Compensation for loss under the Torrens System – Extending State Compensation with Private Insurance

Jonathan Flaws[*]

I. Conveyancing as a blend of state and private actions

The Torrens System is a system under which the transfer of title to land is achieved by a state action – by an official, empowered by Act of Parliament, signing off a memorial in a state administered register. In New Zealand, this is reflected in the provisions of Section 41 of the Land Transfer Act 1952 (the LTA).[1] Changes made by the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 (the LTA Computer Amendment Act) take this principle to another level. The person initiating and now effecting the transfer on the register is no longer a state official but a private person, the conveyancer acting for the party to a transaction. Under the LTA Computer Amendment Act the state has transferred to the private conveyancer the duty of ensuring that the transaction is authorised by the parties and requires that person to collect and retain written evidence of this authority. Removing the need for an operative clause in an instrument extends the principle even further.[2] A transaction is no longer consummated by the flow and effect of the written word finished off by the stroke of a pen and the signature of the parties but by statutory authority and the stroke of a computer key by a conveyancer's clerk setting off a digital reaction in a state administered database. The pen succumbs to the statutory sword.

Prior to the introduction of the Torrens System, the transfer of title to land was achieved by a private action - by a person signing and delivering a deed of conveyance and documents of title in accordance with the common law. This was referred to as the Deeds System. The provision by the state of a system of registration or recording of deeds affecting interests in land was intended to give effect to an action that had already

* LLB(hons), M.Jur, Principal, Sanderson Weir, Solicitors, Auckland; Director, First American Title Insurance Company of Australia Pty Limited. <jonathan.flaws@sandersonweir.com>

1 "No instrument shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render any such land liable as security for the payment of money, but, upon the registration of any instrument under this Act or Land Transfer (Computer registers and Electronic Lodgement) Amendment Act 2002, the estate or interest specified in the instrument shall pass, or, as the case may be, the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature."

2 This is the effect of sections 41(4) of the LTA Computer Amendment Act, which applies to all instruments, not just electronic instruments, and section 26 of that Act which removes the need for an electronic instrument to contain an operative clause. By focussing solely on the act of registration, the state is no longer concerned to verify the intention of the parties as expressed in an operative clause of an instrument, but simply to verify the form and content of an electronic instrument created and certified by a third party who now has the role of obtaining, retaining and, when audited by the registrar, producing, evidence of authority to complete the act of registration.

taken place between the parties to the deed and to regulate priority been competing deeds.[3]

Viewed at this broad level, the declaration of land in New Zealand to be electronic transactions land and the provision of a computer register and a procedure for the electronic lodgement of dealings on the register is simply a continuation of the blending of state and private acts to achieve an efficient and reliable land transfer system. Regardless of whether land is transferred under a Torrens System or a Deeds System, the holder of an interest in land can suffer loss from the application of the relevant land laws. The procedures under which a person suffering loss obtains compensation for that loss can also be described by reference to the division between state and private interests.

Under the Torrens System, a person may be deprived of title to an interest in land by the operation of the empowering Act or may suffer loss as a result of errors, omissions or the misfeasance of a state official. Compensation for those suffering loss or deprivation of title in these circumstances was introduced by the state in order to underpin the integrity of the Torrens System. Hammond J observed in relation to compensation under the Torrens System that "if there was no compensation, insurance in some form would need to be created".[4]

At the time this observation was made, that form of insurance, title insurance, had already been created privately and was available outside of the Torrens System for over 100 years. Title insurance was designed to compensate for losses relating to land and deprivation of title to land as a result of the application of common law rules. By 1995, the movement of this private insurance into a Torrens System had already begun, in Ontario, Canada and it has since been progressively introduced into Australia and New Zealand. As with the introduction of the Torrens System, lawyers have expressed concerns about the introduction of title insurance[5]. This is an instinctive response that flows as much from the belief that the Torrens System provides adequate compensation as it does from a fear that title insurers, as in the majority of states in the United States, will reduce or replace the lawyers role in conveyancing.[6]

The inadequacies and limitations of state compensation are well documented[7] and suggest that the belief in state compensation as an answer to all loss is misplaced. The concern that title insurers will replace lawyers is also misplaced for two reasons. First, one of the major effects that electronic registration will have on the legal profession in

---

[3] Sections 12 and 35 of the Deeds Registration Act 1908.

[4] *Registrar-General of Land v Marshall* [1995] 2 NZLR 189, at 194 per Hammond J.

[5] Lavelle, K, "Property Law: Title insurance – Is it wanted here?" *NSW Law Society Journal* (November 2002) 46.

[6] Mucalov, J and G, in an article in the Vancouver Sun on March 3, 2003 entitled "Real estate buyers offered product they don't need" claimed "The (Torrens) System, improved over the years, has functioned quite successfully in B.C. since the late 19th Century – for ordinary real estate deals it is considered just fine. Title insurance therefore arguably tackles potential problems already adequately dealt with here by a different solution – the Torrens System – at least for most real estate transactions". See also, O'Connor, P, below at note 8, who comments, at 25, that some lawyers view title insurance as a Trojan Horse to give title insurers a role in the Torrens System and suggests that in a mature Torrens System there is no risk of reversion to unregistered conveyancing.

[7] These limitations are considered later in this paper. Virtually every text on land law in a Torrens System contains a section outlining the limitations of the state compensation provisions in its jurisdiction.

New Zealand will be to entrench the role of lawyers in the conveyancing process. Secondly, title insurers in Ontario very quickly discovered that their role in a Torrens System is not to compete with lawyers but to provide products and services to compliment the lawyers' services. This is demonstrated by the fact that "home closing centres", introduced to undertake title insured conveyancing and replicate the United States model of escrow agents, were short lived and soon replaced by a "home closing service" under which title insurer directs clients to lawyers.

An alternative response to title insurance in a Torrens System is that "private title insurance can contribute to the attainment of the economic objects of the Torrens System"[8].

This paper looks at the two methods of providing compensation for conveyancing or property law risks and suggests that private insurance and state compensation are complimentary. It advances the proposition that the introduction of title insurance into a Torrens System jurisdiction is not a threat to the quality of conveyancing practice or to the livelihood of conveyancers. Rather, it can be used to cover the gaps created by many of the limitations and exceptions of state compensation and to provide economic protection against a broad range of property law risks that the state has no business or interest in covering. In the same way that electronic registration is a blending of public and private acts to create a more efficient system, the introduction of private title insurance alongside the provisions in the LTA is a blending of state and private compensation to achieve a safer land transfer system.

II State Compensation

1. The need for compensation under the Torrens System

The rights that a person holds to own, use and exploit land can be described broadly as a person's "title" to land. For most individuals, their title to land represents their most valuable asset. For most banks and lending institutions, the value of the mortgages they hold over their customers' land represents a significant percentage of their assets. The laws that regulate and protect title to land are therefore an integral element in preserving the value of real property assets. For this reason, the Torrens System was designed to establish certainty and administrative efficiency in the application of these laws but the price paid for certainty and efficiency is the potential for a person to suffer loss by the operation of the system.

In New Zealand we have come to accept the proposition that compensation is a fundamental tenet of the Torrens system[9] but this has not always been the case. It has been suggested that Sir Robert Richard Torrens only introduced the concept of state compensation in order to entice lawyers to accept the Torrens system as a means of smoothing the conveyancing process and making it more efficient.[10] When the Torrens System was first introduced in South Australia, lawyers, who had a vested interest in retaining the Deeds System, were hostile to the prospect of a reduction in the value of their role in the conveyancing process. This may explain why Torrens introduced the concept of Land brokers who to this day still undertake the majority of conveyancing in

---

8. O'Connor, P, "Double Indemnity – Title Insurance and the Torrens System" (2003) Volume 3(1) *QUT Law & Justice Journal* < http://www.law.qut.edu.au/about/ljj/editions/v3n1/index.jsp>.
9. *Registrar-General of Land v Marshall,* supra note 4, at 194.
10. New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss* Report 76 (1996), para 1.12.

South Australia. In some jurisdictions with a Torrens System there are no compensation provisions and the state is specifically prohibited from providing compensation.[11] Under a Deeds System, persons may also suffer loss through the application of the laws relating to title to land and yet it is not suggested that the state should compensate for these losses.

A number of property lawyers in New Zealand seem apprehensive about the changes to the LTA that move our Torrens System into the electronic age. The reasons for this apprehension include a concern that electronic registration will increase the incidence of title fraud in New Zealand – something that has already attracted concern.[12] Electronic registration provisions appear to be transferring a degree of administrative responsibility and liability from government employees to private lawyers.

The statutory compensation provisions in sections 172 and 172A of the LTA are offered as a backstop to the guarantee of title.[13] Although there are a number of grounds for compensation including loss as a result of a third party obtaining an indefeasible title despite fraud, there are many potential areas of loss that can affect a person's "title" to land. The compensation provisions of the LTA only apply to loss arising out of the operation of that Act. There are many more laws that affect the collection of rights that comprise a person's "title" to land.[14]

3. Compensation under the Land Transfer Act 1952

The policy behind the inclusion of state compensation under a Torrens System was reviewed in *Registrar-General of Land v. Marshall*[15] and expressed as falling under two heads. The first is that if risk is created by the state, then it is a classic case for insurance to be provided by the state to compensate for loss from those risks. The second is that in the interests of efficiency in public administration it is better for a state official to make a few mistakes and pay for them than spend more money in trying to prevent those mistakes.

It is fundamental to the Torrens System that persons dealing with land need look no further than the register to determine ownership rights. The estate or interest of the person whose name is shown on the register as the proprietor of that estate or interest should be paramount. The state guarantees the registered proprietor an indefeasible title by blocking any action by any other person for possession of the land.[16] A person, who, at common law would have a superior title, therefore loses the right to sustain that title

---

[11] New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss* Issues Paper 6 (December,1989) para 2.13 comments that "it is by no means a foregone conclusion that indemnity is essential for the proper working of a system of registered title to land" and refers to Malaysia, the Sudan, Fiji, West Germany and Austria as jurisdictions in which registration systems operate without making provisions for compensation for loss. This Issues Paper 6 contains a more expansive outline of and background to compensation under the Torrens System.

[12] Muir, R, Registrar-General's Column *The Property Lawyer* (2003) Vol 4, Issue 1, see also "the increasing incidence of title fraud in Auckland" a paper Chapman, D, the District Land Registrar Auckland, at the Auckland District Law Society *Conveyancing Pot Pourri II*, November 2000.

[13] Ibid, at 4.

[14] Apart from the principles of Equity and common law rules that continue to apply to land, the operation of many Acts, including the Local Government Act 1974 and, when it comes into force, the Local Government Act 2002, affect the quality of a persons; "title".

[15] Supra, note 4, at 194.

[16] LTA, s 63.

against the registered proprietor and recover their interest in the land. Loss is, however, not limited solely to deprivation of land and a person who suffers loss may bring an action against the Crown for recovery of damages under one of three statutory provisions;

- *omission, mistake or misfeasance:* loss or damage has been sustained through the omission, mistake or misfeasance of a state official;[17] or
- *deprivation of land*: that person has been deprived of land or an estate or interest in land and is barred by the Act from bringing an action for possession or any other action for recovery of that land[18], or.
- *adverse registration not included on guaranteed search*: having obtained a guaranteed search in the period of 14 days commencing on the 13th day before settlement, and lodged an instrument for registration in the period of two months after the date of settlement, suffers loss due to the registration of any document not shown on the guaranteed search.[19]

4. Limitations on state compensation

The provisions of sections 172 and 172A of the LTA do not offer blanket cover against loss. The right to compensation is a statutory right and as such, unless the loss can be brought within the precise statutory formula, compensation is not payable. The extent and the nature of compensation provisions and their limitations vary according to the jurisdiction. The New Zealand compensation provisions may well be more encompassing and the Courts may approach them with a more expansive approach than in other jurisdictions.[20] There are nevertheless limitations and exceptions that create deficiencies in the state compensation scheme. The overriding limitation is that compensation is limited to the specific risks that arise out of the operation of LTA.

If "title" to land refers to all of the rights that a person holds to own, use and exploit land, then many of these rights and many of the risks that may affect that title are found outside the LTA. The limitations and exceptions in New Zealand of state compensation may not exactly fall within the criticism of being "so guarded by the statutory procedural hurdles which a claimant must surmount, and ... so closely defended by the state, that their very existence is something of a mockery".[21] They have nevertheless received their share of comment over time.[22]

O'Connor divides the deficiencies in the state guarantee broadly into two categories and describes them as gaps in legal security and gaps in economic security.[23] The first can be described as the limitations on compensation arising out of the compensation provisions themselves and the second as the limitations arising out of the rules relating to the process and procedures for obtaining compensation and the administration of claims. The following brief catalogue of the limitations will be helpful when comparing

---

17 LTA, s 172(a).

18 LTA, s 172(b).

19 LTA, s 172A.

20 Hammond J, in *Registrar-General of Land v Marshall,* supra, note 4, at 194-199, embarked on a comparative review of aspects of the state compensation provisions in New Zealand and the policy behind the provisions.

21 Supra, note 4 at 195.

22 Sim, P.B.A. "The Compensation Provisions of the Act", Hinde ed., *The New Zealand Torrens System Centennial Essays* (1971) 138.

23 O'Connor, supra, note 8 at 9.

what is provided by the state to what can be obtained by private insurance. The catalogue, is intended to be illustrative and not exhaustive.

(a) Limitation on indefeasibility of title

At the heart of the Torrens System is the concept that the state guarantees the registered proprietor an indefeasible title to land. Many lawyers have a naïve belief that the guarantee of indefeasibility provided by the state is all that is required.[24] Thomas J, however, referred to the term indefeasibility of title, as a misnomer in *CN and NZ Davies Ltd v Laughton.*[25] He also commented:

> "Certainly, it is far from absolute. A subsequent registration by a new registered proprietor who can claim an indefeasible title may defeat the "indefeasible title" of an earlier registered proprietor. An indefeasible title may become defeasible. Exceptions recognised in the Land Transfer Act itself are far from insubstantial, and the in personam principle encompasses not only rights arising in equity but also rights arising at law."[26]

If a person suffers loss because an indefeasible title has become defeasible, the compensation provisions will not apply unless that loss falls within the ambit of section 172 of the LTA and is not otherwise excluded from compensation.[27] The exceptions to indefeasibility can be categorised as follows:

- *exceptions made by the Land Transfer Act*, such as fraud, the existence of a prior certificate of title for the same land, errors or misdescription of right of way or easements and exceptions in respect of public roads and reserves;
- *the provisions contained in overriding statutes.* Under section 461 of the Local Government Act 1974, for example, statutory rights in the nature of easements, are implied in respect of private drains that are constructed with the consent of adjoining owners or by the Council under certain powers. These rights may be noted on the certificate of title if the Council gives the appropriate notice, but this is not obligatory. The provisions of sections 129, 129A and 129B of the Property Law Act 1952 provide the Court with discretionary powers in respect of encroachments and landlocked land;
- *in personam claims*, the Courts have not allowed the concept of indefeasibility of title under the Torrens System to deprive them of the ability to exercise its jurisdiction in personam to enforce rights that in equity would be unconscionable to allow to be enforced. The effect of a successful in personam claim is not to challenge the indefeasible title of the registered proprietor and cancel the registered interest but simply to make it ineffective to enforce a particular right. There are therefore no grounds for state compensation if rights under a registered interest can not be enforced for there is no deprivation of title, it is simply rendered ineffective in the particular circumstances. Claims in personam are often made to restrain a mortgagee from enforcing rights under a mortgage, particularly if a party to the mortgage was unduly influenced into giving it. The extent of these types of claim is not closed. Lord Nicholls of Birkenhead observed in *Royal Bank of Scotland v.*

---

24 Mucalov, supra note 6.

25 [1997] 3 NZLR 705 (CA), at 712.

26 Ibid.

27 *Man O War Station Limited v Auckland City Council (Judgement No.2)* [2002] 3 NZLR 584 (PC) is an example of land being excluded from an indefeasible title in circumstances that did not give rise to compensation.

Etridge,[28] when outlining the equitable concept of being "put on enquiry, that "(e)quity is not past the age of child bearing."[29] The House of Lords in *Etridge* lowered the threshold at which a mortgagee should be put on enquiry and required to take reasonable steps to ensure that a party to the mortgage understands the nature of the obligations being entered into. It also observed that the relationships in which undue influence can be exercised are infinitely various and can not be exhaustively defined.

- *volunteers* – indefeasibility of title is available only to a bona fide purchaser for value.
- *interests incapable of registration*. – protection is only afforded to registered interests.

(b) Lack of causal nexus between mistake and loss

If a loss is claimed as a result of an omission, mistake or misfeasance of the Registrar or one of his officers, there must be a causal nexus between the mistake and the loss. The presence of a loss and a mistake does not result in compensation unless they are linked.[30]

(c) Area of land wrongly shown

The area of land is always described as "more of less" and an error in the amount of land shown on the certificate of title is not a registrar's error and is not subject to compensation.[31]

(d) Error a result of exercise of discretion by the registrar

Even if a loss has been caused by the registrar's actions, no claim for compensation can be made if the registrar is acting in a purely ministerial capacity or makes an error of judgement in the exercise of a discretionary power.[32]

(e) Limitations in the LTA

The LTA sets out, in section 178, a number of exclusions, including, the breach of trust by a registered proprietor, the inclusion of the same land in two or more Crown Grants, the improper use of the seal of any corporation, the registration of an instrument executed by a person under a disability and the improper exercise of any power of sale or re-entry.[33]

---

28 [2001] 4 All ER 449, [2001] 3 WLR 1021.

29 Ibid, at para 89.

30 Supra, note 4, at 197.

31 *Melville-Smith v Attorney General* [1996] 1 NZLR 596.

32 *Butterworths Land Law in New Zealand* (Hinde, McMorland & Sim), para 2.113.

33 Changes to the manner in which a company incorporated under the Companies Act 1993 may execute documents have gone some way towards reducing the effectiveness of the exception relating to the misuse of a company seal. The use of a company seal is not required to make a deed or instrument binding on a company. Two directors signing on behalf of the company or in some circumstances one director or an authorised signatory signing before a witness can bind the company. This would seem to open the way for a company to claim compensation as a result of the registration of an improperly authorised instrument. Until the provisions of section 178(c) of the LTA are amended, it is arguable that the improper (but not fraudulent) execution of a memorandum of transfer or a Client Authority and Instruction to register a transfer by an officer or person with ostensible authority may give rise to a claim for compensation under section 172 of the LTA.

(f) Application of common law to bring a situation within a statutory exception.

The Privy Council *in Man O War Station v. Auckland City Council*[34] confirmed that the provisions of section 77 of the LTA will prevent any rights to a public road or reserve being acquired notwithstanding that the road or reserve land appears to be included in a certificate of title. Their Lordships found that there need be no formal dedication for a road to exist at law but simply an animus dedicandi*,* which may be assumed from the actions of the parties. They confirmed that the common law rules relating to the dedication of a road apply in New Zealand. In addition, the provisions of section 361(1) of the Local Government Act 1974 operate to effect an automatic vesting of the road, the soil and all materials of which they are composed in the local authority.

(g) Compensation only if registered

Although it is possible, in limited circumstances, for a person to obtain compensation for the loss of an equitable interest,[35] as a general rule, compensation is only available in respect of registered interests. A mortgagee who advances money under a forged mortgage without notice of the forgery does not obtain the benefits of indefeasibility if the forgery is discovered before registration and the mortgage is never registered.[36] If the mortgagee becomes aware of the forgery before registration and allows the registration to proceed it is arguable that it is no longer acting bona fide.

(h) Supervening Fraud

There is a possibility that taking a registered interest with the intention of recognising an unregistered interest then having a change of heart, may be regarded as fraudulent and thus lose the benefit of indefeasibility.[37]

(i) Registered interest not comprising land or an interest in land

A Crown Forestry Licence, granted under section 14 of the Crown Forestry Assets Act 1989 may be registered under the LTA under section 30 of that Act. By section 16 of that Act, the Crown Forestry Licence, despite having all of the characteristics of an interest in land, is not an interest in land. Compensation under section 172(b) of the LTA is only available for deprivation of an interest in land.

(j) Adverse possession

It is possible to acquire an interest in land by adverse possession under Part I of the Land Transfer Amendment Act 1963. Although safeguards are built into the provisions of that Act, if a successful claim is made, no compensation is available.

(k) No guarantee of abbuttals

No compensation is available if a certificate of title incorrectly states the status of adjoining land. If a road is shown, but no road exists, compensation can not be claimed.[38]

Section 189 of the Queensland Land Titles Act 1994 has extended a similar provision to the act of an authorised signatory of the corporation who exceeds the signatories authority.

34 Supra, note 27.

35 Sim, supra, note 22 at 144.

36 In the recent case of solicitor fraud in Christchurch, at least one mortgagee advanced money under a mortgage that was never registered. Its only source of recovery was from the fraudulent solicitor via the law societies solicitors' fidelity guarantee fund.

37 Hinde, McMorland & Sim, supra, note 32, para. 2.064.

(l) Limitations caused by claims process and procedures

Each jurisdiction has its own process for the administration of claims. In New Zealand, a claim is made by bringing an action against the Crown for the recovery of damages.[39] Before commencing any action against the Crown, written notice of the action, the cause and the amount must be served on the Attorney-General and the Registrar-General.[40] They have the ability to admit the claim, in whole or in part and certify that it should be met without the need for any further action. If the claimant elects to proceed with an action and recovers less than the amount certified, no costs can be claimed against the Crown and the Crown is entitled to recover its costs in defending the action from the claimant.[41]

Failure to comply with the procedures of section 172 of the LTA will prevent any action from being commenced. [42] The procedures outlined in sections 172 to 175 of the LTA have been referred to as a code that a claimant must follow.[43] This code, if a case can clearly be established for compensation, does not appear to be onerous. But the claim arises out of a right to bring an action against the Crown for the recovery of damages and as such will need to comply with the rules of civil procedure and meet the standard burden of proof required for civil proceedings. This requires that in addition to being able to prove loss, it will necessary to show that all steps have been taken to mitigate the loss. These procedural requirement make state compensation a payment of last resort and if the claimant has rights against another party those rights should be exhausted first before a claim is made. In some cases, the claim is made by joining the Crown as a party to other proceedings.

(m) Measure of damages

Limitations on the measure of damages are contained in section 179 of the LTA, which limits the recovery to the value of the land at the time of deprivation together with interest at 5%. If the claim relates to deprivation of land and the value of the land has increased from the time of the deprivation and the time the claim is settled, the compensation payable may be less than the actual loss. The costs of any action may need to be funded before compensation is paid and the measure of costs, as in all actions, is a matter for the Court to decide. As a result, even a successful claimant may not recover the full amount of the loss. If compensation is claimed for partial deprivation resulting form the registration of a mortgage, the amount will include principal, interests and costs, provided these do not exceed the value of the land at the time of deprivation.[44]

Actions must be brought within the limitation period of six years, which commences on the date the claimant becomes aware, or but for his own default might have become aware, of the existence of the right to make a claim. This period may be extended to three years from the date the disability ceased if the claimant is under the disability of infancy or unsoundness of mind.

---

38 Hinde, McMorland & Sim, supra, note 32 para. 2.126.

39 LTA s 172.

40 LTA s 173.

41 LTA s 173(3).

42 *Goodwin v Roach* (1977) 1 NZCPR 630.

43 Ibid, at 632.

44 Hinde, McMorland & Sim, supra, note 32 para 2.120.

(n) Contributory negligence

The amount of compensation may be reduced as a result of contributory negligence of the claimant. This also includes the contributory negligence of the claimant's solicitor as was the case in *Registrar-General of Land v Marshall*.[45] Under section 175(1A) of the LTA, the Crown, having paid compensation may recover the amount paid from the purchaser's conveyancer, to the extent that the loss was caused by the purchaser's conveyancer's negligence.

In New Zealand, banks have adopted the practice of instructing the borrower's solicitor to act for the bank in the preparation and registration of the mortgage. The solicitor is asked by the bank to certify that the solicitor is not aware of any unregistered charges that may be prior in time to the bank's mortgage. It is not uncommon for the registration of the mortgage to be affected by the lodging of a caveat to protect an agreement to mortgage with another financier entered into prior to the date of the bank's mortgage. A solicitor acting for both parties who fails to enquire from the mortgagor whether any unregistered interests are outstanding may be negligent to an extent that enables the Crown to recover compensation if any supervening registration results in loss to the mortgagee.

One of the benefits of electronic registration will be the reduction in time between settlement and registration. As a result, the potential for claims under section 172A of the LTA should be reduced. The speed at which registration can be effected under the electronic registration regime is such that the periods of 14 days for a pre settlement guaranteed search and two months for post settlement registration seem excessively generous. It is arguable that given the efficiencies of searching under Land*online,* it might not be prudent for a lawyer registering electronically to rely on a search obtained at the start of the pre settlement period.

III PRIVATE TITLE INSURANCE

1. Introduction

The state compensation provisions are designed to compensate for losses that are caused by the operation of the Torrens System. They are not an insurance against risk but an acknowledgement of responsibility where, as a result of the operation of "a government program undertaken to support the operation of an efficient market in land and landed securities"[46] loss is caused. The limitations on state compensation may be justified on the grounds that they are required to ensure that the state only compensates if a state official is at fault or if the operation of the program overrides private rights.

The response of the market in jurisdictions where the state does not undertake a government program has been to develop private insurance based on classic insurance principles.[47] A title insurer does not look for fault on the part of a state official or look for a causal nexus between the loss and the action of an official or the application of a statutory provision before it acknowledges a liability to compensate. The business of a

---

[45] Supra, note 4.

[46] O'Connor, supra, note 8, at 23.

[47] The text of two title insurance policies for homeowners and their mortgagees in New Zealand are included as Annexure A to this paper. The Home Ownership Protection Policy NZ0601 (HOPP) and the Residential Loan Protection Policy NZRLPP 0700 (RLPP) issued by First American Title Insurance Company of Australia Pty Limited ABN 64 075 279 908.

title insurer is the business of accepting risk in return for the payment of a premium. The only requirements to be met before a claim is accepted are that:

(a) the claimant holds a policy,

(b) the loss has occurred or is likely to occur as a result of a risk in respect of which coverage is provided, and

(c) the circumstances do not give rise to a specified exclusion in the policy wording.

Although adapted for local conditions, New Zealand title policies are based on the standard policy forms approved by the American Land Titles Association.[48] A second title insurer has applied for approval to operate as a general insurer in Australia. If the Canadian experience is followed here, other title insurers will follow and will adopt similar policy wording. Title insurance is not limited to residential properties. Policies have been developed for residential mortgages, commercial property and commercial mortgages and may be issued for special risks, such as the risks associated with purchasing a portfolio of mortgages, or specific interests associated with land.

2. Differences between state and private compensation

(a) Extent of cover

The coverage provided by the two residential title insurance policies is compared with state compensation in Annexure A. This comparison indicates that private insurance covers significantly more risks than those that would give rise to an action against the Crown for damages under section 172 of the LTA.

The most significant difference between the two forms of compensation is not, however, in the extent of coverage but in their nature and application.

(b) The duty to defend

Unlike state compensation, private title insurance is not compensation of last resort. Of equal importance in a title insurance policy to the payment of compensation is the insurer's "duty to defend". In the same way that the label "title insurance" is a misnomer that connotes coverage more limited than is actually provided, the term "duty to defend" connotes only one of the actions that a title insurer can take in settlement of a claim. The insurer under the Home Ownership Protection Policy states "[w]e will defend that part of any proceedings or court case which is based on an insured risk. We will also pay the costs, legal fees and expenses we incur in that defence."[49] When a claim is made, the Insurer also has the option to "prosecute or defend a court case or other proceeding related to the claim."[50] These two statements, read together, indicate that the insurer's role is not only to defend claims but also to prosecute claims on behalf of the insured.

The title insurer's duty to defend is the first and most significant difference between private and public compensation. It means that for a person suffering loss, or facing the potential to suffer loss, a claim under a title insurance policy is a first resort. Not only does the title insurer have the duty to defend the insured's title against the claims of others but it also has the option of taking action against others to protect the insured

---

48 Copies can be viewed on the American Land Titles Association website <http://www.alta.org/store/forms/basicpolicy.htm>.

49 HOPP, cl 1.2.

50 HOPP, cl 4.6.

against the possibility of loss. In many of the circumstances for which cover is provided, taking steps to avoid loss or remedy the situation better serves the interests of the insurer and the insured. Paying a cheque in compensation when the loss is crystallised is often a less effective remedy to rectification of the problem. In comparison, a person must first suffer loss before bringing a claim for damages against the Crown and must first bear the costs of defending his or her position or taking steps to mitigate the loss.

The effect of the duty to defend is that many of the cases that have come before the Courts may have been more satisfactorily resolved in the interests of all parties concerned if the parties had have been title insured. This is because the insurer is interested in avoiding loss by solving potential claims before loss crystallises.

In the case of *Attorney-General v Langdon*,[51] for example, the owner of a property, limited as to parcels, believed he was deprived of land that he considered inside his historical boundary when his neighbour re-surveyed the adjoining property to remove from their certificate of title a limitation as to parcels. Had he been able to lodge a claim under a title insurance policy, the duty to defend would have obliged the insurer to take steps to protect his interest. First by lodging a caveat in form R and then by taking the action required to keep it alive or, if this failed commencing proceedings to enforce a claim for adverse possession. If neither were effective to prevent the deposit of the new plan re-aligning the boundary and the issue of a new certificate of title including land he considered inside his historical boundary, then the insurer would have been obliged to compensate him for his loss under the coverage against any adverse circumstance affecting the land which would have been disclosed by an up-to-date survey.[52] The Registrar-General would also have not been required to compensate the adjoining owners for their costs in obtaining a removal of a second caveat that the Registrar mistakenly allowed to be lodged.

The guaranteed search provisions of section 172A of the LTA are intended to provide protection during the gap between settlement and registration. This gap is regarded as a significant limitation on the Torrens System in other jurisdictions.[53] A claim under section 172A of the LTA does not result in the intervening dealing being removed from the register nor does it affect the issue of priorities between that dealing and the dealing for which the guaranteed search was obtained. It has been suggested that the small number of claims under this section is a result of the meticulous standards maintained by the Land Transfer officials.[54] It may be, however, more a result of the steps taken by lawyers to deal with the intervening registration on behalf of their clients.

Under the duty to defend provisions, the title insurer will cover the costs of dealing with the intervening registration. Internationally, 45% of all payments under title insurance polices are paid to lawyers to assist in resolving claims relating to covered risks. Rather than be used to paper over title deficiencies as suggested by some commentators, title insurers provide a fund out of which the costs of resolving title problems can be met.

A mortgagee under an NZ Residential Loan Protection policy obtains the additional benefit of timely payment cover. This ensures that the mortgagee continues to receive

---

[51] [1999] 3 NZLR 457.
[52] HOPP, cl 1.5(t).
[53] O'Connor, supra, note 8, at 9.
[54] Hayes, B, "Forgery, Fraud and Frailty" (1988) 4 BCB 264.

payments under the defaulting mortgage while the insurer takes steps to resolve the of enforceability of the mortgage under its duty to defend.

(c) The insurer's rights of subrogation

A title insurer, like any other insurer or surety, on payment of a claim acquires by subrogation the rights that the insured has against any third party. This includes the rights to bring an action against the Crown under section 172 of the LTA if state compensation is payable in respect of the covered risk. There is nothing in the LTA preventing the insurer, having paid compensation, from exercising rights of subrogation against the state. Notwithstanding that state compensation is sometimes referred to in insurance terms, the claimant in New Zealand is not lodging an insurance claim for a covered loss but bringing an action against the Crown for damages. This may have been different if compensation was obtainable from a special fund, such as the Torrens Compensation Fund but this fund was dispensed with well before the LTA.

It is unlikely that an insured would seek compensation from the Crown first in preference to making a claim against a title insurer but if this occurred, the Crown, in reverse would not be entitled to be subrogated to the owner's rights against a title insurer. This will not result in a windfall to the insured arising out of a double indemnity. The insured would not be able to be compensated a second time by the title insurer because under a policy[55], no amount is payable if the risk does not result in loss. The amount of any compensation paid by the state would reduce the amount of the loss.

It has been suggested that title insurer's should not have this right to recover compensation from the state.[56] But there is nothing morally or socially unacceptable in the title insurer exercising by subrogation the insured's right against the Crown. Private title insurance is an option. If the owner had elected not to insure, the owner would have a right to claim against the Crown. The state compensation represents the state's acceptance of liability for the errors and omissions of its officials or for loss resulting from the arbitrary application of laws designed to improve administrative efficiency and public certainty in dealings involving land. It is therefore appropriate that compensation from the state should be available whenever these circumstances arise.

The amount payable under a title insurance policy for actual compensation is the insured sum plus the costs and expenses incurred by the insurer (without limit).[57] This is expressed to be the purchase price of the property and rises with the market value of the property to 200% of the purchase price. The post registration risk of deprivation of title due to forgery or fraud can occur at any time. If a complete deprivation of title occurs at a time when the value of the property exceeds 200% of the original purchase price, then the amount of compensation under section 172 of the LTA will be higher than that available under the policy. In these circumstances the benefit of title insurance is in covering the costs of making the claim and funding the steps taken to mitigate loss. The amount paid by the Crown will be applied to fully compensate the owner with the title insurer only recovering what it has already paid.

In New South Wales, section 133 of the Real Property Act 1900 excludes a professional indemnity insurer's rights to claim against the Torrens Assurance Fund and provides the Registrar-General with a right to be subrogated against a professional indemnity insurer

[55] HOPP, clause 2.2.
[56] Recommendation 11 of the New South Wales Law Reform Commission, supra note 10 at para 5.14.
[57] HOPP, cl 5.1.

if moneys are paid from the Fund. A title insurer does not appear to fall within the definition of professional indemnity insurer in the New South Wales Act and accordingly is not prevented from exercising rights of subrogation.

(d) Waiver of rights where contributory negligence of the insured's solicitor

One of the factors that can reduce the amount paid by way of damages under section 172 of the LTA is the contributory negligence of the owner's solicitor. O'Connor suggested that a title insurer's strategy of risk assumption could reduce standards of due diligence in conveyancing and thus increase claims for state compensation.[58] She suggested that governments might propose measures to shift the risk back on to the insurers.

In New Zealand, for the reasons outlined later in this paper, the standards of due diligence on a property transaction, particularly a residential property transaction, are unlikely to be reduced. Even if standards were reduced then that would indicate contributory negligence on the part of the conveyancer and if a claim is made and accepted under section 172 of the LTA, it would be reduced to the extent of this contributory negligence. There would therefore be no increased impact on state compensation funds. The title insurer would remain liable to pay the insured and, if it had waived its rights of subrogation against the conveyancer, would not be able to recover these from the lawyer or the lawyer's professional indemnity insurer.

In the United States, it is the practice of the title insurance industry not to make claims against lawyers if the lawyers' clients make a claim, except in cases of gross negligence or wilful misconduct.[59] This practice is adopted in New Zealand and lawyers are provided with specific confirmation to this effect.[60] A waiver of rights of subrogation by the title insurer against a lawyer is not the provision of professional indemnity insurance for the lawyer although the effect in many cases may be the same.

(e) Relationship between title insurer and lawyer's professional indemnity insurance

Although title insurance has been available in Ontario since the 1960's, it was not until the mid 1990's that its real growth developed.[61] There were three triggers to this growth. The first was the focus by a large American insurer on the processing efficiencies that title insurance could bring to the mortgage refinancing market. The second was the assumption of risk by title insurers and the resulting reduction of claims against real estate lawyers. The third trigger was the introduction by the Law Society of Upper Canada of a new rule requiring lawyers in real estate transactions to understand title insurance and to advise clients about title risks and the methods of minimising these risks.[62] In particular, the options available including the traditional method of relying solely on the lawyer's opinion as to title, private title insurance and a specific policy that combined title insurance and legal services (professional negligence) cover to minimise risk in a real estate transaction and the advantages and disadvantages and on the various insurance polices available.

---

[58] O'Connor, supra, note 8 at 8.

[59] McKenna, B; Lang Mitchener, *Title Insurance – A Guide to Regulation, Coverage and Claims Process in Ontario* CCH Canadian Limited 31.

[60] *The lawyers Guide to the Home Ownership Protection Policy* <http://1title.net/products.htm>, p5.

[61] McKenna, supra note 59 at 5.

[62] Law Society of Upper Canada, *Rules of Professional Conduct* "Rule 30 – Lawyer's Duties with respect to Title Insurance in Real Estate Conveyancing".

The nexus between the assumption of risk by title insurers and the reduction of claims against real estate lawyers was further reinforced by the entry into the market in the summer of 1996 of the insurer owned by the Law Society of Upper Canada, the Lawyers Professional Indemnity Company (LPIC). LPIC provides the Errors and Omissions cover that all Ontario lawyers are obliged to hold. In June 1994 it discovered that there was a deficit on more than one hundred million dollars in this fund and introduced a real estate transaction levy of $50 per transaction.[63] A law firm providing a title insured refinancing programme objected to paying this levy arguing that the presence of title insurance negated the need for the levy.[64] Both the Ontario Court (General Division) and the Ontario Court of Appeal agreed. A change to its policy by LPIC to enable it to continue to collect the levy from title insured transactions was short-lived and in January 1998, the levy was abolished for all title insured transactions. In the meantime, LPIC through a re-insurance arrangement with a title insurer offered title insured polices itself. By 1999, the deficit in the LPIC fund had been completely eliminated. As a result, by the summer of 2000, LPIC was able to report: that litigation claims exceeded real estate claims; that premiums had fallen to the lowest level in five years[65] and gave examples of cases covered by the LPIC TitlePLUS policy that would previously have resulted in a claim under the errors and omissions policy.[66]

(f) Protection from off-title risks

In addition to providing compensation for the same risks provided for under the state compensation provisions, a title insurance policy covers a much broader range of risks, which for the sake of this paper are referred to as “off-title” risks. It is the coverage provided for off-title risks that sends title insurance well beyond the boundaries of the limited state compensation for loss or guarantee of title.

Before a title insurance policy can be issued, a search of the title must be obtained. Cover is not provided against there being no adverse interests shown on the title, simply that there has been no breach of any covenant, restriction, easement or right of way registered on the title. All existing interests recorded on the title (other than those to be removed on settlement) are set out on the policy as exclusions. For this reason, the conveyancer acting for the purchaser will have to search all memorials and advise the purchaser on their effect.

In relation to the state of the title, the benefit provided by title insurance is that the purchaser does not need to enquire if any covenant has been broken. Unlike some jurisdictions, there is no obligation on the vendor to make any comment on these matters or respond to any enquiries made by the purchaser or the purchaser’s solicitor. Unless the vendor has warranted that there are no breaches of covenant, the vendor has no obligations to the purchaser in respect of the quality of the property.[67] Nor, except in the case of a new subdivision, is the vendor bound to point out the boundaries of the

---

63 McKenna, supra note 59, at 6.

64 *De Rubeis, Chetcutti v The Law Society of Upper Canada and Lawyer’s Professional Indemnity Corporation,* 36 O.R. (3d) 462 (Gen Div.).

65 <http://www.lawpro.ca/news/archives/insurance levy surcharge>.

66 LPIC News, June 2000 16 <http://www.lawpro.ca/news/archives/LPIC News/June2000>.

67 In some circumstances, purchasers may have rights under the Contractual Remedies Act 1979 or the Contractual Mistakes Act 1977 from vendors representations implied by silence or vendor’s conduct when he becomes aware that the purchaser is mistaken about a matter affecting the property.

property.[68] Once an agreement for sale and purchase has been signed and the purchaser has not requisitioned for the removal of any title defect, the subsequent discovery of a defect in quality, absent any representation to the contrary, does not entitle cancellation or the recovery of damages. It is arguable therefore that it is too late for a lawyer to investigate matters of quality of title after the agreement has been signed unless there have been specific representations about quality.

Compared with the steps taken by lawyers in other jurisdictions, New Zealand lawyers have traditionally not undertaken much in the way of due diligence for off-title risks. This is as much a result of the process by which agreements for the sale and purchase of land have been entered into as it is of the fact that there is little that could be done and the fact that purchasers have been reluctant to add to the costs of a purchase.

The standard agreement for sale and purchase used in the majority of sales of land in New Zealand[69] provides warranties by the vendor that he is not aware of any government requirements or requisitions affecting the property. If, the parties have so agreed,[70] it also provides the purchaser with a period during which a Land Information Memorandum (LIM Report) can be obtained from the local authority and provides a process for resolving any issues raised by the LIM Report, or cancelling the contract if they can not be resolved.

A LIM Report can only show what is recorded on the local authority records. If the purchaser is unaware that alterations have been made to the property and these have not been made in accordance with the required permits, the lawyer is unable to identify the problem. The limitations of a LIM Report are well documented and many lawyers will leave it for the client to review it and be happy with it rather than give advice on matters that, not having seen the property, are outside the lawyer's knowledge or expertise.[71]

It is not common practice in New Zealand for a purchaser to obtain an up to date survey of the property to determine the boundaries and identify any encroachments. Having signed an agreement for sale and purchase and, absent a representation to the contrary or circumstances that would enable silence to amount to a representation under the Contractual Remedies Act 1977 or that would amount to a mistake under the Contractual Mistakes Act 1977,[72] the purchaser may have no claim against the vendor for any encroachments.

One of the main drivers in other jurisdictions behind the introduction of title insurance was the requirement by mortgagees for lawyers to obtain a myriad of off-title searches and surveys to protect their position. In Ontario, for example, mortgagees typically required the lawyer, even on a refinancing of a mortgage, to obtain an up to date survey. When mortgagees agreed to accept the cover provided by a title insurer against encroachments in lieu of a survey, the transaction costs were immediately reduced. In

---

68 Agreement for Sale and Purchase, 7th ed, July 1999, Auckland District Law Society and Real Estate Institute of New Zealand, cl 5.1.

69 Ibid.

70 Ibid, cl 8.2.

71 Drake, N, Lay, J, Varnham, S, Thomas, C, *Conveyancing Law Handbook* (2002) CCH New Zealand, para 12.1.8.

72 *King v Wilkinson* (1994) 2 NZ ConvC 191,828.

New Zealand, mortgagees are not as particular in their requirements, and off-title searches or surveys have been obtained at the election of the purchaser.[73]

The driver in New Zealand behind the introduction of title insurance for mortgagees is therefore not so much the lowering of transaction costs by the reduction of searches, but the introduction of coverage for risks in respect of which mortgagees are exposed due to the failure to obtain off-title searches and surveys. Rather than reducing standards of due diligence in conveyancing, title insurance in New Zealand reduces the exposure of parties to loss from the lack of or limitations in due diligence in residential transactions.

(g) Mortgage enforceability and protection from transaction risk

The title insurance policy provided to a mortgagee provides coverage for some risks that affect only the mortgagee and which affect in personam or contractual rights as opposed to in rem or title rights. The mortgagee is covered if the Insured Mortgage is invalid or unenforceable as an encumbrance against the title to the Land[74] and if an encumbrance, charge or lien has priority over the Insured Mortgage.[75]

Enforceability coverage is given a broad interpretation in American case law and is claimed in Canada to venture "into areas like independent legal advice, non est factum, forgery and fraud, where internal procedures and outside counsel are rarely able to give clear comfort".[76] The coverage against lack of priority is treated by insurers as confirmation that there are no outstanding unpaid local authority rates or taxes as at the sate of settlement. In New Zealand, a lender endeavours to protect against these two risks by asking the solicitor instructed to act for it (normally the same solicitor acting for the borrower) to certify to a similar effect but the certificate falls short of an unequivocal guarantee that the mortgage is enforceable and the rates are paid.

Under the owner's policy, the insurer limits the compensation in respect of the forced removal or remediation of unauthorised building work to a specified sum. A mortgagee policy has no such limitation.

Mortgagee policies are usually the first policies to be sold in any new jurisdiction. At present, the only policy promoted in Australia is the mortgagee policy. It was also the first policy promoted in New Zealand. The protection the policy gives against transaction risk rather then the pure title risks attract lenders first. In the case of refinancing mortgages, the benefit has been passed on to customers through a faster and more efficient transaction. An increasing number of lenders, for example, give their customers the option of utilising a refinancing service that breaks with the tradition of requiring the borrower to instruct a lawyer to act for the lender. If the customer elects this service, the lender takes care of the preparation and registration of the mortgage and deals with settling the repayment of the existing mortgage.[77] The lender is covered under a title insurance policy for its transaction and property law risk rather than relying

---

[73] A New Zealand mortgagee is currently facing a loss on a refinanced mortgage as a result of the failure of the owner to obtain a code compliance certificate for the buildings completed a year or so before the refinance.

[74] RLPP, cl 2.1(d).

[75] RLPP, cl 2.2(e).

[76] McKenna, supra note 59, at 132.

[77] A benefit to the new mortgagee paying out the prior mortgagee is the ability to rely on the principles in *Ghana Commercial Bank v Chandiram* [1960] AC 732 (HL) together with section 83 of the Property Law Act 1952 to require the prior mortgagee to provided a transfer of mortgage in lieu of a discharge and obtain priority for the amount repaid ahead of any intervening caveat.

on a right to bring an action for damages against a solicitor should a certificate prove to be incorrect.

(g) Claims procedure

If a loss occurs, or a potential for loss is identified, the insured simply makes a claim under the policy. There is no need to prove fault nor is there a requirement to bring any action for damages. On receipt of a claim, the insurer deals with it according to its own claims procedures.

(h) Insurance against known risks

A title insurance policy includes a number of exceptions and exclusions including exclusions for risks that are known to the insured. One of the most common risks identified on a purchase in New Zealand occurs when additions are made to a property that is held under a cross-lease title and have not been included on the deposited plan defining the relevant flat. This is a defect so common, that it would not be appropriate risk management for a title insurer to automatically provide cover. For this reason the risk is shown as a standard exclusion on the Schedule A for the Home Ownership Protection Policy. It is also a matter that a lawyer should raise with the purchaser of a cross lease title and determine whether the title is defective. If it is, there are provisions in the standard agreement for sale and purchase that enable the purchaser to requisition for the title to be rectified and for the agreement to be cancelled if the vendor elects not to rectify.[78]

If the vendor refuses to rectify and the purchaser wishes to proceed, title insurance can provide the purchaser with some degree of comfort. Insurers in the England are used to issuing polices that insure over title defects. Insurance over a known title defect is normally insurance for the benefit of the purchaser and all successors in title.

Title insurers in Australia and New Zealand are also prepared to assess the risk of any specific defect and, if appropriate, insure over it by including it as a specific endorsement to a policy. For example, in the case of an addition not shown on a cross lease flats plan where the property comprises a small number of units or town houses and there are land covenants providing each unit with an exclusive use area, an endorsement will usually be provided. The endorsement will provide coverage against forced removal but will not for unmarketability of title. The issue of unmarketability of title is partially addressed to the extent that the title insurer will agree to provide a similar policy to any future purchaser of the property who is concerned about the potential title defect.

Coverage for a known or disclosed risk is something that the state compensation provisions can not offer.

IV TITLE INSURANCE AND THE AUTOMATED REGISTER

The automation of the register introduces a significant change to the mechanics of registration but it does not alter the underlying principles on which the LTA is based. The new section 4(3), added to the LTA by section 39 of the LTA Computer Amendment Act reinforces these principles. It requires the Registrar to have regard to managing the risk of fraud and improper dealings; ensuring public confidence in the land title system and ensuring the maintenance of the integrity of the register and the right to claim compensation under Part XI.

---

78 ADLS- REINZ, supra note 68, cl 7.3.

In moving away from a paper-based system, three significant changes are made. The first is that it is no longer a prerequisite to registration that the outstanding duplicate certificate of title be presented to the Registrar.[79] The second is that there is no longer a public register of a copy of the instrument signed by the relevant party.[80] Finally, the Registrar allows registration to proceed relying solely on the certificate of a person who is not an official of the state but an agent of the party.[81] "The certification and signing be a lawyer of each instrument in the eDealing leads to an automatic and instantaneous alteration to the Register when the document is submitted."[82]

On the face of it, these three changes would appear to increase the potential for registration errors or the registration of fraudulent dealings. The only verification of the dealing by the Registrar is a formal check of the instrument in the electronic workspace prior to registration to confirm that it complies with the requirements of section 23 of the Land Transfer Amendment Act. The safeguard provided by requiring presentation of the outstanding duplicate certificate of title has been lost and pre-registration verification is simply a matter of reviewing an electronic form for compliance. The New Zealand Law Society refers to this as the removal of the safety net of the physical check of documents by LINZ staff.[83]

Although the Registrar is required to ensure that the integrity and underlying principles and purposes of the LTA are preserved, the process and procedures of electronic registration appear to shift the burden and responsibility of achieving this requirement on to the conveyancers who undertake electronic registration.

Electronic registration is clearly being introduced in furtherance of the aim of administrative efficiency. The question is whether this will result in increased risks and increased claims for compensation.

1. Effect on compensation for omission, mistake, or misfeasance of Registrar

The incidence of omissions, mistakes or misfeasance of the Registrar where an instrument is registered electronically should decrease if his only role is to undertake a pre-registration verification as to the form of the electronic instrument and compliance with the statutory requirements. The most likely mistakes of the Registrar will be that the registration of an instrument has been permitted to proceed without a certificate (or with an incorrect certificate) from the conveyancer for the specified party for that instrument under section 11 of the Land Transfer Amendment Act.

A mistake made by the conveyancer in the instrument itself or in the collection of any of the supporting evidence is not a mistake of the Registrar and therefore not a mistake for which compensation is payable. Section 172(a) of the LTA was extended (by the schedule to the Land Transfer Amendment Act) to "persons to whom a delegation has been made under section 5" and section 5 of the LTA was amended (by section 40 of

79 A notice published in the New Zealand Gazette declared, under section 25 of the LTA Computer Amendment Act, all freehold, leasehold or unit title estate to be electronic transactions land, effective from 14 October 2002.

80 This is the effect of the preparation and registration of an electronic instrument by a conveyancer as opposed to a paper instrument signed by the party.

81 The certificate of a conveyancer given under section 164A of the LTA.

82 The New Zealand Law Society, *Draft Guidelines for the use of Landonline for an Electronic Transaction* (as at 12.11.02), 3 < http://www.nzls.org.nz/memregissuesguide.asp> (NZLS Guidelines).

83 Ibid, at 3.

the Land Transfer Amendment Act) to permit delegations to "any other suitable person". A conveyancer certifying under section 164A of the LTA is not performing a task delegated by the Registrar. The section 164A certificate is simply an elaborate extension of the requirement for a dealing to be certified correct under section 164 of the LTA.

If electronic registration is a case of shifting the risk of errors omissions and mistakes from the public officials to lawyers, and if compensation for these mistakes is not provided by section 172(a) of the LTA then it would appear that the person suffering loss will have to rely on recovery from the lawyer concerned or the lawyer's professional indemnity insurer – if there is one.

2. Mistakes of conveyancer not amounting to fraud

If there is no ability to obtain state compensation for loss arising out of the omission, mistake or misfeasance of a conveyancer undertaking an electronic dealing then the only action available to a person suffering loss is an action for negligence against the conveyancer. Cover for the majority of innocent mistakes by a conveyancer, however, may be provided by a title insurance policy. Assuming the conveyancer was not guilty of gross negligence or fraud, and assuming the title insurer had agreed to waive its rights of subrogation when the policy was issued, the conveyancer would not be exposed to a claim by the title insurer. In this instance, title insurance is moving beyond protecting a person's title and is providing vicarious cover to the party's conveyancer.

If the certificate was fraudulent or materially incorrect or the conveyancer had failed to retain the evidence to support the certificate for the relevant period, the Registrar has the power to revoke the person's right to give certificates.

The conveyancer under section 164A of the LTA must certify, amongst other things, as to the legal capacity, and identity of the party authorising the registration and confirm that reasonable steps have taken to verify the correctness of the statements in the certificate that evidence to this effect will be retained for the relevant period. The New Zealand Law Society provides guidelines to assist lawyers to meet the requirements and the Registrar has accepted that if these are followed, the evidentiary requirements for giving the certificate must be regarded as satisfied. [84]

An area in which lawyers are encouraged to be particularly vigilant is where a Client Authority is signed under a Power of Attorney.[85] For an instrument not registered electronically, a copy of the Power of Attorney must be deposited with the Registrar. The process of certification required by the automated Register shifts the burden of checking that powers of attorney are correct to the conveyancer. There is no reference on the electronic instrument to indicate how the Client Authority and Instruction to register was signed. If a Client Authority and Instruction form is signed by an attorney, it is the responsibility of the lawyer to ensure that the appropriate form of power of attorney is used and that a copy is obtained and retained by the lawyer as evidence. This is in contrast to the current requirement for a copy of the Power of Attorney to be registered. If the Power of Attorney is not effective to authorise the particular action[86], in addition to resulting in sanctions under section 164B of the LTA, may invoke the in

[84] Muir, R, RGL Rulings *Torrenstalk* December 2002 <http://www.linz.govt.nz>.

[85] NZLS Guidelines, supra note 82 at 12.

[86] For example, a delegation of trusteeship under section 31 of the Trustee Act 1956 is not an Enduring Power of Attorney under the Protection of Personal and Property Rights Act 1988, nor can it be delegate power to the only other co-trustee.

personam exception to indefeasibility of title and negate the effect of the registered instrument.

A title insured mortgagee has a claim under the policy if it becomes unenforceable due to the invocation of the in personam rule.[87]

3. Compensation for fraud

Fraudulent or improper dealings on the register are not new. The changes required for the automated Register simply provide new methods by which registration of fraudulent and improper dealings can be achieved. It does not follow that this will increase the incidence of fraud although it may broaden the avenues by which fraud can be perpetrated.[88] Balanced against this, however, is the benefit of raising the profile of fraud as an issue.

Lawyers must now address the issue of fraud by requiring additional steps to be taken verify and record identity and capacity of the party, compliance with other statutory provisions and consent of relevant interested parties. For the purposes of this paper it is not necessary to consider the variety of ways in which title fraud can be perpetrated. It is sufficient to note that there are two main areas of title fraud: fraud or forgery in which a lawyer is a willing participant and fraud or forgery by a third party without the knowledge of the lawyer. By empowering lawyers to effect registration, lawyers are being given increased opportunity to commit fraud. By requiring lawyers to verify the identity and legal capacity of clients, the automated register may reduce the incidence of non-lawyer fraud.

Lawyers have always been required to certify to the correctness of the dealings they present for registration. Section 164 of the LTA permits the certificate of correctness to be provided by the party to the transaction. Although the opportunities may be limited, it is possible at present for forged or fraudulent documents to be registered without the intervention of a lawyer. This is not possible under the electronic regime, unless the lawyer's digital signature password is used by another person, because the only person permitted to give a certificate for electronic dealings is a conveyancer.

The Registrar therefore relies, at present, on the legal profession to maintain the integrity of the register by ensuring and certifying the correctness of dealings. The electronic regime continues this reliance and, by virtue of the nature of the certificate and the steps lawyers are required to follow to ensure it is correct, takes greater care to ensure that the reliance is not misplaced. Lawyers who give fraudulent certificates or certificates that are materially incorrect or who fail to retain the required evidence for the required period, face the penalty of losing their right to certify.

If there is an area of fraud that has been expanded by the automated Register, it is the fraudulent discharge of mortgage. The NZLS Guidelines require a specific form of Client Authority and Instruction for a private individual but permit a wide variety of forms in the case of an institutional mortgagee and permit authority to be provided in

---

[87] RLPP, cl 2.1(d).

[88] Sim, supra note 22, at p159 commented that forgeries have often, regrettably, been committed by solicitors. Toomey, E., "State Guarantee of Title – An Unguided Path?" (1994) 6 Canta. L.R.149 at 162 commented that "the rising incidence of fraud and forgery in mortgage transactions is undeniable. The illegal activities of a few practitioners in the country have seriously undermined public confidence in the legal profession.".

the form of a letter, facsimile or email.[89] A lawyer receiving a communication, apparently from an institutional mortgagee would be within the Guidelines to act on it in the absence of any reasonable indication that it was other than bona fide.[90] If the communication came from a disgruntled employee within the institution or if the institution was negligent in allowing access to its letterhead full compensation for the fraudulent discharge might not be available. A claim under a title insurance policy would be available.

V TITLE INSURANCE IN A TORRENS SYSTEM

The beneficial effects of title insurance in a Torrens System were summed up by O'Connor as follows:

1. it promoted the "security of title" object of the Torrens System by transferring to an insurer risks that are not covered by state compensation such as pre-registration risk, exceptions for overriding interests and reduction in compensation through contributory negligence of the party's insurer or through other grounds involving fault;
2. it improves economic security by compensating for loss and improving legal security to the extent that the insurer clears title defects and encumbrances;
3. even if a risk is covered by state compensation, it provides a quicker, easier and cheaper claims process;
4. it may achieve ease of transactions and reduction of conveyancing costs (depending on local conveyancing practices and costs).[91]

She pointed out that the benefit of title insurance is selective because it is enjoyed by those who buy a policy. In her view, governments may see the presence of private title insurance as a means of escaping liability by providing them with a justification for restricting the scope of state compensation and excluding subrogated claims by insurers. She concluded by suggesting that the best scenario would be for private title insurance to complement the Torrens System but the worst scenario would see governments abandoning the social insurance of state compensation in favour of optional private insurance with many people opting to go without cover and the occasional person suffering disastrous loss without recourse to any compensation.

In Australia and New Zealand, there is no reason why the best scenario can not be achieved. The coverage provided by title insurance is so much broader than state compensation with its limitations and exclusions that it is not a matter of opting for one or the other. If state compensation is an acknowledgement of responsibility for errors by state officials and for the arbitrary application of rules designed to provide certainty and efficiency in the registration and transfer of interest in land then it is not inconsistent with this objective for the state to compensate the person suffering loss, whether that person is the holder of the interest on land or the person contracted through a title insurance policy to defend that interest.

---

[89] NZLS Guidelines supra note 82, at 14.

[90] Supra, note 33 where it is suggested that the exception in s 178(c) against claims arising from the improper use of a company seal may not apply to an unauthorised execution by a company not under seal.

[91] O'Connor, supra note 8, at 26.

There is no competition between the two forms of compensation. If any change is required to accommodate title insurance it is simply a change to prevent the insured being compensated twice for the same loss. This should not be achieved by excluding subrogated claims by title insurers but by requiring a claimant to disclose if the claimant is covered under a private insurance policy and if the answer is affirmative, ensuring that any payment by the Crown is made to the claimant through the insurer.

Three years ago title insurance was present in approximately 15 % of transactions in Ontario.[92] Today it is claimed to be a factor in over 50% of such transactions.[93] It may be some time before it reaches the same penetration here but if the Canadian experience is repeated here, once its role in the Torrens System is understood, it is simply a matter of time before it becomes an integral part of the process. There may well come a time when a conveyancer in New Zealand, as is the case in Ontario, will be regarded as negligent if a client is not advised of the property law risks and the options available to cover that risk.

If, in 50 years from now, a similar conference is held to celebrate the next 50 years of the Land Transfer Act 1952, two developments introduced at its beginning may be seen as significant steps in taking the Torrens System into the 21st Century. Electronic registration by assisting in achieving the aim of an efficient registration system and title insurance by assisting in underpinning its safe use by extending compensation beyond the limitations of that provided by the state.

[92] A figure supplied to the writer by First Canadian Title Insurance Company in October 1999.
[93] Mucalov, supra note 6.

Home Ownership Protection Policy		
Clause	**Risks Before or during Registration period**	**Covered by State Compensation**
1.5(a)	The owner of the estate or interest in the **Land** is different to that described in **Item 2** of the Policy Schedule.	only if through an error or omission or misfeasance of the Registrar.
1.5(b)	The home with the address described in **Item 4** of the Policy Schedule is not located on the **Land.**	No
1.5(c)	Someone lodges a dealing after settlement which prevents your interest in the **Land** from being registered.	only if guaranteed search is obtained and registration lodged within the periods in s 172A. No requirement on Registrar to takes steps to deal with intervening registration.
1.5(d)	Someone else owns an interest in the **Land** or has an easement or right of way that affects the title to the **Land**.	only if through an error or omission or misfeasance of the Registrar
1.5(e)	A document is not properly signed or registered resulting in a defect in the title to the **Land**.	No
1.5(f)	Forgery, fraud, duress, incompetency or incapacity results in a defect in the title to the **Land.**	In come cases but not all. No compensation is available if rights in personam arising before registration result in loss. A volunteer acquiring a title through fraud, does not acquire an indefeasible title and would not have a claim for compensation if deprived of the title by the previous owner.
1.5(g)	There is an encumbrance, writ, charge or lien on the title to the **Land** because of a mortgage, judgement, unpaid rates, taxes, or sums due to local or public authorities	only if guaranteed search is obtained and registration lodged within the periods in s 172A.
1.5(h)	Other persons have rights to the **Land** arising out of a lease, contract, option, right of possession or access order.	No
1.5(i)	There is a defect in the title to the **Land** and, as a result, another person: (i) has the right and does refuse to complete a contract for the purchase of your interest in the **Land**; (ii) will not grant you a mortgage: or (iii) has the right and does not comply with their obligations under a lease.	only if through an error or omission or misfeasance of the Registrar
1.5(j)	Any other defect exists which affects the title to the **Land**.	only if through an error or omission or misfeasance of the Registrar
1.5(k)	You do not have a legal right of pedestrian and vehicular access to and from the **Land**.	No
1.5(l)	You are prevented from using the Land as your home or that use is adversely affected or impaired because it contravenes: (i) a zoning Law; or (ii) any, grant, exception, or reservation registered or otherwise recorded on the title to the Land.	No

1.5(m)	Other persons, having the legal right to use the surface or sub-surface of the Land for: (i) the extraction or development of minerals, water or other substances; or (ii) the creation or maintenance of sewerage, gas, telecommunication or electricity installations or lines, cause damage to the Land and fail to remediate or compensate you for that damage.	No
1.5(n)	You are forced to remove or remediate all or any part of structures on the Land (other than boundary walls and fences) because they were constructed or modified without development or building approvals required by Law. There is a limit to our liability under this clause. This is referred to in clause 5.2.	No
1.5(o)	Notice of a breach or violation of Laws regarding the use of the Land or any structures on the Land (other than boundary walls and fences) is recorded in Public Records.	No
1.5(p)	There is a breach of Laws relating to the subdivision under which the Land, as a separate parcel, was created.	No
1.5(q)	A covenant, restriction, easement or right of way registered or otherwise recorded on the title to the Land has not been complied with or observed.	No
1.5(r)	Structures on the Land (other than boundary walls or fences) encroach onto your neighbour's land or vice versa and as a result, another person: (i) has the right and does refuse to complete a contract for the purchase of your interest in the Land; (ii) will not grant you a mortgage; or (iii) has the right and does not comply with their obligations under a lease.	No
1.5(s)	You are forced to remove all or any part of structures on the Land (other than boundary walls or fences) because they encroach onto: (i) your neighbour’s land; or (ii) an easement or right of way registered or otherwise recorded on the title to the Land.	No
1.5(t)	Any adverse circumstance affects the Land which would have been disclosed by an up-to-date survey of the Land.	No

1.5(u)	Any circumstance affects the Land which would have been disclosed by a LIM Report provided by the local authority in whose district the Land is situated at the Policy Date or the Land is otherwise subject to an affectation, proposal, instrument or notice relating to the Land by Government or by a statutory or local authority which is recorded in Public Records.	No

Risks Occurring after the Registration Period		
1.6(a)	Structures, other than boundary walls or fences, constructed on your neighbour's land encroach onto the Land.	No
1.6(b)	Someone else claims to have an interest in or an encumbrance, charge or lien on the title to the Land because of; (a) an act of forgery or fraud; or (b) a mistake by a title registry or a governmental or local authority.	Yes. In relation to (b), cover is limited to mistakes of RGL or his staff
1.6(c)	Other persons obtaining rights of temporary access to your Land do not comply with their legal obligation to remediate or compensate you for any damage to the Land.	No
Residential Loan Protection Policy		
2.1(d)	The Insured Mortgage is invalid or unenforceable as an encumbrance against the title to the Land	No
2.2(a)	An encumbrance, charge or lien has priority over the Insured Mortgage	No
2.2(b)	If specified in paragraph 4 of schedule A, the assignment or transfer of the Insured Mortgage is invalid or unenforceable or title to the Insured Mortgage does not properly vest in the assignee or transferee free and clear of prior encumbrances.	No
2.3(d)	The Land does not contain a residential dwelling or home unit (unless the Insured Mortgage provides for advances to construct a residential dwelling or home unit).	No

2.7(a)	The Insured Mortgage: (i) becomes invalid or unenforceable as an encumbrance against the title to the Land; or (ii) loses its priority to another encumbrance, charge or lien, because: (iii) the terms of the Insured Mortgage provide for redraws or a come and go facility or for the variation of the interest rate and you make advances or vary the interest rate (or both) pursuant to those terms; (iv) you amend the terms of the Insured Mortgage to facilitate a change in the type of loan which is secured: or (v) you make further advances which are secured under the Insured Mortgage by law or by its terms.	No
2.7(b)	An act of forgery either or both: (i) discharges, varies or adversely affects the Insured Mortgage; and (ii) causes the Insured Mortgage to lose its priority to another encumbrance, charge or lien.	Yes