

Property law changes

Investors must keep abreast

By Grant Harris*

Investors and those in the property industry need to be aware of recent changes to the Overseas Investment Act 2015 and the new Land Transfer Act 2017.

The Justice Select Committee has also released its final report on the long-awaited Trusts Bill, recommending that the Bill be passed with amendments.

A summary of some of the changes is set out below.

Overseas Investment Act 2005

In October 2018 changes to the Overseas Investment Act 2005 (OIA) came into effect. The new regime applies to all agreements entered into from 22 October 2018 and as a result of the OIA amendments all purchasers will be required to complete a Residential Land Statement and provide the statement to their lawyer.

The Residential Land Statement should be completed and provided to the lawyer prior to entering into an agreement to ensure that Overseas Investment Office consent is not required for the transaction.

The Residential Land Statement is a separate document to the Agreement for Sale and Purchase of Real Estate, and is additional to the supporting Land Transfer Tax Statement introduced as a requirement of the Bright-line tax rules introduced in 2015.

Land Transfer Act 2017

The Land Transfer Act 2017 (the 2017 Act) came into force on 12 November 2018 and replaces the Land Transfer Act 1952. It helps modernise New Zealand's land transfer legislation dealing with the statutory framework for land title registration in New Zealand.

The 2017 Act continues and maintains the Torrens system of a land title in New Zealand, and also retains the fundamental principles of that system, including providing security of ownership of estates and interest in land, facilitating the transfer and dealings with estates and interests in land, providing compensation for loss arising from the operation of the system and providing a register of land that

describes and records the ownership of interests in land. Furthermore, it reflects the fact that the transfer register is kept and operated electronically and that most dealings in land are carried out electronically, all of which maintains the integrity of title to estates and interests in land in New Zealand.

New terminology

The 2017 Act introduces new terminology, including the concept of a "record of title" replacing the traditional references to "certificate of title" or "computer register". On commencement of the 2017 Act, an existing certificate of title or computer register is to be treated as if were a record of title.

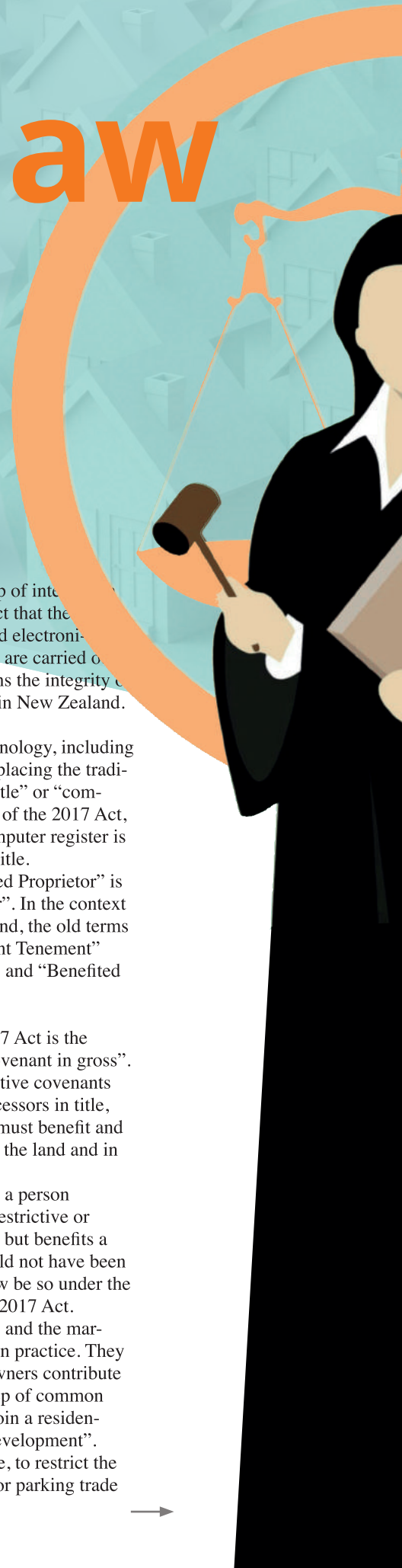
The old terminology of "Registered Proprietor" is now changed to "Registered Owner". In the context of easements and covenants over land, the old terms "Servient Tenement" and "Dominant Tenement" are replaced with "Burdened Land" and "Benefited Land" respectively.

Covenants in gross

An important change under the 2017 Act is the introduction of the concept of a "covenant in gross". The law has long recognised restrictive covenants that run with the land and bind successors in title, however, those types of covenants must benefit and burden land: i.e., they must be over the land and in favour of the land.

A "covenant in gross" will benefit a person or entity, rather than other land. A restrictive or positive covenant that burdens land but benefits a person (rather than other land) would not have been enforceable previously, but will now be so under the covenant in gross reforms with the 2017 Act.

It remains to be seen how lawyers and the marketplace utilise covenants in gross in practice. They could be used to ensure property owners contribute to the cost of maintenance or upkeep of common infrastructure or oblige owners to join a residential association in a "village type development". They may also be used, for example, to restrict the hanging of washing on rails/decks or parking trade vehicles on the driveway.





The taking of first-ranking mortgage security by a bank could be simplified (where other prior existing interests are registered on the title) without the need for priority deeds and/or variations in order for a bank to take its security. This is because an encumbrance is a mortgage at law and the Property Law Act implies a power of sale into an encumbrance (unless excluded), so a prior encumbrance will rank ahead of any subsequently registered mortgage.

If the prior interests were registered as covenants in gross (which do not constitute mortgages and do not contain a power of sale) rather than an encumbrance, the process for the bank to take a first-ranking mortgage would be simpler, with fewer documents required, and could be less costly for borrowers. This sounds good in theory, but could apply only to property titles that have prior covenants in gross registered, which may not arise for some time after the enactment of the 2017 Act.

New version of the ADLS/REINZ agreement

A new version of the Auckland District Law Society / Real Estate Institute of New Zealand Agreement for Sale and Purchase of Real Estate (Ninth Edition 2012(8)) has been published. It incorporates the changes brought about by the amended Overseas Investment Act 2015 and the Land Transfer Act 2017. Property practitioners will need to ensure they are now using the new version.

Trusts Bill

The Justice Select Committee reported back to Parliament at the end of October with its recommended amendments to the long-awaited Trusts Bill. The Bill has been more than a decade in the making and requires two further readings and another 18 months after receiving Royal Assent before it will come into force.

Among the various recommended amendments in the Bill, the game-changer for trustees remains to be the controversial disclosure requirements, which were largely unchanged.

Under the Bill, and unlike the current law, trustees will have a “mandatory duty” to account to the beneficiaries for the trust property. This will mean that trustees will have to follow a detailed process for determining what information must be provided to beneficiaries and when.

The purpose of this is to provide beneficiaries with sufficient information to enable the terms of the trust and the trustees’ duties to be enforced against the trustees. Trustees will need to become more active in the management and administration of the trust or face claims being made against them by beneficiaries. Given that there is still a reasonable amount of time before the Bill passes into law, trustees around the country should get their affairs in order sooner rather than later to avoid any nasty surprises for themselves.



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