An Englishman looks at the Torrens System – another look 50 years on

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SUMMARY
In the 50 years since this journal published Ruoff’s widely-cited four-part article there has been much incremental change to the different Australian Torrens systems of registered land title in addition to some radical re-interpretation of title registration basics. Further, the basis for Ruoff’s observations on the Australian systems has been wholly replaced by the Land Registration Act 2002 passed in early 2002. It is an opportune time to update “An Englishman …”.

INTRODUCTION
Upon being awarded a Nuffield Travelling Fellowship the then Assistant Land Registrar of the English Land Registry travelled to Australia and New Zealand in 1951 to study the various Torrens schemes in use in the Australian states and New Zealand. As a basis for his comparative study he used the 1925 English Land Registration Act with which he was most familiar. Subsequent to his study, the Australian Law Journal published his article in four parts (“The Mirror Principle”, “Simplicity and the Curtain Principle”, “The Insurance Principle”, and “The system in New Zealand”).¹ Later, to commemorate the centenary of the first South Australian Torrens statute in 1857, the Law Book Company published the article as four chapters in a ten-chapter book.² Besides the introductory
chapter one, the additional five chapters were based upon a paper delivered at the First Commonwealth and Empire Law Conference\(^3\) and further articles in the *New Zealand Law Journal*\(^4\), the *Australian Law Journal*\(^5\), the *Canadian Bar Review*\(^6\), and the *Conveyancer*\(^7\). Although dated, the 1952 article and the subsequent 1957 text are seminal to any modern study of the Torrens systems and it is considered apposite to review and comment upon Ruoff’s writings in view of a number of changes in the last half-century. These include a fundamental reversal of the previous approach to interpreting the policy and legislation associated with registered land title, some recent major statutory changes in some of the Australian jurisdictions, and the passing this year of a replacement Act in England.\(^8\) It is here noted that although Ruoff referred to the Torrens registered title system in the singular, the variants in use throughout Australia and New Zealand require the plural to properly describe the divergent systems.

**THE ENGLISHMAN**

Theodore B F Ruoff CB, CBE was no mere “Englishman”. When he came to Australia in 1951 he was the Assistant Land Registrar at His Majesty’s Land Registry and thereafter the Senior Land Registrar (1958–1963) and then, until his retirement in 1975, Chief Land Registrar. Additionally Ruoff was the co-author (with the then Chief Land Registrar G H Curtis) of *The Law and Practice of Registered Conveyancing* (1958) and the author of the second edition in 1965 and the lead author of the third, fourth, and fifth editions published under the title *Ruoff and Roper on the Law and Practice of Registered Conveyancing*. The current sixth edition published in loose-leaf form in 1991 after his death was the first edition in which he ceased to be listed as an author. The fourth (1979)
and fifth (1986) editions were undertaken in retirement. Additionally Ruoff is fondly remembered for his semi-regular "Links with London" column published in the *ALJ* between 1953 and 1988. He died aged eighty in 1990. This year marks the half-century of the original publication in the *Journal* of “An Englishman looks at the Torrens System” and, with the passing of the *Land Registration* Act 2002, the repeal of the English *Land Registration* Act 1925 — the statute administered by Ruoff and used by him as a benchmark in his comparative study.

The merit of Ruoff’s original article and his later expanded text lies in their brevity and deceptive simplicity as an exposition of the principles of land title registration. His easy facility for explanation and description may possibly explain the absence of Barwick QC, Windeyer QC, Coppel QC, and other luminaries of the Australian profession from the much talked of “trial of the year” of 1955 — the prosecution of Colonel A D Wintle for assault before Byrne J at the Sussex Assize and widely reported under the headline “the Colonel and the solicitor”. Attendance at the trial would have required forgoing Ruoff’s presentation of his paper on the “Principles and Ideals of the Torrens system” delivered at the First Commonwealth and Empire Law Conference.

**ATTITUDINAL CHANGE**

The intervening fifty years have seen an important reappraisal of registered land title. Previously it has been considered as an equal alternative to the traditional private conveyancing provided for by English real property law. It is now appreciated as a fundamentally different new system to replace the old rather than provide an alternative.
There no longer exists the perceived need to permit the continued co-existence of both systems with the consequence that the newer system is to be seen as a mere modification and thus subject to those long-established legal principles governing the older.

a. Title by registration alone

   Possibly the most radical change in the approach to land title registration has been the recognition that title is based upon registration and registration alone. There is no room to permit recognition of title dependant upon any other basis. While it is true that this principle was often enunciated in the past, it is only in the recent past that it has been accorded the weight it deserves. Yet, there still remains, in two of the Australian jurisdictions, recognition of title founded upon possession without registration (Victoria and Western Australia) and it was only as recently as 2001 that Tasmania restored the necessity of registering a title founded upon occupation before it could be legally recognised. That is, between 1980 and 2001, Tasmania also recognised title founded upon possession without registration. Further, until this year (2002) the English Land Registration Act provided recognition and protection of an overriding and unregistered title based upon possession without requiring the registration of such a possessory title.

   Previously this fundamental principle has been unequivocally expressed but its performance was lacking. An example is the 1970 dictum that “[t]he Torrens system of registered title … is not a system of registration of title but a system of title by registration.” The author, Sir Garfield Barwick, neglected to draw any distinction between those Australian states that expressly prohibited the acquisition of title based
upon possession, those that permitted such acquisition of title only upon the title being
entered into the registrar, and those that permitted such acquisition of title irrespective of
whether the title is entered into the register. This is surprising given the expression of
regret in his judgment that complete uniformity of the various State Acts had not been
achieved. In the same case Menzies J ventured the opinion that, save for section 48 of the
Queensland *Real Property* Act of 1877, the provisions of the *Real Property* Act (Qld) are
substantially the same as those of the *Transfer of Land* Act (Vic).

A further example is provided in Ruoff’s article: in discussing the “curtain” principle,
Ruoff states that “the register is the sole source of information for proposing purchasers,
who need not and, indeed, must not concern themselves with trusts and equities which lie
behind the curtain.” This fundamental principle is echoed in Rowton Simpson’s detailed
comparative study of international land title registration schemes: “… title is not affected
by anything not shown on the register. It is not only unnecessary but also impossible to
establish a right in the land by other means, ….” 13 It is unfortunate that Ruoff and
Simpson and other commentators, having expressed themselves in unambiguous
absolutes and superlatives, later found it necessary to admit to exceptions and
qualifications to their prior absolutes and superlatives. It is noteworthy that the new
English *Land Registration* Act 2002 prohibits public access to the information (other than
the current title information) contained in the register unless authorised by the registrar.
Except for the registrar and those provided with historical access by authority of the
registrar, the electronic register available for public inspection will only disclose the
current entries in the register. A title investigator curious enough and wishing to peer
behind and beyond the curtain will be unable to do so unless expressly permitted to do so by the registrar.¹⁴

Leaving aside the jurisdictions that still permit title without registration, there has been a much belated recognition that a fundamental component of title registration is registration. Title without registration has no place in a system purporting to be one of registered title. The delay in the recognition of this fundamental principle may be related to the retention (rather than the replacement) of the previous system of private conveyancing alongside the newer public conveyancing by title registration. The retention of the two systems also gave rise to the fallacy that they were merely variants of a common system, which in turn led to the requirement that elements of the older system were necessarily incorporated in the newer. This incorporation was neither necessary nor beneficial to the operation of the newer system. The fact is that the two systems are fundamentally different and the due administration and development of the newer system of title registration has been retarded by the mistakenly imposed requirement that the two systems be compatible and that the newer system is subordinated to the older. This aspect is discussed further under the heading “Statutory re-interpretation” below.

b. Compulsory registration and penalty for failure to register

When the various Torrens statutes were introduced into the Australian jurisdictions in the latter half of the nineteenth century, there were provisions for the voluntary conversion of unregistered (or “old” law or “general” law) land to registered title land. There was no compulsion requiring a landholder to bring an unregistered
holding within the new system. It is here suggested that this omission would not be repeated today and in fact has not been permitted in those developing countries, which are currently implementing land title registration. Further, it is here offered as conjecture that Torrens and his supporters, recognising the opposition arrayed against their proposed legislation, allowed for voluntary conversion to mollify their opponents.

The current Australian practices which have permitted registrable interests to remain unregistered may have also been born of a confidence that the benefits of registration are so apparent and easily appreciated and advantageous to the interest holder that there need be no compulsion on the interest holder to seek conversion of unregistered land. If that was the case then the confidence was misplaced. After 140 years of title registration in Australia there still exists a large number of land parcels remaining outside the registration system despite the perceived benefits attached to registration. There are now moves afoot to force conversion of the remaining “old” law land parcels as a means of reducing the expense of maintaining the two systems concurrently. The modern view is that a registration system should not be reliant upon voluntary conversion and registration. In a study of the Germanic land registration system reputed to have formed the basis of the system introduced into South Australia, Raff\(^{15}\) observed that the Germanic system includes the social obligation to register proprietary interests. Palmer’s 1996 study\(^{16}\) listed several criteria for effective land registration, the first of which — jurisdiction-wide coverage — entails compulsory registration. Larsson\(^{17}\) notes the incorporation of compulsory registration in all but the most rudimentary deeds registration systems while Barnes et al\(^{18}\) assert that a consequence of permitting
voluntary registration is the undermining of the reliability and integrity of a registration system.

More recently the English Parliament has considered the compulsory obligation to register land holdings with the consequences of failing to do so being loss of the protection provided by law. In the debate stage of the passage of the *Land Registration* Act through the English Parliament there was a proposal to impose criminal penalties on those failing to register their legal interests within the period expiring on December 30, 2003. The proposal to include these provisions in the Act was not taken up. Other measures are designed to reduce the number of recognised overriding interests in the first ten years operation of the Act. Failure to register those overriding interests slated for abolition will cause any protection to be lost. A further provision will restrict the use of caveats to protecting only those interests incapable of registration. The use of caveats to protect registrable interests will be confined to interim protection only, pending the registration of the interest. Otherwise the caveat will lapse leaving registration as the only means to protect registrable interests.

The general observation is that those jurisdictions which recognise title without registration permit such a title to be registered but do not require the title to be registered. This results in an off-register title with all the features of a registered title save that it is not disclosed on the register. It is here suggested that such a system should not properly be characterised as a registered title system although it is recognised that after 140 years
it may now be too late to attempt to impose this distinction upon systems that have always been characterised as Torrens registered land title systems.

c. Multi-purpose cadastre

A modern adaptation of the register is the multi-purpose cadastre or land information system. The purpose of the land title register was solely to serve the land market with the consequence that only that land available to the land market was included within the register. A modern adaptation of the land title register is the expansion of the register to include further information beyond that required to support the land market. By expanding the register it is proposed to be made available to users besides the traditional participants in the land market, that is, the expanded register will serve the needs of an expanded user base. It is expected that the increased income derived from the fees payable by the expanded user base will exceed the increased costs associated with the creation and maintenance of the expanded register. Expanding the register to create a comprehensive land information system requires all land including unalienated crown land and other land not available to the land market to be included in the register and the information base includes further information beyond that necessary only to record land titles. The multi-purpose cadastre marks a change from the land market driven title register to a multi-purpose land information register. Such a comprehensive land information system will provide a co-ordinated system in lieu of the sporadic system currently in use.
In failing to foresee this expansion of the land title register Ruoff and his title registry colleagues fell into error. In all editions from the first (1958) through to the current loose-leaf sixth edition (1991) of *The law and practice of registered conveyancing*, the authors were dismissive of the register being the basis of a multi-purpose land information system. All the editions have been written by registry officers for the use of legal practitioners conducting land conveyancing. Consequently, the view that the registry could be utilised as a repository for a wider range of information than that required to support only conveyancing and the land market does not find favour with the authors and was disparaged by them as “Teutonic” and lacking the “inestimable advantage” enjoyed by the narrower registers disclosing a limited range of land information.\(^{22}\) This view has remained unchanged through all editions (including the current edition) although it is not consistent with the modern multi-purpose cadastre.

d. Uniform Australian Torrens system

Despite his title reference suggesting a single Torrens system, Ruoff’s original article discussed the different approaches to title registration adopted by the Australian states and New Zealand. Consequently it may be considered that the concept of a single uniform nationwide registered land title system is outside the scope of a review of his article. The desirability of a single uniform nationwide registered land title system has been raised on many occasions since the introduction of registered title into the Australian jurisdictions in the mid-nineteenth century.\(^{23}\) The driving forces favouring the adoption of uniformity include the perceived cost savings\(^ {24}\) and the simplification of law associated with a single system rather than a multitude. The adoption of a unified system
is related to the establishment of a multi-purpose cadastre in that coherence between the national cadastre and the various state cadastres is promoted by the compatibility (or better, uniformity) of the state cadastres. Another aspect that must be addressed before a uniform cadastre can be created is the disparate approaches to adverse possession in the existing State systems, an aspect suggested to be a major impediment to the adoption of a uniform cadastre.25

STATUTORY CHANGES

In addition to the attitudinal change, the Australian registered land statutes have undergone amendment over the last 140 years generally and more specifically, in the 50 years since Ruoff made his observations. Major changes include the introduction of title acquisition based upon long-term occupation of registered land. Thus New South Wales (1979), Queensland (1952), and New Zealand (1963) have introduced restricted forms of adverse possession into their Torrens systems and all jurisdictions save Victoria, Tasmania, and the Australian Capital Territory have passed legislation similar to the Encroachment of Buildings Act 1922 (NSW). Tasmania swung towards the English model of unrestricted adverse possession in 1980 only to reverse itself in 2001 and now permits only a severely restricted form. In 1994 Queensland relaxed its restricted form of adverse possession but still halted short of the unrestricted English form. Outside of the Australian and New Zealand jurisdictions, the 1925 English Land Registration Act, the starting point for Ruoff’s observations, was wholly replaced in 2002.
New South Wales:

In 1979 New South Wales allowed possessory applications for registered land by amending its *Real Property* Act 1900. Although Ruoff expressed a view that this would arise, he should not necessarily be credited with prescience because the previous public lobbying for security of tenure (for those in occupation with a good holding title and not likely to be challenged by persons claiming as or through the person nominated in the register as the proprietor) was widely known. Further, given Ruoff’s appreciation of adverse possession as a means of resolving discrepancies in boundary location as well as whole parcel ownership issues, it is doubtful that the 1979 introduction of possessory titles into the NSW registered land system would have met with his approval.

The incorporation of a form of adverse possession into a registered land title statute may seem contradictory with its only justification being the pragmatic necessity of providing recognition of an existing de facto state of affairs unlikely to suffer alteration pursuant to the application of the rule of law. It is here suggested that the incorporation of adverse possession into a registered land title system is not contradictory where an essential requirement of the incorporation is that the acquired possessory title be entered into the register. It is only where unregistered interests are given legal recognition without registration that there arises a contradiction.

Tasmania:

In 1980 Tasmania replaced its *Real Property* Act 1862 with the *Land Titles Act* supposedly to modernise and consolidate its registered land statute without effecting any
Another driving force was the need to further compel the conversion of unregistered to registered land. In so doing the Tasmanian legislature did away with a system that had earned Ruoff’s praise as “the sanest solution to a difficult problem” and replaced it with one modelled upon the 1925 English system that had already been the subject of criticism and reform proposals in its home jurisdiction.

That the 1980 reforms were less than desirable is evidenced by the 1995 referral by the then Attorney-General to the Law Reform Commissioner following upon the public disquiet which resulted from the 1994 Supreme Court decision in Woodward. In 2001 the Parliament passed the Land Titles Amendment (Law Reform) Act 2001 which imposed severe restrictions upon applications for registration founded upon adverse possession. The 2001 amendments also indirectly prohibited part parcel adverse possession and thus closed off the “repair” function of the limitations statute with regard to boundary location discrepancies.

One favourable consequence of the 2001 amendments was the elimination of the recognition of unregistered interests with a return to the requirement that interests founded upon adverse possession must be registered before they are accorded the full protection of the law.

South Australia, Queensland, and New Zealand:
Ruoff commented favourably upon the 1945 introduction into South Australia of a limited form of possessory title founded upon adverse possession. He neglected to note that the limited form effectively created a bar to part parcel applications. Thus, any boundary location discrepancies can only utilize statutory encroachment as a repair function. Neither Ruoff’s original 1952 article or the 1957 republication noted that Queensland had also introduced a limited form of possessory title similar to that adopted in SA. Given that Ruoff’s investigations took place in 1951, the omission in the original 1952 article is understandable. Similarly, the 1963 introduction into New Zealand of a limited form of possessory title similar to that adopted in SA obviously occurred too late for Ruoff to comment.

Unlike SA, the Queensland and NZ amendments expressly prohibited all but whole parcel adverse possession applications. Thus, as in SA, any boundary location discrepancies could only utilize statutory encroachment as a repair function. To this end, Queensland (1955), SA (1944), the Northern Territory (1982), Western Australia (1969), and NZ (1950) have introduced statutory schemes similar to the Encroachment of Buildings Act 1922 (NSW) permitting boundaries to be varied where improvements encroach across a boundary into an adjoining parcel.

A common feature of these States introducing adverse possession into their title registration statutes was the necessity of entering the title interest founded upon adverse possession into the register. That is, adverse possession without registration was insufficient to acquire title to the occupied land.
Additionally, in 1994 Queensland replaced its 1861 and 1877 Real Property Acts with the Land Title Act. As in Tasmania, the professed motivation was not to effect change to the substantive law. The intent was to consolidate the two registered land statutes (together with other associated statutes) and modernize the legislative language. Because the Torrens scheme had served Queensland well over the past century the expressed intent was not to change the substantive law of registered land.\(^{36}\) It is here suggested that the 1994 Land Title Act effected major changes to the law of registered title land in Queensland. Unlike the restricted scheme in operation between 1952 and 1994, the current adverse possession provisions of the Land Title Act favour the interests of a person who is entitled to apply to be registered as an owner pursuant to adverse possession\(^{37}\) over those of the registered proprietor. The adverse occupier is not required to apply for registration in order to enjoy the overriding protection of the exception\(^{38}\) to the registered proprietor’s indefeasible title. Another major change introduced by the 1994 Act is the possibility of the adverse possession provisions being invoked to acquire title to the previously forbidden part only of a registered title land parcel.

**STATUTORY RE-INTERPRETATION**

Since Ruoff’s article the interpretation of the registered land title statutes have undergone major changes. These changes are additional to the statutory amendments. As an observer and commentator Ruoff and others were circumscribed by judicial authority with regard to the interpretation of the registered land title statutes. The judicial interpretation was that title registration should be and was subordinated to the general law of real property.
In regard to the colonial title registration statutes this interpretation lost favour commencing with a 1967 watershed. With regard to English title registration the statute remained subordinated to the general law. This interpretation was supported by the express incorporation of recognised exceptional (or overriding) interests which bound the registered proprietor without being entered in the register. It was only as recent as 1998 that the Law Commission and Her Majesty’s Registry recognised the fundamental distinction between general law land (or unregistered land) and registered title land with the result that the Land Registration Act 2002 incorporated the fundamental principle of a conclusive register: the fact that registration and registration alone confers title. This belated recognition of the fundamental principle of title registration still met with opposition during the 2001 parliamentary debates over the 2002 Act, the opposition being based on the perceived need that one system should not be favoured over the other.

These limitations upon the offering of critical commentary suffered by Ruoff and others arose because it does not fall to a public servant administering the statute and most familiar with its operation to correct the appointed members of an appellate bench, that being a prerogative reserved for the non-practising academic writers who neither administer the statute nor are necessarily familiar with it and its operation.

It is observed that the principle of title by registration could have been upheld even with the imposition of its subordination to the general law of real property. This may have been accomplished by a refusal to recognise possession alone as a basis of title.
EFFECT OF STATUTORY RE-INTERPRETATION

Related to the “attitudinal change” already referred to, the belated recognition that title registration was a radical departure from the general or “traditional” law of real property meant that title registration was no longer to be subordinated to the general law of real property. One consequence was that those Torrens or registered title statutes that expressly incorporated general real property law principles inconsistent with registered title could no longer be properly described as Torrens or registered title statutes. That is, the Victorian and Western Australian Transfer of Land Acts and the since repealed English Land Registration Act 1925 and the Tasmanian Land Titles Act 1980 (as it operated prior to the 2001 amendments) cannot now be properly described as Torrens or registered title statutes. It is here suggested that, with the benefit of hindsight, these statutes should never have been accorded the status of Torrens or registered title statutes. Further, to the extent that the Queensland Land Title Act 1994 recognises and extends protection to unregistered title, the current Queensland system should not be included within Torrens or registered title systems. It is recognised however, that after 140 years, it may now be too late to attempt to impose this distinction upon systems that have always been characterised as Torrens registered land title systems.

OTHER CHANGES

There are a number of observations that may be made that are only now recognised as valid since the imposition of the fundamental principle.
Although it has been asserted that land registration requires the abandonment of the fundamental principle that no one can pass a better title than he has (nemo dat quod non habet)\textsuperscript{44}, this assertion must be qualified by a recognition that the principle has not been wholly abandoned where legal protection is provided to the holder of an overriding unregistered title founded upon possession. Thus, in those jurisdictions where title is conferred by registration, a transferee’s interest, once registered, cannot be impugned although the transferor’s title may be defective and amenable to attack. Conversely, where an unregistered overriding interest is an exception to the paramountcy of the registered proprietor’s interest, a transferee’s interest is no less defective than that of the transferor. It is concluded that the fundamental nemo dat principle is only abandoned in those jurisdictions where title is conferred by registration and registration alone and the system may properly be characterised as registered title.

The Insurance principle:

Because of the guarantee (or indefeasibility) of registered title defeating “innocent” victims who would otherwise be protected under traditional real property law, the assurance fund was introduced to compensate those suffering loss or damage in reliance upon the register or the wrongful deprivation of a registered interest. The fund is made up of contributions levied when land is first brought under the scheme or is the subject of a transfer. Although designated in the statutes as an assurance fund, Ruoff
described this aspect of the systems as insurance. The person suffering loss can be indemnified by a monetary award. Ruoff characterised the insurance principle as one of three basic components of land title registration upon which registered land title systems rest. This component was incorporated in the Torrens statutes of the mid-nineteenth century and preceded the modern law of negligence by some seven decades. However, insurance by the State is not a fundamental principle or sine qua non of a registered title system as the introduction of registered land title into developing countries demonstrates. These countries have recognised the value of registered land title and the “export” of consulting expertise in title registration systems has been a steady Australian income earner. However, in some developing countries, the client country’s public servants have expressed concern that an assurance fund may encourage unlawful collusion between fraudsters and corruptible public administrators of the system. Instead, recognising the need for a means of compensating victims reliant upon the register, these countries have adopted a compulsory requirement that the public administrators of the register be covered personally by “professional indemnity” insurance policies. The origin of the inclusion of State insurance in the nineteenth century schemes satisfied the need for compensating those suffering loss or damage in reliance upon the register and who had been deprived of the protection of the abandoned nemo dat principle at a time prior to the advent of the modern law of negligence. Perhaps Ruoff’s “insurance principle” would be better described as a “principle of compensation” of which State insurance was but one approach.

CONCLUSION
Although dated, Ruoff’s article still stands as a remarkable and valuable exposition of the principles of registered land title. It also has the benefit of a comprehensibility that is deceptively easy. Today’s commentary merely brings that of Ruoff up to date in light of statutory alterations to the Australian systems and the evolving appreciation of the basic simplicity inherent in the Torrens ideal.

2 (1957), An Englishman looks at the Torrens System: being some provocative essays on the operation of the system after one hundred years, Sydney, Law Book Co.
4 “Land transfer through English eyes” (1953), 29 NZLJ 249–252.
8 Land Registration Act 2002.
9 “Obituary” (1991), 65 ALJ 120.
12 per Barwick CJ, Breskvar v Wall (1970), 126 CLR 376 at 385.
14 Land Registration Act 2002 (England), section 69.
15 Raff, M J (1999), German Real Property Law and the conclusive Land Title Register, Ph D thesis, Faculty of Law, University of Melbourne, page 427.
38 Section 184(3)(a) Land Title Act 1994.
43 House of Lords, 3 July 2001, 2nd Reading debate.
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