Land Fraud and Inappropriate Dealings in an Electronic Environment: An Australian and New Zealand Perspective

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Introduction

Land registration affects every citizen. This is all the more so in a Torrens regime, where the title of the registrant is protected and guaranteed by the State. Where fraud or inappropriate dealings take place, the results can be catastrophic as, in the absence of fraud; the person deriving the benefit of the registration will retain the property. In such circumstances, the hapless prior owner will be left with only a possible compensation claim against the State.[1] Those not directly affected by the fraud may still be affected. A less secure land title system may cause higher conveyancing transactional fees, higher insurance premia and detrimentally affect perceptions of the security of business transactions.[2] Thus while "Torrens protected registration" would rarely enter the lexicon of consumers, a dysfunctional conveyancing process will hit the hip pocket of every seller and buyer of land.

For all of these reasons, the importance of having a sound land registration system cannot be underestimated. In an era where cyberspace is the location most regularly visited by the people of this planet, the design of automated land registration schemes is, and should be, under the microscope. This paper aims to do that in respect New Zealand and Australia. In New Zealand, Landonline has been in place since 2003 and Australia is about to introduce the Electronic Conveyancing National Law (ECNL) to facilitate the implementation of a national electronic conveyancing system (NECS).

We propose to frame our criteria for assessing the two automated systems, Landonline, and NECS by using what we term as three "proof requirements," which we have developed for this purpose. These are tools we have created to enable an objective means for assessing the strengths and weaknesses of the two automated systems and how they measure against the manual system they replace.

Whilst imperatives for increased speed of registration, ease of access, and cost saving to practitioners, have seen an inexorable push towards automated systems, we suggest a more holistic approach is necessary. We adopt the view that any new system should at least be as safe as the manual system it replaces.

This paper takes the following format. First, we explain how we arrived at the three proof requirements and why we consider they provide a useful tool of measurement. These tools are then utilised to assess the fundamentals of the old manual Torrens system. By this discussion, we are able to conclude that changes over the last 100 or more years have debased the integrity of the three proof requirements in terms of how the manual system operated.

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[1] On what seems a technical approach to the payment of compensation, see *Solak v Registrar of Titles* [2011] VSCA 279.

[2] Rod Thomas "Reduced Torrens Protection: New Zealand Law Commission Proposal for a New Land Transfer Act" [2011] *New Zealand Law Review* 715, (Thomas, Reduced Torrens Protection) at 734.

Thus the manual system is now clearly inappropriate in terms of its operation to satisfy current demands for a sound and reliable system. The two automated systems, being Landonline and the proposed NECS are then introduced and explained in conceptual terms. Their operation is measured against the three proof requirements.

The facts of three recent examples of abuse of Torrens registration are then given. These are the Perrin and Mildenhall frauds perpetrated in Queensland and Western Australia and, for New Zealand, the facts of *Warin v Registrar-General of Land*.[3] We conclude by providing our comments on the credibility of each system, Landonline and the proposed NECS.

The three proof requirements

The three proof requirements are as follows.

Proof of:

1. identity of applicant;
2. ownership of the title interest; and
3. entitlement to deal.

Proof of identity of applicant

The person who wishes to deal with an existing interest in land needs to identify who they are. Strong argument can be made that proof of the identity of the applicant and proof of his or her ownership of the interest that is to be dealt with, are the same proof principle, being proof of title and should be considered together as one proof requirement and not two. However, it will be argued that Landonline (and potentially other automated systems) place undue reliance on proof of the identity of the intended user, at the expense of proof of ownership of the interest being dealt with.

This may be a reflection that identity fraud is currently an issue of international concern in today's automated environment. This issue extends to passports, credit cards, and other forms of identification under online systems.[4] Identity of the applicant wishing to use an automated system is obviously a key issue. However, presentation of a passport or a driver's licence issued in the name of John Smith, properly understood, is only evidence that the John Smith before you has a passport or drivers licence issued in his name. It is not by itself, best proof (or indeed any proof at all) that the John Smith before you is the same John Smith who asserts ownership of an interest he claims to have a right to deal with under an automated system.

This first proof requirement is not seen as being an inherently "Torrens related" issue. However under a deeds based system, operating before automation systems came on line, identity issues were perhaps a less complex issue. It may be that in the 19th century, this principle operated in reverse to what we face in an automated environment. Evidence that the

[3] *Warin v Registrar-General of Lands* (2008) 10 NZCPR 73 (HC).

[4] Thomas, Reduced Torrens Protection at 735 – 736.

person before you was John Smith might have been proved by the fact the person before you had possession of unique title deeds issued in the name of John Smith.

Proof of ownership of the title interest

Having established the party wishing to undertake an automated dealing is "John Smith," the issue arises as to whether John Smith is the same "John Smith" who owns the interest he or she wishes to deal with. To make the point another way, to operate a bank account opened in the name of John Smith, John Smith should have to prove the bank account is his. This is an additional requirement to producing a driver's licence proving he is John Smith.

As indicated, under a deeds based system, such a proof requirement would commonly be met by production of the most recent title deeds, evidencing an unbroken chain of provable title. However, the issue of proof of ownership provides unique challenges in the automated environment where any system is intended to operate solely "on line."

Proof of entitlement to deal

The creation of Torrens titles are an exception to the *nemo dat* principle, which provides one cannot give a better title than one has. The core fundamentals of the Torrens system replace this presumption in that registration (in the absence of fraud) gives an "indefeasible title" by State guarantee. As a reflection of this, the State conventionally provides safeguards to ensure any dealing presented was "sound," and free of defects. This is a separate issue from proof of ownership, although this third proof requirement, proof of entitlement to deal, is often not a key issue for registration. This is for the simple reason that proof of ownership is often, by itself, all the necessary proof required of an entitlement to deal.

The "entitlement to deal" category concerns issues such as whether a proposed transfer contravenes either the general law, or is prohibited by statutory enactment. In this first category may be a conveyance by a minor or other party who lacks either mental or legal capacity. Illustrations may be as a bankrupt or a trust operating in contravention to the terms of its trust deed. In the second category may be a conveyance of land set aside as a public reserve, or land that cannot legally be dealt with without some form of statutory consent process to be first undertaken as a precondition to transfer. An example of this may be a statutory prohibition against acquisition by foreign nationals of significant national assets without prior Government consent.

In both categories the transaction may be willingly undertaken by the true title owner, but the dealing will either be void or voidable at law. Further the recipient of the dealing may not be aware the voidable nature of the dealing. This has obvious significance as, by operation of standard Torrens principles, a State protected indefeasible title is given to any registrant, unless he or she is fraudulent in obtaining that registration. The dealing is therefore good; notwithstanding it offends the nemo dat principle. This has consequences both in terms of principles of general law concerning the effect of irregular transactions at law as well as causing damage where land of special vulnerability (such as reserve land) may be dealt with.

Fundamentals of the old manual system

The manual system was designed to operate in a very different environment from the one we presently face. Torrens statutes imposed from the 1860s onwards[5] created regimes focused on protecting the integrity of the "Register" by overlapping, prophylactic[6] controls.

The invention of a State protected form of title was, and to some extent surely remains, revolutionary. In exchange for the mantra of indefeasibility,[7] the State ensured protections were put in place to ensure any dealing presented for registration had integrity. With New Zealand as the illustration, but with an appreciation that most Torrens systems provided for similar requirements, we examine some of these protections, and how they related to the three proof requirements. The protections we identify were as follows.

a. Authorised witnessing being required for documents to be presented for registration;

b. Production of the outstanding duplicate of the State issued certificate of title as authority to register;

c. Certification that the dealing as "correct for the purpose of the Land Transfer Act"; and,

d. Active policing by registry staff in accepting dealings for registration against abuse of the system.

We will show that from the 1960s onwards, the integrity of these measures weakened with advances in technology, exacerbated to a considerable degree by the pioneering work of Sir Tim Berners-Lee with respect to the Internet. The world is now a much smaller place. Thus these prophylactic controls have become degraded as a real means of protecting the Register.[8] Consequentially the measures by which "Torrens" protection is made available needs to be rethought in the context of our automated environment.

The protective controls, as developed to work in the 19th century, were as follows.

a. Authorised witnessing of documents to be presented for registration.

A dealing presented for registration was required to be witnessed by an authorised witness whose witnessing was a certification to the Registry of the identity of the signatory.[9] In many

[5] The *Real Property Act 1857-1858* (South Australia), as amended between 1858 and 1861.

[6] The Torrens system may not previously have been thought of in this way. In Equity, given the vulnerability of a beneficiary to a breach by a fiduciary a Court of Equity has traditionally imposed over protective measures to over police against possible breaches. See *Keech v Sandford* [1726] EWHC Ch J76.

[7] "The cardinal principle of the statute is that the Register is everything:" *Fels v Knowles* (1906) 26 NZLR 604, 620.

[8] John Greenwood and Tim Jones "Automation of the Register: Issues Impacting on the Integrity of the Title" in D Grinlinton (ed), *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) 323.

[9] *Land Transfer Act 1952* (NZ), ss 157 – 160. Section 159 sets out questions a Registrar was entitled to require from a witness. Section 159(1)(b) was a certification that the witness "personally [knew] the person signing this instrument and whose name [was] attested."

registries, the class of acceptable witnesses was limited.[10] An oath or statutory declaration was required from any witness, who did not belong to this authorised class.[11] This enabled the Registrar to call on the witness when there were queries regarding the identity of the applicant or queries regarding the proper execution of the document.[12]

When Torrens was set up, this was seen to be a tangible form of protection of the first proof requirement, proof of identity of the applicant. An authorised witness, being a solicitor or bank officer would be taken to have acted responsibly. He or she would satisfy themselves as to the identity of the person executing the document, and this knowledge may even have extended to the second proof requirement, knowledge of ownership of land or interest. The witnessing of instruments to be presented for registration certainly extended to the third proof requirement, entitlement to deal. In this regard a witness could be called upon to certify the signatory of the document was "of sound mind" and "freely and voluntarily [signed] the [instrument to be registered].[13]

Over time, this proof requirement became debased. Increased commercial activities and diversity of land ownership placed stresses on assumptions that the witness would have the necessary knowledge of the signatory. This inevitably reduced the value of this form of protection to the extent registries have now dispensed with the need for an authorised witnesses.[14]

b. Production of the outstanding duplicate title.

Under the manual system, production of the outstanding duplicate of the Torrens issued title was conclusive proof in legal proceedings in "all Courts of law and equity as evidence of the particulars therein set forth [and as] conclusive evidence [of ownership]."[15] This is the second proof requirement, proof of ownership of the land.

The outstanding duplicate also went some significant way to act as proof of an entitlement to deal, the third proof requirement. A dealing with any title interest could not be accepted for registration without production of the outstanding duplicate title.[16] Thus a first mortgagee would, as part of the security, be entitled, under the legislation to possession of the outstanding duplicate title.[17] This gave some element of control over the secured land, as no dealing could be processed for registration by the Registry without that document being produced. As a reflection of the importance of the outstanding duplicate title, a somewhat

[10] E C Adams, *The Land Transfer Act 1952* (2nd ed, Butterworths, Wellington, 1971) (Adams) at [446] and [448]. Justices of the Peace, Solicitors, Clergymen, Land Brokers, Postmasters, Law Clerks, a Land Transfer Officer of other person "of good repute whose signature [was] known in the Land Transfer office."

[11] *Land Transfer Act 1952* (NZ), s 158.

[12] *Land Transfer Act 1952* (NZ), s 158.

[13] *Land Transfer Act 1952* (NZ), s 159(1)(c).

[14] Indeed, prior to Landonline being introduced in its fully automated form, the need for authorised witnesses to any land transfer dealing was dispensed with: *Land Transfer Regulations 2002* (NZ), Sch 2, Form 26.

[15] *Land Transfer Act 1952* (NZ), s 75. The section goes on to provide that this proof could be overturned by production of a certified copy if the register, if the certified copy was different on content. See Adams at [111].

[16] *Land Transfer Regulations 1966*, reg 18 (now abolished). *See the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002* (NZ), s 18.

[17] *Land Transfer Act 1952*, (NZ) s 109

onerous procedure had to be undertaken in order to obtain a fresh outstanding duplicate if the original was lost.[18]

Further, under the deeds system, the mere possession of title deeds could be construed as the evidencing the creation of an equitable charge or mortgage security over the land.[19] This concept translated under the Torrens system as enabling a pledge of the outstanding duplicate to be made until payment of a debt that was due.[20]

However, the introduction of photocopiers into commercial office use from the 1960s on steadily diminished the relevance of the outstanding duplicate both as evidence of ownership and as evidence of an entitlement to deal. Photocopiers enabled an exact copy of the duplicate or Register original of the title to be made. Any number of exact images could be in circulation at any time, reducing the value of possession of the original. This also increased the possibility of a fraudulent copy being made of the duplicate, which could then be presented to the registrar as an authority to register a dealing.[21] This risk exacerbated following the advent of personal computers with the ability to scan exact copies of documents.[22] Thus the credibility of physical possession of the outstanding duplicate was reduced to consideration of issues such as the quality of paper or the colour of ink used on by Registry staff, or in more recent times, imbedding authentication codes into the outstanding duplicate, or by attaching thermochromic icons.[23]

c. Certification that the dealing as "correct for the purpose of the Land Transfer Act"

In New Zealand, certification that "the dealing is correct for the purposes of the Land Transfer Act"[24] was signed by either the solicitor for the transferee, or the party taking the benefit. As conceived, this was intended to act as some form of certification of the third proof requirement, "entitlement to deal." Whilst this can be criticised as placing the onus on the wrong party,[25] at least in principle, it created some element of control by providing an

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[18] *Land Transfer Act 1952* (NZ), s 87.

[19] P V Baker and P St J Langan, *Snell's Equity* (29th ed, Sweet and Maxwell, London, 1990) at 46. For example *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546. This is given statutory recognition in Qld, *Land Title Act 1994* (Qld), s 75; NT, *Land Title Act 2000* (NT), s 77, and SA, *Real Property Act 1886* (SA), s 149.

[20] This was a form of security, but fell short of being a mortgage. Section 77 of the *Property Law Act 1952* and its predecessor prohibited the creation of an equitable mortgage by deposit of title deeds. See G W Hinde, D W McMorland and P B A Sim, *Land Law*, vol 2 (Butterworths, Wellington, 1979) at [8.009].

[21] Robbie Muir "Electronic Registration: The Legislative Scheme and Implications for the Torrens System in New Zealand" in D Grinlinton (ed), *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) 311, 317 and 318.

[22] John Greenwood and Tim Jones "Automation of the Register: Issues Impacting on the Integrity of the Title" in D Grinlinton (ed), *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) 323, 340.

[23] To the authors' knowledge, New South Wales is the only State in Australia that currently issues a Certificate of Title that incorporates a unique Certificate Authentication Code (CAC), which is a randomly generated number. The CAC Certificate of Title was introduced on 1 January 2004. The CAC Certificate of Title can therefore be remotely verified by the NSW Land Registry using a one-way encrypted record of the Certificate Authentication Code at the Registry: NSW Land Registry, *Certificate of Title Solution for Concurrent Electronic and Paper-based Conveyancing*, 5 March 2010, [2] & p24 (report prepared by Clayton Utz). In the other Australian jurisdictions, the certificates of title issued may incorporate certain security features such as a watermark, trust seal, thermochromic icon and control number but not a Certificate Authentication Code: Landgate, Certificate of Title,< http://www.landgate.wa.gov.au/docvault.nsf/web/Certificate-Title-DL/$FILE/Certificate-Title-DL.pdf> accessed 22 May 2012.

[24] *Land Transfer Act 1952* (NZ), s 164.

[25] The party deriving the benefit may not know of any irregularity in the dealing by the applicant, or whether the dealing is either void or voidable at law, being in contravention to either the general law or statute. As stated by Adams at para [102]. "If … The solicitor for the proposed transferee or mortgagee knows that the registered proprietor as an infant or is under some other legal disability, or has good reason to suspect that he is an infant or under some other legal disability, then he should not go on with the proposed transaction: in such circumstances he could not conscientiously signed a certificate of

undertaking to the registrar that the dealing was correct for acceptance. However, the significance of the certificate was never fully understood, as illustrated by the fact that there no known convictions of any party giving an incorrect certification, nor any known civil claim by the Crown against the certifier.[26] On reflection, this may be because the other prophylactic protections we have identified in this paper, collectively proved adequate protection concerning entitlement to deal.

Prior to the introduction of Landonline, the New Zealand Registrar-General of Lands commissioned a paper identifying the relevance of the certification, by Brian Hayes, a former Registrar General.[27] The ambiguities inherent in the certification become evident from this paper, which suggests following the acceptance of immediate indefeasibility "a certificate of correctness [did not] now itself [constitute] an arbiter of anything essential"[28] and further, post the acceptance of the concept of immediate indefeasibility[29] it was "no longer a determinant in the process of registration."[30]

d. Active policing against abuse of the system by registry staff.

Under the various Torrens enactments, the Registrar was invariably charged with policing the registration system to ensure against abuse.[31] It was:[32]

> "the Registrar's duty to refuse to register any instrument which ex facie [was] invalid, or where there [was] prima facie evidence of fraud or improper dealing. Thus, if the instrument appear[ed] to be in contravention of statute law, he should not [have] register[ed] it. The Registrar [was] supposed to know the statute law, and he [could not] ignore the records in his office".

This obligation extend to policing contravention of various statutory enactments, protecting the Register against casually or ineptly prepared documentation and ensuring titles did not issue in contravention of local body subdivision constraints.[33] In effect, this extended to an overview of compliance concerning all three proof requirements; identity of the interest holder, proof of ownership, as well as policing any entitlement to deal.

In undertaking this function, the Registrar was perceived to be fulfilling a quasi-judicial role,[34] with the ability to query registration and, in some instances, overturn registration.[35]

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correctness required of s 164 of the Land Transfer Act 1952 which is guaranteed to all the world that the transaction is bona fide and above board."

[26] The penalty on conviction was, on any account, exceptionally modest. It was and is $100.

[27] B E Hayes, The Certificate of Correctness under the Land Transfer Act (Land Information New Zealand, Information Paper 2000/01, edited April-May 2006) (Hayes paper). This can be found at http://www.linz.govt.nz/docs/titles-and-records/rgl-publications/certificate-of-correctness.pdf.

[28] Hayes paper at 21.

[29] *Fraser v Walker* [1967] NZLR 1069 (PC).

[30] Hayes paper at 23.

[31] *Land Transfer Act 1952* (NZ), s 211(d).

[32] Adams at [7].

[33] See a more extensive discussion by Adams [7], [597], [598] and [600]. See also *Land Transfer Regulations 1966*, reg 8.

[34] Decisions of the Registrar were and are still appealable directly to the High Court. *Land Transfer Act 1952* (NZ), ss 216 – 221. See discussion in David Grinlinton, "The Registrar's Power of Correction" in David Grinlinton (ed), *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) 217, 228 and 239 – 240.

[35] *Land Transfer Act 1952* (NZ), ss 80 and 81. The power to overturn registration under s 81 extended, and still does, to any entry that has been "fraudulently or wrongfully obtained, wars fraudulently or wrongly retained… ".

Where the Registrar was concerned the Register may be at risk, he or she was empowered to place a registrar's caveat on the title, "freezing" a title pending the anomaly being resolved.[36]

Given this policing role, achieving registration could prove problematic. The purchaser will have paid over the purchase price at "settlement" (not a term envisaged under the original Torrens precepts as having a separate identity free from registration).[37] Registration still had to be achieved. Pending this occurring, the purchaser remained vulnerable to possible third-party claims.[38] A combination of a backlog of registration and overzealous protection of the Register by staff could result in significant gaps occurring between settlement and registration.[39]

Such delays were never conceived under the intended operation of the Torrens System. This disparity could only get worse with increased frequency and complexity of commercial transactions, ultimately having an adverse effect on the credibility of the Register as reflecting current land ownership. In New Zealand, the gap between settlement and registration were such that the legislature was forced to introduce the concept of a "guaranteed search"[40] being obtained by the registrant before settlement which protected his or her risk against any third party dealing, by providing compensation if the registration was then defeated.

The notoriety of delays in registration being achieved has been a clear driver for the development of an automated Register.[41] However, much dialogue has emphasised the benefits of automation in terms of increase speed of registration, cost savings and ready access to the Register.[42] By contrast, continued issues of integrity of the Register have not received the same prominence.[43]

In summary, we table the performance of the old manual system against the three proof requirements as follows:

Proof Requirements	Protections in the old manual system
Identity of applicant	Authorised witnessing of documents presented for registration, certification by the party taking the benefit, and policing by Registry staff

[36] *Land Transfer Act 1952* (NZ), s 211(d). This power to lodge a caveat extends to "the protection of any person who is under the disability of infancy or unsoundness of mind or is absent from New Zealand … and also to prohibit the dealing with any land … and which it appears to him that an error has been made by misdescription of the land or otherwise in a certificate of title or any other instruments, or for the prevention of any fraud or improper dealing."

[37] Rod Thomas, "Land Transfer Fraud and Unregistered Interests" [1994] *NZ Recent Law Review* 218.

[38] For example see *Jacobs v Platt Nominees* [1990] VR 146.

[39] Rod Thomas, "Land Transfer Fraud and Unregistered Interests" [1994] *NS Recent Law Review* 218, 231. In *IAC (Finance of Ltd v Courtney* (1962 – 1963) 110 CLR 550, 580 (HCA) the delay was up to 12 months.

[40] *Land Transfer Act 1952* (NZ), s 172A.

[41] John Greenwood and Tim Jones, "Automation of the Register: Issues Impacting on the Integrity of the Title" in D Grinlinton (ed), *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) 323.

[42] Robbie Muir, "Electronic Registration: The Legislative Scheme and Implications for the Torrens System in New Zealand" in D Grinlinton (ed) *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington 2003) 311 reflects as follows. "The ability to electronically lodge and instantly register title transactions will revolutionise conveyancing practice." See also LawTalk, no 627 (NZ Law Society 28 June 2004).

[43] Rod Thomas, "Fraud, risk and the automated register" in D Grinlinton (ed) *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington 2003); Benito Arrunada, "Leaky Title Syndrome" [2010] *New Zealand Law Journal* 115; Thomas "Reduced Torrens Protection.

Proof of ownership	Authorised witnessing; production of the outstanding duplicate, certification by the party taking the benefit, and policing by Registry staff
Entitlement to deal	Authorised witnessing of documents, production of the outstanding duplicate, certification by the party taking the benefit and policing by Registry staff

Automated systems

a. Landonline

Landonline was introduced in 2003.[44] The need for an outstanding duplicate title, and indeed the production of any paper instruments in the registration process are dispensed with under this automated system.[45] The Registry is a virtual Registry, accessed by "conveyancers" who are licensed by the Registrar General to operate the system, for most dealings, without intervention from the registry staff.[46] Indeed, it is mandatory for conveyancers to use the automated system, even though the manual system still exists for individuals undertaking their own conveyancing.[47]

A conveyancer may therefore transfer or deal with most routine title interests without the intervention or involvement of a third party.[48] The registration will be successful providing the transferee is not found guilty of land transfer fraud, and no *in personam* rights exists as between the transferor and the transferee.[49] Thus the transferee obtains good title against the world.

Given the automated process, the Registry relies on a certification and indemnification by the "conveyancer" that the dealing is appropriate for registration.[50] This goes to all three of the three proof requirements; identity of the interest holder, proof of ownership of land and entitlement to deal.

To facilitate this 164A(3), of the *Land Transfer Act 1952* was enacted in the following terms.

Section 164A(3)provides:

> Certifications must specify that—

[44] Tom Bennion and others, *New Zealand Land Law* (2nd ed, Thomson Reuters, Wellington, 2009) (Bennion and Others) at [3.1].

[45] Ibid at [3.4.02].

[46] There is provision for some dealings to "step down" from "auto reg" to "lodge." Some dealings ware always set at "lodge," such as caveats, or dealings required facilitating a subdivision. The documents for these dealings are scanned and emailed to the Registry who then processes them for registration. See Appendix C, e-dealing User Guide v3.3.37 at 233. This is found at http://www.landonline.govt.nz/edealing/training-resources/user-guide.

[47] Bennion and Others at [3.4]. Dealings lodged by the paper system have to be submitted by post. Thus a disparity is created with automated registration which is "instantaneous."

[48] See Rod Thomas "Fraud, Risk and the Automated Register" in D Grinlinton (ed), *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) 349, 355.

[49] Ibid.

[50] John Greenwood and Tim Jones "Automation of the Register: Issues Impacting on the Integrity of the Title" in D Grinlinton (ed), *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) 323, 330.

(a) *the person giving the certification has authority to act* for the party specified in regulations in relation to that class of instrument *and that party has legal capacity to give such authority*; and

(b) the person giving the certification has taken reasonable steps to *confirm the identity of the person* who gave the authority to act; and

(c) the instrument complies with *any statutory requirements specified by the Registrar for that class of instrument*; and

(d) the person giving the certification has evidence showing the truth of the certifications in paragraphs (a) to (c) and that the evidence will be retained for the period prescribed for the purpose by regulations made under this Act.

(emphasis added)

It is argued that these certifications only indirectly deal with the second proof requirement, proof of ownership of the title interest. This remains the case, notwithstanding earlier academic criticism in this regard.[51] In this regard the certifications patently deal with two of the three proof requirements. These are proof of identity of the applicant (s164A(3)(b)) and the third requirement, proof of entitlement to deal (s164A(3)(c)).

First proof requirement

The requirement to "*confirm the identity of the person* who gave the authority to act" (s164A(3)(b)) is satisfied by compliance with the Registrar General's published *Standard for Verification* [52] supported by the New Zealand Law Society *E-Dealing Guidelines*.[53] Under both this is satisfied for "routine transactions" by production of a driver's licence or passport, or other such identification, and for "high risk transactions," more onerous requirements must be satisfied.[54] For overseas clients, a conveyancer is entitled to have identity "carried out by a delegate" who "must be an independent trusted person who the practitioner can reasonably rely on."[55] For overseas parties, this may be a notary public in the relevant jurisdiction.[56]

Second proof requirement

Section164A does not require an express undertaking be given that the party purporting to undertake a dealing, owns the land or title interest being dealt with. It may be arguable s164A(3)(a) impliedly does this, by providing the "person giving the certification has authority to act for the party specified in regulations in relation to that class of instrument". The "specified party" would then be that party identified by reference to the terms "The

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[51] Rod Thomas "Fraud, Risk and the Automated Register" in D Grinlinton (ed), *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) 349, 364.

[52] *Standard for Verification of identity for registration under the Land Transfer Act 1952* (Land Information New Zealand, LINZ20002, 11 February 2011) (*Standard for Verification*). This is found at http://www.linz.govt.nz/sites/default/files/document/20002-Verification%20of%20identity%20for%20registration%20under%20the%20Land%20Transfer%20Act%201952%20-%20LINZS20002%20.pdf. The standards focus on identification rather than proof of ownership of a title interest. If the practitioner does not have personal knowledge of the "landowner" or the transaction is "high risk" para 5.1 of the Standard for Verification applies. This appears to have no statutory effect, but is intended for guidance purposes.

[53] *E-Dealing Guidelines* (Property Law Section, New Zealand Law Society, October 2008 (*E-Dealing Guidelines).*

[54] *Standard for Verification* at [5]; E-Dealing Guidelines [J].

[55] *Standard for Verification* at 13: "General Requirements for practitioners; delegating verification of identity (a)"

[56] Ibid at (c).

transferor," "The grantor" and so on set out in the relevant regulations.[57] The party asserting to the conveyancer as being that relevant transferor or grantor, as the case may be, would therefore impliedly be representing he or she owned the necessary title interest. By this indirect linkage, the certification required by s164A(3)(a) is made to the applicable party purporting to have an interest in land.

Such latent ambiguities are unfortunate. If a conveyancer is to be required to certify as to any party's ownership of a title interest there is strong argument the certification should be clear and unambiguous. The effect of the certification, in clear wording, should expressly be brought to the notice of the party providing the certification.

Instead the Registrar General's *Standard for Verification* and the *E-Dealings Guidelines* (neither of which appear to have a statutory basis) set out what an acceptable form of proof of ownership will be.[58] In this regard, production to the conveyancer of a local body rates notice, bank statement or utilities account addressed to the client at the property is stated as providing acceptable proof of the client's link to the property to be dealt with.[59]

The issue with such documents is not one of "best proof," but whether any of these can be relied upon as proof of anything, let alone title ownership. In the New Zealand, local body rates notices, power accounts and bank statements are electronically produced.[60] Even if the document produced was origional, it could have been intercepted in the mail. Alternately, it could have "factored together" by various means to create some form of approximate documentation convincingly giving the appearance of being an origional. In an automated environment where the outstanding duplicate is no longer reliable proof of ownership, how can this be credible?[61]

A "high risk" transaction is where the client is not known to the conveyancer and is transferring unencumbered land.[62] In such circumstances the practitioner should undertake further steps including checking the historical view of the register to identify any discrepenacies in the age of the client against the length of period the land has been owned, contacting the owner using independantly obtaining information, or undertaking "other independent corroberation".[63]

Third proof requirement

[57] *Land Transfer Regulations 2002*, Part 3, Certification and execution of instruments".

[58] The *E-Dealing Guidelines* note "[a]s there is no longer a duplicate Certificate of Title the lawyer ought to consider obtaining evidence linking the client whose ID has been established with the property in the case of sale and/or mortgage transactions:" *E-Dealing Guidelines* at 14.

[59] *E-Dealing Guidelines* at 15. See also the *Standard for Verification* at [4.1(a)(ii)].

[60] In New Zealand, local body rates are normally payable by the owner or lessee of the property: *Local Government (Rating) Act 2002*, ss 11, 12.

[61] Under any automated title system it may be possible to create some form of unique identifier PIN number to be presented to the Registry as authorisation of ownership. This would go to all three proof requirements, identity, ownership and (to some extent) entitlement to deal. It would reduce the risk of improper dealings to those who have knowledge of the PIN number. See generally, Benito Arrunada "Leaky Title Syndrome" [2010] *New Zealand Law Journal* 115.

[62] *Standard for Verification* at [5].

[63] *Standard for Verification* at [5.2]. The Standard states the protective measures are straight forward. At 18 the directive continues as follows: "There is no intention that practitioners are expected to go to unreasonable links to confirm client identity."

In respect of the third proof requirement, entitlement to deal, s164A(3)(a)) requires the person providing the certification undertakes the person he or she acts for "*has legal capacity to give such authority"*. Again, does this relate to the capacity of the client giving the instructions, or does this extend to ensuring that client owns the title interest he or she seeks to convey, and has the legal capacity to convey it? The *E-Dealings Guidelines* then require practitioners to be satisfied the client has legal competence and capacity.[64]

The issue of proof of entitlement to deal extends to aspects of policing the Register from abuse. However, under Landonline, this is the responsibility of conveyancers. It is perhaps one of the least satisfactory aspects of Landonline. By gazette notice[65] the Registrar General has published some 23 different statutory provisions that need to be complied with by conveyancers in certifying the dealing may be accepted for automated registration. This "off line" certification comes within the terms of s 164A(3)(c) as "statutory requirements *specified by the Registrar for that class of instrument*".

Given the potential complexity of the 23 provisions, they are only identified in this paper by their subject matter. They extend to:

- the *Burial and Cremation Act 1964*;
- the *Housing Act 1955*;
- transfers of registered licenses under the *Land Transfer Act 1952*;
- public reserve land under s 129(5) of the *Land Transfer Act 1952*;
- the *Maori Housing Amendment Act 1938*;
- the *Maori Purposes Act 1970*;
- the *Maori Purposes Act 1991*;
- the *Maori Purposes Act 1993*;
- the *Maori Reserved Land Act 1955*;
- the *Maori Reserved Land Amendment Act 1997*;
- the *Te Ture Whenua Maori Act 1993*;
- the *Mining Tenures Registration Act 1962*;
- the *New Zealand Railways Corporation Restructuring Act 1990*;
- the *Otago Regional Council (Kuriwao Endowment Lands) Act 1994*;
- the *Public Bodies Leases Act 1969*; and
- the *Reserves Act 1977*.

It should be noted that many of these statutes seek to protect land of special sensitivity or vulnerability where dealings with the land without the required consents would, at law, be a void or voidable transaction – but nevertheless give valid title (in the absence of purchaser fraud) under standard Torrens principles.[66]

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[64] *E-Dealing Guidelines*, [I], and [M]. Such evidence is retained by the solicitor "off line." It is not made part of the registration process.

[65] See "Statutory Requirements, Forms of Electronic Instruments, and Requirements for the Retention of Evidence" *Supplement to New Zealand Gazette* MO No 144/08(26 September 2008). See http://www.landonline.govt.nz/sites/default/files/edealing/regulatory-info-guidelines/RGL_gazette_notice_sep_2008.pdf

[66] New Zealand Law Commission, *Review of the Land Transfer Act 1952*, at [13.91] makes it clear that the e-dealing system relies upon certifications given by conveyancers. See also [13.79(c)] and [13.100] and following: such "evidence" is retained on the file of the conveyancer, and is not sighted by the registry staff. In time, after the event, it may be subject to an audit regime.

In the absence of any registry checks before acceptance for registration, the breadth of these certifications is understandable. The Registrar-General has termed all the certifications a "vital step" in terms of undertaking registration.[67] In giving these undertaking, commentators have correctly identified conveyancers now "become de facto Registrar-Generals of Land or guardians of the integrity of the Register".[68]

However it is somewhat concerning these gazetted provisions (which may alter from time to time)[69] are not individually listed on Landonline and explained to conveyancers in terms of providing the necessary certification. For many conveyancers, the various legislative provisions are not commonly known or understood in terms of their operation. Their application requires a level of understanding previously within the institutional knowledge of the Registry staff in operating the old, manual system.[70] Surely Landonline should itemise the various statutory provisions, explain their operation, and require they be individually certified by the conveyancer as having no application to the registration being undertaken?

Issues of transference of risk

The transference of risk to conveyancers regarding the operation of Landonline is not widely understood.[71] The prophylactic protections and controls of the old manual system (including the role of the registry staff in auditing and checking compliance) which provided a protective, overlying mantle, on the registration process, are no longer in place. To suggest (as has been the case) that the certification "[is] no more onerous than [the paper system]" [72] overlooks the fact that there was clear ambiguity (if not some confusion) as to what that prior certification pertained to. It also bypasses the frank acknowledgment made prior to the introduction of Landonline that the certificate became only an issue of secondary importance (in New Zealand at least) following the adoption of the concept of immediate indefeasibility.[73]

Indeed, the New Zealand Registrar General has been recorded as stating he no longer wishes his powers of correction to be extensive, leading the New Zealand Law Commission to recommend they be reduced in scope.[74] However, there is no doubt that the possibility for

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[67] T Bennion and Others, [3.4.06]

[68] John Greenwood and Tim Jones "Automation of the Register: Issues Impacting on the Integrity of the Title" in D Grinlinton (ed), *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) 323, 330.

[69] The original list was gazetted in 2002. See Rod Thomas "Fraud, risk and the automated register" in D Grinlinton (ed), *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) at 364.

[70] One of the authors was previously a legal officer in the Land Registry Office. The office retained comprehensive files dealing with the application of various statutes to difficult areas of registration. These files would be considered from time to time when difficult registration issues occurred.

[71] See Rod Thomas "Fraud, Risk and the Automated Register" in D Grinlinton (ed), *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003), 349, 363.

[72] John Greenwood and Tim Jones "Automation of the Register: Issues Impacting on the Integrity of the Title" in D Grinlinton (ed), *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) 323, 335 and 335. See also T Bennion and others at [3.4.06]. Robbie Muir "Electronic Registration: The Legislative Scheme and Implications for the Torrens System in New Zealand" in D Grinlinton (ed), *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) 311, 319.

[73] It is telling that post introduction of *Landonline* in New Zealand, conveyancers were prohibited from using the manual system that still exists for private conveyancing. This requirement was, no doubt, to ensure the new system, with its more onerous certification requirements was well supported by conveyancers and would succeed. See T Bennion and Others at [3.4.01].

[74] To administrative powers only. See the New Zealand Law Commission, *A New Land Transfer Act* (Report 116, Wellington, June 2010) at [2.49].

some policing function may still remain. As from March 2012,[75] Land Information New Zealand (LINZ)[76] has indicated that any known Maori land issued with a Torrens title will progressively be flagged on Landonline as requiring a manual check by registry staff before acceptance. Whilst this is obviously a step in the right direction, it applies only to know Maori land.[77] Although it appears possible other title interests of vulnerability could also be flagged for manual registration,[78] one may speculate that if vulnerable land in terms of the identified 23 statutory undertakings were dealt with in this way, much of the cost savings and speed obtained through automated registration (which is a key benefit of Landonline) will be lost.[79]

In closing on Landonline, it is of interest that the New Zealand Law Commission has proposed a provision be enacted enabling the High Court to overturn void or voidable registration where it has caused a "manifest injustice."[80] Although not expressed by the Law Commission in such terms, if the Register is less secure than was previously the case, some form of redress may be desirable to balance any inappropriate registration accepted for registration by Landonline.[81]

b. Australia: NECS

In Australia, establishing a national electronic conveyancing system (NECS) is an initiative of the Council of Australian Governments (COAG) National Partnership Agreement for a Seamless National Economy.[82] The National E-Conveyancing Development Limited (NECDL) is a company set up in early 2010 to develop National Electronic Conveyancing platform, for use by all the Australian States on the understanding a national standard of electronic conveyancing is desirable for economic benefits.[83]

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[75] LINZ has announced release 3.7 for its Landonline is due to be released on 19 March 2012. This will include a "flagging" of titles at the search stage, identified as potentially having the status of Maori land. See http://my.lawsociety.org.nz/news/landonline_says_new_release_on_schedule. The announcement also states, "[A]dditional validations will be run on corporate and individual name fields to reduce the incidence of common errors. This is aimed at improving data quality and providing more accurate matching when searching using the name fields. A&I forms will also display correct names as a result of the validations".

[76] LINZ is the New Zealand Government department responsible for the land registry.

[77] The New Zealand Law Commission considered the issue problematic and needed to be addressed by further investigation. The Law Commission noted that since it had initially looked at this issue, records of Maori Land would not, in the future, be registered automatically by Landonline. Instead, on attempting registration, the dealing would step down from "auto registration" to "lodge." This would mean that the dealing would only be registered after first being examined by Registry staff. Law Commission Report at para 6.12.

[78] The Land Registry Office has a list of some "30 Step Down Reasons" why registration would step down from "auto reg" to manual processing. The list concerns issues such as spelling discrepancies, presentation of wrong forms or internal inconsistencies being discovered in presented documentation identified by Landonline during the registration process.

[79] It should be noted that the New Zealand Law Commission has proposed a new *Land Transfer Act*, which, if enacted, would enable the High Court to overturn registration if to allow registration to continue would allow a manifest injustice to occur.

[80] New Zealand Law Commission, *A New Land Transfer Act* (Report 116, Wellington, June 2010), 82 and 216.

[81] Thomas, Reduced Torrens Protection at 744.

[82] ARNECC, Proposed Electronic Conveyancing National Law Exposure Draft, 30 March 2012, accessed 3 May 2012, <http://www.arnecc.gov.au/publications>

[83] NECDL is a company limited by shares and is majority Government owned. The original members were New South Wales, Queensland and Victoria, with Western Australia subsequently becoming a member. States that are not members of NECDL can still use the National Electronic System by authorising NECDL to operate an electronic lodgement network in

The NECDL Electronic Lodgement Network (ELN) is a result of this joint endeavour between the States. It will provide a web based hub for parties to a conveyancing transaction to electronically prepare and settle the transaction and to lodge electronically the transaction for registration at the relevant land registry, on a "trans State" basis.[84] This system will only be available to registered subscribers[85], such as lawyers, conveyancers, and financial institutions.[86]

To give effect to this, the Australian Registrars' National Electronic Conveyancing Council (ARNECC) was established to facilitate implementation and ongoing management of the necessary regulatory framework for the national electronic conveyancing system.[87] The central piece in the regulatory framework to support NECS is the Electronic Conveyancing National Law (ECNL). This is therefore the main point of focus, in being the provider of the intended regulatory framework between the Australian States for automated land registration to occur. At the time of writing this paper, the first draft of ECNL has been released.[88]

Unlike Landonline, there is no intention to enable a fully automated register. On automated submission of the documents, the Registrar must still process the dealing for registration.[89]

First proof requirement

The Model Participation Rules support the ECNL.[90] Clause 6.5 of the Model Participation Rules requires the Subscriber to comply with the Verification of Identity Rules.[91] This is simply to ensure the person who asserts a right to deal is who they say they are. In support of this, the subscriber must exercise due care, skill and diligence in its conduct of conveyancing transactions (clause 6.8). Schedule 8 of the Participation Rules then provides the mechanics of how identity is to be verified.

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that jurisdiction. See: ARNECC, Proposed Electronic Conveyancing National Law Discussion Paper, <http://www.arnecc.gov.au/publications. The NECDL website: http://www.nationaleconveyancing.com.au/

[84] ARNECC, Proposed Electronic Conveyancing National Law Discussion Paper, <http://www.arnecc.gov.au/publications. The ELN is defined in the ECNL as 'an electronic system that enables the lodging of registry instruments and other documents in electronic form for the purposes of the land titles legislation' and that 'an ELN may also enable the preparation of registry instruments and other documents in electronic form for lodging under the land titles legislation': s13 ECNL.

[85] This is defined in the ECNL in s3 as 'a person who is authorised under a participation agreement to use an ELN to complete conveyancing transactions on behalf of another person or on their own behalf.

[86] The electronic conveyancing system will not be available to members of the public unless they are represented by a Subscriber: ARNECC, *Proposed National Electronic Conveyancing National Law Exposure Draft*, 30 March 2012.

[87] ARNECC, *Proposed Electronic Conveyancing National Law Exposure Draft*, 30 March 2012.

[88] ARNECC, *Proposed Electronic Conveyancing National Law Exposure Draft*, 30 March 2012. The proposal is for ECNL to be introduced as a National applied law scheme where it will be introduced first in the host jurisdiction, New South Wales, after which the remaining States and Territories will follow by enacting legislation in their respective jurisdictions applying the ECNL as a law to those jurisdictions or enacting legislation closely mirroring the ECNL. ARNECC anticipates the ECNL Bill to be introduced into the NSW Parliament in the 3rd quarter of 2012.

[89] Section 8 ECNL.

[90] Section 23 ECNL provides that the Registrar in each jurisdiction the power to determine participation rules which will apply to the Subscribers. To ensure national consistency, s24 ECNL requires the Registrars to have regard to Model Participation Rules developed by ARNECC. At the time of writing, ARNECC had released the first draft of the Model Participation Rules.

[91] There is no parallel in Australia to this in terms of paper-based conveyancing.

The requirements in Schedule 8 are more onerous that the well-known 100 point test to open a bank account. Clause 1 requires the Subscriber to verify identity of each Client Party or each of their Client Party Representatives that the Subscriber intends to represent. Further, if the Subscriber is a mortgagee or represents a mortgagee, where a mortgage or discharge of mortgage is given, the Subscriber must verify the identity of each mortgagor (cl 1). Where the Subscriber is a mortgagee the verification of identity must be performed at or before the signing of the completed mortgage (cl 2). In all other cases, verification of identity must be performed at or before the signing of the Client Authorisation[92] (cl 2). A face-to-face interview is required (Sch 8, cl. 3), with the subscriber satisfied that the client has the same facial characteristics[93] as depicted in any photographic evidence (Sch. 8, cl 3.2).

Five categories of documents are put forward as evidence of identity, with the Subscriber required to show that the earlier categories are unavailable before proceeding to the subsequent category. For example, category 1 provides minimum documents of an Australian passport, plus an Australian driver's licence, photo card or proof of age card, plus change of name or marriage certificate if necessary. Category 5, which directly relates to verification conducted overseas, requires a foreign passport, plus full birth certificate, plus another form of government issued identity document plus change of name or marriage certificate if necessary.

The Rules currently do not specify the class of persons who can verify identity for overseas verification of identity.[94] The Rules do specify that the Subscriber may use an Agent to verify the identity of a person and any Identifier (Sch 8, cl 9). Thus presumably for overseas verification, the Subscriber in Australia would use an Agent overseas. However if this occurs, the Subscriber must accept all liability for any loss caused or contributed to by the Agent not having conducted the verification of identity in accordance with the Rules (Sch 8, cl 9).

Finally on the issue of the first proof requirement, the Rules provide that the subscriber need not verify identity if the client has been known for at least 12 months, or where client identification was done in the last 24 months, or where the subscriber, being an APRA approved organisation has verified identity in light of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006.* Critically however, if the subscriber relies on this exemption, then the Subscriber must accept all liability for any loss caused or contributed to by the fail to verify identity (cl 11).

Second and third proof requirement

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[92] A 'Client Authorisation' is a document by which a party to a conveyancing transaction authorizes a subscriber to do one or more things on that party's behalf in connection with the transaction so that the transaction, or part of that transaction, can be completed electronically: s10 ECNL. Also see cl 6.3 Model Participation Rules.

[93] 'Facial characteristics' is not defined in the Model Participation Rules. However in the Western Australia Registrar and Commissioner of Titles Joint Practice on Verification of Identity, 'facial characteristics' is explained as 'the shape of the mouth, nose, eyes and the position of the cheek bones rather than the colour and cut of a person's hair or makeup used': Western Australian Government, *Registrar and Commissioner of Titles Joint Practice, Verification of Identity Consultation Draft,* 12 March 2012, p2.

[94] Contrast this to the WA Joint Practice on Verification of Identity, which propose that Australian Consular Officers are the only persons that may verify identity outside of Australia: Western Australian Government, *Registrar and Commissioner of Titles Joint Practice, Verification of Identity Consultation Draft,* 12 March 2012, p4.

In terms of the second and third proof requirement, ownership and entitlement to deal, clause 6.4 of the Model Participation Rules requires the Subscriber to establish that their Client is entitled to enter into the Conveyancing Transaction identified in the Client Authorisation.

There is however no explanation or direction as to how the Subscriber is to achieve this. As noted earlier, in the old manual system, presentation of the outstanding duplicate certificate of title was evidence of entitlement to deal. However, over the years, this requirement has been dispensed with. In New South Wales, recognition of the role played by the certificate of title in terms of evidencing ownership[95] and right to deal has resulted in several reports prepared by Clayton Utz on behalf of the NSW Land Registry. The reports examined to what extent the 'functionality and risk management currently provided by the CT [certificate of title] continue for…electronic conveyancing [once this is introduced].[96] Helpfully, what is explicitly recognised in the reports is that the control of the right to deal (CoRD), the third proof requirement, is a separate component to that of the second proof requirement, identity of the client. As noted in the report drafted by Clayton Utz in the context of the New South Wales Land Registry:

> "In practice a CT/CoRD holder has a right to be consulted about the registration of most dealings on the title and the right to refuse consent to the registration of most dealings unless compelled by the Registrar-General. The practical effect of holding the CT/CoRD is:
>
> - ✓ to give the first-ranking registered mortgagee with the CT/CoRD a veto over the creation of later interests (especially subsequent mortgages) by the registered proprietor; and
> - ✓ to give the registered proprietor who has the CT/CoRD some protection against fraudulent dealing with the title by requiring a separate act of producing the CT."[97]

In Queensland, where issuing of the paper duplicate certificate is optional, safeguards introduced include mandating who can witness documents.[98] However, as noted by Clayton Utz:

> "CoRD and prescribed witnessing of signatures on instruments have different aims and different effects. They are not interchangeable nor readily comparable as to aim or effect. To attempt to compare risk management in a CoRD based conveyancing system with risk mitigation in a No CoRD system using prescribed witnessing of party signatures on instruments is to compare chalk and cheese."[99]

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[95] Proof of ownership is not dealt with specifically in the ECNL or the Model Participation Rules, but as noted by the authors on page 4, proof of ownership is often, by itself, all the necessary proof of an entitlement to deal. Thus in most cases, both these proofs are dealt with together.

[96] NSW Land Registry, *Certificate of Title Solution for Concurrent Electronic & Paper-based Conveyancing*, 22 September 2011 (Report prepared by Clayton Utz).

[97] NSW Land Registry, *Certificate of Title Solution for Concurrent Electronic & Paper-based Conveyancing*, 22 September, 2011, (Report prepared by Clayton Utz), 1.4.

[98] NSW Land Registry, *Certificate of Title Solution for Concurrent Electronic & Paper-based Conveyancing*, 22 September, 2011, (Report prepared by Clayton Utz), 1.6.

[99] NSW Land Registry, *Certificate of Title Solution for Concurrent Electronic & Paper-based Conveyancing*, 22 September, 2011, (Report prepared by Clayton Utz), 1.6.

The preferred risk management strategy proposed by Clayton Utz was to continue using certificates of title issued with a Certificate Authentication Code[100] and only a restricted class of users such as Australian Prudential Regulation Authority (APRA) regulated subscribers to opt for no certificate of title to be issued. [101]

General comments

The authors' opinion is that the proposed ECNL and Model Participation Rules satisfies the first proof requirement, proof of identity of the applicant, better than the old manual system by requiring photo ID to be produced, face to face verification and the need for the Subscriber to be satisfied that the person whose identity is being verified bears the same facial characteristics as that in the photographs.

There is however an unsatisfactory paucity of information available on the issue of the second and third proof requirement, that is proof of ownership of the title interest, and proof of entitlement to deal. Certainly the New South Wales proposal to retain some equivalent of the outstanding duplicate, suggests an awareness in that State of the need for at least the second proof requirement, ownership.

It is however heartening that the actual acceptance of that documentation for registration is still intended to be handled by personnel, trained for the purpose, and with the ongoing task of ensuring the Register is protected. At least in principle, this holds out hope for a degree of policing of the Register where that staff can query issues of proof of ownership of the title interest, and proof of entitlement to deal. This scrutiny is a reflection of the need to ensure the ongoing integrity of the Torrens Register.

Based on what we know to date, we summarise our assessment of the two systems in the table below.

Proof Requirements	Landonline	NECS
Identity of applicant	S164A(3) and LINZ. Satisfactory.	Cl 6.5 and Verification of Identity Rules and registry staff policing function. Satisfactory.
Proof of ownership	Not credible. Requirements are for production of a local body rates notice, bank statements and the such	Will vary depending on jurisdiction. In NSW for example – CAC Certificate of Title. Registry staff policing function

[100] The Certificate Authentication Code (CAC) is a randomly generated number operating as a unique document identifier, it can be verified online: NSW Land Registry, *Certificate of Title Solution for Concurrent Electronic and Paper based Conveyancing*, 23 September 2011 (report prepared by Clayton Utz).

[101] NSW Land Registry, *Certificate of Title Solution for Concurrent Electronic and Paper based Conveyancing*, 22 September 2011 (Report prepared by Clayton Utz), 1.10. The solution proposed by the report appears to be for both paper based and electronic environments. However it is unclear at this point in time as to how and to what extent this proposal will be adopted in the NECS.

Entitlement to deal	S164A. Conveyancers act as de facto Registrars in accepting the dealing for registration.	Cl 6.4 and registry staff still undertake policing function
Assessment	The first proof requirement looks credible. There is a lack of credible controls for the second and third proof requirement.	The first proof requirement looks credible. It is not clear how the second and third proof requirement will be satisfied. However the continued involvement by the registry staff suggest a continued policing function of these two proof requirements

In the next section we contextualise our assessment against three examples of Torrens abuse. Our discussion here will contribute to our assessment above by providing a concrete demonstration as to which system best meets the three proof requirements and which system falls short.

Queensland - the Perrin fraud

On the facts of Perrin, it was alleged that the husband of the registered proprietor, Mrs Perrin, forged her signature on two mortgages. It was also alleged that the signatures of Mr Perrin's brother, solicitor Fraser Perrin, who purportedly witnessed the security documents were also forged.[102] On default by Mr Perrin, the Bank sued to recover the guarantee as well as seeking declaratory relief as to the enforceability of the mortgages.[103] The Bank had left all relevant documents for Mr Perrin to sign and had not made contact with Mrs Perrin. Perrin Partners, the solicitors who were holding the certificate of title, had released the certificate to Mr Perrin without requiring a signature from Mrs Perrin.[104]

Under the NZ provisions, if the LINZ standard was adopted for compliance with the reasonable steps requirement, then the Perrin fraud would be classed as a routine transaction because Mrs Perrin had an existing relationship with the bank. This means identity verified via an original government-issued photographic ID would have sufficed. The need to produce the photographic ID by Mrs Perrin may have prevented the fraud because it might have alerted Mrs Perrin to the fact that her husband was attempting to mortgage her property without her consent.

In Australia, under the proposed NECS, the subscriber who failed to verify identity and the right to deal would be liable for failing to verify identity. Obviously, a face-to-face interview with Mrs Perrin by the bank as subscriber would have revealed that she was unaware of the mortgage fraud.

[102] *Commonwealth Bank of Australia v Perrin* [2011] QSC 274, [2].
[103] *Commonwealth Bank of Australia v Perrin* [2011] QSC 274, [3].
[104] *Commonwealth Bank of Australia v Perrin* [2011] QSC 274, [26].

The following table represents our assessment of the Perrin fraud under NECS and Landonline.

Proof Requirements	Landonline	NECS
Identity of applicant	Routine transaction – identity verification via photographic ID required	Commonwealth Bank as Subscriber would need to perform verification of identity of the mortgagor, Mrs Perrin, via face-to-face verification of identity
Proof of ownership	Lack of credibility in terms of production of rates notice or equivalent as proof of ownership.	As below
Entitlement to deal	Deficient. There is no equivalent of an outstanding duplicate title, as in the old manual system	Commonwealth Bank as Subscriber would need to establish Mrs Perrin's entitlement to enter into the mortgage.
Result of the Perrin fraud	Attempt at fraud may have been discovered at the identity verification stage	Attempt at fraud would have been discovered early because the Bank, by complying with the requirements for face to face identity verification would not have acted on Mr Perrin's instructions without confirming with Mrs Perrin first.

Western Australia fraud - Mildenhall

Whilst he was living overseas, Mr Mildenhall's unencumbered investment property was sold without his knowledge by fraudsters operating out of Nigeria. He found out about the sale through an acquaintance. Mr Mildenhall returned to Perth, to find a second property sold by the fraudsters, but not yet settled. It appears the fraudsters had intercepted Mr Mildenhall's mail and had thus become familiar with details of the property. With this knowledge, the fraudsters, pretending to be the owner, instructed a real estate agent to sell the properties, by use of an email account previously used by Mr Mildenhall. By email, the fraudsters provided an overseas telephone address, for contact purposes. Mr Mildenhall's signatures on the contract of sale and ensuing transfer documents were forged. Verification of identity was purportedly performed by a Notary Public in Nigeria.[105] Once the transaction had settled, the

[105] Eileen Webb, Scammers Target WA Real Estate Transactions' (2010) *Australian Property Law Bulletin* 186, 187. It is not clear whether a false certificate of title was created based on false documentation or whether the scammers were able to obtain the certificate of title (for example, tricking the Land Registry to issue a new certificate).

sale proceeds were forwarded to a bank in China. When the news broke on Mr Mildenhall's plight, another similar scam came to light.[106]

Under Landonline, where an instruction is obtained from a client overseas, the issue is considered as being within the "high risk" category. This requires certification of identity by Notary Public acting in that overseas jurisdiction. On the facts, this may have been able to be provided, as the documentation was returned from Nigeria witnessed by a party who purported to be a Notary Public acting in that jurisdiction. However, given the public notoriety of Nigeria as a haven for international online scams this fact alone might have alerted the solicitor within New Zealand to be on guard.

In Australia, presumably the Subscriber in Australia would use a Subscriber Agent to verify the identity of Mr Mildenhall as he is overseas. However, as with Landonline, if these were easily forgeable in the country of issue, and/or the fraudulent person forges the Subscriber Agent's certification that identification was carried out in accordance with the Rules and/or the Subscriber's Agent was in some way party to the fraud, then perhaps the fraud would not be prevented. However under Sch 8, cl 10, the Subscriber is required to undertake further steps to verify identity in situations where the Subscriber has reason to believe that it would be reasonable to do so. In Mr Mildenhall's case there were certain discrepancies that would have warranted further steps to be taken - the instructions in the email to the Subscriber were in poor English and there was a change of the vendor's contact details before the listing. Further if the NSW proposed CAC Certificate of Title is used as proof of ownership and entitlement to deal, this may have made the fraud more difficult to perpetrate because of the increase levels of security in the Certificate of Title, making it more difficult to forge.

The following table represents our assessment of the Mildenhall fraud under NECS and Landonline.

Proof Requirements	Landonline	NECS
Identity of applicant	High Risk transaction, higher obligations imposed. Given the "Nigerian" connection, it is hoped a conveyancer under Landonline would have been put in guard, and made further enquiries.	Subscriber could use a Subscriber Agent to perform the identity verification. Possible opportunity for fraudulent person to forge identity documents and Subscriber Agent's certification. But cl 10 requires Subscriber to undertake further checks if the circumstances warrant further checks
Proof of ownership	Lack of credibility in terms	As below.

[106] The fraud occurred in Feb and March of 2008. The fraud involved a Perth doctor. Dr Peter D'Allessandro said he was 10 days from settlement on a West Perth apartment when the legitimate owner, who had been living in South Africa, found out about the sale and brought the process to a halt. The property had been on the market without the legitimate owner's knowledge and was to be sold for $775,000. Dr D'Allessandro said the email address used for correspondence with the agent was traced to Nigeria. Police investigated the fraud in 2008 but it was not resolved. More recently, WA police authorities have been reported as investigating allegations that another house has been sold in Perth without the owner knowing. Police say they have been told that a home in the suburb of Ballajura, worth around $400,000, was recently sold by Nigerian scammers. In both cases, the owners were overseas and in both cases the sale proceeded without any face-to-face interaction between the 'owners' and the estate and settlement agents.

	of production of rates notice or equivalent as proof of ownership	
Entitlement to deal	Deficient. There is no equivalent of an outstanding duplicate title, as in the old manual system	Subscriber would need to establish entitlement to deal
Result of Mildenhall fraud	Possible, would depend on the vigilance of the solicitors handling the transaction	Possible, will depend on the vigilance of the Subscribers and what is put in place by individual States by way of proof of entitlement to deal and ownership. Use of the NSW CAC Certificate of Title May have made the fraud more difficult to perpetrate due to increase levels of security in the certificate of title, making it more difficult to forge

New Zealand – Warin v Registrar-General of Land

In contravention of the terms of the *Te Ture Whenua Maori Act 1993* (TTWMA), the Maori Trustee sold a piece of Maori land without following the due processes contained in the TTWMA to prohibit the alienation of Maori land to third parties, without consent of the Maori Land Court. The transfer had been registered in the Land of Registry office, causing the purchaser to claim an indefeasible title, free of the alienation constraints set out in the TTWMA.

The High Court held that the provisions of the Land Transfer Act overrode the TTWMA, giving the purchaser a fee simple title, protected by indefeasibility.[107] In giving judgment, the Court reflected the importance and primacy of certainty of Torrens registration,[108] leading to the finding that the indefeasibility of the Land Transfer Act trumped various provisions in the TTWMA that any alienation or dealing of land "… shall be of no force or effect" until confirmed by the Maori Land Court.[109]

This finding was made despite a ready recognition by the Court that payment of compensation for loss of land was not an adequate form of recompense. This is because Maori, land was "regarded as a taonga"[110] and "not to be surrendered."[111]

The Registrar General of New Zealand has indicated in the future identified Maori land titles will be flagged for manual registration. This will no doubt be a gradual process, and it is

[107] *Warin v Registrar-General of Lands* (2008) 10 NZCPR 73 at [88].

[108] At [125] the Court opined: "Security of title by registration lies at the very heart of this country's system of land ownership".

[109] This was by reference to ss 156 and 228(3) of the TTWMA.

[110] Loosely translated as inalienable "treasure."

[111] At [133].

uncertain to what extent this process can be duplicated for other vulnerable land interests.[112] The issue is not limited to Maori land. Reference is again made to the 23 statutory provisions conveyancers undertake will not be contravened in lodging their dealings for registration.[113] Reported cases exist from both jurisdictions providing examples of void and voidable dealings protected by indefeasibility, once registered.[114]

The facts of *Warin* are different from the two Australian examples. The dealing registered was a deliberate transfer by the transferor; but void as having no legal effect. This case highlights a fundamental difference between Landonline and NECS in that in NECS, lodgement will not lead to automatic registration. It appears intended Australian Registries will still run their own checks before updating the Register.

The following table represents our assessment of the Warin registration under NECS and Landonline.

Proof Requirements	Landonline	NECS
Identity of applicant	Not an issue	Not an issue
Proof of ownership	Not an issue	Not an issue.
Entitlement to deal	Deficient. There is a reliance on conveyancer undertakings with no checks being undertaken. Although this is being remedied for Maori land, concern remains for other vulnerable land.	Not yet clear. However retention of registry staff to police registration suggests at least the present level of protection in this regard will be maintained.
Result of Warin registration	The system is vulnerable to abuse by both fraud and inappropriate registration.	Same level of protection as exists under the manual system to be maintained.

Conclusion

[112] John Greenwood and Tim Jones "Automation of the Register: Issues Impacting on the Integrity of the Title" in D Grinlinton (ed), *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) 323, 335 suggest reserve land will be flagged on Landonline, so dealings with that land "cannot be registered via eDealing." It is uncertain to what extent, if at all, this has occurred to date.

[113] See the earlier discussion explaining the operation of Landonline.

[114] Inappropriate grants of easements, conveyances without authority, mortgages registered with unauthorised alterations, titles acquired in breach of statutory prohibition, dealing registered notwithstanding abuses of powers of attorney, stamp duty or breaches of subdivisional constraints: Peter Butt, *Land Law* (6th ed, Thomson Reuters, NSW, 2010), [20.19] fn 123.

Businesses have embraced technology – from the use of faxes to email to storing data on computer systems and now, with the advent of cloud computing, storing data 'in the cloud'. Land registration systems need to embrace this technology.

The issue is not whether manual land registration systems should be automated, but how this is done in terms that protect the integrity of the Register. We have taken the line that an automated system should at least be as credible as the manual system it is intended to replace. Given the benefits of indefeasibility, the old manual system adopted an overlapping prophylactic approach concerning the three proof requirements, which required a high standard of proof be passed to achieve registration with the benefits of indefeasibility.

It is not certain that either Landonline or the anticipated Australian system is comparable to the old manual system, in terms of its original operation. This is not in terms of identity of the applicant, the first proof requirement, but the second and third proof requirements, being proof of ownership of the title interest and proof of entitlement to deal. Of the two systems, Landonline appears to be the less secure, given its primary focus is on proof of identity of the applicant. Proof of ownership of the title (the second proof requirement), is overcome by production of secondary, easily forgeable records not generated for the purpose of providing proof of ownership. Likewise with regard to entitlement to deal (the third proof requirement), there is reliance on conveyancer undertakings without input by registry staff before the dealing is accepted for registration.

Details of how the second and third proof requirements are to be implemented under the anticipated ECNL system are not yet clear. However, the adoption of measures such as the New South Wales CoRD system, and retention of registry staff to police compliance and actually register the dealings gives hope all three proof requirements will be credible, and overlapping controls will be in place, as was the case with the manual system.

The examples of the Perrin and Mildenhall frauds go some way to illustrate this issues that may arise. Where land is particularly vulnerable, as was demonstrated in the NZ case of *Warin*, the only solution against abuse may be to retain manual checking by registry staff.[115]

There is a public interest in ensuring the integrity of land registration systems. It is part of the fabric of modern Western societies that have embraced the notion of competitive capitalism. The housing market is fundamental to all its citizens, the need for shelter a basic human right. Further security of property interests remains of key concern to continued commercial confidence.

[115] Consequentially, there may be benefit in the proposal put forward by the New Zealand Law Commission (for Landonline) giving the court a discretion to overturn titles that are otherwise indefeasible. However the issue arises of where the threshold for overturning titles should lie. Too lower a threshold disturbs the concept of immediate indefeasibility and reintroduces by the back door, concepts of deferred indefeasibility. See further, Thomas Reduced Torrens Protection at [V1].