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**PANDORA'S BOX? AN EXPLORATION OF S 81 OF
THE LAND TRANSFER ACT 1952 AND ITS EFFECT
ON INDEFEASIBILITY OF TITLE**

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Abstract:

Section 81 of the Land Transfer Act 1952 has a tumultuous past. It has faced various criticisms surrounding its potential for undermining indefeasibility of title, a key concept under our Torrens system of transfer. This paper addresses some of these criticisms, positing first that s 81 does in fact grant the District Land Registrar a wide discretion to correct or cancel titles which have been gained fraudulently or wrongfully, and secondly that this discretion should be exercised if an appropriate case surfaces. Such an exercise is supported by the approach taken in other Torrens jurisdictions and can be regulated through the adoption of a number of simple guidelines, to be considered during any exercise of discretion under s 81. This will reduce the risk of any uncertainty arising from a wide interpretation of s 81 and ensure that the overall justice of the case is the central consideration of any exercise of discretion.

Key words: Land Transfer Act 1952, s 81, District Land Registrar, powers of correction, meaning of “wrongful”, indefeasibility

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I Introduction

Everyone knows the story of Pandora’s Box. Overcome with fatal curiosity Pandora opened the box given to her by Zeus—King of the Gods—and released evil into the world, turning it to darkness. This analogy has been used to describe the potential effect of s 81 of the Land Transfer Act 1952 (LTA) on the principle of indefeasibility of title in New Zealand.

Private property is the foundation upon which modern capitalist society is built, governing how we interact and form relationships: “security of land ownership and tenure is a fundamental building block of most developed economies”.¹ As noted during the introduction of New Zealand’s first Real Property Bill, “the highest ambition of most people appears to be to obtain a homestead for themselves ... all are animated by the desire of having a piece of the world they may call their own.”²

Thus we take the mechanisms by which we protect owners’ rights and oversee the purchase and transfer of land in New Zealand very seriously:³

[I]f the possession of landed property be a matter of so much consequence, it must necessarily be also a matter of much consequence that the evidence of the title of persons to the ownership of property, and facilities for its transfer, should be secured and facilitated ... by law.

The LTA sets out the mechanisms by which we protect the rights of those who deal with land. It is based on the Torrens system of land transfer, which is in turn underpinned by indefeasibility of title: upon registration of an interest in land, a person gains a title which cannot be impugned. Some commentators fear that s 81—which gives discretionary powers to the District Land Registrar (Registrar) to correct or cancel the register where title is entered fraudulently or wrongfully—threatens this cornerstone principle. They believe certainty should be the overriding principle of the land transfer system and is best achieved by having as few exceptions to indefeasibility as possible. That a wide interpretation of s 81 could grant broad discretionary powers to correct the register has led to the provision being described as “Pandora’s box”,⁴ and a “time bomb ticking beneath the concept of indefeasibility”.⁵ What this fails to account for is

¹ David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) at ix.

² (August 23 1870) 9 NZPD 194.

³ At 194.

⁴ GW Hinde and others *Hinde McMorland & Sim Land Law in New Zealand* (Lexis Nexis, Wellington, 2004) at [9.027].

⁵ GW Hinde and DW McMorland *Butterworths Land Law in New Zealand* (Butterworths, Wellington, 1997) at [2.069].

that rigid adherence to indefeasibility of title, particularly “immediate” indefeasibility, can lead to injustice. This paper analyses the scope of the Registrar’s powers to determine precisely how far-reaching they are, followed by a critical examination of whether these powers (if they exist) should be exercised at all.

This paper argues that s 81 does grant substantial powers to the Registrar and these are a logical extension of existing exceptions to indefeasibility. While such an interpretation may somewhat undermine indefeasibility of title, the Registrar should exercise these powers if the occasion calls for it. This paper does not suggest New Zealand’s current immediate indefeasibility approach should be overturned completely, but an exercise of s 81 powers will often be in the interests of justice and will not collapse the land transfer system.

II Background to the Torrens System and Indefeasibility of Title

A Aims of the Torrens System

The Torrens system was first introduced by Sir Robert Torrens in South Australia through the Real Property Act 1861.⁶ It sought to provide an alternative to the deed system prevalent in England which had become expensive, inefficient and uncertain. The deed system was based on *nemo dat* (“no one gives what he does not have”): if any transfer in the chain of title is defective (for example, fraud), anyone who subsequently obtained title would be vulnerable to adverse claims. Thus an expensive and time consuming investigation of title during conveyancing was necessary—usually costing a substantial percentage of the value of the land being purchased.⁷ Only a small class of people in England could afford to own land however, so the issues with the deed system were not as prominent as they became in a new colony such as Australia, where land was readily available, and relatively cheap.

The Torrens system has two main aims: to provide security to owners of land and to facilitate ease of transfer and protect purchasers.⁸ It is based on three simple principles:⁹

⁶ Real Property Act 1861 (SA).

⁷ Douglas Whalan “Immediate Success of Registration of Title in Australasia and Early Failures in England” (1967) 2 NZULR 419 at 423.

⁸ Richard Torrens *The South Australian system of conveyancing by registration of title: with instructions for the guidance of parties dealing, illustrated by copies of the books and forms in use in the Land Titles Office* (Register and Observer Printing Offices, Adelaide, 1859); and Law Commission *A New Land Transfer Act* (NZLC 116, 2010) at [1.11].

⁹ T Ruoff *An Englishman Looks at the Torrens System* (Law Book Co, Sydney, 1957) as cited in Tom Bennion and others *New Zealand Land Law* (2nd ed, Brookers, Wellington, 2009) at 39; and GW Hinde “Indefeasibility of Title since *Frazer v Walker*” in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 33 at 33.

- (a) the “mirror” principle—the register should accurately and completely mirror the state of title;
- (b) the “curtain” principle—purchasers should be able to rely on the register for an accurate description of the interests attached to property and not concern themselves with other interests lying behind the curtain of the register; and
- (c) the “insurance” principle—if the mirror of title gives an incorrect reflection and as a result a person incurs a loss, it should be met by a State assurance fund.

These principles are reflected in legislation from around the world which establish a system of title by registration. In such systems the purchaser is entitled to rely on the register for accurate information about existing interests, registration confers indefeasible title, and the State guarantees this title, accepting responsibility for mistakes through a system of compensation. These three principles are given life through the concept of indefeasibility of title and underlie one of the major tensions running through any Torrens system: the conflicting interests of owners and purchasers.

B Indefeasibility of Title

1 Overview

Indefeasibility of title means that, once registered, a person’s interest in a particular plot of land is impervious to adverse claims. However, the term is a misnomer;¹⁰ the LTA does not grant truly indefeasible title. There are various exceptions which confer on certain persons the ability to defeat a registered title holder’s interest. As explained by Lord Wilberforce in *Frazer v Walker*, indefeasibility of title is:¹¹

[A] convenient description of the immunity from attack by adverse claim ... which a registered proprietor enjoys ... It does not involve that the registered proprietor is protected against any claim whatsoever, [for] there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims *in personam*. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor and while he remains as such, no adverse claim (except as specifically admitted) may be brought against him.

2 Exceptions

There are three principal exceptions to indefeasibility of title in New Zealand which can allow a person to defeat the title of a registered interest holder:

¹⁰ GW Hinde, DW McMorland and PBA Sim *Land Law* (Butterworths, Wellington, 1976) vol 1 at [2.056] and [2.065].

¹¹ *Frazer v Walker* [1967] NZLR 1069 (PC) at 1075–1076 [*Frazer*].

- (1) Those contained in statute—either expressly stated in the LTA, or contained in other Acts which may be read as overriding the LTA.¹²
- (2) Fraud under the LTA. For this there needs to be actual dishonesty, or a suspicion of wrongdoing and a failure to act, by the owner and registered proprietor or their agent.¹³
- (3) Claims *in personam*. The courts will not allow the holder of a registered interest under the LTA to hide behind their indefeasible title to avoid obligations that they have undertaken personally.¹⁴

3 Immediate or Deferred?

The LTA does not define indefeasibility. Indeed, “indefeasible” is used only twice in the entire Act, and those only in minor provisions. This has caused controversy around the courts’ application of indefeasibility. The Act offers little guidance about which provisions should carry greater weight, and Parliament has not indicated which way certain sections should be interpreted. This has led to conflict in the courts, and major debate between those who prefer a “deferred indefeasibility” approach, and those who prefer “immediate indefeasibility”—approaches which are “as similar as two completely dissimilar things in a pod”.¹⁵ Both interpretations have featured at different points in time; the choice between the two is a key differentiator amongst the various land registration systems around the world.¹⁶ The distinguishing feature between them is where each places the emphasis between the conflicting interests underlying the Torrens system: security of title (achieved by protecting the rights of current registered proprietors), and facility of purchase (through the protection of purchasers). In other words, the difference between the two approaches is where they strike the balance between static and dynamic security.¹⁷

In the case of deferred indefeasibility, title obtained through fraud or the registration of a void or voidable instrument can be defeated by the previous registered title holder until title is “perfected” by a subsequent transaction with a bona fide purchaser for valuable consideration.¹⁸ However, under immediate indefeasibility, a purchaser for value who becomes the registered

¹² For example see *Miller v Minister of Mines* [1963] NZLR 560 (PC).

¹³ *Assets v Mere Roihi* [1905] AC 176 (PC).

¹⁴ *Frazer*, above n 11.

¹⁵ Rowan Atkinson as Edmund Blackadder “Duel and Duality” in Richard Curtis and Ben Elton *Blackadder the Third* (S02:E06, BBC Television, first broadcast 22 October 1987) at 3 min.

¹⁶ Pamela O’Connor “Registration of Invalid Dispositions: Who Gets the Property?” in Elizabeth Cooke (ed) *Modern Studies in Property* (Hart Publishing, Oxford, 2005) 45 at 47.

¹⁷ R Demogue “Security” in Fouillé and others (eds) *Modern French Legal Philosophy* (Augustus M Kelley, New York, 1968), at ch XIII as cited in O’Connor, above n 16, at 47.

¹⁸ Bennion, above n 9, at 53.

proprietor of an estate acquires, in the absence of fraud, an indefeasible title—even if the instrument of registration was void or voidable.¹⁹

Deferred indefeasibility favours static security. This term describes rules protecting the interests of existing title holders against purchasers. It reflects the idea that property should not be alienated by the act of another without the owner’s consent.²⁰ It is static as it seeks to preserve the status quo in terms of the existing allocation of property. Salmond J explained this when he said “the effect of registration is to perfect the purchaser’s title notwithstanding defects in the vendor’s registered title”, but that this is different to “whether registration also validates, as between the parties themselves, all defects in the instrument registered”.²¹

Conversely, immediate indefeasibility places more weight on dynamic security, which seeks to protect the reasonable expectations of purchasers that they will acquire a title free of unknown prior claims and defects.²² This opposing principle is designed to facilitate transactions and provide incentives to acquire assets “for productive purposes” as purchasers are assured of having an indefeasible title—inasmuch as the law can grant one.²³

The difficulty faced by many jurisdictions is deciding where to strike the balance. If a strict, absolute approach to immediate indefeasibility is taken, the line falls too far on the side of dynamic security. While this is beneficial when ensuring the ease and brevity of transactions, it provides little protection to existing owners who may be deprived of their property without consent.

4 *The New Zealand Approach*

The choice between adopting immediate or deferred indefeasibility in New Zealand has been hotly contested and attitudes have varied greatly.²⁴ In New Zealand indefeasibility of title is said to be established by ss 62, 63, 75, 182 and 183 of the LTA. These are the root of the legal effect of registration in New Zealand and the State’s guarantee of title. However, as the Act does not actually define indefeasibility, debate centres on what exactly the Act provides for: immediate indefeasibility? Deferred indefeasibility? Discretionary indefeasibility? Salmond J opined that the Act was “so badly drafted . . . it was difficult to harmonise these sections”.²⁵ This

¹⁹ At 53.

²⁰ O’Connor, above n 16, at 47–48.

²¹ *Boyd v Mayor of Wellington* [1924] NZLR 1174 (CA) at 1202 per Salmond J.

²² O’Connor, above n 16, at 47–48.

²³ At 48.

²⁴ See *Gibbs v Messer* [1891] AC 248 (PC); *Frazer*, above n 11; *Westpac New Zealand Ltd v Clark* [2010] 1 NZLR 82 (SC); and Law Commission, above n 8.

²⁵ *Boyd v Mayor of Wellington*, above n 21, at 1211 per Salmond J (dissenting).

led for many years to a lack of clarity which is unbecoming of a jurisdiction based on Torrens principles of transfer.

The debate was largely concluded following the Privy Council decision in *Frazer*, which most have interpreted as signifying that New Zealand applies the principles of immediate indefeasibility in all cases other than fraud.²⁶ This interpretation of indefeasibility is based on what is thought to be the ‘correct’ legal interpretation of the Torrens statute.²⁷ Unfortunately, this has been largely driven by the tendency to view indefeasibility as a “sacred principle”.²⁸ Mason noted this interpretation “is not based on a considered assessment of the comparative benefits and detriments associated with each of the two versions of indefeasibility”.²⁹ Nonetheless, immediate indefeasibility as the accepted practice is unlikely to change. It does not need to change. However, it should not interfere with the application of other principles within the Torrens system.

The courts have latterly used the theory of immediate indefeasibility to help interpret the provisions of the LTA and the powers within it, rather than using the Act to help interpret how we apply indefeasibility; “the tail has wagged the dog”.³⁰ This has often led to a restrictive reading of s 81 in an attempt to make the powers granted within comply with our conception of indefeasibility, rather than looking objectively at the kind of security the Act was meant to achieve.

III Does the Registrar have wide powers of correction?

The focus of most academic critics is s 81(1), which provides the following:³¹

81 Surrender of instrument obtained through fraud, etc

- (1) Where it appears to the satisfaction of the Registrar that any certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error, or that any grant, certificate, instrument, entry or endorsement has been fraudulently *or wrongfully* obtained, or is fraudulently *or wrongfully* retained, he may require the person to whom that grant,

²⁶ *Frazer*, above n 11.

²⁷ Sir Anthony Mason “Indefeasibility – Logic or Legend?” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 3 at 17.

²⁸ At 17.

²⁹ At 17.

³⁰ Struan Scott “Indefeasibility of Title and the Registrar’s ‘Unwelcome’ S81 Powers” 1998–2000 7 *Canta LR* 246 at 247.

³¹ Land Transfer Act 1952, s 81(1) (emphasis added).

certificate, or instrument has been so issued, or by whom it is retained, to deliver up the same *for the purpose of being cancelled or corrected*, as the case may require.

Under this section there are three grounds a person can cite for correction of the register. First, where an instrument has been issued in error or contains a misdescription. Second, where any entry or endorsement has been issued in error, and thirdly, where any entry or endorsement has been fraudulently or wrongfully obtained or retained. The first two are generally well understood and thought to be covered by the express exceptions to indefeasibility elucidated in ss 62 and 63 of the Act.³² Thus it is the third which has caused so much controversy.

The LTA does not define fraud. However, the decision in *Assets v Mere Roihi* definitively described what constitutes fraud for the purposes of the LTA.³³ Fraud is a paramount exception to indefeasibility as is clearly stated in ss 62 and 63. Any confusion around the scope and applicability of s 81 therefore stems from the myriad interpretations of “wrongfully”.

A “Wrongfully”

In *Frazer* the Privy Council suggested that references to “fraudulently” and “wrongfully” in s 81 were not synonymous when they stated “*as well as in the case of fraud*, where any grant, certificate, instrument, entry, or endorsement has been wrongfully obtained or is wrongfully retained, the Registrar has power of cancellation and correction”.³⁴ However, “wrongfully” is not defined in the Act and is an inherently ambiguous and contested concept. This has caused much consternation, particularly because if the legislation does give the Registrar power to decide on substantive issues and to act on them (and it appears that it does), then “the Registrar could do what the High Court could not”.³⁵

The courts have struggled with this issue since *Frazer*, and have in various judgments expressed an opinion on what may or may not fall under “wrongfully” in s 81. For the purposes of this paper the wide approach suggested by *McMorland* is adopted.³⁶ Where a person gains a registered interest directly under a void or voidable instrument, they will have done so wrongfully.³⁷ This “includes all instruments which are void or voidable for whatever reason”.³⁸

³² DW McMorland “Registrar’s Powers of Correction” (1968) 6 NZLJ 138 at 140.

³³ *Assets v Mere Roihi*, above n 13.

³⁴ *Frazer*, above n 11, at 1079 (emphasis added).

³⁵ *Hinde and others*, above n 4, at [9.027].

³⁶ *McMorland*, above n 32.

³⁷ At 141.

³⁸ At 141.

Various other interpretations exist, but these are generally attempts by courts to restrict s 81 by giving “wrongfully” as narrow an interpretation as possible.

Using basic principles of statutory interpretation, given that “wrongfully” appears alongside “fraudulently” they must have distinctive meanings. “Wrongfully” then is wide enough to encompass situations other than registration through fraud. The Oxford English Dictionary defines “wrongful” as “not fair, just, or legal” and suggests various synonyms including “improper” and “illegitimate”.³⁹ The Collins English Dictionary posits that it includes acts which are “immoral, unjust, or illegal”.⁴⁰ This supports a wide interpretation of “wrongfully”. Any title which is gained through the registration of a void or voidable instrument can be seen as improperly or incorrectly registered, and therefore “wrongfully” entered on the register.

B Section 81 and the Courts

The courts have had a tumultuous relationship with s 81, at times appearing to accept the Registrar has extensive powers in the case of “wrongful” entries on the register, and at others attempting to read down the section as much as possible.⁴¹ This paper will spend little time analysing the courts treatment of s 81 since this has been covered at length in other works; nonetheless some background is necessary.⁴²

It is accepted that whatever the scope of the Registrar’s powers, they must be read subject to s 183, which protects subsequent bona fide purchasers who give valuable consideration from obtaining faulty title due to a defect in the title of the previous registered proprietor.⁴³

Some early cases found the Registrar was entitled to rectify the register in situations where the transferee had gained title through a void instrument.⁴⁴ The Privy Council in *Frazer* thought that “[t]he powers of the Registrar under s 81 are *significant and extensive*”.⁴⁵ McGechan J in the High Court acknowledged that a liberal approach to s 81 is the correct one, saying he saw

³⁹ *Concise Oxford English Dictionary* Angus Stevenson and Maurice Waite (ed) (12th ed, Oxford University Press, Oxford, 2011) at 1667.

⁴⁰ *Collins English Dictionary* (online edition, 2015) <http://www.collinsdictionary.com>.

⁴¹ See *Frazer*, above n 11; *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662 (HC) [*Housing Corporation*]; *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd* [1984] 2 NZLR 704 (HC); and *Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747 (CA) [*Dollars & Sense*]. Note that statements made by the CA in *Dollars & Sense* were not discussed in the judgment of the Supreme Court on appeal.

⁴² For example see Hinde, above n 9; GW Hinde and others *Principles of real property law* (2nd ed, LexisNexis, Wellington, 2014) at 343–347; and David Grinlinton “The Registrar’s Powers of Correction” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 217.

⁴³ See *Assets Co v Mere Roihi*, above n 13; and *Frazer v Walker*, above n 11, at 1079.

⁴⁴ See *De Chateau v Child* [1928] NZLR 63 and *District Land Registrar v Thompson* [1922] NZLR 627.

⁴⁵ *Frazer*, above n 11, at 1072 (emphasis added).

“no escape from the conclusion that s 81 is alive and well, however unwelcome”.⁴⁶ In related proceedings the Court of Appeal referenced this statement without objection.⁴⁷ A number of more recent cases have expressed the view that the Registrar could use s 81 to resolve incorrect Maori land registrations.⁴⁸

Others however have played down the scope of s 81 by expressing strong views on the negative impact on indefeasibility that a wide interpretation would have. Beattie J in *Chan v Lower Hutt City Corporation* said that “if the argument [for a wide interpretation] were to succeed then the doctrine of immediate indefeasibility would receive a major set-back. There would be much uncertainty as to the effect on the titles in this kind of case”.⁴⁹ Barker J in the High Court claimed “[w]rongful registration involves something more than that the instrument pursuant to which it was procured was void or that the certificate of correctness was erroneous for that reason”,⁵⁰ and that:⁵¹

[T]here should be no reason for holding that registration has been “wrongfully” obtained, if the registered proprietor or mortgagee acted honestly and in good faith and where he or his solicitors had diligently carried out every conveyancing procedure normally required and appropriate in the circumstances.

The most recent cases considering the Registrar’s s 81 powers are the decisions of the Court of Appeal in *Nathan v Dollars & Sense Finance Ltd*, and *Minister of Conservation v Maori Land Court*.⁵² In *Dollars & Sense* the Court took a conservative approach:⁵³

[Section] 81 either does not permit the impeachment of a title which is indefeasible under ss 62 and 63 (which is perhaps the predominant view) or alternatively, as a matter of practice, would (or should) not be invoked for that purpose ...

⁴⁶ *Housing Corporation*, above n 41, at 699.

⁴⁷ *Housing Corporation of New Zealand v Maori Trustee (No 2)* [1988] 2 NZLR 708 (CA) at 717.

⁴⁸ See *Pakiri R Block and Rahui te Kuri Inc* (Maori Appellate Court, 1/93, 23 March 1994); and *Waipuka 3B1B1 and Waipuka 3B1B2B1C2 A Block* (1993) 135 Napier MC 164 (Rotorua, 23 July 1993).

⁴⁹ *Chan v Lower Hutt City Corporation* [1976] 2 NZLR 75 at 85.

⁵⁰ *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd*, above n 41, at 714.

⁵¹ At 715.

⁵² See *Dollars & Sense*, above n 41; and *Minister of Conservation v Maori Land Court* [2008] NZCA 564, [2009] 3 NZLR 465 [*Minister of Conservation*].

⁵³ *Dollars & Sense*, above n 41, at [36] per William Young P.

Glazebrook J added:⁵⁴

[I]t is unlikely that the Registrar acting administratively would be empowered to defeat indefeasibility in circumstances where a Court cannot.

...

We do not favour the alternative view ... If there were power to impeach an indefeasible title, there seems no reason why it should not be used, but in our view the Registrar has no such power.

In *Minister of Conservation*⁵⁵ the Court cited with approval a decision of the then Supreme Court in *Re Mangatainoka IBC No 2*.⁵⁶ There the Court held the Registrar had the power to alter the register on discovering that an entry had been made in error (and wrongfully), and that the alteration applied retrospectively. Chambers and Robertson JJ in *Minister of Conservation* said the *Mangatainoka* case was:⁵⁷

[A]uthority for the proposition that ... title ‘can be corrected’, but only by the District Land Registrar ... or by the High Court on appropriate proceedings under the Land Transfer Act.

They concluded the 1998 decision of the Maori Land Court which was in question had been “wrongly made” and suggested that at the time the issue could have been brought before the Registrar under a request for the exercise of their discretion under s 81.⁵⁸

Thus the two most recent judgements which consider s 81 are two Court of Appeal judgments which take conflicting stances on its scope and application. This highlights the controversy s 81 has caused—and continues to cause. For this to be resolved a claim would have to be taken under s 81 through to the Supreme Court. So far, this has not occurred, and nor is it likely to given the apparent reluctance of those dealing with the LTA to request an exercise of the Registrar’s discretion.

Some hesitation may be a result of statements released by the then Registrar-General following the judgment in *Housing Corporation*. McGechan J acknowledged the wide application of s 81, but strongly suggested that s 81 was “an unwanted anachronism”,⁵⁹ and the Registrar should

⁵⁴ At [156] and [158].

⁵⁵ *Minister of Conservation*, above n 52.

⁵⁶ *Re Mangatainoka IBC No 2* (1913) 33 NZLR 23, approved in *Minister of Conservation*, above n 52, at [95].

⁵⁷ *Minister of Conservation*, above n 52, at [95] (emphasis in original).

⁵⁸ At [104].

⁵⁹ *Housing Corporation*, above n 41, at 701.

use extreme caution in exercising this discretion for fear of being labelled an “activist” and “looked upon in askance”.⁶⁰ Shortly after this judgement the Registrar-General released the following:⁶¹

Notwithstanding the affirmation some 21 years ago by the Privy Council of the existence of extensive powers of cancellation by the DLR [District Land Registrar], our DLRs have not since then in any way menaced titles ... but have continued to take the view that if an issue lies between parties the opinion of the High Court must first be obtained. Only when advised by the Court in contentious situations will the DLR exercise the discretion given by s 81 of the LTA 1952.

He justified this by saying:⁶²

This note is intended to provide, on our part as Registrars, a public assurance that there will not be a change in attitude from within the titles system, thus affirming in effect the pragmatic approach taken by McGechan J.

This stance has an important consequence. Section 81 is a statutory provision which grants a discretionary power on the Registrar within the meaning of the Judicature Amendment Act 1972.⁶³ If the Registrar refuses to exercise this discretion on request, or fails to follow the rules of natural justice (in applying a pre-determined policy decision which to always refuse to correct the register under s 81), this decision can be judicially reviewed on application to the High Court.⁶⁴ An aggrieved party also has the ability under s 216 of the LTA to contest the refusal of the Registrar to exercise their powers.⁶⁵ Thus if a situation arises where the Registrar is asked to consider exercising their s 81 powers, they must undertake a true exercise of discretion and provide appropriate reasons for their decision. The blanket policy elucidated in the Registrar’s statement above is not a true exercise of discretion.

C Making Sense of the Chaos

Currently the highest authority which discusses the application of s 81 is still the Privy Council decision of *Frazer*, which acknowledges the wide scope and “significant and extensive” nature of the discretion. The turmoil seen in the courts surrounding s 81 is likely a result of the widely held belief amongst many involved in our land transfer system that s 81 is more of a menace than anything else, threatening indefeasibility as Pandora’s box threatened the stability of

⁶⁰ At 699.

⁶¹ BE Hayes “DLRs and the Power to Cancel Registration” (1988) 4 BCB 255 at 256.

⁶² At 256.

⁶³ Judicature Amendment Act 1972, s 3, definition of “statutory power”.

⁶⁴ McMorland, above n 32, at 139.

⁶⁵ Hinde and others, above n 42, at 347.

Ancient Greece. This opinion is based on a misplaced belief in the inscrutable importance of the rule of immediate indefeasibility. As evidenced by Torrens,⁶⁶ and acknowledged by the Law Commission,⁶⁷ the Torrens system was based on the idea of protection—both dynamic and static—in order to underwrite the costs of the deed system and provide a measure of certainty and security to those dealing with the transfer and ownership of land rights; in other words to provide “rigidly defined areas of doubt and uncertainty”.⁶⁸

The main consequence of the decision in *Frazer* is that in New Zealand we typically apply the doctrine of immediate indefeasibility. However, the Privy Council left open a major loophole. As well as admitting that actions *in personam* could in certain cases defeat a registered interest, they also acknowledged that “[t]he powers of the Registrar under s 81 are significant and extensive”.⁶⁹ While the judgment clarified that the Registrar’s powers are limited by s 183, beyond that the extent of the Registrar’s powers was left open.

Arguably these two outcomes of the Privy Council decision are “totally inconsistent”;⁷⁰ they have elicited a general response whereby s 81 is treated as the anomaly.⁷¹ This is because proponents of immediate indefeasibility view a wide interpretation of s 81 as an attack on the preferred approach to indefeasibility. Immediate indefeasibility grants indefeasible title to a transactor upon registration of an interest under the LTA, even if the instrument of registration was void or voidable. If s 81 grants wide discretionary powers to correct the register in any case of “wrongful” entry on the register this would arguably make titles gained through void or voidable instruments defeasible—completely at odds with the theory of immediate indefeasibility.

McMorland and Scott have both scrutinised the decision in *Frazer* in an attempt to address this issue and reconcile the Privy Council’s recognition of wide powers under s 81 with the concept of immediate indefeasibility.⁷² McMorland opines “where a registration may properly be said to be wrongful, although the title is ‘indefeasible’ under ss 62 and 63, the Registrar has power to override the ‘indefeasibility’ conferred and correct the register”.⁷³ He does not see this as inconsistent with the immediate indefeasibility approach laid down in *Frazer* which held that

⁶⁶ Torrens, above n 8.

⁶⁷ Law Commission, above n 8.

⁶⁸ Douglas Adams *The Hitchhiker’s Guide to the Galaxy* (Pan Books, London, 2009) at 145.

⁶⁹ *Frazer*, above n 11, at 1072.

⁷⁰ Scott, above n 30, at 258.

⁷¹ At 258.

⁷² See McMorland, above n 32; and Scott, above n 30.

⁷³ McMorland, above n 32, at 140.

for all void instruments “registration is effective to vest and divest title and to protect the registered proprietor against adverse claims”.⁷⁴

Scott has a similar view, which he expresses in terms of the distinction between “allowable” claims, and “adverse” claims.⁷⁵ He suggests the current “orthodox” understanding of *Frazer* as conferring immediate indefeasibility in the case of void documents is mistaken. He explains that Lord Wilberforce recognised two types of challenge to the register, which Scott categorises under the monikers of “adverse” and “allowable” claims. Subject only to the recognised statutory exceptions in ss 62 and 63, registration of an interest provides immediate protection against adverse claims—that is, those involving prior interests in the property which a claimant insists have survived the registration under the LTA of another’s same interest.⁷⁶ However, registration does not confer immunity against “claims *in personam* ... nor the exercise of the Registrar’s s 81 powers”.⁷⁷ “Allowable” claims are only limited by the subsequent registration of someone who falls under s 183 of the LTA. The effect of this is a person who has gained title through a void instrument will have immediate protection against any adverse claims brought against the title, unless they fall within the exceptions noted in ss 62 and 63, but will not be able to rely on their indefeasible title in the case of any allowable claims against them, including an application to the Registrar under s 81.

With respect, while McMorland and Scott make well-reasoned, rational arguments, they overcomplicate the issue. Reconciling Lord Wilberforce’s statements about immediate indefeasibility and the Registrar’s substantial powers under s 81 may be simplified if we accept that s 81 is nothing more than another statutory exception to indefeasibility.

D Just Another Exception

A number of exceptions to indefeasibility have been recognised by the courts. Statutory provisions are one of the principle means by which a title holder may be impeachable under the Torrens system. This includes those exceptions to indefeasibility expressly provided for in ss 62 and 63, specific exceptions made by other statutes,⁷⁸ and statutes which are seen as overriding the LTA.⁷⁹

⁷⁴ *Frazer*, above n 11, at 419, 584, 654 and 1078.

⁷⁵ Scott, above n 30.

⁷⁶ *Frazer*, above n 11, at 1078.

⁷⁷ Scott, above n 30, at 260.

⁷⁸ See *Boyd v Mayor of Wellington*, above n 21, particularly discussion around the Public Works Act 1928 at 1185, 1189–1190 per Stout CJ and 1190 per Sim J.

⁷⁹ Hinde, above n 9, at 39–40; and for example see *Miller v Minister of Mines*, above n 12, particularly discussion around the Mining Act 1926 at 567–569.

Section 81 should be regarded as simply another statutory exception to indefeasibility contained within the LTA itself. Immediate indefeasibility is a creature of the common law. As a creation of statute, s 81 need not comply with the theory of immediate indefeasibility. While the common law can facilitate the interpretation of statute, we must prevent the ‘tail wagging the dog’—in other words avoid the temptation of using immediate indefeasibility to interpret provisions of the LTA and the powers within it, and instead use the Act itself to help interpret how indefeasibility is applied. Attempts by the courts to read down s 81 come across as strained and logically insupportable. Decisions such as *Chan* and *Dollars & Sense* are examples of the courts’ tendency to venerate the idea of immediate indefeasibility to an illogical degree, which has led to suggestions that “[a]n unqualified power to cancel or correct the register book could strike at the very roots of indefeasibility of title”,⁸⁰ a sentiment echoed in various cases over the years.⁸¹ A more cogent approach to interpreting s 81 is to view the provision as a discrete statutory exception to indefeasibility under the Act; one which grants a discretion which can be used to cancel or correct the register in appropriate cases.

Even taking this approach, s 81 is not entirely inconsistent with immediate indefeasibility. As McMorland notes, there is no blanket rule under s 81 that void documents will not confer indefeasible title upon a registered proprietor. On its proper construction, a registered proprietor who has obtained title through the registration of a void document will have an immediately indefeasible title. If, however, a claim is brought before the Registrar and the method of registration is deemed to be wrongful, the Registrar can choose to exercise their discretion and cancel the title or correct the register. This is little different from any other exception currently recognised under the LTA. Furthermore, a wide interpretation of s 81 brings new meaning and consistency with the rest of the LTA, in particular with s 183 which perfects the title of a subsequent bona fide transactor which may have been defective because it was obtained through fraud, “or under any void or voidable instrument”, through the act of registration.⁸² If s 81 were intended to be interpreted and applied narrowly, s 183 would surely limit itself merely to perfecting titles which are faulty due to fraud.

Yet the question still remains: if it is accepted that the Registrar has extensive powers to correct or cancel the register in the case of wrongful entry, *should the Registrar do so*; or would this constitute too much of an attack on indefeasibility of title which would irreparably damage our system of land transfer? It has been noted that, as s 81 is a statutory discretion, the Registrar must undertake a full and proper exercise of judgement under s 81 if called upon or risk judicial

⁸⁰ John Baalman *The Torrens System in New South Wales* (1951) at 417 as cited in Hinde, above n 9, at 53.

⁸¹ *Housing Corporation*, above n 41, at 699; and *Edwards v Maori Land Court of New Zealand* HC Wellington CP 78-01, December 11 2001.

⁸² Land Transfer Act, s 183; and McMorland, above n 32, at 141.

review. Such an exercise still allows the Registrar to decide against an exercise of their powers. At issue is whether the Registrar should be more open to a positive exercise of these powers, and more willing to cancel or correct the register in appropriate cases.

IV Should the Registrar exercise these powers?

Section 81 does not undermine indefeasibility. Not every registration of a void instrument will constitute a “wrongful” registration, and until the Registrar chooses to exercise their powers under the Act, a registered instrument which may be susceptible to them remains indefeasible and enjoys all the benefits of immediate indefeasibility.⁸³

A system instigated more than a century ago must be made flexible enough to accommodate changes in our society ... The inflexibility of an absolute immediate indefeasibility principle has surfaced and it would be foolish not to accept that a practical solution must be found.⁸⁴

It may be that in most cases other exceptions to indefeasibility such as the *in personam* exception will apply such that recourse to s 81 will not be necessary. However, this does not lead logically to the conclusion that there is no need for s 81. Many cases have suggested that the powers under s 81 are wider than the exceptions to indefeasibility in ss 62 and 63.⁸⁵ Following this, if an appropriate case arises the courts should not be shy of calling on the Registrar to do what it cannot, and those who practice in the legal profession should not shy away from requesting an exercise of the Registrar’s discretion.

Some justification of this proposition is necessary. The remainder of this paper focusses on discussing the arguments surrounding an application of s 81 powers, including how this affects other relevant provisions within the LTA, whether the Registrar has the resources to exercise such a discretion, the approach taken in other Torrens jurisdictions, and the recent Law Commission report released following the review of the current LTA.

⁸³ See *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd*, above n 41, at 715 per Barker J; *Hinde and others*, above n 42, at 345; *Bennion*, above n 9, at 161; and *Hinde*, above n 9, at 68–70.

⁸⁴ E Toomey “Fraud and Forgery in the 1990s: Can our Adherence to *Frazer v Walker* Survive the Strain?” (1994) 5 *Canta LR* 424 at 435.

⁸⁵ *Frazer*, above n 11; and *Housing Corporation*, above n 41.

A Consistency with Other Provisions within the Land Transfer Act

1 Section 182: The Notice Provision

Thomas J stated:⁸⁶

It is now over a century since the nature and purpose of the Torrens system was described by the Privy Council in *Gibbs v Messer* ... The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of the title and to satisfy themselves of its validity. This end is accomplished by providing that everyone who purchases land, without fraud ... from a registered proprietor and enters his or her deed of transfer or mortgage on the register thereby acquires an indefeasible right notwithstanding any infirmity in the title.

This reflects the view that the best way to save people from having to search through the transactional history of the title they are interested in is to adopt immediate indefeasibility. The practical effect of this is purchasers do not have to make enquiries into the validity of the instrument of transfer where it appears on its face to be in order.⁸⁷ However, given in most situations the only party with the agency to ensure the transaction was valid for the purposes of the LTA will be the purchaser, it seems just and logical that they should bear the burden of the mistake. This argument was eloquently stated by Salmond J who thought that too strict an approach to immediate indefeasibility would encourage transactors to avoid looking into the validity of a transaction so as to avoid responsibility and ensure that they can claim bona fide intentions. Taylor similarly suggested that such an approach would encourage “careless conveyancing”.⁸⁸

Section 182 of the LTA is often used to justify the application of immediate indefeasibility in New Zealand. The relevant parts are set out below:⁸⁹

182 Purchaser from registered proprietor not affected by notice

Except in the case of fraud, no person ... dealing with ... a transfer from the registered proprietor of any registered estate or interest shall be required ... to inquire into or ascertain the circumstances in...which that registered owner or any previous registered owner of the estate or interest in question is or was registered ...

⁸⁶ *CN and NA Davies Ltd v Laughton* [1997] 3 NZLR 705 at 712–713.

⁸⁷ Ronald Sackville “The Torrens System – Some Thoughts on Indefeasibility and Priorities” (1973) 47 ALJ 526 at 531.

⁸⁸ Warrington Taylor “Scotching Frazer v Walker” (1970) 44 ALJ 248 at 254.

⁸⁹ Land Transfer Act, s 182.

Essentially transactors are legally entitled to rely on the register as to whether the vendor has good title. However, this section does not relieve a purchaser of the need to ensure they are in fact dealing with the person who is listed on the register, or of ensuring the title they are gaining is not void for any other reason. The section specifically states it will only apply to those transactors “dealing with...the registered proprietor”. Presumably then, this does not extend to those who have not in fact dealt with the actual registered proprietor but have transacted with a fraudster who used their name.⁹⁰ Such a transaction would be void and so wrongfully obtained, and subject to s 81. Given the relative positions of the parties to ensure a valid transaction, there should not be a bar on the exercise of discretion in appropriate cases.

2 *The Compensation Provisions*

One of the principles of the Torrens system is that a person who has acquired an interest in land in good faith on the strength of the register should not be deprived of that interest without monetary compensation. Some have suggested that a cancellation of title under s 81 would result in the party who, having registered through a void transaction, is removed from the register being unable to claim for compensation under the LTA—making it inequitable for the Registrar to exercise their discretion under s 81.⁹¹ However, when the main compensation provision of the LTA is considered, it is clear that a person who gained title through the registration of a void document and is subsequently removed from the register under s 81 should be able to claim compensation.

Section 172 is the main compensation provision of the LTA. Section 172(a) makes it clear that compensation can be claimed by anyone who sustains loss through any mistake by the Registrar in the performance of their duties.⁹² A party who has been removed following a s 81 determination of “wrongful” entry would still be able to claim damages under s 172 because the Registrar made a mistake in registering their interest to begin with, without which they could not have suffered a subsequent loss. The Registrar, in allowing their interest to be registered made a mistake—for “whether or not registration confers immediate indefeasibility does not affect the status of an unregistered instrument. A person who might benefit should it obtain indefeasibility (as through mistake occasioned by ignorance as to its status) is not entitled to obtain registration”⁹³—which is corrected upon the application of s 81.

⁹⁰ Hinde and others, above n 42, at 297.

⁹¹ At 399–406; and Hinde, above n 9, at 64.

⁹² Land Transfer Act, s 172(a).

⁹³ *Westpac New Zealand Ltd v Clark*, above n 24, at [13] per Elias CJ.

B Limited Resources?

Hinde made the following observations with respect to the Registrar’s exercise of discretion under s 81:⁹⁴

The Courts have not regarded the procedure provided by [s 81] as appropriate for the full-scale trial of questions of title, and have said that the Registrar’s powers of correction should be exercised only where the right of the applicant is demonstrably plain.⁹⁵ The procedure is not intended to be used in cases in which grave and perhaps complicated questions of law and fact might arise, so that where the applicant’s right has to be made out against a registered title upon facts and law it should be established in a regular action.⁹⁶

There is some truth to that view. The Registrar no longer has the resources it once had. Extensive investigation may need to be undertaken to determine the facts of a particular case, or a quasi-judicial approach necessary to determine whether a particular registration is wrongful. Perhaps the Registrar is ill-equipped to undertake these tasks. Even amongst those who recognise the need for powers such as those in s 81, there is dissatisfaction due to the discretion residing with the Registrar rather than the courts.⁹⁷ It would be preferable if these powers were vested in the courts—they have greater resources and experience dealing with complex factual and legal situations—but currently they are not.

Limited resources should not be an excuse to avoid exercising a discretion to provide a remedy which the Registrar alone can grant, particularly if this would result in manifest injustice. If necessary the courts could be used to assist in determining any factual or legal issues at play, as long as the ultimate decision on the question of discretion is left to the Registrar. This should be a last resort. As suggested later in this paper the Registrar could adopt certain guidelines to steer a decision as to the exercise of the discretion. In most cases, even with limited resources, the Registrar should be able to utilise these guidelines to direct their inquiries and so make an informed and rational decision based on the facts of each individual case.

C Overseas Jurisdictions

New Zealand is not the only nation to utilise the Torrens system of transfer. However, not all take the same approach to indefeasibility; indeed “[i]mmediate indefeasibility is far from being the norm in the Torrens jurisdictions. It applies in Australia, New Zealand, Papua New Guinea,

⁹⁴ Hinde, above n 9, at 52.

⁹⁵ See *Manahi Te Hiakai v The District Land Registrar* (1909) 29 NZLR 130 at 132 per Chapman J; and *Duthie v The District Land Registrar at Wellington* (1911) 31 NZLR 245 at 250 per Sim J.

⁹⁶ See *Manahi Te Hiakai v The District Land Registrar*, above n 94; *Duthie v The District Land Registrar at Wellington*, above n 94; and *District Land Registrar v Thompson*, above n 47, at 629 per Sim J.

⁹⁷ *Housing Corporation*, above n 41; Law Commission, above n 8, at [2.47] and [2.49].

Saskatchewan and...Malaysia. Other jurisdictions generally prefer deferred indefeasibility, in absolute or presumptive form, or else have no clear decision rule".⁹⁸

In Australia and Canada, different states or provinces have different approaches. The courts tend to apply either immediate or deferred indefeasibility as appropriate in the circumstances, depending on the facts of each case.⁹⁹ It is generally thought that deferred indefeasibility yields more satisfactory results in cases involving void instruments, and this approach does not appear to have resulted in insuperable problems.¹⁰⁰ Even some European nations with land registrations systems appear more in line with the concept of deferred rather than immediate indefeasibility.¹⁰¹

The prevalence of such relaxed approaches to the concept of indefeasibility in other jurisdictions and the clear indications that this approach has more of an element of fairness than our current strict one should highlight the fact that a more open view of indefeasibility is required in New Zealand. The application of a more discretionary view of indefeasibility has not unduly affected Canada's system of land transfer, or had a detrimental effect on certainty when dealing with land. Section 81 therefore, as an extremely limited form of discretion in the case of void instruments, is unlikely to destroy our Torrens system of transfer.

D Law Commission Report on the New Land Transfer Act

Recently the Law Commission, in conjunction with Land Information New Zealand, carried out a review of our current system of transfer and in mid-2010 issued a report entitled *A New Land Transfer Act* detailing their observations and suggestions for change.¹⁰² It included a draft Bill which was suggested as a replacement for the current LTA. Since then, no action has been taken by Parliament to address this, let alone enact it.

The review specifically dealt with the Registrar's powers of correction under s 81 and acknowledged the nature and scope of these powers are unclear.¹⁰³ The Commission has suggested giving the Registrar administrative powers only, to correct errors, record boundary changes or to give effect to a court order. This would remove any argument that the Registrar has any extensive corrective powers.

⁹⁸ O'Connor, above n 16, at 63.

⁹⁹ Toomey, above n 84, at 435; Land Titles Act 1994 (Qld), s 187; Land Registration Act 2001, RSNS ch 6, s 35; Land Title Act, RSBC 1996, c 250, ss 25.1(1) and 297(3); and Mason, above n 27, at 16.

¹⁰⁰ Mason, above n 27, at 16.

¹⁰¹ O'Connor, above n 16, at 60.

¹⁰² Law Commission, above n 8.

¹⁰³ Land Information New Zealand *Exposure Draft for Consultation: New Zealand Land Transfer Bill* (LINZ, Wellington, 2013) at [5.12].

However, it has also proposed an extension of judicial powers by granting a limited judicial discretion to order the alteration of the register in appropriate cases to avoid “manifest injustice”.¹⁰⁴ The current interpretation of the LTA is weighted towards the facilitation of transfer and protection of purchasers (as opposed to security of ownership) as can be seen from the preference for immediate indefeasibility of title.¹⁰⁵ Section 81 readjusts the balance somewhat by giving owners a way of challenging void transactions outside of the narrow scope of fraud. The Commission seeks to mimic this more balanced approach by taking these powers and giving a (somewhat watered-down) version of them to the courts. The current system:¹⁰⁶

[G]ives a purchaser title immediately upon registration (following *Frazer*), whether or not the transfer instrument is void or voidable. This favours facility of transfer, and immediate protection of purchasers ... However ... it does not necessarily support continued security of title of a registered owner. In cases of void transfer of instruments (particularly fraudulent transfers), immediate indefeasibility is not always fair on previously registered owners (especially those in occupation) who ... did not wish or intend to transfer their property.

In such cases the courts have tried to find ways around the injustices which may be caused by immediate indefeasibility by resorting to *in personam* claims which are justified on the basis that the registered owner undertook an obligation themselves to which they must be bound. There could be another course of action—recourse to s 81—but the courts are reluctant to open this avenue. However, if the Commission’s suggestions as to granting a judicial discretion is what has been proposed, why could the Registrar not use their current powers to do the same?

It appears that the issues of interpretation surrounding s 81 stem less from its ability to undermine indefeasibility, and more as a result of the courts’ reluctance to acknowledge that such a quasi-judicial discretion is wielded by the Registrar rather than the court system. While the courts probably are in a better position to exercise such a discretion, until the Law Commission’s suggestions have been acted upon, the power resides with the Registrar. Since the Commission proposed a discretionary judicial power it has acknowledged that there is a need for such a thing. Unless the LTA is amended to reflect the suggestions made in its report, the Registrar should not be so quick to dismiss an application for correction or cancellation under s 81.

¹⁰⁴ Law Commission, above n 8, at [2.16].

¹⁰⁵ At [1.11].

¹⁰⁶ At [2.5].

E Proposed Guidelines for the Exercise of Discretion

Not every void transaction will lead to a registered title holder being removed from the register. There are many reasons for which a transaction may be void, and each case should be analysed on its particular facts when considering an exercise of discretion under s 81. In a Canadian review undertaken by the Joint Land Titles Committee, various guidelines were proposed to help the exercise of discretion under their version of New Zealand's LTA, including taking into account the following circumstances:¹⁰⁷

- the nature of the ownership and the use of the property by either of the parties;
- the circumstances of the invalid transaction;
- the special characteristics of the property and their appeal to the parties;
- the willingness of one or both of the parties to receive compensation;
- the ease with which the amount of compensation for a loss may be determined; and
- any other circumstances that make it just and equitable to exercise or refuse to exercise these powers.

While these guidelines were proposed in reference to an exercise of discretion by the courts rather than the Registrar, there is no reason why they cannot equally apply to the Registrar for the time being. The New Zealand Law Commission have also cited these considerations favourably in their report into the current LTA.¹⁰⁸ Thus, to combat claims the exercise of s 81 may lead to uncertainty, it is proposed that when considering an exercise of discretion under s 81, the Registrar consider the above guidelines and only exercise their powers of cancellation or correction where it is clear the overall justice of the situation calls for it.

Not every void transaction will lead to a registered title holder having a defeasible title—a transaction may be void for various reasons; for example, if one of the parties was under the age of 18. In such a case, if through some error or mistake the void documents were registered and title was issued, a Registrar would be unlikely to exercise their discretion as, assuming both parties were contracting willingly, there would be little injustice in allowing the underage transactor to remain on the register.

This compares with a situation in which someone forges a certificate of title to a property owned by X, and—purporting to be X—sells the property to Y, who becomes the registered proprietor.

¹⁰⁷ Joint Land Titles Committee (Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan, Yukon) *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, 1990) as cited by Law Commission, above n 8, at [2.13].

¹⁰⁸ Law Commission, above n 8, at [2.13].

In this situation, X did not choose to give up their title, and depending on the circumstances of the case (for example, the length of time X had lived on the property, its value, the length of time X waited to bring a claim) it may be that an exercise of discretion by the Registrar which would return the property to X would be the route which conforms with the overall justice of the situation. Taylor suggests that it is this—the risk of losing security of title through a forged instrument—that is the main danger of an immediate indefeasibility approach to land transfer.¹⁰⁹

This more guided approach to s 81 may relieve many of the issues of uncertainty surrounding its use, and also align more with the powers of the court proposed in the draft Bill for the new LTA.

V Conclusion

A wide interpretation of s 81 of the LTA fills a gap in the current legislative scheme. It has been continually noted that the current strict approach to immediate indefeasibility and the issue of void instruments can lead to unfair results, and the suggestions made in the Law Commission report on the current Act acknowledge the need for a mechanism to deal with these sorts of situations. A wide interpretation of the Registrar's powers also better conforms to the dual purposes of the Torrens system itself: to provide both dynamic *and* static security to those involved in the sale and purchase of land. Such an interpretation is consistent with New Zealand's current approach to indefeasibility, as it merely exists alongside the various other exceptions to indefeasibility which are already recognised and accepted by the courts.

If in the future an appropriate case were to come before the Registrar, should they exercise the discretion conferred by Parliament, it will not be the proverbial opening of Pandora's box. Instead, it could correct a severe injustice caused by an overly conservative approach to indefeasibility of title.

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¹⁰⁹ Taylor, above n 87.

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