

DOUBLE INDEMNITY – TITLE INSURANCE AND THE TORRENS SYSTEM

PAMELA O’CONNOR*

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Problems in the operation of the Torrens indemnity scheme have received more attention from law reform bodies in Australia in the past decade than any other aspect of the Torrens System of land title registration.¹ While some progress has been made in relaxing procedural obstacles to the payment of compensation, governments have shown little inclination to extend the risk cover of the Torrens indemnity schemes. On the contrary, several jurisdictions have legislated to exclude or restrict the right to indemnity, effectively shifting certain risks to claimants, their agents and solicitors.

In 1989 the New South Wales and Victorian Law Reform Commissions issued a joint discussion paper and an issues paper for a review of ‘the extent of the State guarantee of Torrens titles and the manner in which it is provided’.² The issues paper indicated that the two Commissions proposed jointly to consider, *inter alia*, ‘whether private title insurance could be substituted for the existing State guarantee of Torrens titles’,³ and also whether it could complement the existing statutory Torrens indemnity schemes.⁴ Public submissions were invited on these and other matters. The Victorian Commission was disbanded before it could complete its reference. The New South Wales Commission continued alone and delivered its final report in 1996.

In the end, the contribution that private insurance could make to the operation of the Torrens System received scant consideration from the Commission, which recommended instead that the State’s statutory scheme should be remodeled with a

* Senior Lecturer in Law, Monash University. The author acknowledges the valuable comments of Dr Elise Histed of Monash University.

¹ New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss*, Issues Paper No 6, (1989); New South Wales Law Reform Commission and Law Reform Commission of Victoria, *Torrens Title: Compensation for Loss*, Discussion Paper No 19 (NSWLRC) and Discussion Paper No 16 (LRCV) (1989); New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss*, Report No 76 (1996); Queensland Law Reform Commission, *Consolidation of Real Property Acts*, Report No 40 (1991); Land Law Review Committee of the Northern Territory, Fifth Report, *Guarantee of Torrens Title in the Northern Territory* (August, 1991).

² New South Wales Law Reform Commission, Issues Paper No 6; New South Wales Law Reform Commission, Discussion Paper No 19 and Law Reform Commission of Victoria, Discussion Paper No 16, above n 1.

³ New South Wales Law Reform Commission, Issues Paper No 6, above n 1, para 2.15.

⁴ *Ibid* para 2.20.

greater focus on insurance principles.⁵ The Commission's dismissal of a role for private insurance is not surprising. There was at the time no private title insurer in Australia to put submissions for the industry, and no standard title insurance product on the Australian market for the Commission to cost and evaluate.⁶

An important development occurred too late to be considered by the Commission. Shortly after the Commission delivered its report, the largest of the international title insurers, the First American Title Insurance Company ('First American') established an Australian subsidiary that was licensed as a general insurer in late 1996, trading under the name First American Title Insurance Company of Australia Pty Ltd ('First Title') and commenced offering title insurance in Australia in 1998.⁷

As in the US and other countries, title insurance policies are of two kinds: lender's policies and owner's (including purchaser's) policies. Lender's policies insure the security interest that the lender has in the policy, while an owner's policy insures an owner or a purchaser against the risk that the title is other than as stated in the policy document. First Title commenced operations by offering a lender's policy for residential properties, and proposes to launch an owner's policy in late 2002.⁸ It also proposes to extend its policies to commercial properties.⁹ Based on the experience of Canada and England, it is likely that its overseas competitors will be quick to follow the international market leader's expansion into the Australian and New Zealand markets.¹⁰

Given that a title insurer is now operating in Australia and New Zealand, it is timely to reconsider how private title insurance may affect the Torrens System. Will it contribute to achieving the twin objects of the Torrens System: to provide security of title, and to facilitate transactions by making them quick, cheap and safe?¹¹ Along with the opportunities we must also consider possible threats: will the establishment of a private title insurance industry or the marketing of its products harm our State-administered system of registration of title, or the quality of our conveyancing services?

This paper commences by explaining the nature and origins of title insurance. It then examines the potential for title insurance to cover the residual risks of the Torrens

⁵ New South Wales Law Reform Commission, Report No 76, above n 1, Recommendation 1 and para 5.1.

⁶ Arruñada says that in countries where title insurers do not have a business office, insurance is available on a transaction by transaction basis. Where they establish direct operations, they offer standard policies tailored to the local market: Benito Arruñada 'A Transaction-Cost View of Title Insurance and its Role in Different Legal Systems', Benito Arruñada homepage, Department of Economics and Management, Universitat Pompeu Fabra, Barcelona, Spain, Working Paper 565, <<http://www.econ.upf.es/~arrunada/eng/>> (copy on file with the author) [12] (forthcoming in (2002) 27 *The Geneva Papers on Risk and Insurance: Issues and Practice* 582-601).

⁷ Ron Zucker, 'Title Insurance: Here Today, Here Tomorrow' (Paper presented at the Accredited Specialists conference, New South Wales Law Society, Sanctuary Cove Qld, July 2001) 15 (copy on file with the author)

⁸ Ibid. The company launched its owners' policy in New Zealand in September, 2002.

⁹ Ibid.

¹⁰ Another major US title insurer, Stewart Title has applied to the Australian Prudential Regulation Authority for a licence to operate in Australia: Keren Lavelle, 'Title insurance: Is it wanted here?' (2002) 40:10 *Law Society Journal* 46, 48.

¹¹ As to these objects, see J E Hogg, *Registration of Title to Land Throughout the Empire* (1920) 100 and n 32 (citing numerous case authorities); Thomas Mapp, *Torrens' Elusive Title: Basic Principles of an Efficient Torrens System* (1978) 59-60; Victor Di Castri, *Registration of Title to Land* (looseleaf, orig 1987, Carswell, Canada) Vol 1, [756].

System, focussing on four problem areas: first, the lack of security and indemnity for purchasers of interests in registered land in the pre-registration period; secondly, the lack of security and indemnity for losses resulting from the existence of overriding interests not shown on the register; thirdly, fault-based exclusion or reduction of indemnity in some jurisdictions; and fourthly, the costs and procedural hurdles in accessing indemnity payments from the Torrens assurance funds. The paper concludes with an assessment of possible impacts of the title insurance industry on the administration of the Torrens System.

I WHAT IS TITLE INSURANCE?

Title insurance originated in the United States, as a market response to the uncertainties inherent in a conveyancing system based on registration of deeds rather than titles. The provision of an insurance policy, often paid for by the vendor or borrower, emerged as a means of assuring title to the purchaser or lender. In the US, where title insurance is purchased in 85% of residential purchase and sale transactions,¹² insurers also investigate titles, produce title reports and settle real estate transactions. The vertical integration of title assurance services enables them to adopt a strategy of risk avoidance, clearing existing title defects and preventing new risks arising from errors in the immediate transaction.¹³ Title insurance also includes an element of casualty insurance for residual risks that cannot be prevented or are uneconomic to eliminate.¹⁴

In recent decades, title insurers have adapted their product and found new markets in insuring registered titles. Several US title insurers entered the English market in the mid 1970s, initially meeting with limited success.¹⁵ Their market was boosted by the expansion of mortgage refinancing transactions in the 1980s, as they found ways to interest mortgage lenders.¹⁶ Several of the larger US title insurers are building markets in Canada and England, writing policies in respect of both registered and unregistered land, while the leading English title insurer, London & European, has expanded its operations into France (which has a deeds registry system) and Spain (which registers titles).¹⁷

Since there is at present only one title insurer operating in Australia, the following discussion of the nature of title insurance is based on First Title's Home Ownership Protection Policy 0601 of 2001 ('the owner's policy') and Residential Loan Protection Policy RLPP 0300 of 2000 ('the lender's policy'), copies of which have been provided to the author by Mr Ron Zucker, First American's Vice President, Underwriting, Asia-Pacific Region.¹⁸ It is anticipated that other title insurers entering the local market will offer similar policy terms, since the US market has seen a degree of similarity in the risks covered by most policies.¹⁹ If this assumption proves false, the paper's analysis of

¹² Arruñada, above n 6, 5.

¹³ Ibid 6-7.

¹⁴ Ibid 7. Casualty insurance means that the insurer assumes the risk and charges a premium based on actuarial calculation of the risk.

¹⁵ Giles Morgan, 'Title Insurance: Its Relevance to Lenders' in P Jackson and D C Wilde (eds), *Contemporary Property Law* (1999) 168, 169.

¹⁶ Ibid.

¹⁷ Arruñada, above n 6, 17.

¹⁸ On file with the author.

¹⁹ Morgan, above n 15, 170.

First Title's policies will at least provide a point of reference for comparing the policies offered by other title insurers.

A *The Evolution of Title Insurance*

Title insurance originated as a contract of indemnity that covers the insured person against loss or damage arising out of existing title defects or encumbrances other than those specifically excepted.²⁰ This conventional understanding of title insurance is no longer adequate, as the nature of the product has broadened in recent years. The direction of its evolution has made it more attractive to persons dealing in Torrens System titles.

The first change is that indemnity now commonly extends beyond losses due to title defects and encumbrances, insuring against risks that affect the insured's use and enjoyment of the land. For example, the owner's policy covers the following risks: that the insured lacks a legal right of access to and from the land,²¹ that the insured is required to remove an illegally-constructed or encroaching building (other than a boundary wall or fence), and that the insured's use of the land as a home is prevented or impaired because it contravenes a zoning law or a grant, exception or reservation recorded on the title.²² These risks are unlikely to attract compensation under the Torrens statutes.

The second extension to the nature of title insurance is that the indemnity is no longer confined to losses arising from defects, encumbrances and other risks in existence at the policy date (ie, the date of settlement of the contract). Traditionally, title insurers covered only pre-acquisition risks arising from events that occurred before the policy date.²³ The risk of losses arising from subsequent settlement could be covered only by special endorsement. The extension of indemnity to post-acquisition risks is a recent development in title insurance. It was pioneered by First American in the USA in 1997, and quickly adopted by other title insurers.²⁴ Since title insurers cannot prevent risks arising after the policy date, insurance for these risks is provided on a casualty basis.²⁵

The extension of the indemnity to cover post-acquisition risks makes title insurance more attractive to holders of Torrens titles, since judicial acceptance of the principle of immediate indefeasibility²⁶ has reduced their security in the period following registration. Under the previous rule of deferred indefeasibility, registered owners deprived of their interest by the registration of a forged or otherwise void instrument were entitled to be restored to the register. This right was subject only to the rights of

²⁰ Ibid 169.

²¹ Admittedly, this is a rare problem in Australia due to legislation regulating the registration of plans of subdivision. Zucker cites *Batey v Gifford* (1998) ANZ Conv R 330 as an example of such a problem resulting in litigation: Zucker, above n 7, 14.

²² Home Ownership Protection Policy 0601 of 2001, clause 1.5(k), (n), (r), (l).

²³ J Paul Rieger, 'Evolution to Revolution: Enhanced Title Insurance Protection' (2001) 34 *Maryland Bar Journal* 25, 25; Morgan, above n 15, 169.

²⁴ Rieger, above n 23.

²⁵ Arruñada, above n 6, 7.

²⁶ In *Breskvar v Wall* (1971) 126 CLR 376, the High Court of Australia followed the Privy Council in *Frazer v Walker* [1967] 1 AC 569, adopting the principle that a person who takes and registers a forged instrument without being party to fraud gains an indefeasible title immediately upon registration.

any third party who had acquired a subsequent interest in reliance on the unrectified register and had registered the interest without fraud.²⁷ The doctrinal shift improves the security of purchasers, while increasing the risks that owners may be deprived of their titles after registration through the wrongful act of another.²⁸ In effect, it shifts risks from the pre-acquisition to the post-acquisition stage.

B *What does the insurer agree to do?*

The owner's policy insures against actual loss resulting from the covered risks for up to 200% of the purchase price of the land (to allow for capital appreciation during the period of ownership).²⁹ The lender's policy indemnifies the lender against actual loss up to 125% of the principal sum secured under the insured mortgage.³⁰ In addition, under both policies the insurer undertakes to cover the costs, legal fees and expenses it incurs in defending the insured's title.³¹ The costs incurred by the insurer in defending the insured's title do not reduce the amount of the indemnity for loss payable under the policy.³²

The insurer in effect guarantees that the insured's title is as stated in the policy, and undertakes to defend that title against adverse claims based on an insured risk. Although the contract is one of indemnity, the insurer may at its discretion settle a claim by clearing an encumbrance or defect from the title, and restore the insured's title to that stated in the policy.³³ Zucker says that his company generally attempts to rectify title problems. If it cannot do so, it compensates the insured.³⁴

C *What will it cost?*

Unlike most other forms of insurance, the premium is a once-off payment made on purchase of the policy. The policy continues to provide cover so long as the insured can suffer loss.³⁵ Insured owners are covered so long as they own or retain an interest in the land or are liable under any title warranties they give to a purchaser.³⁶ While the owner's policy is not assignable, the lender's policy benefits the lender and certain assignees until the loan is fully repaid.³⁷ Even after the lender has exercised its power of

²⁷ *Gibbs v Messer* [1891] AC 248; *Clements v Ellis* (1934) 51 CLR 217.

²⁸ Warrington Taylor, 'Scotching Frazer v Walker' (1970) 44 *Australian Law Journal* 248, 251-53; Mapp, above n 11, 68; Douglas Baird and Thomas Jackson, 'Information, Certainty and the Transfer of Property' (1984) 13 *Journal of Legal Studies* 299, 300; Thomas J Miceli, *Economics of the Law* (1997) 127.

²⁹ Home Ownership Protection Policy 0601, cl 1.4.

³⁰ Residential Loan Protection Policy RLPP 0300, cl 1.1. The allowance of 125% is to provide for interest accrued under the mortgage.

³¹ Residential Loan Protection Policy RLPP 0300, cl 1.2; Home Ownership Protection Policy 0601, 1 'Summary'.

³² *Ibid.* First Title reports that half of the claims paid out under its policies are for defence costs: Zucker, above 7, 2-3.

³³ Residential Loan Protection Policy RLPP 0300, cl 7(a)-(c); Home Ownership Protection Policy 0601, cl 4.6.

³⁴ Ron Zucker, personal communication with the author, 9 July 2002.

³⁵ Morgan, above n 15, 170.

³⁶ Home Ownership Protection Policy 0601 cl 3.2

³⁷ Residential Loan Protection Policy RLPP 0300 cl 5(a) and (b).

sale, the policy covers it for certain warranties made to a purchaser concerning the title.³⁸

First Title is proposing to set a premium in the order of AU\$200 for most owner's policies offered to homeowners in Australia, and NZ\$200 for a similar policy in New Zealand.³⁹ An increment to this flat rate will be payable for properties above a certain threshold value, set well above the value of the average home. Most lender's policies for residential properties will cost a single premium of AU\$100 in Australia, or \$NZ100 in New Zealand, and a discount may be available if an owner's and a lender's policy are purchased at the same time.⁴⁰ The rate for the lender's policy includes the cost of processing the mortgage, while the owner's premium is for risk cover only. It remains to be seen whether these premium rates, which are considerably lower than in the US,⁴¹ are sustainable in the longer term.

A purchaser will be able to take out a cover note before entering into a contract of purchase, but is required by the policy to disclose to the insurer any risks actually known to him or her as at the policy date (defined as the date of settlement).⁴² Special endorsements to insure against known risks (such as easements and encroachments that may affect the marketability of the land on re-sale, mortgage or leasing) may be negotiated for an adjusted premium. This is known as 'defective title' insurance.⁴³

D *How will title insurers market their policies?*

Overseas experience suggests that lenders will embrace title insurance more readily than owners. In jurisdictions like Western Canada and England, where titles to most residential properties are registered, the principal market for title insurers has been lenders' policies purchased in connection with mortgage refinancing. These are secondary financing transactions where the mortgage is not taken to finance the purchase of the land, but for other purposes such as debt consolidation, business financing or renovations.

Owner's policies are much more difficult to market under title registration systems. In the US, where an owner's policy is the nearest a purchaser can get to a guaranteed title, the benefits are more readily apparent. Owners and purchasers of Torrens titles are not so easily convinced that they need title insurance, particularly if their lawyers are hostile to it. In Canada, some title insurers alienated the legal profession by offering conveyancing services in competition to them. The legal profession in Ontario

³⁸ Ibid cl 5(b) (iii).

³⁹ Zucker, above n 34.

⁴⁰ Ibid.

⁴¹ Average premiums in the US are \$3.50 per thousand units of value for the owner's policy, and \$2.50 per thousand for the lender's policy: Arruñada, above n 6, 9-10.

⁴² Home Ownership Protection Policy excludes 'risks which are disclosed to you in the contract for the purchase of your interest in the land' (cl 2.2(b)) and 'risks which are known by you, but not us, unless they appear in Public Records on the Policy Date' (2.2(c)). Note that cl 7 defines 'know or knew' to mean actual knowledge: 'It does not include constructive knowledge or knowledge which may be imparted by matters appearing in Public Records'. However the introduction to the policy refers to the insured's duty under the *Insurance Contracts Act 1984* (Cth), s 21, to disclose to the insurer 'every matter that you know, or could reasonably be expected to know, is relevant to the insurer's decision whether to accept the risk of the insurance and, if so, on what terms'.

⁴³ Zucker, above n 7, 13.

responded by extending its professional indemnity scheme to cover some risks covered by title insurance policies.⁴⁴

First Title appears to have learned the lessons of its sister company's acrimonious debut in Canada,⁴⁵ adopting a strategy that is less likely to bring it into conflict with the legal profession in Australia and New Zealand. Instead of offering conveyancing services in competition with them, it will market its policies to lawyers and lending institutions. To relieve the concerns of lawyers that it will enforce their professional liability to the insured, the company is offering to provide a written waiver of its subrogated rights to sue them for losses arising from their errors and omissions made in good faith.⁴⁶ The company's marketing strategy will seek to persuade lawyers that purchasing title insurance for their clients will serve both their interests and their clients' interests. Lawyers will be able to shift to the insurer some of the risks presently borne by them and their professional indemnity insurers.⁴⁷ Their clients will benefit by obtaining protection against a range of risks, and in some cases by a lowering of transaction costs.⁴⁸

E *Risk assumption as a strategy for lowering transaction costs*

Title insurers know that it is not the additional risk cover *per se* that will induce purchasers and lenders to buy title insurance, since the risk of losses not covered by the Torrens guarantee is small. First Title's marketing emphasises the saving in transaction costs made possible by the ability to transfer risks to the insurer. As an example, Zucker points out that in Canada, title insurers made considerable progress in the mortgage market when they agreed to accept the risk of lenders not obtaining updated identification reports. For a \$200 premium, lenders could save up to \$800 in survey costs.⁴⁹

Cost saving through risk transfer will also figure prominently in the company's strategy for marketing lender's policies in Australia and New Zealand. According to Zucker:

A lender under one of our insured mortgage programs does not require a borrower to undertake any searches or enquiries in relation to either a purchase or a refinance transaction. We accept the risk that if done, the result of those searches may be adverse and cause loss ... either because of the existence of statutory liens or because of affectations or proposals which are discovered when the power of sale is exercised.⁵⁰

⁴⁴ Derek Lundy, 'Ont lawyers provide warm welcome to TitlePlus system' 17: 29 *The Lawyers Weekly* Butterworths Canada, December 5, 1997; Arruñada, above n 6, 15.

⁴⁵ In Canada, a subsidiary of First American trades under the name 'First Canadian'.

⁴⁶ Ron Zucker expressed this as follows: 'Frankly, I don't see how I can convince a lawyer to use our policy if we simply replace the client as a potential litigant. If the lawyer acts honestly and in accordance with the procedures we provide, we will waive subrogated rights even if there has been negligence': R Zucker, personal communication to the author, 24 August 2002.

⁴⁷ Zucker, above n 7, 4.

⁴⁸ Whether the reduction in transaction costs is passed on to the clients of lawyers depends on the competitive state of the local market for conveyancing services.

⁴⁹ Zucker, above n 7, 11-12; see previous footnote.

⁵⁰ Zucker, *ibid* 11.

The owner's policy does not require any searches to be made other than a Land Registry search.⁵¹ A conveyancing solicitor whose client is insured and who has received a written waiver from the insurer may decide to omit some searches and enquiries that prudence would otherwise require, so long as the client is willing to accept monetary indemnity as a substitute for a clear title.

The insurers' strategy of risk assumption could result in increased claims upon the Torrens indemnity fund, by reducing standards of due diligence in conveyancing. If changed conveyancing practices induced by title insurance adversely impact upon the fund, it is likely that governments will propose measures to shift the risks back to the insurers. Legislatures will bar title insurers from exercising the subrogated rights of the insured to claim from the fund,⁵² and exclude claims on the fund by privately insured persons for losses covered by their policies. Provided that insurers are made to bear the added risk that they have agreed to accept, any reduction in search costs made possible by title insurance will promote the 'ease of transaction' object of the Torrens System. Apart from the direct effect of title insurance in reducing transaction costs, competition from title insurers may prompt lawyers to adopt more efficient conveyancing practices, as shown by recent developments in Canada. In the Prairie Provinces, the Torrens statutes do not reserve the priority of a mortgage that has been lodged and subsequently withdrawn for amendment following requisitions from the registrar.⁵³ In the meantime, another dealing could be lodged and take priority over the mortgage. Because of this risk, lenders would not release the loan funds until the mortgage was actually registered. Purchasers had to arrange bridging finance for the registration gap, adding significantly to their costs.⁵⁴

Faced with competition from title insurers who were willing to accept the lender's risk, the law societies of Alberta, Saskatchewan, Manitoba and British Columbia launched the Western Law Societies Conveyancing Protocol in February, 2001. The protocol enables lawyers acting for lenders to disburse the loan funds once the lawyer provides a short-form opinion on the title. The lawyers' professional indemnity insurer then assumes the risk of any losses. This cover enables lenders to release funds at settlement, avoiding the need for bridging finance.⁵⁵ It is doubtful that this saving in transaction costs would have occurred without the competitive challenge posed by title insurers.

II DEFICIENCIES IN THE STATE GUARANTEE

The Torrens System promises legal security to registered owners, and economic security to those whose property rights are suppressed by the system's rules. Legal security means the enforceability of an interest as a right *in rem* against others, and economic security means that the holder of an interest will be compensated for its loss.⁵⁶

⁵¹ Ownership Protection Policy 0601, cl 2.3(a) excludes claims for losses resulting from covenants, easements, restrictions and rights of way that are recorded or otherwise noted on the title as at the Policy Date.

⁵² NSW has a legislative precedent for this. The *Real Property Act 1900*, s 133(1) bars professional indemnity insurers from exercising subrogated rights to claim upon the fund.

⁵³ Janice Mucalov, 'New western provinces conveyancing protocol making tasks a lot easier', 20:39 *The Lawyers Weekly* Butterworths, Canada, February 23, 2001.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Arruñada, above n 6, 21.

In order to promote ease of transaction, the system reverses some of the property rules of general law conveyancing. In the absence of fraud, a purchaser for value (and, in some jurisdictions, a gratuitous transferee)⁵⁷ obtains upon registration a title that cannot be impugned on the ground that the seller's title was defective, or that the conveyance from the seller to the purchaser was invalid for any reason.⁵⁸

The system compensates the 'true owner' for the loss of his or her property right pursuant to this rule. All Australasian Torrens statutes provide for an indemnity scheme or assurance fund,⁵⁹ administered by the registrar⁶⁰ or other government official, and funded through contributions levied on registry transactions. Legal security and economic security are the complementary elements of the State guarantee of registered title, in theory providing comprehensive security for owners and purchasers. 'Under the Torrens system, a man is to have either his interest in the land or adequate monetary compensation therefore'.⁶¹ In reality, there are gaps in the coverage provided by the State guarantee. The gaps, and the extent to which title insurance can remedy them, are discussed below.

A Gaps in the Legal Security

1 Vulnerability of Interests in the 'Registration Gap'

The Torrens System does not guarantee the validity or the priority of interests in registered land until they are registered, nor does it compensate their owners for their loss.⁶² At most the statutes provide an indemnity for unregistered interest holders who suffer loss as a result of certain registry errors, such as an error or omission in a search certificate or omission to register a caveat. The statutes also provide, through the caveat facility, a means by which owners of unregistered interests can get early warning of an application to register an adverse interest and dispute its priority. The lodgment or omission of a caveat is not *per se* determinative of priority between unregistered

⁵⁷ In Queensland and the Northern Territory, this is expressed in the legislation: *Land Titles Act 1984* (Qld) s 180; *Land Title Act 2000* (NT) s 183. In Western Australia and New South Wales the rule is of judicial origin: *Conlan v Registrar of Titles* (2001) 24 WAR 299; *Bogdanovich v Koteff* (1988) 12 NSWLR 472. However since 2000, gratuitous transferees in NSW are no longer protected against proceedings for recovery or possession of land if their grantor was registered through fraud: *Real Property Act 1900* (NSW), s 118(1)(d).

⁵⁸ The latter proposition is true only in jurisdictions where the judiciary have accepted the principle of immediate indefeasibility, explained above in text accompanying n 26.

⁵⁹ The scheme is often called the 'Assurance Fund', even in jurisdictions where the separate fund has been transferred to Consolidated Revenue and claims are paid thereout. In insurance parlance, 'assurance' strictly refers to cover against events that are certain to occur at some unknown time (eg the death of a person), while 'insurance' referred to cover against eventualities that may never occur. However the two terms are often used interchangeably: J L Hanson, *A Dictionary of Economics and Commerce* (5th ed, 1977).

⁶⁰ Since the nomenclature of the land titles registry and the official in charge varies from one jurisdiction to another, the terms 'registry' and 'registrar' are used by the author in a generic sense.

⁶¹ Douglas J Whalan, *The Torrens system in Australia* (1982) 346.

⁶² New South Wales Law Reform Commission, Discussion Paper No 19 and Law Reform Commission of Victoria, Discussion Paper No 16, above n 1, para 38; New South Wales Law Reform Commission, Issues Paper No 6, above n 1, para 6.6. The Victorian statute recognises that a compensable loss or deprivation may occur through a payment or consideration given to another person on the faith of a recording in the Register: *Transfer of Land Act 1958* s 110(1)(d).

interests,⁶³ although an interest protected by caveat is generally assured of retaining its first-in-time priority over a later interest.⁶⁴

The inadequate protection for purchasers in the 'registration gap' between acquisition of an interest and registration is one of the major problems facing the Torrens system. During this hiatus, the general law rules of priority apply, and can lead to the loss or postponement of a purchaser's interest.⁶⁵ The rules are uncertain in their application, and this encourages litigation.⁶⁶ Australia has a high incidence of priority disputes between holders of unregistered interests in registered land, compared to England where such cases are rarely reported.⁶⁷

The incidence of priority disputes could be reduced if conveyancers might be persuaded to make more use of caveats to protect interests before registration,⁶⁸ and to take advantage of the provisions that allow purchasers and lenders to reserve the priority of their interests for a specified period before settlement.⁶⁹

In recent years more radical proposals have been advanced for the introduction of a 'race' system that confers priority on unregistered interests according to their date order of entry in the register. In the 1980s the Victorian Law Reform Commission proposed that caveats should determine priority as between unregistered interests.⁷⁰ In 1990 Canada's Joint Land Titles Committee published its *Model Land Recording and Land Registration Act*, a central feature of which was its proposal to replace the caveat with a system of interest recording. The Committee proposed that the recording of unregistered interests would not guarantee their existence or efficacy but would, in the absence of fraud, ensure their priority over unrecorded or later recorded interests.⁷¹ The UK Law Commission has proposed a similar system, under which the priority of unregistered interests would be determined by the date of entry of a 'notice' in the register, and the

⁶³ *J & J H Just (Holdings) Pty Ltd v. Bank of New South Wales* (1971) 125 CLR 546, 554 (Barwick CJ); *Jacobs v Platt Nominees Pty Ltd* [1990] VR 146; Peter Stubbs, 'Equitable Priorities and the Failure to Caveat' (1989) 6 *Auckland University Law Review* 199; T D Castle, 'Caveats and priorities: the "mere failure to caveat"' (1994) 68 *Australian Law Journal* 143.

⁶⁴ Whether this is on the basis that the later acquirer has 'notice': *Moffett v Dillon* [1999] 2 VR 480 (Brooking JA, Buchanan JA concurring), or because the lodgement of a caveat neutralises any 'postponing conduct' on the part of the first-in-time owner: Adrian Bradbrook, Susan McCallum & Anthony Moore, *Australian Real Property Law* (3rd ed, 2002) [4.104]-[4.112].

⁶⁵ *Ibid* [4.113]. The general law rules are modified in New South Wales by *Real Property Act 1900*, s 43A.

⁶⁶ Victorian Law Reform Commission, *Priorities*, Report No 22 (1989) para 14.

⁶⁷ England and Wales have perhaps a dozen judicial decisions adjudicating priority disputes between unregistered interests under the *Land Registration Act 1925*, although over 80% of all land parcels are registered: see generally, Kevin Gray and Susan Francis Gray, *Elements of Land Law* (3rd ed, 2001) 9.29-9.30.

⁶⁸ Lodgement statistics provided to the author by Land Registry Victoria on 17 September, 2002 indicate that the ratio of lodged caveats to transfers in 2001-02 was less than 1 to 9. Allowing for the fact that not all caveats are lodged in respect of transfers, the figures indicate very low usage of caveats to protect purchasers' interests pre-registration in that State: details on file with the author.

⁶⁹ For a discussion of the provisions (variously called settlement notices (Qld), priority notices (Tas), stay orders (Vic and WA), and the reasons for their limited use, see Bradbrook, McCallum & Moore, above n 64, [4.116].

⁷⁰ Above n 66, Recommendation 10, 10-11

⁷¹ Canada. Joint Land Titles Committee., *Renovating the foundation : proposals for a model land recording and registration act for the provinces and territories of Canada* (Edmonton, 1990), 13-18, and Part 4 of the model Act.

general law rules of priority would no longer apply.⁷² The Commission's proposals have been enacted in Part 3 of the *Land Registration Act 2002*, which is expected to commence operation during 2003.

The proposed implementation of electronic conveyancing may reduce priority disputes between unregistered interests by eliminating the present registration gap between settlement and registration. The technology will allow conveyancers to register the new interest electronically at the moment of settlement, and legislation may indeed require it. This leaves the problem of the other registration gap, between the creation of an equitable interest under a specifically enforceable contract of purchase and the date of settlement/registration. It is likely that when electronic conveyancing is fully implemented, the formalities for creating interests in land will specify some form of entry on the register as the only recognised way of creating such interests.⁷³

If combined with a 'race' system that awards priority by date order of entry in the register, this system could virtually eliminate priority disputes, at least so far as formally created interests are concerned.⁷⁴ What might emerge is a two-tier interest registration and interest recording system, similar to that proposed by Canada's Joint Land Titles Committee. Certain classes of interests, such as legal fee simple and major leasehold estates, would be registered with a full State guarantee, as at present. Lesser interests, including many that are presently unregistrable, would obtain priority upon being recorded in the register, but would not attract a State guarantee. This is because it is uneconomic for registries to examine and assume the risk of interests that are of short duration or are variable in their incidents.⁷⁵ Interests that are recorded without guarantee would enjoy priority only for what they are worth under the general law of property. The owners of recorded interests would still bear the risk that their interest might prove to be void, unenforceable or not effective according to its terms.

Pending these reforms, can title insurance improve the economic security of purchasers and lenders in the pre-registration period? The owner's policy provides cover for the following title risks occurring before registration:

- Someone lodges a dealing after settlement which prevents your interest in the land from being registered.
- Someone else owns an interest in the Land or has an easement or right of way that affects title to the Land.

⁷² Law Commission and H M Land Registry, *Land Registration for the Twenty First Century: A Consultative Document* Law Com No 254 (1998) Ch VII; UK Law Commission and H M Land Registry, *Land Registration for the Twenty First Century: A Conveyancing Revolution*, Law Com No 271 (2001), Part V.

⁷³ The UK Law Commission predicts that '[w]hen electronic conveyancing becomes the norm, it is likely to become impossible to create or transfer many interests in registered land except by simultaneously registering them.': Law Com 271, *ibid* para 2.17.

⁷⁴ The need to protect informally created interests, whose owners may not appreciate the need to enter them in the register, is a presently unresolved issue in Australia: Bradbrook, McCallum & Moore, above n 64, [4.99]; UK Law Com, No 254, above n 72, [5.61]. In England, such interests are protected as overriding interests if their owner is in possession: *Land Registration Act 1925* (UK), s 70(1)(g); *Williams v Glyn's Bank Ltd v Boland* [1980]3 WLR 138.

⁷⁵ Alberta Law Reform Institute and Canada, Joint Land Titles Committee, *Towards a New Alberta Land Titles Act* (Alberta Law Reform Institute, Edmonton, 1990) 42-43. The UK Law Commission has raised the question whether the categories of registrable instruments should be extended: Law Commission No 254, *ibid* paras 3.7, 3.26.

- Other persons have rights to the Land arising out of a lease, contract, option, right of possession or access order.
- Fraud, forgery, duress, incompetency or incapacity results in a defect in the title to the Land.
- Any other defect exists which affects the title to the Land.⁷⁶

The cover is subject to general exclusions for risks that are disclosed in the contract or purchase or are actually known to the insured, but not to the insurer, on the date of settlement of the purchase, unless they appear in public records.⁷⁷ The date of settlement is the relevant date for determining what risks the purchaser knows about, but a purchaser can take out a cover note to protect their interest from the date of the contract of purchase. Any risks that the purchaser discovers between contract and settlement must be disclosed to the insurer. Assuming that the purchaser is not entitled to rescission or does not elect to rescind, the insurer may agree to cover the notified risk by special endorsement. For example, if a purchaser discovers that a structure on the land encroaches on a neighbour's title, the insurer may agree to an endorsement to cover the risk that the purchaser may at some time be required to demolish the structure, or that the encroachment may cause problems when the purchaser attempts to sell, mortgage or lease the land.

The lender's policy covers mortgagees for risks in the pre-registration period, including the invalidity or unenforceability of the insured mortgage as an encumbrance against the title to the land, or the circumstance that an encumbrance, charge or lien has priority over the insured mortgage.⁷⁸ It also covers against loss due to a defect in title to the land, or to unmarketability of the title.⁷⁹

None of these risks to purchasers and lenders in the pre-registration period are indemnified by the Torrens assurance fund. My conclusion is that title insurance can substantially improve economic security for purchasers and lenders by insuring them against the risk of loss of priority in the registration gap. It can also relieve against a risk for which the Torrens System has no answer, namely, the risk that a legal defect (of a kind that would be 'cured' on registration)⁸⁰ renders an unregistered interest void or unenforceable.

2 *Overriding interests*

Once the purchaser attains registration, the indefeasibility of their title is subject to a number of exceptions to indefeasibility, also known as overriding interests. These may be specified in the Torrens statutes or under other statutes that modify the operation of the indefeasibility provisions. Overriding interests are enforceable against the registered owner as rights *in rem* without any requirement that they be recorded on title. It has

⁷⁶ Residential Loan Protection Policy RLPP 0300, cl 1.5(b), (d), (h), (f), (j).

⁷⁷ Ibid, cl 2.2(b), (c).

⁷⁸ Residential Loan Protection Policy RLPP 0300, cl 2.1(d); 2.2(a).

⁷⁹ Ibid, cl 2.1(c); 2.3(a).

⁸⁰ This includes any defect that would, on general principles of law, invalidate the instrument or the transaction itself, e.g, breach of legislative requirements, forgery, execution by an agent exceeding his or her authority, *non est factum*. Under the rule of immediate indefeasibility, the register may not be rectified against a purchaser for value (or in some jurisdictions, a volunteer) who registers the instrument without complicity in fraud.

long been recognised that the existence of the category of overriding interests derogates seriously from the ‘mirror principle’, which holds that purchasers should be able to rely on the register as an accurate and complete record of all matters affecting the title.⁸¹ Despite this concern, the categories of overriding interests have been maintained, for what governments deem to be sufficient policy reasons.

All the statutes provide for an indemnity for loss suffered through ‘an error, omission or misdescription in the register’.⁸² This phrasing is wide enough to cover a loss due to the existence of an unrecorded overriding interest, for its absence from the register can be said both to be an ‘omission’⁸³ and to cause the register to ‘misdescribe’ the state of the title.⁸⁴ On this view, the absence of an overriding interest from the register is a loss for which a statutory indemnity is payable.

Courts have not always been willing to take a liberal approach to the interpretation of the provision.⁸⁵ In *Trieste Investments v Watson*,⁸⁶ a majority of the New South Wales Court of Appeal held that the loss suffered by the plaintiff due to an unrecorded resumption order was not due to an ‘error, omission or misdescription’, since the Registrar was under no duty to note the resumption on title. On this reasoning, there would be no entitlement to indemnity for loss arising from an overriding interest, for the registrar is under no general duty to record them on title. The New South Wales Law Reform Commission agreed with this limitation, recommending that statutory interests should not be required to be recorded on the register ‘and that accordingly State guarantee should not be provided in respect of these interests generally’.⁸⁷

Title insurance can improve economic security for purchasers, lenders and owners if it provides cover against the risk of losses caused by overriding interests not discovered by the insured before settlement. This is not an area where title insurers have performed well overseas. Arruñada says that in the US, standard policies exclude the claims of persons in unrecorded possession, defects that would have been discovered by accurate survey and unrecorded easements.⁸⁸ He adds that title insurance policies sold outside the US are even more restrictive, typically excluding cover for unrecorded legal interests enforceable *in rem*.⁸⁹ The exclusion of overriding interests has limited the use of title insurance in title registration systems overseas.⁹⁰

⁸¹ The ‘mirror principle’ is from T B Ruoff, *An Englishman Looks at the Torrens System* (1957) 7-8, Ch 3 *passim*.

⁸² *Land Titles Act 1925* (ACT) ss 154(1)(d), 155; *Real Property Act 1900* (NSW) ss 120(1)(b) and (2); 129(1)(c); *Land Title Act 1994* (Qld) ss 188(1)(b), 188A(1)(a); *Real Property Act 1886* (SA) ss 203, 208; *Land Titles Act 2000* (NT) ss 192 (1)(b), 193(1)(a); *Land Titles Act 1980* (Tas) ss 152(1)(d), 153(1)(b); *Transfer of Land Act 1958* (Vic) s 110(1)(c); *Transfer of Land Act 1893* (WA) ss 201, 205.

⁸³ Peter Butt, *Land Law* (4th ed., Lawbook Co, Sydney, 2001), [2096.1]; *Cirino v Registrar-General* (1993) 6 BPR 13,260.

⁸⁴ *Trieste Investments v Watson* (1963) 64 SR (NSW) 98, 107 (Nagle J).

⁸⁵ *Ibid*; *Dempster v Richardson* (1930) 44 CLR 576; [1937] ALR 81; (1930) 4 ALJ 309, *Chowood v Lyall (No 2)* [1930] 2 Ch 156.

⁸⁶ (1963) 64 SR (NSW) 98, 107 .

⁸⁷ New South Wales Law Reform Commission, Report No 76, above n 1, para 4.21.

⁸⁸ Arruñada, above n 6, 10.

⁸⁹ *Ibid* 12-13.

⁹⁰ *Ibid* 12.

It is therefore surprising that provisions in the lender's and owner's policies appear to cover a number of the risks posed by exceptions to indefeasibility. The exceptions, and the extent of the cover available, are outlined below.

(a) *Unregistered easements, rights of way and tenancies*

All the statutes give overriding status to particular unregistered easements, and to certain unregistered leases or tenancies.⁹¹ The exception for tenancies appears to be based on the view that it is unreasonable to expect tenancies of short duration to be registered, and that tenants' claims are sufficiently advertised by their possession.⁹² One problem with this exception is that the protection for the tenant's interest may extend to incidental interests that are not reasonably discoverable. In *Downie v Lockwood*,⁹³ the tenant's overriding interest was held to extend to equity to rectify the lease, an interest that was not discoverable by inspecting the property or reading the lease.⁹⁴

While the terms of the exception for easements vary from one jurisdiction to another, Sackville & Neave summarise the position as follows:

The end result is that in all states a bona fide purchaser of Torrens system land is exposed to the risk of being bound by interests the existence of which cannot be ascertained from the register or, in some cases, from any other source at the time of the purchase.⁹⁵

The owner's policy insures the owner against the risk that 'someone else owns an interest in the land or has an easement or right of way that affects the title to the Land'.⁹⁶ It also covers the risk that 'other persons have rights to the Land arising out of a lease, contract, option, right of possession or access order'.⁹⁷ These provisions cover purchasers for losses arising from unregistered easements, rights of way and tenancies that existed prior to registration, provided that their existence was not actually known to the Insured at the date of settlement or disclosed in the contract for the purchase of the land.⁹⁸

Lenders only suffer loss by reason of such interests if their existence renders the property unmarketable, or diminishes its value so that the lender recovers on sale an amount less than the sum secured. Accordingly, the lender's policy covers the risks that the title to the Land is 'unmarketable', or that 'the use of the Land for residential purposes is adversely affected or impaired because it contravenes . . . any easement, right of way, covenant, restriction, lease, grant, exception or reservation affecting the title to the Land'.⁹⁹ Lenders are also covered against loss if 'improvements on the Land

⁹¹ Bradbrook, McCallum & Moore, above n 64, [4.57], [4.59]. In Victoria, tenancies of any duration are protected as overriding interests: *Transfer of Land Act 1958* (Vic) s 42(2)(e).

⁹² *Ibid* [4.60].

⁹³ [1965] VR 257.

⁹⁴ For examples of other interests of a tenant protected by s 42(2)(e) of the Victorian Act, see Marcia Neave, C J Rossiter and M A Stone, *Sackville & Neave's Property Law: Cases and Materials* (6th ed, 1999) [9.2.198].

⁹⁵ *Sackville & Neave's Property Law: Cases and Materials* (6th ed, 1999).

⁹⁶ Home Ownership Protection Policy 0601, cl 1.5(d).

⁹⁷ *Ibid* cl 1.5(h).

⁹⁸ *Ibid* cl 2.2(b)(c).

⁹⁹ Residential Loan Protection Policy RLPP 0300 cl 2.3(a), (c).

. . . interfere with, encroach on or contravene the terms of an easement or right of way affecting the title to the Land'.¹⁰⁰

(b) *Adverse possession*

In several jurisdictions, the registered owner's title is subject to the rights of a person in adverse possession of the land.¹⁰¹ This creates the risk that a purchaser or lender may take an interest from a registered owner whose title has been extinguished by adverse possession under the Limitation Act or who, in Tasmania, holds on trust for the adverse possessor.¹⁰²

Title insurance is available to cover this risk. The lender's policy insures the lender against the risk that it has taken its charge from someone other than the true owner of the land.¹⁰³ The owner's policy contains a corresponding provision covering the owner against the risk that the owner of the estate or interest in the land is other than the Insured named in the policy.¹⁰⁴ Claims by owners will often be excluded by their actual knowledge of the fact that a person is in adverse possession, although the policy does not require the insured to make any enquiries or inspections to find out who is in occupation of the land.

Many adverse possession claims arise from boundary encroachments by neighbours. The lender's policy includes broad coverage against 'an adverse circumstance relating to the boundaries of or improvements to the Land that would have been disclosed by an accurate identification survey'.¹⁰⁵ The Company's commentary states that this could include unlawful occupation of a section of the land by a neighbour or the misplacing of a fence.¹⁰⁶ No similarly wide coverage is provided in the owner's policy. In cases where a neighbour's structure (other than boundary walls or fences) encroaches onto the insured's land, the owner's policy covers the insured in the event that another person refuses on account of the encroachment to complete a contract to purchase the land, to grant a mortgage or to comply with their obligations under the lease. Cover is excluded if the insured had actual knowledge of the encroachment at the date of settlement.¹⁰⁷

(c) *Rates, taxes and statutory encumbrances created by overriding legislation*

Unpaid rates and taxes are express exceptions to indefeasibility in the Torrens statutes of Victoria, the Australian Capital Territory and Western Australia,¹⁰⁸ but elsewhere their overriding status depends on the terms of other statutes.¹⁰⁹ Exceptions to

¹⁰⁰ Ibid cl 2.4(b).

¹⁰¹ *Transfer of Land Act 1958* (Vic), s 42(2)(b); *Transfer of Land Act 1893* (WA), s 63; *Land Titles Act 1980* (Tas), s 40(3)(h); *Land Title Act 1994* (Qld), s 185(1)(d); see generally, Sackville & Neave, above n 94, [6.3.104]; Bradbrook, McCallum & Moore, above n 64, [16.85]-[16.88].

¹⁰² *Land Titles Act 1980* (Tas), s138T-ZA; discussed in Bradbrook, McCallum & Moore, above n 64 [16.86].

¹⁰³ Residential Loan Protection Policy RLPP 0300 cl 2.1(a).

¹⁰⁴ Home Ownership Protection Policy 0601, cl 1.5(a).

¹⁰⁵ Residential Loan Protection Policy RLPP 0300, cl 2.4(d).

¹⁰⁶ The Residential Loan Protection Policy Commentary and Explanatory Information, 2.4(d).

¹⁰⁷ Ibid cl 2.2(c). In this event, cover might still be available by way of special endorsement.

¹⁰⁸ *Transfer of Land Act 1958* (Vic) s 42(2)(f); *Land Titles Act 1925* (ACT) s 58(1)(f); *Transfer of Land Act 1893* (WA) s 68.

¹⁰⁹ Bradbrook, McCallum & Moore, above n 64, [4.61].

indefeasibility created by other statutes that override the Torrens statutes have been called 'perhaps the greatest single threat to public confidence in the Torrens system',¹¹⁰ because they may be practically undiscoverable by a purchaser, and the resulting loss may attract no right to an indemnity.¹¹¹

Insured lenders are indemnified under the lender's policy for loss caused when an encumbrance, charge or lien takes priority over the insured mortgage.¹¹² This would include a prior statutory encumbrance to secure rates, taxes and charges, if it prevents the lender from recovering on sale the full amount secured.

The owner's policy insures against 'an encumbrance, writ, charge or lien on the title to the Land because of a mortgage, judgment, unpaid rates, taxes or sums due to local or public authorities'.¹¹³ Cover is provided only for encumbrances existing at the date of registration that were neither mentioned in the contract nor actually known to the Insured at the date of settlement.¹¹⁴

B Gaps in the Economic Security – the Indemnity Scheme

3 Purpose of the Indemnity Scheme

An indemnity scheme, in the form of a statutory scheme of social insurance¹¹⁵ administered by the registrar, is an original feature of most, but not all, systems of land title registration.¹¹⁶ This is a departure from the general law of unregistered conveyancing, which concerned itself only with questions of legal security. The New South Wales and Victorian Law Reform Commissions questioned the need to provide an indemnity scheme for land.¹¹⁷ In its final report, the New South Wales Commission noted that commentators had offered a variety of justifications for the existence of the indemnity scheme, ranging from marketing strategy to arguments based on fairness and

¹¹⁰ Butt, above n 83, 759; Whalan, above n 61, 338; Bradbrook, McCallum & Moore, above n 64, [4.65].

¹¹¹ *Trieste Investments v Watson* (1963) 64 SR (NSW) 98, 107; Bradbrook, McCallum & Moore, above n 64, [4.67].

¹¹² Residential Loan Protection Policy RLPP 0300 cl 2.2(a).

¹¹³ Home Ownership Protection Policy 0601, cl 1.5(g).

¹¹⁴ *Ibid* cl 2.2 (b), (c).

¹¹⁵ The following definition of 'social insurance' is based upon that provided by the [US] Commission on Insurance Terminology: 'A device for the pooling of risks by their transfer to an organisation usually governmental, that is required by law to provide pecuniary . . . benefits to or on behalf of covered persons upon the occurrence of certain pre-designated losses under all of the following conditions [so far as relevant]: coverage is compulsory by law in virtually all instances; eligibility for benefits is derived, in fact or in effect, from contributions having been made to the person by or in respect of the claimant . . . ; the method for determining the benefits is prescribed by law; the benefits for any individual are not usually directly related to contributions made or in respect of him but [often redistribute income]; and the plan is administered by the government': R Mehr and E Cammack, *Principles of Insurance* (5th ed, 1972) 378-90.

¹¹⁶ Although no indemnity scheme is provided in the land title registration statutes of Germany, Israel, Malaysia and Austria: Robert Stein, 'The Torrens Assurance Fund in New South Wales' (1981) 55 *Australian Law Journal* 150, 152-55.

¹¹⁷ New South Wales Law Reform Commission, Discussion Paper No 19 and Law Reform Commission of Victoria, Discussion Paper No 16, above n 1, paras 36-40. In its Issues Paper and Discussion Paper, the New South Wales Commission suggested that there was a case for abolishing the indemnity: *ibid* and New South Wales Law Reform Commission, Issues Paper No 6, above n 1, paras 6.4-6.6. The Victorian Commission expressed no opinion on the question.

government accountability.¹¹⁸ It ultimately recommended retention of the State guarantee with a new emphasis on insurance principles,¹¹⁹ but without reaching any clear view as to the purpose of the indemnity.

The purpose is best understood from an economic perspective. The objects of the Torrens System are themselves economic: to promote security of title and ease of transactions, in order to support the operation of efficient land and capital markets.¹²⁰ The insurance scheme contributes to the objects by providing economic security to those denied legal security, thereby reducing risk and transaction costs. The scheme also reduces the cost of administering the title examination functions of the land registry.

(a) *How the indemnity scheme reduces risks and transaction costs*

Under the Torrens System the State assumes the responsibility for assuring title. It examines title instruments and investigates titles, guaranteeing those that it accepts for registration. This substantially improves the legal security of registered owners, who enjoy better enforcement of their rights. It also reduces the legal insecurity of purchasers, who do not have to investigate the quality of their grantor's title.

But while the system significantly reduces risk, it does not eliminate all the risks. Where interests conflict, the system must provide rules specifying which interest has priority. The legal security enjoyed by the owner of the priority interest is bought at the expense of the security of the other owners.¹²¹

The existence of legal insecurity detracts from the objects of the Torrens System. Security of title is both an end in itself, and a means to achieving the system's 'ease of transaction' object. According to Willett, the objective existence of risk associated with an activity gives rise to subjective uncertainty, a disagreeable state of mind which deters risk-averse people from engaging in the activity.¹²² Purchasers respond to uncertainty about title outcomes by investigating the title, which increases transaction costs and delays in completing land transfers. It was to overcome such notorious difficulties under the old conveyancing law that the Torrens System was introduced by 19th century reformers. Any mechanism for reducing residual risks contributes to the objects of the system both by improving security and by reducing the need to incur transaction costs.

Insurance reduces risk through transfer and distribution.¹²³ The insured transfers the risk to an insurer, in consideration of a premium. Through the pooling of contributions, a fund is accumulated that allows losses to be distributed among the group. Risks experienced by individuals as random and unpredictable become quantifiable when transferred to insurers, as Carter explains:

¹¹⁸ New South Wales Law Reform Commission, Report No 76, above n 1, 4.2-4.10.

¹¹⁹ Ibid Recommendation 1.

¹²⁰ Pamela O'Connor, 'Registration of Title to Land in England and Australia: A Theoretical and Comparative Analysis' (Paper presented at the Fourth Biennial Conference of the Centre for Property Law, University of Reading, UK, 21 March 2002) 4-5 (forthcoming in E Cooke (ed) *Modern Studies in Property Law Vol II* (2003)).

¹²¹ Ibid 5-7, 11-12.

¹²² A H Willett, *The Economic Theory of Risk and Insurance* (1951) 24-26.

¹²³ Ibid 62-68. Willett argues that insurance reduces the cost of production and promotes capital formation by reducing the uncertainty that deters the assumption of risks: 63, 87.

Risk for insurers is of a different nature. By combining a large number of individual exposure units insurers enjoy the advantages expressed in the law of large numbers in that their actual results more closely approximate to expected results. It is the process of risk transfer, and thus of risk reduction, which constitutes the primary function of the insurance industry and is the source of its main contribution to the welfare of society.¹²⁴

Mapp observed that the risks of registered conveyancing are eminently suitable for transfer and distribution through insurance.¹²⁵ The risks are capable of actuarial measurement, and a large group of persons is subject to the same definable peril which strikes randomly and rarely, causing disastrous loss to individuals.¹²⁶ Risk-averse purchasers and lenders would, if they were aware of the risks, be willing to pay a premium to transfer the risk to an insurer.¹²⁷ This indicates the need for an insurance scheme that will enable transacting parties to transfer a broad range of risks.

(b) *How the scheme reduces title registry costs*

As the indemnity scheme includes cover for registry errors and omissions, the registrar is able to bring a risk management approach to the examination of titles. Title investigations are subject to a law of diminishing returns, as more particular and costly inquiries are required to eliminate residual small risks, known to insurers as 'fly specks'. The registrar's responsibility for claims administration enables him or her to weigh the costs of further investigations against the risk of a claim against the fund.¹²⁸ The scheme allows the registrar to adopt a mixed strategy of risk prevention with selective risk assumption, similar to the way that private title insurers operate in the US.

Title insurance can improve upon the protection provided by the Torrens indemnity by giving greater coverage against risk and improved enforcement of rights.¹²⁹ While the indemnity provisions of the Torrens statutes vary, in all jurisdictions the right to indemnity from the fund is subject to exclusions and restrictions, and the enforcement of rights to indemnity is subject to procedural difficulties.

4 *Fault-based restrictions on indemnity*

The trend of recent legislative change has been to restrict rather than to extend right to indemnity, by introducing or extending fault-based exclusions. Governments have become increasingly unwilling to indemnify for losses caused wholly or partly by the fraud or negligence of agents and professionals acting for the claimant, or by the claimant's own want of care.¹³⁰

All the Australasian Torrens statutes originally included a provision indemnifying those who suffered loss through fraud and errors in the registration process. Fault-based

¹²⁴ R L Carter, *Economics and Insurance*, 24.

¹²⁵ Mapp, above n 11, 69-70.

¹²⁶ Ibid; Registrar-General of Land v Marshall [1995] 2 NZLR 189 at 194.

¹²⁷ Mapp, above n 11, 69-70.

¹²⁸ Ruoff, above n 81, p 34, Ch 5 passim.

¹²⁹ Arruñada, above n 6, 3.

¹³⁰ Stein criticised fault-based exclusion of indemnity on the basis that it was inconsistent with insurance principles, Stein, above n 116, 155; for a similar criticism of the introduction of fault-based reduction in the UK, see also Roger Smith, 'Land Registration Reform – The Law Commission's Proposals' [1987] *The Conveyancer* 334, 344.

restrictions have since narrowed the scope of the Torrens indemnity provisions in several jurisdictions:

- In 1954, the Victorian Act was amended to exclude indemnity where the claimant, the claimant's solicitor or agent caused or substantially contributed to the loss by 'fraud, neglect or wilful default'.¹³¹ The provision also places the onus on the claimant to prove that the loss was not caused by such fraud or negligence.¹³²
- In 1983, South Australia introduced an amendment providing that, in an action for compensation from the fund, the court must reduce the amount of the compensation by such amount as is just in view of any contributory negligence on the part of the claimant or a person through whom he claims.¹³³
- New South Wales legislated in 2000 to provide that the Assurance Fund is not liable to the extent that the loss is 'a consequence of any act or omission' by the claimant.¹³⁴ It also excludes liability to the extent that the loss is a consequence of any fraudulent, wilful or negligent act or omission by any solicitor, licensed conveyancer or real estate agent and is compensable under an indemnity given by a professional indemnity insurer.¹³⁵ This introduces a scheme for reduced indemnity from the fund on the basis of an apportionment of responsibility.¹³⁶
- Queensland legislated in 1994 to exclude indemnity if the claimant, a person acting as agent for the claimant, or a solicitor covered by indemnity insurance acting or purporting to act for the person caused or substantially contributed to the loss by fraud, neglect or wilful default.¹³⁷ The *Land Titles Act* (NT) adopts the Queensland provision.¹³⁸

The fault-based exclusions apply to risks arising before or after registration, but are more likely to affect claims for post-registration losses. Since the judicial adoption of immediate indefeasibility, owners are at risk of losing their registered interest, or losing priority to another interest or charge, if a forged or otherwise void instrument is

¹³¹ Section 110(3). In *Registrar of Titles v Fairless* [1997] 1 VR 404 the Victorian Court of Appeal held that s 110(3)(a) only disentitles a claimant to indemnity under s 110(1) for his or her neglect where the neglect was the sole cause of the loss or made a considerable, large or big contribution to the loss.

¹³² *Transfer of Land Act 1958* (Vic), s 110(3)(a). This amendment predates the acceptance of immediate indefeasibility in Victoria. Previously, indemnity was available for loss caused by fraud.

¹³³ *Real Property Act 1886*, s 216 (substituted by Act No 56, 1983, s 9).

¹³⁴ *Real Property Act 1900* (NSW) s 129(2)(b). The amendments were inserted by the *Real Property Amendment (Compensation) Act 2000*.

¹³⁵ *Real Property Act 1900* (NSW) s 129(2)(b). Note that the Minister has a discretion to grant *ex gratia* compensation notwithstanding the exclusion: s 130.

¹³⁶ A similar principle of apportionment for contributory fault was implemented in England and Wales by the *Land Registration Act 1925*, ss 83(5)(a) and 83(6), as substituted by *Land Registration Act 1997*. The change was made on the recommendation of the UK Law Commission and H M Land Registry, *Transfer of Land: Land Registration Law Com No 235* (1995), paras 4.4-4.6.

¹³⁷ *Land Title Act 1994* (Qld) ss 189(1)(b) and (2); discussed in Carmel McDonald, Les McCrimmon and Anne Wallace, *Real Property in Queensland* (1998) 430-34.

¹³⁸ Sections 195(1)(b) and (2), enacted in 2000. The Torrens assurance fund was abolished upon the Territory attaining self-government in 1978, but indemnity was paid by the government under an *ex gratia* scheme on the same terms as under the repealed legislation: Land Law Review Committee of the Northern Territory, *Guarantee of Torrens Title in the Northern Territory*, Discussion Paper (August, 1990) paras 3.3-3.7.

registered against their title by a non-fraudulent purchaser. This could occur through forgery, fraud, duress, incompetence or incapacity.

In forgery cases, the primary causes of the loss are the dishonest actions of the fraudulent party, and the inadequacy of the system's methods for verifying the grantor's identity and detecting forged instruments. Fraudulent persons usually abscond with the money or are unable to compensate their victims, and governments have not been willing to implement more effective methods for preventing identity fraud.¹³⁹ Instead, some governments have sought to protect the assurance fund by shifting losses back to the victims, if they or their agents can be said to have contributed to the loss by their conduct. It has even been suggested that the conduct of victims in permitting a wrongdoer to defraud them is a contributing cause of the loss.¹⁴⁰

In some instances there may be something that the claimant could have done to prevent the risk. They may have unwisely parted with a signed instrument or certificate of title (in jurisdictions where the certificates still serve as proof of the right to transact), or have executed an instrument without reading it. Governments wish to encourage owners to take what precautions they can to prevent the risks.¹⁴¹ Fault-based exclusions are intended to control the problem known to insurers as 'moral hazard' – the tendency of persons to take less care to prevent risks if they are insured against them.¹⁴²

It is questionable whether the exclusions will reduce risky behaviour if, as seems likely, purchasers and owners are generally ignorant of both the exclusions and the risks. The New South Wales Commission thought that the exclusion for losses caused by the fraud of a solicitor or agent was intended to encourage owners to exercise care in selecting an agent.¹⁴³ It concluded that the exclusion was unsound, for it was unfair 'to assume that citizens have any ability to make accurate assessments of their agents' honesty and

¹³⁹ On more effective safeguards against identity fraud, see Celia Hammond, 'The Abolition of the Duplicate Certificate of Title and its Potential Effect on Fraudulent Claims over Torrens Land' (2000) 8 *Australian Property Law Journal* 115, 130-34; Russell Cocks and John Barry, 'Electronic Conveyancing: Challenges for the Torrens System' (2001) 8 *Australian Property Law Journal* 270, 275-77.

¹⁴⁰ According to the Minister's second reading speech for the 2000 amendments to the NSW legislation, the new s 129 was intended to reduce or exclude indemnity to 'a registered proprietor who signs a transfer under the influence of fraud', for the reason that '[i]n such cases the victim is assumed to have control over what is occurring': The Hon. Carmel Tebbutt, Real Property Amendment (Compensation) Bill 2000, Second Reading Speech, Legislative Council Hansard, NSW, 31 May 2000, 6141. This view was rejected by the NSW Law Reform Commission: New South Wales Law Reform Commission, Report No 76, above n 1, para 4.27, and has also found judicial disfavour: *Parker v Registrar-General* [1977] 1 NSWLR 22, 30 (Mahoney J); *Registrar of Titles v Fairless* [1997] 1 VR 404, 418-21.

¹⁴¹ The NSW Law Reform Commission thought that the shift to immediate indefeasibility could potentially result in increased claims on the fund. Under deferred indefeasibility, the former registered owner was entitled to be restored to the register, and the person whose title was rectified had no claim on the fund because the person was deemed to have had no interest in the land. The Commission's researches, however, found no evidence that immediate indefeasibility had had any significant impact on claims: New South Wales Law Reform Commission, Report No 76, above n 1, paras 3.24 – 3.26.

¹⁴² Carter, above n 1244, 30-31, distinguishing this phenomenon from 'moral hazard', which refers to the risk that the insured will engage in opportunistic behaviour, actively seeking to bring about or to inflate the loss.

¹⁴³ The Commission suggested that this was the purpose of the Victorian exception: New South Wales Law Reform Commission, Issues Paper No 6, above n 1, para 6.16.

skills’, and ‘to force them to bear the consequences of the unauthorised acts of their agents’.¹⁴⁴

The exclusion of indemnity for losses caused by the claimant’s solicitor has been justified by the argument that professionals and their insurers, rather than the Torrens assurance fund, should pay for their failings. This policy could, as the New South Wales Commission observed, be achieved without the exclusion. It would be sufficient to give the Registrar a right of recourse against the professional to recover the amount of the indemnity paid by the fund.¹⁴⁵ The New South Wales legislature enacted the exclusion against the Commission’s recommendation.¹⁴⁶

5 *Fault-based exclusion and title insurance*

Title insurance indemnifies an insured owner or lender on a no-fault basis, and contributory negligence does not typically reduce entitlement.¹⁴⁷ Under the owner’s policy, the insured is covered for the risk, post-registration, that ‘someone else claims to have an interest in or an encumbrance, charge or lien on the title to the land because of an act of forgery or fraud’.¹⁴⁸ The lender’s policy covers mortgagees against the risk of a post-registration forgery that ‘discharges, varies or adversely affects’ the mortgage, or causes it to lose priority to another encumbrance, charge or lien.¹⁴⁹

The standard policies impose no conditions on owners or lenders with respect to custody of certificates of title or identity documents. The only relevant standard exclusion is for risks that the insured creates, allows or agrees to at any time.¹⁵⁰ The insurer’s commentary to the lender’s policy indicates that this refers to an intentional act by the insured which causes loss, such as where a lender lends money to a person, knowing the person to be intellectually handicapped and the mortgage is later set aside on that ground.¹⁵¹

¹⁴⁴ New South Wales Law Reform Commission, Report No 76, above n 1, para 4.34. In *Registrar of Titles v Fairless* [1997] 1 VR 404 the exclusion in s 110(3)(a) for losses caused by the fraud of the claimant’s agent was held not to apply where the loss was caused by the agent’s fraudulent acts outside the scope of his authority.

¹⁴⁵ New South Wales Law Reform Commission, Report No 76, above n 1, Recommendations 4, 7, paras 4.25-4.37: McCrimmon notes that a number of Australian and overseas law reform bodies have recommended the subrogation model: Les McCrimmon, ‘Compensation Provisions in Torrens Statutes: The Existing Structure and Proposals for Change’ (1997) 63 *Australian Law Journal* 904, 917.

¹⁴⁶ Also overturning the decision in *Behn v Registrar-General* [1979] 2 NSWLR 496, holding that contributory negligence is not a defence to a claim for fraud, or to proceedings upon a statutory right of action. The Commission recommended in its final Report that indemnity should be denied only where the claimant was wholly responsible for the loss. It also recommended that the scheme should indemnify losses caused by the fraud or negligence of the claimant’s agent: New South Wales Law Reform Commission, Report No 76, above n 1, Recommendations 4, 9 and paras 4.28-4.34.

¹⁴⁷ John McCormack, ‘Torrens and Recording: Land Title Assurance in the Computer Age’ 18 *William Mitchell Law Review* 61-129, 81.

¹⁴⁸ Home Ownership Protection Policy 0601, cl 1.6)(b).

¹⁴⁹ Residential Loan Protection Policy RLPP 0300, cl 2.7(a), (b).

¹⁵⁰ *Ibid* cl 3.2(a); Home Ownership Protection Policy 0601, cl 2.2(a).

¹⁵¹ First American Title Insurance Company of Australia, *The Residential Loan Protection Policy Commentary and Explanatory Information* (2001) (copy on file with the author), para 3.2(a).

While title insurers bear the losses caused by the insured's own carelessness, they are subrogated to any right of action that the insured has against a third party. Arruñada finds that where title insurers operate under title registration systems and do not generate title information, they can be expected to enforce the professional liability of conveyancing intermediaries such as legal practitioners and surveyors.¹⁵² This enforcement role tends to antagonize the legal profession, making it more difficult to market title insurance to their clients. First Title's offer to waive its rights of recourse against conveyancing lawyers who buy its policies for their clients is intended to reduce the profession's opposition to its products.

6 Administration of Claims

A major benefit of title insurance is that it offers better enforcement of claims.¹⁵³ The insured is entitled to payment of the indemnity without any necessity to bring a legal action against the insurer or any other person who caused the loss.

The Torrens statutes vary considerably in their provisions for enforcement of remedies. In four jurisdictions, the Torrens indemnity still operates as a fund of last resort. In South Australia, Western Australia, Tasmania and the Australian Capital Territory, in most cases claimants must first exhaust their remedies against the person who was responsible for the loss or who has benefited by the error.¹⁵⁴ This prerequisite to a claim on the fund does not apply if the bringing of an action would be futile or impossible for reasons such as the death or bankruptcy of the defendant, or if the defendant ceases to be liable to compensate the claimant.¹⁵⁵

The hardships caused by the 'last resort' model of indemnity are well known. The provisions creating remedies against third parties are so complex that in some cases claimants have had difficulty identifying the right person to sue, and the right remedy to pursue.¹⁵⁶ The requirement to sue other defendants, even where the chances of obtaining and enforcing a judgment are remote,¹⁵⁷ delays eventual recovery from the fund and inflates the loss. The limitation period for bringing an action against the Fund can expire while claimants vainly pursue litigation against 'the person primarily responsible'.¹⁵⁸ The costs incurred in obtaining a judgment and attempting to execute it

¹⁵² Arruñada, above n 6, 22-23.

¹⁵³ Ibid 3.

¹⁵⁴ Bradbrook, McCallum & Moore, above n 64, [4,129]; McCrimmon, above n 1455, 911.

¹⁵⁵ For example, because he or she has transferred the title bona fide and for value.

¹⁵⁶ New South Wales Law Reform Commission, Report No 76, above n 1, paras 3.8, 3.31, 2.40. The cases discussed are *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611; *Armour v Penrith Projects Pty Ltd* [1979] 1 NSWLR 98, *Mayer v Coe* (1968) 88 WN (Pt 1) (NSW) 549. Mrs Mayer suffered loss when her solicitor registered a forged instrument of mortgage against her title before absconding. Mrs Mayer's action against the Registrar-General under s 126(1) of the *Real Property Act 1900* (NSW) failed, although the Registrar-General suggested to the Commission that she might have succeeded against him under s 127. Mrs Mayer appears to have borne her loss without ever receiving compensation: *ibid* para 2.40.

¹⁵⁷ See, eg, the case of *Registrar-General v Harris* (1998) 45 NSWLR 404, where the Registrar-General for New South Wales opposed a claim against the fund on the ground that the claimant was required to sue the wrongdoer, despite the fact that the latter was unable to pay his debts. The Registrar unsuccessfully argued that the wrongdoer was not 'insolvent' for the purposes of the Act unless he had actually been adjudged bankrupt.

¹⁵⁸ This occurred in *Breskvar v White* [1978] Qd R 187; *Beardsley v Registrar of Titles* [1992] Qd Conv R 54-440; McCrimmon, above n 1455, 912; Sackville & Neave, above n 94, [6.3.117].

against a ‘wrongdoer’, are generally not recoverable from the fund.¹⁵⁹ In some cases, a claim against the fund requires a claim to be made by commencing court action against the State, Territory or registrar as nominal defendant.¹⁶⁰ The proceedings may be defended in an adversarial manner, with the registrar pleading all available defences.¹⁶¹ Courts have tended to construe the indemnity provisions narrowly against claimants and have been reluctant to attribute liability to the registrar for errors.¹⁶²

The requirement to institute a claim by court action has been relaxed in all jurisdictions except the Australian Capital Territory. All the other statutes now provide that, where a claim lies against the State, Territory or registrar, the claim can be made administratively without the necessity for the claimant to apply to the court. Court proceedings will still be necessary if the registrar does not settle the claim. In New South Wales, the Registrar-General’s power to settle claims administratively is limited as to the amount of compensation that he or she may award.¹⁶³

III WILL TITLE INSURANCE PROMPT A RESTRUCTURE OF THE TORRENS SYSTEM?

The Torrens System is a government program undertaken to support the operation of an efficient market in land and landed securities. Title insurance originated in the unregulated US market, as part of a market response to the same economic imperatives. There are functional similarities between a State guaranteed title backed by a statutory indemnity, and a representation of title backed by an insurance policy. In an era when State and Territory governments are keen to privatise government services, will the establishment of a title insurance industry in Australia and New Zealand prompt a re-assessment of the role of government in managing the risks of registered conveyancing?

A *Incorporating Title Insurance into the Torrens System*

The different roles that title insurers could play in a restructured Torrens System were canvassed by the New South Wales Law Reform Commission. In an issues paper, the Commission originally identified two options: first, ‘whether private title insurance

¹⁵⁹ *Robinson v Registrar-General* (1982) 2 BPR 9634; (1983) NSW ConvR ¶55-138; *Allen v Grangrove Pty Ltd* [1993] 2 Qd R 589; McCrimmon, above n 145, 913.

¹⁶⁰ *Land Titles Act 1925* (ACT), ss 143, 154(1), (2); *Real Property Act 1900* (NSW), s 132(1), subject to s 131.

¹⁶¹ Di Castri says that the purpose of requiring claims to be instituted by proceedings against the registrar is to enable the registrar to raise all available defences to protect the fund: Di Castri, above n 11 [990].

¹⁶² New South Wales Law Reform Commission, Report No 76, above n 1, para 2.55-2.56; Sackville & Neave, above n 94, [6.3.121]. There are some recent indications that the courts may be more willing to give to the indemnity provisions a beneficial interpretation consistent with their remedial purpose: see e.g. *Registrar-General v Harris* (1998) 45 NSWLR 404, para 7, where Mason P remarked that ‘[t]he subject matter of s 126 clearly qualifies it for a beneficial interpretation, however much the sorry history of attempts to make claims on the Fund suggests to the contrary. I see no reasons why claims should be frustrated by a niggardly interpretation.’ See also *Registrar of Titles v Fairless* [1997] 1 VR 404, where the Victorian Court of Appeal construed narrowly the fault-based exclusion in s 110(3) of the *Transfer of Land Act 1958* (Vic).

¹⁶³ Up to \$100,000 or other prescribed amount, unless the Minister determines a greater amount in respect of a particular claim: *Real Property Act 1900* (NSW), s 131(5).

could be substituted for the existing State guarantee of Torrens titles',¹⁶⁴ and second, whether it could complement the existing statutory Torrens indemnity schemes.¹⁶⁵

In its final report the Commission refined these alternatives as follows. The option to have the State guarantee provided by a private insurer was modified to a proposal that the State would out-source the claims administration while itself remaining the underwriter.¹⁶⁶ The Commission impliedly rejected this option in recommending that the insurance scheme remain under the administration of the Registrar-General.¹⁶⁷ The Commission stated that the submissions received on this option generally rejected it, and cited three arguments raised against it: first, that it would compromise public confidence in the administration of the Torrens system; second, that it would make claims administration more costly; and third, that a private insurer would be less publicly accountable to the Parliament.¹⁶⁸ The Commission expressed no opinion on these arguments, although it appears to have dismissed the option from further consideration.

The second proposal considered by the Commission was that 'optional private title insurance could replace or complement the existing Torrens insurance schemes'. In its final report this was reformulated as a proposal that 'private insurance, either optional or compulsory, could replace the State guarantee'.¹⁶⁹ Taken together, the two formulations encompass at least four discrete options, as follows:

1. the abolition of the State guarantee for all losses other than those due to registry error, with registered owners purchasing optional private title insurance;
2. as per (1) above, but with compulsory purchase of private title insurance;
3. retention of the State guarantee to the extent that it already exists, with optional title insurance for the risks not covered by the statutory scheme (i.e., the option discussed in this paper);
4. as per (3) above, but with compulsory title insurance for the excluded risks.

The Commission appears to have rejected each option, stating simply that it '[did] not support the introduction of a system of private insurance'.¹⁷⁰ It gave no reasons of its own, but impliedly adopted the two arguments that it had received in the submissions.¹⁷¹ The first was that it 'would be too costly for the registered proprietor'.¹⁷² The report gives no cost estimate and cites no evidence for this conclusion. The second argument was that holders of Torrens title do not need a title insurance product that was designed to compensate for deficiencies in the American system of conveyancing.¹⁷³ The argument assumes that title insurers would not adapt their products to the different risk

¹⁶⁴ New South Wales Law Reform Commission, Issues Paper No 6, above n 1, para 2.15.

¹⁶⁵ Ibid para 2.20.

¹⁶⁶ New South Wales Law Reform Commission, Report No 76, above n 1, paras 4.11,4.12.

¹⁶⁷ Ibid Recommendation 2.

¹⁶⁸ Ibid para 4.12.

¹⁶⁹ New South Wales Law Reform Commission, Report No 76, above n 1, para 4.13.

¹⁷⁰ Ibid para 4.14.

¹⁷¹ Ibid paras 4.13, 4.14

¹⁷² The Commission said that this was the main argument advanced by all the submissions that considered the question: *ibid* at 4.14. The Commission received no submissions from the insurance industry or from economists.

¹⁷³ *Ibid* para 4.14, citing submission from A Lang.

profile of a system of registered titles. The assumption is not supported by overseas experience.¹⁷⁴

The Commission showed foresight in considering how title insurance and insurers might contribute to the operation of the Torrens System but, lacking the data to evaluate the options, it refrained from expressing concluded opinions on them. The issues and options it raised require further consideration in the light of new information about title insurance products in the Australian market.

Some property lawyers will see a Trojan Horse in any proposal to give title insurers a role in the Torrens System. The suspicion stems from the role played by the US title insurance industry in lobbying for more than a century against the Torrens System in America.¹⁷⁵ In Australia and New Zealand, which have mature Torrens Systems, there is no risk of reversion to unregistered conveyancing. In these jurisdictions, the concerns relate to possible erosion of the social insurance model, with its broad risk cover, its compulsory and universal application, and its complementary provision of legal and economic security through the mechanism of State guaranteed title.

B *The Social Insurance Model*

The present model of social insurance was adopted at a time when there was no private alternative. The entry of title insurers into the local market will prompt debate as to whether the statutory scheme should be abolished or pared back, leaving optional private insurance to fill the gap. Governments looking for ways to cut costs and risks will be attracted to proposals to outsource services, and to shift risks from the State to the transacting parties who can now insure privately. While it is beyond the scope of this paper to examine the options in detail, it is worth briefly noting two advantages of the social insurance model.

First, the universal coverage of social insurance facilitates the distribution of the risk by maximising the pool of insured persons. This would be difficult to replicate under a regime of private insurance, for governments are unlikely to compel people to purchase insurance. The compulsory nature of the social insurance scheme is accepted because of its long history, and because the contribution to the fund is regarded as an integral part of the cost of obtaining a State-guaranteed title. Public acceptance of compulsion might not survive the uncoupling of insurance from the State guarantee. Many people would opt to save the premium and assume the risks themselves, and a few would suffer losses. This could damage public confidence in the security of registered titles and the conveyancing system, contrary to the objects of the Torrens System.

¹⁷⁴ Arruñada, above n 6, 12-14, 20-22.

¹⁷⁵ Some US commentators have been critical of the role played by title insurers, abstract companies and attorneys in organising and funding opposition to the Torrens system in the US: Ted J Fiflis 'Land Transfer Improvement: The Basic Facts and Two Hypotheses for Reform' (1966) 38 *University of Colorado Law Review* 431-75, 432; J V B II, 'Comments: Yes Virginia – There is a Torrens Act' (1975) 9 *University of Richmond Law Review* 301, 320-21; Barry Goldner, 'The Torrens System of Title Registration: A New Proposal for Effective Implementation' (1982) 29 *UCLA Law Review* 661-710, 664-676. McCormack doubts that opposition from title insurers played a significant role in the failure of the US Torrens Systems: McCormack, above n 147, 63-64.

The second advantage of the social insurance model is that it allows for cross-subsidisation. The right to indemnity is not confined to contributors. Persons who have had no dealings with the registry may suffer loss through a registry error or omission, for example, where a prior interest is inadvertently left off the register on first registration of a parcel.¹⁷⁶ The extension of cover to non-contributors insures the registrar against liability for losses arising from registry errors and omissions. This enables the registrar to contain administrative costs by adopting a risk management strategy in conducting title investigations. If the social insurance model is abandoned in favour of optional private insurance, alternative provision would be required to insure the registrar. This might be done by setting aside a component of the registry fees to provide a fund for compensating losses caused by registry error – in effect, a compulsory contribution to an indemnity fund.

IV CONCLUSION

As recently as 1996, the New South Wales Law Reform Commission pondered whether private title insurance and insurers could make a useful contribution to the Torrens System. The arrival on the scene of a private risk-taker enlivens that discussion by expanding the options for managing conveyancing risks.

The Commission identified the options as being, first, that title insurance will complement the Torrens indemnity, providing optional extra risk cover. The second option is to abolish or scale back the cover provided by the statutory indemnity, leaving owners, lenders and purchasers to insure privately. Under a variant of this option, the purchase of title insurance would be compulsory, at least for certain risks. The third option is for a public-private partnership in which the statutory scheme and compulsory contributions to the fund would be retained, with the administration of claims outsourced to private insurers.

This paper has focussed on the first option, and concluded that private title insurance can contribute to the attainment of the economic objects of the Torrens System. Insurance can promote the 'security of title' object to the extent that it enables owners, purchasers and lenders to transfer to an insurer certain risks that the Torrens System leaves with them, namely:

1. loss in the pre-registration period arising from a matter that renders the interest void or unenforceable, or from loss of priority to a competing interest;¹⁷⁷
2. that the insured's title will be subject to certain types of overriding interests;
3. that the insured will suffer loss through the fraud, forgery or negligence of his or her solicitor, or agent, or through a loss to which the insured has contributed through his or her own negligence, and that in some jurisdictions, indemnity will be excluded or reduced on 'fault' grounds.

¹⁷⁶ In all jurisdictions, a person who is deprived of an interest in land as a consequence of the bringing of the parcel under the Torrens statute is entitled to compensation: for a list of the provisions, see Bradbrook, McCallum & Moore, above n 64, [4.126].

¹⁷⁷ The Torrens System has a partial remedy for the priority risk in the form of caveats and priority notices, but title defects arising from the instrument or transaction are cured only upon registration.

The primary effect of title insurance is to improve economic security by providing compensation for losses. To the extent that title insurers actually clear the title of adverse claims,¹⁷⁸ it also improves legal security.

Title insurance is useful even for risks that are covered by the Torrens indemnity, because it offers a quicker, easier and cheaper claims process. Claims under a title insurance policy are subject to no requirement that the insured must first sue a ‘wrongdoer’, or institute legal proceedings against the insurer. The insured’s position after indemnification is likely to be better under title insurance than under the Torrens indemnity, which does not cover the insured’s legal costs.

Title insurance can also contribute to achieving the ‘ease of transaction’ object of the Torrens System. By reducing risks, title insurance has the dual effect of improving the insured’s economic security and reducing the costs of conveyancing transactions. Some conveyancing expenditures, such as identification surveys, are undertaken to prevent specific risks. If the risks can be transferred to an insurer, purchasers and lenders enjoy new possibilities for reducing their costs. The extent of the saving depends on local conveyancing practices and costs, and the willingness of purchasers¹⁷⁹ to accept economic security as a substitute for assurance of a clear title. If the saving is less than the amount of premium, title insurance will be more difficult to sell.

While title insurance compensates for some of the deficiencies of the State guarantee, the benefits are enjoyed only by those who buy a policy. Private insurance does nothing to promote systemic reform, and may even retard it by masking the deficiencies in the public scheme and by creating an expectation that it is imprudent to rely on the State guarantee.¹⁸⁰

State and Territory governments, ever anxious to shift their risks and shed costs, will be receptive to arguments that private title insurers are better able to manage insurance risks and to administer claims than the registrars. Their response may include further restrictions on the scope of the Torrens indemnity, exclusion of subrogated claims by title insurers, and exclusion of claims against the fund by privately insured persons in respect of insured losses.

Whether title insurance proves a boon to the Torrens System will depend largely on how governments react to it. In the best scenario, it could complement the system by improving economic security, lowering transaction costs, and modelling the insurance approach that the New South Wales Law Reform Commission recommended for the Torrens fund. It could also provide a catalyst for reform by focussing attention on the gaps in the security provided by the Torrens System. The worst scenario would see governments abandoning universal social insurance in favour of optional private insurance, many people opting to go without cover and the occasional person suffering disastrous loss without recourse to compensation.

¹⁷⁸ See above, text accompanying n 34.

¹⁷⁹ It is assumed that lenders will readily accept full monetary indemnity as a substitute for their interest, but purchasers and owners facing eviction may have different preferences: Miceli, above n 28, 128-29.

¹⁸⁰ Goldner suggests that, in the US, title insurance impedes reform of the recordation system by compensating for the system’s inadequacies: see, eg, Goldner, above n 1755, 661.