

TITLE INSURANCE – IS THERE A CATCH?

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In 1996, after a lengthy inquiry into the adequacy of the compensation provisions of the State's *Real Property Act* 1900, the New South Wales Law Reform Commission concluded that it did not support the introduction of private title insurance in relation to land under the Torrens system.¹ Apparently nobody told the Australian Prudential Regulatory Authority (APRA), which later in the same year licensed the first title insurance company to operate as a general insurer in the Australian market. The largest of the US title insurers, the First American Title Insurance Company ('First American') established Australian subsidiaries, First American Title Insurance Company of Australia Pty Ltd and First Title Company Pty Ltd, trading jointly under the name 'First Title'. First Title commenced offering title insurance policies for residential mortgage lenders on the local market in 1998. In March, 2003, Stewart Title Ltd, a subsidiary of the large US-based company Stewart Title Guaranty Co, was the second title insurance company to be licensed by APRA as a general insurer.

Until now, the local conveyancing market has been relatively unaffected by the forces of globalisation. We now have the prospect of two of the largest international title insurers competing to offer title insurance products and property services in the Australian market. Lawyers and licensed conveyancers will have to consider how to respond to the new competitive environment, and how the availability of title insurance will affect their strategies for managing the risks of conveyancing.

Both companies propose to market home owner's and residential lender's policies through lawyers, for purchase on behalf of clients.² First Title is also packaging title insurance for mortgage lenders with a document processing, settlement and registration service, for a fee from \$295 inclusive of the insurance premium.³ The company is presently selling about 3000 lender's policies per month in Australia. Stewart Title does not propose to offer conveyancing services in competition with lawyers. It will operate as a wholesaler, selling insurance policies to legal practitioners.⁴ It will also offer a range of ancillary real estate information services, including property reports and online property auctions. In the future, we can also expect to see policies tailored for commercial buyers and lenders.

The insurers are hoping to establish a close and co-operative business relationship with the legal profession. Lawyers are likely to be wary and sceptical of the insurers and their products. As they examine the policies and premium rates, lawyers will be looking for the catch.⁵ Are the premiums too high, or unsustainably low? Do the policies cover real and substantial risks, or notional perils

¹ New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss*, New South Wales Law Reform Commission, 76 (New South Wales Law Reform Commission, Sydney, 1996) para 4.14. The Commission gave no reasons of its own for its rejection of private title insurance.

² The companies' policies are not yet available on their websites. Copies of First Title policies can be requested by email to info@etitle.com.au.

³ This is the fee, as at April, 2003, for processing a security over a single property. Higher fees apply for additional securities.

⁴ Karen Lavelle, 'Title Insurance – Is it Wanted Here?' (2002) 10 *Law Society Journal* 46, 48

⁵ For some of the concerns and misgivings of lawyers, see Lavelle, *ibid*.

that hardly ever eventuate? What risks are excluded by the fine print? Are the title insurers free-riding on the security provided by the Torrens system, with its State guarantee of registered title? Is the insured sum too low to provide adequate cover? Will the insurers actually pay up, promptly and without a quibble, when a genuine claim is made? Will they exercise their subrogated rights as insurer to sue the insured's lawyer when things go wrong in a conveyancing transaction? Will they seek to control the way that lawyers conduct conveyancing for title-insured clients?

This paper does not purport to answer all these questions, but focuses on one basic question about title insurance – what can it usefully add to our present systems and strategies for managing the risks of conveyancing? The starting point is to explain what title insurance is and what risks are covered by a standard owner's policy of the kind likely to be marketed in Australia by the two title insurers. The focus then shifts to an evaluation of what an owner's policy adds to the security provided by the Torrens guarantee of registered title.

I WHAT IS TITLE INSURANCE?

Title insurance is a contract of indemnity based upon an agreed representation of the state of the title as at the policy date. The policy date is the date of settlement, and the representation is the title that the insured expects to acquire in the conveyancing transaction. Under the 'recordation' or deeds registration systems of the US, the representation as to title is provided in the form of an attorney's opinion, based upon a process of search and examination of title documents. For Torrens system land, the representation is based on the title search of the land registry, adjusted for any other title information actually known to the insured before the policy date.

Title insurance has two effects. Firstly, it entitles the insured to an indemnity if the title as represented in the policy document proves to be wrong, and actual loss results.⁶ Secondly, the insurer is under a duty to defend the title as represented in the policy. Title insurance indemnifies against risks that existed at the policy date, but were unknown to the insured and did not cause a problem until after settlement. In this respect it differs from property/casualty insurance, which indemnifies against future risks, that is, risks arising from events after the policy date.⁷ Casualty underwriters rely on actuarial assessment of risk to set premiums at a level to match expected losses.⁸ Title insurers adopt a very different risk management strategy. Since the insurance covers existing but unknown risks, title insurers spend considerable resources in detecting and eliminating risks.

In some US States, title insurers are involved at every stage in the conveyancing process – conducting title searches, preparing title opinions and settling real estate transactions. By managing the conveyancing process, they seek to resolve existing risks before they trigger claims, and prevent new risks arising from errors in the transaction. This emphasis on generating title information and eliminating risks explains why title insurers seek to 'vertically integrate' their underwriting business with conveyancing services.⁹ Ziff cites a 1997 study by Michael Braunstein which reports that, of the 40 US States that responded to his survey, in only eight States was it usual for lawyers to 'close'

⁶ Bruce Ziff, 'Title Insurance: The Big Print Giveth, But the Small Print Taketh Away?' (Paper presented at the Taking Torrens into the 21st Century Conference, Auckland, NZ, 19-21 March, 2003) 3

⁷ A M Best, *Title Insurance and Industry Statistics – 2001*, October 2002, American Land Title Association website < <http://www.alta.org/membrship/indrsrc/AMBEST02.pdf> > (accessed 9 April, 2003) 3

⁸ Ibid 3-4

⁹ Benito Arruñada, 'A Transaction-Cost View of Title Insurance and its Role in Different Legal Systems' (2002) 27 *The Geneva Papers of Risk and Insurance* 582, 583-86

or settle real estate transactions.¹⁰ In the other 32 States, closing services were handled by real estate agents, title insurers, a corporate closing company or an escrow agent.¹¹

Given their long history of involvement US conveyancing, American title insurers naturally expected to operate in the same way when they expanded into other countries. When First Title's sister company, First Canadian, entered the Ontario market in 1995, it moved into the conveyancing business in competition with lawyers. It established 'home closing centres', based upon the US model of escrow agents, which provided title-insured residential conveyancing services.

The Law Society of Upper Canada responded to this competitive challenge by moving into the title insurance business. In 1997 the Law Society established a title insurance company, TitlePlus, based upon the American model of bar-affiliated title insurance companies. TitlePlus offers title insurance policies through a re-insurance arrangement with a US-based title insurer, Chicago Title, and also provides cover for errors and omissions by lawyers in conveyancing transactions.¹² TitlePlus has been successful in Ontario, and is expanding its services into other Canadian provinces.¹³ In the meantime, First Canadian abandoned its home closing centres, which had not been a success. First Title has no plans to establish similar centres in Australia.

The distinction between title insurance and property/casualty insurance has blurred in recent years. Since 1998, title insurance policies offered by US insurers commonly include casualty-type cover against certain post-settlement risks.¹⁴ So title insurance policies now provide coverage mainly, but not exclusively, for risks that existed at or before the date the insured acquired the property. Usually these are risks that are unknown to the insured and to his or her lawyer at the time of the settlement, although it is possible to negotiate a special endorsement to the policy to insure over known risks. This is known as 'defective title' insurance. For example, if it is discovered before settlement that a garage on the subject property encroaches over the title boundary, an endorsement may be purchased to provide indemnity against loss in the event that the neighbour should in future require the insured to demolish or move the garage.¹⁵

II OVERVIEW OF THE OWNER'S POLICY

This section of the paper provides an overview of the main areas of risk coverage likely to be available under title insurance policies in the Australian markets. First Title was proposing to launch its owner's policy in Australia in 2002, but decided to trial it in New Zealand first. Stewart Title has said that its policies will be similar to those offered by First Title. This paper therefore examines First Title's New Zealand owner's policy ('the New Zealand policy'), with a disclaimer that it is merely indicative of the cover that may soon be available in Australia. First Title is already offering a residential lender's policy in Australia, the Residential Loan Protection Policy No RLPP 0300. Generally speaking, the risk cover for lenders is more extensive than for owners. Lender's policies will not be examined in this paper.¹⁶

¹⁰ Ziff, above n 6, 26, citing M Braunstein, 'Structural Change and Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing' (1997) 62 *Missouri Law Review* 241, 265.

¹¹ Ibid

¹² Ziff, above n 6, 10

¹³ Ibid 14

¹⁴ J Paul Rieger, 'Evolution to Revolution: Enhanced Title Insurance Protection' (2001) 34 *Maryland Bar Journal* 25

¹⁵ This example is drawn from a First Canadian policy, where the risk was not covered by the standard policy, as it is under the New Zealand policy, cl 1.5(r).

¹⁶ The lender's policy is discussed in Pamela O'Connor, 'Double Indemnity: Title Insurance and the Torrens System' (2003) 3 *QUT Law and Justice Journal*, available online at http://www.law.qut.edu.au/about/ljj/editions/v3n1/oconnor_full.jsp.

In New Zealand, First Title is offering an owner's policy (the Home Ownership Protection Policy) for a one-time premium of NZ\$225 for residential properties valued up to \$500,000. Premiums for more valuable properties are calculated on an ad valorem scale.¹⁷ The policy will normally be taken out by purchasers at or before settlement. The benefits of the policy enure so long as the insured or his or her heirs has an interest in the property and can suffer loss.¹⁸ The policy covers actual losses incurred in relation to the insured risks up to the limit of the 'insured sum'. The 'insured sum' is the purchase price of the property, updated in line with increases in market value to 200% of the purchase price. Costs incurred by the insurer in defending the insured's title are not capped, and do not reduce the indemnity coverage.¹⁹

A What risks are covered?

Bruce Ziff's analysis of standard owner's policies in Canada groups the covered risks into six clusters, 'for ease of exposition'.²⁰ This simplification can also be usefully applied to the New Zealand policy.

(i) Standard title risks

The first cluster deals with the risk that the insured fails to acquire the title as represented in the policy schedule. These include the risk that the owner of the estate or interest in the land is different to the person specified in the schedule as the purchaser (cl 1.5(a)); the home at the address listed in the schedule is not located on the land (cl 1.5(b)); 'someone lodges a dealing after settlement which prevents your interest in the land from becoming registered' (cl 1.5(c)); 'someone else owns an interest in the land or has an easement or right of way that affects the title to the land' (cl 1.5(d)); 'other persons have rights to the land arising out of a lease, contract, option, right of possession or access order' (cl 1.5(h)); 'there is an encumbrance, writ, charge or lien on the title to the land because of a mortgage, judgment, unpaid rates, taxes or sums due to local or public authorities (cl 1.5(g)). A catch-all in clause 1.5(j) covers any other defect that affects the title.

(ii) Defects in the documentation

The second cluster covers risks arising from defects in the title documentation, including where 'a document has not been properly signed or registered resulting in a defect in the title to the land' (Cl 1.5(e), and 'forgery, fraud, duress, incompetency or incapacity result in a defect in the title to the land': (cl 1.5(f)). This cover might seem redundant in a Torrens system under which registration of a void instrument confers an immediately indefeasible title on a bona fide purchaser, but consider a situation like that in *Breskvar v Wall*.²¹ The bona fide purchaser, Alban, was stopped from registering his transfer from Wall by a caveat lodged by the Breksvars, who had been deprived of their registered title when Wall was registered as owner through the fraud of his agent. The purchaser, Alban, found himself embroiled in an equitable priority dispute, which he won on the basis that he held the better equity. If he had been title insured, the insurer would have defended his title at its expense, and either settled the matter or compensated him if he lost.

¹⁷ See fees schedule in *A Lawyer's Guide to Insuring Clients against Property Law Risk under a Home Ownership Protection Policy*, First Title New Zealand website < <http://1title.net/home.htm> > (accessed 7 April, 2003), p 3. At the time of writing, Stewart Title Ltd did not have a website for Australia.

¹⁸ In fact the policy insures the person named as the insured in the schedule, his or her spouse who receives the title for nominal consideration; the insured's heirs on his or her death; and any trustee of a trust settled by the insured or beneficiary of a trust of which the insured is the trustee, to whom the insured transfers the title: cl 3.1.

¹⁹ Subject to what is said in the text accompanying n 28 below.

²⁰ Ziff, above n 6, 16ff

²¹ (1971) 126 CLR 376 (HCA)

(iii) Marketability problems

The third cluster deals with existing defects that affect the marketability of the land when the insured comes to sell, lease or mortgage it. Cover is provided where an existing title defect (cl 1.5(i)) or an encroaching structure other than boundary wall or fence (cl 1.5 (r)) entitles a purchaser to rescind a contract or a lessee to avoid complying with their lease obligations, or where the insured is refused a mortgage on account of the defect or encroachment.

(iv) Existing contraventions

The fourth cluster covers existing contraventions of laws and rights. This category is more extensive than under the equivalent 'Gold' Policy offered in Canada by First Title's sister company, First Canadian.²² The cluster include the risk that a structure (other than a fence or boundary wall) must be 'removed or remediated [sic]' because it encroaches onto a neighbour's land or registered easement (cl.5(s)), or because it was constructed or modified without building or development approvals: (cl 1.5(n) – note that liability under this clause is capped at \$50,000 (cl 5.2). The policy also covers an existing breach of a covenant, restriction or right of way recorded on the title to the insured land (cl 1.5(q)). The insured is covered if a pre-existing breach of a zoning law or of any rights reserved on the title to the land adversely affects the use of the land as the insured's home (cl 1.5(l)). Two clauses deal with the breach of laws *per se* without specifying the kind of adverse effect upon the insured. Clause 1.5(p) covers breach of subdivision laws, and clause 1.5(o) applies where notice of certain legal contraventions is recorded in public records.

(v) Post-acquisition risks

The fifth cluster deals with post-acquisition risks, that is, risks arising from events that occurred after the policy date. As previously mentioned, title insurance used to be limited to risks in existence at the policy date. Cover is now available for certain risks occurring after registration: encroachment of a neighbour's structure (other than a fence or boundary wall) onto the insured's land (cl 1.6(a); and breach of compensation obligations by persons having temporary access over the insured's land (cl 1.6(c)). An important post-registration risk covered by the policy is that, 'someone else claims to have an interest in or an encumbrance, charge or lien on the title to the land because of an act of forgery or fraud, or a mistake by the title registry or a local authority (cl 1.6(b)). This risk would normally attract a right to compensation under the Torrens indemnity provisions.

(vi) Residual risks

The sixth cluster is a residual category, into which Ziff places the risk that there is no legal right of pedestrian or vehicular access to the land (cl 1.5(k)). A further risk in this category is that other persons having the right to use the land for mining or for construction or maintenance of utility connections (eg gas lines) cause damage to the land and fail to remediate or compensate the insured (cl 1.5(m)).

The other residual risks are the existence of adverse circumstances affecting the land that would have been disclosed by an up-to-date survey of the land (cl 1.5 (t)), or any proposals or notices that would have been disclosed if a Land Information Memorandum Report had been obtained from the local authority (cl 1.5(u)).²³ The purpose of the latter two clauses is to enable purchasers to dispense with a survey and LIM report, and insure over the risks that they might have disclosed. For title insurers, it is a major selling point that the purchase of title insurance brings offsetting savings in disbursements for title and property investigations.

The scope of risk cover provided by cl 1.5(t) is uncertain. First, it is unclear what would be disclosed by an 'up-to-date' survey. The term is undefined, and surveys may encompass various

²² See Ziff, above n 6, 16-17

²³ The Land Information Memorandum is issued by local authorities in New Zealand.

inquiries, such as boundaries, encroachments, compliance with laws, permits and covenants etc. Secondly, it is unclear what is meant by an ‘adverse circumstance [that] affects the land’. For example, the policy does not expressly cover the risk that the insured discovers after settlement that a fence or party wall encroaches onto his or her land or onto a neighbour’s land. Encroachment by party walls and fences are expressly excluded so far as concerns (a) marketability problems under cl 1.5(r); (b) forced removal action against the registered owner under cl 1.5(s) and (c) encroachment of structures onto the insured’s land occurring after registration (cl 1.6(a)). Assuming that an existing encroachment would have been revealed by ‘an up-to-date survey’, this is arguably an ‘an adverse circumstance that affects the land’ within the scope of cl 1.5(t).

However, title insurers generally do not cover encroachments by fences and party walls. These encroachments are very common, as the dividing structures are usually erected with the agreement of both landowners on what are assumed to be the title boundaries, without conducting a survey.²⁴ The fence or wall may be misplaced by as little as a few centimetres. To provide cover for existing fence and party wall encroachments would tend to encourage neighbour disputes and opportunistic claims by insured persons.

It is to be hoped that the scope of cl 1.5(t) will be clarified before the owner’s policies are launched in Australia. If not, lawyers acting for title-insured purchasers would be wise to seek clarification from the insurer before omitting to check for encroachments in reliance on cl 1.5(t).

Insurance against known risks

Insurance against known risks is not part of the standard policy, but may be obtained by special endorsement to a standard policy. This may be subject to a limit on the amount of the claim, and an adjustment to the premium. At present, a purchaser who discovers a defect before settlement has the choice of either refusing to complete the contract (if the defect is one that gives a right to rescission), or electing to proceed with the transaction and assume the risk. Defective title insurance adds a third option for dealing with known risks.

B What risks are excluded?

It goes without saying that any risks not specifically listed as an ‘insured risk’ is excluded. In addition, the standard exclusions in clause 2 of the New Zealand policy are

- risks which the insured creates, allows or agrees to,
- risks disclosed in the contract of purchase,
- risks that are actually (not merely constructively) known to the insured at the policy date,²⁵
- risks which cause the insured no loss or damage
- post-registration risks other than those specifically covered in clause 1.6,
- risks arising from business activities other than residential leasing,
- matters recorded on the title register at the policy date (although some contraventions are covered),
- the existence of laws relating to use or ownership (but some breaches of the laws are covered),

²⁴ Jonathan Flaws, personal communication to the author, 10 April, 2003.

²⁵ Clause 7 defines ‘know’ or ‘knew’ to mean actual knowledge. It expressly excludes constructive knowledge or knowledge of what may be found in public records. The title insurer does not rely solely on what is known to the insured personally. It also makes inquiries of the legal practitioner acting for the insured purchaser.

- dilapidation or infestation of structures, or that they were not constructed in compliance with building codes or standards (as opposed to construction without a required building or development permit, which is covered),
- environmental contaminants or hazardous waste,
- native title claims,²⁶ and
- any additional exclusions listed in the policy schedule.

C Claims

In the event of a valid claim, clause 4.6 of the policy provides that the insurer may (i) pay out the adverse claim against the insured's title; (ii) negotiate a settlement; (iii) prosecute or defend an action or other proceeding; (iv) pay the insured the amount required by the policy; (v) take other action to protect the insured, or (vi) cancel the policy by paying out the insured sum together with all accrued costs and legal fees. Ziff points out that the main effect of cancellation is to terminate the duty to defend.²⁷ The policy itself sets no cap on the insurer's liability for costs incurred in the defence of the claim. In effect, the cancellation option allows the insurer to limit its defence costs to the insured sum.²⁸

III WHAT DOES THE POLICY ADD TO EXISTING RISK COVER?

This overview of the elements of the standard New Zealand policy shows that title insurance covers many risks beyond the purview of the Torrens system, such as marketability problems, the cost of rectifying existing contraventions of laws and property rights, the risk that the land will turn out to be land-locked, or that the insured will be required to remove an encroaching structure placed there by a predecessor. These are not title risks, and are not covered by the Torrens guarantee of title. In residential conveyancing, most purchasers simply assume the risk of unknown defects in the quality of the property. Title insurance will give them an extra option - to transfer the risks to an insurer.

A second point that emerges from the analysis of the New Zealand policy is that title insurance covers some risks that may be created by errors and omissions in the conveyancing process. For example clause 1.5(e) covers the risk that the insured incurs actual loss because a document is not properly signed or registered, resulting in a defect in his or her title. This could be due to an error or omission by the insured's legal practitioner. The insured may have an action in negligence against his or her solicitor for a loss that is covered under the policy. If the insurer indemnifies the loss, it is entitled under the principle of subrogation to pursue the insured's cause of action against the legal practitioner.

Since the exercise of subrogated rights against lawyers would sour their relationship with the legal profession, some title insurers are willing to waive their rights against a legal practitioner who acts for a title-insured client in a conveyancing transaction. First Title, for example, has offered to give a written waiver of its subrogated rights against a practitioner should the insured make a claim under the policy.²⁹ The waiver applies so long as the practitioner has acted honestly, even if negligently, in the conveyancing transaction.³⁰ The net result is that many of the risks of

²⁶ Ziff regards the exclusion of aboriginal title claims as a major exclusion in Canada: Ziff, above n 6, 22. In Australia, it is clear that a grant of freehold title permanently extinguishes native title rights over the land: *Fejo v Northern Territory* (1998) 195 CLR 96.

²⁷ Ziff, above n 6, 19.

²⁸ Ibid

²⁹ Lavelle, above n 4, 50; Jonathan Flaws, 'Compensation for Loss Under the Torrens System: Extending State Compensation with Private Insurance' (Paper presented at the Taking Torrens into the 21st Century Conference, Auckland, NZ, 19-21 March, 2003) 18

³⁰ Ron Zucker, 'Title Insurance: Here Today, Here Tomorrow' (Paper presented at the Accredited Specialists conference

conveyancing errors and omissions are transferred from legal practitioners and their professional indemnity (PI) insurers to title insurers. This is likely to offer relief from rising PI premiums and claims.³¹

A third observation about the owner's policy outlined above is that many of the covered perils are title risks. This prompts the question – why would anyone want to insure against title risks, given that a Torrens system that operates on the principle of immediate indefeasibility provides better security for purchasers than any other conveyancing system? There are two answers to this. Firstly, an owner's policy covers many title risks that are excluded from the Torrens guarantee. Secondly, there are many situations where the Torrens system guarantees, not an indefeasible title, but an entitlement to compensation or damages from the State for the loss of an estate or interest. In cases where the Torrens system offers only money rather than land, title insurance provides much better enforcement of rights to indemnity.

A Title risks excluded from the Torrens guarantee

In principle, the Torrens system provides the State's guarantee that every registered title to an estate or interest or encumbrance in land is valid, enforceable and free from adverse prior unregistered interests. In reality, there are many exceptions to the conclusiveness of registered title. Every textbook and commentary on the Torrens system points out the inroads made by statutory exceptions to indefeasibility, whether they arise from the provisions of the Torrens statutes themselves, or from other overriding statutes. In addition to statutory exceptions, it has long been recognised that the principle of indefeasibility does not prevent the courts from enforcing against registered proprietors *in personam* obligations arising from their transactions and conduct, whether occurring before or after registration.³² In some cases, this can result in the owners being required to give up the whole or part of their registered title, notwithstanding that registration gave them an immediately indefeasible title to it.³³ Rights enforceable in personam are treated as functionally equivalent to an exception to the indefeasibility principle.

(a) Overriding interests

(i) Exceptions to indefeasibility created by the Torrens statutes

In Victoria, the statutory exceptions to indefeasibility listed in s 42(2) of the *Transfer of Land Act* 1958 include, in para (b), any rights subsisting under any adverse possession of the land. If the total period of continuous adverse possession exceeds the statutory limitation period (normally 15 years),³⁴ the title of the registered owner is extinguished by statute, even though his or her name remains on the register. By virtue of s 42(2)(e), a purchaser who buys a title that is statute-barred receives nothing, even if he or she registers a transfer from the previous owner shown on the register. Since registered owners take subject to the rights listed in s 42(2), the purchaser has no entitlement to indemnity under s 110 of the Act. A purchaser may insure against this risk, and will be covered so long as he or she had no actual knowledge of the adverse possessor's rights at the policy date. (See clauses 1.5(a), (d), (h), (j)). In order to be covered for the risk, the purchaser is not required to survey the land or to inspect it for evidence of adverse possession: cl 1.5(t).

New South Wales Law Society, Sanctuary Cove Qld, July 2001) 4.

³¹ The effect of title-insured conveyancing upon PI premiums and claims for conveyancing errors and omissions is likely to be significant. In Ontario, three years after the Law Society established TitlePlus, the Society's professional liability committee LawPro reported that PI premiums had fallen to the lowest level in five years, and that real estate claims had been overtaken by litigation claims: Flaws, *ibid* 19, citing LPIC http://www.LawPRO.ca/news/archive_sections/insurance_levy_surcharge.asp and *LPIC News*, June 2000, 16 at http://www.lawpro.ca/news/pdf/LPICnews_2000June.pdf.

³² *Frazer v Walker* [1967] 1 AC 569, 585; [1967] NZLR 1069, 1077 (Lord Wilberforce)

³³ *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ)

³⁴ *Limitation of Actions Act* 1958 (Vic), s 8,

Other interests that override the title of a registered owner include ‘any public rights of way’ (s 42(2)(c)), ‘any easement howsoever acquired subsisting over or upon or affecting the land’ (s 42(2)(d)), and the interest of a tenant in possession of the land. The risks of such undiscovered interests are covered by cl 1.5(d) and (h) of the policy. Unpaid land tax, unpaid rates and certain other charges are also protected as overriding interests under s 42(2)(f). Provided that these debts are not actually known to the insured at the policy date, they are covered by cl 1.5(g).

(ii) Exceptions created by overriding statutes

Unrecorded interests may also subsist over registered land through the operation of other statutes that override the indefeasibility provisions of the *Transfer of Land Act*. For example, s 203(1) of the *Local Government Act 1989* (Vic) operates to vest in the local council in fee simple title to any land that has been dedicated as a public highway. The provision overrides the indefeasibility of registered title. In *Calabro v Bayside City Council*,³⁵ certain land forming a cul-de-sac had been dedicated to the public before 1939 by being marked as a road on a registered plan of subdivision and used as a road by the public. When introduced on 1 November 1989, s. 203 (2) of the *Local Government Act 1998* (Vic) provided that a public highway vests in fee simple in the Council of the municipal district in which it is located. In 1995, the appellant C purchased the land from the then registered owner. Balmford J held that the subject land vested in the council by virtue of the former s. 203(2) on 1 November 1989, the commencement date of the provision, thereby divesting the then registered proprietors. It appeared that no-one was aware of the statutory vesting, and there was in any case no procedure for altering the title register to record it. Balmford J said that the statutory vesting of the land in the council was wholly inconsistent with the indefeasibility provisions of s 42 of the *Transfer of Land Act 1958*, and as the later statute, the *Local Government Act 1989* must prevail.³⁶ Therefore it was not possible for C to obtain a fee simple estate in the land by registration of a transfer in 1995, and there was no provision for him to be compensated for a loss that arose from the vesting of title under the *Local Government Act*.³⁷

A person in the position of Mr C who held a title insurance policy would be covered under clauses 1.5(a), (d) and (j)). Examples of deprivation of registered title through vesting under other statutes have also caused losses in other States,³⁸ and recently in New Zealand, where a provision of the *Local Government Act 1974* (NZ) similar to that considered in the *Calabro* case was held to effect an automatic vesting of a road in the local authority, notwithstanding that it appears to be included in a certificate of title.³⁹

(b) *In personam rights*

One of the most uncertain areas of Torrens jurisprudence is the scope of the rights that may be enforced against registered proprietors in personam. Although some of the Australian Torrens statutes now expressly recognise the exception,⁴⁰ its ambit is still defined by principles that lie outside the Torrens system. Because the principle of immediate indefeasibility can sometimes

³⁵ [1999] 3 VR 688; (1991) 106 LGERA 402 (SCV, Balmford J)

³⁶ Although s 42(2)(c) provides that the registered title is subject to ‘any public rights of way’, Balmford J found that the two statutes were inconsistent because s 203 of the *LGA* provided for the vesting in fee simple without reference to s 44(2) of the *TLA* or any other Act: [1999] 3 VR 688, paras 52-54.

³⁷ [1999] 3 VR 688, para 45.

³⁸ *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603; *Vickery v Municipality of Strathfield* (1911) 11 SR (NSW) 354; *Pratten v. Warringah Shire Council* [1969] 2 N.S.W.R. 161; *Quach v. Marrickville Municipal Council* (1990) 22 N.S.W.L.R. 55; Pamela O’Connor, ‘Public Rights and Overriding Statutes as Exceptions to Indefeasibility of Title’, (1994) 19 *M.U.L.R.* 649

³⁹ *Man O War Station Ltd v Auckland City Council* [2002] 3 NZLR 584 (PC)

⁴⁰ *Land Title Act 1994* (Qld) s 185(1)(a); *Real Property Act 1886* (SA) s 71IV; *Land Title Act* (NT) s 189(1)(a); discussed in Adrian Bradbrook, Susan V MacCallum and Anthony P Moore, *Australian Real Property Law* 3rd ed., (Lawbook Co, Sydney, 2002) [4.69]

cause harsh outcomes, and the Australian courts have maintained a very high threshold for conduct to be counted as statutory fraud, parties are increasingly probing the limits of the exception. A successful in personam claim may result in an order that a registered owner give up all or part of his or her registered title. Where this occurs, the statutes provide no indemnity, for the loss does not arise from the operation of the Torrens system.

It is impossible to generalise about whether an owner's policy covers a deprivation of land through a successful in personam claim. The claims are heterogenous in nature, and rarely result in a proprietary remedy against a registered owner. A court is unlikely to order the owner to give up all or part of his or her registered title unless it would be unconscionable in the circumstances for him or her to retain it.⁴¹ Assume, for example, a purchaser (P) registers a transfer from a co-owning couple, knowing that the husband has sustained serious brain injury and is subject to a guardianship order. In proceedings brought on behalf of the husband to rectify the register, a court finds that he is entitled to raise the plea of *non est factum*, and that P should have known this.⁴² While there is no finding of fraud against P, the court finds that the husband has an action against him in personam, and orders P to retransfer the property. Prima facie, P's loss is covered by cl 1.5(e) (document not properly signed or registered, resulting in title defect) and 1.5(f) (incompetency or incapacity results in a defect in the title). But given the court's finding, the insurer may be entitled to rely on cl 2.2(a), which excludes cover for risks created or allowed by the insured.

Most successful in personam actions are brought against mortgagees. An example of where title insurance can cover the risk of loss through an in personam claim is where a mortgagee is prevented from enforcing its security under the principles in *Garcia v National Bank of Australia*.⁴³ In that case a bank was held to be disentitled from enforcing its mortgage even though it had not been fraudulent. Mr and Mrs Garcia had mortgaged their home to the bank as security for their company's debt to the bank. While her consent had not been obtained by undue influence, Mrs Garcia did not understand the extent or purpose of the guarantee, nor that it was secured by a mortgage over her home. The High Court held that the bank should have realised that, as a married woman, Mrs Garcia may have trusted her husband in matters of business and that accordingly, the husband might not fully and accurately explain to her the extent of the guarantee secured by the mortgage. Knowing those circumstances and that she had nothing to gain from the transaction, the bank should have either explained the transaction to her, or ensured that she received independent advice. Since it had failed to do so, it was unconscionable for the bank to enforce its security against her.

Lenders commonly deal with the risk of a *Garcia* type claim by ensuring that the mortgagor/guarantor obtains independent legal advice. If this miscarries, a title-insured lender can rely on its cover against the risk that 'the mortgage is invalid or unenforceable as an encumbrance against the title' (RLPP 0300, cl 2.1(d)). The cover is excluded if the invalidity or unenforceability stems from a breach of consumer or credit laws (RLPP 0300, cl 3.3) but this would not include a breach of the procedures indicated in *Garcia*.

(c) *Risk of loss in the pre-registration period*

One of the major gaps in the risk cover provided by the Torrens system is that the purchaser or mortgagee will lose priority to another interest between settlement and registration. It is only upon registration that the holder of an interest takes free of unregistered interests. The existence of the

⁴¹ *Duncan v McDonald* [1997] 3 NZLR 669, 683 (Blanchard J); *Ryan v Brain* [1994] 1 Qd R 681; *Vassos v State Bank of South Australia* [1993] 1 VR 316, 332 (Hayne J); Peter Butt, *Land Law* 4th ed., (Lawbook Co, Sydney, 2001) [2082], Lyn Stevens and Kerry O'Donnell, 'Indefeasibility in Decline: The In Personam Remedies' (Paper presented at the Taking Torrens into the 21st Century Conference, Auckland, NZ, 19-21 March, 2003) 10-19

⁴² The scenario is based on the findings in *Lissa v Cianci* (1993) NSW ConvR 55-667, with the difference that the personal equity was raised against a registered mortgagee rather than a purchaser.

⁴³ (1998) 194 CLR 395

‘registration gap’ has given rise to much litigation over priorities, and nice legal controversies concerning the effect in a priority dispute of earlier interest holder’s failure to lodge a caveat.

This is a risk that is eminently suitable for transfer to an insurer. The New Zealand owner’s policy covers the pre-registration risk that ‘someone lodges a dealing after settlement which prevents your interest in the land from being registered’ (cl 1.5(c), and the risk that ‘someone else owns has an interest in the land’ (cl 1.5(d)). Lenders are also covered against the pre-registration risk that ‘an encumbrance, charge or lien has priority over the insured mortgage’⁴⁴ and the risk that ‘the mortgage is invalid or unenforceable as an encumbrance against the title’⁴⁵

First Title’s mortgage processing procedures provide an example of how a title insurer can deal with ‘gap’ problems by a strategy of risk assumption. Where the company provides mortgage processing services to a lender, it does not attend settlement. The lender disburses the loan funds on the basis of undertakings by other parties to provide the documentation later, and the insurer assumes the risk that the undertakings will be breached and that enforcement action may be required.⁴⁶ This can result in cheaper processing costs, provided that the losses from breaches do not exceed the costs saved by dispensing with attended settlements.

B Risks covered by the Torrens guarantee

Some title-insured risks may also give rise to an entitlement under the compensation provisions of the Torrens statutes. For example, an owner may be deprived of his or her title, or find it encumbered by a mortgage, if a forged transfer or mortgage is registered by a third party who is not implicated in the fraud. This gives rise to a right to seek compensation under the Torrens statutes (subject to fault-based exclusion or apportionment). The same risk is also covered under the owner’s policy, cl 1.6(b)(i).

Where there is an overlap, the owner or lender will be better off insuring against the risk and claiming under the title policy. The general scheme of the Torrens statutes is that the State provides compensation as a last resort, to be used when remedies against other parties are precluded or exhausted. Many of the statutes have been amended in recent years to deny or apportion compensation payment in case of fault by the claimant or by his or her legal practitioner or agent. Title insurance provides no fault cover, and an indemnity of first resort. The insured is not required to sue anybody else who may be at fault. If another person is liable for the loss, the insurer can pursue them under its right of subrogation.

Title insurance policies are written in plain English. They are construed strictly against the insurer, and in line with the insured’s reasonable expectations.⁴⁷ No *contra preferentum* rule applies to the interpretation of the Torrens compensation provisions, most of which are poorly drafted and unclear in their application to certain situations. Where actions are brought against the State or the registrar as nominal defendant, registrars have generally considered it their duty to raise all possible defences and legal objections to the claim. Although the compensation provisions are remedial legislation and should be given a beneficial interpretation, courts have often construed them in a legalistic and niggardly fashion.⁴⁸ The law reports document numerous cases in which claimants have

⁴⁴ First Title, Residential Loan Protection Policy, RLPP 0300, cl 2.2(a)

⁴⁵ Ibid, cl 2.1(d).

⁴⁶ First Title proposal document provided via personal communication to the author by Ellie Comerford, Managing Director, First Title, 21 March, 2003.

⁴⁷ Ziff, above n 6, fn 7

⁴⁸ See *Registrar-General v Harris* (1998) 45 NSWLR 404, para 7, where Mason P, referring to s 126 of the *Real Property Act 1900* (NSW) 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 Marcia Neave, C J Rossiter and M A Stone, *Sackville & Neave’s Property Law: Cases and Materials* 6th ed., (Butterworths, Sydney, 1999) [6.3.121]; NSWLRC, above n 1, paras 2.55-2.56.

experienced extraordinary difficulty, delay and cost in pursuing compensation under the Act. The reasons for their difficulties have more to do with legal technicalities than the substantive merits. For some claimants, the Torrens indemnity has turned out to be a costly mirage, luring them into expensive and ultimately fruitless litigation.⁴⁹

Most owners want the mud, not the money. The title insurer's duty to defend the insured's title is probably of greater value to the insured than the entitlement to indemnity for actual loss. The insurer may defend legal actions brought against the insured, and may prosecute actions on behalf of the insured. Any costs involved in defending the insured's title are borne by the insurer, and do not reduce the insured sum. Jonathan Flaws estimates that 'internationally, 45% of all payments under title insurance policies are paid to lawyers to assist in resolving claims relating to covered risks'.⁵⁰ In effect, title insurance provides a defence fund for fixing title problems. Both First Title and Stewart Title take a pro-active approach to insured risks, settling or resolving problems before they result in a claim. In many cases, this means that the insured gets the title as represented in the policy clear of defects and adverse claims, rather than monetary compensation in lieu. The Torrens system never comes to the aid of a deprived party in this way.

Because of these advantages, title insured persons will find it more advantageous to claim under their policies than under the Torrens statutes. A case may arise in which the insured's loss is greater than the insured sum, eg, where the value of the land at the date of the loss is more than 200% of the purchase price. This will not be common, as most claims arise soon after settlement, and the quantum is usually less than the value of the land.⁵¹ In such a case, Flaws says that the insurer will cover the costs of making the claim under the Torrens provisions and taking steps to mitigate the loss.⁵² 'The amount paid by the Crown will be applied to fully compensate the owner with the title insurer only recovering what it has already paid'.⁵³

IV CONCLUSION

The paper started with the question: what can an owner's policy add to the existing methods for managing the risks of property transfer? It emerges from the above discussion that it adds the following:

1. It provides coverage against certain title risks not covered by the Torrens State guarantee and compensation provisions, including many overriding interests, and the risk of loss of priority to another interest in the interval between settlement and registration. It may in a few cases provide cover against deprivation of property by remedies granted against a registered proprietor under a successful in personam claim, although this is more likely to avail lenders than owners.
2. Where an insured risk is one that also entitles the insured to compensation under the Torrens provisions, it is more advantageous to claim under the policy. The policy provides no fault cover as a 'first resort' without legal technicalities and procedural hurdles, and without the

⁴⁹ For similar criticisms, see S R Simpson, *Land Law and Registration* (Cambridge University Press, Cambridge, 1976) 179-183; Thomas W Mapp, *Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens System* (Alberta Law Review, University of Alberta, Edmonton, Alberta, 1978) 69; Sim, "The Compensation Provisions of the Act" in G.W. Hinde (ed.) *New Zealand Torrens System Centennial Essays* (1971) 138-157; Les A McCrimmon, 'Compensation Provisions in Torrens Statutes: The Existing Structure and Proposals for Change' (1993) 67 *Australian Law Journal* 904; R Stein, 'The Torrens Assurance Fund in New South Wales' (1981) 55 *Australian Law Journal* 150.

⁵⁰ Flaws, above n 29, 11

⁵¹ A M Best says that 'the bulk of title insurance claims occurs shortly after closing and represents low-dollar costs', with the occasional severe claim: Best, above n 7, 14

⁵² Flaws, above n 29, 17

⁵³ Ibid

need to incur costs in making a claim. Moreover, the insurer will try to fix the title problem, which is usually a preferable outcome for the insured than to sustain a loss and receive compensation.

3. An owner's policy covers a range of perils that are not title risks and have nothing to do with the Torrens system, such as the risk of having to rectify an existing contravention of zoning and building laws. (See, in particular, the risks in the fourth and sixth clusters).
4. An owner's policy may be endorsed to insure over a known risk. Previously, a purchaser's options were limited to (i) rescission (if the remedy was available in the circumstances); and (ii) assumption of the risk.
5. If a purchaser is title insured, many risks of errors and omissions in the conveyancing transaction are transferred from the legal practitioner (or his or her PI insurer) to the title insurer. PI insurance is of limited value to a client, since it is the lawyer who is the insured, and the client has to show that the loss results from the lawyer's negligence. The client is better off being able to claim on a no-fault basis under a title insurance policy. The lawyers and their insurers are also better off if the client is title insured. Since the title insurers are willing to waive their subrogated rights against a negligent but honest practitioner, the risk of the errors and omissions remains with the title company.
6. In some cases, title insurance may allow a purchaser to dispense with off-title searches and surveys, relying on their insurance cover against unknown defects. This can produce savings to offset the cost of the insurance premium. The precise scope of this protection is presently unclear, but may be clarified before the owner's policies are marketed in Australia.

Although this analysis shows that title insurance can offer real benefits for purchasers, it is a matter for commercial assessment whether the benefits justify the costs. The costs of insuring are easy to evaluate since the premium is measured in dollars. The benefits of the additional risk cover are harder to evaluate. It is one thing to identify what perils are covered by a policy, and quite another to assess the probability of those perils striking a particular individual.

It is conceptually tenable to explain the Torrens system as an integrated set of strategies for managing the risks of land transfer. Insurance has always played an important role in risk management. This was recognised by the New South Wales Law Reform Commission, which recommended that the Torrens indemnity scheme be remodelled with a greater focus on insurance principles.⁵⁴ Some progress has been made in that direction, as all jurisdictions except the Australian Capital Territory have legislated to allow administrative settlement of claims without the need to institute legal proceedings.⁵⁵ At the same time, legislatures have moved away from the insurance model by extending fault-based restrictions on entitlement to compensation.⁵⁶ If the Torrens compensation scheme is not to operate along insurance lines, private title insurance can usefully supplement our options for managing the risks of transferring registered land.

⁵⁴ NSWLRC, Report No 76, above n 1, Rec 1 and para 5.1

⁵⁵ Court action is still necessary if the claim is not able to be settled.

⁵⁶ The history of these provisions is detailed in O'Connor, above n 16.