



Part 2

COMMENTARY ON THE LAND TRANSFER BILL

Commentary on the Land Transfer Bill

THE PURPOSE OF THE COMMENTARY

This part of the report contains a commentary on the individual clauses of the Land Transfer Bill (the Bill), which follows in Part 3. Many existing sections of the Land Transfer Act 1952 (the LTA), the Land Transfer Amendment Act 1963 (the 1963 Act), and the Land Transfer (Computer Registration and Electronic Lodgement) Act 2002 (the 2002 Act) are simply carried forward into the Bill and rewritten in a more modern style but without material change in substance. The policy considerations underlying significant changes are discussed in Part 1 of the report and are not repeated in the commentary. The commentary cross refers to the relevant paragraphs in that part. It also discusses matters raised in the Issues Paper (Law Commission in conjunction with Land Information New Zealand *Review of the Land Transfer Act 1952* (NZLC IP10, Wellington, 2008)) (the Issues Paper). The final part of the commentary explains why some legislative provisions raised in the Issues Paper have not been implemented in the Bill. However, most sections of the existing legislation that have not been included in the Bill have been omitted because they are out of date or duplicative. If these sections were not raised in the Issues Paper or are not directly relevant to another clause of the Bill they are not mentioned in the commentary. The comparative tables in the Appendix show sections of the LTA that have no equivalent in the Bill.

MATTERS OF TERMINOLOGY

A number of submitters commented on the terminology employed in the 2002 Act. The majority of these found the term “computer register”, replacing the previous “certificate of title”, confusing, especially as it is also used for the various categories of register (“computer freehold register”, for example). Several submitters suggested that the word “title” should be restored and this has been done in the Bill. “Record of title” is the new term proposed for “certificate of title” instead of “computer register”. “Registered owner” replaces “registered proprietor”. Other terms have been changed and modernised, particularly for consistency with the Property Law Act 2007.



Land Transfer Bill

CLAUSE 1 Title

This clause states the title of the Bill is the Land Transfer Act 2010. Other titles were considered, for example, Land Title Act, as in Queensland, or Land Registration and Transfer Act. However, the first Torrens statute in New Zealand was the Land Transfer Act 1870 and subsequent Acts have all been Land Transfer Acts. We see no reason to change the name of one of New Zealand’s principal statutes particularly as the Bill does not propose radical changes in the underlying principles of the existing legislation.

CLAUSE 2 Commencement

This clause states that the Bill comes into force on a date to be appointed by Order in Council and that one or more orders may be made bringing different provisions into force on different dates. The reason for this is that it will be necessary to draft the regulations to support the Bill before it can become operative.

PART 1
PART 2
PART 3

Part 1

Preliminary provisions

CLAUSE 3 Purpose

Clause 3 states the purposes of the Bill. These are the basic purposes that have long been recognised as underpinning New Zealand's land transfer legislation. The purposes of the Bill are to provide a modern, accessible statute that:

- continues the Torrens system of land title,
- retains the fundamental principles of that system, that is, to provide security of ownership of estates and interests in land, to facilitate the transfer of and dealings with estates and interests in land, to provide a system of compensation for loss, and provide a register of land that describes and records the ownership of estates and interests in land; and
- reflects the fact that the land transfer register is now maintained and operated electronically and dealings are carried out electronically.

Stating continuation of the Torrens system as one of the purposes of the Bill should serve to indicate at the outset that radical reform is not intended and that the Bill continues to reflect the key principles of that system.

CLAUSE 4 Land subject to this Act

This clause replaces section 10 of the LTA. The clause clarifies what land is subject to the Bill, that is:

- land that was subject to the LTA immediately before the commencement of the Bill;
- land alienated from the Crown (or contracted to be so alienated) after the commencement of the Bill;
- land made subject to the Bill by any other Act; and
- land vested in a person in fee simple, after the commencement of the Bill, under any other Act.

Section 10(c) of the LTA specifically refers to land made subject to the LTA by any Maori Land Act. The new clause 4(c) replaces this with a generic reference to land made subject to the Bill by any other Act. This is adequate to capture what was provided for in section 10(c) and will apply to any other Acts which bring land under the land transfer system.

CLAUSE 5 Interpretation

Subclause (1) of this clause sets out the following definitions:

Chief executive

“Chief executive” means the chief executive of the department or ministry that is, with the authority of the Prime Minister, for the time being responsible for the administration of the Bill. This definition is similar to that in the Land Transfer (Computer Registration and Electronic Lodgement) Act 2002 (the 2002 Act).

Court

“Court” means the High Court. This definition is new although the High Court has always had jurisdiction over matters relating to the LTA.

Crown grant

“Crown grant” means a grant of land by the Crown.

Department

“Department” means the department or ministry that is for the time being, with the authority of the Prime Minister, responsible for the administration of the Bill. Land Information New Zealand is no longer specifically mentioned as the responsible department in line with the modern practice of not specifying the names of administering agencies.

Electronic instrument

“Electronic instrument” means an instrument prepared in an electronic workspace facility (see definition below).

Electronic workspace facility

“Electronic workspace facility” is a facility provided or approved under clause 37 for use in the preparation of electronic instruments for lodgement for registration, a definition currently in the 2002 Act.

Freehold estate

“Freehold estate” is defined to include a life estate but not a lease for life. This is consistent with the Property Law Act 2007 and with the current treatment of leases for life, although it is a change from the common law whereby a lease for life was a freehold estate as it was of uncertain duration.

Future Estate

“Future Estate” is defined to mean an estate conferring the right to possession of land at a future time, whether contingent or otherwise, such as a reversion or remainder. The phrase “future estate” is consistent with the terminology used in the Property Law Act (see section 59).

Incapacitated

“Incapacitated” means that the person, because of temporary or permanent physical, intellectual or mental impairment is or, at the material time, was not capable of understanding the issues on which his or her decision would be required. This meaning of incapacitated is for the purposes of Part 11 (applications to bring land under the land transfer system) and Part 12 (adverse possession applications) of the Bill.

Instrument

“Instrument” means a document in paper or electronic form and includes a caveat. This is a simpler definition than in the LTA but will cover the same terms as maps, plans, and memoranda are all documents. Caveats are expressly included to make it clear that the provisions that relate to lodgement apply to caveats, for example, clause 49, which relates to requisitions and rejections.

Intellectual or mental impairment

“Intellectual or mental impairment” means a clinically recognisable intellectual or mental impairment, whether or not it includes: an intellectual disability as defined in section 7 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 or a mental disorder as defined in section 2(1) of the Mental Health (Compulsory Assessment and Treatment) Act 1992.

Interest in land

This clarifies that a mortgage is an interest in land. In the LTA this is stated in a definition of “estate or interest”. The definition of “estate or interest” in section 2 of the LTA as “every estate in land” has not been carried forward as it is superfluous.

Land

This is a non-exhaustive spatial definition to clarify that land includes buildings and structures on land, land covered with water, and plants and trees on land. It follows the approach of the English and Welsh Land Registration Act 2002, in section 132, and the Scottish Law Commission (Scottish Law Commission *Report on Land Registration* (Scot Law Com No 222, Edinburgh, 2010, vol 2) at 485). The current definition in the LTA is also non-exhaustive, but the language is dated. The definition in section 4 of the Property Law Act relates to land tenure (“all estates and interests, whether freehold or chattel, in real property”) rather than the spatial aspects of land. As the phrase “estate or interest in land” is used many times in the Bill, the Property Law Act definition would become circular.

Lease

This definition is new to clarify that a lease includes a lease for life for the reasons noted under the commentary on “freehold estate”. This reflects the current practice of dealing with leases for life under the lease provisions in the LTA and is consistent with the Property Law Act. However, section 212 of the Property Law Act, which relates to the termination of leases terminating on the occurrence of a future event, provides that a lease terminates after 10 years unless the event has occurred in that time. This provision is inconsistent with leases for life. It is unlikely that this section was intended to apply to leases for life and it should be amended to make it clear that it is subject to section 61 of the Property Law Act.

Local authority

“Local authority” means a regional council or a territorial authority within the meaning of section 5(1) of the Local Government Act 2002.

Minister

“Minister” means the minister who, under the authority of the Prime Minister, is for the time being responsible for the administration of the Bill. This term is defined in the same way under section 4 of the 2002 Act.

Mortgage

“Mortgage” means a charge over an estate or interest in land, the principal purpose of which is to secure the payment of money, whether or not:

- (a) it also secures the performance of an obligation;
- (b) any obligation is unconditional or conditional on the failure of another person to perform it.

Paragraph (a) makes it clear that performance of an obligation is a secondary purpose of a mortgage, and is intended to prevent the use of a rentcharge to essentially secure collateral covenants in gross. Covenants in gross are now provided for in a proposed amendment to the Property Law Act contained in clause 203 of the Bill and are discussed in detail in chapter 7 of Part 1 of the Report. Paragraph (b) is designed to make it clear that the definition does not affect mortgages that support a guarantee.

The definition is different from that in the LTA, which distinguishes between repayments of loans of existing debts and of future advances or debts, payments of bonds and other securities issued by the mortgagor, and payments such as annuities or rentcharges of sums of money other than a debt. The new definition is simpler and covers all of these various forms of payment of debts or dues. The current definition in the Property Law Act is also different and may need to be aligned with the definition in the Bill for consistency and because it currently allows a mortgage to be simply “for the performance of obligations”.

Mortgagee

A mortgagee is the person to whom a mortgage is given (as mortgagee), which mirrors the definition in the Property Law Act. This is a more accurate definition than that in the LTA which defines mortgagee as the proprietor of a mortgage.

Mortgagor

A mortgagor is the owner of an estate or interest in land that is subject to a mortgage. This is consistent with the definition in the Property Law Act and similar to the definition in the LTA.

Owner

“Owner” is a more modern and plain English term for “proprietor”. It is defined to mean the owner of a legal or equitable estate or interest in land and includes a person who has a future estate or interest in land.

Personal representative

“Personal representative” means an executor, administrator or trustee of the estate of a person who has died.

Practitioner

“Practitioner” means a lawyer or conveyancing practitioner within the meaning of section 6 of the Lawyers and Conveyancers Act 2006. This definition is in the LTA, but the reference to “landbrokers” is removed as landbrokers have been replaced with conveyancing practitioners.

Public notice

“Public notice” of a matter relating to land is defined, for the purposes of the Bill, in clause 186, to mean notice that (a) is published in the *Gazette* and in 1 or more newspapers circulating in the area where the land is located; and (b) gives sufficient information about the matter to enable persons who might respond to the notice to understand it.

Record of title

“Record of title” is the new term for a computer register (previously “certificate of title”). It means a record of title for an estate or interest in land created under clause 27 of the Bill.

Registrar

“Registrar” means the Registrar-General of Land (appointed under clause 196). “Registrar-General” is defined in the same way in the LTA with “Registrar” having the corresponding meaning. This definition is clearer and means the abbreviated term “Registrar” can be used throughout the Bill.

Surveyor-General

“Surveyor-General” means the person holding the office of Surveyor-General under the Cadastral Survey Act 2002.

Transmission

“Transmission” means the acquisition of an estate or interest in land by operation of law.

Unique identifier

“Unique identifier” is defined in the same terms as in the 2002 Act as a combination of letters or numbers, or both, by which a record of title, an instrument or a document is to be identified.

Working Day

“Working day” means a day of the week other than Saturday, Sunday, Waitangi Day, Good Friday, Easter Monday, Anzac Day, the Sovereign’s Birthday, and Labour Day; a day in the period commencing 25 December and ending with 2 January the following year, and the day observed as the anniversary of any province in which an act is to be done. The definition in the Property Law Act 2007 for working day has been adopted for consistency and for greater clarification. The LTA definition, stating that it is a day on which the land registry office is open to the public in accordance with regulations under the Act, is no longer appropriate.

Clause 5(2) re-enacts section 239 of the LTA. It provides that a reference, in a form or document prescribed in regulations under the Bill or specified by the Registrar, to an owner, transferor, transferee, mortgagor, mortgagee or a person seised of, owning, having or taking an estate or interest in land includes a reference to that person’s heirs, executors, successors and assigns.

CLAUSE 6 Act binds the Crown

Clause 6 states that the Bill binds the Crown and repeats section 2A of the LTA.

Part 2

Title to land

CLAUSE 7 Title by registration

Clause 7 is a key provision of the Bill. It gives effect to the principle that title to land acquired by registration cannot be set aside (subclause (1)) and is free from interests that are not registered or notified, or not capable of being registered or notified (subclause (2)). This principle is known as the principle of indefeasibility although neither the clause nor the Bill uses the term; the LTA itself only uses the word “indefeasible” in two relatively minor sections of the Act.

Subclause (2) makes it clear that an unregistrable interest does not override the register, following Tipping J’s conclusion in *Regal Castings v Lightbody* [2008] NZSC 87 (at [150]–[153]), departing from *Carpet Import Co Ltd v Beath & Co Ltd* [1927] NZLR 37 (SC, Full Court). Subclause (3) states that the title of the registered owner is nevertheless subject to the exceptions and limitations listed in clause 9 and to any enactments that override or limit it. See chapter 5 in Part 1.

Subclause (4)(a) makes it clear that a volunteer is in no different position to that of a person who acquires title for valuable consideration. The clause removes any doubt about sections 63 and 183 of the LTA in this respect and confirms the view, also expressed by Tipping J in *Regal Castings v Lightbody*, that the LTA did not intend to distinguish between volunteers and purchasers for value (at [129]–[137] of the judgment, see discussion in Part 1, at [2.17]–[2.18])). This is the same position as in the Queensland Land Title Act 1994. Subclause (4)(b) overrules *Gibbs v Messer* [1891] AC 248 (PC) (see discussion in Part 1 at [2.5], and in the Issues Paper at [2.38]–[2.39]), in line with section 3 of the New South Wales Real Property Act 1900 (which defines fraud to include fraud by a fictitious person).

The clause replaces sections 62, 63 and 183 of the LTA. The effect of providing that a registered title cannot be set aside means that, consistently with modern Torrens statutes, it is unnecessary to expressly protect a registered owner against ejectment. The “no ejectment” provisions in section 63 have therefore not been repeated. The exceptions in section 63 are covered in clause 9, which sets out exceptions to indefeasibility, or by other Acts (see commentary to clause 9). Section 183 has not been specifically carried forward partly because of problems with its interpretation discussed in the Issues Paper (at [2.36]–[2.44]). In *Regal Castings v Lightbody*, Tipping J stated that the purpose of section 183 is to make

it clear that good faith purchasers are not affected by any “vice in a predecessor’s title” (at [132]). This is essentially captured by the concept of title by registration (title that cannot be set aside) in clause 7(1).

Subclause (5) simply states that the in personam jurisdiction is not affected (see the discussion in Part 1 at [2.39]–[2.43]).

CLAUSE 8 **Meaning of fraud in this Part**

Clause 8 defines fraud (but only for the purposes of Part 2 of the Bill) to mean dishonest conduct by a registered owner or a registered owner’s agent in acquiring a registered estate or interest in land (see the discussion in Part 1 at [2.31]–[2.38]). This definition covers fraud against the owner of a registered or an unregistered estate or interest. Fraud against the owner of an unregistered estate or interest is also further defined in subclause (4). Essentially the definition states who must be the perpetrator of the fraud for the purposes of defeating title; it covers what is often currently referred to as “land transfer fraud”. “Fraud” for the purposes of obtaining compensation can be committed by a third party fraudster.

The definition in subclause (2) incorporates the main elements of the concept of fraud from the leading cases (for example, *Assets Co v Mere Rohi* [1905] AC 176 (PC)), while leaving it to the courts to determine whether the facts of individual cases amount to fraud. Fraud is defined in subclause (2) as forgery or other dishonest conduct by the registered owner or the registered owner’s agent in acquiring a registered estate or interest in land. It applies both to fraud against a previous registered owner, and to fraud against the owner of an unregistered interest. Subclause (3) makes it clear that constructive notice cannot lead to fraud.

Subclause (4), which is based in part on section 4 of the Nova Scotia Land Registration Act 2001 SNS c 6, applies specifically to fraud against the owner of an unregistered interest. The subclause makes it clear that a person who acquires a registered estate or interest in land will be guilty of fraud against the owner of an unregistered interest only if the person or their agent has actual knowledge of, or was wilfully blind to, the existence of the interest and intended registration to defeat the unregistered interest. This incorporates the definition from *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1923] NZLR 1137 at 1173–1176 (CA) (see discussion in Part 1 at [2.31]–[2.36]).

The fraud must be conduct in acquiring a registered estate or interest. The clause prevents supervening fraud, that is, dishonest conduct that takes place entirely after registration, constituting an exception to valid title (see discussion in Part 1, [2.37]).

This clause replaces section 182 of the LTA insofar as it refers to fraud.

CLAUSE 9 Exceptions and limitations

Clause 9 sets out the exceptions and limitations to which the title of the registered owner of land is subject (see the discussion in Part 1 at [2.26]–[2.30]). These are:

- fraud; (see commentary on clause 8, above)
- existing estates and interests registered or notified on the record of title;
- the estate or interest of a person with a valid claim under a prior record of title;
- any estate or interest of another registered owner included in the record of title as a result of an incorrect description of area or boundaries;
- omitted and misdescribed easements;
- the estate of a mortgagee or mortgage transferee under the exception to indefeasibility contained in clauses 11(7) and 12 (2), that is, where the mortgagee or mortgage transferee has failed to verify the identity of the mortgagor as required by clauses 11 and 12, and the mortgage instrument has been executed by a person other than the mortgagor or person with lawful authority;
- an order made by the High Court under clause 13 cancelling the registration of an estate or interest under a void or voidable instrument;
- acquisition of land as a result of a successful application under Part 12 by a person in adverse occupation to that of the registered owner;
- an estate or interest in land under Part 13 (which relates to title to access strips);
- the estate or interest of a person to whom clause 171 applies (who claims an estate in relation to land in a limited title through adverse occupation that commenced before the title was issued).

The clause continues the exceptions currently found in sections 62, 63, 79 and 183 of the LTA and includes other exceptions and limitations provided for by the Bill.

The exceptions to indefeasibility no longer include the situations where a mortgagor is in default and a lessor is in default (currently in section 63(a) and (b) of the LTA). The circumstances under which a mortgagee may enter into possession of the land of a defaulting mortgagor or exercise a power of sale of that land are covered fully in Part 3 of the Property Law Act 2007. Likewise the circumstances under which a lessor may cancel a lease are covered in Part 4 of the Property Law Act.

CLAUSE 10 No title to public road or reserve unless authorised

Clause 10 replaces and restates without substantive change section 77 of the LTA. It applies where a road or reserve has been included in a record of title without authority or has been acquired under an unauthorised instrument. In these circumstances, the road or reserve retains its status as a road or reserve and does not vest in the person in whose title it has been inadvertently included. This is different to the exceptions in clause 9.

CLAUSE 11 Verification of identity of mortgagor by mortgagee

Clause 11 imposes an obligation on mortgagees to take reasonable steps to verify the identity of the mortgagor (see the discussion in Part 1 at [2.19]–2.24). This is a significant policy change. This new provision is aimed at reducing mortgage fraud and reducing complex litigation in mortgage fraud cases. For references to the prevalence of mortgage fraud, particularly overseas, see Part 1 at [2.20].

Clause 11 is based on similar legislation in Queensland and New South Wales (see the Land Title Act 1994 (Qld), sections 11A and 11B, and the Real Property Act 1900, section 56C (not yet in force)). A mortgage will be defeasible unless, in the case of an imposter mortgagor, reasonable steps have been taken by the mortgagee to verify the identity of the mortgagor.

Subclause (1) provides that in the case of a mortgagor who is an individual, a mortgagee is required to verify the identity of the mortgagor and the authority of any attorney who executes the mortgage. In the case of a mortgagor that is a body corporate, the mortgagee must verify the identity of the mortgagor and verify the identity and authority of every person who executes the mortgage. A mortgagee who complies with standards prescribed by the Registrar (or other reasonable standards) will be treated as having complied with the obligation in subclause (1) (subclauses (2) and (3)).

There is a requirement under subclause (4) to keep a record of the steps taken and to retain this for 10 years along with documents and other evidence relied on by the mortgagee. The Registrar may require a mortgagor to inform the Registrar of the steps taken to verify identity and to produce the material relied on (subclause (5)). It is an offence for a mortgagee to fail to do so (subclause (6)).

Subclause (7) provides that non-compliance with subclause (1) is an exception to indefeasibility. There is a cross-reference to this subclause in clause 9 (Exceptions and limitations). A registered mortgagee does not obtain the benefit of clause 7 (title that cannot be set aside) if:

- the mortgagee does not comply with clause 11; and
- the mortgage was executed by a person other than the mortgagor or a person with lawful authority to execute the mortgage on behalf of the mortgagor.

The new clause will not affect mortgages executed before the commencement of the Act (subclause (8)(a)). Subclause (8)(b) makes it clear that the clause will not affect the law relating to the duties of mortgagees who will continue to be subject to the obligations imposed on them by the ordinary law, for example, the duty to ensure in certain situations that a potential mortgagor is advised to obtain independent advice.

CLAUSE 12 Transferee of mortgage to verify identity of mortgagor

Clause 12 ensures that the obligations imposed on mortgagees by clause 11 also apply to mortgage transferees (subclause (1)). Subclause (2) is similar to clause 11(7) and provides that mortgage transferees do not obtain the benefit of clause 7 if:

- the transferee does not comply with clause 12; and
- the mortgage was executed by a person other than the mortgagor or a person with lawful authority to execute the mortgage on behalf of the mortgagor.

There is a cross-reference to this subclause in clause 9 (Exceptions and limitations).

CLAUSE 13 Court may direct register to be altered in cases of manifest injustice

This clause is an exception to the principle that registration confers an unchallengeable title. It is sometimes referred to as a form of discretionary indefeasibility. It is often claimed that a central feature of the LTA is that it protects the title of registered owners. That is true insofar as it protects a purchaser who becomes a registered owner under a void instrument and who is not implicated in any fraud. The Act does not, however, protect the innocent owner from whom the title was acquired. That person may get only monetary compensation. In this respect the Act makes a hard choice in favour of purchasers in the interests of transactional efficiency.

There was widespread support from submitters for relaxing the so-called immediate indefeasibility rule established in *Frazer v Walker* [1967] AC 569 (PC), in favour of giving the court discretion in exceptional cases to direct cancellation of a registration that would otherwise defeat the title of an innocent transferor.

Clause 13 gives the High Court power to make an order directing that the registration of a person as the owner of an estate or interest in land is cancelled (subclause (2)). An application for an order may only be made by a person who has been deprived of an estate or interest in land through the registration of a void or voidable instrument, or whose estate or interest has been adversely affected by the registration under a void or voidable instrument of another person (subclause (1)). The latter person is most likely to be a mortgagee. Subclause (3) provides that compensation can be claimed under Part 3 by the person who loses their estate or interest as a result of the order.

The court may make an order only if satisfied that it would be manifestly unjust for the registration of the new owner to continue (subclause (4)). An order under the section cannot be made if the estate or interest in question has been on-transferred to a person acting in good faith (subclause (5)).

Subclause (6) allows the court to make an order subject any conditions it thinks fit. Subclause (7) lists a range of factors the court may take into account in determining whether to make an order under the clause; for example, the length of time that either the original owner or the new owner has owned and occupied the land, the nature of any improvements made to the land and the nature of the estate or interest in the land. Another example of a situation in which a court might make such an order could be where there has been a failure to comply with Te Ture Whenua Maori Act 1993. The application has to be made within six months of the person becoming aware of the loss through registration of the new owner (subclause (8)). Subclause (9) provides that the Registrar must make the alteration to the register upon receiving a copy of the order.

Part 3

Compensation


CLAUSE 14 Meaning of fraud in this Part

This clause is new. The purpose of the clause is to clarify that compensation for fraud can be obtained in a broader range of circumstances than those that would defeat an indefeasible title as set out in clause 8 in Part 2. As with fraud under clause 8, under Part 3 fraud means forgery or other dishonest conduct. However, in contrast to the definition in clause 8, clause 14 does not limit either those who can commit the fraud or at what point in time the fraud must be committed. Under the definition in clause 14, fraud that can be compensated can be committed by any person (that is, not only by the registered owner or his or her agent) and at any time (that is, not only in the course of acquiring a registered estate). This, for example, would cover a situation such as *Frazer v Walker* [1967] 1 AC 569 (PC), where the fraudster was one of two registered owners and fraudulently mortgaged the land without the other owner's knowledge. In this situation the innocent owner would be entitled to compensation. However, it is not fraud within the meaning of the definition in clause 8 for Part 2 of the Bill.

CLAUSE 15 Compensation for loss resulting from Registrar's error and system failure

Clause 15 makes the Crown liable to pay compensation to a person who suffers loss of an estate or interest in land or any other loss as a result of error, or the wrongful act or omission on the part of the Registrar or someone acting under delegated authority from the Registrar, or as a result of a failure or malfunction of the computer system used to operate the register (see the discussion in relation to compensation generally in chapter 4 of Part 1).

Section 172 of the LTA deals with compensation. Paragraph (a) applies to claims based on Registrar's error while paragraph (b) relates to claims for loss of land, or of an estate or interest in land, resulting from the registration of some other person or from other factors. The clause re-enacts section 172(a) of the LTA but extends its application to include system failure. Clause 16, discussed below, re-enacts section 172(b). Differentiating between these two bases for claiming



compensation is considered preferable to the current section 172 which unhelpfully includes them in a single provision headed “compensation for mistake or misfeasance of Registrar” when the section has a much wider application.

CLAUSE 16 Compensation for loss of estate or interest in land

Clause 16, which re-enacts section 172(b) of the LTA, specifies the grounds on which a person who is deprived of an estate or interest in land, or whose estate or interest in land is adversely affected, may claim compensation from the Crown. The underlying principle of Torrens land title statutes is that the State should compensate a person for loss that the person might otherwise be able to recover from a wrongdoer, but whose rights to obtain redress are effectively prevented by the statute itself. Thus an owner who is deprived of his or her land by the fraudulent conduct of a third party cannot claim the return of the land from a purchaser who has acquired the land without any wrongdoing on the purchaser’s part. Australasian Torrens systems operate on the basis that the innocent purchaser’s title is secure even though it has been acquired under a void instrument: the innocent owner gets compensation because the legislation effectively blocks redress. While clause 13 of the Bill will allow an innocent owner to claim the return of his or her land in limited circumstances, clause 16 continues the fundamental principle of the LTA and its predecessors (see discussion in chapter 4 of Part 1).

Paragraph (a) provides for compensation where another person is registered through a void instrument or fraud. This is designed to cover what is provided for in section 172(b), which concerns a person: “who is deprived of any land, or of any estate or interest in land, ... by the registration of any other person as proprietor of that land”. It should be noted that “fraud” in paragraph (a) is fraud as defined under clause 14.

Paragraph (b) covers the situation where land is brought under the land transfer system. This replaces section 181 of the LTA (plaintiffs to be nonsuited if laches proved). This section provides that a plaintiff in an action for recovery of land will be non-suited in an action for possession where the land has been brought under the Act if the plaintiff had notice of the application, but failed to lodge a caveat or allowed a caveat to lapse. Section 181 is placed in the part of the LTA relating to compensation, although it deals with actions for possession rather than compensation. As a result of changes to the High Court Rules made several years ago and carried into the new rules, it is no longer possible to obtain a non-suit. Paragraph (b) provides that compensation is only available where the proper processes have not been followed. If the proper process has been followed under the Bill, an indefeasible title is acquired.

Paragraph (c) is new and relates to clause 13 of the Bill, which provides for discretionary indefeasibility. A person who has lost an estate or interest in land due to the application of clause 13 may make an application for compensation.

Paragraph (d) is new and covers unlawful interference with the register. This additional ground is designed to protect against loss that might result from possible increased access to the electronic land register and mirrors section 188(1)(e) of the Queensland Land Title Act 1994.

Section 172(b) of the LTA also provides for compensation for loss of an estate or interest in cases of error, omission or misdescription. The implication is that these grounds are designed to cover situations where someone other than the Registrar has made an error. These grounds for compensation have not been re-enacted in the Bill as it is hard to think of circumstances where compensation is appropriate for mistakes that are not caused by the Registrar. If the loss is caused by the Registrar, clause 15 will apply.

Subclause (2) makes it clear that compensation is recoverable by a volunteer. This is because a volunteer, that is, a person who acquired the estate or interest without consideration, obtains a title that cannot be set aside (see clause 7).

CLAUSE 17 Compensation for loss occurring after search and before registration

The clause re-enacts section 172A of the LTA. The clause provides for a guaranteed search (for discussion of this clause see Part 1 at [4.7]–[4.8]). The clause applies if a person obtains a search copy of the record of title in the five working days before settlement and suffers loss because of the registration or lodging under the Bill of another instrument or document (subclause (3)). Subclause (4) provides that the purchaser is entitled to compensation if the search copy does not disclose the registration or lodgement of the instrument or document and the document was registered or lodged before the earlier of:

- the expiry of the period of 10 working days commencing on the day after the transaction was settled; or
- the registration of documents or instruments required to give effect to the transaction.

The court may extend the second period (of 10 working days) if satisfied that the failure to register the documents and instruments within that period was not due to the fault of the purchaser or their practitioner or agent (subclause (5)).

The time frames have been reduced from 14 days and two months in the LTA to five working days and 10 working days respectively to reflect the fact that, under the Landonline system of registration and dealing, settlement and registration are in most cases simultaneous (subclause (1)).

Unlike section 172A, the clause applies whether or not valuable consideration has been given, and therefore includes volunteers, consistently with clause 16(2) for the reasons expressed in the commentary on that clause (see the definition of transaction in clause 17(1)).

CLAUSE 18 Exceptions to compensation

Clause 18 lists exceptions to the right to claim compensation. The clause substantially re-enacts section 178 of the LTA but also incorporates other provisions that exclude the right to claim compensation.

Paragraph (a) excludes loss resulting from a breach of trust. The justification commonly advanced for the exception is that it is consistent with the fact that trusts cannot appear on the register. Australian legislation is similar in this respect.

Paragraph (b), which mirrors section 178(e), excludes loss arising from the improper exercise of a power of sale under a mortgage or a re-entry under a lease. In this situation the loss does not relate to public faith in the land transfer system and there is a remedy available against the mortgagee or lessor.

Paragraph (c) is new and excludes loss arising from the operation of another statute that overrides or limits title to an estate or interest in land. As already indicated, Torrens based systems allow for compensation where the loss is the result of the operation of the Torrens legislation itself. There would seem to be no good reason for extending this to loss resulting from the operation of another statute. Where appropriate, the other statute can provide its own compensation regime. For example, the owner of landlocked land who is granted access to the land by the court may be required under section 330 of the Property Law Act 2007, as a condition, to pay compensation to the person over whose land the access is granted. As noted in the Issues Paper, some statutes specifically provide that the compensation provisions of the LTA do not apply (at [11.35]).

Paragraphs (d) and (e) exclude a claim by a mortgagee or mortgage transferee who has failed to comply with the obligation in clauses 11 and 12 to verify the identity of a mortgagor.

A number of exceptions to compensation in the LTA are excluded in the draft Bill. The removal of these exceptions is not intended to extend the scope of compensation, rather the exceptions have generally been omitted because they seem to be unnecessary.

Section 178(b) of the LTA, which provides an exception where the same land has been included in two or more grants from the Crown, is no longer covered. This is an exception to indefeasibility in section 62(a) (and continues to be under the Bill, see clause 9(c)). This has been omitted from the compensation exceptions, first, because it seems unlikely to have occurred and to have not been identified by now. Secondly, if such a situation has occurred it seems unfair not to provide any compensation to the innocent second owner if the loss falls under one of the grounds in clauses 15 and 16.

Section 178(c) of the LTA, the improper use of the seal of any corporation or company, is also no longer an exception as seals are no longer used by companies.

Section 178(d) is also not re-enacted in the Bill. This provides an exception for the registration of any instrument executed by any person under any legal disability, unless the fact of that disability was disclosed on the instrument by virtue of which that person was registered as proprietor. The requirement to state a legal disability known to the Registrar on that person's title to an estate or interest contained in section 67 of the LTA, is not re-enacted in the Bill. The statutes relating to persons under legal disabilities, for example, the Minors' Contracts Act 1969 and the Protection of Personal and Property Rights 1988, are designed to deal with issues relating to dealing with land. It is also inappropriate for the Registrar to determine whether people have capacity to deal with land independently of these other legislative frameworks. If there is no requirement to state notice of status on the title, there should be no exception to compensation. If loss falls within in the grounds in clauses 15 and 16 a person should be entitled to compensation regardless of whether the dealing involved a person under a legal disability.

Section 19 of the Land Transfer Amendment Act 1963 (the 1963 Act) expressly excludes compensation where a new certificate of title is issued consequent on a successful adverse possession claim. The provisions of the 1963 Act are now incorporated in the Bill. A specific exception is not necessary because there is nothing in the specific provisions of clause 16 that would entitle a former registered owner to claim compensation for loss arising from a successful adverse possession application. Likewise, section 89E of the LTA provides an exception to compensation where the loss is caused by an application relating to an access strip; sections 201 and 204 provide an exception to compensation in relation to title limited as to titles, and section 209 of the LTA provides an exception in relation to loss resulting from limitation on a title limited as to parcels. For the same reasons as those in relation to the exception to compensation for adverse possession claims, these sections are not included as exceptions under the Bill.

Subclause (2) carries forward in modified form section 60 of the LTA. It provides that the Crown is not liable to compensate the owner of land who has not registered the land under the Deeds Registration Act 1908 at the time the land is brought under the Act, unless notice of a claim to the land was given to the Registrar or the Registrar had actual knowledge of the claim and failed to recognise it. It is more appropriate to include this exception in clause 18 along with all other exceptions.

CLAUSE 19 Amount of compensation

Clause 19, which replaces section 179 of the LTA, sets out the basis for determining the amount of compensation payable under clauses 15 to 17 of the Bill (see the discussion in Part 1 at [4.10]–[4.17] and in chapter 11 of the Issues Paper) These are:

- where the claim is for loss of an estate or interest in land, the value of the estate or interest;
- where an estate or interest has been adversely affected, the amount by which the estate or interest has been reduced;
- where the priority of an interest has been subordinated, the reduction in the value of the interest;
- the amount of the loss in every other case.

The courts have held that section 179 applies only to claims under section 172(b) and that claims based on Registrar's error must be dealt with applying ordinary common law principles (*McNicholl v Attorney-General* (1996) 3 NZ Conv C 192,451 (HC)). The clause does not distinguish between claims in this way and will thus apply to all claims including those based on Registrar's error.

Subclause (2) provides that the amount of compensation is to be determined by reference to the value of the estate or interest together with improvements at the date of the claim or, if the court thinks that amount would be inadequate or excessive, on any other basis the court thinks fit. Section 179 currently provides that the amount recoverable cannot exceed the value of the land or estate or interest at the time of the loss, together with improvements then existing.

Subclause (3) makes it clear that the court can reduce the amount recoverable to take account of any benefit obtained by the claimant. This is designed to avoid the kind of situation that arose in *McNicholl v Attorney-General* (1996) 3 NZ Conv C 192,451 (HC) (discussed in detail at [11.45] of the Issues Paper) where the amount of compensation paid to the applicant, and determined on the basis of the value of the land involved at the time of the loss, did not take into account the fact that at the time of the claim the impediment to the claimant's title (a paper road) had been removed.

Subclause (4) provides for payment of interest on the amount awarded at the prescribed rate from the date of the claim to the date of judgment thus allowing for the rate to be adjusted. Section 179 of the LTA currently provides for interest at a fixed rate of 5%.

CLAUSE 20 Compensation may be reduced if claimant contributes to loss

Clause 20 provides that the amount of compensation may be reduced to the extent the court thinks just having regard to the extent to which the claimant has contributed to the loss (for a full discussion see Part 1 at [4.20]–[4.28]). This is a new provision for which the LTA has no equivalent. As noted in chapter 4 of Part 1, the doctrine of contributory negligence was held to apply to compensation claims in cases decided in the early years of land transfer legislation. More recently the Contributory Negligence Act 1947 has been held to apply to claims under section 172(a) (See Part 1 at [4.20] referring to *Miller v Davy* (1889) 7 NZLR 515 at 521 (CA); *Russell v Registrar-General of Land* (1907) 26 NZLR 1223 at 1229 (CA); *Melville-Smith v Attorney-General* [1996] 1 NZLR 596 at 603 (HC)).

Commentators argue that the Act should logically apply to section 172(b) claims, that is, for loss or deprivation resulting otherwise than from Registrar's error. For the reasons discussed in chapter 4 of Part 1, subclause (3) states that the Contributory Negligence Act 1947 does not apply. The Act does not apply to intentional torts and in many instances it is unrealistic to equate the operation of the compensation regime with claims in tort based litigation: in claims for compensation it is the Crown that stands in the position of the defendant but the Crown may not have caused the event giving rise to the liability to pay compensation.

Subclause (2) provides that the amount of compensation is not to be reduced on account of the negligence of the claimant's solicitor or conveyancing practitioner. This is in line with the principle that the compensation regime should operate as a system of first resort with a right of subrogation in favour of the Crown against the wrongdoer. Section 175(1A) of the LTA partly recognises this in providing a right of subrogation for the Crown against a negligent conveyancer where a claim is made under the guaranteed search provisions of section 172A.

CLAUSE 21 Right of subrogation

Clause 21 provides that the Crown is subrogated to rights of the successful claimant (see the discussion in Part 1 at [4.29]–[4.32]). Currently, section 175 of the LTA entitles the Crown to recover the amount of compensation against a person who fraudulently brings land under the Act and against a person who commits fraud in becoming registered as proprietor under the Act. Section 172A of the LTA allows the Crown to recover the compensation paid where the loss was caused by the negligence of a solicitor but only where the claim relates to the guaranteed search provision. Clause 21 is not so limited.

CLAUSE 22 Compensation paid in case of fraud recoverable by Crown as debt

This clause makes it clear that compensation may, in the case of fraud, be recovered from the person by whom the fraud was committed as a debt due to the Crown. This is the position under sections 175 and 172A of the LTA. The Crown will thus be able to recover against any person whose fraud has caused the loss or deprivation of an estate or interest and not solely against a person registered through their own fraud.

CLAUSE 23 Procedure for making claim

Clause 23 replaces sections 173 and 174 of the LTA. Subclause (1) provides that, before commencing a compensation claim, a claimant must give 20 working days' notice of the claim. If the amount of a claim does not exceed an amount prescribed by regulations, the claimant will be required to give notice of the claim to the Registrar (subclause (1)(a)). If the amount exceeds the prescribed amount, notice must be given to both the Attorney-General and the Registrar (subclause (1)(b)). The notice must be in the prescribed form and contain the prescribed information (subclause (2)). If the claim does not exceed the prescribed amount, the Registrar may accept liability in whole or in part, thus avoiding the need to issue proceedings (subclause (3)). Enabling the Registrar to deal with claims in this way is new and will enable minor and undisputed claims to be dealt more efficiently. If the claim exceeds the prescribed amount, the Attorney-General and the Registrar may accept liability in whole or in part (subclause (4)).

Subclause (5) provides that, if a claimant issues proceedings and recovers no more than the amount accepted by the Registrar or the Attorney-General and the Registrar, the court may take that fact into account in determining costs. In this respect, subclause (5) differs from section 174(3), which not only disentitles a plaintiff to any costs, but also makes the plaintiff liable for the Crown's costs.

Part 4

Land Title Register

Part 4 of the Bill is an amalgamation of Part 3 (Registration) of the LTA (presently addressed essentially to paper registration, with references to “certificate of title”) and the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 (the 2002 Act). The provisions of the latter Act are now the main focus of registration.

Under the Bill the “register” is the total record of registered estates and interests in land, and dealings with, or affecting, those estates and interests.

There will no longer be provisions for the separate categories of computer freehold registers, computer interest registers, and computer unit title registers provided for under the 2002 Act. This will not alter the operation of the current register or of Landonline, but it means that the concept of a single register will be reinforced and the concept of separate categories of register in sections 7 to 12 of the 2002 Act will not be continued.

As already noted, the term “record of title” will replace the term “computer register” which is itself a replacement for the former “certificate of title”. Many submitters considered the term “computer register” confusing since it appears to refer to the register, or category or type of register, rather than the document that records a person’s title to an estate or interest.

LAND TITLE REGISTER

CLAUSE 24 Registrar to keep register

Clause 24 re-enacts and merges sections 33 of the LTA and section 5 of the 2002 Act. Subclause (1) requires the Registrar to maintain a register of land subject to the Bill. Subclause (2) provides that the register may be kept in a form or manner determined by the Registrar including a computer system or facility that enables information to be recorded or stored electronically or by other means, and permits the information to be accessed and reproduced in usable form. The clause reflects the reality that the register is now almost entirely computerised but also comprises some written instruments and documents registered in paper form, for example, plans. It is possible that at some time in the future the register will be held entirely in an electronic form. However,

if circumstances change, for example, if technology develops, this provision allows the form of the register to be changed. Further, it can encompass any current certificates of title which have not been converted to electronic form.

CLAUSE 25 Purpose of register

Clause 25 states the purposes of the register. These are to:

- provide a public record of land subject to the Bill including title to estates and interests and other information recorded in the register;
- provide a mechanism for creating title to estates and interests in land, which title cannot be set aside, subject to the Bill;
- facilitate the transfer of and dealings with estates and interests subject to the Bill;
- facilitate giving effect to the objects of the Bill;
- enable the requirements of any other Act for the registration of instruments under the Bill (affecting land or estates and interests in land) to be complied with.

This is a new provision.

CLAUSE 26 Contents of register

This is a new provision that specifies the information that must be recorded in the register. That is:

- (a) particulars of land subject to the Bill;
- (b) particulars of estates and interests in land registered under the Bill;
- (c) the names of persons registered as owners of those estates or interests;
- (d) particulars of instruments benefiting, burdening or affecting those estates or interests;
- (e) instruments lodged for registration under the Bill affecting those estates or interests;
- (f) any certificate, notification, endorsement, memorandum, information or matter relating to registered estates and interests in land that may be or that is required to be included or recorded or noted in the register under the Bill or any other Act;
- (g) plans deposited under the Bill; and
- (h) other prescribed information.

Paragraph (f) is designed to include caveats that may, under the Bill, be entered on the register, positive and restrictive covenants that may, under the Property Law Act 2007, be notified on the register rather than registered, and memoranda containing terms to be implied in mortgages registrable under clause 176 of the Bill.

Subclause (2) authorises the Registrar to record any other information necessary or desirable to ensure that the register is complete and accurate.

RECORDS OF TITLE

CLAUSE 27 Record of title

Clause 27 is a consolidation of sections 7–13 of the 2002 Act (which provide for the creation and the content of computer registers). These sections replaced certain provisions in the LTA concerning certificates of title such as section 39 and 65. The Bill provides generically for the contents of a record of title, thus merging sections 8, 10 and 12 of the 2002 Act, as it does not separate categories of computer register (now termed records of title).

Clause 27(1) requires the Registrar to create a record of title for freehold estates, leasehold estates, stratum estates under the Unit Titles Act 2010, other estates and interests required under other legislation to be registered, such as leases and licences under the Land Act 1948, and proclamations and *Gazette* notices that must be registered.

Subclause (2) specifies the information that must be included in a record of title:

- a unique identifier for the record of title itself;
- a description of the land (spatially) and of the estate or interest in the land;
- a unique identifier for every instrument affecting the estate or interest;
- a description of the type of instrument, the date and time of its registration, and other information necessary to determine its priority;
- the name of the registered owner;
- any status affecting the legal capacity of the registered owner notified to the Registrar under any other enactment; and
- any other information required under another enactment or that the Registrar considers necessary.

Subclause (3), which is similar to section 13 of the 2002 Act, enables a composite record of title to be produced. A composite record of title includes a combination of estates and interests relevant to one lot, for example, in a cross-lease development or a timeshare arrangement.

CLAUSE 28 Record of title created in name of deceased person

This clause re-enacts section 74 of the LTA. The clause provides that where a record of title is created in the name of a person who has previously died, it takes effect as if it was created immediately before the person died.

QUALIFIED RECORDS OF TITLE

CLAUSE 29 Qualified record of title

Chapter 13 of the Issues Paper discussed provisional registration (contained in sections 50–54 of the LTA) and noted that the rationale for this type of registration is mostly historic with the exception of the provisional registration of Māori land under section 124 of Te Ture Whenua Maori Act 1993. However, there may still be some residual need for registering information in a way that does not confer full indefeasibility, and the Issues Paper asked whether provisional registration could be replaced by a modern form of qualified title (see discussion at [13.117]–[13.123]). Submitters who commented on this issue agreed with adopting a modern form of qualified title and clauses 29, 30 and 31 of the Bill reflect this.

Qualified title is, therefore, a form of provisional title (see sections 50–54 of the LTA). Clause 29 replaces section 50 of the LTA which relates to the creation of a provisional register. Under clause 29, qualified title can be created where boundaries of the land are not sufficiently defined (clause 29(1)(a)), circumstances prescribed by regulations exist (clause 29(1)(b)), it is a replacement record of title under clause 55 (clause 29(1)(c)), or section 124 of Te Ture Whenua Maori Act 1993 applies (clause 29(1)(d)). Rather than comprising a separate register (as is the case with provisional title), the qualified status of the interest is to be entered on the record of title.

Subclause (2) provides that the Registrar must note the particular qualification (as to ownership or insufficiently defined boundaries, for example). It is anticipated that there should be very few new qualified titles. However, under clause 207 of the Bill any existing estate or interest on the provisional register will be treated as if a qualified title had been issued for that estate or interest.

Under subclause (3), clause 29 applies to an existing record of title and a new record of title.

Subclause (4) clarifies that qualified title is to be distinguished from limited title to which Part 14 applies. Part 14 is designed to apply to title that is already held in a limited title under the LTA and does not allow for the creation of new limited titles under the Bill. If a new title needs to be created for land, the boundaries of which could not be sufficiently defined, a qualified title would be issued.

CLAUSE 30 Effect of qualified record of title

Clause 30 sets out the effect of the qualified record of title. This replaces section 54 of the LTA which relates to the effect of provisional title. The clause provides that:

- the title is subject to the qualification;
- the only persons who cannot set aside the title because of the qualification are the first registered owner and any other subsequent registered owners;
- if the nature of the qualification is prescribed in regulations (under clause 29(1)(b)), it is subject to any other qualification expressed in those regulations.

Section 52 of the LTA, which relates to the evidentiary effect of qualified title, is not reproduced. Beyond clause 30, the qualified title has the effect of a normal record of title and the general provisions relating to records of title and instruments apply, for example, the evidence provisions.

CLAUSE 31 Removal of qualification

This clause relates to the removal of qualifications from a qualified record of title. It replaces section 51 of the LTA which provides for the closure of a provisional register in respect of a piece of land, once the register is “finally constituted”. If the grounds for creating the qualified record of title cease to exist, the Registrar may cancel the qualified record of title and create a new record of title without the qualification (subclause (1)). If this occurs, the Registrar must record on the new record of title any estates or interests registered or notified on the qualified title in the same order of priority (subclause (2)).

RETENTION OF INFORMATION ON REGISTER

CLAUSE 32 Information in register to be retained

This clause re-enacts with minor modification section 32 of the 2002 Act. It requires the retention in the register itself of all information that has been registered or recorded in the register even if it has been altered or superseded or it is no longer current. In effect, it provides for an “historic view” of the register at any point in time and will be accessible in the same way as the “current view”.

The need for a general provision allowing the removal of expired interests such as leases was raised as an issue in the Issues Paper (at [16.36]–[16.44]). Section 70 of the LTA which relates to the removal of easements, was suggested as a possible model for this. However, clause 32 should be adequate to deal with this issue. Interests, which are no longer current, for example, expired leases, are not removed from the register but rather form part of the historic view of the register.

REGISTRAR'S POWERS OF ALTERATION

CLAUSE 33 Registrar's powers of alteration

Clause 33 replaces sections 80 and 81 of the LTA (See the discussion in Part 1 at [2.44]–[2.50]). Section 80 has been regarded as little more than a “slip section” allowing correction of minor errors and omissions. Section 81 gives the Registrar power to correct the register where a title has been issued in error, where there is a misdescription of land or boundaries, and where a title has been fraudulently or wrongfully retained. Chapter 5 of the Issues Paper discusses in detail the interpretative problems with section 81. There is authority for the view that it allows the Registrar to make substantive determinations concerning the existence of fraud and whether conduct has occurred that infringes the legal rights of another, thus justifying intervention in a way that might run counter to the principle of indefeasibility. There is also authority that section 81 is limited to administrative correction, stopping short of allowing the Registrar to intervene in circumstances where the High Court could not.

Neither are academic commentators agreed on the scope of the provision and there has been a long standing reluctance on the part of Registrars to invalidate title under the section. The Property Law and Equity Reform Committee, reporting in 1977, recommended that, since the Registrar was not equipped to determine issues of fraud or wrongdoing and would not attempt to act unless the court had made a determination, section 81 should be confined to a power to enable the Registrar to carry an order of the court into effect (See Property Law and Equity Reform Committee *The Decision in Frazer v Walker* (Report, Wellington, 1977) 18–21).

Clause 33 resolves the long standing conflict concerning section 81 by adopting a restrictive approach to the Registrar's powers that more closely aligns with current practice. While broader than a mere “slip” power, the clause limits the grounds on which the Registrar may alter the register to correcting an error in the register itself, correcting an error in a document, recording a boundary change resulting from accretion or erosion, and implementing a court order (subclause (1)).

Subclause (2) provides that, except where the alteration is to give effect to a court order, no alteration may be made that would materially affect the registered estate or interest of a person unless the person consents or the Registrar gives notice of the proposed alteration and there is no objection. Subclause (3) provides additionally that the Registrar may alter the register for any purpose with the consent of the persons affected. In exercising powers under the clause, the Registrar may rely on information he or she considers relevant and reliable (subclause (4)) and this is subject to regulations (subclause (5)). Under the clause, mistakes should be able to be quickly and cheaply fixed, even where the alteration of the register may affect a registered title, as long as there is agreement or proper notice is given and there is no objection.

REGISTRATION OF INSTRUMENTS

CLAUSE 34 Registration of instruments and other information

Clause 34 provides that the Registrar must register or notify an instrument presented for registration or notification if the person presenting it complies with the requirements of the Bill, any other enactment and any regulations; and the form of the instrument complies with the Bill, any other enactment, and regulations. Registration occurs when a unique identifier for the instrument is entered in the register (subclause (2)). When registered or notified, an instrument forms part of the register (subclause (3)). The clause applies to instruments in electronic and paper form and replaces section 30 of the 2002 Act (which applies to registration under that Act) and section 34 of the LTA (which applies to registration of instruments in paper form).

CLAUSE 35 Registration or notification of instrument created or executed by person not registered as owner of estate or interest

This clause re-enacts section 76 of the LTA. The clause provides that an instrument may be registered or notified, even though that at the time that it was created or executed a person named in the instrument was not the registered owner of the estate or interest. This, for example, allows for the creation of a mortgage before the mortgagor of the land has been registered as owner.

CLAUSE 36 Effect of registration

Clause 36 is largely a re-enactment of section 41 of the LTA. It states that an instrument has no effect to create, transfer, or affect an estate or interest in land subject to the Bill until the instrument is registered (subclause (1)). This means that, while a person may own an equitable estate or interest, the legal estate or interest does not pass until registration. This is subject to some exceptions, for example, unregistered leases of less than a year under the Property Law Act 2007 are a legal interest in land (see sections 207 and 209). On registration, the instrument operates to create, transfer, or otherwise deal with the estate or interest specified in the instrument, on the terms and subject to the covenants (a) contained or incorporated in the instrument or (b) implied in it by the Bill or any other enactment (subclause (2)).

Subclauses (3) and (4) deal with the rare case where an instrument does not contain an operative provision and repeat section 41(4) and (5). Subclause (5) states that a reference to a unique identifier in an instrument is a reference to the entire estate or interest for which the record of title was created, unless otherwise provided.

Subsection (2) of section 41, which relates to the order of registration of instruments executed by the same registered proprietor that affect the same land, and which are presented simultaneously, is not re-enacted in its current form. Priority of registration is dealt with under clauses 47 and 48 of the Bill.

ELECTRONIC WORKSPACE FACILITIES

CLAUSE 37 Electronic workspace facilities

Clause 37 largely repeats section 22 of the 2002 Act but clarifies it. It gives the chief executive the authority to provide an electronic workspace facility, and to set conditions for its use, and to audit the facility and monitor the activities in an electronic workspace facility (subclauses (1) and (2)).

Electronic workspace facilities may be provided by others but need to be approved by the Registrar. Subclauses (3) and (4) authorise the Registrar to approve electronic workspaces for lodging instruments electronically only if satisfied that adequate provision exists to ensure that instruments will comply with the Bill when lodged, and that the Registrar will be able to carry out his or her functions. Subclause (5) allows the Registrar to withdraw approval of a facility that does not meet the requirements for approval. Subclause (6) authorises the Registrar to monitor activities in the workspace to detect fraud or improper dealings.

INSTRUMENTS

While it is anticipated that electronic lodgement will continue to be by far the main method of lodgement, paper lodgement must continue to be provided for. However, in the interests of accessibility, both electronic and paper lodgement are dealt with in the same part of the Bill. The aim is to give prominence to electronic lodgement and registration, but to make provision for paper lodgement, which will still be necessary for some documents and for those wishing to do their own conveyancing.

CLAUSE 38 Instruments to comply with the Act and regulations

Clause 38 provides that both electronic and paper instruments may be lodged for registration only if they comply with the Bill, any other Act and regulations. The clause partially re-enacts section 23(1) of the 2002 Act but the details of what amounts to compliance with the Bill have been omitted as they are made clear in other sections of the Bill or will be in regulations. Clause 38 also replaces section 42 of the LTA, which provides that the Registrar must not register the instrument unless it complies with the LTA.

CLAUSE 39 Certification of instruments

Clause 39 provides for the mandatory certification of prescribed classes of electronic and paper instruments before lodgement. Subclause (2) provides that regulations may prescribe that all electronic instrument or all paper instruments, or a class of electronic or paper instruments, require certification.

Clause 39 replaces sections 164 and 164A of the LTA. Section 164 was the original certification section during the “paper” era and requires all applications for bringing land under the Act and any instrument purporting to deal with any estate or interest under the Act to be certified as correct. Section 164A of the LTA was inserted when the 2002 Act came into force and currently requires

certification of all electronic instruments and for any specified class of paper instrument. It also prescribes the matters that must be certified. Under the Bill, the matters that will require certification will be prescribed in regulations.

Section 164(3) of the LTA provides that it is an offence to falsely or negligently give a certification under that section. This subsection has not been continued. This is discussed in the commentary on the offence provisions of the Bill, clauses 184 and 185.

CLAUSE 40 **Persons authorised to certify instruments**

Clause 40 provides that the persons who may certify instruments are practitioners and any other person belonging to a class authorised by regulations. The term “practitioner” covers lawyers who hold current practising certificates issued under the Lawyers and Conveyancers Act 2006, and conveyancing practitioners, that is, persons who hold current practising certificates issued by the New Zealand Society of Conveyancers under the Lawyers and Conveyancers Act.

Section 164B of the LTA currently limits the right to certify to practitioners, that is, lawyers and conveyancing practitioners. Several organisations have sought certification rights for their experienced members. Clause 40 allows the categories of person who may certify instruments to be extended by regulation and specified classes of person may have limited certification rights for certain purposes. If a case could be made for certification rights, clause 40 would then allow extension of the authorised classes of certifiers.

CLAUSE 41 **Revocation of right to certify**

Clause 41 authorises the Registrar to revoke a person’s authority to give a certificate. Under subclause (1), the grounds are that the person has given a fraudulent certificate or a certificate that is materially incorrect or that the person has not complied with the obligations under clause 42. Subclause (2) requires the Registrar to give the person at least 10 working days’ notice and to consider submissions or representations made by or on behalf of the person. Subclause (3) allows the Registrar to reinstate the authority if satisfied that the person will not give a fraudulent or materially incorrect certification. The clause is a substantial re-enactment of section 164B except for subclause (2) which is new.

CLAUSE 42 **Evidence of certification**

Clause 42, which re-enacts section 164C of the LTA with minor wording changes, sets out requirements relating to the retention of the evidence of certification. Subclause (1) provides that a person who gives a certificate must retain the evidence relied on that supports matters stated in the certificate for the prescribed period. Subclause (2) states that the Registrar may specify standards that, if met, are evidence that may be relied on in support of such matters. Subclause (3) provides that the Registrar may, by notice in writing, require a person who has given a certificate to produce the evidence referred to in subclause (1); or provide a written sworn statement as to any further information that the Registrar requires, or the circumstances surrounding the

preparation and electronic transmission of an instrument. Subclause (4) states that a requirement under subclause (3) must be complied with within 10 working days.

CLAUSE 43 Effect of certification

The clause replaces section 164E of the LTA in much simpler terms. Section 164E(1) provides that, except in the case of a discharge of a mortgage, a certified instrument has on registration “the same effect as a deed”. This phrase is omitted in clause 43 and instead it is provided that, on registration, an electronic instrument certified under clause 39 is to be treated as having been made in writing and executed by every prescribed party, and as having effect according to its terms (subclause (1)). This states directly what the consequences of registration are, and avoids any reference to the law relating to deeds, which is not without difficulty, as had been pointed out by Professor JF Burrows writing in the Otago Law Review (“The Law Relating to Deeds in New Zealand” (1969–72) 2 Otago L Rev 240).

Subclause (2) provides that nothing in any other Act or rule of law relating to the execution, signing, witnessing or attestation of instruments applies to an instrument certified under clause 39.

Section 164E(2) of the LTA makes the section subject to section 3 of the Official Appointments and Documents Act 1919. That section makes specific provision regarding the execution of deeds by the Governor-General and would apply in any event. An express reference to the section appears to be unnecessary.

Section 164E(3) provides that the instrument has on registration the same effect as if it were in writing and had been executed by the parties specified for the purpose in regulations. Clause 43(1) of the Bill is a simpler way of stating this.

Section 164E(4) provides that when a certified instrument is registered, section 25 of the Property Law Act 2007 is to be regarded as having been complied with. Section 164E(5) of the LTA states that subsection (4) is for the avoidance of doubt. Section 25 of the Property Law Act provides that the disposition of certain legal or equitable interests in land must be in writing. Clause 43 is sufficiently plain in its own terms to make express reference to section 25 of the Property Law Act unnecessary. These subsections have accordingly been omitted in the interests of simplicity.

CLAUSE 44 Lodgement of instruments electronically

Clause 44 provides that a person referred to in clause 40 (persons authorised to certify instruments) must lodge instruments electronically from an electronic workspace facility except in certain circumstances:

- instruments that are in an exempt class; and
- instruments that the Registrar has determined that it is impracticable or inappropriate to lodge from an electronic workspace facility.

This applies whether or not the instrument is an instrument that must be certified under clause 39.

CLAUSE 45 Execution of paper instruments

Clause 45 requires instruments in paper form to be executed in accordance with the Bill and regulations. However, paper instruments of a class specified in regulations will still have to be certified under clause 39 of the Bill and the precise requirements for that certification will be prescribed in regulations. Clause 45 re-enacts in modified form section 157(1) and (2) of the LTA. Section 157(3), which provides that an instrument executed in accordance with the sections has the same effect as a deed, and section 157(4), which provides that the section is subject to section 3 of the Official Appointments and Documents Act 1919, have not been carried forward: see discussion under clause 43.

CLAUSE 46 Lodging of paper instruments

Clause 46 requires paper instruments to be lodged by posting them to a designated land registry office, re-enacting section 47(1)(c) of the LTA. Clause 46(2) provides that the Registrar must give notice of the address of the designated land registry office both in the *Gazette* and in any other way the Registrar considers appropriate.

Although virtually all instruments are electronic, it is still necessary to make provision for instruments in paper form to accommodate those who wish to do their own conveyancing and for certain kinds of instrument that can only be lodged in paper form. Section 47(1)(a) and (b), which provide that an instrument may be lodged by hand at the public counter or by depositing it in a secure facility, are not carried forward. Land registry offices are closed for the purposes of lodgement at the public counter or lodgement by means of a secure facility.

CLAUSE 47 Priority of instruments

Clause 47 states that an instrument must be registered or notified according to the time it is lodged and has priority according to the time it is lodged, not when it is executed. This replaces section 37 of the LTA with a minor change. Section 37(2) (which provides that instruments have priority according to the date of registration) is not re-enacted in the same terms as the time of lodgement is the decisive time for priority of an instrument. Subclause (3) provides that the clause is subject to clause 48, and to clause 83, which makes separate provision for variation in the priority of mortgages.

CLAUSE 48 When paper instruments lodged

This clause sets out rules relating to the priority of paper instruments. Subclause (1), which re-enacts section 47(4) of the LTA, states that an instrument lodged by post is taken to have been lodged on the working day after the day on which it is received and before any other instrument relating to the same estate or interest lodged on that day.

Subclause (2), which re-enacts section 47(5) of the LTA, states that a caveat lodged by post is taken to have been lodged after any other instrument lodged in the same manner on the same day. The reference in section 47(5) to notices of claim under the Property (Relationships) Act 1976 is not carried forward. This is because section 42 of the Property (Relationships) Act provides that every notice of claim to an interest under that Act is deemed to be a registrable interest under the LTA and has effect as if it were a caveat lodged under section 137 of the LTA.

Subclause (3) deals with the situation where a number of instruments relating to the same estate or interest are lodged for registration simultaneously and appear to the Registrar to be incompatible with each other. The Registrar must register them in the order agreed by the parties or in accordance with any determination by the court. This is a change from the current position in section 41(2) of the LTA which requires the Registrar to give priority to the instrument which is accompanied by a Crown grant or certificate of title. Section 41(2) is outdated as certificates of title no longer exist and owners are very unlikely to have a Crown grant, and, therefore, it is necessary to provide a new process to deal with this situation.

CLAUSE 49 Rejection and requisition of instruments

Clause 49 is substantially a re-enactment of section 43 of the LTA. It will apply to both electronic and paper instruments. The clause authorises the Registrar to return or retain, pending correction, any instrument lodged for registration or notification that does not comply with clause 38 (clause 49(1)). The inclusion of reference to instruments lodged for notification will ensure the clause applies to those instruments, such as covenants notified on the title under the Property Law Act 2007 and caveats, that are lodged otherwise than for the purposes of registration. “Instrument” is expressly defined to cover caveats in clause 5 and this makes section 148B, which relates to the Registrar’s powers if the caveat does not comply with the requirements of the Act, unnecessary.

Subclause (2) requires the Registrar to give notice of rejection or retention. Subclause (3) is a new provision and will require the Registrar to give reasons for rejecting or requisitioning an instrument.

Subclause (4) gives the Registrar authority to refuse to register or notify an instrument that was retained and to return it. Subclauses (5)–(6) concern retention of fees and re-enact section 43(3) and (4) of the LTA, but make it clear that forfeiture is to the Crown. Subclause (7) provides, as does section 43(6) of the LTA, that if an instrument is returned it must be treated as not having been lodged.

Chapter 13 of the Issues Paper asked if the requisitions option should be retained for dealing with defective instruments. Submitters who commented on this issue thought that the requisition option should be retained, particularly for dealings that are not in the “auto-reg” category, that is, instruments that are not registered automatically upon lodgement.

The requisition option has been retained in the Bill. Clause 49 does not distinguish between “auto-reg” and other instruments; any instrument may be either rejected or retained by the Registrar pending correction within a specified time.

CLAUSE 50 Copying or imaging of paper documents

Clause 50 applies specifically to paper documents. The clause, which largely re-enacts section 27 of the 2002 Act, authorises the Registrar to make a record or copy or image of a paper instrument and to return the original unless it is needed by the Registrar (subclause (1)). The Registrar may use the copy to register the instrument or perform any other function (subclause (2)).

Section 27(4) of the 2002 Act states that, in the absence of evidence to the contrary, a record, copy, or image of a document produced by the Registrar is the definitive form of the instrument, whereas subsection (5) provides that every matter arising under the LTA relating to an instrument of which a record, copy, or image has been made must be effected and determined as if the instrument itself had been presented in that form. The apparent inconsistency between these provisions is removed by stating in clause 50 that the record, copy, or image is to be treated as if it were the original instrument and had been lodged at the same time as the original (subclause (3)).

CLAUSE 51 Rejection of instrument that cannot be imaged

This clause authorises the Registrar to refuse to register an instrument if, in the case of an electronic instrument, it is impracticable to capture data in it and, in the case of a paper instrument, it is impracticable to copy or image it (subclause (1)). This may be because part of an image is missing or the image is too dark or wording is too faint so that it is illegible. The Registrar must give notice of the refusal and arrange for the instrument to be resubmitted in a form that complies with clause 51 (subclause (2)(a)). The instrument may be resubmitted and does not lose its priority if this occurs within 40 working days or any longer period specified by the Registrar (subclause (2)(b)). Otherwise the instrument must be treated as never having been lodged for registration (subclause (2)(c)).

Clause 51 re-enacts section 28 of the 2002 Act with one change. Section 28(3)(b) currently requires the Registrar to contribute to the costs or expenses of resubmitting an instrument that has been rejected. This is not carried forward. If the Registrar has made an error in relation to this clause this will, of course, be covered by the compensation provisions (see Part 3 of the Bill).

ACCESS TO REGISTER

CLAUSE 52 Access to register

There are a number of sections in the LTA and the 2002 Act which relate to access to the register. Section 45 of the LTA requires the Registrar to provide, on application, certified copies of instruments. Section 45A of the LTA requires the Registrar to provide copies of grants and certificates of title as well as other documents entered on the register under the Land Act 1948. Section 46 of the Act allows a person to search the register at times specified in regulations. The operation of these provisions is subject to section 33 of the 2002 Act, which was required to accommodate a computerised register that cannot be searched in the same way as it could when it was entirely paper based.

There was a concern in submissions that, as the register is not technically publicly open to search (as stated in the heading of section 46 of the LTA), it should be clear what “access to the register” does mean. Clause 52 makes it clear that access to the register is through the Registrar who can provide copies of requested items on the payment of a fee.

Clause 52 is designed to simplify the interrelationship of the LTA provisions. It will require the Registrar on request and payment of a prescribed fee to provide a copy of a registered instrument, and provide a copy of a record of title (subclause (1)). It will thus be possible to obtain access to information registered electronically as well as held in paper form. Subclause (2) provides that, if the person requires the copy to be a certified copy, the Registrar must provide a certified copy. Under section 33 of the 2002 Act, the chief executive of the department administering the register is able to direct that copies of instruments and records of title be provided in electronic form. The chief executive will continue to make determinations to provide the information electronically under subclause (3), subject to specified conditions (subclause (4)). Subclause (5) provides that the clause is subject to the Public Records Act 2005. This allows for access to older instruments held by Archives New Zealand to be regulated under that Act.

EVIDENTIARY EFFECT OF DOCUMENTS

CLAUSE 53 Evidentiary effect of documents

Clause 53 replaces sections 45, 75 and 163 of the LTA and sections 34 and 35 of the 2002 Act. It provides that a document that appears to be an electronic image of an instrument registered or notified on the register, and that does not appear to have been altered, is conclusive evidence of the contents of the instrument and of the fact that it has been registered or notified (subclauses (1) and (2)). A document that appears to be an electronic image of a record of title, and that does not appear to have been altered, is conclusive evidence of the information contained in the record of title, and of the fact that it identifies all interests and other matters affecting the estate or interest to which the record relates that are registered or notified in the register (subclauses (3) and (4)).

A copy of an instrument or record of title that is certified by or on behalf of the Registrar is conclusive evidence in all courts of its contents, and that the instrument is registered or notified under the Bill (subclause (5)). A copy of a record of title that is certified by or on behalf of the Registrar is conclusive evidence in all courts of the information stated in the record of title as at the date and time stated in the record of title and that the information identifies all interests and other matters registered or notified in the register affecting the record of title (subclause (6)). If the copy appears to be a certified copy, in the absence of proof to the contrary, it will be conclusive evidence that it is so certified (subclause (7)).

INSTRUMENTS LOST BEFORE REGISTRATION OR NOTIFICATION

CLAUSE 54 Instruments lost before registration or notification

Clause 54 is a substantially simplified version of sections 56 and 57 of the LTA. Under the electronic system there are unlikely to be many lost instruments. Subclauses (1) and (2) of this clause enable a person claiming to be entitled to be registered or notified as the owner of an estate or interest under an instrument or authority that has been lost or destroyed or of which no record can be found before registration or notification, to apply to the court for an order that the person is entitled to be registered or notified as owner of the estate or interest. The application must be served on the Registrar, the registered owner of every estate or interest in the land and any other persons as the court directs (subclause (3)). The court may, if satisfied that the instrument or authority has been lost or destroyed, or that no record of it can be found, order the Registrar to register or notify the person as owner of the estate or interest (subclause (4)). Such registration has effect as if the original instrument or authority had been registered or notified or the person had been registered or notified as owner of the estate or interest as a result of the instrument or authority (subclause (5)).

REPLACEMENT OR RECONSTITUTION OF RECORDS

CLAUSE 55 Registrar may replace or reconstitute records

Clause 55 replaces sections 215A and 215B of the LTA relating to the Registrar's power to replace documents or information. These sections are modernised and adapted to suit an electronic system. Sections 215A–215B of the LTA apply to records that are lost or damaged, mainly after registration, in comparison to sections 56–57 of the LTA, which apply where instruments are lost before registration or notification. Clause 55 applies where a registered or notified document, or a document that is in the custody of the Registrar, has been lost, damaged, destroyed or has become unfit for use, or information registered or notified in the register or lodged for registration or notification is lost or unfit for use. Subclause (2) provides that the Registrar may replace or reconstitute such a document or information. The replacement or reconstituted document or information has the same effect as the original (subclause (3)). Subclause (4) provides that if the Registrar replaces or reconstitutes a document or information, the Registrar must make an entry on the title to that effect.

This clause removes the requirement in section 215A that the replacement title be certified by the Registrar. Certification is not necessary in these circumstances.

ORDERS RELATING TO RECORDS OF TITLE

CLAUSE 56 Court may make orders relating to records of title

This clause enables the court, in a proceeding under the Bill, to direct the Registrar to cancel a record of title or an entry on a record of title, create a new record of title, or alter a record of title. The clause replaces section 85 of the LTA. An example of a situation in which it may be invoked is to direct the cancellation of a title obtained by fraud.

CREATION OF AMALGAMATED AND SEPARATE RECORDS OF TITLE

CLAUSE 57 Registrar may issue amalgamated or separate records of title

Clause 57 re-enacts section 86 of the LTA. Subclause (1) enables the Registrar, on application by the registered owner, to create a single record of title in place of two or more records of title, in the name of the registered owner for the whole of the land. Subclause (2) enables the Registrar, on application by the registered owner of two or more parcels of land recorded in a single record of title, to create two or more records for those parcels in place of the single record of title.

JOINT TENANCY

CLAUSE 58 Registration of persons as joint tenants

This clause re-enacts in simplified terms section 61 of the LTA. It provides that, unless the instrument provides otherwise, two or more persons named in an instrument as transferees are to be treated as joint tenants, (subclauses (1) and (2)(a)). It does not apply, however, to Māori land under Te Ture Whenua Maori Act 1993, (subclause (2)(b)).

CLAUSE 59 Severance of joint tenancy

This clause is new. It enables a person to be registered as a tenant in common where that person has severed their joint tenancy by deed. Previously there was no specific legislative authority for registration of such changed status. The new clause confirms *Samuel v District Land Registrar* [1984] 2 NZLR 697 (HC).

SEPARATE RECORDS OF TITLE FOR UNDIVIDED SHARES IN LAND

CLAUSE 60 Separate titles for undivided shares in land

This clause replaces section 72 of the LTA. Section 72 provides that tenants in common in undivided shares are entitled to separate certificates of title for their undivided shares. The proviso to the section, which is curiously expressed, states that they are not bound to take separate certificates unless and until they require to deal separately with their respective interests and the Registrar requires them to have separate certificates.

Clause 60(1) repeats the first part of section 72 stating that the Registrar must, if so requested, create separate records of title for tenants in common. Subclause (2) provides that the Registrar, if requested to do so by the registered owner of an estate in land, may create separate records of title for undivided shares in that estate. This subclause provides, for example, for the situation where developers of cross-leased properties, retirement villages or time shared properties need to have separate titles issued for undivided shares in land (see the Issues Paper at [21.12]–[21.13]). This differs from the wording in section 72, which requires the shares to be owned by different people. The clause does not repeat the proviso in section 72 as it is not relevant for electronic dealings; if one tenant wanted to deal separately with their interest, the Registrar would be bound to create a new record of title for that interest.

DEALINGS BY OVERSEAS GOVERNMENTS

CLAUSE 61 Dealings in land by government of overseas country

Clause 61 largely re-enacts section 165 of the LTA. It makes it clear that an overseas government may be registered as an owner of an estate or interest in land and deal with estates and interests in land (subclause (1)). A paper instrument used for the dealing may be executed by the overseas government's representative in New Zealand (subclause (2)), and an instrument that appears to be such an instrument is sufficient evidence of its proper execution and binding on the overseas government (subclause (3)). Subclause (4) states that the clause does not affect the use of an electronic instrument for the relevant dealings. The term "overseas government" is extended to include the government of a province, state, territory or other political subdivision of an overseas country, a local or regional government or authority in an overseas country, and a body that exercises authority for an association of overseas countries (subclause (5)). "Representative" is also defined in subclause (5).

REGISTERS UNDER OTHER ACTS

CLAUSE 62 Registers under other Acts

Clause 62 authorises the Registrar to operate a register required by another Act, to be kept in the land registry office (subclause (1)), for it to be part of the register or a separate register (subclause (2)(a)), and kept in the same manner as the land title register (subclause (2)(b)). The Registrar may issue a record of title for an interest so registered (subclause (3)). Currently, a separate computer interest register is required under section 9(1)(d) of the 2002 Act.



Part 5

Transfers, transmissions, and vesting

TRANSFERS OF ESTATES AND INTERESTS

CLAUSE 63 Transfer of estates and interests

This section replaces section 90 of the LTA concerning the use of a transfer instrument to register the transfer of estates and interests in land under the Act, but makes minor changes.

Under the LTA, a transfer instrument can be used to transfer any estate or interest in land (see section 90(1)(a) of the LTA) and to create or surrender a registered easement or profit à prendre (see section 90(1)(b) of the LTA). This is still the case under the Bill. But section 90(1)(b) has not been repeated in clause 63. Instead it has been included in clause 89, (which prescribes the methods of registration and surrender of easements and profits) where it is more appropriately placed, with a cross-reference to clause 63.

The information to be included in the transfer document will be prescribed in regulations rather than in the clause (see subclause (2)).

Subclause (3) provides that the transfer instrument must be executed by the registered owner of the estate or interest and, where it contains covenants binding a person, by that person.

CLAUSE 64 Transfer of part of land in record of title

Clause 64 is in part a replacement for sections 92 and 93 of the LTA. In the case of the transfer of part of the land in a certificate of title, section 92 of the LTA provides that an endorsement by the Registrar on the certificate to that effect operates as a cancellation of the certificate as to the part of the land which has been transferred. Section 93 of the LTA requires the Registrar to issue a new certificate for the land transferred. It also requires the Registrar, if required

by the registered proprietor of the untransferred balance of the land, to issue a new certificate of title for that balance. Section 94 provides that the Registrar may allow the existing certificate of title to remain in force for the untransferred balance of the land providing that it is clearly defined.

Clause 64 seeks to simplify and modernise these provisions and reflect current practice. Under the clause, on registration of an instrument that transfers part of a freehold estate, the Registrar must cancel the existing record of title so far as it relates to the land transferred and may create a new record of title for that land in the name of the registered owner. The reason that the Registrar has discretion as to creating a new record of title is that the transferred part of the land is often for the purpose of a road, in which case a record of title would not be issued. There may also be other transfers of part of a freehold estate where no record of title would be issued. The Registrar also has a discretion to create a new record of title for the part not transferred.

Section 91 of the LTA provides that it is not necessary to issue a new certificate of title on the transfer of the whole of the land comprised in the title; it is sufficient if a memorial of transfer is endorsed on the certificate. Certificates of title have been replaced by computer registers and will be replaced by records of title under the Bill. The Registrar is required by clause 26 of the Bill to record on the record of title particulars of instruments affecting estates and interests. It is accordingly unnecessary to carry forward section 91 of the LTA.

Section 94(2), which relates to the transfer of road lines to the Crown, is obsolete as roads are no longer created in this way, and the subsection has not been carried forward.

CLAUSE 65 **Effect of transfer of leases and mortgages**

Clause 65 replaces section 97 of the LTA in much simplified terms. It states that on registration of a transfer instrument that transfers a lease or mortgage, the estate or interest of the transferor and the rights, powers and privileges attaching to the estate or interest, vest in the transferee. The transferee acquires the same rights and becomes subject to the same liabilities as the transferor. Section 97(1), which provides that leases and mortgages may be transferred, is not carried forward. It was probably unnecessary in view of section 90, just as clause 63 of the Bill makes it clear that any estate or interest may be transferred by means of a transfer instrument.

CLAUSE 66 **Life and other limited freehold estates**

Section 95 of the LTA provides for the creation and registration of life estates and other limited freehold estates (that will terminate on the happening of some future event), with successive future estates, and also for powers of appointment. The Issues Paper noted that the section is framed in relatively arcane terminology using the language of remainders, reversion, executory limitations (contingent or otherwise) for the future estates, and requires an understanding of limited and future estates (see Issues Paper at [16.45]–[16.59]). It was suggested that

it would be timely to redraft the provision consistently with the Property Law Act 2007 in simpler and clearer terminology, and submitters who commented on this section agreed.

Clause 66 restates section 95 of the LTA in modern language. Subclause (1) provides that a transfer instrument must be used by the owner of a fee simple estate to register a life estate with successive future interests, or another freehold estate that terminates on the happening of a future event. The references in section 95(1) to powers of appointment and executory limitations are not carried forward. Section 16 of the Property Law Act provides for the creation of powers of appointment in writing to be executed in accordance with requirements for execution of a deed. As a power of appointment, or an assignment of the same, would not be registered on the land transfer register, there is no need to provide for their creation or registration or transfer in the LTA.

The reference in section 95(1) to “executory limitations” has been removed as it is quite unclear what these really are. “Executory interests” were a special class of future interests derived from the Statutes of Uses 1535 and of Wills 1540, and usually took the form of “shifting” or “springing uses” (in other words, trusts that could arise in the future on certain contingencies), in order to avoid the complicated remainder rules. They produced what Megarry and Wade refer to as “much intricate and abstruse learning” and are now more or less obsolete. (See RE Megarry and HWR Wade *The Law of Real Property* (4th ed, Stevens & Sons Ltd, London, 1975) 181 and 188–189). To the extent that they still exist they should be covered by “future interests”.

Subclauses (2)–(3) replace section 95(2) of the LTA. Subclause (2) provides for: (a) cancellation of the record of title for the previous registered owner of the fee simple estate; (b) creation of a record of title for the registered owner of the life estate or other limited freehold estate; and (c) noting on the new record of title the registered interest of any person who will be entitled to a future estate (previously called remainders or the reversion), in order to ensure that future interests are on record. The terminology is consistent with the Property Law Act, which provides for the creation of future estates in section 59, by will or by deed.

Subclause (3) provides that the Registrar must cancel the record of title for the limited freehold estate and create a record of title in the name of a person entitled to a future estate, on application, once that person becomes vested in possession when the life estate or limited estate terminates (by death or the happening of the determining event).

Clause 66 of the Bill, like section 95, is confined to life estates (or other limited freehold estates), and should be distinguished from leases for life which are treated as leases. Where covenants are required or, for example, there is a sublease for life created, the leases provisions in Part 6 of the Bill would be appropriate (see *Amalgamated Brick and Pipe Co Ltd v O’Shea* (1966) 1 NZCPR 580 at 583). Leases and subleases for life in cross leases should also be registered as leases (as discussed in the Issues Paper (at [16.54])). Where there is a cross-lease arrangement, registered future interests cannot be nominated.

TRANSMISSIONS

CLAUSE 67 Transmission instruments required to register transmission

This clause re-enacts section 122 of the LTA. It provides that a transmission instrument must be used for a person to become registered as owner by a transmission. Unlike section 122(2), details of the form and the information to be contained in it will be prescribed in regulations. Under section 122(2) the application must be verified by oath or statutory declaration. The clause no longer requires the application to be verified by an oath or a statutory declaration. The Issues Paper raised the issue of how to deal with statutory declarations in an electronic environment. The paper suggested three options (at [14.13]):

- (a) remove the requirement for applications for transmission to be supported by statutory declarations and review the elements that need to be covered in the application; or
- (b) provide for declarations to be lodged electronically;
- (c) retain the declaration but enable the Registrar to rely on the application and certification for registration purposes.

Submitters were divided on these proposals. The draft Bill removes the requirement for statutory declarations. There seems to be no rationale for treating statutory declarations any differently from other supporting evidence that lawyers are required to keep. For electronic instruments, statutory declarations will be prescribed as a form of evidence to support practitioner certifications.

CLAUSE 68 Effect of registering transmission instrument

The Issues Paper raised the matter of what details need to be included in an application for transmission under sections 122 and 123 of the LTA and in particular whether an application should be required to state the equitable interests in the land (at [14.3]–[14.7]). Most submitters who commented on this indicated that equities should be covered.

Clause 68 re-enacts section 123 of the LTA. Section 123(1) provides that, if it appears to the Registrar that the applicant is entitled to the estate or interest, he or she must be registered as proprietor. This implies that the Registrar considers the application and evidence on a case by case basis. However, this is no longer the reality in an electronic environment and the clause reflects this.

Clause 68 simply states that on registration of the transmission instrument the applicant becomes the registered owner and holds the estate subject to any equities or other interests to which it was subject.

VESTING

CLAUSE 69 Vesting of land by court order

Section 99 of the LTA relates to vesting of land by court order and section 99A relates to the vesting of land by a statute. Chapter 14 of the Issues Paper asked whether these sections should be treated as stand alone provisions. Submitters agreed that they should be kept as separate provisions rather than be merged with any other provisions in a new LTA. The Bill does this in clause 69 and 70, and locates these provisions with the other transmissions provisions in Part 5 of the Bill.

Clause 69 re-enacts section 99 of the LTA. The clause provides that where an order of a court vesting an estate or interest in land is lodged for registration, the Registrar must register it. Upon registration, the estate or interest vests in the person named in the court order on the terms and conditions stated in the order. The rules relating to registration set out in Part 4 apply to such an order lodged for registration.

CLAUSE 70 Vesting of land by statute

This clause re-enacts section 99A of the LTA. The clause provides that a person may apply to the Registrar to register a vesting of an estate or interest under an enactment. The application must be in the prescribed form and contain the prescribed information. Under subclause (3) the Registrar must register the vesting in accordance with the enactment.

The clause does not re-enact the provision in section 99A, which removes the need for an application where the estate or interest in question is sufficiently described in the enactment so that the Registrar can identify it in the register. This would place an unrealistic and onerous obligation on the Registrar. Without an application it is difficult for the Registrar to establish the date and time to effect registration of the vesting and its priority in relation to other documents that might be presented. Furthermore, it is hard to see any good reason for the person in whom the estate or interest is vested to be exempt from paying processing fees that would be payable with an application. The rules relating to registration set out in Part 4 apply to such vesting.

Part 6

Leases

CLAUSE 71 Lease instrument required to register lease

This clause re-enacts section 115 of the LTA. Subclause (1) provides that a lease instrument must be used to register a lease under the Act. Leases of any length may be registered under the LTA. The clause no longer uses the word “demise” in addition to lease (see section 115(1)). This was the technical term for a lease under the common law. However, the use of the term “lease” is more common today and there does not appear to be any interest which would be covered by “demise” but not by “lease”.

Subclause (2) states that the lease must be in the prescribed form and contain the prescribed information. This is a departure from section 115(2) of the LTA which sets out the information that is to be contained in a lease instrument. This change reflects the policy adopted in the design of the Bill that matters of detail such as forms and information to be contained in forms should be prescribed in regulations.

Subclause (3) provides that the lease instrument must be executed by the lessor and the lessee.

Subclause (4) re-enacts sections 115(4) and 119. It provides that mortgagee consent is necessary to register a lease instrument. The consent binds the mortgagee and every person who subsequently derives an interest in the mortgage from the mortgagee.

A lease is defined in the interpretation section to include a lease for life.

CLAUSE 72 Variation of leases

This clause re-enacts section 116 of the LTA. Subclause (1) confirms the position in section 116(1) that a lease variation instrument is required extend the term of the lease or vary the covenants and conditions contained in the lease. The subclause no longer refers to “restrictions” (as is section 116(1)) as this is adequately covered by “covenants and conditions”.

As with lease instruments, subclause (2) provides that the lease variation instrument must be in the prescribed form and contain the prescribed information.



Subclause (3) re-enacts section 116(2) which provides that a lease variation instrument must be registered before the expiry of the current term of the lease. If a lease has expired, a new lease instrument is needed. This was discussed in the Issues Paper (at [16.22]–[16.35]). It is preferable that a lease variation instrument cannot revive an expired lease. The problem of lease variation instruments lodged after the expiry of the lease should be addressed as an education issue and does not justify legislative reform.

Subclause (4) re-enacts section 116(4) and provides that the lease instrument extending the term of the lease has the same effect as if it were a lease instrument for the extended term. The lease variation instrument is subject to the same covenants and conditions as the lease.

Subclause (5) provides that the lease variation instrument must be executed by the lessor and the lessee.

Subclause (6) re-enacts section 116(5) in part. Under paragraph (a), a varied lease will continue to be subject to all interests to which the lease was subject before the registration of the lease variation instrument. The phrase “encumbrances, liens and interests” used in section 116(5), and in section 117 in relation to leases in renewal and substitution (now clause 75) and section 118A in relation to the acquisition of the fee simple (now clause 76), was discussed in the Issues Paper (at [16.20]). This language could usefully be modernised as liens are no longer registrable and the use of the term “encumbrance” to mean interests, rather than rentcharges and annuities as in the mortgage provisions, is outdated. Clause 72(6) (and clauses 75 and 76) simply use the word “interests”.

A related issue is whether sections 116, 117 and 118A of the LTA apply to unregistered interests which are noted on the title, such as those protected by caveats or restrictive or positive covenants (see Issues Paper at [16.7]–[16.8]). The usual caveat process is designed to operate in these types of transactions and it is unnecessary for the Bill to provide that caveats can be brought forward.

In contrast, there is a strong argument that the word “interest” in the LTA and the Bill covers interests noted on the title such as restrictive and positive covenants that burden the land. The considerations that relate to caveats do not apply to these interests and they are able to be brought forward under clauses 72, 75 and 76. This is consistent with section 307 of the Property Law Act 2007, which provides that restrictive and positive covenants are interests for the purposes of section 62 of the LTA. Clauses 72(6), 75(3) and 76(2) apply to interests which are registered or notified and are intended to cover interests notified on the title such as covenants notified under the Property Law Act.

Subclause (6)(b) is new and provides that the lease has the benefit of registered or notified interests, which benefited the lease before registration of the lease variation, if the owner of the burdened land consents to them continuing to benefit the lease. The issue of appurtenant interests was discussed in the Issues Paper (at [16.10]).

Subclause (7) is new. It confirms that a lease variation instrument cannot be used to alter boundaries. It cannot thus add land to the lease or remove any land from the lease.

Subclause (8) re-enacts section 116(7) and section 119. It provides that mortgagee consent is necessary to register a lease variation instrument. The consent binds the mortgagee and every person who subsequently derives an interest in the mortgage from the mortgagee.

CLAUSE 73 Special provisions relating to variation of cross leases

This clause is new. It covers a cross-lease situation and provides that a lessee seeking to vary the lease under clause 72 does not have to obtain the consent of all mortgagees in the cross lease but only that of the mortgagee of the land covered by the lease. This change was raised as a possibility in the Issues Paper because it can be difficult and expensive for a lessee to get the consent of all mortgagees (at [15.27]). Subclause (2) provides that the lease variation is, nevertheless, binding on those mortgagees whose consent did not need to be obtained under subclause (1). This avoids a situation where mortgagees who do not consent are not bound by the lease variation.

Subclause (3) defines cross lease. This definition is based on section 2 of the Resource Management Act 1991. Cross lease means a lease of a building or part of a building on land that is granted by the owner of the land and is held by a lessee who also has an estate or interest in an undivided share of the land.

CLAUSE 74 Lease surrender instrument required to surrender lease

This clause re-enacts section 120 of the LTA. Subclause (1) provides that a lease surrender instrument must be used to surrender a registered lease. The lease surrender instrument must be in the prescribed form and contain the prescribed information (subclause (2)) and be executed by the lessor and the lessee (subclause (3)).

Subclause (4) provides that a lease cannot be surrendered without the consent of a mortgagee or sublessee. Section 120 uses the term “underlease”, but the Bill replaces this with the term “sublease” as this is the terminology used in the Property Law Act 2007. Subclause (5) is new and provides that the consent of a sublessee is not required if section 216 of the Property Law Act applies, which relates to the surrender of a lease in order to enable a new superior lease to be entered into without affecting a sublease, and the lease surrender instrument is lodged together with the new lease.

Subclause (6) is new and sets out the effect of surrendering a lease with the consent of the mortgagee or sublessee. If the mortgage or sublease is not registered on the record of title of a replacement lease (clause 75), it is extinguished and its entry on the record of title must be cancelled.

CLAUSE 75 Registration of interests on replacement lease

This clause re-enacts section 117 of the LTA. The clause uses the term “replacement lease” to describe a lease in renewal or substitution. Subclause (1) defines replacement lease. The definition clarifies that the lease must take effect immediately on the expiry or surrender of the prior lease, that is, there must be continuity of term between the two leases. This clause cannot be used to revive a lease that has expired.

Under subclause (2) the lessee or the owner of an interest to which the lease is subject may apply to register the lease as a replacement lease. If the lease is registered as a replacement lease, the lease is subject to all interests to which the prior lease was subject. The new subclause (3) extends this and paragraph (b) provides that the lease has the benefit of registered or notified interests that benefited the prior lease if the owner of the burdened land consents to them benefiting the replacement lease. The issue of appurtenant interests was discussed in the Issues Paper (at [16.16]–[16.20]). The use of the term “interests” rather than “encumbrances, liens and interests” used in section 117 and what interests are covered is discussed under clause 72.

The Issues Paper asked whether the equivalent of section 117 need refer to section 216 of the Property Law Act, which deems a sublease to be an interest to which the replacement lease is subject (at [16.21]). Some submitters supported this. However, this is unnecessary as a sublease clearly falls within the definition of interest and section 216(5) provides that a sublease is an interest to which a lease is subject under section 117 of the LTA (now clause 75). There is no need to restate this in the Bill.

Subclause (4) states that the Registrar must record such interests on the record of title for the replacement lease in order of registered priority. Subclause (5) provides that references to the prior lease must be read as references to the replacement lease.

CLAUSE 76 Recording of interests under lease on record of title for fee simple estate on acquisition of fee simple by lessee

This clause re-enacts part of section 118A of the LTA (see also clause 77). The clause allows the lessee who acquires the fee simple estate to apply to the Registrar to record on the record of title for the fee simple estate registered and notified interests to which the lease was subject and to note the merger of the fee simple and leasehold estates (subclause (1)).

Under subclause (2), the fee simple estate becomes subject to registered or notified interests which burdened the lease immediately before registration of the transfer of the fee simple. Paragraph (b) of the subclause extends section 118A by providing that the lease has the benefit of registered or notified interests,

which benefited the lease before registration of the transfer. However, paragraph (b) only applies if the owner of the burdened land consents to them continuing to benefit the lease (see clause 77). The current section 118A applies on request. This is different to the similar section 114 of the Land Act 1948 under which it is mandatory to bring down interests where leasehold and fee simple are merged (see the Issues Paper at [16.16]). Different considerations apply to land under the Land Act, in particular because the leases are generally of long duration. Some submitters favoured an automatic process. However, due to the varied types of interests that relate to leases under the LTA, it is preferable and appropriate that the process should not be automatic, but rather should continue to be subject to a request. Clause 76 continues to apply on request.

Under subclause (3) interests to which the fee simple was subject before the merger take priority over interests referred to in subclause (2). The interests referred to in subclause (2) have the same priority, between themselves, as they did before registration of the transfer (subclause (4)).

The clause does not apply to a lease under the Land Act 1948 (subclause (5)). Clause 76 is subject to clause 77 (subclause (6)).

CLAUSE 77 Additional provision relating to recording of interests and merger

This clause re-enacts part of section 118A. Subclause (1) provides that the consent of the holder of an interest to which the lease is subject must be obtained before the interest can be recorded on the record of title for the fee simple, and before the fee simple and leasehold estates merge. Subclause (2) provides that a fee simple estate does not have the benefit of interests that benefit the lease unless the registered owner of the burdened land consents. Failure to consent does not prevent the merger of the fee simple and leasehold estates in this case. The issue of appurtenant interests was discussed in the Issues Paper (at [16.9]–[16.10] and [16.16]–[16.20]).

CLAUSE 78 Covenant by or right for lessee to purchase fee simple estate

This clause re-enacts section 118 of the LTA. Section 118 provides that a right or covenant to purchase may be included in the lease and if the lessee pays the purchase money and otherwise observes the covenants, the lessor is bound to execute a memorandum of transfer. This has been interpreted to mean that the option to purchase is indefeasible (see *Fels v Knowles* (1908) NZLR 604, at 621). This section may not be necessary to confer indefeasibility on such covenants as, in general, covenants in leases attract indefeasibility (see *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd* [1984] 2 NZLR 704, at 713–714 and *Duncan v McDonald* [1997] 3 NZLR 669, at 682). Options to purchase can be distinguished from other covenants in leases because they are equitable interests in land in their own right. Whether or not options to purchase have statutory authority, they are likely to be indefeasible. For the purposes of clarity, this section has been re-enacted. The interpretation of section 118 to the effect that it confers indefeasibility is made express in the new Bill.

Subclause (1) provides that a registered lease may contain a covenant by the lessee to purchase the fee simple or a right for the lessee to purchase it. Under subclause (2) the lessor must transfer the fee simple if the lessee pays the purchase money, and has performed any covenants and obligations that must be performed under the lease for the lessee to purchase the fee simple. In addition, subclause (3), a new provision, clarifies the effect of such a covenant, that is, that it is an interest in land to which clause 7 applies. In other words, it is an indefeasible interest.

CLAUSE 79 Re-entry by lessor

This clause re-enacts section 121 of the LTA. The clause is designed to make the process more transparent and to more clearly reflect the practice adopted by the Registrar. For this reason the clause is more detailed than section 121. Under subclause (1) a lessor who has taken possession under an order of the court, or re-enters in exercise of a power to cancel under section 244 of the Property Law Act 2007, may apply to the Registrar to note the record of title to that effect.

The phrase “by process of law” used in section 121 has been replaced by the concept of re-entry under an order of the court as this is, in reality, what would be covered by the original phrase. Subclause (2) provides that, where the lessor takes possession of the land under an order of the court, the application must be accompanied by the order and the Registrar must note on the record of title that the entry has occurred.

Under subclause (3), if the lessor re-enters in exercise of a power under the lease, the Registrar must give notice in the *Gazette* and in a local newspaper. Under section 121 public notice only applies when the Registrar cannot give notice to “all persons interested under the lease”. However, public notice is mandatory in the Bill to reflect the current practice of the Registrar. The notice must be in the prescribed form and state that, unless the Registrar receives an objection within a specified time, the Registrar will note on the record of title that the lessor has re-entered (subclause (4)). If no objection is received, the Registrar must make such a note on the record of title (subclause (5)). Under subclause (6), if an objection is received the Registrar must make such a note only if the objection is withdrawn, or the court directs the Registrar to do so. Once such a note is made, the estate of the lessee and every person claiming under the lessee terminates (subclause (7)). Termination does not release a person from liability for a breach of a covenant or condition in the lease (subclause (8)).

Part 7

Mortgages

CLAUSE 80 Mortgage takes effect only as security

Clause 80 re-enacts section 100 of the LTA which provides that a mortgage takes effect only as security and does not transfer to the mortgagee the estate or interest charged.

CLAUSE 81 Mortgage instrument required to register mortgage

Section 101 of the LTA (Forms of mortgage) provides for registration of mortgage instruments or of an encumbrance instrument for the purposes of charging any land or estate or interest under the Act, or making land or an estate or interest in land security for the payment of any money. Section 2 of the LTA defines mortgages to include payments to any person by yearly or periodic payments or otherwise of any annuity, rentcharge, or sum of money other than a debt. Such payments are known as “encumbrances”, and in order to register them an encumbrance instrument is used.

As discussed in chapter 7 of Part 1, we are persuaded that the wide use of a rentcharge encumbrance mainly for purposes of securing the performance of covenants in gross should be discontinued. Under the Bill, rentcharges and annuities and similar payments must be for the principal purpose of securing the payment of money. These are rare. Hence there is no longer provision for a separate “encumbrance instrument” (as in section 101(4)–(5) of the LTA).

Clause 81 provides that mortgage instruments must be used for a mortgage under the Bill. However, a mortgage instrument can be used for securing payments previously known as encumbrances, where their principal purpose is to secure the payment of money, because they are covered by the definition of mortgage in clause 2 of the Bill.

Subclause (2)(a) provides that the mortgage instrument must be executed by the mortgagor. The details of the information to be contained in the mortgage instrument, currently in section 101(2) will go in regulations (see subclause (2)(b)).

CLAUSE 82 Mortgage variation instrument required to vary mortgage

This clause replaces section 102 of the LTA, providing for variation of mortgage terms. There are, however, a number of changes.

A mortgage variation instrument must be used to vary: the amount or priority limit, the rate of interest, the term and currency of a mortgage, and the covenants, conditions and powers contained or implied in a mortgage (subclause (1)(a)–(d)). The reference to the priority limit is new. Subclause (2) provides that a mortgage variation instrument must be executed by the mortgagor, unless the variation only reduces the amount secured, the priority amount or the rate of interest; and by the mortgagee, unless the variation only increases these matters. This subclause re-enacts section 102(3) of the LTA with the additional reference to the “priority amount” in order to clarify that this is included.

The details as to the information required in the instrument, currently in section 102 (2), will be in regulations (see subclause (3)).

Subclause (4) provides for the consent of a subsequent mortgagee to a variation unless it only reduces the amount secured, the priority amount or the rate of interest. This subclause reverts to the pre-2002 version of section 102(4) and requires only the consent of a subsequent mortgagee, not a prior mortgagee, to a variation. This was suggested in the Issues Paper (at [15.25]) and supported by submitters. The current subsection means that prior mortgagees (and encumbrancees) also need to give consent to variations, and there seems to be no reason for this.

Subclause (5) is now located in the clause and provides that the consent of a submortgagee must be obtained to the variation of the mortgage and binds the submortgagee and persons deriving an interest in the mortgage from the submortgagee.

Currently submortgagees’ consent is in a separate section of the LTA, section 114, which provides for their consent to a discharge of mortgage, to a variation of terms, and to the exercise of the power of sale. But consent by a submortgagee to variation of priority of mortgages is dealt with in section 103(3) (albeit in a different way, see the Issues Paper (at [15.26])). In the Bill, consent to all these matters is dealt with in the relevant clauses for ease of reference. Accordingly, section 114 has not been carried forward into the Bill.

The wording of the consent provisions is consistent with other provisions in the Bill (consent must be given and binds the mortgagee or submortgagee and persons subsequently deriving an interest in the mortgage) so that it is quite clear that consent is mandatory (see discussion in the Issues Paper at [15.7]–[15.13]).

A group of submitters stated that local authorities can charge customers high fees for consent to a variation of a mortgage where they have an encumbrance as a means of securing obligations. It was suggested that the variations would

not prejudice a local authority so this consent requirement for encumbrances serves no purpose. However, once encumbrances can no longer be used essentially to secure covenants in gross for the future, as provided for in the Bill, this problem should gradually diminish. In the meantime it is not practicable to create special provisions to deal with the issue.

Some submitters argued for an extension of the mortgagee consent regime to subsequent mortgages and transfers where that transaction is subject to a mortgage. The rationale is that since the abolition of certificates of title the contractual obligations on mortgagors to obtain mortgagee consent have been frequently overlooked. However, there is a distinction between consent regarding registration, which should be provided for in the Bill, and consent obligations that are a matter of contract between the parties, and are not the concern of the Registrar. No such provision has been made in the Bill.

CLAUSE 83 Mortgage priority instrument required to vary priority of mortgages

This clause replaces and essentially re-enacts section 103 of the LTA, allowing variation of priority of mortgages. A mortgage priority instrument must be used to vary priority (subclause (1)), and once registered, the priority of mortgages in relation to a particular estate or interest is as specified in the instrument despite clause 47, which relates to priority of instruments (subclause (2)).

Subclause (3) incorporates the conditions and powers to be prescribed by regulations by implication unless otherwise stated. In the LTA, these matters are set out in schedule 3. Under the Bill, these will be moved to regulations as they are of a technical and detailed nature.

The instrument must be executed by the mortgagor and all mortgagees under any mortgage that will rank after a mortgage over which it previously had priority (subclause (4)).

The need for mortgagors to execute priority instruments was questioned in submissions as it increases costs and time and priority arrangements do not affect the rights or obligations of the mortgagor. However, mortgagors should still be involved in the process as they may have ordered their affairs on the basis of the original arrangements (they might have a payment arrangement with a first mortgagee, for example) that could be affected by the variation.

A mortgage priority instrument must be in the prescribed form (subclause (5)) and the consent of any submortgagee must be obtained before registration of a mortgage priority instrument that postpones the priority of its head mortgage (subclause (6)). This subclause rewords section 103(3) of the LTA making it clearer that consent of the submortgagee is mandatory and binding, rather than making the variation “not effective” if consent is not obtained.

Subclause (7) is the replacement for section 103(7) of the LTA, which widens the definition of a mortgage for the purposes of the section, but has been modernised as liens are no longer registrable. The phrase “other registered security for the payment of money” in section 103(7) refers to a security interest

registered in the land registry under other Acts. Subclause (7) continues to provide that “mortgage”, in this clause, includes a registered charge securing the payment of money under the Bill or under any other Act.

CLAUSE 84 **Sale of mortgaged land**

This clause replaces section 105 of the LTA in more up-to-date language. The clause provides that the estate or interest of a mortgagor vests in a purchaser of the land on registration of a transfer instrument executed by a mortgagee, for the purpose of exercising a power of sale (subclause (1)). The estate or interest in land is transferred free of liability under the mortgage, and free of any other mortgage or interest not having priority over the mortgage or that is not binding on the mortgagee (subclause (2)).

Subclause (3) provides that a transfer instrument cannot be registered if the mortgage is subject to a submortgage. Registration would extinguish the mortgage. This wording is in response to the suggestion in the Issues Paper (at [15.16]–[15.21]) (and supported by submitters) that instead of the submortgagee giving consent to a registration, it would be simpler (and avoid an electronic instrument for which special certification was required) if the submortgagee were to discharge their mortgage.

A number of provisions have already been repealed and relocated in the Property Law Act 2007: section 104 of the LTA (which related to the application of purchase money on a mortgagee sale), section 106 (which related to entry into possession by a mortgagee), section 107 (which related to the power of a mortgagee to distrain), and section 108 (which conferred on a mortgagee the equivalent powers of a lessor to recover premises). Section 109 (which provides for mortgagees to have custody of certificates of title) is no longer required and has not been carried forward into the Bill.

CLAUSE 85 **Mortgage discharge instrument required to discharge mortgage**

This clause re-enacts section 111 of the LTA and requires a mortgage discharge instrument to be used for the purpose of registering a discharge (subclause (1)). Subclause (2) states that the estate or interest in land identified in the instrument ceases to be subject to the mortgage on registration of the discharge instrument.

Subclause (3) provides that the instrument must be executed by the mortgagee and be in the prescribed form, replacing section 111(2) and (3) of the LTA.

Subclause (4) provides that a discharge instrument cannot be registered while the mortgage is subject to a submortgage. The rationale for this is the same as for clause 84(3), above.

CLAUSE 86 Court may order mortgage to be discharged if mortgagee's remedies barred by Limitation Act 1950

This clause replaces section 112 of the LTA. It allows a mortgagor to apply to have a mortgage discharged by the High Court if remedies under it are statute barred (subclause (1)). The Registrar must register the court order discharging the mortgage and on registration the mortgage is discharged (subclauses (2) and (3)). Subclause (4) provides that the court may direct that public notice is given of an application and that notice of the application is served on specified persons. Although there appears to be no evidence that section 112 has been actively used, it is not obsolete so has been modernised and retained.

CLAUSE 87 Discharge of mortgage securing annuity

Clause 87 replaces and modernises section 113 of the LTA to provide specifically for the discharge of a mortgage securing an annuity. The Registrar must register the discharge if satisfied that the annuitant has died or the annuity has ceased, and all arrears owing have been paid or satisfied, or discharged.



Part 8

Easements, profits à prendre, and covenants under the Property Law Act 2007

Clauses 88–93 and 97 replace sections 90A–90F of the LTA. There are a number of changes and the provisions have been simplified and clarified to make them more accessible and to assist compliance.

Under the LTA, it is not obvious that profits à prendre are included in section 90A (creation and surrender of easements by easement instrument) until section 90E of the LTA is read (which applies sections 90 and 90A–90D to profits). Under the Bill, profits are included within the easement sections, where applicable (clauses 88, 89, 90, 93, 94 and 95).

Section 90F of the LTA applies sections 90A–90E to restrictive and positive covenants notified under section 307 of the Property Law Act 2007 “with necessary modifications”. These are now treated separately in clause 97 as they are notifiable rather than registrable. This clause also covers covenants in gross in accordance with the proposed amendments to the Property Law Act found in clause 203 of the Bill.

EASEMENTS AND PROFITS À PRENDRE

CLAUSE 88 Interpretation

Clause 88 is a separate interpretation section defining “grantor” and grantee” for the purposes of this Part (currently defined in section 90E(2)(a) and (b) of the LTA). A grantee is the registered owner of the benefited land or (in the case of an easement in gross or profit à prendre in gross) the person entitled to the benefit of an easement or a profit. The grantor is the registered owner of the burdened land. The definition avoids using the outdated references in

section 90E(2) to the “registered proprietors of the dominant and servient tenements”, using instead the terms “benefited land” and “burdened land”, which is consistent with the Property Law Act 2007.

CLAUSE 89 Registration and surrender of easements and profits à prendre

Clause 89 sets out the three ways of registering the creation or surrender of an easement or profit à prendre. It replaces sections 90(1)(b), 90A(2) and 90B(2) of the LTA, with significant modification. Subclause (1) provides that for easements and profits there are two instruments to be used for registration (of either their creation or their surrender):

- an easement instrument (paragraph (a)); or
- a transfer instrument (paragraph (b)).

A transfer instrument would be used where an easement or profit is reserved in a subdivision, for example. Subclause (1)(c) provides for a third method of registration (by deposit document together with deposit of a plan, currently in section 90B(2) of the LTA), but this method only applies to easements.

Subclause (1)(b) (registration using a transfer instrument) is the equivalent of the current section 90(1)(b) of the LTA, which relates to transfers generally. In subclause (1)(b), reference is made to a “transfer instrument under clause 63” of the Bill (the general transfer provision). As noted in the commentary to clause 63, it is more appropriate that provision for registering easements or profits by way of a transfer instrument be located in the Part of the Act dealing with other ways of registering easements or profits, rather than in clause 63 (the equivalent of section 90 of the LTA, where such provision is at present).

Subclause (2) provides that a transfer instrument for an easement or profit must be executed by the grantor and the grantee, modifying the language of section 90(3) of the LTA.

Some provisions in section 90E are included in clause 89. Subclause (3) allows an easement to be registered even though the same person is both grantee and grantor (overruling the common law). This re-enacts section 90E(1). Subclause (4) provides that the Registrar must register the easement on the record of title for both the burdened and the benefited land. Subclause (5) provides for a separate record of title for an easement over Crown land for which no record of title exists. This re-enacts section 90E(2)(d).

CLAUSE 90 Easement instruments

Clause 90 replaces section 90A(3) and (4) of the LTA, providing requirements for easement instruments. Subclause (1) provides that an easement instrument must be in the prescribed form and contain the prescribed information. The information will be contained in regulations rather than specified in the Act. Subclause (2) provides that an easement instrument must be executed by the grantor and grantee, simplifying the wording of section 90A(4).

Mortgagee consent requirements for registration or surrender of easements or profits à prendre (as well as before registration of variations) are now in the relevant sections, for ease of reference, rather than in a separate section, as with section 90E of the LTA. Clause 90(3) requires consent of a registered mortgagee of the burdened land before registration of an instrument that creates an easement or profit. Subclause (4) requires consent of a registered mortgagee of any benefited land, or of any easement or profit, before registration of an instrument that surrenders the easement or profit. Subclause (5) states that consent binds both the mortgagee and any person deriving an interest from the mortgagee.

CLAUSE 91 **Creation or surrender of easement on deposit of plan**

This clause substantially re-enacts the current section 90B of the LTA (creation and surrender of easement on deposit of plan). However, the new clause only applies to easements (not profits à prendre or land covenants) as is appropriate. Section 90B has not been used in practice. A deposit document that specifies the matters listed in subclause (3) may be used to create or surrender an easement (subclause (1)) and the deposit document must be in a form specified by the Registrar under clause 191. Subclause (3) lists the matters that must be specified in the deposit document, including description of the land, with reference to the register, the nature and extent of the easement, and rights and powers prescribed by regulations or contained in a memorandum registered under clause 176. Such an easement will be created or surrendered on deposit of a plan under clause 190 (subclause (4)).

The deposit document must be executed by the grantor and grantee (subclause (5)). This subclause is new. Section 90B(5) of the LTA requires the consent of such persons for creation or surrender of an easement, but does not require them to execute the instrument. Subclause (6) requires the consent of the mortgagee of the burdened land before creation of an easement: this provision is taken from the general mortgagee consents in the current section 90E (see discussion under clause 90). Subclause (7) requires the grantor and grantee, and any mortgagee of a mortgage of the easement or of the benefited land, to consent to surrender of an easement. The consent of the mortgagee under subclauses (6) and (7) binds that mortgagee (subclause (8)).

CLAUSE 92 **Rights and powers implied in easements**

Clause 92 substantially re-enacts section 90D of the LTA. Subclause (1) provides for regulations to prescribe rights and powers that are implied in different classes of easements. The grantee of the easement has, on creation of the easement, the rights and powers implied in easements of that class (subclause (2)). Except in the case of an easement created by deposit document under clause 91, the instrument creating the easement may vary, add to, or omit the implied rights and powers (subclauses (3) and (4)). The implied rights and powers bind the grantor and grantee (subclause (5)). Subclause (6) provides, as does section 90D(6) of the LTA, that the application of sections 26(3), 27(4), and 28(3) of the Housing Act 1955, which relate to pipe line certificates, right of way certificates, and party wall certificates, is not affected.

Strictly speaking, section 90D applies to profits as well as easements (see section 90E(5)). This is probably an error. It is not likely that regulations would ever prescribe rights and powers to be implied in profits. Indeed, Schedule 4 of the Land Transfer Regulations 2002, sets out rights and powers that are implied only in easements. For this reason, clause 92 applies only to easements.

CLAUSE 93 Easement variation instrument required to vary easements and profits à prendre

Clause 93 replaces section 90C of the LTA in relation to variation of easements and profits à prendre. An easement variation instrument is required to vary, omit or add to the terms and conditions or covenants of an easement or profit (subclause (1)). The instrument must be in the prescribed form and contain the prescribed information (subclause (2)). Subclause (3) provides that the instrument must be executed by the grantor and grantee, replacing section 90C(3) in simpler and more modern language.

Subclause (4), which is similar to section 90E(3)(a) and (b) of the LTA, sets out the mortgagee consents required for variations. The consent of a mortgagee of any mortgage of the easement or profit and of the burdened and any benefited land must be obtained before registration of the variation instrument. Consent binds the mortgagee and a person who derives an interest from the mortgagee (subclause (5)).

CLAUSE 94 Merger and extinguishment of easements and profits à prendre through lapse of time

This clause re-enacts that part of section 70 of the LTA which relates to the removal of easements or profits à prendre due to merger or extinguishment due to lapse of time. Section 70 was discussed in chapter 17 of the Issues Paper. Section 70 covers three situations, and these have been separated into three clauses to set out more clearly the different procedure for each. These situations are:

- merger and extinguishment through lapse of time (clause 94);
- extinguishment on occurrence of an event (clause 95); and
- extinguishment due to redundancy (clause 96).

Chapter 17 of the Issues Paper considered whether the grounds for removal should be extended, for example, to include abandonment (at [17.1]–[17.5]). The grounds for making an application have not been extended in the Bill. This would require an objective test. Such a test is difficult to set out in cases of abandonment except where the pieces of land have been physically separated, which is covered by the redundant easement provisions. Clauses 94–96 retain the grounds in section 70 of the LTA.

Clause 94 sets out the process for removal where there is merger or the easement is extinguished through lapse of time. Subclause (1) states that either the grantor or the grantee may apply to the Registrar to make an entry on the title that an easement or profit has become extinguished or merged.

Subclause (2) provides that, for the purposes of the clause, an easement or profit à prendre is extinguished if it was granted for a fixed period of time which has elapsed.

Subclause (3) provides that the application must be in the prescribed form and contained the prescribed information. If the Registrar is satisfied that the easement or profit has merged or become extinguished, this must be noted on the record of title (subclause (4)), and upon such an entry on the register, the interest of the grantee is extinguished (subclause (5)).

There is no provision for the Registrar to give public notice because, although section 70(4) of the LTA provides that the Registrar must give notice of determined, redundant or extinguished easements or profits, subsection (6) provides that there is no requirement to give notice if the easement is extinguished due to effluxion of time or merger. There no reason to change this and there is no need to provide for notice in this provision.

CLAUSE 95 **Extinction of easements and profits à prendre on occurrence of event**

This clause re-enacts that part of section 70 of the LTA which relates to easements or profits à prendre that have become extinguished on the occurrence of an event. Subclause (1) provides that either the grantor or the grantee may apply to the Registrar to make an entry on the title that an easement or profit has become extinguished.

Subclause (2) provides that an easement or profit is extinguished under this section if an event specified in the document creating the easement or profit occurs, bringing the easement or profit to an end.

Subclause (3) provides that the application must be in the prescribed form and contain the prescribed information.

Under subclause (4) the Registrar must give public notice of the application and notice to persons who appear to have an interest under the easement or profit. This re-enacts section 70(4) which applies to easements which have become extinguished on the occurrence of an event. A person claiming to have an interest in the easement or profit may object to the application by giving notice in writing to the Registrar (subclause (5)).

Subclause (6) provides that the Registrar must make an entry on the record of title to the effect that the easement or profit is extinguished unless:

- within 10 working days after the notice of objection is served, the objector gives notice to the Registrar that an application has been made to the court for an order that the application must not be granted; and
- the court makes an order that the application must not be granted or an appeal against the order is dismissed.

Once the entry is made the interest of the grantee is extinguished (subclause (7)).

CLAUSE 96 Redundant easements

This clause re-enacts that part of section 70 of the LTA which relates to removal of redundant easements. The clause does not apply to *profit à prendre*. This appears to be the case under section 70, although it is somewhat confused due to fact that extinguished easements and profits, and redundant easements are dealt with in the same section. Problems relating to the removal of redundant easements under section 70 of the LTA were discussed in chapter 17 of the Issues Paper.

Subclause (1) defines redundancy to require spatial separation of the burdened and benefited land as the result of a subdivision or any other reason. This provision no longer allows the Registrar to specify grounds for redundancy as is currently the case under section 70(3).

The Issues Paper asked whether the Registrar should continue to be able to specify new grounds of redundancy (see section 70(3)(b) of the LTA) or whether this should be in the legislation (at [17.7]–[17.8] and Q 122). Although this power has been in the LTA since 2002, it has not been used. We are unable to identify any other likely situations where it would be appropriate to remove redundant easements in this way and for this reason it has not been included in the Bill.

Subclause (2) provides that either the grantor or the grantee may apply to have the easement extinguished on the record of title. The clause removes the requirement in section 70 for the applicant to make a statutory declaration. This is inconsistent with other similar applications and there does not appear to be any justification for such a requirement.

Subclause (3) provides that the form and information to be contained in the application are to be prescribed by regulation.

Under subclause (4) the Registrar must give public notice of the application and notice to persons who appear to have an interest under the easement. A person claiming to have an interest in the easement may object to the application by giving notice in writing to the Registrar (subclause (5)).

Subclause (6) provides that the Registrar must make an entry on the record of title to the effect that the easement is extinguished unless:

- within 10 working days after the notice of objection is served, the objector gives notice to the Registrar that an application has been made to the court for an order that the application must not be granted; and
- the court makes an order that the application must not be granted or an appeal against the order is dismissed.

Once the entry is made the interest of the grantee is extinguished (subclause (7)).

Subclause (8) makes it clear that this provision does not apply to easements in gross.

NOTIFICATION OF COVENANTS UNDER PROPERTY LAW ACT 2007

CLAUSE 97 Notification of covenants under Property Law Act 2007

Clause 97 re-enacts in modified form section 90F of the LTA which relates to the noting on the register of restrictive and positive covenants to which section 307 of the Property Law Act 2007 applies. The clause also applies to the noting on the register of covenants in gross to which the proposed new section 307E of the Property Law Act will apply (see clause 203 of the Bill and chapter 7 of Part 1).

Subclause (1) provides that a covenant instrument must be used to notify both categories of covenant on the register and also to revoke such covenants. The clause creates a new covenant instrument rather than using a modified easement instrument as is the case under section 90F of the LTA. This is for greater clarity and reflects the fact that covenants are not registered. Subclause (2) provides that a covenant variation instrument must be used to notify that the covenant is affected or modified. This also differs from section 90F of the LTA, which provides that an easement variation instrument should be used. An instrument specific to covenants is created for the same reasons as for subclause (1). A covenant instrument and a covenant variation instrument must be executed by the covenantee and the covenantor (subclause (3)), and must be in the prescribed form and contain the prescribed information (subclause (4)).

Subclause (5) provides that notification on the register of a restrictive or positive covenant has no greater effect than is specified in section 307(4) and (5) of the Property Law Act. Subclause (6) is a similar provision in relation to covenants in gross to which the new section 307E will apply. This means that the relevant covenant is an interest for the purposes of clause 9(b) of the Bill (section 62 of the LTA) and will bind a purchaser but is not indefeasible in the same way as a registered interest. Subclause (7) provides that a transfer instrument may be used to notify the assignment of a covenant in gross under 307E. This provision is only necessary for covenants in gross because the covenant does not run with any benefited land. If the covenantee changes, there needs to be a mechanism to notify this change on the register. Subclause (8) sets out a number of provisions in the Property Law Act that apply to covenants notified on the register under the clause.

The reference in section 90F(2)(a) of the LTA to covenants having effect as deeds inter parties has been omitted. The Property Law Act adequately deals with their legal effect.

Part 9

Statutory land charges

As noted in chapter 23 of the Issues Paper, statutory land charges are charges authorised by statute that give notice of monies owing. There is a significant lack of uniformity of registration regimes. Many statutes provide their own regime for registration of the charges; some may be registered under the LTA or Deeds Registration Act 1908; still others are registered on the land transfer title under the Statutory Land Charges Registration Act 1928 (SLCRA). In addition there are varying consequences of registration as noted in the Issues Paper (at [23.4]–[23.6]). A number of authorising statutes provide for other aspects such as special priority for their charges, or for the effect that such charges have on subsequently lodged instruments. The SLCRA provides a default position for statutory land charges created by legislation that does not prescribe forms of charge or release.

Because of administration difficulties associated with registration of charges under a multiplicity of different Acts, with varying consequences, the Issues Paper suggested incorporation of the SLCRA into the new Land Transfer Act (at [23.7]). Land Information New Zealand consulted those agencies responsible for the administering and lodging for registration of different types of statutory land charge, and all, in principle, supported the suggestion.

Submitters who addressed this issue also supported the incorporation of the SLCRA into the new LTA. One group of submitters also suggested that the new part of the LTA should provide default provisions relating to:

- use of forms (charge and discharge);
- priority of charges as against other instruments;
- effect of the charge against other instruments;
- effect of delay in registration of charge against other dealings.

Part 9 of the Bill replaces the SLCRA. Clause 99 provides that regulations will prescribe default notice forms for registration. Clause 100 provides for priority of charges and clause 101 provides for release and partial release of charges. Other suggestions would go beyond the scope of the LTA review and would require greater consultation.

CLAUSE 98 Application of this Part

This clause covers sections 3 and 4 of the SLCRA, concerning charges to which the Bill applies, and exemptions, in general and simpler terms. Subclauses (1) and (2) state that the Part applies to charges on land created under other Acts, but not if express provision is made for their registration and effect under the other Act. Subclause (3) provides that the Part does not apply to Crown land unless expressly authorised by another Act. It is no longer necessary to list other specific exemptions in the clause as they are either no longer applicable, or their enabling Act determines their status.

Section 8 of the SLCRA (saving of existing provisions as to registration) is now covered by subclause (2). Section 10 of the SLCRA (application to the Crown) is covered in subclause (3).

CLAUSE 99 Registration of charge

This clause is in substitution for section 6 of the SLCRA (mode of effecting registration). Subclauses (1) and (2) retain provisions for the Registrar to register charges upon receipt of a notice to register them in the prescribed form (current section 6(1) and (2) of the SLCRA). Subclause (3) modernises section 6(4) (which provides that fees are to be recoverable from the person liable), and clarifies that the fees are recoverable from the owner of the estate or interest against which the charge is registered.

There is no longer a specific reference to signing by corporations entitled to the benefit of charges – as in section 6(3) of the SLCRA; see also clause 101 which does not repeat section 7(2) of the SLCRA regarding corporations' signatures. The documents will be signed in accordance with their authorising enactments.

CLAUSE 100 Priority of charge

Clause 100 is a new priorities provision. Priorities are generally to be determined in accordance with the Bill unless priority is provided for in another Act. Clause 100 replaces part of section 5(1) of the SLCRA (land charges to be registered), a provision that is mainly concerned with the registration priority rule. The remainder of section 5(1) is out of date (as it refers to registration of charges by 1 January 1930).

Section 5(2) of the SLCRA is redundant.

CLAUSE 101 Release of charge

Clause 101 re-enacts section 7(1) and (3) of the SLCRA (release of registered charge) in more modern language. Certificates of release may be lodged with the Registrar for the purpose of releasing the land (or part of the land) from the whole or part of a registered charge (subclause (1)). Subclause (2) provides that the certificate must be signed by the person entitled to the benefit of the charge and that forms will now be prescribed in regulations, not in a schedule to the Act. The Registrar may also release or partially release a charge on application by a registered owner, if satisfied that it has been wholly or partially paid and it is impossible or impracticable to obtain a certificate (subclause (3)).

CLAUSE 102 Protection of Registrar

Clause 102 is a modernised version of section 11 of the SLCRA. The clause protects the Registrar when he or she registers a charge on the basis of a notice under clause 99; or releases a charge, whether on the basis of a certification under clause 101, or if satisfied that the charge has been wholly or partially satisfied, and it is impossible or impracticable to obtain a certificate, under clause 101(3). Unlike section 11 of the SLCRA, clause 102(b)(ii) covers the situation where protection would most be needed.



Part 10

Trusts and caveats

TRUSTS

CLAUSE 103 Trusts not to be entered on register

This clause reflects the policy decisions first, to continue to provide that trusts are not registrable, but that trustees may continue to limit their liability only to the extent of the trust assets in a registered instrument (section 128(1) of the LTA); and secondly, to remove the provision allowing trust deeds to be deposited with the Registrar (section 128(2)), which is no longer used. See chapter 3 of the report for an explanation of the policy decisions.

Subclause (1) provides that no notice of a trust may be registered or notified on the register and has no effect if it is. Subclause (2) states that if a registered or notified instrument provides that a person executing the instrument is liable only to the extent of an estate or interest or assets of which that person is trustee, this is not a notice of trust.

Subclause (3) states that the clause is subject to clauses 104 (which relates to trusts of reserves and public lands) and 105 (which relates to caveats against dealings by persons with beneficial estates or interests in land under an express, implied, resulting or constructive trust), and also to any other enactment that requires or permits notice of a trust to be registered or notified on the register. This reflects the fact that certain trusts may be registered (such as trusts of public reserves and trusts under Te Ture Whenua Maori Act 1993), and that a caveat may be entered on the record of title to give notice of trust.

CLAUSE 104 Trusts of reserves

Clause 104 essentially re-enacts section 129 of the LTA in simpler language. Subclause (1) provides that a person, in whom a public reserve (defined in subclause (6)) is vested, holds the land subject to any trust relating to the land. The subclause replaces section 129(1) omitting out of date references to Crown grant, warrant in lieu of grant, and certificate of title.

Subclause (2) provides that the responsible chief executive must give notice in writing to the Registrar of the creation, alteration or revocation of a trust affecting a public reserve, and subclause (3) provides that the Registrar must

then record the trust, alteration or revocation in the register. This subclause replaces section 129(2) of the LTA, substituting “responsible chief executive” for Director-General of Conservation (see subclause (6) below for the definition of responsible chief executive).

Subclause (4) provides that land, other than a public reserve, vested in or transferred to a person under an enactment, vests in that person in the capacity in which the land is held under that enactment, and is subject to any trusts on which it is held under the enactment.

The Registrar must not register or record any matter in the register that prejudicially affects a trust specified in the clause (subclause (5)). Subclause (6) defines a “public reserve” in the same way as in section 2(1) of the Reserves Act 1977, or as land vested in a person under an enactment or instrument as a public reserve. This subclause also defines a “responsible chief executive” as the chief executive of the department or ministry that is for the time being responsible for the administration of the enactment under which the trust affecting the public reserve is created, altered or revoked.

The current section 129 is essentially retained in the Bill. But a public reserve has been defined in terms of the definition in the Reserves Act 1977 (which is new) as well as land specifically vested in a person under an enactment or instrument as a public reserve or for a special purpose (currently in section 129(1)). Section 112 of the Reserves Act 1977 provides that there must be compliance with trusts upon which the reserve is held, and that section 129 (1)–(3) and (5) of the LTA apply to land reserved by the Crown and land defined under the Reserves Act as a reserve.

Sections 130–131 of the LTA (transferor and trustees registered as joint proprietors may apply for entry of “no survivorship”) and sections 132–133 (effect of such entry and procedure for obtaining an entry) provide that where there is a “no survivorship” notation on the title record no less number of joint proprietors than the number registered may transfer or deal with the land without an order of a High Court judge. These provisions are apparently rarely used and one submitter opposed them as costly and time-consuming. They are omitted from the Bill for those reasons. However, they will need to be retained for existing trusts that use them, in transitional provisions.

Section 135 of the LTA (beneficiary conducting proceedings in the name of trustee) has not been carried forward as it seems to go further than current trust law. The cases hold that a beneficiary may bring proceedings in the name of a trustee only in exceptional circumstances and relief must be equitable. See *Sharpe v San Paulo Railway Co* (1873) 8 Ch App 597; *Fletcher v Fletcher* (1884) 4 Hare 67 at 78; and *Yeatman v Yeatman* (1877) 7 Ch D 210, cited in N Kelly, C Kelly and G Kelly *Garrow and Kelly Law of Trusts and Trustees* (6th ed, LexisNexis Ltd, Wellington, 2005) at [25.2.3].

CAVEATS

CLAUSE 105 Caveats against dealings with land

This clause re-enacts section 137 of the LTA. Subclause (1) sets out who is entitled to lodge a caveat against dealings:

- (a) Any person who claims an interest in the estate or interest whether the interest is capable of registration or not. This expressly endorses the wide view of caveatability: that any person who claims to have an interest in land may lodge a caveat, whether the interest is registrable or not (see chapter 3 of Part 1).
- (b) A person who has a beneficial interest in the land under a trust.
- (c) A person transferring the estate or interest to be held on trust.
- (d) A registered owner may caveat his or her own estate or interest if the owner has another interest distinct from that of registered owner, or establishes to the satisfaction of the Registrar that, at the time the caveat is lodged, there is a risk that the estate or interest may be lost through fraud.

Paragraph (d) is a new ground which was suggested by the Issues Paper (at [7.17]–[7.21]). The rationale for its adoption is discussed in chapter 3 of Part 1. The limitations are designed to avoid large numbers of caveats being lodged by registered owners where there is no good reason to do so.

Subclause (2) provides that a caveat must be executed by the caveator or the agent of the caveator. Often caveats need to be lodged with speed and it is appropriate to continue to allow caveats to be lodged by the person's attorney or agent. This re-enacts section 137(3), removing the reference to attorney as this would be covered by agent.

Subsection (3) provides that the caveat must be in the prescribed form and contain the prescribed information. The Issues Paper considered whether this detail in section 137(2) should remain in the Act or be located in regulations (at [18.2]–[18.6] and Q132). For consistency with other provisions in the Bill and due to the technical and detailed nature of section 137(2), this information should be set out in regulations.

The clause does not re-enact section 137(4), which relates to the time that caveats must be entered on the register as this is covered by the general registration provisions.

CLAUSE 106 Notice of caveat against dealings

This clause re-enacts section 142(b) of the LTA, which relates to notice of caveats against dealings. The Registrar must give notice of the caveat to the registered owner of the estate or interest against which the caveat is lodged.

CLAUSE 107 Effect of caveat against dealings

This clause is re-enacts section 141(1), (2) and (5) of the LTA (subsections (3) and (4) of this section now form clause 108).

Subclause (1) states that as long as a caveat is on the register, the Registrar must not register or record anything that “transfers, charges or prejudicially affects” the estate or interest protected by the caveat. The phrase “prejudicially affects” is a new addition. This phrase reflects how the current section 141(1) operates in practice.

Subclause (2) provides a non-exhaustive list of instruments that the Registrar can register. Paragraph (a) re-enacts section 141(2) and provides that the Registrar may register an instrument lodged for registration before the lodging of a caveat. Paragraph (b) combines section 141(5)(a) and (b) of the LTA. It collapses the paragraphs relating to transmissions into one because they are all transmissions by operation of law.

The term “secondary interests” in section 141(5)(c) and (f) of the LTA has been identified as problematic. Subclause (2) combines these paragraphs into a new paragraph (c) and allows dealings that relate to other estates or interests where the caveat only affects the fee simple estate. This avoids the term secondary interest.

The new paragraph (d) re-enacts paragraph (d) of section 141(5). The new paragraph (e) re-enacts paragraph (e) of section 141(5). The new paragraph (f) re-enacts paragraph (g) of section 141(5). Paragraph (h) of section 141(5) splits into the new paragraphs (g) and (h). The new paragraph (i) re-enacts paragraph (i) of section 141(5). The new paragraph (j) re-enacts paragraph (j) of section 141(5). Paragraph (k) is new and it allows regulations to authorise other types of instruments.

Subclause (3) states that the list in subclause (2) is not exhaustive.

CLAUSE 108 Caveat against dealings not to prevent transfer by mortgagee under power of sale

This clause re-enacts section 141(3) and (4) of the LTA. Subclause (1) provides that the Registrar may register a transfer in the following circumstances, despite clause 107:

- the transfer results from the exercise of a power of sale under a registered mortgage; the transfer results from the purchase by a vendor mortgagee, under section 196 of the Property Law Act 2007, on the sale by the Registrar of the High Court under a power of sale in a registered mortgage; or the transfer results from the purchase by a mortgagee under a power of sale in a registered mortgage in accordance with a court order under section 200(3) of the Property Law Act; and
- the caveat was lodged after the registration of the mortgage; and
- the interest protected by the caveat is the same interest as that to which the mortgage relates and arises under an unregistered mortgage or agreement to mortgage dated later than the date of registration of the registered mortgage.

This clause extends section 141(3) by including a reference to section 200(3) of the Property Law Act.

Subclause (2) provides that on registration of such a transfer, the caveat lapses and the estate or interest of the mortgagor vests in the purchaser free from the caveated interest.

CLAUSE 109 Removal of caveat against dealings

Clause 109 re-enacts section 143 of the LTA in relation to caveats against dealings. This clause allows a person to apply to the court to have a caveat removed. In this situation the High Court Rules apply and the detail relating to process in section 143 is unnecessary, and not repeated in the new clause.

CLAUSE 110 Lapse of caveat against dealings

This clause re-enacts and combines sections 145 and 145A of the LTA.

Subclause (1) provides that the following persons may apply to the Registrar to lapse a caveat against dealings:

- (a) a person who wishes to register an instrument affecting the estate or interest protected by the caveat (section 145 of the LTA); or
- (b) the registered owner of the estate or interest affected by the caveat (section 145A of the LTA).

Under subclause (2) the Registrar must give notice of the application to the caveator. Subclause (3) provides that the caveat will lapse after the Registrar gives notice to the caveator unless:

- within 10 working days of receiving notice from the Registrar, the caveator gives notice to the Registrar that an application has been made to the court that the caveat does not lapse; and
- within 20 working days after the notice of the application is served on the Registrar (the relevant period), an order of the court is served on the Registrar.

The clause retains the same time periods as the LTA. Often the caveat will not be able to be fully dealt with by the court within 20 working days. However, the new clause provides that within that period the court can make orders that the caveat not lapse; interim orders that the caveat not lapse; or orders adjourning the application (subclause (4)). The ability to make interim orders and adjourn proceedings reflects current practice and addresses concerns raised in the Issues Paper (at [18.24]–[18.26]). In relation to concerns about the timeliness of dealing with these applications, a possible solution would be to allow these applications to be dealt with by the District Court. However, it does not seem that this would result in the applications being addressed more swiftly and we do not support removing the High Court's jurisdiction over any LTA matters. Subsection (5) provides that the caveat will lapse if the court makes an order to that effect before the close of the relevant period.

If an interim order, or an order adjourning the application, is made, the caveat will not lapse, if, after the close of the relevant period, the court makes a final order that the caveat not lapse and serves it on the Registrar (subclause (6)). Alternatively, in that situation, the caveat will lapse, if, after the close of the relevant period, the court makes a final order that the caveat lapse and the order is served on the Registrar (subclause (7)).

Subclause (8) is new and allows the process to be stopped without the caveat lapsing, if an application to the court has been made, with the leave of the court, and, if not, at any time. Currently the lapsing process cannot be stopped. This adopts the proposal suggested in the Issues Paper (at [18.27]–[18.28]).

CLAUSE 111 Withdrawal of caveat against dealings

This clause re-enacts the part of section 147 of the LTA which allows caveats to be withdrawn. Section 147 relates to withdrawal of caveats and consent to dealings without withdrawing the caveat. This has been split into two provisions for greater clarity.

Clause 111 provides that the caveat may be withdrawn as to the whole or part of the estate or interest by the caveator or the caveator's agent. The Bill does not repeat the requirement in section 147 that an agent have written authority.

CLAUSE 112 Caveator may consent to registration of instrument

This clause re-enacts the part of section 147 of the LTA relating to consenting to dealings and replaces section 147A of the LTA. These provisions allow a caveator to consent to dealings. Section 147 relates to paper transactions and requires explicit consent. However, section 147A provides that for electronic conveyancing, a dealing is regarded as being made subject to the rights of the caveator. The new provision is generic and applies to electronic and paper dealings. It provides that the caveator may consent and that the consent is subject to the rights of the caveator.

CLAUSE 113 Second caveat against dealings may not be lodged

This clause re-enacts section 148 of the LTA. This clause provides that a second caveat, by or on behalf of the same person, to protect the same estate or interest as a caveat that has been removed under clause 109 or lapsed under clause 110, may not be lodged unless the court orders otherwise. The Bill removes references to the Registrar. This is designed to make it clearer that the obligation not to lodge such a caveat is on the caveator. In practice, if a caveat is in clear violation, it will not be entered on the register by the Registrar.

This provision will continue to apply to notices of claim under section 42 of the Property (Relationships) Act 1976. See discussion in the Issues Paper at [18.38]. The legislation places the obligation on the caveator, not the Registrar, so there is no obligation on the Registrar to verify whether they are, in fact, the same interest.

CLAUSE 114 Registrar not required to verify entitlement to lodge caveat against dealings

This clause re-enacts section 148A of the LTA. This section is substantially the same as in the current legislation. It provides that the Registrar does not have to verify that a person is entitled to lodge a caveat (subclause (1)), although a caveat must comply with clause 105 (subclause (2)).

CLAUSE 115 Compensation for lodging of improper caveat against dealings

This clause re-enacts section 146 of the LTA. Subclause (1) provides that a person, including the agent of a person, who lodges a caveat without reasonable cause is liable to pay compensation to a person who suffers loss or damage. This subclause is not restricted to the caveator. The person lodging can be a practitioner, or any other agent of the caveator. Under subclause (2) a claim for compensation must be heard and determined by the court. Subclause (3), which is new, makes it clear that the clause applies to second caveats under clause 113.

CLAUSE 116 Registrar may lodge caveat

This clause re-enacts section 211(d) of the LTA which relates to the Registrar's power to lodge caveats. The clause has been located with the caveat against dealings provisions as a more logical position. The clause attempts to spell out more clearly when the Registrar may lodge a caveat. The grounds are when a dealing may prejudice (subclause (1)):

- a minor;
- a person who the Registrar is satisfied is not capable of managing his or her own affairs;
- a person because of a misdescription of the land or estate or interest;
- a person through fraud or improper conduct.

The clause excludes any reference to a person absent from New Zealand (mentioned in section 211(d) of the LTA). This is outdated as it is obviously possible now to manage land from a distance. "Improper dealing" in section 211(d) has been replaced by the phrase "improper conduct". This phrase is designed to cover a broader range of activity.

As registered owners will be able to lodge caveats to protect their own interest under clause 105 where they suspect fraud, this may remove some of the need for the Registrar to lodge a caveat. The clauses relating to Registrar's caveats are stand-alone provisions. Clauses 105-115 do not apply to them.

CLAUSE 117 Notice of caveat

This clause is new. It provides for giving notice of a Registrar's caveat without reference to the other caveat provisions. The Registrar must give notice to the owner of the estate or interest against which the caveat is lodged.

CLAUSE 118 Effect of Registrar's caveat

This clause is new. It sets out the effect of a Registrar's caveat without reference to the other caveat provisions. The clause provides that the Registrar must not register or record anything unless he or she is satisfied that it will not prejudice the person whose interest the caveat protects.

CLAUSE 119 Registrar may withdraw caveat

This clause is new. It provides for withdrawal of a Registrar's caveat without reference to the other caveat provisions. The Registrar may withdraw a Registrar's caveat at any time.



Part 11

Applications to bring land under Act

Part 11 re-enacts the provisions relating to voluntary applications to bring land under the Act, principally located in sections 19–32 of the LTA. These provisions were discussed in chapter 20 of the Issues Paper. They have been relocated to near the end of the Bill. While the prominent position at the beginning of the LTA may have been appropriate in the early years of the Torrens system, these provisions are no longer of such importance. Most land has been brought under the LTA and such applications are likely to be rare.

CLAUSE 120 Land to which this Part applies

This clause substantially replaces section 19 of the LTA. Clause 120 provides that the Part applies to land which is not subject to the land transfer system, but has been alienated by the Crown by Crown grant or other instrument. The clause removes the requirement that, where no Crown grant has been issued, the application must be approved by the Surveyor-General and assented to by the Governor-General. This process is no longer necessary.

CLAUSE 121 Applications to bring land under Act

This clause re-enacts of section 20 of the LTA. Section 20(1) sets out both those who have standing to make an application (for example, a person who claims to be entitled to possession of the fee simple – paragraph (a)), and those who are able to make a claim on behalf of someone else who has standing to make a claim (for example, the guardian of an infant – paragraph (e)). Subclauses (1) and (2) distinguish between these categories of claimants.

Subclause (1) lists those persons who have standing to make an application to bring land under the land transfer system. This clause is substantially the same as section 20. For example, it includes a person in whom the fee simple is vested in possession (paragraph (a)), or a person who claims a life estate in possession (paragraph (c)). Subclause (1)(b) makes it explicit that a person may make an application where they are entitled to the land by virtue of adverse possession. While this is how the current law is applied, on the face of section 20 of the LTA this is unclear.

Subclause (2) lists those persons who can make a claim on behalf of someone who has standing under subclause (1). The clause covers substantially the same classes of persons, however, there have been some changes from section 20 of the LTA. The guardian of a minor (paragraph (a)) is still covered as are incapacitated persons (paragraph (b)). “Incapacitated” is defined in clause 5. However, subclause (2)(b) removes any reference to the Mental Health (Compulsory Assessment and Treatment) Act 1992 and replaces this with a more generic provision. This is because, even though a person may be considered mentally disordered under the Mental Health (Compulsory Assessment and Treatment) Act, this does not in itself mean that the person is incapable of dealing with property matters. The term “protection order” used in section 20(1)(g) in relation to the Protection of Personal and Property Rights Act 1988 has been replaced with “property order” as this is the term used in that Act (paragraph (c)). The reference to the holder of a power of attorney where the proprietor is absent in section 20(1)(h) of the LTA has been removed as it is clear that an attorney can exercise such a power without specific statutory authority.

Subclause (3) re-enacts the proviso in section 20(1)(a), and provides that a person who is beneficially entitled to the estate or interest in land must consent to an application under that paragraph (subclause (1)(a)) if the trustees do not have a power to sell.

Subclause (4) re-enacts section 20(1)(b) and provides that a person entitled to a future estate must consent to the application of the person whose application is on the grounds that they have a life estate in the land (subclause (1)(c)).

Subclause (5) replaces a limitation in section 20(1)(c) and provides that a person who has the power to dispose, legally or equitably, of the fee simple in possession, may only make an application, if this power is subject to consent by another person, with the consent of that other person.

Subclause (6) re-enacts the part of section 20(1)(d) which provides that an application by a person who owns the land as a public reserve (under subclause (e)) is subject to any trust affecting the land.

Subclause (7) re-enacts section 20(2)(a), and provides that a person owning undivided shares in the land must make the application together with any other owners of undivided shares in the land.

Subclause (8) re-enacts section 20(2)(b) and provides that an application by a mortgagor can only be made with the mortgagee’s consent.

Subclause (9) re-enacts section 20(2)(c), and provides that the application can only be made by a mortgagee, if the mortgagee is exercising a power of sale.

Subclause (10) provides that the application must be in the prescribed form and be accompanied by the prescribed information. This clause means that section 21 of the LTA is not necessary.

Subclause (11) provides that clause 49 (rejection and requisition of instruments) applies with necessary modifications. This replaces the parts of section 25 of the LTA which allow applications to be rejected. The Issues Paper asked whether more flexibility to reject deficient applications was needed (at [20.14]). This provision allows for such flexibility.

Section 20(3) of the LTA has not been brought forward into the Bill. It is obsolete because these matters are no longer dictated by body corporate rules.

CLAUSE 122 Notice of application

This clause relates to notice. The process for giving notice of an application is set out in sections 23, 24, 25 (in part), 26 and 28 of the LTA.

Section 23 of the LTA provides that if it appears to the Registrar that land in respect of which the application is made is held by the applicant and that all interested persons (other than lessees under a lease for years) are parties to the application, the Registrar must give notice of the application in the *Gazette* and in one or more newspapers published in the locality. The notice must specify a time limit (not less than the prescribed period) within which a caveat can be lodged against bringing the land under the Act.

Section 24 provides that if it appears that the applicant is the original Crown grantee and nothing affecting the title other than the Crown grant has been registered, the notice in section 23 may be dispensed with and the land can be brought under the Act.

Section 25 applies where it appears to the Registrar that a person who has an interest in the land is not a party to the application, or that the evidence provided by the applicant in support of the claim is deficient. In this situation the Registrar may either reject the application (see now clause 121(11)), or provide notice of a time limit within which a caveat must be lodged against bringing of the land under the Act. The section sets out how this notice should be provided.

Section 26 provides that the Registrar should post notice of an application in a “conspicuous place” in an office of the Registrar, and in other places that are deemed “expedient”. The Registrar should also forward copies of the notice to the persons (if any) stated by the applicant to be in occupation of the land, or to be occupiers or owners of adjoining land.

Section 28 provides that if there is a failure in the service of notice, the Registrar may extend the period of time in which a caveat can be lodged.

Clause 122 replaces these provisions with a new process for giving notice. Under subclause (1) if it appears to the Registrar that the applicant is entitled to have the land brought under the land transfer system, the Registrar must:

- give public notice of the application (public notice is defined in clause 186);
- give notice to every person who appears to have an estate or interest in the land;
- give notice to every owner or occupier, other than the applicant, of adjoining land; and
- give notice to other persons in the manner that the Registrar thinks fit.

The notice must specify the period in which a caveat can be lodged and be in the prescribed form and contain the prescribed information (subclause (2)).

Subclause (3) provides that if the Registrar considers that the notice was not effective or that it is desirable to give further notice he or she may give notice again under subclause (1) and specify a further period in which a caveat may be lodged.

CLAUSE 123 Caveat against bringing land under Act

This clause replaces section 136 of the LTA. Section 136 is located among the group of sections relating to caveats in the LTA (along with provisions relating to caveats against dealings) and provides that a person who claims to have an interest in land that is subject to an application to bring land under the Act, may lodge a caveat. Section 136(2) sets out the information that must be contained in the caveat and section 136(3) provides that the caveat must be executed by the caveator or his or her agent. The clauses relating to caveats under Part 11 of the Bill also replace the process set out for notifying outstanding interests when land is brought under the Act (sections 58 and 59 of the LTA) with a caveat system to protect these types of interests (see clauses 128 and 129).

Clause 123 sets out who can lodge a caveat in more detail than does section 136 of the LTA. Subclause (1) distinguishes these different caveators in order to clarify the different effects depending on the type of interest claimed. These types of interests are:

- (a) a person claiming a freehold estate;
- (b) a person claiming to be entitled to an estate or interest (that is not a freehold) under an instrument; and
- (c) a person entitled to an estate or interest (that is not a freehold estate), but not under an instrument.

The type of interest in (a) follows a different process for lapsing and has a different effect (under clause 127) from those in (b) and (c) (under clause 128) because ownership of this type of interest would be inconsistent with the application to bring land under the land transfer system. In contrast, the interests in (b) and (c) can exist once the applicant's interest is brought under the system, but may need recognition in the land transfer system, for example, registration against the title or protection by a caveat against dealings.

Paragraph (b) is designed to cover interests where there is some documentary evidence of ownership and paragraph (c) is designed to cover interests where there is no documentary evidence. The process to be followed according to the Bill is identical regardless of whether the interest falls under (b) or (c).

Subclause (2) provides that the caveat must be executed by the caveator or the caveator's agent. Subclause (3) provides that the caveat must be in the prescribed form and contain the prescribed information. Subclause (4) applies clauses 111 (withdrawal of caveat against dealings), 113 (second caveat against dealings may not be lodged), 114 (Registrar not required to verify entitlement to lodge caveat against dealings) and 115 (compensation for lodging of improper caveat against dealings) with necessary modifications and as if the caveat were a caveat against dealings. The other caveat against dealings provisions are either not relevant to this type of caveat or have an equivalent within Part 11.

CLAUSE 124 Effect of caveat

This clause provides that while there is a caveat in force under this Part, the Registrar may not bring the land under the land transfer system. This replaces section 140 of the LTA.

CLAUSE 125 Notice of caveat

This clause re-enacts section 142(a) of the LTA which provides for notice of caveats against bringing land under the Act. The clause provides that the Registrar must give notice of the caveat to the applicant.

CLAUSE 126 Removal of caveat

This clause re-enacts section 143 of the LTA in relation to caveats against applications to bring land under the Act. This allows the applicant to apply to the court to have the caveat removed. In this situation the High Court Rules would apply and it is not necessary to specify matters relating to process in section 143. They are not repeated in the new clause.

CLAUSE 127 Procedure where caveat lodged by person under section 123(1)(a)

This clause replaces section 144 of the LTA in relation to a caveator who claims to be entitled to the freehold estate. Section 144 provides that a caveat automatically lapses after three months unless the caveator takes proceedings in the High Court to have the claim upheld. Clause 127 re-enacts this process for caveats under clause 123(1)(a), that is, where the caveator claims a freehold estate in the land.

Under subclause (2) the caveator must commence a proceeding in the court to determine entitlement of the applicant and give notice of this to the Registrar. The proceeding must be commenced within 60 working days after the caveat is lodged (subclause (3)).

Subclause (4) and (5) are new provisions and provide that, in a proceeding, the court may make an order that the applicant is entitled to have the land brought under the land transfer system; an order that the applicant is not entitled to have the land brought under the system; or any other order that the court thinks fit (subclause (4)). These orders or the decision of the court on appeal must be given effect to by the Registrar (subclause (5)). Subclause (6) is also new and provides that copies of orders or decisions of the court, notice of appeal, and a decision of a court on appeal, must be served on the Registrar.

CLAUSE 128 Procedure where caveat lodged by person under section 123(1)(b) or (c)

This clause replaces section 144 of the LTA (which relates to lapsing caveats against bringing land under the Act) and sections 58 and 59 of the LTA (which relate to outstanding interests when land comes under the LTA).

Clause 128 sets out the process for dealing with caveats where the caveator claims an estate or interest less than freehold under clause 123(1)(b) and (c). Unlike under section 144, clause 128 provides that the caveat will not automatically lapse unless the caveator starts proceedings in the court. This is because the interests protected by these caveats are not necessarily inconsistent with the applicant's interest in the land.

Under subclause (2), within 20 working days, the applicant must give notice to the Registrar stating whether or not the applicant agrees to the land being brought under the land transfer system, subject to the caveator's interest, and serve a copy of this notice on the caveator.

If the applicant agrees to the land being brought under the land transfer system subject to the caveator's interest, the Registrar must register the applicant as registered owner, subject to the caveator's interest (subclause (3)).

If the applicant does not give notice within 20 days or does not consent to the interest specified in the caveat, the caveator must commence proceedings and give the Registrar notice of this (subclause (4)). The proceeding must be commenced and notice given within 60 working days after the earlier of the expiry of the 20 working days referred to in subclause (2), or the date on which notice is served on the caveator by an applicant who does not accept the caveated interest (subclause (5)).

Subclause (6) and (7) are new provisions that provide that, in a proceeding, the court may make an order that the applicant is entitled to have the land brought under the land transfer system; an order that the applicant is not entitled to have the land brought under the system; or any other order that the court thinks fit (subclause (6)). The Registrar must give effect to these orders or any decision on appeal (subclause (7)). Subclause (8) is also new and provides that copies of decisions of the court, notice of appeal, and a decision of a court on appeal, must be served on the Registrar.

This section is subject to clause 129 (subclause (9)).

CLAUSE 129 Registrar may require instrument creating or recording estate or interest of caveator

This is a new clause that sets out the process if a caveat under clause 123(1)(b) or (c) is upheld. The clause replaces the process in sections 58 and 59 of the LTA which relate to notifying outstanding interests when land is brought under the Act. Under subclause (1), the Registrar may require the applicant and the caveator to lodge an instrument in registrable form. This is because it is likely that the interest, while still a registrable interest, will not be in the form of a registrable instrument. Under subclause (2), if the interest

is unregistrable, the Registrar may require the caveator to lodge a caveat against dealings under clause 105. Clause 105 now makes it clear that a caveat can be used to protect unregistrable interests.

CLAUSE 130 Withdrawal of application

This clause replaces section 29 of the LTA. It provides that the applicant may withdraw the application at any time before the applicant is registered as the owner of the estate or interest (subclause (1)). If a person has lodged a caveat or consented to the application under clause 121(3), (4), (5) or (8), the application may only be withdrawn with the consent of the caveator or the person who has consented to the application. If the caveator or the person who has consented to the application does not consent to the application being withdrawn, the court may make an order approving the withdrawal (subclause (2)).

CLAUSE 131 Registration of applicant

This clause re-enacts section 27 of the LTA and provides that the Registrar must register the applicant as the registered owner if the applicant has complied with Part 11, no caveat is lodged, or any caveat has lapsed or has been withdrawn, and there is no reason to prevent the Registrar from doing so.

The Issues Paper discusses the problem of where a caveatable interest comes to light outside the timeframe for lodging caveats (at [20.16]). Such interests may be fatal to the applicant's claim yet there is currently no way to stop the application under the LTA. Clause 128(c) allows the Registrar to take into account any reason that may prevent the Registrar from registering the applicant as owner of the estate or interest. This would allow the Registrar to take such interests into account.

CLAUSE 132 Cancellation of previous instruments of title

This clause replaces section 30 of the LTA. It provides that on registration of the applicant as owner of the estate or interest, the Registrar must cancel any previous instruments from which the applicant's title was derived (subclause (1)). Under subclause (2) if the instrument relates to an interest other than the interest of which the applicant is registered as owner, the Registrar must endorse the instrument to the effect that it is cancelled to the extent of the estate or interest of which the applicant has become registered owner.

CLAUSE 133 Registration of Crown grant under Deeds Registration Act 1908 unnecessary

This clause replaces section 32 of the LTA. The clause provides that the Registrar does not need to register a Crown grant under the Deeds Registration Act 1908 if the land is the subject of an application under this Part of the Bill.

Part 12

Applications for title to land under this Act based on adverse possession

Part 12 of the Bill re-enacts the Land Transfer Amendment Act 1963 (the 1963 Act), which concerns applications for prescriptive title to land. Prescriptive title is title to land based on possession adverse to the registered owner. The terminology “adverse possession” is commonly used and is reflected in the title to Part 12. There is little substantive change from the 1963 Act.

Adverse possession was discussed in chapter 19 of the Issues Paper. Those who made submissions on this area unanimously supported the regime in the 1963 Act, including the period of 20 years’ continuous possession before an application can be made.

The Issues Paper discussed the “equity exception” based on equitable estoppel and mistaken boundaries being added as grounds for an application (at [19.22]–[19.25], see Land Registration Act 2002 (UK), Part 9). One submitter favoured these being adopted in New Zealand. However, most submitters were not in favour of this change, there being other avenues for relief by way of in personam claims for estoppel, and under the Property Law Act 2007 for mistaken boundaries (encroachment claims). No changes are proposed in this regard.

All submitters agreed that the 1963 Act should be re-enacted as part of the Bill.

CLAUSE 134 Application for record of title based on adverse possession

This clause re-enacts section 3 of the 1963 Act with little change. The terminology is modernised.

Subclause (1) permits a person to apply to the Registrar for the creation of a record of title in their name as the owner of freehold land if a record of title has been created for the estate, or a Crown grant for the land has been registered

(clause 134(1)(a)); the applicant has been in continuous possession for at least 20 years (clause 134(1)(b)), and that possession would have entitled the person to apply for a record of title if the land were not subject to the land transfer system (clause 134(1)(c). Subclause (2) provides that (a) possession by a person through or under whom the applicant claims to be entitled must be treated as possession by the applicant; and (b) possession by one or more joint tenants or tenants in common is not possession by another joint tenant or tenant in common, and is capable of being possession against another joint tenant or tenant in common. Subclause (3) requires the application to be in the prescribed form and contain the prescribed information.

Subclause (4) is new but effectively replaces section 6 of the 1963 Act (Registrar to refuse application if evidence insufficient). Where the application fails to comply with Part 12, clause 49, which concerns the procedure for rejection and requisition of instruments, will apply to the application with any necessary modification. The prescribed period for an adverse possession application remains 20 years continuous possession but is now specifically subject to clauses 136 and 137 (see subclause (5)).

CLAUSE 135 Information relating to land

Clause 135 is new but repositions and effectively replaces section 14 of the 1963 Act, which currently requires a certificate by a cadastral surveyor, or a plan of survey concerning the boundaries of the land once all notices advertising the application have been given, all time limits have expired and there are no caveats. Clause 135 now requires this information to accompany the application.

The advantage of having such information (a certificate or plan of boundaries of the land) at the time of an application (rather than after advertisement of the application) is discussed in the Issues Paper (at [19.32]). Essentially it avoids publication of inaccurate details of the land claimed. Submitters supported clearer definition of the land and of who would be affected by the application. At present the Registrar may well reject an application that is not fully informative as regards the extent of the land claimed.

Clause 135(1) defines, for the purposes of the clause, terms related to the information required to be submitted with the application (“occupation boundary” and “title boundary”), as in section 14(1).

Subclause (2) provides for an application to be accompanied by a certificate by a cadastral surveyor; or, alternatively, by a survey plan such as is required under clause 190. Subclause (3) states that the boundaries of the survey plan must be drawn in terms of the occupation boundaries of the land, but subclause (4) provides that if the occupation boundary is outside the title boundary, the plan must be in terms of the title boundary.

Subclauses (3) and (4) simplify section 14(3) of the 1963 Act. Section 14(3)(a) provides that where the title boundary of the land (or any part thereof) is the common boundary between that land, or any part thereof, and land owned by the Crown or any local authority or held for any public purposes, the plan shall be drawn in terms of the title boundary, even if the applicant does not occupy the land up to that boundary. This provision has not been continued as it is now common for public land to be registered, and submitters did not consider that there should be different outcomes depending on whether land adjoining the land claimed was publicly or privately owned (see discussion in the Issues Paper, regarding publicly owned “intervening land” at [19.32]–[19.38] and regarding non-publicly owned intervening land at [19.39]–[19.42]).

Section 16 of the 1963 Act concerns title to intervening land where the fence is not on the boundary and the land is not publicly owned. Section 16 allows an applicant who occupies land adjacent to a strip of land (the “intervening land”) to acquire that land, after going through the full application process, even though the applicant may not have been otherwise entitled to it. The rationale for the policy was administrative tidiness. There are concerns that the current provision creates inconsistencies and has eroded the indefeasibility principle more than is needed. It is seldom used. It is therefore proposed to discontinue the provision. This will be consistent with the omission of section 14(3)(a).

CLAUSE 136 Incapacity of registered owner

Section 4 of the 1963 Act deals with the situation where the registered proprietor is under a disability. It provides that if the registered proprietor is under a disability at the end of the 20 year period of adverse occupation, no application may be made until the person ceases to be under a disability. The section provides that a person is under a disability if he or she is an infant or of unsound mind. It further provides that a person is conclusively presumed to be of unsound mind if he or she is an inmate (other than as a voluntary patient) in a hospital within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992. The problem with the approach adopted by the 1963 Act is that a person who is a patient in a hospital under the Mental Health (Compulsory Assessment and Treatment) Act 1992 may be capable of understanding the implications of an adverse possession application against him or her, and of making decisions in relation to the matter. Each situation is best assessed having regard to the circumstances relating to the mental health of the individual rather than applying a blanket rule that treats every person as disabled and therefore unable to deal adequately with a claim. For minors, however, it is appropriate to have a blanket rule; this is provided separately in clause 137.

For these reasons, clause 136 provides that if a registered owner of land that is the subject of an adverse possession application proves that at any time during the 20 year period he or she was incapacitated, the court may extend the period (see subclauses (1) and (2)) having regard to a range of factors specified in subclause (3). These are whether a representative managed the person’s affairs relating to ownership of the land, any steps taken by the representative, the effects or likely effects on the applicant of extending the 20 year period, and any other relevant matters.

“Incapacitated” in terms of intellectual or mental impairment is defined in clause 5 of the Bill (as is “intellectual or mental impairment”).

CLAUSE 137 Minors

Clause 137 provides that for a minor the 20 year period in clause 131 does not run during the person's minority. This replaces section 4 of the 1963 Act in relation to minors. As explained under clause 136, section 4 provides that an adverse possession cannot be made until the registered proprietor ceases to be under a disability (which covers infancy). In contrast, under clause 137, the 20 years does not start to run until the registered owner ceases to be a minor.

CLAUSE 138 Certain applications prohibited

Clause 138, which prohibits certain applications, is the equivalent of section 21 of the 1963 Act. It is repositioned so that it follows the provisions setting out who can make application. It is otherwise unchanged except for some simplification of the language. Applications that are prohibited are any in respect of Crown land; Māori land (within the meaning of Te Ture Whenua Maori Act 1993); local authority land; land held in trust for a public purpose noted on the register; land occupied by the owner of adjoining land or any other person by reason of a mistaken marking of a boundary; and land occupied by the owner of adjoining land or any other person by reason of a change in the course of a river or stream, or isolation of land from other land by a river or stream. "Local authority" is now defined in clause 5 of the Bill. Submitters considered that the exclusions set out in the current section 21 of the 1963 Act are appropriate.

CLAUSE 139 Evidence

Clause 139 re-enacts section 5(2) and (3) of the 1963 Act. The clause allows the Registrar to dispense with a requirement to provide information that the Registrar is satisfied cannot reasonably be provided by the applicant, or to require the applicant to provide further information. The need for additional information to be provided should be reduced under the Bill, having regard to the information that must be provided with the application under clause 134.

CLAUSE 140 Notice of application

Clause 140 re-enacts section 7 of the 1963 Act in a more simplified and streamlined form. The Registrar, once satisfied that the applicant complies with the Part must:

- give public notice of the application (subclause(1)(a)), and
- give notice to every person who appears from the register to have an estate or interest in the land or part of the land to which the application relates, or who, in the Registrar's opinion, has, or may have, an estate or interest or claim to an estate or interest in the land to which the application relates (subclause (1)(b)).
- give notice to adjoining owners or occupiers (subclause (1)(c)). This is a new requirement but conforms to current practice.
- give notice in any other way and to any other persons the Registrar thinks fit (subclause (1)(d)).

Subclause (2) requires the notice to specify a date by which a caveat may be lodged to prevent an application. Subclause (3) permits the Registrar to extend the period within which a caveat may be lodged under clause 141. The form and content of the notice in subclause (2) will be prescribed in regulations (subclause (4)).

CLAUSE 141 Caveats against application

Clause 141 is the equivalent of section 8 of the 1963 Act and provides for lodging caveats against adverse possession applications. Section 8 applies a number of the caveat sections in the LTA to caveats under the 1963 Act.

Subclause (1) enables a person claiming an estate or interest in the land to lodge a caveat against the application. Subclause (2) provides that the caveat must be executed by the caveator or the caveator's agent. Under subclause (3), the caveat must be lodged within the time specified in the notice under clause 140 and it must be in the prescribed form and contain the prescribed information. Under subclause (4), clauses 111 (withdrawal of caveat against dealings), 113 (second caveat against dealings may not be lodged), 114 (Registrar not required to verify entitlement to lodge caveat against dealings) and 115 (compensation for lodging of improper caveat against dealings) apply with necessary modifications.

CLAUSE 142 Notice to applicant

This clause states that the Registrar must give notice of the caveat to the applicant. Section 8 of the 1963 Act applies section 142 of the LTA, which relates to providing notice of a caveat to a registered owner or applicant. This provision is set out in full for greater clarity.

CLAUSE 143 Removal of caveat

The court may order, on application by the applicant, that the caveat be removed. This provision is new. Under section 8(2) of the 1963 Act, section 143 of the LTA, which allows an application to the court to have a caveat removed, is expressly not applied. However, it is hard to see the justification for denying the applicant the right to apply to the court to have a caveat removed at the outset rather than having to let the objection process take its full course.

CLAUSE 144 Caveat by registered owner of fee simple or other estates

This clause replaces section 9 of the 1963 Act, in simpler and shorter form. It provides that the Registrar must refuse an application if satisfied that a caveat is lodged under clause 141 by a registered owner of a fee simple estate, life estate, or a future estate. The caveat can be lodged by the registered owner or by his or her authorised agent. The provisions in section 9(2) and (3) of the LTA, requiring the production of evidence to satisfy the Registrar that the person executing the caveat has been duly authorised, have not been carried forward as there are no longer considered to be the same risks that an agent may not be duly authorised. An authorised agent includes an attorney.

As in section 9 of the 1963 Act, a caveat lodged under clause 144 stops an application completely. This is consistent with indefeasibility of registered title.

Most submitters considered that the Act had the appropriate balance of rights between a registered owner and an adverse possessor claimant, although one submitter thought a registered owner should not be able to stop an adverse possession claim simply by lodging a caveat. As the policy of the Act is to protect registered title unless circumstances are exceptional, we consider that the registered owner should be able to stop a claim by lodging a caveat. The adverse possessor claimant can still re-apply if it seems worthwhile.

CLAUSE 145 Caveat by beneficial or equitable owner of fee simple or other estate

Clause 145 is the equivalent of section 10 of the 1963 Act. It applies if the Registrar is satisfied that a caveat has been lodged under clause 141 by a person claiming to be the beneficial or equitable owner of a fee simple estate, a life estate, or future estate that has not terminated (subclause (1)). Such estates might be evidenced on the register by a transmission to an executor or trustee, or pursuant to clause 66 (life and other limited freehold estates).

Subclause (2) provides that the Registrar must, within a prescribed time, give notice to the caveator to (a) establish the claim and become registered, or (b) satisfy the Registrar that the claim is valid but not capable of being converted into a registered estate or interest.

For clarity subclause (3) provides that the caveat lapses once time to establish the claim has run out – not that it is “deemed” to have lapsed as in section 10(2) of the 1963 Act. If the caveat lapses the Registrar must remove it from the record of title (subclause (4)).

Subclause (5) requires the Registrar to refuse the adverse possession application if (a) satisfied the estate or interest is established from the register itself, as would be the case with a future estate; or (b) the caveator complies with subclause (2) (a) or (b) above.

CLAUSE 146 Caveat by person entitled to other estate or interest registered or notified on record of title

Clause 146 replaces and substantially re-enacts section 11 of the 1963 Act. Subclause (1) provides that the clause applies if the Registrar is satisfied that a caveat has been lodged by a registered owner of, or a person notified on the record of title as entitled to, an estate or interest in the land or any part of it, other than an estate covered by clauses 144 and 145. This covers, for example, registered easements, registered mortgages or covenants notified on the record of title. The adverse possession applicant has the option of taking title subject to the estate or interest of the caveator (subclause (2)). If the applicant accepts, the caveat then lapses and the Registrar must create a record of title subject to the caveator’s estate or interest (subclause (3)).

If the applicant fails to take up that option, the Registrar must refuse the application: subclause (4). Subclauses (5) and (6) apply specifically to registered mortgages. The applicant must be treated as (a) registered owner of the land for the purposes of clause 86 (court may order mortgage to be discharged if mortgagee's remedies barred by Limitation Act 1950); and (b) registered owner of the land and the mortgagor for the purposes of subpart 5 of Part 3 of the Property Law Act 2007. Subpart 5 of Part 3 deals with restrictions on exercise of mortgagees' powers (giving of notice before exercise of powers for example). Subclause (6) provides that if the applicant accepts title subject to a mortgage, nothing in subpart 8 of Part 3 of the Property Law Act applies to a transfer of the freehold estate by the applicant or by a person who derives title through the applicant. Subpart 8 of Part 3 of the Property Law Act covers the liability to a mortgagee of person who accepts a transfer, transmission or assignment of property subject to a mortgage.

CLAUSE 147 Caveat by person entitled to other estate or interest

Clause 147 replaces section 12 of the 1963 Act covering caveats by the owner of an equitable estate or interest less than fee simple and not already referred to in clauses 144–146, for example, an unregistered mortgagee or lessee (subclause (1)).

Subclause (2) provides that the Registrar must give notice requiring the caveator, within a prescribed time, to establish the claim, and become registered, or satisfy the Registrar that the claim is valid but not capable of being converted into a registered estate or interest.

For clarity, subclause (3) provides that the caveat lapses once time to establish the claim has run out if the caveator has not complied with subclause (2) – not that it is “deemed” to have lapsed as in section 12(2) of the 1963 Act. The Registrar must note the lapsing on the record of title (subclause (4)).

Subclause (5) provides that if the caveator complies with subclause (2)(a), clause 146 applies with modifications so that the adverse possession applicant may opt to take title subject to the caveator's interest.

Subclause (6) provides that if the caveator complies with subclause (2)(b), or the estate or interest claimed is evidenced by the register, clause 146 applies with modifications so that the adverse possession applicant may opt to take title subject to the caveator's interest.

CLAUSE 148 Registration of applicant as owner of freehold estate

This clause is the equivalent of section 15 of the 1963 Act and provides for registration of an applicant once three prerequisites have been satisfied (as in section 15(1)(a)–(c)). They are that the applicant has complied with this Part of the Bill (such as the requirement of possession for 20 years); any caveat lodged has lapsed or been withdrawn, and there is no reason preventing the Registrar from registering the applicant as registered owner of an estate in fee simple in the land, and creating a record of title.

Subclause (2) provides that the record of title must be free of any other estates or interests unless it is subject to any estate or interest under clauses 146(3) or 147(5) or (6).

CLAUSE 149 Cancellation of record of title

Clause 149 is the equivalent of section 18 of the 1963 Act, in a simpler, modernised form. Once a record of title is created for the freehold estate in the name of the applicant as the new owner, the previous record must be cancelled or partially cancelled as far as it relates to the freehold estate (subclause (1)). The cancellation must state that it is made under clause 149 (subclause (2)) and cancellation extinguishes the estate of the previous registered owner, and any other estate or interest recorded or notified on the title (subclause (3)), except if it is an estate or interest recorded or notified under clause 146(3) or 147(5) or (6) (subclause (4)).

CLAUSE 150 Application relating to land of dissolved company

This clause re-enacts section 17 of the 1963 Act and concerns applications where the land is registered in the name of a dissolved company and has vested in the Crown as bona vacantia (subclause (1)). The language has been modernised but the substance is the same.

Subclause (2) provides that the Registrar must not proceed with the application unless either (a) the Crown is entitled to disclaim any estate in the land, has done so, and no proceedings have been commenced by a person to become registered owner of the estate or to restore the company to the companies register; or, (b) if the Crown is not entitled to disclaim the estate, the Secretary to the Treasury consents to the application.

Subclause (3) provides that, if the Registrar knows that a person intends to commence proceedings, the Registrar must give the person notice of the application, and subclause (4) provides that the notice must be in the prescribed form and contain the prescribed information. If the proceedings are commenced within the time specified in the notice the Registrar may only proceed with the application if the proceedings – or an appeal against the dismissal of the proceedings – are dismissed or discontinued (subclause (5)). Subclause (6) provides that if the proceedings are not commenced in time the Registrar must proceed with the application.

Part 13

Title to access strips

As discussed in chapter 22 of the Issues Paper (at [22.1]–[22.2]), before the days of requirements to provide legal access to public roads for allotments in a subdivision, subdividers could set aside land for access to roads (access strips) but might fail to transfer it to the allotment owners. Part 4A of the LTA (comprising sections 89A–89E) was enacted in 1966 to enable owners of allotments in subdivisions, where the access strips were still in the name of the original subdivider, to apply for title to those access strips

Part 13 replaces part 4A of the LTA. Part 4A is unduly complex and difficult to apply in practice. The new Part aims to remove some of the practical problems with the current provisions which have, at times, and for largely technical reasons, operated to prevent applications from succeeding.

Some submitters were in favour of using the “access lot” terminology in the Property Law Act 2007. Section 2 of that Act defines access lot as a separate allotment in a subdivision created to provide access from all or any of the other allotments to an existing road. Part 13 retains the term “access strip” for consistency with the current provisions. However, “adjoining” is used in place of “contiguous” and “lot” in place of “allotment”.

CLAUSE 151 Meaning of access strip

Clause 151 is new and defines the term “access strip”. A separate definition section was supported by submitters. There are two components to the definition. The first is that an access strip is land set aside as part of a subdivision for the purpose of providing access from adjoining lots in the subdivision, and any other lots in the subdivision, to an existing road, and that at the time of the application the access strip is, in the Registrar’s opinion, being used principally for that purpose (paragraph (a)). This differs from the position under section 89A which requires the Registrar to be satisfied that the sole purpose was to provide access to an existing road. The second, which restates section 89A(5), is that the term does not include land accepted or declared by a local authority to be a road, street, service lane, or access way (paragraph (b)).

CLAUSE 152 Application by adjoining owners for title to access strip

Clause 152 replaces part of section 89A. Section 89A(1) currently deals with the position of multiple applicants and the allocation of proportionate shares to them as tenants in common for land subject to the LTA or still under the deeds system. These matters are, in the interests of greater clarity, dealt with separately in clause 161. Section 89A(3) has been re-enacted in clause 158 in order to simplify clause 152.

Clause 152 authorises the owners of the fee simple estate in lots adjoining an access strip to apply for the issue of a record of title to the access strip (subclause (1)). The clause does not apply to an adjoining owner who owns a freehold estate in the access strip: the position of an adjoining owner who owns a freehold estate in the access strip is dealt with in clause 159 (subclause (2)). Subclause (3) provides that the application must be in the prescribed form and contain the prescribed information. Subclause (4), which replaces section 89A(2) of the LTA, provides that if there has been a further subdivision of a lot since the access strip was set aside, the lots in the further subdivision are to be treated as a single lot in the original subdivision. Subclause (5) provides that clause 49 (rejection and requisition of instruments) applies, with necessary modifications, to an application that fails to comply with clause 152.

CLAUSE 153 Notice of application

This clause deals with giving notice of the application, currently dealt with by section 89C of the LTA. Section 89C(1) provides that, unless otherwise provided in Part 4A, notice, plans, caveats and fees and all other matters shall be dealt with in accordance with the provisions relating to applications to bring land under the Act, as far as those provisions are applicable and with necessary modifications. Section 89C(2) provides further notice and caveat provisions for a local authority that would have jurisdiction over the access strip if it were a road, street or a service lane, or an access way. Part 13 of the Bill sets out these matters in greater detail.

Clause 153(1) provides that the Registrar, if satisfied that the application complies with clause 152, must:

- give public notice of the application; and
- give notice to every person who appears from the register to be the owner of a freehold estate in the access strip; or to every person who appears to the Registrar to be the owner of a freehold estate in the access strip (where it is deeds land); and
- give notice to the territorial authority and any statutory body that would have jurisdiction over the access strip if it were a road, a service lane, or an access way; and
- give notice to any other person the Registrar thinks fit.

Subclause (2) provides that the notice must specify a date for lodging a caveat under clause 154, be in the prescribed form, and contain the prescribed information. Subclause (3) permits the Registrar to extend the period within which a caveat may be lodged under clause 154.

CLAUSE 154 Caveats against application

This clause is in substitution for section 89C(1) of the LTA insofar as it provides that matters relating to caveats are to be dealt with in accordance with the provisions relating to applications to bring land under the Act, with necessary modifications (see commentary on clause 153).

Clause 154(1) provides that the following persons may lodge a caveat to prevent the application being granted:

- if the access strip is registered under the land transfer system, the registered owner of a freehold estate in the access strip; or,
- if the access strip is not subject to the land transfer system (that is, it is deeds land), the person claiming to be entitled to a freehold estate in the access strip.

A caveat must be lodged within the time specified in clause 153 (subclause (2)), must be executed by the caveator or the caveator's agent (subclause (3)), and be in the prescribed form and contain the prescribed information (subclause (4)). The Registrar must notify the caveat on the record of title for the access strip or, if the access strip is deeds land, on the relevant record under the Deeds Registration Act 1908 (subclause (5)). A caveat prevents an application being granted but does not prevent a dealing affecting the access strip (subclause (6)). Clauses 111 (withdrawal of caveat), 113 (second caveat may not be lodged except by order of the court) and 115 (a person who improperly lodges a caveat is liable to pay compensation to a person who suffers loss or damage) apply as if the caveat were a caveat against dealings (subclause (7)).

CLAUSE 155 Notice of caveat

Clause 155 requires the Registrar to give notice of a caveat to the applicant.

CLAUSE 156 Removal of caveat

Clause 156 provides that the court may, on application by the applicant, remove the caveat.

CLAUSE 157 Procedure where caveat lodged

Clause 157 provides that if a caveat is lodged by a person whom the Registrar is satisfied is the registered owner of a freehold estate in the access strip or the owner of a freehold estate in the access strip (where the access strip is in deeds land), the Registrar must refuse the application to the extent that it relates to the estate protected by the caveat (subclauses (1) and (2)). A caveat must remain notified under clause 154 if an application is refused or partially refused (subclause (3)).

CLAUSE 158 Owner of access strip who is not an adjoining owner

Section 89A(3) of the LTA provides that an application (by owners of lots adjoining an access strip) cannot proceed unless every owner of the estate in fee simple in the access strip consents to the granting of the application, or cannot be found after such enquiries as the Registrar considers reasonable.

Clause 158 applies similarly to owners of the freehold estate in the access strip, who are not owners of adjoining lots, who:

- cannot be found after reasonable enquiries have been made (subclause (1)(a)); or
- consent to the grant of the application and to forfeiting ownership of the estate (subclause (1)(b)).

The consent must be in the prescribed form (subclause (2)). The application by the adjoining owners must include either proof that the owner of the access strip cannot be found, or that the owner consents to the application (subclause (3)). In both circumstances, if the application complies, subclause (4) provides that the estate of the previous owner vests in the applicants.

CLAUSE 159 Adjoining owner with interest in access strip who is not an applicant

Section 89B of the LTA deals with the situation where there are registered owners of an adjoining lots who are not applicants. In this case, the application can proceed if the adjoining owner consents; such consent must not be unreasonably withheld. However, it also provides that if the non-applicant registered owners cannot be found after enquiries that the Registrar considers reasonable, consent is not necessary. But the rights of the non-applicants in relation to the access strip will not be prejudiced.

There are a number of problems with the current section, some of which were noted in the Issues Paper (at [22.12]). First, it appears that a refusal to consent stops the application proceeding. Secondly, it is unclear whether an adjoining owner will lose their rights over the access strip if they reasonably refuse to consent to the application. Thirdly, section 89C does not distinguish between an adjoining owner who is not an applicant but who has an interest in the access strip, and one who does not have an interest in the access strip.

Clauses 159 and 160 deal separately with these situations. Also, the proviso to section 89B of the LTA is modified. There is no longer a prerequisite that non-applicants cannot be found in order to preserve their rights to apply, and it is clear that if the non-applicants do not consent they do not lose either their estate or interest in the access strip or their right to apply for a record of title (whichever is relevant).

Clause 159 deals with the situation of an owner of an adjoining lot who is not an applicant under clause 152 and who already has an estate or interest in the access strip (subclause (1)). Such a person may consent to an application and forfeit their ownership of the estate or interest (subclause (2)). The consent must be in the prescribed form (subclauses (3)). Subclause (4) provides that, if the person consents, the application must be accompanied by the form of consent.

Subclause (5) provides that if the non-applicant consents to forfeiture, the estate or interest in the access strip vests in the applicants. If the non-applicant does not consent to forfeiting the estate or interest, the estate or interest of that person continues to exist and will not be affected by the grant of the application (subclause (6)).

CLAUSE 160 Adjoining owner with no interest in access strip who is not an applicant

Clause 160 deals with the situation of an adjoining owner who is not an applicant but does not have an estate or interest in the access strip (subclause (1)). Subclause (2) provides that such a person may consent and waive a right to apply for a record of title to an access strip. The consent must be in the prescribed form (subclause (3)). Subclause (4) provides that the application must be accompanied by the consent. If the person consents to waiving any right to apply for a record of title to an access strip, the person has no right at any time to apply for a record of title to the access strip (subclause (5)). But if the person does not consent to waiving any right to apply for a record of title to a share in the access strip, he or she does not lose that right to apply (subclause (6)).

CLAUSE 161 Record of title for access strip

Clause 161(1) provides for the Registrar to create a record of title where the Registrar is satisfied that an application complies with three prerequisites (rather than the five listed in section 89D of the LTA). The prerequisites are that: the application complies with the Part, no caveat prevents the application and there is no other reason to refuse to grant the application. The two additional prerequisites in section 89D are that the Registrar is satisfied that all notices required to be given have been given, and that all times required to expire have expired. The requirement that the application complies with Part 13 would seem to cover these matters satisfactorily.

Subclause (2) provides that, if there are two or more applicants, title must be issued to the applicants as tenants in common in their appropriate shares. Subclause (3) provides that the record of title must record:

- if the access strip is subject to the land transfer system, any interests registered or notified on the former record of title for the access strip;
- if the access strip is not subject to the land transfer system, any existing interest to which the access strip is subject that is capable of registration or notification under the land transfer system.

The share proportion of each applicant is specified in subclause (4). It is to be equal to the proportion that the applicant's lot bears to the aggregate of the lots of all applicant adjoining owners and the lots of any persons to whom clauses 159(6) and 160(6) apply. Subclauses (2) and (4) are based on provisions in section 89A(1), but modified to allow for shares already granted or rights to apply for shares in the access strip.

Subclause (5) replaces section 89E(c) of the LTA and requires the Registrar to cancel the previous record of title for the access strip. Subclause (6) provides that the creation, under this clause, of a record of title for an access strip that is not subject to the land transfer system (that is, was deeds land) has the effect of bringing the land under the land transfer system.

CLAUSE 162 Provisions applying when record of title created for access strip

Clause 162 is in part a replacement for section 89E of the LTA in simpler and more modern language. Subclause (1) sets out provisions that apply on the creation of a new title. Paragraph (a) replaces section 89E(a) providing that an owner of an access strip (or share therein) must not transfer or mortgage that access strip without transferring or mortgaging the adjoining lot to the transferee or mortgagee.

The reference to this provision not applying to a settlement under Joint Family Homes Act 1964 in section 89E(a) is now in clause 162(3) in order to simplify subclause (1)(a).

Paragraph (b) replaces section 89E(b) to the effect that the Registrar must note on the record of title of the relevant share in the access strip, and the record of title to the adjoining lot, that the adjoining lot is subject to subclause (1)(a).

Paragraph (c) replaces section 89E(e) to the effect that where persons hold adjoining lots as joint tenants or tenants in common, their share in the access strip vests in the same manner.

Paragraph (d) replaces and significantly modifies section 89E(f) of the LTA. A power of sale in a mortgage of an adjoining lot or part of an adjoining lot, to which the share in the access strip relates, extends to the share in the access strip. Currently if the contiguous allotment (adjoining lot) is mortgaged at the time title is acquired to a share in the access strip, the power of sale is deemed to extend to the share in the access strip. However, if the mortgage is only over part of the adjoining lot, then the power of sale only extends over a *proportionate part* of the share in the access strip belonging to that lot. This last provision is unworkable as there is no formula for ascertaining that proportion. It would force a subdivision of the access strip to reflect the proportion. It seems reasonable that the mortgage over the part of the adjoining lot should extend over the entire share in the access strip if a power of sale becomes exercisable, as now provided under clause 162(1)(d).

Further, paragraph (d) applies to a lot settled as a joint family home under the Joint Family Homes Act 1964, whether the share in the access strip is owned by both spouses or either spouse (paragraph (e)). Paragraph (e) replaces section 89E(g) of the LTA.

Subclause (2) replaces section 89E(h) of the LTA to widen the definition of mortgage for the purposes of the clause, to include a charge under the LTA or any other enactment.

As noted above, subclause (3) is based on the final provision in section 89E(a) of the LTA providing that clause 162(1)(a) does not apply to a settlement of an adjoining lot under the Joint Family Homes Act.

Section 89E(i) is not carried forward in the Bill. This paragraph provides that an action for compensation does not lie against the Crown or Registrar by a person whose estate in fee simple has ceased under section 89E(d), unless that person was deprived of the estate by fraud on the part of any applicant under the Part or error on the part of the Registrar. This omission is discussed under the commentary on clause 18 (exceptions to compensation).



Part 14

Special provisions relating to limited titles issued under Part 12 of the Land Transfer Act 1952

As discussed in chapter 20 of the Issues Paper, despite the fact that by the early 1950s the conversion from the deeds system was virtually complete and almost all privately owned land was under the LTA, the Land Transfer (Compulsory Registration of Titles) Act 1924 was incorporated into the LTA as part of that Act, presumably to retain a mechanism to deal with remnants of deeds land. The Issues Paper noted that Part 12 is now virtually obsolete and seldom, if ever, used. No submissions supported its retention and any remaining deeds land can be brought under the land transfer system by way of applications under Part 11 of the Bill. For these reasons, there is no need to re-enact Part 12. It is, however, necessary to retain certain of its provisions to deal with existing limited titles issued under Part 12, that is, titles limited as to title or as to parcels or limited as to both title or parcels, particularly as regards the removal of existing limitations.

CLAUSE 163 Purpose of this Part

Clause 163 sets out the purpose of Part 14, that is, to continue those provisions of Part 12 of the LTA in relation to land for which limited titles have been issued when the land was brought under the LTA or under the earlier Land Transfer Act 1915 pursuant to the Land Transfer (Compulsory Registration of Titles) Act 1924.

CLAUSE 164 Meaning of limited title

This clause defines limited title as title that is limited as to parcels, limited as to title, or both, and was issued under the LTA or under the Land Transfer Act 1915 pursuant to the Land Transfer (Compulsory Registration of Titles) Act 1924. The clause reflects the fact that under section 191 of the LTA a limited certificate of title could be limited as to parcels or title or limited both as to title and as to parcels (see also clause 166).

CLAUSE 165 Registrar's minutes

This clause replaces sections 193 and 194 of the LTA. Section 193 provides that before issuing a limited certificate of title the Registrar must file a minute that sets out the acts or matters to be done or proved, and the requisitions to be complied with, in order to obtain an ordinary certificate of title. These minutes must be sent to the owner of every estate and interest in the land as evidenced by the Deeds Register. The Registrar may revise and update the minutes. Under section 194, the minutes do not form part of the register for the purpose of section 46 of the LTA, that is, the provision related to access to the register.

Even though no more limited titles will be issued, the existing minutes need to be retained. Clause 165 provides for this. Subclause (1) provides that the Registrar must retain the minutes kept under section 193 of the LTA. Subclause (2) provides that the Registrar may update them to indicate the action taken to comply with requisitions and requirements relating to a limited title. Subclause (3) provides that the minutes do not form part of the LTA register. Access is no longer expressly prohibited, as in section 194 of the LTA, and the minutes are able to be accessed under the Official Information Act 1982.

CLAUSE 166 Record of title to indicate limitations

This clause requires a record of title to indicate that a limited title is limited as to title or to parcels or limited as to both title and parcels. This replaces section 191(1) of the LTA.

CLAUSE 167 Effect of limited record of title

This clause replaces sections 198 and 199 of the LTA which provide for the effect of limited title. Section 198 provides that an entry on a limited certificate of title must be received in court as evidence of the matters set out in the title and that the person named on the title possesses the estate. Section 199 provides that all the provisions in the Act apply as far as possible to limited titles. However, the title is only indefeasible as against the person named in the original title for the land. The title and memorials are evidence under section 75 of the LTA subject to:

- the doing of the acts, and proof of the matters, and compliance with the requisitions set out in the Registrar's minutes;
- the title to any estate or interest in the land, of any person, the existence,

or the probable or possible existence of which title is set out or indicated in the Registrar's minutes;

- the title of any person in any existing lease or agreement for a lease for a term not exceeding seven years;
- the title of any person adversely in actual occupation of, and rightfully entitled to, the land or any part of the land.

Clause 167(1) provides that the provisions of the Bill apply to an estate or interest for which a limited record of title has been created and the registration or notification of instruments or other matters affecting the estate or interest. Subclause (2) provides that the only person who cannot set aside the title of the registered owner of an estate or interest subject to a limited record of title is the first registered owner or a person subsequently registered as owner of an estate or interest subject to the limited record of title. Section 53 (evidentiary effect of documents) applies subject to:

- compliance with requirements in the Registrar's minutes;
- the estate or interest or possible or estate or interest of any other person the existence (or possible existence) of which appears in the Registrar's minutes;
- the title of a person in adverse occupation and entitled to the estate or interest.

Subclause (4) is to the same effect as section 199(3) of the LTA and provides that the issue of a limited title does not prevent the Limitation Act 1950 applying in favour of a person in adverse possession of the land at the time that the limited title was issued.

CLAUSE 168 Removal of limitations from limited record of title

This clause replaces section 195 of the LTA which provides for a limited title to be made ordinary. Section 195(1) applies once the requisitions and requirements that are specified in the Registrar's minute are complied with. In this situation the Registrar must either cancel the limited title and issue an ordinary certificate of title, or make the limited title an ordinary title by endorsement that the title has ceased to be a limited title. Under section 195(2) if a requirement in the minutes has become unnecessary, the Registrar may issue an ordinary title or make a limited title ordinary in the way outlined in subsection (1).

Subclause (1) of clause 168 provides that the Registrar may note on the record of title that the record of title is no longer subject to the limitation or create a record of title that is not subject to the limitation. Subclause (2) provides that the Registrar may do so only if satisfied that:

- having regard to compliance with requisitions or requirements in the Registrar's minutes the limitation can be removed; and
- having regard to any other matters the Registrar considers material, the limitation can be removed from the title; and
- the title of the registered owner has not been extinguished by the operation of the Limitation Act 1950.

Subclause (3) provides that the Registrar may act under subclause (1), despite subclause (2)(a), if satisfied that, because of the lapse of time, a requisition or requirement in the Registrar's minutes has become unnecessary.

Section 196 of the LTA provides that as long as a title continues to be limited, no certificate of title other than a limited certificate of title can be issued for the estate, unless it relates to part of the land that is not subject to the limitation. This section is not necessary and has not been retained in the Bill. Clause 168 adequately covers the circumstances in which a title can be made ordinary.

CLAUSE 169 Further restriction on removal of limitation from limited record of title limited as to parcels

This clause re-enacts section 207 of the LTA. Section 207 contains additional restrictions on when an ordinary title can be issued. Clause 169 provides that the Registrar must not act under clause 168(1) as regards a limited record of title that is limited as to parcels unless:

- the Registrar is satisfied by the deposit of a survey plan or other evidence that no part of the land is held in adverse occupation; and
- the Registrar gives notice to owners or occupiers of adjoining land; and
- within the time specified, no person objects to the action being taken by the Registrar.

CLAUSE 170 Other estates and interests subject to limitation

This clause replaces section 203 of the LTA. It states that an estate or interest that is not a freehold estate for which a limited record of title has been created is subject to the same limitations as stated in the limited record of title for the freehold estate.

CLAUSE 171 Applications by persons claiming title to land subject to limited title

This clause replaces section 200 of the LTA. Section 200 provides that if land is comprised in a limited title, a person can make an application based on adverse possession or on a title, the existence or probable or possible existence of which is set out in the Registrar's minutes, as if the Land Transfer (Compulsory Registration of Titles) Act 1924 and Part 12 of the LTA had not been passed and the limited certificate of title had not been issued. If the Registrar is satisfied that the person's claim is valid, the Registrar must issue an ordinary certificate of title in that person's name.

Clause 171(1) provides that the clause applies if a person claims to be entitled to the freehold estate in land that is in a limited title, by adverse possession or under a title or possible title, the existence of which is recorded in the minutes. In such a case, an application can be made under Part 11, which relates to applications to bring land under the Act. Part 11 applies with necessary modifications (subclause (2)).

CLAUSE 172 Certain interests extinguished

This clause replaces section 204 of the LTA. The clause applies to an estate or interest that is not registered or notified on the limited record of title for that land (subclause (1)). That estate or interest is extinguished after 12 years from the date of the first issue of the limited record of title (subclause (2)). Under subclause (3) this does not apply to an estate or interest that is in the possession of a person who is also entitled to it or to a person in adverse possession of the land.

Under subclause (4) the Registrar may, after the expiry of 12 years, create a record of title for the land that is no longer limited as to title.

CLAUSE 173 Status of caveats lodged under section 205(1) of Land Transfer Act 1952

This clause relates to caveats that have been lodged under section 205(1) of the LTA (subclause (1)). Section 205(1) provides that, although a caveat against bringing land under the Act is not capable of being lodged in respect of a compulsory application to bring land under the Act, a person who would have been entitled to lodge a caveat against bringing land under the Act may register a caveat under the Deeds Registration Act 1908 at any time prior to the issue of a certificate of title under Part 12 of the LTA.

Clause 173 provides that caveats that have been lodged under the Deeds Registration Act in accordance with section 205(1) will be treated as if they are caveats against applications under Part 11, under clause 123 of the Bill, and Part 11 of the Bill will apply to the caveat (subclause (2)). The caveat does not prevent registration of an instrument relating to a dealing with the land in a limited title to the extent that the limited title is limited as to title (subclause (3)). Subsections (2), (3), (6) and (7) of section 205, which relate to the details to be contained in and the process of lodging such a caveat, are no longer needed.

CLAUSE 174 Caveats against limited title limited as to parcels

This clause re-enacts section 205(4) and (5) of the LTA. Subsection (4) provides that if land is comprised in a title limited as to parcels, any occupier of that land or any adjoining occupier or proprietor may lodge a caveat at any time after the issue of that certificate of title. Subsection (5) provides that sections 136(2) and (3), 143, and 145 to 148, with any necessary modifications, apply to caveats referred to in subsection (4). Certain of these provisions relate to caveats against bringing land under the Act (section 136(2) and (3)), others relate to caveats against dealings (sections 145 and 145A), and the remainder relate to both types of caveat (sections 143, 146–148). Subsection (5) also provides that a caveat under this section does not prevent the registration of any dealing with the land comprised in any certificate of title limited as to title.

Clause 174 provides that an occupier of the land in the limited record of title, or the owner or occupier of adjoining land, may lodge a caveat against a title that is limited as to parcels. Under subclause (2) the caveat must be executed by the caveator or the caveator's agent and under subclause (3) it must be in the prescribed form and contain the prescribed information.

Under subclause (4) a number of caveat provisions are applied with necessary modifications:

- clause 110 – lapse of caveats against dealings;
- clause 111 – withdrawal of caveat against dealings;
- clause 113 – second caveat against dealings may not be lodged;
- clause 114 – Registrar not required to verify entitlement to lodge caveat against dealings;
- clause 115 – compensation for lodging of improper caveat;
- clause 125 – notice of caveat;
- clause 126 – removal of caveat.

Clauses 110, 111, 113–115 are contained in Part 10 of the Bill relating to caveats against dealings. Clauses 125 and 126 are contained in Part 11, which relates to applications to bring land under the land transfer system, and are referred to here because they specifically relate to caveats against applications.



Part 15

General provisions

COVENANTS IMPLIED IN INSTRUMENTS

CLAUSE 175 Implied covenants requiring persons to give effect to instruments

Clause 175 is a modernised version of section 154 of the LTA. Subclause (1) provides that certain covenants are implied in every instrument by the person transferring or charging an estate or interest (person A) with the person deriving the estate or interest (person B). The covenants are that A will do everything necessary to give effect to the terms, conditions and covenants stated or implied in the instrument, and on request by B, and at B's cost, A must execute any instruments necessary for B to acquire the estate or interest (subclause (2)). This clause applies before as well as after registration. Despite *West v Read* (1913)13 SR (NSW) 575 suggesting that an equivalent Australian provision does not apply to unregistered instruments before registration, in practice section 154 of the LTA has operated before registration. This is confirmed in clause 175.

PROVISIONS INCORPORATED IN INSTRUMENTS BY REFERENCE

CLAUSE 176 Incorporation in instruments of provisions in memorandum

Clause 176 re-enacts with modifications section 155A of the LTA. It is a key provision, the purpose of which is to incorporate provisions into registered instruments by reference to a memorandum that has been separately registered.

Subclause (1) defines a memorandum as a memorandum in the prescribed form containing provisions to be incorporated by reference into instruments that are of a class specified in the memorandum.

Subclause (2) allows the Registrar at the request of any person to register a memorandum prepared by that person. The Registrar may also prepare a memorandum and register it. A memorandum is registered when a signed memorial of registration is endorsed on it by the Registrar (subclause (3)).

Although the memorandum is registered, subclause (4) provides that it is part of the register only for purposes of access to the register.

Subclause (5) is the operative provision and states that an instrument of a class specified in a registered memorandum that incorporates all or any of the provisions contained or referred to in the memorandum must be treated as incorporating those provisions, subject to any modifications stated in the instrument. Subclause (6) provides that subclause (5) does not limit or affect a provision of an instrument that incorporates provisions other than those referred to in that subclause.

Section 155A(6), which enables regulations to prescribe a memorandum, has not been retained. No such regulations have ever been made and it is accepted that the power to do so is unnecessary.

INSTRUMENTS UNDER THIS ACT THAT MAY BE USED UNDER OTHER ACTS

CLAUSE 177 Instruments under this Act may be used under other Acts

This clause re-enacts section 99B of the LTA. Clause 177 provides that regulations may prescribe instruments, to be used with or without modification, under any other Act that provides for registration or notification under the Bill (subclause (1)). Subclause (2) provides that neither this clause nor any regulations made for the purposes of subclause (1) affect the operation of any Act that provides for registration or notification of any instrument or thing under the Bill, but does not expressly adopt an instrument prescribed under those regulations.

POWERS OF ATTORNEY

CLAUSE 178 Registered owner may deal with estate or interest by attorney

This clause re-enacts section 150 of the LTA. Clause 178 allows attorneys to execute instruments, authorise dealings, or make applications under the Bill. The phrase “power of attorney in any usual form” used in section 150 is replaced with “power of attorney that confers the necessary authority”.

CLAUSE 179 Deposit of power of attorney

This clause replaces section 151 of the LTA. Section 151 requires every power of attorney intended for use under the Act to be deposited with the Registrar. On the face of this section, it applies to both paper and electronic instruments. However, it is only necessary for the power of attorney to be deposited where the instrument is in paper form.

The clause requires a power of attorney to be deposited with the Registrar where instruments are in paper form (subclause (1)). A power of attorney may be, but does not have to be, deposited in other cases (that is, for electronic dealings) (subclause (2)). In this clause a power of attorney includes a duplicate power of attorney and a copy of a power of attorney certified in the prescribed manner (subclause (3)).

CLAUSE 180 Notice of revocation of power of attorney

This clause re-enacts section 152 of the LTA. Section 152(1) provides that the grantor of a revocable power of attorney deposited with the Registrar may revoke the power by notice to the Registrar. The power of attorney is not deemed to be revoked by virtue of a subsequent power of attorney being deposited without notice of the revocation, and the revocation does not take effect as to any instruments executed before the notice of the revocation to the Registrar (section 152(2)). The power is not deemed to be revoked due to the bankruptcy of the grantee or marriage of a female grantee (section 152(3)).

Clause 180 alters this to provide for notice to the Registrar of the revocation, suspension or termination of any power of attorney rather than just revocable powers of attorney (subclause (1)). Subclauses (2) and (3) re-enact section 152(2) without any change in substance. Subsection (3) of the original section has not been reproduced as it is unnecessary.

REVIEW AND APPEAL

CLAUSE 181 Review by Registrar of decision

This clause re-enacts section 216 of the LTA. Section 216 enables a registered proprietor or a person claiming an estate or interest who is dissatisfied by any decision of the Registrar, or a person acting under delegated authority, to apply to the Registrar for a reconsideration of the decision. Section 216(2) of the LTA gives the Registrar the power to make any investigation into the matter that the Registrar sees fit. The Registrar may require the aggrieved person to “provide any evidence, information, or explanation that is relevant to the matter” (section 216(3)). Under subsection (4) the Registrar must, if the aggrieved person requests it, give him or her an opportunity to be heard. Subsection (5) provides that the Registrar must, as soon as practicable, confirm the decision or substitute a new decision. The Registrar must provide written justification for the decision (subsection (6)). The section applies to decisions of District Land Registrars and Assistant Land Registrars as if they were decisions of a delegate of the Registrar (subsection (7)).

Clause 181 re-enacts this process with some changes. Subclause (1) applies to a registered owner or a person claiming an estate or interest in land. Under subclause (2), such a person who is dissatisfied with a decision of the Registrar or a person acting under a delegation, may apply to the Registrar by notice in writing to have the decision reviewed. Subclause (3) is new and requires the Registrar to give notice to other people, who, in the Registrar’s opinion, are affected or likely to be affected by the review. The Registrar may investigate the matter or require the applicant to provide relevant evidence or information (subclause (4)).

Under subclause (5), both the applicant and persons who are affected or are likely to be affected by the review can make submissions in writing to the Registrar. This is in line with requirements of natural justice. The Legislation Advisory Committee Guidelines indicate the need to consider whether, in the context of an appeal or a review, other interests beyond that of the individual

directly involved in the appeal or review need to be represented (Legislation Advisory Committee *Legislation Advisory Committee Guidelines* (2001 ed with amendments, Wellington, 2001) at [13.6.2]).

Subclause (5) permits these two categories of people to make written submissions, rather than granting a right to be heard. This reflects the current process that is generally followed if a decision is reviewed. Written submissions would seem to be adequate for this type of review procedure.

Subclause (6) re-enacts section 216(5) and provides that the Registrar must review the matter as soon as practicable and confirm the original decision, or substitute any other decision that the Registrar thinks fit.

The requirement to provide reasons for the decision to the aggrieved person in section 216(6) is extended in clause 181(7) of the Bill to the applicant and every person to whom notice was given under subclause (3), whether or not they made a submission under subclause (5).

CLAUSE 182 Appeal to Court

This clause replaces the appeal process that is set out in sections 217–219, 223 and 224 of the LTA. Section 217 of the LTA provides that appeals may only be made after a review has been undertaken under section 216 (although this may not be how the provisions operate in practice). The new provision enables a person to appeal directly to the High Court against a decision by the Registrar, or a person acting under a delegation, or against a decision by the Registrar under the review power in clause 181 (subclause (1)).

The appeal sections in the LTA contain much procedural detail. They provide that:

- notice of an appeal must be served on the Registrar at least six days before the hearing (section 217);
- the Registrar has a right of reply (section 218);
- if a question of fact is involved, the High Court may direct an issue to be tried to decide the facts (section 218);
- expenses must be paid by the person initiating the proceedings unless the court orders otherwise (section 219);
- the same rules apply and there are the same rights of appeal as in ordinary proceedings in the same court (section 223);
- rules may be made under section 51C of the Judicature Act 1908 for regulating proceedings in the High Court under the Act (section 224).

These matters are all matters that can be appropriately dealt with under the High Court Rules. Subclause (2) provides that Rules of Court apply to appeals under this clause. The procedural provisions in the LTA are not re-enacted.

APPLICATION TO COURT BY REGISTRAR

CLAUSE 183 Registrar may apply to Court for directions

This clause replaces section 222 of the LTA. Section 222, a seldom if ever used provision, provides that the Registrar may submit questions to the Court of Appeal. This has similarities with an appeal by way of case stated. The Legislation Advisory Committee guidelines note that this:

[P]rocedure has been criticised on the grounds that it wastes time, weakens the value of the appellant's right of appeal because the tribunal controls the formulation of the question, and is essentially an unduly cumbersome appeal procedure (Legislation Advisory Committee *Legislation Advisory Committee Guidelines* (2001 ed with amendments, Wellington, 2001) at [13.4.2]).

This clause replaces the procedure in section 222 with a power for the Registrar to apply to the High Court for directions (subclause (1)). This avoids the problems associated with appeal by way of case stated, but allows the Registrar to seek guidance from the High Court if it is necessary. Under clause 183(2) the Registrar must give notice of the application to registered owners likely to be affected by the decision and any other person the court directs. These people are entitled to appear and be heard as parties to the application (subclause (3)). Although the occasions on which the Registrar will apply to the court are likely to be few, it was thought to be useful to retain the ability for the Registrar to do so.

OFFENCES

Clauses 184 and 185 replace sections 225–228A of the LTA. A significant amount of overlap has been identified between the offence provisions of the LTA and the Crimes Act 1961, in particular Part 10. The Bill generally does not re-enact provisions of the LTA that are covered by the general provisions in the Crimes Act, leaving only those offences in the Bill which are specific to the Bill or of particular importance to the Bill.

The penalties in the LTA (three and four years' imprisonment) are significantly lower than those for similar offences under the Crimes Act. Relying on the Crimes Act where possible will partially address the problem of consistency of penalties. However, the Bill raises the penalties for the offences that remain in the Bill to seven years, in order to align the provisions with the Crimes Act.

This commentary outlines the existing offence provisions in the LTA and explains which are provided for by the Crimes Act. It then refers to the offence provisions in the Bill.

Section 225 of the LTA

Section 225(1) of the LTA (fraudulently procuring certificate of title, etc) provides for a number of offences with a maximum penalty of three years' imprisonment.

Paragraph (a) is outdated as it refers to fraudulently procuring certificates of title and is designed to apply in a paper system. This paragraph has largely been replaced by the following paragraph (ab) which relates to fraud in relation to lodgement, registration, or deleting or altering matters in the register, under the electronic system. In any event, both paragraphs (a) and (ab) are covered by the Crimes Act: section 256 (forgery), section 257 (using forged documents) and section 258 (altering, concealing, destroying, or reproducing documents with intent to deceive).

Paragraph (b) relates to the fraudulent use of a form. This is covered by section 228 of the Crimes Act (dishonestly taking or using document).

Paragraph (c) creates an offence to mislead or deceive a person authorised to demand an explanation in respect of an application to bring land under the Act. There is no longer a power to demand an explanation in relation to an application to bring land under the Act, therefore, it appears that this paragraph is no longer necessary. However, false explanations more generally would be covered by clause 185 below (false statements).

Paragraph (d) creates an offence to knowingly or recklessly give a false certification under section 164A. This is not covered by the Crimes Act and is covered instead by clause 185 (see discussion below). A similar offence is contained in section 164(3) of the LTA, which provides that it is an offence to falsely or negligently certify the correctness of an application or instrument. Negligence in this regard is an inappropriate basis for a criminal liability so the Bill does not repeat this.

Subsection (2) provides that:

Any certificate of title, entry, erasure, recording, deletion, or alteration so procured or made by fraud shall be void as between all parties or privies to the fraud.

This provision appears to be unnecessary. Fraud is an exception to indefeasibility under section 62 of the LTA and this is still the case under clause 9 of the Bill.

Section 226 of the LTA

Section 226 of the LTA (other offences under Act) creates a number of other offences with a maximum penalty of four years' imprisonment.

Paragraph (a) provides that it is an offence to forge or assist in forging the seal of the Registrar or the name, signature or handwriting of an officer of the land registry office where the officer is authorised to affix his or her signature. Paragraph (b) relates to stamping a document with a forged seal. Paragraph (c) relates to the forging of the name, signature, or handwriting of any person to an instrument or in pursuance of a power in any Act which is authorised to be signed by that person. Paragraph (d) relates to using, with intention to defraud, a document on which the seal has been forged.

Paragraphs (a)–(d) are outdated and have not been altered to bring them into line with electronic conveyancing practices. They would all be covered by section 256 (forgery), section 257 (using forged documents) and section 258 (altering, concealing, destroying, or reproducing documents with intent to deceive) of the Crimes Act.

Paragraph (e) provides that it is an offence to fraudulently or with intent to defraud deposit a power of attorney. There is no direct equivalent of this paragraph in the Crimes Act. However, this provision would be covered by more general provisions, such as section 228 (dishonestly taking or using document) and section 240 (obtaining by deception or causing loss by deception).

Paragraph (f) provides that it is an offence to knowingly or wilfully make a false oath or declaration. Certain provisions of the Crimes Act could be considered to apply to this situation (section 110 (false oaths) and section 111 (false statements or declarations)), provided the person is required or authorised by law to make the oath or declaration. Paragraph (f) will be covered by clause 185 of the Bill.

Paragraph (fa) relates to fraudulently copying, imaging, recording, or registering an instrument or document under the Land Transfer (Computer registration and Electronic Lodgement) Amendment Act (the 2002 Act). Paragraph (fb) relates to fraudulently omitting to do any act in relation to copying, imaging, recording, or registering an instrument or document under the 2002 Act. As with section 225(ab) these paragraphs would be covered by the Crimes Act: section 249 (accessing computer system for dishonest purpose), section 256 (forgery), section 257 (using forged documents) and section 258 (altering, concealing, destroying, or reproducing documents with intent to deceive).

Paragraph (fc) relates to unauthorised access to the electronic system. This would be covered by sections 249–252 of the Crimes Act (crimes involving computers).

Paragraph (g) relates to fraudulent entries or authentications of any memorial in the register. This provision would now relate only to electronic dealings and would be covered by sections 249–252 of the Crimes Act (crimes involving computers).

Paragraph (h) provides that it is an offence to give a fraudulent certificate under section 164A. As this requires dishonesty, it would likely be covered by the Crimes Act, for example, by section 228 (dishonestly taking or using document) or the provisions relating to forgery: section 256 (forgery), section 257 (using forged documents) and section 258 (altering, concealing, destroying, or reproducing documents with intent to deceive).

Section 228A of the LTA

Section 228A (fraudulent removal, destruction, etc, of records) of the LTA creates an offence of fraudulently removing or destroying records. It provides:

Where any person fraudulently –

(a) Removes from any Land Registry Office any property of a Land Registry Office, including, but without limiting the meaning of the term “property”, any certificate or other instrument of title, plan, record, index to records, document, or instrument of any kind whatsoever; or

(b) Destroys, conceals, cancels, obliterates, or damages any such property, –

he shall be deemed for the purposes of the Crimes Act 1961 to have stolen that property, and shall be liable to the penalty prescribed by paragraph (b) of section 227 of that Act as if the property were an object to which that paragraph applies.

First, this section is problematic as section 227(b) of the Crimes Act no longer exists. Secondly, the offences appear to be covered by other provisions in the Crimes Act. The definition of document in section 217 of the Crimes Act and the offences contained in sections 219 (theft) and 228 (dishonestly taking or using a document) should cover conduct that would fall under paragraph (a). Paragraph (b) is likely to be covered by wilful damage (section 269) or sections 249–252 if the documents are held in a computer. Thirdly, records in the electronic system would be covered by offences relating to fraud or computer offences, and historic records will not be held by LINZ, but rather by Archives New Zealand. For these reasons, this section is not re-enacted in the Bill.

CLAUSE 184 Offences in relation to registration

Clause 184 makes it an offence if a person, with intent to defraud, brings about the registration or notification of an instrument or information or a matter or thing under the Bill (subclause (1)(a)) or, with intent to defraud, brings about the destruction, removal, deletion or alteration of an instrument or information or a matter or thing registered or notified under the Bill (subclause (1)(b)). While this activity would probably be covered by the Crimes Act 1961, it has been included in the Bill because it relates to activity that is a central part of the land transfer system. As noted above, the penalties have been increased to imprisonment for no more than seven years to align the provision with the Crimes Act provisions of a similar nature (subclause (2)).

CLAUSE 185 False statements

This clause makes it an offence to knowingly or recklessly make, give or authorise the making or giving of a false or misleading statement, certificate or document, or to knowingly or recklessly make or authorise an omission from a statement, certificate, or document that makes it false or misleading (subclause (1)). The clause replaces sections 164(3) and 225(1)(c) and (d) of the LTA, which, as indicated above, are not covered by the Crimes Act 1961. As noted above, the penalties have been increased to imprisonment for no more than seven years to align the provision with the Crimes Act provisions of a similar nature (subclause (2)).

NOTICES

CLAUSE 186 Public notice

This clause re-enacts section 240 of the LTA concerning the ways in which public notice under the Act may be given by the Registrar. The clause provides that public notice of a matter relating to land is given by publishing notice in the *Gazette*, or in one or more newspapers circulating in the area where the land is located, that gives sufficient information about the matter to enable persons who might respond to understand it.

CLAUSE 187 Notice by Registrar to particular persons

This clause re-enacts section 240B of the LTA. Subclause (1) lists seven ways of giving notice unless a provision of the Bill requires notice to be given in a particular way (subclause (2)). The methods are:

- delivering it to the person (this re-enacts section 240B(1)(a) of the LTA);
- delivering it to the person's usual home or business address (this differs from section 240B(1)(b) of the LTA which provides for delivering to the "usual or last known place of abode or business");
- posting it to the person's usual home or business address (this re-enacts section 240B(1)(c) of the LTA except for the addition of "usual");
- if the person has supplied a fax number for the purpose of receiving notices, by fax (this re-enacts section 240B(1)(d) of the LTA);
- if the person has supplied an email address for the purpose of receiving notices, by email (this re-enacts section 240B(1)(e) of the LTA which provides for email delivery, although the reference to "other similar means" to electronic mail is omitted);
- if the instrument was generated in an electronic workspace facility, by sending or directing the notice to that facility (this re-enacts section 240B(1)(f) of the LTA);
- by any prescribed method (this is new and will enable different methods to be prescribed in line with developments in technology).

Subclause (3) provides that "person" (to whom the notice is given) includes the authorised agent of the person and re-enacts section 240B(2) of the LTA.

CLAUSE 188 Notice to Registrar

This clause re-enacts section 240C of the LTA. The clause sets out the following methods for delivering notice to the Registrar:

- posting it to a designated land registry office (this re-enacts section 240C(b) of the LTA);
- if the Registrar has specified a fax number for receiving notices, by fax (this re-enacts section 240C(c) of the LTA);
- if the Registrar has specified an email address for receiving notices, by email (this re-enacts section 240C(d) of the LTA);
- if the Registrar has specified that notices of that class may be sent from

an electronic workspace facility, by sending or delivering it from that facility (this re-enacts section 240C(e) of the LTA); or

- any other prescribed method (this is new and will enable different methods to be prescribed in line with changes in technology).

Subclause (2) provides that subclause (1) applies unless notice is required to be given in a particular way by the Bill. Subclause (3) provides that the Registrar must give notice of the address of the designated land registry office in the *Gazette* and in any other way the Registrar considers appropriate.

Section 240C(a) (delivery to a land registry office) is not re-enacted. Land registry offices have closed for the purposes of providing counter lodgement or secure facility lodgement. Notices must, therefore, be posted rather than delivered.

CLAUSE 189 When notices given

This clause re-enacts section 240D of the LTA. Under subclause (1) notice is given:

- if sent by post, at the time when the notice would in the ordinary course of post be delivered (this re-enacts section 240D(1)(a) of the LTA);
- if sent by fax, at the time shown on the record of transmission (this re-enacts section 240D(1)(b) of the LTA);
- if sent by email, at the time that a record of transmission shows it was received in the electronic communications system (this re-enacts part of section 240D(1)(c) of the LTA);
- if sent from an electronic workspace facility, at the time that a record of transmission shows it was received in the electronic communications system (this re-enacts part of section 240D(1)(c) of the LTA);
- in the case of a prescribed method, at the prescribed time (this is a new provision which relates to clauses 187(1)(g) and 188(1)(e)).

Subclause (2) is new. It provides that notice is not given if it is proved that, through no fault on the recipient's part, the notice was not received within the time specified in subclause (1).

Subclause (3) provides that for the purposes of subclause (1)(a) it is sufficient to prove that the notice was properly addressed and posted.

Subclause (4) re-enacts section 240D(2). "Electronic communications system" is defined to mean, in the case of email, the electronic communications system for sending email or, in the case of an electronic workspace facility, the electronic communications system by which users can send and receive communications (subclause 4(a)). A "record of transmission" is either an acknowledgement from the electronic communications system, or the absence of a notification that a transmission has not been received (subclause 4(b)).

Section 240D(3) is not retained because it relates to delivery to a land registry office, which, as explained under the discussion on clause 188, is no longer a method by which notice may be given to the Registrar.

PLANS

CLAUSE 190 Registrar may require plans

Section 167 of the LTA gives the Registrar a discretion to require a deposit of a plan of land in certain cases, such as upon application to bring land under the Act, or for a new title in a subdivision of land, or for registration of an instrument affecting part only of land comprised in a title. The plan is to be in accordance with regulations.

Clause 190(1) provides that the Registrar is not required to perform certain functions unless the land is adequately defined. The functions are:

- deal with an application;
- register an instrument;
- create, alter or cancel a record of title;
- note a record of title;
- perform any other function under the Bill in relation to land.

Subclause (2) provides that a person wishing the Registrar to perform a function under the Bill may present for deposit (under the clause) a plan defining any land.

A plan is deposited under the Bill when (a) the Registrar creates a record to that effect or, alternatively, (b) on the date of lodgement of the relevant instrument or dealing, if the deposit depends on registration of an instrument or dealing (subclause (3)). This alternative is a practical addition to section 167(5) of the LTA.

Subclause (4) provides that land is adequately defined: (a) if the land is shown as a separate lot or discrete area on the plan deposited under the clause, and (b) the plan is prepared for the particular function for which it is required, and (c) it complies with the Cadastral Survey Act 2002. This is a new provision in order to give clarity regarding the drawing up of plans. Clause 190(5) is also new and, for the avoidance of doubt, makes the clause subject to other Acts providing for spatially defining land.

There are no longer provisions permitting the Registrar, in cases of hardship, to exempt a person from the requirement to deposit a plan but memorialise the title as “limited as to parcels” (see current section 167(2)–(4)). These provisions are no longer relevant as titles “limited as to parcels” will no longer be able to be created under the Bill. It is also inconsistent with the aim of increasing certainty of title.

CLAUSE 191 Registrar may specify form of deposit document

Clause 191 is the equivalent of section 167A of the LTA, relating to the forms for deposit documents. The new clause is similar apart from updating references.

Subclause (1) provides that the Registrar may specify forms of a document for certain matters referred to in subclause (2) as a requirement for (a) the deposit of a plan under clause 190, or (b) the creation of a record of title, or (c) any other prescribed matter. Subclause (2) lists the matters for which these forms of document are required: a consent, approval or certificate and any matter

under the Bill, or any other enactment, that may be included in a document under the clause. Subclause (3) provides that a specified form may differ from a form prescribed by regulations for the same matter, and subclause (4) provides that a form specified under subclause (1) must be used for the matters stated (that is, consent, approval, certificate or any other matter).

Subclause (5) provides that, if a form is specified under subclause (1) for consent, approval, certificate or any other matter that under any other enactment may be included in a document under the clause, the consent, approval, certificate or other matter may be given or done either (a) under the other enactment, or (b) in the form specified by the Registrar.

Subclause (6) provides that the specified form must include a representation or reference that (a) links it to a plan that is to be deposited, (b) gives the person approving or consenting appropriate information about the effect of depositing the plan, and (c) indicates that person's approval or consent.

A specified form may be an electronic instrument but must not be registered under the Bill (subclause (7)). Clause 191(8) provides that clause 201(2) and (3) apply to specification of a form as if the form were a standard under that clause, which provides the authority for the Registrar to set standards.

Section 168 of the LTA which provides that the deposit of a plan does not operate as dedication of a road shown on the plan is not re-enacted in the Bill. Roads are no longer dedicated in this way and the provision is obsolete.

Section 169 of the LTA (land taken for roads to be defined on register) is not carried forward as it is also obsolete.

CLAUSE 192 Cost of survey to correct plans

This clause is an updated version of section 170 of the LTA requiring the Crown to meet the cost of a survey, certified by the Surveyor-General as required to correct any error in plans deposited under the Bill or in records of title.

REGULATIONS

CLAUSE 193 Regulations

This clause replaces section 236 of the LTA and sets out the purposes for which regulations may be made.

Paragraph (a) allows regulations to be made to regulate the practice applying to, and the conduct of, dealings under the Bill. This re-enacts section 236(1)(a) of the LTA.

Paragraph (b) provides for regulations that prescribe forms to be used under the Bill, the information to be contained in them, and the documents to accompany them. This replaces section 236(1)(p) of the LTA which provides a power to make regulations that prescribe the forms of paper instruments and section 236(1)(q) of the LTA which provides a power to prescribe forms for notices and

consents under the Act. The approach adopted in the Bill is for technical matters and matters of detail such as the form of, and the information to be contained in, instruments and applications to be prescribed in regulations.

Paragraph (c) prescribes the period of time for giving notices, or within which any matter must be done. This re-enacts section 236(1)(b) of the LTA.

Paragraph (d) re-enacts section 236(1)(c) of the LTA. It provides for regulations to prescribe the manner in which instruments must refer to the register.

Paragraph (e) replaces section 236(1)(d) of the LTA and allows regulations, which specify the classes of instruments that are exempt from being electronic instruments.

Paragraph (f) re-enacts section 236(1)(e) of the LTA and allows regulations to specify procedures by which mortgagees may:

- prevent electronic instruments affecting land over which they hold a mortgage from being registered without their consent;
- be notified of the registration of electronic instruments.

Paragraph (g) permits regulations to be made to specify the classes of electronic instruments and paper instruments that require certification. In relation to paper instruments, this replaces section 236(1)(j) of the LTA which relates to specifying the classes of paper instruments which may be certified under section 164A(2)(b). In relation to electronic instruments, this paragraph is new as section 164A(2)(a) of the LTA applies to all classes of electronic instruments.

Paragraph (h) allows regulations to authorise the classes of persons who may certify instruments under the Act. This is discussed under the commentary on clause 40.

Paragraph (i) provides for regulations which prescribe matters which must be certified including the following:

- That the person giving the certificate has authority to act for the party specified in the regulations and that the party has the legal capacity to give the authority. This replaces section 236(1)(k) of the LTA, which provides a power to make regulations for the purpose of specifying parties for the purposes of section 164A(3)(a). That section provides that the certification must state that the person giving the certification has authority to act for the party specified in regulations in relation to that class of instrument and that the party has legal capacity to give such authority.
- That the person giving the certification has taken reasonable steps to confirm the identity of the person who has the authority to act. This replaces section 164A(3)(b) of the LTA.
- If statutory requirements have been specified for instruments of a particular class, that those requirements have been complied with. This replaces section 164A(3)(c) of the LTA.
- That the person giving the certificate has evidence showing the truth of the certifications and that this evidence will be retained for a prescribed period. This replaces section 164A(3)(d) of the LTA, which provides that evidence of the truth of the certifications must be retained, and section 236(1)(l) of the

LTA, which allows regulations to prescribe time periods for which such evidence must be held.

Paragraph (j) allows regulations to be made to prescribe the form of the certification. This replaces section 236(1)(m) and 164A(4) of the LTA which provide that regulations may prescribe the form of the certifications.

Paragraph (k) allows the amount of a claim for compensation to be prescribed for the purposes of clause 23. This is a new provision. Clause 23 relates to the procedure for claiming compensation. If the amount does not exceed the prescribed amount the claim must be dealt with by the Registrar alone; if it exceeds the prescribed amount, it must be dealt with by the Attorney-General and the Registrar. It is anticipated that relatively small claims will be dealt with by the Registrar without reference to the Attorney-General (for further discussion see the commentary under clause 23).

Paragraph (l) allows information that must be recorded in the register under clause 26 to be prescribed. Clause 26 sets out the contents of the register. This is a new regulation-making power.

Paragraph (m) provides for regulations to specify the persons who must execute paper instruments, how they must be executed, and who must witness them. This replaces section 236(1)(i) of the LTA which provides that regulations may prescribe the manner in which paper instruments must be executed, witnessed, or attested for the purposes of section 157.

Paragraph (n) provides that regulations may prescribe for the purposes of clause 83 (variation of priority of mortgages) conditions and powers that are implied in a mortgage the priority of which is postponed. This is new as these rights and powers are currently provided for in a schedule to the LTA.

Paragraph (o) provides for regulations to prescribe the rights and powers implied in different classes of easement for the purposes of clause 92 (rights and powers implied in easements). This re-enacts section 236(1)(g) of the LTA.

Paragraph (p) provides that regulations may prescribe the form of a memorandum under clause 176 (incorporation in instruments of provisions in memorandum). This re-enacts section 236(1)(f) of the LTA.

Paragraph (q) allows regulations to specify instruments which may, under clause 177 (instruments under this Act may be used under other Acts), be used with or without modification under another enactment. This re-enacts section 236(1)(h) of the LTA.

Paragraph (r) enables regulations to prescribe the method of giving notices under clauses 187(1)(g) (which relates to notices by Registrar to particular persons) and 188(1)(e) (which relates to notices to the Registrar). These clauses list ways in which notices may be given. The inclusion in these clauses of other prescribed methods of giving notice is new.

Paragraph (s) provides that regulations can prescribe the time when notice is given under clause 189(1)(e) (when notices given). Clause 189(1)(e) provides that where notice is given in a prescribed method, it will be given at the prescribed time. This is a new provision.

Paragraph (t) provides for regulations to specify fees and charges under clause 194 (fees and charges). In the LTA, regulations prescribing fees and charges are provided for separately under section 235.

Paragraph (u) provides a regulation-making power in relation to any other matters necessary for the administration of the Bill or to give the Bill its full effect. This general power re-enacts section 236(1)(r) of the LTA.

Section 236(2) of the LTA enables regulations to be made that prescribe elements of electronic instruments of a more complex nature that would require separate specification if they were to be capable of automatic registration. No regulations have been made. The electronic registration of these instruments has been managed without the need for regulations and there is no suggestion that they will be required in the future. For this reason, the provision is not retained.

FEES AND CHARGES

CLAUSE 194 Fees and charges

This clause replaces section 235 of the LTA. Regulations may be made under clause 193(t) that specify fees and charges under this clause. Under clause 194(1) such regulations may specify:

- the fees and charges payable for the performance or exercise of functions, duties or powers of the Registrar under the Bill or any other enactment; performance or exercise of functions, duties or powers of the chief executive under the Bill; the performance of functions of the chief executive in relation to the administration and operation of the Bill, including the provision of the register and other facilities and services (this re-enacts section 235(1)(a) of the LTA);
- the fees and charges payable having regard to costs and expenses incurred by the department responsible for the administration of the Cadastral Survey Act 2002 in providing a national survey control system for cadastral surveys supporting title to land under the Bill and the maintenance of cadastral survey data (this re-enacts section 235(5) of the LTA);
- the amount of those fees or charges or the method or rates used to assess them (this re-enacts section 235(1)(b) of the LTA);
- the persons liable to pay fees and charges (this re-enacts section 235(1)(c) of the LTA);
- the circumstances in which payment of fees and charges may be remitted or waived, and who is entitled to remit or waive fees (this re-enacts section 235(1)(d) of the LTA); and
- the manner in which fees and charges are to be paid (this re-enacts section 235(1)(e) of the LTA).

Subclause (2) re-enacts section 235(2) of the LTA and permits the chief executive or the Registrar to refuse to act until the relevant fee is paid or a credit arrangement has been made.

Subclause (3) re-enacts section 235(4) of the LTA. The clause provides that despite subclause (2), the Registrar may dispense with payment of all or part of a fee or refund all or part of a fee.

Subclause (4) re-enacts section 235(3) of the LTA. Regulations may prescribe that interest is payable at the rate prescribed under section 87 of the Judicature Act 1908 and the circumstances and manner in which interest is payable.

LAND REGISTRATION DISTRICTS

In accordance with current drafting practice, mechanical provisions relating, for example, to land registration districts and the position and role of the Registrar are located in Part 15 at the end of the Act. A number of these provisions are currently located at the start of the LTA.

CLAUSE 195 Land registration districts

This clause re-enacts section 3 of the LTA which relates to land registration districts. Although land registry offices have been progressively closed, this provision is still needed to cater for the existence of separate records for each district.

Subclause (1) provides that the land registration districts that existed immediately before the commencement of the Bill will continue until altered under subclause (2).

Subclause (2) provides that the Governor-General may by Order in Council alter the boundaries of a district, amalgamate districts, create new districts, give names to districts or abolish all districts. Under subclause (3) the making of an Order in Council does not require the Registrar to alter or amalgamate parts of the register unless it is appropriate to do so.

REGISTRAR-GENERAL OF LAND

CLAUSE 196 Registrar-General of Land

This clause re-enacts section 4 of the LTA. Under subclause (1), there must be a Registrar-General of Land appointed under the State Sector Act 1988. The Registrar must be a barrister and solicitor of the High Court, as must any person directed under the State Sector Act to perform a power or duty of the Registrar (subclause (2)). Subclause (3) sets out the objectives the Registrar and every delegate must have regard to in exercising powers and performing duties under the Bill. These are:

- ensuring an efficient and effective system for registering dealings;
- managing the risk of fraud and improper dealings;
- ensuring public confidence in the land titles system;
- ensuring the integrity of the register and the right to claim compensation.

CLAUSE 197 Seal of office

This clause replaces section 6 of the LTA. Clause 197 provides that the Registrar may have a seal of office (subclause (1)) and that the seal may be electronic or mechanical (subclause (2)). This is a departure from section 6, which requires the Registrar to have a seal. The change reflects the diminishing importance of the seal and the fact that the register is now electronic. Subclause (3) provides that an instrument bearing a representation of the seal is, in the absence of proof to the contrary, to be treated as having been issued by or under the direction of the Registrar.

CLAUSE 198 Delegation of Registrar's duties and powers

This clause re-enacts section 5 of the LTA. It is more appropriate to locate it at the end of the Bill with other provisions in respect of the Registrar. The new clause is similar to section 5 of the LTA. Subclause (1) provides that the Registrar may delegate in writing any of his or her duties or powers, other than those specified and the power to delegate under the clause. Subclause (2) provides that a delegation may be made to a specified person, persons of a specified class or the holder of a specified office.

Subclause (3) is new. It provides that a delegation may be general, specific, or limited to performance of a particular duty or power. Subclause (4) clarifies the implication in section 5(1) of the LTA that a delegation may be to an employee of the department (that is, Land Information New Zealand) or of another department or ministry.

Subclause (5) re-enacts section 5(3), (4), (5) and (6) of the LTA. It provides that a delegation:

- does not affect the performance of a duty or exercise of a power by the Registrar;
- does not affect the Registrar's responsibility for the actions of the delegate;
- may be revoked by the Registrar in writing;
- continues in force despite a change in Registrar;
- is subject to any directions or conditions imposed by the Registrar.

Subclause (6) re-enacts section 5(6) of the LTA. It provides that a delegate may perform the duties delegated in the same manner and with the same effect as if they had been conferred on the delegate directly. The qualification that this is "subject to any general or special directions given by the Registrar" is removed into a separate subclause. A delegate must also comply with any directives or standards of the Registrar (subclause (7)). Subclause (8) is the equivalent of section 5(7) of the LTA: a delegate is presumed to be acting in accordance with the relevant delegation. Subclause (9) requires a person who is not an employee of the responsible department to produce evidence of their delegation if so requested as is the case under section 5(8) of the LTA.

CLAUSE 199 Registrar not required to give certain evidence

This clause is the equivalent of section 241 of the LTA. Subclause (1) makes it clear that, unless ordered to do so by the court, neither the Registrar nor any delegate of the Registrar is obliged to:

- produce evidence in court of information or of an instrument registered or recorded on the register or in the Registrar's or the delegate's custody; or
- give evidence in court.

Subclause (2) provides that the court may not make such an order unless satisfied that (a) the attendance of the Registrar or the delegate is necessary and that (b) evidence cannot be given by production of a copy of a certified instrument or a certified record of title, or by any other means.

CLAUSE 200 Registrar and other persons not personally liable

Clause 200 is the equivalent of section 243 of the LTA. Subclause (1) provides that neither the Registrar nor a delegate is personally liable for any act or omission in performing, exercising, or purporting to perform or exercise, a duty, function, or power, either under the Bill or which the Registrar (or delegate) reasonably believed he or she could perform or exercise. Subclause (2) is new and provides that the immunity from personal liability does not apply if the Registrar or delegate acted or omitted to act in bad faith. Section 243 appears to give the Registrar and delegates absolute immunity even where they have acted in bad faith. It is appropriate that the Registrar and delegates should be liable where they have acted, or omitted to act, in bad faith as is the position with many other similar statutory immunities.

CLAUSE 201 Registrar may set standards and issue directives

Clause 201 expands on section 240A of the LTA (specifications). Subclause (1) enables the Registrar to set standards and issue directives in relation to:

- the administration and operation of the register;
- dealings by practitioners and other persons authorised to give certificates;
- retention of evidence under clause 42 by practitioners and other persons authorised to give certificates;
- compliance by any person with a requirement under the Bill.

The Registrar must not set a standard or issue a directive unless he or she has consulted with organisations that will be affected by the standard or directive, given the organisation an opportunity to comment, and considered any comments by the organisation (subclause (2)). Subclause (3) provides that the Registrar must make copies of standards and directives available for purchase at a reasonable price, and publish them free of charge on the internet site maintained by the department. This replaces section 240A(1) and (2) which provides for publication in the *Gazette* with copies available at every land titles office. Subclause (4) provides that standards and directives are regulations for the purposes of the Regulations (Disallowance) Act 1989, but not for the purposes of the Acts and Regulations Publication Act 1989.



Part 16

Amendments, repeals, savings, and transitional provisions

This Part of the Bill does not yet contain comprehensive savings provisions, transitional provisions or consequential amendments. Such provisions can be included in any Bill that the Government might introduce to implement the recommendations in this Report.

AMENDMENTS TO PROPERTY LAW ACT 2007

CLAUSE 202 Amendments to Property Law Act 2007

This clause provides that clause 203 amends the Property Law Act 2007.

CLAUSE 203 New sections 307A to 307H inserted

This clause inserts new provisions in the Property Law Act 2007 which relate to the notification of covenants in gross. These are designed to provide an alternative to registering encumbrances to secure covenants in gross. These changes are discussed in detail in chapter 7 of Part 1. The new sections are broadly the same as sections 303–305, 307 and 316–318 of the Property Law Act 2007, which apply to restrictive and positive covenants that benefit other land. We think it preferable to enact what is, in effect, a discrete code of provisions to deal with notification of covenants in gross, rather than try to extend the current provisions with the result that they become overly complicated and difficult to apply.

New section 307A Covenants in gross

New section 307A defines covenant in gross to mean a covenant in relation to land that:

- is contained in an instrument;
- requires the covenantor to act or refrain from acting in a particular way in relation to the occupation or use of the land or part of the land;
- benefits another person; and
- is not attached to other land.

New section 307B Legal effect of covenants in gross

New section 307B sets out the legal effect of a covenant in gross. Under subsection (1), unless a contrary intention appears, covenants in gross are binding in equity on every person who becomes the owner of the burdened land and every person who is the occupier of the burdened land. Under subsection (2), unless a contrary intention is expressed, when a person referred to in subsection (1) ceases to be an owner or occupier of the burdened land, they cease to be bound by the covenant in gross. This does not prejudice that person's liability for breach of covenant arising before that person ceased to be the owner or occupier of the land. The owner of the burdened land is bound in equity; however, registered title will override a covenant in gross if the covenant is not notified under section 307E and there is no fraud on the part of the new registered owner.

A contrary intention must appear in the instrument in which the covenant is expressed (subsection (3)). This section overrides any other rule of law or equity but is subject to sections 307C and 307D (subsection (4)). This section is the equivalent of section 303 of the Property Law Act, which relates to restrictive and positive covenants that benefit other land.

New section 307C Whether, and to what extent, administrator bound by covenant in gross to which section 307B applies

New section 307C applies to the administrator of the estate of a person who was bound by a covenant in gross (subsection (1)). The administrator is only bound if assets from the estate are available to the administrator to meet the covenant obligations and only to the extent that these assets are available (subsection (2)). This section is the equivalent of section 304 of the Property Law Act, which relates to restrictive and positive covenants that benefit other land.

New section 307D How rights under covenant to which section 307B applies rank in relation to other unregistered interests

New section 307D provides that the covenant ranks against other unregistered interests as if it were an equitable interest (subsection (1)), subject to the effect of notification of the covenant on the register (subsection (2)). This section is the equivalent of section 305 of the Property Law Act.

New section 307E Notification of covenants in gross

New section 307E provides that covenants in gross can be notified on the record of title of the land burdened by the covenant. The Registrar may also note on the record of title any instruments which purport to affect the operation of a notified covenant in gross, or any modification or revocation of a covenant in gross (subsection (2)).

Under subsection (3) a covenant will be an interest notified in the register for the purposes of clause 9(b) of the Bill, that is, it is a limitation on indefeasibility and the owner of the burdened land for the time being is bound by the covenant.

Notification does not give the covenant in gross greater operation that it would otherwise have (subsection (4)). Covenants in gross will be treated as equitable interests, notwithstanding notification. Subsections (3) and (4) also apply to instruments purporting to modify the operation of a covenant and a modification or revocation of a covenant (subsection (5)). This section is the equivalent of section 307 of the Property Law Act, which relates to restrictive and positive covenants that benefit other land.

New section 307F Application for order under section 307G

New section 307F provides that a person bound by the covenant may apply to a court for an order under section 307G to modify or extinguish the covenant (subsection (1)). This provision is similar to the existing section 316 of the Property Law Act 2007, which provides for an application to the court to modify or extinguish easements or restrictive or positive covenants that benefit other land. The application must be made in a proceeding brought by the person burdened by the covenant in gross, or in a proceeding brought by any person in relation to the covenant or the land burdened by the covenant (subsection (2)). The application must be served on the territorial authority and on any other persons the court directs (subsection (3)).

New section 307G Court may modify or extinguish covenant in gross

New section 307G provides that the court may modify or extinguish the covenant in certain circumstances. It adds to the grounds contained in section 317 of the Property Law Act 2007 on which easements or restrictive and positive covenants that benefit other land may be modified or extinguished.

The grounds are as follows:

- a change since the creation of the covenant in the nature or extent of occupation or use of the burdened land, the character of the neighbourhood, or any other circumstances that the court considers relevant;
- the covenantee cannot be found after reasonable enquiries;
- the continuation of the covenant in its existing form would impede the reasonable use of the burdened land in a different way or to a different extent than could have been foreseen at the time of its creation;
- every person entitled who is of full age and capacity agrees that the covenant should be modified or extinguished or may be considered to have abandoned or waived the right to the covenant;
- the proposed modification does not substantially injure any person entitled;
- the covenant is contrary to public policy or to any enactment or rule of law; or
- for any other reason it is just and equitable to modify or extinguish the covenant.

The ground for modification or extinguishment where the covenantee cannot be found is not currently in section 317. We believe that this ground is necessary for covenants in gross because, as there is no benefited land, there is a greater risk that the covenantee may cease to exist or to have a connection with the covenant. The last two grounds, that the covenant may be modified or removed if it is contrary to public policy or law or it is just and equitable to do so, are also new. These grounds are particularly necessary for covenants in gross because, as they are not attached to another piece of land, there is a greater risk that covenants in gross will be used to secure covenants that may become inappropriate over time. Similarly, if these covenants are contrary to public policy or law, there needs to be a mechanism to remove them from the land transfer title.

However, we consider that these last two grounds should also apply to covenants that benefit other land and a proposed amendment to provide for this is contained in clause 204, below.

Under subsection (2) the court may require the applicant to pay reasonable compensation.

Subsection (3) provides that the new section does not limit or affect another enactment or a rule of law under which the covenant may be void, voidable, set aside, cancelled, extinguished or modified or varied. Because covenants in gross are not indefeasible, they can be challenged and removed from the title.

New section 307H Registration and recording of orders under section 307G

New section 307H provides that the Registrar must make entries on the record of title to give effect to orders under section 307G (subsection (1)). These amendments and entries are binding on every person entitled to the benefit of the covenant (subsection (2)). This section is the equivalent of section 318 of the Property Law Act, which relates to easements and restrictive and positive covenants.

CLAUSE 204 Court may modify or extinguish easement or covenant

This clause amends section 317 of the Property Law Act 2007 to extend the grounds on which where covenants that benefit other land may be extinguished or modified by the court in order to align the provision with new section 307G relating to covenants in gross. The clause adds new paragraphs (e) and (f) to subsection (1). Paragraph (e) provides that a covenant can be modified or extinguished where it is contrary to public policy or any enactment or rule of law. Paragraph (f) provides that a covenant can be modified or extinguished if for any other reason it is just and equitable to do so. These new grounds should remove any incentives to use section 307 where a covenant is essentially in gross. The new grounds do not, however, apply to easements as they are registered interests and different considerations apply.

REPEAL

CLAUSE 205 Land Transfer Act 1952 repealed

Clause 205 repeals the Land Transfer Act 1952. This will include the repeal of the Land Transfer Amendment Act 1963 and the Land Transfer (Computer Registers and Electronic Lodgement) Act 2002.

SAVINGS PROVISION

CLAUSE 206 Covenants implied in certain mortgages and instruments

Clause 206 provides that the covenants, conditions and powers set out in schedule 3 of the LTA implied in mortgages the priority of which is postponed under section 103 of the LTA, and the covenants set out in full in schedule 4 of the LTA implied in an instrument in which they were implied immediately before the repeal of the LTA, in accordance with section 155 of that Act, continue to be implied despite the repeal of the LTA.

TRANSITIONAL PROVISION

CLAUSE 207 Application of Act to estates registered on provisional register under Land Transfer Act 1952

This clause provides that clauses 29–31, which relate to qualified titles, apply with necessary modifications, to estates and interests on the provisional register as if a qualified title had been created for that estate.

Matters not dealt with in the Bill

The following matters were raised as issues in the Issues Paper but are not provided for in the Bill.

SECTIONS 125 AND 126 OF THE LTA

The Issues Paper discussed sections 125 and 126 of the LTA, which relate to transmissions in the case of insolvency (at [14.14]–[14.24]). Submitters thought that the relationship between the LTA and the Insolvency Act 2006 should be clarified by amending the LTA provisions.

However, following consultation with the Ministry of Economic Development, the new Bill does not carry over provisions equivalent to sections 125 and 126 since it seems unnecessarily duplicative and potentially problematic to provide for different methods for dealing with this matter in different statutes. The Insolvency Act is the more appropriate statute. In any event, it seems that no applications have ever been made under sections 125 and 126.

SECTION 155 OF THE LTA

Section 155 (short forms of covenants) was discussed in the Issues Paper at [17.22]–[17.26]. Section 155(1) (regarding paper instruments) and (2) (regarding electronic instruments) enable covenants set out in Schedule 4 of the LTA, which are intended to be implied in any instrument prepared for the purpose of registration under the Act, to be implied in that instrument as if set out in full, with all the modifications that may be necessary in order to adapt them to the instrument. Section 155(3) provides that the covenant relating to insurance in Schedule 4 does not apply to a mortgage, unless otherwise expressed in the mortgage.

The language of the covenants in Schedule 4 is outdated and it appears that section 155 is no longer used. Re-enactment of the provision is not required.

DEEDS REGISTRATION ACT 1908

Deeds registration was discussed in the Issues Paper (at [20.45]–[20.59]). Although there is little deeds land in existence, it is clear that the deeds registration system is still required for the foreseeable future for the land still under the deeds system. For the present, it will continue to be supported by the Deeds Registration Act 1908 and we do not recommend any changes to the Act.

FLAT AND OFFICE OWNING COMPANIES

Chapter 21 of the Issues Paper considered flat and office owning companies created under Part 7A of the LTA and asked whether:

- the status quo should be maintained and new developments should be able to be created; or
- there should be a moratorium on the creation of new developments but existing developments should be allowed to continue and the existing provisions should be retained for this purpose; or
- flat and office owning companies should be abolished and existing developments should be converted into a different form, for example, unit titles.

A number of submitters favoured the abolition of this form of ownership of land. Others favoured retention of flat and office owning companies as an effective way of overseeing who can become tenants.

In 1999, the Law Commission recommended that further flat and office owning companies should not be permitted (New Zealand Law Commission *Shared Ownership of Land* (NZLC R59, Wellington, 1999) at 33). This proposal has never been implemented. However, new flat and office owning companies are comparatively rare. There is no significant pressure for change and many people favour the controls available under this mechanism. We do not consider it would be appropriate to force conversion to unit title ownership.

One submitter suggested simplifying the company ownership structure to make it similar to the unit title scheme. However, the number of these developments in existence does not justify substantially reforming the structure around them. If a simpler structure is desired by land owners, the unit title system can always be used.

Part 7A was originally Part 1 of the Companies Amendment Act 1964 and was inserted into the LTA in 1994 when the Companies Amendment Act 1964 was repealed. Legislation dealing with flat and office owning companies does not sit easily in either land transfer or companies legislation. We think that part 7A should be a separate Act. We have not attached a draft Bill for a new Flat and Office Owning Companies Act to the report. A Bill can be drafted if the Government wishes to implement the recommendation for a new LTA. In doing so, the existing provisions of Part 7A could be modernised, simplified and made considerably more accessible.

