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4 May 2009

The Hon. Tony Kelly MLC
Minister for Lands
Level 34
Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister,

Real Property and Conveyancing Legislation Amendment Bill 2009 (Bill)

I am writing to you at the request of the Law Society's Property Law Committee (Committee).

The Committee has the responsibility of considering and dealing with any matters relating to property law and advising the Council of the Law Society on all issues relevant to that area of practice. The members of the Committee are senior property law practitioners and experts. Many of them advise clients, both property owners and lenders, of their rights and obligations under relevant legislation including the *Real Property Act 1900* and the *Conveyancing Act 1919*.

Lack of Consultation

The Committee notes that the Bill was introduced in the Legislative Assembly on 24 March 2009. Although the Committee met with representatives from the Department of Lands at a scheduled quarterly liaison meeting on the day before the Bill was introduced, there was no notice given to the Committee of the Bill or its contents.

The Committee has not, on behalf of the Law Society, nor has any other Law Society representative made any comment to date supporting the Bill despite suggestions in the Lower House that the Law Society had been consulted. That is simply not the case.

Many of the amendments contained in the Bill have a significant impact upon fundamental concepts underpinning the integrity of the Torrens system in New South Wales, including the principle of indefeasibility and access to the Torrens Assurance Fund. Given the significance of the Bill, it is most surprising that no attempt appears to have been made to consult with community and professional stakeholders.

Key Concerns

The Committee has real concerns about the Bill. The Committee's major concerns relate to the provisions which affect indefeasibility of title and the Torrens Assurance Fund (TAF). The principle of indefeasibility of title and the TAF are the key platforms which underpin the integrity of a State-guaranteed title system.

The Committee understands that the amendments to the provisions dealing with the TAF have been proposed by the Department of Lands through its Land and Property Information Division ("LPI"). As LPI is the branch of the Department which has first responsibility for deciding claims on the TAF, and given the scope of the proposed amendments set out in Schedule 1 of the Bill, it is the Committee's view that those matters should be referred to an independent body for review before legislative change is enacted. Any proposal to limit access to the TAF should be reviewed by a body which is not the primary decision-maker about payments out of the TAF.

If the Committee's proposal for referral to an independent body is not adopted, then the Committee suggests that it is imperative that further debate on the Bill is postponed to allow the ramifications for consumers to be fully considered.

The Committee is also concerned that a number of the proposed amendments will create a divergence between the provisions of the two key statutes governing property law in New South Wales and their counterparts in other Australian jurisdictions.

These concerns are discussed in more detail below.

1. The 'Overriding Statutes' Exception to Indefeasibility of Title

1.1 Indefeasibility and its exceptions – the current position

The principle of indefeasibility of title is of central importance to the concept of title by registration and the operation of the Torrens system.

Section 42 currently identifies six categories of exceptions to indefeasibility – five enumerated exceptions in the sub paragraphs to Section 42 (1) and fraud in the body of sub section (1) itself.

Other major categories of exemptions or qualifications to indefeasibility recognised by the courts include:

- claims for title by adverse possession (Section 45 D); and
- the "*in personam*" exception illustrated by cases such as *Bahr v Nicolay (No. 2) (1988) 164 CLR 604.*

Another major exception is the ability of later legislation to override an earlier statute.

It is a basic principle of statutory construction that subsequent legislation which is directly inconsistent with earlier legislation will abrogate earlier legislation to the extent of the inconsistency. However, a Court would generally be reluctant to find that property rights are removed by a later enactment unless the later statutory provision is very clearly intended to apply to Torrens land and is interpreted as directly inconsistent with the indefeasibility provisions.

1.2 The proposed amendment

The Bill proposes to amend Section 42, the key indefeasibility section of the *Real Property Act 1900*, to provide that the principle of indefeasibility is not overridden by subsequent legislation, except where the subsequent legislation expressly provides otherwise.

The proposed means of achieving this is to add a new Section 42(3) as follows:

"... (3) This section prevails over any inconsistent provision of any other Act or law unless the inconsistent provision expressly provides that it is to have effect despite anything contained in this section".

Schedule 3 to the Bill amends specified sections in twenty three existing statutes to expressly override Section 42.

A proposal to identify comprehensively those statutory provisions which override indefeasibility is useful. However, the proposed method of implementation is problematic for the reasons set out below.

1.2.1 Difficulty in identifying which later statutes contain overrides

It is important for those dealing with Torrens land to be able to identify the existence of exceptions to indefeasibility of title. It would be far preferable to identify all exceptions to indefeasibility (not only those within current contemplation but also future exceptions) in the *Real Property Act 1900* itself.

1.2.2 Difficulties in investigating effect of an override

The Committee is strongly of the view that any recognition of an exception to indefeasibility should be predicated on the existence and nature of that unregistered interest being clearly identifiable- for example as to its extent, location and quantum. The Committee notes that in a number of cases such identification has been difficult or practically impossible. It should be possible for property owners, purchasers, financing mortgagees and their advisers to be able to easily and efficiently verify the nature and extent of the interest of a body benefiting from an override. The investigation procedure should be cost-effective, and the outcome of the investigation should be available promptly.

Many of the matters covered in Schedule 3 are investigated in the normal course of a conveyancing transaction by obtaining a number of "usual searches". A Section 47 certificate which discloses whether there is a land tax charge on the property is one example. There are plainly sound policy reasons why the Office of State Revenue should have the benefit of a land tax charge over land without registration. However, it is not clear why, for example, where the Rural Assistance Authority provides financial assistance to a farm owner under the *Farm Water Supplies Act 1946*, the deed of charge contemplated by s12 of the *Act* should not be accompanied by a notification of the charge on the Torrens register.

The proposed amendments do not differentiate between statutory provisions dealing with rates and charges (where there are clear and well-grounded policy reasons for overriding section 42) and those provisions which vest interests in land in bodies such as local councils without the need to amend the Register.

The Committee has some specific comments and concerns about a number of the amendments contained in Schedule 3 – these are addressed in Annexure "A" to this submission.

1.2.3 Future Erosion of indefeasibility

It is troubling that the *Real Property Act 1900* should be amended in such a way as to enable the indefeasibility principle embodied in Section 42 to be overridden relatively easily. A government department may, for its own convenience, propose legislation to override a fundamental principle of the integrity of registered property interests and in doing so undermine the reliability of the Torrens register. The economic consequences to the State of acquiring or extinguishing property rights by this means, including liabilities to pay compensation, should be borne in mind.

1.2.4 Who is the appropriate arbiter of proposed overrides?

The Committee considers that the expert arbiter within Government of whether it is appropriate to create an exception to indefeasibility is LPI. LPI fulfilled that role in the drafting of the Bill. Making the *Real Property Act 1900* the repository of an exhaustive list of those later statutory provisions which operate as exceptions to indefeasibility would also have the benefit of giving LPI a supervisory role in what statutory provisions will override indefeasibility in the future. To do otherwise invites uncontrolled attempts to take a provision in a statute out of the reach of indefeasibility, thereby encouraging the proliferation of what Young J (as His Honour then was) described as "the single greatest threat to the operation of the Torrens System" *(Quach v Marrickville Municipal Council (1990) 22 NSW LR 55 at 61).*

1.2.5 The manner of overriding indefeasibility in the future

There is a further benefit in LPI acting as arbiter. The analysis in Annexure "A" highlights an alarming variety of approaches by past draftspersons of legislation, and by implementing authorities, as to how to best achieve an override to indefeasibility. The Committee acknowledges there would be real difficulty in undoing some long-standing problems evidenced by the body of court cases (for example, it would be impracticable to require registration of all interests which had, over many decades, vested in local councils under Section 59A of the *Local Government Act* 1993 and its predecessors). Having said that, at least steps should be taken to ensure that future reliance on statutory overrides will be evidenced on the Torrens Register. One way of so doing would be to utilise the Central Register of Restrictions ("CRR"). Unfortunately, not all Departments and statutory authorities have demonstrated the same level of commitment to the CRR as LPI has. If LPI undertook the role of arbiter the operation of the CRR could be enhanced, for the benefit of all stakeholders.

1.3 Way Forward

The statutory exceptions to indefeasibility of title should be set out in the *Real Property Act 1900* itself (perhaps particularised in a Schedule to the Act), so that those relying on the integrity of the Register can identify all those provisions of other statutes which impinge on indefeasibility and make appropriate further inquiry.

2. Amendments to the TAF Provisions

It is a fundamental tenet of the Torrens system that the State guarantees title and compensates persons incurring loss through the operation of this title system.

The Committee has been given no background information on the impetus for the proposed changes, other than a statement in a briefing note from the Department of Lands sent after the Bill's introduction which states:

"*A number of recent cases have highlighted some deficiencies in the legislation which have led to spurious claims being made against the Fund and excessive amounts being paid from interest and costs*".

2.1 Specific Comments

The overall thrust of the amendments is to limit access to the TAF.

The Committee considers the limiting of access in the way contemplated by the Bill is inconsistent with a fundamental objective of the TAF, namely the provision of compensation to those who have suffered deprivation of an interest in land arising as a result of the operation of the *Real Property Act 1900* (cf *Diemasters Pty Ltd v Meadowcorp Pty Ltd* (2001) 52 NSWLR 572; (2001) 10 BPR 18,769 at [32]-[33] per Windeyer J). The Committee endorses the comments of Bryson J in *Challenger Managed Investments Ltd v Direct Money Corporation Ltd* [2003] NSWSC 1072 at [76] regarding the operation of Part 14 of the Real Property Act:

> *Overall a regime is established in which loss or damage as a result of the operation of the Act is compensated for as part of the ordinary workings of the Torrens System. Compensation is not an extraordinary remedy, and is not reserved for faults, blunders or enormities.*

The Committee believes the approach adopted in the Bill is contrary to the tenor of the recommendations of the Law Reform Commission Report number 96 (1996): Torrens Title: Compensation for Loss.

The proposals regarding the TAF reverse a number of the welcome reforms to the operation of the TAF enacted by Parliament following the LRC report and embodied in the *Real Property Amendment (Compensation) Act* 2000. To quote from then-Minister Yeadon's Second Reading Speech on the Bill:

> *The Torrens Assurance Fund provides monetary compensation not only to a person who is deprived of land by the operation of the Torrens System but also to a person who suffers loss through a mistake in the Land Titles Office or through an error, omission or misdescription in the register of titles.*
>
> *The benefit of the compensation scheme is that it reinforces public confidence in the State guarantee and in the integrity and accuracy of the Register of Title. Moreover, the compensation provisions are so deeply ingrained in the Torrens System that without such a scheme there would be significant and detrimental repercussions in conveyancing costs and practices.*

The Committee opposes any legislative amendment which could lead to a return to the pre-2000 approach "*in which the assurance fund was zealously defended and appeals were common, so that recourse to the assurance fund where the workings of the Torrens System imposed losses was not readily available*" (*Challenger Managed Investments Ltd v Direct Money Corporation Ltd* at [64]). The proposed amendments constitute an unwarranted and unwelcome contraction of the rights of consumers.

The Committee's major concerns with the provisions affecting the TAF proposed in the Bill are set out in more detail in Annexure "B".

2.2 Increase to Fund

Annexure "C" to this letter is a table showing the latest available figures on the state of the TAF (derived from LPI Annual Reports). It discloses that the balance at year's end for 2007- 2008 was twice as much as the balance 5 years ago.

If it is considered prudent to increase the funds available in the TAF it would be preferable, in the Committee's view, to increase the "per dealing" levy rather than to reduce coverage for those who suffer loss through the operation of the Torrens system.

2.3 A conflict of interest?

There is a strong argument that any proposals to limit access to the TAF should be reviewed by a body which is not the primary decision maker about whether or not a payment should be made out of the Fund. Failure to undertake an independent review would invite criticisms similar to those levelled at the Building Services Corporation prior to its abolition in the mid - 1990's.

2.4 Way Forward

The operation of the TAF was the subject of a joint reference by the Law Reform Commissions of NSW and Victoria in 1988. After some delays, the NSW Commission issued Report number 96 (1996): Torrens Title: Compensation for Loss.

Many of the recommendations were adopted.

A number of the proposals in the Bill are contrary to recommendations made in the LRC report.

Given the scope of the proposed amendments to the TAF, the provisions of the Bill dealing with the Fund should be reviewed by a body such as the Law Reform Commission, or an independent acknowledged expert on the operation of the Torrens system. It is noted that Professor Peter Butt has previously undertaken a review of the Torrens statutes for the Law Council of Australia. Alternatively, there are experts in other jurisdictions, if considered preferable.

3 Harmonisation

The Law Society has long supported the commitment of Government and other stakeholders towards cross-jurisdictional harmonisation of laws in general, and of conveyancing procedures in particular (evidenced by the progress towards a National Electronic Conveyancing System). Any proposal to amend significantly the *Conveyancing Act 1919* or the *Real Property Act 1900* should take into account whether the journey to harmonisation will be advanced or impeded as a result of the change. The Committee appreciates that at times achieving harmonisation is not easy, but believes that the difficulties which can arise in doing so make it even more important that the cross-jurisdictional implications of amendments be considered carefully.

The Bill, its accompanying Explanatory Memorandum and the debate in the Legislative Assembly make scant mention of the position in other jurisdictions. To take two specific examples of provisions which warrant further consideration from the harmonisation perspective:

(a) the Committee notes that in Victoria rates and charges discoverable by certificate are the subject of a concise and specific statutory exclusion from indefeasibility (section 42(2) (f) *Transfer of Land Act* 1958 (Vic)). There may be benefit in a corresponding provision being enacted in New South Wales; and

(b) proposed section 111A of the *Conveyancing Act 1919*, while drawing on provisions in the conveyancing statutes in Queensland and the Northern Territory and on section 420A of the *Corporations Act 2001 (Cth)*, is not in precisely the same form as the other jurisdictions. The enactment of the section is intended to create a clear divergence between the law of New South Wales regarding the exercise of a mortgagee's power of sale, and the law that applies in Victoria, South Australia, Western Australia, Tasmania and the Australian Capital Territory. The Committee also observes that proposed subsection 111A(2) would if enacted be unique to New South Wales.

4 Other amendments

A number of other provisions which the Committee considers require review are set out in Annexure "D".

Conclusion

The Committee has serious concerns about the effect of those sections of the Bill highlighted above. These concerns relate to fundamental concepts which affect the integrity of the Torrens system itself.

The Bill should not proceed further until the Government and LPI engage in a meaningful consultation process with the Law Society (and with other stakeholders).

A review of the statutory provisions relating to indefeasibility of title and the TAF, by the Law Reform Commission or an independent expert, is warranted.

The Chair of the Committee, Ms Mary Macken, is happy to meet with you to discuss these concerns, if you wish. Please contact Ms Liza Booth, Executive Member of the Property Law Committee on (02) 9926 0202 or by email to ljb@lawsocnsw.asn.au if you wish to discuss this submission or arrange a meeting.

Yours sincerely,

Joseph Catanzariti
President

Annexure "A"

Overriding statutes – exceptions to indefeasibility set out in Schedule 3.

The Committee notes the following examples, taken from Schedule 3:

Contaminated Land Management Act 1997

Section 34 allows the Environment Protection Authority ("EPA") to give a notice requiring a person to pay administration costs incurred by the EPA in the preparing, etc of investigation or of remediation orders or monitoring action under them, seeking compliance, etc. Section 35 is similar but it relates to costs in actually carrying out the order. Section 39 allows for a registration of cost notices under section 35(2). Under Section 39 the notice can be registered *'in relation to any land'* and the Registrar General must register the notice *'in such a manner as the Registrar General thinks fit'*.

On registration a charge is created to secure the payment and in relation to Torrens land has priority over every mortgage, lease or other interest on the register. It is not affected by any change in ownership except in the case of a bona fide purchaser for value without notice of the charge. Registration constitutes notice. If the charge relates to land under the *Real Property Act 1900*, the charge has no effect until it is registered under the Act (Section 40(6)).

While on the one hand the inclusion of this Act in Schedule 3 section seems unnecessary as the charge only becomes effective on registration, it illustrates an alternative approach to this issue. This approach has the benefit of maintaining the integrity of the Register and allowing the parties to a land transaction to easily ascertain their rights and obligations under this Act.

Environmental Planning & Assessment Act 1979

Section 28 has a widespread operation but so far the litigation has related primarily to the suspension of covenants and easements. Cases in particular in relation to easements have been decided in different ways and those on covenants have depended entirely on the wording of the LEPs (or other relevant documents such as leases) which vary considerably. The diminution of easement rights resulting from Section 28 that are not evidenced by any registered documentation is of major concern.

Before Section 28 is listed in legislation as an exception to indefeasibility, the section should be amended to clarify whether the operation of the section extends to easements. That is, the tension between *Doe v Cog*ente Pty Ltd BC 9707498 NSWCA and *Cracknell & Lonergan Pty Ltd* v *Council of the City of Sydney* (2007) 155 LCERA 291should be resolved.

Farm Water Supplies Act 1946

This Act allows owners of farming lands to apply for advances for the purposes of carrying out works. The Rural Assistance Authority ("RAA") makes the decision. Either it does the work or the applicant does it. Under Section 12, repayment of the advance with interest is to be secured by deed of charge over farming lands in such form as may be required by the RAA. There is nothing to say that the charge is to be registered. Even where a private irrigation board obtains a loan it shall be advanced *'upon such security…as the RAA determines*'. There is no mention of registration.

There is nothing in the Act which provides for third parties to obtain protection. Query as to whether there is any in the regulations or in legislation relating to the RAA.

Land Tax Management Act 1956

Under Section 47 land tax is until payment a first charge on the land taxed in priority to the usual wide range of encumbrances. Purchasers and mortgagees can protect themselves against the existence of such a charge by obtaining a land tax certificate.

It is noted that the Commissioner has on occasions placed caveats on properties to protect his position.

Local Government Act 1993

Councils have functions which include the provision of water, sewerage and drainage works and facilities (see chapter 6 LGA). Section 59A is similar to legislation for the other authorities who supply services, providing that the council is the owner of all water supplies, sewerage and stormwater drainage work, installed in or on land by the council whether or not the land is owned by the council. There is specific power of entry under Section 191A in relation to these services.

Section 550 relates to levying of rates and charges. Purchasers and mortgagees can protect themselves against the existence of such a charge by obtaining a certificate under Section 603.

Soil Conservation Act 1938

The Committee has recently been advised that there is now a difficulty in obtaining replies to inquiries under this Act because the relevant department has, unilaterally it seems, decided to discontinue the provision of information. Given that certain matters under that Act are the subject of warranties under the *Conveyancing (Sale of Land) Regulation 2005*, that decision is problematic. The inclusion of the Act in Schedule 3 makes it doubly so.

Annexure "B"

Torrens Assurance Fund Proposals

Major Concerns

Section 120: Proceedings for Compensation

The amendment to Section 120 vests exclusive jurisdiction in the Supreme Court where there is a dispute over an administrative decision on a fund claim (the current provisions allows for a court of competent jurisdiction to determine claims). Such a change will not assist litigants to access prompt and affordable justice.

Section 129(2) (e) – (i)

This amendment is described in the Explanatory Memorandum as being by way of statute law revision. The Committee considers the amendment to be of greater significance.

The amendment appears to have the effect that any conduct within paragraphs (e) to (i) will entirely remove any claim on the TAF, even if that conduct was but one of the factors contributing to the loss. If that is its effect, the Committee strongly opposes the amendment.

Sections 129(2) (j) – (o)

Section 129 currently stipulates nine circumstances in which compensation is not available. This has been expanded to sixteen circumstances.

The Committee disagrees with the inclusion of **all** of these additional categories enumerated in s129 (2) (j) – (o), with the exception of paragraph (m).

Paragraph (j) – loss or damage arising from failure to comply with Section 56C.

See the commentary on section 56C.

Paragraph (k) – loss or damage from recording or removal of Registrar General's caveat

> *"(k) where the loss or damage arises from the recording of a Registrar General's caveat in the Register under Section 12(1)(e) or (f) or the removal of such a caveat by the Registrar General ...."*

As these actions are of the Registrar General's own volition, it is the Committee's view that any loss or damage arising from the Registrar General's conduct should be compensable under the TAF.

Paragraph (l) – Loss or damage from the execution of an instrument by an attorney

> *"(l) Loss or damage from the execution of an instrument by an attorney where the loss or damage arises from the execution of an instrument by an attorney (under a power of attorney) acting contrary to, or outside of, the authority conferred on him or her by the power of attorney....."*

The Committee is unsure as to the specific mischief that this provision aims to address and queries whether it may be better addressed under the *Powers of Attorney Act 2003.*

Paragraph (n) – Loss or damage from the improper exercise of a power of sale

The Committee considers that it is not clear what is meant by an "improper" exercise of a power of sale.

The rationale for this exclusion, given the purpose of the Fund, is also not clear.

Paragraph (o) – Loss or damage from the operation of Section 129 of the *Corporations Act 2001 (Cth).*

See the comments in relation to Section 106 in annexure "D".

Information Brokers

Section 129(2) (b) currently includes an entitlement to compensation:

> *"(b) to the extent to which loss or damage:*
>
> *(i) is a consequence of any fraudulent, wilful or negligent act or omission by any solicitor, licensed conveyancer or real estate agent, and*
>
> *(ii) is compensable under an indemnity given by a professional indemnity Insurer."*

It is proposed to extend the exclusion to acts or omissions by an information broker. Given that information brokers obtain that position through contractual arrangements with LPI itself, this seems an inappropriate addition to the category of exclusions. The position of information brokers is not on all fours with that of solicitors, licensed conveyancers and real estate agents, each of whom is regulated (including as to the requirements for holding professional indemnity insurance) by a statutory regime other than the *Real Property Act 1900.*

Limits on amount recoverable in respect of mortgage obtained by fraud – Section 129B

It is not clear what is meant by "r*easonable costs incurred by the mortgagee in directly protecting the mortgagee's interest in respect of the land mortgaged*" in section 129(6).

The Committee suggests that if the nominated rate was adopted to target "low-doc" loans, it actually appears to capture virtually all mortgages issued by financial institutions.

Shortened Key Time Limits

Court proceedings for the recovery of compensation must be commenced within three months of the date on which administrative proceedings have been determined in relation to the compensable loss. This is shortening this key time limit from twelve months to three months. This seems unreasonably short considering that the time before there is a deemed refusal of a claim by the Registrar General under s131 (9) is twelve months.

Annexure "C"

Torrens Assurance Fund – Special Deposit Account

Balances	**2008**	**2007**	**2006**	**2005**	**2004**	**2003**
	$000	**$000**	**$000**	**$000**	**$000**	**$000**
Opening cash balance	17,554	14,821	11,745	8,825	8,273	9,327
Add:						
Revenue	3,196	3,167	3,240	3,228	2,017	498
Less:						
Expenditure	(2,343)	(434)	(164)	(308)	(1,465)	(1,552)
Balance at YE	**18,407**	**17,554**	**14,821**	**11,745**	**8,825**	**8,273**
Per dealing fee	$4	$4	$4	$4	$2	

Source: LPI Annual Reports 2003/4 to 2007/8

Annexure "D"

Other Objections

Real Property Act 1900

Duty of mortgagee and witness to verify identity – Section 56C

A new Section 56C requires a mortgagee to take reasonable steps to ensure that the person who executed the mortgage is the same person who is, or is to become, the registered proprietor of the land being mortgaged.

A similar obligation, to verify the identity of the person signing a land dealing, will be imposed on witnesses. The 'reasonable steps' required will be prescribed by regulations. How these provisions will operate in practice is unknown in the absence of regulations.

Cancellation of recordings in the register – Section 56C (6) (b) (i)

This subsection would allow the Registrar-General at any time to cancel a mortgage where the mortgagee had failed to take "reasonable steps" to confirm the identity of the mortgagor. It would be more appropriate for the Registrar-General to satisfy himself as to compliance with that requirement before the mortgage was registered, not after.

Application to transferee of a mortgage - Section 56C (8)

The effect of this section is that a transferee of mortgage, in the event that the transfer takes place within seven years of the date of the registration of the mortgage, is subject to the same requirements as the transferor including record-keeping dating from the date of registration of the transfer. This seems onerous and the Committee questions whether the imposition is justified.

Execution of instruments by corporations - Section 106

The Committee objects to the presumption of regularity being extended to bodies that are not regulated under the *Corporations Act 2001 (Cth).*

Certificate of Correctness – Section 117

The Committee cannot comment on the efficacy or reasonableness of this section without seeing the Regulations.

Conveyancing Act 1919

Duties of mortgagees and charges in respect of the sale price of land: Section 111A (2) - "agent"

The Committee considers that the meaning of the term "agent" in this subsection requires clarification, especially given the multiplicity of contexts in which the term "agent" can be used and the absence of any equivalent provision in the legislation in the other jurisdictions.