

# Regulatory Impact Statement

Land Transfer Bill Regulations – Policy Decisions

## Agency Disclosure Statement

*This Regulatory Impact Statement (RIS) has been prepared by Land Information New Zealand (LINZ).*

*It provides analysis of options to address two regulations policy issues in relation to the Land Transfer Bill (the Bill). The Bill is expected to commence in May 2018.*

### **Compensation**

The Bill introduces a two-tiered process for dealing with claims against the Crown for compensation for loss of an interest or estate in land, or other loss or damage, through the operation of the land transfer system. The Registrar-General of Land (Registrar) alone will be authorised to accept and settle simple, undisputed compensation claims against the Crown. For more complex claims, the Bill carries over the existing process, requiring the Registrar and the Attorney-General (A-G) to concur on the treatment of claims. Regulations are required to set the dollar threshold below which the Registrar can accept compensation claims without the involvement of the A-G. The main policy objectives in setting an appropriate threshold are to ensure:

- minor, undisputed claims, of an administrative nature are settled by the Registrar;
- claims are adequately scrutinised before Crown liability is accepted; and
- public funds are managed responsibly.

The prescribed threshold should capture a majority of undisputed, minor claims that are largely administrative in nature, in a cost effective and transparent manner.

### **Withholding information for person's safety – court orders as conclusive evidence**

The Bill extends the Registrar's existing powers to withhold information where necessary to protect the personal safety of landowners and their families. Regulations can specify court orders the Registrar can rely on as conclusive evidence when deciding whether to withhold information from the register for a person's safety.

Any proposal to prescribe court orders as conclusive evidence should be consistent with the policy intent of the Bill's withholding provisions. The objective is to strengthen the protection available to landowners and their family members at risk of harm (by being identified on the register) similar to those with protection orders under the Domestic Violence Act 1995. Proposals should maintain an appropriate balance between the individual interest in personal safety and society's interest in the free flow of information from the register.

Major stakeholders are comfortable with the proposals for both issues. None of the options require further work to implement the proposed policy decisions.

Vivienne Holm  
**Acting Manager Policy**



4 May 2017

## Executive summary

1. In November 2010, Cabinet agreed [DOM Min (10) 20/8 confirmed in CAB Min (10) 41/4] that the Land Transfer Bill (Bill) should implement recommendations from the New Zealand Law Commission's 2010 report *A New Land Transfer Act*. In 2012, Cabinet agreed to further policy proposals mainly related to technical matters [EGI Min (12) 21/2 confirmed in CAB Min (12) 34/5]. Following consultation with stakeholders, two more policy proposals in 2015 were approved [EGI Min (15) 9/5 confirmed in CAB Min (15) 15/3A].
2. The Bill is in its final Parliamentary stages with an anticipated commencement date of May 2018.
3. Under the Bill, the fundamental system of land title registration, and the main processes used to give it effect, will not change. Therefore, no significant policy changes are proposed for the regulations required to implement the Bill. The regulations will generally carry over the substance of the current Land Transfer Regulations 2002, subject to some minor, technical revisions.
4. Regulations will also make consequential amendments to the Land Information New Zealand (Fees and Charges) Regulations 2003 and the Land Transfer (Land Information and Offshore Persons Information) Exemption Regulations 2015. These regulations are expressly saved by the Bill (Schedule 1 cl 10); however, this was done on the understanding that the regulations would still require consequential amendments to refer to the new Act and use the Act's new terminology (e.g., "record of title" to replace "certificate of title"), to avoid unnecessary confusion.
5. There are two new minor policy matters for regulations as a result of the Bill:
  - the monetary level to which the Registrar-General of Land (Registrar) will be authorised to settle minor and undisputed claims against the Crown for compensation for loss of an interest or estate in land, or other loss or damage, through the operation of the land transfer system and
  - court orders to be accepted by the Registrar as conclusive evidence of the need to withhold information from the register of land (or an instrument or record of title) for a person's safety.
6. It is proposed that the prescribed dollar amount up to which the Registrar can settle compensation claims without referral to the Attorney-General (A-G) will be \$10,000. It is also proposed that non-contact orders, granted under the Victims' Orders Against Violent Offenders Act 2014, should be prescribed as conclusive evidence for the purposes of withholding information from the land register for a person's safety.



7. This RIS accompanies a Cabinet paper that will seek decisions relating to these two minor policy matters. That paper will also seek decisions for some other minor, technical matters related to the regulations to support the Bill.

## **Status quo and problem definition**

8. This section provides analysis of the two new policy matters that are currently not regulated. The first of these considers an appropriate dollar threshold below which the Registrar can accept minor, undisputed compensation claims without the involvement of the A-G. The second of these examines which court orders should be conclusive evidence for the Registrar when deciding whether to withhold information from the register of land for a person's safety.

### ***Compensation threshold***

9. The current compensation regime is intended to insure landowners against loss of an interest or estate in land, or other loss or damage, through the operation of the land transfer system, in certain situations. Landowners can claim compensation from the Crown if they are prevented from directly recovering the land or interest in the land by the Land Transfer Act 1952 (LTA).
10. The LTA (s 173) requires claimants to notify the A-G and the Registrar of any claim against the Crown they intend to take to Court one month before the commencement of the action. Where a claim is clearly substantiated, the Registrar, in agreement with the A-G, can accept Crown liability (in whole or in part) and pay the claimant out of the Crown Bank Account. This allows formal Court proceedings to be avoided and meritorious claims to be settled without unnecessary expense or delay.
11. The grounds for compensation under the LTA are for:
  - loss or damage through any "omission, mistake, or misfeasance in the performance of any duty, function, or power imposed or conferred" on the office of the Registrar (s 172(a))
  - the deprivation of land, or of any estate or interest in land (through the bringing of the land under the Land Transfer Acts; or by the registration of any other person as proprietor of that land; or by any error, omission, or misdescription in any certificate of title, or in any entry or memorial in the register), or any loss or damage by the wrongful inclusion of land in any certificate of title, where the Act bars the bringing of an action for possession or other action for the recovery of that land, estate, or interest (s 172(b))
  - loss occurring after search and before registration (s 172A).
12. The Registrar operationally classifies claims under one of the following four headings: 'Error', 'Lost Documents', 'GSN' (being for claims based on loss due to reliance on a Guaranteed Search) and 'Fraud'. The first three categories tend to be the least controversial and simple to process.
13. The Registrar received a total of 66 claims for compensation in the period between 1 July 2014 and 30 June 2016. Of these claims,
  - 94% (62 claims) related to 'Lost Documents' and 'Error'. A further 3% related to two claims received in the 'GSN' category. The majority of claims in these three categories tend to be minor claims that the Crown accepts liability for on the basis of readily verifiable evidence from claimants.

- Almost all of the 'Lost Documents' cases were undisputed and Crown liability was accepted. In some cases, the amount accepted was slightly less than the amount claimed. Frequently, 'Lost Documents' claims relate to simple matters of reimbursing claimants for solicitors' costs incurred in correcting errors on a title or in replacing missing documents, such as cross-leases.
  - Crown liability was accepted for the majority of claims for 'Error'. These claims typically relate to costs associated with reinstating memorials that have been omitted from titles in error or errors made at the time of conversion to electronic titles. They are claims that are largely administrative in nature.
  - Only two claims were received in the 'GSN' category, which is too few to arrive at any concrete conclusion as to their nature. However, the two claims were of a low monetary value (\$5,620.61 and \$3,072.83), with Crown liability accepted for both.
  - There were only two fraud claims. Claims based on fraud tend to be rare, complex and more expensive than other compensation claims. The nature of a claim involving fraud is inherently difficult to establish and will always require a high level of investigation. The amounts claimed in this category – \$56,446.34 and \$515,000.00, respectively – are indicative of the difficulty involved in assessing them. It is also indicative of their complexity that neither of these claims has yet been resolved.
14. The grounds for compensation in the Bill, and the Registrar's administrative classifications of those grounds, will remain the same.
  15. The Bill (clauses 62 and 63) introduces a two-tiered process for dealing with compensation claims. For 'simple' claims (that is, below the amount prescribed in regulations), the Registrar alone is now authorised to accept and settle compensation. For more complex claims (that is, above the prescribed amount), the LTA's existing process is retained, which requires the Registrar and the A-G to concur on the settlement of Crown liability for the claim.
  16. The rationale for this change is that it will increase administrative efficiency for claims of low monetary value, and decrease costs in processing small claims with obvious merits or claims the Crown is unlikely to dispute.

#### *Status quo*

17. Regulation is required to implement the Bill's new approach for compensation claims. The regulation must specify the dollar amount under which the Registrar alone will be authorised to settle claims against the Crown for loss of land, or an interest in land, through the operation of the land transfer system.

#### *Issue*

18. The policy question is what the prescribed amount or "ceiling" should be for enabling the Registrar alone to accept Crown liability for payment of small claims for compensation.
19. When considering this issue, the Law Commission considered a "small claim" to be one that is relatively inexpensive, uncomplicated, seeking a low level of compensation and relatively easy to assess. The majority of such "small claims" tend to be for landowners' legal costs resulting from LINZ losing documents and recording errors. The appropriate threshold should capture most of these kinds of claims, most of which are also uncomplicated, relatively easy to assess and undisputed. However, the decision about the threshold should also consider the risk of potential public perception that the Registrar's administrative power is being extended too widely.



20. Regardless of the threshold specified for the Registrar to accept Crown liability for payment of small compensation claims, he or she would still have the discretion to refer a claim under that threshold to the A-G and/or obtain independent legal advice from Crown Law.

***Withholding information for person's safety – court orders as conclusive evidence***

21. 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/or targeted violence.
22. Currently, the Registrar has an explicit statutory power under section 112 of the Domestic Violence Act 1995 (DVA) to withhold information relating to owners with protection orders. That power does not cover other landowners facing similar threats. Outside the domestic violence legislation, the Registrar has on rare occasions used an administrative power to remove identifying details where serious concerns have been raised about the safety of a particular landowner. Approximately 3,000 to 3,500 protection order applications are granted each year.<sup>1</sup> Currently, only 53 titles have owners' details omitted, following applications to withhold information to protect the safety of the person or their family.
23. In April 2015, Cabinet agreed 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" [EGI Min (15) 9/5 confirmed in CAB Min (15) 15/3A refers].
24. Clause 40(5) of the Bill makes clear that the access to the register is subject to, amongst other things, Part 6 of the DVA. As a result, landowners with protection orders continue to have the ability to apply to the Registrar, and the Registrar continues to have an explicit statutory power, to withhold information relating to those landowners.
25. Clause 42 of the Bill provides for persons other than those with DVA protection orders to be able to apply to the Registrar to withhold information about the applicant in the register of land (or an instrument or record of title) for a person's safety. The Registrar may withhold information if satisfied, on the basis of any relevant evidence provided in the application, that disclosure of a person's whereabouts could prejudice the safety of the person or the person's family. Evidence provided in the application can include:
  - a. a restraining order that is in force under the Harassment Act 1997 in respect of any person (clause 42(3)(a));
  - b. any prescribed order of a court (clause 42(3)(b));
  - c. a statutory declaration by a constable, or the person's employer (if the prejudice arises from the person's employment), that he or she believes that the publication of information may prejudice the safety of the person or the person's family (clause 42(3)(c));
  - d. any other relevant evidence (clause 42(3)(d)).

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<sup>1</sup> New Zealand Family Violence Clearinghouse, *Data Summary: Violence against Women*, Data Summary 2 July 2016, p. 11, <https://nzfvc.org.nz/sites/nzfvc.org.nz/files/DS2-Violence-Against-Women-2016.pdf> (last accessed 1 May 2017).

26. The duration of the withholding period under the Bill is 5 years or any earlier date on which the Registrar decides to end the period.
27. The Bill (clause 43) includes safeguards to ensure withholding a person's information for safety reasons is only a minor impediment to users of the register. The Registrar is entitled to provide a copy of a title when necessary (e.g., to conduct a transaction with the protected person). The Registrar must give notice to the protected person before providing the copy of the instrument or record of the title to the person who requires it (or as soon as practicable afterwards if it is impracticable to give notice beforehand).
28. The Bill states that, for the purposes of evidence for an application to the Registrar to withhold information for a person's safety under clause 42, restraining orders granted under the Harassment Act will be treated as conclusive evidence (rather than merely relevant) of the matters to which they refer, unless there is proof to the contrary.
29. The Bill provides for regulations to specify other court orders that will also be treated as conclusive evidence.

#### *Status quo*

30. Under the status quo, no court orders would be prescribed in regulations. Protection orders and restraining orders would be the only court orders treated as conclusive evidence, as provided for in the Bill.

#### *Issues*

31. Under the Bill, the existence of a court order is not a pre-requisite for the Registrar to accept an application for withholding information. The regime can work without any court orders being prescribed. Any relevant court orders (in addition to those specified in the Bill) could still be provided and considered as evidence in an application to the Registrar.
32. If other court orders are clearly comparable to protection orders and restraining orders, and address comparable risks of significant harm, specifying them in regulations would be clearer and more transparent. Not prescribing comparable court orders as conclusive evidence creates an inconsistency, with very similar types of risk treated differently. This could result in delays in dealing with such applications.

## **Objectives**

### ***Compensation threshold***

33. When considering the question of compensation, the principles of Torrens' insurance,<sup>2</sup> transparency and responsible fiscal management must be borne in mind. The main policy objectives in setting an appropriate threshold are to ensure:
  - minor, undisputed claims, of an administrative nature are settled by the Registrar (as per the policy intent)
  - claims are adequately scrutinised before Crown liability is accepted

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<sup>2</sup> One of the main principles underpinning the Torrens system, introduced in 1870, is that the State now insures purchasers against such a loss, or guarantees indefeasible title. The State became responsible for passing registered title to any estate or interest from one party to another. Therefore, it was recognised that the State could also potentially be responsible for a purchaser's loss, sustained due to any error in the register. Compensation was considered a necessary corollary of this.



- public funds are managed responsibly.
34. The prescribed threshold ought to enable the Registrar to deal with the majority of undisputed, minor claims that are largely administrative in nature; in a cost effective, fiscally responsible and transparent manner; whilst mitigating any risk of reduced scrutiny in accepting Crown liability.
  35. The Registrar is already subject to a number of requirements to ensure transparency and fiscal responsibility, including contributing to LINZ's Annual Report (signed off by the Minister and publicly available) and regular detailed reporting to the Treasury in respect of compensation settlements. These requirements will continue to apply, regardless of the prescribed threshold amount chosen.

***Withholding information for person's safety – court orders as conclusive evidence***

36. The main policy objective of the Bill's withholding information provisions is to strengthen the protection available to those at risk of significant harm through being identified on the register, by ensuring the Registrar has an explicit power to withhold details of landowners and their family members who have protection orders, or who are facing similar threats.
37. Other objectives of the Bill's provisions for withholding information are to:
  - create an accessible process for landowners potentially at significant risk of harm to request that their information be withheld
  - ensure the process is transparent and subject to clear criteria
  - have minimal impact on business and other users of the register.
38. These objectives informed the decision to specify Harassment Act restraining orders in the Bill as conclusive evidence for the purposes of an application to the Registrar to withhold information for a person's safety under clause 42. Specifying restraining orders as conclusive evidence in the Bill:
  - ensures an accessible and transparent process for landowners potentially at risk of harm similar to that addressed by protection orders; and
  - is likely to have minimal impact on users of the register, given the total number of restraining orders granted. Over the period 2014-2016, the average number of restraining orders issued each year was 52.<sup>3</sup> Based on the Registrar's experience of those with protection orders who seek to have their details omitted from the register (see para 22, above), it is expected that only a very small number of landowners with restraining orders will seek to have their details omitted from the register using the clause 42 application process.
39. These objectives also inform consideration of what other court orders, if any, should be prescribed in regulations as conclusive evidence. Any proposal to prescribe court orders should maintain an appropriate balance between the individual interest in personal safety and society's interest in the free flow of information from the register.

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<sup>3</sup> Ministry of Justice email to LINZ, dated 2 May 2017. The number of orders granted was: 52 in 2014, 53 in 2015 and 52 in 2016.

## Options and impact analysis

### Compensation threshold

40. The options for an appropriate compensation threshold all involve legislative reform, because the Bill requires regulations to specify the amount.

<i>Option 1 – \$5,000</i>	<i>Option 2 – \$10,000 (Preferred option)</i>	<i>Option 3 - \$20,000</i>
<ul style="list-style-type: none"> <li>• would capture 79% of the 66 total claims received during 1 July 2014 to 30 June 2016</li> <li>• would catch 78% of 'Lost Document' claims and 87% of 'Error' claims</li> <li>• would catch a majority of claims that are undisputed, minor and uncontroversial.</li> <li>• little potential for perverse incentives to try to 'game' the compensation process</li> <li>• little legal or fiscal risk, as claims at this level are relatively straightforward and easy to assess</li> </ul>	<ul style="list-style-type: none"> <li>• would capture 89% of the 66 total claims received during 1 July 2014 to 30 June 2016</li> <li>• would catch over 90% of 'Lost Document' and 'Error' claims</li> <li>• would catch most of the straightforward cases</li> <li>• possibly perverse incentives for claimants to               <ul style="list-style-type: none"> <li>○ artificially inflate claims (knowing would be only one level of scrutiny) or</li> <li>○ ensure claim fell below the threshold (to avoid second level of scrutiny afforded by A-G)</li> </ul> </li> <li>• potential fiscal and legal (precedent) risks if Registrar incentivised to accept Crown liability, even if claim could be disputed, because easier and cheaper than having to refer claim to A-G</li> </ul>	<ul style="list-style-type: none"> <li>• would capture 94% of the 66 total claims received during 1 July 2014 to 30 June 2016</li> <li>• would catch almost all 'Lost Document' and 'Error' claims</li> <li>• would catch 1 Fraud claim</li> <li>• would capture a few more contentious claims involving significant investigation by both Registrar and A-G</li> <li>• possibly perverse incentives for claimants to               <ul style="list-style-type: none"> <li>○ artificially inflate claims (knowing would be only one level of scrutiny) or</li> <li>○ ensure claim fell below the threshold (to avoid second level of scrutiny afforded by A-G)</li> </ul> </li> <li>• potential fiscal and legal (precedent) risks if Registrar incentivised to accept Crown liability, even if claim could be disputed, because easier and cheaper than having to refer claim to A-G</li> </ul>

41. It is proposed that the regulations specify \$10,000 as the “prescribed amount” for the purposes of a claim for compensation being able to be made to, and have liability accepted by, the Registrar alone. This threshold would catch most of the straightforward cases but few if any of the more complex claims.

42. The Registrar is already subject to a number of requirements to ensure transparency and fiscal responsibility, including contributing to LINZ’s Annual Report (signed off by the Minister and publicly available) and regular detailed reporting to the Treasury in respect of compensation settlements. These requirements will continue to apply, regardless of the threshold amount chosen.

### **Withholding information for person’s safety – court orders as conclusive evidence**

43. For withholding information from the register, a regulatory and a non-regulatory option have been identified for resolving the above problems.

44. A review of legislation indicates that there is one other kind of court order intended to provide protection against a risk of significant harm similar to protection orders and restraining orders – non-contact orders under the Victims’ Orders Against Violent



Offenders Act 2014 (VOAVOA). A victim of a serious violent or sexual offence for which the offender was imprisoned for more than 2 years can apply (any time after the offender has been sentenced in respect of the offence) for a non-contact order to prevent the offender from contacting the applicant. A person cannot apply for a non-contact order if there is already a protection order or restraining order in force against that offender.

<b><i>Option 1 (Status quo) – No prescribed court orders</i></b>	<b><i>Option 2 (Preferred) – Prescribe Non-contact Orders granted under VOAVOA</i></b>
<ul style="list-style-type: none"> <li>• protection orders would be provided for through clause 40(5) of Bill applying Part 6 of the DVA</li> <li>• restraining orders would be only court orders treated as conclusive evidence, as provided for in Bill</li> <li>• Registrar would retain ability to withhold information based on other relevant evidence provided by applicant, including other court orders</li> <li>• any other court orders that address comparable risk of harm to landowners or family member would be treated differently, which could delay processing applications and expose person to serious and unjustifiable risk of harm</li> <li>• inconsistent with policy intent of Bill's withholding provisions</li> </ul>	<ul style="list-style-type: none"> <li>• non-contact orders comparable in nature, and granted for similar purposes as, protection orders and restraining orders, so comparable significant risk of harm to landowners or family member treated consistently</li> <li>• administratively easier and more efficient for LINZ to deal with withholding applications involving non-contact orders</li> <li>• Registrar would retain ability to withhold information on title based on other evidence provided by an applicant</li> <li>• consistent with policy intent of Bill's withholding provisions</li> </ul>

45. It is proposed that the regulations specify non-contact orders under VOAVOA as conclusive evidence for the purposes of an application to withhold information for a person's safety.

## Consultation

46. The following were consulted on this Regulatory Impact Statement: Te Puni Kōkiri, the Department of Conservation, the Department of Internal Affairs, Inland Revenue, the Ministry of Business, Innovation and Employment, the Ministry for Culture and Heritage, the Ministry of Justice, the Office of the Privacy Commissioner, and the Treasury. The Department of Prime Minister and Cabinet and the State Services Commission have been informed.
47. The New Zealand Law Society, the Auckland District Law Society, the Real Estate Institute of New Zealand, and the Society of Conveyancers were consulted on high level proposals regarding the regulations. Feedback was provided on an appropriate compensation threshold and the possibility of prescribing non-contact orders for the purposes of withholding information for a person's safety.
48. The Office of the Privacy Commissioner and the Ministry of Justice were consulted on withholding information for a person's safety and are comfortable with the proposal.
49. The Ministry of Justice was consulted on an appropriate compensation threshold and is comfortable with the proposal.
50. Treasury did not consider that the regulatory impacts of the policy matters are significant, further to its consideration of the Preliminary Impact and Risk Assessment (PIRA) prepared by LINZ.

## Conclusions and recommendations

51. It is proposed that the regulations specify \$10,000 as the "prescribed amount" for the purposes of a claim for compensation against the Crown being made to, and having liability accepted by, the Registrar alone under clauses 62 – 63 of the Bill.
52. It is proposed that the regulations specify that non-contact orders in force under VOAVOA in respect of any person will be treated as conclusive evidence for the purposes of withholding information for a person's safety under clauses 41 – 43 of the Bill.

## Implementation plan

53. A transitional period of 18 months from enactment to implementation is proposed for the Bill. This is to allow sufficient time for LINZ to develop regulations, standards and guidance material and to make related adjustments to Landonline.<sup>4</sup> Also for industry stakeholders to make the necessary adjustments to their internal systems and procedures.

## Monitoring, evaluation and review

54. The operation of the new act, including the measures outlined above, will be monitored by LINZ as part of its business as usual internal audit and reporting requirements. There are no plans to proactively review the primary legislation. LINZ expects that any issues with the effectiveness of the system will be picked up in the monitoring outlined above. The subordinate legislation will be reviewed as part of the ongoing LINZ regulatory scan under the Government's Regulatory Review Programme.

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<sup>4</sup> Landonline is the transaction centre established by LINZ for property professionals and local councils to carry out land dealings efficiently and securely online. Surveyors, lawyers, conveyancers and other professionals can securely search, lodge and update title dealings and survey data, digitally, all in real time.