

also in other ways. It would seem that the attachment of a registration schedule to a guaranteed search would put a conveyancer on enquiry. In the case of land which is not electronic transactions land, so, too, would an unsigned memorial entered on the register. See Hayes (1983) 1 BCB 39 at 39-40.

- 23 See, for example, the Land Transfer Regulations 2002 (SR 2002/213), reg 31.
- 24 For the steps to be taken to secure the protection given by the Land Transfer Act 1952, s 172A, in a normal conveyancing transaction, see Hayes (1983) 1 BCB 39 at 40.

## (7) PRIVATE TITLE INSURANCE

### 9.102 Title insurance in New Zealand

Sections 172-181 of the Land Transfer Act 1952 provide that compensation may be claimed for loss which has already been suffered through the operation of the Act.<sup>1</sup> The extent of, and the limitations upon,<sup>2</sup> those provisions have already been noted.<sup>3</sup>

The opinion has been expressed that the introduction of computerised registration of titles by the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 has increased both the risk of fraud and the possibilities for error.<sup>4</sup> Time will tell whether those misgivings are justified. It has, however, been pointed out that:<sup>5</sup>

New registration procedures provide a shift from a system that contained inbuilt protections to avoid fraud, and registration of incorrect instruments, to one that relies on the skill and integrity of the users of the system. It is for this reason [that] the system is more open to abuse. Title registration is at the mercy of the dishonest or incompetent conveyancer.<sup>6</sup>

Having regard to these developments it is perhaps opportune that private title insurance has recently become available in New Zealand.<sup>7</sup> Depending upon the terms of the policy such insurance can:

- (1) Provide cover in respect of losses which are outside the scope of the statutory compensation scheme;<sup>8</sup> and
- (2) "Provide economic protection against a broad range of property law risks that the state has no business or interest in covering".<sup>9</sup>

Title insurance originated in the United States of America more than 100 years ago<sup>10</sup> "as a market response to the uncertainties inherent in a conveyancing system based on registration of deeds rather than titles".<sup>11</sup> In *Federal Trade Commission v Ticor Title Insurance Co* Justice Kennedy, delivering the majority opinion of the Supreme Court of the United States, said:<sup>12</sup>

Title insurance [in the United States] is the business of insuring the record title of real property for persons with some interest in the estate, including owners, occupiers, and lenders. A title insurance policy insures against certain losses or damages sustained by reason of a defect in title not shown on the policy or title report to which it refers. Before issuing a title insurance policy, the insurance company or one of its agents performs a title search and examination. . . .

The title search and examination are major components of the insurance company's services. There are certain variances from State to State and from policy to policy, but a brief summary of the functions performed by the title companies can be given. The insurance companies exclude from coverage defects uncovered during the search; that is, the insurers conduct searches in order to inform the insured and to reduce their own liability by identifying and excluding known risks. The insured is protected from some losses resulting from title defects not discoverable from a search of the public records, such as forgery, missing heirs, previous marriages, impersonation, or confusion in names. They are protected also against errors or mistakes in the search and examination. Negligence need not be proved in order to recover.

Early title insurance policies were contracts of indemnity which covered the person insured only against loss or damage arising out of existing defects in title or encumbrances other than those specifically excluded.<sup>13</sup> Modern policies are likely to be broader in scope in two respects:<sup>14</sup>