

# **Covenants and encumbrances under the new Land Transfer Act**

**Thomas Gibbons, Director, McCaw Lewis, Hamilton**

The Land Transfer Act 2017 provides for covenants in gross – that is, land covenants that burden land but benefit a person, rather than other land.

This paper will first consider the current position of land covenants under New Zealand law: New Zealand, unlike many other jurisdictions, already allows for both restrictive and positive covenants. Covenants have become relatively common tools of land law practice, particularly in relation to subdivisions, and the degree of complexity of covenants, and the number of cases arising from them, continues to increase. There is limited conceptual analysis of land covenants in New Zealand, though there is increasing attention to their impact on housing typologies and supply, and some of the concerns that have arisen overseas (including from the work of O'Connor, Sherry, Heller and others) warrant further attention in New Zealand.

While New Zealand has allowed for both restrictive and positive covenants, to date, land covenants have been required to both burden and benefit land (that is, be over land A for the benefit of land B). To allow restrictions on land use to bind persons, rather than other land, New Zealand conveyancers have used encumbrance instruments. There is an extensive history to the use of encumbrances, and a similarly long debate over their efficacy and propriety as a kind of hybrid land law tool (including the work of Thomas and others). It is necessary to consider this debate, which has played out both in scholarship and in the Courts, and which touches on many of the issues that concern land covenants.

Covenants in gross have been introduced in the Land Transfer Act 2017 as something of a replacement for encumbrances, but the encumbrance regime remains untouched. This paper will consider what the new covenants in gross regime is expected to achieve, and practical and conceptual arguments for and against the use of covenants in gross (versus encumbrances).

More normatively, the position under the LTA 2017 is that covenants in gross are regulated in a relatively detailed manner, while encumbrances are not, and this may mean that notwithstanding the conceptual and practical advantages of covenants in gross, encumbrances will continue to be used. This may well lead to encumbrances requiring further regulation in future, and the form and manner of this regulation will be explored with a view to guiding the future policy and practice of encumbrances.