

# **A Methodology to Review Torrens Systems and Their Relevance to Changing Societies from a Legal Perspective**

**Jude Wallace LL M LL B**

Lawyer

13 Mary Street

St Kilda 3182

Australia

Tel 61 3 95372028 Fax 61 3 9537 2030

Email [jwallace@property.legal.net.au](mailto:jwallace@property.legal.net.au)

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## **ABSTRACT**

The traditional ways of thinking about land registration systems have been constrained by their legal and administratively contexts. These restraints are no longer omnipresent. The concept of a land registration system as a mere recording process of private land interests is being tested by a barrage of changes and influences. The problem now is to make the systems do their basic job better, and at the same time to make them responsive to the broader social and economic needs.

In seeking to extend the horizon, a basic framework for a Torrens system is articulated in the context its relationship with land rights and land markets and the relationship between the state and individuals. The core functions of the Torrens system and its insurance component are reworked to assist a multi-disciplinary approach to the future. The contribution of a secure land registration system to markets in primary property commodities and complex property commodities is examined.

*Keywords and phrases: title insurance, core land registration functions, primary property commodities, complex property commodities.*

## **INFLUENCES FOR 2000**

The land register was devised to include information not available from any other source – information about private titles to and interests in land. For over a century, recording of private individual titles have been the *raison d'être* of land registration. This is now challenged. Given the infinite capacity of computers, the structure of the register can be rethought. It is conceptually possible for the register to include more than the basic and essential information about owners, interests and parcels. The questions of information expansion and aggregation raise substantial legal and technical sub-issues:

- Should we 'register' (take responsibility for) or merely 'record' (provide a convenient information source with no guarantee of accuracy) non-private interests and decisions of administrative and statutory agencies?
- If so, what non-private interests should be registered?
- If we register some of them, should the registration make the information indefeasible, and who takes the risk of error, copyright, privacy and so on, and who has the responsibility of keeping it accurate? How do you systematically

record passive and bureaucratic information on a register which is normally transaction driven?

- How will registration of government or statutory restrictions affect the land market and ease of transactions? Are we making transactions more transparent and efficient, or are we facilitating permanent recording of mindless bureaucratic invasion of private opportunities in a system which contains no clear pathways to achieve coherence, interrelation of limitations between parcels, and, ultimately, removal of intrusive and obsolete interests?

Into this context of specific registration issues, the outside world has intruded even more challenging questions and considerations, particularly in last 20 years.

- Registration is always extremely expensive because it must be timely, accurate and complete. Its bureaucratic overheads are heavy. This has forced governments to examine its value for money and to demand more strategic outcomes than mere recording of land interests. Systems have become multi-purpose, particularly by supporting other government functions such as macro financial planning, taxation and land use planning.
- Computer technology offers huge labour cost reductions and vast improvements in information quality for high capital investment.
- The growth in the consumer movement has dropped the scales of mystique from many eyes. Influential demands for simplification of conveyancing, record management, and competitive service provision have been articulated.
- Controls on anti-competition practices, improved consciousness of how professional groups attract areas of activity to their closed doors and a parallel determination to extend the opportunities for competitors have lead to influential demands for simplification of registration procedures and conveyancing.
- The idea that land registration and its satellite functions of surveying, conveyancing and recording should be inevitably the realm of government has been seriously discussed, if not fundamentally challenged. According to some theories, a registration service could be entirely provided by private contractors. In practice, while many parts of the land registration activities such as surveying and conveyancing, and provision of computer services are private, the attraction of a government run and democratically accountable system of land recording as a core of the land market remains heavily weighted. For most analysts, land registration is too fundamentally important to the social and economic activities of a community and to the essential role of government to be privatised. More fundamental reasons for maintaining land registration as a government responsibility are explored later in this paper.
- Where land value and trading has stripped ahead of the capacity of the local land registration system, a vast increase in the level of land disputation has resulted. The improvement in land registration, of itself, is an essential component in removing these dispute sites.
- Competitive registration models for other high value property, particularly shares, ships, airplanes, and even cars, illustrate alternative working models starkly contrasting with the sometimes ponderous land registration systems. Paperless registration systems in the capital markets of shares and futures show the future for paperless land registration.

- Registration systems have initiated reconceptualisation of property interests. The new Dutch Civil Code has introduced a concept of *registergoederen* (register property) which is defined as ‘property that can only be transferred, or created, by way of registration on the public register kept for this purpose.’<sup>1</sup> The conceptualisation effects the categorisation of property as movables and immoveables by introducing a new concept. While there is no move to integrate the respective registers, it is important for the overall categorisation of rights: all movables now belong to the category of register property, whereas only a few classes of movables belong to this category.
- Opportunities for electronic document exchange and third party data entry (for instance, banks taking the primary responsibility for keying in transfer and mortgage information) are being examined. These are a prelude to a functional system of electronic conveyancing and settlement of transactions.
- Land identification systems have matured and provide cheaper and more reliable results. The physical identification of land is expensive, but can be addressed in a number of ways – making possession and existing boundaries legally effective and choosing the most appropriate identification methods (from hand drawn maps and community recognition right through to a fully operational global positioning system with supporting network).
- Stunning developments in computer mapping technologies have focused attention on the information resource inherent in land information.<sup>2</sup> With data matching capacities and large scale databases, land information is capable of being used for a much wider variety of applications.<sup>3</sup> Land ownership and transaction record keeping is being influenced by demands for higher quality information.
- The integration of personal, corporate, land and tax information as a means of revealing tax liabilities and equalising tax burdens is now possible, despite the varying sources of base information.
- Fundamental changes in popular transactions: replacement of *caveat emptor* by *caveat vendor* principles, especially sales of houses and land among non business parties, and standardisation of consumer lending arrangements are pushed by the idea that the registration system could reveal all to all.
- Visions of integrated land administration systems in which land records perform a variety of tasks are now realistic, thanks to the uniform/unique parcel identifiers and computers.

In short, we are demanding that land registration systems be more responsive to the community’s broader economic and social needs and less focused on servicing narrow legal or market needs.

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<sup>1</sup> Art 3.1.1.10

<sup>2</sup> Tracking of moving vehicles and assets is now possible, provided digital maps are available.

<sup>3</sup> In mature systems, land information from integrated land registration and other databases is used in drawing electoral boundaries, health service provision, voting, provision of emergency services, historical recording, prediction of business and housing needs, and many other functions.

## **FUNCTIONS OF REGISTRATION SCHEMES**

The **core functions** of land registration systems<sup>4</sup> are –

1. **Identification of the land parcels.** This can be without survey and without locating the parcel in a map. The earliest recordings of land information depended on the reputation of ownership and local knowledge attributed to a parcel. More recently, maps or plans have accompanied text recording so that the parcel is identified by its boundaries. Even this can be by description of general boundaries, sans survey. With the growth of surveying as a science and of computers, sophisticated means of identifying the land have included placing it accurately on the surface of the earth – geo-referencing the parcel. All modern systems rely on geo-references in their registration systems. Third World countries do not, because of cost and lack of skills.
2. **Identification of the owner.** While many systems adopt the identify shown on transfer papers at face value, even highly democratic systems which place a high value on privacy are becoming concerned to guarantee the name on the title accords with the individual claiming ownership. Whether the registration process includes production (with or without recording) of personal details such as social security or other identification numbers, photographic or other unique identification, there is now a real tension between demands for privacy and the quest for making an accurate and fraud proof register.<sup>5</sup> Certainly, with registration of legal persons such as corporations, formal identification requirements are axiomatic.<sup>6</sup>
3. **Verification of the interest.** In title registration, an investigation or an evidentiary formality prior to initial land registration ensures the existence of the title claimed to the satisfaction of an official according to generally accepted legal and business norms.
4. **Identification of the interest** obtained, the time and mode of its acquisition (important for resolving competing claims).
5. **Increase of the proprietary protection** available to the interest. The act of registration generally improves the opportunity to assert interests against third parties, not just by proving it exists, but by increasing the measure or influence of the protection. At peak, in the positive registration systems such as Torrens systems, registration creates the interest and turns it into a property right protected against any other claim (with minor exceptions usually in favour of the State's right to collect taxes).
6. **Transaction facilitation** by verification of the title (not the identity) of the person conveying land. In a deeds system, this involves a laborious investigation of the deed chain. In Torrens systems, it is a search of a simple title. This is the most attractive feature of a Torrens system – it virtually eliminates most of the transaction costs associated with sale, development and securitisation of land. All

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<sup>4</sup> Dale and McLaughlin (1988) **Land Information Management**, Clarendon Press, Oxford offer 12 functions in their seminal text on registration systems: p 26

<sup>5</sup> Use of ID numbers in Indonesia raises a fundamental problem of racial discrimination because the numbers code in racial and religious characteristics.

<sup>6</sup> Corporations are conceptual creations of the legal system. They have no physical existence. They cannot be photographed. Hence the numbers and registration systems.

systems require the transacting party to verify the person with whom they are dealing is the person on the register.

7. **Proof of registration.** Many systems provide the owner with a record of the entry, though this is not essential. Indeed some systems are moving away from the paper recordation prior to introducing fully digitised administration. The proof can be a notation on the instrument or deed indicating its registration identification numbers, a certificate issued by the registration authority (as in Indonesia), a receipt for payment of registration fees, or (in digitised systems) a print out of the computer record supported by electronic signatures. Whether the proof of registration is required to be returned to authorise subsequent dealings depends on the local system. Torrens systems permit a range of solutions to the authority to deal issue: from returning the “issued” duplicate title with the proposed dealing to authenticating the identity of the person making the registrable instrument.<sup>7</sup>

## **TORRENS SYSTEMS**

The Torrens system is a unique form of land registration. From the modern perspective, there are three distinguishing features of the Torrens system.<sup>8</sup>

### **1 Register Creates Title**

The Torrens system makes registration the source of the legal title, as opposed to the transaction leading to registration. In these systems, the register is not only the final or highest proof of title, a title cannot exist in the full legal sense without it.

### **2 Simple Transaction Procedure**

Torrens systems have acknowledged capacity bleed out transaction formalities. In their early appearance in Australia, they replaced the ritualised “signed sealed and delivered” deed of conveyance, lease or mortgage, (complete with its habendum, recitals, particulars, execution clauses, all of which were crafted specific to transaction<sup>9</sup>) with a simple, signed and witnessed document which contained pro forma details allowing transaction particulars of parties name, land reference and date to be inserted – by people who were not legally trained.

The advent of computers offers opportunity for reassessment of the formalities, including the final elimination of paper as a mechanical recording procedure.

### **3 Reversal of the Effect of Forgery - Insurance**

The third feature is the systems’ reversal of the law of forgery.<sup>10</sup> Under the normal rules, which are eminently sensible, a forgery cannot pass a title. Only the owner’s

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<sup>7</sup> These options will be readdressed with the move to electronic or computerised conveyancing.

<sup>8</sup> Contrast Theo Ruoff’s famous analysis of the three Torrens principles: mirror, curtain and insurance. The title is the mirror of interests in the land, the system draws a curtain over interests which do not appear on the register (with some exceptions) so that the register is entirely reliable, and the insurance or guarantee backup ensured that the reversal of forgery principles caused no loss to innocent parties. **An Englishman Looks at the Torrens System.**

<sup>9</sup> The novels of Dickens, particularly **Bleak House**, contain the best accounts in English literature of the excesses associated with this system.

<sup>10</sup> The land registration system in England does not confer indefeasibility (protection) on a person who registers a forgery. Arguably, the Victorian Torrens system does not, either – its statutory provisions suggest indefeasibility is deferred to the next dealing in good faith. However the High Court in *Gibbs v Messer* has strongly endorsed immediate indefeasibility.

signature or action can pass the title, whether it is an instrument related to land, a cheque, a car sale or a transfer of a company share. This law developed alongside the laws which permitted writing as a means of conveyance or transfer of property. While Torrens systems still require someone acquiring an interest to do their best to verify that the person they are dealing with is the same as the person on the register, forgeries do happen.<sup>11</sup> The Torrens system allows a registered forgery to pass ownership in the land to the acquirer.<sup>12</sup> The insurance/assurance fund is therefore an inevitable and indispensable part of the Torrens edifice – without it the system could not achieve public support for this would be tantamount to asking the public to endorse a land registration system which enabled forgers to transact owners' land and cause the owners' lasting loss. The public reputation of the Torrens system depends on its risk containment – the person who relies on the forgery in good faith gains the land, and the person who loses the land is paid its value.<sup>13</sup>

Torrens systems insurance also indemnifies people who suffer loss through administrative failures.

## TITLE INSURANCE

Title insurance, whether the private system used in the US, or the system built into land registration systems, only works well if the following preconditions are satisfied–

- Registration is generally accurate and mistakes are rare
- Fraud and forgery are adequately policed by the criminal justice system
- Priority rules in land disputes are clear and consistently applied by the courts (thus minimising the creation of competing interests) and neglected claims are closed off by an effective system of possessory title and limitation of actions
- Conveyancing systems reliably verify that the person purporting to convey is identical to the owner
- Initial registration eliminates unregistered claims by arbitrary cut-off measures, title examination prior to registration or a combination of these
- Related systems of insurance, especially professional indemnity insurance for negligence and guarantee funds for criminal fraud, reduce the risk overhead on title insurance by being first port of call for victims.<sup>14</sup>

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<sup>11</sup> The ease of forgeries in systems which rely on possession of a paper title or certificate as authority to deal is made more obvious by the advent of computerisation. Canadian systems which require extensive formalities (such as affidavits of identification) for execution of registrable instruments and which restrict reliance on paper titles are much more successful in repressing forgeries.

<sup>12</sup> Some systems repair the forgery immediately on registration by a good faith taker. Others require a second transaction by a person relying on the registration before indefeasibility is granted. The different standards are known as immediate indefeasibility and deferred indefeasibility. In policy terms neither is perfect.

<sup>13</sup> Obviously, a rigid system which destines the land to the person with slightest connection by time or use and money to the owner whose farm or other property might have uncompensable sentimental or emotional value, has its limitations. See the work of the Victorian Law Reform Commission, especially Report No 12, the **Torrens Register Book**, 1987, *Fraud and forgery*, p1112, which argues for a discretionary determination of the various entitlements to account for the person most easily compensated by payment of money.

<sup>14</sup> The title insurance of NSW is being made first call, with rights of subrogation in the scheme against other insurers who might cover the same risk.

If these preconditions exist, the losses are precisely and narrowly defined and directly related to the operation of the scheme and the insurance system can function successfully.

In the Torrens systems, the insurance component is not market driven. The premiums are not related to risk. Historically, many of the schemes collected large amounts of unallocated premium income. In the US, schemes failed because claims could not be met by the fund. If we stand back and examine the relationship between the insurance principle and the operation of the system, we see that it is not really insurance at all, but a loss distribution system that is an inevitable consequence of two things: the reversal of the forgery rule and the administration expressly agreeing to compensate victims of its own errors. This latter process provides an administrative identification of failures, errors, mistakes and other difficulties in the registration system. If the administrators of the system directly control the insurance claims and payouts, a predictable consequence is the development of highly orchestrated risk elimination (rather than management) systems. The administrations tend to over administer, demand legislative power for every process, and build bureaucratic procedures and consequently staff numbers. This form of rent-seeking is controllable by sound management procedures.

## REGISTRATION AND MARKETS

At bottom, registration is simply identification of interests in land and could stand aloof from a market system, provided the government was able to bear the cost of establishing and running it. Even without a market, the need to order opportunities for allocation of and exclusion from particular land parcels is an appropriate reason to notify or register interests in land. However, **a market introduces much more complexity**. Under capitalism, “a property right has a major allocative function of not just allocating the land, but allocating the internalisation of beneficial and harmful effects of owning land. ... Property rights are best understood by their association with the emergence of new and different beneficial and harmful effects. ... [T]he emergence of new property rights takes place in response to the desires of the interacting persons for adjustment to new benefit-cost possibilities. ... Property rights arise when it becomes economic for those affected by externalities to internalise benefits and costs.”<sup>15</sup> The significance of these opportunities in industrialised capitalist systems demands systematic allocations and clear rules about enforceability of interests to support market activity. Also essential is a clear and precise statement of the role of the state in relation to the land.

People need social recognition of interests in land for two reasons – to identify and enhance its value and to protect against loss. Recognition of interests develops into land rights, beginning with the right to possession.<sup>16</sup> The more energetic and successful economies promote a symbiotic relationship between the state as a protector and identifier of land rights, public knowledge about ownership, and tradeability (commodification) of land and interests in land. The Torrens systems (with their local variations) remain the most successful symbiosis. Torrens systems provide the most effective, simplest, most reliable and cheapest parcel/interest/owner

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<sup>15</sup> Harold Demsetz, *Toward a Theory of Property Rights*, 1967, **American Economic Review** 347

<sup>16</sup> Francis Philbrick, *Changing Conceptions of Property in Law*, 1938, 86 **University of Pennsylvania Law Review** 691

identification, leaving aside the surveying costs which apply no matter what system is used.<sup>17</sup>

Giving land a value (monetisation<sup>18</sup>) may occur even without a trading system of a land market. Ascribing a value is an essential mechanism for making rational decisions about liabilities, risks and state intervention in land uses.<sup>19</sup> In developed economies, land is both monetarised or commodified.<sup>20</sup> Hence in all economic systems which deliberately allocate land use, some form of land administration system is essential. The most effective systems will record both ownership and use, but will not necessarily control either.

### **Land Rights First?**

Communist systems demonstrate that there is no necessary relationship between a system which records entitlement to land and the recognition by the legal order of individually owned land rights. In communist countries which do not recognise a market in land, the recording of entitlements to land nevertheless performs a useful function of identifying the persons who have appropriate possession. Thus a society can recognise entitlements without granting or land rights or treating them as marketable commodities.

Most countries use registration to achieve more than this prosaic and preliminary function. In the rush to export land registration systems, many of us forget that they developed in industrialised countries which enjoy the luxury of highly and precisely defined **land rights**. It is these, not registration, which sustain the land market. The relationships between land registration systems, land rights and land markets are unexamined. When one seeks to import registration to the Third World, the question of what is one registering is profound. Criticisms which identify a deleterious impact of land registration on local land holding patterns in underdeveloped countries are probably more appropriately aimed at the deeper issue: the nature and sustainability of the land rights created by the system. Land registration cannot cure defects in land rights or make them into marketable commodities.

The Indonesian experience is an illustration. There, land rights are locally defined and unique, restricted to individual ownership, and use and time delimited for commercial, industrial and retail uses. Like some other Asian nations, restrictions on foreign ownership are heavy and counterproductive.<sup>21</sup> Conceptually, much of the

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<sup>17</sup> For analytical purposes, it is unnecessary to distinguish between a land registration system (such as England uses) and Torrens systems. A land registration system sources or creates land titles through the registration process. Other registration systems are recordings of rights created by transactions or by formal deeds or notarised instruments – while they may perfect a right, they are not its source. The distinction is fundamental. See the discussion of the role of the state in land titling below.

<sup>18</sup> The process of assigning a value to land or to interests in land, usually but not necessarily in order to facilitate trade and exchange.

<sup>19</sup> A classic analysis of legal relationships and development of comprehensive and rational policies about entitlements, liabilities and inalienabilities is by Guido Calabresi and A Douglas Melamed, *Property Rules, Liability rules and Inalienability, One View of the Cathedral*, 1972, 85 **Harvard Law Review** 1089. The questions addressed by these tort and property rules subsist in all kinds of economies, whether or not a market in land is permitted.

<sup>20</sup> EB Pashukanis, **Law and Marxism – A General Theory**, Inks London, 1978

<sup>21</sup> The Land Administration Project, funded by the World Bank, has a policy component which has undertaken work on the issue of land rights, among other major issues of transmigration, forestry, and



opportunity for a land market is eliminated by the titles and the tenures. Even if the registration system was changed from negative to positive,<sup>22</sup> it would not redress the quality of the titles.

## CRITERIA FOR SYSTEM

Despite its simplicity, the Torrens system is a mature form of land registration. A Torrens system can only operate effectively in an environment which provides –

- Stable government administration
- An effective legal system, and
- Sustainable land rights.

The most essential element of any methodology to review Torrens systems is the identification of the assumptions and principles used to support it. It is axiomatic that the land administration system in countries whose economies allow land and interests in land to be tradeable must include a registration system, at least in the minimum sense of a publicly accessible and reliable owner/interest/parcel information system.<sup>23</sup> In these market oriented countries, the consequences of computer technology and divestment of government responsibilities to the private sector are the challenging policy issues. Meanwhile, in Third World countries or countries undergoing transition following the post-communism adoption of capitalism, different policy choices are pressing. In these, fundamental systemic questions include whether to allow a land market, how large and unregulated the market should be, then how the state can and should manage it.

These questions are asked by people in a range of contexts: aid agencies pursuing the strategy of land registration, government bodies charged with (or having assumed) the task of developing regulatory policy, politicians concerned with political survival, agrarian and land reformers, academics, economists, critics and analysts seeking to understand dynamics of intervention and regulation, and, most importantly, people concerned to tackle the questions of environmental protection.

The divergent contexts of these policy choices has contributed to confusion in much of the literature. To avoid some, but probably not all, confusion, and to develop a wider legal perspective, the basic components of a conceptual framework for a review methodology are identified below.

## BASIC REVIEW FRAMEWORK

- Legal rights can only exist between people. “Land rights” is a phrase which many use to describe an owner’s relationship with the land. But this is convenient shorthand and very misleading if presented as legal analysis. The **legal rights**

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facilitation of transactions. A report on Land Rights is part of this policy component and will be available in 1999.

Rachael Haverfield, *Land Reform in Indonesia*, **Indonesia Law and Society**, ed Tomothy Lindsey, 1999, Sydney, The Federation Press, 42 provides an analysis of the influence of *Adat* law (customary law) on the substantive effect of land right.

<sup>22</sup> The Basic Agrarian Law of 1960 and the land registration system built into it establish a negative registration system which provides “evidence” of title, not protection of title.

<sup>23</sup> With this broad definition, even the systems of deeds conveyancing and private title insurance used in the US, qualifies. While these systems support market activity, they involve higher transaction costs and complexities than do land registration systems.

which give this common language meaning are not between the owner and the land, but between the owner and others in relation to the land.<sup>24</sup>

- The objects and subjects of legal rights are therefore people (or juristic, legally competent entities). The legal relationship between them is conceptual, intangible, and inherently flexible, capable of being constructed in specific detail in actual situations. The inherent flexibility of this legal relationship is obvious to anybody who examines the different ways societies order land related entitlements.
- Jurisprudential analysis which accepts that legal relationships subsist only between people, not people and things, is liberating – it sets the scope for giving content to legal norms at the extent of our imagination, a far greater range than that allowed if our perceptions are limited to the physical relationships that men can have with things. Legal relationships, legal concepts and legal actions can become much more conceptual, ethereal, abstract and valuable.
- To make the idea simple, conceptualise land as a **primary property commodity** that is tradeable in terms of the immediate right to use the land for whatever purpose the owner (in the context of the socio-political order) wants. A local economy that permits trading in land needs to manage its land market. Land is commodified (made into a commodity) and monetarised (given an exchange value). A land registration system is an important assistance to these processes. The stability of the land system influences the stability of the economic order, perhaps best demonstrated by the sustained ascendant economic position of the Hansaetic city states in middle Europe.
- Depending on the socio-political order and on the economic creativity of the system, the legal order will begin to identify interests which are remarkably remote from the land but which are immensely valuable. When the legal system identifies abstract interests in the land and allows these to be traded in their own right, it has invented which might be called **complex property commodities**. The significance of this development in property law is simply astounding: property rights of almost any content can be created in relation to anything of value. The rights create entitlements and interests which are enforceable amongst people. The entitlements and interests can then become tradeable commodities.

In the case of land, there is much more trading opportunity available if the system allows trading in interests, not just trading in land. The growth of personal trusts, property investment trusts, high rise development rights, secondary mortgage markets, futures exchanges and so on depend on the ability of the legal system to recognise entirely conceptual arrangements as capable of legal definition and economic value. A recent example is the commodification of mortgage rights into tradeable bonds in a secondary mortgage market. Another is the sharing of income and risk involved in vast and diverse property investments through listed property trusts. Economic acceleration is achieved by stepping beyond the inhibitions affecting land (a non-liquid asset involving high transaction

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<sup>24</sup> Felix Cohen, (1954) *Dialogue on Private Property*, 9 **Rutgers Law Review** 357. “Private property is a relationship among human beings such that the so called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out his decision.” 373. This is a fundamental assumption – laws can only regulate human behaviour. Laws of nature describe the natural world. Laws of man are norms or ought statements – compliance and enforcement are matters of human judgment.

complexity and cost) and trading in interests – particularly in shares or units in listed companies or trusts.

At this point of economic development, the land registration system is a vital component in the stability and continuing confidence in the market processes. Without a reliable system of land parcel/owner/interest identification as the foundation, the hierarchical market system would collapse. However, while it is a necessary condition on the functioning of a complex market, land registration is not sufficient.

- One of the key components in the transition from a simple primary commodity market to complex market in abstract commodities is the separation of risk from entrepreneurial activity. Capitalism achieves this separation by the corporation, historically the joint stock company, which allows the entrepreneur to use capital and/or debt to fund activities, shifting the business risk to investors and creditors and spreading it so that larger business risks invoke smaller and knowable personal consequences.
- When the development of complex property commodities is combined with the flexibility of corporations, the flowering of entrepreneurial capitalism occurs, demanding regulation by the state (the level of which is the debating point between economic rationalists who demand a ‘free’ market and the regulators), and coherent legal and administrative systems which reduce the complexities and opportunities to manageable and intelligible alternatives.
- High levels of market activity in complex property interests tend to generate complex property laws.<sup>25</sup> The greatest assistance to market vibrancy is keeping the registration system simple, even in the context of complex law. On the comparative scale, among registration systems, a Torrens system achieves greatest simplicity, and has the highest potential for delivering more.
- In developed systems, the involvement of the state is expressed in its construction of the legal and administrative systems, and in the initial delegation or grant of land tenure to an individual, who thereafter makes the important decisions about the land<sup>26</sup>, subject to overriding state and public interests.
- The **source** of “land rights” is not a person’s the relationship with land, but the legal relationship between citizens and the state. The state, by setting the legal standards for land allocation, ownership and transfer, creates and manages land rights. **The state is always essential** in these processes. The level of involvement

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<sup>25</sup> But property laws have the capacity to become overly complex for other reasons, as well. For instance, the opposite process of obstructing tradeability of land created the extraordinary law which established strict settlements ensuring ascendancy of the English landed aristocracy for 300 years, law which had to be dismantled by government to free up the assets of the landed aristocracy in response to agricultural depression in the late nineteenth century.

<sup>26</sup> Don Veitch, (1999) **Who Owns the Land?**, Mabo Edition, David Syme College of National Economics, Flemington Victoria Australia. Veitch explores the implications of source of property rights, particularly the English Crown as conquering or settling nation or through the Constitutional statements of rights between the state and citizens.

The constitution and land law of Indonesia also creates a substantial debate by stating that the state “controls” the land in an attempt to divorce the experience of colonialism under the Dutch whose law recognised state “ownership”. The language however conceals the reality that control by the Indonesian state is far more intrusive on land tenures than the ownership under eminent domain in industrialised western economies.

varies immensely. In the industrialised west, once land is granted to an owner, the control is highly detached – the state does not interfere with owners’ decisions about land, except at the peripheral planning and acquisition for public purpose levels, and so on. In developing countries, ubiquitous state control tends to be tentatively divested, with consequences for their markets.

- It is possible for the state to delegate the administration of the land rights to the private sector (for example, through deeds conveyancing backed up by private insurance as in the United States of America), but this is a highly exceptional and very expensive and, despite privatisation, continues to demand detailed state controls of standards and pricing.
- It is not possible for the state to delegate to private persons or organisations the responsibilities of making of property law or sourcing initial property rights without exciting extraordinary risks to good governance and civil peace. This probably applies to all socio-political systems which realize that land is scarce (either in total or in relation to useable, desirable portions).
- If registration creates legal title to land parcels, the process demands direct state control and accountability. Torrens registration could not be privatised without serious consequences for market confidence and good governance.
- The relationship between the state, the individual and the land inherent in Torrens systems is more simple and intelligible than other systems. Simplicity is achieved by making registration the source of entitlement to land. To sustain registration, the continuing symbiotic relationship between the registration system and the state must be clear and accountable to the public. The Westminster system provides this accountability by giving the registrar a precise statutory role, administered through the appropriate minister and reportable to Parliament. It is essential for the system to be state involving, but safe from political or personal hijack. Once a registration system is seen to serve a particular interest or political group, it can neither provide fair land distribution nor support for a market in land or complex commodities.
- Systematic elimination of disputes about land is usually not acknowledged as a component of a Torrens system. It is however fundamental. The simplicity of determining entitlements to land by the order of registration is readily intelligible and easily applied by the public. But the advantages do not stop there. The administration system not only determines legal entitlements which compete within the registration process (where the registrar acts quasi judicially), but the authority of the register settles external disputes. The ability of the registration system to negate and prevent disputes is a valuable result of a well run administration.

None of this means that Torrens systems are invincible or incorruptible. They are corruptible. Their operations must therefore be as transparent and accountable as possible to ensure that their public purposes are not compromised. They must operate in a background of the rule of law and without subjective or selective barriers to registration. They must be accessible, cheap and cautiously administered.

## **THE STATE OF ANALYSIS**

We need a text on “Property and the Rise of Capitalism” which parallels Weber’s **Religion and the Rise of Capitalism** to provide the analytical breadth and conceptual coherence necessary for developing sound policy. Development of an

equivalently broad analytical framework has been stalled because theoretical activity was diverted into justifying and defending the capitalist and communist systems, private versus collective land ownership. With hindsight, capitalism was bound to win if only because it resonated with the intuitive human judgement that a person is more likely to make efforts to develop land (or grow food) if there is a direct personal gain. The point is axiomatic in capitalism which provides more direct rewards to the land owner/user (food grower) who produces – he or she gets the immediate and the long term benefit (other things being equal). Therefore, in so far as land development, etc, is a social or economic good, capitalism is more likely to produce it. To a lesser extent, capitalism forces those who would gain to take the risks of activities, subject to the obvious distortions brought about by political and other processes.

With the exhaustion of this debate (at least for the time being), other debates which explore the relationship between land and socio-economic policies have taken over. The most important explore –

- The relationship between land tenure and food production<sup>27</sup>
- The sustainability of an indigenous culture<sup>28</sup>
- The appropriateness and success of land registration as an instrument in the economic maturation of a nation and improvement of life for its people<sup>29</sup>
- The enormous pressure on the concept of land as a series of privately owned and managed parcels, that flows from our growing awareness of the massive problems of pollution, salinity, loss of water resources and so on.

Meanwhile in the industrialised economies, computerisation, unlimited access to information and electronic document exchange raise a different range of issues. These involve administrative, marketing and functional issues including –

- Ownership of the key data<sup>30</sup>
- Central data maintenance versus accessed data through a network or hub
- Privacy and access
- Aggregation of information and its limits
- Copyright and its appropriateness
- Risk management (liability for error, insurance coverage, responsibility to correct errors)

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<sup>27</sup> Daniel Maxwell and Keith Wiebe, (1998) **Land Tenure and Food Security: A Review of Concepts, Evidence and Methods**, Land Tenure Centre Research Paper 129, Land Tenure Centre, University of Wisconsin, Madison,

<sup>28</sup> The Draft Convention on Rights of Indigenous People of the Human Rights Committee of the United Nations provides a background to an extensive and growing literature on this issue. Land rights, of course, will not preserve a culture which will inevitably capture and absorb facets of other cultures as communication, glitz commodities, and other outside influences intrude.

<sup>29</sup> The Aid community has used land registration as a focus of aid with different results. There is a debate about the suitability of land registration programs. While this debate is valuable, land rights remain a loud demand by poor people the world over. The Aid community should not confuse land registration programs with land rights programs. The latter remain essential, even if land registration programs are reduced.

<sup>30</sup> See the process of asserting ownership and copyright in plans of subdivision in Queensland by the surveying professionals, with the consequences for use of that information in the land information trade.

- Combination of private owner and parcel information with government and non-owner generated land information
- Electronic conveyancing
- Relationship between costs of collection, maintenance and pricing
- Wholesaling information, on-selling, value adding – driving the market in land information.

These are relatively easy to deal with – they are articulated and discussed. Many of them cannot be avoided. However deeper issues arise in the expanded horizon offered by better information management systems, including many with political and sociological aspects, such as providing information for the sake of information or for the applying some idea of “transaction fairness”, or using land information and registration systems to back up failing or new regulatory structures and systems. These issues potentially change the fundamental philosophy of registration systems, whether Torrens or not. They raise specific questions, including –

- Whether the system should contain *only private interests*  
The inclusion of business licences (particularly those grounded in licensed premises, such as liquor, gambling, licensed brothels, apartment houses, and so on) in the register is an open question of great interest
- Inclusion on the register of known hazards, such as fire risks, filled land, sloping and unstable land, contaminated sites, salt affected land
- Inclusion of building information – dates and types of permits and certificates, name of builders, insurers, suppliers and so on
- Exposure of known misalignments of buildings and fences
- Providing building and planning officialdom with opportunities for enforcement of “controls” over standards relating to chemical hazards, wiring and electricity installations, cable capacity, business compliance, domestic safety standards<sup>31</sup>, plumbing, heating, building permits and certificates, registration of plumbers, builders, electricians, and other bureaucratic edifices. This option appears especially attractive to those who require certificates or installations in premises to be evidenced at time of sale as a means of enforcement of systems which would otherwise (given human nature) be more likely to be avoided than not. Using land registration to “solve” problems of enforcement of extraneous standards is thoroughly destructive of its core functions. While it provides an information tracking system which delivers superficial satisfaction for the bureaucrats, it cannot cure problems in systems which seek to apply standards in workmanship and personnel.

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<sup>31</sup> Victoria leads the way in regulatory red tape with the Government defining standards for on site risks, including fire and requiring compulsory smoke detectors and swimming pool fences. But these are not the only changes. With the deregulation of the service suppliers, particularly builders, electricians, gasfitters, plumbers, the government is shifting risks onto householders and owners who must provide certificated (not a cheap process) evidence of the standard of works. The compliance costs for the whole community will increase dramatically. Whether there is commensurate improvement in the substantive quality of the services and facilities remains to be seen. Meanwhile, the land registration and conveyancing system looks like being hijacked as part of the enforcement processes in these regulatory changes.

- Facilitating fundamental changes in the conveyancing system from *caveat emptor* (let the buyer beware) to *caveat vendor* (under which the seller is required to reveal to the world all known risks, and in some proposals is forced to reveal information which should have been discovered by diligent searches to the title, buildings and business compliance)<sup>32</sup>.

## TORRENS AND POSSESSION

The issue of whether the register should override the reality of long established boundaries and buildings is of many answers. In some systems, boundaries are forced to accord to the register initially and through out the history of transactions and uses. The Australian Capital Territory, which benefited from government created land parcels and expensive surveying, was able to establish a finely tuned coherence between actual, surveyed and titled boundaries both initially and through subsequent dealings. With the special status of the national capital, the law and the administration of the system could afford to continue to demand coherence. In New South Wales, actual boundaries are required to fit title boundaries, necessitating high transaction costs and continuous transaction associated surveying to identify the inevitable discrepancies and voluminous land disputes result.

In Victoria and Western Australia, the opposite approach is taken. Title boundaries are altered to reflect long established actual boundaries which are favoured by the law.<sup>33</sup> If the action to recover the land (whole or part) is unavailable because the time within which the action could be brought has expired, it is cheaper to move a title boundary to accord with the legal occupation than it is to move a building or acquire a sliver of land in a next-door title through negotiation with a rent seeking neighbour. It is also morally defensible to recognise that an owner who failed to enforce title to his land should be the loser in the situation of encroachment, whether the encroachment is deliberate or inadvertent (but not fraudulent).<sup>34</sup>

The Law Commission in the UK has recently reported on this issue and has been influenced by the inadequacy of the law relating to squatting. In its view, a registered title should override possession, even though this produces different results between registered and unregistered land. It is not a conclusion supported by common sense or sound legal analysis.

The principle that registration creates ownership through recording of transactions is acceptable. It is an unjustifiable extension of the principle to allow registration to override title by possession which, ex hypothesis, produces no registrable instrument. For anyone acquiring land, reliance on possession poses no threat to the clarity of the register. No registration system gives buyers leave to buy without inspecting it, nor should it. Inspection usually reveals the circumstances of possession. Only evident and adverse possession legally threatens a registered title. If possession of whole or party of the land is obvious and evident, it is clear to a buyer who bothers to take precautions of enquiring and measuring.

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<sup>32</sup> A proposal to realign information available to a buyer on sale is now being considered by Victorian Government in its review of the Sale of Land Act 1962. Even now, a vendor in Victoria must reveal government decisions about which he or she "should have known": section 32

<sup>33</sup> Both systems allow title to be amended to accord with possession as to whole or part. Title by possession is a paramount interest and overrides the registered title.

<sup>34</sup> Adverse possession is not land theft. It is recognition of land use over long periods, or in the US even short periods. The shortest periods are three to 5 years in some US states.

Whether or not to allow title to be acquired by possession should be addressed by consideration of the issues related to recognition of long user and quietening of land disputes,<sup>35</sup> not by land registration principles. There is nothing incoherent or unworkable about a Torrens system which recognises possession as a legal source of title. In fact, the congruity between the registered owner and the legal owner is achieved. Additionally, it allows the supremacy of possession as a source of title to remain.

## **INDIGENOUS LAND RIGHTS**

Torrens principles are compatible with recognition of indigenous titles. The barriers to recognition of indigenous relationships with the land are political and legal, not administrative. If the indigenous relationship is accorded legal status, the local administration and recording system can contain the information. The systems can absorb many variations of common ownership, ranging from existing western concepts of common ownership, trusts, cooperative ownership, to novel and unique tribal ownership structures.<sup>36</sup> Whether in Africa, Australia or New Zealand, land registration systems are able to contain records of the unique relationships with land inherent in indigenous customs. The integration of customary titles with the land titling system is easier if communities are sedentary. Nomadic land use areas, especially those with imprecise boundaries or with non-exclusive or shared land entitlements, are regarded by many formalists as incompatible with legally recognisable interests in land. However, these can still be accommodated by including in the system entitlements which are not exclusive<sup>37</sup>, especially in a system which recognises “overlay” interests.

## **CONCLUSIONS**

Without the deeper conceptual framework, analysis of land registration and its functions has been relatively unsophisticated, focussing on mechanics and legalisms within particular disciplinary boundaries. With the pace of change, land registration is escaping critical review and **critical protection**. It lies open to hijack by an faddism or remains the playground of entrenched, historically derived, powerful interests (especially lawyers and, to a much lesser extent, surveyors – who are generally much cheaper and less organised).

Three major issues need to be put on the agenda.

### **1 Scarcity and Its Implications**

All this talk of land may be misplaced. Water, not land, will become the scarce commodity of the future, and its allocation will determine both quality of life and land uses. With the damming of major rivers, Yangtze and Nile, Murray, Colorado etc.

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<sup>35</sup> Closure of legal disputes by running of time is an essential component of land law. For illustrations of what happens in systems which do not establish clear limitations rules, the backlog of court cases in Indonesia and India is a salutary result. In other jurisdictions, for instance New South Wales, recent history shows that a society cannot live with a register which is out of kilter with ownership – the law there now recognises adverse possession claims.

<sup>36</sup> Rachael Haverfield, above.

<sup>37</sup> Such as identification of areas used for seasonal hunting and gathering by their remotest boundaries. The consequences of this identification depend on legal identification and protection. If the indigenous people are given a legal right to continue their traditional lifestyle over land, the law will need to specify how other claimants gain access for different purposes.



pollution of others, Rhone, Danube, etc, and loss of artesian water in great plains of US (where the aquifer is dropping 4 feet per year and refilling at the rate of half an inch with life expectancy of under 30years or less), Australia and north Africa. In the final result, land without water is folly. The land registration system will eventually be adapted to deal with water scarcity.

## **2 The Relationship between Land Registration and Effective Markets**

The second has already been identified but needs emphasis. A land registration system, well run, is the foundation for much more of the economic activity than the standard analysis recognises. Land registration is profoundly important in the maintenance and engineering of markets in complex commodities. Entry into this dynamic market activity by a nation (industrialised or not) requires an effective land registration system. The Third World needs a pathway to using registration to achieve economic flexibility and growth while retaining sensible land use planning, reasonable capital markets which attract long term and patient capital rather than high risk-high return capital, fair but effective taxes, compatible development and sustainable traditional land relationships.

## **3 Globalisation**

Concentration on differences between registration systems rather than on their congruity means that every system is regarded as unique and local, allowing its professional supporters control and monopoly. If we worked on the opposite end of the spectrum to describe commonality and to develop coherent and shared responses to the demands and influences on change, we would be better off. This is in no way arguing that local autonomy or national philosophies should be overturned in favour of multi national capital. It is a plea for more discussion about opportunities and more sharing of our unique local achievements and mistakes. It is certainly time for the debate to define the essential place of land registration in the socio-political order, to identify its functions and to chart a path for adoption and change which recognises the full range of options. A combined disciplinary approach might be better able to provide answers to the deeper questions, to expose greater opportunities for sensible land information policies and, most importantly, protect the land register to ensure it services its **core functions**, not others. In seminal thinking on sustainable land development, the notion of ownership is being rearticulated to define responsibilities towards the land.<sup>38</sup> Will the Torrens system be ready for this?

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<sup>38</sup> Murray Raff, **German Real Property Law and the Conclusive Land Title Register**, pending Ph D thesis submitted to Melbourne University Law Faculty, 1999, develops the theme of social and environmental responsibilities as a component of the legal concept of title in the context of Hansaetic registration law and practices and their transported version of Australian Torrens systems.

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