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Dear Cindy

### **Land Transfer Act Review - Government Response**

The New Zealand Law Society (Society) appreciates the opportunity of making submissions in relation to the Land Transfer Bill that the Law Commission has drafted. The Society also appreciates the extent to which its earlier submissions to the Law Commission have been adopted.

#### **1 Definition of Land – clause 5**

- 1.1 The Society has several concerns relating to the definition of 'land' in the Bill.
- 1.2 The definition differs substantially from that in the Property Law Act 2007. It is not desirable that the two major statutes concerning land have such differing approaches to this central definition.
- 1.3 The Society understands that paragraph (a) of the definition under which land includes 'buildings and other structures on land' is not intended to alter the current law relating to accession to land. However, arguably the definition would extend to temporary buildings and structures placed on land. The definition could result in uncertainty.

The Society considers that paragraph (a) would best be omitted.

- 1.4 Paragraphs (b) and (c) of the definition probably do no more than state the existing law and the Society accordingly questions the need for these.
- 1.5 It is submitted that it would be preferable to amend the definition of land to correspond with that in the Property Law Act.

#### **2 Encumbrances**

- 2.1 The Society in its submissions to the Law Commission relating to encumbrances (a copy of which is **attached**) emphasised the extent to which encumbrances are currently used and the need for the Land Transfer Act to recognise this.
- 2.2 However, the Bill does not contain any provision that recognises or permits the registration of encumbrances.

2.3 The Society considers that there is a need to retain encumbrances. Some of the reasons for this position are set out in subparagraphs 2.3.1 to 2.3.3 below.

2.3.1 There remains a need in some circumstances to charge land to secure a rent charge, annuity, or other periodic payments. Encumbrances were designed for that purpose.

2.3.2 A very common example of periodic payments which encumbrances protect is the obligation for individual owners in a housing development to join a residents society and to pay subscriptions and other dues to the society. The industrial or commercial equivalent is a precinct society that is created in respect of an industrial or commercial development.

The purposes of a residents or precinct society include:

- various management functions in relation to the development
- control and maintenance of common areas (including leisure and sporting areas) within the development
- controlling and maintaining facilities and amenities and infrastructure
- promulgating rules relating to the common areas, facilities, amenities and infrastructure.

To support these arrangements, encumbrances are registered against the titles to the individual properties in the development requiring the owners to join the relevant society and to pay all subscriptions and other dues which become payable to the society.

2.3.3 For these sort of purposes an encumbrance has various advantages over a covenant in gross, including the following:

- a The encumbrance constitutes a charge on the land in respect of moneys which fall due for payment, whilst a land covenant carries with it no more than a personal obligation to pay.
- b A land covenant is not fully indefeasible and it is not registered.
- c It is doubtful under the draft s307A of the Property Law Act, which the Bill would enact, that a covenant to join a residents or precinct society and to pay dues could be said to require the covenantor 'to act or refrain from acting in a particular way **in relation to the occupation or use of the land or part of the land**' (emphasis added). We comment further on this below.

2.4 Accordingly, the Society would like to see encumbrances retained and without any requirement that their principal purpose must be to secure the obligation to pay money. There could, if it was felt necessary or desirable, be a requirement that the purpose of an encumbrance must **at least in part** be to secure the obligation to pay money. However, the Society would not favour this.

2.5 If despite the case for retention set out above, encumbrances were to be discontinued, then the Society submits as follows:

- 2.5.1 The Bill should contain a provision recognising existing encumbrances.
- 2.5.2 There should be a provision dealing with the discharge of an encumbrance and also for its modification (perhaps restricting the ability substantially to extend the obligations contained in the encumbrance).
- 2.5.3 Some saving provision should be included where a party has previously entered into a contractual obligation to create an encumbrance. The Society's attention has been drawn to various instances of this. One is where parties involved in a land exchange to enable the creation of a marine industrial precinct provide for the creation of a precinct society and encumbrances to require owners to join. However, the marine precinct may not come to fruition for several years. If in the meantime encumbrances were outlawed, then existing contractual rights could be seriously affected.

### 3 Covenants in gross

- 3.1 The Society supports the proposed amendments to the Property Law Act which would permit the introduction of covenants in gross and enable them to run with the land.
- 3.2 However, the Society is concerned at the requirement in the proposed s307A that the covenant must require the covenantor to act or to refrain from acting in a particular way **in relation to the occupation or use of the land or part of the land** (emphasis added).
- 3.3 It does not seem clear that a requirement to join a residents or precinct society is one that could necessarily be said to relate to the occupation and use of the land, although arguably it could be. Given the prevalence and desirability of residents and precinct societies, it is submitted that the provision should be amended to clarify the position. This could be achieved by a provision along the lines that a requirement to join an entity established for the purpose of administering or managing matters relating to the area within which the land is situated or any common facilities amenities or services relating to that area, is deemed to relate to the occupation and use of the land.
- 3.4 The Society considers that a provision of this kind is very desirable irrespective of whether or not encumbrances are retained as recommended in paragraph 2 above.

### 4 Definition of mortgage

- 4.1 The definition of 'mortgage' in clause 5 of the Bill includes the requirement that the principal purpose must be to secure the performance of an obligation to pay money. Further, the definition differs from that in the Property Law Act.
- 4.2 The Society considers that this requirement would introduce an undesirable element of uncertainty. Difficulties which are likely to arise include the following:
  - 4.2.1 Mortgages are frequently given in support of a guarantee. The guarantee may or may not relate principally to payment of money and can relate to the performance of other obligations. It would seem unclear whether a charge given in support of a guarantee would constitute a mortgage, particularly if the guarantee relates to non-monetary obligations.
  - 4.2.2 It would not be possible to ascertain from an 'all obligations mortgage' whether or not its principal purpose is to secure the performance of an obligation to pay money.

- 4.2.3 The Society understands that LINZ would not wish to police this requirement. Whether or not the principal purpose of a particular mortgage relates to an obligation to pay money could be a complex question of fact and also of law, which in some cases could be resolved only after extensive enquiry.
- 4.2.4 The issue would arise as to the status of a charge which achieved registration as a mortgage but the purpose of which was primarily to secure the performance of an obligation other than the payment of money. The issue would arise as to whether registration would confer indefeasibility. There is authority to suggest that it would.
- 4.2.5 A document primarily securing obligations other than to pay money would still constitute a mortgage for the purposes of the Property Law Act and presumably would support a caveat.
- 4.3 For the above reasons, the Society submits that the proposed new element in the definition of mortgage is undesirable and should be omitted.

## **5 Identity of mortgagor**

- 5.1 The Society has several concerns regarding the obligation which clause 11 would impose on a mortgagee to establish the identity of a mortgagor prior to registration of the mortgage. Some of these concerns are set out below.
- 5.2 The use of the term ‘mortgagor’ in clause 11(1) does not fit with the definition of that term in clause 5, namely ‘the person who is the owner of an estate or interest in land that is subject to a mortgage’.

Clause 11(a) should be directed to establishing the identity of the person who signs the authority and instruction form as mortgagor. It is the identity of that person, rather than that of the owner, which needs to be established. By way of contrast, s164A of the current Act requires the certifying practitioner to take reasonable steps to confirm the identity of the person who gave the authority to act.

- 5.3 Where the mortgage is executed by an attorney, the current LINZ requirement is that the practitioner establish the identity of the attorney but not that of the mortgagor. However, clause 11(1)(a) of the Bill imposes a greater obligation on a mortgagee and requires the mortgagee to establish the identity of the mortgagor as well.

Powers of attorney are often given in circumstances where it may be impractical to obtain evidence of a mortgagor’s identity at short notice.

The Society submits that the additional obligation imposed by the Bill should not be adopted.

- 5.4 Where a mortgagee lodges a mortgage instrument for registration without having complied with the identity verification obligation, there are two sanctions:
- a the mortgage may not be indefeasible; and
  - b the mortgagee commits an offence and is liable to a monetary penalty.

The Society questions the appropriateness of the monetary sanction. The offence is directed to the registration of a mortgage rather than creating the charge. Liability could be avoided by taking an unregistered mortgage and lodging a caveat.

It may be considered that a penalty provision would be better included in general legislation that required secured lenders to establish the identity of the person giving the security. The case for this would seem just as strong as that which led to the decision to remove the provisions relating to flat and office owning companies into a separate Act.

## **6 Establishing identity of mortgagor on transfer of mortgage**

- 6.1 Clause 12 of the Bill requires the transferee of a mortgage to re-verify the identity of the mortgagor. The Society considers that this requirement would create a number of difficulties, some of which are set out below.
- 6.1.1 The transfer may take place years after the mortgage is created, with the mortgagor having complied with the obligations under the mortgage during that period.
  - 6.1.2 In order to comply with LINZ requirements, it will be necessary to establish the identity of the transferor.
  - 6.1.3 There will be occasions when it will be difficult or impossible to re-establish the identity of the mortgagor, particularly if the mortgagor declines to co-operate in this process.
  - 6.1.4 This requirement would seriously interfere with or prevent the sale of a mortgage portfolio that may involve the transfer of hundreds of mortgages.
  - 6.1.5 The requirement does not extend to a submortgage. There would seem no valid reason for the identity requirement applying on a transfer of a mortgage but not on a submortgage. Not infrequently, a submortgage is effected by way of a transfer of a mortgage with a collateral deed of defeasance.
- 6.2 It is submitted that the obligation to re-verify the identity of the mortgagor on a subsequent transfer of the mortgage should be omitted. At the most, the identity obligation of the transferee of a mortgage should be limited to obtaining from the transferor the records and documents referred to in clause 11(4) of the Bill.

## **7 Guaranteed searches**

- 7.1 Clause 17(1) would reduce the periods during which a guaranteed search must be obtained.
- 7.2 The second period, namely that following settlement of a transaction up to registration, would be reduced from two months to 10 working days.
- 7.3 This has the potential to create a problem in relation to 'lodge' documents, as opposed to 'auto-reg' documents. A 'lodge' document could be rejected after or towards the end of the second period leaving the party concerned unable to correct the matter and to re-present the documents for registration prior to the expiration of the second period.

- 7.4 Whilst a transfer or mortgage will generally be an 'auto-reg' dealing, there are instances where the transfer or mortgage may be merely one instrument in an otherwise complex 'lodge' dealing. An example of this is where a transfer is added to the end of a subdivision dealing.
- 7.5 There are occasions where LINZ has taken two weeks to reject a subdivision dealing. If a transfer or mortgage had been included then 10 working days' protection would not have afforded the intended protection of the guaranteed search.
- 7.6 Given that LINZ's permissible resubmission time limit for re-lodgement is still two months, it would be somewhat anomalous not to link this with the period of protection for guaranteed searches.
- 7.7 For these reasons, the Society submits that the second period should remain two months. However, if it is shortened, it should be at least one month.

## **8 Unique identifier**

- 8.1 It is suggested that this is a somewhat cumbersome expression. It is also tautologous. It is suggested that 'identifier' would be a simpler and more appropriate term.
- 8.2 It is noted that in search copies from the LINZ Computer Register, the reference is to 'identifier' rather than to 'unique identifier'.
- 8.3 It is suggested that the definition of 'identifier' (or 'unique identifier' if that expression is adopted) could usefully be expanded by linking it to the record of title required by clause 27 of the Bill.
- 8.4 Clause 5 of the Bill contains a definition of 'record of title' by reference to clause 27. However, there is no definition of 'register'. It would seem desirable to include a definition of this expression, defining it by reference to clause 24.

## **9 Limitations as to parcels**

- 9.1 Clause 169(b) would continue the present position where the Registrar must give notice to owners or occupiers of adjoining land before a limitation as to parcels may be removed.
- 9.2 It is suggested that this requirement should be dispensed with in the case of an adjoining owner who has consented in writing to the removal of the limitation. The Society understands that this would do no more than provide a statutory basis for current LINZ policy.
- 9.3 It would also seem appropriate to dispense with the requirement where an adjoining owner's boundary has been established by survey, forms part of a guaranteed title, and that boundary has been adopted on the survey plan to remove the parcel limitations.

## **10 Removal of easements from record of title**

- 10.1 Clauses 95 and 96 deal with the removal from the record of title of spent or redundant easements.
- 10.2 Both clauses would require the Registrar to give notice to interested parties and also public notice and each would permit a person claiming an interest in the easement to give notice objecting to the removal of the easement.

10.3 However, neither of these clauses specifies a period within which the objection must be lodged. This contrasts with the subsequent 10-working day period after an objection is lodged within which notice must be given of a Court application in support of the objection.

## 11 General

11.1 There are several typographical errors in the draft Bill. It is assumed that these will be corrected before the Bill is presented to Parliament.

The Society would be happy to enlarge upon any of the above submissions if this would assist. It is likely that we will be seeking to send you some supplementary submissions early in the coming week.

If you have any queries please direct these in the first instance to Kim Oelofse, NZLS Property Law Section Manager, email [kim.oelofse@lawsociety.org.nz](mailto:kim.oelofse@lawsociety.org.nz) or DDI 04 463 2991.

Yours sincerely



Jonathan Temm  
**President**

Cc Robbie Muir, Registrar-General of Land, Land Information New Zealand, [rmuir@linz.govt.nz](mailto:rmuir@linz.govt.nz)



11 May 2009

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Law Commission  
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Dear George

### **Review of Land Transfer Act 1952 - Instruments of Encumbrance**

The Property Law Section ('Section') appreciates the opportunity to make submissions in relation to Instruments of Encumbrance.

- 1 The Land Transfer Regulations 2002, Schedule 2, Form 8, provides a form for an Encumbrance Instrument. Under s 101 of the Land Transfer Act 1952 this form is provided as a form of mortgage for the purpose of charging any land, estate or interest with the payment of a sum of money, usually in this case a rent charge or annuity. Over the last 40 years they have, however, been put to a quite different use.
- 2 Before 1986 the law made no provision for the burden of positive covenants to run with the servient land, and it still makes no general provision for the burden of covenants in gross, i.e. those without a dominant tenement, to run with the servient land. (See, however, s 108(2)(d) Reserve Management Act.) Nevertheless, there are practical circumstances where local authorities and others need to create such interests and ensure that the burden will continue to bind the servient land in perpetuity.
- 3 In Brookfield [1970] NZLJ 67, Professor Brookfield suggested that an Encumbrance could be used to overcome this difficulty.
- 4 A registered Encumbrance gives notice of the covenant to a successor in title, but it is not notice that is the primary issue. Notice cannot cause the burden of a personal obligation to bind a third party, and the law did not recognise before 1986 that the burden of positive covenants could run with the land, and still does not recognise that the burden of covenants in gross can run with the land.
- 5 Section 104 of the Property Law Act 1952 (now s 203 of the Property Law Act 2007) provides that a successor in title, subject to the mortgage, of mortgaged land, becomes personally liable to the mortgagee for the performance of all covenants in the mortgage, and an Encumbrance is, in terms of the definitions in both the Land Transfer Act 1952, s 2, and the Property Law Act 2007, s 4, a mortgage. Section 104 therefore creates the possibility of the burden of the covenant binding successors in title of the servient land and gives notice of the covenants to those successors.
- 6 Since the publication of Professor Brookfield's article there has been extensive use, both in New Zealand and in South Australia, of Encumbrances for this purpose. However, it has from time to time been commented both judicially and by other commentators that this is an invalid

use of Encumbrances and that such Encumbrances, even if registered, are therefore void. It has also been commented, both judicially and by other commentators, that even if this is technically an invalid use of Encumbrances, the practice is now so longstanding and widespread that a court should not now hold it invalid. There is a discussion of this history in Hines McMorland & Sim, *Land Law in New Zealand*, para 17.041. Also a summary by Don McMorland of the legal issues involved is set out in Schedule A.

- 7 Encumbrances are now used in a variety of different situations. Many of these are set out in Schedule B. Registered Encumbrances would now number tens of thousands.
- 8 As the use of Encumbrances to secure collateral obligations is so widespread. If the use for this purpose were held to be invalid, then a very large number of legitimate arrangements would be struck down. Accordingly, the Section considers there is a very strong case for a statutory amendment which would remove any doubt as to the validity and enforceability of Encumbrances which contain collateral covenants.
- 9 Various issues would need to be addressed in respect of any amending legislation. These would include the following:
  - a Nature of the amendment.
  - b Court's power to modify and cancel Encumbrances.
  - c Transferability of Encumbrances.
  - d Retrospectiveness.
  - e Implementing amendments.

#### **Nature of the amendment**

- 10 The Section considers there is a strong case for permitting any type of covenant to be included in an Encumbrance. The Courts will have the power to declare a covenant illegal or void for a variety of reasons, including breaching the Commerce Act or being contrary to public policy.
- 11 The only requirement relating to the nature of permitted covenants is that they should relate to the land in some way and not be merely personal covenants. They should be covenants 'burdening land' within the meaning of s 302(1) of the Property Law Act.
- 12 There is also a strong case for dispensing with the requirement that the covenants must be associated with an annuity or rent charge. Currently, in the case of the vast majority of Encumbrances, the annuity or rent charge is simply a device to bring the collateral covenants within the provisions of s 101 of the Land Transfer Act. There would seem no need to perpetuate this device. Further, there is no need for covenants in gross themselves to constitute a charge on land any more than is the case for land covenants which are not in gross.
- 13 Covenants in gross are already permitted in some situations. S 108(2)(d) of the Resource Management Act permits a Council as a term of a resource consent to require a covenant to be entered into in favour of the Council in respect of the performance of any condition of the resource consent which relates to the use of land affected by the covenant.

### **Court's power to modify or cancel Encumbrances**

- 14 The Section suggests that the powers of a Court under s 317 of the Property Law Act could usefully be extended to apply to covenants in gross with the Court having the power to modify or extinguish the covenants or Encumbrances accordingly.
- 15 The grounds on which orders can be made, may need to be extended to include situations where covenants are held to be invalid or illegal for any reason. It may also be considered desirable to give the Courts a general power to modify or extinguish covenants in gross where the Court considers it is just and equitable to do so.

### **Transferability of Covenants in gross**

- 16 It would be desirable to provide that the benefit of a covenant in gross over land is capable of assignment. This would then reflect for covenants in gross the position in s 291(4) of the Property Law Act relating to the assignment of easements in gross.
- 17 However, it would also be desirable to provide that the parties are free in any particular covenant instrument to restrict or negate the covenantee's right of assignment. There may be occasions where it is not desired that there be a right of assignment, e.g. in the case of covenants in favour of Councils.

### **Retrospectiveness**

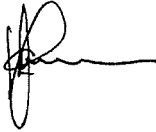
- 18 The question will arise as to the extent as to which existing Encumbrances should be validated. It is suggested that this may well be desirable. The amending provision could state that existing Encumbrances which come within criteria specified in the amending legislation are valid.

### **Implementing Amendments**

- 19 If the requirement to link covenants in gross with Encumbrances were to remain, then the appropriate amendments might best be effected by inserting a new provision after s 101 of the Land Transfer Act. At the same time, it would be necessary to amend some provisions in the Property Law Act, including the equity of redemption provisions in s 97, to provide that s 97(1) does not apply to Encumbrances.
- 20 However, if the more desirable approach is adopted of permitting covenants in gross to stand in their own right, then this would be best implemented by inserting appropriate provisions in the Property Law Act.

The Section thanks the Law Commission for the opportunity of making submissions on this important topic. We would be happy to discuss the matter or comment further if this would assist the Law Commission. The Working Party is giving ongoing consideration to this issue and we may send you some supplementary material prior to the meeting of representatives of the Working Party with you scheduled for 29 May.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Chris Moore', with a long horizontal flourish extending to the right.

Chris Moore  
**Chair**

## Schedule A

- 21 In New Zealand the arguments for and against the use of an Encumbrance securing a rent charge are rehearsed by Thomas (1997) 8 BCB 1 and Brookfield (1998) 8 BCB 13. Mr Thomas raises three arguments against.
- 22 The first is an attempt to read down the scope of the PLA 1952, s 104 (now the PLA 2007, s 203). This argument is based on the distinction between "ancillary covenants" (i.e. those supporting the purpose of the Encumbrance to provide a secured rent charge or annuity) and "collateral covenants" (i.e. those not supporting that purpose, but which, in the present context, are the primary purpose of the Encumbrance). Mr Thomas' argument is also based on the application to this distinction in type of covenant of the other distinction found in the law of landlord and tenant, that between covenants touching and concerning the land, i.e. that are integral to the relationship of landlord and tenant, and those which are not. The argument is that the application of the second distinction to Encumbrances containing both ancillary and collateral covenants would prevent the burden of collateral covenants in a mortgage, and therefore in an Encumbrance, which comes within the statutory definition of a mortgage, running with the servient land under s 104. Professor Brookfield reasons against and rejects the argument. In this case, I agree with Professor Brookfield's arguments.
- 23 The second argument relies upon s 151 of the PLA 1952 (now, in slightly different terms, s 115 of the PLA 2007) which gives the court a discretion to make an order allowing the payment into court of a specified amount that, in the opinion of the court, is sufficient to produce enough income to meet any periodical payment under the mortgage as it falls due. Professor Brookfield agrees that the section provides an avenue for the encumbrancer to seek a remedy. However, that remedy is discretionary and Thomas and Brookfield disagree that, where the Encumbrance protects substantial collateral covenants, the court would readily exercise its discretion in favour of the encumbrancer. In this context, where the purpose of the Encumbrance is to cause the burden of collateral covenants to run with the servient land, and particularly now that the servient owner under both positive and negative covenants which have a dominant tenement can apply under s 316 of the PLA 2007 for an order modifying or extinguishing the covenant, Professor Brookfield argues it is unlikely that the discretion under s 115 of the PLA 2007 would be used to effect that end. The argument might well be different, of course, where the covenants, whether positive or negative, are in gross and s 316 does not apply.
- 24 The third argument relies on the equity of redemption embodied, formerly, in s 81 of the PLA 1952, and now in ss 97 and 98 of the PLA 2007. If I may suggest, with respect, neither Mr Thomas nor Professor Brookfield fully reason through the issues raised by s 81. In my opinion, Mr Thomas is correct to rely on the word "entitled" in the section. He mentions it only as used in subs (2), but it also appeared in subs (1). Now it appears in s 97(1) of the 2007 Act.
- 25 The issue is essentially the application of the statutory right to redeem the charge as seen in the context of the wording of the particular charge.
- 26 Both writers refer to *Thames-Coromandel District Council v Schnauer* (1994) and rightly recognise that redemption was possible in that case because, instead of following

Professor Brookfield's recommendation of a rent charge securing payment annually of a sufficiently large sum, defeasible on the performance of the covenants in perpetuity, the covenants were contained in a mortgage securing only the nominal sum of 10 cents, and the equity of redemption was clearly applicable by tendering the 10 cents.

- 27 More recently, in *Menere v Jackson Mews Management Ltd* (HC, Wellington, CIV 2008-485-562, 6 October 2008), Ronald Young J held that the right of redemption also applied to an Encumbrance embodying certain covenants protecting a Management and Service Agreement with the defendant in circumstances where the life of the Encumbrance was specified as 99 years and the amount secured was an annual rent charge of 10 cents payable on demand, in regard to which the encumbrancers had clubbed together to raise the \$9.90 required to tender payment in full and secure a release of the Encumbrance instrument. The encumbrancers alleged that Jackson Mews was collecting fees under the management contract but providing few, if any, services. This, however, was not the point as regards redemption. His Honour was satisfied that the Encumbrance was a mortgage and that s 81 of the PLA 1952 applied to provide a right to redeem.
- 28 There is no mention in the judgment either of the decision in *Thames-Coromandel* or of the Thomas/Brookfield articles. However, Professor Brookfield had argued that s 81 could not apply to any rent charge where the remedies over the land itself - essentially the powers of sale and entry into possession - are removed from the Encumbrance. It is not clear from the judgment whether the powers of sale and entry into possession were removed from the present Encumbrance, and Professor Brookfield's argument that s 81 applies only to Encumbrances containing such powers was not put to the court, or at least considered in the judgment. However, where the term of the Encumbrance is not perpetual (making the amount payable on redemption obvious), or the amount secured is not substantial (making it easy to tender), the decision clearly holds that the statutory right of redemption applies.
- 29 One further argument should also be considered. Section 2 of the PLA 1952 defines a mortgage simply as a charge for securing money. That definition is widened in s 4 of the PLA 2007 to include a charge for the performance of obligations (i.e. covenants). In the same terms, s 81 of the PLA 1952 refers only to the payment of the money due and owing under the mortgage. Section 97(2) of the PLA 2007 is different; to bring about redemption of the mortgage, it speaks of "payment of all amounts and the performance of all other obligations secured by the mortgage" (emphasis added). These amendments, both to the same end, could well be considered relevant by a court considering redemption of an Encumbrance where the collateral, and in reality the primary, purpose of the Encumbrance is to secure the performance of certain covenants. *Menere* was decided under the 1952 Act. This alteration to the wording of the definition and to s 97(2) could also have a bearing on the approach of the court to the exercise of its discretion under s 115 of the PLA 2007.

## Schedule B

### Use of Encumbrances

- Used by Councils to enforce a variety of covenants.

- Used in subdivisions to require owners of the lots to join a residents' association and to pay annual fees.
- Used in unit titled apartments requiring owners to join an owners' association.
- Used in subdivisions to require owners to enter into standard contracts with a utility provider and to pay charges for use of utilities.
- Used to require owners to enter into franchise or supply agreements.
- Used to set out restraint of trade provisions.
- Used in place of carparking/signage easements or to secure compliance under a carparking/signage licence.
- Used to prohibit an owner from objecting to the presence of an electricity company's infrastructure on their land.
- Used to provide that a boatshed would be placed on one lot in a subdivision (the owners in the development were shareholders in the jetty company).
- Used to secure performance of an owner's obligations under an agreement in relation to fire separation.
- Used to secure compliance with a right of first refusal to offer a property back to a third party.
- Otherwise, used in place of covenants in gross to record on the title all manner of contractual obligations.
- A variety of miscellaneous uses, e.g. to require owners of properties with rights of way over an access strip to consent to and facilitate the access strip being vested as a road when desired.