

Managing Property Law Risk - Mortgagees and legal indemnity Insurers

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The Land Transfer Act 2017 is designed to provide modern legislation to maintain the integrity of title to estates and interests in land. While the Act goes a long way to managing property law risks associated with establishing rights of ownership, risks outside the boundaries of the Torrens system also require managing. This paper reviews the extent to which the Act may alter a mortgagee's property law risk and the extent to which private insurance may complement the Act's management of risks and the extent to which insurance may manage such risks.

The Act amends the concept of instant indefeasibility by the introduction of the ability to delay and potentially deny indefeasibility if a Court is satisfied that it would be manifestly unjust for the register to remain unaltered. It also changes the rules relating to compensation. Although loss to a mortgagee in these circumstances is likely to be addressed by compensation or damages, this paper reviews the adequacy of the provisions of subpart 3 of the Act for a mortgagee. It also examines whether, in the case of fraud, the Act adequately manages a mortgagee's risk when the mortgagee elects to use an all obligations style mortgage.

A fully electronic register means that a physical mortgage in the form of a deed is replaced by a "virtual mortgage" constructed out of the registered instrument and terms and conditions and covenants contained or incorporated in the instrument or implied by law. This paper reviews the extent to which provisions in a separate loan agreement may be incorporated in the registered mortgage and thus attain indefeasibility.

A mortgagee may be affected by issues arising from the electronic operation of the register, such as mistakes made by third parties for which compensation under section 58 is not available, and by issues relating to the verification of identity and certification for registration. The extent by which a mortgagee may be affected by these issues is reviewed. The paper also questions whether specific private insurance for loss arising from electronic registration issues is a preferable alternative to relying on the third party's professional negligence insurance.

The registration of covenants in gross in place of an encumbrance is reviewed. For example, does a covenant in gross, registered in priority to a mortgage and carrying a monetary penalty affect the value of the mortgage security and change the risk profile for a mortgagee?

Since the introduction of compulsory registration of interest in land in England and Wales, the use of legal indemnity insurance (or title insurance) as a commercial option to covering property law risk has increased. The paper reviews the relevance of the English experience to New Zealand. Although many property law risks insured against are dealt with under other legislation, such as the Property Law Act 1952, the Resource Management Act 1991 and the Building Act 2004, legal indemnity insurance may also be used to provide coverage for matters dealt with in the Act. For example, issues relating to redundant easements, extinguishment or variation of covenants, adverse possession or cross lease variations can be prohibitively expensive to resolve but left unresolved could result in significant subsequent loss. Insuring against their future occurrence and transferring to an insurer the risk of subsequent rectification or compensation for loss may be a more financially efficient way to deal with such issues.
