



# Précis Paper

## Restrictive Covenants in Victoria

A discussion about the creation, interpretation, varying and removal of restrictive covenants.

### **Discussion Includes**

- Restrictive covenants
- Creation of restrictive covenants in the 20<sup>th</sup> century
- Creation of modern restrictive covenants
- Interpretation of restrictive covenants
- Varying and removing restrictive covenants
- Section 84 *Property Law Act 1958* (VIC) process

## Précis Paper

# Restrictive Covenants in Victoria

In this edition of BenchTV, Tiphanie Acreman (Barrister, Isaacs Chambers, Melbourne) and Victoria Sivinski (Senior Associate, SBA Law, Melbourne) discuss the creation, interpretation, varying and removal of restrictive covenants.

### Restrictive covenants

1. A restrictive covenant is a private agreement that limits the way that land can be used and developed. It is a promise made by one person (covenantor) to another (covenantee) that they will not do certain things on the land. Covenants burden some land (covenantor's land) and benefit other land (covenantee's land).
2. Covenants are negative in nature, whereas easements are positive in nature and give rights to do things.

### Creation of restrictive covenants in the 20<sup>th</sup> century

3. In the early 20<sup>th</sup> century, covenants were often created by transfers of land. There would usually be a subdivision created and the lots would be transferred out of the parent title. Covenants would be included in the transfer and these appear on the Torrens Register as instruments. They also appear on Register search statements. They were used to regulate land in the way that planning schemes today regulate land, and to create particular characteristics within a subdivision.
4. It was common to have single dwelling covenants in the transfer, where the purchaser promised not to build more than one dwelling on the lots. It was possible to have multiple covenants in a transfer. Another common type of covenant was a materials covenant, which required the dwelling to be constructed using certain materials such as stone or brick.
5. There would often be a network of covenants that were written in similar terms on all the lots within a subdivision.

### Creation of modern restrictive covenants

6. Modern versions of restrictive covenants are often found in plans of subdivision at the end of the plan of subdivision document itself.
7. More commonly, they are used in larger developments where new estates or satellite suburbs or sub-suburbs are being created. The purpose of these covenants is to ensure that the new estate or satellite suburb has the same character and same sort of look and feel throughout the entire development.

8. Another example of a type of covenant, which particularly appears in coastal areas, is a covenant on the plan of subdivision to prevent certain lots that are situated in front of other lots from building above a certain height or permitting trees to grow above a certain height. The purpose is to ensure the views of owners sitting behind them are not obstructed.
9. Another reason to introduce a restrictive covenant onto a title is to prevent a person an owner is selling land to from using the land in a way that would otherwise be permitted by the planning scheme that would be in competition with the owner's own business. This type of covenant would be created by private agreement between a vendor and purchaser as opposed to being created on the plan of subdivision itself.
10. The method of creating these private agreements and registering them on title is to prepare a memorandum of common provisions. This gets registered at the land registry. Once registered, a restriction can be created in the transfer of land by referencing the number of the memorandum of common provisions. Searches of the Register will show that there is a restrictive covenant relating to the land.

#### Interpretation of restrictive covenants

11. Where restrictive covenants are created by private agreements, contractual principles can assist with their interpretation. They often contain a number of exceptions that need to be interpreted, as well as the prohibitions. However, restrictive covenants tend to be interpreted very strictly. The main reason is due to the fact that they are registered on title and subject to the principles of the Torrens system, such as indefeasibility of title and paramountcy of the interest of the registered proprietor. This has an influence on the way in which courts tend to interpret them.
12. Any bona fide purchaser for value without notice purchasing a property should be entitled to rely on what is on the Register. Interpretation by reference to extrinsic materials, or documents incorporated by reference, without the document itself, causes problems for those purchasing land.
13. The covenants in many plans of subdivision often reference design guidelines. Where a document is referenced within the covenant itself, then regard should be had to that document when interpreting the covenant. Design guidelines will often be available at the Council.
14. In the case of *Barport Pty Ltd v Baum* [2019] VSCA 167, a Civil Aviation Safety Authority manual was referenced in one of the covenants on title. The Court of Appeal stated that there can be references made to extrinsic material to interpret the covenant if the extrinsic material is directly referenced in the covenant. The case also supports the principle that these extrinsic materials are capable of being enforced in the covenant.
15. Modern covenants tend to be written in plain English style. Older covenants were often written in archaic language. With older covenants, wording should be taken at face value,

and the person interpreting the covenant should not impugn an intention on the parties that may or may not be correct.

16. In cases involving older covenants, the traditional approach has been to consider the network of covenants, including considering similar covenants on other lots that came from the same parent title, even where they are not referenced in the covenant in question. There exists the question about whether this approach remains appropriate in light of more recent cases such as *196 Hawthorn Road v Duszniak* (2020) 61 VR 539.

#### Varying and removing restrictive covenants

17. To vary or remove a covenant from title, the first step is to determine who the beneficiaries are by conducting a search of the title history. For older covenants, this might include substantive investigative work as lots in a subdivision could have been subdivided again, resulting in many child and grandchild titles that could potentially be the beneficiaries of the covenant.
18. It is also important to consider the way a covenant is worded because at times it will not necessarily benefit all the lots in a plan, particularly for modern covenants. Modern covenants on a plan of subdivision will often specify which lots are to be burdened and which lots are to be benefited by the restrictive covenant.
19. The next step is to determine whether the covenant is enforceable against all potential beneficiaries. If the land was transferred to another person before the covenant was registered, that land will not have the benefit of the covenant. It is therefore incorrect to assume that if the land is within the original plan of subdivision, then it automatically benefits from the covenant. Further research and obtaining copies of transfers is required to determine what date the transfer was registered compared to the date the covenant was registered.
20. The next step is to determine whether obtaining consent from the beneficiaries to remove or vary the covenant is feasible. If there are hundreds of beneficiaries, this option is not reasonable. If this is the case, the better option is to review the *Planning and Environment Act 1987* (VIC) and *Property Law Act 1958* (VIC).

#### Planning permit process

21. One method to remove or vary a restrictive covenant is to apply to the local government council for a planning permit under the *Planning and Environment Act 1987* (VIC). If this is refused, an application seeking review of the decision can be made to the Victorian Civil and Administrative Tribunal.
22. The legal tests applicable under a planning permit application will determine whether or not the course of action is appropriate. For covenants created after 1991, the material detriment test is to be met (*Planning and Environment Act 1987* (VIC), s 60(2)). For covenants created before 1991, the test takes into account any perceived detriment which objecting

beneficiaries might argue. This is a difficult test to meet (*Planning and Environment Act 1987* (VIC), s 60(5)).

23. A further option to remove or vary a restrictive covenant under the *Planning and Environment Act 1987* (VIC) is to apply for a planning scheme amendment. However, this is not a commonly used method.

#### Section 84 *Property Law Act 1958* (VIC) process

24. Another option is to apply for discharge or modification of the covenant under section 84 of the *Property Law Act 1958* (VIC). For covenants created before 1991, this is often the better option to avoid the "perceived detriment test".
25. Section 84(1)(c) prescribes a substantial injury test. The process includes preparing an affidavit in support outlining the beneficiaries and filing of town planning evidence by obtaining an affidavit from a town planner who looks at the town planning circumstances and considers the substantial injury test.
26. The next step in the process is to attend an ex parte directions hearing, where directions will be made for notice to be given to all of the beneficiaries. Notice will commonly also be placed physically on the land. In order to provide notice, the address on the Register will be used for beneficiaries. This is one reason why it is important for a registered proprietor to keep their address for service of notices current with the land registry. A second directions hearing will be listed for about 30 to 45 days later.
27. At the second directions hearing, any objecting beneficiaries can apply to be joined as defendants to the proceeding. If there are no objecting beneficiaries, then the application can go to a non-contested hearing. Even if there are no objecting beneficiaries, the plaintiff is still required to persuade the Supreme Court to exercise its discretion to grant the application. There are instances where the court has declined to exercise its discretion even in the absence of objecting beneficiaries.
28. If there are objecting beneficiaries who wish to be joined as defendants, then the matter will be listed for a contested hearing. This process can take six to eight months and involve filing evidence, mediation and final hearing.

#### Planning permits for developments which breach a restrictive covenant

29. Section 61(4) of the *Planning and Environment Act 1987* (VIC) prevents a planning permit being issued if it would result in the breach of a registered restrictive covenant. There could therefore be situations where, although the planning permit could or should be granted on the planning merits, there is no jurisdiction to grant one because the proposed development would breach a covenant. In the case of someone proposing to develop land that is subject to a restrictive covenant, an application for a permit to vary the covenant needs to be made before or at the same time as the application for a permit to develop the land.

30. In *Healthscope Ltd v Moreland City Council & M Giordano and Ors* [2013] VCAT 99, the John Fawkner Hospital was seeking to extend into neighbouring property which was subject to a single dwelling covenant. The Victorian Civil and Administrative Tribunal determined that the planning merits were appropriate and a permit should be granted, but they did not have the power to grant the permit because the covenant would be breached.

## **BIOGRAPHY**

### Tiphannie Acreman

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Ms Acreman practices in civil and administrative law. Prior to signing the Bar Roll, she was associate to the Hon. Chief Justice Warren and later to the Hon. Justice Judd of the Supreme Court of Victoria. She previously worked at the Department of the Environment and Water Resources where she was involved in the development of the *National Greenhouse and Energy Reporting Act 2007* (Cth). Ms Acreman is recognised in Doyle's Guide to the Australian Legal Profession as a recommended Victorian barrister in planning & environment (2018, 2019, 2020 and 2021). She has been a Board member of the National Environmental Law Association since 2019.

### Victoria Sivinski

Senior Associate, SBA Law, Melbourne

Ms Sivinski has acted for both landlords and tenants in all aspects of leasing transactions, including the negotiation and drafting of agreements for lease and leases. She has also acted for developers on acquisitions, sub-divisions, off the plan sales, construction contracts and leasing transactions within retail, commercial and residential developments. Prior to joining SBA Law, Victoria worked as a lawyer at a boutique Melbourne law firm, where she practised predominantly in the areas of property law, commercial law and commercial litigation.

## **BIBLIOGRAPHY**

### Cases

*Barport Pty Ltd v Baum* [2019] VSCA 167  
*196 Hawthorn Road v Dusznik* (2020) 61 VR 539  
*Healthscope Ltd v Moreland City Council & M Giordano and Ors* [2013] VCAT 99

### Legislation

*Planning and Environment Act 1987* (VIC)

*Property Law Act 1958* (VIC)