



28.4.2016

Submission to the Parliament on the Land Transfer Bill.

### **Introduction**

1. This submission, examining the major changes the Land Transfer Bill has been prepared by the Wellington Community Justice Project.
2. The Wellington Community Justice Project (WCJP) ([www.wellingtoncjp.org](http://www.wellingtoncjp.org)) is a student-led organisation at Victoria University of Wellington. The project, formed in 2010, has twin aims: to improve access to justice and legal services in the community; and to provide law students with an opportunity to gain practical experience. It pursues these goals by establishing community-based volunteer projects and working with other organisations that have similar goals.
3. The research for this submission was carried out by students Cameron McCracken (LLB/BA), Josiah Koh (LLB), and Julia MaClean (LLB/BA) as part of volunteer work for the project.

## *I Introduction*

1. This submission concerns the Land Transfer Bill 2016 that follows the recommendations proposed by the Law Commission in the 2008 report. This submission examines a few major changes in the Bill.

2. First, the judicial discretion to order alteration of the register to restore ownership of land to the previous registered owner. Second, the changes to the method of valuation of land for the purposes of compensation. Third, foreign investment and finally, consistency with Maori Land Law Reform.

## *II Current Framework for Indefeasibility of Title*

3. The Land Transfer Act 1952 (“the Act”) provides for title upon registration and embodies the core principles of the Torrens land transfer system. There are three principles which we wish to highlight below. In particular, there is often a tension between the first and second principles, and the third principle.

- a. Title to land should be acquired by registration;
- b. Title should, as far as possible, be secure and indefeasible; and
- c. Adequate compensation where an innocent owner has suffered loss due to the operation of the system.

4. This tension is best seen in the operation of immediate indefeasibility, which is a concept derived from the Act's title upon registration. A bona fide purchaser who relies on the register and registers a transfer obtains a good title. Once registration occurs, whether the transfer instrument used was void or invalid becomes irrelevant.

5. This system offers good protection for purchasers. First, it promotes transactional ease. Purchasers can rely solely on the register and not conduct their own investigation into ownership. Second, it confers certainty of title upon transfer. Registration means that the purchaser is now the legal proprietor. These advantages tie in with the core principles of the Torrens system, namely title by registration, and security and indefeasibility of title.

6. However, strict application of immediate indefeasibility can lead to unfair results for owners who are innocent victims of third party fraud. This is because the purchaser acquires a good title upon registration (assuming that there is no fraud) and the previous registered owner loses her property even though the transfer instrument used was void or invalid.<sup>1</sup> The defrauded previous owner may apply for compensation but this may not be adequate recompense for losing her home.<sup>2</sup> In particular, for many New Zealanders, buying a home is the biggest investment they will ever make. Monetary compensation may therefore be insufficient to compensate for both the financial loss and any emotional harm suffered. This ties in with the principle of adequate compensation mentioned above. In such situations, the statute becomes a mechanism of fraud.

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<sup>1</sup> Law Commission *Review of the Land Transfer Act 1952* (NZLC IP10, 2008) at 2.48.

<sup>2</sup> Law Commission, above n 1, at 2.68.

7. The Cabinet Paper on the Law Commission Report has emphasised the need for a balance between promoting transactional ease for purchasers and security of ownership against third party fraud.<sup>3</sup> WCJP agrees with this view.

### *III Proposed Legislative Changes for Indefeasibility of Title*

8. Under s 56 of the Bill, a person who has been deprived of an estate or interest in land or who suffers any other loss or damage by the registration under a void or voidable instrument of another person may apply to the court for an alteration of register under s 57. Pursuant to s 57, such an order may only be made if the court is satisfied that it would be manifestly unjust for the new registered proprietor to remain the registered owner of the estate or interest.

9. The words “manifestly unjust” indicate an extremely high threshold that naturally promotes caution. Since title by registration is such a fundamental concept of the Act, courts are likely to only exercise this discretion in exceptional circumstances. Nonetheless, WCJP is of the opinion that the circumstances in which such a discretion may be exercised will need to be carefully defined.

10. Section 57 of the Bill provides factors that the court may consider when deciding whether to exercise its discretion. They can be broadly categorised into five groups. First, the nature of the ownership. This includes considering the nature of the interest, and the period of time that the previous and new registered owner have owned or occupied the land. Second, the parties’ use of the property. This includes any improvements made to the land and the identity of the person occupying the land. Third, any special characteristics of the land and their significance

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<sup>3</sup> Cabinet Paper “Law Commission Report – A New Land Transfer Act” (04 April 2011) at 5.

to the parties. Fourth, the circumstances of the invalid transaction. This includes considering how the new registered owner acquired the interest, whether she failed to comply with any statutory rules in the process, and the conduct of both parties. Finally, any other circumstances that the court thinks is relevant.

11. WCJP considers that these factors provide good guidance for judges. In particular, we believe that it is desirable and relevant for the courts to consider the personal circumstances of the parties. For example, whether the previous or new registered owner had invested all their savings in the land and its improvements. Such circumstances would certainly inform the opinion of what is “manifestly unjust”. Personal circumstances can be made into an explicit factor, or can be dealt with under the last group of “any other circumstances”.

12. Moreover, where the land is of great significance to the previous registered owner, monetary compensation alone may not be adequate. WCJP recommends the addition of another factor for consideration: the extent to which the loss of the previous registered owner may be adequately recompensed.

13. Finally, some principles as to the standard of what is “manifestly unjust” for the purposes of s 57 would be desirable. However, in order to give the term flexibility to adapt to the myriad of possible circumstances, it may be better dealt with by the courts (rather than by legislation).

#### *IV Current Framework for Compensation*

14. The Act allows a person to recover damages from the Crown if she has been deprived of any interest or estate in land, by the error of the Registrar or failure of the land registration system.

15. When measuring compensation, the loss suffered is calculated based on the value of land at the date of deprivation. This approach is often unfair because there is usually a substantial period of time between the actual deprivation and the discovery of that deprivation.<sup>4</sup> This means that any increase in property values or improvements made to the property during that time will not be accounted for in the compensation. This undermines the principle of adequate compensation which the Act seeks to promote.

#### *V Proposed Legislative Changes for Compensation*

16. Section 65 of the Bill provides that land valuations are based on market value at the date on which the claimant gained (or ought reasonably to have gained) knowledge that the loss had occurred. This means that valuation is no longer calculated with respect to the date of deprivation.

17. WCJP supports this change as it promotes fairness to the deprived party, who should now receive greater compensation. This ties in with the core principle of adequate compensation. In addition, this change enables the valuation of land to be calculated with greater ease and

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<sup>4</sup> Law Commission, above n 1, at 11.51.

accuracy.<sup>5</sup> This is because the date at which the claimant gained knowledge of the loss will be more current.<sup>6</sup> Notably, this promotes efficiency and simplicity, which is another core principle of the Torrens system.

18. We also note that s 68 of the Bill preserves the court's discretion to adjust compensation if it considers that the amount would be inadequate or excessive. This is desirable as it enables the court to do justice in appropriate cases.

## *VI Land Transfer Bill and Foreign Investment*

19. The Land Transfer Bill has come under criticism by several members of Parliament for failing to impose further restrictions upon the sale of NZ land to overseas persons.<sup>7</sup> It has been put forward that farm owners are going to be put under pressure to sell their land due to the threat of banks foreclosing on their debts, the only way to keep the value of the land up is to ensure overseas persons are able to invest and purchase the land, and that this will facilitate the sale of land to non-residents or overseas persons as they are the ones that will have the funds to be able to ensure that farmers still get a good deal for their land.<sup>8</sup> There is concern that the land will then be alienated indefinitely from New Zealanders and that this will be to the detriment of New Zealand.

20. There are benefits and risks involved with the sale of assets in general to non-residents, however it appears to be in the interest of New Zealanders as a whole that foreign investment

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<sup>5</sup> Law Commission, above n 1, at 11.51.

<sup>6</sup> Law Commission, above n 1, at 11.51.

<sup>7</sup> (15 March 2016) 712 NZPD 9682.

<sup>8</sup> (15 March 2016) 712 NZPD 9682.

not be subject to further restrictions. It is important weigh up potential benefits and disadvantages that may occur as a result of overseas investment, and also to compare New Zealand's current approach to that of the practices in other countries.

## *VII Overseas Practices*

21. It is often desirable to have New Zealand law consistent with those of similar overseas jurisdictions. The Canadian province of Saskatchewan is a good example with which to compare New Zealand, as farming and agriculture are vital to the province's economy and are important to the people of the province,<sup>9</sup> in much the same way they are vital to New Zealand.<sup>10</sup>

22. New Zealand currently requires there to be permission granted for the transfer of land to a non-resident with the relevant Minister making the determination of whether permission should be granted for sale of more than 5 hectares by ensuring the benefit that will exist to New Zealand will or is likely to be "substantial and identifiable", looking at the character, business acumen, financial commitment and the individual eligibility for visas.<sup>11</sup> Furthermore, New Zealand courts are able to order the disposal of property where it is deemed that an overseas person has failed to meet their obligations in owning sensitive land.<sup>12</sup> It is clear that New Zealand's current laws surrounding foreign investment and purchase of land are already reasonably restrictive.

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<sup>9</sup> SN Kulshreshtha and BF Noble "Agriculture" in BD Thrave *Saskatchewan: geographic perspective* (University of Regina Press, Regina, Saskatchewan, 2007) 337 at 337.

<sup>10</sup> "New Zealand Financial and Economic Overview" (2015) The Treasury <[www.treasury.govt.nz](http://www.treasury.govt.nz)> at 17.

<sup>11</sup> Overseas Investments Act 2005, s 16.

<sup>12</sup> Section 47.

23. In Saskatchewan, the quantity of land that may be purchased or held by non-residents is limited to 10 acres.<sup>13</sup> Although this is a higher quantity than the review threshold in New Zealand, it is a limit which cannot be surpassed as is demonstrated by the Saskatchewan Court of Queen's Bench decision in *Saskatchewan (Farm Land Security Board) v Anderson*.<sup>14</sup> In New Zealand, a non-resident can purchase far greater quantities of land at the discretion of the relevant Minister(s) or the regulator and there are no limits on the total amount of New Zealand farmland which a non-resident may possess.<sup>15</sup>

24. It should also be noted, that the approach in Australia is much less strict than that of New Zealand as the national interest test for determining whether to permit foreign investment in Australia is a negative test.<sup>16</sup> This means that it is only when it is contrary to national interest that a foreign investment proposal will be prevented. In New Zealand it is only when it is beneficial to New Zealand that a foreign investment proposal will be approved and thus it is more difficult to make a purchase in New Zealand than Australia.

25. Should New Zealand decide that it wishes to place further restrictions upon the sale of farmland to overseas purchasers, the approach in Saskatchewan may be useful to follow. However it should be noted that New Zealand's current measures are not overly lax as it is, and it may be better leave the laws as they currently are or at the most, adopt some ideas from Saskatchewan and perhaps place a limit upon the maximum land one non-resident may possess. New Zealand should not be hasty to discourage foreign investment for the reasons explained below.

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<sup>13</sup> The Saskatchewan Farm Security Act SS 1988 c S - 17.1, s 80.

<sup>14</sup> *Saskatchewan (Farm Land Security Board) v Anderson* 1999 SKQB 217.

<sup>15</sup> Overseas Investment Act 2005, s 14.

<sup>16</sup> Foreign Acquisitions and Takeovers Act 1975 (Cth), s 67.

## *VIII Benefits and Disadvantages of Foreign Investment*

26. Concerns over foreign investment and purchase of New Zealand farmland stems from fear that the land will be taken out of the reach of the people of New Zealand. However foreign investment is important for the New Zealand economy.

27. Whilst there should be concern regarding the ability of New Zealanders to purchase land, the perspective of the farm owners looking to sell must also be taken into consideration. Involving interested foreign potential investors would increase the demand and competition for the land and this would likely drive up the value of the land, in terms of the sale value to the farm owner.<sup>17</sup> This benefits farm owners looking to sell as they are then able to get a better price for their land. Furthermore, foreign investment increases domestic capital and can often bring expertise and links to markets with it,<sup>18</sup> which is of course beneficial to New Zealand as a country. Foreign investors pay taxes and will mostly employ New Zealanders to work on these farms anyway,<sup>19</sup> which mitigates concerns regarding loss of employment.

28. Despite the economic benefits, there is reason to be concerned that the sale of farmland may result in a loss of opportunity for New Zealanders aiming to purchase farmland and have control over their own lands. Prospective farm owners will quite possibly be put off the idea of becoming involved in the farming and agriculture industries in New Zealand if they have the view that it will not be possible to one day own their own farmland. This would be incredibly detrimental to New Zealand because – as was earlier noted – farming and

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<sup>17</sup> Roger Kerr “Should We Restrict Foreign Investment in Land?” (8 October 2010) The New Zealand Initiative <<http://nzinitiative.org.nz/>>.

<sup>18</sup> Kerr, above n 17.

<sup>19</sup> Kerr, above n 17.

agriculture are incredibly important to New Zealand the economy and are important in providing employment opportunities for New Zealanders.<sup>20</sup> It will be easier to encourage New Zealanders to enter farming and agriculture industries if they are able to reasonably foresee themselves being able to own their own land at some point. The disadvantage of making the land more difficult for New Zealanders to acquire may be a valid concern due to its potential to discourage New Zealanders from entering the farming and agriculture industries which are vital to the economy and as a source of employment.

29. There are economic benefits of foreign investment which apply to those directly involved with the transaction, and wider New Zealand. These economic benefits are persuasive arguments for not putting further restrictions upon foreign investment and maybe even to encourage and facilitate foreign investment as much as is practicable. However there is valid concern regarding the fact that land may become less attainable for people aspiring to own their own farmland and thus discourage these people from going into the industry in the first place. Balance must be struck between these two interests.

### *VIII Consistency with Maori Land Law Reform*

30. Land ownership has historically been a contentious issue between Maori and Pakeha in New Zealand. Therefore any changes to land legislation, no matter how minor, should aim to minimise potential for conflict and grievance. Consistency and awareness of other laws which affect Maori land interests will help ensure New Zealand's land law works as a cohesive whole. Since the original Land Transfer Act was implemented in 1952, social and political

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<sup>20</sup> "Household Labour Force Survey: December 2015 quarter – tables" (3 February 2016) Statistics New Zealand < [www.stats.govt.nz](http://www.stats.govt.nz) > at table 7.

conditions have changed. Now there are legislative safeguards against the alienation of Maori land, ranging from individual statutes such as Te Ture Whenua Maori Act 1993 to the inclusion of specific Treaty of Waitangi clauses in broader statutes that regulate land use, such as the Resource Management Act 1991 and the State-Owned Enterprises Act 1986.<sup>21</sup> Therefore, in this legislative context Parliament has a duty to fully consider how new legislation impacts existing Maori land rights.

31. Clause 57 of the Bill provides for judicial discretion to alter title in cases of manifest injustice such as breach of Te Ture Whenua Maori Act, and clause 158 bars application for title based on adverse possession if the title is for Maori freehold or customary land.<sup>22</sup> These are positive developments in that the Bill recognises existing Maori property rights. There has been judicial debate in the past over whether the Land Transfer Act 1952 could override Te Ture Whenua Maori Act.<sup>23</sup> By identifying specific circumstances where Maori land rights can prevail, the Bill provides welcome clarity on this issue.

32. The Bill's purpose of enhancing clarity and accessibility of the land transfer system could be best achieved by inquiring into the effects of the upcoming Te Ture Whenua Maori Bill which is currently being drafted.<sup>24</sup> As the Te Ture Whenua Maori Act is the main statute regulating administration of Maori land, it inevitably overlaps with land transfer.<sup>25</sup> In fact, when discussing the need for a modern land transfer act, the Law Commission recommended a separate review be conducted on the issue of Maori title registration due to its complexity.<sup>26</sup>

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<sup>21</sup> Geoffrey and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Oxford, 2004) at 337.

<sup>22</sup> Land Transfer Bill 2016, (118-1), cl 57 and cl 58.

<sup>23</sup> Law Commission *A New Land Transfer Act* (NZLC R116, 2010) at 47.

<sup>24</sup> Land Transfer Bill 2016 (118-1) (explanatory note) at 1, and Te Puni Kōkiri "Te Ture Whenua Māori Reform" <[www.tpk.govt.nz](http://www.tpk.govt.nz)>.

<sup>25</sup> Te Puni Kōkiri *Te Ture Whenua Māori Act 1993 Review Panel Discussion Document* (March 2013) at 14.

<sup>26</sup> Law Commission *A New Land Transfer Act* (NZLC R116, 2010) at 52.

33. Arguably the situation has grown more complicated with the advent of major reforms planned for Te Ture Whenua Maori Act, which will affect the ownership and retention of Maori land.<sup>27</sup>

## *VI Conclusion*

34. For the reasons above, WCJP strongly supports the two major changes to the Act, namely:

- a. The addition of judicial discretion to order alteration of the register to restore ownership of land to the previous registered owner; and
- b. The change to the method of valuation of land for the purposes of compensation.

35. There are potential benefits and disadvantages of the sale of New Zealand farmland to non-residents and overseas investors. Concerns that New Zealanders will find it more difficult to purchase land and therefore be dissuaded from entering the farming and agriculture industries must be balanced with the benefits (largely economic) that will likely follow from allowing and encouraging foreign investment. There are countries which take far more liberal approaches to the permitting of foreign investment than that which New Zealand currently takes, but as securing land for future generations of New Zealanders is undoubtedly important it may be beneficial to impose restrictions upon the quantity of land which foreign investors may hold. This limitation should not be as strict as that in Saskatchewan and should still encourage overseas persons to invest in New Zealand farmland. Investment by overseas investors is beneficial and should be encouraged, but it should also be moderated.

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<sup>27</sup> Carwyn Jones “Te Ture Whenua Māori Reform” (3 August 2015) Ahikāroa Indigenous Law <[www.ahikaroa.wordpress.com](http://www.ahikaroa.wordpress.com)>.

36. Finally, the Land Transfer Bill will be best placed to achieve a comprehensive reform of the transfer system if it is analysed alongside corresponding and relevant changes in the Te Ture Whenua Maori Bill. Such analysis would reduce the opportunity for legislative contradiction, and could help strengthen Maori land rights within the updated system.