Chapter 6

Purpose and Nature of Covenants

CONTENTS

Enforcement of restrictive covenants in equity 74
Restrictive covenants distinguished from statutory agreements and restrictions 75
  Statutory agreements 75
  Restrictions 77
Statutory restrictions under the Subdivision Act 77
  Creation of restrictions 77
  Why a ‘restriction’ on a plan of subdivision is not a restrictive covenant 78
  Why a restriction on a plan should not take the place of a restrictive covenant 79
The status of restrictive covenants on registered land 80
  Should restrictive covenants be recorded or registered? 80
Identification of benefited land 82
Positive covenants 84
  Management of common property developments 84
  Other ways of imposing positive obligations on successors 85
  Submissions 86
  Conclusion 87
  Statutory scheme for covenants 88
Limiting the duration of restrictive covenants 88
  Renegotiability and information overload 88
  Submissions 89
  Discussion 90
Existing restrictive covenants 91
Restrictions and section 173 agreements 91
Purpose and Nature of Covenants

6.1 A covenant is a promise in an agreement. The person who gives the promise—who has the burden of the promise—is called the covenantor. The person to whom the promise is given—who has the benefit of the promise—is the covenantee.

6.2 Under the law of contract, a covenant is enforceable only against the covenantor.\(^1\)

6.3 A restrictive covenant is a special type of covenant in an agreement. It is a promise by a covenantor to observe a restriction on the use of his or her land (the burdened land) for the benefit of land owned by the covenantee (the benefited land). The terms ‘benefited land’ and ‘burdened land’ have similar meanings to the terms ‘dominant land’ and ‘servient land’ in the law of easements. Like an easement, a restrictive covenant is a property right attached to the benefited land.

6.4 Restrictive covenants differ from other types of covenants because, if the covenantor sells or passes on the burdened land to someone else, the restrictive covenant binds the new owner. In this way, the burden of a restrictive covenant ‘runs with the land’.

6.5 Restrictive covenants are also different from restrictions imposed under planning and property legislation. This has caused confusion and uncertainty about the legal effect of the different types of restrictions.

6.6 Before discussing how the distinction between restrictive covenants and other restrictions on the use of land has become blurred, we briefly describe how the modern law of restrictive covenants emerged.

ENFORCEMENT OF RESTRICTIVE COVENANTS IN EQUITY

6.7 Restrictive covenants are treated differently from other types of covenants because of the intervention of equity. Equity was a distinct body of law administered by the English Court of Chancery.\(^2\) In 1848, the Court decided in Tulk v Moxhay\(^3\) that a covenant was enforceable against the covenantor’s successors who took the burdened land with notice of the covenant. In doing so, the Court effectively created a new type of property right.\(^4\)

6.8 Before then, restrictive covenants, like other covenants, were purely contractual arrangements. The other English courts, which administer the common law, continued to regard them in this way.

6.9 Over the half century following Tulk v Moxhay, the scope of the new property right became settled. It was decided that equity would enforce only covenants that were:

- intended to run with the covenantor’s land\(^5\)
- given for the benefit of land held by the covenantee\(^6\)
- ‘restrictive’ in the sense that they prohibited specified uses of the burdened land.\(^7\)

6.10 These rules apply in Victoria,\(^8\) subject to exceptions created by legislation.

6.11 A restrictive covenant is an ‘equitable’ property right in the sense that it depends on enforcement by a court that can grant equitable orders. The usual remedy is an injunction, but a court may grant equitable damages instead of, or in addition to, an injunction.\(^9\) It can also grant a declaration as to the existence, nature and extent of the restriction, and who may enforce it against whom.\(^10\) In Victoria, all courts now administer both common law and equity and, if there is any conflict or variance between them, the rules of equity prevail.\(^11\)
6.12 As equitable property rights, restrictive covenants are subject to different rules of enforcement than common law property rights. Enforcement is not ‘of right’, but depends on the discretion of the court. Restrictive covenants remain equitable property rights under the Transfer of Land Act 1958 (Vic) (Transfer of Land Act), which regulates Victoria’s Torrens system of registered title.

6.13 It is important to note that the burden of a covenant does not run with registered land until it is recorded by the Registrar. The status and enforceability of restrictive covenants under the Torrens system in Victoria is discussed below.14

RESTRICTIVE COVENANTS DISTINGUISHED FROM STATUTORY AGREEMENTS AND RESTRICTIONS

6.14 Restrictive covenants need to be distinguished from covenants in statutory agreements and restrictions in a registered plan (statutory restrictions).

6.15 ‘Restrictive covenant’ is a well-defined legal term and its legal consequences are fully specified in case law. It belongs in the realm of property law. Its clarity is being marred by legislation that extends the legal tests and procedures that apply to restrictive covenants to statutory agreements and uses the term ‘restrictive covenant’ to define restrictions.

6.16 There is a need to clarify meanings and to use standard and consistent definitions in legislation. Due to uncertainty about the legal effects, multiple methods are sometimes used to create an enforceable restriction. In other cases, the method used does not create an enforceable restriction at all.

6.17 Some believe that a restriction can be created by including it in a ‘memorandum of common provisions’ lodged with the Registrar. The memorandum is simply a means of shortening instruments such as plans and transfers. It is a repository of provisions that can be incorporated by reference into instruments subsequently lodged in the Office of Titles. The memorandum itself does not create a restriction.

6.18 In our discussion below, we attempt to sharpen the distinction between restrictive covenants and statutory agreements and restrictions.

STATUTORY AGREEMENTS

6.19 A statutory agreement contains a promise made by a landowner to a government agency or statutory authority relating to the use of the land. It binds the landowner and his or her successors by force of the legislation under which the agreement is made.17

6.20 Statutory agreements are normally used where the government agency or statutory authority owns no land that benefits from the covenant. Because there is no benefited land, the agreement would not be enforceable in equity as a restrictive covenant. These agreements are sometimes called ‘covenants in gross’, although this is not a property right recognised by equity.

6.21 The agreements may be varied or released either by agreement, by the relevant Minister or Secretary, and in some cases by the Victorian Civil and Administrative Tribunal (VCAT).19

6.22 A number of Victorian statutes provide for statutory agreements for regulatory purposes, such as environmental, conservation or cultural purposes. Examples are Land Management Co-operative agreements under the Conservation, Forests and Lands Act 1987 (Vic) and Cultural Heritage Agreements under the Aboriginal Heritage Act 2006 (Vic).20

1 This discussion refers only to freehold covenants. The common law does allow the burden of leasehold covenants to pass to an assignee of the tenant.
2 The Court of Chancery is now known as the Chancery Division of the High Court of England and Wales.
3 Tulku v Moshay (1848) 2 Ph 774; 41 ER 1143.
5 Austerberry v Corporation of Oldham (1885) 29 Ch D 750. There is a statutory presumption that a covenant relating to the land of the covenantor is made on behalf of the covenantor and his or her successors and the persons deriving title under the covenantor or successors: Property Law Act 1958 (Vic) s 79.
6 London County Council v Allen (1914) 3 KB 642.
7 Haywood v Brunswick Permanent Benefits Building Society (1881) 2 QB 403; Edgeworth, above n 4, 397; Adrian Bradbrook and Marcia Neave, Easements and Restrictive Covenants in Australia (Butterworths, 2nd ed, 2000) [12.6].
9 Bradbrook and Neave, above n 7, [18.30], [18.64]; Supreme Court Act 1986 (Vic) s 8.
10 A declaration as to a covenant can be made under the Property Law Act 1958 (Vic) s 842.
11 Supreme Court Act 1986 (Vic) s 29.
12 Equitable property rights are unenforceable against a bona fide purchaser for value of the legal estate without notice, while legal rights are held subject only to prior inconsistent legal rights.
13 Transfer of Land Act 1958 (Vic) s 88(1).
14 See discussion at paras [6.51]–[6.58].
15 See, eg, Association of Consulting Surveyors (Victoria), Submission 28, 4.16 Transfer of Land Act 1958 (Vic) s 91A, 91B.
17 Depending on the statute, it might make the agreement enforceable against successors in title of the covenanting landowner, or all persons deriving title under the landowner or the successors.
18 See, eg, Planning and Environment Act 1987 (Vic) s 182(b).
19 See, eg, Consar Nominees, Forests and Lands Act 1987 (Vic) s 76(1), which allows a party to apply to VCAT for a review of a decision by the Minister to vary or terminate the agreement, or refuse to vary or terminate the agreement. Section 72(4) also allows a landowner to make an application to the Supreme Court for an order declaring that the agreement is no longer in force.
20 Conservation, Forests and Lands Act 1987 (Vic) s 69–72; Aboriginal Heritage Act 2006 (Vic) s 68–79. See also s 163 agreements under the Building Act 1993 (Vic) ss 162–5; Heritage Council Covenants under the Heritage Act 1995 (Vic) s 85–92; Trust for Nature covenants under the Victorian Conservation Trust Act 1972 (Vic) s 3A; Section 49 agreements under the Victorian Urban Development Authority Act 2003 (Vic) s 49 (these are created and regulated in the same way as s 173 agreements).
Chapter 6

Purpose and Nature of Covenants

6.23 The most common type of statutory agreement is a planning agreement made under section 173 of the Planning and Environment Act 1987 (Vic) (Planning and Environment Act) (section 173 agreement) between a landowner who has applied for a planning permit and a ‘responsible authority’ (usually a council or the Minister) that is empowered to grant it. A responsible authority may require the applicant to enter into an agreement with it as a condition of the permit.

6.24 Once a section 173 agreement is recorded by the Registrar, it runs with the land and is enforceable by the responsible authority against ‘any person who derives title from the person who entered into it’. The agreement can be used to ensure that permit conditions are enforceable against not only the permit applicant but all subsequent owners of the land.

6.25 The legislation under which statutory agreements are made usually provides that, if the agreement is recorded by the Registrar, the burden of the agreement is enforceable by the relevant authority against successors of the person who entered into the agreement as if it were a restrictive covenant. Such provisions seek to equate a statutory agreement with something it is not. The equation does not work.

6.26 Not only can statutory agreements impose restrictions on the use of land, they can also include covenants that impose positive obligations (positive covenants). A positive covenant requires the landowner to take some deliberate action, such as paying money or completing works. If not for the operation of the legislation under which the statutory agreement is made, the positive covenant could not run with the land.

6.27 The equitable rules for the enforcement of restrictive covenants are inadequate or unsuitable for positive covenants. Whenever legislation allowing positive covenants to run with land has been proposed or introduced in other jurisdictions, additional provisions have always been required. The Ontario Law Reform Commission said that ‘it would not be sufficient ... merely to reform the law of restrictive covenants and make it applicable to positive covenants’.

6.28 A provision that makes a statutory agreement enforceable ‘as if it were a restrictive covenant’ may also have the effect of giving the landowner a right to apply under section 84(1) of the Property Law Act 1958 (Vic) (Property Law Act) for an order to ‘discharge’ or ‘modify’ the covenant. Section 85 of the Property Law Act provides that, where proceedings are taken to enforce a restrictive covenant, the person against whom the proceedings are taken may apply for an order under section 84.

6.29 Section 84(1) of the Property Law Act is not a suitable mechanism for removing and varying statutory agreements. Its tests and procedures are designed for restrictive covenants, in which there is benefited land as well as benefited owners. It is not designed for statutory agreements that do not benefit land, nor for agreements that impose positive obligations.

6.30 Statutory agreements are created for regulatory purposes under statute. They should be enforced, removed and varied in accordance with provisions specified in the statute under which they are created.

6.31 A review of the Planning and Environment Act in 2009 by the Department of Planning and Community Development found that the provisions for removal and variation of section 173 agreements, other than by consent, are inadequate. New provisions have been drafted and included in a draft Exposure Bill. If these or similar provisions are adopted, they could provide a model for other statutory agreements.
In Chapter 3 we outlined how express subdivisional easements are created under restrictions created upon registration of a plan of subdivision and restrictive covenants has become increasingly obscured by the inadequate distinction between restrictions created upon registration of a plan of subdivision and restrictive covenants. The provisions in the Subdivision Act relating to restrictions are confusing. The term ‘restriction’ is sometimes used in a functional sense, to mean the effect of any legal instrument (such as a transfer, plan or statutory agreement) that imposes a specific restriction on the use of a lot. Sometimes it is used to mean the instrument itself. For the sake of clarity, we use the term in its functional sense. The term ‘restriction’ is sometimes used in a functional sense, to mean the effect of any legal instrument (such as a transfer, plan or statutory agreement) that imposes a specific restriction on the use of a lot. Sometimes it is used to mean the instrument itself. For the sake of clarity, we use the term in its functional sense.

‘Restriction’ has no fixed meaning in legislation. Its meaning depends on the context. The Subdivision Act contains a definition but it is inadequate and the related statutes do not assist:

- The Subdivision Act defines ‘restriction’ as ‘a restrictive covenant or restriction which can be registered or recorded in the register under the Transfer of Land Act’.
- The Transfer of Land Act provides for the recording of ‘restrictive covenants’ only. Plans that may include restrictions can be registered, but the restrictions specified in the plans are not recorded.
- Adding to the confusion, the Planning and Environment Act defines ‘registered restrictive covenant’ to mean ‘a restriction within the meaning of the Subdivision Act’.

This ‘circle of definitions’ was the subject of comment by VCAT in Focused Vision Pty Ltd v Nillumbik SC. It is confusing to employ the defined word itself in a definition. The result is that there is no effective definition and no fixed meaning in law of the concept of restriction. VCAT added that ‘the definitions make clear that the primary, if not exclusive, meaning of a “restriction” is a “restrictive covenant”’. In Gray v Colac Otway SC, VCAT said ‘[a] restriction is a limitation placed on the use or enjoyment of land’. VCAT noted that the references to both a ‘restrictive covenant’ and a ‘restriction’ in the Subdivision Act’s definition of ‘restriction’ indicate a distinction between a restrictive covenant created privately between parties and a restriction created under a statutory power.

The provisions in the Subdivision Act relating to restrictions are confusing. The distinction between restrictions created upon registration of a plan of subdivision and restrictive covenants has become increasingly obscured by the inequitable and confusing definition of ‘restriction’ and needs to be clarified. Before discussing how to disentangle the concepts and terms, we explain how the restrictions are created.

Creation of Restrictions

In Chapter 3 we outlined how express subdivisional easements are created under the Subdivision Act. A similar process is used to create restrictions.
6.38 Responsible authorities have the power under the Planning and Environment Act to impose a restrictive condition in a planning permit and require that it be shown on a plan. For example, they may impose a condition that no building or development shall occur outside the building envelope shown on the plan, or that no trees are to be removed. A restriction may also be required by a referral authority as an alteration to a draft plan of subdivision.

6.39 Plans showing restrictions imposed in this way must be certified by the council before they are registered. Upon registration, section 24(2)(d) of the Subdivision Act provides that ‘any easement, restriction or other right is created, varied or removed as specified in the plan’ (our italics).

6.40 It is commonly assumed that a restriction created by registration of a plan is a restrictive covenant and that all lot owners in the subdivision have the benefit of it. The idea is likely to have been fostered by the inclusion of ‘restrictive covenant’ in the definition of ‘restriction’ in the Subdivision Act. It also finds some support from administrative provisions recently inserted into the Transfer of Land Act, which refer to a ‘restrictive covenant created by plan’.

6.41 We disagree with this assumption. A restriction created in a plan is not one that equity would recognise or enforce, as the restriction is not created for the benefit of specified land. Equity has strict requirements about identifying the benefited land.

6.42 In order for a restriction in a plan to operate as a restrictive covenant, the legislation would need to expressly give it that effect and confer the benefit of the covenant on other land. Section 24(2)(d) of the Subdivision Act does not deem a restriction in a plan to be enforceable as if it were a restrictive covenant or provide for the benefit to be attached to other land. Nor does anything in the Transfer of Land Act give a restriction created under the Subdivision Act the effect of a restrictive covenant.

6.43 If, as we maintain, statutory restrictions are not restrictive covenants, they are enforceable under administrative law rather than as property rights. Administrative law is the branch of public law that regulates the exercise of public powers and duties. Statutory duties and restrictions can be enforced by obtaining an injunction or declaration by a court. The Attorney-General has the right to enforce the public interest in the observance of a statutory duty or a restriction, and can apply to a court for an injunction or declaration or authorise somebody else to do it.

6.44 A private person otherwise has ‘standing’ to apply for an injunction or declaration where ‘the interference with the public right is such that some private right of his [or hers] is at the same time interfered with’, or where he or she has ‘a special interest in the subject matter’. Although a neighbour may have standing under administrative law to enforce a statutory restriction on the use of other land, there are no ‘benefited owners’ of a statutory restriction in the property law sense.

6.45 We believe the term ‘restrictive covenant’ is a misnomer for a ‘restriction’ created upon registration of a plan by section 24(2)(d) of the Subdivision Act. A ‘restriction’ created upon registration of a plan should be confined to a restriction required by a responsible authority or referral authority in the exercise of their statutory powers.
RECOMMENDATION

31. A restriction created by section 24(2)(d) of the Subdivision Act 1988 (Vic) should be defined as a restriction that is required by a responsible authority or a referral authority in the exercise of its statutory powers.

WHY A RESTRICTION ON A PLAN SHOULD NOT TAKE THE PLACE OF A RESTRICTIVE COVENANT

6.46 In the last decade, it has become common for developers to include restrictions in the plan of subdivision which they might otherwise have created as restrictive covenants by agreement with the purchasers of each lot.52

6.47 We consider that developers should not be able to use section 24(2)(d) of the Subdivision Act to create restrictions that are not required by the public planning system. Private parties should not be able to create restrictions by exercising a statutory power provided for a regulatory purpose. If restrictions are to be created by developers independently of the requirements of regulatory authorities, they should be created as restrictive covenants in accordance with the rules of property law.

6.48 To create a restrictive covenant, equity requires the benefited owner to enter a valid agreement with the burdened owner. In addition, section 88(1) of the Transfer of Land Act requires the consent of all registered owners and mortgagees of the burdened land for the covenant to be recorded. We see no policy justification for dispensing with the requirement that a restrictive covenant be created by an agreement. A developer should not be able to bypass the market and create restrictions unilaterally with the aid of a statute.

6.49 There is a need to change the procedures in the Subdivision Act to prevent the inclusion in registered plans of restrictions other than those required by responsible authorities or referral authorities. Currently, plans are drafted by or on behalf of developers, and councils must certify the plans if they satisfy the requirements in section 6(1) of the Subdivision Act. There is a need to empower councils to refuse certification if the plan includes restrictions other than those required by the responsible authority or a referral authority.

6.50 Any restrictions required by authorities should be consistent with the planning scheme and policies. In Northern Land Investments Pty Ltd v Greater Bendigo Shire Council,53 VCAT deleted a condition in a permit for subdivision issued by a council that required the plan to include a restriction on further subdivision and a restriction on the construction of more than one dwelling per lot. The restrictions were inconsistent with planning policies and with the purpose of the Residential 1 zone, which included promoting a range of densities and housing types. VCAT said that the council should not attempt, by imposing a restriction, to rule out exercising its discretion to grant permission for future proposals that might otherwise be acceptable.54

RECOMMENDATIONS

32. Section 6(1) of the Subdivision Act 1988 (Vic) should be amended to provide that, if a plan creates a restriction, the restriction must be one that is required by a responsible authority or referral authority in the exercise of its statutory powers.

33. Sections 88(1AA)–(1C) of the Transfer of Land Act 1958 (Vic) should be amended to delete references to a ‘restrictive covenant’ created by a plan, and to substitute the word ‘restriction’.


42. Subdivision Act 1988 (Vic) ss 9, 10.

43. Ibid ss 5(1), pts 2, 4.

44. This means a plan of subdivision, a plan of consolidation, or a plan of the creation of a restriction: Subdivision Act 1988 (Vic) s 8(1), s 24.

45. For example, Transfer of Land Act 1958 (Vic) s 22A(1–1A); Subdivision Act 1988 (Vic) s 4(4) s 37(3)(c)(ii)(D).


47. An example of how this could be done is s 88B(3) of the Conveyancing Act 1919 (NSW).

48. There are no provisions in the Subdivision Act 1988 (Vic) for their enforcement. If a breach of a restriction also contravenes a planning scheme, permit or s 173 agreement, enforcement provisions in pt 6 of the Planning and Environment Act 1987 (Vic) may apply.

49. Boyce v Paddington Borough Council (1903) 1 Ch 109, 493; Bateman v Australian Local Aboriginal Land Council v Aboriginal Community Benefits Fund Pty Ltd (1988) 194 CLR 447. The designation is known as a ‘fiat’, and the resulting action is said to be at the relation of the Attorney-General.

50. Boyce v Paddington Borough Council (1903) 1 Ch 109, 493 (Buckley J). This is known as the ‘first limb’.

51. Bateman v Australian Local Aboriginal Land Council v Aboriginal Community Benefits Fund Pty Ltd (1986) 194 CLR 447; Quinlan v Hargraves and Kirby SC, [101]–[103] (McHugh Ji), [108]–[109] (Hayne J). Note that the standing requirement applies whether the defendant is a public body or a private individual: [81] (McHugh Ji).

52. Gray v Colac Otway SC (2005) VCAT 2266 [31], noting that restrictions in plans are usually created by developers. Maddocks, Restrictive Covenants in Growth Areas: Report for the Melbourne 2030 team at Department of Planning and Community Development (2006) (unpublished) 60 reported that the most currently popular method of imposing restrictions on land was to include them in a plan that incorporates a memorandum of common provisions or a set of design guidelines.

53. Northern Land Investments Pty Ltd v Greater Bendigo Shire Council (2005) VCAT 902.

54. Ibid [18]. It is a principle of administrative law that a body exercising powers under legislation should not fetter the future exercise of its discretionary powers.
6.51 Equity enforced a restrictive covenant against the covenantor’s successors only if they acquired their interest in the land with notice of the covenant.\(^5\) Notice was therefore the core of the restrictive covenant.

6.52 Under the Torrens system of registered title to land, registration of an interest in land confers title to the interest. A registered landowner is not affected by notice of any unregistered interest in the land, except in the case of fraud.\(^6\)

6.53 When the Torrens system was introduced in Victoria in 1862, no provision was made for restrictive covenants to be recorded or registered. For this reason, the Torrens system could have spelt the end of the restrictive covenant in Victoria, as it did in Queensland.\(^7\)

6.54 In Victoria, restrictive covenants continued to run with the land after the introduction of the Torrens system because, at least from 1880, the registry adopted the practice of ‘notifying’ them on the folio of the burdened lots without any express statutory authority to do so.\(^8\)

6.55 The effect was to make the covenants enforceable against all successive registered owners of the burdened land. Under section 42(1) of the Transfer of Land Act and its predecessors, the registered proprietor holds the land ‘subject to such encumbrances as are recorded on the relevant folio of the register’.

6.56 The recording did not validate the covenant as a property right.\(^9\) Its enforceability depended on the rules of equity. The recording of a valid covenant made it enforceable in equity because the purchaser had notice of it.\(^10\) The result was that a restrictive covenant, which equity enforces on the basis of notice, was enforceable under a registered title system that was designed to free registered owners from the effects of notice.\(^11\)

6.57 For many decades, the enforceability of restrictive covenants under the Torrens system in Victoria depended tenuously on registry practice rather than express legislative provision. Stanley Robinson states that, although the registry practice of ‘notifying’ restrictive covenants on folios received some support from the court and was indirectly recognised in a 1918 statute, the practice was not expressly authorised by statute until 1954.\(^12\) A further statute in 1964 validated past practice by deeming the Registrar always to have had the power.\(^13\)

6.58 Restrictive covenants have long had an uneasy relationship with the Torrens system. New South Wales did not make provision for the recording of restrictive covenants until 1930.\(^14\) The Torrens statutes in South Australia and Queensland still make no express provision for private restrictive covenants and conveyancers in those jurisdictions use various devices to make covenants enforceable against successors.\(^15\) Western Australia and Tasmania provide for the recording of restrictive covenants, subject to conditions.\(^16\)

**SHOULD RESTRICTIVE COVENANTS BE RECORDED OR REGISTERED?**

6.59 Although restrictive covenants are only recorded, it is often assumed that they are registered and consequently validated by registration.\(^17\) This misconception is partly due to the fact that they are referred to in the Planning and Environment Act as ‘registered restrictive covenants’ (our italics).\(^18\)

6.60 Registered titles have the effect set out in section 42 of the Transfer of Land Act. Registration confers upon the registered owner title to the specified interest, free of all encumbrances except those that are recorded on the folio or fall within listed exceptions. In other words, registration makes an interest ‘indefeasible’ in the sense that it confers title to it and allows the holder to enjoy it free of most other interests.
6.61 Recording does not confer title to an interest, but can affect its enforceability. Restrictive covenants are recorded, not registered. Recording does not make covenants indefeasible or create a presumption that they are valid. Their validity and legal effect depends on the general rules of contract, equity and statutes. The sole effect of recording them is to make valid covenants enforceable against successors of the covenantor who, as registered owners, would otherwise take free of them.

6.62 In our consultation paper, we asked whether restrictive covenants should be recorded or registered.

6.63 Most submissions in response supported registration. Those that specified a reason indicated that registration would ensure consistency with other forms of restrictions. The other submissions that stated a preference for registration did not give reasons for their choice.

6.64 Moorabool Shire Council referred to the definition of ‘registered restrictive covenant’ in the Planning and Environment Act and expressed the view that, to ensure certainty, terminology should be ‘congruent throughout the various Acts relating to this matter’.

6.65 The Law Institute of Victoria, which also proposed that all expressly created easements should be registered, said that covenants should be registered in order to achieve consistency of approach.

6.66 Michael Macnamara submitted that registration should occur as part of a scheme of covenants as in the Northern Territory. The Northern Territory is the only Australian jurisdiction that provides for the registration of covenants. The practice was introduced as part of a new statutory scheme for both positive and restrictive covenants. Mr Macnamara did not envisage any Victorian scheme extending beyond restrictive covenants.

6.67 We recognise that reducing the distinctions in the legal status of interests shown on the folios could make the law a little simpler. In practice, however, having restrictive covenants registered rather than recorded would not improve the efficiency of the conveyancing process.

55 This is the rule that equitable interests are enforceable against all successors other than a bona fide purchaser for value without notice. Volunters, who provided no consideration for their interest in the land, took subject to any covenants that bound the person who granted the interest.

56 The provision is now in s 43 of the Transfer of Land Act 1958 (Vic).

57 In Queensland, restrictive covenants do not run with registered land, except for certain statutory covenants.

58 The history is detailed by Judge Scholl in Re Arcade Hotel Pty Ltd (1962) 27 VLR 274, citing Norman Currey, Manual of Titles Office Practice in Victoria: with Forms in General Use, also Notes of the Practice of the Office of the Registrar-General of Deeds, Adelaidis, and the Office of Titles, Perth (Lawbook Co, 1933) 125–30, which explained the practice by saying that ‘such covenants were in the nature of easements’.

59 Fitt v Luxury Developments Pty Ltd (2000) VSC 258 [178].


62 Stanley Robinson, Transfer of Land in Victoria (Lawbook Co, 1979) 350–1; Re Arcade Hotel Pty Ltd (1962) 27 VLR 274; Mayor etc of Brunswick v Dawson (1879) 5 VLR (Eq) 2; Kenna v Ritchie (1907) VJR 386.

63 Real Property Act 1918 (Vic) s 106).

64 Transfer of Land Act 1954 (Vic) s 88(1).

65 Transfer of Land (Restrictive Covenants) Act 1964 (Vic): the retrospective validation is carried forward in s 88(1) of the Transfer of Land Act 1958 (Vic).

66 Conveyancing Act 1919 (NSW) s 88(3).


68 Ibid. The authors note that in South Australia, covenants are created by memorandum of encumbrance, and in Queensland, chains of covenants are used.

69 Christensen and Duncan, above n 67: Land Titles Act 1980 (Tas) ss 102–4; Transfer of Land Act 1893 (WA) ss 129A, 129B.


71 Planning and Environment Act 1987 (Vic) s 3.

72 Fitt v Luxury Developments Pty Ltd (2000) VSC 258 [178–182], [315], [325], [326] (Gillard J).

73 The ‘general law’ is the law of property other than the Torrens system rules contained in the Transfer of Land Act 1958 (Vic). It includes other statutes and the common law and equitable rules of property law developed by the courts.


75 Section 88(3) of the Transfer of Land Act 1958 (Vic) provides that the recording of a restrictive covenant in the register ‘shall not give it any greater operation than it has under the instrument or Act creating it’. This means that the recording of a covenant does not validate it.

76 Victorian Law Reform Commission, above n 70.

77 Wellington Shire Council, Submission 10; City of Greater Dandenong, Submission 18; Real Estate Institute of Victoria, Submission 25.

78 Moorabool Shire Council, Submission 11.

79 Law Institute of Victoria, Submission 26, 12.

80 Mr Michael Macnamara, Submission 4, 5.
6.68 Since registration confers rights, it must be based on examination of instruments by the Registrar. If restrictive covenants were registered rather than recorded, each one would need to be examined for consistency with equitable requirements and legislation.

6.69 The submission from Land Victoria indicates the complexity and cost of the examination that would be required for registration:

The examination procedures of the Office of Titles reflect that covenants are recorded. It would be prohibitively costly were restrictive covenants to be registered. The Office of Titles would need to examine covenants word by word and ensure the registration of the covenant was properly authorised by the governing law. This would have significant resource implications for the Office of Titles and add delays to conveyancing. For this reason ... the current provisions providing for the recording of covenants should remain.80

6.70 Because covenants are created as private agreements, their content and wording is highly variable. Covenants are often poorly drafted, overly broad or unclear. Some may conflict with other laws, such as a covenant that restricts the covenantor from using a builder other than one nominated by the developer.81 Some may be inconsistent with public policy, such as a covenant that prevents the burdened owner from selling the land without the consent of the developer.82

6.71 We think that restrictive covenants should not be registered just for consistency with easements or other forms of restrictions. Easements are less costly to examine. They fall into particular categories and are briefer and more standardised in their wording. They are less likely than covenants to be in conflict with other laws and public policy.

6.72 Registering restrictive covenants would not give them the same legal effect as statutory agreements and statutory restrictions, which have the effect specified in the statutes under which they are created.

6.73 On balance, we doubt that any practical advantage of registering covenants rather than simply recording them would offset the additional costs of registration.

**RECOMMENDATION**

34. Restrictive covenants should not be registered interests. They should continue to be recorded under section 88(1) of the *Transfer of Land Act 1958* (Vic) and recording should not affect their validity.

**IDENTIFICATION OF BENEFITED LAND**

6.74 The law of covenants has always been concerned to ensure that covenants can be renegotiated.83 A burdened owner needs to be able to find the benefited owners to negotiate the release or variation of the covenant or gain permission for a use that would otherwise breach the covenant.84 For this reason, equity developed strict rules to ensure that the benefited land is clearly identified.

6.75 In our consultation paper we discussed issues regarding the identification of the lots benefited by a covenant, particularly a building scheme covenant.85
6.76 A building scheme is a form of subdivision regulated by an equitable rule under which each lot owner is entitled to enforce a covenant given to the developer by the purchaser of any other lot, regardless of the order in which the lots were sold by the developer.66 Unless the covenant provides otherwise, the benefit of a building scheme covenant attaches to ‘every subdivided part which is capable of benefiting from it’. 97

6.77 Building scheme covenants magnify renegotiatability problems because the number of benefited owners is potentially very large.88 In modern subdivisions, hundreds of lots may have the benefit of a particular covenant. Building scheme restrictive covenants affecting Torrens system land are not enforceable in Victoria unless the Registrar records on the folio of the burdened land the nature of the restrictions and the identity of the benefited land.89

6.78 It may not be easy to identify the benefited land from the register. The Registrar records covenants on the folio of the burdened land only.90

6.79 We asked consultees what difficulties they saw in identifying the lots that have the benefit of restrictive covenants. The majority of submissions that commented on this agreed with our analysis of the issues.91

6.80 The Law Institute of Victoria submitted that ‘it is usually extremely difficult to identify the benefited land without access to the instrument that created the covenant’.92 The Association of Consulting Surveyors Victoria commented that it is difficult to ‘determine the benefited land for covenants created over land in older plans of subdivision’.93 Wellington Shire Council submitted that difficulties arise due to the ‘inconsistent application of covenants at the time of transfer’.94 Finally, the Real Estate Institute of Victoria considered that the benefit and burden of restrictive covenants should be noted on titles.95

6.81 Land Victoria submitted that recording covenants in folios of all benefited lots is impractical and unnecessary, because:

First, a Register search statement would run to several pages for a standard green fields subdivision as, for example, if the subdivision contains 100 lots, 99 of the lots would need to be noted as benefiting … This seems unnecessary as it is clear which lots are affected.

Second, in modern creations of covenant there is no difficulty ascertaining both benefited and burdened land. It is in fact in very early creations of covenant that there may be some ambiguity and … this issue would remain.96

6.82 Land Victoria advised of its current requirements for the recording of building schemes:

The Registrar adheres to the well-accepted principles set out in Re Dennerstein in identifying a possible building scheme (such as a common vendor, similar wording and so on). If the Registrar suspects a covenant is part of a building scheme, an application under section 88(1) … will require the registered proprietors of all the land in the scheme to be a party.97

6.83 This requirement ensures that the benefited lots of newly created building scheme covenants will be easier to identify.

6.84 As far as older covenants are concerned, we were informed that appropriately-trained personnel can identify which lots have the benefit of the covenants by researching the instruments and plans on the register.98 The problems in identifying the benefited lots are difficult to resolve as they arise from practices of the past.

6.85 We make no recommendation concerning the recording of restrictive covenants on benefited land.
Chapter 6

Purpose and Nature of Covenants

**POSITIVE COVENANTS**

6.86 Positive covenants impose an obligation on a landowner to do something for the benefit of other land. For example, they may impose an obligation to make a periodic contribution or payment, make repairs to a building, or maintain premises in a specified condition. Restrictive covenants, by comparison, require a person to refrain from doing something or allowing something to be done in relation to the burdened land.

6.87 The distinction between restrictive and positive covenants is one of substance, not form. A covenant is restrictive if it is possible to comply with it by ‘doing absolutely nothing’, while a positive covenant requires some deliberate action or expenditure of money. For example, a covenant that a landowner must not allow a building to fall into disrepair is negative in form, but positive in effect, since action must be taken to maintain the building in a state of repair.

6.88 A positive covenant is enforceable only in contract, against the original covenantor. The burden of the obligation under a positive covenant does not run with land. It is not enforceable against the successors of the covenantor. This is the rule in *Austerberry v Corporation of Oldham* (the *Austerberry rule*).

6.89 There are limited exceptions. Some positive covenants run with land in Victoria, but they are all statutory covenants, created under special legislation, such as planning agreements under section 173 of the Planning and Environment Act. Generally, they can be created only in favour of government agencies or statutory authorities for some regulatory purpose specified by the statute.

6.90 The legal justification for the *Austerberry rule* was explained in *Rhone v Stephens*. Lord Templeman said that enforcing a positive covenant against a successor to the covenantor would breach the rule that contracts are enforceable only against the persons who entered into them. The enforcement of restrictive covenants does not breach the rule, because equity does not enforce the covenant as such. Rather, equity prevents the purchaser from exercising a right that he or she did not acquire.

6.91 The *Austerberry rule* has been challenged in England and abolished in some other jurisdictions. An English report in 1965 questioned whether the rule should be retained. Since then, a series of English reports have put forward proposals for a statutory scheme of restrictive and positive covenants.

6.92 England has not legislated to allow positive covenants, but the English proposals have inspired a few jurisdictions to implement similar schemes. The first was Trinidad and Tobago, which passed an Act in 1981 but never brought it into operation. New Zealand followed in 1987, Northern Ireland in 1997, the Northern Territory in 2000 and Ireland in 2009.

6.93 No Australian jurisdiction apart from the Northern Territory has abolished the *Austerberry rule*. The rule also applies in Canada.

6.94 Positive covenants have been able to run with land in Scotland and the United States since the mid 19th century. Civil law countries generally do not allow positive obligations to run with land, unless they are connected with a servitude (easement).

**MANAGEMENT OF COMMON PROPERTY DEVELOPMENTS**

6.95 A key reason for the growing interest in positive covenants is the rise of common property in urban developments. Large areas of land are subdivided into many individual lots or units for sale to different purchasers. Areas such as driveways, paths, stairwells, liftwells, lobbies, corridors, parking bays and recreation areas are provided for common use and designated as common property.
Whenever there is common property, there is a need for someone to manage and maintain it. There must be a mechanism to impose an obligation on all lot owners to contribute to the costs. In some jurisdictions, law reform bodies have suggested that positive covenants are needed for this purpose.112

The Australian response has been to provide special legislation for owners corporations to own and manage the common property.113 The Subdivision Act and Regulations, together with the Owners Corporations Act 2006 (Vic) (Owners Corporations Act) and the Owners Corporations Regulations 2007 currently form the statutory framework for managing common property.

Where a plan of subdivision makes provision for common property, it must also provide for the creation of an owners corporation.114 An owners corporation may also be established where there is no common property.115 It operates as the governing body for the affected lots and is made up of all the lot owners.116

The Owners Corporations Act empowers the corporation to levy fees on lot owners and to make rules within limits specified by the Act.117 All owners, tenants and occupiers of lots must comply with the rules.118 It also imposes a positive obligation on lot owners to maintain any part of their lot that affects its outward appearance or the use and enjoyment of common property.119

OTHER WAYS OF IMPOSING POSITIVE OBLIGATIONS ON SUCCESSORS

Victoria has a number of statutory provisions that can be used to impose positive obligations on the owners and occupiers of land and all successors.

As we noted above, positive obligations can be made to run with land by a section 173 planning agreement between the developer and the council.120 For example, an agreement may be used to ensure that building works undertaken by the developer or a lot owner conform to design guidelines approved by the council.

Other kinds of statutory agreements can be used to impose positive obligations on owners and occupiers of land for particular regulatory purposes. For example, the Trust for Nature (Victoria) is empowered to enter into positive or restrictive covenants with landowners for the purpose of conservation or preservation.121

100 Positive obligations do run with leases, so that an assignee of the tenant takes subject to the tenant’s obligations in the lease. This discussion focuses on freehold covenants.
101 Austinberry v Corporation of Oldham (1885) 29 Ch D 750.
103 Rhone v Stephens (1994) 2 All ER 65.
104 Ibid.
107 Land and Conveyancing Act 1981 (Tasmania) s 118; this legislation has yet to come into operation.
110 On United States law, see Jesse Dukeminier and James E Krier, Property (Aspen Law and Business, 5th ed, 2002), 862–3. On Scottish law, see Scottish Law Commission, Real Burdens Discussion Paper No 106 (1998) [7.65], noting that affirmative real burdens have been allowed to run with land since Tailors of Aberdeen v Coutts (1840) 1 Rob 296.
111 Scottish Law Commission, Real Burdens, above n 110. McCarthy says the reason that French law does not allow positive covenants is to prevent the reintroduction of forced labour: Paul McCarthy, ‘The Enforcement of Restrictive Covenants in France and Belgium: Judicial Discretion and Urban Planning’ (1973) 73 Columbia Law Review 1, 4.
113 In other jurisdictions, they may be called a body corporate or strata corporation.
114 Subdivision Act 1988 (Vic) s 27A.
115 Ibid s 27.
116 On registration of the plan of subdivision, the owners corporation is incorporated, the owners of the lots become the members and the common property is vested in the lot owners as tenants in common in shares corresponding to their lot entitlements: Subdivision Act 1988 (Vic) s 30.
118 Ibid ss 128, 137, 141.
119 Ibid s 129.
120 Planning and Environment Act 1987 (Vic) s 182.
121 Victorian Conservation Trust Act 1972 (Vic) s 3A. In several American states, conservation covenants entered into between private landowners and charitable or not-for-profit organisations are commonly used to achieve the same purpose: Dukeminier and Krier, above n 110, 858, 892.
Chapter 6

Purpose and Nature of Covenants

6.103 It is sometimes maintained that positive covenants are needed to allow neighbours to establish a contributory scheme for a common facility or utility. Victoria has provisions that enable landowners to contribute to funding for special services or local amenities for their common benefit, in conjunction with the council. For example, a council may arrange for the extension of reticulated water supply, utilities and roads to particular localities, and recover contributions from the benefiting landowners and their successors by levying a differential rate. Councils can also establish a special rate or special charge scheme to fund the provision of local benefits.

SUBMISSIONS

6.104 In our consultation paper, we recognised a need for positive obligations to be imposed on current and future landowners. We recognised that this can be done through legislation and owners corporations rules. We posed the question whether, in addition, it should be possible to impose positive obligations upon landowners by covenants, which would involve abolishing the Austerberry rule.

6.105 All but two of the seven submissions that addressed this question answered in the negative.

6.106 Cathy Sherry said that the experience in the United States is that if positive covenants impose obligations to pay money, governing bodies are needed to manage them. In the United States, developers use positive covenants to empower the homeowner association to take liens over lot owners’ titles to secure unpaid fees. Ms Sherry considers that the Australian system, where owners corporations ‘are created under legislation and are fundamentally uniform’, is preferable to the ‘hotchpotch of legal frameworks’ that might otherwise be created by developers. ‘The most valuable aspect of the Australian regulatory system is the ability of the legislature and the courts to control the content of owners corporation rules.’

6.107 Two submissions were in favour of positive covenants. Stonnington City Council said that councils use covenants to achieve broad outcomes and favoured allowing certain types of positive covenants to run with land.

6.108 Goulburn-Murray Water said that positive covenants could be advantageous, and gave three specific examples of where they might be needed:

- under section 121 of the Road Management Act 2004 (Vic) in relation to private works in road reserves
- pursuant to the Planning and Environment Act, in relation to planning permit conditions, as an alternative to section 173 agreements—such as a requirement for the maintenance and repair of septic tanks
- in the syndication of privatised irrigation supply and works where a group of landowners are required to give certain undertakings to one another in relation to property rights.

6.109 The first example relates to agreements between a road authority and an owner of land adjacent to a road. The agreement may include positive obligations, namely provisions for payment for the works and arrangements for future maintenance. Section 121 of the Road Management Act provides that, if the road authority is the responsible authority for the purposes of the Planning and Environment Act, the terms of the agreement may be incorporated into a section 173 agreement. The problem arises where the road authority is not a responsible authority.
6.110 Since the agreement is not for the benefit of land owned by the authority, it would be ineffective as a positive covenant even if the Austerberry rule were abolished. A statutory agreement would be needed, or a provision such as section 56 of the Road Management Act, which enables a road authority to require adjacent landowners to contribute to the costs of constructing a new road.

6.111 In the second example, it is proposed that a positive obligation to repair that is imposed by a condition in a planning permit should be enforceable as a positive covenant, rather than by requiring the permit applicant to enter into a section 173 agreement which incorporates the obligation.

6.112 The proposal appears to be a roundabout way of making an obligation in a permit condition enforceable against successors. It requires, first, that positive covenants should be allowed to run with land, and secondly, that a permit condition should have the effect of a positive covenant.

6.113 The third example is a new problem. Goulburn-Murray Water is required by the government to divest itself of the ownership of freehold title and easements in land used for spur irrigation channels, and to pass the responsibility for managing them to the irrigators who use them. It was suggested that, if positive covenants were available, they could be created to form a neighbourhood scheme in which individual irrigators undertake positive obligations to the others to maintain a section of channel.130

6.114 Other legal arrangements are under consideration to implement the transfer of responsibility for managing spur irrigation channels. Special legislation may be required to implement the change, which will affect other water authorities.

6.115 Although it does not favour allowing landowners to impose positive obligations by covenant, the Law Institute of Victoria suggested that ‘there should be scope to apply to a court for the creation of a positive covenant’.131 It proposed that the court should be able to order the grant of a covenant if satisfied that the covenant is reasonable and not onerous.132

6.116 The idea of requiring a landowner to enter into a covenant seems to come from an analogy with section 62(2) of the Planning and Environment Act. This provision authorises permit conditions requiring the applicant to enter into a section 173 agreement or a conservation agreement.133

6.117 We consider that, if positive obligations are to be imposed by a statute or a court, they should be imposed upon current and future owners directly by or under the statute. They should not be imposed by requiring a person to enter into a covenant on terms specified by a court or statutory authority.

CONCLUSION

6.118 After considering the submissions, we recommend retaining the Austerberry rule, along with the limited statutory exceptions. We consider that, as a general rule, positive covenants should operate only in contract and should not bind the covenantor’s successors.

6.119 The Austerberry rule ensures that the imposition of positive obligations on land in Victoria remains under the control of Parliament. It would be more difficult for Parliament to control the content of positive covenants than positive obligations created by statute ‘because of resistance to regulation of privately created property rights’.134 Positive covenants could bind successive owners of burdened land to obligations that are unduly onerous in relation to the benefits they provide.
6.120 If positive covenants were allowed to run with land, they could displace owners corporation rules as a means of imposing positive obligations on lot owners. They could be used to avoid the statutory limits and controls on rule making by owners corporations, thereby undermining the protections established by the Owners Corporations Act.

**RECOMMENDATION**

35. The burden of a positive covenant should not run with the covenantor’s land except under specific legislation.

**STATUTORY SCHEME FOR COVENANTS**

6.121 In our consultation paper, we said that, if positive covenants were allowed to run with land, new provisions would be required for them. The equitable rules for restrictive covenants are not sufficient or wholly suitable for positive covenants. For example, positive covenants are usually enforceable against a narrower class of successors than restrictive covenants.

6.122 All the jurisdictions that have introduced positive covenants have found it necessary to provide a statutory scheme of provisions for both positive and restrictive covenants. This is a sizeable undertaking.

6.123 Since we do not recommend the introduction of positive covenants, we do not consider it necessary to replace the rules of equity and the provisions of the Property Law Act with a statutory scheme for covenants.

**LIMITING THE DURATION OF RESTRICTIVE COVENANTS**

6.124 Restrictive covenants exist indefinitely unless they are specifically time-limited when they are created. Most covenants do not contain lapsing provisions and will continue to bind successive owners of the burdened land, even when they no longer serve a useful purpose. As noted by the Scottish Law Commission, ‘[m]ost if not all burdens become obsolete in the end. If burdens are allowed to proliferate without limitation, property will increasingly be encumbered by ageing and inappropriate restrictions.’

6.125 Covenants continue to restrict land use even when their purpose ceases to be relevant or changed circumstances make it impractical to comply. For example, covenants requiring the use of particular building materials could specify materials that are no longer available or are impractical to use due to shortages, high costs, changed building standards or practices, or safety issues.

**RENEGOtiABILITY AND INFORMATION OVERLOAD**

6.126 In earlier times, it was common for just a few covenants to be included in a conveyance, such as a covenant not to build more than one dwelling on the land, or a covenant restricting the use of building materials other than brick and stone.

6.127 With the rise of large subdivisions, there has been a substantial increase in both the number of covenants on each lot and the number of lots that have the benefit of the covenants. The proliferation of covenants imposes high transaction costs on burdened owners who wish to negotiate the release or variation of covenants. Where the number of benefited owners is large, the chances of obtaining the formal consent of all are remote.
6.128 Some covenants generate a daunting amount of documentary material that has to be disclosed by vendors and evaluated by purchasers. Purchasers have limited time to read and assimilate the material, particularly if they buy at auction.\(^{143}\) The Registrar has identified the following problems caused by two types of restrictions—building scheme envelopes and design guidelines:

- **Unnecessarily voluminous plans of subdivision; excessive documentation required for a vendor’s statement; and confusion for customers as a result of obsolete building envelope restrictions or information that does not relate to title boundaries.**\(^{144}\)

6.129 In 2010, the Registrar wrote to municipal chief executive officers, expressing his ‘strong preference that building envelopes should sunset as soon as possible after the land is built on’.\(^{145}\) He also said that he was seeking regulatory change to ensure that the restrictions lapse after seven years.

### SUBMISSIONS

6.130 In our consultation paper, we proposed the introduction of a statutory limitation on the duration for covenants. We proposed three options:\(^{146}\)

1. A statutory sunset provision under which all new covenants or certain types of new covenants will lapse automatically after a certain period of time.
2. A sunset provision as in option one, but with provision for the benefited owner or owners to extend the covenant by notifying the Registrar within a specified time before the expiry date.
3. No lapsing provision, but the judicial power of removal in section 84 of the Property Law Act should include as a relevant consideration the period that has elapsed since the covenant was created, or whether a specified period of time has elapsed.

6.131 Many of the submissions that addressed this question appeared to support the introduction of a statutory ‘sunset’ provision under either options one or two.\(^{147}\) It was not always clear whether the submissions supported statutory provisions limiting the duration of covenants, as opposed to the voluntary inclusion of an expiry date in the drafting of the covenants. For example, the Housing Industry Association favoured greater use of sunset provisions in covenants and restrictions—building scheme envelopes and design guidelines:

6.132 Land Victoria proposed statutory sunset provisions for new and existing restrictive covenants, to address two problems: covenants that have become obsolete by changed conditions and passage of time, and the proliferation of covenants resulting from their use in large-scale subdivisions.\(^{148}\)

6.133 The Association of Consulting Surveyors (Victoria) submitted that ‘the introduction of compulsory sunset clauses or expiry dates on covenants, restrictions and Section 173 agreements (where appropriate) should also be supported’.\(^{150}\)

6.134 Council officers of the Shire of Yarra Ranges submitted that covenants should be abolished but, if they are retained, they should be required to include an expiry date.\(^{151}\) They proposed that existing covenants should also be given an expiry period.

6.135 Brian and Judith Magree proposed a scheme for the statutory lapsing of single dwelling covenants after five years.\(^{152}\)

6.136 The Australian Institute of Conveyancers supported the second option where ‘the benefited owner or owners can extend the covenant by notifying the Registrar within a specified time before the expiry date’.\(^{153}\) They also submitted that there should be a ‘simple and inexpensive’ way to remove ‘non-lapsing covenants’.\(^{154}\)
6.137 The City of Melbourne also supported the second option but submitted that ‘a dominant owner should only be permitted to extend a lapsing period by Court direction’. It further submitted that the Registrar should have the power to ‘remove all clearly lapsed covenants off title’.156

6.138 Only two submissions supported the third option. In expressing his support, Mr Macnamara added the qualification that ‘time in itself should not be a ground for lifting or modifying a covenant’. He said that ‘the term of freehold covenants should be indefinite’.159

6.139 The Law Institute of Victoria also preferred the third option. It said that it did not support a statutory sunset but, if one is introduced, the dominant owner should have a right to extend the time.160

6.140 The Real Estate Institute of Victoria did not support any of the options for change and submitted that covenants should lapse ‘only in circumstances where a covenant has been created for a specified period’.161

DISCUSSION

6.141 In considering the duration of covenants, the interests of the developers, lot owners, future owners and the wider community need to be balanced. The developer and first purchasers of lots in a new subdivision each have an interest in securing the implementation of the plan for the establishment of the built environment.

6.142 Once the estate is established, the covenants designed to achieve its character are redundant. These covenants are likely to incorporate detailed design guidelines and other documents. They should be removed at an early date to prevent the burdening of land with spent covenants and the burdening of purchasers with excessive documentation.

6.143 Some types of covenants are intended to preserve the built environment and neighbourhood character beyond the establishment phase, for the indefinite future. We consider that the desire to prevent change to the environment is not one that the law should uphold indefinitely. Land is a finite resource, and today’s landowners only enjoy the fruits of ownership for a limited time.

6.144 In *Luke v Maroochy Shire Council & Westpac Developments*162 Queensland’s Planning and Environment Court said:

> While brochures, covenants and the like will create expectations in local residents, they cannot be taken as forever determining the future development that will necessarily occur, or proscribing other kinds of development.163

6.145 There is a tension between enduring covenants and the principle of sustainable development.164 As defined by the Brundtland Commission, sustainable development ‘meets the need of the present without compromising the ability of future generations to meet their own needs’.165 This principle of ‘inter-generational equity’ has been expressly recognised in Victorian legislation.167

6.146 As static requirements imposed on evolving communities, covenants have the potential to exclude new uses and to lock in the values, lifestyle choices and aesthetic preferences of the original lot owners.168 This limits the ability of future owners to use land in a way that meets their needs.

6.147 Ms Sherry submitted that landowners who create covenants do not consider the implications for future generations and cannot be expected to do so. That is a function of public planning:
When individual actors negotiate agreements between themselves in relation to land, they are (rightly) thinking of their own interests. Will the agreement make the land more marketable from the vendor’s point of view? Will it make the land a better home and community from the purchaser’s point of view? ... The negotiating parties are not urban planners, nor are they democratically elected government charged with the responsibility of considering the interests of the entire community. They are individual actors with responsibility only for themselves.  

6.148 Although covenants are property rights, this does not mean that they should last forever. There is nothing unusual about property rights being subject to expiry by operation of law. Because property rights would otherwise exist indeﬁnitely, statutory time limits are sometimes necessary to ensure that the use of land by subsequent owners is not unduly restricted. Time limits on the exercise of rights are an accepted way of balancing competing interests.  

6.149 We think that a speciﬁed expiry date should be included in all covenants. Following the discussion in our consultation paper of the different time periods, we recommend that restrictive covenants created in future should have a maximum duration of 20 years, as in the Northern Territory. After the covenant expires, it should be open for renegotiation.  

6.150 A duration of 20 years will be sufﬁcient to protect the interests of developers and initial purchasers who contribute to the establishment of a new subdivision. More than 90 per cent of homeowners who take out a mortgage to buy a home will not be there in 20 years time. In its most recent report on housing mobility and conditions, carried out in 2007–08, the Australian Bureau of Statistics found that: ‘for owners with a mortgage, 58% of ... persons had spent more than 5 years in their current dwelling and 9% had spent more than 20 years’.  

Expired covenants and the register  

6.151 Land Victoria indicated that it would be unable to identify and remove lapsed covenants from folios until the next transaction is recorded on the folio. For the beneﬁt of purchasers, it would need to be clear from the information in the register or instruments whether or not the covenant has lapsed. This would make it more complex to administer a system in which beneﬁted owners can unilaterally extend the covenant by notice.  

6.152 We do not recommend a provision for unilateral extension. It would be inconsistent with the way that time limits on other property rights operate. It is also inconsistent with the purpose of limiting the duration of the covenants.  

EXISTING RESTRICTIVE COVENANTS  

6.153 A further question is whether a sunset provision should apply to existing covenants, as was proposed by Land Victoria and the ofﬁcers of the Shire of Yarra Ranges. We think that it is better to regulate existing rights than to terminate them by legislation. In the following chapters, we make recommendations for the regulation of the operation of covenants and for their removal or variation by judicial order.  

RESTRICTIONS AND SECTION 173 AGREEMENTS  

6.154 Our proposals for a statutory sunset provision are conﬁned to restrictive covenants. We have recommended that statutory restrictions under the Subdivision Act should be created solely for public planning purposes. Sunset provisions, such as the seven-year sunset for building envelope restrictions proposed by the Registrar, could be included in regulations under the Subdivision Act.
6.155 We consider that the sunsetting of section 173 agreements and statutory restrictions is a matter for planning law. As it lies outside our terms of reference, we make no recommendations for limiting their duration.

RECOMMENDATION

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.