



# Accounting for risk: The advent of capped conveyancing title insurance

*Lynden Griggs, Rouhshi Low, and Rod Thomas\**

*Title insurance companies originating from America, have, in the past 15 years become part of the Australian conveyancing landscape. However for most residential freehold owners, their activities would be a mystery. A purchaser does not routinely obtain title insurance, with the companies presently focussing on servicing the mortgagee sector. While the lack of penetration in the residential purchaser market may be attributed to the consumer's lack of knowledge, evidence from Ontario and New Zealand illustrates that title insurance is likely to become an additional cost in the conveyancing process in Australia. In this article we highlight the reasons why, and demonstrate how title insurers have, by working with the legal profession been able to subtly move the risk of responsibility for compensation for loss, (at least in the first instance) from the state to the insurer, but with the added benefit for the state and the conveyancing agents that the cost of the insurance is ultimately borne by the consumer. In New Zealand this development is being accelerated by the introduction of capped conveyancing title insurance. Whether title insurance will become part of the conveyancing process is no longer the relevant question for Australia, (it undoubtedly will), but the unknown issue is just how title insurance companies will work with conveyancing agents to infiltrate the market, and what response this infiltration will have in terms of the state's view as to their continued role in the provision of assurance. We suggest that developments from New Zealand in relation to capped conveyancing insurance are likely to be replicated in Australia in the near future, and that the state's role in providing an assurance fund will continue, though the state may seek to expand the areas in which the right to compensation is restricted.*

The move to electronic conveyancing in Australia and New Zealand<sup>1</sup> combined with legislative and case law developments has subtly changed the model of risk allocation within the Torrens system of land registration. For example, case law is replete with illustrations where mortgagees have been denied the benefits of immediate indefeasibility where an all moneys mortgage has been forged.<sup>2</sup> We also see increased legislative responsibility

\* Respectively, University of Tasmania, Queensland University of Technology and Auckland University of Technology. The authors thank Mr Jeffrey W Lem, Director of Titles, Regulatory Services Branch, Ministry of Government and Consumer Services, Ontario, Canada for his time in reading an earlier draft of this article and for his valuable comments.

1 In Australia, the lead jurisdiction for electronic conveyancing is New South Wales, with the lead legislation from this jurisdiction being the Electronic Conveyancing (Adoption of National Law) Act 2012, with PEXA at <[www.pexa.com.au](http://www.pexa.com.au)> (accessed 16 March 2015), the exchange that facilitates this. In New Zealand, the system is governed by Land Information New Zealand at <<http://www.linz.govt.nz/>> (accessed 23 March 2015) the underlying system goes by the name of Landonline.

2 See, eg, *Yazgi v Permanent Custodians Ltd* (2007) 13 BPR 24,567; (2007) ANZ ConvR 566;

imposed on mortgagees to verify identity (or risk loss of indefeasibility).<sup>3</sup> Operating guidelines for the electronic exchanges within Australia and New Zealand have also placed an obligation on subscribers (such as solicitors and banks) to verify that their client is who they say they are.<sup>4</sup> The writers' view is that private title insurance companies will grasp the opportunity presented by these challenges and changes and will, incrementally and slowly, transform the culture in relation to conveyancing and the use of title insurance in Australia. This development, which we think is irresistible, does have potential consequences. The purchase of private title insurance in a Torrens context (and indeed in a non-Torrens context) could lead to moral hazard whereby participants such as purchasers and conveyancing agents undertake less diligent searches in the knowledge that insurance will cover the economic loss of any harm. This trend may well be heightened by the major title insurance companies in Australia undertaking that they will not take action against negligent conveyancing agents where a title insurance policy has been taken out — in effect incentivising solicitors to be the distribution network for the sale of the insurer's product.<sup>5</sup> It also has the potential to change the way the state looks at its role in the provision of a Torrens based assurance fund. As O'Connor presciently forecast in 2005:

If changed conveyancing practices induced by title insurance adversely impact upon the fund, it is likely that government will propose measures to shift the risk back to the insurers. Legislatures will bar title insurers from exercising the subrogated rights

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[2007] NSWCA 240; BC200707767; *Solak v Bank of Western Australia* [2009] V ConvR 54-762; *Perpetual Trustees Victoria v English* (2010) 14 BPR 27,339; [2010] NSWCA 32; BC201001246.

- 3 All states are progressively moving to impose verification of identity requirements on clients of subscribers. This is done in line with the move to electronic conveyancing — eg, Transfer of Land Act 1958 (Vic) ss 87A and 87B.
- 4 ARNECC, Model Operating Rules, Version 3, January 2015, Pt 7 & Sch 7 (verification of identity of subscribers); ARNECC, Model Participation Rules, Version 2, January 2015, Sch 8 (verification of clients of subscribers), in New Zealand, it is the Landonline terms and conditions, see at <<http://www.linz.govt.nz/land/landonline/getting-started>> (accessed 23 March 2015).
- 5 For example First Title Australia provides that: First Title waives its subrogation rights against the practitioner for covered risks. This means we don't pursue the conveyancer or solicitor for errors made that result in claims against the policy, unless there are exceptional circumstances.' At <<http://www.firsttitle.com.au/conveyancers-solicitors/benefits-to-you>> (accessed 8 September 2015).

Stewart Title Ltd has the following waiver: In partnering with solicitors and conveyancers to make our protection available to purchasers and home owners, we have made a commitment to waive any rights and remedies or relief to which we become entitled in our policies by way of subrogation against you where a claim arises as a result of your negligence while acting for the insured in relation to an insured transaction under a Stewart Title policy.

This waiver is subject to the following:

- The waiver will not apply where the solicitor's or conveyancer's conduct is grossly negligent or criminal, or they conspire with others who are grossly negligent or criminal;
- The waiver will not apply unless the solicitor or conveyancer advises Stewart Title immediately upon becoming aware of a possible claim under the policy for which Stewart Title might be liable and does not attempt to settle the matter without first contacting Stewart Title. At <<http://stewartau.com/public/SolicitorsConveyancers41.html>> (accessed 8 September 2015).

of the insured to claim from the fund, and exclude claims on the fund by privately insured persons for losses covered by their policies. Provided that insurers are made to bear the added risk that they have agreed to accept, any reduction in search costs made possible by title insurance will promote the 'ease of transaction' object of the Torrens System.<sup>6</sup>

Somewhat analogously we see this in operation today, with New South Wales, Queensland, Victoria and the Northern Territory legislating to limit the operation of the Torrens indemnity through excluding responsibility where the conveyancing agent is at fault, or the claimant has in some way contributed to the loss.<sup>7</sup>

Within non-Torrens environs the searching of title and identification of problems is done as far as possible by the title insurers prior to accepting the policy of insurance. The private title registries in the United States consequentially duplicate what government funded bodies do in Torrens jurisdictions. With indefeasibility of title attached to Torrens title, and specifically immediate indefeasibility in Australia and New Zealand, there is no incentive for title insurance companies to replicate what well organised land registries do in those two jurisdictions. Indeed, this has seen Ohio (one of the few states of the Union to engage with title by registration) 'banning the use of title insurance in 1947',<sup>8</sup> and which in 2007, led the NSW Law Society Property Law Committee to come to a view that a professionally undertaken conveyance would reveal most of the risks covered by title insurance.<sup>9</sup> Despite this opposition or questioning of the value of title insurance, the authors are convinced that the introduction of very low cost title insurance in New Zealand, promoted through the legal profession and conveyancing agents will be replicated in Australia. More fundamentally, such a move highlights the question as to whether a conveyancing system with protective hedges (funded by the private sector) makes the Torrens system a somewhat different beast from that envisaged by Sir Robert Torrens. Does this initiative undermine a legal coherency which flows from a state assurance fund mirroring the obligations of the state guarantee of title? For some registration of title will still be a Torrens system irrespective of the extent to which private title insurance becomes endemic within the conveyancing process. But for the authors, with their understanding of Torrens built on the pillars of the curtain, the mirror, and the state indemnity, the move to replicate or replace the final item by movement to the private corporate insurer represents a subtle incursion into their understanding of Torrens. To do so undermines the jurisprudence of the non-derivative, non-historical title, with each successive transaction involving a surrender of the current title to the Crown, with the Crown then deregistering this title and replacing it with one unencumbered by its history.<sup>10</sup> After all, this is what Torrens was seeking to achieve — remove

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6 P O'Connor, 'Double Indemnity: Title Insurance and the Torrens System' (2005) 3(1) *Law and Justice Journal* 142 at 149.

7 Real Property Act 1900 (NSW) s 129(2)(a) and 2(b); Land Title Act 1994 (Qld) s 189(1) and (2); Land Title Act (NT) s 195 and Victoria Transfer of Land Act 1958 (Vic) s 110.

8 As noted by N Winton, 'Title Insurance in a Torrens Context' (2007) *Polemic* 49 at 51.

9 Ibid.

10 As noted in *Gibbs v Messer* [1891] AC 248 at 254; [1891–4] All ER Rep Ext 2047: 'The main object of the [Torrens Act], and the legislative scheme for the attainment of that object,

the dependent nature of land title ownership, with the Crown the central instrument in the achievement of this. If the Crown is no longer central to compensation, the link between the state guarantee of clear title and the provision of monies to those affected by loss is lost. Such a development could potentially bring into question our understanding of indefeasibility and how that operates and links with the assurance fund. Indeed if there is no link, the concept of indefeasibility becomes significantly less important, as the insurance fund will protect against most financial losses caused by defects in title.

Fraud within land registration will always exist. It is simply not possible within a cost effective way to eliminate fraud altogether and still ensure that conveyancing is done at a price that is affordable to the public at large. For this reason it is easy to understand why the risk of loss of title to land should, in the policy maker's eyes, be spread across as many people as possible, thus reducing the expense on each individual person. And in saying this, it should be noted that fraud is still a rare event, with estimates in 2007 of one in 19,000 transactions in Victoria being questionable.<sup>11</sup> As noted by the Canadian Joint Land Titles Committee:

If there were no compensation system, persons dealing with the land would be likely to take expensive and time consuming precautions to avoid losses which could, but are not likely to, occur under the system. The social cost of taking such precautions is not justifiable. It is better to accept that fact that there will be losses and to spread them over all users through a user-funded compensation system.<sup>12</sup>

Title insurance is a necessary expense to incur in jurisdictions based on 'title recording systems'. However in Torrens jurisdictions, title insurance is normally considered as an overly expensive and unnecessary hedge against risks which are unlikely to occur and, if the risks do materialise, the loss is compensated by the state:

The function of title insurance is to indemnify landowners who lose their land as a result of a defective title. Thus, under the recording system with title insurance, legitimate claimants [the pre-existing owner] receive title to the land, and current owners [the purchasers] receive monetary compensation.

[By contrast] under the Torrens systems, current owners [the purchasers] register their property with the government, at which time an examination of the title is conducted. If no claims are made, title is declared to reside with the owner

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appears to [their Lordships] to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title'.

11 Law Council of Australia, *Uniformity of Property Laws and Procedures*, p 8 at <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/HarmoniousSystemofTorrensTitle.pdf>> (accessed 8 September 2015).

12 Joint Land Titles Committee, *Removing the Foundation: Proposals for a Model Recording and Registration Act for the Provinces and Territories of Canada*, July 1990, p 28.

[purchaser] against all future claims, and a public fund is established from registration fees to be used to compensate legitimate claims who subsequently appear.<sup>13</sup>

While one view may be that purchasers of interests within registration-based systems are unlikely to need title insurance, what the passage of time has shown is that Ontario, an archetypal Torrens jurisdiction with deferred indefeasibility, has title insurance taken out in close to all residential transactions.<sup>14</sup> We have also seen in New Zealand, from July 2015, the introduction of a modestly priced capped conveyancing title insurance product (NZ\$56 + GST), with this price available if all conveyancing transactions within the conveyancing firm have title insurance attached to them.

The question for Australia is will we follow suit? Our conclusion will be that within 5–10 years, the answer will be yes. Our submission will be that the frontline of conveyancing (conveyancing agents and solicitors) will likely promote the use of title insurance as a risk allocation mechanism of value to the consumer of real estate. Given the expertise that these individuals are portraying to their clients, and the very low cost (which undoubtedly reflects low risk on behalf of the insurer), consumers are likely to drive the demand-side uptake of this insurance. While beyond the remit of this article to identify how this could play in the minds of budget conscious public servants looking to rein in potential liability via state based assurance funds, the long term outlook is for continued amelioration of the underlying risk taken on by the state, with this moved to the private sector. As to whether that is bad, good or neutral is something to which reasonably-minded people could differ in their view. If there is no change to fraud patterns and the same ease of availability of compensation then perhaps the Torrens system retains its underlying integrity and functional utility.

## Recording and registration based land systems

At its heart, the goal of the conveyancing process is simple — transfer the in rem property rights associated with land from one person to another. Be it recording based systems, (France, United States of America) or registration (Torrens jurisdictions such as large parts of Canada, Australia, New Zealand, Malaysia, Singapore, and with their own registration based systems, Germany, Spain) two stages are common to both. First, there is the private contract between the parties with this governed by in personam contractual rules. This is followed by the more significant element, notification to the world at large that ownership has changed, though with Torrens jurisdictions it is more correct to describe registration as the process to obtain ownership, whereas with recording based systems, the registration is merely notification and not validation. In legal terms, the differences between recording and registration is critical. Under Torrens based jurisdictions, the title of the new registered

13 T J Miceli and C F Sirmans, 'The Economics of Land Transfer and Title Insurance' (1995) 10 *Journal of Real Estate Finance and Economics* 81 at 81.

14 B Aaron, 'Title Insurance isn't really optional', 7 December 2012 at <[http://www.thestar.com/life/homes/2012/12/07/title\\_insurance\\_really\\_isnt\\_optional.html](http://www.thestar.com/life/homes/2012/12/07/title_insurance_really_isnt_optional.html)> (accessed 10 August 2015). It should be noted that under the Land Titles Act 1990 (Ont), a title insurer cannot advance a subrogated claim against the assurance fund (s 59(1)(e) & (f)).

proprietor is cleared of any errors, mistakes or hidden defects, the process of registration acting as a purge of past omissions or incorrect additions.<sup>15</sup>

In a recording based operation, title provided to the purchaser is only as good as what can be passed from the previous owner (the *nemo dat* principle applies). For this reason, risks inherent within the title and possible consequential loss from the occurrence of this risk are protected through the taking out of private title insurance. This privatisation of risk can be seen as a means to reduce the cost of conveyancing in recording based jurisdictions with competition between suppliers of insurance leading to a product that responds to the risks within conveyancing, but at a lower cost, and in a more efficient way than that which could be supplied by government.<sup>16</sup> This privatisation of risk has seen title insurance phenomenally successful in the United States. Its take up increased dramatically post-World War II to meet the demands for security in the mortgage market as a rising middle class began to drive a housing boom.<sup>17</sup> With title insurance covering risks that are inherent, but unknown, (unlike traditional insurance, which covers risks of future events, which may or may not occur) title insurance operates not to spread loss around the community but to ameliorate the effects of catastrophic loss on one individual.<sup>18</sup> As the risks are pre-existing but unknown, title insurance companies are incentivised to identify the risks with this, as noted, leading to some in the United States running their own private title registries:

The rationale behind title insurance is therefore not mere risk aversion on the part of the insured, but the provision of powerful incentives for the screening of pre-existing risks, and the correct performance of closing services, thus avoiding the emergence of new risks. Title insurance is thus better seen as an arrangement for reducing transaction costs, by motivating the production of information and the enforcement of liability in order to, respectively, reduce information asymmetry and moral hazard.<sup>19</sup>

Intuitively title insurance would seem unnecessary in a Torrens jurisdiction where registries are managed by highly professional and well trained staff with, (hopefully), adequate resources to guard against all but the most unusual or unforeseeable risk. While the benefits (or not) of title insurance for Torrens jurisdictions has been described elsewhere<sup>20</sup> our purpose is to address the contextual question as to why title insurance has been so successful in Ontario, and is likely to be equally successful in Australian and New Zealand.

15 See B Arrunada, 'A Transaction Cost View of Title Insurance and its Role in Different Legal Systems' (2002) 27 *The Geneva Papers on Risk and Insurance* 582; B Arrunada, *Institutional Foundations of Impersonal Exchange, Theory and policy of contractual registries*, University of Chicago Press, 2011.

16 Though, such benefits may be lost where economies of scale are not achieved, and there is duplication of effort. See Arrunada, *Institutional Foundations*, *ibid*.

17 American Land Title Association, *Title Insurance: A Comprehensive Overview*, 3–4, at <<http://www.alta.org/about/TitleInsuranceOverview.pdf>> (accessed 8 September 2015).

18 An Australian example of catastrophic loss can be seen in *Black v Garnock* (2007) 230 CLR 438; 237 ALR 1; [2007] HCA 31; BC200705972.

19 Arrunada, *Institutional Foundations*, above n 15, p 218.

20 M Ziemer, 'Title Insurance, the good, the bad, and the ugly: Does Victoria need it' (2011) 20 *APLJ* 1; Winton, above n 8; P O'Connor, 'Title Insurance: Is there a catch' (2003) 10 *APLJ* 120.

## The common origins of the Torrens system

While it is a misnomer to talk of one Torrens system, with each jurisdiction having its own idiosyncratic variations, one thing is indisputably certain: the origin of this form of land registration emanated from a common source. This was the work of Sir Robert Torrens in the mid 1850's in the then colony of South Australia — the one-time Collector of Customs elected to Parliament on a mandate of land law reform and eventually enjoying a term as Premier in the month of September 1857. Torrens was motivated on this topic when a colleague and friend suffered a 'grievous injury and injustice' when an error in the title was discovered on land that the friend had improved.<sup>21</sup> The context is also relevant. As an emerging British colony, South Australia was in desperate need of monies to fund the development of its public infrastructure. Pursuant to the Wakefield method of colonisation (a method that subsequently penetrated New Zealand and Canada), the sale of land was seen as the means to achieve this. If this Wakefield method was to be successful, the infrastructure necessary for a secure land titles system to encourage land purchase was paramount.<sup>22</sup> The Torrens system provided this security. After South Australia in 1858 became the first jurisdiction in the world to adopt this method of land registration, Vancouver Island (to become part of British Columbia), closely followed in 1869,<sup>23</sup> with the Australian colonies (now states) following soon after. New Zealand was to adopt its own Torrens system in 1870.<sup>24</sup> Its spread has been phenomenal. Malaysia, Singapore, Fiji, Papua New Guinea, a small number of US states (Minnesota, Massachusetts, Colorado, Georgia, Hawaii, Ohio, Washington, North Carolina), Kenya, Uganda, Tunisia, Madagascar, Philippines, Dominican Republic, Ireland, Thailand, Iran just some of the countries/jurisdictions to adopt a variant of this system.<sup>25</sup> The extent of this Torrens conquest is testament to its advantages, its simplicity, and the way in which it ruthlessly dealt with the defects of deeds based recording systems. The failure to succeed in the majority of the US states is testament to the vociferous opposition that was orchestrated by the title insurance industry, as well as constitutional difficulties peculiar to the United States and inadequate funding to ensure that land titles offices were appropriately resourced at their inception.<sup>26</sup>

Even with jurisdictional variances, all Torrens systems have a common underlying rationale or *raison d'être*. Whether it is called indefeasibility,

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21 G Taylor, *The Law of the Land — the Advent of the Torrens System in Canada*, University of Toronto Press, 2008, p 19. It would be remiss not to mention that some legal historians have questioned Torrens role in the development of the system that now bears his name. For a discussion of this, see also, p 27.

22 Names after the Edward Gibbon Wakefield, a controversial figure who, after spending 3 years in prison for kidnapping, was then able to impose his influence on the colonisation of South Australia, New Zealand and Canada. For biographical details, see at <<http://www.teara.govt.nz/en/biographies/1w4/wakefield-edward-gibbon>>

23 Taylor, above n 21, Ch 3.

24 Land Transfer Act 1870 (NZ).

25 See the discussion by Taylor, above n 21, p 4 in respect of the spread of Torrens. However, it is important to note that the extent of adoption does significantly differ between jurisdictions.

26 See generally P Young, 'Why did the Torrens System Succeed in Australia yet fail in North America' (1994) 2 *APLJ* 227.

paramountcy, or something else, the Torrens system can operate to turn an otherwise defective title into one that has the imprimatur and the guarantee of the state. Recording based systems simply do not do this. What recording based systems do is provide a public record of what is a bad title and this is where title insurance steps in. The contractual relationship between policy holder and insurer indemnifying the holder of the policy if the title is found to be defective and enforcement measures need to be taken. By contrast, with Torrens the system operates to render an inoculation, or in these words, '[The] Torrens register is a hospital. It does make things better, cure invalidities, and make people's titles certain . . . The Torrens system therefore means the end of the need to look backwards for possible flaws'.<sup>27</sup>

However, once we move beyond this and ignore minor variations between jurisdictions, critical differences start to emerge. Perhaps the most significant is that of indefeasibility. Whereas Australia and New Zealand have conclusively accepted immediate indefeasibility,<sup>28</sup> Ontario's current thinking is to prefer deferred indefeasibility.<sup>29</sup> In practical terms what this means is that where a transfer from the current owner to the new purchaser is void because of some defect (eg, fraud), the current owner in Australia and New Zealand is compensated from the assurance fund, whereas in Ontario, the purchaser is compensated, the current owner retaining possession. This divergence in judicial result occurring despite the assurance fund provisions of Ontario<sup>30</sup> being modelled on Pt 18 of the Real Property Act 1886 of South Australia, though recourse to the assurance fund in Ontario is predicated on evidence that one has taken due diligence,<sup>31</sup> a position that some see as harsh and a reason for preferring immediate indefeasibility.<sup>32</sup> Ontario's response in preferring deferred indefeasibility also arguably a riposte to the well-publicised fraud that affected Susan Lawrence. Her property was transferred from herself to a fraudster who then took out a mortgage with the Maple Trust. Whose interest should prevail in terms of ownership of the land — Susan Lawrence, or the Maple Trust? In favouring Lawrence, the Canadian courts preferred static security (or the ownership rights of the original owner)

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27 Taylor, above n 21, p 10.

28 *Breskvar v Wall* (1971) 126 CLR 376; [1972] ALR 205; (1971) 46 ALJR 68; BC7100630; *Frazer v Walker* [1967] 1 AC 569; [1967] NZLR 1069; [1967] 1 All ER 649; [1967] 2 WLR 411, though New Zealand's law reform body in its proposed changes to the Land Transfer Act has suggested that immediate indefeasibility be able to be overridden should there exist manifest injustice. For a critique of this suggestion, see R Thomas, 'Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act' (2011) 4 NZRL Rev 715.

29 *Lawrence v Maple Trust* [2007] ONCA 74.

30 Land Titles Act 1990 s 57 (Ont).

31 Land Titles Act 1990 (Ont) ss 57(4)(b) and 57(4.1)(b).

32 N Siebrasse, *Report on Land Title Conveyance Practices and Fraud*, submitted to Canada Mortgage and Housing Corporation, December 2003, p 39. The view expressed here is that to deny compensation to someone that, though not guilty of collusion or participation of the fraud but has simply failed to take reasonable care, is harsh, particularly as the person who failed to take care may not be a bank or other entity with access to resources and well-qualified staff. It should be noted that in 2007, the due diligence requirements for the purchaser were softened somewhat, specifically in contrast to the mortgagee, charge or lender. See Order of the Director of Titles Land Titles Act RSO 1990, CL 5 as amended (DOT — 2007-02: 25 May, 2007).



to dynamic security (or the rights of the innocent purchaser).<sup>33</sup> In effect mortgagees such as Maple Trust had a better opportunity to protect their own interest and should have done so. It was a view that has been recently endorsed and if anything strengthened by the decision of *CIBC Mortgage Inc v Computershare Trust Co of 2008*.<sup>34</sup> The homeowner obtained a registered mortgage from Computershare in 2008. In 2009, this mortgage was fraudulently discharged from title with, in the view of Justice Murray, the knowledge of the homeowners. The homeowners continued with payments to Computershare for some 4.5 years post the discharge. In 2011, the homeowners granted a new first mortgage to private lenders and subsequently took out a mortgage from CIBC. The money from CIBC was used to repay the private lenders and as far as title was concerned, CIBC became the first ranking mortgage. In 2012 a second ranking mortgage was granted to Secure Capital. In 2013, the homeowners stopped making payments on all mortgages and declared bankruptcy. The mortgage amounts owing were in the vicinity of \$560,000 — the property on sale realised \$297,754. In deciding that Computershare was entitled to first ranking, CIBC subordinated to second, and Secure Capital third, Murray J applied the doctrine of deferred indefeasibility. As an innocent party cannot gain a good title from a fraudster, CIBC's interest was defeated by the interest of the party equivalent to the true owner (in this case Computershare). Computershare was in its own way comparable to the homeowner, Susan Lawrence, in *Maple Trust*. The decision has attracted much controversy. Counsel for CIBC in writing a note about this decision<sup>35</sup> was scathing towards the outcome. In the view of this legal practitioner, such an outcome offended the mirror principle:

This principle supposes that the register is an accurate depiction of the state of title at any given time, and that, unlike the registry system, there is no need to look behind any particular registered instrument. The decision in *Computershare* would seem to offend that principle in its most fundamental way. Similarly, the curtain principal [which posits that no party need look behind an instrument once registered and certified] is profoundly impacted.<sup>36</sup>

This legal practitioner was then of the view that title insurance is a 'must for any lending transaction',<sup>37</sup> though this can be contrasted with the view of Taylor that, '[w]ith sufficient imagination, diligence, and dedication on the part of its administrators, the Torrens system will continue to be strong in Canada, and *wasteful private title insurance on the American model* will not be needed'.<sup>38</sup>

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33 See the unpublished thesis by P O'Connor, *Security of Property Rights and Land Registration Systems*, Phd Thesis, Monash University, 2003.

34 [2015] ONSC 543.

35 Chaitons LLP, 'New Issues in Mortgage Enforcement — CIBC Mortgages Inc v Computershare: Shattering the Mirror and Peeking behind the Curtain', 10 July 2015 at <<http://www.chaiton.com/our-firm/in-the-news/2015/07/10/new-issues-in-mortgage-enforcement-cibc-mortgages-inc.-v-computershare-shattering-the-mirror-and-peeking-behind-the-curtain>> (accessed 27 August 2015). The writer did acknowledge his bias in making the comments critical of the decision. The decision is on appeal.

36 *Ibid*, p 3 of online version.

37 *Ibid*.

38 Taylor, above n 21, p 167 (emphasis added).

With these contrasting perspectives in mind, it is our belief that the previously noted current developments around all-monies mortgagees, the operating guidelines of the electronic exchange, and the legislative imposition of client identification on mortgagees<sup>39</sup> will hasten the trend towards the taking out of title insurance — a trend that will occur irrespective of what model of indefeasibility is judicially or statutorily established. Indefeasibility after all is a legal concept that only the esoteric practitioners of land law would understand. However, insurance against loss is commonly recognised and something with which the risk averse consumer commonly engages.<sup>40</sup> With participants such as banks and conveyancing agents being burdened by greater responsibilities in the conveyancing process, recalibration of risk is likely to occur. That recalibration can occur by way of title insurance, a cost directly borne by the consumer within the transaction.

### What is capped conveyancing insurance?

[L]enders and their solicitors need to consider that much of the efficacy of indefeasibility has been removed. The duty to detect imposter-fraud, and the risk if they fail, has now fallen on them. They need to make changes to procedures to increase their vigilance, and solicitors need to advise their lender clients of the new realities, and the potential need for title insurance.<sup>41</sup>

Perhaps the most important reason for the likely use of title insurance in Australia is the recent introduction of capped conveyancing issue in New Zealand, with this product likely to be offered in Australia in the near future. Ultimately we consider it likely that title insurance will be standard within conveyancing practice on a level equivalent to Ontario, where lawyers now directly compete with title insurance companies with their own product, TitlePLUS.<sup>42</sup> What capped conveyancing insurance does is to provide a low cost title insurance policy that is taken out by the lawyer, not the homeowner. Such an approach has perceived advantages to the firm of integrating services to the client, providing a competitive and marketing advantage over those firms that don't have the coverage, limiting professional indemnity claims, and achieving an overall improvement in the risk matrix that surrounds conveyancing. The policy will cover risks, up to NZ\$100,000, that are not necessarily covered by the assurance fund guarantee,<sup>43</sup> such as errors within council information, prior non-compliance with local authority edicts, boundary disputes, misrepresentation by the vendor and rights over land which may be undiscovered prior to settlement. While it is taken out by the

39 New Zealand has proposed to follow the lead of Queensland and New South Wales in requiring mortgagees to check the identity of mortgagors and ensure that they are acting with lawful authority. See New Zealand Law Commission, *A New Land Transfer Act*, (Report no 116, 2010), Recommendation 4. Specifically, it is suggested that New Zealand model their legislation on the Queensland Land Titles Act 1994 s 11A and s 11B.

40 For a general discussion on behavioural economics and the consumer and the risk averse nature of the consumer, see I McAuly, *Roundtable on Economics for Consumer Behaviour: Summary Report*, OECD, 2007.

41 M Bransgrove, 'Torrens Ceases to Assure: A Wake-up Call for Lenders' (2014) 88 *ALJ* 82 at 84.

42 At <[www.titlePLUS.ca](http://www.titlePLUS.ca)> (accessed 6 August 6 2015).

43 Full coverage one-off policies are also available, eg, a property with a value of NZ\$750,000 will attract a policy fee of approximately NZ\$420 + GST.

lawyer, it will cover the interests of the client and the mortgagee, with the vendor of this product advising how the solicitor should notify the client that they are included within the coverage.<sup>44</sup> While mistakes by the conveyancing agent would be covered under the professional indemnity policy, capped conveyancing insurance provides a simple mechanism to cover such problems. In addition, without the adversarial nature of a professional negligence claim it should provide a simpler recourse to compensation when needed. It will prevent rises in the professional indemnity policies though presumably the base cost of NZ\$56 will rise if claims grow. Practice will presumably dictate that the cost of such policies are passed on to the client as a charged conveyancing overhead.

So while the developments in Ontario and New Zealand may have stemmed from different pressures within their own jurisdictions, the result is the same. What we see are Torrens based jurisdictions with title insurance embedded as part of the culture and cost of conveyancing. Whether it is done as a response to legislative enactments, private law evolution, real estate fraud, rises in professional indemnity insurance, or the complexity of conveyancing and its raft of bureaucratic searches that can influence the quality of title,<sup>45</sup> title insurance has become a cost for all or nearly all consumers. Despite it being perceived as profitable for the insurance companies,<sup>46</sup> there is no doubt that for the price paid, it represents peace of mind for the few that are knowledgeable as to the limitations of the assurance fund, or just generally consumers seeking to limit risk associated with their most expensive purchase.

## Conclusion

Some property lawyers will see a Trojan Horse in any proposal to give title insurers a role in the Torrens System. The suspicion stems from the role played by the US title insurance industry in lobbying for more than a century against the Torrens System in America. In Australia and New Zealand, which have mature Torrens Systems, there is no risk of reversion to unregistered conveyancing. In these jurisdictions, the concerns relate to possible erosion of the government funded social assurance model, with its broad risk cover, its compulsory and universal application, and its complementary provision of legal and economic security through the mechanism of state guaranteed title.<sup>47</sup> The reason for the success of title insurance in Torrens jurisdictions lies in a combination of factors. There is the difficulty of access to the assurance fund, the protective nature of Registrars in managing the resources of the Crown, the increasing responsibility on stakeholders in the move to e-conveyancing and the various exceptions to indefeasibility that are removed from

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44 J Williamson, 'Capped Conveyancing insurance — a new approach to managing risk in residential conveyancing' (2015) 20 *LawNews* 4.

45 These can include bankruptcy investigations, local government searches, mines department enquiries, corporate searches, identification of wayleave agreements, heritage concerns, water supply details, landslip or flood plain information, council imposed covenants, title searches etc.

46 L Griggs, 'The Assurance Fund: Government Funded or Private' (2002) 76 *ALJ* 250 at 254, (losses as a percentage of premiums approximate 2.5%).

47 P O'Connor, 'Double Indemnity: Title Insurance and the Torrens System' (2005) 3(1) *Law and Justice Journal* 142 at 166.

compensation. The potential is that this increased role for title insurance will be taken note of by the Crown<sup>48</sup> and a corresponding withdrawal or weakening of assurance funds may occur — in essence a state based consumer protective measure is replaced or complemented by private insurance.<sup>49</sup>

In the context of immediate and deferred indefeasibility, O'Connor commented that:

The jurisdictions examined . . . are indeed locked into a continuous quest for legal coherence. They experience ongoing controversy of a largely rhetorical kind, and are liable to sudden seismic shifts in the rules.<sup>50</sup>

The same comment can be made here in the discussion around risk management within conveyancing practices. Legal coherence will see a more nuanced understanding and reflection around risk. Currently with immediate indefeasibility, the current owner's title is always at risk of loss due to fraud and the registration of another. The dynamic security that is currently provided to the purchaser with its resultant reduction in search and verification costs comes at an expense once registered. The protection in the process has led to vulnerability at the destination. That protection in the process and this vulnerability is now being subtly moved. Because of this movement of risk, we believe that title insurance will become prevalent in Australia — it is cheap, it covers gaps where the Torrens scheme embodies exceptions, the guarantee of dynamic security is now layered with an obligation to check identity, and legislative reform is working to remove the umbrella of indefeasibility if negligence in process is shown. For all of these reasons, title insurance will become a recognised cost of the conveyancing transaction. The open question is whether the state will see this as an opportunity to wind back assurance fund eligibility and, if it does so, is what we have left something which Sir Robert Torrens would endorse?

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48 As noted by O'Connor, *ibid*, at 168:

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

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

49 Such a development already seems to be occurring in Hong Kong: S Ko, 'Rectification and Indemnity in Land Title Registration: A Risk Analysis for Reform' (2013) *HKLJ* 111, p 13 of online version: 'The government envisaged that security gaps left by the indemnity scheme will stimulate demand for and eventually be covered by a private title insurance market'.

50 P O'Connor, 'Deferred and Immediate Indefeasibility: bijural ambiguity in registered land title systems' (2009) 13 *Edin LR* 194 at 223. O'Connor was considering the jurisdictions of Australia, New Zealand, Canada, Malaysia and Singapore.