

Victorian
Law Reform
Commission

PROPERTY LAWS

EASEMENTS AND COVENANTS

Final Report 22

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Terms of Reference

- 1) The Victorian Law Reform Commission is to review and report on the desirability of changes to Victoria's property laws in relation to—
 - a) the *Property Law Act 1958*; and
 - b) easements and covenants.
- 2) In conducting the review, the Commission should have regard to—
 - the aims of the Attorney-General's *Justice Statement 2*, in particular to simplify and modernise the law, and reduce the costs associated with the justice system;
 - relevant, contemporaneous reviews or policies in the field in other jurisdictions, both within Australia and internationally;
 - opportunities for harmonisation with laws of other Australian jurisdictions;
 - developments in technology, including the availability of electronic conveyancing;
 - the scope for reducing the administrative and/or compliance burden imposed on business and the not for profit sector, in line with the Government's Reducing the Regulatory Burden initiative; and
 - social and demographic trends and new approaches to planning and sustainable land use and risk in Victoria.
- 3) The purpose of the review is to ensure that the laws under review are transparent, accessible and support an efficient and effective system of property rights and transactions in Victoria.
- 4) In particular, the Commission should consider—
 - Any necessary changes to ensure that the *Property Law Act 1958* is certain, effective and up to date. This may include, but is not limited to, any reforms required to modernise and/or simplify the language in the Act, clarify meanings that are in doubt, remove obsolete provisions, or improve the overall functioning of the Act.
 - The operation of the law of easements and covenants broadly, and any beneficial changes to streamline planning processes and/or relevant property laws and practices, as well as options to facilitate simpler and cheaper processes. This should incorporate a consideration of the interrelationship, and opportunities for harmonisation and increased clarity across the rules, practices and Acts, including the *Transfer of Land Act 1958*, *Property Law Act 1958*, *Subdivision Act 1988* and *Planning and Environment Act 1987*, amongst others, that govern easements and covenants.

The Commission is also asked to report on any related issues that are identified during the course of the review and that may warrant further investigation.

The Commission is to report regarding the *Property Law Act 1958* by 30 September 2010, and to report regarding easements and covenants by 17 December 2010.

* Commissioners involved in this reference.

† Retired 30 June 2010

Preface

In August 2009, the former Attorney-General asked the Commission to review Victoria's property laws. The first component of the reference was a review of the *Property Law Act 1958 (Vic)*, which the Commission completed in September 2010. This report, which deals with the law of easements and covenants, concludes the reference.

Easements and restrictive covenants gained recognition as private property rights well before land use and planning legislation emerged. They now exist alongside a variety of powers and restrictions created under the umbrella of planning legislation and enforced by various public entities. The interaction of these separate bodies of law is not always clear.

The recommendations in this report seek to disentangle property law and planning law while modernising the relationship between them. Easements and restrictive covenants required for private purposes would be regulated under property law. Easements and restrictions required for planning purposes would be regulated under planning law.

Some of the reform proposals concerning the relationship between restrictive covenants and planning law emerged after the Commission published a consultation paper in July 2010. Consequently, we recommend further public consultation about these important matters. This process need not delay the implementation of the other recommendations in this report.

I wish to thank the many people who gave generously of their time and expertise to assist the Commission. We received valuable assistance from the expert consultative committee, comprising Justice Clyde Croft, Justice Marcia Neave AO, Ms Jane Allan, Ms Susan Brennan, Associate Professor Sue McCallum, Mr Phil Nolan, Ms Rebecca Leshinsky and Ms Robyn Crozier.

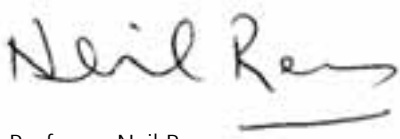
A number of very thoughtful responses to our consultation paper enhanced this report.

I would like to acknowledge, in particular, the academic lawyers, legal practitioners and surveyors who shared important insights into how the law of easements and covenants operates in Victoria and how it has developed elsewhere. They include: Professor Elizabeth Cooke and her team from the Law Commission for England and Wales, Professor Kenneth Reid from the University of Edinburgh, Professor Brendan Edgeworth and Ms Cathy Sherry from the University of New South Wales, Mr Lynden Griggs from the University of Tasmania, Associate Professor Fiona Burns from the University of Sydney, Professor Michael Weir from Bond University, Professors Bill Duncan and Sharon Christensen from Queensland University of Technology, Ms Astrid Di Carlo of Russell Kennedy, Mr Rob Easton of Easton Consulting, and Mr Alan Norman and Mr Gerry Shone from the Association of Consulting Surveyors.

The Commissioner in charge of this reference, Associate Professor Pam O'Connor, has been an inspirational leader of a highly talented team comprising Lindy Smith (team leader), Zane Gaylard and Hilda Wrixon. Pam O'Connor's knowledge of property law and her understanding of its evolution, both in Australia and abroad, are in evidence throughout this report. I congratulate Pam O'Connor and her team for their clear-sighted view of the way ahead in the law of easements and covenants.

I would also like to thank fellow Commissioners Judge Felicity Hampel and Professor Sam Ricketson (retired 30 June 2010), who with Pam O'Connor and me comprised the Division of the Commission responsible for this reference. My colleagues were asked to read and comment upon significant amounts of material and they made important contributions to our recommendations for reform.

A number of Commission staff contributed to the research undertaken for this reference and to the preparation of the final report. I thank the research and policy team, communications team and all the other staff who have supported the Property Division of the Commission in its work.



Professor Neil Rees

Chairperson

17 December 2010

Glossary

Austerberry rule	The rule established in <i>Austerberry v Corporation of Oldham</i> ¹ that the burden of positive covenants does not run with land.
Benefited land	A lot or lots to which the benefit of a restrictive covenant is attached. Same as dominant land in the case of an easement.
Building scheme	A 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.
Burdened land	A lot or lots which are subject to a covenant that requires the lot owner to refrain from doing something on or to the land. Same as servient land in the case of an easement.
Caveat	A notice lodged by an objector under the <i>Transfer of Land Act 1958</i> (Vic) which forbids a specified act such as registration of an instrument or the deletion of a recording.
Common law	Law derived from judicial decisions as opposed to legislation. More specifically, the traditional body of law developed by the English courts, other than the Court of Chancery.
Consolidation	The bringing together of separate lots into a single lot with one title.
Covenant	A binding promise created expressly by an agreement between a person who gives the promise (the covenantor) and a person to whom the promise is given (the covenantee).
Covenantee	The party to a covenant to whom the promise is made and who has the benefit of the promise.
Covenantor	The party to a covenant who gives the promise and has the burden of fulfilling the promise.
Developer	A landowner who subdivides land and is the common vendor of the lots in the subdivision.
Dominant land	A lot or lots which benefit from an easement and to which the easement is attached.
Dominant owner	The owner of dominant land.
Easement	A property right to make a limited use of land by someone other than an owner. It cannot give exclusive possession, and must be for the benefit of other land (the dominant land).
Easement in gross	An easement for the benefit of the holder of the easement (usually a service provider) which is not attached to dominant land. It is not recognised at common law and can exist only under legislation.
Equitable orders	Discretionary orders and remedies such as injunctions, declarations and equitable damages which are granted by a court of equity to right a wrong.
Equity	The separate body of judge-made law, developed in the English Court of Chancery, which 'supplements, corrects, and controls the rules of common law'. ² Equity is similar to the common law in that it is law made by judges rather than by the legislature. The rules and forms of orders developed under this body of law are 'equitable rules' and 'equitable orders'.

1 *Austerberry v Corporation of Oldham* (1885) 2 Ch D 750.

2 LexisNexis Butterworths, *Encyclopaedic Australian Legal Dictionary* (9 September 2004) <<http://www.lexisnexis.com/au/legal/>>.

Folio	The record in the register relating to a lot showing the registered owner and other interests held in the land. Folios are of three kinds: ordinary, provisional or identified.
Immature claim	A claim arising from the use of land in a manner which, if it continued for 20 years, would at the end of that period give rise to a prescriptive easement.
Implied easement	An easement that is not expressly created by a grant or reservation in an instrument or by a statute but is implied by common law or statute so that the land can continue to be used in a particular way. ³
Indefeasibility	As applied to an interest registered under the <i>Transfer of Land Act 1958</i> (Vic), it means that registration confers title to the interest and the holder enjoys it free of other interests subject to specified exceptions. ⁴
Instrument	A document which has legal effect, such as a deed, transfer, planning scheme or permit.
Land Victoria	A unit within the Department of Sustainability and Environment, which incorporates the Registrar, the Office of Titles and other officers.
Lost modern grant	A common law rule of prescription under which an easement is presumed to have been granted but the documents lost. It is a legal fiction which is used to explain why the law recognises an easement that has been used for 20 years without the permission of the owner of the land.
Lot	A parcel of land which has its own unique identifier. A lot for which a folio has been created under the <i>Transfer of Land Act 1958</i> (Vic) is identified by a volume and folio number.
Occupier	A person physically using or taking up a place on land. ⁵ A person can be an occupier without necessarily being an owner or a tenant.
Plan of subdivision	A document required in the subdivisional planning process showing the proposed location of lots and easements. The plan must be certified by a council and registered by the Registrar before individual folios are created for the lots to enable them to be sold. ⁶
Planning scheme	A form of delegated legislation prepared by planning authorities such as councils or the Minister which sets out objectives, policies and controls for the use, development and protection of land in an area, usually a municipal district. ⁷
Positive covenant	An agreement between parties to perform an obligation or expend money in respect of burdened land. It requires something to be done, rather than preventing something, as in a restrictive covenant. It is not an interest in land.
Prescription	A legal rule under which rights can be acquired without being expressly granted if a person makes use or has possession of the property of another for a specified period of time without the owner's permission.
Prescriptive easement	An easement acquired by using land for at least 20 years without secrecy, permission or force. The owner of the land may also need to have known about the use and not prevented it.

3 Peter Nygh and Peter Butt (eds), *Butterworths Australian Property Law Dictionary* (Butterworths, 1997) 122.

4 Indefeasibility refers to the effect of ss 40–2 of the *Transfer of Land Act 1958* (Vic).

5 LexisNexis Butterworths, *Encyclopaedic Australian Legal Dictionary* (9 September 2004) <<http://www.lexisnexis.com/au/legal/>>.

6 See *Subdivision Act 1988* (Vic) s 6; *Sale of Land Act 1966* (Vic) s 9AA.

7 See *Planning and Environment Act 1987* (Vic) Part 2.

Glossary

Profit à prendre	A right to enter another person's land and take something that is part of the land or the natural produce of the land, such as timber, sand or fruit.
Private easement	An easement that is attached to dominant land. The essential characteristics of private easements are explained in Chapter 2.
Referral authority	A person or body specified in clause 66 of each planning scheme to whom an application for a planning permit must be referred by the council. ⁸ Usually a service provider.
Register	The records kept by the Registrar of Titles in accordance with the <i>Transfer of Land Act 1958</i> (Vic). The register includes the folios for particular lots. The entry of information into the register has the legal effects set out in the <i>Transfer of Land Act 1958</i> (Vic).
Registrar	The Registrar of Titles, who carries out duties and functions as set out in the <i>Transfer of Land Act 1958</i> (Vic). The primary function of the Registrar is the administration of the register to ensure that records of interests in property are accurate and up to date.
Regulatory easement	An easement which, under a statutory provision, may be held in gross by a service provider. Regulatory easements are created under statute because easements in gross are not recognised at common law.
Release	Extinguishment of an easement or covenant by instrument executed by the dominant or benefited owner.
Responsible authority	The council, Minister or any other person specified in a planning scheme who is responsible for the implementation and enforcement of the scheme and is empowered to grant permits. ⁹
Restrictive covenant	An agreement between parties which prohibits specified uses of the burdened land. It is a property right attached to the benefited land and enforceable in equity against the owners of the burdened land and their successors.
Run with the land	The term used to describe the benefit and burden of a property right passing to successors in title to land, so that it continues to apply to the new owner or occupier.
Service provider	A council, public authority or corporation with the function under legislation of providing water, drainage, sewerage, gas, electricity or telecommunications services.
Servient land	A lot or lots which are burdened by an easement.
Servient owner	The owner of servient land.
Standing	The right to make an application to a court.
Subdivision	Subdivision means the division of land into two or more parts which can be disposed of separately. ¹⁰ It also refers to the entirety of an estate which has been divided in this way.

⁸ *Planning and Environment Act 1987* (Vic) ss 52(1)(c), 55.

⁹ *Planning and Environment Act 1987* (Vic) s 13.

¹⁰ *Subdivision Act 1988* (Vic) s 3.

Successors	Persons who derive title from or through a specified person, including purchasers, heirs, and tenants.
Torrens system	A system of registered title to land that provides authoritative information about property rights for each lot. In Victoria, the Torrens system is regulated by the <i>Transfer of Land Act 1958</i> (Vic) and administered by the Registrar.
Torrens system land	Land registered in ordinary folios under the <i>Transfer of Land Act 1958</i> (Vic) and held subject to the rules in the Act.
Unity of estates	Where both the dominant and servient lots are owned and occupied by the same person. Also called 'unity of seisin'.

Executive Summary

Easements and restrictive covenants are property rights that a person has in relation to someone else's land. They were first recognised by law at a time when land use was determined largely by custom and private agreements between landholders. Today, most land use is determined by public planning bodies under legislation.

In this report, we rethink the relationship between easements and restrictive covenants created by private agreements, and rights and restrictions created by planning law. Our recommendations will simplify and clarify the law, reduce costs, improve access to justice and make it easier for landowners to know their rights and obligations.

An easement is a right to make use of someone's land without occupying it. A restrictive covenant limits what can be done on or with the land. If the land is sold or transferred, both easements and restrictive covenants can be enforced against subsequent owners and occupiers.

Easements can now be created under planning law as part of the process of subdividing land. Instead of neighbours having to acquire private easements of access through each other's land to water, power and other essential services, most easements for these purposes are held by public authorities. We call them 'regulatory easements'.

We make a number of recommendations to provide increased certainty for owners and purchasers about the easements affecting their land. Standardised wording for common types of easement will enable landowners to know their rights and obligations. To ensure that information about easements is accessible, we recommend limiting the types of easements that can exist without being recorded on title.

Easements can arise under the ancient common law rule of prescription, which enables a person to acquire an easement after 20 years use without the permission of the landowner. We recommend abolishing the rule, while preserving prescriptive easements that already exist. Modern planning has greatly reduced the need to rely on prescription, and any function it still performs could be served by fairer mechanisms.

Where an easement is reasonably necessary and can't be obtained by agreement, we propose that the Victorian Civil and Administrative Tribunal (VCAT) should be able to order that one be created and compensation paid. To reduce the need for easements, we recommend new statutory reciprocal rights of support by a party wall and soil support for buildings and structures on land.

Restrictive covenants are restrictions on the use of land created by agreements between landowners, or between a vendor and a purchaser, for the benefit of other land. They are property rights that pass with the benefited land. Restrictions on land use can also be created under legislation, by plans of subdivision and by agreements between landowners and government authorities. Due to inadequate definitions in the legislation, there is some confusion about whether these legislative restrictions operate as restrictive covenants. Our recommendations clarify the differences between the various types of restrictions.

Restrictive covenants emerged as a means of controlling land use when public planning was in its infancy, but are used now more than ever. When land is subdivided, hundreds of lots may be created. Each lot may be sold by the developer subject to a number of restrictive covenants that can be enforced by all or many of the other lot owners.

Restrictive covenants are commonly created to ensure that the neighbourhood is built to the developer's plan and does not change. They may be created for a limited time but many are of indefinite duration. The proliferation of covenants that are difficult to remove when circumstances change is an emerging problem for future owners. To control the problem, we recommend that future covenants operate for a definite period and no more than 20 years.

Covenants restricting the use of land can have a significant effect on the implementation of planning policies, such as those for higher density and greater diversity of developments in and around areas designated as activity centres. Under planning legislation in force since 2000, a council or VCAT cannot grant a planning permit for a use that would breach a restriction in a covenant, except in very limited circumstances. This rule is out of step with the law in other states and territories. It creates costs and delays in the planning permit system. It makes permit decisions by councils and VCAT depend on the terms of private agreements rather than on planning policies that advance wider interests.

We propose that the provisions in planning legislation for the removal or variation of easements and restrictions should no longer apply to restrictive covenants. Instead, we propose a new regulatory approach, which we recommend should be the subject of further consultation. Under this approach, a planning scheme would be able to specify uses that cannot be prevented by a covenant. A covenant would be unenforceable to the extent that it is inconsistent with a specified use in the planning scheme, but it would not be removed or varied.

Decisions about planning permits would be based on planning schemes and policies rather than covenants. As private agreements, covenants would be enforceable only by owners of the benefited land, not by councils.

We also recommend extending the existing procedures under section 84 of the *Property Law Act 1958 (Vic)* for the variation and removal of restrictive covenants to apply to private easements. Regulatory easements and restrictions would continue to be removed or varied under planning law.

In a number of related recommendations, we propose further amendments to section 84 of the *Property Law Act 1958 (Vic)*. Jurisdiction to hear applications for variation or removal, which currently rests with the Supreme and County Courts, would be extended to VCAT and the Magistrates' Court. Section 84(1) would be re-drafted to provide a list of relevant considerations for VCAT or the court to weigh up in each case. New provisions would provide VCAT with a broader discretion to order an applicant to pay some or all of the respondent's costs.

Our recommendations will clarify concepts and processes that have become more and more muddled as public planning has expanded. Easements and restrictions required for planning purposes will be created, enforced and removed under planning law. Easements and restrictive covenants required for private purposes will be created, enforced and removed under property law.

Recommendations

CHAPTER 2: PURPOSE AND CHARACTERISTICS OF EASEMENTS

PRIVATE EASEMENTS IN GROSS

1. No change should be made to the current rule that easements cannot exist in gross except under special legislation.

NEGATIVE EASEMENTS

2. The categories of negative easement should not be extended to create an easement of access to solar energy, as restrictive covenants provide a more suitable mechanism for this purpose. Further consideration should be given to the development of a public planning framework for regulating solar access for energy generation.

CHAPTER 3: EXPRESS CREATION OF EASEMENTS

EXPRESS SUBDIVISIONAL EASEMENTS

3. Section 98(a) of the *Transfer of Land Act 1958* (Vic) and sections 12(2) and 24(2)(d) of the *Subdivision Act 1988* (Vic) should be consolidated into a single provision that prospectively creates express subdivisional easements.

STANDARD WORDING

4. Standard wording for types of private easements, together with an assigned word label for each type, should be prescribed in regulations. The standard wording should apply to easements created by a registered or unregistered instrument or by a registered plan of subdivision that creates an easement by reference to one or more of the assigned word labels. It would not apply to regulatory easements.
5. The regulations prescribing standard wording for private easements should include updated wording for an easement of carriageway, replacing schedule 12 of the *Transfer of Land Act 1958* (Vic).

CREATION OF PRIVATE EASEMENTS BY ORDER OF VCAT

6. The *Property Law Act 1958* (Vic) should empower VCAT to make an order granting an easement over land if the easement is:
 - a. reasonably necessary for the effective use or development of other land that will have the benefit of the easement, and
 - b. consistent with the reasonable use and enjoyment of the lot or lots over which the easement is sought.
7. VCAT should be empowered to make an order for the grant of an easement over land only if satisfied that:
 - a. the use of the land having the benefit of the easement will not be inconsistent with the public interest
 - b. the owner of the land to be burdened by the easement can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and
 - c. all reasonable attempts have been made by the applicant to obtain the easement or an easement having the same effect but have been unsuccessful.

8. VCAT should not be empowered to make an order granting an easement over Crown land or land in which any right, title or interest is held by a council, VicTrack, the Melbourne Water Corporation, an Authority within the meaning of the *Water Act 1989* (Vic), or a licensee under Division 1 Part 2 of the *Water Industry Act 1994* (Vic).
9. VCAT should be empowered to order that notice of an application for an order granting an easement be given to the council and to any referral authority.
10. When VCAT orders that an easement be granted, it should be required to:
 - a. direct the Registrar to amend the register to give effect to the order, and
 - b. make an order for compensation unless it finds that no compensation should be paid due to the special circumstances of the case.
11. Where the burdened land is registered land, an easement created by VCAT order should take effect only when the Registrar makes a recording of the easement under section 103(1AA) of the *Transfer of Land Act 1958* (Vic).
12. Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) should be amended to enable VCAT to apply the following principles, in place of section 109(1), to the award of costs in a proceeding under the *Property Law Act 1958* (Vic) for an order that an easement be granted:
 - a. Where the application is unsuccessful, the applicant should normally pay the costs of the respondent over whose land the easement is sought.
 - 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 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.
13. An easement created by order of VCAT should be able to be removed or varied by order of a court or VCAT under section 84 of the *Property Law Act 1958* (Vic).
14. Section 36 of the *Subdivision Act 1988* (Vic) should no longer apply to the acquisition of a private easement.

CHAPTER 4: IMPLIED AND PRESCRIPTIVE EASEMENTS

IMPLIED EASEMENTS

15. From the commencement of the provision for easements created by VCAT order (Recommendation 6), it should no longer be possible to acquire an easement under the common law doctrine of necessity. It should still be possible to acquire an implied easement under other common law rules.
16. Section 12(2) of the *Subdivision Act 1988* (Vic) should be amended, without prejudice to any existing rights, to require the circumstances that create the necessity for an easement or right to be in existence or in the developer's plan at the time of subdivision.

PRESCRIPTIVE EASEMENTS

17. From a date on which the provision for easements created by order of VCAT commences (the specified date), the rule of law permitting a person to acquire an easement by long user under the fiction of lost modern grant (prescriptive easements) should be abolished.

Recommendations

18. A prescriptive easement that is subsisting and in use on the specified date should be expressly preserved.
19. Upon the abolition of prescriptive easements, immature claims to a prescriptive easement should not be preserved.

STATUTORY RECIPROCAL RIGHTS

20. The *Property Law Act 1958* (Vic) should provide a reciprocal right of support by a party wall where on adjoining lots there are erected buildings supported by a party wall. The owner of each lot should have the right to the continued existence of the portion of the wall that is necessary for the support of a building on the owner's land and is part of the adjoining lot.
21. The natural right to the support of land in its unimproved state from neighbouring land should be extended to provide a right of support for buildings and structures on the land.
22. On the application of an owner or occupier of land, VCAT should be empowered to make an order authorising the applicant to enter neighbouring land for the purpose of carrying out necessary or desirable works to the applicant's land or to a structure on the land, on such terms as VCAT thinks fit.

COMMON LAW EXTINGUISHMENT BY UNITY OF ESTATES

23. The common law rule that easements are extinguished by unity of estates should be prospectively abolished. An easement should not be extinguished merely because the owner of the lot benefited by the easement acquires an interest, or a greater interest, in the lot burdened by the easement.

NARROWING THE ENFORCEABILITY OF UNRECORDED EASEMENTS

24. Section 42(2)(d) of the *Transfer of Land Act 1958* (Vic) should be amended to provide that the registered title is subject to any easements howsoever acquired before a specified date, and the following easements that are created or arise after a specified date:
 - a. easements created or implied by statute or by common law
 - b. easements at any time omitted from, or misdescribed in, the register.

CHAPTER 5: REGULATORY EASEMENTS

CREATION OF REGULATORY EASEMENTS

25. Section 36 of the *Subdivision Act 1988* (Vic) should be amended to empower VCAT to order that an easement acquired on the basis of a written statement by the council or a referral authority under section 36(1) is an easement in gross for the benefit of the council or referral authority specified in the order.

AVAILABILITY OF INFORMATION ABOUT REGULATORY EASEMENTS

26. Statutes that authorise the creation of a regulatory easement should require the holder of the easement to take all steps necessary to have the easement registered or recorded by the Registrar.

AVAILABILITY OF INFORMATION ABOUT ASSETS WHEN NO EASEMENT HAS BEEN ACQUIRED

27. All service providers operating under Victorian legislation should issue property statements on request containing details of any assets they have installed on a privately owned lot, including any that are not contained within a registered regulatory easement.
28. The Department of Sustainability and Environment should lead the development of a scheme for providing simpler access to information about the assets installed by service providers on a lot, including those installed without creating a regulatory easement.
29. Section 32 of the *Sale of Land Act 1962* (Vic) should be amended to require the vendor's statement to include a warning to the effect that not all assets installed and owned by service providers may be contained within easements and that any proposed renovation to buildings or redevelopment of the property may be affected by the location of these assets.

CHAPTER 6: PURPOSE AND NATURE OF COVENANTS

RESTRICTIVE COVENANTS DISTINGUISHED FROM STATUTORY AGREEMENTS AND RESTRICTIONS

30. Statutes that provide for statutory agreements should specify how they may be enforced, varied and removed and not express the agreements as being enforceable 'as if they were restrictive covenants'.

STATUTORY RESTRICTIONS UNDER THE SUBDIVISION ACT

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.
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'.

THE STATUS OF RESTRICTIVE COVENANTS ON REGISTERED LAND

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.

POSITIVE COVENANTS

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

LIMITING THE DURATION OF RESTRICTIVE COVENANTS

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.

Recommendations

CHAPTER 7: EASEMENTS AND COVENANTS UNDER PLANNING LAW

REMOVAL OF AN EASEMENT UNDER SECTION 36 OF THE SUBDIVISION ACT

37. Section 36 of the *Subdivision Act 1988* (Vic) should be amended so that it no longer provides for the removal of private easements.

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* (Vic) and the *Subdivision Act 1988* (Vic) 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.
39. The *Property Law Act 1958* (Vic) should be amended to clarify that a restrictive covenant that is inconsistent with any law is unenforceable to the extent that it is inconsistent.

CHAPTER 8: REMOVAL OF EASEMENTS AND COVENANTS BY ORDER

REMOVAL AND VARIATION OF EASEMENTS AND RESTRICTIVE COVENANTS BY ORDER OF A COURT OR VCAT

40. Section 84 of the *Property Law Act 1958* (Vic) should be expressed not to apply to a restriction in a plan created by operation of the *Subdivision Act 1988* (Vic).
41. Section 84 of the *Property Law Act 1958* (Vic) should be amended to include the power to remove or vary by order easements created other than by operation of statute.
42. Section 84(3) of the *Property Law Act 1958* (Vic) should be amended to provide that the court may direct that notice of the application be given to any local authority.

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* (Vic).

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* (Vic), 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.

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.

RELEASE FROM CONTRACTUAL OBLIGATIONS

47. The *Property Law Act 1958 (Vic)* should expressly empower the court or VCAT to order that, from the date on which an order under section 84 takes effect:
 - a. If the order is for discharge of the restrictive covenant, the covenantor is released from any contractual obligation or liability under the restrictive covenant without prejudice to his or her liability for any prior breach of the restrictive covenant.
 - b. If the order is for modification of a restrictive covenant, the covenantor is released from any contractual obligation or liability under the restrictive covenant to the extent of the modification without prejudice to his or her liability for any prior breach of the restrictive covenant.

Chapter 1

Introduction

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Introduction

- 1.1 In August 2009, the former Attorney-General asked the Commission to review Victoria's property laws. The full terms of reference contain two components: a review of the *Property Law Act 1958* (Vic) (Property Law Act) and a review of laws relating to easements and covenants.
- 1.2 We reported to the former Attorney-General on the first component on 30 September 2010.¹ This is the final report on easements and covenants.
- 1.3 Later in this chapter, we discuss how we conducted the review and give a summary of what the report contains. First, we provide a brief overview of what easements and covenants are and how the law has evolved in Victoria.

THE LAW OF EASEMENTS AND COVENANTS IN VICTORIA

- 1.4 Easements and restrictive covenants are property rights that originated in different areas of the law at different times. The essential feature of a property right is that it is enforceable against persons other than the one who granted the right.²
- 1.5 Easements have long been recognised at common law, though much of their legal development did not occur until the 18th and 19th centuries in response to population growth, higher density living and an emerging diversity of land use.³
- 1.6 Restrictive covenants were once a purely contractual arrangement at common law. They evolved into a property right partly in response to the same pressures and, in English law, as a result of decisions in the mid 18th century by the Court of Chancery.⁴ The Court of Chancery administered a distinct body of law known as 'equity'.

EASEMENTS

- 1.7 An easement is a right to make use of someone else's land without occupying it. Easements are often created to provide land with permanent access to essential services passing over or under neighbouring land. They can also allow neighbouring land to be used in a way that would otherwise be a trespass, such as crossing one property to access another.
- 1.8 There are many ways in which easements can be created. They can be categorised by method of creation into three groups:
 - easements that are expressly created, such as in a transfer on sale (express easements)
 - easements that arise by implication (implied easements)
 - easements that arise from 20 years use under the rule of prescription (prescriptive easements).
- 1.9 Most easements are expressly created. They can be created by deed or by transfer under the *Transfer of Land Act 1958* (Vic) (Transfer of Land Act). They may be acquired by agreement or, where permitted under legislation, by compulsory process. Many are created by plan of subdivision under planning legislation.
- 1.10 Vendors and purchasers of land do not always turn their minds to whether an easement is needed. In some circumstances, the common law will imply an easement that the parties have failed to create expressly. There are two kinds of implied easement: an easement by implied grant and an easement by implied reservation. The rules for each are different and complex. Easements can also be implied on a registered plan of subdivision, under the *Subdivision Act 1988* (Vic) (Subdivision Act) and the Transfer of Land Act.

- 1.11 Prescriptive easements are created under an ancient legal principle that certain types of property rights can be acquired by long possession or use, without the right ever being formally granted. In Victoria, the long use of a right over neighbouring land can give rise to an easement for that use. The use must have been without force, without secrecy and without the permission of the landowner for a continuous period of 20 years or more.
- 1.12 Under the Transfer of Land Act, all easements, 'howsoever acquired', exist over land even if they do not appear on the register.⁵ If the land is sold, the purchaser takes the land subject to these rights, whether or not they are recorded on the title.

COVENANTS

- 1.13 A covenant is a promise created expressly by an agreement between a person who gives the promise and a person to whom the promise is given. A positive covenant imposes an obligation on a landowner to do something, such as to repair property or contribute towards its maintenance. It is not a property right because it cannot be enforced against subsequent owners and occupiers of the land, unless specifically permitted by legislation.
- 1.14 A restrictive covenant limits the ways in which the landowner may use the land. Developers commonly use restrictive covenants to place restrictions on the use of a lot in a subdivision, often for the benefit of all the other lots. Some restrictions are intended to ensure that new buildings and landscaping are completed in accordance with the original development plan and timetable. Other restrictions are intended to ensure that the future use of lots preserves the character and quality of the neighbourhood.

PUBLIC PLANNING AND PRIVATE RIGHTS

- 1.15 The law under which easements and covenants were first created has been overlaid with property, planning and subdivision legislation as land use has increasingly been regulated by public policy rather than by private agreements and actions interpreted by the courts.
- 1.16 With the passage of the *Planning and Environment Act 1987* (Vic) (Planning and Environment Act) and the Subdivision Act, Victoria, like other Australian jurisdictions, adopted an integrated system for the subdivision of land. Councils and other public authorities are authorised by legislation to acquire easements for regulatory purposes, such as for access and the provision of essential services, and to impose restrictions on land use.
- 1.17 A major finding of this report is that Victorian law has blurred the boundary between regulatory easements and restrictions created under planning statutes, and easements and covenants created by contracts and conveyances between landowners. They are different in purpose and nature and require different rules for their creation, enforcement and removal.
- 1.18 Victorian legislation does not always distinguish between private and regulatory rights and restrictions. This has led to confusion of concepts and terminology, and gaps and overlaps in the application of rules. Some procedures and criteria designed for the management of private easements and covenants apply inappropriately to regulatory easements and restrictions, and vice versa.
- 1.19 Uncertainty about the nature and legal effect of different kinds of restrictions encourages developers, councils and other public authorities to use multiple methods to create them. This can increase costs, not only at the time the restrictions are created, but also when someone later seeks to remove or vary them.

- 1 Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report No 20 (2010).
- 2 Susan Bright, 'Of Estates and Interests: A Tale of Ownership and Property Rights' in Susan Bright and John Dewar (eds), *Land Law Themes and Perspectives* (Oxford University Press, 1998) 529.
- 3 Samantha Hepburn, *Principles of Property Law* (Cavendish Publishing, 1998) 265.
- 4 The Court of Chancery is now known as the Chancery Division of the High Court of England and Wales.
- 5 *Transfer of Land Act 1958* (Vic) s 42(2)(d).

- 1.20 A number of our recommendations are intended to clarify the relationship between planning law and property law, and the distinction between regulatory and private rights. More certainty and simpler processes should reduce disputes about land use and costs and delays in developing land.

REVIEW OF THE LAW OF EASEMENTS AND COVENANTS

- 1.21 In July 2010, we published a consultation paper that outlined the current law, problems, issues and options for reform, and posed 34 questions on which we sought comments.⁶ We received 35 written submissions in response and they are listed in the Appendix.
- 1.22 In preparing the consultation paper, we were assisted by a consultative committee of experts in property law. They comprised property law academics, practitioners in property and planning law, and senior judges. The committee provided valuable guidance on the identification and evaluation of the issues and reform options.
- 1.23 Following the publication of the consultation paper, we met with surveyors, planning and property law practitioners, members of the Victorian Civil and Administrative Tribunal (VCAT) Planning List and departmental officials to discuss the issues raised and ideas for reform.
- 1.24 We have also drawn on public consultations undertaken by the Department of Planning and Community Development on proposed reforms to planning law. In March 2009, the Department released a discussion paper on modernising the Planning and Environment Act, and later that year it released a draft Bill.⁷ It received many public submissions on both the discussion paper and the draft Bill, some of which discussed the law of easements and covenants.⁸

OTHER REVIEWS

- 1.25 Our terms of reference require us to consider 'relevant, contemporaneous reviews or policies in the field in other jurisdictions, both within Australia and internationally'.
- 1.26 This is not the first review of the law of easements and covenants in Victoria. A predecessor law reform body, the Law Reform Commission of Victoria, was given a reference on 1 May 1986 by the Victorian Attorney-General, the Hon Jim Kennan QC MP, 'to examine, report and make recommendations on ... references in relation to land law'. It was asked to look in particular at the rules governing easements and covenants, and it reported to the Attorney-General in October 1992.⁹ The report was not tabled in Parliament and the government of the day did not respond to it, but we have taken account of the findings and recommendations in our review.
- 1.27 Meanwhile, there has been a great deal of law reform activity concerning the law of easements and covenants in other jurisdictions. Reviews in Tasmania,¹⁰ England and Wales,¹¹ Ireland,¹² Northern Ireland,¹³ Scotland,¹⁴ Western Australia,¹⁵ New Zealand,¹⁶ New South Wales,¹⁷ the Northern Territory¹⁸ and Ontario¹⁹ have produced proposals for reform. The American Law Institute has completed its Third Restatement on the Law of Servitudes,²⁰ which reformulated the general principles of the law of the United States in this area.
- 1.28 These reviews, and particularly those conducted in the United States and United Kingdom, have generated a stream of academic literature examining the law of easements and covenants from the perspectives of comparative law, law and economics and human rights. We have been mindful of this wider discourse when examining Victorian laws and practices.

STRUCTURE OF THIS REPORT

- 1.29 Our discussion in this report starts with an outline in Chapter 2 of the general nature and characteristics of easements and the functions they serve. We introduce an important distinction between a private easement, which is a right enjoyed by a landowner over a neighbour's land, and a regulatory easement, which is a right held by a council or other provider of essential services to a neighbourhood.
- 1.30 In Chapter 3, we discuss easements that are created expressly. Instruments creating express easements can be difficult to interpret and we recommend that standard wording be prescribed in regulations. Express easements can also be created on plans of subdivision by operation of overlapping provisions in different legislation. We recommend that the provisions be consolidated.
- 1.31 The discussion then turns to the procedure under section 36 of the Subdivision Act for the compulsory acquisition of easements. We conclude that this provision is useful for acquiring regulatory easements but inappropriate for the acquisition of private easements. We recommend that it should instead be possible for private easements to be created by order of VCAT, and we set out the essential features of the new scheme. The scheme would be similar to the schemes for court-ordered easements that already exist elsewhere in Australia.
- 1.32 Chapter 4 contains our discussion of implied and prescriptive easements. There are too many rules under which easements can be implied and this causes uncertainty and associated costs. The introduction of a scheme whereby easements can be imposed by VCAT would allow some of the existing rules to be abolished. We recommend that it should no longer be possible to acquire an easement under the common law doctrine of necessity or the rule of prescription. To reduce the need for easements and to remedy problems with existing common law rules, we also recommend the creation of a number of statutory reciprocal rights that serve the function of easements. Finally, we recommend amendments to the Transfer of Land Act to narrow the classes of easement that can be enforced against successive owners of the servient land without being recorded or registered.
- 1.33 In Chapter 5 we discuss regulatory easements, which are easements held by service providers for the purpose of providing water, drainage, sewerage, gas and electricity services. Not all regulatory easements are registered, and not all of the pipes, cables and other assets that are used in delivering the services are located within easements. Our recommendations would see regulatory easements recorded on the register, and the existence and location of all assets more easily discovered by owners, purchasers and other service providers.
- 1.34 The discussion turns to restrictive covenants in Chapter 6. We explain the difference between restrictive covenants, covenants in statutory agreements, and statutory restrictions. We recommend changes to the legislation to reduce confusion about the meaning of these terms and the legal effects of the restrictions they describe. After discussing the proliferation in the number of restrictive covenants being created in new subdivisions, and the number of lots that have the benefit of each covenant, we recommend that future covenants should be for a defined period not exceeding 20 years.

- 6 Victorian Law Reform Commission, *Easements and Covenants*, Consultation Paper No 9 (2010).
- 7 Department of Planning and Community Development, *Modernising Victoria's Planning Act: A discussion paper on opportunities to improve the Planning and Environment Act 1987* (March 2009). A copy is available on the Department's website, at <http://www.dpcd.vic.gov.au/_data/assets/pdf_file/0018/41436/P_and_E_Act_Review_Discussion_Paper_Final.pdf>; Planning and Environment Amendment (General) Bill 2009 (Vic).
- 8 Submissions are available to read on the Department of Planning and Community Development's website for the review, at <<http://www.dpcd.vic.gov.au/planning/theplanningsystem/improving-the-system/modernising-victorias-planning-act#subm>>.
- 9 Law Reform Commission of Victoria, *Easements and Covenants* Report No 41 (1992).
- 10 Tasmania Law Reform Institute, *Law of Easements in Tasmania* Final Report No 12 (2010).
- 11 Law Commission (England and Wales), *Easements, Covenants and Profits a Prendre: A Consultation Paper* Consultation Paper No 186 (2008).
- 12 Law Reform Commission (Ireland), *Report on Reform and Modernisation of Land Law and Conveyancing* Law Report No 75 (2005); Law Reform Commission (Ireland), *Report on the Acquisition of Easements and Profits a Prendre by Prescription* Report No 66 (2002); Law Reform Commission (Ireland), *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and other proposals* Report No 70 (2003).
- 13 Northern Ireland Law Commission, *Land Law* Consultation Paper No 2 (2009).
- 14 Scottish Law Commission, *Report on Real Burdens* Report No 181 (2000).
- 15 Western Australian Law Reform Commission, *Final Report on Restrictive Covenants* Report No 91 (1997).
- 16 New Zealand Law Commission, *A New Property Law Act* Report 29 (1994); New Zealand Department of Justice, *Positive Covenants Affecting Land* (1985).
- 17 New South Wales Law Reform Commission, *The Right to Support from Adjoining Land* Report No 84 (1997); New South Wales Land Titles Office, *Review of the Law of Positive Covenants Affecting Freehold Land* (1994).
- 18 Northern Territory Law Reform Committee, *Report on the Law of Property* Report No 18 (1998).
- 19 Ontario Law Reform Commission, *Report on Covenants Affecting Freehold Land* (1989).
- 20 American Law Institute, *Restatement (Third) of Property: Servitudes* (2000).

- 1.35 In Chapter 7, we discuss the removal and variation of easements and ‘restrictions’ under the Subdivision Act and the Planning and Environment Act. We propose that new criteria be provided for a permit to remove an easement or statutory restriction. We note that the provision for administrative enforcement of restrictive covenants by councils is out of step with Australian and international practice, with the exception of Houston, Texas. We also propose that, instead of removing or varying restrictive covenants by planning scheme amendment or permit, the effects of covenants on land uses permitted under planning schemes should be regulated.
- 1.36 Finally, in Chapter 8, we discuss the removal and variation of easements and restrictive covenants. Restrictive covenants can be removed or varied by order of the County Court or Supreme Court under section 84 of the Property Law Act. Our recommendations are to amend section 84 to include easements, confer jurisdiction on VCAT and the Magistrates’ Court as additional forums, and include a list of factors that the tribunal or court would be required to consider in making an order.

Chapter 2

Purpose and Characteristics of Easements

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Purpose and Characteristics of Easements

- 2.1 Victoria has two different types of easements, which we call private easements and regulatory easements. Private easements are property rights under rules of English common law that have been adopted in Victoria. Regulatory easements are a product of statute, and do not have to comply with the common law rules.
- 2.2 We begin this chapter by outlining the common law rules that apply to private easements, then explain how regulatory easements differ from them.

ESSENTIAL CHARACTERISTICS OF PRIVATE EASEMENTS

- 2.3 A private easement is a right enjoyed by a landowner over a neighbour's land. A common example of a private easement is a driveway across a neighbour's lot to get access to a public road (easement of carriageway).
- 2.4 The lot over which the easement exists is called the 'servient land', and its owner is the 'servient owner'. The lot that benefits from the easement is called the 'dominant land', and its owner is the 'dominant owner'. In our example, the driveway is on the servient land and the property at the end of the driveway is the dominant land.
- 2.5 Private easements are not merely contractual rights, even if they are created by an agreement.¹ Once created, they are property rights that are attached to the dominant land.² Private easements enhance the use or enjoyment of the dominant land by making limited use of the servient land.
- 2.6 When the dominant land is transferred to a new owner, the easement is transferred with it. The right can be exercised by anyone who acquires title to the dominant land. In this sense, the easement is said to 'run with the land'.
- 2.7 Just as the benefit of the easement runs with the dominant land, so the burden of the easement runs with the servient land. A purchaser, mortgagee or tenant who derives title from the servient owner who granted the easement takes the land subject to the easement.³
- 2.8 The common law recognises the right to use someone else's land as an easement only if it has all of the following characteristics:⁴
 - There must be dominant land and servient land.
 - The easement must 'accommodate', or benefit, the dominant land.⁵
 - The dominant and servient lots must not be owned and occupied by the same persons.
 - The rights are not expressed too widely and vaguely.⁶
- 2.9 Additionally, the right must not amount to exclusive use of the servient land.⁷ For example, if an owner of land grants a neighbour the right to park in a lock-up garage on the land, the right could not be an easement if it excludes the owner from using the garage.⁸
- 2.10 A right to use land that does not have all of the essential characteristics required at common law is some other form of right, such as a lease, licence or a right created under legislation.

REGULATORY EASEMENTS

- 2.11 Providers of water, drainage, sewerage, gas and electricity services hold easements over land in order to install and maintain cables, pipes and other assets. The legislation under which the service providers operate allows them to hold an easement, despite the fact that they do not own land that benefits from it.⁹ We refer to these easements as regulatory easements.

- 2.12 Regulatory easements are easements in gross. Easements in gross burden servient land but only benefit the holder of the right, and not any dominant land. For this reason, they are not recognised at common law¹⁰ and can only be created under legislation.
- 2.13 Easements held by service providers under legislation are not attached to any other land. There is a holder of the easement, but no dominant land.
- 2.14 Enabling service providers to hold easements in gross is a simpler and more efficient means of ensuring the delivery of essential services than the available alternatives at common law. Otherwise, either the service provider would have to negotiate a lease or licence with every current and subsequent owner of the servient land, or owners of private land would have to acquire easements from their neighbours.
- 2.15 We discuss regulatory easements in more detail in Chapter 5.

SHOULD THERE BE MORE TYPES OF EASEMENTS?

PRIVATE EASEMENTS IN GROSS

- 2.16 There are different theories about why the common law does not allow easements in gross. One explanation is that, where an easement confers only a personal benefit and does not enhance the use of other land, there is insufficient justification for creating property rights that burden land for an indefinite period.¹¹ By prohibiting easements in gross, the common law limits the duration of arrangements that are created for the more transient purpose of conferring personal benefits upon individuals.
- 2.17 Another function of the common law rule against easements in gross may be to prevent over-burdening the servient land. If there were no requirement for the easement to benefit dominant land, the benefit could be assigned, subdivided and shared among an unlimited number of people, all of whom would be entitled to use the servient land.¹² As a leading English text observes:

*The confinement of user to the dominant owner (and his agents or invitees) may, in some circumstances, serve the ecologically important purpose of protecting fragile land from excessive and damaging traffic.*¹³

- 1 While many easements are created by an agreement or conveyance, there are other ways they can be created: see Chapters 3–5.
- 2 Strictly speaking, the benefit of the easement does not attach to the land itself but to an estate or interest in the land. Usually this is the freehold estate.
- 3 A tenant in possession can also grant an easement to an owner or occupier of neighbouring land: Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (Law Book Co, 4th ed, 2007) [18.190]; Jonathan Gaunt and Paul Morgan, *Gale on Easements* (Sweet and Maxwell Ltd, 18th ed, 2008) 120–1.
- 4 *Re Ellenborough Park* (1956) Ch 131; *Riley v Penttila* (1974) VR 547; see also Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (Butterworths, 2nd ed, 2000) [1.4].
- 5 This requirement means that the easement must be for the benefit of the dominant land and be connected to its use. See, eg, Peter Butt, *Land Law* (Law Book Co, 6th ed, 2009) 443–4.
- 6 *Re Ellenborough Park* (1956) Ch 131 at 164. In *Re Ellenborough Park* it was said that it cannot be a mere right of recreation of no utility or benefit.
- 7 *Re Ellenborough Park* (1956) Ch 131 at 164; *Riley v Penttila* (1974) VR 547; Bradbrook and Neave, above n 4, [1.6]–[1.9].
- 8 Michael Weir, 'Easements for Storage and Parking: Time for a Rethink?' in Lyria Bennett Moses, Brendan Edgeworth and Cathleen Sherry (eds), *Security and Property: Selected Essays* (Lawbook Co, 2010) 251.
- 9 See, eg, *Electricity Industry (Residual Provisions) Act 1993* (Vic) s 43; *Gas Industry (Residual Provisions) Act 1994* (Vic) s 61; *Local Government Act 1989* (Vic) s 187A; *Major Transport Projects Facilitation Act 2009* (Vic) s 116; *Pipelines Act 2005* (Vic) s 97; *Rail Management Act 1996* (Vic) s 51; *Water Act 1989* (Vic) ss 130(3), 287Q; *Water Industry Act 1994* (Vic) s 55A.
- 10 In *Gallagher v Rainbow* (1994) 179 CLR 624, 633 it was said that an easement is 'no mere personal right' (Brennan, Dawson and Toohey JJ).
- 11 Brendan Edgeworth, 'The Numerus Clausus Principle in Contemporary Australian Property Law' (2006) 32 *Monash University Law Review* 387, 394–5; Susan French, 'Design Proposal for the New Restatement of the Law of Property Servitudes' (1988) 21 *University of California Davis Law Review* 1213, 1222.
- 12 Kevin Gray and Susan Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2008) [5.1.25].
- 13 *Ibid*, referring to *British Columbia (Minister of Environment Lands and Parks) v Thomas* (1998) 161 DLR (4th) 74, 85.

Purpose and Characteristics of Easements



- 2.18 In its recent report on easements, the Tasmania Law Reform Institute concluded that the current rule serves the public interest in preventing the over-burdening of land with interests that exist for an unlimited period of time.¹⁴ In its view, the benefits of easements in gross can be obtained through alternative means, such as statutory provisions, contracts, licences and leases.¹⁵
- 2.19 We asked in our consultation paper whether there is a need to relax the current restrictions on who can hold easements in gross.¹⁶ All but two of the submissions that answered the question saw no need to do so.¹⁷
- 2.20 On the other hand, Lynden Griggs submitted that easements in gross could play a useful role in conservation and heritage applications, provided that the easements were consistent with planning policies.¹⁸
- 2.21 In the United States, private organisations concerned with heritage preservation and conservation are able to advance their purposes through land use agreements over private land.¹⁹ Victoria has legislation providing for conservation, heritage and planning agreements that are capable of running with the land and binding future owners.²⁰ Only specified bodies are able to enter into these statutory agreements with the landowners. We received no submissions indicating that the provisions under which these agreements are made are inadequate.
- 2.22 Goulburn-Murray Water suggested there may be benefit in allowing private easements in gross,

*particularly as an alternative to Rights of Access Agreements under Part 12 of the Water Act, and where private syndicates take over the responsibility for the operation and maintenance of spur channels.*²¹
- 2.23 We do not see the need to provide an alternative to what can be done under Part 12 of the *Water Act 1989* (Vic).
- 2.24 We agree with the views expressed in the majority of submissions and by the Tasmania Law Reform Institute that there is no need to relax the current restrictions on who can hold easements in gross.

RECOMMENDATION

1. No change should be made to the current rule that easements cannot exist in gross except under special legislation.

NEGATIVE EASEMENTS

- 2.25 Most easements are positive, which means that they give the holder of the easement a right to do something on or in relation to the servient land, such as drive across it or run a water pipe under it. There are a few easements which are negative. A negative easement is ‘a right to receive something from land owned by another without obstruction or interference’.²²
- 2.26 The common law recognises four types of negative easement:
 - a right of support of buildings from land or other buildings
 - a right to receive light through a defined aperture (door or window)
 - a right to receive air through a defined channel
 - a right to receive a flow of water in an artificial stream.

- 2.27 All four types of negative easements are private easements. They were recognised at common law before it became possible to enforce restrictive covenants as an equitable property right, which occurred in the mid 19th century.²³ Since then, restrictive covenants have become the usual method of placing private restrictions on how a neighbour's land is used.
- 2.28 The Law Commission for England and Wales has recently proposed that negative easements be abolished, so that all restrictions on land would be created by 'Land Obligations'—a new kind of property right to replace the restrictive covenant, which would also allow positive covenants to run with land.²⁴
- 2.29 In 1965, an English Court of Appeal judge said that the categories of negative easement are closed.²⁵ Although a leading Australian text doubts that the categories are closed,²⁶ no wholly new types of negative easements have been recognised in England, Australia or the United States for well over 100 years.²⁷

Solar easements

- 2.30 We received a submission from Anna Kapnoullas arguing that Victorian law does not adequately protect solar access rights.²⁸ She proposed a package of measures to reform the law, including a proposal for a solar easement permits system.
- 2.31 A solar easement would be a form of negative easement and whether it can exist at common law is uncertain.²⁹ Adrian Bradbrook has examined the scope for solar easements to be created at common law and has concluded that they might be able to exist as either a form of easement of light or as a new category of negative easement.³⁰
- 2.32 It appears unlikely that a solar easement could be a form of easement of light because an easement of light may not ensure enough sunlight to provide solar access for energy generation.³¹ The amount of sunlight required to utilise solar energy is greater than the amount of light usually required for vision.³²
- 2.33 As for the idea of creating a new form of negative easement, we do not believe the law should recognise an easement of solar access. A restrictive covenant is a more appropriate way of imposing restrictions on a neighbour's use of his or her land because it can specify the restrictions imposed on the burdened land.
- 2.34 As noted in Ms Kapnoullas' submission, easements, by themselves, would not be sufficiently definite to provide an adequate mechanism for protecting solar access.³³ This is partly because the test for establishing nuisance is subjective and requires interference with the easement that 'would be deemed substantial by the ordinary person'.³⁴
- 2.35 Restrictive covenants can be used to restrict uses of land that will obstruct solar access to other land. For example, covenants can be used to restrict the height of walls or fences to prevent overshadowing of solar devices. Without additional statutory requirements, such as the permit system proposed by Ms Kapnoullas, a negative easement of solar access would provide much less guidance as to what the neighbour must do, or refrain from doing, on his or her own land.
- 2.36 Even though we consider restrictive covenants more suitable for this purpose than a new category of negative easement, we do not see private agreements between landowners as a sufficient framework for managing the provision of solar access.
- 2.37 The use of either solar easements or restrictive covenants for this purpose could lead to the emergence of a 'first appropriation' model in which early adopters of solar technology permanently acquire access to the solar energy that is available in a particular area.³⁵ Solar energy is a finite resource, as the right to access for one property may limit access to occupiers of other land due to the relative position and angle of the property's panels.³⁶

14 Tasmania Law Reform Institute, *Law of Easements in Tasmania* Final Report No 12 (2010) [1.17.11]–[1.17.15].

15 *Ibid* [1.17.16].

16 Victorian Law Reform Commission, *Easements and Covenants* Consultation Paper No 9 (2010) 17.

17 Mr Michael Macnamara, Submission 4, 1; Wellington Shire Council, Submission 10, 1; Boroondara Shire Council, Submission 15a, 2; Australian Institute of Conveyancers, Submission 17, 1; City of Greater Dandenong, Submission 18, 1; Real Estate Institute of Victoria, Submission 25, 1; Law Institute of Victoria, Submission 26, 3.

18 Mr Lynden Griggs, Submission 6, 2.

19 Susan French, 'Towards a Modern Law of Servitudes: Reweaving the Ancient Strands' (1982) 55 *Southern California Law Review* 1261, 1287–8.

20 See, eg, Cultural Heritage Agreements under the *Aboriginal Heritage Act 2006* (Vic) ss 68–77; s 173 agreements under the *Planning and Environment Act 1987* (Vic) s 173; Land Management Notices under the *Catchment and Land Protection Act 1994* (Vic) ss 37–40; Land Management Co-operative agreements under the *Conservation, Forests and Lands Act 1987* (Vic) ss 69–72; *Victorian Conservation Trust Act 1972* (Vic) s 3A.

21 Goulburn-Murray Water, Submission 21, 2.

22 Law Commission (England and Wales), *Easements, Covenants and Profits a Prendre: A Consultation Paper* Consultation Paper No 186 (2008) [1.8].

23 We discuss the development of the law of restrictive covenants in Chapter 6.

24 Law Commission (England and Wales), above n 22.

25 *Phipps v Pears* (1965) 1 QB 76, 82–3 (Denning MR) (CA); see also Jesse Dukeminier and James Krier, *Property* (New York: Aspen Law and Business, 5th ed, 2002), 855–8.

26 Bradbrook and Neave, above n 4, [1.49].

27 Dukeminier and Krier, above n 25.

28 Ms Anna Kapnoullas, Submission 19.

29 Adrian Bradbrook, 'Solar Access Law: 30 Years On' (2010) 27 *Environmental and Planning Law Journal* 5, 6–7 ('Solar Access Law').

30 Adrian Bradbrook, 'The Development of an Easement of Solar Access' (1982) 5 *University of New South Wales Law Journal* 229, 231–8.

31 *Ibid* 231–4.

32 *Ibid* 232–4.

33 Ms Anna Kapnoullas, Submission 19, 35.

34 *Ibid*, citing *Colls v Home and Colonial Stores Ltd* (1904) AC 179, 204.

35 See, eg, discussions of 'prior appropriation models' in Troy Rule, 'Shadows on the Cathedral: Solar Access Laws in a Different Light' (2010) *University of Illinois Law Review* 851, 876–8.

36 *Ibid* 862.

- 2.38 Solar easements or restrictive covenants may restrict the height of buildings, the intensity of development or the tree canopy in ways that conflict with public planning policies and building standards.
- 2.39 Professor Bradbrook has argued that planning regulations are the best approach to ensuring solar access.³⁷ For example, one planning scheme in Victoria has adopted policy objectives of minimising overshadowing of solar collectors.³⁸ Similarly, the system proposed by Ms Kapnoullas would rely heavily on planning permits.³⁹ We see merit in dealing with solar access under planning law but recognise that the regulation of solar access is a complex topic that we are unable to examine in the scope of the current review.

RECOMMENDATION

2. The categories of negative easement should not be extended to create an easement of access to solar energy, as restrictive covenants provide a more suitable mechanism for this purpose. Further consideration should be given to the development of a public planning framework for regulating solar access for energy generation.

37 Bradbrook, 'Solar Access Law' above n 29, 21–2.

38 See Melbourne Planning Scheme cl 22.19.

39 Ms Anna Kapnoullas, Submission 19, 47.

Chapter 3

Express Creation of Easements

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Express Creation of Easements



- 3.1 In this chapter, we discuss the creation of easements by the following means:
- by granting or reserving the easement in an instrument (such as a deed or transfer) between the owners of the servient and dominant land
 - by noting the easement on a registered plan of subdivision (an express subdivisional easement)
 - by compulsory acquisition.
- 3.2 We refer to these as 'express' methods of creation because the easement is created in writing.
- 3.3 The easements we discuss in this chapter are primarily private easements, which have the essential characteristics required at common law. Regulatory easements, which are created to provide essential services to neighbourhoods, can also be created by instrument, plan of subdivision or compulsory acquisition but they are not recognised at common law because they are not attached to dominant land. They are created at the direction of service providers operating under legislation, rather than by decisions between landowners. We discuss regulatory easements in more detail in Chapter 5.

EXPRESS GRANT OR RESERVATION

- 3.4 In Victoria, private easements can be expressly created by grant or reservation. Creating an easement by 'grant' means that the servient owner grants the dominant owner an easement over his or her land for the benefit of the dominant land. An easement is created by 'reservation' when a vendor conveys land to a purchaser but reserves an easement over that land, for the benefit of other land that the vendor owns.
- 3.5 The agreement to create or reserve the easement is set out in an instrument such as a deed or instrument of transfer. It can be effective to create an easement even if it is not registered or recorded.¹

EXPRESS SUBDIVISIONAL EASEMENTS

- 3.6 Many easements are now created in Victoria by registering a plan of subdivision or consolidation. Subdivision is the division of a larger parcel into smaller lots; consolidation brings together two or more lots to form a larger lot. For the purposes of this report, we refer only to subdivision because easements are more likely to be created by subdivision than by consolidation.
- 3.7 Victoria has an integrated planning process under which a proposed subdivision requires planning approval and registration before individual folios are created on the register for the subdivided lots.² A person who wishes to subdivide land (a developer) must ordinarily first apply to a 'responsible authority' (usually the local council) for a permit to subdivide the land.³ The responsible authority gives a copy of the application to every relevant 'referral authority' specified in the planning scheme⁴ (usually a public authority, such as a water authority, or a government department). Both the responsible authority and the referral authorities can add conditions to a permit requiring the creation or acquisition of an easement.⁵
- 3.8 After a permit has been granted, the applicant must then prepare and submit a draft plan of subdivision to the local council for certification.⁶ The council refers the draft plan to the relevant referral authorities and both the council and the referral authorities have the power to require amendments to the plan to include certain easements.⁷

- 3.9 The council certifies the plan after checking that it includes the easements required by either itself or the referral authorities.⁸ When the certified plan is registered by the Registrar, the easements shown in the plan are created by operation of section 24(2)(d) of the *Subdivision Act 1988* (Vic) (Subdivision Act). Easements created in this way are ‘express subdivisional easements’.
- 3.10 The Subdivision Act also creates easements that are implied in a plan of subdivision by section 12(2), even though their nature and location is not specified on the plan. We discuss these ‘implied subdivisional easements’ in Chapter 4.

OVERLAPPING PROVISIONS FOR EXPRESS SUBDIVISIONAL EASEMENTS

- 3.11 Overlapping provisions for the creation of express subdivisional easements are contained in two different statutes:
- section 12(1) of the Subdivision Act
 - section 98(a) of the *Transfer of Land Act 1958* (Vic) (Transfer of Land Act).
- 3.12 Section 12(1) of the Subdivision Act requires all proposed and existing easements to be specified in subdivision plans. These easements are then created upon registration of the plan.⁹ Easements created under this section are in addition to those created under section 98(a) of the Transfer of Land Act.¹⁰
- 3.13 Section 98(a) of the Transfer of Land Act, which predates section 12(1) of the Subdivision Act, deems certain classes of easements¹¹ to be attached to the dominant owner’s lot where they are necessary for the reasonable enjoyment of the land and where they are shown on an approved or registered plan of subdivision.
- 3.14 Both sections create easements on registered plans of subdivision, though section 98(a) is limited to certain classes that are necessary for the reasonable enjoyment of the land. They overlap insofar as section 98(a) continues to apply to plans of subdivision registered since the commencement of the Subdivision Act.
- 3.15 We suggested in our consultation paper that the two provisions should be consolidated because it is confusing to have two provisions with overlapping operation but different wording. Submissions that commented on this point agreed there is a need for a single provision that prospectively creates express subdivisional easements.¹²

RECOMMENDATION

3. Section 98(a) of the *Transfer of Land Act 1958* (Vic) and sections 12(2) and 24(2)(d) of the *Subdivision Act 1988* (Vic) should be consolidated into a single provision that prospectively creates express subdivisional easements.

STANDARD WORDING

- 3.16 Instruments creating easements by grant or reservation are often difficult to interpret. The terms are variable, and small differences in wording can change the meaning.¹³ Problems can arise when interpreting instruments that are ambiguous or omit important terms. Even instruments that appear unambiguous on their face can give rise to difficulties of interpretation when unforeseen circumstances arise.

- 1 *Property Law Act 1958* (Vic) s 52. Easements can be registered or recorded by the Registrar but even if they are not, they can be enforced against all registered owners of the servient land: *Transfer of Land Act 1958* (Vic) s 42(2)(d).
- 2 See, eg, *Sale of Land Act 1962* (Vic) ss 8A, 9AA; *Planning and Environment Act 1987* (Vic) s 6, and generally, *Subdivision Act 1988* (Vic).
- 3 Des Eccles and Tannetje Bryant, *Statutory Planning in Victoria* (The Federation Press, 3rd ed, 2006) 28–30; but see *Subdivision Act 1988* (Vic) s 5(4). See also *Planning and Environment Act 1987* (Vic) s 61(1).
- 4 *Subdivision Act 1988* (Vic) s 8. The referral authorities are specified in clause 66 in each planning scheme.
- 5 *Planning and Environment Act 1987* (Vic) s 62.
- 6 *Subdivision Act 1988* (Vic) s 5(3).
- 7 *Ibid* ss 9, 10.
- 8 *Ibid* s 6.
- 9 *Ibid* s 24(2)(d).
- 10 *Ibid* s 12(8).
- 11 Such as easements of access or for water, gas or electricity.
- 12 Stonnington City Council, Submission 23, 1; Mr Dean Jackson, Submission 24, 1; Land Victoria, Submission 27, 7.
- 13 *Gubby v Mornington Peninsula SC & Ors* (2002) VCAT 1344 [26]; *Tonks v Tonks* (2003) VSC 195 [13].

Express Creation of Easements



- 3.17 Easements are often drafted on the basis of unstated assumptions that reflect the understandings and expectations of the original parties at the time the easement was created. They may be unclear to people reading them many years later, particularly if the physical features or uses of the land have changed.
- 3.18 Following the decision of the High Court in *Westfield Management Ltd v Perpetual Trustees Co Ltd*,¹⁴ easements must be interpreted by examining the terms of the instrument. Most other evidence showing what the original parties intended is excluded. The court's ruling in *Westfield* represented a shift in interpretation, which increases the importance of clear and comprehensive drafting.¹⁵
- 3.19 Difficulties in determining the meaning and effect of expressly created easements are not confined to those created by grant or reservation. Similar problems can arise in interpreting subdivisional easements created by specification in a registered plan.
- 3.20 For example, in *Mantec Thoroughbreds Pty Ltd v Batur*,¹⁶ the court had to determine the nature and scope of an easement noted on a registered plan. The easement had been marked on a diagram in the plan with the label 'E-1' and the word 'easement'. E-1 was further described in the plan as a 'way'. The dispute before the court related to the scope of the easement and particularly to which types of traffic the easement allowed over the servient land.¹⁷
- 3.21 In our consultation paper we asked whether standard wording should be adopted for particular types of easements. Standard form wording operates by allowing conveyancers to use certain terms to create predefined types of easement in both plans and instruments. These predefined easements contain standard terms that would commonly appear in well-drafted easements of that type.
- 3.22 The primary benefits of having standard wording are:
- It can address issues that might otherwise be overlooked when drafting. For example, a standard carriageway easement might state whether it extends to a right to park on the carriageway, and whether the dominant owner's employees, customers and visitors are allowed to use the easement.
 - It would reduce ambiguity in easements. Even where ambiguities are found to exist, the uniformity of the standard wording would mean that judicial decisions interpreting one easement would apply to all others of that type.
 - It would provide greater consistency in the types of rights created by easements, meaning that landowners would have a greater awareness of their rights. This could forestall disputes about the scope or use of easements.
- 3.23 All of the submissions that addressed the question stated that standard wording should be adopted for easements.¹⁸
- 3.24 Currently, Victoria has standard wording for easements created using the term 'right of carriageway', though the wording is legalistic and outdated.¹⁹ Otherwise, standard terms exist only for regulatory easements created under planning law for the provision of water, electricity and gas services.²⁰

3.25 Legislation in other Australian jurisdictions contains standard wording for common forms of easements.²¹ A good model for standard wording legislation is schedule 9A to the *Transfer of Land Act 1893* (WA). The schedule provides, for example, that use of the term ‘an easement for a right of footway’ incorporates the following standard wording into the instrument or plan:

*The right of every person who, for the time being, is entitled to an estate or interest in possession in the land indicated as the dominant tenement or any part of the land with which the right is capable of enjoyment or in the case of an easement in gross the person having the benefit of the easement and the right for that person and the person’s employees, agents and visitors, at any time, to go, pass and repass on foot for any purpose, without vehicles, to and from the dominant tenement or any such part of it by the way delineated in this plan/diagram/instrument.*²²

3.26 To avoid ambiguities in express subdivisional easements, we suggested in our consultation paper that statutory definitions or standard form easements could be linked to certain notations in a plan.²³ For example, a statute could provide that an easement marked E-1 ‘easement’ on a diagram in a plan of subdivision is a right of carriageway, expressed in a specified form of wording.

3.27 Land Victoria observed that standard wording might be difficult to implement for notations on a plan of subdivision because the classes of easement frequently overlap on plans.²⁴ This problem could be addressed by ensuring that the individual notations can contain more than one type of standard form easement; for example, an easement of drainage and an easement of carriageway.

3.28 Another issue to consider in introducing standard wording is the effect on the interpretation of existing easements. We expect that the standard wording would apply only to instruments created, and plans registered, after a certain date.

3.29 A final question is where the standard wording should be prescribed. Standard wording for easements created by a deed or instrument of transfer between the dominant and servient owner could be prescribed in regulations made under the *Transfer of Land Act* or the *Property Law Act 1958* (Vic) (*Property Law Act*).

3.30 Many regulatory easements are now created by registering a plan under section 24(2)(d) of the *Subdivision Act*.²⁵ As noted above, standard wording for some of these easements already exists in industry legislation under which water, electricity and gas services are provided. Any necessary further standardisation could be prescribed in the industry legislation or in regulations under the *Subdivision Act*.²⁶

14 *Westfield Management Ltd v Perpetual Trustees Co Ltd* (2007) 239 ALR 75.

15 The extent to which this decision has changed the approach to interpretation, and the limited scope for admitting extrinsic evidence, are analysed by Michael Weir, ‘The Westfield Case: A Change for the Better?’ (2009) 21 *Bond L Rev* 182.

16 *Mantec Thoroughbreds Pty Ltd v Batur* (2009) VSC 351.

17 *Ibid* [66].

18 Mr Michael Macnamara, Submission 4; Mr Lynden Griggs, Submission 6; Wellington Shire Council, Submission 10; Moorabool Shire Council, Submission 11; Boroondara City Council, Submission 15a; Australian Institute of Conveyancers, Submission 17; City of Greater Dandenong, Submission 18; Goulburn-Murray Water, Submission 21; Mr Dean Jackson, Submission 24; Real Estate Institute of Victoria, Submission 25; Law Institute of Victoria, Submission 26; Land Victoria, Submission 27; Association of Consulting Surveyors, Submission 28.

19 *Transfer of Land Act 1958* (Vic) s 72(3), sch 12.

20 *Water (Subdivisional Easements and Reserves) Regulations 2001* (Vic); *Water Industry Regulations 2006* (Vic) pt 4; *Electricity Industry Act 2000* (Vic) s 88, sch; *Gas Industry Act 2001* (Vic) s 146, sch.

21 Tasmania Law Reform Institute, *Law of Easements in Tasmania* Final Report No 12 (2010) 62–3. The standard form easements are contained in: *Transfer of Land Act 1893* (WA) sch 9A; *Real Property Act 1886* (SA) sch 5, 6; *Law of Property Act 2000* (NT) sch 3; *Conveyancing Act 1919* (NSW) sch 8; *Conveyancing and Law of Property Act 1884* (Tas) sch 8; *Transfer of Land Act 1958* (Vic) sch 12.

22 *Transfer of Land Act 1893* (WA), sch 9A.

23 Victorian Law Reform Commission, *Easements and Covenants* Consultation Paper No 9 (2010) 22 [3.23].

24 Land Victoria, Submission 27.

25 They may also be compulsorily acquired or obtained by agreement: see Chapter 5.

26 The regulations would appear to be authorised by *Subdivision Act 1988* (Vic) ss 43(1)(bb) and (bc).

RECOMMENDATIONS

4. Standard wording for types of private easements, together with an assigned word label for each type, should be prescribed in regulations. The standard wording should apply to easements created by a registered or unregistered instrument or by a registered plan of subdivision that creates an easement by reference to one or more of the assigned word labels. It would not apply to regulatory easements.
5. The regulations prescribing standard wording for private easements should include updated wording for an easement of carriageway, replacing schedule 12 of the *Transfer of Land Act 1958* (Vic).

COMPULSORY ACQUISITION

SECTION 36 OF THE SUBDIVISION ACT

- 3.31 Under section 36 of the Subdivision Act, an owner of land may acquire an easement compulsorily over other land in the subdivision or consolidation, or in the vicinity, if granted leave to do so by the Victorian Civil and Administrative Tribunal (VCAT). This provision is useful for the creation of regulatory easements and we discuss in Chapter 5 why it should be retained for this purpose, albeit in amended form. However, we consider that it should no longer apply to the acquisition of private easements.
- 3.32 Clause 52.02 of each planning scheme provides that a permit is required before a person proceeds under section 36 to acquire an easement, unless a council or referral authority gives a written statement in accordance with section 36(1).²⁷ The written statement conveys the view of the council or referral authority that ‘the economical and efficient access to land requires the owner of land to acquire an easement over other land’ and ‘that the acquisition of the easement will not result in an unreasonable loss of amenity in the area affected by the acquisition’.²⁸
- 3.33 If VCAT grants leave, the applicant may acquire the easement by registration of a plan, and the *Land Acquisition and Compensation Act 1986* (Vic) (Land Acquisition and Compensation Act) applies to the acquisition.²⁹
- 3.34 The procedure for an acquisition under section 36 of the Subdivision Act is complex and may result in multiple discontinuous hearings. The applicant must first obtain a permit or a written statement from the council or a referral authority. A decision by a council or referral authority to either make a written statement or to decline to make it is reviewable by VCAT,³⁰ and is heard by the Planning and Environment List.³¹ An application for leave to acquire the easement is heard by VCAT’s Real Property List.³² If leave is granted, the compensation is assessed by VCAT’s Valuation List.³³
- 3.35 In our consultation paper, we argued that section 36 of the Subdivision Act is unsatisfactory as a means of acquiring private easements because:
- it creates a process with multiple steps and decision makers
 - the application of the section is too limited to enable landowners to acquire easements in all cases where they are needed
 - the test for making a statement under the section is too stringent and is not directed to the relevant considerations
 - it does not set out criteria for the decision by VCAT about whether to grant leave to acquire the easement.³⁴
- 3.36 Based on these criticisms, we proposed that section 36 be replaced with a provision for easements created by order of VCAT or a court.

SECTION 235 OF THE WATER ACT

- 3.37 An even more limited mechanism for the compulsory acquisition of rights in the nature of private easements is available under section 235 of the *Water Act 1989* (Vic) (Water Act). Under this section, landowners can apply to the Minister to acquire a right of access to other land for drainage, water supply or salinity mitigation. Upon application, the Minister must appoint an authority to decide whether to grant the right of access, taking into account whether:
- any damage will be caused to the servient property
 - the owner can be fully compensated for any damage.

- 3.38 A right of access has effect only if registered, at which point it is enforceable against subsequent owners of the servient land and is therefore very similar to a regulatory easement.³⁵
- 3.39 Although section 235 of the Water Act is of very limited scope, it is deficient because:
- it is an administrative mechanism for the acquisition of a property right without the consent of the servient owner
 - it provides no criteria for assessing the underlying need for the right of access.
- 3.40 Because the rights created under section 235 of the Water Act are very similar to regulatory easements created under section 36 of the Subdivision Act, we asked in our consultation paper whether section 235 should also be replaced by provisions for court or VCAT-ordered easements.
- 3.41 Goulburn-Murray Water would prefer retaining the provision.³⁶ In its submission, Goulburn-Murray Water stated that the need for section 235 of the Water Act arises in the context of implementing community drainage, water supply and salinity mitigation schemes under section 244 of the Act. Usually, the rights necessary to implement such schemes can be acquired by agreement. In rare instances where this does not occur, section 235 is used.³⁷
- 3.42 The compulsory acquisition of rights by one landowner from another should be determined under a mechanism that contains more fully specified criteria for deciding whether the right should be granted. For example, the criteria currently listed in section 235 do not require the authority to consider why the right of access is being sought or whether it is necessary.
- 3.43 The provision should also include a requirement that the deciding authority balance the need for the compulsory acquisition of the right of access against any detriment to the owner of the land over which it is sought. It might also be relevant to consider the existence or implementation of a community drainage, water supply or salinity mitigation scheme.
- 3.44 The rights of access created under section 235 of the Water Act are not easements and therefore do not fall within our terms of reference. We consider that the provision should be reviewed, but we make no recommendations to replace or amend section 235.

OTHER JURISDICTIONS

- 3.45 In most other Australian jurisdictions, easements can be created by order of a court or tribunal.³⁸
- 3.46 Court-ordered easements operate in a manner similar to section 36 of the Subdivision Act, insofar as they enable a landowner to apply to acquire an easement over other land, but the scope, tests and compensation provisions are different.
- 3.47 A good example of legislation that provides for court-ordered easements is section 88K of the *Conveyancing Act 1919* (NSW). Unlike section 36 of the Subdivision Act, it does not require a statement from a referral authority or council in connection with a proposed planning scheme amendment or planning permit.

27 This is the combined effect of *Subdivision Act 1988* (Vic) s 36(1) and clause 52.02 of the planning scheme: *Echuca Workers & Services Club v Campaspe SC* (2009) VCAT 1633, [20]. The statement may also be in the form of a permit condition as set out in *Planning and Environment Act 1987* (Vic) s 62(2)(l).

28 *Subdivision Act 1988* (Vic) s 36(1).

29 *Ibid* s 36(2).

30 *Ibid* s 40(2). On review, VCAT can make the statement itself or direct the council to make it: *JT Snipe Investments Pty Ltd v Hume CC* (2007) VCAT 1831 [14].

31 See, eg, *Clarcor Pty Ltd v Maroondah CC* (2003) VCAT 435 [15]; *JT Snipe Investments Pty Ltd v Hume CC* (2007) VCAT 1831.

32 *Victorian Civil and Administrative Tribunal Rules 2008* (Vic) sch 1, pt 2, cl 10.6 and see, eg, *Lo Giudice v Yarra CC* (2004) VCAT 1783.

33 *Victorian Civil and Administrative Tribunal Rules 2008* (Vic) r 5.01(4); *Focussed Vision v Nilimbuk CC* (2003) VCAT 1393 [30].

34 Victorian Law Reform Commission, above n 23, 24 [3.33]–[3.44].

35 *Water Act 1989* (Vic) s 236.

36 Goulburn-Murray Water, Submission 21, 3.

37 *Ibid*.

38 *Conveyancing Act 1919* (NSW) s 88K; *Land and Environment Court Act 1979* (NSW) s 40; *Conveyancing Law and Property Act 1884* (Tas) s 84; *Property Law Act 1974* (Qld) s 180; *Law of Property Act 2000* (NT) s 164.

Express Creation of Easements



3.48 Under section 88K of the *Conveyancing Act 1919* (NSW), a court may make an order creating an easement if the easement is ‘reasonably necessary for the effective use or development of other land’. The court can only make an order creating the easement if satisfied that:

- the use of the benefited land will not be inconsistent with the public interest
- the owner of the burdened land can be adequately compensated for any loss
- reasonable attempts have been made by the applicant to obtain the easement.

3.49 The court is able to order that the applicant pay such compensation as it considers appropriate, unless it determines that no compensation is payable because of the special circumstances of the case.³⁹

SUBMISSIONS

3.50 In our consultation paper, we asked whether the provision for compulsory acquisition of easements in section 36 of the Subdivision Act should be replaced with a provision for easements created by order of a court or VCAT.

3.51 Most submissions that answered this question indicated that section 36 of the Subdivision Act should be repealed or amended.⁴⁰ Michael Macnamara said that the criticism of the provision is generally well-founded.⁴¹ Stonnington City Council characterised the process for creating easements under section 36 as ‘uncertain and unwieldy’.⁴²

3.52 Boroondara City Council said that the current provisions are difficult to implement and offer little guidance to assist VCAT or councils in their assessment of applications.⁴³ Council added:

*The concept of making a recommendation to support the creation of an encumbrance over other properties for the benefit of one landowner is difficult for Council to deal with, particularly when Council is making the assessment as part of a planning, not a property law application.*⁴⁴

3.53 Wellington Shire Council said that section 36 of the Subdivision Act should be retained but amended to improve the decision criteria and to specify the range of circumstances in which an application to VCAT for compulsory acquisition can be made.⁴⁵

3.54 The submissions expressed mixed views on the question of whether provisions for court-ordered easements should replace the current provisions for compulsory acquisition. Two submissions wanted section 36 of the Subdivision Act to be amended rather than repealed, and another simply said it should not be repealed.⁴⁶

3.55 Three submissions approved of replacing section 36 of the Subdivision Act with a mechanism for easements to be created by order of a court or VCAT.⁴⁷ A further four submissions appeared to support the proposal, with some reservations.⁴⁸

3.56 Some of the reticence to support the repeal of section 36 of the Subdivision Act in favour of a new mechanism appears to be due to the function it serves in effectively allowing councils and referral authorities to direct the private creation of regulatory easements.

3.57 Although it identified shortcomings in section 36 of the Subdivision Act and called for it to be reviewed, Boroondara City Council saw a need to retain the private compulsory acquisition of easements for the purpose of enabling the provision of particular services to new developments.⁴⁹

- 3.58 The Association of Consulting Surveyors pointed out that referral authorities are generally reluctant to become involved in the compulsory acquisition process unless they see a direct and compelling need.⁵⁰ Section 36 of the Subdivision Act allows developers to undertake the process without relying on prompt action by a referral authority to acquire an easement.
- 3.59 As we discuss in Chapter 5, we agree that section 36 of the Subdivision Act should be retained for the purpose of creating regulatory easements.

RECOMMENDATIONS FOR THE CREATION OF PRIVATE EASEMENTS BY ORDER OF VCAT

- 3.60 Victoria needs new legislation for the compulsory acquisition of private easements for private purposes. Section 36 of the Subdivision Act grafts a procedure for acquiring private easements onto the processes specified in the Land Acquisition and Compensation Act for the acquisition of regulatory easements and other interests in land by public authorities. This provision is unsuitable for the acquisition of easements for private purposes.
- 3.61 Section 36 is limited to plans of subdivision and applications for a permit under planning legislation. These are not the only situations in which an easement may be needed.
- 3.62 We consider that private easements should be able to be created by order of VCAT. We discuss the features of our recommended new scheme, and our reasons for it, below.
- 3.63 The new scheme is also a key element in the package of measures proposed in Chapter 4 for the abolition of prescriptive easements and common law easements of necessity.

FORUM

- 3.64 The idea of giving VCAT jurisdiction to order the creation of easements received general support in submissions. Four of the submissions commenting on this issue favoured VCAT having jurisdiction⁵¹ and two said that the jurisdiction should be shared between VCAT and the courts.⁵² A further two submissions did not specify a particular forum but said that it should be the cheapest and most expedient available.⁵³
- 3.65 VCAT already has jurisdiction to hear applications for leave to acquire an easement under section 36 of the Subdivision Act and appeals from decisions made under section 235 of the Water Act.⁵⁴ Under our proposal, it would have jurisdiction to deal with the acquisition of both regulatory and private easements.
- 3.66 As no court has jurisdiction to order the creation of an easement, there are unlikely to be related proceedings that fall outside VCAT's jurisdiction.

CRITERIA AND TESTS

- 3.67 A criticism of section 36 of the Subdivision Act is that it does not set out sufficient decision criteria. The new scheme will need to provide better guidance while still imposing a suitable threshold for the compulsory imposition of easements. Mr Macnamara said that a 'high bar' should be erected when determining whether to impose an easement, because the power to compulsorily acquire interests in land is generally confined to public authorities.⁵⁵
- 3.68 Two submissions supported the adoption of a 'reasonable necessity' test,⁵⁶ and two appeared to favour a test based on 'strict necessity'.⁵⁷

- 39 *Conveyancing Act 1919* (NSW) s 88K(4).
- 40 The exception was the Real Estate Institute of Victoria, which said that it has no present reason for suggesting that section 36 should not be retained in its current form: Submission 25, 3.
- 41 Mr Michael Macnamara, Submission 4, 1.
- 42 Stonnington City Council, Submission 23, 1.
- 43 City of Boroondara, Submission 15b, 2.
- 44 Ibid.
- 45 Wellington Shire Council, Submission 10, 1.
- 46 Ibid; Borondora City Council, Submission 15b, 2; Real Estate Institute of Victoria, Submission 25, 2.
- 47 Mr Lynden Griggs, Submission 6, 2; Law Institute of Victoria, Submission 26, 5; City of Melbourne, Submission 31, 1.
- 48 Mr Michael Macnamara, Submission 4, 1–2; Stonnington City Council, Submission 23, 1, 2; Dean Jackson, Submission 24, 2; Association of Consulting Surveyors, Submission 28, 2–3.
- 49 Boroondara City Council, Submissions 15a, 1; 15b, 2.
- 50 Association of Consulting Surveyors Victoria, Submission 28, 2.
- 51 Mr Michael Macnamara, Submission 4, 1–2; Wellington Shire Council, Submission 10, 1; Boroondara City Council, Submission 15a, 1; Law Institute of Victoria, Submission 26, 6.
- 52 Real Estate Institute of Victoria, Submission 25, 2. City of Greater Dandenong, Submission 18, 1.
- 53 Mr Lynden Griggs, Submission 6, 2; Stonnington City Council, Submission 23, 2.
- 54 *Water Act 1989* (Vic) s 235(6).
- 55 Mr Michael Macnamara, Submission 4, 1–2.
- 56 Stonnington City Council, Submission 23, 2; Law Institute of Victoria, Submission 26, 5–6.
- 57 Mr Michael Macnamara, Submission 4, 1–2; Real Estate Institute of Victoria, Submission 25, 2.

Express Creation of Easements



- 3.69 A test based on 'reasonable necessity' would not preclude the creation of an easement when the need can be met in another way. Under a test based on 'strict necessity', the creation of the easement would have to be essential and the only feasible option. An example is where the landowner seeks to acquire an easement of carriageway over neighbouring land to gain access to a government road. If the owner can access his or her land by boat, the easement of carriageway is not strictly necessary, but vehicular access may be reasonably necessary.
- 3.70 We consider that the reasonable necessity test, as used in section 88K of the *Conveyancing Act 1919* (NSW),⁵⁸ creates a sufficiently high bar for an application for an easement. Although the criteria for an order under section 88K are broader than those under section 36 of the Subdivision Act, they are still tied to reasonable necessity, which is a difficult threshold to meet.⁵⁹ Section 88K adds a separate requirement that the easement must not be contrary to the public interest.
- 3.71 The New South Wales test is preferable to the 'strict necessity' test because it provides greater flexibility when determining whether an easement should be ordered. A further advantage of adopting the New South Wales test is that there is a body of case law from New South Wales that would aid in the interpretation and application of the test.⁶⁰
- 3.72 For example, in *Marshall v City of Wollongong*,⁶¹ Justice Bryson held that an easement of way was necessary where there was no other practicable means of access to the land by vehicles. Other decisions indicate that section 88K of the *Conveyancing Act 1919* (NSW) might not be satisfied where the impact on the servient owner is too onerous,⁶² or the easement is merely for the convenience of the owner.⁶³

COMPLEXITY AND TIMING

- 3.73 Some submissions expressed concern that easements by order of VCAT or a court might be expensive, lengthy and complex.⁶⁴ We do not consider that the process of creating easements by order of VCAT would necessarily be lengthier or more complex than using the procedures that already exist under section 36 of the Subdivision Act.

INVOLVEMENT OF COUNCILS AND REFERRAL AUTHORITIES

- 3.74 Submissions emphasised the need to ensure that councils and referral authorities are consulted about the creation of easements in their local area.⁶⁵
- 3.75 We agree that councils and referral authorities should continue to be involved, even though the easement is not being created in their favour.⁶⁶
- 3.76 We therefore recommend that the provision for the creation of easements by order of VCAT should also provide for notice of the application to be given to the relevant council. The notification would enable the council or a referral authority to apply to be joined as a party to the proceedings.⁶⁷

COSTS

- 3.77 The submissions from the Law Institute of Victoria and the Real Estate Institute of Victoria argued that, if jurisdiction is given to VCAT, the ordinary costs rule should be altered for applications for an order imposing an easement.⁶⁸ The ordinary rule at VCAT is that parties bear their own costs.⁶⁹ The Law Institute of Victoria and the Real Estate Institute of Victoria argued⁷⁰ that the ordinary costs rule in these cases should be that costs follow the event, which means that the losing party should pay the cost of the application.⁷¹

- 3.78 Under section 88K(5) of the *Conveyancing Act 1919* (NSW), the costs of the proceedings are payable by the applicant, subject to any order of the court to the contrary. The default situation in New South Wales is therefore that the applicant will ordinarily pay regardless of who wins or loses.
- 3.79 In Chapter 8, we discuss the special rules that have developed with regard to costs related to applications to vary or remove covenants under section 84 of the Property Law Act. We also discuss the implications of the *Civil Procedure Act 2010* (Vic), which provides that parties in civil proceedings have an ‘overarching obligation’ to use reasonable endeavours to resolve disputes and to ensure that costs are reasonable and proportionate.⁷²
- 3.80 Similar issues arise with regard to the imposition of easements over land. The defendant should not be unduly exposed to costs for defending an application for special leave to impinge on his or her property rights, but nor should the defendant be deprived of the incentive to accede to a reasonable request or accept a reasonable settlement offer.
- 3.81 We propose that the costs rule should therefore enable VCAT to award costs against the applicant at least until the defendant has had enough time and information to assess the merits of the application. This should protect reasonable landowners seeking to protect their property interests while discouraging frivolous objections and encouraging negotiated settlements. Ultimately, however, an order for costs should remain at the discretion of VCAT, which can take into account the facts and circumstances of the case, the conduct of the parties and other relevant matters.⁷³

APPLICATION TO PUBLIC LAND

- 3.82 Councils and other public bodies also raised concerns about the acquisition of easements over public land. In New South Wales, for example, section 88K of the *Conveyancing Act 1919* (NSW) has been interpreted as empowering the court to grant an easement over community land.⁷⁴
- 3.83 We agree that the legislation allowing for the creation of easements by VCAT order should not extend to easements over public land. A precedent for limiting the acquisition of rights against certain public entities already exists in Victoria.⁷⁵

RECOMMENDATIONS

6. The *Property Law Act 1958* (Vic) should empower VCAT to make an order granting an easement over land if the easement is:
 - a. reasonably necessary for the effective use or development of other land that will have the benefit of the easement, and
 - b. consistent with the reasonable use and enjoyment of the lot or lots over which the easement is sought.
7. VCAT should be empowered to make an order for the grant of an easement over land only if satisfied that:
 - a. the use of the land having the benefit of the easement will not be inconsistent with the public interest
 - b. the owner of the land to be burdened by the easement can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and
 - c. all reasonable attempts have been made by the applicant to obtain the easement or an easement having the same effect but have been unsuccessful.

- 58 See para [3.48].
- 59 It should, however, be noted that in this context the term necessity does not mean the ‘strict necessity’ of an implied easement of necessity. See, eg, *Owners Strata Plan 13635 v Ryan* (2006) NSWSC 221 [28].
- 60 See, eg, *Owners Strata Plan 13635 v Ryan* (2006) NSWSC 221 [26] for a list of relevant authorities.
- 61 *Marshall v City of Wollongong* (2007) NSWSC 137.
- 62 *ING Bank (Aust) Ltd v O’Shea* (2010) NSWCA 71 [46]–[49].
- 63 See, eg, *ibid* [49]–[56].
- 64 Mr Dean Jackson, Submission 24, 2; Association of Consulting Surveyors, Submission 28, 1.
- 65 Stonnington City Council, Submission 23, 1, 2; Association of Consulting Surveyors, Submission 28, 1.
- 66 *Transfer of Land Act 1958* (Vic) s 45(3) provides that the consent of the council is required for the registration of an instrument that creates or surrenders an easement of carriage way.
- 67 See *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 60 for the rule relating to joinder of parties to a VCAT action.
- 68 Law Institute of Victoria, Submission 26, 6. Real Estate Institute of Victoria, Submission 25, 2.
- 69 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109(1).
- 70 Law Institute of Victoria, Submission 26, 6; Real Estate Institute of Victoria, Submission 25, 2.
- 71 See, eg, Neil J Williams, *Civil Procedure Victoria*, (Butterworths, vol 1 1987) [63.02.80]–[63.02.90].
- 72 *Civil Procedure Act 2010* (Vic) ss 10(1), 11, 22, 24.
- 73 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) Division 8.
- 74 *Marshall v Wollongong* (2007) NSWSC 137.
- 75 The *Limitation of Actions Act 1958* (Vic) ss 7, 7A, 7AB, 7B, and 7C limit the right to adverse possession against *inter alia*, the Crown, water authorities and councils.



8. VCAT should not be empowered to make an order granting an easement over Crown land or land in which any right, title or interest is held by a council, VicTrack, the Melbourne Water Corporation, an Authority within the meaning of the *Water Act 1989* (Vic), or a licensee under Division 1 Part 2 of the *Water Industry Act 1994* (Vic).
9. VCAT should be empowered to order that notice of an application for an order granting an easement be given to the council and to any referral authority.
10. When VCAT orders that an easement be granted, it should be required to:
 - a. direct the Registrar to amend the register to give effect to the order, and
 - b. make an order for compensation unless it finds that no compensation should be paid due to the special circumstances of the case.
11. Where the burdened land is registered land, an easement created by VCAT order should take effect only when the Registrar makes a recording of the easement under section 103(1AA) of the *Transfer of Land Act 1958* (Vic).
12. Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) should be amended to enable VCAT to apply the following principles, in place of section 109(1), to the award of costs in a proceeding under the *Property Law Act 1958* (Vic) for an order that an easement be granted:
 - a. Where the application is unsuccessful, the applicant should normally pay the costs of the respondent over whose land the easement is sought.
 - 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 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.
13. An easement created by order of VCAT should be able to be removed or varied by order of a court or VCAT under section 84 of the *Property Law Act 1958* (Vic).
14. Section 36 of the *Subdivision Act 1988* (Vic) should no longer apply to the acquisition of a private easement.

Chapter 4

Implied and Prescriptive Easements

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Implied and Prescriptive Easements



- 4.1 Today, most easements needed for access to land and the provision of services are created by plan of subdivision or by an instrument of transfer on sale. In the past, the process of subdividing land was not regulated by planning law, and the creation of easements was unsystematic.
- 4.2 When part of a larger lot was sold, vendors and purchasers did not always turn their minds to whether an easement was needed for the benefit of the sold land or the land retained by the vendor. Consequently, the common law developed certain rules or 'doctrines' that operated to create easements by implication, based on the actual or presumed intention of the parties.
- 4.3 Apart from easements implied under common law doctrines, certain easements can be implied by operation of statute when the land is subdivided, even though their nature and location is not specified on the plan of subdivision. We call them 'implied subdivisional easements'.
- 4.4 Another way easements can arise without being expressly created is under a common law rule called prescription. A prescriptive easement can be acquired by what is called 'long user' (20 years continuous use).
- 4.5 Victoria retains all the common law rules of implication and prescription that predate the subdivisional planning system, as well as the new statutory provisions for implied subdivisional easements. The result is a complex jumble of overlapping rules. In this chapter, we consider which of these rules are still needed and what changes should be made to streamline them and improve their operation.
- 4.6 We think that, as far as possible, easements should be shown on the folio for the servient land in the title register so that purchasers can easily discover them. We discuss which easements should have to be registered or recorded, and which should be enforceable against subsequent owners of the servient land even if unregistered and unrecorded.

IMPLIED EASEMENTS

COMMON LAW IMPLIED EASEMENTS

- 4.7 In Chapter 3 we explain that private easements can be expressly created at common law either by grant or by reservation. The distinction between grant and reservation also matters when discussing implied easements. Some types of implied easements can only be created by implied grant.
- 4.8 An easement created by implied grant is an easement over land retained by the vendor for the benefit of the land sold to the purchaser. For example, if the vendor uses a driveway over the retained land to access the sold land, the purchaser may assume that he or she will also be able to use the driveway to access the sold land.
- 4.9 Conversely, an easement by implied reservation is an easement over the land sold to the purchaser for the benefit of land retained by the vendor. For example, the parties may intend to reserve a right of carriageway over the land sold, to provide the vendor's retained land with access to a road.¹ The rules as to when the common law will imply the reservation of an easement are more restricted than the rules for implied grant.
- 4.10 The types of easements that can be created at common law by implication include:
 - easements of necessity
 - intended easements
 - easements implied under the rule in *Wheeldon v Burrows*.²

Easements of necessity

- 4.11 Under the doctrine of necessity, the grant or reservation of an easement may be implied at common law. The easement must be 'absolutely necessary' for the use of the land, such as a right of way to access an otherwise landlocked parcel.³
- 4.12 The doctrine relies on the actual or presumed intention of the parties rather than on public policy.⁴ If the parties did not intend to create the easement, it will not be created despite its necessity. For example, in *North Sydney Printing Pty Ltd v Sabemo Investment Corporation Pty Ltd*,⁵ a lot was subdivided and part sold without an easement, leaving the remaining portion landlocked. The court held that an easement of necessity was not created as there was in fact no intention to retain access to the remaining portion.

Intended easements

- 4.13 Intended easements are easements that are implied in order to give effect to the common intention of the vendor and the purchaser as to the proposed use of the land.⁶ The easements can be either impliedly granted to a purchaser or impliedly reserved by a vendor. For example, the grant of a right of way to service a building might be implied where the vendor knew of the purchaser's plan to construct the building on unimproved land.⁷

The rule in *Wheeldon v Burrows*

- 4.14 Under the rule in *Wheeldon v Burrows*,⁸ the grant of an easement may be implied where the vendor enjoyed a 'quasi-easement' over the retained land before the sale. A quasi-easement is a use that would be capable of being an easement if the servient and dominant lands were owned or occupied by different persons.⁹
- 4.15 For example, the vendor may have accessed the sold land by a driveway across the retained land. Since the vendor at that time was simply exercising his or her rights as owner of both lots, no easement could exist until one of the lots was sold. Prior to the sale, the vendor's right to use the driveway is called a 'quasi-easement'.
- 4.16 The conditions under which a quasi-easement will become an implied easement on the sale of the land are:
- at the time of the sale, the exercise of the quasi-easement was continuous and apparent
 - the quasi-easement is necessary for the reasonable enjoyment of the land sold
 - at the time of the sale, the vendor used the quasi-easement for the benefit of the land sold.¹⁰
- 4.17 If all the conditions are satisfied, the quasi-easement becomes an implied easement over land retained by the vendor for the benefit of the sold land.
- 4.18 The rule in *Wheeldon v Burrows* was more useful in the days before subdivisions were regulated by planning law. If a vendor subdivides land into separate lots for sale, the *Subdivision Act 1988* (Vic) (Subdivision Act) provides for easements to be created by plan.¹¹
- 4.19 The rule may still be needed for cases where a vendor owns adjoining lots with separate titles and no subdivision is required before the sale of one lot. For example, a farmer may buy up adjoining lots without consolidating them into a single lot,¹² use them as one large farm for a time, and then sell one of the lots.

- 1 The creation of landlocked lots is now very unlikely to occur in Victoria, due to rigorous subdivision and planning processes, but it has occurred in the past.
- 2 *Wheeldon v Burrows* (1879) 12 Ch D 31.
- 3 See generally, Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2009) 461–4.
- 4 *North Sydney Printing Pty Ltd v Sabemo Investment Corp Pty Ltd* (1971) 2 NSWLR 150; see also *Nickerson v Barraclough* (1981) 1 Ch 426 (CA).
- 5 *North Sydney Printing Pty Ltd v Sabemo Investment Corporation Pty Ltd* (1971) 2 NSWLR 150.
- 6 Butt, above n 3, 460.
- 7 Jonathan Gaunt and Justice Morgan, *Gale on Easements* (Sweet and Maxwell, 18th ed, 2008) 133, citing *Stafford v Lee* (1992) P & CR 172.
- 8 *Wheeldon v Burrows* (1879) 12 Ch D 31.
- 9 Under the rule of unity of estates, no easement can exist as long as the dominant and servient lots are owned and occupied by the same person.
- 10 Butt, above n 3, 466.
- 11 See *Subdivision Act 1988* (Vic) ss 12, 24.
- 12 Consolidation means uniting different lots into a single lot, by registering a plan of consolidation.

Reform of implied easements

- 4.20 In our consultation paper, we outlined three options with regard to common law implied easements:
- retain the current law
 - codify the common law rules of implication in a statute,¹³ or
 - replace the common law rules of implication with a scheme that empowers a court or the Victorian Civil and Administrative Tribunal (VCAT) to order the grant of an easement that is reasonably necessary for the use of land.
- 4.21 Lynden Griggs supported the codification option, noting that common law rules are complex. In his view, a statutory system could overcome deficiencies in the common law. It could ensure that the result is not necessarily 'winner takes all' by imposing conditions on the use of an easement granted or implied by statute and the payment of compensation.¹⁴ The Law Institute of Victoria supported abolishing some rules for implied easements and adopting court-ordered easements.¹⁵
- 4.22 Some submissions expressed a preference for retaining all of the common law rules for implied easements. Michael Macnamara argued that an inspection of the land should put a prospective purchaser on notice, and that the doctrines of implication 'come to the aid of the status quo on land where ... easements under subdivisional legislation have not been brought into existence'.¹⁶ Land Victoria and the Real Estate Institute of Victoria also indicated that they would prefer the common law rules of implication to remain.¹⁷
- 4.23 We consider that just one type of common law implied easement should be abolished: the easement of necessity.
- 4.24 There is some overlap between the easement of necessity and intended easements. Recent authorities indicate that the common law easement of necessity is based on the intention of the parties.¹⁸ The Ontario Law Reform Commission says that easements of necessity may merely be examples of intended easements.¹⁹ Abolishing the easement of necessity would help to streamline the categories of implied easements by reducing overlap.
- 4.25 There would be no need to retain the common law easement of necessity if, as we recommend in Chapter 3, VCAT can order the grant of an easement that is both:
- reasonably necessary for the effective use and development of the dominant land
 - consistent with the reasonable use and enjoyment of the servient land.²⁰
- 4.26 The standard of necessity that we recommend VCAT apply is the same as that which applies to the creation of implied subdivisional easements under section 12(2) of the Subdivision Act (discussed below). It derives from the rule in *Wheeldon v Burrows* and is not as strict as the standard that must be met for the creation of a common law easement of necessity. Therefore, any rights that would have been recognised under the common law easement of necessity would meet the requirements for creation of an easement by VCAT order.
- 4.27 Although it should no longer be possible to acquire an easement under the common law doctrine of necessity, subsisting easements of necessity should be expressly preserved.

- 4.28 The remaining common law doctrines, intended easements and easements implied under the rule in *Wheeldon v Burrows*, serve the useful function of giving effect to the actual or presumed intention of the parties to a transaction. As we received no submissions that the rules caused actual hardship to purchasers of land burdened by the easements, we think they should be retained.

RECOMMENDATION

15. From the commencement of the provision for easements created by VCAT order (Recommendation 6), it should no longer be possible to acquire an easement under the common law doctrine of necessity. It should still be possible to acquire an implied easement under other common law rules.

EASEMENTS IMPLIED BY STATUTE

Section 62 of the Property Law Act

- 4.29 At common law, it was customary to include in conveyances of land certain ‘general words’ to ensure that interests and rights enjoyed by the vendor passed to the purchaser, including all of the easements that benefited the land prior to the sale.²¹ In order to shorten the length of conveyances, legislation was enacted to deem the general words to be included in all conveyances. ‘Conveyance’ is widely defined, and includes an instrument of transfer.²²
- 4.30 Section 62 of the *Property Law Act 1958* (Vic) (Property Law Act) deems conveyances of land to include ‘all ... privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof’.²³
- 4.31 This provision applies to transfers of land under the operation of the *Transfer of Land Act 1958* (Vic) (Transfer of Land Act) as well as to transfers of land under the previous deeds-based system of title.²⁴
- 4.32 The effect of section 62 of the Property Law Act is that any easements or covenants or other interests attached to the land pass with it, regardless of whether they are specified in the instrument of transfer. In addition, section 62 may also operate to convert revocable licences into easements.²⁵
- 4.33 Section 62 may operate in a way the parties did not intend, particularly where a licence is converted into an easement. A number of other jurisdictions have identical provisions, all derived from section 62 of the *Law of Property Act 1925* (UK). Law reform bodies both in Australia and overseas have recommended amending the provision to exclude the possibility that it might operate to create new easements and other property rights.²⁶ We proposed a similar amendment in our consultation paper on the review of the Property Law Act.²⁷ We received no submissions against the idea and recommended in the final report of that review that section 62 be amended accordingly.²⁸

Implied subdivisional easements

- 4.34 Section 24(2)(d) of the Subdivision Act and section 98(a) of the Transfer of Land Act operate to create certain easements as specified in a registered plan. We discuss these express subdivisional easements in Chapter 3.
- 4.35 Section 24(2)(e) of the Subdivision Act operates to create another type of easement by registered plan even though its nature and location are not specified in the plan. We call easements of this type ‘implied subdivisional easements’.²⁹

- 13 This means incorporating the common law rules into a statutory provision.
- 14 Mr Lynden Griggs, Submission 6, 3.
- 15 Law Institute of Victoria, Submission 26, 9.
- 16 Mr Michael Macnamara, Submission 4, 3.
- 17 Real Estate Institute of Victoria, Submission 25, 3. Land Victoria, Submission 27, 5.
- 18 *North Sydney Printing Pty Ltd v Sabemo Investment Corp Pty Ltd* (1971) 2 NSWLR 150.
- 19 Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (1996) 133.
- 20 Recommendation 6.
- 21 Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (Butterworths, 2nd ed, 2000) [4.31].
- 22 *Property Law Act 1958* (Vic) s 18(1).
- 23 *Ibid* s 62(2).
- 24 *National Trustees, Executors & Agency Co v Long* (1939) VLR 33.
- 25 Bradbrook and Neave, above n 21, [4.33]. In *Wright v McAdam* (1949) 2 KB 749, a licence given by a landlord to a tenant to use a coal shed was, on renewal of the lease, turned into an easement by force of s 62; see also *Hair v Gillman* (2000) 80 P & CR 108.
- 26 Law Reform Commission of Victoria, *Easements and Covenants*, Report No 41 (1992) 13–16, Recommendation 5; Northern Ireland Law Commission, *Land Law Consultation Paper NILC 2* (2009) [10.20]; Ontario Law Reform Commission, above n 19, 146; Law Commission (England and Wales), *Easements, Covenants and Profits a Prendre: A Consultation Paper* Consultation Paper No 186 (2008) [4.102]–[4.104], [4.68]–[4.78], [6.21]–[6.30]; Tasmania Law Reform Institute, *Law of Easements in Tasmania* Report No 12 (2010) 31–2, Recommendation 4.
- 27 Victorian Law Reform Commission, *Review of the Property Law Act 1958* Consultation Paper 8 (2010) Appendix A. See also Victorian Law Reform Commission, *Easements and Covenants Consultation Paper 9* (2010) 49 [6.10]–[6.12].
- 28 Victorian Law Reform Commission, *Review of the Property Law Act 1958* Report No 20 (2010) Appendix A.
- 29 We do not discuss section 98(b) of the *Transfer of Land Act 1958* (Vic), which creates implied subdivisional easements in subdivisions of buildings but does not apply to a plan under the Subdivision Act: *Subdivision Act 1988* (Vic) s 12(9).

- 4.36 Section 24(2)(e) of the Subdivision Act provides that, on registration of the plan, 'any easements or rights implied by section 12(2) are created'.
- 4.37 Section 12(2) of the Subdivision Act provides that there are implied into certain plans of subdivision,³⁰ for the benefit of each lot and any common property, 'all easements and rights necessary to provide' the following:
- support, shelter or protection
 - passage or provision of water, sewerage, drainage, gas, electricity, garbage, air or any other service of whatever nature (including telephone, radio, television and data transmission)
 - rights of way
 - full, free and uninterrupted access to and use of light for windows, doors or other openings
 - maintenance of overhanging eaves.
- 4.38 It is possible to expressly note in the plan that only some, or none, of these easements will be implied over the subdivision.³¹
- 4.39 The easements are implied into the plan of subdivision if they are both:
- necessary for the reasonable use and enjoyment of the lot or the common property
 - consistent with the reasonable use and enjoyment of the other lots and the common property.
- 4.40 The phrase 'necessary for the reasonable use and enjoyment' is derived from *Wheeldon v Burrows*. The standard it imposes is less strict than the standard of necessity required for a common law implied easement of necessity.³² The word 'necessary' in this context has been interpreted to mean essential, rather than substantially preferable.³³ Whether an easement is essential depends on whether there is a feasible or reasonably available alternative.³⁴ The standard of necessity required for the easement has therefore been held to be more than as a matter of 'mere convenience',³⁵ but not 'absolutely essential'.³⁶

Conflict with the Torrens system

- 4.41 In our consultation paper, we noted that there are different schools of thought about whether implied easements are consistent with the principles of the Torrens system.³⁷ In one view, implied easements undermine the Torrens system because prospective purchasers may be unaware of them. They are not recorded on the register, yet are enforceable against subsequent registered owners.³⁸ The alternative view is that implied easements have always been enforceable against subsequent registered owners without being recorded on title; they were taken into account when the Torrens system was designed.³⁹
- 4.42 As we discuss below, similar arguments are made about prescriptive easements, which are acquired by long possession or use of land. However, our conclusions about the two different categories of easement are quite different.
- 4.43 Unlike prescriptive easements, implied easements continue to make a valuable contribution to efficient land use. As Land Victoria pointed out '[t]he implication of statutory easements is an essential and common part of modern surveying and land registration practice'.⁴⁰

4.44 It was suggested that implied subdivisional easements are needed because it is not always possible to determine the precise location of installations such as electrical cables and air conditioning units when a plan of subdivision is being prepared. Although it would be desirable to have all easements appear on the register where purchasers can readily discover them, it is not practicable to require all easements to be expressly created and recorded. Land Victoria observed:

*It is not always possible to know with sufficient accuracy where a building boundary will be located until after it is built. In many cases the location of an implied easement cannot be known at the outset. Later insertion of location would be expensive and very complex for multi-storey buildings.*⁴¹

4.45 We believe that implied subdivisional easements are more likely to prevent and settle disputes among lot owners than to create them. We received no submissions indicating that purchasers were disadvantaged by them. However, as we discuss in the next section, there is a risk that purchasers could be disadvantaged if the necessity for an implied subdivisional easement can arise from circumstances that did not exist when the plan was registered.

Possible future application

4.46 In *Gordon v Body Corporate Strata Plan 3023*,⁴² Justice Osborn held that the easements implied by section 12(2) of the Subdivision Act did not depend on the circumstances existing at the time of the subdivision. He held that the phrases 'necessary for the reasonable use and enjoyment of the lot or the common property' and 'consistent with the reasonable use and enjoyment of the other lots and the common property' in section 12(2) should be interpreted as having a prospective operation.⁴³

4.47 Justice Osborn examined the legislative history of section 12 of the Subdivision Act. The predecessor provision, section 12 of the *Strata Titles Act 1967* (Vic), operated to create implied subdivisional easements that 'may from time to time be necessary for the reasonable use or enjoyment' of the common property and each unit on the registered plan.⁴⁴ Section 12(2) of the Subdivision Act, as originally enacted, provided that certain classes of easements were created based on circumstances existing at the time the plan was registered. Those temporal references were subsequently removed by amendment.⁴⁵ Justice Osborn concluded that the terms and history of the legislation show that, if the implication of easements was meant to be confined to circumstances existing at the time of the subdivision, the Act would contain express words of limitation.⁴⁶

4.48 In a subsequent decision, the Court of Appeal appears to have approved Justice Osborn's interpretation.⁴⁷

4.49 The potential for implied subdivisional easements to bind unsuspecting purchasers of the servient land increases substantially if the necessity for them can be implied from circumstances that exist from time to time. Purchasers cannot be expected to anticipate easements that may only become necessary as a result of future development of the dominant land that was not contemplated in the plan.

4.50 In *Gordon v Body Corporate Strata Plan 3023*,⁴⁸ Justice Osborn held that an easement could be implied under section 12(2) of the Subdivision Act for a building extension undertaken 32 years after the subdivision.

30 See *Subdivision Act 1988* (Vic) s 12(2)(a).

31 *Subdivision Act 1988* (Vic) s 12(3). This is qualified in relation to buildings by s 12(3A).

32 *Body Corporate No. 413424R v Sheppard and Another* (2008) 20 VR 362 [66]; *Gordon v Body Corporate Strata Plan 3023* (2004) 15 VR 557 [32].

33 *Body Corporate No. 413424R v Sheppard and Another* (2008) 20 VR 362 [74]–[81].

34 *Ibid* [81]–[82].

35 *Ibid* (2008) 20 VR 362 [58]–[63].

36 *Body Corporate No. 413424R v Sheppard and Another* (2007) VSC 203 [7], upheld by *Body Corporate No. 413424R v Sheppard and Another* (2008) 20 VR 362.

37 Victorian Law Reform Commission, *Easements and Covenants*, above n 27, 50 [6.17]–[6.18].

38 *Transfer of Land Act 1958* (Vic) s 42(2)(d).

39 See Butt, above n 3, 459 and Fiona Burns, 'Implied Easements and the Integrity of the Torrens System' (2009) 21 *Bond Law Review* 1 for examples of these conflicting views.

40 Land Victoria, Submission 27, 7.

41 *Ibid*.

42 *Gordon v Body Corporate Strata Plan 3023* (2004) 15 VR 557.

43 *Ibid* [42].

44 *Ibid* [45].

45 *Ibid* [47]–[48].

46 *Ibid* [48]–[49].

47 *Body Corporate No 413424R v Sheppard and Another* (2008) VSCA 118 [59]–[60].

48 *Gordon v Body Corporate Strata Plan 3023* (2004) 15 VR 557.



- 4.51 We recognise that lots are commonly sold in an undeveloped state with an expectation or requirement that the purchaser will build on the lot. But the process of implication should not have unlimited prospective operation. The purpose of section 12(2) of the Subdivision Act is to imply provisions required for an effective subdivision. It should not be an unlimited grant of implied easements for extensions and works undertaken long after the built environment in the subdivision is established.
- 4.52 We believe that the implication of an easement under section 12(2) of the Subdivision Act should arise from circumstances that existed or were planned by the developer at the time of subdivision.
- 4.53 If a regulatory easement subsequently becomes necessary, the owners corporation or lot owner should apply under section 36 of the Subdivision Act to acquire it for the benefit of the relevant service provider. If a private easement is required and the lot owner cannot obtain it by agreement, the owner of the dominant land would be able to apply to VCAT, under our proposed new provisions, for an order granting an easement. In both cases, VCAT would be empowered to make an order for compensation.

RECOMMENDATION

- 16. Section 12(2) of the *Subdivision Act 1988* (Vic) should be amended, without prejudice to any existing rights, to require the circumstances that create the necessity for an easement or right to be in existence or in the developer's plan at the time of subdivision.

PRESCRIPTIVE EASEMENTS

- 4.54 Prescriptive easements are a separate category of easement that can be created by operation of common law without an express grant. Prescription is an ancient legal principle under which certain types of property rights can be acquired by long possession or use of land. It underlies many rules of property law in English law and European legal systems.⁴⁹
- 4.55 In Victoria, the 'long user' (use) of a right over neighbouring land can give rise to an easement for the use, under a rule of prescription known as the doctrine of lost modern grant.⁵⁰ By a legal fiction, it is presumed that an easement for the use was granted but the documentary evidence of the grant has been lost.⁵¹ Since the doctrine of lost modern grant is the only rule of prescription under which easements can be acquired in Victoria, we simply call it 'prescription'.⁵²
- 4.56 For an easement to arise by prescription, the use must have been capable of being the subject of an easement at common law.⁵³ The use must have been exercised 'as of right' and for a continuous period of 20 years or more (the prescription period).⁵⁴
- 4.57 It has been said that use 'as of right' means use 'as if of right'.⁵⁵ For the use to be 'as of right' it must be without force, without secrecy and without permission.⁵⁶ If the use is authorised by a licence, permit or lease, it will not give rise to a prescriptive easement. Whether use of land has been 'as of right' will be a question of fact to be determined by the court.⁵⁷
- 4.58 In addition, the servient owner must have acquiesced in the use throughout the 20-year prescription period.⁵⁸ To show acquiescence, it must be established that the servient owner had knowledge (or the means of acquiring knowledge) of the use, and had the power to prevent the use or sue the claimant and failed to do so.⁵⁹

4.59 Western Australia allows easements to be acquired by prescription on the same basis as Victoria.⁶⁰ South Australia allows prescriptive easements to run with land only where the same registered owner owned the land for the whole of the prescription period and the easement has been registered.⁶¹ Tasmania has replaced common law prescription with a statutory scheme.⁶² Prescriptive easements cannot be acquired over registered land in New South Wales.⁶³ Queensland does not allow rights of way to arise by prescription.⁶⁴ Otherwise, the position in Queensland, and in the ACT and the Northern Territory, is unclear.⁶⁵

CRITICISMS OF PRESCRIPTION

4.60 As noted in our consultation paper,⁶⁶ prescription has been controversial in Australia and many other jurisdictions. Critics of prescription have said that it:

- conflicts with the Torrens system
- conflicts with notions of fairness and human rights
- is overly broad
- is outdated in light of modern planning law.

Conflict with the Torrens system

4.61 Like implied easements, prescriptive easements are enforceable against subsequent owners of the servient land even though they do not appear on the register.⁶⁷ They are difficult for purchasers to discover, particularly as the use giving rise to the easement might be intermittent and unobservable on inspection of the land.

4.62 Even if a purchaser is aware of the easement, it may be difficult to ascertain its scope since there is no document that sets out the terms. The scope depends upon the use of the servient land during the prescription period.⁶⁸ There may be evidentiary difficulties in establishing the extent and nature of the use during that time.⁶⁹

4.63 There is a policy principle that, in a system of registered title, interests should not run with land unless they are registered or recorded on title.⁷⁰ The former Law Reform Commission of Victoria recommended that prescriptive easements be abolished, partly because of the conflict with this principle.⁷¹ Other commentators have also criticised prescription on this point.⁷² In his submission, Mr Griggs stated that '[p]rescriptive easements have no role to play in a system of Torrens title and their historical legacy has caused nothing but confusion and division'.⁷³

49 The rule of adverse possession, under which a squatter can acquire a possessory title to land, is also a rule of prescription. It is related to, but distinct from, prescriptive acquisition of easements. Adverse possession for 15 years extinguishes the landowner's title under s 8 of the *Limitation of Actions Act 1958* (Vic). That Act does not apply to prescriptive easements.

50 *Nelson v Hughes* (1947) VLR 227; *Sunshine Retail Investments Pty Ltd v Wulff* (1999) VSC 415.

51 Adrian Bradbrook, Susan McCallum and Anthony Moore, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) [18.245].

52 In England, there are three different rules of prescription. Western Australia, Tasmania and South Australia adopted the *Prescription Act 1832* (UK), which provides a different means of acquiring an easement by prescription: Bradbrook and Neave, above n 21, [5.38]–[5.57].

53 Law Reform Commission (Ireland), *Report on the Acquisition of Easements and Profits a Prendre by Prescription* Report No 66 (2002) 3–4.

54 Bradbrook and Neave, above n 21, [5.7]–[5.9], [5.18]–[5.37].

55 *R (Beresford) v Sunderland City Council* (2004) 1 AC 889 [72] (House of Lords, Walker LJ).

56 This is often formulated as '*nec vi, nec clam, nec precario*'.

57 Bradbrook and Neave, above n 21, [5.18].

58 *Ibid* [5.31]–[5.37].

59 Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 8 ('The Future of Prescriptive Easements').

60 *Di Masi v Piromalli* (1980) WAR 57.

61 *Goldberg v Tanner* (1991) 56 SASR 482.

62 *Land Titles Act 1980* (Tas) Pt IXB. We discussed the scheme in Victorian Law Reform Commission, *Easements and Covenants*, above n 27, 67 [7.55]–[7.58].

63 *Williams v State Transit Authority* (2004) 60 NSWLR 286.

64 *Property Law Act 1974* (Qld) s 198A.

65 Bradbrook, McCallum and Moore, above n 51, [18.240].

66 Victorian Law Reform Commission, *Easements and Covenants*, above n 27, Chapter 7.

67 Prescriptive easements are enforceable under s 42(2)(d) of the *Transfer of Land Act 1958* (Vic).

68 Law Reform Commission (Ireland), above n 53, 20–1.

69 Law Commission (England and Wales), above n 26, 72.

70 See, eg, the often cited quote by Chief Justice Barwick in *Breskvar v Wall* (1971) 126 CLR 376, 385 that 'The Torrens system of registered title of which the Act is a form is not a system of registered title but a system of title by registration'.

71 Law Reform Commission of Victoria, above n 26, 21.

72 See, eg, Burns, 'The Future of Prescriptive Easements', above n 59, 23–4, 36–7; Lyria Moses and Cathy Sherry, 'Unregistered Access: Wheeldon v Burrows Easements and Easements by Prescription over Torrens Land' (2007) 81 *Australian Law Journal* 491, 500.

73 Lynden Griggs, Submission 6, 3.

- 4.64 The contrary view is that easements of all kinds have long had a special position under the Torrens system in Victoria and therefore prescriptive easements form part of the overall scheme.⁷⁴

Fairness and human rights

- 4.65 Prescription has been criticised for allowing claimants to acquire a permanent proprietary right for nothing or by 'mere accident'.⁷⁵ The Irish Law Reform Commission said that prescription arguably lacks 'any moral justification' for its operation.⁷⁶
- 4.66 Where the acquisition of the right is not by 'mere accident', prescription has been criticised as rewarding the dominant owners for what would otherwise be wrongful behaviour.⁷⁷ Professor Brendan Edgeworth calls it 'legalised theft'.⁷⁸
- 4.67 It could be argued that the acquisition of an easement by prescription is contrary to human rights because it occurs without consent, due process or compensation.⁷⁹ However, we do not think that prescription is contrary to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter). Section 20 of the Charter states that 'a person must not be deprived of his or her property other than in accordance with law'. Prescriptive acquisition has long been permitted by Victorian law and may be considered to be 'in accordance with the law'.
- 4.68 Professor Edgeworth submitted that, even if the Charter does not authorise the courts to overturn a long-established principle like prescription, human rights as expressed in decisions of bodies such as the European Court of Human Rights 'offer sound policy reasons for the reform of the domestic law in Australia'.⁸⁰

Indiscriminate mechanism

- 4.69 One of the strongest justifications for prescription is that it protects expectations and reliance based on long use,⁸¹ but it is poorly designed for this purpose. Professor Edgeworth characterises it as an indiscriminate mechanism.⁸²
- 4.70 In some respects, the operation of prescription is too broad. While there is a requirement of acquiescence by the servient owner, there is no requirement of actual reliance by the dominant owner on the use.⁸³ Even if reliance exists, it does not follow that it should create an easement.⁸⁴ To confer a permanent property right in the land 'confers too many benefits on the long user'.⁸⁵ It is a disproportionate response.
- 4.71 In other ways, prescription is too limited. The requirement of acquiescence by the servient owner limits its value in protecting reliance based on long use. Where the use is difficult to detect, such as crossbeams of support for buildings adjacent to a boundary, or underground pipes, drains or cables, the servient owner may be able to assert lack of knowledge (and therefore no acquiescence) to defeat the claim to a prescriptive easement.

Discouragement of neighbourly toleration

- 4.72 Acquiescence by the servient owner is the basis of prescription,⁸⁶ but tolerance of a neighbour's incursions might be explained by other factors. Acquiescence in some cases might have more to do with a desire to be a good neighbour and avoid conflict than to legitimise a use.⁸⁷ The Law Commission of England and Wales noted that prescription may actually operate to penalise altruism and 'good neighbourly' attitudes.⁸⁸
- 4.73 Alternatively, conduct deemed to be acquiescence might simply reflect the difficulty in disrupting the encroaching use. For example, it is hard to imagine what reasonable steps can be taken to prevent the acquisition of a prescriptive easement of support of a building.⁸⁹ In such cases, it is likely that 'often the acquiescence will be a fiction not a fact'.⁹⁰

Unnecessary in light of modern planning

4.74 The development of prescription was driven by the lack of planning regulation, and particularly the unregulated private subdivision of land.⁹¹ The introduction of legislation that provides for the creation of express and implied subdivisional easements upon registration of a plan of subdivision has diminished the need to rely on prescription. As noted by Moses and Sherry, '[h]ighly regulated modern systems of planning greatly reduce the likelihood that land will be developed without necessary easements being created'.⁹²

Easements over land held by councils and other statutory authorities

4.75 Submissions from several councils and VicTrack expressed the view that the law should not permit persons to acquire prescriptive easements over their land.⁹³

4.76 VicTrack is a statutory body that owns most of Victoria's railway land. It submitted:

*It seems incongruous that VicTrack is immune from adverse possession claims, but could be subject to claims for lesser interests in land, such as unregistered easements and rights of way by long user. This is particularly so, given the quantity, nature and geographical spread of VicTrack's landholdings ... The reasons for protecting VicTrack from adverse possession claims apply equally to these other claims.*⁹⁴

4.77 The City of Greater Geelong said that claims to prescriptive easements over council land commonly relate to land that was purchased for parking at the rear of retail and commercial areas but is used for unauthorised access to adjoining private properties.⁹⁵ Claims also arise where owners of private adjoining land install gates in park fences, boat ramps over sensitive coastal reserves and double-locks on gates to parkland to gain vehicular access to the rear of their properties.

4.78 The City of Greater Geelong offered the following justifications for statutory protection against prescriptive easements on council land:

- *Loss of interest in community land is against the public interest.*
- *If private owners are seeking permanent easements over public land, where appropriate, that right should be purchased at fair value.*
- *Council's landholdings are extensive and detailed management of prescriptive easements through access licences is onerous.*⁹⁶
- *Administering a licence system for access to Council land is often viewed by licensees as overly restrictive and aimed at revenue raising.*
- *Councils have limited means to prevent unauthorised access once established. Local laws allow only for fines, and enforcement of the Fences Act 1968 and trespass requires the obtaining of court orders.*
- *Resisting registration of prescriptive easements requires time consuming research and gathering of historic information. Witness statutory declarations introduce a level of subjectivity into the process.*⁹⁷

4.79 These submissions demonstrate that prescriptive acquisition imposes significant abatement costs on councils, statutory authorities and corporations such as VicTrack. Accounts of landowners brazenly installing locks, gates and boat ramps on council property for their own use are disturbing. It seems that prescription may provide an incentive for landowners to make unauthorised use of adjoining land from which it is difficult or costly to exclude them.

74 See, eg, *Transfer of Land Act 1890* (Vic) s 74.

75 Law Reform Commission (Ireland), above n 53, 20.

76 Ibid 20.

77 Brendan Edgeworth, 'Adverse Possession, Prescription and their Reform in Australian Law' (2007) 15 *Australian Property Law Journal* 1, 23.

78 Ibid.

79 See generally, Lynden Griggs, 'Possession, Indefeasibility and Human Rights' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 286.

80 Professor Brendan Edgeworth, Submission 29, 10–11.

81 Jaffey argues that the key justification theory in property law is the 'reliance principle', which upholds the assumption of persons that they will have the benefit of a property right when they have acted in reliance on it in accordance with background principles of law: Peter Jaffey, *Private Law and Property Claims* (Hart Publishing, 2007) 79.

82 Edgeworth, above n 77, 25.

83 Ibid 14.

84 Law Commission (England and Wales), above n 26, [4.176].

85 Professor Brendan Edgeworth, Submission 29, 1.

86 *Dalton v Angus* (1881) LR 6 App Cas 740, 773–4.

87 Michael Hernandez, 'Restating Implied, Prescriptive, and Statutory Easements' (2005) 40 *Real Property, Probate and Trust Journal* 75, 109.

88 Law Commission (England and Wales), above n 26, [4.176].

89 Moses and Sherry, above n 72, 499.

90 Colin Sara, 'Prescription—What is it for?' (2004) *The Conveyancer* 13, 16 citing *Dalton v Angus* (1881) 6 App. Cas. 740, 817.

91 See generally, Moses and Sherry, above n 72, 491.

92 Moses and Sherry, above n 72, 500.

93 City of Greater Geelong, Submission 14, 2; VicTrack, Submission 3; Frankston City Council, Submission 9, 2.

94 VicTrack, Submission 3, 1.

95 City of Greater Geelong, Submission 14, 2.

96 The grant of a licence means that the use is by permission, and therefore does not meet the requirements for acquisition of an easement by prescription.

97 City of Greater Geelong, Submission 14, 2.



Alternatives to prescription

- 4.80 In our consultation paper, we noted that prescription provides benefits as well as creating problems.⁹⁸ It may have a function in quieting disputes where a servient landowner might otherwise seek to disrupt a longstanding use of the land. It may also save costs by allowing easements of a minor nature to be created by long use where the cost of recording or registering them is out of proportion to the perceived need.
- 4.81 If the rule of prescription is abolished, there is a need to ensure that the functions it currently serves are met in other ways. In our consultation paper, we suggested that this could be achieved by a combination of:
- existing express and implied subdivisional easements created under the Subdivision Act
 - the introduction of court-ordered easements, subject to payment of compensation
 - new statutory reciprocal rights in the nature of easements, to avoid the need to rely on prescription to obtain an easement of party wall or an easement of support for buildings (discussed later in this chapter).⁹⁹
- 4.82 Three submissions indicated that prescription should not be abolished in favour of court-ordered easements.¹⁰⁰ Mr Macnamara said that:
- [T]he rule of prescription ... generally come[s] to the aid of the maintenance of the status quo on land where for a variety of reasons express easements or statutory easements under subdivisional legislation have not been brought into existence.*¹⁰¹
- 4.83 Eight submissions indicated clear support for replacing prescription with court-ordered easements.¹⁰² Professor Edgeworth submitted that a mechanism for court-ordered easements similar to section 88K of the *Conveyancing Act 1919* (NSW) would be 'a useful alternative regime for dealing with compensable ... interests by prescription'. He said that the provision for compensation overcomes the human rights objections to compulsory acquisition.
- 4.84 As we discuss in Chapter 3, we favour the introduction of easements created by order of VCAT rather than by a court, though section 88K of the *Conveyancing Act 1919* (NSW) provides a useful model.

CONCLUSIONS ON REFORM OF PRESCRIPTION

- 4.85 Prescription should be abolished, not just for land owned by councils and statutory authorities, but for all land. Prescription was needed in the past when easements were a matter of private agreement between landowners and subdivision of land was unregulated. Modern planning has greatly diminished the need for it, and the needs that remain can be served by other mechanisms.
- 4.86 Prescription is also at odds with international human rights norms.¹⁰³ It allows property rights to be acquired over somebody's land without consent, without notice and without compensation. To accord with human rights, such a law would have to be a measure that is 'carefully considered, balanced and proportionate'.¹⁰⁴
- 4.87 The legal principle of prescription, and specifically the doctrine of lost modern grant, is not 'carefully considered'. It was received in Victoria along with the common law of England, and has never been adopted into Victorian legislation.¹⁰⁵ Parliament has not had occasion to consider whether the doctrine should be retained.¹⁰⁶ It is not 'balanced', as there is no balancing of the competing interests of claimants and the landowners over whose land an easement is claimed. It is not 'proportionate', since the creation of an easement may in some cases be more than what is required to satisfy the claimant's reliance on the use.

4.88 There is a further public interest in preventing the acquisition of prescriptive easements over land that is required for public purposes. The need to prevent unauthorised uses from ripening into easements imposes significant costs on councils and corporations, which are ultimately borne by ratepayers and taxpayers.

Long use and easements created by VCAT order

4.89 One of the functions of prescription is to give effect to expectations arising from long use of other land. We recommend in Chapter 3 that VCAT should be able to order the creation of easements in certain circumstances.¹⁰⁷ In accordance with our recommendation, easements created by order of VCAT would be able to satisfy expectations arising from long use where the easement is reasonably necessary for the use of the land that has the benefit of the easement.

4.90 There is clear authority in Queensland and New South Wales that long use is a relevant factor in determining whether to grant an easement under the court-ordered easement provisions in those states.¹⁰⁸ In *Marshall v Council City of Wollongong*, Justice Bryson said, in applying the court-ordered easement provision in section 88K of the *Conveyancing Act 1919* (NSW):

*I regard it as a relevant consideration, when acting under s 88K, that the plaintiff's application is made in circumstances which, subject to proof, could give rise to an easement by prescription under the Old System.*¹⁰⁹

4.91 Easements created by order of VCAT offer many advantages over common law prescriptive acquisition of easements:

- Their use would remove an incentive to trespass, since longstanding use would no longer be the sole consideration in obtaining an easement.¹¹⁰
- Easements that were granted would only be as broad as the necessity dictated, rather than being potentially overbroad, as they are under the doctrine of prescription.
- VCAT-ordered easements would be more certain in scope since they are defined by the terms of the order and not by the nature of the use during the prescription period.
- A provision for obtaining easements by order of VCAT satisfies human rights concerns by providing due process and compensation for servient owners.
- The local council and referral authorities can be notified of the application for an easement.

RECOMMENDATION

17. From a date on which the provision for easements created by order of VCAT commences (the specified date), the rule of law permitting a person to acquire an easement by long user under the fiction of lost modern grant (prescriptive easements) should be abolished.

Transitional provisions

4.92 A key issue in making the transition to a system that no longer recognises certain unrecorded rights as enforceable against subsequent registered owners is what should be done with those rights that already exist and are enforceable but are not currently recorded.

98 See generally, Victorian Law Reform Commission, *Easements and Covenants*, above n 27, Chapter 8.

99 Victorian Law Reform Commission, *Easements and Covenants*, above n 27, 66–9 [7.49]–[7.72].

100 Mr Michael Macnamara, Submission 4, 3; City of Greater Dandenong, Submission 18, 1; Real Estate Institute of Victoria, Submission 25, 11.

101 Mr Michael Macnamara, Submission 4, 3.

102 Lynden Griggs, Submission 6, 2; Wellington Shire Council, Submission 10, 2; City of Boroondara, Submission 15a, 2; Telstra, Submission 16, 1; Stonnington City Council, Submission 23, 2; Law Institute of Victoria, Submission 26, 8–9; City of Melbourne, Submission 31, 1; Professor Brendan Edgeworth, Submission 29.

103 Such as the Universal Declaration of Human Rights (UDHR), Art 17.2 'No one shall be arbitrarily deprived of his property'. In *Nolan v MBF Investments Pty Ltd* (2009) VSC 244, Justice Vickery took account of Article 12 of the UDHR and international law relating to the protection of a person's home from arbitrary interference, in interpreting a statutory provision relating to the mortgagee's power of sale. The relevance of human rights norms in Victorian property law is reviewed in Greg Taylor and Michael Ziemer, 'Justice vs Certainty: International Law and the Mortgagee's Power of Sale' (2010) 18 *Australian Property Law Journal* 245.

104 Law Commission (England and Wales), above n 26, [1.28], summarising the implications for property law reform of the decision of the European Court of Human Rights (Grand Chamber) in *J A Pye (Oxford) Ltd v United Kingdom* App No 44302/02 (2008) 46 EHRR 45, which considered the European Convention on Human Rights, Art 1 of Protocol 1.

105 Apart from partial abrogation of the doctrine in ss 195 and 196 of the *Property Law Act 1958* (Vic), Victorian legislation is silent as to prescriptive easements.

106 Prescriptive acquisition of an easement, unlike acquisition of title by adverse possession, does not rely on the *Limitation of Actions Act 1958* (Vic).

107 Recommendation 6.

108 See, eg, *Owners Strata Plan 13635 v Ryan* (2006) NSWSC 221 [60]–[67]; *Re Hodgskin* (1999) QSC [225]; Professor Brendan Edgeworth, Submission 29, 7.

109 *Marshall v Council City of Wollongong* (2000) NSWSC 137 [28].

110 Edgeworth, above n 77, 23.

- 4.93 We considered whether subsisting prescriptive easements should be preserved only if they are recorded or registered within a specified time. They can be recorded by the Registrar under section 72(2B) of the Transfer of Land Act on the evidence of a legal practitioner's certificate, or under section 103(1) where a court directs the Registrar to give effect to a judgment or order.
- 4.94 We came to the view that this option would be impractical. We expect that very few owners of prescriptive easements would seek to record them, even if an alternative procedure for proving and recording the claims were provided. Holders of prescriptive easements tend to take them for granted and would not think to protect them until they perceive a risk of losing them. There is no sure and easy way of identifying the holders of the easements to alert them to the need to register or record easements within a time period specified by statute.
- 4.95 A requirement to record easements within a specified time would impose significant compliance costs in assembling evidence to support the claim. The need to prove the claims would also stir up disputes between users and servient owners. The costs of recording the easements would be out of proportion to the benefits of a more complete register.
- 4.96 For these reasons, we have concluded that prescriptive easements that are subsisting and still in use should be preserved without a requirement to record them.

RECOMMENDATION

18. A prescriptive easement that is subsisting and in use on the specified date should be expressly preserved.

Immature claims

- 4.97 A person who has been using somebody else's land for less than 20 years in a way that would, at the end of that period, give rise to a prescriptive easement, may be said to have an 'immature claim'¹¹¹ to a prescriptive easement.
- 4.98 New Zealand did not preserve immature claims when it abolished the doctrine of lost modern grant. Section 296(1) of the *Property Law Act 2007* (NZ) provides:
- After 31 December 2007, no period of time runs, or continues to run, in favour of a person who, but for this subsection, would, at the expiry of that period, acquire, by continuous use or enjoyment throughout that period, (a) a prescriptive right to an easement.*
- 4.99 We agree with the law reform commissions of Ontario, British Columbia and Manitoba that immature claims should not be preserved to enable them to mature into prescriptive easements.¹¹² The use of land for less than 20 years does not give rise to an existing right. It is a wrongful act that the landowner is entitled to terminate at any time within the prescription period.¹¹³ If immature claims are necessary for the use of other land, the claimant would have the option of applying to VCAT for an order to create an easement.

RECOMMENDATION

19. Upon the abolition of prescriptive easements, immature claims to a prescriptive easement should not be preserved.

Profits à prendre

- 4.100 Prescription also applies to another category of property rights called a profit à prendre (profit). A profit can be defined as a 'right to enter another person's land and take away part of the soil or the natural produce of the soil'.¹¹⁴
- 4.101 Common examples of the subject matter of a profit are timber, crops, wild birds or animals (such as rabbits), sand, gravel, and fruits. A profit is similar to an easement in that it is an interest in land that does not give a right to possess the land. Unlike a private easement, it can be held in gross.¹¹⁵ At common law, profits can be created by express grant or by prescription.¹¹⁶
- 4.102 If prescription is abolished, it would be necessary to consider whether the abolition should extend to profits as well as easements. As profits were not included in our terms of reference, we have not examined this issue.

STATUTORY RECIPROCAL RIGHTS

- 4.103 Some legislation in Victoria and other jurisdictions creates statutory rights that serve the function of easements. These statutory rights supplement implied subdivisional easements in ensuring the efficient and effective use of land, though they do not depend on the registration of a plan of subdivision.
- 4.104 They typically exist as reciprocal rights between landowners. For example, under current Victorian legislation, landowners have certain reciprocal rights in relation to fences under the *Fences Act 1968* (Vic) (Fences Act).
- 4.105 We suggested in the consultation paper that several other categories of statutory reciprocal rights could be created in order to reduce the need for easements or to remedy issues with the common law rules. We proposed that reciprocal rights be created in party walls, the support of buildings and temporary rights of access to adjoining land. Legislation creating such reciprocal rights has been adopted in other states and territories.¹¹⁷
- 4.106 Of the submissions that commented on this issue, all but one agreed that statutory reciprocal rights similar to those which exist in other jurisdictions should be created in Victoria.¹¹⁸ Wellington Shire Council argued that section 12(2) of the Subdivision Act is adequate for this purpose.¹¹⁹
- 4.107 Although there is a natural right to the support of land in its unimproved state, which does not depend on the creation of an easement, an easement for the support of buildings from adjoining land must be created in a manner recognised by law such as by grant, implication or prescription.¹²⁰ Under section 12(2)(c) of the Subdivision Act, all easements and rights necessary to provide 'support, shelter or protection' are implied into a plan of subdivision. This probably covers support of buildings¹²¹ and party walls, but only where the land and structures are contained in a plan of subdivision. For this reason, we remain of the view that legislation to clarify and extend the rights implied under section 12(2) of the Subdivision Act is necessary.
- 4.108 The Law Institute of Victoria agreed that the adoption of statutory rights for party walls and support of buildings is desirable, but pointed out that the Fences Act and the *Building Act 1993* (Vic) (Building Act) already allow access to neighbouring land for certain purposes, though the adequacy of their scope and application may require review.¹²²

111 See Glossary for definition of 'immature claims'.

112 Ontario Law Reform Commission, above n 19, 153; Law Reform Commission of British Columbia, *Report on Limitations Part 1—Abolition of Prescription* (1970), 20–1; Manitoba Law Reform Commission, *Report on Prescriptive Easements and Profits à Prendre* (1982) 27.

113 Ontario Law Reform Commission, above n 19.

114 Butt, above n 3, 512.

115 Ibid.

116 See, eg, *Maher v Bayview Gold Club* (2004) NSWSC 275 [79].

117 For party walls, see *Conveyancing Act 1919* (NSW) s 88BB; *Development Act 1993* (SA) s 61; *Local Government (Miscellaneous Provisions) Act 1960* (WA) ss 383–97; *Conveyancing and Law of Property Act 1884* (Tas) s 34B(a); *Common Boundaries Act 1981* (ACT) s 28. For support of buildings, see *Conveyancing Act 1919* (NSW) s 177; *Property Law Act 1974* (Qld) s 179. For temporary access, see *Access to Neighbouring Land Act 2000* (NSW); *Access to Neighbouring Land Act 1992* (Tas).

118 Mr Michael Macnamara, Submission 4; City of Greater Dandenong, Submission 18; Stonnington City Council, Submission 23; Real Estate Institute of Victoria, Submission 25; Law Institute of Victoria, Submission 26.

119 Wellington Shire Council, Submission 10, 2.

120 Bradbrook and Neave, above n 21, [7.19]–[7.22].

121 See, eg, *Piling v Prynew Nemeth* (2008) NSWSC 118 [50]–[55], interpreting a similar provision in New South Wales legislation.

122 Law Institute of Victoria, Submission 26, 8.



- 4.109 Certainly, the Fences Act does provide statutory rights of access in certain circumstances. Under section 32 of that Act, a person engaged in constructing or repairing a fence can enter adjoining land to carry out work. This obviates the need for an easement allowing this kind of access. Section 14 of the Fences Act requires that the owners of neighbouring land share the expenses of repairing fences between their properties under most circumstances. This possibly overrides a common law rule that allowed 'quasi-easements' to arise, either impliedly or prescriptively, where one party was solely responsible for the maintenance of the fence.¹²³
- 4.110 The Building Act contains limited provisions dealing with a right of entry to carry out works. Under section 95 of that Act, an adjoining landowner can enter neighbouring land to 'carry out protection work required by the building regulations', subject to some restrictions.¹²⁴ The provisions in the Building Act are very limited in scope and do not cover the majority of instances where access to neighbouring land might be necessary to carry out works.
- 4.111 We recommend that legislation be introduced to allow access to adjoining land in other reasonable circumstances. It could supplement rather than replace existing legislation.

RECOMMENDATIONS

20. The *Property Law Act 1958* (Vic) should provide a reciprocal right of support by a party wall where on adjoining lots there are erected buildings supported by a party wall. The owner of each lot should have the right to the continued existence of the portion of the wall that is necessary for the support of a building on the owner's land and is part of the adjoining lot.
21. The natural right to the support of land in its unimproved state from neighbouring land should be extended to provide a right of support for buildings and structures on the land.
22. On the application of an owner or occupier of land, VCAT should be empowered to make an order authorising the applicant to enter neighbouring land for the purpose of carrying out necessary or desirable works to the applicant's land or to a structure on the land, on such terms as VCAT thinks fit.

EASEMENTS AND THE TORRENS SYSTEM

- 4.112 In our consultation paper, we asked whether easements expressly created by instrument should be registered or recorded, and whether unregistered easements should continue to be enforceable.¹²⁵
- 4.113 The responses and our conclusions regarding private easements are discussed in the following sections. We discuss the recording and registration of regulatory easements in Chapter 5.

SHOULD EASEMENTS BE RECORDED OR REGISTERED?

Registered easements

- 4.114 Easements can be created by registration of a transfer of the dominant land. Section 45(2) of the Transfer of Land Act provides that, on registration of a transfer, the transferee becomes the registered proprietor of the estate or interest set out in the transfer, 'with all rights powers and privileges thereto appertaining'. This indicates that the registered proprietor's title includes the benefit of any easement attached to the land.

- 4.115 Section 42(1) of the Transfer of Land Act confers upon the registered proprietor title to the land described in the relevant folio of the register. 'Land' is defined in section 4(1) to include 'any interest or estate in land' and is therefore broad enough to include an easement.
- 4.116 Registered easements can also be created by 'a transfer of that interest under section 45 of the Transfer of Land Act'.¹²⁶
- 4.117 Registered interests are statutory interests conferred by operation of the Transfer of Land Act on registration of the transfer.¹²⁷ A registered interest cannot be annulled or set aside unless it was obtained through fraud.¹²⁸ Even a forged instrument of transfer confers a valid title upon an innocent purchaser who registers it.¹²⁹
- 4.118 An easement can also be recorded on the folio of the servient or dominant land. Under section 72 of the Transfer of Land Act, the Registrar may record an easement on the folio of the dominant and servient land if satisfied of its existence by a transfer, instrument, deed or written document, court order or award of an arbitrator or a legal practitioner's certificate.¹³⁰ In *Riley v Penttila*,¹³¹ Justice Gillard held that the recording of an easement on the folio to the dominant land under section 72 is conclusive evidence of the dominant owner's right to the easement.
- 4.119 In response to the question in our consultation paper about whether expressly created easements should be registered or recorded, six submissions supported registration¹³² and one supported recording.¹³³ Of the submissions that supported the registration of expressly created easements, only three put forward arguments as to why registration should be preferred over recording. The submissions made the following arguments:
- Registration would provide certainty with regard to the easements.
 - Registration allows access to compensation if losses occur because an easement that should not be registered is registered.¹³⁴
- 4.120 Land Victoria suggested that it could be left to the parties to elect whether to record or register easements.¹³⁵ In making this suggestion, Land Victoria indicated that it would be less onerous and less costly to record rather than register an easement, as registration demands more rigorous examination by the Registrar.
- 4.121 We consider that the current law, which gives transacting parties a choice of recording or registration, is satisfactory.

COMMON LAW EXTINGUISHMENT BY UNITY OF ESTATES

- 4.122 Easements can be extinguished at common law if the same owner acquires both possession of and title to the dominant and servient estates.¹³⁶ This is called extinguishment by unity of estates.¹³⁷
- 4.123 In our consultation paper, we noted that the operation of the Torrens system might serve to revive easements that have been extinguished at common law by unity of estates.¹³⁸ Registration creates a statutory title to land, which can be different to the title of the previous registered owner. For example, a transfer might refer to an easement and thus revive it,¹³⁹ or a recorded easement might not be extinguished until it is removed from the register, despite being inoperative at common law.¹⁴⁰
- 4.124 We asked whether, as a solution, unity of estates should be an express ground for removal of the record of an easement from the register. Only one submission supported the proposition.¹⁴¹

- 123 Gaunt and Morgan, above n 7, 46.
- 124 See generally, *Building Act 1993* (Vic) ss 84–100.
- 125 Victorian Law Reform Commission, *Easements and Covenants*, above n 27, Chapter 5.
- 126 Land Victoria, Submission 27, 4.
- 127 *Transfer of Land Act 1958* (Vic) ss 41–4.
- 128 *Ibid* ss 42, 44(1).
- 129 Discussed in Joyce Tooher and Brian Dwyer, *Introduction to Property Law* (Butterworths, 2008) 77.
- 130 *Transfer of Land Act 1958* (Vic) ss 72(1), (2), (2B), (3). We understand the term 'notified' easement to mean one that is brought to the Registrar's attention in one of these ways.
- 131 *Riley v Penttila* (1974) VR 547. Justice Gillard referred to entry on the certificate of title, which is now called the folio.
- 132 Mr Michael Macnamara, Submission 4, 2–3; Wellington Shire Council, Submission 10, 2; Australian Institute of Surveyors, Submission 17, 1; City of Greater Dandenong, Submission 18, 1; Real Estate Institute of Victoria, Submission 25, 2; Law Institute of Victoria, Submission 26, 7.
- 133 Moorabool Shire Council, Submission 11, 1–2.
- 134 See, eg, Law Institute of Victoria, Submission 26, 7.
- 135 Land Victoria, Submission 27, 5.
- 136 Butt, above n 3, 507. It is doubtful that unity of estates will extinguish an easement that is necessary for the enjoyment of the dominant land: see, eg, Gaunt and Morgan, above n 7, 501, citing *Margil Pty Ltd v Stegul Pty Ltd* (1984) 2 NSWLR 1.
- 137 Unity of estates also applies to the creation of easements but its application has been statutorily limited. The *Subdivision Act 1988* (Vic) allows a single owner of land to create easements over multiple lots by registration of a plan of subdivision.
- 138 Victorian Law Reform Commission, *Easements and Covenants*, above n 27, 85–6 [9.43]–[9.47].
- 139 *Margil Pty Ltd v Stegul Pty Ltd* (1984) 2 NSWLR 1.
- 140 For example, in *Post Investments Pty Ltd v Wilson* (1990) 26 NSWLR 598, a recorded covenant was held to have not been extinguished by unity of estates. This was despite s 88(3)(b) of the *Conveyancing Act 1919* (NSW) providing that it had no greater operation than at common law.
- 141 Mr Michael Macnamara, Submission 4, 4.

4.125 Three submissions argued that extinguishment by unity of estates should instead be abolished in Victoria.¹⁴² Goulburn-Murray Water submitted that:

*When easements are extinguished at common law the extinguishment is rarely noted on the relevant Titles ... this can, and does, cause confusion and uncertainty when the ... lands are sold on to third parties.*¹⁴³

4.126 Abolition of the doctrine in Victoria would promote harmonisation. In most Australian states, extinguishment by unity of estates has been abolished.¹⁴⁴

RECOMMENDATION

23. The common law rule that easements are extinguished by unity of estates should be prospectively abolished. An easement should not be extinguished merely because the owner of the lot benefited by the easement acquires an interest, or a greater interest, in the lot burdened by the easement.

NARROWING THE ENFORCEABILITY OF UNRECORDED EASEMENTS

4.127 Easements can be enforced even if they have been neither recorded nor registered. Section 42(2)(d) of the Transfer of Land Act provides that the title of a registered proprietor is subject to all easements, 'howsoever acquired'. This means that once an easement is created, it is enforceable against all successive owners of the servient land whether it is recorded or not.

4.128 The effect of this provision is that there is little incentive for dominant owners to register or record the easements, since to do so does not affect the enforceability of the easement. As a result, the information in the register about expressly created easements is incomplete.

4.129 In our consultation paper, we asked whether the scope of the provision should be narrowed.¹⁴⁵

Omitted or misdescribed easements

4.130 In several other Australian jurisdictions, unrecorded easements bind the servient owner if the easements are 'omitted or misdescribed' from or in the register.¹⁴⁶

4.131 Section 185(3) of the *Land Titles Act 1994* (Qld) provides a definition of an 'omitted' easement.¹⁴⁷ 'Omitted' means:

- (a) *the easement was in existence when the lot burdened by it was first registered, but the easement particulars have never been recorded ...*
- (b) *the easement particulars have previously been recorded ... but the current particulars ... do not include the easement particulars, other than because the easement has been extinguished ...*
- (c) *the instrument providing for the easement was lodged for registration but, because of an error ... has never been registered.*¹⁴⁸

4.132 In Victoria, omitted and misdescribed easements are enforceable against subsequent servient owners,¹⁴⁹ who are entitled to compensation under section 110(1)(c) of the Transfer of Land Act for the error.

4.133 Where an easement is omitted or misdescribed, difficult issues arise. In particular, there are two parties with competing claims: the owner of dominant land who wishes to preserve the easement, and the owner of the servient land who may have been unaware of the easement and wants it to be extinguished. Where one party succeeds in having the easement preserved or extinguished, the other party will have a valid claim for compensation.

- 4.134 The Law Institute of Victoria submitted that omitted and misdescribed easements should not be enforceable against subsequent registered owners of the servient land and that the Registrar should be liable to compensate for any losses incurred through registry errors.¹⁵⁰
- 4.135 However, we consider that the easement should be preserved, as rights of use that dominant owners rely upon would otherwise be lost. In most cases, the purchaser is likely to be aware of the easement prior to sale, as section 32(2)(b) of the *Sale of Land Act 1962* (Vic) requires the vendor to disclose in a written statement particulars of any easement affecting the land. Some easements may also be apparent from inspection of the land.
- 4.136 To preserve omitted and misdescribed easements would be consistent with the law in other states.

Express easements

- 4.137 Land Victoria submitted that, if an easement is created expressly by instrument but is not registered or recorded, a purchaser of the servient land should be bound by it only if the purchaser has notice of it.¹⁵¹
- 4.138 The submission is at odds with the Torrens system principle that registered owners take free of unregistered interests even if they have notice of them.¹⁵²
- 4.139 If expressly created easements are enforceable against purchasers of the servient land without registration or recording, there is little incentive for dominant owners to register or record them. We therefore think that the easements should not be enforceable against subsequent owners unless they appear on the folio of the servient land.¹⁵³

Implied easements

- 4.140 At common law, easements can be implied into a transaction as a means of protecting the expectations of one of the parties. Because the dominant landowner may be unaware that an easement was created by the transaction, he or she cannot be expected to register or record it.
- 4.141 Earlier in this chapter, we recommended retaining the classes of implied easements that can be created at common law, with the exception of the common law easement of necessity. To be effective, implied easements must continue to be enforceable against subsequent registered owners of the servient land.
- 4.142 Any amendment to section 42(2)(d) of the *Transfer of Land Act* would also need to preserve the enforceability of easements implied into plans of subdivision under section 12(2) of the *Subdivision Act*.

Easements created by reservations in Crown grants

- 4.143 Some easements were created when the land was first granted by the Crown, and the grant reserved an easement to the Crown.¹⁵⁴ The reservations in any Crown grant are preserved by section 42(2)(a) of the *Transfer of Land Act* and will be unaffected by proposed amendments to section 42(2)(d).

Transitional provisions

- 4.144 In this chapter, we have recommended abolishing prescription and reducing the categories of implied easements. These recommendations apply only to the future acquisition of these rights.

- 142 Goulburn-Murray Water, Submission 21, 6; Stonnington City Council, Submission 23, 4; Law Institute of Victoria, Submission 26, 11.
- 143 Goulburn-Murray Water, Submission 21, 6.
- 144 See, eg, *Conveyancing Act 1919* (NSW) s 88B(3)(c)(iii); *Real Property Act 1900* (NSW) s 47(7); *Conveyancing and Law of Property Act 1884* (Tas) s 9A; *Land Titles Act 1980* (Tas) s 109; *Land Title Act 1994* (Qld) s 88; *Real Property Act 1886* (SA) s 90C(2).
- 145 Victorian Law Reform Commission, *Easements and Covenants*, above n 27, 76–7 [8.26]–[8.30].
- 146 *Land Titles Act 1994* (Qld) s 185(1)(c); *Land Titles Act 2000* (NT) s 189(1)(c); *Real Property Act 1886* (SA) s 69(d); *Real Property Act 1900* (NSW) s 42(1)(a1).
- 147 *Land Titles Act 1974* (Qld) s 185(1)(c).
- 148 *Ibid* s 185(3).
- 149 *Transfer of Land Act 1958* (Vic) s 42(2)(d).
- 150 Law Institute of Victoria, Submission 26, 9.
- 151 Land Victoria, Submission 27, 3.
- 152 See *Transfer of Land Act 1958* (Vic) s 43.
- 153 Note that the registered proprietor takes subject to ‘such encumbrances as are registered on the relevant folio’: *Transfer of Land Act 1958* (Vic) s 42(1). It is therefore unnecessary to include them in the list of exceptions in s 42(2)(d).
- 154 A condition in the nature of an easement in a Crown grant can be removed or varied by the same process as if the condition was an easement: *Subdivision Act 1988* (Vic) ss 23(4), (5), and see *Planning and Environment Act 1987* s 6(2)(g).

4.145 Any rights that exist at the date specified in the new legislation should remain enforceable against present and future owners of the servient land without being recorded or registered. This means that the register will remain an incomplete record of easements for a long time to come. Eventually, however, the majority of easements will appear on the register.

RECOMMENDATION

24. Section 42(2)(d) of the *Transfer of Land Act 1958* (Vic) should be amended to provide that the registered title is subject to any easements howsoever acquired before a specified date, and the following easements that are created or arise after a specified date:
- a. easements created or implied by statute or by common law
 - b. easements at any time omitted from, or misdescribed in, the register.

Chapter 5 Regulatory Easements

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Regulatory Easements

FUNCTION OF REGULATORY EASEMENTS

- 5.1 Many easements that burden private land titles are regulatory easements. As we explain in Chapter 2, regulatory easements are easements in gross held by providers of essential services. Unlike private easements, which benefit dominant land, regulatory easements benefit the holder of the easement. For this reason, they are not recognised at common law and must be created under legislation.¹
- 5.2 Regulatory easements provide access for pipes, cables and other assets necessary to deliver water, sewerage, drainage, gas, electricity, and telecommunications services to neighbourhoods.² The services are provided by councils and a combination of statutory authorities, statutory corporations and private corporations operating under licence.³
- 5.3 The assets contained within regulatory easements are vital to the community and are directly protected by legislation. Penalties can apply for removing or damaging assets belonging to a service provider and service providers have statutory powers to enter land to maintain them.⁴
- 5.4 Delays and wasted costs can arise when assets are not located within a regulatory easement, the regulatory easement is not recorded, or for some other reason plans to purchase or redevelop the land are made without knowledge that assets belonging to a service provider have been installed. Before considering possible solutions to this problem, it is first necessary to look at how regulatory easements are created.

CREATION OF REGULATORY EASEMENTS

- 5.5 Most regulatory easements are created upon subdivision of land. Service providers operating under Victorian law also have powers to compulsorily acquire them under the *Land Acquisition and Compensation Act 1986* (Vic) (Land Acquisition and Compensation Act). All regulatory easements over private land are expressly created.⁵

ON PLAN OF SUBDIVISION

- 5.6 Service providers may require regulatory easements to be reserved in draft plans of subdivision that they review in their capacity as a 'responsible authority' or a 'referral authority' under the *Planning and Environment Act 1987* (Planning and Environment Act).⁶ The location of these easements must be specified in the registered plan.⁷
- 5.7 If the land is subsequently offered for sale, the vendor must disclose the existence of the easement and provide a copy of the registered plan to the purchaser before the purchaser signs the sale contract.⁸
- 5.8 If the beneficiary of the regulatory easement is a water authority or water corporation, its rights upon creation are prescribed by regulation.⁹ The rights of electricity and gas companies as holders of subdivisional regulatory easements are set out in the legislation under which they operate.¹⁰

COMPULSORY ACQUISITION BY DEVELOPER

- 5.9 Not all of the regulatory easements required upon development of land are confined to the lots within the subdivision. A proposed change to the use of land may create a need for a regulatory easement on land owned by somebody else. In these circumstances, the service provider may indirectly acquire the easement from the owner of the other land by proceeding under section 36 of the *Subdivision Act 1988* (Vic) (Subdivision Act). We discuss the operation of section 36 in Chapter 3.

- 5.10 We suggested in our consultation paper that section 36 of the Subdivision Act is an unsatisfactory method of compulsorily acquiring private easements.¹¹ We explain in Chapter 3 why we maintain this view and recommend a new process for creating private easements by order of the Victorian Civil and Administrative Tribunal (VCAT).
- 5.11 It is nevertheless apparent that section 36 of the Subdivision Act serves a useful function in facilitating the delivery of essential services. Service providers are using section 36 to ensure that easements necessary for development are acquired by landowners, at their own expense, prior to commencing works.
- 5.12 A planning permit can be subject to an 'easement acquisition condition' in similar terms to the 'written statement' required under section 36(1) of the Subdivision Act.¹² Permit conditions are used by councils to require permit applicants to acquire specified easements on behalf of the council or a referral authority.
- 5.13 For example, in *Macedon Pastoral Developments Pty Ltd v Macedon Ranges SC*,¹³ a permit issued for a subdivision contained the following requirement:
- Pursuant to section 36 of the Subdivision Act, the Responsible Authority considers ... the economical and efficient subdivision and servicing of the land ... requires the permit holder to acquire an easement ... in the vicinity of the land, namely, any land not owned by the developer through which a drainage extension servicing the development is to be located. The easements created must be in favour of the Shire of Macedon Ranges.*¹⁴
- 5.14 In the same case, a similar permit condition was made for the acquisition of an easement in favour of Western Water for sewerage purposes. On review of the permit decision, VCAT retained the requirement in the permit condition to obtain the easements in favour of the council and Western Water.¹⁵
- 5.15 In effect, through the use of permit conditions, councils and referral authorities are using section 36 of the Subdivision Act to shift the costs of acquiring easements that are necessary to service new developments to permit applicants.
- 5.16 It appears sound in principle that landowners whose development proposals create the need for additional easements should bear the costs of acquiring them. If the service providers had to acquire them by compulsory means, they would have to pass the costs to ratepayers or taxpayers in the form of higher charges or rates.
- 5.17 It is also reasonable that the easements acquired for the purposes of the development should be held by the service provider, just as if the service provider had acquired them by its own action.
- 5.18 However, section 36 of the Subdivision Act is not drafted to clearly express this function. It provides no mechanism for a private person to acquire an easement in gross for the benefit of the service provider.

RECOMMENDATION

25. Section 36 of the *Subdivision Act 1988* (Vic) should be amended to empower VCAT to order that an easement acquired on the basis of a written statement by the council or a referral authority under section 36(1) is an easement in gross for the benefit of the council or referral authority specified in the order.

- 1 See, eg, *Electricity Industry (Residual Provisions) Act 1993* (Vic) s 43; *Gas Industry (Residual Provisions) Act 1994* (Vic) s 61; *Local Government Act 1989* (Vic) s 187A; *Major Transport Projects Facilitation Act 2009* (Vic) s 116; *Pipelines Act 2005* (Vic) s 97; *Rail Management Act 1996* (Vic) s 51; *Water Act 1989* (Vic) ss 130(3), 287Q; *Water Industry Act 1994* (Vic) s 55A.
- 2 Our discussion of regulatory easements does not include privately owned assets on private land, such as the privately owned channels and pipelines on newly created private easements that are replacing redundant channels owned by Goulburn-Murray Water. See Goulburn-Murray Water, Submission 21.
- 3 These statutory authorities and statutory corporations are often designated as referral authorities for the purposes of the *Subdivision Act 1988* (Vic) and the *Planning and Environment Act 1987* (Vic).
- 4 For example, it is an offence to wilfully or by culpable negligence damage, or allow to be damaged, any meter, pipeline, burner, fitting, appliance or other apparatus belonging to a gas transmission or distribution company that is used in connection with the consumption of gas: *Gas Industry (Residual Provisions) Act 1994* (Vic) ss 151, 152. An example of a power to enter land is s 133 of the *Water Act 1989* (Vic).
- 5 Regulatory easements can be implied on public land by statute. By operation of section 12(3B) of the *Subdivision Act 1988* (Vic), all easements and rights necessary to provide water, sewerage, drainage, gas, electricity and telephone services are implied over any road set aside in a plan of subdivision, if consistent with the reasonable use of the land as a road.
- 6 *Planning and Environment Act 1987* (Vic) s 171; *Electricity Industry Act* (Vic) s 88; *Gas Industry Act 2001* (Vic) s 146; *Water Act 1989* (Vic) s 136; *Water Industry Act 1994* (Vic) s 61.
- 7 *Subdivision Act 1988* (Vic) s 12(1), (1A), (1B).
- 8 *Sale of Land Act 1962* (Vic) s 32(2)(b), (3).
- 9 *Water (Subdivisional Easements and Reserves) Regulations 2001* (Vic); *Water Industry Regulations 2006* (Vic) Part 4.
- 10 *Electricity Industry Act 2000* (Vic) s 88, sch; *Gas Industry Act 2001* (Vic) s 146, sch.
- 11 Victorian Law Reform Commission, *Easements and Covenants* Consultation Paper No 9 (2010) 24–5 [3.33]–[3.44].
- 12 *Planning and Environment Act 1987* (Vic) s 62(2)(l).
- 13 *Macedon Pastoral Developments Pty Ltd v Macedon Ranges SC* (2006) VCAT 1154.
- 14 *Ibid.*
- 15 *Ibid* [67]–[69].



ACQUISITION DIRECTLY FROM THE SERVIENT LAND OWNER

- 5.19 Many service providers that have the power to hold easements in gross also have the power to obtain them by compulsory acquisition.¹⁶ The legislation under which they operate authorises them to acquire easements by compulsory process and deems them to be an ‘authority’ for the purposes of the Land Acquisition and Compensation Act.¹⁷ This means they must exercise their powers to obtain regulatory easements in accordance with the procedures set out in that Act.¹⁸ Compensation is payable to the burdened landowner in accordance with the Act.¹⁹
- 5.20 A service provider can acquire an easement by agreement, rather than by exercising its power of compulsory acquisition under the Land Acquisition and Compensation Act.²⁰

INSTALLATION AND MAINTENANCE OF ASSETS WITHOUT AN EASEMENT

- 5.21 Some service providers have statutory powers to enter land to install, maintain or repair their equipment and facilities, whether or not they have acquired an easement.²¹ They must give the owner reasonable notice and comply with other statutory requirements in exercising these powers.
- 5.22 Equipment and facilities belonging to a service provider may not be protected under an easement for either of two reasons:
- They may have been installed by a telecommunications carrier licensed under the *Telecommunications Act 1997* (Cth).²² Carriers do not have the statutory power to acquire easements in gross but do have powers to enter land and install facilities.²³
 - The service provider relies on its statutory powers to enter land to install and maintain the equipment or facilities, and on provisions that make it an offence to damage its assets.²⁴ In some cases, decisions have been made not to acquire easements to save money and time. In other cases, the installation of assets without an easement has been attributed to an oversight in the rush to complete the task.²⁵
- 5.23 The Victorian legislation under which service providers operate, and which empowers them to compulsorily acquire easements in gross under the Land Acquisition and Compensation Act, embodies a clear policy that assets will be installed in easements and that owners of the servient land will be compensated.
- 5.24 The large-scale placement of assets outside of regulatory easements appears to have subsided after it became possible to create them on plans of subdivision or by private compulsory acquisition under section 36 of the Subdivision Act. Nevertheless, although we do not know how widespread it is, the practice continues to this day.

AVAILABILITY OF INFORMATION ABOUT REGULATORY EASEMENTS

- 5.25 Because regulatory easements contain assets that provide essential services to communities, there is a public interest in ensuring that owners and service providers know where they are located. Purchasers of land should also be aware of easements that affect any redevelopment plans they may have.
- 5.26 Certainly, regulatory easements recorded on the folio for the land will be easy to identify. As many regulatory easements are now created upon registration of a plan of subdivision, a purchaser of the servient land can discover them by checking the register. The plan of subdivision must show the purpose of the easement and the service provider or other body in whose favour it has been created.²⁶

- 5.27 Regulatory easements created before the Subdivision Act came into effect or by other means may or may not be recorded on the register. Those created by compulsory process under the Land Acquisition and Compensation Act are more likely to have been recorded on the folio of the servient land than those created by agreement.²⁷ Even if not recorded, regulatory easements that meet the requirements of the statute that allows them to be created would bind subsequent registered owners by force of the statute.²⁸
- 5.28 An important means of informing purchasers about regulatory easements is the vendor disclosure provision in section 32 of the *Sale of Land Act 1962* (Vic) (Sale of Land Act). Before a purchaser signs a contract of sale, the vendor must provide a statement setting out all the particulars required by section 32(2) of the Act.
- 5.29 Section 32(2)(b) requires the vendor's statement to include a description of any registered or unregistered easement and particulars of any existing failure to comply with it. Vendors are under no duty to disclose easements and restrictions of which they are unaware.²⁹ If the vendor is unaware of the existence of an unregistered easement, the vendor disclosure requirements do not help the purchaser.
- 5.30 Section 32(3) of the Sale of Land Act sets out a list of documents that must be attached to both the statement and the contract. The list includes any registered or proposed plan of subdivision.³⁰ A registered plan will reveal regulatory easements created upon subdivision of the land.
- 5.31 We asked in our consultation paper whether service providers should be required to notify the Registrar of all agreements with landowners for the creation of regulatory easements.
- 5.32 All but one submission on this issue called for the registration of all regulatory easements.³¹ The Law Institute of Victoria added that existing rights referred to in caveats should also be covered by registered easements.³²
- 5.33 Goulburn-Murray Water does not support the registration of regulatory easements created by agreement because of the cost and the fact that water authorities and corporations are already required to provide such information on request.³³ It observed that the fee for notifying the Registrar of the creation or surrender of an easement is \$526 and contrasted this amount with the fee of \$45 that it charges for information about the placement of its assets.³⁴
- 16 The approval of the Governor-in-Council or the responsible minister may be required. Examples: electricity companies under the *Electricity Industry Act 2000* (Vic) s 86; gas distribution and transmission companies under the *Gas Industry Act 2001* (Vic) s 143(1); project authorities under the *Major Transport Projects Facilitation Act 2009* (Vic) s 112; councils under the *Local Government Act 1989* (Vic) s 187(1); VicTrack under the *Rail Corporations Act 1996* (Vic) s 13C; water authorities under the *Water Act 1989* (Vic) s 130(1).
- 17 See, eg, *Local Government Act 1989* (Vic) s 187(1), (2); *Water Act 1989* (Vic) s 130(1), (2), (3); *Rail Corporations Act 1996* (Vic) s 13C(1), (2); *Gas Industry Act 2001* (Vic) s 143(1), (2).
- 18 *Land Acquisition and Compensation Act 1986* (Vic) s 4. See, eg, *Local Government Act 1989* (Vic) ss 187, 187A; *Pipelines Act 2005* (Vic) pt 6 div 2; *Water Act 1989* (Vic) ss 130(1)–(3); *Rail Corporations Act 1996* (Vic) s 13C.
- 19 *Land Acquisition and Compensation Act 1986* (Vic) s 30.
- 20 *Ibid* s 18.
- 21 *Electricity Industry Act 2000* (Vic) s 93; *Gas Industry Act 2001* (Vic) s 148; *Rail Corporations Act 1995* s 13G; *Water Act 1989* (Vic) s 133; *Telecommunications Act 1997* (Cth) sch 3.
- 22 Since 1997, carrier licences have been issued to almost 300 entities nationally under the *Telecommunications Act 1997* (Cth), though about a third of them have since been surrendered or cancelled. See Australian Communications and Media Authority, *Register of licensed carriers and nominated carrier declarations* (29 November 2010) <http://www.acma.gov.au/WEB/STANDARD/pc=PC_1625>.
- 23 They can also rely on implied easements over public roads—see *Subdivision Act 1988* (Vic) s 12(3B)—and may be able to use electricity easements—see *Electricity Industry Act 2000* (Vic) s 89.
- 24 Mr Robert Ford, Submission 1.
- 25 Goulburn-Murray Water, Submission 21, observed: 'It is evident that the enthusiasm of [our] predecessor organisations to construct an extensive irrigation network from time to time led them to inadvertently construct channel works either without acquiring an easement or outside of the boundaries of the registered easement'.
- 26 *Subdivision Act 1988* (Vic) s 12(1)(b) (subject to s 12(1B)).
- 27 The Registrar may be notified of the acquisition under s 88(2) of the *Transfer of Land Act 1958* (Vic). Notification of the acquisition is not mandatory but is likely. The Registrar will have already been notified of the proposal to acquire the interest, as this is required by s 6 of the *Land Acquisition and Compensation Act 1986* (Vic). Regulatory easements created by operation of s 36 of the *Subdivision Act 1988* (Vic) may be registered upon application under s 72(2) of the *Transfer of Land Act 1958* (Vic).
- 28 Note also that easements 'howsoever acquired' bind the registered proprietor under s 42(2)(d) of the *Transfer of Land Act 1958* (Vic).
- 29 This is the effect of s 32(7) of the *Sale of Land Act 1962* (Vic). Whereas s 32(5) of the Act says that a purchaser may rescind the contract if the vendor fails to provide all of the required information, s 32(7) provides an exception if the court is satisfied that the vendor acted reasonably and honestly.
- 30 *Sale of Land Act 1962* (Vic) s 33(2)(ba), (c)–(e).
- 31 Wellington Shire Council, Submission 10; Australian Institute of Conveyancers, Submission 17; City of Greater Dandenong, Submission 18; Boroondara City Council, Submission 15b; Stonnington City Council, Submission 23; Real Estate Institute of Victoria, Submission 25; Law Institute of Victoria, Submission 26.
- 32 Law Institute of Victoria, Submission 26.
- 33 Goulburn-Murray Water, Submission 21, 4–5.
- 34 *Ibid* 5.

- 5.34 The cost to the particular service provider of registering a regulatory easement needs to be weighed against the cost to other service providers and purchasers of the land that may arise from not knowing about it. A number of submissions alluded to problems caused by service providers creating easements across a lot without regard to or knowledge of easements that already exist.³⁵ Easier discoverability could reduce disputes or confusion about use of the land.
- 5.35 Regulatory easements run with land, they are an interest in property created under statute for a public purpose, and penalties may apply if the assets they contain are damaged. Therefore, they should be easily discoverable by successive owners of the servient land, other service providers and other interested parties.
- 5.36 Mr Macnamara suggested that the *Transfer of Land Act 1958 (Vic)* (Transfer of Land Act) should be amended to provide that regulatory easements created in the future should not be enforceable against subsequent owners of the land unless they are registered.³⁶
- 5.37 Such an amendment might not be effective, since it can be overridden by later statutes that express a clear intention that easements are enforceable irrespective of whether they are registered.³⁷ To the extent that the amendment does operate, the unenforceability of an unrecorded regulatory easement could cause hardship to owners and occupiers of other lots who rely on it for the provision of essential services.
- 5.38 We consider that service providers should be under a statutory duty to take steps to have the easement registered or recorded.

RECOMMENDATION

26. Statutes that authorise the creation of a regulatory easement should require the holder of the easement to take all steps necessary to have the easement registered or recorded by the Registrar.

AVAILABILITY OF INFORMATION ABOUT ASSETS WHEN NO EASEMENT HAS BEEN ACQUIRED

- 5.39 According to the Australian Institute of Conveyancers, most conveyancing practitioners have discovered underground assets on a lot where no easement has been created or recorded on the register.³⁸
- 5.40 Purchasers acquiring a property with the intention of renovating it may be unaware of the existence or placement of these assets or how they may affect their plans.³⁹ There is no requirement that the vendor disclose this information to purchasers before the sale.⁴⁰
- 5.41 Even longstanding owners may not know about underground assets. As one submission observed:

[T]here is no obligation to register these encumbrances and usually the first time a current owner is aware of the existence of the water or sewer main within their property is when they lodge a plan to redevelop or extend a building only to be told by the local council or building inspector that they need consent of the local water corporation which may not necessarily be given. You can understand their frustration and sometimes anger to be told a sewer main was laid through the middle of their lot in 1927 that they are not aware of and can't build over.⁴¹

- 5.42 Generally, assets for drainage, water and sewerage services that were installed before the commencement of the Subdivision Act, or in circumstances unconnected to the subdivision of land, are less likely to be within a regulatory easement than assets installed in connection with the subdivision of land under the Subdivision Act. As noted above, easements over private land are not acquired by telecommunications carriers because they are not required to be.
- 5.43 Dissatisfaction with the placement of assets outside of easements is not confined to owners and purchasers. A submission from a surveyor was critical of a telecommunications carrier for not routinely determining where title boundaries are prior to placing services, and for considering it the responsibility of others to know where its services are located and avoid any contact with them.⁴²
- 5.44 A problem repeatedly raised in submissions is the identification of stormwater drainage pipelines. A significant proportion of stormwater drainage pipelines are located in properties without easements.⁴³ The relevant council with responsibility for them may not know where they are.
- 5.45 The absence of easements may affect the council's ability to prevent buildings being constructed over drainage assets. Bayside City Council pointed out that section 310 of the *Building Regulations 2006* requires the consent of the service provider for a building permit allowing construction over an easement vested in the provider, but assets that are not within an easement are exempt from the requirement.⁴⁴
- 5.46 Although this problem relates primarily to older properties, many thousands of lots are affected. The drainage pipelines are most likely to be found in regional cities and towns, but also in older metropolitan suburbs of Melbourne.
- 5.47 Landowners and purchasers seeking information about assets installed on the land must request it from the service provider. The information is likely to be given in standard form. For example, Frankston City Council discloses the existence of drains in private properties in Land Information Certificates that are issued to owners and prospective purchasers.⁴⁵ Water authorities and water corporations have a statutory obligation to provide, on request, a statement containing details of restrictions on the use of land arising from the performance of their functions, including encumbrances that would not be disclosed by a search of the register.⁴⁶
- 5.48 Increasingly, asset owners provide information indirectly through Dial Before You Dig Vic/Tas (DBYD), a not-for-profit member-based association that was established to reduce the risk of injury to excavators and the public, and damage to underground assets. It provides anyone intending to begin digging work with easy access to plans and information about underground services directly from the asset owners.
- 5.49 DBYD members include all major telecommunication providers, electrical and gas distributors, and owners of registered pipelines. Participation by gas and electricity distribution companies is now effectively mandatory.⁴⁷ Many local councils and water authorities are also members but not all service providers participate. Some local councils, water authorities and small internet providers are not members.
- 5.50 Conveyancers use DBYD to discover information about concealed cables and pipes that may affect a purchaser's decision to acquire land, though less than one per cent of inquiries to the service in 2009–10 are thought to have been for conveyancing or planning purposes.⁴⁸ Although DBYD information is free to excavators, some members charge for conveyancing and planning requests and take longer to respond to them because inquiries related to sales present no immediate risk to assets.

- 35 Mr Peter Bennett, Submission 7; Telstra, Submission 16; Goulburn-Murray Water, Submission 21.
- 36 Mr Michael Macnamara, Submission 4.
- 37 *Calabro v Bayside City Council* (1999) VSC 509.
- 38 Australian Institute of Conveyancers, Submission 17.
- 39 Boroondara City Council, Submission 15a.
- 40 *Sale of Land Act 1962* (Vic), s 32 requires disclosure of easements, not assets placed on or under the land.
- 41 Mr Robert Ford, Submission 1, 1.
- 42 Mr Peter Bennett, Submission 7.
- 43 Bayside City Council, Submission 8, 1; Frankston City Council, Submission 9, 1.
- 44 Bayside City Council, Submission 8, 2.
- 45 Frankston City Council, Submission 9, 1.
- 46 *Water Act 1989* (Vic) s 158(3); *Water Industry Act 1994* (Vic) s 75(3).
- 47 Electricity distribution companies in Victoria are required to operate under an electricity safety management scheme, approved by Energy Safe Victoria. Gas companies are similarly required to operate under an approved gas safety case. Energy Safe Victoria does not give approval unless the electricity or gas company is a member of Dial Before You Dig Vic/Tas and has an adequate procedure for maintaining and updating a register of underground assets.
- 48 Estimate provided by Mark Binks, State Manager, Dial Before You Dig Vic/Tas.



- 5.51 Sometimes a public utility or service provider places a caveat on the property, rather than creating an easement, to protect its interests. A caveat is a notice to the Registrar which forbids the registration of any instrument that is inconsistent with rights claimed by the caveator.⁴⁹ For example, an electricity company may lodge a caveat on a property to protect a substation that has been installed there.
- 5.52 While this can also alert a purchaser to the company's interests, and the company to any potential infringement of its rights, a broadly-worded caveat can create difficulties in conveyancing. The purchaser may need to change the wording of the transfer, or negotiate with the company to consent to the registration of the transfer.
- 5.53 A caveat is not necessary where the utility or service provider's rights are directly protected by the legislation under which it operates. The Law Institute of Victoria has suggested that it should no longer be possible to use caveats in this way. We consider that the use of caveats for this purpose should be reviewed as part of a broader review of the role of caveats under the Transfer of Land Act.

SUBMISSIONS

- 5.54 We asked in the consultation paper whether the current arrangements to inform purchasers about the existence and location of regulatory easements and concealed structures are adequate.⁵⁰ Most submissions addressing this issue indicated that the current arrangements are inadequate.⁵¹ Only one submission said that they are adequate.⁵² Our recommendation that all regulatory easements be recorded in future should improve certainty about where they have been acquired.
- 5.55 The greatest concern expressed in submissions was about identifying the existence and location of concealed assets that service providers have installed without taking out an easement. The solutions put forward fall broadly within two categories:
- proposals to create easements over existing assets
 - proposals to provide more information to purchasers.

Proposals to create easements over existing assets

- 5.56 Councils do not consider it practicable to acquire easements over existing assets by compulsory process or agreement because of the cost and possible opposition by the landowners.⁵³
- 5.57 Some submissions suggested that the way to identify and protect concealed assets is to register implied easements or convert implied easements to express easements.⁵⁴ This solution reflects the belief that a regulatory easement can be implied over private land. We do not agree with this interpretation of the law. Certain easements that are not specified on a plan can be implied under section 12(2) of the Subdivision Act, but they are not regulatory easements in favour of service providers. They are private easements 'for the benefit of each lot and any common property'.⁵⁵
- 5.58 Another suggested solution is to introduce legislation that enables easements in gross to be acquired over existing assets by prescription.⁵⁶ As we consider prescription an unsatisfactory principle and recommend in Chapter 4 that it be abolished prospectively, we do not agree that it should be extended by legislation. Furthermore, this solution would not clarify the location and nature of the easements and what rights the service providers claim.

Proposals to provide more information to purchasers

- 5.59 Approximately 30 per cent of residential sales in Melbourne occur by auction.⁵⁷ The popularity of this fast-paced form of sale increases the importance of ensuring that purchasers are given accurate, useful and relevant information about the property without being swamped with detail.
- 5.60 A solution favoured by many submissions is a central repository of information about assets installed by service providers on, in or over individual lots. Views differed about the form of the repository and none of the proposals was fully developed. If a central repository is to be used, further consultation is needed to ensure that the regulatory burden and associated costs are proportionate to the expected benefit.
- 5.61 Some submissions suggested that the existence of assets on private land outside of easements should be recorded on the register.⁵⁸ Dean Jackson suggested that section 88(2) of the Transfer of Land Act, under which the Registrar is notified of regulatory easements, could be widened to enable notification of the existence of assets. The recording would not establish a legal interest above that which exists under the legislation that applies to the service provider.
- 5.62 Although this proposal builds on an existing central repository of information, the register currently contains only information about rights in the land. A service provider does not acquire property rights over private land by installing assets in, on or over it. Co-locating records of assets with records of easements could give the opposite impression, creating confusion. Owners, purchasers and service providers alike may come to see no distinction between an easement for the purpose of providing a service, and the presence of assets on the property without an easement. Service providers could be less inclined to acquire regulatory easements, in which case the landowners would not be compensated.
- 5.63 The Law Institute of Victoria proposed that a central register similar to the DBYD service be established.⁵⁹ It would contain information about all easements and 'quasi-easements' created by service providers. This would avoid changes to the register and could be specifically designed for its purpose. The drawback is that it would duplicate elements of both the register and the DBYD service.
- 5.64 A solution advanced by Telstra is to require all service providers to register with DBYD and then require vendors to attach plans from DBYD to the vendor disclosure statement under section 32 of the Sale of Land Act.⁶⁰
- 5.65 This solution would make purchasers aware of the existence of the assets but it provides a more comprehensive regulatory response than the problem requires.
- 5.66 Requiring the vendor to purchase plans of underground assets, even if they are within an easement, would create costs and delays with uncertain benefit. The vendor is already required to provide information about regulatory easements that have been created over the lot. Requiring the vendor to also provide information about the existence and location of the assets within the easement is unnecessary.
- 5.67 As a member-based organisation, DBYD determines its own functions and direction. It directs its services to providing information about proposed excavation sites to people involved in the excavations, at their request. It is not a repository of information that its members share and can search.

- 49 Caveats may be lodged under the *Transfer of Land Act 1958* (Vic) s 89(1).
- 50 Victorian Law Reform Commission (2010), above n 11, 40 [4.68].
- 51 Mr Michael Macnamara, Submission 4; Bayside City Council, Submission 8; Wellington Shire Council, Submission 10; Moorabool Shire Council, Submission 11; Boroondara City Council, Submission 15a; Stonnington City Council, Submission 23; Real Estate Institute of Victoria, Submission 25; Law Institute of Victoria, Submission 26.
- 52 City of Greater Dandenong, Submission 18.
- 53 Bayside City Council, Submission 8, 2; Frankston City Council, Submission 9, 1.
- 54 Bayside City Council, Submission 8; Moorabool Shire Council, Submission 11.
- 55 *Subdivision Act 1988* (Vic) s 12(2)(b).
- 56 Goulburn-Murray Water, Submission 21, 2.
- 57 Real Estate Institute of Victoria, *A Guide to Buying Your Home*, 3 <http://www.propertiesonline.com.au/agents_folder/2039/secureaccess/guide_buying.pdf>.
- 58 Mr Robert Ford, Submission 1; Mr Dean Jackson, Submission 24.
- 59 Law Institute of Victoria, Submission 26, refer to page 7.
- 60 Telstra, Submission 16, 3. Telstra does not guarantee the accuracy of the location of its assets on Dial Before You Dig plans and has pointed out that a Telstra accredited Asset Plan Locator would still need to be engaged before the land was disturbed.



5.68 We see merit in a scheme that:

- provides access to information about assets that service providers have installed on a lot, including those that they have installed without creating a regulatory easement
- encompasses all service providers
- is accessible to all service providers as well as the general public.

5.69 The proposals suggested in the submissions have raised some ideas but further investigation and consultation is clearly needed before a solution is identified.

5.70 The Department of Sustainability and Environment (DSE) has made significant progress towards providing information for online searching on rights, restrictions and responsibilities affecting individual lots. It is also a member of the Victorian Spatial Council, a peak body of spatial information associations in Victoria. The Victorian Spatial Council leads the development and implementation of a strategy for the provision and management of spatial information in Victoria. Assets placed on land without an easement represent a gap in Victoria's land information system which could be addressed as part of the Victorian Spatial Information Strategy or as a separate project.

RECOMMENDATIONS

27. All service providers operating under Victorian legislation should issue property statements on request containing details of any assets they have installed on a privately owned lot, including any that are not contained within a registered regulatory easement.
28. The Department of Sustainability and Environment should lead the development of a scheme for providing simpler access to information about the assets installed by service providers on a lot, including those installed without creating a regulatory easement.

5.71 In any event, purchasers should be alerted to the need to seek out this information before signing a contract of sale, if they intend to redevelop the land.

RECOMMENDATION

29. Section 32 of the *Sale of Land Act 1962* (Vic) should be amended to require the vendor's statement to include a warning to the effect that not all assets installed and owned by service providers may be contained within easements and that any proposed renovation to buildings or redevelopment of the property may be affected by the location of these assets.

Chapter 6

Purpose and Nature of Covenants

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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 land⁵
 - given for the benefit of land held by the covenantee⁶
 - ‘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.¹² Enforcement is not 'as 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.¹³ 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.¹⁵ 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.¹⁶ 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.¹⁸ 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 *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143.
- 4 Brendan Edgeworth, 'The Numerus Clausus Principle in Contemporary Australian Property Law' (2006) 32 *Monash University Law Review* 387, 396.
- 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 Benefit 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].
- 8 See, eg, *Fitt v Luxury Developments Pty Ltd* (2000) VSC 258; *Pirie v Registrar-General* (1962) 109 CLR 619; *Forestview Pty Ltd v Perpetual Trustees (WA)* (1998) 152 ALR 149; *Clem Smith Nominees Pty Ltd v Farrelly & Farrelly* (1978) 20 SASR 227; *Quadramain Pty Ltd v Sevastapol Investments Pty Ltd* (1976) 8 ALR 555.
- 9 Bradbrook and Neave, above n 7, [18.30], [18.64]; *Supreme Court Act 1986* (Vic) s 38.
- 10 A declaration as to a covenant can be made under the *Property Law Act 1958* (Vic) s 84(2).
- 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) ss 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, *Conservation, 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) ss 69–72; *Aboriginal Heritage Act 2006* (Vic) ss 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) ss 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).



- 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.²¹
- 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'.²² 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*.²³ 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.²⁴ If not for the operation of the legislation under which the statutory agreement is made, the positive covenant could not run with the land.²⁵
- 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'.²⁶
- 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.²⁷ 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.²⁸ New provisions have been drafted and included in a draft Exposure Bill.²⁹ If these or similar provisions are adopted, they could provide a model for other statutory agreements.

RECOMMENDATION

30. Statutes that provide for statutory agreements should specify how they may be enforced, varied and removed and not express the agreements as being enforceable 'as if they were restrictive covenants'.

RESTRICTIONS

- 6.32 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.³⁰
- 6.33 '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'.³¹
 - The Transfer of Land Act provides for the recording of 'restrictive covenants' only.³² Plans that may include restrictions can be registered, but the restrictions specified in the plans are not recorded.³³
 - Adding to the confusion, the Planning and Environment Act defines 'registered restrictive covenant' to mean 'a restriction within the meaning of the Subdivision Act'.³⁴
- 6.34 This 'circle of definitions' was the subject of comment by VCAT in *Focused Vision Pty Ltd v Nillumbik SC*:³⁵
- [I]t 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.*³⁶
- VCAT added that 'the definitions make clear that the primary, if not exclusive, meaning of a "restriction" is a "restrictive covenant"'.³⁷
- 6.35 In *Gray v Colac Otway SC*, VCAT said '[a] restriction is a limitation placed on the use or enjoyment of land'.³⁸ 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.³⁹

STATUTORY RESTRICTIONS UNDER THE SUBDIVISION ACT

- 6.36 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 inadequate 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

- 6.37 In Chapter 3 we outlined how express subdivisional easements are created under the Subdivision Act. A similar process is used to create restrictions.

- 21 *Planning and Environment Act 1987* (Vic) s 173. The provisions enable 'responsible authorities' (usually councils) to enter into agreements with land owners (including developers) which may impose positive or negative obligations regulating the use or development of land.
- 22 *Planning and Environment Act 1987* (Vic) s 182. Note also that any person may apply to VCAT for an enforcement order if a use or development of land contravenes a s 173 agreement: *Planning and Environment Act 1987* (Vic) s 114.
- 23 See, eg, *Victorian Conservation Trust Act 1972* (Vic) s 3A(11).
- 24 We discuss positive covenants in more detail at paras [6.86]–[6.120].
- 25 See, eg, *Aboriginal Heritage Act 2006* (Vic) s 77(b).
- 26 Ontario Law Reform Commission, *Report on Covenants Affecting Freehold Land* (1989)104. See also Scottish Law Commission, *Report on Real Burdens* Report No 181 (2000) [4.31].
- 27 This point is more fully discussed in Chapter 8.
- 28 See Mark Dwyer, *Review of section 173 agreements*, Discussion Paper (2004); Department of Planning and Community Development, *Modernising Victoria's Planning Act: discussion paper on opportunities to improve the Planning and Environment Act 1987*, (2009). Section 173 agreements are not 'restrictions' for purposes of the Subdivision Act so cannot be removed under s 23 of that Act: *Van Der Heyden v Mansfield SC* (2003) VCAT 102.
- 29 See Department of Planning and Community Development, *Modernising Victoria's Planning Act: Planning and Environment Amendment (General) Bill 2009—Commentary on the Draft Bill*, (2009); Planning and Environment Amendment (General) Bill Exposure Draft ss 58–64.
- 30 This proposed functional meaning is consistent with judicial interpretation of the word 'restriction' in s 84 of the *Property Law Act 1958* (Vic). See paras [8.4]–[8.8] in Chapter 8.
- 31 *Subdivision Act 1988* (Vic) s 3(1).
- 32 *Transfer of Land Act 1958* (Vic) s 88.
- 33 Section 88(1A) of the *Transfer of Land Act 1958* (Vic) provides that the provision for recording of covenants in s 88(1) does not apply to the creation of covenants as part of a plan of subdivision or by planning scheme or permit under the *Planning and Environment Act 1987* (Vic).
- 34 *Planning and Environment Act 1987* (Vic) s 3(1). See comments of Moorabool Shire Council regarding the use of the term 'registered restrictive covenant', that 'all terminology should be congruent throughout the various acts relating to such matters': Moorabool Shire Council, Submission 11, 3.
- 35 *Focused Vision Pty Ltd v Nillumbik SC* (2003) VCAT 1393.
- 36 *Ibid* [35].
- 37 *Ibid*. These remarks were cited with approval in *Cardoso v Greater Bendigo CC* (2006) VCAT 2043 [10]–[11].
- 38 *Gray v Colac Otway SC* (2005) VCAT 2266 [27]. In *Costa v Glen Eira CC* (2005) VCAT 2719 at [42] it was pointed out that restrictions imposed by the *Planning and Environment Act 1987* (Vic) are different to restrictive covenants.
- 39 *Gray v Colac Otway SC* (2005) VCAT 2266 [27].



- 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.⁴⁰ 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.⁴¹ A restriction may also be required by a referral authority as an alteration to a draft plan of subdivision.⁴²
- 6.39 Plans showing restrictions imposed in this way must be certified by the council before they are registered.⁴³ 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’⁴⁴ (our italics).

WHY A ‘RESTRICTION’ ON A PLAN OF SUBDIVISION IS NOT A RESTRICTIVE COVENANT

- 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’.⁴⁵
- 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.⁴⁶
- 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.⁴⁷ 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.⁴⁸ 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.⁴⁹
- 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’,⁵⁰ or where he or she has ‘a special interest in the subject matter’.⁵¹ 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 City 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'.

- 40 *Subdivision Act 1988* (Vic) s 62.
- 41 See, eg, *B and K Douglas v Yarra Ranges Shire Council* (2002) VCAT 987 [1]. A restriction can amount to a complete prohibition on an activity: *Foley v Padley* (1984) 154 CLR 349.
- 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 3(1), s 24.
- 45 For example, *Transfer of Land Act 1958* (Vic) s 88(1AA)–(1A); *Subdivision Act 1988* (Vic) s 4(4), s 37(3)(iv)(D).
- 46 See, eg, *Re Dennerstein* [1963] VR 688, 696; *Fitt v Luxury Developments Pty Ltd* (2000) VSC 258 [100]–[106]; *Morgan v Yarra Ranges SC* (2009) VCAT 701 [14] citing *Thornton v Hobsons Bay CC* (2004) VCAT 383 [10]; Bradbrook and Neave, above n 7, [13.39]–[13.41].
- 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's Bay Local Aboriginal Land Council v Aboriginal Community Benefits Fund Pty Ltd* (1998) 194 CLR 247. The authorisation 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's Bay Local Aboriginal Land Council v Aboriginal Community Benefits Fund Pty Ltd* (1998) 194 CLR 247 [50] (Gaudron, Gummow and Kirby JJ), [101]–[103] (McHugh J), [108]–[109] (Hayne J). Note that the standing requirement applies whether the defendant is a public body or a private individual: [81] (McHugh J).
- 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) 20 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 City 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.



THE STATUS OF RESTRICTIVE COVENANTS ON REGISTERED LAND

- 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.⁵⁵ 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.⁵⁶
- 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.⁵⁷
- 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.⁵⁸
- 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.⁵⁹ 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.⁶⁰ 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.⁶¹
- 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 court⁶² and was indirectly recognised in a 1918 statute,⁶³ the practice was not expressly authorised by statute until 1954.⁶⁴ A further statute in 1964 validated past practice by deeming the Registrar always to have had the power.⁶⁵
- 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 1930.⁶⁶ The Torrens statutes in South Australia and Queensland still make no express provision for private restrictive covenants⁶⁷ and conveyancers in those jurisdictions use various devices to make covenants enforceable against successors.⁶⁸ Western Australia and Tasmania provide for the recording of restrictive covenants, subject to conditions.⁶⁹

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.⁷⁰ 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).⁷¹
- 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.⁷² Their validity and legal effect depends on the general rules of contract, equity and statutes.⁷³ 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.⁷⁴
- 6.62 In our consultation paper, we asked whether restrictive covenants should be recorded or registered.⁷⁵
- 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.⁷⁶
- 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'.⁷⁷
- 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.⁷⁸
- 6.66 Michael Macnamara submitted that registration should occur as part of a scheme of covenants as in the Northern Territory.⁷⁹ 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. Volunteers, 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) VR 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, Adelaide, 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].
- 60 *Ibid* [181] citing; *Forestview Pty Ltd v Perpetual Trustees* (WA) (1998) 152 ALR 149, 163, 165 and *Pirie v Registrar-General* (1962) 109 CLR 619, 627–8.
- 61 Sir Robert Torrens considered that the doctrine of notice caused much cost and complexity in conveyancing under the old system: P Moerlin Fox, 'The Story Behind the Torrens System' (1950) 23 *Australian Law Journal* 489, 489–90, 493; Stanley Robinson, *Equity and Systems of Title to Land by Registration in England and Australia*, PhD thesis, Monash University (1973) 22–3.
- 62 Stanley Robinson, *Transfer of Land in Victoria* (Lawbook Co, 1979) 350–1; *Re Arcade Hotel Pty Ltd* (1962) VR 274; *Mayor etc of Brunswick v Dawson* (1879) 5 VLR (Eq) 2; *Kenna v Ritchie* (1907) VLR 386.
- 63 *Real Property Act 1918* (Vic) s 10(6).
- 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).
- 67 Sharon Christensen and WD Duncan, 'Is it time for a national review of the Torrens' system: The eccentric position of private restrictive covenants' (2005) 12 *Australian Property Law Journal* 104, 105.
- 68 *Ibid*. The authors note that in South Australia, covenants are created by memoranda 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.
- 70 See discussion in Chapter 11 of Victorian Law Reform Commission, *Easements and Covenants* Consultation Paper No 9 (2010).
- 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.
- 74 *Fitt v Luxury Developments Pty Ltd* (2000) VSC 258 [176]–[186] (Gillard J); *Pirie v Registrar-General* (1962) 109 CLR 610, 627–8. 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.
- 75 Victorian Law Reform Commission, above n 70.
- 76 Wellington Shire Council, Submission 10; City of Greater Dandenong, Submission 18; Real Estate Institute of Victoria, Submission 25.
- 77 Moorabool Shire Council, Submission 11.
- 78 Law Institute of Victoria, Submission 26, 12.
- 79 Mr Michael Macnamara, Submission 4, 5.

Purpose and Nature of Covenants



- 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.⁸⁶ Unless the covenant provides otherwise, the benefit of a building scheme covenant attaches to 'every subdivided part which is capable of benefiting from it'.⁸⁷
- 6.77 Building scheme covenants magnify renegotiability 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.

- 80 Land Victoria, Submission 27, 12.
- 81 The covenant would likely breach the restrictions on third-line forcing in the *Trade Practices Act 1974* (Cth) s 47(6) or (7); see pt IXA of the *Competition Policy Reform (Victoria) Act 1995* (Vic) ss 19, 20.
- 82 Restrictions on sale of land are generally disallowed as being contrary to the right of ownership: Kevin and Susan Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009) [3.1.38].
- 83 Carol Rose Servitudes: *Research Frontiers in Law and Economics, Arizona Legal Studies Discussion Paper No 09-13* (2009) 15, available at SSRN <http://ssrn.com/abstract=1371251>.
- 84 Law Commission (England and Wales), *Easements, Covenants and Profits a Prendre: A Consultation Paper* Consultation Paper No 186 (2008) 133.
- 85 This is also known as a scheme of development.
- 86 This was a rule developed by equity in *Elliston v Reacher* (1908) 2 Ch 374, and applied in *Re Dennerstein* (1963) VR 688: See Adrian Bradbrook, Susan McCallum and Anthony Moore, *Australian Real Property Law* (Lawbook Co, 4th ed) (2007) 807, fn 96. The United States developed a similar rule for enforcement of 'reciprocal implied covenants'.
- 87 *Property Law Act 1958* (Vic) s 79A.
- 88 The term 'renegotiability' was coined by Rose: Rose, above n 83.
- 89 *Fitt v Luxury Developments Pty Ltd* (2000) VSC 258 [320]–[331]; *Re Dennerstein* (1963) VR 688, 696. In *Fitt*, Justice Gillard did not follow *Re Dennerstein* on the question of whether the existence of a building scheme must be recorded.
- 90 In our consultation paper, we discussed how an amendment to the *Transfer of Land Act 1958* (Vic) in 2009 appeared to empower the Registrar to record a covenant on the folio of benefited land as well as the burdened land: Victorian Law Reform Commission, above n 70, Chapter 11; *Transfer of Land Act 1958* (Vic) s 88(1) as inserted by *Land Legislation Amendment Act 2009* (Vic) s 44(1). In response, Land Victoria has confirmed that 'there was no intention to amend section 88(1) to enable the Registrar to record covenants on the folios of all benefited land': Land Victoria, Submission 27, 12.
- 91 Mr Michael Macnamara, Submission 4, 5; Law Institute of Victoria, Submission 26, 12; Real Estate Institute of Victoria, Submission 25; City of Greater Dandenong, Submission 18; Wellington Shire Council, Submission 10; Association of Consulting Surveyors Victoria, Submission 28, 4.
- 92 Law Institute of Victoria, Submission 26, 12.
- 93 Association of Consulting Surveyors Victoria, Submission 28, 4.
- 94 Wellington Shire Council, Submission 10.
- 95 Real Estate Institute of Victoria, Submission 25, 4.
- 96 Land Victoria, Submission 27, 11.
- 97 *Ibid*, 12.
- 98 Oral communication with Robert Easton, Easton Consulting (29 September 2010).

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',⁹⁹ 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.¹⁰⁰ It is not enforceable against the successors of the covenantor. This is the rule in *Austerberry v Corporation of Oldham*¹⁰¹ (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.¹⁰² 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*.¹⁰³ 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.¹⁰⁴
- 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.¹⁰⁵ Since then, a series of English reports have put forward proposals for a statutory scheme of restrictive and positive covenants.¹⁰⁶
- 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.¹⁰⁷ New Zealand followed in 1987, Northern Ireland in 1997, the Northern Territory in 2000 and Ireland in 2009.¹⁰⁸
- 6.93 No Australian jurisdiction apart from the Northern Territory has abolished the *Austerberry* rule. The rule also applies in Canada.¹⁰⁹
- 6.94 Positive covenants have been able to run with land in Scotland and the United States since the mid 19th century.¹¹⁰ Civil law countries generally do not allow positive obligations to run with land, unless they are connected with a servitude (easement).¹¹¹

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.

- 6.96 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
- 6.97 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.
- 6.98 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
- 6.99 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

- 6.100 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.
- 6.101 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.
- 6.102 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

- 99 Bruce Ziff, *Principles of Property Law* (Thomson Carswell, 4th ed, 2006) 381.
- 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 *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750.
- 102 See discussion at [6.23]–[6.24] above.
- 103 *Rhone v Stephens* (1994) 2 All ER 65.
- 104 *Ibid*.
- 105 Committee on Positive Covenants (UK), *Report of the Committee on Positive Covenants Affecting Land* (1965) Cmnd 2719.
- 106 Law Commission (England and Wales), *Transfer of Land—Report on Restrictive Covenants* Report No 11 (1967); Law Commission (England and Wales), *Transfer of Land—Appurtenant Rights* Working Paper No 36 (1971); Law Commission (England and Wales), *Transfer of Land—The Law of Positive and Restrictive Covenants* Report No 127 (1984).
- 107 *Land and Conveyancing Act 1981* (Trinidad and Tobago) s 118; this legislation has yet to come into operation.
- 108 *Property Law Act 2007* (NZ); *Property (NI) Order 1997* Art 34; *Law of Property Act 2000* (NT) div 4; *Land and Conveyancing Law Reform Act 2009* (Ir) s 49.
- 109 *Durham CC No 123 v Amberwood Investments Ltd* (2002) 50 RPR (3d); Ziff, above n 99, 389–95.
- 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.
- 112 See, eg, Ontario Law Reform Commission (1989), above n 26; New Zealand Department of Justice, *Positive Covenants Affecting Land* (1985).
- 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.
- 117 *Owners Corporations Act 2006* (Vic) ss 23, 138 and sch 1.
- 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.



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.¹²² Councils can also establish a special rate or special charge scheme to fund the provision of local benefits.¹²³

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.¹²⁴ 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.¹²⁵ In the United States, developers use positive covenants to empower the homeowner association to take liens over lot owners' titles to secure unpaid fees.¹²⁶ 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.'¹²⁷
- 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.¹²⁸
- 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) (Road Management Act) 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.¹²⁹
- 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 used to create 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.

122 *Local Government Act 1989* (Vic) ss 161, 161A, 162.

123 *Ibid* s 163. The special charge can be levied if the council considers that the performance of the function/exercise of power is or will be of special benefit to the persons required to pay the charge. An example would be a street fair organised by the council whereby it can recoup expenses by way of special charge to the retailers in the street. The special benefit is increased business for the retailers.

124 Victorian Law Reform Commission, above n 70, 109 [12.54].

125 Ms Cathy Sherry, Submission 34, 23.

126 *Ibid*.

127 *Ibid*, 23–4.

128 Stonnington City Council, Submission 23.

129 Goulburn-Murray Water, Submission 21.

130 Oral communication with Stephen Rodgers, Property Services, Goulburn-Murray Water (29 October 2010).

131 Law Institute of Victoria, Submission 26, 12.

132 *Ibid*.

133 *Planning and Environment Act 1987* (Vic) s 62(2)(f), (g).

134 Ms Cathy Sherry, Submission 34, 23.

Purpose and Nature of Covenants

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.¹³⁵ 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.¹³⁶

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.¹³⁷

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'.¹³⁸

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.¹³⁹

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.¹⁴⁰ The proliferation of covenants imposes high transaction costs on burdened owners who wish to negotiate the release or variation of covenants.¹⁴¹ Where the number of benefited owners is large, the chances of obtaining the formal consent of all are remote.¹⁴²

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 agreements once they are spent.¹⁴⁸

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.¹⁴⁹

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 date.

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

135 Victorian Law Reform Commission, above n 70, 109 [12.51], Chapter 13.

136 Ontario Law Reform Commission, above n 26, 104; Scottish Law Commission, *Report on Real Burdens*, above n 26, [4.31].

137 See discussion regarding the challenges and design issues of such a scheme identified in Victorian Law Reform Commission, above n 70, Chapter 13.

138 Scottish Law Commission, *Report on Real Burdens*, above n 26, 126.

139 See, eg, *Rosscorp Pty Ltd v Manningham CC* (2001) VCAT 1609 [36]–[40], discussing a covenant requiring walls be made of brick, stone, concrete, glass, timber, aluminium or asbestos cement. See also Housing Industry Association, Submission 32, 2.

140 A report in 2006 estimated that between 85% and 100% of new lots created in the growth areas of Melbourne were subject to some form of restriction: Maddocks, above n 52, 17.

141 Cathy Sherry observed that the widespread use of covenants can have effects on other people within and outside the subdivision: Ms Cathy Sherry, Submission 34.

142 This type of situation is sometimes referred to as an 'anti-commons' problem. An anti-commons exists where many different parties have the power to veto a use of land. The cost of negotiating with all of these parties to use the land may far outweigh its benefit. See, eg, Rose, above n 83.

143 Purchasers who buy at auction are required to sign a binding contract of sale immediately, and there is no cooling-off period.

144 Undated letter from Mr Chris McRae, Registrar, to municipal CEOs, attached to Land Victoria, Submission 27, 18.

145 See *ibid*, 17–18.

146 Victorian Law Reform Commission, above n 70, 125 [14.26].

147 Wellington Shire Council, Submission 10; Yarra Ranges Council, Submission 20; Australian Institute of Conveyancers, Submission 17; City of Greater Dandenong, Submission 18; Association of Consulting Surveyors (Victoria), Submission 28, 4; City of Melbourne, Submission 31; Housing Industry Association, Submission 32.

148 Housing Industry Association, Submission 32, 2.

149 Land Victoria, Submission 27, 15.

150 Association of Consulting Surveyors (Victoria), Submission 28, 4.

151 Yarra Ranges Council, Submission 20, 3.

152 Brian and Judith Magree, Submission 12.

153 Australian Institute of Conveyancers, Submission 17.

154 *Ibid*.



- 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’.¹⁵⁵ 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.¹⁵⁷ In expressing his support, Mr Macnamara added the qualification that ‘time in itself should not be a ground for lifting or modifying a covenant’.¹⁵⁸ 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,¹⁶⁵ sustainable development ‘meets the need of the present without compromising the ability of future generations to meet their own needs’.¹⁶⁶ 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 governments charged with the responsibility of considering the interests of the entire community. They are individual actors with responsibility only for themselves.*¹⁶⁹

- 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.¹⁷⁰ Time limits on the exercise of rights are an accepted way of balancing competing interests.¹⁷¹
- 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,¹⁷² we recommend that restrictive covenants created in future should have a maximum duration of 20 years, as in the Northern Territory.¹⁷³ After the covenant expires, it should be open for renegotiation.¹⁷⁴
- 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'.¹⁷⁵

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.¹⁷⁶ 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.

- 155 City of Melbourne, Submission 31.
- 156 Ibid.
- 157 Mr Michael Macnamara, Submission 4, 6; Law Institute of Victoria, Submission 26, 15.
- 158 Mr Michael Macnamara, Submission 4, 6.
- 159 Ibid.
- 160 Law Institute of Victoria, Submission 26, 15.
- 161 Real Estate Institute of Victoria, Submission 25, 5.
- 162 *Luke v Maroochy Shire Council & Westpac Developments* (2003) QPEC 5.
- 163 Ibid [137].
- 164 For example, Gerald Korngold, 'Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations' (2006–07) 56 *American University Law Review* 152; Mollie Shaffer Van Houweling, 'The New Servitudes' (2008) 96 *Georgetown Law Journal* 885, 900–3.
- 165 World Commission on Environment and Development ('the Brundtland Commission'), *Our Common Future* (1987) (report commissioned by United Nations General Assembly Resolution 38/161 in 1983).
- 166 Ibid.
- 167 *Climate Change Act 2010* (Vic) s 12, relating to principles to be considered in making decisions in managing climate change.
- 168 More particularly, the developer's covenants are likely to serve the assumed values of the target buyer market.
- 169 Ms Cathy Sherry, Submission 34, 18.
- 170 For example, the *Perpetuities and Accumulations Act 1968* (Vic) limits the period for which owners can control the ways in which their property passes and is dealt with by their successors.
- 171 Examples are the rules for acquisition of easements by 20 years use, extinguishment of title under s 18 of the *Limitation of Actions Act 1958* (Vic) once the limitation period has expired, and removal of easements under s 73(3) of the *Transfer of Land Act 1958* (Vic) for 30 years non-use.
- 172 Victorian Law Reform Commission, above n 70, 123 [14.12]–[14.16].
- 173 *Law of Property 2000* (NT) s 174.
- 174 This approach is recommended by Carol M Rose, 'Servitudes, Security and Assent: Some Comments on Professors French and Reichman' (1981–82) 55 *Southern California Law Review* 1403, 1413.
- 175 Australian Bureau of Statistics, 4130.0.55.002—*Housing Mobility and Conditions, 2007–08* (20 November 2009) <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4130.0.55.002Main%20Features22007-08?opendocument&tabname=Summary&prodno=4130.0.55.002&issue=2007-08&num=&view=>>.
- 176 Land Victoria, Submission 27, 15; Yarra Ranges Council, Submission 20, 2.

Purpose and Nature of Covenants

6.155 We consider that the sunseting 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.

Chapter 7

Easements and Covenants under Planning Law

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Easements and Covenants under Planning Law

INTRODUCTION

- 7.1 This and the following chapter deal with the removal and variation of easements and restrictive covenants without the consent of the landowners who have the benefit of them.
- 7.2 In this chapter, we discuss whether the current provisions for the removal and variation of easements and restrictive covenants under planning legislation are suitable and workable. We identify shortcomings, explain how they developed, and put forward recommendations and proposals that would reduce the reach of planning law into matters that need to be resolved under property law.
- 7.3 In the next chapter, we discuss the removal and variation of covenants by judicial order under section 84 of the *Property Law Act 1958* (Vic) (Property Law Act), and we recommend that the section be extended to apply to private easements.

MECHANISMS FOR REMOVAL OR VARIATION UNDER PLANNING LEGISLATION

- 7.4 In some cases, problems with easements or covenants can be overcome by removing them. In other cases, the solution may be to modify or vary their terms without removing them.
- 7.5 An easement can be varied by realigning,¹ narrowing² or partly deleting³ it. For example, in *Jordan v Stonnington City Council* an existing easement was varied by deleting part of an easement of carriageway that had been built over.⁴
- 7.6 A restrictive covenant can be varied by amending the terms to modify the restriction. For example, in *Dukovski v Banyule City Council*,⁵ a restrictive covenant was varied to allow the burdened owners to build a house facing in a particular direction, which was prohibited by the original covenant.
- 7.7 Both easements and restrictive covenants can be removed or varied by registration of a plan. Section 23 of the *Subdivision Act 1988* (Vic) (Subdivision Act) provides that an easement or restriction can be removed or varied by registered plan in accordance with a planning scheme or a permit. As we discuss in Chapter 6, 'restriction' is defined for the purpose of the Subdivision Act to include a restrictive covenant.
- 7.8 It follows that, for both easements and restrictive covenants, there are two main mechanisms for removal or variation by registration of a plan:
- by a planning scheme, or amendment to a planning scheme, that authorises or requires the removal or variation
 - by a permit for the removal or variation.⁶
- 7.9 A third method is removal or variation under the significant projects power contained in section 9A of the *Planning and Environment Act 1987* (Vic) (Planning and Environment Act). It is of very limited application and we do not discuss it in this report.
- 7.10 The procedures for making and amending a planning scheme are quite different from the procedures for obtaining a permit to remove or vary an easement or restriction. This is because planning schemes are a form of delegated legislation, while permits are an administrative instrument made under a planning scheme.⁷
- 7.11 For easements, the procedure for removal or variation by permit causes relatively few problems. For restrictive covenants, removal or variation by permit has not worked well. We discuss later in this chapter how a series of legislative amendments have been unable to reduce uncertainty, costs and delays in land use decisions.

7.12 Before discussing the differences in the procedures for the removal and variation of easements and restrictive covenants, we give a brief overview of the elements that they have in common.

REMOVAL OR VARIATION BY PLANNING SCHEME

7.13 The removal or variation of an easement or restrictive covenant can be authorised or required by a planning scheme under section 6(2)(g) of the Planning and Environment Act and then implemented by registration of a plan under section 23 of the Subdivision Act.⁸ The consent of anyone who has the benefit of the easement or restrictive covenant is not required.⁹

7.14 In most cases, the person seeking to remove or vary an easement or restrictive covenant must obtain a permit to do so. Clause 52.02 of each planning scheme states that a permit is required before proceeding under section 23 of the Subdivision Act to create, vary or remove an easement or restriction.

7.15 A permit is unnecessary if the removal or variation is required or authorised by the planning scheme itself. The planning scheme may list in a schedule to clause 52.02 the easements or covenants that may be removed or varied without a permit.

7.16 Since planning schemes for each municipal district already exist, any addition to the list in the schedule to clause 52.02 requires an amendment to the scheme.

7.17 A planning scheme amendment can be requested by anybody, but must be prepared by a 'planning authority' (usually a council) with the authorisation of the Minister for Planning.¹⁰ The procedures for making an amendment require a high degree of public participation. The planning authority must give notice to owners and occupiers of land that may be affected.¹¹ Any person may make a submission, and the planning authority must consider all submissions.¹²

7.18 If the planning authority does not accommodate a submission requesting a change to the amendment, it must refer it to a planning panel.¹³ The panel must consider all submissions referred to it and give hearings to the persons who made the submissions.¹⁴ The panel must report its findings to the planning authority and may make recommendations.¹⁵ The planning authority must consider the panel's report in deciding whether to adopt or change the amendment.¹⁶ The amendment comes into operation when the notice of approval is published.¹⁷

7.19 The submissions in response to our consultation paper indicated that planning scheme amendment is not generally a suitable method for removing easements or covenants affecting particular lots at the request of the owners. Moorabool Shire Council stated that amendments are 'complex and time consuming strategic processes' and are unsuitable for dealing with easements and covenants.¹⁸ South Gippsland Shire Council described the process as 'cumbersome and lengthy', requiring the support of the planning authority, which must commit significant resources to the amendment process.¹⁹ Adrian Finanzio said that 'while the method exists as an option, it exists in name only and is not really a viable method in most cases'.²⁰

REMOVAL BY A PERMIT TO REMOVE OR VARY

7.20 The second main mechanism for removal of easements or restrictive covenants under planning law is by permit (a 'permit to remove or vary').

7.21 A permit to remove or vary is different to a permit for a use or a development (a planning permit), though both types are granted under Part 4 of the Planning and Environment Act by a 'responsible authority'. A responsible authority is usually a council or the Minister.²¹

1 See, eg, *Brighton Beach Apartments PL v Bayside CC* (2002) VCAT 236.

2 See, eg, *Pitt & Others v Surf Coast SC and Another* (2000) VCAT 1664.

3 *Jordan v Stonnington City Council* (2004) VCAT 2008.

4 *Ibid* [94]–[95].

5 *Dukovski v Banyule City Council* (2003) VCAT 190.

6 Easements may also be removed by operation of s 36 of the *Subdivision Act 1988* (Vic). We discuss this method later in this chapter.

7 *MA Zeltoff Pty Ltd v Stonnington CC* (1999) 3 VR 88 [26].

8 *Subdivision Act 1988* (Vic) s 23(1).

9 *Ibid* s 23(2).

10 *Planning and Environment Act 1987* (Vic) s 8A.

11 *Ibid* s 19(1). The Minister can grant exemption from the notice requirements: s 20.

12 *Planning and Environment Act 1987* (Vic) ss 21(1), 22(1).

13 *Ibid* s 23(1).

14 *Ibid* s 24.

15 *Ibid* s 25.

16 *Ibid* ss 27–29.

17 *Ibid* ss 36, 37. The amendment requires the approval of the Minister, unless the Minister has authorised the council to approve it: ss 35, 35A, 35B and 11.

18 Moorabool Shire Council, Submission 11, 4.

19 South Gippsland Shire Council, Submission 5, 1. The Council said that it 'would be unlikely to have the resources in order to facilitate such an amendment'.

20 Mr Adrian Finanzio, Submission 33, 4. Mr Finanzio advises that his submission is endorsed by the Victorian Planning and Environmental Law Association, Mr Christopher Canavan QC and Mr Ian McP Pitt SC.

21 *Planning and Environment Act 1987* (Vic) s 13. In an application for review of a decision of a responsible authority, VCAT can exercise the power of the responsible authority—*Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 51.

Easements and Covenants under Planning Law



- 7.22 Section 60 of the Planning and Environment Act sets out a list of matters to be considered by a responsible authority in granting a permit. The list includes specific tests for applications to remove or vary 'restrictions',²² but none for applications relating to easements. Later in this chapter, we discuss the tests for the removal of restrictions and how they have affected the public planning process.
- 7.23 If a planning permit is granted, the owner of the burdened land must lodge a certified plan with the Registrar.²³ On registration of the plan, the easement or restrictive covenant is removed or varied as specified in the plan.²⁴

REMOVAL AND VARIATION OF EASEMENTS

REMOVAL OR VARIATION BY PERMIT

- 7.24 As section 60 of the Planning and Environment Act does not prescribe any criteria specifically for the grant of a permit to remove or vary an easement, the responsible authority must imply the relevant considerations by examining the scope, text and purpose of the legislation.²⁵
- 7.25 The Administrative Appeals Tribunal, a predecessor to the Victorian Civil and Administrative Tribunal (VCAT), identified the following relevant considerations in *KJ Barge & Associates v City of Prahran Body Corporate—Strata Plan No 1235* (the *Barge* test):
- (a) *Does the current use of or the current state or condition of the dominant and servient lands (tenements) indicate a need or requirement for the continued existence of the easement; and*
 - (b) *would the owners of the dominant land suffer any material detriment in their use and enjoyment of that land if the easement were removed or varied?*²⁶
- 7.26 The *Barge* test, although not binding,²⁷ has often been applied in VCAT decisions.²⁸
- 7.27 In *Preston Corporate Centre Pty Ltd v Darebin City Council*,²⁹ VCAT summarised the considerations it applies in an application for a permit to remove an easement. The 'need and detriment' factors in the *Barge* test are applied first.³⁰ If the test is not met, the permit should not be granted. VCAT must also consider the matters in section 60 of the Planning and Environment Act, state and local planning policy, and the orderly planning of the area, to the extent that they are relevant. Finally, VCAT must bear in mind that a property right should not be extinguished lightly.
- 7.28 We believe that these guidelines are generally appropriate for permits to remove or vary an easement, although the reference to 'dominant land' in the *Barge* test is not applicable to regulatory easements.³¹

REMOVAL UNDER SECTION 36 OF THE SUBDIVISION ACT

- 7.29 Section 36 of the Subdivision Act provides for both compulsory acquisition and compulsory removal of easements. In Chapter 3, we identified a number of difficulties with the application of section 36 to compulsory acquisition. Similar difficulties arise in relation to removal.
- 7.30 An easement can be removed under section 36 if the landowner applies to VCAT for leave to do so. The application can be made to VCAT in either of two circumstances:
- the council has granted a planning permit with a condition as to removal of an easement (easement removal condition)³²
 - the council or referral authority has made a written statement in the terms specified in section 36(1) when considering or implementing an amendment to a planning scheme or considering an application for a permit (written statement).³³

- 7.31 In effect, section 36 has a limited role in the removal of easements. As far as regulatory easements are concerned, the council or other holder of the easement (usually a referral authority) can release an easement without needing VCAT approval.
- 7.32 Section 36 is also of little use to an applicant who desires to remove a private easement, other than a right of way, burdening his or her own land.³⁴ Section 36(1) allows a landowner to apply to VCAT for leave to remove a right of way over the applicant's own land, or an easement 'over other land in the subdivision or consolidation or in the vicinity'. Except in the case of a right of way over the applicant's own land, a written statement or easement removal condition can be made only if the easement burdens land other than the land in the permit application.³⁵
- 7.33 Another difficulty with section 36 of the Subdivision Act is that it does not specify any criteria to guide VCAT in an application for leave to remove an easement. VCAT applies 'an overriding test of reasonableness' having regard to the circumstances of the case.³⁶
- 7.34 In our consultation paper, we asked whether the provision for removing easements under section 36 should be retained in its present form.³⁷ Four submissions supported retaining it without amendment.³⁸ Two councils expressed a desire to remain involved in the process of removing easements.³⁹
- 7.35 Two submissions supported repealing the removal provisions in favour of a mechanism for court-ordered removal.⁴⁰
- 7.36 We recognise the need for councils to retain section 36 for regulatory easements, but the section is unsuitable for the removal of private easements. We have already discussed its procedural complexity⁴¹ and have noted above the lack of criteria for balancing the interests of the owners of the dominant and servient lots.
- 7.37 Often the need to remove or vary an easement arises from a development proposal, but this is not always the case. In *Focussed Vision Pty Ltd v Nilumbuk SC*,⁴² VCAT declined to grant a permit to remove a private easement where there was no planning issue. VCAT said that it is

*not part of the core function of the planning system to readjust ownership rights as between ... owners as distinct from regulating the use or development of land which they own.*⁴³

- 22 *Planning and Environment Act 1987* (Vic) ss 60(2)–60(7).
- 23 *Subdivision Act 1988* (Vic) s 23(1). The owner is required to lodge a certified plan only if he or she wishes to remove or vary an easement or restriction affecting the land: *Zullaphella Pty Ltd v Stonnington City Council* (1999) VCAT 200 [64].
- 24 *Subdivision Act 1988* (Vic) ss 24(1), 24(2)(d).
- 25 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 [15].
- 26 *KJ Barge & Associates v City of Prahran Body Corporate—Strata Plan No 1235* (1992) 10 AATR 345.
- 27 See, eg, *Potts v Glen Eira CC* (2003) VCAT 1129 [11]; *Castles v Bayside CC* (2004) VCAT 864 [23].
- 28 See, eg, *Echuca Workers & Services Club Ltd v Campaspe SC* (2009) VCAT 1633; *Jordan v Stonnington CC* (2004) VCAT 2008 [41]; *Preston Corporate Centre Pty Ltd v Darebin CC* (2010) VCAT 617 [50]–[64].
- 29 *Preston Corporate Centre Pty Ltd v Darebin CC* (2010) VCAT 617, citing and summarising the factors identified in *Echuca Workers & Services Club v Campaspe SC* (2009) VCAT 1633 [23]–[28].
- 30 *Jordan & McMahon v Stonnington CC* (2004) VCAT 2008, [41]–[81].
- 31 Regulatory easements are easements in gross, for the benefit of the holder of the easement rather than for the benefit of dominant land. See Chapter 5.
- 32 This is the combined effect of *Subdivision Act 1988* (Vic) s 36(1), and clause 52.02 of each planning scheme: *Echuca Workers & Services Club v Campaspe SC* (2009) VCAT 1633 [20]. An easement removal condition is in the form set out in *Planning and Environment Act 1989* (Vic) s 62(2)(l).
- 33 See para [3.32]. Note that Clause 52.02 of each planning scheme provides that a permit is required before a person proceeds to remove an easement under s 36, with some exceptions. VCAT has set out principles for interpreting the s 36 requirements: *J T Snipe Investments Pty Ltd v Hume CC* (2007) VCAT 1831 at [14].
- 34 The point was raised in *Preston Corporate Centre Pty Ltd v Darebin CC* (2010) VCAT 617, [78]–[82] but it was unnecessary to resolve it.
- 35 *Preston Corporate Centre Pty Ltd v Darebin CC* (2010) VCAT 617 [81].
- 36 *J T Snipe Investments Pty Ltd v Hume CC* (2007) VCAT 1831 [14].
- 37 Victorian Law Reform Commission, *Easements and Covenants* Consultation Paper No 9 (2010) 80 [9.3]–[9.6].
- 38 Boroondara City Council, Submission 15a, 3; City of Greater Dandenong, Submission 18, 2; Stonnington City Council, Submission 23, 3–4; Real Estate Institute of Victoria, Submission 25, 3.
- 39 Stonnington City Council, Submission 23, 3–4; Moorabool Shire Council, Submission 11, 2.
- 40 City of Melbourne, Submission 31, 1; Law Institute of Victoria, Submission 26, 10.
- 41 See para [3.34]. 'An application for leave under s 36 is complex and contains multiple steps': *Preston Corporate Centre Pty Ltd v Darebin CC* (2010) VCAT 617 [76] (Mr G Code, Member).
- 42 *Focussed Vision Pty Ltd v Nilumbuk SC* (2003) VCAT 1393 [25], [58].
- 43 *Ibid.*

Easements and Covenants under Planning Law

The decision underlines the need for a property law procedure for removing and varying private easements.

- 7.38 We recommend in Chapter 8 that section 84 of the Property Law Act, under which restrictive covenants may be removed or varied by court order, should be extended to apply to easements. This would be a more suitable provision for the removal of private easements that benefit other land. Our proposals allow for councils to be given notice of applications for removal or variation.

RECOMMENDATION

37. Section 36 of the *Subdivision Act 1988* (Vic) should be amended so that it no longer provides for the removal of private easements.

REMOVAL AND VARIATION OF RESTRICTIVE COVENANTS

DEVELOPMENT OF THE CURRENT LAW

Bringing restrictive covenants under planning legislation

- 7.39 Restrictive covenants were unable to be removed or varied under planning law before the Planning and Environment Act and the Subdivision Act commenced.
- 7.40 The Planning and Environment Act introduced the idea that covenants and planning permits could be dealt with at the same time, in a planning forum. Before then, Victorian law conformed to the following general principles:⁴⁴
- Restrictive covenants are created by agreements between private parties and do not require planning approval.
 - A planning permit may be granted for a use or development that would breach a restriction in a covenant.⁴⁵
 - If a planning permit is granted, it simply means that the permitted use or development does not contravene planning law.
 - A planning permit does not authorise a breach of a covenant; nor does it release the permit applicant from any restriction in a covenant.
 - A planning permit applicant who wishes to avoid exposure to legal proceedings must have the covenant removed or varied so that it no longer restricts the use or development in the permit. This can be done by agreement with all benefited owners, or by obtaining a court order for removal or variation of the covenant.
 - The planning authority that grants the planning permit is not responsible for ensuring that the permit applicant actually obtains release from the covenant restriction.
 - If the planning permit applicant proceeds with the use or development without obtaining release of the covenant restriction, any person who has the benefit of the covenant can apply to the court for an order to enforce the covenant.
 - A court does not have to vary or remove a covenant to enable the applicant to proceed with a use or development for which a permit has been granted.
- 7.41 This model of ‘almost complete independence’ of covenants and planning⁴⁶ is the international norm. Permits for development are granted subject to the rights of third parties, and planning authorities are therefore ‘neither limited by private covenants nor entitled to enforce them’.⁴⁷

- 7.42 The removal and variation of covenants by permit, introduced by the Planning and Environment Act and the Subdivision Act, was novel and unique to Victoria. It was intended to provide a simpler and cheaper method for removing and varying restrictive covenants and to give responsible authorities greater control over land use development.⁴⁸ The provisions for a permit to remove or vary were designed to save the permit applicant from having to make a separate application to a court to remove or vary a covenant.⁴⁹
- 7.43 Subsequent legislative amendments between 1991 and 2000 have produced the opposite effect. The Planning and Environment Act now works in a way that ensures that covenants are administratively enforced by responsible authorities, even at the expense of planning objectives. Responsible authorities must consider restrictive covenants in deciding whether or not to grant a planning permit.⁵⁰ In many cases, a responsible authority cannot grant a planning permit for a use that would breach a covenant, even if no benefited owner objects.⁵¹
- 7.44 In allowing covenants to be the controlling factor in decisions to grant a planning permit, Victorian law since 2000 has reversed the conventional relationship between planning law and restrictive covenants. Victorian law is now out of step with other Australian states and territories and overseas jurisdictions.
- 7.45 To explain how the reversal occurred, we need to trace the changes made to the Planning and Environment Act between 1991 and 2000.

Introduction of criteria for permits to remove or vary: sections 60(2) and 60(5)

- 7.46 In 1991, a test for the grant of a permit to remove or vary a restriction was inserted in section 60(2) of the Planning and Environment Act.⁵² It provided that the responsible authority must not grant a permit that 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 financial loss, loss of amenity, loss arising from change to the character of the neighbourhood, or any other material detriment.
- 7.47 The proponents of the amendment said that it was to provide 'a more simple mechanism for the removal of outdated and superfluous covenants'.⁵³ Tooher comments that, in placing private interests above public interests, the amendment departed from the intention of the 1987 Act.⁵⁴
- 7.48 Two years later, the permit provisions were further amended.⁵⁵ The *Planning and Environment (Amendment) Act 1993* (Vic) inserted section 60(5) into the Planning and Environment Act. It contains a more stringent test for the granting of a permit to remove or vary a restriction. The test in section 60(2) was retained, but only for restrictions created after 25 June 1991.⁵⁶
- 7.49 Section 60(5) provides that a responsible authority must not grant a permit that allows the removal or variation of a restriction created prior to 25 June 1991 unless it is satisfied that:
- the owner of any land benefited by the restriction (other than one who has consented) is unlikely to suffer any detriment of any kind, including 'perceived detriment', as a consequence of the removal or variation of the restriction
 - if the owner has objected, the objection is vexatious or not made in good faith.
- 7.50 The stated objective of section 60(5) was:

*[to] tighten the provision in relation to covenants in place before ... section 60(2) of the principal Act commenced ... [so that] permits should be granted only for 'dead wood' covenants if no owner benefiting from the covenant objects.*⁵⁷

- 44 *Swinton's Pty Ltd v City of Melbourne and Crediton Nominees Pty Ltd & Ors* (unreported, AAT, 1993/37829 and 1993/68123), quoted in *Zullaphella Pty Ltd v Stonnington CC and Ors* (1999) VCAT 200 [41].
- 45 This general statement does not take account of the effect of s 61(4) of the *Planning and Environment Act 1987* (Vic), which is considered below.
- 46 Paul McCarthy, 'The Enforcement of Restrictive Covenants in France and Belgium: Judicial Discretion and Urban Planning' (1973) 73 *Columbia Law Review* 1, 27.
- 47 *Ibid.* This is also the usual position in the United States: 'American authorities may not validly "enforce" private restrictions by refusing to issue a building permit on the grounds that the project would violate a private covenant': *ibid.* 48.
- 48 Geoffrey Code, 'The Planning and Environment (Restrictive Covenants) Act 2000 (Vic): Another Setback for Public Planning?' (2001) 18 *Environmental and Planning Law Journal* 211, 212; see also Joyce Tooher, 'Restrictive Covenants and Public Planning Legislation—Should the Landowner Feel "Touched and Concerned?"' (1991) 9 *Environmental and Planning Law Journal* 63, 75 ('Restrictive Covenants').
- 49 Tooher, 'Restrictive Covenants', above n 48.
- 50 *Planning and Environment Act 1987* (Vic) ss 60(2), 60(5), 61(4).
- 51 Code, above n 48, 220.
- 52 Introduced by the *Subdivision (Miscellaneous Amendments) Act 1991* (Vic).
- 53 Tooher, 'Restrictive Covenants', above n 48, 81. This was a House amendment in the Legislative Council.
- 54 Tooher, 'Restrictive Covenants', above n 48, 81.
- 55 Tooher said that the reason for the amendment was that s 60(5) as interpreted by the Administrative Appeals Tribunal, had not achieved its original purpose: Joyce Tooher, 'Victorian Parliament Strikes Back!' (1994) 11 *Environmental and Planning Law Journal* 349, 350.
- 56 *Planning and Environment (Amendment) Act 1993* (Vic) s 60(4). The relevant date is the date on which the covenant was lodged for recording.
- 57 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 November 1993, 1694 (Robert Maclellan).

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- 7.51 The test in section 60(5) is so stringent that, for covenants created before 25 June 1991, the permit mechanism is practically ineffective except where nobody objects.⁵⁸
- 7.52 From 1993 to 2000, the tests in sections 60(2) and 60(5) applied only to permits to remove or vary a restriction. They did not affect decisions on applications for a planning permit. VCAT continued to hold that covenants were irrelevant in a decision to grant a planning permit.⁵⁹

The effect on restrictive covenants becomes integral to planning permit decisions: sections 61(4) and 62(1)(aa)

- 7.53 The most significant departure from the conventional relationship between covenants and planning permits resulted from amendments made in 2000. The *Planning and Environment (Restrictive Covenants) Act 2000* (Vic) inserted section 61(4) into the Planning and Environment Act. This provision states:

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

- 7.54 The purpose of section 61(4) was to ensure that the application for a permit to remove or vary a restriction was dealt with concurrently with the application for a planning permit.⁶⁰ It was intended to 'improve coordination', by avoiding the need for benefited owners to respond to two separate applications.⁶¹
- 7.55 The Minister for Planning told Parliament that the 1993 amendments had made it very difficult to obtain a permit to remove or vary a covenant.⁶² Applicants had responded by applying first for a planning permit, and then to the court for an order to remove or vary the covenant. As a result, applicants and benefited owners 'lost the chance for simultaneous consideration of both development and covenant matters. Responsible authorities and [VCAT] lost opportunities to act as a one-stop shop'.⁶³
- 7.56 The 2000 amendments also inserted section 62(1)(aa) into the Planning and Environment Act. It allows a responsible authority to grant a planning permit subject to a condition that the permit only comes into effect when a covenant is removed or varied.⁶⁴
- 7.57 VCAT interprets section 62(1)(aa) to mean that, where a permit to remove or vary a covenant and a planning permit are determined at the same time, the condition may be used to ensure that the record of the covenant is deleted by the Registrar before the development can proceed.⁶⁵ VCAT will only grant a permit subject to a condition under section 62(1)(aa) if an order to remove or vary the covenant has been made.⁶⁶
- 7.58 Although the 2000 amendments were intended to ensure 'simultaneous consideration of both development and covenants', the introduction of section 61(4) also had the indirect effect of making the grant of a planning permit subject to the restrictive tests in sections 60(2) and 60(5). Mr Finanzio described the effects in his submission as follows:

The provision (along with section 62(1)(aa)) has been interpreted by the Tribunal to mean that, where the grant of a permit would allow a development that would breach a restrictive covenant, no permit can be granted—not even a permit which might contain a condition to the effect that no building works may commence until such time as the covenant has been removed or varied.⁶⁷

- 7.59 It seems that the consequences of the interaction between section 61(4) and sections 60(2) and 60(5) were not fully intended or foreseen by the proponents of the Bill.⁶⁸ The amendments were believed to be merely procedural. They were not intended to change the relationship between covenants and planning schemes.
- 7.60 Some stakeholders raised concerns about the implications of the amendments in their submissions on the Bill.⁶⁹ For example, Casey City Council said that the difficulty of satisfying the tests in sections 60(2) and 60(5) of the Planning and Environment Act could impede state planning policy objectives, and that councils would lose control over planning to developers, who could impose covenants in which the public and council had no say.⁷⁰ The City of Greater Geelong said the amendments would undermine the objectives of planning schemes and add to costs and delays in permit decisions.⁷¹ The Association of Consulting Surveyors said it would deny permit applicants the chance to have the planning merits of their applications considered.⁷²
- 7.61 The consultant who reported to the Minister on the submissions did not discuss the wider policy implications of the Bill. He said that comments such as those made in the submission from Casey City Council were beyond the scope of his report and the purpose of the Bill, which he identified as follows:

*The purpose of the Bill is not to overhaul the statutory provisions in the Principal Act concerning restrictive covenants. It is to ensure that there is a better relationship and co-ordination between how the public planning process operates and restrictive covenants.*⁷³

Consequences of the 2000 amendments

- 7.62 The 2000 amendments have not been wholly successful in achieving their purpose of creating a 'one-stop shop' in which covenants and planning permits are dealt with at the same time.
- 7.63 The bar in section 61(4) of the Planning and Environment Act on the granting of a planning permit does not apply if the covenant has already been either removed or varied by an order of the court under section 84 of the Property Law Act so that it does not restrict the proposed use. Therefore, some applicants now apply first under section 84 of the Property Law Act for an order to remove the covenant, and subsequently to the council for a planning permit under the Planning and Environment Act. This means that, instead of applying to the court after obtaining a planning permit—as applicants often did before the 2000 amendments—they now apply before.⁷⁴
- 7.64 Mr Finanzio said that the reversal of the order of applications means that the court is deprived of the opportunity
- to examine proposals for variation of covenants which have been tested against the planning framework. Instead, a proponent is or will be required to apply under section 84 for complete removal.*⁷⁵
- 7.65 Many landowners cannot afford the costs of an application to the court under section 84 of the Property Law Act to remove or vary a covenant. Brian and Judith Magree submitted that 'funding such an action is beyond the capacity of the average property owner'.⁷⁶ In such cases, the restrictive tests in section 60(2) and (5) of the Planning and Environment Act effectively determine whether a planning permit can be granted.
- 7.66 There is one situation where the permit mechanism may be effective to remove or vary a covenant. The requirements to give notice do not apply where the land in the permit application has been used or developed for two years in a manner that breaches the covenant but would otherwise have been lawful.⁷⁷

- 58 LexisNexis Butterworths, *Planning and Environment Service Victoria* (at Service 155), [431, 180.20]; *Swinton's Pty Ltd v City of Melbourne and Crediton Nominees Pty Ltd & Ors* (unreported, AAT, 1993/37829 and 1993/68123), quoted in *Zullaphella Pty Ltd v Stonnington CC and Ors* (1999) VCAT 200 [41]. See also *Trajkovski v Wyndhan CC* (2009) VCAT 1231 [19].
- 59 Code, above n 48, 215.
- 60 Victoria, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 2160 (the Hon John Thwaites).
- 61 *Ibid.*
- 62 *Ibid.*
- 63 *Ibid.*
- 64 *Planning and Environment Act 1987* (Vic) s 62(1)(aa), inserted by s 10(1) of the *Planning and Environment (Restrictive Covenants) Act* (Vic) 2000.
- 65 *Bevilacqua v Port Phillip CC* (2002) 12 VPR 256 at 259–68; *Cardmone v Darebin CC* (2004) VCAT 171 [19]–[21]; *Costa v Glen Eira CC* (2005) VCAT 2719 [93]; *Adler v Cardinia SC* (2007) VCAT 130.
- 66 *Ibid.*
- 67 Mr Adrian Finanzio, Submission 33, 6.
- 68 *Ibid.*
- 69 Terry Montebello, *Report to the Minister for Planning on the Submissions to the Planning and Environment (Restrictive Covenants) Bill 2000* (2000), pt 7 (copies of the submissions are attached to the report).
- 70 *Ibid.*, submission 13.
- 71 *Ibid.*, submission 11.
- 72 *Ibid.*, submission 16.
- 73 Montebello, above n 69, 31.
- 74 *Re Djurovic* (2010) VSC 348 [6].
- 75 Mr Finanzio, Submission 33, 6, citing *Stanhill Pty Ltd v Jackson & Ors* (2005) 12 VR 224 [69].
- 76 Brian and Judith Magree, Submission 2, 1.
- 77 *Planning and Environment Act 1987* (Vic) ss 47(2), 52. The Law Institute said in its submission that this provision is unfair to benefited owners because the breach may have been concealed: Submission 26, 16.

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CONFUSION OF LAWS RATHER THAN COORDINATION OF PROCESSES

- 7.67 The goal of ‘simultaneous consideration of both covenants and development’ in the same ‘one-stop shop’ remains elusive. In our view, it is not a worthwhile goal. The idea that they should be dealt with together in the same forum overlooks fundamental conceptual and procedural differences between planning and property law.
- 7.68 Decisions on planning permits are administrative in nature. They require decision makers to consider a range of public policies that need to be balanced to reach an acceptable outcome in particular cases.⁷⁸ Decisions on the alteration of property rights require a private law process, which balances the interests of the parties who have the benefit and the burden of the rights.
- 7.69 The different subject matter of the decisions means that the processes require different rules about who can be a party. Planning law encourages participation by interested parties in decision making, and therefore enables planning authorities to consider objections without having to apply restrictive standing tests. Property law enables persons to enforce their private property rights against anyone who infringes them.
- 7.70 The result of the attempt to deal with both matters in a single proceeding and a single forum is that it tends to attract objections from persons who cannot show that their interests may be affected by the removal or variation of a covenant.⁷⁹ In *Ingberg RC v Bayside City Council*, VCAT said that:

*The variation of a covenant is primarily a matter of private rights, and it will be seldom that anyone who is not entitled to the benefit will be affected by it.*⁸⁰

VCAT also noted that:

*The temptation is to confuse the variation with the development that may or would result from it, and which is the subject of a separate permission with separate right of objection.*⁸¹

- 7.71 Excessively wide notice provisions in the Planning and Environment Act invite objections from persons who are not benefited owners. Even though occupiers as such do not have the benefit of covenants,⁸² occupiers of benefited lots must be notified of an application for a permit to remove or vary, and they are deemed to be persons who may be affected by the grant of the permit.⁸³ Section 52(1AA) of the Planning and Environment Act also requires notice to be given by placing a sign on the land and publishing a notice in a newspaper. The result is that objections are attracted from persons who are not entitled to the benefit of the covenant.⁸⁴
- 7.72 In *Stoops v Frankston City Council*,⁸⁵ VCAT discussed the notice provisions and remarked that it was ‘anomalous to adopt planning procedures created under public law as a means of providing a private remedy in relation to private property rights’.⁸⁶

SUBMISSIONS ON THE REMOVAL AND VARIATION OF RESTRICTIVE COVENANTS UNDER PLANNING LAW

- 7.73 South Gippsland Shire Council submitted that ‘the removal or variation of covenants should not be something that is considered in the public planning system’.⁸⁷

*The planning system in Victoria is concerned with achieving outcomes for the greater good of the State. Covenants are inherently applied to land for the private benefit, usually, of a small number of persons. The purpose of covenants sits outside the purpose of planning in Victoria. It seems that their consideration in planning matters has ‘crept’ its way into the planning process.*⁸⁸

- 7.74 Two submissions supported retaining section 61(4) of the Planning and Environment Act in its current form.⁸⁹

- 7.75 The Real Estate Institute of Victoria supported repealing section 61(4), but not allowing planning authorities the discretion to grant permits that conflict with covenants.⁹⁰
- 7.76 Wellington Shire Council said that section 61(4) should be retained, but councils should have the discretion to grant permits that may conflict with a covenant.⁹¹
- 7.77 Michael Macnamara supported the repeal of section 61(4) if the provisions for removal or variation of covenants are removed from planning legislation.⁹² The Law Institute of Victoria also favoured repealing section 61(4) but added that, if it is retained, it should be modified so that ‘the existence of a covenant is simply a discretionary criterion to which the planning authority is to have regard in determining whether or not to issue a permit’.⁹³ A similar scheme was proposed by officers of the Shire of Yarra Ranges in their submission.⁹⁴

COVENANTS AS A RELEVANT CONSIDERATION

- 7.78 A ‘relevant consideration’ is a matter that a decision maker must have regard to when making a decision.⁹⁵ Usually there are a number of relevant considerations that must be weighed in making a decision. They may be expressly listed in the statute or may be implied from the nature and purpose of the statutory power. A relevant consideration specified in the statute must always be considered, although it is for the decision maker to determine its comparative importance.⁹⁶
- 7.79 If section 61(4) of the Planning and Environment Act is repealed and section 60 specifies that covenants are a relevant consideration in a planning permit application, the responsible authority would have to consider covenants along with the other matters, including those listed in section 60 of the Planning and Environment Act and the decision guidelines in clause 65 of the relevant planning scheme.
- 7.80 In other states and territories, covenants are not specified in planning legislation as a discrete consideration in permit decisions, but the responsible authority may be obliged to have regard to covenants in particular cases.⁹⁷ For example, if a benefited owner makes a submission to a responsible authority that his or her interests would be adversely affected by the permit, the authority must consider the submission.⁹⁸

- 78 *Grech v Hepburn SC* (2003) VCAT 846 [35].
- 79 Under s 57 of the *Planning and Environment Act 1987* (Vic), ‘any person who may be affected by the grant of a permit’ may lodge an objection.
- 80 *Ingberg RC v Bayside CC* (2000) VCAT 2407 [75].
- 81 *Ibid.*
- 82 While occupiers may derive title from the covenantor or the covenantor’s successors if, for example, they are purchasers or tenants, they do not have the benefit of the covenant ‘simply by being occupiers’: *Stoops v Frankston CC* (2008) VCAT 1337 [24].
- 83 *Planning and Environment Act 1987* (Vic) ss 52(1)(cb), 57(1A).
- 84 *Stoops v Frankston CC* (2008) VCAT 1337 [28]. VCAT left open the question whether objectors who are not entitled to the benefit of the covenant are persons ‘who may be affected by the grant of the permit’ under s 57(1) of the *Planning and Environment Act 1987* (Vic).
- 85 *Stoops v Frankston CC* (2008) VCAT 1337 [21]–[31].
- 86 *Ibid.* See also *Jordan v Stonnington CC* (2004) VCAT 2008 [59]; *Costa v Glen Eira CC* (2005) 27 19 [70]–[79].
- 87 South Gippsland Shire Council, Submission 5, 2.
- 88 *Ibid.*
- 89 Moorabool Shire Council, Submission 11, 5; City of Boroondara, Submission 15a, 5, Submission 15b, 1.
- 90 Real Estate Institute of Victoria, Submission 25, 5.
- 91 Wellington Shire Council, Submission 10, 5.
- 92 Mr Michael Macnamara, Submission 4, 7.
- 93 Law Institute of Victoria, Submission 26, 17.
- 94 Yarra Ranges Council, Submission 20, 3. The proposal is that benefited owners could not veto the removal of a covenant but would be entitled to object to it. In New South Wales, the existence of a covenant has been held to be a relevant consideration in a decision to grant a development consent under s 79C of the *Environmental Planning and Assessment Act 1979* (NSW): *Donald Crone v Council of the City of Bathurst* (1988) NSWLEC 73.
- 95 *Minister for Aboriginal Affairs v Peko-Walsend Ltd* (1986) 162 CLR 24 [15].
- 96 *Ibid* [11].
- 97 Clifford Ireland, ‘Environmental Planning in the Public Interest and Private Property Rights: The Role of s 28 of the Environmental Planning and Assessment Act 1979 (NSW)’ (2010) *Local Government Law Journal*, 155, 160; *Donald Crone and Associates Pty Ltd v Council of the City of Bathurst and Ors* (1988) NSWLEC 73; *Ludwig v Coshott* (1994) 83 LGERA 22.
- 98 *Minister for Aboriginal Affairs v Peko-Walsend Ltd* (1986) 162 CLR 24 [20]–[23]; *Planning and Environment Act 1987* (Vic), s 60(1)(c). In *Herring Daw & Blake NSW Pty Ltd v Gosford City Council* (1995) NSWLEC 92, Judge Talbot said that the reasons for the creation of a restrictive covenant may ‘coincidentally’ be a relevant consideration in an application for a building permit even if the covenant, as such, was not.

Easements and Covenants under Planning Law



- 7.81 Planning panels, which advise the Minister on amendments to planning schemes,⁹⁹ have considered the relevance of restrictive covenants. Prior to 2004, the panels treated covenants as requiring special consideration in planning scheme amendments, but no settled guidelines emerged.¹⁰⁰ In 2004, a planning panel adopted a list of relevant criteria based on more general planning considerations, including 'net community benefit' and the interests of affected parties, including persons entitled to the benefit of the covenant.¹⁰¹ The considerations are not specific to covenants but take account of the effects on private property rights generally.
- 7.82 We consider that covenants should not be a special and discrete consideration in planning decisions. Responsible authorities are already required to consider submissions from 'any person who may be affected by the grant of a permit'.¹⁰² The grant of a permit may affect the interests of a person who holds the benefit of a covenant in the land to which the permit relates. Similarly, it may affect the interests of a person who holds an easement or some other property right in the land. It may also affect the interests of neighbouring landowners who do not hold a covenant.
- 7.83 The grant of a permit does not in itself affect rights under a covenant. It does not release the permit applicant from the restrictions under the covenant, or prevent a benefited owner from enforcing the covenant by court order.¹⁰³

Proposal to grant planning permits with a condition as to covenants

- 7.84 Mr Finanzio proposed a model for separate consideration of planning permits and covenants.¹⁰⁴ He submitted that, if the object is to protect covenants, the legislation should expressly empower responsible authorities to grant a permit for a use or development that would contravene a restrictive covenant, on the condition that development not commence until the covenant is varied or removed. He also proposed that the court be given exclusive jurisdiction to remove covenants that predate 25 June 1991.¹⁰⁵
- 7.85 We agree with this proposal to the extent that covenants are excluded from planning permit decisions, but we do not think that responsible authorities should be given the function of ensuring that the permit applicant observes the restrictions in a covenant.
- 7.86 Before a responsible authority could impose the planning permit condition, it would have to determine whether the use or development for which the permit is sought would breach a restrictive covenant. This means the council would have to consider whether the covenant is valid and effective in equity¹⁰⁶ and assess its scope and meaning.¹⁰⁷
- 7.87 Some responsible authorities do not consider themselves equipped to determine the validity and effect of covenants.¹⁰⁸ South Gippsland Shire Council submitted that responsible authorities do not have the expertise to interpret 'the ambiguities and nuances resulting from the legalistic wording in many covenants'.¹⁰⁹ Therefore, they often need expert legal advice and representation before VCAT, which involves additional costs. The Council thinks that it is inequitable that the 'costs burden is borne by all ratepayers for the benefit of potentially one person'.¹¹⁰

SHOULD COUNCILS BE RESPONSIBLE FOR ENFORCEMENT OF COVENANTS?

- 7.88 The 2000 amendments were prompted by a concern that, if a planning permit can be granted for a use or development that would breach a covenant, the permit applicant may carry out the use or development despite the covenant. Mr Finanzio observed that section 61(4) of the Planning and Environment Act was intended to prevent developers from adopting a ‘stop me if you dare’ strategy of deliberately taking the risk that no benefited owner would act to enforce the covenant.¹¹¹
- 7.89 It is not in all cases unreasonable for developers and landowners to take a calculated risk that nobody will enforce a covenant. There are many outdated or overly broad covenants that no reasonable person would seek to enforce. For example, many old covenants designed to prevent quarrying are so widely drafted that they restrict any excavation or carrying away of soil.¹¹² Some covenants impose restrictions that require approval of works by persons who are deceased,¹¹³ or companies that have been wound up. To require them to be removed by order of a court imposes an unnecessary regulatory burden.
- 7.90 Covenants are not enforceable ‘as of right’, as common law rights are. They are enforceable against successive owners of the land only at the discretion of the court. Equity recognises a range of defences to relieve landowners against the unjust enforcement of covenants.¹¹⁴
- 7.91 Even where a covenant is one that equity would enforce, there is no reason why it should be enforced by the public planning system.¹¹⁵ Covenants arise from private agreements, independent of the public planning process. They are the result of a commercial judgment by private parties as to their own interests and are not authorised by planning authorities. Covenants do not take account of the broader strategic interests of the community, future owners and the environment. That is the role of public planning policies.
- 7.92 Planning permits represent a determination that a proposed land use is consistent with public planning legislation and policies. They are not a ruling on the legality of the proposed use for all purposes.

- 99 See para [7.18]. Planning scheme amendments are not subject to the threshold tests in ss 60(2)–(7) of the *Planning and Environment Act 1987* (Vic). See *MA Zeltoff Pty Ltd v Stonnington CC* (1999) 3 VR 88 [26]–[29].
- 100 Tannetje Bryant, ‘Removal or Variation of Restrictive Covenants in Victoria’ (1996) 1 *Local Government Law Journal* 164, 174; Code, above n 48, 216–18.
- 101 Planning Panel, *Mornington Peninsula Planning Scheme Amendment C46 & Planning Permit Application CP 02/004*, Panel Report, (2004) 23–6. For subsequent panel decisions adopting this approach see: Planning Panel, *Stonnington Planning Scheme Amendment C23 & Application No 1290/01*, Interim Panel Report (2004) 11–13; Planning Panel, *Stonnington Planning Scheme Amendment C23*, Panel Report (2004) 30–1; Planning Panel, *Casey Planning Scheme Amendment C67*, Panel Report (2005) 19–20; Planning Panel, *Hume Planning Scheme Amendment C65 & Permit Application P9074*, Panel Report (2006) 20–2; Planning Panel, *Manningham Planning Scheme Amendment C72*, Panel Report (2008) 6–7.
- 102 *Planning and Environment Act 1987* (Vic) ss 57(1), 60(1)(c).
- 103 *Costa v Glen Eira CC* (2005) 2719 [78].
- 104 Mr Adrian Finanzio, Submission 33, 4–5.
- 105 *Ibid.*
- 106 See, eg, *Herzog Group of Companies v Glen Eira CC* (2010) VCAT 44: recorded covenant held to be merely personal, not attached to benefited land.
- 107 An administrative authority acting under statute is empowered to determine a question of fact, or mixed fact and law, upon which its jurisdiction depends, although its decision on this question is subject to review by a court: Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 3rd ed, 2004) 236, fn 381; see also *Arifoglou v Stonnington CC* (2001) VCAT 1461, [4.4]–[4.6].
- 108 Boroondara City Council commented that ‘the legitimacy of a restrictive covenant can only be questioned when its interpretation cannot possibly be resolved by the courts’, and ‘the role of the courts in interpreting the meaning of covenants should not be usurped by some form of quasi legislative or administrative process’: Submission 15b, 2.
- 109 South Gippsland Shire Council, Submission 5, 2. See also Moorabool Shire Council, Submission 11, 4, which submitted that council planners are not trained to deal with covenants.
- 110 South Gippsland Shire Council, Submission 5, 2.
- 111 Mr Adrian Finanzio Submission 33, 6.
- 112 See, eg, the covenant in *D’Amelio & Ors v Monash CC* (2004) VCAT 2644 [5].
- 113 An example was given in Victoria, Legislative Assembly, *Hansard, House Debates*, 30 October 2001, 1317.
- 114 A court of equity may refuse to enforce a covenant if the benefited owner has waited too long to restrain breaches, or has led the burdened owner to assume that the covenant will not be enforced. Where this occurs, the covenant is ‘effectively discharged’: Adrian Bradbrook, Susan McCallum and Anthony Moore, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 811; These equitable doctrines (known as laches and acquiescence) are discussed further in Chapter 8.
- 115 In *Miller v Evans* (2010) WASC 127 [38], Justice Hall said ‘Compliance with the restrictive covenant was, of course, no business of the Shire’.

Easements and Covenants under Planning Law



- 7.93 It should not be the role of government bodies to enforce private agreements between citizens, or the private property rights of citizens.¹¹⁶ Such enforcement does not occur in any other area of law. Instead, courts and tribunals are the appropriate forums for the enforcement of private rights.
- 7.94 There is one other jurisdiction in which local government is required to enforce private covenants. The city of Houston, Texas, is famous for allowing private covenants, rather than municipal zoning ordinances, to determine the use of land. Houston's City Code provides that no building permit shall be issued until an affidavit has been submitted to the building official stating that the works and the land use will not violate covenants running with the land.¹¹⁷ Additionally, the Code empowers the City Attorney to sue to enforce restrictive covenants and seek civil penalties for noncompliance.¹¹⁸
- 7.95 Municipal enforcement of covenants in Houston effectively delivers control of land use to developers and landowners without any opportunity for stakeholders or the public to participate in planning the outcomes.¹¹⁹ The Houston approach, which subordinates public planning to private covenants, is exceptional and highly controversial in the United States.¹²⁰
- 7.96 We believe that government should adopt a neutral role in disputes between landowners over the enforcement of private agreements. The state should be involved only through the courts, and only when a landowner applies either for enforcement or removal of a covenant.¹²¹
- 7.97 The state has made adequate provision for benefited owners to enforce their rights under covenants. They can apply to the Magistrates', County or Supreme Court for equitable relief such as a declaration, injunction and damages.¹²² If successful, they can expect to obtain an order against the respondent for payment of their costs. Each court can also provide assisted dispute resolution services, and parties who wish to resolve disputes without issuing legal proceedings can use the Dispute Settlement Centre.¹²³

THE IMPACT OF COVENANTS ON THE IMPLEMENTATION OF PLANNING POLICIES

- 7.98 The objectives of planning in Victoria include providing for the fair, orderly, economic and sustainable use and development of land, the protection of natural and man-made resources, the orderly provision of facilities for the benefit of the community, and the securing of a pleasant, efficient and safe environment.¹²⁴
- 7.99 Each municipal district has its own planning scheme, which comprises a framework of state and local policies. Planning policies are 'statements of intent and expectation' that seek to achieve a desired outcome over time by the consistent application of the policy.¹²⁵ They assign specific types of land use to particular areas, but do not require that land be put to these designated uses.
- 7.100 Planning schemes encourage desired changes in land use by creating opportunities and incentives for landowners to put their land to more valuable uses. For example, if land currently used for low density development is zoned for medium density, medium density development will tend to occur as owners seek a better return on their investment in the land.
- 7.101 Covenants can impede the implementation of planning policies by preventing burdened owners from responding to the incentives and opportunities that they create. Covenants tend to confine land to its current uses. Some covenants are created for the purpose of precluding changes that may be permitted by the planning scheme. Examples are covenants that restrict subdivision or limit the use of land to a single dwelling.

7.102 The impact of covenants on planned outcomes is greater when large areas are blanketed by the same restriction. Restrictive covenants multiplied across large subdivisions can have a significant effect on the achievement of public planning policies in an area. Higher density and more diverse development in planned activity centres may be prevented by covenants that restrict the use of the land to a single dwelling or impose building height restrictions.

REMOVAL AND VARIATION OF COVENANTS BY PLANNING SCHEME AMENDMENT

7.103 A planning scheme can authorise or require the removal or variation of restrictive covenants by listing them in the schedule to clause 52.02. A covenant listed in the schedule to clause 52.02 of the planning scheme is only removed or varied when the burdened owner lodges a plan under section 23 of the Subdivision Act.

7.104 Since covenants must be individually removed or varied by a plan, the schedule to clause 52.02 must specify them by reference to sites. This creates practical difficulties.

7.105 There is no easy way to identify which lots in an area are burdened by particular types of covenants. Claire Anderson, Project Manager (Strategic Planning), City of Knox, explained the difficulties councils face in determining the nature, location and pattern of distribution of restrictive covenants for the purpose of planning the location of higher density developments in and around an activity centre:

I did a random title search of a 100 or so properties within the Activity Centre, then matched this with the few original subdivision plans that we could find from our records. This was a very time consuming, expensive and not altogether accurate way of getting a broad picture of where the covenants might be.

I would very much support a cheaper, more efficient and accurate way of gauging where restrictive covenants are [and] a more efficient way of facilitating their removal, as I'm sure there are many other cases like ours across Melbourne where restrictive covenants inhibit future development in Activity Centres—which is obviously contrary to both State and local planning policy to support increased housing densities.¹²⁶

7.106 The current provisions for removal and variation of covenants by plan under section 23 of the Subdivision Act are unwieldy. They are designed for lot-by-lot removal, with updating of the register by lodgement of plans. There is a need for a provision that facilitates the implementation of planned outcomes such as activity centres across an area.

7.107 In their submission, Brian and Judith Magree proposed the approach adopted in Western Australia.¹²⁷ Under the *Planning and Development Act 2005 (WA)*, a planning scheme can provide for the extinguishment or variation of a restrictive covenant or easement.¹²⁸ A model planning scheme clause provides that a restrictive covenant affecting any land in the scheme area that limits the number of dwellings to less than that permitted by the scheme is extinguished or varied to the extent of the inconsistency.¹²⁹

7.108 In 1999, the Full Court of the Western Australian Supreme Court upheld the use of a similar clause under an earlier Act to extinguish a restrictive covenant.¹³⁰ Chief Justice Malcolm said:

While not unanimously accepted, it is widely accepted that it is proper for a local authority to have the power to extinguish or vary a restrictive covenant in the context of the orderly and proper planning and use of land within the jurisdiction of the authority.¹³¹

116 Jonathan C Levine, *Zoned Out: Regulation, Markets and Choices in Transportation and Metropolitan Land Use* (RFF Press, 2006) 106–7.

117 Code of Ordinances, City of Houston § 10-3. Penalty provisions apply for breach: § 29-5. Any permits issued are expressly subject to covenants and do not authorise any violation of them: § 29-6.

118 Code of Ordinances, City of Houston §§ 10-551-5.

119 Levine, above n 116, 105–6.

120 Ibid; Michael Lewyn, 'How Overregulation Creates Sprawl (Even in a City Without Zoning)' (2005) 50 *Wayne Law Review* 1171.

121 Levine, above n 116, 105–6.

122 The Magistrates' Court has power to grant equitable relief within its civil jurisdictional limit, currently \$100 000, or unlimited as to amount if the parties agree: *Magistrates' Court Act 1989* (Vic) ss 100(1), 100(3), 3(1).

123 See generally, Department of Justice, Victoria, *Disputes* (18 October 2010) <<http://www.justice.vic.gov.au/disputes>>.

124 *Planning and Environment Act 1987* (Vic) s 4.

125 Victorian Planning Provisions cl 20.02.

126 Email communication, from Ms Claire Anderson, Project Manager (Strategic Planning), City of Knox, 22 October 2010.

127 Brian and Judith Magree, Submission 12, 3.

128 *Planning and Development Act 2005* (WA), sch 7, cl 9.

129 *Town Planning Regulations 1967* (WA), Appendix B, cl 5.4.1. Special notice requirements apply where a permit is sought in relation to land subject to such a covenant: cls 5.4.2, 9.4.

130 *Perpetual Trustees WA Ltd v City of Joondalup* (1999) WASCA [196]. Clause 11 to sch 7 of the *Planning and Development Act 2005* (WA) appears to re-enact cl 15 to sch 1 of the *Town Planning and Development Act 1928* (WA).

131 *Perpetual Trustees WA Ltd v City of Joondalup* (1999) WASCA 196 [9].

Easements and Covenants under Planning Law



REGULATION AS AN ALTERNATIVE TO REMOVAL

- 7.109 Some submissions said that, as covenants are private property rights, they should not be removed by planning authorities.¹³² Other submissions said there is a need to provide a simpler and less costly method of removing the restrictions imposed by covenants.¹³³
- 7.110 While the Victorian Parliament has the legislative power to extinguish property rights such as covenants, with or without compensation,¹³⁴ it is generally better to regulate rights than to extinguish them. To facilitate land uses that are consistent with planning objectives, it may be necessary to limit the enforcement of covenants that restrict them. The regulation of the enforcement of covenants does not require their removal or variation as recorded instruments.
- 7.111 Planning law is ‘concerned with the orderly management of land in society so as to protect at once the interests of individuals, the community and the environment’.¹³⁵ To achieve its objects, it restricts the rights of landowners, often to a very significant extent and, in most cases, without compensation.¹³⁶ The Victorian Supreme Court has recognised that ‘it is well established that [planning] legislation ... does authorise interference with the property rights of owners’.¹³⁷
- 7.112 Planning and environmental law is premised on the right of the state to regulate the use of private property rights in the public interest.¹³⁸ Many of the common law rights that landowners once enjoyed are now restricted by planning, environmental, building and other laws. Most uses, other than existing uses, are either prohibited, permitted with a permit, or permitted subject to conditions specified in the planning scheme.¹³⁹
- 7.113 In modern societies, property rights are not ‘an absolute prerogative’.¹⁴⁰ They are limited by various laws that safeguard the interests of neighbours, the community and the environment.
- 7.114 The rights of persons entitled to the benefit of restrictive covenants, like other property rights, can be regulated by planning legislation. A statute can restrict the exercise or enforcement of rights under the covenant to achieve a regulatory purpose. A statute can also provide that a planning scheme may have this effect.
- 7.115 The possibility of facilitating planning outcomes by regulating the effect of covenants on land use has been overlooked in Victoria. Public debate has been polarised because all parties have assumed that the only way to control the effects of covenants on planning outcomes is to remove or vary them.

REGULATION OF COVENANTS—THE NEW SOUTH WALES APPROACH

- 7.116 Two submissions suggested that section 28(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (EPAA) provides a suitable model for regulating the enforcement of covenants.¹⁴¹
- 7.117 The effect of the New South Wales provision is that an ‘environmental planning instrument’ (similar to a planning scheme) can suspend the operation of a ‘regulatory instrument’ (including a restrictive covenant)¹⁴² to the extent necessary to enable development to be carried out in accordance with the environmental planning instrument or a ‘development consent’ (planning permit).
- 7.118 Model local clause 1.9A for local environmental plans in New South Wales provides that any agreements, covenants or other similar instruments that restrict the carrying out of development in accordance with the plan or a ‘development consent’ do not apply to the extent necessary to serve that purpose.¹⁴³

7.119 Most section 28 clauses are broadly expressed, like model local clause 1.9A, but the application of a clause may be expressly limited to specified zones,¹⁴⁴ sites,¹⁴⁵ or classes of covenants, such as those that impose restrictions on the erection or use of buildings.¹⁴⁶

7.120 The effect of section 28 of the EPAA is to suspend the operation of restrictive covenants, but not to remove or vary them.¹⁴⁷ The covenants are suspended only to the extent necessary for the permitted land use or development to proceed.¹⁴⁸ For example, a covenant that restricts use of land in a residential zone to a single dwelling may be suspended to the extent it prevents multiple dwellings, but it will still operate to the extent that it restricts the land to residential use.

7.121 The suspension of covenants by planning instruments is well accepted in New South Wales.¹⁴⁹ The courts have rejected arguments that section 28 should be given a narrow interpretation because it affects the property rights of benefited owners.¹⁵⁰ In *Wainwright v Canterbury Municipal Council*,¹⁵¹ Justice Briscoe said that the effect on property rights was consistent with the intention of the Act to promote the proper management and development of land resources. He said it is not unreasonable that private arrangements should yield to a contrary provision in a planning instrument that represents the wider public interest.

SHOULD PLANNING SCHEMES OVERRIDE COVENANTS?

7.122 In 1997, the Law Reform Commission of Western Australia (LRCWA) considered the New South Wales approach.¹⁵² It decided not to recommend that planning schemes should be able to override restrictive covenants, for three reasons.

7.123 The first reason was that restrictive covenants are needed because planning controls are not always stringent enough 'to improve the amenity of an area or to protect the economic interests of landowners'.¹⁵³ We think that the New South Wales provision leaves room for covenants to supplement planning controls. Where they are inconsistent with the planning policies, the public interest in the implementation of the policies should prevail.

132 Mr Michael Macnamara, Submission 4, 7; Boroondara City Council, Submission 15b, 1.

133 Housing Industry Association, Submission 32, 2; Brian and Judith Magree, Submission 12, 3; Yarra Ranges Council, Submission 20.

134 On the power of a state parliament to extinguish property rights, see *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 7 (HCA); *Commonwealth v Tasmania* (1983) 158 CLR 1; *Bone v Mothershaw* (2003) Qd R 600.

135 *Hillpalm Pty Ltd v Heavens Door Pty Ltd* (2004) 220 CLR 472 [71] (Kirby J).

136 The *Planning and Environment Act 1987* (Vic) provides for compensation for actions authorised by the Act only in limited circumstances, such as where land is compulsorily acquired, reserved for a public purpose, where permits are cancelled or amended, in cases of unreasonable delay and where there are errors in planning certificates.

137 *271 William Street Pty Ltd v City of Melbourne* (1975) VR 156, 164–5 (Harris J); cited in LexisNexis Butterworths, *Planning and Environment Service Victoria* (at Service 155), [433, 510]. See also *Perpetual Trustees WA Ltd v City of Joondalup* (1999) WASCA 196 [9]. As the Morris Report said: 'There is no compensation for zoning': Stuart Morris, *Land Acquisition and Compensation: Proposals for New Land Acquisition and Compensation Legislation: Report to the Minister for Planning (Vic)* (January 1983), [803].

138 Ireland, above n 97, 156, citing numerous judicial authorities who recognise this.

139 Clause 31.01 to 31.03 of each planning scheme.

140 Kevin and Susan Francis Gray, *Land Law*, (Oxford University Press, 6th ed, 2009) 423; *Bropho v State of Western Australia* (2008) FCAFC 100 [80]–[81].

141 A provision of this type was proposed by Cathy Sherry, Submission 34, 20, and Moreland Energy Foundation, Submission 30, 2.

142 The reference to 'covenant' in the definition of 'regulatory instrument' in s 28(2) was held to include a restrictive covenant: *Wainwright v Canterbury Municipal Council* (1992) NSWLEC 96.

143 Model local clauses are approved by the Department of Planning (NSW) and the Office of Parliamentary Counsel. Weir comments that such a provision is considered unnecessary in Queensland because of the much more limited use of restrictive covenants: Michael Weir, 'Private and Public Planning: Implications for Legal Processes' (1994) 11 *Environmental and Planning Law Journal* 137, 150.

144 For example, in *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* (2010) NSWCA 214, the s 28 clause suspended the operation of any restriction on the use of land in any zone except for one specified zone.

145 *Cracknell and Lonergan Pty Ltd v Council of the City of Sydney* (2007) NSWLEC 392 [46].

146 *Ludwig v Coshott* (1997) 8 BPR 15,519 at 15,521; and other examples cited in Ireland, above n 97, 156–7.

147 See generally, Peter Butt, 'Planning Principles vs Private Property Rights: Environmental Planning and Assessment Act 1979 (NSW) s 28' (2004) 78 *The Australian Law Journal* 560.

148 Ibid 562. This effect of s 28 appears to have been relatively uncontroversial in New South Wales. For example, in 2009, a savings provision was inserted into s 28 to ensure that private interests that had been overridden remained so: *Real Property and Conveyancing Legislation Amendment Act 2009* (NSW).

149 Section 28 was a replacement for a similar provision in the *Local Government Act 1919* (NSW), which was inserted into the Act in 1945: See *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* (2010) NSWCA 214 [9]–[12], citing *Local Government Act 1919* (NSW) s 342G (repealed). The provision was bolstered in 2009 by the addition of s 28(6), which provides that the section has effect despite anything in s 42 of the *Real Property Act 1900* (NSW) (the indefeasibility provision).

150 Ireland, above n 97, 159–60; *Lennard v Jessica Estates* (2008) 71 NSWLR 306 [13], [24]; *Natva Developments Pty Ltd v McDonald Bros Pty Ltd* (2004) NSWSC 777 [62]; *Ludwig v Coshott* (1994) 83 LGERA 22 [35]. Butt says that in most of the cases arising under s 28, courts have found that the covenants were overridden: Peter Butt, 'What is a Land Use?' (2008) 82 *Australian Law Journal* 75, 76.

151 *Wainwright v Canterbury Municipal Council* (1992) NSWLEC 96 (pinpoint reference unavailable). See also *Ludwig v Coshott* (1994) 83 LGERA 22; and see other authorities discussed in Ireland, above n 97, 155–7.

152 Law Reform Commission of Western Australia, *Restrictive Covenants*, Report 91 (1997) [5.17].

153 Ibid.

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- 7.124 The second reason identified by the LRCWA was that overriding covenants ‘would unfairly prejudice those who enjoy the benefit of a covenant but would provide a windfall to those who were subject to the burden of the covenant’.¹⁵⁴
- 7.125 In overriding a restriction in a covenant, the planning scheme can affect the economic interests of the burdened and benefited owners. It is widely recognised that planning controls often create ‘windfalls’ by allowing certain land to be put to more economically valuable uses.¹⁵⁵ The economic advantage to an individual owner is an incidental effect of regulation that advances the public interest.¹⁵⁶ Similarly, a planning scheme can adversely affect the value of land by limiting the permitted uses. It has long been recognised that the effect on land values is not, by itself, a valid planning consideration.¹⁵⁷
- 7.126 Thirdly, the LRCWA said there could be uncertainty about the effect of the planning scheme on the covenant.¹⁵⁸ We agree that, in some cases, there may be doubt about the extent to which the covenant is made unenforceable, particularly if the covenant is unclear or ambiguous. In cases where certainty is needed, a burdened owner could apply for an order for removal or variation of the covenant, or either party could apply for a declaration as to the effect and enforceability of the covenant.¹⁵⁹

A MODEL FOR THE REGULATION OF COVENANTS

- 7.127 We propose a new model, in which covenants are regulated rather than removed by planning legislation. The key elements of this model arose from submissions in response to our consultation paper and from our subsequent consultations and deliberations.
- 7.128 As the model was not suggested as an option for reform in our consultation paper, stakeholders and the wider public have not yet had an adequate opportunity to comment on it. For this reason, we put the model forward as a set of proposals for further consultation rather than as a recommendation.
- 7.129 The following proposals give effect to the principle that regulatory easements and restrictions created by operation of statute for public planning purposes should be removed or varied by planning processes, while restrictive covenants and private easements attached to benefited or dominant land should be removed or varied under property law processes.
- 7.130 We propose that the provisions in section 23 of the Subdivision Act and in the Planning and Environment Act for the removal and variation of easements and restrictions should no longer apply to restrictive covenants. The provisions would be retained for easements and statutory restrictions only.
- 7.131 Responsible authorities would no longer be able to grant a permit to remove or vary a restrictive covenant. The removal or variation of restrictive covenants without the consent of benefited owners would require an order under section 84(1) of the Property Law Act.
- 7.132 New provisions in the Planning and Environment Act would provide that:
- a planning scheme may specify forms of use or development of land that cannot be prevented by a restrictive covenant
 - a restrictive covenant cannot be enforced to the extent that it is inconsistent with such a specification.¹⁶⁰
- 7.133 The effect of these amendments would be that a specification in a planning scheme could affect the operation of a covenant but not authorise its removal or variation.

- 7.134 We do not recommend that the specification should have the effect of suspending the covenant, as in section 28 of the EPAA. The concept of suspension is unnecessary and confusing. It creates uncertainty by suggesting that the effect on the covenant is temporary.
- 7.135 A planning scheme specification would be an amendment to a planning scheme. It could apply either to all existing restrictive covenants, or only to covenants created after the commencement of the relevant amendment. There would be no need for the amendment to identify the specific covenants or the lots affected by them.
- 7.136 Specifications that are intended to operate statewide would be included in the Victorian Planning Provisions, which incorporate the State Planning Policy framework.¹⁶¹ A specification that is intended to operate only within a municipal district, or within a particular zone, could be included in the local provisions of the planning scheme.
- 7.137 As the specification of a use or development would require an amendment to a planning scheme, benefited owners would be able to make submissions about the proposed amendment.¹⁶²
- 7.138 Although owners corporation rules are outside our terms of reference, we suggest that the same mechanism could be used to restrict the operation of rules that impede the implementation of planning policies.¹⁶³
- 7.139 There would be no need to amend the recording of a covenant in the register to show that its operation is restricted by a planning scheme specification. The register does not generally show the effect of land use regulation on property rights.¹⁶⁴ Since covenants are merely recorded, not registered, there is no question of inconsistency with the indefeasibility provision in section 42 of the *Transfer of Land Act 1958* (Vic).

RECOMMENDATION

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* (Vic) and the *Subdivision Act 1988* (Vic) 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.

154 Ibid.

155 The windfall effect is known as 'betterment'. There is a long history of failed attempts to recover the windfall through betterment taxes and use it to compensate for the losses that result from zoning changes. See Des Eccles and Tannetje Bryant, *Statutory Planning in Victoria*, (3rd ed, Federation Press, 2006) Chapter 9.

156 As the Law Reform Commission of Western Australia said in relation to judicial removal of covenants: 'The fact that this approach allows one private party by invoking the public interest to secure the abridgement of the rights of another is not a barrier': above n 152, [5.23].

157 Eccles and Bryant, above n 155, 110. See also James Gobbo and the Committee of Inquiry into Town Planning Compensation, *Report of the Committee of Inquiry into Town Planning Compensation* (Gobbo Report) (1978), 30-1, 40-1, which found that it is not feasible to compensate everyone who suffers economic loss due to zoning change.

158 Law Reform Commission of WA, *Restrictive Covenants*, Report 91 (1997) [5.17].

159 A declaration can be made under s 84(2) of the *Property Law Act 1958* (Vic), and an order for removal or variation under s 84(1). In Chapter 8, we recommend making the procedure more accessible.

160 This would require amendments to ss 6(g) and 6A of the *Planning and Environment Act 1987* (Vic).

161 Moreland Energy Foundation, Submission 30, 2, said that the suspension process should be able to be initiated by residents, local government or the Minister.

162 *Planning and Environment Act 1987* (Vic) s 21 provides that any person may make a submission.

163 Moreland Energy Foundation, Submission 30, 1-2, where the Foundation points out that both owners corporation rules and covenants can impede sustainability measures.

164 Zoning and overlays are shown in planning certificates issued under the *Planning and Environment Act 1987* (Vic) s 199 and the *Planning and Environment Regulations 2005* s 57.

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EFFECT OF PLANNING PERMIT ON ENFORCEMENT OF COVENANTS

7.140 Where a planning permit is granted for a use that is restricted by a covenant and there is no specification about covenants in the planning scheme, the permit applicant would be able to apply for its removal or variation under section 84(1) of the Property Law Act. The grant of a planning permit would not of itself prevent the enforcement of a restrictive covenant.

COVENANTS THAT ARE INCONSISTENT WITH A LAW

- 7.141 The interaction between covenants and planning schemes is complex because planning schemes generally do not conflict in a direct or legal sense with restrictions imposed by covenants.
- 7.142 Legislation in other areas of law that expressly requires or prohibits certain actions is more likely to conflict directly with covenants. For example, if a building regulation requires a building to be equipped with a water tank, it would conflict directly with a covenant that restricts the installation of an external structure.
- 7.143 The *Building Regulations 2006* incorporate the Building Code of Australia, which has introduced new energy efficiency measures. For example, from 1 May 2010, the Code requires commercial buildings to source energy from a renewable source or low greenhouse gas intensity.¹⁶⁵
- 7.144 Some covenants restrict the use of energy-efficient housing design features or the installation of efficient fixtures.¹⁶⁶ Examples are covenants that restrict householders from using light colours on roofs and external walls, hanging laundry in the open, and installing roof-mounted solar water heaters.¹⁶⁷
- 7.145 In order to promote energy efficiency, Queensland legislated in 2009 to limit the use of restrictive covenants and owners corporation rules that restrict the use of light roof colours, energy efficient windows or window treatments, and solar hot water systems or photovoltaic cells.¹⁶⁸ These amendments affect covenants and by-laws in two ways: they prospectively prevent the creation of restrictions on certain building practices or materials,¹⁶⁹ and they retrospectively invalidate restrictions on other building practices or materials.¹⁷⁰
- 7.146 The Moreland Energy Foundation submitted that:
- The law relating to covenants in Victoria should be amended to restrict the use of covenants that inappropriately limit householders' ability to take measures to improve the energy efficiency, energy consumption or environmental impact of their homes.*¹⁷¹
- 7.147 The Foundation observed that restrictions on sustainability measures often arise indirectly, where a covenant or owners corporation rule restricts a use, except with the approval of the developer or owners corporation.¹⁷² The Foundation suggested that legislation should provide that, where a use is restricted by a requirement for an approval, the approval must not be refused on aesthetic grounds.
- 7.148 These kinds of sustainability measures may be implemented in two ways: by including them in a planning scheme or by direct regulation. If they are included in a planning scheme, the sustainable uses could be specified as uses that cannot be prevented by a restriction in a covenant.¹⁷³
- 7.149 If the sustainability measures are implemented by building regulations or environmental legislation, they would conflict with any contrary restriction in a covenant. Equity would not enforce a restriction in a covenant that is contrary to any law, or that prevents a burdened owner from complying with the law.

7.150 We think it would be useful to include a provision in the Property Law Act stating that a restrictive covenant that is inconsistent with any law is unenforceable to the extent that it is inconsistent.¹⁷⁴ This would not change the law, but would make the law more accessible and would have an educative effect.

RECOMMENDATION

39. The *Property Law Act 1958* (Vic) should be amended to clarify that a restrictive covenant that is inconsistent with any law is unenforceable to the extent that it is inconsistent.

165 Building Commission, 'Safer and More Sustainable Buildings', (Media Release, 1 May 2010).

166 Department of Infrastructure and Planning, Queensland, *Improving Sustainable Housing in Queensland* Discussion Paper (2008).

167 Ibid.

168 The *Building and Other Legislation Amendments Act 2009* (Qld) amending the *Building Act 1975* (Qld). The amendments were themselves amended by the *Building and Other Legislation Amendment Act 2010* (Qld).

169 Such as restrictions on light roof colours, the use of energy efficient windows, minimum roof pitches and minimum floor areas.

170 Those restrictions that restrict the ability to install solar hot water systems or photovoltaic cells.

171 Moreland Energy Foundation, Submission 30, 1.

172 Ibid.

173 See paras [7.127]–[7.139] and Recommendation 39.

174 For example, s 140 of the *Owners Corporations Act 2006* (Vic) provides that a rule of an owners corporation is of no effect if it is inconsistent with any Act or regulation.

Chapter 8

Removal and Variation of Easements and Covenants by Order

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Removal and Variation of Easements and Covenants by Order

OVERVIEW

- 8.1 Section 84 of the *Property Law Act 1958* (Vic) (Property Law Act) allows the owner of land burdened by a restrictive covenant (the plaintiff) to apply to the Supreme or County Court for an order to 'discharge' (remove) or 'modify' (vary) a restrictive covenant. If the court grants the application, it may order the plaintiff to pay compensation to a person entitled to the benefit of the covenant who is a party to the proceedings (the defendant).
- 8.2 This judicial removal provision is a private law procedure, quite separate from the provisions for removal and variation of restrictions under planning law discussed in the last chapter. The application under section 84 does not have to be prompted by any planning change or planning process.
- 8.3 Victoria has had a provision for judicial removal of covenants since 1918.¹ Section 84 of the Property Law Act is based on an English provision that Victoria adopted in 1928,² and which is also the parent provision for equivalent legislation in many other jurisdictions.³ Section 84 has not been updated in line with reform trends in other jurisdictions since 1928.

WHAT CAN BE REMOVED OR VARIED UNDER SECTION 84?

RESTRICTIVE COVENANTS AND RESTRICTIONS

- 8.4 Section 84(1) of the Property Law Act gives the court power to remove or vary 'any restriction arising under covenant or otherwise as to the user [of land] or any building thereon'. This phrase is unchanged from the *Real Property Act 1918* (Vic), and as such was never intended to refer to restrictions created under the *Subdivision Act 1988* (Vic) (Subdivision Act).⁴ 'Restriction' is used in its functional sense, to refer to the effect of the covenant on the use of the land.⁵
- 8.5 The phrase 'any restriction arising under covenant *or otherwise*' (our italics) has generated discussion about the scope of the English equivalent of section 84.⁶ In Victoria, section 84 has only been applied to restrictive covenants⁷ and the extent to which it applies to restrictions arising 'otherwise' has yet to be considered by a court.⁸
- 8.6 We consider that section 84 should not be used to remove or vary a 'restriction' created in a plan under the Subdivision Act.⁹ The procedures and criteria in section 84 of the Property Law Act are designed for restrictive covenants, in which there are benefited owners who can be parties to the application, whose interests must be considered, and to whom compensation may be granted.¹⁰
- 8.7 'Restrictions' in registered plans are created by operation of statute, for planning purposes.¹¹ We consider that they should be removed or varied under section 23 of the Subdivision Act in accordance with our recommendations in Chapter 7.
- 8.8 For clarification, it should be provided that 'restriction' for the purposes of section 84 does not include a restriction in a plan.

RECOMMENDATION

40. Section 84 of the *Property Law Act 1958* (Vic) should be expressed not to apply to a restriction in a plan created by operation of the *Subdivision Act 1988* (Vic).

STATUTORY AGREEMENTS

- 8.9 Some statutes that provide for the creation of statutory agreements do not make express provision for the removal or variation of the agreements other than by consent. They usually provide that an agreement is enforceable by the relevant authority as if it were a restrictive covenant. This approach indirectly makes section 84 apply. Section 85 of the Property Law Act provides that, where action is taken to enforce a restrictive covenant, the defendant may apply to the court under section 84 for the covenant to be removed or varied.¹²
- 8.10 In Chapter 6, we recommend that the statutes under which these agreements are created should specify how they may be removed and varied.¹³

EASEMENTS

- 8.11 We consider that regulatory easements should continue to be removed or varied in accordance with section 23 and section 36 of the Subdivision Act and the associated provisions of the *Planning and Environment Act 1987* (Vic) (Planning and Environment Act).¹⁴ They are created for a planning purpose and should be removed under planning law.
- 8.12 Planning law is not appropriate for the removal and variation of private easements. These are easements that are created by non-statutory means, such as by an instrument of transfer, a deed, an agreement between parties that is enforceable in equity, or by operation of the common law doctrines of implication and prescription.
- 8.13 There will often be issues about the existence, scope and enforceability of the easement, which need to be resolved under property law.
- 8.14 Victoria has no scheme for the judicial removal or variation of easements. Many other jurisdictions have extended the scope of their provisions for judicial removal to include easements.¹⁵ In our consultation paper, we asked whether section 84 of the Property Law Act should also be extended to easements.¹⁶
- 8.15 The easements that would be removed or varied under section 84 would include both private easements and implied subdivisional easements.
- 8.16 Similar issues to those that arise in relation to private easements can also arise in relation to implied subdivisional easements created by sections 12(2) and 24(2)(e) of the Subdivision Act.¹⁷ Although, like regulatory easements, implied subdivisional easements are created by operation of statute, they are more like private easements because they are 'for the benefit of each lot and any common property'.¹⁸ By contrast, regulatory easements are created for the benefit of the holder of the easement rather than for the benefit of other land.
- 8.17 Because implied subdivisional easements are enforceable by benefited owners in the same way as private easements, we consider that servient owners should have the same rights to make an application for removal or variation of the easement.¹⁹ For example, if an owner of a subdivided lot applies for an injunction to restrain a lot owner from interfering with an implied subdivisional easement, the defendant may wish to make a cross-application for removal or variation of the easement.
- 8.18 The grounds for judicial removal of easements under section 84 of the Property Law Act would be similar to those that apply to restrictive covenants, but some additional considerations would be relevant to easements, such as abandonment.
- 8.19 Most of the submissions that addressed the question expressed support for extending section 84 to easements.²⁰

- 1 *Real Property Act 1918* (Vic) s 10.
- 2 *Law of Property Act 1925* (Eng) s 84, originally adopted by the *Property Law Act 1928* (Vic), a predecessor to the *Property Law Act 1958* (Vic).
- 3 *Conveyancing Act 1919* (NSW) s 89; *Transfer of Land Act 1893* (WA) s 129C; *Property Law Act 1974* (Qld) s 181; *Conveyancing and Law of Property Act 1884* (Tas) s 84C.
- 4 See also s 84(2), which refers to 'a restriction imposed by any instrument'.
- 5 In *Vrakas v Registrar of Titles* (2008) VSC 281 [26].
- 6 See, eg, George Newsom, *Preston and Newsom's Restrictive Covenants Affecting Freehold Land* (Sweet and Maxwell, 9th ed, 1998) [10.05]–[10.08]; Robert Megarry and William Wade, *The Law of Real Property* (Sweet and Maxwell, 7th ed, 2008) [32.090].
- 7 See, eg, *Re Miscamble's Application* (1966) VR 596; *Re Robinson* (1972) VR 278.
- 8 'It seems unlikely that the provision could be read as including restrictions imposed by planning legislation': Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (Butterworths, 2nd ed, 2000) [19.59]. See comments in *M A Zeltoff Pty Ltd v Stonnington City Council* (1999) 3 VR 88 [29].
- 9 See discussion regarding 'restrictions' in Chapter 6.
- 10 *Stanhill Pty Ltd v Jackson* (2005) 12 VR 224.
- 11 See Chapter 6.
- 12 We found no decided cases involving the application of s 84 of the *Property Law Act 1958* (Vic) to a statutory agreement.
- 13 See discussion at [6.19]–[6.31].
- 14 See Chapter 7.
- 15 See *Law of Property Act 1925* (Eng) (as amended by *Law of Property Act 1969* (Eng) s 28); *Conveyancing Act 1919* (NSW) s 89; *Transfer of Land Act 1893* (WA) s 129C; *Property Law Act 1974* (Qld) s 181; *Conveyancing and Law of Property Act 1884* (Tas) s 84C.
- 16 Victorian Law Reform Commission, *Easements and Covenants* Consultation Paper 9 (2010) 144 [16.34] (*Easements and Covenants*).
- 17 See, eg, *Gordon v Body Corporate Strata Plan 3023* (2004) 15 VR 557; *Body Corporate No 41342R v Sheppard and Another* (2008) VSCA 118.
- 18 *Subdivision Act 1988* (Vic) s 12(2)(b). Note that an express subdivisional easement, being an easement specified on the plan, can be either a private or regulatory easement: s 12(1).
- 19 This defensive use of s 84 of the *Property Law Act 1958* (Vic) in the case of covenants is expressly authorised by s 85 of the same Act.
- 20 Mr Michael Macnamara, Submission 4, 8; Moorabool Shire Council, Submission 11, 5; City of Greater Dandenong, Submission 18; Real Estate Institute of Victoria, Submission 25, 5; Law Institute of Victoria, Submission 26, 17.

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- 8.20 In support of the proposal, Michael Macnamara submitted that:
- Given that the power under section 84 is located outside the planning system, proper regard will be paid to easements as proprietary interest(s). Providing proper safeguards are included, it would seem appropriate for the courts' powers to be extended to easements as well as covenants.*²¹
- 8.21 Moorabool Shire Council supported the proposal and added that 'dealing with such matter(s) as property law rather than planning matters is a much more efficient mechanism. Land use planning adds little if any value to such matters'.²²
- 8.22 Stonnington City Council opposed the proposal, on the ground that 'councils should have a continuing role to determine whether an easement should be varied and/or removed'.²³ The submission added that 'council has the technical, building, engineering, planning and practical expertise and local knowledge to determine whether an easement should be removed'. The Council said that:
- To redirect easement removal applications through the courts will exponentially increase the cost of the process but more significantly lead to very unsatisfactory outcomes for the neighbourhoods in which they are located.*²⁴
- 8.23 Boroondara City Council argued that councils and other relevant authorities should always be consulted before an easement is removed.²⁵ The Council added that easements for stormwater drainage purposes should always be protected.²⁶
- 8.24 The concerns expressed by Stonnington and Boroondara City Councils relate mainly, but not solely, to regulatory easements. Some private easements may be of no interest to a council, such as an easement to store merchandise or equipment on a neighbour's land. Other private easements may be of interest to a council or referral authority if their removal would create a need for a regulatory easement or have an adverse impact on other land.²⁷
- 8.25 Section 84(3) of the Property Law Act empowers the court to direct that enquiries be made of any local authority, but does not specifically empower the court to direct that notice of the application be given to any local authority.

RECOMMENDATIONS

41. Section 84 of the *Property Law Act 1958* (Vic) should be amended to include the power to remove or vary by order easements created other than by operation of statute.
42. Section 84(3) of the *Property Law Act 1958* (Vic) should be amended to provide that the court may direct that notice of the application be given to any local authority.

RELATIONSHIP WITH PROVISIONS FOR ADMINISTRATIVE REMOVAL

- 8.26 Land Victoria submitted that the provisions for administrative removal of easements by the Registrar under sections 73 and 73A of the *Transfer of Land Act 1958* (Vic) (Transfer of Land Act) should be retained.²⁸
- 8.27 Section 73 empowers the Registrar, upon application by a registered owner, to delete the recording of any easement that has been abandoned or extinguished. A dominant owner may object by lodging a caveat.

- 8.28 Section 73A empowers the Registrar to create a folio for land that omits the recording of 'any right or easement of way' that has been under continuous and exclusive adverse occupation for at least 30 years. The provision is useful for clearing obsolete easements from old system land when creating a new folio for it.
- 8.29 Land Victoria submitted that making section 84 of the Property Law Act the principal mechanism for removing or varying both easements and covenants would involve 'all the attendant expenses of applying to the Court to obtain the relevant court order'.²⁹ We agree with Land Victoria that sections 73 and 73A of the Transfer of Land Act should be retained. Section 73 provides an inexpensive and expedient method for deleting the recording of easements that have already been extinguished or abandoned at common law.

WHERE SHOULD THE APPLICATIONS BE HEARD?

- 8.30 Currently, an application for removal or variation of a restrictive covenant under section 84 of the Property Law Act can be made to either the Supreme Court or the County Court, which have concurrent jurisdiction.³⁰
- 8.31 In our consultation paper, we asked which forums (courts and/or the Victorian Civil and Administrative Tribunal (VCAT)) should have jurisdiction to hear applications under section 84.³¹ We identified the following options:
- the Supreme Court and County Court, as at present
 - the Supreme Court, County Court and Magistrates' Court
 - VCAT exclusively
 - the Supreme Court, County Court and VCAT.

SUBMISSIONS ON CHOICE OF FORUM

- 8.32 The majority of submissions were split between VCAT having exclusive jurisdiction and VCAT and the Supreme and County Courts having concurrent jurisdiction as alternative forums. None of the submissions favoured concurrent jurisdiction of the Supreme, County and Magistrates' Courts.
- 8.33 Submissions from councils were generally in favour of giving VCAT exclusive jurisdiction.³² The City of Greater Dandenong submitted that VCAT would be 'probably a cheaper, quicker option'.³³ Council officers of the Shire of Yarra Ranges expressed concern that 'bringing matters before a court of law can be costly, complex and potentially intimidating for members of the public'.³⁴ They further submitted in favour of VCAT:
- The Victorian Civil & Administrative Tribunal is considered a more appropriate body to decide on applications to remove a covenant. Any legislative change to empower VCAT to decide on these matters should be on that basis that it would be a structured discretion with specific assessment criteria such as those suggested in Section 16.41 of the [consultation paper].³⁵*
- 8.34 Adrian Finanzio put forward a model that would see the repeal of section 84 of the Property Law Act as well as sections 60(2) and (5) of the Planning and Environment Act.³⁶ VCAT would have original jurisdiction to remove or vary covenants under a new provision setting out policy-based criteria.
- 8.35 Michael Macnamara favoured concurrent jurisdiction of the Supreme and County Courts and the Real Property List of VCAT.³⁷

- 21 Mr Michael Macnamara, Submission 4, 8.
- 22 Moorabool Shire Council, Submission 11, 5.
- 23 Stonnington City Council, Submission 22, 6.
- 24 Ibid, 3-4.
- 25 Boroondara City Council, Submission 15a, 3.
- 26 Ibid, 2.
- 27 This interest is recognised in provisions such as s 45(3) of the *Transfer of Land Act 1958* (Vic), which provides that registration of an instrument that creates or surrenders an easement of carriageway requires the consent of the council.
- 28 Land Victoria, Submission 27.
- 29 Ibid, 16.
- 30 *Property Law Act 1958* (Vic), s 3, definition of 'court'.
- 31 Victorian Law Reform Commission, *Easements and Covenants*, above n 18, 144 [16.34].
- 32 Wellington Shire Council, Submission 10; City of Greater Dandenong, Submission 18; Yarra Ranges Council, Submission 20, 2; Stonnington City Council, Submission 23, 6; Anonymous, Submission 22.
- 33 City of Greater Dandenong, Submission 18.
- 34 Yarra Ranges Council, Submission 20, 2.
- 35 Ibid. The Victorian Law Reform Commission, *Easements and Covenants*, above n 18, 145 [16.41] lists the potential criteria drawn from the existing 'threshold tests' in s 84 of the *Property Law Act 1958* (Vic).
- 36 Mr Adrian Finanzio, Submission 33, 4-6.
- 37 Mr Michael Macnamara, Submission 4, 8.

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8.36 Brian and Judith Magree criticised both the Supreme Court and VCAT:

Although VCAT is meant to operate as an easily accessible dispute settling tribunal where the layperson may have his or her case heard at a minimal cost, it now operates as a court where legal and planning consultancies dominate the proceedings. The costs related to evidence provided by specialists can be prohibitive. On the surface access to the Supreme Court appears to be available to an applicant for covenant removal, however estimating the likely costs related to such an undertaking is fraught with difficulty and funding such an action is beyond the capacity of the average property owner.³⁸

8.37 Finally, the Housing Industry Association submitted that:

Taking the matter to the Supreme Court to have a covenant removed from a title is a costly exercise and overly difficult when the reason for the covenant (particularly an older one) may have effectively ceased and beneficiaries are difficult to locate.³⁹

8.38 The Supreme Court is an expensive forum when an application is contested and goes to trial, but it can provide a quick and efficient outcome for unopposed applications. If no benefited owner objects to the application, or if any dispute is settled by negotiation at the first hearing, the whole process may be completed in three to four months.⁴⁰ We were informed by planning consultant Robert Easton that in some 100 applications he has had in the Supreme Court, two proceeded to trial, 10 were withdrawn and the remainder were settled.⁴¹

8.39 The Law Institute of Victoria submitted that a court similar to the New South Wales Land and Environment Court should be established in Victoria and should have jurisdiction under section 84 of the Property Law Act. Otherwise, the Law Institute of Victoria suggested that VCAT should have jurisdiction provided that:

- *a specialist list is created;*
- *only appropriately qualified persons preside (such as Deputy Presidents or legal members);*
- *the no costs rule does not apply, so that costs follow the event; and*
- *VCAT has adequate resources to ensure that such matters can be dealt with in a timely and efficient manner.⁴²*

8.40 The Real Estate Institute of Victoria considered VCAT to be a possible forum only if a specialist list were created and costs were awarded on the same basis as in a court. Otherwise, the Real Estate Institute of Victoria did not favour VCAT as a forum.⁴³

DISCUSSION ON CHOICE OF FORUM

8.41 The option we prefer is to give VCAT and the Supreme, County and Magistrates' Courts concurrent jurisdiction as alternative forums.

8.42 This would allow applicants to choose the forum, having regard to the complexity of the case; the listing delays and costs in each jurisdiction; whether any benefited owner is likely to oppose the application; which other applications are brought at the same time; and what other orders are sought.

- 8.43 We see no need for a new VCAT List to deal with section 84 of the Property Law Act. VCAT already has a Real Property List. The *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* (VCAT Act) provides that, for the purposes of its jurisdiction under Part IV of the Property Law Act (co-owned land and goods), 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’.⁴⁴ This provision could be extended to the Tribunal’s jurisdiction under section 84.
- 8.44 A judicial member of VCAT has power to strike out all or part of a proceeding if the member considers that the matter would be more appropriately dealt with by a court, and may refer it to the court.⁴⁵
- 8.45 Provision already exists for complex matters to be transferred to a higher court. Under the *Courts (Case Transfer) Act 1991 (Vic)*, a designated judicial officer has the power to transfer a proceeding to a higher court that has the appropriate skill, experience and authority to hear it having regard to its gravity, difficulty and importance, where a transfer is just and convenient.⁴⁶
- 8.46 While the submissions did not opt for giving the Magistrates’ Court jurisdiction under section 84, the court already has jurisdiction to enforce easements and covenants by equitable relief within its jurisdictional limit in civil proceedings (currently \$100 000), or without limit as to value where the parties agree to jurisdiction.⁴⁷ Where proceedings are brought to enforce an easement or covenant, the defendant should be able to cross-apply for an order to remove or vary it under section 84, and both matters should be heard in the same forum.⁴⁸

POWER TO MAKE A DECLARATION

- 8.47 Apart from the judicial removal power in section 84(1) of the Property Law Act, section 84(2) empowers the court, on the application of any interested person, to declare whether or not land is affected by a restriction imposed by any instrument, or to declare the nature and extent of the restriction and whether it is enforceable and, if so, by whom.
- 8.48 An application for a declaration under section 84(2) may be brought in conjunction with an application for judicial removal. For example, an applicant may argue that the covenant is invalid or unenforceable, and alternatively, if it is found to be valid and enforceable, that it should be removed or varied.⁴⁹
- 8.49 The power to make a declaration is sufficiently related to the judicial removal power that VCAT and the Magistrates’ Court should have concurrent jurisdiction with the other courts under section 84(2) as well as section 84(1).

RECOMMENDATIONS:

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 (Vic)*.
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.

38 Brian and Judith Magree, Submission 12.

39 Housing Industry Association, Submission 32, 2.

40 We were told that the costs of an application that proceeds to trial, including expert witnesses, were likely to exceed \$100 000 for the applicant alone. However, the costs for unopposed applications can be less than \$20 000: Oral communication with Mr Robert Easton, Easton Consulting (15 November 2010).

41 Oral communication with Mr Robert Easton, Easton Consulting (15 November 2010).

42 Law Institute of Victoria, Submission 26, 6.

43 Real Estate Institute of Victoria, Submission 25, 2.

44 *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* sch 1 cl 66A.

45 *Ibid* s 77.

46 *Courts (Case Transfer) Act 1991 (Vic)* ss 3(1), 16.

47 *Magistrates’ Court Act 1989 (Vic)* ss 100(1), (3), s 3(1).

48 *Property Law Act (1958) (Vic)* s 85 gives the defendant the right to cross-apply under s 84.

49 See, eg, the relief sought by the defendant in *Fitt v Luxury Developments Pty Ltd* (2000) VSC 258 [20].

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COSTS

- 8.50 If VCAT and the courts have concurrent jurisdiction in proceedings under section 84 of the Property Law Act, the costs rules in the courts and VCAT should be consistent.
- 8.51 Although VCAT can award costs against an unsuccessful party, the general rule in section 109(1) of the VCAT Act is that each party must bear his or her own costs.⁵⁰ This is called the 'no costs' rule because it means that VCAT normally does not order the losing party to pay the successful party's costs. It differs from the normal rule in civil matters in the courts, which is that 'costs follow the event', and the losing party is ordered to pay the successful party's costs.⁵¹
- 8.52 Not all VCAT proceedings are subject to the 'no costs' rule. Schedule 1 of the VCAT Act modifies the application of section 109(1) in specified types of proceedings.⁵²
- 8.53 The Supreme Court's approach to costs under section 84 of the Property Law Act is that, unless objections to the application are 'frivolous', the plaintiff should pay the costs of an unsuccessful defendant who is 'seeking to maintain the continuance of a privilege which by law is his'.⁵³
- 8.54 This approach tends to engender a high level of expectation from defendants that their costs will be paid. It deprives them of the usual incentive for civil defendants to weigh their chances of successfully opposing the application and accept reasonable settlement offers before trial.
- 8.55 To require successful applicants to pay all the costs of any defendant is not in keeping with legislative policy to facilitate the early resolution of disputes and reduce the private and public costs of justice.⁵⁴ The *Civil Procedure Act 2010* (Vic) sets out an overarching purpose in civil proceedings that requires the court 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.⁵⁵ The Act also provides that parties in civil proceedings have an 'overarching obligation' to use reasonable endeavours to resolve disputes and ensure that costs are reasonable and proportionate.⁵⁶
- 8.56 We consider that a preferable approach to costs is as stated by Justice Cross in *Re Jeffkin's Indentures*:
- A plaintiff seeking a declaration that restrictive covenants do not affect his property is expected to pay his own costs. He is also expected to pay the costs of any defendants who enter an appearance down to the point in the proceedings at which they have had a full opportunity of considering the matter and deciding whether or not to oppose the application. Any defendant who then decides to continue, and appears unsuccessfully before the judge, does so at his own risk as to his own costs at that stage. Such defendant would not, however, be ordered to pay the plaintiff's costs.*⁵⁷
- 8.57 To enable VCAT to implement this costs rule, section 109(1) of the VCAT Act would need to be modified in its application to proceedings under section 84 of the Property Law Act.
- 8.58 As always, an order for costs is at the discretion of the court, and the court takes into account the facts and circumstances of the case, the conduct of the parties and other relevant matters.⁵⁸
- 8.59 VCAT would have the power to make an order that a party pay the costs of another party if satisfied that it is fair to do so having regard to the matters listed in section 109(3) of the VCAT Act. The subsection refers to the conduct of the parties, such as whether a party has been responsible for unreasonably prolonging the time taken to complete the proceedings.

RECOMMENDATION

45. In an application under section 84 of the *Property Law Act 1958* (Vic), the court or VCAT should apply the following principles to the award of costs:
- Where the application is unsuccessful, the applicant should normally pay the costs of any respondent entitled to the benefit of the easement or restriction.
 - 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.

REFORMULATION OF THE POWER

THRESHOLD TESTS OR RELEVANT CONSIDERATIONS?

- 8.60 The court's power to vary or discharge a covenant under section 84 of the Property Law Act depends upon being satisfied that one or more of the conditions (threshold tests) in section 84(1) exist. In our consultation paper, we called them the 'obsolescence test', the 'impediment to reasonable user test', the 'substantial injury test' and the 'consent test'.⁵⁹ If a threshold test is satisfied, the court has power to grant an order, but the section does not specify what other matters the court may consider in exercising its discretion.
- 8.61 We suggested reformulating section 84(1) of the Property Law Act as a structured discretion instead of as a set of threshold tests and a discretionary field.
- 8.62 A structured discretion is one in which the section specifies the relevant considerations that the court must consider in exercising its discretion. No single consideration is essential or decisive. It is left to the court to balance the considerations and determine what weight to give to each in the circumstances of each case. This approach has been adopted in a number of other jurisdictions.⁶⁰
- 8.63 We formulated a list of potential considerations for inclusion in section 84 and asked which should be adopted. Those that we put forward were drawn from the following sources:
- considerations embedded in the existing threshold tests
 - considerations listed in judicial removal provisions in other Australian and overseas jurisdictions
 - common law principles that operate to extinguish easements
 - equitable defences to the enforcement of restrictive covenants.⁶¹
- 8.64 The responses to our proposal for the reformulation of section 84(1) to specify discretionary criteria rather than a threshold test were generally positive.⁶²
- 8.65 Only two submissions disagreed with our proposal.
- 8.66 The Real Estate Institute of Victoria indicated, without elaboration, that it did not support the modification of section 84(1) in respect to covenants, although it suggested that some discretionary criteria could be considered in the removal of easements.⁶³ Brian and Judith Magree were opposed to the judicial removal provision generally, regardless of the formulation of section 84(1).⁶⁴
- 8.67 Only three submissions specifically addressed the content of the criteria to be included.⁶⁵ These submissions are discussed below.

50 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109(1).

51 See, eg, LexisNexis Butterworths, *Civil Procedure Victoria*, vol 1 (at service 246) [63.02.80]–[63.02.90].

52 For example, s 46 of sch 1 provides that s 109 does not apply to a proceeding under the *Land Acquisition and Compensation Act 1986* (Vic).

53 *Re Withers* (1970) VR 139 (Anderson J), applied in *Stanhill Pty Ltd v Jackson and Others* (2005) VSC 355. This approach was supported by Mr Adrian Finanzio, Submission 33, 10.

54 Chapter 11, 'Reducing the Cost of Litigation' in Victorian Law Reform Commission, *Civil Justice Review Report No 14* (2008).

55 *Civil Procedure Act 2010* (Vic) ss 7, 8, 9.

56 *Ibid* ss 10(1), 11, 22, 24.

57 *Re Jeffkin's Indentures* (1965) 1 WLR 375 (High Court, Chancery Division); Stanley Robinson, *Property Law Act (Victoria)* (Lawbook Co, 1992) 185. Costs may also be awarded on an indemnity basis: *Eucalypt Group P/L v Robin & Anor* (2003) QSC 178.

58 *Re Withers* (1970) VR 139.

59 See Chapter 16, Victorian Law Reform Commission, *Easements and Covenants*, above n 18 for a full discussion of these threshold tests.

60 The most recent example being s 50 of the *Land and Conveyancing Law Reform Act 2009* (NI).

61 Victorian Law Reform Commission, *Easements and Covenants*, above n 18, 144–55 [16.35]–[16.105].

62 Mr Michael Macnamara, Submission 4, 8; City of Greater Dandenong, Submission 18; Stonnington City Council, Submission 23, 7; Law Institute of Victoria, Submission 26, 17.

63 The consideration of non-use of an easement for an extended period of time was supported by the Real Estate Institute of Victoria in their submission: Real Estate Institute of Victoria, Submission 25, 6.

64 Brian and Judith Magree, Submission 12.

65 Mr Michael Macnamara, Submission 4, 8; Law Institute of Victoria, Submission 26, 17; Real Estate Institute of Victoria, Submission 25, 6.

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RECOMMENDED LIST OF RELEVANT CONSIDERATIONS

8.68 Having regard to the comments in submissions, we have refined our list of relevant considerations for inclusion in a structured discretion in section 84(1). Each is discussed below. The recommended considerations are:

- the relevant planning scheme
- the purpose of the easement or restrictive covenant
- 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)
- any increased burden of the easement on the servient land resulting from changes to the dominant land or its mode of use
- the extent to which the removal or variation of the easement or a restrictive covenant would cause real detriment to a person who has the benefit of the easement or restrictive covenant
- the extent to which a person who has the benefit of an easement or a restrictive covenant can be adequately compensated for its loss
- acquiescence by the owner of the dominant land in a breach of the restrictive covenant
- delay by the dominant owner in commencing legal proceedings to restrain a breach of the restrictive covenant
- abandonment of the easement by acts or omissions
- non-use of the easement (other than an easement in gross) for 15 years
- any other factor the court or tribunal considers to be material.

RELEVANT PLANNING SCHEME

8.69 In our consultation paper, we noted that the decisions of the Supreme Court are inconsistent on the question of whether public planning considerations can be taken into account in an application under section 84 of the Property Law Act, either in applying the threshold tests or in the field of discretion.⁶⁶

8.70 We also observed that a number of other jurisdictions have amended their judicial removal provisions to include public planning considerations in tests or lists of relevant considerations:

- The English judicial removal provision was amended in 1969 to include considerations of public interest and of planning patterns.⁶⁷
- The Queensland provision mirrors the 1969 English amendments.⁶⁸
- Tasmania's legislation provides that a tribunal may remove or vary an interest if it is satisfied that the 'continued existence of the interest would impede a user of the land in accordance with an interim order or planning scheme'.⁶⁹
- The Irish, Northern Irish and Scottish legislation all require the public interest and/or planning considerations to be taken into account.⁷⁰

8.71 Four submissions in response to our consultation paper specifically addressed the question of whether the planning scheme should be a relevant consideration under section 84. Officers of the Shire of Yarra Ranges said that the court should consider whether an application to remove or vary a covenant would result in a use or development that would conflict with the planning scheme's objectives for the area.⁷¹

- 8.72 The Law Institute of Victoria submitted that no criteria involving consideration of planning policies or planning schemes should be included in an amended section 84.⁷²
- 8.73 Mr Macnamara supported the amendment of section 84 to include discretionary considerations but ‘would not support a wholesale overthrow of covenants by reference to planning law’.⁷³
- 8.74 We detected concern that, if planning considerations are admitted as relevant, they would tend to trump all other considerations. This apprehension is unwarranted.⁷⁴ The planning scheme would be one of a list of relevant considerations to be weighed in a decision under section 84.⁷⁵
- 8.75 English experience over four decades shows that a requirement to consider planning matters can fill a gap in context without being a decisive factor. A leading English property law text comments:
- The mere fact that planning permission has already been granted in respect of a proposed development does not necessarily indicate that the [English] Lands Tribunal must, under section 84, discharge or modify a particular restrictive covenant. Almost all applications under section 84 are supported by planning consent for the development proposed. The availability of such consent is merely one of the considerations relevant to the Lands Tribunal’s exercise of discretion although in some cases it may prove strongly persuasive (references omitted).*⁷⁶
- 8.76 Mr Finanzio supported the inclusion of planning considerations in section 84. He submitted that:
- Whatever criteria are enunciated in any new legislative framework, such criteria should include consideration and appreciation of the existence of the covenant as a property right and the need to balance that right against planning outcomes.*⁷⁷
- 8.77 He added that the Supreme Court has ‘expressed the view that it is of assistance for the Court to know exactly what is proposed by the removal or variation of a restrictive covenant’.⁷⁸
- 8.78 We believe that the court or VCAT should consider, as one of a number of relevant matters, the consistency of the easement or restrictive covenant with the current and future use of the land under the relevant planning scheme.
- 8.79 A restrictive covenant may be consistent with the planning scheme where, for example, the restriction preserves heritage features in an area to which a heritage overlay applies. A covenant could also be inconsistent with the planning scheme where, for example, a large lot in an area that is zoned for high density development is subject to a covenant that restricts it to use for a single dwelling.⁷⁹

PURPOSE OF THE EASEMENT OR RESTRICTIVE COVENANT AND CHANGED CIRCUMSTANCES

- 8.80 Section 84 empowers the court to remove or vary a covenant if it is satisfied that, because of the changed circumstances (character of the property or the neighbourhood or other circumstances), the covenant ‘ought to be deemed obsolete’.⁸⁰
- 8.81 There is conflict between the authorities about how to determine whether a covenant is ‘obsolete’.

- 66 Victorian Law Reform Commission, *Easements and Covenants*, above n 18, 142 [16.20]–[16.21]. *Greenwood v Burrows* (1992) V Conv R 54-444; *Stanhill Pty Ltd v Jackson and Others* (2005) 12 VR 224, 237–8; *Vrakas v Registrar of Titles* (2008) VSC 281. In *Greenwood v Burrows* (1992) V Conv R 54-444 Judge Eames stated that he did not believe that planning policy should be considered by the court when deciding whether to exercise its discretion. Other judges have appeared to accept the relevance of planning policy and/or local planning requirements: see, eg, *Stanhill Pty Ltd v Jackson and Others* (2005) 12 VR 224, 237–8; *Kort Pty Ltd v Shaw* (1983) WAR 113.
- 67 *Law of Property Act 1969* (Eng) s 28.
- 68 *Property Law Act 1974* (Qld) s 181.
- 69 *Conveyancing and Law of Property Act 1884* (Tas) s 84C.
- 70 See discussion at 150–2 [16.82]–[16.94], Victorian Law Reform Commission, *Easements and Covenants*, above n 18; *Land and Conveyancing Law Reform Act 2009* (NI) s 50(2)(c)–(d); *Property (Northern Ireland) Order 1978* (No 459) (N.I.4) Art 5(5); *Title Conditions (Scotland) Act 2003* (Scot) s 98.
- 71 Yarra Ranges Council, Submission 20, 3.
- 72 Law Institute of Victoria, Submission 26, 18.
- 73 Mr Michael Macnamara, Submission 4, 8.
- 74 ‘Even if planning consent has been given for a particular development, the court is not required to discharge or modify the covenant to permit the development to occur’: Bradbrook and Neave, above n 8, [19.82] citing *Gilbert v Spoor* (1983) ch 27.
- 75 See, eg, the approach taken by Lord Justice Fox in *Re Martin’s Application* (1989) 57 P&CR 119, 125, a decision regarding the English s 84. See also: Newsom, above n 6, [10.32]–[10.39].
- 76 Kevin Gray and Susan Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2008) [3.4.95].
- 77 Mr Adrian Finanzio, Submission 33, 8.
- 78 *Ibid.*
- 79 Email from Claire Anderson, Project Manager—Strategic Planning, Knox City Council, 22 October 2010.
- 80 *Property Law Act 1958* (Vic) s 84(1)(a).

Removal and Variation of Easements and Covenants by Order



- 8.82 Prior to the decision of the Supreme Court in *Stanhill Pty Ltd v Jackson (Stanhill)*⁸¹ the established approach to the obsolescence test was to consider a covenant obsolete only if 'its original purpose can no longer be served'.⁸² The interpretation of this test has developed in such a way that the courts have failed to regard a covenant as 'obsolete' where the covenant 'continues to have any value for the persons entitled to the benefit of it'.⁸³ The test for obsolescence has therefore been very hard to meet.⁸⁴
- 8.83 In *Stanhill*, Justice Morris held that the word 'obsolete' should be given its ordinary English meaning, so that the test is whether the covenant is 'outmoded' or 'out of date'.⁸⁵ Subsequent authorities appear to have diverged, with some judges inclining to the *Stanhill* approach and others expressly declining to follow it.⁸⁶
- 8.84 In the United States, the equitable doctrine of changed circumstances allows for modification or termination of a servitude (easement or covenant) where changes have rendered either its purposes impractical or the servient land unsuitable for the uses it permits.⁸⁷ The test for finding changed conditions sufficient to justify removal or modification of servitudes is stated in the *Third Restatement of Property* as follows: 'the test is not whether the servitude retains value, but whether it can continue to serve the purposes for which it was created'.⁸⁸
- 8.85 In contrast to United States law, the development of the equitable doctrine of changed circumstances in Victoria, as in England, has been limited by its incorporation into the 'obsolescence' threshold test in section 84(1) of the Property Law Act. Under this statutory test, changed circumstances are considered only in the context of determining whether the court should deem the covenant obsolete. Separate consideration is not given to the effect of the changed circumstances on the suitability or practicability of enforcing the covenant.
- 8.86 The 'obsolescence' requirement in section 84 has introduced a higher threshold to be satisfied. We consider that this ambiguous statutory constraint on the equitable doctrine of changed circumstances should be removed.
- 8.87 Consideration of the effect of changed circumstances is closely linked to consideration of the original purpose of the easement or covenant. These considerations apply equally to easements. For example, if a right of access or right of way has been built over by subsequent development, the purpose of the easement can no longer be achieved and the easement is redundant.
- 8.88 We recommend that the court or VCAT should consider the original purpose of the easement or restrictive covenant. We also recommend that, as a separate consideration, the court or VCAT should consider 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).

INCREASED BURDEN OF EASEMENT

- 8.89 In our consultation paper, we noted that, under a common law rule, the changed use of an easement that imposes an increased burden on the servient land can extinguish the easement where the increase is deemed to be excessive.⁸⁹
- 8.90 The increased burden could arise from a change in the use of the dominant land.⁹⁰ In the case of *Jelbert v Davis*⁹¹ it was held that an easement was extinguished by the increased use of a right of way by patrons of a caravan park that had been agricultural land when the easement was granted.⁹²
- 8.91 An easement will not ordinarily be extinguished if the excessive use can be quantified—such as the use of cars to travel over a footway—because an order to restrain the excessive use would be more appropriate in such cases.⁹³

- 8.92 In *Boglari and Another v Steiner School and Kindergarten*,⁹⁴ the Victorian Supreme Court of Appeal held that it is a question of fact whether an increase in use is excessive. The Court upheld a decision that the burden of an easement that had originally provided rear access to a residential dwelling was not impermissibly increased when it was used to provide access to a car park for a school.
- 8.93 In the case of *Gallagher v Rainbow*,⁹⁵ the High Court held that there was a presumption that an easement for the benefit of dominant land would also attach to any subdivided parts of that land. However, the Court indicated that ‘the owners of subdivisions of the dominant tenement may be restricted in their use of the servient tenement within limits’.⁹⁶ The Court said that subdivision gives no right to impose an additional burden on the servient land.⁹⁷
- 8.94 Cases in which an easement has been held to be extinguished at common law as a result of excessive burden are few. Nevertheless, the principle is sufficiently well-established that it should be a relevant consideration for removal or variation of an easement under section 84 of the Property Law Act.
- 8.95 We recommend that the court or tribunal should have regard to any increased burden of an easement on the servient land resulting from changes to the dominant land or its mode of use.

MATERIAL DETRIMENT

- 8.96 In our consultation paper, we proposed a criterion of whether the removal or variation of an easement or covenant would cause material detriment to the benefited or dominant owner.⁹⁸
- 8.97 ‘Material detriment’ as a legislative criterion has been interpreted by VCAT in the context of the test under section 60(2) of the Planning and Environment Act. This provision sets out a list of matters that a responsible authority must consider in granting a permit to remove or vary a restrictive covenant.⁹⁹ The responsible authority cannot grant a permit to remove or vary a restrictive covenant unless it is satisfied that the benefited owner will be unlikely to suffer ‘financial loss; or loss of amenity; or loss arising from change to the character of the neighbourhood; or any other material detriment’.
- 8.98 VCAT has interpreted ‘material detriment’ in section 60(2)(d) as meaning
*a detriment which is more than trivial or inconsequential but may be less than important detriment or detriment of much consequence and is to be assessed on the merits of each particular case.*¹⁰⁰
- 8.99 The term ‘material detriment’ also appears in section 52(1) of the Planning and Environment Act.¹⁰¹ Under this provision, a responsible authority must give notice of a planning permit application to adjoining owners of the subject land unless it is satisfied that ‘the grant of the permit would not cause material detriment to any person’. VCAT has said that the material detriment ‘need not be substantial’,¹⁰² and that ‘it must be real as distinct from being fanciful but it may in fact be only minor’.¹⁰³ In *SunnyCove Management Ltd v Stonnington City Council*,¹⁰⁴ ‘material detriment’ was taken to mean ‘a real and identifiable detriment’.¹⁰⁵
- 8.100 These VCAT decisions demonstrate the need to show detriment that is real and identifiable and which may be minor but need not be substantial. We consider this an appropriate formulation of the kind of detriment that is relevant to considerations under section 84(1) of the Property Law Act.
- 8.101 We recommend that the court or VCAT should consider the extent to which the removal or variation of the easement or restrictive covenant would cause material detriment to a person who has the benefit of the easement or restrictive covenant.

- 81 *Stanhill Pty Ltd v Jackson* (2005) 12 VR 224.
- 82 In *Re Truman, Hanbury, Buxton & Co Ltd's Application* (1956) 1 QB 261; *Re Miscamble's Application* (1966) VR 596, 601; see discussion in Chapter 16, Victorian Law Reform Commission, *Easements and Covenants*, above n 18.
- 83 *Re Robinson* (1972) VR 278, 282 (Adam J).
- 84 Toother observes that courts don't accept that a covenant can be made obsolete in the sense of futile or useless where it is inconsistent with the planning scheme: Joyce Toother, ‘Restrictive Covenants and Public Planning Legislation—Should the Landowner Feel “Touched and Concerned?”’ (1991) 9 *Environmental and Planning Law Journal* 63, 69.
- 85 *Stanhill Pty Ltd v Jackson and Others* (2005) 12 VR 224, 237–8.
- 86 For cases appearing to follow *Stanhill*, see *Re Milbex Pty Ltd* (2007) V ConvR 54-726; *Dissanayake & Anor v Hillman & Ors* (2008) V ConvR 54-745; *Fraser v Di Paolo* (2008) V ConvR 54-751. For cases declining to follow *Stanhill*, see *Bevilaqua v Merakovsky* (2005) ANZ ConvR 504; *Vrakas v Registrar of Titles* (2008) VSC 281.
- 87 See generally, American Law Institute, *Restatement (Third) of Property: Servitudes* (2000) § 7.10.
- 88 *Ibid.*
- 89 Victorian Law Reform Commission, *Easements and Covenants*, above n 18, 145 [16.43]–[16.47]. See, eg, Jonathan Gaunt and Paul Morgan, *Gale on Easements* (Sweet and Maxwell, 18th ed, 2008) 515–16, 542–4; Bradbrook and Neave, above n 8, [19.35]–[19.38].
- 90 Brendan Edgeworth, et al, *Sackville and Neave Australian Property Law* (Butterworths, 8th ed, 2008) 1041.
- 91 *Jelbert v Davis* (1968) 1 WLR 589.
- 92 *Ibid.*
- 93 See generally, Gaunt and Morgan, above n 89, 542.
- 94 *Boglari and Another v Steiner School and Kindergarten* (2007) 20 VR 1.
- 95 *Gallagher v Rainbow and Others* (1994) 121 ALR 129.
- 96 *Ibid.* 136.
- 97 *Ibid.*, citing Charles James Gale, *A Treatise on the Law of Easements* (Sweet and Maxwell, 7th ed, 1899) 77.
- 98 Victorian Law Reform Commission, *Easements and Covenants*, above n 18, 155 [16.105].
- 99 For a discussion of section 60(2) of the *Planning and Environment Act 1987* (Vic), see [7.47]–[7.52].
- 100 *Pletes v Knox CC* (1992) VCAT 8 citing *I Tjorpatzis, D & N Brennan and J & E Berry v City of Preston* (Appeal No 1991/42499—as yet unreported).
- 101 *Planning and Environment Act 1987* (Vic) s 52(1)(a).
- 102 *McBride v Stonnington CC* (2005) VCAT 2321 [6].
- 103 *Ibid.*
- 104 *SunnyCove Management Ltd v Stonnington CC* (2006) VCAT 1705.
- 105 *Ibid.* [19]. VCAT has also found that ‘material detriment would not be satisfied where the alleged effect of retaining the easement was merely remote, speculative or hypothetical’: *Jordan v Stonnington City Council* (2004) VCAT 2008 [49] citing *Michael Drapac & Associates v Yarra CC* (Tribunal No 1999/20613) in the context of variation of an easement.

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EXTENT TO WHICH COMPENSATION WOULD BE ADEQUATE

- 8.102 Under section 84(1) of the Property Law Act, the court may order the applicant to pay compensation to any person suffering loss as a consequence of the removal or variation of a restriction by the court.
- 8.103 The issue of compensation is already a factor the court must consider. It is no departure from current practice to recommend that, in exercising its discretion under an amended provision, the court or VCAT should consider the extent to which a person who has the benefit of an easement or covenant can be adequately compensated for their loss.

ACQUIESCENCE AND DELAY

- 8.104 In our consultation paper, we discussed how several doctrines have emerged in equity that may prevent the dominant owner from using equitable remedies to enforce an easement or a restrictive covenant.¹⁰⁶ These equitable defences work differently for covenants and easements.
- 8.105 Because covenants are recognised only at equity, an equitable defence will generally act as an absolute bar on actions for enforcement or damages.¹⁰⁷ Easements, on the other hand, can exist as legal interests or as equitable ones, depending on the way they were created. The equitable defences only bar equitable remedies, such as injunctions and equitable damages, while leaving the possibility of legal damages for breach.
- 8.106 We consider that, in an application to remove or vary a restrictive covenant, the court should be required to consider:
- the acquiescence by the dominant land owner in a breach of a restrictive covenant
 - the delay by the dominant land owner in commencing legal proceedings to restrain the breach of the restrictive covenant.

Acquiescence

- 8.107 Acquiescence in the breach of a restrictive covenant or easement may result in equitable remedies being refused.¹⁰⁸ Acquiescence can be shown either by actions that indicate an acceptance of the breach, or by inaction in the face of a breach which would lead someone to infer acceptance.¹⁰⁹
- 8.108 In *Gafford v Graham*,¹¹⁰ a defendant converted a bungalow to a two-storey house and extended a barn in breach of a covenant. The plaintiff waited for three years before instigating action. In considering whether acquiescence had occurred, Lord Justice Nourse stated:

*As a general rule, someone who, with the knowledge that he has clearly enforceable rights and the ability to enforce them, stands by whilst a permanent and substantial structure is erected, ought not to be granted an injunction to have it pulled down.*¹¹¹

Delay

- 8.109 It is a general rule of equity that a court may refuse an equitable remedy, such as an injunction, on the ground of delay in commencing proceedings.¹¹² In determining whether the delay is sufficient to justify refusal of an equitable remedy, two factors will be considered: the length of the delay, and the nature of acts done during the delay.¹¹³ Generally, there is no minimum length of delay for the doctrine to apply, but delay alone will be insufficient.¹¹⁴

8.110 The Law Institute of Victoria submitted that delay should be a relevant consideration under section 84(1) of the Property Law Act only if it amounts to ‘unreasonable and unjustifiable delay by the owner of the dominant land ... in commencing legal proceedings to restrain a breach’.¹¹⁵ The Law Institute said:

*For example, delays while awaiting a response to initial correspondence or attempting mediation should not prejudice the dominant owner as long as every reasonable attempt was made to achieve a remedy before issuing legal proceedings.*¹¹⁶

8.111 We consider that the proposed higher standard of ‘unreasonable and unjustifiable’ behaviour departs from the equitable doctrine of delay, which looks to the general nature of the delay and the nature of the acts done.

8.112 A delay that would lead equity to refuse to enforce a covenant should be sufficient to be a consideration in an application under Section 84 to remove the covenant.

8.113 We recommend that delay should be a relevant consideration, and should be applied in accordance with the established principles of equity.

ABANDONMENT AND NON-USE OF EASEMENT

8.114 To prove abandonment of an easement at common law, the servient owner has the burden of proving that the easement has been abandoned.¹¹⁷ To determine abandonment, the court will look at the intention of the dominant owner.¹¹⁸ The dominant owner must have ‘demonstrated a fixed intention never at any time thereafter to assert the right himself or to attempt to transmit it to anyone else’.¹¹⁹ This has been taken to require knowledge of the easement by the dominant owner.¹²⁰

8.115 It has been generally acknowledged that intention to abandon is very difficult to establish.¹²¹ At common law, non-use alone will be insufficient to prove abandonment.¹²²

8.116 In other Australian jurisdictions, provisions for judicial removal or variation of easements already contain mechanisms for their removal on the basis of abandonment.¹²³

8.117 Section 89(1A) of the *Conveyancing Act 1919* (NSW) makes it easier to prove abandonment in cases of non-use. It provides that an easement may be treated as abandoned if the court is satisfied that the easement has not been used for at least 20 years before the application.

8.118 Other Australian jurisdictions have enacted provisions that provide a clearer indication that non-use for the statutory time limit is grounds for removal of an easement.¹²⁴ For example, section 229A(2) of the *Transfer of Land Act 1893* (WA) empowers the Commissioner (Registrar) to direct the removal of an easement if satisfied that it has not been used or enjoyed for 20 years. The section does not mention abandonment.

8.119 Section 108 of the *Land Titles Act 1980* (Tas) retains abandonment as the ground for removal by the Recorder (Registrar), but allows it to be proved by non-use. The legislation allows all the common law modes of proving abandonment, while avoiding the need to prove intention to abandon where 20 years non-use is shown.

8.120 In our view, abandonment and non-use should be separate considerations in an application for removal of an easement under section 84(1) of the Property Law Act. Abandonment would have its common law meaning, and non-use for a specified period would be an alternative consideration based solely on behaviour rather than intention.

106 Victorian Law Reform Commission, *Easements and Covenants*, above n 18, 145–6 [16.46–16.48].

107 Except in cases where there is privity of contract or estate. See generally, Bradbrook and Neave, above n 8, [18.23]–[18.27].

108 Gino E Dal Pont, Donald Chalmers and Julie Maxton, *Equity and Trusts: Commentary and Materials* (Lawbook Co, 4th ed, 2007) 889. Although it is often confused with laches, acquiescence is a separate doctrine in equity.

109 See, eg, *Mehmet v Benson* (1965) 113 CLR 295.

110 *Gafford v Graham* (1999) 77 P&CR 73.

111 *Ibid* 84.

112 Bradbrook and Neave, above n 8, [18.78]–[18.91]. The equitable defence of laches applies to enforcement of covenants.

113 *Beamer Pty Ltd v Star Lodge Supported Residential Services Pty Ltd* (2005) VSC 236 [470], citing *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221.

114 Dal Pont, Chalmers and Maxton, above n 108, 888. In *Jessica Estates Pty Ltd v Lennard* (2007) 13 BPR 25, 297 (reversed by *Lennard v Jessica Estates* (2008) 71 NSWLR 306 on other grounds), the court found that delay of two and a half months in applying for a mandatory injunction to enforce a restrictive covenant was not substantial enough to warrant refusal of an equitable remedy.

115 Law Institute of Victoria, Submission 26, 18.

116 *Ibid*.

117 *Bookville Pty Ltd v Ross Brendan O’Loughlen* (2007) VSC 67 [18].

118 *Ibid* [15].

119 *Tehidy Minerals Ltd v Norman* (1971) 2 QB 528, 553.

120 *Shelmerdine v Ringen Pty Ltd* (1993) 1 VR 315, 338, 339.

121 See, eg, Lynden Griggs, ‘The Common Law Abandonment of Easements on Torrens Land: Can it be Done, and, if so, Should the Intent of Predecessors in Title be Taken into Account?’ (2007) 14 *Australian Law Journal* 162, 163.

122 Gaunt and Morgan, above n 89, 528.

123 Griggs, above n 121, 165. An example is *Conveyancing Act 1919* (NSW) s 89.

124 The consideration of non-use of an easement for an extended period of time was supported by the Real Estate Institute of Victoria in its submission: Submission 25, 6.

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8.121 Mr Macnamara suggested that the period of non-use should be 30 years.¹²⁵ Land Victoria submitted that 'in the interests of consistency, clarity and administrative efficiency'¹²⁶ the time period for non-use of an easement should be 15 years. If a freehold title can be extinguished by 15 years' adverse possession, it is inconsistent to require a longer period of non-use to remove a lesser interest.

8.122 We are persuaded by Land Victoria's reasoning, and recommend that the time period for non-use of an easement should be 15 years.

OTHER FACTORS

8.123 The court should have the discretion to take into account any other factors that it considers material when making its decision. For example, a court would be free to take into account matters that are generally considered when administering equitable remedies such as injunction.¹²⁷

RECOMMENDATION

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.

RELEASE FROM CONTRACTUAL OBLIGATIONS

8.124 One of the difficulties with freehold covenants is the continuing contractual operation of covenants. As we discuss in Chapter 6, covenants were originally purely contractual rights. The law still treats them as contractual rights that under certain conditions operate as property rights.

8.125 It has been held that an order under section 84 of the Property Law Act to remove or vary a covenant does not release an original covenantor from his or her contractual obligations under the covenant.¹²⁵ Even if the court releases the burdened land from the covenant, the benefited owner to whom the covenant was granted (the covenantee) could sue the covenantor in contract.

8.126 We consider that an order of the court or VCAT under section 84 of the Property Law Act should expressly state that the removal of the covenant has the effect of discharging liability for breach of covenant.

RECOMMENDATION

47. The *Property Law Act 1958* (Vic) should expressly empower the court or VCAT to order that, from the date on which an order under section 84 takes effect:

- a. If the order is for discharge of the restrictive covenant, the covenantor is released from any contractual obligation or liability under the restrictive covenant without prejudice to his or her liability for any prior breach of the restrictive covenant.
- b. If the order is for modification of a restrictive covenant, the covenantor is released from any contractual obligation or liability under the restrictive covenant to the extent of the modification without prejudice to his or her liability for any prior breach of the restrictive covenant.

¹²⁵ Mr Michael Macnamara, Submission 4, 4.

¹²⁶ *Land Victoria*, Submission 27, 10.

¹²⁷ For example, courts will not grant an injunction where it would be futile: *Dal Pont, Chalmers and Maxton*, above n 108, 928; or allow a claim where the plaintiff seeks to 'derive advantage from his own wrong': *Meyers v Casey* (1913) 17 CLR 90, 124.

¹²⁸ See, eg, *Re Markin; Re Roberts* (1966) VR 494, 496.

Appendix

SUBMISSIONS	
1	Mr Robert Ford
2 & 12	Mr Brian Magree & Mrs Judith Magree
3	Victorian Rail Track (VicTrack)
4	Mr Michael Macnamara
5	South Gippsland Shire Council
6	Mr Lynden Griggs
7	Mr Peter Bennett (Bennett Consulting Surveyors)
8	Bayside City Council
9	Frankston City Council
10	Wellington Shire Council
11	Moorabool Shire Council
13	Department of Transport
14	City of Greater Geelong
15a & 15b	Boroondara City Council
16	Telstra Corporation Limited (Telstra)
17	Australian Institute of Conveyancers (Victorian Division) Inc.
18	City of Greater Dandenong
19	Ms Anna Kapnoullas
20	Yarra Ranges Council <i>Submission by Council officers on behalf of Council</i>
21	Goulburn-Murray Rural Water Corporation (Goulburn-Murray Water)
22	Anonymous

SUBMISSIONS	
23	Stonnington City Council
24	Mr Dean Jackson
25	The Real Estate Institute of Victoria Ltd
26	Law Institute of Victoria
27	Land Victoria
28	Association of Consulting Surveyors (Victoria) Inc.
29	Professor Brendan Edgeworth
30	Moreland Energy Foundation
31	City of Melbourne
32	Housing Industry Association Limited
33	Mr Adrian Finanzio <i>Submission endorsed by Victorian Planning and Environmental Law Association, Mr Christopher Canavan QC, and Mr Ian McP Pitt SC</i>
34	Ms Cathy Sherry
35	Australian Property Group of the Law Council of Australia

Bibliography

- American Law Institute, *Restatement (Third) of Property: Servitudes* (2000)
- Aronson, Mark, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 3rd ed, 2008)
- Australian Bureau of Statistics, *Housing Mobility and Conditions: 2007–08*, Catalogue No 4130.0.55.002
- Bradbrook, Adrian, 'The Development of an Easement of Solar Access' (1982) 5 *University of New South Wales Law Journal* 299
- Bradbrook, Adrian, 'Solar Access Law: 30 Years On' (2010) 27 *Environmental and Planning Law Journal* 5
- Bradbrook, Adrian and Marcia Neave, *Easements and Restrictive Covenants in Australia* (Butterworths, 2nd ed, 2000)
- Bradbrook, Adrian, Susan McCallum and Anthony Moore, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007)
- Bright, Susan, 'Of Estates and Interests: A Tale of Ownership and Property Rights' in Susan Bright and John Dewar (eds), *Land Law Themes and Perspectives*, (Oxford University Press, 1998)
- Bryant, Tannetje, 'Removal or Variation of Restrictive Covenants in Victoria' (1996) 1 *Local Government Law Journal* 164
- Burns, Fiona, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3
- Burns, Fiona, 'Implied Easements and the Integrity of the Torrens System' (2009) 21 *Bond Law Review* 1
- Butt, Peter, *Land Law* (Lawbook Co, 6th ed, 2009)
- Butt, Peter, 'Planning Principles vs Private Property Rights: Environmental Planning and Assessment Act 1979 (NSW) s 28' (2004) 78 *The Australian Law Journal* 560
- Butt, Peter, 'What is a Land Use?' (2008) 82 *Australian Law Journal* 75
- Christensen, Sharon and William Duncan, 'Is it Time for a National Review of the Torrens System? The Eccentric Position of Private Restrictive Covenants?' (2005) 12 *Australian Property Law Journal* 104
- Code, Geoffrey, 'The Planning and Environment (Restrictive Covenants) Act 2000 (Vic)—Another Setback for Public Planning?' (2001) 18(2) *Environmental and Planning Law Journal* 211
- Committee on Positive Covenants (UK), *Report of the Committee on Positive Covenants Affecting Land*, Cmnd 2719 (1965)
- Dal Pont, Gino, Donald Chalmers and Julie Maxton, *Equity and Trusts: Commentary and Materials* (Lawbook Co, 4th ed, 2007)
- Department of Infrastructure and Planning, Queensland, *Improving Sustainable Housing in Queensland*, Discussion Paper (2008)
- Department of Justice (Victoria), *Attorney-General's Justice Statement 2: The Next Chapter* (2008)
- Department of Planning (Victoria), *Land Acquisition and Compensation: Report to the Minister for Planning* (1983)
- Department of Planning and Community Development (Victoria), *Modernising Victoria's Planning Act: A Discussion Paper on Opportunities to Improve the Planning and Environmental Act 1987* (2009) <www.dpcd.vic.gov.au/__data/assets/pdf_file/0018/41436/P_and_E_Act_Review_Discussion_Paper_Final.pdf>
- Dovey, Kim, Ian Woodcock and Stephen Wood, 'Slippery Characters' in Dovey, Kim (ed), *Becoming Places: Urbanism/Architecture/Identity/Power* (Routledge, 2010)
- Dukeminier, Jesse and James Krier, *Property* (Aspen Law and Business, 5th ed, 2002)
- Dwyer, Mark, *Review of Section 173 Agreements*, Discussion Paper (2004)
- Eccles, Des and Tannetje Bryant, *Statutory Planning in Victoria* (Federation Press, 3rd ed, 2006)
- Edgeworth, Brendan, 'The Numerus Clausus Principle in Contemporary Australian Property Law' (2006) 32 *Monash University Law Review* 387
- Edgeworth, Brendan, 'Adverse Possession, Prescription and their Reform in Australian Law' (2007) 15 *Australian Property Law Journal* 1

- Edgeworth, Brendan, et al, *Sackville and Neave Australian Property Law* (8th ed, LexisNexis Butterworths, 2008)
- French, Susan, 'Towards a Modern Law of Servitudes: Reweaving the Ancient Strands' (1982) 55 *Southern California Law Review* 1261
- French, Susan, 'Design Proposal for the New Restatement of the Law of Property Servitudes' (1988) 21 *University of California Davis Law Review* 1213
- Fox, P Moerlin, 'The Story Behind the Torrens System' (1950) 23 *Australian Law Journal* 489
- Gaunt, Jonathan and Paul Morgan, *Gale on Easements* (Sweet and Maxwell, 18th ed, 2008)
- Committee of Inquiry into Town Planning Compensation, *Report of the Committee of Inquiry into Town Planning Compensation* (Gobbo Report) (1978)
- Gray, Kevin and Susan Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2008)
- Gray, Kevin and Susan Gray, *Land Law* (Oxford University Press, 6th ed, 2009)
- Griggs, Lynden, 'The Common Law Abandonment of Easements on Torrens Land: Can It be Done, and, if so, Should the Intent of Predecessors in Title be Taken into Account?' (2007) 14 *Australian Property Law Journal* 162
- Griggs, Lynden, 'Possession, Indefeasibility and Human Rights' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 286
- Hepburn, Samantha, *Principles of Property Law* (Cavendish Publishing, 1998)
- Hernandez, Michael, 'Restating Implied, Prescriptive, and Statutory Easements' (2005) 40 *Real Property, Probate and Trust Journal* 75
- Ireland, Clifford, 'Environmental Planning in the Public Interest and Private Property Rights: The Role of s28 of the Environmental Planning and Assessment Act 1979 (NSW)' (2010) 15 *Local Government Law Journal* 155
- Jaffey, Peter, *Private Law and Property Claims* (Hart Publishing, 2007)
- Korngold, Gerald, 'Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations' (2007) 56 *American University Law Review* 1525
- Law Commission (England and Wales), *Transfer of Land—Report on Restrictive Covenants*, Report No 11 (1967)
- Law Commission (England and Wales), *Transfer of Land—Appurtenant Rights*, Working Paper No 36 (1971)
- Law Commission (England and Wales), *Transfer of Land—The Law of Positive and Restrictive Covenants*, Report No 127 (1984)
- Law Commission (England and Wales), *Easements, Covenants and Profits a Prendre: A Consultation Paper*, Consultation Paper No 186 (2008)
- Law Reform Commission of British Columbia, *Report on Limitations: Part 1—Abolition of Prescription*, Project No 6 (1970)
- Law Reform Commission (Ireland), *Report on the Acquisition of Easements and Profits a Prendre by Prescription*, Report No 66 (2002)
- Law Reform Commission (Ireland), *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals*, Report No 70 (2003)
- Law Reform Commission (Ireland), *Report on Reform and Modernisation of Land Law and Conveyancing Law*, Report No 75 (2005)
- Law Reform Commission of Victoria, *Easements and Covenants*, Report No 41 (1992)
- Levine, Jonathan, *Zoned Out: Regulation, Markets and Choices in Transportation and Metropolitan Land Use* (RFF Press, 2006)
- Lewyn, Michael, 'How Overregulation Creates Sprawl (Even in a City without Zoning)' (2005) 50 *Wayne Law Review* 1171
- LexisNexis Butterworths, *Civil Procedure Victoria*, vol 1 (at Service 246)
- LexisNexis Butterworths, *Planning and Environment Service Victoria* (at Service 155)

Bibliography

- Manitoba Law Reform Commission, *Report on Prescriptive Easements and Profits a Prendre*, Report No 48 (1982)
- McCarthy, Paul, 'The Enforcement of Restrictive Covenants in France and Belgium: Judicial Discretion and Urban Planning' (1973) 73 *Columbia Law Review* 1
- Megarry, Robert and William Wade, *The Law of Real Property* (Sweet and Maxwell, 7th ed, 2008)
- Mendes Da Costa, D, 'Changes in the Character of a Neighborhood as a Defence to the Enforcement of Restrictive Covenants by Injunction—A Comparative Study' (1966) 5(1) *Melbourne University Law Review* 205
- Montebello, Terry, *Report to the Minister for Planning on the Submissions to the Planning and Environment (Restrictive Covenants) Bill*, 17 August 2000
- Morris, Stuart, *Land Acquisition and Compensation: Proposals for New Land Acquisition and Compensation Legislation: Report to the Minister for Planning* (January 1983)
- Moses, Lyria and Cathy Sherry, 'Unregistered Access: Wheeldon v Burrows Easements and Easements by Prescription over Torrens Land' (2007) 81 *Australian Law Journal* 491
- New South Wales Land Titles Office, *Review of the Law of Positive Covenants Affecting Freehold Land* (1994)
- New South Wales Law Reform Commission, *The Right to Support from Adjoining Land*, Report No 84 (1997)
- New Zealand Department of Justice, *Positive Covenants Affecting Land* (1985)
- New Zealand Law Commission, *A New Property Law Act*, Report 29 (1994)
- Newsom, George, *Preston and Newsom's Restrictive Covenants Affecting Freehold Land* (9th ed, Sweet and Maxwell, 1998)
- Nygh, Peter, and Peter Butt (eds), *Butterworths Australian Property Law Dictionary* (Butterworths, 1997)
- Northern Ireland Law Commission, *Land Law Consultation Paper*, No 2 (2009)
- Northern Territory Law Reform Committee, *Report on the Law of Property*, Report No 18 (1998)
- Ontario Law Reform Commission, *Report on Covenants Affecting Freehold Land* (1989)
- Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (1996)
- Planning Panel, *Stonnington Planning Scheme Amendment C23 and Application No 1290/01*, Interim Panel Report (2004)
- Planning Panel, *Mornington Peninsula Planning Scheme Amendment C46 and Planning Permit Application: CP 02/2004*, Panel Report (2004)
- Planning Panel, *Stonnington Planning Scheme Amendment C23 Planning Permit Application 1290/01*, Panel Report (2004)
- Planning Panel, *Casey Planning Scheme Amendment C67: 67–69 Caserta Drive, Berwick*, Panel Report (2005)
- Planning Panel, *Manningham Planning Scheme Amendment C72: Removal of Covenants in Doncaster Hill Activity Centre*, Panel Report (2008)
- Real Estate Institute of Victoria, *A Guide to Buying Your Home* <www.propertiesonline.com.au/agents_folder/2039/secureaccess/guide_buying.pdf>
- Robinson, Stanley, *Equity Systems of Title to Land by Registration* (PhD Thesis, Monash University, 1973)
- Robinson, Stanley, *Transfer of Land in Victoria* (Lawbook Co, 1979)
- Robinson, Stanley, *Property Law Act* (Victoria) (Lawbook Co, Sydney, 1992)
- Rose, Carol, 'Servitudes, Security, and Assent: Some Comments on Professors French and Reichman' (1982) 55 *Southern California Law Review* 1403
- Rose, Carol, *Servitudes: Research Frontiers in Law and Economics*, Arizona Legal Studies Discussion Paper No 09–13 (2009). Available at SSRN <<http://ssrn.com/abstract=1371251>>
- Rule, Troy, 'Shadows on the Cathedral: Solar Access Laws in a Different Light' (2010) *University of Illinois Law Review* 851

- Sara, Colin, 'Prescription—What Is It for?' (2004) *Conveyancer and Property Lawyer* 13
- Scottish Law Commission, *Real Burdens*, Discussion Paper No 106 (1998)
- Scottish Law Commission, *Report on Real Burdens*, Report No 181 (2000)
- Tasmania Law Reform Institute, *Law of Easements in Tasmania*, Final Report No 12 (2010)
- Taylor, Greg and Michael Ziemer, 'Justice vs Certainty: International Law and the Mortgagee's Power of Sale' (2010) 18(3) *Australian Property Law Journal* 218
- Tooher, Joycey, 'Restrictive Covenants and Public Planning Legislation—Should the Landowner Feel "Touched and Concerned?"' (1991) 9 *Environmental and Planning Law Journal* 63
- Tooher, Joycey, 'Victorian Parliament Strikes Back!' (1994) 11 *Environmental and Planning Law Journal* 349
- Tooher, Joycey and Brian Dwyer, *Introduction to Property Law* (LexisNexis Butterworths, 2008)
- Van Houweling, Mollie Shaffer, 'The New Servitudes' (2008) 96 *Georgetown Law Journal* 885
- Victorian Law Reform Commission, *Civil Justice Review*, Report No14 (2008)
- Victorian Law Reform Commission, *Easements and Covenants*, Consultation Paper No 9 (2010)
- Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper No 8 (2010)
- Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report No 20 (2010)
- Weir, Michael, 'Private and Public Planning: Implications for Legal Processes' (1994) 11 *Environmental and Planning Law Journal* 137
- Weir, Michael, 'The Westfield Case: A Change for the Better?' (2009) 21(2) *Bond Law Review* 186
- Weir, Michael, 'Easements for Storage and Parking: Time for a Rethink?' in Moses, Lyria, Brendan Edgeworth and Cathy Sherry (eds), *Security and Property: Selected Essays*, (Lawbook Co, 2010)
- Western Australian Law Reform Commission, *Final Report on Restrictive Covenants*, Report No 91 (1997)
- World Commission on Environment and Development (The Brundtland Commission), *Our Common Future: Report of the World Commission on Environment and Development* (1987)
- Ziff, Bruce, *Principles of Property Law* (Thomson Carswell, 4th ed, 2006)

