



A NEW LAND TRANSFER ACT

IN CONJUNCTION WITH
LAND INFORMATION NEW ZEALAND





A NEW LAND TRANSFER ACT

IN CONJUNCTION WITH
LAND INFORMATION NEW ZEALAND

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

A handwritten signature in black ink, appearing to read "Geoffrey Palmer". The signature is written in a cursive style and is positioned above a horizontal line.

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

CONTENTS

Foreword	iv
Acknowledgments	v
Summary of recommendations	4
Chapter 1	4
Chapter 2	4
Chapter 3	4
Chapter 4	5
Chapter 5	5
Chapter 6	5
Chapter 7	5

PART 1 CONCEPTUAL ISSUES **7**

CHAPTER 1

Introduction	8
Why a new Land Transfer Act	8
Principles and aims of the Torrens system	9
Structure of this report	10

CHAPTER 2

Indefeasibility of title	11
Introduction	11
Title to land	11
Fraud.....	21
In personam jurisdiction	23
Registrar’s powers of correction	24

CHAPTER 3

Unregistered interests, caveats and trusts	26
Unregistered interests.....	26
Interest recording.....	29
Caveatability of interests	32
Trusts “off the register”.....	33

CHAPTER 4

Compensation.....	35
Principles.....	35
Grounds	35
Exceptions	37
Measure of damages.....	37
Responsibility for the loss	39
Procedure.....	42
Limitation period	42
Private title insurance.....	42

CHAPTER 5

Overriding statutes	43
Enactments overriding the LTA	43
Options and recommendations	43

CHAPTER 6

Registration of Māori land	47
Introduction	47
Recent developments	47
Submissions.....	50
Changes that effect registration of Māori Land	52
Future review	52

CHAPTER 7

Encumbrances and a new mechanism for securing covenants in gross.....	53
Introduction	53
Covenants in relation to freehold land	54
Encumbrances.....	54
Problems with the use of the encumbrance mechanism	55
Rentcharges in the United Kingdom	58
Should the encumbrance mechanism continue in New Zealand?.....	60
Proposal to implement statutory covenants in gross	61
Options for limiting covenants in gross	62
Conclusion.....	67

COMMENTARY ON THE LAND TRANSFER BILL

LAND TRANSFER BILL 71

PART 1 Preliminary provisions 72

PART 2 Title to land 78

PART 3 Compensation 84

PART 4 Land Title Register 92

PART 5 Transfers, transmissions, and vesting 109

PART 6 Leases..... 114

PART 7 Mortgages 120

PART 8 Easements, profits à prendre, and covenants under the Property Law Act 2007 125

PART 9 Statutory land charges 132

PART 10 Trusts and caveats 135

PART 11 Applications to bring land under Act..... 143

PART 12 Applications for title to land under this Act based on adverse possession..... 150

PART 13 Title to access strips 158

PART 14 Special provisions relating to limited titles issued under Part 12 of the Land Transfer Act 1952 165

PART 15 General provisions 171

PART 16 Amendments, repeals, savings, and transitional provisions..... 189

MATTERS NOT DEALT WITH IN THE BILL..... 194

PART 3 LAND TRANSFER BILL

LAND TRANSFER BILL 199

APPENDIX

APPENDIX

Comparative tables..... 316

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.

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.

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

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”.

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.

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

CHAPTER 3 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.

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

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.

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.

CHAPTER 4

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.

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.

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.

CHAPTER 5

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

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

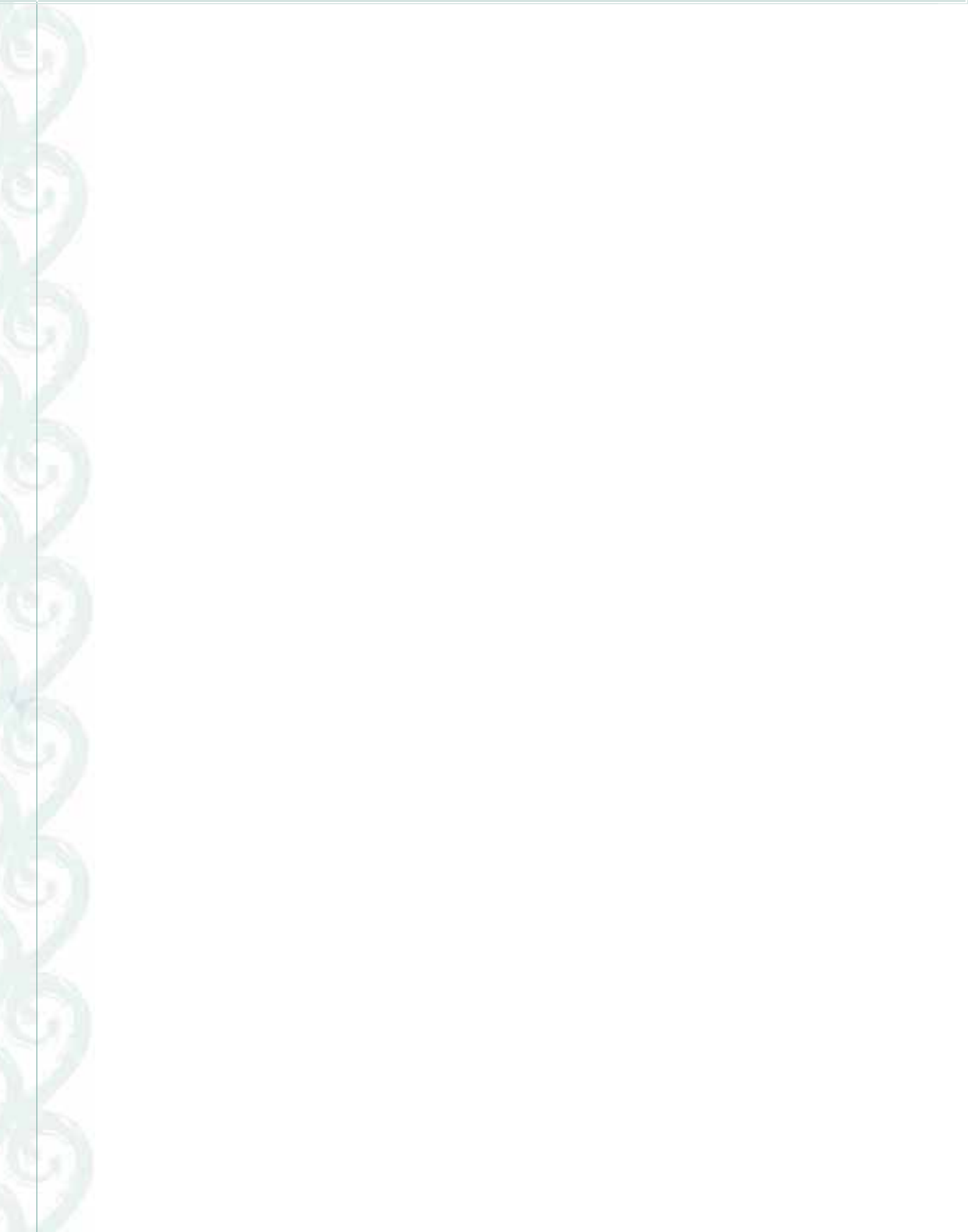
CHAPTER 7

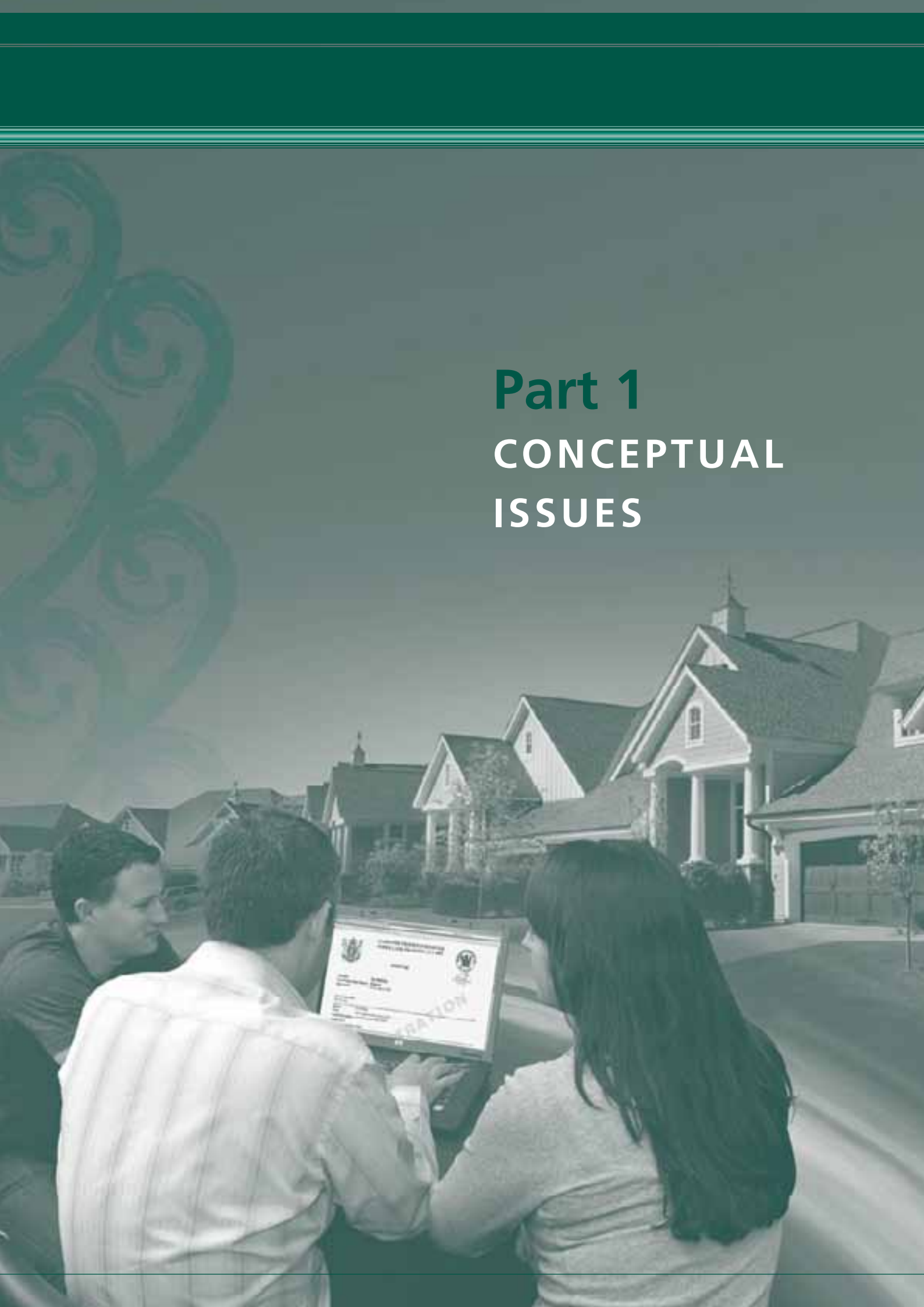
R22 The Property Law Act 2007 should provide for covenants in gross.

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 led 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 led 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); *Conlon 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 Australia³³ 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.

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 r e l e v a n t l a n d . The Land Registration Act 2002 (UK), section 65 and schedule 4, provides that the register can be rectified in cases of fraud or lack of 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 legislation⁴⁷ (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 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.

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 Australia⁵³ 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”.

- 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 Trustee* [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 Porea 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 Poreas) that if they moved into a property owned by the Poreas, met the mortgage payments and allowed the Poreas to stay in the property when they visited New Zealand, the house would be theirs once the loan was repaid. After Mrs Porea's death, Mr Porea 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 Porea 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 Porea and Tangi-Tuake* [2009] NZCA 541 at [68]–[69].

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

82 *Ibid*, at [4].

- 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).

GROUND S

- 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

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 override¹³⁷ 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 RECOMMEND- ATIONS

- 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 appealation 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 covenants¹⁹⁵ 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.

encumbrance. 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.

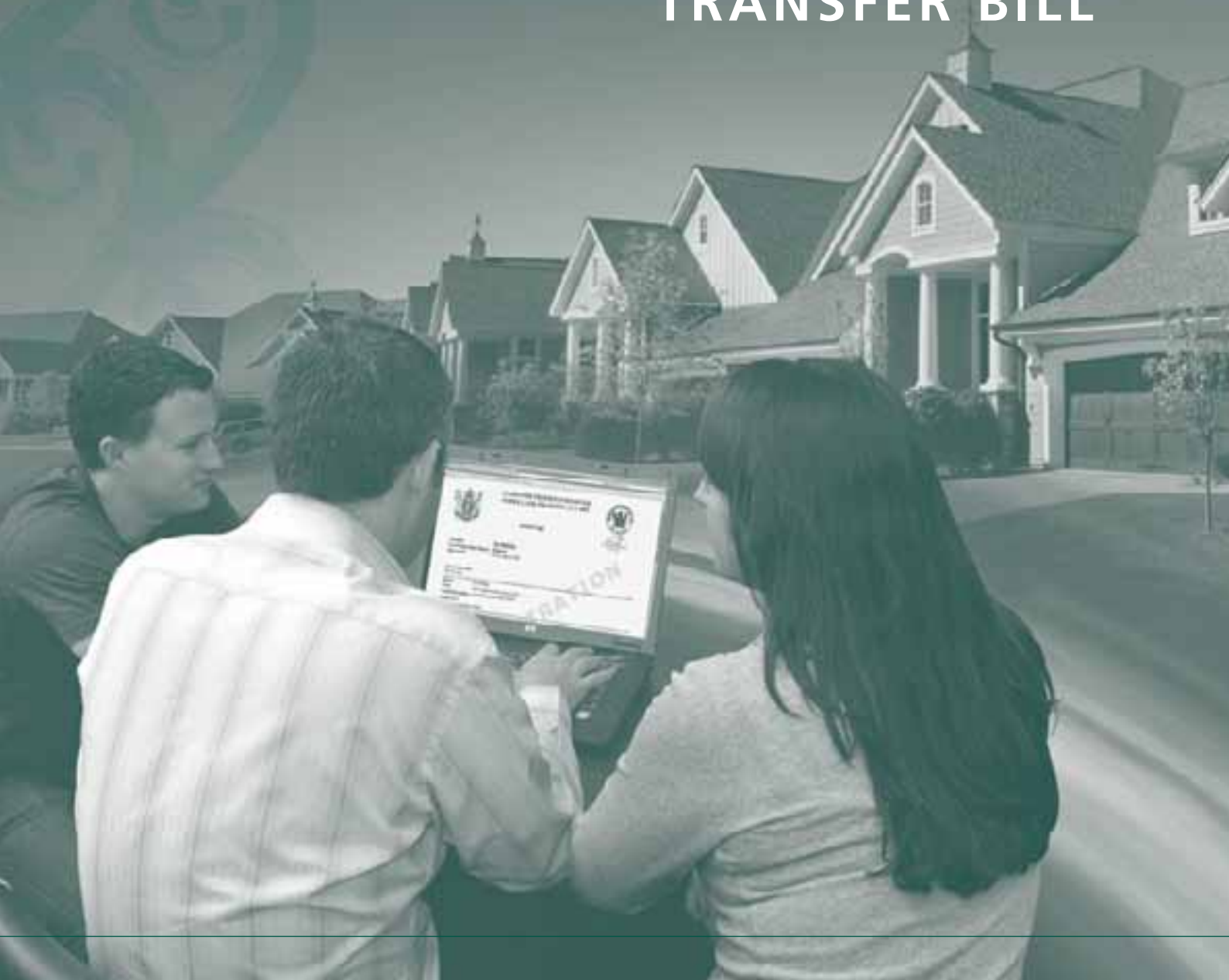
RECOMMENDATIONS

- 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.



Part 2

COMMENTARY ON THE LAND TRANSFER BILL



Commentary on the Land Transfer Bill

THE PURPOSE OF THE COMMENTARY

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

MATTERS OF TERMINOLOGY

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



Land Transfer Bill

CLAUSE 1 Title

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

CLAUSE 2 Commencement

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

Part 1

Preliminary provisions

CLAUSE 3 Purpose

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

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

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

CLAUSE 4 Land subject to this Act

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

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

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

CLAUSE 5 Interpretation

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

Chief executive

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

Court

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

Crown grant

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

Department

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

Electronic instrument

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

Electronic workspace facility

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

Freehold estate

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

Future Estate

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

Incapacitated

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

Instrument

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

Intellectual or mental impairment

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

Interest in land

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

Land

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

Lease

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

Local authority

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

Minister

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

Mortgage

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

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

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

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

Mortgagee

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

Mortgagor

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

Owner

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

Personal representative

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

Practitioner

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

Public notice

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

Record of title

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

Registrar

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

Surveyor-General

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

Transmission

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

Unique identifier

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

Working Day

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

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

CLAUSE 6 **Act binds the Crown**

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

Part 2

Title to land

CLAUSE 7 Title by registration

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

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

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

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

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

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

CLAUSE 8 Meaning of fraud in this Part

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

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

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

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

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

CLAUSE 9 Exceptions and limitations

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

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

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

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

CLAUSE 10 No title to public road or reserve unless authorised

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

CLAUSE 11 Verification of identity of mortgagor by mortgagee

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

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

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

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

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

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

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

CLAUSE 12 Transferee of mortgage to verify identity of mortgagor

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

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

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

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

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

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

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

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

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

Part 3

Compensation

CLAUSE 14 Meaning of fraud in this Part

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

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

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

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

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

CLAUSE 16 Compensation for loss of estate or interest in land

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

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

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

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

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

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

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

CLAUSE 17 Compensation for loss occurring after search and before registration

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

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

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

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

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

CLAUSE 18 Exceptions to compensation

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

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

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

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

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

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

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

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

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

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

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

CLAUSE 19 Amount of compensation

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

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

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

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

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

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

CLAUSE 20 Compensation may be reduced if claimant contributes to loss

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

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

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

CLAUSE 21 Right of subrogation

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

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

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

CLAUSE 23 Procedure for making claim

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

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

Part 4

Land Title Register

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

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

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

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

LAND TITLE REGISTER

CLAUSE 24 Registrar to keep register

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

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

CLAUSE 25 Purpose of register

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

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

This is a new provision.

CLAUSE 26 Contents of register

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

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

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

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

RECORDS OF TITLE

CLAUSE 27 Record of title

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

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

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

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

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

CLAUSE 28 Record of title created in name of deceased person

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

QUALIFIED RECORDS OF TITLE

CLAUSE 29 Qualified record of title

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

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

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

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

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

CLAUSE 30 Effect of qualified record of title

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

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

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

CLAUSE 31 Removal of qualification

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

RETENTION OF INFORMATION ON REGISTER

CLAUSE 32 Information in register to be retained

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

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

REGISTRAR'S POWERS OF ALTERATION

CLAUSE 33 Registrar's powers of alteration

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

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

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

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

REGISTRATION OF INSTRUMENTS

CLAUSE 34 Registration of instruments and other information

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

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

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

CLAUSE 36 Effect of registration

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

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

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

ELECTRONIC WORKSPACE FACILITIES

CLAUSE 37 Electronic workspace facilities

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

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

INSTRUMENTS

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

CLAUSE 38 Instruments to comply with the Act and regulations

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

CLAUSE 39 Certification of instruments

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

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

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

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

CLAUSE 40 Persons authorised to certify instruments

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

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

CLAUSE 41 Revocation of right to certify

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

CLAUSE 42 Evidence of certification

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

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

CLAUSE 43 Effect of certification

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

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

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

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

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

CLAUSE 44 Lodgement of instruments electronically

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

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

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

CLAUSE 45 Execution of paper instruments

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

CLAUSE 46 Lodging of paper instruments

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

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

CLAUSE 47 Priority of instruments

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

CLAUSE 48 When paper instruments lodged

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

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

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

CLAUSE 49 Rejection and requisition of instruments

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

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

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

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

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

CLAUSE 50 Copying or imaging of paper documents

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

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

CLAUSE 51 Rejection of instrument that cannot be imaged

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

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

ACCESS TO REGISTER

CLAUSE 52 Access to register

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

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

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

EVIDENTIARY EFFECT OF DOCUMENTS

CLAUSE 53 Evidentiary effect of documents

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

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

INSTRUMENTS LOST BEFORE REGISTRATION OR NOTIFICATION

CLAUSE 54 Instruments lost before registration or notification

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

REPLACEMENT OR RECONSTITUTION OF RECORDS

CLAUSE 55 Registrar may replace or reconstitute records

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

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

ORDERS RELATING TO RECORDS OF TITLE

CLAUSE 56 Court may make orders relating to records of title

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

CREATION OF AMALGAMATED AND SEPARATE RECORDS OF TITLE

CLAUSE 57 Registrar may issue amalgamated or separate records of title

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

JOINT TENANCY

CLAUSE 58 Registration of persons as joint tenants

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

CLAUSE 59 Severance of joint tenancy

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

SEPARATE RECORDS OF TITLE FOR UNDIVIDED SHARES IN LAND

CLAUSE 60 Separate titles for undivided shares in land

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

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

DEALINGS BY OVERSEAS GOVERNMENTS

CLAUSE 61 Dealings in land by government of overseas country

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

REGISTERS UNDER OTHER ACTS

CLAUSE 62 Registers under other Acts

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

Part 5

Transfers, transmissions, and vesting

TRANSFERS OF ESTATES AND INTERESTS

CLAUSE 63 Transfer of estates and interests

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

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

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

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

CLAUSE 64 Transfer of part of land in record of title

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

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

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

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

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

CLAUSE 65 Effect of transfer of leases and mortgages

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

CLAUSE 66 Life and other limited freehold estates

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

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

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

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

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

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

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

TRANSMISSIONS

CLAUSE 67 Transmission instruments required to register transmission

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

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

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

CLAUSE 68 Effect of registering transmission instrument

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

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

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

VESTING

CLAUSE 69 Vesting of land by court order

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

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

CLAUSE 70 Vesting of land by statute

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

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

Part 6

Leases

CLAUSE 71 Lease instrument required to register lease

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

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

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

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

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

CLAUSE 72 Variation of leases

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

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

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

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

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

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

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

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

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

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

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

CLAUSE 73 Special provisions relating to variation of cross leases

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

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

CLAUSE 74 Lease surrender instrument required to surrender lease

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

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

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

CLAUSE 75 Registration of interests on replacement lease

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

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

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

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

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

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

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

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

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

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

CLAUSE 77 Additional provision relating to recording of interests and merger

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

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

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

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

CLAUSE 79 Re-entry by lessor

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

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

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

Part 7

Mortgages

CLAUSE 80 Mortgage takes effect only as security

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

CLAUSE 81 Mortgage instrument required to register mortgage

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

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

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

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

CLAUSE 82 Mortgage variation instrument required to vary mortgage

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

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

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

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

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

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

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

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

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

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

CLAUSE 83 Mortgage priority instrument required to vary priority of mortgages

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

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

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

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

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

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

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

CLAUSE 84 Sale of mortgaged land

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

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

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

CLAUSE 85 Mortgage discharge instrument required to discharge mortgage

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

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

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

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

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

CLAUSE 87 Discharge of mortgage securing annuity

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



Part 8

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

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

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

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

EASEMENTS AND PROFITS À PRENDRE

CLAUSE 88 Interpretation

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

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

CLAUSE 89 Registration and surrender of easements and profits à prendre

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

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

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

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

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

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

CLAUSE 90 Easement instruments

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

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

CLAUSE 91 Creation or surrender of easement on deposit of plan

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

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

CLAUSE 92 Rights and powers implied in easements

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAUSE 95 Extinguishment of easements and profits à prendre on occurrence of event

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

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

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

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

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

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

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

CLAUSE 96 Redundant easements

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

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

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

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

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

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

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

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

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

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

NOTIFICATION OF COVENANTS UNDER PROPERTY LAW ACT 2007

CLAUSE 97 Notification of covenants under Property Law Act 2007

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

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

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

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

Part 9

Statutory land charges

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

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

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

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

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

CLAUSE 98 Application of this Part

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

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

CLAUSE 99 Registration of charge

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

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

CLAUSE 100 Priority of charge

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

Section 5(2) of the SLCRA is redundant.

CLAUSE 101 Release of charge

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

CLAUSE 102 Protection of Registrar

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

Part 10

Trusts and caveats

TRUSTS

CLAUSE 103 Trusts not to be entered on register

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

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

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

CLAUSE 104 Trusts of reserves

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

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

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

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

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

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

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

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

CAVEATS

CLAUSE 105 Caveats against dealings with land

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

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

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

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

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

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

CLAUSE 106 Notice of caveat against dealings

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

CLAUSE 107 Effect of caveat against dealings

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

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

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

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

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

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

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

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

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

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

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

CLAUSE 109 Removal of caveat against dealings

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

CLAUSE 110 Lapse of caveat against dealings

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

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

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

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

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

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

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

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

CLAUSE 111 Withdrawal of caveat against dealings

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

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

CLAUSE 112 Caveator may consent to registration of instrument

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

CLAUSE 113 Second caveat against dealings may not be lodged

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

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

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

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

CLAUSE 115 Compensation for lodging of improper caveat against dealings

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

CLAUSE 116 Registrar may lodge caveat

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

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

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

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

CLAUSE 117 Notice of caveat

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

CLAUSE 118 Effect of Registrar's caveat

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

CLAUSE 119 Registrar may withdraw caveat

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



Part 11

Applications to bring land under Act

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

CLAUSE 120 Land to which this Part applies

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

CLAUSE 121 Applications to bring land under Act

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAUSE 122 Notice of application

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

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

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

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

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

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

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

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

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

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

CLAUSE 123 Caveat against bringing land under Act

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

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

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

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

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

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

CLAUSE 124 Effect of caveat

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

CLAUSE 125 Notice of caveat

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

CLAUSE 126 Removal of caveat

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAUSE 130 Withdrawal of application

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

CLAUSE 131 Registration of applicant

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

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

CLAUSE 132 Cancellation of previous instruments of title

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

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

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

Part 12

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

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

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

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

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

CLAUSE 134 Application for record of title based on adverse possession

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

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

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

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

CLAUSE 135 Information relating to land

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

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

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

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

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

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

CLAUSE 136 Incapacity of registered owner

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

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

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

CLAUSE 137 Minors

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

CLAUSE 138 Certain applications prohibited

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

CLAUSE 139 Evidence

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

CLAUSE 140 Notice of application

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

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

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

CLAUSE 141 Caveats against application

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

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

CLAUSE 142 Notice to applicant

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

CLAUSE 143 Removal of caveat

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAUSE 147 **Caveat by person entitled to other estate or interest**

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

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

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

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

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

CLAUSE 148 **Registration of applicant as owner of freehold estate**

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

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

CLAUSE 149 Cancellation of record of title

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

CLAUSE 150 Application relating to land of dissolved company

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

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

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

Part 13

Title to access strips

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

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

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

CLAUSE 151 Meaning of access strip

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

CLAUSE 152 Application by adjoining owners for title to access strip

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

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

CLAUSE 153 Notice of application

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

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

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

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

CLAUSE 154 Caveats against application

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

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

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

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

CLAUSE 155 Notice of caveat

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

CLAUSE 156 Removal of caveat

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

CLAUSE 157 Procedure where caveat lodged

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAUSE 161 Record of title for access strip

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



Part 14

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

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

CLAUSE 163 Purpose of this Part

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

CLAUSE 164 Meaning of limited title

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

CLAUSE 165 Registrar's minutes

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

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

CLAUSE 166 Record of title to indicate limitations

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

CLAUSE 167 Effect of limited record of title

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

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

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

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

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

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

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

CLAUSE 168 Removal of limitations from limited record of title

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

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

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

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

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

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

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

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

CLAUSE 170 Other estates and interests subject to limitation

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

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

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

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

CLAUSE 172 Certain interests extinguished

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

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

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

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

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

CLAUSE 174 Caveats against limited title limited as to parcels

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

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

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

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

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

Part 15

General provisions

COVENANTS IMPLIED IN INSTRUMENTS

CLAUSE 175 Implied covenants requiring persons to give effect to instruments

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

PROVISIONS INCORPORATED IN INSTRUMENTS BY REFERENCE

CLAUSE 176 Incorporation in instruments of provisions in memorandum

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

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

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

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

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

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

INSTRUMENTS UNDER THIS ACT THAT MAY BE USED UNDER OTHER ACTS

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

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

POWERS OF ATTORNEY

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

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

CLAUSE 179 Deposit of power of attorney

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

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

CLAUSE 180 Notice of revocation of power of attorney

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

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

REVIEW AND APPEAL

CLAUSE 181 Review by Registrar of decision

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

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

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

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

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

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

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

CLAUSE 182 Appeal to Court

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

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

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

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

APPLICATION TO COURT BY REGISTRAR

CLAUSE 183 Registrar may apply to Court for directions

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

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

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

OFFENCES

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

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

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

Section 225 of the LTA

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

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

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

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

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

Subsection (2) provides that:

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

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

Section 226 of the LTA

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

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

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

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

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

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

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

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

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

Section 228A of the LTA

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

Where any person fraudulently –

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

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

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

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

CLAUSE 184 Offences in relation to registration

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

CLAUSE 185 False statements

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

NOTICES

CLAUSE 186 Public notice

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

CLAUSE 187 Notice by Registrar to particular persons

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

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

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

CLAUSE 188 Notice to Registrar

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

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

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

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

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

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

CLAUSE 189 When notices given

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

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

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

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

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

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

PLANS

CLAUSE 190 Registrar may require plans

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

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

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

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

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

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

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

CLAUSE 191 Registrar may specify form of deposit document

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

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

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

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

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

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

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

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

CLAUSE 192 Cost of survey to correct plans

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

REGULATIONS

CLAUSE 193 Regulations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FEES AND CHARGES

CLAUSE 194 Fees and charges

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

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

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

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

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

LAND REGISTRATION DISTRICTS

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

CLAUSE 195 Land registration districts

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

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

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

REGISTRAR-GENERAL OF LAND

CLAUSE 196 Registrar-General of Land

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

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

CLAUSE 197 Seal of office

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

CLAUSE 198 Delegation of Registrar's duties and powers

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

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

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

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

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

CLAUSE 199 Registrar not required to give certain evidence

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

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

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

CLAUSE 200 Registrar and other persons not personally liable

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

CLAUSE 201 Registrar may set standards and issue directives

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

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

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



Part 16

Amendments, repeals, savings, and transitional provisions

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

AMENDMENTS TO PROPERTY LAW ACT 2007

CLAUSE 202 Amendments to Property Law Act 2007

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

CLAUSE 203 New sections 307A to 307H inserted

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

New section 307A Covenants in gross

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

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

New section 307B Legal effect of covenants in gross

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

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

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

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

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

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

New section 307E Notification of covenants in gross

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

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

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

New section 307F Application for order under section 307G

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

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

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

The grounds are as follows:

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

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

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

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

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

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

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

CLAUSE 204 Court may modify or extinguish easement or covenant

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

REPEAL

CLAUSE 205 Land Transfer Act 1952 repealed

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

SAVINGS PROVISION

CLAUSE 206 Covenants implied in certain mortgages and instruments

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

TRANSITIONAL PROVISION

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

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

Matters not dealt with in the Bill

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

SECTIONS 125 AND 126 OF THE LTA

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

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

SECTION 155 OF THE LTA

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

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

DEEDS REGISTRATION ACT 1908

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

FLAT AND OFFICE OWNING COMPANIES

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

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

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

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

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

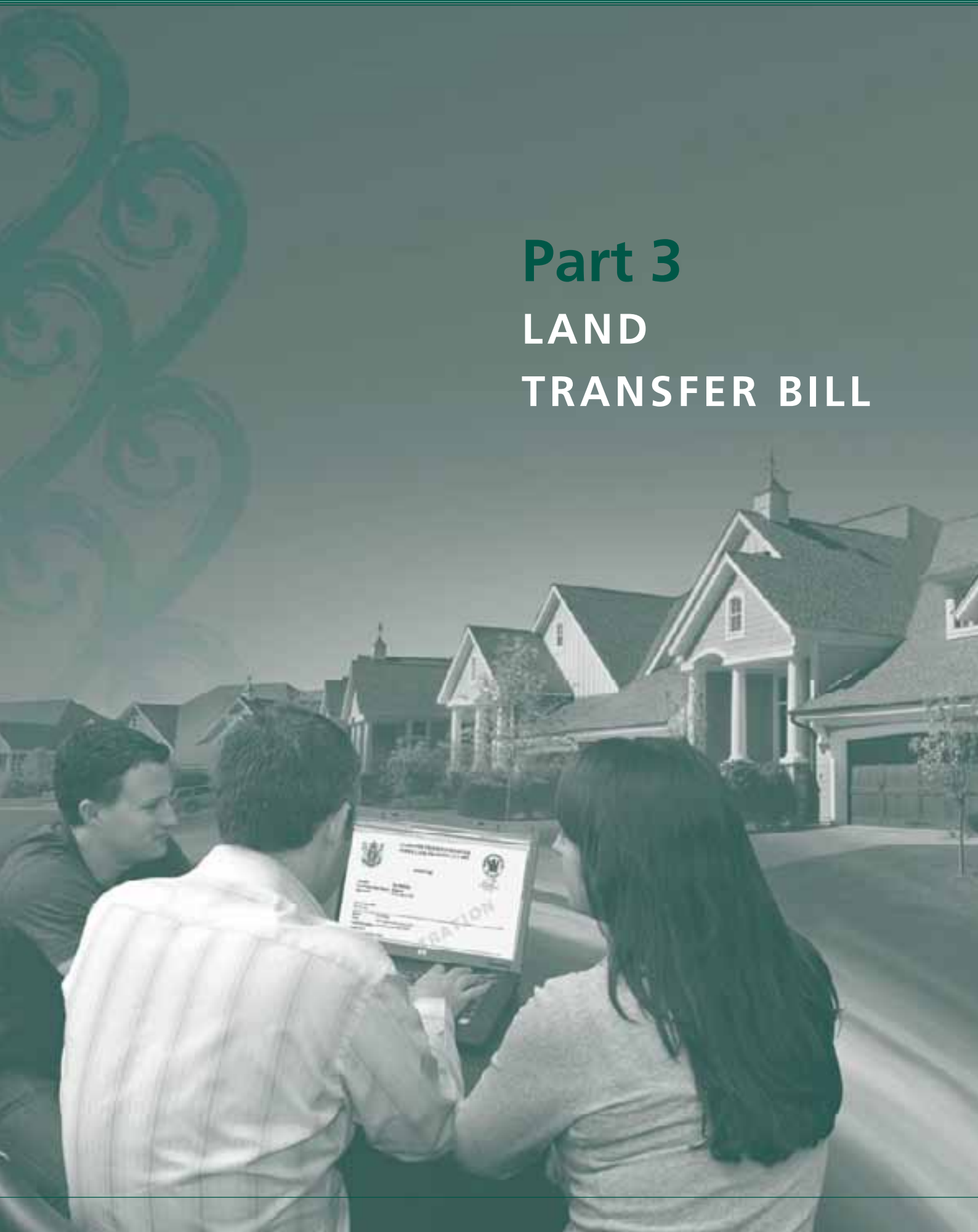
Part 7A was originally Part 1 of the Companies Amendment Act 1964 and was inserted into the LTA in 1994 when the Companies Amendment Act 1964 was repealed. Legislation dealing with flat and office owning companies does not sit easily in either land transfer or companies legislation. We think that part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



Part 3

LAND

TRANSFER BILL



Land Transfer Bill

Land Transfer Bill

Government Bill

Contents

		Page
1	Title	10
2	Commencement	10
Part 1		
Preliminary provisions		
3	Purpose	10
4	Land subject to this Act	11
5	Interpretation	11
6	Act binds the Crown	14
Part 2		
Title to land		
7	Title by registration	14
8	Meaning of fraud in this Part	15
9	Exceptions and limitations	15
10	No title to public road or reserve unless authorised	16
11	Verification of identity of mortgagor by mortgagee	16
12	Transferee of mortgage to verify identity of mortgagor	17
13	Court may direct register to be altered in cases of manifest injustice	18
Part 3		
Compensation		
14	Meaning of fraud in this Part	19
15	Compensation for loss resulting from Registrar's error and system failure	20
16	Compensation for loss of estate or interest in land	20

1

Land Transfer Bill		
17	Compensation for loss occurring after search and before registration	20
18	Exceptions to compensation	22
19	Amount of compensation	22
20	Compensation may be reduced if claimant contributes to loss	23
21	Right of subrogation	23
22	Compensation paid in case of fraud recoverable by Crown as debt	23
23	Procedure for making claim	24
Part 4		
Land Title Register		
<i>Land Title Register</i>		
24	Registrar to keep register	24
25	Purpose of register	25
26	Contents of register	25
<i>Records of title</i>		
27	Record of title	26
28	Record of title created in name of deceased person	27
<i>Qualified records of title</i>		
29	Qualified record of title	27
30	Effect of qualified record of title	27
31	Removal of qualification	28
<i>Retention of information on register</i>		
32	Information in register to be retained	28
<i>Registrar's powers of alteration</i>		
33	Registrar's powers of alteration	28
<i>Registration of instruments</i>		
34	Registration of instruments and other information	29
35	Registration or notification of instrument created or executed by person not registered as owner of estate or interest	30
36	Effect of registration	30
<i>Electronic workspace facilities</i>		
37	Electronic workspace facilities	31

Land Transfer Bill

<i>Instruments</i>		
38	Instruments to comply with Act and regulations	32
39	Certification of instruments	32
40	Persons authorised to certify instruments	32
41	Revocation of right to certify	32
42	Evidence of certification	33
43	Effect of certification	33
44	Lodgement of instruments electronically	34
45	Execution of paper instruments	34
46	Lodging of paper instruments	34
47	Priority of instruments	34
48	When paper instruments lodged	35
49	Rejection and requisition of instruments	35
50	Copying and imaging of paper documents	36
51	Rejection of instrument that cannot be imaged	36
<i>Access to register</i>		
52	Access to register	37
<i>Evidentiary effect of documents</i>		
53	Evidentiary effect of documents	37
<i>Instruments lost before registration or notification</i>		
54	Instruments lost before registration or notification	39
<i>Replacement or reconstitution of records</i>		
55	Registrar may replace or reconstitute records	39
<i>Orders relating to records of title</i>		
56	Court may make orders relating to records of title	40
<i>Creation of amalgamated and separate records of title</i>		
57	Registrar may issue amalgamated or separate records of title	40
<i>Joint tenancy</i>		
58	Registration of persons as joint tenants	41
59	Severance of joint tenancy	41
<i>Separate records of title for undivided shares in land</i>		
60	Separate titles for undivided shares in land	41
<i>Dealings by overseas governments</i>		
61	Dealings in land by government of overseas country	41

Land Transfer Bill		
<i>Registers under other Acts</i>		
62	Registers under other Acts	42
Part 5		
Transfers, transmissions, and vesting		
<i>Transfers of estates and interests</i>		
63	Transfer of estates and interests	43
64	Transfer of part of land in record of title	43
65	Effect of transfer of leases and mortgages	43
66	Life and other limited freehold estates	44
<i>Transmissions</i>		
67	Transmission instrument required to register transmission	44
68	Effect of registering transmission instrument	44
<i>Vesting</i>		
69	Vesting of land by court order	45
70	Vesting of land by statute	45
Part 6		
Leases		
71	Lease instrument required to register lease	45
72	Variation of leases	45
73	Special provisions relating to variation of cross leases	47
74	Lease surrender instrument required to surrender lease	47
75	Registration of interests on replacement lease	48
76	Recording of interests under lease on record of title for fee simple estate on acquisition of fee simple by lessee	49
77	Additional provision relating to recording of interests and merger	49
78	Covenant by or right for lessee to purchase fee simple estate	50
79	Re-entry by lessor	50
Part 7		
Mortgages		
80	Mortgage takes effect only as security	51
81	Mortgage instrument required to register mortgage	51
82	Mortgage variation instrument required to vary mortgage	51
83	Mortgage priority instrument required to vary priority of mortgages	52
84	Sale of mortgaged land	53

Land Transfer Bill

85	Mortgage discharge instrument required to discharge mortgage	53
86	Court may order mortgage to be discharged if mortgagee's remedies barred by Limitation Act 1950	54
87	Discharge of mortgage securing annuity	54

Part 8

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

Easements and profits à prendre

88	Interpretation	55
89	Registration and surrender of easements and <i>profits à prendre</i>	55
90	Easement instruments	55
91	Creation or surrender of easement on deposit of plan	56
92	Rights and powers implied in easements	57
93	Easement variation instrument required to vary easements and <i>profits à prendre</i>	57
94	Merger and extinguishment of easements and <i>profits à prendre</i> through lapse of time	58
95	Extinguishment of easements and <i>profits à prendre</i> on occurrence of event	58
96	Redundant easements	59

Notification of covenants under Property Law Act 2007

97	Notification of covenants under Property Law Act 2007	60
----	---	----

Part 9

Statutory land charges

98	Application of this Part	61
99	Registration of charge	61
100	Priority of charge	61
101	Release of charge	62
102	Protection of Registrar	62

Part 10

Trusts and caveats

Trusts

103	Trusts not to be entered on register	62
104	Trusts of reserves	63

Caveats

105	Caveats against dealings with land	64
-----	------------------------------------	----

Land Transfer Bill		
106	Notice of caveat against dealings	64
107	Effect of caveat against dealings	64
108	Caveat against dealings not to prevent transfer by mortgagee under power of sale	65
109	Removal of caveat against dealings	66
110	Lapse of caveat against dealings	66
111	Withdrawal of caveat against dealings	68
112	Caveator may consent to registration of instrument	68
113	Second caveat against dealings may not be lodged	68
114	Registrar not required to verify entitlement to lodge caveat against dealings	68
115	Compensation for lodging of improper caveat against dealings	68
116	Registrar may lodge caveat	68
117	Notice of caveat	69
118	Effect of Registrar's caveat	69
119	Registrar may withdraw caveat	69

Part 11

Applications to bring land under Act

120	Land to which this Part applies	69
121	Applications to bring land under Act	69
122	Notice of application	71
123	Caveat against bringing land under Act	72
124	Effect of caveat	72
125	Notice of caveat	72
126	Removal of caveat	72
127	Procedure where caveat lodged by person under section 123(1)(a)	73
128	Procedure where caveat lodged by person under section 123(1)(b) or (c)	73
129	Registrar may require instrument creating or recording estate or interest of caveator	75
130	Withdrawal of application	75
131	Registration of applicant	75
132	Cancellation of previous instruments of title	76
133	Registration of Crown grant under Deeds Registration Act 1908 unnecessary	76

Part 12

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

134	Application for record of title based on adverse possession	76
-----	---	----

Land Transfer Bill

135	Information relating to land	77
136	Incapacity of registered owner	78
137	Minors	78
138	Certain applications prohibited	78
139	Evidence	79
140	Notice of application	79
141	Caveats against application	80
142	Notice to applicant	80
143	Removal of caveat	80
144	Caveat by registered owner of fee simple or other estates	80
145	Caveat by beneficial or equitable owner of fee simple or other estate	80
146	Caveat by person entitled to other estate or interest registered or notified on record of title	81
147	Caveat by person entitled to other estate or interest	82
148	Registration of applicant as owner of freehold estate	83
149	Cancellation of record of title	83
150	Application relating to land of dissolved company	84

Part 13

Title to access strips

151	Meaning of access strip	85
152	Application by adjoining owners for title to access strip	85
153	Notice of application	86
154	Caveats against application	86
155	Notice of caveat	87
156	Removal of caveat	87
157	Procedure where caveat lodged	87
158	Owner of access strip who is not an adjoining owner	88
159	Adjoining owner with interest in access strip who is not an applicant	88
160	Adjoining owner with no interest in access strip who is not an applicant	89
161	Record of title for access strip	89
162	Provisions applying when record of title created for access strip	90

Part 14

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

163	Purpose of this Part	91
164	Meaning of limited title	91
165	Registrar's minutes	91

Land Transfer Bill		
166	Record of title to indicate limitations	91
167	Effect of limited record of title	92
168	Removal of limitations from limited record of title	92
169	Further restriction on removal of limitation from limited record of title limited as to parcels	93
170	Other estates and interests subject to limitation	93
171	Applications by persons claiming title to land subject to limited title	94
172	Certain interests extinguished	94
173	Status of caveats lodged under section 205(1) of Land Transfer Act 1952	94
174	Caveats against limited title limited as to parcels	95
Part 15		
General provisions		
<i>Covenants implied in instruments</i>		
175	Implied covenants requiring persons to give effect to instruments	95
<i>Provisions incorporated in instruments by reference</i>		
176	Incorporation in instruments of provisions in memorandum	96
<i>Instruments under this Act that may be used under other Acts</i>		
177	Instruments under this Act may be used under other Acts	96
<i>Powers of Attorney</i>		
178	Registered owner may deal with estate or interest by attorney	97
179	Deposit of power of attorney	97
180	Notice of revocation of power of attorney	97
<i>Review and appeal</i>		
181	Review by Registrar of decision	98
182	Appeal to Court	98
<i>Application to Court by Registrar</i>		
183	Registrar may apply to Court for directions	99
<i>Offences</i>		
184	Offences in relation to registration	99
185	False statements	99

Land Transfer Bill

Notices

186	Public notice	100
187	Notice by Registrar to particular persons	100
188	Notice to Registrar	101
189	When notices given	101

Plans

190	Registrar may require plans	102
191	Registrar may specify form of deposit document	103
192	Cost of survey to correct plans	104

Regulations

193	Regulations	104
-----	-------------	-----

Fees and charges

194	Fees and charges	106
-----	------------------	-----

Land Registration Districts

195	Land registration districts	107
-----	-----------------------------	-----

Registrar-General of Land

196	Registrar-General of Land	108
197	Seal of office	108
198	Delegation of Registrar's duties and powers	109
199	Registrar not required to give certain evidence	110
200	Registrar and other persons not personally liable	110
201	Registrar may set standards and issue directives	111

Part 16

Amendments, repeals, savings, and transitional provisions

Amendments to Property Law Act 2007

202	Amendments to Property Law Act 2007	111
203	New sections 307A to 307H inserted	111
	307A Covenants in gross	112
	307B Legal effect of covenant in gross	112
	307C Whether, and to what extent, administrator bound by covenant in gross to which section 303B applies	112
	307D How rights under covenant to which section 307B applies rank in relation to other unregistered interests	113
	307E Notification of covenants in gross	113

cl 1	Land Transfer Bill	
	307F Application for order under section 307G	114
	307G Court may modify or extinguish covenant in gross	114
	307H Registration and recording of orders under section 307G	115
204	Court may modify or extinguish easement or covenant	115
	<i>Repeal</i>	
205	Land Transfer Act 1952 repealed	116
	<i>Savings provision</i>	
206	Covenants implied in certain mortgages and instruments	116
	<i>Transitional provision</i>	
207	Application of Act to estates registered on provisional register under Land Transfer Act 1952	116

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the **Land Transfer Act 2010**.

2 Commencement

- (1) This Act comes into force on a date to be appointed by the Governor-General by Order in Council.
- (2) One or more orders may be made under **subsection (1)** bringing different provisions into force on different dates.

Part 1
Preliminary provisions

3 Purpose

The purpose of this Act is to replace the Land Transfer Act 1952 with a modern and accessible statute that—

- (a) continues the Torrens system of land title in New Zealand; and
- (b) retains the fundamental principles of that system which are to—
 - (i) provide security of ownership of estates and interests in land:

- (ii) facilitate the transfer of and dealings with estates and interests in land:
 - (iii) provide compensation for loss arising from the operation of the system:
 - (iv) provide a register of land which describes and records the ownership of estates and interests in land; and
- (c) reflects that fact that the land transfer register is maintained and operated electronically and that dealings in land are carried out electronically.

4 Land subject to this Act

The following land is subject to this Act:

- (a) land that is subject to the Land Transfer Act 1952 immediately before the commencement of this Act:
- (b) land alienated or contracted to be alienated from the Crown in fee simple after the commencement of this Act:
- (c) land made subject to this Act by any other Act:
- (d) land that is vested in a person for an estate in fee simple after the commencement of this Act under any other Act.

5 Interpretation

- (1) In this Act, unless the context otherwise requires,—

chief executive means the chief executive of the department or ministry that, with the authority of the Prime Minister, is for the time being responsible for the administration of this Act

Court means the High Court

Crown grant means a grant of land by the Crown

department means the department or ministry that, with the authority of the Prime Minister, is for the time being responsible for the administration of this Act

electronic instrument means an instrument prepared in an electronic workspace facility

electronic workspace facility means a facility approved under **section 37** (which relates to electronic workspace

facilities for use in the preparation of electronic instruments for lodging for registration)

freehold estate—

- (a) includes a life estate; but
- (b) does not include a lease for life

future estate means an estate conferring the right to possession of land at a future time whether contingent or otherwise, for example, a reversion or a remainder

incapacitated, in relation to the making of any decision by a person affecting a matter under **Part 11** or **Part 12**, means that the person, because of temporary or permanent physical, intellectual, or mental impairment is or, at the material time, was not capable of understanding the issues on which his or her decision would be required

instrument—

- (a) means a document in paper or electronic form; and
- (b) includes a caveat

intellectual or mental impairment means a clinically recognisable intellectual or mental impairment, whether or not it is or includes—

- (a) an intellectual disability as defined in section 7 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003; or
- (b) a mental disorder as defined in section 2(1) of the Mental Health (Compulsory Assessment and Treatment) Act 1992

interest in land includes a mortgage

land includes—

- (a) buildings and other structures on land;
- (b) land covered with water;
- (c) plants and trees on land

lease includes a lease for life

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

Minister means the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Min-

ister, is for the time being responsible for the administration of this Act

mortgage means a charge over an estate or interest in land created by a mortgagor under this Act the principal purpose of which is to secure the performance of an obligation to pay money whether or not—

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

mortgagee means a person to whom a mortgage of an estate or interest in land is given as mortgagee

mortgagor means the person who is the owner of an estate or interest in land that is subject to a mortgage

owner—

- (a) means the owner of a legal or equitable estate or interest in land; and
- (b) includes a person who has a future estate or interest in land

personal representative means an executor, administrator, or trustee of the estate of a person who has died

practitioner means a lawyer or conveyancing practitioner within the meaning of section 6 of the Lawyers and Conveyancers Act 2006

public notice has the meaning given to it in **section 186**

record of title means a record of title for an estate or interest in land created under **section 27**

Registrar means the Registrar-General of Land appointed under **section 196**

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

transmission means the acquisition of an estate or interest in land by operation of law

unique identifier means a combination of letters or numbers, or both, by which a record of title or an instrument or a document is, or is to be, identified

working day means a day of the week other than—

- (a) Saturday, Sunday, Waitangi Day, Good Friday, Easter Monday, Anzac Day, the Sovereign's Birthday, and Labour Day; and
 - (b) a day in the period commencing with 25 December and ending with 2 January in the following year; and
 - (c) the day observed as the anniversary of any province in which an act is to be done.
- (2) A reference in a form or document prescribed in regulations made under this Act or specified by the Registrar to any of the following persons includes a reference to that person's heirs, executors, successors, and assigns:
- (a) an owner, transferor, transferee, mortgagor, mortgagee, lessor, lessee, or trustee:
 - (b) a person seised of or owning or having or taking an estate or interest in land.

6 Act binds the Crown

This Act binds the Crown.

Part 2 Title to land

7 Title by registration

- (1) On registration of a person under this Act as the owner of an estate or interest in land the person obtains a title to the estate or interest that cannot be set aside.
- (2) The title of the registered owner is free from estates and interests in the land that—
 - (a) are not registered or notified on the register; or
 - (b) are not capable of being registered or notified on the register.
- (3) Despite **subsections (1) and (2)**, the title of the person registered as owner of the estate or interest is subject to—
 - (a) the exceptions and limitations in **section 9**; and
 - (b) any other enactment that overrides or limits the title.
- (4) **Subsections (1) and (2)** apply whether or not the registered owner acquired the estate or interest—
 - (a) for valuable consideration; or

- (b) from a fictitious person.
- (5) Nothing in this section affects the in personam jurisdiction of the Court.

8 Meaning of fraud in this Part

- (1) This section applies only for the purposes of this Part.
- (2) **Fraud** means forgery or other dishonest conduct by the registered owner or the registered owner's agent in acquiring a registered estate or interest in land whether against the owner of a registered or unregistered estate or interest.
- (3) The equitable doctrine of constructive notice does not apply for the purposes of deciding whether conduct is fraudulent.
- (4) A person obtains a registered estate or interest in land through fraud as against the owner of an unregistered interest if and only if, in acquiring the estate or interest, the person or the person's agent—
 - (a) had actual knowledge of, or was wilfully blind to, the existence of the interest; and
 - (b) intended at the time of registration of the estate or interest that its registration would defeat the unregistered interest.

9 Exceptions and limitations

The title of a registered owner to an estate or interest in land is subject to the following exceptions and limitations:

- (a) in a case where the title of the registered owner of the estate or interest is acquired through fraud on the part of the registered owner or the registered owner's agent:
- (b) an estate or interest registered or notified on the record of title at the time of registration:
- (c) the estate or interest of a person having a valid claim to the same estate or interest under a prior record of title:
- (d) the estate or interest of another registered owner that has been included in the record of title as a result of an incorrect description of area or boundaries:
- (e) an easement omitted from, or incorrectly described in, the record of title regardless of whether the easement

was created before or after the land was brought under this Act:

- (f) in the case of a the mortgagee of a registered mortgage, the exception in **section 11(7)**;
- (g) in the case of the transferee of a registered mortgage, the exception in **section 12(2)**;
- (h) an order made by the Court under **section 13** (which relates to cancellation of registration of a registered owner in certain circumstances);
- (i) an estate or interest in land acquired by a person under **Part 12** (which relates to the acquisition of title by adverse possession);
- (j) an estate or interest in land acquired by a person under **Part 13** (which relates to title to access strips);
- (k) the estate or interest of a person to whom **section 171** applies.

10 No title to public road or reserve unless authorised

A person does not acquire title by registration to a public road or a reserve if the road or reserve has been—

- (a) included in the record of title unlawfully; or
- (b) acquired under an unauthorised instrument.

11 Verification of identity of mortgagor by mortgagee

(1) Before a mortgage instrument is lodged for registration, the mortgagee must take reasonable steps to verify—

- (a) in the case of a mortgagor who is an individual, the identity of the mortgagor and the identity and the authority of any person who executes the mortgage as an attorney; and
- (b) in the case of a mortgagor that is a body corporate, the identity of the mortgagor and the identity and the authority of any person who signs or executes the mortgage on behalf of the body corporate.

(2) A mortgagee complies with **subsection (1)** if the mortgagee complies with standards specified by the Registrar under **section 201**.

(3) **Subsection (2)** does not limit the ways in which a mortgagee may comply with **subsection (1)**.

- (4) The mortgagee must ensure that—
 - (a) a record of the steps taken under this section is kept for not less than 10 years; and
 - (b) the documents or copies of the documents and other evidence relied on to comply with this section are kept for not less than 10 years.
- (5) The Registrar may require a mortgagee to—
 - (a) inform the Registrar of the steps taken to comply with this section; and
 - (b) produce the material referred to in **subsection (4)** for inspection.
- (6) Every person who fails without reasonable excuse to comply with **subsection (4)** commits an offence and is liable on summary conviction—
 - (a) in the case of an individual, to a fine not exceeding \$5000; or
 - (b) in the case of a body corporate, to a fine not exceeding \$25,000.
- (7) A registered mortgagee does not obtain the benefit of **section 7** if—
 - (a) the registered mortgagee fails to comply with this section; and
 - (b) the mortgage instrument was executed by a person other than the mortgagor or a person with lawful authority to execute the mortgage on behalf of the mortgagor.
- (8) Nothing in this section—
 - (a) applies to a mortgage instrument executed before the commencement of this Act; or
 - (b) limits or affects any rule of law relating to the duties of a mortgagee.

12 Transferee of mortgage to verify identity of mortgagor

- (1) **Section 11** applies to the transferee of a mortgage in the same way that it applies to a mortgagee. For that purpose, a reference in that section to—
 - (a) lodging a mortgage for registration includes a reference to lodging a mortgage transfer instrument for registration; and

- (b) a mortgagee includes a reference to the transferee of a mortgage.
- (2) A transferee of a mortgage does not obtain the benefit of **section 7** if—
 - (a) the transferee of the mortgage fails to comply with this section; and
 - (b) the mortgage instrument was executed by a person other than the mortgagor or a person with lawful authority to execute the mortgage on behalf of the mortgagor.

13 Court may direct register to be altered in cases of manifest injustice

- (1) This section applies to a person (**person A**)—
 - (a) who has been deprived of an estate or interest in land through the registration under a void or voidable instrument of another person (**person B**) as the owner of the estate or interest; or
 - (b) whose estate or interest in land has been adversely affected by the registration under a void or voidable instrument of another person (**person C**) as the owner of an estate or interest in the land.
- (2) The Court may, on the application of person A, make an order cancelling the registration of person B or person C as the owner of the estate or interest.
- (3) **Part 3** applies to a claim for compensation by person B or person C.
- (4) The Court may make an order only if it is satisfied that it would be manifestly unjust for person B or person C to remain registered owner of the estate or interest.
- (5) The Court may not make an order under this section if person B or person C has transferred the estate or interest to a person acting in good faith.
- (6) The Court may make an order under this section on any conditions the Court thinks fit, for example, an order relating to possession of the land.
- (7) In determining whether to make an order, the Court may take into account—

- (a) the circumstances surrounding the acquisition by person B or person C of the estate or interest; and
 - (b) failure by person B or person C to comply with any statutory power or authority in acquiring the estate or interest; and
 - (c) if the estate or interest is in Maori freehold land, failure by a person to comply with Te Ture Whenua Maori Act 1993; and
 - (d) the identity of the person in actual occupation of the land; and
 - (e) the nature of the estate or interest, for example, whether it is an estate in fee simple or a mortgage; and
 - (f) the length of time person A and person B have owned or occupied the land; and
 - (g) the nature of any improvements made to the land by either person A or person B; and
 - (h) the use to which the land has been put by either person A or person B; and
 - (i) any special characteristics of the land and their significance for either person A or person B; and
 - (j) the conduct of person A and person B or person C in relation to the acquisition; and
 - (k) any other circumstances the Court thinks relevant.
- (8) An application for an order must be made not later than 6 months after person A becomes aware or ought reasonably to have become aware of the acquisition of the estate or interest by person B or person C.
- (9) The Registrar must, on receiving a copy of the order, make the alterations to the register required to give effect to the order.

Part 3 Compensation

14 Meaning of fraud in this Part

In this Part, **fraud** means forgery or other dishonest conduct by any person.

15 Compensation for loss resulting from Registrar's error and system failure

- (1) This section applies to a person who is deprived of an estate or interest in land or who suffers any other loss as a result of—
- (a) the error or wrongful act or omission of the Registrar or of a person to whom a power or function is delegated under **section 198**; or
 - (b) a failure or malfunction of a computer system or facility kept under **section 24(2)**.
- (2) The person may bring a proceeding against the Crown for compensation.

16 Compensation for loss of estate or interest in land

- (1) A person who is deprived of an estate or interest in land or whose estate or interest in land is adversely affected as a result of any of the following may bring a proceeding against the Crown for compensation:
- (a) registration of another person as the owner of the estate or interest or of a different estate or interest under a void instrument or through fraud;
 - (b) bringing land under the Act otherwise than in accordance with the procedure prescribed by this Act or any other Act;
 - (c) an order under **section 13** (which relates to the power of the Court to direct that the register be altered);
 - (d) unlawful interference with the register.
- (2) The liability of the Crown to pay compensation does not depend on whether the person acquired the estate or interest for valuable consideration.

17 Compensation for loss occurring after search and before registration

- (1) In this section, —
- first period**, in relation to a transaction, means the period of 5 working days commencing on the 4th working day preceding the date on which the transaction is settled
- purchase money** includes the amount to be advanced by a mortgagee in consideration for the grant of a mortgage

search copy means a search copy of a record of title issued for the purposes of this section

second period, in relation to a transaction, means the period of 10 working days commencing on the day after the date on which the transaction is settled

transaction means an agreement or arrangement under which a party (**the purchaser**) is to acquire or has acquired from the other party (**the vendor**), whether for valuable consideration or not, an estate or interest in land that is subject to this Act.

- (2) For the purposes of this section, a transaction is settled when—
- (a) the purchaser provides the purchase money to the vendor either in full or to the extent necessary to entitle the purchaser to require the vendor to do whatever the vendor is required to do to enable the purchaser to become registered as owner of the estate or interest to which the transaction relates; or
 - (b) the parties otherwise agree.
- (3) **Subsection (4)** applies to a purchaser who—
- (a) obtains during the first period a search copy of the record of title for the land to which the transaction relates; and
 - (b) who suffers loss or damage because of the registration or lodging under this Act of an instrument or other document relating to that land.
- (4) A purchaser is entitled to compensation from the Crown if—
- (a) the search copy of the record of title does not disclose the registration or lodgment of the instrument or document; and
 - (b) the document or instrument was registered or lodged before the earlier of the following—
 - (i) the expiry of the second period;
 - (ii) registration of the documents and instruments required to give effect to the transaction.
- (5) The Court may, on application by the purchaser, extend the second period if the Court is satisfied that failure to register the documents and instruments within the second period was not due to the fault of the purchaser or the purchaser's practitioner or agent.

18 Exceptions to compensation

- (1) The Crown is not liable to pay compensation under **section 15 or section 16** if—
- (a) the loss results from a breach of trust by the registered owner;
 - (b) the loss results from the improper exercise of a power of sale under a mortgage or re-entry under a lease;
 - (c) the loss results from the operation of another enactment that overrides or limits the title to an estate or interest in land;
 - (d) a mortgagee sustains loss as a result of a failure by the mortgagee to comply with **section 11** (which relates to the steps required to be taken by a mortgagee to verify the identity of a mortgagor);
 - (e) a mortgage transferee sustains loss as a result of a failure by the mortgage transferee to comply with **section 12** (which relates to the steps required to be taken by a mortgage transferee to verify the identity of an original mortgagee).
- (2) The Crown is not liable to pay compensation under **section 15 or section 16** for loss of an estate or interest in land as a result of bringing the land under this Act if the estate or interest in the land could have been, but was not, registered under the Deeds Registration Act 1908 or any comparable earlier legislation unless, before the land was brought under this Act,—
- (a) notice of a claim to the estate or interest was given to the Registrar; or
 - (b) the Registrar had actual knowledge of the claim but failed to recognise it.

19 Amount of compensation

- (1) The amount of compensation payable under **sections 15 to 17** is—
- (a) if the claimant has been deprived of an estate or interest in land, the value of the estate or interest of which the claimant has been deprived;
 - (b) if the estate or interest of the claimant has been adversely affected, the amount by which the value of the estate or interest has been reduced:

- (c) if the priority of the claimant's interest has been subordinated, the reduction in the value of the interest;
 - (d) in any other case, the actual amount of the loss suffered.
- (2) The amount of compensation payable to a claimant that relates to the value of an estate or interest in land may be determined—
- (a) by reference to the value of the estate or interest to which the claim relates, including improvements, at the date on which the claim is made; or
 - (b) if the Court considers that the amount of compensation determined under **paragraph (a)** would be inadequate or excessive, on any other basis the Court thinks fit.
- (3) The value of any benefit obtained by the claimant may be taken into account by the Court in reducing the amount of compensation if the Court considers it just in all the circumstances to do so.
- (4) The amount of compensation must include interest at the prescribed rate from the date of the claim to the date of judgment.

20 Compensation may be reduced if claimant contributes to loss

- (1) The amount of compensation payable under **sections 15 to 17** may be reduced to the extent the Court thinks just having regard to the extent to which the claimant contributed to the deprivation or loss.
- (2) **Subsection (1)** does not apply to a claim for deprivation or loss contributed to by the claimant's practitioner.
- (3) The Contributory Negligence Act 1947 does not apply to a claim for compensation under this Act.

21 Right of subrogation

The Crown is subrogated to the rights of a person to whom compensation is paid under this Act.

22 Compensation paid in case of fraud recoverable by Crown as debt

The amount of compensation paid by the Crown under this Act for loss or deprivation resulting from fraud may be recovered

Part 3 cl 23

Land Transfer Bill

by the Crown as a debt due from the person responsible for the fraud.

23 Procedure for making claim

- (1) Before commencing a proceeding to recover compensation, a claimant must give not less than 20 working days' notice of a claim,—
 - (a) if the amount of the claim does not exceed the prescribed amount, to the Registrar; or
 - (b) if the amount of the claim exceeds the prescribed amount, to the Attorney-General and the Registrar.
- (2) The notice must be in the prescribed form and contain the prescribed information.
- (3) If the claim does not exceed the prescribed amount, the Registrar may give notice to the claimant accepting liability for payment of the whole or part of the claim without the need for the claimant to commence a proceeding.
- (4) If the claim exceeds the prescribed amount, the Attorney-General and the Registrar may give notice to the claimant accepting liability for payment of the whole or part of the claim without the need for the claimant to commence a proceeding.
- (5) If after receiving a notice under **subsection (3) or subsection (4)**, the claimant commences a proceeding and recovers no more than the amount for which liability is accepted by the Registrar or the Attorney-General, any order for payment of costs made in accordance with rules of court may take that fact into account.

Part 4
Land Title Register

Land Title Register

24 Registrar to keep register

- (1) The Registrar must keep and operate a register of land subject to this Act.
- (2) The register may be kept in a form or manner determined by the Registrar including by means of a computer system or facility that—

24

- (a) records or stores information electronically or by other means; and
- (b) permits the information recorded or stored to be readily accessed or reproduced in usable form.

25 Purpose of register

The purpose of the register is to—

- (a) provide a public record of land subject to this Act, including a record of—
 - (i) title to estates and interests in land registered under this Act; and
 - (ii) other information relating to estates and interests in land recorded or noted on the register under this Act:
- (b) provide the mechanism for creating title to estates and interests in land that, subject to this Act, cannot be set aside:
- (c) facilitate the transfer of and dealings with estates and interests in land subject to this Act:
- (d) facilitate giving effect to the objects and purposes of this Act:
- (e) enable the requirements of any other Act for the registration under this Act of instruments affecting land or estates or interests in land to be complied with.

26 Contents of register

- (1) The Registrar must record in the register—
 - (a) particulars of land subject to this Act:
 - (b) particulars of estates and interests in land registered under this Act:
 - (c) the names of the persons registered as owners of those estates and interests:
 - (d) particulars of instruments that benefit or burden or affect those estates or interests lodged for registration:
 - (e) instruments lodged for registration under this Act affecting those estates or interests:
 - (f) any certificate, notification, endorsement, memorandum, information or matter that relates to registered estates and interests in land that may be or that is

required to be included or recorded or noted in the register under this Act or any other enactment:

- (g) plans deposited under this Act;
 - (h) prescribed information.
- (2) The Registrar may record in the register any other information that the Registrar considers necessary or desirable to ensure that the register is complete and accurate.

Records of title

27 Record of title

- (1) The Registrar must, from the information recorded or stored in the register, create a record of title for—
- (a) freehold estates;
 - (b) leasehold estates;
 - (c) stratum estates under the Unit Titles Act 2010;
 - (d) any other estate or interest for which a record of title is required by any other Act;
 - (e) a proclamation or notice published in the *Gazette* and registered under this Act pursuant to any other Act.
- (2) A record of title must comprise—
- (a) a unique identifier for the record of title;
 - (b) a description of the land and of the estate or interest in the land in a form determined by the Registrar with reference to the instrument creating the estate or interest;
 - (c) a unique identifier for each instrument affecting the estate or interest;
 - (d) a description of the type of instrument, the date and time of its registration, and any other information necessary to determine its priority;
 - (e) the name of the registered owner of the estate or interest;
 - (f) any status affecting the legal capacity of the registered owner of the estate or interest notified to the Registrar under any other enactment;
 - (g) any other information that—
 - (i) must be included under any other enactment; or
 - (ii) the Registrar considers necessary to give effect to this Act or any other enactment.

- (3) The Registrar may create a composite record of title for all or any of the estates, interests, proclamations, or notices referred to in **subsection (1)**.

28 Record of title created in name of deceased person

For the purposes of this Act, a record of title created in the name of a person who has previously died takes effect as if the record of title was created immediately before the person died.

Qualified records of title

29 Qualified record of title

- (1) The Registrar may record on a record of title that the title is qualified (**qualified record of title**) if—
- (a) the boundaries of the land are not sufficiently defined in an instrument or plan lodged for registration; or
 - (b) a circumstance prescribed by regulations exists; or
 - (c) the record of title is a replacement record issued under **section 55** (which relates to reconstituted records of title) and the Registrar is unable to create a record of title that is identical to the record replaced; or
 - (d) section 124 of Te Ture Whenua Maori Act 1993 (which relates to the registration of orders that are not supported by sufficient plans) applies.
- (2) The Registrar must note on the record of title the qualification to which the record of title is subject.
- (3) This section applies to—
- (a) an existing record of title;
 - (b) a new record of title.
- (4) Nothing in this section or in **sections 30 and 31** applies to a limited record of title to which **Part 14** applies.

30 Effect of qualified record of title

The provisions of this Act apply in relation to an estate for which a qualified record of title has been created subject to the following qualifications and exceptions:

- (a) the title of the person registered as the owner of the estate is subject to the qualification:

- (b) the only persons who cannot, by reason of the qualification, set aside the title of the registered owner of the estate are—
 - (i) the person first registered as the owner of the estate comprised in the qualified record of title; and
 - (ii) a person who is subsequently registered as the owner of the estate comprised in the qualified record of title;
- (c) if the title is qualified by reason of a circumstance prescribed by regulations, any other qualification specified in those regulations.

31 Removal of qualification

- (1) If the Registrar is satisfied that the grounds for creating the qualified record of title have ceased to exist, the Registrar may cancel the qualified record of title and create a record of title without the qualification.
- (2) The Registrar must record on the record of title created under **subsection (1)** any estate or interest registered or notified on the qualified record of title in the same order of priority.

Retention of information on register

32 Information in register to be retained

Information that is registered or recorded in the register must be retained in the register or elsewhere even if—

- (a) the information was incorrect and has been altered by the Registrar under **section 33** (which relates to the Registrar's powers of alteration); or
- (b) the information has been superseded; or
- (c) the information is no longer current; or
- (d) the form in which the register is kept is changed.

Registrar's powers of alteration

33 Registrar's powers of alteration

- (1) The Registrar may alter the register for the purpose of—
 - (a) correcting an error made by the Registrar or a person acting under a delegation under **section 198**:

- (b) correcting an error made by a person in the course of preparing or submitting a document or information for registration;
 - (c) recording a boundary change resulting from accretion or erosion;
 - (d) giving effect to an order or direction of the Court.
- (2) The Registrar may not alter the register under **subsection (1)(a), (b), or (c)** if the alteration would materially affect the registered estate or interest of any person unless—
- (a) the person consents to the alteration; or
 - (b) in accordance with regulations made under this Act,—
 - (i) the Registrar gives notice of intention to alter the register; and
 - (ii) no objection to the proposed alteration is received.
- (3) The Registrar may alter the register for any purpose with the consent in writing of the persons affected.
- (4) The Registrar may, in exercising powers under this section, have regard to any material or information the Registrar considers relevant and reliable.
- (5) **Subsection (4)** is subject to any regulations made under this Act.

Registration of instruments

34 Registration of instruments and other information

- (1) The Registrar must register or notify instruments lodged for registration or notification if—
- (a) the person lodging the instrument complies with the requirements of this Act, any other enactment, and regulations; and
 - (b) the instrument is lodged in a form that complies with the requirements of this Act, any other enactment, and regulations.
- (2) Registration or notification of an instrument is effected when a unique identifier for the instrument is entered in the register.
- (3) An instrument forms part of the register when it is registered or notified.

35 Registration or notification of instrument created or executed by person not registered as owner of estate or interest

An instrument may be registered or notified despite the fact that at the time the instrument was created or executed, a person named in the instrument was not registered as the owner of the estate or interest to which the instrument relates.

36 Effect of registration

- (1) An instrument has no effect to create or transfer or otherwise affect an estate or interest in land subject to this Act until the instrument is registered.
- (2) On registration the instrument has effect to create or transfer or otherwise affect the estate or interest specified in the instrument on the terms and conditions and subject to the covenants—
 - (a) contained or incorporated in the instrument; or
 - (b) implied in the instrument by this Act or any other enactment.
- (3) On registration of an instrument that does not contain an operative provision that gives effect to the object of the instrument,—
 - (a) the estate or interest specified in the instrument passes to the person identified as the party to whom the estate or interest is intended to pass; or
 - (b) in the case of a mortgage, the estate or interest becomes liable as security; or
 - (c) in the case of an instrument that surrenders, discharges, or varies an estate or interest, the estate or interest is extinguished or varied.
- (4) **Subsection (3)** is subject to—
 - (a) the terms, conditions, and covenants contained in the instrument or implied in the instrument by this Act; and
 - (b) in the case of the discharge of a mortgage, **section 85** (which relates to the discharge of a mortgage) to the extent the discharge is for the whole or part of the principal sum or annuity or other amount.
- (5) Unless the instrument provides otherwise, a reference in an instrument to a unique identifier for a record of title must be

taken to be a reference to the entire estate or interest for which the record of title was created.

Electronic workspace facilities

37 Electronic workspace facilities

- (1) The chief executive may provide an electronic workspace facility.
- (2) The chief executive may—
 - (a) set conditions for the use of the electronic workspace facility;
 - (b) audit the electronic workspace facility to ensure compliance with the conditions;
 - (c) monitor activities in the approved electronic workspace facility for the purpose of maintaining the effectiveness and efficiency of the facility.
- (3) The Registrar may approve 1 or more electronic workspace facilities for use in the preparation of electronic instruments for lodgement under this Act.
- (4) The Registrar must not approve an electronic workspace facility unless satisfied that adequate provision is made to ensure that—
 - (a) instruments prepared in the facility comply with the requirements of this Act when lodged; and
 - (b) the Registrar is able to carry out the Registrar’s functions and duties under this Act.
- (5) The Registrar may, at any time, withdraw approval of an electronic workspace facility that fails to meet the requirements referred to in **subsection (4)**.
- (6) The Registrar may monitor activities in an electronic workspace facility provided under **subsection (1)** or approved under **subsection (3)** for the purpose of detecting fraud and improper dealings.

*Instruments***38 Instruments to comply with Act and regulations**

An instrument may be lodged for registration or notification only if the instrument complies with this Act, any other Act, and any regulations.

39 Certification of instruments

(1) The following instruments may be lodged only if they are certified:

- (a) electronic instruments specified in regulations as requiring certification;
- (b) instruments in paper form specified in regulations as requiring certification.

(2) Regulations may specify that—

- (a) all electronic instruments or all paper instruments require certification; or
- (b) a class of electronic instruments or paper instruments requires certification.

40 Persons authorised to certify instruments

(1) The following persons are the only persons who may certify instruments for the purposes of this Act—

- (a) practitioners;
- (b) a person of a class authorised by regulations to certify instruments.

(2) Regulations may specify that a class of persons is authorised to certify all instruments or instruments of a specified class.

41 Revocation of right to certify

(1) The Registrar may by notice in writing to the person concerned revoke the person's authority to give a certificate if the Registrar believes on reasonable grounds that the person—

- (a) has given a fraudulent certificate; or
- (b) has given a certificate that is materially incorrect; or
- (c) has failed to comply with a requirement under **section 42** (which relates to retaining evidence of certifications and providing information).

- (2) The Registrar must not revoke a person's authority to give a certificate unless the Registrar—
 - (a) gives the person not less than 10 working days' notice of intention to do so; and
 - (b) considers any submissions or representations made by or on behalf of the person.
- (3) The Registrar may, by notice in writing to the person concerned, reinstate the authority of the person to give a certificate if the Registrar is satisfied that the person—
 - (a) will not give a certificate that is fraudulent or materially incorrect; and
 - (b) will comply with **section 42**.

42 Evidence of certification

- (1) A person who gives a certificate must retain for the prescribed period the evidence relied on in support of the matters stated in the certificate.
- (2) The Registrar may specify standards that, if met, are evidence that may be relied on in support of the matters stated in a certificate.
- (3) The Registrar may by notice in writing require a person who has given a certificate to—
 - (a) produce to the Registrar the evidence referred to in **subsection (1)**: or
 - (b) provide a written statement on oath as to—
 - (i) any further information required by the Registrar; or
 - (ii) the circumstances surrounding the preparation and electronic transmission of an instrument.
- (4) A requirement under **subsection (3)** must be complied with within 10 working days of receipt of the notice.

43 Effect of certification

- (1) On registration, an electronic instrument certified under **section 39**—
 - (a) is to be treated as having been made in writing and executed by every party specified for the purpose in regulations; and

- (b) has effect according to its terms.
- (2) Nothing in any other Act or rule of law relating to the execution, signing, witnessing, or attestation of instruments applies to an instrument certified under **section 39**.

44 Lodgement of instruments electronically

- (1) A person referred to in **section 40** must lodge the instrument electronically from an electronic workspace facility.
- (2) **Subsection (1)** does not apply to—
 - (a) instruments of a class exempted from the application of that subsection by regulations; or
 - (b) an instrument that the Registrar determines it is impracticable or inappropriate to lodge from that facility.

45 Execution of paper instruments

A paper instrument that creates, transfers, or charges an estate or interest in land must be executed and witnessed in accordance with this Act and regulations.

46 Lodging of paper instruments

- (1) A paper instrument must be lodged by posting the instrument to a land registry office designated for that purpose by the Registrar.
- (2) The Registrar must give notice of the address of the designated land registry office—
 - (a) in the *Gazette*; and
 - (b) in any other way the Registrar considers appropriate (for example, on an internet website maintained by the department).

47 Priority of instruments

- (1) An instrument must be registered or notified according to the time when it is lodged.
- (2) An instrument has priority according to the time when it is lodged, not when it is executed.
- (3) This section is subject to—
 - (a) **section 48** (which relates to lodging paper instruments); and

- (b) **section 83** (which relates to variation of the priority of mortgages).

48 When paper instruments lodged

- (1) An instrument that is lodged by posting to a designated land registry office is taken to have been lodged—
 - (a) on the working day after the day on which it is received; and
 - (b) before any other instrument relating to the same estate or interest lodged on that day.
- (2) A caveat lodged by posting to a designated land registry office is taken to have been lodged after any instrument lodged in the same manner on the same day.
- (3) Two or more paper instruments lodged for registration at the same time that relate to the same estate or interest in land and that appear to the Registrar to be incompatible with each other must be registered in the order—
 - (a) agreed in writing by the parties to the instruments; or
 - (b) determined by the Court.

49 Rejection and requisition of instruments

- (1) An instrument lodged for registration or notification that does not comply with **section 38** may, together with any instruments lodged with it,—
 - (a) be rejected and returned to the person who lodged them or, if the instruments cannot be returned to that person, to a person who the Registrar considers appropriate to receive them; or
 - (b) be retained by the Registrar to be corrected within a time specified by the Registrar.
- (2) The Registrar must give notice to the person by whom an instrument was lodged that the instrument—
 - (a) has been rejected under **subsection (1)(a)**; or
 - (b) retained under **subsection (1)(b)**.
- (3) A notice under **subsection (2)** must state the reasons for rejecting or retaining the instrument.
- (4) If an instrument retained under **subsection (1)(b)** is not corrected within the specified time, the Registrar may—

- (a) refuse to register or notify the instrument and any instruments lodged with it; and
 - (b) return the instrument and any instruments lodged with it to the person by whom they were lodged or, if the instruments cannot be returned to that person, to a person who the Registrar considers appropriate to receive them.
- (5) If an instrument is returned under **subsection (1)(a) or subsection (4)(b)**, the Registrar may retain any fees paid to the Registrar.
- (6) Fees retained by the Registrar under **subsection (5)** are forfeited to the Crown.
- (7) An instrument that is returned under **subsection (1)(a) or subsection (4)(b)** must be treated as not having been lodged for registration or notification.

50 Copying and imaging of paper documents

- (1) The Registrar may—
- (a) produce a record or copy or image of a paper instrument lodged under this Act or any other enactment; and
 - (b) unless it is necessary to retain the instrument so that the record or copy or image can be understood, return the instrument to the person who lodged it together with a written statement that a record or copy or image has been made.
- (2) The Registrar may use the record or copy or image for the purposes of registering the instrument or to perform any other statutory function.
- (3) If the record or copy or image is used in that way, it must be treated as if it—
- (a) were the original instrument; and
 - (b) had been lodged at the same time as the original instrument.

51 Rejection of instrument that cannot be imaged

- (1) The Registrar may refuse to register or notify an instrument if it is impracticable,—

- (a) in the case of an electronic instrument, to capture the data; or
 - (b) in the case of a paper instrument, to copy or image it.
- (2) If **subsection (1)** applies,—
- (a) the Registrar must give notice to the person who lodged the instrument and arrange for the instrument to be lodged again in a form that complies with that subsection:
 - (b) the priority of the instrument is not affected if the instrument is lodged again within 40 working days or any other period specified by the Registrar in a form that complies with that subsection:
 - (c) unless the instrument is lodged again within the period referred to in **paragraph (b)**, it must be treated as never having been lodged for registration.

Access to register

52 Access to register

- (1) The Registrar must, on request and on payment of the prescribed fee or charge,—
- (a) provide a person with a copy of an instrument registered or notified on the register or that forms part of the register:
 - (b) provide a person with a copy of a record of title.
- (2) If the person requires the copy of the instrument or record of title to be a certified copy, the Registrar must provide a certified copy.
- (3) The information referred to in **subsection (1)** may, if the chief executive determines, be provided in electronic form.
- (4) A determination under **subsection (3)** may be made subject to specified conditions.
- (5) This section is subject to the Public Records Act 2005.

Evidentiary effect of documents

53 Evidentiary effect of documents

- (1) **Subsection (2)** applies to a document that—

-
- (a) appears to be an electronic image of an instrument registered or notified on the register under this Act; and
 - (b) does not appear to have been altered in any way.
 - (2) The document is conclusive evidence—
 - (a) of the contents of the instrument; and
 - (b) that the instrument is registered or notified on the register under this Act.
 - (3) **Subsection (4)** applies to a document that—
 - (a) appears to be an electronic image of a record of title created under this Act; and
 - (b) does not appear to have been altered in any way.
 - (4) The document is conclusive evidence—
 - (a) of the information contained in the record of title as at the date and time stated in the record; and
 - (b) that the information contained in the document identifies all interests and other matters registered or notified in the register affecting the estate or interest to which the record of title relates.
 - (5) A copy of an instrument certified by or on behalf of the Registrar to be a correct copy of an instrument registered or notified under this Act is conclusive evidence in all courts—
 - (a) of the contents of the instrument; and
 - (b) that the instrument is registered or notified under this Act.
 - (6) A copy of a record of title certified by or on behalf of the Registrar to be a correct copy is conclusive evidence in all courts—
 - (a) of the information contained in the record of title as at the date and time stated in the record of title; and
 - (b) that the information identifies all interests and other matters registered or recorded or notified in the register affecting the estate or interest to which the record of title relates.
 - (7) In the absence of proof to the contrary, the fact that the copy of the instrument or record of title appears to be certified by or on behalf of the Registrar is conclusive evidence that it is certified by or on behalf of the Registrar.

Instruments lost before registration or notification

54 Instruments lost before registration or notification

- (1) This section applies to a person who claims to be entitled to be registered or notified as the owner of an estate or interest in land under an instrument or authority that has, before registration or notification, been lost or destroyed or of which no record can be found.
- (2) The person may apply to the Court for an order that the person is entitled to be registered or notified as the owner of the estate or interest.
- (3) Notice of the application must be served on—
 - (a) the Registrar; and
 - (b) the registered owner of every estate or interest in the land; and
 - (c) such other persons as the Court directs.
- (4) The Court may, if satisfied that the instrument or authority has been lost or destroyed or no record of it can be found and that the person is entitled to be registered or notified as the owner of the estate or interest,—
 - (a) order the Registrar to register or notify the person as the owner of the estate or interest; or
 - (b) make any other order the Court thinks fit.
- (5) Registration or notification of the person as the owner of the estate or interest in accordance with the order has the same effect, as from the date and time of registration or notification, as if—
 - (a) the original instrument or authority had been registered or notified; or
 - (b) the person had been registered or notified as the owner of the estate or interest as a result of the instrument or authority having been given.

Replacement or reconstitution of records

55 Registrar may replace or reconstitute records

- (1) This section applies to—

Part 4 cl 56

Land Transfer Bill

- (a) a document that is or has been registered or notified and that has been lost, damaged, destroyed or become unfit for use:
 - (b) a document that is or has been in the custody of the Registrar and that has been lost, damaged, destroyed or become unfit for use:
 - (c) information registered or notified in the register or lodged for registration or notification that has been lost or is unfit for use.
- (2) The Registrar may replace or reconstitute a document or information to which this section applies.
 - (3) The replacement or reconstituted document or information has the same effect as if it were the original.
 - (4) The Registrar may make an entry on the record of title stating that the replacement or reconstituted document or information has been created under this section.

*Orders relating to records of title***56 Court may make orders relating to records of title**

The Court may, in any proceeding under this Act, direct the Registrar to—

- (a) cancel the record of title for any estate or interest in land or any entry on the record of title; or
- (b) create a new record of title for the estate or interest; or
- (c) alter the record of title for the estate or interest in the manner directed by the Court.

*Creation of amalgamated and separate records of title***57 Registrar may issue amalgamated or separate records of title**

- (1) The Registrar may, on application by the registered owner of parcels of land recorded in 2 or more records of title, create a single record of title for the whole of the land in the name of the registered owner.
- (2) The Registrar may, on application by the registered owner of 2 or more parcels of land recorded in a single record of title,

40

create 2 or more records of title each comprising part of the land.

Joint tenancy

58 Registration of persons as joint tenants

- (1) Two or more persons named in an instrument as transferees, mortgagees, or owners of an estate or interest in land must be treated as joint tenants.
- (2) **Subsection (1)**—
 - (a) is subject to a contrary intention in the instrument:
 - (b) does not apply to Maori land within the meaning of section 4 of Te Ture Whenua Maori Act 1993.

59 Severance of joint tenancy

A person (**person A**) who owns an estate or interest as a joint tenant with another joint tenant (**person B**) may be registered as a tenant in common if person A transfers person A's estate or interest to person A.

Separate records of title for undivided shares in land

60 Separate titles for undivided shares in land

- (1) The Registrar must, if requested to do so by the registered owner of an undivided share as a tenant in common in an estate in land, create a separate record of title for that share.
- (2) The Registrar may, if requested to do so by the registered owner of an estate in land, create separate records of title for undivided shares in that estate.

Dealings by overseas governments

61 Dealings in land by government of overseas country

- (1) An overseas government may—
 - (a) be registered as the owner of an estate or interest in land; or
 - (b) transfer, lease, mortgage or otherwise deal with an estate or interest in land.

- (2) A paper instrument used to transfer, lease, mortgage or otherwise deal with an estate or interest in land by an overseas government may be executed on behalf of the government by a representative in New Zealand of that government.
- (3) An instrument that appears to be an instrument of the kind referred to in **subsection (2)** is, in the absence of proof to the contrary, sufficient evidence that the instrument has been executed under proper authority and binds the overseas government.
- (4) This section does not affect the use of an electronic instrument to—
- (a) transfer an estate or interest in land to an overseas government; or
 - (b) transfer, lease, mortgage, or otherwise deal with an estate or interest in land by an overseas government.
- (5) In this section,—
- overseas government** means—
- (a) the government of a country other than New Zealand:
 - (b) the government of a province, state, territory or other political subdivision of a country other than New Zealand:
 - (c) a local or regional government or authority in a country other than New Zealand:
 - (d) a body that exercises authority for an association or union of overseas countries
- representative** means—
- (a) a person who holds a prescribed office:
 - (b) a person acting for a person who holds that office.

Registers under other Acts

62 Registers under other Acts

- (1) The Registrar must keep and operate a register required by any other Act to be kept in the Land Registry Office.
- (2) Despite the other Act, the register may be—
- (a) part of the land title register or a separate register; and
 - (b) kept in the same manner as the land title register under **section 24(2)**.

- (3) The Registrar may issue a record of title for an estate or interest registered under this section.

Part 5

Transfers, transmissions, and vesting

Transfers of estates and interests

63 Transfer of estates and interests

- (1) A transfer instrument must be used to register the transfer of an estate or interest in land under this Act.
- (2) A transfer instrument must be in the prescribed form and contain the prescribed information.
- (3) A transfer instrument must be executed—
- (a) by the registered owner of the estate or interest; and
 - (b) in the case of a transfer instrument that contains covenants binding on a person, by that person.

64 Transfer of part of land in record of title

On registration of a transfer instrument that transfers part of the freehold estate in possession, the Registrar—

- (a) must cancel the existing record of title to the extent it relates to the land transferred; and
- (b) may create a new record of title for the land transferred in the name of the transferee as the registered owner; and
- (c) may create a new record of title in the name of the registered owner for the part of the land not transferred.

65 Effect of transfer of leases and mortgages

On registration of a transfer instrument that transfers an estate or interest under a registered lease or mortgage,—

- (a) the estate or interest of the transferor together with the rights, powers, and privileges attaching to the estate or interest vest in the transferee; and
- (b) the transferee acquires the same rights and becomes subject to the same liabilities as the transferor.

66 Life and other limited freehold estates

- (1) A transfer instrument must be used by the registered owner of a fee simple estate to register—
- (a) a life estate with successive future estates; or
 - (b) any other freehold estate that terminates on the happening of a future event.
- (2) On registration of the transfer instrument, the Registrar must—
- (a) cancel the record of title of the registered owner of the fee simple estate; and
 - (b) create a new record of title for the life estate or other freehold estate in the name of the owner of the estate; and
 - (c) note on the record of title the registered interest of every person entitled to a future estate.
- (3) The Registrar must, on application by a person who becomes vested in possession of a future estate—
- (a) cancel the record of title for the life estate or other freehold estate; and
 - (b) create a record of title for the estate in the name of that person.

*Transmissions***67 Transmission instrument required to register transmission**

- (1) A transmission instrument must be used to register a person (**the applicant**) who claims to be entitled to be registered as the owner of an estate or interest by transmission.
- (2) A transmission instrument must be in the prescribed form and contain the prescribed information.

68 Effect of registering transmission instrument

- On registration of a transmission instrument the applicant—
- (a) becomes registered as the owner of the estate or interest; and
 - (b) holds the estate or interest subject to any equitable or other interests to which it was subject.

*Vesting***69 Vesting of land by court order**

- (1) A sealed copy of an order of a court vesting an estate or interest in land in a person may be lodged for registration under this Act.
- (2) The Registrar must register the order.
- (3) On registration of the order the estate or interest vests in the person named in the order on the terms and conditions stated in the order.

70 Vesting of land by statute

- (1) A person may apply to the Registrar to register the vesting under an enactment of an estate or interest in land.
- (2) The application must be in the prescribed form and contain the prescribed information.
- (3) The Registrar must register the vesting of the estate or interest in accordance with the enactment.

**Part 6
Leases****71 Lease instrument required to register lease**

- (1) A lease instrument must be used to register a lease of land under this Act.
- (2) The lease instrument must be in the prescribed form and contain the prescribed information.
- (3) The lease instrument must be executed by—
 - (a) the lessor; and
 - (b) the lessee.
- (4) The consent of a registered mortgagee of an estate or interest in land to be leased must be obtained before registration of a lease instrument. The consent binds the mortgagee and every person who subsequently derives an interest in the mortgage from the mortgagee.

72 Variation of leases

- (1) A lease variation instrument must be used to vary a registered lease by—

Part 6 cl 72

Land Transfer Bill

- (a) extending the term of the lease; or
 - (b) varying the covenants or conditions contained in the lease.
- (2) The lease variation instrument must be in the prescribed form and contain the prescribed information.
- (3) The lease variation instrument must be registered before the expiry of the current term of the lease.
- (4) A lease variation instrument extending the term of a lease has the same effect as if it were a lease instrument for the extended term subject to the same covenants and conditions, with any necessary modifications, as are contained in the lease.
- (5) A lease variation instrument must be executed by—
- (a) the lessor; and
 - (b) the lessee.
- (6) On the registration of the lease variation instrument, the lease—
- (a) continues to be subject to the registered or notified interests to which the lease was subject immediately before registration of the lease variation instrument; and
 - (b) has the benefit of the registered or notified interests—
 - (i) of which the lease had the benefit immediately before registration of the lease variation agreement; and
 - (ii) which the registered owner of the burdened land consents to continuing to benefit the lease.
- (7) A lease variation instrument may not be used to—
- (a) add any land or estate or interest in land to the land or estate or interest in land to which the original lease was subject; or
 - (b) remove any land or estate or interest in land from the land or estate or interest in land to which the original lease was subject.
- (8) The consent of a registered mortgagee of an estate or interest in land subject to a lease must be obtained before registration of a lease variation instrument. The consent binds the mortgagee and every person who subsequently derives an interest in the mortgage from the mortgagee.

73 Special provisions relating to variation of cross leases

- (1) Despite **section 72(8)**, if a lease variation instrument relates to a cross lease only the consent of the mortgagee of the cross lease must be obtained before registration of the lease variation instrument.
- (2) A lease variation instrument that relates to a cross lease binds—
 - (a) a mortgagee of the cross lease who has consented to the lease variation instrument; and
 - (b) every other mortgagee of a cross lease held by a person who has an estate or interest in an undivided share in the same land.
- (3) In this section, **cross lease** means a lease of a building or part of a building on or to be erected on land that—
 - (a) is granted by the owner of the land; and
 - (b) is held by a lessee who also has an estate or interest in an undivided share in the land.

74 Lease surrender instrument required to surrender lease

- (1) A lease surrender instrument must be used to surrender a registered lease.
- (2) The lease surrender instrument must be in the prescribed form and contain the prescribed information.
- (3) The lease surrender instrument must be executed by—
 - (a) the lessor; and
 - (b) the lessee.
- (4) A lease subject to a mortgage or a sublease may not be surrendered without the consent of the mortgagee or sublessee.
- (5) The consent of a sublessee to the surrender of a lease is not required if the lease surrender instrument—
 - (a) states that the lease is surrendered under section 216 of the Property Law Act 2007; and
 - (b) is lodged for registration together with the new lease.
- (6) If a lease is surrendered with the consent of a mortgagee or sublessee and the mortgage or sublease is not registered on the record of title of a replacement lease under **section 75**,—
 - (a) the mortgage or sublease is extinguished; and
 - (b) the Registrar must cancel the entry on the record of title.

75 Registration of interests on replacement lease

- (1) In this section, **replacement lease** means a lease—
- (a) that is a renewal of, or in substitution for, a prior lease; and
 - (b) that takes effect immediately on the expiry or surrender of the prior lease; and
 - (c) that is between the same parties as the parties to the prior lease; and
 - (d) the lessee of which is the registered owner, or the personal representative of the owner, of the prior lease at the time of the registration of the lease or on the expiry or surrender of the prior lease, whichever is earlier; and
 - (e) that relates to the same parcel of land as the prior lease.
- (2) The following persons may apply to the Registrar to register a lease as a replacement lease:
- (a) the lessee;
 - (b) the owner, or the personal representative of the owner, of any interest to which the prior lease was subject.
- (3) On registration, the replacement lease—
- (a) becomes subject to the registered or notified interests to which the prior lease was subject at the time of its expiry or surrender; and
 - (b) has the benefit of the registered or notified interests—
 - (i) of which the prior lease had the benefit at the time of its expiry or surrender; and
 - (ii) which the owner of the burdened land consents to continuing to benefit the lease.
- (4) The Registrar must record the interests referred to in **subsection (3)** on the record of title for the replacement lease in the order of their registered priority.
- (5) Unless the context otherwise requires, references in any other enactment or in an agreement, deed, instrument, notice, or other document to the prior lease or to the estate of the lessee under the prior lease must be read as references to the replacement lease or to the estate of the lessee under the replacement lease.

76 Recording of interests under lease on record of title for fee simple estate on acquisition of fee simple by lessee

- (1) The lessee under a registered lease of land who acquires the fee simple estate in the land may apply to the Registrar to—
 - (a) record on the record of title for the fee simple estate all registered or notified interests to which the lease was subject; and
 - (b) note the merger of the fee simple and leasehold estates.
- (2) On registration of the transfer of the fee simple estate in the land to the lessee or to his or her personal representative, the record of title of the fee simple estate—
 - (a) becomes subject to all registered or notified interests to which the lease was subject immediately before registration of the transfer; and
 - (b) has the benefit of all registered or notified interests of which the lease had the benefit immediately before registration of the transfer.
- (3) Interests to which the fee simple estate is subject immediately before registration of the transfer of the fee simple estate take priority over the interests referred to in **subsection (2)**.
- (4) The interests referred to in **subsection (2)** have, as between themselves, the same priority they had immediately before the registration of the transfer.
- (5) This section does not apply to a lease of land under the Land Act 1948.
- (6) This section is subject to **section 77**.

77 Additional provision relating to recording of interests and merger

- (1) The consent of the holder of an interest to which the lease is subject must be obtained before—
 - (a) the interest may be recorded on the record of title of the fee simple estate;
 - (b) the fee simple and leasehold estates merge.
- (2) The fee simple estate does not have the benefit of the interests referred to in **section 76(2)(b)** unless the registered owner of

the burdened land consents. However, failure to consent does not prevent the merger of the fee simple and leasehold estates.

78 Covenant by or right for lessee to purchase fee simple estate

- (1) A registered lease may include—
 - (a) a covenant by the lessee to purchase the fee simple estate; or
 - (b) a right for the lessee to purchase the fee simple estate.
- (2) The lessor must, when required to do so by the lessee in accordance with the lease, transfer the fee simple estate to the lessee if the lessee—
 - (a) pays the purchase money; and
 - (b) performs any covenants and obligations that must be performed under the lease for the lessee to purchase the fee simple.
- (3) A covenant or right to which **subsection (1)** applies is an interest in land to which **section 7** applies.

79 Re-entry by lessor

- (1) The lessor of leased land who takes possession of the leased land under an order of the Court or who re-enters the leased land in exercise of a right to cancel the lease under section 244 of the Property Law Act 2007 may apply to the Registrar to note the record of title to that effect.
- (2) If the lessor takes possession of the leased land under an order of the Court,—
 - (a) the application must be accompanied by a copy of the order; and
 - (b) the Registrar must note the record of title to the effect that the lessor taken possession of the leased land.
- (3) If the lessor re-enters the leased land in exercise of a power under the lease, the Registrar must give notice of the application in the *Gazette* and in a newspaper circulating in the locality.
- (4) The notice under **subsection (3)** must—
 - (a) be in the prescribed form; and

- (b) state that unless within the time specified in the notice the Registrar receives an objection to the application, the Registrar will note the record of title to the effect that the lessor has re-entered the leased land.
- (5) If no objection is received by the Registrar within the time specified in the notice of application, the Registrar must note the record of title to the effect that the lessor has re-entered the leased land.
- (6) If the Registrar receives an objection within the time specified in the notice of application, the Registrar must note the record of title to the effect that the lessor has re-entered the leased land only if—
 - (a) the objection is withdrawn; or
 - (b) the Court directs the Registrar to do so.
- (7) On noting of the record of title, the estate of the lessee and of every person claiming under the lessee terminates.
- (8) Termination under **subsection (7)** does not release a person from liability for breach of a covenant or condition contained or implied in the lease.

Part 7

Mortgages

80 Mortgage takes effect only as security

A mortgage under this Act takes effect only as security and not as a transfer of the estate or interest charged.

81 Mortgage instrument required to register mortgage

- (1) A mortgage instrument must be used to mortgage an estate or interest in land under this Act.
- (2) A mortgage instrument must be—
 - (a) executed by the mortgagor; and
 - (b) in the prescribed form and contain the prescribed information.

82 Mortgage variation instrument required to vary mortgage

- (1) A mortgage variation instrument must be used to vary the following terms of a registered mortgage:

Part 7 cl 83

Land Transfer Bill

- (a) the amount or priority limit secured by the mortgage:
 - (b) the rate of interest:
 - (c) the term or currency of the mortgage:
 - (d) the covenants, conditions, and powers contained or implied in the mortgage.
- (2) A mortgage variation instrument must be executed—
- (a) by the mortgagor, unless the variation only reduces the amount secured or the priority amount or the rate of interest; and
 - (b) by the mortgagee, unless the variation only increases the amount secured or the priority amount or the rate of interest.
- (3) A mortgage variation instrument must be in the prescribed form and contain the prescribed information.
- (4) The consent of a subsequent mortgagee must be obtained before registration of the mortgage variation instrument unless the variation only reduces the amount secured or the priority amount or the rate of interest. The consent binds the mortgagee and every person who subsequently derives an interest in the mortgage from the mortgagee.
- (5) The consent of a submortgagee of a mortgage must be obtained to the variation of the mortgage. The consent binds the submortgagee and every person who subsequently derives an interest in the mortgage from the submortgagee.

83 Mortgage priority instrument required to vary priority of mortgages

- (1) A mortgage priority instrument must be used to vary the priority between themselves of registered mortgages.
- (2) Despite **section 47** (which relates to the priority of instruments), the mortgages have, on registration of the mortgage priority instrument, priority in the order specified in the instrument.
- (3) The prescribed conditions and powers are, on registration of a mortgage priority instrument, implied in a mortgage the priority of which is postponed, except as otherwise stated in the instrument.
- (4) A mortgage priority instrument must be executed by—

52

- (a) the mortgagor; and
 - (b) the mortgagee under a mortgage that, on registration of the mortgage priority instrument, will rank after a mortgage over which it had priority immediately before registration of the instrument.
- (5) A mortgage priority instrument must be in the prescribed form and contain the prescribed information.
- (6) The consent of a submortgagee of the mortgage must be obtained before registration of a mortgage priority instrument that postpones the priority of that mortgage. The consent binds the submortgagee and every person who subsequently derives an interest in the submortgage from the submortgagee.
- (7) In this section, **mortgage** includes a registered charge securing the payment of money under this Act or any other Act.

84 Sale of mortgaged land

- (1) The estate or interest of a mortgagor in land vests in the purchaser of the land on registration of a transfer instrument executed by a mortgagee for the purpose of exercising a power of sale under a mortgage.
- (2) The estate or interest transferred vests in the purchaser free of—
- (a) liability under the mortgage; and
 - (b) any other mortgage or interest that does not have priority over the mortgage or that is not binding on the mortgagee.
- (3) The transfer instrument cannot be registered if the mortgage is subject to a submortgage.

85 Mortgage discharge instrument required to discharge mortgage

- (1) A mortgage discharge instrument must be used to discharge a registered mortgage.
- (2) The estate or interest identified in the instrument ceases to be subject to the mortgage on registration of a mortgage discharge instrument.
- (3) A mortgage discharge instrument must be—
- (a) executed by the mortgagee; and

- (b) in the prescribed form and contain the prescribed information.
- (4) A mortgage discharge instrument cannot be registered if the mortgage is subject to a submortgage.

86 Court may order mortgage to be discharged if mortgagee's remedies barred by Limitation Act 1950

- (1) The Court may, on application by the registered owner of an estate or interest in land that is subject to a registered mortgage, order that the mortgage is discharged if the Court is satisfied that—
 - (a) a proceeding by the mortgagee for payment of money secured by the mortgage is barred by the Limitation Act 1950 or any other enactment; and
 - (b) but for **section 7**, any other proceeding by the mortgagee for a remedy in respect of the mortgaged land would also be barred by the Limitation Act 1950 or any other enactment.
- (2) The Registrar must register the order discharging the mortgage on lodgment of a sealed copy of the order.
- (3) The mortgage is discharged on registration of the order.
- (4) The Court may direct that—
 - (a) public notice is given of an application under this section:
 - (b) notice of the application is served on any person the Court specifies.

87 Discharge of mortgage securing annuity

The Registrar must register the discharge of a mortgage that secures the payment of an annuity if the Registrar is satisfied that—

- (a) the annuitant has died; or
- (b) the annuity has ceased in accordance with the terms of the mortgage instrument; and
- (c) all arrears owing under the mortgage have been paid, satisfied, or discharged.

Part 8
Easements, *profits à prendre*, and
covenants under Property Law Act 2007

Easements and profits à prendre

88 Interpretation

For the purposes of this Part—

grantee in relation to an easement or *profit à prendre*, means the registered owner of the benefited land or the person entitled to the benefit of the easement or *profit à prendre*

grantor in relation to an easement or *profit à prendre*, means the registered owner of the burdened land.

89 Registration and surrender of easements and *profits à prendre*

- (1) The following must be used to register the creation or surrender of an easement or *profit à prendre*:
 - (a) an easement instrument under **section 90**: or
 - (b) a transfer instrument under **section 63**; or
 - (c) in the case of an easement, a deposit document under **section 91** together with the deposit under **section 190** of a plan to which the deposit document relates.
- (2) A transfer instrument under **section 63** must be executed by the grantor and the grantee—
 - (a) in the case of the creation or surrender of an easement or *profit à prendre*; and
 - (b) in the case of an easement that is reserved.
- (3) An easement may be registered even though the same person is the grantor and the grantee.
- (4) The Registrar must register the easement on the record of title for the burdened land and any benefited land.
- (5) The Registrar must create a record of title for an easement over Crown land for which no separate record of title exists.

90 Easement instruments

- (1) An easement instrument must be in the prescribed form and contain the prescribed information.

- (2) An easement instrument must be executed by the grantor and the grantee.
- (3) The consent of a registered mortgagee of the burdened land must be obtained before registration of an instrument that creates an easement or *profit à prendre*.
- (4) The consent of a registered mortgagee of any benefited land or of any easement or *profit à prendre* must be obtained before registration of an instrument that surrenders the easement or *profit à prendre*.
- (5) The consent of a mortgagee under **subsections (3) or (4)** binds—
 - (a) the mortgagee; and
 - (b) any person who derives an interest from the mortgagee.

91 Creation or surrender of easement on deposit of plan

- (1) A deposit document that specifies the matters referred to in **subsection (3)** may be used to create or surrender an easement.
- (2) The deposit document must be in a form specified by the Registrar under **section 191**.
- (3) The matters that must be specified are—
 - (a) the burdened land or the benefited land or both, including a reference to the register; and
 - (b) the nature and extent of the easement; and
 - (c) the rights and powers that will apply to the easement by reference, without modification, to rights and powers—
 - (i) prescribed by regulations; or
 - (ii) contained in a memorandum registered under **section 176**.
- (4) An easement is created or surrendered under this section on the deposit under **section 190** of a plan to which the deposit document relates.
- (5) The deposit document must be executed by the grantor and the grantee.
- (6) The consent of the mortgagee of the burdened land must be obtained before the creation of the easement.
- (7) The following persons must consent to the surrender of the easement:
 - (a) the grantor and the grantee:

- (b) a mortgagee of a mortgage of the easement or of the benefited land.
- (8) The consent of a mortgagee under **subsection (6) or subsection (7)** binds the mortgagee.

92 Rights and powers implied in easements

- (1) Regulations may prescribe the rights and powers that are implied in different classes of easements.
- (2) On the creation of an easement of a class prescribed by regulations, the grantee has the rights and powers implied in easements of that class.
- (3) Despite **subsection (2)**, an instrument creating an easement may—
 - (a) vary the implied rights and powers; or
 - (b) include additional rights and powers; or
 - (c) omit the implied rights and powers.
- (4) **Subsection (3)** does not apply to an easement created under **section 91**.
- (5) The rights and powers implied in an easement under this section bind the grantor and the grantee.
- (6) Nothing in this section limits sections 26(4), 27(3), and 28(3) of the Housing Act 1955.
- (7) In this section, **rights and powers** includes terms, conditions, and covenants.

93 Easement variation instrument required to vary easements and *profits à prendre*

- (1) An easement variation instrument must be used to vary, omit, or add to the terms, conditions, or covenants of a registered easement or *profit à prendre*.
- (2) The easement variation instrument must be in the prescribed form and contain the prescribed information.
- (3) An easement variation instrument must be executed by the grantor and the grantee.
- (4) The consent of the following persons must be obtained before registration of an easement variation instrument—
 - (a) a mortgagee of any mortgage of the easement or *profit à prendre*; and

- (b) a mortgagee of any mortgage of the burdened land and of any benefited land.
- (5) The consent of a mortgagee under **subsection (4)** binds—
 - (a) that mortgagee; and
 - (b) any person who derives an interest from the mortgagee.

94 Merger and extinguishment of easements and *profits à prendre* through lapse of time

- (1) The grantor or the grantee of an easement or *profit à prendre* may apply to the Registrar to make an entry on a record of title that the easement or *profit à prendre* has merged or become extinguished.
- (2) For the purposes of this section, an easement or *profit à prendre* is extinguished if the easement or *profit à prendre* was granted for a fixed period of time which has elapsed.
- (3) The application must be in the prescribed form and contain the prescribed information.
- (4) The Registrar must, if satisfied that the easement or *profit à prendre* has merged or become extinguished, note the record of title to that effect.
- (5) The interest of the grantee of the easement or *profit à prendre* and of every person claiming under the grantee is extinguished on the making of an entry on the record of title.

95 Extinguishment of easements and *profits à prendre* on occurrence of event

- (1) The grantor or the grantee of an easement or *profit à prendre* may apply to the Registrar to make an entry on a record of title that the easement or *profit à prendre* has become extinguished.
- (2) For the purposes of this section, an easement or *profit à prendre* is extinguished if an event specified in the document creating the easement occurs that brings the easement or *profit à prendre* to an end.
- (3) The application must be in the prescribed form and contain the prescribed information.
- (4) The Registrar must give—
 - (a) public notice of the application; and

- (b) give notice of the application to every person who appears to the Registrar to have an interest under the easement or *profit à prendre*.
- (5) A person who claims to have an interest under the easement or *profit à prendre* may object to the application by giving notice in writing to the Registrar.
- (6) The Registrar must make an entry on the record of title to the effect that the easement or *profit à prendre* is extinguished unless—
 - (a) within 10 working days after notice of the objection is served on the Registrar, the objector gives a further notice to the Registrar that an application has been made to the Court for an order that the application must not be granted; and
 - (b) the Court makes an order that the application under **subsection (1)** must not be granted or an appeal against the order is dismissed.
- (7) The interest of the grantee of the easement or *profit à prendre* and of every person claiming under the grantee is extinguished on the making of an entry on the record of title.
- (8)

96 Redundant easements

- (1) For the purposes of this Act, an easement is redundant if—
 - (a) all or part of the benefited land no longer adjoins the burdened land as a result of a subdivision or for any other reason; and
 - (b) as a result, the easement has no practical effect.
- (2) The grantor or the grantee of an easement may apply to the Registrar to make an entry on a record of title that the easement is extinguished.
- (3) The application must be in the prescribed form and contain the prescribed information.
- (4) The Registrar must give—
 - (a) public notice of the application; and
 - (b) give notice of the application to every person who appears to the Registrar to have an interest under the easement.

Part 8 cl 97

Land Transfer Bill

- (5) A person who claims to have an interest under the easement may object to the application by giving notice in writing to the Registrar.
- (6) The Registrar must make an entry on the record of title to the effect that the easement is extinguished unless—
 - (a) within 10 working days after notice of the objection is served on the Registrar, the objector gives a further notice to the Registrar that an application has been made to the Court for an order that the application must not be granted; and
 - (b) the Court makes an order that the application under **subsection (2)** must not be granted or an appeal against the order is dismissed.
- (7) The interest of the grantee of the easement and of every person claiming under the grantee is extinguished on the making of the entry on the record of title.
- (8) Nothing in this section applies to an easement in gross.

*Notification of covenants under Property Law
Act 2007*

- 97 Notification of covenants under Property Law Act 2007**
- (1) A covenant instrument may be used to notify on the register—
 - (a) a positive or restrictive covenant to which section 307 of the Property Law Act 2007 applies;
 - (b) a covenant in gross to which **section 307E** of the Property Law Act 2007 applies;
 - (c) the revocation of a covenant referred to in **paragraph (a) or (b)**.
 - (2) An covenant variation instrument may be used to notify on the register that the covenant is affected or modified.
 - (3) A covenant instrument and a covenant variation instrument must be executed by the covenantor and the covenantee.
 - (4) A covenant instrument and a covenant variation instrument must be in the prescribed form and contain the prescribed information.
 - (5) Notification of a covenant under section 307 of the Property Law Act 2007 has no greater effect than that specified in subsections (4) and (5) of that section.

60

- (6) Notification of a covenant in gross under **section 307E** of the Property Law Act 2007 has no greater effect than that specified in **subsections (4) and (5)** of that section.
- (7) A transfer instrument may be used to notify the assignment of a covenant in gross to which **section 307E** of the Property Law Act 2007 applies.
- (8) Sections 4, 8(1) and (2)(c), 23(2), 275 to 278, 301 to **307H** and 316 to 318 of the Property Law Act 2007 apply to covenants noted on the register under this section.

Part 9

Statutory land charges

98 Application of this Part

- (1) This Part applies to a charge on land created or arising under an Act other than this Act.
- (2) This Part does not apply to a charge created or arising under an Act other than this Act that makes express provision for the manner and effect of the registration of the charge.
- (3) A charge cannot be registered under this Act against land owned by the Crown unless expressly authorised by another Act.

99 Registration of charge

- (1) A charge to which this Part applies may be registered by lodging with the Registrar a notice in the prescribed form and containing the prescribed information.
- (2) The Registrar must register the charge on receipt of the notice.
- (3) The amount of any fee payable to register the charge is an addition to the amount secured by the charge and may be recovered by the person who pays it from the owner of the estate or interest against which the charge is registered.

100 Priority of charge

- (1) The priority of a charge registered under this Part is determined in accordance with this Act.
- (2) **Subsection (1)** is subject to any other Act under which the priority of a charge is determined.

101 Release of charge

- (1) A certificate of release of charge may be lodged with the Registrar to release any land from the whole or part of a registered charge.
- (2) The certificate must be—
 - (a) signed by the person entitled to the benefit of the charge; and
 - (b) in the prescribed form and contain the prescribed information.
- (3) The Registrar may, on application by the registered owner of land against which a charge is registered, release or partially release the charge if satisfied that—
 - (a) the charge has been wholly or partially satisfied; and
 - (b) it is impossible or impracticable to obtain a certificate for the purposes of **subsection (1)**.

102 Protection of Registrar

The Registrar is entitled, without making any further inquiries, to—

- (a) register a charge under **section 99** on the basis of the information contained in the notice;
- (b) release a charge under **section 101** on the basis of the information—
 - (i) contained in a certificate under **subsection (2)** of that section; or
 - (ii) provided by the applicant under **subsection (3)** of that section.

Part 10 Trusts and caveats

Trusts

103 Trusts not to be entered on register

- (1) No notice of a trust, whether express, implied, resulting, or constructive, may be registered or notified on the register and has no effect if it is.
- (2) A provision in an instrument registered or notified under this Act to the effect that a person executing the instrument is liable

only to the extent of an estate or interest or assets of which the person is a trustee is not notice of a trust.

- (3) This section is subject to—
- (a) **sections 104 and 105**; and
 - (b) any enactment that requires or permits notice of a trust to be registered or notified on the register.

104 Trusts of reserves

- (1) The person in whom a public reserve is vested holds the land subject to any trust to which the land is subject under the enactment or instrument that vests the land in that person.
- (2) The responsible chief executive must give notice in writing to the Registrar of the creation, alteration, or revocation under any enactment of a trust affecting a public reserve.
- (3) The Registrar must record the trust, alteration, or revocation in the register.
- (4) Land, other than a public reserve, that is vested in or transferred to a person under an enactment the title of which is recorded in the register vests in that person—
 - (a) in the capacity in which the land is held under the enactment; and
 - (b) subject to any trusts on which the land is held under the enactment.
- (5) The Registrar must not register an instrument or record any matter in the register that prejudicially affects a trust on which an estate or interest in a public reserve or land to which this section applies is subject.
- (6) In this section,—

public reserve means land subject to this Act that is—

 - (a) a reserve within the meaning of section 2(1) of the Reserves Act 1977; or
 - (b) vested in a person under an enactment or instrument as a public reserve or for a special purpose

responsible chief executive means the chief executive of the department or ministry that, with the authority of the Prime Minister, is for the time being responsible for the administration of the enactment under which the trust affecting the public reserve is created, altered, or revoked.

*Caveats***105 Caveats against dealings with land**

- (1) A person may lodge a caveat against dealings with an estate or interest in land (**caveat against dealings**) on the basis that the person—
- (a) claims an estate or interest in the land, whether capable of registration or not; or
 - (b) has a beneficial estate or interest in the land under an express, implied, resulting, or constructive trust; or
 - (c) is transferring the estate or interest in the land to another person to be held on trust; or
 - (d) is the registered owner of the estate or interest in the land and—
 - (i) has an interest that is distinct from that of registered owner; or
 - (ii) establishes to the satisfaction of the Registrar that at the time the caveat is lodged there is a risk that the estate or interest may be lost through fraud.
- (2) A caveat against dealings must be executed by the caveator or the caveator's agent.
- (3) A caveat against dealings must be in the prescribed form and contain the prescribed information.

106 Notice of caveat against dealings

The Registrar must give notice of the lodging of a caveat against dealings to the registered owner of the estate or interest against which the caveat is lodged.

107 Effect of caveat against dealings

- (1) As long as a caveat against dealings remains entered on the register, the Registrar must not register an instrument or record any matter in the register that transfers, charges, or prejudicially affects the estate or interest protected by the caveat.
- (2) Despite **subsection (1)**, the Registrar may—
- (a) register or notify an instrument lodged for registration or notification before the lodging of the caveat:
 - (b) register or notify an instrument in the register to give effect to the transmission of an estate or interest by oper-

ation of law (for example, to an executor, administrator, or trustee of the estate of a deceased person, a transmission to the Official Assignee of the estate of a bankrupt under the Insolvency Act 2006, or to the survivor on the death of a tenant under a joint tenancy):

- (c) if the caveat affects only the fee simple estate, register or notify an instrument that relates to any other estate or interest:
 - (d) register or notify an instrument in the register necessary to make a change to, or correct, the name of the owner of an estate or interest without changing the ownership of the estate or interest:
 - (e) register or notify an instrument in the register to transfer an estate or interest sold in exercise of powers under the Local Government (Rating) Act 2002:
 - (f) register or notify an instrument in the register that creates or relates to an easement that benefits the estate or interest subject to the caveat:
 - (g) create a single record of title in place of separate records of title:
 - (h) create separate records of title in place of a single record of title:
 - (i) register further caveats, statutory land charges, or charging orders:
 - (j) make an entry in the register to give effect to an enactment or order of a court vesting or affecting the land or estate or interest in land protected by the caveat:
 - (k) register or notify an instrument in the register of a class authorised by regulations.
- (3) **Subsection (2)** is not an exhaustive list of the instruments that may be registered or notified by the Registrar without contravening **subsection (1)**.

108 Caveat against dealings not to prevent transfer by mortgagee under power of sale

- (1) Despite **section 107**, the Registrar may register an instrument or make an entry in the register to transfer an estate or interest in land if—
 - (a) the transfer results from—

Part 10 cl 109

Land Transfer Bill

-
- (i) the exercise of a power of sale under a registered mortgage over the estate or interest; or
 - (ii) the purchase by a vendor mortgagee under section 196 of the Property Law Act 2007 on the sale by the Registrar of the High Court under a power of sale in a registered mortgage; or
 - (iii) the purchase by a mortgagee under a power of sale in a registered mortgage in accordance with an order made by the Court under section 200(3)(d) of the Property Law Act 2007; and
 - (b) the caveat against dealings was lodged after registration of the registered mortgage; and
 - (c) the estate or interest protected by the caveat—
 - (i) relates to the same estate or interest to which the registered mortgage relates; and
 - (ii) arises under an unregistered mortgage or an agreement to mortgage dated later than the date of registration of the registered mortgage.
 - (2) On registration of a transfer under **subsection (1)**—
 - (a) the caveat against dealings lapses; and
 - (b) the estate or interest of the mortgagor vests in the purchaser free from the estate or interest protected by the caveat.
 - (3) The Registrar may make an entry on the register that the caveat has lapsed.

109 Removal of caveat against dealings

The Court may, on application by a person having an estate or interest affected by a caveat against dealings, order that the caveat is removed.

110 Lapse of caveat against dealings

- (1) The following persons may apply to the Registrar for the lapse of a caveat against dealings affecting an estate or interest in land:
 - (a) a person who wishes to register an instrument affecting the estate or interest protected by the caveat; or

- (b) the registered owner or a person acting for or on behalf of the registered owner of the estate or interest affected by the caveat.
- (2) The Registrar must give notice of an application under **subsection (1)** to the caveator.
- (3) A caveat to which an application relates lapses unless—
 - (a) within 10 working days after the date on which Registrar gives notice of an application under **subsection (1)** to the caveator, the caveator gives notice to the Registrar that an application has been made to the Court for an order that the caveat does not lapse; and
 - (b) within 20 working days after the date on which the caveator gives a notice to the Registrar under **paragraph (a) (the relevant period)**, an order of the kind referred to in **subsection (4)** is served on the Registrar.
- (4) The orders are—
 - (a) an order that the caveat not lapse;
 - (b) an interim order that the caveat not lapse;
 - (c) an order adjourning the application.
- (5) The caveat lapses if the Court makes an order to that effect before the close of the relevant period.
- (6) If the Court makes an order under **subsection (4)(b) or (c)**, the caveat will not lapse if, after the close of the relevant period,—
 - (a) the Court makes a final order that the caveat not lapse; and
 - (b) the order is served on the Registrar.
- (7) If the Court makes an order under **subsection (4)(b) or (c)**, the caveat will lapse if, after the close of the relevant period,—
 - (a) the Court makes a final order that the caveat lapse; and
 - (b) the order is served on the Registrar.
- (8) An application under **subsection (1)** may be withdrawn—
 - (a) if an application has been made by the caveator under **subsection (3)(a)**, with the leave of the Court;
 - (b) in any other case, at any time.

111 Withdrawal of caveat against dealings

A caveat against dealings may be withdrawn as to the whole or part of the estate or interest protected by the caveat by the caveator or the caveator's agent.

112 Caveator may consent to registration of instrument

- (1) A caveator may consent to the registration of an instrument affecting the estate or interest protected by a caveat against dealings.
- (2) Consent is subject to the rights of the caveator.

113 Second caveat against dealings may not be lodged

Unless the Court orders otherwise, a caveat against dealings may not be lodged by or on behalf of the same person to protect the same estate or interest as a caveat against dealings that has been removed under **section 109** or lapsed under **section 110**.

114 Registrar not required to verify entitlement to lodge caveat against dealings

- (1) The Registrar does not have to be satisfied that a caveator is in fact or in law entitled to lodge a caveat against dealings.
- (2) Despite **subsection (1)**, a caveat against dealings must comply with **section 105**.

115 Compensation for lodging of improper caveat against dealings

- (1) A person, including the agent of a person, who lodges a caveat against dealings without reasonable cause is liable to pay compensation to a person who suffers loss or damage as a result.
- (2) A claim for compensation must be heard and determined by the Court.
- (3) A caveat against dealings lodged in contravention of **section 113** is lodged without reasonable cause.

116 Registrar may lodge caveat

- (1) The Registrar may lodge a caveat (**Registrar's caveat**) for the purpose of preventing a dealing with an estate or interest in land that may prejudice—

- (a) a minor;
 - (b) a person who the Registrar is satisfied is not capable of managing his or her affairs in relation to the estate or interest;
 - (c) a person on account of a misdescription of the land or the estate or interest in the land on the record of title;
 - (d) a person through fraud or improper conduct.
- (2) **Sections 105 to 115** do not apply to a Registrar's caveat.

117 Notice of caveat

The Registrar must give notice of the lodging of the Registrar's caveat to the registered owner of the estate or interest against which the caveat is lodged.

118 Effect of Registrar's caveat

As long as a Registrar's caveat remains entered on the register, the Registrar must not register an instrument or record any matter in the register unless the Registrar is satisfied that the registration or recording will not prejudice the person in whose favour the caveat has been lodged.

119 Registrar may withdraw caveat

The Registrar may withdraw a Registrar's caveat at any time.

Part 11

Applications to bring land under Act

120 Land to which this Part applies

This Part applies to land that—

- (a) is not subject to this Act; and
- (b) has been alienated or contracted to be alienated by the Crown by Crown grant or other instrument.

121 Applications to bring land under Act

- (1) The following persons may apply in their own right to bring land under this Act:
 - (a) a person who claims to be the person in whom the fee simple estate in the land is vested in possession, whether

- through registration or by reason of an equitable interest:
- (b) a person who claims to be entitled to the land through adverse occupation as against a person prevented by the Limitation Act 1950 from bringing an action to recover the land:
 - (c) a person who claims a life estate in possession which is not a lease for life:
 - (d) a person who has the power to dispose of the fee simple estate in possession:
 - (e) a person who owns the fee simple estate in the land as a public reserve.
- (2) The following persons may apply to bring land under this Act on behalf of a person to whom **subsection (1)** applies:
- (a) the guardian of a minor within the meaning of section 4 of the Age of Majority Act 1970:
 - (b) in the case of an incapacitated person,—
 - (i) a person authorised by an enactment to make the application:
 - (ii) Public Trust:
 - (iii) a person appointed by the High Court to make the application:
 - (c) in the case of a person in respect of whom a property order is in force under the Protection of Personal and Property Rights Act 1988, the manager.
- (3) A person who claims to be beneficially entitled to an estate or interest in the land must, if the trustees do not have express power to sell the land, consent to an application under **subsection (1)(a)**.
- (4) A person entitled to the future estate must consent to an application under **subsection (1)(c)**.
- (5) A person whose consent is required to the exercise of a power to dispose of the fee simple estate in possession must consent to an application under **subsection (1)(d)**.
- (6) An application under **subsection (1)(e)** is subject to any trust affecting the land.

- (7) An application that relates to land in which 2 or more persons hold undivided shares must be made by all the holders of the undivided shares.
- (8) An application by a mortgagor of the land may be made only with the consent of the mortgagee.
- (9) An application may not be made by a mortgagee of the land unless the application is made in connection with the exercise of a power of sale.
- (10) The application must be in the prescribed form and contain or be accompanied by the prescribed information.
- (11) **Section 49** applies with necessary modifications to an application that does not comply with this Part as if the application were an instrument lodged for registration.

122 Notice of application

- (1) If it appears to the Registrar that the applicant may be entitled to have the land brought under this Act, the Registrar must—
 - (a) give public notice of the application; and
 - (b) give notice of the application to every person who appears to the Registrar to have or who may have an estate or interest or a claim to an estate or interest in the land; and
 - (c) give notice to every person, other than the applicant, who is an owner or occupier of adjoining land; and
 - (d) give notice of the application to other persons and in a manner the Registrar thinks fit.
- (2) A notice under **subsection (1)** must—
 - (a) specify the prescribed period within which a caveat may be lodged under **section 123** to prevent the land being brought under this Act; and
 - (b) be in the prescribed form and contain the prescribed information.
- (3) If the Registrar considers that giving notice under **subsection (1)** has not been effective or that it is desirable to give further notice of the application, the Registrar may—
 - (a) give notice again under that subsection; and

- (b) specify in the notice a further period within which a caveat may be lodged to prevent the land being brought under this Act.

123 Caveat against bringing land under Act

- (1) The following persons may, within the period specified in a notice under **section 122**, lodge a caveat preventing the Registrar from bringing land under this Act:
 - (a) a person who claims through possession adverse to the applicant to be entitled to a freehold estate in the land to which the application relates:
 - (b) a person who claims to be entitled under an instrument to an estate or interest in the land to which the application relates that is not a freehold estate:
 - (c) a person who claims to be entitled, but not under an instrument, to an estate or interest in the land to which the application relates that is not a freehold estate or interest.
- (2) A caveat must be executed by the caveator or the caveator's agent.
- (3) A caveat must be in the prescribed form and contain the prescribed information.
- (4) **Sections 111 and 113 to 115** apply with necessary modifications to a caveat as if the caveat were a caveat against dealings.

124 Effect of caveat

As long as a caveat remains in force, the Registrar must not bring land under this Act.

125 Notice of caveat

The Registrar must give notice of the caveat to the applicant.

126 Removal of caveat

The Court may, on application by the applicant, order that the caveat must be removed.

127 Procedure where caveat lodged by person under section 123(1)(a)

- (1) This section applies if a caveat is lodged under **section 123(1)(a)**.
- (2) The caveator must—
 - (a) commence a proceeding in the Court for an order determining the entitlement of the applicant to have the land brought under this Act; and
 - (b) give notice to the Registrar that the proceeding has been commenced.
- (3) The proceeding must be commenced and the notice must be given within 60 working days after the date on which the caveat is lodged. If they are not, the caveat lapses.
- (4) In a proceeding under this section, the Court may—
 - (a) make an order that the applicant is entitled to have the land brought under this Act; or
 - (b) make an order that the applicant is not entitled to have the land brought under this Act; or
 - (c) make any other order the Court thinks fit.
- (5) The Registrar must give effect to any order made by the Court in a proceeding under this section or, if there is an appeal against the decision of the Court, to the decision of the court on the appeal.
- (6) The following documents must be served on the Registrar—
 - (a) a sealed copy of every order or decision of the Court under this section;
 - (b) a copy of a notice of appeal against an order or decision of the Court under this section;
 - (c) a sealed copy of every order or decision of a court on appeal under this section.

128 Procedure where caveat lodged by person under section 123(1)(b) or (c)

- (1) This section applies if a caveat is lodged under **section 123(1)(b) or (c)**.
- (2) The applicant must, within 20 working days after receiving a notice under **section 125**,—

-
- (a) give the Registrar notice stating whether or not the applicant agrees to the land being brought under this Act subject to the estate or interest of the caveator; and
- (b) serve a copy of the notice on the caveator.
- (3) If the notice states that the applicant agrees to the land being brought under this Act subject to the estate or interest of the caveator, the Registrar must register the applicant as the owner of the estate or interest to which the application relates subject to the estate or interest of the caveator.
- (4) If the applicant does not give a notice under **subsection (2)** or if the notice states that the applicant does not agree to bringing the land under this Act subject to the estate or interest of the caveator, the caveator must—
- (a) commence a proceeding in the Court to determine the entitlement of the applicant to have the land brought under this Act free from the estate or interest of the caveator; and
- (b) give the Registrar notice that the proceeding has been commenced.
- (5) The proceeding must be commenced and the notice must be given within 60 working days after the earlier of the following:
- (a) the expiry of the period referred to in **subsection (2)**;
- (b) the date on which a notice is served on the caveator under that subsection.
- (6) In a proceeding under this section, the Court may—
- (a) make an order that the applicant is entitled to have the land brought under this Act free from any estate or interest of the caveator; or
- (b) make an order that the applicant is entitled to have the land brought under this Act subject to the estate or interest of the caveator; or
- (c) make any other order the Court thinks fit.
- (7) The Registrar must give effect to any order of the Court in a proceeding under this section or, if there is an appeal against the decision of the Court, to the decision of the court on the appeal.
- (8) The following documents must be served on the Registrar—

- (a) a sealed copy of every order or decision of the Court under this section:
 - (b) a copy of a notice of appeal against an order or decision of the Court under this section:
 - (c) a sealed copy of every order or decision of a court on appeal under this section.
- (9) This section is subject to **section 129**.

129 Registrar may require instrument creating or recording estate or interest of caveator

- (1) For the purpose of giving effect to an agreement or order under **section 128**, the Registrar may require the applicant and the caveator to lodge an instrument for registration that creates or records the estate or interest of the caveator in a form and containing sufficient particulars to enable the estate or interest of the caveator to be registered.
- (2) If the interest of the caveator cannot be registered under this Act, the Registrar may require the caveator to lodge a caveat under **section 105** to protect the interest.

130 Withdrawal of application

- (1) An applicant may withdraw an application under **section 121** at any time before registration of the applicant as the owner of the estate or interest to which the application relates.
- (2) An application may be withdrawn only if—
- (a) a person who has lodged a caveat under **section 123** consents to the withdrawal or, if the person does not consent, the Court makes an order approving the withdrawal; and
 - (b) a person who has consented to the application under **section 121(3),(4), (5), or (8)** consents in writing to the withdrawal or, if the person does not consent, the Court makes an order approving the withdrawal.

131 Registration of applicant

The Registrar must register the applicant as the owner of the estate or interest to which the application relates if—

- (a) the applicant has complied with this Part; and

Part 11 cl 132

Land Transfer Bill

- (b) no caveat has been lodged under **section 123** or any caveat lodged under that section has lapsed or been withdrawn; and
- (c) there is no reason to prevent the Registrar from doing so.

132 Cancellation of previous instruments of title

- (1) The Registrar must, on registering an applicant as the owner of the estate or interest to which the application relates, cancel any previous instrument under which the title of the applicant to the estate or interest was derived.
- (2) If the instrument relates to or includes an estate or interest other than the estate or interest of which the applicant is registered as owner, the Registrar must endorse the instrument to the effect that it is cancelled only to the extent of the estate or interest of which the applicant has become registered as owner.

133 Registration of Crown grant under Deeds Registration Act 1908 unnecessary

The Registrar does not need to register a Crown grant under the Deeds Registration Act 1908 if the land to which the grant relates is the subject of an application under this Part.

Part 12**Applications for title to land under this Act based on adverse possession****134 Application for record of title based on adverse possession**

- (1) A person may apply to the Registrar for the creation of a record of title in the name of the person as the owner of the freehold estate in land under this Act if—
 - (a) a record of title has been created for the estate or a Crown grant for the land has been registered; and
 - (b) the person has been in possession of the land for a continuous period of not less than 20 years; and
 - (c) the possession would have entitled the person to apply for a record of title as owner of the freehold estate in the land if the land were not subject to this Act.
- (2) For the purposes of this Part,—

76

- (a) possession of the land by a person through or under whom the applicant claims to be entitled to make the application must be treated as possession by the applicant; and
- (b) possession of the land by 1 or more joint tenants or tenants in common—
 - (i) is not possession of the land by another joint tenant or tenant in common; and
 - (ii) is capable of being possession as against another joint tenant or tenant in common.
- (3) The application must be in the prescribed form and contain the prescribed information.
- (4) **Section 49** applies with necessary modifications to an application that does not comply with this Part as if the application were an instrument lodged for registration.
- (5) This section is subject to **sections 136 and 137**.

135 Information relating to land

- (1) In this section,—

occupation boundary means a fence, wall, hedge, building, ditch, or other artificial means, or natural feature of land, by which the land occupied by the applicant is limited or defined

title boundary means the boundaries of the land shown—

 - (a) on the record of title or Crown grant; or
 - (b) on the latest survey plan approved under the Cadastral Survey Act 2002 or any corresponding previous Act.
- (2) The application must be accompanied by—
 - (a) a certificate by a licensed cadastral surveyor that the occupation boundaries or such of them as exist coincide with the title boundaries; or
 - (b) if a certificate cannot be given, a survey plan suitable for deposit under **section 190**.
- (3) The boundaries on a survey plan must be drawn in terms of the occupation boundaries of the land.
- (4) Despite **subsection (3)**, if the occupation boundaries or part of the occupation boundaries of the land are outside the title boundary, the survey plan must be drawn in terms of the title boundary.

136 Incapacity of registered owner

- (1) This section applies to a registered owner of an estate or interest that is the subject of an application under **section 134** who proves that at any time during the period of 20 years referred to in **subsection (1)(b)** of that section (**prescribed period**) he or she was incapacitated.
- (2) If this section applies to a registered owner, the Court may, if it thinks it just to do so on an application made to it whether before or after the end of the prescribed period order that the prescribed period is extended to the close of a date stated in the order.
- (3) In determining whether to make an order, the Court must take into account—
 - (a) whether, while the registered owner was incapacitated, an authorised representative managed the claimant's affairs with respect to ownership of the land; and
 - (b) any steps taken by the authorised representative to manage those affairs; and
 - (c) the effects or likely effects on the applicant of extending the specified period; and
 - (d) any other matters the Court thinks relevant.

137 Minors

The period of 20 years referred to in **section 134(1)(b)** does not run during the period when a registered owner of an estate or interest the subject of an application under that section is under 18 years of age.

138 Certain applications prohibited

An application under **section 134** may not be made in the case of—

- (a) land owned by the Crown, other than land to which **section 150** applies;
- (b) Maori land within the meaning of Te Ture Whenua Maori Act 1993;
- (c) land the registered owner of the fee simple of which is a local authority;
- (d) land held in trust for a public purpose noted on the register under **section 104**:

- (e) land occupied by the owner of adjoining land or by any other person by reason of a mistaken marking of a boundary between the pieces of land:
- (f) land occupied by the owner of adjoining land or by any other person by reason of—
 - (i) a change in the course of a river, creek, or stream; or
 - (ii) the isolation of the land from other land by a river, creek, or stream or other natural feature or by a road.

139 Evidence

The Registrar may—

- (a) dispense with a requirement to provide information that the Registrar is satisfied cannot reasonably be provided by the applicant; or
- (b) require the applicant to provide additional information relating to the application.

140 Notice of application

- (1) If the Registrar is satisfied that the applicant complies with this Part, the Registrar must—
 - (a) give public notice of the application; and
 - (b) give notice of the application to every person who—
 - (i) appears from the register to have an estate or interest in the land or part of the land to which the application relates; or
 - (ii) in the Registrar's opinion has or may have an estate or interest or a claim to an estate or interest in the land to which the application relates; and
 - (c) give notice to every person, other than the applicant, who is the owner or occupier of adjoining land; and
 - (d) give notice in any other way and to any other persons the Registrar thinks fit.
- (2) The notice must specify a date within the prescribed period which a person may lodge a caveat under **section 141** to prevent the application proceeding.
- (3) The Registrar may, before granting the application, extend the period within which a caveat may be lodged under **section 141**.

- (4) A notice must be in the prescribed form and contain the prescribed information.

141 Caveats against application

- (1) A person claiming an estate or interest in land to which an application relates may lodge a caveat preventing the application from being granted.
- (2) A caveat must be executed by the caveator or the caveator's agent.
- (3) A caveat must be—
- (a) lodged within the period specified in a notice under **section 140** or any period extended by the Registrar; and
 - (b) in the prescribed form and contain the prescribed information.
- (4) **Sections 111 and 113 to 115** apply with necessary modifications to a caveat lodged under this section.

142 Notice to applicant

The Registrar must give notice of the caveat to the applicant.

143 Removal of caveat

The Court may, on application by the applicant, order that the caveat must be removed.

144 Caveat by registered owner of fee simple or other estates

The Registrar must refuse an application if satisfied that a caveat is lodged under **section 141** by, or by the authorised agent of, the registered owner of any of the following estates in the land or any part of the land to which the application relates—

- (a) an estate in fee simple;
- (b) an estate for life;
- (c) a future estate that has not terminated.

145 Caveat by beneficial or equitable owner of fee simple or other estate

- (1) This section applies if the Registrar is satisfied that a caveat is lodged under **section 141** by a person who claims to be the

beneficial or equitable owner of any of the following estates in the land or in any part of the land to which the application relates—

- (a) an estate in fee simple;
 - (b) an estate for life;
 - (c) a future estate that has not terminated.
- (2) The Registrar must give notice to the caveator requiring the caveator within the time prescribed in the notice to—
- (a) establish the claim and become registered as owner of the estate; or
 - (b) satisfy the Registrar that the claim is valid but that it is of such a nature that it is not capable of being converted into a registered estate.
- (3) The caveat lapses unless, within the time specified in the notice or any extension allowed by the Registrar, the caveator complies with **paragraph (a) or paragraph (b) of subsection (2)**.
- (4) If the caveat lapses, the Registrar must remove the caveat from the record of title.
- (5) The Registrar must refuse the application if—
- (a) the Registrar is satisfied that the estate of the caveator is established from the register itself; or
 - (b) within the time specified in the notice or any extension allowed by the Registrar, the caveator complies with **paragraph (a) or paragraph (b) of subsection (2)**.

146 Caveat by person entitled to other estate or interest registered or notified on record of title

- (1) This section applies if the Registrar is satisfied that—
- (a) a caveat is lodged under **section 141** by a person who is the registered owner of, or a person notified on a record of title as entitled to, an estate or interest in the land or in any part of the land to which the application relates; and
 - (b) the estate or interest is not an estate or interest of a kind referred to in **section 144 or section 145**
- (2) The Registrar must give notice to the applicant that the applicant may, within the time specified in the notice, advise the Registrar in writing that the applicant accepts the applicant's

title being made subject to the estate or interest of the caveator and any estate or interest through or under which the caveator derives title.

- (3) If the applicant advises the Registrar under **subsection (2)**,—
 - (a) the caveat lapses; and
 - (b) the Registrar must, in accordance with **section 148**, create a record of title for the applicant subject to the estate or interest of the caveator.
- (4) If the applicant does not advise the Registrar under **subsection (2)**, the Registrar must refuse the application.
- (5) If the freehold estate is subject to a registered mortgage, the applicant must be treated as—
 - (a) the registered owner of the freehold estate for the purposes of **section 86**; and
 - (b) the registered owner of the freehold estate and the mortgagor for the purposes of subpart 5 of Part 3 of the Property Law Act 2007.
- (6) If, in the case of a freehold estate subject to a mortgage, the applicant advises the Registrar under **subsection (2)**, nothing in subpart 8 of Part 3 of the Property Law Act 2007 applies to a transfer of the freehold estate by the applicant or by a person who derives title through or under the applicant.

147 Caveat by person entitled to other estate or interest

- (1) This section applies if the Registrar is satisfied that—
 - (a) a caveat is lodged under **section 141** by a person who claims to be the beneficial or equitable owner of an estate or interest in land or in any part of the land to which the application relates that is not registered or notified on the record of title; and
 - (b) the estate or interest is not an estate or interest of a kind referred to in **sections 144, 145, or 146**.
- (2) The Registrar must give notice to the caveator requiring the caveator within the time prescribed in the notice to—
 - (a) establish the claim and become registered as owner of the estate or interest; or

- (b) satisfy the Registrar that the claim is valid but that it is of such a nature that it is not capable of being converted into a registered estate or interest.
- (3) The caveat lapses unless, within the time specified in the notice or any extension allowed by the Registrar, the caveator complies with **paragraph (a) or paragraph (b) of subsection (2)**.
- (4) The Registrar must note the lapsing of the caveat on the record of title.
- (5) If within the time specified in the notice or any extension allowed by the Registrar, the caveator complies with **subsection (2)(a), section 146** applies with such modifications as may be necessary as if the caveator had been registered as the owner of the estate or interest at the date the caveat was lodged.
- (6) If within the time specified in the notice or any extension allowed by the Registrar, the caveator complies with **subsection (2)(b)** or the Registrar is satisfied that the estate or interest claimed is evidenced by the register, **section 146** applies with such modifications as may be necessary as if the caveator had been registered as the owner of the estate or interest at the date the caveat was lodged.

148 Registration of applicant as owner of freehold estate

- (1) The Registrar must register the applicant as the owner of the freehold estate in the land to which the application relates and create a record of title for that estate if satisfied that—
 - (a) the applicant has complied with this Part; and
 - (b) any caveat lodged under this Part has lapsed or been withdrawn; and
 - (c) there is no reason preventing the Registrar from doing so.
- (2) The record of title must be free of any estates or interests previously recorded except for an estate or interest to which **section 146(3) or 147(5) or (6)** applies.

149 Cancellation of record of title

- (1) On the creation of a record of title for a freehold estate under **section 148**, the Registrar must—

Part 12 cl 150

Land Transfer Bill

- (a) cancel any previous record of title for the freehold estate; or
- (b) partially cancel any previous record of title to the extent it relates to the freehold estate.
- (2) The cancellation must state that is made under this section.
- (3) On the cancellation of the record of title—
 - (a) the estate of the previous registered owner is extinguished; and
 - (b) any other estate or interest registered or notified on the record of title is extinguished.
- (4) **Subsection (3)** does not apply to an estate or interest to which **section 146(3) or section 147(5) or (6)** applies.

150 Application relating to land of dissolved company

- (1) This section applies to an application that relates to a freehold estate—
 - (a) the registered owner of which was a company or other body corporate that has been dissolved; and
 - (b) that vests in the Crown as *bona vacantia*.
- (2) The Registrar must not proceed with the application unless—
 - (a) if the Crown is entitled under an enactment to disclaim the estate,—
 - (i) the Crown has disclaimed the estate; and
 - (ii) the Registrar is satisfied that no proceedings have been commenced in a court by a person to become registered owner of the estate or to restore the company to the companies register under the Companies Act 1993; or
 - (b) if the Crown is not entitled under an enactment to disclaim the estate, the Secretary to the Treasury consents to the application.
- (3) If the Registrar knows that a person intends to commence proceedings referred to in **subsection (2)(a)(ii)**, the Registrar must give notice of the application to that person.
- (4) The notice must be in the prescribed form and contain the prescribed information.

- (5) If proceedings are commenced within the time specified in the notice, or within any extension allowed by the Registrar, the Registrar may proceed with the application only if—
 - (a) the proceedings are dismissed or discontinued; or
 - (b) an appeal against the dismissal of the proceedings is dismissed or discontinued.
- (6) If proceedings are not commenced within the time specified in the notice, or within any extension allowed by the Registrar, the Registrar must proceed with the application.

Part 13

Title to access strips

151 Meaning of access strip

For the purposes of this Part, **access strip** in relation to an application under this Part,—

- (a) means land that has been set aside as part of a subdivision for the purpose of providing access from adjoining lots and any other lots in the subdivision to an existing road and that at the time of the application is, in the opinion of the Registrar, being used principally for that purpose; but
- (b) does not include land accepted or declared by a local authority to be a road or street or a service lane or an access way.

152 Application by adjoining owners for title to access strip

- (1) The registered owners of the fee simple estate in lots adjoining an access strip (**adjoining owners**) may apply to the Registrar for the issue of a record of title to the access strip.
- (2) **Subsection (1)** does not apply to an adjoining owner who owns a freehold estate in the access strip.
- (3) The application must be in the prescribed form and contain the prescribed information.
- (4) For the purposes of this section, 2 or more lots that adjoin an access strip and that arise from the subdivision of a single lot that originally adjoined an access strip must each be treated as a single lot in the original subdivision.

- (5) **Section 49** applies with necessary modifications to an application that does not comply with this section as if the application were an instrument lodged for registration.

153 Notice of application

- (1) If the Registrar is satisfied that the application complies with **section 152**, the Registrar must—
- (a) give public notice of the application; and
 - (b) give notice of the application to every person who—
 - (i) if the access strip is subject to this Act, appears from the register to be the owner of a freehold estate in the access strip; or
 - (ii) if the access strip is not subject to this Act, appears to the Registrar to be the owner of a freehold estate in the access strip; and
 - (c) give notice of the application to the territorial authority and any statutory body that would, if the access strip were a road or a service lane or an access way, have jurisdiction over it; and
 - (d) give notice of the application to every other person the Registrar thinks fit.
- (2) The notice must—
- (a) specify a date within the prescribed period within which a person may lodge a caveat under **section 154** to prevent the application proceeding; and
 - (b) be in the prescribed form and contain the prescribed information.
- (3) The Registrar may, before granting the application, extend the period within which a caveat may be lodged under **section 154**.

154 Caveats against application

- (1) The following persons may lodge a caveat preventing the application from being granted as to the whole or part of the freehold estate in the access strip:
- (a) if the access strip is subject to this Act, a person who is the registered owner of a freehold estate in the access strip:

- (b) if the access strip is not subject to this Act, a person who claims to be entitled to a freehold estate in the access strip.
- (2) A caveat must be lodged within the time specified in the notice under **section 153** or any period extended by the Registrar.
- (3) A caveat must be executed by the caveator or the caveator's agent.
- (4) A caveat must be in the prescribed form and contain the prescribed information.
- (5) The Registrar must notify the caveat—
 - (a) if the access strip is subject to this Act, on the record of title for the access strip; or
 - (b) if the access strip is not subject to this Act, on the relevant record for the access strip under the Deeds Registration Act 1908.
- (6) While it remains notified, a caveat prevents an application being granted, but does not prevent a dealing affecting the access strip.
- (7) **Sections 111, 113, and 115** apply with necessary modifications to a caveat as if the caveat were a caveat against dealings.

155 Notice of caveat

The Registrar must give notice of the caveat to the applicant.

156 Removal of caveat

The Court may, on application by the applicant, order that the caveat be removed.

157 Procedure where caveat lodged

- (1) In the case of an access strip that is subject to this Act, if the Registrar is satisfied that a caveat is lodged by a person who is registered as the owner of a freehold estate in the access strip, the Registrar must refuse the application to the extent it relates to an estate protected by the caveat.
- (2) In the case of an access strip that is not subject to this Act, if the Registrar is satisfied that a caveat is lodged by a person who is the owner of a freehold estate in the access strip, the

Registrar must refuse the application to the extent it relates to an estate protected by the caveat.

- (3) A caveat must remain notified under **section 154** if an application is fully or partially refused.

158 Owner of access strip who is not an adjoining owner

- (1) This section applies to an owner of the freehold estate in the access strip who is not an adjoining owner and who—
- (a) after reasonable enquiries have been made, cannot be found; or
 - (b) consents to the application and to forfeiting ownership of the estate to the applicants.
- (2) The consent must be in the prescribed form.
- (3) The application must be accompanied by—
- (a) proof of the matters referred to in **subsection (1)(a)**; or
 - (b) the form of consent referred to in **subsection (1)(b)**.
- (4) If the application complies with this section, the estate of the owner vests in the applicants.

159 Adjoining owner with interest in access strip who is not an applicant

- (1) This section applies to a person who is not an applicant, but who—
- (a) is an adjoining owner; and
 - (b) has an estate or interest in the access strip.
- (2) The person may consent to forfeiting ownership of the estate or interest to the applicants.
- (3) The consent must be in the prescribed form.
- (4) If the person consents under **subsection (2)**, the application must be accompanied by the form of consent.
- (5) If the person consents to forfeiting ownership of the estate or interest, the estate or interest of the person in the access strip vests in the applicants.
- (6) If the person does not consent to forfeiting ownership of the estate or interest, the estate or interest of the person in the access strip continues to exist and is not affected by the grant of the application.

160 Adjoining owner with no interest in access strip who is not an applicant

- (1) This section applies to a person who is not an applicant, but who—
 - (a) is an adjoining owner; and
 - (b) does not have an estate or interest in the access strip.
- (2) The person may consent to waiving any right to apply for a record of title to the access strip.
- (3) The consent must be in the prescribed form.
- (4) If the person consents under **subsection (2)**, the application must be accompanied by the consent.
- (5) If the person consents to waiving any right to apply for a record of title to the access strip, the person has no right at any time to apply under this Part for a record of title to the access strip.
- (6) If the person does not consent to waiving any right to apply for a record of title to the access strip, the person does not lose the right to apply for a record of title to a share in the access strip.

161 Record of title for access strip

- (1) The Registrar may create a record of title for the access strip and the adjoining lot to which it relates if satisfied that—
 - (a) the application complies with this Part; and
 - (b) no caveat prevents the application from being granted; and
 - (c) there is no other reason to refuse to grant the application.
- (2) The record of title must be created in the name of the applicant or, if there are 2 or more applicants, in the names of the applicants as tenants in common in their appropriate shares.
- (3) The record of title must record—
 - (a) if the access strip is subject to this Act, any interests registered or notified on the former record of title for the access strip; or
 - (b) if the access strip is not subject to this Act, any existing interest to which the access strip is subject that is capable of registration or notification under this Act.
- (4) The share of an applicant in the access strip is equal to the proportion that the applicant's lot bears to the aggregate of—
 - (a) the lots of all adjoining owners who are applicants; and

- (b) the lots of any persons to whom **sections 159(6) and 160(6)** apply.
- (5) On creating a record of title under this section, the Registrar must cancel any previous record of title for the fee simple estate in the whole of the access strip.
- (6) The creation of a record of title under this section for, or for a share in, an access strip that is not subject to this Act has the effect of bringing the land comprised in the access strip under this Act.

162 Provisions applying when record of title created for access strip

- (1) The following provisions apply on the creation of a record of title under **section 161**:
 - (a) the owner of an access strip or of a share in an access strip must not transfer or mortgage the access strip or share unless, at the same time, the owner disposes of or mortgages the adjoining lot to the transferee or mortgagee:
 - (b) the Registrar must note the record of title for the relevant share in the access strip and the record of title for each adjoining lot to which the share relates to the effect that the adjoining lot is subject to **paragraph (a)**:
 - (c) the share in an access strip held by persons who are the owners as joint tenants or tenants in common of an adjoining lot to which the share relates vests in those persons in the same manner:
 - (d) a power of sale in a mortgage of an adjoining lot or part of an adjoining lot to which the share in an access strip relates extends to the share in the access strip:
 - (e) **paragraph (d)** applies to a lot settled as a joint family home under the Joint Family Homes Act 1964 after the creation of the record of title whether the share in the access strip is owned by both spouses or either spouse.
- (2) In this section **mortgage** includes a charge securing the payment of money under this Act or any other enactment.
- (3) **Subsection (1)(a)** does not apply to the settlement of an adjoining lot under the Joint Family Homes Act 1964.

Part 14
Special provisions relating to limited titles
issued under Part 12 of the Land Transfer
Act 1952

163 Purpose of this Part

The purpose of this Part is to continue with appropriate modification provisions of Part 12 of the Land Transfer Act 1952 in relation to estates in land for which limited titles have been issued following the bringing of the land under—

- (a) that Act pursuant to Part 12 of that Act; or
- (b) the Land Transfer Act 1915 pursuant to the Land Transfer (Compulsory Registration of Titles) Act 1924.

164 Meaning of limited title

For the purpose of this Part, **limited title** means a title for an estate or interest in land that—

- (a) is limited as to parcels or limited as to title or limited both as to parcels and title; and
- (b) was issued under—
 - (i) the Land Transfer Act 1952 pursuant to Part 12 of that Act; or
 - (ii) the Land Transfer Act 1915 pursuant to the Land Transfer (Compulsory Registration of Titles) Act 1924.

165 Registrar's minutes

- (1) The Registrar must retain the Registrar's minutes kept under section 193 of the Land Transfer Act 1952.
- (2) The Registrar may update the Registrar's minutes to record the action taken to comply with requisitions or requirements relating to any limited title.
- (3) The Registrar's minutes do not form part of the land title register.

166 Record of title to indicate limitations

The record of title under this Act for an estate or interest in land for which a limited title has been issued must indicate that the

title is limited as to parcels or limited as to title or limited both as to parcels and title (**limited record of title**).

167 Effect of limited record of title

- (1) The provisions of this Act apply to—
 - (a) an estate or interest in land for which a limited record of title has been created; and
 - (b) the registration or notification of instruments or other matters affecting the estate or interest.
- (2) The only persons who cannot, by reason of the limitation, set aside the title of the registered owner of an estate or interest in the land subject to the limited record of title are—
 - (a) the person first registered as the owner of an estate or interest in the land subject to the limited record of title; and
 - (b) a person subsequently registered as the owner of the estate or interest in the land subject to the limited record of title.
- (3) **Section 53** applies to a limited record of title subject to—
 - (a) compliance with any requirements specified in the Registrar's minutes; and
 - (b) the estate or interest or possible estate or interest of a person in the land the existence or possible existence of which appears from the Registrar's minutes; and
 - (c) the title of any person in adverse possession of and entitled to the an estate or interest in the land.
- (4) The issue of a limited title does not prevent the Limitation Act 1950 applying in favour of—
 - (a) a person in adverse possession of land at the time the limited title was issued; or
 - (b) a person claiming through or under a person referred to in **paragraph (a)**.

168 Removal of limitations from limited record of title

- (1) The Registrar may—
 - (a) note on the record of title that the record of title is no longer subject to the limitation; or
 - (b) create a replacement record of title that is not subject to the limitation.

- (2) The Registrar may act under **subsection (1)** only if satisfied that,—
- (a) having regard to action taken to comply with any requisition or requirement in the Registrar’s minutes in relation to the record of title, the limitation can be removed from the title; and
 - (b) having regard to any other matters the Registrar considers material, the limitation can be removed from the title; and
 - (c) the title of the registered owner has not been extinguished by the operation of the Limitation Act 1950.
- (3) Despite **subsection (2)(a)**, the Registrar may act under **subsection (1)** if satisfied that because of the lapse of time compliance with a requisition or requirement in the Registrar’s minutes has become unnecessary.

169 Further restriction on removal of limitation from limited record of title limited as to parcels

The Registrar must not act under **section 168(1)** in relation to a limited record of title that is limited as to parcels unless—

- (a) the Registrar is satisfied by the deposit of a survey plan or other evidence that no part of the land is held in adverse occupation to the title of the registered owner of the land; and
- (b) the Registrar gives notice to the owners or occupiers of any adjoining land of the Registrar’s intention to take the action; and
- (c) within the time specified in the notice or within such further time the Registrar may allow, no person to whom a notice is given lodges a caveat under **section 174**.

170 Other estates and interests subject to limitation

A registered estate or interest other than the freehold estate for which a limited record of title has been created is subject to the same limitation as stated in the limited record of title for the freehold estate.

171 Applications by persons claiming title to land subject to limited title

- (1) This section applies to a person who claims to be entitled to a freehold estate in land for which a limited record of title has been created—
 - (a) by possession adverse to the title of the registered owner that commenced before the limited title was issued; or
 - (b) under a title or possible title the existence of which is recorded in the Registrar's minutes.
- (2) A person to whom this section applies may apply under **Part 11** of this Act to be registered as the owner of the estate. **Part 11** applies to the application with all necessary modifications.

172 Certain interests extinguished

- (1) This section applies to an estate or interest in land that is not registered or notified on the limited record of title for that land.
- (2) The estate or interest is extinguished on the expiration of 12 years from the date of the first issue of the limited record of title.
- (3) **Subsection (2)** does not apply—
 - (a) to an estate or interest in the possession of a person who is also entitled to it; or
 - (b) to a person in adverse possession of the land.
- (4) The Registrar may, at any time after the expiration of 12 years from the date of the first issue of a limited record of title that is limited as to title, create a record of title for the land that is no longer so limited.

173 Status of caveats lodged under section 205(1) of Land Transfer Act 1952

- (1) This section applies to a caveat lodged under the Deeds Registration Act 1908 in accordance with section 205(1) of the Land Transfer Act 1952.
- (2) The caveat must, for the purposes of this Act, be treated as having been lodged under **section 123** against an application to bring land to which the caveat relates under this Act. The provisions of **Part 11** apply with any necessary modifications to the application and the caveat.

- (3) The caveat does not prevent registration of an instrument relating to a dealing with the land comprised in a limited title to the extent that the limited title is limited as to title.

174 Caveats against limited title limited as to parcels

- (1) The following persons may lodge a caveat against a limited record of title that is limited as to parcels—
- (a) an occupier of the land;
 - (b) the owner or occupier of adjoining land.
- (2) A caveat must be executed by the caveator or the caveator's agent.
- (3) A caveat must be in the prescribed form and contain the prescribed information.
- (4) **Sections 110, 111, 113 to 115, 125, and 126** apply with necessary modifications to the caveat.

Part 15
General provisions

Covenants implied in instruments

175 Implied covenants requiring persons to give effect to instruments

- (1) The covenants referred to in **subsection (2)** are implied in every instrument used to create, transfer, or charge an estate or interest under this Act on the part of the person creating, transferring, or charging the estate or interest under the instrument (**person A**) with the person deriving the estate or interest under the instrument (**person B**).
- (2) The covenants are that person A will, before or after registration of the instrument,—
- (a) do everything necessary to give effect to the terms, conditions, and other covenants stated or implied in the instrument; and
 - (b) on request by person B and at person B's cost, execute any instruments necessary for person B to acquire the estate or interest.

*Provisions incorporated in instruments by
reference*

176 Incorporation in instruments of provisions in memorandum

- (1) For the purposes of this section, **memorandum** means a memorandum in the prescribed form containing provisions to be incorporated by reference in instruments of a class specified in the memorandum.
- (2) The Registrar may—
 - (a) at the request of any person register a memorandum prepared by that person; or
 - (b) register a memorandum prepared by the Registrar.
- (3) A memorandum is registered when a memorial of registration signed by the Registrar is endorsed on the memorandum.
- (4) A memorandum registered under this section is part of the register only for the purposes of **section 52** (which relates to access to the register).
- (5) An instrument of a class specified in a registered memorandum that incorporates all or any of the provisions contained or referred to in the memorandum must be treated as incorporating those provisions subject to any modifications stated in the instrument.
- (6) **Subsection (5)** does not limit or affect a provision of an instrument that incorporates provisions other than those referred to in that subsection.

*Instruments under this Act that may be used
under other Acts*

177 Instruments under this Act may be used under other Acts

- (1) Regulations may be made specifying instruments under this Act that may be used, with or without modification, under any other Act that provides for the registration or notification of any instrument or thing under this Act.
- (2) Neither this section nor any regulations made for the purposes of **subsection (1)** affect the operation of any other Act that—
 - (a) provides for the registration or notification of any instrument or thing under this Act, but

- (b) does not expressly adopt an instrument prescribed by those regulations.

Powers of Attorney

178 Registered owner may deal with estate or interest by attorney

An attorney acting under a power of attorney that confers the necessary authority may—

- (a) execute an instrument under this Act; or
- (b) authorise the creation, transfer, charge or other dealing in relation to an estate or interest in land under this Act; or
- (c) make an application under this Act to the Registrar or to the Court or a Judge.

179 Deposit of power of attorney

- (1) A power of attorney under which an instrument in paper form is executed must be deposited with the Registrar before the instrument is registered.
- (2) A power of attorney may be deposited with the Registrar before an attorney authorises the lodging of an electronic instrument or does any other act under this Act under the power of attorney.
- (3) In this section, **power of attorney** includes—
 - (a) a duplicate of a power of attorney; and
 - (b) a copy of a power of attorney certified in the prescribed manner.

180 Notice of revocation of power of attorney

- (1) Notice of the revocation, termination, suspension, or ceasing to have effect, in whole or in part, of a power of attorney may be given to the Registrar.
- (2) The deposit under **section 179** of a subsequent power of attorney does not revoke an earlier power of attorney unless notice under **subsection (1)** has been given in relation to the earlier power of attorney.
- (3) The revocation, termination, suspension, or ceasing to have effect of a power of attorney does not affect the execution of

an instrument or anything done under the power of attorney before notice under **subsection (1)** is received by the Registrar.

Review and appeal

181 Review by Registrar of decision

- (1) This section applies to—
 - (a) a person who is registered as the owner of an estate or interest in land;
 - (b) a person who claims to be entitled to an estate or interest in land.
- (2) A person to whom this section applies who is dissatisfied with a decision by the Registrar or by a person acting under delegation from the Registrar may apply to the Registrar by notice in writing to review the decision.
- (3) The Registrar must give notice of the application to any other person who, in the Registrar's opinion, is affected or is likely to be affected by the review.
- (4) The Registrar may—
 - (a) investigate the matter;
 - (b) require the applicant to provide evidence or information relevant to the matter.
- (5) The applicant and any person affected or likely to be affected by the review may make submissions in writing to the Registrar.
- (6) The Registrar must review the matter as soon as practicable and may—
 - (a) confirm the original decision; or
 - (b) substitute any other decision the Registrar thinks fit.
- (7) The Registrar must give notice of the Registrar's decision together with reasons to—
 - (a) the applicant; and
 - (b) any person to whom the Registrar gave notice under **subsection (3)** whether or not that person made submissions to the Registrar under **subsection (5)**.

182 Appeal to Court

- (1) A person who is dissatisfied with either of the following decisions may appeal to the Court against the decision:

- (a) a decision under this Act by the Registrar or by a person acting under delegation from the Registrar;
 - (b) a decision by the Registrar under **section 181**.
- (2) Rules of Court apply to appeals under this section.

Application to Court by Registrar

183 Registrar may apply to Court for directions

- (1) The Court may, on the application of the Registrar, give directions concerning the performance of any function or the exercise of any power by the Registrar under this Act.
- (2) The Registrar must give notice of the application to—
- (a) any person who is registered as the owner of an estate or interest likely to be affected by the application; and
 - (b) any other person the Court directs.
- (3) A person to whom a notice is given is entitled to appear and be heard as a party to the application.

Offences

184 Offences in relation to registration

- (1) A person commits an offence if the person—
- (a) with intent to defraud brings about the registration or notification of an instrument or information or a matter or thing under this Act; or
 - (b) with intent to defraud brings about the destruction, removal, deletion, or alteration of an instrument or information or a matter or thing registered or notified under this Act.
- (2) A person who commits an offence against **subsection (1)** is liable on conviction on indictment to imprisonment for a term not exceeding 7 years.

185 False statements

- (1) A person commits an offence if the person—
- (a) makes or gives or authorises the making or giving of a statement, certificate, or document under this Act knowing that it is false or misleading in a material particular

- or being reckless as to whether it is false or misleading in a material particular; or
- (b) omits or authorises the omission from a statement, certificate, or document under this Act of any information or matter knowing that the omission makes the statement, certificate, or document false or misleading in a material particular or being reckless as to whether it is false or misleading in a material particular.
- (2) A person who commits an offence against **subsection (1)** is liable on conviction on indictment to imprisonment for a term not exceeding 7 years.

Notices

186 Public notice

For the purposes of this Act, public notice of a matter relating to land means a notice that —

- (a) is published in the *Gazette* and in 1 or more newspapers circulating in the area where the land is located; and
- (b) gives sufficient information about the matter to enable persons who might respond to the notice to understand it.

187 Notice by Registrar to particular persons

- (1) A notice required by this Act to be given by the Registrar to a person may be given by—
- (a) delivering it to the person; or
- (b) delivering it to the person's usual home or business address; or
- (c) posting it to that person at the person's usual home or business address; or
- (d) if the person has given the Registrar a fax number for the purpose of receiving notices by fax, faxing it to that number; or
- (e) if the person has given the Registrar an email address for the purpose of receiving notices by email, emailing it to that address; or

- (f) if an instrument to which a notice relates was generated at an electronic workspace facility, sending or directing it to that facility; or
 - (g) any other prescribed method.
- (2) **Subsection (1)** applies unless a provision of this Act requires the notice to be given in a particular way.
- (3) In this section, **person** includes the authorised agent of a person.

188 Notice to Registrar

- (1) A notice required by this Act to be given to the Registrar may be given by—
- (a) posting it to a designated Land Registry Office; or
 - (b) if the Registrar has specified a fax number for the purpose of receiving notices of that class by fax, by faxing it to that number; or
 - (c) if the Registrar has specified an email address for the purpose of receiving notices of that class by email, by emailing it to that address; or
 - (d) if the Registrar has specified that notices of that class may be sent or delivered from an electronic workspace facility, by sending or delivering it from that facility; or
 - (e) any other prescribed method.
- (2) **Subsection (1)** applies unless a provision of this Act requires the notice to be given in a particular way.
- (3) The Registrar must give notice of the address of the designated land registry office—
- (a) in the *Gazette*; and
 - (b) in any other way the Registrar considers appropriate (for example, on an internet website maintained by the department).

189 When notices given

- (1) For the purposes of this Act, a notice is given,—
- (a) if sent by post, at the time when the notice would in the ordinary course of post be delivered;
 - (b) if sent by fax, at the time shown on the record of transmission:

- (c) if sent by email, at the time a record of transmission shows that it was received in the electronic communications system:
 - (d) if sent to or from an electronic workspace facility, at the time a record of transmission shows that it was received in the electronic communications system:
 - (e) in the case of any prescribed method, at the time prescribed.
- (2) However, a notice is not given to a person if it is proved that through no fault on the person's part, the notice was not received within the time specified in **subsection (1)**.
- (3) For the purposes of **subsection (1)(a)**, it is sufficient to prove that the notice was properly addressed and posted.
- (4) For the purposes of **subsection (1)(c) and (d)**,—
- (a) **electronic communications system** means,—
 - (i) in the case of an email system, the electronic communications system for sending and receiving email; and
 - (ii) in the case of an electronic workspace facility, the electronic communications system by which users of the facility can send and receive communications:
 - (b) **record of transmission** includes—
 - (i) an acknowledgement from an electronic communications system; or
 - (ii) the absence of notification that a transmission has not been received into or processed by an electronic communications system.

Plans

190 Registrar may require plans

- (1) The Registrar is not required to perform any of the following functions under this Act in relation to any land unless the land is adequately defined:
- (a) deal with an application:
 - (b) register an instrument:
 - (c) create or alter or cancel a record of title:
 - (d) note a record of title:

- (e) perform any other function under this Act in relation to land.
- (2) A person who wishes the Registrar to perform a function under this Act may present a plan defining any land for deposit under this section.
- (3) For the purposes of this Act, a plan is deposited—
 - (a) on the date recorded by the Registrar as the date on which the plan is deposited; or
 - (b) if the deposit of the plan depends on registration of an instrument or dealing, on the date recorded by the Registrar as the date of lodgement of the instrument or dealing.
- (4) In this section, land is adequately defined if—
 - (a) it is shown as a separate lot or a discrete area on a plan deposited under this section; and
 - (b) the plan is prepared for the particular function for which it is required; and
 - (c) the plan complies with the Cadastral Survey Act 2002.
- (5) This section is subject to any other enactment that makes different provision for spatially defining land for the purposes of registration under this Act.

191 Registrar may specify form of deposit document

- (1) The Registrar may specify the form of a document for a matter referred to in **subsection (2)** as a requirement for—
 - (a) the deposit of a plan under **section 190**; or
 - (b) the creation of a record of title; or
 - (c) any other prescribed matter.
- (2) The matters are:
 - (a) a consent, approval, or certificate;
 - (b) any matter that under this Act or any other enactment may be included in a document under this section.
- (3) A specified form may differ from a form prescribed by regulations for the same matter.
- (4) A form specified under **subsection (1)** for a consent, approval, certificate or other matter under this Act must be used for the consent, approval, certificate or other matter.

- (5) If a form is specified under **subsection (1)** for a consent, approval, certificate or other matter that under any enactment other than this Act may be included in a document under this section, the consent, approval, certificate or other matter may be given or done—
- (a) under the other enactment; or
 - (b) in the form specified by the Registrar under **subsection (1)**.
- (6) A form specified for the purposes of **subsection (1)(a)** must include a representation or reference—
- (a) that links it to the plan that is to be deposited; and
 - (b) gives the person approving or consenting appropriate information about the effect of depositing the plan; and
 - (c) indicates that person's approval or consent to the deposit of the plan.
- (7) A specified form—
- (a) may take the form of an electronic instrument; but
 - (b) must not be registered under this Act.
- (8) **Section 201(2) and (3)** apply to the specification of a form as if the form were a standard set under that section.

192 Cost of survey to correct plans

The Crown must meet the cost of a survey certified by the Surveyor-General as required to correct an error in a plan deposited under this Act or in a record of title.

Regulations

193 Regulations

The Governor-General may, by Order in Council, make regulations for all or any of the following purposes:

- (a) regulating the practice applying to and the conduct of dealings under this Act;
- (b) prescribing the forms required to be used by this Act, the information that must be contained in them, and the documents that must accompany them;
- (c) prescribing the periods of time for giving notices or within which any matter or thing must be done:

- (d) prescribing the manner in which instruments must refer to the register:
- (e) specifying classes of instruments that are exempt from the application of **section 44(1)**:
- (f) specifying procedures by which mortgagees may—
 - (i) prevent electronic instruments affecting estates or interests in land over which they hold a mortgage from being registered without their consent:
 - (ii) be notified of the registration of electronic instruments:
- (g) specifying the classes of electronic instruments and instruments in paper form that require certification:
- (h) authorising classes of persons who may certify instruments under this Act:
- (i) prescribing for each class of instrument the matters which must be certified, including all or any of the following matters—
 - (i) that the person giving the certificate has authority to act for the party specified in the regulations and that the party has the legal capacity to give the authority:
 - (ii) that the person giving the certificate has taken reasonable steps to confirm the identity of the person who gave the authority to act:
 - (iii) if statutory requirements have been specified by the Registrar for instruments of a particular class, that the instrument complies with those requirements:
 - (iv) that the person giving the certificate has evidence showing the truth of the certifications and that the evidence will be retained for a prescribed period:
- (j) prescribing the form of certificates:
- (k) prescribing the amount of a claim for compensation for the purposes of **section 23**:
- (l) prescribing information that must be recorded in the register under **section 26**:
- (m) specifying for the purposes of **section 45** the persons who must execute paper instruments, the manner in

which they must be executed, and the persons who must witness them:

- (n) prescribing for the purposes of **section 83** conditions and powers that are, on registration of a mortgage priority instrument, implied in a mortgage the priority of which is postponed:
- (o) prescribing the rights and powers implied in different classes of easements for the purposes of **section 92**:
- (p) prescribing the form of a memorandum under **section 176**:
- (q) specifying instruments that may, under **section 177**, be used with or without modification under any other enactment that provides for the registration or notification of any instrument or thing under this Act:
- (r) prescribing under **sections 187(1)(g) and 188(1)(e)** a method for giving notices:
- (s) prescribing under **section 189(1)(e)** the time when a notice is given:
- (t) specifying fees and charges under **section 194**:
- (u) providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect.

Fees and charges

194 Fees and charges

- (1) Regulations made under **section 193** may specify—
 - (a) the fees and charges payable for—
 - (i) the performance or exercise of functions, duties, or powers of the Registrar under this Act or any other enactment:
 - (ii) the performance or exercise of functions, duties, or powers of the chief executive under this Act:
 - (iii) the performance of functions of the chief executive in relation to the administration and operation of this Act including the provision of the register and other facilities and services by the chief executive:
 - (b) the fees and charges payable having regard to the costs and expenses incurred by the department of State for the

- time being responsible for the administration of the Cadastral Survey Act 2002 in providing a national survey control system for—
- (i) cadastral surveys supporting title to land under this Act; and
 - (ii) the maintenance of cadastral survey data:
- (c) the amount of those fees or charges or the method or rates by which they are to be assessed;
 - (d) the persons liable to pay the fees and charges;
 - (e) the circumstances in which and the person by whom the payment of the whole or part of the fees and charges may be remitted or waived;
 - (f) the manner in which the fees and charges are to be paid.
- (2) The chief executive or the Registrar may refuse to perform or exercise a function, duty, or power for which a fee is payable until—
 - (a) the fee has been paid; or
 - (b) the Registrar has accepted a credit arrangement for the payment of the fee.
 - (3) Despite **subsection (2)**, the Registrar may—
 - (a) dispense with payment of all or any part of a fee payable under this Act; or
 - (b) refund all or any part of a fee paid under this Act.
 - (4) Regulations made under **section 193** may prescribe—
 - (a) that interest is payable on an unpaid fee at the rate prescribed for the time being under section 87 of the Judicature Act 1908; and
 - (b) the circumstances and manner in which that interest is payable.

Land Registration Districts

195 Land registration districts

- (1) The land registration districts existing immediately before the commencement of this Act continue until altered under **subsection (2)**.
- (2) The Governor-General may, by Order in Council,—
 - (a) alter the boundaries of a district;
 - (b) amalgamate 2 or more districts:

- (c) create new districts:
 - (d) give a name to a district:
 - (e) abolish all districts.
- (3) Unless the Registrar considers it appropriate to do so, an Order in Council under **subsection (2)** does not require the Registrar to alter or amalgamate parts of the register, including a record of title, a qualified title, or a limited record of title.

Registrar-General of Land

196 Registrar-General of Land

- (1) There must be a Registrar-General of Land appointed under the State Sector Act 1988.
- (2) Unless the person is a barrister and solicitor of the High Court, no person may be—
- (a) appointed Registrar-General of Land; or
 - (b) directed under section 62(1) of the State Sector Act 1988 to exercise or perform a power or duty of the Registrar-General.
- (3) In exercising or performing the powers and duties of the Registrar, the Registrar and every delegate of the Registrar must have regard to the following objectives:
- (a) ensuring an efficient and effective system for registering dealings in land:
 - (b) managing the risk of fraud and improper dealings:
 - (c) ensuring public confidence in the land titles system:
 - (d) ensuring the maintenance of the integrity of the register and the right to claim compensation under **Part 3**.

197 Seal of office

- (1) The Registrar may have seal of office with the impression of the New Zealand Coat of Arms and the words “Registrar-General of Land, New Zealand”.
- (2) The seal may be electronic or mechanical.
- (3) An instrument bearing a representation of the Registrar’s seal and that appears to be issued by or on behalf of the Registrar is, in the absence of proof to the contrary, to be treated as having been issued by or under the direction of the Registrar.

198 Delegation of Registrar's duties and powers

- (1) The Registrar may delegate in writing any of the Registrar's duties and powers under this Act other than—
 - (a) a power or duty under any of **sections 23, 176(2)(b), 181, 183, 191, and 201**; or
 - (b) the power to delegate under this section.
- (2) A delegation may be made to—
 - (a) a specified person;
 - (b) persons of a specified class;
 - (c) the holder of a specified office.
- (3) A delegation may be—
 - (a) general; or
 - (b) specific; or
 - (c) limited to performing a duty or exercising a power in relation to a particular activity or operation or class of activity or operation.
- (4) A delegation may be made to a person whether or not that person is an employee of the department or of any other department or ministry of the public service.
- (5) A delegation—
 - (a) does not affect or prevent the performance of a duty or the exercise of a power by the Registrar;
 - (b) does not affect the responsibility of the Registrar for the actions of a person to whom a duty or power is delegated;
 - (c) may be revoked by the Registrar in writing;
 - (d) continues in force despite a change in the person holding office as Registrar;
 - (e) is subject to any directions or conditions imposed by the Registrar.
- (6) A person to whom a duty or power has been delegated may perform the duty or exercise the power in the same manner and with the same effect as if the duty or power had been conferred directly on the person by this Act.
- (7) A person to whom a duty or power is delegated must perform the duty or exercise the power in accordance with any standard set or directive issued by the Registrar under **section 201**.

- (8) A person who purports to act under a delegation is, in the absence of proof to the contrary, presumed to be acting in accordance with the delegation.
- (9) A person to whom a duty or power is delegated who is not an employee of the responsible department must, if requested to do so, produce evidence of the delegation.

199 Registrar not required to give certain evidence

- (1) Unless the Court makes an order requiring the Registrar or a delegate of the Registrar to do so, neither the Registrar nor a delegate is obliged to—
- (a) produce in Court evidence of information registered or recorded on the register or of an instrument registered or recorded on the register or in the custody of the Registrar or the delegate; or
 - (b) give evidence of any matter in Court.
- (2) The Court may not make an order under **subsection (1)** unless it is satisfied that—
- (a) the personal attendance of the Registrar or the delegate is necessary; and
 - (b) the evidence cannot be given by—
 - (i) the production of a copy of an instrument certified under **section 53(5)** or a record of title certified under **section 53(6)**; or
 - (ii) any other means.

200 Registrar and other persons not personally liable

- (1) Neither the Registrar nor a delegate of the Registrar is personally liable for any act or omission in performing or exercising or purporting to perform or exercise a duty, function, or power—
- (a) under this Act; or
 - (b) which the Registrar or delegate reasonably believed he or she could perform or exercise.
- (2) **Subsection (1)** does not apply if the Registrar or delegate acted or omitted to act in bad faith.

201 Registrar may set standards and issue directives

- (1) The Registrar may set standards and issue directives in relation to—
 - (a) the administration and operation of the register;
 - (b) dealings by practitioners and other persons authorised to give certificates under this Act;
 - (c) retention of evidence under **section 42** by practitioners and other persons authorised to give certificates under this Act;
 - (d) compliance by any person with a requirement under this Act.
- (2) The Registrar must not set a standard or issue a directive unless the Registrar—
 - (a) consults with any organisation that represents persons who will be affected by the standard or directive; and
 - (b) gives the organisation an opportunity to comment on the proposed standard or directive; and
 - (c) considers any comments made by the organisation.
- (3) The Registrar must—
 - (a) make copies of standards and directives available for purchase from the head office of the department; and
 - (b) publish standards and directives free of charge on an internet site maintained by the department.
- (4) Standards and directions are regulations for the purposes of the Regulations (Disallowance) Act 1989 but not for the purposes of the Acts and Regulations Publication Act 1989.

Part 16
Amendments, repeals, savings, and
transitional provisions

Amendments to Property Law Act 2007

202 Amendments to Property Law Act 2007

Section 203 amends the Property Law Act 2007.

203 New sections 307A to 307H inserted

The following sections are inserted after section 307:

“307A Covenants in gross

In sections 307B to 307H, covenant in gross in relation to land, means a covenant that—

- “(a) is contained in an instrument; and
- “(b) requires the covenantor to act or to refrain from acting in a particular way in relation to the occupation or use of the land or part of the land; and
- “(c) benefits another person; and
- “(d) is not attached to other land.

“307B Legal effect of covenant in gross

“(1) A covenant in gross, unless a contrary intention appears, is binding in equity on—

- “(a) every person who becomes the owner of the burdened land—
 - “(i) whether by acquisition from the covenantor or from any of the covenantor’s successors in title; and
 - “(ii) whether or not for valuable consideration; and
 - “(iii) whether by operation of law or in any other manner; and
- “(b) every person who is for the time being the occupier of the burdened land.

“(2) Every covenant in gross, unless a contrary intention appears, ceases to be binding on a person referred to in **subsection (1)** when that person ceases to be the owner or occupier of the burdened land but without prejudice to that person’s liability for breach of the covenant arising before that person ceased to be the owner or occupier of the land.

“(3) For the purposes of this section, a contrary intention must appear in the instrument in which the covenant is expressed.

“(4) This section overrides any other rule of law or equity, but is subject to **sections 307C and 307D**.

“307C Whether, and to what extent, administrator bound by covenant in gross to which section 307B applies

“(1) This section applies to an administrator of the estate of a person who was bound, at the time of that person’s death, by a covenant in gross to which **section 307B** applies.

- “(2) The administrator is bound by the covenant—
- “(a) only if assets of the estate are available in the administrator’s hand for meeting the obligations under the covenant; and
 - “(b) if so, only to the extent that they are so available.

“307D How rights under covenant to which section 307B applies rank in relation to other unregistered interests

- “(1) The rights under a covenant to which **section 307B** applies rank, in relation to all other unregistered interests affecting the same land, as if the covenant were an equitable and not a legal interest.
- “(2) The ranking, under **subsection (1)**, of rights under a covenant is subject to the effect of the notification of the covenant, under **section 307E** in the register (as defined in **section 5** of the Land Transfer Act **2010**).

“307E Notification of covenants in gross

- “(1) This section applies to a covenant in gross that burdens land under the Land Transfer Act **2010**.
- “(2) The Registrar may enter on the record of title created under **section 27** of the Land Transfer Act **2010** for the land burdened by a covenant in gross all or any of the following:
- “(a) a covenant to which this section applies:
 - “(b) an instrument purporting to affect the operation of a covenant notified under **paragraph (a)**:
 - “(c) a modification or revocation of a covenant notified under **paragraph (a)**.
- “(3) A covenant notified under **subsection (2)** is an interest notified on the register to which **section 9(b)** of the Land Transfer Act **2010**.
- “(4) Notification of a covenant under **subsection (2)** makes the covenant an interest of the kind specified in **subsection (3)**, but does not in any way give the covenant any greater operation than it would otherwise have.
- “(5) **Covenant in subsections (3) and (4)**, includes an instrument purporting to modify the operation, and a modification or revocation, of a covenant notified under **subsection (2)(a)**.

“307F Application for order under section 307G

- “(1) A person bound by a covenant in gross that is noted on a record of title in accordance with **section 307E** may apply to a court for an order under **section 307G** modifying or extinguishing the covenant.
- “(2) The application may be made in a proceeding brought by that person for the purpose, or in a proceeding brought by any person in relation to, or in relation to land burdened by, that covenant.
- “(3) The application must be served on —
- “(a) the territorial authority in accordance with relevant rules of court, unless the court directs otherwise on application for the purpose; and
 - “(b) any other persons, and in any manner, the court directs on an application for the purpose.

“307G Court may modify or extinguish covenant in gross

- “(1) On an application (made and served in accordance with **section 307F**) for an order under this section, a court may, by order modify or extinguish (wholly or in part) the covenant to which the application relates if satisfied that—
- “(a) the 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 occupation or use being made of the burdened land;
 - “(ii) the character of the neighbourhood;
 - “(iii) any other circumstances the court considers relevant; or
 - “(b) after reasonable enquiries have been made, the covenantee cannot be found
 - “(c) the continuation of the covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original covenantor and the covenantee at the time of its creation; or
 - “(d) every person entitled who is of full age and capacity—

- “(i) has agreed that the covenant should be modified or extinguished (wholly or in part); or
 - “(ii) may reasonably be considered, by act or omission, to have abandoned, or waived the right to, the covenant, wholly or in part; or
 - “(e) the proposed modification or extinguishment will not substantially injure any person entitled; or
 - “(f) the covenant is contrary to public policy or to any enactment or rule of law; or
 - “(g) for any other reason it is just and equitable to modify or extinguish the covenant, wholly or in part.
- “(2) An order under this section modifying or extinguishing the covenant may require the applicant for the order to pay to any other person specified in the order reasonable compensation determined by the court.
- “(3) Nothing in this section limits or affects the operation of any other enactment or rule of law under which a covenant in gross may be—
- “(a) declared void or voidable; or
 - “(b) set aside, cancelled or extinguished; or
 - “(c) modified or varied.

“307H Registration and recording of orders under section 307G

- “(1) The Registrar must enter on the record of title created under **section 27** of the Land Transfer Act **2010** for the land burdened by a covenant in gross all amendments or entries necessary to give effect to an order under **section 307G**.
- “(2) Those amendments and entries are, when so entered, binding on every person who is, or who later becomes, a person entitled, whether or not that person—
- “(a) was of full age and capacity at the time the order was made; or
 - “(b) was a party to the proceeding.”

204 Court may modify or extinguish easement or covenant

- (1) Section 317(1)(d) is amended by omitting “entitled”, and substituting “entitled; or”.
- (2) Section 317(1) is amended by adding the following paragraphs:

Part 16 cl 205

Land Transfer Bill

- “(e) in the case of a the covenant, the covenant is contrary to public policy or any enactment or rule of law; or
- “(f) in the case of a covenant, for any other reason it is just and equitable to modify or extinguish the covenant.”

*Repeal***205 Land Transfer Act 1952 repealed**

The Land Transfer Act 1952 is repealed.

*Savings provision***206 Covenants implied in certain mortgages and instruments**

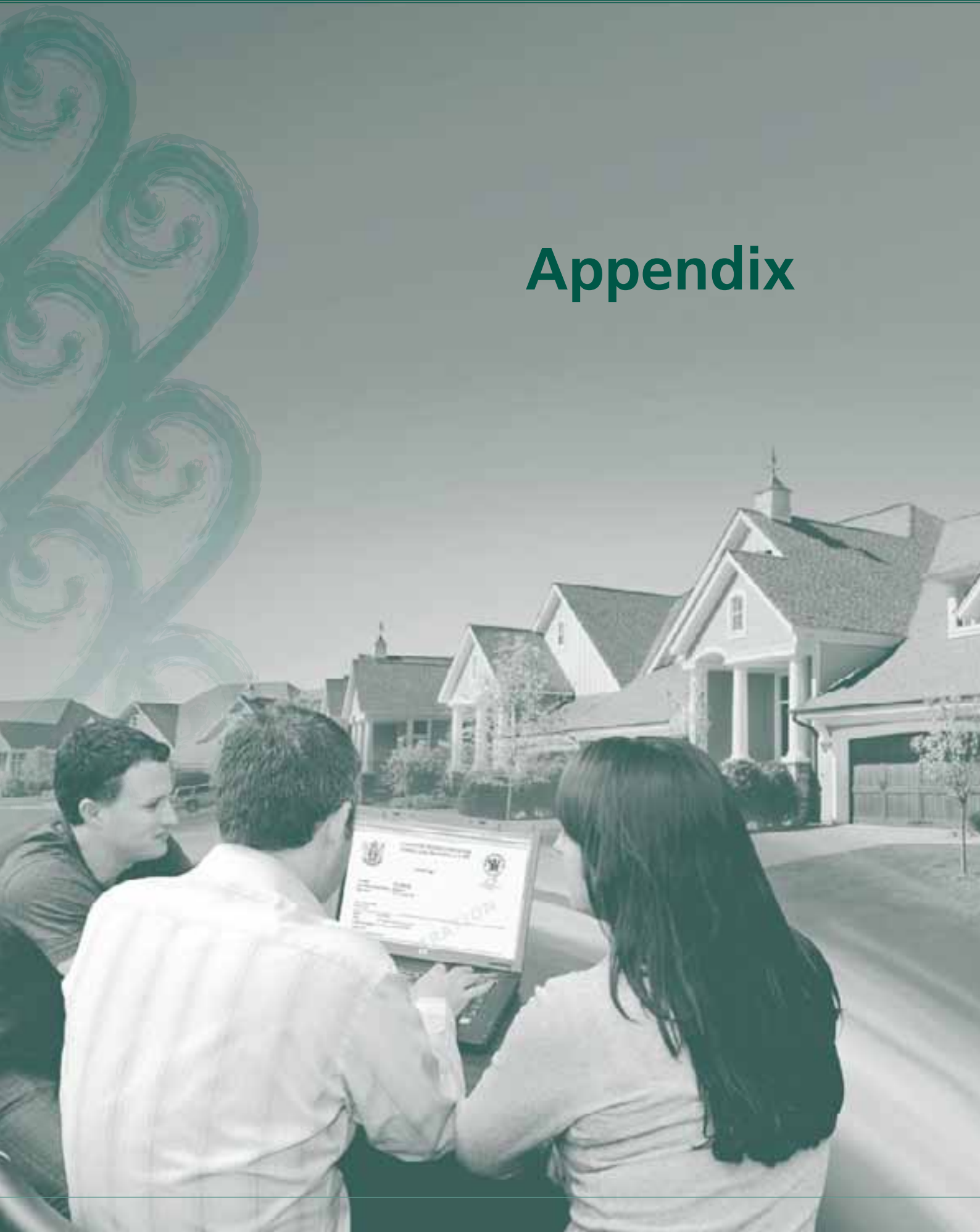
Despite the repeal of the Land Transfer Act 1952,—

- (a) the covenants, conditions, and powers set out in schedule 3 of the that Act that are implied in a mortgage the priority of which is postponed under section 103 of that Act continue to be implied in the mortgage as if that Act had not been repealed:
- (b) the covenants set out in full in schedule 4 of that Act continue to be implied in an instrument in which they were implied immediately before the repeal of that Act in accordance with section 155 of that Act as if that Act had not been repealed.

*Transitional provision***207 Application of Act to estates registered on provisional register under Land Transfer Act 1952**

Sections 29 to 31 apply with necessary modifications to an estate registered on the provisional register under section 50 of the Land Transfer Act 1952 and to any interest or other matter registered or notified under that section affecting that estate as if a qualified title had been created for the estate.

Appendix



Appendix

Comparative tables

The following tables set out:

- clauses of the Land Transfer Bill (the Bill) with the equivalents, if any, under existing legislation, that is, under the Land Transfer Act 1952 (LTA), the Land Transfer Amendment Act 1963 (the 1963 Act), the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 (the 2002 Act) and the Statutory Land Charges Registration Act 1928 (SLCRA);
- sections of the LTA with the equivalents, if any, under the Bill;
- sections of the 1963 Act with the equivalents, if any, under the Bill; and
- sections of the 2002 Act with the equivalents, if any, under the Bill.

The tables are intended to provide a general guide to the equivalent provisions in the other legislation. They do not provide any detail about subclauses or subsections. The commentary in Part 2 of the Report should be referred to where a more detailed discussion of a clause in the Bill is required. Sections of the Amendment Acts that amend the LTA are not included in the tables.

LAND TRANSFER BILL AND EQUIVALENTS UNDER EXISTING LEGISLATION	
Land Transfer Bill	Existing legislation
cl 1	s 1 LTA
cl 2	s 1 LTA
Part 1 Preliminary provisions	
cl 3	no equivalent
cl 4	s 10 LTA
cl 5	ss 2, 239 LTA; s 2 1963 Act; s 4 2002 Act
cl 6	s 2A LTA
Part 2 Title to land	
cl 7	ss 62, 63, 183 LTA
cl 8	s 182 LTA
cl 9	ss 62, 63, 79, 183 LTA
cl 10	s 77 LTA
cl 11	no equivalent
cl 12	no equivalent

LAND TRANSFER BILL AND EQUIVALENTS UNDER EXISTING LEGISLATION	
Land Transfer Bill	Existing legislation
cl 13	no equivalent
Part 3 Compensation	
cl 14	no equivalent
cl 15	s 172 LTA
cl 16	ss 172, 181 LTA
cl 17	s 172A LTA
cl 18	ss 60, 178 LTA
cl 19	s 179 LTA
cl 20	no equivalent
cl 21	s 175 LTA
cl 22	s 175 LTA
cl 23	ss 173, 174 LTA
Part 4 Land Title Register	
cl 24	s 33 LTA; s 5 2002 Act
cl 25	no equivalent
cl 26	no equivalent
cl 27	ss 7, 8, 9, 10, 11, 12, 13 2002 Act
cl 28	s 74 LTA
cl 29	s 50 LTA
cl 30	s 54 LTA
cl 31	s 51 LTA
cl 32	s 32 2002 Act
cl 33	ss 80, 81 LTA
cl 34	s 34 LTA; s 30 2002 Act
cl 35	s 76 LTA
cl 36	s 41 LTA
cl 37	s 22 2002 Act
cl 38	s 42 LTA; s 23 2002 Act
cl 39	ss 164, 164A LTA
cl 40	s 164B LTA
cl 41	s 164B LTA
cl 42	s 164C LTA
cl 43	s 164E LTA

LAND TRANSFER BILL AND EQUIVALENTS UNDER EXISTING LEGISLATION	
Land Transfer Bill	Existing legislation
cl 44	no equivalent
cl 45	s 157 LTA
cl 46	s 47 LTA
cl 47	s 37 LTA
cl 48	ss 41, 47 LTA
cl 49	ss 43, 148B LTA
cl 50	s 27 2002 Act
cl 51	s 28 2002 Act
cl 52	ss 45, 45A, 46 LTA; s 33 2002 Act
cl 53	ss 45, 75, 163 LTA; ss 34, 35 2002 Act
cl 54	ss 56, 57 LTA
cl 55	ss 215A, 215B LTA
cl 56	s 85 LTA
cl 57	s 86 LTA
cl 58	s 61 LTA
cl 59	no equivalent
cl 60	s 72 LTA
cl 61	s 165 LTA
cl 62	s 9 2002 Act
Part 5 Transfers, transmissions, and vesting	
cl 63	s 90 LTA
cl 64	ss 92, 93, 94 LTA
cl 65	s 97 LTA
cl 66	s 95 LTA
cl 67	s 122 LTA
cl 68	s 123 LTA
cl 69	s 99 LTA
cl 70	s 99A LTA
Part 6 Leases	
cl 71	ss 115, 119 LTA
cl 72	ss 116, 119 LTA
cl 73	s 116 LTA
cl 74	s 120 LTA
cl 75	s 117 LTA
cl 76	s 118A LTA
cl 77	s 118A LTA

LAND TRANSFER BILL AND EQUIVALENTS UNDER EXISTING LEGISLATION	
Land Transfer Bill	Existing legislation
cl 78	s 118 LTA
cl 79	s 121 LTA
Part 7 Mortgages	
cl 80	s 100 LTA
cl 81	s 101 LTA
cl 82	ss 102, 114 LTA
cl 83	s 103 LTA
cl 84	ss 105, 114 LTA
cl 85	ss 111, 114 LTA
cl 86	s 112 LTA
cl 87	s 113 LTA
Part 8 Easements, profits à prendre, and covenants under the Property Law Act 2007	
cl 88	s 90E LTA
cl 89	ss 90, 90A, 90B, 90E LTA
cl 90	ss 90A, 90E LTA
cl 91	ss 90B, 90E LTA
cl 92	s 90D LTA
cl 93	ss 90C, 90E LTA
cl 94	s 70 LTA
cl 95	s 70 LTA
cl 96	s 70 LTA
cl 97	s 90F LTA
Part 9 Statutory land charges	
cl 98	ss 3, 4, 8, 10 SLCRA
cl 99	s 6 SLCRA
cl 100	s 5 SLCRA
cl 101	s 7 SLCRA
cl 102	s 11 SLCRA
Part 10 Trusts and caveats	
cl 103	s 128 LTA
cl 104	s 129 LTA
cl 105	s 137 LTA
cl 106	s 142 LTA
cl 107	s 141 LTA
cl 108	s 141 LTA
cl 109	s 143 LTA

LAND TRANSFER BILL AND EQUIVALENTS UNDER EXISTING LEGISLATION	
Land Transfer Bill	Existing legislation
cl 110	ss 145, 145A LTA
cl 111	s 147 LTA
cl 112	ss 147, 147A LTA
cl 113	s 148 LTA
cl 114	s 148A LTA
cl 115	s 146 LTA
cl 116	s 211 LTA
cl 117	no equivalent
cl 118	no equivalent
cl 119	no equivalent
Part 11 Applications to bring land under Act	
cl 120	s 19 LTA
cl 121	ss 20, 25 LTA
cl 122	ss 23, 25, 26, 28 LTA
cl 123	s 136 LTA
cl 124	s 140 LTA
cl 125	s 142 LTA
cl 126	s 143 LTA
cl 127	s 144 LTA
cl 128	ss 58, 59, 144 LTA
cl 129	ss 58, 59 LTA
cl 130	s 29 LTA
cl 131	s 27 LTA
cl 132	s 30 LTA
cl 133	s 32 LTA
Part 12 Applications for title to land under this Act based on adverse possession	
cl 134	ss 3, 6 1963 Act
cl 135	s 14 1963 Act
cl 136	s 4 1963 Act
cl 137	s 4 1963 Act
cl 138	s 21 1963 Act
cl 139	s 5 1963 Act
cl 140	s 7 1963 Act
cl 141	s 8 1963 Act
cl 142	s 8 1963 Act
cl 143	no equivalent

LAND TRANSFER BILL AND EQUIVALENTS UNDER EXISTING LEGISLATION

Land Transfer Bill	Existing legislation
cl 144	s 9 1963 Act
cl 145	s 10 1963 Act
cl 146	s 11 1963 Act
cl 147	s 12 1963 Act
cl 148	s 15 1963 Act
cl 149	s 18 1963 Act
cl 150	s 17 1963 Act
Part 13 Title to access strips	
cl 151	s 89A LTA
cl 152	s 89A LTA
cl 153	s 89C LTA
cl 154	s 89C LTA
cl 155	no equivalent
cl 156	no equivalent
cl 157	no equivalent
cl 158	s 89A LTA
cl 159	s 89B LTA
cl 160	s 89B LTA
cl 161	ss 89A, 89D, 89E LTA
cl 162	s 89E LTA
Part 14 Special provisions relating to limited titles issued under Part 12 of the Land Transfer Act 1952	
cl 163	no equivalent
cl 164	s 191 LTA
cl 165	ss 193, 194 LTA
cl 166	s 191 LTA
cl 167	ss 198, 199 LTA
cl 168	s 195 LTA
cl 169	s 207 LTA
cl 170	s 203 LTA
cl 171	s 200 LTA
cl 172	s 204 LTA
cl 173	s 205 LTA
cl 174	s 205 LTA
Part 15 General provisions	
cl 175	s 154 LTA
cl 176	s 155A LTA

LAND TRANSFER BILL AND EQUIVALENTS UNDER EXISTING LEGISLATION	
Land Transfer Bill	Existing legislation
cl 177	s 99B
cl 178	s 150 LTA
cl 179	s 151 LTA
cl 180	s 152 LTA
cl 181	s 216 LTA
cl 182	ss 217, 218, 219, 223, 224 LTA
cl 183	s 222 LTA
cl 184	ss 225, 226 LTA
cl 185	ss 164, 225 LTA
cl 186	s 240 LTA; s 20 1963 Act
cl 187	s 240B LTA; s 20 1963 Act
cl 188	s 240C LTA; s 20 1963 Act
cl 189	s 240D LTA; s 20 1963 Act
cl 190	s 167 LTA
cl 191	s 167A LTA
cl 192	s 170 LTA
cl 193	s 236 LTA
cl 194	s 235 LTA
cl 195	s 3 LTA
cl 196	s 4 LTA
cl 197	s 6 LTA
cl 198	s 5 LTA
cl 199	s 241 LTA
cl 200	s 243 LTA
cl 201	s 240A LTA
Part 16 Amendments, repeals, savings, and transitional provisions	
cl 202	no equivalent
cl 203	no equivalent
cl 204	no equivalent
cl 205	no equivalent
cl 206	no equivalent
cl 207	no equivalent

LTA AND EQUIVALENTS UNDER LAND TRANSFER BILL

LTA	Land Transfer Bill
s 1	cls 1, 2
s 2	cl 5
Part 1 Administration	
s 2A	cl 6
s 3	cl 195
s 4	cl 196
s 5	cl 196
s 6	cl 197
Part 2 Land subject to this Act	
s 10	cl 4
s 11	no equivalent
s 12	no equivalent
s 13	no equivalent
s 14	no equivalent
s 15	no equivalent
s 16	no equivalent
s 17	no equivalent
s 18	no equivalent
s 19	cl 120
s 20	cl 121
s 21	no equivalent
s 23	cl 122
s 24	no equivalent
s 25	cls 121, 122
s 26	cl 122
s 27	cl 131
s 28	cl 122
s 29	cl 130
s 30	cl 132
s 31	no equivalent
s 32	cl 133
Part 3 Registration	
s 33	cl 24
s 34	cl 34
s 35	no equivalent
s 36	no equivalent

LTA AND EQUIVALENTS UNDER LAND TRANSFER BILL	
LTA	Land Transfer Bill
s 37	cl 47
s 38	no equivalent
s 39	no equivalent
s 40	no equivalent
s 41	cls 36, 48
s 42	cl 38
s 43	cl 49
s 44	no equivalent
s 45	cls 52, 53
s 45A	cl 52
s 46	cl 52
s 47	cls 46, 48
s 50	cl 29
s 51	cl 31
s 52	no equivalent
s 53	no equivalent
s 54	cl 30
s 56	cl 54
s 57	cl 54
s 58	cls 128, 129
s 59	cls 128, 129
s 60	cl 18
s 61	cl 58
s 62	cls 7, 9
s 63	cls 7, 9
s 64	no equivalent
Part 4 Certificate of title	
s 65	no equivalent
s 66	no equivalent
s 67	no equivalent
s 68	no equivalent
s 69	no equivalent
s 70	cls 94, 95, 96
s 71	no equivalent
s 72	cl 60
s 73	no equivalent

LTA AND EQUIVALENTS UNDER LAND TRANSFER BILL	
LTA	Land Transfer Bill
s 74	cl 28
s 75	cl 53
s 76	cl 35
s 77	cl 10
s 78	no equivalent
s 79	cl 9
s 80	cl 33
s 81	cl 33
s 82	no equivalent
s 83	no equivalent
s 84	no equivalent
s 85	cl 56
s 86	cl 57
s 87	no equivalent
s 88	no equivalent
s 89	no equivalent
Part 4A Title to access strips	
s 89A	cls 151, 152, 158, 161
s 89B	cls 159, 160
s 89C	cls 153, 154
s 89D	cl 161
s 89E	cls 161, 162
Part 5 Transfers	
s 90	cls 63, 89
s 90A	cls 89, 90
s 90B	cls 89, 91
s 90C	cl 93
s 90D	cl 92
s 90E	cls 88, 89, 90, 91, 93
s 90F	cl 97
s 91	no equivalent
s 92	cl 64
s 93	cl 64
s 94	cl 64
s 95	cl 66
s 97	cl 65

LTA AND EQUIVALENTS UNDER LAND TRANSFER BILL	
LTA	Land Transfer Bill
s 99	cl 69
s 99A	cl 70
s 99B	cl 177
Part 6 Mortgages	
s 100	cl 80
s 101	cl 81
s 102	cl 82
s 103	cl 83
s 105	cl 84
s 109	no equivalent
s 111	cl 85
s 112	cl 86
s 113	cl 87
s 114	cls 82, 84, 85
Part 7 Leases	
s 115	cl 71
s 116	cls 72, 73
s 117	cl 75
s 118	cl 78
s 118A	cls 76, 77
s 119	cls 71, 72
s 120	cl 74
s 121	cl 79
Part 7A Flat and office owning companies	
ss 121A–121P	no equivalent (new stand-alone Act)
Part 8 Transmissions, trusts, caveats, and powers of attorney	
s 122	cl 67
s 123	cl 68
s 125	no equivalent
s 126	no equivalent
s 128	cl 103
s 129	cl 104
s 130	no equivalent
s 131	no equivalent
s 132	no equivalent
s 133	no equivalent

LTA AND EQUIVALENTS UNDER LAND TRANSFER BILL	
LTA	Land Transfer Bill
s 135	no equivalent
s 136	cl 123
s 137	cl 105
s 140	cl 124
s 141	cls 107, 108
s 142	cls 106, 125
s 143	cls 109, 126
s 144	cls 127, 128
s 145	cl 110
s 145A	cl 110
s 146	cl 115
s 147	cls 111, 112
s 147A	cl 112
s 148	cl 113
s 148A	cl 114
s 148B	cl 49
s 149	no equivalent
s 150	cl 178
s 151	cl 179
s 152	cl 180
s 153	no equivalent
Part 9 General provisions as to instruments	
s 154	cl 175
s 155	no equivalent
s 155A	cl 176
s 156	no equivalent
s 157	cl 45
s 163	cl 53
s 164	cls 39, 185
s 164A	cl 39
s 164B	cls 40, 41
s 164C	cl 42
s 164D	no equivalent
s 164E	cl 43
s 165	cl 61
s 166	no equivalent

LTA AND EQUIVALENTS UNDER LAND TRANSFER BILL	
LTA	Land Transfer Bill
Part 10 Plans and surveys	
s 167	cl 190
s 167A	cl 191
s 168	no equivalent
s 169	no equivalent
s 170	cl 192
Part 11 Guarantee of title	
s 172	cls 15, 16
s 172A	cl 17
s 173	cl 22
s 174	cl 22
s 175	cls 21, 22
s 176	no equivalent
s 177	no equivalent
s 178	cl 18
s 179	cl 19
s 180	no equivalent
s 181	cl 16
s 182	cl 8
s 183	cls 7, 9
Part 12 Compulsory registration of titles	
s 184	no equivalent
s 185	no equivalent
s 186	no equivalent
s 187	no equivalent
s 188	no equivalent
s 189	no equivalent
s 190	no equivalent
s 191	cls 164, 166
s 192	no equivalent
s 193	cl 165
s 194	cl 165
s 195	cl 168
s 196	no equivalent
s 197	no equivalent
s 198	cl 167

LTA AND EQUIVALENTS UNDER LAND TRANSFER BILL	
LTA	Land Transfer Bill
s 199	cl 167
s 200	cl 171
s 201	no equivalent
s 202	no equivalent
s 203	cl 170
s 204	cl 172
s 205	cls 173, 174
s 206	no equivalent
s 207	cl 169
s 208	no equivalent
s 209	no equivalent
s 210	no equivalent
Part 13 General provisions	
s 211	cl 116
s 212	no equivalent
s 215	no equivalent
s 215A	cl 55
s 215B	cl 55
s 216	cl 181
s 217	cl 182
s 218	cl 182
s 219	cl 182
s 222	cl 183
s 223	cl 182
s 224	cl 182
s 225	cls 184, 185
s 226	cl 184
s 228	no equivalent
s 228A	no equivalent
s 235	cl 194
s 236	cl 193
s 237	no equivalent
s 238	no equivalent
s 239	cl 5
s 240	cl 186
s 240A	cl 201

LTA AND EQUIVALENTS UNDER LAND TRANSFER BILL	
LTA	Land Transfer Bill
s 240B	cl 187
s 240C	cl 188
s 240D	cl 187
s 241	cl 199
s 242	no equivalent
s 243	cl 200
s 245	Part 16
Schedules	
Schedule 1	no equivalent
Schedule 2	no equivalent
Schedule 3	no equivalent
Schedule 4	no equivalent
Schedule 5	no equivalent
Schedule 8	no equivalent

THE 1963 ACT AND EQUIVALENTS UNDER LAND TRANSFER BILL	
1963 Act	Land Transfer Bill
Part 1 Prescriptive title to land	
s 1	no equivalent
s 2	cl 5 LTA
s 3	cl 134
s 4	cls 136, 137
s 5	cl 139
s 6	cl 134
s 7	cl 140
s 8	cls 141, 142
s 9	cl 144
s 10	cl 145
s 11	cl 146
s 12	cl 147
s 13	no equivalent
s 14	cl 135
s 15	cl 148
s 16	no equivalent
s 17	cl 150
s 18	cl 149
s 19	no equivalent
s 20	cls 186, 187, 188, 189
s 21	cl 138

THE 2002 ACT AND EQUIVALENTS UNDER LAND TRANSFER BILL	
2002 Act	Land Transfer Bill
s 1	no equivalent
Part 1 Preliminary provisions	
s 2	no equivalent
s 3	no equivalent
s 4	cl 5
Part 2 Computer registers and electronic instruments	
s 5	cl 24
s 6	no equivalent
s 7	cl 27
s 8	cl 27
s 9	cl 27
s 10	cl 27
s 11	cl 27
s 12	cl 27
s 13	cl 27
s 14	no equivalent
s 15	no equivalent
s 16	no equivalent
s 17	no equivalent
s 18	no equivalent
s 19	no equivalent
s 20	no equivalent
s 21	no equivalent
s 22	cl 37
s 23	cl 38
s 24	no equivalent
s 25	no equivalent
s 26	no equivalent
s 27	cl 50
s 28	cl 51
s 29	no equivalent
s 30	cl 34
s 31	no equivalent

THE 2002 ACT AND EQUIVALENTS UNDER LAND TRANSFER BILL

2002 Act	Land Transfer Bill
s 32	cl 32
s 33	cl 52
s 34	cl 53
s 35	cl 53
s 36	no equivalent
s 37	no equivalent
s 38	no equivalent

This document was printed on Novatech Paper. This is an environmentally friendly stock that originates from sustainable well managed forests. Produced at Nordland Papier paper mill, which holds both FSC and PEFC chain of custody certificates. (Reg. No. SGS-COC-2249) ISO 14001 environmental management systems certified. The mill is registered under the EU Eco-management and Audit Scheme EMAS. (Reg. No.D – 162 – 00007). The paper bleaching process is Elemental Chlorine Free, and Acid Free.

The HIT Pantone inks used in production of this report are vegetable oil based with only 2 percent mineral content, and are created from 100% renewable resources. The wash used with these inks was Bottcherin 6003, which is entirely CFC and Aromatic free.

