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## Key changes introduced by the Land Transfer Act 2017

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The Land Transfer Act 2017 (Act) came into force on Monday, 12 November 2018. It repealed the Land Transfer Act 1952 (Old Act), and is intended to modernise, simplify and consolidate the Old Act and its amendments.

The Act also made amendments to the Property Law Act 2007 (PLA), including the introduction of covenants in gross, with effect from 12 November 2018.

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In the main, the Act is not intended to change our land transfer laws substantially. However, some controversy exists regarding the right of an owner to reclaim title under the manifest injustice provisions, arguably eroding the principle of indefeasibility of title. Also, not all changes promoted during consultation have been adopted, such as placing more onus on mortgagees to verify the identify of their clients, separately defining encumbrances from mortgages, and permitting senior legal executives to certify and sign 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” has become the crisper “record of title”, and “registered proprietor” has become “registered 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 is able to refuse to provide a copy of an instrument or a record of title that identifies a person, or to include those details on the register in the first place, if the Register is satisfied that the information discloses or is likely to disclose the person’s location and prejudice their safety.

## **Caveats**

There is now an express right for an owner of an estate or interest in land 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 had to obtain a “guaranteed search” within 14 days before settling the transaction, and had to 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 (and including) the settlement date; and
- reducing the period after settlement during which the transaction documents must be lodged at Land Information New Zealand (LINZ) 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 the “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 shifts 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 and restore title to a person who has been deprived of an estate or interest, or suffered loss, due to that registration. The Court must take 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. However, 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 the indefeasibility of an owner's title to land. "Fraud", as an exception to indefeasibility, 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**

Until commencement of the Act, it was not possible to register an instrument that contained covenants or promises given by a landowner "in gross" – i.e. in favour of another person, rather than benefiting another parcel of land. Traditionally, these covenants have been included in encumbrances, which are a form of mortgage used for securing a long term obligation to pay a rental (known as a "rent charge"). To reduce the widespread use of encumbrances, the PLA has been amended to allow covenants in gross to be noted on records of title. This has been long awaited and should provide a registration option which is more palatable especially to banks. It also allows 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 (but uncommonly) used to register rent charges, and encumbrances are still referred to in the parts of the Act governing mortgages. Encumbrances therefore remain a viable instrument. There are some benefits in using encumbrances over covenants, including exclusion of the covenant modification provisions in the PLA, but, where the real purpose is to require a landowner to do or refrain from doing something for the benefit of another person, a covenant in gross will generally be the appropriate instrument.

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

The Act clarifies the circumstances in which the Registrar is able to correct titles. The Registrar's power of correction is now limited to correcting an error made by the Registrar, correcting an error made by a person preparing a document or information for registration, recording a boundary change due to accretion or erosion and 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 have also been revoked, with the Land Transfer Regulations 2018 (Regulations) replacing them.

One of the key changes made in the Regulations is to update the terms implied into certain classes of easements. These changes include:

- altering the description of the affected land from "servient tenement" to "burdened land" and from "dominant tenement" to "benefited land";

- referring to the part of the burdened land subject to the easement as the “easement area”, in line with commonly-used wording;
- updating and aligning the equipment that can be installed under the various types of easement;
- removing unnecessary wording, such as replacing the class of easement previously called “telecommunications and computer media” with simply “telecommunications”;
- requiring the owner of the burdened land to act reasonably when the grantee seeks to install easement facilities; and
- adding an implied electricity conveyance right in order to operate equipment installed under the easement powers (eg. a water pump).

The Regulations also update the core information required to be used in land transaction forms. LINZ has provided template forms, although these remain inconsistent with each other and do not always contain the required core information.

### **New requirements for authority and identity**

In conjunction with the Act and the Regulations, LINZ has issued new guidelines for authority and identity and the New Zealand Law Society has issued new authority and instruction forms. The guidelines and forms include greater detail about how clients instruct lawyers and conveyancing practitioners to electronically certify and sign land transfer instruments and how those instructions are required to be confirmed to be valid. In conjunction with the extension of Anti-Money Laundering requirements to lawyers, lawyers now play a key role in confirming that land transactions are free of fraud and other illegal activity.

If you would like further information, please do not hesitate to contact any of our property lawyers. Contact details can be found [here](#).

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