

**Pacific Rim Real Estate Society (PRRES)
Conference 2000**

Sydney, 23-27 January, 2000

**CAN THERE BE A MODEL TITLE REGISTRATION
SYSTEM**

TREVOR MILLS

International School of Business
University of South Australia
Adelaide, SA 5000
Australia

Contact author for all enquiries

Phone: 61-8-8302-0526, Facsimile: 61-8-8302-0512, E-mail: trevor.mills@unisa.edu.au

Keywords: Land Title, land registration, Torrens Title, Deeds system, land recording

"CAN THERE BE A MODEL TITLE REGISTRATION SYSTEM?"

Abstract:

It is widely held that for a country to progress, that is to improve its economy, its living standards and its national well-being, it needs some method of recording what parcels of land exist in the country, or region, and who owns it.

Further, to encourage foreign or even local investment in real estate, there needs to be some form of title to evidence the various interests permitted in that land, and to give some measure of security to the owner of that interest. This in turn is recognized as an incentive for more economical use and maintenance of a property, and hence better land-use planning. Secure title is more likely to attract overseas investment in real estate and thus generate more employment and wealth for the local inhabitants.

Another important advantage of a land registration system is in the ability for it to be used as a base for the application of an equitable tax levy, according to people's ability to pay. That same system can act as a preventive measure against people avoiding their rightful obligation to their society.

It is also commonly held that there are two main systems of land registration in the world. The one named after its founder and introduced in South Australia, The Torren's Title System and the other, based on the old English system of Registration of Deeds.

There are many European countries as well as African, South American and Asian countries who, in the last 10 years or so, have been forced to review their land recording systems, because of political or economical changes in their respective countries. Many countries, to determine an appropriate solution to these changes, have spent much money investigating various systems. There is some evidence that some of the recommended systems have been the direct application of an existing system elsewhere in the world, without due regard for local conditions.

There has even been a suggestion that there could eventually be a uniform and beneficial registration system for all the countries of the world, available through on-line access.

Whether or not the registration be uniform, online or positively archaic there are essential elements that are required for a useful system to work.

This paper looks at various registration systems around the world and papers on a similar theme from other academics to determine what essential elements are in a title registration system and what considerations should be given to implement a system.

(A) Aim -

To examine the essential elements of a land recording system (i.e. a system of recording interests in land), what matters should be considered before adopting any system and the varying degrees of success of existing systems. The results of that examination should provide material to suggest the form and likely degree of success of a model system.

(B) Introduction -

This paper is only concerned with a system for registration of title, and not with the interests that are likely to be recorded. It is assumed that an essential pre-requisite of a recording system would be to have first identified what interests will be recorded. These interests would presumably be what were legislated for, or what were acceptable to the society contemplating introducing the recording system. "In Anglo-American law alone, there are easily fifty well-recognised forms of rights over land, and the major legal systems of continental Europe have a similar array" (Henssen, 1991)

Whatever are the interests permitted, the essential means of recording them are the same. The detail may change but the requirements for, and means of, recording will be substantially the same.

It is further assumed that in recording who owns what land, some guarantee to title is afforded the person who is registered, otherwise there is limited reason for having the recording system in the first place.

Changing political, economical and social events and values in many countries over the last decade have encouraged governments to review their land recording systems.

There is ample evidence that there has been a need for reform in this area not only in developing countries but also where there has been changes in governments brought about (say) by the fall of the Berlin Wall.

For instance, "The prevailing land-tenure system in most developing countries.... (results) in a situation where ownership, land tenure and usage rights and interests are largely ill-defined, undocumented and untransactable". So says one of a series of manuals of UNCHS (Habitat) c1990.

This same report goes on to state that "it is estimated that up to 90% of land parcels in developing countries have no documentary evidence of title.... nor any confirmed tenure".

Further, it suggests that a proper land registration system, coupled with a land information system, is a "pre-requisite for efficient human settlements development"

In Europe, in changing to a market economy, there is the added problem of restitution of parcels of land that was taken from the true owners many years ago. The determination of the true owner in this case is not unlike the adjudication process in implementing a new land recording system or indeed, in changing from a deeds system to a registration of title system.

The World Bank has endorsed the need for reform in land recording systems, specifically in developing countries, by allocating millions of dollars over the years towards developing satisfactory systems.

Unfortunately, an internal review by Wachter and English concluded that this funded development resulted in " very few (land titling projects) could be considered successful various problems hampered project performance. These problems ... may be grouped into ... categories

- (a) an overall lack of political support
- (b) conflicting bureaucratic priorities and/or infighting
- (c) lack of institutional capacity or an unwillingness to commit adequate resources
- (d) underestimation in the preparation phase of the complexity and/or cost of the tasks" (reported in Burns et.al)

The origin of this paper lies in anecdotal evidence that countries looking to introduce a new system, or amendments to their existing system, are having the deeds system recommended as the preferred option. If this was true, to one steeped in the Torren's system of title registration, it seemed reason enough to investigate whether there may be some other method which could suit the circumstances. After all, the deeds system in South Australia, eventually adopted some elements of the Torren's system to give it additional security albeit while still falling short of total security. In other words, all of the advantages and disadvantages (If any) of the Torren's system as currently practiced in South Australia seemed to be right and proper to use as a basis for the recording of interests in land. Which system of tenure and what interests are recognised to exist matter not since this paper is concerned with the system of recording, the quality of information, the ability to maintain the system and the other issues that arise in day-to-day procedures and practices.

Firstly let us look at what are the reasons for a system that records who owns what land. There are many papers available which easily and succinctly identify and justify without doubt, the importance of having and maintaining such records.

For example, one such paper (Toms 1996) refers to "the perceptions of the benefits of Land Titling" as reported by others (Williamson 1984; Acquaye 1984; Dale & McLaughlin 1988) who between them suggest benefits in the following terms:

"the result (of land titling) is in security of tenure... increased incentive to invest in land improve his stewardship of the land use the land as collateral....the result of these higher inputs will be a higher output per area for farmers.."

It should provide the State with "the land related information necessary for policy formulation and implementation". "reduction in cost and time spent on litigation"

Benefits to Government include: survey control for mapping purposes; definition of land parcels can be used in valuation and physical planning; increased revenue via more efficient land taxation; costs can be recovered by "user-pays" policy; provide machinery for land development control.

Other benefits resulting from land registration include: improved conveyancing; stimulation of the land market; facilitating land reform; management of state lands.

Others (Pearce & Warford, 1993) are reported as saying that lack of formal title (recording) can result in:

- inability of land holder to transfer on an open market inhibiting investment in the development of the parcel;
- take-over by some other party causing land ownership concentration;
- land failing to reach its highest and best value;
- the landholder having no acceptable collateral for borrowing for investment in land.

In addition it has been conclusively shown that there has been a significant increase in productivity and value of farming land in Thailand as a direct result of the current land titling project. Thus there appears little dissension from the proposition that land recording (titling) is beneficial to government and its people.

Little wonder then that enormous amounts of money have been directed to developing countries to upgrade or implement an appropriate system for each. Unfortunately it seems that well intentioned people made the mistake of trying to apply the system, with which they were familiar, directly to another country without recognising the different needs and conditions between the two countries.

Many of the available papers on the subject of land registration recognise that the aim in introducing a system to a developing country should be to implement a system which is tailor-made for that country. In other words it should recognise the local conditions, beliefs, community life, practices, customs, needs of the government and the people and even religious beliefs and activities.

This paper then endeavours to assess whether there is a possibility for a model system of recording interests in land which would be suitable as a basis for everyone.

(C) Information likely to be recorded.

What is meant by a "recording system?" Most people would be conversant with the two major systems by which people can own an interest in land. The one by registration of title, commonly referred to as the Torren's System, and the Deed's System whereby the interest is created by the signing of a deed. To these can be added a third system whereby interests are exhibited by a lease from the Government . Irrespective of the mode of tenure, each requires certain information to be recorded for it to be useful for both Government and the people.

A brief analysis of the aims, procedures and practices of the Torren's system will indicate the basic requirements for any land title recording system. It is the principles of the system and its usefulness that are of importance, rather than necessarily the concept of title by registration.

For many years, South Australia has had each of the three systems operating side by side, although no land was alienated from the Crown under the deeds system after about 1850. Thus, since land after that date was automatically issued under the provisions of the Torren's system, it rapidly became the dominant system, particularly in the settled areas. Much of the pastoral land of South Australia is unalienated land and is still held under various types of leases from the Crown, albeit partly governed by the same legislation (Real Property Act) as the alienated land.

It would be useful at this stage to reiterate the intended benefits of the original Torren's system of registration of title. They centred mainly around the following principles:

- It would be convenient and not expensive
- It would be a relatively quick process
- It would be open to the public (indeed the public were expected to "search" the title before entering into any dealing otherwise they may jeopardise their rights)
- The title would reflect ALL charges, encumbrances and liens that affected it.
- Registration (not the document) conferred title
- Once registered, the proprietor of an interest would have an indefeasible title
- Providing third parties dealt with the registered proprietor they too would receive an indefeasible title.
- Title was guaranteed by the Government
- No-one would be required to "go behind the face of the title" ie to enquire about the registered proprietor's authority to deal with the land.
- The creation of specialised conveyancing personnel, called Land Brokers (now Conveyancers) to be licensed to complete land transactions . [note: this was Torren's way of overcoming strenuous objections, to his proposed system, from the legal profession]
- The system would be compulsory from the date of introduction, with provision for records in the existing deeds system to be converted voluntarily (subsequently made compulsory)

The principles have survived, and thrived, to this day and the advantages of this system, at least in South Australia, now include:

- computerised land records
- remote access to land records by conveyancers
- current sales data
- inclusion of a mechanism to allow the issue of Strata and Community titles that have the same qualities as the original Torren's titles.
- an efficient conveyancing system substantially implemented by non-solicitor conveyancers (in fact this concept has only to be adopted by Queensland and Tasmania, probably in 2000, and it will be in all States of Australia)
- an integrated system that allows rating and taxing authorities access to details of all land transactions within days of them being recorded.
- frequent and substantial involvement of land surveyors in private practice.

The detractors of this system point to the fact that the title does not show ALL outstanding charges, encumbrances and liens. This is certainly a valid argument brought about mainly with the introduction of much legislation giving many departments and authorities the right to now make claims on land where in 1880 there were no such rights. This argument, to my mind, is equally valid for any other system. However, it is not a sufficiently strong case for decrying the distinct and overwhelming advantages that the Torren's system can provide. It has already shown that it is adaptable to changing circumstances and there is no reason yet to think that it cannot continue. What may have to change however, is the unnecessary level of detail that is sometime required by government departments, and which can make conveyancing practitioners engage in unnecessary work. The recording system can take as much, or as little, information as is required with the governing factors probably being the efficiency of obtaining it and its quality and usefulness.

While the objection that the Torren's title does not show all outstanding encumbrances is true, it is also true that the deeds system is no better in this regard. In South Australia the Lands Titles Office has for some time had a convenient connection to many other government departments that could possibly have a claim against a title, such that it (the LTO) can produce a statement identifying which of these departments have indeed an outstanding claim. Known as Section 7 enquiries, it is mandatory for purchasers to be given this information before being committed to a contract. While this information is not directly on the title it can be made available, from the same office, within a few days. It should not be a big step to eventually make a more direct connection between the title and these sources of information, without unnecessarily "cluttering up" the main elements of the title. This could be an innovation to be pursued as a complete computerised conveyancing and lodgement system is developed and introduced in the 21st century. Again, the recording system can be in more than one part with formal channels of liaison between them to ensure that the level of information that is required is available when and how it is needed.

The deeds system in South Australia is practically non-existent. The operation of both systems together has given evidence of the savings in time and money that a registration of titles system has over a deeds system.

However, what is being referred to in this paper is a system that records basic information, regardless of which of the two main recording systems it may be. In fact it is highly likely that the ideal system may be a combination of elements of both title and deeds systems, which will fulfil the needs of a particular locality or country. It can also incorporate land which is held solely, or partly, under lease. In this context then it will be simply referred to as a "land registration" system without intending to imply either a title or deeds system.

It is difficult to avoid the notion that any recording system for interests in land must be based on the parcel of land. One of the main characteristics of land, that it is immovable, gives it some of its other important characteristics as well. The ownership and other interests may change at anytime but the land will always remain in the same location albeit in a changed form. Thus it is relatively easy to base the recording system on such a fixed datum as a parcel of land itself.

The basic information that is necessary to record is

- (1) *the size, shape and location* of the parcel of land together with some means of identifying it so that it cannot be confused with any other land parcel. This in turn relies on the capacity of the Authority concerned, to carry out land surveys to an acceptable level.
- (2) *What interests exist*, and are permitted to exist, in that parcel. This may primarily be a function of legislation but also it may be dependent upon traditional unwritten customs.
- (3) *Who owns the interests* in that parcel. Not only is it necessary to establish the existing interests but also the recording system must provide for the maintenance of the information recorded. Thus all transactions as they occur must be made known to a central source otherwise the records quickly lose their usefulness.

- (4) *What conditions attach* to the various permitted interests in land parcels. Again, these could be a function of legislation or of unwritten traditional custom.

Given that this is the information to be recorded other issues that are necessary to support, identify and resolve these items, arise as a consequence.

For example, and quite apart from any costs involve, consideration would have to be given to matters such as:

- (a) *the identification of the land parcel* – Questions arise as to who will be responsible for the planning and implementing of the program, who will actually carry out the work, what level of expertise and knowledge will be necessary, will it require time to implement a training program for indigenous people or can the expertise be imported, how will it be done, how will it need to be done – in stages, to differing degrees of standards, what level of accuracy is required,
- (b) *Interests in land* - Questions could include: what interests are permitted by the governing body or by legislation, what conditions attach to these interests, what evidence of ownership of these interests is required, how are these interests protected, can the interests be traded, exchanged or otherwise dealt with, how are interests created especially in the first instance, who is entitled to have an interest in land, to what extent do customary (native) titles, claims and rights affect the proposed system. Of paramount importance as regards interests is the security of those interests. Registered owners will have little comfort about being registered if the registration does not attract security as against third parties. Whether the title is guaranteed by the government or by some means of insurance is not so important as the fact that the interest must be guaranteed by someone of substance.
- (c) *Adjudication of initial owners* – Questions to arise include: what evidence is required, what procedures should be adopted for determination of claims to an interest in land, time limits to be applied, will there be a provision for an “interim” title (in a similar manner as a Limited Certificate of Title in the South Australian Torren’s title system)
- (d) *Records* – The big question of whether to have a manual or electronic system, a special government department to administer and maintain the program, how is it to be properly staffed and resourced, to register land parcels and interests and to constantly maintain and process applications. Other matters include arrangements for the general public to have access to the land records.
- (e) *Monitoring land dealings* – This part can be easily administered once there is an acceptable form of “conveyancing” system that allows for changes to initial information, ie transfer of interest, subdivision of a land parcel, mortgaging of a parcel etc to be properly dealt with and formally recorded. For this to work efficiently there must not only be a compulsion for all people to use it but it the system and the idea of the system must be accepted by the users. The system must be seen to benefit even the most humblest of users. “Unless the land titling is continually demonstrated to be in support of the fundamental quality of life-issues confronting developing nations, the commitment from government will waiver and the participation and confidence of the community will be difficult to achieve (Burns et.al.)

- (f) *Security* – Security is important in two matters. The one being security of title as mentioned above, and the other in the recording system itself and the processing of claims. As well, the "conveyancing" system must be, and must be seen to be, scrupulously honest and foolproof. The system itself can substantially contribute to the level of security. Two instances given here are only to illustrate a point. Other means may be just as satisfactory. The system may insist that all transactions be accompanied by the duplicate certificate of title in order to be accepted for registration and all documents must be witnessed by a nominated functionary. A stable government with honest and genuine officials implementing the system would also add to the perception of security and thus the acceptance by the users.

(D) Two popular title systems of the world

There being many papers available on the subjects of registration of title and registration of deeds that little will be achieved by repeating the substance of these. Many writers substantially agree on the advantages and disadvantages of both, even if there is a bias towards that which is most familiar.

Instead let me make some observations that are based as much on reading as they are on practical experience working in the South Australian Lands Titles Office many years ago.

Again, these observations are included to justify the conclusions for the question posed by the title of this paper and not to support a specific title system.

Torren's system v registration of deeds

Despite each system's proponent's vehement arguments regarding the differences between the two systems it could be that each is as good as the other. Most deed's systems have a requirement that all deeds must be recorded, or memorialised, to be effective against other unrecorded deeds. It is also a fact that the deeds themselves are not necessarily legal just because they have been registered and, if containing an error, could in fact collapse the chain of title back to where the error was introduced. In addition, there may always be an outstanding claim that could appear at any time to adversely affect the interest of the current registered owner. It is this uncertainty that has spawned the huge Title Insurance Companies of the world and created a multi-million dollar business. Torrens overcame this quite simply by having the government guarantee the title, including the registrations recorded on it, by effectively having the users of the system pay for it with small levies charged against documents lodged.

The uncertainty could easily be removed from the deeds system if

- (1) the deeds were only prepared by approved persons, such as the land broker (conveyancer) contemplated by Torrens. The format of these deeds could be refined enormously to simple standards in a similar manner as the panel form document spawned with the advent of the computer and the need to capture data.

- (2) The deeds, representing all transactions as they occur, had to be compulsorily registered.
- (3) The need for repetitious searching back to the original deed was abolished. This could be in the form of detailed adjudication at the time of registration or by the introduction of "staged" titles grading from doubtful to assured titles. For instance, after the initial registration of a deed, the lapse of (say) 10 years after registration of an owners name should prohibit anyone from making a claim against the registered owner and the title could henceforth be guaranteed by the government. Alternatively the title after 10 years could progress to a "class II title" and after a further 10 years without a claim then a "class I" title could be issued and from then on, be guaranteed by the government.

(E) Unique Conditions which may have to be catered for in the recording system:

customary use/"native title" -

This type of interest arises where the people probably live a nomadic life, taking what is necessary for life i.e. animals and vegetable material for clothing and food or minerals for tools where appropriate. To them the concept of ownership of land, known to Europeans, is totally foreign. The land is something to cross and re-cross, provide water, fish, prey to hunt, places to worship etc. Many indigenous people have an affinity with the land such as Europeans do not have, nor in many instances even understand the concept. In some countries this relationship with the land may exist simultaneously with the European concept of land having value and being a tradeable commodity. There is no reason why the two concepts cannot co-exist as evidenced by the conditions of the Crown Leases in South Australia (referred to previously). These leases contained provision for the indigenous people to always have their natural rights to live and hunt on the leased land. It is only when these concepts overlap with competing claims that the difficulty arises. If for example an area is developed for commercial uses, eg retail, commerce, industry along the lines of western tradition then a system of registration of title could easily record those interests. If on the other hand large tracts of land can be identified, albeit not to any high degree of accuracy because there is no real need for accuracy, as belonging to a clan, tribe or distinguishable group of people then a nominated person [or persons] could be registered as the nominal owner. These people have probably been administering the land that they are presently occupying for hundreds of years and quite successfully. It seems to be fairly well accepted that these indigenous people know their place in their system, know the boundaries of their land, know their rights, abide by the chiefs [or elders] decisions and generally determine their own destinies. Thus it would be a retrograde step to do other than leave them be within their identified tract of land with the "official" records showing that the senior person(s) is registered as the owner but as "trustee" for the whole group. Matters internal to the group are determined according to their own rules. No individual transactions can be undertaken by anyone with members of the group but must go through the "trustees". As the trustees change according to the group's rules so the registered owners can be shown to have change also. Even in this there seems little reason to maintain specific names of people as trustees when in reality negotiations of any kind will probably be with the senior members at the time.

other people's attitudes to land and land ownership

people may have an affinity with the land, ie the connection that is attributed to indigenous people who do not have the western world's concept of land ownership and how it can be exploited. Instead this group of people consider themselves the custodians of the land for themselves, their fellow tribesmen, their children, their children's children and for their ancestors. It is not an article of worth in monetary sense but rather a thing to be cherished, nurtured and cared for since it is so important for their ability to exist. This is not to say that their particular use of, and rights over, the land should not or could not be recorded. Far from it. In fact the recent land claims and subsequent court decisions in Australia would suggest that all claims on land should be identified and recorded for posterity. The recording of interests does not detract from nor change those interests but if done properly will allow for their protection as well as change if the holders of those interests ever want to. An additional consideration may be that there is an influence from religious beliefs that may affect land holdings and ownership.

(F) Elements of a land recording system.

1. Boundary definitions

Maybe there needs to be two or more standards - one for the city and (say) one for the country - the more valuable the land the more accurate it should be - the larger the allotment the less accurate. People in western countries buy what they can see. Usually, when they buy a house or a building they can see it and consciously or not, weigh up the value of the property with their needs or aims. What difference does it make that it is 200 m² or 202 m²? Likewise, people rent what they can use efficiently and if they can physically see the premises and from that judge it to be adequate for their needs, then they will accept it without measurement. They will certainly compare the rent that they will have to pay with the chance of making a profit by being in that location. The rate per sq m is a convenient way of comparing properties used by valuers, accountants and economists but hardly by the users, except under the influence of a professional adviser to whom these figures mean something - people may use the detail if they find that they can exploit it to gain advantage over someone, eg the agent, the vendor for damages or the like

Identification of land parcels should be under the auspices of a government "Survey" department, which should also be a part of the Titles Office. Alternatively the survey dept should work closely with the Titles Office in the division of land and subsequent creation of new certificates of title.

It probably requires parcel identification to be done with the assistance of local people conversant with the local customs, uses, rules (in the case of traditional owners) to ensure that social and cultural protocols are preserved. This also presupposes that any legislation has taken these matters into account.

2. Adjudication

It is necessary, to enable a recording system to be designed and implemented, to determine what rights exist and who the current owners are. As previously stated, there are many rights which are already recognised in the European systems. It is highly likely that there are other rights that are recognised by

indigenous people that are not familiar to Europeans and that need to be provided for in some proposed recording systems. These will need to be adequately identified and interpreted to enable them to be appropriately recorded.

The process of adjudication must be fair and equitable, relatively quick to resolve, easily accessible to the owners of the interests and must involve the local population.

Even in the Torrens system this process is required when converting land which is under the deed system to the Torrens system - people must follow a set process to supply adequate evidence to support their claim otherwise their claim is denied. Alternatively, where the claim cannot be completely substantiated enough to allow a guaranteed title to issue then perhaps a system of "staged" titles can be permitted (as previously described). As time elapses without a claim from other parties so the "staged" title can mature into a guaranteed title. Without this sort of approach it is possible that parcels of land may be left idle for want of a vague, and maybe impossible technical requirement, when in all probability no amount of time will ever see the fulfilment of that requirement.

Where the land is being transferred from the ownership of the governing body of the country then that parcel can automatically be covered by the recording system and most likely registered electronically.

3. Ease of conveyancing or dealing with an interest in a parcel of land.

The success of the recording system will depend on how well changes in ownership or other transactions and events are noted in the records. This implies that all transactions, changes to the parcel and dealings with any interests are noted as near as possible to the date of the change or event. This further implies that all dealings with titles must be compulsory, otherwise there is a serious risk that the very people who are supposed to benefit from this recording will choose to take the easiest path and not do anything. This in turn means that there is a compulsory process to follow when any change in an interest in land occurs. One of the major reasons why the Torren's system failed in the United States of America was because it was not made compulsory.

No matter in what type of economy a recording system is to exist there will be good reason to record even relatively minor changes such as a death, maybe a marriage or other processes which may affect the Authorities rating and taxing or planning programmes. Thus even where there is only one owner of land, but a multitude of users, it is beneficial for management purposes to record changes in the users' circumstances

A minimum number of simple documents, in a standard format appropriate for the purpose and the ability of the users to access and understand will help in the acceptance by the users. As an example Alberta, a province of Canada, has 4 only standard documents that can be used to cover the variety of interests that are recognised by their Torren's system. The lower the level of expertise of the users the more reason there is to have a simple method of obtaining the information to record. It probably also means that there needs to be an "advisory service" in the form of an official in whom the locals have confidence. In some

cases it may also mean that there is a minimum [or even absence of] paper documentation but more reliance on oral depositions. Maybe something along the lines of the system in Thailand that allows the purchaser and vendor to appear before an official in the Titles Office and have the transaction formalised and registered while they sit there. Unfortunately for the official, he/she is personally liable for any errors and may have to pay out of their own pockets for their mistakes.

The officials who are responsible for collecting the information to record would need to be in a location that is very convenient to the land being dealt with for fear of encouraging the locals to not bother to advise of their transactions.

The conveyancing system, and processes, should not only be simple to use but also within the means of everyone to access it. Otherwise there are likely to be information regarding many transactions lost because the parties cannot afford to have them recorded.

4. Accessible to public -

As mentioned, Thailand not only gives the users a conveyancing service which in many other countries is handled by professionals in private practice but also have a Titles Office in every district now numbering something in the order of 700. Unlike South Australia where there is only one Titles Office for the whole State. In developing countries these two elements may not only be highly desirable but also essential to the success of any recording system. In any event there would be a need for people trained in the intricacies of the system to properly advise and direct the users.

The alternative to having the Title Authority take care of the technicalities involved in the conveyancing or dealing with land is to have specifically trained people such as the land broker envisaged by Torrens. Control over these professionals is maintained by a system of registration or licencing permitting them to practice. The basis of the acceptance of these people for that position of trust is not only that they be of fit and proper character but also have successfully completed an education program designed to give them competency to carry out their duties. Again, the depth of education and service to be provided must be tailored to suit the circumstances and the aims of the system.

5. Security in dealings

As part of the suggested conveyancing process there must be some mechanism to ensure that only the people entitled to exercise their rights are in fact the people who use the system. In our system it is an easy matter to establish someone's identity from a driving licence upon which is a photograph and signature of the person. Some other system is required where there are no driver's licences. In years gone by the South Australian system required that the witness to a document must be a Justice of the Peace, a Notary Public, a Commissioner for taking Affidavits in the Supreme Court and various other dignitaries according to where in the world one was and other factors. In later years this requirement has been replaced by the need to have only an adult witness sign and give their name, address and daytime phone number. They are under penalty of a fine if they do not know the person who has signed the document or if they have not satisfied themselves as to the identity of that

person. A much more simple and efficient approach to what had been a very time consuming and inconvenient method of proving a signature without any real gain. Another means of trying to protect the registered proprietor of an interest was to insist on the duplicate certificate of title being lodged with every transaction to be recorded. No title, no acceptance. The trend now, in Canada and Australia, is to do away with a duplicate of title since it is now seen as an inconvenience with no benefit to anyone.

A controlled conveyancing process that is seen to be self regulating with built-in safeguards in the form of frequent checks between conveyancers and the Titles Office will assist in the willingness of the government, or other authority, to give a guarantee of title.

Whatever evidence there should exist of the transactions to be recorded should be in a form which is acceptable to the locals, achieves the desired end and can be seen to be secure. It may be a paper (contract/document/deeds etc) system if transactions or possibly oral agreements between both parties in front of a notary public or some such dignitary. It should be adapted to suit local conditions and customs and the final recording system to be adopted. For acceptance by the locals there needs to be an integration of local knowledge and customs as regards traditional ways of doing things and what is important and what is not amongst the LTO staff and the conveyancers. Clearly there should be a high level of involvement by the local people.

6. costs

How this system is to be paid for needs to be the subject of a special paper but I make the following observations. The benefits that have been proved to flow from the implementation of a recording of title system are indisputable. Thus it seems to be more a question of when such a system should be introduced rather than if. In other words most cannot afford to be without a title recording system rather than not afford to have one. While initially the system may have to be funded entirely from government revenue, eventually it should become self funding. As the benefits are felt later on through higher values, increased production and free market trading fees may be charged or increased according to what the people can afford rather than try to implement fees before the system is working and seen to be of benefit. The alternative is that the locals feel that they are paying out for no real benefit. This would most likely only lead to them abandoning, or avoiding, the system thereby deliberately sabotaging its success.

7. *Ease of public access to records*

It is a trite statement but the Public must believe in the system, otherwise they will not use it, especially where

- (a) the level of education and standard of living is not of a particularly high standard,
- (b) there are no perceived benefits,
- (c) their priorities do not include keeping records, filling out forms or going out of their way for some "interfering government department."

The Public must have access to the records and for that purpose the records must be

- (a) kept in a form that the Public can understand
- (b) convenient to the people, ie local offices. This necessarily means that the system would have to be highly decentralised but could be linked by a good communication system.

As to what information should be available to the public it depends on the environment in which the information is to be used, that is things like the development process, the land division process, the distribution of land ownership, the type of land ownership etc. It may be that the Public, including surveyors, solicitors, financiers and others need to have access to survey data, ownership details, encumbrance details, values, sale prices and many other similar details. Once the overall aims and details of the recording system are known, and having due regard for all factors which may influence that system, then it will become apparent as to what information would be available. The sale of this information contributes to the costs of running the system. Again the user pays according to their means

8. Acceptance by the Public

Transactions must be transparent to promote honesty of participants and to show that there is not favouritism and that everyone is treated equally as regards protection of their interest. If officials are seen to be benefiting because of their position, at the expense of the locals then understandably the locals will avoid dealing with them. "land titling is continually demonstrated to be in support of the fundamental quality of life issues confronting developing nations ... participation and confidence of the community will be difficult to achieve. (Burns et.al)"

9. Training

Having enough sufficiently qualified personnel to be able to start to implement a recording scheme could be a major feat in itself. Unless the people responsible for acquiring and processing information were entirely capable of achieving the desired standard, there would be little hope of the scheme succeeding.

Thus the key areas requiring trained personnel are:

(a) Project management:

To determine the objectives and requirements of the proposed scheme. To assess what information is available and what information is required. To assess what expertise is available and what is required. To determine realistic time lines and financial budgets. To determine what legislation is required to control what interests are to be permitted and which are to be recorded. To prepare a master plan to implement the proposed scheme. One could reasonably expect this function to be the responsibility of overseas consultants suitably assisted by appropriate local talent.

(b) Land identification:

Surveyor types to identify and set out parcels of land

(c) Adjudication:

A relatively simple, quick and fair system must be available to determine the true ownership of the existing interests that are to be recorded. In most cases this will require the involvement of local inhabitants, especially where traditional lands are concerned or where there is no form of written record.

(d) Registration:

In most countries a government department, a Lands Titles Office, is responsible for the entry and maintenance of the records. Its function is not only to register dealings with land in the sense of changes of ownership but also involves checking the survey data from which titles are going to issue. This requires close cooperation between a survey department and the clerical department. Both departments should therefore be under a single control. In charge of this operation there must be a qualified and experienced person, supported by similar heads of departments. Below them, there is probably room for less qualified but industrious staff who are familiar with local conditions.

This department really needs to be de-centralised in order to be convenient to as many of the users as possible. It needs to be able to give advice and re-assurance to the users as well as be seen to be honest and efficient.

This office would not only be charged with overseeing the recording scheme but also issuing titles, recording transactions and maintaining up-to-date records.

(e) Conveyancers:

These can be local people who act in a similar manner as conveyancers, solicitors, Notary Publics and Justices of the Peace elsewhere in the world. As in Australia these professionals are trained specifically in land transactions and thus do not require to be trained (say) as a fully qualified solicitor. There is no reason why they cannot be local people who are capable of maintaining the required standard of accuracy and legality but also who are acceptable to the users of the scheme.

(f) Maintenance:

As mentioned above, maintenance is part of the role of the government department that is responsible for the issue of titles and recording of dealings. This function occurs not only through what could be classed as normal transfer but also through changing circumstances of the registered owners of interests either because of marriage, death, division of land, abandonment etc. In part this presupposes that a consequence of an efficient and secure recording system will be a free market. Whether there is a free market or not, there will still be this type of change that will need to be recorded to maintain the register.

In addition, changes to legislation and grants, by the governing body, of new interests to different people will necessitate updating the register.

To maintain a current register it is essential that all transactions must be registered compulsorily and the information must be processed and registered as soon as reasonably possible.

The accuracy of the information being submitted for registration will largely depend on the base from which everyone is working but also on the conveyancing procedures that are adopted and encouraged. The procedures can be designed with in-built security checks to ensure that illegal or fraudulent practices are minimised or prevented. The system in use in South Australia is a good example of a secure system.

Since part of the maintenance of records occurs because of the division of land into smaller parcels, it follows that any division must follow a set

procedure to ensure control over development but also the standard of data that is received.

It should be noted too, that changes to records must be done in such a way as to record the history of dealings with any given parcel of land.

10. Division of land

Apart from the previous comments, there must be a connection between the approval for applications to divide land and the department responsible for the issue of titles. The connection in South Australia is that (a) the Lands Titles Office checks the survey plans for data that will form part of the title and (b) does not issue any titles until there is formal consent from the approving authority. There is a division of land approval process that must be followed in every case, or there is no division. The standards, detail and formality of such a process can be determined according to the local conditions and requirements, but it means that there is a record of development. It may be, for instance, that there are different standards which apply to city land from country land.

It follows that appropriate legislation is required to regulate compliance with some Master Plan for the relevant area.

11. Computers

Whatever system is started it should be done with an eye to converting to computers sooner or later. That shouldn't however, be an excuse for doing nothing until one can afford a computer system.

Computers will save on manpower but not if the expertise is unavailable - in some respects it may be desirable to use manpower since it is probably abundantly available even if it has to be trained. SA, and others, used manpower for over 100 years and it worked well until costs got the better of the system through rising wages (amongst other rising costs). If the country has plenty of cheap labour that can be trained then why not use it to help improve the unemployment figures as well as have adequate staff to rapidly install/update the land recording system?

The recording process may take more time manually, but it can still work accurately if not efficiently. One may argue that if the wages of the staff involved are relatively low and it is a means of employing large numbers of people then it could still be efficient. The major drawback is in having enough trained people to adequately control the quality of the output. This expertise can be gradually built up and expanded with a controlled education scheme. A similar thing is being done in Thailand where a few people are being taught to be valuers in order for them to teach many others the same skills. Thus, theoretically, the number of qualified people can soon double then triple and so on.

12. Legislation

A sample of the type of legislation required can be found on the Internet at URL <http://www.pics.sa.gov.au/isysleg.htm> , Real Property Act 1886. Other supporting legislation includes the Development Act.

Again, it is a major part of the role of governing authority to implement the means and rules that give the force of law to:

- The status of the land records, especially the certificate of title, its format and use
- The LTO and its office bearers and their responsibilities to issue and maintain titles and records.

- Land division approval procedures and issue of new titles
- Which interests in land are permitted, how each can be created, amended, cancelled or otherwise dealt with, whether they be customary interests, deeds, title registration, indigenous interests or other interest unique to the area.
- What dealings with interests in land are permitted, the procedures which must be followed and form of the appropriate documentation (if any)
- What effect registration of transactions and dealings has on the title, the interest or the land
- Ensure the integrity and security of the titles, the records and the interests of those registered.
- The protection of registered interests and to confirm that, if interests are to be lost through compulsory acquisition, adequate compensation is paid.
- The policing of the law (rules) so that once the program is implemented there is a local council, inspector or whatever to make sure that what is approved is what is built/used etc

13. *Supervision*

Any system will probably be easier to work, and may even have to work, by using many local staff who have been previously trained for specific jobs in the first instance ie they need not be trained to the maximum to be able to handle every job. That can be done gradually and with on the job experience by (say) rotation around the office, one at a time. Not unlike the induction of new staff into the Lands Title Office of South Australia up to recent times. In these cases, new staff were allocated a function, under the supervision of an experienced person, and thus learnt the procedures and details of their limited responsibility. By rotating these staff throughout the discrete departments, so each learnt the intricacies of the entire system. Their education was further developed with "in-house" training sessions at regular intervals.

The bulk of the responsibility for the implementation, overseeing and training involved in the system will have to be undertaken by qualified and experienced practitioners, probably from overseas. In that manner there will be the opportunity to commence the implementation of a system with limited qualified personnel. All other staff will require some training, at least to handle their specific functions in the first instance with continuous follow-up education programs as required.

These key people would have to ensure that the staff immediately below them are gradually trained to take over in a given time span so that they become self sufficient as soon as possible.

14. *Setting up*

There can be two systems running side by side. It has been done, and is still being done in many countries in the world. There can be a planned "change-over" or transition period where gradually one system is supplanted by the other, if that is the objective. In South Australia there is a almost a third system, after the Torrens and Deeds systems, that records the large areas of land that are held under Leases from the Crown. The title to land in these cases is evidenced by a Lease document that is recorded and dealt with in a similar manner as the Torren's titles. An example of the flexibility of the Torren's system.

The obvious way to convert from one system to another is to introduce a compulsory change in selected areas, probably the easiest or most valuable first

(or based on any other criteria that is thought appropriate) and simultaneously to convert all current "titles" progressively as they become the subject of a transaction or dealing. There is no doubt that the change-over will be a long and involved process but it is also true that the longer it is delayed the more difficult it will become to ever change. Although the job may be difficult, time consuming and costly the consequences of not doing anything at all may far outweigh these factors. The process will only get worse with time, not better.

The transition period would see some matters being treated according to existing rules and others being treated according to new rules, until all matters are being treated according to the new rules. An example of this approach was evidenced in South Australia, when computerised titles were introduced. As a starting point all strata titles were selected to be converted first ie all new ones were automatically issued by computer while existing ones were compulsorily converted, whether or not there had been a transaction effected. The existing ones were only converted in the office until the day the next transaction involving a particular unit was lodged for registration. At that time the old title was destroyed and the new computerised title was put into circulation. Fortunately the strata titles records were able to be accessed with relative ease thus making the transition simple. Other titles are gradually being computerised both as they are produced with evidence of a transaction and in a systematic manner.

If no system exists or it is changing from a system where predominantly there is only one-owner of land then the opportunity is ripe for a relatively easy implementation of the selected system. The main issues would then become the adjudication process and the encouragement of the people to use the system. The other elements described earlier in this paper would still apply.

15. Degrees of accuracy

In South Australia there still exists a requirement for a very high level of accuracy and propriety in every aspect of the recording, development, conveyancing, surveying and documentation systems

The identification of land parcels is taken to an infinite degree when compared to the size and value of the land. The costs in time and money to produce a plan that is accurate to a centimetre or two do not always relate favourably to the benefits. England would seem to have the correct idea in accepting hedges and the like as boundaries instead of some marker that is accurate to one centimetre. With the exception of high value land where every centimetre can make a difference to which the land may be put, and thus the value, one can question why is there a need for such accuracy. One could also question why should a few centimetres in length or square metres in area, make such a big difference to a development anyway. In the author's experience, for the most part the only importance that size has had with a purchase is whether or not their furniture will fit into the building. Whether the frontage was 20 metres or 21 metres, whatever was visible was acceptable without question. People seem to buy what they see and if it appears sufficient to them, then a high degree of accuracy regarding the measurements becomes of little importance.

In documentation there has always been the need to ensure that the correct parties are the signatories and that the chances of perpetrating a fraud are avoided or at the very least minimised. Although our society requires transactions

and records to be evidenced in writing it is not necessarily a requirement for everyone. For example, provided the record is substantial, either written or electronic, there seems to be no real need for anything else to be so formal. An example to illustrate this concept is taken from Thailand. There the parties to a transaction present themselves to the recording office where their particulars are recorded while they wait. While they have to identify themselves the recording office takes care of the formal requirements. It seems reasonable then to allow parties to face a proper official without formal documentation, especially if it is beyond their ability to produce it, be identified and have the transaction faithfully recorded.

Even the documentation that is now in use in the Torrens system is eventually going to be replaced by electronic means to produce not only the present documents but also allow for electronic signatures and identification. Easily acceptable to a modern generation raised on computers but a substantial change for those steeped in tradition. In reality the security and end result can be the same, with the major difference being a function of the older people's attitudes.

In recording, as previously mentioned, the modern change is to the electronic medium. There are many countries for which this may not be an option at this stage. That should hardly be a consideration, save that any system that is in place or proposed, should be directed towards becoming computerised in due course. One could argue that there is little wrong with a system that relies on manually recording data and producing the appropriate records. Certainly it would take people with at least some training but on the positive side it may help with the employment of people in otherwise less rewarding activities. All countries started off this way and became accustomed to it, even with all its (now apparent) disadvantages. These manual systems themselves became very sophisticated after many years of adapting to changing circumstances. Thus there should be plenty of examples around of the most efficient system of that type to use as a basis for any proposed system where computers are not an option. In any event, the principles of the system remain valid whatever the means of recording, it is only some procedural details that need to be changed.

16. Costs

When one considers a report that the rate of progress achieved to date in the implementation of converting the title system in Indonesia indicates that it will take about another 100 years to complete, then the estimate of costs becomes a huge exercise. An analysis of the costs involved in the Thailand titling program would be of some assistance in estimating a budget.

Suffice it to say in this paper that, apart from identifying the factors that form the recording and titling system, the real cost could be measured by considering the implications of not implementing a formal system.

That is, if the system is not implemented, how can one measure the cost of continually fixing the problems caused by the chaos, economic and social, that could follow as a result. What means will there be to control such functions as the development of land or the use of land or to levy rates or taxes? Even the longest journey must start with the first small step and it may be as well to start sooner rather than later.

The real question is whether a country can not afford to have a recording of title system rather than whether it can afford it.

17. Valuation of properties

To get the most value from a recording system it should be capable of satisfying a variety of needs. One of the most common reasons for implementing a recording system even thousands of year ago was to better be able to tax the owners/occupiers.

The basis of modern taxation is the value of the parcel of land. Thus it follows that while land transactions are being recorded it is a simple matter to also record the value of the parcel of land which is the subject of that transaction. As part of the documentation/information submitted to the LTO for registration on the title is an expressed value of the parcel at the time of the transaction. This represents, in the case of genuine transactions, a reflection of the current market value that is the basis for the comparable sales principle of valuation. In SA it is monitored by the VG who is responsible for establishing the market value of all land in the State for the purpose of taxation.

As a further vehicle for collecting duty (tax by another name) our conveyancing system makes it compulsory to lodge all land transaction documents with the Stamp Duties Office (SDO) for an assessment of duty prior to lodging at the LTO for registration. The SDO accepts the sale price shown in the transfer document unless it differs widely from the Valuer General's assessment of value.

The recording system can support, in terms of supplying current information, a Valuer General's department if the country wants to eventually take that path. It is not necessary immediately although the question of collecting some form, and appropriate level, of duty (tax) as part of transaction may be a priority. In any event, the ownership records provide sufficient information for at least the appropriate party to be taxed.

18. Public acceptance

Part of the role of the government and for the success of any scheme is for it to be accepted by those who are expected to use it and provide information for it. If the program is too complicated, too difficult or too inconvenient the ordinary folk will resort to a program of their own making and convenience.

The benefits to the public must be "sold" to them by the governing authority and be simple for them to use.

It must overcome the public's natural concern that, if the government is collecting what could be considered to be private details of transactions, who is to say that this information will not be used against the them to extract more and unfair taxes or used for some other sinister purpose?

In part, this will be helped by the stability of the government and its perceived integrity.

(G) Conclusions:

The answer is, I believe, that a single system of recording is not only possible but also desirable. How it is implemented and monitored can initially be a very complex matter but will naturally require a detailed assessment of the current situation and what the objectives are. There can be a basic model, incorporating essential principles and features, which can be adapted to suit local conditions. Even in Australia, the home of the Torren's system, each state has its own variation of the Torren's registration of title system based on all of the essential principles.

If no system exists already then the implementation of a recording system with the features of a registration of title system, modified if necessary, is appropriate.

With sound investigation, analysis and planning for any given location, implementation of the chosen system can be monitored and corrected as appropriate. This presupposes of course, that the personnel involved are suitable for their functions.

If a registration of deeds system exists, it could be converted to a registration of title system if one really had the desire to do so. The differences between the two are not great.

Two systems, where one is the preferred system, can run simultaneously while gradually being converted to the preferred single system.

A recording system can be implemented in stages, depending on the objectives of the governing authority, local society and the economy.

The time to implement the system is sooner rather than later since the total costs involved will only continue to rise and the effects of no system, or an inefficient system, will increase rapidly. This is especially true where the neighbouring countries and/or trading partners have a more efficient economy because of an efficient title system.

There must be appropriate legislation in place to support the preferred recording system.

The preferred system must be compulsory

The preferred system must be accepted by the community.

The preferred system must be secure.

The preferred system must be guaranteed or assured in some acceptable way.

References:

- Bernstein, Janis D., The Cost of Land Information System, discussion paper 1986
- Burns, Tony; Eddington Bob; Grant Chris; Lloyd Ian., Land Titling Experience in Asia , undated (c1996)
- Fourie Dr. Clarissa., Cleaning up Cloudy Title in a Developing Country., (undated)
- Haldrup, Niels Otto, Land Registration Under Uncertainty, January 1994
- Haldrup, Niels Otto., Land Registration in the Context of Informal Settlements, (undated) available from O.I.C.R.F. The Hague, Holland
- Henssen J.L.G., Land Tenure., International Institute for Aerospace Survey and Earth Sciences.
- Henssen J.L.G. & Williamson, I.P., Land Registration, Cadastre and its Interaction - A World Perspective, first published in Proceedings of FIG XIX Congress, Helsinki, Finland, 10 -19 June 1990
- Larsson, G., Land Registration in Developing Countries, undated, available from O.I.C.R.F, The Hague, Holland
- McLaughlin John & Palmer David., Land Registration and Development, ITC Journal 1996
- McLaughlin, John & de Soto, Hernando., Property Formalisation: The PROFORM Solution, South African Journal of Surveying and Mapping, Vol 22 Part 5, August 1994
- Toms, K.N., Part 1 - Land Titling in Developing Countries: What Surveyors ought to know about it, The Australian Surveyor, March 1996
- UN Meeting of Cadastral Experts., Report of the United Nations Meeting of Cadastral Experts., A summary of the deliberations of the meeting held at Bogor, Indonesia 18 -22 March 1996
- UNCHS (Habitat) Manual, c1990, available on Internet at URL address : <http://www.maine.edu/guidelines.html>
- Zevenbergen. Jaap., Is Title Registration really the panacea for Defective Land Administration in Developing Countries., Proceedings of the International Conference on Land Tenure in the Developing World with a focus on South Africa, University of Cape Town 1998, p 570 -580
- Zevenbergen, Jaap., The Interrelated Influence of the Technical, Legal and Organisational Aspects on the Functioning of Land Registrations (Cadastral)., URL address: <http://www/sli.unimelb.edu.au/fig7/Brighton98/Comm7.../TS22-Zevenbergen.htm>