

Encumbrances, Land Covenants in Gross and Caveats

A. High level summary of key elements of Encumbrances, Land Covenants in Gross and Caveats

Please note this table is a high level summary of certain key aspects of encumbrances, land covenants in gross and caveats. It is necessarily brief and general in nature.

	Encumbrance	Land Covenant in Gross	Caveats
What is it?	<ul style="list-style-type: none"> Encumbrances are like a mortgage, in that they are registered against a title to secure the payment of money, and/or the performance of other obligations which relate to the property. The person who the encumbrance benefits (Encumbrancee) and the owner of the burdened land (Encumbrancer) both agree and sign documentation to register the encumbrance. After that, the Encumbrancer (including any subsequent owners) must comply with the encumbrance, including paying any money the encumbrance requires, and doing/not doing any acts as set out in the encumbrance. Encumbrances generally have a time limit after which they will expire. If anyone wished to remove the encumbrance before the expiry date, then the Encumbrancer and Encumbrancee would need to agree, or a court order would need to be obtained ordering its removal. 	<ul style="list-style-type: none"> Land covenants are comparable to a legally binding promise to do/not do something in respect of the burdened land. On registration, they create an enforceable legal obligation to do or not do those activities. Currently, a land covenant needs both burdened land (the land which the legally binding promise affects), and benefitting land (land which receives the benefit of the promise and the right to enforce it). Both the owner of the burdened land (Grantor) and the owner of the benefitting land (Grantee) need to agree and sign documentation to register the land covenant. The land covenant then “runs with the land”, so subsequent owners of the burdened land and the benefitting land are subject to/benefit from the land covenant. Land covenants in gross are a new tool coming into effect once the Land Transfer Act 2017 commences (expected to be late 2018 or early 2019). Once in place, land covenants will no longer require any benefitting land, and instead they can be in favour of a person. In this situation, the owner of the burdened land is still the Grantor, but the Grantee can now be a person. Land covenants generally do not have a time limit. If anyone wished to remove them, the Grantee and the Grantor would need to agree, or a court order obtained ordering its removal. 	<ul style="list-style-type: none"> Caveats are a mechanism which a holder of an interest in land can use to notify others of their claimed interest. The person who holds or claims to hold the interest (Caveator) registers the caveat on the titles of the burdened land. The burdened land owner’s consent is not required. After this, the caveat will show up on the burdened land’s title whenever anyone searches it, and will prevent anyone from dealing with the title (including transferring it, or registering something new on it, like a mortgage). If anyone does tries to deal with the title (transfer it, register something else on it), the Caveator will get a notice of this, and will need to apply to the High Court to sustain the caveat. If the Caveator does not, then the caveat will lapse, and the land owner will be free to deal with the title again. Caveats are also susceptible to another fast-tracked removal process, where certain people (like the owner of the burdened land) can force the Caveator to apply to the High Court to sustain the caveat without needing to try and deal with the burdened land first.
“Who is who” for public housing?	<ul style="list-style-type: none"> MSD would be the Encumbrancee. The Provider would be the Encumbrancer. 	<ul style="list-style-type: none"> MSD would be the Grantee. The Provider would be the Grantor. 	<ul style="list-style-type: none"> MSD would be the Caveator. The Provider would be the owner of the burdened land.
When are they used?	<ul style="list-style-type: none"> To secure payment of money relating to the burdened land (e.g. rates, mortgages) and/or the performance of an obligation relating to the burdened land. Because land covenants in gross are not yet an option, encumbrances are often used to secure the performance of obligations relating to the use of burdened land, like promises to do/not do something, e.g., to use the burdened land only for public housing. Generally used in longer term situations, given greater security on registration (harder to remove), and less administrative involvement by Encumbrancee and Encumbrancer if instrument allows for express consent to certain transactions. 	<ul style="list-style-type: none"> Not yet used, as the Land Transfer Act 2017 is not yet in force. Once in force, land covenants in gross are expected to replace the use of encumbrances in many situations that involve the securing of the performance of actions, instead of payment of money. MSD therefore proposes to provide for both encumbrances and land covenants in gross in the New Supply Development Funding and Capacity Services Agreement. 	<p>Caveats tend not to be used to register or protect interests in the long term, and are generally used:</p> <ul style="list-style-type: none"> where time is a critical factor, and failure to register could result in loss to the Caveator. where the interest is only relevant in the short term, and full registration is burdensome (e.g. securing a short term loan). in disputed situations, where the burdened land owner may not agree to the registration of the claimed interest, so refuses to sign any necessary documentation.
Some other useful information in public housing context	<ul style="list-style-type: none"> Like a mortgage, an encumbrance can contain a power of sale, which gives the Encumbrancee the right to sell the burdened land if the encumbrance is breached. However, the encumbrances MSD would use here do not contain this right (see modifications to statutory provisions on front page of proposed form of encumbrance). Encumbrances require the consent of the Encumbrancee to many dealings with land (including transfers, mortgages, and easements). However, the encumbrances MSD would use here provide for this consent within them (see clause 17 of the proposed form of encumbrance), and so the Encumbrancer can largely freely deal with the land without needing further consent from MSD. 	<ul style="list-style-type: none"> Land covenants in gross many be a suitable alternative to encumbrances once the Land Transfer Act 2017 is fully in force. This has not been fully explored at this stage. Unlike a mortgage, land covenants in gross will not contain a power of sale. Land covenants in gross will sit more passively on the burdened land’s title, and will not require the consent of the Encumbrancee before the burdened land can be dealt with (e.g., transfers, mortgages and easements). 	<ul style="list-style-type: none"> In almost all cases, caveats prevent any dealings with the burdened land. This means MSD’s consent would be required each time the burdened land owner wished to do something with its land. Caveats only have a brief description of the nature of the interest claimed, unlike encumbrances or land covenants in gross which can give all of the relevant detail in them. This means anyone looking at the caveat is only aware that an interest is claimed, and does not have any further information to understand what impact that might have on the burdened land, or what they would like to do with it, without investigating further.