

In Confidence

Office of the Minister for Land Information

Cabinet Economic Growth and Infrastructure Committee

LAND TRANSFER BILL – MINOR CHANGES TO 2010 POLICY DECISIONS AND ADDITIONAL POLICY DECISIONS

Proposal

1. This paper seeks agreement to minor changes to policy decisions made by Cabinet in 2010 and to two new policy proposals, in relation to the Land Transfer Bill.

Executive Summary

2. In November 2010, Cabinet agreed to accept all the recommendations from the Law Commission report *A New Land Transfer Act*. Cabinet also agreed to a suite of related proposals to inform the drafting instructions for a Land Transfer Bill to be based on the model bill produced by the Law Commission.
3. During the drafting process, officials undertook extensive stakeholder consultation. Consequently, a number of issues requiring minor changes to policy approvals were identified. These modifications will:
 - 3.1 limit the Court's discretion to depart from the compensation formula prescribed in the Land Transfer Act 1952, change the formula to better allow for property market value shifts and allow the Registrar-General of Land (Registrar) to intervene in any proceedings involving the loss of an estate or interest in land
 - 3.2 remove proposals that prohibit the use of encumbrances to secure collateral covenants and reduce the protection available to mortgagees negatively affected by cross lease variations
 - 3.3 reduce the maximum penalty for making false statements
 - 3.4 correct an inconsistency that has resulted in administrators having limited liability in relation to positive, but not restrictive, covenants.
4. New policy proposals will strengthen privacy protections for those whose personal information is held on the land transfer register and simplify the procedure for using adverse possession to claim ownership of land in a limited title.

5. The Bill has a category three priority (to be passed, if possible, in the year) in the 2015 Legislation Programme.

Background

6. On 15 November 2010 and 24 September 2012, Cabinet agreed to policy proposals relating to the Land Transfer Bill and to the issuing of drafting instructions [CAB Min (10) 41/4 and CAB Min (12) 34/5 refer]. On 23 February 2015, Cabinet also agreed that the Bill should hold a category three priority in the 2015 Legislation Programme [CAB Min(15) 5/7 refers].
7. The Bill implements the recommendations from the Law Commission's 2010 report *A New Land Transfer Act*. The recommendations were aimed at modernising, simplifying and consolidating the land transfer legislation for enhanced clarity and accessibility and improving certainty of property rights.
8. The Bill will repeal and replace the Land Transfer Act 1952, the Land Transfer Amendment Act 1963 and the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, with a new Land Transfer Act.

Comment

Changes to Cabinet policy decisions

9. The proposals in this paper are comprised mainly of minor changes to policy decisions made by Cabinet in 2010. Officials consulted key industry stakeholder groups and government agencies on an exposure draft bill in 2013. Most of the proposals address issues raised during that consultation process. None of them are inconsistent with the overarching objectives of the Bill, as outlined in paragraph 7 above.

Compensation

10. The compensation regime under the Act is intended to compensate landowners for loss of land or an interest in land, in certain situations. The landowner can claim compensation from the Crown if the Act prevents them from recovering the land or interest in land involved (usually due to the provisions that guarantee registered titles, making them 'indefeasible').¹
11. In November 2010, Cabinet agreed that the compensation regime under the new Land Transfer Act should continue to cover landowners for losses arising from Registrar error, the operation of the land transfer system and guaranteed searches [DOM Min(10) 20/8 confirmed in Cab Min 41/4 refers]. Cabinet also agreed to two changes intended to make the compensation scheme fairer for landowners.
12. First, the date at which land is valued for setting compensation was to be shifted from the date of loss to the date the claim is made. As land usually appreciates in

¹ An indefeasible title means that the registered proprietor's title cannot be challenged or set aside.

value, and improvements may have been made to the property between the date of loss and the date of claim, this change would in most cases mean that claimants receive more compensation.

13. Using the date of claim to assess compensation could enable claimants to manipulate the regime to obtain windfall gains. This could happen in two different ways:
 - 13.1 Claimants could make improvements to land after becoming aware of the loss and before lodging a claim, in the knowledge that the Crown would ultimately have to pay for the resulting increase in the value of the land.
 - 13.2 Claimants could delay lodging claims in order to receive a higher payment. This could happen if the claimant was aware of something that might in the future increase the value of the particular estate or interest involved, over and above a more generic rise in property values. Examples include an upcoming change in the zoning of the land or developer interest in buying a particular site at a premium.
14. Cases of this type will not be common. However, the sums involved could be significant. Consequently, I consider that it would be preferable to provide for valuations to be based on the date when a claimant became aware of the loss or, if earlier, the date when a reasonable person would have become aware of it. Compensation will not be paid in relation to improvements made after that date, unless they had to be undertaken by the claimant to meet a legal obligation.
15. If the claim is paid out in a rising market, a loss adjustment allowance (additional sum based on property market movement) may be necessary to compensate for the increase in property value from the date of discovery to the date when the claim is determined.
16. Currently, interest at a rate of 5% is applied to the valuation of a loss in all cases. I favour a more flexible and accurate approach. The loss adjustment should be discretionary so that it is only applied if necessary to achieve fairness. Examples of when loss adjustment would not be necessary include claims made in a falling market and situations where the claimant delayed making the claim without good reason.
17. If a loss adjustment allowance is paid, the amount should be determined on a case by case basis, using a formula prescribed in regulations. The formula should be based on market movement in the relevant area in the period between the date of discovery and date the claim is settled.
18. The second change that Cabinet agreed to in 2010 was to give the Court discretion to use a different method of setting compensation if the method provided for in the Act would produce an unfair result (for the claimant or the

Crown). A series of recent court decisions on the *Burmeister* claim has highlighted risks with creating such an open-ended discretion.²

19. In *Burmeister* a fraudster obtained a mortgage over the claimants' property. The mortgage secured a sum of money which significantly exceeded the value of the property. The claimants sought enough compensation to enable them to pay off the mortgage and discharge it but were only awarded the value of the property. This was because the formula in the Act prevented the Court from awarding them any more. However, the Court signalled that it would have awarded the higher amount if the Act had allowed this. There was also some suggestion that the Law Commission's proposals might enable this to occur if legislated for in the future.
20. This outcome was not intended by Cabinet when accepting the Law Commission's recommendations and would significantly increase the Crown's liability for compensation. To avoid this, I want to clarify that the amount required to compensate claimants fairly is the amount that would enable them to buy a comparable property. For mortgagees, this would mean that compensation only extends to the value of the security (value of the land over which the mortgage is registered) and excludes any amount beyond that which might be owing under the mortgage.
21. As a further measure to prevent unintended outcomes of this type, I propose to limit the Court's discretion to depart from the compensation formula in the Act. The discretion should be limited to changing the date of valuation (this was the aspect of the existing compensation formula that the Law Commission was most concerned about) and applying the loss adjustment allowance.
22. *Burmeister* also highlighted the need to ensure that the Crown is able to become involved in any proceedings relating to the loss of an estate or interest in land that may eventually result in a claim against the Crown. *Burmeister* showed that findings made in earlier proceedings can affect the way subsequent compensation claims are approached by the courts. This can disadvantage the Crown. It is important that the Court's findings are made on a fully informed basis, with the benefit of the Crown's input.
23. Accordingly, I propose that plaintiffs be required to notify the Registrar of any proceedings that relate to the loss of an estate or interest in land. The Registrar would then have the right to intervene, by becoming a party to the proceedings.

Mortgagee consents required to vary cross lease provisions

24. Under the current legislation, a cross lease can only be varied with the consent of all of the mortgagees of all of the leases held under the same freehold title.
25. In November 2010, Cabinet agreed that the only consents required would be those of the mortgagees of the particular cross leases involved.³ This was to

²*Burmeister v Registrar-General of Land* [2014] NZHC 631 [1 April 2014] and *Burmeister v Registrar-General of Land* [2014] NZHC 2033 [26 August 2014].

³ There was no Cabinet decision explicitly referring to cross lease variations. Cabinet implicitly agreed to make the 2010 changes to the status quo under the Act in its decision that a bill be drafted that is closely based on the

address stakeholder concerns that obtaining consents could be difficult, time-consuming and costly.

26. When LINZ consulted stakeholders on the exposure draft bill in 2013, the New Zealand Law Society and Auckland District Law Society strongly opposed this policy. Variations can have a significant impact on the value of other leases under the same freehold title, undermining mortgage securities. Consequently, both groups were concerned that not requiring mortgagee consents could result in unfairness. I share those concerns and consider that the proposal should be removed and the status quo restored.

Use of encumbrances to secure covenants in gross

27. In November 2010, Cabinet agreed to prohibit the use of encumbrances where their primary purpose was to secure collateral covenants in gross (covenants that are not intended to secure the payment of money). However, consultation that LINZ has since undertaken with the New Zealand Law Society and the Auckland District Law Society suggests that this policy will be unworkable.
28. To reach a view on whether the 'primary purpose' of a particular encumbrance was to secure covenants in gross, LINZ staff would have to weigh the amount of money payable under an encumbrance against the significance of the particular covenant involved, on a case by case basis. It is not administratively feasible or practical for LINZ staff to undertake this exercise. As a result, compliance could not be effectively monitored and enforced.
29. It also seems from the consultation that the policy is unnecessary as the problem it was intended to address has been dealt with by another Cabinet decision. Cabinet also agreed in November 2010 to allow covenants in gross to be notified on the record of title. This measure will give landowners most of the benefits they would gain from using an encumbrance, at less cost, and with fewer risks.
30. As landowners are likely to voluntarily stop using encumbrances over time and instead have covenants in gross notified on the record of title, I propose to remove this proposal and restore the status quo.

Liability of administrators for costs arising from covenants

31. As noted in paragraph 29, Cabinet has decided to allow covenants in gross to be notified on titles. Amendments to the Property Law Act 2007 will be required to outline the process for making these notations and their legal effect. One of the new provisions will clarify that administrators (of estates of deceased persons) are not required to meet the costs of complying with the covenants in gross out of their own pockets.
32. The drafting of this new provision has highlighted an existing issue with section 304 of the Property Law Act 2007. Section 304 provides that administrators are only liable for the costs of meeting any obligations arising under positive

covenants to the extent that the assets of the estate are available to the administrators to meet those costs. However, section 304 does not make the same provision for costs related to restrictive covenants. Administrators are liable for the full costs of those obligations even if they exceed the value of the estate assets available to the administrators.

33. There is no reason for the liability of administrators to differ depending on the type of covenant involved, particularly given that the same substantive obligation can often be expressed in either a positive or restrictive way. For example, a covenant could be expressed to positively require that any building be constructed on an identified building site, or to prevent any building elsewhere on the land involved. Either way, the result is the same.
34. This policy could also result in some administrators being held personally liable for costs that they should not have to meet. This could have the flow on effect of discouraging people from taking on administrator positions in the future.
35. For those reasons, I propose that section 304 of the Property Law Act should be amended to include restrictive covenants.

Maximum penalty for making false statements

36. In November 2010, Cabinet agreed that the offence of making false statements should carry a maximum term of imprisonment not exceeding seven years. This is much higher than the penalties for similar offences. For consistency with penalties for similar offending, I propose that the maximum period of imprisonment for these offences should be reduced to three years.

New policy proposals

Adverse possession process for land in limited title

37. A person who has occupied land continuously and excluding the documentary owner can in some situations apply for ownership of it based on adverse possession. For land in a limited title (title that is not fully guaranteed by the Crown and where the boundaries of the land may not have been properly surveyed) the current process involves giving public notice. This is expensive and can take months. These costs and delays are normally unnecessary, as it is unlikely that anybody apart from the current registered owner and any adjoining owner could be affected by the outcome.
38. I propose to simplify the process and reduce costs by limiting notification to owners and occupiers (excluding the applicant) of the land and adjoining land, and anyone else who the Registrar considers might have an interest in the land. The notice requirement should be waived if those entitled to notice have consented to the application.

Privacy

39. The Bill provides an opportunity to strengthen privacy protections for those whose personal information is held on the land transfer register. Two issues have been identified.
40. First, I want to clarify that the electronic register is covered by the privacy principles that apply to the (now superseded) public registers under the Privacy Act 1993 (this was always the intention). The drafting of the existing legislation makes this clear for the paper-based register but it is less clear for the electronic register. To avoid doubt, I propose to make it explicit that the electronic register is subject to these principles.
41. The second privacy issue relates to the Registrar's powers to withhold personal information in order to protect the safety of a landowner or their family. The register includes landowners' names and addresses. Providing access to that information can enable users to track down particular individuals and, in doing so, facilitate stalking and targeted violence.
42. The Registrar has an explicit power to suppress the details of owners with court orders under the domestic violence legislation, but that power does not cover other owners facing similar threats. The Registrar has on rare occasions removed identifying details where serious concerns have been raised about the safety of a particular landowner. However, the extent of the Registrar's discretion to do this is unclear. Further, there are no statutory criteria to guide decision making and ensure transparency.
43. I propose an extension to the Registrar's existing powers to withhold personal information where required to protect the personal safety of landowners and their families.

Consultation

44. The New Zealand Law Society and Auckland District Law Society were consulted on the proposals regarding cross lease variations and the use of encumbrances to secure covenants in gross.
45. The Law Commission was consulted on this paper and is content with the proposals to rescind or change the 2010 Cabinet decisions. The Office of the Privacy Commissioner was consulted on this paper and is comfortable with the proposals related to privacy. The Crown Law Office has also provided advice in relation to certain aspects of the proposals.
46. The Ministry of Justice and Treasury were consulted on this paper. The State Services Commission and the Department of the Prime Minister and Cabinet were informed of the contents of this paper.

Financial Implications

47. There are no financial implications associated with these proposals.

Human Rights

48. All of the proposals appear to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. A final determination as to the consistency of these proposals with the New Zealand Bill of Rights Act will only be possible once the legislation has been drafted.

Legislative Implications

49. Drafting instructions were issued in September 2011 for the Land Transfer Bill. This bill currently has a category three priority (to be passed, if possible, in the year) in the 2015 Legislation Programme.

Regulatory Impact Analysis

50. A Regulatory Impact Statement (RIS) has been prepared by Land Information New Zealand officials and is attached to this paper. Cindy O'Brien, Manager Policy, has reviewed the RIS and associated supporting material. The reviewer considers that the information and analysis summarised in the RIS meets the regulatory impact analysis quality assurance criteria.

51. I have considered the analysis and advice of my officials, as summarised in the attached RIS, and I am satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:

- are required in the public interest
- will deliver the highest net benefits of the practical options available; and
- are consistent with commitments in the Government statement "Better Regulation, Less Regulation".

Publicity

52. I am seeking Cabinet's agreement for LINZ to publicly release this paper on its website.

Recommendations

53.I recommend that the Committee:

1. **note** that on 15 November 2010, Cabinet agreed to accept all the recommendations from the Law Commission report *A New Land Transfer Act* and invited the Minister for Land Information to issue drafting instructions to Parliamentary Counsel for a Land Transfer Bill to implement the recommendations [CAB DOM Min (10) 20/8 confirmed in Cab Min (10) 41/4 refers];
2. **note** that in accepting the Law Commission's recommendations referred to in paragraph 1 above, Cabinet agreed that:
 - 2.1 compensation should generally be based on the value of the estate or interest as at the date on which the claim is made, but where this value is inappropriate the court should have discretion to determine the amount of compensation on a different basis
 - 2.2 encumbrances should no longer be able to be registered where their primary purpose is to secure collateral covenants
 - 2.3 the maximum penalty for the offence of making false statements should be seven years imprisonment
 - 2.4 mortgagee consents required to vary cross leases should only be required from the mortgagees of the particular cross leases involved
 - 2.5 administrators (of estates of deceased persons) should have limited liability in relation to positive but not restrictive covenants;
3. **note** that recent case law and stakeholder consultation during the drafting of the Bill, have highlighted the need for several minor changes to those policy decisions;
4. **agree** to recommend to Cabinet that it rescinds the decisions in paragraph 2 above and instead:
 - 4.1 **note** that the amount required to compensate claimants fairly is the amount that would enable them to buy a comparable property
 - 4.2 **note** that for mortgagees, compensation only extends to the value of the security (value of the land over which the mortgage is registered) and excludes any amount beyond that which might be owing under the mortgage
 - 4.3 **agree** that compensation should generally be based on the value of the estate or interest lost as at the date on which the claimant discovered the loss or, if earlier, the date on which a reasonable person would have discovered the loss; and that compensation will not be paid for improvements made after that date unless they

they had to be undertaken by the claimant to meet a legal obligation.

- 4.4 **agree** that where this value is unfair the court should have discretion to change the valuation date, and to add a further amount (assessed using a loss adjustment formula prescribed in regulations) to reflect any increase in the value of the loss since the date of valuation
- 4.5 **agree** that plaintiffs should be required to notify the Registrar of any proceedings involving the loss of an estate or interest in land with the Registrar being empowered to intervene in such proceedings
- 4.6 **agree** that the maximum penalty for the offence of making false statements should be three years imprisonment
- 4.7 **agree** that section 304 of the Property Law Act 2007 should be amended to apply to administrators bound by restrictive covenants as well as positive covenants;
- 5. **agree** that the notice requirements for adverse possession claims for land in limited title should be limited to:
 - 5.1 owners and occupiers (excluding the applicant) of the land and adjoining land
 - 5.2 any other persons who the Registrar considers may have an estate or interest in the land
 - 5.3 and waived altogether where those entitled to notice have consented to the application;
- 6. **agree** that the land transfer legislation should be amended to clarify that the electronic register is a public register under the Privacy Act 1993;
- 7. **agree** to extend the Registrar's statutory power to withhold personal information on the register where required to protect the personal safety of landowners or their families in specified circumstances;
- 8. **agree** that this paper will be publicly released on the LINZ website.

Hon Louise Upston
Minister for Land Information
_____/_____/2015