualty-type cover against certain post-settlement risks. Title insurance policies now provide coverage mainly, but not exclusively, for risks that existed at or before the date the insured acquired the property. Usually these are risks that are unknown to the insured and to his or her lawyer at the time of the settlement, although it is possible to negotiate a special endorsement to the policy to insure over known risks. This is known as ‘defective title’ insurance. For example, it is discovered before settlement that a garage on the subject property encroaches over the title boundary, an endorsement may indemnify against loss in the event that the neighbour should in future require the insured to demolish or move the garage.

B. OVERVIEW OF THE OWNER’S POLICY

This section of the chapter provides an overview of the main areas of risk coverage likely to be available under home owner’s policies title in the Australian markets. First Title was proposing to launch its ‘home ownership protection policy’ in Australia in late 2002, but decided to trial it in New Zealand first. Stewart Title has provided the author with its “residential purchasers policy”, which it expects to launch on the Australian market in mid-2003. The two policies are worded slightly differently, but are very similar in their terms and coverage. This chapter examines First Title’s New Zealand home ownership protection policy NZ0601 (‘the New Zealand policy’), referring to any relevant differences from Stewart Title Ltd’s (‘ST’) policy. At the time of writing, neither policy was yet on the market in Australia. It is possible that changes to the

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12 Ibid.
13 Ziff, above n 7, at 10.
14 Ibid at 14.
16 This example is drawn from a First Canadian policy, where the risk was not covered by the standard policy, as it is under the New Zealand policy, cl 1.5(c).
17 A contributing factor to the inability of the centres to compete successfully with lawyers was Regulation 666 of the Insurance Act RSO 1990, cl 1.8, which provided that no title insurance policy could be issued unless the insurer obtained a certificate as to the title from an independent legal practitioner. This ensured that an independent lawyer was indispensable in every title insured transaction: Ziff, above n 7, at 11-12.
policies may be made before they are launched. The analysis of the policies in this Part of the chapter is therefore subject to the disclaimer that what is said is merely indicative of the cover that may soon be available in Australia.

First Title is already offering a residential lender’s policy in Australia, the Residential Loan Protection Policy No RLPP 0300. Generally speaking, the risk cover for lenders is more extensive than for owners. Lender’s policies will not be examined in this chapter. The lender’s policy is discussed in Chapter 8.

In New Zealand, First Title is currently offering its owner’s policy for a one-time premium of NZ$225 for residential properties valued up to $500,000. Premiums for more valuable properties are calculated on an ad valorem scale. At the time of writing Stewart Title Ltd had not released its premium rates, but they are expected to be competitive with First Title’s.

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Subject to what is said in the text accompanying n 36 below.

What risks are covered?

Bruce Ziff’s analysis of standard owner’s policies in Canada groups the covered risks into six clusters, ‘for ease of exposition’. This simplification can also be usefully applied to the New Zealand policy.

(i) Standard title risks

The first cluster deals with the risk that the insured fails to acquire the title as represented in the policy schedule. These include the risk that the owner of the estate or interest in the land is different to the person specified in the schedule as the purchaser (cl 1.5(a)); the home at the address listed in the schedule is not located on the land (cl 1.5(b)); ‘someone lodges a dealing after settlement which prevents your interest in the land from becoming registered’ (cl 1.5(c)); ‘someone else owns an interest in the land or has an easement or right of way that affects the title to the land’ (cl 1.5(d)); ‘other persons have rights to the land arising out of a lease, contract, option, right of possession or access order’ (cl 1.5(h)); ‘there is an encumbrance, writ, charge or lien on the title to the land because of a mortgage, judgment, unpaid rates, taxes or sums due to local or public authorities’ (cl 1.5(g)). A catch-all in clause 1.5(j) covers any other defect that affects the title. Note that any of these risks that were actually known to the insured at the policy date or disclosed in the contract of purchase are excluded (cl 2.1(b), (c)).

(ii) Defects in the documentation

The second cluster covers risks arising from defects in the title documentation, including where ‘a document has not been properly signed or registered resulting in a defect in the title to the land’ (cl 1.5(e)), and ‘forgery, fraud, duress, incompetency or incapacity result in a defect in the title to the land’ (cl 1.5(f)). This cover might seem redundant in a Torrens system under which registration of a void instrument confers an immediately indefeasible title on a bona fide purchaser - but consider a situation like that in Breskvar v Wall. The Stewart Title policy also includes cover for strata charges: ST cl 2.1(g).

The text is accompanied by n 36 below.

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18 The lender’s policy is discussed in Chapter 8.
20 The ST policy provides that the policy amount is not updated for increases in the value of the land due to improvements made by the insured after the policy date. However an increase in the policy amount may be negotiated for an additional premium (ST cl 1.4).
21 Subject to what is said in the text accompanying n 36 below.
22 Ziff, above n 7, at 16ff.
23 The Stewart Title policy also includes cover for strata charges: ST cl 2.1(g).
24 (1971) 126 CLR 376 (HCA).
his transfer from Wall by a caveat lodged by the Breksvars, who had been deprived of
their registered title when Wall was registered as owner through the fraud of his agent.
Alban, found himself embroiled in an equitable priority dispute, which he won on the
basis that he held the better equity in the circumstances. If he had been title insured, the
insurer would have defended his title at its expense, and either won the case, settled it or
compensated him if he lost.

(iii) Marketability problems

The third cluster deals with existing defects that affect the marketability of the land
when the insured comes to sell, lease or mortgage it. Cover is provided where an
existing title defect (cl 1.5(i)) or an encroaching structure other than boundary wall or
fence (cl 1.5 (r)) allows another person to refuse to perform a contract or lease, or the
insured is refused a mortgage on account of the defect or encroachment. Stewart Title
extends this marketability cover (a) where the present use of the land violates an
existing zoning law; (b) where there are adverse matters that an up-to-date survey would
have shown. Note that neither policy covers the risk that the insured will be unable to
find a willing buyer or lessee because of the defect, or that the buyer or lessee requires
an abatement of the price to enter a contract or lease.

(iv) Existing contraventions

The fourth cluster covers existing contraventions of laws and property rights. This type
of cover is expensive to underwrite. The insurer is liable for the cost of remedying the
contravention, and also for reimbursing the insured the rental of alternative
accommodation, if the contravention prevents the insured from using the land as his or
her home (cl 1.3). The cluster includes the risk that a structure (other than a fence or
boundary wall) must be ‘removed or remediated [sic]’ because it encroaches onto a
neighbour’s land or registered easement (cl.5(s)), or because it was constructed or
modified without building or development approvals: (cl 1.5(n)). First Title limits its
liability under this clause to $50,000 (cl 5.2). Stewart Title Ltd caps its liability at
$30,000, and requires the insured to contribute an excess deductible, equal to the lesser
of $5,000 or 1% of the policy amount, in the event of a claim (ST cl 6(b)). The limit
and excess in the ST policy extends to other insured risks in this cluster.25

The New Zealand policy also covers an existing breach of a covenant, restriction or
right of way recorded on the title to the insured land (cl 1.5(q)). The insured is covered
if a pre-existing breach of a zoning law or of any rights reserved on the title to the land
adversely affects the use of the land as the insured’s home (cl 1.5(i)). Two clauses deal
with the breach of laws per se without specifying the kind of adverse effect upon the
insured. Clause 1.5(p) covers breach of subdivision laws, and clause 1.5(o) applies
where notice of certain legal contraventions is recorded in public records.

(v) Post-acquisition risks

The fifth cluster deals with post-acquisition risks, that is, risks arising from
circumstances that occur after the policy date. In this cluster the New Zealand policy
covers the encroachment of a neighbour’s structure (other than a fence or boundary
wall) onto the insured’s land (cl 1.6(a); and breach of compensation obligations by
persons having temporary access over the insured’s land (cl 1.6(c)).

An important post-registration risk covered by the policy is that, ‘someone else claims
to have an interest in or an encumbrance, charge or lien on the title to the land because
of an act of forgery or fraud, or a mistake by the title registry or a local authority’ (cl
1.6(b)). This risk would normally attract a right to compensation under the Torrens
indemnity provisions, but not in all cases. For example, some of the Torrens statutes
exclude the payment of indemnity where the fraud is committed by the claimant’s agent
or solicitor.27 In Victoria, a claim cannot be made against the Legal Practitioner’s

25 The deductible and the limit apply if the insured is prevented by a public authority from
using the land as a residence or is forced to remove all or part of an existing
structure (other than a boundary wall of fence) because it breaches a zoning law,
because of an outstanding notice of violation or deficiency, any matter recorded
on the title or construction or modification of a structure without a building or
development permit: ST policy, cls 2.1(r) and 6(b).

26 There is no equivalent cover to cl 1.6(c) in the ST policy.

27 Transfer of Land Act 1958 (Vic), s 110(3)(a) (no indemnity payable for loss
caused by the fraud of the claimant’s solicitor or agent); Real Property Act 1900
(NSW), s 129(2) (no compensation payable to the extent of contribution by
the fraud of a solicitor, licensed conveyancer or real estate agent where the loss is
compensable by a PI insurer); Land Title Act 1994 (Qld), s 189(1), (2) and Land
Fidelity Fund for a solicitor's defalcation relating to contributory mortgage activities and investment activities that are merely incidental to legal practice or to the administration of the estate of a deceased or protected person. For losses arising from solicitor fraud in this category, the homeowner may have no right to indemnity from either the Torrens fund or the Fidelity Fund.

(vi) Residual risks

The sixth cluster is a residual category, into which Ziff places the risk that there is no legal right of pedestrian or vehicular access to the land (cl 1.5(k)). A further risk in this category is that other persons having the right to use the land for mining or for construction or maintenance of utility connections (eg gas lines) cause damage to the land and fail to remediate or compensate the insured (cl 1.5(m)). Stewart Title provides cover only if those persons cause interference with the use of the land as a residence (ST cl 2.1(r)).

The other residual risks are the existence of adverse circumstances affecting the land that would have been disclosed by an up-to-date survey of the land (cl 1.5(t)), or any affectations, proposals, instruments or notices relating to the land by a Government, statutory or local authority that is recorded in public records, and would have been disclosed if a local authority report had been obtained (cl 1.5(u)). The purpose of the latter two clauses is to enable purchasers to dispense with a survey and local authority report, and insure over the risks that they might have disclosed. For title insurers, it is a major selling point that the purchase of title insurance may allow offsetting savings in disbursements for local authority searches and surveys. For example, in New Zealand, a comprehensive local authority report (called an L1M) is usually obtained in residential conveyancing, and may cost more than the premium for a homeowner's policy. In jurisdictions like New South Wales where identification surveys are commonly ordered in residential conveyancing, a title insurance policy offers the possibility of saving the cost of the survey. In other jurisdictions like Victoria

where surveys are not routinely ordered and local authority searches are modestly priced, there may be little saving to offset the cost of the policy.

In deciding to buy an owner's policy and dispense with a local authority search or survey, a purchaser would have to assume the risk of any non-insured risk which the search or survey might have disclosed. He or she would also have to be willing to accept monetary indemnity as a substitute for an assurance that the property is free of problems that might be disclosed by the omitted search or survey.

The scope of risk cover provided by cl 1.5(t) is uncertain. First, it is unclear what would be disclosed by an 'up-to-date' survey. The term is undefined, and surveys may encompass various inquiries, such as boundaries, encroachments, compliance with laws, permits and covenants etc. Secondly, it is unclear what is meant by an 'adverse circumstance [that] affects the land'. For example, the policy does not expressly cover the risk that the insured discovers after settlement that a fence or party wall encroaches onto his or her land or onto a neighbour's land. Encroachment by party walls and fences are expressly excluded so far as concerns (a) marketability problems under cl 1.5(r); (b) forced removal action against the registered owner under cl 1.5(s) and (c) encroachment of structures onto the insured's land occurring after registration (cl 1.6(a)). Assuming that an existing encroachment would have been revealed by 'an up-to-date survey', this is arguably an 'an adverse circumstance that affects the land' within the scope of cl 1.5(t).

However, title insurers generally do not cover encroachments by fences and party walls. These encroachments are very common, as the dividing structures are usually erected with the agreement of both landowners on what are assumed to be the title boundaries, without conducting a survey. The fence or wall may be misplaced by a mere matter of centimetres. To provide cover for existing fence and party wall encroachments might generate neighbour disputes and nuisance claims by insured persons.

It is to be hoped that the scope of cl 1.5(t) will be clarified before the owner's policies are launched in Australia. If not, lawyers acting for title-insured purchasers would be wise to seek clarification from the insurer before dispensing with a survey in reliance on cl 1.5(t).

Title Act (NT), s 195(1)(b) (no entitlement where the fraud was committed by the claimant's agent or "indemnified solicitor").

Legal Practice Act 1996 (Vic), s 208(3).

The cost varies from one municipality to another, but may cost up to NZ$3150.

Jonathan Flaws, Director, First American Title Insurance Co of Australia Pty Ltd, personal communication to the author, 10 April, 2003.
Insurance against known risks

Insurance against known risks is not part of the standard policy, but may be obtained by special endorsement to a standard policy. This may be subject to a limit on the amount of the claim, and an adjustment to the premium. At present, a purchaser who discovers a defect before settlement has the choice of either refusing to complete the contract (if the defect is one that gives a right to rescission), or electing to proceed with the transaction and assume the risk. Defective title insurance provides an extra option for dealing with known risks.

What risks are excluded?

It goes without saying that any risk not specifically listed as an ‘insured risk’ is excluded. In addition, the standard exclusions in clause 2 of the New Zealand policy are:

1. risks which the insured creates, allows or agrees to,
2. risks disclosed in the contract of purchase,
3. risks that are actually (not merely constructively) known to the insured at the policy date,
4. risks which cause the insured no loss or damage,
5. post-registration risks other than those specifically covered in clause 1.6 (ie, fifth cluster),
6. risks arising from business activities other than residential leasing,
7. interests and encumbrances recorded on the title register at the policy date (although some contraventions are covered),
8. the existence of laws relating to use or ownership of land (but some breaches of the laws are covered),
9. dilapidation or infestation of structures, or that they were not constructed in compliance with building codes or standards (as opposed to construction without a required building or development permit, which is covered),
10. environmental contaminants or hazardous waste (but affectations and proposals in public records are covered),
11. native title claims,
12. any additional exclusions listed in the policy schedule. Standard exclusions in the schedule to the New Zealand policy are (a) a mortgage given by the insured and (b) certain problems arising in a ‘cross lease’ title. The Stewart Title policy is subject to exclusions in Schedule B, but there are no ‘mandatory’ or universal exclusions.

Stewart Title has the following additional exclusions:

13. risks which arise because the insured did not pay full value for the land (ST cl 3.2(d),
14. destruction of or damage to a home building or to any personal or domestic property: (ST cl 3.2(h) and (0),
15. breach of laws with respect to any swimming pool on the land (ST cl 3.3(e), and
16. modifications to structures to conform with fire prevention laws and tenant retrofit issues (ST cl 3.3(f)).

Notes:

32 Ziff regards the exclusion of aboriginal title claims as a major exclusion in Canada: Ziff, above n 7, at 22. This is not so in Australia, where a grant of freehold title permanently extinguishes native title rights over the land: Fejo v Northern Territory (1998) 195 CLR 96.
33 Personal communication to the author by Marcus Cann, Managing Director, Stewart Title Ltd, 11 April 2003.
34 Ziff says, of a similar exclusion in the First Canadian Gold Policy, that its purpose is to exclude cover for volunteers: Ziff, above n 7, at 18. The New Zealand policy lacks this exclusion, but the same effect is achieved by limiting the insurer’s liability to an insured sum based on the purchase price paid by the insured. If the insured is a purchaser for value, his or her voluntary assignees are covered by the policy.
Claims

In the event of a valid claim, clause 4.6 of the policy provides that the insurer may (i) pay out the adverse claim against the insured’s title; (ii) negotiate a settlement; (iii) prosecute or defend an action or other proceeding; (iv) pay the insured the amount required by the policy; (v) take other action to protect the insured, or (vi) cancel the policy by paying out the insured sum together with all accrued costs and legal fees. Ziff points out that the main effect of cancellation is to terminate the duty to defend.\(^\text{35}\) The policy itself sets no cap on the insurer’s liability for costs incurred in the defence of the claim. In effect, the cancellation option allows the insurer to limit its defence costs to the insured sum.\(^\text{36}\)

C. WHAT DOES THE POLICY ADD TO EXISTING RISK COVER?

Non-title risks

This overview of the elements of the standard New Zealand policy shows that title insurance covers many risks beyond the purview of the Torrens system, such as marketability problems, the cost of rectifying existing contraventions of laws and property rights, the risk that the land will turn out to be land-locked, or that the insured will be required to remove an encroaching structure placed there by a predecessor. These are not title risks, and are not covered by the Torrens guarantee of title. In residential conveyancing, most purchasers simply assume the risk of unknown defects in the quality of the property. Title insurance will give them an additional option - to transfer the risks to an insurer.

Errors and omissions in the conveyancing transaction

A second point that emerges from the analysis of the New Zealand policy is that title insurance covers some risks that may be created by errors and omissions in the conveyancing process. For example clause 1.5(e) covers the risk that the insured incurs actual loss because a document is not properly signed or registered, resulting in a defect in his or her title. This could be due to an error or omission by the insured’s legal practitioner. The insured may have an action in negligence against his or her solicitor for a loss that is covered under the policy. If the insurer indemnifies the loss, it is entitled under the principle of subrogation to pursue the insured’s cause of action against the legal practitioner.

Since the exercise of subrogated rights against lawyers would deter them from buying policies for their clients, some title insurers are willing to waive their rights against a legal practitioner who acts for a title-insured client in a conveyancing transaction. Both First Title and Stewart Title are prepared to provide a written waiver of their subrogated rights against a practitioner should the insured make a claim under the policy.\(^\text{37}\) The net result is that many of the risks of conveyancing errors and omissions are transferred from legal practitioners and their professional indemnity (PI) insurers to title insurers. In the longer term, this may provide some relief from rising PI premiums and claims.\(^\text{38}\)

Why insures title risks?

A third observation about the owner’s policy outlined above is that many of the covered perils are title risks. This prompts the question – why would anyone want to insure against title risks, given that a Torrens system that operates on the principle of immediate indefeasibility provides better security for purchasers than any other conveyancing system? There are two answers to this. Firstly, an owner’s policy covers many title risks that are excluded from the Torrens guarantee. Secondly, there are many situations where the Torrens system guarantees not an indefeasible title, but compensation or damages from the State for the loss of an estate or interest. In cases where the Torrens system offers only money rather than land, title insurance provides a more convenient and user-friendly claims process.

\(^{35}\) Ziff, above n 7, at 19.

\(^{36}\) Ibid.
Title risks excluded from the Torrens guarantee

In principle, the Torrens system provides the State's guarantee that every registered title to an estate or interest or encumbrance in land is valid, enforceable and free from adverse prior unregistered interests. In reality, there are many exceptions to the conclusiveness of registered title. In addition to statutory exceptions, it has long been recognised that the principle of indefeasibility does not prevent the courts from enforcing against registered proprietors in personam obligations arising from their transactions and conduct, whether occurring before or after registration. In some cases, this can result in the owners being required to give up the whole or part of their registered title, notwithstanding that registration gave them an immediately indefeasible title to it. Rights enforceable in personam are treated as functionally equivalent to an exception to the indefeasibility principle.

(a) Overriding interests

(i) Exceptions to indefeasibility created by the Torrens statutes

In Victoria, the statutory exceptions to indefeasibility listed in s 42(2) of the Transfer of Land Act 1958 include, in para (b), any rights subsisting under any adverse possession of the land. If the total period of continuous adverse possession exceeds the statutory limitation period (normally 15 years), the title of the registered owner is extinguished by statute, even though his or her name remains on the register. A purchaser who buys a title that has been extinguished by statute receives nothing, even if he or she registers a transfer from the previous owner shown on the register. A purchaser who buys a title that has been extinguished by statute receives nothing, even if he or she registers a transfer from the previous owner shown on the register. Since registered owners take subject to the rights listed in s 42(2), the purchaser has no entitlement to indemnity under s 110 of the Act. Provided that these debts are not disclosed in the contract or purchase or actually known to the insured at the policy date, they are covered by cl 1.5(g).

Other interests that override the title of a registered owner include 'any public rights of way' (s 42(2)(c)), 'any easement howsoever acquired subsisting over or upon or affecting the land' (s 42(2)(d)), and the interest of a tenant in possession of the land. The risks of such undisclosed interests are covered by cl 1.5(d) and (h) of the policy. Unpaid land tax, unpaid rates and certain other charges are also protected as overriding interests under s 42(2)(f). Provided that these debts are not disclosed in the contract or purchase or actually known to the insured at the policy date, they are covered by cl 1.5(g).

The cover for overriding interests is more extensive than what is offered under many overseas title insurance policies. Arruñada says that policies sold outside the US typically offer very restricted cover for unrecorded property rights, and that this has limited the use of title insurance in title registration systems overseas.

(ii) Exceptions created by overriding statutes

Unrecorded interests may also subsist over registered land through the operation of other statutes that override the indefeasibility provisions of the Transfer of Land Act. For example, s 203(1) of the Local Government Act 1989 (Vic) operates to vest in the local council in fee simple title to any land that has been dedicated as a public highway. The provision overrides the indefeasibility of registered title. In Calabro v Bayside City Council, certain land forming a cul-de-sac had been dedicated to the public before 1939 by being marked as a road on a registered plan of subdivision and used as a road by the public. When introduced on 1 November 1989, s 203 (2) of the Local Government Act 1989 (Vic) provided that a public highway vests in fee simple in the Council of the municipal district in which it is located. In 1995, C purchased the land from the then registered owner, Balmford J held that the subject land vested in the council by virtue of the former s 203(2) on 1 November 1989, the commencement date of the provision, thereby divesting the then registered proprietors. It appeared that no-one was aware of the statutory vesting, and there was in any case no procedure for altering the title register to record it. Balmford J said that the statutory vesting of the land in the council was wholly inconsistent with the indefeasibility provisions of s 42 of the Transfer of Land Act 1958, and as the later statute, the Local Government Act 1989...
must prevail. A person in the position of C who held a title insurance policy would be covered under clauses 1.5(a), (d) and (j)). Examples of deprivation of registered title through vesting under other statutes have also caused losses in other States, and recently in New Zealand, where a provision of the Local Government Act 1974 (NZ) similar to that considered in the Calabro case was held to effect an automatic vesting of a road in the local authority, notwithstanding that it appeared to be included in a certificate of title.

(b) In personam rights

One of the most uncertain areas of Torrens jurisprudence is the scope of the rights that may be enforced against registered proprietors in personam. Although some of the Australian Torrens statutes now expressly recognise the exception, its ambit is still defined by principles that lie outside the Torrens system. A successful in personam claim may result in an order that a registered owner give up all or part of his or her registered title. Where this occurs, the statutes provide no indemnity, for the loss does not arise from the operation of the Torrens system.

44 Although s 42(2)(c) provides that the registered title is subject to ‘any public rights of way’, Balmford J found that the two statutes were inconsistent because s 203 of the LGA provided for the vesting in fee simple without reference to s 44(2) of the TLA or any other Act: [1999] 3 VR 688, at paras 52-54.


47 Man O War Station Ltd v Auckland City Council [2002] 3 NZLR 584 (PC).

48 Land Title Act 1994 (Qld) s 185(1)(a); Real Property Act 1886 (SA) s 71IV; Land Title Act (NT) s 189(1)(a); discussed in Adrian Bradbrook, Susan V MacCallum and Anthony P Moore, Australian Real Property Law 3rd ed., (Lawbook Co, Sydney, 2002), at para [4.69].

It is impossible to generalise about whether an owner’s policy covers a deprivation of land through a successful in personam claim. The claims are heterogeneous in nature, depend on evaluation of particular conduct, and rarely result in a proprietary remedy against a registered owner. A court is unlikely to order the owner to give up all or part of his or her registered title unless it would be unconscionable in the circumstances for him or her to retain it.

Assume, for example, a purchaser (P) registers a transfer from a co-owning couple, knowing that the husband has sustained serious brain injury and is subject to a guardianship order. In proceedings brought on behalf of the husband to rectify the register, a court finds that he is entitled to raise the plea of non est factum, and that P should have known this. While there is no finding of fraud against P, the court finds that the husband has an action against him in personam, and orders P to retransfer the property. Prima facie, P's loss is covered by cl 1.5(e) (document not properly signed or registered, resulting in title defect) and 1.5(f) (incompetency or incapacity results in a defect in the title). But given P's conduct, the insurer may be entitled to rely on cl 2.2(a), which excludes cover for risks created or allowed by the insured.

Most successful in personam actions are brought against mortgagees. An example of where title insurance can cover the risk of loss through an in personam claim is where a mortgagee is prevented from enforcing its security under the principles in Garcia v National Bank of Australia. In that case a bank was held to be disentitled from enforcing its mortgage even though it had not been fraudulent. Mr and Mrs Garcia had mortgaged their home to the bank as security for their company’s debt to the bank. While her consent had not been obtained by undue influence, Mrs Garcia did not understand the extent or purpose of the guarantee, nor that it was secured by a mortgage over her home. The High Court held that the bank should have realised that, as a
married woman, Mrs Garcia may have trusted her husband in matters of business and that, accordingly, the husband might not fully and accurately explain to her the extent of the guarantee secured by the mortgage.\(^{52}\) Knowing those circumstances and that she had nothing to gain from the transaction, the bank should have either explained the transaction to her, or ensured that she received independent advice. Since it had failed to do so, it was unconscionable for the bank to enforce its security against her.

Lenders commonly deal with the risk of a Garcia type claim by ensuring that the mortgagor/guarantor obtains independent legal advice. If this miscarries, a title-insured lender can rely on its cover against the risk that ‘the mortgage is invalid or unenforceable as an encumbrance against the title’ (RLPP 0300, cl 2.1(d)). The cover is excluded if the invalidity or unenforceability stems from a breach of consumer or credit laws (RLPP 0300, cl 3.3) but this would not include a breach of the procedures indicated in Garcia.

(c) Risk of loss in the pre-registration ‘gap’

One of the major deficiencies in the risk cover provided by the Torrens system is that the purchaser or mortgagee can lose priority to another interest between settlement and registration. At settlement the purchaser hands over the purchase monies in return for a registrable document, but it is only upon registration that he or she gets an indefeasible title free of unregistered interests. The existence of the ‘registration gap’ has given rise to much litigation over priorities. There are conveyancing solutions, such as the use of caveats and other devices that allow purchasers to reserve priority for their instruments for a specified period.\(^{53}\) The problem is persuading legal practitioners to use them. Except in Tasmania and England, the provisions are underutilised.\(^{54}\)

This risk of the registration gap is eminently suitable for transfer to an insurer. The New Zealand owner’s policy covers the pre-registration risk that ‘someone lodges a dealing after settlement which prevents your interest in the land from being registered’ (cl 1.5(c), and the risk that ‘someone else owns has an interest in the land’ (cl 1.5(d)). Lenders are also covered against the pre-registration risk that ‘an encumbrance, charge or lien has priority over the insured mortgage’\(^{55}\) and the risk that ‘the mortgage is invalid or unenforceable as an encumbrance against the title’\(^{56}\)

First Title’s mortgage processing procedures provide an example of how easily an insurer can solve gap problems, by a strategy of risk assumption and risk distribution. Where the company provides mortgage processing services to a lender, it does not attend settlement. The lender disburses the loan funds on the basis of undertakings by other parties to provide the documentation later. The insurer assumes the risk that an undertaking may be breached and that it will need to enforce the undertaking or indemnify the lender.\(^{57}\) The risk of the occasional breach is distributed over a very large number of transactions. This allows the company to reduce its mortgage processing costs, so long as the costs saved by not attending settlements exceed the losses resulting from dishonoured undertakings.

PI insurance can also be used to solve gap problems. After the arrival of title insurers in Western Canada, lawyers devised an innovative solution to their gap problem that involved a change in conveyancing practices and an extended role for their PI insurance. The problem was that mortgage lenders were unwilling to disburse the loan advance until their mortgage was registered. Home buyers using a mortgage to assist in the purchase had to procure bridging finance to settle their contract. The title insurers were willing to insure the lender’s risk that a competing interest might be registered in the interval between settlement and registration of the mortgage. In order to match the security and convenience offered by title insurance, the law societies of the four Western Canadian provinces devised the Western Torrens Protocol, which commenced in 2001.\(^{58}\) Where the protocol is used, the loan monies can be disbursed before the mortgage is registered. The lawyer’s errors and omissions insurer assumes the risk that

\(^{52}\) Ibid at 409.
\(^{53}\) These are variously called settlement notices (Qld), priority notices (Tas), and stay orders (Vic and WA).


\(^{55}\) First Title, Residential Loan Protection Policy, RLPP 0300, cl 2.2(a).
\(^{56}\) Ibid, cl 2.1(d).

\(^{57}\) First Title proposal document provided via personal communication to the author by Ellie Comerford, Managing Director, First Title, 21 March, 2003.

a competing interest may be registered first. The normal deductibles are waived for
claims under the protocol.\(^{59}\)

**D. INSURING RISKS COVERED BY THE TORRENS GUARANTEE**

Some title-insured risks may also give rise to an entitlement under the compensation
provisions of the Torrens statutes. For example, an owner may be deprived of his or her
title, or find it encumbered by a mortgage, if a forged transfer or mortgage is registered
by a third party who is not implicated in the fraud. This gives rise to a right to seek
compensation under the Torrens statutes (subject to fault-based exclusion or
apportionment). The same risk is also covered under the owner’s policy, cl 1.6(b)(i).

(a) No fault indemnity as a ‘first resort’

Where there is an overlap, the owner or lender will be better off insuring against the risk
and claiming under the title policy. In half the Australian jurisdictions, a person who has
suffered loss must first bring an action against the individual who was responsible for
the loss. The State or Territory provides compensation as a last resort, when remedies
against other parties are precluded or exhausted.\(^{60}\) Many of the statutes have been
amended in recent years to deny or apportion compensation payment in case of fault by
the claimant or by his or her legal practitioner or agent.\(^{61}\)

Title insurance provides no fault cover, and an indemnity of first resort. The insured is
not required to sue anybody else who may be at fault.

(b) Better enforcement of indemnity rights

Title insurance policies are written in plain English. Policy exclusions are construed
strictly against the insurer, and in line with the insured’s reasonable expectations.\(^{62}\)

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\(^{59}\) Ziff, above n 7, at 13.

\(^{60}\) *Real Property Act* 1886 (SA) s 203; *Transfer of Land Act* 1893 (WA) s 201, *Land Titles Act* 1980 (Tas) s 154(1)(a); *Land Titles Act* 1926 (ACT) ss 154(1)(a), 154(3). The costs incurred in obtaining a judgment and attempting to execute it are generally not recoverable even if a compensation claim is eventually granted: *Robinson v Registrar-General* (1982) 2 BPR 9634; (1983) NSW ConvR 155-138; *Allen v Grangrove Pty Ltd v Registrar-General* (1990) 170 CLR 146 where it took nine years of litigation for the appellant to obtain an order for compensation: ibid at para 2.41, 4.43. In *Breskvar v White* [1978] Qd R 187, the claimants, who had spent nine years fruitlessly pursuing the persons primarily liable, were ruled out of time for bringing an action for damages against the Registrar-General as nominal defendant.

\(^{61}\) The history of the amendments is detailed in Chapter 8.

\(^{62}\) Ziff, above n 7, at note 7.

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such *contra proferentur* rule applies to the interpretation of the Torrens compensation
provisions, most of which are poorly drafted and unclear in their application to certain
situations. Where actions are brought against the State or the registrar as nominal
defendant, registrars have generally considered it their duty to raise all possible
defences and legal objections to the claim. Although the compensation provisions are
remedial legislation and should be given a beneficial interpretation, courts have often
construed them in a legalistic and niggardly fashion.\(^{63}\) The law reports document
numerous cases in which claimants have experienced extraordinary difficulty, delay and
cost in pursuing compensation under the Act.\(^{64}\) The reasons for their difficulties have
more to do with legal technicalities than the substantive merits. For some claimants, the
Torrens indemnity has turned out to be a costly mirage, luring them into expensive and
ultimately fruitless litigation.\(^{65}\)

(c) Rectification of problems is better than compensation

Most owners want their land asset, not the money. The title insurer’s duty to defend the
insured’s title is probably of greater value to the insured than the entitlement to

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interpretation has narrowed the operation of the entitlement provisions.

\(^{64}\) This is commonly due to the need to exhaust remedies against other defendants
first. A number of the cases are discussed in NSWLR, ibid. See eg the case of
Mrs Mayer, discussed at para 2.40, who missed out because she sued under s
120(1) instead of a s 127 of the *Real Property Act* 1900 (NSW); *Northside
Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 where it took
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defendant.

\(^{65}\) For similar criticisms, see S R Simpson, *Land Law and Registration* (Cambridge
Elusive Title: Basic Legal Principles of an Efficient Torrens System* (Alberta Law
Review, University of Alberta, Edmonton, Alberta, 1978) at 69; P B A Sim, "The
Compensation Provisions of the Act" in G W. Hinde (ed.) *New Zealand Torrens
System Centennial Essays* (1971) at 138-157; Les A McCormon, 'Compensation
Provisions in Torrens Statutes: The Existing Structure and Proposals for Change'
(1993) 67 Australian Law Journal 904; R Stein, 'The Torrens Assurance Fund in
indemnity for actual loss. The insurer may defend legal actions brought against the insured, and may prosecute actions on behalf of the insured. Any costs involved in defending the insured's title are borne by the insurer, and do not reduce the insured sum. Jonathan Flaws estimates that 'internationally, 45% of all payments under title insurance policies are paid to lawyers to assist in resolving claims relating to covered risks'.

In effect, title insurance provides a defence fund for rectifying title and real estate problems. Both First Title and Stewart Title take a pro-active approach to insured risks, settling or resolving problems before they result in a claim.

In many cases, this means that the insured gets the title as represented in the policy clear of insured risks rather than monetary compensation in lieu. The Torrens system never comes to the aid of an owner in this way.

(d) Claims above the insured sum

A case may arise in which the insured's loss is greater than the insured sum, eg, where the value of the land at the date of the loss is more than 200% of the purchase price. This will not be common, as most claims arise soon after settlement, and the quantum is usually less than the value of the land. In that event, Flaws says that the insurer will cover the costs of making the claim under the Torrens provisions and complying with any procedural requirements. The amount paid by the Crown will be applied to fully compensate the owner with the title insurer only recovering what it has already paid.

In such cases, the financial support of a title insurer will help to redress the asymmetry of power when a deprived owner sues the State for compensation. The government defendant has the advantage of being a repeat player in this type of litigation, familiar with the system and able to draw upon the financial and legal resources of the State. A litigant with these advantages can skew the legal rules in its favour over the longer term.

1. It provides coverage against certain title risks not covered by the Torrens State guarantee and compensation provisions, including many overriding interests, and the risk of loss of priority to another interest in the gap between settlement and registration. It may in a few cases provide cover against deprivation of property by remedies granted against a registered proprietor under a successful in personam claim, although this is more likely to avail lenders than owners.

2. Where an insured risk is one that also entitles the insured to compensation under the Torrens provisions, it is more advantageous to claim under the policy. The policy provides no fault cover as a 'first resort' without legal technicalities and procedural hurdles, and without the need to incur costs in making a claim. Moreover, the insurer will try to fix the title problem, which is usually a preferable outcome for the insured than to sustain a loss and receive compensation.

3. An owner's policy covers a range of perils that are not title risks and have nothing to do with the Torrens system, such as the risk of having to rectify an existing contravention of zoning and building laws. (See, in particular, the risks in the fourth and sixth clusters).

4. An owner's policy may be endorsed to insure over a known risk. Previously, a purchaser's options were limited to (i) rescission (if the remedy was available in the circumstances); and (ii) assumption of the risk.

5. David will stand a better chance against the government Goliath if he has the backing of a multinational title insurer. This may lead to a more beneficial interpretation of the compensation provisions, leading to better outcomes for claimants generally.

E. CONCLUSION

The chapter started with the question: what can an owner's policy add to the existing methods for managing the risks of property transfer? It emerges from the above discussion that it adds the following:

1. It provides coverage against certain title risks not covered by the Torrens State guarantee and compensation provisions, including many overriding interests, and the risk of loss of priority to another interest in the gap between settlement and registration. It may in a few cases provide cover against deprivation of property by remedies granted against a registered proprietor under a successful in personam claim, although this is more likely to avail lenders than owners.

2. Where an insured risk is one that also entitles the insured to compensation under the Torrens provisions, it is more advantageous to claim under the policy. The policy provides no fault cover as a 'first resort' without legal technicalities and procedural hurdles, and without the need to incur costs in making a claim. Moreover, the insurer will try to fix the title problem, which is usually a preferable outcome for the insured than to sustain a loss and receive compensation.

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4. An owner's policy may be endorsed to insure over a known risk. Previously, a purchaser's options were limited to (i) rescission (if the remedy was available in the circumstances); and (ii) assumption of the risk.

Although this analysis shows that title insurance can offer real benefits for purchasers, it is a matter for commercial assessment whether the benefits justify the costs. The costs of insuring can easily be measured in dollars, while the benefits of the additional risk cover are harder to evaluate. It is one thing to identify what perils are covered by a policy, and quite another to assess the probability of them striking a particular individual.

Title insurers, registrars of title and conveyancers are all in the business of managing the risks of errors and omissions in the conveyancing transaction are transferred from the legal practitioner (or his or her PI insurer) to the title insurer. PI insurance is of limited value to a client, since it is the lawyer who is the insured, and the client has to show that the loss results from the lawyer’s negligence. The client is better off being able to claim on a no-fault basis under a title insurance policy. The lawyers and their insurers are also better off if the client is title insured. Since the title insurers are willing to waive their subrogated rights against a negligent but honest practitioner, the risk of the errors and omissions remains with the title company.

In some cases, title insurance may allow a purchaser to dispense with off-title searches and surveys, relying on their insurance cover against unknown defects. This can produce savings to offset the cost of the insurance premium. The precise scope of this protection is presently unclear, but may be clarified before the owner’s policies are marketed in Australia.

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the reasons for the failure of the Torrens systems in the US is that under-resourced county
governments were unable to provide the financial support that the systems needed in their
establishment phase. At the time that Illinois closed down its Cook County registry in 1991, there
was a two-year delay in registering land, and the registry was receiving more applications to
withdraw land from the system than applications for first registration.

The design of legal rules can also play a part in the success or failure of LTR systems. While
various model LTR statutes have been proposed or endorsed by legal commentators, little empirical
work has been done to measure the impacts of different legal rules, or to develop criteria for
evaluating them. Arguments for one rule over another are often little more than assertions based on
legal doctrine. To move beyond this stage, law must engage with other disciplines like economics
and social science, and harness their methodologies.

This work has focussed on certain persistent problems in the legal rules of LTR systems. The
problems stem from a fundamental conflict in the systems' objects and, ultimately, in the economic
functions of private property itself. Western legal systems allow the in rem enforcement of rights, to
provide owners with an incentive to husband land resources and to use them productively. But
since land is a scarce resource, it is necessary to allow multiple interests to exist in the same parcel
of land, to facilitate specialised activity and maximise collective welfare. The result is that conflicts
of property rights in land are bound to occur. This imposes costs on the party to whom the law
allocates the risk of loss.

There is a tension between facilitating transfer and inhibiting non-consensual transfer. The
'property' rule serves static security by requiring that only a consensual act can divest an owner of
his or her land. But there are information costs in ensuring that every transfer is consensual, and that
all previous transfers in the vendor's chain were also consensual. Facility of transfer requires that
some limit be placed upon the information cost that purchasers must bear. A rule that allows a non-
consensual transfer to pass an interest in land in some circumstances promotes dynamic security,
but diminishes static security.

Demogue provided advice on how to manage this conflict. He pointed out the paradoxical
relationship between dynamic and static security. The two are not only antithetical, but also
interdependent. Neither is sufficient without the other. There is little value in being able to acquire
land assets non-consensually from prior owners if we in turn are subject to losing our assets through
a non-consensual transfer post acquisition. We must strive to find ways of avoiding a conflict of
rights from arising and, if we cannot, we must formulate a decision rule that balances dynamic and
static security.

Chapters 5 and 6 compared three rules that are used by LTR systems in common law countries to
resolve property disputes arising from the registration of a forged or unauthorised disposition. The
rule known as immediate indefeasibility is a pure rule of dynamic security. The other two rules,
deferred indefeasibility and the 'English' rule, each seek to balance static and dynamic elements in
their own distinctive way. All three rules concede more to dynamic security than did the historic
priority rules of English property law.

It was found that immediate indefeasibility is inferior to the other rules for a variety of reasons. By
making non-consensual deprivation of property rights immediately irreversible, it derogates from
the 'property' rule, and is arguably inconsistent with human rights norms that entitle individuals to
protection from arbitrary deprivation of property and from interference with their homes. It
undermines the rules of public policy embodied in a number of rules of law relating to the formal
requirements for land transfer, by neutralising the sanction of invalidity. When it prevents the
recovery of land unlawfully taken by government officials acting beyond their power, it subverts
the rule of law and blunts judicial safeguards against the abuse of executive power.

The rule of immediate indefeasibility normally allocates the land interest to the purchaser (often a
mortgagee), while depriving the occupying owner, who may be entitled to compensation in lieu.
Established owners in possession are likely to value the land more highly than the new acquirer and
to esteem their loss far above the available monetary compensation. It is more efficient in most
cases to allocate the land to the owner in possession, and to compensate the purchaser. It is also
fairer to do so, according to Radin's theory that people are entitled to have their 'personal' property
protected against the 'fungible' claims of others. Immediate indefeasibility produces an allocation
which is in most cases the opposite of what efficiency and fairness indicate.

Comparative law analysis shows that very few countries use the rule of immediate indefeasibility in
their LTR systems. In its pure form, the rule is confined to Australia and New Zealand, Papua New
Guinea, Saskatchewan, and (possibly only temporarily) Malaysia. It is only in Australia and New
Zealand that the rule is applied with any enthusiasm. The judiciary in those countries adopted the
rule a little over thirty years ago, without any discussion of the policy implications. The judicial
justification rests on the formal legal doctrine of 'title by registration', which holds that it is the act
of registration, not the registered instruments, that passes title under LTR. It follows that
registration procured by a forged or void instrument is nonetheless effective to pass title. All LTR
systems acknowledge this principle, but most allow an unlawfully procured entry to be set aside, at
least against the proprietor immediately registered under the void instrument. The Australasian

The tension between dynamic and static security presents itself as a conflict between the interests of prior owners whose interests are not protected on the register, and subsequent registered owners. This conflict is a persistent problem in common law-based systems, where equity recognises a wide range of interests as effective without registration.

Torrens statutes also provided for this, but the very width of the registrar’s power of correction was taken to preclude a literal interpretation. Judicial construction of the power has sharply confined the scope of the power.

The rule of immediate indefeasibility goes too far in promoting dynamic security. In doing so, it makes existing ownership insecure, and imperils other important legal principles, norms and policies. It is inefficient and unfair. A more balanced rule is preferable, as Demogue and Mapp recommended. Some options for an alternative rule were evaluated in Chapter 6.

Another important insight contributed by Demogue was that certain institutional arrangements may reduce the incidence of conflicts of rights, or mitigate the pain caused by the need to choose between dynamic and static security when conflicts arise. The principal strategies that Demogue proposed are publicity for interests, and insurance.

The strategy of publicity was examined in Chapter 7. It was found that LTR statutes are less effective than deeds registration in generating publicity for all interests. Because of the costs of the title assurance functions undertaken by the registry, LTR systems typically allow only a restricted class of property rights to be registered. Deeds registries can provide publicity for a much wider range of interests. Since it would be unacceptable to allow unregistrable interests to be defeated by a registered owner without making provision for their protection, most LTR systems incorporate some form of deeds registration or interest recording. Interests that are ‘recorded’ in this way are not covered by an affirmative warranty, but generally gain some form of priority or protection against extinguishment.

In order to achieve the strategy of publicity, a system of deeds registration or LTR must provide an incentive for owners to register or record their interests. This is done by substituting a ‘publicity’ rule of priority for the ‘contract’ rule of priority. In its pure form, known as a ‘race’ system, the ‘publicity’ rule provides that registered interests are ranked for priority by their date of registration (effectively, the date of lodgement), and a registered interest prevails over an unregistered one. The same rule can apply as between recorded and unrecorded interests. International experience in deeds registration suggests that ‘race’ systems tend to produce doctrinal instability. There is constant pressure to reintroduce concepts of notice, either directly, or via the requirement of ‘good faith’ or absence of fraud.

In cases where the law must award a disputed interest either to the prior owner, or to the good faith purchaser, the loser is compensated, at least in theory. Under the originalTorrens statutes, the compensation is provided in the first instance by the person primarily responsible for the loss, and the statutory indemnity is available only as a last resort. This model imposes substantial costs and delays on claimants, who must fruitlessly sue other available defendants before becoming entitled to claim from the public assurance fund. In recent years, a few jurisdictions have amended their statutes to allow applicants to claim against the fund as a first resort, subrogating the registrar or the state to any remedies the claimant may have against other persons.

For many years, legal commentators have pointed to the gaps and deficiencies in the risk cover provided by the statutory indemnity scheme. These complaints have for the most part gone unheeded by legislatures. Until very recently, supplementation of the risk cover by private title insurance was not available in many jurisdictions that practised LTR. A number of international title insurance companies have adapted their policies to suit the needs of owners, purchasers and lenders under LTR systems, and are marketing their products for use in conjunction with registered titles. Chapters 8 and 9 examined policies on offer in the Australasian market, and concluded that they can usefully supplement our present strategies for managing conveyancing risks under the Torrens system. The existence of a private risk taker may prompt governments to re-evaluate whether they wish to continue in the business of insuring transactions in registered land. This may lead them to privatise the function, or alternatively, to remodel their indemnity schemes to provide more comprehensive risk cover and to administer and managed as an insurance undertaking.

While the dilemma of legal security can never be resolved completely, there are a variety of strategies for minimising the incidence of conflicts, and a range of possible rules for adjudicating the conflicts that do arise. This thesis has sought to show that some strategies and rules are more effective than others, and to propose broad, interdisciplinary criteria for evaluating the alternatives.
Appendix A: Bibliography

A select bibliography, listing works cited in the thesis

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