

NSW Law Reform Commission REPORT 76 (1996) - TORRENS TITLE: COMPENSATION FOR LOSS

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Terms of Reference and Participants

To the Honourable Jeff Shaw QC MLC
Attorney General for New South Wales

Dear Attorney

Torrens title: compensation for loss

We make this final Report pursuant to the reference to this Commission dated 20 January 1988.

The Hon Justice David Hodgson

(Commissioner-in-Charge)

Professor Michael Tilbury

(Commissioner)

The Hon Justice Mahla Pearlman

(Commissioner)

Mr Craig Kelly

(Commissioner)

June 1996

Terms of Reference

On 20 January 1988 the Commission received the following terms of reference:

To inquire into and report on:

- (i) the extent to which all or some of the Torrens System Register should be subject to a State guarantee, and the extent of this guarantee;
- (ii) the operation of the Assurance Fund, established under the *Real Property Act 1900* (NSW) ("RPA"), to assess whether it is working as intended and as efficiently as possible; and
- (iii) any related matter.

Participants

The Law Reform Commission is constituted by the *Law Reform Commission Act 1967*. For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

The Hon Justice David Hodgson*

Mr Craig Kelly

The Hon Justice Mahla Pearlman

NSW Law Reform Commission: REPORT 76 (1996) - TORRENS TITLE: COMPENSATION FOR LOSS

The Hon G J Samuels AC QC (from 3 April 1993 - 28 February 1996)

Professor Michael Tilbury

(* denotes Commissioner-in-Charge)

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Executive Summary

The Torrens System of land registration operates in New South Wales under the *Real Property Act 1900*. It is a system whereby title to land is dependent on registration. This means that the person whose name is recorded on the Register as proprietor is, in most cases, assured of a good title free from any unregistered interests. However, from time to time, whether as a result of error by the Land Titles Office or fraud by a third party, a person may be wrongfully deprived of title. Where this occurs the *Act* provides for compensation to be paid. In effect the State guarantees good title.

The Commission's terms of reference required it to review the compensation provisions (*Real Property Act 1900*, s126, 127). The Commission found that there have been significant problems of interpretation because these provisions are complex and obscure. The result was that the circumstances in which compensation is paid are very limited.

The Commission, in the course of its inquiry, considered the following options:

abolition of the State guarantee of Torrens title;

continuation of the State's role as insurer of Torrens titles, but with the insurance provided by private insurance companies;

acceptance by registered proprietors of responsibility for insurance of Torrens titles (either in addition to or in substitution for the present State guarantee); and

retention of State guarantee, but with improvements to the current compensation scheme.

The Commission recommends the fourth option, namely that the State guarantee of title should be retained but with improvements to the compensation provisions by relying more directly on principles of insurance. This approach was strongly supported in submissions to the Commission.

The Commission recommends the introduction of a new statutory scheme which will allow persons suffering loss to claim directly against the Registrar-General without first having to commence a court action to exhaust other remedies.

The Registrar-General will then be subrogated to any rights of the claimant against any person who has contributed to the loss or any fund which is liable to indemnify the claimant against the loss or person responsible for the loss. Proceedings against third parties responsible for the loss will still be available to a claimant, subject to a notification requirement.

The Commission has also recommended that compensation should be available for losses arising not only from mistakes in the Land Titles Office and forgery, but also losses arising from fraud generally and negligence of third parties.

The recommendations in this report have been framed bearing in mind the greater capacity of the Land Titles Office, relative to proprietors suffering loss, to pursue an action against a wrongdoer with respect to the Torrens System.

List of Recommendations

Recommendation 1

State guarantee of title should be retained and a new statutory scheme should be introduced with greater focus on insurance principles.

Recommendation 2

Any person suffering compensable loss arising out of the operation of the Torrens system and its administration should be able to claim compensation directly from the Registrar-General by lodging a claim with the Land Titles Office.

Recommendation 3

Compensation should be available for losses (whether or not involving deprivation of land) arising out of the operation of the Torrens system which result from fraud, negligence, the bringing of land under the Real Property Act, errors in the Register, and errors and loss of documents in the Land Titles Office.

Recommendation 4

A person with a compensable claim who is wholly responsible for the loss should not be able to recover compensation from the Registrar-General, but a person with a compensable claim should not be precluded from recovery where the loss is caused by the fraud or negligence of an agent.

Recommendation 5

Corporations whose administrators (directors and other officers in management) have knowingly performed unauthorised acts resulting in a compensable claim should be granted compensation in such a manner as to ensure that the administrators themselves do not benefit unfairly from compensation by virtue of their relationship with the company; for example, if the administrators who are fraudulent or negligent are shareholders of the company.

Recommendation 6

A person with a compensable claim may only bring an action to recover compensation against the Registrar-General if that person's claim for compensation from the Registrar-General is rejected or the person refuses the Registrar-General's offer of compensation.

Recommendation 7

A person suffering loss can (without lodging a compensation claim) bring an action for damages against another person responsible for the loss other than the Registrar-General. The Registrar-General must be notified of the commencement of the action. After being notified, the Registrar-General may intervene as a co-defendant in the action and join other co-defendants, or compensate the plaintiff. If compensation is paid to the plaintiff, the Registrar-General is subrogated to the plaintiff's rights as in Recommendation 9.

Recommendation 8

A plaintiff who has obtained judgment in respect of loss against a wrongdoer where notice has not been given to the Registrar-General, or who has compromised proceedings against a wrongdoer without approval of the Registrar-General cannot claim compensation for that loss against the Registrar-General.

Recommendation 9

If the Registrar-General pays compensation to a person with a compensable claim, the Registrar-General is subrogated to that person's rights and can recover the compensation from the person responsible for the loss or that person's insurer, or where the wrongdoer is deceased or bankrupt or insolvent, against that person's estate.

Recommendation 10

The limitation period runs from the time the compensable claim is lodged against the Registrar-General.

Recommendation 11

Where an insurer (such as a professional indemnity insurer who insures against loss caused by the dishonest or negligent acts of the insured) has paid compensation to the person suffering loss, the insurer should be unable to recover compensation from the Registrar-General.

Recommendation 12

Any person with a compensable claim should recover the amount of the loss he or she has suffered. This should be determined in accordance with ordinary rules as to quantum of damages and interest.

Recommendation 13

Apportionment of liability for the loss will occur between the parties responsible for the loss including apportionment of responsibility for the loss arising from contributory negligence or other fault of the person with the compensable claim.

Recommendation 14

Claims for compensation should be lodged with the Registrar-General within 1 year after the claimant is aware of the loss, with a discretion in the Registrar-General or the Court to extend this period. Proceedings to enforce such claims should be subject to the normal limitation period of 6 years.

Recommendation 15

Statutory authorities should be required to give notice of resumptions; the Registrar-General should be required to record them; and losses suffered as a result of reliance on the Register should be compensable, where the resumption has not been recorded.

Recommendation 16

Section 133(b) of the *Real Property Act* should be repealed.

1. Introduction

THE REFERENCE

1.1 On 20 January 1988 the Commission received the following terms of reference:

To inquire into and report on:

- (i) the extent to which all or some entries in the Torrens System Register should be subject to a State guarantee, and the extent of this guarantee;
- (ii) the operation of the Assurance Fund, established under the *Real Property Act 1900* (NSW), to assess whether it is working as intended and as efficiently as possible; and
- (iii) any related matter.

1.2 The reference was received as a joint inquiry with the Law Reform Commission of Victoria under the Commission's standing reference on co-operative law reform projects, made on 15 October 1987.

Co-operation with Victoria

1.3 The Law Reform Commission of Victoria was undertaking a similar reference as part of a major review of land law, which was announced by the then Attorney-General of Victoria, the Honourable J H Kennan MLC, on 1 May 1986. The two Commissions had undertaken this reference on a co-operative basis. This co-operative basis ceased when the Law Reform Commission of Victoria was abolished in 1992.

Publications and consultations

1.4 Discussion Paper 19¹ was issued jointly with the Law Reform Commission of Victoria in June 1989. Issues Paper 6² was published by this Commission in December 1989. The Discussion Paper outlined the Torrens system compensation schemes operating in New South Wales and Victoria, and set out the arguments for and against the retention of the compensation schemes. It also suggested proposals to reform the compensation scheme if it were to be retained. The Issues Paper supplemented and expanded the discussion of the State's guarantee of title in New South Wales and in Victoria.

1.5 Submissions were invited and received in respect of both papers. A list of persons who made submissions is contained in Appendix A to this Report. The Commission has also consulted representatives from the Land Titles Office of New South Wales on a regular basis in relation to the preparation of this Report.

1.6 Unfortunately there has been a significant lapse of time between publication of the consultation papers, receipt of the submissions and preparation of the final report. The Commission undertook additional research in 1991 but thereafter deferred further work because of requests by successive Attorneys General to give priority to other projects. The project was revived in the latter half of 1995.

OUTLINE OF THE TORRENS TITLE SYSTEM

The introduction of the Torrens system

1.7 The Torrens system of title by registration was created by Sir Robert Richard Torrens, who introduced it into South Australia in 1857. The "old" system, which operated before the introduction of the Torrens system throughout Australia (and continues to operate with respect to some land), was a system of conveyancing by deeds, whereby "title to land was established by the production of deeds tracing the chain of title to the person who wished to pass on his interest in the land."³ The fundamental principle underlying the deeds system is that it depends on the execution and preservation of original valid instruments, so that in the event of a deed being invalid, for example, through forgery or by operation of statute, no transfer is effected.⁴

1.8 There were few trained lawyers in the colonies in the first 50 years of settlement. Fraud and corruption were rife, property rights were insecure and title transfer confusing.⁵ Prior to the passage of the first *Real Property (Torrens) Act*, there had been many calls for amendment of the conveyancing laws in South Australia. The Torrens system responded to those calls by making title to land depend upon registration and not upon the execution of documents. The execution of title deeds (for example, transfers, leases and mortgages) was to be merely the means of obtaining registration and was not intended to affect the land or pass any estate or interest until registration. The Torrens system has thus been described as a system of “title by registration” rather than “registration of title”.⁶

1.9 The Torrens system was introduced into New South Wales in 1862, following its successful implementation in South Australia. In New South Wales the “old” system is still important, but conversion of Old System title to the Torrens system is actively pursued.⁷

The purpose of the compensation provisions

1.10 Sir Robert Torrens explained the purpose of compensation as a complement to the “indefeasibility of title” created by his new system.⁸ Under this principle, the person whose name is recorded on the Register as proprietor is assured of a good title free from unregistered encumbrances. To provide for the possibility (which did eventuate) that the system might sometimes operate to deprive proprietors of their interests, an assurance fund was established with the aim of providing financial compensation to such proprietors.⁹

[T]he principle of compensation as enacted can perhaps be based on solid theoretical grounds as an integral part of a system of registration of title. A study of the present provisions in the statutes perhaps yields two reasons for their enactment. ... First, the provisions were designed to compensate any person sustaining loss through omission, mistake or misfeasance of the Registrar or any of his officers. Secondly, and perhaps this is more important, the provisions are a “corresponding counterpart to the indefeasible title which the Act sets out to confer on the registered proprietor”.¹⁰

1.11 This view accords with the submission of the Land Titles Office:

The administration of the Torrens system is in the hands of State officials. The State is therefore obliged to compensate persons who suffer any loss through an error of those officials. ... In that a person can, without any fault on his or her part, be deprived of an estate or interest in land by the operation of the Torrens system, compensation must be available. In other words, the indefeasibility and compensation provisions of the *Real Property Act* have a logical and inseparable connection.¹¹

1.12 However, some writers argue that the institution of the compensation fund resulted from the need to overcome the hostilities of lawyers opposed to the Torrens system,¹² and “to afford to the administration such a measure of latitude in its approach to conveyancing problems as was considered essential to the smooth and economic flow of business.”¹³ As a result, “access to the Fund is often difficult, if not impossible to achieve upon the application of any principle of insurance.”¹⁴ The virtual inaccessibility of the Fund can perhaps be explained on the basis that it was created primarily to allay the fears of hostile lawyers, rather than with any insurance principle in mind.

THE MAIN FEATURES OF THE CURRENT COMPENSATION SCHEME

The problem of inaccessibility

1.13 The original compensation provisions made access to compensation depend on litigation, whether against the person responsible for the loss, such as a fraudster, or against the Registrar-General.

In the cases where suit remains as the sole method we have the spectre, unknown to the generality of insurance: not only must the arsonist be found but he or she must be proceeded against, for the loss occasioned by the destruction of the house, without receiving payment, before recourse may be had to the policy. This defeats the whole purpose of insurance if the Fund was

established to provide compensation where loss arises through the operation of title by registration. But, we have suggested that the reason or reasons for the Fund were otherwise and our conclusion suggests also that our assessment and that of others is correct.¹⁵

1.14 These comments were made prior to an amendment to the compensation provisions which now makes access to compensation marginally easier. The recent changes allow the Registrar-General to settle claims of up to the amount of \$100,000, (unless the relevant Minister approves a higher amount) without the person suffering loss having to commence an action.¹⁶

Grounds for recovery of damages and compensation

1.15 The compensation provisions (which are discussed in detail in Chapter 2) permit the recovery of loss by a damages action against a wrongdoer, including loss resulting from the deprivation of land on the grounds of:

fraud;

land having been brought under the provisions of the RPA by Crown grants or private applications;

the registration of another person; and

loss resulting from an error, omission or misdescription in the Register.

1.16 The provisions also generally enable an action to be brought against the Registrar-General as nominal defendant, where the above grounds of recovery are inapplicable or where loss has resulted from an error in the Land Titles Office. No recourse may be had to the Fund where land may be recovered under s 124 of the Act, which contains a list of exceptions to indefeasibility of title.

1.17 An indefeasible title is one which cannot be set aside due to a defect which existed before a person became a registered proprietor. For example, if the land is Old System title and A's solicitor forges A's name on a conveyance of A's land to B, no interest passes to B even if B registers the deed, because the deed is void as a result of the forgery.¹⁷ However, under the Torrens system, if B is not guilty of fraud, he or she obtains a title which cannot be upset, or in other words is "indefeasible" whilst A would have lost his or her land. The concept of indefeasibility of title is explored in more detail later in this Report.

1.18 The Torrens Assurance Fund is maintained as a Special Deposit Account administered by the Registrar-General. This Fund came into operation in December 1992 pursuant to s 133A of the RPA.¹⁸ Compensation payments prior to the introduction of the amendment came from Consolidated Revenue.¹⁹

OPTIONS FOR REFORM IN THE CONSULTATION PAPERS

1.19 Chapters 3 and 4 of the Discussion Paper and Chapter 6 of the Issues Paper set out the following options for reform of the State guarantee of title:²⁰

abolition of the State guarantee of Torrens title;

continuation of the State's role as insurer of Torrens titles, but with the insurance provided by private insurance companies;

acceptance by registered proprietors of responsibility for insurance of Torrens titles (either in addition to or in substitution for the present State guarantee); and

retention of State guarantee, but with improvements to the current compensation scheme.

PRIMARY RECOMMENDATION

1.20 The Commission's investigations have led it to conclude that the existing provisions of the RPA containing the State's guarantee of title could be further improved to fulfil the insurance principles underlying the Fund.²¹

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This Report recommends the adoption of the fourth option, that State guarantee of title be retained with improvements to the compensation provisions.²²

OUTLINE OF REPORT

1.21 Chapter 2 discusses the law in relation to the compensation provisions in New South Wales as it stood at the time of publication of the Issues Paper. Chapter 3 discusses the 1992 statutory changes and the recent case law on the compensation system. Chapter 4 assesses the submissions received on the four options for reform. Chapter 5 contains the recommendations of the Commission.

1.22 Appendix A contains a list of persons who made submissions. Appendix B contains statistical information on the nature of claims made against the Registrar-General of New South Wales. The Commission is very grateful for the assistance provided by the Land Titles Offices of New South Wales.²³

FOOTNOTES

1. New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss* (Discussion Paper 19, June 1989).
2. New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss* (Issues Paper 6, December 1989).
3. D J Whalan, *The Torrens System in Australia* (Law Book Company, Sydney, 1982) at 13.
4. R T J Stein and M A Stone, *Torrens Title* (Butterworths, Sydney, 1991) at 4.
5. See R T J Stein and M A Stone, *Torrens Title* (Butterworths, Sydney, 1991) at 20.
6. *Breskvar v Wall* (1971) 126 CLR 376 at 385-386 per Barwick CJ.
7. Mr Noel Benham, a senior administrative officer at the Land Titles Office estimated that as at 19 April 1993, 40,000 Old System parcels remained to be converted to Torrens title. In the year 1993-4, 3,821 land parcels were converted to Torrens, while 3,650 were converted in 1994-5: New South Wales, Department of Conservation and Land Management, *Annual Report* 1993-94 at 35; and New South Wales, Department of Land and Water Conservation, *Annual Report* 1994-95 at 28.
8. R R Torrens, *The South Australian System of Conveyancing by Registration of Title* (Register and Observer General Printing Offices, Adelaide, 1859) at 9.
9. Stein and Stone at 349.
10. Whalan at 345.
11. Registrar-General, Submission (6 April 1990) at 9, para 28(a) and (b).
12. Stein and Stone at 349-350. Most authors agree that this was a compelling reason: R A Woodman and P J Grimes, *Baalman on The Torrens System in New South Wales* (2nd edition, Law Book Company, Sydney, 1974) at 389.
13. R A Woodman and P J Grimes, *Baalman on The Torrens System in New South Wales* (2nd edition, Law Book Company, Sydney, 1974) at 389.
14. Stein and Stone at 349.
15. Stein and Stone at 350.
16. These and related provisions are discussed in more detail in Chapter 2 of this Report.

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17. A J Bradbrook, S V MacCallum and A P Moore, *Australian Real Property Law* (Law Book Company, Sydney, 1991) at para 4.03; Stein and Stone at 4-6.
18. See statements for Land Titles Office in New South Wales, Department of Land and Water Conservation, *Annual Report 1994-5: Financial Statements*.
19. A brief history of the funding of the Assurance Fund is contained in NSWLRC IP 6 at paras 3.1-3.2.
20. NSWLRC IP 6 at para 6.3.
21. NSWLRC IP 6 at paras 5.6-5.11.
22. See Recommendation 1, at x, below.
23. For a detailed discussion of:
 - the background to the reference;
 - the historical aspects of the compensation scheme and the rationale for compensation;
 - the current compensation scheme in New South Wales and Victoria including the bases for making claims; and
 - the principles of the Torrens system,readers are referred to NSWLRC DP 19 and NSWLRC IP 6.

2. The Torrens System Compensation and Insurance Principles

INTRODUCTION

2.1 This chapter discusses the compensation and insurance principles underlying the State guarantee of Torrens title. It also focuses on the range of judicial interpretations of the more significant provisions which were in force in New South Wales at the time of the publication of the Issues Paper. To this extent it lays the groundwork for Chapter 3 which, by contrast, will examine changes in the law as a result of recent High Court and lower court decisions in addition to recent statutory reforms. At the conclusion of that discussion there will be an assessment of whether the general structure of the law has been sufficiently modified by these changes to make the need for further reform less pressing. The Commission's conclusion is that there is still a need for an overhaul of the compensation and insurance provisions.

Title by registration

2.2 As noted above, a fundamental principle of the Torrens system is that title to land is dependent on registration and not on the execution of documents. Once registered under the *Real Property Act 1900* ("RPA"), the proprietor has an "indefeasible title."¹ This means that the title cannot be set aside because of a defect which existed before the proprietor was registered. The other side to indefeasibility is that people can lose their interest in land in circumstances where they would have been protected under Old System title.² Under the deeds registration provisions of Old System title, which continue to apply to a limited, if diminishing, extent, the fact of registration is not relevant to the issue of conferring title. Rather, registration is a mechanism for retaining priority as against competing interests over the same land.³ So, for example, if A's solicitor forged A's name to a conveyance of A's land to B, no interest passed to B even if B registered the deed because the deed was void as a result of the forgery.⁴ The registration of such a deed would not validate it in any way. By contrast, in the same circumstances under the Torrens system, B would get an indefeasible title on registration so long as he or she was not tainted by the fraud.⁵ It follows that the Torrens system, by virtue of its indefeasibility principle, renders registered proprietors peculiarly vulnerable to forms of fraudulent behaviour not possible under Old System title.

Compensation principle

2.3 The compensation objective of the provisions has been stated in these terms:

The scheme of the Act is to provide a fund for compensating all persons who are deprived of their land by the operation of the Act, and reason and justice require that no qualification should be put upon the rights so given which is not in express terms imposed by the statute. ... The fund is therefore in the position of a quasi-surety, guaranteeing against losses which but for the Act could not occur. ... In short, the provisions aim to form the second part of the complement that, under the Torrens system, a man is to have either his interest in the land or adequate monetary compensation therefor.⁶

Accordingly, s 126 and 127 of the RPA adopt the principle that the state should compensate two types of losses:⁷

losses flowing from mistakes within the Land Titles Office; and

losses caused by the registration of another person's interest.

Moreover, s 126 and 127 identify two classes of potential defendants: the person or persons responsible for the loss; and the Registrar-General. As will be seen later, this bifurcation of liability seriously undermines a genuine insurance principle.

Insurance principle

2.4 The essence of an insurance principle is the contribution, by persons in a class, of small amounts of money into a central fund subject to certain risks. The fund can be called upon to make good the losses suffered by particular individuals. Accordingly, an insurance scheme is a mechanism for spreading the loss equally among all contributors to the fund. Without insurance, losses lie where they fall. In the context of title to land the priority rules form the legal mechanism designed to determine the party on whom the loss falls. In the above example, under Old System title, B would bear the loss insofar as he is the party on whom the loss ultimately falls. This is because, irrespective of registration, B fails to get a good title despite paying valuable consideration. Under the Torrens system it is A who bears the loss on B's registration. The Torrens system can be seen, therefore, to introduce a new set of priority, and therefore loss-shifting, rules. To this extent there is nothing special about the Torrens system: priority rules generally exist to determine who loses out in a competition in respect of all types of property. The uniqueness of the Torrens system, however, lies in the fact that it supplements its loss-shifting rules with loss-spreading rules. These rules are embodied in the insurance and compensation provisions.

2.5 The insurance principle underlying these provisions is contained chiefly in s 133A of the RPA. Subsection (1) states that "There shall be established in the Special Deposits Account an account called the Torrens Assurance Fund". By subsection (4) :

There is to be paid into the Fund such amount as the Minister may direct from each fee paid to the Registrar-General in respect of the lodgment of any dealing, caveat or withdrawal of a caveat. Such fee may be prescribed so as to include the amount required to be paid into the Fund.

Notwithstanding these provisions, the insurance principle operates in a somewhat limited fashion. As will be seen below, the many criticisms levelled at this aspect of the legislation, now well over a century old, have gone largely unheeded.

THE LIMITED SCOPE OF THE COMPENSATION AND INSURANCE PRINCIPLES

2.6 With one exception, all submissions to the Commission agreed that the compensation provisions of the RPA need amendment to fulfil the principles discussed above.⁸ The precise contours of these criticisms will be examined later. In the meantime, the specific structure of the provisions will be examined.

Compensation scheme: a fund of last resort

2.7 As stated by Woodman and Nettle, under RPA s 126, "[t]he person deprived of land must have pursued his remedies fruitlessly against the wrongdoer or his voluntary assigns if they are accessible"⁹ before claiming compensation from the Registrar-General. Section 126 is mainly concerned with identification of the person who is to be the defendant in the first action. There is no intention to relieve accessible wrongdoers from liability. Further, no recovery lies against the Registrar-General where land can be recovered,¹⁰ as RPA s 124 provides for the possibility of an action for the recovery of land by possession or otherwise, and s 126 only applies where a deprivation of land has occurred. Furthermore, while under s 127 it is possible to proceed against the Registrar-General directly for errors perpetrated by the Land Titles Office, that section also seems to envisage a residual right against the Registrar-General where a remedy is "inapplicable" against the defendant responsible for the loss. Therefore, to the extent that this section is also based on the principle of the fund as a fund of last resort, it is equally at odds with a comprehensive insurance principle. Due to their individual complexities it will be necessary to examine these two key provisions separately.

Primary right to compensation: section 126

2.8 Section 126(1) of the RPA provides as follows:

- (1) Any person deprived of land or of any estate, or interest in land:
 - (a) in consequence of fraud; or
 - (b) through the bringing of such land under the provisions of this Act; or
 - (c) by the registration of any other person as proprietor of such land, estate, or interest; or

- (d) in consequence of any error, omission, or misdescription in the Register, may bring and prosecute in any Court of competent jurisdiction an action for the recovery of damages.

These provisions appear broad in scope, but in practice they have given rise to difficulties of interpretation and have offered limited redress to persons who have lost interests in land.

Fraud

2.9 The scope of fraud as a head of recovery independent of s 127 was reduced significantly by the High Court in *Registrar of Titles (WA) v Franzon*.¹¹ The Court held that plaintiffs cannot rely on the fraud basis of recovery in s 126 to succeed in an action against the Registrar-General (where the fraudster is inaccessible) if the fraudulent party has not been registered as a proprietor. In practice, plaintiffs whose loss has resulted from the fraud of persons other than those becoming registered proprietors have brought claims under s 127.¹² This is consistent with the overall policy noted above: persons who have suffered should be in a position to get compensation whenever they suffer loss, either from the person who causes the loss or from the Registrar-General as nominal defendant. However, it is clearly undesirable for victims to fail to get compensation to which they are entitled because they have brought an action under the wrong section of an exceedingly complex provision.

2.10 The key facts in *Registrar of Titles (WA) v Franzon* were that a mortgage was forged by the registered proprietors' solicitor. The mortgagee was innocent of the fraud. The Court held that the "fraud" referred to in the section must be read as a reference to fraud for which the person becoming registered was responsible. As a result of this case, it can be concluded that the "fraud" basis for recovery in s 126(1)(a) is ineffective in every situation in which the person responsible for the fraud does not obtain registration. The Court also held that an "erroneous registration", provided for in New South Wales by s 126(1)(c) requires disconformity between the instrument lodged for registration and the registration on which it is based. In other words, an "erroneous registration" would only be satisfied if either the Registrar-General or the person seeking registration and those acting for them were at fault by not recording the instrument faithfully in the Register. In most cases, plaintiffs who fail on this basis then rely on s 127, normally with success. Thus, the effectiveness of the fraud basis for recovery in s 126, independent of s 127, is doubtful.

2.11 So, for example, the plaintiff in the case of *Armour v Penrith Projects Pty Ltd*¹³ could not recover damages on the basis of fraud in s 126(1)(a) against the Registrar-General because the fraudster who sold the plaintiff's land simply forged a signature to the transfer document (without the true owner's knowledge) before absconding from bail. As such, the fraudster never actually obtained registration. The transferee of the land from the fraudster who obtained registration was innocent of the fraudster's wrongdoing, and thus the fraud basis of recovery was not applicable. If fraud could be sheeted home to the proprietor who becomes registered and if he or she then transfers the land to an innocent third party, provided the other conditions for recovery on the basis of fraud are satisfied, a remedy would lie against the Fund. The general rule is that, where an agent is acting within either the actual or apparent scope of his or her authority, those actions will bind the principal.¹⁴ However, it seems unlikely, in cases in which bona fide proprietors instruct agents such as solicitors or others to act on their behalf and in relation to principal and agent relationships generally, that those agents would be authorised to commit fraudulent acts.

2.12 In *Armour's* case, the plaintiff also claimed recovery from the Registrar-General on the basis that he was deprived of land by the registration of another person as proprietor of the land which is the basis for recovery set out in s 126(1)(c). However, in order to succeed on this basis, the plaintiff had to show that an erroneous registration was made by the person applying for registration. This was because of the effect of s 126(2) (discussed in detail below). This section was seen in *Armour's* case to limit recovery against the Registrar-General under s 126(1)(c) to the situation where the person primarily responsible for the deprivation was the one on whose application the erroneous registration was made.¹⁵ While it was clear that the fraudster was not the one who made the application for registration, the effect of s 126(3), which was relied on by the plaintiff, was to make the person receiving the value (the fraudster in this case) the person on whose application the transferee was registered. So the plaintiff was able properly to assert that the fraudster was the person on whose application the erroneous registration was made. However, the plaintiff failed to show there was an erroneous registration within s 126(2)(b) because of the interpretation given to the phrase in *Franzon's* case which required disconformity between the registration and the instrument on which it was based. It should be noted that *Armour*

would have succeeded against the Registrar-General under s 127. This was the law at the time the Issues Paper was written. As will be seen in Chapter 3, it has been radically changed in New South Wales by the recent decision of the High Court in *Saade v Registrar-General*.¹⁶

2.13 The difficulties which have arisen with establishing the fraud basis for claiming compensation can be contrasted with the generosity given to its meaning by the New South Wales Court of Appeal in *Parker v Registrar-General*.¹⁷ In *Parker's* case, an undischarged bankrupt named Gray befriended the Parkers and tricked them into signing a transfer of their land to a company. The company subsequently mortgaged the land. The Parkers were not paid and brought proceedings against Gray and the company. Title to the land was registered in the Parkers' name but subject to the mortgage. The Parkers discharged the mortgage using borrowed money, and brought proceedings against the Registrar-General under RPA s 126. The Registrar-General sought to make a distinction between cases of forgery and those in which the owners are induced by fraudulent misrepresentation to sign transfers. He argued that compensation should be available in the first case, but not in the second. The Parkers succeeded in their claim for compensation. Justice Mahoney in the Court of Appeal stated that:

The categories of fraud are not closed; frauds may take on different forms. There is no reason why a right of recovery should be limited as against the person responsible for the fraudulent deprivation of land according to whether, eg, the fraud involves the voluntary signing of a transfer induced by fraud, the signing of it by mistake, or the forgery of a document. Where as I have said, the particular fraud was directed to achieving the deprivation of land which occurred, I see no reason why the remedy against the person responsible for that fraud should be limited by reference to the means chosen to give effect to the fraud.¹⁸

2.14 In summary, under s 126(1)(a), a fraudster who never obtained registration to the property cannot be the subject of proceedings under the section and neither can an innocent proprietor who becomes registered as a consequence of fraud by a person who does not obtain registration. Also, a plaintiff who deals with a forger who purports to act on behalf of a (fictitious) registered proprietor cannot recover his or her losses against the Registrar-General.¹⁹ In addition, an action against the Registrar-General for the recovery of damages, where a person is deprived of his or her land by the registration of another person as proprietor of the land, will only succeed where the Registrar-General, the person obtaining registration or those acting for them failed to record the instrument accurately in the Register.

Loss through registration of any other person as proprietor

2.15 It has been said that this basis for recovery, contained in s 126(1)(c), overlaps with the others in s 126:

To the extent to which "any other person" is registered in consequence of fraud or of error, or through the bringing of land under the Act, subs (1)(c) overlaps the other contingencies provided in the subsection. It is probably intended to cover circumstances such as those in *Boyd v Mayor of Wellington* [1924] NZLR 1174; [1974] Gaz LR 489 where, without any fraud or error, except perhaps a mistaken view of the law, an existing proprietor was deprived by registration of an instrument alleged to be invalid.²⁰

2.16 Another view is that, although "the provision would seem to overlap with other heads of claim, under which there would very often be a registration of another person resulting in a loss", the section does cover claims not caught by other heads. *Queensland Trustees Ltd v Registrar of Titles*²¹ was such a case. There an executrix, who was also sole devisee under a will, was registered by transmission. She then mortgaged the land. Subsequently the grant of probate was revoked and administration granted to Queensland Trustees Ltd who were held to have been deprived of an estate or interest in land by virtue of the registration of the mortgage.²² The Court held that the administrator was a person deprived of land and entitled to be indemnified out of the Fund to the amount necessary to redeem the mortgage from the bank which was a bona fide mortgagee without notice.

2.17 Some authors have said that the section is only related to land which has already been brought under the Act, and thus does not overlap with s 126(1)(b) which enables recovery for losses resulting from bringing the land under the provisions of the RPA.²³ These authors are also in agreement with others who view recovery on this

basis to be the same as that on the basis of error, omission or misdescription in the Register,²⁴ except that s 126(1)(c) does not require mistakes within the Land Titles Office:

Any person deprived through the error, omission or misdescription on the Register.

Professor Hogg contended for the view that this ground is really indistinguishable from (3) above [ie, s 126(1)(c)] and he suggested that it refers to mistakes in the Land Titles Office. However, though we agree with the first observation, the latter would render s 127 surplusage which should not be thought to have been the aim of the draftsman. Nevertheless, the words in both provisions seem identical except that s 127 is more fully expressed. The subsection covers a wrong name being entered on the Register where this cannot be cured but it seems to be within the express words of s 126(1)(c) as well.²⁵

2.18 The intention of the legislature regarding this basis for claiming is thus not clear. The authors of the leading real property texts are not in agreement as to whether the section requires an error to be made within the Land Titles Office or whether it contains the same requirements as s 127. Some authors are of the view that the provision is identical to s 126(1)(d) while others are of the view that it covers an additional category of mistakes of law and other losses not covered by the other bases for claiming in s 126.

In consequence of any error, omission or misdescription in the Register

2.19 It has been said that this provision is no different to a similar provision in s 127, and there is difficulty in seeing the purpose of this apparent overlapping. However, this provision is limited to errors in the Register, which is defined in s 31B(2) to be comprised of:

folios;

dealings registered therein under the RPA or any other Act;

the record of all dealings relating to the computer folio;

instruments of a prescribed class; and

records which the regulations require the Registrar-General to keep as part of the Register.

2.20 Pre-registration dealings are not covered by the section.²⁶ Some authors, as noted above, are of the view that mistakes in the Land Titles Office are required by the section,²⁷ whilst others have said that they are not (otherwise, s 127 would be no different). Some authors, as stated above, have suggested that there should be no difference between s 127 and this basis for recovery, as cases which have interpreted s 127, such as *Dempster v Richardson*,²⁸ require misfeasance on the part of the Registrar-General²⁹ as an element which must be proved.

Person against whom damages are recovered

2.21 Under s 126(2) of the Act, the action available under s 126(1), can only be brought against the person:

upon whose application the land was brought under the provisions of this Act;³⁰

upon whose application the erroneous registration was made;³¹ or

who acquired title to the land, or the estate or interest therein, through the fraud, error, omission or misdescription.³²

Section 126(2) provides an exception to this principle when actions are commenced against the Registrar-General as nominal defendant, namely, where the land is included in two or more folios, or an incorrect folio has been created.

2.22 Otherwise, generally, damages may be claimed from the Assurance Fund by action against the Registrar-General as nominal defendant only when a person who is liable for damages under s 126 is dead, bankrupt, insolvent or cannot be found within the jurisdiction.³³ The Registrar-General can also act as nominal defendant in another case under s 126, but it is necessary to look further at the provisions which limit recovery to certain persons before this other situation can be explained.

2.23 Section 126(3) further qualifies the categories of persons against whom an action can be brought. However, there has been much uncertainty whether this subsection applied to all three situations detailed above, or only to the last of fraud, error, omission or misdescription, or indeed to the last two. The subsection states :

In every case in which the fraud, error, omission, or misdescription occurs upon a transfer for value, the transferor receiving the value shall be regarded as the person on whose application the transferee was recorded as registered proprietor in the folio of the Register.

The words “fraud, error, omission, or misdescription” would seem to tie the subsection to s 126(2)(c) only. One author reaches this conclusion but is nevertheless forced to admit that “the section, all through, presents grave difficulties of construction”.³⁴ Another commentator goes further, describing the section as a whole as “complex and turgid Victorianese”.³⁵ Section 126(3) may also qualify s 126(2)(b) if, as some authors have suggested, the grounds in paragraph (b) are indistinguishable from paragraph (c).³⁶ The subsection makes the transferor receiving the value, rather than the transferee, liable for damages where it is necessary to determine who the person is on whose application the transferee was recorded as registered proprietor.

2.24 Therefore, if s 126(3) functions to qualify one or more paragraphs of s 126(2), it reverses their apparent effect as the person liable is not the transferee, that is, the person who makes the application or who acquires title through the fraud, error, omission or misdescription, but rather the transferor receiving the value. Liability will not, contrary to what paragraph (b) says, attach to the person seeking registration who is a transferee for value, who is normally the person who tenders the instrument for registration. This was a key issue in *Franzon*. As we have seen, under the equivalent provision in the Western Australian statute the person responsible for the fraud was the appropriate defendant. However, because there was no erroneous registration effected, and also because there was no acquisition of title, there could be no s 126-type access to the Assurance Fund.

Termination of liability for some defendants

2.25 Section 126(4) adds further complexity to the provisions which determine the identity of the defendant by terminating the “defendant’s” liability after a transfer by that person to a bona fide purchaser. This section states:

Except in the case of fraud or of error occasioned by any omission, misrepresentation, or misdescription in his application, or in any instrument executed by him, the person upon whose application such land was brought under the provisions of this Act, or such erroneous registration was made, shall, upon a transfer of such land bona fide for value cease to be liable for the payment of any damages which might have been recovered from him under this section.

2.26 Some authors have suggested that as no mention is made in s 126(4) of an end to liability under s 126(2)(c), liability remains in the situation outlined in the latter.³⁷ Section 126(4) is somewhat curiously expressed in this regard if it is linked to s 126(2)(c) as the former provision has an additional category of “misrepresentation,” and the “error” in the former has to be occasioned by “omission, misrepresentation, or misdescription” which injects a causal element not present in subsection (c). Neither the reasons, nor the consequences of the differences are apparent. Moreover, the ruling in *Saade* and the resultant expanded meaning of “erroneous registration” in New South Wales indicates how subsection (4) has no bearing on the liability of defendants such as Mr Saade, because liability continues after a transfer for value in cases of “fraud or of error occasioned by any omission, misrepresentation, or misdescription”. As we have seen, subsection (3) made the transferor receiving the value the person upon whose application the registration was made. Subsection (4) purports to relieve “the person upon whose application ... such erroneous application was made”, but only if there was no fraud present. Moreover, subsection (4) would not appear to absolve anyone who falls within the ambit of paragraph (c) as “[n]o mention is made in section 126(4) of an end to liability under s 126(2)(c)”.³⁸

2.27 Where defendants cease to be liable for damages, damages and costs of the action can be recovered out of the Assurance Fund by action against the Registrar-General as nominal defendant.³⁹ This is the other category for recovering against the Registrar-General.

Conclusions on defendant to be sued under section 126

2.28 It can be seen from the above discussion that the provisions determining which claims can be brought, and against whom, under s 126 appear somewhat complex. In most cases, where recovery by proceedings against the wrongdoer is available, this must first occur before action can be brought against the Registrar-General as nominal defendant. The provisions for recovery appear to create a multiplicity of proceedings, although this is overcome to a certain extent by the Registrar-General's practice of making compensation payments in undisputed cases. It is clear however that s 126 operates to make the Fund the last resort for persons suffering loss under the RPA.

Actions against the Registrar-General as nominal defendant: section 127

2.29 Section 127 permits an action for the recovery of damages to be brought directly against the Registrar-General as nominal defendant. The section states:

When actions may lie against the Registrar-General as nominal defendant

127(1) Any person sustaining loss or damages through any omission, mistake, or misfeasance of the Registrar-General or any of his officers or clerks in the execution of their respective duties under the provisions of this Act, or by the registration otherwise than under section 45E of any other person as proprietor of land, or by any error, omission, or misdescription in the Register, and who by the provisions of this Act is barred from bringing proceedings in the Supreme Court or the District Court for possession of that land, or other proceedings or action for the recovery of such land, estate, or interest or to whose claim every such proceedings or action would be inapplicable may, *in any case in which the remedy by action for recovery of damages as hereinbefore provided is inapplicable*, [emphasis added] bring an action against the Registrar-General as nominal defendant for the recovery of damages.

2.30 Thus, under s 127, where s 126 proceedings are inapplicable plaintiffs can bring proceedings against the Registrar-General under RPA s 127 for the recovery of damages where plaintiffs have sustained loss as a result of any one or more of the following:

departmental error;

the registration of any other person as proprietor of land (except for that under s 45E which relates to possessory applications); or

errors, omissions or misdescriptions in the Register;

but only where proceedings for the recovery of land are barred or inapplicable.

2.31 The section has been criticised with some force for being unduly narrow in its inapplicability to possessory applications.⁴⁰ Why there should be an exception to even the restricted terms of the section with respect to s 45E is incomprehensible: in this respect, apparently, the Registrar-General, and his or her officers may be as incompetent as they like without resort to the Fund.

Claims against the Assurance Fund

2.32 Under RPA s 133(c) a person suffering loss can look to the Assurance Fund if any loss or deprivation of land is caused by the inclusion of land in the same folio of the Register or certificate of title with other land through misdescription of boundaries or parcels of any land where the person liable for compensation is dead, or has absconded, or is insolvent or bankrupt, or is unable to pay the full amount awarded by the court by way of compensation or damages as certified by a sheriff. In the case where the same land is included in the same folio

or certificate of title, it is unclear from the terms of the section whether it is necessary to bring an action against the Registrar-General as nominal defendant, as the only qualification in the section is proof of the circumstances described. The section states:

Assurance Fund only liable in certain cases

133 The Assurance Fund shall not, under any circumstances, be liable for compensation for any loss, damage, or deprivation occasioned -

...

- (c) by any land being included in the same folio of the Register or certificate of title with other land through misdescription of land boundaries or parcels of any land, unless it is proved that the person liable for compensation and damages is dead or has absconded or is insolvent or bankrupt, or the sheriff shall certify that such person is unable to pay the full amount awarded in any action for recovery of such compensation and damages.

2.33 While the section does not refer to the need to commence an action for the recovery of damages against the Registrar-General as nominal defendant, proof of the circumstances appears to contemplate a determination of liability, the fact of insolvency or bankruptcy and an inability to pay, all of which, on the face of the provision, would arguably involve commencing proceedings against the "primary" defendant. In *Behn v Registrar-General*, the Registrar-General argued that judgment would actually have to be obtained against the fraudulent party before an action could be brought directly against the Registrar-General. However, Justice Holland held that it is only necessary to establish that one of the conditions of s 126(5) has been met for an action to be commenced directly against the Registrar-General.⁴¹

Barring of actions against the Registrar-General: section 130

2.34 Under s 130(3) a person who is deprived of an interest in land as a consequence of land being brought under the Act cannot bring an action for the recovery of damages against the Registrar-General where the person or person through whom he or she claims was aware that the land was being converted and had "wilfully or collusively omitted to lodge a caveat forbidding the bringing of the land under the provisions of the Act or had allowed such a caveat to lapse." A similar provision applies to a claim of deprivation of land through the grant of a possessory application, except that there is no reference to the omission being wilful or collusive. The section states:

...where the person alleging the deprivation, or the person through or under whom he claims title, had notice by personal service or otherwise or was aware that the application had been made, and had omitted to lodge a caveat forbidding the grant of the application or had allowed such a caveat to lapse.

Bona fide purchasers and mortgagees protected: section 135

2.35 The final section amongst the compensation provisions which affects the identity of the defendant is s 135. This section states:

Purchasers and mortgagees protected

135. Nothing in this Act contained shall be so interpreted as to leave subject to an action for recovery of damages as aforesaid, or to proceedings in the Supreme Court or the District Court for possession of land or other proceedings or action for the recovery of land, or to deprivation of the estate or interest in respect to which he is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act on the plea that his vendor or mortgagor may have been registered as proprietor, or procured the registration of the transfer to such purchaser or mortgagee through fraud or error, or under any void or voidable instrument, and this whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.

2.36 This section does not mirror previous sections such as s 126(1), (2), (3) and (4). It uses the words “wrong description” rather than “misdescription” and does not refer to “misrepresentation” or “omission”. The section intermeshes with RPA s 41, 42, 126 and 127⁴²; for example, there is mention of the “wrong description of parcels or of boundaries” in s 42(1)(c). Section 135 also uses the terms “void or voidable instrument” which is not used in the complementary sections affecting compensation. The original section did not refer to the terms, and the later addition of the words, as explained in paragraph 3.10 of the Issues Paper, resulted from the acceptance of the new theory of immediate indefeasibility which is discussed in paragraph 2.39 below.

2.37 Section 135 forms in the Torrens system the category of “protection of purchasers” provisions in the mosaic of the other categories of “paramourty”, “ejectment”, and “notice” provisions.⁴³ The paramourty provision, contained in s 42, provides that, notwithstanding the existence in any other person of any estate or interest in land which but for the RPA might be held to be paramount or have priority, the registered proprietor of land or any estate or interest in land, except in the case of fraud, holds that land, estate or interest subject to such encumbrances, liens, estates or interests as are notified or recorded in the Register, but absolutely free from all others.⁴⁴ However, there are specific exceptions to the paramourty of indefeasibility contained in the same section and s 42(1)(c) contains one of them.

2.38 Section 42(1) refers to a registered proprietor being

absolutely free from all other estates and interests that are not so recorded except:

...

- (c) as to any portion of land that may by wrong description of parcels or of boundaries be included in the folio of the Register or registered dealing evidencing the title of such registered proprietor, not being a purchaser or mortgagee thereof for value, or deriving from or through a purchaser or mortgagee thereof for value; and...

2.39 In other words, a registered proprietor who is registered in respect of land included in the grant, certificate or folio by a wrong description of parcels or boundaries will not have a State guaranteed title⁴⁵ if he or she is the purchaser without value or has not taken from a purchaser for value. To put it another way, the exception to indefeasibility is inapplicable where the registered proprietor is a bona fide purchaser for value or someone deriving from or through such a purchaser.⁴⁶ Seen in this light, the relationship to s 135 is clear. Section 135 mirrors the effect of s 42(1)(c) in the sense that the latter exception is subject to the overriding rights of a bona fide transferee for value or anyone claiming through him or her. Section 135 while doing this, also protects a registered proprietor who is a bona fide transferee not only from proceedings resulting from a wrong description of parcels or boundaries, but also from proceedings involving fraud or error even if not involving a wrong description of the boundaries or parcels of land.

APPROACH OF THE LAND TITLES OFFICE

Compensation denied for a valid claim

2.40 In the Issues Paper, the Commission stated:

The principle of compensation has also been eroded by what one commentator has described as “the quite repulsive tenacity with which some jurisdictions are prepared to resist even valid claims upon the fund”. Some claimants become so frustrated with litigation that they decide to bear the loss themselves.⁴⁷

There is no direct evidence in New South Wales that claimants have become so frustrated with litigation that they decide to bear the loss themselves.⁴⁸ However, the general previous⁴⁹ approach of the Land Titles Office is perhaps illustrated in the case of *Mayer v Coe*⁵⁰ where the plaintiff, Mrs Mayer, failed in an action against Mr Coe under RPA s 126. In this case, Mrs Mayer’s solicitor without her authority granted a mortgage over her land to Mr Coe by forging Mrs Mayer’s signature on the mortgage documents. The solicitor absconded with the mortgage monies advanced by Mr Coe who believed that the solicitor was properly collecting the monies on Mrs Mayer’s behalf. The Court held that because the mortgagee who became registered was not a party to the fraud,

Mrs Mayer's claim under that head of s 126(1) could not succeed. The Registrar-General has subsequently suggested that the plaintiff may have succeeded against him in an action under RPA s 127.⁵¹ This is undoubtedly an accurate statement of the law. However, it was not suggested by him that Mrs Mayer's valid claim was compensated *ex gratia*. Instead, Mrs Mayer appears to have borne her loss. It should be noted that the case would be decided in her favour today as a result of the decision in *Saade*.

Delay in paying compensation claims

2.41 It is clear that litigation is frustrating in terms not only of outcome, but of cost to the parties and the general community. A further example is the case of *Northside Development Pty Ltd v Registrar-General*⁵² which involved a compensation claim commenced in 1981 in the Supreme Court. This court's decision was reversed in the Court of Appeal, which was followed by a further reversal in the High Court. Judgment of the High Court was handed down on 28 June 1990, in favour of the plaintiff almost nine years after proceedings commenced. The lengthy course of these proceedings must have been frustrating for both the Registrar-General and the plaintiff. The *Northside* case is discussed in paragraph 4.43 and is an illustration of an unfortunate waste of resources for all litigants involved. Appendix B to this Report contains details of claims lodged since 1975 including the dates when matters were commenced and the dates on which they were finally concluded.

Ex gratia compensation

2.42 While it is true that the Registrar-General has granted *ex gratia* compensation for departmental error, it is more appropriate that persons suffering loss have the certainty of recourse to the provisions of the RPA, rather than having to rely on the inclinations and broad discretion of the Registrar-General to pay appropriate compensation.

NARROW BASES FOR CLAIMING UNDER SECTIONS 126 AND 127

Limitations of recovery in section 127

2.43 There is some disagreement among authors on whether s 127 is broader in scope than s 126 because it covers purely financial losses and not merely losses which relate to deprivation of land. The favoured view of some authors⁵³ is that s 127 relates to the deprivation of land because, to rely on the section, the plaintiff must be:

a person who is barred by the RPA from bringing proceedings for possession of that land; or

a person who is barred by the RPA from bringing other proceedings or action for the recovery of such land;
or

a person to whose claim every such proceedings or action would be inapplicable; or

a person to whom s 126 proceedings are inapplicable.

2.44 The last proviso has been interpreted to tie s 126 to s 127. Section 126 provides an action for the recovery of damages to plaintiffs who are deprived of land or of any estate or interest in land. If this interpretation is accepted, this limitation makes the compensation provisions narrow in scope. Paragraph 5.9 of the Issues Paper suggested that the bases for claiming compensation are narrow, that is, a claimant must establish deprivation of land or an interest in land and not simply that loss or damage has been sustained, as is the case in Victoria. However, paragraph 3.5 of the Issues Paper suggested that, unlike s 126 which requires proof of deprivation of land, s 127 only requires proof of loss or damage. The two statements are clearly inconsistent⁵⁴ and it is suggested that the second proposition is accurate for the reasons appearing below, while the other view is at best arguable, even though it appears to be the favoured one among some authors.

Compensation said to be available only if deprivation of land occurs

2.45 Section 126 provides an action for the recovery of damages to plaintiffs who are deprived of land or of any estate or interest in land. Purely financial loss cannot be recovered. This limitation makes the compensation

provisions narrower in scope than, for example, the Victorian legislation which allows persons sustaining loss or damage whether by deprivation of land or otherwise to claim an indemnity from the Registrar of Titles if any of the grounds listed in s 110 of the *Transfer of Land Act 1958* (Vic) apply. Section 127, by contrast, which is mainly concerned “to provide a remedy for persons sustaining loss through Departmental errors and where no other remedy is available,”⁵⁵ is expressed to cover “loss or damages”. However, even if s 127 is available for purely financial loss, its scope has been substantially restricted by the court’s reluctance to attribute liability to the Registrar-General for errors.

2.46 The Tasmanian case of *Dempster v Richardson* is a good illustration of the narrow construction of the bases for claiming losses resulting from “departmental error” and “errors in the Register” contained in s 127. The application of this decision in New South Wales would result in parties being deprived of compensation who would otherwise be reasonably entitled to it.⁵⁶

2.47 In the *Dempster* case, the plaintiff, Mrs Dempster commenced building on a road frontage of 74 ft 9 in which was indicated on her certificate of title. It was discovered that there was only 74 ft legally available to be built on. Her neighbour demolished one of the walls which encroached on the adjoining land. Mrs Dempster claimed compensation from the Fund on the basis that the Recorder of Titles made an error by misstating the dimensions in the certificate of title. The High Court rejected this argument holding that the error was made by the previous registered proprietor who intended to transfer title to frontage he did not have.⁵⁷ The High Court also stated that the right of action given by the Tasmanian equivalent of RPA s 127 is clearly and definitely governed by the limitation expressed in the words “in any case in which the remedy by action for recovery of damages as hereinbefore provided is barred”.⁵⁸

The distinction between “barred” and “inapplicable” in section 127

2.48 An important issue of interpretation arises by the use of the word “inapplicable” in addition to “barred” in s 127. Woodman and Nettle have suggested the following consequences result from the court’s interpretation of this limitation:

The effect of those words is to tie the Tasmanian equivalent of s 127 to the equivalent of s 126.⁵⁹

But this statement by itself, if baldly applied to New South Wales as being the effect of the decision, ignores the distinction between “barred” and “inapplicable” in the New South Wales statute. Woodman and Nettle do, however, point to the significance of the distinction by observing that the right of action may be inapplicable without being barred. According to the authors writing on the High Court’s construction of the Tasmanian section, the right of action appears to be restricted to cases of loss which would found an action *inter partes*. It would not be available in the case of an error made by the Recorder for which he or she only could be blamed. For example, if in issuing a new certificate of title for a servient tenement he or she omitted to carry forward the memorial of a covenant, and the dominant owner thereby suffered loss, there is no right of action given by the preceding section which could be barred; but that would be a case to which the right of action given by the section is inapplicable. The difference in wording suggests that, in the situation set out, s 127 of the New South Wales Act would apply.

Section 127 reduced in scope by court’s interpretation of error

2.49 Even though recourse may be had to the Registrar-General under RPA s 127 in the specific example given by Woodman and Nettle, if the facts in *Dempster’s* case recurred here, the result could be the same. So a plaintiff in the same situation as Mrs Dempster could be denied compensation. Justice Starke in *Dempster’s* case found that the error in the certificate of title was not due to an omission, mistake or misfeasance of the Recorder but was the fault of the predecessor in title of Mrs Dempster or the predecessor’s surveyor.⁶⁰ Justices Rich and Dixon implied that the adoption by the Recorder of the erroneous measurement was not within the then Tasmanian equivalent of s 127.

Even if it could be said that the adoption of the measurement by the Recorder was an omission, mistake, or misfeasance within the general meaning of these words, *a thing which we do not say* [emphasis added], yet it is clear that it is not such a case that sec 128 contemplates.⁶¹

Also relevant in this context is the question whether the losses recoverable under s 127 must relate to the deprivation of land. There is some uncertainty as to whether s 127 applies to purely financial losses. Woodman and Nettle are of the view that the “section is ... related to the recovery of land, and has no application to losses sustained otherwise than by the deprivation of land”.⁶² Other writers are of the view that “a right of action exists although the loss does not consist of the deprivation of any estate or interest in land”.⁶³ However, this is by no means clear in the provision, and the position should be clarified.

2.50 In *Oakden v Gibbs*,⁶⁴ land was brought under the *Transfer of Land Act 1958* (Vic) but the Registrar did not endorse that fact on the last material registered documents which were lodged by Thomson, the owner. He was issued with the certificate of title. Thomson produced the Old System deeds for the land and, fraudulently withholding the fact that the land had been brought under the *Transfer of Land Act*, borrowed money on the security of the general law title deeds, by mortgaging the land described in the Old Title deeds to the borrowers, the plaintiffs. The plaintiffs searched the register under the old law which showed Thomson to be the owner. The plaintiffs did not search the Torrens register. Thomson subsequently sold the land. It was held that the lenders on the security had never obtained an interest in land as, at the time, the land was registered and the deeds were valueless. The plaintiffs could not maintain an action against the Registrar-General for compensation for deprivation.⁶⁵ The wording of the equivalent of s 127 in the Victorian case of *Oakden* was similar to that in *Dempster's* case in its reference to the use of the word “barred” rather than “barred or inapplicable”. This would mean that if the facts of *Oakden's* case were repeated in New South Wales, even if a purely financial loss occurred, it may be that a plaintiff could rely on s 127 to recover compensation. However, the majority in *Oakden's* case stated that the Registrar-General's neglect must have been the sole cause of the plaintiff's loss. In this case, Thomson's fraud was the immediate cause of the loss, and at most, the Registrar-General's neglect enabled Thomson to commit the fraud and was only indirectly the cause of the loss.⁶⁶ The effect of *Oakden's* case in New South Wales would be that s 127 cannot assist a plaintiff to recover any loss whenever that loss has resulted from an error of an official as well as from the fraud of a third person. The Court said:

If it be said that the word “through,” in s 146, [the equivalent of s 127 in New South Wales] points more strictly to an indirect, as the word “by” to a direct, cause of loss; still we think there are no grounds to justify the extension of the loss not merely to an injury resulting from the act of omission or commission of an official, but to an injury resulting from such an act combined with the fraud of a third person.⁶⁷

Thus the scope of s 127 is narrow, even though it may be broad enough to apply to purely financial losses.

Narrowness of “error” and the problem of overriding statutes

2.51 Another limitation on the right to compensation is that it may only be available for registrable interests which are registered, although this is not clear.⁶⁸ So for example, in the case of *Trieste Investments Pty Ltd v Watson*⁶⁹ where there was a resumption under the *Public Roads Act 1902* (NSW) which was not registered, the Court held that s 127 was not available to the plaintiff. The plaintiff's title was not indefeasible on the ground that the *Public Roads Act* was an overriding statute. Consequently, title over the land resumed arose by virtue of the formalities required by that Act rather than by virtue of the registration provisions of the RPA. The court held that no compensation was payable in this case, because the RPA at the time empowered the Registrar-General only to record particulars of instruments, dealings and matters required or authorised by the Act to be entered: resumptions prior to 1930 could not be registered because the Registrar-General had no power to register them. The Court failed to refer to the power conferred by s 14 of the *Real Property (Amendment) Act 1921* whereby the Registrar-General could record a statutory vesting on receipt of a formal application to do so.⁷⁰

2.52 In *Trieste's* case, Chief Justice Herron said:

In my opinion, the words error or omission are subjective in application and connote something more than simply not there or absent from. Whilst misdescription is a word of greater objectivity, none the less it conveys the same notion of a mistake in a description authorized to be made under the Act. Considered in light of the rest of the Act and of the Torrens system generally, I think the first two words relate to errors or omissions in details where such by the Act are authorized to have been made and are not made. I do not base my opinion on any want of duty by the Registrar-

General but upon the scope of his authority conferred by the Act to note or register this resumption.⁷¹

This interpretation was endorsed in the judgment of Justice Nagle:

Each of these words appears to me to convey the concept of something lacking from the register book which would be expected to be in it, and I do not think that it can be said that there is “an error omission or misdescription”, if, consonant with the provisions of the Act, the particular entry might or might not be found on the register. Unless one closes one’s eyes completely to the remainder of the Act it seems to be difficult to say anything can be in error or omitted or misdescribed unless it is error, omission or misdescription contemplated by the Act itself.⁷²

2.53 Section 31A(3)(a) of the RPA now gives the Registrar-General power to record a resumption in the Register where he or she has notice of a resumption, and some authors are of the view that this power cures the problem inherent in *Trieste’s* case.⁷³ However, under s 31A(4)(b) of the RPA, actions against the Registrar-General for the recovery of damages for deprivation of land are barred where the Registrar-General does not choose to record a resumption, so that even if the problem inherent in *Trieste’s* case is covered by the section, the damages action may only be available if the Registrar-General exercises the power and makes an entry incorrectly. It is instructive to compare the approach of the majority to that of Justice Ferguson who dissented, concluding that the obligation to pay compensation had nothing to do with the question of the Registrar-General’s duty. The mere fact that the register misdescribed the true situation was enough to sustain the plaintiff’s claim: after all, the loss was due to the plaintiff’s reliance on the register.

2.54 This decision has been criticised as paying

insufficient attention to the necessity for maintaining the integrity of the register and misconceives the basis for awarding compensation to a registered proprietor. An order for compensation does not imply neglect on the part of the Registrar-General, but merely that a purchaser has sustained loss by relying on the register and, therefore, in accordance with the goals of the system, should be compensated for the loss.⁷⁴

As will be seen later, this decision may be limited by a recent decision of the Supreme Court.⁷⁵

Summary

2.55 Even if the obscurity of the compensation provisions is not, of itself, sufficient justification for their revision, the Commission is of the view that the insurance principle is not being effectively fulfilled, and that statutory reform is necessary for this reason alone. As has been seen above, the complexity of the provisions has been at least partly due to the narrow interpretation given to the reach of the sections. In particular, the High Court’s restrictive interpretation of the words “omission, mistake or misfeasance of the Registrar-General” in *Dempster’s* case would narrow the section’s effect and deprive of compensation parties in New South Wales in Mrs Dempster’s situation. Likewise, *Trieste* indicates the limited nature of the protection in respect of unregistered resumptions by statutory authorities. Similarly, the requirement in *Oakden’s* case that the Registrar-General’s neglect must be the direct cause and not merely a contributing factor which leads to the plaintiff’s loss for s 127 to apply narrows the scope of that section for assisting plaintiffs where purely financial loss has been occasioned. On the question of compensation of economic loss the New South Wales legislation seems to permit greater access to the Fund under s 127 than the equivalent Tasmanian section (as it then was) because of the use of “inapplicable” rather than “barred”. The difference in wording suggests that financial losses are compensable under the provision but, in view of the divergence of opinions of experts in the area, the lack of clarity in the section and the resources spent in interpretation of the section, the grounds for amendment are compelling.

CONCLUSION

2.56 The compensation provisions of the RPA operate as an insurance scheme only to a limited extent because of the primary responsibility on victims to commence action initially against the person responsible for the loss. In conjunction with the demonstrable complexities of the language of s 126 and 127 claimants face

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considerable hurdles in ultimately getting compensation. The High Court decision in *Franzon*, for instance, shows the problems faced by persons who are victims of certain types of fraud. There is also evidence of delay in the payment of compensation in New South Wales. The poor drafting of the compensation provisions might also explain the cautious approach of the Land Titles Office in awarding compensation in the past, and its determination to resist claims in the courts. Finally, while it seems that s 127 allows recovery of compensation for losses not involving deprivation of land, the scope of the section has been restricted by the court's reluctance to attribute liability for certain errors to the Registrar-General and to award compensation in certain situations only if the Registrar-General's error was the sole cause of the loss.

FOOTNOTES

1. It is now settled in New South Wales that volunteers receive the benefits of indefeasibility in the same way as other registered proprietors: *Bogdanovic v Koteff* (1988) 12 NSWLR 472. This will be discussed in detail in the next chapter: paras 3.27-3.29.
2. New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss* (Issues Paper 6, December 1989) at paras 1.4-1.5.
3. *Conveyancing Act 1919* (NSW) Part 23.
4. A J Bradbrook, S V MacCallum and A P Moore, *Australian Real Property Law* (Law Book Company, Sydney, 1991) at [4.03]; R T J Stein and M A Stone, *Torrens Title* (Butterworths, 1991, Sydney) at 4-6.
5. *Frazer v Walker* [1967] 1 AC 569.
6. D J Whalan, *The Torrens System in Australia* (Law Book Company, Sydney, 1982) at 345-346.
7. IP 6 at para 1.6.
8. See also: IP 6 at para 3.9; generally, differences in judicial interpretation of RPA s 127 are in *Trieste Investments Pty Ltd v Watson* (1963) 64 SR (NSW) 98; *Armour v Penrith Projects Pty Ltd* [1979] 1 NSWLR 98 at 101 per Needham J; M A Neave, C J Rossiter and M A Stone, *Sackville and Neave Property Law: Cases and Materials* (5th ed, Butterworths, Sydney, 1994) at 528; R A Woodman and K Nettle, *The Torrens System in New South Wales* (Law Book Co) at [121.3] and [126.2]; P J Butt, *Land Law* (2nd ed, Law Book Company, 1988) at 534; Whalan at 346, 351.6, 352.6, 354.9, 357.5, 359.5, 308.5; Sir Laurence Street, *Submission* (29 January 1988) at para 3; Stein and Stone at 350 (although note that the authors suggest that the original purpose of the Assurance Fund was either to allay fears of hostile lawyers and others, perhaps; or to afford administrative latitude (the former being more plausible), rather than have any insurance or assurance purpose: see 349-350).
9. R A Woodman and K Nettle, *The Torrens System in New South Wales* (Law Book Co, Sydney) at [126.3].
10. Stein and Stone at 357.
11. (1975) 132 CLR 611.
12. Registrar-General, *Submission* (29 October 1990) at 9. Section 127 is discussed at paras 2.29-2.31.
13. [1979] 1 NSWLR 98.
14. Stein and Stone at 100.
15. *Armour v Penrith Projects Pty Ltd* [1979] 1 NSWLR at 101.
16. (1993) 179 CLR 58.
17. [1977] 1 NSWLR 22.

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18. *Parker v Registrar-General* [1977] 1 NSWLR 22 at 30.
19. *Gibbs v Messer* [1891] AC 248. The Privy Council's judgment was delivered by Lord Watson who said at 258:

"In the opinion of their Lordships, the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal, rests with the mortgagees themselves; and if they accept a forgery they must bear the consequences."

20. *Woodman and Nettle* at [126.7]. In *Boyd v Mayor of Wellington*, the plaintiff was the registered proprietor of lands which were resumed by the defendants for the purposes of a tramway. The proclamation which effected the resumption was defective in form and invalid for this reason. The question was whether the title of the defendants could be upset because of the defects in the proclamation. The New Zealand Court of Appeal by majority held that even assuming that a proclamation taking land under the *Public Works Act* was void, its registration conferred an indefeasible title in the absence of fraud, of which there was no evidence.
21. (1893) 5 QLJ 46.
22. *Whalan* at 349-350.
23. *Stein and Stone* at 352.
24. RPA s 126(1)(d).
25. *Stein and Stone* at 352.
26. *Woodman and Nettle* at [126.8]; *Whalan* at 350.
27. *Woodman and Nettle* at [126.8]. It has been held that, in an action under s 126, it is not necessary to prove misfeasance on the part of the Registrar-General.
28. (1930) 44 CLR 576: discussed below at paras 2.46-2.47.
29. *Whalan* at 350.
30. RPA s 126(2)(a).
31. RPA s 126(2)(b).
32. RPA s 126(2)(c).
33. RPA s 126(5)(b). See *Price v Registrar-General* (NSW Supreme Court, Windeyer J, 14 March 1996, ED 2985/95, unreported) at 13.
34. A P Canaway, *The Real Property Act, 1900 (New South Wales): With Notes and Index* (Law Book Company, Sydney, 1902) at 185-6, cited in *Saade v Registrar-General* (1993) 179 CLR 58 at 66.
35. W D Duncan, "State Indemnified Title in Queensland - Success or Failure" (1977) 10 *University of Queensland Law Journal* 15 at 28.
36. *Stein and Stone* at 354; J E Hogg, *The Australian Torrens System* (William Clowes, London, 1905) at 853.
37. *Stein and Stone* at 354.
38. *Stein and Stone* at 354.

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39. RPA s 126(5)(a).
40. Stein and Stone at 356.
41. *Behn v Registrar-General* [1979] 2 NSWLR 496, affirmed on appeal on similar grounds: [1980] 1 NSWLR 589 (CA); (1981) 35 ALR 633 (HC).
42. Stein and Stone at 358.
43. Whalan at 293; Woodman and Nettle at [42.2] state that s 40, 43, 44, 124 and 135 must be read with s 42 in order to obtain a complete picture of indefeasibility of title.
44. Whalan at 293.
45. See Whalan at 297, who together with some other authors, views the phrase “indefeasibility” of title as being somewhat of a misnomer, in view of the attacks which can be made on title; see also Bradbrook, MacCallum and Moore at [5.23].
46. Bradbrook, MacCallum and Moore at [5.52].
47. NSWLRC IP 6 at para 2.11.
48. As observed in Registrar-General, *Submission* (6 April 1990) at paras 4-5.
49. We say “previous”, because it has become obvious to us, from our consultations with representatives from the Land Titles Office, that the Office wants to encourage claimants to settle valid claims administratively with the Registrar-General rather than commence proceedings in Court.
50. (1968) 88 WN (Pt 1) (NSW) 549.
51. Registrar-General, *Submission* (6 April 1990) at para 11.
52. (1990) 170 CLR 146.
53. Woodman and Nettle at [127.3]; Whalan at 347; Butt at 353; Stein and Stone at 353.
54. Registrar-General, *Submission* (6 April 1990) at para 18.
55. R A Woodman and P J Grimes, *Baalman on The Torrens System in New South Wales* (2nd edition, Law Book Company, Sydney, 1974) at 411.
56. The Registrar-General, *Submission* (6 April 1990) at para 18 has questioned the application of the case of *Dempster v Richardson* to show that the bases of claim are too narrow and to support the claim in IP 6 para 5.9 that parties reasonably entitled have been deprived of compensation. These arguments were raised to show that the relevant provisions of the RPA require revision.
57. *Dempster v Richardson* (1930) 44 CLR 576 per Starke J at 590-591.
58. *Dempster v Richardson* per Rich and Dixon JJ at 591.
59. Woodman and Nettle at [127.2].
60. *Dempster v Richardson* (1930) 44 CLR 576 per Starke J at 590.
61. *Dempster v Richardson* at 588.
62. Woodman and Nettle at [127.3].

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63. Whalan at 355.
64. (1882) 8 VLR (L) 380.
65. *Oakden v Gibbs* (1882) 8 VLR (L) 380 at 394-395, 400; see also *Stein and Stone* at 353.
66. *Oakden v Gibbs* at 399.
67. *Oakden v Gibbs* at 399.
68. *Stein and Stone* at 355.
69. *Trieste Investments v Watson* (1963) 64 SR (NSW) 98.
70. *Woodman and Nettle* at [127.2].
71. *Trieste* at 104.
72. *Trieste* at 109.
73. *Woodman and Nettle* at [127.2].
74. *Neave, Rossiter and Stone* at 531.
75. See paras 3.9-3.14.

3. Recent Reforms and Shortcomings of the Current Law

INTRODUCTION

3.1 This chapter will examine three separate issues. They are:

recent changes to the law relating to the Assurance Fund since the publication of the Issues Paper;

the significance of immediate indefeasibility for the Assurance Fund;

the relevance of these developments to the question of reform.

RECENT CHANGES TO THE LAW

3.2 In the comparatively short time since the Issues Paper was published the law relating to the Assurance Fund has undergone a number of significant changes. These changes have had a marked impact on the principles outlined in Chapter 2. They can be usefully split into two separate categories, case law and statutory reform.

Recent case law on the Assurance Fund provisions

Termination of liability for some defendants: s 126(2) and s 126(3)

3.3 In paragraph 2.9 the serious problems facing plaintiffs who have been defrauded of their land under s 126 were outlined, largely as a result of the High Court decision in *Franzon*.¹ This very question as to who is the appropriate person to sue under the combined effect of s 126(2) and s 126(3) in New South Wales arose for consideration by the High Court in 1993 in *Saade v Registrar-General*.² In *Franzon*, the analogous provisions in Western Australia had been interpreted by the High Court as denying a remedy because the person responsible could not be held to have made an erroneous registration. In *Saade v Registrar-General*, Mrs Saade was the registered proprietor as joint tenant with her husband of the matrimonial home. Mr Saade forged his wife's signature to a memorandum of transfer in favour of Mr Khoury, the second respondent who was a party to the fraud. At trial, Justice Powell found that Mrs Saade was estopped from asserting her rights against Mr Khoury because she withdrew a caveat previously lodged against his newly acquired title. However, Justice Powell entered judgment against the Registrar-General in the sum of \$53,000, assessed as the loss suffered by Mrs Saade. The New South Wales Court of Appeal upheld an appeal by the Registrar-General rejecting liability under either s 126 or s 127.

3.4 The High Court unanimously upheld the appeal. In particular, the Court held that s 126(3) applied to paragraph (b) of s 126(2), reasoning that:

The purpose of subs (3) is to identify the person upon whose application the certificate was issued to the transferee. It operates in every case in which "the fraud, error, omission or misdescription occurs upon a transfer for value". The litany "fraud, error, omission or misdescription" appears of course in section 126(2)(c) and it may be thought that subs (3) is correspondingly limited in its operation. But that cannot be so since para (c) is concerned with action against the person "who acquired title to the land". It is of no relevance to para (c) to identify the person upon whose application the transfer was registered. That identification is relevant only in the context of para (b) of subs (2).³

Insofar as paragraph (c) refers to persons "who acquired title to the land" the Court held that it applied to Mr Khoury in this case. Paragraph (b), by contrast, could only apply to Mr Saade in light of subsection (3). However, in order to establish liability on the part of Mr Saade, the appellant still needed to establish that the transaction was an "erroneous registration". It was on this point that the Court was faced with the contrary authority of *Franzon*. As noted above, this case decided that where a third party forges the signature of a registered proprietor of land to a mortgage and the innocent mortgagee becomes registered, there is no "erroneous registration" for the reason that there is "no disconformity between the registration and the instrument on which it was based and which was the foundation of the application."⁴ Despite this, the Court distinguished *Franzon* in

Saade on the basis that the New South Wales provision was materially different from its counterpart in the Western Australian statute. In particular, the Court pointed to the fact that there was no provision like subsection (3) in Western Australia. Moreover, it held that the fact that in the New South Wales statute subsection (3) was limited in its operation to paragraph (2)(b) - that is, it only applied to persons "upon whose application" erroneous applications are made. This was said to indicate that the term had a different meaning:

Clearly the subsection [(3)] fastens on to the transferor as the person to answer that description, in the circumstances to which it refers. And it does so in order to widen the category of persons against whom the statutory cause of action will lie ... In the context of the Act, "erroneous registration" can be seen as a shorthand expression intended to cover the elements in s 126(1) which give rise to a cause of action.⁵

3.5 The judgment had a further, purposive colouring. It also held that if the phrase were not interpreted in this way "there would indeed be ... the lack of an essential protection to persons who are defrauded".⁶ This decision is to be welcomed insofar as it has clearly resolved some of the difficulties associated with reconciling some of the constituent parts of this section and has removed from New South Wales law the restrictive influence of *Franzon* for defrauded plaintiffs noted above.⁷ To this extent it has given welcome expression to the insurance principles of the Act and has belatedly answered the criticisms of a number of commentators who have felt that the Act's already limited insurance provisions have all too often suffered further reduction in the hands of the judiciary.⁸ In doing so the High Court answered the complaint of Justice Needham in *Armour v Penrith Projects Pty Ltd*⁹ who concluded that the Act "lacks essential protection to persons who are defrauded in their interests in registered land being taken from them by forgery".¹⁰ However, although it resolves the serious problems concerning fraud, the case raises some other difficulties.

3.6 For instance, it appears to follow from *Saade* that a defrauded person in similar circumstances has a choice either to seek compensation from the Registrar-General or to attempt to get possession of his or her property back from the presently registered but fraudulent proprietor. This would appear to be a direct consequence of Justice Powell's holding at first instance in this case that Mrs Saade had effectively waived her remedies against Mr Khoury by withdrawing her caveat, and her ultimate success before the High Court.¹¹ This case therefore seems to have afforded persons who are deprived of an interest in land a significantly wider choice of parties to proceed against. This would appear to be at odds with at least one of the policies behind the Assurance Fund's provisions: that where the land can be recovered from wrongdoers, the question of compensation should be irrelevant. Given that Mr Khoury seems to have been tainted by the fraud and therefore failed to get an indefeasible title, there should be some clear obligation on the defrauded party to seek to dislodge him from the register. If it is now possible to waive one's rights against such persons and still get compensation, then the Registrar-General (and this means ultimately all those who contribute to the fund) will foot the bill.

3.7 It may be argued against this that the Registrar-General retains a right of subrogation under s 128(2) to the rights and remedies of the plaintiff who has received payment of damages from the fund "against any person who was wholly or partly responsible for the loss". Obviously, this includes Mr Saade in this case. But if he is out of the jurisdiction, or bankrupt, can the Registrar-General proceed against Mr Khoury? In most circumstances, this avenue of redress would be available as a straightforward mechanism for recouping damages. However, if those rights have been waived, as they were held to have been at first instance in this case, it is difficult to see that there exist any longer "rights and remedies of the plaintiff" enforceable against "any person who was wholly or partly responsible for the loss", as s 128(2) requires. In which case there would appear to be nothing to which the Registrar-General could be subrogated. This seems to be the worst of all possibilities in terms of equity and efficiency namely, that the Fund pays compensation in respect of a fraud concerning which it has no independent right of action. In the meantime one of the defrauding parties remains, indefeasibly so, on the register. There is little doubt that it would have been a tragedy for the appellant to have failed to secure any redress in a case such as this. Likewise, it would have been an indictment of the provisions of the Act if no remedy were available to cover a situation like this. But the consequences seem to be unsatisfactory given the difficulties faced by the Registrar-General in relation to subrogation. Clearly, this too needs to be resolved in any ultimate reform package.

3.8 Equally, too much should not be made of the apparent expansion of remedies afforded by this decision. While the case expands the rights of plaintiffs under s 126 and, as the Court pointed out, it now removes "the lack

of essential protection to persons who are defrauded",¹² its net effect is merely to locate a right in s 126 which was in any event available under s 127 after *Franzon*. This is because if there is no erroneous registration where a forged document is registered in the normal way, there is no "applicable" remedy under s 126. Accordingly, s 127 would be available as a basis for compensation. This has been recognised by the Registrar-General in the context of *Mayer v Coe*.¹³ This interpretation represented a great boon for this particular appellant, but its overall significance in the scheme of the compensation provisions is rather small when it is recognised that victims in the same position as *Franzon*, *Mayer* and *Armour* would all have s 127 remedies. It is easy to say this in hindsight, especially in light of a very obscurely worded set of provisions, but the real problem for the plaintiffs in these cases was not that there was no remedy available to them but that they sought redress under the wrong section. It is the Commission's view that it is preferable if there is simply one identifiable party against whom a person deprived of land may proceed. This would avoid the present problem of selecting the right defendant, and in the case of the Registrar-General, selecting the correct head of liability.

"Error or Omission" - Trieste and Dempster limited

3.9 As seen above, the majority in *Trieste* took the view that error or omission did not extend to matters which the Registrar-General failed to note on the register where, according to the view of the Court, the Registrar-General did not have the power to note those matters. However, this ruling has been limited in effect by a recent decision of the Supreme Court. In *Voudouris v Registrar-General*,¹⁴ Justice Hodgson took a generous view of what fell within the expression "error, omission, or misdescription in the Register".¹⁵ The plaintiffs, Mr and Mrs Voudouris, had purchased a house at a public auction for development as a dual occupancy. The copy certificate of title, which the plaintiffs relied on, disclosed the area as being 1,000 sq m. A copy of the deposited plan attached to the contract showed a similar measurement. The deposited plan contained a certificate by a registered surveyor that the survey represented on the plan was accurate. In fact, the area was misstated and was actually only 795.6 sq m. The error was purely one of calculation: the lengths and boundaries were correctly set out on the Register, but the area shown was greater than the area which a correct calculation based on the correct boundary lengths and directions would have shown.¹⁶ The plaintiffs stated that they would not have purchased the property if they had known it was only about 800 sq m.

3.10 The plaintiffs first argued that to maintain a certificate of title stating an incorrect area was a mistake of the Registrar-General within s 127(1). It was also argued that the Registrar-General could not avoid this by pointing to the error of the surveyor who prepared the deposited plan where the error could be shown by calculations based on the survey itself without having to inspect the land physically. Justice Hodgson stated that *Dempster's* case, on which the Registrar-General relied, might be distinguishable on the basis that:

the error or misdescription there did not appear from matters recorded on the title itself, but depended upon matters which could only be ascertained by measurements or surveys undertaken at the site. In the present case, the error was purely one of calculation: the lengths and directions of boundaries were correctly set out on the Register, but the area shown was greater than the area which a correct calculation based on the boundary lengths and directions would have yielded.¹⁷

However, he went on to hold that it was open to the Registrar-General to be satisfied by the surveyor's certificate, and that to do so was not a mistake.

3.11 The next issue was whether there was "any error, omission, or misdescription in the Register" within the meaning of s 127(1).¹⁸ Justice Hodgson referred to *Trieste's* case, which seemed to support a narrow interpretation of this phrase, denying its application to the omission of something which the Registrar-General was not authorised to record under the RPA (although, as mentioned in paragraph 2.51 above, the Court in *Trieste's* case failed to take note of an amendment which gave the Registrar-General the power to record statutory vesting on receipt of an application to do so). Justice Hodgson distinguished *Trieste's* case on the basis that it:

concerned a matter which could not, under the legislation as it then existed, be noted on the Register at all; and it was this that the majority relied on in reaching their conclusion that there was no error, omission or misdescription in the Register. In the present case, undoubtedly the correct area could have been stated on the Register, and I see no basis for saying that there is no error in

the Register, simply because the error is one for which a surveyor was responsible rather than the Registrar-General. Thus, I do not think *Trieste* is in point.¹⁹

3.12 As this case demonstrates, it is a fine distinction which separates this decision from those in *Trieste* and *Dempster*. In *Dempster*,²⁰ an error of the surveyor was involved and the Recorder of Titles relied on the survey, as the Recorder did in the *Voudouris* case. The only discernible factual difference is that the first case involved a measurement of frontage, while the second involved one of area; so that in the first situation, the true measurements could only be determined by a physical survey unlike the second which simply required an arithmetic calculation of area from the certificate. However, a different result was reached through the different wording of s 127, including making its remedies available when other remedies were "inapplicable"; whereas in *Dempster*, the relevant remedies were available only when other remedies were "barred".

3.13 It is clear in both cases that there was a factual misstatement in the Register, and, as noted above in *Voudouris*, Justice Hodgson observed that there was no basis for saying there was no error in the Register merely because a surveyor rather than the Registrar-General was responsible.²¹ This view clearly supports the need for the third category in s 127 to be available for purely factual errors.

3.14 This accords with the minority judgment in *Trieste's* case:

As to the third category, it seems to me that it is completely divorced from any breach of duty. Otherwise it would add nothing to the first category. In my opinion the legislature intended it to deal with the factual situation existing at the relevant time. This is the natural meaning of the words and, given that meaning, they provide a remedy in respect of a situation obviously likely to occur, and which equally obviously could cause serious damage to an innocent purchaser.²²

Statutory reform

Registrar-General's power to settle actions

3.15 The recent amendments to the compensation provisions enable the Registrar-General to settle claims against him or her as nominal defendant directly without the plaintiff having to commence an action. The main terms of these amendments are as follows:

Registrar-General may settle claims

129 (1) The Registrar-General may settle a claim for damages made against the Registrar-General under section 96I or Part 14, whether or not the person making the claim has commenced an action to enforce the claim.

(2) The power of the Registrar-General to settle a claim is subject to the following restrictions:

- (a) a claim must not be settled unless the Registrar-General is satisfied that the claimant would be successful in an action to enforce the claim or that it is reasonable in all the circumstances of the case to settle the claim;
- (b) the amount to be paid in settlement of the claim must not exceed \$100,000 (or such other amount as may be prescribed by the regulations) unless the Minister has approved of the settlement.

(3) In settling a claim, the Registrar-General may pay such amount as the Registrar-General thinks reasonable. The amount may include any costs of action incurred by the claimant before the settlement.

3.16 Section 96I gives a person who, in respect of a transaction involving land, relies on the accuracy of an official search which is incorrect, the right to bring a damages action against the Registrar-General to recover his or her losses. The damages recovered are paid out of the Fund. If the person suffering loss instructs a solicitor or licensed conveyancer, who relies on the official search, the person has no right of action against the solicitor or

licensed conveyancer for any loss or damage suffered as a result of an inaccuracy in the official search. In the latter situation, the person suffering loss (if not more than \$100,000) would presumably claim against the Registrar-General who would then be subrogated to the rights of the person suffering loss against any other person responsible.

3.17 It should be noted that the availability of the section is confined to the case where the Registrar-General is satisfied that the claimant would be successful in the action to enforce the claim or, that it is reasonable in all the circumstances of the case to settle the claim. The amount of settlement cannot exceed \$100,000 without the Minister's approval.

3.18 Part 14 of the RPA deals with civil rights and remedies in the RPA. Sections 121-123A contain the machinery for the settlement of disputes as to the propriety of official acts by the Registrar-General. While the amendments are to be applauded, the terms of their operation still leave the compensation provisions short of achieving the insurance principle. As was seen in Chapter 2, s 126 does not relieve a wrongdoer from the consequences of his or her liability. Actions against the wrongdoer still need to be pursued fruitlessly under the terms of s 126, before resort can be made to s 129 which embodies the recent amendments. The section is only directly available if s 126 is inapplicable and the other heads of recovery in s 127 apply. Recovery directly against the Registrar-General is also dependent on certain conditions. For example, s 129(2)(a) states that the Registrar-General can only settle a claim if he or she is satisfied that an action for recovery of damages against the Registrar-General would be successful. Presumably, in such a case prior to the amendments, the Registrar-General's legal advisers would have suggested settlement of the claim in any event, and it would appear that this particular amendment was directed to formalising that power, and making it available before an action needed to be commenced.

3.19 Under s 129(2)(a) the Registrar-General also has the power to settle the claim if he or she is satisfied "that it is reasonable in all the circumstances of the case to settle the claim". This would seem to include cases where the Registrar-General is satisfied that there would not be reasonable prospects of a successful action against him or her and is a more generous basis of recovery for this reason. However, it is not clear from the terms of the legislation exactly what is reasonable, and no guidance is given to claimants in respect of this. Finally, under s 129(3) the amount of damages payable is qualified by whatever the Registrar-General thinks is reasonable, and again, no guidance is given by the statute as to what this means. The Registrar-General also has subrogation rights against the wrongdoer or a professional indemnity insurer by virtue of s 129(5), which deems a payment under s 129 to be a payment of damages in accordance with a judgment for the plaintiff, and the claimant is taken to be the plaintiff.

Subrogation rights against the Registrar-General

3.20 Section 128 was recently introduced into the RPA to prevent "professional indemnity insurers" (who are liable to indemnify persons who suffer from loss as a result of the wilful default, negligence or fraud of professionals or technical experts in carrying out their business) or the person responsible for the loss, from bringing an action against the Registrar-General to recover the compensation paid by them to the plaintiff. The section took effect from 19 March 1992 and overrides any contrary law or agreement to the contrary.²³

EFFECT OF IMMEDIATE INDEFEASIBILITY

General impact of immediate indefeasibility on Assurance Fund

3.21 Paragraph 3.11 of Issues Paper 6 stated:

... in certain circumstances the effect of immediate indefeasibility may be that a person who has lost an interest in land as the result of registration of a void instrument can be left in the unenviable position of both losing title to, or an interest in, land and being precluded from the assurance fund.²⁴

3.22 The Registrar-General disagreed with this proposition and the statement in paragraph 3.10 of the Issues Paper that the compensation provisions should be revised to take into account the judicial acceptance of the theory of "immediate indefeasibility".²⁵ Prior to the case of *Frazer v Walker*²⁶ in 1967, there was a substantial

body of conflicting authority on whether the theory of immediate indefeasibility or the theory of deferred indefeasibility was embraced by the Torrens system. Under the doctrine of deferred indefeasibility, a person (A) registering an instrument which is void on general law principles can have his or her title set aside by the true owner (B), even if A has acted without fraud. B could not however attack the title of a third person (C) who purchases in good faith from A and registers an instrument executed by A. Indefeasibility is thus “deferred” to a subsequent purchaser, C in this case.²⁷ The doctrine of immediate indefeasibility by contrast, confers a good title on A immediately A obtains registration of a transfer (or other instrument), regardless of its invalidity. Thus, if A who has acted without fraud and given valuable consideration registers a forged transfer, A is entitled to protection against action by the previous registered proprietor (B) whose signature to the transfer was forged.

3.23 The facts in the case of *Frazer v Walker* were as follows. Mrs Frazer forged her husband's signature to a mortgage of their jointly-owned property in favour of Radomski (person A on the above analysis). Mrs Frazer failed to make payments under the mortgage. Radomski, the registered mortgagee, exercised power of sale and transferred the land to Walker (person C, on the above analysis). Walker duly registered the transfer. When Walker attempted to claim possession of the land, Mr Frazer (person B on the above analysis) claimed the mortgage to Radomski was a nullity due to his wife's forgery, and asked that the entries in the Register recording the mortgage to Radomski and the interest of Walker be cancelled. The dispute was thus essentially between Mr Frazer (B) and Walker (C). Walker was one transaction away from the invalid document (the forged mortgage to Radomski) and thus, even on the deferred indefeasibility theory would have had the overriding title, being a registered proprietor untainted by Mrs Frazer's fraud. The Privy Council therefore did not strictly have to decide on the conflict between deferred and immediate indefeasibility, but nevertheless, went out of its way to do so. It held that Radomski had an indefeasible title on registration, and the fact that the mortgage document was void at common law did not affect the indefeasibility of Radomski's title.

3.24 One obvious result of this decision is that there is at least a theoretical possibility of a vastly increased number of claims on the fund. Where deferred indefeasibility prevails, the former proprietor is able to get his or her land back, and so will not be a claimant. The victim then becomes the transferee under the void instrument.²⁸ However, because they have never had an interest in the land, they are not able to claim against the Assurance Fund. So, for example, in *Saade's* case, under the principle of deferred indefeasibility, Mrs Saade would have been able to regain her interest in the land, even if Mr Khoury had been completely innocent. Moreover, he would not be able to claim from the Fund. As we have seen, under the present immediate indefeasibility regime Mrs Saade would lose her interest but receive compensation from the fund.

3.25 The adoption by the courts of immediate indefeasibility has led some authors to raise the question of whether some consequential adjustments to the compensation provisions are needed. Neave, Rossiter and Stone for instance, note that “[n]o attempt has been made to revise the legislation to take account of the theory of ‘immediate indefeasibility’ in place of the earlier theory of deferred indefeasibility”.²⁹

3.26 Another view is that no significant loss has occurred as a result of the acceptance of the theory of immediate indefeasibility if figures on a State basis are looked at.³⁰ The Registrar-General on the other hand has stated that there are cases (presumably involving immediate indefeasibility) pending where amounts paid from the Consolidated Fund will be sizeable.³¹ There is also one completed case, which involved a judgment of \$559,279 (not including costs of the appeal etc) being awarded.³² In any event, significance of loss is a relative term and what may be a small loss to one plaintiff may be disastrous for another.³³ Appendix B also indicates that there have been at least 53 claims for loss resulting from fraud between 1975 and 1995 since the acceptance of the concept of immediate indefeasibility in 1967. However it is not apparent whether the loss related to these claims was necessarily due to immediate indefeasibility, as opposed to deferred indefeasibility. Overall the effect of immediate indefeasibility does not appear to have been significant.

The strengthened position of volunteers: *Bogdanovic v Koteff*

3.27 In *Bogdanovic v Koteff*³⁴ the Court of Appeal held that a registered volunteer obtained an immediately indefeasible title and was thereby not subject to a prior unregistered interest created by the previous registered proprietor. As the appellant, who was seeking to upset the title of the registered proprietor, could not point to anything in the RPA preserving her rights against the registered proprietor who took as a volunteer, s 42 operated so as to give Mr Koteff, the volunteer, an interest “absolutely free” from any estate or interest in Mrs Bogdanovic.

3.28 A number of authors have suggested that there are no compelling reasons why a volunteer should obtain the benefit of the paramountcy provision.³⁵ Indeed Whalan has suggested that the matter of whether a volunteer's title should be indefeasible should be put to rest by a legislative provision withholding the benefit of indefeasibility from a volunteer.

3.29 In this context, one problem remains as a result of the decision in *Bogdanovic v Koteff*. The conclusion that a volunteer had an immediately indefeasible title (on the basis that this was the overall objective of the Act) was clearly at odds with the earlier decision of Justice Adam in *King v Smail*.³⁶ Justice Adam reasoned on the basis of repeated references in the Victorian Act to "purchasers for value" and the need to read the Act as a whole that the indefeasibility provisions considered as a whole suggested that volunteers ought not to be given the same protections as purchasers. The Victorian equivalent to s 135 was one such provision referred to. As a result of *Bogdanovic v Koteff* the curious position arises that volunteers would seem to get the protection of immediate indefeasibility under s 42, yet might still be liable to a claim for damages for the reason that they do not come within the ambit of s 135. This apparent result raises an acute problem analogous to that identified by Justice Mason in *Franzon*. That is, the need for persons who have an indefeasible title and who cannot therefore be removed from the register to be equally immune from claims for damages. After *Bogdanovic* volunteers would seem to be in precisely this invidious position. This would appear to be another reason for resolving this matter by statutory amendment.

RELEVANCE OF DEVELOPMENTS TO REFORM

3.30 As was seen in Chapter 2, the compensation provisions, contained in s 126 and 127 of the RPA and related sections, are not easy to interpret. Many authors have commented on their drafting:

Due to ungainly drafting, it is sometimes difficult to discern the separate functions of the sections which confer the above remedies. Particularly in regard to s 126 there have been frequent comments upon ill-drafting, and the late John Baalman commented: "The general impression created by the language of Part XIV is that the draftsman had reached a stage at which he was anxious to see the end of the difficult task".³⁷

3.31 Similar views have been expressed in respect of the provisions which identify the defendants for the purposes of an action for damages under s 126:

As can be seen, except in Victoria, these provisions as to the correct person to sue are a tangled skein.³⁸

And in respect of s 126:

The drafting of s 126, although it has been on a number of occasions amended, leaves much to be desired. One would think in an Act of this kind, where such importance is placed upon the interests of the person whose name appears on the register, that the rights of persons whose interests have been detrimentally affected by error or criminal activity would be precisely spelt out. Unfortunately, the section raises a number of difficult questions of interpretation, and it seems to me to be in need of drastic revision.³⁹

The above mentioned statements indicate that the problem arises from the lack of clarity in the section, and that statutory revision is desirable.⁴⁰

3.32 Criticisms have been made of the interrelationship between s 126 and s 127 in the following terms:

It seems that the errors to which para (d) [ie, s 126(1)(d)] refers are also covered by s 127. That section provides an action for damages against the Registrar-General in cases in which the remedy provided by s 126 is inapplicable. Section 126(5) also provides an action against the Registrar-General when the direct remedy against an individual cannot be pursued. It is difficult to see the purpose in this apparent overlapping.⁴¹

3.33 Criticisms in respect of the failure of the provisions to accord with the insurance principle still apply in spite of recent amendments to the compensation provisions. The insurance principle, which we explained in Chapter 1, is encapsulated in the words of the South Australian Commission in 1873 when it inquired into this issue:

We are of the opinion that the person damnified ought to stand in the same relation to the assurance fund as an assured person does with regard to an assurance company with which he has effected an assurance. In the case of a holder of a policy against fire, it is not necessary for him to prosecute the person guilty of arson before recovering upon the policy; nor in the case of a life assurance need the holder of the policy prosecute a murderer who has caused the death of a person whose life is insured. The person damnified ought to be entitled to make his claim immediately against the Registrar-General, as representing the assurance fund, leaving that functionary to recover against the person who may have committed the fraud.⁴²

CONCLUSION

3.34 The limited scope for compensation under s 126 and 127 has resulted, to a large extent, from the poor drafting of the compensation provisions and, in the past, to the cautious approach of the Land Titles Office in awarding compensation. This previous approach is attributable to the ineffectiveness of the provisions to fulfil insurance principles and the difficulty in their administration. Finally, while it is true that s 127 of the RPA allows recovery of compensation for losses not involving deprivation of land, the scope of the section has been restricted by the court's reluctance to attribute liability for certain errors to the Registrar-General and to award compensation in certain situations only if the Registrar-General's error was the sole cause of the loss. The narrow interpretation accorded to the provisions justifies the need for their amendment to ensure that the compensation principle, discussed in Chapter 2, is properly fulfilled.

FOOTNOTES

1. *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611.
2. *Saade v Registrar-General* (1993) 179 CLR 58.
3. *Saade v Registrar-General* at 66.
4. *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 619.
5. *Saade v Registrar-General* at 68.
6. *Saade v Registrar-General* at 68.
7. Paras 2.9-2.10.
8. M A Neave, C J Rossiter and M A Stone, *Sackville and Neave Property Law: Cases and Materials* (5th ed, Butterworths, Sydney, 1994) at 531; L A McCrimmon, "Compensation Provisions in Torrens Statutes: The Existing Structure and Provisions for Change" (1993) 67 *Australian Law Journal* 904; C. McKelvey, "Fraudulent Deprivation and the Assurance Fund" (1993) 25 *Queensland Law Society Journal* 133.
9. [1979] 1 NSWLR 98.
10. *Armour v Penrith Projects Pty Ltd* [1979] 1 NSWLR 98 at 102.
11. This fact was held to be fatal to her case before the Court of Appeal.
12. *Saade* at 66.
13. See para 2.40, above.
14. *Voudouris v Registrar-General* (1993) 30 NSWLR 195.

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15. *Voudouris* at 200.
16. *Voudouris* at 200.
17. *Voudouris* at 200.
18. *Voudouris* at 199-200.
19. *Voudouris* at 200.
20. *Dempster v Richardson* (1930) 44 CLR 576 at 587.
21. *Voudouris* at 200.
22. *Trieste Investments Pty Ltd v Watson* (1963) 64 SR (NSW) 98 at 107.
23. For example, the *Legal Profession Act 1987* (NSW) which permits the Fidelity Fund to be subrogated to the rights of the claimant.
24. See also Registrar-General, *Submission* (6 April 1990) para 23.
25. Registrar-General, *Submission* (6 April 1990) para 10.
26. *Frazer v Walker* [1967] 1 AC 569.
27. See, for example, *Gibbs v Messer* [1898] AC 248.
28. As noted above, this is the loss-shifting aspect of the priority rules.
29. Neave, Rossiter and Stone at 528.
30. Master Windeyer, *Submission* (28 August 1990) at 1.
31. Registrar-General, *Submission* (6 April 1990) at 8 para 23.
32. See Appendix B.
33. Master Windeyer, *Submission* (1 March 1990).
34. (1988) 12 NSWLR 472.
35. See A J Bradbrook, S V MacCallum and A P Moore, *Australian Real Property Law* (Law Book Company, Sydney, 1991) at [5.64]; and D J Whalan, *The Torrens System in Australia* (Law Book Company, Sydney, 1982) at 336.
36. [1958] VR 273.
37. R A Woodman and K Nettle, *The Torrens System in New South Wales* (Law Book Company, Sydney) at [121.3]. See also *Price v Registrar-General* (NSW Supreme Court, Windeyer J, 14 March 1996, ED 2985/95, unreported).
38. D J Whalan, *The Torrens System in Australia* (Law Book Company, Sydney, 1982) at 354.
39. *Armour v Penrith Projects Pty Ltd* [1979] 1 NSWLR 98 at 101.
40. Woodman and Nettle at [126.14].
41. Woodman and Nettle at [126.8].

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42. South Australia, *Report of Commission Appointed to Inquire into the Intestacy, Real Property, and Testamentary Causes Acts; Together with Minutes of Evidence and Appendix* (Paper No. 30, 1873) XIV, quoted from R M Stein, *Submission* (10 August 1989) at 8; see also E L Piesse "Reform of the Torrens System" (1939) 11 *Australian Law Journal* 465 at 472.

4. Options for Reform

INTRODUCTION

4.1 This chapter discusses submissions received on the following options for reform presented in the Commission's Discussion Paper and Issues Paper:¹

abolition of the State guarantee of Torrens title;

continuation of the State's role as insurer of Torrens titles, but with the insurance provided by private insurance companies;

acceptance by registered proprietors of responsibility for insurance of Torrens titles (either in addition to or in substitution for the present State guarantee); and

retention of State guarantee, but with improvements to the current compensation provisions in the *Real Property Act 1900* ("RPA").

The discussion of the Commission's recommended option for reform, that State guarantee of title be retained with improvements to the legislation, refers to submissions received on the specific proposals for changing the compensation scheme put forward in the Discussion Paper and Issues Paper. This chapter primarily focuses on the main issues arising from the submissions. They are made the subject of recommendations in Chapter 5.

ABOLITION OF STATE GUARANTEE OF TITLE

No longer any need for compensation

4.2 In the Discussion Paper and Issues Paper,² the Commission put forward several arguments in support of abolishing State compensation for losses sustained during the title registration process. One contention was that, while a compensation scheme was necessary for the introduction of the Torrens system over one hundred years ago, it is now anachronistic and should be abolished.³

Compensation provisions as a consumer protection measure

4.3 One response to this argument was that the compensation scheme has been, for the public, a very cheap form of consumer protection.⁴ It has provided compensation not only for Departmental errors, but also in circumstances when the claimant would not have been able to recover loss from anyone else. Thus, it would be quite strange, in this era of consumerism, to remove a very long standing consumer protection measure unless:

it can be replaced with a superior consumer protection measure; and

it is the right time to introduce such a change.

Neither of these qualifications would appear to have been satisfied by the options presented in the Issues Paper.⁵

Technological and other changes

4.4 Another response⁶ to the abolition proposal was to suggest that major technological and other changes have an impact on the operation of the Torrens system and provide further justification for retention of the State guarantee of title. These changes include:

automated titles;

recent conversion of almost the entire Crown land title system to Torrens title (which contains a potential for errors, such as omitted unregistered second mortgages); and

the continuing efforts of the Land Titles Office to eliminate Old System title through the issuing of qualified and limited titles without investigating existing titles and the existence of outstanding interests.

Land registration systems without State guarantee

4.5 Another argument for abolition presented in the Issues Paper⁷ suggested that several foreign jurisdictions operate registration systems satisfactorily without compensation. Despite differences between Australia and these jurisdictions in their legal, social and economic conditions, it was contended that the overseas experience supported abolition of compensation here. The Registrar-General⁸ stated that insufficient details were presented in Issues Paper 6 to enable a proper assessment of the overseas registration systems.

4.6 It is difficult to make any accurate assessment of whether the absence of State guarantee of title in those overseas registration systems supports the abolition of the State guarantee of title here, as New South Wales lacks directly comparable authentication procedures. The suggestion that the existence of registration systems which operate satisfactorily without compensation is an argument for abolition of the compensation scheme in this State was not supported in submissions to the Commission. Furthermore there appears to be general acceptance and support for the need for a compensation scheme.

Tort remedies are inadequate

4.7 In response to the Commission's argument in the Issues Paper⁹ that tort principles might adequately compensate persons suffering loss as a result of the operation of the Torrens system, it was suggested¹⁰ that a compensation scheme for errors made by the Registrar is preferable to bringing a common law action for negligence with all its costs and delays. However, as noted above,¹¹ the current system can also involve considerable delays and a scheme involving direct application for compensation to the Registrar-General would only be better than a common law action if losses were compensated fully and quickly.¹²

No compensation for unregistered titles

4.8 The fact that the State does not pay compensation if a title is unregistered, no matter how diligent an innocent purchaser may have been, was raised in both the Discussion Paper and Issues Paper as an argument for abolition of the State guarantee of title.¹³ In response, Stein¹⁴ suggested that the State did not guarantee the operation of the Old System and there is, therefore, no reason why it should offer compensation for loss flowing from its operation. The State does, however, guarantee the operation of the Torrens title system.

Purchaser of Torrens title land more vulnerable than purchaser of Old System land

4.9 Section 41(1) of the RPA provides:

Dealings not effectual until recorded in Register

41(1) No dealing until registered in the manner provided by this Act, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any dealing in the manner provided by this Act, the estate or interest specified in such dealing shall pass, or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in such dealing, or by this Act declared to be implied in instruments of a like nature.

Thus the purchaser may lose priority of his or her interest to a prior equitable interest in the period between settlement and actual registration or lodgment of documents in a registrable form. It follows that the purchaser of Torrens title land is more vulnerable than the purchaser of Old System land. The purchase price has been paid, but legal title has not been acquired in a Torrens transaction. However, it may be that the effect of the absence of State compensation for an unregistered (but "registrable") dealing is reduced by RPA s 43A which gives purchasers of Torrens title land some protection against prior equitable interests.

Protection as to notice of person contracting or dealing in respect of land under this Act before registration.

43A (1) For the purpose only of protection against notice, the estate or interest in land under the provisions of this Act, taken by a person under a dealing registrable, or which when appropriately signed by or on behalf of that person would be registrable under this Act shall, before registration of that dealing, be deemed to be a legal estate.

This seems intended to give a purchaser of Torrens land, the protection given to a bona fide purchaser of a legal estate under the general law. If a purchaser of Torrens land is a bona fide purchaser for value without notice of prior equitable interests, he or she is not subject to those interests.¹⁵

Absence of guarantee in personal property registration systems

4.10 The fact that the State does not pay compensation for losses arising from the operation of other types of registration was raised as an argument for abolition¹⁶ but is of little merit as the nature of ownership of real property is quite different from personal property. Personalty in the ordinary situation has nothing to do with the Crown. "Realty" however, reposes solely in the ownership of the Crown and proprietors hold estates of the Crown.¹⁷

STATE GUARANTEE PROVIDED BY PRIVATE INSURER

4.11 Issues Paper 6 suggested that the State could continue its role as insurer of Torrens titles but use the private insurance industry to deal with claims. Premiums payable to the insurance companies would be met by the Government. It was suggested in the paper that this option would have the advantage of setting up an independent agency between the claimant and the Land Titles Office. It was also suggested that another advantage of this option would be to encourage the Registrar-General to devote fewer resources to achieving perfection in administering the RPA.¹⁸

4.12 The submissions which addressed this option generally rejected the concept of allowing the private insurance industry to process claims. It was suggested in some submissions that the involvement of private insurers would result in the community generally losing confidence in the Torrens system, and a loss of faith in the accuracy of the Register and in the ability of the Land Titles Office to perform its statutory obligations. Further, the interposition of an independent body to deal with claims would be relatively more costly than allowing the Land Titles Office to deal with claims because of that Office's familiarity with the nature of the claims and understanding of the issues in dispute. It was also suggested that care should be taken not to allow risk management policies to relax to the point where increased litigation results. Other submissions suggested that, while the option was essentially a commercial decision for the Land Titles Office to make, there would be inadequate accountability to the Parliament by a private insurer.

TITLE INSURANCE ARRANGED BY REGISTERED PROPRIETOR

4.13 Another option suggested in the Issues Paper was that registered proprietors could take out insurance to cover losses which relate to their titles. There was also some discussion in the paper of title insurance developments in the United States, such as the development of insurance policies which indemnify both title and non-title related losses and the wide range of transaction-related services provided by title insurance companies. It was also observed that in the few jurisdictions in the United States where the Torrens system operates, finance companies generally required private title insurance even where State guarantees are provided. The option put forward in the Issues Paper was that private insurance, either compulsory or optional, could replace the State guarantee. A variant of this was that the State could continue its indemnity for losses resulting from, for example, errors within the Land Titles Office while registered proprietors themselves could insure against losses resulting from fraud, surveyors' errors and the like.¹⁹

4.14 This option was rejected by all submissions which considered it primarily on the basis that private insurance would be too costly for the registered proprietor. Lang²⁰ stated that in the United States, title insurance is integral to the conveyancing system to cover not only losses which result under a Torrens system, but also to indemnify losses which result from serious deficiencies in the title systems in the North American

jurisdictions and solicitors' negligence. The different and broader purpose of title insurance in those jurisdictions is the reason for the payment of a substantial single premium.²¹ The Commission does not support the introduction of a system of private title insurance.

ELIMINATION OF EXISTING LEGISLATIVE DEFICIENCIES²²

Torrens system losses

4.15 The Torrens system exposes land owners to two types of loss:

losses flowing from the mistakes of Government officers in the Land Titles Office in not entering interests and estates on the Register correctly; and

losses flowing from the deprivation of land through the operation of the indefeasibility provisions of the Torrens statute.

4.16 If it is accepted that the Government should provide compensation for losses arising from the operation of the Torrens system, should the following ideals be pursued:

that the Register be likened to a "mirror" in that it should reflect accurately and completely all matters relevant to the title to a parcel of land, and that the State should compensate anyone suffering loss as a result of their reliance on the Register; and

that the State should compensate those persons who find themselves wrongfully deprived of a registered interest (for example, by the fraud of a third party)?²³

Discussion Paper 19 and Issues Paper 6 put forward a number of proposals in respect of these issues and others on which submissions were received which related to the possible future administration of the compensation scheme. These are considered below.

Reliance on the Register²⁴

4.17 In the Issues Paper²⁵ the Commission asked whether compensation should be paid to a person who sustains loss by reliance on the Register when it is inaccurate, that is, loss:

caused by statutory interests created independently of the Register; and

caused by errors of officers of the Land Titles Office (for example, where an easement is omitted from a title).

All submissions supported the idea of State compensation for losses caused by errors of officers in the Land Titles Office, and of the establishment by legislation of an administrative scheme to replace *ex gratia* payments and court proceedings.²⁶

Statutory interests not recorded on the Register

4.18 A number of "interests" which are not recorded on the Register and which may strictly be neither equitable nor legal interests can exist in respect of a parcel of land. Various and varied inquiries are made of statutory authorities by prudent purchasers, as standard conveyancing procedure,²⁷ to ensure that the land is not affected by such interests. These "interests" may be statutory obligations, charges, duties and limitations on enjoyment; or they may be no more than proposals. Searches are advised to be made in respect of various pieces of legislation including the *Mine Subsidence Compensation Act 1961*, the *Local Government Act 1993*, the *Water Board (Corporatisation) Act 1994* and the *Land Tax Management Act 1956*. Applicants wishing to determine government interests affecting their land need to apply to numerous authorities individually.

The Central Register of Restrictions

4.19 However, with the development of the Central Register of Restrictions ("CRR"), this practice has changed. The CRR is a project developed by the Land Titles Office on behalf of the State Land Information Council.²⁸ The purpose of the CRR is to provide a single point of enquiry for persons seeking information on government interests in land. This has eliminated the need to apply to numerous authorities individually, providing greater convenience and cost savings both to applicants and to the authorities themselves. The CRR operates together with the Property Information Inquiry Service which is based in the Land Titles Office. This service provides a central point for lodging property enquiry forms. A single form and a single payment may be lodged with the Land Titles Office, which distributes the enquiries on a 24 hour basis to the relevant authorities on behalf of the applicant. This service has been operating for some time and will be enhanced by the progressive implementation of the CRR. As authorities record their interests on the CRR, "clear certificates" can be issued immediately upon application without the need to send the enquiry to the authorities concerned. The Property Information Inquiry Service is presently managing enquiries on behalf of the following authorities:

AGL Gas Company (NSW) Ltd

Rural Lands Protection Board

Department of Energy

School Education Department

Department of Mineral Resources

Soil Conservation Service

East Australian Pipeline Ltd

State Forests

Environment Protection Authority

State Rail Authority

Hunter Water Corporation Ltd

Sydney Electricity

Local Councils

Sydney Water

Mine Subsidence Board

The Heritage Council of New South Wales

Office of State Revenue (Land Tax)

TransGrid (Electricity Transmission Authority)

Roads and Traffic Authority

Water Resources

At present not all of these authorities are accessible directly on the CRR. Access to the CRR may be obtained through remote computer terminals, which allow on-line customers to make CRR inquiries for no cost other than

the normal authority inquiry fees.²⁹ The Land Titles Office has entered into agreements with individual authorities which provide for the respective liabilities of the Land Titles Office and the authority for incorrect information, prompt and accurate recording of interests on the CRR and the delegation of authority to the Land Titles Office for the issue of "clear certificates". Any liability of the Land Titles Office in such circumstances would be separate from the liability of the Registrar-General under a statutory compensation scheme of the kind under consideration in this Report.

4.20 Two submissions to the Commission have suggested that it would be ideal to record statutory interests on the Register for completeness.³⁰ Stein also suggested that "cluttering" of the Register which was raised in the Issues Paper as an argument against noting these "interests" in the Register is absurd in light of the successful operation of registers which cross reference such interests in Germany and Austria and which have existed since the thirteenth century. Johnstone³¹ suggests that the present method of inquiring into statutory interests is patently inefficient and that a proper investigation be conducted into whether it would be more efficient in some cases for the government body concerned to note its interest on the certificate of title.

4.21 The Commission³² is of the view that these interests should not, in general, be required to be recorded on the Register, because many of them are neither legal nor equitable interests in land, and they would clutter and confuse the Register; and that accordingly State guarantee should not be provided in respect of these "interests" generally.

Resumptions

4.22 However, in relation to resumptions by statutory authorities, the Commission is of the view that the authorities should be required to give notice of such resumptions, the Registrar-General should be required to record them, and losses suffered as a result of persons relying on the Register should be compensable. There seems no acceptable reason why a person relying on the Register should be at risk of loss in these circumstances, where it would involve no significant burden on the resuming authority to require it to send a copy of its Gazette notice to the Registrar-General, and no significant burden to require the Registrar-General to record the resumption on the Register.³³

4.23 *Trieste Investments Pty Ltd v Watson*³⁴ is an example of a case where compensation was denied for an unregistered statutory interest. It was held in that case that RPA s 127 could not be relied on to compensate a registered proprietor where there was an unregistered resumption under the *Public Roads Act*. This was decided on the stated ground that, before 1930, a resumption could not be registered so that the Registrar-General had no power to register one; although, as observed by Woodman and Nettle,³⁵ no reference was made to the provisions of s 14 of the *Real Property (Amendment) Act 1921* whereby the Registrar-General could record a statutory vesting on receipt of a formal application to do so.

4.24 Section 31A of the RPA now empowers the Registrar-General to record a resumption where he or she has notice of it, but does not require the Registrar-General to do so. The Commission is of the view that no compensation should be payable by the Registrar-General on the basis of failure to exercise a discretion to record a matter, because it cannot be assumed that such a matter will be recorded. However, as stated in paragraph 4.22, the Commission is of the view that any authority capable of resuming Torrens title land should now be required to notify the Registrar-General of resumptions, and that the placement of those resumptions on the Register should be required where notification has been received. Then, compensation should be available from the Registrar-General where resumptions are not recorded: if this happens because the resuming authority failed to notify the resumption, the Registrar-General should be indemnified by the resuming authority.

Wrongful deprivation³⁶

4.25 The Issues Paper suggested that the State may have a duty to compensate individuals wrongfully deprived of land where fraud or negligence of a third party is the primary source of any losses suffered. The bona fide purchaser for value obtains an immediately indefeasible title when registered pursuant to a forged transfer or if a registrable forged transfer has been lodged, while the same purchaser under Old System would gain nothing. Thus, the effect of forgery under the Torrens system is prejudicial to the title holder.

4.26 Submissions received on this issue generally agreed that there should be statutory compensation available where fraud or negligence of a third party has caused the loss.³⁷ The Law Society has suggested³⁸ that aside from fraud, errors in the Register resulting from negligence should “sound in damages calculated in accordance with the existing principles of the common law including liability for contributory negligence”. No specific comment was given by the Law Society on the treatment of fraud.

Documents signed under the influence of fraud

4.27 One of the exceptions to recovery under a “fraud” basis for wrongful deprivation of land suggested in the Discussion Paper and Issues Paper³⁹ was where a registered proprietor voluntarily signs documents of title under the influence of fraud. Here, it was suggested that the case for compensation may not be so strong, as the victim could be assumed to have control over what occurred. The Registrar-General in his submission agreed with this proposition. However, as Justice Mahoney pointed out in *Parker v Registrar-General*,⁴⁰ there seems to be no justification for limiting a right of recovery against a fraudulent party according to whether the fraud involves the voluntary signing of a transfer induced by fraud, the signing of it by mistake or the forgery of a document where the fraud is directed to achieving the deprivation of land. Furthermore, limiting compensation to cases of forgery would not fulfil the insurance principle in that it would not compensate losses resulting from fraud, other than those resulting from forgery (for example, where innocent registered proprietors are fraudulently induced to execute transfers). The proposal would also not compensate losses which involve negligence or error of third parties where error of the Registrar-General or forgery has not occurred (for example, where a solicitor negligently completes instruments which transfer title but there is no disconformity between the instrument and the registration on which it is based, so that there is no mistake by the Land Titles Office).⁴¹

Negligence of a claimant’s solicitor or agent⁴²

4.28 The Issues Paper suggested that the aim of the Victorian exception to compensation in the case of negligence or fraud by the claimant’s solicitor or agent is to provide an incentive to the claimant to exercise care in relation to the choice of agents. It was also suggested that there is no good reason for making the State responsible for loss caused entirely by the fraud or negligence of a claimant’s solicitor or agent. Accordingly, the Commission proposed the following in paragraph 48 of the Discussion Paper:

There should be an exception from the right to compensation in the case of loss totally attributable to the fraud or negligence of a solicitor or agent of the claimant. Apportionment of damages should occur in those cases where a solicitor or agent has been partially responsible.

4.29 Some submissions supported the idea of leaving plaintiffs to bring actions against their solicitors and agents. Others supported the idea of the Registrar-General being subrogated to the rights of plaintiffs against their agents and solicitors. The first option has a number of difficulties which the second does not. Guarantee funds within professions may not cover frauds within, for example, solicitor’s offices by law clerks and other non-qualified employees.⁴³ In addition, the Registrar-General would be in a better position than the average plaintiff to bear the loss.

4.30 To illustrate, in *Robinson’s case*⁴⁴ the plaintiffs, the Robinsons, obtained judgment together with costs of the proceedings against Chatterton, a law clerk who fraudulently transferred the Robinsons’ land to himself and granted a mortgage over the Robinsons’ land. The amount of judgment was not recovered and the Robinsons brought bankruptcy proceedings in the Federal Court in which they obtained a sequestration order against Chatterton’s estate. They were not able to recover from the estate, and claimed damages under RPA s 126(5) (which allows compensation if, amongst other things, the person liable for damages is insolvent) against the Registrar-General, and also costs of the proceedings against Chatterton in the Supreme Court and of obtaining the sequestration order in the Federal Court. However, the Court held that RPA s 126(5) proceedings did not embrace the right to recover the costs of obtaining judgment for damages against Chatterton in the Supreme Court or of obtaining the sequestration order. The Robinsons therefore suffered a loss at least equal to the costs of those two proceedings.

4.31 There are a number of issues in the area of professional indemnity which should be considered. First, an inequitable situation has resulted from plaintiffs claiming directly against professional fidelity funds. The Funds after paying out a claim may then claim against the Registrar-General, thereby creating unnecessary litigation,

and increasing associated costs. For example, in *Gill's case*,⁴⁵ Gill's solicitor, Hawkins, with whom she had left her certificate of title, forged her signature to a mortgage over Gill's property. A company lent Hawkins money on the faith of the mortgage which was registered in favour of the company. After Hawkins' fraud was discovered, Gill claimed against the Fidelity Fund operated by the Law Society which paid out the company and resulted in the removal of the mortgage from Gill's title. The Law Society in the name of Gill, to whose rights it was subrogated under the *Legal Practitioners Act 1898*, sought to claim damages against the Registrar-General under RPA s 127. One of the questions which was referred by Master McLaughlin to the Equity Division of the Supreme Court of New South Wales to be determined prior to the trial was whether the Law Society was entitled to recover damages under RPA s 127 against the Registrar-General as nominal defendant pursuant to its subrogation rights under s 61 of the *Legal Practitioners Act 1898*. Justice Young held that the Law Society could maintain its action against the Assurance Fund. Section 89 of the *Legal Profession Act 1987* enables the Law Society to be subrogated to all rights and remedies of a successful claimant against the Fidelity Fund against any person other than a solicitor who is a partner of a claimant who acted honestly and reasonably. It is unfair that the Law Society can require contribution from practitioners for the Fidelity Fund which is used to compensate claimants for the dishonest acts of their solicitors, and yet obtain reimbursement of those funds by claiming an indemnity from the innocent Land Titles Office which is not responsible for the acts of the dishonest solicitors. It is clearly inequitable that the Registrar-General should be called on to indemnify losses resulting from the fraudulent and dishonest acts of solicitors where funds are available for the very purpose of compensating those losses. If on the other hand Gill had claimed directly against the Registrar-General, it would be quite fair for the Land Titles Office to recover against the Fidelity Fund. The situation has since been remedied by the passing of legislation which precludes professional indemnity insurers from seeking reimbursement from the Registrar-General where losses have resulted from the acts of professionals which have been insured against.

4.32 Secondly, professionals are only required to take the minimum cover necessary under their indemnity schemes, and in any property market with appreciating values, this cover may well be inadequate.⁴⁶

4.33 Thirdly, the Registrar-General is better able to bear the delays and cost of claiming against a fidelity fund than would an individual litigant with small means.

4.34 Fourthly, the final arguments against requiring plaintiffs to pursue remedies against solicitors and agents or their fidelity or professional indemnity funds can be summarised as follows.⁴⁷ Solicitors are properly held out by the Law Society and by individual practitioners themselves to be professionals who are competent and trustworthy. The Registrar-General of the Northern Territory observed that it is unfair to assume that citizens have any ability to make accurate assessments of their agents' honesty and skills. A person living in remote areas serviced by a single sole practitioner has little practical choice in obtaining the services of another solicitor. In any event losses may arise, not so much from the choice of solicitors in a transaction, but by entrusting evidence of title for safekeeping with solicitors. The Commission would add to this that financial and other pressures may lead plaintiffs to choose agents they would not choose under different circumstances. For example, in *Robinson's*⁴⁸ case, the plaintiffs may have used the same solicitor as the vendors to save costs. In an era of consumer protection it is unfair to force the victims to bear the consequences of the unauthorised acts of their agents.

Contributory negligence of a claimant⁴⁹

4.35 The Issues Paper suggested that claimants may contribute to their losses in a number of ways such as by signing a transfer without first obtaining payment or by negligently dealing with a duplicate certificate of title. In such situations there is no good reason for requiring the Registrar-General to compensate people contributing to their own losses. It was also suggested that in cases where the claimant was entirely, and not just partly, responsible for the loss, it would be anomalous to give compensation, while denying it to the claimant whose agent had caused the loss. Accordingly the Discussion Paper proposed that:

There should be an exception from the right to compensation in the case of loss totally attributable to the negligence of the claimant. Apportionment of damages should occur where both the claimant and the Registrar or Registrar-General have been partially responsible.⁵⁰

4.36 Lang has said of this proposal that:

... the decisions dealing with contributory negligence and the apportionment of responsibility between two parties each separately (or in combination) responsible for loss, in the professional liability area, are in my view quite arbitrary and difficult to justify on consistent principles. ... My preference would be that if the loss is attributable partly to an extraneous source (other than the claimant) and the Registrar-General, the fund should pay the entire claim and be subrogated to the claimant's right against the extraneous party.⁵¹

4.37 Stein suggested that although the proposal in the Discussion Paper is sound in theory,

exigencies of the moment and circumstances of degrees of innocence invariably have the result, in some cases, of visiting unreasonable consequences upon people who are often incapable of understanding or appreciating the full nature of contributory negligence.⁵²

The remaining submissions generally supported the contributory negligence argument.

Exhaustion of other remedies

4.38 The expense and delay of litigation may be prohibitive for a potential plaintiff. In paragraph 50 of the Discussion Paper the Commission proposed that:

There should be no requirement that other remedies be exhausted before compensation is payable. The Registrar or Registrar-General should be able to join other persons as co-defendants or bring a separate action by way of subrogation.

4.39 Persons making submissions on this point generally agreed that there should be no requirement that other remedies be exhausted before claiming against the Registrar-General. The Registrar-General stated that there should be several qualifications to this which are discussed below. In addition, he suggested that the present exception in RPA s 133(c) be retained. The merits of retaining RPA s 133(b), as well as s 133(c), as exceptions to compensation are discussed first.

Exceptions to recovery

Sections 133(b) and 133(c)

4.40 Section 133(b) of the RPA prevents claims against the Fund for loss caused by the inclusion of the same land in two or more grants from the Crown. The Commission sees no sufficient reason for this exception, and recommends that it not be retained in any new statutory scheme.⁵³

4.41 RPA s 133(c) excludes recovery from the Fund where loss has resulted from land being included in the same folio of the Register or certificate of title with other land through misdescription of boundaries or parcels unless the person responsible for loss is dead, insolvent, or bankrupt or has absconded. It is anomalous that the State should provide an indemnity where a third party has caused loss to a plaintiff as a result of a misdescription of parcels or boundaries and where the wrongdoer is not able to be sued, but not provide any recourse where the Land Titles Office has caused the error. It is contrary to the insurance principle underlying the Fund that persons who suffer loss through reliance on the Register are denied full compensation, whether such loss arises from land being included in the same folio of the Register or certificate of title with other land through a misdescription of parcels or boundaries by the Registrar-General or a third party.

Unauthorised use of company seals

4.42 Another qualification to the general agreement of the Registrar-General with the proposition that other remedies need not be exhausted before compensation is payable is where companies sustain loss through the misuse of their seals.⁵⁴ The Registrar-General suggested that a specific exception from recovery for such companies be made in the same terms as s 178(c) of the *Land Transfer Act 1952* (NZ) which states that:

The Crown shall not under any circumstances be liable for compensation for any loss, damage, or deprivation occasioned by any of the following things, notwithstanding that effect may have been given to the same by entry on the registrar: ...

(c) By the improper use of the seal of any corporation or company; or ...

4.43 The Commission is of the view that the introduction of a provision similar to the New Zealand exception may unjustly favour those who deal with companies at the expense of innocent creditors and shareholders who are victims of unscrupulous persons acting or purporting to act on behalf of companies.⁵⁵ For example, in the *Northside*⁵⁶ case, Robert Sturgess, a director of Northside Development Pty Ltd ("Northside") without authorisation granted a mortgage over the company's land to secure advances by the lender to companies controlled by Sturgess. The companies were not related to Northside. The mortgagee was unaware of the irregularities in the execution of the mortgage which was registered. Northside defaulted under the mortgage and the lender sold the land to a bona fide purchaser who became registered under the RPA. The mortgage was held to be invalid as the court held that the mortgagee should have been put on inquiry by the circumstances of the loan. This enabled Northside to recover damages from the Registrar-General under RPA s 127, which gives a plaintiff the right to recover damages where loss has resulted from the registration of any other person as proprietor of the land.

4.44 If a company were to be denied compensation by a provision similar to the New Zealand provision, the company, and ultimately its shareholders and creditors, would have to bear the loss, unless they could bring actions to recover loss against the company's directors or other persons managing the company. If innocent shareholders and creditors could not recover against the Registrar-General for losses resulting from the unauthorised acts of their directors or other officers in management, such an exception assumes that their remedies under the *Corporations Law* or at common law against these persons are adequate. If these actions are not available, such innocent parties will have to bear the loss. In addition, innocent purchasers of land from a company may be disadvantaged by such a provision, for example, where the purchaser's land is encumbered by a fraudulent mortgage executed by the company of which the purchaser is unaware. If the companies seal exception applied, the purchaser would not be able to claim from the Registrar-General compensation for losses resulting from the mortgage. Also, there appears to be no valid reason for discriminating between persons suffering loss on the basis of their legal identity. Corporations (and shareholders and creditors having interests in those companies), like individuals, can ill afford actions for recovery of damages.

Other exceptions to recovery

4.45 The other exceptions to recovery suggested by the Registrar-General are:⁵⁷

where claimants have already compromised with, or settled claims against, other persons responsible for their loss; and

where the Registrar-General is joined as a co-defendant in actions against third parties (for example where an error of the Land Titles Office occurs as a result of the negligence of a solicitor).

These suggested exceptions are considered in the Commission's Recommendations discussed in Chapter 5.

Administrative procedures

4.46 In the Discussion Paper and Issues Paper⁵⁸ the Commission expressed the view that litigation against the Registrar-General is time-consuming and a waste of resources. The Victorian approach, in contrast, involving a direct application to the Registrar, has the advantage that the majority of claims are dealt with quickly. Accordingly, the Discussion Paper proposed that:

Compensation should be payable on application to the Registrar or Registrar-General. A decision should be required within a prescribed period.

4.47 Submissions supported the right of plaintiffs to claim directly against the Registrar-General, who would have subrogation rights against any other persons responsible for the loss. The Registrar-General⁵⁹ (amongst others) proposed that the legislation stipulate time limits within which compensation claims should be finalised.

Assessment of compensation

4.48 The Commission proposed in the Discussion Paper and Issues Paper⁶⁰ that a claimant be entitled to recover actual loss suffered, and that the Court develop a test to determine such loss. The date for valuation should take into account both rising and falling property markets, so that claimants are not penalised when property values fall after the date of actual loss. Paragraph 52 of the Discussion Paper proposed that:

Compensation should be for actual loss and it should be the value of the land at the date of the loss or at the date of the claim, whichever is the greater.

4.49 Submissions agreed that compensation should be for the actual loss sustained. One reservation came from the Registrar-General of the Northern Territory⁶¹ which suggested that "actual loss" cannot be fixed with certainty unless the value of land at either the date of the claim or the date of the loss, whichever is the greater, is specified.

Time for making claims

4.50 In the Discussion Paper and Issues Paper⁶² the Commission suggested it was unclear whether the usual six year limitation period set down in the general limitation statutes, applies in New South Wales and Victoria to claims against the Registrar-General. The uncertainty on this point has been recently resolved in *Cirino v Registrar-General*.⁶³ In that case the Registrar-General failed to register on the title of the burdened property a restrictive covenant which was created at the time the property was being subdivided. The purchasers of this property brought an action against the Registrar-General claiming that they would never have purchased it if they had been aware of the covenant. Counsel for the Registrar-General argued that as the purchase had occurred outside the limitation period, any possible liability had come to an end. Justice Cole held that s 14(1)(d) of the *Limitation Act 1969* did apply to actions against the Registrar-General under the compensation provisions of the RPA. Accordingly, if the loss or damage occurred at the time of purchase, the plaintiffs would be out of time as they purchased their property in 1978. However, relying on the High Court's decision in *Wardley Australia Ltd v Western Australia*,⁶⁴ he went on to hold that the plaintiffs had not yet suffered loss or damage, but would do so, for example, when the benefit of the covenant (which had been registered) was exercised by the owners of the adjacent property. Accordingly, the limitation period had not yet started to run.

4.51 As this case demonstrates, and as was suggested in the Discussion Paper, in actions involving real property, there is a significant possibility of claims arising from errors and misconduct long past. Accordingly, in paragraph 53 of the Discussion Paper the Commission proposed the following:

The period of limitation should be six years from the date on which the claimant became aware or, but for his or her own default would have become aware, of the existence of his or her right to make a claim.

It seems that this very closely approximates the present law as stated in *Cirino*.

4.52 The Queensland Bar Association was of the view that injustice has resulted in the past from the imposition of a six year limitation period.⁶⁵ Other submissions generally supported the above proposal. Lang agreed, but suggested that as one party's lack of knowledge was usually necessary for the perpetration by another of a successful fraud, the claimant,

who for many years is unaware of the loss should at least be able to overcome the limitation period by court order and not be excluded merely because "but for his or her own default would have become aware".⁶⁶

FOOTNOTES

NSW Law Reform Commission: REPORT 76 (1996) - TORRENS TITLE: COMPENSATION FOR LOSS

1. New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss* (Discussion Paper 19, June 1989); New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss* (Issues Paper 6, December 1989) at para 6.3.
2. NSWLRC DP 19 at paras 36-38; NSWLRC IP 6 at paras 6.4-6.6.
3. NSWLRC IP 6 at paras 2.12-2.14.
4. A Lang, *Submission* (21 February 1990) at 1 para 2.
5. Lang is not referring here to the option proposing improvement of the current legislative scheme: see A Lang, *Submission* (21 February 1990) at 2 para 5.
6. A Lang, *Submission* (21 February 1990).
7. NSWLRC IP 6 at paras 2.13 and 2.14.
8. Registrar-General, *Submission* (6 April 1990) at 2 para 7.
9. NSWLRC IP 6 at para 6.5.
10. Master Windeyer, *Submission* (28 August 1990). See also Registrar-General, *Submission* (6 April 1990) at 9 para 25.
11. Para 2.41.
12. See also NSWLRC IP 6 at para 6.19.
13. NSWLRC DP 19 at para 38; NSWLRC IP 6 at para 6.6.
14. R T J Stein, *Submission* (10 August 1989) at 6. See also Registrar-General, *Submission* (6 April 1990) at 9.
15. R T J Stein and M A Stone *Torrens Title* (Butterworths, Sydney, 1991) at 142; generally at 141-158.
16. NSWLRC DP 19 at para 38; NSWLRC IP 6 at para 6.6. Australian Bankers' Association, *Submission* (19 October 1989) at 1-2, however, notes that the chattel securities legislation in Victoria does in fact provide for a system of compensation for those suffering loss as a result of the malfunction of the system of registered security interests in vehicles.
17. R T J Stein, *Submission* (10 August 1989) at 6. See also Registrar-General, *Submission* (6 April 1990) at 9.
18. NSWLRC IP 6 at para 6.23.
19. NSWLRC IP 6 at paras 2.15-2.20, 6.24-6.25.
20. A Lang, *Submission* (21 February 1990) at 2.
21. Lang further suggested that it may be appropriate to revisit the issue of private title insurance after Old System title, or most of it, has been eliminated; a comprehensive register of restrictions exists, preferably linked with the title; the issue of whether non-qualified conveyancers can do conveyancing for a reward has been finally resolved.
22. NSWLRC DP 19 at 13-17; NSWLRC IP 6 at 44-48.
23. NSWLRC IP 6 at paras 6.8-6.10.

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24. NSWLRC DP 19 at paras 43-45; NSWLRC IP 6 at paras 6.11-6.13.
25. NSWLRC IP 6 at paras 6.11-6.13.
26. Australian Bankers' Association, *Submission* (19 October 1989) at 1; Australian Bankers' Association, *Submission* (23 March 1990) at 1; J S Grice, *Submission* (16 August 1989) at 1 para 4; Registrar-General, *Submission* (6 April 1990) at 10 para 29; Law Society of New South Wales, *Submission* (27 April 1990) at 2 paras (v) and (vi); A Lang, *Submission* (6 September 1989) para 1 (in relation to DP 19); A Lang, *Submission* (21 February 1990) paras 2 and 5; Northern Territory, Department of Law, *Guarantee of Torrens Title in the Northern Territory* (Discussion Paper, August 1990) paras 2, 5.1 and 5.2; K J Blume, Hill & Blume Pty Ltd, *Submission* (26 March 1990) at 4-5; R T J Stein, *Submission* (10 August 1989) at 9; Master Windeyer, *Submission* (28 August 1990) at 2 para 3; R A Woodman, *Submission* (14 November 1990) at 2.
27. Stein and Stone at 239-240; 255-258.
28. Now the Office of Land Information Policy and Co-ordination operating under the Department of Land and Water Conservation.
29. New South Wales, Land Titles Office, *Annual Report* 1991 at 14.
30. R T J Stein, *Submission* (10 August 1989) and I M Johnstone, A W Simpson & Co, Solicitors, *Submission* (15 January 1990).
31. I M Johnstone, A W Simpson & Co, Solicitors, *Submission* (15 January 1990).
32. NSWLRC IP 6 at para 6.13.
33. See Recommendation 15, at 5.18 below.
34. (1963) 64 SR (NSW) 98.
35. Woodman and Nettle at 646 [127.2].
36. NSWLRC DP 19 at paras 43-47; NSWLRC IP 6 at paras 6.14-6.15.
37. Australian Bankers' Association, *Submission* (19 October 1989) para 2; J S Grice, *Submission* (16 August 1989) at 1; Law Society of New South Wales, *Submission* (27 April 1990) at 2 para (vi); A Lang, *Submission* (6 September 1989) para 1 (in relation to DP 19); R T J Stein, *Submission* (10 August 1989) at 9 para 47; Registrar-General, *Submission* (6 April 1990) at 10 para 31; Registrar-General (Northern Territory), *Submission* (8 August 1989) at 2; Bar Association of Queensland, *Submission* (21 December 1989) para 1; K J Blume, Hill & Blume Pty Ltd, *Submission* (26 March 1990) at 4.
38. Law Society of New South Wales, *Submission* (27 April 1990) at 2 para (vi).
39. NSWLRC DP 19 at para 47; NSWLRC IP 6 at para 6.15.
40. [1977] 1 NSWLR 22 at 30. See also para 2.13, above.
41. This would appear to have occurred in at least some cases involving surveyors and also one involving the error of a claimant's solicitor: see Appendix B under "Other errors" at 116.
42. NSWLRC DP 19 at para 48; NSWLRC IP 6 at paras 6.16 and 6.17.
43. A Lang, *Submission* (6 September 1989) at 1 para 3.
44. *Robinson v Registrar-General* (1983) NSW Conv R 55-138.

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45. *Gill v Registrar-General* (1991) 5 BPR 11,587.
46. Australian Bankers' Association, *Submission* (19 October 1989) at 2 para 4.
47. Master Windeyer, *Submission* (28 August 1990) at 3; Registrar-General (Northern Territory), *Submission* (8 August 1989) at 2.
48. *Robinson v Registrar-General* (1983) NSW Conv R 55-138. See para 4.30 above.
49. NSWLRC DP 19 at para 49; NSWLRC IP 6 at para 6.17.
50. NSWLRC DP 19 at para 4.9.
51. A Lang, *Submission* (6 September 1989) at 1-2.
52. R T J Stein, *Submission* (10 August 1989) at 10.
53. See Recommendation 16, at 5.18 below.
54. Registrar-General, *Submission* (6 April 1990) at 11 paras 34-36.
55. See Mason CJ in *Northside Development Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 151. Although he was speaking of the over extensive application of the "indoor management rule", the same policy consequences can be seen to apply here.
56. *Northside Development Pty Ltd v Registrar-General* (1990) 170 CLR 146.
57. Registrar-General, *Submission* (16 August 1990) at 6.
58. NSWLRC DP 19 at para 51; NSWLRC IP 6 at para 6.19.
59. Registrar-General, *Submission* (6 April 1990) at 12-13.
60. NSWLRC DP 19 at para 52; NSWLRC IP 6 at para 6.20.
61. Registrar-General (Northern Territory), *Submission* (8 August 1989) at 2.
62. NSWLRC DP 19 at para 53; NSWLRC IP 6 at para 6.21.
63. *Cirino v Registrar-General* (1993) 6 BPR 13,260. But see *Price v Registrar-General* (NSW Supreme Court, Windeyer J, 14 March 1996, ED 2985/95, unreported) at 20 where it was held that the Registrar-General could not be subrogated to the rights of the plaintiff against negligent witnesses to a fraudulent mortgage, because the plaintiff's right to action was barred by the *Limitation Act 1969* (NSW) s 14(1)(b). The plaintiff had suffered damage when she had been deprived of her interest in the land.
64. *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514.
65. Bar Association of Queensland, *Submission* (21 December 1989) at 2.
66. A Lang, *Submission* (6 September 1989) at 2.

5. A New Compensation Scheme

STATE GUARANTEE OF TITLE

Recommendation 1

State guarantee of title should be retained and a new statutory scheme should be introduced with greater focus on insurance principles.

5.1 The Commission recommends the introduction of a new statutory scheme, which will replace the current statutory compensation provisions and preclude any existing common law rights against the Registrar-General. Under the proposed scheme, persons suffering loss will be able to claim directly against the Registrar-General, without commencing a court action. The proposed scheme, in addition to according more closely with genuine compensation and insurance principles, should reduce litigation and related costs.¹ The Registrar-General will be subrogated to any common law or statutory rights of the claimant against any person (including any form of association) which has contributed to the claimant's loss or any fund which is liable to indemnify the claimant against the loss or the person responsible for the loss. Persons suffering loss as a result of the operation of the Torrens system will still be able to commence proceedings against any third party responsible for the loss without involving the Registrar-General, subject to a notification requirement.

BASIS OF RECOVERY AGAINST REGISTRAR-GENERAL

Recommendation 2

Any person suffering compensable loss arising out of the operation of the Torrens system and its administration should be able to claim compensation directly from the Registrar-General by lodging a claim with the Land Titles Office.

Recommendation 3

Compensation should be available for losses (whether or not involving deprivation of land) arising out of the operation of the Torrens system which result from fraud, negligence, the bringing of land under the Real Property Act, errors in the Register, and errors and loss of documents in the Land Titles Office.

5.2 The Commission is of the view that compensation should be available for losses resulting not only from mistakes in the Land Titles Office and forgery, but also from fraud generally and the negligence of third parties, such as solicitors and surveyors, where neither a mistake in the Land Titles Office nor forgery is involved. The definition of "loss" should include loss arising from the reliance by a claimant or plaintiff on a statement or representation in the Register. This definition,² together with the basis for recovery being a loss arising in consequence of any error in the Register, will enable a claimant to recover loss arising from the mistake or negligence of his or her surveyor, solicitor, other agent, or the agent of a predecessor-in-title. Volunteers should not, in principle, be excluded from compensation. If a volunteer does not become entitled to compensation it will not be because he or she is a volunteer, but because he or she has suffered no compensable loss in reliance on the Register.

5.3 Losses which arise from an error or a misdescription in the Register, whether or not involving a mistake by the Registrar-General, should be compensated.³ Compensation should be available where "errors, omissions or misdescriptions" relate to those entries required by the RPA to be made as well as factual "errors, omissions or misdescriptions."

5.4 The Commission also recommends that compensation be available for losses which result otherwise than by deprivation of land. As stated in Chapters 2 and 3⁴ a deficiency exists in RPA s 126 and 127 as it is not clear whether they only contemplate losses resulting from the deprivation of land.

RESPONSIBILITY FOR LOSS

Claimants' responsibility for losses attributable to themselves or their agents

Recommendation 4

A person with a compensable claim who is wholly responsible for the loss should not be able to recover compensation from the Registrar-General, but a person with a compensable claim should not be precluded from recovery where the loss is caused by the fraud or negligence of an agent.

Knowing participation in fraud

5.5 Claimants should be precluded from recovering where they are knowing participants in a fraud, rather than innocent victims of the action of others, including their agents. This last aspect of the recommendation is a departure from the proposal in the Discussion Paper which suggested that there should be an exception to the right to compensation in the case of loss totally attributable to the fraud or negligence of a solicitor or agent of the claimant. The proposal in the Discussion Paper stated:

There should be an exception from the right to compensation in the case of loss totally attributable to the fraud or negligence of a solicitor or agent of the claimant.⁵

This proposal does not take account of the fact that agency principles do not attribute an agent's fraud to the principal when the agent has embarked on an independent course of fraud.⁶ Where the claimant is a knowing participant in the fraud, he or she would be deprived of a remedy under the ordinary principles of law as no one can benefit from his or her own fraud.⁷

Negligence

5.6 Claimants will be unable to recover compensation where the whole of their loss is attributable to their own negligence. This endorses the proposal contained in the Discussion Paper.⁸ But a person should not be denied compensation when the loss is wholly attributable to the negligence of his or her agent because:

claimants may have little, if any, choice in the selection of an agent;

it would be unfair to force claimants to exercise greater than average care in their selection of agents;

not all agents will be covered by professional indemnity insurance.

Corporate administrators performing unauthorised acts

Recommendation 5

Corporations whose administrators (directors and other officers in management) have knowingly performed unauthorised acts resulting in a compensable claim should be granted compensation in such a manner as to ensure that the administrators themselves do not benefit unfairly from compensation by virtue of their relationship with the company; for example, if the administrators who are fraudulent or negligent are shareholders of the company.

5.7 In this situation, these shareholders would not be the innocent victims of the unscrupulous acts of others, and should be precluded from benefit by such means as a statutory charge over their shares, securing to the Registrar-General that part of the compensation paid to the corporation proportionate to those shares.

RIGHTS OF ACTION

Right of claimant to bring action against Registrar-General

Recommendation 6

A person with a compensable claim may only bring an action to recover compensation against the Registrar-General if that person's claim for compensation from the Registrar-General is rejected or the person refuses the Registrar-General's offer of compensation.

Right of plaintiff to bring action against third party

Recommendation 7

A person suffering loss can (without lodging a compensation claim) bring an action for damages against another person responsible for the loss other than the Registrar-General. The Registrar-General must be notified of the commencement of the action. After being notified, the Registrar-General may intervene as a co-defendant in the action and join other co-defendants, or compensate the plaintiff. If compensation is paid to the plaintiff, the Registrar-General is subrogated to the plaintiff's rights as in Recommendation 9.

5.8 To accord more with the insurance principle underlying the State guarantee of title, the Commission recommends that claimants be encouraged to claim against the Registrar-General as a first option just as an insured under an insurance policy would usually do against an insurance company. Under the proposed scheme, claimants retain their rights of action against other wrongdoers and can commence proceedings against them without involving the Registrar-General, subject to a notification requirement. The Registrar-General will have the right to obtain information on the nature of the plaintiff's claim, and be joined as a co-defendant if he or she considers it appropriate. The Registrar-General who is a defendant will also have the right to join anyone else as co-defendant. If the Registrar-General does not become a party to the proceedings, he or she will not be able to require the plaintiff to join other parties.

Where claimant compromises, settles, or withdraws claim

Recommendation 8

A plaintiff who has obtained judgment in respect of loss against a wrongdoer where notice has not been given to the Registrar-General, or who has compromised proceedings against a wrongdoer without approval of the Registrar-General cannot claim compensation for that loss against the Registrar-General.

5.9 This recommendation addresses the problem which arises where a potential or actual plaintiff compromises or settles a claim against a wrongdoer and then claims indemnity against the Registrar-General. In this situation the Registrar-General may be precluded from subsequently claiming against the wrongdoer, because of issue estoppel, even though it emerges later that, for example, fraud of the wrongdoer can be proved. The Commission recommends that the right of compensation should be lost where the claimant has obtained judgment in respect of the loss against a wrongdoer in proceedings of which notice was not given to the Registrar-General, or has compromised proceedings against a wrongdoer without the approval of the Registrar-General.

Where other issues need determination first

5.10 Problems have arisen in cases involving disputes primarily between other parties, when the Registrar-General has been joined as a party to such proceedings. One problem is where issues not relevant to the claim against the Registrar-General need to be litigated, and the early involvement of the Land Titles Office is costly and often unnecessary. In practice, it would be open for the Registrar-General to make an application to the Court for orders that the proceedings against him or her be suspended while those issues are determined. The Court could also make an order that the Registrar-General be bound by the judgment, unless he or she elects in writing not to be bound.

SUBROGATION OF REGISTRAR-GENERAL TO RIGHTS OF CLAIMANT

Recommendation 9

If the Registrar-General pays compensation to a person with a compensable claim, the Registrar-General is subrogated to that person's rights and can recover the compensation from the person responsible for the loss or that person's insurer, or where the wrongdoer is deceased or bankrupt or insolvent, against that person's estate.

Recommendation 10

The limitation period runs from the time the compensable claim is lodged against the Registrar-General.

5.11 In addition to according with insurance principles, Recommendation 9 recognises that the Registrar-General is in a far better position financially to bring proceedings and to bear costs and delays, than the average plaintiff. Recommendation 10 gives effect to the Commission's view that the limitation period should not run against the Registrar-General until he or she becomes aware of the compensable claim.

Proceedings against company officers

5.12 Should the facts in the *Northside* case recur,⁹ this recommendation will enable the Registrar-General to proceed against, for example, company officers for breach of their duties at common law and under the *Corporations Law*.¹⁰

Where managers of companies are not owners

5.13 The Commission has rejected the concept of entirely disallowing compensation to companies whose agents have without authorisation used company seals to transfer land.¹¹ This would be inconsistent with the companies seal presumption in s 164(3)(e) of the *Corporations Law*, which states the following:

- (e) that a document has been duly sealed by the company if:
 - (i) it bears what appears to be an impression of the seal of the company; and
 - (ii) the sealing of the document appears to be attested by 2 persons, being persons one of whom, by virtue of paragraph (b) or (c), may be assumed to be a director of the company and the other of whom, by virtue of paragraph (b) or (c), may be assumed to be a director or to be a secretary of the company...

Innocent shareholders and creditors of the company who do not take part in its management would be unfairly treated by such an exception. Particularly where these persons have inadequate legal remedies, and limited financial resources, the Registrar-General would be better able to bring proceedings against the managers or other agents of the company, or ultimately, bear the loss.

PROFESSIONAL AND OTHER INSURANCE FUNDS CANNOT CROSS-CLAIM AGAINST REGISTRAR-GENERAL

Recommendation 11

Where an insurer (such as a professional indemnity insurer who insures against loss caused by the dishonest or negligent acts of the insured) has paid compensation to the person suffering loss, the insurer should be unable to recover compensation from the Registrar-General.

5.14 The Registrar-General will also be able to claim against any professional insurance funds or any other funds which are bound to indemnify the claimant against the loss or the persons responsible for the loss. If this recommendation is adopted, the Registrar-General would not be exposed to defending cross claims by these insurers, as has occurred in the past,¹² where claimants have proceeded in the first instance against professional funds, which have then claimed indemnity from the Registrar-General.¹³ The amendment referred

to above, only covers “professional indemnity insurers”, which, under the amending Act is defined in s 128(4) of the amendment to be:

...an insurer, scheme or fund (whether or not established by or under any Act or law) by or from which claims are payable, being claims made by persons sustaining loss or damage owing to the negligence, fraud or wilful default of a person carrying on business in a particular profession, trade or calling.

5.15 The Commission recommends that this provision should be expanded to preclude claims against the Registrar-General from being made by indemnity funds which insure against loss caused by any acts of the insured, whether or not the “wrongdoer” is a professional or person carrying on business in a particular profession, trade or calling, and whether or not the acts involve negligence, fraud or wilful default of the “wrongdoer”.

RECOVERY

Amount

Recommendation 12

Any person with a compensable claim should recover the amount of the loss he or she has suffered. This should be determined in accordance with ordinary rules as to quantum of damages and interest.

Apportionment

Recommendation 13

Apportionment of liability for the loss will occur between the parties responsible for the loss including apportionment of responsibility for the loss arising from contributory negligence or other fault of the person with the compensable claim.

5.16 This recommendation acknowledges the fact that claimants or plaintiffs can be responsible to some degree for their actions and those of their agents. Accordingly, the court should have the power to determine whether compensation should be reduced where claimants or plaintiffs are partly responsible for the acts of their agents which have contributed to a loss. In situations where agents are partly responsible for the loss and the Registrar-General has rejected a claim, it is contemplated that the plaintiff will commence proceedings against his or her agent and/or the Registrar-General. If the agent is not joined by the plaintiff, the Registrar-General should be able to do so.

5.17 As stated in paragraph 4.45, the Registrar-General expressed a reservation regarding involvement as a co-defendant in proceedings against other third parties responsible for losses, such as where an error of the Land Titles Office only occurs as a result of the negligence of a solicitor. In order to overcome this problem, the Commission recommends that the Court should be able to apportion any losses amongst the parties responsible for that loss.

LIMITATION PERIOD

Recommendation 14

Claims for compensation should be lodged with the Registrar-General within 1 year after the claimant is aware of the loss, with a discretion in the Registrar-General or the Court to extend this period. Proceedings to enforce such claims should be subject to the normal limitation period of 6 years.

5.18 Because the scheme gives effect to insurance principles, it is fair that claimants be required to notify their claims reasonably promptly to give the Registrar-General an opportunity to investigate them.

OTHER RECOMMENDATIONS

Recommendation 15¹⁴

Statutory authorities should be required to give notice of resumptions; the Registrar-General should be required to record them; and losses suffered as a result of reliance on the Register should be compensable, where the resumption has not been recorded.

Recommendation 16¹⁵

Section 133(b) of the *Real Property Act* should be repealed.

FOOTNOTES

1. It may be necessary to increase transaction charges associated with the Torrens Assurance Fund to accommodate any compensation payments beyond the current level.
2. This should ensure that a person is compensated in situations similar to that arising in *Dempster v Richardson* discussed in paras 3.9-3.12, where a claimant was denied compensation because the High Court found that an error in a certificate of title was the fault of the predecessor-in-title of Mrs Dempster or the predecessor's surveyor, and not an error of the Recorder of Titles.
3. See the meaning of "omission" ascribed to s 42(1)(b) in *Dobbie v Davidson* (1991) 23 NSWLR 625 per Kirby P at 630-633.
4. Paras 3.6-3.8, 3.34, 2.43-2.50, above.
5. NSWLRC DP 19 at para 48. See also para 4.28 above.
6. *Schultz v Corwill Properties Pty Ltd* [1969] 2 NSWLR 576; see also discussion in R A Woodman and K Nettle, *The Torrens System in New South Wales* (Law Book Company, Sydney) at [43.8].
7. R T J Stein, *Submission* (10 August 1989) at 10.
8. NSWLRC DP 19 at para 49. See also paras 4.35-4.37, above.
9. *Northside Development Pty Ltd v Registrar-General* (1990) 170 CLR 146. For the facts of the case see para 4.43.
10. See also paras 4.42-4.44, above; and NSWLRC IP 6 at paras 3.31 to 3.34.
11. See paras 4.42-4.44, above.
12. Until a recent amendment contained in the *Real Property (Compensation) Amendment Act 1992* was passed which affects claims for compensation involving professional indemnity insurers after 19 March 1992, but not claims commenced before that date.
13. *Registrar-General v Gill* (NSW Court of Appeal, 16 August 1994, CA 40059/92, unreported).
14. See para 4.22.
15. See para 4.40.

Appendix A: Submissions Received

1. Mr Andrew Lang, (6 September 1989, 21 February 1990)
2. Australian Bankers Association (Mr P M Duck, Chariman, National Operations Committee), (19 October 1989, 23 March 1990)
3. Mr Kevin J Blume, Hill & Blume Pty Ltd, Registered Surveyors, (26 March 1990)
4. Mr John S Grice, (16 August 1989)
5. Law Society of New South Wales, (27 April 1990)
6. Registrar-General (Northern Territory), (8 August 1989, 4 October 1990)
7. Institute of Surveyors New South Wales, Inc, (26 April 1990)
8. Bar Association of Queensland, (21 December 1989, 20 August 1990)
9. Mr Ian Johnstone, A W Simpson & Co, Solicitors, (11 January 1990, 15 January 1990)
10. Dr Robert T J Stein, Barrister at Law (now deceased), (10 August 1989)
11. Hon Sir Laurence Street, Chief Justice of New South Wales, (29 January 1988)
12. Master Windeyer, Supreme Court of New South Wales (now Hon Justice Windeyer), (1 March 1990, 28 August 1990)
13. Professor R A Woodman, (14 November 1990)
14. Registrar-General (New South Wales), (6 April 1990, 16 August 1990, 29 October 1990)
15. Surveyor General (New South Wales), (17 April 1990, 8 June 1990)
16. Mr Harley Wright, (1990)

Appendix B: Statistical Information

Statistical Information on nature of claims from Land Titles Office of New South Wales

Please note that:

Names of parties have been withheld.

In most cases, damages are unliquidated and amounts stated are estimates only.

The year in which each claim was satisfied appears in brackets in the Status of claim column.

Table 1

Date	Wrongdoer	Total of claim	Amount paid	Status of claim
1975	Employee of mortgagee			Dismissed with Registrar-General's costs
1975	Third party/agent		\$22,686	Court order (1981)
1975	Employee of financier		\$6,250	Paid <i>ex gratia</i> (1979)
1977	Solicitor/director of mortgagee		\$20,000	Consent order (1981)
1977	Attorney		\$61,500	Consent order (1982)
1978	Solicitor			Dismissed by consent after payment by Fidelity Fund (1979)
1978	Husband	\$220,000		Struck out by Court (1990)
1979	Solicitor		\$21,202	Consent order (1983)
1981	Attorney	\$230,000		Considered abandoned (1994)
1981	Solicitor		\$35,856	Court order (1982)
1981	Husband			Dismissed (1984)
1981	Sister	\$120,000		Considered abandoned (1994)
1982	Husband and third party	\$90,000	\$101,580	High Court order (1994) (Part costs outstanding)
1983	Son	\$55,000		Dismissed with Registrar-General's costs (1987)
1983	Company director		\$647,278	Court order (1990)
1983	Third party	\$470,000		Dismissed with Registrar-General's costs (1989)
1984	Company director		\$180,000	Consent order (1991)
1985	Financier	\$250,000		Considered abandoned (1994)
1986	Third party			Discontinued (1991)

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1987	Director	\$70,000		Dismissed
1989	Solicitor	\$270,000	\$255,873	Court of Appeal order (1993)
1990	Father	\$490,000		Dismissed with Registrar-General's costs (1991)
1990	Executor/solicitor/son	\$40,000		To be settled
1990	Brother	\$330,000		Dismissed be consent (1991)
1990	Mortgage broker (3 separate claims)	\$500,000		Withdrawn after settlement by Lawcover (1992)
1991	Brother	\$450,000		Pending
1991	Financial adviser	\$425,000	\$221,484	Settled (1994)
1992	Solicitor		\$177,366	Settled (1994)
1992	Solicitor		\$169,071	Settled (1994)
1992	Solicitor	\$1,070,000		Withdrawn after settlement by solicitors' Fidelity Fund
1992	Solicitor's clerk	\$130,000		Pending
1992	Solicitor	\$350,000		Discontinued pending other proceedings (1993)
1992	Director	\$110,000		Discontinued (1993)
1993	Husband	\$65,000		Discontinued (1993)
1993	Son	\$130,000		Discontinued (1994)
1993	Son/daughter-in-law	\$310,000	\$237,000	Settled
1993	Third party unknown to registered proprietor	\$125,000	\$122,000	Settled (1994)
1994	Wife	\$60,000		Discontinued
1994	Husband	\$850,000		Pending
1994	Daughter	\$230,000	\$173,000	Settled (1994)
1994	Third party not known to registered proprietor	\$100,000		Pending
1994	Acquaintance	\$50,000		Pending
1994	Husband	\$190,000		Pending
1994	Nephew shareholder	of \$330,000		Pending
1994	Financial adviser	\$35,000		Pending

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1995	Financial adviser (multiple funds)	\$220,000		Pending
1995	Husband	\$90,000		Pending
1995	Son and daughter-in-law	\$80,000		Judgment against another party (1995)
1995	Husband	\$258,671	\$350,935	Court order (1996) (costs not yet resolved)
1995	Land dealer	\$40,000		Pending
1995	Husband	\$70,000		Pending
1995	Defacto husband	\$840,000		Pending
	Total paid in fraud matters		\$2,894,443	
	Total fraud claims not finalised (estimate)	\$3,525,000		

Errors

In Land Titles Office

Date	Nature of error	Amount claimed	Amount paid	Status
1982	Omission of easement			Discontinued with Registrar-General's costs (1989)
1983	Error in recording of extent of easement		\$7,500	Settled (1988)
1984	Omission of restriction on use of land		\$10,000	Settled (1988)
1986	Omission of easement		\$5,130	Settled (1987)
1987	Error in title diagram as to boundary/area of land			Discontinued (1990)
1987	Omission of easement	\$70,000		Discontinued
1987	Omission of easment	\$270,000		Discontinued
1988	Error in conversion of land to Torrens system			Discontinued with Registrar-General's costs (1992)
1988	Error in recording a s 46C application	\$240,000		Pending (Awaiting outcome of and appeal against another defendant)
1988	Misstatement of area of parcel of land		\$50,000	Settled (1992)
1988	Omission of restrictive covenant		\$4,250	Settled (1995)
1988	Omission of restrictive covenant	\$60,000	\$65,798	Appeal pending
1992	Error in not cancelling a Certificate of Title	\$100,000	\$175,000	Settled (1995)
1993	Erroneous inclusion of land in title	\$41,000	\$27,000	Settled (1993)
1993	Omission of easement	\$30,000	\$25,930	Settled (1994)

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1993	Transposition of parish DP numbers	\$2,310,000		Pending
1993	Erroneous registration of transfer of half share as whole (& fraud of son/daughter-in-law)	\$75,000		Pending
1993	Erroneous cancellation of transfer for road	\$65,000	\$41,500	Settled (1995)
1994	Removal of caveat	\$90,000		Pending
1994	Invalid preliminary agreement	\$185,000		Withdrawn (1995)
1994	Omission of easement	\$9,000	\$79,355	Settled (1995) (costs to be finalised)
1994	Erroneous inclusion of land in Primary Application	\$55,000	\$47,524	Settled (1995)
1994	Erroneous removal of caveat (and fraud of son/daughter-in-law)	\$80,000		Pending (Awaiting outcome of proceedings between other defendants)
	Total paid for LTO errors		\$538,987	
	Total LTO error claims not finalised (estimate)	\$2,855,000		

Other Errors

Date	Nature of error	Amount claimed	Amount paid	Status
1983	Surveyor		\$12,082	Settled (1989)
1990	Error of claimant and claimant's solicitor in transfer			Struck out with Registrar-General's costs
1992	Surveyor		\$70,74	Order (1993)
1993	Surveyor			Discontinued (1994)
	Total paid for error of other parties		\$82,256	

Total amount paid: \$3,515,686

Total of claims not finalised (estimate): \$6,380,000

Summary of Claims Since 1975

NB: Amounts are indexed against the year in which the claim was commenced.

Fraud

NSW Law Reform Commission: REPORT 76 (1996) - TORRENS TITLE: COMPENSATION FOR LOSS

Year	No of claims	Number dismissed/ withdrawn	No settled	No lost	Number outstanding	Estimate of outstanding claims (including costs)	Amount paid
1975	3	1	1	1			\$28,936
1976	Nil						Nil
1977	2		2				\$81,500
1978	2	2					Nil
1979	1		1				\$21,202
1980	Nil						Nil
1981	4	3		1			\$35,856
1982	1			1		\$90,000	\$101,580
1983	3	2		1			\$647,278
1984	1		1				\$180,000
1985	1	1					Nil
1986	1	1					Nil
1987	1	1					Nil
1988	Nil						Nil
1989	1			1			\$255,873
1990	4	3			1	\$40,000	Nil
1991	2		1		1	\$450,000	\$221,484
1992	6	3	2		1	\$130,000	\$346,437
1993	4	2	2				\$359,000
1994	9	1	2		6	\$1,555,000	\$264,362
1995	7	1		1	5	\$1,260,000	\$350,935
Total	53	21	12	6	14	\$3,525,000	\$2,894,443

Departmental Error

NSW Law Reform Commission: REPORT 76 (1996) - TORRENS TITLE: COMPENSATION FOR LOSS

Year	No of claims	No dismissed/ withdrawn	No settled	No lost	No outstanding	Estimate of outstanding claims (including costs)	Amount paid
1975	Nil						Nil
1976	Nil						Nil
1977	Nil						Nil
1978	Nil						Nil
1979	Nil						Nil
1980	Nil						Nil
1981	Nil						Nil
1982	1	1					Nil
1983	1		1				\$7,500
1984	1		1				\$10,000
1985	Nil						Nil
1986	1		1				\$5,130
1987	3	3	1				Nil
1988	4	1	1		2	\$300,000	\$120,048
1989	Nil						Nil
1990	Nil						Nil
1991	Nil						Nil
1992	1		1				\$175,000
1993	5		3		2	\$2,385,000	\$94,430
1994	3	1	1		1	\$90,000	\$79,355
1995	2		1		1	\$80,000	\$47,524
Total	22	6	10		6	\$2,855,000	\$538,987

Other Errors

NSW Law Reform Commission: REPORT 76 (1996) - TORRENS TITLE: COMPENSATION FOR LOSS

Year	No of claims	No dismissed/ withdrawn	No settled	No lost	No outstanding	Estimate of outstanding claims (including costs)	Amount paid
1983	1		1				\$12,082
1990	1	1					Nil
1991	Nil						Nil
1992	1			1			\$70,174
1993	1	1					Nil
1994	Nil						Nil
1995	Nil						Nil
Total	4	2	1	1			\$82,256

Ex gratia and minor claims

Details of *ex gratia* claims for the period 1977-1988 are contained in Issues Paper 6, paragraph 1.20.

Minor claims were often dealt with on an *ex gratia* basis until amendments to s 129 of the *Real Property Act 1900* in 1992 gave the Registrar-General authority to settle claims. In the period from September 1976 until April 1996 157 of these claims have been processed by the Land Titles Office.

Total claims:	157
Pending:	6
Refused:	69
Paid all or part of claim:	82

A total of \$279,539.73 has been claimed in 156 matters (10 claims being for unspecified amounts) and payments totalling \$29,480.30 have been made.

Table of Cases

Armour v Penrith Projects Pty Ltd [1979]	2.11, 2.12, 3.5, 3.8, 3.31
Behn v Registrar-General [1979]	2.33
Bogdanovic v Koteff (1988)	2.2, 3.27, 3.29
Boyd v Mayor of Wellington [1924]	2.15
Breskvar v Wall (1971)	1.8
Cirino v Registrar-General (1993)	4.50, 4.51
Dempster v Richardson (1930)	2.20, 2.46, 2.47, 2.49, 2.50, 2.55, 3.10, 3.12, 5.2
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