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## Key changes introduced by the Land Transfer Act 2017

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The Land Transfer Act 2017 (*Act*) has received Royal Assent and will be in force by 10 January 2019. It will repeal the Land Transfer Act 1952 (*Old Act*) and is intended to modernise, simplify and consolidate the Old Act and its amendments. Some provisions such as the amendments to the Property Law Act 2007 (*PLA*) regarding covenants in gross may come into force earlier than 2019.

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In the main, the Act is not intended to substantively change our land transfer laws. However, some controversy exists regarding the right of an owner to reclaim title under the manifest injustice provisions arguably eroding the principle of indefeasibility. Also, not all changes promoted have been adopted, such as placing more onus on mortgagees to verify the identity of their clients, separately defining encumbrances and permitting senior legal executives to sign and certify instruments in Landonline.

Some key changes are set out below.

### **New terminology**

The Act includes new terminology aimed at modernising the language used. For example, a “certificate of title” and the clumsy “computer freehold/leasehold/interest register” will be a “record of title”, and “registered proprietor” becomes “owner”. There is also a concept of “replacement lease”, which is a renewed lease or a new lease in substitution for a prior lease between the same parties and relating to the same land.

### **Withholding information for a person’s safety**

The Registrar-General of Land will be able to refuse to provide a copy of an instrument or title that identifies a person, as well as refuse to include those details on the public register in the first place, if it is satisfied that the information discloses or is likely to disclose the person’s location and prejudice their safety.

### **Caveats**

An express right for an owner of an estate or interest to lodge a caveat against their

own title where there is a real risk of fraud.

### **Guaranteed title searches**

Guaranteed searches back up the security of the land transfer system, by providing a right to compensation if a purchaser of an interest in a land transaction suffers loss due to the registration of a competing interest. Under the Old Act, the purchaser must obtain a “guaranteed search” within 14 days before settling the transaction, and must lodge the transaction documents within 2 months after settlement.

The Act updates these periods to reflect the electronic nature of land transactions by:

- requiring that a guaranteed search of the title be obtained within 5 working days before settlement; and
- reducing the period after settlement during which loss may occur to 20 working days.

As with the Old Act, no compensation will be payable if the title search disclosed the competing interest.

### **Compensation**

Compensation is payable by the Crown when loss occurs in certain circumstances (including, but not exclusively, under “guaranteed search” situation). Under the Old Act, the calculation for compensation is based on the land value at the time the loss occurred. The Act will shift the date on which compensation is to be assessed to when the claimant “gained (or ought reasonably to have gained) knowledge of the loss”.

The Act confirms that the value of the lost estate or interest in land is the “market value”.

The High Court may adjust compensation where the amount determined by the prescribed calculation is inadequate or excessive, and may determine at which date the market value should be assessed which may include a revised assessment as at the day of the court judgment.

### **Cancellation of land transactions in cases of “manifest injustice”**

The High Court will have limited discretion to order the alteration of titles to avoid “manifest injustice”, but only where compensation or other damages would not properly address the injustice. The High Court may cancel registration of a land transaction after taking into account how the land was acquired, the length of time the parties have owned or occupied the land, the nature of any improvements made, the special characteristics of the land and its significance, and any other relevant circumstances. The Court cannot make an order if the estate or interest has subsequently been transferred to a third person acting in good faith.

### **Fraud**

Fraud is one of the main exceptions to an owner’s title to land. “Fraud” is now

defined as forgery or other dishonest conduct of an owner or agent of an owner in acquiring an estate or interest in land. It is worth noting that, for the purposes of a Court order cancelling a land transaction in the case of “manifest injustice”, the existence of forgery or other dishonest conduct will not itself constitute the required level of injustice.

### **Introduction of covenants in gross and what it means for encumbrances**

Currently it is not possible to register, on a certificate of title, an instrument that imposes obligations or restrictions on a landowner “in gross” – i.e. in favour of another person, rather than benefitting another parcel of land. To reduce the widespread use of encumbrances, which are a form of mortgage, as a mechanism for securing what are regarded more as private contract arrangements the PLA will be amended to allow covenants in gross to be noted on the record of title. This has been long awaited and should provide a registration option which is more palatable especially to banks. It will also allow affected owners to seek modification or cancellation of existing encumbrances and replace them with covenants in gross.

While encumbrances are commonly used as a mechanism to register covenants, they are also properly used to register rent-charges on land, and encumbrances will still be referred to in the provisions governing mortgages. So, the change still allows encumbrances to remain a viable instrument of title but, where the real purpose is to require a landowner to do or not do something for the benefit of someone else, a covenant in gross will be the appropriate instrument.

### **Registrar’s power to correct titles**

The Act clarifies the circumstances in which the Registrar will be able to correct titles. The Registrar’s power will be limited to circumstances such as correcting an error by the Registrar, an error made by a person preparing a document or information for registration, recording a boundary change due to accretion or erosion, or giving effect to a court order.

### **Overriding statutes**

The Act repeals the Statutory Land Charges Registration Act 1928, with the Act dealing with the registration, priorities and release of relevant charges.

### **Regulations**

The Land Transfer Regulations 2002 will be revoked but will be replaced with new regulations still to be issued.

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