

## **FRAUD AND THE VOLUNTEER: HARMONISATION OF PRINCIPLE IN AUSTRALIA**

ELISE HISTED\*

### **INTRODUCTION**

Over the past few years the Victorian Land Registry has been working on a number of initiatives, and much of that work has now reached the point where it wants to open up its aims and projects on a broader scale and to invite the participation of the academic and practical audiences. Essentially, there is a suite of three major projects running under the overall banner of “Torrens Resurgam”. These are:

- the introduction of electronic conveyancing both in Victoria and across Australia;
- the complete reformation of and harmonisation of titles office forms across Australia; and
- the harmonisation of fundamental differences of principle of registered land law between the various states and territories.

My work relates to the last of these projects. As colleagues from the Australian jurisdictions are aware, the various “Torrens” statutes were introduced by the different states and territories at the different times over the last half of the eighteenth hundreds. In many ways these statutes were, and still are, different; they all had the basic Torrens plan of title registration, but expressed in slightly different words, and some aspects of property law were simply left blank. When problems came to the various courts in the various jurisdictions, the judges simply did not say anything or were ambiguous, then decided the case by giving what seemed to be the fairest decision in the particular circumstances and that has led to a perpetuation of different pathways of doctrine.

So, in Australia today we have differences in property law from jurisdiction to jurisdiction. Now differences are not necessarily a bad thing, and the aim is not to make everyone the same in everything - but there are some differences that just do not make sense and can result in much unfairness from place to place. My task is to look at some of those underlying property law doctrines that have evolved differently to see if we can come to some harmony. To take the simile from Marcia Neave, it is a bit like the different gauge railway system in each state and territory; with electronic conveyancing you are building brand new rolling stock for your railway - but if you really want a truly efficient system, you need to have the same gauge railway for it to run, so you are not changing trains each time you come to the next border. If you think of the underlying property law doctrines as the gauges, that is where I am working to see if we can agree on the size of the gauge.

There is something different about this project, though. For the first time we have a project which has involvement from the Registrars of Title in the various jurisdictions. The basic task is to research and present the problem, with international comparisons, to them, and to the academic community, but part of that research will be to work with the Titles Offices, in partnership, to assess the practical angles of the problems as well as the academic angles. However, a summary of the problem and its implications is not the only aim of the project. Perhaps the most vital part of the project will be to suggest and analyse possible solutions to the problem; in other words, the idea is not to work with what we already have in regard to legislation and case law, and pick the

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\* Dr. Elise Histed, formerly Senior Lecturer, Faculty of Law, Monash University, [elise\\_histed@yahoo.com.au](mailto:elise_histed@yahoo.com.au).

best of what happens to be there, but to analyse all possible options and present suggestions for the best solution that can be legislated for across the jurisdictions. In other words, there is a freedom of thought in this project, together with availability of information from the practical side, which has, I believe, never been obtained before.

The Victorian Land Registry has already identified an initial issues list, which I think will give you some idea of how far reaching - and ambitious - this project is:

1. Whether volunteers should receive the protection of the Register offered to purchasers.
2. Different priority treatment offered to instruments and applications under the Australian Torrens legislation.
3. Implication of the entry of trusts on the Register.
4. Indefeasibility - immediate and deferred.
5. Indefeasibility and its exceptions
6. Replacing the prescriptive requirements set out in the legislation with model legislation based on the conceptual principles that underpin the Torrens system.

My work has begun on the first of these issues: the problem of the status of the volunteer in the Australian Torrens systems. We have started with this one because it is an area where there are clear divergences.

As you know, a volunteer is a person who does not give any value for the land they get. The most common examples of volunteers are people who are given land as a gift, and people who get land because it was devised to them in a will. There are other ways to get land for free. I have created a short list here of ways to become a volunteer to give you an idea. There are plenty more, but these are the most common.

- A person who gets a gift of land.
- A devisee of land under a will.
- A beneficiary of a trust.
- A person who has paid nominal consideration for land.
- A trustee (including a trustee in bankruptcy).
- A person who takes a transfer of land under a court (e.g. by family court).

Now we all know that the whole point of the registered land system is to protect the person who becomes the registered proprietor from interests not found on the Register (or listed in the relevant legislation). This is what gives the system the certainty and efficiency it needs. Roughly speaking, at the point of registration of the new registered proprietor the guillotine comes down on any interests milling around out there that have not been protected on the Register in some way; they cannot survive as against the legal interest of the registered proprietor unless the registered proprietor has been fraudulent.

That is all very well when the registered proprietor has bought the land. But the oddity about our statutes is that when they were passed in the 1800s they did not specifically say one way or the other anything about whether a volunteer should also get the same protection; it was always an ambiguity in the legislation. If you read the statute one way it looked as if the volunteer should get the protection and if you read it another you could just as decently argue that they should not. Not surprisingly, some of the Canadian provinces had exactly the same problem, because they copied our Australian statutes. So, influenced in making their decision by the circumstances of each particular case, courts usually chose the morally fairest outcome.

The problem with that, of course, is that that first decision would set the pathway for later decisions and so today the different states and territories have gone down different paths and made different decisions about the status of the volunteer. Queensland and the Northern Territory beat the uncertainty by legislating quite clearly to give the volunteer protection after it began to become apparent that there was a problem. Victoria and South Australia have denied protection, but New South Wales has given protection to the volunteer and Western Australia is following New South Wales. The Australian Capital Territory and Tasmania, along with New Zealand, appear to be reserving judgment at present. This gives you an idea of what we are facing.

## **TYPES OF VOLUNTEER PROBLEM**

The reason there was even any debate about this issue in the first place was because the situation in general land law is that a person who gave no value for the land they were getting takes that land subject to all the equities that the previous owner was subject to - they cannot destroy prior equitable interests. But if the volunteer in Torrens land gets the same protection that a purchaser for value gets, then that means that they can destroy any interests not found on the Register (subject to case law in, for example, the *in personam* area). Those are usually going to be equitable interests that the previous owners had themselves created. And that means that somehow the volunteer can actually get a better title than the previous owner had. It also means that canny people can use this to perpetrate some very interesting frauds, by using the land registration system itself to get rid of the obligations that they themselves created. In other words, the very legislation itself has created a new possibility for what I would call unconscionable conduct, which is something that needs to be taken into account if we are going to try to formulate some coherent principle about the status of the volunteer.

If we consider the entire Torrens picture as regards unregistered or unregistrable interests, we see that a line has been drawn between common law fraud, which makes a registered proprietor's title defeasible, and what one could simply term "bad behaviour". By this bad behaviour I mean deliberate use of mechanisms within the legislation to destroy a person's unregistered or unregistrable interest. Thus, for example, a proprietor may know about a prior unregistered interest, destroy that interest by getting registration, and still have indefeasible title. In any other way of thinking this would be morally wrong, but we have, as a society, made the decision to sacrifice that morality for the sake of efficiency and certainty in property transactions. Thus, the purchaser of land has the protection of the Torrens provisions and can destroy these interests without losing their title. I think, however, it is still legitimate to call it "bad behaviour". Fraud itself, in Australian common law relating to property transactions, must involve "moral turpitude" and must be brought home to the registered proprietor of the interest. Those colleagues who are not from Australian jurisdictions may also be surprised to hear that, as part of our pursuit of immediate indefeasibility of title, in Australia a forged document can be cured by registration. When these factors are combined, avenues for turning bad behaviour into fraud are available.

So, really, we have a number of types of problem with volunteers - one is that if we protect them they can use the Torrens legislation itself to destroy unprotected interests that the previous owner created. In addition, what we find in the various volunteer cases is another type of situation: where there is no moral blame to be cast on either party in the case (in other words, a third party is responsible for the conflict between the volunteer and another interest holder). I have termed this the "innocent volunteer" case, and it tends to occur primarily in family or will disputes. Usually what has happened is that the owner of the land has promised the land to one person (and a constructive trust has arisen), but has died, leaving it to different person. The cases of *Bogdanovic*

*v Koteff*<sup>1</sup> (in New South Wales), and *Rasmussen v Rasmussen*<sup>2</sup> (in Victoria) are the two main examples of this type of innocent volunteer situation. Should the volunteer who has achieved registration of their interest be able to defeat the interest of the person who has a right in that land under a constructive trust, or should they take the land subject to the constructive trust?

Of the two cases, *Bogdanovic v Koteff* is the morally hardest to decide. Spiro Koteff owned and lived in the same house as his tenants, who were a married couple. When the husband died, he asked the wife, Mrs Bogdanovic, to stay in the house and look after him. In return, he said, she could stay there for life. From then on Mrs Bogdanovic (who was 76 at the time of the first hearing) looked after him and did not pay any rent. The court held that she had an equitable interest in the property because of that promise and the fact she had acted upon the promise - so Spiro Koteff was, of course, holding the property on trust for her life interest. When Spiro Koteff died the property was willed to his son Norman.

It was held by the court that Norman had no knowledge of the promise made by his father - he had not been told of it by his father or Mrs. Bogdanovic. Should Norman have the protection given to registered proprietors, and be able to get Mrs. Bogdanovic out of the house, or should he take the house subject to all equities his father had created, and have to let her live there for the rest of her life? Here the court held that even though he was a volunteer, he did have the protection accorded to any registered proprietor, and, therefore, as he was not fraudulent, Mrs. Bogdanovic's claim failed.

In Victoria, however, in *Rasmussen v Rasmussen*, another constructive trust case, the court refused to give the protection of the register to the volunteer, and allowed a son to retain the land his father had given away in his will. These are knife-edge moral decisions, but they do demonstrate the nature of innocent volunteer cases and the very real difficulties in deciding about whether that protection should be given. They are both, however, susceptible to the basic argument that the volunteer is getting something for nothing and that if that something comes with some strings attached that is hard, but eventually the value of the gift will emerge. What these cases also demonstrate very clearly is how two different states can move down two different pathways in relation to the status of the volunteer.

What of the situation where volunteers (for others) are deliberately trying to use the Torrens protection to destroy a prior interest of another person? In reality, of course, the Torrens system can be used deliberately by true purchasers to destroy prior interests - this is part of its attraction and efficiency. The question we have to answer is whether we also want people who have not paid any money to have the benefit of that protection as well. If they do have the benefit of that protection then the possibilities for various types of bad behavior or fraudulent conduct open up, for a very small outlay indeed. Further, we need to start to consider when bad behavior which does not fit the current legal definition of fraud begins to turn into real life fraud when practised on a large scale.

If we speak, for the moment, only of using the system rules to defeat prior interest holders, although true purchasers could use the system rules just as easily as volunteers can, the benefit of using volunteer protected status to achieve this destruction is, for example, that no stamp duty is payable on a transfer "for love and affection", nor is stamp duty payable on a mortgage in Victoria either. Essentially, volunteer destruction is much cheaper to operate than purchaser destruction of

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<sup>1</sup> (1988)12 NSWL 472.

<sup>2</sup> [1995] 1 VR 613.

prior interests; and this is certainly of interest to those who are dabbling in bad behavior which approaches fraud.

On the other hand, if we are speaking of truly fraudulent conduct (not merely using the system rules to defeat a prior interest), it would be thought that the status of the volunteer is irrelevant, because if there is fraudulent conduct in the registered proprietor of the interest that interest will be defeasible, whether they be volunteer or not. This is not necessarily so.

### **Churning**

I would like to show you a real case “from the files of the Land Registry” so that you can see what is currently happening in the way of using Torrens rules to defraud people, and the real difficulties that arise in proving what is going on. The names have been changed to protect the guilty parties. The nickname that Victorian Land Registry has for this type of operation is “churning”. By that they mean quickly transferring titles obtained by fraud to third parties in order to ensure the protection of the Register and the curing of the fraud. As you will recall, however, Victoria is a state where the volunteer does not gain the protection that a purchaser does.

Mr Desperate went to Barracuda Pty Ltd, a “lender of last resort”, to discuss obtaining a mortgage over his property. Someone at Barracuda suggested that Desperate leave his Duplicate Certificate of Title with them while they considered the possibility of giving him a mortgage. It was later discovered that a forged mortgage had been given over Desperate’s land in favor of Barracuda. The same day as the mortgage was registered the mortgage had been transferred for value to another company, Shonky Pty Ltd. The Directors of Barracuda swore that it had advanced the money to Desperate.

The Land Registry believed Desperate, and was able to prove Desperate’s signature on the mortgage was a forgery. Desperate commenced action against the Registrar. However, the legal position by this time was that the transfer of the mortgage for value to Shonky, and its registration, had cured any defect in the original mortgage. The mortgage could not be removed from the register. The position of the Registrar would normally be to have to authorise payment of a claim by Desperate for the loss of his interest from the Insurance Fund.<sup>3</sup>

So here we have a situation where the purchaser protection of the Torrens system is deliberately being used to defraud Desperate. The problem is how do you prove this sufficiently to satisfy a court of fraud? Now imagine a situation where the volunteer is not protected by the Register; if you could simply prove that Shonky did not give any value for its transfer, then it has taken the mortgage subject to Desperate’s interest. In other words, you would not have to prove the full fraud and collusion. Proof of lack of value would achieve the same result and, generally, it is much harder to prove fraud than it is to prove lack of consideration.<sup>4</sup>

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<sup>3</sup> Although the Registrar is not obliged to pay any more than the loss suffered, the position was that by the time the matter had reached the court, Desperate’s entire interest in the land would have been lost as a result of the interest payment due.

<sup>4</sup> Many thanks to my colleague, Associate Professor Pam O’Connor, who has noted that: ‘although in civil proceedings the standard of proof is the balance of probabilities, the strength of the evidence that may be required to establish a particular fact may vary according to the probability that the allegation is true and the gravity of the matter. The leading statement of this principle is that of Dixon J. in *Briginshaw v Briginshaw* (1938) 30 CLR 336 at 362-3: “The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Accordingly, better evidence will be required in cases where serious allegations are made, such as fraud or other criminal or moral wrongdoing.’

The Land Registry investigated the two companies, but was unable to prove a proper link between them, except for a common directorship five years earlier. This was enough, however, to allow discovery against the bank which was used for the transactions. That discovery showed that Barracuda had received money from Shonky for the transfer, but that later there had been a set of payments for the same amount back to Shonky. At minimum Shonky was a volunteer, and thus not entitled to the protection of the Register. Although the evidence would obviously have been of considerable weight in proving fraud as well, for Desperate's, and the Registrar's purposes that was not necessary, because simply proving Shonky's volunteer status meant that the forged mortgage could be removed from title and the Registrar did not have to compensate Desperate for the loss of his interest.

If, however, they had been in a jurisdiction where the volunteer is protected from prior unregistered interests, then in order for Desperate to regain his land he would have to prove not only that Barracuda was fraudulent, but also that there was collusion between Barracuda and Shonky in the fraud and registration of the mortgage and transfer. In addition, if that jurisdiction also did not impose stamp duty on these transactions, the scene is set for some very easy and cheap churning to be done.

Now of course churning can be achieved by genuinely using purchaser protection of the Register - that is, by genuinely buying the transfer of mortgage, or genuinely paying for a property. However, I would suggest that there is no reason to extend this problem by extending the protection of registration and immediate indefeasibility of title to volunteers as well, especially as churning would be much cheaper to do if you had volunteer protection.

Some people would feel uneasy about refusing the volunteer the protection of the register, on the grounds that it would decrease confidence in the register and the efficiency and certainty of transactions in land. Yes, it does mean there is a flaw in the perfection of the efficiency of the registered land scheme; but there are already flaws like that there, and for good reason. For instance, the ability to unravel voluntary transfers of property prior to bankruptcy is a flaw in the efficiency, but is there for very good reason. The addition of the general volunteer to the list is not likely to bring the system into chaos, and it has a valuable purpose - to prevent the system *itself* being used to create fraud.

## **CONCLUSION**

Unfortunately it is not possible in the time available for me to open up the variety of ideas that we have had, and have culled from other land registration systems, as to how to address the status of the volunteer. The appendix to this paper contains a very brief outline of some of the raw thoughts that we have had. We still have much research to do before we can even hope to be able to present a "best choice". However, this is where I would like to open up the entire issue to you as colleagues, because the whole nature of this project is not to stick to old rules, not to grind old axes, but to take on board as many suggestions as possible in the hope that we can proceed to the best solution for our land registration law. So if anyone would like to contribute their ideas to this process I would be more than happy to hear from you and, obviously, give you full and appropriate credit for your thoughts in the final reports. My feeling is that we have had about 150 years of experience now - so we should be able to use that to come up with some sensible solutions to our problems!

## **APPENDIX: PRELIMINARY THOUGHTS ON SOME SOLUTIONS**

### **Give the protection of the Register to the volunteer.**

Advantages are efficiency and certainty, plus security for the volunteer from earlier equitable interests, allowing the volunteer to use and invest in the land with confidence. Disadvantages are the availability of churning, the difficulty of proving collusion in order to prove fraud in the volunteer, and also the unfairness to those with equitable interests who have them destroyed by someone who has given no value for the land.

### **Give protection to the volunteer but radically shift the onus of proof.**

Under this option the volunteer would have to bear a heavy burden of convincing a court there was no fraud/collusion, rather than the plaintiff proving that there was fraud. One disadvantage of this, however, is that it still leaves the innocent equitable interest holder without recompense if the title is transferred to an innocent volunteer.

### **Give protection to certain volunteers - i.e. those where there it is highly unlikely that fraud could be occurring.**

Here I am considering volunteers like, for example, the Trustee in Bankruptcy, Liquidators of Companies, those who are acquiring land under land acquisition schemes, people taking transfers under a court order. Anywhere where the transfer is not one that is intentionally made at a particular time is likely to be extremely safe from fraud. We could also include devisees under wills as well. This would leave the only unprotected volunteer the person who receives an *inter vivos* gift - and that is where the fraud danger lies. Advantages are clarity and certainty and safety in that you are offering protection in an area where fraud is highly unlikely. Disadvantages are that it does not address the innocent volunteer issue where the volunteer gets the title by devise. From the point of view of the equitable interest holder, it might seem rather arbitrary that their right depends on whether the owner of the land is dead or not.

### **Give protection to the volunteer but allow a person whose interest has been destroyed purely by the operation of registration a claim on the Indemnity Fund where no fraud is involved.**

This would certainly involve a change in the nature of the Indemnity Fund, which normally would not compensate a person who loses an unregistered interest due to registration of an interest. Would it be hard to justify this, but leave those whose interests are destroyed by the purchaser uncompensated?<sup>5</sup>

### **Deny protection to the volunteer.**

Under this option to volunteer cannot deny prior interests. Advantages are fairness to those with prior unprotected interests, and the fact that it probably will make it virtually impossible to use the system itself for volunteer fraud. Disadvantages are a consequential decrease in certainty of the system (although the bulk of volunteer issues are bankruptcy ones, and this

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<sup>5</sup> Many thanks to Associate Professor Pam O'Connor for this comment.

does not seem to have destroyed confidence in the register so far) and lack of certainty for the volunteer.

**Deny protection to the volunteer but allow the volunteer to claim from the Indemnity Fund where they are innocently (and I stress innocently) caught by previous unfindable interests.**

This would have the advantage of solving the innocent volunteer problem, and by denying the protection, could also solve the system fraud problem. It would place an onus on the volunteer to prove that the interest was unfindable, though, and issues may arise about the possible introduction of the old rules of notice and constructive notice into this area. However, the obvious question to ask here would be, 'why should the indemnity fund pay out to someone who has lost nothing, merely gained a gift less valuable than they expected?'

**Deny protection to the volunteer, but give them a right to be compensated for any improvements they make to the land if there is rectification of title against them.**

Would this, though, solve our cases of *Bogdanoric* and *Rasmussen* - i.e. the constructive trust over land situation?<sup>6</sup>

**Deny protection to the volunteer, but only for a certain period of time.**

For example, a time period of, say five, or ten, or more or less, years could be prescribed, following which the volunteer gains indefeasible title to the property. This would give equitable interest holders a reasonable amount of time to bring their claims and address the churning problem at the same time, yet not be as harsh on the volunteer as total lack of protection.

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<sup>6</sup> Again my thanks to Associate Professor Pam O'Connor for this compensation suggestion.