

JAMES JONATHAN SIMMONDS KEATE

***INDEFEASIBILITY AND MĀORI
LAND: OPTIONS FOR REFORM***

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2018

Abstract

The principle of indefeasibility of title under the Land Transfer system has a problematic interface with Māori land. The Land Transfer Act 2017 introduces an exception to indefeasibility in cases of manifest injustice. I analyse the effectiveness of this exception by applying it to cases where Māori land has been alienated by operation of indefeasibility. I conclude further reform is needed to adequately protect Māori land. The coalition government is announcing reforms to the Te Ture Whenua Māori Act 1993 in 2018. Minister of Māori Development Hon Nania Mahuta stated the reforms will have a strong preference for protection of Māori land. I propose various reform options for the government to consider adopting. My preferred solution is legislative intervention to make section 126 of the Te Ture Whenua Māori Act prevail over indefeasibility. This will strike a balance between protecting Māori land and retaining certainty of title under the Land Transfer system.

Keywords

Indefeasibility; Māori land; reform; Land Transfer Act; Te Ture Whenua Māori Act; void instrument; manifest injustice.

Table of Contents

I	Introduction	4
II	Background.....	5
A	The Introduction of the Torrens System in New Zealand.....	5
B	Indefeasibility and Māori Land under the Land Transfer Act	6
C	Statutory Exceptions to Immediate Indefeasibility.....	7
1	Housing Corporation of New Zealand v Māori Trustee [1988] 2 NZLR 662 (HC) ...	8
2	Registrar-General of Land v Marshall [1995] 2 NZLR 189 (HC)	8
III	Te Ture Whenua Māori Act 1993.....	9
IV	The Law Commission Report.....	11
V	The Land Transfer Act 2017’s Manifest Injustice Exception	13
VI	Options for Reform.....	16
A	Option 1: The Te Ture Whenua Māori Act Overrides the Land Transfer Act 2017 when in Conflict.....	16
B	Option 2: Indefeasibility Extends to Registration of Voidable but not Void Instruments 18	
C	Preferred Solution - Option 3: Provide that Section 126 of the TTWMA will Override the Principle of Indefeasibility	19
VII	Conclusion	21
VIII	Bibliography	22

I Introduction

The cardinal principle of the Land Transfer Act 1952 (LTA)¹ is that the register is everything.² Upon registration, title to land is indefeasible, except in the case of fraud.³ This regime has a problematic interface with Māori land.⁴ Courts have historically interpreted Māori Land statutes as being subservient to the Land Transfer Act.⁵ This means protections for Māori land in specially designed Māori land statutes are overridden upon registration of title under the Land Transfer System.⁶ In *Beale v Tihema Te Hau* a whole village of Māori land owners were uprooted due to the operation of the LTA.⁷

Imagine a Māori land owner who sells Māori freehold land to a non-Māori purchaser. The purchaser registers on the Land Transfer Register and gains an indefeasible title. However, considering the land is being converted from Māori freehold land to general land, the Māori Land Court was meant to confirm the registration.⁸ It comes to light that the Māori Land Court would not have confirmed the registration due to several breaches of the Te Ture Whenua Māori Act 1993 (TTWMA). Nevertheless, registration under the LTA 1952 perfects the transfer that would otherwise have no legal effect due to breaches of the TTWMA. The registered title is indefeasible, and the Māori owner has no recourse to regain the property.⁹

The Land Transfer Act 2017 comes into force in November 2018. An important change is a move towards discretionary indefeasibility.¹⁰ Title can be overturned if a court decides it would

¹ This paper focusses mainly on the Land Transfer Act 1952 to provide background on the principle of indefeasibility and its effect on Māori land. There is some reference to earlier versions of the Land Transfer Act including the original Land Transfer Act 1870. The main focus of the paper is on the concept of indefeasible title and this has been present in all versions of the Land Transfer Act.

² This proposition originated from *Fels v Knowles* (1906) 26 NZLR 604 (CA) at 620. It means that registration is the source of indefeasible title and any title on the register can be relied on.

³ Section 62 and 63 of the Land Transfer Act 1952 operate to give indefeasible title upon registration. Section 51 of the Land Transfer Act 2017 retains the principle of indefeasibility upon registration. “Indefeasible” title is a “convenient description of the immunity from attack by adverse claim to the land or interest that a registered proprietor enjoys” see *Frazer v Walker* [1967] 1 AC 569 (PC) at 580-581. Purchaser fraud is an exception to indefeasible title found in section 62 of the Land Transfer Act 1952 and section 52 of the Land Transfer Act 2017.

⁴ Katherine Sanders “New Zealand Land Law” (2012) 3 NZLR 545 at 570; Richard Boast “The Implications of Indefeasibility for Māori Land” in David Paul Grinlinton (ed) *Torrens in the Twenty-First Century* (Lexis Nexis, Wellington, 2003) 101 at 103.

⁵ See for example *Housing Corporation v Māori Trustee* [1988] 2 NZLR 662 (HC), *Registrar-General of Land v Marshall* [1995] 2 NZLR 189 (HC) and *Warin v Registrar-General of Land* (2008) 10 NZCPR 73 (HC).

⁶ This paper discusses the Native Lands Act 1862, the Māori Affairs Act 1953 and the Te Ture Whenua Māori Act 1993. The Native Lands Act and the Māori Affairs Act are used because they were the statutes in force at the time of many of the major cases in which Māori land has been alienated due to indefeasibility. The paper focusses mostly on the Te Ture Whenua Māori Act, as it is the current statute in force and about to be reformed by the coalition government.

⁷ (1905) 24 NZLR 883 (SC) at 891.

⁸ Section 126 of the Te Ture Whenua Māori Act 1993 requires the Māori Land Court to provide confirmation when Māori land is to be registered under the Land Transfer System and thereby converted into general land.

⁹ They may have an in personam claim for damages, but they could not get the property back. Registration under the Land Transfer Act does not bar in personam claims, see section 51 of the Land Transfer Act 2017. Alternatively, the Land Transfer Act provides monetary compensation for parties deprived of property by operation of the Act, see subpart 3 – Compensation.

¹⁰ Some commentators are arguing the Land Transfer Act 2017 is backsliding from a system of indefeasibility of title, see generally Roy Thomas “Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act” (2011) 4 NZLR 715; Katherine Sanders “New Zealand Land Law” (2012) 3 NZLR 545; Benito Arrunada *Institutional foundations of impersonal exchange; Theory and policy of contractual registers* (University of Chicago Press, Chicago, 2012) at 242.

be manifestly unjust for the vendor to be deprived of the property.¹¹ The Law Commission considered this would provide some limited protection for Māori land.¹² I will analyse the effectiveness of the new manifest injustice exception to indefeasibility by applying it to cases where Māori have been deprived of their land.

The Law Commission recommended that a separate report was needed to address the relationship between the LTA and the TTWMA and to consider options for reform.¹³ The current government is scheduled to announce reforms of the TTWMA in 2018.¹⁴ I provide my recommendations for legislative reform and conclude that in reforming the TTWMA to better protect Māori land, the legislature must have regard to its relationship with the LTA.

II Background

A The Introduction of the Torrens System in New Zealand

The Land Transfer Act 1870 enacted a Torrens system of land sales in New Zealand.¹⁵ Time consuming and expensive conveyancing work was replaced by a centralised system of state guaranteed title.¹⁶ It was very popular with the settler community as it facilitated fast and cheap land transfers.¹⁷ A Torrens regime creates desirable certainty, as when title is registered, it is said to be indefeasible.¹⁸

However, the LTA was not the only statute dealing with land registration in New Zealand. The Native Lands Act 1862 set out special processes for the alienation of Māori land. It was unclear how the two Acts would work together until the case of *Beale v Tihema Te Hau*.¹⁹ In *Beale* the Court was faced with the question of what should happen if title is registered under the Land Transfer system without complying with the Native Lands Act.

Beale involved three Māori belonging to a group of proprietors who conspired with Mr Burt, claiming that Mr Burt had purchased the whole interest in the land (this was false and fraudulent). The Native Land Court was convinced and issued a certificate of title listing Burt's wife as the registered proprietor. Mr Burt's wife then sold the land to Probert who in turn sold the land to Mrs Beale whose title was registered. During this time the Māori owners were living on the land and were unaware of the legal proceedings. Mrs Beale sued the Māori owners for wrongful possession claiming she was the registered proprietor and therefore had indefeasible title.

The Court examined whether Mrs Beale had indefeasible title to the land. It was accepted that Burt had committed fraud and that the instrument was void because it contravened the Native Lands Act. Despite this, the Court held that Mrs Beale had indefeasible title to the land as she

¹¹ This new power is found in section 54 of the Land Transfer Act 2017 and will be analysed in depth later in the paper.

¹² Law Commission *A New Land Transfer Act* (NZLC R116, 2010) Chapter 2.

¹³ Law Commission *A New Land Transfer Act*, above n 12, at R21.

¹⁴ Nanaia Mahuta "Te Ture Whenua Māori reforms relaunch next year" (press release, 22 December 2017).

¹⁵ The Torrens System was created by Sir Robert Torrens who first introduced it into South Australia in 1858.

¹⁶ Stanhope Rowton Simpson "The Torrens System" in Stanhope Rowton Simpson *Land, Law and Registration* (Cambridge University Press, Cambridge, 1978) 68 at 71.

¹⁷ Stanhope Rowton Simpson "The Torrens System", above n 16, at 72.

¹⁸ Stanhope Rowton Simpson "The Torrens System", above n 16, at 73.

¹⁹ (1905) 24 NZLR 883 (SC).

was a bona fide purchaser.²⁰ It was Burt who committed the fraud and he was not the person on the register. This meant the Māori village was ejected from their land. The Judge noted this was a “grievous wrong” and that “the plaintiff was blameless in this matter”.²¹

The Court viewed the failure to comply with the Native Lands Act as an issue of formality. The Court assumed that indefeasibility under the LTA would override the requirements in the Native Lands Act. Richard Boast criticised the effect of indefeasibility and the LTA in this case for validating illegal or fraudulent dealings in Māori land.²²

A similar issue arose in *Assets Co Ltd v Mere Roihi*.²³ *Assets*, like *Beale*, involved fraud as well as errors in the Native Land Courts. Mr Cooper, a Scottish settler, fraudulently registered himself under the LTA as the owner of land that belonged to Māori. He then mortgaged the land in favour of the Glasgow Bank, and the property was then transferred to the investment group, *Assets*.

The alienation of Māori land did not comply with the Native Lands Act. The Privy Council held that errors of procedure in the Native Land Court do not affect the indefeasibility of a registered proprietor’s title.²⁴ The Land Transfer Act makes it clear that registration is conclusive evidence as to title. Similarly to *Beale*, the Court accepted, without much discussion, that indefeasibility under the LTA overrode the Native Lands Act.²⁵ The existence of fraud was not enough to protect the Māori land, because like in *Beale* there was a subsequent transfer to a bona fide purchaser.²⁶

The cases of *Beale* and *Assets* reveal two things. First, early courts were willing to conclude that registration under the LTA overrode protections in Māori land statutes. Second, when a purchaser or subsequent transferee registered title under the LTA, earlier fraud or errors of process were not enough to favour returning the land to Māori owners.²⁷ This is because registration under the LTA provides indefeasible title.

B *Indefeasibility and Māori Land under the Land Transfer System*

At the time of *Beale* and *Assets* a key debate was emerging in Torrens jurisdictions. The issue was whether registration of void or voidable instruments under the LTA would grant indefeasible title to the purchaser.²⁸ The decision in *Assets* provided support for the position that registration of void instruments did provide indefeasible title, although it did not settle the debate.²⁹ This debate was important for Māori land, as instruments can become void for non-compliance with Māori land statutes. If courts held that registration of void instruments granted

²⁰ The principle of indefeasibility under the Land Transfer system gives purchasers who get on the register impeachable title unless they are fraudulent.

²¹ *Beale v Tihema Te Hau*, above n 19, at 891.

²² Richard Boast ‘The Implications of Indefeasibility for Māori Land’ in David Paul Grinlinton (ed) *Torrens in the Twenty-First Century* (Lexis Nexis, Wellington, 2003) 101 at 109.

²³ [1905] AC 176 (PC).

²⁴ *Assets Co Ltd v Mere Roihi*, above n 23, at 189.

²⁵ At 189.

²⁶ *Assets* was a bona fide purchaser as it did not have knowledge of Mr Cooper’s fraud.

²⁷ The fraud exception to indefeasible title only applies if it is the current registered proprietor who has committed fraud. In both *Beale* and *Assets* the fraud was committed by previous registered proprietors who then transferred the land.

²⁸ The first case on this point was *Gibbs v Messer* [1891] AC 248 (PC) and it held that registration of a void instrument would not grant indefeasible title. This decision was 14 years before *Assets*.

²⁹ The facts of *Assets* were not in point to the debate as the instrument that *Assets* was registered under was not void, so any comments the court made were obiter.

defeasible title, then Māori land owners could bring actions to reclaim their land in the event of non-compliance with a Māori land statute.

The LTA 1952 and its predecessors are silent on whether registration of void or voidable instruments grants indefeasible title. A void transaction means the instrument has no legal effect.³⁰ An instrument can be void because one of the parties to the contract is a minor or a fictitious person.³¹ Alternatively, an instrument can be void because a statute other than the LTA is not complied with.³² By way of contrast, voidable instruments are those with an inherent defect and can be avoided by one of the parties.³³

Gibbs v Messer involved a void contract with a fictitious person. The Court held that registering a void contract did not grant indefeasible title.³⁴ *Boyd v Mayor of Wellington* involved a council compulsorily acquiring land via a void proclamation in breach of the Public Works Act 1981.³⁵ By a slim majority, the Court, largely for policy reasons, decided that registration of a void or voidable instrument grants immediately indefeasible title.³⁶ Immediate indefeasibility was famously affirmed for Torrens jurisdictions in *Frazer v Walker*.³⁷

The Supreme Court in *Westpac v Clark* confirmed immediate indefeasibility for registration of void or voidable instruments and added that there is nevertheless no entitlement to register a void or voidable instrument.³⁸ This creates an unusual dichotomy where if the registrar fails to realise that the proposed instrument is void or voidable and registers it, then indefeasible title will be granted. However, if the registrar notices in time that the instrument is void or voidable, then they will not register it.³⁹ The fact that the instrument is void, for instance for lack of compliance with a Māori land statute, will usually not be noticed by the registrar, as they have no obligation to investigate.⁴⁰

C Statutory Exceptions to Immediate Indefeasibility

Overtime, courts carved out some limited exceptions to indefeasibility of title.⁴¹ A key exception is conflicting statutes. *Millar* held that other statutes can override the general

³⁰ David Hay (ed) *Words and Phrases Legally Defined* (4th ed, LexisNexis Butterworths, London, 2007) vol 2 at 1286-1287, definition of “void”. The instrument in question is the thing that is registered. It is usually a contract.

³¹ In *Gibbs v Messer* [1891] AC 248 (PC) the instrument was void because the contract was with a fictitious person.

³² See for example the Public Works Act 1908 in *Boyd v Mayor of Wellington* [1924] NZLR 1174 (CA) or the Stamp Act 1921 in *Breskvar v Wall* (1971) 126 CLR 376 (HCA).

³³ Daniel Greenberg (ed) *Stroud’s Judicial Dictionary of Words and Phrases* (7th ed, Sweet & Maxwell, London, 2006) vol 3 at 299-2960, definition of “voidable”.

³⁴ An in depth analysis of *Gibbs v Messer* is outside the scope of this paper. In short, the court was of the view that as void instruments are invalid and have no legal effect, they should not be the source of good title upon registration under the Land Transfer system.

³⁵ *Boyd v Mayor of Wellington* [1924] NZLR 1174 (CA).

³⁶ The majority emphasised the certainty the Torrens system is meant to create, and decided that all registration should grant indefeasible title, even if the instrument is void. There was a powerful dissent by Justice Salmond, arguing that as void transactions have no legal effect, they should not provide good title.

³⁷ [1967] 1 AC 569 (PC).

³⁸ *Westpac v Clark* [2010] 1 NZLR 82 (SC), see particularly the judgment of Elias CJ.

³⁹ *Westpac v Clark*, above n 38, see particularly Elias CJ.

⁴⁰ The lack of obligation to investigate is a key principle in a Torrens system. No one should have to look behind the register, see generally Thomas Mapp *Torrens’ Elusive Title: Basic Legal Principles of an Efficient Torrens’ System* (University of Alberta, Edmonton, 1978).

⁴¹ Fraud in getting on the register has always been an exception to indefeasibility. It is found in every iteration of the Land Transfer Act. In personam claims in tort, contract and equity have also been considered an exception to indefeasibility. Although, as the in personam jurisdiction exists independently of the Land Transfer system in

principle of indefeasibility of title.⁴² When a competing statute conflicts with indefeasibility under the LTA, the court must decide which Act should prevail. Courts do this by first looking for express legislative intention, which is usually absent.⁴³ Next, Courts look for the “necessary implication”.⁴⁴ This requires an analysis of Parliament’s implied intention as to which statute should prevail.

As discussed above, *Beale* and *Assets* involved a conflict between the Native Lands Act and indefeasibility under the LTA. The Courts assumed the LTA would prevail, without much elaboration. However, at the time of those cases courts had yet to create the principle that conflicting statutes could override indefeasibility. The issue of whether Māori land statutes would have an overriding effect on indefeasibility was considered in depth in *Housing Corporation* and *Marshall*.⁴⁵ These cases involved a conflict between indefeasibility and protections in the Māori Affairs Act 1953.⁴⁶

1 *Housing Corporation of New Zealand v Māori Trustee*

Housing Corporation involved a mortgage that had not been endorsed by the Registrar of the Māori Land Court under section 233 of the Māori Affairs Act 1953, but had nevertheless been registered under the LTA.⁴⁷ McGechan J had to consider whether the title should be indefeasible, despite non-compliance with section 233 of the Māori Affairs Act, which set out a mandatory requirement for the Māori Land Court to follow.

There was no statement of express legislative intention in either of the statutes as to which should prevail. McGechan J nevertheless held that that indefeasibility under the LTA overrode the Māori Affairs Act. His Honour argued that in amending the Māori Affairs Act in 1967, against the background of indefeasibility, Parliament would have expressly stated the Māori Affairs Act would prevail if that had been their intention.⁴⁸ Further, his Honour characterised section 233 as a “promotion of administrative convenience rather than of deep legal or social importance”.⁴⁹

McGechan J also considered other methods of statutory interpretation. He noted that the Māori Affairs Act was later in time and was special, rather than general legislation. These factors pointed towards section 233 overriding indefeasibility. Nevertheless, his Honour said they are not determinative and concluded that the Māori Affairs Act requirement in section 233 was subject to the principle of indefeasibility in the LTA.

2 *Registrar-General of Land v Marshall*

In *Registrar-General of Land v Marshall* the land transfer register and the Māori Land Court register recorded different people as owners of the land. Additionally, the transfer of the land

may not be correct to describe it as an “exception” see for example Robert Chambers “Indefeasible Title as a Bar to a Claim for Restitution” [1998] Restitution Law Review 126.

⁴² *Miller v Minister of Mines* [1963] NZLR 560 (PC).

⁴³ *Miller v Minister of Mines*, above n 42, at 567.

⁴⁴ *Miller v Minister of Mines*, above n 42, at 567.

⁴⁵ See *Housing Corporation of New Zealand v Māori Trustee* [1988] 2 NZLR 662 (HC) and *Registrar-General of Land v Marshall* [1995] 2 NZLR 189 (HC).

⁴⁶ The Māori Affairs Act 1953 was a later more advanced version of the Native Lands Act 1909. It served as the governing legislation for Māori land until the introduction of Te Ture Whenua Māori Act 1993.

⁴⁷ As per section 62 of the Land Transfer Act 1952, registration gives indefeasible title.

⁴⁸ *Housing Corporation of New Zealand v Māori Trustee* [1988] 2 NZLR 662 (HC) at 674.

⁴⁹ At 674.

had not complied with sections 83 or 233 of the Māori Affairs Act.⁵⁰ The issue was whether Marshall, the registered proprietor under the LTA, could claim compensation for having to prove the strength of his own title.

Hammond J had to decide on the interrelationship between the LTA and the Māori Affairs Act. Similarly to McGechan J in *Housing Corporation*, Hammond J concluded that the LTA prevailed. His judgment focussed more on policy than principles of statutory interpretation. His Honour commented “if there is any area of the law in which absolute security is required – without any equivocation – it must be in the area of security of title to real property.”⁵¹

Hammond J agreed that the Māori Land Court is an important institution; and it is one that many Māori look to before the Land Transfer Office. Further, he agreed that the Māori Land Court is an important guardian of Māori interests.⁵² Nevertheless, he was reluctant to weaken the principle of indefeasibility of title under the LTA. To him, the policy reasons in favour of indefeasibility were too strong to dilute.⁵³

III *Te Ture Whenua Māori Act 1993*

The Māori Affairs Act was repealed and replaced by the Te Ture Whenua Māori Act 1993. In 2010 the Law Commission wrote an issues paper on the relationship between the 1952 LTA and the TTWMA 1993.⁵⁴ The issues paper discussed *Housing Corporation* and *Marshall* and noted the problematic overriding effect indefeasibility had over the Māori Affairs Act. At the time of the issues paper, there had not been a case on the relationship between the TTWMA and the LTA. The TTWMA had new sections that the Law Commission suggested could challenge indefeasibility.

It is convenient to summarise some of the key sections of TTWMA, with a view to understanding their relationship to the LTA. The TTWMA divides land into six types:⁵⁵

- (a) Māori customary land;
- (b) Māori freehold land;
- (c) General land owned by Māori;
- (d) General land;
- (e) Crown land; and
- (f) Crown land reserved for Māori.

A significant amount of land in New Zealand is Māori freehold land.⁵⁶ Māori freehold land is subject to the jurisdiction of the Māori Land Court. The Māori Land Court also has jurisdiction over Māori customary land, however there is virtually no such land in existence.⁵⁷ The Māori Land Court has its own register of title. In some situations, Māori land is also recorded under the LTA.⁵⁸

⁵⁰ Section 83 required the Court to be satisfied on a number of criteria including whether the applicant was fit and proper and section 233 required confirmation for mortgages over Māori land.

⁵¹ *Registrar-General of Land v Marshall* 2 NZLR 189 (HC) at 198-199.

⁵² At 199.

⁵³ At 198-199.

⁵⁴ Law Commission *Review of the Land Transfer Act 1952* (NZLC IP10, Wellington, 2008).

⁵⁵ Te Ture Whenua Māori Act 1993, s 129.

⁵⁶ In 2006, the Māori Land Court administered 1,607,819 hectares of Māori land.

⁵⁷ Boast and others *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at 65.

⁵⁸ Law Commission *Review of the Land Transfer Act 1952* (NZLC IP10), above n 54, at [10.11].

The English version of the preamble to the TTWMA refers to the Treaty of Waitangi and states it is necessary to recognise that land has special significance for Māori. For this reason, the retention of Māori land by Māori owners should be promoted. Further, it is desirable to maintain the Māori Land Court to assist Māori in implementing these principles.⁵⁹

Section 2 of the TTWMA provides that it is the intention of Parliament that the provisions of the Act shall be interpreted in a manner that best furthers the principles set out in the preamble. Further, the powers, duties and discretions conferred by the Act shall be exercised, so far as possible, in a manner that facilitates and promotes the retention, use, management and development of Māori land by Māori owners.⁶⁰ The preamble and accompanying sections promote a strong legislative intention to facilitate retention and management of Māori land by Māori owners.

The interrelationship between the LTA and the TTWMA gives rise to the issue of which statute overrides the other when they are in conflict. Conflicts can arise both from conflicting sections in the Acts and from conflicting records of title registration. There are several sections in the TTWMA that can potentially conflict with the principle of indefeasibility in the LTA.⁶¹ Further, it is not uncommon for the TTWMA and the LTA to record different owners of the property under their separate systems.⁶²

The Māori Land Court must keep records of the orders it makes. Under sections 122 and 123 of the TTWMA every order affecting title made by the Māori Land Court must be registered under the LTA. Importantly, section 126 states that the LTA Registrar shall not register any instrument affecting Māori land unless the instrument has been confirmed by the Māori Land Court. This is a central requirement that has conflicted with the LTA's indefeasibility.⁶³

Under section 44, the Chief Judge of the Māori Land Court may alter or cancel orders of the court when satisfied it "was erroneous in fact or law because of any mistake or omission on the part of the Court or the [LTA] Registrar or in the presentation of the facts of the case to the Court or the [LTA] Registrar".⁶⁴ Orders under section 44 have been seen as a challenge to the principle of indefeasibility as they can affect the title on the LTA register.⁶⁵

A month after the Law Commission's issues paper was published, the question of the relationship between the TTWMA and the LTA arose in *Warin v Registrar-General of Land and the Māori Trustee*.⁶⁶ The *Warin* case involved the sale by the Māori Trustee of a piece of Māori land to the plaintiffs without following a number of processes contained in the TTWMA. The transfer was nevertheless registered under the LTA. Section 126 of the TTWMA states that the District Land Registrar shall not register any instrument affecting Māori Land unless the instrument has been confirmed by the court.

The parties accepted that the transfer should not have been registered as the Māori Land Court had not confirmed the registration. The key question was whether the plaintiffs nevertheless

⁵⁹ See Section 17, outlining the objectives of the Māori Land Court.

⁶⁰ See Section 2(2).

⁶¹ Law Commission Review of the Land Transfer Act 1952 (NZLC IP10), above n 54, at [10.5].

⁶² Law Commission Review of the Land Transfer Act 1952 (NZLC IP10), above n 54, at [10.31]. This occurred in *Warin v Registrar-General of Land* (2008) 10 NZCPR 73 (HC).

⁶³ See *Warin v Registrar-General of Land* (2008) 10 NZCPR 73 (HC).

⁶⁴ Te Ture Whenua Māori Act 1993, s 44.

⁶⁵ Jacinta Ruru "Māori Land Law for Conveyancers" in Struan Scott and others *Adam's Land Transfer* (loose leaf, LexisNexis, Wellington, 2007) Appendix B, para B.2.3.6.

⁶⁶ *Warin v Registrar-General of Land*, above n 63.

gained indefeasible title, due to registration under the LTA. In other words, the question was whether the LTA prevails over the TTWMA when the two are in conflict.

The Court undertook a similar analysis to *Housing Corporation* and held that the LTA prevailed. Allan J noted that the TTWMA was passed after *Housing Corporation*, so if Parliament wanted the TTWMA to override the LTA, the TTWMA would have said so expressly.⁶⁷ His Honour also suggested that the Māori Land Court's record is cumbersome, and the LTA's system of registration is more efficient.⁶⁸ The Land Transfer Register is likely to be more accurate, and easier for potential purchasers to check the title, which better protects the public. On policy, Allan J added that if the TTWMA prevailed, then no successor in title could ever enjoy a greater security of title than that of the original purchaser.⁶⁹

The decision in *Warin* definitively concluded that the LTA's principle of indefeasibility overrides the TTWMA when there is a conflict.⁷⁰ The decision has worrying implications for the protection of Māori land. This is because the TTWMA was designed to add processes specifically to better protect Māori Land.⁷¹ However, upon registration under the LTA, the protections and processes in TTWMA are made largely redundant.

IV The Law Commission Report

The impetus for the 2017 LTA was a 2010 Law Commission report that followed on from the issues paper.⁷² Chapter 6 of the report discusses the registration of Māori land. The report concludes that there are problems with the relationship between the LTA and the TTWMA, particularly after the decision in *Warin* which held that the LTA takes priority.⁷³

Chapter 6 of the 2010 report summarised the common law position in *Housing Corporation* and *Warin* that the LTA prevails over the TTWMA. The Law Commission viewed this as problematic. Even Allan J, the judge in *Warin*, said there may be an alternative way to consider the interface between TTWMA and the LTA as for many Māori “compensation if available, will simply not make good the loss; land is regarded as a taonga and not to be surrendered”.⁷⁴

The Law Commission went on to consider submissions from judges of the Māori Land Court. The judges concluded that the TTWMA should override the LTA.⁷⁵ Their submissions highlighted that the Treaty guarantees Māori land but the case law is filled with situations where Māori have lost their land through the operation of the LTA. Arguments that Māori land should be offered the same protection as general land are overly simplistic, as Māori land is of a different nature and subject to the powers of the Court.⁷⁶ Further, compensation is an inadequate substitute for the loss of Māori land. The judges discussed the result in *Warin* and say section 126 of the TTWMA should have prevailed. The confirmation process is a “central pillar of the Act and the effect of *Warin* is to override this process.”⁷⁷

⁶⁷ *Warin v Registrar-General of Land and the Māori Trustee*, above n 63, at [114].

⁶⁸ At [124].

⁶⁹ At [126].

⁷⁰ See Law Commission *A New Land Transfer Act*, above n 12, at [6.14].

⁷¹ This is made clear in the preamble and in the interpretation section of the Act.

⁷² Law Commission *A New Land Transfer Act*, above n 12.

⁷³ Law Commission *A New Land Transfer Act*, above n 12, at [6.22]-[6.24].

⁷⁴ *Warin v Registrar-General of Land and the Māori Trustee*, above n 63, at [131].

⁷⁵ At [6.15].

⁷⁶ At [6.13].

⁷⁷ At [6.15].

Other submitters agreed the relationship between the two Acts is unsatisfactory and merits a fuller review. For example in *Re Pakiri R Block and Rahui Te Kuri Incorporation*, the Court stated that the relationship between the two Acts should be reconsidered in light of the TTWMA.⁷⁸ The Court noted section 126 of the TTWMA as being of particular importance to maintaining the relationship between the Māori Land Court and the Land Transfer title system and at protecting the Māori Land Court record. Further, Professor McMorland indicated that a much fuller analysis of the relationship between the two Acts and which takes priority was needed.⁷⁹

The most important change recommended (and accepted) by the Law Commission was the introduction of an exception to immediate indefeasibility in cases of manifest injustice.⁸⁰ This new exception is found in sections 54 and 55 of the LTA 2017.⁸¹ The Law Commission noted that these changes will offer some limited protection for Māori land.⁸² However, the Commission recommended that a fuller analysis is required in a separate report to improve the relationship between the LTA and the TTWMA and to better protect Māori land.⁸³ It recommended the separate review be undertaken jointly by the Law Commission, LINZ, the Māori Land Court, the Ministry of Justice and Te Puni Kōkiri.⁸⁴

This recommendation was adopted by the Minister for Land Information in his advice to Cabinet on the Law Commission's report. The Minister advocated an in-depth review into the registration of Māori land.⁸⁵ In November 2010, the Minister directed officials from Te Puni Kōkiri, LINZ and the Ministry of Justice to jointly report on what aspects of Māori land registration should be subject to review.

Following this report, in 2011, the National government agreed that a review of Māori land registration was not warranted at that time. The Ministers reached this view because of relevant ongoing and new initiatives. For instance, LINZ and the Māori Land Court were working on aligning the records between the land transfer registrar and the Māori Land Court's registrar. This alignment is useful, but differences in registration is only one area in which conflicts can arise. Aligning the registers does nothing to prevent the LTA overriding the TTWMA protections. It does not provide protection for the common scenario where Māori freehold land is sold and converted into general land without complying with the TTWMA.

The other justification for the National government not commissioning a full report is that it was reviewing the TTWMA 1993. The review was designed to “unlock the economic potential of Māori land for its beneficiaries, while preserving its cultural significance for future generations.”⁸⁶ This review resulted in the Te Ture Whenua Amendment Bill 2017. It did not squarely address the relationship between the TTWMA and the LTA.

The TTWMA Amendment Bill was discharged from the legislative agenda by the current coalition government in December 2017. Minister of Māori Development Hon Nania Mahuta said “this decision reinforces the coalition government's view that Māori land reforms should

⁷⁸ *Re Pakiri R Block and Rahui Te Kuri Incorporation* (23 March 1994) Māori Appellate Court, Taitokerau District, paras 58-60 Deputy Chief Judge McHugh, Judges Smith and Carter.

⁷⁹ Don McMorland “The Land Transfer Office and the Māori Land Court” (1996) 7 BCB 135.

⁸⁰ Law Commission *A New Land Transfer Act*, above n 12, at R2.

⁸¹ I analyse the effect of this exception on Māori land later in the paper.

⁸² See Law Commission *A New Land Transfer Act*, above n 12, at [6.16].

⁸³ See Law Commission *A New Land Transfer Act*, above n 12, at R 21.

⁸⁴ At [6.24].

⁸⁵ Cabinet Domestic Policy Committee “Law Commission Report – A New Land Transfer Act” available at <www.linz.govt.nz>.

⁸⁶ Christopher Findlayson “Te Ture Whenua Māori Act review announced” (press release, 3 June 2012).

retain a strong preference to protect Māori land interests while improving supports that would assist in better utilisation”.⁸⁷ The coalition government suggested a range of reforms will be put forward in 2018. These reforms have yet to be announced.

My view is that the incoming reforms to the TTWMA need to address its unsatisfactory relationship with the LTA. This is particularly important as the 2017 LTA is coming into force in November 2018, which will coincide with the announcement of the TTWMA reforms. It is crucial that the two statutes are harmonised. In considering options for reforming the TTWMA, it is helpful to first explore why the new manifest injustice exception to indefeasibility in the LTA 2017 will not provide adequate protection for Māori land.

V The Land Transfer Act 2017’s Manifest Injustice Exception

The major change in the LTA 2017 is the introduction of an exception to the principle of indefeasible title in cases of manifest injustice. This exception introduces a power for courts to defeat title registered under void or voidable instruments in cases of “manifest injustice”⁸⁸ This indicates a more discretionary approach to indefeasibility to allow justice to be done in the particular case.

Under the 1952 LTA, if Māori land was alienated and then registered, Māori owners would have no recourse to regain the property except in the case of fraud.⁸⁹ Arguing that the TTWMA overrode the LTA could not succeed after the decision in *Warin*. The consequence of the LTA overriding the TTWMA is that the protections in the TTWMA are of limited use.

However, following the introduction of the manifest injustice provisions in the LTA 2017, Māori will have a new avenue to reclaim their land. If Māori land is transferred to non-Māori owners in breach of the TTWMA, the deprived Māori owners can rely on section 54 of the LTA 2017 and argue that they have been deprived of their land by registration of a void instrument. This is in effect a new statutory cause of action.

The statutory cause of action under section 54 should always be available to Māori owners when there is a conflict between the TTWMA and the LTA, because such a conflict renders the instrument void.⁹⁰ This means the Māori claimant deprived of land would have the jurisdiction to apply to the court under section 54 for the register to be reverted.

Although, just because a claim fits within section 54, it by no means guarantees relief. The court will then consider section 55(1), which states that an order for return of the property should only be made in cases of manifest injustice. Section 55(2) states that “the existence of forgery or other dishonest conduct, does not of itself, constitute manifest injustice.” An express legislative recognition that fraud does not necessarily amount to manifest injustice suggests a high standard is needed. A possible barrier to a claim is section 55(3) which states that an “order reverting the property can only be made if payment of damages is not an adequate remedy”. Given the significance of Māori land as taonga, I suggest this is less likely to apply

⁸⁷ Nanaia Mahuta “Te Ture Whenua Māori reforms relaunch next year” (press release, 22 December 2017).

⁸⁸ See section 54 of the Land Transfer Act 2017. The power can only be exercised to revert the land if a Court finds holds that it would be manifestly unjust for the vendor to be deprived of their property due to the purchaser registered title under a void or voidable instrument.

⁸⁹ The other avenue could be an in personam claim, but these usually result in damages if successful, rather than return of the property.

⁹⁰ See Law Commission *Review of the Land Transfer Act 1952*, above n 12, ch 6; Roy Thomas “Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act” (2011) 4 NZLR 715 at 730.

to Māori claimants. Finally, section 55(4) outlines a number of factors a court *may* take into account when determining whether to make the order.

The most relevant consideration to Māori land is in section 55(4)(c) “if the estate or interest is in Māori freehold land, failure by a person to comply with the Te Ture Whenua Māori Act 1993”. Another relevant factor is section 55(4)(i) “any special characteristics of the land and their significance for either person A or person B”. The status of Māori land as taonga could warrant consideration under this subsection.

Roy Thomas argues the introduction of the manifest injustice exception is a step back from a system of immediate indefeasibility.⁹¹ He argues there is a bias in favour of continued registration. The factors in section 55(4) a Court may consider include the length of tenure or occupation of the land, the conduct of parties to in relation to the acquisition and the nature of improvements made to the land, and by whom. Thomas argues these factors will invariably favour the vendor over the purchaser, as the vendor has been living on the land and will have had more time to make a connection to it.⁹²

Roy Thomas argues that making out manifest injustice may not prove particularly onerous.⁹³ He interprets the phrase as a low standard akin to general unfairness. He would prefer the phrase “repugnant to justice”.⁹⁴ Further, he argues the criteria considered by a Court in section 55(4) should focus on the broader public interest, not just on the position of the affected party.

Although Roy Thomas’ points have merit in relation to general land, I suggest they do not translate fully to Māori land. The introduction of the manifest injustice exception does nothing to prevent protections in the TTWMA being overridden by registration under the LTA. Instead, it promotes a statutory cause of action that Māori owners can rely on retrospectively after they have *already* been deprived of their land. Further, I suggest the manifest injustice exception will not always result in the return of Māori land to its deprived owners. Express reference to the TTWMA as a factor to consider when deciding whether to alter the registrar looks to be a significant step at first glance. However, sections 54 and 55 have some limitations. First, because of the statutory phrase “may”, the consideration of the TTWMA and the significance of the land are not mandatory considerations.⁹⁵ Second, the Court can only exercise its power to alter the register in cases of “manifest injustice”.⁹⁶

A key question is how generously judges will interpret the manifest injustice exception. The Law Commission suggested it would be a remedy reserved for few cases.⁹⁷ Evaluating the effectiveness of this option in protecting Māori land will require some case law under the new provisions to see how courts interpret them. To test the effectiveness of this legislative change, I will examine whether the manifest injustice provisions would change the outcome in any of the major cases where Māori were deprived of their land by operation of the LTA.

In both *Beale* and *Assets* the instruments were void because of numerous errors in the Native Land Courts. Therefore, the Māori owners could apply under section 54 for alteration of the register. Many of the factors in section 55(4) would favour the Māori owners. In both cases,

⁹¹ Roy Thomas “Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act” (2011) 4 NZLR 715.

⁹² Roy Thomas, above n 91, at 726.

⁹³ Roy Thomas, above n 91, at 733.

⁹⁴ As seen in the Property Relationships Act 1976, section 13(1).

⁹⁵ See section 55(4) “in determining whether to make an order, the court *may* take into account”.

⁹⁶ The threshold requirement under section 55(1).

⁹⁷ See Law Commission *Review of the Land Transfer Act 1952*, above n 12, generally at chapter 2.

they had been in possession of the land for long periods.⁹⁸ Further, the land was of significance, especially in *Beale* where it was occupied by a whole Māori village. In *Beale*, the Māori owners had been in occupation the whole time and Mrs Beale had never lived on the property.⁹⁹ The Māori owners in both cases were entirely innocent and were deprived of their land by a combination of purchaser fraud and errors in the Native Land Courts.

Nevertheless, the manifest injustice exception would not provide relief in either *Beale* or *Assets*. Section 56 of the LTA 2017 states that the “Court must not make an order if the estate or interest is transferred to a third person”. Section 56 applies provided the third person is acting in good faith. Section 56 would preclude a remedy in both *Beale* and *Assets* because there had been a subsequent transfer to a third party acting in good faith. In both cases the fraudsters got on the register and then transferred the property to third parties before the Māori land owners realised they had been defrauded. The policy of section 56 is to protect innocent subsequent purchasers. However, it is a significant limitation on the protection the manifest injustice exception offers.

In *Housing Corporation*, section 233 of the Māori Affairs Act 1953 (a predecessor to the TTWMA) had not been complied with. The mortgage had not been endorsed by the Māori Land Court. *Housing Corporation* concerned the ranking of mortgages, not alienation of land per se. Although, as the Māori Affairs Act had not been complied with, the instrument was void. It is possible the Māori trustees could claim under section 54(1)(b) of the LTA 2017 “being the owner of an estate or interest in land, suffers loss or damage by the registration of a void or voidable instrument of another person as the owner of an estate or interest in the land”. They could argue that the loss or damage is the value of the registered mortgage over their land.

The criteria in section 55(4) are not a natural fit to the situation in *Housing Corporation*. The considerations in section 55(4) relate to possession of and connection to land. *Housing Corporation* concerns the ranking of mortgages, and none of the criteria for manifest injustice are squarely relevant. Further, a court would not find the factual standard of manifest injustice to be met as McGechan J characterised section 233 of the Māori Affairs Act as a “promotion of administrative convenience rather than deep legal or social importance”.¹⁰⁰

Section 54 would apply to the facts of *Registrar-General v Marshall* as section 233 of the Māori Affairs Act and section 83 of the Māori Affairs Amendment Act 1967 were not complied with. The property should have been transferred to Marshall only after noting and endorsement by the Māori Land Court, which did not occur. The previous Māori owners could claim under section 54 that Marshall’s registration under a void instrument deprived them of their land.

The court would then consider the criteria in section 55(4). The significance of the land would point towards the Māori claimants,¹⁰¹ as they were in occupation at the time and lived on the land communally. Further, the land had been gifted to them by their father, which would increase its significance to them. Time spent on the land would favour Mr Marshall, as he had been living there for 8 years prior to the trial. Another consideration is the conduct of both parties. This would be neutral as both Marshall and the Māori claimants were innocent. My view is that this situation could reach the standard of manifest injustice. It is not certain however, as section 55 is highly discretionary and there is no case law on it yet.

⁹⁸ Sections 55(4)(f).

⁹⁹ Section 55(4)(d).

¹⁰⁰ See *Housing Corporation*, above n 48, at 674.

¹⁰¹ See Section 55(4)(j) “any special characters of the land and their significant for either person A or B”.

In *Warin*, section 126 of the TTWMA was not complied with. This rendered the instrument void. Therefore, the Māori land owners could go to Court under section 54. However in reality they would be unlikely to do this as they wanted the sale to go ahead.¹⁰² If the Māori land owners changed their mind and did rely on section 54, the Court would then consider section 55.

One of the most relevant considerations in section 55(4) is “if the estate or interest is in Māori freehold land, failure by a person to comply with the Te Ture Whenua Māori Act 1993”. This consideration is relevant as in *Warin* section 126 of the TTWMA was not complied with.¹⁰³ The court can also consider the identity of the person in occupation of the land,¹⁰⁴ and the length of time person A and B have owned or occupied the land.¹⁰⁵ These considerations would favour *Warin*, the non-Māori owner, as he had been in possession for the last 10 years and no one had realised the TTWMA had not been complied with. This result can be criticised as section 126 has been described as a central pillar of the TTWMA.¹⁰⁶

The new manifest injustice exception would change the result in at most one of the major cases where Māori land statutes were breached.¹⁰⁷ This suggests it is an ineffective tool for protecting Māori land. Even if it would change some situations, it leaves that decision up to the discretion of courts. It is not clear which breaches of the TTWMA will amount to manifest injustice and what other circumstances need to be present.

A further problem is that for deprived Māori land owners to regain their land under section 54, they must go to court. Considering how discretionary section 55 is, the gamble might not seem worth it for some potential claimants. Litigation is an expensive and time-consuming option. It is inferior to a legislative solution that would provide certain recourse for Māori owners deprived of land.

Indeed, the Law Commission acknowledged the manifest injustice exception is not a complete solution for Māori land.¹⁰⁸ The Law Commission suggested the relationship between the TTWMA and the LTA needs reform. I agree and suggest that when the government reforms the TTWMA in 2018 to better protect Māori land, it must consider its unsatisfactory interface with the LTA 2017.

VI Options for Reform

A Option 1: The Te Ture Whenua Māori Act Overrides the Land Transfer Act 2017 when in Conflict

The first option the government should consider when reforming the TTWMA is to expressly state the TTWMA prevails over indefeasibility when there is a conflict. This would give effect to the TTWMA’s purpose of protecting and facilitating the retention of Māori land by Māori owners. The overriding effect of indefeasibility under the LTA leads to Māori land being alienated without the protections in the TTWMA being followed.

¹⁰² This was because 10 years had passed and they wanted to sell their land.

¹⁰³ As discussed, there was no confirmation of the transfer by the Māori Land Court.

¹⁰⁴ Section 55(4)(d).

¹⁰⁵ Section 55(4)(f).

¹⁰⁶ See Law Commission *Review of the Land Transfer Act 1952*, above n 12, at [6.15].

¹⁰⁷ I argue above that *Registrar-General v Marshall* is the only case where the manifest injustice exception might apply.

¹⁰⁸ Law Commission *Review of the Land Transfer Act 1952*, above n 12, at [6.20].

There are currently some protections in place if the LTA overrides the TTWMA. If Māori owners are deprived of their land by a fraudster, then they can regain their land, as fraud is an exception to indefeasibility of title.¹⁰⁹ LTA fraud is a high standard however and requires proof of actual dishonesty.¹¹⁰ If Māori land owners are deprived of their land through the operation of the LTA but there is no fraud, they can claim financial compensation under the LTA.¹¹¹ Simply financially compensating Māori for lost land may not be enough, due to the status of land as taonga. Justice Carter commented:¹¹²

“While compensation should be available, to many Māori the loss of family or ancestral land is something that is felt very deeply and cannot simply be replaced by compensation.”

It is clear from the intention and context of the TTWMA that its sections should be interpreted to be given their full effect.¹¹³ The purpose of the statute is to protect and retain Māori land in the hands of Māori owners and only to alienate it consistently with the protections in the statute. Further, the TTWMA states that an interpretation consistent with protection of Māori land and the Treaty guarantee should be preferred.

Having the TTWMA prevail over the LTA would change the result in *Warin*, because under this reform option title is defeasible when provisions in the TTWMA are not complied with. Further, this option would change the result in both *Housing Corporation* and *Marshall*,¹¹⁴ as the Māori Affairs Act provisions would override indefeasibility, meaning the Māori owners could defeat the registered title.

While this reform option would better protect Māori land, it would have a problematic effect on security of title. As Hammond J stated in *Marshall*, it is a matter of unequivocal importance that there is absolute security of title where real property is concerned.¹¹⁵ Indefeasible title upon registration creates desirable certainty. This certainty is of significant benefit to both parties to a land transaction. There is no need to look behind the register to check if formal requirements in the TTWMA or other statutes have been met. This decreases the time and cost involved in the land sales process.¹¹⁶

Another weakness with this option is the effect it would have on innocent purchasers of Māori land. In many cases, the purchaser will have no idea a requirement in the TTWMA has not been complied with. If they did, the fraud exception to indefeasibility would likely apply and there would be no need to consider which statute prevailed.¹¹⁷ In *Warin*, the purchaser was unaware the requirement in section 126 of the TTWMA had not been met. Justice Allan made

¹⁰⁹ See section 52 of the Land Transfer Act 2017.

¹¹⁰ See Land Transfer Act 2017, section 6, which defines fraud.

¹¹¹ See Land Transfer Act 2017, section 59 “Compensation for loss of estate or interest in land”.

¹¹² *Re Marshall – Part Allotment 65B2B Parish of Whangape* (1990) 69 Waikato Minute Book 136, para 50 Judge Carter.

¹¹³ This is clear from the preamble and interpretation section 2 which promotes interpretations favouring protection and retention of Māori land.

¹¹⁴ These two cases were decided under the Māori Affairs Act, a precursor to the Te Ture Whenua Māori Act. However when applying this possible reform option I am assuming that the Māori Affairs Act 1953 would have the same overriding effect that I suggest the Te Ture Whenua Māori Act should have. This is logical as it has many of the same principles and purposes as the Te Ture Whenua Māori Act, which replaced it in 1993.

¹¹⁵ *Registrar-General of Land v Marshall*, above n 51, at 198-199.

¹¹⁶ See Torrens principles generally in Stanhope Rowton Simpson “The Torrens System” in Stanhope Rowton Simpson *Land, Law and Registration* (Cambridge University Press, Cambridge, 1978) 68.

¹¹⁷ This is because the fraud exception defeats title and applies when there is actual dishonesty, see section 6 of the Land Transfer Act 2017 for the definition of fraud and section 52 for its effect on title.

the convincing point that if the TTWMA defeated Warin's title, he would be in a worse position than if he had bought the land from a fraudulent party.¹¹⁸

Further, if the TTWMA overrode the LTA in all situations it would have negative commercial implications for Māori land owners. The primacy of indefeasibility is useful in securing financing. If unforeseen requirements in the TTWMA could defeat registered title, then the risk faced by financiers lending to Māori land owners would be significant. Further, the increased due diligence necessary to check the requirements in the TTWMA had been satisfied would increase the price of lending. This would make it harder for Māori to use their land as security.¹¹⁹

B Option 2: Indefeasibility Extends to Registration of Voidable but not Void Instruments

Indefeasibility of title could extend to the registration of voidable but not void instruments. It is something commentators have advocated for in the past.¹²⁰ It appears logical as void transactions are transactions with no legal force. A void contract is not a contract at all. Therefore it may seem unusual that registration of such a contract gives indefeasible title. By way of contrast, voidable transactions are those that are legally binding unless avoided by the prejudiced party.¹²¹ For instance, a negligent solicitor electronically transfers or surrenders a title interest under Land Online.¹²² The recipient of the newly registered interest may not have any knowledge of this irregularity and the owner never intended to pass title. The dealing retains legal effect, unless avoided by the prejudiced party.¹²³

This option would protect Māori land as any transfer of Māori land in contravention of the TTWMA renders the transaction void. This is because the TTWMA is concerned with preventing the disposal of Māori freehold land without the consent of the Māori Land Court. Any dealing without consent of the Māori Land Court is void. Therefore, under this solution, title registered in breach of the TTWMA would be defeasible.

It would be such an effective protection that it would change the result in *Warin, Marshall and Housing Corporation*. In all these cases Māori Land statutes were not complied with, which rendered the instruments void. Therefore, registration would not have granted indefeasible title, and the Māori owners could have defeated the competing interests. The result in *Beale and Assets* would not change under this option as the defendants in both cases were subsequent transferees. Therefore, while there were void instruments involved in previous transactions, they were not the instruments that the defendants were registered under.

However, a difficulty with this solution is the precise distinction between void and voidable instruments. It is common that parties who think the instrument is void, often find out later it is voidable.¹²⁴ This would create uncertainty in the Torrens system. The differences between

¹¹⁸ If Warin had bought the land from a fraudulent party, but did not know of the fraud himself, then his title will be indefeasible under section 51 of the Land Transfer Act 2017.

¹¹⁹ This consequence is briefly suggested in Law Commission *Review of the Land Transfer Act 1952*, above n 12, at [6.23].

¹²⁰ GW Hinde "The Future of the Torrens System in New Zealand" in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965) 77.

¹²¹ For definition of voidable see *Duncan v Dixon* (1890) 44 Ch D 211 (HC); Halsbury's *Laws of England* (4th ed, 1998).

¹²² This is an example used by Roy Thomas in *Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act*, above n 91, at 730.

¹²³ This was also mentioned in Anne Gibson "Your home may not be your own, says expert" *The New Zealand Herald* (New Zealand, 16 June 2010) <www.nzherald.co.nz>.

¹²⁴ Roy Thomas, above n 91, at 731.

void and voidable instruments are often legally subtle, but under this option one would grant indefeasible title and the other would not.

Although this solution would protect Māori land, the increased uncertainty would make it difficult for Māori to use their land as security. It would create even more uncertainty than option 1, as the distinction between a void and a voidable instrument is often unclear, and parties will need to go to Court or pay for legal advice to determine whether their registration is valid. This would add extra legal costs to the land sales process. Further, this option would undermine the key tenant of the Torrens system that title on the register is valid and can be relied on.

C Preferred Solution - Option 3: Provide that Section 126 of the TTWMA will Override the Principle of Indefeasibility

Section 126 of the TTWMA should be amended to add a subsection (2):

- (1) The District Land Registrar shall not register any instrument affecting Māori land (other than an instrument not required to be confirmed or an order of the court or of the Registrar) unless the instrument has been confirmed by the court, or the Register of the court has issued a certificate of confirmation in respect of the instrument, in accordance with the relevant provisions of Part 8.
- (2) *Any instrument registered without confirmation by the Māori Land Court will not grant indefeasible title under the Land Transfer Act 2017.*

Option 3 is my preferred solution for Parliament to adopt when reforming the TTWMA. The addition of section 126(2) will ensure that section 126, a central pillar of the TTWMA retains its full legal effect. Māori Land Judges have noted the importance of section 126, and how there is currently little incentive to comply with it, because registration under the LTA means there are no consequences for non-compliance.¹²⁵ It is desirable for section 126 to function as intended because the step of confirmation offers protection for Māori land. The Māori Land Court would not confirm a fraudulent transfer nor one that is inconsistent with other protections in the TTWMA.

The addition of section 126(2) would make the title in *Warin* defeasible, as section 126(1) of the TTWMA was not complied with.¹²⁶ This reform option cannot be accurately tested against the results of cases before the TTWMA as there was no true equivalent to section 126(1) in earlier Māori land statutes. Under the Māori Affairs Act 1953 the powers of the Māori Land Court to confirm registration were limited and only applied to a few kinds of transfer.¹²⁷ Section 126(1) of the TTWMA is much wider in the protection it offers as it applies to “any instrument affecting Māori land”.

Adding section 126(2) should not significantly reduce certainty of title under the LTA. It is an express legislative change that applies in defined situations, so that the position for parties to a land sale would be clear. Parties seeking to register Māori freehold land under the LTA will have the added step of ensuring the Māori Land Court has confirmed the order. This is unlikely to add any significant time or cost, as the Māori Land Court is already required to keep track

¹²⁵ Law Commission *Review of the Land Transfer Act 1952*, above n 12, at [6.15], which summarises the submissions of the Māori Land Court judges.

¹²⁶ This may not seem like a desirable result, as the original Māori land owner wanted the sale to go ahead. However, just because the title is defeasible by the Māori owner, it does not mean they have to exercise the power to defeat it.

¹²⁷ See Māori Affairs Act, section 224(1).

of the orders it makes. Therefore, it should be simple to check whether confirmation has taken place, prior to registering title.

This additional check would become necessary for lawyers to complete to give appropriate certifications to the purchaser that the title is good. If a lawyer failed to check whether the Māori Land Court had confirmed the transfer, this could open them up to a negligence claim. However, this is not a new phenomenon, as failure or delay to register title is already grounds for a negligence claim.¹²⁸ Further, the requirement to check whether the Māori Land Court has provided confirmation is only relevant to the alienation of Māori land. Transfers of general land make up most transactions under the LTA and would not be affected.¹²⁹

Ideally the Māori Land Court records would be accurate, and the purchasers' conveyancer would always check for confirmation from the Māori Land Court. However, in reality, this will not always be the case. Therefore to be safe, if Māori land owners want to secure financing, it would be in financiers' best interests to double check whether confirmation had taken place. If confirmation had not taken place, the financier would put themselves at significant risk, because the title to the land they were receiving as security for a loan could be defeated. This extra check by financiers would increase transaction costs but it is a justifiable sacrifice for protection of Māori land.

The strength of this solution largely depends on the accuracy of the Māori Land Court records. They have been described as cumbersome.¹³⁰ However, LINZ and the Māori Land Court have been working to update them. If a purchaser of Māori land checked the Māori Land Courts' records to see if confirmation had taken place, and the records had not been updated, this would slow down the otherwise expedient land transfer process. For this solution to be workable more resources would need to be funnelled into the Māori Land Court's system of records to ensure confirmation orders are entered as quickly and accurately as possible.

A further question is how errors in the Māori Land Court's records should be treated. It is possible the Court could make the administrative mistake of entering a confirmation order when confirmation had not taken place. Alternatively, it could mistakenly issue a confirmation when the TTWMA was not complied with. In these situations, should the record of confirmations still be binding?

The answer to this question is crucial, as if incorrect confirmations are binding, they will have the important consequence of overriding LTA title. This issue is comparable to the question of whether registration of void instruments should give indefeasible title, as in both situations the instrument is registered when it should not have been. The injustices immediate indefeasibility created led to a need for reform in the first place.

Nevertheless, I suggest that incorrect confirmations should have the effect of overriding indefeasible title. If confirmations from the Māori Land Court could later be rescinded due to errors, then parties would not have true security of title, despite taking all the correct steps including checking whether a confirmation had been issued prior to registering the title. The uncertainty would compound the problem of Māori owners using their land as security.

I suggest that false confirmations will be unlikely considering the Māori Land Court is the body issuing the confirmations. A specialist court is less likely to make mistakes than parties to a land transaction. However, there is still some risk that administrators at the Māori Land Court

¹²⁸ This was the basis of the claim in *Westpac New Zealand Ltd v Clark* [2010] 1 NZLR 82 (SC).

¹²⁹ 95% of land in New Zealand is general land, see Law Commission *Review of the Land Transfer Act 1952* (NZLC IP10), above n 54, at [10.2].

¹³⁰ Richard Boast 'The Implications of Indefeasibility for Māori Land', above n 22, at 101-102.

will mistakenly enter confirmations. Checks and balances and additional resources should be put in place to minimise the chance of mistaken confirmations occurring.

Overall, expressly adding section 126(2) to the TTWMA is my preferred solution as it strikes a balance between retaining security of title under the LTA and strengthening the Māori Land Court's guardianship role over Māori land. Option 1 and 2 may better protect Māori land but would sacrifice certainty of title and make it difficult to use Māori land as security. Option 3 is an express legislative carve out Parliament should adopt when it amends the TTWMA. The only caveat is that for my preferred solution to be effective, more resources will need to be funnelled into the Māori Land Court to ensure consistently accurate records.

VII Conclusion

There is a conflict between the TTWMA and the LTA. The former seeks to protect Māori land from alienation, while the latter seeks to provide certainty of title upon registration above all else. When title is registered without protections in the TTWMA being followed, the title is said to be indefeasible. Courts in New Zealand have treated LTA indefeasibility as overriding the protections in the TTWMA.

The Law Commission discussed the problematic interface between the TTWMA and the LTA. It decided the issue was important and complex enough to warrant a new report. The government is planning to announce reforms to the TTWMA in 2018. Minister of Māori Development Hon Nanaia Mahuta stated the reforms will have a strong preference for protection of Māori land.¹³¹

The incoming reforms to the TTWMA 2018 should be viewed against the background of the 2017 LTA, which comes into force in November 2018. The introduction of the manifest injustice exception in the 2017 LTA presents a new avenue for Māori owners to challenge registered title.¹³² However, this cause of action is highly discretionary and Māori land owners must go to court to use it. Further, I argue this reform would not change the result in most of the major cases where Māori have been deprived of their land by operation of the LTA.

I recommend that when Parliament reforms the TTWMA, it should expressly state that section 126 prevails over indefeasibility. My view is that other reform options detract from certainty of title and make it difficult to use Māori land as security. I believe the addition of section 126(2) to the TTWMA will strike the appropriate balance between protecting Māori land and retaining certainty of title under the LTA.

¹³¹ Nanaia Mahuta "Te Ture Whenua Māori reforms relaunch next year" (press release, 22 December 2017).

¹³² Land Transfer Act 2017, section 54.

VIII Bibliography

A Cases

1 England and Wales

Assets v Mere Roihi [1905] AC 176 (PC).

Frazer v Walker [1967] 1 AC 569 (PC).

Gibbs v Messer [1891] AC 248 (PC).

2 Australia

Breskvar v Wall (1971) 126 CLR 376 (HCA).

3 New Zealand

Beale v Tihema Te Hau (1905) 24 NZLR 883 (SC).

Boyd v Mayor of Wellington [1924] NZLR 1174 (CA).

Fels v Knowles (1906) 26 NZLR 604 (CA).

Housing Corporation v Māori Trustee [1988] 2 NZLR 662 (HC).

Miller v Minister of Mines [1963] NZLR 560 (PC).

Registrar-General of Land v Marshall [1995] 2 NZLR 189 (HC).

Re Marshall – Part Allotment 65B2B Parish of Whangape (1990) 69 Waikato Minute Book 136.

Re Orongotea B No 1 (2008) 125 Whangarei Minute Book 36.

Re Pakiri R Block and Rahui Te Kuri Incorporation (23 March 1994) Māori Appellate Court, Taitokerau District.

Warin v Registrar-General of Land (2008) 10 NZCPR 73 (HC).

Westpac New Zealand Ltd v Clark [2010] 1 NZLR 82 (SC).

B Legislation

1 New Zealand

Land Transfer Act 1870.

Land Transfer Act 1952.

Land Transfer Act 2017.

Māori Affairs Act 1953.

Māori Affairs Amendment Act 1967.

Native Lands Act 1862.

Native Lands Act 1909.

Te Ture Whenua Māori Act 1993.

Te Ture Whenua Māori Bill 2017.

C Books and Chapters in Books

Benito Arrunada *Institutional foundations of impersonal exchange; Theory and policy of contractual registers* (University of Chicago Press, Chicago, 2012) at 242.

Richard Boast ‘The Implications of Indefeasibility for Māori Land’ in David Paul Grinlinton (ed) *Torrens in the Twenty-First Century* (Lexis Nexis, Wellington, 2003) 101.

Boast and others *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004).

Richard Boast *The Native Land Court 1862-1887 : A Historical Study, Cases, and Commentary* (Brookers NZ, Auckland, 2013).

Robert Chambers “Indefeasible Title as a Bar to a Claim for Restitution” [1998] *Restitution Law Review* 126.

Daniel Greenberg (ed) *Stroud’s Judicial Dictionary of Words and Phrases* (7th ed, Sweet & Maxwell, London, 2006).

David Hay (ed) *Words and Phrases Legally Defined* (4th ed, LexisNexis Butterworths, London, 2007).

GW Hinde “Indefeasibility of Title since *Frazer v Walker*” in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 33.

GW Hinde “The Future of the Torrens System in New Zealand” in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965) 77.

Thomas Mapp *Torrens’ Elusive Title: Basic Legal Principles of an Efficient Torrens’ System* (University of Alberta, Edmonton, 1978).

Pamela O’Connor “Registration of Invalid Dispositions: Who Gets the Property?” in Elizabeth Cooke (ed) *Modern Studies in Property Law* (Hart Publishing, Oregon, 2005) 45.

Jacinta Ruru “Māori Land Law for Conveyancers” in Struan Scott and others *Adam’s Land Transfer* (loose leaf, LexisNexis, Wellington, 2007) Appendix B, para B.2.3.6.

Stanhope Rowton Simpson “The Torrens System” in Stanhope Rowton Simpson *Land, Law and Registration* (Cambridge University Press, Cambridge, 1978) 68.

Douglas J Whalan “The origins of the Torrens system and its introduction into New Zealand” in GW Hinde (ed) *The New Zealand Torrens System: Centennial Essays* (Butterworths, Wellington, 1971) 1.

D Journal Articles

Don McMorland “The Land Transfer Office and the Māori Land Court” (1996) 7 BCB 135.

Ronald Sackville “The Torrens System – Some Thoughts on Indefeasibility and Priorities” (1973) 47 ALJ 526.

Katherine Sanders “New Zealand Land Law” (2012) 3 NZLR 545.

Roy Thomas “Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act” (2011) 4 NZLR 715.

Warrington Taylor “Scotching Frazer v Walker” (1970) 44 ALJ 248.

Elizabeth Toomey “Fraud and Forgery in the 1990s: Can Our Adherence to *Frazer v Walker* Survive the Strain?” (1994) 5 Canta LR 424.

E Law Commission Reports

Law Commission *A New Land Transfer Act* (NZLC R116, 2010).

Law Commission *Review of the Land Transfer Act 1952* (NZLC IP10, Wellington, 2008).

F Press Releases

Cabinet Domestic Policy Committee “Law Commission Report – A New Land Transfer Act” available at <www.linz.govt.nz>.

Christopher Findlayson “Te Ture Whenua Māori Act review announced” (press release, 3 June 2012).

Nanaia Mahuta “Te Ture Whenua Māori reforms relaunch next year” (press release, 22 December 2017).

G Internet Materials

Anne Gibson “Your home may not be your own, says expert” *The New Zealand Herald* (New Zealand, 16 June 2010) <www.nzherald.co.nz>.

Heta Gardiner “Ture Whenua Bill has been binned” *Māori Television* (New Zealand, 22 December 2017) <www.Māoritelevision.com>.

Word count: *the text of this paper (excluding the abstract, non-substantive footnotes, and bibliography) comprises exactly 9,830 words.*

