NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Land Transfer Bill

20/05/2016

Land Transfer Bill

1 Introduction

1.1 The Law Society welcomes the opportunity to comment on the Land Transfer Bill (**Bill**). Clearly, this is a Bill of very considerable significance.

1.2 The Law Society's submissions include comments on the following key aspects of the Bill:

- Compensation
- Verification of identity of mortgagor
- Modification or extinguishing of encumbrances
- Land covenants
- Legal Executives.

2 Clause 3 – Purpose

2.1 In the fundamental principles in clause 3(b), no reference is made to maintaining integrity of title. One of the fundamental principles of the electronic system is to preserve integrity of title, which in the electronic workspace means addressing the reliability, security, resilience and audit requirements. The fundamental principles in clause 3 need to capture these important aspects.

3 Clause 5 – Interpretation

3.1 The Law Society is pleased to note the addition of 'estates and interests in land' in the definition of 'land'. It suggests however that this should read '*all* estates and interests in land'.

3.2 The definition of 'mortgage' should be consistent with that in section 4 of the Property Law Act 2007. The definition of 'mortgage' in the Bill primarily requires the charge to secure repayment of money, whereas the definition in the Property Law Act means a charge for securing the payment of amounts or the performance of obligations. The equalisation of payment of amounts and the performance of obligations is a better reflection of the definition of 'mortgage'.

3.3 Clearly, encumbrances are to be maintained – clause 99(3) and (4). The Law Society considers it essential that there be a definition of 'encumbrance instrument' in the definition section. It recommends that the definition be similar to that set out in section 101(4) of the Land Transfer Act 1952 (**the 1952 Act)**.

3.4 The term 'unique identifier' is cumbersome and tautologous. It is noted that in search copies from the LINZ Computer Register, reference is to 'identifier' rather than 'unique identifier'. It is recommended that the term 'unique identifier' be replaced with the term 'identifier'.

3.5 Currently, an identifier is a series of numeric characters only. To ensure consistency in the future it is recommended that the identifier be limited to numeric or alpha characters only, to avoid use of other characters such as symbols: %, *, etc.

4 Clause 6 – Meaning of fraud

4.1 Clause 6 reflects the Law Commission's recommendation in its 2010 report, that the new Land Transfer Act should define 'land transfer fraud' to incorporate the leading cases …".[1] The Commission was aware of the danger of defining fraud "in an exclusive way as that could create inflexibility" but thought it would be useful to affirm longstanding leading cases.[2] The Law Society supports this approach, and comments on clause 6 as follows.

4.2 The Law Society notes that clause 6 refers to "forgery or other dishonest conduct". The reference to forgery is unnecessary as it is a form of dishonest conduct and it should therefore be removed.

4.3 The Law Society also questions whether the definition properly captures a conspiracy where more than one person conspires to carry out the fraud.

4.4 Clause 6(2)(b) provides a developed definition of fraud against the owner of an unregistered interest that purports to deal with the doctrine of notice. Clause 6(4) specifically excludes constructive notice. The Law Society has concerns with the whole theme of clause 6(2)(b)(i) and then constructive notice under clause 6(4) as if they are quite realisable terms. There is a wealth of continually developing case law that shows this is not so.

4.5 Clause 6(3) appears to contain a typing mistake in referring to subpart **2** of Part 2 (subpart 2 deals with 'Title to Land'). The Law Society assumes this is meant to read 'For the purpose of subpart **3** of Part 2' (which deals with 'Compensation'). Clause 6(3) reflects the Law Commission's adoption of a broader definition of fraud for the purposes of compensation, compared to a narrow definition of fraud for the purposes of indefeasibility.

5 Clauses 51 and 52 – Title to Land

5.1 Clauses 51 and 52 include references to 'title' throughout. It would be desirable for this term to be defined.

5.2 The explanatory note states that clauses 51 and 52 replace sections 62, 63(1) and 183 of the 1952 Act. Section 63(1) lists, as exceptions, the case of a mortgagee as against a mortgagor in default, and a lessor as against a lessee in default. It is suggested these also be included in clause 52(1).

6 Clauses 56 and 57 – Application to Court for an order for alteration of register in cases of manifest injustice

6.1 Clauses 56 and 57 are new and give the High Court discretion to order alteration of the register in cases of manifest injustice. These clauses introduce a challenge to the concept of indefeasibility. The application of the clauses is not limited to situations of fraud. The inclusion of void and voidable instruments creates a very wide field. For the sake of certainty, there should be a definition of 'a void or voidable instrument'.

So, also, a definition of 'manifest injustice' would be desirable. Without a definition, the courts would be responsible for crafting the 'manifestly unjust' threshold.

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1 *A New Land Transfer Act*, LC R116, 2010, recommendation 6.

2 Note 1 above, at [2.34].

However, it is acknowledged that clause 57(4) which sets out matters which a court may take into account in determining whether to make an order, should be of considerable assistance. It might be desirable to amend the commencement of clause 57(4) to read:

> In determining whether there is manifest injustice or whether to make an order, the court may take into account—

See also the comment in paragraph 6.3 below.

6.2 Clause 56(1) assumes that Person B is a bona fide purchaser or mortgagee for valuable consideration or bona fide volunteers. Person B is not identified as such in the clause. See clause 59(2)(c) where Person B has a ground for compensation for loss of an estate or interest in land. This raises the question as to why alteration of the register is preferred as opposed to compensation.

The potential impact on registered mortgagees of the court's discretion to decide that immediate indefeasibility can be defeated by a 'manifest injustice' situation is profound. A mortgagee lends money on the security of land. The court's power to cancel this means that the mortgagee would lose its security (and its power of sale) and be left arguing with the Crown for compensation, under which there is also an element of discretion.

6.3 Clause 57(4)(j) lists the conduct of B as a factor the court may take into account. If the conduct of B reaches a level of unconscionability, then the well-established in personam claim can be instrumental in depriving B of his or her interest and returning the land to A.

7 Compensation

7.1 Clause 59, which is a more modern expression of the current section 172(b) of the 1952 Act, states that a person may bring a proceeding in court for compensation if that person is deprived of an estate or interest in land, and by the Act, is barred from bringing an action for possession or other action for recovery of the estate or interest.

This aligns with the following comment in the Law Commission's 2010 Report:[3]

> *The [compensation] system operates as one of first resort to compensate people for loss due to the operation of the Land Transfer Act 1952. This means the claimants may bring claims against the Crown without first having 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.*

However, as was clearly demonstrated in the Burmeister proceedings (see below), in practice this does not appear to happen. The Crown did not become involved until the claimant had brought an action against the mortgagee and had been unsuccessful. The Law Society suggests that clause 59 be redrafted to make it very clear that the New Zealand jurisdiction is, indeed, a first resort jurisdiction.

3 Note 1 above, at [4.1].

7.2 Clause 60 – Compensation for loss occurring after search and before registration

Clause 60 reduces the periods during which a guaranteed search must be obtained. There are potential problems that could be caused by the tight timeframe of the second period. **Attached** is a copy of the Law Society's letter to LINZ dated 11 October 2010. For the reasons set out in that letter, the Law Society recommends that the second period should remain two months. If it must be shortened, it should be at least one month.

7.3 Clause 64 – Maximum amount of compensation for deprivation of estate or interest in land

The Law Society notes the clarification that compensation for the amount owing on a mortgage is capped at the value of the estate or interest in land (which is defined in clause 65 – but see comments below). While this will avoid the confusion that arose in *Burmeister v Registrar-General of Land* [2014] NZHC 2033 as to the correct assessment of compensation in the case of partial deprivation, the Law Society questions whether this is a fair bar – see *Burmeister* where the mortgage was approx. $641,000 and the value of the land at the time of loss was $215,000. Under the Bill, the value of the land at date of discovery would be $215,000 plus two years' capital increase.

Most importantly, clause 64 addresses the situation where the mortgagee is a claimant. The Law Society questions under what circumstances that would be the case. It assumes that it would be when a mortgagee loses its registered interest as a result of the application of clause 56 – 'manifest injustice'. The Law Society's concerns with regard to this are set out in paragraph 6.2. The Law Society sees no other reason why a mortgagee would claim compensation. The mortgagee's security is a registered interest in the land and, as such, the mortgagee could not be 'barred from bringing an action for possession or other action for recovery of an estate or interest' (clause 59(1)).

7.4 Clause 65 – Valuation of estate or interest in land and matters relating to onus of proof

The Law Society notes the change of date for ascertaining the value of the estate or interest in land. In the Consultation Draft of the Bill (at clause 60) this date was the date at which the claim was made. In clause 64 of the Bill, it is the date of discovery. This is a significant change.

In its Report,[4] the Law Commission, having looked at various options as to the date upon which to determine the value of the land (including the date of discovery), concluded that the best option was to adopt the date when the claim is made, 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 Note 1 above, at [4.4.16].

The Consultation Draft adopted this suggestion. The Bill has changed this and adopted the date of discovery. The Explanatory Note to the Bill gives no explanation for this change.

Under the *Burmeister* scenario, the date of discovery was April 2003, the date the claim was made was October 2008 – a difference of 5½ years. The Law Society recommends that the date should be re-set as at the date of making the claim. As the court's discretion to alter the date is much more likely to be an adjustment *down* rather than an adjustment *up,* the Law Society suggests that date on which to base the claim be as close as possible to the land's current value.

Market value

The Law Society questions the fairness of assessing the land at 'market value'. There are instances where market value would be inadequate. For instance, two adjoining lots could provide greater value if held together and the loss of one of those (for example an access lot on a separate title) would mean that the other lot, also on a separate title, would no longer be sub-divisible on its own. Compensation based on the market value of the access lot would thus be inadequate and unjust.

The Law Society suggests that the expression 'market value' be replaced by the expression 'compensation assessed as if the land were taken under the Public Works Act 1981'. This would mean that compensation would be the monetary equivalent of what has been lost from the claimant's perspective.

7.5 Clause 66 – Improvements made to the land

The Law Society notes that paring the date back to the date of discovery and excluding any improvements beyond that date creates a very different compensation regime than was suggested in the Consultation Draft where, at clause 60(2), the amount of compensation available (as at the date on which the claim is made) includes improvements.

7.6 Clause 68 – Court's discretion to adjust compensation

Clause 68(1)(b) allows the court to increase compensation to reflect the movement in land values, with the amount to be calculated in accordance with regulations made under section 226.

The Law Society questions the cost, complexity and effectiveness of endeavouring to prescribe market movement by regulation. This may be better left to an independent registered valuer.

7.7 Clause 70 – Award of interest on compensation

The Law Society assumes that the 'prescribed rate' will be in the Regulations and may not be a fixed interest rate as currently appears in section 179 of the 1952 Act.

Clause 70 does not mirror clause 60. If clause 60 is adopted, the words 'from the date of the claim' should read, 'from the date on which the claimant gained (or ought reasonably to have gained) knowledge that the loss had occurred'.

8 Clause 54 – Verification of Identity of mortgagor by mortgagee

8.1 The Law Society raised its concerns in relation to requiring the mortgagee to verify the identity of the mortgagor, in its letter to LINZ referred to in paragraph 7.2 above. The Law Society maintains the concerns expressed in that letter.

8.2 It is assumed that part of the reason for this is the suggestion that mortgage fraud is increasing in overseas jurisdictions, and in Australia in particular. While mortgage fraud may be increasing in Australia, there are a number of relevant factors which make processes in New Zealand more robust, including:

(a) Most states in Australia still operate a largely paper-based system and use duplicate paper titles as authority to register.

(b) In New Zealand, the LINZ Verification and Identity Standard (LINZS20002) requires additional corroborating evidence where an unencumbered property is being mortgaged (see Part 5 High Risk Transactions of the LINZ Standard).

(c) The additional evidence required by clause 5.2(a) of the LINZ Standard includes independently obtaining contact details for the physical address of the property and contacting the landowner using those details.

(d) The level of corroboration referred to above and detailed in the Standard provides a very high level of assurance as to the bona fides of the transaction without the need to positively identify the owner.

8.3 It is understood there has been only one known instance of attempted identity fraud in New Zealand land dealings since Landonline was introduced. This can be largely attributed to the robust identity standards imposed on practitioners.

8.4 The person creating the mortgage and the owner will differ where a power of attorney (**POA**) is being relied upon to execute a mortgage. The primary purpose of granting a POA is to allow a continuation of a person's affairs in their absence. A donor would be unlikely to appoint an attorney they did not trust and the donor is at liberty to limit the scope of the POA if they wish to exclude or limit an attorney's powers.

8.5 Requiring the establishment of the donor's identity may pose extreme difficulty where the donor is uncontactable (on holiday tramping or sailing, for example). The donor's financial and business affairs could be significantly compromised if the attorney cannot act as the principal, as was intended by the granting of the POA. It may be impossible to verify the identity of the donor of an enduring power of attorney who has lost capacity.

8.6 To require the identity of the donor to be positively established would impose virtually the same requirements as having the donor personally sign the authority and instruction form, thus defeating the purpose of having a POA.

8.7 The Law Society understands there are a multitude of agreements to mortgage currently in force. These are often embodied in contracts and are designed to afford one party ('Benefiting Party') security for moneys or obligations which may or will become due to the Benefiting Party. These clauses are often coupled with a provision creating a POA in favour of the Benefiting Party to register a mortgage.

For the reasons set out above, the POA provision may well be of no value if clause 54 remains in its present form. In any event, if clause 54 is to be retained, then it is submitted that a mortgage pursuant to agreement to mortgage dated prior to the Act coming into force should be exempted. Unless this is done, clause 54 would have the effect of retrospectively negating numerous existing contractual rights.

8.8 To require the positive identity of the donor of a POA where a mortgage is created, but not when ownership of the property concerned is being alienated, seems very difficult to reconcile.

8.9 It is also important to note the additional administration costs banks would incur arising from the proposed mortgagor identity verification, which costs would ultimately be passed onto consumers.

8.10 In light of the above, the Law Society submits that clause 54 of the Bill should be omitted. However, if it is retained, then the Law Society submits that:

(a) the mortgagor identity requirements should not apply where a mortgage is signed by an attorney; and

(b) the identity provisions should not apply where the mortgage is granted pursuant to an agreement to mortgage which pre-dates the Act coming into force.

9 Encumbrances

9.1 Clauses 99(3) and (4) refer to encumbrances, whilst the immediately preceding subclauses (1) and (2) address mortgages.

9.2 Whilst the term 'mortgage' is defined, 'encumbrance' is not. However, it appears that the definition of 'mortgage' which 'includes a rent charge or an annuity' would include an encumbrance.

9.3 This results in a confusing situation. By way of example, presumably clauses 100 to 105 relating to mortgages would extend also to encumbrances. However, it is submitted that it would be desirable to state this explicitly.

9.4 It is further submitted that it would be desirable in the Bill to define the expression 'encumbrance'.

9.5 Clause 99(4)(b) refers to the prescribed form of encumbrance. It would be helpful if the prescribed form in the Regulations were available at the same time as the final version of the Bill.

9.6 Modification or extinguishing of encumbrances

(a) It is submitted that the court's power to modify or extinguish a covenant under the proposed section 318 of the Property Law Act 2007 (clause 244) should be extended to encumbrances.

(b) The purpose of the vast majority of encumbrances is to impose covenants in relation to the encumbered land, rather than to secure payment of an annuity or rent charge.

(c) On this basis, the only significant difference between encumbrances and covenants in gross is that the former create a charge over the land whereas the latter do not.

(d) The Law Society understands there are many redundant encumbrances which could impede the reasonable use of the burdened land.

(e) Accordingly, the Law Society submits that there is a strong case for extending to encumbrances the powers of a court to modify or extinguish covenants in gross.

10 Mortgages

10.1 Clause 100 – mortgage variation instruments

Under clause 100(2)(a) there is provision that the mortgagor may not need to sign the variation in certain circumstances. Those circumstances are where the effect of the variation is to reduce the amount secured or to reduce the priority limit or the rate of interest. Whilst there is logic in the mortgagor not having to sign a variation that appears on the face of it to benefit the mortgagor, there is an important element of notice to a mortgagor that is lost if the mortgagor is not required to execute the variation. By way of example, the reduced rate of interest may be higher than that which was negotiated between the parties. It is suggested that the importance and benefits of a mortgagor being given notice about any change to the terms of the mortgage outweigh and take precedence over the expediency of a mortgagor not having to execute the variation in those circumstances. Accordingly, it is recommended that the mortgagor should be required to execute the variation in all circumstances.

10.2 Clause 102 – transfer of mortgaged land by mortgage sale

Clause 102(2)(a) refers to 'liability under the mortgage'. For the sake of clarity, it is recommended that the reference to 'the mortgage' be changed to read 'the mortgage under which the power of sale is being exercised'.

11 Clause 139 – Caveats

11.1 Clause 139(1) provides that whilst land is subject to a caveat the Registrar 'must not register an instrument or record any matter on the register that transfers, charges or **prejudicially** affects the estate or interest protected by the caveat' (emphasis added).

11.2 This may be contrasted with section 141(1) of the 1952 Act, which states that while the caveat remains in force, the Registrar must not make any entry in the Register 'having the effect of changing or otherwise affecting the estate or interest protected by the caveat'.

11.3 The change clause 139(1) would make is to allow registration of an instrument which does not **prejudicially** affect the protected estate or interest.

11.4 The difficulty with this approach is that it would require the Registrar to make a judgment as to whether a particular dealing is prejudicial to the caveators' position. This may be difficult to determine in certain circumstances. Examples would be:

(a) the creation of mutual rights of way between the affected land and the adjoining property, which it may be contended, at least in certain circumstances, would add value to the affected property; and

(b) registration of a lease, which in many cases may add significant value to the affected property.

The difficulty for the Registrar is that it may require information not readily available to him or her concerning whether or not the relevant instrument would in fact prejudicially affect the caveators' position.

11.5 The question of whether a dealing would prejudicially affect the caveators' position would introduce an undesirable element of uncertainty into this area. Accordingly, the Law Society recommends that the word 'prejudicially' be removed from clause 139(1).

12 Covenants

12.1 The introduction of covenants in gross which run with the land is welcomed by the Law Society. However, the requirement in the proposed section 307A of the Property Law Act (clause 240) that the covenant must require the covenantor 'to do something or to refrain from doing something, in relation to the covenantor's land' raises issues.

12.2 A requirement to join a residents' or precinct society cannot necessarily be said to relate to the covenantor's land. Such a requirement relates to the **ownership** rather than to the land itself. Given the prevalence and desirability of residents' and precinct societies, it is recommended that the proposed section 307A(b) be amended.

12.3 Accordingly, it is recommended that section 307A(b) be amended to read 'must require the covenantor to do or refrain from doing something in relation to the covenantor's land or the ownership of that land'.

12.4 The proposed section 307B(4) provides that the benefit of a covenant in gross is capable of being assigned. However, in some circumstances, it may not be appropriate that the person entitled to the benefit of a covenant in gross should have an unfettered right of assignment. In these circumstances, the covenantor may wish in the instrument to negate or limit the right of assignment. To make it clear that this would be effective, it is suggested that section 307B(4) be amended to read:

> The benefit of a covenant in gross, unless a contrary intention appears in the instrument, is capable of being assigned.

12.5 It is understood that an assignment of a covenant in gross may be effected by way of a transfer instrument. It is recommended that the proposed section 307B(4) is amended to make it clear that a covenant may be assigned by way of a transfer and will then be noted on the record of title.

12.6 It is suggested that the Bill include a provision that a land covenant is not enforceable by an assignee against a covenantor until notice of the assignment is given to the covenantor.

12.7 The proposed section 318C (clause 244) deals with applications to court for an order modifying or extinguishing a covenant. The proposed section 318C(3)(a) states that the application must be served on the territorial authority unless the court directs otherwise.

The desirability of this is open to question. A covenant may be created or surrendered without involving the territorial authority and it is difficult to see why the territorial authority should be involved where the covenant is the subject of a court application.

12.8 The proposed section 318C(3)(b) would permit the court to direct service of the application on third parties and this would include the territorial authority where that was considered desirable. Accordingly, it is submitted that subsection (a) should be omitted and subsection (b) consequentially amended by removing the reference to 'other'.

13 Adverse Possession

13.1 Clause 154

(a) The term 'adverse possession' is a curious term since it has negative connotations. Yet applications are those made by persons in occupation and possession with a view to securing title to land. The emphasis then is not on the dispossessed owner. Indeed, as the Law Commission's 2010 Report notes, the existing Land Transfer Amendment Act 1963 concerns applications for prescriptive title, with prescriptive title to land being based on possession adverse to the registered owner. Of course there remains the overriding need to not depart, unless in exceptional cases, from the principle of indefeasibility.

(b) It is recommended that the provisions in this part of the Bill would be better styled as 'Applications for prescriptive title'.

(c) Secondly, applications are limited to freehold titles only and do not reference the distinct possibility that claiming an estate or interest may also involve freehold unit titles. It is submitted that stratum estates in freehold should be included in the definition of 'freehold estate'. Incidentally in clauses 163 and 164 there is reference to 'estate in fee simple' – this should align to the 'freehold estate' definition in clause 5.

(d) Thirdly, there is no definition or guidelines which assist with determining the term 'a continuous period of not less than 20 years and continues in adverse possession of the land' – clause 154(1)(b). The 20-year rule has been around since the early 17th century and there appears no strong need to see this period altered.

(e) Various court decisions have assisted with determining how one assesses the concept of an applicant being in continuous adverse possession for 20 years (see *McDonell v Giblin* [1904] 23 NZLR 660). These variously include that the applicant must prove actual, open and manifest, exclusive and continuous usage: where the applicant must have legal possession without the owner's consent; where the owner has abandoned a site; where there is demonstrated evidence of both physical control and custody; because of the very nature of possession it need not be continuous from day to day; where possession may be claimed even where intervals and sometimes long intervals between acts of a user are demonstrated. It has also been noted fencing of an area is the strongest possible evidence of adverse possession, but not a give and take fence (see *Sinton Damerell Properties Limited v King Trounson Trustees Limited* CP252-SD02-High Court 2003). **Attached** in Schedule 1 is a draft set of suggested guidelines, which could perhaps be included in the Regulations.

(f) Fourthly, reference should be made to the distinction between bringing an adverse possession claim under the Land Transfer Act and the Limitation Act 2010. The adverse possession regime in the Limitation Act is applicable to non-Land Titles land and where a continuous occupation is required for only 12 years with a further six-year provision for successors. It is not surprising that a lesser period to prove a claim is available for non-Land Titles land. However, the drafting in clause 154(1) could be made clearer in referencing that applications may be made only in terms of where an existing title or Crown grant is being impeached and the indefeasibility of that title or Crown grant is in question.

13.2 **Clause 158 – Certain applications prohibited**

Exclusion of Maori land as defined in section 4 of Te Ture Whenua Maori Act 1993 should be reciprocated in Te Ture Whenua Maori Act 1993 (clause 158(b)). Secondly, in clause 158(e) reference to 'mistaken marking' of a boundary between the pieces of land should refer to 'manifest boundary error' of a boundary between the pieces of land, as the word 'mistaken' is too restrictive.

13.3 **Clause 169 – Application relating to land of dissolved company**

The reference in clause 169(1)(a) to 'dissolved' should be 'removed', given that there are various ways in which a company ceases to exist such as being liquidated or struck off for not filing annual returns.

13.4 **Clause 161 – Caveat against application**

It should be made clear that the reference to persons claiming an estate or interest in land relevant to an adverse possession application need to demonstrate that their estate or interest is capable of registration. Whilst this may be evident from regulations still to be published, it is submitted it is important that there be greater certainty to assist persons who lodge caveats notwithstanding that elsewhere in the Land Transfer Bill there is a requirement that the lodging of caveats must have substance to them.

14 Clause 32 – Lodging of Instruments

14.1 Clause 32 does not accord with current practice. Instruments are frequently lodged or submitted by legal executives, personal assistants and secretaries in law offices. Any person with the most basic 'search only' privileges may electronically submit the dealing to LINZ for registration.

14.2 The integrity of the electronic registration system is preserved by the requirement that an instrument which is lodged or submitted must be certified by a person who is authorised to do this.

14.3 Clause 32 as currently drafted would permit only persons who can certify instruments to lodge these. This would be altogether too restrictive.

14.4 It is submitted that the current arrangements should continue in place. To achieve this, clause 32 needs to be re-worded as follows (amendments underlined):

> **32 Lodging of instruments electronically**
>
> (1) An instrument must be lodged from an electronic workspace facility if the instrument—
>
> (a) is of a class specified in regulations as requiring electronic lodgement under this section; and
>
> (b) is <u>certified</u> by—
>
> (i) a practitioner; or
>
> (ii) a person of a class authorised <u>by this Act or</u> by regulations to certify the instrument.
>
> (2) However, the instrument need not be lodged from an electronic workspace facility if the Registrar determines it is impracticable or inappropriate to do so.

15 Legal Executives

15.1 The Law Society understands that the New Zealand Institute of Legal Executives (**NZILE**) is seeking an amendment to clauses 28(1) and 32(1) to permit Fellows of the NZILE who are undertaking legal work under the supervision of a lawyer to certify instruments for registration.

15.2 The Law Society has received from NZILE a copy of its submissions to the select committee in this regard.

15.3 The Law Society supports this submission of the NZILE but with the qualification that the legal executive must be:

(a) employed by a lawyer or an incorporated law firm; and also

(b) under the direct supervision of a lawyer.

15.4 This corresponds with the requirements in section 94A(9)(d) of the Protection of Personal and Property Rights Act 1988 which permits a legal executive to certify in respect of the requirements relating to the execution of an enduring power of attorney.

15.5 The Law Society supports the NZILE position that the proposal is limited to Fellows of the NZILE.

15.6 When a legal executive is employed by a law firm, the principals of that firm will also have a responsibility in relation to the certification of the instruments. In this regard, the lawyers concerned are officers of the High Court and are also subject to a comprehensive regulatory regime directed to the protection of consumers of legal services.

15.7 Accordingly, it is submitted it is appropriate that a legal executive who is employed by a law firm and under the direct supervision of a lawyer be entitled to certify instruments for registration as the interests of consumers and the integrity of the land registration regime would be adequately protected.

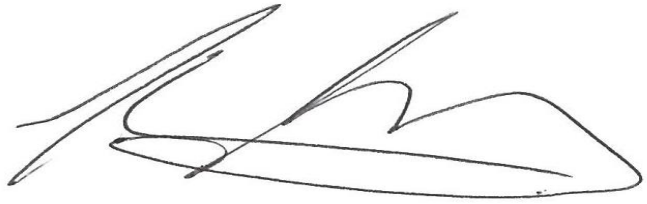
15.8 However, if clause 32 is redrafted as recommended in paragraph 14.4 above, the amendment proposed by the NZILE would not be necessary.

16 General

16.1 A number of minor suggested amendments are set out in Schedule 2.

17 Conclusion

17.1 The Law Society wishes to be heard in support of its submissions. The Law Society is also happy to discuss its submissions with the LINZ officials advising the committee and to contribute to further redrafting if that would be of assistance.



Kathryn Beck
President
20 May 2016

Attachments:

Schedule 1 – Suggested Guidelines for Determining Adverse Possession

Schedule 2 – Minor technical suggested amendments

NZLS letter dated 11.10.10 (ref. paragraph 7.2 above)

SCHEDULE 1

Suggested Guidelines for Determining Adverse Possession

In determining whether to make an order in favour of an applicant the Court may take into account the following factors:

1 Evidence of abandonment by the existing registered proprietor;

2 Evidence of physical possession and control of the subject land;

3 Certainty of subject land being identification such as by existing title or survey plan whether or not fencing of boundaries of the subject land is relevant;

4 Continuous possession for 20 years [query need not be same person but others in possession] allowing for intervals given the character and use of the land, such as for farming operations;

5 That the applicant can claim legal possession and does not have the registered proprietors consent;

6 Where the applicant has paid rates for the subject land;

7 Whether or not the existing registered proprietor has taken any steps to assert their rights;

8 Relevance of other casual users of subject land; and

9 Any other circumstances that the Court thinks relevant.

SCHEDULE 2

10 In clause 221, ‘Land Registry Office’ appears in both higher and lower case. Consistency would be desirable.

11 Clause 226(1)(c) is awkwardly worded and not easily understood. Redrafting would be desirable.

12 Clause 228(1)(e). It may be desirable to state how references to land registration districts in the legislation are to be interpreted if all districts were abolished.

13 Schedule 1 clause 3. This permits the Registrar in **his or her discretion** to accept the lodgement of an instrument under the Act that was executed but not lodged before the commencement of the Act if the Registrar is satisfied that the instrument complies in substance with the requirements of the Act.

14 The Law Society queries whether it would be preferable to state that the Registrar **must** accept lodgement where the Registrar is satisfied that the instrument complies in substance with the requirements of the Act.

15 It is suggested that clause 21(1)(c) be amended to refer to ‘accretion, erosion or avulsion’. Avulsion may occur as a result of an earthquake.

16 In clause 36, the expression ‘designated land registry office’ is used but not defined. Is it envisaged that registry offices will be designated in some way?