

Land Transfer Act 2017

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I INTRODUCTION

The Land Transfer Act 2017 (LTA 2017) was passed on 10 July 2017¹ and is expected to come into force in late 2018.² The Act will replace the Land Transfer Act 1952 (LTA 1952) and its amendments.³ The Act will also revoke the Land Transfer Regulations 2002 and orders relating to the LTA 1952.⁴ New regulations are forthcoming⁵ and new orders, standards and directives will follow.⁶ With the exception of the Property Law Act 2007 (PLA 2007),⁷ other statutes tend to be affected by changes in terminology only.⁸

In this legislation note, I explain the reform process and introduce some of the changes. Part II outlines the reform process. Part III canvasses the changes relating to indefeasibility of title. Part IV notes other changes and proposals for change that were not adopted. I conclude that the LTA 2017 sets a stable legislative foundation for updates to the land transfer system, including the project to replace Landonline.

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1 Land Transfer Act 2017 [LTA 2017].

2 See Land Information New Zealand *Report on Submissions: Submissions received on proposed standards and a directive for the Land Transfer Act 2017* (8 August 2018) at 2. Any provision that has not been brought into force earlier will come into force on 10 January 2019. LTA 2017, s 2(3).

3 Land Transfer Amendment Act 1963 [LTAA 1963]; and Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 [CRELA 2002]. See LTA 2017, s 248.

4 See LTA 2017, s 249.

5 The Governor-General is empowered to make new regulations for the purposes set out in LTA 2017, s 227. Land Information New Zealand (LINZ) invited submissions on the exposure draft of the Land Transfer Regulations 2018 in March and April 2018. Land Information New Zealand *Secondary Legislation for the Land Transfer Act 2017: Consultation document* (5 March 2018) at 5. See Land Transfer Regulations 2018 (Draft for Consultation). See also Land Information New Zealand *Summary of Submissions: Submissions received on secondary legislation for the Land Transfer Act 2017* (9 August 2018).

6 The Registrar-General of Land is empowered to set standards and issue directives under LTA 2017, s 236. Six standards and one directive have been proposed. Submissions on the standards and directive focussed on the Identity Verification Standard 2018. See Land Information New Zealand *Report on Submissions: Submissions received on proposed standards and a directive for the Land Transfer Act 2017*, above n 2, at [4.1].

7 The LTA 2017 amends the provisions in the Property Law Act 2007 [PLA 2007] relating to covenants in gross. See LTA 2017, ss 237–246. See also Jody L Foster “The Interrelationship of the Property Law Act 2007 and the Land Transfer Act 2017” (paper presented to New Horizons for Torrens: Current Reforms, Emerging Issues, Auckland, August 2018). Foster discusses the impact of provisions in the Property Law Act 2007 relating *inter alia* to leases, mortgages, easements, profits-à-prendre, covenants, special powers of the court, and defects in court orders, on land under the LTA 2017.

8 See generally LTA 2017, sch 2.

II A NEW LAND TRANSFER ACT

The LTA 1952 was drafted in the context of the paper-based land transfer system.⁹ With the enactment of the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 (CRELA 2002), which heralded the Landonline database for titles and surveys, and a new system of electronic registration and e-dealing,¹⁰ land registration became “almost exclusively” electronic.¹¹ However, the LTA 1952, expressed as it was in the language of a bygone era, remained the principal land transfer Act, and practitioners, courts and academics, as well as lay vendors and purchasers, were required to re-interpret and apply the Act in the context of the computer-based land transfer system.¹² By 2017, the land transfer legislation was overdue to be consolidated, simplified and modernised.¹³

The Property Law Act 1952 (PLA 1952) and the LTA 1952 were introduced together and considered complementary.¹⁴ However, they would be reviewed separately.

The review of the PLA 1952 was underway by the early 1990s¹⁵ and the Law Commission’s final Report was published in June 1994.¹⁶ However, progress soon slowed and legislation would not be introduced for another decade.¹⁷ Eventually, the Property Law Bill 2006 was introduced on 30 October 2006, received Royal assent on 4 October 2007 and came into force on 1 January 2008.¹⁸ The Bill was based largely on the Law Commission’s draft Bill.¹⁹ However, the long “gestation period”²⁰ meant that some of the

9 The LTA 1952 was derivative of even earlier land transfer legislation. See generally the Land Transfer Acts Compilation Act 1915. See also the Land Transfer Act 1870, Land Transfer Act 1885 and Land Transfer Act 1908. The Land Transfer Act 1870 introduced the Torrens system to New Zealand. In doing so, it repealed the earlier Land Registry Act 1860, which was generally unpopular and accused of being more appropriate for the “necessities” of English title to land rather than the “circumstances” of New Zealand title to land. See, for example, James Edward FitzGerald “The Land Registry Act, 1860” *The Press* (Canterbury, 14 June 1862) at 1.

10 CRELA 2002. The process of converting physical records into digital records began a few years earlier. See the Land Transfer (Automation) Amendment Act 1998.

11 Law Commission *A New Land Transfer Act* (NZLC R116, 2010) at [1.3]. The Law Commission wrote the Report with the assistance of LINZ.

12 John Burrows “Release of the Law Commission’s Report on the Review of the Land Transfer Act 1952” (press release, 20 July 2010): “The result is a mix of hopelessly outdated and obscure provisions alongside more effective modern provisions, some reflecting only the paper registration system and others focussed on electronic registration, with considerable duplication and lack of clarity.”

13 See Land Information New Zealand *Land Transfer Bill* (Departmental Disclosure Statement, 19 November 2015) at 3.

14 See (2 October 1952) 298 NZPD 1731; and (15 October 1952) 298 NZPD 1934.

15 Law Commission *The Property Law Act 1952* (NZLC PP16, 1991).

16 Law Commission *A New Property Law Act* (NZLC R29, 1994).

17 The standstill seems to have been at least partly due to resistance from the Government. The Rt Hon Sir Peter Blanchard QC, who served as a Commissioner for *A New Property Law Act*, writes that the Law Commission “found itself contending with an unwilling, even obstructive, law reform division in the old Department of Justice which did not welcome the draft Property Law Act”. Peter Blanchard “Reform of the Land Transfer Act” (paper presented to New Horizons for Torrens: Current Reforms, Emerging Issues, Auckland, August 2018) at 2.

18 Property Law Bill 2006 (89-1).

19 See Law Commission *A New Property Law Act*, above n 16, at 33–252.

20 (10 October 2006) 634 NZPD 5561.

Law Commission's recommendations had been superseded and new reforms were needed to address issues that had arisen since 1994.²¹

Shortly after the PLA 2007 was enacted, the Minister of Justice approached the Law Commission to lead a review of the LTA 1952, with the assistance of Land Information New Zealand (LINZ) and the Ministry of Justice.²² The Law Commission established a steering committee, and the members of the committee met monthly with the Commissioners to discuss issues and comment on Report drafts.²³ The Rt Hon Sir Peter Blanchard QC recounts the process:²⁴

When the Report was being prepared the committee ... was provided with George Tanner's draft clauses of the Bill in advance of its meetings, enabling, where necessary, a line by line discussion of those proposed provisions. The LINZ representatives were able to ensure that the drafting would enable the registry to operate efficiently in accordance with the proposed legislation instead of having to strain to make its practices fit with the wording of the Act, as has sometimes been the case with the 1952 Act. ... [T]he participation of the [New Zealand] Law Society meant that it could give the Commission the benefit of its practical expertise during the process, rather than having to try to argue for amendments after the [R]eport was published or during the parliamentary process.

The Law Commission produced the Issues Paper on 10 October 2008.²⁵ The Issues Paper reviewed conceptual and technical issues with the land transfer system. In tone, it reflected the committee's view that "the system was generally working well".²⁶

On 20 July 2010, having sought and considered submissions on the Issues Paper,²⁷ the Law Commission published its final Report.²⁸ The Report

21 See (14 November 2006) 635 NZPD 6460–6461.

22 Blanchard, above n 17, at 2. Blanchard notes the collegiality of the three agencies, and comments on the important contributions of Law Commission President The Rt Hon Sir Geoffrey Palmer QC and retired Chief Parliamentary Counsel George Tanner QC.

23 At 2–3. The members of the steering committee were: The Rt Hon Sir Peter Blanchard QC (Supreme Court of New Zealand), Julia Agar (Ministry of Justice), Robbie Muir, Warren Moyes, David Kelliher and Debbie Buck (LINZ), and George Tanner QC and Professor John Burrows QC (Law Commissioners). Law Commission *A New Land Transfer Act*, above n 11, at v.

24 Blanchard, above n 17, at 3–4.

25 Law Commission *Review of the Land Transfer Act 1952* (NZLC IP10, 2008) [*Issues Paper*]. The Commission wrote the Issues Paper with the assistance of LINZ. Elizabeth Toomey was the peer reviewer. See Blanchard, above n 17, at 3.

26 Blanchard, above n 17, at 5. According to Blanchard, the Issues Paper took "a conservative approach" and made it clear that the Commission "was unlikely to be proposing anything very radical". At 5.

27 Law Commission *Issues Paper*, above n 25, at vi. Submissions were due 19 December 2008. Blanchard recalls that the submissions were "generally supportive of the Commission's provisional views" and this meant that George Tanner could "move straight away to the drafting of a bill". Blanchard, above n 17, at 6.

28 Law Commission *A New Land Transfer Act*, above n 11. The Law Commission tabled the Report in Parliament the next day. "Government welcomes review of Land Transfer Act" (press release, 21 July 2010). But see Land Information New Zealand *Law Commission Report – A New Land Transfer Act* (Regulatory Impact Statement) at 1, which gives another date for the Report being tabled. According to Blanchard, the Report went to the Minister of Justice a month earlier in June 2010. Blanchard, above n 17, at 7 and 20.

made 25 recommendations for the Government²⁹ and presented a model Land Transfer Bill.³⁰

In the same year, the Minister for Land Information asked Cabinet to agree to the recommendations, and to issue drafting instructions to the Parliamentary Counsel Office to prepare a Bill to implement the recommendations.³¹ In November 2010, Cabinet agreed to adopt all of the recommendations³² and invited drafting instructions for a Land Transfer Bill based on the model Bill.³³ The Minister for Land Information issued drafting instructions in September 2011,³⁴ and a Bill was drafted that year.³⁵ However, the Bill was not introduced into the House.³⁶ The Minister for Land Information hoped that the draft Bill would be introduced and referred to a select committee by the end of 2012.³⁷ However, it was not long before Cabinet considered additional policy proposals and agreed to issue new drafting instructions,³⁸ and the target was missed.

In 2013, key industry stakeholder groups and government agencies were consulted on an exposure draft Bill.³⁹ The consultation process resulted in minor changes to policy decisions made by Cabinet in 2010 and to two new policy proposals.⁴⁰ In 2015, the Minister for Land Information sought

29 Law Commission *A New Land Transfer Act*, above n 11, at 4–5.

30 At 199–314. Elizabeth Toomey, who was the peer reviewer for the draft Issues Paper, also provided feedback on the draft Report and model Bill. See Blanchard, above n 17, at 3. The New Zealand Law Society, which had already made submissions on the Issues Paper, made a further submission on the model Bill. See New Zealand Law Society “Submission to Land Information New Zealand on the Land Transfer Act Review – Government Response” (11 October 2010) in Ian Haynes, Robbie Muir and Elizabeth Toomey “Torrens in the Digital Age – A New Land Transfer Act” (paper presented to New Zealand Law Society Property Law Conference, 23–24 June 2014) 3, Appendix 2 at 51–57.

31 Maurice Williamson *Law Commission Report – A New Land Transfer Act* (Minister for Land Information, Cabinet Paper) at [1]–[4]. LINZ provided an analysis of options to implement the recommendations. See generally Land Information New Zealand, above n 28.

32 Maurice Williamson “Bill to modernise land transfer legislation announced” (press release, 18 November 2010). But see Maurice Williamson *Land Transfer Bill – Additional Policy Approvals* (Minister for Land Information, Cabinet Paper) at [1].

33 See Louise Upston *Land Transfer Bill – Minor Changes to 2010 Policy Decisions and Additional Policy Decisions* (Minister for Land Information, Cabinet Paper, 2015) at [2].

34 Williamson *Additional Policy Approvals*, above n 32, at [33].

35 Law Commission *Briefing Paper for the Minister Responsible for the Law Commission* (December 2011) at [61].

36 At [61].

37 Williamson *Additional Policy Approvals*, above n 32, at [33].

38 Upston, above n 33, at [6].

39 At [9]. The Law Society made several submissions on the model Bill. New Zealand Law Society “Submission to Land Information New Zealand on the Land Transfer Bill – Exposure Draft” (31 May 2013) in Ian Haynes, Robbie Muir and Elizabeth Toomey “Torrens in the Digital Age – A New Land Transfer Act” (paper presented to New Zealand Law Society Property Law Conference, 23–24 June 2014) 3, Appendix 1 at 35–49. Some of the submissions are mentioned in this note. Other submissions include that encumbrances should be retained, that covenants in gross should have broader protection, and that Parliament should review the definitions of “land”, “mortgage” and “unique identifier”. The Law Society made similar submissions in 2010. See generally New Zealand Law Society “Submission to Land Information New Zealand on the Land Transfer Act Review – Government Response”, above n 30.

40 The changes to Cabinet’s earlier policy decisions related to compensation, mortgagee consents required to vary cross lease provisions, use of encumbrances to secure covenants in gross, liability of administrators for costs arising from covenants, and the maximum penalty for making false statements. Upston, above n 33, at [9]–[36]. The new policy proposals related to the adverse possession process for land in limited title, and privacy protections for those with personal information on the land transfer register. At [37]–[43]. The policy changes and proposals were

Cabinet's agreement to these proposals⁴¹ and the Bill was updated. By then, Cabinet was aiming for the Bill to be passed by the end of 2015.⁴²

The Bill was finally introduced to Parliament on 11 February 2016,⁴³ and it was referred to the Government and Administration Committee on 15 March 2016,⁴⁴ where it received 20 submissions.⁴⁵ It took over another year for the Bill to receive Royal assent on 10 July 2017.

The LTA 2017 adopts most of the Law Commission's recommendations. However, some recommendations were superseded as a result of policy decisions,⁴⁶ supplementary order papers⁴⁷ and revisions during the lengthy parliamentary process.⁴⁸ The reforms include substantive changes, as well as stylistic and structural changes.⁴⁹ Part III will canvass changes relating to indefeasibility of title. Part IV will note other changes, as well as proposals for change that were not adopted.

accompanied by another regulatory impact analysis. See Cindy O'Brien *Land Transfer Bill – Minor Changes to 2010 Policy Decisions and Additional Policy Decisions* (Regulatory Impact Statement, 20 March 2015).

41 See generally Upston, above n 33.

42 The Bill was allocated a category three priority in the 2015 Legislation Programme. See Upston, above n 33, at [6]. The Legislation Programme dictates that category one bills must be passed or introduced within the year as a matter of law; category two bills must be passed within the year; and category three bills should be passed within the year if possible. Cabinet Office "About the Legislation Programme" (18 July 2017) Department of the Prime Minister and Cabinet <www.dPMC.govt.nz>.

43 Land Transfer Bill 2016 (118-1). Blanchard suggests that some of the delay was due to the Exposure Draft being made available for public comment, and clauses in the Law Commission's model Bill being re-ordered. See Blanchard, above n 17, at 20.

44 See the Land Transfer Bill 2016 (118-2) (as reported from the Government Administration Committee) [Land Transfer Bill Commentary] at 8.

45 At 8. Submissions closed on 28 April 2016. See, for example, New Zealand Law Society "Land Transfer Bill" (submission to the Government and Administration Committee, 20 May 2016).

46 See, for example, Upston, above n 33.

47 Supplementary Order Paper 2016 (249) Land Transfer Bill 2016 (118-2) *inter alia* extended the "backstop" date for the commencement of the Bill; corrected drafting errors; simplified clauses; omitted amendments that were no longer necessary; re-inserted references that were omitted in error; corrected cross-references; amended clauses relating to caveats, fees and charges, applications for title to access strips, and the re-entry of leased land; amended the Building Act 2004; and updated references in Te Ture Whenua Māori Act 1993, and other enactments, to the LTA 1952 and regulations made under it. Supplementary Order Paper 2016 (252) Land Transfer Bill 2016 (118-2) superseded Supplementary Order Paper 2016 (249) to add an amendment to the clause that would become LTA 2017, s 54(1). Supplementary Order Paper 2017 (313) Land Transfer Bill 2016 (118-3) proposed the deletion of the clause that would become LTA 2017, s 55(3). Supplementary Order Paper 2017 (314) Land Transfer Bill 2016 (118-3) proposed a new clause that would have required mortgagees to verify the identity of mortgagors. The Government Administration Committee later removed this requirement. Land Transfer Bill Commentary, above n 44, at 3. Supplementary Order Paper 2017 (323) Land Transfer Bill 2016 (118-3) corrected minor drafting errors. Supplementary Order Paper 2017 (325) Land Transfer Bill 2016 (118-3) proposed a new clause that would have required the Registrar to keep a *foreign ownership of land* register.

48 For example, the Government Administration Committee recommended against imposing "a new requirement on mortgagees to take reasonable steps to verify the identity of the mortgagor and the identity and authority of any person who executes the mortgage". Land Transfer Bill Commentary, above n 44, at 3.

49 The Law Commission surveyed three models for the structure. See Law Commission *Issues Paper*, above n 25, at ch 12. The adopted model is based on the LTA 1952 incorporating the LTAA 1963 and CRELA 2002, but draws on the other two models, for instance, by setting out clear principles at the outset and allowing regulations to add more detail. Law Commission *A New Land Transfer Act*, above n 11, at [1.6]–[1.8].

III INDEFEASIBILITY AND EXCEPTIONS

Indefeasibility

In *Frazer v Walker*, the Privy Council affirmed the principle of immediate indefeasibility.⁵⁰ Since that case, New Zealand courts have interpreted indefeasibility as immediate.⁵¹ However, the strict adherence to the principle has not been without criticism.⁵²

The prospect of new land transfer legislation provided an opportunity for the Law Commission to re-evaluate indefeasibility and for the legislature to confirm in the land transfer legislation how indefeasibility should be interpreted.

The Law Commission's provisional view was that the LTA 2017 should adhere to the principle of immediate indefeasibility and ensure "no possibility of a deferred indefeasibility interpretation".⁵³ However, the Law Commission acknowledged "persuasive arguments" for overturning the principle⁵⁴ and invited submissions on options for reform, including "deferred indefeasibility",⁵⁵ "immediate indefeasibility with limited judicial discretion"⁵⁶ and "immediate indefeasibility with specific statutory exceptions".⁵⁷

Interestingly, the submissions established no consensus. The Law Commission reported that "only a minority of submitters" favoured the status quo and "some" others favoured deferred indefeasibility.⁵⁸ It was an alternative option that received the most favourable submissions: "immediate indefeasibility with limited judicial discretion".⁵⁹ George W Hinde suggested this approach only a few years after *Frazer v Walker*.⁶⁰ It had since been

50 *Frazer v Walker* [1967] NZLR 1069 (PC).

51 See, for example, *Housing Corp of New Zealand v Maori Trustee* [1988] 2 NZLR 662 (HC) at 671; *Registrar-General of Land v Marshall* [1995] 2 NZLR 189 (HC) at 196; and *Nathan v Dollars & Sense Finance Ltd* [2007] NZCA 177, [2007] 2 NZLR 747 at [138].

52 See, for example, Struan Scott "Indefeasibility of Title and the Registrar's 'Unwelcome' S81 Powers" (1999) 7 *Canta LR* 246 at 246; and Elizabeth Toomey "Fraud and Forgery in the 1990s: Can our Adherence to *Frazer v Walker* Survive the Strain?" (1994) 5 *Canta LR* 424 at 428 and 435.

53 See Law Commission *Issues Paper*, above n 25, at [2.72].

54 At [2.72]. See at [2.72]–[2.78]; and Law Commission *A New Land Transfer Act*, above n 11, at [2.4]–[2.16].

55 See *Gibbs v Messer* [1891] AC 248 (PC).

56 See Anthony Mason "Indefeasibility – Logic Or Legend?" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 3 at 17–19.

57 See Douglas J 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) 258 at 276.

58 Law Commission *A New Land Transfer Act*, above n 11, at [2.9].

59 At [2.10]. The Report elaborates that there was now "widespread support" for "relaxing" the principle of immediate indefeasibility. At 82. But see Property Law and Equity Reform Committee *The Decision in Frazer v Walker* (Wellington, 1977) at 11. The Committee concluded that there was no compelling case to relax the principle.

60 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 76.

implemented in other Torrens statutes⁶¹ and received support from notable commentators.⁶²

In its Report, the Law Commission recommended that the new legislation should reject deferred indefeasibility and adopt the option for reform of “immediate indefeasibility with limited judicial discretion”, arguing that “the interests of justice [would] substantially outweigh transactional certainty in the few cases where discretion would need to be exercised”.⁶³

The LTA 2017 broadly follows the Law Commission’s recommendations. First, it rejects deferred indefeasibility: s 51 provides that a person, on registration as the owner of an estate or interest in land, obtains a title that cannot be set aside, unless an exception applies.⁶⁴ Secondly, it *appears* to affirm immediate indefeasibility.⁶⁵ Finally, it gives the courts a limited judicial discretion to alter the register in favour of a previous registered owner in cases of manifest injustice.⁶⁶

Exceptions to Indefeasibility

In *Frazer v Walker*, Lord Wilberforce noted that indefeasibility “does not involve that the registered [owner] is protected against any claim whatsoever”.⁶⁷ Registered title is paramount unless an exception applies.

The LTA 2017 reaffirms existing exceptions, including exceptions for estates and interests registered or noted on the title,⁶⁸ estates or interests under a prior record of title,⁶⁹ estates or interests of another registered owner included in the record of title due to an incorrect description of boundaries⁷⁰ and omissions or mis-descriptions in the record of title of easements.⁷¹ The LTA 2017 also includes an exception for overriding statutes,⁷² which was not stipulated in the LTA 1952, but had become reasonably settled in the common law.⁷³

61 See, for example, Land Title Act 1994 (Qld), s 187; and Land Registration Act SNS 2001 c 6, s 35(5).

62 See, for example, Mason, above n 56, at 19.

63 See Law Commission *A New Land Transfer Act*, above n 11, at [2.16].

64 Compare LTA 1952, ss 62, 63 and 64. *Gibbs v Messer*, above n 55, is also overruled. LTA 2017, s 51(4)(b) confirms that a purchaser from an apparently fictitious person will obtain good title.

65 LTA 2017, s 51 affirms immediate indefeasibility. But the LTA 2017 as a whole does not affirm immediate indefeasibility because the judicial discretion disaffirms the prevailing normative value of immediate indefeasibility, which is transactional certainty. See Jayden Houghton “Immediate Indefeasibility with Transactional Uncertainty” (forthcoming).

66 LTA 2017, s 55.

67 *Frazer v Walker*, above n 50, at 1075 per Lord Wilberforce.

68 LTA 2017, ss 51(2) and 52(1)(b). Compare LTA 1952, s 62(1).

69 LTA 2017, s 52(1)(c). Compare LTA 1952, s 63(1)(e).

70 LTA 2017, s 52(1)(d). Compare LTA 1952, ss 62(1)(b) and 62(1)(c).

71 LTA 2017, s 52(1)(e). Compare LTA 1952, s 62(1).

72 LTA 2017, s 51(3)(b). A statute can expressly override the LTA 2017. But the LTA 2017 does not resolve whether a statute can override the LTA 2017 by implication.

73 See *Miller v Minister of Mines* [1963] NZLR 560 (PC). But see *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [138], where Tipping J argues that the “fundamental importance of indefeasibility of title” requires that a statute only overrides the Land Transfer Act if that is expressly stated in the statute or if the terms of the statute make it necessary to imply that.

The exception for adverse possessory title by *prescription* is unchanged in substance.⁷⁴ The exception for adverse possessory title by *limitation* is also largely unchanged in substance and continues to apply to both Deeds system land and Land Transfer land.⁷⁵ However, an adverse possessor of full title land no longer has a defence to a claim to recover land if the adverse possession had run its course before the land was brought under the LTA 1952.⁷⁶ The LTA 2017 also clarifies that the 20 year period does not run while the registered owner is incapacitated or a minor.⁷⁷

In this section, I discuss how the LTA 2017 affects the fraud exception, the Registrar's powers to correct the register, and the position of volunteers. I also briefly introduce the new exception in cases of manifest injustice.

1 Land Transfer Fraud

(a) Fraud

Fraud is an exception to indefeasibility. The exception arises where a person registers their title to a property and another person with an adverse interest claims the new registered owner would not have become the registered owner but for fraud, such that the new registered owner cannot take the benefit of indefeasibility.

The courts have made broad statements about what amounts to fraud.⁷⁸ Fraud must be either committed by the registered owner (or their agent) or brought home to the registered owner (or their agent).⁷⁹ The

74 The adverse possessor needs to prove uninterrupted use of Land Transfer land for 20 years plus continued possession of the land until applying for title. See LTA 2017, s 155(1). Compare LTAA 1963, s 3. However, the true owner can lodge a caveat to end the process at any time before the adverse possessor applies for title, or, if the adverse possessor has applied for title, before the end of the period prescribed by the Registrar in the s 161 notice. LTA 2017, ss 161(2) and 162. Compare LTAA 1963, s 8.

75 An adverse possessor of land continues to have a defence to a claim to recover land with a limited title if the adverse possession ran its course or if the adverse possession started when the land was brought under the Land Transfer Act and then continued for total of 12 years. LTA 2017, ss 51(3)(a), 200(4) and 204(1)(a). Compare LTA 1952, ss 199(1)(d), 199(3) and 200. See Limitation Act 2010, ss 21 and 27.

76 See LTA 1952, s 79. Previously, an adverse possessor of land would have a defence to a claim to recover the land if the adverse possession had run its course before the land was brought under the LTA 1952. The defence applied to land with a full title, as well as to land with a limited title. See LTA 1952, s 79. Interestingly, the Law Commission did not seem to foresee that this defence would be omitted from the LTA 2017. The Report does not justify or explain it being removed, and the Report even suggests that the Law Commission believed LTA 1952, s 79 was being affirmed. See *A New Land Transfer Act*, above n 11, at 80, 213–214 and 325.

77 LTA 2017, s 155(5). See LTA 2017, ss 157 and 158.

78 See *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC); *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1923] NZLR 1137 (CA) at 1155 per Hosking J and 1175 per Salmond J; and *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1926] AC 101 (PC) at 106–107 per Lord Buckmaster. These cases became synonymous with the test for fraud and were widely applied throughout the 20th Century. See, for example, *Bunt v Hallinan* [1985] 1 NZLR 450 (CA) per Richardson and McMullin JJ, and Eichelbaum J (dissenting).

79 See *Waimiha Sawmilling (CA)*, above n 78, at 1155 per Hosking J. For a registered owner to be liable for fraud on the basis of the agent's conduct, the agent must have committed the fraud or the fraud must have been brought home to the agent while they were acting within their actual or

registered owner must also have had actual knowledge of the fraud. While constructive notice is not enough,⁸⁰ actual knowledge is taken to include wilful blindness and voluntary ignorance.⁸¹ However, mere knowledge is not enough.⁸² Importantly, fraud also requires dishonesty on the part of the registered owner.⁸³

The LTA 1952 did not define fraud or provide any guidance about what amounts to fraud. This would appear to have been a conscious decision made by the legislature.⁸⁴ After all, the seminal cases on land transfer fraud pre-dated the LTA 1952.⁸⁵ However, this became problematic, not least because ambiguity about the meaning of fraud caused unnecessary litigation.⁸⁶

The LTA 2017 defines land transfer fraud,⁸⁷ as recommended by the Law Commission.⁸⁸ The definition is composite, and this is reflected in the construction of the statute. Whereas most terms are defined in the interpretation section,⁸⁹ the definition of fraud is reserved for a separate section following the interpretation section, where it is defined on its own.

In the LTA 2017, except for purposes relating to compensation,⁹⁰ 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”⁹¹ against the “registered owner of an estate or interest in land” or the “owner of an unregistered interest”.⁹² Conduct against the owner of an unregistered interest will only be fraud if the registered owner “in acquiring the estate or interest had actual knowledge of, or was wilfully blind to, the existence of the unregistered interest” and “intended at the time of registration of the estate or interest that the registration would defeat the unregistered interest”.⁹³

apparent authority. If so, it would not be necessary to show that the registered owner knew about the fraud. See *Nathan v Dollars & Sense Ltd* [2008] NZSC 20, [2008] 2 NZLR 557.

80 LTA 1952, s 182.

81 For example, where the registered owner’s “suspicions were aroused [and they] abstained from making inquiries for fear of learning the truth”. *Assets Co v Mere Roihi*, above n 78, at 210.

82 See 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 43.

83 There is no consensus about what counts as dishonesty. See, for example, *Sutton v O’Kane* [1973] 2 NZLR 304 (CA) at 316–336 per Turner P (dissenting); and *Bunt v Hallinan*, above n 78, at 463–467 per Eichelbaum J (dissenting).

84 The parliamentary debates on the Land Transfer Bill 1952 and the Property Law Bill 1952 do not mention “land transfer fraud”. See (2 October 1952) 298 NZPD 1731; (15 October 1952) 298 NZPD 1934–1936; and (23 October 1952) 298 NZPD 2067. See also Land Transfer Bill 1952 (89-1), Explanatory Note at i–iii; and Property Law Bill 1952 (90-1), Explanatory Note at i. Neil Campbell suggests that there was a “deliberate aversion to a definition”. Neil Campbell “The new fraud test” (paper presented to New Horizons for Torrens: Current Reforms, Emerging Issues, Auckland, August 2018) at 1.

85 See, for example, above n 78.

86 See Williamson *Law Commission Report – A New Land Transfer Act*, above n 31, at [21].

87 LTA 2017, s 6. See Campbell, above n 84, at 11–13.

88 See Law Commission *A New Land Transfer Act*, above n 11, at [2.38].

89 LTA 2017, s 5.

90 See ss 59(2)(a), 69(1)(a), 72(1) and 72(2). For these purposes, fraud means “forgery or other dishonest conduct by any person”. LTA 2017, s 6(3).

91 LTA 2017, s 6(1).

92 Section 6(2).

93 Section 6(2)(b).

The definition is consistent with the existing case law.⁹⁴ For example, wilful blindness might be sufficient to meet the knowledge requirements, but constructive notice will not.⁹⁵ Furthermore, knowledge of the conduct is not enough — the registered owner must act dishonestly. While the definition is composite, it is by no means comprehensive, and broad statements in the existing case law about what amounts to fraud will continue to guide courts' assessments of fraud in future cases.

The definition is also sufficiently flexible to allow the courts to further develop the concept of *land transfer fraud*⁹⁶ — for example, to decide what “dishonest conduct” means in specific cases. In this way, the land transfer legislation remains deferential to this long time judicial project.

(b) Supervening Fraud

Supervening fraud is a term that describes fraud where the dishonest conduct takes place only after registration. An example is where a person purchases a property intending to recognise someone else's unregistered interest, but, later, after becoming the registered owner, refuses to recognise the interest.⁹⁷ For at least 100 years, the courts have been unable to agree about whether this counts as fraud and the registered owner loses the benefit of indefeasibility.⁹⁸ The LTA 2017 settles this debate.

In the Issues Paper, the Law Commission suggested it would be “clearer and more consistent with the rest of the Act to statutorily reject supervening fraud”.⁹⁹ The concept was already considered by many to be inconsistent with the LTA 1952.¹⁰⁰ It was also inconsistent with guiding statements in seminal fraud cases. For example, the Privy Council in *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* observed that fraud occurs when “the designed object of a transfer be to cheat a man of a known existing right”,¹⁰¹ implying that fraud relates only to conduct before and at the time of

94 See Williamson *Law Commission Report – A New Land Transfer Act*, above n 31, at [21]. See also New Zealand Law Society “Submission to Land Information New Zealand on the Land Transfer Bill – Exposure Draft”, above n 39, at [18]–[22].

95 LTA 2017, s 6(4). Compare LTA 1952, s 182.

96 See Williamson *Law Commission Report – A New Land Transfer Act*, above n 31, at [21]. The Minister for Land Information recommended that the definition should “reflect the leading cases and should also be sufficiently flexible to future proof the legislation and allow for judicial development of the concept of land transfer fraud”. See also New Zealand Law Society “Submission to Land Information New Zealand on the Land Transfer Bill – Exposure Draft”, above n 39, at [18]–[22].

97 See *Sutton v O'Kane*, above n 83.

98 Generally, supervening fraud was not accepted. See, for example, *Sutton v O'Kane*, above n 83, at 314 per Wild CJ. But the concept continued receive sporadic judicial support for at least 100 years. See, for example, *Merrie v McKay* (1897) 16 NZLR 124 (SC) at 127–128 per Prendergast CJ; *Webb v Hooper* [1953] NZLR 111 (SC) at 114 per Stanton J; *Sutton v O'Kane*, above n 83, at 334 per Turner P; *Tuscany Ltd v Gill* HC Christchurch CP56/99, 7 August 2001 at [70] per Chisholm J; and *Centillion Investments Ltd v Hillpine Investments Ltd* HC Auckland CIV-2006-404-6965, 6 December 2006 at [34] per Christiansen J. The general tenor of these judgments is that the timing of the fraud should not protect the fraudster.

99 See Law Commission *Issues Paper*, above n 25, at [3.28].

100 See, for example, *Sutton v O'Kane*, above n 83, at 344 per Richmond J. See also LTA 1952, ss 62 and 182.

101 *Waimiha Sawmilling (PC)*, above n 78, at 106.

registration. Submissions to the Law Commission called for the concept of supervening fraud to be “abolished insofar as it does still seem to exist”.¹⁰² The Law Commission agreed.¹⁰³

In the LTA 2017, the legislature adopted the Law Commission’s recommendation and defined fraud so as to prevent a supervening fraud interpretation. The definition clarifies that the forgery or dishonest conduct must be “in acquiring” a registered estate or interest in land.¹⁰⁴ In other words, dishonest conduct by the registered owner after registration will not support a finding of land transfer fraud. With the concept formally precluded, it is expected that the in personam jurisdiction of the court will be used to achieve fairness in cases that would have otherwise been corrected by the application of supervening fraud.¹⁰⁵

2 Powers to Correct the Register

The LTA 1952 provided the Registrar with powers to correct the register. Section 80 permitted the Registrar to correct errors in certificates of title and computer registers. Section 81 permitted the Registrar to cancel or correct “fraudulent” and “wrongful” entries. Unlike s 80, which was for minor slips and “not of substantive importance”,¹⁰⁶ s 81 was the subject of much judicial and academic discussion.

In *Frazer v Walker*, Lord Wilberforce was careful to strike a balance between individual justice and transactional certainty. The balance was struck in favour of transactional certainty. But this seemed to be justified by the Registrar’s powers to correct the register.¹⁰⁷ The Privy Council could have interpreted the Registrar’s s 81 power as “no more than a very narrow power” or “virtually no power at all” and still have decided in favour of immediate indefeasibility.¹⁰⁸ However, Lord Wilberforce was deliberate in calling the Registrar’s powers “significant and extensive”.¹⁰⁹ In doing so, his Honour endowed the Registrar with powers to protect against “the more unacceptable consequences” of immediate indefeasibility.¹¹⁰

The courts interpreted the s 81 powers to apply “where the person obtaining registration does so in a manner which is ‘wrongful’ in the sense that it infringes the legal rights of another”.¹¹¹ In effect, this meant that the

102 Law Commission *A New Land Transfer Act*, above n 11, at [2.37].

103 At 22.

104 LTA 2017, s 6(1).

105 See Law Commission *A New Land Transfer Act*, above n 11, at [2.37].

106 *Frazer v Walker*, above n 50, at 1076 per Lord Wilberforce.

107 See at 1079.

108 *Housing Corp*, above n 51, at 691 per McGechan J.

109 *Frazer v Walker*, above n 50, at 1079. For that proposition, Lord Wilberforce cited *Assets Co v Mere Roihi*, in which Lord Lindley only went so far as to call the powers “[I]arge”. *Assets Co v Mere Roihi*, above n 78, at 194.

110 *Housing Corp*, above n 108, at 691 per McGechan J.

111 At 699 per McGechan J. But see *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75 at [148] per Elias CJ. Elias CJ agrees that the s 81 powers could have been exercised in circumstances that did not involve actual fraud. However, her Honour considered that the registration would have required “unconscionable conduct of some kind”. See also at [26] per William Young and O’Regan JJ.

Registrar's powers to cancel or correct "wrongful" entries exceeded even the court's powers to correct the register in cases of fraud.¹¹²

In practice, the Registrar was reluctant to exercise those powers¹¹³ and, over time, conveyancers and their clients came to expect the Registrar *not* to exercise the powers to interfere with substantive property rights. However, the Registrar did continue to use the powers from time-to-time to make minor corrections to the register arising from "abuse or misuse".¹¹⁴

Submissions on the Issues Paper suggested that the Registrar's powers of correction were still required in the electronic system, with some venturing that the powers were important to allow the Registrar to rectify mistakes made by the solicitors.¹¹⁵ The Law Commission proposed two options for reform: to "retain the current interpretation of section 81, but clarify that the Registrar's powers are limited"; or to "adopt a provision that gives the Registrar a broader discretion to exercise powers of correction".¹¹⁶ The submissions suggested that it would be problematic to retain the Registrar's power to correct "wrongful" entries.¹¹⁷ However, the submissions also generally "supported the Registrar having broad powers", with some suggesting that "specifying the grounds for exercising the powers of correction would facilitate their use".¹¹⁸

In its Report, the Law Commission ultimately recommended that the Registrar have an administrative power, not a quasi-judicial power, to correct the register.¹¹⁹ In the Law Commission's view, the High Court would be better placed to decide complex land transfer issues.¹²⁰

The LTA 2017 clarifies the Registrar's powers to correct titles. Importantly, it does not resurrect the Registrar's power to cancel or correct "fraudulent" and "wrongful" entries. The Registrar can only "correct an error made by the Registrar", "correct an error made by a person in preparing or submitting a document or information for registration" and "record a boundary change resulting from accretion or erosion".¹²¹ Furthermore, in what is perhaps the most demonstrable limitation on the powers, the Registrar must not alter the register in any of these circumstances "if the alteration would materially affect the registered estate or interest of any person" unless strict formal requirements are satisfied.¹²²

112 At 699 per McGechan J.

113 See, for example, BE Hayes "DLR's and the Power to Cancel Registration" (1988) 4 Butterworths Conveyancing Bulletin 255.

114 See David Grinlinton "The Registrar's powers under the new Land Transfer Act 2017" (paper presented to New Horizons for Torrens: Current Reforms, Emerging Issues, Auckland, August 2018) at 5–6.

115 Law Commission *A New Land Transfer Act*, above n 11, at [2.45]. See Law Commission *Issues Paper*, above n 25, at [5.6].

116 Law Commission *Issues Paper*, above n 25, at [5.31].

117 Law Commission *A New Land Transfer Act*, above n 11, at [2.47].

118 At [2.47].

119 See at [2.49].

120 See at [2.49].

121 LTA 2017, ss 21(1)(a)–21(1)(c). The Registrar may also alter the register to "give effect to an order or a direction of a court". Section 21(1)(d). But note that the Registrar may alter the register for any purpose if they receive the consent in writing of the persons affected. Section 21(3).

122 Section 21(2).

But recall that in *Frazer v Walker*, Lord Wilberforce justified the Privy Council’s interpretation of indefeasibility as immediate by endowing the Registrar with “significant and extensive” powers of correction.¹²³ If the Registrar is no longer able to ameliorate the potentially harsh effects of immediate indefeasibility, does the LTA 2017 ameliorate those effects another way?

3 *Manifest Injustice*

Whereas the LTA 2017 constrains the Registrar’s powers to correct the register, it also creates a judicial discretion to alter the register in cases of manifest injustice.¹²⁴ Thus, it would appear that it is the *courts* that are now endowed with “significant and extensive” powers of correction.¹²⁵ However, the courts’ discretion, while broad, is intended to be limited.

Sections 54 and 55 allow specific persons to apply to the court for an order cancelling the registration of a bona fide purchaser, mortgagee or volunteer as the owner of an estate or interest in land. The persons who can apply for the order are: first, a person (A) who has been “deprived of an estate or interest in land by the registration under a void or voidable instrument of another person [B] as the owner of the estate or interest in the land”;¹²⁶ and, secondly, a person (A) who “being the owner of an estate or interest in land, suffers loss or damage by the registration under a void or voidable instrument of another person [B] as the owner of an estate or interest in the land”.¹²⁷

The court may exercise its discretion if certain conditions are satisfied. First, the application needs to be made within 6 months of when A became “aware, or ought reasonably to have become aware, of the acquisition of the estate or interest by person B”.¹²⁸ Secondly, the estate or interest must not have been transferred to a third person acting in good faith.¹²⁹ Thirdly, compensation or damages must be insufficient to properly address the injustice.¹³⁰

If the conditions are satisfied, the court may exercise its discretion to make an order to cancel the registration of B if it is satisfied that it would be manifestly unjust for B to remain the registered owner of the estate or interest.¹³¹

Section 55(4) provides a list of considerations that the court *may* take into account in determining whether to make an order:

123 *Frazer v Walker*, above n 50, at 1079.

124 See LTA 2017, ss 54–57.

125 For the avoidance of doubt, I would argue it is preferable that the court, and not the Registrar, deals with these substantive property rights.

126 Section 54(1)(a).

127 Section 54(1)(b).

128 Section 54(3).

129 Section 56.

130 Section 55(3).

131 Section 55(1).

- (a) the circumstances of the acquisition by person B of the estate or interest; and
- (b) failure by person B to comply with any statutory power or authority in acquiring the estate or interest; and
- (c) if the estate or interest is in Māori 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 in relation to the acquisition of the estate or interest; and
- (k) any other circumstances that the court thinks relevant.

While the list is relatively detailed, its inclusive nature and the open-endedness of consideration (k) allow the courts to decide each case on its facts.

The new discretion will allow the courts to reverse land transfers in cases of manifest injustice. This could be highly effective in many cases, for example, to protect Māori landowners from being dispossessed of land in which they have particular *mana whenua*.¹³² However, the discretion is likely to affect transactional certainty for new and prospective bona fide registered owners.¹³³ Prospective registered owners may be less willing to rely on the face of the register and more careful to investigate the transactional history of a title. Consequently, the land transfer system will become less efficient. Conveyancers could also become liable for negligence if they fail to check the transactional history of a title. If so, the burden will shift to the conveyancer and conveyancing costs will increase.¹³⁴ It is also possible that more registered owners will pay for title insurance to protect themselves against losses related to the property's title or ownership.¹³⁵

In addition, there is an important issue relating to costs. A new registered owner will need to expend their own funds to defend the application

132 *Mana whenua* is a Māori concept that can be defined as *authority over land*.

133 See Houghton "Immediate Indefeasibility with Transactional Uncertainty", above n 65. The article argues that, while the Act purports to *reaffirm* the principle of immediate indefeasibility, the new judicial discretion to alter the register in cases of manifest injustice in fact *subverts* the prevailing normative justification for interpreting indefeasibility as immediate — to give new and prospective bona fide registered owners transactional certainty. It argues that the new judicial discretion does this by creating three uniquely problematic uncertainties for new and prospective bona fide registered owners: applicant uncertainty, discretionary uncertainty and transitional uncertainty.

134 See Rod Thomas "Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act" [2011] NZ L Rev 715 at 734.

135 See Thomas Gibbons "Delayed indefeasibility – implications for conveyancers" (paper presented to New Horizons for Torrens: Current Reforms, Emerging Issues, Auckland, August 2018) at 8.

for a s 55 order. However, they will only be entitled to compensation from the Crown if the title is lost.¹³⁶ Therefore, a new registered owner may be forced into a no-win position as soon as a s 55 order has been applied for. As Thomas argues:¹³⁷

It is arguable that a party may be better off losing title as a result of a finding of manifest injustice, rather than retaining the title and having to bear all that party's litigation costs, subject to any costs award made by the court.

The Law Commission needs to address this issue immediately, and the legislature needs to make the necessary amendments as soon as possible.

Providing this issue can be resolved, the impact of the new judicial discretion on transactional certainty is likely to be acceptable provided the courts develop an approach which demonstrates that the s 55 discretion will be exercised in rare cases only.

4 *Volunteers*

The position of volunteers has long been the subject of judicial disagreement, primarily because many provisions in the LTA 1952 did not differentiate between volunteers and purchasers for value.¹³⁸ Early New Zealand decisions suggested that volunteers did acquire an indefeasible title.¹³⁹ In some Australian states, legislation now recognises that the benefits of registration apply equally to volunteers.¹⁴⁰ However, court decisions in the other states remain divided. Whereas New South Wales¹⁴¹ and Western Australia¹⁴² have decided that volunteers do have the protection of indefeasibility (except where there are statutory exceptions), Victoria¹⁴³ has decided that volunteers do not.

In *Regal Castings Ltd v Lightbody*, the New Zealand Supreme Court finally had an opportunity to comment on the position of volunteers. Notably, Tipping J preferred the argument that volunteers do have the protection of indefeasibility.¹⁴⁴

The Issues Paper was published before *Regal Castings* and did not express a preference one way or the other.¹⁴⁵ The Law Commission's final Report was published after *Regal Castings* and was able to engage with the case. In its Report, the Law Commission agreed with Tipping J that a

136 See LTA 2017, s 59.

137 Rod Thomas "The Manifest Injustice Test" (paper presented to New Horizons for Torrens: Current Reforms, Emerging Issues, Auckland, August 2018) at 16.

138 See, for example, LTA 1952, ss 62 and 182. Compare LTA 1952, ss 63 and 183, which refer to "bona fide purchasers for value".

139 See, for example, *Re Mangatainoka IBC No 2* (1913) NZLR 23 (SC) at 65 and 68; and *Boyd v Mayor of Wellington* [1924] NZLR 1174 (CA) at 1222–1223.

140 Queensland Land Title Act 1994, s 180; and Northern Territories Land Title Act 2000, s 183.

141 See *Bogdanovic v Koteff* (1988) 12 NSWLR 472 (NSWCA); and *Silvera v Savic* (1999) 46 NSWLR 124 (NSWSC).

142 See *Conlan v Registrar of Titles* [2001] WASC 201, (2001) 24 WAR 299.

143 See *King v Smail* [1958] VR 273 (VSC); *Rasmussen v Rasmussen* [1995] 1 VR 613 (VSC); and *Valutin Pty Ltd v Furst* (1998) 154 ALR 119 (FCA).

144 See *Regal Castings*, above n 73, at [129]–[136].

145 Law Commission *Issues Paper*, above n 25, at 26–27.

volunteer, like a purchaser for value, should take the benefit of indefeasibility on registration, subject to the exceptions to indefeasibility that apply to a purchaser for value.¹⁴⁶ The LTA 2017 adopted the same.¹⁴⁷

A potential concern about extending the protection of indefeasibility to volunteers is that it could encourage transfers to a volunteer to defeat an unregistered interest. The Law Commission did not consider this to be a strong enough reason to deny a volunteer indefeasible title.¹⁴⁸ In any case, it is likely that the volunteer in such cases would have actual knowledge of the unregistered interest and intend to use the transfer to defeat the interest. Therefore, the volunteer would be committing fraud and the volunteer's title would be defeasible.

IV OTHER FEATURES

The LTA 2017 clarifies and changes the law in other important ways. The Act amends the Property Law Act 2007 to allow covenants in gross to be notified on the register.¹⁴⁹ The Act clarifies that a person may lodge a caveat against dealings where they claim an estate or interest that is not capable of registration.¹⁵⁰ It also clarifies that a registered owner can caveat their own title if they have a distinct interest or there is a risk that the estate or interest may be lost through fraud.¹⁵¹ The Act confirms that the principle of immediate indefeasibility does not affect the availability of in personam claims,¹⁵² although it leaves it to the courts to develop the categories for such claims. The Act requires the courts to assess compensation at the time the loss or damage becomes known (or should have been known),¹⁵³ and allows the courts to adjust the date if the amount is inadequate or excessive¹⁵⁴ and reduce the amount where the applicant was contributorily negligent.¹⁵⁵ It also updates the periods for guaranteed title searches to reflect the electronic nature of land transactions.¹⁵⁶ The Act provides that the Registrar can refuse to provide a copy of an instrument or title that identifies a person, and prevent that

146 See *A New Land Transfer Act*, above n 11, at [2.18].

147 LTA 2017, s 51(4)(a).

148 See *A New Land Transfer Act*, above n 11, at [2.18].

149 LTA 2017, ss 237–246. See PLA 2007, ss 307A–307F and 318A–318E.

150 LTA 2017, s 138(1)(a).

151 Section 138(1)(d).

152 Section 51(5).

153 Section 65(1). Compare LTA 1952, s 179.

154 LTA 2017, s 68. Compare LTA 1952, s 179. See *Burmeister v Registrar-General of Land* [2014] NZHC 631, (2014) 15 NZCPR 91 at [63]–[68]; and Upston, above n 33, at [19], [21] and [53], r [4.4].

155 LTA 2017, s 69(2). The LTA 1952 did not stipulate whether compensation could be reduced on the ground of contributory fault. However, courts applied the Contributory Negligence Act 1947. See *Melville-Smith v Attorney-General* [1996] 1 NZLR 596 (HC) at 603; and *Burmeister*, above n 154, at [76]. In the context of a s 55 order, Elizabeth Toomey argues that the court's ability to take person B's carelessness into consideration when assessing compensation has the potential to punish person B twice. See Elizabeth Toomey "Knocking at the Compensation Door – What Might a Deprived Owner Expect under the Land Transfer Act 2017?" (paper presented to New Horizons for Torrens: Current Reforms, Emerging Issues, Auckland, August 2018) at 10.

156 LTA 2017, s 60. Compare LTA 1952, s 172A.

information from being included in any part of the public register, if satisfied that publishing the information may prejudice the person’s safety or the safety of their family.¹⁵⁷ The Act also expands certification rights.¹⁵⁸

The LTA 2017 is also notable for what it does *not* change. The Law Commission’s model Bill introduced a new requirement on mortgagees and transferees of mortgages to take reasonable steps to verify the identity of mortgagors and the identity and authority of any attorney who executes the mortgage.¹⁵⁹ The proposal was met with resistance. For example, the Law Society argued that the requirements were too cumbersome.¹⁶⁰ The Government Administration Committee agreed. The Committee argued the identification requirements would “impose significant compliance costs on banks”, which could increase costs for customers.¹⁶¹ It also, ultimately, considered the requirements to be unnecessary because it believed the existing verification of identity standards provided sufficient protections.¹⁶² Consequently, the Committee decided to delete these clauses, and the LTA 2017 does not contain the Law Commission’s proposed verification requirements.

Furthermore, the Law Commission recommended prohibiting the use of encumbrances where the primary purpose of the encumbrance is to secure collateral covenants, rather than secure the payment of money.¹⁶³ Cabinet agreed to this proposal. However, following consultation with the New Zealand Law Society and the Auckland District Law Society, LINZ reported that compliance would be problematic to administer.¹⁶⁴ Consequently, the Minister for Land Information removed the proposal,¹⁶⁵ and the LTA 2017 does allow for the use of encumbrances.¹⁶⁶

V CONCLUSION

The LTA 2017 comes into force at a time when New Zealand is recognised as the leading country in the world for ease of registering property.¹⁶⁷ The Act adopts most of the Law Commission’s recommendations and clarifies many of the grey areas in the jurisprudence under its predecessor. It also modernises

157 LTA 2017, s 41.

158 See generally ss 27–31.

159 Clauses 11 and 12. Law Commission *A New Land Transfer Act*, above n 11, at 214–216.

160 See New Zealand Law Society, above n 30, at [5]–[6]; and New Zealand Law Society, above n 39, at [46]–[56].

161 Land Transfer Bill Commentary, above n 44, at 3.

162 At 3.

163 See Law Commission *A New Land Transfer Act*, above n 11, at [7.61].

164 Upston, above n 33, at [27].

165 At [27]–[30].

166 See LTA 2017 s 5 definition of “mortgage”; and s 100. This is despite the recognition of covenants in gross. See above n 149. Thomas Gibbons argues that encumbrances will continue to be used because they are regulated in a less detailed manner than covenants in gross, and recommends minor reforms to “dilute the benefits of encumbrances”. Thomas Gibbons “Covenants in Gross and Encumbrances under the new Land Transfer Act” (paper presented to New Horizons for Torrens: Current Reforms, Emerging Issues, Auckland, August 2018) at 12–13.

167 World Bank *Doing Business 2017: Equal Opportunity for All* (Washington DC, 2017) at 228.

the land transfer legislation, making it clearer, more accessible and more congruent with legal practice in the e-dealing era.

The timing of the new legislation is important. New Zealand's property rights system is due to undergo several changes. For example, over the next few years, LINZ is progressing various initiatives, including two initiatives to ensure that New Zealand continues to have an "efficient and robust" property system.¹⁶⁸ First, the Advanced Survey and Title Services project (ASaTS) will update the current Landonline electronic survey and title system to make property information more accessible and improve the quality of decisions concerning land.¹⁶⁹ In 2013, the Minister for Land Information recommended that Cabinet direct LINZ to develop a Detailed Business Case for the project.¹⁷⁰ The Detailed Business Case was published in 2015,¹⁷¹ and the project received Cabinet approval in 2016.¹⁷² The new system will be delivered in phases until it is fully operational by 2021.¹⁷³ Secondly, the Integrated Property Services (IPS) programme aims to make property information from across central and local government and the private sector more accessible, connected and integrated.¹⁷⁴ In tidying up and modernising the land transfer laws in New Zealand, the LTA 2017 sets a stable legislative foundation for these reforms.¹⁷⁵

So, can the LTA 2017 weather 65 years like its predecessor? The Act is fundamentally improved. It fits together logically. It reads well. And its tendency to defer the more changeable details to the Land Transfer Regulations safeguards it from a death by a thousand amendments. For these reasons, I believe it will take a conceptual shift in the land transfer system before New Zealand requires a new Land Transfer Act.

But perhaps a better question to ask is: does the LTA 2017 *need* to be so durable? The land transfer system is dynamic, and the land transfer legislation ought to be congruent with how the system works in practice. When eventually the LTA 2017 does need to be reformed, we can only hope that it does not take so long.

168 Land Information New Zealand *Briefing to the Incoming Minister for Land Information: Introduction to the Land Information Portfolio* (25 October 2017) at 12.

169 See Louise Upston *Advanced Survey and Title Services: Investing in the Quality and Efficiency of Survey and Title Services* (Minister for Land Information, Cabinet Paper, April 2016) at [18]–[30]. According to LINZ, a "failure to proactively invest in the quality and efficiency of the survey and title service [would have posed] a significant risk to the continuity of essential service provision from 2020". Land Information New Zealand *Advanced Survey and Title Services (ASaTS): Detailed Business Case* (9 September 2015) at [1.1.2].

170 Maurice Williamson *Indicative Business Case for Advanced Survey and Title Services* (Minister for Land Information, Cabinet Paper, 7 November 2013) at [1] and 22–24.

171 Land Information New Zealand *Advanced Survey and Title Services (ASaTS): Detailed Business Case*, above n 169.

172 Land Information New Zealand *Briefing to the Incoming Minister for Land Information: Introduction to the Land Information Portfolio* (20 December 2016) at 10–11.

173 Land Information New Zealand *Briefing to the Incoming Minister* (2017), above n 168, at 12.

174 At 13.

175 But see John Greenwood and Tim Jones "Automation" (paper presented to New Horizons for Torrens: Current Reforms, Emerging Issues, Auckland, August 2018) at 18. Greenwood and Jones suggest that the principle of indefeasibility is "firmly entrenched" in the LTA 2017, but emphasise that automation must not "get in the way of the pure principles".