LAW COMMISSION
TE AKA MATUA O TE TURE

June 2010, Wellington, New Zealand | REPORT 116

A NEW LAND TRANSFER ACT

IN CONJUNCTION WITH LAND INFORMATION NEW ZEALAND

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E31(116)

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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

The Commissioners are:

Right Honourable Sir Geoffrey Palmer SC – *President*

Dr Warren Young – *Deputy President*

Emeritus Professor John Burrows QC

George Tanner QC

Val Sim

The General Manager of the Law Commission is Brigid Corcoran

The office of the Law Commission is at Level 19, HP Tower, 171 Featherston Street, Wellington

Postal address: PO Box 2590, Wellington 6140, New Zealand

Document Exchange Number: sp 23534

Telephone: (04) 473-3453, Facsimile: (04) 471-0959

Email: com@lawcom.govt.nz

Internet: www.lawcom.govt.nz

National Library of New Zealand Cataloguing-in-Publication Data

New Zealand. Law Commission.
A new land transfer act / in conjunction with Land Information New Zealand.
(Law Commission report ; no. 116)
ISBN 978-1-877316-98-2 (pbk.)
ISBN 978-1-877316-99-9 (internet)
1. New Zealand—Land Transfer Act 1952. 2. Land titles—
Registration and transfer—New Zealand. 3. Conveyancing—New Zealand.
I. Land Information New Zealand. II. Title III. Series:
New Zealand. Law Commission. Report ; no. 116.
346.930438—dc 22

ISSN 0113-2334 (pbk)
ISSN 1177-6196 (internet)
This paper may be cited as NZLC R116
This report is also available on the Internet at the Law Commission's website:www.lawcom.govt.nz

The Hon Simon Power
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

30 June 2010

Dear Minister

NZLC R116 – A NEW LAND TRANSFER ACT

I am pleased to submit to you Law Commission Report 116, *A New Land Transfer Act*, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

Geoffrey Palmer
President

FOREWORD

The Torrens system of land transfer was one of the great legal reforms of the 19th century. It gave people security in their dealings with land. The system originated in South Australia but has long been a feature of New Zealand law, the first Act being passed in 1870. The transfer of land affects most people in New Zealand. The Torrens system was, and is, a great improvement in facilitating the effective transfer of land compared with the old deeds system.

The existing Act, the Land Transfer Act 1952, is nearly 60 years old. It is largely a re-enactment of earlier Acts. There has never been a fundamental review. A significant part of the Act is out of date or obsolete. There are now two stand-alone amendment Acts: the Land Transfer Amendment Act 1963, which relates to adverse possession, and the Land Transfer (Computer Registration and Electronic Lodgement) Amendment Act 2002 (the 2002 Act).

The 2002 Act heralded the electronic era for land transfer in New Zealand. But the principal Act, the Land Transfer Act, is still based on a paper system. Although the system is workable, the legislative structure behind the system is now awkward and outmoded and does not reflect the modern New Zealand Torrens system. An Act that brings land transfer into the 21st century is long overdue.

The Law Commission's Issues Paper on the *Review of the Land Transfer Act 1952*, written in conjunction with Land Information New Zealand, analysed conceptual issues relating to the Land Transfer Act, which have been the subject of academic and judicial debate, and technical issues, which relate to the operation of the land transfer system. The Issues Paper sought the views of the public on these matters.

This Report completes the review of the Land Transfer Act and contains a draft Land Transfer Bill that is up to date and in plain English. The Bill continues the Torrens system of title by registration in New Zealand, with some adjustments in response to submissions, concerns and research. The Bill reflects and supports the modern land transfer system that principally operates in an electronic environment, while retaining elements of the paper system where necessary.

The Land Transfer Act is a basic part of New Zealand legal infrastructure. An effective system for land transfer is essential to the workings of a modern economy. Much of the Bill is technical because detail matters in a land transfer system. The Law Commission and Land Information New Zealand have designed the legislation to be clear, effective and fair.

Geoffrey Palmer

President

ACKNOWLEDGMENTS

The review of the Land Transfer Act 1952 and reform of the legislation was undertaken by the Law Commission in conjunction with Land Information New Zealand (LINZ). The Law Commission acknowledges the valuable contribution and co-operation of Robert Muir, Registrar-General of Land, and his staff, in particular Warren Moyes.

The Law Commission greatly appreciates the contribution of the project's steering committee: The Rt Hon Justice Peter Blanchard (Supreme Court of New Zealand), Julia Agar (Ministry of Justice), Robert Muir, Warren Moyes, David Kelliher and Debbie Buck (LINZ), George Tanner QC (Law Commissioner), and Professor John Burrows QC (Law Commissioner).

The Law Commission also wishes to thank Associate Professor Elizabeth Toomey (Canterbury University) and the Property Law Section of the New Zealand Law Society for their involvement and helpful feedback on early iterations of the Bill.

We are grateful to the following individuals and agencies who have made written submissions to the Law Commission, or with whom the Commission has consulted to discuss matters relevant to this reference:

Professor Richard Boast, Victoria University of Wellington

AJ Coleman, Barrister and Solicitor

Professor Elizabeth Cooke and the Property, Family and Trust Law team at the Law Commission of England and Wales;

Michael Croker and staff of HM Land Registry, England

Shaunnagh Dorsett, Reader, Victoria University of Wellington

The Hon Eddie Durie

Russel Feist, Tripe Matthews & Feist

Jonathan Flaws, Sanderson Weir

Shane Gibbons, Registrar of the Māori Land Court

John Greenwood, Greenwood Roche Chisnall

Professor George Gretton and the land law team at the Scottish Law Commission

Associate Professor David Grinlinton, University of Auckland

Dr Matthew Harding, Melbourne University

Ian Haynes and the New Zealand Law Society Property Section (Chairs, Tim Jones and Chris Moore; convenor, Kim Oelofse)

His Honour Chief Judge Wilson Isaac and Judges of the Māori Land Court

Chris Kelly

Max Locke, Registrar of Titles, and staff at the Queensland Land Registry

Dr Rouhshi Low, Queensland University of Technology

Dr Don McMorland

Anthony Mole, Barker Gooch & Swailes

Stephanie Ng, Department of Justice, Melbourne

New Zealand Bankers' Association co-ordinated by Damo Damodaran

New Zealand Institute of Legal Executives Incorporated (Jo Buckton, Executive Officer)

Associate Professor Pamela O'Connor, Monash University, Commissioner, Victoria Law Reform Commission

John Oliver, Crown Law

John O'Regan, Brandons

Sandra Peterssen, Alberta Law Commission

Arthur Rickit, Land Information New Zealand

PR Saunders, Inder Lynch Lawyers

Associate Professor Struan Scott, Otago University

Mack Storey

Duncan Terris, Mobile Conveyancing Services

Rod Thomas, Auckland University of Technology

Associate Professor Elizabeth Toomey, Canterbury University

Professor Peter Watts, University of Auckland

Professor Michael Weir, Bond University

The Hon Justice Joseph Williams, High Court

Te Kani Williams and Bernadette Arapere, Wackrow Williams & Davies

The lead commissioner for this project was George Tanner QC, who drafted the Land Transfer Bill. Professor John Burrows QC was the second commissioner. The legal and policy advisers at the Law Commission were Janet November and Julia Rendell.

A New Land Transfer Act

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Summary of recommendations

CHAPTER 1	R1	The Land Transfer Bill attached to this report, which consolidates and modernises the Land Transfer Act 1952, the Land Transfer Amendment Act 1963 and the Land Transfer (Computer Registration and Electronic Lodgement) Amendment Act 2002, should be considered for enactment.
CHAPTER 2	R2	The new Act should confirm the current system of immediate indefeasibility upon registration, but modify it by introducing judicial discretion as a means of avoiding manifest injustice in limited cases.
	R3	A volunteer should obtain a title that cannot be set aside subject only to the same exceptions that apply to a purchaser for value.
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R12 A registered owner should be able to caveat his or her own title where there is an additional interest or a real risk of fraud.

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R20 A section should be added to the Legislation Advisory Committee guidelines that sets out matters to be considered by agencies developing legislation that will create interests that affect title to land.

CHAPTER 6

R21 There should be an in-depth review into the registration of Māori land.

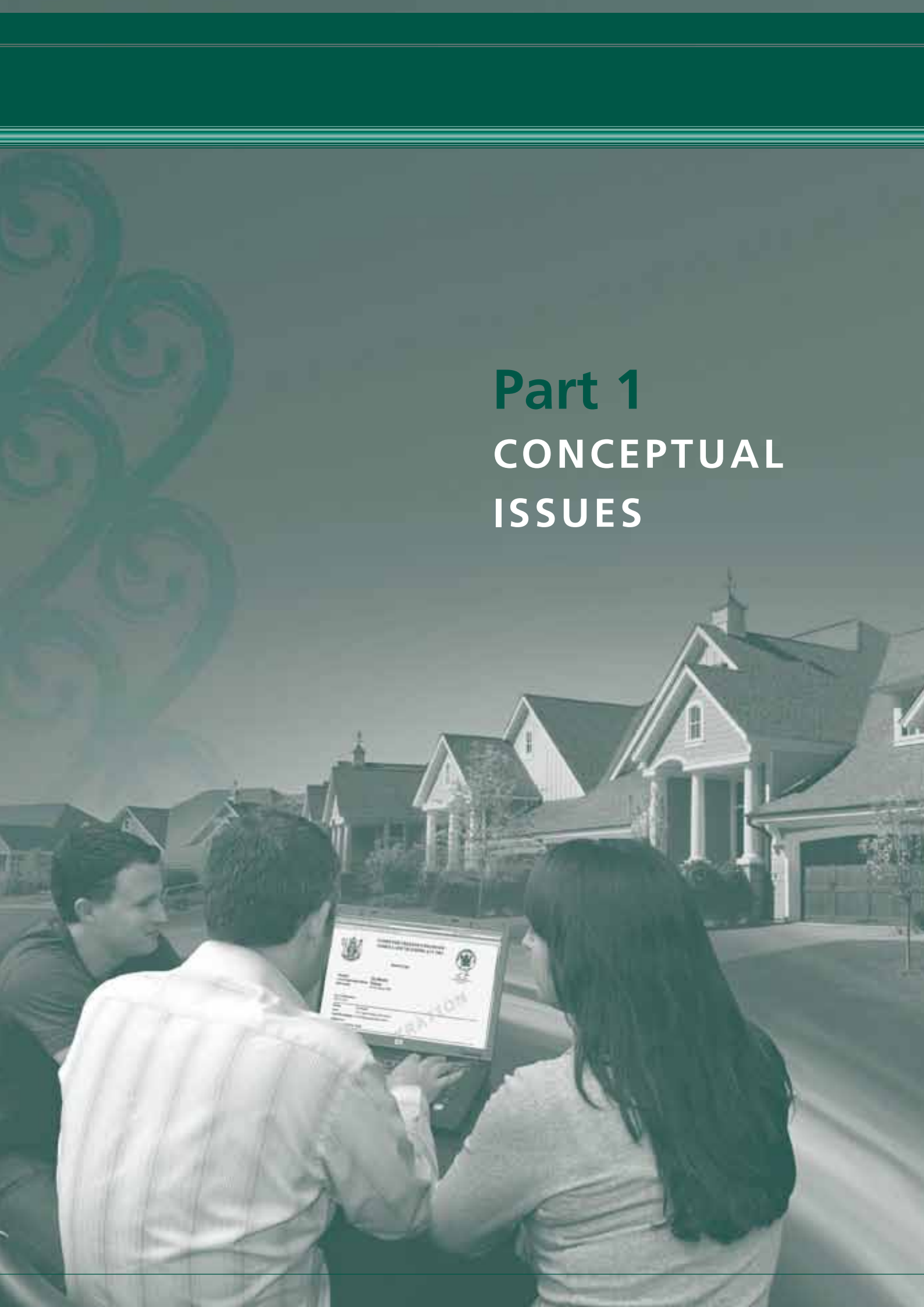
CHAPTER 7

R22 The Property Law Act 2007 should provide for covenants in gross.

R23 Covenants in gross should be treated in the same way as restrictive and positive covenants, that is, notified on the record of title as interests that run with the land; they should not be registered.

R24 Covenants in gross should relate to the use of the land and there should be a broad power for the court to modify or remove them.

R25 Encumbrances should no longer be able to be registered where their primary purpose is to secure collateral covenants.



Part 1
CONCEPTUAL ISSUES

Chapter 1
Introduction

WHY A NEW LAND TRANSFER ACT

1.1 The Land Transfer Act 1952 (LTA) is nearly 60 years old and much of it is based on the Land Transfer Act 1885. The wording of some provisions has remained unchanged for over a century. The LTA originally comprised 245 sections. New parts and new sections have been added, many sections have been amended and other sections have been repealed.

1.2 There are also two separate stand-alone amendment Acts: the Land Transfer Amendment Act 1963 (the 1963 Act), which sets out a procedure to claim land based on adverse possession, and the Land Transfer (Computer Registration and Electronic Lodgement) Amendment Act 2002 (the 2002 Act), which provides for the computerisation of the register and for electronic dealing (Landonline).

1.3 The LTA originally provided for manual, paper-based registration. The 2002 Act was required to enable the register to become electronic and to support e-dealing, but it was essentially an "add-on". The principal Act and the 2002 Act, while workable and effective, do not reflect the fact that the system of land registration is now almost exclusively electronic.

1.4 For the above reasons a new Act is called for, and to this end the Law Commission, in conjunction with Land Information New Zealand (LINZ), produced an issues paper in October 2008, *Review of the Land Transfer Act 1952* (the Issues Paper),[1] asking for submissions in response to a number of conceptual and technical concerns that have been identified by practitioners, commentators and LINZ. Submissions that we received and further consultation with interested parties have contributed to the policy decisions in this report and the draft Land Transfer Bill (the Bill) that forms Part 3 of the Report.

1.5 The primary purpose of the draft legislation is to produce an Act that is centred on electronic registration. Merging the LTA and the 2002 Act into a single statute will reflect this. This is the first objective of the proposed Bill.

1.6 In addition, there is a need for consolidation, modernisation, reorganisation, clarification and removal of obsolete sections. The second objective of reform, therefore, is to ensure that the new Act conforms to principles of clear drafting

1 Law Commission in conjunction with Land Information New Zealand *Review of the Land Transfer Act 1952* (NZLC IP10, Wellington, 2008) [IP10].

and is relatively simple, coherent and accessible for all users. Some of the parts and sections of the LTA are reorganised into a more logical order within the new Bill; much of the language has been updated.

1.7 In terms of the structure of the Bill, chapter 12 of the Issues Paper suggested three possible models:[2]

- a model based on the current LTA incorporating the 1963 and 2002 Amendment Acts;
- a model based on the Queensland Land Title Act 1994 as a modern Torrens Act;
- a model based on the proposed Canadian Model Land Recording and Registration Act,[3] which is a short Act setting out the principles of land registration, with details in regulations.

1.8 Most submitters who commented on these options preferred the first option and the Bill essentially adopts that structure. But it has also been influenced by the Queensland Land Title Act 1994, and it aims to put as much detail as possible in regulations.

1.9 While some changes are proposed in the area of indefeasibility and compensation, the basic principles of the Torrens system, as reflected in the LTA, have not changed in any radical sense.

PRINCIPLES AND AIMS OF THE TORRENS SYSTEM

1.10 Chapter 1 of the Issues Paper considered the principles and aims of the Torrens system as expressed over the years by academic commentators, politicians, judges and others, and by Robert Richard Torrens himself.[4]

1.11 We agree with these authorities that the principles and aims of the system are:

- title to land should be acquired by registration;
- title should be, as far as possible, secure and indefeasible;
- a purchaser should not need to go behind the register to investigate the "root" of title;
- the register should reflect as accurately as possible the true state of title to land so that "persons who propose to deal with land can discover all the facts relative to the title";[5]
- the system for the transfer of land should be efficient, effective and simple; and
- there should be adequate compensation where an innocent owner has suffered loss due to the operation of the system.

2 Ibid, at [12.23]–[12.42].

3 Joint Land Titles Committee (Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan, Yukon) *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, 1990).

4 IP10, above n 1, at [1.18]–[1.26].

5 DJ Whalan "The Torrens System in New Zealand – Present Problems and Future Possibilities" in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) at 258.

1.12 In 1990, the Canadian Joint Land Titles Committee said:[6]

> A land titles and conveyancing system should have two purposes. One is to provide security of ownership, that is, it should protect an owner against being deprived of ownership except by his or her own act or by the specific operation of a legal process such as expropriation or debt collection. The other purpose is to provide facility of transfer, that is, it should enable anyone, particularly a purchaser, to acquire ownership easily, quickly, cheaply and safely. Unfortunately, a measure designed to achieve one of these purposes is likely to militate against achieving the other.

1.13 This highlights the tension between security of ownership and facility of transfer in a Torrens registration system. This inherent tension was a factor in the longstanding judicial and academic debate about so-called "deferred indefeasibility" (supporting security of ownership) and "immediate indefeasibility" (supporting transactional ease for a purchaser) discussed in the Issues Paper.[7] The Bill seeks to balance these contradictory aims and to provide for a relatively easy, fast and certain transfer system, while also providing maximum security of ownership.

RECOMMENDATION

R1 The Land Transfer Bill attached to this report, which consolidates and modernises the Land Transfer Act 1952, the Land Transfer Amendment Act 1963 and the Land Transfer (Computer Registration and Electronic Lodgement) Amendment Act 2002, should be considered for enactment.

STRUCTURE OF THIS REPORT

1.14 This Report is in three parts. Part 1 (chapters 1–6) covers the conceptual issues that are more comprehensively discussed in Part 1 of the Issues Paper, giving reasons for any policy changes and recommendations. These chapters refer to the Issues Paper for detailed discussion of issues in order to avoid duplication. Chapter 7 of Part 1 discusses an issue raised by submitters since the publication of the Issues Paper: the use of an encumbrance instrument to secure what is effectively a covenant in gross. This matter is discussed in some detail in chapter 7 as it was not raised as an issue previously. Part 2 of this report is a commentary on the Bill. This goes through the clauses in the Bill and briefly explains reasons for changes, particularly technical changes, some of which were discussed in Part 2 of the Issues Paper. Part 3 of the report is the draft Land Transfer Bill. An appendix to the Report sets out comparative tables that compare the Bill to the existing legislation.

Note regarding terminology

1.15 The report uses the phrase "registered proprietor" when discussing the LTA or cases decided under the LTA but "registered owner" when discussing the Bill and our recommendations for the future.

6 Joint Land Titles Committee, above n 3, at 6.

7 IP10, above n 1, at [2.34]–[2.70].

Chapter 2
Indefeasibility of title

INTRODUCTION

2.1 This chapter covers the issues that were discussed in greater detail in the Issues Paper in chapters 2 (Indefeasibility of title under the Torrens system), 3 (Land transfer fraud), 4 (In personam claims) and 5 (Registrar's powers of correction).[8]

TITLE TO LAND

2.2 Chapter 2 of the Issues Paper is headed "Indefeasibility of title under the Torrens system". The concept of indefeasibility has been said to be a "convenient description of the immunity from attack by adverse claim to the land or interest" that a registered proprietor enjoys.[9] The Issues Paper discusses the current "indefeasibility" provisions in the Land Transfer Act 1952 (LTA), the immediate or deferred indefeasibility debate, and proposals or provisions for change in various jurisdictions (New Zealand, Victoria, Canada and Scotland).[10]

2.3 The Bill aims to continue the Torrens principle of title by registration, to provide a secure system that protects a registered owner from being deprived of title, and, at the same time, to provide facility and efficiency of transfer of land. As noted in chapter 1, these aims can be contradictory and Part 2 of the Bill (Title to land) seeks to find the balance between ease of transfer and security of ownership.

Title by registration – options

2.4 Four options were proposed in the Issues Paper:[11]

(a) immediate indefeasibility, whereby registration cures any forged or otherwise invalid transfer instrument and gives good title to a bona fide purchaser immediately (the current rule following *Frazer v Walker*),[12] subject to reforming *Gibbs v Messer*;[13]

(b) immediate indefeasibility with limited judicial discretion to order alteration of the register;

8 Law Commission in conjunction with Land Information New Zealand *Review of the Land Transfer Act 1952* (NZLC IP10, Wellington, 2008) [IP10].

9 *Frazer v Walker* [1967] 1 AC 569 (PC) at 580–581.

10 See IP10, above n 8, at [2.13]–[2.63].

11 Ibid, at [2.72]–[2.75].

12 *Frazer v Walker*, above n 9.

13 *Gibbs v Messer* [1891] AC 248 (PC): registration did not immediately cure a forged transfer by a non-existent purchaser but a mortgage in favour of a bona fide mortgagee was valid.

(c) deferred indefeasibility, whereby an original owner can defeat the title of a purchaser or mortgagee registered (even if innocently) through a forged or otherwise invalid transfer instrument, but only until such time as the land is on-sold to a bona fide purchaser;

(d) immediate indefeasibility subject to statutory exceptions.

Immediate indefeasibility – option (a)

2.5 The first option would continue the law of the last 40 years. It gives a purchaser title immediately upon registration (following *Frazer v Walker*),[14] whether or not the transfer instrument is void or voidable. This favours facility of transfer, and immediate protection of purchasers. This option was subject to reversing *Gibbs v Messer*, that is, ensuring a bona fide purchaser obtains good title from an apparently fictitious purchaser.[15]

2.6 However, there are persuasive arguments not to support option (a) in all cases. It does not necessarily support continued security of title of a registered owner. In cases of void transfer instruments (particularly fraudulent transfers), immediate indefeasibility is not always fair on previously registered owners (especially those in occupation) who, as innocent victims of fraud for example, did not wish or intend to transfer their property.[16]

2.7 In such circumstances, immediate indefeasibility has lead to litigation in which courts have endeavoured to do justice using the in personam jurisdiction.[17] Or, in the mortgage cases involving fraud, they have distinguished between a simple mortgage and an "all obligations" mortgage,[18] and, in the case of the latter, they have been invited to assess the effectiveness of personal loan covenants as part of the documentation signed by a mortgagor.

14 *Frazer v Walker*, above n 9.

15 *Gibbs v Messer*, above n 13. See IP10, above n 8, at [2.38]–[2.39].

16 See IP10, above n 8, at [2.34]–[2.70] for a full discussion of the concepts and the arguments for and against each option. Compare, Malaysia: A Moosdeen "On the Proviso in Section 340(3) of the National Land Code 1965" [2002] 2 MLJA 66 on the problem of interpreting land registration legislation as to whether it provides for "immediate" or "deferred" indefeasibility. The problem has lead to strong judicial views in favour of each interpretation. For views by eminent jurists favouring an interpretation of section 183 of the LTA as providing for deferred indefeasibility see, for example, *Boyd v Mayor of Wellington* [1924] NZLR 1174 (CA) (the minority) and *Clements v Ellis* (1934) 51 CLR 217 (HCA) per Dixon J.

17 In personam claims are personal claims against registered owners which, if they succeed, often have consequences for their registered title, specific performance of a contract for the sale of land being a quintessential remedy. See IP10, above n 8, chapter 4.

18 An "all obligations" mortgage is one that includes, for example, personal obligations under a collateral loan agreement, often securing future liabilities to the mortgagee. See Matthew Harding "Property, Contract and the Forged Registered Mortgage" [2010] 24 NZULR 21, for a view that the distinction should not be relevant to the forged mortgage cases, supporting the analysis in *Duncan v McDonald* [1997] 3 NZLR 669 (CA) per Blanchard J, in terms of what Harding calls a property/contract compromise (compromising values of Torrens registered certainty and values of contractual autonomy).

2.8 For example, in *Westpac v Clark*, an imposter fraudulently signed an "all obligations" mortgage to be charged against an innocent home owner's land.[19] It had not been registered before the Registrar was alerted to the possibility of fraud. But had it been registered, the Supreme Court would have found that it was indefeasible but secured nothing, as the imposter who signed the personal loan agreement (as well as the mortgage) was not the person referred to as "you" in the personal loan covenant and mortgage documents. That person was the real registered proprietor and reference to the "secured money" was to all the money that the real registered proprietor might owe to Westpac. The outcome of such cases depends on the construction of the relevant documents and sometimes on small but significant distinctions in wording.[20]

Submitters' views

2.9 Only a minority of submitters favoured option (a). Some submitters preferred deferred indefeasibility (option (c) above) because of the possibility of unfairness to registered owners who lose their homes in cases of third party fraud, or what would otherwise be void transfers, or a mortgagee's failure to properly check identity. Deferred indefeasibility is the approach adopted in some Canadian provinces like Ontario and New Brunswick, but there have been subtle differences in its application, and it suffers from complexity and a consequent lack of clarity.[21]

19 See *Westpac New Zealand Ltd v Clark* [2009] NZSC 73. *Westpac v Clark* was followed in *Galuvao v Bridgecorp Ltd* HC Auckland CIV–2008–404–8217, 15 February 2010. See also, the Australian forged mortgages cases cited in IP10, above n 8, at footnote 61 and cases cited in Rouhshi Low "Opportunities for Fraud in the Proposed Australian National Electronic Conveyancing System: Fact or Fiction?" (2006) 13(2) Murdoch University Electronic Journal of Law 225 < https://elaw.murdoch.edu.au/ > .

20 See, for example, *Sabah Yazgi v Permanent Custodians Ltd* [2007] NSWCA 240; *Solak v Bank of Western Australia Ltd* [2009] VSC 82 (the Victorian Supreme Court coming to a different conclusion from the Supreme Court of New Zealand in *Westpac v Clark*, above n 19, in interpreting a similar loan agreement); *Provident Capital Ltd v Printy* [2008] NSWCA 131. See also Patricia Lane "Indefeasibility for What? Interpretative Choices in the Torrens System" (Sydney Law School Research Paper No 10/14, 2010) < http://papers.ssrn.com/sol3/papers.cfm?abstract_id = 1516091## > , and the cases cited therein, which show the problems of construing "all moneys" mortgages and the variety of interpretations in the cases.

21 See Brian Bucknall "Real Estate Fraud and Systems of Registration: the Paradox of Certainty" (2008) 47 Canadian Business Law Journal 1 and cases mentioned therein – particularly *Lawrence v Wright and Maple Trust Co* (2006) 51 RPR (4th) 1; (2007) 278 DLR (4th) 698 and *Reviczky v Meleknia* (2007) 287 DLR (4th) 193. These cases raise the issue of what has been called "deferred indefeasibility plus" (see Pamela O'Connor "Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems" (2009) 13 Edin L Rev 194 at 213) in the situation where the true owner (A) has been defrauded by transfer of his or her property to a fraudster (B) who has at the same time mortgaged that property to an innocent mortgagee (C). The Ontario Court of Appeal in *Lawrence v Wright* held that deferred indefeasibility meant that the transfer to the innocent mortgagee was void for fraud and defeasible, although any further onward transfer to a bona fide purchaser (D) would be valid and indefeasible once registered.

2.10 Most submitters preferred to retain a presumption of immediate indefeasibility, with a judicial discretion to alter the registered ownership in favour of the original owner in some limited circumstances (option (b) above). They considered that immediate indefeasibility by itself is too rigid and has the potential to create unfairness. A presumption of immediate indefeasibility with a judicial discretion was also suggested by George Hinde in 1971, by the Property Law and Equity Reform Committee in 1977 in *The Decision in Frazer v Walker* and by others, including The Hon Sir Anthony Mason, and John Greenwood and Tim Jones in 2003.[22]

Immediate indefeasibility with limited judicial discretion – option (b)

2.11 The Bill attached to this report adopts the option (b) approach in the interests of finding the balance between facility of transfer (dynamic security) and security of ownership (static security).[23] Immediate indefeasibility remains the normal rule and will apply to the vast majority of cases. The Bill also abrogates *Gibbs v Messer* (insofar as it had preserved a distinction between a fictitious imposter and an actual imposter and supported deferred indefeasibility) in clause 7.[24]

2.12 Clause 7 of the Bill, in its first two subclauses, encapsulates immediate indefeasibility following *Frazer v Walker*, and the title by registration principle that is currently to be found in sections 62, 63, and (on the orthodox current interpretation) section 183 of the LTA.[25] However, we consider that there may be a minority of cases where immediate indefeasibility can cause a clear injustice. Clause 13 of the Bill, therefore, gives the court discretion to direct that the register be altered in favour of a previous registered owner (A) where a transfer instrument (registering B as the new owner or C, who is very likely to be a mortgagee) would be void but for the LTA, and it would be manifestly unjust not to rectify the situation.[26] This would apply to a very small number of cases. And if a bona fide purchaser had become registered by transfer from B or C, A would not be able to make a claim.

22 GW Hinde "Indefeasibility of Title since *Frazer v Walker*" in G Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 33; Property Law and Equity Reform Committee *The Decision in Frazer v Walker* (Wellington, 1977); Sir Anthony Mason "Indefeasibility – Logic or Legend?" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 3 at 19; and J Greenwood and T Jones "Automation of the Register: Issues Impacting upon the Integrity of Title" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 323 at 346. See too IP10, above n 8, at [2.49]–[2.51].

23 R Demogue "Security" in A Fouille and others (eds) *Modern French Legal Philosophy* (Boston Book Co, Boston, 1916) 428 cited in O'Connor, above n 21, at 198.

24 *Gibbs v Messer*, above n 13. Compare the Real Property Act 1900 (NSW), s 3, defining fraud to include fraud by a fictitious person.

25 See *Frazer v Walker*, above n 9, and see *Boyd v Mayor of Wellington*, above n 16, and *Clements v Ellis*, above n 16, regarding the interpretation of section 183 of the LTA that favoured deferred indefeasibility.

26 Compare section 160 of the Singapore Land Titles Act (Cap 157, 2004, Rev Ed Sing) which gives the court or Registrar power to rectify the register in cases where an entry has been procured by fraud, omission, or mistake, but not so as to affect the title of a proprietor in possession, unless the proprietor is a party or privy to the fraud, or has caused or substantially contributed to the fraud, omission or mistake by his act, neglect or default.

2.13 Clause 13 sets out guidelines for the court when exercising such discretion, influenced by the Canadian Joint Land Titles Committee's proposed guidelines for "discretionary indefeasibility".[27] A compensation claim would be available for the innocent purchaser (B) or mortgagee (C) if deprived of registered ownership.

2.14 The aim of providing for this discretion is to improve security of title in favour of previously registered owners, who had no intention to transfer or mortgage their property, and to improve fairness where a transfer would be void or voidable but for the LTA – particularly in cases involving fraudsters. This proposal should also reduce lengthy and expensive litigation in fraud cases, or avoid pushing the boundaries of the in personam jurisdiction in Torrens title cases.

2.15 Other Torrens statutes have similar provisions. The Queensland Land Title Act 1994 gives the Supreme Court wide discretion to make orders it considers just where certain exceptions to indefeasibility apply.[28] Nova Scotia has legislated for "discretionary indefeasibility",[29] although from a position of deferred indefeasibility, giving the court a list of factors to take into account (similar to those in the Bill), and jurisdiction to make such orders as it thinks just and equitable (as in Queensland). However, the New Zealand proposal does not provide for such a wide judicial discretion (to make orders that the court considers just) as the provisions in these jurisdictions.

2.16 A few submitters were concerned about importing judicial discretion on grounds of the lack of certainty. Other submitters pointed out that judicial discretion works well under sections 326–331 of the Property Law Act 2007, where the court may grant reasonable access to landlocked land, for example. We consider that the interests of justice substantially outweigh transactional certainty in the few cases where discretion would need to be exercised. It is likely that those few cases would be litigated in any event, with uncertain outcome. We also recommend limiting the discretion with specific guidelines, rather than giving the court a broad discretion as in Queensland, which should help to allay any concerns about this proposal.

RECOMMENDATION

R2 The new Act should confirm the current system of immediate indefeasibility upon registration, but modify it by introducing judicial discretion as a means of avoiding manifest injustice in limited cases.

27 Joint Land Titles Committee (Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan, Yukon) *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, 1990). See IP10, above n 8, at [2.55]. The guidelines include the nature of the ownership and use of the property by the parties, the circumstances of the invalidity, and the willingness of either party to receive compensation.

28 Land Title Act 1994 (Qld), s 187.

29 Land Registration Act SNS 2001 c 6, s 35(5).

Position of volunteers

2.17 Volunteers in this context are those who have acquired land for no consideration. Their position has never been entirely clear. Section 62 of the LTA (estate of registered proprietor paramount, subject to limited exceptions) makes no distinction between volunteers and purchasers for value, and nor does section 182 of the LTA (a purchaser has no need to inquire into the root of title, nor is affected by mere notice of unregistered interests). However, section 63 (the protection from ejectment section) and section 183 (further protection of purchasers) refer to "bona fide purchasers for value". Early New Zealand cases such as *In re Mangatainoka* and dicta in *Boyd v Mayor of Wellington* suggested volunteers acquired an indefeasible title, as do some leading Australian cases such as *Bogdanovic v Koteff* and *Conlon v Registrar of Titles*.[30] These Australian cases were cited in *Regal Castings v Lightbody* by Tipping J, who considered that section 62 of the LTA (the paramountcy section) was the key indefeasibility section.[31] Section 62 makes no reference to a need for consideration and Tipping J considered that this indicated that protection of purchasers should apply equally to purchasers for value and volunteers. Section 180 of the Queensland Land Title Act 1994 and section 183 of the Northern Territories Land Title Act 2000 also provide that the benefits of registration apply equally to volunteers.

2.18 Clause 7(4)(a) of the Bill likewise makes it clear that a volunteer acquires title through registration just as a purchaser for value does. The clarification of the position is consistent with the principle that registration confers title. The main concern is that giving volunteers indefeasible title may encourage transfers in order to defeat an unregistered interest. However, if a volunteer transferee was aware of an unregistered interest and the transaction was intended to defeat the interest, this could well be fraud and therefore defeasible; see discussion relating to fraud below.

RECOMMENDATION

R3 A volunteer should obtain a title that cannot be set aside subject only to the same exceptions that apply to a purchaser for value.

30 *In re Mangatainoka* (1914) NZLR 23 at 65 and 68 (SC); *Boyd v Mayor of Wellington*, above n 16; *Bogdanovic v Koteff* (1988) 12 NSWLR 472 (CA); *Conlan v Registrar of Titles* (2001) 24 WAR 299. See IP10, above n 8, at [2.25].

31 *Regal Castings Ltd v GM and GN Lightbody and Ors* [2008] NZSC 87, [2009] 2 NZLR 433 at [129]–[137].

Mortgagee to verify identity of mortgagor

2.19 There was support in submissions for provisions to ensure that mortgagees be required to take reasonable steps to verify the identity of mortgagors, as suggested as an option in the Issues Paper, following sections 11A and 11B of the Queensland Land Title Act 1994.[32] The New Zealand Bankers' Association thought that the imposition of statutory duties was unnecessary as other legislation requires identity checks (such as the Financial Transactions Reporting Act 1996). However, while such checks may accord with best practice for members of the Bankers' Association, other mortgagees may not necessarily follow such a code of practice nor be subject to such duties. Further, the main consequence of non-compliance with LTA identity checks would be different from the consequences of non-compliance in other legislation: a mortgagee's title would be defeasible if their title was challenged by a mortgagor on grounds that reasonable steps to verify a mortgagor's identity were not taken in the case of mortgage fraud.

2.20 Mortgage fraud is a particular concern in Australia[33] and also in England and Canada.[34] There have been recent cases of mortgage fraud in New Zealand, notably *Westpac v Clark*.[35] We are therefore of the view that it is prudent to impose a legislative requirement on mortgagees to take reasonable steps to check that they are dealing with the actual registered owner and not with a fraudster. This may go some way towards preventing mortgage fraud becoming widespread. Mortgagees are also usually the "cheaper cost avoider"[36] and are usually in a better position to prevent fraud than is a registered owner. They can ensure that providing a loan is conditional upon proof of the borrower's identity. From the Bankers' Association submission it would seem that identity checks do not impose an additional onerous duty on banks.

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32 IP10, above n 8, at [2.77].

33 See for example, P Watkins "Fraud in Conveyancing" (paper presented at the Australian Institute of Conveyancers 2007 National Conference, March 2007) who notes that recent national statistics indicate that 21% of all serious fraud offences in Australia and New Zealand involve mortgage fraud, quoting R Smith *Serious Fraud in Australia and New Zealand* (Research and Public Policy Series no 48, Australian Institute of Criminology and PricewaterhouseCoopers, 2003). Serious fraud involves, amongst other things, financial loss exceeding AUD$ 100,000.00; For recent Australian cases see Low, above n 19; S Rodrick "Forgeries, False Attestation, and Imposters: Torrens System Mortgages and the Fraud Exception to Indefeasibility" (2002) 7 Deakin LR 97; Pamela O'Connor "Immediate Indefeasibility for Mortgagees: a Moral Hazard" (2009) 21 Bond LR 133; and Scott Gratten "Recent Developments Regarding Forged Mortgages: the Interrelationship between Indefeasibility and the Personal Covenant to Pay" (2009) 21 Bond LR 43.

34 See N Ryder and C Chambers "Bursting the Mortgage Bubble" (2008) 158 NLJ 882: according to the Association of Chief Police Officers the level of mortgage fraud in the United Kingdom is approximating £700 million a year. Fraud is apparently becoming epidemic in England: discussion with HM Land Registry officials and the Law Commission of England and Wales (28 July 2008). However, the consequences of a forged mortgage are different in England as an innocent homeowner in possession would retain their home: see A Eilledge "Safe as Houses?" (2009) 159 NLJ 1160. For Canada, see above n 21. In Ontario, where deferred indefeasibility was the assumed rule, the decision in *Household Reality Ltd v Liu* (2005) 261 DLR (4th) 679, endorsing immediate indefeasibility, was received with a barrage of criticism from legal commentators, the media and the provincial government in the light of a "serious mortgage-fraud" plague: see O'Connor, above n 21, at 211. But see now, *Lawrence v Wright and Maple Trust Co* (2007) 278 DLR (4th) 698; this case restored deferred indefeasibility. There was a similar reaction in Malaysia to the immediate indefeasibility decision of *Boonsom Boonynait v Adorna Properties Sdn Bhd* [1997] 2 Malayan LJ 62: see Moosdeen, above n 16.

35 *Westpac v Clark*, above n 19. Note that the imposter had already arranged other mortgages over homes she did not own: C MacLennan "Warning about Conveyancing Fraud Using False Passports" (2005) 39 Auckland District Law Society News 1.

36 O'Connor, above n 21, at 207.

2.21 Clauses 11 and 12 of the Bill adopt and adapt the Queensland provisions in sections 11A and 11B of the Land Title Act 1994. Mortgagees and transferee mortgagees who fail to take reasonable steps will obtain only a defeasible title to a charge if the mortgage was executed by a fraudster. Similar provisions have also been enacted in New South Wales.[37]

2.22 Queensland's Registrar of Titles has published practices for the guidance of mortgagees in the Land Title Practice Manual, but these are not intended to prescribe the only way that a mortgagee can take reasonable steps to comply with sections 11A or 11B.[38] Section 11A(3) provides that the mortgagee takes reasonable steps if the mortgagee complies with the practice in the manual. Section 11B(3) provides the same for a mortgagee transferee. A similar approach is proposed in the Bill. Under section 187 of the Queensland Land Title Act 1994, the Supreme Court may make any order it thinks just where the mortgagee has failed to comply with the identity checking sections.

2.23 In August 2008, Land Information New Zealand published a *Standard for Verification of Identity for Registration under the Land Transfer Act 1952* as an essential safeguard against identity fraud in conveyancing transactions, for New Zealand mortgagees.[39] It includes requiring verification for high risk transactions where a vendor or mortgagor is not previously known to the conveyancer who is providing certification of correctness. A similar approach could be adopted, with any necessary modifications, for the purposes of setting out a mortgagee's duty to take reasonable steps to verify under the proposed new provisions.

2.24 The new provisions should ensure that all mortgagees and transferee mortgagees take reasonable care to check the identity of potential mortgagors to ensure that their registered mortgage is not liable to be defeated where the mortgage has been acquired by fraud. The provisions should also assist in avoiding the need to distinguish differences of wording between mortgage documents that have not been signed by the person who is the registered owner of the land securing the mortgage.

RECOMMENDATION

37 These are not in force at the time of writing. See Real Property and Conveyancing Legislation Amendment Act 2009 (NSW), amending section 56C of the Real Property Act 1900. Under section 56C(6) the Registrar-General may cancel any recording with respect to a mortgage if of the opinion that the execution of the mortgage involved fraud against the registered proprietor of the mortgaged land and the mortgagee failed to comply with reasonable steps to confirm identity, or had actual or constructive notice that the mortgagor was not the same person as the registered proprietor of the relevant land. The Land Registration Act 2002 (UK), section 65 and schedule 4, provides that the register can be rectified in cases of fraud or lack or proper care, substantial contribution to a mistake by a registered proprietor or if for any other reason it would be unjust not to rectify.

38 Registrar of Titles and Registrar of Water Allocations *Land Title Practice Manual (Queensland)* (State of Queensland, Department of Environment and Resource Management, 2009) at [2–2005] < www.derm.qld.gov.au/property/titles/ltpm.html > .

39 Land Information New Zealand *Standard for Verification of Identity for Registration under the Land Transfer Act 1952* (LINZS20002, 2008) < www.linz.govt.nz/survey-titles/land-registration/land-titles-standards/DocumentSummary.aspx?document=215 > .

R4 The title of a mortgagee should be defeasible if the mortgagee fails to take reasonable steps to check the identity of mortgagor and the mortgage was executed by a person without lawful authority.

Definition of indefeasibility

2.25 The Bill does not use the term "indefeasible".[40] The term, while it is a useful general description of guaranteed title as an essential feature of the Torrens system, does not accurately reflect its complexity and the limitations of, and exceptions, to guaranteed title. The term is not easily understood other than by lawyers and judges. Submitters generally had some reservations about the term as somewhat of a misnomer (as discussed in the Issues Paper).[41] Most who commented suggested defining the concept with reference to the exceptions. The Bill (in clause 7(1)) refers to registered title as a "title that cannot be set aside" subject to exceptions listed in clause 9 of the Bill, and to overriding statutes (see clause 7(3)). Although it is likely that the concept and term "indefeasibility" will continue to be used by lawyers and judges as the starting point in any discussion of registered title, we believe that what is a fundamental basis of the Torrens system should be expressed in the legislation in clear and accessible language.

Exceptions to and limitations on "indefeasible" title

2.26 The LTA itself and other Acts contain a number of exceptions to, and limitations on, registered title.[42] Exceptions defeat title – at least in part, whereas limitations qualify it. The exceptions and limitations in the Bill are largely those in the present LTA but are collected in the same section for clarity and ease of reference. This approach has been followed in more modern Torrens Acts (such as the Tasmanian Land Titles Act 1980 and the Queensland Land Title Act 1994) and was supported by all submitters.[43] Uncontroversial exceptions include fraud by a purchaser (partially defined below), estates or interests under prior records of title, misdescribed boundaries, or where an adverse possession claim has been made out.

40 The Land Transfer Act 1952 uses the term "indefeasible" only rarely and not in the main "indefeasibility" sections but in sections 54 and 199.

41 IP10, above n 8, at [2.2]–[2.6].

42 For discussion of these in other Acts see chapter 5. These exceptions in other statutes are too numerous to list, if indeed it is possible to list them all. See Pamela O'Connor, Sharron Christensen and Bill Duncan "Legislating for Sustainability: A Framework for Managing Statutory Rights Obligations and Restrictions Affecting Private Land" (2009) 35 Monash U LR 233 at 242–243, discussing attempts to list for disclosure statutory encumbrances, outside land transfer statutes, that run with the land. O'Connor, Christensen and Duncan cite R Bennett and others "Organising Land Information for Sustainable Land Administration" (2008) 25 Land Use Policy 126: this study identified 514 Federal Acts, 620 Victorian Act and 11 local laws authorising the creation of property rights, restrictions or responsibilities. O'Connor, Christensen and Duncan also note that Western Australia's Department of Land Administration reported 180 "interests" affecting land not presently recorded on certificates of title in 2003: Standing Committee on Public Administration and Finance Parliament of Western Australia "The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia" (2004) at 527.

43 See IP10, above n 8, at [2.10].

2.27 In addition, the exceptions in clause 9 of the Bill include the case where a court in its discretion has made an order to direct the register to be altered under clause 13 of the Bill, and the case of a registered mortgage where the mortgagee has failed to comply with the duty to take reasonable steps to verify the identity of the mortgagor in a forged mortgage case.

2.28 Limitations include estates or interests registered or notified on the record of title, and omitted or misdescribed easements. Two individual submitters thought that omitted easements should not be included, but others specifically considered that it should remain. The omitted easement "exception" is in section 62 of the LTA and in the equivalent provisions of every Australian state and territory, some allowing a wider definition of "omitted easement" (encompassing a variety of common law easements) than others. The purpose of these sections has been said to be "to protect the rights of persons in relation to unrecorded easements from the loss of those rights by the operation of the general principle favouring the conclusiveness of the register".[44]

2.29 This exception is nowadays only likely to arise in New Zealand if the easement was created but omitted by mistake (whether or not previously registered). Lost modern grant easements have been abolished and easements may not be created by prescription after 1 January 2008.[45] The landlocked land provisions in the Property Law Act 2007 largely take care of easements of necessity and implication.[46] Despite these factors, we are not persuaded that there is a case for removing the exception altogether and we believe that it should be retained, preserving consistency with Australia. Clause 9(e) of the Bill is similar to the New South Wales provision, the narrowest of the Australian equivalent provisions.

2.30 Australian legislation[47] (and English and Canadian equivalent legislation) also contains an exception for short-term leases (usually for tenants in actual possession). There are arguments in favour of these being a specific exception in New Zealand also. However, section 58(1)(c) of the Residential Tenancies Act 1986 protects a tenant's right to occupation, notwithstanding a mortgagee or other person having become entitled to possession (and subject to the same notice of termination of the tenancy that the previous lessor would have had), and also notwithstanding anything in the LTA or any other enactments. This means that any residential tenancy is a limitation on a purchaser's title, although an unregistered commercial lease would not be protected (unless caveated). Short-term leases are legal interests in New Zealand by virtue of section 209 of the of the Property Law Act 2007, and any lease can be registered – although in practice many are not. Legal status will give a short-term lease priority over equitable interests. But a non-residential lease is liable to be overridden by a registered estate in the absence of fraud, unless registered or caveated. However, this does not appear to be a problem, and we do not recommend changing the longstanding law for the sake of consistency with Australian legislation in this case.

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44 See Kirby P in *Dobbie v Davidson* (1991) 23 NSWLR 625 (CA), following some New Zealand cases including *Sutton v O'Kane* [1973] 2 NZLR 304 (CA) at 311.

45 Property Law Act 2007, s 296.

46 Property Law Act 2007, ss 326–331.

47 Real Property Act 1900 (NSW), s 42(1)(d); Transfer of Land Act 1958 (Vic), s 42(2)(e); Land Title Act 1994 (Qld), s 182(1)(b); Real Property Act 1886 (SA), s 59(9).

RECOMMENDATION

R5 The new Act should not define indefeasibility but should state that registered title cannot be set aside, subject to exceptions and limitations.

FRAUD

2.31 Fraud as an exception to indefeasibility was discussed in chapter 3 of the Issues Paper. Fraud was discussed in relation to its perpetration:

- against a previous registered proprietor; and
- against the holder of an unregistered interest.

2.32 The main question was whether to clarify the kind of fraud that would defeat title, either by incorporating key elements of the case law or by a definition based on Canadian models or a combination of both. At present fraud is not defined except that section 182 of the LTA states that notice of an unregistered interest "shall not of itself be imputed as fraud". But a concept of "land transfer fraud" has developed over the years that is narrower than "equitable fraud".[48]

2.33 Most submitters preferred a limited legislative definition, confirming the leading cases (such as *Assets Co v Mere Roihi (Assets Co)* and *Waimiha Sawmilling Co v Waione Timber (Waimiha)*).[49] *Assets Co* defines land transfer fraud to the extent that it is dishonesty (not constructive fraud) by or brought home to a registered proprietor whose title is challenged, or by their agent; *Waimiha* holds that it is fraud if the designed object of a transfer is to cheat a person of a known existing right.

2.34 We consider that it is unwise to define fraud in an exclusive way as that could create inflexibility, but agree that it would be useful to affirm *Assets Co* and *Waimiha* as longstanding leading cases. Clause 8(2) of the Bill therefore defines fraud for the purposes of Part 2 of the Bill (that is, as an exception to the title of the registered owner) to the extent of stating that fraud is dishonest conduct by a registered owner, or an agent of the registered owner, in acquiring a registered estate or interest (the *Assets Co* definition). The test for agency has recently been clarified by the Supreme Court in *Dollars & Sense Finance v Nathan* as: whether the agent's acts were so connected to the tasks he or she was asked to do that they could be regarded as a mode of performing them.[50]

2.35 Clause 8(2) covers both fraud against a previous registered owner and against the holder of an unregistered interest. Clause 8(4) of the Bill further defines fraud in relation to the holder of an unregistered interest (*Waimiha*). The transferee must, in acquiring a registered estate or interest, have had actual knowledge of the interest and that it was not registered, and have intended that the transferee's registration would defeat the unregistered interest. The draft

48 See IP10, above n 8, at [3.33].

49 *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC) and *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1923] NZLR 1137 (CA) at 1173–1175 and [1926] AC 101 (PC) and see *Dollars & Sense Finance Ltd v Rerekohu Nathan* [2008] NZSC 20. See also other cases discussed in IP10, above n 8, at [3.9]–[3.19].

50 *Dollars & Sense Finance Ltd v Nathan*, above n 49.

was influenced by section 4 of the Nova Scotia Land Registration Act 2001.[51] This provision was favoured as a model by some submitters. We consider it allows clearer fact-finding for the courts than currently.

2.36 Several submitters wanted to make it clear that constructive notice cannot lead to fraud and the Bill does this in clause 8(3). Two submitters thought that the stricter Australian interpretation of fraud should apply.[52] However, this test has not always been applied in Australia[53] and it has not been the prevailing New Zealand approach.

2.37 Another matter discussed in the Issues Paper concerned so-called "supervening fraud": whether the fraud exception should apply to dishonest acts by a registered owner taking place entirely after registration, in relation to an unregistered interest.[54] Some submitters thought that supervening fraud should be abolished insofar as it does still seem to exist.[55] The way in which fraud is defined in the Bill confines it to conduct in acquiring a registered estate or interest. This ought to preclude any arguments based on "supervening fraud" or fraud in relation to an unregistered interest taking place entirely after registration. Such conduct should be dealt with by an in personam claim against the registered owner if appropriate.[56]

2.38 We note that the definition is only for the purposes of this Part of the Bill. Fraud for the purposes of compensation is defined in Part 3 and is not limited to dishonest conduct by a registered owner or their agent in acquiring their registered estate or interest, but covers fraud by a third party more generally. It is hoped that the statutory definition of land transfer fraud in Part 2, as far as it goes, will improve certainty and reduce litigation while at the same time allowing scope for judicial development of the concept of fraud when necessary.

RECOMMENDATION

R6 The new Act should define "land transfer fraud" to incorporate the leading cases for both fraud against a previous registered proprietor and against an unregistered interest; to further clarify the definition of fraud against an unregistered interest; and to exclude "supervening fraud".

51 Land Registration Act 2001 SNS c 6, s 4, noted in IP10, above n 8, at [3.38]. This section was modelled on the recommendations of the Joint Land Titles Committee, above n 27, Model Land Recording and Registration Act, s 1.2. See also The Rt Hon Peter Blanchard "Indefeasibility Under the Torrens System in New Zealand" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 29 at 45–46, noted in IP10, above n 8, at [3.21].

52 See IP10, above n 8, at [3.20].

53 See IP10, above n 8, at [3.20] and see for example, *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265.

54 See discussion in IP10, above n 8, at [3.22]–[3.28].

55 See the recent mortgage cases such as *Instant Funding Ltd v Greenwich Property Holdings Ltd* HC Auckland CIV 2007–404–006806, 20 December 2007.

56 Note that fraud in such a case would not be "land transfer fraud".

IN PERSONAM JURISDICTION

2.39 Personal claims against a registered owner have sometimes been described as "the in personam exception" to indefeasible title. Chapter 4 of the Issues Paper considers the in personam jurisdiction in relation to land transfer title. Most submitters thought that any further development of this jurisdiction as it relates to land registration should be left to the courts.[57] Recent developments in this jurisdiction were reviewed in the Issues Paper. For example, it discussed *Barnes v Addy* claims (that is, obtaining title in knowing receipt of trust property); *Barclays Bank v O'Brien* and *Royal Bank of Scotland v Etridge* claims (that is, obtaining title with knowledge of the undue influence by, or wrongdoing of, another); and restitutionary claims (that is, obtaining title by unjust enrichment).[58]

2.40 A few submitters thought the Bill should list key prerequisites for exercise of the in personam jurisdiction. These have been held to be:[59] (a) the claim must not undermine the objectives of the Torrens system; (b) there must be unconscionable conduct on the part of the current registered proprietor; (c) in personam claims can encompass only known causes of action. One submitter would have included a fourth requirement: "(d) the conduct can arise before or after registration".

2.41 However, in our view the cases and academic commentary show that this is a developing area and any attempt to legislate for prerequisites to a successful claim would be unwise. Further, the need to rely on the in personam jurisdiction should be reduced if the courts have discretion (as conferred by clause 13, discussed above) to direct alteration of the register, in circumstances of manifest injustice, where title is acquired by an instrument that would be void or voidable apart from the operation of the LTA.

2.42 To include in personam claims as an exception to indefeasibility (as in the Queensland legislation)[60] is arguably not conceptually accurate.[61] It is not necessarily helpful to consider the in personam jurisdiction as so related to registered title that it should be included in a land transfer Bill. As one

57 This view would be supported by a recent article in the Melbourne University Review: Tang Hang Wu "Beyond the Torrens Mirror: A Framework of the In Personam Exception to Indefeasibility" (2008) 32 Melb U LR 672.

58 *Barnes v Addy* (1874) LR 9 Ch App 244; *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 (HL); *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 (HL). See IP10, above n 8, at [4.14]–[4.33]. There is authority for the view that *Barnes v Addy* claims infringe the principle of indefeasibility: see *Macquerie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 (VSCA), especially per Tadgell JA (discussed in IP10, above n 8, at [4.16]), and *Say-Dee Pty Ltd v Farah Construction Pty Ltd* [2007] 230 CLR 89 (HCA).

59 *Duncan v MacDonald* [1997] 3 NZLR 669 at 683–684 per Blanchard J and see IP10, above n 8, at [4.5].

60 Section 184 of the Land Title Act 1994 (Qld) provides that indefeasibility is subject to "an equity arising from the act of a registered proprietor". This so-called "equities" exception is even more inaccurately termed because an "in personam" claim is not necessarily founded in equity. In *Frazer v Walker*, above n 9, at 585, the Privy Council had said that indefeasibility "in no way denies the right of a plaintiff to bring against a registered proprietor a claim founded in law or equity…".

61 See IP10, above n 8, at [4.34]–[4.41], and reference to M Harding "*Barnes v Addy* Claims and the Indefeasibility of Torrens Title" (2007) 31 Melb U LR 343. See too, *CN & NA Davies v Laughton* [1997] 3 NZLR 705 at 712, and discussion in E Cooke and P O'Connor "Purchaser Liability to Third Parties in the English Land Registration System: a Comparative Perspective" [2004] 120 LQR 640 at 649.

commentator has observed, indefeasibility is intended to protect a registered proprietor from claims based on prior title, whether the remedy sought is personal or proprietary.[62]

2.43 Successful in personam claims do not necessarily lead to proprietary consequences, although they may sometimes mean that a registered owner loses title (a specific performance decree being an example of this). However, as the effect of a successful in personam claim is to defeat registered title in some cases, we believe that it is desirable that the Bill should at least recognise in personam claims in relation to registered land (following *Frazer v Walker* in this respect).[63] Clause 7(5) does this.

RECOMMENDATION

R7 The in personam jurisdiction should be referred to in the new Act only to clarify that it is not affected by indefeasibility of title.

REGISTRAR'S POWERS OF CORRECTION

Nature of Registrar's power

2.44 Chapter 5 of the Issues Paper discussed the powers of the Registrar contained in sections 80 and 81 of the LTA. These powers, particularly those contained in section 81, are confusing in their extent and their application.

2.45 The Issues Paper asked whether the need for the Registrar's powers of correction had changed in the context of the electronic system.[64] Submitters were of the opinion that the powers were still highly relevant under the electronic system. Some submitters thought that the increased role of solicitors required the Registrar to have powers to alter mistakes made by the solicitors. We agree that powers of correction continue to be important under the electronic system.

2.46 The meaning of the word "wrongfully" in section 81 was discussed in the Issues Paper.[65] The meaning of this word is unclear and may potentially be broader than the exceptions to indefeasibility.[66] The paper also considered whether

62 KFK Low "The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities" [2009] 33 Melb U LR 205. Low prefers the term "inter se" claims to "in personam" in this context (suggested by Bruce Ziff *Principles of Property Law* (4th ed, Thomson Carswell, Toronto, 2006)), as the remedy may well be proprietary. As he says, where the claim does not arise out of prior title, Torrens indefeasibility does not preclude an in personam claim.

63 *Frazer v Walker*, above n 9.

64 IP10, above n 8, at [5.6].

65 Ibid, at [5.11]–[5.19].

66 For a narrow view of the meaning of "wrongfully" see, for example, *Chan v Lower Hutt City Corporation* [1976] 2 NZLR 75 (SC); *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance* [1984] 2 NZLR 704 (HC); *Dollars & Sense Finance Ltd v Nathan* [2007] 2 NZLR 747 at [156] (CA); GW Hinde "Indefeasibility of Title Since *Frazer v Walker*" in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 33 at 68. For a broader view, see, *Housing Corporation of New Zealand v Maori Trus*tee [1988] 2 NZLR 662 at 700 (HC).

the Registrar's power to correct the register should be an administrative power or whether it should permit substantive findings as to legal rights.[67] Two options for reform were suggested:[68]

(a) to retain the current interpretation of section 81, but clarify that the Registrar's powers are limited; or

(b) to adopt a provision that gives the Registrar a broader discretion to exercise powers of correction as, for example, the Registrar has in Queensland.[69]

2.47 Most submitters were against retaining the word "wrongfully" as a ground for the Registrar exercising a corrective power. The majority of the submitters supported the Registrar having broad powers, as he or she, at least arguably, does currently. However, this seemed to be derived from a perception that the Registrar is currently unwilling to exercise powers of correction. Some submitters considered that specifying the grounds for exercising the powers of correction would facilitate their use.

An administrative power

2.48 A new LTA should no longer use the term "wrongfully". The term has not been included in the Bill.

2.49 We do not believe the Registrar should have a quasi-judicial power to correct the register. The Registrar does not want such a power. We recommend that the power be an administrative one. Although it might be thought that permitting the Registrar to make substantive findings may be a cheaper, quicker and more efficient way to resolve disputes than taking them to the High Court, the Registrar is not well placed to make decisions involving complex issues of law and fact that are very likely to be appealed in any event. Where the correction involves issues relating to fraud or indefeasibility more generally, or where the correction is contested, the High Court is the best forum for the matter to be decided.

2.50 Clause 33 of the Bill sets out the Registrar's powers of alteration. The power is only available to correct an error by the Registrar or a person acting under a delegation, to correct an error made by a person preparing a document or information for registration, to record a boundary change due to accretion or erosion or to give effect to an order of the court. Except in the case of a court order, if the alteration materially affects an estate or interest, consent or notice must be given and no objections received. There is also a general power to alter any information with the written consent of all affected parties.

RECOMMENDATION

R8 The Registrar should have an administrative power to correct the register.

67 IP10, above n 8, at [5.20]–[5.30]. See also David Grinlinton "The Registrar's Powers of Correction" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 217 at 228 and 239–240.

68 Ibid, at [5.31].

69 See Land Title Act 1994 (Qld), ss 15 and 19.

Chapter 3

Unregistered interests, caveats and trusts

UNREGISTERED INTERESTS

3.1 Chapter 6 of the Issues Paper identified unregistered interests as a problematic area in the Torrens system.[70] It recognised that these interests will continue to exist outside the Land Transfer Act 1952 (LTA), usually in an equitable form,[71] and identified three types of unregistered interests:[72]

- interests that are capable of registration but not yet registered;
- interests contained in unregistrable instruments; and
- interests that are currently incapable of being registered (unregistrable interests).

3.2 In light of recent judicial authority, we propose that all unregistered interests in land be treated in the same way.

Interests incapable of registration

3.3 The Issues Paper asked whether any unregistrable interests should be made capable of registration.[73] Submitters did not suggest any unregistrable interests that should be made registrable, nor have we identified any such interests.

3.4 There is a line of authority that interests incapable of registration may override LTA title.[74] However, since the Issues Paper was published this matter has been considered by the Supreme Court in *Regal Castings Ltd v Lightbody*.[75] Justice Tipping, in a strong obiter dictum, considered that if Regal Castings

70 New Zealand Law Commission in conjunction with Land Information New Zealand *Review of the Land Transfer Act 1952* (NZLC IP10, Wellington, 2008) at [6.14]–[6.17] [IP10].

71 In contrast short-term leases, which are defined as unregistered leases of less than one year under section 207 of the Property Law Act 2007, are legal interests (Property Law Act 2007, s 209).

72 IP10, above n 70, at [6.7]–[6.18].

73 IP10, above n 70, at [6.18].

74 IP10, above n 70, at [6.14]–[6.17]. See *Carpet Import Co Ltd v Beath and Co Ltd* [1927] NZLR 37 (SC, Full Court) at 59; *Gray v Urquhart* [1910] 30 NZLR 303 (SC) at 308; *Town & Country Marketing Ltd v McCallum* (1998) 3 NZ Conv C 192,698 (HC) at [29]. For a dissenting view see *Ruapekapeka Sawmill Co Ltd v Yeatts* [1958] NZLR 265 (SC) at 271.

75 *Regal Castings Ltd v GM and GN Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 per Tipping J with Blanchard and Wilson JJ in agreement.

had had an unregistrable interest in the land, that interest would not have prevailed against the registered proprietor's title. In Justice Tipping's view, the effect of section 62 was as follows:[76]

> Except in the case of fraud, the registered proprietor takes free of all interests that are not notified. The certainty and simplicity of that proposition should not be watered down by reference to whether the interest qualifies for registration. It is the fact of non-notification which is crucial … If you have an interest, whether registrable or not, of which you wish to give notice, you should, if possible, protect it by caveat. I can find nothing in either the text of the Act or in its underlying purpose to support the view that the paramountcy afforded by s 62 does not apply against unregistrable interests.

3.5 *Regal Castings Ltd v Lightbody* is persuasive high authority in New Zealand that no unregistered interests should override the register (with the exception of those which override by virtue of a statutory provision). We agree that unregistrable interests should not be able to override the LTA register and consider that the Bill should settle the matter once and for all. Clause 7(2)(b) of the Bill confirms this position.

RECOMMENDATION

R9 The new Act should provide that a registered interest will defeat any unregistered interest, whether registrable or not, where there is no overriding statutory provision and the registered interest was not obtained through fraud.

The registration gap

3.6 The Issues Paper discussed the problem of the registration gap: the gap between settlement and registration.[77] It considered the two interpretations of section 182 of the LTA, that is, that a person gains the protection of indefeasibility:

- once registered (the orthodox interpretation);[78] or
- once a person is contracting with or proposing to take an interest from the registered owner (the literal interpretation).[79]

76 Ibid, at [150], supported by Blanchard and Wilson JJ. His Honour acknowledged the *Carpet Import Co*, above n 74, line of authority but was satisfied that this view was "erroneous" and based on a misunderstanding of the earlier case, *Gray v Urquhart*, above n 74. In his view, *Gray v Urquhart* related to the application of a statutory provision rather than "any general principle that the paramountcy provisions do not prevail against interests which are incapable of registration" (at [152]).

77 IP10, above n 70, at [6.19]–[6.24].

78 See *Mercury Geotherm Limited (In Receivership) v McLachlan* [2006] 1 NZLR 258 (HC) and RP Thomas "Land Transfer Fraud and Unregistered Interests" [1994] NZ Law Rev 218 at 218. This interpretation has also prevailed in Australia: see *Templeton v Leviathan Pty Ltd* (1921) 30 CLR 34 (HCA) at 54–55 per Knox CJ; *Lapin v Abigail* (1930) 44 CLR 166 (HCA); *IAC (Finance) Pty Ltd v Courtenay* (1963) 110 CLR 550 (HCA) at 572 per Kitto J.

79 This interpretation has not been supported by case law in New Zealand, but see Rt Hon Justice Peter Blanchard "Indefeasibility Under the Torrens System in New Zealand" in David Grinlinton *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 29 at 44–45; Douglas J Whalan "The Meaning of Fraud Under the Torrens System" (1975) 6 NZULR 207 at 211.

3.7 The Court of Appeal has recently confirmed the orthodox interpretation of section 182 stating that it would not be appropriate to overturn a longstanding interpretation of the section particularly in light of this review of the LTA.[80]

3.8 Indeed, in our view, *Perkins v Purea and Tangi-Tuake* provides an example of the dangers of adopting an interpretation of section 182 that is protective of the purchaser against other equitable interests, during the registration gap. The Tangi-Tuakes had an agreement with Mrs Tangi-Tuake's parents (the Pureas) that if they moved into a property owned by the Pureas, met the mortgage payments and allowed the Pureas to stay in the property when they visited New Zealand, the house would be theirs once the loan was repaid. After Mrs Purea's death, Mr Purea signed a transfer and sent it to Mrs Tangi-Tuake's solicitor, although this was never registered. The Tangi-Tuakes subsequently had a falling out with Mr Purea who then attempted to sell the house. The Perkins bought the property but before settlement and registration the Tangi-Tuakes lodged a caveat. The Court saw this as a case of competing equities and in this situation the Tangi-Tuakes' interest took precedence.

3.9 Leave to appeal the decision to the Supreme Court has been declined.[81] The Supreme Court held that:[82]

> Mr and Mrs Perkins's appeal also could not succeed unless this Court were prepared not only to overturn a long line of cases but also to apply s 182 even before settlement. We are convinced that it would not and should not do that.

3.10 The complex nature of this situation shows that it is not easily addressed in legislation. We think that allowing the courts to determine equitable priorities is the best way to allow all the relevant circumstances to be taken into account.

3.11 The Bill does not have an exact equivalent of section 182, although the substance of that section is contained in the definition of what sort of fraudulent conduct will defeat an otherwise indefeasible title (clause 8 of the Bill). In order to gain the protection of the LTA, the interest must be registered. This is fundamental to the operation of the Torrens system as a system of title by registration. Until an interest is registered, a person must take steps to protect the interest, such as lodging a caveat, obtaining a guaranteed search under section 172A (which is retained in clause 17 of the Bill, subject to reduced timeframes, as discussed in chapter 4), or relying on the rules of equitable priority. Indeed, the registration gap is unlikely to arise often as, under the electronic system, settlement and registration are generally close together in time.

80 *Perkins v Purea and Tangi-Tuake* [2009] NZCA 541 at [68]–[69].

81 *Perkins v Purea and Tangi-Tuake* [2010] NZSC 15.

82 Ibid, at [4].

INTEREST RECORDING

3.12 Chapter 6 of the Issues Paper considered whether an interest recording system could improve some of the deficiencies of the Torrens system regarding unregistered interests. We considered the following models:

- a notification system (as used for restrictive and positive covenants under section 307 of the Property Law Act 2007);[83]
- a caveat system that records priorities;[84]
- an interest recording system (as suggested by the Canadian Model Titles Act);[85] and
- the English and Welsh recording system for minor interests.[86]

3.13 Submitters were divided on this point. A number favoured the introduction of either a full interest recording system or a caveat priority system to give greater protection to unregistered interests and avoid litigation on equitable priorities. Others thought that that would be an unnecessary departure from the current system and that a system of recording equitable interests, where the first interest to be recorded takes priority, could be unfair in its application.

Advantages of interest recording or caveat priority system

3.14 As it is not possible to allow registration for all interests in land, combining a title registration system with an interest recording system is an attractive proposal. This would allow registration for the most important interests, for example, fee simple estates, leasehold estates, and mortgages, while other interests are simply noted on the title record. Recording would not confer ownership or indefeasibility.

3.15 An obvious advantage of an interest recording system would be to prevent fraud against unregistered interests. The system could also avoid litigation on equitable priorities as the first to be noted would obtain priority, although it would be necessary to set out exceptions for interests that are unknown to their owners, for example, beneficiaries of constructive trusts.[87]

83 IP10, above n 70, at [6.31]–[6.33] and [6.42]. See Pamela O'Connor "Information, Automation and the Conclusive Land Register" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 249 at 260.

84 IP10, above n 70, at [6.43]–[6.52]. This system has been adopted in a number of Canadian jurisdictions and Singapore: Land Title Act RSBC 1996 c 250, s 31; Land Titles Act RSA 2000 c L–4, ss 135, 147; Real Property Act CCSM c R30, s 155; Land Titles Act 1993 (Sing), s 49. See also Law Reform Commission of Victoria *Priorities* (LRCV R 22, Melbourne, 1989) at 12; See Douglas J Whalan "The Position of Purchasers Pending Registration" in GW Hinde (ed) *The New Zealand System Centennial Essays* (Butterworths, Wellington, 1971) 120 at 133–134; Dr DW McMorland "Notice, Knowledge and Fraud" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 67 at 99.

85 IP10, above n 70, at [6.53]–[6.57]. See also Joint Land Titles Committee (Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan, Yukon) *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, 1990).

86 IP10, above n 70, at [6.58]–[6.63]. See Land Registration Act 2002 (UK), ss 28, 32, 33 and Law Commission and HM Land Registry *Land Registration for the Twenty-first Century: A Conveyancing Revolution: Land Registration Bill and Commentary* (LC 271, The Stationery Office, London, 2001) at 95.

87 Mary-Anne Hughson, Marcia Neave and Pamela O'Connor "Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders" [1997] 21 Melb U LR 460 at 488.

3.16 A full interest recording system could operate in a more efficient way than a caveat-priority system as it would not prevent transfer, but rather land could be transferred subject to the noted interests.[88] An interest recording system would more accurately reflect the interests that related to a particular piece of land, endorsing the Torrens "mirror" principle.[89]

3.17 Although, due to electronic conveyancing, the gap between settlement and registration has diminished (and if a guaranteed search is obtained, an interest holder may obtain compensation for any loss), another deficiency that an interest recording system could counter is the gap between the creation of the interest by means of a contract and its registration. This gap may still be of significance. This means that an interest may still be in a vulnerable position for a significant period.

Disadvantages of interest recording

3.18 There are, however, a number of practical disadvantages to implementing an interest recording system in New Zealand.

A system is not needed?

3.19 First, we are not aware of empirical evidence that there is a significant problem requiring legislative intervention.

3.20 The Issues Paper explored the system proposed by the Canadian Joint Land Titles Committee and the system in the United Kingdom, both of which combine interest recording with title registration.[90] The policy of the Land Titles Committee was that only those interests of sufficient importance could be registered.[91] The United Kingdom Act also starts from the basis that not all interests in land can, or should be, registered and gain the benefits of registered title.[92]

3.21 In contrast, in New Zealand a large number of interests are capable of registration and the line between what is capable of registration and what is not is not clearly delineated as in the United Kingdom and under the Canadian Model Act. While some interests are frequently left unregistered, for example, commercial leases, this is generally a matter of choice. Nevertheless, it seems unnecessary to develop a system around interests that are capable of registration, but are not registered for reasons of practicality.

3.22 Interest holders often do not lodge caveats to protect their unregistered interests. This suggests that a new system for noting such interests may not be used by those who own unregistered interests.

88 Les A McCrimmon "Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title" (1994) 20 Monash U LR 300 at 313.

89 See TBF Ruoff "An Englishman Looks at the Torrens System: Part 1: The Mirror Principle" (1952) 26 ALJ 118 at 118.

90 IP10, above n 70, at [6.43]–[6.57].

91 Joint Land Titles Committee, above n 85, at 21. Section 5.1 of the Model Land Recording and Registration Act sets out these interests.

92 Land Title Registration Act 2002 (UK).

3.23 Some interests are not currently registrable, for example, restrictive and positive covenants. However, these are already protected by means of a type of interest recording, which allows them to be recorded and to run with the land, but does not confer indefeasibility.[93]

Possible operational problems

3.24 There are practical considerations that weigh against an interest recording system. If it is implemented by means of a caveat recording system, it may significantly increase the number of caveats that are lodged. Alternatively, if a notification system is adopted to allow more unregistered interests to be noted, this too may increase the number of interests that would need to be noted.

3.25 The resulting effect may be that the record of title is "cluttered" and contains too much information. It has been suggested that any changes to the interest may also have to be recorded on the register, thus increasing the "clutter".

3.26 Another factor is that unregistered interests will mostly be equitable in nature and it may be difficult to establish criteria as to whether these interests should be allowed to be caveated or noted. This argument may be valid, but the problem exists under the current caveat system.

Equitable priority rules more flexible

3.27 The effect of an interest recording system is to create a system based on a race to be recorded: the first person to lodge a caveat or record his or her interest gains priority against other unregistered interests, circumventing the rules of equitable priority. However, the situations surrounding unregistered interests will often be complex and it may be overly simplistic to allow priorities to be resolved by such a system. Also, interest holders may not appreciate the need to caveat or record their interests.

3.28 Even without introducing a recording system, generally under the equitable priority rules it will be important to record an interest by means of a caveat and failure to do so may postpone an earlier interest to a later one.[94] Further, the equitable priority rules are more flexible and can address situations such as where a person does not know that he or she holds an equitable interest.

93 Property Law Act 2007, s 307.

94 *Australian Guarantee Corporation (NZ) Ltd v CFC Commercial Finance Ltd* [1995] 1 NZLR 129 (CA) at 138. See Hinde McMorland & Sim *Land Law in New Zealand* (loose leaf, LexisNexis, Wellington, 2005) at [9.005] and [10.005] for discussion of equitable priority rules generally and in relation to caveats.

Conclusion

3.29 On balance we do not favour the introduction of an interest recording or caveat priority system in New Zealand. Although unregistered interests can be in a vulnerable position, the problem does not seem to justify such a departure from the current system. There are a number of practical considerations that would make it difficult to implement such a system. We are not satisfied that the current mechanisms to protect unregistered interests are so inadequate as to justify designing and running a specific system to provide for a caveat priority system or an interest recording system.

RECOMMENDATION

R10 The new Act should not contain an interest recording system.

CAVEATABILITY OF INTERESTS

What interests can be caveated?

3.30 Chapter 7 of the Issues Paper considered what types of interests in land should be able to be caveated: only those that are ultimately capable of registration, or all interests in land regardless of whether they can be registered?[95] Since the publication of the Issues Paper, Tipping J, in *Regal Castings Ltd v Lightbody*, has supported the broad view of caveatability, stating "an interest can be the subject of a caveat even if it is not registrable".[96] Tipping J's view, albeit obiter, is likely to have settled the matter in New Zealand. All the submitters who commented on this favoured this interpretation. We agree, and the position is confirmed in clause 105(1)(a) of the Bill.

Can registered owners caveat their own titles?

3.31 The Issues Paper asked whether registered owners should be able to caveat their own titles.[97] Currently, the law in New Zealand is that a registered owner can caveat his or her own title where he or she possesses something more than merely the interest of a registered owner.[98] Some submitters supported the legislation providing that registered owners can caveat their own titles in a broader range of circumstances, while others were not convinced that such a provision was necessary. We do not believe that registered owners should be able to caveat their titles in all circumstances. However, there is a case for recognising the current position that caveating one's own title is possible where an additional interest exists.

95 IP10, above n 70, at [7.4]–[7.16].

96 *Regal Castings Ltd v Lightbody*, above n 75, at [151], per Tipping J, supported by Blanchard and Wilson JJ. The Court of Appeal had previously expressed a provisional view in favour of the wider approach to caveatability in *Waitikiri Links v Windsor Golf Club Incorporated* (1998) 8 NZCPR 527 (CA).

97 IP10, above n 70, at [7.17]–[7.21].

98 See *Re Haupiri Courts Ltd (No 2)* [1969] NZLR 348 (SC) at 357 and *Whiteleigh Holdings (New Zealand) Ltd (in receivership) v Whiteleigh Pacific Resources Ltd* (1987) ANZ ConvR 480.

3.32 Also, if fraud is suspected, we are of the opinion that registered owners should be able to take steps such as lodging a caveat to protect their interest provided that the owner establishes that there is a real risk of fraud to the satisfaction of the Registrar. The Bill confirms this position (see clause 105(1)(d)).

RECOMMENDATIONS

R11 Any interest, registrable or not, should be able to be caveated.

R12 A registered owner should be able to caveat his or her own title where there is an additional interest or a real risk of fraud.

TRUSTS "OFF THE REGISTER"

3.33 Chapter 8 of the Issues Paper canvassed the arguments for and against noting on the register that registered owners are trustees. Most Australian Torrens statutes, like the LTA, keep trusts "off the register". However, in Queensland and the Northern Territories, registered proprietors may be registered as trustees.[99]

3.34 A number of submitters favoured trustees having the option of being registered as owners in their capacity as trustees where applicable, and if so done, some said the trust deed should be deposited with the Registrar. Reasons advanced include greater transparency so that land titles should reflect true ownership of property (the "mirror" principle), and protection of beneficiaries.[100] But nearly all submitters said that it should be for the vendor, not the purchaser, to ensure compliance with the trust deed, and several suggested that this could be done through certification by the vendor's conveyancer that the terms of the trust deed had been complied with. If so, there seems no good reason for the option of depositing the trust deed with the Registrar. That option, in the current section 128(2), is apparently rarely used now and has not been carried forward into the Bill.

3.35 Some submitters expressed opposition to noting trustees as registered owners. We have decided against recommending changing the law in this regard. Optional noting would not necessarily lead to more transparency and a fuller application of the mirror principle (to assist purchasers and potential creditors to know when they are dealing with a trust, for example). For this to happen, noting would need to be mandatory. This would be a major change from the present situation (and from other Torrens legislation). As mandatory noting was not specifically addressed in the Issues Paper, submitters have not had an opportunity to respond to this option and no submitter suggested it as a reform.

99 See Land Title Act 1994 (Qld), ss 109–110A, and Land Title Act 2000 (NT), ss 125–131.

100 It was also noted that if a trustee vendor signs for himself or herself and other trustees, the vendors may be able to resile from the contract on the basis that it is not the unanimous decision of the trustees.

3.36 In relation to protection of beneficiaries, they may be able to caveat to protect their interests, although if they are discretionary beneficiaries there is authority that a discretionary beneficiary lacks a proprietary interest in trust assets, and so generally would have no vested interest in the land to protect against possible sale or other dealing.[101]

3.37 Further, the rationale for not noting registered owners as trustees on a record of title is to promote ease and speed of transfer for a purchaser who should not need to be concerned with a trust deed. As suggested in the Issues Paper, noting of trusts would open the question of a purchaser's obligation to examine the trust deed and make inquiries as to compliance with it. This should not be a matter for the registration process; registered owners who are trustees should retain their responsibility as trustees in respect of the property owned. If compliance with the trust deed were to be certified by the vendor trustees' solicitor (as some submitters suggested), there could be a risk of bringing matters of trustees' duties into the land registration process. We consider that such matters of trusts law are not the appropriate concern of a land registration statute and that they should remain "behind the curtain". Trustees are very likely to have a power of sale in any event.

3.38 Finally, noting trustees as registered owners might increase compliance costs and delay. At present senior examiners in the Queensland Titles Offices scrutinise trust dealings to ensure the dealing is not in breach of trust.[102]

3.39 We are not persuaded that an optional right or a mandatory obligation for trustees to register in their capacity as trustees is warranted. Clause 103 therefore restates the current section 128 of the LTA.

RECOMMENDATION

R13 The new Act should continue to provide that no entry should be made on the register of any notice of trust, or if so entered, it should not be of any effect.

101 *Holt v Anchorage Management Ltd* [1987] 1 NZLR 108 (CA) (a beneficiary can sustain a caveat where he or she may claim a beneficial interest in specific land); *Philpott v NZI Bank* [1990] ANZ Conv Rep 242 at 234 (section 137(a) of the LTA does not extend to mere potentialities which have not ripened into interests in any particular properties, per Cooke P); *R & I Bank of Western Australia v Anchorage Investments Pty* (1992) 10 WAR 59, all cited in *Patchett v Williams* HC Blenheim CIV 2005–406–8, 5 October 2005 per Miller J (a discretionary beneficiary had no right to caveat).

102 Email from Queensland's Registrar of Titles, 17 March 2008.

Chapter 4
Compensation

PRINCIPLES

4.1 A state compensation system is an essential underpinning of the Torrens system in New Zealand and this was discussed in chapter 11 of the Issues Paper. The system operates as one of first resort to compensate people for loss due to the operation of the Land Transfer Act 1952 (LTA). This means that claimants may bring claims against the Crown without having first to exhaust remedies against wrongdoers. This system must continue under the new Act. The policy is fundamental to maintaining public confidence in the registration system.

4.2 A review by the Law Reform Commissions of Manitoba and Saskatchewan considered that a system of first resort was preferable because:[103]

- requiring claimants to exhaust other remedies can increase their subjective sense of loss due to the cost, delay and uncertainty, especially where it is clear that it is impossible to recover from the wrongdoer;
- it is faster and more efficient to allow the claimant to obtain compensation immediately and to allow the Registrar to pursue the wrongdoer where appropriate;
- prompt reimbursement minimises mental distress and consequential loss.

4.3 This principle is reflected in the provisions of the Bill relating to compensation (see clauses 14–23 of the Bill).

GROUNDS

4.4 The LTA currently allows compensation to be recovered where:

(a) there is any loss due to the mistake of the Registrar (section 172(a));
(b) there is a loss of an interest in land due to the operation of the LTA (section 172(b));
(c) any loss or damage occurs as a result of having obtained and relied upon a guaranteed search copy (section 172A).

4.5 The Issues Paper considered whether the risk of mistakes in the registration process has increased under the electronic system.[104] It also asked whether it was satisfactory that claims under section 172(a) of the LTA are limited to Registrar's

103 Manitoba Law Reform Commission *Private Title Insurance* (a joint project with the Law Reform Commission of Saskatchewan) (MLRC R114, Winnipeg, 2006) at 54–55.

104 New Zealand Law Commission in conjunction with Land Information New Zealand *Review of the Land Transfer Act 1952* (NZLC IP10, Wellington, 2008) at [11.9]–[11.10] and Q 51 [IP10].

errors. Submitters were divided on these questions.[105] While some believed that errors had decreased under the electronic system, others were of the opinion that they had increased. Some submitters thought that the increased role of solicitors under electronic conveyancing, and the fact that the Registrar no longer actively scrutinises instruments which are automatically registered, justified an extension of section 172(a).

4.6 We believe that the balance between section 172(a) and (b) is appropriate and that section 172(a) should not be extended. These provisions are in clauses 15 and 16 of the Bill. They are consistent with provisions in a number of other Torrens jurisdictions. Where a person loses all or part of their interest in land through the operation of the Torrens system, the State will compensate, whether or not the loss was caused by the Registrar. However, where the loss is not a loss of land, it must have been caused by the error of the Registrar in order to be compensable. A solicitor lodging a document for electronic registration does not assume a greater role than under the old paper system and is not acting as an agent of the Registrar.

4.7 The Issues Paper asked whether section 172A, which provides for a guaranteed search, was still necessary in light of electronic conveyancing and the reduced time between settlement and registration.[106] A number of submitters supported the continuation of this provision. Some thought that it could be removed if all transactions were electronic.

4.8 A guaranteed search might be necessary; for example, if a person opts to do his or her own conveyancing, the whole transaction must be done on paper, and it would be unfair to deny the protection of a guaranteed search in this situation. Further, while the practice is now to lodge an instrument for registration immediately after settlement, it is still possible for there to be a gap. For these reasons, we have concluded that an equivalent of section 172A is needed. However, we are of the opinion that due to the changed conveyancing environment, the time periods in section 172A are unnecessarily long. Under the Bill, the periods would be reduced from 14 days and two months to five and 10 working days respectively (see clause 17 of the Bill).

RECOMMENDATION

R14 The new Act should provide compensation for any loss caused by Registrar's error; loss of land through the operation of the land transfer system; and loss after having relied on a guaranteed search.

105 Ibid, at [11.9]–[11.10] and Q 52.

106 Ibid, at [11.17]–[11.18] and Q 56.

EXCEPTIONS

4.9 The Issues Paper noted that the exceptions to compensation were scattered throughout the Act and the Land Transfer Amendment Act 1963.[107] Submitters favoured a consolidation of these provisions. The Bill gathers these exceptions together in one place. Some of the exceptions have been removed (see commentary on clause 18 of the Bill).

MEASURE OF DAMAGES

4.10 The Issues Paper identified problems with the mechanisms for measuring damages under section 179 of the LTA:[108]

- the LTA sets out a measure of damages for claims only where there has been a loss of land or an estate or interest in land, generally covered by section 172(b);[109] and
- section 179 may not provide an appropriate test for determining damages particularly in regard to measuring the damages as at the date of deprivation.

4.11 Submitters supported having a single provision that deals with all compensation claims under the Act. Clause 19 of the Bill provides for this.

4.12 The guiding principle for determining the amount of compensation is to put the person in the same position as if the wrongful act had not been done.[110] The value of the land or interest, which is the determining factor under section 179, is relevant where the interest holder has been totally deprived of an interest in land. Where the interest holder has only been partially deprived of the interest, for example, by registration of a mortgage over their land, the relevant question is the extent of the reduction of value in their interest. Where the interest holder has suffered a loss other than an interest in land, it is more appropriate to consider the value of that loss.

4.13 Currently section 179 provides that for loss of land the amount of compensation is limited to the value of the land at the date of deprivation. As discussed in the Issues Paper, this date can be unfair as deprivation can often take time to be discovered and the plaintiff will not receive compensation that covers any increase in property value or improvements subsequently added to the property.[111] In contrast, claims that do not fall under section 179 are decided in accordance with ordinary principles.[112] Submitters agreed that date of deprivation can produce unfair results.

107 Ibid, at [11.24]–[11.30]. See Land Transfer Act 1952, ss 60, 89E, 178, 180, 181, 201, 204, 209 and Land Transfer Amendment Act 1963, s 19.

108 Ibid, at [11.44]–[11.51].

109 In *McNicholl v Attorney-General* (1996) 3 NZLR 457 (HC), the High Court held that section 179 did not apply to loss under section 172(a) and assessed damages according to the ordinary common law principles.

110 See *Registrar of Titles v Spencer* (1909) 9 CLR 641 at 645.

111 IP10, above n 104, at [11.50]–[11.51].

112 However, in *McNicholl v Attorney-General*, above n 109, the amount of compensation was, nevertheless, based on the date of deprivation.

4.14 Other options are to determine the amount of compensation:

- at the date of discovery;[113]
- at the date of making a claim under the Act;[114]
- at the date of judgment in the claimant's favour; or
- at a discretionary date determined by a judge.[115]

4.15 Using the date of discovery or the date of making a claim as the relevant date will in most cases reflect the value of the land at a more recent date than the date of deprivation and ensure that a claimant is compensated on a fairer basis, although if the property value has declined this may be detrimental to the plaintiff. Of these two dates, the Canadian Joint Land Titles Committee favoured the date of making a claim as it is more current.[116] However, it has been suggested that this may provide an incentive to delay making a claim. A discretionary date has the advantage of being able to be adjusted to the particular circumstances, but it is less transparent and clear.

4.16 For these reasons, clause 19(2) of the Bill adopts the date when the claim is made as the default, with discretion to alter the date if the court considers it appropriate. This provides a clear date on which to base the claim that will be closer to the land's current value. Allowing the court to alter the date where appropriate can address the situation where a person delays making a claim in order to get more compensation.

4.17 The Bill also includes a provision that allows any benefits received by the claimant to be taken into account.[117] This will avoid the situation in *McNicholl v Attorney-General*, where the claimant received compensation even though the loss had been rectified by the time of bringing the claim.[118]

RECOMMENDATION

R15 Compensation should generally be based on the value of the estate or interest as at the date on which the claim is made, but where this value is inappropriate the court should have discretion to determine the amount of compensation on a different basis.

113 See Joint Land Titles Committee (Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan, Yukon) *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, 1990) at 31.

114 Ibid, at 31.

115 See *Registrar-General v Behn* [1980] 1 NSWLR 589 at 597.

116 Joint Land Titles Committee, above n 113, at 31 and see Model Land Recording and Registration Act, s 7.2.

117 See Alberta Law Reform Institute *Proposals for a Land Recording and Registration Act for Alberta* (Vol 1, Report 69, Edmonton, 1993) Draft Land Recording and Registration Act, clause 7.2.

118 *McNicholl v Attorney-General*, above n 109. See IP10, above n 104, at [11.44]–[11.45].

RESPONSIBILITY FOR THE LOSS

4.18 Loss under the Torrens system can be caused in a number of ways. People or organisations who can cause or contribute to loss include the Registrar or his or her staff, the person who suffered the loss, a solicitor or conveyancer involved in a particular transaction, or a third party.

4.19 Loss caused by the Registrar is specifically covered by section 172(a) of the LTA, which covers any loss, and will continue to be covered by the Bill (see clause 15). The situation where loss is caused or contributed to by any of the other actors listed is discussed below.

Contributory fault

4.20 The LTA does not refer to the impact of contributory fault. However, case law initially held that the doctrine of contributory negligence applied,[119] and subsequently the Contributory Negligence Act 1947 was applied by the courts to compensation claims.[120] These cases involved claims under section 172(a) of the LTA (or its equivalent in older versions of the Act), where Registrar's error was the basis of the claim.

4.21 In the Issues Paper we noted that immediate indefeasibility may be seen as protecting the purchaser or mortgagee against their own lack of care and commented that:[121]

> [i]t may seem like contradictory policy that the mortgagee who negligently accepts a void mortgage (perhaps through fraud of a third party) is protected, but the mortgagor who negligently but innocently enables the fraud to occur is unprotected.

4.22 Submitters generally agreed with applying contributory negligence principles but some expressed reservations about the situation where parties on both sides of the transaction are negligent.

4.23 The options appear to be as follows:

(a) to reduce or bar compensation where a person has contributed to their own loss;

(b) as in option (a), but with exceptions to its application, for example, where registration has been obtained via a void instrument and both parties have contributed to this;[122]

(c) to exclude contributory negligence as a ground for reducing or barring compensation claims.[123]

119 *Miller v Davy* (1889) 7 NZLR 515 (CA) at 521; followed in *In Re Jackson's Claim* (1892) 10 NZLR 148 (SC); *Russell v Registrar-General of Land* (1907) 26 NZLR 1223 (CA) at 1229.

120 *Registrar-General of Land v Marshall* [1995] 2 NZLR 189 (HC) at 201; *Melville-Smith v Attorney-General* [1996] 1 NZLR 596 (HC) at 603.

121 IP10, above n 104, at [11.59].

122 Some submitters supported this option.

123 One submitter favoured this option.

4.24 We believe that compensation should be reduced but not barred altogether where a person has contributed to their own loss. There is a risk that full compensation would not provide people with an incentive to take steps to protect their own interests. This is consistent with the policy behind the Contributory Negligence Act 1947.

4.25 While we acknowledge the potentially contradictory policy, described above, which allows one person to take an indefeasible title, but reduces the other's compensation, where both may be negligent,[124] we cannot see that this justifies the State stepping in and providing full compensation where a person has contributed to their loss. It would be very difficult to address this through exceptions to the rules relating to contributory negligence and it is likely that such exceptions would cause more unfairness. Nevertheless, the issue will be partially addressed by provisions in the Bill that deny indefeasibility to mortgagees who have not taken reasonable steps to ascertain identity of mortgagors, and provide for discretionary indefeasibility (clauses 11–13).

4.26 We are concerned that reducing compensation where a person or their agent has contributed to the loss may work unfairly in some circumstances. The LTA is technical legislation and individuals will often be dependent on their lawyer or conveyancer. For this reason, we do not consider that loss caused by practitioners should be attributed to the claimant.[125] We believe that to do so would undermine the system of first resort and public confidence in the system. In these situations the claimant should be entitled to claim first from the State, which would then have a right of subrogation from the solicitor. This is the model currently used where a practitioner is negligent in claims under section 172A of the LTA.

4.27 Once it is accepted that compensation should be reduced in cases of contributory fault, it is necessary to consider how this should be done. There are problems with the application of the Contributory Negligence Act 1947. Section 3 of that Act provides that a court can apportion the damages where "any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons". Fault is defined as "negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence".[126] The balance of authority has favoured the interpretation that this definition confines the defence to situations where it was available under the common law. This means that it does not apply where a person has committed an intentional tort but only where there is a breach of statutory duty or negligence.[127]

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124 IP10, above n 104, at [11.59].

125 See New South Wales Law Reform Commission *Torrens Title: Compensation for Loss* (R 76, Sydney, 1996) at [5.6] and recommendation 4, which recommended that a person not be denied compensation where the loss is attributable to the negligence or fraud of a solicitor

126 Contributory Negligence Act 1947, s 2.

127 See Todd and others *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2005) at 988–999. For example, *Rowe v Turner Hopkins & Partners* [1980] 2 NZLR 550 (HC), *Standard Chartered Bank v Pakistan National Shipping Corporation* (No 2) [2003] 1 AC 959 (HL), *Amatal Corporation Ltd v Maruha Corporation* [2007] 3 NZLR 192 (SC). Some authorities have allowed the defence where there was an intentional tort.

4.28 The difficulty of applying this definition of fault to claims under the LTA is that often there will be no tort, or certainly not a tort amounting to a breach of statutory duty or negligence. This is particularly the case with claims under section 172(b), where the principal cause of loss could be fraud on the part of a third party and the claim is against the State which has not committed any tort. Under the Contributory Negligence Act there would be no ability to reduce compensation where, for example, the claimant had facilitated the fraud by signing a blank transfer document. For this reason, we do not support applying the Contributory Negligence Act to compensation claims under the Bill. Rather, clause 20 of the Bill deals directly with the matter and provides that compensation can be reduced where the claimant has contributed to the loss.

Subrogation

4.29 In the LTA there is limited scope for the Crown to claim back costs where the Registrar was not responsible for the loss. Under section 175(1) the compensation will be considered to be a debt due to the Crown where it was caused:

(a) By fraud, or by fraudulent omission, misdescription, or misrepresentation of any kind on the part of any proprietor in bringing land under any of the Land Transfer Acts; or

(b) By fraud on the part of any person causing or procuring himself to be registered as a proprietor under any of the Land Transfer Acts by virtue of any dealing with or transmission from a registered proprietor.

4.30 This provision does not cover the situation where a fraudster has obtained the registration of another person, such as in *Frazer v Walker*, where a registered proprietor wife fraudulently obtained a mortgage over the land, but the mortgagees were innocent.[128]

4.31 Where loss under section 172A (the guaranteed search provision) occurs and it was caused wholly or partly by the negligence of the purchaser's practitioner, the compensation amount is considered to be a debt due to the Crown. However, there is no provision that allows compensation to be claimed from a negligent solicitor where it falls under another ground.

4.32 Clause 21 of the Bill provides for a general right of subrogation where another person is responsible for the loss. This should enable the Crown to reclaim the money from any wrongdoer. Where the wrongdoer is a fraudster, the compensation may be recovered as a debt due to the Crown (see clause 22 of the Bill).

RECOMMENDATIONS

R16 The new Act should provide that compensation be reduced if a claimant or his or her agent (excluding a solicitor or conveyancer) contributes to the loss.

R17 The Crown should have a right of subrogation where loss is caused by a third party.

128 *Frazer v Walker* [1967] AC 569 (PC).

PROCEDURE

4.33 In the Issues Paper, the procedure of making a claim was discussed and the issue of whether small claims should be dealt with in a less formal way without reference to the Attorney-General was raised.[129] Submitters were supportive of this suggestion and it has been adopted in the Bill (see the commentary on clause 23 for more detail).

LIMITATION PERIOD

4.34 The Issues Paper discussed the limitation period under section 180 of the LTA.[130] This provides that claims must be made within six years from the date that the right to bring an action accrued. This can be problematic as there is often a delay in discovering the loss.[131] The Issues Paper noted the development of a new Limitation Bill and suggested that this may address the issues identified here.[132] At the time of publication, the Limitation Bill is before the Justice and Electoral Select Committee. This Bill provides that it is a defence to a money claim if a claim is filed after six years.[133] However, the Limitation Bill provides for a late knowledge date in certain specified circumstances.[134] In this situation, it is a defence to the claim if the claim is filed at least three years after the late knowledge date.[135] We believe that these provisions are adequate to address time limits to claims for compensation under the Land Transfer Bill and, in anticipation of the Limitation Bill being enacted, have not provided for a limitation period for compensation claims in the Land Transfer Bill.

PRIVATE TITLE INSURANCE

4.35 Private title insurance and its role in the Torrens system were discussed in the Issues Paper.[136] Specifically, it was asked whether the existence of private title insurance indicates problems with the Torrens system. Submitters have not suggested that this is the case. The fact that private title insurance is not used as a matter of course suggests that there is public confidence in the operation of the system. If those dealing with land choose to take out insurance to cover situations that are excluded from cover under the Torrens compensation provisions (for example, loss incurred by the operation of another enactment or to cover additional costs, such as the duty to defend), this may complement the system. It does not, however, indicate any deficiencies with the LTA system. A number of submitters were supportive of the use of title insurance in this way and saw it as a matter of commercial opportunity.

4.36 It is appropriate to continue to review the adequacy of compensation under the land transfer system. If, in the future, title insurance assumes a more extensive role in New Zealand, this may be an indication of deficiencies in the land transfer compensation scheme that can be addressed then.

129 IP10, above n 104, at [11.19]–[11.23].

130 Ibid, at [11.52]–[11.56].

131 See, for example, Joint Land Titles Committee, above n 113, 31.

132 IP10, above n 104, at [11.56].

133 Limitation Bill (33–1), cl 10(1).

134 Limitation Bill (33–1), cl 13.

135 Limitation Bill (33–1), cl 10(3).

136 IP10, above n 104, at [11.62]–[11.66].

Chapter 5
Overriding statutes

ENACTMENTS OVERRIDING THE LTA

5.1 Chapter 9 of the Issues Paper discussed the existence of rights, powers or charges which are created by statute and override[137] the Land Transfer Act 1952 (LTA), even though they are not noted on the register.[138] The existence of these statutory provisions and their effect on registered title is not always appreciated. There are a considerable number of such provisions in other Acts. They are not referred to in the LTA but can affect title to land in significant ways.

5.2 The Issues Paper discussed how these interests are sometimes used as an administrative control on land use to achieve public policy objectives that justifiably override or limit the principle of indefeasibility.[139] Australian commentators have noted the ad hoc growth of these controls on private land use because of the increasing need for the regulation of land and natural resources to achieve social and environmental objectives, such as the sustainable management of land and natural resources.[140] They note the resulting information costs for people seeking information about statutory interests affecting land.

5.3 Currently there is no systematic and principled approach to control the proliferation of overriding statutory interests and there is concern that these interests undermine the integrity and accuracy of the register, and the security of a registered owner's title.

OPTIONS AND RECOMMENDATIONS

5.4 Options were identified in the Issues Paper to address those concerns about overriding statutory interests.[141] These were:

(a) to include an explicit provision in the LTA that other statutes may create interests that affect land, so as to alert people to their existence;

(b) to provide guidelines for agencies involved in developing legislation that may affect title to land and, in particular, requiring the legislation to state explicitly whether or not it overrides the LTA;

137 For brevity the term "overriding statutes" is used in this chapter. However many "overriding provisions" are more accurately described as limitations on registered title.

138 Law Commission in conjunction with Land Information New Zealand *Review of the Land Transfer Act 1952* (NZLC IP10, Wellington, 2008), examples were cited at [9.17]–[9.25] [IP10].

139 Ibid at [9.29].

140 Pamela O'Connor, Sharon Christensen and Bill Duncan "Legislating for Sustainability: A Framework for Managing Statutory Rights Obligations and Restrictions Affecting Private Land" (2009) 34 Monash U LR 233.

141 IP10, above n 138, at [9.44]–[9.48].

(c) to refer all Bills concerning land to the Legislation Advisory Committee (LAC) to ensure compliance with LAC guidelines, which would be amended to include a process for ensuring the least possible impact on indefeasibility.

Option (a) – amendment of LTA

5.5 Submitters supported signalling overriding statutory interests more clearly to people for the transparency and integrity of the system. One submitter considered it would be desirable to have a schedule of overriding statutory provisions in the new LTA, noting that whole statutes as well as statutory provisions can override the LTA. Submitters generally supported requiring overriding statutory interests to be registered under the LTA so that people dealing with the land do not need to search beyond the register. One submitter commented that registration should be required or, if not, the particular Act should be specifically made subject to the LTA. Some submitters considered that where another statute directly impacts on the interests of the registered owner this should be reflected on their land title. But where the impact is indirect it should not necessarily be registered against a title.

5.6 Clause 7(3)(b) of the Bill provides that a registered owner's title is subject to any other enactment that overrides or limits the title. This will at least signal that there are interests outside the LTA that may affect a registered owner's land, although it does not solve the problem of searching beyond the register for title information and the consequent costs.

5.7 However, to compile a list of legislative provisions in the new Act authorising the imposition of rights, powers or charges on land would be a major task. In order to be effective it would need to note every such provision and there is a risk that it could inadvertently omit some. The list would need to be updated regularly to include new statutes. No other Torrens statute has incorporated such a list, and Australian studies have identified large numbers of interests impacting on land ownership and not recorded on registered titles.[142]

5.8 The New South Wales land registration statute, the Real Property Act 1900, was recently amended to protect its "paramountcy" provision from implied repeal by other legislation.

5.9 Section 42(3) of that Act provides:

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

142 See O'Connor, Christensen and Duncan, above n 140, who cite R Bennett and others "Organising Land Information for Sustainable Land Administration" (2008) 25 Land Use Policy 126: this study identified 514 Federal Acts, 620 Victorian Acts and 11 local laws authorising the creation of property rights, restrictions or responsibilities. O'Connor, Christensen and Duncan also note that Western Australia's Department of Land Administration reported 180 "interests" affecting land not presently recorded on certificates of title in 2003: Standing Committee on Public Administration and Finance Parliament of Western Australia "The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia" (2004) at 527.

5.10 There is a Schedule amending about 20 statutes to provide that the burdens on registered proprietors created by those statutes will apply notwithstanding the provisions of section 42.

5.11 Thus, to override registered title in New South Wales, legislation needs to expressly indicate that intention. Australian commentators have noted that this applies to the interpretation of all statutes, not just later ones, which could upset the established relationship between statutes and result in unintended and anomalous effects.[143] Further, the provision may not prevent later statutory provisions prevailing where they do not state an express override of the Real Property Act.[144] An override will still be implied if the legislative intention clearly authorises an interest to operate in rem, that is, that runs with the land so as to bind future owners, without registration. On balance we do not consider that a provision like section 42(3) of the New South Wales Act would overcome the problem.

5.12 Clause 7(3)(b) of the Bill alerts registered owners to the possibility of statutes that override the LTA. As an educative measure, Land Information New Zealand (LINZ) proposes to provide some general guidance on its website about the interplay between the LTA and other statutory provisions that have overriding effect, together with a list of significant legislation that impacts on the LTA. This list would not be exhaustive and would not be in legislation.

Options (b) and (c) – administrative guidelines for future legislation

Option (b) – government agency guidelines

5.13 There was support in submissions for administrative principles and guidelines concerning the development of overriding statutory provisions. It is desirable to include a clear statement in a new statute to the effect that its provisions are intended, or not intended, to override the LTA, as this will assist in ascertaining legislative intention for the purpose of reconciling conflicting statutory provisions.

5.14 We consider that government agencies should be encouraged to take a uniform approach to the creation of interests that affect land. This can be achieved through the development of principles by LINZ and the Ministry of Justice (based on LAC guidelines) for agencies to refer to when constructing their own internal guidelines and when they consider new policy proposals that create interests affecting land. These proposals should be scrutinised early in the policy development process so that policy makers are aware of the interface with the LTA and the nature of the different legal effects of new interests in land. The guidelines should require that statutory interests affecting land should not operate in rem, that is should not bind successors in title, unless that is necessary to achieve their intended legislative purpose. Also, they should explain the significance of registration and the necessity for registration where interests are intended to operate in rem.

143 O'Connor, Christensen and Duncan, above n 140; Patricia Lane "Indefeasibility for What? Interpretative Choices in the Torrens System" (Sydney Law School Research Paper No 10/14, 2010) at 2–7 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id = 1516091## > .

144 See also the Real Property Act 1886 (SA), discussed in *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 (HCA) where charges imposed under later legislation took priority.

Option (c) – LAC guidelines

5.15 In addition and as a consequence, the LAC guidelines should be updated to include a section on the creation of any new statutory interests affecting land. This new section should:

- require agencies to consult the agencies that administer the LTA, LINZ and the Ministry of Justice, on the proposals early on in the development process;
- require draft provisions to expressly state whether they override or do not override the LTA;
- explain the different legal effect of interests, that is, whether they run with the land or affect only the present owner of land, and the significance of registration;
- explain that, if it is intended that interests will run with the land, the authorising statute should require those interests to be registered or be noted on the land title register in order to be consistent with the LTA, and if registration or noting is not required, they should not run with the land; and
- define and standardise the terminology used for consistency and clarity.

RECOMMENDATIONS

R18 The new Act should provide that registered title can be limited by "overriding interests" in other statutes.

R19 LINZ and the Ministry of Justice should produce guidelines for agencies to consider when developing legislation that deals with land, based on Legislation Advisory Committee guidelines.

R20 A section should be added to the Legislation Advisory Committee guidelines that sets out matters to be considered by agencies developing legislation that will create interests that affect title to land.

Chapter 6

Registration of Māori land

INTRODUCTION

6.1 Chapter 10 of the Issues Paper described problems with the relationship between the Land Transfer Act 1952 (LTA) and Te Ture Whenua Maori Act/Maori Land Act 1993 (TTWMA) at both a conceptual level and a practical level. The conceptual issues concern the relationship between the two Acts and whether the LTA overrides TTWMA. The practical issue relates to possible administrative changes to either or both systems to ensure consistency between them. The Issues Paper asked whether the relationship between the two Acts needs clarification and also how practical interface problems between the two Acts could be addressed.

6.2 This chapter discusses some changes in the law since the publication of the Issues Paper. Then it summarises the submissions received on this issue, and, in particular, the submission of the Māori Land Court Judges. Lastly, it explains the suggestions for the new LTA which will have an impact on the treatment of Māori land under the LTA system.

RECENT DEVELOPMENTS

Does the LTA override TTWMA?

6.3 The Issues Paper first discussed the conceptual issue of whether the LTA overrides TTWMA.[145] This focused on two High Court cases, *Housing Corporation of New Zealand v Maori Trustee* and *Registrar-General of Land v Marshall*, both of which held that TTWMA's predecessor, the Maori Affairs Act 1953, was overridden by the LTA.[146] The Issues Paper noted that there was no equivalent decision in relation to TTWMA and that, as TTWMA has significantly changed the focus of Māori land law, there may need to be a reconsideration of the position taken in these two cases.[147]

145 Law Commission in conjunction with Land Information New Zealand *Review of the Land Transfer Act 1952* (NZLC IP10, Wellington, 2008) at [10.6]–[10.43] [IP10].

146 *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662 (HC); *Registrar-General of Land v Marshall* [1995] 2 NZLR 189 (HC).

147 IP10, above n 145, at [10.33].

6.4 Shortly after the publication of the Issues Paper, the High Court in *Warin v Registrar-General of Land* (*Warin*) considered the interface between TTWMA and the LTA.[148] The ratio of this case is in line with the previous High Court judgments: failure to conform to the requirements of TTWMA does not affect indefeasible title under the LTA. It is relevant to consider in more depth the reasoning of this case.

6.5 The case arose from the sale by the Māori Trustee of a piece of Māori land to the plaintiffs without following a number of processes contained in TTWMA. The transfer was nevertheless registered under the LTA. There was no question of fraud being involved. However, the Māori Trustee did not:

(a) observe restrictions on the powers of alienation under section 228 of TTWMA;

(b) give a right of first refusal to one or more of the preferred class of alienees under section 147(2) of TTWMA;

(c) obtain a special valuation for the Māori Land Court (the Court) to assess whether the consideration was adequate (section 152(1)(d) and (e) of TTWMA); and

(d) apply to the Court for confirmation of the alienation.

6.6 All parties accepted that the transfer ought not to have been registered as it was contrary to a number of provisions in TTWMA, in particular, section 126. Section 126 states that an instrument affecting Māori land must not be registered under the LTA unless it has been confirmed by the Court or the Registrar of the Court has issued a certificate of confirmation. The transfer was also contrary to regulation 16 of the Land Transfer Regulations 1966, which prohibits the registration of an instrument that is contrary to any enactment.[149] However, the key question was whether the plaintiffs nevertheless obtained an indefeasible title.

6.7 Allan J held that the LTA overrides TTWMA and that the plaintiffs had obtained an indefeasible title. He noted that, in accordance with the principles of immediate indefeasibility, "[i]t is not sufficient,… that the instrument be shown to be a nullity or founded upon a void transaction".[150] Rather it is necessary to show that the "indefeasibility provisions of the LTA are necessarily overridden, expressly or by necessary implication, by the relevant provisions of the Act".[151]

6.8 Allan J was of the opinion that it was important to consider the implications of how the two Acts are interpreted for the integrity of the LTA system as it may mean that no successor in title could ever enjoy greater security of title than that of the original purchaser.[152] Further, it is not always clear to a purchaser that land is Māori land as titles do not always carry a status notification.

148 *Warin v Registrar-General of Land and the Maori Trustee* HC Whangarei CIV 2006–488–000245, 31 October 2008.

149 See Land Transfer Regulations 2002, reg 21(b), for the current provision.

150 *Warin v Registrar-General of Land and the Maori Trustee*, above n 148, at [88].

151 Ibid, at [88].

152 Ibid, at [118].

6.9 In reaching this decision, Allan J considered the previous two High Court cases (mentioned above) and in particular the *Housing Corporation* case.[153] He was not persuaded that:[154]

> [T]he factors that particularly appealed to McGechan J in the *Housing Corporation* case ought not to carry determinative weight in this case, despite the significantly more protective regime established by the Act in comparison with earlier days… Those responsible for drafting the Act must be taken to have known of the Judge's comments in that case and have been aware of the need, if the intention was to override the LTA, to say so expressly.

6.10 It is possible to lose indefeasibility by statutory implication. However, Allan J, could not conclude that this was the legislature's intention where a purchaser of Māori land was registered without fraud.[155]

6.11 Allan J also commented that there may be an alternative way to consider the interface between TTWMA and the LTA as, for many Māori, "compensation, if available, will simply not make good the loss; land is regarded as a taonga and not to be surrendered".[156] Referring to the Issues Paper, Allan J noted that "[t]here is obvious merit in the early identification of solutions to the problems illustrated by the facts of this case".[157]

Administrative developments

6.12 The Issues Paper noted that Land Information New Zealand (LINZ) and the Māori Land Court have undertaken a Māori Freehold Land Registration Project, designed to align the two records, which is likely to assist in avoiding future inconsistencies. Since the publication of the Issues Paper, LINZ has also implemented a new procedure for the registration of Māori land. Currently, land flagged as Māori land steps down from "auto registration" to "lodge", that is, transfers of Māori land can be lodged electronically but are only registered after they have been examined by LINZ staff. It is hoped that this will address any discrepancies until differences between the two records are finally resolved. This should assist in addressing the potential risk of non-compliance with TTWMA as illustrated in the Issues Paper.[158]

153 *Housing Corporation of New Zealand v Maori Trustee*, above n 146 ; *Registrar-General of Land v Marshall*, above n 146.

154 *Warin v Registrar-General of Land and the Maori Trustee*, above n 148, at [125].

155 Ibid, at [126].

156 Ibid, at [131].

157 Ibid, at [133].

158 IP10, above n 145, at [10.59]–[10.62].

SUBMISSIONS

Judges of the Māori Land Court

6.13 The judges of the Māori Land Court (the Court) made a detailed submission on this chapter.[159] The judges see the Court as the "gateway" to Māori title and the Court has an extensive role in creating, recording, altering and transferring Māori title.[160]

6.14 The judges considered question 49 in the Issues Paper relating to the relationship between the LTA and TTWMA. The judges commented that, although *Warin* has answered this question and the LTA overrides TTWMA,[161] the effect of this decision is that the Court's record and the LTA title are inconsistent, and that the Māori Land Court and Māori Appellate Court decisions are in conflict with the High Court decision, although they have not been overturned.[162]

6.15 The judges considered whether the TTWMA should override the LTA, noting that they believed it should (although they noted that this was not intended to be a criticism of *Warin*).[163] The judges' reasons were as follows:[164]

- The starting point for Māori must be the Treaty and the guarantee of their land and the case law is over-represented by cases where Māori have lost land through the application of the LTA.[165]
- While it may be argued that Māori land is entitled to the same protections as general land, this argument is overly simplistic. Māori land is of a very different nature and subject to the powers of the Court.
- Not all the aims of the Torrens system are relevant to Māori land, for example, the aim of having a single register and the aim of achieving facility of transfer.
- Section 126 of TTWMA should be given its full effect. The judges believe the intention of this section is clear from the context of the Act.
- It is appropriate that the consequence of non-compliance with section 126 falls on LINZ as it is best placed to ensure compliance. There is currently little incentive to comply with section 126 of TTWMA.
- Compensation is an inadequate substitute for the loss of Māori land. Also, as those who suffer loss are often members of the preferred class of alienees, it is doubtful whether they are entitled to compensation.
- The confirmation process is a central pillar of the Act and the effect of *Warin* is to override this process.
- This proposed exception to indefeasibility (non-compliance with TTWMA) would be limited.

159 Māori Land Court Judges "Submission on *Review of the Land Transfer Act 1952*" (11 March 2009).

160 Ibid, at [3.3]–[3.5].

161 *Warin v Registrar-General of Land and the Maori Trustee*, above n 148.

162 Māori Land Court Judges, above n 159, at [4.11].

163 Ibid, at [4.13].

164 Ibid, at [4.15]–[4.23].

165 The judges offered the example of *Beale v Tihema Te Hau* [1905] 24 NZLR 883.

6.16 The judges indicated that section 126 should expressly provide that if an instrument is registered in breach of the section, it does not confer an indefeasible title. The registration would be suspended and the parties would have to apply to the Court for confirmation.[166]

6.17 The judges also commented on question 50 in the Issues Paper, which relates to the practical problems of the interface between the LTA and TTWMA. Their recommendations in relation to the practical interface are as follows:[167]

- LTA titles should show the status of Māori land. Where land is flagged as Māori land, and the registered owner objects to this, an application should be made under section 131 of TTWMA to address this.
- The noting provisions under the TTWMA should be reviewed to ensure consistency.
- If an instrument is registered where noting is not required, LINZ should notify the Court.
- The Court should have the ability to electronically register court orders.
- LINZ's ability to reject court orders for matters of substance or jurisdiction should be reviewed.
- The process of registering court orders should be reviewed. There should be statutory timeframes, better protocols if the order is rejected on form, and if the order is rejected on jurisdiction, LINZ must apply to the Court for a rehearing.
- The Court's title must be retained but an integrated title record could be explored, for example, through having a single register with layers, or two linked registers.
- An equivalent to section 62(b) of the LTA (omitted easements) must be retained to recognise the numerous unregistered easements over Māori land.
- The Court should have exclusive jurisdiction over subdivisions, or all subdivisions should be given an appellation approved by the Court, and LINZ should be required to notify the Court of subdivisions.
- Māori reservations should be treated consistently by LINZ by issuing a separate computer interest record (or its equivalent under the new legislation).

6.18 This submission raised a large number of issues in relation to Māori land. These suggestions cannot fully be considered within the scope of the LTA review but could form a useful starting point for a subsequent fuller review.

166 Māori Land Court Judges, above n 159, at [4.24]–[4.30].

167 Ibid, at [12.1]–[12.17].

Other submissions

6.19 A number of submitters agreed that the interrelationship between the two Acts is unsatisfactory and merits a fuller review. Some submitters suggested that the important goal of protecting Māori land warrants treating it as an exception to indefeasibility. Others felt that the LTA must be treated as paramount. Other submitters considered that administrative improvements to the two systems could remove the need to consider whether one statute overrides the other. Most of the submitters who commented on the chapter supported the suggestion that the Registrar-General of Land and the Registrar of the Māori Land Court be required to notify each other of changes to either title.

CHANGES THAT EFFECT REGISTRATION OF MĀORI LAND

6.20 The Bill contains some changes that will impact on the treatment of Māori land. First, discretionary indefeasibility recommended in Chapter 2 and contained in clause 13 of the Bill, can operate to restore land to its Māori owners where a transfer is void or voidable due to non-compliance with TTWMA, provided it has not been on-transferred to a bona fide third party.

6.21 Secondly, the Bill allows the possibility for persons other than conveyancers and solicitors to be able to electronically lodge instruments. It is possible under the Bill to extend this to cover officials at the Māori Land Court.

6.22 The Law Commission acknowledges that these changes are limited and that a number of other problems with the interface between the two Acts exist.

FUTURE REVIEW

6.23 The issues surrounding the relationship between the LTA and TTWMA and how they are best addressed are significant and complex. It is not just a simple matter of providing that an instrument registered under the LTA has no effect if it does not comply with TTWMA. If Māori land registered under the LTA is defeasible in certain circumstances, it is possible that there may be a negative impact on the ability to use such land as security. We believe the issues require separate and more detailed study than we have been able to give them in the context and within the timeframes set for this project which is, in essence, to review the LTA.

6.24 We acknowledge the importance of the issues. However, we think that the time and resources required to identify and put in place an effective and enduring solution to the problems is likely to delay significantly the implementation of the reforms to the LTA proposed in this report. We think the issues surrounding the relationship between the two Acts and how they can best be resolved should be the subject of a further separate project to be undertaken jointly, possibly by the Law Commission, LINZ, the Māori Land Court, the Ministry of Justice and Te Puni Kōkiri.

RECOMMENDATION

R21 There should be an in-depth review into the registration of Māori land.

Chapter 7

Encumbrances and a new mechanism for securing covenants in gross

INTRODUCTION

7.1 The Issues Paper briefly referred to the conveyancing practice of registering an encumbrance instrument (a type of mortgage instrument) to secure collateral covenants, generally covenants in gross, under the Land Transfer Act 1952 (LTA).[168] The phrase "encumbrance mechanism" is used, in this chapter, to refer to this use of encumbrance instruments. Since the publication of the Issues Paper we have become aware of a number of problems in relation to this practice. In addition, submitters have expressed concern about this use of encumbrance instruments and their proliferation on the register.[169] For these reasons, this chapter provides a more in-depth analysis on this issue than is found in the other chapters of this report.

7.2 The chapter explains the nature of covenants relating to land and the statutory provisions that recognise covenant-type interests. It also provides an explanation of encumbrance instruments and what the instrument is designed to secure. It then considers the problems with the use of the encumbrance mechanism to secure collateral covenants. Having concluded that the encumbrance mechanism should no longer be allowed to be used to secure collateral covenants, we set out options for reform, and make our recommendations. Responses of overseas Law Commissions and legislatures to similar issues are included where relevant.

168 See New Zealand Law Commission in conjunction with Land Information New Zealand *Review of the Land Transfer Act 1952* (NZLC IP10, Wellington, 2008) at [6.33] [IP10]. The usage was apparently encouraged by EM Brookfield's article "Restrictive Covenants in Gross" [1970] NZLJ 67.

169 New Zealand Law Society Property Law Section "Submission on *Review of the Land Transfer Act*" (11 May 2009).

COVENANTS IN RELATION TO FREEHOLD LAND

7.3 Covenants affecting freehold land are obligations contained in a deed, enforceable between the parties to the covenant. However, certain covenants are interests in land and enforceable against persons who are not original parties to the agreement, that is, they run with the land.[170] Under the Property Law Act 2007, restrictive covenants, which involve an obligation not to perform a certain activity on the land, and positive covenants, which involve an obligation to perform a certain activity, run with the land provided that the covenant benefits the land of the covenantee. Such covenants can be notified on a record of title (but not registered) under section 307 of the Property Law Act.

7.4 A covenant in gross is a covenant that may be restrictive or positive, which burdens particular land of a covenantor, but which does not benefit the land of the covenantee. The benefit of the covenant in gross usually attaches to a person or a body such as a local authority. Despite authority from the 19th century to the contrary,[171] the Court of Appeal has recently held that covenants in gross cannot run with the land.[172] Unlike restrictive and positive covenants not in gross, covenants in gross cannot be notified on a title.[173]

7.5 There are mechanisms in other legislation that allow the registration of covenants in gross. However, the circumstances in which these are permitted are limited. For example, the consent notice provisions in section 221 of the Resource Management Act 1991 only apply to territorial authorities where there is a subdivision. Other provisions are limited by the purpose for which the covenant may be created, for example, section 27 of the Conservation Act 1987 allows a covenant for conservation purposes.[174] We have been told that individuals or groups other than territorial authorities frequently register encumbrances securing covenants in gross for purposes that are not provided for in legislation. Indeed the proliferation of these collateral covenants indicates that the current legislation does not adequately meet existing needs.

ENCUMBRANCES

7.6 Encumbrance instruments are provided for in Part 6 of the LTA. An encumbrance is a mortgage for the purposes of both the LTA and the Property Law Act. It is designed to secure rentcharges or annuities. A rentcharge is a sum of money paid periodically to someone who is not entitled to any future estate in the land, that is, the reversion or the remainder. An annuity is a sum payable yearly as a personal obligation of the grantor or out of property not consisting exclusively of land. These types of interests, inherited from English property law, are no longer common.[175]

170 See for example, *Tulk v Moxhay* [1843–1860] All ER 9.

171 *Staples and Co (Ltd) v Corby* (1899) 17 NZLR 734.

172 *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd*, [2006] 3 NZLR 351 (CA) at [76] per William Young J, with whom Anderson P and Glazebrook J agreed on this point. This decision is consistent with the fact that earlier English authorities on which *Staples v Corby*, above n 171, was based have been held to be wrongly decided (see, for example, *London County Council v Allen* [1914] 3 KB 642), and Australia has followed the later English authority (see, for example, *Howie v New South Wales Lawn Tennis Ground Ltd* (1956) 95 CLR 132 and *Pirie v Registrar-General* (1962) 109 CLR 619).

173 Property Law Act 2007, s 307. See *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd*, above n 172.

174 See also Crown Pastoral Land Act 1998, s 97; Historic Places Act 1993, s 6; Reserves Act 1977, s 77.

175 See [7.20]–[7.25] below as to the history of rentcharges in the United Kingdom.

7.7 Encumbrances are now commonly and predominantly used by way of a rentcharge to secure collateral covenants, primarily covenants in gross. This practice appears to have developed many years ago,[176] and has now become commonplace.

7.8 Examples of the use of the encumbrance mechanism include:[177]

- use in a subdivision to require owners of the lots to join a residents' association and pay annual fees;
- use in a subdivision to require owners to enter contracts with a utility provider and pay charges for the use of the facilities;
- to provide that a boatshed be placed on one lot in a subdivision, the owners in the development being shareholders in the jetty;
- to set out restraint of trade provisions in relation to a piece of land.

PROBLEMS WITH THE USE OF THE ENCUMBRANCE MECHANISM

7.9 There are a number of problems with the use of the encumbrance mechanism. First, there has been a lack of clarity about its status and validity. Secondly, the use of the encumbrance instrument confers the benefits of registration on covenants in gross when they may only have a tenuous connection to the land. Thirdly, they are treated as mortgages, but there are problems with applying the rules relating to mortgages to an interest that is not, in reality, a mortgage. Given these problems, it is concerning that, as submitters have informed us, there are so many encumbrances securing collateral covenants, in particular covenants in gross, registered under the LTA.

Status and validity

7.10 The validity of the encumbrance mechanism has been questioned by some commentators.[178] As noted above, the Court in *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* held that covenants in gross cannot run with the land,[179] which means they are not interests in land. However, the Court noted the conveyancing practice of using encumbrances to secure covenants in gross. The Court noted that the artificiality of the device had caused some concern and debate, but the practice of using this mechanism was not further discussed as the appellants did not challenge its use.[180]

176 See EM Brookfield, above n 168, referring to an article by Professor ID Campbell "Restrictive Covenants Affecting Land" [1944] 20 NZLJ 68, who suggested a method whereby a covenantor entered into a deed containing a covenant in gross in favour of the covenantee and then gave a memorandum of encumbrance for a nominal rentcharge in favour of the covenantee, not payable so long as the covenants in the deed were enforced. Purchasers would have notice of the covenant in gross and be bound under the doctrine in *Tulk v Moxhay*, above n 170, because the New Zealand decision of *Staples v Corby* above n 171, had held that *Tulk v Moxhay* applied to covenants in gross. The Court of Appeal in *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd,* above n 172, at [76] declined to follow *Staples v Corby*. See above, n 172.

177 New Zealand Law Society Property Law Section, above n 169. It should be noted that some of the covenants in gross may have been able to have been registered or notified on the register by other means.

178 Rod Thomas "Possible Hazards of Memoranda of Encumbrance" (1997) 8 BCB 1, and see reply by Professor Brookfield "Possible Hazards of Memoranda of Encumbrance: a Reply" (1998) 8 BCB 13, and his earlier article "The Rent Charge as a Device for Binding Successors in Title to Perform Covenants" [1980] 6 NZ Recent Law 225. See more recently Rod Thomas "Encumbrance Instruments – A Real Burden" (2009) 127 NZ Lawyer 14; R Thomas "Encumbrance Instruments" (2010) NZLJ 10.

179 *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd*, above n 172, at [76].

180 Ibid, at [50]–[53].

7.11 The encumbrance mechanism has been accepted as a conveyancing practice in another recent Court of Appeal case.[181] Therefore, it seems unlikely that an argument relating to the validity of encumbrances would succeed.

Encumbrances as registered instruments

7.12 Covenants in gross cannot be registered or notified on the register, except in certain limited statutory circumstances. In contrast, rentcharges are registered by means of an encumbrance instrument and are indefeasible. This means that covenants secured by the encumbrance mechanism run with the land. Further, the encumbrance itself cannot be set aside. It is unclear to what extent covenants in gross within an encumbrance are indefeasible. Only those interests that are "intimately related" to the estate or interest are indefeasible.[182] Generally, all covenants contained in transfers of fee simple estates or in leases will be indefeasible.[183] However, in the case of mortgages this is not so as the "property interest serves a more limited and collateral purpose" and "it is therefore only the right of recourse for the principal, interest and expenses in the event of default which is integral to the mortgage".[184] It is debatable whether covenants in gross in an encumbrance instrument would be considered intimately related to the title.

7.13 Securing covenants in gross using an encumbrance mechanism is in any event inconsistent with the treatment of covenants that benefit other land, which can only be notified on the title. Covenants in gross may often have only a tenuous connection with use of the land (for example, a covenant in restraint of trade), and there may be valid policy reasons for preventing them from running with the land if they are essentially personal obligations.

7.14 The encumbrance mechanism has also apparently been used for covenants not in gross, that is, which benefit the covenantee's land. As noted above, it has been considered appropriate to allow these covenants to only be notified on the register, not registered. Although they run with the land, they are not indefeasible. It is questionable, and possibly contrary to the intention of Parliament, that encumbrances should be able to be registered in order to secure covenants that could be notified on the register under existing provisions in the Property Law Act.

7.15 Whether the encumbrance mechanism is used to secure covenants that benefit land or covenants that do not benefit land, there are concerns about allowing these collateral covenants to be entered on the register by means of a registered instrument. This permits the covenant to run with the land in perpetuity, without any safeguards around such usage. As encumbrances are not designed primarily to secure covenants, it is not surprising that there are no legislative

181 *Jackson Mews Management Ltd v Menere & ors* [2009] NZCA 563.

182 *Duncan v McDonald* [1997] 3 NZLR 669 (CA) at 682. See also, Congregational *Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd* [1984] 2 NZLR 704 at 713–714, and discussion in Hinde McMorland & Sim *Land Law in New Zealand* (loose leaf, LexisNexis, Wellington, 2005) at [9.007].

183 *Duncan v McDonald*, above n 182, at 682.

184 Ibid, at 682.

safeguards in place to provide constraints on their use. In addition, we understand that the encumbrance mechanism is used to circumvent the consent notice provisions of the Resource Management Act.

Rentcharges as mortgages

7.16 As noted above, the provisions in both the LTA and the Property Law Act that relate to mortgages generally apply to encumbrances. For example, as registered mortgages they become enforceable against successors in title under section 203(1)(a)(ii) of the Property Law Act (all covenants contained in a mortgage will bind transferees of the charged land). However, where the primary purpose of the encumbrance is to secure a collateral covenant, treating it as a mortgage is not without problems. It is artificial and, at times, potentially inappropriate. There has been debate about the extent to which an encumbrance will be treated as a mortgage.

7.17 In *Menere v Jackson Mews Management Ltd*, the High Court held that the right of redemption applied to an encumbrance the primary purpose of which was to secure covenants.[185] The encumbrance in question required the inhabitants of a retirement village to pay a particular company to provide management and maintenance services for the village. The High Court decided the case under section 81 of the Property Law Act 1952, which allowed redemption of a mortgage once all monies due had been paid, and held that the rentcharge encumbrance could be redeemed.

7.18 However, the Court of Appeal reversed this decision, holding that redemption was not possible. The Court held that the relevant provision was section 97 of the Property Law Act 2007, subsection (2) of which permits redemption of a mortgage on payment of all amounts owing and "the performance of all other obligations secured by the mortgage". The obligations being for 99 years in this case, redemption was impossible.[186]

7.19 In the Court of Appeal's view, in *Jackson Mews Management Ltd v Menere* (*Jackson Mews*) the rentcharge involved was a "third category rentcharge" in terms of the analysis of different sorts of rentcharges in England, discussed

185 *Menere v Jackson Mews Management Ltd* Wellington HC CIV 2008–485–562, 6 October 2008 per Ronald Young J.

186 *Jackson Mews Management Ltd v Menere & ors* (CA), above n 181. The Court assumed that the Law Commission was well aware of the widespread use of the rentcharge device to secure ongoing obligations in retirement villages and other group housing situations when writing its report *A New Property Law Act* (NZLC R29, Wellington, 1994), and that the addition of the words "the performance of all other obligations secured by the mortgage", in section 97(2) of the Property Law Act 2007, could be seen as confirmation that such rentcharges should not be redeemable on payment of the nominal sum of the annual rent for 99 years. See Rod Thomas "Encumbrance Instruments", above n 178, at 11 suggesting that "'all obligations' mortgages are commonly drafted to secure future liabilities to the bank", but the mortgage can still be discharged. However, the situation is different if the unfulfilled covenants are unrelated to the payments of money (that is, are not to protect the debt) as in *Jackson Mews Management Ltd v Menere*.

immediately below.[187] It therefore, seemingly, had "none of the problems associated with covenants in gross".[188] This was presumably because the covenant was interpreted as an appurtenant covenant that benefited land of the covenantee (a unit in the village owned by Jackson Mews Management). The case therefore does not address the problem of the encumbrance mechanism that secures a covenant in gross.

RENTCHARGES IN THE UNITED KINGDOM

7.20 In 1975 the United Kingdom Law Commission produced a Report on Rentcharges.[189] It described these as a species of interest in land, as follows:[190]

> A rentcharge is an annual or periodic sum of money payable to someone who is not entitled to the reversion to the land charged with its payment. This feature distinguishes it from ordinary rent payable under a lease. As a matter of history, the separate existence of rentcharges seems to have risen in consequence of the statute of Quia Emptores (1290).

7.21 Prior to 1290, it seems, a grant of freehold created a "lord and tenant" relationship and the lord could claim chattels on the land for arrears of rent still owing – known as "subinfeudation". The 1290 statute forbade subinfeudation and the landlords began including a "rentcharge" in the grant of freehold to make up the arrears of rent, often to be paid in perpetuity.

7.22 In England, the rentcharge device was gradually expanded so that by 1975 there were at least four different uses. It was criticised, not so much for providing security for payments due, but because it caused freehold land to be subject to encumbrances ("blots" on title) and because of the propriety of some of the liabilities being secured.[191] In addition rentcharges were often impossible to redeem. In 1975, the United Kingdom Law Commission recommended redemption of most existing rentcharges and a ban on the creation of new ones. This was accomplished by the Rentcharges Act 1977 (UK).

7.23 However, this was subject to the temporary exception of "covenant-supporting" or "service charge" rentcharges, forming an integral part of a housing development scheme and beneficial, directly or indirectly to the land charged.[192] These are called "estate rentcharges" in the Rentcharges Act. They are the "third category rentcharge" referred to by the New Zealand Court of Appeal in *Jackson Mews*.[193] An estate rentcharge is defined in the Rentcharges Act 1977 as one created for the purpose of (1) enabling the rent owner to enforce covenants against the landowner

187 The Court quoted from Burn and Cartwright *Cheshire and Burn's Modern Law of Real Property* (17th ed, Oxford University Press, Oxford, 2006) at 707, describing rentcharges used as a conveyancing device to enable the burden of positive covenants to run against the unit holders for the time being in a property development. The rentcharge is imposed on each unit for the benefit of the other units supported by positive covenants to repair, insure and so on. The purpose is not to procure the payment of the rentcharge, which is often nominal, but to create a set of positive covenants which are actually designed to preserve the development as a whole, and which are directly enforceable as they happen to incidentally support the rentcharge.

188 *Jackson Mews Management Ltd v Menere & ors* (CA), above n 181, at [51].

189 Law Commission *Transfer of Land: Report on Rentcharges* (Law Com No 68, London, 1975) [*Transfer of Land: Report on Rentcharges*].

190 Ibid, at [1] and [9].

191 Ibid, at [24]–[39].

192 Ibid, at [48]–[51].

193 *Jackson Mews Management Ltd v Menere & ors* (CA), above n 181.

for the time being; or (2) meeting or contributing towards the cost of services, maintenance, repairs or making any payment by the landowner for the benefit of the land affected by the rentcharge, or for the benefit of that and other land.

7.24 The rationale for the estate rentcharge exception was that, in such a situation, the preservation, value and enjoyment of each unit may well depend upon the observation of certain covenants by the owners of the other units. The reason for this exception at that stage was that, although restrictive covenants could run with the land in England, positive covenants (allowing the burden to run with the land affected) could not do so. Conveyancers therefore resorted to rentcharges, as a conveyancing device, imposed on each unit for the benefit of the other units, supported by de facto positive covenants to repair and insure. The purpose of the scheme was to create a set of positive covenants designed to preserve the development as a whole. The amount of the rentcharge might be nominal, but could be quite substantial if a management company needed funds, for example to cover maintenance and insurance.[194]

7.25 This type of covenant-supporting estate rentcharge is similar to the New Zealand development of a rentcharge secured by an encumbrance, where the main purpose is to enable de facto covenants in gross that run with the land. However, in England they are not a type of mortgage and not considered to be "in gross". The benefited land is that of all the units in the development. In 1984, the United Kingdom Law Commission reported on the law of positive and restrictive covenants[195] and recommended that it should be impossible to create "estate rentcharges" once alternative recommendations that it made for development schemes had been put in place.[196]

7.26 The Law Commission of England and Wales (English Law Commission) has recently endorsed this recommendation. In view of the fact that it is recommending that positive burdens should be able to run with the land, it provisionally recommends that it should no longer be possible to create new estate rentcharges, where title to land is registered.[197] Clearly the English Law Commission is of the view (or was provisionally of the view) that perpetual rentcharges are not the best way to provide for covenants designed to support and preserve housing developments. The Irish Parliament has prohibited the creation of new rentcharges.[198] Rentcharges that are already in existence are permitted to remain but are to be enforceable as a simple contract only (that is, they would not run with the land).

194 *Transfer of Land: Report on Rentcharges*, above n 189, at [49].

195 Law Commission *Transfer of Land: The Law of Positive and Restrictive Covenants* (Law Com No 127, London, 1984).

196 Ibid, at [24.39]–[24.45] and [27.1].

197 Law Commission *Easements, Covenants and Profit à Prendre: A Consultation Paper* (CP 186, London, 2008) at [8.115]–[8.118] [*Easements, Covenants and Profit à Prendre: A Consultation Paper*]. However, see also Elizabeth Cooke "To Restate or not to Restate? Old Wine, New Wineskins, Old Covenants, New Ideas" [2009] 73 Conv 448 discussing the various "workarounds" to enable positive covenants to run with the land, and the further development of the Law Commission's thinking.

198 Land and Conveyancing Law Reform Act 2006, ss 41–42.

SHOULD THE ENCUMBRANCE MECHANISM CONTINUE IN NEW ZEALAND?

7.27 On the Court of Appeal's analysis in *Jackson Mews*,[199] it would seem that the encumbrance mechanism is not always used to register covenants in gross, but rather can sometimes be seen as the equivalent of the "estate rentcharge" device used in England to register a type of positive covenant that benefits land of the covenantee. However, as (unlike in England) positive covenants that benefit land can be noted on title to land, there is no need to resort to the encumbrance mechanism for these covenants. But in many cases where encumbrances are currently registered, there would be no obvious "benefited land" so that the covenants secured are de facto in gross. In our view, the situation requires clarification and a legislative solution.

7.28 Despite the popularity of the encumbrance mechanism for registering covenants, we do not consider that it should continue. In the first place, the use of encumbrances for such purposes is artificial; encumbrances as security interests are allied to and dealt with as mortgages in the LTA, whereas covenants are related to how land is used. The rentcharge amount is usually minimal. If the covenant is not in gross, section 307 of the Property Law Act should be used to notify a positive or restrictive covenant.

7.29 Secondly, the encumbrance mechanism gives protection to a type of covenant that has not been recognised by the common law or equity as an interest in land. Including these covenants in a registered document enables them to obtain greater protection than restrictive and positive covenants (not in gross), which, under section 307 of the Property Law Act, are only notifiable, and are not registered. Registration means that the encumbrances cannot be easily challenged and removed from the title (although, as discussed above, it is debatable to what extent covenants in the encumbrance are indefeasible). Further, the Court of Appeal decision in *Jackson Mews* means that it is unlikely that such encumbrances can be redeemed.[200] This can lead to undesirable results. For example, in a situation such as that in *Jackson Mews*, a person may be bound by the encumbrance, which requires using a particular service provider, even where the service provider is not fulfilling their obligations.

7.30 Thirdly, there is no explicit legislative mandate to create covenants in gross in either the LTA or Property Law Act. There is a legislative mandate in section 221 of the Resource Management Act for local authorities in certain limited situations, but the encumbrance mechanism is apparently preferred to avoid Resource Management Act compliance.

7.31 Fourthly, some such covenants are apparently used to record on title to land "all manner of contractual obligations".[201] It is not, however, appropriate for many personal contractual obligations to run with the land.

7.32 Finally, from a public policy point of view, not all such covenants should necessarily be supported, for example, those that are essentially in restraint of trade rather than strictly related to land use, or those that require execution of a power of attorney by a covenantor in favour of a covenantee and sale of the encumbrancer's property in accordance with conditions set down by the

199 *Jackson Mews Management Ltd v Menere* (CA), above n 181.

200 Ibid.

201 New Zealand Law Society Property Law Section, above n 169, schedule B.

encumbrancee. There will often be an imbalance of power between the person seeking to impose the encumbrance and the person who will be bound by it (in a retirement village situation for example). This risks imposing onerous and long-lasting obligations on individuals who may not have substantial bargaining power.

7.33 For all these reasons we do not support continuing to allow the rentcharge encumbrance mechanism to create covenants in gross, or for registering restrictive or positive covenants, for the future. We recommend defining "mortgage" in such a way that it excludes rentcharges the principle purpose of which is not to secure the payment of money (see clause 5 of the Bill).

PROPOSAL TO IMPLEMENT STATUTORY COVENANTS IN GROSS

7.34 We consider that if the encumbrance mechanism is used to secure covenants that benefit other land, the existing provisions in the Property Law Act, which allow for the notification of such covenants on the register, should be used. We are not aware of any reason why these provisions are inadequate.

7.35 In contrast, the proliferation of covenants in gross on the register and the lack of any general statutory mechanism for their notification, indicates that there is a demand for these types of interests to be able to be entered on the register, which the LTA and the Property Law Act are not meeting currently. In light of this, we believe there is a strong case for express recognition of covenants in gross, to ensure their validity and make their creation transparent.

7.36 Other jurisdictions have provided for covenants in gross in a limited way. The Law Reform Commission of Western Australia discussed restrictive covenants in gross in its *Report on Restrictive Covenants* and endorsed section 76 of the Transfer of Land Amendment Act 1996, which provides for local governments and public authorities to enter into restrictive covenants in gross.[202] There is also limited recognition of covenants in gross in favour of the state or local government in the Queensland Land Title Act 1994.[203] The Ontario Law Reform Commission in its Report on *Covenants Affecting Freehold Land* recommended that the *benefit* of land obligations should be permitted to exist either as appurtenant to land or in gross, that is, the owner for the time being of the benefit should be able to enforce the obligation against the owner for the time being of the burdened land.[204]

7.37 We recommend that provision be made for covenants in gross by replicating the provisions in sections 303–305 and 307 and 316–318 of the Property Law Act to cover covenants in gross, in addition to restrictive and positive covenants not in gross. This would mean that, like positive and restrictive covenants, covenants in gross would be interests in land. They would run with the burdened land and be assignable to a new covenantee. In addition, they would be notifiable on a record of title, but would not be fully indefeasible as they are not registered.

202 Law Reform Commission of Western Australia *Report on Restrictive Covenants* (Project No 91, Perth, 1997) at [5.31]–[5.36] and *Discussion Paper on Restrictive Covenants* (Project No 91, Perth, 1995) at [4.2]–[4.4] and [5.25]–[5.27].

203 Land Title Act 1994 (Qld), division 4A.

204 Ontario Law Reform Commission *Report on Covenants Affecting Freehold Land* (Toronto, 1989) at 111.

OPTIONS FOR LIMITING COVENANTS IN GROSS

7.38 The English Law Commission has provisionally recommended against allowing restrictive and positive covenants where there is no dominant tenement (that is, covenants in gross).[205] In its view, land obligations should not be used to confer benefits unconnected with land. This was due partly to the complexity that would result, to the overburdening of the land, and the inevitable fragmentation of the benefit when land is divided.[206]

7.39 Although we appreciate the position taken by the English Law Commission, we do not believe this approach is realistic in New Zealand, for the reasons expressed above. It does, however, suggest that from a public policy perspective, there would need to be some limits on the use of covenants in gross, in order to prevent interests, which are personal in nature, being treated as interests in land and running with the land indefinitely. This could impose onerous obligations on those burdened by the covenant. Such covenants could be limited by:

- restricting the class of people who can benefit from a covenant in gross;
- only allowing restrictive covenants in gross and prohibiting positive covenants in gross;
- requiring a covenant to conform with specific purposes or restricting the purpose for which the covenant can be lodged negatively;
- requiring the covenant to "touch and concern" the land;
- providing the court with a power to remove covenants in gross.

Restriction on class of covenantees

7.40 Some jurisdictions have limited the class of persons who can be covenantees (that is, the persons who benefit from the covenant). For example, in Queensland the covenantee in gross can only be the State, another entity representing the State, or a local government.[207] Limiting the class to the State or public authorities would not be adequate in New Zealand, if covenants in gross were to act as a replacement for the encumbrance mechanism.

7.41 We considered the possibility of more broadly setting out the classes of persons who could be covenantees. If a key purpose for allowing covenants in gross is to regulate the use of the land, the covenantees would need to have some connection to the land. For example, they could be public authorities, land developers or residents' associations. But we do not favour this option as it is impractical. It is difficult to define such bodies and there is a risk of omitting classes of persons with legitimate interests in the land. Further,

205 *Easements, Covenants and Profit à Prendre: A Consultation Paper*, above n 197, at [8.63]–[8.65]. In the Law Commission's view it is the existence of land which is benefited by the obligation which justifies conferring proprietary status on the right in question, at [8.64]. The Law Commission also expressed a provisional view against easements in gross, at [3.3]–[3.18].

206 Discussion with the Property Law team of the Law Commission of England and Wales, 9 July 2009, with reference to their draft report recommendations. The Land Registry also opposed the creation of covenants in gross as adding a layer of complexity because of the many separate covenant titles that would need to be created. The Commission considers that "commonhold" (equivalent of unit titles) structures are appropriate for complex communal developments, and in more simple "title splitting" development cases, they suggest a way of creating appurtenant rights where the dominant and servient tenements are in single ownership prior to splitting the title.

207 Land Title Act 1994 (Qld), s 97A. See also section 76 of the Transfer of Land Amendment Act 1996 (WA), enacting section 129BA of the Transfer of Land Act 1893 (WA), which allows the local government or a public authority to create a restrictive covenant.

the notification process will not be monitored and there is a risk that covenants that benefit persons not within these categories would still be notified (although such covenants could be challenged as they are not indefeasible). For these reasons we do not support this option.

No positive covenants in gross?

7.42 Another possible way to confine the use of covenants in gross is to only allow restrictive covenants in gross (covenants which prevent a person from doing something on the land), and prohibit positive covenants in gross (which impose a positive obligation to do something on the land). In 1985, the Property Law and Equity Reform Committee specifically recommended that positive covenants in gross, that is covenants that require the owner of the burdened land to perform a positive act, should not be recognised.[208] The Committee assumed the existence of restrictive covenants in gross at that time (although not as an interest that could be notified in the manner of a restrictive covenant not in gross) and said they would be unaffected by the legislation they proposed.[209] The Committee was of the view that the negative nature of restrictive covenants (and easements) "limits their use as a means of exercising economic power". As an example of an inappropriate positive covenant, the Committee suggested a hotel being required to stock a particular brand of liquor.[210]

7.43 However, it is quite possible to word a positive covenant in a negative or restrictive way and obtain the same result by a different formulation. We believe that it would not be wise to encourage a preoccupation with form over substance; and if covenants in gross are to be notified, it is better to allow both restrictive and positive covenants in gross. Therefore, we do not recommend adopting this option.

Restricted purposes of covenants in gross

7.44 Another option is to attempt to prescribe in legislation the purposes for which covenants in gross can be used. This could be done by setting out the purposes for which they can be used or by negatively defining what a covenant may not do. For example, this could prevent the transferor of the land being able to impose restraint of trade conditions on the transferee in such a way that conditions run with the land.[211]

208 Property Law and Equity Reform Committee *Report on Positive Covenants Affecting Land* (Report 39, Wellington, 1985) at 64.

209 Ibid, at 20 and 64 referring to *Staples v Corby*, above n 171; EM Brookfield, above n 168, and ID Campbell, above n 176. However, the Court of Appeal in *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd*, above n 172, declined to follow *Staples v Corby*.

210 Property Law and Equity Reform Committee, above n 208, at 64.

211 See *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd,* above n 172.

7.45 The Queensland Land Title Act 1994 allows the State or local government to lodge positive or negative covenants in gross in certain situations, including where the covenant must:[212]

> (a) relate to the use of –
>
> (i) the lot or part of the lot; or
>
> (ii) a building, or building proposed to be built, on the lot; or
>
> (b) be aimed directly at preserving –
>
> (i) a native animal or plant; or
>
> (ii) a natural or physical feature of the lot that is of cultural or scientific significance…

7.46 Paragraph (b) would be covered in New Zealand by the covenants under section 27 of the Conservation Act. Paragraph (a) is similar to a requirement that a covenant must "touch and concern" the land (explained below) and this requirement does not place extensive limits on the purposes for which the covenant may be used. It is important to note that in Queensland this type of covenant is further limited as it can only be lodged by the State or local government.

7.47 It would be difficult to accurately set out the purposes for which a covenant in gross can be used or cannot be used. To attempt to do so would risk excluding certain legitimate purposes. In New Zealand, there already are a number of provisions that allow covenants in gross for specific purposes. It would also be difficult to provide a list that adequately excludes what might be considered to be objectionable purposes (for example, because they are contrary to public policy). Further, providing a detailed list of permitted or prohibited purposes may not prevent such covenants being recorded on the title. It may be possible to draft covenants in such a way as to circumvent those provisions and such a requirement would be hard to monitor. For these reasons we do not support adopting this option.

The "touch and concern" test

7.48 In equity, restrictive covenants were required to "touch and concern" the benefited land.[213] This is a way of prescribing the purpose of the covenant, meaning it must relate to the use of the land, but it is a more general way of doing so than prescribing specific purposes. The test has been criticised,[214] but it essentially means that the covenant must have a close link with the land rather than be merely personal (to buy petrol, write a song or pay an annuity, for example) as the English Law Commission has put it.[215] In its consultation paper on *Easements, Covenants and Profits à Prendre*, the English Law Commission

212 Land Title Act 1994, s 97A. See also Transfer of Land Act 1893 (WA), s 129BA which allows the local government or a public authority to create a restrictive covenant.

213 *Tulk v Moxhay*, above n 170.

214 See *London Diocesan Fund v Phithwa* [2005] UKHL 70.

215 *Easements, Covenants and Profit à Prendre: A Consultation Paper*, above n 197, at [8.75]. See also, Scottish Law Commission *Report on Real Burdens* (Scot Law Com no 181, Edinburgh, 2000) at [2.9].

proposed a detailed "touch and concern" test for covenants (then called "land obligations"). This stated that a land obligation must relate to or be for the benefit of dominant land, and would only do so where:[216]

- it benefited the dominant owner for the time being;
- it affected the nature, quality, mode or user or value of the land of the dominant owner;
- it was not expressed to be personal, and
- if it was an obligation to pay a sum of money, it was also connected with something to be done on or in relation to the land.

7.49 In relation to covenants in gross, the "touch and concern" test is not immediately applicable as there is no "dominant tenement" (benefited land) which the covenant must "touch and concern". However, we consider that it is important that the covenant has some connection with the use of the land burdened by the covenant. For example, a covenant providing that the covenantee can require the covenantor to sell the land if they are convicted of any criminal offence would not be considered to touch and concern the burdened land.

7.50 In contrast, the following covenants would be considered to touch and concern the land:

- a covenant in favour of territorial authority providing that the land must not be used for a commercial purpose; or
- a covenant that benefits a residents' association that requires certain maintenance activities to be performed on the land.

7.51 We also consider that the covenant should be required to benefit another person or group of persons (the covenantee). The issue of benefiting the covenantee is complicated. For example, if a covenant is imposed by a local authority, it may benefit the community generally or the environment rather than the local authority directly. Nevertheless, it is an important requirement. If the covenant relates to a management body of a development, the benefit should relate to the development as a whole.

7.52 For these reasons, we support adapting the "touch and concern" test, requiring the covenant to relate to the use of the burdened land and benefit the covenantee. However, we acknowledge that this provision will not, on its own, be able to adequately address all potential problems with covenants in gross and avoid objectionable covenants being noted on the record of title. To assist in solving this problem, we propose a final option below.

216 *Easements, Covenants and Profit à Prendre: A Consultation Paper*, above n 197, at [8.80]. The test was taken from *P&A Swift Investments v Combined English Stores Group Plc* [1989] AC 632. See also the Ontario Law Reform Commission's *Report on Covenants Affecting Freehold Land*, which noted that in order to touch and concern the benefited land and not be merely personal or collateral, it has been held that a covenant must affect the nature, quality or value of the land, or mode of enjoying or using it. Ontario Law Reform Commission, above n 204, at 13, citing *Mayor of Congleton v Pattison* (1808) 10 East 130, 103 ER 725 (KB), and at 108–111 regarding covenants in gross.

A power to remove covenants in gross

7.53 A final option is to allow covenants in gross in a relatively unrestricted manner but provide a broad power for the court to modify or remove such covenants. As covenants in gross would not be registrable, they would not obtain the benefits of indefeasibility and could be removed from the title if void or voidable. If there were to be a statutory mechanism to notify covenants in gross on the register, it would be appropriate to also set out grounds for the court to remove or modify covenants in gross.

7.54 Section 317 of the Property Law Act provides a power for the court to modify or extinguish restrictive and positive covenants (and easements) in certain circumstances:

> (a) the easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:
>
> (i) the nature or extent of the use being made of the benefited land, the burdened land, or both:
>
> (ii) the character of the neighbourhood:
>
> (iii) any other circumstance the court considers relevant; or
>
> (b) the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or
>
> (c) every person entitled who is of full age and capacity –
>
> (i) has agreed that the easement or covenant should be modified or extinguished (wholly or in part); or
>
> (ii) may reasonably be considered, by his or her or its acts or omissions, to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or
>
> (d) the proposed modification or extinguishment will not substantially injure any person entitled.

7.55 We support adopting a provision such as this to allow the extinguishment or modification of covenants in gross. However, we consider that a broader power to extinguish covenants than is provided for in section 317 of the Property Law Act is necessary for covenants in gross. First, because of the lack of any specific benefited land, there is a risk that the covenantee may cease to exist or cease to have any connection with the burdened land. We therefore recommend that if a covenantee cannot be found or has ceased to exist, this should be a ground for the court to extinguish the covenant in gross.

7.56 Secondly, there is a risk that covenants in gross may be contrary to public policy and impose unfair obligations on land owners in perpetuity. This risk is stronger for covenants in gross than for covenants that burden other land because there is no required attachment to benefited land. We recommend that there be a general power for the court to remove covenants in gross where the covenant is contrary to public policy or any enactment or rule of law, or the court considers removal to be just or equitable.

7.57 We also believe the powers to remove or modify covenants in gross where they are contrary to public policy, or it is just and equitable to do so, should be extended to apply to restrictive and positive covenants that benefit other land. Although the requirement to benefit land provides some limit on the creation of such covenants, it is still possible for them to be contrary to public policy, or otherwise unjust, and there is no reason for distinguishing them from covenants in gross. If the two mechanisms are not aligned there is a risk that there will be an incentive to adapt a covenant so that it benefits other land and falls within the less restrictive regime.

CONCLUSION

A new mechanism for notifying covenants in gross

7.58 We recommend that the Property Law Act be amended to permit covenants in gross and allow them to be notified on the title in the same manner as restrictive and positive covenants. This recommendation is adopted in clause 202 of the Bill, which will insert new provisions into the Property Law Act. As interests notified on the register under clause 9(b) of the Bill, covenants in gross will run with the land and bind any purchasers. However, they will not be indefeasible, that is, they can be set aside if void. If there is no notification of a covenant on the register, in the absence of fraud a registered owner will take the land free of the covenant.[217]

7.59 In order to limit the use of covenants in gross, we recommend that they be required to "touch and concern" the burdened land and to benefit a covenantee. Clause 203 of the Bill inserts a new section 307A into the Property Law Act which defines covenant in gross to mean a covenant 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;
- is not attached to other land.

7.60 We also recommend an extended power for the court to modify or remove objectionable covenants in gross. Clause 203 proposes new sections 307F–307H that put in place such a power. Likewise, clause 204 extends section 317 of the Property Law Act to provide additional grounds for modifying or extinguishing covenants that benefit other land.

217 See *Town & Country Marketing Ltd v McCallum* (1998) 3 NZ Conv C 192,698 (HC) at [30]–[31].

Encumbrances under the LTA

7.61 We have recommended that covenants in gross become notifiable under the Property Law Act. After this occurs, there will be no need for practitioners to use encumbrances to secure collateral covenants. Therefore, we recommend defining mortgages to cover annuities and rentcharges (which would currently be contained in an encumbrance instrument) provided that the primary purpose of the annuity or rentcharge is to secure the payment of money (see clause 5 of the Bill). This would mean that annuities and any genuine rentcharges, which are not primarily designed to secure covenants in gross, should still be permitted. Although these are likely to be used rarely, we do not see any reason to prevent their use in the future. As we expect these types of interests to be used infrequently, the Bill does not provide for a form for registration of a memorandum of encumbrance; the mortgage form must now be used for annuities and genuine rentcharges.

7.62 The proposed chapters will not apply retrospectively, that is, they will not affect existing encumbrances.

RECOMMENDATIONS

R22 The Property Law Act 2007 should provide for covenants in gross.

R23 Covenants in gross should be treated in the same way as restrictive and positive covenants, that is, notified on the record of title as interests that run with the land; they should not be registered.

R24 Covenants in gross should relate to the use of the land and there should be a broad power for the court to modify or remove them.

R25 Encumbrances should no longer be able to be registered where their primary purpose is to secure collateral covenants.