

# THE TORRENS SYSTEM'S MIGRATION TO VICTORIA\*

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*2008 will see the 150<sup>th</sup> anniversary of the invention of South Australia's revolutionary Torrens system of lands titles registration. It quickly spread from its home to the other Australian colonies. It was introduced in Victoria in October 1862, four-and-a-half years after its adoption in South Australia. While the adoption of the Torrens system in Victoria may, from this historical distance, seem rapid and thus inevitable, it was not without considerable effort that the proponents of the Torrens system in Victoria were able to overcome the tenacious opposition to its introduction from certain lawyers. This article traces the seven stages in the adoption of Torrens in Victoria and shows that the Torrens system succeeded because it was truly the people's cause in Victoria, as it had been in its South Australian home.*

## I INTRODUCTION

The adoption of the Torrens system throughout Australia was not an historically inevitable process. This was especially so given the system's initial teething troubles in South Australia, the opposition offered to it both there and elsewhere by the legal profession, and a number of contemporary competing English proposals. But when the Torrens system did come to Victoria in 1862,<sup>1</sup> it conquered what was then Australia's most populous and richest colony at about the same time as Victoria was opening up its land to purchase.<sup>2</sup> The advent of the Torrens system in Victoria also provided a striking illustration of the fact that colonial Australians were quite capable of striking out on indigenous paths and refusing to follow English proposals for reform if they had a better idea of their own. The story is, therefore, very well worth knowing.

Recently Professor Wilfrid Prest has pointed to a 'remarkable blossoming – indeed explosion – of historico-legal and legal-historical research over the past quarter-century or so, in Australia as throughout the common-law world'.<sup>3</sup> That is true. However, there is still a long way to go in Australian legal history before

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1 *Real Property Act* [1862] (Vic).

2 See eg, Stephen H Roberts, *History of Australian Land Settlement, 1788-1920* (1969) ch 20.

3 Wilfrid Prest, 'Legal History in Australian Law Schools: 1982 and 2005' (2006) 27 *Adelaide Law Review* 267, 271.

even the principal facts and events have been the subject of adequate description and analysis. This is one reason why the only attempt at a general legal history of Australia is wanting in so many respects,<sup>4</sup> and the time is not yet ripe for a better attempt. Thus, while a useful analysis has appeared of how the Torrens system came to be adopted in Tasmania,<sup>5</sup> until now there have only been the briefest mentions of how Victoria came to adopt Torrens's Copernican revolution in one of the most fundamental legal fields, lands titles law.<sup>6</sup>

The events in Victoria were far from devoid of interest and significance, and the Torrens system's path to the statute book in that colony was a hard one. The events included ferociously conducted public and parliamentary debates; mass denigration of lawyers as a caste; idolisation of Torrens by the public; accusations that Torrens was a plagiarist and detailed denials by him; a split in the Cabinet, which led to the Governor's receiving conflicting advice from his Ministers about whether he should assent to the Bill to introduce the Torrens system at all; and threats to block supply in not one, but both Houses of Parliament, if assent was not given.

The significance of the battle for Torrens in Victoria thus extends even beyond real property law, and includes constitutional aspects. As well as the government's rumblings about denying assent to legislation passed by Parliament, it is not the least interesting aspect of the introduction of the Torrens system in Victoria that it provides us with an example of the legislature's acting, not just as a handmaid of the executive, but as a real debating forum and decision-making organ. It is interesting and refreshing from today's perspective, although it caused less comment in those days before the rise of modern political parties, to see both Houses of the Victorian Parliament considering such a significant proposal for new legislation on its merits, against the opposition of leading members of the government, and without strict party discipline.

The Torrens system was adopted in Victoria largely as the result of a campaign by the press and politicians which overcame the opposition offered by certain lawyers – in particular by lawyer-politicians such as the Attorney-General and the Solicitor-General, whose opposition rendered the government unable to take action itself and passed the initiative over to private members and the broad-based public and press campaign. It is obvious, reading the newspaper reports of proceedings in Victoria, from February and March 1862 in particular, that a wave of public demand for the Torrens system went through the colony at that time. Without for a moment suggesting that the two issues are comparable in any other way, I am reminded of the similar explosion of debate and public feeling that occurred towards the end of 2006 when considerable concern about the alleged peril of global warming was created almost overnight. This development seems

4 Jeremy Finn, 'A Formidable Subject: Some Thoughts on the Writing of Australasian Legal History' (2003) 7 *Australian Journal of Legal History* 53, 62f.

5 Stefan Petrow, 'Knocking Down the House? The Introduction of the Torrens System to Tasmania' (1992) 11 *University of Tasmania Law Review* 167. See also Stefan Petrow, 'Responses to the Torrens System in Tasmania, 1862 to 1900' (1997) 5 *Australian Property Law Journal* 194.

6 The best overview that I am aware of is provided by Douglas J Whalan, *The Torrens System in Australia* (1982) 9f.

largely attributable to a popular film featuring what has been referred to judicially as the 'charismatic presence'<sup>7</sup> of a former Vice-President of the United States of America, Mr 'Al' Gore. When we recall that, of today's popular media, only the press existed in the early 1860s and accordingly the opportunities to project a 'charismatic presence' were far more limited, the level of demand that could be stirred up for the Torrens system in colonial Victoria and the high public profile of Torrens himself are even more striking.

The reasons for the phenomenal degree of public support for a reform of land conveyancing law in Victoria closely mirror the reasons why the Torrens system was a popular cause when it was first invented and introduced in South Australia in 1857–58: the circle of landowners in gold-soaked Victoria was perhaps even greater than it was in South Australia, and accordingly a very large percentage of the population came into contact with the perils and expense associated with the old pre-Torrens system of land conveyancing. In Victoria's case, there was, moreover, the example of South Australia itself, where the Torrens system had already begun to be a striking success by the early 1860s, despite opposition from some judges and lawyers. Nowadays, we might think it difficult to awaken any public interest in the dry topic of land conveyancing, but in the 1860s many people could see from personal experience that the law was serving them poorly in that field. Many people also owned land or wished to do so. The public could, therefore, be mobilised to support the Torrens system, and opposition from lawyers in Victoria could be dismissed as attributable solely to the unworthy desire to save lawyers' lucrative monopoly on conveyancing.<sup>8</sup>

As opposition was offered on a variety of fronts, the adoption of the Torrens system in Victoria is more a series of short plays linked by a common theme than one seamless narrative. Virtually every imaginable obstacle that could be found to obstruct the introduction of the system, short of revolutionary displacement of the entire system of government, was placed in its way. The Torrens system surmounted each one, not only because of its inherent virtues, but also because the great defects of the prior law meant that there was huge public support for change.

As with other, even greater acts of creation, the events occurred in seven phases, and there was a day off:

- first, before the Torrens system was widely known, Victorian politicians conducted a half-hearted search for a model for reform of land conveyancing, admitted on all sides to be in a catastrophic state, causing much needless uncertainty and expense to the people it was supposed to serve;
- secondly, the Torrens system was proposed as a model for Victoria and won public support over its competitors, both locally produced Victorian proposals and imports from England;

7 *Dimmock v Secretary of State for Education and Skills* [2007] EWHC 2288 (Admin), [3].

8 I expand on the points that I make in this paragraph and provide further references in Greg Taylor, 'Is the Torrens System German?' (2008) 29 *Journal of Legal History* (forthcoming).

- thirdly, attempts to have the government adopt it as an official measure failed, because the law officers were opposed to it;
- next came a pause while a reform of the reform proceeded in South Australia and the Victorians awaited the results of that process;
- fifthly, the Torrens system – South Australia’s new improved version – was seen through Parliament by private members on the wave of popular demand referred to earlier;
- sixthly, the government was prevailed upon, by a mixture of appeals to its better side and threats to block supply, to endorse the Bill by recommending it for Royal Assent and making arrangements for its proper administration;
- finally, the government also supported a Bill to eliminate errors of detail in the original statute caused by its non-co-operation with the process earlier on.

I shall consider each of these episodes in turn.

## II PHASE 1: THE SEARCH FOR A MODEL

In Victoria in the 1850s, as South Australia was breaking entirely new ground, English models for conveyancing reform were predominant.

As early as November 1851, when Victoria had existed for only a few months, Barry S-G introduced ‘a Bill to facilitate the conveyance of real property’.<sup>9</sup> Despite this somewhat grand title, the Bill was largely a transcript of parts of 8 & 9 Vic c 119 (1845) (UK).<sup>10</sup> That statute permitted the shortening of language used in deeds by the substitution of economical language for various florid phrases. For example, the phrase ‘free from all incumbrances’ was to take the place of a 106-word clause. Although a similar statute about leases was already part of the law of Victoria,<sup>11</sup> this was not. No doubt it would have been a useful statute in Victoria, but it would hardly have ended all uncertainty and expense.

Barry S-G’s Bill was seconded by no lesser colonist than J P Fawkner. It was read a second time and committed on 5 December, the Solicitor-General thinking that ‘it was not necessary to go into the details of this Bill’.<sup>12</sup> Barry S-G, however, was soon to be appointed to the Bench, and, thereafter, there was no further progress even with this modest reform.<sup>13</sup> In 1857 his Honour commented that the Bill ‘lapsed principally as the House did not feel at the time disposed to consider the subject,

9 *The Argus* (Melbourne), 22 November 1851, 2.

10 The reference to the English statute which provided the inspiration for this Bill in the newspaper report is incorrect, but the original of the Bill is preserved in the State Library of Victoria, microfilm in series LTOM 100. The 1845 statute has long since been repealed and its functions in the law of England are now fulfilled by *Law of Property (Miscellaneous Provisions) Act 1994* (UK) Part I. A comparable modern Victorian statute is the *Property Law Act 1958* (Vic) s 76.

11 The *Leases Act 1845* (UK) having been adopted by the Legislature of New South Wales, when Victoria was part of it, by 11 Vic No 28 (1847) (NSW).

12 *The Argus* (Melbourne), 6 December 1851, 2.

13 As is indicated by the table in the *Votes & Proceedings* for the session.

in what appeared to me to be the spirit which it deserved',<sup>14</sup> and added that a major defect in the Bill was its failure to provide for compulsion in registration. In fact, it said nothing significant about registration at all.

After this timid and abortive start, conveyancing reform was taken no further until responsible government arrived, when it was taken up immediately. On 25 November 1856, opening the first Parliament of Victoria, the Acting Governor announced a Bill 'for facilitating the transfer of real property, and the registration of transfers'.<sup>15</sup> When this promise had not been redeemed two months later, a member of the Legislative Council asked (Sir) William Mitchell for the government what had happened to it, and received the reply that he hoped it would be only a few days more.<sup>16</sup> Meanwhile, Tom McCombie MLC had been working on his own Bill, which he introduced on 10 February. It received a second reading on 3 March.<sup>17</sup>

McCombie's Bill, which represented, as he said, the best he could do despite not being a lawyer,<sup>18</sup> proposed the appointment of commissioners who would issue certificates of title for land having been 'guided by the real justice and good conscience of the case without regard to legal forms and solemnities', and liberated from the rules of evidence (cl 6). Their certificates were to grant a clear title to the owner at the time of their issue, but there was no provision for the registration of future transactions.<sup>19</sup> There was a precedent for that latter part of the plan in an old Chancery procedure and a more recent statute applying in Ireland.<sup>20</sup> But, given the frequency with which land was traded in the colonies, this Bill was merely a valiant attempt which would have produced little progress in the end, because under colonial conditions the certificates would quickly have become out of date. Nevertheless, any improvement, however minimal, of a catastrophic situation was better than nothing at all, and the Bill made it through the Legislative Council. In a foretaste of future battles about whether lawyers or laymen were to be in charge, it survived an attempt by J B Bennett to have the Supreme Court substituted for the commissioners, which, to McCombie, seemed like a way of re-introducing detested legalism through the back door; he even read an extract from *Bleak House* to illustrate his point.<sup>21</sup> Only J B Bennett opposed the third reading in the

14 Victoria, *Parliamentary Papers*, Legislative Council, 1856–57 no D15, 19.

15 Victoria, *Votes & Proceedings*, Legislative Assembly, 25 November 1856, 24; Victoria, *Parliamentary Debates*, Legislative Council, 25 November 1856, 10.

16 Victoria, *Parliamentary Debates*, Legislative Council, 27 January 1857, 341.

17 Victoria, *Parliamentary Debates*, Legislative Council, 3 March 1857, 537.

18 Victoria, *Parliamentary Debates*, Legislative Council, 3 March 1857, 536.

19 A copy of the Bill was supplied to me from the records of Parliament.

20 Anon, 'Enhancing the Marketability of Land: The Suit to Quiet Title' (1959) 68 *Yale Law Journal* 1245, 1266f; J A Dowling, 'The Landed Estates Court, Ireland' (2005) 26 *Journal of Legal History* 143, 150. Shortly afterwards, the *Declaration of Title Act 1862* (UK), which applied in England, would take up a similar idea.

21 Victoria, *Parliamentary Debates*, Legislative Council, 9 June 1857, 744f; 16 June 1857, 801 (*Bleak House* reading).

Legislative Council, specially asking for his ‘total dissent’<sup>22</sup> from the Bill to be recorded.

When it was sent down to the Legislative Assembly its first reading was moved on the spot by Dr Augustus Greeves,<sup>23</sup> but it was doomed when Fellows S-G first announced that it was not a government Bill and then moved that it should be postponed for six months,<sup>24</sup> a proposal which was agreed to on 4 August and was the equivalent of rejection (both by custom and because all Bills lapsed on prorogation). Both (Sir) Charles Gavan Duffy and the barrister J D Wood opposed it, while another member suggested employing a drafter for the Upper House to avoid the numerous blunders allegedly to be found in the Bill.<sup>25</sup> *The Argus*,<sup>26</sup> too, had not been impressed by McCombie’s pretensions as a law reformer. It referred to the need to wait for English reforms before proceeding and also summarised the opinions of that notorious opponent of lands titles registration, Lord St Leonards, before remarking acidly that ‘[t]o the transcendental and intuitive genius of Mr Thomas McCombie the opinions of a lawyer, however eminent, on a legal subject are worthless’.

McCombie’s response to this was to accuse the Legislative Assembly of ‘buffoonery’ (earning him a rebuke from the President) and to move successfully for the setting up of a Select Committee to consider the topic of conveyancing.<sup>27</sup> It reported very promptly after just over six weeks of investigations.<sup>28</sup> As well as reiterating the suggestion of a commission to clear doubtful titles, it did something to remedy the defects in McCombie’s earlier Bill by suggesting that transfer should be made by an endorsement on the Crown grant. It heard from Barry J, the American Consul and a wide range of businessmen and land agents. One of the latter expressed an opinion which we shall hear again in this debate.

[McCombie —] Do you consider the attorneys generally to be against any reform? — [Witness —] Decidedly.

Why? — Because a reform in conveyancing will reduce their profits exceedingly; and I might say, that will curtail their tricks.

Then you think anything they may put forth of their being favo[u]rable to it is simply a blind? — For the purpose of deception, and nothing more. [...] <sup>29</sup>

That McCombie might well have shared this view is indicated by his remarks as the Governor was arriving to close the session, when he warned against listening

22 Victoria, *Parliamentary Debates*, Legislative Council, 23 June 1857, 865; see also 7 July 1857, 902; 9 July 1857, 928.

23 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 July 1857, 937.

24 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 July 1857, 994.

25 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 August 1857, 1037.

26 *The Argus* (Melbourne), 31 October 1857, 4.

27 Victoria, *Parliamentary Debates*, Legislative Council, 6 August 1857, 1051f.

28 Victoria, *Parliamentary Debates*, Legislative Council, 22 September 1857, 1210.

29 Victoria, *Parliamentary Papers*, Legislative Council, 1856-57 no D 15, 9 qq 159-161.

to the views of *The Argus* on the issue because the journal was edited by a lawyer<sup>30</sup> (the future Higinbotham C J, in fact, although, of course, McCombie did not know what future greatness awaited plain George Higinbotham).

Meanwhile, Bennett for his part had introduced his own Bill into the Legislative Council.<sup>31</sup> It was modelled on the plan of John Bullar, a prominent English conveyancing barrister of the day, which had been put forward to the British Royal Commission of 1853.<sup>32</sup> The Bill was drawn up by C B Skinner, a practising Victorian barrister<sup>33</sup> and later a County Court Judge.<sup>34</sup> His Bill<sup>35</sup> provided for a system of transfer by surrender and re-grant; the fresh grant was to be indefeasible subject to three exceptions. The first two were for other registered interests and leases of three years and under; the third indicated the manner in which the proposal was to accommodate pre-existing interests, for it would have excepted from indefeasibility 'the state of the title prior to the first transfer of ownership under this Act' (cl 23(3)). This Bill, therefore, attacked the problem from the other end to McCombie's Bill. Under Bennett's Bill, the statute of limitations would eventually have taken care of all outstanding claims, and things would have become gradually better, rather than suddenly better but gradually worse, as under McCombie's.

The House referred Bennett's Bill to a Select Committee set up specially for the purpose (not, at Bennett's special request, to McCombie's Conveyancing Select Committee.<sup>36</sup> It is clear that there was already some competition to be the great hero who brought about the epoch-making reform.) The Select Committee on Bennett's Bill had time to present only a progress report before the prorogation on 24 November.<sup>37</sup> However, the Bill was re-introduced in the new session on 15 December<sup>38</sup> and, after McCombie had blocked further progress for a while by calling attention needlessly and maliciously to the lack of a quorum,<sup>39</sup> it was on 23 December again referred to a Select Committee,<sup>40</sup> which reported favourably on the Bill on 3 June 1858, the day before the next prorogation.<sup>41</sup>

30 Victoria, *Parliamentary Debates*, Legislative Council, 24 November 1857, 1396.

31 Victoria, *Parliamentary Debates*, Legislative Council, 1 September 1857, 1143f; 17 September 1857, 1205f.

32 *Parliamentary Papers*, House of Commons, 1853 vol XXXVI, 397ff; Victoria, *Parliamentary Papers*, Legislative Council, 1857-58 no D 6, 16f q 215.

33 Victoria, *Parliamentary Papers*, Legislative Council, 1856-57 no D 21, 1 q 4.

34 Eric E Hewitt, *Judges Through the Years* (1984) 8.

35 It is not (I am informed by the responsible parliamentary officers) preserved in Parliament's record of Bills introduced, but it is preserved in the report of the Select Committee on it: Victoria, *Parliamentary Papers*, Legislative Council, 1857-58 no D6.

36 Victoria, *Parliamentary Debates*, Legislative Council, 17 September 1857, 1206.

37 Victoria, *Parliamentary Debates*, Legislative Council, 20 November 1857, 1391; Victoria, *Parliamentary Papers*, Legislative Council, 1856-57 no D 21.

38 Victoria, *Parliamentary Debates*, Legislative Council, 15 December 1857, 50.

39 Victoria, *Parliamentary Debates*, Legislative Council, 22 December 1857, 83.

40 Victoria, *Parliamentary Debates*, Legislative Council, 23 December 1857, 88.

41 Victoria, *Parliamentary Debates*, Legislative Council, 3 June 1858, 539.

Bennett trumped McCombie by securing the evidence not merely of a puisne judge, but of Stawell CJ himself. Unlike the judges in South Australia, one or two of whom were to distinguish themselves by mindless opposition to any reform, Stawell CJ indicated that, in his Honour's view, the chief defect in the Bill was that it did not effect enough reform. His Honour also, speaking (whether he knew it or not) thirteen days after assent had been given to the Torrens system legislation in South Australia, indicated his approval of one of its cardinal principles,<sup>42</sup> agreeing to the proposition that the entry in the register should constitute the transfer of property rather than the deed.<sup>43</sup> John Carter, a conveyancing barrister, was of the same view.<sup>44</sup>

### III PHASE 2: THE TORRENS SYSTEM DISPLACES OTHER PROPOSALS

The Select Committee on Bennett's Bill, having approved that Bill's principles, recommended the introduction of a Bill along the same lines at the start of the coming session. But the Victorian Parliament, rather as if waiting to see what would happen with South Australia's experiment inaugurated on 1 July 1858, did and said nothing at all about the issue of lands titles reform in the session of 1858-59.<sup>45</sup> In early 1860, however, the game resumed, but with a new player.

*The Argus*<sup>46</sup> had already noticed the Torrens system on 27 June 1859, when a copy of Torrens's pamphlet<sup>47</sup> was the subject of commentary in a leader. That this leader was written and published at all shows how closely developments in this field were followed even in the general press of the day. That was because the need for reform was well known to the public. It was not just a dry question for lawyers.

Perhaps *The Argus*'s leader of 27 June was also written by the future Higinbotham CJ, who did not resign from the post of editor of the newspaper until the following month.<sup>48</sup> Higinbotham was indeed opposed to the Torrens system; or at least he was prepared to say as a parliamentary candidate in mid-1861, when this view was by no means the royal road to instant popularity, that he preferred an alternative

42 *Real Property Act* [1858] (SA) s 31.

43 Victoria, *Parliamentary Papers*, Legislative Council, 1857-58 no D 6, 6 q 55.

44 Victoria, *Parliamentary Papers*, Legislative Council, 1857-58 no D 6, 14 q 188.

45 *The Argus* (Melbourne), 30 December 1859, 4, suggests that that was indeed the reason, although the terms in which the statement is phrased suggest an educated guess rather than inside knowledge. It should also be mentioned that Parliament's records contain a Registry of Landed Estates Bill on which is printed the statement that it was ordered to be printed on 19 January 1859. This is an error, as reference to the *Votes & Proceedings* and the Victorian *Hansard* readily shows. It should be 19 January 1860.

46 *The Argus* (Melbourne), 27 June 1859, 4.

47 *The South Australian System of Conveyancing by Registration of Title, with Instructions for the Guidance of Parties Dealing: Illustrated by Copies of the Books and Forms in use in the Lands Titles Office* (1859).

48 According to his biographical entry: see Gwyneth M Dow, 'Higinbotham, George (1826-1892)' *Australian Dictionary of Biography* vol 4 (1972) 391, 391.

proposal to the Torrens system.<sup>49</sup> Whoever the writer of the editorial of June 1859 was, he was not greatly impressed, finding Torrens's Act 'very loosely drawn' and 'exceedingly confused'. The best that could be said of it was that it was 'the clumsy application of sound principles'. In order to frame an acceptable statute, it was impossible to do without the help of the legal profession:

They alone possess the peculiar knowledge which prudent legislation on so complicated a subject requires, and while we fully sympathise with Mr Torrens, and thank him for what he has done, and heartily wish his scheme success, we regret that he should have carried it as a victory over the profession of the law, and we hope that we shall be able to devise for this colony a system which shall effect all his objects with greater simplicity and greater safety.

The Torrens system made its first appearance in the Victorian Parliament on 30 November 1859, when George Coppin moved for leave to introduce a Bill to bring it in.<sup>50</sup> Coppin later stated that Torrens's pamphlet had given him the idea of bringing forward the Bill.<sup>51</sup> The Bill was virtually a carbon copy of the South Australian efforts to that time, down to referring to Victoria in the preamble and various clauses as a 'Province', a formal title which only South Australia ever assumed (Victoria being a mere 'Colony').<sup>52</sup> Coppin later said that Torrens had helped him draft it,<sup>53</sup> but one wonders how much this help really amounted to.

In the days of part-time, unpaid parliamentarians, the day job of George Selth Coppin MLC (1819–1906) was mostly an evening job. Coppin was an actor and a theatrical entrepreneur of some note. He had, however, also been elected to the Victorian Legislative Council, sitting for the South-Western electorate. And he had a 'life-long friendship'<sup>54</sup> with one Robert Richard Torrens. He had spent six years in South Australia and had got to know Torrens well. Just as, therefore, the Torrens system was drawn up by a non-lawyer, so also its crucial conquest of Australia's most prosperous colony proceeded from the initiative of another non-lawyer.

Either by design or by coincidence the Bill's introduction was accompanied by that day's leader in *The Herald*<sup>55</sup> praising the project of reform. As if replying to *The Argus*'s earlier dismissal of reform by reference to Lord St Leonards' views, the leader-writer pointed out that other major English figures such as Sir Hugh Cairns were in favour of it. Furthermore, reform had succeeded 'next door' in South Australia, where the advertising columns of the newspapers indicated the success (more strictly perhaps the popularity) of their system. Needless to say, an increase in advertising revenue would not have gone amiss in Victoria either, as far as the proprietors of newspapers were concerned. An even more decided

49 *The Age* (Melbourne), 15 July 1861, 6.

50 Victoria, *Parliamentary Debates*, Legislative Council, 30 November 1859, 117. The Bill is preserved in the volume of Bills for 1859–60, 547ff.

51 *Ballarat Star* (Ballarat, Vic), 3 April 1860, 3; *Ballarat Times* (Ballarat, Vic), 3 April 1860, 2.

52 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1860, 1057.

53 *Ballarat Star* (Ballarat, Vic), 3 April 1860, 2; *Ballarat Times* (Ballarat, Vic), 3 April 1860, 2.

54 Alec Bagot, *Coppin the Great: Father of the Australian Theatre* (1965) 228.

55 *The Herald* (Melbourne), 30 November 1859, 5.

opinion was expressed four days later in *The Age*.<sup>56</sup> Its editor did not yet have a copy of the Bill, but if it was based on the South Australian one, he most certainly approved of it. Opposition was, however, to be expected from 'the ravenous maw of a legal priesthood', which thrive on 'one of the most obnoxious systems ever devised to plague and plunder', a system 'which has been too long suffered to perplex and pillage society' and so on. The editor of *The Argus*,<sup>57</sup> no longer George Higinbotham, also expressed his approval of the Torrens system in glowing terms in late 1859. As 1859 closed, therefore, all three metropolitan newspapers were promoting the Torrens system. They would remain largely on side until the final victory in 1862.

Introducing the Torrens Bill formally on 8 December, when it was given a first reading, Coppin said that he had 'previously ascertained the opinions of hon. members as being favourable to the consideration of the subject'. Far-sightedly, he referred to the desirability of as much uniformity of law among the Australian colonies as possible, even though they were not yet federally united. He closed by indicating that Torrens himself was satisfied that his absence from Adelaide would not harm the Act and was, therefore, prepared to travel to Victoria to assist the cause.<sup>58</sup>

When he sat down, two members competed for the honour of seconding his Bill. But slightly sour notes were injected by J B Bennett, who thought that his Bill was better, and would re-introduce it; and by T H Fellows, still on the government side but no longer Solicitor-General, who proposed a government Bill based on Sir Hugh Cairns's scheme.

The mandate of 'home' was important to many colonists then. Thus, we find Coppin, successfully moving the second reading of the Bill on 18 January, arguing that it was 'nearly similar'<sup>59</sup> to Sir Hugh Cairns's, although that stretched matters except at the broadest general level of aim and purpose. From our perspective, we can see that it was a very good thing that, in truth, the Torrens system differed considerably from the later Lord Cairns's Bills, for all the latter's attempts to introduce lands titles registration, even those that actually reached the statute book, ended in failure. Slightly later, a last-minute attempt was also made by the writer of a letter to the editor of *The Argus*<sup>60</sup> in April 1862 to have what was to become the *Land Registry Act 1862* (UK) ('Lord Westbury's Act'), just introduced into the House of Lords, considered as a possible model for Victoria. This suggestion also sank without trace, which was just as well given that Lord Westbury's Act too was a failure, even in England.<sup>61</sup> Despite the respect often accorded in Australia

56 *The Age* (Melbourne), 3 December 1859, 4.

57 *The Argus* (Melbourne), 22 December 1859, 4; 26 December 1859, 4f.

58 Victoria, *Parliamentary Debates*, Legislative Council, 8 December 1859, 183.

59 Victoria, *Parliamentary Debates*, Legislative Council, 18 January 1860, 348. For another example of the same sort of argument, see *The Argus* (Melbourne), 29 April 1862, 4.

60 *The Argus* (Melbourne), 28 April 1862, 6f.

61 J Stuart Anderson, *Lawyers and the Making of English Land Law, 1832-1940* (1992) 112f, 140, 335, 338f; Douglas J Whalan, 'Immediate Success of Registration of Title to Land in Australasia and Early Failures in England' (1967) 2 *New Zealand Universities Law Review* 416, 416.

to English reforms in the nineteenth century, these stood no chance in this field, not least because key English provisions<sup>62</sup> contemplated the reference of disputes about applications to the equity Court, a degree of involvement by lawyers that would never have been tolerated by public opinion in Victoria. Furthermore, people could see that mass land ownership was a reality in Australia, but not in England, and that that made a difference to the form of land registry that was practicable and acceptable.

Thus, the *Ballarat Star*<sup>63</sup> on 19 January 1860 expressed its preference for Torrens over an English import precisely because the Torrens system had worked in the very similar conditions prevailing in South Australia; very perspicaciously and boldly, it doubted whether an English Bill such as Cairns's would really be suitable for colonial conditions. The only reservation it had was that Torrens would require all business to be transacted in Melbourne and thus promote centralisation at the expense of the provincial districts.

It has been said that 'in Victoria, as elsewhere in Australia, there was a strong, generally an almost slavish, reliance on British statutes as the preferred means of controlling a wide range of commercial activities'.<sup>64</sup> The ultimate enactment of the Torrens system throughout Australia and its defeat of all English rivals showed that this was clearly not so, at least in the area of real property law. Nineteenth-century Australians were quite capable of forming a view on whether it was sensible to copy a British statute in the interests of Empire-wide uniformity, or whether it was necessary to strike out on their own in any particular case.

Fellows's two registration Bills, based, as he had anticipated, on Sir Hugh Cairns's Bills of 1859,<sup>65</sup> were introduced on 19 January 1860. He seemed at this stage quite happy for his Bills to be considered alongside the Torrens Bill and also claimed that his principle of investigation of title was similar to Torrens's – with the exception that, with him, the investigation would be in the charge of lawyers.<sup>66</sup> Perhaps he thought that this was likely to appeal to honourable members. His scheme, like Cairns's, consisted of two Bills: one permitting the Supreme Court of Victoria to declare the identity of the holder of title to land, and another permitting (but not requiring) the land then to be enrolled in a register recording future transactions. However, his adaptation was not slavish or unintelligent: he inserted special sections<sup>67</sup> requiring Crown grants to be registered when they were issued, which were not included in the English model as large-scale granting of land by the Crown was not going on there. There appears to be no English precedent for these

62 For example, s 6 of Lord Westbury's Act; cl 4 of (Lord) Cairns's Registry of Landed Estates Bill, *Parliamentary Papers*, House of Commons, 1859 (1) vol II, 599f.

63 *Ballarat Star* (Melbourne, Vic), 19 January 1860, 2.

64 Alex C Castles, *An Australian Legal History* (1982) 453.

65 Landed Estates Bill 1859 and Land Registry Bill 1859, to be found in *Parliamentary Papers*, House of Commons, 1859 (1) vol II 595ff, 803ff.

66 Victoria, *Parliamentary Debates*, Legislative Council, 19 January 1860, 364.

67 Clause 14 of the former Bill and cl 5 of the latter.

provisions,<sup>68</sup> and there were various other alterations as well. Nevertheless, this scheme lacked the provision for compulsory registration of transfers for registered land that was to be a key to the success of the Torrens system. Like the McCombie Bill, it would probably have resulted in out-of-date certificates as transactions occurred but were not registered. Furthermore, there was less incentive to register and to keep the state of title on the register up to date than under the Torrens system: certificates were to be only prima facie evidence of what they contained, and as with Bennett's earlier Bill registration would not eliminate prior interests, at least until the sale of the land.<sup>69</sup> In both cases, these flaws echoed Sir Hugh Cairns's 1859 scheme,<sup>70</sup> which in its turn foreshadowed the later English schemes, which also ended in failure for the sorts of reasons just mentioned.<sup>71</sup>

On 8 February, yet another Bill was introduced, Bennett's, which was a rehash of the Bullar/Skinner production considered in 1857–58<sup>72</sup> – so much so that the copy supplied to me from the parliamentary records of the session 1859–60 still has '1857' in various places – and, like the 1857 production, relied on the statute of limitations to dispose gradually of prior outstanding interests. There were now three rival reform schemes.

But the Legislative Council had already indicated its preference by the extraordinary step of passing the 146 clauses and 21 schedules of the Torrens Bill through the Committee stage in one fell swoop on 25 January.<sup>73</sup> The next day, *The Age*<sup>74</sup> suggested that perhaps the very summary fashion in which the Bill had been dealt with in the Legislative Council could be attributed to the Bill's inherent excellence, rendering prolonged discussion of it superfluous. On 9 February, the one-fell-swoop procedure was the subject of a bad-tempered debate in the House, the lawyers accusing the non-lawyers of not knowing what they were doing (an allegation which J P Fawkner vigorously disputed), while the lawyers were accused of withholding their assistance from the House in order to prevent the Bill's passage in the interests of ensuring a continued flow of fees to their profession.<sup>75</sup> More – much more – of this was to come.

At any rate, the Bill was amended in parts and re-committed on 16 February for a few more amendments (with (Sir) J H Fisher, the President of the South Australian Legislative Council and a key participant in debates on the Torrens system in South Australia, looking on from a seat on the floor of the House).<sup>76</sup> The Bill was again the subject of several more spirited exchanges in which T T à Beckett took the lawyers' part against Fawkner. (À Beckett was the brother of

68 At least none that I know of, or can find, using the electronic search facility in the 'Pro Quest' database of House of Commons Papers.

69 Clauses 7 and 12 of Fellows's second Bill.

70 *Parliamentary Papers*, House of Commons, 1859 (1) vol II, 600f, cll 9, 13.

71 Particularly useful in this regard is the comparison in Whalan, above n 61, 416.

72 Victoria, *Parliamentary Debates*, Legislative Council, 8 February 1860, 508.

73 Victoria, *Parliamentary Debates*, Legislative Council, 25 January 1860, 405.

74 *The Age* (Melbourne), 26 January 1860, 4.

75 Victoria, *Parliamentary Debates*, Legislative Council, 9 February 1860, 519-521.

76 Victoria, *Parliamentary Debates*, Legislative Council, 16 February 1860, 581.

Victoria's first Chief Justice and the father of the author of what was for many years the standard textbook on the Torrens system in Victoria.)<sup>77</sup> When à Beckett's amendment designed to replace Torrens's non-legal Lands Titles Commissioners with the Master in Equity was rejected, à Beckett determined to make no further suggestions and to give the House no further help. That, too, was just a foretaste of what was to come. His behaviour provoked two correspondents of the editor of *The Argus*<sup>78</sup> to express the view that the fight for conveyancing reform would be a fight against lawyers. At about this time also, Mr Punch, newly resident in Melbourne, also joined in. What he had to say was not actually very funny, but it is worth noting as a reminder of how high conveyancing reform was on the public agenda. Mr Punch published a mock petition of solicitors reciting their alleged 'opinion that laymen ought to continue to be the helpless victims of legal practitioners' as a result of the system of conveyancing.<sup>79</sup> The German-language newspaper said the same thing too,<sup>80</sup> purged of the attempts at humour. A pattern of derogation of lawyers as grasping had already emerged.

A distinct preference for the system to be in the hands of non-lawyers, and thus for the Torrens system, emerged in the general published commentary. The general view was that Torrens was superior to its competitors because it dispensed with lawyers in the process of issuing the first title to any parcel of land newly brought under the system: Torrens's Lands Titles Commissioners were to be laymen, not the lawyers advocated by Fellows.<sup>81</sup> On 20 February, *The Herald*<sup>82</sup> added the interesting information that the South Australian reforms had put so many lawyers out of work in Adelaide that there were 'many South Australian lawyers, belonging to the lower ranks of the profession, wandering about the streets of Melbourne in search of precarious employment'. By this point, it had abandoned any attempt at neutrality or even detachment, the editor adorning a lawyer's letter to him, arguing that things were not as bad as they were made out to be, with no fewer than four footnotes arguing the point.<sup>83</sup>

*The Argus*<sup>84</sup> now also definitely preferred Torrens's lay commissioners too, and contrasted the two proposals on this point: '[b]y the one Bill, the community are emancipated from a costly serfdom; by the other Bill, one system is destroyed, but a new serfdom is substituted' because the involvement of lawyers would continue. As it pointed out shortly afterwards, the class that had most to gain from the ending of the existing 'black mail' system was that of the small free-holder, because such persons would not only enjoy cheaper conveyancing but would also be able to

77 T à Beckett, *Introduction and Notes to the Transfer of Land Statute of Victoria* (2<sup>nd</sup> ed, 1883).

78 *The Argus* (Melbourne), 22 February 1860, 7; 24 February 1860, supplement, 1.

79 *Melbourne Punch* (Melbourne), 16 February 1860, 27. This joke was later recycled: *Melbourne Punch* (Melbourne), 13 March 1862, 52.

80 *Melbournner deutsche Zeitung* (Melbourne), 2 March 1860, 156.

81 One of many possible examples is *The Herald* (Melbourne), 2 February 1860, 4.

82 *The Herald* (Melbourne), 20 February 1860, 5. This produced a response from à Beckett in *The Herald* (Melbourne), 21 February 1860, 5.

83 *The Herald* (Melbourne), 24 February 1860, 5.

84 *The Argus* (Melbourne), 29 February 1860, 5.

borrow against their land at reasonable rates of interest.<sup>85</sup> *The Age*<sup>86</sup> made the same point a couple of weeks later, calling reform ‘a poor man’s question’. This merely echoed opinions that were being expressed at about the same time in New South Wales<sup>87</sup> and Tasmania.<sup>88</sup> It is somewhat odd, therefore, that Victoria’s rich man’s House, the Legislative Council,<sup>89</sup> so quickly passed the Bill, while it came to grief in the Legislative Assembly.

Returning to the events in Parliament in 1860: the Torrens Bill cleared triumphantly the few remaining hurdles in the Legislative Council, despite a refusal by à Beckett to yield to the inevitable by allowing it to pass unopposed.<sup>90</sup> The opposite approach would have done more to reduce the extreme public distrust of lawyers’ utterances about anything connected with conveyancing. Bennett even insisted on moving the second reading of his own Bill on 23 February although it was obviously doomed.<sup>91</sup> It was discharged from the notice paper a week later, and the final postponement of Fellows’s two Bills occurred on the same day.<sup>92</sup> Also on that day, 1 March 1860, the Torrens Bill received its third reading and passed the Legislative Council. The debate was another lawyers-*versus*-the-world affair and of the four votes that could be mustered against the Bill – as against the fifteen supporting it – three were the Fellows/Bennett/à Beckett trio plus only that of James Henty, a prominent businessman.<sup>93</sup>

Even a defeat of that magnitude, however, did not shut the lawyers up, for Bennett asked a question on 14 March about whether the Bill had been sent to the Legislative Assembly in the same form as that in which it had passed the Legislative Council. It had, said the President.<sup>94</sup> If lawyers wished to dispel a reputation for offering pettifogging opposition to worthwhile reforms on worthless technical grounds, this was not really the way to go about it.

Debate in the Legislative Assembly on the Torrens Bill began with a point of privilege: had the Council, by following the House of Lords’ practice and sending down money clauses with blanks, infringed the Assembly’s financial privileges under s 56 of the colonial *Constitution*?<sup>95</sup> This was an unproductive debate for the Torrens system, however interesting constitutionally, but the Bill emerged from it with a first reading and a statement of support by (Sir) John O’Shanassy, who ‘so thoroughly concurred in the principle of the Bill, that he had, at the request of its originator in the Council, undertaken to take charge of it while it was in this

85 *The Argus* (Melbourne), 16 March 1860, 4f.

86 *The Age* (Melbourne), 29 March 1860, 4.

87 A R Buck, *The Making of Australian Property Law* (2006) 104, 112-116.

88 Petrow, ‘Knocking Down the House?’, above n 5, 167, 172.

89 John C Waugh, ‘Evading Parliamentary Control of Government Spending: Some Early Case Histories’ (1998) 9 *Public Law Review* 28, 29.

90 Victoria, *Parliamentary Debates*, Legislative Council, 23 February 1860, 629.

91 Victoria, *Parliamentary Debates*, Legislative Council, 23 February 1860, 631-633.

92 Victoria, *Parliamentary Debates*, Legislative Council, 1 March 1860, 688.

93 Victoria, *Parliamentary Debates*, Legislative Council, 1 March 1860, 685-687.

94 Victoria, *Parliamentary Debates*, Legislative Council, 14 March 1860, 772.

95 More or less identical in content with what is now s 62 of the *Constitution Act 1975* (Vic).

House'.<sup>96</sup> O'Shanassy's support is notable because he was the Premier when the Torrens system passed through Parliament two years later. The Bill's first reading was, however, moved by John Bailey, who was Postmaster-General in the Nicholson ministry then in office,<sup>97</sup> although there was no sign that it was a government Bill. In fact, according to *The Herald*,<sup>98</sup> Augustus Greeves, who otherwise barely rates a mention in that day's *Hansard*, agreed to take on the Bill's second reading when no-one else would, but when he did so his action greatly pleased the House, 'which had all along manifested unmistakable signs of their approval of it as a whole'.

Progress was, however, very slow in March. Little happened beyond the procedural steps<sup>99</sup> and, on 15 March, the order of the day for the Bill's second reading was actually discharged without explanation.<sup>100</sup> Parliament did not take up the issue again until 19 April. What had happened in the meantime to cause it at last to take further action cannot be discovered in the pages of *Hansard*. But it is very obvious from the contemporary newspapers. The great hero Torrens had come to town on a four-lecture tour: Melbourne, St Kilda, Geelong and Ballarat. *The Age*<sup>101</sup> was moved to give this great event free publicity.

All three metropolitan newspapers reported in great detail, over three or more full columns, on the proceedings at his lectures, each printing a verbatim account of Torrens's lecture and other proceedings as well as sundry news items, commentaries and explanations relating to it. The *Geelong Advertiser*<sup>102</sup> also boasted that it had succeeded in making a verbatim report of the *ex tempore* lecture, 'a *tour de force* of which we are rather proud'. One is continually struck by the degree of public interest in conveyancing reform in this period – attributable, of course, to the defects of the old system and the wide circle of actual or would-be landowners. From all these reports,<sup>103</sup> we know that Stawell CJ was expected to preside at the meeting, but had had to cancel at the last minute. However, a judicial chairman of the meeting was still found, namely Robert Pohlman AJ, a hard-working and well-respected member of the County Court Bench, whom the government twice selected to act as a Justice of the Supreme Court for extended periods and who had a reputation for numerous and varied contributions to the community.<sup>104</sup> His Honour called the Torrens system 'one of the greatest improvements in modern times' but also disclaimed knowledge of it and claimed to be attending merely in order to inform himself. The *Geelong Advertiser*,<sup>105</sup> for one, was very encouraged

96 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 1860, 722.

97 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 1860, 723.

98 *The Herald* (Melbourne), 8 March 1860, 4f.

99 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 1860, 756; 14 March 1860, 774.

100 Victoria, *Votes & Proceedings*, Legislative Assembly, 15 March 1860, 234; Victoria, *Parliamentary Debates*, Legislative Assembly, 15 March 1860, 792.

101 *The Age* (Melbourne), 21 March 1860, 5.

102 *Geelong Advertiser* (Geelong, Vic), 26 March 1860, 3.

103 For example, *The Argus* (Melbourne), 26 March 1860, 5, 6; *The Age* (Melbourne), 26 March 1860, 5f; 29 March 1860, 4; *The Herald* (Melbourne), 26 March 1860, 4f.

104 See his biographical entry: Suzanne G Mellor, 'Pohlman, Robert Williams (1811–1877)' *Australian Dictionary of Biography* vol 5 449, 449f.

105 *Geelong Advertiser* (Geelong, Vic), 27 March 1860, 3.

by these judicial expressions of interest in reform and suspected that Victorian judges would not be as unbalanced as South Australian ones.

Also attending was the very canny and well-respected Governor of the Colony, Sir Henry Barkly. His Excellency wrapped the proceedings up by stating that he could not express a view on the reform because it was currently before Parliament, but did wish to thank Torrens for his clear explanation. Unconstrained by such niceties, the Mayor of Melbourne said simply that he wished success for the reform. Attendance was very high despite a charge that was made for the better seats, the proceeds of which were donated to the Benevolent Asylum; but the *Geelong Advertiser*<sup>106</sup> noticed that lawyers were pretty thin on the ground. In its view, though, '[i]f the legal gentlemen choose to assist – good; if they don't people will in this matter do without them'.

Torrens was listened to attentively, despite the dry nature of his topic. The audience frequently cheered him as he gave a run-down of the defects of the old system of conveyancing and the workings and merits of his own scheme. It was a litany familiar to the historian of the Torrens system, as well no doubt to many present as a result of personal experience: excessive cost and complication coupled with inadequate security under the old system, which Torrens contrasted with the simplicity and security to be expected from his. He was careful to compliment the local Judges – Stawell CJ and Barry J – for their Honours' pro-reform stance, something which for him made a pleasant change from the implacable opposition of at least one South Australian judge.

Only the fanatical *Herald*<sup>107</sup> was a bit disappointed, and that was because, in its view, Torrens had not gone far enough and had seemed somewhat restrained, as if unwilling to give offence. In particular, he did not, the newspaper thought, explain why the Court challenges to the Act in Adelaide did not justify the sweeping conclusions about its unworkability that some Victorian lawyers wished the public to draw. In early 1861 the newspaper connected its disappointment with its view that Torrens had really just copied the English proposals of 1857: he was unable to talk about much more than his experiences as a customs officer because he was really just a plagiarist of other people's ideas.<sup>108</sup> By the logic of the times, a statement that the reform was actually English and conceived by eminent lawyers, while merely being marketed by Torrens, was neither intended nor received as opposition.

The Melbourne meeting was followed by one at St Kilda, also numerous attended and, in *The Herald*'s<sup>109</sup> view, a success: the audience was 'absorbed' in the lecture. A vote of thanks to Torrens was proposed by Henry Jennings, a solicitor of the

106 *Geelong Advertiser* (Geelong, Vic), 23 March 1860, 2.

107 *The Herald* (Melbourne), 26 March 1860, 4f.

108 *The Herald* (Melbourne), 8 January 1861, 4. See further *The Herald* (Melbourne), 9 January 1861, 5, which contains Torrens's response; *The Herald* (Melbourne), 2 April 1861, 5, copied in *Register* (Adelaide), 5 April 1861, 3; *Register* (Adelaide), 10 April 1861, 3; 25 April 1861, 3. I deal with this episode in greater detail in Taylor, above n 8, *sub numero* VIII.

109 *The Herald* (Melbourne), 29 March 1860, 5.

firm of Jennings & Coote in Queen Street,<sup>110</sup> who 'declared his entire concurrence in the views expressed in so lucid a manner by Mr Torrens'. Torrens then travelled to Geelong, where he lectured most successfully before about 500 people,<sup>111</sup> and thence to Ballarat. In Ballarat also, he had the support of the local media. The *Ballarat Star*<sup>112</sup> stated on the morning of his lecture that anyone who doubted the benevolence of his reforms was 'open to the suspicion of lunacy or lawyerdom'. And in Ballarat, too, Torrens was 'very warmly received'.<sup>113</sup>

In Ballarat a meeting of various local bodies (the two municipal councils, the Chamber of Commerce and the Mining Board) occurred on 13 April<sup>114</sup> and was numerously attended. Interestingly, however, one Mr Scott objected to the idea of centralising all the business in Melbourne, one of the very few examples of dissent from the floor at a Torrens meeting in the period of evangelisation in Victoria. Mr Scott's objections must surely have appealed to others there present, but the historical record at least is still one of contentment with the proposed system at the meeting. But the *Ballarat Star*<sup>115</sup> shortly afterwards broke ranks with all other Victorian newspaper voices and repeated its earlier general view in favour of the Torrens system, but against Coppin's version of it because it would promote centralisation.

Not everyone shared *The Herald's* view of Torrens's Melbourne lecture. For *The Age*,<sup>116</sup> the series of successful outings by the Registrar-General for South Australia were a 'signal service to the people of Victoria', 'laying bare to even the humblest comprehension in our community the magnitude of the mischief for which he [Torrens] has provided an effectual remedy'. It also indicated that the Bill should be passed that session, something that could not happen unless rapid work occurred. The Geelong Chamber of Commerce sent a petition to the Legislative Assembly urging them to take action.<sup>117</sup> Clearly all this pressure and publicity put some pressure on Parliament to take up the topic again, which it duly did on Thursday 19 April.<sup>118</sup> The second reading did not occur until 2 May, but once that hurdle had been successfully cleared only the Committee stage and the formality of a third reading in the Legislative Assembly, as well as the Royal Assent, stood between Victoria and the Torrens system. The local conveyancers had already been unnerved enough to send a petition to Parliament asking to be admitted as

110 *Sands & McDougall's Commercial and General Melbourne Directory for 1862* (6<sup>th</sup> ed, 1862) 248.

111 *Geelong Advertiser* (Geelong, Vic), 2 April 1860, 2f.

112 *Ballarat Star* (Ballarat, Vic), 2 April 1860, 2.

113 *Ballarat Star* (Ballarat, Vic), 3 April 1860, 2.

114 Reported in the *Ballarat Star* (Ballarat, Vic), 14 April 1860, 2; *Ballarat Times* (Ballarat, Vic), 14 April 1860, 3.

115 *Ballarat Star* (Ballarat, Vic), 23 April 1860, 2.

116 *The Age* (Melbourne), 5 April 1860, 4.

117 Victoria, *Votes & Proceedings*, Legislative Assembly, 17 April 1860, 263; Victoria, *Parliamentary Debates*, Legislative Assembly, 17 April 1860, 907.

118 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 April 1860, 951.

solicitors if the Bill passed (and deprived them of their livelihoods).<sup>119</sup> Had Victoria adopted the system at this point it would have had the honour of being the second jurisdiction to do so, ahead of Vancouver Island, which, as matters turned out, was second instead.<sup>120</sup> On the other hand, Victoria would have received an immature version of the system, as Queensland did,<sup>121</sup> and so there was a silver lining in the delay that was about to ensue.

From the second reading debate on 2 May we learn from Augustus Greeves that ‘Mr Torrens had been kind enough to favour him by a careful perusal of the Bill as now printed, and also with the alterations which experience in South Australia had shown to be necessary to a fair and complete working of the measure’.<sup>122</sup> However, this was not enough to satisfy the lower House, unlike the Upper. According to Thomas Parsons, a lawyer writing to the editor of *The Herald*<sup>123</sup> the next year, the Bill at this point, having been rammed through the Upper House by ‘a gentleman distinguished for success in dodges’ (ie Coppin, an actor), was ‘in such a shape as would necessitate its immediate repeal, if it had passed into law’. The Legislative Assembly was not going to be party to such an enterprise.

Wood A-G drew attention to various drafting errors in the Bill indicating that it had not been adapted sufficiently to qualify as a Victorian rather than a South Australian measure: it referred to a non-existent entity (the Province of Victoria), assumed that primogeniture had been abolished (which was not the case in Victoria) and did not take into account differences in the law of dower.<sup>124</sup> Being apparently convinced of the need for the Bill to receive a thorough going-over, the Legislative Assembly took no further action even though it was not prorogued until 18 September.<sup>125</sup> Greeves accepted the need for some re-drafting of the Bill during the recess.<sup>126</sup> He had written to *The Argus*<sup>127</sup> the previous month, in response to a leader asking why he was not pushing the matter, stating that the need for a lot of amendments to the Bill coupled with the press of other business and the prohibition on new business after 11 pm were the causes.

119 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 April 1859, 973. This wish was eventually granted in a modified form: Act No 223 (1864) ss 24, 25. It was denied for some years (eg Victoria, *Parliamentary Debates*, Legislative Council, 24 February 1863, 489), but was eventually granted at the instance of Fellows, with the agreement of the Judges and once the objections from the Law Institute had been removed: Victoria, *Parliamentary Debates*, Legislative Council, 26 April 1864, 299; Legislative Assembly, 23 May 1864, 434; 27 May 1864, 463.

120 As I shall show in a work to be published shortly, the title of which is expected to be *The Law of the Land: Canada's Receptions of the Torrens System* (forthcoming 2008) ch 3.

121 Whalan, above n 6, 8. The same stricture does not apply to Vancouver Island, which exercised considerable local judgment in adapting the system it took over.

122 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1860, 1053.

123 *The Herald* (Melbourne), 1 May 1861, 7.

124 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1860, 1057f.

125 Other than the move for an amendment recorded in Victoria, *Parliamentary Debates*, Legislative Assembly, 8 May 1860, 1089.

126 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 September 1860, 1810. The Bill was formally discharged from the notice paper at Victoria, *Parliamentary Debates*, Legislative Assembly, 14 September 1860, 1856.

127 *The Argus* (Melbourne), 6 August 1860, 4; 7 August 1860, 4. For a follow-up letter see *The Argus* (Melbourne), 10 August 1860, 7.

All those explanations were certainly true, but the defects in the Bill were far from overwhelming, and were certainly not so great that they could not have been removed by a reform-minded barrister who was willing to put in a few hours' effort. On the other hand, the Torrens system was still very much an experimental measure at this stage and the legal and other members of the House might have been forgiven for preferring at this point to await further results of the experiment in its South Australian home. And on balance the reform, given its far-reaching nature and importance, had done very well on its first introduction to Parliament: it had passed one House and received a second reading in the other. Many worthwhile reforms in the nineteenth century, in the UK Parliament as well as in the colonial ones, had a 'practice shot' or 'run-up' of such a nature before becoming law. Other legal reforms that eventually made it on to the statute book, and are now hardly given a second thought, such as the general provision for accused persons to give evidence at trial,<sup>128</sup> were first accepted after a campaign of introducing Bills and getting people used to the idea of change that extended over more than a decade. So, although it had not been adopted, the Torrens system, on its first outing before the Victorian Parliament, had also not been disgraced. It had also, most importantly, established itself in this period as the clear favourite of Parliament, press and people over all rivals, both local and English.

#### IV PHASE 3: DELAY AND BETRAYAL

At the end of November 1860, the Nicholson government<sup>129</sup> fell and was replaced by the Heales government,<sup>130</sup> led by a working man, and with more than a whiff of radicalism about it – just the sort of government to forge ahead with the Torrens system. The new Ministers were required by then-current constitutional law to resign and re-contest their seats,<sup>131</sup> which gave them an opportunity to enunciate their policy. Addressing an election meeting in Brunswick, Heales, standing for the seat from which he had resigned on appointment as Premier, stated that 'the government intended to introduce and force through Parliament, as far as their influence would permit, Mr Torrens's amended South Australian Act'.<sup>132</sup> The government could not be sure of a majority in at least one House, hence the qualification; but given the broad support for Torrens in Parliament and the vigorous terms in which the promise was phrased, the enunciation of the qualification could only be taken as little more than a gesture towards the observance of forms and decencies.

128 For references, see Greg Taylor, 'The *Accused Persons Evidence Act* 1882 of South Australia: A Model for British Law?' (2002) 31 *Common Law World Review* 332, 365f.

129 Which had included Greeves for its last couple of months in office (*Victoria Government Gazette*, 24 September 1860, 1795), but this had no effect on the Torrens matter.

130 *Victoria Government Gazette*, 26 November 1860, 2269.

131 Victor Isaacs, 'The Case of the Missing Premier – A Strange Parliamentary Practice' (2005) 20 *Australasian Parliamentary Review* 34.

132 *The Argus* (Melbourne), 5 December 1860, 5.

Following all this closely, *The Herald*<sup>133</sup> – which had pointed out to the new government on the morning after its appointment that the Torrens system was necessary and that lawyers were the only impediment to its successful introduction<sup>134</sup> – triumphantly concluded that the Torrens system would now be a government measure. The battle seemed won. Apparently it did not notice a statement by Ireland A-G in Maryborough, in which he stated that he would bring in ‘a Bill embodying the best portions of Torrens’s Act and Sir Hugh Cairns’s Bill’,<sup>135</sup> which gave him much more room to manoeuvre.

When Parliament resumed at the start of January, the new Premier Heales, having been re-elected for his own seat, sounded a note of caution, stating that the government was intent on having as much information about the Bill’s workings as possible, given the opposition it had aroused in South Australia, and would await the imminent arrival of Mr Torrens in Melbourne.<sup>136</sup> A substantial debate, during which we learn that the government had employed the eminent conveyancer John Carter to adapt one of Sir Hugh Cairns’s Bills for Victoria, ended with the rejection of a motion to resume consideration of the Torrens Bill.<sup>137</sup> This caused alarm to *The Herald*, which asked on 8 January<sup>138</sup> why the government were now resiling from a promise made only five weeks or so beforehand. It was in this context that the newspaper attempted to rebut suggestions that the Torrens system was an inferior colonial product by referring to its supposed English origins.

Torrens by this point had arrived in Melbourne (by sea, as the intercolonial railway was still a quarter of a century in the future). He had come in order to participate in a meeting at Parliament House involving (among various others) him, Coppin (as chairman), the Premier, Ireland A-G and – a new player in this game – Prof W E Hearn of the University of Melbourne. The last-mentioned was an obvious choice given that he was also the drafter of what was to become the *Land Act 1862* (Vic), which received the Royal Assent on the same day as the *Real Property Act*, and dealt with the sale and occupation of Crown lands.

A substantial report of this meeting, which occurred on Saturday 19 January 1861, appeared only in *The Herald*.<sup>139</sup> However, no representative of a newspaper was present on the occasion, and the accuracy of what must, therefore, have been leaked information is open to question.<sup>140</sup> It is not obvious from the report who the leaker was. For what it is worth, the report said that, after Torrens had outlined his system to the assembled notables, the Attorney-General announced that his preference was for voluntary registration of lands titles with the statute of limitations taking care of claims not shown on the register – essentially the same as the Bennett/

133 *The Herald* (Melbourne), 6 December 1860, 4.

134 *The Herald* (Melbourne), 27 November 1860, 4.

135 *The Argus* (Melbourne), 7 December 1860, 6.

136 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 January 1861, 72.

137 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 January 1861, 72-78.

138 *The Herald* (Melbourne), 8 January 1861, 4.

139 *The Herald* (Melbourne), 21 January 1861, 5.

140 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 March 1861, 474.

Bullar/Skinner Bills of 1858–1860. This, of course, was the opposite of the Torrens system in two crucial respects: the Torrens system relied on compulsion for land alienated from the Crown after its operation commenced, and it contained a grant of indefeasibility in the Act itself, not dependent upon the passage of the limitation period. That period had admittedly been reduced in Victoria only the year before, in 1860, from the inherited English rule of twenty to what was by contemporary standards the relatively short interval of fifteen years;<sup>141</sup> but it is still probable, based on experience with English systems and other non-compulsory failures, that a system such as that outlined by Ireland A-G would not have been much of a success. Joining it would have been neither compulsory nor attractive: what landowner would pay for a clear title not now, but in fifteen years, and along the way run the risk of stirring up dormant claims or trouble-makers? Such a system would probably have grown very slowly, if at all. If it ever did so, it would have taken many years indeed for such a system to reach the critical mass, the stage at which land not under the system was at a distinct disadvantage on the market and the system would begin to be compulsory as a matter of economics if not law.<sup>142</sup> Nevertheless, the Attorney-General said, or was reported to have said, that Professor Hearn had drafted a Bill embodying such a system.

Those who missed this report of the meeting in *The Herald* might have noticed the *Warrnambool Examiner's*<sup>143</sup> report that had Ireland A-G saying at Warrnambool at the end of February 1861 that '[h]e had seen Mr Torrens, and had conferred with him on this subject [transfer of lands]', and was willing to bring in a Bill that 'included the principle of Torrens' Act, but was much simpler in detail'. This phrasing was broad enough to include a Bill that would dispense with what many saw as essential ingredients in the success of the Torrens system and, in particular, might re-introduce the legal monopoly by investing the power to bring land under the Act in a Court instead of Torrens's non-lawyer commissioners. On 8 March, Heales promised in Parliament a Bill 'in the course of a few days',<sup>144</sup> but there was a complicated answer to a question about this four days later with much reference to revision of draft Bills and consultations with legal gentlemen. This could be taken either as an indication of pleasing progress behind the scenes, or as a cover for unlimited delay. It does appear from this debate, however, that a Bill partly or wholly revised by Torrens himself had been circulated among some members of Parliament, and the Premier, Mr Heales, said that this Bill was currently being revised by a lawyer on behalf of, or at least with the knowledge of, the government, suggesting that it was taking the Torrens system seriously. In the same vein, the Premier also cast doubt upon *The Herald's* report of the meeting at Parliament on Saturday 19 January.<sup>145</sup>

141 Act no 112 (1860) (Vic) s 33.

142 Cf Whalan, above n 61, 416, 417 – factors 1, 2 and 4.

143 *Warrnambool Examiner* (Warrnambool, Vic), 1 March 1861, 2.

144 Victoria, *Parliamentary Debates*, Legislative Assembly, 8 March 1861, 459.

145 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 March 1861, 474; see also 28 May 1861, 978.

For its part, *The Herald* continued to take its own line, and on 3 April<sup>146</sup> found that it had developed a case of cold feet. Referring to moves to appoint a Royal Commission in South Australia into the working of the Torrens system, and against the background of Court decisions by the Torrens system's enemies, such as Mr Justice Boothby, calling into doubt its effectiveness as a means of conferring an indefeasible title,<sup>147</sup> it urged caution and abstention from all haste. Things seemed to be going backwards. Not only were doubts now being expressed about the worth of the system; little further progress was visible to the public, and on 23 April, one 'Philo-Torrens', as he was pleased to call himself, was writing to *The Argus*<sup>148</sup> asking despairingly, 'What has become of Torrens's Bill or Mr Greeves?'. Greeves explained that the true Torrens believers were (contrary to his wish) holding fire, waiting for the long-promised government Bill and thinking that a Bill supported by the government would stand a higher chance of success.<sup>149</sup> In fact, the government had little to offer beyond continued delay and repeated promises of action soon. At other times, the government's representative in the Legislative Council professed ignorance of the government's intentions.<sup>150</sup> *The Argus*<sup>151</sup> and *The Herald*<sup>152</sup> were furious at the delay; by mid-May the latter had obviously been cured of cold feet and could not understand why 'Ministers are not ashamed of themselves, and of their broken promises, and delays'.

When at long last the government Bill was introduced, there were only six weeks left to the prorogation, and not enough time to deal with it. Even worse, it was not the long-hoped-for Torrens Bill. The Premier said on 22 May, only a few weeks before the expected end of the session, that he had pledged support only to the principle of the Torrens system, which meant a system of indefeasible titles. It did not include the non-lawyer commissioners.<sup>153</sup> In other words, even if this Bill was meant to be taken seriously – as distinct from being a grudging gesture towards redeeming an election promise that had since become inconvenient – pettifogging grasping lawyers were to rule the roost under it. Ireland A-G – who did not mention Professor Hearn on this occasion – expressly recorded that he differed in this point from 'his friend Mr Torrens, who had given him some very valuable suggestions',<sup>154</sup> and he did this because he had more trust in lawyers than did Torrens. Furthermore, South Australia was a small rural community, whereas Victoria was a bustling engine of prosperity in which transactions of enormous value were conducted.<sup>155</sup> Ireland A-G also went to the trouble of revising *The Argus's* report of his speech

146 *The Herald* (Melbourne), 3 April 1861, 4.

147 The decision in *Payne v Dench*, referred to in Ralph M Hague, *Hague's History of the Law in South Australia 1837–1867* (2005) Vol II 626–628, was still fresh in memories.

148 *The Argus* (Melbourne), 23 April 1861, 6.

149 *The Argus* (Melbourne), 27 April 1861, 4.

150 Victoria, *Parliamentary Debates*, Legislative Council, 30 April 1861, 771; 7 May 1861, 833; Legislative Assembly, 8 May 1861, 851; Legislative Council, 14 May 1861, 881; Legislative Assembly, 881.

151 *The Argus* (Melbourne), 3 May 1861, 4.

152 *The Herald* (Melbourne), 15 May 1861, 5.

153 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 May 1861, 964.

154 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 May 1861, 961.

155 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 May 1861, 962.

and publishing it as a twenty-page pamphlet for publicity purposes. He clearly worked quickly, as his preface in the pamphlet was written only two days after the speech itself was delivered. He explained the need for the pamphlet on the grounds of 'the importance of the subject, its technicality, and the want of acquaintance with the principles of real property reform on the part of the general public'.<sup>156</sup>

Ireland A-G's Bill<sup>157</sup> bears some traces of familiarity with the Bennett/Bullar/Skinner production of the late 1850s: for example, clause 25(2) of the 1861 Bill would have exempted from the grant of indefeasibility to registrants 'the state of the title at the date of the original registration', paralleling the exception in clause 23(3) of the Bennett/Bullar/Skinner Bill for 'the state of the title prior to the first transfer of ownership under this Act'. Thus the government's Bill of 1861 also would have given effect to the idea of simply letting the statute of limitations take care of claims prior to registration, as indeed was forecast by *The Herald's* unauthorised report of the Attorney-General's meeting with Torrens in January. Faster indefeasibility could have been obtained under the Bill, but only by means of a petition in equity. This, too, was most unlikely to appeal – either to landowners if enacted,<sup>158</sup> or to legislators as proposed – given the reputation of lawyers, in general, and of equity, in particular, in the middle of the nineteenth century.

On the other hand, cl 14 of the draft Bill provided for future Crown grants to be registered, as occurred under the Torrens system – a step forward from the plans revealed at the meeting in January. This would at least have ensured that this system would not have languished in total obscurity, as its empire would have grown slowly but surely – although not as quickly as the Torrens system's, with its statutory conferral of indefeasible title with registration which encouraged registration even by earlier grantees of land, those who were not under any legal compulsion.

Very shortly after its appearance, the Bill was condemned by all three metropolitan newspapers, sometimes in very sarcastic and dismissive terms, as less than the full Torrens, and, therefore, less than had been promised to the people, and was desired and needed by them.<sup>159</sup> The country newspapers that noticed the Bill condemned it, too, from Portland to Beechworth.<sup>160</sup> Large claims were made about the public's

156 Ireland A-G, *Speech of the Hon Richard Davies Ireland, Attorney-General for Victoria, on Moving for Leave to Bring in a Bill to Establish a Register of Lands and Titles Thereto, and to Facilitate the Transfer of Estates* (1861), 3. Alex Castles mistakenly concludes that this speech promoted the Torrens system: Castles, *Annotated Bibliography of Printed Materials on Australian Law 1788-1900* (1994), 180.

157 Printed and preserved in the volume of Assembly Bills for 1860–61.

158 See the letter from 'R', *The Age* (Melbourne), 14 May 1861, 5; *The Herald* (Melbourne), 16 May 1861, 5.

159 *The Argus* (Melbourne), 24 May 1861, 4; 5 June 1861, 4; *The Age* (Melbourne), 23 May 1861, 5; 24 May 1861, 4; *The Herald* (Melbourne), 23 May 1861, 5; 24 May 1861, 5. In both *The Herald* editorials we are told that the appellation 'the Torrens system' was applied by South Australian lawyers to the system 'in derision of that gentleman's claim to the discovery of the principle of registration by title' (23 May 1861, 5; see also 2 April 1862, 4f). This is certainly a surprise, which I comment upon in Taylor, above n 8, *sub numero* V.

160 *Ovens and Murray Advertiser* (Beechworth, Vic), 12 June 1861, 2; *Portland Guardian and Normanby General Advertiser* (Portland, Vic), 31 May 1861, 2; 19 June 1861, 2.

ardent and resolute desire for the full undiluted Torrens gospel; anything short of this was probably trickery by lawyers such as Ireland A-G in the interests of preserving their fees. In the wake of this and other incidents, Ireland A-G's reputation for fair play was already starting on the downward slope which, as his biographer in the *Australian Dictionary of Biography* records, was to cost him his seat in Parliament in 1867.

On 5 June *The Herald*,<sup>161</sup> having obviously reconciled itself with Torrens sufficiently since its allegations of plagiarism in January,<sup>162</sup> published one-and-a-third columns of notes by the great man himself (with Henry Gawler, the solicitor to the Lands Titles Commission in Adelaide) explaining in elaborate detail why his Act was better than Ireland A-G's Bill, and in case anyone missed this added the newspaper's own supporting comments in yet another leader. Torrens was clearly being treated even by the previously hostile *Herald* as the guru of lands titles law and was a household name by now in Victoria. It is amusing to come across at about the same time a judge's suggestion to two parties litigating in Ballarat over a solicitor's bill of costs that they should compromise, as 'if the case went on it might reveal some fearful statistics for Mr Torrens'.<sup>163</sup> Apparently no explanation of this was required; everyone knew what the judge meant, and who this Torrens fellow was.

## V PHASE 4: A PAUSE FOR REFLECTION

The government's Bill progressed no further in Parliament before the prorogation. Parliament was prorogued on Wednesday 3 July 1861, thus formally killing the Bill, and on Thursday 11 July the Legislative Assembly was dissolved.<sup>164</sup> As the Heales government also dissolved, although rather more slowly, Ireland ceased to be its Attorney-General (for reasons unrelated to the Torrens system) and, on 29 July, Butler Cole Aspinall, formerly a Crown Prosecutor and defender of the Eureka accused, took on that role – as it turned out, briefly.<sup>165</sup> As far as the Torrens system's supporters were concerned, the whole session that concluded with the dissolution had been spent waiting for Godot in the shape of the government Torrens Bill, which never materialised. The pro-Torrens forces now distrusted the Heales government, which had introduced a pale shadow of what they sought too late for serious consideration.

In those days, general elections extended over a couple of weeks as there were different polling days in the various constituencies; in 1861 the elections were held from 2 to 19 August.<sup>166</sup> Numerous candidates pledged themselves to support

161 *Herald* (Melbourne), 7 June 1861, 4f (after a false start on 5 June 1861, 5).

162 See above, n 108.

163 *Ballarat Star* (Ballarat, Vic), 10 June 1861, supplement, 1. There is another report in the *Ballarat Times* (Ballarat, Vic), 10 June 1861, 2, although without the phrase in question.

164 *Victoria Government Gazette*, 11 July 1861, 1325.

165 *Victoria Government Gazette*, 29 July 1861, 1441.

166 *Victoria Government Gazette*, 16 July 1861, 1343.

the Torrens system by name,<sup>167</sup> some adding withering condemnation of the government's alleged breach of its election promise to introduce the system.<sup>168</sup> One or two candidates made reference to the Royal Commission into the operation of the Torrens system, which was about to report in Adelaide, and made their support conditional on its findings.<sup>169</sup> The Royal Commission was to report in November and quite broadly endorsed the Act, subject to a very few significant adjustments of detail.<sup>170</sup> Both the testimony before it and the commission's final report were followed in the Victorian press and seen as further confirmation of the system's success. Much was made of the fact that the Commissioners included both the retired Chief Justice of South Australia, Sir Charles Cooper, and the incumbent, (Sir) Richard Hanson.<sup>171</sup>

Other candidates in the Victorian elections however, including the prominent lawyer JD Wood,<sup>172</sup> who was to become Minister for Justice in the third O'Shanassy ministry, did not endorse the Torrens system by name, stressing their support only for an undefined 'measure having for its object the simplification and reduction in expense of the transfer of real property'<sup>173</sup> or suchlike. Wood went even further in his own constituency, where the local newspaper reported that he had stated that 'Torrens' Act was a mistake, in so far as appointing a lay tribunal to investigate claims for titles. [He w]ould substitute a legal commissioner or judge, but this need not entail any extra expense'.<sup>174</sup> Whether for this reason or not, he lost his seat (the Ovens) and was not returned to Parliament for another six months when he found another place at the opposite end of the colony in Warrnambool. Owing to what was seen as its broken promise to introduce Torrens, the government was on the defensive on this issue, and Heales was forced to mount a moderately long and very detailed and tedious defence of his government's conduct, which even in an age of longer attention spans must have tested the tolerance of the electorate.<sup>175</sup>

During the campaign, writers of letters to the editor tried to keep the Torrens issue alive, with some success: a debate developed in the columns of *The Argus*.<sup>176</sup> The supporters of the Torrens system referred to its inventor, without any trace of irony, by such epithets as 'noble', 'great' and 'generous'.<sup>177</sup> Some newspapers were also openly partisan on the issue. The *Geelong Advertiser*<sup>178</sup> published in a

167 For example, *The Argus* (Melbourne), 13 July 1861, 7; 15 July 1861, 6; 17 July 1861, 5 (twice).

168 *The Argus* (Melbourne), 17 July 1861, 5 (a third candidate).

169 *The Argus* (Melbourne), 17 July 1861, 5; 27 July 1861, 5.

170 South Australia, *Parliamentary Papers*, no 192/1861.

171 *The Argus* (Melbourne), 2 December 1861, 4; 10 December 1861, 4; *Ballarat Star* (Ballarat, Vic), 14 December 1861, 2; *Maryborough and Dunolly Advertiser* (Maryborough, Vic), 17 February 1862, 2.

172 *The Argus* (Melbourne), 25 July 1861, 8.

173 *The Argus* (Melbourne), 19 July 1861, 8; see also 25 July 1861, 8; 26 July 1861, 8.

174 *Federal Standard and Border Post* (Chiltern, Vic), 31 July 1861, 2.

175 *The Argus* (Melbourne), 23 July 1861, 5.

176 *The Argus* (Melbourne), 18 June 1861, 7; 2 July 1861, 7; 4 July 1861, 6; 10 July 1861, 7; 12 July 1861, 7; etc, until at least 9 August 1861, 7. In the letter of 2 July the author refers to the possession even by 'intellectual Germany' of a register of lands titles.

177 *The Argus* (Melbourne), 2 July 1861, 7.

178 *Geelong Advertiser* (Geelong, Vic), 21 June 1861, 2.

leader a selection of ministerial promises on the issue, including Heales's 'force through Parliament'<sup>179</sup> statement the previous December, and left it to voters to draw their own conclusions. Just before polling day, it called on voters to support only candidates who were pledged to support Torrens 'unmutilated'.<sup>180</sup> No doubt partly as a result of this pressure, Aspinall A-G, who was a candidate for East Geelong, declared, as polling day approached, that he would support Torrens with the alteration of 'a few trifling details' such as not calling Victoria a 'province' and 'a few things which Mr Torrens would have been glad of'.<sup>181</sup> He, unlike Wood, was re-elected.

The third Parliament of Victoria first assembled on Friday 30 August 1861. Heales initially remained as Premier until (in this era of unstable allegiances to individuals rather than formal parties) his government fell on fiscal issues unrelated to the Torrens system<sup>182</sup> and was replaced by the third O'Shanassy ministry on 14 November – in which Ireland was again Attorney-General. J D Wood, whom we have met earlier, became Minister of Justice.<sup>183</sup>

Once the election was over and Parliament had re-assembled, one might have expected that the pro-Torrens forces would have resolved not to lose a minute of parliamentary time in the session of 1861–62, but they started off in fact very slowly. There seems to have been a general agreement to await the report of the Royal Commission into the Torrens system then underway in Adelaide. The Governor's speech promised 'a measure analogous to that of Mr Torrens',<sup>184</sup> but only after the inquiry in Adelaide had concluded.

On 25 October Heales said that he had been in communication with Torrens – a hopeful sign for the pro-Torrens forces – and hoped for a copy of the progress report from the Royal Commission soon.<sup>185</sup> Three weeks later his government fell. There was then a pause as the new government developed its plans, won the ministerial by-elections and so on. (Sir) John O'Shanassy, the new Premier, was on record, as we saw, some years beforehand as an enthusiast for Torrens, having agreed to take charge of the 1860 Bill in the Legislative Assembly.<sup>186</sup> But, for some reason unknown to me, his ardour seemed to have cooled in the meantime. Perhaps his Attorney-General and Minister of Justice, both anti-Torrens, had won him over. In mid-January 1862, having been in office for about two months, he was asked whether he would distribute copies of the South Australian legislation (now the consolidated and much improved *Real Property Act 1861*). He unenthusiastically

179 See *The Argus*, above, n 132.

180 *Geelong Advertiser* (Geelong, Vic), 27 July 1861, 2. See also *Geelong Advertiser* (Geelong, Vic), 18 July 1861, 2.

181 *Geelong Advertiser* (Geelong, Vic), 1 August 1861, 2.

182 Paul Strangio and Brian Costar (eds), *The Victorian Premiers 1856–2006* (2006) 24.

183 *Victoria Government Gazette*, 14 November 1861, 2191.

184 Victoria, *Votes & Proceedings*, Legislative Assembly, 3 September 1861, 7; Victoria, *Parliamentary Debates*, Legislative Council, 3 September 1861, 5.

185 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 October 1861, 208.

186 See Victoria, *Parliamentary Debates*, above n 96. For his later explanation of this, see Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 1862, 747.

referred members to the Parliamentary Library, or to the possibility of purchasing a copy themselves.<sup>187</sup> But not all his Ministers shared this view. A week later in the Legislative Council, Coppin handed a report to (Sir) William Mitchell, again a minister, asking him to table it. Mitchell was obliged to refuse on the grounds that he would be vouching for the genuineness of a document that he was seeing for the first time. However, he gladly tendered the documents he did have – a copy of a South Australian amending Bill and memoranda by the Royal commissioners<sup>188</sup> – and also volunteered to write to South Australia for an official copy of the proffered report that could be tabled.<sup>189</sup> It duly appeared, with commendable speed, on 4 February.<sup>190</sup> It was, of course, the report of the Royal Commission, which largely endorsed the Act,<sup>191</sup> and it was printed as a Victorian parliamentary paper as well.<sup>192</sup>

## VI PHASE 5: TRIUMPH OF THE REVISED SOUTH AUSTRALIAN MODEL

Meanwhile, however, the cudgels had been taken up by someone new. On 31 January 1862, James Service had sought leave to introduce into the Legislative Assembly a new Torrens Bill.<sup>193</sup> It continued the approach of faithfulness to the latest South Australian legislation. A canny, intelligent Scottish merchant by origin, Service had a significant parliamentary career and a highly successful<sup>194</sup> premiership ahead of him. He followed his initial sortie up with a motion on 4 February designed to ensure that every succeeding Thursday would be devoted to the Torrens Bill.<sup>195</sup>

Two days later, the first major debate took place.<sup>196</sup> Service referred to the endorsement of the Torrens system by the Royal Commission in South Australia and by three years' experience of its operation in that place. The honour of seconding what it was hoped would be the successful Bill for the introduction of the Torrens system into Victoria was given to one of the members for Collingwood, the solicitor John Edwards, who mentioned that he perceived an absolute majority of the House for Torrens. Premier O'Shanassy anticipated a competition with this private member's Bill by referring to 'the primary duty of the government to deal with this matter' although he had obviously not forgotten his earlier support

187 Victoria, *Parliamentary Debates*, Legislative Assembly, 14 January 1862, 399.

188 Victoria, *Votes & Proceedings*, Legislative Council, 21 January 1862, 44.

189 Victoria, *Parliamentary Debates*, Legislative Council, 21 January 1862, 428f.

190 Victoria, *Parliamentary Debates*, Legislative Council, 4 February 1862, 546.

191 As is made clear by Victoria, *Votes & Proceedings*, Legislative Council, 4 February 1862, 45.

192 Victoria, *Parliamentary Papers*, Legislative Council, 1862 pp. 165ff; see also the memorandum at 161-163.

193 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 January 1862, 533.

194 Strangio and Costar, above n 182, 75. See also Robert Murray, *150 Years of Spring Street: Victorian Government: 1850s to 21<sup>st</sup> Century* (2007) 78-80.

195 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 February 1862, 547.

196 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 February 1862, 564-567.

for reform and condemned the existing law as totally unsatisfactory on the usual grounds such as cost, delay and insecurity. But when the debate resumed on 12 February, Ireland A-G stated that he intended to oppose the Bill every step of the way, and referred to the possibility of stirring up litigation which the newspaper advertisements of an intention to bring land under the Torrens system invited.<sup>197</sup> He formally introduced his own Bills<sup>198</sup> – one to cover existing titles to land and the other to cover newly granted land – on 7 March.<sup>199</sup> The Premier declared the latter at least to be a government Bill,<sup>200</sup> and Ireland A-G again attempted to promote his scheme by publishing his speech in Parliament as a pamphlet.<sup>201</sup> A review of the latter Bill indicates some considerable similarities with Torrens: for example, cl 1 made registration of newly granted Crown land compulsory, and under cll 7 and 33 a transfer could occur only by an entry on the register, a crucial Torrens principle. But Ireland A-G's first Bill differed in a vital point from Torrens's Act by requiring titles to be passed by a special Court rather than by the lay commissioners for which Torrens's Act provided.<sup>202</sup>

When Service's Bill received a first reading on 14 February,<sup>203</sup> the Attorney-General, *The Age*<sup>204</sup> reported, had agreed to postpone his objections to it to a later time. The result of the still inevitable duel between the Attorney-General's Bills and the Torrens/Service Bill was rightly anticipated by newspapers across the colony; this is the point by which the public clamour for Torrens had clearly become overwhelming. The *Maryborough and Dunolly Advertiser*<sup>205</sup> spoke for all the press and almost the entire colony when it stated its preference for 'a well-digested measure from a layman to a questionable Bill from a lawyer'. Lawyers were untrustworthy, being 'too deeply interested in maintaining the present costly and complicated system of conveyancing'. This opinion found an

197 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 February 1862, 580. For the next formal steps, see *Ibid.*, 598; 14 February 1862, 619f.

198 The latter is preserved in the 1861-62 volume of Bills introduced into the Legislative Assembly, 523ff. It seems that the former Bill was not printed as the second reading was never formally debated, although it was ordered to be printed: Victoria, *Votes & Proceedings*, Legislative Assembly, 7 March 1862, 179; or perhaps it was printed but later lost. Whatever the explanation may be, a hand-written index to the printed Bills provided to me from the parliamentary records has a dash alongside the name of the Bill instead of a page number, and searches in three separate volumes of Bills (those at Parliament itself, the State Library of Victoria and Monash University) have been fruitless.

199 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 1862, 733, 738.

200 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 1862, 749.

201 *Speech of the Hon Richard Davies Ireland, Attorney General for Victoria, on Moving the Second Reading of a Bill to Establish a Register of Titles to Lands which Shall Hereafter be Alienated by the Crown and to Facilitate the Transfer of the Same* (1862), <<http://www.slv.vic.gov.au/vicpamphlets/0/9/5/pdf/vp0957.pdf>> at 10 December 2007. Alex Castles (see above, fn 156) again mistakenly concludes that this was the second-reading speech for the successful Torrens Bill.

202 This is apparent from sources such as *The Age*, 27 February 1862, 4, despite what is recorded above, n 198.

203 Victoria, *Parliamentary Debates*, Legislative Assembly, 14 February 1862, 619f.

204 *The Age* (Melbourne), 15 February 1862, 4.

205 *Maryborough and Dunolly Advertiser* (Maryborough, Vic), 17 February 1862, 2. See further its leader on 5 March 1862, 3.

echo in *The Argus*<sup>206</sup> and *The Herald*<sup>207</sup> shortly afterwards. With the exception of the aforesaid lawyers, the *Maryborough and Dunolly Advertiser* thought, the colony was 'absolutely unanimous' for the Torrens system.<sup>208</sup> Extreme cynicism was universally expressed about the Attorney-General's Bills. *The Age*<sup>209</sup> thought that Ireland A-G's sole purpose in bringing forward these Bills was to delay the adoption of the Torrens Bill. The *Ballarat Star*, despite its earlier concerns about centralisation, was also still a strong supporter of Torrens and of the view that '[p]eople in this colony have got into a habit of not very much believing in Mr Ireland'.<sup>210</sup> At Beechworth the *Ovens and Murray Advertiser*<sup>211</sup> was even blunter, saying that Ireland A-G was 'too well-known to be respected, or for anything to be thought of whatever he may say or do'. It thought that Ireland A-G's Bill was 'totally uncalled for' and 'more like a disreputable dodge', and sang the praises of Torrens's system at length.<sup>212</sup> The *Geelong Advertiser*<sup>213</sup> and newspapers in the far south-west and the far north-east of the colony joined in this by now deafening chorus.<sup>214</sup>

Three days later, the strongest press supporter of Torrens in the colony, the *Geelong Advertiser*,<sup>215</sup> reported the exciting news that Torrens himself was on his way to Victoria, and claimed on the basis of a South Australian report that forty members of the Victorian Legislative Assembly had formed a committee to ensure passage of the Bill. A day later again, it reminded its readers that it was the last day to sign the monster pro-Torrens petition, which already had more than 3000 signatures and was sponsored by the local firm of brokers and agents<sup>216</sup> Messrs Gibson Bros & Co.<sup>217</sup> By 10 March, it was blessing the gods of history which had given South Australia the right man and the right moment for the enactment of such a glorious reform as the Torrens system.<sup>218</sup> A forty-yard-long petition from Geelong, now with nearly 4000 signatures, was to be presented to Parliament.<sup>219</sup> A series of petitions,

206 Letter to the Editor, *The Argus* (Melbourne), 10 March 1862, 7.

207 *The Herald* (Melbourne), 26 February 1862, 4.

208 Accord *The Herald* (Melbourne), 6 March 1862, 4.

209 *The Age* (Melbourne), 8 March 1862, 4.

210 *Ballarat Star* (Ballarat, Vic), 3 March 1862, 2.

211 *Ovens and Murray Advertiser* (Beechworth, Vic), 18 March 1862, page number unclear (leader page).

212 *Ovens and Murray Advertiser* (Beechworth, Vic), 6 March 1862, 2.

213 *Geelong Advertiser* (Geelong, Vic), 22 February 1862, 2.

214 *Portland Guardian and Normanby General Advertiser* (Portland, Vic), 6 March 1862, 2; *Chiltern Federal Standard* (Chiltern, Vic), 2 April 1862, 4.

215 *Geelong Advertiser* (Geelong, Vic), 25 February 1862, 2. Apparently an association did exist at one stage: see the letter from 'Layman', *The Argus* (Melbourne), 24 April 1862, 6. I have attempted to find the alleged South Australian report without success.

216 Untitled Geelong Directory for 1861 held in the State Library of Victoria, microfiche, genealogy section, 79.

217 *Geelong Advertiser* (Geelong, Vic), 25 February 1862, 2.

218 *Geelong Advertiser* (Geelong, Vic), 11 March 1862, 2.

219 Victoria, *Parliamentary Debates*, Legislative Council, 4 March 1862, 706; *The Herald* (Melbourne), 5 March 1862, 5.

including one from Melbourne with about 6000 names, followed.<sup>220</sup> At around the same time, back in the capital, *The Argus*<sup>221</sup> and *The Age*<sup>222</sup> printed long laudatory articles mostly taken from the *South Australian Handbook* on the operation of the Torrens system.

By the start of March 1862, the bandwagon was quite unstoppable and would have run over anyone who tried to stand in its path. Although today the nearly universal pro-Torrens feeling is preserved only on the lifeless pages of microfilmed newspapers from almost 150 years ago, their witness to the popular clamour for this reform from virtually every side has lost nothing of its vividness. The Melbourne correspondent of the *Ballarat Tribune*<sup>223</sup> summed up the impression one gets from the newspapers of the day by reporting that ‘public feeling here is universal in favo[u]r of Torrens’ Act’.<sup>224</sup> On 1 March in Melbourne, the Hall of Commerce hosted a pro-Torrens meeting which attracted forty people despite very short notice. It was chaired by the leading businessman Alfred Ross, and the only debate was whether or not it was necessary to specify the advantages to be expected of the Torrens system given that, as Dr Augustus Greeves said, ‘Everybody knows them’.<sup>225</sup> Shortly afterwards, the Ballarat Chamber of Commerce sent in its own petition,<sup>226</sup> and from the other side of the tracks a petition emerged from a crowded meeting at the Ballarat Mechanics’ Institute, at which one speaker made the suggestion that the lawyers should all be sent by Cobb’s coaches beyond Cooper’s Creek, where they could play their conveyancing games among themselves to their own satisfaction, but without injury to the populace.<sup>227</sup>

On 18 March *The Argus*<sup>228</sup> printed a letter from E J Murphy, of Eldon Chambers, adding his voice to the clamour for Torrens and calling the Torrens Bill ‘beyond all comparison the best Bill we have yet seen’, its success ‘almost beyond belief’. Similar rhapsodies had been heard at about the same time from a correspondent of *The Age*,<sup>229</sup> who said that the Torrens system ‘is so simple and so inexpensive

220 Victoria, *Votes & Proceedings*, Legislative Council, 4 March 1862, 55; 2 April 1862, 74; 8 April 1862, 77; *Parliamentary Papers*, 232; Victoria, *Parliamentary Debates*, Legislative Council, 4 March 1862, 706; 2 April 1862, 904; 8 April 1862, 937; Victoria, *Votes & Proceedings*, Legislative Assembly, 4 March 1862, 173; 11 March 1862, 183; Victoria, *Parliamentary Debates*, Legislative Assembly, 4 March 1862, 707; 11 March 1862, 752.

221 *The Argus* (Melbourne), 27 February 1862, 7.

222 *The Age* (Melbourne), 25 February 1862, 4f.

223 *Ballarat Tribune* (Ballarat, Vic), 29 March 1862, 2.

224 See also *Ballarat Star* (Ballarat, Vic), 12 March 1862, 2.

225 *The Herald* (Melbourne), 3 March 1862, 5. See also *The Argus* (Melbourne), 3 March 1862, 4, 5; *The Age* (Melbourne), 3 March 1862, 5 (twice).

226 Victoria, *Votes & Proceedings*, Legislative Assembly, 18 March 1862, 191; Victoria, *Parliamentary Debates*, Legislative Assembly, 18 March 1862, 788. Further petitions are recorded in Victoria, *Votes & Proceedings*, Legislative Assembly, 25 March 1862, 202; 27 March 1862, 209; 3 June 1862, 313; Victoria, *Parliamentary Debates*, Legislative Assembly, 25 March 1862, 838; 27 March 1862, 861; 3 June 1862, 1247.

227 *Ballarat Star* (Ballarat, Vic), 20 March 1862, 2; supplement, 1.

228 *The Argus* (Melbourne), 18 March 1862, 7. Noted in the *Maryborough and Dunolly Advertiser* (Maryborough, Vic), 21 March 1862, 2.

229 *The Age* (Melbourne), 24 February 1862, 7.

that many people can hardly bring their minds to believe it. But, sir, it is a fact'. Murphy mentioned also that he had spoken personally to Sir Richard MacDonnell, the retiring Governor of South Australia, and was able to report that his Excellency was unequivocally a Torrens supporter.<sup>230</sup> From top to bottom, society was pro-Torrens, with the exception of the lawyers, and even they were apostatising and abjuring their old faith in the mysteries of common-law conveyancing. The *Geelong Advertiser*<sup>231</sup> reported conversions of further lawyers to the cause. One 'Layman' writing to the editor of *The Argus*<sup>232</sup> mentioned that a number of lawyers had long supported the Torrens system in Victoria – such as Henry Jennings, who had proposed the vote of thanks at Torrens's lecture at St Kilda.

*The Argus*<sup>233</sup> itself was slightly more cautious, pointing out that the Torrens Bill still had flaws but that the public mood simply demanded its adoption and would not trust a Bill prepared by lawyers. The flaws would just have to be fixed later. But, on the whole, it supported the principles of the system, not least because they had worked successfully in South Australia and the Hanse towns.<sup>234</sup>

Ireland A-G attempted, in promoting his own scheme, to undermine Torrens's Bill and even attacked Torrens personally. Faced with a popular cause promoted by a popular personality against which he clearly felt powerless, he became ever shriller in his denunciations and began to express himself in a manner that was unlikely in the extreme to persuade. In Parliament he called Torrens a monomaniac.<sup>235</sup> Torrens himself was in the gallery at the time. We know this because Ireland A-G also accused him of seeking the Registrar-Generalship for Victoria<sup>236</sup> (presumably more lucrative than that for the less prosperous Province of South Australia), and Torrens responded by writing to the newspaper on the very next day quoting a letter he had written supporting the claim of the incumbent (William Henry Archer)<sup>237</sup> to administer the Torrens system.<sup>238</sup> It may be assumed that he heard the whole of Ireland A-G's bitter and unworthy diatribe as well, but in the end, as Torrens well knew, it was, as the *Ballarat Star*<sup>239</sup> put it, 'worse than idle'. All members would have read on that same or the previous morning, either in *The Age*<sup>240</sup> and *The Herald*,<sup>241</sup> or both, denunciations of clever parliamentary tactics on

230 A similar statement was made by James Service in Victoria, *Parliamentary Debates*, Legislative Council, 27 March 1862, 866.

231 *Geelong Advertiser* (Geelong, Vic), 19 March 1862, 2.

232 *The Argus* (Melbourne), 24 April 1862, 6.

233 *The Argus* (Melbourne), 10 March 1862, 4; see also 5 March 1862, 4.

234 *The Argus* (Melbourne), 8 March 1862, 4f.

235 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 1862, 743.

236 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 1862, 747.

237 See Archer's biographical entry for further information about his fate: Cecily Close, 'Archer, William Henry (1825–1909)' *Australian Dictionary of Biography* vol 3 41-3.

238 *The Argus* (Melbourne), 10 March 1862, 5. See also *Advertiser* (Adelaide), 20 February 1862, 2; *Register* (Adelaide), 8 March 1862, 2. For continuations of the correspondence, see *The Argus* (Melbourne), 12 March 1862, 3; 13 March 1862, 5; 18 March 1862, 7.

239 *Ballarat Star* (Ballarat, Vic), 12 March 1862, 2.

240 *The Age* (Melbourne), 7 March 1862, 4.

241 *The Herald* (Melbourne), 7 March 1862, 5.

the part of the government designed to delay the consideration of Service's Bill. *The Argus*<sup>242</sup> joined the chorus a few days later in an utterly devastating leader advising the Ministry to give up its dishonourable tactics of delay and muddying the waters, which merely redounded to its discredit, and instead accept 'the almost unanimous will of the Parliament and the people'. Back in the Legislative Assembly, one of Ireland A-G's Bills was adjourned for a fortnight over the votes of himself, J D Wood and John O'Shanassy.<sup>243</sup> It was finally damned when Torrens himself pronounced against it from Adelaide.<sup>244</sup>

On 11 March, however, a spanner was thrown unexpectedly into the works when Service found himself compelled to withdraw his Bill: B C Aspinall, Crown Prosecutor turned (briefly) Attorney-General in the last days of the Heales ministry, pointed out that it had not been accompanied by a message from the Governor, which s 57 of Victoria's *Constitution Act* [1855]<sup>245</sup> required in the case of a Bill to appropriate money, as this one did (by making provision for the salaries of officers and appropriations for the Assurance Fund). But members were 'warm in their assurances of support'<sup>246</sup> for the Bill, and the next day Service gave notice of another Bill,<sup>247</sup> and introduced it the day after together with a motion that it should have precedence on the following Thursday, which was passed.<sup>248</sup>

This time the timetable was actually adhered to, and the second reading came on 20 March. The required message from the Governor had been procured. The Legislative Assembly, as it was perfectly entitled to do but did rarely, had passed an address seeking one.<sup>249</sup> This amounted to asking the Governor to authorise parliamentary consideration of a private member's Bill which the government refused to adopt. Curiously, there is no recorded advice to the Governor from the Executive Council to send the message in its minutes, or any other discussion; s 57 did not require such advice, but on the other hand the giving of such advice is recorded for other exercises of the same power at about the same time.<sup>250</sup> But the Governor's confidential despatch to the Colonial Office tells us that, when the Governor received the address of the Legislative Assembly praying for such a message, among his advisors 'much difference of opinion was manifested, and the law officers [ie Ireland A-G and J D Wood, were] obliged to yield to a majority of their colleagues on this point' while stating that they would 'do all in their power

242 *The Argus* (Melbourne), 10 March 1862, 4.

243 Victoria, *Votes & Proceedings*, Legislative Assembly, 7 March 1862, 180; Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 1862, 749f.

244 *The Herald* (Melbourne), 2 April 1862, 4f.

245 Formally to be found in sch 1 to the *Victoria Constitution Act 1855* (Imp). The modern equivalent is s 63 of the *Constitution Act 1975* (Vic).

246 *The Age* (Melbourne), 12 March 1862, 5.

247 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 March 1862, 765.

248 Victoria, *Votes & Proceedings*, Legislative Assembly, 13 March 1862, 188; Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 1862, 780.

249 Victoria, *Votes & Proceedings*, Legislative Assembly, 12 February 1862, 144; Victoria, *Parliamentary Debates*, Legislative Assembly, 11 February 1862, 581; 12 February 1862, 598.

250 For example, VPRS 1080/P0000/77f.

to prevent the Bill from becoming law'.<sup>251</sup> So, most of the Cabinet were clearly in favour at least of giving serious consideration to the Torrens system. The Governor's message covered only the salaries of officers and the standing appropriation of the Assurance Fund. For some reason the message did not authorise, unlike both the address seeking its provision and the Act itself (s 120), a standing appropriation of the Consolidated Fund contingent on there being insufficient funds in the Assurance Fund.<sup>252</sup> The point was thus still open and was to be exploited later.

True to their word, as the second reading debate began on 20 March, Ireland A-G and Wood tried to have the Speaker rule, on highly technical points of parliamentary procedure, that the message was not in order; they failed,<sup>253</sup> and, needless to say, this action was not calculated to increase esteem for them or their government or their alternative Bills. After a long and bitter debate in which all the old ground was gone over yet again, and Torrens was once more accused of unworthy motives and even of having his hotel bills in Melbourne paid by money-grubbing,<sup>254</sup> the Bill passed its second reading without a division.<sup>255</sup> For good measure, Ireland A-G also threatened to advise the Governor not to assent to any Bill that was passed, relying on the failure of the message to encompass everything that was proposed by the Bill. On the carrying of the second reading, Ireland A-G protested that members had just voted 'blindly for what they did not understand' and that 'the whole subject should be referred to some competent tribunal'<sup>256</sup> to be dealt with properly, a clear reflection on the House itself. Instead of following that advice, the House immediately formed itself into the Committee of the Whole to consider the Bill further.

The consideration in detail commenced with a few skirmishes on various points, which culminated in a motion to delete the word 'encumbrancer' in clause 3, which J D Wood thought had been wrongly used. He had a point: the Bill<sup>257</sup> defined 'encumbrancer' as the owner of encumbered land and 'encumbrancee' as the person owning the encumbrance.<sup>258</sup> This was a copy of the South Australian legislation,<sup>259</sup> but it is also backwards and suggests confusion with the admittedly confusing pair 'mortgagor' and 'mortgagee'.<sup>260</sup> The motion to correct this was

251 CO 309/60/213 (AJCP reel 1997).

252 Victoria, *Votes & Proceedings*, Legislative Assembly, 11 March 1862, 184; Victoria, *Parliamentary Papers*, Legislative Assembly, 1861-62 vol I, 1037; Victoria, *Parliamentary Debates*, Legislative Assembly, 11 March 1862, 758-763.

253 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 March 1862, 820-822.

254 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 March 1862, 832. See further on this occasion Torrens's own reply, as reported to the House, in Victoria, *Parliamentary Debates*, Legislative Assembly, 27 March 1862, 871; and 29 January 1863, 317.

255 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 March 1862, 832.

256 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 March 1862, 832.

257 Preserved in the 1861-62 volume of Bills introduced into the Legislative Assembly, 413ff, 609ff.

258 This is also preserved in s 3 of the Act.

259 *Real Property Act 1861* (SA) s 3. The *Real Property Act 1886* (SA) s 3 perpetuates this tradition even today.

260 The confusion here is only apparent, however. The mortgagor is, of course, actually the grantor of the interest in land. The difficulty arises because we are used to thinking of the mortgagor rather as the grantee of a loan.

rejected by twenty-nine votes to four (namely, those of O'Shanassy, Ireland A-G, Wood and G C Levey, the member for Normanby).

Thereupon, the Premier and the two law officers walked out of the chamber and, in a repeat of a scene in the Legislative Council a few years before, the House passed the rest of the Bill through the Committee stage in one fell swoop, only the marginal notes being read.<sup>261</sup> The House adjourned, after transacting only a very small amount of other business, at 5.02 am.<sup>262</sup> There was a rota of members prepared to sit up until 7 am in order to ensure the passage of the Bill that same morning.<sup>263</sup>

Needless to say, that great impartial organ the *Geelong Advertiser*<sup>264</sup> supported the House's action wholeheartedly: there had been no choice but to proceed in that way given the nature of the opposition offered to the Bill. It thought that even before the Bill was to come into operation, on 1 October, there would be contracts of sale which would stipulate for the provision of a Torrens title by the vendor. E J Murphy, of Eldon Chambers, also thought that the passing of the Torrens Bill was an occasion for rejoicing, while regretting the lack of consideration of it in detail; but this, he thought, was largely because of the stupid unthinking opposition of the law officers, which had led the House to refuse to consider even the smallest objection from them. He also showed a nice appreciation of the flexibility of language by stating that Parliament could attribute to 'encumbrancee' whatever meaning appealed to it.<sup>265</sup> This flexibility provided some material for Mr Punch too, who suggested making 'vendor' mean 'purchaser' and 'black' 'white' as well.<sup>266</sup>

On 27 March 1862, a week after the second reading and what passed for a Committee stage,<sup>267</sup> the Bill came up for a third reading. It was, of course, going to pass easily. The law officers might therefore have taken the opportunity for a lofty and slightly condescending but still gracious concession of defeat, coupled perhaps with the expression of an earnest hope that the Bill would work better in practice than they themselves suspected it might. These were the sorts of speeches that people in the Victorian era tended to be rather good at making. Even at this stage the law officers might also have salvaged something both for themselves and for the law of the colony by providing, even privately, a list of the technical amendments to the Bill necessary in order to ensure that its greatest defects of detail were removed. They did not do any of those things but rather ensured the

261 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 March 1862, 835.

262 Victoria, *Votes & Proceedings*, Legislative Assembly, 20 March 1862, 200. (The hour of 4.57 am is given in *Hansard*, but that is not the official record.)

263 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 January 1863, 319.

264 *Geelong Advertiser* (Geelong, Vic), 22 March 1862, 2.

265 *The Argus* (Melbourne), 27 March 1862, 5.

266 *Melbourne Punch* (Melbourne), 27 March 1862, 66.

267 And after Torrens had returned to Adelaide: *The Herald* (Melbourne), 16 April 1862, 7, which contains a handy reference to a leading article commenting on the Victorian debates in the *Advertiser* (Adelaide) of 8 April, 2.

perpetuation of further bitterness and ill-will for no good purpose. The Bill was of course passed and sent to the Legislative Council.<sup>268</sup>

As *The Herald*<sup>269</sup> pointed out on 29 March, it was hardly to be expected that the Legislative Council, which had accepted the Bill so enthusiastically in 1860, would reject it in 1862. The real question would come when it was presented for the Royal Assent, which would of course be granted, if at all, on ministerial advice. But for the moment the legislative process proceeded. When Coppin moved the second reading of the Bill on 8 April, the traditional procedure was followed of adjourning the debate after the mover and an opponent of the Bill, Fellows, had spoken.<sup>270</sup> But debate was resumed promptly the next day and the Bill read a second time and referred to the Committee of the Whole.<sup>271</sup> À Beckett promised unspecified amendments, but was quite circumspect and appeared to concede victory to the Bill in principle by stating that he might have no important amendments at all.

However, on 29 April<sup>272</sup> the committee stage proceeded more or less as it had two years previously. The whole Bill was passed in one fell swoop, and most clauses were not even considered in detail, only the marginal notes being read. The following exchange occurred after a few amendments proposed by à Beckett had been lost:

Mr à Beckett said he wished to make some amendments; but, from the spirit displayed by the House, he saw it was of no use his attempting to do so, as they were determined not to accept them.

Mr Coppin said he took the Bill on trust, from the excellent character given to it by some of the highest legal authorities.<sup>273</sup>

This was a reference to the support for the Act in the South Australian inquiry by Sir Charles Cooper and Hanson CJ.<sup>274</sup> The only amendments the House accepted were the authorised ones put forward by Coppin, and at the conclusion of business on 29 April the Bill awaited only its third reading. This it received on 1 May.<sup>275</sup> On 7 May Ireland A-G's Bills were formally removed from the business before the House.<sup>276</sup> A law clerk wrote to *The Argus* asking what compensation would be provided to him and his colleagues when they were thrown out of work by the Torrens system.<sup>277</sup> Only the Royal Assent was now necessary to make the Bill law.

268 Victoria, *Votes & Proceedings*, Legislative Assembly, 27 March 1862, 209; Victoria, *Parliamentary Debates*, Legislative Assembly, 27 March 1862, 874.

269 *The Herald* (Melbourne), 29 March 1862, 4f.

270 Victoria, *Parliamentary Debates*, Legislative Council, 8 April 1862, 938-942.

271 Victoria, *Parliamentary Debates*, Legislative Council, 9 April 1862, 962-964.

272 On the same day, a long letter from Torrens appeared in *The Argus* to rebut Fellows's statements on the second reading (*The Argus* (Melbourne), 29 April 1862, 6).

273 Victoria, *Parliamentary Debates*, Legislative Council, 29 April 1862, 972.

274 See above, n 171.

275 Victoria, *Parliamentary Debates*, Legislative Council, 1 May 1862, 1006.

276 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 May 1862, 1043.

277 *The Argus* (Melbourne), 6 May 1862, 7.

## VII PHASE 6: ROYAL ASSENT

The granting of Royal Assent to the Act almost precipitated a constitutional crisis, and did involve the distinct constitutional oddity of division among the Cabinet in the advice it tendered to the Crown, forcing the Governor to select which advice he should follow.

As we saw earlier, Ireland A-G, displaying his usual degree of strategic judgment and tact, had threatened that any Torrens Bill that passed Parliament would be the subject of advice to the Governor not to assent to it. As early as 9 May, Service asked what advice was to be given to the Governor. The Attorney-General responded that he had not yet considered the question.<sup>278</sup> On 14 May the Royal Assent was given to a number of Bills but not the Torrens Bill.<sup>279</sup> A week later, J P Fawkner took a leaf from Lysistrata's book and moved a motion threatening that the Legislative Council would not pass any more Bills unless the government accounted for its failure to have the Torrens Bill assented to.<sup>280</sup> When Fawkner's motion came on for discussion (Sir) W F Mitchell, for the government, explained that the government was not delaying matters but rather had simply not had time to consider its course of action. The Attorney-General was fully engaged on 'the privilege case'<sup>281</sup> – a reference to the litigation that was to end up before the Privy Council in the case of *Dill v Murphy*.<sup>282</sup> Service returned to the question again on 27 May, and received essentially the same response.<sup>283</sup>

The newspapers of course were not silent during this. *The Argus* contributed a leader and a letter, both on 23 May and both urging assent. The letter was another from E J Murphy of Eldon Chambers, this time taking issue with what he thought were the two most likely reasons for doubting whether the Bill could receive assent as a matter of law. These were the lack of a Governor's message covering the appropriation of the Consolidated Fund in case the Assurance Fund should prove insufficient to meet all claims; and the vagueness of the repealing provision, s 1, which appeared to be contrary to the standard Royal instructions to Governors not to assent to Bills with repealing clauses that were not express and clear.<sup>284</sup> These objections, he said, had been disposed of by the law officers' advice in England leading to the confirmation of the South Australian Bill, in relation to which exactly the same questions had been raised;<sup>285</sup> and as the Torrens Act had since been adopted in Queensland and Tasmania as well it was simply inconceivable that there could be any policy-based objection from the Colonial Office to its adoption in Victoria. All these points were entirely accurate. The Colonial Office objected

278 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 May 1862, 1061.

279 Victoria, *Parliamentary Debates*, Legislative Council, 14 May 1862, 1088.

280 Victoria, *Parliamentary Debates*, Legislative Council, 21 May 1862, 1147.

281 Victoria, *Parliamentary Debates*, Legislative Council, 22 May 1862, 1167.

282 (1864) 1 Moo PC (N.S.) 487; 15 ER 784.

283 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 May 1862, 1198.

284 These were standard issue. Those provided to the previous Governor of Victoria are in Victoria, *Parliamentary Papers*, Legislative Council, 1855-56 vol II, 608.

285 A fact which the *The Argus* also specially mentioned on 27 May 1862, 5.

to colonial enactments only very rarely, and, although it had not completely given up any claim to supervise Australian colonial legislatures,<sup>286</sup> was certainly not going to deny to Victoria what it had granted to other Australian colonies.

*The Herald*<sup>287</sup> also noted the Attorney-General's 'cogitating' on the question of assent and added mockingly that '[i]n a few days the hon. gentleman hopes to have made his mind up on this knotty point'. The *Ballarat Star*<sup>288</sup> was even more open in its derision, referring to the Attorney-General as 'an entire and perfect chrysolite of truth, sincerity and devotion to the public good. These were the elements in that opposition which he showed to the Real Property Bill brought in by Mr Service'. It feared that similar motives might lead to non-assent to the Bill, and suggested a petitioning campaign to convince the government.

Matters became more serious in early June. George Rolfe MLC asked (Sir) W F Mitchell whether advice would 'immediately' be given to assent to the Bill, and the response was again that there had not been time to consider the question. Mitchell, already on the record as more enthusiastic about the Torrens system than his Premier, now added that some of his colleagues were also in favour of the introduction of the Torrens system.<sup>289</sup> This public admission of a split in the Cabinet is explained by the fact that the Torrens system had been declared an 'open' question in the Cabinet, that is, one on which the usual rule of Cabinet solidarity was suspended and public disagreements were permitted.<sup>290</sup> This step is taken very rarely in Australia, but such a device does exist.<sup>291</sup> However, Mitchell's assurance was clearly no longer enough. On the next page of *Hansard*, Fawkner again proposed the Lysistratan solution of holding a Bill, this time the Land Bill, in abeyance until the fate of the Torrens Bill was known, and on the one after that Rolfe gave a notice of motion threatening the blocking of supply.

A week later, on 10 June, the supply Bill was introduced into the Legislative Assembly and Service took it hostage, moving the adjournment of the debate upon it until the fate of the Real Property Bill was known. (Sir) Charles Gavan Duffy, President of the Board of Land & Works and Commissioner of Crown Lands & Survey, openly admitted a split in the Cabinet on the question, saying that 'several members of the government were as anxious to see that Bill become law as any hon. member sitting opposite'.<sup>292</sup> Nevertheless, Service's motion for adjournment was passed, even though it was watered down by a government amendment which reduced the period of adjournment to the following day and squeaked through by 28 votes to 26.<sup>293</sup>

286 There had been a disallowance of a Victorian statute two years earlier, and there were four refusals to assent to reserved legislation in the early 1860s. See John Quick and Robert Randolph Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 695.

287 *The Herald* (Melbourne), 28 May 1862, 4.

288 *Ballarat Star* (Ballarat, Vic), 26 May 1862, 2.

289 Victoria, *Parliamentary Debates*, Legislative Council, 3 June 1862, 1245.

290 This is stated in the Governor's despatch to the Colonial Office, CO 309/60/213 (AJCP 1997).

291 Greg Taylor, *The Constitution of Victoria* (2006) 158.

292 Victoria, *Parliamentary Debates*, Legislative Assembly, 10 June 1862, 1295.

293 Victoria, *Votes & Proceedings*, Legislative Assembly, 10 June 1862, 351.

Victoria seemed headed either for an election on the issue of land conveyancing or, if it was the Legislative Council alone that refused supply, for a full-scale constitutional crisis, anticipating those of the 1860s and 1870s.<sup>294</sup> But, on the next day, Mitchell announced to the Legislative Council that the Ministry had advised the Governor to assent to the Bill.<sup>295</sup> *The Herald*<sup>296</sup> rejoiced that the Act would soon be law: 'It is almost equal to a pecuniary gift to every holder of property in the country' because of the enhancement of the value of property constituted by greater ease in conveying it and borrowing against it. The *Real Property Act* duly received assent with the other Bills of the session passed but still outstanding at the prorogation on 18 June 1862.

So far, I have confined myself, in recounting the events leading to Royal Assent, to sources that were publicly available at the time, in order to allow an appreciation of how matters looked to the public. Since 1862, of course, further documents have become public. The next year, the law officers' advice to the Governor was published.<sup>297</sup> Nowadays, there are available in addition the minutes of the Executive Council<sup>298</sup> and the despatches of Victoria's Governor, Sir Henry Barkly, to the Colonial Office of 21 June and 4 July 1862.<sup>299</sup> This enables us to see what was going on behind the scenes.

The despatches indicate that in the Governor's estimation there was indeed a real danger of a denial of supply if assent were not given to the Real Property Bill. He had received an opinion from the law officers recommending the denial of assent, but this had been expressed 'in such measured terms, and upon grounds to which they themselves seemed to attach so little weight, as at once to relieve my mind from any idea that it was my duty to oppose the view of the majority of the Cabinet, or to assume any personal responsibility in the matter'. The majority of the Cabinet did indeed recommend assent, over the objections of the law officers, and Mitchell's statement in the Legislative Council on 11 June had been authorised by his Excellency in order to clear away a blockage to the conclusion of the session's business by the passing of supply. That very morning, a meeting of Executive Council had occurred at which the various members of the Cabinet had put their competing views, and his Excellency had determined to go with the majority.

His Excellency concluded his despatch by saying that he was sure that blunders had been made in adapting the Bill to the law of Victoria, but was also of the view that he had acted constitutionally in assenting. (For the record, the Colonial Office agreed with this assessment and informed Sir Henry that it approved of his action.)

What, then, were the law officers' objections? As E J Murphy had correctly surmised, there were two. The first was that the message from the Governor

294 John Waugh, 'Blocking Supply in Victoria' (2002) 13 *Public Law Review* 241.

295 Victoria, *Parliamentary Debates*, Legislative Council, 11 June 1862, 1297.

296 *The Herald* (Melbourne), 16 June 1862, 4.

297 Victoria, *Parliamentary Papers*, Legislative Assembly, 1862-63 vol. I, 661-663.

298 VPRS 1080/P0000/7/159-161, 167-170; VPRS 7674/P0001/1.

299 CO 309/60/103ff, 213ff (AJCP 1997).

recommending appropriation for the purposes of the Act should also have covered the contingent liability of the Consolidated Revenue in cases in which the Assurance Fund was not sufficient (s 120 of the Act). The law officers concluded that the message did not cover this feature of the Bill, but that probably a message was not required for the Bill anyway, given that the appropriation of the revenue was merely a side-effect of it rather than its principal purpose. In taking this line, they were arguably correct; the only doubt arises in my mind because cl 120 of the Bill did actually effect an appropriation even if that was not the main purpose of the whole Bill. But, in fact, the law officers' view would nowadays be considered somewhat lax, for constitutional practice later diverged from my view of the law; a message would nowadays be expected simply because the Bill implied the need for expenditure by providing for the appointment of officers who would need to be remunerated.<sup>300</sup> Certainly the law officers, who might have taken the same line, are to be commended for not stretching the law or proffering captious legal objections to a Bill which they opposed for other reasons.

The law officers also considered in their advice whether various Royal instructions to the Governor required the reservation of the Bill. Again, very fairly, as well as correctly, they concluded that the stipulation that Acts should be repealed only by express words did not intrude in this case, as the Bill would merely disapply certain Acts to land under it rather than wholly repeal them; and they also concluded that the Bill did not fall within the paragraph relating to Bills of extraordinary importance. In this they had the good sense to differ with Mr Justice Boothby's highly controversial decision of the previous year in *McEllister v Fenn*;<sup>301</sup> although that decision is nowhere mentioned in their opinion, it must have been present to their minds given the controversy it had caused and the obvious potential for a repeat performance in Victoria. (It is interesting to see that George Coppin was in Adelaide at about the time that this judgment was delivered and the ensuing public controversy about it broke out.<sup>302</sup> Victorian fears of a lawyers' sabotage operation on the Torrens system were by no means illusory.)<sup>303</sup>

The obvious conclusion, then, for the law officers was that there were no legal objections to assent; but desiring (as lawyers in such a position often do) to purchase immunity from blame for themselves in case of a disaster by recommending the most conservative course, they recommended reservation of the Bill because 'there is so much doubt, as regards the various points we have referred to' and 'the very serious consequences which would ensue if it should ultimately be decided to be illegal'. They closed by referring to various infelicities in the Bill such as its misuse of the word 'encumbrancer' and other technical defects not justifying a conclusion that the Bill was invalid; and, finally, to the breach of the doctrine of separation of powers constituted by the granting of quasi-judicial powers to

300 For a discussion of the point, see Taylor, above n 291, 370-372.

301 This case was not officially reported, but is extensively described, together with the public outrage that followed Boothby J's judgment, in Hague, above n 147, vol I 271-318.

302 *Register* (Adelaide), 29 July 1861, 3.

303 For one of numerous express references to the South Australian experience as justifying caution, see *Ballarat Star* (Ballarat, Vic), 20 June 1860, 2.

the Registrar-General and Lands Titles Commissioners. However, these references occurred after their discussion of strict questions of law and were clearly intended as merely commentary on legal policy rather than official legal advice.

Executive Council considered this opinion at the special meeting on 11 June, the morning of Mitchell's statement in the Legislative Council. The meeting of the Executive Council was convened to consider only this question. His Excellency and ten members of the Council were present – a very good attendance because, unusually, the meeting was going to be more than a formal one. The Treasurer, W C Haines, presented the advice of the majority of the Council to assent, from which the two law officers formally dissented. The minutes record that they considered the Bill open to objections as invalid, and

although they may not consider those objections conclusive, yet they think, that as they are of a weighty character, and as the consequences to property might be very prejudicial if the question of the validity of the Bill should hereafter be contested in the Supreme Court, or before the Privy Council, it would be the more advisable course to reserve the Bill for Her Majesty's pleasure.

As however they do not feel convinced of the validity of these objections, Mr Ireland and Mr Wood consider that the question whether the Bill should be assented to or not, is one rather of policy than of law – and as a Bill similar in its provisions has been left to its operation in South Australia, they inform his Excellency that they abstain from taking the course which it might be their duty under other circumstances to adopt, where the majority of the Cabinet do not act upon the advice tendered by the legal members of it.<sup>304</sup>

In other words, they would not resign in protest. Despite all the abuse that had been hurled at the law officers for their lack of support for the Torrens Bill, all their strategic and tactical misjudgements and their lack of appreciation of the advantages of Torrens's plan, here they are to be congratulated for taking a judicious stand illustrating an ability to act as law officers of the Crown, divorcing their advice in that capacity from their opinions as politicians. Or perhaps they had, at last, grasped that the fight was lost, and that the government might well be too if they compelled it to continue fighting.

The Executive Council's minutes allow us however to see that Mitchell's statement to the Legislative Council a few hours later was inaccurate. He should have said that the *majority* of the Ministry had recommended assent. And he did not add that, as the minutes record, the Council adjourned without any formal Vice-Regal indication on the fate of the Bill. Nothing was said about this in the Council until it re-convened on 13 June. But the Governor must have made his decision known informally on 11 June. No doubt a Governor of the intelligence of Sir Henry Barkly told all Ministers informally rather than permitting some of them to learn of the decision at second hand.

304 VPRS 1080/P0000/7/159f.

Formally, the Governor's decision took the form of an oral announcement at the meeting on 13 June that he would assent, followed by a written minute, which his Excellency laid before the Council on 16 June. To justify his decision, his Excellency picked up on the doubts expressed by the law officers themselves about the invalidity of the Bill; queries about whether the Royal instructions were legally binding;<sup>305</sup> the approval of the South Australian Torrens Act by the Imperial authorities; and the need for questions of law relating to invalidity to be solved by the Courts, any delay in assenting being useless for that purpose. This minute, too, was a credit to its author, one of the outstanding Governors of Victoria.

## VIII PHASE 7: IRONING OUT THE FAULTS

Section 135 of the *Real Property Act* (Vic), or Act No 140 (1862) as it now at length had become, provided that it should take effect 'from and after' 1 October 1862. Between the grant of assent to the Act on 18 June and that date its friends expressed deep suspicion of the government's capacity to administer it impartially. Indeed, this distrust had begun to be manifested even on the day before the Bill was formally assented to, when James Service asked the Attorney-General whether he was going to play some further trick, for example provide advice to The Queen to disallow the Bill. The Attorney-General denied any such intention. As the debate progressed, the House was induced by Service to order the law officers' opinion of 11 June to be produced. When the Minister of Justice essayed a formal objection to this course, Hansard records immediate cries of 'No Appropriation Bill'. This is a remarkable indication, by today's standards, of the degree to which Parliamentary control of the executive was a lived reality before disciplined parties had taken over the nest; and it is also a further rather startling indication of how seriously this particular issue was viewed by the parliamentarians of the day. As a result of these cries, the Premier stood up and 'suggest[ed]' that his Minister should withdraw the objection as a sign that the government was acting in good faith. Production of the opinion was indeed ordered.<sup>306</sup>

Concern then turned to the identity of the officers whom the government might appoint to administer the Act. The *Geelong Advertiser*<sup>307</sup> raised this concern as early as 25 June, when the Act was a week old. As the date for the Act's operation approached, the big fear was that the government would appoint lawyers as the Lands Titles Commissioners. The South Australian Act was administered by laymen assisted by lawyers, not the other way around; as we have seen, that was widely held to be a key to its success; but a government that did not share this conviction might appoint lawyers all the way down the line and sabotage the Act by thus re-introducing their detestable pettifogging and quibbling which caused so

305 Shortly afterwards, it was confirmed (with retrospective effect) that they were not binding: *Colonial Laws Validity Act 1865* (Imp) s 4. Of course, this definitive answer, although effective in 1862, was not available then, but there are strong grounds for believing that the statute merely confirmed the law existing aside from it: D B Swinfen, 'The Legal Status of Royal Instructions to Colonial Governors' [1968] *Judicial Review* 21.

306 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 June 1862, 1335f.

307 *Geelong Advertiser* (Geelong, Vic), 25 June 1862, 2.

much useless delay and expense under the old system of conveyancing. Towards the end of September various newspapers ran leaders indicating their unease on this question; the *Bendigo Advertiser*<sup>308</sup> even accused the government of conducting ‘guerrilla warfare’ against the Act. A report appeared in *The Herald*<sup>309</sup> that the government would not appoint any Lands Titles Commissioners, which would of course have made the Act virtually unworkable.

On 24 September, a week before the Act was supposed to come into operation, a deputation including Coppin and Rolfe was formed to see Premier O’Shanassy and put forward the view that the administration of the Act should be effective, and that meant in charge of laymen; it achieved little as the Premier stated that the government had not yet made any decision. The metropolitan newspapers carried long reports of the proceedings from which it incidentally emerges that the government interpreted the words ‘from and after the first day of October’ in s 135 to mean that the Act did not come into force until 2 October.<sup>310</sup> But on the main point in issue the Premier’s reticence about the identity of appointees only increased suspicions. He must have known that that would be so given his previous intervention in Parliament to allay suspicions when the Minister for Justice cavilled at the release of the legal opinion, but presumably decided either to have his fun with the deputation or to play a completely straight bat given that no appointments had in fact been finalised. The first explanation gains some support from the fact that Premier also said, unnecessarily and cryptically, that he wanted to see the Act administered in the same manner as Parliament had passed it – which could be interpreted to mean in a slapdash, ill-considered manner.

On 29 September, at a brief meeting in the Hall of Commerce under Coppin’s chairmanship which attracted only what *The Herald*<sup>311</sup> called the ‘wretchedly small’ attendance of about forty people, a citizen’s watch committee was formed to ensure that abuses by the government did not escape notice.<sup>312</sup> This gives us a rare and valuable insight into the type of citizens who supported the Act so strongly that they were prepared to go along to a meeting and join a committee (even one that, as far as I know, never actually met!). Its members were Amos Cairns, an iron merchant of Flinders Lane; J Lyons, an auctioneer of Bourke Street; W F A Rucker, a mining agent of Collins Street; and George Mouritz, a coal merchant and importer of King Street.<sup>313</sup> They were businessmen, probably reasonably well-off, and clearly prominent enough to render any contemporary explanation by the

308 *Bendigo Advertiser* (Bendigo, Vic), 27 September 1862, 3. The other newspapers were the *The Age* (Melbourne), 27 September 1862, 5 (letter to editor); *The Herald* (Melbourne), 27 September 1862, 4; *Ballarat Star* (Ballarat, Vic), 29 September 1862, 2; *Maryborough and Dunolly Advertiser* (Maryborough, Vic), 26 September 1862, 2.

309 *The Herald* (Melbourne), 24 September 1862, 4.

310 *The Argus* (Melbourne), 25 September 1862, 4; 26 September 1862, 4; *The Herald* (Melbourne), 25 September 1862, 5; 26 September 1862, 6; *The Age* (Melbourne), 25 September 1862, 5.

311 *The Herald* (Melbourne), 30 September 1862, 4.

312 *The Argus* (Melbourne), 30 September 1862, 5, 6; *The Age* (Melbourne), 30 September 1862, 5; *Geelong Advertiser* (Geelong, Vic), 30 September 1862, 2f.

313 I reconstruct this from the details I have from the newspaper reports and *Sands & McDougall’s Commercial and General Melbourne Directory for 1862*, 204, 260, 273, 292.

newspapers about who they were redundant, but hardly the cream of society. As we have seen, the Torrens system had very broad support throughout society because of the wide distribution of land and the even wider circle of those who hoped one day to own it. A businessman in particular might be likely to be attracted not so much by the opportunity to buy or trade in land, but by the ability to borrow more cheaply against land which the Torrens system offered – both because it reduced the expenses of conveyancing in respect of mortgages as well and because it permitted a lower interest rate to be charged as it increased the certainty that the lender was in fact lending to the true owner of the land.<sup>314</sup>

The *Geelong Advertiser*,<sup>315</sup> concluding an article whose main point was that something should be done officially to express the colony's gratitude to Torrens personally, comforted itself with the thought that the public would be watching the implementation of the Act closely and would punish governmental perfidy severely. However, all alarm was dissipated on 2 October when the names of the Lands Titles Commissioners were announced.<sup>316</sup> They were Charles James Griffith, a respected colonist who had been a member of the first Victorian Parliament and was a member of the Irish Bar but had not practised and was known for a variety of achievements unconnected with the law; James Denham Pinnock, formerly registrar of the Supreme Court of Victoria but not legally qualified; and Frederick Armand Powlett, another well-known and respected colonist who had had some contact with the law as a police magistrate but was also free from the taint of legal qualification. It was an extremely distinguished board, as witness the fact that most of the newspapers announcing these appointments did not have to explain to contemporaries who they were, while for those for whom their memories are no longer living each of the three rates a biographical article in the *Australian Dictionary of Biography*. This distinguished board of 'high integrity'<sup>317</sup> was assisted by the 'eminent conveyancer'<sup>318</sup> John Carter and Hugh Chambers, a solicitor to the Bank of Victoria,<sup>319</sup> who were appointed as solicitors under the Act.

So the Act commenced operation, and the first applications began to come in. Number one, still preserved,<sup>320</sup> was for a piece of land at the north-western corner of Kildoroy Street and what is now the Bellarine Highway in an area then known as Rochetown and now as Moolap.<sup>321</sup> The application was held up for some time, unfortunately, as the land had been privately surveyed and there were uncertainties about its boundaries, and CT 1/1 was, therefore, for a property in the Parish of Ravenswood.<sup>322</sup>

314 I shall expand on these points in various places in Taylor, above n 120.

315 *Geelong Advertiser* (Geelong, Vic), 30 September 1862, 2.

316 *Victoria Government Gazette*, 2 October 1862, 1875.

317 *The Herald* (Melbourne), 3 October 1862, 4.

318 *The Herald* (Melbourne), 30 September 1862, 4.

319 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 June 1863, 934f.

320 VPRS 460/P0000/1.

321 Melways reference 453 H12.

322 This is taken from the register of applications, VPRS 405/P0000/1. Also notable is application no 667 by one James Service.

However, it was very quickly discovered that the lawyers had not been entirely wrong when they had pointed out technical defects in the Act. Thomas à Beckett, writing in 1867, declared that experience had shown that there was too much 'official routine and costly but useless precautions, which unnecessarily clogged the working of the system'<sup>323</sup> and led to the introduction of the revised version of the Act in 1866. This enactment inaugurated the name by which the Torrens system statute has ever since been known in Victoria: it was the *Transfer of Land Statute* [1866]. Among other things the consolidation of 1866 tactfully solved the dispute about 'encumbrancer' and 'encumbrancee' by omitting both definitions, and neither word appears today in the *Transfer of Land Act 1958*.

But well before that, on 9 December 1862 in fact – barely two months after operations had commenced – John Carter had provided to Ireland A-G a list of 'several necessary or expedient amendments of the *Real Property Act*, in order that the system established by it may have a fair trial'.<sup>324</sup> They were the sort of drafting points that might have been dealt with in a properly conducted Committee stage in Parliament. They appear trivial when written down but are, indeed, the sort of annoyances which can easily lead to difficulty in practice. For example, s 27 provided for the value of land, to be used in assessing the contribution to the Assurance Fund, to be ascertained by 'oath or solemn affirmation', but the word 'declaration' was used elsewhere in the Act so it was uncertain to what exactly 'solemn affirmation' referred. There needed to be express provisions about dower, and also the machinery could be improved for persons living outside Melbourne. Various other changes or additions were essential or desirable.

By May 1863 *The Argus* was editorialising about the 'glaring defects' of the Act caused by 'reckless legislation';<sup>325</sup> but it added that fortunately relief was at hand thanks to the government's amending Bill, and the 'largely successful'<sup>326</sup> system would be saved from doom. A letter-writer to the same newspaper in July thought that the dearth of applications under the Act was due to the suspicion of the public that the Act was not yet entirely ship-shape.<sup>327</sup> He said there had been fewer than a hundred, although in fact the hundredth application had been made on 22 May and the 120<sup>th</sup> was made on the day his letter was published.<sup>328</sup> From this period there is also preserved a pamphlet by a barrister, Thomas Parsons, who thought it worth the effort of publishing *An Offer to Frame and Initiate the Administration of a Real Property Law*<sup>329</sup> in August 1863. In his sixteen-page pamphlet, he argued that Torrens had been insufficiently radical; that legal title should be entirely abandoned in favour of equitable; that the *Real Property Act* was very poorly drafted, but

323 À Beckett, above n 77, 8.

324 Victoria, *Parliamentary Papers*, Legislative Assembly, 1862-3 vol I, 613; *The Argus* (Melbourne), 20 December 1862, 7. In fact, he is reported to have been drawing up his list much earlier, in *The Herald* (Melbourne), 30 September 1862, 4.

325 *The Argus* (Melbourne), 4 May 1863, 4f.

326 *The Argus* (Melbourne), 9 May 1863, 4.

327 *The Argus* (Melbourne), 28 July 1863, 7.

328 VPRS 405/P0000/1/7f.

329 Thomas Parsons, *An Offer to Frame and Initiate the Administration of a Real Property Law* (1863).

that the idea of certificates of title should be retained for the present as 'the public mind seems to find repose in it';<sup>330</sup> and '[t]hat the labours of Mr Torrens and his coadjutors satisfy South Australia, only proves the very limited requirements of that Province for any real property law whatever'.<sup>331</sup>

This advocacy appears to have found no public echo, and the Bill for the statute to amend the existing Torrens plan was duly introduced. Surprisingly it prompted an outbreak of harmony, J D Wood stating that the changes were 'of a technical character' (rather than affecting the principle).<sup>332</sup> On the second reading Ireland A-G rather wittily, and also most gracefully withdrawing his earlier allegations that Torrens was a monomaniac and after the more lucrative post of Registrar-General for Victoria, referred to Torrens as

a gentleman who was not a lawyer, but who was an enthusiast on the subject; and he admitted that that gentleman had concocted a scheme which was no discredit to him; but he was bound to say, having examined the Bill, that its framer could only have had a smattering of the law of real property, and he had framed an Act to the working of which its author was absolutely necessary. No-one but Torrens could, in fact, administer Torrens' Act; and it was impossible to find a second Torrens to administer it here.<sup>333</sup>

The amending statute was duly enacted in September 1863<sup>334</sup> along with a statute to cure any invalidities in the enactment of the original Act having regard in particular to the lack of a message authorising the contingent appropriation from the Consolidated Fund.<sup>335</sup> This latter was not assented to locally, but in a further outbreak of extreme caution was reserved and sent 'home' in September 1863 for assent (which it was certain to receive). Thus it came into force as Act no 210 (1864) (Vic) only when proclaimed in June 1864.<sup>336</sup> A minute from Higinbotham A-G attached to the Governor's despatch to the Colonial Office explained that a measure to confirm the validity of the original Act was necessary because '[c]onsiderable doubts as to the validity of the Act ... are stated to be entertained by members of the legal profession' owing to the failure to provide a message covering all appropriations made by the Act and the too-general repeals clause.<sup>337</sup> Again events in South Australia – the continuing campaign of Boothby J – are the unstated background to this. At any rate those doubts must have receded in Victoria once Act No 210 had received assent.

330 Ibid, 9.

331 Ibid, 3.

332 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 April 1863, 697.

333 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 May 1863, 818.

334 Act no 180 (1863).

335 See Victoria, *Parliamentary Debates*, Legislative Assembly, 4 September 1863, 1256f.

336 *Victoria Government Gazette*, 2 June 1864, 1191.

337 CO 309/64/335 (AJCP reel 2001).

In December 1863, an official manual appeared giving instructions on how to apply to have land registered under the Act.<sup>338</sup> The number of applications more than doubled from 1863 to 1864 and by 1868 was over three times the level of 1863.<sup>339</sup> This was so even though antagonism among various administrators delayed the work of the Registrar-General's Office and led to the appointment of a Select Committee of the Legislative Assembly to consider the means of remedying this problem.<sup>340</sup> In 1869 the Registrar of Titles reported that, as a result of the administrative re-organisation undertaken, '[d]isorganisation has given place to order, costliness to economy, and delay to despatch'.<sup>341</sup> There was no looking back for the Torrens system in Victoria after that, and by 1998, the system having long since established itself as dominant, only three per cent of land parcels in the State was subject to the old law.<sup>342</sup> Since then, further measures have been taken in order to eliminate entirely non-Torrens titles to land.<sup>343</sup>

## IX CONCLUDING REMARKS

The introduction of the Torrens system in Victoria prompts a number of reflections, some constitutional, and some about the history of the Torrens system.

It is apparent that the Torrens system was forced through Parliament by a determined group of private members over the opposition of leading members of the government, particularly the law officers, even though some Ministers were in favour of it. This could hardly happen nowadays, of course, where a proposal not supported by the responsible Minister would not make it out of the bureaucracy, and strict party discipline and control of at least one House of Parliament means that that would be the end of that. In today's much more complex world that may not be much of a loss either, for good ideas like the Torrens system are much less likely to emerge from an 'enthusiast'.<sup>344</sup>

338 *The Argus* (Melbourne), 3 December 1863, 5. The Mitchell Library of the State Library of New South Wales holds a manual from 1869 by the Commissioner of Titles: John Carter, *Advice Concerning Applications under the Transfer of Land Statute* (1869). There is no indication whether this is related to the earlier manual, the existence of which is known to me only from the newspaper report.

339 Victoria, *Parliamentary Papers*, Legislative Assembly, 1869 vol II, 47.

340 Victoria, *Parliamentary Papers*, Legislative Assembly, 1866 (2) vol I, 757; 1868 vol II 355ff.

341 Victoria, *Parliamentary Papers*, Legislative Assembly, 1869 vol II, 50.

342 Victoria, *Parliamentary Debates*, Legislative Assembly, 14 May 1988, 1783–1785. The Deputy Registrar-General for Victoria, Richard Jefferson, informed me by e-mail on 29 November 2007 as follows:

Although about 20 000 parcels of general-law land have been converted to the *Transfer of Land Act* since 1998, this has not had a significant effect on the area of general-law land remaining. This is because a fair proportion of the remaining general-law land is large tracts of agricultural land in western Victoria. Thus, in terms of the area of the State, we would estimate that there is still around 3% general law.

343 *Property Law Act 1958* (Vic) s 6(2); *Subdivision Act 1988* (Vic) s 5(3)(b); *Transfer of Land Act 1958* (Vic) Part II Divisions 2, 3; Adrian J Bradbrook, Susan V MacCallum, and Anthony P Moore, *Australian Real Property Law* (4<sup>th</sup> ed, 2007) 217f.

344 Victoria, *Parliamentary Debates*, above n 333.

Nevertheless, the invention and spread of the Torrens system are examples of what enthusiastic amateurs can do and may prompt us to reflect on what we may have lost, and may now be losing, by more thorough but also more rigid and bureaucratic processes for assessing proposals. Had the same process existed in the early 1860s Victoria would have missed out on the Torrens system for some time. Victoria, it may be confidently said, would still have received the Torrens system at some point after its success in all other Australian colonies had become clear – but only after the old system had operated for some extra years, that system had cost the community dearly and the cost of conversion had escalated owing to the extra volume of old-system dealings to be comprehended.

It is also interesting to observe the brief flowering of truly parliamentary government in Australia before it was snuffed out by the party system that developed in the 1890s. Parliament at this stage exercised a real control over its executive, as we saw, for example, right at the end of the story when the mere suggestion of refusal of access to a legal opinion prompted a threat to supply in the Legislative Assembly which quickly forced a reversal of the government's stance. Now the system of parliamentary government should not be considered some sort of golden age in which everything must axiomatically have worked much better. Parliamentary government had its defects too, of course. Anyone looking at the list of Victorian Premiers and observing the regularity of changes in this period, many for reasons that could be charitably described as flimsy, will see that. And it was probably doomed by many factors, some quite irreversible and to be welcomed such as the growth in population and the extension of the franchise. But parliamentary government is at least carried out in the open to a greater extent than is Cabinet government, and while again openly carried on government has its drawbacks it has distinct advantages over secretive government. Furthermore, what I have written above indicates that the Victorian Parliament, in this case, made the right choice of system among the various models presented to it. By preferring Torrens to the inferior English or local models that were preferred by lawyers and/or members of the government, it can be seen now to have had a judgment distinctly superior to that of those lawyers and members of the government.

Also on the constitutional level, it is interesting to come across another occasion on which the government clearly believed that it had a decision to make about whether or not it should advise the Governor to assent to proposed legislation.<sup>345</sup> In fact, the South Australian government, also rather dubious of the merits of the original version of the Torrens system which private members had got through the South Australian Parliament in 1857–58, had had a similar decision to make.<sup>346</sup> Of course, it decided as the Victorians did. With the exception of the law officers, the Victorian Ministers seem to have been largely in favour of the Torrens system, and so once strictly legal objections had been disposed of the outcome was inevitable. The interesting thing, though, is that everyone at the time, including the members of Parliament who had supported the Torrens system, believed that the government

345 Two further such occasions are documented in Greg Taylor, 'Two Refusals of Royal Assent in Victoria' (2007) 29 *Sydney Law Review* 85.

346 South Australia, *Parliamentary Papers*, no 51/1858, 3.

had to reach its own decision. There is no sign here of any view even on the part of the parliamentarians themselves that Parliament's 'advice' to the Crown, in the form of its approval of the Bill for the Act, stripped the Ministers of the Crown of any role in the process of Royal Assent either on questions of law or on broader questions of policy.<sup>347</sup> They argued that the executive should endorse the Bill because the Torrens system was a good idea, and because they would block supply if it did not – not simply because Parliament had passed it.

Finally, in the process of adoption of the Torrens system in Victoria there were at least two meetings of Ministers, one a formal meeting of the Executive Council, at which conflicting advice was tendered to the Crown, and it had to choose whose advice to take. That is very unusual in the history of Australian responsible government. This extreme breakdown in Cabinet solidarity, going beyond the occasional agreement to disagree in public, is to some extent a product also of the time before parties, when governments had to be formed from very disparate elements in Parliament and were accordingly more likely to disagree.

Considering now the Torrens system as a law reform in its own right, it is impossible to overlook the huge public support for its introduction. This emerges on the historical record largely because of what would nowadays be called the media. In some circumstances it would be possible to gather from that source a distorted picture of public opinion. For example, if I were writing about *Dill v Murphy*,<sup>348</sup> it would be necessary to discount the voice of the press to some extent as an advocate in its own cause. In relation to the Torrens system, there is admittedly the extra income which would accrue to newspapers from the press advertisements which the system required. However, there is substantial evidence aside from the newspaper leaders that the press was reflecting a great deal of public outrage at lawyers' charges, an appreciation that in this field of law the public could be served much, much better than it was being served, and a realisation that the Torrens system, for all its faults, was a great step forward. This evidence comes from things such as statements in Parliament and petitions which are entirely independent of, but coincide precisely with, what was being said in the press at the same time, as well as factual reports of public events.

Equally, there was little to gain for the press in being so distrustful of lawyers in general and the law officers in particular, and again there is external evidence that this attitude was widespread in relation to this field of law. It is an appalling reflection on the legal profession in both South Australia and Victoria that, with a few honourable exceptions, what may without exaggeration be described as one of the greatest reforms of the law of property in the history of the common-law world – a reform which may be mentioned in same breath as *Quia Emptores* and which soon afterwards also became one of Australia's most successful intellectual exports – occurred not only without the help of most of the experts in the field concerned, but despite some of them. At least in Victoria there was no Mr Justice Boothby to carry on a years-long guerrilla war against the reform. This article

347 Cf Anne Twomey, 'The Refusal or Deferral of Royal Assent' [2006] *Public Law* 580, 601.

348 *Dill v Murphy* (1864) 1 Moo PC (N.S.) 487; 15 ER 784.

documents, however, the huge number of barriers that were thrown up by the legal officers to the introduction of the Torrens system in Victoria. They continued fighting long after the war was lost and just increased their losses in public esteem by doing so.

For its part, the public was educated by this episode to distrust lawyers as avaricious and mendacious. When faced with a system promoted by non-lawyers, which had worked well although not perfectly in a similar but not identical colony nearby, the public rightly preferred it to allegedly better systems proffered by the alleged experts in the field. When the Torrens system had been selected, the main concern of its friends was not allowing its blessings to be spoilt by unsympathetic administration. For them that meant no lawyers could run the show. This is a terrible record for lawyers.