

# **THE ELECTRONIC AGE: VIRTUAL CONVEYANCING AND THE TORRENS TITLE SYSTEM**

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## **ABSTRACT**

This paper describes and analyses a number of issues related to the potential impacts of electronic conveyancing on Torrens title in Australia. The first part of the paper concentrates on the challenges that electronic conveyancing brings to the operation of the land register, while the second part of the paper highlights some of the benefits that the proposed changes may bring. It is concluded that if the safety and security of electronic conveyancing prove to be workable, then the system has the capacity to enhance not only the conveyancing process but also the operation of the register and the title created by registration – Torrens title itself.

## **INTRODUCTION**

When, approximately 150 years ago, Sir Robert Torrens advocated an alternate system of title, he foresaw an institution that would be user-friendly, streamlined and secure. As parchment, sealing wax and historical chains of title gave way to Torrens' vision, many of his aspirations have become a practical reality. (Department of Lands 2004, Gray and Edgeworth 2003: 55, 556)

With the arrival of the electronic age, legislators and administrators are presented with further opportunities to enhance the ease of use and security of our title registration system. These opportunities, however, also present challenges that emanate from the integration of electronic processes into an existing paper-based regime. The first part of this article explores some of the potential problems in the operation of Torrens title that stem from the introduction of electronic processes, while the second part of the article explores some of the benefits that electronic processes may bring both to conveyancing systems and to Torrens title. It is concluded that if potential challenges

can be met, electronic conveyancing is capable of countering a number of operational insufficiencies that have developed within the Torrens system. One such insufficiency is the “registration gap” which is the time lag that occurs between settlement and registration of title documents. The second part of the paper focuses on this issue. .

## **VIRTUAL CONVEYANCING**

The use of electronic media in conveyancing is not new – an Australian article was written on the topic as early as 1967. (Whalan 1967) However, nascent developments tended to emphasise the recording and retrieval of information, rather than the full range of conveyancing procedures. (J L McCormack 1992: 73-74 and 115) A modern-day electronic system is capable of providing more than this, it is capable of “virtual conveyancing”, so that exchange of contracts, settlement, lodgement of documents for registration and transmission of funds may all be accomplished electronically.

Indeed, within the last 15 years, stakeholders such as solicitors, banking institutions and property registrars have continually sought ways in which to achieve these aims. For instance, in New South Wales, the Escrod and Seisin Protocols were promoted in the early 1990s as heralding a new era of electronic conveyancing. (Law Society of New South Wales 1993) However, these schemes were somewhat limited in their application. They were largely based on the release of documents prior to settlement, accompanied by the electronic transmission of funds. The schemes never reached fruition, partly due to the reluctance of lending institutions to release documents prior to receipt of funds. Current developments and proposals focus on a more comprehensive integration of electronic processes. (Department of Lands 2004: 18-19, Christensen 2004) In Australia, the Australian Registrars Electronic Conveyancing Steering Committee (ARECSC) was established in 2000 to develop a unified approach to conveyancing. Its efforts centre on the development of a national Electronic Conveyancing System (NECS) that will dispense with face-to-face meetings, allowing settlements to take place electronically.

The development of electronic conveyancing is significant because of its potential to impact upon the way the property register is maintained. In a Torrens Title system the

title and the register are interdependent (Section 31B *Real Property Act 1900 (NSW)*); a factor that in Australia is reinforced by the operation of Torrens title as a government-guaranteed title. Indeed, the often-quoted remark by Barwick CJ is that Torrens title is based not on “registration of title but (is) a system of title by registration.” (*Breskvar v Wall* (1971) 126 CLR 376 at 381) This means that it is the act of registration that creates the title. Hence, one of the largest potentials for challenge and fine-tuning lies within this link created by the operation of the register and the title itself.

The proposals put forward for the use of electronic conveyancing incorporate three mechanisms: electronic transfer of funds, instantaneous lodgement of dealings and automatic registration of dealings. The process is underpinned by core principles, such as prior verification of the client’s identity, and the preparation, certification, signing and registration of electronic dealings. The settlement phase will largely do away with the need for paper or manuscript documents. This, coincidentally, also includes the duplicate certificate of title. Currently, in New South Wales, when dealings are lodged for registration, they are usually accompanied by this document where it is available. It is important to keep in mind, however, that possession of the duplicate certificate of title does not create ownership, nor does it provide evidence of ownership. It is the register that performs these functions. The duplicate certificate of title does, however, provide evidence of the right to deal with the land. (Section 38 *Real Property Act 1900 (NSW)*) Additionally, it provides an added level of security making it more difficult to perpetrate many types of fraud. Indeed, an empirical study conducted on fraud in the Torrens title system indicates that the abolition of duplicate certificate of title may make it easier for third parties to commit fraud (Hammond 2000: 22). At present, it is envisaged that the duplicate certificate of title will only be issued where the property is unencumbered, or where the registered proprietor has requested it. (Department of Lands 2004: 30) The act of issuing the duplicate certificate of title is an administrative action undertaken by the Registrar General exercising his/her discretion (Sections 33, 33A *Real Property Act 1900 (NSW)*) which does not require additional enabling legislation; as such, these decisions can be revised comparatively easily where necessary.

It is also important to note that while documents are instantaneously lodged for registration upon settlement, registration itself is automatic, rather than instantaneous. (Department of Lands 2004: paragraph 7.4.10) As documents will be entered into the electronic system prior to settlement, problems with the documents will most likely be detected at this early stage and should not, therefore, delay the process of registration. However, the Registrar General has a discretion with respect to registration of dealings and instruments (sections 33, 36 and 39 of the Real Property Act 1900 (NSW)) which will not be removed by the introduction of electronic conveyancing. This means that the Registrar General could exercise his or her discretion and refuse to register a document. Such a situation is, of course, no different from the current system. However, one of the benefits of electronic conveyancing is that documents are lodged for registration at the same time as settlement. This is unlike the current system where documents might be lodged many weeks after settlement. In ensuring that documents are lodged contemporaneously with settlement electronic conveyancing provides a system that comes closer to the ideal of Torrens title and the primacy of the register than the present system. However whether the system will be workable depends on whether certain challenges can be met.

## **TORRENS TITLE AND VIRTUAL CONVEYANCING**

### **The Challenges**

In broad terms, the challenges may be divided into two categories: first, the incorporation of electronic processes into a system that is dependent upon the generation of manuscript documents; and, second, achieving a level of safety and security with electronic documents that is at least as secure as manuscript documents.

In New South Wales, the act of registration refers to the registration of dealings that in the *Real Property Act 1900 (NSW)* are defined as instruments in registrable form. (*Real Property Act 1900 (NSW)* section 3) An instrument is further defined as virtually any document in writing that relates to the disposition, devolution or acquisition of land. (*Real Property Act 1900 (NSW)* section 3) Moreover, to be in registrable form, dealings need to be in “approved form,” a requirement that mandates both signing and witnessing. (*Real Property Act 1900 (NSW)* section 39C) The

provisions of the *Real Property Act*, with respect to dealings for registration, clearly contemplate that these “dealings” are at some stage produced in a written, tangible and prescribed format. These are the very requirements that call into question whether electronic documents can satisfy formalities associated with the need for writing, signature and witnessing.

### **The Need for Writing**

The concept of “writing” has been interpreted liberally in Australia, so that letters, recitals in documents and receipts have all been found to comply with the requirement of writing. (Christensen *et al.* 2003: paragraphs 6-8). Such documents, though, exist in manuscript, or printed form; whereas electronic documents that are essentially a way of transferring data may remain unprinted. Doubts have therefore been expressed whether electronic documents can be considered equivalent to written documents. (Cocks and Barry 2001: 270-280, Christensen, *et al.* 2003: paragraph 9) Undoubtedly, Parliament can endow electronic instruments with a functional equivalence to paper documents and in Australia examples implementing this approach are found at both state and Commonwealth levels in statutes such as the *Electronic Transaction Act 1999 (CTH)*, the *Victorian Transfer of Land (Electronic Transactions) Act 2004* and the *Electronics Transactions Act 2000 (NSW)*.

These statutes are based on the United Nations Commission on International Trade Law (UNCITRAL) 2001, Model Law on Electronic Signatures with Guide to Enactment, which was adopted by UNCITRAL on 5<sup>th</sup> July 2001. The Model law is structured around twin principles of functional equivalency of electronic documents to paper documents and non-discrimination between different forms of technology. With direct reference to real property transactions, for instance, the *Victorian Transfer of Land (Electronic Transactions) Act 2004* introduced Part IIIA into the *Transfer of Lands Act 1958 (Victoria)* and amended section 126 of the *Instruments Act 1958 (Victoria)*. These amendments provide respectively, that dealings may be lodged and registered in electronic format and that requirements for writing with regard to land transactions may be met in accordance with the *Electronic Transactions (Victoria) Act 2000*. Such illustrations indicate that Parliaments are indeed able to enact

facilitative legislation, but the real issue is whether they should be enacting this legislation.

Sneddon (1998: 375) has pointed out that facilitative legislation may not preserve the same level of safety and security as exists in traditional manuscript documents. At issue is whether electronic documents will be more easily forged and whether they are amenable to the requirements for signing and witnessing that accompany manuscript documents

### **The Need for Signatures and Witnessing**

Traditionally, manuscript signatures comprise a mark placed on the surface of a document. (Capps 2002: 446) The mark can serve any number of purposes including an intention to be bound to the document, the witnessing of a document and verification of identity. (McCullagh *et al.* 1998: 456) The importance of the mark hinges on the intent behind its placement. This is a construct that “electronic signatures” have sought to emulate. The term “electronic signature” describes any means of identification made electronically and could encompass a typed name at the end of an email, a scanned manuscript signature, as well as biometric identification by way of retinal and fingerprint scans. (Capps 2002: 446) It could also include a simple click on an icon in an interactive web site. (Law Commission 2001: paragraphs 3.36-3.38)

Differing forms of electronic signatures are used for differing purposes and where securities issues are of concern, a particular type of electronic signature, the “digital signature,” is often used. A digital signature possesses an enhanced level of security because it involves the use of signature keys, accompanied by three additional safeguards. First, the issuing of electronic signature keys themselves is subject to a certification process that verifies the identity of the user prior to the release of the signature keys. The signature keys are then issued in the form of a digital certificate which links the user to the user’s identity. Second, the process incorporates encryption technology to ensure that communications over the Internet, including transmission of documents and signature keys, cannot be read by outsiders. Third, the process makes use of a one-way hash function. This last process is initiated by depressing the hash

key after an instrument has been electronically signed. It reduces a long message to a message digest and locks in every part of the document to the signature. Therefore, any alterations to the document will alter the signature itself. It is anticipated that electronic conveyancing will use a digital signature that incorporates these safeguards (Department of Lands 2004: 29, 33). Moreover, the prior verification and digital signature key will be issued in the form of a smartcard known as a "Landcard" that will incorporate "public key infrastructure" technology. Public key infrastructure system relies on a trusted third party to carry out the certification of identity before the signature keys are issued.

Although this system provides an enhanced level of security, like all systems it is not foolproof. Moreover, in similarity with doubts on whether the use of electronic documents complies with the requirement for writing, doubts also surface about whether electronic signatures can satisfy requirements found in provisions such as section 39C *Real Property Act 1900 (NSW)* for signing and witnessing. Normally, such requirements are accomplished by placing a mark on the surface of a document, something which is not possible with an electronic document. However, as with the need for writing, Parliament is in a position to give electronic signatures a functional equivalence to manuscript signatures if it so desires. In Australia, for instance, section 10 of the *Electronic Transactions Act 1999 (CTH)* stipulates that as long as the identity of the signatory has been verified, the requirement for signature is met by the use of an electronic signature. As with the use of electronic documents, however, the issue is whether parliament should be doing this.

One major problem relates to the very nature of electronic documents. They exist as information stored in a computer, or memory device, and consist of electronic impulses. (McCullagh *et al.* 1998: 465) A human being has no real way of knowing whether a document that is being electronically signed is the same as the image on the computer screen. This same problem also arises with witnessing electronic documents. Witnessing provides an added level of security, authenticating that the document has not been forged, falsified or altered. Manuscript documents can be readily witnessed, as the witness sees both the document and the signatory sign the document. Electronic documents can neither be seen nor witnessed in the same way. The witness may see a person using a computer, but will have no way of knowing

whether a document is being signed electronically or whether the image on the screen is the right one. (McCullagh *et al.* 1998: 464) One approach is to replicate safety features in the electronic medium that as far as possible underpin signing and witnessing of manuscript documents. This could partially be achieved by incorporating a system known as a “trusted path” into electronic signatures. It involves the use of computer software that guarantees what is displayed on the screen and the keystrokes used match with the document being signed. A witness would be able to certify that the document has been electronically signed. (McCullagh *et al.* 1998: 464) Alternately, witnessing could be dispensed with when documents are signed using a digital signature. This appears to be the position taken by the Department of Lands in New South Wales. (Department of Lands 2004: 29) Their approach is premised on the fact that the strong level of security accompanying digital signatures and the prior verification process itself are tantamount to a guarantee of safety against signatures and documents being falsified. It means that the use of digital signatures already incorporates important safety features normally associated with the function of a witness. While this may be true it, still does not address the question of how the signatory can verify that what is being signed is in fact what was intended to be signed. A great deal depends on the reliability of the software, which also leads to other concerns, including how easy it is to alter electronic documents and erase electronic signatures.

Moreover, to achieve complete functional equivalence in a Torrens title system, a further legislative step may be necessary. As already mentioned, Torrens title is a system of title by registration, so the very concepts of the title and its indefeasibility are dependant upon the recording of information and the maintenance of that information in the register. (Christensen and Stickley 2000: 212) In New South Wales, for instance, the word “indefeasibility” is not mentioned in the *Real Property Act 1900 (NSW)*, but results from the interaction of a number of sections relating to the operation of the register. These include section 38 which sets out that the register comprises documents such as instruments and dealings, section 41 that provides dealings are only effectual when recorded in register, and section 42 that stipulates the estate of the registered proprietor is paramount subject only to nominated exceptions, such as fraud. The validity of an electronically-based register, however, is not



clarified by these provisions. It may, therefore, be advisable to reinforce the status of electronic particulars that comprise the property register, as opposed to the electronic documents upon which those particulars are based. In Queensland, sections 37 and 38 of the Land Titles Act 1994(Qld) were enacted for this purpose. Section 37 states that: "An indefeasible title for a lot is created on the recording of the particulars of the lot in the freehold land register", while section 38 provides that an indefeasible title means "the current particulars in the freehold land register about the lot." These sections make it clear that electronic particulars can provide the basis for underpinning indefeasibility of title.

### **Organizational Problems in Computer Transactions**

Organizational problems can also lend themselves to safety and security issues. For example, in offices where documents are to be prepared, signed and lodged, staff may have differing levels of authorization to arrange and verify dealings. (Department of Lands 2004: 33) If staff use others' passwords or identity keys, security will be compromised. Additionally, outsiders such as sub-contractors will have detailed knowledge of the use and installation of new computer systems that can further add to security concerns (Graycar 2002).

Yet another dilemma relates to others hacking into the system which is a risk inherent in all computer-based dealings. Banks regularly face these types of problems, even if they are not always reported. (McCullagh and Caelli 2005: 12) Hackers, for instance, can use a Trojan Horse programme that lies dormant, but gathers information on keystrokes and forwards these to them. The National Australia Bank recently reimbursed a customer who used a computer at an internet café that was infected with "key logger programs" that enabled a hacker to get access to the customer's accounts. (McCullagh and Caelli 2005: 12) In electronic conveyancing systems, should a similar problem occur, the results could be devastating.

The conclusions that can be drawn from this short discussion of the problems associated with electronic documents and electronic conveyancing are that while Parliament can certainly give electronic documents functional equivalence to manuscript documents, much work still needs to be done. However, if electronic

conveyancing can be made workable, it provides benefits that are lacking in the present system and it is to these benefits that we now turn.

## **TORRENS TITLE AND THE REGISTRATION GAP**

### **The Registration Gap, Unregistered Interests and Indefeasibility of Title**

This section of the paper primarily examines the benefits of electronic conveyancing in reducing the “registration gap”. The registration gap itself refers to the time between settlement of a transaction and the registration of documents. When Torrens formulated his scheme, he envisaged that documents would be lodged for registration immediately after settlement. However, in practice this is not always the case. In Victoria, for instance, the average time taken to lodge a document after settlement has been estimated at 20 days, (Cocks and Barry 2001: 2) with delays of many months having been reported in other jurisdictions. (*IAC Finance v Courtenay* (1963) 110 CLR 550)

It is one area of Torrens title where the present paper-based scheme contributes to inefficiencies and the likelihood of unsatisfactorily resolved priority disputes. This means that during the “registration gap” a purchaser for value has an unregistered interest and remains vulnerable to losing priority against a competing unregistered interest, or a subsequently created, but registered, interest. (*IAC Finance v Courtenay*, O’Connor 2003: 10) The reasons for this predicament are found in the way indefeasibility of title operates.

Indefeasibility is the result of registration of dealings relating to land in the absence of one or more of the exceptions to indefeasibility, such as fraud or leases for a term fewer than three years. (Section 42 *Real Property Act 1900 (NSW)*) This may be contrasted with old system, or common law title, where claims to land are based on the legitimacy of chains of documents, comprising historical evidence of a present entitlement to the land. Registration of these documents under the deed registration legislation (Sections 184A-184J *Conveyancing Act 1919 (NSW)*) does not grant indefeasibility or validate title. Rather, it provides a record of what the parties have done and may additionally function to preserve priority. (Section 184G *Conveyancing Act 1919 (NSW)*) It does not cure defects in the documents, nor does it provide for an

indefeasible title. This means that under old system, a party acquires a legal, if defeasible, title upon settlement; whereas under Torrens title the acquisition of legal title is dependant upon registration, at which time, as just mentioned, in the absence of an exception, the title acquired is also an indefeasible one. (Gray and Edgeworth 2003: paragraphs 8.24-8.59). However, while documents remain unregistered, this leaves a hiatus that has not been satisfactorily resolved.

### **Section 43A Real Property Act 1900 (NSW)**

It is within this context that section 43A was introduced into the *Real Property Act 1900 (NSW)* in 1930. The section provides that for the purpose only of protection against notice, the estate or interest in Torrens title land taken by a person under a registrable instrument shall before registration be deemed a legal estate.

It applies to the period between settlement and registration, but only where necessary to protect the holder of a registrable interest against notice acquired between settlement and registration. In order to understand the extent of protection afforded by section 43A, it is necessary to determine what is meant by the phrase "legal estate". It could be taken to mean that the Torrens purchaser gets the same priority against notice as he/she would have done had he/she held a legal title under common law. (Taylor J in *IAC Finance v Courtenay*) It could also be read as elevating the estate of the purchaser to a registered estate. (Kitto J in *IAC Finance v Courtenay*) If the interpretation were taken to be the latter, then arguably it would counter the need to register documents and undermine the operation of the register and the very notion of Torrens title itself. What is now certain is that the section does not elevate the estate of the purchaser for value to a registered estate. (*Jonray (Sydney) Pty. Ltd. v. Partridge Bros* 1969) 89 WN (Pt 1) (NSW) 568 at 576-577). Nor does it deem a legal estate in all circumstances. The section is limited to notice issues. Consequently, section 43A does not eliminate the registration gap.

Moreover, although the section is designed to assist in preserving the priority of the holder of an unregistered instrument the section does not settle how these priorities are to be determined. The approach is not necessarily one of giving priority to the first in time: a number of viewpoints have been offered, each importing broad

equitable principles of fairness. One approach is based on making a selection relative to the balance of merits, or equities of the case, (Kitto J in *Latec Investments v Horel Terrigal Pty Ltd* ), while another approach gives priority to the estate, or interest created first in time, unless there is a reason to postpone that estate or interest. (*Lapin v Abigail* (1930) 44 CLR 166, see discussion in Rodrick 2001: 172) The limited nature of the operation of section 43A and the mischief that may occur, where documents are not promptly lodged for registration, may be illustrated by examining decisions in three cases: *IAC Finance v Courtenay*, *Heid v Reliance Finance*((1983) 154 CLR 326) (*Heid*) and *Diemasters Pty Limited v Meadowcorp Pty Limited & Ors* ([2001] NSWSC 495) (*Diemasters*).

The first two cases involved competing unregistered interests where, although the transaction had settled, relevant documents had not been lodged for registration; while the last case concerned stolen bank cheques that had been used to pay for a discharge of mortgage. In *IAC Finance v Courtenay*, the Courtenays purchased a property where the vendor was providing finance. In accordance with conveyancing practice, the vendor's solicitor, as solicitor for the mortgagee, retained the title documents, transfer and mortgages for registration. However, the documents were not lodged until some nine months after settlement and then they were uplifted before registration. This meant that the Courtenays never became recorded on title. Their erstwhile vendor then exchanged contracts to sell the same property to a third party. Just before completion, this party became aware of the interest of the Courtenays, but still proceeded to settle. The financier, IAC Finance, lodged its documents for registration, but the Courtenays commenced action to have their transfer registered first.

Had section 43A operated to give the Courtenays a protection comparable to that obtained on registration, it is clear that the matter would have been disposed of expeditiously, and in their favour. However, given the limited operation of section 43A, it could not apply to give the Courtenays an estate equivalent to registration. The court, therefore, turned to other doctrines, such as the ordinary rules of priority and, based on these, still decided in favour of the Courtenays, as their interest had been created first and there was no postponing conduct on their part. (*IAC* per Taylor J)

Yet, in *Heid v Reliance Finance Corp* those same rules gave preference to an interest created second in time. In that case, Heid sold land to a company that was part of a group controlled by a firm of mortgage brokers that Heid trusted. So much in fact that Heid provided part of the finance, which should have been secured by a registered mortgage. Heid also agreed to allow the conveyancing for both sides to be carried out by an unqualified employee of the firm. The matter settled, but Heid's mortgage was never registered. The purchaser eventually mortgaged the property to Reliance Finance and this mortgage was also not registered. When Heid realized what had happened, he commenced action claiming a vendor's lien for the unpaid purchase money. The court decided against Heid, because their honours found that Heid had armed the purchaser with the means to represent that it was entitled to the land absolutely. (*Heid* paragraph 9).

In *Diemasters Pty Limited v Meadowcorp Pty Limited & Ors* [2001] SWSC 495 Diemasters had lent money to Meadowcorp Pty Limited, secured by a mortgage over land owned by Meadowcorp. The director of Meadowcorp had procured some stolen bank cheques and used them to discharge a mortgage to Diemasters. At the same time, the property was sold to two purchasers, Chelliah and Jain. When the bank cheques were dishonoured, the outgoing mortgagees lodged a caveat to protect their interest. This meant that the discharge of mortgage remained unregistered. The court examined the operation of section 43A and held that Meadowcorp could not avail itself of the protection afforded by that section because it had obtained the discharge of mortgage by fraud. Moreover, neither Chelliah nor Jain could obtain the protection of the section because they could not be in a better position than Meadowcorp, from whom they derived their title. (*Diemasters* per Windeyer J paragraph 19).

Additionally, the court found that the protection given by section 43A does not inure indefinitely. It is implicit in the wording of the section that the dealing is in fact lodged for registration. Where dealings are not lodged, the protection of the section can be lost after a length of time deemed appropriate by a court. (*Diemasters* per Windeyer J paragraph 23) One problem with this point, however, is that it may be difficult to predict what length of time a court would consider appropriate. Moreover, had the purchasers attempted to lodge their transfer it is not clear that the result would have been any different because as his honour pointed out their claim was based on

dealings with the vendor/mortgagor in circumstances where at least one of the purchasers had notice of the fraud. The issue would have depended on the degree of involvement by the purchasers in the fraud. The result was that the outgoing mortgagee won the case and was able to block registration of the discharge of mortgage and subsequent transfer. Would the use of electronic conveyancing have led to a different result in any of these cases?

### **Section 43A Real Property Act 1900 (NSW) and Electronic Conveyancing**

From the outset, it needs to be kept in mind that in addition to the instantaneous lodgement and automatic registration of documents electronic conveyancing also encompasses the electronic transfer of funds. This is an important aspect of electronic conveyancing that works in synergy with an accelerated registration process. It is essential to ensuring that in closing the registration gap other harmful problems are avoided. In *Diemasters*, for instance, the use of instantaneous transmission of funds as part of electronic conveyancing would have meant that settlement would not have taken place as there were no real funds to discharge the mortgage. This also would have meant that the court would not have had to resort to common law priority rules to resolve a dispute concerning Torrens title property.

The accelerated registration process does, of course, have benefits of its own. In *IAC*, for instance, the transfer and mortgage would have been lodged for registration at the same time as the remittance of funds. Registration would have proceeded automatically, meaning that the Courtenays would have attained a registered interest and maintained priority as against Reliance Finance. The result for them, therefore, would have been the same, but as in the *Diemasters* case, have been decided on the basis of the Torrens register rather than common law rules of priority.

In *Heid*'s case, the use of electronic conveyancing would have led to a different result. If electronic conveyancing were to operate as intended then, on settlement Heid's mortgage would have been instantaneously lodged and automatically registered. The result for him would have been very different, because his mortgage would have gained priority over any subsequently registered mortgage.

What these cases indicate is that electronic conveyancing can improve the conveyancing process and also make priority issues dependant upon the register rather than common law concepts that may not sit well with Torrens schema. Wherever priority issues are in contention the law embarks upon the age-old exercise of resolving rights between innocent claimants, knowing that one of them must miss out. (Griggs 1997/98: 35) This is not a totally satisfactory approach to resolving disputes in a Torrens system where priorities ought to be based on information contained in the register. In a Torrens system, the conclusiveness of the register and the reliance on registration should make the choice a simpler one. At this level, registered interests are not only pitted against each other, but also against unregistered interests. The system patently favours the party who is registered first as between competing registered interests and the party who is registered as between registered and unregistered interests. (Griggs 1997/98: 41-48) Given the primacy of the register, this is an understandable approach. Nevertheless, complications arise because of the large number of unregistered interests that are found in the Torrens system. Because indefeasibility depends upon the register, any delays between settlement and registration of documents can create situations where parties' rights are determined according to unsettled common law principles of priority. This uncertainty runs counter to the safety and security that was generally envisaged as underpinning Torrens title.

Although it might be argued that legislation could be enacted imposing time limits for registration, this does not entirely settle the problem. Electronic conveyancing encompasses more than automatic registration of dealings, it also comprises electronic remittance of funds. This is a combination that adds to the safety and security of Torrens processes. Were legislation introduced imposing time limits for registration of documents, the consequences of breach of the provisions would not necessarily eliminate the registration gap. It could hardly be envisaged that documents would be treated as registered. Yet if the law were to set up a regulatory system imposing penalties these might encourage compliance, but would not necessarily stop the type of fraud committed in *Diemasters*. To overcome this, a system is needed that links payment of funds to the registration of documents and moreover, registration that is undertaken as promptly as possible. In *LAC* and *Heid* the regime would have functioned to give the Courtenays and Mr Heid respectively an indefeasible title upon

settlement. As promoting the primacy and security of the register are two key precepts that support Torrens title the use of electronic conveyancing is a valuable tool in assisting these goals.

## CONCLUSION

The introduction of electronic conveyancing represents one of the most significant changes to our property law system since the institution of Torrens title. In one sense, it is perhaps ironic that it has taken over 150 years and the introduction of a process as far removed from manual recording of dealings as possible to bring the practice of Torrens title closer to the designs of Sir Robert Torrens. With regard to bringing forward the time of registration, the streamlining and expedition made possible by electronic lodgement and registration of dealings will have impacts felt most strongly; particularly since virtual conveyancing all but eliminates the registration gap

This prospect brings a degree of expectation into the process that needs to be tempered by the knowledge that there are still a number of practical difficulties to overcome, as our paper-based system moves into the electronic millennium. Only time will tell whether the scheme is successful, or whether, in the words of one judge who in commenting on the registration of scanned images in Queensland said: "... the legislature will rue the day it introduced this paperless scheme and look back in wonder and ask why it was so mad". (Douglas J in *Young v Hoyer* [2000] QSC 455, paragraph 57) In the meantime, we can look forward to being part of the undertaking and take the time to decide for ourselves.

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