

Regulatory Impact Statement

Law Commission Report – A New Land Transfer Act

AGENCY DISCLOSURE STATEMENT

This Regulatory Impact Statement was prepared by Land Information New Zealand (“LINZ”). It provides an analysis of options to implement the recommendations from the Law Commission Report *A New Land Transfer Act* (NZLC 116).

On 20 July 2010, the Commission tabled the report *A New Land Transfer Act* (“the report”) in the House. The report resulted from the Commission’s comprehensive review of the Land Transfer Act 1952 in conjunction with LINZ and with input from the Ministry of Justice.

The report makes 25 recommendations, and includes a draft Land Transfer Bill, intended to modernise, simplify and consolidate the land transfer legislation for enhanced clarity and accessibility. The overall effect would be to retain the fundamental principles of the existing system (registration as a prerequisite for the acquisition of legal title and State-guarantee of title) subject to some changes to ensure that people continue to be secure in their property ownership. These include a limited judicial discretion to order alteration of the register in cases of “manifest injustice” and requiring mortgagees to take reasonable steps to verify the identity of mortgagors.

The analysis covers three options for implementing the report: status quo, partial implementation and full implementation. Key assumptions are that there will be no or negligible compliance costs associated with full implementation (implementing all of the Commission’s recommendations) and that the government will have to make a very compelling case for not accepting all of the Commission’s recommendations. The related constraints are the requirements under Cabinet Circular CO (09) 1 for responding to Law Commission reports. The key dependency is the Anti-money Laundering and Countering Financing of Terrorism Act 2009 – the analysis explores the inter-relationship between the customer identity verification requirements under that legislation and the mortgagor identity verification requirements proposed for the new Land Transfer Act.

None of the policy options are likely to have the effects that the government has said will require a particularly strong case before regulation is considered.

Cindy O’Brien, Senior Policy Analyst, Land Information New Zealand.

STATUS QUO AND PROBLEM DEFINITION

The status quo

The Land Transfer Act 1952 (“the LTA”) and its two stand-alone amendment Acts (Land Transfer Amendment Act 1963 and Land Transfer (Computer Registration and Electronic Lodgement) Amendment Act 2002) make up the legislative framework that governs land transfer registration and transactions. Almost all privately owned as well as some Crown land is held and transacted under this legislative framework.

The Law Commission led a review of the LTA in conjunction with Land Information New Zealand (“LINZ”) and with input from the Ministry of Justice. The Commission presented the report A New Land Transfer Act to ministers in June 2010 and on 20 July 2010, the report was tabled in the House. The report included a draft bill. The Minister for Land Information is required under Cabinet Circular CO (09) 1 to report to Cabinet within 120 days of the Law Commission report being tabled in the House on whether to accept the Commission’s recommendations.

There is no cost advantage in retaining the status quo – the preferred option is expected to result in no or negligible compliance costs.

The problem

The current legislation is out of date in relation to both form and substance. It has not kept pace with technological and other changes that have occurred since its enactment in 1952. Some of the provisions lack clarity and are inconsistent with current practice while others are being used for purposes for which they were not originally intended. The LTA is focussed on paper-based land registration (the registration system is almost exclusively electronic) and was not designed to counter problems such as increasingly sophisticated forms of mortgage fraud. The strict application of the principle of indefeasibility of title can, in rare cases, have harsh consequences.

OBJECTIVES

It is proposed that Cabinet approves the Commission’s recommendations and agrees that drafting instructions be issued to the Parliamentary Counsel Office for a bill based on the Commission’s draft Land Transfer Bill.

The objectives of implementing the Law Commission’s recommendations are to:

- modernise, simplify and consolidate the land transfer legislation for enhanced clarity and accessibility; and
- introduce measures to enhance security of property ownership.

REGULATORY IMPACT ANALYSIS

Alternative options

Status quo

If the status quo is retained, New Zealand will remain in the incongruous position of having a state of the art electronic land title registration system regulated by legislation that is almost 60 years old. The government will have to report to the House on its reasons for not accepting the Commission's recommendations (Cabinet Circular CO (09) 1 refers). It is difficult to envisage what those reasons might be - the Commission's proposals were widely supported by submitters on a publicly-available issues paper, the general consensus is that the proposed overhaul of the LTA is long overdue and we expect compliance costs to be nil or negligible. The status quo is therefore not the preferred option.

Partial implementation of the Commission's recommendations

An alternative option is to implement only some of the Commission's 25 recommendations. The Government would have to report to the House on its reasons for not accepting all the Commission's recommendations. While this option might be desirable if individual recommendations were particularly costly or otherwise problematic to implement, we have not identified any recommendations that meet this criteria. This option is not preferred because dispensing with individual recommendations would compromise the overall effectiveness of the proposed reforms.

Preferred option

The preferred option is to implement all of the Commission's recommendations via a Land Transfer Bill to be introduced next year with a view to enactment by the end of 2011. On this timing the legislation would be brought into effect by the end of 2012. The bill would:

- modernise, simplify and consolidate the land transfer legislation by removing out-dated provisions, anomalies and unclear provisions and re-enacting provisions to make them clearer, more workable and consistent with modern practice; and
- improve security of property ownership by introducing a judicial discretion to order alteration of the register in cases of "manifest injustice" and requiring mortgagees to take reasonable steps to verify the identity of mortgagors.

COSTS AND BENEFITS

Costs

We expect there to be no or negligible compliance costs to industry in relation to these proposals. Lawyers, conveyancers and legal executives will not be subject to any additional requirements under these proposals.

Banks and non-bank financial institutions will be subject to a new requirement for mortgagees to take reasonable steps to verify the identity of mortgagors. However, mortgagees will be able to meet this requirement by complying with the customer identity verification provisions under the Anti-money Laundering and Countering Financing of Terrorism Act 2009 (the “AML/CFT Act”).

We propose to dovetail the implementation of this requirement with the implementation of the AML/CFT Act and its regulations and industry codes of practice so that mortgagors are not required to incur any compliance costs under the new Land Transfer Act additional to those incurred under the AML/CFT Act. Waiting for the AML/CFT legislation to be finalised will enable us to avoid imposing unnecessary costs through misalignment of the two legislative regimes. This might mean that some provisions of the new Land Transfer Act come into effect before others.

There are expected to be no compliance costs to the Crown in relation to these proposals.

Benefits

A clearer legislative framework, premised on electronic registration, would assist in the efficient administration of the land transfer system. The clarification the Bill would provide as to the nature of a landowner’s registered title, the extent of any exceptions, the scope of the compensation regime and the Registrar’s powers of correction should provide more certainty and minimise the potential for disputes and litigation on these matters. This benefits anyone who deals with or has an interest in land, including owners, vendors, purchasers, lessors, lessees, and the intermediaries who facilitate land transfer transactions (lawyers, conveyancers, legal executives and financial institutions).

The limited judicial discretion to restore a registered land owner’s title lost through fraud or other illegality by another party will benefit affected owners and maintain confidence in the land title system.

The requirement for mortgagees to take reasonable steps to verify the identity of mortgagors, will reinforce existing obligations in that regard under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. It puts appropriate incentives in place for mortgagees to exercise due diligence when establishing the bona fides of a prospective mortgagor. In the event of identity fraud, a mortgagee who has failed to discharge these obligations will not be entitled to enforce the mortgage or seek compensation from the Crown. It therefore benefits registered land

owners and potential purchasers by addressing the risk of mortgage fraud and providing greater certainty of ownership.

There are also legislative and non-legislative measures intended to provide information and guidance about the interface between the LTA and other land-related statutes. These will benefit all participants in the land market as well as the agencies that administer the legislation.

CONSULTATION

The Law Commission consulted widely during its review of the LTA. Public consultation occurred via submissions on the issues paper Review of the Land Transfer Act 1952 (NZLC IP 10, Wellington, 2008). The Commission also engaged in targeted stakeholder consultation with industry groups, including the NZ Law Society and the NZ Bankers' Association.

LINZ consulted the following industry stakeholders on these proposals: the New Zealand Law Society, Auckland District Law Society, New Zealand Bankers' Association, Financial Services Federation, New Zealand Society of Conveyancers and the Institute of Legal Executives. Consultation occurred via submissions on the report and meetings with those who wanted to discuss their submissions.

We also consulted the following government agencies on these proposals: the Ministry of Justice, Te Puni Kokiri, Treasury, the Crown Law Office and the Law Commission. The State Services Commission and the Department of Prime Minister and Cabinet were informed of this paper.

Industry stakeholders are generally very supportive of the proposals and the Commission's draft bill. The proposal of most concern to industry is the requirement on mortgagees to verify the identity of mortgagors. These concerns include:

- uncertainty for mortgagees around what constitutes "reasonable steps";
- unnecessary legislative duplication of customer identity verification requirements as mortgagees are already required to follow similar requirements under the Financial Transactions Reporting Act 1996 and the AML/CFT Act;
- potential for inconsistency with the AML/CFT regulations and codes of practice which would cause uncertainty and increased compliance costs; and
- the Commission's draft bill requires re-verification of the mortgagor's identity if the mortgage is transferred – this is unworkable.

The proposals were altered to address these concerns by providing for the new Land Transfer Act identity verification requirements to come into force by Order in Council after the AML/CFT regulations and industry codes of practice have been finalised. The AML/CFT standards can be adopted by deeming compliance with them (with or without modification) as compliance with the new Land Transfer Act requirements.

The legislation will also reflect that the transferee of a mortgage will be in no better position than the original mortgagee if the latter failed to comply with the mortgagor identify verification requirements when that mortgage was created.

We will continue to liaise with the Ministry of Justice on the development of the AML/CFT regulations and industry codes of practice to ensure that both sets of identity verification standards are as closely aligned as possible.

Government agencies are also supportive of the proposals. There was only one area where the proposals were changed following consultation – the Commission’s recommendation that an in-depth review be carried out in relation to the registration of Maori land. We consulted Te Puni Kokiri and the Ministry of Justice on this proposal and all agencies agreed that some initial scoping work should be done before committing resources to an in-depth review largely because work in this area has progressed since the Commission finalised its report and some of the problems identified at the interface of Te Ture Whenua Maori Act 1993 and the LTA have or are being resolved. The Law Commission is comfortable with this modified approach to the recommendation.

IMPLEMENTATION

A transitional period of 12 months from enactment to implementation is proposed for the legislation intended to give effect to the Commission’s recommendations. This is to allow sufficient time for:

- LINZ to develop regulations, standards and guidance material and to make related adjustments to Landonline; and
- Industry stakeholders to make the necessary adjustments to their internal systems and procedures. (Stakeholder consultation suggests that this will likely be related to the customer identity verification requirement).

MONITORING, EVALUATION AND REVIEW

The operation of the new act 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.