

# FRAUD AGAINST THE REGISTRAR — AN UNNECESSARY, UNHELPFUL AND PERHAPS, NO LONGER RELEVANT COMPLICATION IN THE LAW ON FRAUD UNDER THE TORRENS SYSTEM

NATALIE SKEAD\* AND PENNY CARRUTHERS\*\*

*Under the Torrens system of land registration it is irrefutable that, pursuant to the fraud exception, a fraudulent registered proprietor does not acquire an indefeasible title. There are two clear categories of cases in which the fraud exception may arise: (1) where a prior registered proprietor has been defrauded out of his or her interest; and (2) where an unregistered interest holder has been defrauded out of his or her interest. In both cases the fraud exception will only apply if the fraud can be brought home to the current registered proprietor or his or her agent. In addition to these two undisputed categories, cases and commentary suggest that there is a third category of fraud case: (3) where there has been a fraud committed against the Registrar, most commonly as a result of a false attestation. Again, the fraud exception will only apply in this third category if the fraud can be brought home to the current registered proprietor or his or her agent. This paper seeks to establish that the notion of fraud against the Registrar is an unnecessary, unhelpful and perhaps, no longer relevant complication in the law on fraud under the Torrens system.*

## I INTRODUCTION

It is well established that upon the registration of a dealing regarding Torrens system land the non-fraudulent registered proprietor obtains an immediately indefeasible title.<sup>1</sup> Indefeasibility is conferred regardless of any invalidity or defect in the instrument registered or in the process leading up to registration.<sup>2</sup> One of the most significant express exceptions to a registered proprietor's indefeasible title is fraud. In order for the fraud exception to apply, the fraud must be 'brought home to'<sup>3</sup> the registered proprietor or to his or her agent. Despite the

\* Faculty of Law, University of Western Australia.

\*\* Faculty of Law, University of Western Australia.

1 This concept of indefeasibility is enshrined in the core indefeasibility provisions of the Torrens statutes. The most significant is the 'paramountcy' provision: *Land Titles Act 1925* (ACT) s 58; *Real Property Act 1900* (NSW) s 42; *Land Title Act 2000* (NT) ss 188–9; *Land Title Act 1994* (Qld) ss 184–5; *Real Property Act 1886* (SA) ss 69–70; *Land Titles Act 1980* (Tas) s 40; *Transfer of Land Act 1958* (Vic) s 42; *Transfer of Land Act 1893* (WA) s 68.

2 However, as will be discussed in Part IV of this paper, the position in New South Wales, Victoria and Queensland is different where a mortgagee, without fraud, registers a forged mortgage instrument and has failed to take reasonable steps to verify the identity of the mortgagor: *Real Property Act 1900* (NSW) s 56C; *Transfer of Land Act 1958* (Vic) ss 87A, 87B; *Land Title Act 1994* (Qld) s 185(1A).

3 *Assets Co Ltd v Mere Roihi* [1905] AC 176, 210 ('Assets').

significance of this exception, the precise content of what constitutes statutory fraud is unclear. This is probably due to the fact that fraud is not defined in the Torrens legislation and so the meaning to be ascribed to fraud has largely been left to the courts.

The traditional view of the fraud exception is that the fraud must have been practised against the person seeking to set aside the title of the registered proprietor.<sup>4</sup> However, in recent decades the courts have developed an exception to the traditional view such that statutory fraud may also be established where the actionable fraud is said to be a ‘fraud against the Registrar’. Fraud in this sense arises when a person becomes registered pursuant to an instrument and the person has actual knowledge of, or is recklessly indifferent to, the fact that the instrument does not comply with the formalities for the execution and attestation of the instrument. The fraud lies in the misrepresentation to the Registrar that the instrument is a valid document that may properly be acted upon, when in truth the person registering the instrument knows that this is not the case.

The classic situation giving rise to a claim of fraud against the Registrar concerns the registration of mortgages by mortgagees in circumstances where a mortgagee — or more usually the mortgagee’s agent or employee — has falsely attested to having witnessed the signature of the mortgagor to the mortgage document, when in fact the mortgagee was not present when the mortgagor purportedly executed the document. The question arises: does the false attestation by the mortgagee or the mortgagee’s agent or employee constitute fraud so as to render the registered mortgage defeasible through the operation of the fraud exception? As noted, these circumstances have been viewed as possibly giving rise to a defeasible mortgage on the basis of fraud against the Registrar.

It is the thesis of this paper that the notion of fraud against the Registrar is an unnecessary, unhelpful and perhaps, no longer relevant complication in the law on fraud under the Torrens system. In order to explore this thesis, the paper commences with an examination of indefeasibility and the fraud exception and identifies the main categories in which the fraud exception arises. However, the main focus of the paper is twofold: first, to examine critically the cases of fraud against the Registrar to demonstrate that the notion is both unnecessary and unhelpful; and second, a review of recent developments in the law on fraud by an agent and in conveyancing requirements and practices across Australia which together, perhaps, serve to render fraud against the Registrar an increasingly irrelevant complication in the law on fraud under the Torrens system.

## II INDEFEASIBILITY AND THE FRAUD EXCEPTION

The Torrens system has been described as a system of ‘title by registration’.<sup>5</sup> Title to land passes on registration of an instrument regardless of any invalidity or defect in the registered instrument.

4 *Munro v Stuart* (1924) 41 SR (NSW) 203, 206 (‘*Munro*’).

5 *Breskvar v Wall* (1971) 126 CLR 376, 384 (Barwick CJ) (‘*Breskvar*’).

The robust nature of the indefeasible title conferred on a registered proprietor of Torrens land is most emphatically set out in the ‘paramouncy’ provisions in each of the Torrens statutes.<sup>6</sup> The broad gist of the paramouncy provisions is that notwithstanding the existence of any estate or interest which, but for the Torrens legislation might be held to be paramount, the registered proprietor shall, except in the case of fraud, hold the land absolutely free of any estate or interest except for certain express exceptions.

‘Fraud’ is, accordingly, an express exception to indefeasibility. One of the early cases to provide a comprehensive definition of fraud was *Assets* where the Privy Council commented:

by fraud ... [what] is meant [is] actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud ... Further ... the fraud which must be proved in order to invalidate the title of a registered purchaser for value ... must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.<sup>7</sup>

This definition is revealing. Fraud does not include constructive or equitable fraud,<sup>8</sup> but entails actual fraud, dishonesty of some sort, which is ‘brought home to’ the registered proprietor or his or her agent. Fraud by persons from whom the registered proprietor claims title does not affect the current registered proprietor unless the current registered proprietor or agent had knowledge of the fraud. Failure to make enquiries that may have revealed fraud does not affect the registered proprietor. However, ‘wilful blindness’ as to the existence of fraud, in the sense of failing to make enquiries when suspicions are aroused, may

6 See *Land Titles Act 1925* (ACT) s 58; *Real Property Act 1900* (NSW) s 42; *Land Title Act 2000* (NT) ss 188–9; *Land Title Act 1994* (Qld) ss 184–5; *Real Property Act 1886* (SA) ss 69–70; *Land Titles Act 1980* (Tas) s 40; *Transfer of Land Act 1958* (Vic) s 42; *Transfer of Land Act 1893* (WA) s 68.

7 [1905] AC 176, 210.

8 More recent cases have suggested that equitable fraud may suffice. As noted by Beazley P in *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612, 617–8 [16] (emphasis added):

In *Bahr*, Mason CJ and Dawson J ... considered that not all species of equitable fraud stood outside s 42. In *Bank of South Australia Ltd v Ferguson* (1998) 192 CLR 248 ... the High Court said “[n]ot all species of fraud which attract equitable remedies will amount to fraud in the statutory sense”, thus arguably leaving scope for the operation of equitable fraud for the purposes of s 42.

In *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 273–4 the High Court found the existence of equitable fraud in circumstances where there was a collusive sale by a mortgagee to a subsidiary in breach of the mortgagee’s duty in exercising the power of sale.

constitute Torrens fraud. Clearly in these latter situations, there is a fine dividing line between a failure to make further enquiries, which is not fraud, and wilful blindness as to the existence of fraud, which is fraud.<sup>9</sup> Some assistance as to the distinction between the two may be derived from the comments of Tadgell J in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* where his Honour described wilful blindness as

a form of cognisance which law and equity alike equate to subjective knowledge from which dishonesty may be inferred. ... [which is] more than a failure to see or look ... [and] connotes a concealment, deliberately and by pretence, from oneself — a dissembling or dissimulation. In other words wilful blindness connotes a form of designed or calculated ignorance ...<sup>10</sup>

These comments regarding fraud suggest a narrow definition of statutory fraud and this view is reinforced by the ‘notice’ provision in the Torrens legislation.<sup>11</sup> The provision provides, in essence, that a registered transferee of an interest in land is not to be affected by actual or constructive notice of any pre-existing unregistered interest or trust.<sup>12</sup> Indeed, even where the person who becomes registered is aware that registration will defeat the prior unregistered interest, this too is not fraud.<sup>13</sup>

Since the *Assets* case was decided, there have been many more judicial pronouncements as to the meaning of fraud.<sup>14</sup> However, for present purposes, there are two particular areas that require further discussion: the concept of immediate and deferred indefeasibility; and the three broad categories that give rise to the fraud exception.

9 For further discussion on the interrelationship between failure to make further enquiries and wilful blindness, see generally Peter Butt, *Land Law* (Thomson Reuters, 6<sup>th</sup> ed, 2010) 797 [20.68.1]; Adrian Bradbrook et al, *Australian Real Property Law* (Thompson Reuters, 5<sup>th</sup> ed, 2011) 226 [4.225]. See also *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188; *Grgic v Australia and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202 (‘*Grgic*’).

10 [1998] 3 VR 133, 146.

11 See *Land Titles Act 1925* (ACT) ss 59, 60(2); *Real Property Act 1900* (NSW) s 43(1); *Land Title Act 2000* (NT) s 188(2); *Land Title Act 1994* (Qld) s 184(2); *Real Property Act 1886* (SA) ss 186–7; *Land Titles Act 1980* (Tas) ss 41(1)–(2); *Transfer of Land Act 1958* (Vic) s 43; *Transfer of Land Act 1893* (WA) s 134.

12 The wording of the notice provision is not clear on its face, however, it has been interpreted to mean that the protection from notice only applies once the transferee has become registered: see *Templeton v The Leviathan Pty Ltd* (1921) 30 CLR 34.

13 As noted by Kitto J in *Munro* (1924) 41 SR (NSW) 203, 206, ‘a purchaser may shut his eyes to the fact of there being an unregistered interest, and need not take any consideration of the persons who claim under the unregistered interest’.

14 *Frazer v Walker* [1967] 1 AC 569 (‘*Frazer*’); *Breskvar* (1971) 126 CLR 376; *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101; *Registrar of Titles (WA) v Franzone & Finance Corporation of Australia Ltd* (1975) 132 CLR 611; *Parker v Registrar-General* [1977] 1 NSWLR 22; *Schultz v Corwill Properties Pty Ltd* [1969] 2 NSWLR 576 (‘*Schultz*’).

## **A The Concept of Immediate and Deferred Indefeasibility**

It is now settled that upon the registration of a dealing regarding Torrens system land, the non-fraudulent registered proprietor will obtain an indefeasible title despite the fact the instrument lodged for registration was a forgery. Indefeasibility is conferred on the registered proprietor's title 'immediately'.<sup>15</sup> The effect of immediate indefeasibility is that a person becoming registered pursuant to a forged instrument is preferred to the prior registered proprietor or unregistered interest holder who has been defrauded of his or her interest.

For some years an alternative view of indefeasibility, termed 'deferred' indefeasibility had been adopted by the courts.<sup>16</sup> Under the deferred approach, a person becoming registered pursuant to a forged document would not obtain an indefeasible title. Although registered, the title would be defeasible and the former registered proprietor would be entitled to bring an action to be restored to the register as proprietor.

Although the immediate indefeasibility approach is now adopted in the Australian jurisdictions, recent amendments to the Torrens legislation in Queensland, Victoria and New South Wales have effectively introduced a hybrid form of deferred indefeasibility in relation to registered forged mortgages. The amendments introduce a requirement for mortgagees to take reasonable steps to verify the identity of the mortgagor. If these steps are not complied with and the mortgage is a forgery, in Queensland the mortgagee will not obtain the benefits of an immediately indefeasible title and in Victoria and New South Wales the Registrar or Registrar-General (respectively) may cancel the registered mortgage. This is discussed further in Part IV.

## **B The Categories of Fraud**

The Australian cases on fraud may conveniently be divided into three broad categories: first, where a prior unregistered interest holder has been defrauded of their interest; second, where a previous registered proprietor has been defrauded of their registered interest; and third, cases in which the court has found a fraud has been committed against the Registrar.

Although largely separate, these categories can overlap. In particular, cases involving fraud against the Registrar are, by and large, also cases in the second category where the prior registered proprietor has been defrauded of their interest.

15 *Frazer* [1967] 1 AC 569; *Breskvar* (1971) 126 CLR 376. The paramouncy provision provides statutory support for the immediate indefeasibility approach.

16 *Gibbs v Messer* [1891] AC 248; *Clements v Ellis* (1934) 51 CLR 217. For a detailed discussion of the different approaches adopted in overseas Torrens jurisdictions, see Pamela O'Connor, 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems' (2009) 13 *Edinburgh Law Review* 194. For a specific discussion of recent developments in Malaysia, see Teo Keang Sood, 'All Because of a Proviso — A Nine-Year Wait to Right the Wrong' in Penny Carruthers, Sharon Mascher and Natalie Skead (eds), *Property and Sustainability: Selected Essays* (Thomson Reuters, 2011) 161.

Typically cases in the second category involve those situations where a registered proprietor has acquired a registered interest pursuant to a forged instrument. If the person becoming registered or their agent committed the forgery, then the fraud exception is applicable and the registered proprietor's title will not be indefeasible but rather, defeasible. The fraud exception will also apply if the registered proprietor or their agent either had knowledge of the forgery or was wilfully blind as to the existence of forgery.

The fraud against the Registrar scenario arises in cases where the current registered proprietor has not committed the forgery, yet still is found to be guilty of fraud. The fraud arises by virtue of the fact the registered proprietor, or his or her agent, misrepresents to the Registrar that the instrument is a valid document that may properly be acted upon; when in truth the person registering the instrument knows that this is not the case. The fraud in such cases is said to have been committed against the Registrar.<sup>17</sup>

It is this third category of fraud that is the focus of this paper.

### III FRAUD AGAINST THE REGISTRAR — AN UNNECESSARY AND UNHELPFUL COMPLICATION

By far the least common category of fraud cases are cases of fraud against the Registrar. Recent case law focusing on the requirement of establishing 'a wilful and conscious disregard and violation of the right of other persons'<sup>18</sup> before the fraud exception will apply, has resulted in fraud in these cases becoming increasingly difficult to isolate. The authors consider this difficulty, and indeed, this category of fraud against the Registrar, to be an unnecessary and unhelpful complication in Torrens fraud.

It is argued in this article that this third category of fraud be abandoned and that the fraud against the Registrar cases be reconceptualised as simply another form of the second and relatively straightforward category of fraud cases. In short, the authors reject the three-fold taxonomy of fraud cases and submit that all cases of fraud can be properly understood and analysed by reference only to the first two categories: fraud against a previous unregistered interest holder and fraud against a prior registered proprietor.

Supporting this argument is the proposition advanced by Harvey J in 1924,<sup>19</sup> and endorsed by later courts including the High Court in 1998,<sup>20</sup> that to render

17 See, eg, *Australian Guarantee Corporation Ltd v De Jager* [1984] VR 483 ('*De Jager*'); *Beatty v Australia and New Zealand Banking Group Ltd* [1995] 2 VR 301 ('*Beatty*'); *Bank of South Australia Ltd v Ferguson* (1998) 192 CLR 248 ('*Ferguson*'); *Westpac Banking Corporation v Sansom* (1994) 6 BPR 13 790 ('*Sansom*'); *National Commercial Banking Corporation of Australia Ltd v Hedley* (1984) 3 BPR 9477 ('*Hedley*').

18 *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1923] NZLR 1137, 1173.

19 *Munro* (1924) 41 SR(NSW) 203, 206.

20 *Ferguson* (1998) 192 CLR 248, 258. See also *Davis v Williams* (2003) 11 BPR 21 313, 21 316 [17], 21 327 [90] ('*Davis*').

a registered interest defeasible, the relevant fraud must have been against the party seeking to assert an interest against the fraudulent registered proprietor. In other words, the fraud must have been against the defrauded party who has been deprived, whether partially or totally, of an estate or interest in land and who is seeking the assistance of the court. The Registrar is not such a party. Reconceptualising the cases of fraud against the Registrar as cases of fraud against the prior registered proprietor will not only simplify the law on fraud in the Torrens system, it will promote consistency in the treatment and, therefore, outcome of like cases.

There are five different kinds of fact scenarios that have historically been treated as cases of fraud against the Registrar. These scenarios are where: (1) the registered proprietor or his or her agent did not have a hand in, and was not aware of, the forgery but falsely attested the forged signature;<sup>21</sup> (2) the registered proprietor altered the instrument (whether forged or not) after execution but before lodgement for registration;<sup>22</sup> (3) the registered proprietor did not have a hand in, and was not aware of, the forgery or the false attestation but caused the forged and falsely attested instrument to be registered;<sup>23</sup> (4) the instrument was not forged but it was falsely attested by the registered proprietor or his or her agent;<sup>24</sup> and (5) the registered proprietor or his or her agent attested the signature of an imposter.<sup>25</sup> The first, fourth and fifth scenarios are situations where there has been a false attestation by the registering party. The second and third scenarios do not involve a false attestation by the registering party, however, may also give rise to a claim of fraud against the Registrar.

An examination of the cases reveals that in each kind of case the moniker of ‘fraud against the Registrar’ is either unnecessary or unhelpful, or both, and is, furthermore, prone to lead to inconsistent and, in some cases, inappropriate outcomes.

### **A False Attestation of Forged Signature**

The approach of Australian courts to cases where the registered proprietor is not responsible for the forgery itself but, either directly or through an agent, effected the false attestation of the forged signature, is exemplified in the often-cited 1984 Victorian case of *De Jager*. In this case, Mrs De Jager’s signature to a mortgage over her home in favour of Australian Guarantee Corporation Ltd (AGC) was forged. Mr and Mrs De Jager were the joint registered proprietors of

21 See, eg, *De Jager* [1984] VR 483; *Russo v Bendigo Bank Ltd* [1999] 3 VR 376 (‘*Russo*’); *Beatty* [1995] 2 VR 301; *Sansom* (1994) 6 BPR 13 790; *Hedley* (1984) 3 BPR 9477.

22 See, eg, *Davis* (2003) 11 BPR 21 313; *Beatty* [1995] 2 VR 301; *J Wright Enterprises Pty Ltd (in liq) v Port Ballidu Pty Ltd* [2010] QSC 213 (17 May 2010) (‘*J Wright Enterprises*’).

23 See, eg, *Hilton v Gray* [2007] QSC 401 (13 December 2007) (‘*Hilton*’); *Young v Hoger* [2001] QCA 453 (23 October 2001) (‘*Young*’); *Equity One Mortgage Fund Ltd v Ilford Tower Pty Ltd* [2013] VSC 68 (26 February 2014) (‘*Equity One*’).

24 See, eg, *Hickey v Powershift Tractors Pty Ltd* (1998) 9 BPR 17 339 (‘*Hickey*’); *Ferguson* (1998) 192 CLR 248.

25 See, eg, *Ratcliffe v Watters* [1969] 2 NSW 146 (‘*Ratcliffe*’); *Grgic* (1994) 33 NSWLR 202.

the property. The court made no finding as to who had committed the forgery but did find that AGC was not aware of the forgery. However, an employee of AGC was aware that Mrs De Jager's signature to the mortgage had not been attested. The employee was also aware that a witness who, of course, did not see Mrs De Jager executing the mortgage, falsely attested her signature. With this knowledge, AGC's employee/s lodged the mortgage for registration and it was registered. The issue for Tadgell J was whether AGC held an indefeasible mortgage over Mrs De Jager's interest in the property or whether the mortgage was defeasible and liable to be set aside on the grounds of fraud.

In finding that the fraud exception did apply and, therefore, that AGC could not claim possession of the De Jager's property, Tadgell J focused on the significance of attestation in the conveyancing process. Quoting Sir John Romilly in *Wickham v Marquis of Bath*, his Honour noted that attesting a deed 'means, as I understand it, that one or more persons are present at the time of the execution for that purpose, and that as evidence thereof they sign the attestation clause'.<sup>26</sup> Such an attestation is commonly a prerequisite for the registration of a deed. This was the case in regards to the mortgage in *De Jager*.

Attestation clauses generally take a fairly standard form. The attestation clause in *De Jager* is a typical attestation clause: 'Signed, sealed and delivered by the said ... [mortgagor] in the presence of ... [the witness]'.<sup>27</sup> Both the mortgagor and witness sign the deed. At a fundamental level, signing an attestation clause in a mortgage — or any other instrument for that matter — without having witnessed the mortgagor executing the mortgage is an inherently dishonest act. The witness is certifying to all who may care to examine the instrument that it was properly signed in the witness's presence, while knowing full well that, in fact, it was not. This constitutes actual dishonesty. To state it simply, it is a lie.

In *De Jager*, AGC (through its employee/s) being alive to the proper attestation of the mortgage being a prerequisite to its registration, Tadgell J concluded that

when AGC presented the subject instrument of mortgage for registration, it was *representing to the Registrar of Titles*, as against the mortgagors, an honest belief that they, and each of them, had executed the instrument in the presence of a witness who, if it came to the point, could be relied on to prove the execution. To lodge an instrument for registration in the knowledge that the attesting witness had not been present at execution must deprive the lodging party of an honest belief that it is a genuine document on which the Registrar can properly act.<sup>28</sup>

An analysis of Tadgell J's reasoning reveals that, in his Honour's view, the fraud in question lies not in the false attestation itself (despite the inherent dishonesty thereof) but rather in the resultant false representation that is made to the registering authority as to the circumstances in which the instrument was

26 Ibid 498, quoting *Wickham v Marquis of Bath* (1865) LR 1 Eq 17, 24.

27 Ibid 488.

28 Ibid 498 (emphasis added).



executed. Hence the categorisation of these case as involving fraud against the Registrar.

A compelling fact for Tadgell J, in finding that AGC had committed fraud against the Registrar, was that AGC had no contractual or other relationship with Mrs De Jager. Knowing that Mrs De Jager's purported signature had not been properly attested must necessarily have raised 'a suspicion of irregularity'<sup>29</sup> and, in Lord Lindley's words in the *Assets* case, AGC had 'abstained from making inquiries for fear of learning the truth'.<sup>30</sup>

The approach of Tadgell J in *De Jager* has been adopted consistently in subsequent false attestation cases. In *Beatty*,<sup>31</sup> for example, Mandie J found fraud on the part of ANZ Bank. An officer of the bank, knowing 'that the subject mortgage was not executed in her presence by the ... [mortgagor]', nonetheless 'put the subject mortgage forward on the path to registration without having an honest belief that the subject mortgage was executed by the ... [mortgagor] in her presence, *whilst appreciating that the lodging of the mortgage would convey a representation to the contrary*'.<sup>32</sup> The false representation in this case, as in *De Jager*, was held to have been made 'to the Registrar of Titles'.<sup>33</sup>

For many years, treating false attestation cases as instances of fraud against the Registrar seemed an appropriate mechanism for dealing with these difficult cases. Although the later registered proprietor or his or her agent was not involved in, and was not aware of, the forgery, the registered proprietor was nonetheless held responsible for loss sustained as a result of the registration of the forged instrument due to the inherently dishonest conduct in falsely attesting the forged signature.

In 1999, however, the artificial and problematic nature of this taxonomy emerged in the case of *Russo*.<sup>34</sup> Russo was the registered proprietor of property. Her daughter and son-in-law controlled a company which obtained a loan from Bendigo Bank. The loan was secured by a registered mortgage over Russo's home. Russo was not aware of, and did not consent to, the mortgage. Her signature on the mortgage was forged by her son-in-law. A law clerk, Gerada, who worked for Bendigo Bank's solicitor, falsely attested Russo's signature. She did this despite having been instructed in very clear terms by the solicitor never to attest an instrument that was not signed in her presence. The court accepted that neither Gerada nor the solicitor knew the mortgage was forged and the solicitor was not aware of Gerada's false attestation.

29 Ibid 499.

30 *Assets* [1905] AC 176, 210.

31 [1995] 2 VR 301.

32 Ibid 314 (emphasis added).

33 Ibid 315. See also *Hedley* (1984) 3 BPR 9477; *Sansom* (1994) 6 BPR 13 790, 13 798 in which, following an examination of the case law, Rolfe J concluded that '[t]hese authorities establish there is fraud, within the meaning of s 42, when a representation is made, contrary to fact, that a person is personally known to the attesting witness and has signed the document in his/her presence'.

34 [1999] 3 VR 376.

Ormiston JA, with whom Winneke P agreed, found that, notwithstanding the false attestation that Gerada knew ‘contained a false representation that she had been present at the time of [Russo’s] signature’ and ‘accepting what was said in *De Jager*’,<sup>35</sup> Gerada had not committed fraud against the Registrar. This was because, in addition to actual fraud, personal dishonesty and moral turpitude, there is a ‘final and critical element in fraud, namely ... “a wilful and conscious disregard and violation of the rights of other persons”’.<sup>36</sup> Gerada may have been aware that her attestation of Russo’s signature was false and that she was not to falsely attest a signature. However, the court found, being only 19 or 20 years old with only three years’ experience as a law clerk, there was no evidence that Gerada understood the conveyancing process or that the mortgage was to be lodged for registration or, perhaps most importantly, that an attestation clause constituted a representation to the Registrar that the mortgage had been properly executed by Russo in Gerada’s presence.<sup>37</sup> Accordingly, Gerada cannot be said to have ‘wilfully or consciously disregarded’ the Registrar’s right to rely on the attestation clause as verification of the identity of the mortgagor and, consequently, the validity and authenticity of the mortgage. So, while Gerada ‘knew that what she had said was false ... she ... [had not] been shown to be dishonest’.<sup>38</sup>

The outcome in *Russo* is somewhat unsettling. If *Russo* is correct, whether a forged mortgage is enforceable against a defrauded registered proprietor would seemingly depend on an assessment of the age, experience and level of understanding of the person attesting the mortgage on behalf of the registered mortgagee. Basing the success or failure of a registered proprietor’s claim on this arbitrary and highly subjective assessment is both undesirable and unjust. Undesirable because, as suggested by Rodrick, it provides little incentive for mortgagors and their agents to provide training in regards to this crucial aspect of the conveyancing process. Indeed, it provides a compelling incentive not to do so.<sup>39</sup> Further, it perpetuates, perhaps even rewards, ‘the lax approach to attestation that is said to be widespread in the community’.<sup>40</sup> Unjust because a claim of fraud will stand or fall on the basis of the subjective understanding of a person with whom the defrauded claimant may have had no contact whatsoever, as was the case in *Russo*.

As noted by Rodrick, it is not easy to reconcile the reasoning and decision in *Russo* with the previous cases including *De Jager* and *Beatty*. In particular, Rodrick points out, in the previous cases, ‘an appreciation of the consequences

35 Ibid 381–2 [22].

36 Ibid 385 [33], 386 [37], quoting *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1923] NZLR 1137, 1173 (Salmond J).

37 *Russo* [1999] 3 VR 376, 386–7 [39].

38 Ibid 387 [41]. For an excellent discussion on false attestation of forged instruments generally and *Russo* specifically, see Sharon Rodrick, ‘Forgeries, False Attestations and Imposters: Torrens System Mortgages and the Fraud Exception to Indefeasibility’ (2002) 7 *Deakin Law Review* 97.

39 Rodrick, above n 38, 121.

40 Ibid 122.

of a false attestation requirement was not overtly emphasised by the courts as a separate and independent requirement of fraud in the attestation process'.<sup>41</sup>

The concern and inconsistency is not, however, a result of the emphasis in *Russo* on the subjective element of fraud, requiring a wilful and conscious disregard or violation of the rights of another person. Rather, it lies in the unhelpful and unnecessary, indeed, inappropriate categorisation of these cases as involving fraud against the Registrar and, therefore, focusing the enquiry on whether the false attester appreciated and, consequently, disregarded the rights of the Registrar. As Gerada did not appreciate that, the Registrar would rely on the attestation clause as authenticating Russo's signature and the validity of the mortgage, she could not be said to have disregarded the Registrar's right to do so. It seems entirely logical and sensible that you cannot disregard a right you do not know exists.

If, as the authors suggest, one focuses the enquiry on the defrauded party who has been deprived of an interest in land and who is seeking the assistance of the court, the outcome may well be different. Gerada may not have appreciated the Registrar's right to rely on the attestation clause as verifying the identity of the mortgagor and the veracity of her signature. However, given the strict and explicit instructions by her employer not to attest a signature she had not, in fact, witnessed, Gerada surely did understand the right of the mortgagor, Russo, to 'the protection that proper attestation is designed to provide'.<sup>42</sup> It was this right that Gerada wilfully and consciously disregarded and violated. Therefore, it is arguable that, even if statutory fraud does require an element of subjective wrongdoing as suggested in *Russo*, Gerada's false attestation did amount to fraud: perhaps not fraud against the Registrar, but certainly fraud against the mortgagor. Whether or not that fraud could then be sheeted home to the mortgagee Bendigo Bank, so as to render the mortgage indefeasible, falls to be decided on agency principles — an issue beyond the scope of this article.<sup>43</sup>

In analysing the decision in *De Jager*, Rodrick argues that Tadgell J expressly recognises that a false attestation amounts to a disregard of a mortgagor's rights:

Tadgell J was of the opinion that an unwitnessed signature should automatically raise a suspicion of irregularity in the mind of an attesting witness and if that witness proceeds to attest the signature, he or she should be regarded as having consciously disregarded the mortgagor's rights. ... A person who falsely attests a mortgage has told a lie, and even if he or she did not intend the mortgagor to suffer loss, and actually assumed that the attestation was giving effect to the mortgagor's intentions, the witness still

41 Ibid 113.

42 Ibid 120.

43 Ormiston JA and Winneke P considered that this was 'the very kind of fraud which ought to have been' imputed to the bank: *Russo* [1999] 3 VR 376, 391 [50]. Dissenting on this issue Batt JA held that 'the agent's employee's fraud cannot be sheeted home to the agent or his principal', it being 'too remote from the registering party to affect that party': at 392 [55]. A different view from that of Batt JA's was adopted by the Supreme Court of New Zealand in *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557 ('*Dollars & Sense*'), where the forgery of a sub-agent, Rodney, for the agent, Mr Thomas, was sheeted back to the registered mortgagee — Dollars & Sense.

told a lie and that lie amounted to a disregard of the mortgagor's rights. Portraying the situation in this way does not require the witness to have understood the process of registration.<sup>44</sup>

The authors endorse this analysis.

Reconceptualising forgery and false attestation cases as simply another form of fraud against the registered proprietor will not only accord with the strong pedigree of cases requiring the fraud to have been against the party seeking to assert an interest against the fraudulent registered proprietor,<sup>45</sup> but it will also introduce consistency of reasoning and certainty of outcome into this difficult area. In addition, it may go some way to dispelling the unwarranted and objectionable notion that 'the signature of an attesting witness to a document to be registered under the ... [Torrens statutes] is no more than a formality'.<sup>46</sup>

## **B Alteration after Execution**

The unhelpfulness of treating cases in which a registered instrument has been unilaterally altered after execution, but before registration, as frauds against the Registrar is well illustrated in *Beatty*.<sup>47</sup> Ms Beatty and Mr Hennessy were the registered joint tenants of property in Victoria. They subsequently married. Mr Hennessy sought finance from ANZ Bank for a business venture. ANZ Bank was prepared to loan the money on security of a registered mortgage over Mr Hennessy and Ms Beatty's property. Ms Beatty did not consent to the mortgage. Indeed, she expressly refused to put the property up as security for the loan.

Undeterred by his wife's refusal, Mr Hennessy agreed to the terms of the loan offered by ANZ Bank. Although the precise facts at this point are somewhat sketchy, the court accepted that Ms Beatty's signature to the mortgage was a forgery. It followed that the attestation of Ms Beatty's signature by the bank officer, Mrs Mills, was false.

Following the line of reasoning in *De Jager*, Mandie J found that, as against Ms Beatty, the mortgage was defeasible on grounds of fraud perpetrated by ANZ Bank:

the bank (whilst having no knowledge of the forgery itself) had falsely represented to the Registrar of Titles an honest belief that the plaintiff had executed the instrument in the presence of Mrs Mills ... whereas the bank by its employees knew that this was not the case (or had no honest belief that this was the case).<sup>48</sup>

44 Rodrick, above n 38, 121.

45 See, eg, *Munro* (1924) 41 SR(NSW) 203; *Ferguson* (1998) 192 CLR 248. See also *Davis* (2003) 11 BPR 21 313.

46 *De Jager* [1984] VR 483, 497.

47 *Beatty* [1995] 2 VR 301.

48 *Ibid* 315.

That, however, was not the end of the story. In addition to the false attestation of Ms Beatty's signature, it was also found that the mortgage had been altered materially after execution. The mortgage had been prepared and fraudulently executed in the name of John Joseph Hennessy and Susan Elizabeth Hennessy. However, the Certificate of Title reflected the registered proprietors as John Joseph Hennessy and Susan Elizabeth Beatty. To facilitate registration of the mortgage, the words 'nee Susan Elizabeth Beatty' were added to the mortgage after execution and without initialling by the mortgagors. Mandie J found that this alteration, too, was an act of statutory fraud on the part of ANZ Bank. It was, his Honour reasoned,

a false representation to the registrar that the instruments had been executed by the mortgagors after such alteration or in their altered state, as to which state of affairs no honest belief existed on the part of the relevant bank employees.<sup>49</sup>

The reasoning of Mandie J would suggest that, even if Ms Beatty's signature to the mortgage was not a forgery and she had both consented to and executed the mortgage, the alteration would nonetheless, of itself, have been sufficient to render the registered mortgage defeasible. In the authors' view, this would be a remarkable and inappropriate outcome, albeit, on the reasoning adopted by the court, a correct one. It would be an outcome resulting directly from the unhelpful and unnecessary treatment of the case as one of fraud against the Registrar.

It is true that lodging the mortgage for registration with the subsequent alteration was a false representation to the Registrar as to the circumstances in which the alteration was made. It is, therefore, arguable that in lodging the mortgage with the Titles Office, ANZ Bank wilfully and consciously disregarded the Registrar's right to rely on that lodgement and the attestation of the mortgage as verifying not only the authenticity of the mortgagors' signature but also the procedural validity of the instrument. It follows that, even on a *Russo* analysis, the alteration does constitute statutory fraud against the Registrar.

As noted above, however, to render a registered interest defeasible, the relevant fraud must have been against the party seeking the assistance of the court. In *Ferguson*, the High Court unanimously considered that 'for fraud to be operative, it must operate on the mind of the person said to have been defrauded and to have induced detrimental action by that person'.<sup>50</sup>

Treating this case correctly as a fraud against the party seeking the assistance of the court — Ms Beatty — would provide a far more convincing and palatable outcome. Had Ms Beatty, in fact, consented to the mortgage and executed it in its pre-alteration state, could it truly have been said that she was defrauded as a result of the alteration? Surely not. The effect of the subsequent alteration was not to deprive her of an interest and was not inconsistent with her intention. She fully intended to grant the mortgage to ANZ Bank. Nor could it be said in those

49 Ibid 316.

50 (1998) 192 CLR 248, 258 [19].

circumstances that ANZ Bank wilfully and consciously disregarded Ms Beatty's right. The alteration did not in any way alter her rights and obligations under the mortgage, which she had executed. The alteration was simply done to give effect to the parties' shared intention.

Rather than the alteration being an act of actual dishonesty and moral turpitude on the part of ANZ Bank, at most, in these modified circumstances, it might be said that it constituted an irregularity in the process of registering the mortgage. All Australian Torrens statutes incorporate a provision to the effect that the title of a registered proprietor shall not 'be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate'.<sup>51</sup> The alteration would therefore not be a basis for declaring the mortgage defeasible whether on grounds of fraud or some other exception to indefeasibility.

This was the reasoning adopted by White J in *J Wright Enterprises*<sup>52</sup> in concluding that an alteration to a mortgage, effected after execution, did not amount to fraud. The alteration was adding the words 'by Trevor O'Rourke — Director its duly constituted Attorney under Power of Attorney No 70981228' below O'Rourke's properly attested signature on the mortgage.<sup>53</sup> His Honour reasoned as follows:

By adding the words that he did, he conveyed a false impression to the Registrar of Titles but by the time he added those words of capacity he had seen the original power of attorney and he did not act in violation of any other person's rights ... the authorities do not support such exacting standards upon agents of mortgagees with respect to registration, and, it must be emphasised, *there were no other rights, for example, of priority, which were disregarded*.<sup>54</sup>

While curious in some respects, this statement clearly directs the focus of the fraud enquiry at the mortgagor claimant — the person asserting fraud — rather than the Registrar. It recognises that, if the mortgagor consented to and properly executed the mortgage, then it cannot be said that his or her rights were violated and, it follows, there has been no statutory fraud.

Similar reasoning was adopted by Young CJ in Eq in *Davis*.<sup>55</sup> The Chief Justice acknowledged the (by then) long pedigree of case law treating false attestation (and alteration) cases as cases of fraud against the Registrar. This categorisation did not, however, prove helpful. In deciding that the alteration in question did not constitute statutory fraud his Honour noted:

Even though anyone who attests a dealing under the Torrens system falsely is in one sense committing fraud against the Registrar General,

51 *Transfer of Land Act 1893* (WA) s 63. See also *Land Titles Act 1925* (ACT) s 53; *Land Title Act 2000* (NT) s 33; *Land Title Act 1994* (Qld) s 46; *Real Property Act 1886* (SA) s 68; *Land Titles Act 1980* (Tas) s 39; *Transfer of Land Act 1958* (Vic) s 27D.

52 [2010] QSC 213 (17 May 2010).

53 *Ibid* [50].

54 *Ibid* [92] (citations omitted) (emphasis added).

55 (2003) 11 BPR 21 313.

the cases show that that is not enough ... In all cases it must be shown that there was fraud by the person becoming registered or its agent in obtaining registration so that an interest which would otherwise take priority over that interest has been defeated ... In the present case, Ms Moore never intended that her action would *deprive any person of any interest in the land*.<sup>56</sup>

By directing the fraud enquiry to the wilful or conscious disregard of the mortgagor's rights, Young CJ in *Eq* reached a decision contrary to that of Gzell J who found the alteration to be a fraud against Registrar:

by altering the instrument and lodging it, the registration clerk falsely represented to the Registrar-General that New South Wales Land and Housing Corporation had transferred the land to the first opponent and her husband as tenants in common in equal shares. The false lodgment [sic] of the altered document was, in my view, enough to constitute fraud.<sup>57</sup>

It is submitted that the approach adopted by White J in *J Wright Enterprises* and Young CJ in *Eq* in *Davis* is a far more sensible approach to dealing with alteration cases. In each case the outcome will turn on the context in which that conduct occurred. If the conduct did no more than give effect to the parties' shared intention, and the rights of the person asserting fraud were not disregarded, or indeed, affected in a way that he or she did not intend, fraud will not be established. Abandoning the 'fraud against the Registrar' tag will enable courts to draw a clearer line between actual fraud and mere irregularities.

### **C Lodgement of Forged and Falsely Attested Instrument for Registration**

An extension of the forgery and false attestation cases above, is the situation where the registered proprietor did not have a hand in, and was not aware of, the forgery or the false attestation, but lodged the forged and falsely attested instrument for registration. *Young*<sup>58</sup> is such a case. Mr and Mrs Hoger were the registered joint tenants of a rural property. A mortgage was executed over this property in favour of the appellants. Neither Mr nor Mrs Hoger had executed this mortgage. Rather, their daughter, Denise, forged both of their signatures. Mr Hoger was unaware of this forgery. Mrs Hoger, on the other hand, was both aware of, and consented to, the forgery. A Justice of the Peace purportedly witnessed the forged signatures. In fact, Denise forged the attestations. Denise returned the forged and falsely attested documents to the appellant's solicitor, Parker. The appellants conceded that Parker was acting as their agent in dealing with the Hogers and Denise.

At first instance it was found that, in all the circumstances of the case including Parker's failure to follow his own identification procedures of insisting on

56 Ibid 21 329 [110]–[111] (emphasis added).

57 Ibid 21 345 [253].

58 [2001] QCA 453 (23 October 2001).

receipt of certified copies of the mortgagors' identity documents, his failure to deal directly with one of the mortgagors (Mr Hoger), and his failure to verify the attestation by the Justice of the Peace, Parker 'had no factual basis for any honest belief that the mortgage instrument was genuine ... His conduct in not ascertaining from Mr Hoger what he, Mr Hoger, knew about the transaction was reckless in the extreme'.<sup>59</sup> This recklessness amounted to statutory fraud.

The Court of Appeal unanimously overturned this decision. In light of all the facts and applying the approach adopted in the *Assets* case, the Court of Appeal considered that it could not be said that Parker had acted dishonestly. Rather than finding that Parker's suspicions were aroused and that he wilfully abstained from making an enquiry for fear of learning the truth, it was found that he was careless in his belief that Mr Hoger had executed the mortgage. This was insufficient to find statutory fraud against Parker.<sup>60</sup>

Of interest in *Young* is the absence of any reference to the subjective element of fraud requiring a wilful and conscious disregard by Parker of the rights of another. This may be because this case was decided shortly before *Russo* in which this requirement for fraud was highlighted as a critical feature of statutory fraud. It is quite possible that if the Court of Appeal had focused its enquiry on this subjective element, a different conclusion may have resulted. Parker was a solicitor of many years' experience. He had put in place his own clear procedures for identifying parties to a conveyancing transaction. Unlike Gerada in *Russo*, he clearly had established those procedures knowing the importance of ensuring that instruments headed for registration are properly executed by the parties to be bound. Yet he failed to follow those procedures, thereby facilitating the registration of a forged and falsely attested mortgage.

Construing this case as one of 'fraud against the Registrar', it is arguable that although his suspicions as to fraud may not have been aroused, by failing to follow his own identification processes and then putting this mortgage on the path to registration, Parker falsely represented to the Registrar that the identity of the mortgagors had been verified and the mortgage had been properly executed and attested, in circumstances where he had no basis for believing the same. In this sense, Parker might be said to have wilfully and consciously disregarded the rights of the Registrar to rely on Parker's lodgement of the mortgage as a representation that Parker had verified the identity of the mortgagors and the mortgage had been properly executed and attested.<sup>61</sup>

Even if one were to construe this case properly as fraud against the registered proprietor, Mr Hoger, the same result may well ensue. Simply, by failing to carry out his own internal identity checks, Parker wilfully and consciously disregarded

59 Ibid [12], quoting judge at first instance.

60 See *Hilton* [2007] QSC 401 (13 December 2007) [42]–[44] in which Douglas J on very similar facts to *Young*, and adopting the reasoning in that case, found that while the registered proprietor's solicitors may have been careless in not following their own internal identification processes, they had not been actually dishonest.

61 See the analogous case of *Quest Rose Hill Pty Ltd v Owners Corp — Strata Plan 64025* (2012) 16 BPR 31 387.



Mr Hoger's right to the lodgement of a properly executed and attested mortgage, a right which Parker fully understood and appreciated.

Analysed from a subjective perspective as suggested in *Russo*, it is evident that, although adopting the fraud against the Registrar categorisation in this kind of case may not be unhelpful, it is unnecessary.

#### **D False Attestation of Otherwise Valid Instrument**

A rare example of fraud against the Registrar arises where, although the prior registered proprietor did, in fact, execute the registered instrument which resulted in him or her being deprived of an interest in land, that registered proprietor seeks to set aside the registered instrument on the grounds that it was falsely attested. The curiosity in this kind of case lies in the fact that the person asserting fraud has in fact, executed the instrument fully intending that it will be registered and enforceable. This registered proprietor then seeks to avoid the legal consequences of the registered instrument by averring fraud on the part of the later registered proprietor or his or her agent. Such an averment of, and reliance on, fraud seems somewhat dubious and less than honest.

*Hickey*<sup>62</sup> provides a useful illustration of this rare and curious situation. Hickey signed two duplicate originals of a mortgage over her home in favour of Powershift Tractors. Although Birrell witnessed Hickey signing the mortgages, he did not sign as witness. As he was a director of Powershift Tractors, Birrell thought that he was not a competent witness. Birrell handed the signed but unwitnessed documents to a chartered accountant whom he asked to witness the documents. Hickey sought to avoid the mortgage on grounds that Powershift Tractors was 'involved in a "fraud" within the meaning of the Real Property Act in that it knowingly permitted a document to go forward for registration which it was aware had not been witnessed in accordance with section 36(1D) of the Real Property Act',<sup>63</sup> that is; a fraud had been committed against the Registrar.

Bryson J considered the circumstances to be 'disgraceful to the professional people involved'.<sup>64</sup> Although his Honour stated that '[t]he present case is unusual, perhaps unique in that the attestation was untrue but the document was in fact executed by the party as purportedly attested',<sup>65</sup> his Honour was nonetheless satisfied that Hickey had established fraud by Powershift Tractors rendering the mortgage defeasible. In so finding, Bryson J stated 'there was actual dishonesty for the purposes of s 42, but it was not directed specifically to dishonestly depriving the mortgagor of her interest in the property. The advantage gained by fraud was registration, and that advantage is vitiated'.<sup>66</sup> His Honour continued that '[r]egistration is an advantage and a set of facts known to be false was relied on

62 (1998) 9 BPR 17 339.

63 Ibid 17 340.

64 Ibid 17 343.

65 Ibid 17 344.

66 Ibid.

to obtain registration, and hence there was, in my finding, actual fraud, involving moral turpitude, with respect to the registration'.<sup>67</sup>

Whilst Bryson J found that Powershift Tractors was not entitled to enforce the mortgage as a registered and, therefore, indefeasible interest in Hickey's property, there would be no justice if Hickey were permitted to take advantage of this irregularity and disavow the effect of the mortgage which she had in fact consented to and signed.<sup>68</sup> By finding that the vitiating effect of the fraud extended only to the registration and not the underlying mortgage agreement, Bryson J reached the conclusion that the agreement was enforceable against Hickey in equity as an unregistered mortgage.<sup>69</sup>

Not only are the facts in *Hickey* unusual, the reasoning of the court is, in the authors' view, unsatisfactory. Being a 1998 case, it is not surprising that the court cited and followed the reasoning in the false attestation cases. In construing this case as one of 'fraud against the Registrar', Bryson J was compelled by precedent to find that Powershift Tractors had engaged in statutory fraud.<sup>70</sup> By lodging the falsely attested mortgage for registration and thereby representing to the Registrar that the mortgage had been signed by Hickey in the presence of the chartered accountant when Powershift Tractors, through its officers, knew that this was untrue — or at the very least, had no honest belief that it was true — Powershift Tractors had committed a fraud against the Registrar. Following the reasoning in *Russo*, Powershift Tractors wilfully and consciously disregarded the Registrar's right to rely on the attestation clause as verifying that the mortgage was properly executed by the mortgagor in the presence of the witness.

Whilst in accordance with precedent, the reasoning in *Hickey* is unconvincing and, in the authors' view, the outcome inappropriate. It was the agreed intention of all the parties involved, including Hickey, that Hickey would grant a registered mortgage over her property to Powershift Tractors. She purported to do this when she executed the mortgage in duplicate in the presence of a witness. Like Birrell, she was aware that the witness was required to, but had not, attested her signature. She acquiesced in Birrell taking the document away to be attested, lodged and registered. She then sought to take advantage of this irregularity by having the mortgage set aside. It is submitted that, in the circumstances, not only should Hickey be bound by the unregistered mortgage agreement, but she should also be bound by the consequences of the registration of the mortgage.

The unsatisfactory outcome in *Hickey* is, once again, a direct result of construing it as a case of fraud against the Registrar. If one construes this case, as the authors propose all these cases ought to be construed, as a fraud against the registered proprietor — Hickey — the outcome may well be different. Bryson J expressly stated that, although there was fraud by Powershift Tractors, 'it was not directed specifically to dishonestly depriving the mortgagor of her interest in the property'.<sup>71</sup> The fraud related solely to the process of registration. It follows that

67 Ibid.

68 Ibid 17 342–3.

69 Ibid 17 344.

70 Ibid 17 344.

71 Ibid.

while there may have been fraud against the Registrar, there was no actual fraud amounting to moral turpitude against Hickey — the person asserting fraud and seeking the assistance of the court.

As noted above, the High Court in *Ferguson*<sup>72</sup> — decided in the same year as *Hickey* — stated that ‘for fraud to be operative, it must operate on the mind of the person said to have been defrauded and to have induced detrimental action by that person’.<sup>73</sup> Not only was Hickey not defrauded, she did not act to her detriment as a result of the fraud attestation. The false attestation ‘did not have the effect of harming, cheating or otherwise being dishonest to’ Hickey.<sup>74</sup> To use the language adopted in *Russo*, Powershift Tractors did not wilfully or consciously seek to violate or disregard the rights of Hickey.<sup>75</sup> Hickey intended to grant an enforceable indefeasible mortgage to Powershift Tractors, and that was the effect of her own conduct as well as that of Birrell, the accountant and Powershift Tractors.

Once again fraud against the Registrar proves an unhelpful and in this sort of case, inappropriate, categorisation.

### **E Attestation of Signature of Imposter**

Cases involving signature of an instrument by an imposter in the presence of a witness are few and far between. The unanimous decision of the New South Wales Court of Appeal in *Grgic*<sup>76</sup> sets out the judicial approach to assessing the existence of statutory fraud on the part of the registered proprietor or his/her agent in attesting the signature of an imposter.

In this case, Mr Grgic Jnr and his wife arranged an overdraft facility with ANZ Bank on security of a mortgage over property owned by Mr Grgic Snr. Mr Grgic Snr did not consent to, and indeed, was not even aware of, this arrangement. Mr Grgic Jnr and his wife arranged for Mr Sierra to attend with them at ANZ Bank, present himself as Mr Grgic Snr and execute the mortgage instrument as if he were Mr Grgic. At the meeting with the bank officer, Mr Sierra produced the duplicate Certificate of Title for the mortgaged property as well as a form of mortgage, possibly executed by Mr Grgic Snr, in relation to a previously proposed loan by a different bank. Mr Sierra’s forgery of Mr Grgic Snr’s signature on the mortgage instrument in favour of ANZ Bank was witnessed by a bank employee.

Mr Grgic Jnr and his wife defaulted on the terms of the overdraft facility and ANZ Bank sought to enforce the mortgage against Mr Grgic Snr. Mr Grgic Snr counter-claimed on the basis that the mortgage was not enforceable against him because it was procured by the fraud of an employee of ANZ Bank. The fraud in question was constituted in an employee of ANZ Bank falsely certifying that (1) Mr Grgic was personally known to him; and (2) the dealing was correct for

72 (1998) 192 CLR 248.

73 Ibid 258 [19].

74 Ibid.

75 See *Equity One* [2013] VSC 68 (26 February 2014) [92].

76 (1994) 33 NSWLR 202.

the purposes of the relevant Torrens statute. These false certifications constituted statutory fraud against the Registrar.<sup>77</sup>

The court rejected this submission. While the court was prepared to accept, with the benefit of hindsight, that the bank officers ‘were less than meticulous than they might otherwise have been in seeking to establish that the person who was introduced to them as Mr Grgic Snr was in truth the registered proprietor of the subject property’ and,

it being well-established that a person who presents for registration a document which is forged or has been fraudulently or improperly obtained, is not guilty of ‘fraud’ if he honestly believes it to be a genuine document which can be properly acted upon ... a less than meticulous practice as to the identification of persons purporting to deal with land ... does not constitute a course of conduct so reckless as to be tantamount to fraud.<sup>78</sup>

This result is a palatable and proper outcome on the facts in *Grgic* and accords with prevailing conveyancing practice at the time. As noted by Rodrick, the bank employee ‘could not be described as having acted dishonestly or with moral turpitude, or as having consciously sought to defeat or disregard the rights of others’.<sup>79</sup> However, in the current conveyancing environment where explicit and rigorous identification processes have been introduced into Titles Office practice as detailed in Part IV below, it is possible that such a ‘less than meticulous’ practice could constitute statutory fraud, being a failure to follow mandatory identification processes. This may well be the case regardless of whether such a case is treated as a fraud against the Registrar or a fraud against the prior registered proprietor. Failure to follow clearly articulated identification processes may not only be sufficiently reckless as to the identity of the signatory so as to constitute fraud but, in addition, would constitute a conscious disregard of the registered proprietors’ rights to a properly executed and attested instrument. Once again, resorting to the language of fraud against the Registrar to establish statutory fraud is an unnecessary complication in the analysis of the imposter cases.

#### **IV FRAUD AGAINST THE REGISTRAR — AN INCREASINGLY IRRELEVANT COMPLICATION**

As discussed in Part III above, the formulation of a claim of fraud against the Registrar is both unnecessary and unhelpful. However, not only is it unnecessary and unhelpful but, due to recent developments in the law, a claim of fraud against the Registrar is also an increasingly irrelevant complication in the law on Torrens fraud. The challenges to the continued relevance of this category of fraud arise from a number of quarters: (1) the revised and potentially expanded operation of fraud by an agent; (2) the application of indefeasibility to forged ‘all moneys’ mortgages; (3) the potential impact on indefeasibility of s 42 of

77 Ibid 215.

78 Ibid 221–2. See also *Ratcliffe* [1969] 2 NSW 146, 149.

79 Rodrick, above n 38, 126.

the National Credit Code; and (4) the introduction of considerably strengthened identity verification requirements for the execution of Torrens documents in the Australian jurisdictions.

### **A The Operation of Fraud by an Agent**

The Privy Council made it clear in *Assets* that a registered proprietor's title may be challenged on the basis of fraud, even though the registered proprietor was not personally fraudulent, if it can be established that the registered proprietor's agent was guilty of fraud or had knowledge of fraud.

The traditional starting point for a discussion of fraud and agency in the Torrens context in Australia is the judgment of Street J in *Schultz* where his Honour identified two alternative situations of fraud by an agent: first where the fraudulent act is committed by the agent; and second where the agent has knowledge of a fraud whereby the previous registered proprietor was deprived of his or her interest.<sup>80</sup> In the first situation the general principle of agency law, 'respondet superior', applies such that the fraudulent actions of the agent that were within the agent's actual or apparent authority will bind the registered proprietor so as to make the registered proprietor's title defeasible through fraud. Street J referred with approval to *Bowstead on Agency* and commented:

An act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests. ... But the mere fact that the principal, by appointing an agent, gives that agent the opportunity to steal or otherwise to behave fraudulently does not without more make him liable.<sup>81</sup>

The second situation is where the agent has knowledge of fraud with regards the transaction under which the principal, the registered proprietor, became registered. In this case, the law presumes the agent communicates to the principal all information concerning the transaction and imputes the agent's knowledge of fraud to the principal. However, Street J identified an exception to this general rule, namely, if the knowledge to be imputed is knowledge of the agent's own fraudulent conduct then the principal is permitted to bring evidence to rebut the presumption of knowledge and to prove ignorance of the agent's fraud.<sup>82</sup>

In recent case law<sup>83</sup> and commentaries some aspects of these comments and the decision of Street J in *Schultz* have been criticised. There are two main areas of criticism. First, it has been said that though Street J stated the test for fraud by the agent correctly, he erred in his restrictive application of the test to the facts in the *Schultz* case.<sup>84</sup> Second, it has been argued there is 'illogicality' in the exception

80 [1969] 2 NSW 576, 582.

81 Ibid 583.

82 Ibid 584.

83 See *Dollars & Sense* [2008] 2 NZLR 557.

84 Pamela O'Connor, 'Immediate Indefeasibility for Mortgagees: A Moral Hazard?' (2009) 21(2) *Bond Law Review* 133, 143.

to the imputation of knowledge where what is in issue is the agent's knowledge of his or her own fraudulent conduct.<sup>85</sup> In order to explore these criticisms it is worthwhile reviewing briefly the facts of the *Schultz* case and the recent New Zealand case *Dollars & Sense*.<sup>86</sup>

In *Schultz*,<sup>87</sup> a company, Corwill Properties Pty Ltd, was the registered proprietor of land and Galea — a solicitor — was the company's secretary. Galea advised Schultz to invest 3000 pounds on the security of a registered mortgage over the company's property. Schultz advanced the money, Galea forged the company's execution of the mortgage, the mortgage in favour of Schultz was registered and Galea misappropriated the funds. The question arose: Was the fraud of Galea to be imputed to his principal Schultz so as to make her registered mortgage defeasible? The short answer was no.

Street J held that it was not within the scope of Galea's actual or apparent authority to forge the execution of the mortgage.<sup>88</sup> Schultz had instructed Galea to obtain a valid mortgage and a safe security for her investment. The forged execution of the mortgage was an 'independent activity entirely in furtherance of his own interests and in no way done for or on behalf of Mrs. Schultz'.<sup>89</sup>

There are two main difficulties with this application of the respondeat superior test by Street J. First, Street J narrowly defined the scope of Galea's authority as limited to obtaining a valid mortgage.<sup>90</sup> In obtaining a forged mortgage, Galea stepped outside the scope of his authority and therefore his fraudulent acts could not be imputed to the registered mortgagee, Schultz. This restrictive application of the test implies that a principal would never be liable for the acts of an agent in forging a mortgage since, invariably, the principal would always seek to obtain a valid mortgage and a safe security. In forging a mortgage, the agent would therefore be viewed as acting outside the scope of his or her authority.

The second criticism is the implication that fraudulent actions that are entirely for the benefit of the agent cease to be within the scope of the agency.<sup>91</sup> This view was rejected in *Dollars & Sense*<sup>92</sup> and it is submitted the better view is to consider the fact of the agent's benefit as 'a relevant but not a decisive factor'<sup>93</sup> in the overall enquiry as to whether the fraud was within the scope of the agency.

In *Dollars & Sense*, Rodney Nathan, the son of the registered proprietors, arranged a loan to himself from the company, Dollars & Sense Ltd, using his parent's property as security for the loan. The solicitor for the company, Mr Thomas, arranged delivery to Rodney of the loan and mortgage documentation. Rodney forged his mother's signature to the mortgage and returned the documents to the company. The mortgage was registered and the loan monies paid over to Rodney.

85 Butt, above n 9, 803–4 [20.77]. See also *Dollars & Sense* [2008] 2 NZLR 557, 574–5 [43].

86 *Dollars & Sense* [2008] 2 NZLR 557.

87 *Schultz* [1969] 2 NSW 576.

88 *Ibid* 584.

89 *Ibid*.

90 *Ibid*.

91 *Ibid*.

92 *Dollars & Sense* [2008] 2 NZLR 557, 573–4 [41]–[42].

93 O'Connor, 'Immediate Indefeasibility for Mortgagees', above n 84, 143.

Rodney defaulted under the mortgage, and the company sought to exercise the power of sale against Mr and Mrs Nathan's property relying on the registered mortgage and indefeasibility of title. Mrs Nathan argued that her purported signature was forged by Rodney in the course of his agency for the company and, accordingly, the registered mortgage was defeasible by virtue of the fraud of the company's agent, Rodney.

There were two main questions to be decided. First, did Rodney have the actual authority, either express or implied, to act as agent for the company to procure Mrs Nathan's signature to the mortgage? Second, if so, was Rodney's forgery and fraud within the course of the agency? In relation to the first question the court concluded that Rodney was the company's agent for the purpose of obtaining his parents' signatures to the mortgage and loan documentation.<sup>94</sup>

In relation to the second question, the court identified a two stage inquiry: first, what acts has the principal authorised and, secondly, is the agent's act so connected with those acts that it can be regarded as a mode of performing them?<sup>95</sup> The court commented further that

an act can be within the scope of an agency even when it is the antithesis of what the principal really wanted. ... The true test is whether the tortious act has a sufficiently close connection with the task so that the commission of the tort can be regarded as the materialisation of the risk inherent in that task.<sup>96</sup>

The court determined the authorised acts were obtaining the mortgagors' signatures to the mortgage and uplifting the duplicate certificate of title.<sup>97</sup> It was Rodney's task to obtain registrable documents and the court concluded that 'obtaining execution, even by forgery, was within the scope of that task'.<sup>98</sup> The court noted that Rodney's fraud took place 'to achieve the very thing that Rodney was asked to do as agent by Dollars & Sense; that is to obtain a registrable mortgage'.<sup>99</sup> The result of the case was that as the fraud of Rodney was within the task Dollars & Sense had asked Rodney to perform, fraud could be imputed to Dollars & Sense and the registered mortgage was defeasible by virtue of the fraud exception.

A final point to note from *Dollars & Sense* concerns the 'exception' that precludes the imputation of the agent's knowledge of fraud to the principal where the agent's knowledge is knowledge of the agent's own fraudulent conduct. The court refutes the notion that such an exception is appropriate.<sup>100</sup> Accordingly, in cases of fraud by an agent due to the agent's fraudulent conduct, the principal's liability should be determined on the basis of the general principle of respondeat superior and the exception precluding imputation of knowledge is inapplicable.

94 *Dollars & Sense* [2008] 2 NZLR 557, 570–1 [27].

95 *Ibid* 571 [32].

96 *Ibid* 576 [46].

97 *Ibid* 571 [34].

98 *Ibid* 576 [46], citing *Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747, 771 [103].

99 *Dollars & Sense* [2008] 2 NZLR 557, 576 [46], quoting *Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747, 772 [107].

100 *Dollars & Sense* [2008] 2 NZLR 557, 574–5 [43].

The decision in *Dollars & Sense* considerably broadens the situations in which a registered proprietor's title may be rendered defeasible by virtue of fraud by an agent. This breadth is seen in the very recognition of Rodney as an agent of the mortgagee, *Dollars & Sense*. Many of the classic Torrens cases where fraud has been raised arguably involve the appointment, by the registering party, of the fraudster as an agent. On reflection, could it be argued that Mrs Frazer,<sup>101</sup> Mr Gosper,<sup>102</sup> Mr De Jager,<sup>103</sup> Mr Halaseh,<sup>104</sup> or Denise and Mrs Hoger,<sup>105</sup> were agents for their respective registering mortgagees to obtain registrable mortgage documents such that their fraud in forging the mortgagor's signature to the mortgage becomes the fraud of the registered mortgagee? It may well be that an agency relationship ought not to be found on the facts of these particular cases, however, there is no doubt that *Dollars & Sense* has opened the door for a revised treatment of this question in future cases.

The other area in which *Dollars & Sense* has broadened the potential application of agency fraud is by rephrasing the question concerning the scope of the agency to ask: are the agent's acts so connected with the authorised acts that they can be regarded as a mode of performing them or as a 'materialisation of the risk inherent in that task'? If the authorised task is to obtain a registrable mortgage, then obtaining a forged mortgage is both a mode of performing the authorised task and a materialisation of the risk inherent in obtaining a registrable mortgage.

The revised and expanded treatment of agency fraud revealed in *Dollars & Sense* may have the effect that future forgery and false attestation cases will be treated as a straightforward application of the second category of the fraud exception — fraud against the prior registered proprietor — by virtue of the agent's fraud. This may well have the effect of eroding the continued relevance of the notion of fraud against the Registrar.

## **B The Applicability of Indefeasibility to Registered Forged 'All Moneys' Mortgages**

Another recent development in the law regarding Torrens fraud that may diminish the relevance of fraud against the Registrar, is the applicability of indefeasibility to registered forged 'all moneys' mortgages.<sup>106</sup> There is a distinction between a

101 *Frazer* [1967] 1 AC 569.

102 *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32. In this case, the argument was raised that Mr Gosper had been appointed the mortgagee's agent for the purpose of obtaining Mrs Gosper's signature to the mortgage. Only the dissenting judge Meagher JA dealt with this argument at 52–3. His Honour did not consider there was any factual basis on which to found the existence of an agency arrangement, but even if such an arrangement had been made, it was for the limited purpose of procuring Mrs Gosper's genuine signature and the forged execution of the mortgage by Mr Gosper was outside the scope of that agency. These comments are reminiscent of the comments of Street J in *Schultz* [1969] 2 NSW 576, 584.

103 *De Jager* [1984] VR 483.

104 *Russo* [1999] 3 VR 376.

105 *Young* [2001] QCA 453 (23 October 2001).

106 The discussion that follows concerning all moneys mortgages has been adapted from an earlier article by one of the authors: Penny Carruthers, 'Indefeasibility, Compensation and Anshun Estoppel in the Torrens System: The *Solak* Series of Cases' (2012) 20 *Australian Property Law Journal* 71.



‘traditional’ and an ‘all moneys’ mortgage. A traditional mortgage contains a statement of the principal sum lent, an acknowledgement by the mortgagor that the sum has been lent and an undertaking to repay that sum.<sup>107</sup> Upon registration of a traditional mortgage, an indefeasible charge is created over the land to secure the amount stated in the mortgage as having been lent to the mortgagor. This charge is effective even though the mortgage is forged and the money has been advanced, not to the mortgagor, but to the forger.<sup>108</sup>

An all moneys mortgage ‘does not state that a particular amount is secured, but rather purports to secure all moneys owing by the mortgagor to the mortgagee’ under an unregistered collateral loan agreement or guarantee.<sup>109</sup> The question that arises with a forged all moneys mortgage is: what, according to the true meaning and effect of the mortgage, is the debt which it secures? It is clear that the mortgagee’s charge is indefeasible, as it is contained within the registered mortgage.<sup>110</sup> However, unless the mortgage effectively incorporates the personal covenant to pay the mortgage debt contained in the unregistered and forged loan agreement, the mortgage secures nothing.<sup>111</sup>

Frequently, all moneys mortgages include a number of interlocking documents.<sup>112</sup> The registered mortgage itself is silent as to the indebtedness it secures on the property. However, the mortgage usually includes a term that the mortgagor covenants that the provisions of a registered memorandum are incorporated into the mortgage. The memorandum then provides that the mortgage is security for the payment of the ‘secured money’ as provided for under a ‘secured agreement’. The memorandum defines the term ‘secured money’ as the amount owing to ‘Us’ (the mortgagee) under a ‘secured agreement’. The ‘secured agreement’ is defined as any present or future agreement between ‘Us’ and ‘You’ (the mortgagor).<sup>113</sup>

The difficulty, from the point of view of the mortgagee, is that where the ‘present or future agreement’ is not between ‘Us’ and ‘You’, because the collateral loan agreement has been forged, there is no ‘secured agreement’ and consequently there is no ‘secured money’. Therefore, the mortgage, though indefeasible, secures

107 *Perpetual Trustees Victoria Ltd v Tsai* (2004) 12 BPR 22 281, 22 284 [20] (‘*Tsai*’).

108 *Ibid* [13].

109 Scott Grattan, ‘Recent Developments Regarding Forged Mortgages: The Interrelationship between Indefeasibility and the Personal Covenant to Pay’ (2009) 21(2) *Bond Law Review* 43, 56. In fact, as Grattan indicates, all moneys mortgages may also occur where the mortgage ‘purports to secure all moneys owing by the mortgagor to the mortgagee: (a) for any reason; or (b) under any agreement between the parties; or (c) under a particular agreement between the parties’: at 56 (citations omitted).

110 Typically the mortgage includes a term charging the land with the repayment of the secured money. Extraordinarily, in *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25 343 (‘*Vella*’), Young CJ noted that one of the relevant mortgages in the case did not appear to include a charging clause. However, as no one had made any point about this, Young CJ read the documents in a ‘commercial and sensible way’ though his Honour noted it was ‘rather odd’: at 25 373 [261].

111 *Tsai* (2004) 12 BPR 22 281, 22 284 [21].

112 See Patricia Lane, ‘Indefeasibility for What? Interpretive Choices in the Torrens System’ in Lyria Bennett Moses, Brendan Edgeworth and Cathy Sherry (eds), *Property and Security: Selected Essays* (Thomson Reuters, 2010) 149, 160, for a discussion of the practical benefits of the all moneys mortgage for both mortgagors and mortgagees.

113 Interlocking documents and terms may be found, for example in *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24 675, 24 681 [22] (‘*Chandra*’); *Vella* (2008) 13 BPR 25 343, 25 372 [258]–[260], 25 373 [264]; *Provident Capital Ltd v Priny* (2008) 13 BPR 25 199, 25 201 [12]–[13] (‘*Priny*’).

nothing. This approach has generally been adopted throughout Australia,<sup>114</sup> and also in New Zealand,<sup>115</sup> with the ultimate result that, as there is no enforceable loan agreement, the mortgage secures no money and the mortgage must be discharged.<sup>116</sup> Notably, this approach has not been adopted in Victoria.<sup>117</sup>

The plethora of recent cases in this area indicate that banks and finance companies have been using all moneys mortgages in place of traditional mortgages.<sup>118</sup> As the registration of a forged all moneys mortgage will have the effect of securing nothing, the practical effect is that the ‘defrauded’ mortgagor is entitled to have the forged mortgage discharged and has no need to resort to a court action based on fraud against the Registrar.<sup>119</sup>

### **C The Impact on Indefeasibility of National Credit Code Section 42 — Overriding Statutes**

A third area requiring discussion concerns the effect of overriding statutes on the principle of indefeasibility. As a general proposition, the Torrens legislation, as with any legislation, may be wholly or partially repealed or amended by later legislation. This may occur directly or may occur indirectly if repeal or amendment is ‘the ordinary and proper implication to be drawn from the later statute’.<sup>120</sup>

114 See, eg, *Isai* (2004) 12 BPR 22 281; *Yazgi v Permanent Custodians Ltd* (2007) 13 BPR 24 567; *Printy* (2008) 13 BPR 25 199.

115 *Westpac New Zealand Ltd v Clark* [2010] 1 NZLR 82.

116 For the purposes of this paper, the comments regarding all moneys mortgages are restricted to mortgages with a single mortgagor. Where there are joint mortgagors, and only one of the mortgagor’s signatures is forged, then the position is more complicated. If the mortgagors’ liability for the debt is expressed to be joint and several, then, provided the signature of one of the mortgagors on the off register loan agreement is genuine, this may be effective to secure the indebtedness over the whole of the property. For recent cases in this area, see *Perpetual Trustees Victoria Ltd v English* (2010) 14 BPR 27 339; *Van Den Heuvel v Perpetual Trustees Victoria Ltd* (2010) 15 BPR 28 647. For a discussion of the law regarding all moneys mortgages and joint proprietors see Lane, above n 112, 163–6; Evan Peterson, ‘Are All Torrens Transactions Equal? A Focus on the Efficiency of the Indefeasibility Accorded to Torrens Mortgages’ (2011) 19 *Australian Property Law Journal* 280, 304–6; Grattan, above n 109, 62–3; Brett Harding, ‘Under the Indefeasibility Umbrella: The Covenant to Pay and the “All-Moneys” Mortgage’ (2011) 19 *Australian Property Law Journal* 231, 253–7; Sam Schroeder and Patrick J Lewis ‘Indefeasibility of Title and Invalid All Moneys Mortgages: Determining Whether Invalid Personal Covenants to Pay Are Protected under the Indefeasibility Umbrella’ (2010) 18 *Australian Property Law Journal* 185; Rouhshi Low and Lynden Griggs, ‘Immediate Indefeasibility — Is It under Threat?’ (2011) 19 *Australian Property Law Journal* 222; Sam Schroeder, ‘Forged Mortgages and Indefeasibility: A Minefield for Mortgagees’ (2011) 85 *Australian Law Journal* 71.

117 *Solak v Bank of Western Australia Ltd* [2009] VSC 82 (17 March 2009). The decision in this case has been criticised by a number of commentators including Lane, above n 112, 161–3; Lee Aitken, ‘Indefeasibility and the Forged Mortgage’ (2009) 32 *Australian Bar Review* 253; Carruthers, above n 106.

118 The cases mentioned above n 107, 110 and 113 all involve all moneys mortgages. More recent cases include *Perpetual Trustees Victoria v Cox* [2014] NSWCA 328 (18 September); *Ocvirk v Permanent Custodians* [2013] NSWSC 1021 (26 July 2013).

119 This is not to say, however, that the mortgagor suffers no loss. In *Chandra* (2007) 13 BPR 25 259 the mortgagor sustained loss in the form of legal costs and was held entitled to recover this loss pursuant to the compensation provisions and *Real Property Act 1900* (NSW) s 129(1)(a).

120 Bradbrook et al, above n 9, 244–5 [4.325].

Of particular relevance here is the effect of the *National Credit Code*,<sup>121</sup> which applies to loans made by credit providers<sup>122</sup> to individuals ‘for personal, domestic or household purposes’ or ‘to purchase, renovate or improve residential property for investment purposes’.<sup>123</sup> *NCC* s 42(1) provides that a mortgage must be in writing and signed by the mortgagor, otherwise, according to s 42(4), the mortgage is not enforceable.<sup>124</sup> In the event a mortgage is a forgery and has not been signed by the mortgagor, the question arises: is *NCC* s 42 an overriding statutory provision such that indefeasibility is repealed and the registered forged mortgage is unenforceable?

Although the effects of overriding statutes on Torrens legislation have been considered in a number of cases,<sup>125</sup> there does not yet appear to be a definitive answer to the question of the impact of *NCC* s 42 on indefeasibility.<sup>126</sup> In a recent article, Backstrom and Christensen have argued that s 38 of the *Uniform Consumer Credit Code*, the forerunner to *NCC* s 42, may operate as an exception to indefeasibility.<sup>127</sup> As the authors note:

It would be inconsistent with the policy of the Consumer Credit Code if an unsigned mortgage could be enforced against a mortgagor or their interest in the land merely because it was registered under the Torrens

121 The *National Credit Code* is contained in *National Consumer Credit Protection Act 2009* (Cth) sch 1 (*‘NCC’*).

122 *NCC* s 5(1)(d) makes the Code applicable to a credit provider who provides the credit ‘in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction’.

123 *Ibid* s 5.

124 *Ibid* s 42 replaces the earlier provision in *Consumer Credit (Queensland) Act 1994* (Qld) app s 38 (*‘Uniform Consumer Credit Code’*).

125 See, eg, *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1; the *Hillpalm* litigation concluding with the High Court decision in *Hillpalm Pty Ltd v Heaven’s Door Pty Ltd* (2004) 220 CLR 472; *City of Canada Bay v Bonaccorso Pty Ltd* (2007) 71 NSWLR 424.

126 In *Vella* (2008) 13 BPR 25 343, 25 382–3 [354]–[355], Young CJ effectively avoided considering the question in relation to *Uniform Consumer Credit Code* s 38, the forerunner to *NCC* s 42, on the grounds that, in his view, the Code did not apply as the loan was not for personal, domestic or household purposes. Similarly, in *Solak v Registrar of Titles* (2011) 33 VR 40, 50 [43] (*‘Solak’*), Warren CJ was not required to come to a definitive conclusion on the ‘Credit Code point’ since Mr Solak’s counsel considered the Credit Code point was a ‘triable issue’ and accordingly the Court of Appeal in *Solak* treated the point as ‘arguable’. Warren CJ stated: ‘I am not convinced that this concession [by Mr Solak’s counsel] was rightly made’ and provided a number of reasons to support the view that *Uniform Consumer Credit Code* s 38 did not abrogate the indefeasibility of a forged registered mortgage: at 50 [44]. In summary, her Honour’s reasons were: (1) ‘given the importance and the long standing of the doctrine of indefeasibility, it seems doubtful that the legislature would abrogate indefeasibility of fraudulently obtained mortgages without making that intention clear’; (2) the protection of indefeasibility ‘benefit[s] ... the whole community by making land transactions cheaper and more efficient. Acceptance of the Credit Code point would undermine that protection’; (3) ‘[i]t is ... doubtful ... that indefeasibility would be abrogated by an Act ... [intended] to deal with a mischief of a completely different kind, namely, less than scrupulous lenders in relation to genuine borrowers’; and finally, (4) ‘very strange anomalies would arise if the ... Code were to apply to fraudulent credit contracts’ as, in determining whether the Code applies, one needs to determine the intended use of the credit. ‘If the credit contract is fraudulent, the question arises: whose intention is to be assessed?’ Who it be the fraudsters or the borrowers?: at 49 [39], 50,[42]. See also Carruthers, above n 106, 91–4.

127 Michelle Backstrom and Sharon A Christensen, ‘Qualified Indefeasibility and the Careless Mortgagee’ (2011) 19 *Australian Property Law Journal* 109, 123. It should be noted this article was written prior to the Victorian Court of Appeal decision in *Solak*, which indicated a contrary view. See also the discussion in above n 126.

legislation. ... [G]iven the nature and purpose of s 38, it seems unlikely that it was intended to only apply to mortgages not subject to the Torrens legislation.<sup>128</sup>

In relation to the class of mortgages covered by the *NCC*, if a future court were to adopt the approach suggested by Backstrom and Christensen and treat *NCC* s 42 as an exception to indefeasibility, then, once again, the need for reliance on the notion of fraud against the Registrar is rendered redundant.

#### **D The Introduction and Ramifications of Strengthened Identity Verification Requirements**

In analysing the cases of fraud against the Registrar in Part III, it becomes reasonably clear that the calamity that ensues from the registration of a forged document could have been avoided had the registering party carried out basic identity verification checks of the person whose signature was forged and falsely attested. In recent years there have been, and indeed, continue to be, significant advances in relation to ‘verification of identity’ (VOI) requirements in the execution of Torrens documents. These advances can be seen in amendments to the Torrens legislation of New South Wales, Victoria and Queensland regarding the execution of mortgages; the introduction of VOI requirements in Western Australia and South Australia; and the proposed adoption, throughout Australia of ‘Participation Rules’ pursuant to *Electronic Conveyancing (Adoption of National Law) Act 2012* (NSW) app s 23 (‘*ECNL*’).

The introduction of these more stringent VOI requirements will reduce the opportunity for fraudsters to engage in fraud and forgery. With the fraudsters thwarted, there is, of course, no fraud, no defrauded registered proprietor and no need to bring a claim of fraud against the Registrar.

#### **1 The Queensland, New South Wales and Victorian Amendments**

In November 2005, Queensland introduced ‘careless mortgagee provisions’<sup>129</sup> that require a mortgagee to take reasonable steps to ensure that the person who is the mortgagor under the mortgage instrument is the same person as the person who is, or who is about to become, the registered proprietor of the land.<sup>130</sup> Under *Land Title Act 1994* (Qld) s 185(1A), a registered mortgagee who fails to take reasonable steps to identify the mortgagor, in circumstances where the registered mortgage is a forgery, does not obtain the benefit of indefeasibility. In addition,

128 Backstrom and Christensen, above n 127, 123.

129 Ibid 110 n 7. The expression ‘careless mortgagee provisions’ appears to have been coined by Backstrom and Christensen to ‘refer to the provisions of the Qld and NSW legislation that remove the benefits of indefeasibility from mortgagees who fail to take reasonable steps to identify the mortgagor’.

130 *Land Title Act 1994* (Qld) s 11A(2). A similar provision applies in the case of a transfer of a mortgage at s 11B(2).

the careless mortgagee is not entitled to compensation from the State for any deprivation, loss or damage.<sup>131</sup>

Similar provisions were introduced in New South Wales and Victoria and came into effect in New South Wales in November 2011<sup>132</sup> and in Victoria in September 2014.<sup>133</sup> However, in New South Wales and Victoria, if the mortgagee fails to take reasonable steps to identify the mortgagor, then, the Registrar-General in New South Wales<sup>134</sup> or the Registrar in Victoria<sup>135</sup> has discretion as to whether to cancel the registration of the mortgage.

These careless mortgagee provisions introduce a form of hybrid deferred indefeasibility and, it is submitted, the provisions will go a long way to averting mortgage forgery — in particular, the imposter scenario — as mortgagees will be more diligent in ensuring the mortgagor is properly identified. A failure to carry out the appropriate identity checks may affect the enforceability of a forged but registered instrument without the need to resort to a claim of fraud against the Registrar. For example, in the recent Queensland case of *Commonwealth Bank of Australia v Perrin*,<sup>136</sup> the registered mortgagee conceded that it had failed to adhere to the requirements to take reasonable steps to identify the mortgagor and, as a result, lost the benefit of an indefeasible mortgage.

Despite the clear advantages of the careless mortgagee provisions there have been some criticisms of the provisions. These criticisms relate to the question of what constitutes ‘reasonable steps’. In Queensland, a mortgagee is considered to have taken reasonable steps if the mortgagee complies with the practice set out in the *Land Title Practice Manual*.<sup>137</sup> It is suggested that a significant deficiency in the current Queensland provisions is the failure to mandate face-to-face verification of the mortgagor’s identity by the mortgagee. The authors therefore submit that face-to-face VOI should be, as suggested by Low and Griggs, a ‘core’ principle in VOI requirements.<sup>138</sup>

131 *Ibid* s 189(1)(ab).

132 *Real Property Act 1900* (NSW) s 56C. See also *Real Property Act 1900* (NSW) s 129(2)(j) in relation to compensation.

133 *Transfer of Land Act 1958* (Vic) ss 87A, 87B. These provisions were inserted pursuant to *Transfer of Land Amendment Act 2014* (Vic) s 17.

134 *Real Property Act 1900* (NSW) s 56C(6).

135 *Transfer of Land Act 1958* (Vic) ss 87A(3), 87B(3).

136 [2011] QSC 274 (19 September 2011).

137 See *Land Title Act 1994* (Qld) s 11A(3); Registrar of Titles and Registrar of Water Allocations, *Land Title Practice Manual (Queensland)* (Department of Resources, 2009) [2-2005]. In essence, these practices reflect the ‘100 points of identification’ provisions under the *Financial Transaction Reports Act 1988* (Cth); *Financial Transaction Reports Regulations 1990* (Cth). The verification procedure is specified in reg 3 and the points value for various checks are contained in regs 4–9, 10A, 10B.

138 Rouhshi Low and Lynden Griggs, ‘Identity Verification in Conveyancing: The Failure of Current Legislative and Regulatory Measures, and Recommendations for Change’ (2012) 76 *The Conveyancer and Property Lawyer* 363, 377.

Recent amendments in New South Wales<sup>139</sup> and Victoria<sup>140</sup> have adopted the verification of identity requirements set out in the participation rules of the ECNL. As discussed in Part IV(D)(3) below, these verification of identity requirements require a face-to-face interview thus satisfying the ‘core’ principle identified by Low and Griggs.

## 2 VOI Requirements in Western Australia and South Australia

In an effort to reduce the risk of fraud in land transactions in Western Australia, the Western Australian Registrar and Commissioner of Titles issued a ‘Joint Practice: Verification of Identity’ that commenced in July 2012 with full compliance required from January 2013.<sup>141</sup> The VOI Practice is based on the proposed standard of VOI that is being considered for introduction under the National Electronic Conveyancing, and applies only to documents executed on paper. The types of documents to which the Practice applies includes transfers, mortgages, requests for duplicate Certificate of Title, applications for replacement duplicate Certificate of Title, transmission applications, survivorship applications and powers of attorney.<sup>142</sup>

The standard of VOI has two base requirements: (1) the production of identity documents; and (2) visual verification of identity by way of face-to-face comparison between the photograph on the original identity documents and the person being identified.<sup>143</sup> The persons authorised to undertake VOI (the ‘identifier’) include staff at Australia Post, conveyancers, lawyers, mortgagees or agents appointed by the conveyancer or lawyer or mortgagee to undertake VOI.<sup>144</sup> If VOI takes place outside Australia, an Australian Consular Officer is required to undertake

139 *Real Property Regulation 2014* (NSW) commenced on 1 September 2014 and replaced *Real Property Regulation 2008* (NSW). Regulation 12 of the 2014 regulations deals with mortgages executed before 1 January 2015 and deems the mortgagee to have taken reasonable steps if the mortgagee either takes the steps set out in *Real Property Regulation 2014* (NSW) regs 13–15 or complies with the *Anti-Money Laundering and Counter-Terrorism Financing Rules 2007* (Cth) made under the *Anti-Money and Counter-Terrorism Financing Act 2006* (Cth). However, pursuant to *Real Property Regulation 2014* (NSW) reg 16, which deals with mortgages executed after 1 January 2015, the prescribed reasonable steps for confirming the identity of a mortgagor are the steps set out in the ‘Verification of Identity Standard’ which is the standard set out in sch 8 to the participation rules of the ECNL. Importantly, cl 2.1 of sch 8 requires the verification of identity to be conducted during a face-to-face in-person interview.

140 *Transfer of Land Act 1958* (Vic) s 87A(2) provides that the mortgagee is considered to have taken reasonable steps to verify the authority and identity of the mortgagor if the mortgagee has taken steps consistent with any verification of identity and authority requirements (a) determined by the Registrar in accordance with s 106A; or (b) set out in the participation rules within the meaning of the ECNL.

141 Western Australian Land Information Authority, *Land Titles Registration Practice Manual*, 5 December 2014, ch 14 (*‘Land Titles Registration Practice Manual’*). Another object of the VOI Practice is to reduce the risk of claims against the State under the compensation provisions of the Torrens legislation. The VOI Practice was prompted by the fraudulent sale of the property of Roger Mildenhall in suburban Perth by overseas scammers. The fraud is discussed by Low and Griggs, ‘Identity Verification in Conveyancing’, above n 138; Eileen Webb, ‘Scammers Target WA Real Estate Transaction’ (December 2010) *Australian Property Law Bulletin* 186.

142 *Land Titles Registration Practice Manual*, above n 141, 500 [14.1.4] table 1.

143 See *ibid* 503–5 [14.3].

144 *Ibid* 506 [14.4.2].

the VOI.<sup>145</sup> The Western Australian Title's Office, Landgate, has included a VOI Statement, to be completed by the identifier, into the new approved Transfer and Mortgage forms.<sup>146</sup> The Statement essentially provides that the identifier has taken all reasonable steps to verify the identity of the person being identified and reasonably believes that the person has been identified and that the person has the authority to deal with the land.

In South Australia, a broadly similar VOI policy to the Western Australian VOI Practice was introduced for documents executed after July 2013.<sup>147</sup> Full compliance with the VOI policy has been required since 28 April 2014.

The full impact of the introduction of the VOI requirements in these jurisdictions is yet to be fully realised. However, one would anticipate that the mandated 'core' requirement for a face-to-face, visual identification of the mortgagor, transferor, or other person proposing to deal with the land, will have a significant role in reducing the opportunity for fraud and forgery in land transactions. Once again, this will significantly limit the circumstances in which a defrauded registered proprietor may need to rely on a claim of fraud against the Registrar.

### **3 The Participation Rules under the ECNL**

Pursuant to s 23 of the *ECNL*, *Model Participation Rules* have been developed by the Australian Registrar's National Electronic Conveyancing Council (ARNECC). The *Model Participation Rules* are to be adopted by the Registrars of Titles in the states and territories. Version 2 of ARNECC's *Model Participation Rules* was released in March 2014.<sup>148</sup>

Clause 6.5 of the *Model Participation Rules* requires a 'subscriber' to take reasonable steps to verify the identity of, among others, a mortgagor and any client the subscriber represents. Under cl 6.6.2, compliance with the VOI standard set out in sch 8 of the *Model Participation Rules* will be deemed to constitute taking reasonable steps to verify identity. Importantly, pursuant to cl 2.1 of sch 8, 'the verification of identity must be conducted during a face-to-face in-person interview between the Subscriber ... and the Person Being Identified'.

While it is beyond the scope of this paper to provide a critique of the new *Model Participation Rules* or to comment on their efficacy in thwarting potential fraudsters in the electronic arena, there is little doubt that they will go some way to

145 Ibid 506 [14.4.2.2].

146 At this stage, it is not compulsory to use the new forms. A verifier may instead, provide the VOI statement on the firm's letterhead or by way of a statutory declaration.

147 See Department of Planning, Transport and Infrastructure, *Verification of Identity: Registrar-General's Verification of Identity Policy* <[https://www.sa.gov.au/\\_data/assets/pdf\\_file/0017/7262/Register-Generals-Verification-of-Identity-Requirements.pdf](https://www.sa.gov.au/_data/assets/pdf_file/0017/7262/Register-Generals-Verification-of-Identity-Requirements.pdf)>. See generally Department of Planning, Transport and Infrastructure, *Verification of Identity Policy* (25 July 2014) <<https://www.sa.gov.au/topics/housing-property-and-land/land-services-industry/verification-of-identity-policy-for-conveyancing>>.

148 Version 2 of the *Model Participation Rules* may be found at <[http://www.arnecc.gov.au/\\_data/assets/pdf\\_file/0006/196251/Model\\_Participation\\_Rules\\_Version\\_2\\_-\\_18\\_March\\_2014.pdf](http://www.arnecc.gov.au/_data/assets/pdf_file/0006/196251/Model_Participation_Rules_Version_2_-_18_March_2014.pdf)>.

inhibiting the opportunities for forgery and fraud in the conveyancing process.<sup>149</sup> This benefit is assured by the inclusion in the *Model Participation Rules* of the ‘core’ requirement of a face-to-face personal interview. Once again, the authors submit that this is a fundamental requirement to ensure an appropriately rigorous and effective VOI standard. It is doubtless that as Australia moves into a new electronic age with regards to conveyancing transactions, new and different opportunities for fraudsters will arise. Whether the opportunities will raise the problem of forgeries and false attestations, and so perpetuate the notion of fraud against the Registrar, remains to be seen. Until then, it would seem this notion may become increasingly irrelevant.

## V CONCLUSION

The critical analysis of the case law on fraud against the Registrar undertaken in this paper reveals that this category of fraud is both an unhelpful and unnecessary complication in the law on Torrens fraud. In addition, the examination of recent developments in the law on fraud by an agent and in conveyancing requirements and practices across Australia, demonstrates that this third category in the three-fold taxonomy of fraud is likely to become increasingly irrelevant.

In recommending that the category of fraud against the Registrar be abandoned, echoing the sentiment of Juliet Capulet of William’s Shakespeare’s *Romeo and Juliet*, the authors would say:

Tis but thy name that is my enemy;  
 Thou art thyself, though not a ... [fraud against the Registrar].  
 What’s ... [fraud against the Registrar]? it is nor ... [helpful], nor ...  
 [necessary],  
 ... nor any other part  
 Belonging to ... [Torrens fraud]. O, be some other name!  
 [Be fraud against the prior registered proprietor]<sup>150</sup>

149 For a detailed discussion of fraud and electronic conveyancing see Low and Griggs, ‘Immediate Infeasibility — Is It Under Threat?’, above n 116; Low and Griggs, ‘Identity Verification in Conveyancing’, above n 138; Rouhshi Low ‘Maintaining the Integrity of the Torrens System in a Digital Environment: A Comparative Overview of the Safeguards Used within the Electronic Land Systems in Canada, New Zealand, United Kingdom and Singapore’ (2005) 11 *Australian Property Law Journal* 155; Rouhshi Low ‘Opportunities for Fraud in the Proposed National Electronic Conveyancing System: Fact or Fiction?’ (2006) 13 *Murdoch University Electronic Journal of Law* 225.

150 William Shakespeare, *Romeo and Juliet* (II, ii, 37–42).