PROPERTY LAW LAWS50030
Semester 1, 2020.

RESTRICTIVE COVENANTS
IN VICTORIA

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WHAT ARE RESTRICTIVE COVENANTS?

1. Restrictive covenants are contracts that run with the land, that are negative in nature.

2. A detailed explanation of the law in relation to restrictive covenants in Victoria is set out in *Fitt & Anor v Luxury Developments Pty Ltd* [2000] VSC 258, [54] to [70]:

> 54 A restrictive covenant is an agreement creating an obligation which is negative or restrictive forbidding the commission of some act. In its most common form it is a contract between neighbouring land owners by which the covenantee[1] determined to maintain the value of his property or to preserve the enjoyment of his property acquires a right to restrain the other party, namely the covenantor,[2] from using his land in a certain way.
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> 55 The original parties to the covenant can enforce it against the other.
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> 56 Being a contract between two parties it does usually continue to bind those two parties personally and this is the position even when one of the parties ceases to own the land. However, the only remedy available in those circumstances where there is a breach would be nominal damages. …
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> 58 Problems can arise when one of the parties to the covenant sells the land and ceases to have any control over it. By reason of the law of privity of contract the new owner not being a party to the covenant could not enforce it, except in the case of an assignment of the right to him.
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> 59 However, the Common Law did recognise that the benefit of a restrictive covenant which was made with the covenantee having an interest in the land to which the covenant related, passed to his successor in title and could be enforced by the latter – see for example *Sharp v Waterhouse* (1857) 7E and D 816; 119 E.R. 1449.
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> 60 At Common Law subject to proof of certain matters the benefit did run with the land and the covenantor was liable to the successors of the covenantee by reason of the terms of the covenant. In other words he was personally liable on the covenant.
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> 61 Although the benefit could run with the land for the purpose of enforcing the covenant against the covenantor owner, at Common Law the burden did not run and hence a new owner was not liable on the covenant. See Austerberry v The Corporation of Oldham (1885) 29 Ch. D 750.
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> > "As between persons interested in land other than as landlord and tenant, the benefit of a covenant may run with the land at law but not the burden: see the Austerberry case" per Lord Templeman in Rhone v Stephens (1994) 2 AC 310 at 317.
>
> 63 Because the Common Law did not enforce the burden of a covenant against a new owner, equity stepped in.
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> 64 Equity recognised that the burden of restrictive covenant may run with the land in certain circumstances.
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> 65 In 1848 in the historic case of *Tulk v Moxhay* equity intervened and provided remedies which were not available at common law in respect to the enforcement of a restrictive covenant against a subsequent transferee of land from the original covenantor.
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> 66 In *Tulk v Moxhay* (1848) 2 Ph. 774; 41E.R. 1143 equity enforced a restrictive covenant against a purchaser of the land who was not the covenantor but who purchased with full notice of its terms.

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[1] The person to whom the promise is made.

[2] The person who makes the promise, or agrees to be bound by the covenant.

67 The facts were that in the year 1808 the plaintiff then an owner of a vacant piece of ground in Leicester Square in London as well as several houses forming the Square sold a piece of the ground by description of "Leicester Square Garden or pleasure ground . . . to one Elms in fee simple". In the deed of conveyance Mr Elms covenanted with the plaintiff "his heirs and administrators" – "that Elms, his heirs and assign should, and would from time to time, and at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and square garden, and the iron railing around the same in its then form, and in sufficient and proper repair as a square garden and pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order."

68 The land was subsequently conveyed to a number of purchasers and ultimately to the defendant whose purchase deed contained a similar covenant with his vendor.

69 The defendant admitted that he had purchased the block of land with notice of the covenant in the deed of conveyance of 1808.

70 The defendant manifested an intention to alter the character of the Square garden and to build upon it and the plaintiff who still owned several houses in the Square applied for an injunction. The Master of the Rolls granted an injunction and motion was made to the Lord Chancellor to discharge the order.

3. Typically, restrictive covenants are imposed over lots as they are transferred out of a certificate of title containing a large portion of land that has been, or is in the process of being, subdivided. This certificate of title from which the subject land is created is commonly referred to as the ‘parent title’. For reasons of privity, explained below, covenants are typically only enforceable by parties who take ownership of land remaining within the parent title. They need not be appurtenant land owners, although the more distant a beneficiary is, the harder it might be for that person to show direct injury from a covenant’s proposed variation, such as overlooking, overshadowing and visual bulk etc.

4. To this extent, restrictive covenants can be haphazard in application and enforceability. In other words, if your land was the first lot sold and transferred out of the parent title you may be bound by a covenant to the whole of the parent title, as all lots will be transferred out after you. On the other hand, if you are the last owner to transfer your land out of the parent title, you may find that there is nobody with the ability to enforce the covenant against you.

5. Needless to say, this is an imperfect system.

6. Consider, for example, the following plan from a subdivision in Reservoir:

7. The subject land to the south east of the plan, shaded green, is the burdened lot. The parcels shaded yellow are those lots with the benefit of the covenant. The implications of this distribution of beneficiaries is that if the person to the immediate north of the burdened land either supports, or is indifferent to, a proposed modification to the covenant (to say allow the construction of four dwellings), other beneficiaries might be limited to arguing that the proposed variation represents a precedential impact that might result in the gradual watering down of the network of covenants within the subdivision.

Legal formalities of a covenant

8. For a covenant to be legally valid, three elements are required:

   a) it must be negative in nature;

   b) it must touch and concern the land; and

   c) it must be annexed or assigned to the land.

Covenant must be negative in nature

9. A covenant must be negative in that it must restrain a person from dealing with their land in a certain way. Whether a covenant is negative is assessed by the court as a question of fact. It is therefore immaterial whether the wording is phrased as a positive requirement.[3]

10. For example, if a covenant states that a person must use a dwelling as a private residence only, although this appears positive, it can be construed as negative in nature, as, it is a covenant not to use the premises for any other purposes other than a dwelling.[4]

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[3] *Fitt & Anor v Luxury Developments Pty Ltd* [2000] VSC 258, at [151].

[4] Anthony P Moore, Scott Grattan, Lyndren Griggs, *Australian Real Property Law* (Thomson Reuters, 6th ed, 2016); *Thamesmead Town Ltd v Allotey* [1998] 3 EGLR 97.

11. In contrast, an obligation to maintain landscaping to a particular standard would be positive in nature and would fall foul of this rule. It is partly for this reason that section 173 of the *Planning and Environment Act 1987* was introduced. This is a statutory power to create agreements that run with the land, but in contrast to restrictive covenants, 'section 173 agreements' can be positive or negative in nature.

Covenant must touch and concern the land

12. The requirement that the benefit of a covenant must 'touch and concern' the land, can be seen in *Smith and Snipes Hall Farm v River Douglas Catchment Board*[5] and *Town of Congleton v Pattison*.[6]

13. In *Snipes Hall*[7], the covenant required landowners of land abutting a river to maintain the riverbank. The riverbank fell into disrepair and caused flooding. Whilst the requirement, or burden, to maintain the riverbank may be considered to be positive in nature, the benefit, that the river would not flood, was found to directly affect, or touch and concern, the land. Tucker LJ explained that to touch and concern the land:

> … it must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land, and it must then be shown that it was the intention of the parties that the benefit therefore should run with the land.[8]

14. In contrast, the landowner in *Town of Congleton v Pattison*[9] operated a silk mill on his land. The covenant affecting his land barred people from outside the Parish from working at the mill. The Court found that such a covenant did not go to the mode of occupation of the land, but rather sought to limit foreigners from being able to find work, and as such it did not touch and concern the land.

15. When assessing whether the benefit touches and concerns the land, the benefitted land will need to be sufficiently proximate to the burdened land for it to be capable of receiving the benefit.[10] There is no need for the lands to be contiguous, however both parcels must be 'in same the neighbourhood'.[11] Thus, land in Mildura could not reasonably be said to be land that benefits from burdened land in Hawthorn.

Covenant must be annexed to the land

16. Common law principles requiring the benefit and burden of a covenant to be annexed to the land are now reflected in sections 78 and 79 of the *Property Law Act 1958* (Vic).

17. Section 78 of the *Property Law Act 1958* (Vic) provides a statutory presumption that any person deriving title under the covenantee, being the owner of the originally benefitted land, will, all other factors being equal, take the benefit of the covenant:

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[5] [1949] 2 All ER 179.

[6] [1808] EWHC KB J66.

[7] *Smith and Snipes Hall Farm v River Douglas Catchment Board* [1949] 2 All ER 179.

[8] *Smith and Snipes Hall Farm v River Douglas Catchment Board* [1949] 2 All ER 179 at 183.

[9] [1808] EWHC KB J66.

[10] *Clem Smith Nominees v Farrelly* (1978) 20 SASR 227.

[11] *Clem Smith Nominees v Farrelly* (1978) 20 SASR 227 at 249.

(1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.

For the purposes of this subsection in connexion with covenants restrictive of the user of land successors in title shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.[12]

18. Similarly, section 79 of the *Property Law Act 1958* (Vic) provides the further presumption that the land burdened by the covenant will continue to be burdened, even if it passes out of the ownership of the original covenantor:

(1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself, his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed.

This subsection shall extend to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

19. The practical effect of section 78 and 79 of the *Property Law Act 1958* (Vic) is that, save where expressly set out in the covenant to the contrary, the benefit and burden of the covenant will pass to the subsequent possessors in title to the original covenanting parties.

WHAT IS THE PURPOSE OF A RESTRICTIVE COVENANT?

20. Restrictive covenants were developed as a crude form of planning control, limiting the density of land development and preventing land uses such as quarries and noxious industries from being established on land sold for residential development.

21. Common examples of restrictive covenants include controls over:

a) the number of dwellings on a lot;[13]

b) the height or number of storeys on dwellings;[14]

c) the type of building materials that can be used;[15] or

d) the excavation of land.[16]

HOW COMMON ARE THEY IN VICTORIA?

22. Restrictive Covenants are commonly found in the eastern suburbs of Melbourne, from Prahran, down to Brighton and through Glen Waverley out to Boronia.

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[12] Section 78 of the *Property Law Act 1958* (Vic).

[13] *Prowse v Johnstone* [2012] VSC 4.

[14] *Mark William Suhr & Ors v Andrew Gordon Michelmore & Ors* [2013] VSC 284.

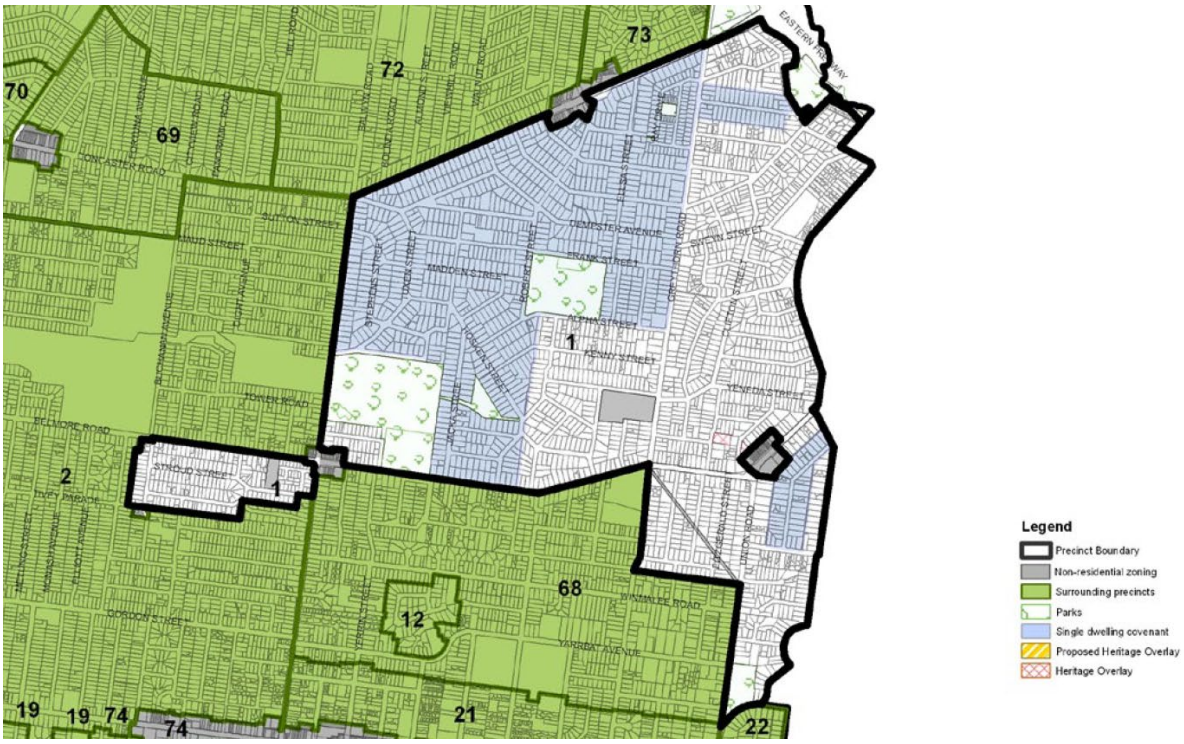
[15] *Gardencity Altona v Grech & Ors* [2015] VSC 538; *Jacobs v Greig.*

[16] *ITMA by Tu and Yew* [2018] VSC 738; *Re Zhang* [2018] VSC 721.

23. However, the largest cohesive network of covenants is perhaps in Reservoir in Melbourne's north, as described by Morris J in *Stanhill v Jackson*:

> 4 It would appear that in about 1919 two entrepreneurs, Thomas Michael Burke and Patrick Deane, purchased 1,119 acres of land at Reservoir and gradually commenced the process of subdividing the land into more than 3,000 lots. Initially the residential lots were transferred directly out of the original title. Later larger lots were transferred out of the original title, then these larger lots were further subdivided into residential lots.

24. One particular network of covenants in Balwyn is so intact, it now receives a degree of protection by the Boroondara Planning Scheme, which is somewhat ironic given that one enduring effect of single dwelling covenants is to defeat the otherwise broadly accepted principle of urban consolidation:[17]



INTERACTION OF PRIVATE PROPERTY LAW AND PUBLIC PLANNING LAW

25. Restrictive covenants are often considered to be an early form of town planning, providing for the use and development permitted or encouraged in a particular area. This role of covenants in establishing and enforcing town planning policies has now been largely subsumed by planning law and placed in the hands of local government and city councils pursuant to the *Planning and Environment Act 1987* (Vic) and the various planning schemes.

26. A planning scheme applies 'zones' and 'overlays' to all land in Victoria which dictate use types and development objectives of the area. As an area of public law, planning law is guided by government policy and public or community interests.[18]

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[17] Boroondara Character Study, Precinct Statement, Precinct 1, Adopted 24 September 2012, updated October 2013.

[18] Leslie A Stein, *Principles of Planning Law* (Oxford University Press, 2008) 12.

27. The *Planning and Environment Act 1987* (Vic) provides the local executive government control of town planning matters, the responsibility for developing and enforcing planning aspects within their municipality.[19] Review of a responsible authority's decisions made under the Planning Scheme may be sought in the Planning and Environment List at the Victorian Civil and Administrative Tribunal (**VCAT**).

28. On the other hand, while restrictive covenants may also seek to control the use and development of land, they are a matter of private law or proprietary rights and interests. For this reason, the enforcement and management of restrictive covenants is largely left in the hands of those individuals with the benefit of the covenant.[20]

29. This genesis in private law means that matters of public policy are generally not relevant for the purpose of construing or considering whether to amend a covenant. As explained by Mukhtar AsJ in *Re Jensen* [2012] VSC 638*:*

> [10] … As for the request that the Court take into account planning considerations, it will be better, I would respectfully suggest, if councils are concerned about such matters, for them to assist the Court by becoming respondents to the proceedings and putting before the Court any matters concerning planning policy. The legislation does not require the Court to take into account the relationship between covenants and public planning control. The traditional view has been that the Court concerns itself only with the question whether an applicant comes within the heads stated in s 84 of the Act.[21] Recent decisions of this Court have it that town planning principles and considerations are not relevant to the Court's consideration of whether an applicant has established a ground under s 84: see *Vrakas v Registrar of Titles*[22] and *Prowse v Johnstone.*[23]

30. Consideration of town planning controls and policies might be of interest to the court to the extent they help understand how a development might manifest following a proposed variation to a covenant:

> 105 Turning to other relevant principles, I note the statement of Kyrou J that town planning principles and considerations are not relevant to the court's consideration of whether an applicant has established a ground under s 84(1). His Honour cites five Victorian cases in that regard. I agree that those cases make it clear that it is no part of the Court's function to consider whether a proposed development would or would not be desirable or acceptable under town planning principles and considerations. However, in the present case the plaintiff seeks to make use of statutory planning provisions in a slightly different way. She says that those provisions include protections for neighbouring properties. She says that this is potentially relevant for the purpose of assessing substantial injury. I am prepared to assume, without deciding, that planning provisions of that kind may be relevant in that way. However, as will be seen, the provisions upon which the plaintiff seeks to rely in the present case do not sufficiently avail her in any event.[24]

31. It would be to fall into error, however, to argue that a development should be approved because town planning policy encourages that form of use or development.

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[19] Ss 8A and 8B *Planning and Environment Act.*

[20] S 84 of the *Property Law Act 1958* and R 52.09 *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

[21] See generally *Bradbrook and Neave's Easements and Restrictive Covenants* (3rd ed.) at 19.79.

[22] [2008] VSC 281.

[23] [2012] VSC 4.

[24] *Prowse v Johnstone* [2012] VSC 4 at [105].

32. An applicant will still need to deal with those policies and controls as part of a later process:

> [10] …None of that is to suggest that planning laws or requirements will be compromised or sidelined. As is always acknowledged in these applications, the Jensens will require a planning permit for a two lot subdivision from the City of Knox which as responsible authority will apply the many detailed standards contained within the Knox Planning Scheme.[25]

ARE RESTRICTIVE COVENANTS STILL BEING USE IN CONTEMPORARY TRANSFERS?

33. Given the scope of modern-day planning controls, restrictive covenants have declined in popularity, however, they are still being introduced.

34. In one case before the court at the moment, a church is applying to modify a restrictive covenant that was imposed across an industrial estate as recently as 2018.

35. The land is zoned Urban Growth, in which a Place of Assembly (Church) is a permitted land use. However, the covenant stipulates that the registered proprietors of the Land must not use the land as a place of assembly:

> (A) build, construct, erect, cause or permit to be built constructed, erected or permit to remain erected on the lot, or any part of it, any building or other structures or improvements including signage and landscaping (improvements) that do not comply with the Thompsons Base Planning and Design Guidelines (design guidelines);
>
> (B) landscape any area within five (5) metres on any lot abutting the north/ south industrial spine;
>
> (C) during the carrying out of any improvements on the lot, or any part of it, or permit any of its servants or agents to do any matter or thing which is contrary to the design guidelines;
>
> (D) allow the land or any improvements on the land to become unsightly or in a state of disrepair;
>
> (E) allow any signage to be erected or displayed on the land which does not directly relate to the business activities being carried out by the transferee on the land or allow any third party signage (such as commercial advertising signage) to be erected or displayed on the land;
>
> (F) use the land, wholly or partly, for any of the following purposes:
>
> (i) brothel;
>
> (ii) concrete batching plant;
>
> (iii) concrete panel plant;
>
> (iv) recycling plant;
>
> (v) vehicle wreckers;
>
> (vi) junk yard;
>
> (vii) adult bookshop;
>
> (viii) agriculture;

[25] *Re Jensen* [2012] VSC 638 at [10].

(ix) place of assembly (including circus or carnival);

(x) crop raising;

(xi) animal husbandry;

(xii) mining;

(xiii) shipping container storage;

(xiv) transfer station;

(xv) stone extraction;[26]

36. The latest indications are that this application to modify the covenant will succeed and so the Church will be free to pursue planning permission according to the Casey Planning Scheme:

HOW DO I KNOW IF LAND IS BURDENED BY A RESTRICTIVE COVENANT?

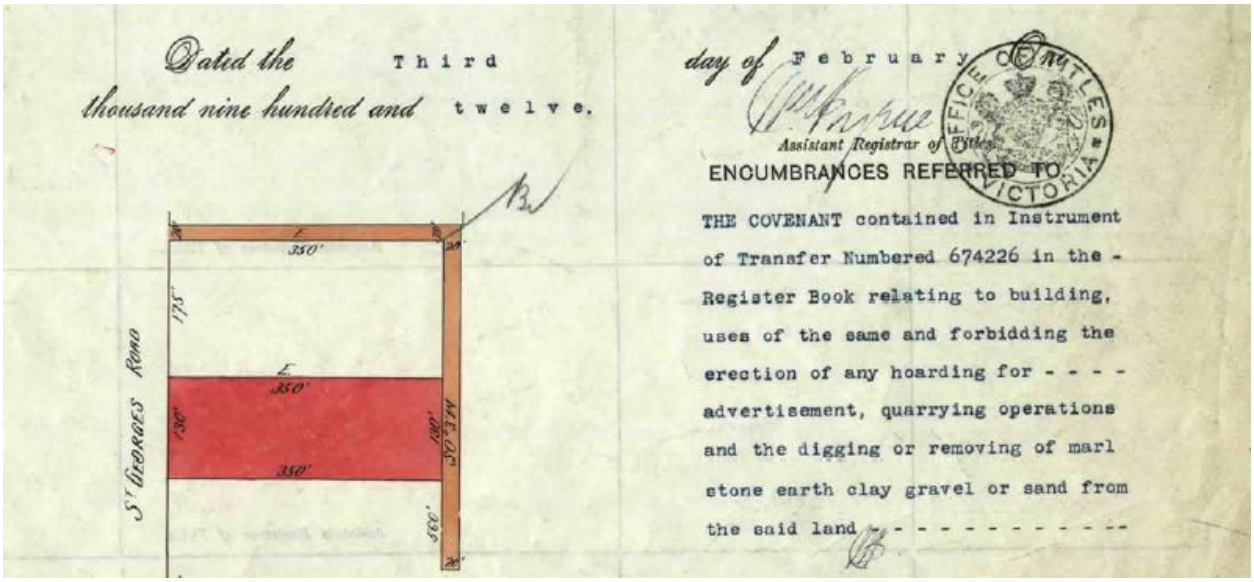
37. If a restrictive covenant burdens or runs with a parcel of land, it should be noted under the heading "Encumbrances, Caveats and Notices" on a register search for a certificate of title available from Landata. For example:

ENCUMBRANCES, CAVEATS AND NOTICES

COVENANT 0853012

38. Alternatively, it may be disclosed on the imaged certificate of title itself.

[26] Emphasis added. Underlining indicates portions of the Covenant relevant to the Application.



HOW DO I KNOW IF LAND HAS THE BENEFIT OF A RESTRICTIVE COVENANT?

39. Typically, the extent of beneficiaries can be discerned from a careful reading of the words of the covenant itself, but this may require further title searches and a careful examination of the Parent Title.

40. To be legally effective, a covenant can only purport to attach the benefit to land owned by the covenantee at the time it was signed. This is due to the principles of privity of contract described below.

41. Yet a surprising number of covenants purport to convey the benefit of a covenant to all the land in a subdivision, despite this being legally ineffective.

42. For instance, in a covenant I recently considered, the covenant, which was signed in 2010, purportedly extends the benefit to all the land in the Plan of Subdivision PS547194H:

> … that the benefit of the forgoing covenant shall be attached to and run at law and in equity with the land comprised in the Plan of Subdivision other than the land hereby transferred …

43. This form of wording raises the issue considered by Wooten J in *Re: Mack and the Conveyancing Act* [1975] 2 NSWLR 623. In this matter, it was found that just as the burden of a covenant can only be applied to land owned by the covenantor, the benefit of a covenant can only attach to land owned by the covenantee:

> 19 The covenant clearly states the land to which the benefit of the restriction is intended to be appurtenant, and the only question is whether the benefit is in law so appurtenant, i.e. whether the restriction is validly created. There is ample authority that a vendor of land in respect of which he takes a restrictive covenant cannot, by the covenant, annex the restriction to land which he does not own,[27] unless the covenant is given as part of a building scheme or development scheme... In the present case, the vendor purported to annex the benefit of the covenant to the whole

[27] Or extending the benefit to other land.

of the land comprised in deposited plan No. 16,724, other than the land transferred.[28]

44. The principle in *Re: Mack and the Conveyancing Act* [1975] 2 NSWLR 623 was originally reiterated in Victoria by Gillard J in *Fitt & Anor v Luxury Development Pty Ltd* [2000] VSC 258, where it was held:

> 153. The important point to note here is that the covenantee does not have the right to enforce a covenant except as against the original covenantor, if he does not have any land for the benefit of which, the covenant was taken.
>
> 154. A covenantee or his successor in title must own land to be benefited in order to impose the burden on the owner of the burdened land. [29]

45. This was recently confirmed again in Victoria in *Xu v Natarelli* [2018] VSC 759, which reiterated the need for privity between the covenantee and the benefiting land, and where this privity fails, so too does the benefit:

> 105. However, contractual principles of privity exclude the registered proprietors of the lots transferred out of the parent title before the covenant was made. Equity does not extend the benefit of the covenant to them although it does extend the benefit to proprietors (and their successors in title) of the lots transferred out of the parent title, that is subdivided and sold, *after* the restrictive covenant was made.[30]

46. Privity of contract refers to the concept that the relationship between the parties in a contract entitles them to hold each other accountable to the contract—but prevents a third party from doing so.

47. Therefore, in the context of restrictive covenants, privity means that a covenantee can only pass the benefit of a covenant to land which he or she owns. Likewise, the covenantor can only agree to accept the burden on behalf the land he or she is taking or has ownership of. Privity thus prevents the covenantee from creating a benefit for third parties, such as neighbours or other surrounding lots not owned by the covenantee at the time the covenant was signed.

48. This underscores the importance of careful analysis and expert advice in the construction of restrictive covenants. We routinely find significant errors in work carried out by experienced solicitors and specialists in land title searching.

49. By way of example, I know of one case in which an applicant spent ~$10k in advertising an application to amend a restrictive covenant, only to later find that the covenant was expressed in identical terms to one considered by Morris J in *Thornton v Hobsons Bay City Council* [2004] VCAT 383 where the covenant was akin to a circular reference in a spreadsheet—it simply did not make sense:

> 11. In the present case the transferor has sought to identify the land to be benefited by reference to land remaining untransferred in a particular certificate of title. That method of identification purports to be a precise method. It follows, as Ms Tooher submitted, that there is less scope in such circumstances to use surrounding circumstances to identify the benefited land. The problem is that, at the time the transfer was made on 25 April 1953, certificate of title volume 6836, folio 089 was no longer in existence, it having been cancelled on 15 September 1952. Thus at that

[28] *Re Mack and the Conveyancing Act* [1975] 2 NSWLR 623

[29] *Fitt & Anor v Luxury Development Pty Ltd* [2000] VSC 258

[30] *Xu v Natarelli* [2018] VSC 759 at [105]. Emphasis in original.

> time there was no land remaining untransferred in that certificate of title. Hence notwithstanding the exactitude with which the draftsman of the covenant sought to achieve, in fact all he has achieved is a nonsense.[31]

50. Another example was in *Re Hunt* [2017] VSC 779, where the Court declared the covenant to be ineffective on the basis of a failure to identify land to which the benefit is annexed:

> 47 The Covenant does not identify in its terms any land to which its benefit is annexed. In my view, it is unarguable that the Covenant does not annex its benefit to land, and so is personal only to the transferor and his executor, both of whom are now dead.[32]

51. These are not rare examples and it is one reason practitioners should resist invitations to give 'back of the envelope' assessments of restrictive covenants.

BUILDING SCHEMES WERE AN ATTEMPT TO DEAL WITH PRIVITY ISSUES

52. Where a building scheme, (otherwise known as a scheme of development) is established, all purchasers and their assigns are bound by, and entitled to the benefit of, the restrictive covenant—regardless of the order in which their land was transferred out of the parent title. However, notwithstanding the frequency with which building schemes are discussed in Victoria, they are rarely established.

53. One difficulty in attempting to uphold a building scheme is establishing that a purchaser of land was, or should have been, aware that a building scheme was in place prior to purchase and therefore ought to be bound by its terms. As explained in *Fitt & Anor v Luxury Development Pty Ltd* [2000] VSC 258:

> Where a scheme was established many, many years ago often there is no extrinsic evidence available to establish it. Hence in those circumstances one is left with the conveyancing documents and the like produced at the time and the court must do its best on that evidence... Nevertheless the court can draw the inference from the documentation and will readily do so where it is proven that there was a large subdivision of building blocks and which *were sold over a relatively short period*.
>
> In the case of *Re Dennerstein* Hudson J discussed the available evidence at p.692 and relied upon such factors as a common vendor, many lots being offered for sale in a subdivision and the common form of restrictive covenant as being factors of some importance in drawing the inference.

54. The four requirements of a building scheme were first established in *Elliston v Reacher* [1908] 2 Ch 374, and include:

a) deriving title under a common vendor;

b) that the vendor laid out the estate and applied restrictions to each lot;

c) that the restrictions were for the benefit of all lots; and

d) that the land in the estate was bought and sold on the footing that restrictions would apply to all lots:

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[31] *Thornton v Hobsons Bay City Council* [2004] VCAT 383.

[32] *Re Hunt* [2017] VSC 779.

I pass, therefore, to the consideration of the question whether the plaintiffs can enforce these restrictive covenants. In my judgment, in order to bring the principles of *Renals v Colishaw* and *Spicer v Martin* into operation it must be proved:

(1) that both the plaintiffs and defendants derive title under a common vendor;

(2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme. of development;

(3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and

(4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases.[33]

55. Building Schemes are not only difficult to find but equally difficult to enforce. This is particularly so in light of the decision in *Randell v Uhl* [2019] VSC 668, in which Derham AsJ brought building schemes in line with the principles of the Torrens System[34] by setting aside the previous positions that allowed constructive notice of building schemes. Specifically, Derham AsJ found that while a building scheme had been established, the plaintiff was not bound by its terms because the existence of a scheme was not evident on the face of the title, or any documents referred to therein:

82 … If it were sufficient notice that the Head Title in this case bears the notification of a building scheme, it would require a person interested in purchasing the Land to search the Register further than the title search indicated and to go back to the Head Title and the original, or first edition, of the Subdivision. That would render conveyancing a hazardous and cumbersome operation beyond what is reasonable to expect.

83 In summary, I am satisfied that a building scheme was established but the notification of it was not sufficient to give notice of it to the plaintiffs because a search of the title of the Land by the plaintiffs did not, and would not, reveal the existence of the scheme either directly, or indirectly by reference to any instrument referred to in the search of the title.[35]

HOW ARE RESTRICTIVE COVENANTS TO BE CONSTRUED?

56. Derham AsJ restated the principles of construing a restrictive covenant in *Clare & Ors v Bedelis* [2016] VSC 381.

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[33] *Elliston v Reacher* [1908] 2 Ch 374 at 384.

[34] Discussed below.

[35] *Randell v Uhl* [2019] VSC 668.

57. Critically, the objective of construction is to ascertain the intention of the parties at the time the covenant was created. And that needs to be done principally by reference to the terms of the covenant itself:

> **The Construction of Restrictive Covenants**
>
> 31 A review of the authorities reveals the following principles of interpretation are applicable to restrictive covenants:
>
> (a) subject to the qualifications mentioned below, the ordinary principles of interpretation of written documents apply. [36] The object of interpretation is to discover the intention of the parties as revealed by the language of the document in question;[37]
>
> (b) the words of a restrictive covenant:
>
> (i) should generally be given their ordinary and everyday meaning and not be interpreted using a technical or legal approach.[38] Evidence may be admitted, however, as to the meaning of technical engineering, building or surveying terms and abbreviations;[39]
>
> (ii) must always be construed in their context, upon a reading of the whole of the instrument,[40] and having regard to the purpose or object of the restriction;[41]
>
> (c) importantly, the words of a restrictive covenant should be given the meaning that a reasonable reader would attribute to them.[42] The reasonable reader may have knowledge of such of the surrounding circumstances as are available.[43] These circumstances may be limited to the most obvious circumstances having regard to the operation of the Torrens system and the fact that the covenant is recorded in the register kept by the Registrar of Titles.[44] As the High Court held in Westfield:
>
> > The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee…[45]

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[36] Bradbrook and Neave's *Easements and Restrictive Covenants*, AJ Bradbrook and SV MacCallum, 3rd Ed, ('**Bradbrook & Neave**'), [15.3]

[37] Bradbrook & Neave; But see *Prowse v Johnston & Ors* [2012] VSC 4 at [55]–[58] ('***Prowse'***).

[38] *Re Marshall and Scott's Contract* [1938] VLR 98, 99; *Ferella v Otvosi* (2005) 64 NSWLR 101 at 107 ('***Ferella***'); *Ex parte High Standard Constructions Limited* (1928) 29 SR (NSW) 274 at 278 ('***High Standard***'); *Prowse* at [52].

[39] *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 at [157]-[158] ('***Phoenix***'); *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 233 CLR 528 at [44] ('***Westfield***').

[40] *Ferella* at 107; *High Standard* at 278; *Prowse* at [52].

[41] *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22], 462 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Phoenix* at [148]-[149].

[42] *Phoenix* at [157]-[158].

[43] These are limited by the decision in Westfield and subsequent decisions: see Se*rtari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324; *Berryman v Sonnenschein* [2008] NSWSC 213; *Shelbina Pty Ltd v Richards* [2009] NSWSC 1449; *Neighbourhood Association DP No 285220 v Moffat* [2008] NSWSC 54; *Fermora Pty Ltd v Kelvedon Pty Ltd* [2011] WASC 281 at [33]-[34]; *Prowse* at [58].

[44] *Westfield* at [37]-[42]; *Sertari* at [15]; *Phoenix* at [148]-[158].

[45] *Westfield* at [39].

(d) the words of the covenant should be construed not in the abstract but by reference to the location and the physical characteristics of the properties which are affected by it,[46] and having regard to the plan of subdivision and, depending on the evidence, possibly having regard to corresponding covenants affecting other lots in the estate;[47]

(e) because the meaning of particular words depend upon their context

> (including the purpose or object of the restriction in a covenant) cases that consider similar words provide no more than persuasive authority as to the meaning of words in a different document.[48] Further, the decisions upon an expression in one instrument are of very dubious utility in relation to another;[49]

(f) the rules of evidence assisting the construction of contracts inter partes, of the nature explained by *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales*,[50] do not apply to the construction of easements and covenants;[51]

(g) if the meaning remains in doubt after other rules of interpretation have been applied, as a last resort or 'very late resort,' the covenant should be construed contra proferentem, that is, against the covenantor;[52]

(h) whether a covenant has been breached or not is a question of fact to be determined according to the facts of the case and in the light of the actual language in which the restrictive covenant is framed;[53] and

(i) generally speaking, the proper construction of an instrument intended to have legal effect is a question of law, not fact.[54] On the other hand, the meaning of a particular word or expression in such an instrument may be a question of fact, particularly where the Court has already determined as a matter of construction that the word or expression is used in its ordinary and natural meaning.[55] [*Footnotes from original*].

58. It is important to keep in mind when interpreting a covenant that, unlike in interpretation of a common contract, the information that can be relied upon in its construction is narrow.[56]

59. Victoria, along with the rest of Australia, has adopted a land management system known as the Torrens System, which acts as a record of all land and associated dealings. A

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[46] *Richard van Brugge v Hare* [2011] NSWSC 1364 at [36]; *Big River Paradise Ltd v Congreve* [2008] NZCA 78 at [23].

[47] *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324 at [16]; See *Fermora Pty Ltd v Kelvedon Pty Ltd* [2011] WASC 281 at [33]; *Prowse* at [58].

[48] Bradbrook & Neave at [15.4] citing *Christie & Purdon v Dalco Holdings Pty Ltd* [1964] Tas SR 34 at 41.

[49] *Ferella* at [17]; *In Re Marshall and Scott's Contract* [1938] VLR 98, at 100 where Mann CJ observed that small differences of language can be of great importance and that the decision often turns on them; *Prowse* at [54].

[50] (1982) 149 CLR 337.

[51] *Westfield*; *Ryan v Sutherland* [2011] NSWSC 1397 at [10]; *Prowse* at [57]

[52] *Ferella* at [21]; Bradbrook & Neave's at [15.6].

[53] Per Herring CJ in *In Re Bishop and Lynch's Contract* [1957] VLR 179 at 181; *Prowse* at [53].

[54] See, in relation to statutes, S *v Crimes Compensation Tribunal* [1998] 1 VR 83 at 88 (J D Phillips JA). See, in relation to written contracts, *FAI Insurance Co Ltd v Savoy Pty Ltd* [1993] 2 VR 343 at 351 (Brooking J); *O'Neill v Vero Insurance Ltd* [2008] VSC 364 [10] (Beach J); *Prowse* at [53].

[55] See *S v Crimes Compensation Tribunal* [1998] 1 VR 83 at 88; cf *Phoenix* at [158]; *Prowse* at [53].

[56] *Codelfa Constructions Pty Ltd v State Rail Authority (NSW)* (1982) 41 ALR 467; *Westfield Management Limited v Perpetual Trustee Company Limited* [2007] HCA 45.

principle of this Torrens System is that the Register is a true and correct representation of the land, and so a person inspecting the Register need look no further to ascertain the pertinent facts of the land.[57]

60. Hence, the use of extrinsic documents, such as communications between the original covenanting parties; contracts of sale; diary entries; or other documents intended to shed light on the subjective intention of the signatory parties cannot be used to aid in the construction or interpretation of the restrictive covenant. See *Westfield Management Limited v Perpetual Trustee Company Limited* [2007] HCA 45, which involved an Easement, but the same principles are believed to apply to restrictive covenants, at [35]-[39]:

> 35 In going on to allow the appeal, Hodgson JA (again correctly) remarked that the decision of the primary judge appeared to be the product of an error in preparedness to look for the intention or contemplation of the parties to the grant of the Easement outside what was manifested by the terms of the grant. Extensive evidence of that nature had been led by Westfield on affidavit with supporting documentation.
>
> 36 In this Court, counsel for Perpetual submitted that some but not all of the extrinsic evidence had been admissible; in particular, the evidence said to supply part of the "factual matrix" but which post-dated a deed dated 26 February 1988 containing a covenant to grant the Easement was inadmissible. So also was said to be evidence of the subjective intention of the then owner of Glasshouse which had not been communicated to the then owner of Skygarden. Perpetual accepted that what had been admissible was evidence of a preceding oral agreement between those parties: this had been to the effect that the Easement was to permit access to Skygarden via Glasshouse.
>
> 37 However, in the course of oral argument in this Court it became apparent that what was engaged by the submissions respecting the use of extrinsic evidence of any of those descriptions, as an aid in construction of the terms of the grant, were more fundamental considerations. These concern the operation of the Torrens system of title by registration, with the maintenance of a publicly accessible register containing the terms of the dealings with land under that system. To put the matter shortly, rules of evidence assisting the construction of contracts *inter partes*, of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[58], did not apply to the construction of the Easement.
>
> 38 Recent decisions, including *Halloran v Minister Administering National Parks and Wildlife Act 1974*,[59] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[60] and *Black v Garnock,*[61] have stressed the importance in litigation respecting title to land under the Torrens system of the principle of indefeasibility expounded in particular by this Court in *Breskvar v Wall*.[62]
>
> 39 The importance this has for the construction of the terms in which easements are granted has been remarked by Gillard J in *Riley v Penttila*[63] and by Everett J in

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[57] *Breskvar v Wall* (1971) 126 CLR 376.

[58] (1982) 149 CLR 337 at 350-352.

[59] (2006) 80 ALJR 519 at 526 [35]; 224 ALR 79 at 88.

[60] (2007) 81 ALJR 1107 at 1150-1152 [190]-[198]; 236 ALR 209 at 266-269.

[61] (2007) 237 ALR 1 at 4 [10].

[62] (1971) 126 CLR 376. See also *Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd* (1999) 196 CLR 245 at 264 [26]-[27]

[63] [1974] VR 547 at 573.

Pearce v City of Hobart.[64] The statement by McHugh J in *Gallagher v Rainbow*,[65] that:

> *"[t]he principles of construction that have been adopted in respect of the grant of an easement at common law ... are equally applicable to the grant of an easement in respect of land under the Torrens system",*

is too widely expressed. The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.[66]

HOW DO RESTRICTIVE COVENANTS GAIN LEGAL TRACTION IN VICTORIA?

61. Prior to 2000, planning permits could be granted that would permit a breach of a restrictive covenant.

62. The responsible authority under the *Planning and Environment Act 1987* (Vic), typically the relevant local Council or the Administrative Appeals Tribunal (or from 1998, the Victorian Civil Administrative Tribunal) on review, would eschew any interest in restrictive covenants saying that this was a private legal matter and an irrelevant matter for the purposes of town planning. For instance, in *Luxury Developments v Banyule CC* [1998] VCAT 1310 the Tribunal explained:

> **15.2 Restrictive Covenant**
>
> A restrictive covenant affects the property. This covenant limits the development to one dwelling on the site. Mr. Hooper submitted that the restrictive covenant has no bearing on the decision to be made on the planning merits of this proposal. I agree with this submission. Any action to remove or vary the covenant will be the subject of a separate application and procedures by the landowner, and may or may not be the subject of a separate application for review, depending on which legal course the applicant chooses to take. Whilst the area is comprised of single and two storey detached housing, that does not necessarily prohibit the removal of the covenant nor does it necessarily prohibit, in a planning sense, the development of the site for more than one dwelling.[67]

63. Few landowners had the resources or inclination to protect their property rights and so developers would routinely construct developments on the calculated assumption that nobody would enforce the covenant.

64. However, after the permit was granted in the above case of *Luxury Developments v Banyule CC* [1998] VCAT 1310, and construction commenced in furtherance of the permit, the residents of the Hartland Estate in Ivanhoe commenced injunctive proceedings in the Supreme Court of Victoria.

65. Over four days in the Practice Court of the Supreme Court, Gillard J determined to stop the construction of three medium density homes at 270 Lower Heidelberg Road, Ivanhoe East:

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[64] [1981] Tas R 334 at 349-350.

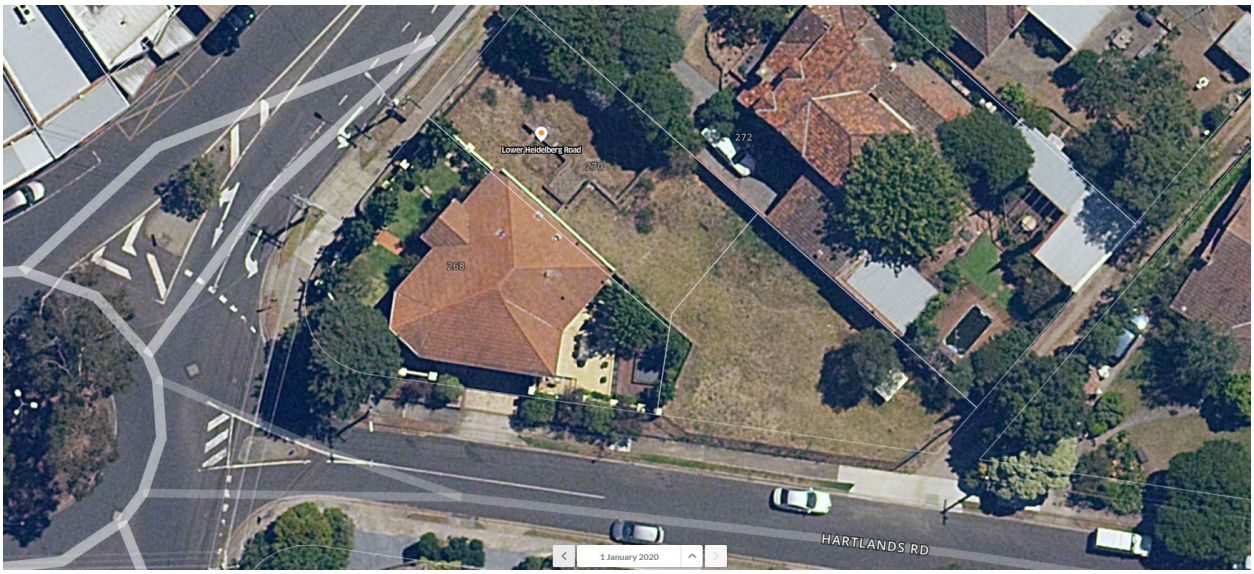
[65] (1994) 179 CLR 624 at 639-640.

[66] cf *Proprietors Strata Plan No 9,968 v Proprietors Strata Plan No 11,173* [1979] 2 NSWLR 605 at 610-612.

[67] *Luxury Developments v Banyule CC* [1998] VCAT 1310.

> 332 Luxury Developments commenced building works on 14 February 2000 in the knowledge that the plaintiffs and particularly Mr Fitt had warned Mr Seiffert that if it commenced building works they would take legal proceedings.
>
> 333 The plaintiffs issued their originating motion on 6 March 2000 and Mr Seiffert continued with the building works to 31 March. Luxury Developments have spent approximately $75,000 on the works to date. A proportion of the cost was incurred after the proceeding was instituted.
>
> 335 I am satisfied that there are no discretionary factors which would preclude the plaintiffs enforcing their right. Luxury Developments proceeded with this development with full knowledge that it had been opposed at every step by the plaintiffs and others and with the knowledge that there was a substantial probability that a proceeding would be brought against it. Further, Luxury Developments did not take advantage of the course that was open to it to approach the court under s.84 of the Property Law Act to determine the question before commencing the building works.
>
> 337 In my opinion the plaintiffs have established the necessary requirements to enforce the benefit of the covenant in equity against Luxury Developments which purchased the land with full knowledge of the terms of the covenant and is bound by the burden.[68]

66. To this day, the Land remains only partly developed, with only one of the three dwellings ever having been constructed:



67. It is understood that Luxury Developments later went into liquidation, leaving the residents of the Hartlands Estate out of pocket for their litigation costs. However, soon after this decision was handed down, the Victorian Parliament passed the *Planning and Environment (Restrictive Covenants) Act 2000*, an Act that would prevent planning permits from being issued where they would breach a restrictive covenant.

68. Section 61(4) to the *Planning and Environment Act 1987* (Vic) now provides:

> (4) If the grant of a permit would authorise anything which would result in a breach of a registered restrictive covenant, the responsible authority must refuse to grant the

[68] *Fitt & Anor v Luxury Development Pty Ltd* [2000] VSC 258.

permit unless a permit has been issued, or a decision made to grant a permit, to allow the removal or variation of the covenant.[69]

69. This provision has been responsible for a renaissance of restrictive covenant applications in the Supreme Court.

HOW DO I VARY OR MODIFY A RESTRICTIVE COVENANT?

Planning and Environment Act 1987

70. For what might be described as "deadwood" covenants, an application may be made for a planning permit to remove or modify a covenant pursuant to clause 52.02 of the relevant planning scheme.

71. However, the operation of section 60(5) of the *Planning and Environment Act 1987* means that where there is a real prospect of genuine opposition to such an application, this avenue is to be avoided. Section 60(5) provides:

> The responsible authority must not grant a permit which allows the removal or variation of a restriction … unless it is satisfied that—
>
> the owner of any land benefited by the restriction … will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the removal or variation of the restriction;[70]

72. As described by DP Gibson of the VCAT in *Hill v Campaspe SC* [2011] VCAT 949, at [65], this provision is "a high barrier that prevents a large proportion of proposals."

73. For covenants created on or after 25 June 1991, a less restrictive test applies.

> (2) The responsible authority must not grant a permit which allows the removal or variation of a restriction (within the meaning of the Subdivision Act 1988) unless it is satisfied that the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer—

74. A further disincentive for relying on this provision is the need to notify all, rather than only the closest beneficiaries of the application.

75. In determining an application under this provision, clause 52.02 of the planning schemes requires that the interests of the 'affected persons' also be taken into account.

76. The term 'affected people' has been given a broad interpretation and provides standing to all those who may experience the impacts of the development on the land resulting from the variation of the covenant, including non-beneficiaries.

> [56] In my view, the scheme incorporated into the Planning and Environment Act 1987 and the planning scheme regarding the removal or variation of a restrictive covenant establishes three categories of potential objectors:
>
> - Those who own land that has the benefit of the covenant;
> - Occupiers of land that has the benefit of the covenant; and

[69] Section 61(4) of the *Planning and Environment Act 1987* (Vic).

[70] Section 60(5) of the *Planning and Environment Act 1987* (Vic)

- Other affected people. …

[60] However, as I have said, there is nothing within the planning scheme or the Act that limits the right of any other person who may be affected by the grant of a permit under clause 52.02 to object to the grant of a permit. The decision guidelines in clause 52.02 provide that before deciding on an application, in addition to the decision guidelines in clause 65, the responsible authority must consider the interests of affected people. Section 57(1A) of the Act provides that an owner or occupier of any land benefited by the covenant is deemed to be a person affected by the grant of the permit. Clearly, they may object to a permit under clause 52.02 and their interests must be considered under the decision guidelines, but equally other people may be affected and their interests should also be considered. …

[67] I consider that people can be affected by the removal or modification of a covenant, even though they may not be the owner or occupier of land with the benefit…[71]

77. Interestingly, however, there is a little-known provision of the *Planning and Environment Act 1987* (Vic) that allows the circumvention of the onerous advertising provisions in the where a breach of a restrictive covenant has been in existence for two years or more. Section 47(2) provides:

> (2) Sections 52 and 55 do not apply to an application for a permit to remove a restriction (within the meaning of the Subdivision Act 1988) over land if the land has been used or developed for more than 2 years before the date of the application in a manner which would have been lawful under this Act but for the existence of the restriction.[72]

78. Section 52 concerns the advertising of applications for permits to potentially affected third parties, whilst section 55 considers the need for referral to bodies such as DELWP, Telstra, VicRoads and so on.

79. In *Hill v Campaspe SC* [2004] VCAT 1399, the Tribunal explained:

> 26 My conclusion is that if part of a covenant is breached, and the breach continues for 2 years without any action on the part of those having the benefit of the covenant, it is reasonable that no notice should be given of an application to vary by removal part of the covenant of which there is a breach. But this exemption from notice pursuant to section 47(2) of the Act should not extend to the removal of any aspect of a covenant of which there is no breach.[73]

80. Although the proper interpretation of this provision is not free from doubt, this decision suggests that if a use or development has been in breach of a covenant for more than two years, a permit can be granted to remove or modify the covenant to regularise the use or development. If you are to rely on this provision, the relevant responsible authority under the Act should issue the permit to remove or amend the covenant without notifying other beneficiaries. However, as DP Gibson cautions, the power is limited, so any application should be judiciously drafted.

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[71] *Hill v Campaspe SC* [2011] VCAT 949, at [56], [60] and [67].

[72] *Planning and Environment Act 1987* (Vic)

[73] *Hill v Campaspe SC* [2011] VCAT 949

Section 84 of the Property Law Act 1958

81. Where some degree of opposition is expected from one or more beneficiaries, an application may be made to remove or modify the covenant pursuant to section 84(1) of the *Property Law Act 1958* (Vic).

82. Section 84(1) is structured as a series of threshold tests to be satisfied before the court's discretion to exercise its power is enlivened. The most common provisions are sections 84(1)(a) and (c):

> (1) The Court shall have power … to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) upon being satisfied:
>
> (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Court deems material the restriction ought to be deemed obsolete or that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user; or …
>
> (c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction…[74]

83. An application pursuant to section 84(1) usually involves the filing of an Originating Motion and Summons for Relief with the Supreme Court. That application should be accompanied by planning or other evidence in support of the application for modification or removal.

84. This is returnable before an Associate Judge who may inquire as to the nature and location of beneficiaries before determining the extent of advertising required—often a combination of letters to the closest beneficiaries and the posting of a sign on the land.

85. Unlike in applications made pursuant to the *Planning and Environment Act 1987* (Vic) where notice of an application for the variation of a covenant is provided to all 'affected properties', notice under the *Property Law Act 1958* (Vic) is given only to the lots which have the legal benefit of the covenant. That is, as set out above, those lots which remained in the ownership of the covenantee at the time the covenant was signed. However, orders for notice may further be limited where the Court believes it to be appropriate.[75]

86. Orders may then be made for the return of the application at a future hearing at which objectors may attend.

87. A surprising number of applications attract no objections. Upon being satisfied that this is the case, the Court may grant the application.

88. Alternatively, objections may be received and/or objectors may attend court on the return.

89. If a mutually acceptable agreement on the application cannot be reached with the objectors, orders may be made for the exchange of further evidence before the matter is listed for mediation and/or final hearing.

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[74] S 84(1) of the *Property Law Act 1958* (Vic).

[75] S 84(3) of the *Property Law Act 1958* (Vic).

90. Historically, the courts have taken a conservative approach to applications for the removal or modification of restrictive covenants. In the often-cited words of Farwell J in *Re Henderson's Conveyance* [1940] Ch 835:

> … I do not view this section of the Act as designed to enable a person to expropriate the private rights of another purely for his own profit. I am not suggesting that there may not be cases where it would be right to remove or modify a restriction against the will of the person who has the benefit of that restriction, either with or without compensation, in a case where it seems necessary to do so because it prevents in some way the proper development of the neighbouring property, or for some such reason of that kind; but in my judgment this section of the Act was not designed, at any rate prima facie, to enable one owner to get a benefit by being freed from the restrictions imposed upon his property in favour of a neighbouring owner, merely because, in the view of the person who desires the restriction to go, it would make his property more enjoyable or more convenient for his own private purposes.[76]

91. However, in recent times, the Court has been more prepared to agree to modification applications based on section 84(1)(c) of the *Property Law Act 1958*.[77]

92. The practical challenge is to reassure the court about the likely impacts of the proposed development scheme, while allowing sufficient flexibility in the subsequent town planning permit application process.

93. To this end, the preparation of preliminary development plans is important. As Morris J explained in *Stanhill Pty Ltd v Jackson* [2005] VSC 169:

> … the lack of specific plans makes it more difficult for the plaintiff to discharge the onus of showing that a modification of a restriction will not substantially injure persons entitled to the benefit of the restriction.[78]

94. For modest variations to covenants there is some scope to rely on the planning system as a means of ensuring that substantial injury would not result from the variation. This occurred in *Hermez v Karahan* [2012] VSC 443, where Daly AsJ held:

> 4 … in respect of the relevance of town planning principles in determining whether an applicant has established a ground for removal or modification of a restrictive covenant, Cavanough J agreed with the general principle laid down by the authorities that the desirability or otherwise of a proposed development, taking into account such considerations was not part of the Court's function. However, his Honour was prepared to assume, without finally deciding the matter, that the existence of statutory planning provisions aimed at protecting the amenity of neighbours might be relevant for assessing substantial injury. For the purposes of this application, I am also prepared to assume that planning and building regulations governing building size and height, set backs, and allowable overshadowing and overlooking are relevant to assessing whether modifying the covenant would cause substantial injury[79].

95. In other words, one should not approach a covenant modification application arguing that such an outcome would further objectives of urban consolidation, but one can argue that an application should be supported, because any future application would be subject to

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[76] *Re Henderson's Conveyance* [1940] Ch 835, at 846.

[77] *Wong v McConville & Ors* [2014] VSC 148 and *Maclurkin v Searle* [2015] VSC 750.

[78] *Stanhill Pty Ltd v Jackson* [2005] VSC 169.

[79] *Hermez v Karahan* [2012] VSC 443, at [4].

the constraints of the planning system and therefore any injury would be contained to within predictable limits.

The importance of costs in section 84 applications

96. Potential applications pursuant to section 84 of the *Property Law Act 1958* (Vic) should be familiar with the practice cost implications of *Re: Withers* [1970] VR 319 that:

> … unless the objections taken are frivolous, an objector in a proper case should not have to bear the bitter burden of his own costs when all he has been doing is seeking to maintain the continuance of a privilege which by law is his.[80]

97. *Re: Withers* [1970] VR 319 was applied by Morris J in *Stanhill Pty Ltd v Jackson* [2005] VSC 169 who noted:

> The principle set out in *Re Withers* is consistent with other decisions of the Court, such as that by Gillard J in *Re Markin*, Lush J in *Re Shelford Church of England Girls' Grammar School* and McGarvie J in *Re Ulman*. In my opinion, it is a sound principle.[81]

98. However, his Honour did sound a note of caution that objector defendants should not see the reimbursement of costs as an absolute entitlement:

> 6 It is also relevant that the defendants conducted the proceeding responsibly. If a defendant, resisting an application to modify a covenant, acts irresponsibly then it would not be entitled to costs in relation to that irresponsible conduct; indeed, it might be in a position where it would have to pay the plaintiff's costs.[82]

99. For this reason, a well-advised plaintiff should continually look for opportunities to make Calderbank offers (named after the case of *Calderbank v Calderbank* [1975] 3 All ER 333) and/or Offers of Compromise to improve their position for that time when it comes to discussing the issue of costs.

Planning Scheme amendment

100. Interestingly, the least-used means of removing or amending a covenant is also the one arguably capable of delivering the most ambitious proposals, namely amending the planning scheme to remove or amend a covenant.

101. In this process, the assessment is made according to ordinary planning principles and the broad open textured test known as 'net community benefit'. In the *Mornington Peninsula C46 Panel Report*, Member Ball explained:

> First, the Panel should be satisfied that the Amendment would further the objectives of planning in Victoria. …
>
> Second, the Panel should consider the interests of affected parties, including the beneficiaries of the covenant. It may be a wise precaution in some instances to direct the Council to engage a lawyer to ensure that the beneficiaries have been correctly identified and notified.
>
> Third, the Panel should consider whether the removal or variation of the covenant would enable a use or development that complies with the planning scheme.

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[80] *Re Withers* [1970] VR 319, at 320.

[81] *Stanhill Pty Ltd v Jackson* [2005] VSC 169.

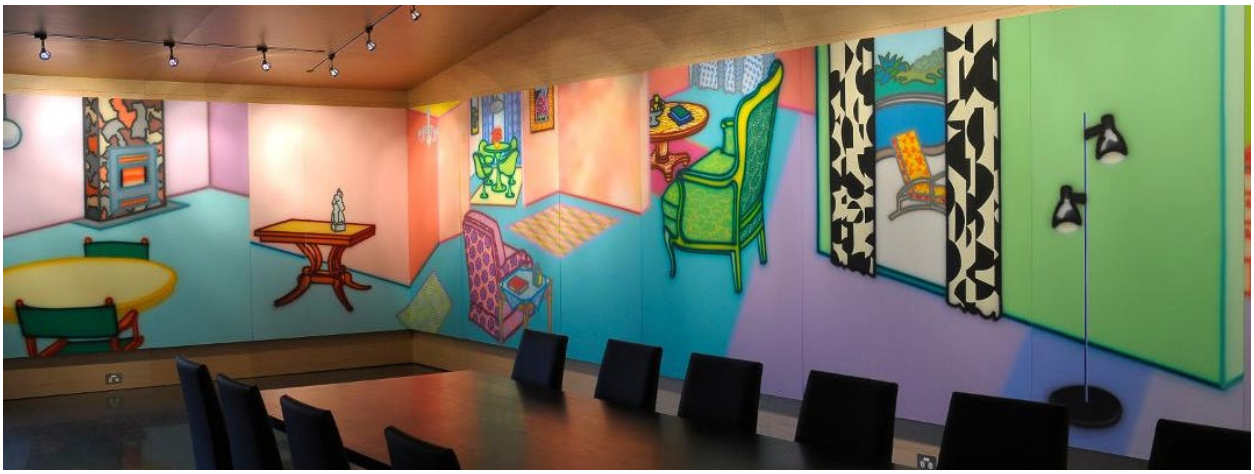
[82] *Stanhill Pty Ltd v Jackson* [2005] VSC 169.

Finally, the Panel should balance conflicting policy objectives in favour of net community benefit and sustainable development. If the Panel concludes that there will be a net community benefit and sustainable development it should recommend the variation or removal of the covenant.

102. Here an applicant runs an entirely different risk, for to succeed, an application will need the support of the local council and the relevant Minister at the time the amendment is both prepared and adopted. In the worst case scenario, the period between these two events may be many months and punctuated by Council elections adding a further element of political risk.

103. An example of this process being successfully employed was the approval of a Place of Assembly (museum) at 217 And 219 Cotham Road, Kew as part of Amendment C143 to the Boroondara Planning Scheme. This proposal involved the conversion of two dwellings into a contemporary museum with a liquor licence and on-site parking spaces, contrary to a restrictive covenant that prevented the use of the land for anything other than dwellings.

104. Arguably, there would have been no prospect that such an ambitious project would have been approved under section 84 of the *Property Law Act 1958* (Vic), but the project received Council backing at both ends of the process and a highly favourable planning panel report.



Removing or modifying a covenant by consent

105. A restrictive covenant can be removed or modified by consent. Section 88(1AC) of the *Transfer of Land Act 1958* (Vic) provides:

> A recording on a folio of a restrictive covenant that was created or authorised in any way other than by—
>
> (a) a plan of subdivision or consolidation; or
>
> (b) a planning scheme or permit under the Planning and Environment Act 1987—
>
> (c) may be deleted or amended by the Registrar if the restrictive covenant is released or varied by—
>
> …
>
> (d) the agreement of all of the registered proprietors of all land affected by the covenant; …

106. If the proposed modification or removal is not controversial and/or the number of beneficiaries is not large, this may be the most efficient means of proceeding.

Removing a covenant at the direction of the Registrar of Titles

107. Finally, a covenant may be removed at the direction of the Registrar of Titles pursuant to section 106(1)(c) of the *Transfer of Land Act 1958* (Vic). This provides:

> (1) The Registrar—
>
> (c) if it is proved to his satisfaction that any encumbrance recorded in the Register has been fully satisfied extinguished or otherwise determined and no longer affects the land, may make a recording to that effect in the Register;

108. This provision can be used for covenants that do not define the land to which the benefit is affixed or where the benefit of the covenant might be said to have not passed to subsequent successors or transferees. Covenants of this nature were discussed in *Prowse v Johnstone* [2015] VSC 621 at [62] and *Re Hunt* [2017] VSC 779.

ATTEMPTS AT REFORM

109. In 2011, the Victorian Law Reform Commission published an extensive review of the law in relation to restrictive covenants. Notably, it found that covenants should have a mandated limited life:

> 36. A restrictive covenant that is recorded by the Registrar after a specified date must be for a defined period of time not exceeding 20 years.

110. It further found that planning schemes should be relieved of their powers to remove covenants:

> **Regulation as an alternative to removal**
>
> 38. We propose the following set of reforms to planning legislation and recommend further public consultation regarding their implementation:
>
> a. It should no longer be possible to remove a restrictive covenant by registration of a plan under section 23 of the *Subdivision Act 1988* (Vic).

Consequential amendments should be made to the *Planning and Environment Act 1987* and the *Subdivision Act 1988* to omit provisions that enable restrictive covenants to be removed or varied by or under a planning scheme.

b. In determining an application for a planning permit, a responsible authority should not be expressly required to have regard to any restrictive covenant.

c. The *Planning and Environment Act 1987 (Vic)* should provide that:

i) The Victorian Planning Provisions may specify forms of use or development of land that cannot be prevented or restricted by a restrictive covenant.

ii) A planning scheme may, in respect of a zone or a planning scheme area, specify forms of permitted use or development of land that cannot be prevented or restricted by a restrictive covenant.

iii) A restrictive covenant is unenforceable to the extent it is inconsistent with such a specification.

111. The report also recommended that the Supreme Court, the County Court, the Magistrates' Court and VCAT should have concurrent jurisdiction to hear applications under section 84 of the *Property Law Act 1958* (Vic)*:*

Forum and costs

43. The Supreme Court, the County Court, the Magistrates' Court and VCAT should have concurrent jurisdiction to hear and determine applications under sections 84(1) and (2) of the *Property Law Act 1958*.

44. Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) should provide that, for the purpose of hearing an application under section 84 of the *Property Law Act 1958* (Vic), VCAT must be constituted by or include a member who in the opinion of the President has knowledge of or experience in property law matters.

45. In an application under section 84 of the *Property Law Act 1958*, the court or VCAT should apply the following principles to the award of costs:

a. Where the application is unsuccessful, the applicant should normally pay the costs of any respondent entitled to the benefit of the easement or restriction.

b. Where the application is successful, the applicant should normally pay the costs of the respondent incurred prior to the point in time at which, in the opinion of the court or of VCAT, the respondent has had a full opportunity to assess the merits of the application. The respondent should normally bear his or her own costs incurred after that point, but not the costs of the successful applicant.

112. The Victorian Law Reform Commission also recommended a new set of conditions that would replace the existing criteria in section 84(1)(a) – (c):

Relevant considerations

46. The conditions in section 84(1)(a)–(c) of the *Property Law Act 1958* (Vic) should be removed. Instead, the court or VCAT should be required to consider the following matters in deciding whether to grant an application for the discharge or modification of an easement or restrictive covenant:

a. the relevant planning scheme

b. the purpose of the easement or restrictive covenant

c. any changes in circumstances since the easement or restrictive covenant was created (including any change in the character of the dominant or benefited land or the servient or burdened land or the neighbourhood)

d. any increased burden of the easement on the servient land resulting from changes to the dominant land or its mode of use

e. the extent to which the removal or variation of the easement or a restrictive covenant would cause material detriment to a person who has the benefit of the easement or restrictive covenant

f. the extent to which a person who has the benefit of an easement or a restrictive covenant can be adequately compensated for its loss

g. acquiescence by the owner of the dominant land in a breach of the restrictive covenant

h. delay by the dominant owner in commencing legal proceedings to restrain a breach of the restrictive covenant

i. abandonment of the easement by acts or omissions

j. non-use of the easement (other than an easement in gross) for 15 years

k. any other factor the court or VCAT considers to be material.

113. However, the state government was unmoved by the recommendations of the Victorian Law Reform Commission and few recommendations of the report were adopted:

	Restrictive Covenants	
26	As a first step, remove the legislative block (section 61(4) of the Act) to the grant of a planning permit until a restrictive covenant is varied	Not agree
27	Further examine the recommendations of the Victorian Law Reform Commission in its report on easements and covenants (Final Report 22)	Not agree

CONCLUSION

114. At the present time, the private rights of beneficiaries to curtail the use and development of land sits somewhat uneasily against the public policy and principles of broad third party participation inherent in the Victorian town planning system. True it is, that restrictive covenants have established neighbourhoods with a special character; on one view this collective agreement to opt out of the planning system simply forces other neighbourhoods to bear the greater burden of the effects of urban consolidation.

115. Further, networks of restrictive covenants are often haphazard in their distribution and arbitrary in their enforceability, relying largely on the happenchance that land was transferred out of a parent title early enough to create beneficiaries with sufficient proximity and interest to want to defend the covenants' collective purposes.

116. But despite having been given a once-in-a-generation opportunity to reform this area of the law, the government of Victoria not only declined the invitation, its Parliament legislated to elevate the standing of restrictive covenants, suggesting that fundamental changes to this area of the law will not be occurring any time soon.

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[83] With thanks to Amelia Murphy, Thomas Polhill and Subi Ramesh