

# inbrief

LEGAL UPDATE FOR REAL ESTATE CLIENTS

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JANUARY 2019

## RESIDENTIAL LAND OR NOT?

**Amendments to the overseas investment act 2005 (oia) that restrict certain overseas people from buying “residential land” in New Zealand came into force on 22 October 2018.**

The effect of the amendments is to require overseas persons to obtain consent from the Overseas Investment Office (OIO) under the OIA before they can buy residential land in New Zealand. The requirements are:

- the agreement for sale and purchase must be conditional on OIO consent, and OIO consent must be granted before settlement; or
- a pre-approved OIO consent, which is available for overseas persons buying a home to live in, must have been obtained before the sale and purchase agreement is entered into.

From 22 October 2018, all transactions involving the sale and purchase of residential land require purchasers to complete a Residential Land Statement (RLS) prior to or at the time of settlement. The RSL requires purchasers of residential land to identify whether:

- they are citizens of New Zealand, Australia, or Singapore (and are exempt from the OIA residential land regime)
- they are New Zealand, Australian, or Singaporean permanent

resident visa holders who live in New Zealand (and are exempt from the OIA residential land regime)

- they are New Zealand resident visa holders who live in New Zealand (and are exempt from the OIA residential land regime)
- they have consent to purchase residential land from the OIO; or
- the purchase is covered by an exemption certificate issued by the OIO to the developer of a large apartment complex.

It is, therefore, important for purchasers to know whether land is residential land or not so that they can determine whether they need OIO consent or not.

Residential land is defined as land that has a property category of “residential” or “lifestyle” in or for the purpose of the relevant district valuation roll.

Sometimes, a property’s property category is called its land use or building type. Information about a property’s property category can be found on most council websites under rating information or on [www.qv.co.nz](http://www.qv.co.nz).

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## RESIDENTIAL LAND OR NOT? .... CONTINUED FROM PG 1

Some residential land will also be “sensitive land” under the OIA. If land is residential land and sensitive land, different criteria and consent pathways will apply. /

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## CHANGES TO TERMINOLOGY IN THE NEW LAND TRANSFER ACT 2017

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### **Changes to terminology in the new Land Transfer Act 2017.**

**While the main principles of the land registration system have been retained, the Land Transfer Act 2017 (the new Act) revises and modernises the Land Transfer Act 1952. The new Act does this by adopting a range of reforms proposed by the Law Commission in its 2010 report.**



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New terminology introduced under the new Act will require amendment to the ADLS-REINZ approved forms including the agreement for sale and purchase for land. Some of the changes to terminology under the new Act are:

1. The introduction of a “record of title” which refers to the registered ownership and interests affecting the estate for freehold, leasehold, and stratum property. A record of title will replace references to “certificate of title” and “computer register”.
2. “Registered proprietor” is to be replaced with simply the term “registered owner”.
3. Reference in easements to the “dominant tenement” and the “servient tenement” is to be replaced with notions of the “burdened land” and the “benefited land”.

The changes to terminology under the new Act are designed to reflect modern usage, less jargon, and to ensure the wording is consistent with other legislation.

The Land Transfer Act 2017 came into force on 12 November 2018. /

*Should you wish to discuss any of the above please do not hesitate to contact Gaynor McLean (DDI: (09) 914 3528; gaynor.mclean@glaister.co.nz)*



## DO I REALLY NEED TO SIGN A DEED OF LEASE?

**You have found the perfect premises for your business, and you sign up an agreement to lease drafted by the landlord's agent. The agreement to lease is unconditional, and you are about to move into the premises when you are asked by the landlord to sign a deed of lease.**

What is the difference between an agreement to lease and a deed of lease?

The agreement to lease and the deed of lease are different documents. An agreement to lease sets out the broad commercial terms; for example, the term, the rights of renewal of the lease, the rental, and the rent reviews.

The deed of lease not only incorporates the commercial terms in the agreement to lease but also provides detail about the day-to-day operations of the lease. For example, what are the obligations to maintain the premises, what is required to alter the premises, or what happens at the end the lease.

The standard agreement to lease states that the terms of an Auckland District Law Society deed of lease will apply even if a deed of lease is not signed. It does anticipate, however, that a deed of lease will be drawn up by the landlord's solicitor and entered into by the parties.

A signed unconditional agreement to lease will bind the parties to a lease so you might ask the question why do I need to sign another document recording the lease?

There are benefits to signing a deed of lease. The agreement to lease may be conditional upon certain matters. For example, it may provide that your lease does

not commence until the landlord has completed works on the premises. In that case, the agreement to lease will not record the actual commencement date of the lease.

But, a deed of lease will record the date your lease started, and it will record the final expiry date. Also, the standard Auckland District Law Society deed of lease form changes over the years. For example, new provisions were added following the Christchurch earthquakes to deal with what should happen to the lease if the building was damaged or inaccessible. When you sign an agreement to lease, you are bound by the terms of a deed of lease; so, it makes sense to know what the actual terms in the lease contains.

Besides, a signed deed of lease provides certainty to the parties that the terms are agreed and the paperwork is in order should you wish to assign the lease in the future.

We recommend that clients take advice on the agreement to lease prior to signing. And, we recommend you follow the good practice to take the further step to sign a deed of lease. /

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## THE DIFFERENCES BETWEEN AN INDEMNITY AND GUARANTEE

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**The differences between a guarantee and an indemnity are often overlooked and under appreciated. Indeed, it is not uncommon for people to mistakenly view the two obligations as synonymous.**



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In commercial transactions, parties are often asked or required to provide a guarantee, an indemnity, or both. These types of obligations can usually be found in everyday commercial contracts such as supply agreements and loan documents.

It is, therefore, important to understand and appreciate what the differences are between a guarantee and an indemnity before agreeing to them.

The differences between a guarantee and an indemnity obligation were recently highlighted by the English High Court in *Catalyst Business Finance v. Very Tangy Television Limited, Richard Tuckwell, Very Tangy Media Limited* [2018] EWHC 1669 (QB).

The case provided a vital reminder that a guarantor is obligated to answer for another party's default. The guarantee creates a secondary obligation on the guarantor; so that, in a supply agreement for example, the supplier can look to the guarantor for recovery of damages upon a purchaser's default under the agreement. However, it is worthwhile to note that a guarantor, in these circumstances, is entitled to the benefit of any defences available to the defaulting party. On the facts in the case, the English High Court determined that the guarantor in a loan agreement was entitled to a right of set-off as this defence was available to the defaulting primary obligor.

On the other hand, an indemnity obligation creates a primary obligation on the party providing the indemnity.

An indemnifier undertakes an original and independent obligation owed to the principal party. This means that the indemnifier's obligation, unlike that of a guarantor's obligation, is not contingent on the actions of the defaulting party, and, in a loan agreement for example, the creditor does not need to establish liability of the borrower for the principal debt. The party giving the indemnity cannot rely on any defences or right of set-off that the borrower may have. Also, the amount required to be paid under an indemnity obligation could potentially be greater than the amount required to be paid under a guarantee obligation. This is because the indemnity creates new obligations.

Often, as in the English High Court case, the terms "guarantee and indemnity" are used together in a contract. Naming an obligation as a "guarantee", an "indemnity", or both would not be determinative of whether it creates a guarantee, indemnity, or both. Therefore, it is important to carefully examine the contract to determine what the obligation is. Further, creditors and suppliers should carefully consider the wording in their contracts to ensure that obligations in those documents will protect them. /

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## GLAISTER ENNOR ELEVATES ANTHEA COOMBES AND NICOLA HARRISON TO PARTNER

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**Glaister Ennor has elevated two high performing senior associates to its partnership. Anthea Coombes and Nicola Harrison have been appointed as new partners in the firm's land development and property team. Glaister Ennor now has 13 partners and over 60 staff in its central Auckland offices.**

Joint Managing Partner, Stephanie Harris commented, "It is my pleasure to welcome Anthea and Nicola as new partners at Glaister Ennor. They both demonstrate exceptional client focus and bring a wealth of commercial and strategic property knowledge to our firm. We are delighted to be promoting these two outstanding lawyers to the partnership."



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Anthea is a leading expert in subdivisions and has significant experience in a wide range of land development and property matters. With over 12 years' experience in property law, Anthea has worked on major subdivisions, commercial property transactions, complex title matters and large property developments. Anthea's ability to build relationships with key stakeholders is critical to the success of her strong and loyal client base. Advising on transactions from inception to completion allows her to see the big picture and provide considered, pragmatic advice to clients.



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With close to 20 years' experience in NZ and the UK, Nicola is an expert in commercial property law, residential land development and commercial contracts. Nicola provides an agile, bespoke approach to finding solutions for her clients via tailored advice that is commercially savvy, thoughtful and future-proofed. Nicola has worked on some of New Zealand's largest and most complex property transactions and looks after commercial property investors, developers, commercial landlords, franchisors and high profile businesses. Nicola has an innovative and collaborative approach and an unrelenting focus on the client's goals and strategic objectives.

## Glaister Ennor

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