



# The Land Title Assurance Fund—Illusory Remedy?

**T**he system of land title registration, first created in the Australian colonies in the 19th century and subsequently adopted in Western Canada and elsewhere, was called the Torrens system, after its inventor Sir Robert Torrens, Governor of South Australia.

In each jurisdiction where it was adopted, an “assurance fund” was established, but only in 1898 in British Columbia, long after the adoption of our land registration system. The fund was to be financed by small levies on land registry transactions and maintained at \$50,000. If it fell below that figure, the shortfall must be made up from Consolidated Revenue. Despite inflation, that is still the amount.

The purpose of having an assurance fund has always been twofold:

1. to compensate innocent people who have been deprived of their ownership of land or of an interest in land because of the conclusiveness of the land title register; and
2. to compensate people who suffer a loss by reason of the “omission, mistake, or misfeasance” of the Registrar.

Claims against assurance funds have in the past seldom been made in any jurisdiction. An Australian author once wrote, “The highest tribute that could be paid to the success of the Torrens system is the infrequency of claims on the Assurance Fund.” He noted that during the first 70 years after its establishment in South Australia, the total claims made against it in that state were less than £7000.

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There may, however, have been another reason why such claims had rarely been made or, if made, were rarely successful.

As will be explained below, there have been and remain serious legal hurdles facing a person wishing to make a claim against the Fund. Not every victim has a remedy or an adequate remedy. That was so under the 1898 legislation and it remains so today, but first, let us examine at greater length why the creation of the Torrens system resulted in a need for compensation that had not existed at common law.

At common law the true owner of land could evict a person who unlawfully occupied his land, even if the occupier had

acquired title in good faith and for value, whether from a crook or from an honest person who had in turn innocently acquired it from a crook. The true owner could not only evict the occupier of his land, whether the occupier was innocent or crooked, but could also acquire ownership of all improvements made to the land, all without compensation to the person evicted.

The remedy an innocent occupier had was to sue the person who had sold the land to him and the crook, if there had been intervening owners, and then only if he or she could find the person to be sued and if his or her claim had not been defeated by the passage of time.

To protect themselves against the risk of losing their property, purchasers would take out title insurance. In much of the United States, that is still the practice.

By contrast, under the Torrens system, a person in occupation of land who has acquired title in good faith and for value from the registered owner, cannot be evicted by the true owner, however innocent the latter might be. The purchaser or mortgagee does not usually take out title insurance, although that is now available in British Columbia.

A thief of land can give good title of the stolen land to an innocent purchaser at the expense of the true owner. Such a scenario is not fanciful. It has been known in modern times for crooks to seek out