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FEEDBACK::

LIMITED TITLES - GUIDANCE (2023)

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The ICS is an organisation whose membership is actively engaged in cadastral surveying.

This response represents the collective views of the ICS Executive Committee and is based on the experience and wisdom of key personnel within our leadership team who are passionate about the integrity and value of the survey system. It is also submitted in the best interests of landowners and the public - our clients.

We thank you for the opportunity to provide feedback on the **Limited Title Guidance** document.

Statement

The ICS **is generally comfortable** with the tenor and style of the guidance document.

We accept that the document is an initial guide that focuses on the survey process to remove limitations, and therefore is a good general guide that steps one through the process and the current (LINZ) survey requirements.

It is disappointing that updated guidance on removing limitations on titles has taken so long to get to this stage, noting that our initial contribution was in July-2022 - although the ICS has been advocating for a change in this space for some time before then. It is our view that the 2014 LINZ "Masterclass" presentations increased the confusion and complexity with dealing with limited title surveys – both from the practitioner and regulator perspectives.

Our concerns with other issues related to limited titles, and the related survey rule and policy requirements by LINZ Survey (OSG) and LINZ Titles (RGL) have been previously noted.

We note also that the LINZ review of its legal and survey processes relating to limited titles is on-going, and that you anticipate the review will be completed in 2024. It is hoped that the LINZ Limited Titles review can therefore be fast-tracked to completion in this timeframe, and that the process - when completed - will address some/all of these "other" issues.

For clarity, the ICS comments that follow relate to the draft Limited Titles guidance document supplied as a PDF file with attachments and called *Limited Titles – removing limitations_v1.1_final draft for external circulation_8-12-2023.pdf*. We understand that further guidance will be developed and added at a future date.

The following feedback summary references the document sections. Additional comments are included within these sections – or added at the end - where we consider they are relevant to this initial guide, or important enough to be addressed in this or subsequent guidance or policy.

1. Survey process to remove limitations as to parcels – Background (pg1)

It is noted that limitations *as to title* in the register have now expired.

Presumably this relates to s21 Land Transfer (Compulsory Registration of Titles) Act 1924 – where after twelve years from the date of the first certificate of title limited as to title for any land, the interests excepted from guarantee were extinguished.

For academic reasons, it may be useful to reference that note in the guidance document.

2. Step 1 – Define underlying parcel boundaries (as if the title is not limited) (pg3)

2a: **Hierarchy of evidence**: The hierarchy of evidence is referenced in the first paragraph and is further addressed under "Additional notes" (pg13).

It is recognised that the hierarchy priorities are not absolute but are a guide – as implied by the LINZ v Te Whanau o Rangiwhakaahu Hapu Charitable Trust [2013] case. In some instances of conflict, the value of occupation may increase in importance [Good Survey Practice – 181031 GoodSurveyPractice_ICS2018_v2.4.
https://www.ics.org.nz/wm/wp-content/uploads/2022/05/181031-GoodSurveyPractice_ICS2018_v2.4.pdf]

It would be useful additional information to have a link to a suitable source that further describes the hierarchy of evidence concept. The reference within the LINZ survey guidance is probably sufficient:
https://www.linz.govt.nz/guidance/survey/cadastral-survey-guidelines/quality-boundary-definition

2b: **Old boundary marks:** The requirement to search for historic boundary marking and old boundary marks is noted in the second paragraph.

We certainly agree that thorough searching of boundary monuments is a key requirement for any survey definition.

However, with the effluxion of time, the likelihood of locating old boundary marks that would now be circa 100 years old – especially if they were wooden pegs – is becoming rare. In locations where ground conditions are conducive, old (100-130yrs) pegs can remain and be recovered - this is the exception and not the norm.

An acknowledgement that old marks placed up to the early 1900's are becoming less likely to locate due to age alone may be warranted.

3. Step 2 – Exclude areas of adverse possession – Figure 1 and Figure 2 (pg5)

3a: **Diagrams**: The diagrams are clear and are succinctly summarised by the preceding narrative. We consider that using diagrams wherever possible is a very useful way to depict and describe scenarios.

3b: **Residue parcels (pg6)**:
The guidance relating to residue parcels in this section (and in the Cadastral Survey Guidelines) involving adverse possession is clear. However, it does not address the problem of very narrow strips of residue land that leave the cadastre no better off after survey.

In our experience, true residue parcels are not common – but sometimes cannot be avoided. For residue parcels in general our additional comments include:

- There needs to be a general warning about creating them unnecessarily;
- There is often more than one option to ascertain documentary boundary position:-
    - define 'in' from each end
    - pro-rata boundary dimensions
    - ignoring previously approved surveys based on justifiable erroneous data
    - define completely in terms of occupation
- The best outcomes are pragmatic solutions which fit with occupation, and where adjoining owners are comfortable with survey definition;
- To define documentary boundaries wholly in terms of the plan dimensions takes no account of the inherent accuracy of the survey work, or the occupation.
  For example, in rural locations for instance, there are often old barberry or boxthorn hedges which predate limited title issue, which have been accepted by many generations as the occupied boundary. On occasion, there are also slight bends in these hedges, where they go over hillocks or through gulleys.
  For the surveyor to pretend they know the location of the documentary boundaries with any degree of precision (in the absence of old marks), and to create residue parcels on either side of these occupied lines, particularly where both parties have accepted them as longstanding boundaries, disregards the "Hierarchy of Evidence".
  Indeed, many guaranteed titles are defined also in this manner based on that "Hierarchy". The important questions the surveyor should be asking are *"What errors are prevalent in the underlying survey work?",* and *"How can I demonstrate I am respecting adjoining titles? - (dimensions and area)".*
- The situation where there is most likely to be conflict between documentary and occupation boundaries is in urban locations - on what are most likely relatively good (but old) surveys.
  Some old plans may have placed no or few pegs but are generally well controlled. Many regional centres and their outlying townships are defined on such early plans.
  The traditional "measure occupation along the block" scenario is used to ascertain (even with guaranteed titles) where shortages or excesses might apply. A conservative position is to claim no excess, and for each parcel to accept a share of the shortage.
  Note also that occupation width of say an iron or paling fence (~0.2-0.3m) may be of little help in distributing small errors, so consideration toward being liberal with a "little more or less" is relevant when dealing with limited title definition.
  Buildings on or near boundaries on the subject or adjoining properties are likely to be most problematic. This is where, if possible, neighbours should be well informed, and options for resolution discussed and agreed with clients/neighbours.

Potentially, LINZ may be lenient on such situations where the application of a pragmatic definition and the "a little more or less" principle can be beneficial to avoid a residue parcel. Adding some of the bulleted points above into the guideline may lead to better understanding for all parties.

There may also be a case for a change to the Land Transfer Act which would enable narrow strips of residue land to be dealt with more simply.

4. Adverse possession of a neighbouring limited title – Figure 3 (pg9)

The diagram is clear and succinctly summarised by the following narrative. Refer to our comment in 3a above regarding the use of diagrams.

5. Survey and CSD requirements – Boundary Marking (pg10)

It is noted that the CSR 2021 states *all existing boundary points on a parcel having its limitations uplifted mark be marked if practicable* (r35(2)(d). Subsequently, the guidelines indicate that "*If a surveyor considers the requirement to mark a boundary point is impractical or unreasonable, dispensation must be sought from marking it."*

There is some guidance on the difference between what is '*practical'* and '*impractical'* in the LINZ guidelines, but the criteria stated are considered to be more onerous than necessary. The guidelines imply that 'impractical' or 'unreasonable' is limited to mean *difficult, inconvenient, or not sensible*.

The included rule 35(1)(e) - *it is unlikely that it will need to be physically located in the foreseeable future…* is a pragmatic rule that justifies not marking a boundary point. With the other sub-clauses within r35(1) suffixed with "or", this rule can be used on its own to justify not marking a new boundary point.

Other valid aspects that should also be considered with being impractical to mark a boundary point – with limited title surveys in particular - could/should include the following guidance points – perhaps prefaced with "and some or all of":

- it is uneconomical to do so (from the client perspective);
- the landowner/client does require the boundary to be marked;
- the likelihood that the mark will be disturbed/destroyed in the near future (eg: by stock activity in rural areas);
- the position can be determined mathematically (within acceptable tolerances) and recreated on the ground if required;
- the surveying of the occupation is an adequate boundary determinate.

It is widely (and historically) accepted that physical monumentation of boundary points are an important component that supports the integrity of the cadastral network – not only immediately post-survey but often when many years have passed, or when there has been land movement.

However, modern determinations of boundary positions can now be easily supported with vector based mathematical determinations within survey software (eg: 12d Model). Traverse blocks of captured and adopted observations, and calculated or recalculated boundaries can be reported with circuit closures indicating the accuracy of each block.

Thus, a boundary point that is considered impractical to mark by the surveyor that is also adequately supported by an acceptable mathematical determination and data record could be left unmarked – including existing boundaries of a parcel whose limitations as to parcels is being uplifted. Its position is recorded within the CSD as unmarked, and the point (by vectors and coordinates) can be recreated and marked at a later time if ever required.

[Additional note - it was not that long ago when a Surveyor-General was promoting the concept of not pegging some primary parcel boundaries….]

In any event, we would anticipate that a dispensation request that includes sound and pragmatic reason(s) to not demarcate some/all of a boundary having limitations removed – including some of the above factors - would not be unduly declined.

6. Other Comments

6a: Unnecessary (re)pegging of boundaries: Where neighbouring parcels are derived from the same parent title as the limited title land under survey, the repegging of these boundaries is often unnecessary.

There are many reasons why it should be possible to adopt boundaries - rather than having to repeg them. These could include:

- adequate recent or modern surveys of adjoining land are available;
- the number of adjoining properties involved are significant;
- if the adjoining land is abandoned;
- adjoining surveys have been used to uplift adjoining limitations;
- whether adjoining land is leasehold/freehold/Crown.

This may be part of your subsequent review. In this regard the RGL needs to consider the provisions of s200 of the Land Transfer Act 2017 (Effect of limited record of title) before demanding that all the boundaries of the title are re-pegged.

6b: Adjoining owner consent: Some more detailed guidance on obtaining neighbours' consents – particularly where the adjoining land is Crown land - would be useful.

6c: Case law: We consider that there should be a change in emphasis with the application of Case law.

Whilst obviously Case Law has an impact on law interpretation, there are a number of cases which have had variable outcomes in terms of limited title definition. For instance:

- Sinton Damerell Properties Ltd v King Trounson Trustees Ltd — [2004] 2 NZLR 66 - Ponsonby, Auckland *[Where a possessory title has matured and possession continues, ought to be taken into account by the surveyor]*
- Boskett & Barnes v Drummond, Drummond, Gilkison & Frater - [2006] CA CA190/05 - Moutere, Nelson *[A dismissed claim where a physical feature (a drainage ditch) marked the practical boundary that was initially accepted; then a line of pine trees and a fence as a boundary of convenience with both features replaced with another fence in a different alignment at a later time – combined with various but not contiguous familial ownership periods.]*
- Southern Agriculture Ltd v RGL & Anor — [2009] HC WN CIV-2008-485-1013 - Makara, Wellington *[Findings in favour of an old fence defining the Ltd Title boundary rather than documentary evidence]*
- Edmunds v Lauder & RGL [2013] – NZHC 2770 [22 October 2013] - Green Island Bush Rd/ Dunedin *[Derogation from the principle of indefeasibility]*

Many of these cases are about the individual actions of landowners, with boundaries of varied survey/title history and inherent error, making application of any general learnings relative to such case law about limited title definition difficult.

Many of these cases have one client/surveyor pitted against another, without independent experts (eg: LINZ or industry Experts) defending "good survey practice" or the "hierarchy of evidence" – the outcomes of such cases perhaps are less applicable in any general surveying sense.

We consider that the statement in the first paragraph on page 4 noting that *"Case law indicates that "striking differences" are not acceptable"* may not be universally correct as a general statement, as in other circumstances (other than Edmunds v Lauder) differences may result that are accepted.

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