

How to settle when Landonline is unavailable



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Occasionally, the Landonline system is unavailable. This fact sheet is designed to offer practical guidance to firms wishing to settle when the system is unavailable for any length of time. Please note that this information applies only to an outage of the Landonline system.

> **What do the New Zealand Law Society Guidelines advise?**

The NZLS *e-dealing* Guidelines advise what should happen in the event of a system outage in Guideline Z, as follows:

'If after settlement and possession, as a result of for example a system failure, certified and signed instruments are no longer available... every practitioner has an obligation to co-operate with the other parties to a transaction to achieve registration.'

> **How to settle if funds are yet to be paid**

In the event that Landonline is unavailable on settlement day and funds have not yet passed, it would be prudent not to settle. The contractual rationale is that the vendor would be unable to access 'workspace' to 'release' the instruments. Accordingly, the requirements of clause 3.7 of the ADLS Agreement for Sale and Purchase (7th edition (2) July 1999) could not be met; namely the ability to pass clear title to the purchaser.

If settlement monies were passed, the purchaser's lawyer could be considered negligent if he or she knew prior to passing funds that, as a result of the outage, the vendor could not give clear title. If mortgage funds were involved, the lawyer could be in breach of the mortgagee's instructions and would almost certainly be in breach of the Solicitor's Certificate.

However, the circumstances of the outage are relevant in determining the appropriate course of action. For example, if the outage is temporary, with a time estimate that would allow settlement to occur on the same day, then waiting until it is accessible would be prudent.

The Landonline system has a User Activity Log (UAL) that clearly identifies who was transacting on which title at the time of the outage. This information includes details of the instruments that were prepared and the status of those instruments such as 'draft', 'signed' or 'released'.

A back-up of all data in the Landonline system is carried out on a twice-daily basis. Accordingly, the most data that could potentially be lost is a half business day's data. The UAL referred to above captures the summary of data on a virtually continuous basis and that information would be available to the time of the outage.

In the event of a disaster or outage, a Departmental Dealing is automatically placed on those titles that are currently being transacted on. LINZ would then seek confirmation from the respective lawyers involved in those transactions as to the status of the dealing and agreement as to whether registration should be perfected.

If the outage is due to a disaster, settlement should be deferred until the system is available or alternatively, firms may wish to carry out a paper dealing, if practicable. This option will however only be available until 1 August 2007, from which date all Transfers and Mortgages which are *e-dealing* capable must be lodged through the system.

It is relevant to consider that LINZ uses and accesses the same database and underlying software internally as all external users. Accordingly, if there is a major outage of Landonline as opposed to merely the external user portal into Landonline, then any paper dealing submitted would also be prevented from registration until the outage is rectified. Therefore in a major disaster it is best to wait until Landonline is available as opposed to preparing alternative paper instruments.

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Possession

The next relevant issue to consider is to the appropriateness of allowing a purchaser into possession in the above scenario. Effectively, the contractual position would be a 'no fault' inability to settle and therefore the parties should not be penalised.

If the parties are agreeable, the option of placing funds on an interest bearing account for the benefit of the vendor could be made, with possession then being given to the purchaser. It would not be unreasonable for the vendor to request an undertaking from the purchaser to settle in full without deduction and also confirmation that insurance risk passes upon taking possession.

Regrettably, this option will not extend to other parties further down the chain if there are ongoing transactions.

There are a number of circumstances that can arise on settlement day that preclude settlement from being effected and the arrangements made between respective solicitors to accommodate their clients is dealt with on a case by case basis. It is not possible to identify all the scenarios and options.

> **How to settle if funds have been paid**

Where settlement funds have passed and the vendor has not yet released the transfer and discharge of mortgage (if any), the NZLS Guidelines indicate that the instruments should be 'released' on the same day as settlement occurs. (Please note that Landonline can be accessed 7am- 9pm Monday to Thursday, 7am-7pm on Fridays and 9am-5pm on Saturdays for everything except the submitting of instruments, which can only be done between the hours of 9am and 4pm on any business day.)

If the form and content of the undertaking given by the vendor to the purchaser is as indicated in guideline W, as noted below, the purchaser has the protection of both contractual obligations and the undertaking.

Extract from Guideline W:

Suggested Undertaking:

Re: Client X to Client Y – Property Address

I/we refer to the above transaction which is being transacted as an electronic dealing in Landonline I/we undertake that I/we have certified and signed the instruments listed below.

Immediately following receipt of confirmation of deposit of settlement funds to my/our trust account ,I/we further undertake;

- 1. to release the following instruments from the Landonline Workspace into your control:*
 - Transfer*
 - Discharge of Mortgage number*
 - (List any other discharges);and*
- 2. not to attempt to withdraw such releases or attempt any alteration of such instruments following settlement or release; and.....*

The purchaser also has protection by the Departmental Dealing freezing the title pending confirmation from the lawyers involved that it is appropriate for registration to proceed.

The vendor's lawyer has the obligation pursuant to the undertaking to release the documents as soon as practicable following settlement. If it is clear that the disaster is affecting the whole Landonline system, including internal LINZ processing as well as external access, then the parties should wait until Landonline is again available. If, as part of the reinstatement process of Landonline, the internal processing is available to electronic registration, the parties should consider perfecting the transaction on the basis of

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paper. LINZ has indicated that the priority for electronic registration would be given to those dealings that were in the process of finalisation and again that should address the purchaser's concerns.

> **How to prepare in case Landonline goes down**

There are three fundamental practices that can help mitigate the impact of the unavailability of Landonline.

These are:

- Obtain guaranteed searches prior to settlement day
- Certify and sign the *e-dealing* prior to settlement day, and
- Settling without Landonline.

> **Guaranteed searches (GSN)**

The GSN may be obtained anytime within the first operative period and it is recommended that this occur before the day of settlement.

The 'first operative period' is specified in Section 172A of the Land Transfer Act, i.e. "first operative period, in relation to any transaction to which this section applies, means the period of 14 days commencing with the 13th day preceding the date on which the transaction is settled".

> **Settlement – Certify and Sign in advance**

It is recommended solicitors certify and sign any instruments in advance of settlement day.

This practice is secure, in that registration can only be effected once all instruments in an *e-dealing* have been released.

> **Settling without Landonline**

Settlement can still occur between the parties using an undertaking regardless of access to Landonline. This process is a continuation of practice prior to Landonline.

This excerpt is from the NZLS guidelines to *e-dealing*, p25, Guideline W:

"The release should occur as soon as possible after settlement and always on the day of settlement.

If the vendor's lawyer cannot access the Landonline workspace due to malfunction of either

the lawyer's computer system or Landonline, the vendor's lawyer must facilitate such release as soon as practicable."

This guideline explains the completion of settlement irrespective of the availability of Landonline by utilising an undertaking between solicitors to settle for the parties.

All documents can then be released as soon as practicable when access to Landonline is restored.

> **Improvements to Landonline**

LINZ works to continuously improve the internal factors that may impact the robustness and performance of Landonline.

This includes:

- Capacity upgrades, to monitor various areas of the system and schedule upgrades accordingly. To ensure we have suitable capacity ahead of the additional customer numbers accessing and using Landonline LINZ monitors key areas such as the Citrix servers, the processing units and our databases.
- Scheduled releases, which include major technology updates to the Landonline application and database. An example is the change of the image storage system from FileNet to Centera.
- Reactive improvements, where we improve things quickly, particularly if a fault has occurred. These improvements may be carried out prior to an upgrade or release.

LINZ also monitors the performance of its customers to ensure they are managing our systems effectively and efficiently on our behalf.

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Unfortunately, there are also other factors that impact our customer's experience of Landonline, which LINZ does not have control over. These include the set up and performance of a customer's internet service provider (ISP) connection, the performance of the ISP itself and the set up and maintenance of customers' computer systems.

It is important that firms read Landonline technical information and support to ensure their IT structure is optimal, especially operating systems and internet connections.