

The Versatility of State Indemnity Provisions

SIMON COOPER*

Systems for registration of title commonly include a provision making available an indemnity by the state for losses which occur in the course of dealings with registered land. Often the rationale for these indemnity provisions is explained summarily as a supplement to indefeasibility of title, taking the stance that any property rights taken away by the state's registration system ought to be replaced with a monetary substitute from the state. For example, it has been said¹ that the state's creation of a source of loss of property obliges the state on moral grounds to take responsibility through the award of indemnity to compensate such losses: 'Because the risk is created by a state-imposed title registration system, it seems imperative that the indemnity system designed to distribute that risk be provided by the state as an integral part of the title registration system.'² But regardless of its value in supporting a concept of security of wealth through the protection of property rights via their substituted value in monetary terms, this paper argues that indemnity is also to be justified on account of its function as a policy tool to manipulate the attitudes and behaviour of those involved in land dealings. Challenging the view that indemnity merely reflects the doctrine of indefeasible title in monetary terms, this paper argues that indemnity's merit lies in its versatile character which enables it to implement a range of specific policy objectives. Those objectives will be identified below.

DANGERS TO THE PROPRIETOR

Indemnity is usually expressed in the statutes as a state liability to pay in the event of some particular type of loss, so it is helpful first to identify what dangers present themselves to the holder of rights in land under a system of registered title. In order to do this, the registered proprietor must look not only at the current state of the land title register but, Janus-like, must look into the future to seek potential sources of prospective

* Dr Simon Cooper is a Senior Lecturer at the Cayman Islands Law School and Visiting Professor at Stetson University.

¹ Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No.69, Edmonton, 1993) 51.

² TW Mapp, *Torrens' Elusive Title* (Edmonton, Alberta Institute for Law Research and Reform, 1978) 760. There is also a hint of this philosophy in Sir Robert Torrens' own writings where it is recorded that the scheme of indefeasibility 'is effected in the manner most consistent with individual rights' through the provision of indemnity to compensate those who are barred from recovering the land itself by the operation of the registration law: RR Torrens, *The South Australia System of Conveyancing by Registration of Title* (Adelaide, 1859) 43.

deprivation occurring due to future events, and into the past to discern events before acquisition which might have generated claims derogating from the state of title as currently appearing in the register. These two sets of dangers to the integrity of the registered title will be considered in turn.³

The danger of future deprivation of registered title is a necessary part of every system of title by registration. The system which gives to the current registered proprietor an indefeasible title is the very same system which can take it away in order to allocate an indefeasible title to a new registered proprietor. In the Torrens system, this type of loss is demonstrated by the classic *Frazer v Walker*⁴ in which Mr Frazer lost his registered title through a forged disposition under which Mr Walker indirectly became registered. It is also to be seen in the English system wherever a former registered proprietor seeks to be reinstated in place of a new registered proprietor who was entered mistakenly, but the rectification claim is unsuccessful - a situation illustrated by *Norwich & Peterborough Building Society v Steed*⁵ in which Mr Steed failed in his claim to remove the building society's registered charge acquired pursuant to a family member's fraud.

An analogous type of deprivation caused by the principle of indefeasibility occurs when a parcel undergoes the transition from unregistered to registered title. If, at first compilation of the register, the existing common law rights are not entered on the register, the usual rule in registration systems is that they lose their priority vis-à-vis the first registered proprietor. In this way, first registration can constitute a future event with the potential to deprive a common law owner of title.

Deprivations of registered title caused by future events occurring only after the moment of acquisition must be clearly differentiated from any defects in title which are rooted in past events. A system for registration of title need not stipulate that the registered title as currently revealed in the register is absolutely definitive and exhaustive, and the reality is that all registration systems have at least some circumstances in which property rights not entered on the register at the time of acquisition are nevertheless permitted to be enforced against a registered proprietor. It is the enforcement of these property rights, ante-dating the moment of the proprietor's registration, or arising at the moment of and because of the proprietor's registration, which constitute a second source of danger to the integrity of the land title register as a description of the rights of the registered proprietor.

INDEMNITY FOR FUTURE-EVENT DEPRIVATIONS:

³ There are naturally many other sources of losses which can occur in the administration of a system for registration of title: for example, loss of documents stored at the registry, errors occurring in the part of the land title register which are merely recorded as opposed to registered, erroneous certificates issued by the registry, and so on. These errors do not alter the vesting of property rights, since that occurs only when the registered material on the land title register is changed. Indemnity provisions covering these dangers have their own particular justifications and objectives and are not dealt with in this paper.

⁴ *Frazer v Walker* [1967] 1 AC 569 decided under the Land Transfer Act 1952 (New Zealand).

⁵ *Norwich & Peterborough Building Society v Steed* [1993] Ch 116 decided under the Land Registration Act 1925 (England).

POLICY OBJECTIVES

If a registered proprietor suffers a deprivation due to the acquisition of indefeasible title by a new registered proprietor, and the deprivation occurred without consent or the proper operation of some overriding general law, then generally in English and Torrens registration systems the former registered proprietor will be entitled to a statutory indemnity.⁶ The remaining part of this segment will seek to identify the objectives which justify the availability of indemnity in this case.

Promoting Acceptance of Registration

The first purpose ascribed to indemnity is to promote acceptance of the registration system in order to secure the initial enactment of the registration bill. Ceding compensation in such cases was perceived as having a critical role in the acceptability of the registration schemes and ultimately securing their enactment. Whalan has specifically observed that the possibility of loss of land under the indefeasibility provisions without redress was one of the chief grounds on which the South Australian legal profession based its opposition to the original Torrens Bill; indemnity was vital to ‘inspire confidence’ and to ‘draw the fangs of the opposition.’⁷ This had earlier been recognised by the English commission reporting on the first proposed registration of title regime in England⁸, and again when the Torrens system spread to the African colonies.⁹

Once the relevant land registration bill has been enacted and has secured general acceptance, it may be the case that the other advantages of title registration are recognised as sufficient to entice the public to accept registration without indemnity.¹⁰ If so, consideration needs to be given to the continuing justifications for indemnity, whether it has served its purpose and may be abrogated. While it can be argued that the initial idea

⁶ There was a degree of cross-fertilisation of ideas between Australasian registration and English registration. Torrens took the idea of an assurance fund from the 1857 land transfer commission report; see DJ Whalan, ‘The Origins of the Torrens System and its Introduction into New Zealand’ in GW Hinde *The New Zealand Torrens System Centennial Essays* (Wellington, Butterworths, 1971) 9. Torrens himself was questioned in England by the 1870 land transfer commission on indemnity in the course of its deliberations (see ‘Report of the Royal Commissioners Appointed to Inquire into the Operation of the Land Transfer Act’ (1870, c.20), Minutes of Evidence, qqn. 768-807).

⁷ DJ Whalan, *The Torrens System in Australia* (Sydney, Law Book Co, 1982) 345. See also D Pike, ‘Introduction of the Real Property Act in South Australia’ (1961) *Adelaide Law Review* 169; *pace* R Stein ‘The Torrens System Assurance Fund in New South Wales’ (1981) 55 *Australian Law Journal* 150, 151.

⁸ See ‘Report of the Commissioners to Consider the Subject of the Registration of Title with Reference to the Sale and Transfer of Land’ (1857, c.2215), paras. 26, 30, 57, 86.

⁹ E.g. JF Spry, ‘Notes on the Tanganyika Land Registration Bill’ para. 9, contained in Appendix II of SR Simpson, IE Morgan & JE Jardin, *A Report on the Registration of Title to Land in Kenya* (Nairobi, 1961, Unpublished).

¹⁰ See New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss* (Report No.76, Sydney, 1996), paras 1.1.2, 4.2.

of palliating the objectors to enactment may have passed, there remains of course the possibility that if the indemnity provision were repealed the registration system would cease to command the confidence of the population. In England, for example, when it was realised that the statutory bars to indemnity would prohibit indemnity payment on the basis of an innocent contribution to an erroneous registration, the resulting expression of concern¹¹ led quickly to amendment of the terms of the statutory indemnity bar.¹² Several other imperfections in the indemnity provision, primarily in the method of quantifying indemnity awards, have been improved¹³ in response to critical comment.¹⁴ Other states, including Australian¹⁵ and Canadian¹⁶ jurisdictions, have also shown an on-going interest in keeping under review the adequacy of their indemnity provisions.

In order to promote acceptance of the registration system, a registration bill must, at the very least, confer indemnity in those cases where the registration system is capable of making a person worse off. The principal danger not encountered at common law is that the statutory scheme of indefeasibility can cause an owner to relinquish priority in circumstances where the common law principle of *nemo dat quod non habet* would have allowed that owner to prevail. An indemnity provision which seeks merely to compensate for the losses that follow from the revised priority rules contained in a land registration statute could be drafted so as to indemnify simply for those deprivations which have been caused by the statute. This causation-based approach is taken in one of the constituent limbs of the traditional indemnity provision in Torrens statutes, as seen in the Land Transfer Act 1952 of New Zealand, which confers an indemnity claim on: ‘Any person... (b) who is deprived of any land, or of any estate or interest in land, through... the registration of any other person as proprietor of that land...and who by this Act is barred from bringing an action for possession or other action for the recovery of that land, estate, or interest...’¹⁷

An illustration of the restrictive scope of this style of indemnity provision is presented by those Canadian states where the doctrine of deferred indefeasibility

¹¹ S Cretney & G Dworkin, ‘Rectification and Indemnity: Illusion and Reality’ (1968) 84 *Law Quarterly Review* 528, 555.

¹² S 3(1) of the Land Registration and Land Charges Act 1971 (England).

¹³ By the Land Registration Act 1997 (England).

¹⁴ Including DJ Hayton, *Registered Land*, 1 edn (London, Sweet & Maxwell, 1973), chapter 9. See also Law Commission, *Land Registration* (Law Comm Working Paper No.45, 1972) and Law Commission, *Third Report on Land Registration* (Law Comm Report No.158, 1987).

¹⁵ Examples include: New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss* (Report No.76, Sydney, 1996); Queensland Law Reform Commission, *Consolidation of the Real Property Acts* (Report No.40, Victoria, 1991); Land Law Review Committee of the Northern Territory, *Guarantee of Torrens Title in the Northern Territory* (Report No.5, 1991).

¹⁶ Joint Land Titles Committee of Canada, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, JLTC, 1990); Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No.69, Edmonton, 1993).

¹⁷ S 172 of the Land Transfer Act 1952 (New Zealand).

prevails.¹⁸ Under the regime of deferred indefeasibility, if a fraudster were to impersonate the registered proprietor of land in a sale, the purchaser becoming registered under a forged transfer, then the purchaser's registered title would be subject to revision. Upon revising the register to reinstate the former registered proprietor, the purchaser would be unable to claim indemnity since the loss of title would not be a deprivation caused by the operation of the statute¹⁹: the loss would have occurred at common law under the principle of *nemo dat*, since in unregistered land the forgery would have passed no interest to the purchaser²⁰, and consequently the registration statute cannot be said to have caused the loss. Where immediate indefeasibility prevails, in contrast, the common law result is reversed in favour of the purchaser and indemnity would be payable to the ousted proprietor. Regardless of whether the regime in question is one of immediate or deferred indefeasibility, indemnity can be linked exclusively to the reversal of priority caused by the new registered land regime, and it serves the purpose of compensating deprivations that would not occur under common law. Some dissatisfaction has been expressed over the comparison with common law priority rules to determine the availability of indemnity and a movement has developed which prefers to eliminate any comparison with common law property priority rules and to substitute new rules which rely on the validity of the transaction which led to the disputed registration.²¹ While this approach possesses certain practical and technical advantages, it inevitably involves a slight departure from the technique of measuring loss by reference to the common law. To that extent, it falls short of the ideal of compensating deprivations caused by the registration system, and correspondingly diminishes its ability to promote acceptance of the registration statute.

Easing Registry Examinations of Instruments

As well as promoting the acceptance of a new registration regime, indemnity may also be used as an instrument to control the behaviour of those involved in the land transfer process. In particular, the presence of an indemnity clause may influence the operations

¹⁸ **Cross-reference Michael Bryan & Matthew Harding's paper.**

¹⁹ TW Mapp, *Torrens' Elusive Title* (Edmonton, Alberta Institute for Law Research and Reform, 1978) chapter 6; PBA Sim, 'The Compensation Provisions of the Act' in GW Hinde (ed), *The New Zealand Torrens System Centennial Essays* (Wellington, Butterworths, 1971) 148.

²⁰ This was the position in *Gibbs v Messer* [1891] AC 248, decided at a time when the doctrine of immediate indefeasibility was not confirmed in Victoria.

²¹ See the 'government undertakings' approach to indemnity proposed in Land Law Review Committee of the Northern Territories 'Guarantee of Torrens Title in the Northern Territories' (Report No.5, Darwin, 1991) 5; the 'system malfunction' approach in Part 7 of the Model Land Recording and Registration Bill recommended in Joint Land Titles Committee of Canada, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, JLTC, 1990); the 'mistake' based approach to rectification, upon which the availability of indemnity largely depends, under para 2, Sched 4 and para 1(1), Sched 8 of the Land Registration Act 2002 (England).

of the registry. By introducing a power to accept less than perfect titles, coupled with an indemnity provision to cover any losses that may arise from that approach, a registry is prompted to accept instruments for registration which are imperfect. The registry may then take an approach to the examination and registration of instruments, avoiding uneconomic inquiries into all possible imperfections which might require an impracticably costly and time-consuming effort.

In contrast to first registrations, the scope for doubts to arise upon examination is substantially reduced where submissions consist only of instruments dealing with a title already registered. Once a parcel has been brought under the registration system, there are common features of registration systems which tend to simplify titles further: the simplicity of registered land priority rules, the conversion of titles from inferior grade of title to absolute, compulsory usage of standard form instruments, quieting of disputes under any preserved laws of prescription and limitation, and so on. It is therefore rare that the registry would ever need to rely on indemnity to justify taking a calculated risk that a perceived blemish in an instrument might be reflect some genuine enforceable right.²² Only seldom might there be any query over a disposition which justifies the registry placing a conscious reliance on indemnity: questions over validity of execution are perhaps one of the few areas where this might be regularly exercised.²³ Nevertheless, the easing of registry examinations has still been recognised as a policy objective in Canadian reform proposals which state, within a discussion of indemnity, that 'It is intended that Registrars will accept for registration documents which comply with the regulations [prescribing form] and that they will not make independent investigations to determine the authenticity or validity of documents.'²⁴

INDEMNITY FOR FUTURE-EVENT DEPRIVATIONS: COUNTERPOLICIES

Having examined the policy objectives attributable to the availability of indemnity for future-event deprivations, it remains to consider how those objectives may conflict with other objectives of the registration system. The following subheadings describe potential countervailing objectives which militate against indemnity in certain spheres, and which are therefore occasionally found as express restraints on the ambit of an indemnity clause.

²² This is dramatically different from regimes where there is on-going submission of titles for first registration, where the titles may be exceedingly complex, built upon ancient roots of title, and governed by laws which lack the simplifications embodied in the English 1925 legislation (including sixty-year roots of title, the prevalence of legal successive and concurrent interests without a 'curtain principle', the lack of statutory overreaching, and the technicality of drafting rules).

²³ Author's interview with Mr RC Buchanan, Cayman Islands Registrar of Lands, 10 July 2001. See also TW Mapp, *Torrens' Elusive Title* (Edmonton, Alberta Institute for Law Research and Reform, 1978) 70.

²⁴ Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No.69, Edmonton, 1993) 154.

Sanctity of Property

One of the policy objectives of indemnity mentioned above was the easing of the registry's examination of instruments submitted for registration. This carries with it the potential destruction of valid and subsisting property rights as the price paid for enhancing the simplicity and reliability of the land registration system. Of course the conscious destruction by the state of possible adverse claims is not in itself an independent policy objective²⁵; a balance should therefore be sought in the administration of the registry's examination of instruments which allows the potential destruction of rights to be weighed against the importance of enhancing registration. By permitting an executive official to make a decision to disregard rights of unknown enforceability when accepting a title for registration, there may be difficulty in complying with state guarantees of protection against interference with property. Although monetary compensation could be offered through indemnity, this is not always a satisfactory substitute for the property right and the security of wealth afforded by indemnity may be only one element in determining whether constitutional requirements are fulfilled.

Suppressing Land Transaction Costs

One of the primary goals of land registration is to promote an efficient land market and to reduce the disincentives to trafficking in land, particularly those disincentives lying in the process of transaction itself, such as expense and delay. The need to set up and maintain an indemnity fund will inevitably lead to extra transactional costs in the guise of premiums taken by the registry for maintenance of the fund. If the premiums are allowed to escalate, this has a detrimental effect on overall transaction costs, and could frustrate indemnity's goal of cheapening conveyancing. Hopefully the basic precautions taken by conveyancers and the registry should limit the number of indemnifiable future deprivations caused by imposters and simple forgeries (particularly the requirement in Torrens systems for notarised execution of transfers²⁶), but various statutory constraints on the administration of indemnity have been imposed which are designed to keep premiums low. They include the techniques of correlating payments into the indemnity fund with payments out, and imposing limits on indemnity awards.

Correlating Premiums and Awards

For so long as the indemnity system is administered in accordance with an insurance model, the costs attributable to indemnity should be low in comparison with private title insurance covering the same risks. Once the indemnity system deviates from the insurance model, there is the likelihood that the cost of the indemnity programme will cease to be correlated to the achievement of its objectives. A common situation (seen in

²⁵ CT Emery, 'The Chief Land Registrar's Power to Approve of a Good Holding Title' (1976) 40 *Conveyancer and Property Lawyer* 122, 129.

²⁶ For example, ss 88-90 of the original Real Property Act 1858 (South Australia).

England²⁷ and Torrens countries²⁸) is for a separate indemnity fund to be replaced by the transmission of indemnity premium revenues directly to general government funds, without any attempt to make an appraisal on an actuarial basis of the likely payments out upon successful claims. Where a substantial surplus is simply appropriated to general funds it may be characterised as no longer reflecting an insurance system but representing a form of disguised taxation of land transactions. The result is that the cost of land transactions may increase without delivering improvements in return.

Limits on Indemnity

Certain limits on the availability of indemnity in exceptional cases may be regarded as acceptable so long as the general effectiveness of indemnity as a policy tool is achieved in the broad run of cases by influencing the behaviour of conveyancers and registry title examiners. Limits on indemnity could assist in the preservation of the indemnity fund against exceptionally large claims and hence keep down the costs of the indemnity premiums. This approach would depend on a conscious policy of utilising indemnity solely as an instrument to influence behaviour, and not on the provision of indemnity pursuant to some moral imperative or constitutional guarantee of property. Various types of limits on the availability of indemnity are to be found. Simple caps on the amount of payment under the indemnity provision, for example, are to be encountered.²⁹ While it should be possible to allow unlimited indemnity and recoup any shortfall from future fees, a cap on individual indemnity claims could permit the fulfilment of the indemnity policy objectives in common dealings, leaving parties involved in especially large transactions to consider the desirability of private title insurance.³⁰ Other methods may be employed to relate payments out to payments in, such as providing for *pro rata* indemnity payments proportional to the standing of the indemnity fund, or simple non-payment upon the fund becoming exhausted.³¹ Bars to indemnity or restrictions on quantum may also be imposed for particular types of loss, such as mineral titles in England³² and some Canadian jurisdictions.³³

²⁷ Ss 4, 6 of the Land Registration Act 1936 uncoupled the size of the indemnity fund from the level of payments in, and s 1 of the Land Registration and Land Charges Act 1971 amalgamated the indemnity fund with the Consolidated Fund.

²⁸ For example, the Land Transfer Act 1870 (New Zealand) and its successors established the Assurance Fund which, after various mutations, was transferred to the Consolidated Fund by s 53 of the Finance Act 1930 (New Zealand).

²⁹ For example, s 179(1) of the Land Titles Act 2000 (Alberta).

³⁰ See Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No.69, Edmonton, 1993), para 8(f).

³¹ As was the rule in England for a number of years in relation to the discretionary indemnity for adverse possession: proviso to s 75(4) of the Land Registration Act 1925 (England), repealed by s 3(2) of the Land Registration Act 1936. Discretionary indemnity under s 75(4) of the Land Registration Act 1925 (England) was repealed by s 14 of the Land Registration and Land Charges Act 1971.

³² Para. 2, Sched 8 of the Land Registration Act 2002 (England).

³³ For example, s 86 Land Titles Act, 2000 (S.S. 2000. c.L-51) (Saskatchewan); s 185 Land Titles Act (RSA 2000, c.L-4) (Alberta).

Encouraging Basic Self-Protection by the Proprietor

A danger in conferring indemnity is that it may tend to encourage a proprietor to neglect to take obvious and simple steps to safeguard his or her position against the possibility of future deprivation. A suitable response to this could be to bar the availability of indemnity where such steps have not been taken. English and Torrens registration systems reveal provisions which seek to incorporate this sort of policy-based restriction on indemnity. One technique, seen in England³⁴, New Zealand³⁵ and New South Wales³⁶ amongst many others, has been to create a bar to indemnity, or to reduce its amount, in the event that the negligence of the indemnity claimant or his agent has contributed to the deprivation in respect of which indemnity would otherwise have been payable.

A clear illustration of negligent conduct would be the failure to protect a newly-acquired right on the register. If the land registration scheme were to permit indemnity upon an unprotected right being overridden by a later registered disposition, then the loss can be attributed exclusively to the failure to take the elementary precaution of registering; registration is the type of simple, cheap and speedy step that should not be discouraged through the provision of indemnity to the irresponsible purchaser. Omission to register was expressly declared to be a form of negligence barring entitlement to indemnity through the operation of statutory priority rules under the English Land Transfer Act 1897³⁷, and it has been suggested that the same conclusion ought to have been reached under the 1925 English statute.³⁸ The leading work land titles in New Zealand suggests a similar response on the interpretation of the New Zealand Torrens provisions³⁹, and an equivalent provision has also been incorporated into the proposed Alberta reforms.⁴⁰

³⁴ Para. 5, Schedule 8 of the Land Registration Act 2002 (formerly s 83(5)(a) of the Land Registration Act 1925).

³⁵ The defence was originally recognised as a total defence in *Miller v Davy* (1889) 7 New Zealand LR 515; after the Contributory Negligence Act 1947 (New Zealand) was passed, creating a proportionate defence, it was recognised in *Registrar-General v Marshall* [1995] 2 NZLR 189 that indemnity would be apportioned.

³⁶ S 129(2)(a) of the Real Property Act 1900 (NSW) as amended by the Real Property Amendment (Compensation) Act 2000 (NSW).

³⁷ S 7(3) Land Transfer Act 1897 (England).

³⁸ RJ Smith, 'Land Registration Reform' [1987] *Conveyancer and Property Lawyer* 334, 343; RJ Smith *Property Law* 2 edn (Longman London 1998) 256. One example was put on an express basis: indemnity was barred in respect of loss of company charges that had not been registered at the Land Registry: s 60(2) of the Land Registration Act 1925 (England).

³⁹ GW Hinde, DW McMorland and PBA Sim, *Land Law in New Zealand* (Wellington, Lexis Nexis, 2003) paras 9.092, 9.096, relying on s 60 of the Land Transfer Act 1952 (New Zealand).

⁴⁰ Clause 7.4 of the Model Land Recording and Registration Bill proposed by Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No 69 Edmonton 1993).

In those registration systems issuing land certificates to registered proprietors which must be submitted upon a transfer, another example of negligent conduct encouraged by the ready availability of indemnity might be the failure to guard the land certificate against the risk of theft or unauthorised usage.⁴¹ In England, placing the land certificate in the hands of an untrustworthy agent has been regarded as the sort of invitation to fraud or unauthorised dealing that should be discouraged by the withdrawal of indemnity⁴², and precisely the same conclusion has been suggested in those Torrens systems issuing duplicate certificates of title.⁴³ The position would be even clearer where the proprietor puts both the certificate and a transfer form signed in blank into the hands of an unreliable agent.

To the extent that indemnity is barred by such negligent conduct, this policy of encouraging the proprietor to guard against fraud could, however, impinge on the objective of promoting the acceptance of registration by indemnifying losses that could not occur at common law. The loss of title and proposed removal of indemnity here could put a landowner in a worse position under the registration regime than under the common law rules, where the principle of *nemo dat* generally applies to prevent the acquisition of title by the fraudster or the fraudster's assigns and where the failure by the victim to safeguard the muniments of title does not, without more, bar the recovery of the property. For this reason, Torrens authors have recommended that, in a regime where indemnity's goal is to compensate losses that would not have occurred at common law, full indemnity should be awarded without any negligence-based bar for this type of careless conduct.⁴⁴

INDEMNITY FOR PAST-EVENT DEFECTS IN TITLE: POLICY OBJECTIVES

In some registration systems there is provision for indemnity for a registered proprietor where there has been a past event or state of affairs which leads to the land title register failing to represent the totality of proprietary interests in the land at the time when the registered proprietor became registered. This is an altogether different function from indemnifying losses caused by the future event of the registered proprietor being removed from the register without consent or proper operation of the general law. The failure of the register to account for third party claims which, despite arising before or at the moment of registration of the proprietor, may still be enforced, is not comfortably described as a 'loss'. The registered proprietor does not lose anything upon the third party

⁴¹ See L Griggs 'The Assurance Fund: Government Funded or Private?' (2002) 76 *Australian Law Journal* 250, 254-5.

⁴² CF Brickdale and JS Stewart-Wallace, *Land Registration Act 1925* 4 edn (London, Stevens, 1939) 220.

⁴³ L McCrimmon, 'Compensation Provisions in Torrens Statutes: The Existing Structure and Proposals for Change' (1993) 67 *Australian Law Journal* 904, 910. Contrast the mere failure to take custody of a certificate of title under s 189(1A) of the Land Title Act 1994 (Queensland).

⁴⁴ AE Wallace & CAC MacDonald, 'A New Era in Torrens Title in Queensland' (1994) 68 ALJ 675, 680.

successfully asserting an interest, since the title was subject to the defect from the first moment the proprietor became registered.⁴⁵

Torrens systems generally, but not universally, protect a registered proprietor against title defects originating prior to his or her registration. For example, where a mortgage is improperly omitted by the registrar from a register, and the parcel is later sold, the purchaser will be protected by indefeasibility and the mortgagee will be left to indemnity. Where, however, it is a legal easement that has been improperly omitted from the register before the parcel is sold, then the purchaser is bound in those systems where the easement falls within an exception to indefeasibility.⁴⁶ Indemnity is allowed here to the registered proprietor who fails to secure the clear title initially promised by the register.⁴⁷ This is the judicial interpretation of the typical Torrens indemnity provision expressed in terms which compensate a 'loss' caused by an 'error, omission or misdescription' in the register.⁴⁸ As with the English statutes, the Torrens statutes have tended to intertwine the different indemnity heads, and few Torrens authors have stressed the two, fundamentally unrelated, functions of indemnity in compensating future deprivations of title and past defects in title.⁴⁹

In England, indemnity for certain defects in title has been available since 1897⁵⁰, but the later indemnity clauses have taken a circuitous route in determining the availability of indemnity by linking it to the principle of statutory vesting and the rectification power. The English system awards indemnity for 'loss'⁵¹ and then contrives to manufacture the necessary 'loss' in cases of a failure to acquire the desired title on account of unregistered interests existing before registration. This is achieved by declaring that a registered proprietor takes free from registrable but unregistered interests⁵² and then introducing the possibility of rectification to re-establish those interests.⁵³ By reviving the binding status of an unregistered interest through the event of

⁴⁵ To avoid any reference to 'loss', recent reform proposals conceive this form of indemnity as an undertaking or warranty, in favour of the registered proprietor, that the title is as expressed in the land register: Scottish Law Commission, *Discussion Paper on Land Registration: Registration, Rectification and Indemnity* (Discussion Paper No.128, Edinburgh, 2005) para.7.26.

⁴⁶ For example, s 172(b) of the Land Transfer Act 1952 (New Zealand); applied in *Millns v Borck* [1986] 1 NZLR 302.

⁴⁷ Whether compensation is dependent or not upon the unregistered right being one that is registrable and submitted for registration is a matter of interpretation on which views conflict. See, for example, the well-known divergence between *Trieste Investments Pty Ltd v Watson* (1963) 64 SR (NSW) 98 and *Voudouris v Registrar General* (1993) 30 NSWLR 195.

⁴⁸ For example, s 172(b) of the Land Transfer Act 1952 (New Zealand).

⁴⁹ The division is clearly set out in B Ziff, *Principles of Property Law* 4 edn (Toronto, Thomson, 2006) 447.

⁵⁰ S 7(2) of the Land Transfer Act 1897.

⁵¹ Para. 1(1), Sched 8 of the Land Registration Act 2002.

⁵² Ss 29, 30 of the Land Registration Act 2002.

⁵³ Para. 2, Sched 4 of the Land Registration Act 2002.

rectification, the English system⁵⁴ takes a defect in the registered title arising from a past event and, by a statutory sleight of hand, converts it into a future-event deprivation. The technique of taking what is, in substance, a defect in title based on past events and treating it as a future deprivation conceals the nature of the two component limbs of the English indemnity provision, which must be carefully separated when examining their respective justifications and objectives. To describe the dangers to a registered proprietor's title stemming from overriding interests and rectification, this paper will use the phrase 'past-event defect in title' in order to emphasise two points: first, that the concept is not appropriately described as a loss (except within the confines of English rectification) and second, that it applies only to defects which are rooted in events that occurred either before or at the moment when the proprietor was entered on the register (thus eliminating future-event deprivations).

The following subheadings will attempt to deduce various policy objectives from the availability of indemnity to a registered proprietor upon the assertion of an unregistered interest arising from events before or at the moment of acquisition.

Promoting Acceptance of Registration and Abridging Registry Examinations of Instruments

Some of the policy objectives mentioned earlier in relation to indemnity for future-event deprivations are equally applicable to indemnity for past-event defects in title. In the latter case, the availability of indemnity promotes acceptance of the registration system by ensuring that certain losses arising from historic defects in title can be the subject of compensation which may have no equivalent in a system of unregistered land. Indemnity for past-event defects may also tend to ease the registry examination of instruments submitted as staff may be more willing to abbreviate examination and run the risk of improperly omitting to register certain new rights (or of improperly failing to preserve the registration of certain existing rights) if the rightholder could subsequently assert those rights against a registered proprietor who in turn could then secure indemnity.

Easing Conveyancers' Investigations into Title and Validity of Transaction

The reassurance afforded to purchasers by the availability of indemnity may be accepted by conveyancers as a substitute for their investigations into certain categories of possible title defect, yielding the advantage of reducing time and expense associated with the

⁵⁴ This approach to indemnity may also be seen in Torrens systems if they retreat from the rigours of indefeasibility by providing for discretionary enforcement of unregistered interests against a registered proprietor as in the English system. A movement in this direction was addressed in A Mason, 'Indefeasibility - Logic or Legend' in D Grinlinton (ed), *Torrens in the Twenty-First Century* (Wellington, Lexis Nexis, 2003); E Toomey, 'Fraud and Forgery in the 1990s' (1994) 5 *Canterbury Law Review* 424. See r 34(3) Métis Settlements Land Registry Regulation 361/91 (Alberta), and ss 68-74 Land Titles Act, SNB, 1981 (New Brunswick), embodying discretionary indefeasibility in registration statutes which otherwise draw on a Torrens system heritage.

acquisition of interests in land.⁵⁵ To take maximum advantage of this effect of indemnity, the indemnity clause should be directed at deterring conveyancers from indulging in investigations of title beyond the face of the land title register for the relevant parcel, relying on the knowledge that compensation will be awarded if a defect does materialise.

If there were compensation for the register failing to describe accurately the totality of enforceable rights in the land, the register's reliability would be enhanced and purchasers would be more willing to treat the register as a conclusive statement of the state of title, eliminating the need to make further investigations and requisitions on those matters.⁵⁶ Early Torrens cases specifically linked the availability of indemnity to title searches: one judgment awarded indemnity despite the fact that the purchaser could have discovered the title defect by careful examination of the conflicting registered plans for the lot and the lease of part, with the words, 'If purchasers under the Land Transfer system have to search and ascertain the title of the transferring party or of his transferor, the beneficial effect of the Land Transfer Act will be much impaired.'⁵⁷ The use of indemnity in order to encourage reliance on the register was seen⁵⁸ as one of the principal functions of the land registration scheme in England where the guarantee was provided 'in order to limit the extent of investigation of title without undue risk to the purchaser...'⁵⁹ The same policy is seen elsewhere in provisions which encourage reliance by relieving a conveyancer from liability for relying on a certified copy of the register⁶⁰ and in some systems this ideal has been bolstered by enacting that a purchaser is not permitted to call for proof of title matters lying behind registered entries.⁶¹

⁵⁵ See P O'Connor 'Double Indemnity - Title Insurance and the Torrens System' (2003) 3 *Queensland University of Technology Law and Justice Journal* 1, 17-18. In many countries, investigation of title is no longer the most expensive or most delaying aspect of the conveyancing process.

⁵⁶ The decision to deny indemnity in *Dempster v Richardson* (1930) 44 CLR 576 (Tasmania) was criticised as potentially inducing purchasers to investigate the history of register entries to determine their validity: SR Robinson, *Transfer of Land in Victoria* (Melbourne, Law Book Co, 1979) 419.

⁵⁷ *Russell v Registrar-General of Land* (1906) 26 NZLR 1223, 1228 (Stout CJ). *Racoon Ltd v Turnbull* [1996] 3 WLR 353 has been criticised by the author for requiring similar inquiries: SAA Cooper 'Indefeasibility of Title in the British Dependent Territories' (1995) 20 *West Indies Law Journal* 22.

⁵⁸ H Potter, 'Registered Conveyancing and the Land Law' (1949) 12 *Modern Law Review* 205, 207.

⁵⁹ H Potter, *Key & Elphinstone's Precedents in Conveyancing: Registered Land*, 15 edn vol 3 (London, Sweet & Maxwell, 1954) 93-94.

⁶⁰ For example, s 67(2) of the Land Registration Act 2002; formerly r 295 of the Land Registration Rules 1925 (England); s 36(2) of the Registered Land Law (2004 Revision) (Cayman Islands).

⁶¹ S 110 of the Land Registration Act 1925 (England). Law Commission & HM Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Comm Report No. 254, 1998), paras. 2.49, 11.40, recommended that parties be free to determine obligations about deducing title. Para.2, Sched 10 of the Land Registration Act 2002 (England) permits rules - which may override private contractual arrangements - to be made about the title obligations.

While the need to discourage conveyancers from inquiring into the validity of register entries is conceptually fundamental to title registration, the impracticality of such inquiries would probably tend to discourage that activity regardless of any indemnity clause. Perhaps the most feasible source of inquiry would be examining the bundle submitted at first registration to ensure that the register was correctly compiled; but even then registration statutes may curtail alterations to the register based on pre-adjudication matters. For later dealings with the land, a conveyancer may, depending on the particular system, be permitted to investigate the earlier registered instruments stored at the registry in order to verify that their content had been accurately transcribed onto the register. Apart from these matters, there is little more a conveyancer could realistically do; if prior registered instruments are available, it might be possible to check their execution for signs of forgery but this would no doubt be expensive, time consuming and ultimately inconclusive. There is virtually nothing that could be done to uncover any past frauds which induced the execution of an instrument.⁶² In Torrens systems, it might be possible to discover the issue of a prior, conflicting certificate (a common exception to indefeasibility⁶³) by tracing the chain of registered title back to the original Crown grant.⁶⁴

The policy objective of minimising conveyancers' title investigations could be advanced by taking the indemnity provision beyond the positive warranty that the entries on the register are accurate and extending it to the negative warranty that there were no unregistered interests existing at the date of registration that can still be asserted against the registered proprietor. If an objective of indemnity is to encourage conduct which will quicken or cheapen conveyancing, then the indemnity provision need not be limited to matters which are mentioned on the register. The preventative effect of discouraging conveyancers from engaging in investigations of title could be pursued regardless of the cause of the title defect or whether the registry was involved in the defect's creation or detection. For example, the award of indemnity to compensate for overriding interests could be utilised in order to discourage the purchaser from making inquiries into the existence of any overriding interests, leading to savings in time and cost to the purchaser in the transaction. A limited version of such a proposal has already been encountered in England, where the Law Commission previously recommended⁶⁵ the introduction of indemnity upon the assertion of overriding interests against a registered proprietor in certain cases.

⁶² TW Mapp, *Torrens' Elusive Title* (Edmonton, Alberta Institute for Law Research and Reform, 1978) 14; EJ Cooke, *The New Law of Land Registration* (Oxford, Hart Publishing, 2003) 105.

⁶³ For example, s 62(c) of the Land Transfer Act 1952 (New Zealand).

⁶⁴ Considered in IL Head, 'The Torrens System in Alberta: A Dream in Operation' (1957) 35 *Canadian Bar Review* 1, 13. See also Alberta Law Reform Institute *Proposals for a Land Recording and Registration Act for Alberta* (Report No 69, Edmonton, 1993) 37, where it is proposed that historical searches to detect prior certificates be discouraged through the provision of indemnity, a rare case of a Torrens bill indemnifying against the risk of an exception to indefeasibility materialising.

⁶⁵ Law Commission *Third Report on Land Registration* (Law Comm Report No.158, 1987), para 3.39.

This point highlights the difficult relationship between indemnity and conveyancing professional standards. To the extent that indemnity is utilised as a tool to ease title investigations by a purchaser's conveyancer, it necessarily discourages the fuller investigation of title traditionally undertaken in accordance with established professional practice. If indemnity were to be extended to provide the purchaser with cover for losses attributable to overriding interests, the standards to be expected of conveyancers should be recast. The indemnity could be aimed at encouraging the conveyancers to dispense with almost all title investigations, a solution which may perhaps be of particular appeal to those whose interests lie primarily in the economic value of land rights, such as mortgagees.⁶⁶ If indemnity were designed for this breadth of policy objective, the corresponding professional standards should be altered in order to prevent the position occurring that conveyancers continue to adopt the fullest investigations of title for the purpose of avoiding the perceived risk of professional negligence liability.

For similar reasons, any bar to indemnity based on fault or contribution to the loss should be addressed only in conjunction with an appraisal of the professional standards. Where such a bar to indemnity is enacted, the value of indemnity in discouraging investigating title could be diminished by the perception that the very steps being discouraged by indemnity were the same steps whose omission would lead to the indemnity being barred on the ground of fault or contribution to the loss. Even without such a bar to indemnity, a similar dilution of the ability of indemnity to achieve the objective of easing conveyancers' investigations would follow if full indemnity were available to the client suffering loss but the conveyancer were ultimately held liable to reimburse the registry under some form of statutory right of subrogation following the indemnity award. It has also been recognised that a similar counter-productive effect would follow if a vendor or any other former registered proprietor were liable to the registry for recoupment.⁶⁷ For indemnity to function effectively in discouraging investigation of title behind the land register, therefore, it is necessary to integrate the indemnity provision, the indemnity bar, rights of subrogation and relevant professional standards. Without a unified approach achieved by the integration of these matters, it must be doubted whether indemnity could have any causative influence in altering conveyancing practices concerning the investigation of title.

The attempt of indemnity to change conveyancing behaviour could extend beyond investigating defects in the root of title and include the conveyancer's activity in assessing the validity of the disposition submitted for registration. This can be seen in Canadian reform proposals from the 1990s where indemnity was explicitly justified by its capacity to ease investigations into the circumstances of the transfer: 'If the system requires every purchaser to conduct elaborate investigations to determine that the

⁶⁶ See, for example, P O'Connor, 'Double Indemnity - Title Insurance and the Torrens System' (2003) 3 *Queensland University of Technology Law and Justice Journal* 1, 7-8; J Flaws, 'Compensation for Loss under the Torrens System' 18-21, and B Ziff, 'Title Insurance: The Big Print Giveth but the Small Print Taketh Away?' in D Grinlinton (ed), *Torrens in the Twenty-First Century* (Wellington, Lexis Nexis, 2003).

⁶⁷ A Underhill, 'Land Transfer Commissioners' Report' (1911) 27 *Law Quarterly Review* 173, 177-8.

conveyances they receive are binding upon his or her vendor, it will tend to obstruct rather than facilitate the transfer of interests.’⁶⁸

INDEMNITY FOR PAST-EVENT DEFECTS: COUNTERPOLICIES

The following subheadings describe possible objectives of land registration systems which are capable of conflicting with the objectives of indemnity, and which consequently might be used to circumscribe the indemnity clause.

Suppressing Transaction Costs

The ready availability of indemnity for past-event defects will raise the indemnity premium payable on land transactions and, if allowed to escalate, could lead to a potentially counterproductive impact on the land market. Various techniques for suppressing the cost of indemnity premiums have been noted above: premiums may be correlated to indemnity awards; arbitrary caps may be imposed; certain high-value interests or transactions may be excluded. When considered in the context of indemnity for past-event defects, further possible tactics are presented. In particular, the suppression of premiums can be assisted by avoiding superfluous awards. This can be achieved by, amongst others, tailoring the availability of indemnity to its policy objectives in changing behaviour, and discouraging purchasers from taking excessive risks in conveyancing. These two categories will be dealt with under the following subheadings.

Tailoring Indemnity to its Policy Objectives

One obvious solution to suppress indemnity premiums is to ensure that the availability of indemnity claims is narrowly tailored to the pursuit of indemnity’s policy objectives. The indemnity provision should target the behaviour only of those whom it is specifically sought to influence; this can be achieved by a suitable statutory clauses barring indemnity. This approach is of particular value in the context of indemnity for past-event defects in title which could potentially be inquired into by conveyancers at the time of purchase. If indemnity were to be available in circumstances where conveyancers and registry examiners had not placed any reliance on indemnity in determining their

⁶⁸ Joint Land Titles Committee of Canada, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, JLTC, 1990) 25. See also the recommendation that ‘the Registry should be as prepared to guarantee that the persons shown on the Register are the persons who sign the instrument as they are to guarantee the title itself, and that is why we have made such strict provisions with regard to verification of execution’: ‘Report of a Working Party on Registration of Ownership of Land in Lagos’ (Lagos, Federation of Nigeria, 1960) 37. The Lagos recommendations formed the starting point for the development of the Foreign and Commonwealth Office model statute for the British Overseas Territories.

practices for investigating title, then indemnity in those circumstances would not be efficiently tailored to its objectives in influencing behaviour. Two classes may be identified in which it is anticipated that persons are likely not to place reliance on the availability of indemnity in the course of conveyancing practices, and which therefore demonstrate circumstances in which indemnity is superfluous. They will be considered in turn.

The first class is where a conveyancer cannot practically take some precautionary step as part of relevant conveyancing practice. In this type of case, there is no precautionary behaviour that could be discouraged by making indemnity available. It follows that any indemnity provision here would lack any effect as a policy instrument.⁶⁹ This may be seen clearly where there is a source of risk to a purchaser that could, at least in theory, be detected by investigation but which is not sought out by the purchaser in practice. Even in the absence of any indemnity provision, it might be found in practice that certain investigations into particular sources of risk would not be taken. In such circumstances there is no conveyancing behaviour that indemnity needs to remodel in accordance with the overall goal of improving land transfer. One of those risks is the risk of negligence or fraud by the professional conveyancer. In practice, clients are rarely likely to seek to verify professional competence or *bona fides* when instructing a new conveyancer or dealing with the other side's conveyancer, and even if they were, there would be some difficulty in determining what sources would yield material on which this could be adjudged.⁷⁰ In these circumstances, the lack of any likely impact on existing practices may suggest that the policy objectives are not advanced by making available an indemnity claim to compensate for losses attributable to those sources.⁷¹

The second class where participants are likely not to place reliance on the availability of indemnity is where there are external influences on the relevant conveyancing practices which are so compelling that the availability of indemnity is unlikely to have a causative effect in changing those practices. Here again the existence of indemnity will not alter conveyancing behaviour. One example where the effectiveness of indemnity is diminished in this manner arises when compensation is forthcoming from other sources. This might occur under certain forms of insurance for conveyancers: where the insurer assumes the risk of loss, then the conveyancer may take advantage of the

⁶⁹ Hence the proposal that indemnity should not be available for administrative mistakes by the registry after submission of instruments: Scottish Law Commission, *Discussion Paper on Land Registration: Void and Voidable Titles* (Discussion Paper No.125, Edinburgh, 2004) paras. 3.35-3.41.

⁷⁰ New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss* (Report No.76, Sydney, 1996) para. 4.34.

⁷¹ Another example of an area in which indemnity has no effect in influencing behaviour occurs in purchases which trigger first registration of title, when the purchaser cannot have relied on any existing register to inform the decision to purchase. When the register is subsequently rectified, it has been suggested that there is no need to provide indemnity: see 'Royal Commission on the Land Transfer Acts: Second and Final Report of the Commissioners' (St. Aldwyn Commission) (1911, Cd. 5483) para 57; EJ Harvey, 'The Land Transfer Report II' (1912) 28 *Law Quarterly Review* 26, 33-34; SR Simpson, *Land Law and Registration* (Cambridge CUP 1976) 596.

opportunity to rely on the insurance coverage in determining what steps to take.⁷² Consequently, state indemnity may be perceived as superfluous, the desired influence on behaviour already having been achieved through external sources of compensation. In order to remove indemnity in these circumstances, a statutory indemnity clause might simply bar any indemnity claims by insurers who have paid out and are seeking to transfer their loss to the state indemnity fund.⁷³

Another external influence which may tend to lead conveyancers to resist the more liberal practices encouraged by an indemnity regime is to be found in the professional standards prescribed for conveyancers. To the extent that indemnity is utilised as a tool to ease the title investigations of a purchaser's conveyancer, it necessarily discourages the fuller investigation of title and other precautionary steps which might be traditionally undertaken in accordance with established professional practice. While the risks associated with abandoning these steps could fall within the ambit of an indemnity provision, conveyancers may be reluctant to transgress established professional standards by incurring the risk of land rights being lost with merely monetary compensation as a substitute. Fear of liability in negligence or fiduciary law, for breach of warranty of authority, or simply an unwillingness to provide what may be perceived as a substandard professional service, might be sufficient to prevent indemnity from having an influence on conveyancing practices.

Discouraging Excessive Risk-Taking in Conveyancing

One of the primary policy objectives attributed to indemnity is to ease the land transfer process by deterring certain investigations into title and other precautionary measures taken by a purchaser's conveyancer. The pursuit of this policy of easing land transfer is, however, curtailed by the desirability of striking a balance between deterring conveyancers' excessive, inefficient inquiries into risks on one hand, and on the other hand shifting easily avoidable losses onto the indemnity fund. Taken to an extreme, the effect of a comprehensive indemnity regime could be to encourage a reckless approach to the risks encountered in a land transaction⁷⁴, and it may be regarded as preferable to avoid at least some types of loss by encouraging conveyancers to take obvious and simple checks, thereby protecting the indemnity fund and suppressing the cost of indemnity

⁷² See P O'Connor, 'Double Indemnity - Title Insurance and the Torrens System' (2003) 3 *Queensland University of Technology Law and Justice Journal* 1, 7-8; P O'Connor, 'Title Insurance - Is there a Catch?' (2003) 10 *Australian Property Law Journal* 8, 22-23. The papers supply examples of insurance taken out for the purpose of enabling purchasers to dispense with certain title investigations.

⁷³ This is the approach now found in New South Wales in relation to future-event deprivations: s 129(2)(b)(ii) of the Real Property Act 1900 as amended by Real Property Amendment (Compensation) Act 2000 (New South Wales). See New South Wales Law Reform Commission *Torrens Title: Compensation for Loss* (Report No.76, Sydney, 1996) para. 3.20.

⁷⁴ HL Robinson, 'The Assurance Fund in British Columbia' (1952) 30 *Canadian Bar Review* 445, 456 referring to the potential lessening of the 'ordinary business wariness that a purchaser should possess.'

premiums, as well as increasing the likelihood of ensuring that the client obtains the land rather than mere monetary compensation. In reality, it is thought that the encouragement of such 'recklessness' is unlikely, having regard to the external influences canvassed above, particularly negligence liability, that tend to resist the most extreme effects of indemnity.

Land registration statutes reveal provisions which seek to implement this type of restriction on the availability of indemnity. One technique, seen in England⁷⁵ is to create a bar to indemnity, or to reduce its amount, in the event that the negligence of the indemnity claimant or his agent has contributed to the error or omission in respect of which indemnity would otherwise have been payable. The same bar was recognised in New Zealand and applied in the most obvious case so as to block any indemnity claim where the defect was already visible from the face of the register⁷⁶ or from the daily record of pending instruments.⁷⁷

The use of contributory negligence as a total or proportionate bar to indemnity may, however, be an unsatisfactory basis to achieve the desired influence on conveyancing behaviour on account of the difficulty in defining what constitutes negligence within the registration scheme. This must be determined whilst bearing in mind that it is the very function of indemnity to influence the practices to be carried out by conveyancers. The concept of contributory negligence inevitably enjoys a symbiotic relationship with conveyancing standards and the instrumentality of indemnity. Any effort to bar indemnity on the simple ground of contributory negligence suffers from lack of predictability in its application; its existence would stimulate conveyancers to behave defensively, increasing the degree of caution in their conveyancing to reflect concern over the possible loss of indemnity cover and detracting from the effectiveness of indemnity in easing conveyancers' title investigations.

A contributory negligence bar could be aimed either at penalising the negligence of purchasers personally, or at the negligence of both purchasers and their agents. Were the negligence of agents to affect the indemnity entitlement of a purchaser, the prospect of loss of indemnity might have little impact on the purchaser's behaviour because of the difficulty in taking steps to forestall fraud or negligence by an agent. When the negligence of agents was mooted as a bar to indemnity, the proposal was rejected in New South Wales⁷⁸ for several reasons, including the reason that it would not necessarily encourage a prospective client to employ the best solicitors on account of the lack of

⁷⁵ Para. 5, Sched 8 of the Land Registration Act 2002; formerly s 83(5)(a) of the Land Registration Act 1925.

⁷⁶ *Miller v Davy* (1889) 7 NZLR 515. The better route to the same result might have been to hold that the content of the register was the standard by which the existence of a title defect was to be measured, otherwise there is difficulty in identifying what constitutes the necessary statutory 'loss.'

⁷⁷ *Re Jackson's Claim* (1890) 10 NZLR 148.

⁷⁸ In England under the Land Registration Act 2002, the electronic registration of a fraud will pass title as if authorised, and it has been queried whether the deemed authorisation attributes the solicitor's fraud to the client as principal: EJ Cooke, 'E-Conveyancing in England: Enthusiasms and Reluctance' in D Grinlinton (ed), *Torrens in the Twenty-First Century* (Wellington, Lexis Nexis, 2003) 287.

choice in selecting conveyancing solicitors.⁷⁹ This illustrates the inability of the indemnity bar to achieve any corresponding advantage as a policy instrument to control behaviour since, in the absence of the purchaser being able to assess the risks in employing a particular conveyancer, the purchaser would be penalised without having been able to select a better conveyancer.⁸⁰

Even if a contributory negligence bar were to operate only upon the negligence of the claimant personally, and not that of his or her conveyancer, a similar counter-productive effect on the behaviour of conveyancers would result if such a bar were to be supplemented by a provision allowing the registry to exercise subrogated rights as insurer against a negligent agent. Although such a scheme for indemnity would benefit the indemnity claimant, it exerts the same influences on conveyancing practice as a contributory negligence bar based on the negligence of agents: that is, from the fear of liability arises the conveyancer's incentive to maintain higher, traditional standards in investigating title and in other precautionary steps. In the reforms proposed in Alberta, there can be no exercise of any subrogated rights by the registry in cases of mere negligence by conveyancers⁸¹ on the ground that such subrogation would have the potential to detract from the policy objective of indemnity in discouraging conveyancers from undertaking defensive practices to save themselves from recoupment after a successful indemnity claim. The English scheme does not go that far but at least limits the recoupment to cases of fault.⁸²

A contributory negligence bar is a blunt instrument to implement the policy objectives. It lacks focus in its effort to change behaviour and causes problems of uncertainty. But it is not the only device available for the strategic withdrawal of indemnity in order to limit the excessive effects of indemnity on conveyancing practices. Other discriminatory approaches to indemnity are found which are targeted more specifically, constructively stimulating care in particular aspects of the conveyancing

⁷⁹ PBA Sim, 'The Compensation Provisions of the Act' in GW Hinde (ed), *The New Zealand Torrens System Centennial Essays* (Wellington, Butterworths, 1971) 159. Similarly acknowledged in New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss* (Report No.76, Sydney, 1996), paras. 4.28-4.34 and P O'Connor, 'Double Indemnity - Title Insurance and the Torrens System' (2003) 3 *Queensland University of Technology Law and Justice Journal* 1, 20-21.

⁸⁰ In the event, the New South Wales legislature did not find these policies sufficiently compelling to displace the indemnity bar for the contributory negligence of agents: section 129 of the Real Property Act 1900 as amended by Real Property Amendment (Compensation) Act 2000 (NSW). The same principle applies under the Queensland reforms: section 174 of the Land Title Act 1994 (Queensland). See AE Wallace & CAC MacDonald, 'A New Era in Torrens Title in Queensland' (1994) 68 *Australian Law Journal* 675, 680.

⁸¹ Clause 7.8(1) of the Model Land Recording and Registration Bill proposed by Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No.69, Edmonton, 1993).

⁸² Under the English Land Registration Act 2002, 'subrogation will only be sought against somebody who is at fault through fraud or negligence. A particular assurance to this effect was given in the passage of the Bill through the House of Lords by Baroness Scotland': PN Kenny, *Current Law Statutes 2002* vol.1 (London, Thomson, 2002) 9-97.

process by removing the safety-net afforded by indemnity. For example, indemnity could be removed in relation to loss attributable to fraud in which the purchaser's conveyancer failed to verify that the identity of the vendor matched the registered proprietor; to encourage the highest standards in investigating this matter, an indemnity bar could impose an absolute standard and need not be limited to circumstances of negligence by the purchaser's conveyancer.

From the late nineteenth century, commentators were debating the need for indemnity to cover frauds and impersonation.⁸³ In England there was formerly an indemnity bar which precluded indemnity where the claimant had caused or substantially contributed to the loss by his act, neglect or default.⁸⁴ While the concepts of neglect and default established a contributory negligence-based indemnity bar, the concept of the 'act' was interpreted in *Attorney-General v Odell*⁸⁵ so as to create an indemnity bar based on an innocent involvement in causing the loss. This could occur through the mere fact of lodging for registration an instrument which had been signed by an imposter. The effect of the innocent indemnity bar was that it tended to encourage conveyancers to take precautions against the possibility of forgery and impersonation by a vendor.⁸⁶ In determining the allocation of loss between the two possible victims - the original rightholder or the purchaser from the fraudster - it may be contended that the purchaser was better placed to discover the risk of fraud and so, as a matter of promoting care in verifying identity, the risk of loss ought to be borne by the purchaser.⁸⁷

A similar effect to the indemnity bar based on 'innocent contribution' could be achieved by removing from a purchaser particular areas of protection under the indefeasibility provisions and allowing the assertion of unregistered rights against the purchaser's title without indemnity. The withdrawal of title protection could occur either through a regime of deferred indefeasibility, or by the specific withholding of

⁸³ T Key, 'Registration of Title to Land' (1886) 2 *Law Quarterly Review* 324, 346.

⁸⁴ S 7(3) of the Land Transfer Act 1897 (England), repealed by s 83(5)(a) of the Land Registration Act 1925. The act/neglect/default bar was reinstated by s 1(4) of the Land Registration Act 1966 before being repealed again by the Land Registration and Land Charges Act 1971.

⁸⁵ *Attorney-General v Odell* [1906] 2 Ch 47 (CA).

⁸⁶ Although this must have been the effect of the decision in *Odell*, it was not perceived as the deliberate policy behind the statute: the decision was a 'shock to those responsible for the drafting and for the administration of the 1897 Act': JS Stewart Wallace, *Introduction to the Principles of Land Registration* (London, Stevens & Sons, 1937) 47.

⁸⁷ Such was the argument presented by the Attorney-General on behalf of the trustees of the indemnity fund in *Attorney-General v Odell* [1906] 2 Ch 47 at 59 and recognised as having some force by 'Royal Commission on the Land Transfer Acts: Second and Final Report of the Commissioners' (St. Aldwyn Commission) (1911, Cd. 5483) para 54 and more recently by Scottish Law Commission, *Discussion Paper on Land Registration: Void and Voidable Titles* (Discussion Paper No.125, Edinburgh, 2004) paras 3.31, 4.45. Ruoff criticised that approach in TBF Ruoff, *An Englishman Looks at the Torrens System* (Sydney, Law Book Co, 1957) 47 on the basis of the difficulty of the purchaser in verifying the vendor's identity.

indefeasibility for a particular type of interest, such as a charge.⁸⁸ This type of provision would again operate to encourage absolute care by the person taking under the relevant disposition. Two examples of the application of these provisions were seen under English and Torrens systems in *Attorney-General v Odell*⁸⁹ and *Gibbs v Messer*⁹⁰ respectively. In both cases, a forged disposition entered on the register was denied the protection of indefeasibility, the register was revised, and the stricken purchaser was denied indemnity. While a policy objective of discouraging excessive risk-taking in conveyancing may be implemented through the indemnity bars encountered in these cases⁹¹, they were later regarded as unsatisfactory for jeopardising the reliability of the land register⁹² and efforts were made to reverse both.⁹³ The chequered history of these provisions reflects the concern in striking the right balance between confidence in the land title register and the establishment of minimum levels of care in conveyancing. Outside Victoria where *Gibbs v Messer* was decided, the Torrens states generally require a certificate of correctness⁹⁴ on instruments submitted for registration, which tends to encourage a degree of care by the purchaser's conveyancer in inquiring into the circumstances of the dealing.

A further illustration of promoting the pursuit of care in a particular sphere of conveyancing behaviour is to subjugate the purchaser's registered title to some particular type of paramount or overriding interest without indemnity. While overriding interests

⁸⁸ Charges were not included in the statutory vesting provisions of the Land Transfer Act 1875 (England) and remain excluded from the statutory vesting provisions in the Foreign and Commonwealth Office model statute for the British overseas territories: see, for example, s 23 of the Registered Land Law (2004 Revision) (Cayman Islands).

⁸⁹ *Attorney-General v Odell* [1906] 2 Ch 47 (CA) interpreting the English Land Transfer Act 1897.

⁹⁰ *Gibbs v Messer* [1891] AC 248 (PC) interpreting the Victorian Transfer of Land Act 1866.

⁹¹ W Taylor, 'Scotching *Frazer v Walker*' (1970) 44 *Australian LJ* 248, 254. See also GW Hinde, 'Indefeasibility of Title since *Frazer v Walker*' in GW Hinde (ed), *The New Zealand Torrens System Centennial Essays* (Wellington, Butterworths, 1971) 71; P O'Connor, 'Registration of Invalid Dispositions: Who Gets the Property?' chapter 3 in E Cooke, *Modern Studies in Property Law*, vol. 3 (Oxford, Hart Publishing, 2005) 60-61. Contrast the dissatisfaction with the 'onerous burdens' this would impose in the purchaser: R Sackville, 'The Torrens System - Some Thoughts on Indefeasibility and Priorities' (1973) *Australian LJ* 526, 531 and see also M Neave, 'Indefeasibility of Title in the Canadian Context' (1976) 23 *University of Toronto LJ* 173, 192.

⁹² In relation to *Gibbs v Messer*, see JR Adams, 'Registration of Title and Forged Transfers' (1892) 8 *Law Quarterly Review* 151, 152. In relation to *Attorney-General v Odell* (CA), see JE Hogg, "'Mortgage Charge" of the Land Transfer Acts' (1907) 23 *Law Quarterly Review* 68, 74.

⁹³ Reversed in England by s 83(4) of the Land Registration Act 1925, as explained in *Brickdale and Stewart-Wallace on the Land Registration Act 1925*, 3 edn (London, Stevens, 1927) 280-1. Reversed in Victoria by the Transfer of Land (Forgeries) Act 1939 following the split decision in *Clements v Ellis* (1934) 51 CLR 217.

⁹⁴ For example, s 164 of the Land Transfer Act 1952 (New Zealand). See BE Hayes, *The Certificate of Correctness under the Land Transfer Act* (Land Information New Zealand, Information Paper 2000/1, available on the website <http://www.linz.govt.nz/>).

may serve many purposes, the significance of their exclusion from the indemnity regime is that the burden on the indemnity fund is diminished and premiums suppressed⁹⁵, at the same time forcing the conveyancer to inquire into them as a possible source of title defect. If the overriding interest is justified by the desire to deter conveyancers from throwing the most easily avoidable losses onto the indemnity fund, then the overriding interest need only comprise those rights which are likely to be discovered by basic conveyancing inquiries which are rapid, inexpensive and yield reliable results. In England, for example, there is a class of overriding interest based on actual occupation⁹⁶ in order to encourage purchasers to take what is considered the elementary step of inspecting the land, but which is constrained by a telling concept of ‘discoverability.’⁹⁷ This constraint reveals the link between the overriding interest and standards in conveyancing behaviour by requiring a reasonable inspection to seek out occupiers.

Sanctity of Property

Notions of sanctity of property, described above, may exert a restraining force on the willingness of the registry to abridge examination of submitted documents in reliance on the availability of rectification coupled with indemnity for past-event defects.

Enhancing Comprehensiveness in First Compilation of the Register

While indemnity may protect proprietors generally against past-event defects, there may be special considerations at play when the registered proprietor was entered as such at the first compilation of the register for the parcel. In land registration systems which are based upon systematic adjudication of a territory, great importance may be attached to the unique and comprehensive assessment of title for first registration. This is seen when first compilation of the registers is performed by a single, systematic adjudication of all titles at a time when the state provides a finite regime for the temporary staffing, funding and the practical and legal administration of an exhaustive adjudication process.⁹⁸

⁹⁵ Brickdale, an influential English registrar, advocated the creation of classes of overriding interests explicitly for the purpose of protecting the indemnity fund: ‘Royal Commission on the Land Transfer Acts: First Report of the Commissioners’ (1909, Cd. 4510), Minutes of Evidence of Charles Fortescue Brickdale. See JS Anderson, ‘The 1925 Property Legislation: Setting Contexts’ in S Bright & J Dewar (ed), *Land Law Themes and Perspectives* (Oxford, OUP, 1998) 124; JS Anderson, *Lawyers and the Making of English Land Law 1832-1940* (Oxford, OUP, 1992) 277-280. Later in the century, reform proposals to permit indemnity for certain overriding interests were rejected on cost grounds: Law Commission & HM Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Comm Report No. 254, 1998), para. 4.19.

⁹⁶ para 2, Sched 3 of the Land Registration Act 2002.

⁹⁷ para 2(c), Sched 3 of the Land Registration Act 2002, referring to a person whose occupation ‘would not have been obvious on a reasonably careful inspection of the land’.

⁹⁸ Exemplified by the comprehensive programme of systematic adjudication and registration of titles in the British overseas territories of the Caribbean during the 1970s.

Participation of local communities, extensive notification procedures and public advertising may be employed to ensure that all rightholders present their claims. As part of the package of inducements and penalties to encourage potential claimants both to submit claims and ensure proper entry of rights on the register, indemnity could be withheld from claims arising from alleged interests existing prior to first registration which were not made in timely fashion during the adjudication process.⁹⁹ By denying indemnity where an unregistered right is asserted against the first registered proprietor, the indemnity bar tends to provide an added incentive to ensure proper participation in the adjudication process and thereby enhance the comprehensiveness of the register. This type of indemnity bar is, conversely, quite unsuited to the traditional regimes of sporadic adjudication of title, where there may be no broad public inquisition into land rights, no public education of the need to raise claims on pain of loss and no widespread programme of advertising for claimants, but rather a primary reliance by the registry on the title documents and affidavits supplied by the applicant who is engaged in the transaction which triggers the first registration.

INDEMNITY FOR LOSSES CAUSED BY FIRST REGISTRATION

Where the registered proprietor in question is the first registered proprietor following initial compilation of the register for a parcel, he or she may be subject to the risk of a past-event defect if some outstanding interest which pre-dated the first registration can still be asserted (whether through rectification or otherwise). The availability of indemnity in that situation was considered above. If, on the other hand, the first registered proprietor is protected by indefeasibility and the earlier right is incapable of enforcement, then the title of the unregistered common law rightholder suffers a future-event deprivation caused by the first registration. Indemnity for this type of loss possesses its own particular objectives and constraints.

Promoting Acceptance of Registration

The availability of indemnity tends to promote acceptance of registration by ensuring that unregistered common law owners at the time of introducing the registration system, who might be deprived of title upon registration of another, would not go uncompensated.

Easing Registry Examinations of Root of Title at First Registration

The presence of this type of indemnity may strongly influence the operations of the registry. By introducing a power to accept less than perfect titles, coupled with an indemnity provision to cover any losses that may arise from that approach, a registry is prompted to accept imperfect titles for first registration. The registry may then take a business-like approach to the examination and first registration of titles, avoiding uneconomic examinations of title which seek to inquire into all possible imperfections,

⁹⁹ Illustrated in the Cayman Islands by s 141(1)(b) Registered Land Law (2004 Revision).

where an ‘impracticably costly and stringent’¹⁰⁰ investigation of title might have revealed the flaw; by ‘an extensive reliance on the insurance principle..., and the once formidable difficulty of first registration with absolute title can be almost entirely eliminated.’¹⁰¹

The effect of omitting an indemnity clause is dramatically revealed by the proposals that led to the English Land Registry Act 1862. Despite the reformers having proposed an indemnity clause which guaranteed titles insured on the Consolidated Fund¹⁰², Anderson records that the guarantee was eventually jettisoned in the light of Treasury objections.¹⁰³ In consequence, the registry adopted a painstaking procedure for establishing an indefeasible title, requiring that the applicant for registration show good marketable title, a standard that reformers had already warned was ‘unattainably high.’¹⁰⁴ Principally for this reason, the 1862 scheme was regarded as an abject failure, with a negligible number of titles being registered under its provisions. An inquest carried out by Royal Commission reported that the failure could be attributed, amongst others matters, to the requirement that an impeccable title be shown, with the registrar lacking the discretion to ignore blemishes on title that prospective purchasers would be willing to risk.¹⁰⁵ Accordingly, the registration system later propounded in the Land Transfer Act 1875 included measures to encourage the acceptance of titles for registration with the benefit of indefeasibility despite the applicant being unable to satisfy the criterion of good marketable title. Various provisions in the 1875 statute were designed to achieve this, including the express provision that the registrar was empowered to approve for registration a safe holding title, notwithstanding that the title would be open to objection.¹⁰⁶ Pursuing the same policy to which these provisions were directed, an

¹⁰⁰ Sir John Stewart-Wallace, *Introduction to the Principles of Land Registration* (London, Stevens, 1937) 50. The importance of the point was recognised in Law Commission, *Third Report on Land Registration* (Law Comm Report No.158, 1987), para. 3.23, and New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss* (Report No.76, Sydney, 1996), para 1.12.

¹⁰¹ CF Brickdale and JS Stewart-Wallace, *The Land Registration Act 1925* 3 edn (London, Stevens, 1927) 274. Similar sentiments were expressed in AH Withers, ‘Twenty Years’ Experience of the Property Legislation of 1925’ (1946) 62 *Law Quarterly Review* 167, 169.

¹⁰² ‘Report of the Commissioners Appointed to Consider the Subject of the Registration of Title with Reference to the Sale and Transfer of Land’ (1857, c.2215), para. XXX. An indemnity clause was included within the proposed Transfer of Land Bill presented by V Scully QC in Appendix A to the Report.

¹⁰³ JS Anderson, *Lawyers and the Making of English Land Law 1832-1940* (Oxford, OUP, 1992) 110.

¹⁰⁴ Anderson, *op. cit.*, 111. See also HW Elphinstone, ‘Transfer of Land’ (1886) 2 *Law Quarterly Review* 12, 17.

¹⁰⁵ Report of the Royal Commissioners appointed to inquire into the operation of the Land Transfer Act (1870, c.20) paras 44, 77. See HW Elphinstone, ‘Reviews and Notices’ (1886) 2 *Law Quarterly Review* 237, 238; W Strachan, ‘Land Transfer Registries’ (1899) 15 *Law Quarterly Review* 15, 17; DJ Whalan, ‘Immediate Success of Registration of Title to Land in Australia and Early Failures in England’ (1967) 2 *New Zealand Universities Law Review* 416.

¹⁰⁶ S 17(3) of the Land Transfer Act 1875 (England).

indemnity provision was introduced in the Land Transfer Act 1897¹⁰⁷ when registration was first made compulsory on sale. This ensured that if some pre-registration entitlement had been overlooked or discounted by the registry upon examination, then either the registered title could subsequently be amended through rectification, or, if rectification was unavailable on account of the strict limits imposed on the rectification jurisdiction (particularly the inability to rectify to the prejudice of estates or rights acquired by registration under the Act)¹⁰⁸, compensation would be forthcoming for the dispossessed former rightholder.¹⁰⁹ Although stigmatised as the replacement of absolute title by a merely guaranteed title¹¹⁰, the reforms operated to encourage a policy of abridged registry examination of title since the need to carry out the fullest scrutiny of titles before registering was significantly weakened by the availability of compensation for any rights overlooked.¹¹¹ The regime's structure of either rectifying or indemnifying was subsequently carried through into the Land Registration Act 1925¹¹² and formed the basis for the successful expansion of title registration in England throughout the twentieth century¹¹³, the early Chief Land Registrars noting that by 'an extensive reliance on the insurance principle the general practice can be rendered extremely convenient and elastic, and the once formidable difficulty of first registration with absolute title can be almost entirely eliminated.'¹¹⁴

The value of indemnity in easing the task of the registry was not confined to the English experience. Even for the supposedly simple land titles of the Australasian colonies, with their short roots of title derived from a perfect Crown grant, the land registration statutes tended to contain a specific provision for indemnity in the event of deprivation of an interest by virtue of it having been omitted when the parcel was brought

¹⁰⁷ Ss 7(1), 21 of the Land Transfer Act 1897. Various indemnity clauses had been proposed in the bills presented in the interim, including: cl 16, Lord Halsbury's Land Transfer Bill 1887; cl 53, Lord Halsbury's Land Transfer Bill 1888 (February); cl 49, Lord Halsbury's Land Transfer Bill 1888 (December); cl 3, Lord Herschell's Land Transfer Bills 1893 and 1894.

¹⁰⁸ S 95 of the Land Transfer Act 1875 (England).

¹⁰⁹ S 7(1) of the Land Transfer Act 1897 (England). The indemnity clause was introduced despite concerns that a liberal indemnity regime, coupled with the reduced examination of title in the Land Registry, would be 'offering a premium to fraud'! See T Key, 'Registration of Title to Land' (1886) 2 *Law Quarterly Review* 324, 345.

¹¹⁰ BL Cherry & HW Marigold, *The Land Transfer Acts 1875 & 1897* (London, Sweet & Maxwell, 1899) 10, 168.

¹¹¹ 'Royal Commission on the Land Transfer Acts: Second and Final Report of the Commissioners' (St. Aldwyn Commission) (1911, Cd. 5483) para 82.

¹¹² Sections 82, 83 of the Land Registration Act 1925 (England).

¹¹³ See, for example, the commendation of W Strachan, 'Land Transfer Registries' (1899) 15 *Law Quarterly Review* 15 and 'Registration of Title along Business Lines' (1915) 31 *Law Quarterly Review* 404, 407.

¹¹⁴ *Brickdale and Stewart-Wallace on the Land Registration Act 1925*, 3 edn (London, Stevens, 1927) 274. Similar sentiments were expressed in AH Withers, 'Twenty Years' Experience of the Property Legislation of 1925' (1946) 62 *Law Quarterly Review* 167, 169.

under the registration system.¹¹⁵ Here too, indemnity was perceived as a significant tool in easing examination of titles in the registry. Baalman explained one of the two principal reasons for the institution of the Torrens Assurance Fund as being ‘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’¹¹⁶ although the full advantages seem not to have been realised in all Torrens states¹¹⁷ because of the registry’s insistence on strict proof of title.¹¹⁸ More recently, the provisions introduced in Victoria¹¹⁹ to encourage the rapid conversion to Torrens title required a ‘less thorough analysis’ of title and were ‘predicated on compensation being freely available for persons who suffer loss as a result.’¹²⁰

Removal of Blemishes in the Root of Title

The strategy of liberally granting unqualified grade of title, under a regime of abbreviated registry examination of title at first registration, has a further beneficial effect: it tends to clear off blemishes from titles. If a title submitted for registration appears to be afflicted by some blemish which may reflect an outstanding adverse interest, then the existence of indemnity, coupled with the discretion to accept imperfect titles for registration, enables the registry to create a registered title with absolute grade of title notwithstanding the blemish. When this opportunity is taken, the blemish is removed from the title forever,

¹¹⁵ For example, s 172(b) of the Land Transfer Act 1952 (New Zealand).

¹¹⁶ RA Woodman & PJ Grimes, *Baalman’s Torrens System in New South Wales* 2 ed (Law Book Co, Sydney, 1974) 389. Another leading commentator acknowledged that ‘perhaps it may have been intended originally that titles the evidence of which was not quite as perfect as conveyancing counsel would have insisted on were to be accepted, as the Assurance Funds would be there to give any indemnity’: DJ Whalan, *The Torrens System in Australia* (Sydney, Law Book Co, 1982) 59.

¹¹⁷ Whalan, *op. cit.*, 59; PW Young ‘Compensation under the Torrens System’ (1996) 70 *Australian Law Journal* 786, 788. This cautious approach dismayed those such as Ruoff, former registrar in England: TBF Ruoff, *An Englishman Looks at the Torrens System* (Sydney, Law Book Co, 1957) chapter 5.

¹¹⁸ Where the Torrens statutes do not explicitly prescribe the standard of title, a good marketable title is generally demanded before an ordinary (fully-guaranteed) Certificate of Title will be issued: *Smith v Auckland District Land Registrar* (1905) 24 NZLR 862; *Beck v Auerbach* (1985-6) 6 New South Wales LR 454. Exceptions are found in the Torrens systems of Tasmania and Manitoba, which follow the English approach in expressly permitting the issue of an ordinary Certificate of Title upon proof of a mere safe holding title: ss 12(3), 17 of the Land Titles Act 1980 (Tasmania) and ss 37, 43 Real Property Act 1988 (Manitoba). Under an important New Zealand innovation, titles falling short of the marketable title standard received a limited Certificate of Title, which did not prejudice the enforcement of existing paramount rights affecting the title once registered: ss 190(3), 191, 199 of the Land Transfer Act 1952 (New Zealand).

¹¹⁹ Transfer of Land (Conversion) Act 1986 (Victoria).

¹²⁰ AJ Bradbrook, SV McCallum & AP Moore, *Australian Real Property Law* (Sydney, Law Book Co, 1991) 194.

subject only to the possibility of rectification (a route which is usually strictly limited for claims arising from circumstances existing prior to adjudication), so that a title which before registration may have been regarded as nothing more than a safe holding title may be elevated to a good marketable title. Encouraging the removal of blemishes or paramount interests in this fashion may be regarded as an independent policy objective that is attributable to the indemnity clause. The importance of this aspect of registration was emphasised by former registrars in England, who had described it as their 'prime and justifiable aim to endeavour to cure for all time the greatest possible number of defective titles,'¹²¹ and who regarded it as 'one of the most useful functions of HM Land Registry.'¹²²

Sanctity of Property

To the extent that the registry staff abridge the examination of title at first registration, there is an increased risk that some overlooked common law right will be destroyed by the registry's allocation of title at first registration. By permitting an executive official to take the decision to disregard rights of unknown enforceability when accepting a title for first registration, there may be conflict with state guarantees of protection against interference with property. From the time of Lord Westbury's 1862 registration bill¹²³, concerns had been raised in England at the prospect of a bureaucratic registry exercising judicial powers at first registration, especially when employed for the purpose of diminishing the extent of examination of title.¹²⁴ The point was appreciated by Stewart-Wallace, an early English registrar, who recognised the constitutional importance in 'safeguarding landowners from the risk of the Executive unjustly, illegally, mistakenly or tyrannically depriving them of their land by declaring itself or some other persons to have absolute title to their land.'¹²⁵ In South Australia, similar concerns had been raised at the third reading of Torrens' Real Property Bill where it was argued that the bill would place

¹²¹ RB Roper *et al.*, *Ruoff & Roper on The Law and Practice of Registered Conveyancing* (London, Sweet & Maxwell, 1998 Looseleaf) para.12-47 (omitted from latest edition).

¹²² TBF Ruoff, *An Englishman Looks at the Torrens System* (Sydney, Law Book Co, 1957) 83.

¹²³ 'Report of the Commissioners Appointed to Consider the Subject of the Registration of Title with Reference to the Sale and Transfer of Land' (1857, c.2215) para 86. Later critical comment is expressed in T Key, 'Registration of Title to Land' (1886) 2 *Law Quarterly Review* 324, 335, W Strachan, 'Land Transfer Registries' (1899) 15 *Law Quarterly Review* 15 and C Sweet, 'The Land Transfer Act' (1908) 24 *Law Quarterly Review* 25, 31. See also JS Anderson, *Lawyers and the Making of English Land Law 1832-1940* (Oxford, OUP, 1992 OUP) 111.

¹²⁴ 'Report of the Commissioners Appointed to Consider the Subject of the Registration of Title with Reference to the Sale and Transfer of Land' (1857, c.2215), dissent of Mr Wilson in Appendix A.

¹²⁵ Sir John Stewart Stewart-Wallace, *Introduction to the Principles of Land Registration* (London, Stevens, 1937) 44.

a 'dangerous and unconstitutional power in the hands of an irresponsible person.'¹²⁶ In the United States, moreover, the constitutional provision¹²⁷ for due process in relation to the deprivation of property compelled the inclusion in its Torrens systems of an expensive and time-consuming judicial hearing before first registration with absolute title, leading to doubts over the cost-effectiveness of the entire land registration system.¹²⁸

CONCLUSION

Indemnity functions as a versatile policy instrument. Common law property systems tend to allocate the land to one of the competing claimants leaving the loser with nothing, and the rules of priority in title registration systems have the same effect. There is rarely any scope in property priority rules to exercise a judgment of Solomon and divide the proprietary rights between competing claimants, and there may be cases in which the successful claimant is undeserving for various reasons. Indemnity has the advantage in these cases: it may be available to multiple claimants; it can be reduced on grounds of negligence, fault, contribution, and so on; it can be removed entirely to punish or encourage certain types of behaviour; it can be increased beyond the value of the lost land rights so as to cover consequential losses. It follows that indefeasibility and indemnity are not opposite sides of the same coin¹²⁹: the one need not necessarily substitute for the other, and if it does, then the indemnity need not reflect the value of the property rights lost but can be a greater or lesser sum. It is these flexible characteristics which allow it to pursue the diverse policy objectives identified in this work.

Despite its versatility, however, indemnity can be weak in its influence on behaviour. Those involved in land dealings may operate under much more potent forces that influence their conduct. For example, despite the availability of indemnity for past-event defects, a purchaser's conveyancer might nevertheless continue to carry out investigations beyond the register in order to provide a good client service, avoid the possibility of censure, give a certificate of correctness or reduce the risk of liability upon the registry exercising its subrogated action after having paid out an indemnity to another. On the other hand, external factors might discourage the taking of certain steps whether or not indemnity is available: for example, where the purchaser's conveyancer already relies on a private insurance policy for the same purpose, or where a purchaser's conveyancer is already discouraged from carrying out particular investigations into title or transactions on account by the factual impracticalities attending such investigations. In

¹²⁶ RR Torrens, *Speeches of Robert R. Torrens Esq* (Adelaide, 1858) 19, reporting Torrens' rebuttal of the criticism.

¹²⁷ The Due Process Clause of the XIV Amendment of the United States Constitution.

¹²⁸ BC Shick & IH Plotkin, *Torrens in the United States: A Legal and Economic History and Analysis of American Land-Registration Systems* (Lexington Books, Lexington, 1978) 10, 22.

¹²⁹ Reform proposals in Scotland have recently emphasised the desirability of severing the dependency of indemnity on rectification altogether, and linking indemnity instead to inaccuracy in the register: Scottish Law Commission, *Discussion Paper on Land Registration: Registration, Rectification and Indemnity* (Discussion Paper No.128, Edinburgh, 2005) para.7.17.

both sets of cases, factors are at work amongst which indemnity is only one force and one which may not be sufficiently compelling to change behaviour.