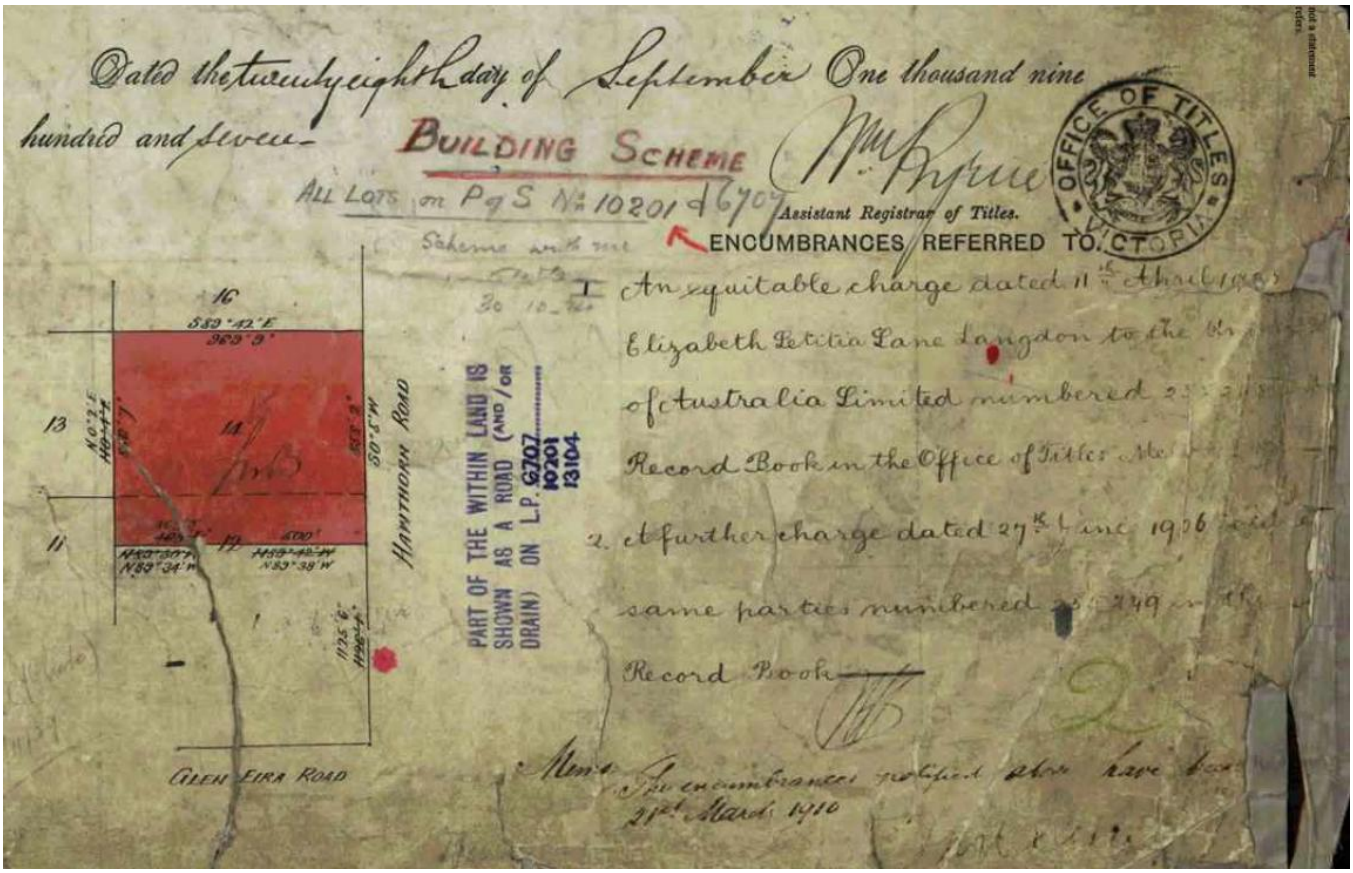
Restrictive Covenants, Easements, Roads and Adverse Possession in Victoria



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RESTRICTIVE COVENANTS

WHAT ARE RESTRICTIVE COVENANTS?

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

3. As explained by Gillard J in *Fitt & Anor v Luxury Developments Pty Ltd* [2000] VSC 258, [54]–[70] a restrictive covenant is an agreement creating an obligation which is negative or restrictive, forbidding the commission of some act:

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

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1 The person to whom the promise is made.

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

63 Because the Common Law did not enforce the burden of a covenant against a new owner, equity stepped in.

64 Equity recognised that the burden of restrictive covenant may run with the land in certain circumstances.

65 In 1848 in the historic case of *Tulk v Moxhay* equity intervened and provided remedies which were not available at common law in respect to the enforcement of a restrictive covenant against a subsequent transferee of land from the original covenantor.

66 In *Tulk v Moxhay* (1848) 2 Ph. 774; 41 E.R. 1143 equity enforced a restrictive covenant against a purchaser of the land who was not the covenantor but who purchased with full notice of its terms.

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

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

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

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

4. Traditionally, restrictive covenants were imposed over lots as they were transferred out of a larger area of land that was in the process of being subdivided. For example, one of the covenants considered in *Randell v Uhl*[3] adopted the following formulation:

> … with the intent that the benefit of this covenant shall be attached to and run at law and in equity with every Lot on the said Plan of Subdivision other than the Lot hereby transferred and that the burden of this covenant shall be annexed to and run at law and in equity with the said Lot hereby transferred …

5. In the absence of a building scheme, discussed below, covenants are typically only enforceable by parties who take ownership of land remaining within the parent title[4]

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

4 'Parent title' refers to the title or description of a property *before* the land is subdivided or consolidated.

at the time of the transfer of the burdened land. Beneficiaries need not be appurtenant landowners. Although a more distant beneficiary may find it harder to show direct injury from a covenant's proposed variation, such as overlooking, overshadowing and visual bulk. To this extent, restrictive covenants can be haphazard in application and enforceability.

6. In other words, if your land was the first lot sold and transferred out of the parent title you may be bound by a promise to all future owners of land remaining in the estate, as all lots will transfer out after yours. On the other hand, if yours was the last lot transferred out of the parent title, you may find the owners of no other parcel of land can enforce the covenant against you.

7. This is an imperfect system.

8. Consider, for example, the following plan from an application to vary a covenant pursuant to section 84(1)(c) of the *Property Law Act 1958* (Vic) in Reservoir. The subject land to the south east of the plan, shaded green, is the burdened lot. The covenant provided that a prospective developer of the land may construct only *one* dwelling on the lot. The parcels shaded yellow are those lots with the benefit of the covenant:

9. In varying the single dwelling covenant to allow the development of land with four dwellings, Derham AsJ relied on the fact that most beneficiaries were some distance away. The beneficiary to the immediate north of the subject land was indifferent to, or supportive of the application to vary the covenant:

(i) all other properties having the benefit of the covenant are so remote from the Land that there will be no significant impacts from overlooking, overshadowing and other amenity issues;

…

(m) there will be no reduction in the quality of life for beneficiaries of the covenant within the neighbourhood. The present rear yard of the Land does not contribute to their enjoyment and is generally remote from them;

10. Had the property to the north actively opposed the application, the Court might have arrived at a different conclusion. For example, in *Foudoulis v O'Donnell* [2020] VSC 248, Mukhtar AsJ explained that beneficiaries close to the burdened land would experience a tangible impact on their amenity:

> 26 Unlike the O'Donnells, the Kiriazidis' and the Danieles have additional grounds for resistance because they are physically so close to the plaintiff's land. They are in a position to be heard to say they will suffer tangible injury in having two double story dwellings of a substantial build near a boundary interfering with the privacy and the use and enjoyment of their back yard.
>
> 54 … in my judgment, the construction of two semi-detached double storey dwellings on the plaintiff's land would involve a substantial change to the built form and density of his land. I have viewed the backyard of the Danieles place and the Kiriazidis' place and looked over to the plaintiff's land. One can envisage there will be no relief to the mass of the proposed build form when seen from the gardens of these beneficiaries.
>
> 55 Accordingly, I hold that the plaintiff has not made out a case under s 84(1)(c). I do not see an injustice in holding Mr Foudoulis to the covenant by which he is legally bound.

TECHNICAL REQUIREMENTS

11. For a covenant to be legally valid, the following elements are required:

a) it must be negative in nature;

b) it must touch and concern the land;

c) it must be annexed or assigned to the land; and

d) the benefited land must be 'easily ascertainable'.

A restrictive covenant must be negative in nature

12. A covenant must be negative in that it must restrain a person from dealing with land in a certain way. Whether a covenant is negative is assessed by the court as a question

of fact. It is therefore immaterial whether the wording is phrased as a positive requirement:[5]

> 151. The court is concerned with substance rather than form and accordingly whether the covenant is negative in nature is a question of fact. It is immaterial whether the wording is positive. A negative covenant is one that restrains a person from dealing with his land in a certain way.

13. For example, although a covenant stating that a person 'must use a dwelling as a private residence only', is positively expressed, in substance it is a covenant to *not* use the premises for any purpose other than a dwelling.[6] As explained by the Victorian Law Reform Commission (**VLRC**):

> 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',[7] 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.[8]

14. In contrast, agreements made pursuant to section 173 of the *Planning and Environment Act 1987* (Vic) can run with the land and be positive or negative in nature:

> (1) A responsible authority may enter into an agreement with an owner of land in the area covered by a planning scheme for which it is a responsible authority.
>
> (1A) Without limiting subsection (1), a responsible authority may enter into an agreement with an owner of land for the development or provision of land in relation to affordable housing.
>
> (2) A responsible authority may enter into the agreement on its own behalf or jointly with any other person or body.
>
> (3) A responsible authority may enter into an agreement under subsection (1) or (1A) with a person in anticipation of that person becoming the owner of the land.
>
> (4) Despite anything in this Division, if an agreement entered into with a purchaser in anticipation of the purchaser becoming owner is recorded by the Registrar of Titles, it does not bind the vendor unless the vendor assumes the purchaser's rights and obligations under the agreement.

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

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

7 Bruce Ziff, *Principles of Property Law* (Thomson Carswell, 4th ed, 2006) 381.

8 Victorian Law Reform Commission, *Easements and Covenants: Final Report 22* (Victorian Law Reform Commission 2011), 84.

A restrictive covenant must touch and concern the land

15. The requirement that the benefit of a covenant must 'touch and concern' the land can be seen in the cases of *Smith and Snipes Hall Farm v River Douglas Catchment Board*[9] and *Town of Congleton v Pattison*.[10]

16. In *Snipes Hall*,[11] the covenant required landowners of land abutting a river to maintain the riverbank. The riverbank fell into disrepair and caused flooding. The benefit that the river would not flood was found to directly affect, or touch and concern the land. Tucker LJ explained that, to touch and concern the land:

> … it must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land, and it must then be shown that it was the intention of the parties that the benefit therefore should run with the land.[12]

17. In contrast, the landowner in *Town of Congleton v Pattison*[13] operated a silk mill on his land. The covenant affecting his land barred people from outside the Parish from working at the mill. The Court found that such a covenant did not go to the mode of occupation of the land, but rather sought to limit foreigners from being able to find work, and as such it did not touch and concern the land.

18. When assessing whether the benefit touches and concerns the land, the benefitted land will need to be sufficiently proximate to the burdened land for it to be capable of receiving the benefit.[14] There is no need for the lands to be contiguous, however both parcels must be 'in the same neighbourhood'.[15] Thus, land in Mildura could not reasonably be said to be land that benefits from burdened land in Hawthorn.

A restrictive covenant must be annexed to land

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

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

> (1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title

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9 Smith and Snipes Hall Farm v River Douglas Catchment Board [1949] 2 All ER 179 (Snipes Hall).

10 *Town of Congleton v Pattison* [1808] EWHC KB J66 (*Congleton*).

11 *Snipes Hall*.

12 Ibid 183.

13 Congleton.

14 *Clem Smith Nominees v Farrelly* (1978) 20 SASR 227.

15 Ibid, 249.

> under him or them, and shall have effect as if such successors and other persons were expressed.
>
> For the purposes of this subsection in connexion with covenants restrictive of the user of land successors in title shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.[16]

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

> (1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself, his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed.
>
> This subsection shall extend to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

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

> 43 For completeness, I note that there are several statutory provisions that extend the benefit or burden of a covenant, being ss 78, 79 and 79A of the PLA. Section 78 provides that a covenant made after the commencement of the Act is deemed to be for the benefit of the covenantee and his successors in title, even if those words are not used, and s 79 applies the same deeming provision in respect of the burden of a covenant in relation to covenants made after the commencement of the Act. It is not necessary to consider those provisions further in this case, as the Covenant is of an earlier date.
>
> 44 Counsel for the plaintiff has taken me to an earlier provision, in force at the time of creation of the Covenant. That provision is s 65 of the Conveyancing Act 1904. Section 65(2) of that Act deemed a covenant 'relating to land not of inheritance or not devolving on the heir as special occupant' (which would appear to be the situation in respect of the Covenant) to be made with 'the covenantee his executors administrators and assigns' even if those persons were not expressed to be benefited in the covenant itself. That deemed extension does not in my view annex the benefit of the Covenant to land, but merely extends its personal benefit to those other persons. In this case, the covenantee's executor is himself deceased, and there is no evidence of any assignee of the benefit of the Covenant from the covenantee. Thus s 65 does not undermine the plaintiff's contentions in this case.[17]

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16 Section 78 of the *Property Law Act 1958* (Vic).

17 *Re Hunt* [2017] VSC 779, 793.

23. Note that the effect of these provisions only applies to covenants created after 18 December 1929, when the *Property Law Act 1928* (Vic) commenced with provisions in similar form.[18]

The benefited land must be 'easily ascertainable'

24. Sections 78 and 79 of the *Property Law Act 1958* (Vic), however, do not overcome any failure to adequately describe the land with the benefit of the covenant.

25. For example, in *Beman Pty Ltd v Boroondara City Council*[19] the text of the Covenant was as follows:

> The said Robert Padmore Greenshields hereby covenants with the said Kate Lynch and James Byrne and their transferees that any buildings (except outbuildings) now and hereafter to be erected on the said land transferred shall be built of brick or stone with roofs of tiles, slates or iron or any other material and … will not erect on that part of the said land transferred fronting Mary Street any shop or detached dwelling house facing Mary Street only but this covenant shall not prevent the said Robert Padmore Greenshields or his transferees from erecting outbuildings and accommodation appurtenant to any buildings erected in Glenferrie Road and it is intended that this covenant shall be set out as an encumbrance at the foot of the Certificate of Title to be issued in respect of the said land and shall run with the land.[20]

26. The applicant owned the land and wished to develop it for apartments. It had sought a planning permit to remove the Covenant from the title to the land on the basis that the Covenant no longer had any work to do and was unenforceable.

27. The Boroondara City Council issued a planning permit modifying the terms of the Covenant, rather than permitting its removal. The applicant appealed to the Victorian Civil and Administrative Tribunal seeking the removal of the Covenant, rather than the variation of its terms.

28. The Tribunal affirmed the decision of the Council and made no amendment to the planning permit that had been issued. Its key finding was that, on the proper interpretation of the terms of the Covenant, it was probable that there were still beneficiaries of the Covenant and this should have been fully investigated as part of the permit application.

29. On appeal, Emerton J of the Supreme Court of Victoria disagreed with the Tribunal's conclusion and found that the covenant was unenforceable:

> 32 … had the Covenant described the benefiting land as the un-transferred part or parts of the land owned by Kate Lynch and James Byrne on the relevant date, it

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18 See *Pollard v Registrar of Titles* [2013] VSC 286, [24]-[25] (Mukhtar AsJ); *Property Law Act 1928* (Vic) ss 78-79.

19 *Beman Pty Ltd v Boroondara City Council* [2017] VSC 207.

20 Ibid, 207 [2].

may have served to create a restrictive covenant enforceable by the landowners from time to time of the previously un-transferred part or parts of the original parcel. In in the absence of some such specification, however, while it might be possible to speculate with a level of confidence about which land the parties intended should benefit from the Covenant, the benefited land is not 'easily ascertainable'.

33 Hence, notwithstanding that the Covenant expresses the intention that it 'run with the land' the subject of the transfer and records that the buyer, Mr Greenshields, covenants with Kate Lynch and James Byrne 'and their transferees', it does not satisfy the third element identified above: it does not specify which land held or previously by Kate Lynch and James Byrne 'and their transferees' is to benefit from the Covenant.

34 In these circumstances, the words '*and shall run with the land*' at the end of the Covenant are not 'game-changing'. They do not solve the problem of identifying the land to benefit from the Covenant.[21]

30. Similarly, in *Re Hunt* [2017] VSC 779, Lansdowne AsJ declared a covenant to be ineffective on the basis that the covenant failed to identify any land with the benefit:

47 The Covenant does not identify in its terms any land to which its benefit is annexed. In my view, it is unarguable that the Covenant does not annex its benefit to land, and so is personal only to the transferor and his executor, both of whom are now dead.[22]

31. Mukhtar AsJ declared a covenant to be ineffective on the same basis in *Re Pollard* [2013] VSC 286:

2 The title shows an encumbrance on the land identified as Covenant O6444466. That is a restrictive covenant given under a registered transfer of land dated 4 March 1911 from Frank Edward Godden, art dealer, to Herbert Harry Burton, livery stable proprietor. It purports to be a single dwelling and building materials covenant. It says where relevant –

> The said Herbert Harry Burton doth herby for himself his executors administrators and transferees covenant with the said Frank Edward Godden and his transferees that he or they will not erect more than one dwelling house on the land hereby transferred without the previous consent or waiver in writing of the said Frank Edward Godden and that such house shall be of brick or stone and it is intended that this covenant shall be set out as an encumbrance on the Certificate of Title to be issued herein and shall run with the land.

3 The problem with the covenant is apparent. It does not identify the land intended to be benefited, not even in general terms. The lack of identification expressly or by implication, together with the fact that no other transfer in a 23 lot subdivision had any covenant, is the basis of the plaintiffs' application under section 84(2) of the *Property Law Act* for a declaration of the covenant is

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21 Ibid. See also *Re Hunt* [2017] VSC 779.

22 *Re Hunt* [2017] VSC 779, 794. See also *Re Ferraro* [2021] VSC 166.

unenforceable because there was no express or implied annexation. That is, the plaintiffs contend the covenant was on its proper construction only for the personal benefit of the original covenantee Godden and is not attached to any benefitted land.

4 For the reasons that follow, I think the application is well founded…

32. The Court is routinely invited to declare restrictive covenants unenforceable on the grounds that no land is identified as benefiting from a restriction, and it will generally do so without any form of public or private notice:

a) in *Re Pomroy* S ECI 2021 03444 Matthews AsJ (as she then was) discharged a restrictive covenant on the grounds that "The restrictive covenant contained in Instrument of Transfer No. 1159026 in the Register kept by the Registrar of Titles under the Transfer of Land Act 1958 (Vic) is not enforceable by any persons other than the Transferors named in the said Instrument of Transfer";

b) in *Re Antony & Sunita* S ECI 2023 03873 Ierodiaconou AsJ concluded that the Covenant was invalidly registered, as it "failed to identify any land as taking its benefit". It followed that: "The Covenant should be discharged because of there being no substantial injury to any person entitled to its benefit"; and

c) in *Re Burton* S ECI 2024 02915, Daly AsJ discharged a restrictive covenant on the grounds that "The Court is satisfied that the covenant is invalidly registered, as it fails to identify any land as taking its benefit. The covenant should be discharged because of there being no substantial injury to any person entitled to its benefit."

33. No form of notice was required in any of these applications.

An equitable interest in land is sufficient to annex the benefit of a covenant

34. In *Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* (1998) 152 ALR 149, the High Court of Australia stated equity did not import the common law requirement for privity of estate in dealing with the benefit of restrictive covenants and that the key matter is the question of the intention of the parties as evinced in the terms of the restrictive covenant:

[30] It is apparent from the above authorities that the requirement in equity that the benefit of the restrictive covenant was intended to run with the land concerned expresses, in particular, the conclusion that equity did not, by analogy, import the common law requirement of privity of estate. The requirement is an expression, rather than a denial, of the preference of equity for intention over form and to the giving effect to the intention evinced in the terms of the restrictive covenant in question. It has rightly been said that the question of the intention of the parties "is at the heart of the matter".[23]

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[23] Hayton, "Restrictive Covenants as Property Interests" (1971) 87 *Law Quarterly Review* 539 at 563

35. The High Court affirmed the position adopted by Megarry J in *Brunner v Greenslade* [1971] Ch 993, that in relation to restrictive covenants, equity operates to give effect to the common intention of the parties notwithstanding any technical difficulties involved:

> [16] Several concerns of equity have been involved in the development of the *Tulk v Moxhay* doctrine. No particular one is determinative of the various requirements of that doctrine as they have been formulated. Nevertheless, they provide guidance for the resolution of fresh issues as they arise. Thus, in *Brunner v Greenslade*, Megarry J said:
>
> > [E]quity, in developing one of its doctrines, refuses to allow itself to be fettered by the concept upon which the doctrine is based if to do so would make the doctrine unfair or unworkable. After all, it is of the essence of a doctrine of equity that it should be equitable, and, I may add, that it should work: equity, like nature, does nothing in vain.
>
> His Lordship went on to emphasise that, in dealing with restrictive covenants, "equity readily gives effect to the common intention notwithstanding any technical difficulties involved"[24]

36. The High Court of Australia cited:

a) *Rogers v Hosegood* [1900] 2 Ch 388;

b) *Besinnett v White* [1926] 1 DLR 95; and

c) *Long v Gray* (1913) 58 Sol Jo 46—

with approval, and stated that equity does not regard common law objections as sufficient to defeat the intention of the parties when that intention is clear:

> [28] Accordingly, in dealing with the passing of the benefit of restrictive covenants, equity did not act upon any close analogy with the common law. Rather, it had regard to the intention of the parties creating the covenant and did not regard objections drawn from common law doctrine necessarily as sufficient to defeat that intention where it was clear. Thus, in *Rogers v Hosegood*…The Court of Appeal rejected the submission that, because it had not been taken by the mortgagees as well as the mortgagors, the benefit of the covenant would pass with the equitable but not the legal title to the land…[63]
>
> [63] See also *Besinnett v White* [1926) 1 DLR 95 where the covenantee who enforced the covenant had taken it as a purchaser who had not then received a conveyance of the freehold and *Long v Gray* (1913) 58 Sol Jo 46 where the Court of Appeal rejected the submission that the restrictive covenant was unenforceable because it had not been entered into with anyone possessed of the legal fee simple; it was sufficient that the covenant was taken by the tenant for life and the trustees who alone had the power of sale.

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[24] Emphasis added.

PRIVATE PROPERTY RIGHTS MERGING WITH PUBLIC PLANNING LAW

Restrictive covenants were once a nascent form of planning control

37. Restrictive covenants were an early form of town planning control, providing for the use and development permitted or encouraged in a particular area. For instance, the network of covenants that helped create the Ranelagh Estate in Mt Eliza (shown below) was described by Eames J in *Greenwood & Anor v Burrows & Ors*[25] as directed towards establishing a residential estate:

> In this case it seems to be clear enough that the purpose of [the restrictive covenant] is to maintain the purely residential character of the land which is subjected to it. And there is no doubt in this case that other lots have been made subject to the like restrictions, and that the general purpose is to preserve not only the particular lot in this case as a residential area, but the general area as a residential area ... It is a very common type of covenant and well recognized as having this object of preventing the area being turned into an area of a different character.

25 *Greenwood & Anor v Burrows & Ors* (1992) V ConvR 54–444.

38. The Glenard Estate in Eaglemont also accommodates a network of covenants that controls building numbers, building materials and roof materials:

39. In *Prowse v Johnstone & Or* [2012] VSC 4 Cavanough J found that a network of single dwelling covenants was a form of dwelling density control, noting the attendant benefits that such a condition provides:

> The plaintiff … confronts a restrictive covenant, indeed a web of restrictive covenants, with a clear purpose or object indistinguishable from the purpose or object identified by the Full Court in *Re Stani*[26] in respect of a similar covenant, namely to ensure that "one residence only was to be erected on each block so that there would be a reasonable density of population giving a reasonably quiet residential atmosphere, attractive in that it would provide a tranquil, quiet existence". Similarly, *in Re Miscamble's* Application McInerney AJ said of a comparable covenant that its purpose was … to prevent the erection on the subject land of more than one dwelling house, and thereby to preserve the area in question … as an area of spacious homes and gardens … .[27]

40. Derham AsJ set out an elaboration on this concept of a density control in *Lahanis v Livesay*[28]:

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26 At page 8.

27 *Re Miscamble's Application* [1966] VR 596, 601.

28 [2021] VSC 29

20 The common single dwelling covenant is imposed for the purpose of ensuring one residence only can be erected on the particular land, so that there would be a reasonable density of population, giving a reasonably quiet residential atmosphere, attractive in that it would provide a tranquil, quiet existence.[29] The general suggestion is that this living environment would be reduced by higher density housing, leading to a reduction of open space, a greater congestion of people and traffic and an increased demand on municipal amenities. The judgment to be made about 'substantial injury' turns on the nature and degree of the injury to those benefits.[30]

21 In the recent decision in *Hivance Pty Ltd v Moscatiello & Ors,*[31] Macaulay J provided a terminological refinement of the residential atmosphere designed to be achieved by the single dwelling covenant by describing it as a 'single dwelling character' the features of which were, in that case:

> …the large and generous proportions of the blocks of land; the sense of open space and privacy; the predominance of family homes, primarily large single dwelling homes with large open garden spaces front and rear; low density living and the absence of congestion; in short, a special mood which set the area apart from others…[32]

41. In *Conlan v Benton & Ors,*[33]the narrow lots facing Woodland Street, Essendon in the following proposed plan of subdivision, were intended to establish a commercial precinct by restricting those lots for use as a shop or shops with an associated residence:

> … That the said Sarah Searls her heirs executors administrators or transferees shall not at any time hereafter erect or allow to be erected on the land hereby transferred any building other than one shop or shops with or without dwelling house attached... [34]

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29 *Re Stani* (Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 8; See also *Re Miscamble's Application* [1966] VR 596, 601 (***Miscamble***); *MacLurkin* [2015] VSC 750, [59]; *Re Morihovitis* [2016] VSC 684, [38] (***Morihovitis***).

30 *Morihovitis* [2016] VSC 684, [38].

31 [2020] VSC 183 (***Hivance***).

32 Ibid, [21].

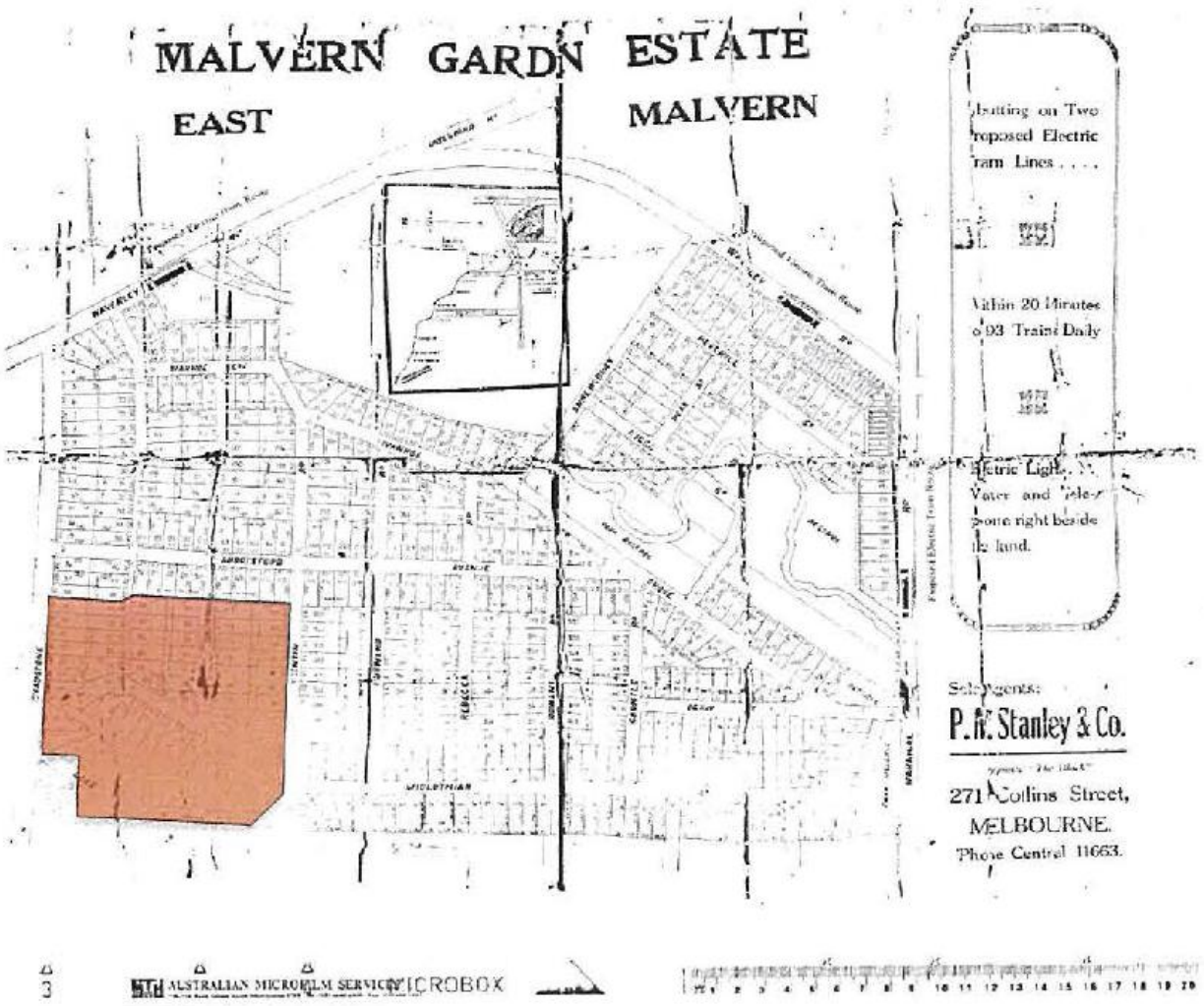
33 Conlan v Benton & Ors [2017] VSC 244.

34 Ibid [7].

42. Restrictive covenants have also been used as a means of preventing quarrying pits from blighting residential estates, such as those found in the Malvern Garden Estate in East Malvern. In *City of Stonnington v Wallish*,[35] Ierodiaconou AsJ explained:

> 31 … The covenants only makes sense if they are construed having regard to the purpose, being a primitive control on the extract of earth-based resources. The evidence given by Mr Milner and Mr Raworth supports this. On the other hand, Mr Chapman, for the defendants, has looked at the words in the covenants without considering the underlying purpose. The purpose he identifies is not consistent with how the covenants have been construed for years. Mr Chapman has simply taken the words at face value. His evidence refers to the effect of the covenants rather than suggesting a purpose for them. It is very clear in reading the covenants that they control earth-based resources. It is only when the words are broken down that confusion arises.

35 *City of Stonnington v Wallish* [2021] VSC 84.



43. In *Re Izadi and others* [2019] VSC 137 Mukhtar AsJ found that the purpose of a 'building materials' covenant was to establish a residential neighbourhood of buildings made with quality and durable materials:

> 24 The purpose of the materials covenant is to establish a residential neighbourhood of buildings made with quality and durable materials as a matter of structural integrity as well as aesthetic presentation and, I suppose, to get away from what might have once been regarded as undesirable or fire hazardous timber homes or, worse still, shanty fibro-sheeting. The first question is whether the covenant disallows plaster rendering over brick walls. There are various authorities which say that a building materials covenant is not breached by the application of a particular finish such as a concrete render over exposed: see *Jacobs* v *Greig*;[36] *Grech v Garden City*[37] and *Clare v Bedelis*.[38] The photographs in evidence show that the rendered finish achievable on a substrate of polystyrene foam does make it, at least from a distance,

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36 *Jacobs v Greig* (1956) VLR 597.

37 *Grech v Garden City* [2015] VSC 538.

38 *Clare v Bedelis* [2016] VSC 381.

imperceptible from a rendered finish over a brick wall. The same type of finish and aesthetic purpose is achieved. I saw fit to reveal to the parties in Court that I am personally closely familiar with the choice and the use of a rendered polystyrene finish on an upper storey external wall.

44. The lightweight construction regularised in the Court's decision can be seen on the upper level of the building shown below:

Planning schemes are now the primary means of controlling land use and development

45. This reliance on a network of restrictive covenants as a precinct-based development control has now been largely subsumed by the operation of the *Planning and Environment Act 1987* (Vic) and its network of planning schemes, zones and overlays.

46. Indeed, in *City of Stonnington v Wallish*,[39] the Court was moved to conclude that the introduction of planning controls and other surrounding circumstances all but made the network of quarrying covenants obsolete:

> 122 The covenants impose a restriction on quarrying on the subject land. I have accepted that development of the surrounding land and planning controls mean that the subject land could not be realistically used as a quarry, even if it were commercially viable to do so. I would therefore find that due to the evolution of the character of the subject land and the neighbourhood, as well as the effluxion of time, the covenant is now obsolete.

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39 *City of Stonnington v Wallish* [2021] VSC 84.

…

125 As it is no longer realistic for quarrying to occur on the land, the covenants are now obsolete.

47. It is a common mistake, however, to assume that the very existence of planning controls and policies means that a network of covenants has no work left to do. As explained by Mukhtar AsJ in *Re Jensen*:[40]

> [10] … As for the request that the Court take into account planning considerations, it will be better, I would respectfully suggest, if councils are concerned about such matters, for them to assist the Court by becoming respondents to the proceedings and putting before the Court any matters concerning planning policy. The legislation does not require the Court to take into account the relationship between covenants and public planning control. The traditional view has been that the Court concerns itself only with the question whether an applicant comes within the heads stated in s 84 of the Act.[41] Recent decisions of this Court have it that town planning principles and considerations are not relevant to the Court's consideration of whether an applicant has established a ground under s 84: see *Vrakas v Registrar of Titles*[42] and *Prowse v Johnstone*.[43]

48. That said, consideration of town planning controls and policies might be relevant to the extent they may assist a court in understanding how land might be developed, should a variation to a covenant be approved:

> 105 Turning to other relevant principles, I note the statement of Kyrou J that town planning principles and considerations are not relevant to the court's consideration of whether an applicant has established a ground under s 84(1). His Honour cites five Victorian cases in that regard. I agree that those cases make it clear that it is no part of the Court's function to consider whether a proposed development would or would not be desirable or acceptable under town planning principles and considerations. However, in the present case the plaintiff seeks to make use of statutory planning provisions in a slightly different way. She says that those provisions include protections for neighbouring properties. She says that this is potentially relevant for the purpose of assessing substantial injury. I am prepared to assume, without deciding, that planning provisions of that kind may be relevant in that way. However, as will be seen, the provisions upon which the plaintiff seeks to rely in the present case do not sufficiently avail her in any event.[44]

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40 *Re Jensen* [2012] VSC 638.

41 See generally *Bradbrook and Neave's Easements and Restrictive Covenants* (3rd ed.), 19.79.

42 *Vrakas v Registrar of Titles* [2008] VSC 281.

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

44 Ibid [105].

49. This reasoning was applied by Riordan J in *Oostemeyer v Powell*[45] who found that planning provisions might be relevant to assessing a realistic picture of what could be constructed on the Land if the Covenant is modified:

> In *Prowse v Johnstone*, Cavanaugh J considered that, in assessing the benefits actually conferred by the covenant, the Court should have regard to 'the realistic probabilities of the plaintiff actually bringing about the "worst" that could be done under the existing covenant.' His Honour was also prepared to 'assume, without deciding' that in assessing the benefits which would remain, if the covenant is removed or modified, the Court could consider the protections afforded to neighbouring properties by statutory planning provisions. In my opinion, it is relevant to consider evidence of statutory planning provisions to the extent it shows what realistically will be the result of the removal or modification of the covenant because 'it would be artificial and wrong to pay no heed at all to the reality of the situation'.[46]

50. However, the amenity protections inherent in planning controls are a compromise between the private need for privacy against the broader public need for urban consolidation. It is therefore wrong to assume a privacy protection in a planning scheme covers off on the proprietary interests of beneficiaries. As Cavanough J explained in *Prowse v Johnstone & Or*[47]:

> 118 I am not satisfied that all substantial injury would be prevented by the operation of the provisions of the planning scheme. The plaintiff relies in particular on clause 55 of the Stonnington Planning Scheme, commonly known as ResCode. However, those provisions represent a legislative compromise between the interests of developers and the interests of surrounding residents. They leave considerable discretion to the planning authorities. They cannot be regarded as a substitute for the proprietary rights of the defendants pursuant to the restrictive covenant.

51. It is therefore an error to apply town planning principles in a section 84 application, as one might in a merits planning appeal before the Victorian Civil and Administrative Tribunal:

> 41 Instead of the correct test for the first limb of s 84(1)(a) Mr Chapman asks whether the Covenant is 'out-moded' and expresses the view that:
>
> > The continuation of the existing single dwelling covenant on this property is considered to be redundant in the context of the suite of planning policy, restrictions and requirements applicable to the area that has generally kept density to a modest level that is respectful of the low key character of the neighbourhood.
>
> 42 The test is not whether the restriction in the Covenant is 'out-moded' or 'redundant' i.e. no longer necessary. It is whether it retains utility i.e. is still

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45 [2016] VSC 491.

46 Ibid [49].

47 Ibid [118].

capable of fulfilling any of its original purposes, even if only to a diminished extent.[48]

52. Indeed, the Court is more likely to accept that the policies inherent in urban consolidation demonstrate the enduring value of the covenant:

> 58 Indeed, I accept the submission by the Council that the objective or purpose of constraining population density in the Covenant is now quite different, in fact contrary, to the planning objective of increasing urban density expressed in recent state planning pursuant to the Planning and Environment Act 1987. Far from showing that the Covenant is obsolete, this shows that it has even greater utility for its beneficiaries than perhaps at earlier times. It is important to keep in mind that the question in this application is not whether or not the restriction to a single dwelling is desirable from a planning perspective, or from the perspective of the state as a whole, but whether it retains utility or its modification would cause substantial injury as a matter of private property law.[49]

For many years, planning permits could facilitate the breach of restrictive covenants

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

54. For instance, in *Luxury Developments v Banyule CC*[50] the Tribunal explained that its remit was exclusively the application of town planning controls and policies. It had no jurisdiction to consider the proprietary legal interests raised by the existence of a restrictive covenant:

> 15.2 Restrictive Covenant
>
> A restrictive covenant affects the property. This covenant limits the development to one dwelling on the site. Mr. Hooper submitted that the restrictive covenant has no bearing on the decision to be made on the planning merits of this proposal. I agree with this submission. Any action to remove or vary the covenant will be the subject of a separate application and procedures by the landowner, and may or may not be the subject of a separate application for review, depending on which legal course the applicant chooses to take. Whilst the area is comprised of single and two storey detached housing, that does not necessarily prohibit the removal of the covenant nor does it necessarily prohibit, in a planning sense, the development of the site for more than one dwelling.[51]

55. Few landowners had the resources or inclination to protect their property rights and so developers would routinely construct developments on the calculated assumption that no potential beneficiaries would enforce the covenant.

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48 *Del Papa v Falting & Ors* [2018] VSC 384.

49 *Del Papa v Falting & Ors* [2018] VSC 384

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

51 Ibid.

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

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

> 332 Luxury Developments commenced building works on 14 February 2000 in the knowledge that the plaintiffs and particularly Mr Fitt had warned Mr Seiffert that if it commenced building works they would take legal proceedings.
>
> 333 The plaintiffs issued their originating motion on 6 March 2000 and Mr Seiffert continued with the building works to 31 March. Luxury Developments have spent approximately $75,000 on the works to date. A proportion of the cost was incurred after the proceeding was instituted.
>
> 335 I am satisfied that there are no discretionary factors which would preclude the plaintiffs enforcing their right. Luxury Developments proceeded with this development with full knowledge that it had been opposed at every step by the plaintiffs and others and with the knowledge that there was a substantial probability that a proceeding would be brought against it. Further, Luxury Developments did not take advantage of the course that was open to it to approach the court under s 84 of the Property Law Act to determine the question before commencing the building works.
>
> 337 In my opinion the plaintiffs have established the necessary requirements to enforce the benefit of the covenant in equity against Luxury Developments which purchased the land with full knowledge of the terms of the covenant and is bound by the burden.[52]

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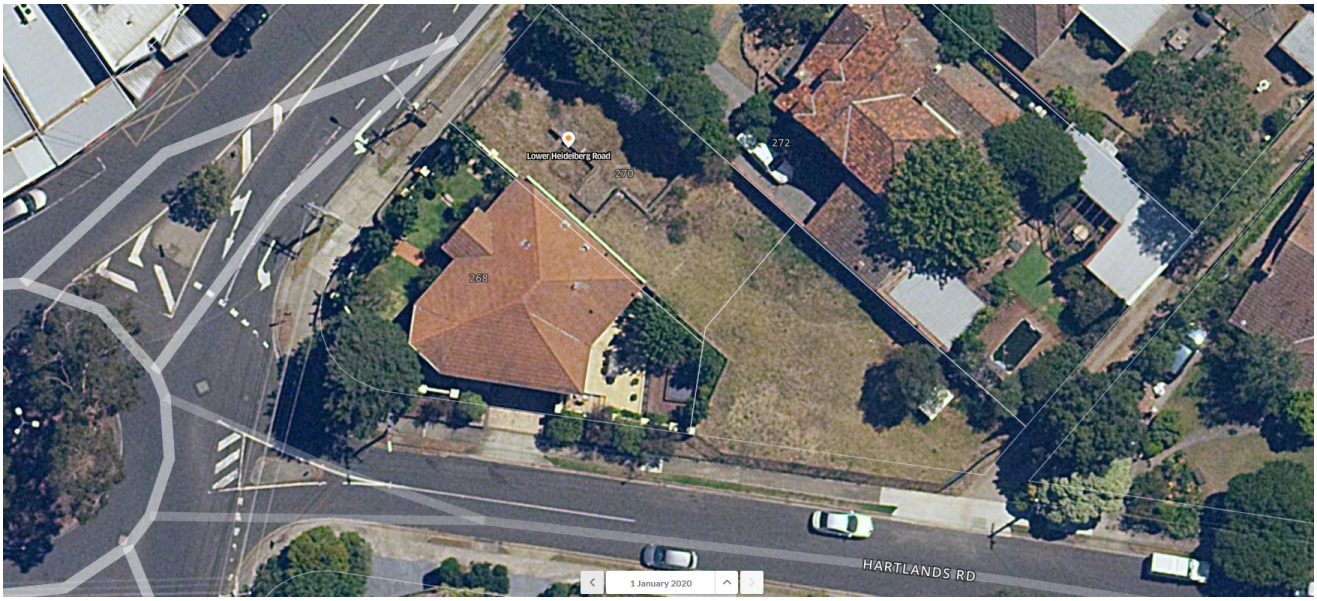
52 *Fitt & Anor v Luxury Development Pty Ltd* [2000] VSC 258.

58. To this day, only one of the three dwellings has been completed:



Since 2000, planning permits cannot result in the breach of a covenant

59. Luxury Developments subsequently went into liquidation, leaving the residents of the Hartlands Estate unable to recover their costs. Partly in response to this case, the Victorian Parliament passed the *Planning and Environment (Restrictive Covenants) Act 2000*, an Act that would prevent planning permits from being issued where they would breach a restrictive covenant.

60. The second reading speech explained:

> In 1988, the then Labor government introduced ground-breaking legislation to allow covenants to be removed or varied by planning processes. This introduced a simple alternative to complex Supreme Court proceedings.
>
> In 1993, the Kennett government introduced amendments to the legislation that made it very difficult to remove or vary a covenant by grant of a planning permit. Most applicants then opted to apply for a permit to use or develop land, before subsequently acting to remove or vary the covenant.
>
> This caused a variety of problems. Covenant beneficiaries had to participate in two applications to defend a covenant.
>
> They also found that relying on the covenant in support of their objections was not a relevant planning consideration. Applicants lost the chance for simultaneous consideration of both development and covenant matters. Responsible authorities and the now Victorian Civil & Administrative Tribunal lost opportunities to act as a one-stop shop. At times, responsible authorities felt obliged to grant permits even though they supported the covenant.
>
> This bill implements a simple principle to end these problems – that a permit to use or develop land must not be granted if the permit would result in the breach of a

covenant. It may only be granted if authority to remove or vary the covenant is given either before or at the same time as the grant of the permit.[53]

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

> (4) If the grant of a permit would authorise anything which would result in a breach of a registered restrictive covenant, the responsible authority must refuse to grant the permit unless a permit has been issued, or a decision made to grant a permit, to allow the removal or variation of the covenant.[54]

62. In *Pivotel Pty Ltd v Maroondah CC*,[55]Senior Member Byard explained that this provision changed the sequence in which development approvals must be sought:

> 3. The effect of this sub-section is that, where planning permission is required for the use or development of land which, if acted on, would result in a breach of a restrictive covenant, the granting of such permission (prior to the removal or modification of the restrictive covenant so that it would no longer be breached by what the permit authorises) is barred. In other words, in those circumstances, the restrictive covenant must be removed or so modified before the use and/or development permit is granted, or at the same time. An applicant can no longer obtain the use and/or development permit first, and then worry about the restrictive covenant afterwards.
>
> 4. This represents a change in the law. Prior to the 13 December 2000, where various different permits, consents, licences and the like were required under various pieces of legislation before a proposal could be realised, the proponent could seek those licences, permits, approvals, etc. in any order he, she or it might choose. …

63. This circumstance is proposed to be addressed in the Planning Amendment (Better Decisions Made Faster) Bill 2025. This is discussed in detail below.

Planning permits cannot be conditioned on the later removal of a covenant

64. It might be thought that an application for planning permit could be made with a condition requiring the later removal or modification of the restrictive covenant. However, that possibility was quashed in *Design 2u and on behalf of Y & P Harel Pty Ltd v Glen Eira SC*.[56]

65. This case involved an application for review of the council's refusal to grant a permit for a multi-unit development. The subject land was affected by a registered restrictive covenant, which the parties accepted as restricting development on the land to a single

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53 Victoria, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 2160 (the Hon John Thwaites).

54 *Planning and Environment Act 1987* (Vic), s 61(4).

55 *Pivotel Pty Ltd v Maroondah CC* [2001] VCAT 895 (31 May 2001).

56 *Design 2u and on behalf of Y & P Harel Pty Ltd v Glen Eira SC* [2010] VCAT 1865.

dwelling. The Council argued that the Tribunal was precluded from granting a permit in this case because of the operation of section 61(4),[57] set out above.

66. The applicant argued that, provided the permit contains a condition as required by section 62(1)(aa), such a permit could not be properly described as a permit which authorised the breach of a registered restrictive covenant. Section 62(1)(aa) provides as follows:

> **62 What conditions can be put on permits?**
>
> (1) In deciding to grant a permit, the responsible authority must—
>
> …
>
> (aa) if the grant of the permit would authorise anything which would result in a breach of a registered restrictive covenant, include a condition that the permit is not to come into effect until the covenant is removed or varied; and

67. The Tribunal was not persuaded that a condition to the effect of section 62(1)(aa) can operate to overcome the prohibition in section 61(4):

> 5 I find that unless there is a prior or simultaneous grant of a permit or decision to grant a permit to allow the removal of variation of the covenant, a permit cannot be granted by either the responsible authority or the Tribunal if the grant of a permit would authorise anything which would result in a breach of the covenant. I find that as the grant of a permit in this particular case would result in a breach of the covenant affecting the subject land, the application for review must fail and should therefore be dismissed.

68. It is for this reason that developers must now seek to vary a restrictive covenant *before* applying for planning permission.

69. That said, the Tribunal has found that section 61(4) will *only* prevent the grant of a permit if the grant of a permit itself would authorise the breach of covenant. If a further permit is required to authorise the thing that would result in the breach, then that does not preclude the grant of a permit by reason of section 61(4). For example, Deputy President Horsfall said in *Dukovski v Banyule City Council*:[58]

> [22] It is well established that where a covenant places restrictions on construction on an allotment, e.g. a single dwelling covenant, a permit to subdivide the land does not result in a breach of the covenant. Whilst the subdivision may be a pre-requisite or part of the process for ultimate sale of a … dwelling, the subdivision itself does not result in the breach. The breach is created by the relevant construction.

70. Thus, it is not sufficient that the grant of the permit will simply create a set of circumstances where a breach of the covenant may occur in the future.

---

57 *Planning and Environment Act 1987* (Vic).

58 *Dukovski v Banyule City Council* [2003] VCAT 190.

71. In *Trevanion v Maroondah City Council*,[59] the Tribunal was dealing with a two-lot subdivision of land which already had an existing dwelling but was subject to a single dwelling restrictive covenant. The Council granted a permit but attached a note to the permit as follows:

> Council advises that a restrictive covenant exists on title, and prior to the construction of any dwelling on the subject land, a variation of the restrictive covenant to allow the construction of a dwelling on the land would be required.[60]

72. The Tribunal found "there is a good case that some form of warning should be given in the permit regarding the implications of the restrictive covenant." However, the Tribunal decided that rather than include a note on the permit, it should be replaced by a more comprehensive and better drafted permit condition.

73. In *Peter Wade v Yarra Ranges Shire Council*,[61] Gibson DP granted a permit for a two-lot subdivision but included a condition that a statement of compliance must not be issued unless and until the restrictive covenant is removed or varied to allow construction of a dwelling on each of the lots created by the subdivision.

Permits can be granted on the condition that the proposal is brought into compliance with a covenant

74. Further, the Tribunal seems content to direct a permit issue subject to changes that would bring a development into compliance with a restrictive covenant. For instance, in *Iacono v Hobsons Bay CC*[62] Member Martin, made findings to this effect:

> 17 However I see a satisfactory resolution to this uncertainty to be that any updated permit conditions set out in the Appendix to this decision make it very clear that the section of the southern façade currently shown as glazing alongside the lift shaft (at the owner's discretion) either:
>
> - remain glazed, but with this glazing being clad over a solid brick or stone external wall; or
> - converted into one of the two listed Hardie matrix panel materials, clad over a solid brick or stone external wall.
>
> 18 To be clear, I am not querying the design merits of this proposed use of a large area of south-facing glass (which may well be attractive), but the starting point needs to be compliance with the covenant.
>
> 19 My overall finding is that, with the design change explained above and assuming the 'Legend' shown in Drawings 3.1 and 3.2 is updated to more overtly ensure that any proposed secondary materials are still clad over a solid

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59 *Trevanion v Maroondah City Council* [2004] VCAT 2480.

60 Ibid [3].

61 *Peter Wade v Yarra Ranges Shire Council* [2005] VCAT 111.

62 [2015] VCAT 769

brick or stone external wall, I am satisfied that the proposal complies with the covenant.

Trust for Nature covenants do not trigger section 61(4) of the *Planning and Environment Act 1987*

75. In *Blackhall v Greater Geelong CC* (Amended)[63] legal member Dalia Cook concluded that non-compliance with a Trust for Nature covenant does not prevent the grant of a planning permit that would result in its breach:

> **Trust for Nature covenant**
>
> 85 We accept the responsible authority's submission that the Trust for Nature Covenant applying to the subject land would not restrict the grant of a permit having regard to section 61(4) of the *Planning and Environment Act 1987*. While it is a type of registered restriction, it has been created under the regime of the *Victorian Conservation Trust Act 1972*. We find that for a registered restriction to prevent the grant of a permit (where a breach would otherwise result), it would need to have been created under the regime of the *Subdivision Act 1988*.

RESTRICTIVE COVENANTS ARE COMMON IN VICTORIA

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

77. The largest cohesive network of covenants is perhaps in Reservoir in Melbourne's north, described by Morris J in *Stanhill v Jackson*:[64]

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

78. In *Foudoulis v O'Donnell*,[65] Mukhtar AsJ explained that this area is the subject of "more than a few" applications for the modification of restrictive covenants:

> 23 The objectors Vicky and John Kiriazidis objected on similar and additional grounds. They say that the neighbourhood is mostly large blocks with single dwellings on them; the character of the neighbourhood gives it the benefit of providing a quiet, family friendly environment with low-density living and a limited amount of traffic; and that to allow the modification in this case would allow or encourage the possibility of other medium density developments such

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63 [2016] VCAT 1507

64 *Stanhill v Jackson* [2005] VSC 355.

65 *Foudoulis* [23].

as townhouses in the area. In support of that apprehension, they exhibit a standard form letter addressed to 'Dear Home Owner' which they in the post from the 'Acquisitions Manager' of a firm describing itself as 'one of Victoria's largest suburban property development firms'. In substance, that letter states that the developer 'is now looking at certain pockets of Melbourne for townhouse development opportunities' and 'based on our research we are interested in speaking with you regarding the potential purchase of your property as you have fit (sic) a specific criteria'. The letter also says that the developer will 'pay a premium for your property in return for a longer settlement (approx. 12 months), as it gives us the opportunity to obtain a permit to develop your land before we settle with you'.

24 It may be supposed this letter was sent to others in the neighbourhood. As counsel for the objectors put it, 'developers are circling' and 'will be interested in this case'. I am able to say this Court has experienced over recent years more than a few applications to modify single dwelling covenants in other neighbourhoods in Reservoir.

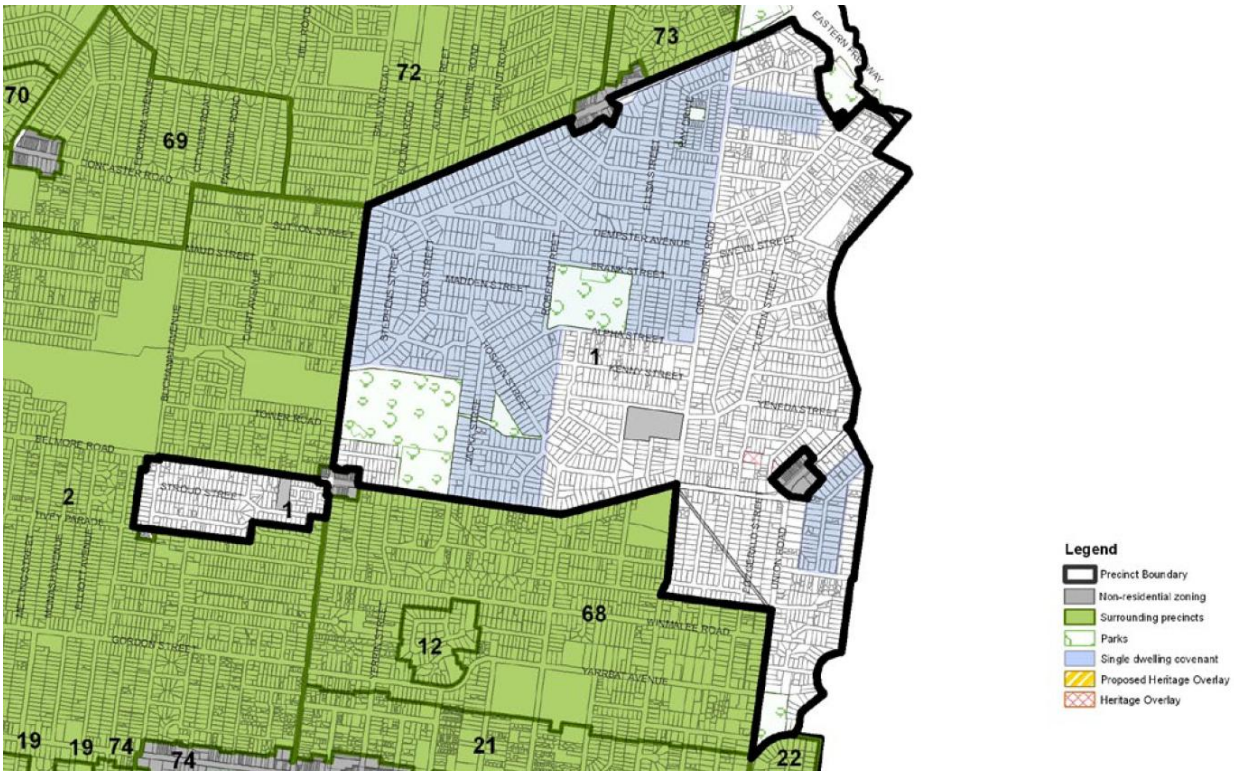
Figure 4: Boundary of Grandfather or Parent Title in red boundary of title 4984/715 in blue and subject land is arrowed

66

79. One network of covenants in Balwyn is so intact, it enjoys a degree of protection in the Boroondara Planning Scheme, which is ironic given that one enduring effect of single

66 Annexure A, in *Foudoulis v O'Donnell* [2020] VSC 248.

dwelling covenants is to defeat the otherwise broadly accepted principle of urban consolidation:[67]



RESTRICTIVE COVENANTS ARE STILL BEING CREATED

80. Given the scope of modern-day planning controls, one might expect restrictive covenants to be declining in popularity. However, they are still being introduced and may be of indefinite duration. The VLRC report lamented:

> 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.[68]

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67 Boroondara Character Study, Precinct Statement, Precinct 1, Adopted 24 September 2012, updated October 2013.

68 Victorian Law Reform Commission, *Easements and Covenants: Final Report* (Victorian Law Reform Commission 2011), 10.

81. As recently as April 2021, Land Use Victoria was moved to introduce two new forms where parties intend to seek to record a restrictive covenant in the Register using a transfer or plan.[69] These were said to have been created due to a "significant number of transfers and plans lodged that … do not meet the requirements for recording a valid restrictive covenant". Typical errors include:

a) benefitted land not being identified; or

b) attempts to burden and benefit the same land.

Creating restrictive covenants through an MCP

82. Pursuant to section 91A of the *Transfer of Land Act 1958* (Vic) (TLA), the Registrar of Titles has the power to require that an instrument is lodged in an approved form, and specify that form. Section 91A provides:

> **91A Recording of common provisions**
>
> (1) Any person may lodge with the Registrar a memorandum in the approved form containing one or more provisions which are intended for inclusion in instruments to be subsequently lodged for registration.
>
> (2) The Registrar may retain a memorandum lodged under subsection (1).
>
> (3) The Registrar may prepare and retain a memorandum containing any provisions which seem appropriate for inclusion in instruments to be subsequently lodged for registration.
>
> (4) A memorandum retained by the Registrar pursuant to this section shall, for the purposes of section 114, be deemed to be part of the Register.

83. On 1 July 2018, the *Registrar's Requirements for Paper Conveyancing Transactions* (Registrar's Requirements) Version 4 came into effect.[70] It contained requirement 12, which requires a restrictive covenant, whether by wording or contained on a Plan of Subdivision, must be set out in a Memorandum of Common Provision (MCP):

> 12.2 The details of any restrictive covenant to be created in a transfer:
>
> a. for which any contract of sale is signed on or after 1 July 2018; or
>
> b. when there is no contract of sale, the transfer is signed on or after 1 July 2018;
>
> must be contained in a MCP or MCPs and referred to in the transfer by the MCP number(s).
>
> 12.3 The details of any restriction to be created in a Plan first signed by the Licensed Surveyor on or after 1 July 2018 must be:

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69 See Fees, Guides and Forms: www.land.vic.gov.au/land-registration/fees-guides-and-forms.

70 See all publications of Registrars Requirements for Paper Conveyancing Transactions: https://www.land.vic.gov.au/land-registration/publications

a. contained in a MCP or MCPs and referred to in the Plan by the MCP number(s): or

b. by reference to a planning permit; and/or

c. be a short-form restriction limited to a single sheet of a Plan.

Referring to an MCP in transfer of land

84. Schedule 6 to the Registrar's Requirements outlines the format to appropriately refer to an MCP in a transfer under the TLA:

> **Transfers under the TLA**
>
> The following wording must be used:
>
> The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restrictive covenant with the intent that the burden of the restrictive covenant runs with and binds the burdened land and the benefit of the restrictive covenant is annexed to and runs with the benefited land.
>
> Burdened land: the Land
>
> Benefited land: [set out]
>
> Restrictive covenant: MCP [set out MCP number(s)]
>
> Expiry date: [dd/mm/yyyy]

Referring to an MCP in a Plan of Subdivision

85. Schedule 6 of the Registrar's requirements also outlines the format to appropriately refer to an MCP in a Plan of Subdivision

> **Plans**
>
> The following wording must be used except for the wording in square brackets:
>
> The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restriction with the intent that the burden of the restriction runs with and binds the burdened land and the benefit of the restriction is annexed to and runs with the benefited land.
>
> Burdened land: [set out]
>
> Benefited land: [set out]
>
> Restriction: The burdened land cannot be used except in accordance with the provisions recorded in MCP [set out MCP number(s)].
>
> [or]
>
> The burdened land cannot be used except in accordance with Planning Permit [set out reference].
>
> [and/or]
>
> [Set out the details of the restriction on up to a maximum of a single sheet of the Plan. The single sheet may include diagram(s). Standard drafting practices apply. The font size must be no smaller than 2.5mm.]

Expiry date: [dd/mm/yyyy]

86. An example is set out below:

PLAN OF SUBDIVISION
Under Section 37 of the Subdivision Act 1988

PLAN NUMBER
PS841640V/S2

CREATION OF RESTRICTION A

The following Restriction is to be created upon registration of Plan of Subdivision PS841640V/S2 by way of a restrictive covenant and as a restriction as defined in the Subdivision Act 1988.

Table of Land Burdened and Land Benefited:

BURDENED LOT No.	BENEFITING LOTS
201	202, 204
202	201, 203, 204
203	202, 204
204	201, 202, 203, 205
205	204, 206
206	205, 207
207	206, 208
208	207, 209
209	208, 210
210	209, 211
211	210, 212
212	211, 213
213	212, 214
214	213, 215
215	214
216	217, 230
217	216, 218, 229, 230
218	217, 219, 229
219	218, 220, 228, 229
220	219, 221, 227, 228
221	220, 222, 223, 224, 227
222	221, 223
223	221, 222, 224
224	221, 223, 225, 227
225	224, 226, 227
226	225, 227

BURDENED LOT No.	BENEFITING LOTS
227	220, 221, 224, 225, 226, 228
228	219, 220, 227, 229
229	217, 218, 219, 228, 230
230	216, 217, 229
232	233, 234
233	232, 234
234	232, 233, 235
235	234, 236
236	235, 237
237	236, 238, 239
238	237, 239
239	237, 238
240	241
241	240, 242, 252
242	241, 243, 251, 252
243	242, 244, 251
244	243, 245, 250, 251
245	244, 246, 247, 250
246	245, 247
247	245, 246, 248, 249
248	247, 249
249	247, 248, 250
250	244, 245, 249, 251
251	242, 243, 244, 250, 252
252	241, 242, 251

DESCRIPTION OF RESTRICTION

The registered proprietor or proprietors for the time being of any burdened lot on the Plan of Subdivision must not without the consent of the Responsible Authority build or allow to be built on the lot:

Memorandum of Common Provisions (MCP)

1. Any building other than a building which has been constructed and sited in accordance with the Memorandum of Common Provisions registered in Dealing No. AA ..... and which Memorandum of Common Provisions is incorporated in this plan.

Small Lot Housing Code

2. Any building in the case of lots less than 300 square metres unless in accordance with the Small Lot Housing Code or unless a specific Planning Permit for the building has been obtained from Wyndham City Council.

The restrictions in paragraphs 1 and 2 shall cease to burden any lot on the Plan of Subdivision with affect from 1st January 2031.

Drafting an MCP

87. The restriction contained in the MCP must still comply with the technical requirements of a restrictive covenant, set out in detail above.

88. Care must be taken to avoid referring to cancelled titles for restrictive covenants that purport to benefit titles cancelled at the time of registration are unenforceable.

89. In *Thornton v Hobsons Bay City Council* [2004] VCAT 383 Morris P held that where a covenant seeks to identify benefitting land by reference to a cancelled title, the result is a nonsense covenant:

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

90. In *Re 313 Investments & Holdings Pty Ltd* [2025] VSC 9 Daly AsJ concluded that a covenant was unenforceable as it was expressed as being for the benefit of the ancestor lot that had been cancelled prior to the registration of the subject covenant:

> 8. The owner proposes to develop the subject land as a place of worship, which is prohibited by the subject covenant.
>
> 9. However, the subject covenant is expressed as being for the benefit of the registered proprietors of land within the ancestor lot, which was cancelled prior to the registration of the subject covenant. Since the title of the ancestor lot was cancelled, the lots within the ancestor lot within which the subject land is located have undergone eight separate subdivisions. Therefore, while it is tolerably clear from the language of the subject covenant and the location of the subject land within the business park that the drafter of the subject covenant intended to benefit the land originally within the ancestor lot other than the parent land, that land no longer existed at the time the subject covenant was registered. It is for that reason that the owner says that the subject covenant is unenforceable, because there is no land that enjoys the benefit of the subject covenant, and the subject covenant should be discharged. …
>
> 46. I am satisfied, for the reasons advanced by the owner in its submissions, that the restriction in the subject covenant is unenforceable, and accordingly, the declaration sought by the owner should be made. Additionally, the unenforceability of the subject covenant renders the subject covenant obsolete, and it should therefore be removed pursuant to s 84(1)(a) of the PLA. Since no land is identified as having the benefit of the subject covenant, there is no utility in making orders requiring advertisement or notification of the current application. Such a process would be unnecessary, could cause confusion, and may impose unnecessary costs upon the owner, and potentially other owners of lots within the business park.

91. More recently, in: *Wegner v Pereira* [2025] VSC 387, Irving AsJ applied the above principles:

> 67. In my view the term 'all of the land comprised in the Plan of Subdivision' means all of the land in PS701111J as at the date of the registration of the

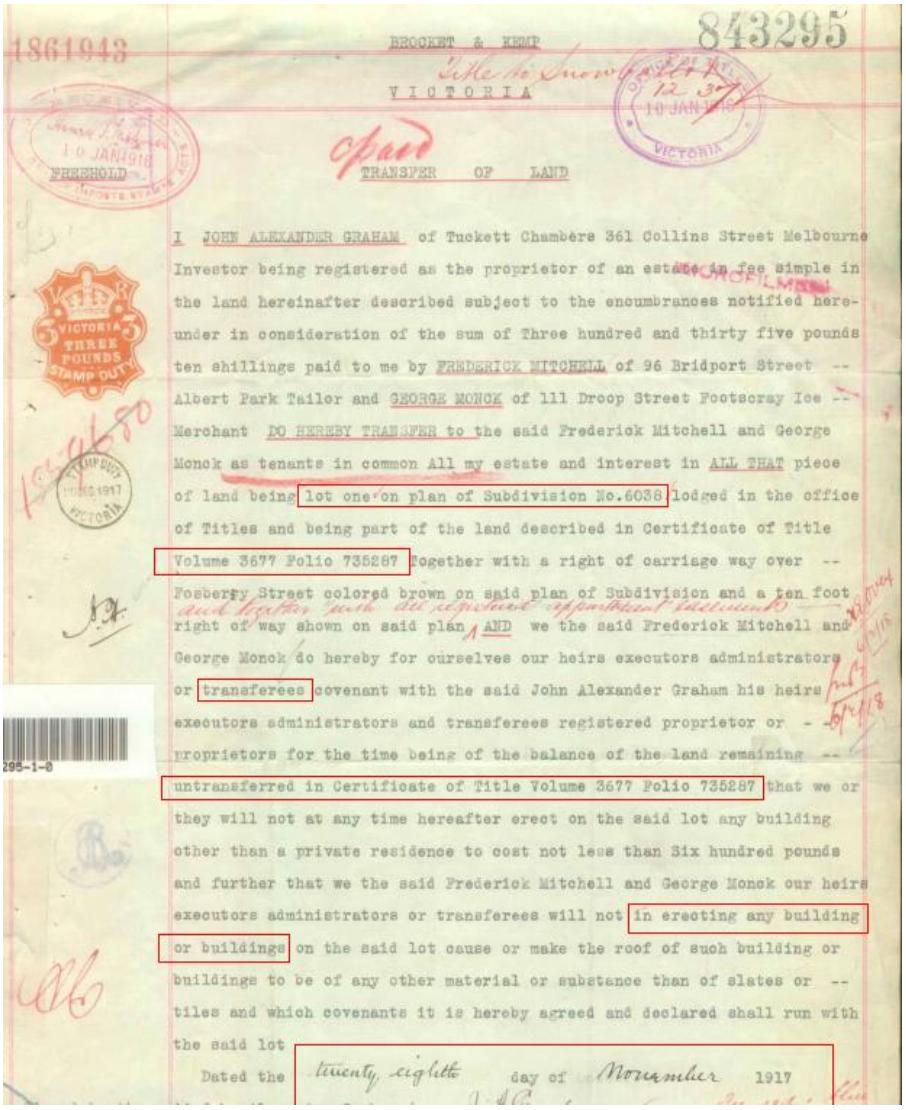
transfer containing the Covenant, being 30 May 2017. As lot A on PS701111J had been cancelled on 13 September 2016, the land comprising lot A on PS701111J was not land comprised in the Plan of Subdivision within the meaning of that phrase in the Covenant. It follows that the benefit of the Covenant is not annexed to the Baker Land.

IDENTIFYING THE BURDENED LAND

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

> ENCUMBRANCES, CAVEATS AND NOTICES
>
> Covenant 843295

93. The instrument of transfer creating the covenant will then typically look something like this:



1861943

843295

BROOKER & KERR

VICTORIA

Copy

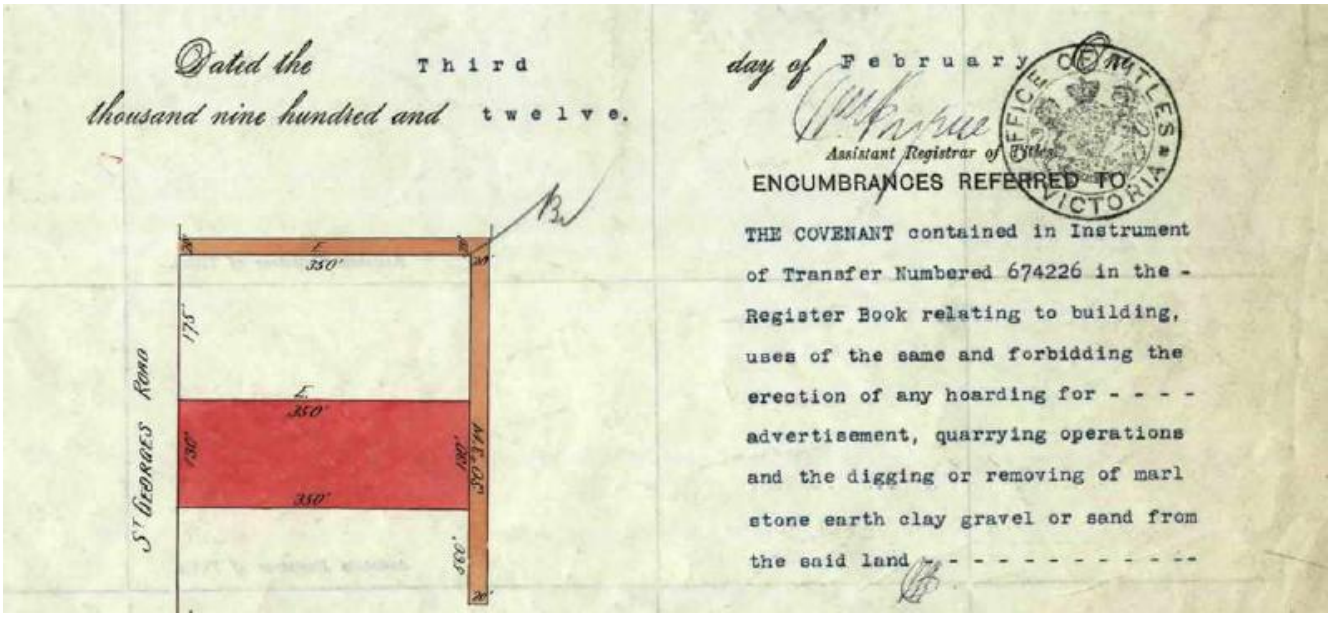
TRANSFER OF LAND

FREEHOLD

I JOHN ALEXANDER GRAHAM of Tuckett Chambers 361 Collins Street Melbourne Investor being registered as the proprietor of an estate in fee simple in the land hereinafter described subject to the encumbrances notified hereunder in consideration of the sum of Three hundred and thirty five pounds ten shillings paid to me by FREDERICK MITCHELL of 96 Bridport Street -- Albert Park Tailor and GEORGE MONCK of 111 Droop Street Footscray Ice -- Merchant DO HEREBY TRANSFER to the said Frederick Mitchell and George Monck as tenants in common All my estate and interest in ALL THAT piece of land being lot one on plan of Subdivision No.6038 lodged in the office of Titles and being part of the land described in Certificate of Title Volume 3677 Folio 735287 Together with a right of carriage way over -- Fosberry Street colored brown on said plan of Subdivision and a ten foot right of way shown on said plan AND we the said Frederick Mitchell and George Monck do hereby for ourselves our heirs executors administrators or transferees covenant with the said John Alexander Graham his heirs executors administrators and transferees registered proprietor or -- proprietors for the time being of the balance of the land remaining -- untransferred in Certificate of Title Volume 3677 Folio 735287 that we or they will not at any time hereafter erect on the said lot any building other than a private residence to cost not less than Six hundred pounds and further that we the said Frederick Mitchell and George Monck our heirs executors administrators or transferees will not in erecting any building or buildings on the said lot cause or make the roof of such building or buildings to be of any other material or substance than of slates or -- tiles and which covenants it is hereby agreed and declared shall run with the said lot

Dated the twenty eighth day of November 1917

94. Alternatively, a covenant may be disclosed on the imaged certificate of title itself.



But this is likely to be a summary of the covenant rather than the document that created it.

95. If you are acting for a responsible authority seeking to establish that a covenant does not offend section 61(4) of the *Planning and Environment Act 1987*, discussed in greater detail below, you should ask for production of:

a) the instrument of transfer that created the covenant; or

b) the plan of subdivision that created the restriction—

paying particular attention to the date at which the covenant was created, in the former case, being the date at which the agreement was made.

IDENTIFYING THE BENEFITTED LAND

96. Typically, the nature and extent of the beneficiaries can be discerned from a careful reading of the words of the covenant, but this may require further title searches and a careful examination of the parent title.

97. To be legally effective, a covenant can only attach the benefit to land owned by the covenantee at the time it was signed. Yet a surprising number of covenants purport to convey the benefit of a covenant to all the land in a subdivision, despite this being legally ineffective. In *Xu v Natarelli*,[71] Ierodiaconou AsJ explained:

71 *Xu v Natarelli* [2018] VSC 759.

105. However, contractual principles of privity exclude the registered proprietors of the lots transferred out of the parent title before the covenant was made. Equity does not extend the benefit of the covenant to them although it does extend the benefit to proprietors (and their successors in title) of the lots transferred out of the parent title, that is subdivided and sold, *after* the restrictive covenant was made.[72]

98. Derham AsJ explained in *Randell v Uhl*,[73] that the date of the execution of the transfer is the relevant date, not registration:

> 57 It is common ground between the parties that if there is no building scheme, then certain lots in the subdivision do have the benefit of the Covenants, namely those lots that remained untransferred out of the Head Title at the time of the execution of the transfers of Lots 12 and 13, respectively; but that those that were transferred out of the Head Title before Lots 12 and 13, respectively, do not have the benefit of the Covenants. This is because it is well established that the original covenantee and his successors cannot enforce a restrictive covenant against a successor in title of the covenantor unless they retain land which is benefited by the covenant.[74] Thus, a vendor of land in respect of which he takes the benefit of a restrictive covenant cannot, by the covenant, annex the restriction to land which he does not own at the time of the covenant, unless the covenant is given as part of a building scheme.[75] If the existence of a building scheme is established, the defendants do not have to prove that the benefit of the Covenants was annexed to their land. The date of the execution of the transfer is selected as the relevant date because it is only in equity that the burden and benefit of the Covenants run with the Land, and in equity the date on which the transfers were executed is the relevant date, not registration.

99. This principle does not extend to restrictions on title made pursuant to *Subdivision Act 1998*. This is discussed in more detail, below. In this instance, the need for privity is displaced by the operation of the statute.

BUILDING SCHEMES

100. An absence of privity may be circumvented by the establishment of a building scheme, as described by Hargrave J *Vrakas v Mills* [2006] VSC 463:

> Where the lots in a subdivision of land are all sold subject to a restrictive covenant, the Court may find that there has been a scheme of development, often called a building scheme. Where a scheme of development is established, all purchasers and their assigns are bound by, and entitled to the benefit of, the restrictive covenant.[76]

---

72 Ibid, [105]. Emphasis in original.

73 [2019] VSC 668.

74 *Chambers v Randall* [1923] 1 Ch 149; *Langdale v Sollas* [1959] VR 634, 639.

75 *Re Mack and the Conveyancing Act* [1975] 2 NSWLR 623; Xu v Natarelli [2018] VSC 759, [105].

76 *Vrakas v Mills* [2006] VSC 463, [27].

101. The best contemporary discussion of buildings schemes can be found in *Randell v Uhl*, in which Derham AsJ explained:

> 58 Where the lots in a subdivision of land are all (or substantially all) sold subject to a restrictive covenant, the Court may find that there has been a building scheme. Where a building scheme is established, all purchasers and their assigns are bound by, and entitled to the benefit of, the restrictive covenant.[77]
>
> 59 In *Elliston v Reacher*[78] Parker J stated the requirements in terms 'that have since been universally accepted',[79] as follows:
>
> [I]t must be proved (1) that both the plaintiffs and defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases.[80]
>
> 60 Counsel for the defendants pointed out, quite correctly, that there is an additional requirement that almost goes without saying, namely, that the area to which the building scheme extends must be defined.[81]
>
> 61 In addition, because the Land is under the operation of the *TLA*, the decision in *Re Dennerstein*[82] establishes, as Hargrave J put it in *Vrakas v Mills*, that:
>
> > …in order to bind a transferee of land registered under the *Transfer of Land Act* with a restrictive covenant arising under a scheme of

---

77 *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258, [249]-[254].

78 *Elliston v Reacher* [1908] 2 Ch 374.

79 *Re Dennerstein* [1963] VR 688, 692 (Hudson J). The principles stated by Parker J have been cited with approval in many Australian cases, including *Cobbold v Abraham* [1933] VLR 385, 391; *Langdale v Sollas* (1959) VR 637, 641; *Cousin v Grant* (1991) 103 FLR 236; *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258, [255]; *Vrakas v Mills* [2006] VSC 463, [28].

80 *Elliston v Reacher* [1908] 2 Ch 374, 384.

81 *Reid v Bickerstaff* [1909] 2 Ch 305, 323; *Dennerstein* [1963] VR 688, 693; *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258, [144].

82 *Re Dennerstein* [1963] VR 688.

development, it is necessary for the notification in the Register to give notice of:

(1) the existence of the scheme;

(2) the nature of the restrictive covenant; and

(3) the identity of the lands affected by the scheme, both as to the benefit and the burden of the restriction.

Further, it is necessary that this notice is given in the certificate of title, either directly or by reference to some instrument or other document to which a person searching the Register has access.[83]

102. Derham AsJ explained, there is often only limited circumstantial evidence available to assist in establishing the existence of a building scheme:

> 63 … Sometimes there is evidence of an auction of many or most of the lots in a subdivision and of a contract that is the source of the covenant in question, as was the case in *Dennerstein.* On other occasions there is little more than the registered instruments and what may be inferred from the terms of the covenant.[84] Nevertheless the court can draw the inference from the documentation and will readily do so where it is proven that there was a large subdivision of building blocks and which were sold over a relatively short period by a common vendor and a common form of restrictive covenant.[85]

103. However, in *Randell*, despite the existence of the building scheme being discoverable from an examination of documents on the register of titles, Derham AsJ found that a purchaser should *not* be obliged to make inquiries beyond those documents disclosed on a simple register search — a document typically provided in a section 32 statement:

> 82 … If it were sufficient notice that the Head Title in this case bears the notification of a building scheme, it would require a person interested in purchasing the Land to search the Register further than the title search indicated and to go back to the Head Title and the original, or first edition, of the Subdivision. That would render conveyancing a hazardous and cumbersome operation beyond what is reasonable to expect.
>
> 83 In summary, I am satisfied that a building scheme was established but the notification of it was not sufficient to give notice of it to the plaintiffs because a search of the title of the Land by the plaintiffs did not, and would not, reveal the existence of the scheme either directly, or indirectly by reference to any instrument referred to in the search of the title.[86]

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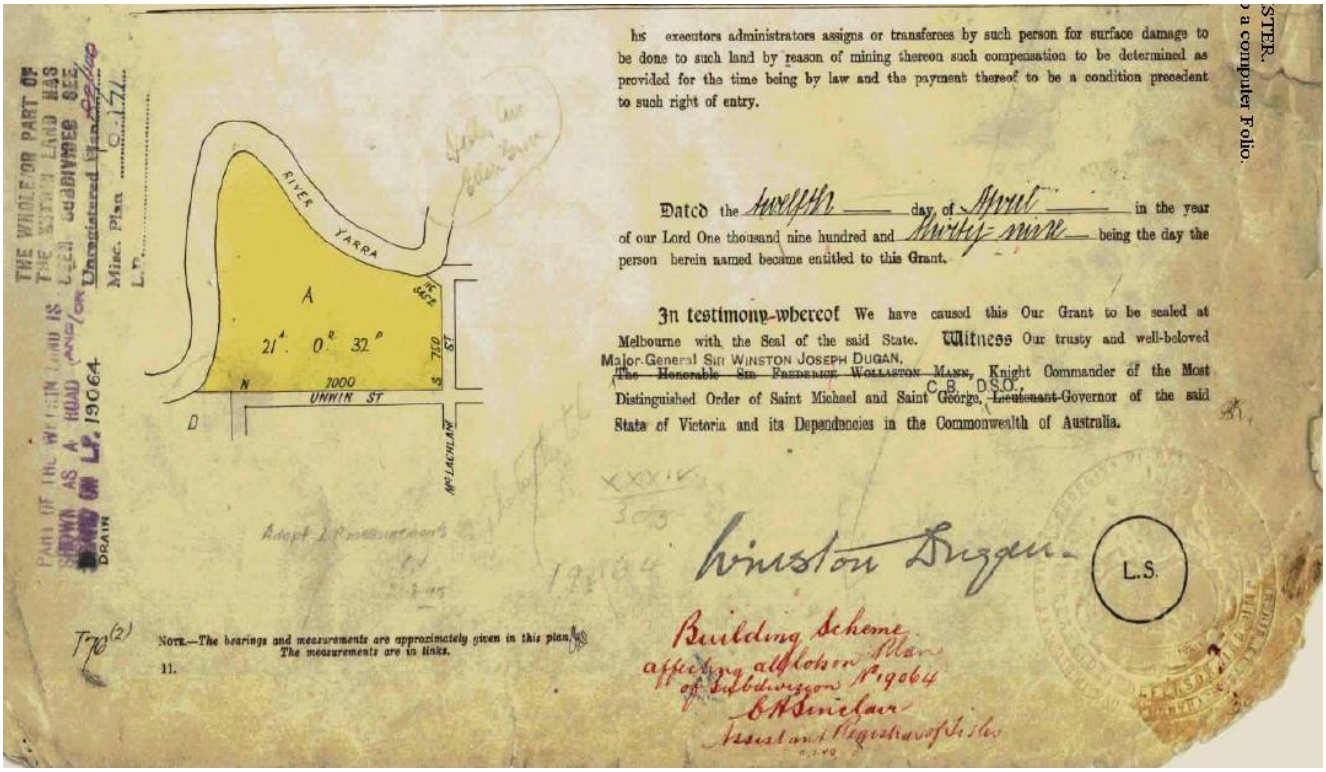
83 *Vrakas v Mills* [2006] VSC 463, [45].

84 *Re Dolphin's Conveyance* [1970] Ch 654; *Re Texaco Antilles Ltd v Kernochan* [1973] AC 609; See *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258, [146].

85 *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258, [146]-[148]; *Vrakas v Mills* [2006] VSC 463, [29].

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

104. The head title or Grandparent Title from *Randell*, is shown below:



his executors administrators assigns or transferees by such person for surface damage to be done to such land by reason of mining thereon such compensation to be determined as provided for the time being by law and the payment thereof to be a condition precedent to such right of entry.

Dated the twelfth day of April in the year of our Lord One thousand nine hundred and thirty-nine being the day the person herein named became entitled to this Grant.

In testimony whereof We have caused this Our Grant to be sealed at Melbourne with the Seal of the said State. Witness Our trusty and well-beloved Major-General Sir WINSTON JOSEPH DUGAN, ~~The Honorable Sir FREDERICK WOLLASTON MANN~~, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, C.B. D.S.O. ~~Lieutenant~~-Governor of the said State of Victoria and its Dependencies in the Commonwealth of Australia.

Winston Dugan L.S.

Building Scheme affecting all lots on Plan of Subdivision No. 19064
E.R. Sinclair
Assistant Registrar of Titles

RIVER YARRA
A
21¹. 0². 32³
1000
UNWIN ST
McLACHLAN ST
D

Note.—The bearings and measurements are approximately given in this plan. The measurements are in links.

APPLICATIONS TO MODIFY OR REMOVE A RESTRICTIVE COVENANT

Clause 52.02 of the relevant planning scheme

105. Efforts to modify or remove restrictive covenants from land often commence with an application for planning permit to modify or remove the covenant pursuant to clause 52.02 of the relevant council planning scheme that provides:

> **52.02 EASEMENTS, RESTRICTIONS AND RESERVES**
>
> **Purpose**
>
> To enable the removal and variation of an easement or restrictions to enable a use or development that complies with the planning scheme after the interests of affected people are considered.
>
> **Permit requirement**
>
> A permit is required before a person proceeds:
>
> - Under Section 23 of the *Subdivision Act 1988* to create, vary or remove an easement or restriction or vary or remove a condition in the nature of an easement in a Crown grant.
>
> …
>
> **Decision guidelines**
>
> Before deciding on an application, in addition to the decision guidelines in clause 65, the responsible authority must consider the interests of affected people.

106. However, caution must be exercised when applying to modify a restrictive covenant through the planning permit process:

a) first, notice will need to be given to all owners and occupiers of land with the benefit of the Covenant. In some cases, this may amount to tens if not hundreds of properties:

> **52 Notice of application**
>
> (1) Unless the responsible authority requires the applicant to give notice, the responsible authority must give notice of an application in a prescribed form—
>
> (a) to the owners (except persons entitled to be registered under the Transfer of Land Act 1958 as proprietor of an estate in fee simple) and occupiers of land benefited by a registered restrictive covenant, if the application is to remove or vary the covenant; …

In contrast, an application made pursuant to section 84 of the *Property Law Act 1958* typically only requires direct notice to the most proximate beneficiaries;[87]

b) second, section 60(5) and to a lesser extent, section 60(2) of the *Planning and Environment Act 1987* are difficult provisions to satisfy, meaning that few, if any, planning permit applications to remove or modify restrictive covenants succeed where there is sustained opposition by a beneficiary. These are discussed in more detail below;

c) third, an application to remove or modify a restrictive covenant necessarily awakens the interest of a well-resourced (and often legally represented) opponent in the responsible authority or relevant municipal council. In contrast, applications pursuant to section 84 of the *Property Law Act 1958* rarely attract the involvement of a municipal council unless it happens to own land with the benefit of the Covenant. As a matter of practice, notice is rarely if ever directed to councils simply by reason of their being responsible for roads in the relevant neighbourhood. In *Re Pivotel Pty Ltd*,[88] the Maroondah City Council received notice of, and actively opposed an application to amend a covenant, but it was the beneficial owner of parkland in the relevant subdivision;

d) fourth, applying to the Supreme Court to modify a restrictive covenant via section 84 of the *Property Law Act 1958*, any earlier application to modify a restrictive covenant via the *Planning and Environment Act 1987* needs to be disclosed to the judge hearing the later section 84 application. Part of the reason for this is that the Court's current practice is to ensure that each beneficiary who objected to an earlier application (irrespective of its statutory basis) receives notice of the section 84 application. This obligation to give notice to more distant and active beneficiaries can have a significant impact on the

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87 See 'The extent of notice required' below

88 *Re Pivotel Pty Ltd* [2000] VSC 264.

conduct of the section 84 application, by triggering the opposition of parties that might otherwise not have been involved in the section 84 process, were it not for this broader notice obligation; and

e) the expression "interests of affected people" in clause 52.02 of the relevant planning scheme has been construed to include non-beneficiaries. In *Hill v Campaspe SC* [2011] VCAT 949, Gibson DP held:

> 61 A proposal to remove or vary a restrictive covenant will clearly affect the property law rights of the owners of land with the benefit of the covenant. However, the provisions of the *Planning and Environment Act 1987* and the planning scheme have blurred the distinction between property law rights and what I will refer to as 'planning interests'. I do not consider that the scheme for removing or varying a covenant under the legislation is limited to a consideration only of the effect on property law rights. If that was intended, the consideration of issues could have been limited to a consideration of issues arising only under section 60(5) (or section 60(2)). But that is not the scheme established under the Act and the planning scheme.

In contrast, in an application pursuant to section 84 of the *Property Law Act 1958*, the Supreme Court is unlikely to give much weight to the views of persons without a proprietary interest in the proceedings, and in many instances, they may not even be aware the application is being considered. In *Re DVC Management & Consulting Pty Ltd*,[89] Mukhtar AsJ explained:

> 5 … as a covenant is a private not a public obligation, only a person having the benefit of the covenant (i.e., the ability to enforce it) has standing to object to such an application in this Court. Of course, if a covenant is removed or modified, disaffected neighbours may make later objections to the particular features of the proposed development to the planning authority on public planning grounds if and when a planning permit is sought.

This is, however, in the discretion of the Court. In *Re Milbex*,[90] Byrne J was prepared to entertain the objections of a non-beneficiary before allowing the variation of a single dwelling covenant to allow the construction of a seven-unit development.

Section 60(5) of the Planning and Environment Act 1987

107. Section 60(5) of the *Planning and Environment Act 1987* has been described as "a high barrier that prevents a large proportion of proposals":[91]

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89 *Re DVC Management & Consulting Pty Ltd* [2018] VSC 814.

90 *Re Milbex* [2006] VSC 298.

91 *Hill v Campaspe SC* [2011] VCAT 949, [65].

(5) The responsible authority must not grant a permit which allows the removal or variation of a restriction referred to in subsection (4) unless it is satisfied that—

(a) the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the removal or variation of the restriction; and

(b) if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith.

108. More particularly, in *McFarlane v City of Greater Dandenong*,[92] the Vice President of the Tribunal, Judge Strong and Member Cimino set out what they considered to be the propositions distilled by the Tribunal in relation to Section 60(5)(a) in *Carabott & Ors v Hume City Council and T Scuderi*:[93]

1 It is for the Tribunal to determine whether it is satisfied on the balance of probabilities that any covenant beneficiary "will be unlikely to suffer any detriment of any kind if the variation is permitted." In other words it is not a question of whether the Tribunal is satisfied there will be detriment: the Tribunal must be affirmatively satisfied that there will be none.

2. Compliance with planning controls does not, of itself, and without more, establish that a covenant beneficiary will be unlikely to suffer any detriment of any kind. Consideration of a proposal from a planning perspective often requires a balancing of competing interests. There is no such balancing exercise involved in the consideration of the issue which arises under paragraph (a). The nature of the enquiry is fundamentally different.

3. The mere assertion of the existence of a detriment is not sufficient to demonstrate its existence. On the other hand, loss of amenity will constitute a detriment, and in this regard amenity includes "an appeal to aesthetic judgment, which is difficult to measure, however the notion of 'perceived detriment' specifically contemplates that this consideration is relevant to the enquiry".

4. The determination must be made on the evidence before the Tribunal "including the appeal site and its environs".

5 It is not necessary for an affected person to assert detriment. This is so for two reasons: first, because the Tribunal must be affirmatively satisfied of a negative, namely that there will probably be no detriment of any kind; secondly, the Tribunal is entitled to form its own views from the evidence.

109. In *Giosis v Darebin CC* [2013] VCAT 825, the Victorian Civil and Administrative Tribunal comprised of Senior Member H. McM Wright QC confirmed that 60(5) of

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92 *McFarlane v City of Greater Dandenong* 2001/P51398 [2002] VCAT 696.

93 *Carabott & Ors v Hume City Council and T Scuderi* (1998) 22 AATR 261.

the *Planning and Environment Act 1987* (Act) is useful for little more than removing "deadwood" or non-contentious restrictive covenants.[94]

110. The case concerned an applicant seeking to review the decision of the Darebin City Council to refuse a permit to vary a restrictive covenant burdening land at 26 Maclagan Crescent, Reservoir (refer detail from Land Victoria, plan below).

111. The part of the covenant sought to be varied vary provides as follows.

> (c) no shops, laundries, factories or works shall be erected on this Lot and not more than one dwelling house shall be erected on any one Lot and the cost of constructing each house shall not be less than Four Hundred Pounds (inclusive of all architect's fees and the cost of erecting any outbuildings and fences). [emphasis added]

112. The variation sought to replace the words "one dwelling house" with the words "three dwellings" thereby enabling the application to be made to redevelop the land for three units or dwellings. There were five objectors, three of which were beneficiaries, all of whom lived 100m away from the burdened land. The Council had refused the application on the grounds that:

> The proposed variation to the Covenant … to allow not more than three dwellings to be constructed on the lot will result in detriment to beneficiaries and is therefore contrary to Section 60(5) of the Planning and Environment Act 1987.

113. The Tribunal quoted from the second reading speech of the *Planning and Environment (Amendment) Act* 1993 (Vic) that inserted section 60(5) into the Act. This speech coined the term "deadwood" covenants or covenants without a continuing purpose:

> The effect of the clause is that permits should be granted only for "dead wood" covenants if no owner benefitting from the covenant objects to its removal or variation. The alterative avenues to remove or vary a covenant remain in place, being applications to the Supreme Court under the Property Law Act 1958 and the preparation of a planning scheme amendment.

114. After quoting from *Carabott and Ors v Hume City Council* (1998) 22 AATR 261 that considered the effect of s60(5) of the Act in some detail, the Tribunal raised a particular flaw with the proposal before it—the absence of plans:

> 17 Unlike many applications for a variation of a restrictive covenant the present applicant has not concurrently sought approval for any particular form of development. This makes it difficult for the responsible authority to be satisfied as required by paragraph (a) because it must consider all possible forms of three unit multi-dwelling development and conclude that it is unlikely that any of them would cause detriment to a benefitting owner.

115. The Tribunal found in the absence of a firm development proposal there were an infinite number of three unit or three dwelling developments that could take place in

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94 *Giosis v Darebin CC* [2013] VCAT 825, 1.

consequence of the variation of the covenant and that it could not be "positively satisfied of a negative, namely, that there is unlikely to be detriment of any kind":

> 21 … In my view it is simply not possible to say that none of those developments would be likely to have a detrimental impact of some kind on the benefitting properties, particularly the adjoining units at 28 Maclagan Crescent. The application for permit therefore falls at the first hurdle.

116. This case therefore underscores the limited utility of applying to VCAT to modify or remove a covenant in the face of heartfelt opposition on the part of one or more beneficiaries. The absence of plans simply made the task more difficult.

The Tribunal may refuse an application under section 60(5) even in the absence of objectors

117. In practice, if an objection is pressed under this provision, it is rarely a good use of time or resources to pursue a Council's refusal to remove or modify a covenant to the Victorian Civil and Administrative Tribunal.

118. This was affirmed in *Willis v City of Casey* [2022] VCAT 650 where the Tribunal refused an application to remove a restrictive covenant that would have allowed a second dwelling on a lot, notwithstanding the absence of an objecting beneficiary:

> 23 Section 60(5)(a) is not confined to the receipt of objections by beneficiaries of registered restrictive covenant. Any detriment of any kind in relation to any land with the benefit of the covenant must be considered, whether the owners of such land have objected or not. Section 60(5) of the P&E Act requires the Council as the responsible authority and, upon review, the Tribunal (standing in the Council's shoes) to be independently satisfied about the likelihood of detriment. <u>This is not a matter that is dependent upon whether or not there are objections</u>.

Section 60(2) of the Planning and Environment Act 1987

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

> (2) The responsible authority must not grant a permit which allows the removal or variation of a restriction (within the meaning of the Subdivision Act 1988) unless it is satisfied that the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer—
>
> (a) financial loss; or
>
> (b) loss of amenity; or
>
> (c) loss arising from change to the character of the neighbourhood; or
>
> (d) any other material detriment—
>
> as a consequence of the removal or variation of the restriction.

120. Section 60(2) was considered comprehensively in *Waterfront Place Pty Ltd v Port Phillip CC* [2014] VCAT 1558. In summary, the Tribunal placed emphasis on the fact that the benefit of the restrictive covenant is a property right and that the Tribunal should be careful in modifying or removing those rights. Moreover, the consideration of planning policy does not occur until the criteria in the provision can be shown to have been established. In other words, the Tribunal does not undertake a balancing exercise of the amenity impacts of the covenant modification with policy in favour of providing additional housing—consideration of the planning merits can occur only if the tests are satisfied and the discretion to grant a permit thereby enlivened:

a) section 60(2) operates to expropriate a property interest without compensation:

Construction and Application of Legislation

60 There is no provision under the *Planning and Environment Act 1987* or any other legislation for the payment of compensation for the removal or variation of a restrictive covenant by either planning scheme amendment or the grant of a permit under clause 52.02.

61 This means that the grant of a permit to remove a restrictive covenant amounts to a de facto expropriation of an interest in property without compensation. This a situation which the law will generally seek to avoid notwithstanding its recognition that the essential purpose of planning legislation is to control and limit the exercise of property rights (see *271 William Street Pty Ltd v City of Melbourne* 1975 VR 156).

b) section 60(2) is intended to protect property interests:

62 The Tribunal considers that this has two consequences in relation to the application of s. 60(2) of the Act.

63 First, the provision is designed to protect proprietary interests and therefore should be interpreted as beneficial legislation and given as wide a meaning as the words of the sub-section reasonably allow.

c) the standard of proof for section 60(2) is "reasonable satisfaction":

64 Secondly, the standard of proof required to satisfy the threshold tests must have regard to the severity and consequences of the findings of fact. In *Briginshaw v Briginshaw* (1938) 60 CLR 336 Dixon J. (as he was then) said at pp. 361 – 362:

> Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

65 More recently, in *Kyriacko v Law Institute of Victoria Limited* (2014) VSCA 322, the Court of Appeal pointed out that because the Tribunal is not bound by the rules of evidence, neither the provisions of s. 140 Evidence Act 2008 nor the common law principles established by Briginshaw are of strict application. However, the Court went on to say (at para 26):

> Nevertheless, those principles reflect common sense notions of probability with respect to human conduct and it is entirely proper for the Tribunal to take them into account when considering allegations of serious misconduct.

66 The Court referred to what the High Court said in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170:

> [T]he strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove.

67 The Tribunal considers that expressed in colloquial parlance it must be persuaded to a "comfortable level of satisfaction" that the threshold requirements are met rather than "only just satisfied".

d) 'material loss' means objective and important detriment:

68 Section 60(2) of the Act was considered by the predecessor of this Tribunal *Pletes v City of Knox and Minister for Planning* (1993) 10 AATR 155. The case was heard a short time after the enactment of the provision. The Tribunal comprised the President and two legally qualified members, and this legal firepower was intended to synthesise principles emerging from cases involving restrictive covenants that had come before the Tribunal up to that time.

69 The Tribunal enunciated a number of propositions of law at pp. 162 – 163. They include the following:

> The expression "any other material detriment" in Section 60(2)(d) qualifies the loss mentioned in each of the sub-sections (a), (b) and (c) with the result that the loss referred to in each means material loss. (Russel, Crimmin, Harvey). Further the word "material" in this section means "important detriment, detriment of such consequence viewed on an objective basis. It does not include trivial or inconsequential detriment" (Russell, Harvey). We add that the word conveys to us the connotation of "real and not fanciful detriment" (Stokes). It is to be contrasted with the somewhat wider meaning of the use of the word "material" in Section 52 of the Act (Tjorpatsis).

70 This proposition does not sit entirely easily with a beneficial construction of the sub-section but is clearly sensible and practical and, given the composition of the Tribunal, is of compelling authority so far as this Tribunal is concerned.

e) the purpose and effect of the restrictive covenant is important is determining whether or not to modify the covenant:

71 The Tribunal also said:

> In performing the exercise required by Section 60(2) it seems to us essential to look at the purpose and effect of the covenant as one of the factors relevant in determining the likelihood of any loss or detriment in the event of removal or variation.

f) planning considerations are relevant once the tests in section 60(2) have been met:

> 72 The Tribunal stated that in applying the tests set out in s. 60(2) it is not a question of balancing the loss suffered by a benefiting owner in each of the categories set out in paragraphs (a) to (d) against the planning benefits of removal or variation of the covenant. The tests must be applied in absolute terms. Consideration of the planning merits can occur only if the tests are satisfied and the discretion to grant a permit thereby enlivened. This Tribunal respectfully agrees.

121. More recently, in *Strathcona Baptist Girls GS v Boroondara CC* [2024] VCAT 1162 Member Whitney summed up the principles in s 60(2) as follows:

a) section 60(2) acts as a series of threshold statutory tests:

> 253 …
>
> a the starting point in interpreting the threshold statutory test is the wording in s 60(2), considered in the context of the Act;

b) losses or detriment must touch and concern the land, rather than being personal to the objectors:

> b the identified losses or detriments suffered by the benefitting landowners are losses or detriment to the land that benefits from the Restrictive Covenant as opposed to the individual property owners in their personal capacity;

c) the threshold tests in section 60(2) are on the balance of probabilities:

> c I need to be satisfied that the proposed removal of the Restrictive Covenant is not statute barred by s 60(2) on the balance of probabilities, mindful that what might be required to satisfy me on the balance of probabilities will be relative to the consequence/importance of the decision but also mindful that the high bar set by the test in s60(2) of the Act, in effect, goes some way to addressing the consequence/importance of the decision;

d) objections per se do not determine the outcome of an assessment on the threshold tests:

> d the making of an objection by a benefitting landowner is not, in and of itself, determinative of the threshold statutory test even if the objection is made in good faith. Rather, any objection made by a benefitting landowner goes 'into the mix' of material before the decision-maker and contributes to the determination that is made 'on the balance of probabilities';

e) specified losses must be objectively real and not fanciful, trivial or inconsequential:

e the specified losses in s 60(2)(a), (b) and (c) of the Act must be 'material' losses in the sense that they are objectively real as compared with fanciful, trivial or inconsequential;

f) the assessment considers what might be done pursuant to the covenant both before and after the modification:

f the assessment of the consequence of the removal of the Restrictive Covenant is properly to compare what is permitted to occur on the Land with the Restrictive Covenant in place and the identified losses or detriment that might occur if the Restrictive Covenant is removed. That is, a comparison of the situation 'as is' compared with 'after' the Restrictive Covenant is removed;

g) the current planning scheme inform the "as-is" in this assessment:

g the 'as is' and 'after' analysis is to be done on the basis of the Scheme as it presently stands;

h) a decision maker can consider the physical context of both the burdened and benefiting land:

h the absence of an associated permit application for use or development of the Land is not a bar to a permit being issued for removal of the Restrictive Covenant. Rather, whether the threshold statutory test is met turns on the facts and circumstances of the Restrictive Covenant, the physical and planning context of the Land and the physical and planning context of the benefitting lots; and

i) the subjective intentions of the parties to the covenant is not material:

i the subjective intention behind the creation of the Restrictive Covenant beyond what is disclosed by the wording of the Restrictive Covenant is not relevant, nor is the fact that it is a private agreement entered into by persons to give effect to their own private interests.

122. It is often difficult to predict how these principles will be applied in any given case. However, it can be said that plans showing the proposed development are helpful and the less ambitious the proposal, the better. In other words, do not seek removal of a covenant, if modification to allow a second dwelling with a single storey would be sufficient.

123. In *Pletes v City of Knox and Minister for Planning* (***Pletes***), the Administrative Appeals Tribunal held that the discretion under section 60(2) will more likely to be exercised in circumstances where the proposed development has atypical or unusual features, such as the subject land being a particularly large allotment:[95]

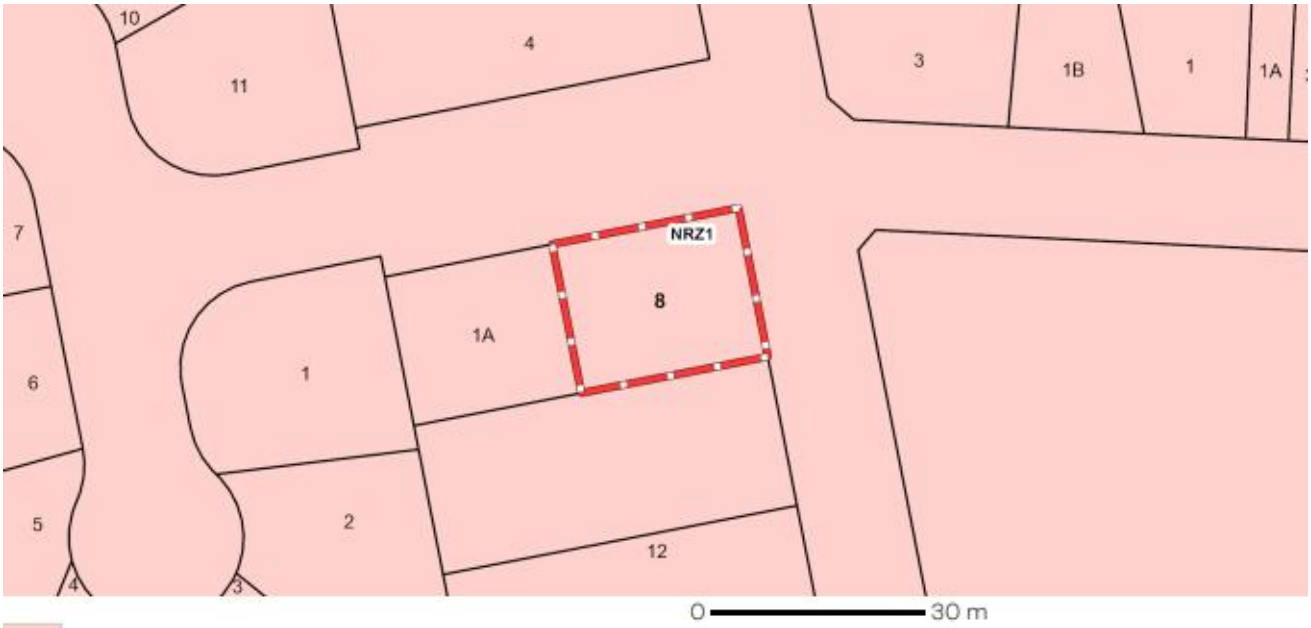
> It appears to us that in each of the cases where variation or removal was permitted there seems to have been some objective factor or combination of factors enabling it to

[95] (1993) 10 AATR 155, 164.

be demonstrated to the Tribunal that, and why it was that, the tests imposed by Section 60(2) were satisfied … The proposed development might have been on an atypically large allotment. There might have been special topographical reasons.

Of course there will always be other situations without such unusual or atypical features in which the rights conferred by the restrictive covenant must be respected as required by Section 60(2) so that no variation or removal of the covenant is warranted.

124. That said, that case concerned the subdivision of land at 8 Marie Street, Boronia, a somewhat typical lot of just over 1000sqm:



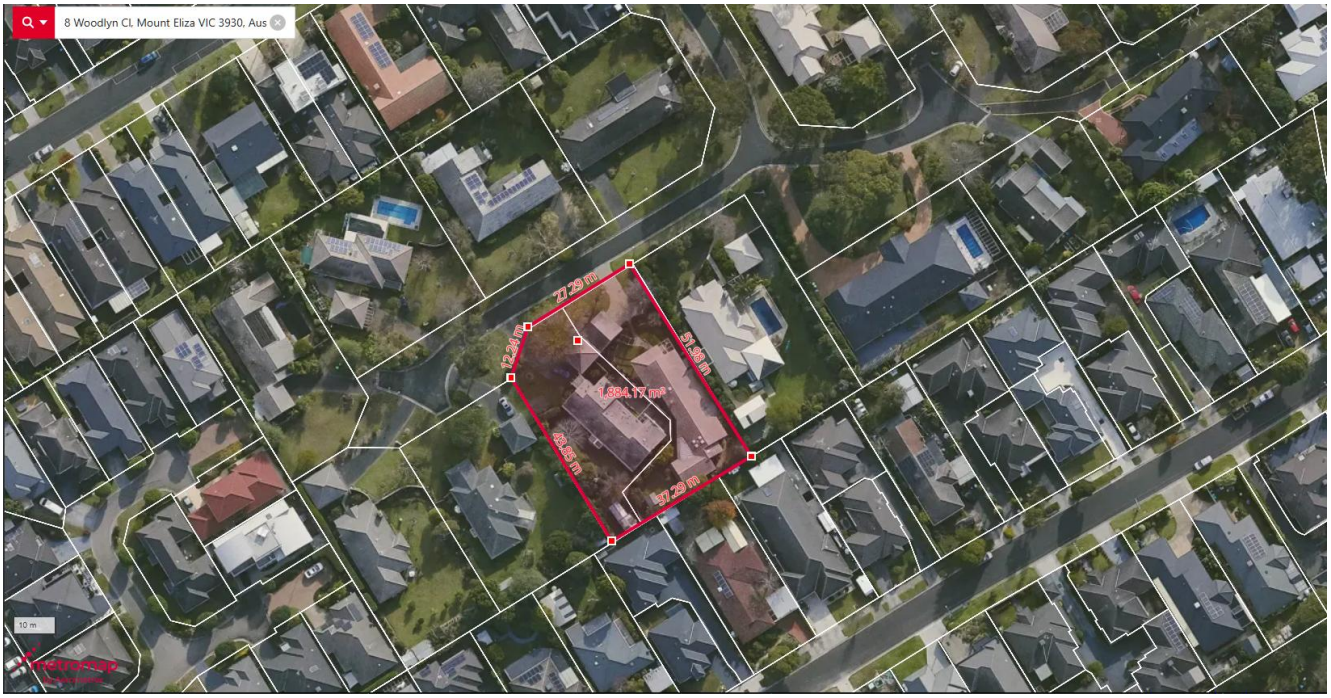
125. In *Gilbert v Mornington Peninsula SC & Elms & Ors* [1998] VicAATRp 26, the applicants were granted a planning permit to subdivide their land at 8 Woodlyn Close, Mt Eliza, into two lots and to vary a restrictive covenant. The covenant restricted each lot into the estate to one single storey dwelling:

Permit Granted

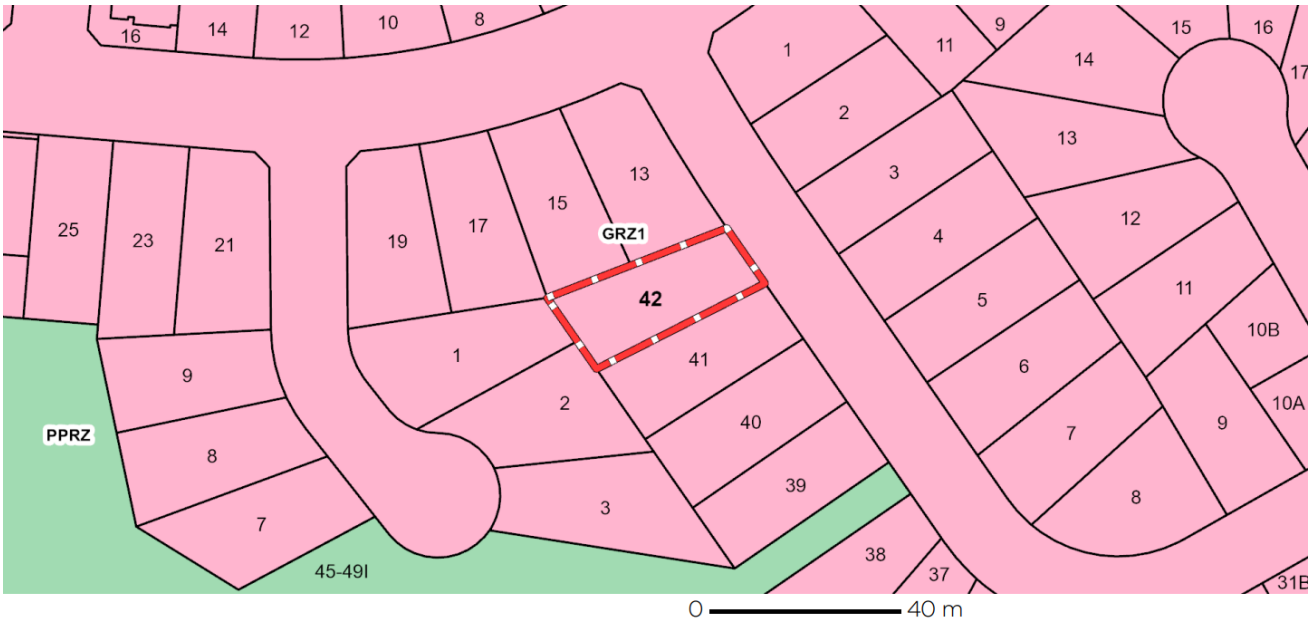
> The determination of the Tribunal is that the appeal is allowed… a permit is granted and directed to be issued to subdivide the land into two lots and to vary the restriction in CS1626D…
>
> Before the plan of subdivision is certified, amended plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved the plans will be endorsed and will then form part of this permit.

126. The tribunal was satisfied that the variation would not result in the losses specified in section 60(2) in relation to changes in neighbourhood character partly because the lot was larger than most other lots on the estate:

> I believe that there would be little if any change to the rhythm of development. It is relevant to note here that the Gilbert's lot is in any event larger than most on the estate and in actual fact, compared to many, the resultant spacing would not be out of character - particularly when compared to the pattern of development at the more northerly end of the estate. …



127. In *Berecz v Casey CC* [2021] VCAT 1336, the Tribunal gave weight to the fact that the additional dwelling was at the rear of the property at 42 Garnet Close, Narre Warren:



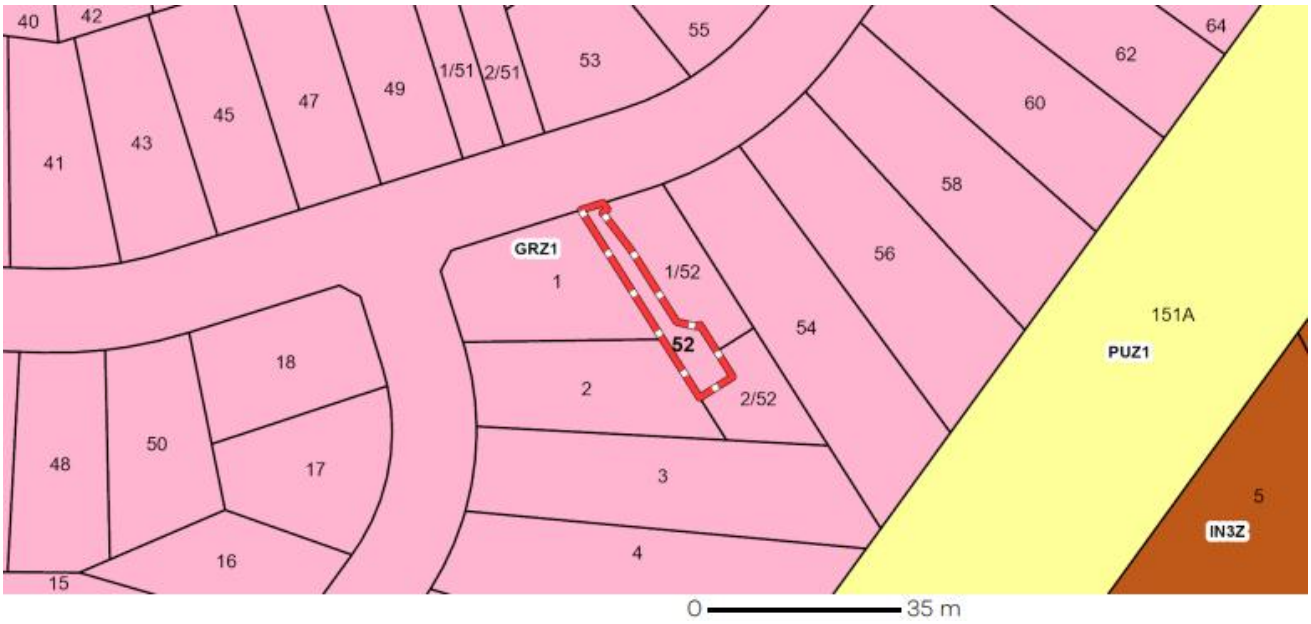
128. That land was only ~626sqm, and the second dwelling was to the rear of the building accessible via a side walkway:

129. The Tribunal considered the rear would be inobtrusive largely because the existing front dwelling substantially 'visually screens' the rear dwelling when viewed from the public realm:

> 26 Turning to our findings, if the proposed variation to the Covenant was allowed, we are satisfied that any beneficiary of the Covenant will be unlikely to suffer loss arising from any change to the character of this neighbourhood. …
>
> 29 A further positive factor here for the applicant is that the second dwelling is the rear one of two single storey dwellings, set back from the front boundary of the subject land. When viewed from the public realm at the front, the rear dwelling is fairly visually inobtrusive, is set back from all boundaries and is not proposed to be altered. The reality is that the existing front dwelling in itself substantially 'visually screens' the rear dwelling, in terms of available views from the public realm.[96]

[96] All emphasis added.

130. In *Charan v Wyndham CC* (***Charan***) [2014] VCAT 219, Member Shpigel gave weight to the fact that the second dwelling would be of single storey construction at 52 Hotham Crescent, Hoppers Crossing:



131. The Tribunal found that varying the covenant to allow a second single storey dwelling would be unlikely to cause the benefitting landowners any of the losses identified in section 60(2):

> 16 I have come to the conclusion that if the covenant was varied to only allow a second single storey dwelling, it is unlikely that any of the benefiting owners or affected persons will suffer loss or detriment as a consequence.

132. The Tribunal's conclusion was influenced by several factors including:

a) the absence of traffic impacts for neighbouring properties:

> 18. …I consider that any traffic generated by the addition of a second dwelling on the subject land would have a negligible impact on Hotham Crescent and

would not cause the benefitting owners or objectors, to suffer any amenity impacts. I am also not persuaded that current traffic flows or on-street parking demand in Hotham Crescent, a local road, are significant.

b) the fact that a single-storey dwelling at the rear of the lot would not produce amenity impacts such as overlooking or overshadowing:

> 18. … I am also satisfied that it is possible for a second single storey dwelling to be developed to the rear of the subject land without any significant amenity impacts, such as overlooking or overshadowing.

c) the absence of visual impact on neighbourhood character, by reason of its location at the rear of the lot hidden behind the existing dwelling:

> 21. I consider that the introduction of a second single storey dwelling to the rear of the existing dwelling will not be a dominating visual element or even particularly discernible from the streetscape. I also consider that the issue of the "backyard scape" can be dealt with at the application assessment stage by the Responsible Authority.

133. On the other hand, in *Ambrosio v Hume CC*[97] Senior Member Code assessed an application for a permit for an additional dwelling at 30 Eucalyptus Ct, Mickleham in the Mt Ridley Estate, against the provisions of s 60(2) and refused it on the basis that the permit could result in amenity or character loss, for instance through the creation of a differently shaped lot:

> 42 I am not satisfied that an owner of a lot in plan of subdivision 418402A would be unlikely to suffer any loss of amenity or loss arising from a change to neighbourhood character as a consequence of the covenant variation. It suffices to state that the consequences could undermine the purposes of the covenant and could result in an amenity or character loss.
>
> 43 It is relevant no more than one dwelling is constructed on each lot in plan of subdivision 418402A. The purposes of the covenant have been and are continuing to be met. The parties also agreed that no lot in plan of subdivision 418402A has been subdivided or approved to be subdivided.
>
> 44 <u>One potential character loss relates the lot shape and resulting impact on spacing of prospective dwellings</u>. Even though lots 3, 4, 28, 29, 32 & 33 have a similar area (of just over 1 ha) to the two proposed lots, each has a materially wider frontage. This means there is the potential for the two proposed dwellings to appear less-spaced and this is confirmed by the proposed envelope spacing.

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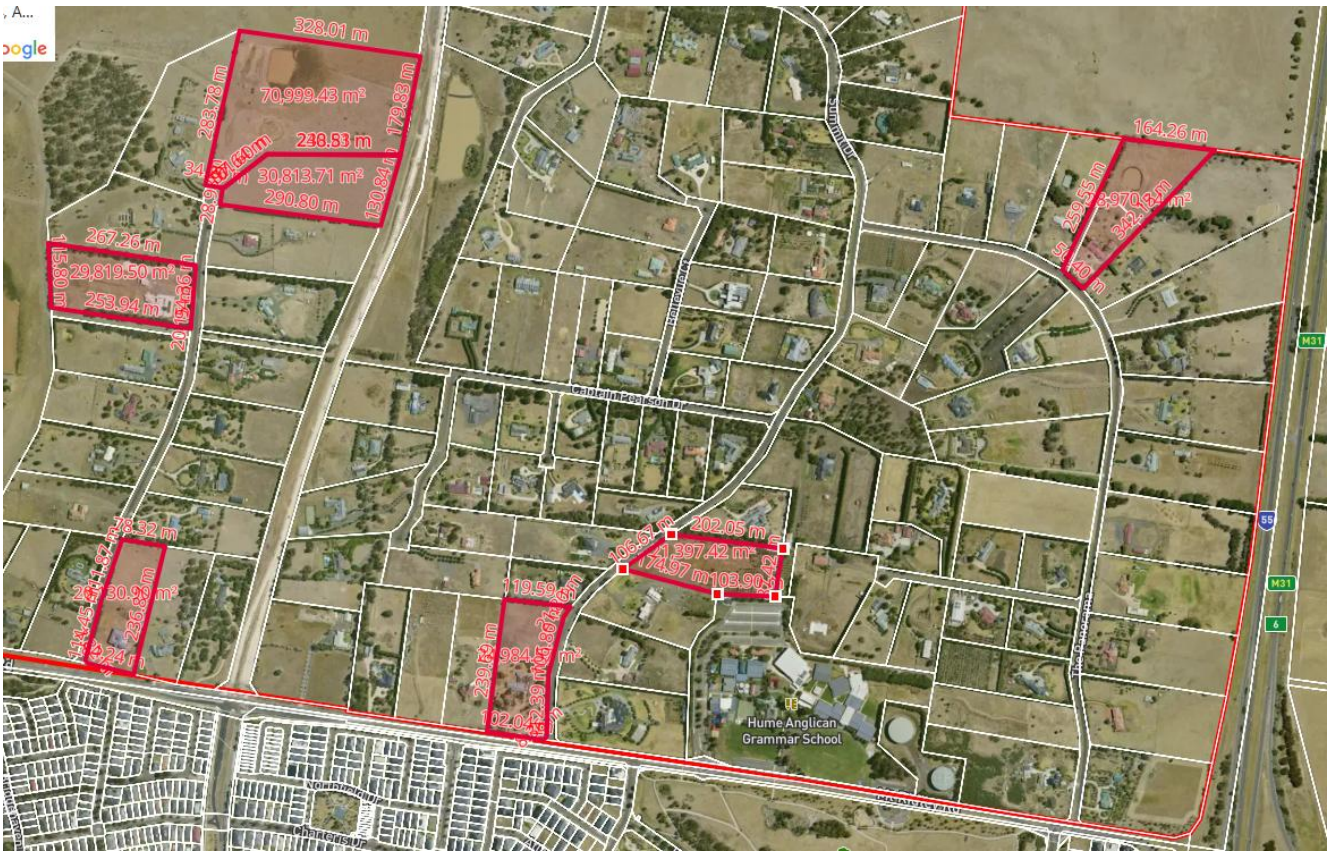
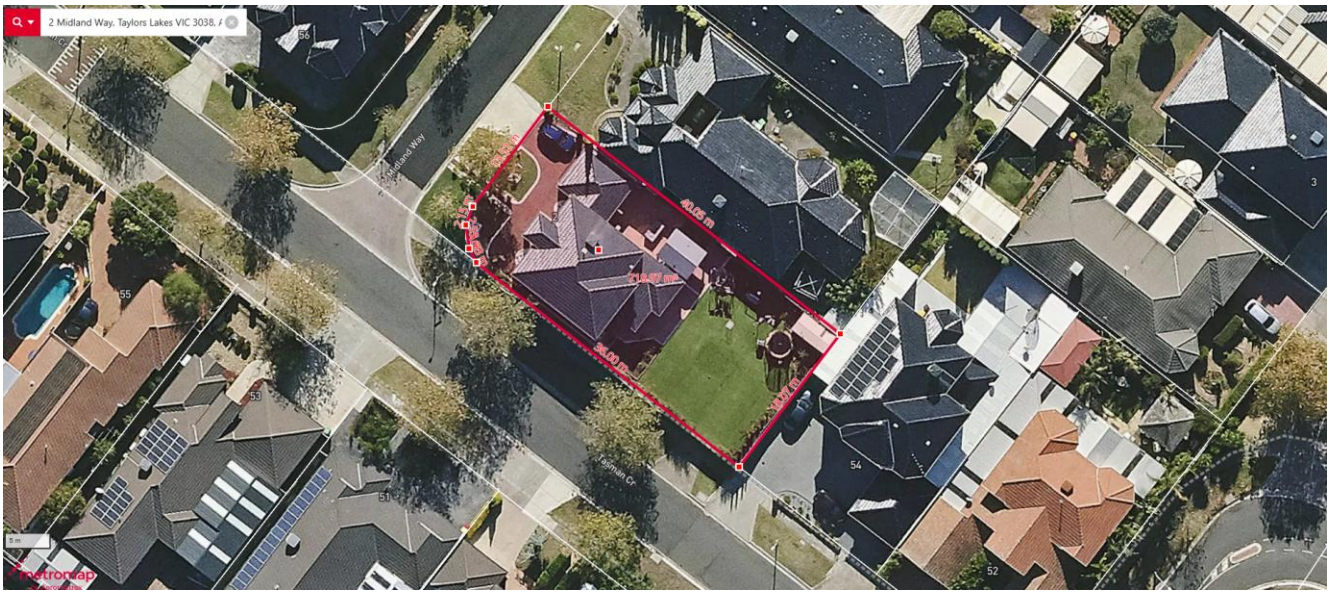
97 [2019] VCAT 2049

134. By way of contrast, the Supreme Court has made numerous modifications to other covenants in the Mt Ridley Estate that change the presentation of lots to the street:



135. Similarly, in *Singh & Kaur v Brimbank*[98] the Tribunal found that the removal of a single dwelling restriction at 2 Midland Way, Taylors Lakes would cause loss from a change to the character of the neighbourhood as any dual dwelling development was inconsistent with the rest of the subdivision:

> 37 As the tests in section 60(2) are to be applied in absolute terms, failure of the application to meet the test of section 60(2)(c) relating to loss arising from a change to the character of the neighbourhood means that the application must fail and no permit is to be granted.
>
> …
>
> 42 Given that I have already determined that no permit is to be granted to allow the variation of the restriction on developing two dwellings, I do not need to consider whether the proposed variation would also cause financial loss, loss of amenity or any other material detriment to beneficiaries. However, in passing, I note that:
>
> > I agree with the applicant that there is nothing to suggest that benefiting lot owners would suffer a material financial loss as a result of the proposal.
> >
> > I also do not consider there to be any amenity impacts arising as a result of traffic and accept the evidence of Mr Zivanovich that there would be no material traffic impacts which would result from the proposal.



Conclusions on covenant applications pursuant to the Planning and Environment Act 1987

136. Applicants are often tempted to pursue the modification of covenants through the Planning and Environment Act permit application process on the basis that it is cheaper than applying to the Supreme Court. However, this can be a false economy when considering that each beneficiary needs to be notified via the *Planning and*

98 [2017] VCAT 1730

Environment Act 1987 process and depending on the size of the subdivision that can be expensive. I have had clients complaining that the process of notice costs between $3,000 for medium subdivisions to $10,000 for large subdivisions.

137. Moreover, the obligations for evidence are no lower in the Tribunal and so the cost of engaging an expert may be greater given that the expert will invariably be required to appear to give evidence at VCAT, whereas a judicial registrar or Associate Judge will typically be content to consider the evidence on the papers.

138. And that hints at perhaps the critical distinction—that cases in VCAT are more often than not opposed by beneficiaries who bear few if any cost consequences from appearing to oppose an application to modify a restrictive covenant whereas in the Supreme Court applications to modify restrictive covenants are typically unopposed.

139. Moreover, Council as the responsible authority will invariably be a party to an application for planning permission whereas they will only rarely be involved in a section 84 application, for instance, if Council owns nearby parkland that enjoys the benefit of the covenant sought to be modified. Taking that wildcard out the equation alone is of profound assistance to applicants.

140. The following comparison is instructive:

a) in *Re Ferraro* [2021] VSC 166 a declaration was sought in the Supreme Court to have a covenant in the Grace Park Estate declared unenforceable. It involved one *ex parte* hearing that lasted for about 30 minutes, before the Court published its decision removing the covenant from the land; whereas

b) in *Mirams v Boroondara* [2022] VCAT 928 a planning permit was applied for, to remove a (relevantly) identical covenant in the same subdivision by way of planning permission, and the matter was the subject of a directions hearing and then a preliminary hearing in VCAT. The permit applicant was represented by senior counsel; the responsible authority was represented by a firm of solicitors, three sets of objectors were represented by three different sets of solicitors, and two sets of objectors were self-represented:

1 The applicant sought a planning permit under Clause 52.02 of the Boroondara Planning Scheme (planning scheme) to remove a registered restrictive covenant (Covenant) from title to the subject land.

2 Relevant purposes of this preliminary hearing included:

- to give directions about future conduct, including to consider who are parties to the proceeding or who may have a right to be heard;
- to consider whether the registered restrictive covenant in Instrument No. 0547039 has any legal effect; and
- to consider whether to make any declarations or final orders in the proceeding...

> 3 In an earlier determination following a practice day hearing, I accepted submissions on behalf of the applicant, as agreed by Boroondara City Council (Council), that there were no living beneficiaries of the Covenant. Instead, I found that the Covenant conferred a personal benefit to the transferees while alive.
>
> 4 In this preliminary hearing, the applicant further submitted that the Covenant is of no legal effect.
>
> 5 It sought final orders in the proceeding granting a permit to remove the Covenant since it may 'mislead' people seeking to rely on it, to the extent it purports to regulate aspects of the use or development of the land but would be ineffective to do so.

141. It is difficulty to overstate the comparative time, expense and risk associated with the application having made to VCAT for ultimately the same outcome.

Section 47(2) of the Planning and Environment Act 1987

142. One of the first questions often asked of aspiring applicants for covenant modification is whether there have been any longstanding breaches of the covenant.

143. The answer to this question can have significant implications. Pursuant to section 47(2) of the *Planning and Environment Act 1987,* where land has been used or developed for at least two years in breach of a restriction,[99] in a manner that would be lawful under the *Planning and Environment Act 1987* but for the restriction, an application to remove the restriction may be made without:

a) notice of the application under section 52 of the *Planning and Environment Act 1987* (including beneficiaries of the covenant); and

b) the application being referred under section 55 to any relevant referral authorities:

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

144. The *Subdivision (Miscellaneous Amendments) Bill* introduced section 47(2) into the Act:[100]

> Clause 61 amends section 47, 68, 69, 81 and 85 of the *Planning and Environment Act 1987* in relation to easements or restrictions. This is consequential on amendments outlined elsewhere in these notes.

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99 As that term is defined in section 3(1) of the *Subdivision Act 1988* (Vic).

100 Explanatory Memorandum, *Subdivision (Miscellaneous Amendments) Bill 1991* No. 48, section 61(1)(c).

It also provides that the notification procedures under the *Planning and Environment Act* 1987 do not apply to the removal of covenants from land where an otherwise lawful building has breached the covenant for more than 2 years.

145. In *Hill v Campaspe SC*,[101] Gibson DP construed the provision by reference to its purpose, namely, to respond to acquiescence in appropriate circumstances:

> 23 To decide what this provision means it is necessary to look at the purpose of the provision. I consider the purpose of the provision is to recognise the principle of acquiescence. This is the principle that assent to an infringement of rights, either express, or implied from conduct, will normally result in the loss of right to equitable relief.[102]

146. In *Alderman v Hume CC* [2024] VCAT 737, Member Djohan described the provision's purpose as exempting a particular class of permit application from notice and referral requirements that would otherwise be required:

> 70. I do not agree with the reasoning in *Pagrati* that the purpose of s.47(2) is to allow for a breached covenant or restriction to be 'regularised'. The purpose of s.47(2) is to exempt a particular class of permit application from notice and referral requirements that otherwise would be required under the PE Act. To that end, s.47(2) relates to the processing of the particular class of permit application and does not alter considerations required under the PE Act for the determination of that class of permit application.

147. In *Hill v Campaspe SC* DP Gibson found that breach of part of a covenant might not allow removal of the whole of the covenant:

> 24 I consider that to allow a breach of one part of a covenant to be used as an excuse to seek removal of the whole of a covenant, including parts which have not been breached, without giving notice to benefiting land owners could be open to abuse. A land owner wishing to remove a covenant without letting people know could deliberately breach one part of the restriction, which people may not notice or may not mind, then use that breach as a lever to remove the whole of the covenant without notice under sections 52 and 55 of the Act. I do not consider that this is what the Act has in mind. Such a view would also be quite contrary to the very onerous provisions elsewhere in the Act where covenants are concerned, which protect the interests, and indeed even the perceived interests, of benefiting land owners. In the present circumstances it is quite possible that people having the benefit of the covenant may not be concerned about a breach relating to a shed whereas they may be concerned about a breach relating to a second dwelling.
>
> 25 In my view, acquiescence in the breach of one part of a covenant should not be construed as acquiescence in the breach of the whole of the covenant. In order for people with the benefit of a covenant to be denied notice of an application to vary or remove a covenant on the basis that they have acquiesced in a breach

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101 *Hill v Campaspe SC* [2004] VCAT 1456.

102 See too: *Pagrati v Boroondara CC* [1996] VicAATRp 20

for more than 2 years, they must have acquiesced in a breach of all the relevant aspects of the covenant which are proposed to be varied or removed. It is not sufficient for them to have acquiesced in the breach of part only.

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

148. This is an awkward provision three reasons, first, for the provision contemplates an application to *remove* a covenant, whereas on one view the deletion of parts of a covenant might be said to allow its *variation*. Member Komesaroff resolved this tension in *Hawley v Yarra Ranges SC*[103] by applying the Latin maxim *Major continet in se minus* (the greater includes the lesser)[104]:

> 26 … it seems to me to be patently absurd for section 47(2) to forgo public notification of an application for a permit to completely remove a restriction yet require public notification of an application for a permit to vary a restriction, because removal is total, whereas variation would, by definition, not be so all-encompassing. Nothing could be greater than total removal of a restrictive covenant, so:
>
> > a court when interpreting ordinary or subordinate legislation should eschew creating absurdities ... technicalities and angels dancing on pinheads are to be avoided. See *Liebler v City of Moorabbin*[105].

149. More recently, however, in *Alderman v Hume CC* [2024] VCAT 737, Member Djohan expressly departed from *Hawley v Yarra Ranges SC* and found that accepted principles of statutory interpretation dictate that section 47(2) does not apply to applications to *vary* a restriction:

> 45. In conclusion, in the textual context of the PE Act, the word 'remove' does not mean 'vary'. …
>
> 69. Further, I reject the submission from Council that the use of the word 'remove' only in s.47(2) was an oversight and the word 'vary' should also be read into that section. It is clear to me from the seconding [sic] reading speech that the Bill was subject to extensive consultation including from legal associations and subject to extensive debate as to its meaning. I am satisfied that in that context the omission of the word 'vary' from the s.47(2) was deliberate.
>
> 70. I do not agree with the reasoning in *Pagrati* that the purpose of s.47(2) is to allow for a breached covenant or restriction to be 'regularised'. The purpose of s.47(2) is to exempt a particular class of permit application from notice and

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103 [2007] VCAT 268

104 See Black's Law Dictionary, Seventh edition, Bryan A Garner Ed, West Group. St Paul Minn, 1999 @ page 1656.

105 (1992) 8 AATR 188, per Nathan J.

referral requirements that otherwise would be required under the PE Act. To that end, s.47(2) relates to the processing of the particular class of permit application and does not alter considerations required under the PE Act for the determination of that class of permit application.

71. I also reject the submission that interpreting 'remove' in s.47(2) to not include 'vary' leads to an absurd outcome or an outcome that does not advance the purpose of the PE Act.

72. Where a person wishes to remove a restriction over land if the land has been used or developed for more than 2 years before the date of the application in breach of that restriction, then that person may make an application under the PE Act to do so. The ability to make such an application was a primary purpose of the 1991 Amendments Act as far as the amendments to the PE Act are concerned. Clause 61 of the 1991 Amendments Act introduces consequential amendments to s.47 of the PE Act to facilitate the making of permit applications under the PE Act for the creation, removal or variation of easements or restrictions.

73. Where a person elects not to seek removal of a restriction that has been breached, but instead seeks to vary the restriction to reflect the use or development that is in breach of the existing restriction then that permit may also make an application under the PE Act to vary the restriction accordingly. The right to do so conferred under the amendments to the PE Act introduced by the 1991 Amendments Act is not interfered with in any way. The consequence of choosing to vary a covenant rather than remove it is that in the processing of a such an application, both notification and referral of the application under the PE Act is required. That can hardly be said to be an absurd outcome. It may be that this outcome is not as convenient to persons who wish to vary rather than remove restrictions that they have been in breach of for more than 2 years but that in this case the legislature has determined that such application should not be exempt from notification or referral. Further, it may be that a practice has evolved in which responsible authorities are more comfortable in varying covenants that have been breached rather than removing them, but I fail to see the relevance of any such practice (if one exists) to the application of the principles of statutory interpretation in determining question 1.

74. In conclusion, I find that there is no reason arising from the extrinsic material referred to above to interpret the word 'remove' as it appears in s.47(2) of the PE Act to include the ordinary meaning of the word 'vary'. I also find that employing a purposive approach to the interpretation of s.47(2) of the PE Act results in the meaning of 'remove' excluding the ordinary meaning of the word 'vary'.

Decision in Hawley

75 In *Hawley*, the Tribunal determined that for the purposes of s.47(2) the word 'remove' is to be interpreted to include 'vary'. This conclusion was reached by employing the general legal maxim *major continet in se minus* – the greater includes the lesser to the interpretation of s.47(2) of the P&E Act. This maxim is an established principle of law usually applied in criminal law matters to assert that a greater charge includes any lesser offences. I disagree that the reasons of

Dixon J in Shire of *Swan Hill v Bradbury* (1937) 56 CLR 746 applied this maxim in construing the word 'restrain' as it appeared in a by-law. In my view, Dixon J did not more than construe the word 'restrain' in relation to the subject matter to which it is to be applied, that is in context.

76. It is also not clear to me why at first instance the Tribunal in Hawley employed the maxim instead of approaching the construction exercise using the accepted principles of statutory interpretation as they were expressed at that time. I acknowledge that much has been said and written about the principles of interpretation since the decision in Hawley.

77. I decline to apply the maxim, because examination of the text, legislative and broader context of s.47(2) of the PE Act leads to the conclusion that the greater does not include the lesser in this instance.

150. This finding might not have such a dramatic impact if one assumes that it is acceptable to delete the various restrictions that comprise a restrictive covenant. So, for instance, the following permit was found to be a lawful application of s47(2) in *Craig v Banyule CC* [2025] VCAT 829 at [38], notwithstanding its characterisation as a 'variation' in the description of what the permit allows:

THE PERMIT ALLOWS:

Variation to covenant 939046

THE FOLLOWING CONDITIONS APPLY TO THIS PERMIT:

1. Unless otherwise agreed in writing by the Responsible Authority, Covenant 939046 registered on Lot 101 of Plan of Subdivision 006957 Volume 04426 Folio 107 shall be amended to delete the following:

   "nor shall there at any time be or suffered on the said lot hereby transferred more than one building and that roofed with tiles or slate..."

2. The certified plan must be lodged with the Office of Titles for registration in accordance with Section 23 of the *Subdivision Act 1988*.

151. Secondly, it is not clear how the responsible authority's discretion is to be exercised in the absence of notification. While the Tribunal has suggested section 60 should nonetheless apply,[106] it is not always easy to reconcile the principle of acquiescence with its inferences of dispensation from matters such as "detriment", "loss of amenity", and in particular, the subjective "perceived detriment" test in 60(5).

152. Thirdly, it is not clear whether the provision can be used in circumstances where the breach has already been rectified through demolition or the removal of non-complying materials.

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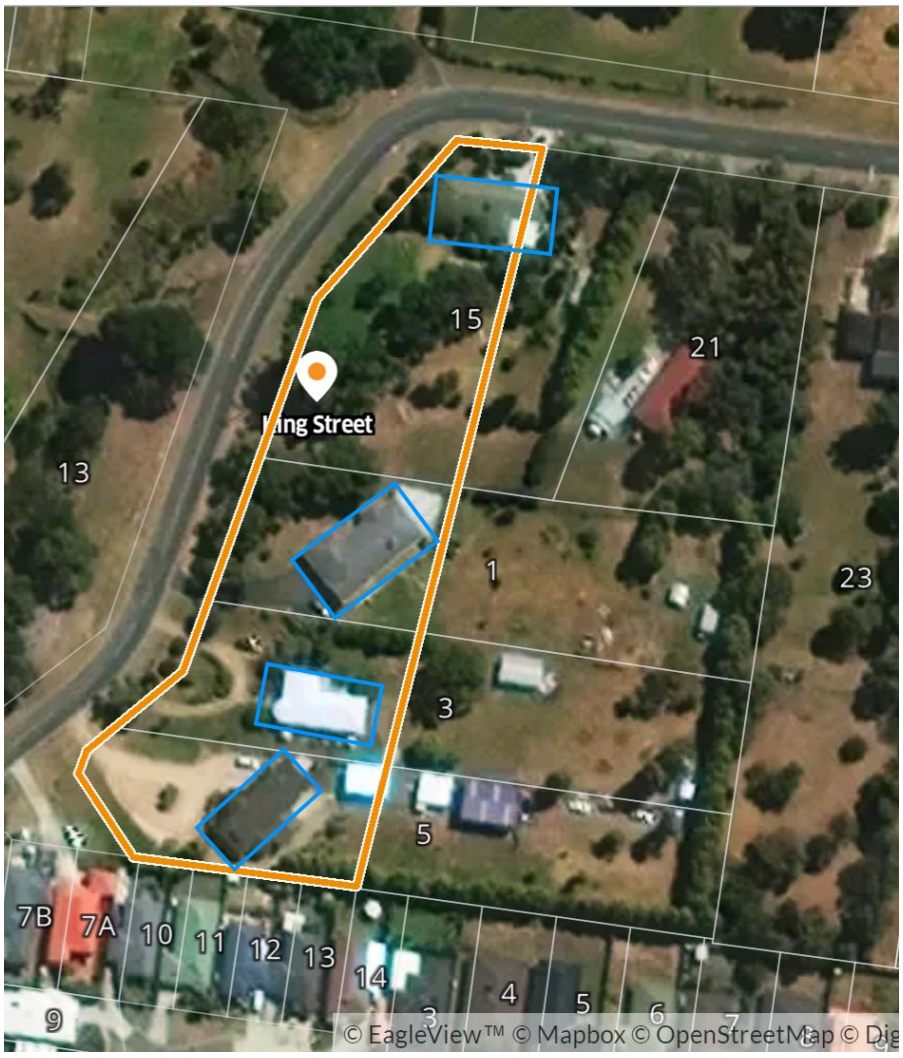
106 *Hill v Campaspe* [2004] VCAT 1399 at [11]; *Alderman v Hume CC* [2024] VCAT 737 at [70]; *Craig v Banyule CC* [2025] VCAT 829 at [26]

153. Consistent with the need for discretion, applications under section 47(2) should be pursued through a separate planning application before the substantive use or development application is made. In other words, if an applicant wishes to build a rear extension out of Alucobond metal and there is a covenant on the land requiring walls to be constructed of brick or stone, an application to remove the restriction under section 47(2) should be made as a separate permit application, in advance of the permit application for the extension.

154. An application pursuant to section 47(2) should be accompanied by sworn evidence as to the existence and duration of the breach and legal advice supporting the provision's use. Evidence may be in the form of aerial or other photographs, building permits or from people familiar with the dwellings' development.

155. In the following examples:

a) evidence of multiple dwellings (highlighted in blue) was used in support of an application to remove the single dwelling restriction on the lot highlighted in orange:



b) evidence of non-compliant roofing materials was used to support an application to remove an obligation to build a roof from slate or tiles:

and

c) evidence of non-compliant building materials was used to support an application to remove a covenant creating an obligation to construct a dwelling from brick or stone:

156. The planning permit amending the covenant might look like this:

PLANNING PERMIT

Planning & Environment Regulations 2015

Planning Scheme: **Banyule**
Responsible Authority: **Banyule City Council**

P[redacted]/2022

ADDRESS OF THE LAND:

[redacted]

THE PERMIT ALLOWS:

Variation to covenant [redacted]

THE FOLLOWING CONDITIONS APPLY TO THIS PERMIT:

1. Unless otherwise agreed in writing by the Responsible Authority, Covenant [redacted] registered on Lot [redacted] of Plan of Subdivision [redacted] Volume [redacted] Folio [redacted] shall be amended to delete the following:

   "nor shall there at any time be or suffered on the said lot hereby transferred more than one building and that roofed with tiles or slate..."

2. The certified plan must be lodged with the Office of Titles for registration in accordance with Section 23 of the *Subdivision Act 1988*.

Expiry of permit

3. The permit shall expire if the variation of restriction has not been registered with the Office if Titles within two (2) years of the date of this permit.

a) Aerial photographs can be obtained through:

b) Google Earth (historical imagery) – open source;

c) NearMap – subscriber service; or

d) MetroMap – subscriber service.

157. Historic and cadastral imagery is also available via:

a) Mapshare – http://mapshare.vic.gov.au/webmap/historical-photomaps/

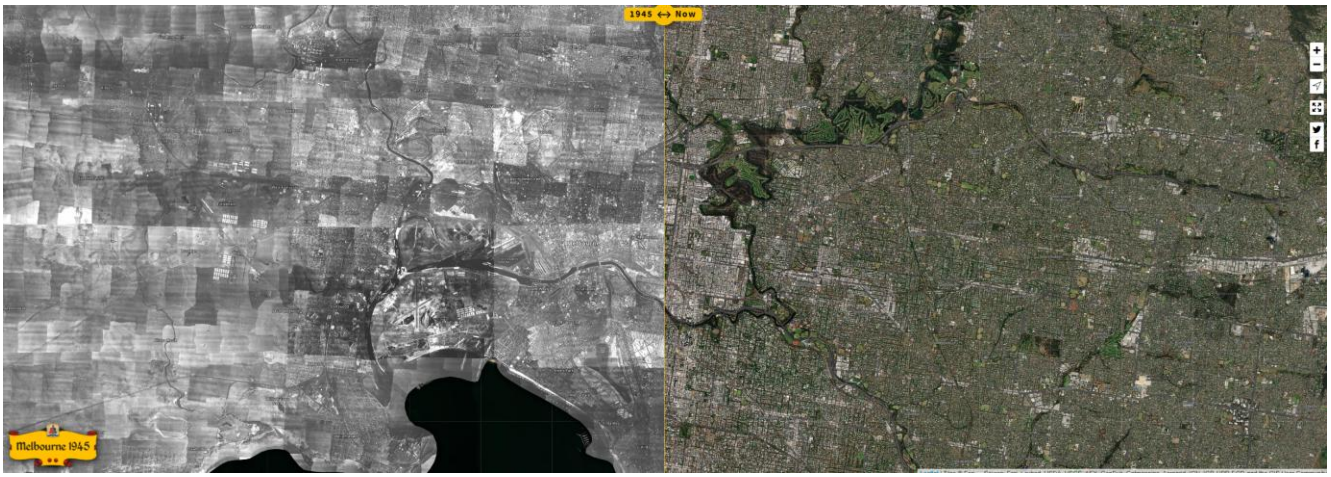
b) Photomapping: http://www.photomapping.com.au/historic-imagery; images@photomapping.com.au; (03) 9328 3444; 133 Abbotsford Street, PO Box 369, NORTH MELBOURNE 3051;

c) United Photo and Graphic Services Pty Ltd – https://www.unitedphoto.com.au/; images@unitedphoto.com.au;

d) Lot search: https://www.lotsearch.com.au/

e) Geoscience Australia: https://www.ga.gov.au and

f) https://1945.melbourne/



Setting aside a permit amended pursuant to s47(2)

158. There are numerous difficulties associated with seeking to cancel or amend a permit granted to modify a restrictive covenant using the process in section 47(2) of the *Planning and Environment Act 1987*.

159. Amongst those include the decision of *Skabal Pty Ltd v Boroondara City Council* [2020] VSC 532. In that case, the Supreme Court considered whether the Tribunal had power to cancel a permit which varied an easement after the variation had been registered to title. The applicant had requested the Tribunal to cancel the permit under section 87 of the PE Act, claiming they were not properly notified.

160. Richards J accepted that once a planning permit authorising a variation of an easement has been acted upon by registration of the plan, the permit is "spent" and cannot be cancelled:

> 62 I accept the Council's submission that, once the plan of variation of easement had been registered on the titles, the permit was spent and the development it allowed was substantially carried out.

161. To the extent it might be suggested that section 103(1AA) of the *Transfer of Land Act 1958* confers power on the Tribunal to order removal of the amendment to the Covenant from the register of titles, consequent on cancellation or amendment of the permit pursuant to s 87(1) of the Act:

> In any proceeding in VCAT relating to land or any instrument or dealing in respect of land, if VCAT directs the Registrar to make any amendment to the Register or otherwise to do any act or make any recordings necessary to give effect to an order of VCAT, the Registrar must obey that direction.

DP Dwyer construed this provision narrowly in *Ingram v McLennan* [2014] VCAT 113:

- contrary to the applicant's assertion, the provision does not confer any separate or general jurisdiction on VCAT. I note in passing that no provision of the Transfer of Land Act 1958 is allocated to any VCAT List under the VCAT Rules, as that Act is not considered to confer any separate jurisdiction on VCAT. It is simply a facilitating or consequential provision, where jurisdiction is established under another enabling enactment;
- I agree with the second respondent that the provision does not purport to undermine the general principles of the indefeasibility of title established under s 42(1) of the Transfer of Land Act 1958; and
- having regard to the legislative history of the provision, s 103(1AA) was originally inserted into the Act when the jurisdiction for co-ownership disputes was transferred from the courts to VCAT in 2005. The provision was expanded in 2009 in line with other specific land legislation amendments, but the explanatory memorandum implicitly confirms that it is a facilitating or consequential provision to give effect to an order arising in a matter where VCAT has jurisdiction. Examples of this may arise for co-ownership disputes under Part IV of the Property Law Act 1958 within VCAT's Real Property List, changes to common property arrangements in VCAT's (where authorised) in the Owners Corporation List, or perhaps a direction to register an Agreement under s 173 of the Planning and Environment Act 1987 in VCAT's Planning and Environment List.

162. These principles were applied in *Craig v Banyule CC* [2025] VCAT 829.[107]

Section 84 of the *Property Law Act 1958*

163. Where opposition from one or more beneficiaries is considered likely, an application may be made to remove or modify the restrictive covenant pursuant to section 84(1) of the *Property Law Act 1958* (Vic):

> **84 Power for Court to modify etc. restrictive covenants affecting land**
>
> (1) The Court shall have power from time to time on the application of any person interested in any land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) upon being satisfied—
>
> (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Court deems material the restriction ought to be deemed obsolete or that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user; or

[107] At paragraphs [84] to [87]

(b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee-simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed have agreed either expressly or by implication by their acts or omissions to the same being discharged or modified; or

(c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction:

Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification nor shall any compensation be payable in excess of such loss; but this provision shall not affect any right to compensation where the person claiming the compensation proves that by reason of the imposition of the restriction the amount of consideration paid for the acquisition of the land was reduced.

164. Section 84(1) is structured as a series of threshold tests to be satisfied before the court's discretion to exercise its power is enlivened.

165. A procedural requirement for a declaration as to notice can be found at Rule 52.09, *Supreme Court (General Civil Procedure) Rules* 2015 (Vic):

52.09 Restrictive covenant

(1) This Rule applies where on an application under section 84 of the *Property Law Act* 1958 an order is made under subsection (3) of that section directing the plaintiff to make inquiries or give notices.

(2) Whether the plaintiff has made inquiries and given notices in accordance with the order and what the results of the inquiries are shall be determined by an Associate Judge after inquiry.

(3) The Associate Judge shall by order declare what the Associate Judge has determined under paragraph (2) and the application shall not proceed until the order is made.

166. The jurisdiction of the Associate Justices to exercises powers pursuant to section 84 are set out in Order 77 of the *Supreme Court (General Civil Procedure) Rules 2015*:

Order 77—Authority of Associate Judges

77.01 Authority

(1) Subject to this Order, an Associate Judge, in addition to exercising the powers and authorities conferred by any other provision of these Rules, may, in any proceeding to which these Rules apply, give any judgment or make any order, including any judgment or order in the exercise of the inherent jurisdiction of the Court.

(2) Subject to this Order, an Associate Judge, in addition to exercising the powers and authorities conferred by any other provision of these Rules, may hear and determine—

(a) any application and exercise any powers and authorities under the following statutory provisions—…

(vii) section 84 of the *Property Law Act 1958* and Part IV of that Act;

The origins of section 84 of the Property Law Act 1958

167. A useful explanation of the history of section 84 of the *Property Law Act 1598* can be found in *Stanhill v Jackson* [2005] VSC 169.

168. In this case, Morris J carried out a thorough analysis of section 84 in an endeavour to discover the underlying purpose of the statute. His Honour's thesis was that the mischief to which the provision was directed was the restriction of the use or development of land by private treaty, often of ancient origin, which inhibited the achievement of reasonable current needs:

> 43 On 11 December 1918, by Act No 2962, the Victorian Parliament passed a law relating to property. Section 10 of that Act is in remarkably similar terms to section 84 of the *Property Law Act* 1958 and is its original ancestor. In its original form it did not include what is now section 84(1)(c); nor did it then include provisions in relation to the payment of compensation. [The predecessor to section 84(1)(c) and the provisions concerning the payment of compensation were added in 1928.]
>
> 44 In moving the Second Reading of the Bill in the Legislative Assembly Mr Mackey MLA said:
>
> > "This Bill, which relates exclusively to the law of real property, is a Bill that was drafted in England, and brought in in the Imperial Parliament in pursuance of the recommendations of a very important Royal Commission appointed to inquire into the state of our real property law. That Royal Commission consisted of the most eminent equity and conveyancing men in the Old Country, including Lord Buckmaster, the late Chancellor of England."[108]
>
> 45 Between 1908 and 1911 a Royal Commission in England on the Land Transfer Acts had recommended that restrictive covenants affecting registered land be registered by reference to the instrument creating them, and, as part of this reform, that the High Court be empowered to discharge or modify obsolete restrictive covenants affecting land, whether they be registered or unregistered.[109] An initial draft of what is now our section 84 appears to have been penned by Sir Benjamin Cherry and introduced into the United Kingdom

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108 Hansard, 6 September 1917, page 1391.

109 See the discussion in Fourth Report of the Acquisition and Valuation of Land Committee on the transfer of Land in England and Wales, Cmd 424, 1919, ("the Scott Committee"), page 41.

parliament by Lord Haldene in 1913, but then shelved on account of the war.[110] In 1919, in the Fourth Report of the Acquisition and Valuation of Land Committee on the Transfer of Land in England and Wales ("the Scott Committee"), more widespread reforms were recommended. The Scott Committee reported:

> "We have considered the best method of dealing with restrictive covenants which continue to bind land after they have become obsolete. As we stated in our Second Report (para.22), 'this question is one of considerable importance, as a large amount of land is bound by restrictive covenants. In many cases such covenants were originally imposed for the protection of vendors who have long since ceased to have any interest in enforcing such covenants, and in other cases land is bound by covenants which were originally designed to ensure that the neighbourhood should continue to enjoy a residential or other special character, and such covenants continue to be in force long after the neighbourhood has ceased to enjoy the special character, to preserve which the covenants were imposed. In some such cases the covenants are, no doubt, ignored, but in others the owners of the land which is subject to such restriction are in doubt as to their position, and are debarred from making the fullest use of their property, or are compelled to purchase the release of the covenants.'
>
> "It is, in our view, very desirable that there should be a power vested in an appropriate authority, on the application of any person interested in any land affected by any restriction arising under covenant or otherwise, by order to discharge or modify any such restriction, on being satisfied that the restriction ought to be deemed obsolete, or that its continued existence would impede the reasonable user of the land for public or private purposes, or that the persons of full age and capacity entitled to the benefit of the restriction have agreed expressly or impliedly to the restriction being discharged or modified, subject to payment of compensation to the persons entitled to the benefit of such restrictions, if such persons are, in fact, damaged by the discharge or modification of such restrictions.
>
> "There are some grounds for thinking, as was recommended by the Royal Commission on the Land Transfer Acts, that the authority to exercise such a power should be the Court. But, in our opinion, questions of policy rather than of law would often be involved in the consideration of such a proposal, and for this reason we do not regard a court as the most suitable authority. It is not for judges either to make new contracts for parties, or to invent new rules of public policy.
>
> "In paragraph 22 of our Second Report above quoted, we advised that the modification or extinction of restrictive covenants should be entrusted to the Sanctioning Authority recommended in our First Report. To that advice we still adhere, and trust that steps may be taken

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110 See Patrick Polden, "Private Estate Planning and the Public Interest", 49 Modern Law Review 195, March 1986, at 196.

> to set up the Sanctioning Authority there recommended. But, in the meantime, we think that jurisdiction to extinguish or modify restrictive covenants, and to assess compensation (if any) in connection therewith should be entrusted to the official arbitrators appointed under the *Acquisition of Land (Assessment of Compensation) Act*, 1919. This recommendation is embodied in Section 86 or Mr Cherry's Law of Property Bill."[111]

46 It was not until 1925 that the law in England was changed to give effect to the recommendation of the Royal Commission and the Scott Committee concerning restrictive covenants.[112] The power was not vested in a court but in an authority outside the court system, but without prejudice to any concurrent jurisdiction of the Court.[113] The drafting of the section included the ability to discharge or modify a restriction subject to the payment of compensation.

47 No doubt by reason of the form of section 84 of the English *Law of Property Act* 1925 the Victorian Act was amended in 1928 to introduce the power to discharge or modify a restriction subject to the payment of compensation and, also, by introducing the provision which is now section 84(1)(c).[114]

48 As Jude Wallace has observed[115], the processes of reform of land law in England are uniquely relevant to Victoria. English historian, Patrick Polden, has explained that section 84 of the English Act was always intended to provide a practical remedy to discharge or remove "live" restrictions.[116] He explains that the Scott Committee was seeking to develop a method of dealing with the legal straitjackets that often constrained land use and prevented a flexible response to changes in society or the economic function of a particular locality. The inclusion of a provision to compensate – and the vesting of the power in a body other than a court – emphasised that the exercise of the power necessarily involved town planning and compensation questions.

49 Polden analysed the approach taken by arbitrators hearing applications for the discharge or modification of covenants prior to the judgment of Farwell J in *Henderson* in 1940. He observed that arbitrators adopted a robust approach, largely discounting legal niceties, and routinely modified covenants subject to the payment of compensation. According the Polden, the hearings tended to

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111 *Scott Committee*, at pages 7 and 8.

112 See section 84, *Law of Property Act* 1925 (UK).

113 The expression "the Authority" where used in the *Law of Property Act* 1925 meant one or more of the Official Arbitrators appointed for the purposes of the *Acquisition of Land (Assessment of Compensation) Act* 1919 as may be selected by the Reference Committee under that Act: see section 84(10) of the *Law of Property Act* 1925.

114 In the explanatory paper to the Victorian Statutes 1929 it is stated that the English legislation relating to property has to a limited extent been embodied in the consolidation of Acts. In relation to section 84 the paper explains that this is based upon section 10 of the Victorian *Real Property Act* 1918, with "some useful additions and variations, the desirability of which seems clear, and which are in accordance with section 84 of the English Act". (See page lxxxiv.)

115 Jude Wallace, "Property Law Reform in Victoria", (1987) 61 ALJ 174.

116 Patrick Polden, "Private Estate Planning and the Public Interest", 49 *Modern Law Review* 195, March 1986.

resemble a planning enquiry rather than a conventional lawsuit, with the arbitrator taking a very active part in the proceeding. Many of the applications involved the construction of flats. The attitude taken by the arbitrators is illustrated by the statistics that only 7% of applications resulted in the *discharge* of the covenant; but only 10% were dismissed outright. The overwhelming number of applications resulted in the modification of the covenant, sometimes subject to the payment of compensation.

50 In 1950 the jurisdiction under the English version of section 84 was transferred to the Lands Tribunal. According to Polden, this led to a decisive shift in the nature of the enquiry, from one having a planning character to a law suit. Further, partly as a result of cases such as *Henderson*, the approach of the tribunal was far more cautious than that of the arbitrators. In 1969 the English law was further modified, including a change to the second limb of paragraph (a) which refers to "some" reasonable user instead of "the" reasonable user. Other changes were made at this time, which have moved the English law away from the Victorian law.

51 This brief historical analysis demonstrates that, at least since 1928, the purpose of section 84 of the Victorian Act has been to empower the court to vary restrictions, subject to the payment of compensation, in broadly defined circumstances, so as to effect the better use and development of land in the *public* interest. The mischief at which the provision was directed was the restriction of the use or development of land by private treaty, often of ancient origin, which inhibited the achievement of reasonable current needs. Hence this history does not support a narrow construction of the empowering provisions in section 84; rather it is consistent with the grammatical meaning I have set out above.

169. His Honour concluded by finding that section 84 was intended to address circumstances where the use or development of land is restricted in a manner contrary to the public interest:

52 In carefully defined circumstances, the court is given power to discharge or modify a private restriction in order to serve this public interest. So understood, it is difficult to justify a narrow interpretation of the various circumstances which would enliven the power of the court to make an order discharging or modifying a restriction. On the contrary, the ordinary grammatical meaning of section 84(1), set out above, is reinforced by reference to the policy basis of the section.

170. Justice Morris' attempt to return the Court's focus back to the words of the statute was met with reproach in some quarters, with Young J writing in the Australian Law Journal that although the actual result of the case appears appropriate:

> … single judges who approach cases on the basis that the majority of previous decision of the same wording over the past 60 years are misguided, seldom do the public a service. This is because so many precedents have been created, documents drafted, and advice given on the basis of what appeared to be universally accepted propositions,

> that disturbance other than by the High Court (and perhaps intermediate appellate courts) is usually to be avoided.[117]

171. But as each year passes, Morris J's analysis appears increasingly prescient, with section 84 now being functionally reduced to a test of "substantial injury" with minimal statutory guidance for the exercise of judicial discretion.

172. Compensation for restrictive covenant modifications is rarely, if ever, paid except in negotiated settlements and, as will be explained below, sections 84(1)(a) and 84(1)(b) have atrophied and are no longer of practical application.

173. Meanwhile single dwelling restrictive covenants continue to fetter land that is otherwise earmarked for a higher and better use such as land zoned Residential Growth along the Principal Public Transport Network.

Standing to commence section 84 proceedings

174. The *Supreme Court (General Civil Procedure) Rules 2015* (Vic) do not expressly establish a general standing to make an application to the Supreme Court of Victoria.

175. Rather, the proper parties to a proceeding are to be determined by the substantive law:

> In order to facilitate the final resolution of a dispute, the court should have before it all parties whose presence is proper and necessary to enable the court to adjudicate effectually and completely on all matters in the dispute. The proper parties to a proceeding are to be determined by the substantive law.[118]

176. Accordingly, the substantive law concerning restrictive covenants is contained in the *Property Law Act 1958*. Section 84(1) of the *Property Law Act* 1958 provides that the court shall have the power to make orders in respect of applications made by 'any persons interested in any land':

> **84 Power for Court to modify etc. restrictive covenants affecting land**
>
> (1) The Court shall have power from time to time on the application of any person interested in any land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon by order wholly or partially to discharge or modify any such restriction.

177. Section 84(2) of the *Property Law Act* 1958 provides that the Court shall have declaratory powers in respect of an application made by 'any person interested':

> **84 Power for Court to modify etc. restrictive covenants affecting land**
>
> (2) The Court shall have power on the application of any person interested—

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117 (2007) 81 ALJ 68.

118 Claudio Bozzi. '*Principles of Civil Procedure in Victoria* (Thomson Lawbook Company, 3rd ed, 2023) at [6.10]

(a) to declare whether or not in any particular case any land is affected by a restriction imposed by any instrument; or

(b) to declare what upon the true construction of any instrument purporting to impose a restriction is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom.

178. In *Jeshing Property Management Pty Ltd & Anor v Yang & Ors* [2022] VSC 306, Matthews AsJ (as she then was) summarised the standing contemplated by these tests. Notably, her Honour presumed that 'persons interested' in Section 84(2) refers to a person with interest in the land or in the proceedings:

> 49 Section 84(1) of the PLA provides that the Court shall have power 'on the application of any person interested in any land' to make orders in respect of covenants over that land. Section 84(2) similarly conditions the Court's declaratory power on an application 'of any persons interested', presumably referring to an interest in the land or in the proceeding (ie. the applicant or a beneficiary to the covenant joined as a defendant to the proceeding). Therefore, to establish standing to make an application seeking:
>
> a) discharge or modification of a restrictive covenant; and/or
>
> b) a declaration in relation to the true construction or land affected by the restrictive covenant; and/or
>
> c) a declaration in relation to the land affected by the restrictive covenant
>
> it must be shown that the person has an interest in any land affected by the restrictive covenant or the proceedings concerning the restrictive covenant.

179. As a matter of statute, a registered mortgage is an interest in land. Section 74 of the *Transfer of Land Act 1958* (Vic) relevantly provides:

> **74 Creation and nature of mortgages and charges**
>
> (2) Any such mortgage or charge shall when registered have effect as a security and be an interest in land, but shall not operate as a transfer of the land thereby mortgaged or charged.

180. As such, a person with a mortgage over land which is affected by a restricted covenant would be a person interested under section 84 of the *Property Law Act* 1958.

181. Separately, there is authority to suggest that an option to purchase is an interest in land. Thus, a person with an option to purchase land that is affected by a restrictive covenant will be a 'person interested' under section 84 of the Property Law Act. *Commissioner of Taxes v Camphin*[119] concerned a taxpayer who had entered into an agreement which granted a company, Wintergarden Theatre Ltd, an option to purchase the residue of a lease and some shares. The issue arose in the proceedings, for taxation purposes, as to the true nature of an option and whether it is an interest in

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[119] (1937) Q.S.R. 126.

land. The majority treated an option is an equitable interest in property. Blair CJ reasoned:

> In *London and South Western Railway Company v Gomm* ([1881] 20 Ch.D. 562 at p. 581) Jessel M.R. said: "A person exercising an option has to do two things: he has to give notice of his intention to *purchase* and to pay the purchase money, but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent and the right to take it away being vested in another the covenant giving the option must give that other an interest in the land" CF. pp. 586 and 588
>
> It is apparently, therefore, sound law that once an option has been created, the option itself is an interest in property.[120]

182. Hart J also concluded that an option is a sale of an interest in land despite not being a sale of the land itself:

> An option creates an interest in land. It creates an estate less than a freehold. That estate is situate in Queensland. There was no sale of the land itself, but the sale of an interest in the land. *London and South Western Railway Co. v . Gomm* 1881] 20 Ch.D. 562 at p. 580, 586, 588). The grant of an option creates an interest in land.

183. Thus, an option to purchase is an equitable interest in land in the sense that it is a right to acquire property that is specifically enforceable. In this way, a person with an option to purchase land burdened by a restrictive covenant is a person with a sufficient interest in land to bring an application pursuant to section 84 of the *Property Law Act* 1958.

184. Often, the Court is satisfied with express permission from the registered proprietor, but it is by no means certain that permission in and of itself is a sufficient basis to establish standing to bring an application pursuant to section 84(1) of the *Property Law Act 1958*. Clearly, the test is broader for applications pursuant to section 84(2) presumably to accommodate the interests of beneficiaries rather than registered proprietors.

Section 84(1)(a) of the Property Law Act 1958

185. The principles that apply to an application under s 84(1)(a) were set out by Kyrou J, as he then was, in *Vrakas v Registrar of Titles*:[121]

> 24 84(1)(a) has two limbs. In essence, the first limb is that, due to changes in the character of the property or neighbourhood or other circumstances, the covenant is obsolete, and the second limb is that the covenant's continued existence would impede the reasonable user of the land without practical

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120 *Commissioner of Taxes v Camphin* (1937) Q.S.R. 126, 133.

121 *Vrakas v Registrar of Titles* [2008] VSC 281, [24-25].

benefits to other persons.[122] An applicant need only establish one of these limbs in order to have a right to a remedy under s 84(1)(a), subject to the court's residual discretion (see below).

25 In relation to the first limb of s 84(1)(a), what is the "neighbourhood" must be determined as at the date of the hearing, rather than the date of the covenant.[123] What is the "neighbourhood" is a question of fact.[124]

26 A covenant is "obsolete" if it can no longer achieve or fulfil any of its original objects or purposes or has become "futile or useless".[125] A covenant is not obsolete if it is still capable of fulfilling any of its original purposes, even if only to a diminished extent.[126] The test is whether, as a result of changes in the character of the property or the neighbourhood, or other material circumstances, the restriction is no longer enforceable or has become of no value.[127] If a covenant continues to have any value for the persons entitled to the benefit of it, then it will rarely, if ever, be obsolete.[128] A covenant could be held to be not obsolete even if the purpose for which it was designed had become wholly obsolete, provided that it conferred a continuing benefit on persons by maintaining a restriction on the user of land.[129]

27 Strictly speaking, the inquiry is as to whether the restriction of user created by the covenant is obsolete, rather than as to whether the covenant itself is obsolete.[130]

28 In relation to the second limb of s 84(1)(a), to establish that a covenant would impede the reasonable user of the land, it must be shown that "the continuance of the unmodified covenants hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the covenants".[131] Whether this is so is essentially a question of fact.[132]

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122 Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 7; *Re Alexandra* [1979] VR 55, 57-8; *Greenwood v Burrows* (1992) V ConvR 54–444, 65 192 ("*Greenwood*").

123 *Re Miscamble's application* [1965] VR 596, 597, 601 ("*Miscamble*"); *Re Pivotel Pty Ltd* (2001) V ConvR 54-635; [2000] VSC 264, [29] ("*Pivotel*").

124 *Miscamble* [1965] VR 596, 602; *Greenwood* (1992) V ConvR ¶54-444, 65 196.

125 *Miscamble* [1965] VR 596, 597, 601; *Re Markin* [1966] VR 494, 496; *Re Robinson* [1971] VR 278, 281; *Greenwood* (1992) V ConvR 54-444, 65 196 - 65 197; *Pivotel* (2001) V ConvR 54-635; [2000] VSC 264, [31]-[33].

126 *Miscamble* [1965] VR 596, 597; *Greenwood* (1992) V ConvR 54-444, 65 197.

127 *Greenwood* (1992) V ConvR 54-444, 65 196. See also *Miscamble* [1965] VR 596, 601.

128 *Re Robinson* [1971] VR 278, 282; *Greenwood* (1992) V ConvR 54-444, 65 197.

129 *Greenwood* (1992) V ConvR 54-444, 65 197 - 65 198.

130 *Greenwood* (1992) V ConvR 54-444, 65 194.

131 *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 8; *Re Alexandra* [1979] VR 55, 58; *Pivotel* (2001) V ConvR 54-635; [2000] VSC 264, [34]; *Bevilacqua v Merakovsky* [2005] ANZ ConvR 504; [2005] VSC 235, [23] ("*Bevilacqua*").

132 *Re Alexandra* [1979] VR 55, 58.

29 It is not sufficient merely to show that the continued existence of the covenant would impede a particular reasonable use which is proposed by the applicant.[133] The applicant must show that the restriction will impede all reasonable uses.[134]

30 "Practical benefits" within the meaning of the second limb of s 84(1)(a) are any real benefits to a person entitled to the benefit of a restrictive covenant and are not limited to the sale value of the land benefited by the covenant.[135]

31 It must be established that the covenant is not necessary for any reasonable purpose of the person who is enjoying the benefit of it.[136]

32 If a relaxation of the restriction imposed by a covenant would be likely to lead to further applications of a similar nature, resulting in a detrimental change to a whole area, this "precedential" effect may be relevant in determining whether the restriction secures any practical benefits.[137]

33 Whether there are any practical benefits to other persons is a question of fact.[138]

186. In contemporary legal practice, applications to remove or modify a restrictive covenant in studied reliance on section 84(1)(a) of the *Property Law Act* 1958 are rare:

a) it is already sufficiently difficult for an applicant to establish that a covenant is incapable of fulfilling any of its *original purposes*. It is close to impossible to prove that a covenant has no residual *ancillary* value where an application to remove or modify a covenant is actively opposed by a beneficiary;

b) there are few, if any, instances in which an application to modify a restrictive covenant pursuant to section 84(1)(a) of the *Property Law Act 1958* might succeed, where an application pursuant to section 84(1)(c) would not. If this is correct, and section 84(1)(a) no longer has any work to do, Morris J might well have been correct that the original intention of section 84 has been lost over time:

> 25 … Covenants have been modified, in contested circumstances, in a number of cases.[139] But the general approach to the section has been to place a substantial onus upon an applicant to demonstrate that the power is enlivened. Indeed, as the years have passed, there may have

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133 *Miscamble* [1965] VR 596, 602-3.

134 See the cases referred to in *Stanhill Pty Ltd v Jackson* (2005) 12 VR 224, 233 [17] fn 15 ("*Stanhill*").

135 *Re Robinson* [1971] VR 278, 283; *Pivotel* (2001) V ConvR 54-635; [2000] VSC 264, [36].

136 *Re Alexandra* [1979] VR 55, 59; *Pivotel* (2001) V ConvR 54-635; [2000] VSC 264, [35]; *Bevilacqua* [2005] ANZ ConvR 504; [2005] VSC 235, [23].

137 *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 9-10.

138 *Re Alexandra* [1979] VR 55, 59.

139 See, for example, *Re Shelford Church of England Girls' Grammar School*, per Lush J, Supreme Court of Victoria, 6 June 1967; *Re Alexandra* [1980] VR 55 per Menhennitt J; and *Longo Investments Pty Ltd* [2003] VSC 37 per Osborn J.

> been a tendency to look for guidance, not so much to the words of section 84, but to the words used by judges over the years in explaining the meaning of the words used in section 84. One must question this practice.[140]

187. In *City of Stonnington v Wallish & Ors*[141], Ierodiaconou AsJ was prepared to accept that planning controls and changed factual circumstances meant that quarrying was no longer likely in the suburb of Chadstone. Had Her Honour been required to do so, she would have found the excavation covenants on the land obsolete, but consistent with the above analysis, her Honour had already found that the application had been made out under section 84(1)(c):

> 121 As I have found that the covenants should be discharged under s 84(1)(c), it is strictly unnecessary to consider the plaintiffs' application for discharge under s 84(1)(a). However, if it were necessary to do so, I would have found that the covenants, as construed, are obsolete.
>
> 122 The covenants impose a restriction on quarrying on the subject land. I have accepted that development of the surrounding land and planning controls mean that the subject land could not be realistically used as a quarry, even if it were commercially viable to do so. I would therefore find that due to the evolution of the character of the subject land and the neighbourhood, as well as the effluxion of time, the covenant is now obsolete.
>
> 123 The defendants made submissions in relation to the issue of obsolescence related to ancillary benefits said to arise from the covenant such as maintenance of the parkland and the character of the neighbourhood. It was suggested that such ancillary benefits provided a continuing benefit on persons by maintaining a restriction on the users of land notwithstanding that the purpose for which the covenant was designed – the prevention of quarrying – may have become wholly obsolete.
>
> 124 However, I do not accept the defendants' submissions that the covenants, properly construed, provide them with ancillary benefits such as the maintenance of the existing parkland and the character of the neighbourhood. While an intention of the imposition of covenants preventing quarrying on the land was to ensure good amenity for the neighbourhood, the covenants do not ensure the continued existence of the Percy Treyvaud Memorial Park in its present form. Instead, the covenants prohibit quarrying. Such use of the land would be antithetical to the creation and maintenance of a residential neighbourhood with good amenity. The covenants do not operate to prevent construction or development of the subject land. Indeed, construction and excavation has previously occurred on the land to create facilities for the bowling and tennis clubs.
>
> 125 As it is no longer realistic for quarrying to occur on the land, the covenants are now obsolete.

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140 *Stanhill Pty Ltd v Jackson* [2005] VSC 169, [25].

141 *City of Stonnington v Wallish & Ors* [2021] VSC 84.

188. Arguably, the principle reason why section 84(1)(a) no longer has much (if any) work to do, is the finding in *Greenwood* that a covenant may not be deemed obsolete if it retains *any* value as a restriction, even if that restriction is unrelated to the covenant's original purpose:

> A covenant could be held to be not obsolete even if the purpose for which it was designed had become wholly obsolete, provided that it conferred a continuing benefit on persons by maintaining a restriction on the user of land.[142]

189. With respect to the learned judge, it is difficult to see how this can be correct. If the test of obsolescence in section 84(1)(a) of the Act was confined to the *intended* purpose of the covenant, and not some *ancillary* purpose that later arises, section 84(1)(a) might again be put to some use. Under the *Greenwood* principle above, it is difficult to envisage a case in which section 84(1)(a) genuinely has some work to do for in every case a restriction might have some enduring, ancillary benefit to an objector.

Section 84(1)(b) of the Property Law Act 1958 – where there is unanimous consent

190. Section 84(1)(b) of the *Property Law Act 1958* provides:

> (1) The Court shall have power from time to time on the application of any person interested in any land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) upon being satisfied –
>
> …
>
> (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee-simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed have agreed either expressly or by implication by their acts or omissions to the same being discharged or modified; or

191. The Court may be prepared to order the modification of a covenant under this section without notice to beneficiaries, provided it can be made clear that the beneficiaries have provided consent. In *Re: 17 Hope Street Pty Ltd* S ECI 2023 3678 the Court noted in other matters:

> H. The evidence demonstrates that all beneficiaries consent to the Covenant being removed as an encumbrance over the Land. See the Mutual Deed of Release dated 1 September 2023 contained in Exhibit 'JDC-2' to the second Christodoulakis affidavit.
>
> I. The evidence further discloses that each beneficiary was informed that the plaintiff would bring this proceeding, and that they each informed the plaintiff's solicitor that no further notice in the matter was sought. Accordingly,

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142 *Greenwood* (1992) V ConvR 54-444, 65 197 - 65 198.

the Court is satisfied that there is no utility in giving further notice of the application to beneficiaries before the determination of the application.

J. The Court is satisfied that all persons having the benefit of the Covenant expressly consented to its removal from the Register, and by necessary implication to the Covenant being discharged by this Court.

192. The Court is typically happy to exercise its power without the need for an expert report in these circumstances:

K. The Court considered whether expert evidence was required from a town planner. However, given the lots benefiting from the Covenant are evident on the Covenant itself, and the beneficiaries consent to the application, expert evidence is not required to determine this application.

193. This makes an application under section 84(1)(b) one the fastest and most cost-effective means of modifying a restrictive covenant, but careful attention should be given to:

a) the identification of beneficiaries; and

b) the evidence in support of the application.

194. While this power might also be available pursuant to section 88(1C) of the *Transfer of Land Act 1958* that provides:

(1C) A recording on a folio of a restrictive covenant that was created in any way other than by a plan under the *Subdivision Act 1988* may be amended or deleted by the Registrar under this section if the restrictive covenant is varied or released by—

(a) the agreement of all of the registered proprietors of the land affected by the covenant; …

the Registrar will typically refuse to consent to the removal of a restriction if there is any suggestion of a building scheme or indeed if there is a need to apply the rule in *Xu v Natarelli* discussed elsewhere in these notes.

195. Unhappily, this may mean a delay of some months from the Titles Office, before an application is eventually refused. In contrast, resolution can typically be achieved within four from the time of lodgement given that final orders will typically be made at the first return. Material in support of the application might be expected to include, an originating motion, an affidavit from a solicitor setting out the details of the titles and covenants involved and evidence of agreement in the form of a deed.

Section 84(1)(b) of the Property Law Act 1958 – where there is acquiescence

196. There are few cases in which section 84(1)(b) has been judicially considered in Victoria. However, the Victorian provision appears to be in similar, if not identical terms to section 84(1)(b) of the *Law of Property Act 1925* (UK). Section 84(1)(b) of the *Law of Property Act* states:

> (1) The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied—…
>
> (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified;

197. A mere failure to object might not be conduct that establishes a ground under s84(1)(b), see *Re Pivotel*, unless the covenant is for the express benefit of those didn't object. See *Re Cornick's Application (1994) 68 P. & C.R. 372*:

> On the first of those three issues the President concluded (at p.381) that because the covenants were imposed expressly and only for the benefit of Mr Mann and his wife as owners of the adjoining land, and they did not object to the modification sought, ground (b) was made out.

198. Section 84(1)(b) might also be invoked where there is an established breach of a covenant, and evidence of laches or delay on the part of beneficiaries to remedy the breach. Here, the breach might be used to support or supplement an application under section 84(1)(c) as a failure to enforce a breach of a covenant might be used to suggest an absence of injury, in particular, when the breach dates back many years.

199. Where a restrictive covenant or easement is not enforced by the persons benefited by it, any subsequent action to enforce the covenant or easement may be barred by delay or acquiescence. Bradbrook and Neave state it as follows:

> However, a person who wishes to develop the burdened land contrary to the terms of the covenant or easement may not wish to risk the possibility that a plea of laches or acquiescence will fail if proceedings to enforce the covenant or easement are subsequently brought against him or her. In such circumstances he or she may attempt to have the covenant or easement modified or extinguished on the basis that the persons benefited by the covenant or easement have, by their acts or omissions, waived the benefit of the restriction, or, in Victoria and Tasmania, have agreed by implication to its extinguishment or modification.[143]

200. In *Re Clearwater Properties Ltd* [2013] UKUT 0210, the President of the Upper Tribunal (Lands Chamber) Lindblom P said:

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143 *Bradbrook and Neave's Easements and Restrictive Covenants*, 3rd ed., LexisNexis, [19.126].

a) there must be clear evidence of consent to the specific outcome for which the applicant contends for a covenant to be discharged or modified under section 84(1)(b):

> 35. If a covenant is to be discharged or modified under subsection (1)(b) there must be clear evidence of consent to the specific outcome for which the applicant contends.

b) the inclusion of "implication" and "omissions" in section 84(1)(b) indicate that the paragraph does not require a legally binding contract:

> 36. Preston & Newsom's "Restrictive Covenants Affecting Freehold Land" (ninth edition, 1998) states (at paragraph 12-57):
>
> > …The meaning of the word "agreement" in the context of paragraph (b) has not yet received definitive analysis, but the references to "implication" and "omissions" clearly indicate that the paragraph does not require a legally binding contract. ..."

c) the power under section 84(1)(b) to discharge or modify a restrictive covenant is widely drawn, and the concept of 'agreement' is a broad one:

> 45. The Tribunal's power to discharge or modify a restrictive covenant under section 84(1)(b) is widely drawn. What is required is agreement to the discharge or modification of the restriction by the party or parties for the time being entitled to the benefit of it. The concept of agreement is not statutorily defined. But, as is clear from the provisions of subsection (1)(b), the concept is a broad one. It is not confined to a formal written agreement embodied in a contract or a deed.

d) it may be nothing more than acquiescence:

> 45. …Agreement by word of mouth is possible. Indeed, words need not be used at all. Agreement may come about either in bilateral conduct or in unilateral action, or by default. In some cases it may be no more than acquiescence. The subsection embraces agreement either express or "by implication". Agreement by implication can take the form of either "acts or omissions". This would include a failure to act in such a way as to assert the benefit of a restriction effectively or unequivocally. Agreement may be found in evidence of a restriction being disregarded or left unenforced (see, for example, *Re Child Brothers Ltd's Application*).

e) while all relevant facts must be considered, it is the consent of the beneficiaries to the covenant that must be shown:

> 47. The essential thing in section 84(1)(b) is that those entitled to the benefit of the covenant have clearly demonstrated their consent to the restriction being removed or varied.
>
> 48. To find whether this has been done the Tribunal must examine all the relevant facts.

f) when construing the beneficiaries' conduct, the test is objective:

49. …The test is objective. A case in point is *Re Graham's Application*, where the line was drawn between agreement being imputed to an objector by an applicant and its being fairly inferred from what the objector had actually done. That distinction is apt.

g) the decision maker must be satisfied that agreement has been reached on the particular facts of the case:

50. Section 84(1)(b) requires the Tribunal to be "satisfied" that agreement has been reached. This sets the Tribunal a somewhat different task from judging "changes in the character of the property or the neighbourhood ..." (under subsection (1)(a)), or whether the restriction, if maintained, would "impede some reasonable user of the land for public or private purposes" (under subsections (1)(aa) and (1A) and (1B)), or whether the proposed discharge or modification would "injure the persons entitled to the benefit of the restriction" (under subsection (1)(c)).

51. Every case of this kind will turn on its own particular facts. The decisions cited in the course of argument here show this to be so. In each case the circumstances were different.

201. These principles were applied by the Supreme Court in *Jayasinghe v Perry* [2025] VSC 751 (revised 5 December 2025). In this case Daly AsJ found acquiescence had been established after the Perrys failed to take sufficient action to protect their rights under a height restriction over the Jayasinghe's land. The decision shows:

a) the views from the Perrys' land prior to development at paragraph [14]:

b) the dwelling under construction at paragraph [40]:

and

c) the roof on the Jayasinghe's Land, once complete, at [46]:

202. The Court explained the point at which acquiescence had been established:

> 217 In my view, any belief held by the Jayasinghes that the Perrys did not oppose the construction of the new dwelling in its current form prior to about October 2024 was mistaken and unreasonable. I accept that the Jayasinghes did not understand that they were bound by the height restriction, and genuinely believed that by building a single-storey building in compliance with the plans approved in the planning permit, they were doing nothing wrong. It is odd that they did not convey their understanding to the Perrys, but this regrettable saga has been characterised by an apparent desire on the part of all parties to avoid confrontation. But, especially, after the July meeting, Mr Jayasinghe in particular should have understood that the Perrys had concerns about the height of the new dwelling, and that those concerns had not been resolved. There was, however, no evidence about whether Mrs Perry's communications with the Jayasinghes' contractors after the July meeting were conveyed to the Jayasinghes.
>
> 218 However, as time passed, and the Perrys took no further action to enforce the height restriction, and from August 2024 did not even complain about the breach of the height restriction, nothing occurred to disturb the Jayasinghes' genuine, albeit mistaken belief that the new dwelling complied with all relevant requirements. What was originally an unreasonable belief became, as the months passed, a quite reasonable belief, particularly as the Perrys returned to Melbourne in late September 2024, and were aware of the final form of the new dwelling. At least by this time, it was reasonable for the Jayasinghes to believe that the Perrys' concerns had been 'resolved'.
>
> 219 Accordingly, all of the necessary elements of acquiescence have been made out. By their inaction after July 2024, and certainly from September 2024, the Perrys' conduct conveyed that they agreed to the breach of the height restriction within the meaning of s 84(1)(b) of the Act.

203. In other words, mere delay in the enforcement of rights is not sufficient to found acquiescence. There must be 'conduct by a person, with knowledge of the act of another person, which encourages that other person to believe that his acts are accepted (if past) or not opposed (if contemporaneous)'.[144]

Section 84(1)(c) of the Property Law Act 1958 – absence of substantial injury

204. Under section 84(1)(c) of the Act, the Court may modify or remove a restrictive covenant upon being satisfied that the proposed modification or removal will not cause substantial injury to those entitled to the benefit of the covenant:

> **84 Power for Court to modify etc. restrictive covenants affecting land**
>
> (1) The Court shall have power from time to time on the application of any person interested in any land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon by order wholly or partially to discharge or modify any such restriction (subject or not to the

144 *Jayasinghe v Perry* [2025] VSC 751 (revised 5 December 2025) at [144].

payment by the applicant of compensation to any person suffering loss in consequence of the order) upon being satisfied—…

(c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction …

205. The operation of section 84(1)(c) of the Act was considered by the Court of Appeal in *Sumervale & Sunyhill v Viva Energy:*[145]

a) the scope of the injury is confined by the purpose or intent of the covenant:

46 The critical question that separates the parties is whether the scope of the 'injury' for the purposes of s 84(1)(c) is confined by the purpose or intent of the restrictive covenant. There is a subsidiary question as to the relevant purpose of the restrictive covenant in this case and whether its purpose should be assessed separately for each of the restrictions coming within it.

b) that purpose will generally be possible to discern from the text of the covenant;

49 It will generally be possible to discern from the text of a restrictive covenant its purpose and intent. That is, it will be apparent from the text how the covenant affects the burdened land and the reason why it was imposed will also usually be obvious. Commonly, a restrictive covenant was imposed as an incipient form of planning control to regulate future development with an aim to preserve the use, character or amenity of the benefitted land and its surrounds.[146]

c) this purpose does not change over time but is objectively determined and fixed:

54 It follows that s 84(1) is predicated on the existence of a restrictive covenant on title and that it is necessary to construe the covenant, including if necessary having regard to its purpose, before turning to the operation of s 84(1). Purpose in this sense is objectively determined and fixed. The purpose of the covenant does not change over time with changes in land use or other variables but, as with a contract or deed, represents the objectively ascertained intent of the parties on the making of the covenant.

d) the relevant injury must be related to the use and enjoyment of the affected person's property:

55 Once the relevant restriction is identified, s 84(1)(c) directs attention to whether the proposed modification or removal will 'substantially injure' the persons entitled to the benefit of the restriction. On the literal construction contended for by the applicants, the negative proposition within s 84(1)(c) is satisfied here because the applicants are entitled to the benefit of the Covenants (and each of their clauses) and, if those clauses are discharged from the title, the applicants will be substantially worse off because it would enable a competitor to operate

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145 [2024] VSCA 140

146 See Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, 3rd ed, 2011) 287–8.

from the Land. Indeed, the applicants point to the findings of the judge and the agreed summary in this Court as irrefutably establishing that the discharge of the Covenants would enable another competitor to operate and thereby lower the profits of the applicants' service station business and, as a result, reduce the market value of a lease of that land as well as the market value of the land itself.

56 The word 'injure' and its cognate 'injury' will take their meaning having regard to the context in which they are used. The word 'injure' in its ordinary sense means to cause harm of any kind to or to damage, hurt or impair and is apt to extend to any deleterious consequence sustained. As already noted, an important aspect of the context is that a restrictive covenant touches or concerns land, and its purpose will relate to the use and enjoyment of land. For that reason, the context strongly suggests that the relevant injury must be related to the use and enjoyment of the affected person's property.

57 In perhaps every case, the restrictive covenant will have been imposed to enhance or protect land. It might enhance the amenity of the land by preventing overcrowding of a lot or overlooking onto the benefitted land, or by limiting the use to which the land can be put. Such enhancement may or may not increase the value of the benefitted land in a given case and its removal may not be easily accounted for in monetary terms. The implicit premise, that a covenant will entail a favourable consequence for the remaining land, is reinforced by the notion of the 'benefit of the restriction' which is found in s 84(1)(c).

e) s 84(1)(c) hinges on the existence of a substantial injury and not merely the loss of the benefit of the restriction:

58 It is significant that s 84(1)(c) hinges on the existence of a substantial injury and not merely the loss of the benefit of the restriction. The concept of injury connotes some harm or detriment and its use in the subsection suggests that is not the same thing as the loss of the benefit of the restriction itself. Rather, it is something that arises as a consequence of the loss of the benefit of the covenant. In other words, it would be fallacious reasoning to say that, because the person has the benefit of the covenant and by reason of the modification or discharge the person will lose that benefit, they must thereby suffer an injury. It follows that a person entitled to the benefit of the restriction may lose that benefit yet not sustain an injury. On the other hand, because of the variable nature of the benefit and its relationship to the use of land, being something whose value is not easily measured in money, there is no reason to construe injury as being limited to an economic loss such as the loss of value of the land. A wide variety of tangible and intangible potential injuries are encompassed by the expression 'substantial injury' in s 84(1)(c).[147]

f) the intended benefits that animated the imposition of the covenant in the first place may be immaterial to a later title holder:

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147 *Webster v Bradac* (1993) 5 BPR 12,032, 12,035; *Frasers Lorne Pty Ltd v Joyce Goldsworthy Burke* (2008) 14 BPR 26,131, 26,138 [27]; [2008] NSWSC 743.

59 The distinction between benefit and injury is reinforced by the use of the word 'entitled' in the phrase 'persons entitled to the benefit of the restriction'. The concept of entitlement serves to identify the person who, by reason of title, stands to benefit from the covenant. Satisfying that aspect does not necessarily say anything about the practical benefit of the restriction or whether, at the time of an application under s 84(1)(c), the person enjoys any particular advantage by reason of the subsistence of the restriction. For example, the intended benefits that animated the imposition of the covenant in the first place may be immaterial to a later title holder. That may be so for a variety of reasons, including a change in land use or regulation or a change in use by the title holder.

g) the textual distinction between use and injury calls up an assessment of the practical consequences of the proposed modification:

60 The textual distinction between injury and the loss of the benefit of the restriction also directs attention to the practical consequences that the removal or modification of the restriction might produce. The need for an up-to-date practical inquiry about injury is unsurprising in the context of covenants which run with the land and bind successive title holders, potentially over generations.

h) the logic of the section requires a connection between the covenant and the injury:

61 The concepts of injury and benefit are different but related. The injury with which s 84(1)(c) is concerned is injury that would be caused by removal or modification of the restriction. Since the relevant injury is one that arises as a consequence of the loss of the benefit, the logic of the section requires some connection, justifying the retention of the restriction, between the covenant and the injury.

i) critically, it is necessary to determine the nature of the benefit the restriction was designed to confer, and whether the injury is one that the restriction was intended to protect:

62 In our view, a consequential or causal connection is not enough. A covenant confers a proprietary right to prevent the particular use of the burdened land for the benefit of the title holder of the benefitted land. In looking at whether the person will be harmed by its modification or removal, it is necessary to determine the nature of the benefit the restriction was designed to confer, and whether the injury is one that the restriction was intended to protect. Section 84(1)(c) does not prevent the removal of a restriction where the injury is unrelated to its intended benefit. To construe the section in that way would produce an entirely adventitious benefit and have the effect of extending the covenant to a circumstance that was never in contemplation. It would give an operation or effect that the covenant, properly construed, was not intended to have.

and

j) it is not sufficient to demonstrate the loss of any benefit:

> 63 Moreover, to construe the concept of injury as tantamount to the loss of any benefit still being enjoyed would, in effect, compel the refusal of an application unless the restriction was obsolete. Given the application of s 84(1)(a) in cases of obsolescence, that construction would leave s 84(1)(c) with very little, if any, work to do. This is unlikely to have been intended. It is noteworthy that, in relation to s 84(1)(a), Eames J in *Greenwood* concluded that a covenant will not be obsolete if it produces a practical benefit even if the purpose for which it was designed has become obsolete.[148] It is unnecessary to decide whether that is correct for the purposes of this case. But assuming it is correct, it tends to suggest a very substantial, if not complete, overlap between the circumstances in which paragraphs (a) and (c) would apply, so that the applicants' construction would largely deprive paragraph (c) of any distinct operation.

206. The starting point in a section 84(1)(c) application is to establish the relevant 'comparator' against which to assess the injury occasioned by the proposed modification or removal of a covenant. In *Re Ulman*[149] McGarvie J observed that when it comes to paragraph 84(1)(c):

> The proper approach is to compare what the covenant before modification permits to be done on the land which it binds with what it would permit to be done after modification.[150]

207. In *Vrakas v Registrar of Title*[151] Kyrou J made some statement of general principle in relation to s84(1)(c):

> 34. In relation to s 84(1)(c), the test for whether a discharge or modification of a covenant would "substantially injure" a person entitled to the benefit of the covenant is similar to that in relation to "practical benefits" in the second limb of s 84(1)(a).[152]
>
> 35. Section 84(1)(c) requires a comparison between the benefits initially intended to be conferred and actually conferred by the covenant, and the benefits, if any, which would remain after the covenant has been discharged or modified – if the evidence establishes that the difference between the two (that is, the injury, if any) will not be substantial, the ground in s 84(1)(c) is made out.[153]

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148 *Greenwood* (1992) V ConvR 54–444, 65,197–65,198; *Vrakas* [2008] VSC 281, [26] (Kyrou J).

149 *Re Ulman* (1985) V Conv R 54-178.

150 Ibid at 63,420.

151 [2008] VSC 281

152 *Re Robinson* [1971] VR 278, 284; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 10; *Pivotel* (2001) V ConvR ¶54-635; [2000] VSC 264, [37]; *Bevilacqua* [2005] ANZ ConvR 504; [2005] VSC 235, [24].

153 *Re Cook* [1964] VR 808, 810-11; *Fraser v Di Paolo* [2008] VSC 117, [36] ("*Fraser*").

36. The injury must not be unsubstantial, and must be real and not a fanciful detriment.[154]

37. It is not enough for the applicant merely to prove that there will be no appreciable injury or depreciation in value of the property to which the covenant is annexed.[155]

38. A lack of specific plans makes it more difficult for an applicant to show that there will be no substantial injury to persons entitled to the benefit of a covenant.[156]

39. The prospect that, if the application for the discharge or modification of a covenant were granted, that might be used to support further applications in a similar vein, may be relevant.[157] Such "precedent value" may, in an appropriate case, of itself be a factor demonstrating that an applicant fails to establish the requirements in s 84(1)(c).[158]

40. Whether a person entitled to the benefit of the covenant would be substantially injured within the meaning of s 84(1)(c) is a question of fact.[159]

41. Town planning principles and considerations are not relevant to the Court's consideration of whether an applicant has established a ground under s 84(1).[160]

42. The applicant has the onus of establishing the matters set out in a limb of s 84(1)(a), or in s 84(1)(c), upon which he or she relies.[161] In relation to s 84(1)(c), this means that the applicant must effectively prove a negative.[162]

43. The absence of objectors to the discharge or modification of a covenant will not, in itself, necessarily satisfy the onus of proof.[163]

44. Each case must be decided on its own facts.[164]

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154 *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 10; *Greenwood* (1992) V ConvR ¶54-444, 65 199.

155 *Re Cook* [1964] VR 808, 810.

156 *Stanhill* (2005) 12 VR 224, 246 [69]; *Bevilacqua* [2005] ANZ ConvR 504; [2005] VSC 235, [22].

157 *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 11; *Greenwood* (1992) V ConvR ¶54-444, 65 200; *Fraser* [2008] VSC 117, [49]-[57].

158 *Greenwood* (1992) V ConvR ¶54-444, 65 200.

159 *Re Alexandra* [1979] VR 55, 60.

160 *Re Robinson* [1971] VR 278, 285; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 6; *Greenwood* (1992) V ConvR ¶54-444, 65 198; *Pivotel* (2001) V ConvR ¶54-635; [2000] VSC 264, [50]; *Bevilacqua* [2005] ANZ ConvR 504; [2005] VSC 235, [22].

161 *Re Cook* [1964] VR 808, 809, 812 (in relation to s 84(1)(c)); *Re Markin* [1966] VR 494, 496 (in relation to s 84(1)(a)); *Re Robinson* [1971] VR 278, 281; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 7; *Greenwood* (1992) V ConvR ¶54-444, 65 192; *Pivotel* (2001) V ConvR ¶54-635; [2000] VSC 264, [28].

162 *Re Cook* [1964] VR 808, 812-13; *Greenwood* (1992) V ConvR ¶54-444, 65 199; *Bevilacqua* [2005] ANZ ConvR 504; [2005] VSC 235, [24].

163 *Re Cook* [1964] VR 808, 812.

164 See *Fraser* [2008] VSC 117, [43], [58].

45. Even if the matters set out in a limb of s 84(1)(a), or in s 84(1)(c), are proved by the applicant, the Court has a discretion to refuse the application.[165]

46. Town planning principles and considerations may be relevant to the exercise of the Court's residual discretion.[166] "Precedential" issues similar to those discussed above may also be relevant in the exercise of that discretion.[167]

208. In *Re Forrester* (*Forrester*),[168] the Court accepted planning evidence that the impact of a large single dwelling would be similar to that of two separate dwellings:

> 37 Mr Easton says he considered the nature of any alternate complying use or development which could otherwise be built on the Subject Land. In particular, he considered a large double story replacement dwelling which does not require a planning permit and as such do not involve third party objection rights. Mr Easton opines that a large dwelling could have a potentially greater impact on any nearby Beneficiaries' properties than the Plaintiff's proposal. He further notes that there were several examples of new double and triple storey dwellings within the neighbourhood and the planning scheme in this location does not limit the height or site coverage…
>
> 90 I do not consider the amenity impacts from the proposal to be significant and I accept Mr Easton's opinion and the Plaintiff's submissions in this regard. First, the Covenant does not restrict dwelling height or bulk and open space of the lots. I accept the Plaintiff's submission that the impact of her proposal may be no greater than the dwelling capable of being constructed upon the Subject Land with the Covenant in its present form.

209. This point is routinely misunderstood by objectors.

210. For instance, beneficiaries in *Randell v Uhl* focused on the fact that trees would be lost if the property was developed for two dwellings, despite the loss of many of the same trees if the land was developed for a single dwelling:

> 115 I agree that what lies behind many objections, particularly from the immediate neighbours, Ms Griffith and Ms Whyte, is the fact that there will be a structure on each lot where previously there has been none. That is the position that has obtained for the whole life of the Subdivision and it is understandable that their attitude to the development of the Land is affected by the delight of a vacant lot of land adjacent to their lots.

211. Similarly, in *City of Stonnington v Wallish & Ors* [2021] VSC 84, the beneficiaries complained about the impact of the construction of a new sporting stadium, despite

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165 *Re Cook* [1964] VR 808, 810; *Re Robinson* [1971] VR 278, 285-6; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 7; *Greenwood* (1992) V ConvR ¶54-444, 65 192, 65 200; *Stanhill* (2005) 12 VR 224, 239 [40].

166 *Greenwood* (1992) V ConvR ¶54-444, 65 200 - 65 201; *Bevilacqua* [2005] ANZ ConvR 504; [2005] VSC 235, [22].

167 *Greenwood* (1992) V ConvR ¶54-444, 65 201.

168 [2023] VSC 284.

that if the application to vary the covenant failed, the stadium could still be built, albeit with above ground car parking:

> 101 When considering whether substantial injury would result from modification or discharge of a covenant pursuant to s 84(1)(c) of the Act, the Court assesses what might occur on the burdened land prior to modification or removal and then compares what might occur on the burdened land after modification or removal. In *Prowse v Johnstone*,[169] Cavanough J explained:
>
> > [E]ven though the plaintiff is entitled to ask the court to take into account the "worst" that could be done under the existing covenant, the defendant is also entitled to invite the court to consider the realistic probabilities of the plaintiff actually bringing about the "worst" that could be done under the existing covenant.[170]
>
> 102 The possibility of the proposal being built above ground, for example through fill being brought in, was raised by the plaintiff as an example of what may occur on the subject land prior to modification or removal, if the effect of the covenants was that they prohibited any digging or excavation of earth on the subject land.
>
> 103 Mr Kwasek gave evidence that if the covenants prohibited the proposal, the facilities would probably need to be elevated creating a visual impact of around 11 to 12 metres from Quentin Road, whereas the proposal currently has a visual impact of 7 metres. It was not suggested by the defendants that such a proposal would be unrealistic.

212. In *Jiang v Monaygon Pty Ltd* [2017] VSC 591 Derham AsJ found that the test of injury must be seen through the prism of the Covenant's purpose. In this case his Honour found that a single dwelling covenant was not a de facto height control because the original purpose of the covenant was to control density, not height:

> (c) a restrictive covenant may secure an auxiliary benefit which is not expressly enumerated within the covenant's wording. However, such an auxiliary benefit must fall within the ambit of the original covenant to be considered a benefit under that covenant. However, in R v Paddington and St Marylebone Rent Tribunal, Ex parte Bedrock Investments Ltd, Lord Goddard CJ summarised the standard at which the court must be satisfied to imply a covenant:
>
> > No covenant ought ever to be implied unless there is such a necessary implication that the court can have no doubt what covenant or undertaking they ought to write into the agreement.
>
> (d) this observation is consistent with the Australian authorities on the requirements that must be satisfied before a term will be implied into any kind of contract. The suggested limitation on the height of buildings on the subject land sought to be implied into the covenants burdening

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169 *Prowse* [2012] VSC 4.

170 Ibid [104].

the subject land is neither reasonable, obvious, capable of clear expression or necessary to give the covenants commercial efficacy;

(e) these matters create an insurmountable problem for any argument that the single dwelling covenant at 33 High implies a height restriction, because it is impossible to state with precision at the date the covenant was granted in 1936 exactly what height above natural ground level any single dwelling on the land must not exceed; and

(f) for these reasons, the single dwelling covenant is discrete and separable from any implied height restriction (as are the two quarrying restrictions, explored in more detail below). It operates to secure its own benefits, namely that the original low-density residential character of the neighbourhood is preserved. There is no evidence in all the circumstances to suggest that the covenantors intended to impose any particular height restriction on the subject land.

60 Further, the plaintiff submitted that to construe either of the covenants in this application as having that effect would be to empower a neighbour to impose an additional restriction on the subject land that it did not have as at the date the covenant was granted in 1936. This, in essence, turns the 'no substantial injury' test as interpreted in the decided cases on its head. It would be wrong to construe covenants as intending to confer and in fact conferring at the outset benefits which only arise because of later changes to the use of a neighbouring property with the benefit of the covenant.

61 In my opinion, a comparison of the benefits initially intended to be conferred by the covenant and actually conferred, with the benefits, if any, which would remain after the covenant has been discharged or modified, leads to the conclusion that no height restriction was intended to be conferred, and none is actually conferred, by the single dwelling restriction, and the modification or removal of the covenant will not change that position. It was not seriously contended by Monaygon that any height restriction could be implied into the covenant.

213. The principle was applied in *Viva Energy Refining Pty Ltd v Sumervale Pty Ltd & Anor* (No 2) [2023] VSC 396. In this case Viva Energy applied for the discharge or modification of four restrictive covenants burdening part of the land known as 90 Refinery Road, Corio, Victoria. The covenants were single dwelling covenants and prevented any trade or business being carried out on the land. Viva Energy wished to construct a service station on the Land to dispense hydrogen, gasoline and diesel, and to offer fast charging stations for battery electric vehicles. Unless modified or discharged, the covenants prevented Viva Energy from doing so.

214. The defendants opposed Viva Energy's application for the discharge or modification of the covenants on the basis that the modification or removal of the covenants would cause a substantial injury in the form of loss of sales.

215. On 9 August 2023, the trial judge discharged the covenants from part of the Land after finding that the Court's jurisdiction to exercise the discretion under s 84(1)(c) of the *Property Law Act 1958* was enlivened, no substantial injury would be caused to

beneficiaries if the covenants were discharged or modified, and there was no reason why the Court's discretion should not be exercised to discharge the covenants.

216. In finding for the Plaintiff, Matthews AsJ (as she then was) found that when determining the benefits enjoyed by beneficiaries, the Court had to first determine the purpose of the covenant rather than reading the restriction on a superficial basis:

> 181 The essential difference between the parties as to the approach that the Court should take, when considering whether the Plaintiff has satisfied the requirements of s 84(1)(c) of the PLA, boils down to this: is the Court to look at the Covenants as a whole to discern their purpose, as part of assessing the benefits initially intended to be conferred and actually conferred by the Covenants (the Plaintiff's approach); or does the Court look solely at the restrictions contained in the Covenants themselves to elucidate the benefits (the Defendants' approach)? In effect, the Defendants would have it that the Court should focus on whether the Defendants were intended to be conferred, and were actually conferred, a benefit by the 'no trade or business' restriction on the Land, without reference to the purpose of the Covenants. If so, the question then is whether the removal or modification of the Covenant would substantially injure the Defendants if the benefit did not remain or was adversely affected.
>
> 182 In my view, it is clear that the Plaintiff's approach is to be preferred. It is consistent with the authorities, whereas the Defendants' approach is not. I accept the Plaintiff's submission set out at paragraph 90 above. In *Randell v Uhl*, Derham AsJ clearly assessed substantial injury by reference to the purpose of the covenant. For example, it is not a single dwelling restriction per se which is the benefit, but a low density neighbourhood as a consequence of that restriction which is to be assessed against the proposed modification.

217. Her Honour accepted that on one view, the defendants enjoyed a practical benefit from the 'no trade or business' clause in the covenant, but not in the sense intended by its architects:

> 195 In the circumstances of this case, it may be accepted that the Defendants experience a practical benefit from not having a commercial competitor operating a service station on the Land. Where the Plaintiff has not challenged the Defendants' expert evidence, either by cross-examination or by submission, the evidence from Dr Wainscoat and Mr Murphy must be accepted. Thus, there is no basis for the Court disregarding the economic effects of another competitor on the profits of the United Petroleum Corio service station as set out in the Wainscoat Report), or the effect of lower profits on the value of the United Petroleum Land insofar as the market value of a lease of that land is concerned, such that it would result in a lower market value of the United Petroleum Land (as set out in the Murphy Report).
>
> 196 Importantly, however, this is not a practical benefit intended to be conferred by the Covenants on the beneficiaries of the Covenants. Therefore, it does not assist the Defendants in opposing the Plaintiff's application.

218. The defendants appealed without success, with the Court of Appeal accepting the approach adopted by the trial judge:

> 80 Turning to the Covenants in this case, we agree with the judge that, although the operation of the restrictions in relation to trade or business are clear in their terms, their purpose was to preserve the residential amenity of the area. While it is true that the presence of a shop, or even a service station, may not deny residential character to the locale, that is beside the point. The point is that, read as a whole, the Covenants do not demonstrate an intent to protect any businesses that might operate on the benefitted land. Regulation of commerce or commercial dealing in that way was not a purpose or object of the Covenants.
>
> 81 The applicants submit that, because the effect of the restriction was to prevent trade or business operating from the Land, its purpose must be to restrict those activities. In our opinion, the judge was correct in observing that this merely restates the restriction. Of course, the purpose of a restriction will often be found in its effect. However, that is not always the case. Giving colour to the relevant restriction by reference to each Covenant as a whole, it is impossible to discern an intention or purpose to protect the business or trade conducted on the benefitted land from competition.

219. Perhaps the most dramatic example of the *Re Ulman*[171] principle in operation can be seen in *EAPE Holdings*,[172] an application that succeeded largely because the applicant was otherwise intending to use and develop the land with a rooming house — an as of right land use under the relevant planning scheme, and a use and development of land otherwise consistent with the existing covenant:

> 51 Having regard to the precedential effect of the modification, in combination with the loss of amenity that would be suffered by the benefited owners directly adjacent to the Land, I would have refused the application to increase the number of permitted dwellings had the matter ended there. I could not have been satisfied that there would be no substantial injury to beneficiaries by reason of the modification.
>
> 66 [However]… I consider the alternative proposal of a six bedroom rooming house, with the possibility of a subsequent addition of a further three bedrooms, is a genuine and likely alternative to the preferred addition of two dwellings at the rear of the Land.
>
> 83 [Also] I conclude that the rooming house proposal would be permitted by the restriction in the covenant, without the necessity for modification.

220. Lansdowne AsJ accepted that "worse issues of noise and disturbance may arise from adult and probably unrelated rooming house residents than from the residents of the proposed additional two dwellings."[173]

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171 *Re Ulman* (1985) V Conv R 54-178.

172 *EAPE Holdings* [2019] VSC 242.

173 At [86].

221. Although her Honour was at pains to ensure that the rooming house proposal in that case was genuine, given the suitability of many pre-development dwellings to rooming house use, it is perhaps surprising that reliance on this approach isn't used more often.

The concept of the 'neighbourhood' in section 84(1)(c) applications

222. Defining the 'neighbourhood' for the purposes of s84(1) of the Act is a question of fact, determined at the date to hearing rather than at the date the Covenant was created:[174]

> 25 In relation to the first limb of s 84(1)(a), what is the "neighbourhood" must be determined as at the date of the hearing, rather than the date of the covenant.[175] What is the "neighbourhood" is a question of fact.[176]

223. In *Del Papa v Falting* [2018] VSC 384, Lansdowne AsJ considered that the extent of the benefit conferred by a covenant would ordinarily inform identification of the 'neighbourhood':

> 44 Identifying the 'neighbourhood' in this way may well make sense from a town planning perspective. It is not, however, in my view necessarily the correct approach when determining the 'neighbourhood' for the private property law purposes of the Covenant. A significant consideration for those purposes would ordinarily be the extent of the benefit of the Covenant. …
>
> 61 …The benefit of a covenant is in my view at least an important factor in the determination of the appropriate neighbourhood. If it was not considered an appropriate determinant, it should nevertheless have been addressed and reasons given for discarding it.

224. In *Freilich v Wharton* [2013] VSC 533, Bell J also recognised the significance of the extent of the benefit conferred by a covenant in determining neighbourhood, and also noted other factors that the court may take into consideration, such as the physical conditions, defining boundaries, and character of the housing in the area in question:

> 51 I do not accept the plaintiff's submission that I should apply the narrow concept of neighbourhood which is used in planning cases. Nor do I find that the relevant neighbourhood is to be confined as the defendants' expert said it should be, albeit on a wider basis. In my view, the neighbourhood is constituted by the Coonil Estate, for three related reasons: first, in cases under s 84(1), the court does not apply a preconceived concept of neighbourhood; second, where relevant, the court should have regard to the concept of neighbourhood which is reflected in the benefits conferred by the covenant; and third, a broader concept of neighbourhood is demanded by the evidence in the case.

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174 *Vrakas v Registrar of Titles* [2008] VSC 281.

175 *Re Miscamble's application* [1965] VR 596, 597, 601 ("*Miscamble*"); *Re Pivotel Pty Ltd* (2001) V ConvR 54-635; [2000] VSC 264, [29] ("*Pivotel*").

176 *Miscamble* [1965] VR 596, 602; *Greenwood* (1992) V ConvR ¶54-444, 65 196.

> 52 Depending on the benefits conferred and the injury which might be suffered, in performing this task it may be necessary for the court to identify the nature and extent of the neighbourhood in which the land is situated. This is done by reference to the evidence in the individual case and not by reference to a preconceived notion of neighbourhood. The court is not confined to the narrow concept of neighbourhood which is applied in planning cases. Because cases may vary infinitely, it is not possible and certainly not desirable to be prescriptive about the evidence which may be relevant. But, typically, the court receives evidence of the physical conditions of the area in question, the presence of any defining boundaries, the character of the housing and such other facts and circumstances as may be relevant.

225. Bell J also considered the creation of a network of covenants in the area to be a significant factor in determining the extent of the neighbourhood:

> 55 But this case is about a lot more than physical amenity. As the terms of the covenant reveal and the evidence of the defendants emphasises, the purpose of the restrictions in this covenant is to protect the residential character of the Coonil Estate. That estate has clearly defined historical boundaries which are well known and understood. The intention behind the restriction, and behind like restrictions in other covenants in the network, is ensuring that houses in the estate are to be used solely for residential purposes and not for trade or commence; that most lots are to have only one building, being a house occupied as a home; and that each such house so occupied will contribute to the residential character of the estate by the conduct of the ordinary domestic life of the person or family concerned.

226. That said, the concept of a 'neighbourhood' plays a diminished role in the statutory assessment process made pursuant to section 84(1)(c) of the *Property Law Act 1958*. Unlike section 84(1)(b), the term "neighbourhood" is not expressly included.

227. Rather, the concept is introduced when the Court considers the precedential effect of any proposed modification or any consequential impacts on neighbourhood character.

228. In *Jiang v Monaygon*,[177] Derham AsJ included in his assessment of the relevant neighbourhood, commercial premises on the opposite side of High Street Road—land outside the parent title:

> 21 The general character of the area is now substantially different to that envisaged in 1936. Both Warrigal Road and High Street Road frontages are now major roads.
>
> 22 I find it impossible, having undertaken a view of the subject land and its surrounds, to exclude from the neighbourhood the commercial development on the south side of High Street Road, occupied by a Woolworths store and car park. It is also noteworthy that the commercial developments on the shop sites along Warrigal Road (within the Plan of Subdivision) have an immediate

177 [2017] VSC 591

impact on the subject land. Below is a photograph of the Woolworths store taken from Mr Easton's First Report:

PLANNING REPORT
31 & 33 HIGH STREET ROAD, ASHWOOD
JUNE 2016

Figure 8: Woolworths development located directly opposite the subject land viewed from the subject land

229. There are limited examples of where the Court has been prepared to include land outside the network of covenants to discern the neighbourhood for the purposes of considering a section 84 application, but the decision to do so may have profound implications if surrounding development is starkly different to that in the network itself.

Matters such as building height, bulk, siting, vegetation, windows and setbacks are not relevant

230. In *Randell v Uhl*,[178] Derham AsJ found that matters such as height, bulk, siting and position on the lot, removal of vegetation, orientation of windows and treatment of the front and side setbacks were not relevant in an application to modify a single dwelling covenant:

> 37 Mr Milner also noted that at present a large house could be constructed on former Lot 13 (lot 1 on the title plan of the Land), in compliance with the Lot 13 Covenant, which could be large and imposing on the south eastern neighbour, with outbuildings and garage, that had two crossings to the street. He correctly observes that the Covenants do not regulate aspects of the proposed development that relate to height, bulk, siting and position on the lot, removal of vegetation, orientation of windows and treatment of the front and side setbacks. These matters, so far as they are considered by the witnesses, including Mr Gattini, as being a factor in the issue of substantial injury, are not relevant to this application, although they are of course highly relevant to any planning application.
>
> …

178 [2019] VSC 668

> 124 The assessment of whether the users of the benefitted properties will be substantially injured in their enjoyment of their properties remains one that is determined by whether two dwellings on the Land, one on each lot after equalisation, will have that effect. The exact configuration of the developments is more a matter for the planning process. The bulk (other than the area of the dwelling, meaning the floor area), height, front and side setbacks and site coverage are matters that are not usually appropriate to be delimited by the Covenants. They are not within the original scope or intent of the Covenants in this case. Similarly, the questions of overlooking and overshadowing the neighbours are matters for the planning jurisdiction.

Traffic and parking concerns rarely amount to substantial injury

231. Equally, matters of parking and traffic are not regulated by a single dwelling covenant. As Lansdowne AsJ explained in *Re EAPE Holdings Pty Ltd* [2019] VSC 242:

> 46 Matters of parking and traffic congestion are also not directly regulated by a single dwelling covenant. A single dwelling restriction does not of itself limit the number of occupants, or how many cars they may have. For example, a large family home with multiple young adult children still in residence may mean there are multiple vehicles to house and park.

232. Consistent with this, in *Re Zhang [2018] VSC 721*, Derham AsJ found:

> 28 Any traffic impacts as a result of the approval of the application will not result in any increased burden on the beneficiaries of the covenant. The concept plans for the proposed redevelopment show that it is intended that sufficient off-street parking will be provided to support the demands of the additional dwellings, thereby limiting any potential traffic or parking impacts.

233. In *Re Jonson* [2016] VSC 721 Ierodiaconou AsJ found that the variation of a single dwelling covenant to allow *six dwellings* would not create sufficient traffic congestion to amount to substantial injury:

> 41 Both parties refer to the issue of traffic congestion. There was no evidence to suggest that there would be traffic congestion due to the building of the six units. Further, although it is not a determinative factor, it is observed that the proposed development of the subject land provides for a garage for each of the six units, and a proposed visitor parking space. Traffic issues may be the subject of town planning considerations.

234. More recently, Matthews AsJ reiterated these principles in *Re Forrester*:[179]

> 94 …The Covenant does not contain any restrictions regarding to traffic. As the Plaintiff correctly submits, a single dwelling covenant does not control parking and traffic. Therefore, the Covenant did not intend to and did not actually confer benefits regarding traffic. Even if it did, I find it difficult to see how a variation of a single dwelling covenant to allow two dwellings would create

[179] [2023] VSC 284.

> sufficient traffic congestion to amount to substantial injury, particularly so when the proposed lots are 2000m^2 each and the business involving heavy machinery will cease. It is not as if traffic to the subdivided Subject Land will even need to pass the Objectors' lots, as they are further along the cul de sac. It is the Objectors who need to pass by the Subject Land when travelling to their own properties. In this instance, therefore, an increase in traffic to the Subject Land (even if there is such an increase) is unlikely to have any impact, let alone substantial impact, on the Objectors. Ms King's comment that if the front house is sold and six people move in such that the traffic will increase is not something that is prevented by the Covenant. That is something which could occur regardless of whether the application is granted and a second house built.

The Court has acknowledged that corner sites are more likely to support variation

235. The Supreme Court has previously concluded in *Hermez v Karahan*[180] that an additional dwelling is more likely to lead to an absence of substantial injury where that development is situated on a corner:

> 34 …
>
> (f) as for the issue of whether the removal of the single dwelling restriction will create a precedent, I note that this is the last vacant lot within the neighbourhood, and in any event, the land is a corner block where multi unit development tenders to be less intrusive. …

Impact on property value is of questionable relevance

236. Myers J in *Heaton v Loblay*[181] concluded that where a covenant does not intend to protect the value of a property, any depreciation in property value as a result of the modification or discharge of the covenant should not be relevant:

> … Expert evidence has been tendered on behalf of the defendants to prove that the modification would not depreciate the value of the plaintiff's property. I do not pause to consider that point because loss of value is not necessarily a decisive factor and where, as in this case, the covenant was not exacted to preserve the value of the covenanter's land but for another and different purpose, value is not a factor at all.[182]

237. This position was supported by Gillard J in *Re Cook* [1964] VR 808:

> … It seems to me that in order to succeed under paragraph (c) the applicant cannot establish his case by merely proving that there will be no appreciable injury or depreciation in value of the property to which the covenant is annexed: see Re Parimax (S.A) Pty Ltd [1956] SR (NSW) 130. If it were proved by evidence that the purpose of

---

180 [2012] VSC 443

181 (1960) 60 SR (NSW) 332.

182 *Heaton v Loblay* (1960) 60 SR (NSW) 332 at 336 as per Myers J.

the covenant was not to preserve the value of the property, proof of value may even become irrelevant: see *Heaton v Loblay* (1960) 77 WN (NSW) 140 at 142.[183]

238. In *Koller v Rice* [2011] VSC 346 Dixon J dismissed suggestions of valuation impacts without proper evidence:

> 11 Counsel for the plaintiff, Mr Simon, objected, and I agree, that Mr Rice could not assert a loss from a diminution in value without expert valuation evidence.

Little weight is given to adverse findings by the Tribunal another different statutory processes

239. Applicants should not be too troubled by adverse rulings in relation to similar applications in a different statutory context, for it is relatively commonplace for applicants to turn to the Supreme Court process after mistakenly believing the common or garden *Planning and Environment Act* 1987 process will be quicker and cheaper. In *Zwierlein v Coelho* [2021] VSC 451, AsJ Hetyey explained:

> 15 In or around 2011, the plaintiffs applied to the Baw Baw Shire Council for a planning permit to modify the covenant to allow a three-lot subdivision and construction of three dwellings on the land. The application was refused by the Council and the plaintiffs appealed to the Victorian Civil and Administrative Tribunal ('VCAT'). VCAT ultimately refused the appeal.[184] However, the decision of VCAT is of limited relevance to the present application because it pertained to a different statutory test set out in s 60(2) of the *Planning and Environment Act 1987* (Vic). That provision essentially states that a permit for the variation or removal of a restriction in respect of land must not be granted unless the responsible authority is satisfied that a beneficiary of a covenant 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 as a consequence of the removal or variation of the relevant restriction. There are also differences between the nature of the proposal which was then before VCAT and the proposal the subject of the present application.

240. This is not to say the findings by a Tribunal can never have any relevance to a section 84 application, but the Court is going to want to be convinced on the evidence before it.

Residual discretion

241. It is well established that even if an applicant is successful in proving a ground under section 84, the Court retains a residual discretion to refuse an application. Bradbrook and Neave states:

---

183 *Re Cook* [1964] VR 808 at 810.

184 *Zwierlein v Baw Baw SC* [2011] VCAT 74.

> Even if the applicant can establish one of the grounds in the legislation the court retains a residual discretion to reject the application or to modify the covenant or easement rather than extinguishing it.[185]

242. That said, there are very few instances where an applicant has satisfied the jurisdictional stage and then had their application refused pursuant to the Court's discretion. In *Ridley v Taylor* [1965] 1 WLR 611, Russell LJ said:

a) the timing of an application was irrelevant, as a similar application could be made tomorrow; and

b) the personality of the applicant *or* his past behaviour is not relevant to the exercise of the discretion:

> Finally I come to the question of exercise of discretion, assuming there was jurisdiction. I do not for myself think that the particular situation of the applicant, as having not very long since struck a bargain inconsistent with this particular outcome, is a factor in the exercise of discretion. I do not think that the personality of the applicant or his past behaviour is relevant to the exercise of the discretion. I refer again to the fact that tomorrow an assign may make the same application. I think that the decision (including the exercise of discretion) must be related to the property and its history as such.

243. Consistent with this, in *Jiang v Monaygon* [2017] VSC 591, Derham AsJ said matters the subject of the discretion should logically be different to the matters considered in the establishing the ground itself:

> 77 The authorities to which I have referred indicate that both town planning considerations and the precedential value of the modifications may be taken into account in exercising the discretion to refuse the modifications sought. That of course does not limit the matters that may be taken into account. Like all discretions, it must be exercised by reference to facts and matters relevant to the subject matter at hand.
>
> 78 In this case, the residual discretion falls to be exercised once the plaintiff has discharged the burden of satisfying the court that the modifications sought will not substantially injure those having the benefit of the covenants. In my view, to exercise the residual discretion to refuse the modification there would need to be something identified within the protection afforded by the covenants that moves the Court to exercise the discretion. <u>The matters relied on by Counsel for Monaygon as relevant to the residual discretion are those referred to above as relevant to whether the plaintiff has satisfied the 'no substantial injury' test and the matters referred to in paragraph 76 above</u>.
>
> 79 In my view, it would be unwarranted to conclude that the matters I have rejected as relevant to the determination of the 'no substantial injury' test should be taken into account in exercising the Court's residual discretion to refuse the modifications sought.

---

185 *Bradbrook and Neave's Easements and Restrictive Covenants*, 3rd ed., LexisNexis, [19.62].

Original covenantors can become applicants under section 84

244. The question of whether original covenantors can become applicants under section 84 was considered in *Re Markin; Re Roberts* [1966] VR 494 ***(Re Markin; Roberts)***, in which Gillard J found there is jurisdiction to consider an application to vary a covenant by the original covenantors on the basis that section 84 is not so confined. However, the Court found that it should exercise its discretion in favour of such an application with a degree of caution.

245. Gillard J held that the Court clearly had jurisdiction to modify or discharge covenants, albeit the applicants were the original covenantors, for the following reasons: [186]

a) the emphasis in section 84 is on the restriction, rather than the source of the restriction – which would generally arise from contract;

b) the statutory provision enables 'any person interested in any land affected by any restriction' – including the applicants as the original covenantors;

c) there is no limitation as to when the application may be made, as the section provides that 'the court shall have power from time to time … to discharge or modify any restriction'; and

d) the Court was empowered to order payment of compensation by the applicant to any person suffering loss from the order. This would parallel any remedy the original covenantee may have at common law to recover damages for breach of contract, allowing the Court to deal justly on the application with any covenantee's loss.

246. However, the Court considered it relevant that the applicants were the original covenantors. Given the primary consideration that persons should abide by their contracts, Gillard J said: [187]

> I believe a court should be slow to exercise its discretion in favour of such applicants… It should entertain a strong bias against the original covenantor seeking to modify or discharge a restriction on his title, which was brought about by their own voluntary act in entering into a contract with the covenantee thereon.

247. However, more recently, in *Double Bay Bowling Club v Woollahra* [2020] NSWSC 1861 at [90] Rein J found that just because the applicant was the original covenantor was not a reason to exercise a discretion against extinguishment of a covenant when the conditions for extinguishment had otherwise been established. In this respect, Rein J declined to follow *Re Markin, Re Roberts* on the basis that the statutory provision did not require such a bias.

---

186 *Re Markin; Re Roberts* [1966] VR 494, 497-8.

187 *Re Markin; Re Roberts* [1966] VR 494, 498.

248. Arguably, the reasoning of Rein J in *Double Bay Bowling Club* is more in accordance with the statutory provision than the decision in *Re Markin, Re Roberts*.

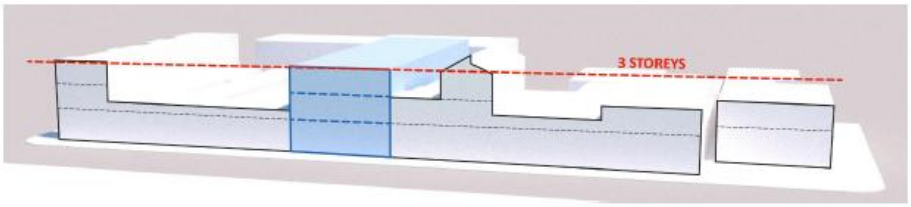
The process of applying to the Court pursuant to section 84 of the *Property Law Act 1958*

249. The starting point in any application to modify or remove a restrictive covenant is the Court's own Guidelines for Practitioners (**Guidelines**).

250. The Guideline, and the principles articulated by Derham AsJ, above, invite applicants to establish their plans with specificity.

251. As with many aspects of section 84 applications, the degree of detail expected by plaintiffs increases in proportion to the amount of opposition to the application by beneficiaries. So:

a) while the Court was satisfied with the following degree of detail in the unopposed matter of *Re Hollow*:[188]

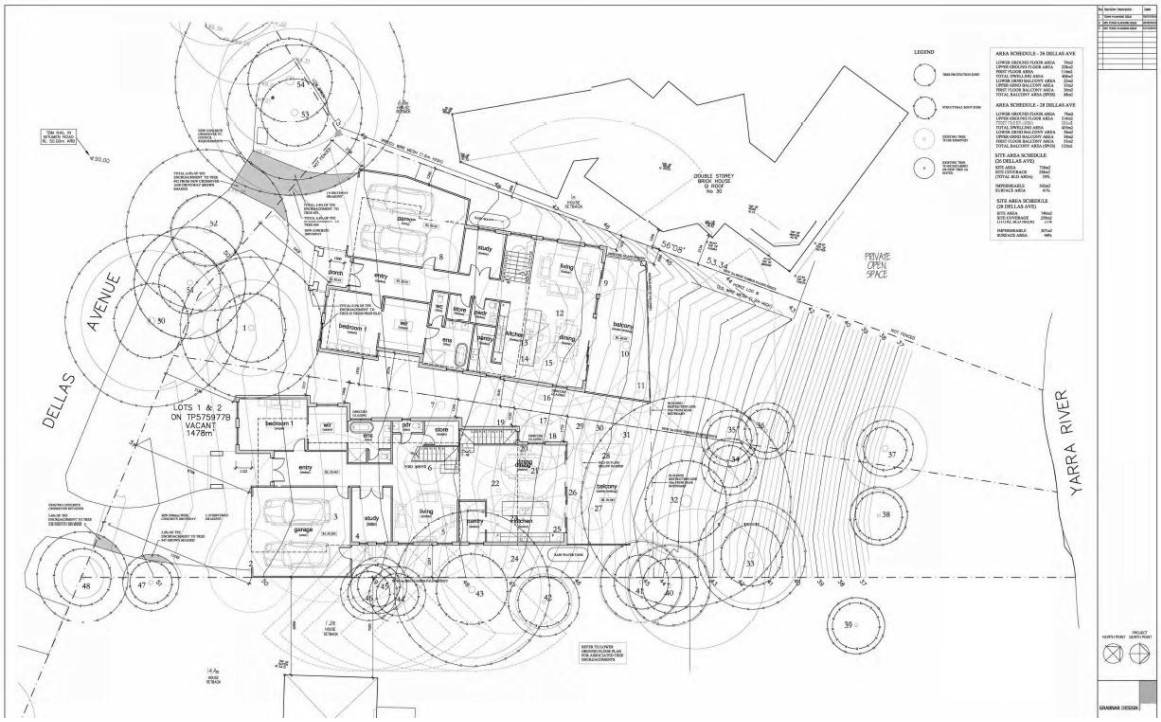


E Figure 14 – Concept building envelope (view west) (Merlyn Street streetscape shown indicatively only)

b) the following detailed plans were prepared in *Randell v Uhl*[189], a case that proceeded to trial:

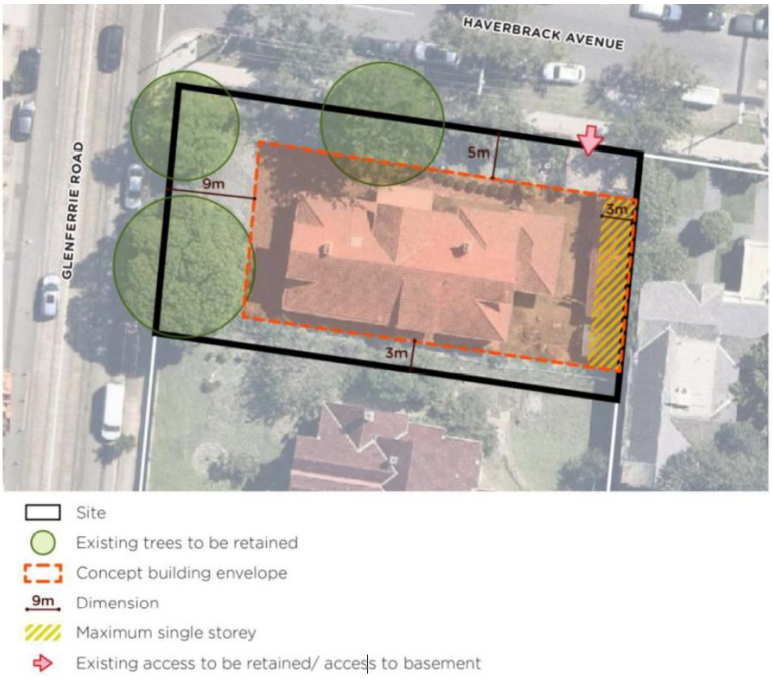
188 Unreported — S ECI 2020 01159.

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



252. Many applicants wish to maximise the value of their land prior to sale but not develop the land themselves. This routinely occurs with deceased estates. In this instance, the plaintiff should declare this fact and invite an expert assessment of what might be fairly described as a reasonably likely development following the disposition of the land.

253. The starting point may be a nominal building envelope showing setbacks and development constraints, but increased detail may be required if the matter proceeds to a contested hearing:



254. In *Zwierlein v Coelho* [2021] VSC 451, the plaintiff was initially reluctant to provide plans given the property was to be sold. The court was ultimately satisfied that the following templates provided by a volume builder were sufficiently informative in the circumstances:

> 93 In discussing the Court's discretion in *Vrakas v Registrar of Titles*, Kyrou J observed:
>
> > Persons who apply to this Court seeking relief that they perceive will bring them financial and other benefits and which they know is perceived by other parties to be detrimental to them should be as specific as possible about the proposals they have in mind so that the Court is placed in the best position to assess the impact that those proposals may have on all the parties. Plaintiffs who do not produce to the Court any specific plans but base their case on a general desire to optimise their options in relation to their property, as in this case, face the risk that the Court will not be satisfied, on the evidence, that they have made out their case.
>
> 94 Similarly, in *Oostemeyer v Powell*, it was noted by Riordan J that the failure by an applicant to establish its plans for the property with specificity may result in the Court not being satisfied that the requirements of s 84(1) of the Act have been fulfilled.
>
> 95 Initially, the defendants took issue with the fact that the plaintiffs had not: (a) made clear whether they themselves would undertake the development of the land; or (b) provided concept plans, floor layouts, setbacks to boundaries, and elevations of the two new proposed dwellings.
>
> 96 However, as the defendants conceded in closing submissions, many of these deficiencies have been belatedly addressed in the plaintiffs' most recent iteration of their proposal. Exhibited to Ms Zwierlein's affidavit of 31 March 2021 were concept plans and floor layouts. In addition, the final version of the proposal contemplated the incorporation within the covenant of setbacks at the northern and eastern boundaries, together with a specified maximum height and site coverage in respect of each proposed new dwelling. What remains absent are elevations and particulars of the siting of the new dwellings on each lot.
>
> 97 Whilst the plaintiffs may be criticised for not putting forward specific plans at an earlier stage of the proceeding, they have ultimately provided the defendants and the Court with a sufficiently detailed description of the proposed development if the modification to the covenant is allowed.


RUMPUS
ALFRESCO
LIVING
MEALS
KITCHEN
WIP
DRY
LOUNGE
DOUBLE GARAGE
ENTRY
STUDY
PORCH
WIR 4
BED 4
WIL
WC
BED 3
BATH
WIR 3
WIR 2
BED 2
ACTIVITY
LINEN
WC
MASTER SUITE
WIR
WIR

255. However, the following diagram was deemed insufficient in in *Jeshing Property Management Pty Ltd v Yang* [2022] VSC 306:

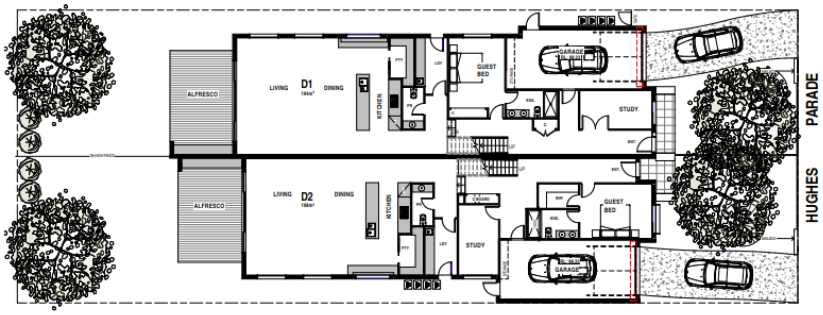
Annexure A to the Originating Motion

256. Matthews AsJ explained that such plans would not "clearly articulate the changes which may occur and whether they will be substantially injurious to the Defendants":

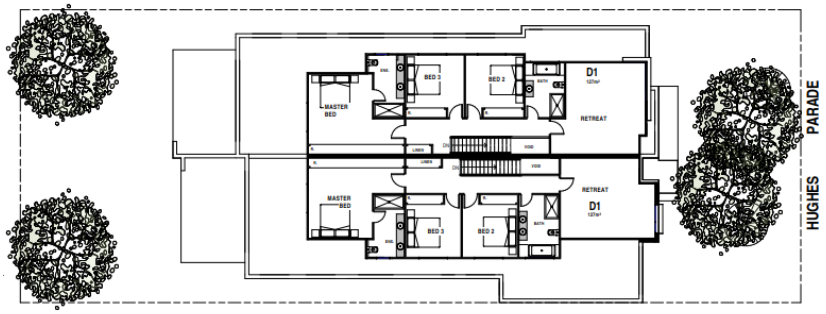
> 338. For the reasons given above, I am not satisfied that there will be no substantial injury to any of the Defendants as a result of the Plaintiffs' proposal. As a consequence, the s 84(1)(c) Application will be refused.
>
> 339. Before moving on, I wish to say something further about the way that the Plaintiffs put their case in respect of the Modification Applications, and it is convenient to do so here. The Plaintiffs clearly made a decision to pursue the Modification Applications without providing detailed drawings or plans of their proposal; rather, the detail of the proposal was confined to the Proposed Envelope. That was their choice, and they were entitled to run their case that way if they saw fit. As noted earlier, having made that choice, they then have to bear the consequences of it in terms of not being able to clearly articulate the changes which may occur and whether they will be substantially injurious to the Defendants.

257. While schematic plans such as these relied on *Yang* may be sufficient for unopposed applications or for mediated settlements, this decision suggests that plaintiffs take a risk by not preparing architectural drawings if the modification application proceeds to trial.

258. In anticipation of the first return, something like the following is ideal:



SITE/GROUND FLOOR PLAN
1 : 100



FIRST FLOOR PLAN
1 : 100

WARDLE DESIGN
597 GILBERT ROAD, PRESTON VIC 3072
PH: 1300 933 744
E: info@wardledesign.com.au
W: www.wardledesign.com.au

No.	Description	Date
A	CONCEPT DESIGN	02.12.2021

PROJECT No. 0
DRAWN BY VB
CHECKED BY BW
DATE 02.12.2021
SCALE 1:100@A1/ 1:200 @A3
ISSUE CONCEPT SKETCH

11 HUGHES PARADE, RESERVOIR
DOUBLE STOREY DUAL OCCUPANCY

REVISION A
SHEET No. TP1

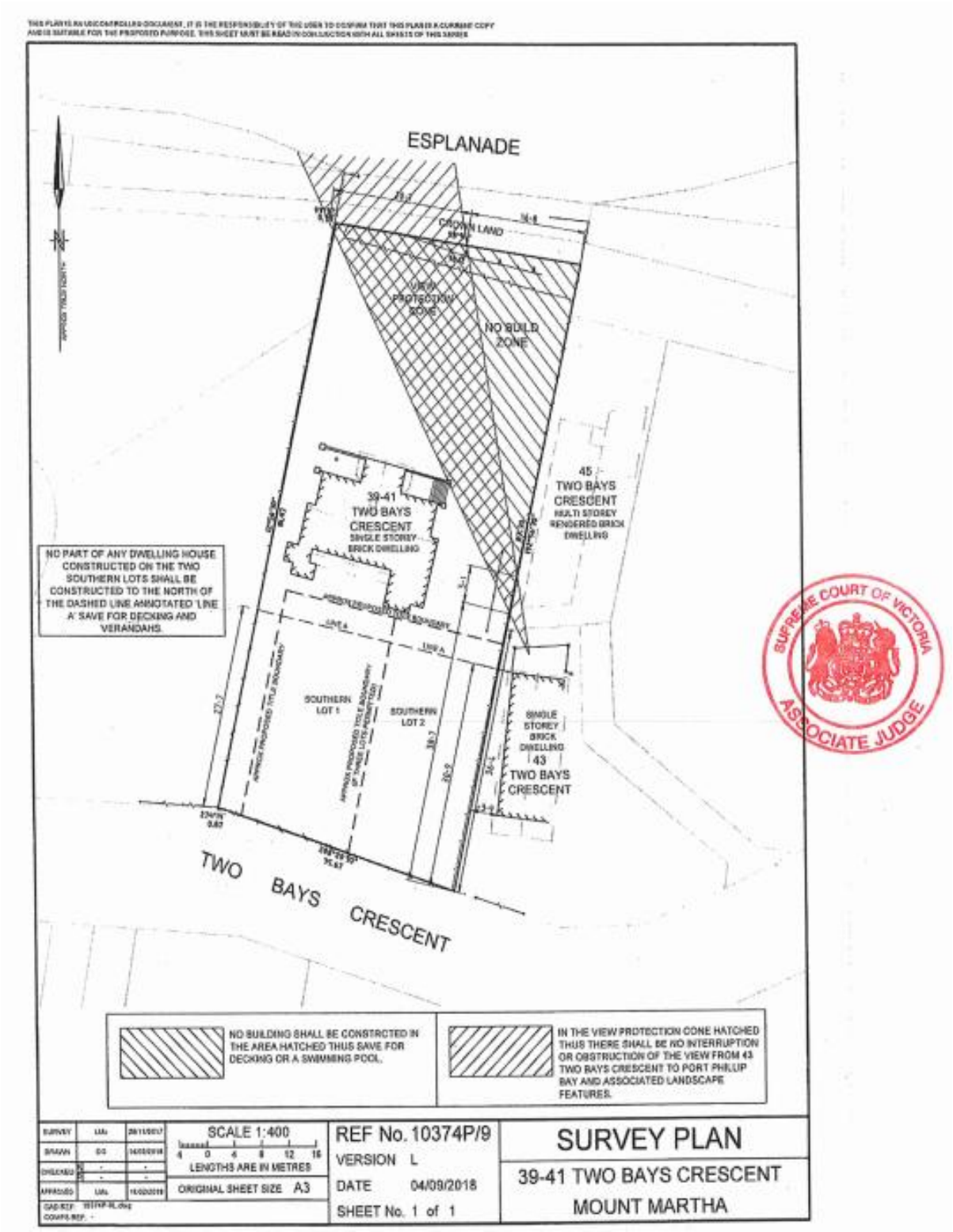
The form of relief sought

259. While the Court is keen to understand a plaintiff's intentions for the land the subject of the application, it is a curiosity if not a weakness of the process, that variations to covenants often do not refer to those plans. Orders are routinely made by, for instance, deleting the word 'one' and replacing it with the word 'two':

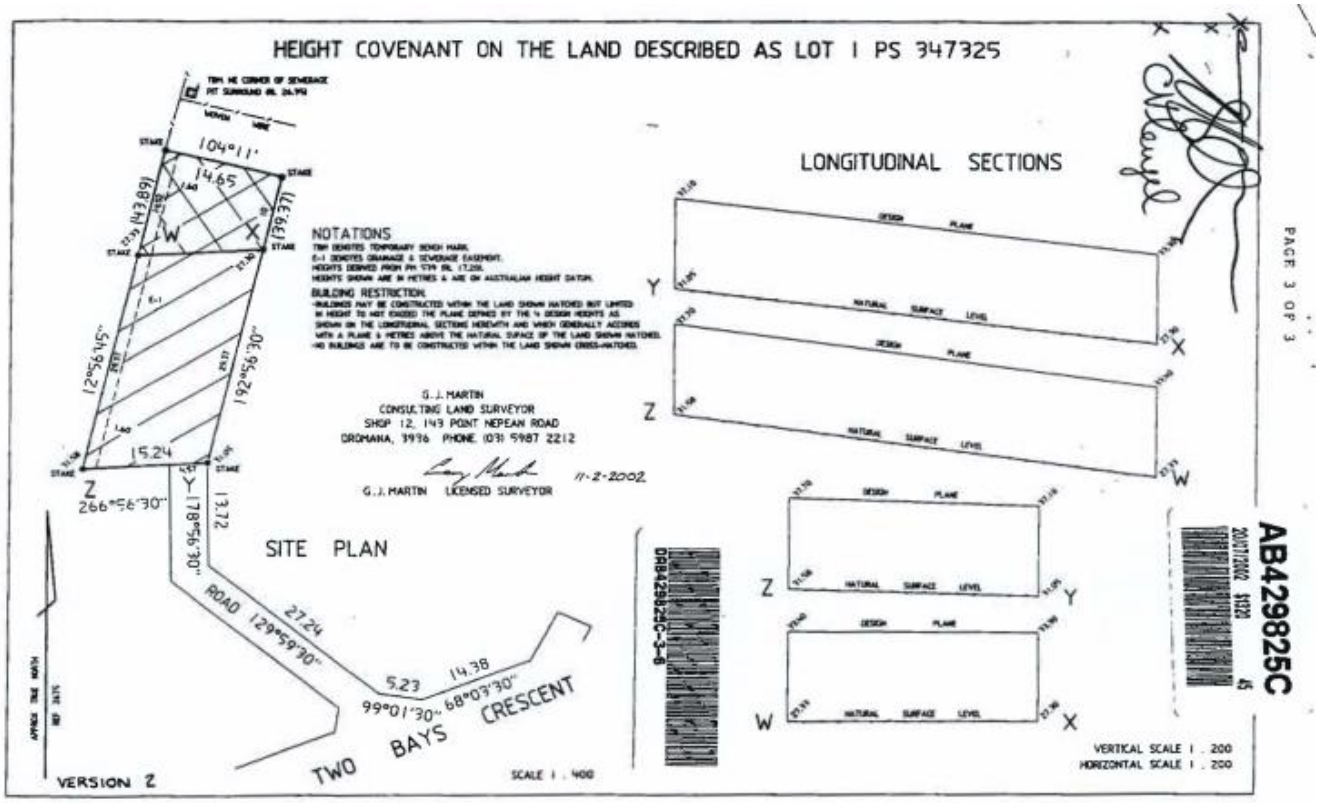
> (a) That at no time hereafter will there be erected upon the said lot or any part thereof any buildings save and except ~~one~~ not more than two private sepearate dwelling houses each of not less than one hundred and eighty five (185) square metres in area together with usual outbuildings including therein one multi or single garage or carport (which may be erected beneath the dwelling house), laundry, tool shed and other outbuildings suitable and appropriate to the dwelling house or houses upon the said lot and reasonable occupation and enjoyment thereof.
>
> (b) That such dwelling house or houses and outbuildings shall not be constructed of other than brick or brick veneer and shall not be roofed with fibrous cement and asbestos cement sheet or panelling and shall not be houses removed from another site and erected on the lot hereby transferred...

260. More detailed variations are more commonly borne out of contested proceedings, such as the following from *Neumann v McGeoch* S C 2016 1811 which refers to an annexed plan:

> THE COURT ORDERS BY CONSENT THAT:
>
> 1. Covenant 1522342 which affects the land in certificate of title volume 08746 folio 871 be modified as follows:
>
> (a) by deleting the following words from the covenant 'and (c) shall not erect or permit to be erected on the said lot hereby transferred more than one such dwelling house'; and
>
> (b) by inserting in the covenant the following words 'and (c) shall not subdivide the said lot into more than three lots and on any subdivided lot shall not erect more than one dwelling house with appropriate outbuildings; and
>
> (c) in accordance with the attached plan, being Plan Version L:
>
> (i) two new lots will be created to the south of the existing dwelling on the lot (" the two southern lots");
>
> (ii) no part of any dwelling house constructed on the two southern lots shall be constructed to the north of the northern extremity of the defendant's house, being beyond dashed Line A in Plan Version L (excluding the deck) save for decking and verandas;
>
> (iii) no building shall be constructed in the area hatched and identified as the "NO BUILD ZONE" on the attached plan save for decking or a swimming pool;
>
> (iv) in the area hatched and identified as the "VIEW PROTECTION CONE" on the attached plan there shall be no interruption or obstruction of the view from 43 Two Bays Crescent to Port Phillip Bay and associated landscape features.



261. Three-dimensional building envelopes such as those set out in Instrument AB429825C, below, have also been imposed on plans of subdivision and might readily be incorporated into a variation to a covenant by reference to an accompanying plan:



262. However, the most common negotiated outcome tends to be the addition of detailed written design requirements such as the following:

> … in circumstances where more than one dwelling is erected on the said lot, then the following additional restrictions shall apply:
>
> (a) any driveway is to run adjacent to or in close proximity of the northern boundary of the said lot;
>
> (b) 'secluded private open spaces' (within the meaning of the relevant Planning Scheme) are not to be located adjacent to the northern boundary of the said lot; and
>
> (c) the outer walls of any building must be at a distance of at least 3 metres from the northern boundary of the said lot.

263. Care needs to be taken to ensure that the varied covenant will ultimately be supported by the responsible authority pursuant to the *Planning and Environment Act 1987* once an application for planning permission is sought.

The extent of notice required

264. Unlike applications made pursuant to the *Planning and Environment Act 1987* (Vic), where notice of an application for the variation of a covenant is provided to all 'affected properties', notice under the *Property Law Act 1958* (Vic) is given only to the

lots which have the benefit of the covenant. However, orders for notice may further be limited where the Court believes it to be appropriate.[190]

265. Section 84(3) provides:

> (3) The Court may before making any order under this section direct such inquiries (if any) to be made of any local authority or such notices (if any) whether by way of advertisement or otherwise to be given to such of the persons who appear to be entitled to the benefit of the restriction intended to be discharged, modified or dealt with as, having regard to any inquiries, notices or other proceedings previously made given or taken the Court thinks fit.

266. At the first return, direct notice to land with the benefit of the covenant might be required in a manner similar to the following:

267. Notice may take the form of an A3 sign on the land, direct notice to beneficiaries via the address indicated on the records of Land Use Victoria (and the street address of the benefiting land if different).

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

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

270. Alternatively, objections may be received and/or objectors may attend court to be heard.

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190 Section 84(3) of the *Property Law Act 1958* (Vic).

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

Be wary of the costs implications of causing notice unnecessarily

272. In *Re: IP Bradley Investments* S ECI 2023 03410, Irving AsJ held that objectors may be entitled to the reasonable costs of ascertaining whether or not they enjoy the benefit of a restrictive covenant.

273. This has implications for plaintiffs when suggesting the form and extent of notice in section 84 applications.

274. Traditionally, the view has been that only beneficiaries of restrictive covenants have sufficient skin in the game to attract the benefit of a costs order, but Irving AsJ held that objectors were entitled to the costs of seeking advice as to whether they were properly entitled to join as defendants:

> 34 I have decided to order that the plaintiff pay the costs of the objectors in an amount that will be discussed further below. My reasons are as follows.
>
> 35 First, the plaintiff asked the Court to make orders for notification of its application by public notice. That notice stated the plaintiff's application, which was put in the alternative, seeking a declaration or modification of the restrictive covenant. In providing notice of that application the plaintiff invited people who saw the notice to consider whether they may be beneficiaries of the covenant the plaintiff sought, albeit in the alternative, to modify.
>
> 36 I accept that in requesting the orders for notification of the application the plaintiff was motivated by fairness and the interests of justice. The plaintiff is not to be criticised for seeking orders to provide public notice of its application. An award of costs is, however, compensatory and not punitive. There is some force in the objectors' counsel's submission that it was open to the plaintiff to seek to have its declaration application determined on an ex parte basis and that if it had done so, the issue of the objectors' costs may, if the Court agreed it was appropriate to proceed on that basis, have been avoided.
>
> 37 Second, having seen the terms of the notice which set out the alternative applications made by the plaintiff, it was reasonable for the objectors to seek legal advice about whether their interests were affected by the application. Additionally, this was not a case in which the plaintiff had filed preliminary submissions which objectors could seek to inspect on the Court file. In those circumstances it was reasonable for the objectors to seek their own legal advice.
>
> 38 Third, the plaintiff's suggestion that in order to be eligible for an award of costs the objectors had to possess a legal interest capable of being affected by the plaintiff's application, is, in my view, too inflexible in light of the particular, and perhaps unusual, facts of this case. On the terms of the notice, it was clear that the plaintiff's primary contention was that there were no beneficiaries. In my view, particularly given the plaintiff's alternative application for modification of the covenant, the objectors were entitled to investigate and should have their reasonable costs of that investigation up until the point it was

clear they held no interests capable of being affected by the plaintiff's application.

39 Fourth, I accept that not every passer-by who observed the notice would be entitled to the legal costs of investigating their own title. In this case, the costs sought are of the investigation of the plaintiff's application. That investigation involved a large number of objectors obtaining one counsel's advice on the accuracy of the plaintiff's analysis of the covenant, provided under cover of the plaintiff's solicitor's letter of 30 October 2023.

40 Fifth, putting to one side for the moment the issue of costs at the hearing on 7 March 2024, the objectors have acted reasonably and sought to minimise costs by retaining a common solicitor and barrister and by notifying the plaintiff's solicitor and the Court at the earliest opportunity that they did not intend to join the proceeding as defendants to the plaintiff's declaration application.

275. It follows that where a plaintiff is confident there are no beneficiaries, a ruling should be invited on the effectiveness of the covenant--before orders for notice are made.

276. In contrast, in *Joshua John Martin & Anor v Anton Lindeman & Anor* S ECI 2023 05420, unreported 20 September 2024, the court upheld the plaintiffs' case that they had been put to unnecessary expense by reason of the defendants pressing on with the proceedings, after being told why they did not enjoy the benefit of the covenant:

V. I am satisfied that the defendants' rejection of the First Compromise Offer was unreasonable. I have reached that conclusion for the following reasons.

W. First, the First Compromise Offer was made in February 2024, very soon after the defendants were joined to the proceeding. The defendants had 14 days to consider the offer, which was supported by detailed written submissions that had been served on the defendants, a link to which had been included in the earlier notification of the proceeding. The compromise offered was clear in its terms and was significant. If accepted it would have seen the covenant maintained yet modified. The significance of the compromise is clear from the ultimate outcome of the proceeding which saw the covenant discharged. The compromise foreshadowed the plaintiffs' intention to apply for indemnity costs in the event the compromise offer was rejected.

X. Second, defendants were on notice at all stages that there was a live question whether there was any land with the benefit of the covenant, including in the notice provided of the proceeding, and prior to being joined to the proceeding. The defendants had the benefit of the plaintiffs' detailed legal submissions before they sought to join the proceeding. Those submissions set out, with detailed reference to the relevant legal principles and case law, why the plaintiffs said the covenant did not benefit any land and why the land was not subject to a building scheme.

Y. Third, the defendants sought to oppose the proceeding at least in part on considerations they thought relevant to the whole of the Point Leo Beach Estate, ie. not only in response to the matters raised by the plaintiffs' application. The defendants sought to oppose the application on the basis that they were seeking to maintain a status quo that did not exist in law. They did

so in circumstances where they were put on notice why that status quo did not exist.

Z. Fourth, the defendants' reliance on the positions taken by the Mornington Peninsula Shire Council and the plaintiffs' previous planning advisors was unreasonable in circumstances where the defendants were legally represented and had the benefit of the plaintiffs' preliminary submissions.

AA. Fifth, for the reasons set out in the judgment, the defendants opposition to the plaintiffs' application was without legal or factual merit.

277. For these reasons, the Court held that the defendants should pay the plaintiffs' costs of the proceedings on standard basis, from a date sufficient to receive legal advice, and then on an indemnity basis from the date of the first Calderbank offer:

> The defendants are to pay the plaintiffs' costs of the proceeding, to be assessed on a standard basis from 31 January 2024 to 11 February 2024 (inclusive) and assessed on an indemnity basis from 12 February 2024, to be taxed in default of agreement.

The court rarely exercises its power to discharge a covenant entirely

278. The Court is typically unwilling to exercise its power to discharge a covenant entirely, preferring instead to modify a covenant to allow the applicant's stated intentions.

279. The objective for applicants should therefore be to modify the restrictive covenant as modestly as possible, while nonetheless comfortably facilitating the intended use or development contemplated, appreciating that the responsible authority under the *Planning and Environment Act 1987* (the municipal council at first instance and then the Victorian Civil and Administrative Tribunal on review), may require additional changes to any plans.

280. That said, an application to *discharge* a restrictive covenant may be allowed where the Court finds that outcome appropriate to avoid future confusion:

a) see *Re: Ambrens*:[191]

> I In many cases, modification of a restrictive covenant to allow an intended development will be more appropriate than discharge of the covenant. In this case, however, the Court considers that discharge of the Covenant is more appropriate than modification. The Court considers that the proposed form of modification, to allow the construction of 'one residential building', could be unclear and so introduce confusion, and is not necessary given the nature of existing development proximate to the subject land and its zoning as residential.

b) see *City of Stonnington v Wallish & Ors*:[192]

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191 *Re: Ambrens* Unreported — SCI2016 03948.

192 *City of Stonnington v Wallish & Ors* [2021] VSC 84.

> Given the limited scope of the restrictions imposed by the covenants and for substantially the same reasons outlined above, I do not consider that my residual discretion should be exercised in the defendants' favour. I accept that it is desirable for the covenants to be discharged in order for there to be clean titles on the subject land. Such a course will avoid any future confusion or disputes and will not cause the defendants substantial injury.

and

c) see *Re: Pierce*:[193]

> G. The Court accepts the Plaintiffs' submissions that the sole purpose of the Covenant was to control the materials used in the construction of the outer walls of any dwelling constructed on the land, and given the extended period of non-compliance with the restriction, including two substantial extensions to the original dwelling last century, that the proposed discharge of the Covenant will not substantially injure the persons entitled to its benefit.
>
> H. In reaching this decision, the Court notes the evidence of Katrin Pierce, one of the Plaintiffs, including that the Plaintiffs were evidently not involved in the construction of the dwelling or its extensions, and only became aware of the breach of the Covenant after their purchase of the land.
>
> I. The Court also records its consideration that the circumstances of the case did not warrant a modification of the Covenant in a manner that might have sought to reverse or negative the breaches, due to the future risk of confusion to those who may be required to interpret the meaning or operation of the restriction as it applies to the subject land.

Section 84(2) of the Property Law Act 1958 and other declaratory powers

281. Often an application to modify a restrictive covenant will be made in conjunction with an application as to the enforceability of the restrictive covenant.

282. The Court's power here is expressly set out in section 84(2) of the *Property Law Act 1958*:

> (2) The Court shall have power on the application of any person interested—
>
> (a) to declare whether or not in any particular case any land is affected by a restriction imposed by any instrument; or
>
> (b) to declare what upon the true construction of any instrument purporting to impose a restriction is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom.

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193 S ECI 2022 03509

283. By way of example, in *Prowse v Johnston*[194] the plaintiff's case was put first as a declaration application and as a modification application in the alternative:

> 21 … so far as declaratory relief is concerned, the plaintiff now seeks, in substance, a declaration that a development generally in accordance with the current architectural plans would not contravene that part of the restrictive covenant which prohibits the erection of more than one house on each of Lots 7 and 8. In the alternative, the plaintiff seeks an order under s 84(1)(a) or (c) of the Act modifying that particular restriction. Further, the plaintiff seeks an order under s 84(1)(a) or (c) modifying the restrictions relating to excavation, building materials, subdivision and frontages. Taken together, the modifications sought are modifications that would permit the construction of a building generally in accordance with the current architectural plans.

284. In that case, Cavanough J expressed reservations as to whether section 84(2) was capable of being used to determine a hypothetical question such as whether a building constructed in accordance with a given set of plans would satisfactorily comply with a restrictive covenant. His Honour therefore relied on the Court's general jurisdiction to make a declaratory order:

> 26 As indicated above, the declaration is sought under s 84(2) of the Act or under the Court's general or inherent jurisdiction and powers, including under s 36 of the Supreme Court Act 1986. It would necessarily be a declaration as to a situation or position that has not yet arisen, in that the development is merely proposed. It is very doubtful whether s 84(2) of the Act would authorise the Court to make a declaration of that kind. The plaintiff acknowledged this during oral submissions and thereafter placed principal reliance on the Court's general or inherent jurisdiction. I accept that that jurisdiction may extend to future questions, and that it is available in this case. The jurisdiction is apparently no less ample than any jurisdiction under s 84(2) of the Act. So it is not necessary to decide finally whether jurisdiction under s 84(2) of the Act also exists.

285. In *Stoops v Lefas*,[195] Cavanough J again discussed the Court's general jurisdiction to grant declarations in this context:

> 17. …However, the claim which Mr Stoops wanted to be free to advance at trial, as set out in the originating motion, was a claim of an entirely theoretical or hypothetical nature. It did not involve any definite development proposal for the land. In fairness to him as an unrepresented litigant, I informed him that, in my view, the Court would probably not entertain such a claim in any event and that, if he wished to proceed, he would probably need to put forward a definite building proposal. I also expressed concern that his claim might in any event amount to a claim for a declaration as to a future matter; that, in those circumstances, s 84(2)(b) of the *Property Law Act 1958* might not be applicable; and that he might need to rely on the Court's general jurisdiction and powers to grant declarations. …I ordered…that by a specified time the plaintiff file and

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

195 [2016] VSC 350.

serve a further amended originating motion confining the proceeding to a claim for a declaration in respect of a clearly defined proposal for the land in question, such as the proposal the subject of the decision given by VCAT in 2003 in the matter referred to above, namely *Stoops v Frankston City Council*; and that the parties be prepared on 14 May 2015 to advance the cases which, if this proceeding were not stayed, they would respectively advance at the final hearing of the proceeding (as confined in accordance with my order)…

19. In his further amended originating motion filed on 15 April 2015, Mr Stoops duly invoked s 36 of the *Supreme Court Act 1986* and Rule 23.05 of the *Supreme Court (General Civil Procedure) Rules 2005*[196] (as well as s 84(2)(b) of the *Property Law Act 1958*) in relation to his claim for a declaration in the contingent final hearing. He substituted for his theoretical or hypothetical claim a claim with respect to the very building proposal (and associated architects' plans) which had been the subject of the application for review determined by VCAT in 2003. He exhibited the relevant plans to an affidavit of his own affirmed on 10 April 2015 and filed on 15 April 2015.

286. In *Commonwealth v Sterling Nicholas Duty Free Pty Ltd*,[197] Barwick CJ explained that a court's general jurisdiction to make a declaratory order includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law:

12. The jurisdiction to make a declaratory order without consequential relief is a large and most useful jurisdiction. In my opinion, the present was an apt case for its exercise. The respondent undoubtedly desired and intended to do as he asked the Court to declare he lawfully could do. The matter, in my opinion, was in no sense hypothetical, but in any case not hypothetical in a sense relevant to the exercise of this jurisdiction. Of its nature, the jurisdiction includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law. Indeed, it is that capacity which contributes enormously to the utility of the jurisdiction.

287. A plaintiff seeking a declaration that a particular development proposal complies with a covenant should therefore invoke the Court's powers under section 36 of the *Supreme Court Act 1986* (Vic) (*Supreme Court Act*) and rule 23.05 of the *Supreme Court (General Civil Procedure) Rules* 2015 (Vic) (*Supreme Court Rules*), which reads as follows:

23.05 Declaratory judgment

No proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

288. The Court is, however, reluctant to declare that a specific hypothetical development would comply with a covenant. As Osborn J emphasised in *Re Longo Investments Pty*

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196 These rules were repealed and replaced in 2015. The current corresponding provision is in the same terms.

197 (1972) 126 CLR 297.

Ltd,[198] it is undesirable to frame a declaration with respect to a hypothetical development which has not yet received planning approval and which may undergo some modification in form during the course of the approval process:

> 16 In the present case I have therefore concluded that it would be desirable to modify the existing covenant because:
>
> (a) it is undesirable to seek to frame a declaration with respect to a hypothetical development which has as yet not received planning approval and which may undergo some modification in form during the course of such approval process; and
>
> (b) it is in the interests of justice that the effect of the covenant with respect to the proposed development be clarified so as to remove doubt prior to the finalisation of the planning approval process.

289. For the same reason, in *Re Powell*,[199] Irving AsJ declined to make any declaration in relation to the compliance of plans for a proposed development with the covenant:

> O. While I will make a declaration that the building height restriction of 5m in the Covenant does not prohibit the existing building, I decline to make any declaration in relation to the compliance of the Plans with the Covenant. I do so for the same reason Osborn J cited in *Longo Investments Pty Ltd* [2003] VSC 37 [16(a)]. Namely, it is undesirable to seek to frame a declaration with respect to a hypothetical development which has not yet received planning approval and which may undergo some modification in form during the course of such approval process. In addition Mr Townsend concedes that the Plans contain at least one error.
>
> P. In light of the plaintiff's proposed re-development of the Land, I have decided it would also be desirable and in the interests of justice to modify the existing covenant to clarify the building height restriction…

290. The Court's general power to grant declaratory relief is discretionary, and requires a real question to be tried. Query whether a contradictor would be required in practice, or whether the Court would be satisfied with notice being first given to beneficiaries:[200]

> 13 The question of the efficacy of Regulation 10 can be resolved either by this Court in declaratory proceedings if brought or by Act of Parliament. There is power in this Court to determine declaratory proceedings, as provided by s 36 *Supreme Court Act 1986* and Rule 23.05 *Supreme Court (General Civil Procedure) Rules 2005*. In limited circumstances the Court will grant declaratory relief. As the Court stated in *Rozenes v anor. v Beljajev and ors*.:
>
> > "The essential requirement is that there be a real question, with the plaintiff having a real interest and a proper contradictor, and that the circumstances be such that it is appropriate to grant a declaration."

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198 [2003] VSC 237.

199 S ECI 2024 01998.

200 *DPP v Frederico* [2006] VSC 24.

291. More generally, although plaintiffs are often tempted to run declarations as preliminary points, they are rarely short and sharp hearings, meaning that a failure in the declaration application can lead to litigation fatigue and the subsequent abandoning of an application. Far better then, in most cases, to run an application for declaration and an application for modification in the same hearing. As the adage goes "Most people who ask for a preliminary hearing on the separate question eventually come to regret it."

292. Strictly speaking, the power in section 84(2) is declaratory only and a finding by the Court that a covenant is not binding on any beneficiaries is not sufficient for the Court to amend, or more relevantly, discharge a restrictive covenant. This results in the unhappy outcome of a restrictive covenant remaining on title, without any work to do. Any number of complications can arise here, with Councils potentially adopting the view that a covenant still encumbers the land—even if the Court has pronounced it moot.

293. For this reason, applications for declarations should be accompanied by an application to discharge a covenant pursuant to section 84(1)(c) adopting the reasoning that if no beneficiaries are impacted by the covenant, it follows that discharge will not substantially injure persons with the benefit of the restriction. Such a conclusion was reached by the Court in *Re Wilson* S ECI 2021/2822:

> H. The Court is satisfied that by reason of there being no person having sufficient standing as a beneficiary to enforce the Covenant's terms, it should be discharged.
>
> I. Further and in any event, the Court is satisfied that there is no injury, or substantial injury, caused to any potential beneficiary by the discharge of the Covenant.

294. Alternatively, the Court may prefer to direct the discharge the covenant to achieve a clean title via section 84(1)(a), the obsolescence ground, see *Re Moolman* S ECI 2025 04277:

> THE COURT DECLARES THAT:
>
> 1. Pursuant to section 84(2) of the *Property Law Act 1958*, the Court declares that the Land is no longer affected by any restrictions contained in the Covenant (including as varied in Dealing No. AK850670B) as the Covenant does not specify the land to which it confers a benefit and is no longer enforceable.
>
> THE COURT ORDERS THAT:
>
> 2. Pursuant to section 84(1)(a) of the *Property Law Act 1958*, the Covenant (including as varied in Dealing No. AK850670B) is discharged as obsolete as the Covenant no longer affects the Land and any personal beneficiaries to the Covenant no longer exist.

Applications for declarations may proceed without notice to beneficiaries

295. In cases where the contention is that a covenant is defective, for instance, reason of the description of the benefitting land being unclear or wholly absent, an application may be made for the matter to proceed without notice. The circumstances in which such a submission may be positively received was discussed by Matthews AsJ (as she then was) in *Re: Ferraro* [2021] VSC 166:

> **Should the Court proceed to hear and determine the application on an ex parte basis?**
>
> 41 Consistent with the orders I made on 29 January 2021, I have considered whether the plaintiff should be required to give notice of her application for a declaration to any person who may wish to argue against it. If the application is to proceed ex parte then there is no contradictor to the plaintiff's submissions, yet if the declaration is made then by virtue of s 84(4), it will be binding on those persons who may have wished to contend that they were beneficiaries of the restrictions.
>
> 42 In order to form a view as to this, it was necessary for me to form a view as to whether any land is identified as benefited by the Covenants. My reasons for concluding that no land is identified as being benefited by the Covenants are set out in the next section of these reasons.
>
> 43 After considering the evidence and the plaintiff's submissions, like Lansdowne AsJ in *Re Hunt*,[201] I consider the plaintiff's case to be such a clear case "that it is neither necessary nor appropriate to seek to elicit any contradictor." As her Honour stated, it would be difficult to identify any person with standing to object to the declaration because such a person would need to have an interest in benefited land, and no land is identified as benefited.
>
> 44 I share her Honour's observation that applicants in other proceedings should not assume that applications for such a declaration will necessarily proceed *ex parte*, since some applications for such a declaration as to enforceability of a covenant have been on notice to potential beneficiaries.[202]
>
> 45 In the exceptional circumstances of this case, I am satisfied that it is appropriate to determine the application without a contradictor.

How long does it take to modify or remove a restrictive covenant through the Supreme Court?

296. People considering applying to modify or discharge a restrictive covenant in the Supreme Court often overestimate how long the process takes.

297. Based on a dataset of 50 recent matters–from the date of the originating motion to the date of final orders:

a) 50% of cases are resolved within 109 days, or three and a half months; and

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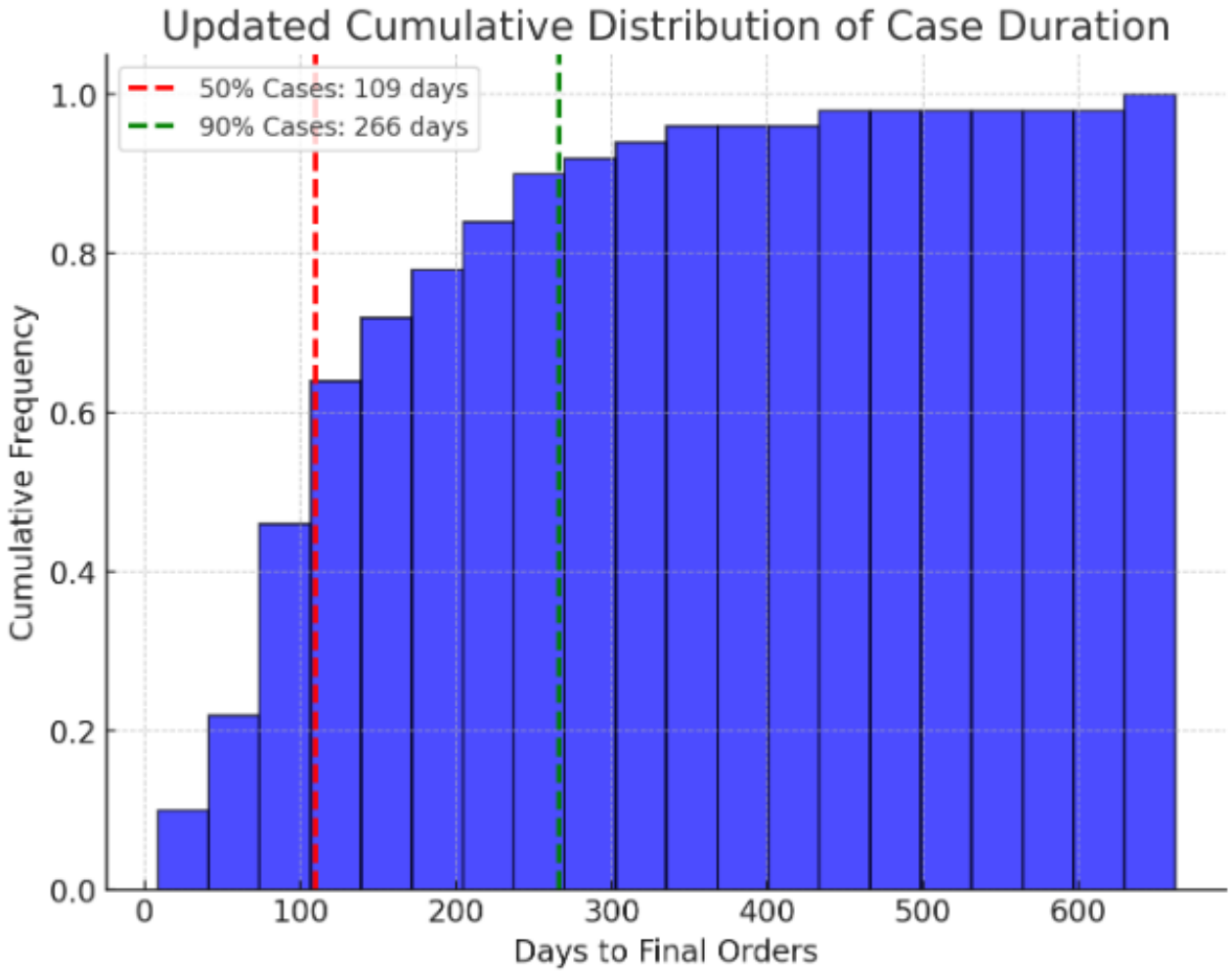
201 *Re Hunt*, [14].

202 *Re Hunt*, [14].

b) 90% of cases are resolved within 266 days, or just under nine months.

298. At one end of the dataset a case was heard and determined within 8 days of the receipt of the Originating Motion. At the other end was a case that took 622 days. That case involved the construction of a regional sporting facility and the discharge of dozens of covenants.

299. From the date of instructions, the process typically requires one to two weeks to draft and file the originating process.



Fine tuning the collating of evidence in a modification application

300. The following section needs to be read subject to the principle that there needs to be a proper basis to the application before it is commenced.

301. That said, there are some subtleties to when a court might be prepared to accommodate the filing of evidence.

302. The following comments from Derham AsJ in *Lahanis v Livesay*[203] are instructive about the importance of title investigations in applications to discharge or remove a restrictive covenant:

a) it is common to rely on expert evidence for the title history of the subject land to help establish who has the benefit of a covenant and whether a network of similar covenants exist—this may be given by an expert town planner or by a lawyer or conveyancer:

> 15 It is common in applications for the modification or discharge of a restrictive covenant for the parties to seek to adduce expert evidence. This evidence tends to cover a number of interrelated matters. The first and most important it to expose the title history of the subject land, which is usually a part of a subdivision and, as in this case, sometimes several subdivisions. The covenants in question are usually set out in a Transfer of Land (and for that reason they are generally required under the Contract under which the land is bought and sold), often the first transfer of the land out of the parent title. Understanding the origin of the covenant is important to the identification of the other proprietors of land having the benefit of the covenant. It may also be important to have evidence of the extent to which the covenant is common throughout a particular neighbourhood. Expert evidence of this 'title history' of the subject land may be given by expert lawyers or conveyancers, but often it is given by an expert town planner, such as Mr Easton.

b) this helps the Court understand who has the benefit and burden of any given covenant is and how it might be construed:

> 16 When, as is usually the case, copies of all the documents relevant to the title history are produced, the Court is in a position to understand from its own inspection who has the benefit and who the burden of particular covenants, what the proper construction of the covenant may be, whether the covenant is enforceable and so on, without the assistance of any expert evidence.

c) the expert may be responsible for assessing changes to a neighbourhood, but the value here is in the collation of this evidence rather than its interpretation:

> 17 Another aspect of the role of the expert is to review the changes that have taken place in the area or areas surrounding the subject land, whether the properties on which changes have occurred were burdened with a covenant similar to the one sought to be modified or discharged, and to describe in some detail the 'built environment' of the areas both proximate and less proximate to the subject land. This assists the Court in identifying any real benefits, that is practical benefits, to the person entitled to the benefit of the covenant in issue. This is an important aspect of expert evidence in applications of this kind. But the expertise is in the collection and collation of 'on the ground' information rather than the interpretation of that information.

and

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203 [2021] VSC 29

d) the expert may express an opinion on the question of injury or obsolescence, but that is ultimately a matter for the Court:

> 18 The expert evidence is of a different character where the expert gives an opinion, as they mostly attempt to do, on the ultimate issue, in this case whether modification sought will not cause substantial injury to the proprietors of lands having the benefit of the covenant, that is, injury in respect of their enjoyment of their land. In this aspect of the evidence, as Mukhtar AsJ recently observed, an expert:
>
> > …may state an opinion about the merits of the application with which the Court may agree, but of course in a lawsuit such as this, it is for the Court to make the judgment according to the applicable legal principles on the ultimate question whether the proposed modification 'will not substantially injure the persons entitled to the benefit of the covenant' as is stated in s 84(1)(c) of the *Property Law Act*.[204]

303. My own practice is to ensure that at the time an application is filed with the Court:

a) the solicitors' affidavit must have been prepared to a sufficient certainty that:

1) the subject covenant must have been satisfactorily construed;

2) the burden and the benefit of the covenant must have been identified (or a view formed that the one or both matters cannot be identified); and

b) the plaintiff must have given clear instructions as to his or her intentions with the land.

304. This is possible if the solicitor has prepare the beneficiary analysis rather that the town planner, whose report may still be in the process of preparation.

305. It is then a case of being able to deliver, at least a clear week before the first return:

a) the solicitors' affidavit; and

b) the plaintiff's affidavit; and

c) submissions in support; and

d) draft orders for the first return—which will include a schedule of properties to receive direct notice.

306. In complex cases, plans can be circulated after the first return, but it is the practice of some judicial officers to include plans in notice to beneficiaries and so a risk of an adjournment is created if notice cannot be effected because of a delay in the preparation of plans.

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204 *RE Young* [2019] VSC 755, [4]; Approved in *Hivance,* [2020] VSC 183, [11].

307. Similarly, planning or expert evidence may follow the first return, but a beneficiary complaining that insufficient time has been available to consider the application because of the late filing of expert evidence is likely to receive a sympathetic hearing from a judge. In other words, the evidence relied on must be ready for distribution at or about the time that third parties receive notice of an application.

308. In summary:

a) prepare your solicitors' affidavit first;

b) prepare the plaintiff's affidavit to set out the basis for the modification; and

c) draft the originating motion.

309. This may be sufficient to file the application with the Court, but a race is then on to complete the expert evidence in time for the first return. Clearly, you also need to have lined up a witness sufficiently familiar with the context of the application to express support for the relief being sought.

310. These principles do not apply to an application for declaration as these often proceed only on solicitors' affidavits that set out the searches of the Register that have been undertaken. The submissions will then explain, for instance, how it is said that the restrictive covenant is void and of no effect.

How to protect against a future purchaser attempting to renegotiate a settled agreement to modify a covenant

311. To the best of my knowledge there is no settled authority on the question of whether a negotiated agreement to amend a covenant becomes the new comparator or floor, for the determination of substantial injury in section 84(1)(c).

312. This is of particular significance to parties negotiating an amendment to a covenant prior to the land being sold. In practical terms, beneficiaries are entitled to ask: "what's to stop the purchaser having another go at this, but using the negotiated agreement as the basis for determining substantial injury under section 84(1)(c) of the Property Law Act 1958?"

313. This challenge was met with the inclusion of the following words in Other Matters in *Re Natwes* S ECI 2024 6528 in the draft consent terms provided for the court's consideration: "In compromising the proceeding, the parties agree that the modifications set out in this order (Agreed Modifications) will not result in substantial injury but acknowledge that any further modification, however minor, may result in a substantial injury to the beneficiaries having regard to the protections afforded by the Covenants in their original form."

314. This drafting was accepted by the Court.

Construing a restrictive covenant

315. In *Jeshing Property Management Pty Ltd v Yang* [2023] VSCA 185 the Court of Appeal found that the 'established principles' of interpretation apply, save for the specific rules regarding extrinsic evidence:

a) the words of a restrictive covenant are to be construed by reference to its text, context and purpose;

b) it is necessary to consider what a reasonable person in the position of the covenanting parties would understand the words to mean; and

c) a construction that accords with commercial sense and commercial convenience is to be preferred:

> 63 As the associate judge correctly stated, the principles to be applied in construing restrictive covenants are the same 'established principles' as apply to the construction of contracts, except the rules of evidence as to the admissibility of extrinsic evidence of surrounding circumstances are constrained by the decisions in *Westfield* and *Deguisa*. This is evident from the judgment of the Court of Appeal in New South Wales in *Phoenix*,[205] and the judgment of this Court in *Barport Pty Ltd v Baum*.[206] On this basis, the principles stated by the High Court in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*,[207] with such adaptions as are necessary to reflect the decisions in *Westfield* and *Deguisa*, should apply to the construction of the Covenants, as follows:
>
> (1) The meaning of the phrase at issue is to be determined objectively, by reference to its text, context (the entire text of the Covenants as well as any registered instrument or statutory provision referred to in the text of the Covenants) and purpose.[208]
>
> (2) In determining the meaning of the relevant terms of the Covenants, it is necessary to ask what a reasonable person in the position of Mrs Buckley and Mr McDonald would have understood those terms to mean. That enquiry requires consideration of the language used by the parties in the Covenants, the circumstances addressed by the Covenants and the commercial purpose or objects of the Covenants.[209]
>
> (3) A construction of the relevant words in the Covenants which accords with commercial sense and commercial convenience should be preferred over one which does not.[210]

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205 [2010] NSWCA 64, [158].

206 [2019] VSCA 167, [68].

207 (2015) 256 CLR 104.

208 Ibid [46].

209 Ibid [47].

210 Ibid [51].

316. In *Barport Pty Ltd v Baum*,[211] the Victoria Supreme Court of Appeal held that the judge had erroneously approached the construction of a restrictive covenant by defining a term according to dictionary definitions without regard to context:

> 88 In our opinion, the respondents were correct in submitting that the judge had erroneously approached the construction of the Covenant by attempting to define the phrase 'height limitation' by reference to dictionary definitions and divorced from its context. The expression is clearly capable of bearing different meanings depending upon the context in which it is used. A height limitation is not necessarily confined to a maximum allowable height beyond which the thing is not permitted. That was the meaning given by the judge. However, it is also apt to describe a height limit as the point at which the building or hangar becomes liable to be regulated under the MOS.

317. The Court of Appeal emphasised that the text of the covenant is 'critical' and must be construed by reference to the context of the instrument as a whole:

> 68 It is not necessary to dwell on the constructional principles that apply to construing a restrictive covenant on title. Plainly, the text of the covenant is crucial. As with any constructional exercise, context plays a role and the words should be construed by reference to the instrument as a whole and not in the abstract, but by reference to the location of the physical characteristics of the properties which are affected by it. However, context may not be used to ascertain or elucidate the subjective intentions or expectations of the covenantor. The purpose of the covenant will be important in so far as it can fairly be discerned from the instrument as a whole.

318. Significantly, statutory definitions such as those found in the *Planning and Environment Act 1987* do not determine the appropriate construction of terms in a covenant. In *Manderson v Smith*[212] Beach and Kennedy JJA held that:

> 43 The Macquarie Dictionary definition of a 'building' is as follows:
>
> 1. a substantial structure with a roof and walls, as a shed, house, department store, etc.
>
> 2. the act, business, or art of constructing houses, etc.
>
> There is nothing in this definition which suggests that a 'building' should extend to a boundary fence. In this respect, we would respectfully disagree with Emerton J that it was appropriate to have recourse to the definition contained in the *Planning and Environment Act 1987*. The matter does not appear to have been the subject of contested submission. In any event, we do not consider that any such recourse is necessary or appropriate. Although the Permit is to be interpreted pursuant to the definitions in that Act, the Permit is spent. It would also be unnecessary to include the words, 'or part of a building' if that definition applied, because the statutory definition already includes 'and

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211 *Barport Pty Ltd v Baum* [2019] VSCA 167.

212 [2021] VSCA 359.

part of a building'. Rather, consistent with the principles already summarised, the words should not be interpreted using a technical or legal approach.

319. In *Jeshing Property Management v Yang* [2023] VSCA 185, the Court of Appeal rejected a narrow interpretation of the words 'his … transferees', preferring to read the words in the context of the full composite phrase in the covenant:

> 64 The words which must be construed are not simply 'his … transferees' but the composite and conjunctive phrase 'for himself his [heirs]74 executors administrators and transferees'. Even when considered alone, this phrase is apt to describe a class including derivative transferees from Mr McDonald, which extends to each transferee who takes after him (broad meaning), and not simply to his 'direct transferees' as sought in the proposed declaration (narrow meaning). Reference to the text of the Covenants as a whole confirms that the broad meaning should be preferred to the narrow meaning.

320. In interpreting the meaning of the words 'his … transferees' with respect to whether the burden of the covenant extends beyond the original transferee, the Court of Appeal looked to the language used to express the benefit of the covenant. The Court found that as there was a clear objective intention to attach the benefit of the covenant to every derivative transferee, it was unlikely that the covenanting parties would have ascribed a narrow meaning to the duration of the burden of the covenant:

> 65 First, the objective intention for the Covenants to continue to burden transferees of the Land beyond direct transferees of Mr McDonald is apparent from the words describing the covenantee or beneficiary of the Covenants, namely Mrs Buckley 'and her transferees the registered proprietor or proprietors for the time being' of the land comprised in the great-great-grandparent title. If the identity of the burdened party is limited as the owner suggests, there is a disconformity between the duration of the beneficial interest under the Covenants and the obligation created by the Covenants. The phrase 'her transferees' in the description of Mrs Buckley as covenantee means every transferee who takes after her and mirrors the language used for Mr McDonald. The words 'the registered proprietor or proprietors for the time being' limit the operation of the Covenants in favour of her transferees only for such time as they are registered proprietors. In circumstances where there is a clear objective intention to benefit the owners of the land comprised in the great-great-grandparent title for the time being (including transferees of part of that land such as the neighbouring owners), it is unlikely that the original parties the Covenants intended the narrow meaning as to the duration of the burden of the Covenants. Such a result would be inconsistent with a construction resulting in the 'congruent operation' to the various components of the Covenants as a whole.

321. The Court of Appeal also favoured an interpretation that accorded with commercial sense, insofar as if the burden only extended to direct transferees, any transferee could simply transfer the land to an associated entity and avoid the burden of the covenant:

> 68 Third, adoption of the narrow meaning would produce absurd results which offend both common sense and commerciality. For example, if Mr McDonald died before transferring the Land, only his personal representatives would be

bound, and not any transferee from them. Further, any transferee from Mr McDonald could easily avoid the burden of the Covenants by further transfer to an associated party. In circumstances where it was clearly intended to benefit the owners of the land comprised in the great-great-grandparent title for the time being, it would be unreasonable to attribute the narrow meaning to the parties.

Admissible evidence

322. A key principle of the Torrens system is that a person need look no further than the register, and the physical features of the land itself, to understand attributes of and encumbrances on the land.[213]

323. This principle is stated in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73:

> But it seems to me that what is "notified" to a prospective purchaser by his vendor's certificate of title is everything that would have come to this knowledge if he had made such searches as ought reasonably to have been made by him as a result of what there appears.

324. The High Court recently restated this principle in *Deguisa v Lynn* (2020) 268 CLR 638:

> 88 A person who seeks to deal with the registered proprietor in reliance on the State's guarantee of the title of the registered proprietor disclosed by the certificate of title in the Register Book (or its electronic equivalent) is not to be put on inquiry as to anything beyond that which is so notified. A common building scheme can operate consistently with the scheme of the Act in relation to the enforceability of the benefit of a restrictive covenant only if those rights are notified on the certificate of title of the burdened land, or by express reference in a memorial on the certificate of title to other registered instruments which contain that information. Anything less is inconsistent with the natural and ordinary meaning of the text of s 69 and the purpose of the Act.

325. The High Court considered the judgments of Barwick CJ and Windeyer J in *Bursill*, finding that their honours' references to the searches of a prudent conveyancer relate only to searches of those documents notified on the relevant certificate of title, not documents that may be found through wider searches of the Registry Office:

> 56 It is tolerably clear from the context in which these observations were made that when Barwick CJ spoke of "search", he meant obtaining and reading such registered instruments as were notified on the certificate of title. He was certainly not suggesting the need for a search for documents that might have been found outside the Register Book or documents that might be found in the Registry Office but were not incorporated by an entry on the certificate of title. …

213 *Breskvar v Wall* (1971) 126 CLR 376.

58 Contrary to the view of the majority of the Court below in the present case (73), the reasons of Barwick CJ in *Bursill* do not support the proposition that what is "notified" within the meaning of s 69 of the Act extends beyond what is referred to on the certificate of title, to include what might be found outside the Register or in other documents somewhere in the Lands Titles Office if one knew how to find them. Indeed, it is apparent from the passages cited that Barwick CJ, in speaking of registered dealings being available for "search and inspection", was speaking of the search of registered instruments or of instruments referred to in such instruments which were themselves registered.

326. *Deguisa* reversed the decision of the Full Court of the Supreme Court of South Australia, which found that a memorandum of encumbrance recorded on a parent title and in the schedule of dealings on the present certificate of title sufficiently was sufficient notification of the existence of a building scheme on the basis that a prudent conveyancer would have made reasonable searches having regard to what appears on the register:

47 The appellants appealed to the Full Court of the Supreme Court of South Australia from both of the primary judge's judgments. The majority of that Court (Peek J, with whom Hughes J agreed) upheld the conclusions of the primary judge. Peek J held that the 52 lots sold out of the subdivision that were encumbered with identical restrictive covenants, which did not include Lots 5 and 21, were therefore part of a common building scheme (56). His Honour held further that the appellants were sufficiently notified of the restrictive covenants. In this regard, Peek J proceeded upon the "governing principle", stated by Windeyer J in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (57):

> "What is 'notified' to a prospective purchaser by the vendor's certificate of title is everything that would have come to his or her knowledge if a prudent conveyancer had made such searches as ought reasonably to have been made by him [or her] as a result of what appears on that certificate of title." Peek J went on to say (58):
>
> "And if one inquires, 'What searches of the Register ought reasonably be made by a prospective purchaser?' the applicable principle becomes:
>
> 'A prospective purchaser is required to make such searches of the Register as ought reasonably be made by a prudent conveyancer having regard to both what appears on the vendor's certificate of title and what comes to his or her knowledge during the course of such reasonable searches.'"

Importantly, Peek J understood that the searches contemplated by Windeyer J included searches that were not directed by entries in the Register Book to particular registered instruments. Peek J considered that the appellants, having inspected the Memorandum of Encumbrance referred to on the certificate of title, would have been put on notice of the possible existence of a "common building scheme", and thus of the likelihood of a number of identifiable lots with mutually enforceable covenants (59).

48 The appellants ought then to have undertaken the further searches of the Register that would have been undertaken by a prudent conveyancer; these

searches would have confirmed that all the lots in the building scheme were sold by the same common vendors, had the same encumbrances and restrictive covenants attached to them, and originated from the same subdivision which had produced Lot 3, and that therefore Lot 3 was part of a common building scheme (60). Further, as to the searches that would have been conducted by a prudent conveyancer, Peek J accepted expert evidence adduced by the respondents to the effect that a search for the "distinctive surname 'Ayton'" in the 1965 or 1966 alphabetical listings of the vendors attainable from the Lands Titles Office would have yielded all of "the encumbrance names" (61). It is noteworthy that the expert evidence in relation to these searches was that "Ayton" rather than "Fielder" would be chosen for the purpose of the searches because "Ayton" was an unusual name, whereas "Fielder" would be "lost in numerous other Fielders" (62).

327. Thus, the High Court found that any prospective purchaser was only notified of the existence of the memorandum of encumbrance and that the covenant was invalid as the benefitting lots were not identified within:

> 73 As a matter of the ordinary and natural meaning of the language of s 69 of the Act, and in conformity with the authoritative exposition of the purpose of the Torrens system in *Westfield*, any intending purchaser of Lot 3 was notified by entry on the present certificate of title only of the memorialised Memorandum of Encumbrance, and of the terms of that instrument. There was no notification on the present certificate of title of the other lots that were benefited by the restrictive covenants in the Memorandum of Encumbrance. Those lots were not identified in the Memorandum of Encumbrance.
>
> 74 The land broker's reference to "a common building scheme" on the back of the Memorandum of Encumbrance did not identify a registrable dealing with land and was not a memorial of a subsisting encumbrance. More importantly, the land broker's notation did not identify the certificates of title to lots that have the benefit of the restrictive covenants that are said to burden Lot 3, so that those lots could be identified by a search of the Register.

328. In *Jeshing Property Management v Yang* [2022] VSC 306, Matthews AsJ found that it was consistent with *Deguisa* to refer to the network of covenants in construing the words of a covenant:

> 100 On this basis, the parties were in agreement that I could have regard to other covenants contained in instruments of transfer out of the Great Great Grandparent Title, as corresponding covenants affecting other parts of that estate. I agree that this is consistent with the approach taken in Deguisa.[87] I note that Deguisa also makes clear that the principle is not so wide that any document on the register is available as an aid, but consider that the covenants in respect of properties transferred out of the Great Great Grandparent Title are admissible as material referred to in the relevant instrument or instruments referred to in that instrument. In this way it is possible to trace the benefit of the Covenants back to the Great Great Grandparent Title and identify covenants within the network in the Beaulieu Estate. I do not consider that other covenants, such as that said by the Plaintiffs to be imposed in respect of 19 Monaro Road, Toorak, are admissible. Nothing in respect of that covenant is to

be found in the register pertaining to the Land or is able to be derived from instruments referred to in respect of the Land.

329. This was overturned by the Court of Appeal,[214] which found that only instruments expressly referred to in the certificate of title or the restrictive covenant are admissible. Referring to the network of covenants (recorded on the great great grandparent title) would be to go a step further than the documents permissible according to the principles in *Westfield* and *Deguisa*:

> 42 Nevertheless, the neighbouring owners correctly acknowledge that the statements in *Westfield* and *Deguisa* contain important and fundamental statements concerning the operation of the Torrens system of title by registration and the need for interests to be clearly notified on the certificate of title. On this basis, and as the neighbouring owners submit, in construing a registered instrument regard may be had to the objective factual context represented by other registered instruments which are referred to in the instrument to be construed. However, the difficulty for the neighbouring owners is that they seek to go a step further. They contend that the other covenants in the network of similarly worded covenants relied on by the associate judge are admissible to construe the Covenants because it is necessary to look at the great-great-grandparent title to determine the land which is benefited by the Covenants and, in doing so, reference must be made to the transfers of land referred to in the great-great-grandparent title which contain the other covenants.
>
> 43 We do not accept the contentions of the neighbouring owners on this issue. For the reasons given below, reference to the great-great-grandparent title falls within the principles stated in *Westfield* and *Deguisa*. It is an instrument expressly referred to in the Covenants and identifies by number the other transfers of land made as part of the subdivision recorded in the plan forming part of the great-great-grandparent title. It is not, however, necessary to look at those instruments of transfer in order to identify the benefited land under the Covenants. This is because the new certificates of title created by those transfers from the great-great-grandparent title are recorded under the dealings columns of the great-great-grandparent title. Thus, by reference to the Covenants and the great-great-grandparent title referred to in the Covenants, a purchaser of the Land would know all that is necessary to identify the lands which are benefited by the Covenants. It is unnecessary to search the dealing numbers of the other transfers of land in order to obtain this information. Thus, unlike in *Deguisa*, the Covenants were complete and bound the Land, subject to their proper interpretation.

330. Hence, as the network of covenants were not 'incorporated by reference' in the certificate of title or covenants, they were inadmissible:

> 45 The only interests notified on the certificate of title to the Land are the Covenants, by reference to the instruments of transfer which contained them. As discussed, the Covenants referred to the great-great-grandparent title and it

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214 *Jeshing Property Management Pty Ltd v Yang* [2023] VSCA 185.

> is permissible to refer to that title to both complete the Covenants and to construe them. However, the associate judge's extension of the scope of admissible evidence to include the network of other covenants was in error. The transfers of land containing those other covenants were not 'incorporated by reference' in the certificate of title or the Covenants,[56] or even referred to in them.[57] In accordance with *Westfield* and *Deguisa*, the fact that the other transfers are referred to in the great-great-grandparent title is an insufficient basis to make them admissible to construe the Covenants.[215]

331. The practical effect is that a covenant cannot be construed by reference to what either is or isn't contained within other like covenants.

332. However, regard may be had to the great-great-grandparent title (or other instrument referred to within the relevant covenant):

> 51 The statement in *Deguisa* which is relied upon by the owner does not prevent reference to the great-great-grandparent title in construing the Covenants. Unlike *Deguisa*, this is a case where the relevant cancelled title is expressly referred to in the Covenants which are noted on the title to the Land. The situation in *Deguisa* was different. The question there was whether an open-ended search of the Register should have been made to locate a registered instrument which would complete an otherwise incomplete encumbrance.[216]

The physical surroundings of the covenant are relevant

333. Easements and restrictive covenants can also be construed by reference to the surrounding physical context and the objectively known facts at the time of the creation of the instrument. See *Cannon v Villars* (1878) 8 Ch D 415 Jessel MR:

> This case has been elaborately argued, but I confess it appears to me that there is really no question either as to what is the law or as to what is the true construction of this agreement. In construing all instruments you must know what the facts were when the agreement was entered into. The first fact here is that the only access to the piece of ground let to the Plaintiff for the purpose of the erection of the workshop available for any cart, waggon, or other vehicle, was through a paved gateway which was the entrance to a long yard also paved in a manner fitted for the passing of carts, waggons, and other carriages. As I understand, it was a stone paved way, so stoned as to be sufficient and proper for that passage. The only other access at all to the locus in quo was through the door of a house through which it is admitted carts, waggons, and carriages could not pass. The ownership both of the land of the yard and of the gateway was in the landlord, the Defendant, Mr. Villars.

334. This extends to the known conditions of the *locus in quo* or the place where an event took place:

> Now I will say a word or two about the law. As I understand, the grant of a right of way per se and nothing else may be a right of footway, or it may be a general right of

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215 *Jeshing Property Management Pty Ltd v Yang* [2023] VSCA 185.

216 *Jeshing Property Management Pty Ltd v Yang* [2023] VSCA 185.

way, that is a right of way not only for people on foot but for people on horseback, for carts, carriages, and other vehicles. Which it is, is a question of construction of the grant, and that construction will of course depend on the circumstances surrounding, so to speak, the execution of the instrument. Now one of those circumstances, and a very material circumstance, is the nature of the locus in quo over which the right of way is granted. If we find a right of way granted over a metalled road with pavement on both sides existing at the time of the grant, the presumption would be that it was intended to be used for the purpose for which it was constructed, which is obviously the passage not only of foot passengers, but of horsemen and carts. Again, if we find the right of way granted along a piece of land capable of being used for the passage of carriages, and the grant is of a right of way to a place which is stated on the face of the grant to be intended to be used or to be actually used for a purpose which would necessarily or reasonably require the passing of carriages, there again it must be assumed that the grant of the right of way was intended to be effectual for the purpose for which the place was designed to be used, or was actually used.[217]

335. In *Barport Pty Ltd v Baum* [2019] VSCA 167 the Court of Appeal held that the words in a covenant should be construed by reference to the physical characteristics of the properties which are affected by it:

> Plainly, the text of the covenant is crucial. As with any constructional exercise, context plays a role and the words should be construed by reference to the instrument as a whole and not in the abstract, but by reference to the location of the physical characteristics of the properties which are affected by it.

336. This is consistent with the ruling of the High Court in *Westfield* that the physical characteristics of the land are relevant, to assess what's happening on the ground:[218]

> 35 Authority is clear. In *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) HCA 45 at [42] the High Court reasoned that the Court could determine user under a registered easement which "may change with the *nature of the dominant tenement* " (emphasis added). Also in *Sertari Pty Limited v Nirimba Developments Pty Ltd* [2007] NSWCA 324 when construing the words of an easement to determine whether a right of way was excessive the Court of Appeal confirmed at [15] - [16] that the effect of *Westfield Management Limited v Perpetual Trustee Company Limited* is that "extrinsic material apart from physical characteristics of the tenements, is not relevant to the construction of instruments registered under the Real Property Act".
>
> 36 Logic dictates the same result. It is difficult to give content to the rights under an easement unless some account is taken of the physical characteristics of the tenements. Otherwise the parties are engaged in an empty debate about the meaning of words in an instrument without reference to what is happening on the ground. The limitations of such a narrow view was emphasised by Campbell JA in *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 at [158].

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217 See also *Suhr v Michelmore* [2013] VSC 284 at [10]

218 *Richard Van Brugge & Anor v Meryl Lesley Hare & Anor* [2011] NSWSC 1364 [30] to [37].

337. Hence, reliance on extrinsic documents to aid construction, such as communications between the covenanting parties; contracts of sale; diary entries; or other documents intended to shed light on the subjective intention of the parties is impermissible. See *Westfield Management Limited v Perpetual Trustee Company Limited*: [219]

> 35 In going on to allow the appeal, Hodgson JA (again correctly) remarked that the decision of the primary judge appeared to be the product of an error in preparedness to look for the intention or contemplation of the parties to the grant of the Easement outside what was manifested by the terms of the grant. Extensive evidence of that nature had been led by Westfield on affidavit with supporting documentation.
>
> 36 In this Court, counsel for Perpetual submitted that some but not all of the extrinsic evidence had been admissible; in particular, the evidence said to supply part of the "factual matrix" but which post-dated a deed dated 26 February 1988 containing a covenant to grant the Easement was inadmissible. So also was said to be evidence of the subjective intention of the then owner of Glasshouse which had not been communicated to the then owner of Skygarden. Perpetual accepted that what had been admissible was evidence of a preceding oral agreement between those parties: this had been to the effect that the Easement was to permit access to Skygarden via Glasshouse.
>
> 37 However, in the course of oral argument in this Court it became apparent that what was engaged by the submissions respecting the use of extrinsic evidence of any of those descriptions, as an aid in construction of the terms of the grant, were more fundamental considerations. These concern the operation of the Torrens system of title by registration, with the maintenance of a publicly accessible register containing the terms of the dealings with land under that system. To put the matter shortly, rules of evidence assisting the construction of contracts *inter partes*, of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[220], did not apply to the construction of the Easement.
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> 38 Recent decisions, including *Halloran v Minister Administering National Parks and Wildlife Act 1974*,[221] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[222] and *Black v Garnock*,[223] have stressed the importance in litigation respecting title to land under the Torrens system of the principle of indefeasibility expounded in particular by this Court in *Breskvar v Wall*.[224]

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219 *Westfield Management Limited v Perpetual Trustee Company Limited* [2007] HCA 45 Emphasis added.

220 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 350--2.

221 Halloran v Minister Administering National Parks and Wildlife Act 1974 (2006) 80 ALJR 519, 526 [35]; 224 ALR 79, 88.

222 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 81 ALJR 1107,1150-1152 [190]–[198]; 236 ALR 209, 266–9.

223 *Black v Garnock* (2007) 237 ALR 1, 4 [10].

224 *Breskvar v Wall* (1971) 126 CLR 376. See also *Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd* (1999) 196 CLR 245, 264 [26]–[27].

39 The importance this has for the construction of the terms in which easements are granted has been remarked by Gillard J in *Riley v Penttila*[225] and by Everett J in *Pearce v City of Hobart*.[226] The statement by McHugh J in *Gallagher v Rainbow*,[227] that:

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

is too widely expressed. The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.[228]

Particular focus should be placed on whether a covenant controls use, development or both

338. When construing a restrictive covenant, it is important to determine whether the restriction was intended to control use, development or both. A good example of this can be seen in the case of *S. & J. Panayiotou v Moonee Valley City Council, & Ors*[229] in this case, Morris J was asked whether a permit for a child care centre at 74 McCracken Street, Essendon would facilitate a breach of a restrictive covenant. His Honour found that the covenant was a development control and not a control on the use of land:

> 6 I now turn to the other matter that needs to be ascertained, namely the meaning of the covenant. The covenant is one which covers a sizeable suburban area, as part of a subdivisional development. It was imposed in 1922. There are a number of beneficiaries of the covenant. The key words of the covenant involve a promise on the part of the landowner, and on behalf of subsequent landowners, that:
>
> > No building shall at any time hereafter be erected on the land hereby transferred save one dwelling house with the usual and necessary outbuildings thereto and such dwelling house shall front McCracken Street.
>
> 8 This case turns upon the construction of the words in the covenant. It is established that in approaching such a task the object is to discover the intention of the parties as revealed by the language they have used in the document in question. (See, for example, *Tonks v Tonks* [2003] VSC 195 per Bongiorno J.) …
>
> 9 The answer to the question must lie in the words used in the covenant. Turning to those words, it is apparent that the covenant is essentially concerned with the erection of buildings. The initial operative words in the covenant are that no

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225 *Riley v Penttila* [1974] VR 547, 573.

226 *Pearce v City of Hobart* [1981] Tas R 334, 349–50.

227 *Gallagher v Rainbow* (1994) 179 CLR 624, 639–40.

228 Cf. Proprietors Strata Plan No 9,968 v Proprietors Strata Plan No 11,173 [1979] 2 NSWLR 605, 610–612.

229 [2003] VCAT 1279

building shall at any time hereafter be erected on the land. Those operative words are then qualified by a saving provision. The focus of the covenant is upon the erection of buildings; it is not upon the use of buildings. …

14 Essentially my conclusion is that the promise made in the covenant was a promise about how the area must be developed. It was not a promise about how the area would be subsequently used into the future.

339. On this basis, his Honour found that the covenant would not infringe section 61(4) of the *Planning and Environment Act 1987* and that subject to the planning merits, a permit could be granted for a child care centre.

Building materials covenants

340. The issue of building materials covenants was considered in *Jacobs v Greig* [1956] VLR 597 (*Jacobs*). This found that a practical approach to the construction of building materials covenants should be taken, so a building to be made of brick and stone—somewhat self-evidently—need not have windows made of brick and stone and may be rendered without breaching a covenant:

> Of course, all such covenants, including this covenant, must be read as they would be understood by an ordinary person, accustomed to the ordinary current use of the English language in the relevant locality, and acquainted with current social habits and usages. No one would read this covenant as requiring that floors, stairs, rafters, or doors should be of brick or stone, or as essaying to interdict on the estate the otherwise common practice of using glass windows, metal or porcelain plumbing materials, or concrete or terrazzo flooring, or cement or plaster rendering over brick walls.

341. Similarly, in *Gardencity Altona v Grech & Ors* [2015] VSC 538 (*Gardencity*) Lansdowne AsJ found that the addition of render didn't detract from the brickwork construction underneath:

> 116 In my view the proper conclusion from this evidence is that it is possible to detect the use of brick as a building material even if the brick is rendered, although perhaps without detailed examination only by an expert. …
>
> 140 … I consider the proper measure of the current use of brick or stone to be its actual incidence, not its physical appearance.

342. In *Gardencity*, Lansdowne AsJ warned that removal of a brick or stone restriction on a covenant may have a substantial, real sense of injury to beneficiaries of a covenant:

> 207 For these reasons, the plaintiff also fails under s 84(1)(c). The right protected by the covenant is a right to require construction in brick or stone. The defendants consider that right to be of value- they have a genuine, and reasonable, preference for brick or stone construction to other forms of construction. Section 84(1)(c) only permits removal of that right if it would not occasion substantial injury to the defendants. Substantial means real and not fanciful. In my view, it would be substantial injury to the defendants to remove their current right to insist on a certain quality building material on a property immediately adjacent (in the case of the third and fourth defendants) and at

one remove and in a direct line of sight (in the case of the first and second defendants) without compensation, and without any certainty as to what building material would be used instead. Removal of the restriction would also cause injury, that is not fanciful, by its likely precedential effect in the immediate proximity of the defendants' land, and in the neighbourhood generally.

343. For many years, *Jacobs* was also authority for the proposition that a brick building covenant required a dwelling to be constructed of solid brick or 'cavity-brick' and not brick veneer:

> … I am satisfied that an ordinary resident of Victoria, reading this covenant in the current decade, would understand it as requiring that the vertical construction of the relevant structures should be substantially wholly of brick or stone, and as forbidding inter alia the use of the method of construction known as "brick veneer".

344. However, in *Gardencity*, Lansdowne AsJ considered that *Jacobs* was limited to its particular facts and time, and brick veneer was now acceptable as 'brick' for the purposes of a covenant:

> 133 The plaintiff submits that *Jacobs v Greig* remains binding for the principle stated in the first extract above, but not the outcome stated in the second extract. The application of the principle would now not exclude brick veneer because it is now acceptable that a high quality building may be constructed in brick veneer. Mr McLaughlin gave evidence to this effect. Indeed, his evidence is that brick veneer construction had replaced double brick construction in Australia by 1950, and so, on that evidence the acceptability of brick veneer had commenced by the time of *Jacobs v Greig*, but had possibly not filtered down to the general population. It is possible that the judgment in *Jacobs v Greig* was also influenced by the location of the subject property in Toorak.
>
> 134 Having regard to Mr McLaughlin's expert evidence that brick veneer is now an acceptable use of brick in construction, I consider the particular outcome in *Jacobs v Greig* to be limited to its particular facts and time. On the principle identified in that case, I find that an ordinary resident of Victoria would consider the covenants here in question do not now exclude brick veneer. Accordingly, I find that for this case at least, brick veneer is 'brick' for the purposes of the covenants, and like covenants in the area.

345. In *Clare v Bedelis*, Derham AsJ found that nothing in the ordinary meaning of 'brick' suggested that a covenant requiring a building's walls to be made of brick meant that this requirement also applied to the internal walls of the building:

> 107 … Nothing in the ordinary dictionary meaning indicates that walls constructed out of bricks on the outer layer, with timber and plaster board on the inner layer, does not satisfy the description 'walls of brick'. …
>
> 108 In this case, there is an enclosing structure composed of brick to the outside world. Must the walls be made wholly or a substantially of brick? The commonsense that was applied by Sholl J in *Jacobs v Greig* when applied here leads me to the opposite conclusion to the one he reached. Given that the purpose of the restriction is to require the external appearance to be of brick or

> stone and to avoid low quality construction materials, there is no reason why walls of brick veneer do not meet the purposes. There was no complaint that the brick is rendered. …[230]

346. Further, Derham AsJ held that the requirement that a building's walls be built of brick was for aesthetic purposes, and thus only affected the external layer of the building:

> 113 In my unaccompanied view of the Land and neighbourhood, it became apparent that the bulk of the houses were constructed with an external appearance of brick. Some had upper levels that included timber. But the overall appearance of the neighbourhood was that houses were substantial in size and built of brick, whether that was solid brick or brick veneer could not be seen. Apart from the decision in *Jacobs v Greig*, there is no warrant in this case for the conclusion that the requirement, in effect, that the dwelling house on the Land be constructed with walls of brick or stone has the purpose of anything more than the aesthetic appearance of the house and the avoidance of low quality materials.[231]

347. Derham AsJ appeared to doubt the merit of Sholl J's finding that the purpose of the materials restriction was for strength, durability, cost and fireproof qualities of a building:

> 110 The evidence before Sholl J in *Jacobs v Greig* did not appear to provide a factual basis for the conclusion that the building materials part of the covenant was to be understood as designed to protect purchasers with regard to the appearance, strength, durability, cost and fireproof qualities of the building.
>
> …
>
> 113 Apart from the decision in *Jacobs v Greig*, there is no warrant in this case for the conclusion that the requirement, in effect, that the dwelling house on the Land be constructed with walls of brick or stone has the purpose of anything more than the aesthetic appearance of the house and the avoidance of low quality materials. As I have said, I am not prepared to take judicial notice that strength, durability or any other matter forms a part of the purpose of the Covenant…

348. It is also noted that the judgement in *Jacobs* was for an interlocutory injunction whereas that of *Clare* concerned modification of a covenant and likely carries more weight:

> 113 … The evidence before Sholl J in *Jacobs v Greig* is not before me. In any event, that decision was merely an interlocutory decision arrived at on the basis that there was a prima facie case that the construction of the covenant required solid or cavity brick and not brick veneer.

349. This emphasis on quality of materials was further explained by Mukhtar AsJ in *Re Hammond* [2015] VSC 608, who noted that the quality of construction and availability of aesthetically high grade materials and finishes means that the court may consider

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230 *Clare & Ors v Bedelis* [2016] VSC 381 at [107] and [108].

231 *Clare & Ors v Bedelis* [2016] VSC 381 at [113]. Emphasis added.

that a brick covenant may no longer be as necessary as it was at the time the covenant was entered into:

> 23 In these sorts of covenants, the courts recognise the reality that in the last one hundred years the type, durability, and aesthetic quality of construction materials has so markedly changed and advanced that the court looks to see if there are any special benefits of a 'bricks and stone covenant' that might be taken away unjustly if the application is granted.
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> …
>
> 25 …the fact is the availability of high grade, everlasting and aesthetically high grade materials and finishes cast serious doubt on views that might have been had over a century ago about building materials.

350. In *Re Sanders* [2019] VSC 217, Lansdowne AsJ accepted that removal of a materials restriction requiring a dwelling to be constructed of brick or brick veneer would occasion no substantial injury to beneficiaries given the contemporary availability of other high quality building materials:

> 40 The plaintiffs also seek removal of the brick (or brick veneer) external walls and tile roof building materials restriction. There is no specific sourced evidence as to the purpose of that restriction in this case, but I proceed on the basis that the purpose was either to ensure a uniformity of appearance for the permitted single dwellings on burdened lots, or to ensure that they were constructed of materials perceived to be of greater attractiveness or prestige than other materials, such as timber, or both of these purposes. Mr Easton opines that the intent of the restriction was likely to be to prevent dwellings being built of materials considered at that time to be of lesser quality. He notes that there are now a variety of materials used in modern buildings, not just brick or brick veneer and tiles, that are considered to be of high quality, and that there is now a tendency to use a mix of building materials on the external walls of dwellings
>
> …
>
> 59 I also consider that no substantial injury will be occasioned to beneficiaries by removal of the materials restriction. I accept Mr Easton's evidence as to the availability of high quality building materials that are not brick, brick veneer or title, and the propensity for mixed use of materials.

351. The same reasoning was adopted in *ITMA by Tu and Yew* [2018] VSC 738:

> 24 …Then there is the brick and tiled roof restriction. I think that restriction is designed to prevent the weather board home and the corrugated iron roof, once regarded as mediocre or worse. The planning report cites instances in this neighbourhood of homes with cladding material other than brick and steel deck carports. I adhere to what was said in *Re Hammond*…

352. More recently, in *Re Izadi and Ors*.[232] Mukhtar AsJ found that a rendered finish over a substrate of polystyrene foam would be imperceptible from a rendered finish over a brick wall, since the same type of finish and aesthetic would be achieved:

> 24 The purpose of the materials covenant is to establish a residential neighbourhood of buildings made with quality and durable materials as a matter of structural integrity as well as aesthetic presentation and, I suppose, to get away from what might have once been regarded as undesirable or fire hazardous timber homes or, worse still, shanty fibro-sheeting. The first question is whether the covenant disallows plaster rendering over brick walls. There are various authorities which say that a building materials covenant is not breached by the application of a particular finish such as a concrete render over exposed: see *Jacobs* v *Greig*; *Grech v Garden City* and *Clare v Bedelis*. The photographs in evidence show that the rendered finish achievable on a substrate of polystyrene foam does make it, at least from a distance, imperceptible from a rendered finish over a brick wall. The same type of finish and aesthetic purpose is achieved. I saw fit to reveal to the parties in Court that I am personally closely familiar with the choice and the use of a rendered polystyrene finish on an upper storey external wall.

353. The *Victorian Civil and Administrative Tribunal* has also published several decisions of relevance to building materials restrictive covenants including findings:

a) that render over brick does not result in the breach of a brick covenant:[233]

> The use of zinc or aluminium cladding does not in anyway detract from the underlying compliance with the covenant that the building is constructed of solid brick. There is nothing within the covenant that indicates the building must be read as being constructed of brick. As stated in *Jacobs* 'decorative additions such as are frequently superimposed on the main vertical structure' can be used.

b) that a note on plans requiring compliance with a building materials covenant does not amount a failure to comply with section 61(4) of the Act; and

c) concrete panels covered by brick inlay satisfies a brick veneer covenant:

> 21 A covenant must be read as it would be understood by an ordinary person, accustomed to the ordinary meaning. Brick veneer is a common building technique defined in the Macquarie dictionary and whilst the ordinary person may not view the difference of an external brick wall as constructed of all brick or brick veneer it is what is perceived as the external fabric of the walls.
>
> 22 In this case the applicant is intending to put a brick inlay tile over the inner skin of the building. The applicant submits the brick inlay tiles will have an external appearance of brick, consistent with the appearance of a brick veneer wall. To the ordinary person this will appear as an external brick wall. There is no

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232 [2019] VSC 137

233 *Beman Pty Ltd v Boroondara CC* [2013] VCAT 1249 per Senior Member Rickards

requirement as to the specification of the brick merely that a layer of brick is required.

23 Whilst the definition in the Macquarie dictionary indicates bricks being placed over a timber frame. Given changes to building techniques the use of concrete and steel frames make no difference to what is placed on the outer skin other than it must resemble brick or brick veneer. As indicated in *Bedelis* it is possible to satisfy the purpose of a covenant in different ways as building materials change over time. I note that in *Bedelis* whilst the walls were constructed of brick veneer a render was placed over the walls so for all intent the walls were not able to be viewed as brick.

and

d) concrete blocks are not bricks for the purposes of a brick and/or stone restrictive covenant:[234]

39 Section 61(4) of the *Planning and Environment Act 1987* prevents a permit being issued, which would result in a breach of a restrictive covenant.

40 There is a restrictive covenant registered on the title of the land which relevantly requires the owner to not use any material other than brick and/or stone in the construction of the walls of any main buildings, without the consent in writing of Altona Beach Estates Limited.

41 While the proposal is mostly constructed with brick, its eastern second storey wall is to be of metal cladding and the ground floor southern and eastern walls are to be of concrete block.

42 Neither of these materials are brick or stone, as required by the covenant.

43 While concrete blocks may also be called concrete bricks, I do not consider that they fall within the common meaning of the term 'brick' as used in the restrictive covenant.

> 'Brick' is defined in the *Macquarie Dictionary* (online) as:
>
> a block of clay, usually rectangular, hardened by drying in the sun or burning in a kiln, and used for building, paving, etc.

44 I do not consider concrete block, which is not made of clay, to fall within the above definition.

45 At the hearing, I asked the respondent about the consequences of me imposing a permit condition requiring changed materials, so that the proposal was entirely constructed from brick. I was advised that there would be no external consequences other than the appearance of the different material and that while it had cost implications, a permit condition requiring a change of materials would be preferable to me refusing to grant a permit for the proposal.

46 Accordingly, I have included a condition on the permit which requires materials to comply with the covenant. This would require the ground floor and first floor walls to all be constructed of brick, unless the covenant is varied

234 *Karlovic v Hobsons Bay CC* [2018] VCAT 1382 per Member Blackburn

or the respondent is able to obtain the consent of the original developer to an alternative material (if the developer is still in existence).

A cost-effective means of amending building materials covenants

354. In *Re Azzopardi Holdings Pty Ltd* S ECI 2022 4301, the Supreme Court was prepared to modify a building materials restrictive covenant without notice to beneficiaries. That was achieved by simply applying the words "or other materials with a rendered finish" after the brick and/or stone restriction:

> B. This proceeding, pursuant to section 84 of the *Property Law Act 1958* (Vic) concerns an application to modify a restrictive covenant that applies to the subject land (Covenant).
>
> C. The Covenant requires, among other things, that the main walls of any building on the land must be constructed of brick or stone.
>
> D. The Plaintiff seeks to modify the Covenant so that the main walls may also be constructed of materials with a rendered finish.
>
> E. Having read the evidence of the Plaintiff's solicitor, Myles Watson, by his affidavit dated 10 November 2022, and having the benefit of the written submissions of Matthew Townsend, counsel for the Plaintiff, and his further submissions made orally today, the Court is of the opinion that the proposed modification of the Covenant is benign in its nature and scope.
>
> F. Further, the affidavit of Myles Watson demonstrates that there is no land having the benefit of the Covenant in proximity of the subject land, but rather that the closest beneficiaries are removed by approximately 450 metres. The Court considers that requiring the Plaintiff to provide direct written notice to distant beneficiaries, would be of limited effect and that a sign being placed on the subject land in the usual manner might only create confusion.
>
> G. The Court is therefore of the opinion that the proposed modification of the Covenant will not cause substantial injury to the persons entitled to its benefit and, in the somewhat unusual circumstances of this case, is prepared to grant the modification sought without notice to beneficiaries.

355. Additionally, in *Re Nikolovski* S ECI 2023 2547, the Court was prepared to add in the following underlined words, again without notice to beneficiaries:

> … the transferee-will not at any time erect construct or build or cause to be erected constructed or built on the said land or any part thereof any building other than a private dwelling house of brick <u>or cement with stone or granite cladding and</u> with a roof of tiles slates or shingles of 2 stories in height with the usual necessary buildings.

356. The Court accepted the Plaintiff's submissions that the fixing of stone or granite finish to a brick substrate could be done without amendment to the covenant (consistent with the established practice of both the Courts and VCAT that the application of render is irrelevant for the purpose of compliance with a building materials covenant) so that all the variation would allow is a change to the underlying supporting

structure. Seen in that context a change to the underlying substrate would result in no injury to beneficiaries.

357. From receiving instructions to receipt of the orders, this process took just over three weeks, which gives an indication as to how efficient the Supreme Court process can be.

The principle in *Tonks v Tonks*—does "a dwelling" mean "one dwelling"?

358. In *Tonks v Tonks* (*Tonks*),[235] Bongiorno J held, that the use of the phrase 'a dwelling' in a restrictive covenant, was not intended to limit the number of dwellings upon the land, but rather only describe its intended use:

> If the parties to the original covenant had wished to restrict the number of dwelling houses built on each of these lots they could have done so very simply and definitively by replacing the word "a" in the covenant with the word "one", or by making some similar simple amendment. The true construction of the covenant is that it prohibits the placing of any building on the land unless that building is a dwelling house. Provided that any building constructed can be properly described as a dwelling house there would be no breach of the covenant. The covenant says nothing, in my opinion, as to the number of dwelling houses which might be built. To import a restriction as to the number of houses which might be built on lot 3 into the covenant would extend its effect beyond the words used by the parties without any warrant for doing so.[236]

359. The Covenant in that case provided:

> … (the registered proprietor for the time being) will not erect or cause or permit to be erected on the land hereby transferred or any part thereof any building other than a dwelling house. …[237]

360. This approach was followed by the Victorian Civil and Administrative Tribunal in *Berenyi v Moreland CC* and *Samson v Moorabool SC*.[238] In *Berenyi v Mooreland CC*, Senior Member Michael Wright QC noted that if it was the intention of the covenanting parties to restrict development to one dwelling, they would have substituted the word "one" for "a":

> **Construction of the Covenant**
>
> 11 The guiding principle to be applied in construing a restrictive covenant is to ascertain the intention of the parties when the covenant was created according to the ordinary and everyday meaning of the words they used (*Prowse v Johnstone* (2012) VSC 4).

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235 [2003] VSC 195.

236 *Tonks v Tonks* [2003] VSC 195 at [17].

237 *Tonks v Tonks* [2003] VSC 195 at [2].

238 *Berenyi v Moreland CC* [2016] VCAT 1471; Samson v Moorabool SC [2012] VCAT 1435.

The First Issue: More than One Dwelling

12 In my view the covenant must be construed as allowing more than one dwelling on the land. It is fair to say that the applicant/objectors did not argue strongly to the contrary.

13 First, the ordinary and everyday meaning of the indefinite article "a" is consistent with either one dwelling or more than one dwelling. However, if it was the intention of the parties to restrict development to one dwelling they would and could easily have said so by substituting "one" for "a". This is a strong reason to construe the covenant as allowing more than one dwelling.[239]

361. While the principle in *Tonks* is frequently applied by municipal councils and the Victorian Civil Administrative Tribunal, Mukhtar AsJ in *Re Hammond* noted that expressions in restrictive covenants containing the indefinite article 'a', such as 'a dwelling house', may not always mean 'one dwelling house', and should still be construed with reference to the usual principles of construction:

> Does the phrase 'a private dwelling house' mean 'one dwelling house'? It is unnecessary, I think, to engage in a disquisition about the principles of construction of restrictive covenants, but it has to be considered to some extent: see generally Bradbrook and Neave's Easements and Restrictive Covenants. The learned authors of that work see the construction of a covenant as no different to the objective technique applied by courts in the construction of written contracts.240

362. In *Re Hammond*, Mukhtar AsJ observed that the expression 'a private dwelling house' was susceptible of more than one meaning.[241] Namely, a promise to not build 'any building other than a private dwelling house' could be a promise about the type of building, or about the number of dwelling houses:

> …the statement 'I will not build any building other than a private dwelling house' means (and these are my words now) 'I will only build a house and not for example a shop or a factory so that even if I wish to build two houses, I am still keeping my promise because nowhere did I promise it would only be one house.' That is, it is a promise about the type of building. I think that is certainly one meaning. But I do not think it is the only possible meaning. A statement that 'I will not build any building other than a private dwelling house' could also mean 'I can only build a house' which as a matter of impression of language in the non-technical idiom of a purchaser of an ordinary suburban block in 1912 (if not now), may be a way of saying the only permitted building is one dwelling house. To my mind, that is an innate and not a forced ambiguity.[242]

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239 [2016] VCAT 1471 at [11]–[13].

240 *Re Hammond* at [10].

241 *Re Hammond* [2015] VSC 608 at [1].

242 *Re Hammond* [2015] VSC 608 at [17].

Shared accommodation may not infringe a single dwelling covenant

363. A typical single dwelling covenant prohibits the development of any building other than one dwelling house. This does not necessarily limit development on the covenanted land to a single-family home.

364. Rather, as Lansdowne AsJ explained in *Re EAPE (Holdings) Pty Ltd* [2019] VSC 242, a building 'must be capable of habitation by only one household' to comply with a single dwelling covenant:

> 72 Broadly speaking, although different results were achieved in the various Australian cases considered by Cavanough J depending on the precise wording of the restrictions there in question, there are three consistent themes.
>
> 73 The first is that it is significant if the restriction includes, as it does here, a descriptor such as 'one', 'single' or 'private'. That is an indicator that the building must be capable of habitation by only one household or family.[243]

365. Relevant factors include whether the building has a common entry, facilitates internal communication between habitants, and whether rooms within the building are structurally separate from one another:

> 74 A second theme is the significance of a common entry and internal communication between habitations as indicators that the building may not offend a single dwelling restriction.[244] The proposed rooming house in this case would have a common entry, and the bedrooms are only accessible internally.
>
> 75 A third consistent theme of these authorities is that habitations within a building are likely to be considered separate dwellings if structurally separate from one another, and each capable of occupation by a separate family or household, causing the building as a whole to infringe a single dwelling restriction.[245] ...

366. It follows that 'one household' could contain 'potentially quite a large number of unrelated residents':[246]

> 79 There was no objector to the application in *Longo*, and so the outcome is not the result of a fully argued case, but in my view it does show that one household may be constituted by potentially quite a large number of unrelated residents occupying their own bedrooms, in that case with ensuite bathrooms, provided other facilities are communal.

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243 *Natraine Nominees Pty Ltd v Patton* [2000] VSC 303 (Smith J), discussed in *Prowse*, [74]; *Tonks v Tonks* [2003] VSC 195 (Bongiorno J), discussed in *Prowse*, [84]-[85].

244 *Ex parte High Standard Constructions Pty Ltd* (1929) 29 SR (NSW) 274, discussed in *Prowse*, [72]-[73].

245 *Cobbold v Abraham* [1933] VLR 385, discussed in *Prowse*, [78]; *Re Marshall and Scott's Contract* [1938] VLR 98, discussed in *Prowse*, [80].

246 *Re EAPE (Holdings) Pty Ltd* [2019] VSC 242.

367. The following are two examples of shared accommodation that the Supreme Court determined would not offend a single dwelling restriction:

Case	Restriction	Development	Private facilities	Common facilities
EAPE Holdings	'one private dwelling house'	Proposed 6-9 bedroom rooming house	Bedrooms	Entry, bathroom, toilets, kitchen, laundry and living areas
Longo Investments [2003] VSC 37	'one main dwelling house'	Hostel providing residential accommodation for the aged	Bedrooms with ensuite bathrooms	Communal activity areas

368. Care must be taken in the design of shared accommodation on land subject to a single dwelling covenant to ensure the proposed development enjoys sufficient shared facilities to avoid being characterised as multiple dwellings.

The importance of costs in restrictive covenant applications

Costs are in the discretion of the Court

369. Section 24 of the *Supreme Court Act 1986* (Vic) specifies that costs are in the discretion of the Court:

> **Costs to be in the discretion of Court**
>
> (1) Unless otherwise expressly provided by this or any other Act or by the Rules, the costs of and incidental to all matters in the Court, including the administration of estates and trusts, is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid.[247] …

370. This discretion in relation to costs is absolute and unfettered to ensure substantial justice is achieved between the parties:

> 3 … the court has an absolute and unfettered discretion in relation to costs, and may, in appropriate circumstances, examine the realities of the litigation and attempt to achieve on the matter of costs substantial justice as between the parties.[248]

247 Supreme Court Act 1986 (Vic) s 24.

248 *Manderson v Wright (Costs)* [2018] VSC 177, [3] (John Dixon J).

The settled practice in civil litigation, however, is that costs follow the event

371. Despite this discretion, there is a settled practice that costs follow the event, and a successful litigant should receive their costs absent disqualifying conduct:

> Although costs are in the discretion of the Court, there is a settled practice (sometimes called a general rule) that in the absence of good reason to the contrary a successful litigant should receive his or her costs. It is not, however, a legal rule devised to control the exercise of the discretion.[249]

This settled practice is modified in section 84 applications to create a presumption that a plaintiff will cover the standard costs of beneficiaries

372. This discretion is modified in certain applications pursuant to section 84 of the *Property Law Act 1958* (Vic) to the effect that "unless the objections taken are frivolous, an objector should not have to bear the burden of his own costs when all he has been doing is seeking to maintain the continuance of a privilege which by law is his." As explained by Derham AsJ in *ROJ Property Group Pty Ltd & Anor v Eventpower Property Pty Ltd (Costs)*:[250]

> 7 … although costs are a matter of discretion and each case stands on its particular facts, the general rule that costs follow the event ordinarily does not apply in these applications because:[251]
>
> (a) under the legislation, the plaintiffs must apply to the Court to modify or remove the restrictive covenant. Even where the owners of the land with the benefit of the covenant agree to the modification, for the registered title to be free of the restriction, or for the restriction to be modified, the owner of the burdened land must come to Court and the Court must be satisfied that the conditions for the exercise of the jurisdiction conferred by s 84 of the Act are satisfied;
>
> (b) the plaintiffs seek to change an existing burden over the servient tenement (the plaintiffs' land) which benefits the dominant tenement (the defendant's land). They therefore seek to modify an existing legal right available to the defendant;
>
> (c) the plaintiff will usually obtain an advantage, often a great advantage commercially, by the modification or removal sought;[252]
>
> (d) although the owner of the burdened land has a statutory right to apply for the modification or removal of the covenant, they must give notice to those having the benefit (as determined by the Court) and those having the benefit (whether given notice or not) are entitled to object

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249 BCA Asset Management Group Pty Ltd v Sand Solutions (Vic) Pty Ltd [2021] VSC 177, [11].

250 [2023] VSC 268

251 *Wong* [2014] VSC 282, [13]–[19].

252 For example see the observations of Anderson J in *Re Withers* [1970] VR 319, 319–320.

> and to maintain the status quo and hold the plaintiff to the covenant which binds them; … [253]

373. The effect of this is that once the matter progresses past the second return, a plaintiff must be cognizant of the likelihood that he or she will be responsible for the costs of objecting beneficiaries.

374. It is therefore useful to separate a section 84(1)(c) application into two parts from a cost management perspective:

a) the application preparation, first return, notice and second return—at which the costs will either be under the direct control of the plaintiff or to the extent that beneficiaries are involved, costs will be minimal; and

b) the process past the second return, following any mediation, at which the costs of objecting beneficiaries may quickly escalate and will, to a degree be in the control of the plaintiff. At this stage, a laser like focus is required on the cost effectiveness of any application and counter-measures are required to manage any costs exposure.

375. This broad demarcation is the reason why 90% or more of applications to the Supreme Court pursuant to section 84(1)(c) are finalised at or soon after the second return. Many applicants roll the dice with even the most ambitious of applications as it is impossible to predict with confidence who will object or more importantly, who has the resources and determination to see an application through to its final determination at trial.

However, this presumption is not an entitlement to costs

376. However, this presumption of a reimbursement of one's standard costs is not an entitlement to costs. This principle was applied by Morris J in *Stanhill Pty Ltd v Jackson*[254] who noted:

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

377. Yet if a defendant, resisting an application to modify a covenant, acts irresponsibly then it would not be entitled to costs in relation to that irresponsible conduct; indeed, it might be in a position where it would have to pay the plaintiff's costs.[255]

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253 Ibid 320.

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

255 *Ibid,* [6].

378. An example of such conduct can be found in *ROJ Property Group Pty Ltd & Anor v Eventpower Property Pty Ltd (Costs)*[256]. This case concerned a dispute between two commercial landowners each keen to advertise to passing traffic along the West Gate freeway. Derham AsJ gave the Defendants a time to absorb the nature of the application to modify the covenant, but after that period, his Honour found that the defendants had inappropriately put the plaintiff to unnecessary expense:

> 33 It seems to me that the plaintiffs are right when they submit that the defendant's opposition to the modification was irresponsible and its objections were frivolous or groundless. The fact that the defendant ignored its own breach of the Signage Restriction is significant. Although the defendant's signage facing the West Gate Freeway is 'Eventpower Solutions', and thus includes a part of the name of the defendant, that entity is not the registered proprietor. The evidence shows there is another company with a common director and secretary, namely Eventpower Solutions Pty Ltd. The name of that company (without the Pty Ltd) also appears on another side of the building on the land owned by the defendant, which further illustrates the observation by the VCAT member in the most recent decision which resulted in the grant of a permit to the second plaintiff — that it is a case of the 'pot calling the kettle black'.[257] It is also significant that there is no land in the Subdivision subject to the Signage Restriction that displays a sign identifying the current 'transferee' or registered proprietor.
>
> 34 It is not so much the hypocrisy of the defendant's position that is significant, although it is, but that its conduct and that of the other land owners in relation to signage illustrates the lack of any injury to the owners of the benefited lands in their enjoyment of those lands. As I said in my Reasons, there is precious little difference between signage directly related to business conducted by tenants or occupiers of the Land and such signage directly related to business conducted by the transferee or current registered proprietor. I fail to see any difference of substance at all.[258] I also fail to see how this was not obvious to the defendant from early in the proceeding.
>
> …
>
> 46 In my view, properly advised, the defendant should have seen that the application would be successful, and its opposition to the modification would fail, at the latest by a reasonable time after 2 August 2022 when they received the letter from the plaintiffs' solicitor giving clear notice of the particular basis on which the plaintiffs sought the modification and the argument in support of it. The defendant's solicitors response to the letter of 2 August 2022 was given on 5 August 2022. In my view, 14 days after 2 August 2022 is sufficient time for the defendant to assess the plaintiffs' case and its own answer to it. Thus, in my view, the conduct of the case by the defendant after that date was irresponsible and lacked a legal or factual basis or merit, as is demonstrated by my finding that the main argument against modification involved a fanciful injury to its

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256 [2023] VSC 268

257 *K & M Property Investments Group Pty Ltd v Melbourne CC* [2023] VCAT 317, [34].

258 Reasons [80].

enjoyment of the benefited land. The defendant should pay the costs incurred by the plaintiffs from 16 August 2022.

Offers of compromise and Calderbank offers can be taken into account in restrictive covenant applications

379. In *Mamfredas Investment Group Pty Ltd v PropertyIT and Consulting Pty Limited* Slattery J found that Calderbanks can be taken into account in applications to modify restrictive covenants[259]

> In exercising its discretion in relation to the costs of Conveyancing Act s 89 applications the Court may take into account any offers of compromise made by the successful applicant to the objectors. But such offers are not necessarily decisive: *Walker* at [14]–[15].

380. In *Wong v McConville*[260] Derham AsJ set out the relevant framework for Calderbank offers in a comprehensive way:

> 20. In *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2),*[261] the Victorian Court of Appeal said, in relation to *Calderbank* offers, that the critical question was whether the rejection of the offer was unreasonable in the circumstances. Deciding whether conduct is unreasonable involves matters of judgment and impression. The Court in *Hazeldene* held that, when considering whether the rejection of a *Calderbank* offer was unreasonable, a court should ordinarily have regard at least to the following matters:
>
> (a) The stage of the proceeding at which the offer was received;
>
> (b) The time allowed to the offeree to consider the offer;
>
> (c) The extent of the compromiser offered;
>
> (d) The offeree's prospects of success, assessed at the date of the offer;
>
> (e) The clarity with which the terms of the offer were expressed; and
>
> (f) Whether the offer foreshadowed an application for indemnity costs in the event of the offeree's rejecting it.
>
> 21. In *Luxmore Pty Ltd v Hydedale Pty Ltd*[262] Maxwell P and Kellam JA noted that what was said by the Court of Appeal in *Hazeldene* was meant to be of assistance to judges in approaching an application for costs consequent upon the service of a *Calderbank letter*. The Court of Appeal was not there engaging in a kind of judicial legislative process; they were simply giving a direction that these are the matters which the trial judge should ordinarily have regard to, in addition to such other matters as the judge might consider relevant.[263] They remarked that it would be wrong to regard the decision as having prescribed a

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259 [2013] NSWSC 929

260 [2014] VSC 282

261 (2005) 13 VR 435, 441–2

262 (2008) 20 VR 481; [2008] VSCA 212, [11].

263 *Foster v Galea (No 2)* [2008] VSC 331, [9].

list of matters which must be taken into account in every case, such that a party failing to get a special order for costs could complain on appeal if one of the matters mentioned by the Court had not been specifically adverted to. Like every question of costs, it is in the discretion of the trial judge and is to be decided according to the circumstances of the particular case.

22. There are some aspects of the matters mentioned in *Hazeldene* relevant to this application that deserve further elucidation, as follows:

(a) There is no presumption that where such an offer is rejected, the offeree should pay indemnity costs where it receives a less favourable result;

(b) The onus always lies upon the offeror to demonstrate unreasonableness in the offeree;[264]

(c) The policy objectives underlying the principle in *Calderbank v Calderbank* include:[265]

(i) That it is in the interests of the administration of justice that litigation should be compromised as soon as possible and so save both private and public costs.[266]

(ii) To indemnify an offeror whose offer is later found to have been reasonable against the costs thereafter incurred. This is considered reasonable because from the time of rejection of the offer the real cause of the litigation is the offeree's rejection of the offer;

(iii) To this end, a party in receipt of an offer of compromise should have some incentive to consider the offer seriously. That incentive is the prospect of a special order as to costs;[267]

(iv) It is nevertheless important not to discourage potential litigants from bringing their disputes to the Court;[268]

(d) It is undesirable that *Calderbank* letters be burdened with technicality;[269]

(e) Where the offer is made by a plaintiff, the requirement that the non-acceptance be unreasonable takes on a particular significance. A plaintiff may be supposed to be aware of the claim which it makes, including, even in a general way, its magnitude and its prospects of success. A defendant, however, faced with an offer of compromise may not have this awareness. If it appears that this lack of awareness is not due to its own default, it is difficult to conclude that its rejection of the offer was unreasonable;

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264 Ibid; *Hazeldene* (2005) 13 VR 435, [19].

265 The policy objectives are more fully set out in *Hazeldene* at [21].

266 *Hazeldene* (2005) 13 VR 435, [21]; *MT Associates Pty Ltd v Aqua-Max Pty Ltd* [2000] VSC 163, [72].

267 Fletcher Insulation (Vic) Pty Ltd v Renold Australia Pty Ltd (No 2) [2006] VSC 293, [13]–[17] (Byrne J).

268 *Oversea-Chinese Banking Corporation v Richfield Investments Pty Ltd* [2004] VSC 351, [60]; Hazeldene (2005) 13 VR 435, [22].

269 *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2007] VSC 441, [5].

(f) A decision to accept or refuse a *Calderbank* offer will ordinarily be based upon the offeree's prediction as to the likely outcome of the trial. An erroneous prediction may not be an unreasonable if at the time the offeree was, for good reason, in possession of insufficient information to make an proper assessment or if the circumstances upon which it was based later changed;[270]

(g) It does not follow necessarily from an adverse outcome for the offeree that rejection of the offer was relevantly unreasonable. Reliance on the outcome to show that rejection of the offer was unreasonable is a hindsight analysis;[271]

(h) The offer must be one capable of acceptance, such that an offer that is subject to approval by a third party will not constitute a *Calderbank* offer, but rather an offer to negotiate;[272] and

(i) The reasonableness of an offer, and the assessment of the reasonableness or unreasonableness of a rejection of an offer, will generally be assisted if the maker gives reasons why the offeror should succeed and/or the offeree should fail to do better than the offer. As Sundberg and Emmett JJ said in *Dukemaster Pty Ltd v Bluehive Pty Ltd*,[273] 'a *Calderbank* offer… is unlikely to serve its purpose of attracting an indemnity award of costs if the rejecting applicant fails to recover more than what is offered, unless the offer is a reasonable one and contains a statement of the reasons the offeror maintains that the application will fail'.

381. In *ROJ Property Group Pty Ltd & Anor v Eventpower Property Pty Ltd (Costs)*[274] Derham AsJ found that had he not determined to order the defendant pay the plaintiffs' costs from an earlier date, he would have ordered costs from the date of the first Calderbank:

> 47 With respect to the *Calderbank* offers, the plaintiffs' contention that the costs should be paid by the defendant from the first offer was put in the alternative to its submission that the costs should be paid from an earlier date. None of the four *Calderbank* offers were put on the basis that the costs to be claimed would be indemnity costs, and nor was there any submission that indemnity costs should be ordered. Therefore, it is strictly unnecessary to deal with those offers.
>
> 48 Nevertheless, the arguments put against the first offer being taken into account depend, first, on the submission that it was made some months before the plaintiffs had particularised their case by filing all of their evidence and submissions. It was thus said that was not unreasonable for the defendant to refuse to accept it at that early stage. In addition, and second, it was said that at

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270 Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No 13) [2007] VSC 516, [13] (Byrne J).

271 Rickard Constructions v Rickard Hails Moretti [2005] NSWSC 481, [17] (McDougall J).

272 *Apostolidis v Kalenik (No 2)* [2011] VSCA 329, [61]–[64] (the offer was subject to approval by the Australian Taxation Office, in effect).

273 [2003] FCAFC 1, [8].

274 [2023] VSC 268

that time there was no reason to conclude the Court would not follow the principles of *Re Withers* in respect of the defendant's costs and no reason to suppose that the defendant's case was unreasonable or vexatious. Therefore, the first offer did not offer a real element of compromise. Rather, it amounted to an invitation to capitulate.

49 The answer to the first point is that the essential elements of the plaintiffs' evidence had been filed at the commencement of the proceeding and its case was clearly outlined at least by its letter of 2 August 2022. The second point ignores the fact that a proper assessment of the plaintiffs' case at an early stage is an important part of the duty of solicitors and counsel engaged to act for a defendant. At the hearing on 19 May 2022, the defendant, then an objector, was represented by its solicitor. Plainly, that solicitor had instructions to oppose the modification, but was given time by the order made to consider the position and notify the plaintiffs if it desired to be made a defendant.

382. Significantly, though this was an unusual case in which expert evidence was not presented. A Calderbank might therefore not be effective until late in most proceedings:

50 In other cases, which do often depend on the detailed evidence and expert opinion about the neighbourhood and the environs of the subject land, it might well be too early for an objecting party to make a reasoned assessment of the prospects of the plaintiffs' application being successful. But in this case, that is not the situation for the reasons I have given. It ought to have been obvious to the defendant's advisers that there was no injury consequent upon the Signage Restriction being modified as sought.

51 For those reasons, in my view, the first offer did constitute a real element of compromise. It offered a cash sum plus all the defendant's costs on the standard basis up to the date of the offer. It explained why there would be no substantial injury to the defendant or the other beneficiaries by the modification. If I had not determined to order the defendant pay the plaintiffs' costs from an earlier date, I would have ordered costs on the basis of the first offer.

383. Calderbanks can have limited utility in binary applications, or matters in which there is little difference between a win and a loss. In *Lahanis v Livesay & Ors (Costs)* [2021] VSC 65 Derham AsJ found that in an application to modify a single dwelling covenant to allow two dwellings, there was insufficient difference between the offer to compromise and capitulation:

51 In this case, the factors that make up a so called 'genuine offer' have been separately considered, including whether the offer involved a real element of compromise. These matters include the timing of the offer, content and terms of the offer, its clarity, the explanation given for it, what was known or not known to the offeree at that time and the offerees' prospects of success. What is left for consideration in order to determine whether the offer was a 'genuine compromise', in the sense of a real compromise, is whether it had an element of compromise or whether in truth it required the defendants to capitulate. In my view, it essentially required the defendants to capitulate.

> 52 In conclusion, it is in my view incorrect to say, as the plaintiff submitted, that the real cause of the litigation from the time of the expiry of the Calderbank offer was the defendants' refusal to accept the offer and not the defendants' legitimate action in defence of the Covenant. The defendants were entitled to put their views before the court and justified in opposing the application, so that the costs incurred by them 'were a necessarily incident to such an application'. In my view, it is only right and proper that the plaintiff should pay all the defendants' costs incurred by reason of the application on the standard basis.

384. Calderbanks have been successfully applied by defendants in *Suhr v Michelmore* [275], and *Manderson v Smith.*[276] In the latter case Efthim AsJ held that an offer of compromise should have been accepted and directed the Plaintiff to pay indemnity costs:

> 21 In my view, indemnity costs should be awarded to the defendants from the date of the first offer of compromise. The plaintiff commenced the proceedings knowing that he had a fence on his own property encroached the boundary line by a much greater distance than the defendants' fence and knowing that all other residents had fences. He should also have known that the defendants' fence was at best only six centimetres over the boundary line.
>
> 22 The first offer of compromise should have been accepted and, in my view, it was unreasonable that it was not. The defendants have come to the Court with clean hands, they obtained a permit from the local council to erect the fence. It is clear from the evidence of Ms Smith that the defendants were concerned about the native flora. They were put to a great deal of expense in defending this claim which they should never have had to do.

Costs may follow the event in interlocutory hearings

385. Costs are not infrequently imposed on objectors in covenant cases where costs are deemed to have been thrown away:

a) an order for costs was made against the defendants in *Rouditser & Rouditser v Schreuder & Schreuder* S ECI 2018 01166 after the defendants were found by Derham AsJ to have been responsible for the trial being adjourned;

b) an order for costs was made against the defendants in *Livingstone v Kelleher & Pomponio* S ECI 2020 0460 after Matthews AsJ found the first defendant had put the court and the parties to unwarranted expense in necessitating an additional directions hearing;

c) an order for costs was made against the defendants in *Sijercic & Sijercic v Brotchie & Bennett in* S ECI 2021 03620 after Matthews AsJ concluded the

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[275] [2013] VSC 284

[276] Unreported, S ECI 2020 03378, 24 August 2021

defendant had not made sufficient effort to cooperate in the settling of pre-trial directions; and

d) an order for indemnity costs was made against a defendant in *210 Hawthorn Road Pty Ltd v Megan Ellinson and Ors* S ECI 2022 05081:

> I will allow the plaintiff's application for indemnity costs in respect of the costs dispute. As the reasons above disclose, there was no proper basis in fact or law for Dr Shafer's application to recover the costs of Mr Shafer's invoices. I accept the plaintiff's submission that it was a frivolous application. It was a poor use of time. It falls into the category of cases that is continued in wilful disregard of known facts or clearly established law, and warrants an order for indemnity costs: see *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 at 7.

386. Costs were also awarded against an objector in *Jiang v Monaygon Pty Ltd (Costs)*[277] where Derham AsJ ordered that the Defendants were entitled to their costs up until the time of the mediation, but from that time onwards, they knew, or should have known, that their case was hopeless:

> 27 The defendant's solicitor and counsel (senior and junior) performed their respective tasks reasonably and properly, in the sense that they behaved respectfully, they generally abided the orders of the Court and they presented their client's case in the best possible way that they could. At the start of his submissions, Senior Counsel for the defendant even acknowledged that the decided cases made it difficult to bring its 'substantial injury' within the ambit of s 84, so that they did realise the hurdle the defendant faced. That forthright acknowledgment was clearly warranted. But regrettably it did not stop the defendant advancing a case that had no real factual or legal merit and thus no real prospect of success.
>
> 28 In these circumstances, the lack of substance to the opposition to the modification sought by the plaintiff means that the appropriate order is that the defendant pay the plaintiff's costs from an appropriate point, allowing sufficient time for the defendant to obtain proper and considered legal advice.
>
> 29 It is therefore necessary to consider the point from which it is appropriate to order the defendant to pay the plaintiff's costs.
>
> 30 The application was notified to the benefitted land holders pursuant to an order of the Court made on 26 August 2016. The notice was served by 9 September 2016. The defendant gave notice of intention to appear and oppose the application on 6 December 2016. By orders made that day, the defendant was joined to the proceeding and directions were made for the filing of material and the holding of a mediation by 28 April 2017.
>
> 31 The mediation was held on 19 April 2017. On 27 April 2017 the parties requested a brief adjournment following the holding of the mediation, which was granted by order made that day. On 20 June 2017 the Court was informed that following the mediation the plaintiff and defendant had signed conditional

277 [2017] VSC 655

terms of settlement and subsequently the condition or conditions failed. On that day the trial of the proceeding was fixed to commence on 21 September 2017 with orders and directions for that purpose.

32 This sequence suggests that the last and best opportunity for the defendant to receive and accept proper and considered legal advice as to the factual and legal merit of the application, its prospects of success, and the prospects of the defence in fact run succeeding, was at the time of the mediation. Accordingly that is the appropriate point to which the plaintiff should pay the defendant's costs, on a standard basis, and the date after which the defendant should be ordered to pay the plaintiff's costs of the proceeding, again on a standard basis.

33 The result is that it will be ordered that the plaintiff shall pay the defendant's costs up to and including the mediation of the proceeding on 19 April 2017 and the defendant shall pay the plaintiff's costs of the proceeding after the mediation on 19 April 2017, both on a standard basis to be taxed in default of agreement.

387. These examples of costs orders against defendants should not dissuade beneficiaries from acting in good faith to protect their property rights and from subsequently seeking reimbursement for the reasonable costs in doing so but defendants (and practitioners) must remember that they are bound by the following overarching obligations in the *Civil Procedure Act 2010*:

> **20 Overarching obligation to cooperate in the conduct of civil proceeding**
>
> A person to whom the overarching obligations apply must cooperate with the parties to a civil proceeding and the court in connection with the conduct of that proceeding.
>
> **22 Overarching obligation to use reasonable endeavours to resolve dispute**
>
> A person to whom the overarching obligations apply must use reasonable endeavours to resolve a dispute by agreement between the persons in dispute, including, if appropriate, by appropriate dispute resolution, unless—
>
> (a) it is not in the interests of justice to do so; or
>
> **23 Overarching obligation to narrow the issues in dispute**
>
> If a person to whom the overarching obligations apply cannot resolve a dispute wholly by agreement, the person must use reasonable endeavours to—
>
> (a) resolve by agreement any issues in dispute which can be resolved in that way; and
>
> (b) narrow the scope of the remaining issues in dispute—
>
> unless—
>
> (c) it is not in the interests of justice to do so; or
>
> (d) the dispute is of such a nature that only judicial determination is appropriate.

24 Overarching obligation to ensure costs are reasonable and proportionate

A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—

(a) the complexity or importance of the issues in dispute; and

(b) the amount in dispute.

25 Overarching obligation to minimise delay

For the purpose of ensuring the prompt conduct of a civil proceeding, a person to whom the overarching obligations apply must use reasonable endeavours in connection with the civil proceeding to—

(a) act promptly; and

(b) minimise delay.

Combined permit and amendment process—96A of the *Planning and Environment Act 1987*

388. Interestingly, the least-used means of removing or amending a covenant is also the one arguably capable of delivering the most ambitious proposals — namely, applying for a combined permit and amendment pursuant to section 96A of the *Planning and Environment Act 1987*. This section provides:

DIVISION 5 — COMBINED PERMIT AND AMENDMENT PROCESS

96A Application for permit when amendment requested

(1) A person who requests a planning authority to prepare an amendment to a planning scheme may also apply to the planning authority for—

(a) a permit for any purpose for which the planning scheme as amended by the proposed amendment would require a permit to be obtained; or

(b) if the amendment provides for the removal or variation of a registered restrictive covenant, a permit for a use or development which would, if the restrictive covenant were not removed or varied, result in a breach of that registered restrictive covenant.

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

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

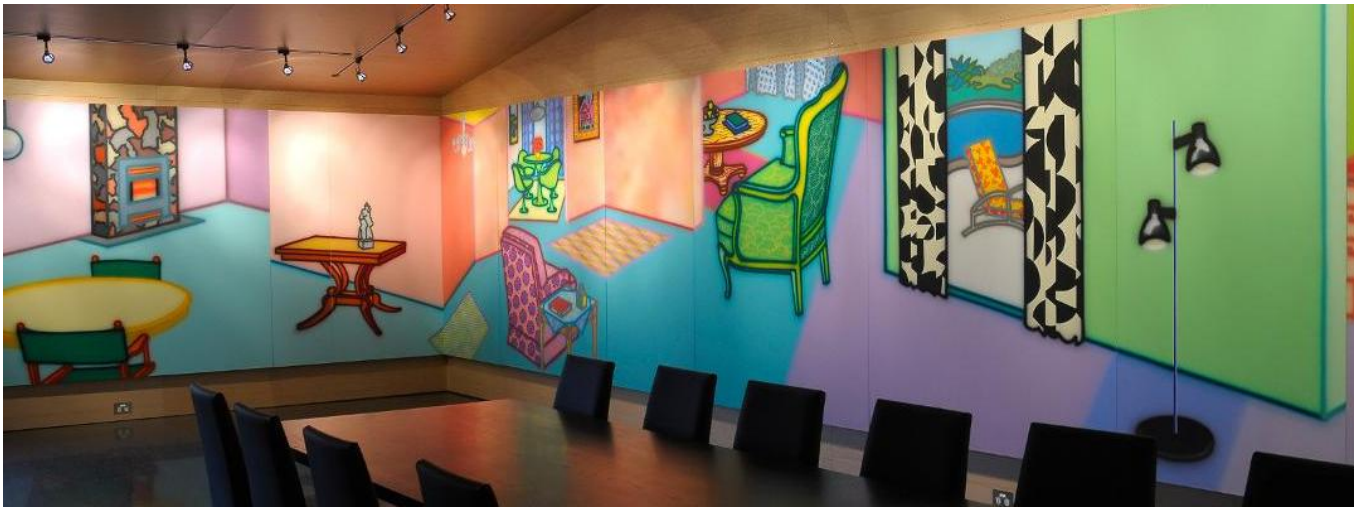
> Finally, the Panel should balance conflicting policy objectives in favour of net community benefit and sustainable development. If the Panel concludes that there will be a net community benefit and sustainable development it should recommend the variation or removal of the covenant.[278]

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

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

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

278 Mornington Peninsula C46 Panel Report (Panel Report, April 2004) 25.



Removing or modifying a covenant by consent--88(1C) of the *Transfer of Land Act 1958*

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

> (1C) A recording on a folio of a restrictive covenant that was created in any way other than by a plan under the *Subdivision Act 1988* may be amended or deleted by the Registrar under this section if the restrictive covenant is varied or released by—
>
> (a) the agreement of all of the registered proprietors of the land affected by the covenant; or
>
> (b) an order of a court or VCAT.

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

Removing a covenant at the direction of the Registrar — 106(1)(c) of the *Transfer of Land Act 1958*

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

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

396. This provision can be used for covenants that do not define the land to which the benefit is affixed or where the benefit of the covenant might be said to have not passed to subsequent successors or transferees. Covenants of this nature were discussed

in *Prowse v Johnstone*[279] at [62] and *Re Hunt*[280]. However, the Registrar will often rely on this power in the clearest of cases and is quick to refer applicants to the Supreme Court for clarification of the covenant's enforceability under section 84(2) of the *Property Law Act 1958*.

Removing a restrictive covenant imposed by mistake

397. The Supreme Court also has the power to remove restrictive covenants accidentally imposed by way of common mistake. For instance, in *Re: Prime Lands (Aust) Pty Ltd* S ECI 2022 02217 Matthews AsJ explained:

> 39 I accept the Plaintiff's submission that rectification is not confined to a contract and may be appropriate in respect of other instruments. Like Mukhtar AsJ in *Re Saliba S ECI* 2017 4200, I consider that where a transfer of land contains a mistake, in the sense of a failure to accord with the common intention of the parties to that transfer, it is susceptible to rectification and that the instrument of Transfer is "a concomitant of an agreement to sell and buy land" and provides a clear nexus to the intention of the parties as evinced in the Contract of Sale. However, it is not necessarily the case that the instrument sought to be rectified be one of a suite of documents giving effect to the contract.
>
> 40 For rectification on the grounds of a common mistake, that is, that the document does not reflect the common intention of the parties, the party seeking rectification must show a common intention continuing down to the execution of the document. While it is not necessary to show a prior agreement amounting to a contract provided that a continuing common intention has been established, in this instance, this is what we have. Here, the Transfer has not given effect to the common intention of the parties, that common intention being manifested in the Contract of Sale.

398. The Court ultimately ordered the deletion of the covenant offering, if required, a direction under s 103(1) of the *Transfer of Land Act* 1958:

> The restrictive covenant created in the Transfer of Land AR902375G as registered under the Transfer of Land Act 1958 (Vic) made between Tezek Pty Ltd as transferor and the Plaintiff as transferee on the land in lot 1616 on Plan of Subdivision No. 804775F, being the whole of the land described in Certificate of Title Volume 12051 Folio 810, shall be deleted it in its entirety to correct a common mistake made by the parties in the inclusion of the Restrictive Covenant in the Transfer of Land.

Restrictions on title under the *Subdivision Act 1988*

399. The above discussion has largely focused on restrictive covenants in equity and it is generally accepted that the Supreme Court's section 84 jurisdiction extends to modifying or removing restrictions on a plan of subdivision. However, the appropriateness of this is not free from doubt. As explained in the VLRC Report:

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279 *Prowse v Johnstone* [2015] VSC 621.

280 *Re Hunt* [2017] VSC 779.

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.

…

6.40 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'[281]

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.[282]

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.[283] 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.

…

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). 'Restriction' is used in its functional sense, to refer to the effect of the covenant on the use of the land.

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. In Victoria, section 84 has only been applied to restrictive covenants, and the extent to which it applies to restrictions arising 'otherwise' has yet to be considered by a court.[284]

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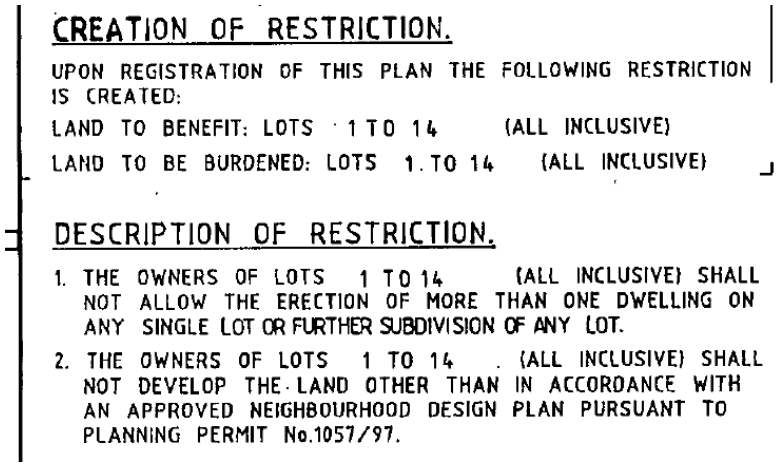
281 Ibid, 78. For example, *Transfer of Land Act 1958* (Vic) s 88(1AA)–(1A); *Subdivision Act 1988* (Vic) s 4(4), s 37(3)(c)(iv)(D).

282 See, e.g., *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*, [13.39]–[13.41].

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

284 Footnotes omitted.

400. To add to the confusion, restrictions on plans can be expressed as equitable restrictions, notwithstanding the arguably misleading nomenclature of "Land to Benefit":[285]



CREATION OF RESTRICTION.

UPON REGISTRATION OF THIS PLAN THE FOLLOWING RESTRICTION IS CREATED:

LAND TO BENEFIT: LOTS 1 TO 14 (ALL INCLUSIVE)

LAND TO BE BURDENED: LOTS 1. TO 14 (ALL INCLUSIVE)

DESCRIPTION OF RESTRICTION.

1. THE OWNERS OF LOTS 1 TO 14 (ALL INCLUSIVE) SHALL NOT ALLOW THE ERECTION OF MORE THAN ONE DWELLING ON ANY SINGLE LOT OR FURTHER SUBDIVISION OF ANY LOT.
2. THE OWNERS OF LOTS 1 TO 14 (ALL INCLUSIVE) SHALL NOT DEVELOP THE LAND OTHER THAN IN ACCORDANCE WITH AN APPROVED NEIGHBOURHOOD DESIGN PLAN PURSUANT TO PLANNING PERMIT No.1057/97.

401. That said, in *Manderson v Wright* [2016] VSC 677, Emerton J suggested that where a restriction in a plan of subdivision is recorded on title, it operates as a registered restrictive covenant, and is therefore subject to the usual methods for varying or removing restrictive covenants:

> 11. Pursuant to s 3 of the *Subdivision Act 1988* (Vic), 'restriction' means a restrictive covenant or a restriction that can be registered, or recorded in the Register under the *Transfer of Land Act 1958* (Vic). The restrictions in the plan of subdivision, including restriction No 2, are recorded on the titles to the land in the Warrenbeen subdivision. They therefore operate as registered restrictive covenants.
>
> 12. Section 88 of the *Transfer of Land Act* provides that a recording on a folio of a restrictive covenant that was created by a plan of subdivision must not be deleted or amended by the Registrar unless the restrictive covenant is released or varied by:
>
> (a) a plan of subdivision or consolidation; or
>
> (b) a planning scheme or permit under the *Planning and Environment Act 1987* (Vic); or
>
> (c) an order of a court…
>
> 14. Once a restrictive covenant has been recorded on title, there are therefore specific legal mechanisms that need to be used to vary the terms of the covenant.

402. Further, section 88(1B) of the *Transfer of Land Act* expressly provides that a restrictive covenant created by a plan under the *Subdivision Act* and registered on title may be varied by an order of a court:

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285 See the discussion of a similar restriction in *Manderson v Wright* [2016] VSC 677.

(1B) A recording on a folio of a restrictive covenant created by a plan under the Subdivision Act 1988 must not be amended or deleted by the Registrar under this section unless the restrictive covenant is varied or released by—

(a) the agreement of all of the registered proprietors of the land affected by the covenant with the consent of the council of the municipal district in which the land is located; or

(b) an order of a court or VCAT.

Removal of restrictive covenants in the compulsory acquisition of land

403. The effect of section 24 of the *Land Acquisition and Compensation Act 1986* is that upon the publication of a notice of acquisition in the Government Gazette land vests in the acquiring authority free from encumbrances such as restrictive covenants:

24 Effect of notice of acquisition

(1) Subject to this section, upon publication in the Government Gazette of a notice of acquisition—

(a) the interest in land described in the notice vests in the Authority without transfer or conveyance freed and discharged from all trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates of any kind; and

(b) any interest that a person has in that land is divested or diminished to the extent necessary to give effect to this subsection.

Restrictive covenants will be discharged if the land burdened and the land benefitted are owned by the same person

404. *Kerridge v Foley* [1964] NSRW 1958 and *Re Tiltwood, Sussex* [1978] Ch 269, support the proposition that restrictive covenants are extinguished if the same party owns, and is in possession of, both the burdened and benefitted land:[286]

> …A person cannot be regarded as subject to the burden of a covenant of which he alone has the benefit.

405. More recently, this principle was repeated by Powell J in *Post Investments Pty Ltd & Anor v Wilson & Anor* (1990) 26 NSWLR 598:

> As a broad general rule, the position at common law is that where land has been subject to an easement, or has been subjected to covenants restrictive of its user, for the benefit of other land, and thereafter the dominant and servient tenements come into the ownership *and* possession of the same person, any easement over, or restriction affecting the user of, the servient tenement is extinguished by operation of law. For the principle of merger to operate both "unities" – ownership and possession - must exist; it following that unity of possession without unity of ownership is not enough – and,

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286 *Gyarfas v Bray* (1989) 4 BPR 9736; *Post Investments Pty Ltd v Wilson (*1990) 26 NSWLR 598

for this purpose, unity of ownership involves the acquisition of both tenements for a fee simple absolute.

406. Gannon and Coorey's 'Easements & Covenants (commentary) repeats this proposition, stating that a covenant will be discharged in circumstances where the burdened and benefitted land are both owned by the same party:

> **[29.310] Discharge of restrictive covenants by unity of ownership**
>
> Restrictive covenants will be discharged when the land burdened and the land benefitted are both owned by the same person. If there is unity of ownership then the covenant will fail by operation of law: see Precedent 290.195.
>
> If the land is being developed by a scheme of development then the law will not presume that there is unity of ownership.

ENFORCING A BREACH OF A RESTRICTIVE COVENANT

The Court is generally not sympathetic to those who defiantly breach restrictive covenants

407. There have been a few recent cases in which restrictive covenants have been enforced in Victoria:

408. *Fitt v Luxury Developments*[287] has been mentioned previously. This was the return of a summons in a proceeding instituted by an originating motion seeking declarations and a permanent injunction to restrain a breach of a restrictive covenant. It didn't end well for the defendant, Luxury Developments with Gillard J observing that it had failed to utilise section 84 of the *Property Law Act 1958* prior to commencing construction:

> 332 Luxury Developments commenced building works on 14 February 2000 in the knowledge that the plaintiffs and particularly Mr Fitt had warned Mr Seiffert that if it commenced building works they would take legal proceedings.
>
> 333 The plaintiffs issued their originating motion on 6 March 2000 and Mr Seiffert continued with the building works to 31 March. Luxury Developments have spent approximately $75,000 on the works to date. A proportion of the cost was incurred after the proceeding was instituted.
>
> 334 The covenant in question is a restrictive one and as a general rule the court will grant an injunction and discretionary factors are of little moment. See *Post Investments Pty Ltd v Wilson*; *Hawthorn Football Club v Harding*.
>
> 335 I am satisfied that there are no discretionary factors which would preclude the plaintiffs enforcing their right. Luxury Developments proceeded with this development with full knowledge that it had been opposed at every step by the plaintiffs and others and with the knowledge that there was a substantial probability that a proceeding would be brought against it. Further, Luxury Developments did not take advantage of the course that was open to it to

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287 *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258

approach the court under s.84 of the *Property Law Act* to determine the question before commencing the building works.

336 I reject the submission that the plaintiffs have been guilty of laches. The defendant continued with the works for a substantial period after service of the proceeding. Its damage has been increased accordingly. Further taking into account the circumstances the granting of the injunction would not affront this court in its equitable jurisdiction.

409. *Clare v Bedelis* involved a proceeding where the plaintiff claimed that the defendant had breached the covenant seeking:

a) a permanent injunction restraining the defendant from breaching the covenant;

b) orders requiring the defendant to demolish an existing house which was allegedly erected in breach of the covenant; and

c) damages either in addition to or in substitution for an injunction.

The defendant denied any breach of the covenant and successfully established that the house erected on the Land had walls of brick and was not more than one storey in height.

410. See too *Manderson v Wright (No 2)* [2018] VSC 162, below.

The consequences of breaching a covenant can be frightening

411. In *Manderson v Wright (No 2)* [2018] VSC 162 Justice John Dixon ordered the demolition of about $1 million of building renovations in the Barwon Heads, saying the building works occurred outside the permitted building envelope governed by a restrictive covenant:

> I am not persuaded in all of the circumstances that the hardship to the defendant from a demolition order is out of all proportion to the relief assured to the plaintiff.

412. The Court found that the defendant knew of the risk of enforcement, but pressed on:

> 76. The defendant already had advice from her architect and understood the problem. Earlier, on 29 January 2016, the architect emailed the plaintiff as follows:
>
> > I have drawn where I think the house is in relation to the proscribed building envelope. It won't be completely accurate as we have never had the property surveyed but I think we can assume that the original house was never within the required space.
> >
> > I'm assuming your neighbours (who are the only ones who can enforce this) won't have the stomach for it as it may end up backfiring on anyone who has done some work or cleared trees in the intervening twenty years. If any action is taken by a valid complainant it will need to be a Civil complaint.

> I recommend we soldier on until or unless we are formally notified of any problem. At the moment it sits as a verbal complaint with the planning department at City of Greater Geelong who have no jurisdiction in this.

413. A subsequent decision on costs of the proceedings, saw the defendant liable for 50% of the costs of the proceeding, claimed by the plaintiff to be an eye-watering $460,000.

That said, not all breaches are significant enough to warrant enforcement

414. However, it is important to appreciate that the Supreme Court will not enforce every breach of a restrictive covenant.

415. *Manderson v Smith S ECI 2020 03378* concerned the same resident of Barwon Heads applying for a mandatory injunction to compel his neighbours to remove at their cost, a fence constructed on their own land, that the plaintiff asserted was in breach of a restrictive covenant.

416. Efthim AsJ found that while there had been a breach of the restrictive covenant, his Honour refused to uphold Manderson's application:

> 56 Here the defendants' fence was not erected entirely on the boundary line. A small part of it is erected outside Lot 3 and at best the fence encroaches the hatched area by approximately 6cm. The fence does breach the Covenant. However I agree with the defendants that any incursion by the front fence into the hatched area is *de minimis*. If I ordered that the fence be removed, then there is a possibility that vegetation would need to be removed or damaged. It could do more harm than leaving the fence where it is.

417. A curious aspect of the case was that the Plaintiff's own fence was also in breach of the covenant:

> 28 In cross-examination Mr Manderson agreed that all properties in Warrenbeen Court have fences. He also agreed that he had a fence and a gate, and believes that the fence encroaches further than 6cm, and more like one to two metres, on to the hatched area on his lot (which is the area on which no buildings can be erected).

ATTEMPTS AT REFORM

Victorian Law Reform Commission's review of the law in relation to restrictive covenants and easements

418. In 2011, the Victorian Law Reform Commission published an extensive review of the law in relation to restrictive covenants and easements. It found the most appropriate approach for reform was the regulation of covenants by planning legislation (be it state or local/municipal planning policies). Crucially, this change would mean that

planning legislation would modify the operation of covenants, but would not permit their removal:[288]

7.127 We propose a new model, in which covenants are regulated rather than remove 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.[289]

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.

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288 Victorian Law Reform Commission, *Easements and Covenants: Final Report* (Victorian Law Reform Commission 2011), 110.

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

7.136 Specifications that are intended to operate state-wide would be included in the Victorian Planning Provisions, which incorporate the State Planning Policy framework.[290] 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.[291]

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.[292]

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.[293] 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).

419. Significantly, the VLRC found that newly created covenants should have a mandated limited life:

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

420. The VLRC found that planning schemes should be relieved of their powers to remove covenants:

> **Regulation as an alternative to removal**
>
> 38. We propose the following set of reforms to planning legislation and recommend further public consultation regarding their implementation:
>
> a. It should no longer be possible to remove a restrictive covenant by registration of a plan under section 23 of the *Subdivision Act 1988* (Vic). Consequential amendments should be made to the *Planning and Environment Act 1987* and the *Subdivision Act 1988* to omit provisions that enable restrictive covenants to be removed or varied by or under a planning scheme.

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

291 Section 21 of the *Planning and Environment Act 1987* (Vic) provides that any person may make a submission.

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

293 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.

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.

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

Forum and costs

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

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

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

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

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

422. The VLRC also recommended a new set of conditions that would replace the existing criteria in section 84(1)(a)–(c) of the *Property Law Act 1958* — a helpful expansion of the criteria over the essentially present test of "substantial injury":

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.

423. Notwithstanding the rigour and extent of substantive issues identified by the VLRC, the state government was unmoved by its recommendations, and few recommendations of the report were adopted:

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

Planning Amendment (Better Decisions Made Faster) Bill 2025.

424. The Victorian Government has released the *Planning Amendment (Better Decisions Made Faster) Bill 2025* (**Bill**).

425. The proposed amendments contain two significant changes to the regulation of restrictive covenants in Victoria and a new scheme for the processing of applications.

426. On 9 December 2025, the Legislative Council made a series of amendments to the Bill. These amendments have been referred to the Legislative Assembly, which will next sit on 3 February 2026.

The reforms are proposed to commence by 29 October 2027

427. On 9 December 2025, the Legislative Council amended clause 2 (commencement) of the Bill. Clause 2 now provides that:

a) Part 1 of the Bill (Preliminary) and sections 11(2) and 11(3) will come into force on the day after the Bill (as a new Act) receives royal assent; and

b) all remaining provisions of the Act will come into force:

1) on a day or days to be proclaimed; and

2) if not in operation sooner, on 29 October 2027:[294]

> **2 Commencement**
>
> (1) This Part and sections 11(2) and 11(3) come into operation on the day after the day on which this Act receives the Royal Assent.
>
> (1A) The remaining provisions of this Act come into operation on a day or days to be proclaimed.
>
> (2) If a provision referred to in subsection (1A) does not come into operation before 29 October 2027, it comes into operation on that day.

428. As set out above Part 1 and sections 11(2) and 11(3) are proposed to commence on the day after the Bill (as an amending act) receives royal assent.

429. Part 1 includes clause 2 (extracted above) as well as clause 1and clause 3:

> **Part 1—Preliminary**
>
> **1 Purposes**
>
> The purposes of this Act are—
>
> (a) to amend the Planning and Environment Act 1987; and
>
> (b) to make consequential amendments to the Land Acquisition and Compensation Act 1986, the Subordinate Legislation Act 1994 and other Acts.
>
> …
>
> **3 Principal Act**
>
> In this Act, the Planning and Environment Act 1987 is called the Principal Act.

430. Sections 11(2) and 11(3) are also proposed to commence on the day after the Bill (as an amending act) receives royal assent. These sections provide a framework for affordable housing contributions under the planning scheme by amending section 6(2) of the *Planning and Environment Act 1987* (Vic).

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294 Incorporating Legislative Council amendments dated 9 December 2025.

431. While not directly relevant to restrictive covenants, in short:

a) under clause 11(2), the planning scheme may provide that any use or development of land is conditional on the provision of an affordable housing contribution; and

b) under clause 11(3), an affordable housing condition may be imposed as a condition on a permit if:

1) the relevant planning scheme identifies a need for affordable housing in the area; and

2) the application exceeds a threshold prescribed in the regulations that is expressed in terms of number of dwellings or value of development.

Transitional Provisions

432. Part 10 of the Bill provides for transitional provisions under clauses 232 and 233. These provisions are not directly relevant to restrictive covenants.

433. Clause 232 generally operates to maintain the existing processes for:

a) an application by a Municipal council to amend the planning scheme made before the relevant provisions of the new Act come into force; and

b) consideration by a planning authority of an application for a planning permit associated with the authorised preparation of a planning scheme amendment made before the relevant provisions of the new Act come into force;

c) preparation of an amendment to the Statement of Planning that has commenced the relevant provisions of the new Act come into force;

d) disputed claims for compensation for loss suffered as the natural, direct and reasonable consequence of land being reserved for a public purpose that are on foot before the relevant provisions of the new Act come into force;

e) applications and submissions related to gifts and donations made before the relevant provisions of the new Act come into force.

434. Clause 231 provides that the Governor in Council may make regulations containing provisions of a transitional nature arising as a result of the enactment the relevant provisions of the new Act.

A new scheme for permit applications

435. The Bill creates a new scheme with three types of permit applications, proposed as:

a) a type 1 application;

b) a type 2 application; and

c) a type 3 application

436. The new section 47AA provides the statutory framework for these applications types, with further detail to be provided under forthcoming guidelines:

> **47AA Types of applications for permits**
>
> (1) A planning scheme may specify the type of permit application required—
>
> (a) for a use or development of land; or
>
> (b) in any of the circumstances mentioned in section 6A(2); or
>
> (c) for any combination of use, development and any of those circumstances.
>
> (2) The regulations may prescribe the type of permit application required for a use, development, circumstance or combination referred to in subsection (1).
>
> (3) For the purposes of subsections (1) and (2)—
>
> (a) the types of permit applications that may be specified or prescribed are—
>
> (i) a type 1 application; or
>
> (ii) a type 2 application; or
>
> (iii) a type 3 application; and
>
> (b) the regulations prevail over a planning scheme to the extent of any inconsistency.
>
> (4) If a provision of a planning scheme require a permit to be obtained for a use, development or circumstance referred to in subsection (1) and the type of permit application is not specified or prescribed for that use, development or circumstance, a type 3 application is required.
>
> (5) If an application for a permit could be more than one type of application because of the use, development, circumstance or combination referred to in subsection (1) that is being applied for, the type of application that applies is the higher numbered application.

437. The second reading speech for the Bill explains that the three application types will be calibrated to reflect the risk and complexity associated with different permit applications:

> The Bill will establish three assessment processes that implement procedural steps and timeframes which are more closely aligned with the risk and complexity of different permit applications. The three application assessment processes vary in terms of timeframes for requesting information; whether or not notice is required and if so, the extent of notice that is required; the extent to which applications are referred to public authorities for comments and conditions; the timeframe for a decision and whether deemed approvals apply, or whether a failure to determine an application gives rise to a right of review at VCAT.

438. Assessment Type 1 would:

a) be a replacement for the current 'VicSmart' application process;

b) process simple low risk proposals envisaged by the applicable zoning and overlay;

c) not require public notice;

d) allow a permit subject to this application type to be deemed approved if the responsible authority does not make a decision within a prescribed timeframe:

> Assessment type 1 is established to process simple low risk proposals that are envisaged by the zone and overlay that applies to the relevant land. Assessment type 1 will replace the existing VicSmart process. As is the case with VicSmart applications, there would be no public notice of these development applications with the assessment of applications being made by responsible authorities against the relevant decision guidelines and codes set in the planning scheme. For applications considered through assessment type 1 it is proposed to establish a new deemed approval mechanism in circumstances where the responsible authority has not made a decision within the prescribed timeframe. In short, if the responsible authority does not make a decision within the prescribed period, then the permit is deemed to be approved.

439. Assessment Type 2 would:

a) apply to applications for uses or developments that are intended to comply with specified codes (such as those for town homes and low rise developments);

b) not require notice to be given unless the code or planning scheme specifies notice must be given;

c) apply to applications that do not require referral to a referral authority;

> Assessment type 2 would apply to applications for uses or developments that are intended to comply with specified codes; or significantly comply with specified codes but also include an element or elements that do not comply with the code but are permissible under state and local policies applied under the relevant planning schemes. No notice will be required to be given for permit applications under the type 2 assessment process, unless the code or the planning scheme specifies circumstances where notice must be given. The statutory time period for making a decision will be prescribed in regulations and is intended to be less than the 60 day period that is currently specified. This assessment process will only be applied to permit applications where it is not necessary to refer the permit application to a referral authority. Codes, such as that developed for town homes and low rise developments, are proposed to be developed in collaboration with local Government, the development industry and the community during the proposed implementation period for reforms.

440. Assessment type 3 would:

a) be the default process;

b) closely mirror the existing planning permit assessment process;

c) provide for public notice and referral where required;

d) be applicable to proposals that are more complex and represent a higher risk of negative impact to nearby landowners and the community;

e) balancing of state and a local policy, and a determination of appropriateness against the purpose and decision guidelines of the zone or overlay controls that apply to the land

> Assessment type 3 will closely mirror the existing planning permit assessment process set out in the Act that provides for public notice and referral where it is required. This assessment process is applicable to proposals that are more complex and represent a higher risk of negative spillover effects on owners and occupiers of land in the proximity of the proposed development and the local community more generally. Determination of type 3 applications require the balancing of state and a local policy, and a determination of appropriateness against the purpose and decision guidelines of the zone or overlay controls that apply to the land. The Bill specifies assessment type 3 as the default process that is applied.

441. Notably, section 60(2) (dealing with removal or modification of a restrictive covenant) only refers to type 2 and 3 applications:

> Before deciding on a type 2 or 3 application which would allow the removal or variation of a restriction (within the meaning of the Subdivision Act 1988), the responsible authority must also consider the following—

442. However, section 61(4) (dealing with a permit endorsing breach of a covenant) is seemingly open to any application type, including type 1:

> (4) Without limiting subsection (1), the responsible authority may grant a permit that would authorise anything which would result in a breach of a registered restrictive covenant.

443. In other words, if the proposal in breach of the covenant is permitted uncontroversially under the relevant controls (for example, it is a section 1 use envisaged by the applicable zoning and overlay, or would have been subject to a VicSmart application previously), then a type 1 application may be made, and deemed approved if a decision is not made within the relevant timeframe.

Planning policy will be a relevant consideration for the removal or variation of a restrictive covenant

444. Significantly, it is proposed that planning policy can be considered in the decision to remove or vary a restrictive covenant. The new section 60(2) will provide:

> Before deciding on a type 2 or 3 application which would allow the removal or variation of a restriction (within the meaning of the Subdivision Act 1988), the responsible authority must also consider the following—
>
> (a) the impact of removing or varying the restriction on the material interests of the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than 3 months before its making, has consented in writing to the grant of the permit) in terms of—
>
> (i) loss of amenity; and
>
> (ii) loss arising from change of character to the neighbourhood; and
>
> (iii) any other material detriment, other than financial loss, that may be suffered;
>
> (b) the impact of the restriction on the ability to deliver—
>
> (i) the objectives of planning in Victoria; and
>
> (ii) any applicable State planning strategy, regional planning strategy or planning strategy for the area covered by the planning scheme; and
>
> (iii) the objectives or purposes of the planning scheme;
>
> (c) whether a matter that is the subject of the restriction to be removed or varied is also regulated by the planning scheme;
>
> (d) if the removal or variation of the restriction is proposed in conjunction with an application for a permit for a use or development that would breach the restriction, for the purpose of considering a matter under paragraph (a), (b) or (c), whether that use or development is acceptable having regard to the matters set out in subsections (1), (1AA), (1A) and (1B) 15 (if relevant).

445. The current wording of section 60(2) requires that the impacts on beneficiaries be resolved before planning policy can be considered. As Senior Member Wright QC explained in *Waterfront Place Pty Ltd v Port Phillip CC* [2014] VCAT 155, there is a two-stage test whereby:

a) the tests in section 60(2)(a) to (d) are applied in 'absolute terms'; and

b) thereafter, consideration of the planning merits may occur:

> The Tribunal stated that in applying the tests set out in s. 60(2) it is not a question of balancing the loss suffered by a benefiting owner in each of the categories set out in paragraphs (a) to (d) against the planning benefits of removal or variation of the covenant. The tests must be applied in absolute terms. Consideration of the planning merits can occur only if the tests are satisfied and the discretion to grant a permit thereby enlivened. This Tribunal respectfully agrees.

446. However, under the Bill, the planning merits and the impact on beneficiaries of removal or modification of a covenant will be considered simultaneously.

447. The second reading speech for the Bill explains that responsible authorities will have greater discretion to approve the removal or variation of a restrictive covenant in circumstances where the restriction is inconsistent with what is permissible under the relevant:

a) planning scheme;

b) zone; and

c) overlays:[295]

> Changes the decision-making criteria that apply when an applicant applies to remove or vary a restrictive covenant using a planning permit. The effect is that responsible authorities will have greater discretion to approve the removal or variation of a restrictive covenant in circumstances where the restriction is inconsistent with what is permissible under the planning scheme, zone and overlays that apply to the land to which the covenant applies.

448. However, the new section 60(2)(b) casts the net wider than just these immediate planning controls, by requiring the responsible authority to expressly consider the impact of the covenant on the ability to deliver:

a) the objectives of planning in Victoria;

b) any applicable State planning strategy, regional planning strategy or planning strategy for the area covered by the planning scheme; and

c) the objectives or purposes of the planning scheme:

> Before deciding on a type 2 or 3 application which would allow the removal or variation of a restriction (within the meaning of the Subdivision Act 1988), the responsible authority must also consider the following—
>
> …
>
> (b) the impact of the restriction on the ability to deliver—
>
> (i) the objectives of planning in Victoria; and
>
> (ii) any applicable State planning strategy, regional planning strategy or planning strategy for the area covered by the planning scheme; and
>
> (iii) the objectives or purposes of the planning scheme;

449. The objectives of planning are set out under section 4(1) of the *Planning and Environment Act*. The Bill provides a new set of objectives of planning in Victoria,

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295 Legislative Assembly, Wednesday 29 October 2025 (Hon Sonya Kilkenny), Hansard, 4409.

including, for the first time, to increase housing supply, diversity and affordability and facilitate the provision of social and affordable housing in Victoria:

> (a) to enhance the State's liveability and prosperity by facilitating the orderly and economically, socially and environmentally sustainable use and development of land; and
>
> (b) to ensure that the use and development of land is planned and designed to respond and adapt to climate change; and
>
> (c) to recognise, protect and promote the rights, interests and values of traditional owners and respect their ongoing cultural, spiritual and custodial relationship to country, including land, sky and waters; and
>
> (d) to protect natural resources and maintain ecological and genetic diversity; and
>
> (e) to plan for population change while protecting those aspects that make Victoria an attractive place to live and work; and
>
> (f) to facilitate well-designed and high amenity places that are safe and accessible and that enhance the health and wellbeing of Victorians and visitors to Victoria; and
>
> (g) to increase housing supply, diversity and affordability and facilitate the provision of social and affordable housing in Victoria; and
>
> (h) to conserve and enhance those buildings, areas and places that are historically, architecturally, culturally, aesthetically, scientifically or socially significant or otherwise of special significance; and
>
> (i) to facilitate the efficient, timely, integrated and orderly provision of public utilities and infrastructure, public spaces and other facilities for the benefit of the community; and
>
> (j) to balance the present and future interests of all Victorians.".

450. Although a new provision is proposed to clarify that the objectives 'are to be balanced against each other'[296], the 'increase housing supply' objective in section 4(1)(g) nonetheless gives any applicant seeking to remove a restriction on dwelling numbers a useful objective to point to during a section 60(2)(b) analysis.

451. The proposed section 60(2)(c) also mandates consideration of whether the subject of the restriction is also regulated by existing controls under the planning scheme:

> (2) Before deciding on a type 2 or 3 application which would allow the removal or variation of a restriction (within the meaning of the Subdivision Act 1988), the responsible authority must also consider the following—
>
> …
>
> (c) whether a matter that is the subject of the restriction to be removed or varied is also regulated by the planning scheme;

296 Clause 5(2) of the Bill, to be inserted as section 4(3) of the Principal Act.

452. Section 60(2)(d) provides that in assessing an application to remove or vary a restrictive covenant that is proposed 'in conjunction with an application for a permit in breach of the restriction', the responsible authority must also consider whether that use or development is acceptable having regard to further provisions:

> (2) Before deciding on a type 2 or 3 application which would allow the removal or variation of a restriction (within the meaning of the Subdivision Act 1988), the responsible authority must also consider the following—…
>
> (d) if the removal or variation of the restriction is proposed in conjunction with an application for a permit for a use or development that would breach the restriction, for the purpose of considering a matter under paragraph (a), (b) or (c), whether that use or development is acceptable having regard to the matters set out in subsections (1), (1AA), (1A) and (1B) (if relevant).

453. These provisions are:

a) subsection (1), which will provide:

> (1) Before deciding on a type 2 or 3 application, the responsible authority must consider—
>
> (a) either—
>
> (i) the relevant planning scheme; or
>
> (ii) if the relevant planning scheme specifies the clauses of the planning scheme to be considered for applications of a particular class to which the type 2 or 3 application belongs, those clauses; and
>
> (b) the objectives of planning in Victoria; and
>
> (c) any response to a traditional owner notice received under section 48AAB; and
>
> (e) any significant effects which the responsible authority considers the use or development may have on the environment or which the responsible authority considers the environment may have on the use or development; and
>
> (f) any significant social effects and economic effects which the responsible authority considers the use or development may have.

b) subsection (1AA), a new provision which provides:

> (1AA) Before deciding on a type 3 application, the responsible authority must also consider—
>
> (a) all objections and other submissions which it has received and which have not been withdrawn; and
>
> (b) any decision and comments of a referral authority which it has received.

c) subsection (1A), which provides:[297]

(1A) Before deciding on a type 2 or 3 application, the responsible authority, if the circumstances appear to so require, may consider—

(b) the approved regional strategy plan under Part 3A; and

(c) any amendment to the approved regional strategy plan under Part 3A adopted under this Act but not, as at the date on which the application is considered, approved by the Minister; and

(d) the approved strategy plan under Part 3C; and

(e) any amendment to the approved strategy plan under Part 3C adopted under this Act but not, as at the date on which the application is considered, approved by the Minister; and

(ea) the approved strategy plan under Part 3D; and

(eb) any amendment to the approved strategy plan under Part 3D adopted under this Act but not, as at the date on which the application is considered, approved by the Minister; and

(f) any relevant environment reference standard within the meaning of the Environment Protection Act 2017; and

(fa) any Order made by the Governor in Council under section 156 of the Environment Protection Act 2017; and

(g) any other strategic plan, policy statement, code or guideline which has been adopted by a Minister, government department, public authority or municipal council; and

(h) any amendment to the planning scheme which has been adopted by a planning authority but not, as at the date on which the application is considered, approved by the Minister or a planning authority; and

(i) any agreement made pursuant to section 173 affecting the land the subject of the application; and

(j) any other relevant matter.

d) subsection (1B), which provides for:

(1B) For the purposes of subsection (1)(f), the responsible authority must (where appropriate) have regard to the number of objectors in considering whether the use or development may have a significant social effect.

454. A new section 60(1AAB) is also proposed, which provides:

(1AAB) Before deciding on a specified type 2 application, the responsible authority must also consider any comments received under section 50H

297 Proposed amendments marked up over existing provision.

455. Section 50H (as referred to in proposed section 60(1AAB) provides a regime for persons notified of a type 2 application to comment on the application:

> **50H Comments on specified type 2 applications**
>
> (1) A person who receives notice of a specified type 2 application may provide a comment on the application.
>
> (2) A comment must be made to the responsible authority in writing and state how the commenter would be affected by the grant of the permit.
>
> …
>
> (6) The responsible authority must make a copy of every comment available in accordance with the public availability requirements.
>
> (7) The responsible authority must make a copy of every comment available under subsection (6) until the end of the period during which an application may be made for review of a decision on the application.

456. The responsible authority has discretion to reject a comment under certain circumstances, notably these circumstances include where the responsible authority:

a) considers the comment has been made to primarily secure or maintain a direct or indirect commercial advantage for the commenter;

b) considers the comment is frivolous or vexatious;

c) considers the comment is 'wholly irrelevant' to the grant of the permit;

d) reasonably believes has been prepared by a third party (other than where a commenter requires assistance or a third party is providing professional advice for the purpose of preparing the comment):

> (3) The responsible authority may reject a comment—
>
> (a) which it considers—
>
> (i) has been made primarily to secure or maintain a direct or indirect commercial advantage for the commenter; or
>
> (ii) is frivolous or vexatious; or
>
> (iii) is wholly irrelevant to the grant of the permit following the specified type 2 application; or
>
> (b) that it reasonably believes has been prepared by a third party and not the commenter.
>
> (4) Subsection (3)(b) does not apply to a comment prepared by a third party for a commenter if—
>
> (a) the commenter requires assistance or personal representation because of age, language or disability; or
>
> (b) the commenter has sought professional advice from the third party for the purpose of preparing the comment.

(5) If a comment has been rejected under subsection (3) this Act applies as if the comment had not been made.

457. A person who provides a comment is not an objector:

(8) For the purposes of this Part—

(a) a person who provides a comment under subsection (1) is not an objector; and

(b) a comment provided under subsection (1) is not an objection.

458. Further, the requirement in the existing section 60(2)(a) to consider financial loss is proposed to be removed. The current provision provides:[298]

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

(a) financial loss; or

(b) loss of amenity; or

(c) loss arising from change to the character of the neighbourhood; or

(d) any other material detriment—

as a consequence of the removal or variation of the restriction.

459. In contrast, the new provision removes the reference to financial loss and ensures that financial loss is not a relevant aspect of 'material detriment' under section 60(2)(a)(iii):

(2) Before deciding on a type 2 or 3 application which would allow the removal or variation of a restriction (within the meaning of the Subdivision Act 1988), the responsible authority must also consider the following—

(a) the impact of removing or varying the restriction on the material interests of the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than 3 months before its making, has consented in writing to the grant of the permit) in terms of—

(i) loss of amenity; and

(ii) loss arising from change of character to the neighbourhood; and

(iii) any other material detriment, other than financial loss, that may be suffered;

The responsible authority is not required to consider any objection or submission where notice is not required to be given.

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298 Emphasis added.

460. The proposed section 60(3) provides that the responsible authority is not required to consider any objection or submission where notice is not required of a type 3 application under:

a) section 52(1);

b) section 52(2);

c) section 57B; or

d) the planning scheme:

(3) Despite subsection (1AA)(a), if no notice is required to be given under section 52(1) or (2) or 57B or the planning scheme of a type 3 application, the responsible authority is not required to consider any objection or submission received in respect of the application before deciding the application.

461. The proposed new section 52 provides for when notice of a type 3 applications must be given.

462. Section 52(1) provides for notice to be given to specified classes of persons under the planning scheme or Minister's guidelines:

52 Notice of type 3 applications

(1) A responsible authority must give notice of a type 3 application that belongs to a particular class to the persons and in the manner specified in the planning scheme or the Minister's guidelines for that class of application.

463. Section 52(2) provides that if the planning scheme or Minister's guidelines do not specify the persons entitled to notice, the responsible authority must still provide notice in the manner described by section 52(2):

(2) If the planning scheme or the Minister's guidelines do not specify the persons to whom notice is to be given and the manner of notice for a type 3 application of a particular class, a responsible authority must give notice in one or more of the following ways—

(a) by post to the owners and occupiers of land adjoining the land which is the subject of the application;

(b) by notice on an Internet site maintained by or for the responsible authority;

(c) by placing a sign on the land which is the subject of the application;

(d) any other way the responsible authority considers appropriate.

464. The exception in section 60(3) does not extend to the proposed section 52(3), which provides:

(3) If an application is made for a permit to remove or vary a registered restrictive covenant, the responsible authority must give notice of the application—

(a) to the owners (except persons entitled to be registered under the Transfer of Land Act 1958 as proprietor of an estate in fee simple) and occupiers of land benefited by the covenant; and

(b) by notice on an Internet site maintained by or for the responsible authority; and

(c) by placing a sign on the land which is the subject of the application.

465. Additionally, the planning scheme cannot exempt the requirement to provide notice to beneficiaries of a restrictive covenant under section 52(3). Section 52(5) only allows for a planning scheme to exempt notice under section 52(1) and (2):

(5) A planning scheme may exempt any class or classes of applications from all or any of the requirements of subsections (1) and (2).

(6) An exemption may be made subject to any other requirements as to notice that are set out in the planning scheme in respect of that class of applications.

466. In effect, with respect to a type 3 application to remove or vary a restrictive covenant:

a) the responsible authority must give notice to all beneficiaries of that covenant; and

b) the planning scheme cannot exempt the notice requirement.

467. This is a lost opportunity in the Bill, given that some estates are so large that the mere process of notice can cost an applicant more than $10,000. The Supreme Court's approach of requiring a sign on the land as a proxy for direct notice to all beneficiaries is superior, and sufficient in nearly all circumstances.

468. As set out above, the responsible authority is also not required to consider any objection or submission where notice is not required under section 57B. The proposed amended section 57B provides for notice requirements for an amended type 3 application:

57B Notice of amended type 3 application

(1) If a type 3 application is amended under section 57A and remains a type 3 application, the responsible authority must determine—

(a) whether and to whom notice should be given in respect of the amended application; and

(b) if notice is to be given, the nature and extent of that notice.

(2) In determining whether or not notice should be given of an amended application that remains a type 3 application, the responsible authority must consider whether, as a result of the amendments made to the application, the grant of the permit would cause material detriment to any person.

(2A) In considering whether the grant of a permit would cause material detriment to a person under subsection (2), the responsible authority

must have regard to any guidelines issued by the Minister under section 52A.

(3) Section 53 applies to a notice under this section as if it were a notice under section 52(1).

Section 60(5) to be repealed

469. Sections 60(4) to 60(7), are proposed to be repealed. Significantly, this includes section 60(5):

(4) Subsection (2) does not apply to any restriction which was—

(a) registered under the Subdivision Act 1988; or

(b) lodged for registration or recording under the Transfer of Land Act 1958; or

(c) created—

before 25 June 1991.

(5) The responsible authority must not grant a permit which allows the removal or variation of a restriction referred to in subsection (4) unless it is satisfied that—

(a) the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the removal or variation of the restriction; and

(b) if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith.

(6) If an application for a permit to remove or vary a restriction referred to in subsection (4) was made on or after 25 June 1991 and the responsible authority had made a decision in respect of the application before the commencement of section 15 of the Planning and Environment (Amendment) Act 1993, the Tribunal must determine in accordance with subsection (5) any appeal under this Act in respect of that decision.

(7) Nothing in subsection (4), (5) or (6) affects the validity of a permit to remove or vary a restriction issued under this Act before the commencement of section 15 of the Planning and Environment (Amendment) Act 1993.

470. The existing section 60(5) of the *Planning and Environment Act 1987* has been described as "a high barrier that prevents a large proportion of proposals":

(5) The responsible authority must not grant a permit which allows the removal or variation of a restriction referred to in subsection (4) unless it is satisfied that—

(a) the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer any detriment of any

kind (including any perceived detriment) as a consequence of the removal or variation of the restriction; and

(b) if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith."

471. Without any exaggeration, this provision means that someone could argue that the proposed modification or discharge of a covenant would make the beneficiaries' curtains fade, and the decision maker would be required to refuse the application. It has never been clear why one standard applies to pre-1991 covenants and a different standard applies to post-1991 covenants. In any event, this distinction is proposed to be end in the Bill, as all covenants are proposed to be covered by the new s60(2), set out above.

Planning permits may endorse the breach of a restrictive covenant

472. The second major change in the Bill is that the Minister or responsible authority would be able to grant a planning permit that will breach a restrictive covenant under the new section 61(4):

(4) Without limiting subsection (1), the responsible authority may grant a permit that would authorise anything which would result in a breach of a registered restrictive covenant.

473. This removes a considerable burden from local councils that presently need to regularly seek legal advice on the proper construction of covenants to avoid granting a permit that may breach a restrictive covenant. As one senior government lawyer explained: "Councils are presently the gate keepers and arbiters of the private property law system. It's incredibly unfair and generates an inordinate amount of work."

474. However, covenants themselves will remain fully enforceable until they are removed or varied:

(4) Without limiting subsection (1), the responsible authority may grant a permit that would authorise anything which would result in a breach of a registered restrictive covenant.

(5) <u>If the responsible authority grants a permit referred to in subsection (4), the responsible authority is not liable for any loss suffered by any person as a result of a breach of the registered restrictive covenant.</u>

475. In some respects, this is a return to the pre-2000 arrangement, whereby planning permits could be granted that would permit a breach of a restrictive covenant. For instance, in *Luxury Developments v Banyule CC* [1998] VCAT 1310 the Tribunal explained that its remit was exclusively the application of town planning controls and policies. It had no jurisdiction to consider the proprietary legal interests raised by the existence of a restrictive covenant. However, after the permit was granted and construction commenced, the residents of the Hartland Estate in Ivanhoe sought and were granted an injunction in the Supreme Court of Victoria to stop the development.

476. Luxury Developments subsequently went into liquidation, leaving the residents of the Hartlands Estate unable to recover their costs. Partly in response to this case, the Victorian Parliament passed the *Planning and Environment (Restrictive Covenants) Act 2000*, an Act that would prevent planning permits from being issued where they would breach a restrictive covenant.

477. While the Bill raises the possibility of this situation arising again, the more liberal rules for the modification or discharge of restrictive covenants in the Bill, will mean that most people applying for a planning permit that would allow the breach of a restrictive covenant will apply to modify or discharge the covenant at the same time. Otherwise, we might expect to see an uptick in the number of applications for injunctive relief in the Supreme Court as beneficiaries force developers to the negotiating table.

Conclusion on the Bill

478. In conclusion, the Supreme Court process may remain the preferred choice of jurisdiction in at least the following circumstances:

a) applications where the Supreme Court is prepared to make orders as generous as planning policy allows, for instance:

1) five lots on a small lot in the General Residential Zone on High Street, Reservoir; or

2) two lots of 2,000sqm from a 4,000sqm lot in the Low Density Residential Zone in Narre Warren North;

b) uncontroversial applications such as amending a building materials covenant to allow contemporary construction or roofing materials;

c) applications where there are large numbers of beneficiaries and where the cost of direct notice to all would be prohibitively expensive;

d) applications for declarations pursuant to section 84(2) of the *Property Law Act* 1958 (Vic); or

e) applications not positively supported by state or housing policy, such as an application to increase the height or number of storeys of a single dwelling subject to a height control —

appreciating that the Supreme Court tends to be much faster and less expensive than VCAT principally because it doesn't ordinarily involve council planners or solicitors, parties who are not beneficiaries, or often, even a contradictor.

479. But for ambitious changes to restrictive covenants where multiple dwellings are proposed over the objections of beneficiaries, it may be that the new process creates a

regulatory framework in which planning policy is given significant weight in a decision to amend or discharge a restrictive covenant.

480. An example of this might be land along Wattletree Road in Malvern, where policy supports more intensive forms of development, but development is constrained by the presence of numerous single dwelling covenants. Presently, an application for planning permit for medium density housing would likely fail if it was opposed by beneficiaries of the single dwelling covenants, but subject to satisfying questions of neighbourhood character, that may be about to change.

CONCLUSION

481. Restrictive covenants were initially conceived as a rudimentary form of planning control. Over time, restrictive covenants have been replaced by comprehensive and sophisticated planning schemes that have proven effective at controlling the use and development of land. Since 2000, the effect of section 61(4) of the *Planning and Environment Act 1987* has meant that planning permits cannot be granted where they authorise the breach of a restrictive covenant.

482. Given the difficulty of satisfying the tests in sections 60(2) and 60(5) of the *Planning and Environment Act 1987*, the Supreme Court of Victoria now bears a large part of the burden of reviewing restrictive covenants on land prior to the commencement of the planning permit process. Yet the Supreme Court's jurisdiction established by section 84 of the *Property Law Act 1958* predates the modern planning system and is, for all practical purposes, limited to a simple test, namely whether the proposed discharge or modification of the restrictive covenant will substantially injure the persons entitled to the benefit of the restriction.

483. As Mukhtar AsJ observed in *Re DVC Management & Consulting Pty Ltd*,[299] the court in section 84 applications is only concerned with impacts on private rights:

> Recent decisions of this Court have it that town planning principles and considerations are not relevant to the Court's consideration of whether an applicant has established a ground under s 84: see *Vrakas v Registrar of Titles*[300] and *Prowse v Johnstone*.[301]

484. This is an uncontroversial expression of the law in Victoria. From a public policy perspective, however, although there may be some residual benefit played by restrictive covenants in establishing neighbourhood character, in practice, they represent a private agreement to opt out of the framework for planning the use, development and protection of land in the present and long-term interests of all Victorians.[302] The end result is that those urban precincts without those contractual

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299 Re *DVC Management & Consulting Pty Ltd* [2018] VSC 814.

300 *Vrakas v Registrar of Titles* [2008] VSC 281.

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

302 *Planning and Environment Act 1987*, section 1.

protections are left to carry an additional burden of the amenity compromises inherent in urban consolidation.

EASEMENTS AND ROADS[303]

WHAT ARE EASEMENTS?

485. An easement is a right to use another person's land without occupying it. The most common form of easement is a right of way over neighbouring land,[304] but there are different varieties:

a) a private easement is 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);

b) an easement in gross is 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 is a creature of statute. An example might be a drainage easement along the rear of residential properties in favour of a water authority;

c) an implied easement is an easement not expressly created by grant or reservation in an instrument or by statute but implied by common law or statute so that the land can continue to be used in a particular way; and finally

d) a prescriptive easement is an easement acquired by using land for at least 20 years without secrecy, permission or force.

486. As with restrictive covenants, easements generally run with the land.

487. While most easements are expressly created, there are several methods by which an easement may be created in Victoria. Four methods include:

a) by grant or reservation in an instrument;

b) by notation on a plan of subdivision;

c) by prescription; and

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303 This section is largely an aggregation of notes from submissions and advice work that I have written over the years. I apologise in advance if I haven't properly or fairly acknowledged the work of others. That is more likely than not an apology owed to the authors of Bradbrook and Neave's Easements and Restrictive Covenants, Third Edition, LexisNexis Butterworths, Australia, 2011 and Victorian Law Reform Commission, *Easements and Covenants* (Report No 22, May 2011) the most useful if not the leading work in this field.

304 Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th ed, 2020).

d) by compulsory acquisition.

Required elements of an easement

488. The landmark decision of the English Court of Appeal in *Re Ellenborough Park* [1956] Ch 131 formulated the essential characteristics of a valid easement that, by and large, continue to be relied on today. In *Re Ellenborough Park*, the Court found a valid easement must have four characteristics:

a) there must be two separate and distinct parcels of land to form a dominant tenement and a servient tenement;

b) the easement must 'accommodate', or benefit, the dominant tenement;

c) the dominant and servient tenements must not be owned by the same person; and

d) the easement must be capable of forming the subject matter of a grant:

> For the purposes of the argument before us Mr Cross and Mr Goff were content to adopt, as correct, the four characteristics formulated in Dr Cheshire's "Modern Real Property", 7th Edition, at pages 456 and following. They are (i) There must be a dominant and a servient tenement: (ii) an easement must "accommodate" the dominant tenement: (iii) dominant and servient owners must be different persons and (iv) a right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.[305]

489. These four characteristics were adopted in Victoria by the Supreme Court in *Riley v Penttila* [1974] VR 547.

(i) There must be a dominant tenement and a servient tenement

490. An easement requires a relationship between two parcels of land. Before a land use can be recognised as a valid easement, it must be established that it attaches to and burdens one piece of land whilst simultaneously benefitting another piece of land.

491. The land that benefits from the easement is described as the *dominant tenement*, whilst the land burdened by the easement is known as the *servient tenement.* More than one property may enjoy the benefit of the easement.

492. The requirement that there be a dominant and servient tenement is based on the rationale that an easement burdening one piece of land must benefit another piece of land in close vicinity.

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305 *Ellenborough Park, Re, Re Davies, Powell v Maddison* [1955] 3 All ER 667, 673.

(ii) An easement must accommodate the dominant tenement

493. The requirement that an easement accommodate the dominant tenement means that it must benefit the *land* rather than be personal to the owner of the dominant tenement.[306]

494. However, it is not necessary for the dominant and servient tenements to be contiguous (physically touching).[307] So long as the dominant and servient tenements are so adjacent that the enjoyment of the dominant is connected with and dependent on the servient, an easement can exist.

495. This requirement has also been interpreted to mean that an easement must be reasonably necessary for the enjoyment of the dominant tenement:

> What is required is that the right accommodates and serves the dominant tenement and is reasonably necessary for the enjoyment of that tenement; for if it has no necessary connection therewith, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is not an easement at all but a mere contractual right personal to and enforceable between the two contracting parties.[308]

(iii) The dominant and servient owners must be different persons

496. While the general principle is that the owner of the dominant and servient tenements must not be the same person, an easement will not be invalidated if the land is owned by the same person where one of the tenements is occupied by someone else.[309]

497. However, a tenant may not acquire an easement over adjoining land belonging to his or her landlord by prescription.[310]

498. Further, an easement must not deny the burdened owner from the land, and a right that substantially deprives the burdened owner of possession of part of their land is not capable of being an easement.[311]

(iv) The right must be capable of forming the subject matter of a grant

499. In *Re Ellenborough Park*, Evershed MR identified three primary issues involved in determining whether a right satisfies the requirement of capacity to form the subject matter of a grant:

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306 *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528.

307 *Gallagher v Rainbow* (1994) 68 ALJR 512.

308 *Frater v Finlay* (1968) 91 WN (NSW) 730.

309 *Maurice Toltz Pty Ltd v Macy's Emporium Pty Ltd* [1970] 1 NSWR 474.

310 *Outram v Maude* (1881) 17 Ch 391; *Kilgour v Gaddes* [1904] 1 KB 457.

311 *Auerbach v Beck* (1985) 6 NSWLR 424; [1985] NSW ConvR 55-246.

a) whether the rights purported to be given are expressed in terms of too wide and vague a character;

b) whether such rights constitute mere rights of recreation, possessing no quality of utility or benefit; and

c) whether the rights are inconsistent with the enjoyment of the servient tenement.[312] Such rights may be inconsistent where they:[313]

1) amount to joint occupation of the servient tenement; and/or

2) deprive the servient tenement of exclusive possession.

The exception of regulatory easements

500. Regulatory easements, such as those for utility providers, burden servient land but do not necessarily benefit dominant land and therefore lack the first characteristic of an easement. For this reason, such easements (known as 'easements in gross') are not recognised at common law and can only be created under statute.

Easement for recreation

501. As noted above, an easement must be capable of forming the subject matter of a grant.[314]

502. In *Re Ellenborough Park* [1956] Ch 131, the Court considered that 'mere rights of recreation, possessing no quality of utility or benefit' do not qualify as easements:

> The exact significance of this fourth and last condition is, at first sight perhaps, not entirely clear. As between the original parties to the "grant" it is not in doubt that rights of this kind would be capable of taking effect by way of contract or licence. But for the purposes of the present case, as the arguments made clear, the cognate questions involved under this condition are: whether the rights purported to be given are expressed in terms of too wide and vague a character; whether, if and so far as effective, such rights would amount to rights of joint occupation or would substantially deprive the owners of the park of proprietorship or legal possession; whether, if and so far as effective, such rights constitute mere rights of recreation, possessing no quality of utility or benefit; and on such grounds cannot qualify as easements.

312 [1956] 1 CH 131, [164].

313 [1956] 1 CH 131, [164].

314 See *Re Ellenborough Park* [1956] Ch 131, 163.

503. In *Riley v Penttila*,[315] Gillard J adopted the reasoning applied in *Re Ellenborough Park* and rejected the notion that the right granted was too wide or vague where it was given to a defined number of lot holders on a plan of subdivision:

> … In my opinion, enjoyment of a defined area for recreation not given to the public, but given to a limited number of lot holders is just as certain as the rights referred to in the above cases,[316] or the right to walk for pleasure referred to in *Duncan v Lauch*,[317] which was approved in the *Ellenborough Park Case* by the Court of Appeal at (Ch.) pp. 184-5.

504. In *Laming v Jennings*,[318] the Court of Appeal accepted that 'an easement for recreation is a recognised and permissible form of easement', but that it is essential for such an easement that the land have 'a common or communal character':

> 143. … an easement for recreation is a recognised and permissible form of easement. However, the contexts in which easements for recreation have been upheld are very different to that in the present case and, in our view, can be distinguished. The easements in the above cases were created over land which had a common or communal character. Ellenborough Park had been reserved as a communal area for the common enjoyment of multiple residents. In the case of *Mulvaney*,[319] the strip of land was a right of way reserved for the cottage residents and which the residents had tended as a garden for common enjoyment. The meaning and operation of the easement for recreation was to be understood in that context. In both *Riley v Pentilla* and *City Developments*,[320] the right to use the servient tenement was again enjoyed in common with others.
>
> 144. Here, the disputed land forms part of a single private land holding. It is true that, by reason of its ownership by Telstra over a number of years, many of the neighbours used the Telstra land and also the disputed land for recreation. However, it could not be said that the disputed land was used in a communal manner. Nor would an easement of that kind be consistent with the case advanced by the respondent at trial, which depended upon the respondent exercising rights (whether of possession or recreation) to the exclusion of the applicant. In the cases mentioned above, the court was not concerned with two private owners exercising rights over the same land which lacked any communal character.
>
> 145. This was not a case where the owner has, in effect, dedicated the land for the purposes of communal recreation. In other words, unlike the land in *Mulvaney*, for example, the disputed land is not required to retain the character of a place for communal recreation. It follows that, although an easement for recreation in

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315 [1974] VR 547.

316 *Re Ellenborough Park* [1956] CH 131; *Miller v Emcer Products Ltd* [1956] CH 304; Heywood v Mallalieu (1883) 25 Ch D 357; Maurice Toltz Pty Ltd v Macey's Emporium Pty Ltd [1970] 1 NSWR 474; *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 47 ALKR 394.

317 (1845) 6 QB 904.

318 [2018] VSCA 335.

319 *Jackson v Mulvaney* [2003] 1 WLR 360.

320 [2001] NTCA 7.

common is recognised at law, the easement found in the present case was not of that nature and cannot be sustained on that basis.

EXPRESS GRANT OR RESERVATION IN AN INSTRUMENT

505. In Victoria, private easements can be expressly created by grant or reservation in an instrument such as a deed or instrument of transfer. The Victorian Law Reform Commission (**VLRC**) described the two methods of creation as follows:[321]

> 3.4 … 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.

506. An instrument that creates an easement, such as a deed or transfer instrument, may be registered under section 72 of the *Transfer of Land Act 1958* (Vic):

> **72 Notification of easements in Register**
>
> (1) A folio of the Register may contain a recording to the effect that the land therein described is subject to or has appurtenant thereto an easement.
>
> (2) Upon application in an appropriate approved form the Registrar shall on the relevant folio of the Register make a recording of any easement over or upon or appurtenant to any land under this Act which the Registrar is satisfied has been created by compulsory acquisition in accordance with section 36 of the *Subdivision Act 1988* or by any instrument deed or other written document or recognized by an order of any court or award of an arbitrator.

507. However, an easement can be effective even where it is not registered or recorded.[322]

Construing the terms of an easement

508. The leading authority on the interpretation of instruments that create easements is *Westfield Management Ltd v Perpetual Trustee Co Ltd*,[323] in which the High Court found extrinsic evidence regarding what the parties contemplated at the time of the grant, is generally not admissible. Rather, the express terms of the registered easement are the primary tools for the constructions of an easement.

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321 Victorian Law Reform Commission, *Easements and Covenants* (Report No 22, May 2011).

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

323 [2007] HCA 45. For a fuller discussion, see Michael Weir, '*Westfield* 5 years on' (2012) 21 *Australian Property Law Journal* 166.

509. However, extrinsic evidence may be admissible where it is necessary to make sense of terms or expressions identified in the register, such as surveying terms, or abbreviations which appear on a plan:[324]

> 44 It may be accepted, in the absence of contrary argument, that evidence is admissible to make sense of that which the Register identifies by the terms or expressions found therein. An example would be the surveying terms and abbreviations which appear on the plan found in this case on the DP.
>
> 45 But none of the foregoing supports the admission in this case of evidence to establish the intention or contemplation of the parties to the grant of the Easement.

510. Further, the general rule does not preclude reliance on evidence of the physical characteristics of the land. Accordingly, easements can also be construed by reference to the surrounding physical context and the objectively known facts at the time of the creation of the instrument. See *Cannon v Villars* (1878) 8 Ch D 415 Jessel MR:

> This case has been elaborately argued, but I confess it appears to me that there is really no question either as to what is the law or as to what is the true construction of this agreement. In construing all instruments you must know what the facts were when the agreement was entered into. The first fact here is that the only access to the piece of ground let to the Plaintiff for the purpose of the erection of the workshop available for any cart, waggon, or other vehicle, was through a paved gateway which was the entrance to a long yard also paved in a manner fitted for the passing of carts, waggons, and other carriages. As I understand, it was a stone paved way, so stoned as to be sufficient and proper for that passage. The only other access at all to the locus in quo was through the door of a house through which it is admitted carts, waggons, and carriages could not pass. The ownership both of the land of the yard and of the gateway was in the landlord, the Defendant, Mr. Villars.

511. A range of authorities have added to this account of the process for determining rights under an easement.

512. In *City of Belmont v Saldanha* [2016] WASC 37, Allanson J explained that the general rule in *Westfield* also applies to an easement in gross:

> 49 The position here differs from that in the many cases on the proper construction of easements, because there is no dominant tenement. The easement in gross is not a form of easement recognised at common law. But the restriction on admissibility of extrinsic evidence is not based on the legal nature of an easement, but in the characteristics of the Torrens system of title by registration, and the maintenance of a publicly accessible register containing the terms of the dealings with land under that system. There is no reason why those principles should not apply also to interests which may only be created because of a particular statutory provision.

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324 *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45, [44]-[45].

> 51 In short, the evidence admissible on the construction of the easement is limited to the terms of the grant, the description of the easement in the register, and the physical characteristics of the land (should they be relevant).

513. Allanson J added that statutory provisions under which the easement may be created or acquired will also be admissible:

> 52 In my opinion, the court should also have regard to any statutory provision under which the easement may be created or acquired. A construction which would lead to an interest which is not recognised by law should not be adopted.

514. However, Allanson J determined that planning policies are not admissible because they are not contained in the register:

> 53 Counsel for the City argued also for the admissibility of planning policies, on the basis that those policies are publicly available documents. I do not believe that material is admissible. It is not the fact that information is publicly available that makes it admissible; it is admissible if it is maintained in the register of land titles and dealings. Policy documents do not meet that criterion for admissibility. Nor are they matters of written law.

515. In Victoria, VCAT has recognised the importance of looking to the relevant statute when assessing what rights have been created by an easement in gross. In its consideration of a drainage easement in *Element 96 Pty Ltd v Moorabool SC* [2018] VCAT 1399, the Tribunal said that:

> 21 To understand who benefits from an easement, it is necessary to understand the law relating to the particular type of easement in question.
>
> 22 The drainage easement in this case arises as a result of legislation which facilitates the creation of easements by a notation on a plan of subdivision.
>
> 23 To know what rights have been created by the easement and in whose favour they have been created, one must look to the legislation which created the easement.

Rights to authorise a third party's use of an easement

516. An express grant or reservation of an easement may expressly define the scope of any third party rights attached to the easement.

517. For example, the relevant drainage easement in *Trevlind Pty Ltd v BMP Manufacturing Pty Ltd* [2008] NSWSC 603 (***Trevlind***) was drafted to enable 'any person authorised' by the dominant tenement owner (the Wyong Shire Council) to also enjoy the rights under the easement:[325]

> … Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any

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325 *Trevlind Pty Ltd v BMP Manufacturing Pty Ltd* [2008] NSWSC 603, [7], emphasis added.

part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, from time to time and at all times to drain water (whether rain, storm, spring, soakage, or seepage water) in any quantities across and through the land herein indicated as the servient tenement…

518. However, the third party's right may be limited to the purpose of benefiting the dominant tenement. This was the view of White J in *Trevlind*:

> 36 Accordingly, I accept the submission of counsel for the plaintiff that on the proper construction of the easement, the Council, as owner of the dominant tenement (Mildon Road), may authorise use of the servient tenement for the purpose of benefiting Mildon Road. The Council is not entitled to authorise the defendant to use the easement for the purpose of draining water from the defendant's land unless that were also for the purpose of benefiting Mildon Road. …

519. The extent of the rights of a third party to use an easement will be a matter of construing the terms of the specific easement in question.

Express subdivisional easements created by way of a plan of subdivision or consolidation

520. Alternatively, a more common method for creating easements in Victoria is by registering a plan of subdivision or consolidation.

521. In the context of the Victorian planning process, the VLRC described how subdivisional easements are created:

> 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.[326] 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.[327] The responsible authority gives a copy of the application to every relevant 'referral authority' specified in the planning scheme (usually a public authority, such as a water authority, or a government department).[328] Both the responsible authority and the referral authorities can add conditions to a permit requiring the creation or acquisition of an easement.[329]
>
> 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.[330] The council refers the draft plan to the relevant referral authorities and both the council and

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326 *Sale of Land Act 1962* (Vic) ss 8A, 9AA; *Planning and Environment Act 1987* (Vic) s 6; Subdivision Act 1988 (Vic).

327 *Subdivision Act 1988* (Vic) s 5(4); *Planning and Environment Act 1987* (Vic) s 61(1).

328 *Subdivision Act 1988* (Vic) s 8.

329 *Planning and Environment Act 1987* (Vic) s 5(3).

330 *Subdivision Act 1988* (Vic) s 5(3).

the referral authorities have the power to require amendments to the plan to include certain easements.[331]

3.9 The council certifies the plan after checking that it includes the easements required by either itself or the referral authorities.[332]

522. In Victoria, two pieces of legislation provide for the creation of subdivisional easements:

a) Section 12(1) of the *Subdivision Act 1988* (Vic) requires all existing and proposed easements to be specified in a plan of subdivision or consolidation and, pursuant to section 24(2)(d), all such easements are created on registration of the plan:

> **12 Plan must show easements and other rights**
>
> (1) A plan of subdivision or consolidation must specify—
>
> (a) existing registered easements that burden the land (other than easements over land referred to in subsection (2)(a)(i)(ii) or (iii)), the purpose of the easements and either the land benefited by the easements or, if they were authorised by or under an Act other than this Act or the *Transfer of Land Act 1958*, the public authority, Council, Minister or other person in whose favour they are created; and
>
> (b) proposed easements (other than easements over land referred to in subsection (2)(a)(i), (ii) or (iii)), the purpose of the easements and either the land which they are to benefit or, if they are authorised by or under an Act other than this Act or the *Transfer of Land Act 1958*, the public authority, Council, Minister or other person in whose favour they are to be created.

b) Section 98 of the *Transfer of Land Act 1958* (Vic), which predates section 12(1) of the *Subdivision Act* 1988, deems certain classes of easements (including easements of access and for utilities) to be attached to the dominant land where they are necessary for the reasonable enjoyment of such land and are shown on an approved or registered plan of subdivision:[333]

> **98 Easements arising from plan of subdivision**
>
> The proprietor of an allotment of land shown on an approved plan of subdivision or a lot shown on a registered plan shall be entitled to the benefit of the following easements which shall be and shall be deemed at all times to have been appurtenant to the allotment or the lot, namely—
>
> (a) all such easements of way and drainage and for party wall purposes and for the supply of water gas electricity sewerage and telephone and other services to the allotment or the lot on over or under the lands appropriated or set apart for

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331 Ibid ss 9, 10.

332 Ibid s 6.

333 See Victorian Law Reform Commission, *Easements and Covenants* (Report No 22, May 2011) 33.

those purposes respectively on the plan of subdivision as may be necessary for the reasonable enjoyment of the allotment or the lot and of any building or part of a building at any time thereon; and

(b) in the case of the subdivision of a building, all such additional easements of way drainage support and protection and for the supply of water gas electricity sewerage and telephone and other services to the allotment or the lot on or over the other allotments or other lots in the subdivision as may be necessary for the reasonable enjoyment of the allotment or the lot as part of that building or any building at any time situated on the land in the subdivision—

in all respects as if all such easements had been expressly granted.

PRIVATE COMPULSORY ACQUISITION

523. While some Australian jurisdictions permit their courts to order the creation of necessary easements, Victoria instead has two processes by which a private landowner may compulsorily acquire an easement over other land without the consent of the servient owner:

a) under section 36 of the *Subdivision Act 1988*; and

b) under section 235 of the *Water Act 1989* (Vic).

Easements under section 36 of the Subdivision Act 1988

524. The Victorian Civil and Administrative Tribunal may grant leave to a landowner pursuant to section 36 of the *Subdivision Act 1988* to compulsorily acquire an easement over other land in a subdivision or consolidation, or 'land in the vicinity':

36 Power of owner to acquire or remove easements

(1) If—

(a) when considering a proposed amendment to a planning scheme or an application for a permit or to amend a permit; or

(b) in implementing an amendment to a planning scheme; or

(c) in a condition in a permit—

the Council or a referral authority states in writing that it considers that the economical and efficient subdivision or consolidation (whether existing or proposed) or servicing of, or access to, land covered by the amendment, proposed amendment, application or permit requires the owner of land to—

(d) remove a right of way over the owner's land;

(e) acquire or remove an easement over—

(i) other land in the subdivision or consolidation; or

(ii) other land in the vicinity—

> and that the removal or acquisition will not result in an unreasonable loss of amenity in the area affected by the removal or acquisition, the owner may apply to the Victorian Civil and Administrative Tribunal for leave to remove the right of way or acquire or remove the easement compulsorily.

525. A landowner must first obtain a written statement from their local council or a referral authority, stating the view of the council or referral authority that:

a) the economical and efficient access to land requires the owner of land to acquire an easement over other land; and

b) that the acquisition of the easement will not result in an unreasonable loss of amenity in the area affected by the acquisition.

526. If the Tribunal grants leave, the landowner may acquire the easement by registration of a plan in accordance with section 36(2) of the *Subdivision Act 1988*.

527. The most relevant step-by-step analysis of this provision is *JT Snipe Investments v Hume*[334] in which Deputy President Dwyer explained that section 36 must be strictly applied because of it grants property rights over another's land:[335]

> the consequence of the section 36 process is the compulsory acquisition by one private landowner of an interest in the land of another private landowner. This may have potentially significant impacts for the landowner whose interest is sought to be acquired… Despite the potential for compensation to be paid, a provision that facilitates compulsory acquisition and affects private interests in land in this way must be very carefully considered and strictly applied.

528. Deputy President Dwyer explained that:[336]

a) the terms 'economical and efficient' are used conjunctively, and both must be objectively satisfied;[337]

b) the consideration of relevant factors must lead to a view that the landowner 'requires' acquisition of the easement, and:[338]

1) 'requires' must be given its plain meaning – i.e. the easement must be necessary or indispensable, rather than merely useful or desirable or convenient;

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334 *JT Snipe Investments Pty Ltd v Hume CC (Red Dot)* [2007] VCAT 1831.

335 At [13].

336 At [14].

337 Applying *Barnett v Frankston CC* [2005] 21 VPR 157 (***Barnett v Frankston***) at [90].

338 ***Barnett v Frankston*** at [88].

2) if the matter can be resolved by other reasonable or practical means, these should be preferred to acquisition of the easement;

3) it is not sufficient to demonstrate that the easement will improve the economic return from the land or facilitate improved and more efficient access, rather it is necessary to demonstrate that there is a real and material impediment to be overcome. For example:

a) it might need to be demonstrated that the use and development of the land is not technically or economically viable without the acquisition of the easement;

b) supporting evidence would normally be required to support claims on both 'economical' and 'efficient' grounds;

c) the 'necessity' for the easement is not limited to the existing use or development of the land, and may arise from its future use or development (as contemplated by a specific permit application);

d) separate references to 'engineering' and 'amenity' require council to consider both technical and planning considerations;

e) even if the easement is 'required' there is an additional requirement that its acquisition will not result in unreasonable loss of amenity in the area affected (area affected will vary from case to case depending on the nature of the acquisition);

f) the section 36 statement from council must be given before a separate application is made to the tribunal under section 36 – the statement and leave cannot be sought from the Tribunal at the same time; and

g) a council's section 36 statement is a necessary pre-condition to an application to VCAT but is not, by itself, determinative. There is still an overriding test of reasonableness that may be applied to the compulsory acquisition according to the circumstances of a particular case.

529. In *Gale v Frankston CC (Corrected)*,[339] the Tribunal endorsed the above principles and further stated that:

a) section 36 invokes the Tribunal's original jurisdiction, so that it has 'an unfettered and very broad discretion as to what matters it should take into account'[340] in deciding an application under section 36;

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339 [2019] VCAT 62.

340 See paras [34]-[36].

b) the word 'requires' in section 36(1) obliges the Tribunal to consider alternatives to the proposed easement, but only those alternatives 'under the control of the permit applicant'.[341]

530. Recently, in *Australia Red Hill v Melton*[342], the Tribunal was critical of the applicant's failure to comprehensively outline alternatives:

> [123] However, we are concerned that we have no detailed, considered assessment of these options. What we have are a few relatively short paragraphs in a joint evidence report which were expanded upon in oral evidence given at the hearing and in short documents prepared in response to options raised by Mr Bishop. We do not consider that this to be sufficient evidence upon which to reach a conclusion that those other temporary options would not also provide an adequate means of managing stormwater until such time as the respondent's land is developed.
>
> …
>
> [126] We are also not satisfied on the evidence before us that temporary options to manage stormwater associated with the subdivision would not be economical. We have not been provided with any detailed evidence as to the costs involved in any stormwater servicing option. For example, we have not been provided with any information as to the impact of development of the applicant's land prior to and separate of the development of the respondent's land, whether it will involve any wasted resources and effort, including in respect of those amenity impacts identified by the respondent.

531. Accordingly, applicants would do well to ensure that all potential alternatives are scoped adequately, including as to costs.

Easements under section 235 of the *Water Act 1989*

532. A landowner may also apply to the Minister for Water under section 235 of the *Water Act 1989* (Vic) to acquire a right of access to other land for drainage, water supply or salinity mitigation purposes. On receiving an application, the Minister must appoint an authority to decide whether to grant the right of access, taking into account:

a) whether any damage will be caused to the servient land; and

b) whether the servient owner can be fully compensated for any such damage:

> **235 Access without agreement**
>
> (1) An owner of land who seeks access for drainage, water supply or salinity mitigation purposes over land owned by another person and who gives notice under section 234(1) may, if agreement has not been reached with the other owner about access within one month after service of the notice on the other

341 Para [54].

342 *Australia Red Hill Real Estate Group Pty Ltd v Melton CC (Corrected)* [2022] VCAT 1165.

owner, apply to the Minister for the appointment of an Authority to decide the issue

(2) The Minister must make an appointment if an application is made.

(3) In deciding whether a right of access should be created over land, the appointed body must have regard to the following—

(a) whether any damage will be caused to the property of the owner of the land;

(b) whether that owner may be fully compensated for that damage by money or otherwise.

(4) If the appointed body decides that a right of access should be created over land, that body must decide the nature and extent of that right and of the works that may be constructed on that land.

533. Section 235 of the *Water Act* 1989 also states that a decision by the appointed authority is binding but can be reviewed by the Tribunal:

(5) A decision of the appointed body is, subject to subsection (6), binding on the parties and may include any order that the body thinks fit for the payment of compensation.

(6) A person whose interests are affected by the decision of the appointed body under subsection (1) may apply to the Tribunal for review of the decision.

534. Section 235 of the *Water Act 1989* is rarely used.[343]

PRESCRIPTIVE EASEMENTS (DOCTRINE OF LOST MODERN GRANT)

535. 'Prescription' has been described as the method by which the common law gives legal recognition to de facto situations that have continued unchallenged for so long that to deny such recognition would amount to an injustice:

> … the method by which English law gives legal recognition and effect to various kinds of de facto situations in which the relevant state of affairs has continued unchallenged for so long that to deny it legal recognition would, it is said, amount to injustice.[344]

536. The elements necessary to establish a valid prescriptive easement were summarised by the Victorian Supreme Court in *Sunshine Retail Investments Pty Ltd v Wulff*:[345]

> 76 The five elements of which the Court must be satisfied, either by direct evidence or by inference, do not seem to be in dispute in this case either, a matter which does not surprise as the principles have been pronounced in

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343 See *Cook v Department of Environment Land Water and Planning* [2019] VCAT 436; Cook v Minister for Water [2019] VCAT 866; Cook v Minister for Water [2019] VCAT 1972.

344 Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, 3rd ed, 2010) [5.1].

345 [1999] VSC 415, affirmed in *Laming v Jennings* [2018] VSCA 335.

countless cases from *Dalton v. Henry Angus & Co.* (1881) 6 App. Cas. 740 at 786. The elements of which the Court must be satisfied are the following:

(1) the doing of an act by a person or persons upon the land of another;

(2) the absence of right to do that act in the person doing it;

(3) the knowledge of the person affected by it that the act is done;

(4) the power of the person affected by the act to prevent it, either by an act on his own part or by action in the courts;

(5) the abstinence by that person from interference of such a length of time which renders it reasonable for the Court to say that it shall not afterwards interfere to stop the act being done.

537. For an easement to arise by prescription:

a) enjoyment of the particular use of the servient tenement must have occurred for a continuous period of 20 years or more;

b) enjoyment of the use must have been 'as of right';

c) the servient owner must have acquiesced to the use;

d) the alleged easement must be permanent; and

e) there must be no unity of possession between the alleged dominant and servient tenements during the period of 20 years.

538. It is necessary that an alleged prescriptive easement has been enjoyed 'as of right', meaning that it must have been acquired:

a) without force;

b) without secrecy; and

c) without permission.[346]

539. The law in relation to prescriptive easements was recently summarised by Gorton J in *Valmorbida v Les Denny Pty Ltd* [2023] VSC 680[347]:

a) instead of the use having to be since time immemorial or for as long as anyone alive could remember, the law now provides that 20 years is sufficient. This is the legal fiction known as 'the lost modern grant:

> 12 … as a matter of logic, any proprietary right, for it to be a right rather than a claimed right, must have had a lawful beginning. In the case of an ordinary easement, there must have been, at some stage, an express or implied

346 See, e.g., *Tickle v Brown* (1836) 111 ER 826, 831.

347 '*Valmorbida*' [2023] VSC 680, [12]-[15].

agreement to create it. If use has been since time immemorial, or for as long as anyone alive can remember, then it may be assumed that, at some stage, there has been such an agreement, even if the details of the agreement cannot now be established. This makes sense in circumstances where the use has been since time immemorial or for as long as anyone alive can remember and the use is not otherwise able to be explained. But, in order to promote the interest of stability in the usages of land, and following the introduction of statutory limitation periods in the United Kingdom in the 19th century, a different method of establishing an easement developed. Instead of the use having to be since time immemorial or for as long as anyone alive could remember, the law now provides that 20 years is sufficient. This is the doctrine of 'the lost modern grant'.[348] Although initially it was a question of fact as to whether or not the existence of a lost grant could be inferred, the inference has since became unassailable; if the necessary use is established, the claim cannot be defeated by evidence that no grant was ever in fact made.[349] Consequently, the notion that there had been a grant that had been lost was recognised as a legal fiction.[350]

b) it is said that the use must have been '*nec vi, nec clam, nec precario*' — that is, without violence, without stealth and without permission:

13 The criteria for the emergence of an easement from 20 years' use of a neighbour's property are otherwise expressed in different ways. It is said that the use must have been '*nec vi, nec clam, nec precario*' — that is, without violence, without stealth and without permission.[351] It is also said that the use must have been 'as of right', and have been with the knowledge of, but without the consent of, the neighbour.[352] These requirements overlap, and must be understood in the context of the underlying rationale and reasoning processes for which the law recognises the emergence of an easement in these circumstances.

c) an easement by prescription arises out of the concept of acquiescence:

14 As noted above, the rationale for the development of the fiction was to promote certainty of peoples' interests in land. But the finding of an easement places a burden on the servient tenement. Accordingly, if it is to be just, there must be something in the conduct of the registered proprietors of the servient tenement that makes it appropriate to burden that property with an easement that the proprietors never in fact agreed to grant and for which they received no consideration. That gives rise to the notion of 'acquiescence'; if a person had notice of the use, and did nothing to prevent it for 20 years, then, just as if there

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348 See *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283, 307–308 (Griffith CJ).

349 *Dalton v Angus* (1881) 6 App Cas 740, 765 (Lindley J), 813–814 (Lord Blackburn); *Hampshire Automotive Centre Pty Ltd v Centre Com (Sunshine) Pty Ltd* (2020) 60 VR 579, 590 [54], 598 [94] (Tate, Niall and Emerton JJA).

350 *Hampshire Automotive Centre Pty Ltd v Centre Com (Sunshine) Pty Ltd* (2020) 60 VR 579, 589 [52] (Tate, Niall and Emerton JJA).

351 See, eg, *Mills v The Mayor, Alderman, and Burgesses of Colchester* (1867) LR 2 CP 476, 486 (Montague Smith J); *Laming v Jennings* [2018] VSCA 335, [83] (Kyrou, McLeish and Niall JJA).

352 See, eg, *Laming v Jennings* [2018] VSCA 335, [84] (Kyrou, McLeish and Niall JJA).

were a statutory limitation period, they could no longer be permitted to complain if the use were to become permanent. A 'lapse of time accompanied by inaction, where action ought to be taken', may confer a right not previously possessed.[353] 'The paper owner would be expected to resist the assertion of right or face the consequences of an easement by prescription arising if it fails to do so.'[354] Indeed, it is this fundamental notion of acquiescence that informs the questions as to whether a particular use has been open and without force, as of right, and whether the owner of the servient tenement had notice. This area of law rests upon acquiescence of the owner.[355] Each of the criteria are, in my view, really ways of considering whether or not there has been the necessary acquiescence. I will develop these connections further below when the individual criteria are considered.

540. That said, a right might even arise in circumstances of constructive notice—where an owner was not aware of the use of land by the dominant tenement, but acting diligently would have known:

> 15 A right may also arise in circumstances where the owner was not aware of the use of the land at all, but 'ought' to have been aware of that use. In those circumstances, notice will be imputed. The rationale for imposing an easement in these circumstances of 'constructive' notice is the expectation that land owners will with reasonable diligence inform themselves of actions taken in respect of their land. They will be held to have notice of that which, with reasonable diligence, they would have observed. Expressed in the negative, 'the prescription cannot arise where the acts would not be known to an owner reasonably diligent in protecting its rights'.[356] Although the distinction is not always made clear, one cannot in fact acquiesce to something of which one is unaware,[357] and so this is, conceptually, an extension from the notion of acquiescence in fact to a form of ascribed acquiescence. It is difficult to see how this extension sits comfortably with the basal concept that the easement arises in circumstances where the conduct of the parties gives rise to an assumption that there must have been at some time in the past an actual grant. Nonetheless, these are the balances that have been struck between the public benefit in promoting certainty in land use and the rights of individual land owners.

541. This analysis and its applicability in Victoria was affirmed on appeal in *Les Denny Pty Ltd v Delma Valmorbida* [2025] VSCA 319. In this case, the owner of the dominant tenement, Les Denny had appealed on two grounds of relevance, namely:

> (b) Proposed ground 4 is that the judge erred in concluding that s 42(2)(d) of the Transfer of Land Act permitted, as an exception to the indefeasibility of title of

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353 *Dalton v Angus* (1881) 6 App Cas 740, 773 (Fry J).

354 *Laming v Jennings* [2018] VSCA 335, [85] (Kyrou, McLeish and Niall JJA).

355 *Dalton v Angus* (1881) 6 App Cas 740, 773 (Fry J), discussed in *Laming v Jennings* [2018] VSCA 335, [85] (Kyrou, McLeish and Niall JJA). See also *Sunshine Retail Investments Pty Ltd v Wulff* [1999] VSC 415, [117] (Hedigan J).

356 *Laming v Jennings* [2018] VSCA 335, [84] (Kyrou, McLeish and Niall JJA).

357 Ibid [86].

a registered proprietor created by s 42(1), a prescriptive easement that arose from 'tacking' user that had occurred before and after the registration of the interest of the registered proprietor.

(c) Proposed ground 5 is that the judge erred in concluding that, at general law, a prescriptive easement could arise from 'tacking' user that had occurred during the ownership of different owners of the servient tenement.[358]

542. The Court of Appeal dealt with the situation at common law first:

a) in 1904, the New Zealand Supreme Court held that the theory of the lost grant is that the grant has been made prior to the commencement of the enjoyment, logically then, the owner of the servient tenement is bound by the acquiescence of his predecessor in title;

63 The case law begins with a 1904 decision of the New Zealand Supreme Court, *Auckran v The Pakuranga Hunt Club*,[359] a claim for remedies for private nuisance comprising noise from hounds and unpleasant smells from boiling down carcasses on the defendants' land. The defendants' predecessors in title had been keeping hounds on the land and boiling down carcasses for their food for more than 20 years, and the defendants claimed to have a prescriptive right to continue those uses. The plaintiff contended that the defendants could not rely on prescriptive rights due to changes in ownership of both the plaintiff's and the defendants' land. The Supreme Court rejected that contention, saying:

> The theory of the presumption of a lost grant, in the case of the enjoyment of an easement for twenty years, is that the grant has been made prior to the commencement of the enjoyment … It follows that the owner of the dominant tenement may take advantage of the enjoyment of his predecessor, and that the owner of the servient tenement is bound by the acquiescence of those who have preceded him.[360]

b) this was applied in Victoria in *Sunshine Retail*, but without any doctrinal analysis:

64 This statement of principle has been applied in two decisions of the Supreme Court of Western Australia, *Pekel v Humich* ('*Pekel*')[361] and *Wayella Nominees Pty Ltd v Cowden Ltd* ('*Wayella*'),[362] in relation to successive owners of the servient tenement. The Supreme Court of Victoria applied it in *Sunshine Retail*, to hold that 'the owner of the dominant tenement may add to his own period of use any period of use by a predecessor in title'.[363] It is the case, as the applicants submitted, that none of these decisions provided an analysis of the doctrinal basis for the principle that was applied.

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358 *Les Denny Pty Ltd v Delma Valmorbida* [2025] VSCA 319 at [35]

359 (1904) 24 NZLR 235.

360 *Auckran* (1904) 24 NZLR 235, 240–1 (Edwards J).

361 (1999) 21 WAR 24, 38 [135] (Templeman J); [1999] WASC 65.

362 [2003] WASC 210, [230] (Roberts-Smith J) ('*Wayella*').

363 *Sunshine Retail* [1999] VSC 415, [145] (Hedigan J).

c) the law of prescription implies the grant of an easement to explain the fact that for 20 years or more, the owners of the servient tenement have acquiesced in the open use of their land by the owners of the dominant tenement—it operates separately to concepts of ownership:

> 65 That analysis was provided by the High Court in *Delohery*, by Kirby P of the New South Wales Court of Appeal in *Dobbie v Davidson*, and by this Court in *Hampshire Automotive*.[364] The law of prescription provides a certain legal basis for what would otherwise be an inexplicable state of affairs. It does so by implying the grant of an easement to explain the fact that, for 20 years or more, the owners of the servient tenement have acquiesced in the open, as-of-right use of their land by the owners of the dominant tenement. This does not require 20 years of acquiescence without any change in the ownership of the servient tenement. Rather, it requires a pattern of prolonged use with the acquiescence of the owners from time to time of the servient tenement, as though an easement had been granted before the use began.

543. The Court of Appeal therefore concluded that ground 5 was not made out and that at general law, an easement can arise based on 20 or more years of use, despite changes in ownership of the relevant land during the period of use.

544. By their fourth ground, the appellants claimed that the judge erred in concluding that s 42(2)(d) of the Transfer of Land Act permitted, as an exception to the indefeasibility of title of a registered proprietor created by s 42(1), a prescriptive easement that arose from 'tacking' user that had occurred before and after the registration of the interest of the registered proprietor.

545. The Court rejected this argument too:

> 97 In *Laming v Jennings*, this Court identified six matters for consideration when the question of 'tacking' under the *Transfer of Land Act* arose for determination:
>
> (a) First, there is no authority on the precise issue whether, for the purposes of s 42(2)(d), an easement can be held to have been subsisting over a servient tenement at the time a person became the registered proprietor, even though the period of 20 years of uninterrupted use was completed after the time of registration;[365]
>
> (b) Second, whether there is any significance in the use of the phrase 'any rights subsisting' in s 42(2)(b), compared to the phrase 'any easements howsoever acquired subsisting' in s 42(2)(d);[366]
>
> (c) Third, the strong policy embedded in the Transfer of Land Act in favour of the integrity of the public register of land titles and the centrality of indefeasibility of title to that policy;[367]

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364 Discussed at [**Error! Reference source not found.**]–[**Error! Reference source not found.**] above.

365 *Laming v Jennings* [2018] VSCA 335, [188] (Kyrou, McLeish and Niall JJA).

366 *Laming v Jennings* [2018] VSCA 335, [189] (Kyrou, McLeish and Niall JJA).

367 *Laming v Jennings* [2018] VSCA 335, [190] (Kyrou, McLeish and Niall JJA).

(d) Fourth, the legislative history of s 42(2)(d);[368]

(e) Fifth, whether the doctrine of lost modern grant may operate more unfairly in the case of a person who becomes the registered proprietor of the servient tenement during the period of 20 years of uninterrupted use, who has less opportunity to observe the use and take steps to stop it, and case law to the effect that such a person is bound by the acquiescence of his or her predecessors in title; and[369]

(f) Sixth, whether the historical rationale of legal fictions such as the doctrine of lost modern grant has significantly diminished with the advent of modern systems for the registration of title, comprehensive planning laws and more mature land law jurisprudence.[370]

546. The Court of Appeal in Valmorbida responded to those considerations in the following way:

a) existing authority supports a conclusion that a prescriptive easement may arise after 20 years of open use of the servient tenement by the owners of the dominant tenement, with the acquiescence of successive owners of the servient tenement;[371]

b) the judge at first instance was correct to considering the exception for adverse possession to be of little assistance in this case, because the 'theoretical underpinning of claims based on adverse possession and the language used in its exception are sufficiently different from the theoretical underpinning of claims based on lost modern grant and the language used in the exception for easements';[372]

c) s 42(2) creates a number of exceptions to indefeasibility in respect of several 'paramount interests', including unregistered easements 'howsoever acquired'. Section 3(1) preserves the operation of the general law in relation to land under the *Transfer of Land Act*, so far as it is not inconsistent with the Act. While there is an obvious tension between the policy of certainty of registered title and the express preservation of certain unregistered interests in land, the legislative history of s 42 indicates that the Parliament of Victoria has consistently resolved that tension in favour of the paramount interests described in s 42(2);[373]

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368 *Laming v Jennings* [2018] VSCA 335, [191]–[194] (Kyrou, McLeish and Niall JJA).

369 *Laming v Jennings* [2018] VSCA 335, [195] (Kyrou, McLeish and Niall JJA).

370 *Laming v Jennings* [2018] VSCA 335, [196] (Kyrou, McLeish and Niall JJA).

371 At [103]

372 At [108]

373 At [110]-[111]

d) the legislative history strongly supports a conclusion that the legislature has deliberately chosen to allow prescriptive easements acquired by long use as an exception to indefeasibility of title under the *Transfer of Land Act*;[374]

e) unless and until Parliament amends the *Transfer of Land Act* to limit or remove the exception for unregistered easements in s 42(2)(d), the Court must give effect to the exception, despite the potential for it to operate unfairly.[375] and

f) many lots in Victoria were created before the advent of modern planning laws – including the lots involved in this case. The historical rationale for prescriptive easements remains relevant.[376]

547. In conclusion, in relation to the fourth ground, the Court of Appeal found that the judge was correct to characterise s 42 of the Transfer of Land Act as an ambulatory provision. It describes the estate of the registered proprietor of land from time to time, not only at the point of registration:

> 132 ... The registered proprietor holds the land free from any encumbrances not recorded on the Register, but subject to the exceptions provided in s 42(2). Those exceptions include 'any easements howsoever acquired subsisting over or upon or affecting the land'. For the reasons given, Mrs Valmorbida acquired an easement over Stevens Court in 2016, which has subsisted since that time despite not being recorded on the Register.

Enjoyment must be 'as of right'

548. For an alleged easement to be enjoyed 'as of right', it must have been acquired without force, without secrecy and without permission. As stated in *Tickle v Brown*:[377]

> … an enjoyment had, not secretly or by stealth, or by tacit sufferance or by permission asked from time to time, on each occasion or even on many occasions of using it; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right, or, though not strictly legal, yet lawful to the extent of excusing a trespass.

549. Acquisition must be 'without force'. As discussed in *Newnham v Willison*,[378] an easement obtained through the violent ejection of the rightful owner cannot be supported by equity:

> In my view, … there may be 'vi'—a forceful exercise of the user—in contrast to a user as of right once there is knowledge on the part of the person seeking to establish

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374 At [125].

375 At [128]

376 At [130]

377 (1836) 111 ER 826, 831f.

378 (1988) 56 P&CR 8.

> prescription that his use is being objected to and that the use which he claims has become contentious. If he then overcomes the objections, and in particular if he overcomes them in a physical way, expressed by the word 'vi' or 'force', such as by removing an obstruction, then that is sufficient evidence [of force].

550. A prescriptive easement must also be used 'without secrecy'. In a leading Australian decision, the High Court held that there cannot be a prescriptive easement if the use under the alleged easement is undiscoverable:[379]

> In this case, which concerned an alleged prescriptive easement of support, the fact that the defendant's beams rested upon the plaintiff's wall could not be discovered by an inspection of either the exterior of the buildings or the inside of the plaintiff's building. The case was determined on a separate issue, but Griffith CJ stated *obiter* (at 178) that on these facts there could be no prescriptive easement because of the *nec clam* requirement.

551. In fact, it has been held that an alleged dominant tenement owner must not only prove that the exercise is not by stealth, but also show that the exercise is 'open'.[380] This suggests a higher standard must be proved.

552. Finally, use of the easement must also be without consent. As explained by Parker J in *Hyman v Van den Bergh*,[381] once consent to use the alleged easement is given by the servient owner, continuity of possession for the purposes of an easement is destroyed, thereby, effectively halting the 20-year period necessary to establish the easement.

> If the enjoyment was due to an agreement or consent, it was held to negative enjoyment as of right at the moment when the agreement was made, or the consent given for the making of the agreement, or the asking for or acceptance of a consent or licence acted as an admission that at that moment there was no right. The continuity of the enjoyment as of right…was thus destroyed; and the continuity of the enjoyment for the purpose of a presumed grant was similarly destroyed if the agreement or licence had been made or given with the twenty years period relied on.

553. Ultimately, the determination of whether a use can be found to be 'as of right' is a matter of objective fact.[382]

554. In *Mills v Silver*,[383] it was held that where evidence shows that the landowner over whose land a prescriptive easement is claimed acquiesced or tolerated the user, it is not inconsistent with a claim "as of right". Here, the court distinguished direct consent or permission from mere acquiescence or toleration. When a servient tenement holder simply tolerates the claimant's use, this is insufficient to establish a consent was granted, thus, use 'as a right' can still be established.

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379 *Milne v James* (1910) 13 CLR 168.

380 *Richardson v Browning* (1936) 31 Tas LR 78.

381 [1907] 2 Ch 516.

382 See *Bishop v Springett* (1831) 1 LJ KB 13; *Gavel v Martyn* (1865) 19 CB (NS) 732; 144 ER 974 (CP).

383 *Mills v Silver* [1991] 61 P&CR 366.

> It is to be noted that a prescriptive right arises where there has been user as of right in which the servient owner has, with the requisite degree of knowledge (which is not an issue in the present case), acquiesced. Therefore mere acquiescence in or tolerance of the user by the servient owner cannot prevent the user being user as of right for purposes of prescription. Equally, where Lord Lindley says that the enjoyment must be inconsistent with any other reasonable inference than that it has been as of right in the sense he has explained, he cannot be regarding user with the acquiescence or tolerance of the servient owner as an alternative reasonable inference which would preclude enjoyment as of right from being established. A priori, user in which the servient owner has acquiesced or which he has tolerated is not inconsistent with the concept of user as of right. To put it another way, user is not '*precario*' for the purposes of prescription just because until 20 years have run, the servient owner could stop it at any time by issuing his writ and asking for an injunction.[384]

555. In that case, the evidence before the Court led to a conclusion that the owners of the servient land had acquiesced to the user. They had known of it, had power to prevent and did not intervene. Nor had permission ever be sought or granted:

> On the facts of the present case as set out in the judgment of Judge Micklem it is, in my judgment, plain that James Price acquiesced in all use of the disputed track with vehicles. He knew of it, had power to prevent it and did not intervene see the words of Morris L.J. in *Davies v. Du Paver*. The same applies to his successors up to the death of Joe Phillips. There was no demur to it, and there is no suggestion in the evidence that permission was ever sought or granted. In my judgment, the user with vehicles for the purposes of Coed Major in Joe Phillips's time was user as of right, and the plaintiffs have no defence in law on the ground of tolerance to the appellants' claim to a prescriptive easement by the presumption of a lost grant.[385]

Acquiescence

556. The servient tenement owner must have acquiesced to the use of the land throughout the 20-year period. Put simply, the servient tenement owner must have had knowledge of, and the power to prevent, the use but not have exercised such power.

557. Acquiescence by the servient tenement owner was discussed in *Dalton v Angus*:[386]

> In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, the doing of some act by one man upon the land of another; secondly, the absence of right to do that act to the person doing it; thirdly, the knowledge of the person affected by it that the act is done; fourthly, the power of the person affected by the act to prevent such act either by act on his part or by action in the courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the courts to say that he shall not afterwards interfere to stop the act being done.

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384 Ibid 371-2.

385 Ibid 375.

386 (1881) 6 App Cas 740 at 773 ff (HL(E)).

558. The authorities have confirmed that evidence of 'actual knowledge' on the part of the servient tenement owner is not necessary, as this would be unnecessarily onerous for the dominant tenement owner to prove,[387] and in certain circumstances, establishing 'constructive knowledge' is sufficient.[388]

The easement sought must be permanent

559. If the object over which a prescriptive right is claimed was only created for a temporary purpose, then the right is incapable of being recognised as an easement:[389]

> If the object over which a prescriptive right is claimed was only constructed for a temporary and not for a permanent purpose, the right is said to be precarious and is incapable of becoming an easement even if all the other requirements are satisfied.

560. The meaning of 'temporary purpose' was considered to include a purpose that may only happen for a short time, as well as a purpose that may be reasonably contemplated by the parties will come to an end.[390]

No unity of possession of dominant and servient tenements

561. The period required for the presumption of lost modern grant to arise will be suspended in the event that possession between the alleged dominant and servient tenement owners unites. In simpler terms, if the respective servient and dominant tenements become possessed by the same land holder:

> The 20-year prescriptive period necessary for a presumption of a lost modern grant cannot run during any time when there is a unity of possession of the alleged dominant and the alleged servient tenements, 'for then the claimant would not have enjoyed "as of right" the easement, but the soil itself'… It appears that in the case of an alleged lost grant, the running of the prescription period is merely suspended during any period of unity of possession.

562. There is a general principle that, by operation of law, an easement at common law is extinguished upon unity of seisin (unity of both possession and ownership).

563. Needham J summarised this neatly in *Margil Pty Ltd v Stegul Pastoral Pty Ltd* [1984] 2 NSWLR 1 (***Margil***):[391]

> The general principle, as expressed by *Gale on Easements*, 14 ed (1972) at 309, is that: "As an easement is a charge imposed upon the servient for the advantage of the dominant tenement, when these are united in the same owner, the easement is extinguished." The same principle can be expressed in the form that a man cannot have

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387 *Fernance v Simpson* [2003] NSWSC 121, [28].

388 See [392].

389 Bradbrook and MacCallum (n 3) [5.37].

390 Farwell J in *Burrows v Lang* [1901] 2 Ch 502, 508.

391 At 9.

an easement over his own land: *Bolton v Bolton* (1879) 11 Ch D 968; *Roe v Siddons* (1888) 22 QBD 224 at 236; *Metropolitan Railway Co v Fowler* [1892] 1 QB 165 at 171.

564. In *Bolton v Bolton* [1879] 11 Ch D 968, Fry J illustrated the foundational logic underpinning the principle with the following example:[392]

> When a man who is owner of two fields walks over one to get to the other, that walking is attributable to the ownership of the land over which he is walking, and not necessarily to the ownership of the land to which he is walking.

565. Notably, other jurisdictions have enacted legislation to preclude the operation of this principle.[393] However, the principle apparently remains applicable to common law easements in Victoria.

566. Whether the principle may be qualified is a live issue. In the New South Wales decision of *Margil*, Needham J held that where the easement is one of necessity, it will survive unity of seisin:

> I propose to apply the principle that unity of ownership or possession does not cause to disappear a right of way (or other easement) where that way or other easement is necessary to the use of the land which previously had the benefit of the easement. In the case of a right of way the necessity is access.

567. The easement was one of necessity in *Margil* because the relevant land would otherwise have been landlocked.

> In the case of a right of way the necessity is access. The right of way which existed in 1950 was clearly a right of way for all purposes including the use of vehicles. The owners of lot 2 of Ward's Estate had no legally enforceable access to any made public road other than access over the site of the right of way. The suggestion made on behalf of the defendants that access was available over Townsend Avenue and Boundary Road is contrary to the evidence. Lot 2 was, in the real sense, landlocked.

568. In *Howard Finance Pty Ltd v Yarra City Council* [2020] VSC 610, Kennedy J cited *Margil* as authority for the general principle that an easement at common law ceases to exist upon unity of seisin, but did not address the issue of whether an easement of necessity would survive:[394]

> … Given there would be unity of seisin, the easement would thereby be extinguished and there would be no 'right of way'…

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392 At 970 – 971.

393 *Real Property Act 1900* (NSW), section 47(7); *Conveyancing Act 1919* (NSW), section 88B(3)(c); *Land Title Act 1994* (Qld), sections 87 and 88; *Real Property Act 1886* (SA), section 90C; *Conveyancing and Law of Property Act 1884* (Tas), section 9A; *Land Titles Act 1980* (Tas), section 109; *Land Title Act* (NT), sections 96 and 97; *Land Titles Act 1925* (ACT), section 103E(4).

394 *Howard Finance Pty Ltd v Yarra City Council* [2020] VSC 610, [235] citing *Margil Pty Ltd v Stegul Pastoral Pty Ltd* [1984] 2 NSWLR 1, 9.

569. Whether necessity is an exception to the general principle in Victoria is therefore perhaps still open for inquiry.

The extent of a prescriptive easement is that reasonably required to exercise the right

570. Where not expressly stated on an instrument, the spatial extent of an easement will depend on the nature of the right granted and what is reasonably required to exercise that right.

571. The dimensions of an easement were considered by the Supreme Court of Victoria in *McMahon v McMahon*,[395] a case concerning a right of way easement created by oral agreement. After determining that an easement had arisen by prescription, Whelan J set out that the relevant inquiry as to the extent of the easement is what is required by the reasonable needs of the dominant tenement:

> 205 The width and height of a right of way extend as far as is required by the reasonable needs of the owner of the dominant tenement.

572. The easement provided access to an airstrip. Therefore, the parties made submissions as to the height and width most desirable to enhance access and safety. Ultimately, Whelan J made a declaration that the easement extended 4 metres wide and to a height of 4 metres, in accordance with CFA guidelines:

> 210 The CFA has recently written to landholders, including Valerie, alerting them to CFA guidelines for access tracks. An expert ecologist called on behalf of the defendants, Lincoln Kern, who has examined the existing track in some detail, expressed the opinion that the current track reflects these CFA guidelines, which he referred to as a 4 metre by 4 metre "box". …
>
> 213 I will make a declaration to the effect that a right of way exists from the north/east corner of Lloyd's small block to the gate to the national park on the western boundary of Don's large block at the location in which the track now exists, such easement to be 4 metres wide and free of trees and shrubs for a height of 4 metres and with gates, if any, at least 3 metres wide.

Registering easements

573. Under the Torrens system of land registrations and transfers in Victoria, all rights and interests in land are registered in the register of the Office of Titles. This register is intended to prove a true, correct and complete description of all land in Victoria.

574. In Victoria, the Torrens system is regulated, in part, by the *Transfer of Land Act 1958*. Section 42(1) confers on a registered proprietor title to the land described in the relevant folio of the register:

> **42 Estate of registered proprietor paramount**

395 [2008] VSC 386.

(1) Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely free from all other encumbrances whatsoever …

575. An easement may be registered by various methods, some of which include:

a) on the registration of a transfer of land pursuant to section 45(2) of the *Transfer of Land Act 1958*;

b) on the registration of a plan of subdivision pursuant to section 12(1) of the *Subdivision Act 1988* or section 98 of the *Transfer of Land Act 1958*; and

c) by the Registrar of Titles recording the easement on the folio of the dominant and servient tenements under section 72 of the *Transfer of Land Act 1958*.

576. Therefore, in accordance with section 42(1) of the *Transfer of Land Act 1958*, the owner of a servient tenement will be bound by any easement acquired and registered against any predecessors in title.

IMPLIED EASEMENTS

577. Section 42(2)(d) of the *Transfer of Land Act 1958* provides that any easements 'howsoever acquired', including those that are not registered, are enforceable against subsequent servient tenement owners:

42 Estate of registered proprietor paramount

…

(2) Notwithstanding anything in the foregoing the land which is included in any folio of the Register or registered instrument shall be subject to—

…

(d) any easements howsoever acquired subsisting over or upon or affecting the land; …

notwithstanding the same respectively are not specifically recorded as encumbrances on the relevant folio of the Register.

578. The effect of section 42(2)(d) is that the title of a servient tenement owner is subject to all easements, whether express or implied, or registered or unregistered. The owner of a servient tenement will therefore be bound by any implied easement acquired against his or her predecessors in title.

Implied easements under statute

579. The *Transfer of Land Act 1958* provides for certain deemed easements where the easements apply "on over or under the lands appropriated or set apart for those purposes respectively on the plan of subdivision":

> **98 Easements arising from plan of subdivision**
>
> The proprietor of an allotment of land shown on an approved plan of subdivision or a lot shown on a registered plan shall be entitled to the benefit of the following easements which shall be and shall be deemed at all times to have been appurtenant to the allotment or the lot, namely—
>
> (a) all such easements of way and drainage and for party wall purposes and for the supply of water gas electricity sewerage and telephone and other services to the allotment or the lot <u>on over or under the lands appropriated or set apart for those purposes respectively on the plan of subdivision</u> as may be necessary for the reasonable enjoyment of the allotment or the lot and of any building or part of a building at any time thereon; and
>
> (b) in the case of the subdivision of a building, all such additional easements of way drainage support and protection and for the supply of water gas electricity sewerage and telephone and other services to the allotment or the lot <u>on or over the other allotments or other lots in the subdivision</u> as may be necessary for the reasonable enjoyment of the allotment or the lot as part of that building or any building at any time situated on the land in the subdivision—
>
> in all respects as if all such easements had been expressly granted.

580. The threshold is whether the easement would be 'necessary for the reasonable enjoyment' of the land in the (common) subdivision or buildings thereon.

581. Similarly, section 12(2) of the *Subdivision Act 1988* provides for the statutory implication of an easement necessary for the reasonable use and enjoyment of a lot or common property that is consistent with the reasonable use and enjoyment of other lots or the common property:

> **12 Plan must show easements and other rights**
>
> …
>
> (2) Subject to subsection (3), there are implied—
>
> (a) over—
>
> (i) all the land on a plan of subdivision of a building; and
>
> (ii) that part of a subdivision which subdivides a building; and
>
> (iii) any land affected by an owners corporation; and
>
> (iv) any land on a plan if the plan specifies that this subsection applies to the land; and
>
> (b) for the benefit of each lot and any common property—

all easements and rights necessary to provide—

(c) support, shelter or protection; or

(d) 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); or

(e) rights of way; or

(f) full, free and uninterrupted access to and use of light for windows, doors or other openings; or

(g) maintenance of overhanging eaves—

if the easement or right is necessary for the reasonable use and enjoyment of the lot or the common property and is consistent with the reasonable use and enjoyment of the other lots and the common property.

582. The servient tenement land must fit within one of the statutory circumstances under section 12(2)(a) of the Subdivision Act, being:

a) all the land on a plan of subdivision of a building;

b) that part of a subdivision which subdivides a building;

c) any land affected by an owners corporation; or

d) any land on a plan if the plan specifies that this subsection applies to the land.

583. In *Body Corporate No 4132424R v Peter James Sheppard & Anor* [2008] VSCA 118 (***Sheppard***), Dodds-Streeton JA (with whom Buchanan JA and Osborn AJA agreed) explained that for the easement to be 'necessary' under section 12(2), there must be no alternative means of achieving the relevant function that is feasible or reasonably available:

> 80 …The reasonable use and enjoyment of the property not only clearly exceeds mere use, but also admits consideration of the effect on the reasonable use and enjoyment of property if the function to be achieved by the easement is unavailable and of the costs or detriments of securing the function by means other than the easement.
>
> 81 His Honour, in my view, correctly concluded that 'necessary' meant that the easement was <u>essential to achieving the specified function, in the sense that no alternative means of achieving the relevant function was feasible or reasonably available</u>. In determining whether an alternative to the easement was reasonably available, all relevant circumstances, including physical factors, legal restrictions, safety considerations and cost should be considered.

584. The function itself will differ in the circumstances of any given case but must be for the reasonable enjoyment of the relevant land (section 98 of the TLA) or reasonable

use and enjoyment of the lot or the common property (section 12(2) of the *Subdivision Act*).[396]

585. The Court of Appeal in *Sheppard* also detailed the relevant case *of Stathoulis v O'Connor* [1984] V ConvR 54, in which Gray J held that an easement of way at the rear of land used for a shop was necessary for reasonable enjoyment of the lot under section 98 of the TLA:

> In Stathoulis v O'Connor, Gray J held that the plaintiffs were entitled, pursuant to s 98 of the Transfer of Land Act 1958, to an easement of way over a strip of land at the rear of their shop property. His Honour found that, as the shop's only current outlet was to the front and there was no side access, it was "necessary for the reasonable enjoyment" of the property to have a rear easement of way. It was not a mere matter of convenience, as without such an easement, it would be necessary to dispose of rubbish by transporting it through the premises to the front access.

586. In *Burford v Wichlinksi,*[397] Beach J found that the defendant's ambition to run a pipe across the front of the plaintiffs' lot was 'convenient', but it was not 'essential':[398]

> … It may well be convenient to run it across the front of Lot 1 but it is not essential that it be. Lot 2 can be just as adequately sewered and drained by running the pipe from Lot 2 due north to the main drain. Nor is it consistent with the reasonable use and enjoyment of Lot 1. …

587. Even significant costs associated with an alternative have failed to make an easement 'necessary' under section 12(2). For example, Beach J reached his honour's decision in *Burford v Wichlinksi* even as the alternative would require the defendant developer to dig a far deeper trench, and excavate part of the footpath and main road to complete the alternative works:[399]

> It is proposal 2 that the defendant prefers and which he has already partially implemented. The defendant prefers proposal 2 because it is easier and cheaper; because (a) he does not have to excavate a trench across the footpath and portion of the surface of Toorak Road; (b) because it does not require the excavation of a trench anywhere near as deep as the trench he will be required to dig if he goes directly out to the main drain.

Implied easement of necessity at common law

588. Implied easements of necessity arise only in association with a severance of land, and not through long user (like prescriptive easements). For an easement of necessity to arise, the necessity must exist at the time of severance and cannot arise later.

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396 Section 98(a) of the TLA.

397 Unreported, Supreme Court of Victoria, Beach J, 30 April 1996

398 Ibid, page 5.

399 Ibid, page 4.

589. Further, an easement of necessity cannot be implied where an express easement exists and may not be implied unless it is considered to be absolutely necessary.

590. The most common example of an easement of necessity is a right of way of necessity, where a grantor has disposed of land in a way that leaves the part granted or the part retained effectively landlocked.

591. It is likely that landlocking is the relevant threshold, as Habersberger J said in *Mantec Thoroughbreds Pty Ltd v Batur* [2009] VSC 351 at [115]:

> Strictly, the defendants must have a licence to cross the bridge over the drainage reserve. But the defendants have never sought a licence, and since 2000 they have crossed the drainage reserve at will, despite not possessing a licence. There is no evidence that this is about to change. Nor is there evidence that they would not be granted a licence… In my opinion, there is no necessity, until such time as the permissive access is closed off to the defendants and their land becomes landlocked.

592. The existence of alternate access, even if less convenient or costly to construct, might therefore be problematic. For example, circumstances considered insufficient to create necessity include:

a) the expense and difficulty associated with construction of an access route to a public highway;[400] and

b) an obstruction that can be removed (albeit at some expense and effort).[401]

593. However, an implied easement may be available if the alternative access is not guaranteed (such as being subject to permitting and/or negotiation). As Danckwerts J commented in *Barry v Hasseldine* [1952] 1 Ch 835 at 839:

> …it is no answer to say that a permissive method of approach was in fact enjoyed, at the time of the grant, over the land of some person other than the grantor because that permissive method of approach may be determined on the following day, thereby leaving the grantee with no lawful method of approaching the land which he has purchased.

Implied easements arising from a common intention

594. In *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634, Lord Parker set out the general principle that an easement may be implied to give effect to the common intention of parties involved in the conveyance of real property, specifically regarding the intended purpose for which the land is to be used:[402]

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400 See *Tarrant v Zandstra (*1973) 1 BPR 9381; *Titchmarsh v Royston Water Co Ltd* (1900) 81 LT 673.

401 See *McLernon v Connor* (1907) 9 WALR 141 in which logs and wire fencing could be readily removed to create an alternative access to the land.

402 At 646–7.

> The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in or for which the land granted or some land retained by the grantor is to be used … But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner.

595. Easements arising from a common intention are rare, however they have arisen:

a) in the case of semi-detached or terraced houses, where the design of the houses creates a mutual dependence for drainage and structural support;[403] and

b) in the case of a transmission infrastructure operator purchasing land for the purposes of building an electricity sub-station, where an easement to transmit noise was implied to achieve the commonly intended use of the land.[404]

Actual and constructive knowledge of an agent

596. In *Laming*,[405] the Victorian Supreme Court of Appeal accepted that the relevant 'knowledge' required for prescription includes:

a) actual knowledge; and

b) in certain circumstances, forms of 'constructive knowledge', being knowledge that a reasonably diligent owner obtain having exercised reasonable care in protecting his or her rights and interests:

> 90. The relevant knowledge for the purposes of prescription includes both actual knowledge and, in certain circumstances, forms of constructive knowledge. …
>
> 91. Constructive knowledge in the present context means the knowledge that a reasonably diligent owner would have obtained exercising reasonable care in protecting its own rights and interests.[406] Assessing what a reasonably diligent owner would know, and what he or she would be expected to make of that knowledge, will often depend on observation and on whether the owner was put on inquiry as to the use of the land by the claimant.

597. In relation to agents, the Court noted that, in the case of a corporate owner, actual knowledge includes the knowledge of agents who have 'sufficient and relevant authority to bind the owner as principal':

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403 *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557 at 563 (Vaughan Williams LJ).

404 *Re State Electricity Commission of Victoria & Joshua's Contract* [1940] VLR 121

405 [2018] VSCA 335.

406 Citing *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch, 557, 570–1 (Romer LJ); *Milne v James* (1910) 13 CLR 168, 177 (Griffith CJ); *Gangemi* (1994) 11 WAR 505, 515–16 (Seaman J); *Williams v State Transit Authority (NSW)* (2004) 60 NSWLR 286, 293 [85] (Mason P).

> 90. In the case of a corporate owner, actual knowledge will include the knowledge of its agents with sufficient and relevant authority to bind the owner as principal.

598. In cases other than a corporate owner, the Court considered that 'whether knowledge or means of knowledge on the part of an agent will bind the owner will … turn on the circumstances of the case':

> 95. … In our opinion, the question whether knowledge or means of knowledge on the part of an agent will bind the owner will instead turn on the circumstances of the case, including the nature of the relationship between the agent and the owner.

599. The Court referred to the conclusions of Hedigan J in *Sunshine Retail Investments Pty Ltd v Wulff*,[407] in which his Honour stated that 'only actual knowledge on the part of an agent will be imputed to the owner':

> 96. *Sunshine Investments* provides a useful example. In that case, a group of residents in Toorak claimed that they had a pedestrian right of way over a path in front of an apartment block. A key issue in the case was whether the servient owner knew of the use of the path as a right of way. Hedigan J accepted that the path was 'moderately busy' with a substantial number of local residents traversing it as a shortcut to the amenities on Toorak Road. However, his Honour was not satisfied that it would have been apparent to an ordinary, diligent owner that the residents were using the path. In reaching this conclusion, his Honour had regard to the fact that the walk along the path would have taken just a few minutes, the residents using the path would have been barely visible from within the apartment block, and that it would have been expected that there would be a substantial number of people moving about the apartment block in any event.
>
> 97. Relevantly for present purposes, Hedigan J concluded that, as a matter of agency law, only actual knowledge on the part of an agent will be imputed to the owner. He considered that the doctrine of constructive knowledge in this context is based on the existence of a duty on the part of an agent to communicate knowledge to the principal. His Honour went on to say:
>
> > 117 If, as I accept to be the proper legal conclusion, that information 'constructively' acquired cannot be imputed to the principal, then reliance by the claimants on the alleged observations by gardeners, or painting and maintenance men, does not advance the claimant's case at all. …
> >
> > 119 [I]t seems impossible to conclude, as counsel for the residents asked me to conclude, that these trade-persons were under a duty to pass on to the managing agent knowledge of use of the footpath by persons other than tenants and their guests, even if they knew that. I would not myself have thought they had any other duty than to carry out their work with proper care and skill.

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407 [1999] VSC 415.

600. However, in limiting Hedigan J's remarks to the facts of his decision, the Court held that there may be 'circumstances beyond the mere fact of agency' that justify attributing an owner the constructive knowledge of his or her agent:

> 98. At first blush, the approach of Hedigan J differs from that in *Diment* in so far as Pennycuick V-C treated the question as being whether the owner's agent had knowledge or the means of knowledge, and declined to extend the presumption to that context. In other words, Pennycuick V-C did not rule out the possibility of an agent's constructive knowledge binding the principal. However, we do not read Hedigan J as excluding the prospect that circumstances beyond the mere fact of agency may justify attributing to an owner the constructive knowledge of that owner's agent. In particular, the relationship between owner and agent might reveal the existence of a duty to communicate relevant knowledge to the owner. In this way, both decisions recognise that the circumstances of the relationship between owner and agent might serve to fix the owner with the actual or constructive knowledge of the agent.

Presumption of knowledge in the face of long user and an agent

601. In the face of open user of land over a period of years, there is a presumption that a servient tenement owner will have knowledge of such user that is sufficient for the implied creation of an easement by prescription.

602. The presumption was described by the Court in *Laming*:[408]

> 92. At this point, two related and contested propositions of law become relevant. The first is that knowledge constructively acquired by an agent cannot be imputed to the owner. The second is that it is presumed, in the face of open user of land over a period of years, that the owner had knowledge of that user. The trial judge did not apply the first proposition but did apply the second. The applicant contended that the judge ought to have applied the first proposition to exclude reliance on knowledge constructively acquired by Telstra's agents and employees. The respondent submitted that the judge was correct to apply the presumption.
>
> 93. That presumption, which is evidentiary in nature and does not displace the onus which lies on the party asserting the existence of an easement, is supported in the Australian authorities. It is often traced to *Pugh v Savage* where Cross LJ (with whom Harman and Salmon LJJ agreed) held that, where long user of a way has been shown, the law should presume, in the absence of any evidence to the contrary, that the owners of the land knew of that user. Cross LJ applied the presumption to establish that successive prior owners of the relevant land knew of user of the land for a period of 18 years which, when added to actual knowledge on the part of the current owner, satisfied the 20 year period.

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408 [2018] VSCA 335.

603. In relation to an agent, the Court stated that the presumption cannot be employed to attribute knowledge or the means of knowledge to an agent in circumstances where it is proved that the owner had neither:

> 95. The presumption articulated in these cases has been applied in Australia. As the above passage in *Diment* shows, it is not a presumption which can be employed for the purpose of attributing knowledge or the means of knowledge to an owner's agent in circumstances where it is proved that the owner had neither. …

EASEMENTS IN GROSS

604. Easements which do not identify a dominant tenement are not recognised at common law. However, many state and territory statutes create exceptions to this rule through easements in gross, or public utility easements.

605. In Victorian, multiple statutes recognise rights in the nature of easements in favour of certain 'holders', generally public authorities, who do not own a dominant tenement that is benefited by the particular rights. For example:

a) section 113 of the *Local Government Act 2020* (Vic), which deems 'any right in the nature of an easement' to be an easement in favour of a local government despite there being 'no land vested in the Council which is benefited':

> **113 Creation of easements**
>
> If any right in the nature of an easement or purporting to be an easement or an irrevocable licence is or has been acquired by a Council, the right is deemed for all purposes to be and to have been an easement even if there is no land vested in the Council which is benefited by the right.

b) section 130(3) of the *Water Act 1989*, which, in relation to water authorities, takes 'any right in the nature of an easement … to be an easement even though there is no land vested in the Authority which is benefited':

> **130 Acquisition of land**
>
> …
>
> (3) If an Authority acquires any right in the nature of an easement or purporting to be an easement, that right must be taken to be an easement even though there is no land vested in the Authority which is benefited or capable of being benefited by that right.

c) section 43(3) of the Electricity Industry (Residual Provisions) Act 1993 (Vic), provides that a right or privilege acquired by an electricity corporation for its works and undertakings is deemed to be an easement vested in the electricity corporation and be appurtenant to its lands:

> **43 Certain rights deemed to be easements appurtenant to lands of electricity corporation**

…

(3) If after the commencement of this section, an electricity corporation acquires a right or privilege in, over or affecting any land for the purposes of its works and undertakings and that right or privilege is not, or is not in any instrument expressed to be, appurtenant to any land, the right or privilege is deemed to be an easement vested in the electricity corporation and appurtenant to the lands vested in the electricity corporation for the time being and from time to time and to every part of them.

606. Such rights are generally to be exercised in accordance with the *Land Acquisition and Compensation Act 1986* (Vic), which entitles affected landowners to a claim for compensation:

> **30 Right to compensation on acquisition**
>
> Subject to this Act, every person who, immediately before the publication of a notice of acquisition, had an interest in land that is divested or diminished by the acquisition of the interest to which that notice relates has a claim for compensation.

EQUITABLE EASEMENTS

Specific enforcement of an agreement

607. Section 52(1) of the *Property Law Act 1958* (Vic) provides the general rule applying to general law land requiring a deed to convey an interest in land, including a legal easement:

> All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.

608. However, equity does not require a formal deed for the conveyance of an interest in land. This is founded on the maxim that equity deems as done that which ought to be done.[409]

609. In effect, equity will 'step in' to treat a contract to convey an easement as effective to transfer the equitable interest to the purchaser even where there is no deed. This rule is often cited as the rule in *Walsh v Lonsdale*.[410]

610. However, as Monahan J noted in *Brownsea v National Trustees Executors and Agency Co of Australasia Ltd*[411], equity will only operate where there is an enforceable contract for

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409 *Banks v Sutton* (1732) 2 P Wms 700 at 715; 24 ER 922 at 928.

410 (1882) 21 Ch D 9 (CA)

411 [1959] VR 243.

the creation of a legal easement, and must import consensus that the easement is permanent in nature and not intended to operate as a right *in personam*:[412]

> Equity will not enforce a contract of which the terms are not clear and defined. A contract to grant an easement necessarily imports consensus between the parties that the qualities to be impressed upon the dominant and servient tenements shall be in their nature permanent; in other words that a right in rem is to arise and not a right in personam.

611. If there is an enforceable contract, the agreement must be evidenced:

a) by a memorandum or note signed by the party to be charged;[413] or

b) by an act of part performance.

612. Accordingly, equity may treat the contract as having been effectively implemented. As Jessel MR stated in *Walsh v Lonsdale*[414], the effect is that, provided relief is available by specific performance, equity grants the interest in the terms of the enforceable contract:

> … He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. …

613. Although *Walsh v Lonsdale* concerned a lease, the principle is broadly applicable to agreements granting any other legal proprietary interest in land, including easements.[415]

614. With respect to an act of part performance, Isaacs and Rich JJ in *McBride v Sandland*[416] explained that the essential elements of the doctrine are:[417]

a) an act that is unequivocally referable to 'some such agreement as that alleged'

b) 'some such agreement as that alleged' refers to some contract 'of the general nature of that alleged';

c) the circumstances must be considered to assess whether an act is unequivocally referable;

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412 *Brownsea v National Trustees Executors and Agency Co of Australasia Ltd* [1959] VR 243.

413 A consequence of the *Instruments Act 1958* (Vic), s 126(1).

414 (1882) 21 Ch D 9.

415 Edgeworth, Brendan, et al. *Sackville and Neave Australian Property Law*, LexisNexis Butterworths, 2020, 240 [4.47].

416 (1918) 25 CLR 69.

417 Ibid, at 78-79. The requirement for an act to be 'unequivocally referable' to the impugned agreement was recently upheld by the High Court in *Pipikos v Trayans* (2018) 265 CLR 522.

d) the act must have been done and the other party must have permitted the act to be done on the faith of the agreement;

e) the act must be done by a party to the agreement; and

f) where the above factors are established, there must also be:

1) a completed agreement; and

2) evidence that the act was carried out by the force of the agreement:

It will conduce to precision in dealing with the voluminous and complicated circumstances detailed in the evidence to state, so far as material to the present case, certain elements of part performance essential to raise the equity : -

(1) The act relied on must be unequivocally and in its own nature referable to 'some such agreement as that alleged'. That is, it must be such as could be done with no other view than to perform such an agreement.

(2) by 'some such agreement as that alleged' is meant some contract of the general nature of that alleged.

(3) The proved circumstances in which the 'act' was done must be considered in order to judge whether it refers unequivocally to such an agreement as is alleged. …

(4) It must have been in fact done by the party relying on it on the faith of the agreement, and further the other party must have permitted it to be done on that footing. …

(5) It must be done by a party to the agreement. These requirements must be satisfied before the actual terms of the alleged agreement are allowed to be deposed to.

Further, when these terms are established, it still remains to be shown:

(6) That there was a completed agreement.

(7) That the act was done under the terms of that agreement by force of that agreement.

Equitable estoppel

615. An easement may also arise under the doctrine of equitable estoppel.

616. The rationale for equitable estoppel does not rely on the existence of any agreement. As set out by Kiefel CJ, Bell, Gageler and Keane JJ in *Pipikos v Trayans*,[418] equitable estoppel is based on the principle that a plaintiff should not be left to suffer detriment where a defendant resiles from a promise:

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418 (2018) 265 CLR 522.

> … equitable intervention by way of equitable estoppel to prevent a defendant resiling from a promise that is not enforceable at law is justified, not by the existence of an unperformed or partially performed promise, but by a concern that the plaintiff should not be left to suffer a detriment by the defendant's so resiling.

617. Although estoppel is more often used as a defence; it may be used as a cause of action.[419]

618. In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Brennan J set out the essential elements of equitable estoppel:

a) the plaintiff believed a specific legal relationship existed with the defendant or expected one to form;

b) the defendant persuaded the plaintiff to hold this belief or expectation;

c) the plaintiff acts or abstains from acting based on this belief or expectation;

d) the defendant knew or intended for the plaintiff to act in this manner;

e) the plaintiff will suffer harm if the belief or expectation isn't met; and

f) the defendant does not prevent this harm, either by fulfilling the expectation or by other means:

> (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act or avoid that detriment whether by fulfilling the assumption or expectation or otherwise.

619. However, the elements are not to be applied in a 'mechanical fashion'.[420]

620. Cases may also be described as involving 'estoppel by encouragement'. In *Carter v Brine*[421], Blue J explained the elements of proprietary estoppel by encouragement:

> The elements of proprietary estoppel by encouragement are:
>
> 1) a representation by the defendant to the plaintiff that the plaintiff has or will have a proprietary interest in property owned wholly or partly by the defendant (*representation*);

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419 *Arfaras v Vosnakis* [2016] NSWCA 65.

420 *Doueihi v Construction Technologies Australia Pty Ltd* [2016] NSWCA 105 at [166] (Gleeson JA).

421 [2015] SASC 204.

2) the plaintiff forms an assumption that he or she has or will have a proprietary interest in that property (*assumption*);

3) the conduct of the defendant in making the representation causes or materially contributes to the formation of that assumption by the plaintiff (*reliance*);

4) the plaintiff takes action in change of his or her position in reliance on that assumption (*inducement*);

5) the plaintiff would suffer detriment if the defendant were permitted to depart from the assumption (*detriment*);

6) it would be unjust or unconscionable for the defendant to depart from the assumption (*unconscionability*).

621. Accepting the elements summarised by Blue J in *Carter v Brine*, Ward CJ in *E CO v Q*[422] noted several further considerations:

> [Blue J's summary in *Carter v Brine*] is a useful practical guide, though three observations may be made. First, as to the use of the term 'representation': Handley AJA has pointed to the desirability of distinguishing between 'a *representation* (of an existing or past fact)' and 'a voluntary *promise* about the speaker's future conduct' (*Equititrust Ltd v Franks* [2009] NSWCA 128 at [73]; my emphasis; cf *Spencer Bower: Reliance-Based Estoppel* at [1.8] fn 38). Second, as to the sixth element: 'unconscionability' does not exist at large and it is not a 'triable issue' as such (see MGL at [17–040] and the authorities cited therein; K Handley, *Estoppel by Conduct and Election* (2nd ed, 2016) at [1-027]–[1-032]). Third, as with Brennan J's formulation in *Waltons Stores v Maher*, it would be inappropriate to apply the formulation in any mechanical fashion, or to treat the elements as subdivided into 'watertight compartments' (*Gillett v Holt* at 225).
>
> Estoppel by encouragement vindicates a plaintiff's expectations when a defendant seeks unconscionably to resile from an expectation that he or she has created (*Sidhu v Van Dyke* at [77]). Importantly, this act of encouragement — the representation or promise — need not be express. (This is one reason why these two forms of estoppel may be difficult to distinguish on the facts of a particular case.)
>
> At least as regards proprietary estoppel by encouragement, it is not necessary in every case for a plaintiff to show that he or she assumed that a 'particular legal relationship' existed or would exist (see *Doueihi* at [153]–[170]; see also *E K Nominees Pty Ltd v Woolworths Ltd* [2006] NSWSC 1172 at [231]–[267]).

622. It is important to understand that equitable remedies are discretionary, which means that relief is flexible and not guaranteed. For example, relief may be withheld if the claimant has offended the equitable maxim that 'he who comes into equity must come with clean hands'.[423]

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422 [2018] NSWC 442.

423 Meagher, Gummow and Lehane, *Equity: Doctrine and Remedies,* (3rd ed, 1992), paras 322–7; Baker and Langan, *Snell's Equity* (29th ed, 1990), pages 31–2.

623. Nevertheless, French CJ, Kiefel, Bell, Gageler and Keane JJ said in *Sidhu v Van Dyke*[424] that the appropriate measure of relief for cases of equitable estoppel will usually reflect the original promise:

> While it is true to say that "the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct", where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party's detriment, the relief which is necessary in this sense is usually that which reflects the value of the promise.

624. Accordingly, a successful claimant might reasonably expect to be granted an easement in the terms represented by the estopped party.

Does section 42(2)(d) extend the exception to indefeasibility to equitable easements?

625. In *Cantelo v Kapellides* [2003] VSC 442 (***Cantelo v Kapellides***), Byrne J accepted that an equitable easement is included in the exception under section 42(2)(d) by reference to the binding precedent of the Privy Council:

> 13 Reliance was placed on the statutory paramountcy of the title prescribed by s.42. But this, too, is subject to "any easements howsoever acquired subsisting over or upon or affecting the land."[425] These are words of very general import[426]. But, it was said, this is a reference to a legal easement, that is, one which is registered and therefore effectual to grant to the dominant landholder the interest in question.[427] This submission derives support from certain text.[428] It is, however, contradicted by the advice of the Privy Council in *James v Stevenson*[429] which opinion binds me. The qualification upon the estate of a registered proprietor created by s.42(2)(d) includes the interest of a dominant tenant under an unregistered agreement to create an easement.

626. With respect to general law, the authors of Bradbrook & Neave, *Easements and Restrictive Covenants in Australia* write that the holder of an equitable easement will ordinarily lose priority to a purchaser of the legal estate for value without notice, explaining that this proposition stems from *Pilcher v Rawlins* (1872) 7 Ch App 259:[430]

> The holder of an equitable easement will always lose in a dispute concerning priority of interests to a purchaser for valuable consideration who obtains a legal estate at the time of his or her purchase without notice of the existence of the prior equitable

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424 [2014] HCA 19.

425 Section 42(2)(d).

426 *Nelson v Hughes* [1947] VLR 227 at 230, per Lowe J.

427 See s. 40(1).

428 Robinson: *Transfer of Land in Victoria* (1979) at p. 195. But contrast Voumard, The *Sale of Land* (1995) at p. 292; and Bradbrook & Neave, *Easements and Restrictive Covenants in Australia* (2000) at p. 250-3.

429 [1893] AC 162.

430 Adrian Bradbrook and Susan MacCallum, *Bradbrook & Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, 3rd ed, 2011) 57–8 [2.14] ('***Bradbrook & Neave***').

easement.[431] This proposition, which has its modern origin in *Pilcher v Rawlins* (1872) 7 Ch App 259, is of general application to priority disputes concerning the enforceability of a prior equitable interest against a subsequent legal interest.[432]

627. However, when considering the Torrens system, the same authors note that the statutory wording of s 42(2)(d) is broad enough to include equitable easements. They note that the Victorian formulation—"easements howsoever acquired…"—is sufficiently wide to embrace equitable easements:[433]

> Where the holder of an equitable easement is involved in a priority dispute with the holder of a competing equitable interest… the first in time, all other things being equal, will prevail. However, different considerations will apply where the holder of an equitable easement is in competition with a registered proprietor. The issue then arises whether the indefeasibility principle will operate so as to defeat the equitable easement. Unlike the general law rules as illustrated in *Pilcher v Rawlins* (1872) 7 Ch App 259 , provided an equitable interest does not fall within any of the statutory exceptions to indefeasibility, a registered proprietor will take free of the outstanding interest even if he or she has actual notice of it. The issue whether equitable easements constitute an exception to indefeasibility is doubtful in some states. Equitable easements are expressly mentioned as an exception to indefeasibility by the *Land Titles Act 1980* (Tas) s 40(3)(e)(ii).[434] In addition, the wording of the relevant statutory exception in the Victorian legislation, 'easements howsoever acquired subsisting over or upon or affecting the land',[435] and in the Western Australian legislation, 'easements acquired by enjoyment or user or subsisting over or upon or affecting such land',[436] <u>is clearly sufficiently wide to embrace equitable easements</u>.

628. By reason of above, it appears that section 42(2)(d) is wide enough to extend the exception to indefeasibility to equitable easements.

REMOVAL OF EASEMENTS

629. The potential methods by which an easement may be removed are:

a) by negotiation with the dominant tenements;

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431 See *Powell v Cleland* [1948] 1 KB 262 for a discussion of the meaning of 'purchaser'. For cases on the meaning of 'notice', see *Smith v Jones* [1954] 2 All ER 823; *Hunt v Luck* [1902] 1 Ch 428; *Caunce v Caunce* [1969] 1 All ER 722; *Hodgson v Marks* [1971] Ch 892; *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487. See also *Property Law Act 1958* (Vic) s 199…

432 The common law rules on this issue may be modified by the general law deeds registration legislation which operates in every state: see … *Property Law Act 1958* (Vic) Pt I.

433 *Bradbrook & Neave* (n 15) 61-2 [2.17].

434 Section 40(3)(e)(ii) reads:

> The title of a registered proprietor of land is not indefeasible … so far as regards … **<u>an equitable easement</u>**, except as against a bona fide purchaser for value without notice of the easement who has lodged a transfer for registration.

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

436 *Transfer of Land Act 1893* (WA) s 68(1).

b) through the registration of a plan with the municipal council, and if approved, lodge the certified plan at the Office of Titles pursuant to section 23 of the *Subdivision Act 1988* (Vic); or

c) commence an application to the Registrar of Titles pursuant to section 73 of the *Transfer of Land Act* on the basis that the easement has been abandoned.

Victoria has no scheme for the judicial removal or variation of easements

630. In contrast to restrictive covenants, Victoria has no scheme for the judicial removal or variation of easements. Other jurisdictions have extended the scope of their provisions for judicial removal to include easements. The VLRC Report in easements and restrictive covenants recommended that:

> 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.

631. Insofar as claims for abandonment are concerned, these are notoriously difficult to prosecute.

632. In *Bookville Pty Ltd v O'Loghlen* [2007] VSC 67, a previous owner of the dominant tenement had erected a double-brick garage which blocked access to the easement. This garage had been in place since at least 1963, far exceeding the 30-years of non-use required to establish abandonment. Section 73 of the *Transfer of Land Act 1958* provides for the deletion from the Register of an easement which has been found to have been abandoned. The relevant provisions of section 73 are as follows:

> (1) A registered proprietor may make application in an appropriate approved form to the Registrar for the deletion from the Register of any easement in whole or in part where it has been abandoned or extinguished. …
>
> (2) Where it is proved to the satisfaction of the Registrar that any such easement has not been used or enjoyed for a period of not less than 30 years, such proof shall constitute sufficient evidence that such easement has been abandoned.

633. Kaye J rejected the application, finding that to establish this, the plaintiff must prove that the owner of the dominant tenement intended to relinquish their rights to the easement forever:

> 17. The relevant intention of the owner of the dominant tenement is generally derived from all the facts and circumstances of the case by a process of inference. In order to establish abandonment, it must be proven that the owner of the dominant tenement, or his predecessors in title, intended forever to forego the rights provided by the easement, and not to assert them again. In *Tehidy Minerals Limited v Norman* [1971] 2 QB 582 at 553, the Court of Appeal (consisting of Salmon, Sachs and Buckley LJJ) stated:
>
> > "Abandonment of an easement or of a profit á prendre can only, we think, be treated as having taken place where the person entitled to it

has demonstrated a fixed intention never at any time thereafter to assert the right himself or to attempt to transmit it to anyone else."

24. … At all times that owner, and indeed his or her successors in title, had the power either to remove the obstruction, or, more realistically, to modify it by inserting a door or other opening in it. That proposition is by no means fanciful. The schematic drawings annexed to the defendant's application for the planning permit demonstrate that it is, and thus always was, feasible for a door to be inserted in the north wall of the garage. Thus at all times the owner of the dominant tenement had in his or her own hands the capacity to insert an opening in the north wall of the garage, and thereby to regain access to the laneway.

634. Insofar as statutory mechanisms to modify or remove easements are concerned, section 23 of the *Subdivision Act 1988* and the *Planning and Environment Act 1987*, together, allow for easements to be removed or varied, without the consent of or compensation being paid to beneficiaries. Section 23 provides:

> **23 What if a planning scheme directs the creation, removal or variation of rights?**
>
> (1) If a planning scheme or permit regulates or authorises the creation, removal or variation of an easement or restriction, the owner of the land burdened or to be burdened by the easement or restriction must, in accordance with the planning scheme or permit and with the Planning and Environment Act 1987, lodge a certified plan at the Office of Titles for registration.

635. For this to occur, a planning permit must first be granted under clause 52.02 of the relevant planning scheme, the purpose of which is:

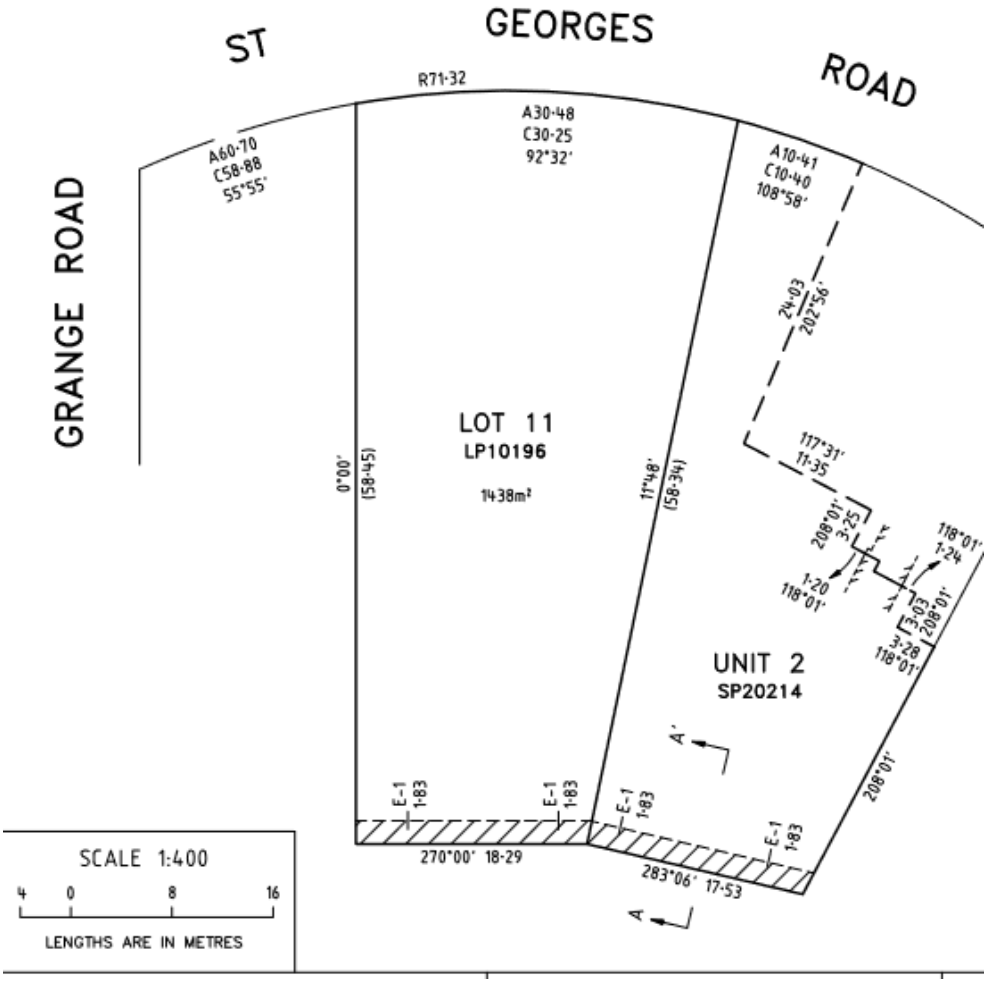
> To enable the removal and variation of an easement or restrictions to enable a use or development that complies with the planning scheme after the interests of affected people are considered.

636. Clause 52.02 provides that before deciding on an application, in addition to the decision guidelines in clause 65, the responsible authority must consider the interests of affected people.

637. An example of this in operation can be found in *Warner Crest Pty Ltd v Stonnington CC* [2019] VCAT 36 in which an applicant wished to remove a drainage easement from the southern end of two properties in St Georges Road, Toorak:

Easement Information

Legend:	A – Appurtenant Easement	E – Encumbering Easement		R – Encumbering Easement (Road)
Subject Land	Purpose	Width (metres)	Origin	Land Benefited/In Favour Of
E-1	DRAINAGE & SEWERAGE	1·83	LP10196	LOTS IN LP10196



638. The applicant submitted that the easement should be removed as there were no services within the easement, and the properties which could potentially use the easement were already served by alternative locations.

639. The relevant sewerage authority did not object to the removal of the easement.

640. However, the City of Stonnington opposed the removal of the easement on the basis that it may be required at some time in the future.

641. In *Warner Crest*, the easement was not expressed as benefiting any party therefore the Tribunal carried out a substantive analysis to understand which properties would benefit from the easement.

642. Having done so, the Tribunal concluded that "the affected people would not suffer any material detriment from the removal of the easement."

643. The Tribunal then turned to the questions of need and acceptable planning outcomes,[437] and found that:

> … there is no need, nor is there a planning reason, to retain the easement. It removes a restriction from land that is no longer necessary and will enable those properties to be more fully utilised.

644. The Application was therefore successful.

645. In contrast, in *Element 96 Pty Ltd v Moorabool SC* [2018] VCAT 1399, the Tribunal refused to allow the removal of the easement on the basis that it was not satisfied that it could properly identify the beneficiaries to the easement. The Tribunal said:

> Unfortunately, resolving the question of who may benefit from the easement is quite a complicated legal question. Difficulties associated with identifying regulatory easements, and of ascertaining the entity responsible for rural drainage have been recognised and discussed elsewhere.[438]

646. The Application was therefore refused, after the Applicant failed to prove its case.

Removal of an easement via section 23 of the *Subdivision Act 1988*

647. An application may also be made pursuant to section 23 of the *Subdivision Act* to compulsorily remove an easement:

> (1) If a planning scheme or permit regulates or authorises the creation, removal or variation of an easement or restriction, the owner of the land burdened or to be burdened by the easement or restriction must, in accordance with the planning scheme or permit and with the *Planning and Environment Act 1987*, lodge a certified plan at the Office of Titles for registration.
>
> (2) The consent of any other person who has an estate, interest or claim in the land is not required to the certification and registration of a plan referred to in subsection (1).

648. According to section 3(3) of the *Subdivision Act*, removal of an easement must first be authorised by a permit granted by the council of the municipal district:

> (3) For the purposes of this Act, the creation, variation or removal of an easement or restriction must be taken to be authorised by a permit (whether granted before or after the commencement of this subsection) or a planning scheme if the permit or scheme (by condition or otherwise)—
>
> (a) in any way requires, directs or allows; or
>
> (b) in any way provides for—

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437 See Hocking v Cardinia Shire Council [2011] VCAT 1067; Grujic v Darebin CC [2016] VCAT 748

438 See eg Victorian Law Reform Commission, *Easements and Covenants Final Report* 22 (2010): Parliament of Victoria, Environment and Natural Resources Committee, *Inquiry into Rural Drainage in Victoria* (June 2013)

that creation, variation or removal.

649. Clause 52.02 of the Planning Scheme sets out that a permit is required before a person proceeds with an application under section 23 of the *Subdivision Act*. The purpose of this clause is:

> To enable the removal and variation of an easement or restrictions to enable a use or development that complies with the planning scheme after the interests of affected people are considered.

650. Before deciding on an application, the Responsible Authority must consider several factors outlined by the decision guidelines in clause 65 and 65.01 of the Planning Scheme:

> 65 DECISION GUIDELINES
>
> Because a permit can be granted does not imply that a permit should or will be granted. The responsible authority must decide whether the proposal will produce acceptable outcomes in terms of the decision guidelines of this clause.
>
> 65.01 APPROVAL OF AN APPLICATION OR PLAN
>
> Before deciding on an application or approval of a plan, the responsible authority must consider, as appropriate:
>
> - The matters set out in section 60 of the Act.
> - Any significant effects the environment, including the contamination of land, may have on the use or development.
> - The Municipal Planning Strategy and the Planning Policy Framework.
> - The purpose of the zone, overlay or other provision.
> - Any matter required to be considered in the zone, overlay or other provision.
> - The orderly planning of the area.
> - The effect on the environment, human health and amenity of the area.
> - The proximity of the land to any public land.
> - Factors likely to cause or contribute to land degradation, salinity or reduce water quality.
> - Whether the proposed development is designed to maintain or improve the quality of stormwater within and exiting the site.
> - The extent and character of native vegetation and the likelihood of its destruction.
> - Whether native vegetation is to be or can be protected, planted or allowed to regenerate.
> - The degree of flood, erosion or fire hazard associated with the location of the land and the use, development or management of the land so as to minimise any such hazard.
> - The adequacy of loading and unloading facilities and any associated amenity, traffic flow and road safety impacts.

- The impact the use or development will have on the current and future development and operation of the transport system.

This clause does not apply to a VicSmart application.

651. Section 5(3) of the *Subdivision Act 1988* provides that to certify and register a plan, the applicant must prepare and submit a plan to the Responsible Authority under the regulations in the *Subdivision Act*. If a permit is granted, and it authorises the removal of an easement, the Client must lodge a certified plan at the Office of Titles for registration.

Affected people

652. In *Warner Crest*, the Tribunal determined that where an easement is in the nature of a 'public easement' and is not expressed in writing as benefiting any party, an analysis must be carried out to understand which properties would benefit from the easement. Here, the Tribunal found that the 'affected people' were all those who own or occupy land benefited and burdened by the easement:

> 11 In determining whether an easement should be removed, the above provisions clearly state that interests of affected people must be considered. The meaning of the term 'affected people' has been considered in previous Tribunal decisions. Deputy President Dwyer, in *Murphy v Bayside CC & Ors* (*Murphy*), noted that to establish who the affected people are, and what their interests are, it is necessary to examine the easement itself. In that case, the easement was in the nature of a 'public' easement, for the benefit of the Council and the public. The Tribunal considered that those who might be affected by the removal or variation of the easement included the council and the resident objectors to the north of the rail line, who used the easement to access Beach Road and the foreshore reserve.
>
> 12 In this case, the easement is not expressed in writing as benefiting any party. The burdened properties are clearly those containing the easement. While the drainage and sewerage authorities are identifiable, in order to determine the affected people, an analysis must be carried out to understand which properties would benefit from the easement.
>
> 13 The council required notification of the permit application to all of the properties within the original plan of subdivision which created the easement. We do not consider that the owners of all of these properties are affected for the purpose of clause 52.02. The easement has no relevance to any properties other than those burdened by it or who benefit from it. The affected people, in this case, are therefore those who own or occupy land benefited and burdened by the easement.

653. As explained above, the interests of 'affected people' must be considered by the Responsible Authority before a permit can be granted under clause 52.02 of the Planning Scheme.

654. In *Warner Crest*, the Tribunal considered an application for a permit to remove a drainage and sewerage easement. The Tribunal established who the 'affected people'

were by reference to the easement itself, determining that this group comprised owners of land benefitting from the easement:

> 18 In terms of the requirement to consider the interests of affected people, it is clear that the easement does not provide any benefit or continuing relevance to the owners of the St Georges Road or Grange Road properties. For the remainder of this decision, when referring to 'affected people', we refer to those people who we consider to be the beneficiaries of the easement and therefore could be affected by the removal of the easement.
>
> 19 On review of the plan above, the affected people would be the owners of 1, 3, 5, 7 and 9 Hill Street (lot 16, 17, 18, 19 and 20 on the plan of subdivision). However, 7 and 9 Hill Street have been developed and further subdivided in such a way that the tennis court connected to 9 Hill Street sits between the rear of the St Georges Road properties and number 7 Hill Street. The property at 7 Hill Street, shown in the image below, cannot now derive any benefit from the drainage easement.
>
> 20 We find, therefore, that the affected people for the purpose of clause 52.02 of the scheme are the owners of 1, 3, 5 and 9 Hill Street.

655. Similarly, in *Murphy v Bayside CC & Ors*[439] (***Murphy***), the Tribunal determined that the 'affected people' were those benefitting from the easement having examined the easement itself:

> 14 To establish who the affected people are, and what their interests are, it is necessary to examine the easement itself. The easement was granted by a former owner of the land on 6 March 1984, and granted the 'Mayor Councillors and Citizens of the City of Sandringham' (i.e. the predecessor-in-law of 'Bayside City Council') full and free right and liberty at all times to use the easement land as a pedestrian footway. The easement land is marked on an annexed plan as being a 3-metre strip of land in its current location.
>
> 15 The easement is therefore in the nature of a 'public' easement, for the benefit of the Council and the public. Those who might be affected by the removal or variation of the easement therefore include the Council and the resident objectors to the north of the rail line, who use the easement to access Beach Road and the foreshore reserve.

The relevant test

656. The relevant legal tests for the Responsible Authority and the Victorian Civil and Administrative Tribunal (Tribunal/VCAT) upon review, are set out in the leading decision with respect to easements, *KJ Barge and Associates v Prahran CC & Anor*[440] (***Barge***). In *Barge*, Deputy President Ball considered whether:

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439 [2010] VCAT 2070.

440 *KJ Barge and Associates v Prahran CC & Anor* (1992) 10 AATR 345, [2].

a) the current use of or the current state or condition of the dominant and servient tenements indicate a need or requirement for the continued existence of the easement; or

b) the owners of the dominant land would suffer any material detriment in the use and enjoyment of the land if the easement was removed or varied.[441]

657. If the answer to either of these questions is in the affirmative, then no permit should be granted:

> If the answer to either of these questions is in the affirmative the Tribunal should not grant the permit.[442]

658. In *Jordan v Stonnington CC* [2004] VCAT 2008 (***Jordan***), Senior Member Byard summarised the two propositions in *Barge* as "need and detriment". However, the Barge tests are not exhaustive and other considerations may be relevant:

> 48 The Barge case has been referred to in a number of later cases. In some of them the two questions appear to have been treated as an exhaustive list of tests and thus the only things that could be relevant to the exercise of the relevant discretion. I think this is stating what was said in Barge more narrowly than the reasons in that case warrant and, indeed, too narrowly. I think the questions posed in Barge should be regarded as questions that are, or will at least normally be relevant, but I think it goes too far to try and say that they are to exclude other possible relevant considerations.

659. Still, Senior Member Byard emphasised that there must be a good reason for the removal of an existing property right:

> [79] … I do not think it is appropriate to lightly extinguish or modify an existing property right, or indeed any existing legal right. There needs to be a good reason for doing so. …

660. Additionally, Senior Member Byard observed that the existence of the legal right does not determine whether it should continue – that is the reason why the statutory framework for removal exists:

> 87 I do not doubt that Mr. Jordan and Ms. McMahon at present have a legal right to an easement over this area. Same is true in relation to the area beneath the house. They apparently would like to exercise the right. However, the existence of the right does not determine whether it should continue. The whole purpose of this proceeding, and the application giving rise to it, is that Mr. Meredith-Smith is seeking, by the proceedings he is undertaking, to modify the easement and extinguish the right in relation to the land under the house, and under the south of the brick wall.

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441 *KJ Barge and Associates v Prahran CC & Anor* (1992) 10 AATR 345, 347.

442 *KJ Barge and Associates v Prahran CC & Anor* (1992) 10 AATR 345, 345.

661. More recently, in *Wheelhouse v Maribyrnong CC* (*Wheelhouse*),[443] Member Blackburn noted that the tests in *Barge* are not exhaustive and other considerations may be relevant, including whether the removal of an easement is an acceptable planning outcome:

> 18. The parties also agreed that the tests in *Barge* are not exhaustive. They referred to a number of previous decisions of the Tribunal in which the Tribunal has said that it also needs to be satisfied that the proposed removal of the relevant easement will be an "acceptable" planning outcome.
>
> 19. Having regard to the above and the matters raised by the parties in this case, the issues which are key to my determination of the proceeding are:
>
> - Does the current use, state or condition of No. 1/113 (servient land) and No. 2 /113 Cowper Street (dominant land) indicate that the easement is needed?
> - Would the removal of the easement result in a material detriment to the use and enjoyment of No. 2/113 Cowper Street (dominant land)?
> - Is the removal of the easement an acceptable planning outcome?

662. The current legal framework for variation of the Easement therefore requires the Responsible Authority to consider:

a) whether the current use of, or the current state or condition of Lot 1 indicates a need for the continued existence of the Easement over the entirety of Lot 1;

b) whether the interests of affected people, including whether Council, the successor to the Board of Works or the owners of Lots 54 to 70 in the Plan of Subdivision will suffer material detriment if the Easement is varied; and

c) whether varying the Easement constitutes an 'acceptable' planning outcome.

663. Although falling short of equating to a mandatory threshold for the grant of a permit under clause 52.02, these considerations guide the Responsible Authority's discretion, as Member Cook explained in *Grujic v Darebin CC*:[444]

> 15 I accept that these considerations guide my discretion in this case. I have applied the facts in the context of these principles to arrive at my decision, although I acknowledge that they fall short of equating to a mandatory threshold for the grant of a permit under the planning scheme control itself.

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443 [2021] VCAT 1171.

444 [2016] VCAT 748.

Does the current use, state or condition of the dominant and servient land indicate that the Easement is needed?

664. In *Grujic v Darebin CC & Ors* (***Grujic***),[445] Member Cook found that where access has been precluded by obstruction, the lack of recent use of the easement is not determinative:

> 29. The issue of need in this case cannot simply be tied to the lack of recent use of the subject land, since the applicant has taken steps to preclude access to the benefitting land for some time (despite related legal proceedings) and the benefitting land has been effectively forced to adjust its operations to using the front access only.

665. However, this was what swayed Member Blackburn in *Varasso v Whitehorse CC*:[446]

> 24. The passageway easement has not provided a practical means of accessing the rear of 152 Junction Road since the fence was erected on the eastern boundary of 152 Junction Road in 2002. I consider my finding that the passageway easement has not been used to access the rear of 152 Junction Road for 14 years, supports my conclusion that the easement is not needed by the owners of 152 Junction Road for the enjoyment of their property.

666. 'Need' should also be considered in light of the reasonable requirements of a use or development that complies with underlying planning controls:[447]

> 28. It is relevant that the test of 'need' is not prescribed by the planning scheme control itself and there is therefore no mandatory threshold in respect of it. Having regard to the purpose of the control (i.e. clause 52.02), I consider that the assessment of need is to be generally referable to the reasonable requirements of a use or development that complies with the underlying planning controls. In this case, this contemplates a commercial use, which the benefitting land is currently put to.

667. In *Grujic*, there were 'significant complications and challenges to the efficient operation' of the dominant tenement caused by the easement's obstruction:

> 31. There are significant complications and challenges to the efficient operation of the café on the benefitting land caused by a combination of the physical internal layout of the longstanding building on that property, combined with the current situation whereby access is limited to the front of the building only. This is evidenced by the need for staff to manoeuvre large commercial bins through the café from rear to front on a regular basis and to move them across Railway Place (with the inherent changes in grade). This is also not a particularly hygienic arrangement for a food and drink premises and I can appreciate why this is considered a last resort by the operator.

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445 [2016] VCAT 748.

446 [2018] VCAT 1004.

447 *Grujic v Darebin CC & Ors* [2016] VCAT 748.

Would the removal of the Easement result in material detriment?

668. In *Wheelhouse*, Member Blackburn considered that the test of material detriment directs attention to whether removal of the easement is of real consequence to the dominant tenement:

> 42. Ms Loke in her evidence and the applicant his submissions suggested that in considering whether a detriment was a material one, I should consider whether the detriment was a reasonable one. I disagree. Rather, I agree with the respondent and council that the question of whether a detriment is material is different to the question of whether a detriment is reasonable. It is common in town planning to assess whether impacts of a proposal are reasonable when considered in light of relevant planning scheme provisions. This is quite a different enquiry to the material detriment that *Barge* says should be considered when deciding whether to remove a property right. The *Barge* test of material detriment directs attention to whether the removal of the property right is of a real consequence to the right- holder. It is as test which I consider to be reflective of the sentiment expressed in many previous decisions of the Tribunal, that existing property rights should not lightly be removed.

669. Material detriment may occur where the removal of an easement:

a) adversely impacts the value of the benefitting land;

b) makes access to the benefitting land less convenient; or

c) otherwise affects the manner in which the benefitting land is used.

670. The term 'material' in this context may impose a relatively low threshold, requiring only a 'measurable' or 'discernible' detriment as distinct from, for example, a 'significant' or 'serious one. This was the Tribunal's interpretation in *Grujic*:

> 37 In this particular context, I regard the most apposite definition of 'material' as 'measurable' or 'discernible' as raised by the Ms Acreman in cross examination of Mr Milner.

Impact on future development potential

671. In *Grujic*, Member Cook indicated that this test focuses on current and potential future material detriment:

> 36. This test focuses on current and potential future material detriment…
>
> 37. In this particular context, I regard the most apposite definition of 'material' as 'measurable' or 'discernible' as raised by the Ms Acreman in cross examination of Mr Milner.
>
> 38. The siting of the existing building on the benefitting property, together with the potential for its use in line with the Commercial 1 Zone of the planning scheme lead me to conclude that there would be material detriment caused if rear access was no longer available to the benefitting land.

> 39. As I have found above, an entitlement to traverse the subject land would confer a clear and ongoing benefit and would enable a need for secondary (rear) access to be met. Conversely, on balance, I consider that removing such an entitlement would lead to material detriment to the benefitting property.

672. That said, unless there are firm plans for redevelopment, the effect of removing the Easement on speculative or hypothetical future development is not something that the Responsible Authority can give much weight in its assessment:[448]

> 29. Nor do I consider the removal of the easement to result in a material detriment to a future use of 152 Junction Road. The respondent conceded that there is no proposal for the future use of 152 Junction Road which would make use of the easement. The respondent also conceded that in the absence of any such proposal, the role that the easement may play in any future development of 152 Junction Road was not something that could be readily taken into account in the circumstances of this case.
>
> 30. I agree that past cases confirm that the effect of the removal of the easement on speculative or hypothetical future development is not something that I can give much weight in my assessment. I consider this particularly so in this case, as there was no expert town planning evidence which indicated any reason, why access via the easement would be needed to facilitate the future use and development of 152 Junction Road.

673. In *Michael Drapac & Ass v Yarra* CC (1997/20613) [1997] VICCAT 583 (***Drapac***) the Tribunal explained that although a future advantage may be a relevant consideration, that future advantage must not be "merely remote, speculative or hypothetical":

> We believe that, even if we were to accept Mr Peake's argument that material detriment can include effects upon future use, it is nevertheless appropriate to adopt the reasoning of the Tribunal above. It is inadequate, in our view, if the effect of retaining the easement is merely remote, speculative or hypothetical. …

674. Accordingly, a party arguing that an easement will be advantageous to some future development of the benefitting land might be unsuccessful where that party cannot point to "sufficient evidence to demonstrate that the removal of the easement would prejudice or disadvantage the future development of the land benefited":

> … In this respect, Mr Peake submitted that his client had purchased land elsewhere and was proposing to relocate the business from the site. He said and that it was proposed to redevelop the site. No plans or proposals were submitted to the Tribunal, however Mr Peake has not provided the Tribunal with sufficient evidence to demonstrate that the removal of the easement would prejudice or disadvantage the future development of the land benefited.
>
> After considering the evidence presented to it and an inspection of the appeal site and adjoining premises the Tribunal comes to the conclusion that having regard to the current condition and use of both the dominant and servient land there is first no need for the continued existence of that part of the carriageway easement sought to be

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448 *Varasso v Whitehorse CC* [2018] VCAT 1004.

removed and secondly the owners of the dominant tenement will not suffer any material detriment if the permit is granted.

A loss of convenience may constitute material detriment

675. In *Wheelhouse*, Member Blackburn found that an easement provided a shorter pedestrian route to a local activity centre, and that the loss of this more convenient route constituted material detriment:

> 38 …Ms Loke's evidence was that the difference between the two distances is less than this, with use of Greenwood Lane only adding around 140 metres to the trip toward the Footscray activity centre and the train station….
>
> 40. In my view, the above factors mean that there is a real, tangible and consequential difference between pedestrian access provided via the easement and pedestrian access provided via Greenwood Lane. The pedestrian access provided by the easement offers a noticeably shorter and more direct route to a location that can be expected to be regularly visited by residents of No. 2/113 Cowper Street by foot.
>
> 41. Loss of this more convenient pedestrian access could only be a detriment to No. 2/113 Cowper Street. It is a detriment that I find to be a material one given the real, tangible and consequential difference I have found to exist between the pedestrian access provided to No. 2 /113 Cowper Street by the easement when compared to the pedestrian access provided by Greenwood Lane.

Is removal of the easement an acceptable planning outcome?

676. In *Warner* Crest, the tribunal determined that a further test — whether the removal would be an acceptable planning outcome — ought to be added to the *Barge* test:

> 30 These questions have become accepted tests by the Tribunal, with the following additional question/test being added in more recent times:
>
> **Would the proposed removal of the relevant easement be an "acceptable" planning outcome?**
>
> 31 In *Murphy*, Deputy President Dwyer discussed the decision and tests developed in Barge and noted that it, and other cases following it, were decided before Amendment VC71 on 20 September 2010, which inserted the current purpose and decision guideline in cl 52.02 where none had previously existed. He conceded that:
>
> > Despite this, the Barge tests do more generally raise the issues of 'need' and 'material detriment to affected persons'.
>
> 32 In terms of the second *Barge* test, he considered as follows:
>
> > The second Barge test (i.e. material detriment) is now supplanted by the purpose clause and decision guideline in cl 52.02. As I have already indicated, the reference to considering 'the interests of affected people' contemplates that a variation of easement might not be granted where those interests are materially or detrimentally affected.

> 33 As discussed earlier in this decision, we have considered the interests of affected people. In line with Deputy President Dwyer's analysis, we do not need to proceed further with the second limb of the *Barge* test. Nevertheless, we confirm our finding that the affected people would not suffer any material detriment from the removal of the easement.
>
> 34 We now turn to the questions of need and acceptable planning outcomes.[449]

677. As such, any application for planning permission to remove an easement would need to be supported by planning evidence.

678. Following Member Blackburn's reasoning in *Wheelhouse,* this is not an exercise in weighing the Easement's benefit to the dominant tenement against its burden to the servient tenement:

> 54. The applicant says that the detriment to his amenity and enjoyment of his property arising from the burden of the easement warrant its removal. However, an assessment of whether the removal of the easement is an acceptable planning outcome is not an exercise in weighing the benefit and the burden of the easement against each other. In any event, I consider it would be inconsistent with orderly planning and would undermine certainty if an easement created by a past subdivision was to be removed on the basis of detriments to the burdened land that have largely existed since the time the easement was created, where beneficial rights associated with the easement remain needed and material.

679. For example, in *Warner Crest*, the Tribunal's decision that removal of the easement was an acceptable planning outcome appears to have been based, in large part, on its earlier finding that removal was a 'fair' outcome and would not materially impact the beneficiaries of the easement:

> 63 Having regard to our findings above, that there is no longer a need for the easement and that the removal of the easement will have no effect on the affected persons required to be considered by clause 52.02, we find that the removal of the easement does lead to an acceptable planning outcome. We have found that there is no need, nor is there a planning reason, to retain the easement. It removes a restriction from land that is no longer necessary and will enable those properties to be more fully utilised.
>
> 64 We note that in *Hocking v Cardinia SC,* the Tribunal referred to section 4 of the *Planning and Environment Act 1987* and 'fairness' as an objective of the planning system. The Tribunal noted that there is a need to consider fairness to all parties and that the removal of an easement in that case would not materially impact the beneficiary of the easement and would also provide a personal benefit to the applicant in terms of less restrictions on the titles to the subject land. We consider that to be the case in this situation as well.

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449 See also: *Varasso v Whitehorse CC* [2018] VCAT 1004, [11]-[12]; *Grujic v Darebin CC* [2016] VCAT 748, [14]-[15]; *Hocking v Cardinia SC* [2011] VCAT 1067, [35]-[36], [41] & [44]; *Murphy v Bayside CC & Ors* [2010] VCAT 2070,[14]-[16].

680. The same is true of the Tribunal's decisions in:

a) *Varasso*:

> 35 Having regard to all the matters before me, including the Whitehorse Planning Scheme and the evidence of the parties, I consider that the removal of the easement will result in an acceptable planning outcome and a net community benefit. Removal of the easement will unencumber a commercial lot in a way which can only facilitate any future use of the site, as well as remove existing obligations on the current owners and its tenants to manage the site in a way that maintains access to its rear by a third party. These benefits will be attained without causing any material detriment to the land benefited by the easement.

b) Hocking:

> 61 Above and beyond the two tests from *Barge*, we are satisfied that the granting of the proposal would have broader planning benefits and be an acceptable planning outcome.
>
> 62 While we appreciate that one of the objectives of the planning system under Section 4 of the *PE Act* is "fairness", relying on the factors set out above, we are struggling to see how our potential approval of the proposal would have any material negative impacts on Mr Hocking such as to be seen as an unfair result. We also need to keep in mind notions of fairness in relation to the Applicant – in this regard we accept that removing the easement will have a personal benefit to the Applicant in terms of less restrictions on the titles to the subject land.

Application pursuant to section 73 of the *Transfer of Land Act* on the basis of abandonment

681. Pursuant to section 73(1) of the *Transfer of Land Act,* a registered proprietor may apply to the Registrar for the deletion of an easement from the Register where it has been abandoned or extinguished:

> **73 Removal of easement etc.**
>
> (1) A registered proprietor may make application in an appropriate approved form to the Registrar for the deletion from the Register of any easement in whole or in part where it has been abandoned or extinguished.

682. Under section 73(3), where it is proved to the satisfaction of the Registrar that any such easement has not been used or enjoyed for a period of not less than 30 years, such proof shall constitute sufficient evidence that such easement has been abandoned:

> (3) Where it is proved to the satisfaction of the Registrar that any such easement has not been used or enjoyed for a period of not less than thirty years, such proof shall constitute sufficient evidence that such easement has been abandoned.

683. Significantly, in Victoria, an easement noted on a certificate of title remains enforceable by the dominant owner, even where it would have been held to have been abandoned at common law:

> Secondly. in my view, the case of *Webster v. Strong*, [1926] V.L.R. 509; [1926] A.L.R. 323, concludes the matter against the defendants in this litigation. The Full Court there held that since a certificate of title stated that appurtenant to the land owned by the registered proprietor was a right of carriageway which had not been used as such for some 40 years, the statement in the certificate of title nevertheless was conclusive evidence that the registered proprietor, despite such non-user, was entitled to a right of carriageway.[450]

684. In *Riley v Penttila* [1974] VR 547 Gillard J found that because the easement was a registered, statutory right created by the *Transfer of Land Act*, it could only be extinguished by application of the relevant statutory provisions:

> These statutory rights were "expressly made "subject to the Act", and an easement thus created by a registration could only be extinguished by the application of the statutory provisions of the Act to be found, for example, in s. 62 or in s. 73.[451]

685. Section 73B of the *Transfer of Land Act* provides an additional requirement in relation to carriageway easements that the relevant municipal council consent to the surrender of the right of carriageway:

> **73B Right of carriageway**
>
> The Registrar must not register or record an instrument that creates or surrenders a right of carriageway unless satisfied that the council of the municipal district in which the land is located has consented to the creation or surrender of the right of carriageway.

Abandonment is notoriously difficult to establish

686. In *Dimitrakakis v Dimitrakakis* [2021] VCC 960, Brimer J summarised the common law principles relating to abandonment of easements by reference to the decision of the Court of Appeal in *Bookville Pty Ltd v O'Loghlen* (***Bookville***):

> 104. The question whether an owner, or any of their predecessors in title, have abandoned an easement of carriageway over a laneway is dealt with in *Bookville Pty Ltd v O'Loghlen,* in which the common law principles relating to abandonment are conveniently summarised:
>
> - At common law, the abandonment of an easement depends on the intention of the dominant tenement. Abandonment is a question of intention of either the owner of the dominant tenement, or one or more of the predecessors of the owner of the dominant tenement. In order to establish abandonment, it must be proven that the owner of the dominant tenement, or their

450 *Riley v Penttila* [1974] VR 547, 572-3.

451 *Riley v Penttila* [1974] VR 547, 574.

predecessor in title, intended forever to forego the rights provided by the easement, and not to assert them again.

- The relevant intention of the owner of the dominant tenement is generally derived from all the facts and circumstances of the case by a process of inference. Each case depends on its own facts.
- It is well-established that mere non-user of an easement, even for a lengthy period of time, is not conclusive evidence of abandonment of a right of way, although it may be evidence of abandonment. Non-user, even for a very long time, will generally not provide by itself sufficient evidence of an intention to abandon.
- Abandonment of an easement can only be treated as having taken place where the person entitled to it has demonstrated a fixed intention never at any time thereafter to assert the right himself or to attempt to transmit it to anyone else.
- The onus of establishing abandonment of an easement lies on the party asserting abandonment.
- Once an easement has been abandoned, it is abandoned forever.
- The cases show how hard it is to establish abandonment notwithstanding what might appear to a layperson to be a strong case for abandonment. A Court will not lightly infer abandonment by the owner of the dominant tenement. An inference of abandonment is not lightly drawn. An easement is a valuable right over a property. As the authorities state, in order that abandonment be established, the plaintiff must prove that the defendant intended forever to forego his rights over the laneway.

687. In *Shelmerdine v Ringen Pty Ltd* [1993] 1 VR 315 (*Shelmerdine*), Brooking J commented on the difficulty in establishing a strong case for abandonment of an easement:

> The cases… show how hard is it to establish abandonment notwithstanding what might appear to a layman to be a strong case of abandonment.

688. As Cosgrove J explained in *R J & C Holdings Pty Ltd v Parkside Developments Vic Pty Ltd* [2016] VCC 237, 'overwhelming evidence' is ordinarily required to establish such an intention:

> 19. Mere non-use of an easement does not constitute conclusive evidence of an intention to abandon the easement. <u>It seems that almost overwhelming evidence is required to establish such an intention</u>.

689. To that end, numerous cases demonstrate the difficulty in establishing that a dominant tenement intended to forever to forego the rights granted by an easement:

a) in *Wolfe v Freijahs' Holdings Pty Ltd* [1988] VR 1017, Tadgell J stated that abandonment of an easement is not lightly inferred, with mere abstinence of use generally being insufficient to establish an intention to abandon:

> At common law the abandonment of an easement depends on the intention of the grantee. Mere non-user or non-enjoyment of an easement is not conclusive

evidence of an intention to abandon. As Viscount Dunedin said in *Keewatin Power Co Ltd v Lake of the Woods Milling Co Ltd* [1930] AC 640, at p. 647: -

> "When you are dealing with grant, a grantee may always, if he chooses, not exercise his rights under the grant to the full without in any way prejudicing his full right if he finds it convenient to use it"

b) in *Re Marriott* [1968] VicRp 31, Gillard J held that 20 years of non-use does not necessarily indicate an intention to abandon a right of way:

> Immediately the question arises then whether from the fact of non-user it might be deduced that the persons who were entitled to a right of way over this street had abandoned their right. It has been suggested that non-user for 20 years would raise a presumption of abandonment. But this over-simplifies the effect of the authorities. "The question of abandonment of a right is one of intention, to be decided upon the facts of each particular case, " per Lord Chelmsford, LC, in Crossley and Sons Ltd v Lightowler (1867) 2 Ch App 478, at p. 482. Mere cessation of user even for longer than 20 years does not necessarily indicate an intention to abandon

and

c) in *Benn v Hardinge* (1992) P& CR 246, Dillon LJ stated that, without more, the court could not infer an intention to abandon an easement even in the event of 175 years of non-use:

> I take the law to have been laid down in clear terms by the judgment of the court in *Gotobed v Pridmore.* In view of that and the many expressions of the high authority in the cases to which I have referred, to the effect that there must be an intention to abandon, I do not feel that it is open to us in this court to say that the way must be presumed to have been abandoned merely because it was not used because no one had occasion to use it, even for so long as 175 years.

690. In *Bookville*, Buchanan JA stated that even if the dominant tenement owner were to block their own access to an easement, such an act would be insufficient to disclose an intention to abandon the easement:

> 13. In the present case an owner of the dominant tenement took the positive step of constructing a wall, barring access between the dominant tenement and the laneway, and his successors maintained the wall. It is, however, one thing for the owner of the dominant tenement to put or leave in place an obstruction which he can readily remove. It is another to alter the dominant tenement so as to make the owner incapable ever again of benefiting from an easement. The former is generally insufficient to disclose an intention to abandon an easement. Thus in *Carder v Davies*, where it was contended that by building a wall the owner of a dominant tenement had abandoned a right of access on to a way adjoining his land, Peter Gibson LJ said:
>
> > Where the easement owner is in no way limited by the words of an easement at any particular point, it matters not that he builds a wall, erects a fence or grows a hedge, which by its nature would not allow

> convenient access under the easement. He is able, if he wishes, to change the access point at any time.

691. As his Honour continued, the creation of an obstruction on the easement was merely evidence that the dominant owner had no use of the easement for the time being, rather than evidence of 'a fixed intention never at any time thereafter to assert the right':

> 14. The owner of 11 Falconer Street could at any time construct an opening in the northern wall of the garage. The existence of the wall without an opening was evidence that for the time being the owner of the land had no use of the easement, rather than evidence of 'a fixed intention never at any time thereafter to assert the right himself or to attempt to transmit it to anyone else'. It is necessary to examine that state of affairs in the context of the surrounding circumstances. Failure to use an easement alone will rarely determine the question of abandonment. Use or non-use of an easement should not be considered in isolation. It is a circumstance to be weighed in conjunction with all other matters from which the intention of the proprietor of the dominant tenement may be inferred. As Lord Denman CJ said in *R v Chorley*:
>
> > The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; and what period may be sufficient in any particular case must depend on all the accompanying circumstances.

MAINTENANCE OF EASEMENTS

692. A fundamental principle of an easement is that it includes all ancillary rights that are reasonably necessary for the exercise and enjoyment of the easement. By consequence, the onus is prima facie placed on the dominant tenement to repair an easement.

693. In *Burke v Frasers Lorne Pty Ltd*[452], Justice Breton stated that these ancillary rights extend to allowing the dominant tenement from doing whatever is reasonably necessary to make the grant effective:

> 21. …This is an ancillary right of a dominant owner: incidental to a grant of a right of way, the grantee may enter on the easement to do whatever is reasonably necessary to make the grant effective – including, in the case of a right of carriageway, not only repairing it but making a road so that there is a serviceable carriageway over which vehicles can pass in poor conditions as well as in good weather. These cases establish that the right to construct a road includes a right to pave.

694. The prima facie right of a dominant tenement's right to maintain is caveated by two exceptions, namely:

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452 [2008] NSWSC 988.

a) where the servient tenement has been bound by prescription to maintain the easement; and

b) where the servient tenement has been bound to maintain the easement through express agreement or by necessary implication.

Interference with rights under an easement

695. As stated by Richmond J in *Barter v Theunissen* [2024] NSWSC 326 (*Barter*), the servient owner is not entitled to do anything on their land that 'substantially interferes with the reasonable exercise by the dominant owner of the rights conferred by [an] easement':

> 46. The owner of the servient tenement has all the rights of an owner of the land and can use it as he or she likes subject to such limitations as are imposed by the easement: *Gale on Easements:* (Thomson Reuters, 21ST Edition, 2020), [1-01]. As Lord Scott noted in *Moncrief v Jamieson* (2007) 1 WLR 2620; [2007] UKHL 42 at [54] every easement prevents any use of the servient tenement by the servient owner that would interfere with the reasonable exercise of the rights conferred by the easement. Hence, the dominant owner having the benefit of a right of way is entitled to the reasonable use and enjoyment of the way: *Clifford v Hoare* [1874] UKLawRpCP 33; (1874) LR 9 CP 362 at 370, 371 and 372; *Carlson v Carpenter* (1998) 8 BPR 15,909 at 15,914; *Brice v Nikolaidis* [2011] NSWSC 682 at [14]. Put another way, the servient owner is not entitled to do anything on the land which substantially interferes with the reasonable exercise by the dominant owner of the rights conferred by the easement: *Zenere v Leate* (1980) 1 BPR 9300 at 9305…

696. His Honour continued, if the servient owner interferes with the rights of the dominant tenement in this manner, the dominant owner will have an action in nuisance against the servient owner:

> 46. …If there is substantial interference with the rights conferred by the easement on the dominant owner, it will have an action in nuisance against the servient owner.

697. An assessment of whether an interference is actionable at common law is a two-step inquiry, involving:

a) determining the scope of the parties rights in accordance with the principles of construction for easements; and

b) assessing whether an obstruction substantially interferes with the rights properly construed—

see *Mantec Thoroughbreds Pty Ltd v Batur.*[453]

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453 [2009] VSC 351

698. As set out in Bradbrook and Neave's *Easements and Restrictive Covenants*, there is a necessary distinction between a 'substantial' and 'trivial' interference with the rights granted by an easement:

> **6.30** An obstruction must be substantial if it is to be actionable: *Dresdner v Scida* [2003] NSWSC 957; *Mantec Thoroughbreds Pty Ltd v Batur* [2009] VSC 351. Trivial obstructions, such as rutted ice and snow on a right of way will be disregarded: *Cluttenham v Anglian Water Authority* (*The Times*, 14 August 1986 (CA)). This can be contrasted with *Jalnarne Ltd v Ridewood* (1989) 61 P&CR 143, where the parking of a car by the servient owners on the right of way was held to constitute a nuisance.

699. In *Middleton v Arthur* [2002] NSWSC 79, Palmer J explained that what amounts to substantial inference with a right of way is ultimately a question of common sense founded upon the circumstances of a particular case:

> 48. What amounts to a substantial interference with the reasonable use of a Right of Way for the purposes of a dominant tenement is essentially and ultimately a question of common sense judgment founded upon the circumstances of each particular case. An obstruction may be small in size and short in duration but, in the light of the particular use for which the Right of Way is reasonably required, it may nevertheless be a substantial interference… On the other hand, the obstruction may be large in size and of permanent duration and yet, because of the limited use for which the Right of Way is reasonably required, it may not be a substantial interference.

700. For example, as held by Rein J in *Shelbina Pty Ltd v Richards* [2009] NSWSC 1449, the servient owner is permitted to fence an easement, subject to the right of reasonable access by the dominant land:

> (6) An owner has a right to fence the easement: see **Pettey v Parsons** [1914] 2 Ch 653 and the very helpful summary of the law in relation to this area in **Trewin v Felton** [2007] NSWSC 851; (2007) 13 BPR 24, 579 at [19] to [35], [43] to [45] per Brereton J, and **McCrow v Chaplin** [2009} NSWSC 965 per Brereton J.
>
> (7) The right to fence is subject however to the right of reasonable access to the dominant land by the owner of the dominant land: see **Trewin v Felton, McCrow v Chaplin**

701. By way of further example, in *Castle v Achdjian* [2022] NSWSC 1340 (*Castle*), Darke J considered a claim by the plaintiffs that their right of carriageway had been obstructed by the construction of three fences, amounting to a substantial interference with their rights pursuant to the easement:

> 27. The plaintiffs submitted that their intended use of the right of carriageway, as a thoroughfare from their property to Marlee Street is entirely reasonable and not inconsistent with those terms. The plaintiffs further submitted that the right of carriageway is presently obstructed by the three fences that traverse it, and that these obstructions amount to a substantial interference with their rights pursuant to the easement. It was submitted that at least the fence at the front of Lot 29, and the fence halfway along the easement, were constructed by the defendants after they had failed to obtain the agreement of the Ryans to cancel the easement. As noted earlier, the plaintiffs seek declaratory relief and an injunction restraining

the defendants from impeding or restricting their rights in respect of the right of carriageway. They also seek orders requiring the defendants to remove, at their own cost, the three fences that block the right of carriageway.

702. Darke J found that the plaintiffs' right to traverse the easement had been obstructed, amounting to actionable nuisance, and ordered the imposition of a mandatory injunction to remove the obstructions:

> 81. Turning then to the plaintiffs' claim, it is clear in my view that the three fences that traverse the right of carriageway amount to obstructions of the easement. The fence located at the front of Lot 29 and the fence located about halfway along the right of carriageway, both of which were erected by the defendants in about 2011 (see the affidavit of Lena Achdjian, 1 April 2022, at paragraph 23), are obstructions that constitute a real substantial interference with the enjoyment of the right of carriageway, and thus amount to actionable nuisances… Declaratory relief to that effect should be given. It would also be appropriate for orders in the nature of mandatory injunctions to be made requiring the defendants to take steps to remove those obstructions. I do not think that any other injunctive relief is called for in the circumstances.

703. Structures that affect the width of an easement may also amount to an unreasonable interference. In *Mantec Thoroughbreds Pty Ltd v Batur*[454], for example, concerned a right of way easement granted over a strip of land 10 metres wide. An issue arose as to whether the wall of an adjoining dam, which reduced the width of the easement to 2 metres at its narrowest point, amounted to an unreasonable interference.

704. Their Honour held that on its proper construction, the easement extended to all forms of vehicular traffic.[455] As such, the dam was a substantial interference as it prevented use for this purpose and thus impeded the rights granted by the easement:

> 78 The dam clearly obstructs the right of way because its western wall is built on part of the land which became subject to the easement, thereby reducing the width of easement, between the eastern boundary of the drainage reserve and the dam wall, generally to approximately five metres but, at its narrowest point, to approximately two metres. As previously stated, the defendants are in effect prevented from driving anything larger than a small tractor or four-wheel motorbike the full length of the right of way. …
>
> 79 … <u>The inability to drive any form of vehicle along the easement onto lot 4 would indeed appear to be a substantial interference with the defendants' reasonable use and enjoyment of the right of way.</u> In this sense, I consider that the dam is a substantial obstruction.

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454 [2009] VSC 351

455 *Mantec Thoroughbreds Pty Ltd v Batur* [2009] VSC 351 at 74.

EASEMENTS OF LIGHT

705. An implied easement is an easement that is not expressly created by grant or reservation in an instrument or by statute but is implied by common law or statute so that the land can continue to be used in a particular way.

706. Section 42(2)(d) of the *Transfer of Land Act 1958* (Vic) (*TLA*) provides an express exception to the principle of indefeasibility, stating that the title of a registered proprietor is subject to any easements howsoever acquired subsisting over or upon or affecting the land:

> **42 Estate of registered proprietor paramount**
>
> (2) Notwithstanding anything in the foregoing the land which is included in any folio of the Register or registered instrument shall be subject to—
>
> (d) any easements howsoever acquired subsisting over or upon or affecting the land;…
>
> notwithstanding the same respectively are not specially recorded as encumbrances on the relevant folio of the Register.

707. It follows that it is no bar to the existence of an easement of light that the potential easement has not been registered.

708. However, there must still be some recognised basis to assert the existence of the implied easement.

There is no implied easement of light under section 12(2) of the *Subdivision Act*

709. Section 12(2) of the *Subdivision Act 1988* (Vic) (Subdivision Act) provides for various implied easements over 'all the land on a plan of subdivision of a building', including those necessary to provide light to windows, doors or other openings:

> **12 Plan must show easements and other rights**
>
> …
>
> (2) Subject to subsection (3), there are implied—
>
> (a) over—
>
> (i) all the land on a plan of subdivision of a building; and
>
> (ii) that part of a subdivision which subdivides a building; and
>
> (iii) any land affected by an owners corporation; and
>
> (iv) any land on a plan that specifies that this subsection applies to the land; and
>
> (b) for the benefit of each lot and any common property—
>
> all easements and rights necessary to provide—
>
> …
>
> (f) full, free and uninterrupted access to and use of light for windows, doors or other openings;

It would be difficult to establish an easement of light by prescription

710. The doctrine of ancient lights provides that after 20 years of enjoyment of access to light over adjoining land, a landowner gains a right to such access by way of an easement of light.[456]

711. The doctrine of ancient lights is described in *Moore v Rawson*,[457] whereby the Court explained that unlike prescriptive easements of way, easements of light are acquired by mere occupancy rather than user:

> There is a material difference between the mode of acquiring such rights" (i.e., rights of common or of way) "and a right to light and air. The latter is acquired by mere occupancy; the former can only be acquired by user, accompanied with the consent of the owner of the land; for a way over the lands of another can only be lawfully used, in the first instance, with the consent, express or implied, of the owner. … But it is otherwise as to and air and light. Every man on his own land has a right to all the light and air which will come to him, and he may erect, even on the extremity of his own land, buildings with as many windows as he pleases. After he has erected his building the owner of the adjoining land may afterwards, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies, from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period.

712. Where a landowner proves that:

a) there is an existing building on their land;

b) the building has windows that enjoy the passage of light over neighbouring land; and

c) the passage of light is unobstructed for at least 20 years—

713. the law may imply an easement of light which prohibits any substantial interference with the right to enjoy the passage of light.

714. The question of whether the English doctrine of 'ancient lights' applies in Australia was before the High Court in *Delohery v Permanent Trustee Co of NSW*. The Court resolved the division in the authorities by finding that the doctrine applies:[458]

> We cannot see that there would be any difficulty in administering the law of prescription, so far as it regards ancient lights, in a new country, so soon as occupation

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456 *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283, 298.

457 [1824] 107 ER 756.

458 (1904) 1 CLR 283.

> had proceeded to such an extent as to allow of a continued enjoyment for 20 years. Possibly in determining whether the enjoyment was unexplained, some different, and, indeed novel considerations might arise, but this would not render impracticable the administration or application of the law itself.

715. The decision in *Delohery v Permanent Trustee Co of NSW* prompted legislative intervention. Section 195 of the *Property Law Act 1958* (Vic) prevents the creation of a prescriptive easement of light after 7 October 1907:

> **195 Right not deemed to exist by reason only of enjoyment or presumption of lost grant**
>
> After the seventh day of October One thousand nine hundred and seven no right to the access or use of light to or for any building shall be capable of coming into existence by reason only of the enjoyment of such access or use for any period or of any presumption of a lost grant based upon such enjoyment.

716. Section 195 does not act retrospectively, such that prescriptive easements of light that came into existence prior to 7 October 1907 may still be created in Victoria.

717. However, in *Murphy v City of South Melbourne*,[459] the Victorian Planning Appeals Board noted that the commencement date in section 195 indicates that the legislature would not expect that a person would claim a prescriptive easement of light some 80 years later.[460]

718. It might therefore be difficult to establish that a prescriptive easement of light exists in Victoria.

An easement of light only protects the light to the extent it was enjoyed by the original windows

719. An easement of light will only protect the 'ancient light'. This means that the owner of a dominant tenement does not have a claim in respect of obstructions to the passage of light for windows in a location where there were no windows in existence at the time the easement was created:

> It is true that in that case the protection given to the ancient light carried with it incidentally protection to the new lights. But the only reason why it did so was that the new lights could not be obstructed without obstruction to the ancient light. New lights are no encroachment, nor did the plaintiff's decree aggravate the defendant's servitude, for he was only prevented from building so as to obstruct the ancient lights.[461]

720. A dominant tenement cannot increase the burden on the servient tenement by altering the size and position of windows. Even if it can be shown that some of the windows

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459 *Murphy v City of South Melbourne* (1987) 27 APA 404.

460 See Bradbrook & Neave's Easements and Restrictive Covenants, 8.9.

461 *Frechette v La Compagnie Manufacturiere de St Hyacinthe* (1883) 9 App Cas 170.

are partially benefitted by the easement of light, only the obstruction of the portion that is benefitted can form the basis of a claim:

> The true view is this. If the plaintiff pulls down the building with ancient light windows and erects a new building totally different in every respect, but having windows to some extent in the same position as the old windows, he cannot require the servient owners to do more than see that the ancient lights, if any, to which he is still entitled are not obstructed to the point of nuisance. He cannot require them not to obstruct non-ancient light merely because a portion of the window through which that non-ancient light enters his premises, also admits a pencil of ancient light. If the obstruction of the pencil itself causes a nuisance the plaintiff is entitled to relief, but if taking the building as it stands, the pencil obstruction causes no nuisance at all, the plaintiff is not entitled to relief.[462]

721. This appears to be accepted in Australian law, as the Court in *Commonwealth v Registrar of Titles for Victoria* found that the general rule that an easement of light must be confined to existing apertures does not apply to easements of light by express grant:

> But, since the enjoyment could only have been of definite apertures, no such prescription could arise except in the case of their existence. The foundation of every implied or presumed agreement or grant is that it must have been intended by the parties, and in the case of vacant land adjoining other vacant land no one could suppose that the owners must have intended that neither should ever interfere with the other's light. But these difficulties do not arise in the case of an express grant, which may in general be formulated in any way the parties please.[463]

722. To preserve a right to light when altering a building, it is essential that clear and definite evidence of the size and position of the former windows is preserved.

723. A court will not grant relief for an obstruction to an easement of light in circumstances where the original building has been replaced and there is no evidence as to whether the new windows coincide with the former windows. See *Fowler v Walker*:[464]

> The Vice-Chancellor says, that "it is not disputed that there were a certain number of windows in the cottages, but what they were, and where exactly they were placed, there is no kind of evidence to shew; and there never was, as I believe, any case yet submitted to the Court-certainly none the decisions of which are recorded-in which the Court has dealt with a case where the position of the ancient lights was to be guessed at, and where there was not any existing framework of a window, or sufficient evidence of the existence of a window, which enabled the Court to apply its judgment to proved facts." I entirely concur with every word of that. There is no particle of evidence to prove that any part of the new windows is coincident with any part of the old.

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462 *News of the World Ltd v Allen Fairhead & Sons Ltd* [1931] 2 Ch. 402, 406, 407.

463 *Commonwealth v Registrar of Titles for Victoria* (1918) 24 CLR 348.

464 [1881] 51 LJ Ch 443.

724. Similarly, in *Pendarves v Monroe*,[465] the Court refused to grant an injunction on the basis that there was not enough evidence to support the claim that a newly erected building's windows coincided with the ancient lights. There, the occupier of the former building swore an affidavit, but no plans were furnished:

> I do not see my way to granting an injunction. The real question is whether the windows in the building put up in 1876 have been shewn as to any particular or defined part to coincide with those in the older buildings pulled down in 1872. Now, the only material evidence is that of the witness Adams … I think very probably he is right in saying that the present windows cover in part the space occupied by old windows, but as to which part or parts I have no evidence … By reason of the omission to keep any plan, there is no evidence that satisfies me that any part of an old window can be identified with any part of an existing window. Under those circumstances, I refuse the motion.

ROADS

725. There are several ways in which land may become a road:

a) pursuant to the Local Government Act 1989;

b) pursuant to the *Road Management Act*; or

c) under the common law doctrine of public highways.

Public highways at Common Law

726. There are two ways of establishing a public highway at common law:

a) express dedication and acceptance; or

b) long user that gives rise to the presumption of dedication.

727. In *Anderson v City of Stonnington*[466] McMillan J explained that a public highway is created at common law when two requirements are satisfied:

a) a competent landowner manifests an intention to dedicate the land as a public highway; and

b) there is an acceptance of that dedication by the public:

> 33 …Those comments do not dispense with or somehow diminish the significance of the twin requirements of dedication by the landowner and acceptance by the public. The rule remains that, for land to become a common law public

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465 [1892] 2 Ch 611.

466 [2016] VSC 374

> highway, there must be an intention to dedicate it to the public as a way that must be accepted by the public for that purpose.

728. A public highway at common law need not be a thoroughfare, an established main road or highway, but broadly refers to 'a way over which all members of the public are entitled to pass and repass on their lawful occasions'.[467] As stated by Windeyer J of the High Court:

> It is the public right to use the land as a way, rather than its physical nature, that makes land a highway.[468]

729. A public highway at common law is therefore taken to mean all public rights of way.[469]

Has land been dedicated as a public highway?

730. 'Dedication' in relation to a public highway at common law means 'that the owner of the land intends to divest himself of any beneficial ownership of the soil, and to give the land to the public for the purposes of a highway'.[470]

731. In the *Anderson Appeal*, the Victorian Supreme Court of Appeal accepted that an intention to dedicate land as a public highway may be express or inferred from the conduct of the landowner:

> 42 The intention to dedicate land as a public highway may be express or may be inferred from the conduct of the landowner.

732. An inference of an intention to dedicate may arise from the 'open, unconcealed and uninterrupted user of the land as a right of way by the public with the acquiescence of the landowner':[471]

> 43 An inference of an intention to dedicate may arise from the manner in which the public uses the land, such as from open, unconcealed and uninterrupted user of the land as a right of way by the public with the acquiescence of the landowner. A finding that the landowner has acquiesced in the use of the land by the public requires a finding that he or she had knowledge of the user. However, proof of actual knowledge is not required. Long and interrupted user of the land by the public gives rise to a presumption of dedication such that, in the absence of evidence to rebut it, the inference will be drawn that the user was with the knowledge and acquiescence of the owner.

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467 *City of Keilor v O'Donohue* (1971) 126 CLR 353, 363 (Windeyer J).

468 *Permanent Trustee Co of NSW Ltd v Campbelltown Municipal Council* (1960) 105 CLR 401, 420.

469 See *Anderson & Anor v Stonnington & Anor* [2016] VSC 374, [29].

470 *Anderson v City of Stonnington* [2017] VSCA 229, [40], quoting Narracan Shire President v Leviston (1960) 3 CLR 846, 861.

471 Ibid.

733. As noted by the Supreme Court in *Anderson v Stonnington* [2016] VSC 374 (*Anderson v Stonnington*),[472] such an inference may be made from the lack of a barrier between the land and an established public highway:

> 34 The intention to dedicate land as a public highway may be express or be inferred from the conduct of the landowner. It may arise from open and uninterrupted use of the land as a way by the public with the acquiescence of the landowner, which evidence may double as evidence of the public's acceptance of the landowner's dedication. It may also be implied by the fact that there is no barrier between the relevant land and a public highway, such that the public, when using the highway, would appear to have an open invitation onto and through the adjoining land.[473]

Express dedication

734. McMillan J also includes a useful discussion on what amounts to an express dedication of land, namely the marking of land on a subdivision plan as 'Road':

> 35 Evidence of an intention to dedicate by a landowner may also arise from the fact that a plan of sub-division lodged with the titles office shows the relevant land as a road or street open to access by the public.[474] The persuasiveness of such evidence will differ depending on the provisions of the relevant legislation. Based on the construction of s 100 of the *Real Property Act 1862* (NSW) adopted by Harvey J in *Attorney-General v City Bank of Sydney*,[475] the New South Wales authorities have regarded such evidence as being capable on its own of leading to an inference that there has been a dedication of the land to the public.[476] That position was clearly articulated by Menzies J in *Campbelltown*:
>
> > …I regard it as an artificial and unreal conception that when roads are left in subdivision they are left as private roads merely for the use of those who want to get to land in the subdivision. It seems more realistic to treat such roads as shown as part of the general roadway system and as open to all so that unless access is prevented by fencing or otherwise, roads shown upon a plan of subdivision are properly to be regarded as open to the public, with the consequence that if there is use of such a road as a means of passage by any members of the public, whether owners of land in the subdivision or not, then it is a public road.[477]

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472 [2016] VSC 374.

473 Citing *Owen v O'Connor* (1963) 9 LGRA 159, 168 (Sugerman J); *Turner v Walsh* (1881) 6 App Cas 636, 642 (Sir Montague Smith); *Metters v District Council of West Torrens* [1910] SALR 1, 7 (Way CJ); *Fleming* [1934] VLR 263, 266 (Gavan Duffy J); *Newington v Windeyer* [1985] 3 NSWLR 555, 559 (McHugh JA)

474 *Campbelltown* (1960) 105 CLR 401, 412 (Kitto J); 415 (Menzies J); 422 (Windeyer J).

475 *Attorney-General v City Bank of Sydney* (1920) 20 SR (NSW) 216 ('*City Bank of Sydney*').

476 Ibid 221; *Campbelltown* (1960) 105 CLR 401, 412 (Kitto J); 415 (Menzies J); 422 (Windeyer J); *Weber v Ankin* [2008] NSWSC 106 (22 February 2008) [54]–[57] (White J).

477 *Campbelltown* (1960) 105 CLR 401, 415 (Menzies J).

36 In Victoria, however, the law developed somewhat differently. The early Victorian authorities held that the fact that a plan of sub-division identifies certain land as a road open to use by the public was not of itself enough to draw an inference of public dedication. That position was propounded by Gavan Duffy J in *Fleming v City of Oakleigh*:

> …it is not reasonable to regard the deposit of the plan as in any sense a dedication to the public of the roads shown in it…It may still be that to leave a road opening into a public road without bar or gate is such an invitation to the public as to show a dedication to them…[478]

His Honour was there referring to s 211 of the *Transfer of Land Act 1915*, which was the Victorian equivalent to the provision considered by Harvey J in *City Bank of Sydney*. Whereas the Victorian provision required a map of sub-division to 'exhibit distinctly delineated all roads…appropriated or set apart for *the use of the purchasers*' (emphasis added), s 100 of the *Real Property Act 1862* (NSW) stated that such a map must 'exhibit distinctly delineated all roads…appropriated or set apart for *public use*' (emphasis added).

37 It was this difference in the legislation that was the cause of the divergence in the law between Victoria and New South Wales.[479] However, more recent decisions have done much to bridge the gap between the two lines of authority. In *Templestowe Developments*, Ashley J (as his Honour then was) expressed the view that Gavan Duffy J might have been overstating the position when he said that a deposited plan could not be reasonably regarded 'in any sense' a dedication to the public.[480] His Honour went on to say that he regarded the latter sentence in the passage from *Fleming* reproduced above to be broadly consistent with the comments of McHugh JA (as his Honour then was) in *Newington v Windeyer*:[481]

> When a road is left in a subdivision and runs into a public road system, the inference usually to be drawn is that it was dedicated as a public road unless access to the road is prevented by fencing or other action.[482]

38 In *Bass Coast Shire Council v King*, Winneke P (with whom Hayne and Charles JJA agreed) emphasised that a plan of subdivision is not evidence of dedication itself, but rather an intention to dedicate the relevant land should the dedication be accepted by the public:

> In the normal course of events the lodging of a plan of subdivision of land in the hands of a private owner is not, of itself, evidence of dedication to the public of the roadways set out on that plan. It is taken to be nothing more than an offer to dedicate such roads which can be withdrawn at any time before the public accepts the offer.[483]

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478 *Fleming v City of Oakleigh* [1934] VLR 263, 266 ('*Fleming*').

479 *Templestowe Developments* [1997] 1 VR 504, 518 (Ashley J).

480 Ibid 518–9.

481 Ibid.

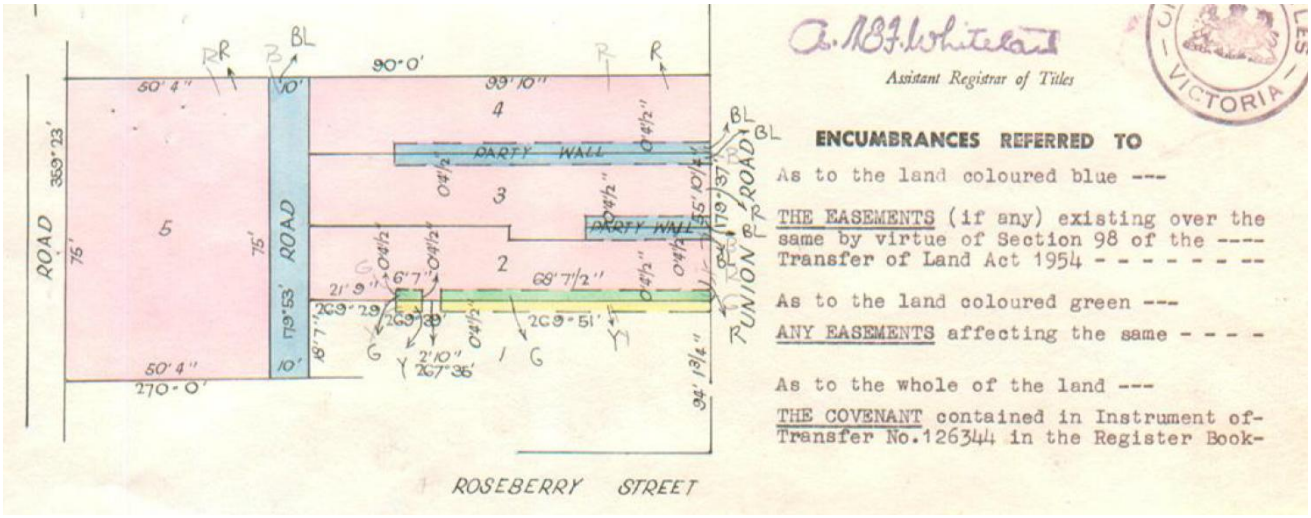
482 *Newington v Windeyer* (1985) 3 NSWLR 555, 559.

483 *Bass Coast Shire Council v King* [1997] 2 VR 5, 18.

This passage is in keeping with Ashley J's summation of the authorities in *Templestowe Developments*.[484] Furthermore, it is consistent with the passage from Menzies J's judgment in *Campbelltown* where his Honour clearly qualifies the proposition that a road shown on a plan of subdivision should be regarded as a public road with the requirement that there must first be 'use of such a road as a means of passage by any members of the public'.[485] This is consistent with the twin conditions of intention to dedicate and acceptance by the public for a public highway at common law.

> 39 The sum of the authorities is that the clear delineation of land as a road on a map or plan of subdivision lodged with the titles office is evidence of an intention to allow the public to use the land as a road such that, where there has been sufficient use of the land as a road by the public to demonstrate acceptance, an inference may be drawn that the land was dedicated to the public for that purpose. Other facts particular to the case may be inconsistent with such an inference; for example, where the road is barred by a gate or fence. However, in most cases the inference will be readily drawn. It follows that there is no longer any practical difference between the Victorian and New South Wales authorities on this point.[486]

735. Examples of such dedication are routinely found on plans registered with the Titles Office:



736. The evidentiary task then turns to establishing acceptance of this act of dedication, discussed in more detail, below.

Implied dedication

737. The authorities establish that 'long and uninterrupted user of the land by the public gives rise to the presumption of dedication such that, in the absence of evidence to the

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484 See also *Calabro v Bayside City Council* [1999] 3 VR 688, [22]–[28] (Balmford J).

485 *Campbelltown* (1960) 105 CLR 401, 415.

486 See also *Land Act 1958*, s 25(4).

contrary, the inference will be drawn that the use of land as a road was with the knowledge and acquiescence of the owner':[487]

> 43 An inference of an intention to dedicate may arise from the manner in which the public uses the land, such as from open, unconcealed and uninterrupted user of the land as a right of way by the public with the acquiescence of the landowner. A finding that the landowner has acquiesced in the use of the land by the public requires a finding that he or she had knowledge of the user. However, proof of actual knowledge is not required. Long and uninterrupted user of the land by the public gives rise to a presumption of dedication such that, in the absence of evidence to rebut it, the inference will be drawn that the user was with the knowledge and acquiescence of the owner.

738. In *Everingham v Penrith Municipal Council*,[488] Street J stated that where user has continued for a long period without interruption 'over a well-defined road, fenced off from adjoining lands, and leading from one highway to another', such evidence 'leads almost irresistibly to an inference of dedication':[489]

> It is ... well settled that to constitute a valid dedication, an intention to dedicate must be proved or inferred, and that user by the public is merely evidence of such an intention; but where the user has continued for a long period, and without interruption, over a well-defined road, fenced off from the adjoining lands, and leading from one highway to another, the evidence, in the absence of anything to rebut it, though not necessarily conclusive, leads almost irresistibly to an inference of dedication.

739. As noted in the *Anderson Appeal*,[490] it is not necessary to identify the previous owner whose dedication is to be inferred, nor the precise act of dedication, provided there is evidence of long and uninterrupted user of the land that is not rebutted:

> 44 Public user does not have to continue for any fixed minimum period before it can qualify as 'long user' and thereby give rise to a presumption of dedication. What constitutes 'long user' varies with the circumstances.
>
> 45 Where land has had multiple owners, a person who relies on long, uninterrupted user of the land to support an inference of dedication need not prove the identity of the owner 'from whom the dedication, necessarily inferred from such a user, first proceeded.' This is because often this information will not be available. In such a case, 'the proper inference is that there was a dedication from a person who could dedicate', unless the inference is rebutted. …

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487 *Anderson v City of Stonnington* [2017] VSCA 229, [43], citing *Metters v District Council of West Torrens* (1910) SALR 1, 7; Owen v O'Connor (1963) 9 LGRA 159, 168; Newington v Windeyer (1985) 3 NSWLR 555, 559; Narracan Shire President v Leviston (1906) 3 CLR 846, 859; Everingham v Penrith Municipal Council (1916) 3 LGR (NSW) 74, 79.

488 (1916) 3 LGR (NSW) 74, quoted in *Anderson v City of Stonnington* [2017] VSCA 229, [53].

489 At 79.

490 [2017] VSCA 229.

> 84 … In many instances of long user, of which this case is one, events take their course over time and there is no discrete resolution, declaration or other identifiable overt act of dedication which can be the subject of evidence. Where there are multiple owners over time, if they are natural persons, they either die or move and become difficult to contact, or cannot remember the details of events long past. If the owners are corporations, it may be difficult to locate a particular officer to whom knowledge and conduct constituting acquiescence can be attributed, and records are often incomplete or unable to be found. Cognisant of these difficulties, the common law developed the presumption of dedication, the effect of which is to shift the evidentiary enquiry to whether there is evidence which rebuts the presumption.

740. See also *Owen v O'Connor* [1964] NSWR 1312:

> Dedication presupposes an intention to dedicate — an *animus dedicandi*. It may be presumed from open and unconcealed user as in exercise of a public right and without interruption by the owner of the land — such a user that the owner must be taken to have been aware of it and with his apparent acquiescence so as to lead to a reasonable belief in the minds of the public that the land was a highway; or it may be presumed from other circumstances.

741. In *Valmorbida v Les Denny Pty Ltd* [2023] VSC 680, Gorton J found that an intention to dedicate may be found from objective circumstances and behaviour notwithstanding the absence of a subjective intention to dedicate:

> 7 There is little authority on whether the intention to be inferred must be subjective or whether it may be determined objectively. For example, in this case it is apparent that Mrs Jennifer McKendry, a director of Wistari Pty Ltd who was the registered proprietor of 31 Ivanhoe Street between May 1984 and April 2015, was probably the mind of that company and she did not herself intend to dedicate Stevens Court as a public highway. Had she intended to do so, I have no doubt that she would have noted that fact when she was selling the property to Mr Pitard. <u>However, I am prepared to assume, for the purpose of this case, that an intention to dedicate may be found from objective circumstances and behaviour notwithstanding the absence of a subjective intention to dedicate</u>.
>
> 8. Because there has not been an express dedication of Stevens Court as a public highway, the question is whether it should be inferred that, at some stage, either Thomas and Marjorie Latham, Bailey Quest Pty Ltd or Wistari Pty Ltd intended to dedicate Stevens Court as a public highway, that is, a way over which members of the public were free to pass and repass as of right and without requiring their permission. The intention to dedicate may be express or may be inferred. Any inference must focus on the 'conduct of landowner', but relevant matters include the features of the land and how it interacts with surrounding properties including whether it has been fenced. If the public have used the land for so long and in such a manner that the owner must have been aware that the public were acting under the belief that the land had been dedicated and has taken no steps to disabuse them of that belief, it may be inferred that the public use was the intended use of the owner. But, a public highway is not acquired by use; rather, 'user is but the evidence to prove

> dedication' and '[t]here cannot be such a thing as turning land into a road without intention on the owner's part.' This makes it unlike a claim for adverse possession, where certain types of dispossession of another of their land may itself give rise to rights, and the situation with easements, discussed later, where prolonged use of the land can establish a right pursuant to a legal fiction.

742. The party asserting the existence of a public highway must establish that there was an *actual intention* to dedicate the land for that purpose on the part of someone who owned the land for it is a serious thing to conclude that a private landowner chose to dedicate land to the public:

> 9. The question can become whether the public's use was 'in the exercise and assertion of a public right' or may be 'ascribed to the tolerance of successive proprietors'. For this reason, evidence that the landowner granted permission to the public to use the land will ordinarily negate an intention to dedicate the land. It is to be remembered, though, that the issue remains one of real-world fact: the party asserting the existence of a public highway must establish that there was an actual intention to dedicate the land for that purpose on the part of someone who owned the land. That necessarily involves a conclusion that an owner intended to divest themselves of the right to exclude members of the public normally associated with ownership of private property.
>
> 10. It has been said that 'it is only unequivocal acts of dedication from which intention to dedicate may be inferred'. Again, however, that should be seen as reminder that it is a serious thing to conclude that a private landowner chose to dedicate land to the public, rather than establishing a further legal test to be satisfied that the acts relied upon to ground the inference be 'unequivocal'. The question remains one of fact; the party asserting the existence of the public road must establish to the reasonable satisfaction of the Court that one of the landowners, at some stage, on the balance of probabilities, dedicated the land as a public road.

Has the public accepted the land as a public highway?

743. For land to become a public highway at common law, it is also necessary for the public to accept the dedicated land as a public highway such that the dedication can be said to be 'perfected'.

744. As explained in *Anderson v Stonnington*,[491] acceptance is typically shown by repeated and continued use of the land as a way by the public 'without force, without secrecy and without permission':

> 41 At common law, the landowner's intention to dedicate their land to the public as a highway was only perfected into a full dedication by the public's acceptance of the land for that purpose. Evidence of the public's acceptance is typically demonstrated by repeated and continued use of the relevant land as a way by the public; that is, evidence of user.

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491 *Anderson & Anor v Stonnington & Anor* [2016] VSC 374, [33].

> 42 In cases where the intention to dedicate must be presumed or inferred from the conduct of the landowner, the manner in which the public uses the land becomes relevant. Evidence of the public's use of the land as a way 'without force, without secrecy and without permission' tends towards a conclusion that the dedication of certain land as a highway has been accepted. Further, evidence of permission or licence to the public to use the land is inconsistent with dedication at common law.[492]

745. Where land has been expressly dedicated as a road, a relatively short period of public use of the land may be sufficient for the purposes of acceptance of the dedication:

> 50 What is required to perfect a dedication of land to the public, that is, what is required in order for the public to accept a landowner's intention to the dedicate their land, will vary from case to case.[493] Where there has been a clear act of dedication on the part of the landowner, a relatively short period of public use of the land may be sufficient for the purposes of acceptance of the dedication.

746. However, a longer period of public use may be required where dedication is to be inferred:

> 51 However, where the landowner's intention to dedicate must be presumed or inferred, whether from public user or not, a longer period of public use may be required in order to show acceptance. In those cases, dedication and acceptance will often arise from the same evidence of public user and both conditions will be satisfied (or not) simultaneously.[494] In *Campbelltown*, where the land in question had been expressed as a road on a plan of subdivision lodged with the Registrar-General, Windeyer J held that 'no great amount of public use was necessary to make the dedication complete'.[495]

Land vests in council upon becoming a public highway at common law

747. As set out under clauses 1(4) and 1(5) of schedule 5 to the *Road Management Act*, a road or public highway vests in fee simple in the relevant municipal council upon becoming a road, free of all mortgages, charges, leas and sub-leases:

> **1 Vesting of roads and public highways**
>
> …
>
> (4) Subject to subclause (6), a road vests in fee simple in the municipal council of the municipal district in which it is located upon becoming a road.
>
> (5) The public highway vests in the municipal council free of all mortgages, charges, leases and sub-leases.

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492 Ibid, citing *Narracan Shire President v Leviston* (1906) 3 CLR 846, 857–9.

493 Harold Parrish and Lord De Mauley, *Pratt and MacKenzie's Law of Highways* (Butterworth, 21st ed, 1967) 35, citing *Rugby Charity Trustees v Merryweather* (1790) 11 East 376n and *Jarvis v Dean* (1826) 3 Bing 447.

494 Ibid 16.

495 *Campbelltown* (1960) 105 CLR 401, 423.

748. The principle that land vests in the relevant council upon being found to be a public highway at common law and therefore a road under the *Road Management Act* was explained in the *Anderson Appeal*:

> 3 The second respondent, Victorian Rail Track ('VicTrack'), has been the owner of the land on which the Lane runs since 1996. However, if the Lane is a 'road' as defined in the *Road Management Act 2004* ('RMA'), it is vested in the first respondent, the City of Stonnington ('Council'), which is the 'responsible road authority' under the RMA for the municipal district of Stonnington. Lovers' Walk is owned by VicTrack and is subject to a lease to the Council.

749. Similarly, in *Howard Finance Pty Ltd v Yarra City Council* [2020] VSC 610 (*Howard Finance*), Kennedy J reiterated that if land is a public highway it vests in the relevant council in fee simple under the *Road Management Act*:

> 25 The RMA defines 'road' to include 'any public highway', which in turn is defined as 'any area of land that is a highway for the purposes of the common law'.
>
> 26 Subclause 1(4) of sch 5 to the RMA further provides, subject to limited exceptions, that a road vests in fee simple in the relevant municipal council.
>
> 27 Thus, as accepted by the plaintiffs, if the lane is a public highway it vests in the Council in fee simple and the plaintiffs cannot claim title by possession. Consistent with the relevant concession, there would be no utility in considering the position under the LGA.

750. A public highway at common law is a road irrespective of whether a notice has been published in the Government Gazette. This is because the definition of 'road' includes *both* land that is a 'public highway' or that has become a road by way of declaration in the Government Gazette.

751. Section 11 of the *Road Management Act* gives a road authority the power to declare that land it either owns or manages is a road:

> **11 Power to declare and name a road**
>
> (1) A road authority may by notice published in the Government Gazette declare a road under this Act over—
>
> (a) any land owned by the road authority; or
>
> (b) subject to subsection (2), any land managed by the road authority.

752. A declaration under section 11 has the effect of dedicating the land to the public within the meaning of the common law:

> (4) A road declared under this section is dedicated to the public as a public highway within the meaning of the common law or any Act.

753. However, a declaration under section 11 is unnecessary in circumstances where the Laneway has already been dedicated and accepted as a public highway at common law.

A perfected public highway can only be extinguished by statute

754. Once land has become a public highway at common law, it retains that status irrespective of whether it is reflected on the title:

> 54 A purchaser of that land is bound by its status as a public highway whether or not he or she was aware of that status at the time of purchase. Neither the owner who has dedicated the land as a public highway nor a successor in title can retract the dedication so as to change the status of the land as a public highway.[496]

755. The rights of the public in relation to a perfected public highway can only be extinguished by statute:

> 19 … [I]t is noted that the rights of the public in relation to a public highway, whether under the [Road Management] Act or at common law, can only be extinguished if the public highway is discontinued as a road under s 12 of the [Road Management] Act, or if the public highway is discontinued or permanently closed as a road under a power to do either one or both of those things conferred by another statute. [497]

756. The Court also noted that the common law position that a public right of way is created 'subject to' any coexisting private right of way has been altered in Victoria:

> 55 Finally, it is well established at common law that a public highway can arise over land already subject to a private right of way. In those circumstances, the public right is created subject to the private right such that, to the extent of any inconsistency, the public must give way to the owner of the private right. However, in most cases, the public and private rights will be 'similar in extent and kind', both being rights of way, and it is therefore preferable to consider the private right as 'co- ordinate with, [rather] than as a restriction upon, the public right'.
>
> 56 The common law as to the co-existence of public and private rights of way over the same land has been altered by statute in Victoria. …

757. Specifically, clause 14 of Schedule 5 to the *Road Management Act 2004* (Vic) (**RM Act**) provides that a private right of way cannot coexist with a public right of way over the same land:

> A private right of way easement cannot—
>
> (a) develop or co-exist with a public right of way over the same land …

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496 Anderson v City of Stonnington [2017] VSCA 229, [54].

497 Ibid s 10. See also Windeyer J's comments on the applicable common law principles in *Permanent Trustee Company of New South Wales Limited v Campbelltown Municipal Council* (1960) 105 CLR 401, 422: '"Once a highway always a highway" was the adage of the common law.'

758. The Court in *Anderson v Stonnington* reasoned that the effect of clause 14 of schedule 5 to the RM Act is to clearly subordinate a 'private right of way or easement' to a 'public right of way over the same land'.

759. Therefore, the existence of a public right of way over land automatically prohibits the exercise of a private right of way or easement over that land, regardless of which was first in time:

> 80 The defendants' construction of the provision must be preferred. The language of clause 14 to Schedule 5 of the RM Act clearly subordinates a 'private right of way or easement' to a 'public right of way over the same land', such that the former is eclipsed by the latter regardless of which was first in time. The RM Act does not define 'public right of way', but on any view that term must include a 'road' within the meaning of that Act or a 'public highway' within the meaning of the common law (which are equivalent for the purposes of the RM Act).[498]

Common law principles of public highways

The whole of the evidence is relevant

760. Per *Turner v Walsh* [1881] 6 App Cas 740:

> The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coeval with the early user.

The law in Victoria is clear that a public highway may be established by long user

761. In *Anderson*, the Victorian Supreme Court of Appeal accepted that an intention to dedicate land as a public highway may be express or inferred from the conduct of the landowner:

> 42 The intention to dedicate land as a public highway may be express or may be inferred from the conduct of the landowner.

762. An inference of an intention to dedicate may arise from the 'open, unconcealed and uninterrupted user of the land as a right of way by the public with the acquiescence of the landowner':[499]

> 43 An inference of an intention to dedicate may arise from the manner in which the public uses the land, such as from open, unconcealed and uninterrupted user of the land as a right of way by the public with the acquiescence of the landowner. A finding that the landowner has acquiesced in the use of the land by the public requires a finding that he or she had knowledge of the user.

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498 Anderson & Anor v Stonnington & Anor [2016] VSC 374, [33].

499 Ibid.

> However, proof of actual knowledge is not required. Long and interrupted user of the land by the public gives rise to a presumption of dedication such that, in the absence of evidence to rebut it, the inference will be drawn that the user was with the knowledge and acquiescence of the owner.

A pathway may be sufficient evidence of user

763. In *Permanent Trustee Company of NSW v Campbelltown* (1960) 105 CLR 401 (*Campbelltown*), despite negligible evidence of user, the Court was willing to infer that a road was used with sufficient frequency due to its physical condition, namely that a pathway had formed:

> … and notwithstanding that the evidence of its use from end to end as a means of going to and fro is negligible, it is clear that parts of it were so used with sufficient frequency to form pathways and one section had been used for the passage of vehicles.
>
> …
>
> It is the public right to use the land as a way, rather than its physical nature, that makes land a highway…

A road need not be a thoroughfare

764. A public highway at common law need not be a thoroughfare, an established main road or highway, but broadly refers to 'a way over which all members of the public are entitled to pass and repass on their lawful occasions'.[500] As stated by Windeyer J of the High Court:

> It is the public right to use the land as a way, rather than its physical nature, that makes land a highway.[501]

765. A public highway at common law is therefore taken to mean all public rights of way.[502]

766. See *Howard Finance*[503] citing *Anderson*:

> As highlighted in *Anderson*, a 'public highway' need not be a main road or even a thoroughfare. Rather, a highway is a way over which 'all members of the public are entitled to pass and repass on their lawful occasions.'

767. See too *Bateman v Bluck* (1852) 18 QB 870:

> Take the case of a large square with only one entrance, the owner of which has, for many years, permitted all persons to go into and around it; it would be strange if he could afterwards treat all persons entering it, except inhabitants, as trespassers.

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500 *City of Keilor v O'Donohue* (1971) 126 CLR 353, 363 (Windeyer J).

501 Permanent Trustee Co of NSW Ltd v Campbelltown Municipal Council (1960) 105 CLR 401, 420.

502 See Anderson & Anor v Stonnington & Anor [2016] VSC 374, [29].

503 [2020] VSC 610.

768. This was precisely the case in *Rugby Charity Trustees v Merryweather* (1790) 11 East 375 n, where it was said that whether a road be a thoroughfare made no difference:

> … but during all that time they permitted the public at large to have the free use of this way, without any impediment whatever and therefore it is now too late to assert the right; for this is quite a sufficient time for presuming a dereliction of the way to the public. In a great case, which was much contested, six years was held sufficient. And as to this not being a thorough fare, that can make no difference. If it were otherwise in such a great town as this, it would be a trap to make people trespassers.[504]

There is no minimum time for long user

769. Public user does not have to continue for any fixed minimum period of time before it can qualify as 'long user' and therefore give rise to a presumption of dedication:[505]

> 44 Public user does not have to continue for any fixed minimum period before it can qualify as 'long user' and thereby give rise to a presumption of dedication. What constitutes 'long user' varies with the circumstances.

770. See *Rex v Lloyd* (1808) 1 Camp 260:

> If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public.

771. Merely ten years of public use was sufficient time for long user in *Grand Surrey Canal Co v Hall* (1840) 133 ER 386:

> … the facts is, that the public had the uninterrupted use of the way from 1822 to 1832. Is not that strong ground for inferring an intention on the part of the company to dedicate the way to the public? It is true that in 1834 they removed the swivel-bridge and erected a permanent stone bridge in its stead, and that ever since a toll has been demanded and paid. If the matter were to rest on what had taken place since 1834, it could not be said that there had been a dedication to the public. But we must look back at what had occurred previous to that period; and the public had acquired a right of way along the swivel-bridge, subject only to the temporary interruption caused by the passing of barges up and down the canal, the circumstance of the company erecting a stone bridge in its place cannot have the effect of destroying the right so acquired …
>
> I think there was sufficient evidence to establish a dedication. It appeared that for ten years the public crossed the canal, without interruption, by such means as were then at hand.

772. In *Rowley v Tottenham Urban District Council* [1914] AC 95, two to three years of non-extensive use was enough to give rise to a presumption of dedication:

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504 Emphasis added.

505 Ibid.

> The evidence at the trial shewed that for the preceding two or three years there had been some, though not a very extensive, user by the general public of the eastern portion of Keston Road; that the road had been used as & thoroughfare by pedestrians and cyclists and also by tradesmen's carts, and that although the metalled southern side of the road was used by vehicular traffic in preference to the unmetalled northern side, yet the latter had been used when necessity arose. The appellant had made no attempt to stop such user by the general public.

773. However, the longer the period, the stronger may be the inference of intention to dedicate.

In the alternative, dedication may be inferred by acts of the owners

774. Where a landowner does not intend to dedicate a road to the public, he ought to do some act to show he gives a licence only:

> If a man opens his land, so that the public pass over it continually, the public, after a user of a very few years, would be entitled to pass over it, and use it as a way ; and if the party does not mean to dedicate it as a way, but only to give a licence, he should do some act to show that he gives a licence only. The common course is to shut it up one day in every year, which I believe is the case at Lincoln's Inn.[506]

775. Or assert his right by putting up a gate:

> …it may be answered that he should have shown it by putting up a gate, or by some other act.[507]

The test of dedication is objective

776. Chief Justice Griffith in *Leviston* cites Littledale J on the proposition that one cannot claim they have not dedicated land as a public highway if they have allowed it to be used as such for a length of time:

> A man may say that he does not mean to dedicate a way to the public, and yet, if he had allowed them to pass every day for a length of time, his declaration alone would not be regarded, but it would be for a jury to say whether he had intended to dedicate it or not.

777. It follows that the test of dedication is objective.

778. In *Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd* (2022) 11 QR 750, the failure to exclude any persons from using a right of way was a strong objective basis to found dedication:

> The fact that the right of way was open to the public and there was no evidence of any steps being taken at any time in excess of 150 years (until recently) to exclude any

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506 British Museum Trustees v Finnis (1833) 5 C & P 460.

507 *Barraclough v Johnson* (1838) 8 A & E 90.

person from the use of the right of way provides a strong basis for an inference that the trustees intended to dedicate the right of way as a public right of way.

779. *Palmisano v Hawse* (2003) 127 LGERA 268,[508] the Court explained that dedication can be inferred from objective acts such as leaving ways open to the public when setting out a subdivision, referring to land as a road in a plan or simply leaving land open for unobstructed public use for a lengthy period of time:

> [7] The law relating to the creation of public roads operated differently in the 19th Century to the highly structured processes under modern statutes, in which public roads are created by unmistakably clear processes of dedication, with registration of survey plans, and only with the agreement of the local or other public authority to which ownership of the land passes. At common law a public road was created by dedication of land for that purpose by the owner of the land, whether the Crown or a private owner, and by acceptance by the public of the dedication. Dedication was not usually a formal act, but was to be understood from events such as leaving ways open to the public when constructing buildings or laying out subdivisions, referring to land as a road in a plan published in some way such as exhibiting it when lands are offered for sale, or even more usually simply by leaving the land open for unobstructed public use for a lengthy period. Acceptance of a dedication was to be understood from use by the public for an extended period. Title to the land over which the public road ran was not altered by its dedication; the land remained the property of the dedicating owner, but became subject to public rights."

780. In *Att-Gen. v. Hemingway* (1917) 81 JP 112, Sargant J said 'the test is put by Maule J, whether they (the persons who own land) had so acted as to induce a reasonable belief on the part of the public that the road in question was a highway.'

781. The act of an owner throwing open a passage to the public is so clear and unequivocal as to prevail in spite of contemporaneous declarations by them that a dedication to the public was not intended. See Littledale J in *Barraclough v Johnson* (1838) 8 A&E 90:

> A man may say that he does not mean to dedicate a way to the public, and yet, if he had allowed them to pass every day for a length of time, his declaration alone would not be regarded, but it would be for a jury to say whether he had intended to dedicate it or not.

782. Blackburn J in *Greenwich Board of Works v Maudslay*:

> It is necessary to show, in order that there may be a right of way established, that it has been used openly as of right, and for S0 long a time that it must have come to the knowledge of the owners of the fee that the public were so using it as of right, and from this apparent acquiescence of the owners a jury might fairly draw the inference that they chose to consent, in which case there would be a dedication.

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508 Emphasis added.

A private road may become a public highway

783. A road that was originally set out as a private road become a public highway if it is used by the public:

> The law, as lately laid down, has led the courts into unimportant inquiries as to there being an intention to dedicate a road to the public. It seems to me that if the jury find that there has been a long user as a public road, I am not at liberty to inquire into the question whether there was such an intention or not. If persons have found a road used as public, and have built a town by it, are we to enter into the question of whether it was intended to dedicate the road or not? On the contrary, I think that the mere fact of the enjoyment of a public road, for a great length of time, ought to be perfectly conclusive of such an intention, and it is immaterial to inquire in whom the soil was vested as owner.[509]

Neighbours and their invitees may constitute members of the public

784. *Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd* (2022) 11 QR 750:

> [59] In Board of Works for the Greenwich District v Maudsley,[26] Blackburn J said of "the right understanding of what constitutes a right of way" (at 404):
>
> > "It is necessary to shew in order that there may be a right of way established, that it has been used openly as of right, and for so long a time that it must have come to the knowledge of the owners of the fee that the public were so using it as of right, and from this apparent acquiescence of the owners a jury might fairly draw the inference that they chose to consent, in which case there would be a dedication."
>
> [60] *Maudsley* is a case in which there was no evidence of any express dedication of the owners of the fee of any part of the path to the public. However, it was accepted by the Court that the act of dedication would be inferred for the use of the public of that very path.
>
> [61] In *Maudsley*, agreed fact 9 included:[27]
>
> > "9. So far back as the memory of man extends the path in question has been used without interruption (except as hereinafter mentioned) by the occupiers of the land enclosed and protected by the wall, and, since the factories and other buildings were built and occupied, by the persons employed at the factories and in the occupation of the buildings, as a means of communication between the factories and buildings and the adjacent neighbourhood, and from one factory or building to another. It has also been used so far back as living memory extends by all persons as a pleasure walk…"
>
> [62] *Maudsley* is an example of the ease of an inference that an act of dedication of a public highway has been made. It explains that what is to be determined is whether the public had been using the thoroughfare for a sufficiently long time for the knowledge of use to become the intention of the owners of the fee.

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509 *R v East Mark* (1848) 11 QB 877.

Blackburn J also pointed out that the use by employees of the proprietor of the land was sufficient to constitute public acceptance of a dedication.

[63] If the owners of the fee acquiesce such use, then as Blackburn J said, "a jury might fairly draw the inference that they chose to consent, in which case there would be a dedication".[28]

785. Further, in *Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd* (2022) 11 QR 750, it was undisputed that the use of a lane by the invitees of abutting owners was evidence of public use:

[81] Mr Matthews recalls that, since at least 1963, Lot 11, which is known as Beatrice Lane, was used by members of the public to access the rear of the buildings on Lot 12.[39] The building at the rear of Lot 12 was a mezzanine carpark, originally being the mezzanine carpark of the Watson Brothers building, which stood upon Lot 12.

[82] There was little challenge to the evidence of Mr Matthews. The only challenge was to the use of the word "constantly" in para 14(a) of his affidavit,[40] where Mr Matthews had deposed that:

786. In *Howard Finance Pty Ltd v Yarra City Council* [2020] VSC 610, a neighbour down the road used a lane as a short cut and to enter the abutting milk bar. There was no suggestion in *Howard Finance* that use of the lane by a neighbour was not 'public use':

87 In 1986 Mr Glynatsis bought 17 Brunswick Street to operate as a restaurant. During his renovations on the property he used the lane frequently to provide access to the rear of his property. Mr Glynatsis operated the restaurant for more than a year from about 1988 to about 1989. He used the lane during the running of the restaurant to access the rear of the restaurant. The lane was used by people making deliveries to the restaurant who would park in Brunswick Street and use the lane to take trolleys to the rear of the restaurant. That was easier than having them climb the stairs at the front of the restaurant.

787. What matters is that certain classes of people are *not* excluded from using the right of way:

> But where an owner allows a particular class of persons to use a way, user by them may be operative as user by the public, unless he takes care to communicate to such persons the fact that the user is only by his permission (m).[510]

Unruly and disorderly members of the public might constitute the public

788. In *Fortune v Wiltshire Council* [2010] EWHC B33, the use of a lane by 'unruly and disorderly members of the public' who trespassed on abutting land constituted a sufficiently large constituency of people to constitute the public:

> The unruly and disorderly members of the public from Chippenham or elsewhere, who trespassed in and stole wood from the coppice, also constituted a sufficiently

510 *R v Broke* (1859) 1 F&F 514.

large constituency of people to constitute the public. No complaint was made that they were trespassing on private roads when they were undoubtedly using Rowden Lane to gain access to the Coppice. The Borough of Chippenham did not own Rowden Lane and therefore could not give consent to anyone to use Rowden Lane;

A public highway can be created where people use land as a short cut

789. In *Howard Finance Pty Ltd v Yarra City Council* [2020] VSC 610 (*Howard Finance*), a neighbour down the road used a lane as a short cut (similar to beach access) and to enter the abutting milk bar (para 78).

790. There was no suggestion in *Howard Finance* that use of the lane by a neighbour was not 'public use', in fact, most witnesses were locals:

> 87 In 1986 Mr Glynatsis bought 17 Brunswick Street to operate as a restaurant. During his renovations on the property he used the lane frequently to provide access to the rear of his property. Mr Glynatsis operated the restaurant for more than a year from about 1988 to about 1989. He used the lane during the running of the restaurant to access the rear of the restaurant. The lane was used by people making deliveries to the restaurant who would park in Brunswick Street and use the lane to take trolleys to the rear of the restaurant. That was easier than having them climb the stairs at the front of the restaurant.

In an area of low population, only a small use of land to create a public highway may be necessary

791. In thinly populated districts slight user may be sufficient. See Lord Watson in *Macpherson v Scottish Rights of Way and Recreation Society* (1888) 13 App Cas 744:

> My Lords, having regard to the character of the track in dispute, and to the thin population of the district in which it is situated, I think the amount of actual user, for upwards of forty years past, has been just such as might have been expected if it bad been admittedly a public way. That being so, the case is narrowed to the issue-Was such use had in the exercise and assertion of a public right, or must it be ascribed to the tolerance of successive proprietors? Notwithstanding the able arguments addressed to us by the Solicitor General for Scotland and Mr. Asher, I have been unable to come to the conclusion that the use was by sufferance merely. It appears to me to have been generally understood, as well by those who used the road as by those who stood by and saw it used, that foot-passengers and drovers were free to pass along it as a matter of right, and that no permission was required.

Evidence of general reputation is admissible

792. Evidence of general reputation has long since been admissible to show that a road is considered as such by members of the public:

> In a matter in which all are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless unless it came from persons who were shown to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. In the case of public rights, in the strict sense, the want of proof of the persons from whom the hearsay evidence is

derived being connected with the subject in question appears to affect the value and not the admissibility of the evidence.[511]

793. *Everingham v Penrith Municipal Council* [1916] 3 LGLR 74:

> It is well settled that a claim of highway may be proved by evidence of general reputation; and for this purpose not only may declarations of deceased persons be used, but maps or plans prepared by members of the public may also be looked at: The Queen V. Berger ([1894. O.B. 823).

794. In *Fortune v Wiltshire Council* [2010] EWHC B33, the court considered as relevant evidence that the road had a distinct name which included the word 'lane':

> Rowden Lane and Gypsy Lane, as they were to become known, contained the word 'Lane' in their name implying a highway running between two major roads or different sections of the same major road.

795. This principle was applied in *Howard Finance Pty Ltd v Yarra CC* [2020] VSC 610:

> I consider that the response of the Fitzroy City Council to Dr MacInerney's application supports that the lane was reputed to be a 'public lane or passage.' There is nothing to suggest a 'mistake' was made, particularly given that council had also been seen as custodian of the lane in 1884. In fact, similar such evidence was taken into account in Owen v O'Connor where the court drew an inference that the lane was 'reputed a public lane' by reason of a request to council to name it 'College Lane'

Once land becomes a public highway it retains that status irrespective of whether it is disclosed as such on title

796. See *Howard:*

> 40 Finally, once land has become a public highway it retains that status irrespective of whether the title discloses that status. Its status cannot thereafter be changed and will not be affected by the public ceasing to use it.[39]

797. And *Everingham v Penrith Municipal Council*:

> For the establishment of a prima facie case of dedication, as an inference to be drawn from evidence of user, it is not necessary to enquire into the state of title to the land.

798. Further, at common law, dedication as a public highway does not affect ownership of the land. See *Ensile Pty Ltd v Wollongong CC* (1994) 84 LGERA 289:

> Dedication does not affect ownership: Halsbury's Laws of England, 4th ed (1981) vol 21, par 94. Prior to the enactment of s 232 of the *Local Government Act 1919* (NSW) (or any relevant predecessor) the title to a road left in subdivision remained with the owner, subject to the ad medium filum rule discussed by Simpson CJ in Equity in *Re Priddle* (1916) 16 SR (NSW) 54; *City of London Land Tax Commissioners v Central London Railway Co* [1913] AC 364 at 372, 379 whereby there was a rebuttable presumption that

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511 *Crease v Barrett* (1835) 1 CM&R, 929 (Parke B).

upon conveyance of land abutting a highway, the conveyance passed the title to the adjoining half of the highway.

799. In *Orb Holdings*, a lane was found to be a public highway at common law despite the land still being a lot registered in the name of the first respondent.

Dedication cannot be recalled by an owner or subsequent owner

800. In *Lawson v Weston* (1850) 1 Legge 666, Stephen CJ explained the law as it relates to the dedication of a public highway:

> 1st. To constitute the dedication of a roadway to the public, there must have existed, in the mind of the owner of the soil, an *intention* to dedicate it. Mere sufferance of an user, therefore, by negligence, or as a matter of temporary favour, will not amount to dedication.
>
> 2nd. But, frequent and long continued user of the roadway, by the public, is ordinarily evidence of a dedication; for negligence on the part of the owner, or ignorance of his rights, or indifference to them, will not be presumed. This evidence will be more or less conclusive, according to circumstances; but particularly, according to the length of the time, and the number of instances of user.
>
> 3rd. Nevertheless, however long that time or numerous those instances, any open or distinct circumstances, done or caused by the owner, indicating and notifying an intention *not* to dedicate, will be strong evidence against the dedication. But it is essential to observe, that if, at *any* time, by *any* owner, a dedication (that is, a designed and intentional dedication) took place, that dedication could not afterwards be recalled, either by him or any subsequent owner.
>
> 4th. The act or circumstances must be, in fact, for the purpose of exercising the right of dissent, and notifying that right to the public. The putting up of a fence across the road, so as to prevent access to it, would be one of the strongest instances of such an act; and, if there were a gateway left in it, but the gate was generally or often kept locked, the inference from the act would remain the same. The erection of such a fence, however, with a slip rail in it at the point of intersection with the road, or a gate secured by a hasp only, may have been, possibly, for the very purpose of saving the right of the public, while at the same time protecting the owner, by preventing cattle from trespassing over the land on either side. In the absence of any such act or circumstance for the purpose of expressing and notifying dissent, the user by the public is evidence that the owner *intended* a dedication.

A public highway need not be disclosed on title

801. Once land becomes a public highway it retains that status irrespective of whether it is disclosed as such on title. See *Howard:*

> 40 Finally, once land has become a public highway it retains that status irrespective of whether the title discloses that status. Its status cannot thereafter be changed and will not be affected by the public ceasing to use it.[39]

802. See too: *Everingham v Penrith Municipal Council* (1916) 3 LGR 74:

> For the establishment of a prima facie case of dedication, as an inference to be drawn from evidence of user, it is not necessary to enquire into the state of title to the land.

803. Further, at common law, dedication as a public highway does not affect ownership of the land. See *Ensile Pty Ltd v Wollongong CC* (1994) 84 LGERA 289:

> Dedication does not affect ownership: Halsbury's Laws of England, 4th ed (1981) vol 21, par 94. Prior to the enactment of s 232 of the *Local Government Act 1919* (NSW) (or any relevant predecessor) the title to a road left in subdivision remained with the owner, subject to the ad medium filum rule discussed by Simpson CJ in Equity in *Re Priddle* (1916) 16 SR (NSW) 54; *City of London Land Tax Commissioners v Central London Railway Co* [1913] AC 364 at 372, 379 whereby there was a rebuttable presumption that upon conveyance of land abutting a highway, the conveyance passed the title to the adjoining half of the highway.

804. In Orb Holdings, a lane was found to be a public highway at common law despite the land still being a lot registered in the name of the first respondent.

A public highway need not be on a council's road register

805. Not all public highways are managed by Council.

806. The Court in *Anderson* explained it this way:

> 27 … Section 40(5) [of the Road Management Act 2004] gives a road authority a discretionary power to 'inspect, maintain or repair a road which is *not* a public road' (emphasis added), but specifically states that the authority is not under a duty to do so.

807. Owen v O'Connor:

> But at common law adoption or acceptance by the local authority is not essential (*R v Leake* (1833) 5 B & Ad 469).

Public highways cannot coexist with private rights

808. The existence of a public right of way over land automatically prohibits the exercise of a private right of way or easement over that land, regardless of which was first in time:

> 80 The defendants' construction of the provision must be preferred. The language of clause 14 to Schedule 5 of the RM Act clearly subordinates a 'private right of way or easement' to a 'public right of way over the same land', such that the former is eclipsed by the latter regardless of which was first in time. The RM Act does not define 'public right of way', but on any view that term must include a 'road' within the meaning of that Act or a 'public highway' within the meaning of the common law (which are equivalent for the purposes of the RM Act).[512]

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512 *Anderson & Anor v Stonnington & Anor* [2016] VSC 374, [33].

COUNCIL'S POWER TO MANAGE ROADS

A public highway at common law is a road under the *Road Management Act*

809. A public highway at common law is defined as a 'public highway' in the *Road Management Act*:[513]

> *public highway* means any area of land that is a highway for the purposes of the common law;

810. A 'public highway' is included in the definition of 'road' in the *Road Management Act*:[514]

> *road* includes —
>
> (a) any public highway;
>
> (b) any ancillary area;
>
> (c) any land declared to be a road under section 11 or forming part of a public highway or ancillary area.

Council is the relevant road authority

811. Council is the responsible road authority in regards to municipal roads:

> **37 Which road authority is the responsible road authority?**
>
> (1) Subject to sections 15 and 16 and subsections (1A), (1B), (1C), (1D), (1E), (1F) and (2), the responsible road authority is—
>
> …
>
> (e) if the road is a municipal road, the municipal council of the municipal district in which the road or part of the road is situated;

812. Council is also the coordinating road authority for municipal roads:[515]

> **36 Which road authority is the coordinating road authority?**
>
> Subject to sections 15 and 16, the coordinating road authority is— …
>
> (c) if the road is a municipal road, the municipal council of the municipal district in which the road or part of the road is situated.

813. A municipal road is any road which is not a state road:[516]

> *municipal road* means any road which is not a State road, including any road which—
>
> (a) is a road referred to in section 205 of the Local Government Act 1989; or

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513 Road Management Act 2004 (Vic) s 3(1).

514 *Road Management Act 2004* (Vic) s 3(1).

515 *Road Management Act 2004* (Vic) s 37.

516 *Road Management Act 2004* (Vic) s 36.

(b) is a road declared by the Head, Transport for Victoria to be a municipal road under section 14(1)(b); or

(c) is part of a Crown land reserve under the Crown Land (Reserves) Act 1978 and has the relevant municipal council as the committee of management;

State road means a road which—

(a) is a freeway or arterial road; or

(b) is declared to be a non-arterial State road under this Act; or

(c) is the responsibility of a State road authority under another Act;

814. Consequently, the Council has a range of responsibilities and powers such as:

a) to provide and maintain roads for use by the community;

b) to design, construct, inspect, repair and maintain roads and road infrastructure; and

c) to coordinate and promote the installation of infrastructure or other works on roads to minimise adverse impacts on the provision of utilities:

34 General Functions

(1) A road authority has the following general functions—

(a) to provide and maintain, as part of a network of roads, roads for use by the community served by the road authority;

…

(ca) to design, construct, inspect, repair and maintain roads and road infrastructure;

(d) to coordinate the installation of infrastructure on roads and the conduct of other works in such a way as to minimise, as far as is reasonably practicable, adverse impacts on the provision of utility or public transport services;

(e) to undertake works and activities which promote the functions referred to in paragraphs (a), (b), (c) and (ca) and to undertake activities which promote the function in paragraph (d).

815. Council also has the power to do all things necessary and convenient to be done for or in connection with the performance of its functions under the *Road Management Act*:

35 Powers of a road authority

(1) Subject to this Act, a road authority has power to do all things necessary or convenient to be done for or in connection with the performance of its functions under this Act.

(2) The generality of subsection (1) is not limited by the conferring of specific powers on a road authority by or under this Act or any other Act.

(3) Schedules 1 to 7A do not limit the functions or powers conferred on a road authority by or under this Act or any other Act.

(4) If a road authority has specific powers under any other Act, this section—

(a) is to be construed as being in addition to those powers; and

(b) is not to be construed as overriding any requirements, restrictions, limitations or conditions to which the specific powers are subject.

Note

If a road authority is a municipal council it has the powers specified in Division 2 of Part 9 and Schedules 1, 10 and 11 of the Local Government Act 1989.

Council has the power to consent to works on the Laneway

816. Under section 121(1) of the *Road Management Act*, a council may enter into an agreement to conduct additional works which may benefit the person who owns the adjacent land:

121 Agreement to conduct additional works

(1) A road authority may enter into an agreement with the owner or occupier of land adjacent to a road or the developer of nearby land or any other person for the performance of works on a road which may benefit that person.

817. A landowner may therefore enter into an agreement providing consent for works on the road to service their land.

818. The landowner must obtain Council's written consent before commencing any works:

63 Interference with a road

(1) Subject to subsection (2), a person must not conduct any works in, on, under or over a road without the written consent of the coordinating road authority to the conduct of the proposed works.

819. Applications to the coordinating road authority for consent to works are made under clause 16 of schedule 7 of the *Road Management Act*:

16 Consent of coordinating road authority

(1) A person may apply to the coordinating road authority for written consent to the conduct of proposed works on a road as specified in the application. …

(2) Without limiting the generality of subclause (1), *proposed works* includes—

(a) installing any infrastructure, erecting any structure or carrying out related activities in, on or over a road;

(b) digging or disturbing the surface of a road;

(c) removing any infrastructure, structure or other object on a road;

(d) pumping water onto a road

(e) erecting any obstruction on a road.

820. Pursuant to clause 17(1) of schedule 7 of the *Road Management Act*, if a coordinating road authority does not respond to an application under clause 16 within the relevant period, it is taken to have given written consent:

> **17 Process applying to applications for written consent**
>
> (1) If the coordinating road authority has not responded to an application under clause 16 before the expiry of the relevant period after the coordinating road authority receives the application, the coordinating road authority is to be taken to have given written consent.

821. The relevant period is 20 business days:

> (5) In this clause, *relevant period* means—
>
> (a) unless paragraph (b) applies, a period of 20 business days; or
>
> (b) a period of business days as may be prescribed.

822. A coordinating road authority must give written reasons if it does not consent to the proposed works:

> **17 Process applying to applications for written consent**
>
> (2) If a coordinating road authority refuses to give written consent, the coordinating road authority must give reasons in writing for the refusal to the applicant.

A public highway at common law is a road and a public highway under the *Local Government Act*

823. The definition of 'road' in the *Local Government Act* provides a non-exhaustive list of land that is considered a road:

> *road* includes—
>
> (a) a street; and
>
> (b) a right of way; and
>
> (c) any land reserved or proclaimed as a street or road under the Crown Land (Reserves) Act 1978 or the Land Act 1958; and
>
> (ca) a public road under the Road Management Act 2004; and
>
> (d) a passage; and
>
> (e) a cul de sac; and
>
> (f) a by-pass; and
>
> (g) a bridge or ford; and
>
> (h) a footpath, bicycle path or nature strip; and
>
> (i) any culvert or kerbing or other land or works forming part of the road;

824. In *Anderson*, the Court stressed that this definition is inclusive. Therefore, the Laneway does not need fall within one of the enumerated categories to be a road for the purposes of the *Local Government Act*:

> 199 Although the definition of road in s 3(1) of the LGA contains 10 categories, it is an inclusive definition. Accordingly, the Lane may be held to be a road even if it does not fall within one of the enumerated categories.

825. In *Howard Finance*, Kennedy J stated that where land is a public highway under the common law, it is also a 'road' under the *Local Government Act*:

> 29 In *Anderson* the court found that, although the trial judge made an error in relation to the applicability of (ca) of the above definition, she correctly found that the lane had been dedicated as a public highway. This in turn meant that the lane qualified as a road within the LGA even if it did not fall within any of the enumerated categories. Further, that it qualified as a 'way over which the public was entitled to pass' and hence satisfied the essential feature of a 'right of way' under paragraph (b).
>
> 30 The above reasoning would also appear to apply in this case (and the plaintiffs did not suggest otherwise) such that the lane would also be a road under the LGA if it has been dedicated as a 'public highway.' It is further unnecessary to consider whether the lane also qualified under (ca) - which appeared to be pleaded by virtue of paragraph 13 of the Council's amended defence (though no submission was made in support of this).Section 206(1) of the *LGA* outlines that Council has a range of powers in relation to roads set out in Schedule 10.

826. Further, under section 3 of the *Local Government Act*, public highways are defined as a road open to the public:

> *public highway* is a road which is open to the public for traffic as a right, irrespective of whether the road is in fact open to traffic, and includes a road—
>
> (a) declared to be a public highway under section 204(1) or under any other Act;
>
> (b) which becomes a public highway under section 24(2)(c) of the Subdivision Act 1988;
>
> (c) which is a public road under the Road Management Act 2004.

827. This is consistent with the Court's findings in *Bass Coast Shire Council v King* [1997] 2 VR 5:

> It would appear from his Honour's reasons that he may have overlooked the definition of "public highway" which had been inserted into the Act by the 1993 amendments. Mr. Shaw, whilst contending that his Honour was entitled to find that the disputed strip was a road of which the council had the "care and management" by virtue of its agreement to do so (s. 205(1)(d)), submitted that, even though his Honour did not so find, the road was none the less a "public highway on Crown land" of which the council had the care and management pursuant to s. 205(1)(c). He submitted that the strip was, within the definition of "public highway", a road which is "open to the public for traffic as a right, irrespective of whether the road is in fact open to traffic…".
>
> …

I am, accordingly, of the view that Mr. Shaw is correct when he contends that, once it has been found that the strip is a road within the meaning of the Local Government Act 1989 (as amended) it is a road which has the necessary characteristics to make it a public highway within the meaning of the same Act. It seems to me that the definition of public highway did little more than emphasise the principal characteristic which the common law attributed to a highway; namely that it was land over which the public had a lawful right to pass and re-pass without trespassing.

Council is responsible for the management of and has powers over the Laneway pursuant to the *Local Government Act*

828. Under section 205(1) of the *Local Government Act*, councils have the care and management of all public highways vested in that council and roads it has agreed to manage, subject to the *Road Management Act*:

> **205 Councils to have the care and management of certain roads**
>
> (1) A Council has the care and management of—
>
> (a) all public highways vested in the Council; and
>
> (b) all roads that are the subject of a declaration under section 204(2); and
>
> (c) all public highways on Crown land and roads vested in a Minister (other than freeways and arterial roads within the meaning of the Road Management Act 2004 and public highways and roads vested in a public authority); and
>
> (d) all roads that the Council has agreed to have the care and management of.
>
> (2) This section is subject to the Road Management Act 2004.

829. Section 206(1) of the *Local Government Act* outlines that Council's powers over roads include those set out in Schedule 10:

> **206 Power of Councils over roads**
>
> (1) The powers of a Council in relation to roads in its municipal district include the powers set out in Schedule 10.

830. Schedule 10 outlines several powers of councils over roads, most relevantly, councils have the power to construct and maintain roads:

> A Council may—
>
> (a) make, maintain and repair roads; and
>
> (b) fix and alter the level of roads.

GOVERNMENT ROADS

The statutory framework for determining the status of land described as a road

831. Section 25(4) of the *Land Act 1958* (Vic) provides that lands upon which a street or road are proclaimed shall be deemed to be dedicated to the public:

> **25 Governor in Council may divide territory into counties etc.**
>
> …
>
> (4) The lands upon which such street or road has been proclaimed shall be and be deemed to be thenceforth dedicated to the public.

832. Section 25(5) of the *Land Act 1958* (Vic) provides that where a document describes Crown Land as a road, this operates as evidence that the land is a road within the meaning of that Act. Furthermore, it provides that in the absence of contrary evidence, it is proof of that fact:

> **25 Governor in Council may divide territory into counties etc.**
>
> …
>
> (5) a document describing Crown land as a road is evidence, and in the absence of evidence to the contrary, is proof that the land is a road within the meaning of this Act.

833. A 'road' within the meaning of the *Land Act 1958* (Vic) includes, relevantly, Crown Land delineated or shown as a road in any map or plan in the Central Plan Office:

> ***road*** includes—
>
> (a) a street; and
>
> (b) Crown land delineated or shown as a road in any original map or plan in the Central Plan Office in accordance with which Crown land has or may have been sold, leased or licensed, or become subject to a residence area right, excluding formed or metalled roads constructed or maintained by a municipal council;
>
> (c) Crown land proclaimed to be a road under section 25(3)(c) or under a corresponding previous enactment or under any other Act relating to Crown lands; and
>
> (d) Crown land which has or may have been reserved as a road under the **Crown Land (Reserves) Act 1978** and the reservation published in the Government Gazette—
>
> but does not include any road or street on land alienated in fee simple by the Crown;

834. Section 25(6) of the *Land Act* states that this provision applies to:

a) a map or plan in the Central Plan Office showing or delineating land as a road; or

b) a copy of the Government Gazette containing a proclamation of land as a road; or

c) a copy of the Government Gazette containing an instrument preserving or purporting to reserve the land as a road.

835. This provision was considered in *Bass Coast Shire Council v King* [1977] 2 VR 5 (***Bass Coast v King***). The case concerned a 'strip' of unalienated Crown land adjoining a crown allotment in the township of Cowes of Phillip Island. In that matter, the strip:

a) was Crown land;

b) had been surveyed and showed on official maps as a road; and

c) did not have the physical characteristics of a road:

> Mr. and Mrs. King owned a block of land in Steele Street, Cowes. Next door was a motel. Alongside the eastern boundary of these two properties ran a strip of land leading into a street. The land was Crown land and has been surveyed and shown on official maps as a road. However, trees grew on it and it did not have the physical characteristics of a road.

836. In considering this provision, Winneke P set out the history of land development by the Crown in Victoria to place the framework in a broader context. In particular, his Honour made note of the 'survey before settlement' approach, which involved surveying and delineating crown roads prior to the settlement of surrounding lands:

> …even before separation in 1851, the settlement of land in the Port Phillip district was achieved in the orderly fashion of surveying the land before settlement. That required land to be marked out into counties and parishes, which were then subdivided into townships, Crown allotments and portions. By this method the government surveyors sought to keep the development of land abreast of the demand for it although it would appear that the demand for land in the 1850s and 1860s put the process under pressure, particularly in those areas affected by the gold rush. This system of settlement, only after survey, was enshrined in the Land Act (Vic) 1862.
>
> …
>
> The aim of the legislation in Victoria was designed to ensure that the survey of land marked out for development preceded its selection and settlement. In its turn this process dictated that Crown lands reserved for roads were marked out and surveyed prior to settlement of the lands which they adjoined. As a consequence of the process it has become commonplace for the various Land Acts from 1862 to the present day to refer to land as being "reserved" for roads.

837. Winneke P went on to conclude that:

a) the setting out of roads on survey maps, and the lodging of those maps with the Surveyor-General, was sufficient evidence that the Crown had dedicated those roads to the public:

> On the other hand, Mr. Shaw contends, the surveying and marking out of Crown land as roads on the plans lodged with the Surveyor-General's Department was in itself an act of dedication by the Crown of such roads to the public. The learned judge was correct, so Mr. Shaw contended, in adopting this view. For my own part, I think that this view is correct. The learned judge found that the disputed strip had, in fact, been marked out as a road in the manner in which it was customary to mark out such roads in Crown land surveys. The evidence of Mr. Parker in this regard, accepted by his Honour, was not challenged. The question then remains whether the survey, the setting out of the road on the survey maps, and the lodging of those maps with the Surveyor-General's Department is capable of amounting to evidence of dedication. His Honour found that it was, and I agree.

b) this finding was consistent with the history of the reservation of Crown land for road purposes:

> It is certainly consistent with the history of the reservation of Crown land for road purposes and is also consistent with the way in which the relevant legislation in the State has defined roads on Crown Land: cf s. 3 of the Local Government Act 1989.

c) sections 25(5) and 25(6) of the *Land Act 1958* (Vic) also supported the conclusion that dedication of land as a road could be established from Crown survey maps:

> Although, in my opinion, it has always been the law in this state that dedication of land by the Crown can be proved both by proclamation or reservation on Crown survey maps, the recent amendments to s. 25 of the Land Act 1958 (Act 96 of 1994) would seem to put the matter beyond doubt. These amendments added subss. (5) and (6) to s. 25 in the manner following…

Determining the true extent of road boundaries

838. The statutory framework contained in section 25 of the *Land Act* entitles one to ascertain that certain land was reserved by the Crown to be a government road.

839. However, the true boundaries of Crown land are governed by the *Property Law Act 1958* (Vic) (**PLA**).

840. Section 268 of the PLA provides that the survey boundaries of Crown land physically marked on the ground at the time of a Crown Survey, and shown by survey marks, are deemed to be the true boundaries of such land:

> **268 Crown survey boundaries as marked on the ground to be deemed the true boundaries**
>
> The survey boundaries of any Crown section portion allotment or other parcel of land marked on the ground at the time of the Crown survey thereof, and shown by survey posts pegs trenches or other survey marks shall, as to any such parcel of land heretofore or hereafter granted or demised by the Crown, be and be deemed to have been the true boundaries of such parcel of land whether such boundaries upon

admeasurement are or are not found to be of the same dimensions or to include the same area as the boundaries or description of such parcel given in the Crown grant or Crown lease thereof.

841. Further, section 269 of the PLA provides that Crown grants of land are deemed to convey the land included within the survey boundaries of that land, as marked on the ground of the Crown survey, notwithstanding any discrepancies between the survey boundaries and the boundaries shown in the Crown grant itself:

> **269 Crown grant or lease to be deemed to convey the land within the survey boundaries**
>
> Every Crown grant and Crown lease purporting to convey a section allotment or other parcel of land, whether describing it by a distinguishing number or letter or by metes and bounds or otherwise, shall be deemed to convey the land included within the survey boundaries of such parcel of land marked on the ground in the Crown survey thereof, notwithstanding any discrepancy between the dimensions of such survey boundaries or the area they include and the dimensions or area expressed in such grant or lease or shown in any plan used in connexion with the alienation by the Crown of such parcel of land.

842. Therefore, though parish plans may provide evidence of whether land was set aside as a road, the true boundaries are to be determined by reference to relevant survey markers "marked on the ground" (**Survey Markers**).

843. In accordance with the *Surveying (Cadastral Surveys) Regulations 2015* (**Surveying Regulations**), licensed surveyors are required to ensure that Survey Markers are made from durable material, placed in readily found and accessed areas, and are located where they are unlikely to be destroyed:

> **8 Primary cadastral marks**
>
> A licensed surveyor must ensure that primary cadastral marks—
>
> (a) are made of a durable material and are permanent and stable in construction; and
>
> (b) are placed to that they can be readily found and accessed; and
>
> (c) are placed in locations where they are unlikely to be damaged or destroyed.
>
> **9 Marking of boundaries**
>
> (1) A licensed surveyor making a cadastral survey must ensure that boundaries--
>
> (a) are marked with pegs together with any additional markings that are necessary to assist in locating the pegs and the direction of boundaries; or
>
> (b) if pegs are not practical, are marked with other suitable marks approved by the Surveyor-General.
>
> (2) A licensed surveyor must ensure that line identification and marking is implemented in a manner so that the defined boundary can be readily identified.

…

The Surveyor-General has the power to amend cadastral boundaries

844. As set out in the *Surveying Act 2004* (Vic), some of the functions of the Surveyor-General include responsibility for the correct positioning of Crown boundaries of land, and to correct defects in Crown descriptions of land:

> **42 Functions and powers of Surveyor-General**
>
> 1. The Surveyor-General has the following functions—
>
> …
>
> (e) to be responsible for the correct positioning of Crown boundaries of land, whether or not the land has been alienated from the Crown or subdivided;
>
> (f) to correct defects in Crown descriptions of land, whether or not the land has been alienated from the Crown or subdivided;
>
> …

845. Accordingly, any discrepancies in the boundaries of the Government Road, including whether the Disputed Land forms part of that road, may be cured by actions of the Victorian Surveyor-General.

846. A party who is concerned about the conduct of a licensed surveyor may make a formal complaint to the Surveyors Registration Board of Victoria pursuant to section 18 of the *Surveying Act 2004* (Vic):

> **18 Complaints about professional conduct**
>
> (1) A person may make a complaint to the Board about the professional conduct of a licensed surveyor.
>
> (2) A person may make a complaint to the Board about a person who was a licenced surveyor if the complaint relates to conduct of the other person at a time when the other person was a licenced surveyor.

DISCONTINUANCE OF ROADS

847. In *Anderson v Stonnington*,[517] the Supreme Court explained that the rights of the public in relation to a perfected public highway can only be extinguished by statute:

> 19 … [I]t is noted that the rights of the public in relation to a public highway, whether under the [Road Management] Act or at common law, can only be extinguished if the public highway is discontinued as a road under s 12 of the [Road Management] Act, or if the public highway is discontinued or permanently closed as a road under a power to do either one or both of those things conferred by another statute.

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517 [2016] VSC 374.

848. The process for discontinuing roads is provided for in section 12 of the *Road Management Act*:

12 Discontinuance of roads

(1) A road can be discontinued in accordance with this section.

(2) The following persons may, by notice published in the Government Gazette, discontinue a road or part of a road—

(a) the coordinating road authority for the road or part of the road;

(b) if the Head, Transport for Victoria is not the coordinating road authority for the road or part of the road, the Head, Transport for Victoria with the consent, in writing, of the relevant coordinating road authority.

(3) If a road is discontinued and the land is not Crown land, the land vests in the discontinuing body.

(4) Subject to subsection (11), the discontinuing body must—

(a) publish a public notice stating that submissions in respect of the proposed discontinuance of the road specified in the public notice will be considered in accordance with this section; and

(b) give a copy of the public notice to each infrastructure manager which is responsible for any infrastructure, of which the discontinuing body is aware, installed in, on, under or over the road.

(5) The discontinuing body must consider any written submission which is received by the discontinuing body within 28 days after the publication of the public notice under subsection (4).

(6) Any person who has made a written submission to the discontinuing body and requested that the person be heard in support of the written submission is entitled to appear in person or by a person acting on behalf of that person at a meeting with the discontinuing body.

(7) The discontinuing body must—

(a) fix the day, time and place of the meeting for the purpose of subsection (6); and

(b) give reasonable notice of the day, time and place of that meeting to every person who has lodged a separate submission and in the case of a submission lodged on behalf of a number of persons, to the person specified in the submission as the person to whom notice is to be given.

(8) The discontinuing body must take into consideration all the submissions made under this section.

(9) If subsection (4)(b) applies, the discontinuing body must have regard to the works and infrastructure management principles.

(10) After the discontinuing body has made a decision, the discontinuing body must notify in writing—

(a) every person who has lodged a separate submission; and

(b) in the case of a submission lodged on behalf of a number of persons, to the person specified in the submission as the person to whom notice is to be given; and

(c) if the decision to discontinue is made by the Head, Transport for Victoria under a consent under subsection (2)(b), the coordinating authority for the road—

of the decision and the reasons for the decision.

(11) Subsections (4) to (10) do not apply in respect of a proposed discontinuance if an exemption—

(a) specified by the regulations applies; or

(b) is given by the relevant Minister by a notice published in the Government Gazette which specifies the specific proposed discontinuance or which specifies a class of cases which includes the proposed discontinuance.

(12) In this section, *discontinuing body* means—

(a) if a consent under subsection (2)(b) has not been given, the relevant coordinating road authority for the road; or

(b) if consent has been given under subsection (2)(b), the Head, Transport for Victoria.

849. See also section 206 of the *Local Government Act 1989*:

206 Power of Councils over roads

(1) The powers of a Council in relation to roads in its municipal district include the powers set out in Schedule 10.

(2) Except as provided in section 207B(1), the exercise of a power under clause 2, 3 or 8(1)(a) of Schedule 10 does not in itself vest the land in a Council.

850. And clause 3 of schedule 10 of the *Local Government Act 1989*:

3 Power to discontinue roads

A Council may, in addition to any power given to it by sections 43 and 44 of the Planning and Environment Act 1987—

(a) discontinue a road, or part of a road, by a notice published in the Government Gazette; and

(b) sell the land from that road (if it is not Crown land), transfer the land to the Crown or itself or retain the land.

851. Land in a discontinued road also vests in a council pursuant to section 207B of the Local Government Act 1989:

207B Certain land used, or to be used, for roads to vest in Council

(1) The following land vests in fee simple in the Council (if it is not already vested in the Council) in whose municipal district the land is situated on the date the

relevant notice required by Schedule 10 is published in the Government Gazette—

(a) land acquired for a road deviation under clause 2 of Schedule 10;

(b) land which is a road, or part of a road, which is discontinued as a result of the exercise of a power under clause 2, 3, 7 or 8(1)(a) of Schedule 10.

(2) However, subsection (1) does not apply if the land is Crown land.

(2A) Despite subsection (2), if a road on Crown land is discontinued under clause 2 of Schedule 10 and the land on to which the road is to be deviated is not Crown land, the land on which the discontinued road was situated vests in fee simple in the Council in whose municipal district it is situated on the date the notice required by Schedule 10 is published in the Government Gazette.

(3) On the date the relevant notice is published—

(a) the land vests free of all encumbrances other than those referred to in section 207C; and

(b) the land is brought under the operation of the Transfer of Land Act 1958, if it is not already under the operation of that Act.

(4) The Subdivision Act 1988 does not apply to the discontinuance of a road, or a part of a road, under clause 2, 3, 7 or 8(1)(a) of Schedule 10.

852. The discontinuance of a road does not affect the rights of public authorities with respect to sewers, drains, pipes, wires or cables:

207C Sewers, pipes, wires etc. of public authorities not affected

(1) Section 207B does not affect any right, power or interest held by a public authority in a road in connection with any sewers, drains, pipes, wires or cables under the control of the authority in or near the road.

(2) The Registrar of Titles may record as an encumbrance on the relevant folio of the Register any such right, power or interest.

(3) If a Council seeks the consent of a public authority to the extinguishment of any such right, power or interest, the authority must not unreasonably withhold its consent.

(4) In this section *public authority* includes—

(a) any person who is a licensee within the meaning of the Electricity Industry

(b) any person who under the Pipelines Act 2005 is the holder of a licence to construct and operate a pipeline.

853. A council's power to sell land once a road has been discontinued is subject to section 114 of the *Local Government Act 2020*:

114 Restriction on power to sell or exchange land

(1) Except where section 116 applies, if a Council sells or exchanges any land it must comply with this section.

(2) Before selling or exchanging the land, the Council must—

(a) at least 4 weeks prior to selling or exchanging the land, publish notice of intention to do so—

(i) on the Council's Internet site; and

(ii) in any other manner prescribed by the regulations for the purposes of this subsection; and

(b) undertake a community engagement process in accordance with its community engagement policy; and

(c) obtain from a person who holds the qualifications or experience specified under section 13DA(2) of the Valuation of Land Act 1960 a valuation of the land which is made not more than 6 months prior to the sale or exchange.

854. And section 223 of the Local Government Act 1989:

223 Right to make submission

(1) The following provisions apply if a person is given a right to make a submission to the Council under this section (whether under this or any other Act)—

(a) the Council must publish a public notice—

(i) specifying the matter in respect of which the right to make a submission applies;

(ii) containing the prescribed details in respect of that matter;

(iii) specifying the date by which submissions are to be submitted, being a date which is not less than 28 days after the date on which the public notice is published;

(iv) stating that a person making a submission is entitled to request in the submission that the person wishes to appear in person, or to be represented by a person specified in the submission, at a meeting to be heard in support of the submission;

(b) if a request has been made under paragraph (a)(iv), the Council must—

(i) provide the person with the opportunity to be heard in support of the submission in accordance with the request at a meeting of the Council or of a committee determined by the Council;

(ii) fix the day, time and place of the meeting;

(iii) give reasonable notice of the day, time and place of the meeting to each person who made a request;

(c) if the committee determined under paragraph (b)(i) is not responsible for making the decision in respect of which the submissions have been made, the committee must provide a report on its proceedings, including a summary of hearings, to the Council or the special committee which is responsible for making the decision;

(d) the Council or special committee responsible for making the decision must—

(i) consider all the submissions made under this section and any report made under paragraph (c);

(ii) notify in writing, each person who has made a separate submission, and in the case of a submission made on behalf of a number of persons, one of those persons, of the decision and the reasons for that decision.

(2) If a proposal by the Council involves the exercise of powers at the same time under more than one section giving a right to make a submission and written submissions are received under more than 1 of those sections the submission procedure may be carried out in respect of all the written submissions at the same time.

(3) Despite section 98, a Council may authorise the appropriate members of Council staff to carry out administrative procedures necessary to enable the Council to carry out its functions under this section.

(4) A member of a committee specified in subsection (1)(b)(i) is subject to section 79 as if that member were a member of a special committee.

855. Most councils have a road discontinuance and sale policy that outlines criteria for discontinuing roads and how the land is dealt with after the road is discontinued.

856. For instance, the City of Melbourne's Road and Reserves Discontinuance and Sale Policy has eight principles that will be considered upon an assessment on whether a road should be retained:

5.1 Retention of Road and Reserve Principles

All Roads and Reserve are to be retained except where the Road or Reverse:

1. Is no longer required for the use it was set aside for; and
2. Is no longer reasonably required for general public use; and
3. Will not obstruct necessary service and access arrangements; and
4. Does not, or will not support, facilitate or contribute to Council's current or future land use requirements as identified in the Council Plan; and
5. If discontinued and sold, will facilitate and / or promote investment and positive economic development outcomes; and
6. Does not contribute historic, economic, environmental or community benefit to the municipality to justify its retention; and
7. Has no strategic significance to Council on a long term basis; and
8. Is not identified in a Council strategy, plan, budget, policy or planning scheme as being required for retention.

857. The decision to discontinue or retain a road is at a council's discretion. An applicant does not have any formal rights of appeal:

Council's powers to discontinue and sell a Road or Reserve is discretionary, meaning Council in its absolute discretion can refuse to proceed with a Discontinuance application if the Road or Reserve meets the principles for retention, regardless of an

Approved Development. An applicant has no formal rights of appeal to such a decision.

858. According to the City of Melbourne's Road and Reserves Discontinuance and Sale Policy, land subject to an application for the discontinuance of a road will be sold at market value with all associated costs paid by the purchaser:

> 5.5 Financial
>
> An applicant must pay a non-refundable application fee and provide a bank guarantee to meet all of the Council's reasonable costs associated with a Road or Reserve Discontinuance, regardless of whether the application proceeds or not.
>
> The applicant will be responsible for all costs associated with the relocation or removal of any assets, infrastructure, fences or other encroachments on the land resulting from a Discontinuance of a Road or Reserve. Council reserves the right to retain any assets from the Road or Reserve including bluestone pitches or other pavers.
>
> The sale of any land resulting from a Discontinuance of a Road or Reserve must be sold at Market Value determined by Council unless a price below Market Value is supported by a Council resolution.
>
> A valuation will be undertaken to determine the Market Value. A second valuation may be undertaken at the discretion of Council, especially in the case of land with significant value.

859. Council also often requires the purchaser to enter into a 173 agreement to consolidate the discontinued road into the abutting land:

> Council may require an applicant to enter into a Section 173 Agreement as a condition of the Discontinuance and sale to provide support, access, projections and / or consolidation of title.

860. The City of Melbourne's Explanatory Notes (July 2022) state that an application must include the following information:

a) current copies of titles of the applicant's land abutting the road and the road;

b) a plan clearly showing the area of the road proposed to be discontinued and purchased;

c) photos/plans showing of the Road, including affected services, abutting buildings and fencing;

d) details of any existing or required pedestrian or vehicular access across the Road;

e) identification of any proposed division of the Road with adjoining owners (if applicable); and

f) a detailed summary of consultation that has been carried out with adjoining owners and other potentially affected parties.

861. Before an application can continue, the owner of abutting land must:

a) pay the application fee of $2,500 plus GST;

b) give Council an unconditional bank guarantee for a sum of $30,000 to reimburse all of Council's reasonable advertising, valuation, gazettal and legal costs, regardless of whether the application is successful or not, or is withdrawn; and

c) have a plan for road discontinuance purposes prepared by a licensed surveyor.

ADVERSE POSSESSION

WHAT IS ADVERSE POSSESSION?

862. Adverse possession is a legal rule that enables the occupier of a piece of land to obtain ownership of it, provided they can prove uninterrupted and exclusive possession of the land for at a period of at least 15 years.[518]

863. The law in relation to adverse possession is reasonably well settled in Victoria. The principal authority in Victoria remains *Whittlesea City Council v Abbatangelo* [2009] VSCA 188; (2009) 259 ALR 56, which sets out a comprehensive summary of the law.

864. The opening words in *Cervi v Letcher* might fairly describe many adverse possession cases: "This proceeding concerns a neighbour's dispute, of an extreme kind."[519] As such, applicants seeking to make a claim of adverse possession should afford a degree of sensitivity.

865. The key to managing adverse possession disputes is to collect and circulate evidence early, and in an open and transparent way. A common mistake by litigants (and practitioners) is not gathering evidence early enough, or worse, wanting to hold evidence back for trial.

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[518] Department of Transport and Planning, 'Adverse possession', *Victorian land and property information* (Web Page, 25 November 2020) https://www.land.vic.gov.au/land-registration/first-time-here/land-registration-glossary/glossary-letters/apricots#:~:text=Adverse%20possession%20is%20a%20legal,for%20at%20least%2015%20years.

[519] *Cervi v Letcher* [2011] VSC 156.

RELEVANT PRINCIPLES

The essential elements of a claim in adverse possession

866. For adverse possession to be legally valid, the following elements are required for the entirety of the 15-year limitation period, pursuant to the *Limitations of Actions Act 1958* (Vic) *(LAA)*:[520]

a) factual possession; and

b) the requisite intention to possess (*animus possidendi*).

General principles

There is a rebuttable presumption that the paper title holder is in possession of the land

867. In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as the person with the prima facie right to possession.

868. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.[521]

869. However, this is a rebuttable presumption.

To disturb this presumption an adverse possessor must show factual possession and the intention to possess

870. To rebut this presumption, the adverse possessor must prove they had, for over 15 years, factual possession of the land in question and the requisite intention to possess, *animus possidendi:*

> (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (*animus possidendi*).[522]

Each case must be decided on its own facts

871. Each case must be decided on its own particular facts. While previous cases can provide guidance as to the relevant principles which are to be applied, they should be treated with caution in terms of seeking factual analogies by reference to particular

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520 *Whittlesea City Council v Abbatangelo* [2009] VSC 188.

521 [2009] VSC 188.

522 [2009] VSC 188.

features of a person's dealings with land. Acts that evidence factual possession in one case may be wholly inadequate to prove it in another.[523]

> 6
>
> (c) In considering whether the putative adverse possessor has factual possession, a court has regard to all the facts and circumstances of the case, including the nature, position and characteristics of the land, the uses that are available and the course of conduct which an owner might be expected to follow.

872. A court will decide what is the most probable inference to make on the evidence that is available.[524]

Adverse possession must be continuous and uninterrupted

873. Adverse possession must be continuous and uninterrupted.[525] If the adverse possessor's possession is interrupted by the paper title holder, or if the landed ceases to be possessed by anyone, the 'clock' resets and the fifteen-year limitation period is reset.

Whether or not the paper owner realises that dispossession has taken place is irrelevant

874. Whether or not the paper owner realises that dispossession has taken place is irrelevant:[526]

> 6…
>
> (a) The reference to 'adverse possession' in s 14(1) of the Act is to possession by a person in whose favour time can run and not to the nature of the possession. The question is simply whether the putative adverse possessor has dispossessed the paper owner by going into possession of the land for the requisite period without the consent of the owner, with the word 'possession' being given its ordinary meaning. Whether or not the paper owner realises that dispossession has taken place is irrelevant.

875. Conversely, there is no requirement that the squatter intends to exercise physical control over the property, wrongfully.[527] In other words, a squatter may simply assume (incorrectly) that she owns the land.

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523 *Whittlesea City Council v Abbatangelo* [2009] VSC 188.

524 *Adverse Possession*, 2nd Edition, Jourdan QC, Stephen, & Radley-Gardner, Oliver, at 9-105

525 Limitation of Actions Act s 14(1).

526 *Whittlesea City Council v Abbatangelo* [2009] VSC 188 [6]

527 *Adverse Possession*, 2nd Edition, Jourdan QC, Stephen, & Radley-Gardner, Oliver, at 9-38

A person asserting title may do so in reliance on predecessors in title

876. A person asserting title may do so in reliance upon the possession and intention of predecessors in title:

> A person asserting a claim to adverse possession may do so in reliance upon possession and intention to possess on the part of predecessors in title. Periods of possession may be aggregated, so long as there is no gap in possession.[528]

877. *Shelmerdine v Ringen* [1993] 1 VR 315 is authority for the proposition that a deed of assignment is not essential for adverse possession to be established:

> At the trial Ringen argued that the case was one of successive intruders and that their periods of possession could not be aggregated. Reliance was placed on Trustees Executors and Agency Co Ltd v Short (1888) 13 App Cas 793 and Solling v Broughton [1893] AC 556. The argument was that periods of possession of successive occupiers could be aggregated only if there had been express assignments of the possessory rights. His Honour rightly rejected this contention. Short's Case was one in which a person had held possession for a time - not long enough to extinguish the rightful owner's title - and had then abandoned possession: in such a case the possession of the intruder ceases upon its abandonment to be effectual for any purpose. Adverse possession for the necessary period cannot be established by means of successive occupiers if there is any gap in their possession. But if there is no gap, their periods of possession may be aggregated, although there has been no assignment of their possessory rights.[529]

Tenancy is no bar to a claim in adverse possession

878. In *KY Enterprises Pty Ltd v Darby* [2013] VSC 484, the Court held that the Defendant had established his counterclaim for adverse possession over a parcel of disputed land notwithstanding the fact that he had been a tenant for the entirety of the 15-year period extinguishing the paper title owners title:

> 5 The defendant's evidence is that he first occupied the land at 10 Eames Avenue in 1971 and he or persons claiming an interest through him have done so continuously ever since. Initially he occupied that land as a tenant, but then entered into a contract to purchase the land on vendor's terms, which purchase was completed in 1986. He became the registered proprietor of the land, more particularly described as Lot 3 of PS 42335, and Certificate of Title Volume 8171 Folio 847, on 19 March 1986…
>
> …
>
> 34 I have concluded that the defendant has shown that he first took up occupation of his land and went into possession of the disputed land in 1971. He has shown that his adverse possession of the disputed land continued uninterrupted from that time until the events in March 2021. Accordingly, I have concluded that the title of the plaintiff's predecessor in title to the

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528 *Whittlesea City Council v Abbatangelo* [2009] VSC 188 [.

529 [1993] 1 VR 315, 341.

disputed land was already extinguished by fifteen years of continuous adverse possession by the defendant prior to the purchase of that title by the plaintiff in 1987.

879. In *Bottos v CityLink Melbourne Ltd* [2021] VSC 585, Gorton J held that there is a displaceable presumption that a tenant adversely possessing land is doing so on behalf of its landlord. To that end, Gorton J accepted that a landlord is entitled to rely on its tenants possession in support of its own claim in adverse possession:

> 20 The following propositions underlay the second part of the Bottos brothers' argument set out in paras (b) and (c) above:
>
> (a) there is a presumption that a tenant adversely possessing land I adversely possessing that land on behalf of its landlord;
>
> (b) unless that presumption is rebutted, it is the landlord that obtains the benefits or protections given by the Limitations Act;
>
> (c) because of this, it is only the landlord that can plead and take advantage of the Limitations Act;
>
> (d) here, the presumption has not been rebutted, the Crown has not pleaded the Limitations Act, and indeed would now be estopped from doing so; and
>
> (e) accordingly, CityLink is not able to rely on the protections given by the Limitations Act.
>
> 21 I accept the propositions set out in paras (a) and (b), at least in so far as the land occupied is adjacent to the leased premises. But I do not accept that it follows that a tenant is not able to plead and take advantage of the Limitations Act in a proceeding brought against it. The presumption that an adversely-possessing tenant is doing so on behalf of its landlord is directed to the result at the end of the tenancy. The presumption means that the adversely possessed land is treated as part of the demised property rather than land being separately occupied by the tenant outside that tenancy arrangement. At the end of the tenancy, the tenant does not retain a right of possession as against the landlord; and the landlord, as against the registered title owner, is able to take advantage of the period of dispossession that took place during the tenancy. However, there is no presumption that the tenant is not possessing the land for its own purposes during the course of the tenancy. There is no reason to think that, so long as the tenancy continues, the tenant in possession does not or ought not have such protections as the Limitations Act provides.

880. On appeal,[530] the Court of Appeal upheld the Supreme Court's determination that adverse possession had been lawfully made out, citing with approval the following statement of Neuberger LJ discussing the possibility that both landlords and tenants can obtain title by adverse possession:

> 75 Similarly, the applicants' submissions that the judge misconstrued *Tower Hamlets* must be rejected. As Neuberger LJ said, once the necessary number of years of

530 *Bottos v CityLink Melbourne Ltd* [2022] VSCA 266.

adverse possession has been established, 'the paper title owner loses his title, and someone, either the landlord or the tenant acquires it'. If it is the landlord who then acquires title, the land is added to the holding comprised in the tenancy; if it is the tenant, then he holds the freehold of the land in possession.

Easements do not preclude claims in adverse possession

881. In *Braye v Tarnawskyj* [2019] NSWSC 277, Darke J considered a claim for adverse possession over land that was the subject to an easement of carriageway:

> 3 The proceedings primarily concern a claim for possessory title over a small parcel of adjoining land, being the land contained in qualified folio 1/1063598. This land, which for convenience will be referred to as "the claimed land", is rectangular in shape, approximately 2.743m wide and 18.288m long…
>
> 4 A right of way, granted in 1902, exists over the claimed land for the benefit of the 7 Brien Street property. The right of way is noted on item 5 of the Second Schedule to the folio in respect of the claimed land.

882. Notwithstanding the existence of the easement, Darke J held that the plaintiff had established possessory title with respect to part of the claimed land:

> 55 In my opinion, for the reasons which follow, the plaintiff has established possessory title in respect of part of the claimed land. That is to say, the plaintiff has established the existence of factual possession and an intention to possess for a period of at least 12 years over all the claimed land save for the part that falls within what may be described as the concrete pathway area.

883. Likewise, in *Hardy v Sidoti* [2020] NSWSC 1057, Kunc J found in favour of the plaintiff's adverse possession claim over land that was subject to a right of way easement:

> 6 These proceedings are about so much of the right of way as passes over the rear of the Sidoti Property adjoining the Hardy Property. According to a survey plan attached to the Second Amended Summons, it is approximately 88cm wide (close enough to 1 yard in Imperial measurement) and 3.81 metres long (making a total of 3.35 square metres of land). At the hearing, this strip of land was referred to as the "Yellow Land" because it was marked in that colour on the survey plan (and is shown as such on the Schematic).
>
> …
>
> 129 Mr Hardy has succeeded in his claim to the Yellow Land. It follows from what I have set out in paragraph [128] above that Mr Hardy is entitled to a declaration of his ownership of the Yellow Land and to orders that the defendants bring their trespass to an end by, at their expense, removing the fence and structures which they have erected on the Yellow Land and building a new fence where the old corrugated iron fence had stood.

884. On appeal, the Court of Appeal upheld the decision of the Supreme Court, with Brenton J taking no issue with the adverse possession of land subject to an easement:

> 74 The answer may be that while land subject to an easement can be acquired by adverse possession, including by a person other than the dominant owner, it would remain subject to the easement unless and until it is extinguished.[531]

Continuous, uninterrupted occupation of disputed land is not required to establish adverse possession

885. As set out in *Whittlesea v Abbatangelo*, factual possession signifies an appropriate degree of physical control, which requires proof of single and exclusive possession:

> The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed …

886. Broadly speaking, factual possession requires the alleged possessor to demonstrate control over the land as an occupying owner might have, to the exclusion of all others:

> It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession … Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.[532]

887. This reasoning implies that an adverse possessor need not be physically present on the claimed land at all times to establish 15 years of factual possession.

888. This point was considered by Bowen CJ in *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464, who confirmed that continuous residence is not required to establish adverse possession:

> While each of these elements of use, of residence, of the maintenance of improvements and fencing, where they are present, furnish useful evidence of possession, as I have already pointed out their absence does not prove lack of possession. Much depends upon the nature of the land and the circumstances. A person with a title based on adverse possession may be expected to act like a real owner would act. He may or may not use the land, may or may not be continuously in residence, and may or may not maintain improvements and fencing. There are various ways of demonstrating possession and ownership.[533]

889. To that end, in *Whittlesea v Abbatangelo*, the Plaintiff lived over 100km away from the disputed land for a period of five years. Despite this, the Court held that a 'tenable view of the evidence' supported a finding that actual possession with the requisite intent to possess occurred throughout this five-year period:

> 30. From about October 1970 until about February 1975, the Abbatangelos lived in Geelong. They returned to Mernda to live in a house which had been built

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531 *Sidoti v Hardy* [2021] NSWCA 105.

532 [2009] VSCA 188.

533 [1974] 2 NSWLR 464, 479.

whilst their principal place of residence was Geelong. As at trial, that house was still the Abbatangelo home.

…

73. On a tenable view of the evidence, actual possession with requisite intent was continuous from the early 1960s until 2004. But even if the better view was that possession was broken during the period when the Abbatangelos resided in Geelong - that is, between about October 1970 and February 1975 - there was, we consider, continuous possession with requisite intent for more than 15 years from the time that they returned to Mernda.[534]

Inconsistent use may indicate factual possession and an intention to possess

890. While inconsistent use with the paper title's ordinary use is not necessary, it can be a relevant factor when present, as it may indicate both factual possession and the intent to possess the land to the exclusion of the rightful owner.

6…

(i) While inconsistent use is not required, it may be a factor, where it is present, which is indicative of factual possession and of an intention to possess to the exclusion of the paper owner.[535]

Later conduct may throw light on earlier circumstances

891. In some case, the courts have been willing to look at acts by a squatter after the commencement of the limitation period as shedding light on whether the squatter was in possession throughout the whole period.[536]

Once the limitation period has expired, the interest of the adverse possessor cannot be abandoned and the title of the legal owner is extinguished

892. The interest of the adverse possessor cannot be abandoned, once a limitation period has expired. After the limitation period to recover land has lapsed, the title of the legal owner will be extinguished pursuant to section 18 of the *LAA,* and the adverse possessor's interests will become an interest *as of right*.

Factual possession principles

Factual possession must be single and exclusive, but this is dependent on the circumstances

893. Factual possession signifies an appropriate degree of physical control, which requires proof of single and exclusive possession. However, what constitutes an appropriate

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534 [2009] VSCA 188.

535 *Whittlesea City Council v Abbatangelo* [2009] VSC 188.

536 *Adverse Possession*, 2nd Edition, Jourdan QC, Stephen, & Radley-Gardner, Oliver, at 8-33

degree of physical control depends on the circumstances, such as the nature of the land and manner in which it is commonly used or enjoyed:

> The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed … It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession … Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.[537]

Possession over part of the land may be sufficient to establish possession over the whole of the land

894. Acts of possession with respect to only part of land claimed by way of adverse possession may in all the circumstances constitute acts of possession with respect to all the land claimed.[538]

Animus possidendi principles

An adverse possessor must make it clear to the world that the land has been possessed and exercise exclusive control of the land

895. In addition to proving factual possession, an applicant must also be able to prove that it maintained a clear intention to exercise custody and control over the disputed and for the required 15-year period.

896. The courts will require clear and affirmative evidence that the adverse possessor, claiming that she has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world:

> The *animus possidendi*, which is also necessary to constitute possession, involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.
>
> …
>
> When the law speaks of an intention to exclude the world at large, including the true owner, it does not mean that there must be a conscious intention to exclude the true owner. What is required is an intention to exercise exclusion control.
>
> If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by her actions or words that she has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner.[539]

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537 [2009] VSC 188.

538 *Whittlesea City Council v Abbatangelo* [2009] VSC 188.

539 *Whittlesea City Council v Abbatangelo* [2009] VSC 188.

897. Believing one to be the true owner may be sufficient to establish intention, see *Bligh v Martin*.[540]

Enclosure by itself, prima facie, indicates the requisite animus possidendi.

898. As Cockburn CJ said in *Seddon v Smith*:[541] "Enclosure is the strongest possible evidence of adverse possession".

899. Russell LJ in *George Wimpey & Co Ltd v Sohn*[542] also observed: "Ordinarily, of course, enclosure is the most cogent evidence of adverse possession and of dispossession of the true owner".[543]

900. There have been many cases where the disputed property lay between land belonging to the true owner and land belonging to the squatter. In such a case, if the disputed property is, or becomes separated from the true owner's adjoining land, as by a hedge, stream or wall, so that the true owner can only gain access to the dispute property with the squatter's consent, and the squatter makes more than minimal use of the disputed land, the courts have readily found that the squatter has taken possession of the disputed property.[544]

Equivocal acts may not be sufficient to establish intention on their own, but may be, if referenced collectively

901. It is well established that an alleged adverse possessor cannot rely on acts which are merely equivocal to prove their intention to exclude the paper title owner: see for example *Tecbild Ltd v Chamberlain,* as cited in *Abbatangelo*:[545]

> 5. It is well established that it is no use for an alleged adverse possessor to rely on acts which are merely equivocal as regards the intention to exclude the true owner (Tecbild Ltd v Chamberlain (1969) 20 P &Cr 633 at 642).

902. However, acts which are considered separately, might appear equivocal may, considered collectively, unequivocally evidence the requisite intention:[546]

> (6)…
>
> …

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540 [1968] 1 WLR 804

541 (1877) 36 LT 168 at 1609.

542 [1967] Ch 487 at 511A.

543 Whittlesea City Council v Abbatangelo [2009] VSC 188.

544 *Adverse Possession*, 2nd Edition, Jourdan QC, Stephen, & Radley-Gardner, Oliver, at 33-12

545 (1969) 20 P & Cr 633 at 642, *per* Sachs LJ

546 *Whittlesea City Council v Abbatangelo* [2009] VSC 188.

(e) A number of acts which, considered separately, might appear equivocal may, considered collectively, unequivocally evidence the requisite intention.

The requisite intention is an intention to possess, not an intention to own

903. The intention required by law is not an intention to own, or even an intention to acquire ownership of the land, but an intention to possess it.

904. The squatter need not establish that they believes themselves to be the owner of the land:[547]

> At least probably, once the limitation period has expired the interest of the adverse possessor, or of a person claiming through him, cannot be abandoned.[548]

Intention to possess is frequently deduced from objective acts of physical possession

905. The squatter's intention to possess may be, and frequently is, deduced from the objective acts of physical possession:[549]

> 6…
>
> (b) Factual possession requires a sufficient degree of physical custody and control. Intention to possess requires an intention to exercise such custody and control on one's own behalf and for one's own benefit. Both elements must be satisfied by a putative adverse possessor, although the intention to possess may be, and frequently is, deduced from the objective acts of physical possession.

906. It is difficult to find a case in which there has been a clear finding of actual possession in which the claim to adverse possession has failed for lack of intention.[550]

LEGISLATIVE FRAMEWORK

Limitations of Actions Act 1958 (Vic)

907. The law in Victoria regarding adverse possession is largely governed by the *LAA*.

Land exempted from adverse possession

908. Pursuant to the *LAA,* adverse possession is not permitted against the following parties or land:

a) the Crown;

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547 *Whittlesea City Council v Abbatangelo* [2009] VSC 188.

548 *Whittlesea City Council v Abbatangelo* [2009] VSC 188.

549 Ibid [6].

550 *Adverse Possession*, 2nd Edition, Jourdan QC, Stephen, & Radley-Gardner, Oliver, at 9-120

b) PTC or Victorian Rail Track;

c) Water Authorities;

d) Councils; and

e) Common property under an Owners Corporation:

7 No title by adverse possession against Crown

Notwithstanding any law or enactment now or heretofore in force in Victoria, the right title or interest of the Crown to or in any land shall not be and shall be deemed not to have been in any way affected by reason of any possession of such land adverse to the Crown, whether such possession has or has not exceeded sixty years.

7A No title by adverse possession against PTC or Victorian Rail Track

Despite any rule of law or provision made by or under this or any other Act but without limiting section 7, the right, title or interest of Victorian Rail Track within the meaning of section 3 of the Transport Integration Act 2010 to or in any land is not, and must be taken never to have been, affected by reason only of any possession of that land adverse to Victorian Rail Track, irrespective of the period of that possession.

7AB No title by adverse possession against water authorities

Despite any rule of law or provision made by or under this or any other Act, but without limiting section 7, the right, title or interest of an Authority, within the meaning of the Water Act 1989 to or in any land is not affected by any possession of that land adverse to the Authority irrespective of the period of that possession.

7B No title by adverse possession against Councils

(1) Despite any rule of law or provision made by or under this or any other Act, but without limiting section 7, the title of a Council to council land is not affected by reason only of any possession of that land adverse to the Council, irrespective of the period of that possession.

(2) This section does not apply to a possession of council land adverse to a Council if –

(a) an application for title to all or part of that council land is based on that adverse possession is made to the Registrar before, or within 12 months after, this section commences; and

(b) that adverse possession is for more than 15 years.

(3) In this section –

Council has the same meaning as in the *Local Government Act 2020*;

Council land means land of which a Council is a registered proprietor under the Transfer of Land Act 1958;

Registered proprietor and *Registrar* have the same meanings as in the Transfer of Land Act 1958.

7C Adverse possession of common property

(1) Despite any rule of law or provision made by or under this or any other Act but without limiting section 7, the right, title and interest of an owners corporation, or an owner of a lot affected by the owners corporation, in land which is common property affected by the owners corporation is not affected by reason only of any possession of that land adverse to the owners corporation or the lot owner by another owner of a lot affected by the owners corporation, irrespective of the period of that possession.

(2) Words and expressions used in this section have the same meanings as they have in the Owners Corporation Act 2006.

15 year limitation period

909. The limitation period to commence an action to recover land that has been dispossessed is 15 years, as governed by the *LAA*:

> **8 Action to recover land**
>
> No action shall be brought by any person to recover any land after the expiration of fifteen years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person:
>
> Provided that if the right of action first accrued to the Crown the action may be brought at any time before the expiration of fifteen years from the date on which the right of action accrued to some person other than the Crown.

910. Relevantly, section 9 of the LAA denotes that the 'clock' begins when the putative adverse possessor goes into possession, dispossessing the paper title owner:

> **9 Accrual of right of action in case of present interests in land**
>
> (1) Where the person bringing an action to recover land or some person through whom he claims -
>
> (a) has been in possession thereof; and
>
> (b) has while entitled thereto been dispossessed or discontinued his possession –
>
> the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.
>
> (2) Where –
>
> (a) any person brings an action to recover any land of a deceased person, whether under a will or on intestacy; and
>
> (b) the deceased person was on the date of his death in possession of the land, or, in the case of a rentcharge created by will or taking effect upon his death, in possession of the land charged, and was the last person entitled to the land to be in possession thereof –
>
> the right of action shall be deemed to have accrued on the date of his death.
>
> (3) Where –
>
> (a) any person brings an action to recover land, being an estate or interest in possession assured otherwise than by will to him or to some person

through whom he claims by a person who at the date when the assurance took effect was in possession of the land or, in the case of a rentcharge created by the assurance, in possession of the land charged; and

(b) no person has been in possession of the land by virtue of the assurance –

the right of action shall be deemed to have accrued on the date when the assurance first took place.

911. Section 10 of the LAA denotes specific provisions for impact of adverse possession on future interests in land:

10 Accrual of right of action in case of future interests

(1) Subject as hereafter in this section provided, the right of action to recover land shall, in a case where -

(a) the estate or interest claimed was an estate or interest in reversion or remainder or any other future estate or interest; and

(b) no person has taken possession of the land by virtue of the estate or interest claimed –

the right of action shall be deemed to have accrued on the date on which the estate or interest became an estate or interest.

(2) If the person entitled to the preceding estate or interest, not being a term of years absolute, was not in possession of the land on the date of the determination thereof, no action shall be brought by the person entitled to the succeeding estate or interest after the expiration of fifteen years from the date on which the right of action accrued to the person entitled to the preceding estate or interest, or six years from the date on which the right of action accrued to the person entitled to the succeeding estate or interest, whichever period last expires.

(3) No person shall bring an action to recover any estate or interest in land under an assurance taking effect after the right of action to recover the land had accrued to the person by whom the assurance was made or some person through whom he claimed or some person entitled to a preceding estate or interest, unless the action is brought within the period during which the person by whom the assurance was made could have brought such an action.

(4) Where any person –

(a) is entitled to any estate or interest in land in possession; and

(b) while so entitled, is also entitled to any future estate or interest in that land, and his right to recover the estate or interest in possession is barred under this Act –

no action shall be brought by that person, or by any person claiming through him, in respect of the future estate or interest unless in the meantime possession of the land has been recovered by a person entitled to an intermediate estate or interest.

11 Provisions in case of settled land and land held on trust

(1) Subject to the provisions of subsection (1) of section twenty-one of this Act, the provisions of this Act shall apply to equitable interests in land, including interests in the proceeds of the sale of land held upon trust for sale, in like manner as they apply to legal estates; and accordingly a right of action to recover the land shall, for the purposes of this Act but not otherwise, be deemed to accrue to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land.

(2) Where the period prescribed by this Act has expired for the bringing of an action to recover land by a tenant for life or a statutory owner of settled land, his legal estate shall not be extinguished so long as the right of action to recover the land of any person entitled to a beneficial interest in the land either has not accrued or has not been barred by this Act; and the legal estate shall accordingly remain vested in the tenant for life or statutory owner and shall devolve in accordance with the Settled Land Act 1958; but when every such right of action as aforesaid has been barred by this Act the said legal estate shall be extinguished.

(3) Where –

(a) any land is held upon trust including a trust for sale; and

(b) the period prescribed by this Act for the bringing of an action to recover land by the trustees has expired –

the estate of the trustees shall not be extinguished so long as the right of action to recover the land of any person entitled to a beneficial interest in the land or in the proceeds of sale either has not accrued or has not been barred by this Act; but when every such right of action has been so barred the estate of the trustees shall be extinguished.

(4) Where any settled land is vested in a statutory owner or any land is held upon trust including a trust for sale, an action to recover the land may be brought by the statutory owner or trustees on behalf of any person entitled to a beneficial interest in possession in the land or in the proceeds of sale whose right of action has not been barred by this Act notwithstanding that the right of action of the statutory owner or trustees would apart from this provision have been barred by this Act.

(5) Where any settled land or any land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled thereto, no right of action to recover the land shall be deemed for the purposes of this Act to accrue during such possession to any person in whom the land is vested as tenant for life statutory owner or trustee, or to any other person entitled to a beneficial interest in the land or the proceeds of sale.

912. Section 12 denotes that a right to recover land due to forfeiture or breach of condition arises on the date when the forfeiture incurred, or the condition was broken:

12 Accrual of right of action in case of forfeiture or breach of condition

A right of action to recover land by virtue of a forfeiture or breach of condition shall be deemed to have accrued on the date on which the forfeiture was incurred or the condition broken:

Provided that if such a right has accrued to a person entitled to an estate or interest in reversion or remainder and the land was not recovered by virtue thereof, the right of action to recover the land shall not be deemed to have accrued to that person until his estate or interest fell into possession as if no such forfeiture or breach of condition had occurred.

913. Section 13 denotes that, among other things, an adverse possession claim by a tenant against the landlord will accrue a year after the lease starts, in essence creating a 16-year period before any possessory rights accrue. Or in the event of a periodic lease, the total period will be 15 years plus one period:

13 Accrual of right of action in case of certain tenancies

(1) A tenancy at will shall for the purposes of this Act be deemed to be determined at the expiration of a period of one year from the commencement thereof unless it has previously been determined, and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued on the date of such determination.

(2) A tenancy from year to year or other period without a lease in writing shall for the purposes of this Act be deemed to be determined at the expiration of the first year or other period; and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued at the date of such determination:

Provided that where any rent has subsequently been received in respect of the tenancy the right of action shall be deemed to have accrued on the date of the last receipt of rent.

(3) Where –

(a) any person is in possession of land by virtue of a lease in writing by which a rent amounting to the yearly sum of not less than $2 is reserved; and

(b) the rent is received by some person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease; and

(c) no rent is subsequently received by the person rightfully so entitled –

the right of action of the last-named person to recover the land shall be deemed to have accrued at the date when the rent was first received by the person wrongfully claiming as aforesaid and not at the date of the determination of the lease.

914. Critically, no right of action to recover land shall be deemed to accrue unless the land is in possession of some person in whose favour the period of limitation can run; the 'clock' does not start until the land is adversely possessed:

14 Right of action not to accrue or continue unless there is adverse possession

(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as "adverse possession"); and where under the foregoing provisions of this Act any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date the right of action shall not be deemed to accrue until adverse possession is taken of the land.

(2) Where a right of action to recover the land has accrued and thereafter before the right is barred the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action be deemed to accrue until the land is again taken into adverse possession.

(3) For the purpose of this section –

(a) possession of any land subject to a rentcharge by a person (other than the person entitled to the rentcharge) who does not pay the rent shall be deemed to be adverse possession of the rentcharge;

(b) receipt of rent under a lease by a person wrongfully claiming, in accordance with subsection (3) of the last preceding section, the land in reversion shall be deemed to be adverse possession of the land.

(4) When any one or more of several persons entitled to any land or rent as joint tenants or tenants in common have been in possession or receipt of the entirety or more than his or their undivided share or shares of such land or of the profits thereof or of such rent for his or their own benefit or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them but shall be deemed to be adverse possession of the land.

915. After the limitation period to recover land has lapsed the title of the legal owner will be extinguished:

18 Extinction of title after expiration period

Subject to the provisions of section eleven of this Act, at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action or an action to compel discharge of a mortgage) the title of that person to the land shall be extinguished.

Interruptions to the limitation period

916. The limitation period for commencing an action to recover land can be interrupted, starting a new 15-year limitation period.

917. A fresh right of action will accrue when an adverse possessor acknowledges the title of the person to whom the right of action has accrued, or in the case of a mortgagee in possession, where that mortgagee receives any payment with respect to a mortgage:

24 Fresh accrual of action on acknowledgement or part payment

(1) Where there has accrued any right of action (including a foreclosure action) to recover land or any right of a mortgagee of personal property to bring a foreclosure action in respect of the property, and -

(a) the person in possession of the land or personal property acknowledges the title of the person to whom the right of action has accrued; or

(b) in the case of a foreclosure or other action by a mortgagee, the person in possession as aforesaid or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest –

the right shall be deemed to have accrued on and not before the date of the acknowledged or payment

(2) Where the mortgagee –

(a) is by virtue of the mortgage in possession of any mortgaged land; and

(b) either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges the title of the mortgagor or his equity of redemption or right to discharge of the mortgage –

an action to redeem or to compel discharge of the mortgage of the land in his possession may be brought at any time before the expiration of fifteen years from the date of the payment or acknowledgment.

(3) Where –

(a) any right of action has accrued to recover any debt or other liquidated pecuniary claim or any claim to the personal estate of a deceased person or to any share or interest therein; and

(b) the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof –

the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:

Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.

918. An example of an adverse possessor acknowledging title of the person whom owns the paper title was seen in *Laming v Jennings*[551], whereby the adverse possessors, over time, made written attempts to purchase the disputed land:

120 It is well established that a possessory claim will be defeated if the possessor acknowledges the title of the paper owner and an offer to purchase the property by a person claiming possession will often be treated as a form of acknowledgment of the superiority of the paper owner's title.[552]

26 Effect of acknowledgement or part payment on persons other than the maker or recipient

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551 [2017] VCC 1223.

552 *Refina Pty Ltd v Binnie* [2009] NSWSC 914 at [29].

(1) An acknowledgment of the title to any land or mortgaged personality by any person in possession thereof shall bind all other persons in possession during the ensuing period of limitation.

(2) A payment in respect of a mortgage debt by the mortgagor or any person in possession of the mortgaged property shall, so far as any right of the mortgagee to foreclose or otherwise to recover the property is concerned, bind all other persons in possession of the mortgaged property during the ensuing period of limitation.

(3) Where two or more mortgagees are by virtue of the mortgage in possession of the mortgaged land, an acknowledgment of the mortgagor's title or of his equity of redemption or right to discharge of the mortgage by one of the mortgagees shall only bind him and his successors and shall not bind any other mortgagee or his successors; and where the mortgagee by whom the acknowledgment is given is entitled to a part of the mortgaged land and not to any ascertained part of the mortgage debt, the mortgagor shall be entitled to redeem or to compel discharge of the mortgage of that part of the land on payment, with interest, of the part of the mortgage debt which bears the same proportion to the whole of the debt as the value of the part of the land bears to the whole of the mortgaged land.

(4) Where there are two or more mortgagors and the title or right to redemption or to discharge of the mortgage of one of the mortgagors is acknowledged as aforesaid the acknowledgment shall be deemed to have been made to all mortgagors.

(5) An acknowledgment of any debt or other liquidated pecuniary claim shall bind the acknowledge or and his successors but not any other person:

Provided that an acknowledgment made after the expiration of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any successor on whom the liability devolves on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the acknowledgment.

(6) A payment made in respect of any debt or other liquidated pecuniary claim shall bind all persons liable in respect thereof:

Provided that a payment made after the expiration of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any person other than the person making the payment and his successors, and shall not bind any successor on whom the liability devolved on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the payment.

(7) An acknowledgment by one of several personal representatives of any claim to the personal estate of a deceased person or to any share or interest therein, or a payment by one of several personal representatives in respect of any such claim shall bind the estate of the deceased person.

(8) In this section the expression *successor* in relation to any mortgagee or person liable in respect of any debt or claim means his personal representatives and any other person on whom the rights under the mortgage or, as the case may be, the liability in respect of the debt or claim devolve, whether on death or

bankruptcy or the disposition of property or the determination of a limited estate or interest in settled property or otherwise.

919. To be effective, such acknowledgements and part payments must be in writing and signed by the person making the acknowledgement:

> **25 Formal provisions as to acknowledgements and part payments**
>
> (1) Every such acknowledgement as aforesaid shall be in writing and signed by the person making the acknowledgement.
>
> (2) Any such acknowledgment or payment as aforesaid may be made by the agent of the person by whom it is required to be made under the last preceding section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

920. Pursuant to section 16 of the *LAA,* mere formal entry onto the land or continual claim of rights does not constitute an interruption to the limitation period:

> **16 No right of action to be preserved by formal entry or continual claim**
>
> For the purposes of this Act no person shall be deemed to have been in possession of any land by reason only of having made a formal entry thereon, and no continual or other claim upon or near any land shall preserve any right of action to recover the land.

Extensions of the limitation period

921. The limitation period for commencing an action to recover land will be extended in cases where the person to whom a right of action accrues is under a disability or in cases of fraud.

922. If a person to whom a right of action accrues is under a disability, the limitation period for commencing that action to recover land will be extended:

> **23 Extension of limitation period in case of disability**
>
> (1) If on the date when any right of action accrued for which a period of limitation is prescribed by this Act the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years, or in the case of any action for which a less number of years is prescribed by this Act (except under section 5(1AA) or (1A)) as the period of limitation then such less number of years, from the date when the person ceased to be under a disability or died whichever event first occurred notwithstanding that the period of limitation has expired:
>
> Provided that –
>
> (a) this subsection shall not affect any case where the right of action first accrued to some person (not under a disability) through whom the person under a disability claims;
>
> (b) when a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to

another person under a disability, no further extension of time shall be allowed by reason of the disability of the second person;

(c) no action to recover land or money charged on land shall be brought by virtue of this subsection by any person after the expiration of thirty years from the date on which the right of action accrued to that person or some person through whom he claims;

(d) this subsection shall not apply to any action to recover a penalty or forfeiture, or sum by way thereof, by virtue of any enactment, except where the action is brought by an aggrieved party.

(1A) Subsection (1) does not apply to a right of action to which Part IIA applies.

(2) Any time during which it was not reasonably practicable for a person to commence any action by reason of any war or circumstances arising out of any war in which the Commonwealth of Australia is or was engaged shall be excluded in computing the period prescribed by this Act for the commencement of that action; and the said period shall not be deemed to expire before the end of twelve months from the date when it became reasonably practicable to commence the action.

923. The period of limitation for bringing an action to recover land will be postponed in cases of fraud, until the person with the accrued right discovers the fraud, or could have discovered it with reasonable diligence:

27 Postponement of limitation periods in case of fraud or mistake

Where, in the case of any action for which a period of limitation is prescribed by this Act –

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake –

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

Provided that nothing in this section shall enable any action to be brought to recover or enforce any charge against or set aside any transaction affecting any property which –

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made by a person who did not know or have reason to believe that the mistake had been made.

Transfer of Land Act 1958 (Vic)

924. Notwithstanding that under the Torrens System it is the act of registration of a property interest that gives a party title, a registered proprietor's title remains subject to rights subsisting through adverse possession:

> **42 Estate of registered proprietor paramount**
>
> (1) Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely free from all other encumbrances whatsoever, except -
>
> (a) the estate or interest of a proprietor claiming the same land under a prior folio of the Register;
>
> (b) as regards any portion of the land that by wrong description of parcels or boundaries is included in the folio of the Register or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.
>
> (2) Notwithstanding anything in the foregoing the land which is included in any folio of the Register or registered interest shall be subject to – …
>
> (b) any rights subsisting under any adverse possession of the land; …
>
> notwithstanding the same respectively are not specially recorded as encumbrances on the relevant folio of the Register.

APPLICATIONS TO CLAIM ADVERSELY POSSESSED LAND

925. The most common application to claim adversely possessed land is a section 60 Application pursuant to the *Transfer of Land Act 1958* (Vic) (*TLA)*, however, in some circumstances applications can be made via the County Court or Supreme Court, section 15 of the *TLA* and via Magistrates' Court pursuant to the *Fences Act 1968* (Vic).

Evidence should be collected early and with care

926. Regardless of the method of application for an adverse possession claim, evidence should be collected early and with care.

927. Evidence in adverse possession cases is often called from landowners, neighbours and predecessors in title, whose recollection may be hazy, particularly in relation to times a decade or longer ago.

928. As the Court explained in *Roy v Lagona* there is, with the passage of time, a natural dimming of recollection and memory:[553]

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553 *Roy v Lagona* [2010] VSC 250

> 45 In assessing the credit and reliability of the witnesses for the purpose of fact finding I have regard to the difficulty in accurately recollecting statements and events that occurred years ago. There is, with "the passage of time … a natural dimming of recollection and memory". It is trite but true that human memory is fallible. It may fade with time, and may be affected by recollection partially true, or innocent but inaccurate reconstruction of what is thought to have been said or observed. Sometimes, also, understanding and recollection may be affected by the interest of the person giving evidence, even quite innocently. The judicial task in these circumstances is difficult, yet must be undertaken by the court in order to resolve the parties' dispute. Steadily bearing in mind considerations of this nature, and having carefully read the transcript, and clearly recalling the witnesses, I have concluded as follows concerning the credit and reliability of the witnesses.

929. The following exchange in cross examination recorded in *KY Enterprises Pty Ltd v Darby*[554] is typical:

> 46 The defendant's oral evidence is that he first took up occupation in 1971. He said he dated occupation of the shop as being a few months before his daughter's birth, and he had made a mistake in his earlier documents because he thought she was born in 1974. On discussion with "others in the family" he realised or was told that his daughter was born in 1971. When put to him that his first memory (mid 1970s) may be true he denied it, adding in this next question and answer :
>
> > Q: It's very difficult to remember so far back isn't it?
> >
> > A: Well, when you associate it with the birth of a child and others in the family, saying the birth of the child and when we moved from Corrigan Avenue into a smaller house and we couldn't - and we got the shop prior to that, it all fitted in place, but obviously when I first said, I said mid 70s. But if I've said that I said it, but I was wrong, OK?

930. Another example, also drawn from *KY Enterprises Pty Ltd v Darby*[555], shows the weight the Court can give to even the most subtle pieces of evidence:

> 90 Here the defendant's own evidence as to intention is that he always thought the disputed land was in fact his land. I accept this evidence. It was volunteered in the context of answering a question in chief as to what he did in relation to the disputed land, and in response to the characterisation of the land in question as "disputed". His exact evidence was:
>
> > When you say disputed land, I always thought it was my land. I never ever thought we would be disputing anything.
>
> 91 In the context, the statement did not appear to me to be gratuitous or deliberately self serving, but an honest statement of his position. It was not put squarely to the defendant in cross examination that this statement was incorrect. Indeed, in answer to another question using the phrase "disputed

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554 [2013] VSC 484.

555 [2013] VSC 484.

land", the defendant repeated his evidence that "I never ever thought it was disputed. It's only just become disputed..." and the plaintiff's counsel did not challenge this evidence by any question directed to it. In this cross examination, the defendant agreed that his intention in constructing the gate was to secure items he kept at the rear of his property. It was put to him that he only wanted to use the disputed land to drive over it, and the defendant agreed that "it's mainly a driveway".

931. Aerial photography is often useful and determinative but the image quality at 15+ years for NearMap, MetroMap and Google Earth can be poor, and often the images for the relevant period won't exist at all:

932. On the other hand, Photomapping has access to aerial photography and satellite imagery dating back as to the 1930s. Images are sourced from their own projects and the archives of State and Commonwealth Governments.[556]

933. Adverse possession disputes are often fought over parcels of land of low value and as with some planning disputes, can be a proxy for other issues. In *Kierford Ridge Pty Ltd v Ward*[557] the land was 2.4m by 1.1m. In *Nicholas Olandezos v Bhatha & Ors* the value of the land was ~$3,850.[558]

934. To help ensure legal and other costs in proceedings are reasonable and proportionate to the amount in dispute,[559] evidence in adverse possession disputes should be collected early and made available to any party with an interest in the proceedings.

935. After all, a person whose name is on the title to land should not be expected to surrender those rights on anything other than the best of evidence.

Section 60 Application for Torrens Land

936. If the land under which a person is claiming through adverse possession is Torrens Land, under the operation of the *TLA,* an application can be made pursuant to Section 60 of the *TLA*. Section 60 sets out the procedure through which a person claiming title through adverse possession can apply to the Registrar for an order vesting the land in them:

> **60 Application for order by person claiming title by possession**
>
> (1) A person who claims that he has acquired a title by possession to land which is under this Act may apply to the Registrar in writing in an appropriate approved form, accompanied by a plan of survey (with an abstract of field records) of the land certified by a licensed surveyor or any other plan, diagram or document describing the land which satisfied the Registrar as to description,

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556 http://www.photomapping.com.au/historic-imagery; images@photomapping.com.au; (03) 9328 3444

557 [2005] VSC 215.

558 [2017] VSC 234.

559 Section 24 Civil Procedure Act 2010

for an order vesting the land in him for an estate in fee simple or other the estate claimed.

(2) The Registrar shall cause notice of the application to be advertised once at least in a newspaper circulating in the city of Melbourne or in the neighbourhood of the land and to be given to any person he thinks proper including every person appearing by the Register to have any estate or interest in the land.

(3) The applicant shall cause a copy of the notice to be posted in a conspicuous place on the land or at such place as the Registrar directs and to be kept so posted for not less than 30 days prior to the granting of the application.

(3A) A notice under subsection (3) must be posted on the day on which the application is advertised under subsection (2).

(4) The Registrar shall appoint a period of not less than 30 days from the publication of the advertisement or service of the notice after the expiration of which he may, unless a caveat is lodged as hereinafter provided, grant the application altogether or in part.

937. The fee for lodging a section 60 application is $683.90, as of October 2024.

938. Pursuant to section 60(1), the Registrar will require the following documents completed in every section 60 application:

a) Adverse Possession-TLA60 Form; and

b) Adverse Possession Section 60 Checklist.

939. Section 60(1) provides that a claim could be supported by a certified plan of survey by a licensed surveyor or any other plan:

60 Application for order by person claiming title by possession

(1) A person who claims that he has acquired a title by possession to land… accompanied by a plan of survey (with an abstract of field records) of the land certified by a licensed surveyor or any other plan, diagram or document describing the land which satisfied the Registrar as to description…

940. While survey documents are not required for an application that does not amend title boundaries, the disputed land must be a separately transferable parcel and be wholly enclosed by land that cannot form part of an application for adverse possession.[560]

[560] Guide to Adverse Possession 2022, Land Use Victoria, https://www.land.vic.gov.au/__data/assets/word_doc/0030/470991/Guide-to-adverse-possession-2022.docx

941. However, if the disputed land comprises or includes part of a separately transferable lot or Crown allotment, then a plan of survey is required, along with a licensed surveyor's report and an abstract of field records.[561]

942. As will be discussed, *Laming v Jennings* is authority for the fact that when the paper title owner undertakes survey work on the land, this can be a sufficient assertion of the owner's rights to amount to possession.

943. According to Land Use Victoria, the plan of survey must clearly and separately define the land adversely possessed, reflect the current circumstances and include the following, all signed and dated by a license surveyor:

a) a plan of survey;

b) an abstract of field records, including a depiction of the full enclosure of the property; and

c) a surveyor's report.

944. These documents must be lodged electronically by the licensed surveyor through SPEAR at www.spear.land.vic.gov.au.

945. Survey documents and aerial photographs are not required where the land being claimed is:

a) a separately transferable parcel which is wholly enclosed by:

1) land to which the applicant has title;

2) government roads;

3) Crown land; or

4) a combination of any or all of the above

b) an application made by:

1) a mortgagee in possession;

2) a mortgagor may remove an outstanding mortgage that is statue barred, only if section 84(2) *TLA* cannot be used; or

3) one or more co-proprietors against the other co-proprietor(s).

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561 Guide to Adverse Possession 2022, Land Use Victoria, https://www.land.vic.gov.au/__data/assets/word_doc/0030/470991/Guide-to-adverse-possession-2022.docx

946. If a person is proposing to apply for a whole parcel on the basis of possession, it may be possible for that person to use an aerial photograph in the place of a survey plan.

947. A survey plan can only be waived in cases where all boundaries of the land claimed are previously known to Land Use Victoria. Typically, survey waiver applications are only appropriate for rural areas.

The intersection of the law of caveats and adverse possession

948. Section 61 of the *TLA* states that a person claiming an interest in land may lodge a caveat with the Registrar in order to protect that interest:

> **61 Caveat**
>
> (1) A person claiming any estate or interest in the land in respect of which any such application is made may before the granting of the application lodge a caveat in an appropriate approved form with the Registrar forbidding the granting thereof.
>
> (2) The caveat shall in all other respects be subject to the same provisions, and have the same effect with respect to the application against which it is lodged, as a caveat under section 26R against the creation of a folio.

949. In *Olandezos v Bhartha & Ors*[562], a plaintiff sought the removal of two caveats pursuant to s 90(3) of the *TLA*. The caveats had been lodged by the caveators in relation to a strip of land near the Benjeroop-Tresco Road, Tresco.

950. The caveators claimed a freehold estate in ~7ha of land by adverse possession, claiming that they had exercised exclusive and continuous possession of the disputed land since 2010.

951. However, it was said against them that they were not entitled to the disputed land by adverse possession because they would not be able to establish that they had exclusive possession of the disputed land, without interference, for a minimum of 15 years.

952. Second, it was said that the claim was statute barred because the Australian Securities and Investments Commission (ASIC) is an arm of the Commonwealth, and as we know, claims in adverse possession cannot succeed against the Crown.

953. The court agreed that there was a factual dispute as to the caveators' entitlement to the freehold estate in the land by adverse possession, but suggested they would need to elect whether or not to proceed with their claim:

> 50. … The evidence of the situation of the land, the totality of the fencing, the history of the occupation of the disputed land, the use to which the plaintiff and his predecessors may have put the land … require more extensive evidence. If the Caveats remain without any condition requiring the

562 [2017] VSC 234

commencement of proceedings, and if the plaintiff lodges a caveat under s 61 of the TLA claiming an interest in the land, for example a right of way by long user, the dispute will have to return to Court, but with the plaintiff having the burden of establishing a prima facie case and that the balance of convenience is in his favour.

51. This may be an advantage to the Caveators. But it is hardly in the interests of the due administration of justice and the overarching obligation under the Civil Procedure Act 2010 (Vic) to take a course that results in precisely the reverse of the position that now faces the parties.

954. The Court ultimately ordered that unless within one month, the Caveators commenced proceedings to establish their entitlement to the freehold estate in the disputed land by adverse possession, the Caveats were to be removed.

Common law application of the section 60 procedure

955. This procedure was also explained by Derham AsJ in *Olandezos v Bhartha & Ors* [563]:

48. Section 60 of the TLA is in Division 5 of Part IV headed 'Acquisition by possession'. The procedure is, in summary, as follows:

a) the claimant writes to the Registrar in an appropriate approved form, supported by survey evidence:

(a) the claimant applies to the Registrar in writing in an appropriate approved form accompanied by a plan of survey (with an abstract of field records) of the land certified by a licensed surveyor or any other plan, diagram or document describing the land which satisfies the Registrar as to description, for an order vesting the land in them for an estate in fee simple or other the estate claimed;

b) the Registrar causes notice of the application to be advertised:

(b) the Registrar causes notice of the application to be advertised once at least in a newspaper circulating in the city of Melbourne or in the neighbourhood of the land and to be given to any person he thinks proper including every person appearing by the Register to have any estate or interest in the land;

c) notice is placed on the land:

(c) the applicant posts the notice in a conspicuous place on the land or at such place as the Registrar directs and it is so posted for not less than 30 days prior to the granting of the application, and that notice must be posted on the day on which the application is advertised;

d) after 30 days, if a caveat is not lodged the application may be granted in whole or in part:

563 [2017] VSC 234.

(d) the Registrar appoints a period of not less than 30 days from the publication of the advertisement or service of the notice after the expiration of which he may, unless a caveat is lodged, grant the application altogether or in part;

(e) a person claiming any estate or interest in the land in respect of which any such application is made may, before the granting of the application, lodge a caveat in an appropriate approved form with the Registrar forbidding the granting thereof. The caveat is subject to the same provisions, and have the same effect with respect to the application against which it is lodged, as a caveat under section 26R against the creation of a folio; and

(f) subject to the TLA, after the expiration of the period appointed, the Registrar, if satisfied that the applicant has acquired a title by possession to the land, may make an order vesting the land in the applicant, or in such person as the applicant directs, for an estate in fee simple or the estate or interest acquired by the applicant free from all encumbrances which have been determined or extinguished by such possession.

Section 62 of the Transfer of Land Act 1958 (Vic)

956. If satisfied that an applicant has acquired title through adverse possession on the basis of a section 60 application, the Registrar may make an order vesting the disputed land in the applicant pursuant to section 62:

62 Power to make a vesting order

(1) Subject to this Act after the expiration of the period appointed the Registrar if satisfied that the applicant has acquired a title by possession to the land may make an order vesting the land in the applicant, or in such person as the applicant directs, for an estate in fee simple or other the estate or interest acquired by the applicant free from all encumbrances which have been determined or extinguished by such possession and free from any easement recorded as an encumbrance which has been proved to the satisfaction of the Registrar to have been abandoned by reason of non-user for a period of not less than thirty years.

(2) Where a vesting order is so made the Registrar shall –

(a) make any amendments to the Register that are necessary to give effect to the vesting order;

(b) create in the name of the applicant, or of any person the applicant directs, a new folio of the Register, dated as at the date of making the vesting order –

(i) for an estate in fee simple or other estate acquired in the land described in the vesting order, free from all encumbrances extinguished under subsection (1); or

(ii) at the Registrar's discretion, consolidating the land described in subparagraph (i) with any adjoining parcel of land owned by the applicant.

(3) If the applicant or such other person dies before the vesting order is made the land shall be registered in his name and shall pass in like manner as if the folio of the Register had been created before the death.

(4) As soon as practicable after making a vesting order, the Registrar must notify the Council of the municipal district where the land is located.

(5) In this section, encumbrance includes, but is not limited to, any estate, interest, mortgage, charge, right, claim, demand, caveat, lease, sub-lease, restrictive covenant or statutory charge or an agreement under section 173 of the *Planning and Environment Act 1987*.

Section 15 Application for General Law Land

957. If the adverse possession claim is over General Law land, not Torrens land, an application should be made under section 15 of the *TLA*, not section 60, to bring the land under the *TLA*.

958. The fee for lodging a section 15 application is $108.60, as of October 2024.

959. A section 15 application must include the following:

a) a certified plan of survey of the land;

b) deeds that relate to the title and that are in the applicant's possession;

c) deeds that relate to the title to the land and that the person may compel another person to produce;

d) a search of title;

e) a legal practitioner's certificate relating to the title of the land; and

f) the material on which the legal practitioner's certificate is based:

15 Application (survey) conversion scheme

(1) An entitled person may apply under this section to the Registrar to have the land brought under this Act.

(2) An application must be in the approved form and the applicant must lodge with the application—

(a) a plan of survey of the land (with an abstract of field records) certified by a licensed surveyor or any other plan, diagram or document describing the land which satisfies the Registrar as to description; and

(b) the deeds that relate to the title to the land and that are in the applicant's possession; and

(c) the deeds that relate to the title to the land and that the person may compel another person to produce except—

(i) deeds which are deposited with the Registrar-General under the Property Law Act 1958; and

(ii) deeds which are retained by the Registrar under section 26T or any corresponding previous provision; and

(d) a search of title; and

(e) a legal practitioner's certificate relating to the title to the land; and

(f) if the applicant's title to the land is claimed by possession, the material on which the legal practitioner's certificate is based.

(3) The Registrar must cause notice of the proposed creation of the folio to be given in accordance with section 26Q.

(4) If in respect of land the provisions of subsection (1) and of subsection (2)(a), (b), (c), (d) and (e) and of sections 26Q and 26R are complied with and the deeds lodged show a good root of title which is at least 30 years old, the Registrar may create—

(a) an ordinary folio; or

(b) a provisional folio on which there is recorded a warning in the form of Part III of the Fifth Schedule, a warning in the form of Part IV of the Fifth Schedule or both those warnings, as the Registrar considers appropriate.

(5) If in respect of a title to land claimed by possession, the provisions of subsection (1) and subsection (2)(a), (d), (e) and (f) and of sections 26Q and 26R are complied with, the Registrar may create—

(a) an ordinary folio; or

(b) a provisional folio on which there is recorded a warning in the form of Part III of the Fifth Schedule, a warning in the form of Part IV of the Fifth Schedule or both those warnings, as the Registrar considers appropriate.

(6) An applicant may withdraw an application at any time before the creation of a folio of the Register.

(7) On the withdrawal of an application, the Registrar must return to the applicant or to the person appearing to be entitled to them the documents lodged in support of the application.

960. A survey can be waived under similar conditions as set out above for a section 60 application.

961. The Registrar must cause the notice to be given in accordance with section 26Q of the *TLA*:

26Q Notice of creation of folio or removal of warning

(1) The Registrar must cause the notice required to be given to a person under section 15 or 26P in respect of land to be given—

(a) by publication at least once in a newspaper circulating in the city of Melbourne or in the district in which the land is situate; and

(b) personally or by post—

(i) to the occupiers of the land and to the owners and occupiers of contiguous land; and

(ii) to such other persons (if any) as the Registrar thinks fit.

(2) The Registrar must cause the notice required to be given under section 26O to be given personally or by post to the registered proprietor of the land in the provisional folio.

(3) If the folio to be created or the folio from which the warning is to be removed is or was created on the basis of a claim by possession, the Registrar, in addition to the notice under subsection (1), must cause the person who is or is to be the registered proprietor of the land in the folio to be created or from which the warning is to be removed—

(a) to post a notice of the proposal in an appropriate approved form on the land or at a place the Registrar directs; and

(b) to keep the notice so posted for not less than 30 days prior to the creation of the folio or the removal of the warning.

(4) A notice under this section must specify a time (being not less than 30 days) after the expiration of which the Registrar may, unless a caveat is lodged forbidding that action, create the relevant folio of the Register for the land or remove the warning from the folio.

962. Section 26R provides that any person claiming an estate or interest in the land may lodge a caveat:

26R Caveats

(1) Any person claiming an estate or interest in the land for which notice is required to be given in accordance with section 26Q(1) may, before the creation of the folio for the land or the removal of the warning, lodge a caveat with the Registrar in an appropriate approved form forbidding the creation of the folio or the removal of the warning.

(2) The registered proprietor of land to whom notice is required to be given in accordance with section 26Q(2) may, before the creation of the new folio for the land, lodge a caveat with the Registrar in an appropriate approved form forbidding the creation of the folio.

(3) On the lodgement of a caveat under this section, the Registrar—

(a) must notify the person who is to be the registered proprietor of the folio which is to be created or the registered proprietor of the folio from which the warning is to be removed, of the caveat; and

(b) must not proceed with the creation of the folio or the removal of the warning until—

(i) the caveat has been withdrawn or has lapsed; or

(ii) a judgment or order in the matter has been obtained from a court.

(4) The person notified under subsection (3)(a) may summon the caveator to attend before a court to show cause why the caveat should not be removed.

(5) The court may make any order in the matter either ex parte or otherwise and as to costs as the court thinks fit.

(6) A caveat under this section is deemed to lapse after the expiration of 30 days from the lodgement of the caveat unless the caveator has within that time—

(a) given notice in writing to the Registrar that proceedings in a court to substantiate the claim of the caveator in relation to the land and the estate or interest therein in respect of which the application is made are on foot; or

(b) obtained and served on the Registrar an injunction or order of a court restraining the Registrar from creating the folio or removing the warning.

(7) A caveat must not be renewed by or on behalf of the same person in respect of the same estate or interest.

(8) If an application has been withdrawn under section 15 and a caveator has been put to expense without sufficient cause by reason of the application, the caveator is entitled to receive from the applicant any compensation that the court considers just and orders.

963. Following this, in accordance with s 15(5) of the *TLA*, the registrar may create an ordinary folio or a provisional folio for the land.

Required evidence for Section 15 and 60 applications

964. Land Use Victoria sets out in detail the evidence required to support an adverse possession claim pursuant to section 15 and 60 of the *TLA*, in the 'Guide to evidence supporting an adverse possession claim.' In summary, the following evidence will likely be required:

a) statutory declarations from the applicant and prior possessors to provide for at least the last 15 years;

b) statutory declaration from at least one disinterested witness;

c) rating evidence;

d) statutory declaration from applicant's lawyer, if period of possession is less than 30 years;

e) assignment or chain of assignments of the possessory rights, if applicant has not been in possession for at least 15 years; and

f) any additional evidence such as photos, contracts of sale etc.

965. Please refer to Land Use Victoria's guide for more detailed information.

Magistrates Court proceedings

966. A person may be able to initiate proceedings in the Magistrates Court if the adversely possessed land is also subject to a fencing dispute under the *Fences Act 1968* (Vic).

967. Pursuant to section 30E(1) of the *Fences Act 1968* (Vic), a person may file a complaint in the Magistrates' Court claiming adverse possession if:

a) a complaint has already been filed regarding the land under another provision of the *Fences Act 1968* (Vic); and

b) the land which is being claimed is land on which fencing works and any subsidiary works that are the subject of that complaint are to be carried out:

> **30E Adverse possession claims arising from fencing disputes**
>
> (1) A person may file a complaint in the Magistrates' Court under this section claiming title by possession to a part of adjoining land to the land that person owns if
>
> (a) the land that person owns is land in respect of which a complaint is filed under another provision of this Act; and
>
> (b) the land that the person is claiming title by possession to is land on which fencing works and any subsidiary works that are the subject of that complaint are to be carried out.

968. Section 30E(2) states that the Magistrates' Court may make an order as to who is entitled to title by possession of the part of land on which the fencing works and any subsidiary works are:

> **30E Adverse possession claims arising from fencing disputes**
>
> …
>
> (2) The Magistrates' Court may make an order in relation to who is entitled to title by possession of that part of the adjoining lands on which the fencing works and any subsidiary works are to be carried out.

DEFENDING TITLE AGAINST A CLAIM FOR ADVERSE POSSESSION

969. When a claim for adverse possession is lodged, the title owner should receive a notice from the Office of Land Titles Victoria. At this stage it is important to obtain legal advice as to the options open to defending title against the claim, some which are set out below.

Lodge a caveat

970. If a claim is made against land, the title owner should receive a notice from Land Victoria advising of the adverse possession claim.

971. At this point, a caveat could be filed with Land Victoria to forbid the grant of adverse possession for 30 days, if the claim does not have merit or the claim is arguable, pursuant to:

a) Section 61(1) of the *TLA*, for Torrens Land; or

b) Section 26R of the *TLA*, for General Law Land.

972. A caveat must be lodged within 30 days of receiving notice of the adverse possession claim, and it will be valid for 30 days. If proceedings are not issued, and the 30 day period expires, the Registrar is free to grant the adverse possession claim.

Disprove factual possession or requisite intention to possess

973. The most common way to defend title against a claim for adverse possession is to demonstrate that the claimant did not have either factual possession or the requisite intention for the 15 year period.

974. To counter the adverse possessors claim, evidence should be gathered as early and quickly as possible, as this may counter or contradict evidence relied upon by the applicant.

975. A person defending title should also consider whether any actions or circumstances have interrupted or extended the limitation period, such as fraud, disability, or acknowledgement of title, pursuant to the *LAA.*

Acknowledgement of title

976. As briefly mentioned, in *Laming v Jennings*[564],, Cosgrave J stated that previous offers to purchase the 'possessed' land is an acknowledgement of title pursuant to section 24 of the *LAA,* demonstrating a lack of the requisite intention and defeating an adverse possession claim:

> 120 It is well established that a possessory claim will be defeated if the possessor acknowledges the title of the paper owner and an offer to purchase the property by a person claiming possession will often be treated as a form of acknowledgment of the superiority of the paper owner's title.[565]
>
> 121 However, the courts are wary of laying down general rules on the issue because it always depends upon the context of the alleged acknowledgment and the actual terms of the acknowledgment. Where there is a simple situation of a person offering to purchase a property, that person is saying, as between himself and the person to whom the offer is made, that the offeror realises and

564 [2017] VCC 1223 (*Laming)*

565 Refina Pty Ltd v Binnie [2009] NSWSC 914 at [29].

accepts that the offeree has a better title to the land in question than the offeror. This is a plain form of acknowledgment.[566]

122 By way of comparison, a letter challenging the ownership of the paper owner, but offering by way of compromise to accept a tenancy, is not an acknowledgment.[567] Negotiations for the compromise of a bona fide claim for possessory title do not of themselves equate to an acknowledgment of title, at least where they do not result in a final bargain.[568] The position was summarised by Windeyer J in Phillips v Marrickville Municipal Council[569] as follows:

While it is clear that a simple offer to purchase from the documentary title owner would usually amount to confirmation … that cannot be said to be the position when such an offer is made as part of negotiations between parties claiming entitlement to land in dispute: Edginton at 377; Cawthorne v Thomas (1993) 6 BPR 13840 at 13845.

…

124 Usually where the signed offer to purchase is in writing and the other evidence does not raise qualifications about the context of the offer, that offer will constitute an acknowledgment of the plaintiff's title. This has the effect of restarting the limitation period under the Limitations Act.

125 In my view, the offer made by the Howards to purchase the sliver of land compulsorily acquired by Telstra years earlier constituted an acknowledgment of Telstra's title and meant that the Howards could not satisfy all the legal requirements to be in possession of any part of the Disputed Land. By acknowledging the better title of Telstra, they showed that they lacked the animus possidendi needed for possession in law.

977. In *Butler v Dickson* [2018] VCC 610 (*Butler)*, acknowledgement of title was considered in regards to a series of letters sent by the adverse possessor to the title holder. However, Ryan J found that these letters did not specifically acknowledge the title holder as in possession and maintained a clear intention to remain in possession; irrespective of that, the letters were sent after the expiration of the limitation period:

82 There is no absolute rule that an offer to purchase freehold property is an acknowledgment that the offeree has a better title than the offeror. Consideration must be given to the whole of the terms of the supposed acknowledgment and its circumstances.

83 An offer to purchase will not always amount to an acknowledgment of title, but it can be said that such an offer is made as part of the negotiations between parties claiming entitlement to the land in dispute.

84 Significantly, any letters amounting to confirmation after the limitation period are insufficient to revive an extinguished title.

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566 Edginton v Clark [1963] 3 All ER 468, 471.

567 Ibid.

568 Ibid.

569 [2002] NSWSC 396, [20].

…

93 The offers to purchase the land were also coupled with statements by the defendants that they would continue with their adverse possession claim if the offers were not accepted. As such, the letters did not specifically acknowledge the plaintiff was in possession of the land, and showed a clear intention by the defendants that they intended to remain in possession. Consequently, as a matter of construction, I find the letters did not amount to a sufficient acknowledgment of the plaintiff's title. But in any event, this analysis is redundant to the extent that the first three offers made in 2013 and the fourth offer in May 2016 were made well after the relevant time period for adverse possession by the Dicksons had accrued. Consequently, the offers being made outside the relevant period are of no effect, even if there had been sufficient acknowledgment of the plaintiff's title.

978. In *Matusik v Maher Farms Pty Ltd & Ors* [2022] VCC 393 (*Matusik),* Ryan J found that an offer to purchase after the required 15 year period of adverse to be irrelevant and as such acknowledgement of title are only material if made during the 15 year limitation period:

115 …In any event, the alleged discussion at the Christmas party in 2018 occurred well after the 15-year period of adverse possession had run and is therefore irrelevant.

Assertion of owner's rights

979. In *Laming,* Cosgrave J also stated that survey work undertaken by the title owner to clarify title dimensions with a view to sell is a sufficient assertion of the owner's rights:

181 In my opinion, the better view is that where the survey work is undertaken, as here, for purposes which include clarifying the title dimensions of certain properties with a view to sale, then there is a sufficient assertion of the owner's rights to amount to possession. Hence, to the extent that, at the time, there was a squatter accruing rights in adverse possession, the accrual ceased because the paper owner retook possession of the subject land. To the extent that these actions by Laming or his predecessors in title occurred in 1995, 1997 and 2008, Jennings and his predecessors in title could not have a continuous period of 15 years' adverse possession by means of which they extinguished the plaintiff's entitlement to the Disputed Land.

980. However, it should be noted that *Laming* did not consider the effect of a survey on a small sliver of land.

Acts of dispossession

981. In *Matusik*, the defendants, attempting to defend their title against adverse possession unsuccessfully argued that acts of dispossession defeated the plaintiff's adverse possession claim.

982. In *Matusik,* Ryan J reiterated the proposition that a title holder can recover possession and stop the 'clock' running, irrelevant of how short a period of repossession lasts:

> 121 If a title holder recovers possession of disputed land, they stop the time running on the period of adverse possession. It is irrelevant for how short a period the repossession lasts.

983. The defendants first argued that a series of leases to a third party amounted to a dispossession. However, Ryan J stated that amongst other reasons, the leases failed to include the disputed land and therefore were not acts of repossession:

> 133 Based on the dimensions of the Maher land, the disputed land, Murray's evidence and coupled with the handwritten map and terms of the lease agreement, I find that the May-Kelly lease did not include the disputed land.
>
> …
>
> 158 The question to be determined is whether a squatter's time stops running against the freehold interest in the land by the registered proprietor's mere granting of a lease over the disputed land to a third party.
>
> 159 It is not contentious that where a squatter commences possession on leased land, time will not run against the landlord, but rather the tenant. Time will not run against the freehold interest until the lease expires or is surrendered.
>
> 160 Butt's Land Law (6th edition) (a secondary material referred to in the defendants' submissions) provides at 91 that the grant of a lease where the tenant does not take actual possession does not stop time running, as it does not amount to a factual retaking of possession. Butt cites the case of Simpson v The Council of North West County District (1978) 4 BPR 9277 ('Simpson') to support this conclusion.
>
> …
>
> 166 I do not accept the defendant's submissions that mere entry into a lease stops Murray or Mr Suckling's time running against the registered proprietor.
>
> 167 …Whilst the entry into a lease by the owner would ordinarily suggest a retaking of possession, a factual enquiry must still be made as to whether the lessee has actually committed acts of repossession sufficient to dispossess the adverse possessor.
>
> 168 In addition, it must be brought to the squatter's attention that the registered proprietor is repossessing the land. I agree with the plaintiff's submission that mere entry into a lease, without physical acts of repossession, fails to amount to such notice. The acts of the tenant fall to be considered as to whether those acts amount to a repossession of the disputed land. Precision's payment of rent to Elizabeth Kelly was not observable to the world at large (including Murray), and thus lacked a physical manifestation of repossession. The enquiry that needs to be made is whether the tenant acted in a way which was inconsistent with the possession of the plaintiff or which could be regarded as an assertion of his or her rights as tenant against the possession of the plaintiff.

984. This judgement suggests that for a lease to be an act of dispossession it must be inconsistent with the adverse possession or regarded as an assertion of rights, therefore, to do so a lease will likely have to:

a) include the disputed land;

b) be brought to the attention of the squatter; and

c) involve physical acts of repossession.

985. The defendants in *Manusik* also argued that through physical acts of repossession the plaintiff had been disposed. According to Ryan J, this is a question of fact and requires consideration of both the nature of the acts of repossession and the nature of the land:

> 174 To repossess their land, a title holder must reassert their right to possession, including by retaking factual possession of the land with the requisite intention to possess. Repossession is a question of fact and requires consideration of both the nature of the title holder's conduct and the nature of the land.
>
> 175 This is articulated by A'Beckett ACJ in Robertson v Butler [1915] VLR 31 at 37:
>
> > "The legal effect of acts relied upon as disturbances of possession must in every case depend upon the character of the possession which they are said to disturb. That which would be an interruption of possession evidenced by continuous acts done upon a small area might be no interruption of possession evidenced by intermittent acts of ownership done at difference places over a wide area."
>
> 176 Occasional use of the land itself will be insufficient to amount to retaking of possession.[570] Shared use will also be insufficient to establish the title holder's retaking of possession unless the use is inconsistent with the enjoyment of the land by the squatter.[571]
>
> 177 When assessing factual acts of repossession, "[w]hile previous cases can provide guidance as to the relevant principles which are to be applied, they should be treated with caution in terms of seeking factual analogies by reference to particular features of a person's dealings with land".[572] The Court of Appeal Whittlesea also stated that "a number of acts which, considered separately, might appear equivocal may, considered collectively, unequivocally evidence the requisite intention".[573]

986. Ryan J concluded that fleeting activities such as intermittent fishing and camping did not disturb adverse possession of the disputed land:

> 190 However, the use of the land by a registered proprietor must be sufficient to be inconsistent with the squatter's alleged use. I am of the opinion that, until 2019,

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570 *KY Enterprises Pty Ltd v Darby* [2013] VSC 484 at [139]

571 Ibid at [141]

572 Whittlesea at [6].

573 Ibid.

the acts of the Kelly siblings and the defendants were insufficiently unequivocal to repossess the disputed land from Murray or Mr Suckling.

191 The intermittent fishing and yabbying in the dam, and the camping both at the hut and around the dam were fleeting activities that did not disturb Murray and Mr Suckling's use and possession of the disputed land for farming, grazing, and irrigating. The second defendant's lambs may have grazed on lucerne in the northern portion of the disputed land occasionally, but the transitory use of the disputed land's resources lacks the unequivocal characterisation to manifest repossession of land being used for commercial gain by Murray and Mr Suckling.

987. *Butler* provides another example of a defendant attempting to argue repossession of disputed land. Ms Butler provided evidence about several visits by herself and her family to the disputed land. However, once again, this argument was dismissed by Ryan J:

64 The actions of Ms Butler and her father need to be considered during this period to ascertain whether or not any of their conduct during the period between 1996 and 2011 was sufficient to retake possession, so as to stop the time running for adverse possession by the Dicksons. If a title owner wishes to stop time running, then the title owner must retake possession.

65 Ms Butler gave evidence about a number of visits she and/or other family members made to Lot 6 between 1996 onwards…

66 In order to retake possession, shared use is not sufficient unless the use is inconsistent with the enjoyment of the land by the person then in possession of it, here the Dicksons. The requirement is that the possession must be single and exclusive distinguishes it from mere occupation of the land. There is a distinction between possession and use in principle so that even use by the paper title holder with the permission of the adverse possessor will not be sufficient in itself to stop time running. …

69 The mere entry onto the land on sporadic occasions does not amount to retaking of possession. Such use was not inconsistent with the enjoyment of the land by the Dicksons, as is required for possession to be retaken. There can only be one person in possession. In my view, the visits listed above did not amount to the retaking of possession by the plaintiff or her father. I consider this is apparent from the nature of the visits themselves which were brief and intermittent. Further, on none of these occasions was their presence made known to the Dicksons…

988. As a result of these two cases, it is clear that acts of repossession cannot merely be described as 'ships in the night,' unbeknownst to the adverse possessor.

If there is possession but 15 years has not elapsed

989. If there is possession but the limitation period has not expired yet, the person defending title could consider:

a) issuing legal proceedings to seek a declaration;

b) ejecting the squatter or re-entering the land; and/or

c) rejecting acts of possession e.g. removing or erection a fence, or changing locks

990. However, these actions must be taken with caution and legal advice, in order not to commit trespass, breach the *Fences Act 1968* (Vic) or cause unnecessary conflict.

Matthew Townsend
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