



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 91

Restrictive Covenants

REPORT

JUNE 1997

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In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on aspects of the law relating to restrictive covenants.

W S Martin QC, Chairman

9 June 1997

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The pronouns and adjectives "he", "him" and "his", as used in this discussion paper, are not intended to convey the masculine gender alone, but include also the female equivalents "she", "her" and "hers".

Glossary of terms

Bind the land	Where land is subject to a restrictive covenant so that the restrictive covenant is enforceable by either the original owner of the block benefited by the covenant or his successor in title, it is said to bind the land.
Council	The Council of a local government. It is the governing body of a local government and consists of the mayor or president, deputy mayor or deputy president and councillors.
Covenant in gross	A restrictive covenant in which there is land which is subject to a restriction but where there is no land which has the benefit of the covenant.
Covenantee	The landowner who is entitled to the benefit of a restrictive covenant.
Covenantor	The landowner whose land bears an obligation created in a restrictive covenant.
Easement	A right, such as a right of way, annexed to land owned by A concerning the use of land owned by B giving A a right to use B's land in the manner specified in the easement.
Indefeasibility provisions	Provisions in the <i>Transfer of Land Act 1893</i> which ensure that any person who is registered as the holder of an estate in Torrens system land has an interest which is unaffected by any prior claim, except in the case of fraud or the other statutory exceptions.
Local government	A local government established under the <i>Local Government Act 1995</i> .
Local law	A law made by a local government.
Old system land	Land which is not part of the Torrens system, where title must be established by a series of instruments by which the history of the ownership of the land can be traced back to a good title.
Restrictive covenant	An agreement affecting land restricting the use to which the land may be put.
Run with the land	A restrictive covenant passes with the transfer of land and successors in title of the covenantor become liable as covenantors upon the covenant made by their predecessor and the covenant may be enforced in equity against the covenantor's successors by the covenantee and his successors.

Servitude	A burden, whether positive or negative, upon an estate in land for the benefit of another estate in land.
Successors in title	All those who succeed to the title of a predecessor with respect to the land in question.
Torrens system	A system of title to land in which title is conferred by the registration of a dealing in the land under the <i>Transfer of Land Act 1893</i> .
Touch and concern	A requirement that a restrictive covenant must touch and concern land means that it must be for the benefit of land owned by the covenantee. It must not be intended for the personal benefit of the covenantee.

Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission has been asked:

"To review the circumstances, if any, in which restrictive covenants should be used to restrict or regulate the subdivision, development or use of land or to preserve the amenity and aspect of land and, in particular, to consider -

- (a) who can, or should, be a party to a restrictive covenant;
- (b) whether local authorities should have power beyond that of a private landowner to enter into restrictive covenants with owners of land in their area to regulate or restrict the development or use of the land or to preserve the amenity and aspect of land;
- (c) whether there should be any time limit on when a restrictive covenant should be valid;
- (d) the means of enforcing restrictive covenants; and
- (e) who should have standing to, or be empowered to, enforce a restrictive covenant to which they are not a party.

To consider whether local authorities have adequate power to regulate land in their area for the purpose of restricting or regulating the development or use of the land or preserving the amenity and aspect of the land, either permanently or for a specified period of time."

2. THE ORIGIN AND ROLE OF RESTRICTIVE COVENANTS

1.2 A restrictive covenant is an obligation attached to a block of land which restricts the use or enjoyment of that block of land for the benefit of owners of other blocks and their successors in title. A covenant is an agreement between two or more parties. Usually an agreement only binds the parties to it. A restrictive covenant, however, has a more enduring effect than other agreements since the restriction will be binding on subsequent purchasers of the land. The use of land may, therefore, be controlled long after the original parties to the agreement have disposed of their interest in the land concerned. For example, one block owner may agree with another block owner that he will not construct a house on his block

other than in a prescribed building envelope. If the agreement satisfies the rules for creating a restrictive covenant,¹ the covenant is said to run with the burdened land. As a result, those who subsequently acquire the burdened block are under an obligation to the owners for the time being of the benefited block to refrain from constructing a house other than in the prescribed building envelope.

1.3 The use of restrictive covenants as a form of private land-use planning developed in the last century at a time when governments did not control land use as is done today:

"Land developers, in an effort to protect against diminution in value of land caused by inappropriate development of neighbouring property and to promote appreciation of the value of their land, sought to restrict the use of land by restrictive covenants at law. Although the common law provided the tortious remedy of nuisance to proscribe activity on land that injured the neighbour, this remedy was limited by the requirement that a positive action was necessary to support any relief and evidentiary requirements might be difficult to satisfy. In addition the type of development which a party wished to protect against, for example, neighbouring low standard development, might not provide the type of injury that was contemplated by the remedy of nuisance."²

A court of equity might, however, enforce the covenant in some circumstances. Today the State Government and local governments regulate and control town planning,³ subdivisions and building, but there is still a demand for private land-use control. One writer, M J Weir, has suggested that this is due to the greater rigidity of restrictive covenants as compared to town planning schemes.⁴ Because of the changing nature of the urban and semi-urban environment, moves have been made to make town planning more flexible. For example, town planning schemes must be reviewed at least every fifth year.⁵ This relative flexibility is said to encourage ". . . the development of the use of the restrictive covenant, as a primary goal of a covenantee is to preserve the economic value of land which can be affected by incompatible use of neighbouring property."⁶

¹ Para 2.3 below.

² M J Weir *Private and Public Planning - Implications for Legal Processes* (1994) 11 Environmental and Planning Law Journal 137, 138.

³ Town planning legislation was first enacted in Western Australia in 1928: *Town Planning and Development Act 1928*.

⁴ M J Weir *Private and Public Planning - Implications for Legal Processes* (1994) 11 Environmental and Planning Law Journal 137, 140.

⁵ *Town Planning and Development Act 1928* s 7AA(1)(b).

⁶ M J Weir *Private and Public Planning - Implications for Legal Processes* (1994) 11 Environmental and Planning Law Journal 137, 140.

1.4 Another reason for the continued demand for restrictive covenants is that town planning schemes, which deal with the use of land, local laws and building codes may not deal with all the matters that may be necessary to protect the economic interests of a property owner. A developer may wish to preserve the amenity and aspect of the neighbourhood by various restrictions such as those which prohibit the use of materials in walls other than clay brick, concrete or stone or prohibit the use of reflective roofing on houses.

3. MAJOR PROBLEMS

1.5 While restrictive covenants provide a private means of controlling the use of land or the amenity of an area, their existence can result in a conflict between a restrictive covenant and the public interests promoted by town planning schemes and local laws, including building codes. For example, a restrictive covenant made decades ago may limit the use of a block to a single residence but the town planning scheme for the area may permit the erection of a duplex on the block. In this case, a duplex cannot be built unless the Supreme Court or a town planning scheme wholly or partially extinguishes the covenant or those who own land benefited by the covenant agree to it being extinguished. The other major problem is that it can be difficult and expensive to ensure that landowners comply with restrictive covenants. These and other issues are examined in this report.

1.6 The main issues on which recommendations are made in this report are -

- * Should all uses of restrictive covenants be abolished?
- * Should any particular uses of restrictive covenants be abolished?
- * Should limitations be placed on the use of restrictive covenants by developers or others involved in creating new blocks of land?
- * How should inconsistencies between restrictive covenants and a town planning scheme or local law be resolved?

- * How should restrictive covenants be enforced and should local governments have standing to enforce them?
- * Do local governments require any additional powers to control the development or use of land?

4. "OLD SYSTEM" LAND

1.7 In Western Australia there are two systems of title to land: the Torrens system and "old system" land. The Torrens system was introduced to simplify the process of land transfer and to make the title to land more certain. Two systems remain because land alienated by the Crown before the Torrens system was introduced was not automatically brought under the Torrens system and some of that land has not subsequently been brought under the Torrens system. A comparatively small number of titles remain under the old system. The Torrens system provides a more secure system of title than old system land because it is based on a register which describes land and records the owners of interests in that land. Except for some special and very limited circumstances the register is conclusive of the ownership of all interests in the land, and prospective purchasers or mortgagees can safely deal with registered proprietors on that basis. Registration itself vests title in the interest in its owner. The old system title was based on a system of private conveyancing in which it was necessary to check preceding dealings in land to ensure that a person who claimed to own an interest in land had a good title to the interest. The checking process was difficult and expensive. That system has been modified in Western Australia by the *Registration of Deeds Act 1856* which provides a means of registration of deeds and other documents concerning dealings with interests in land, including restrictive covenants.⁷ The main effect of registration is to give priority to documents according to the date of registration.⁸ It differs from the Torrens system in that registration does not confer title.

1.8 Although there is very little old system land in Western Australia, for the sake of completeness, the Commission *recommends* that the recommendations in this Report be applied to that land. In particular, the proposed scheme for the discharge or modification of a restrictive covenant⁹ should be applied to old system land.

⁷ *Registration of Deeds Act 1856* s 2.

⁸ *Id* s 3.

⁹ Para 5.23 below.

5. CONSULTATIONS

1.9 The Commission published a discussion paper in June 1995 seeking comments on the issues raised by the terms of reference. 31 submissions have been received in response to the discussion paper.¹⁰ A Commission officer has also held discussions on the project with members of Parliament, officers of the Ministry for Planning, the Department of Land Administration, local government officers and members of the public. The Commission gratefully acknowledges the help of those who have made submissions or who have otherwise assisted the Commission.

¹⁰ The names of those who made a submission are listed in Appendix I.

Chapter 2

RESTRICTIVE COVENANTS: PRIVATE REGULATION OF THE DEVELOPMENT OR USE OF LAND

1. INTRODUCTION

2.1 The term restrictive covenant is used to describe a special obligation which imposes restrictions on the use or enjoyment of land for the benefit of other land. It differs from ordinary contractual obligations in that it is enforceable by and against persons between whom there may be no privity of contract¹ and between whom there is no privity of estate.² For this reason restrictive covenants are said to "run with the land". One example of a circumstance in which a covenant may be used is where an owner of a block wishes to subdivide the block into two blocks but wishes to preserve the view from one block. A restrictive covenant can be created when one block is sold subject to a covenant which limits the height of the building that can be constructed on it. The owner of that block and all subsequent owners are prohibited by the covenant from constructing a building on the block exceeding the height limit. Another example is where a developer of an area of land subdivides it and transfers each block subject to a restrictive covenant for the protection of the other blocks in the subdivision. All purchasers of blocks in the subdivision may be able to enforce the covenant against each other.

2.2 Some examples of restrictive covenants are covenants that -

- * limit the number of buildings that may be constructed on a block;
- * limit the use to which a block may be put, for example, a covenant may provide that a block can be used only for residential purposes;
- * prohibit the use of materials in walls which are not clay brick, concrete or stone;

¹ That is, the notion that only the parties to a contract may sue on it or be the subject of obligations created by it.

² That is, an immediate relationship such as that between a landlord and tenant.

- * prohibit the use of reflective roofing on buildings on the block;
- * prohibit the erection of asbestos or similar fibre fencing;
- * prohibit the erection of rain water tanks or clothes lines or hoists which are visible from the street;
- * prohibit the placement of solar water heaters or air conditioners on roofs; or
- * prohibit the erection of buildings on a block other than in a prescribed building envelope. There may be various reasons for such a limitation: it may protect an environmentally sensitive area such as a sand dune area on the coast or maintain separation between buildings in a semi-rural or bush setting.

2. CREATION OF RESTRICTIVE COVENANTS

(a) Ensuring that the burden of a restrictive covenant runs with the land

2.3 At common law the burden of a covenant does not run with freehold land so as to bind it in the hands of a person other than the original owner, that is, it does not run to a successor in title of the original owner. However, in equity a restrictive covenant is enforceable against all successors in title to the land whether or not they have notice of the covenant, except in the case of a purchaser for value of the legal estate without notice of the covenant. Under the Torrens system notification of the covenant on the register provides notice to every prospective acquirer of an interest in the land. The burden of the covenant runs with the land and is enforceable against successors in title if the following conditions exist -

- * there is land for the benefit of which the covenant is given, that is, there must be both burdened and benefited land and the covenant must touch and concern the benefited land;³

³ If the covenant is annexed only to the whole of the land it is not enforceable unless it "touches and concerns" the whole as a whole: *In re Ballard's Conveyance* [1937] 1 Ch 473. In this case, the land to which the benefit of the covenant was annexed was about 1,700 acres and the covenant was annexed to the whole only and not to each and every part. It restricted the user of the adjoining 18 acres to dwelling houses. While a breach of the covenant could affect a part of the 1,700 acres in the vicinity of the

- * the burden of the covenant is intended to run with the land;⁴
- * the covenant is negative in nature, in that it requires the owner of the burdened land to refrain from doing certain acts or exercising certain rights,⁵ for example, to restrain a person from erecting buildings on the land, to limit the height of a building or to use a dwelling as a private residence.⁶ It must be a burden on the land, affecting it in the hands of successors in title.

2.4 A restrictive covenant cannot be enforced against a successor in title to the covenantor if the covenantee does not have land for the benefit of which the covenant is given.⁷ Where the covenantee has no land, a successor in title to the original covenantor is bound neither in contract nor in equity. This limitation effectively means that a public authority, including a local government, cannot enforce a restrictive covenant against a successor in title to the covenantor, whether or not it is for a public purpose, unless it has land capable of benefiting from the covenant. Except in the case of estate schemes,⁸ a covenant cannot be annexed to land which the covenantee does not own at the time the covenant is made.⁹

(b) Building or estate schemes

2.5 At the beginning of the century it was recognised that the above rules relating to the passing of the benefit and burden of restrictive covenants were not satisfactory to cope with the enforcement of restrictive covenants in estate schemes.¹⁰ Under these schemes, developers of large-scale subdivisions include restrictions as to the future use or development

burdened land, most of the 1,700 acres would not be affected by a breach of the covenant. The covenant was therefore held to be unenforceable against a subsequent purchaser of the restricted land. If the covenant is annexed to each and every part it may be enforced by any person who has a part which is "touched and concerned" even though some parts may not be "touched and concerned". It cannot be enforced by the owner of a part which is not "touched and concerned": *Marquess of Zetland v Driver* [1939] 1 Ch 1. In Western Australia, unless it is expressly provided to the contrary, a restriction is deemed to be and always to have been annexed to the whole and to each part of that other land capable of benefiting from the restriction: *Property Law Act 1969* s 49.

⁴ S 48 of the *Property Law Act 1969* provides that covenants affecting land are deemed to be made on behalf of the covenantor and his successors in title unless a contrary intention is expressed.

⁵ Positive covenants, such as a covenant to carry out repairs, do not run with freehold land: see generally *Rhone v Stephens* [1994] 2 AC 310.

⁶ *German v Chapman* (1877) 7 Ch D 271.

⁷ *London County Council v Allen* [1914] 3 KB 642.

⁸ Paras 2.5-2.8 below.

⁹ *Kerridge v Foley* (1964) 82 WN (Pt 1) (NSW) 293.

¹⁰ See A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (2nd ed 1997) 18-22 - 18-24.

of each of the blocks in the scheme. They are usually designed to enhance the value and amenity of the neighbourhood. The covenants are imposed on the understanding that each successor in title to the original owner is to have the benefit of the covenants entered into by every other person, whether such person took before or after him from a common vendor.¹¹ Unless there is a waiver or variation of the stipulations, the original vendor is also bound as against his purchasers in respect of any property still owned by him.¹²

2.6 In order to overcome limitations of the rules relating to the passing of the benefit and burden of restrictive covenants, special rules were developed relating to the enforcement of covenants contained in estate schemes. In the leading case, *Elliston v Reacher*, it was held that four requirements had to be established before an owner of a block is entitled in equity to enforce covenants entered into by the owner of another block or his predecessors with the common vendor, the developer, irrespective of the dates they purchased their block -

1. The title to a block must be derived from a common vendor. This rule has been relaxed in at least two circumstances -
 - (a) where a vendor dies after selling some of the blocks in a subdivision and the remaining blocks are sold by his successor in title;¹³ and
 - (b) where blocks in a development are held by a number of developers but they intended to create a common scheme and have made arrangements to carry out this intention.¹⁴
2. The blocks in the scheme should be subject to common restrictions, though there may be varying details as to particular blocks. This requirement has also been relaxed. For example, it has been held that the fact that nine of 115 blocks in a scheme were sold without restrictions did not vitiate the scheme.¹⁵

¹¹ *Elliston v Reacher* [1908] 2 Ch 374.

¹² *MacKenzie v Childers* (1889) 43 Ch D 265.

¹³ *In re Dolphin's Conveyance* [1970] 1 Ch 654.

¹⁴ *Re Mack and the Conveyancing Act* [1975] 2 NSWLR 623, 635.

¹⁵ *Ibid.*

3. The restrictions were intended by the common vendor to be and were for the benefit of all the blocks intended to be sold. They need not be for the benefit of other land retained by the vendor.
4. The plaintiffs and defendants, or their predecessors in title, purchased their blocks from the common vendor on the basis that the restrictions were to enure for the benefit of the other blocks included in the scheme.

2.7 Some estate schemes contain a restrictive covenant to the effect that no building or structure is to be erected on a block without prior written approval of the developer. The developer might also prepare guidelines which are to be taken into account in granting approval and deal with matters such as the type of dwelling permitted and the building materials that can be used. Such restrictions may bind the land notwithstanding that it is necessary to go beyond the encumbrance on the title to know the precise restriction.¹⁶

(c) Estate subschemes

2.8 The owners of certain blocks in a valid estate scheme may agree amongst themselves that different or additional covenants will bind their blocks thus creating an estate subscheme. These covenants are enforceable against other owners of blocks in the subscheme, but do not affect the other owners of blocks in the head scheme.

(d) Creation of a restrictive covenant by notation on subdivision plans

2.9 A recent amendment of the *Transfer of Land Act 1893*¹⁷ provides that a restrictive covenant may be created by the proprietor of land that is a subject of a subdivision plan noting on the plan a restrictive covenant to which the land is proposed to be subject.¹⁸ A restrictive covenant cannot be noted on a plan unless an instrument in an approved form is lodged in relation to the plan and the terms of the covenant are specified in the instrument.¹⁹ Land outside the plan may receive the benefit of the covenant. All persons having a prior registered interest in the land or a caveator are required to consent to the creation of the covenant. In the

¹⁶ *West Lakes Ltd v Makris* [1993] ANZ Conv R 193, 196-197.

¹⁷ By s 81 of the *Transfer of Land Amendment Act 1996*.

¹⁸ *Transfer of Land Act 1893* s 136D(1).

¹⁹ *Id* s 136D(3) and (4).

case of a plan lodged for registration under the *Strata Titles Act 1985* land becomes subject to a covenant noted on the plan at the time the Registrar registers the plan under that Act.²⁰ In other cases land becomes subject to a covenant at the time the new certificate or all new certificates for the land the subject of the plan have been registered.²¹ This new procedure for creating restrictive covenants was introduced because the existing practice was considered to be "cumbersome, confusing and inefficient".²² Under that practice a plan of subdivision had to be approved and the certificate of titles issued by the Registrar of Titles before restrictive covenants could be created. Once the titles were issued, restrictive covenants were created by the proprietor in transfers between the proprietor and purchasers upon sale of each lot in the new subdivision.²³

2.10 The proprietor of land burdened or benefited by a covenant created in this manner may apply for the covenant to be discharged or to be modified in the manner set out in the application.²⁴ That covenant may be discharged or modified with the consent express or implied of each of those who have a registered interest in, or are caveators in respect of, the land.²⁵

(e) Creating a restrictive covenant for the benefit of the Crown or a local government

2.11 Even if the Crown or a local government does not own land capable of being benefited (that is, there is no dominant tenement), a restrictive covenant for the benefit of the Crown or a local government can be created pursuant to section 33A of the *Land Acquisition and Public Works Act 1902*, which was enacted in 1950. Section 33A permits the creation of an easement in gross (that is, an easement without a dominant tenement) and to attach or annex to an easement the benefit of a restriction as to the use of land. A recent amendment of the *Transfer of Land Act 1893*²⁶ provides generally for a covenant in gross benefiting local governments and public authorities to be created.²⁷

²⁰ Id s 136F(1)(a).

²¹ Id s 136F(1)(b).

²² Hon G D Kierath MLA Western Australian Parliamentary Debates (Legislative Assembly) 29 August 1996 p 4863.

²³ Ibid.

²⁴ *Transfer of Land Act 1893* s 136J(1).

²⁵ Id s 136J.

²⁶ By s 76 of the *Transfer of Land Amendment Act 1996*.

²⁷ *Transfer of Land Act 1893* s 129BA. No reason was given by the Minister in his second reading speech for the introduction of this type of covenant.

2.12 Restrictive covenants benefiting a local government may also be made by first creating some sort of easement (for example, a small right of carriageway or perhaps an easement for light and air) or transferring a small area of land, such as a drainage sump, to the government and then making the relevant restrictive covenant appurtenant to that easement.²⁸ However, one requirement which must be established before an owner of a block is entitled to enforce a covenant in an estate scheme is that the restriction must be intended by the developer to be and was for the benefit of all blocks in the scheme.²⁹ It may not be possible to establish this in relation to the land transferred to the local government because it would not be intended that the authority would be an owner in the same manner as the other owners of blocks in the scheme with reciprocal rights, enforceable between all block owners and their successors in title.³⁰ If this were the case, the covenant would be enforceable only between the original parties to it, that is, the developer and the local government.

2.13 Another device used to involve a local government in a restrictive covenant is a deed³¹ between a developer and a local government. The deed between the developer and the local government embodies the restrictive covenants. It contains a number of other clauses to ensure that the restrictive covenants are registered on the title of the blocks. In the deed the developer agrees not to sell a block to another person unless the purchaser has also entered into a deed with a similar effect. The developer also agrees to charge its interest in the subdivision in favour of the local government and authorises the authority to lodge a caveat to prevent a transfer to a purchaser unless the restrictive covenants are created. However, it is debatable ". . . whether there is a chargeable interest between a subsequent purchaser and the Shire".³² If not, the local government could not ensure that transfers to a purchaser created a restrictive covenant. To enable the local government to act in place of the developer in relation to some covenants, such as a covenant requiring a purchaser to obtain the developer's permission to make improvements on the land, the developer also gives the local government an irrevocable power of attorney to act for the developer. This device can only be used if both the developer and the local government are prepared to enter into the deed.³³

²⁸ The amendment to the *Transfer of Land Act 1893* referred to in the previous paragraph will make the use of this device unnecessary.

²⁹ Para 2.6 above.

³⁰ *City of Mitcham v Clothier* (1994) 62 SASR 394, 402.

³¹ A deed is required by the Land Titles Division unless a restrictive covenant is created by a transfer of land: Department of Land Administration *Land Titles Registration Practice in Western Australia* (3rd ed 1994) para 7.150.

³² *Marford Nominees Pty Ltd v State Planning Commission* (unreported) Town Planning Appeal Tribunal of Western Australia 23 February 1995, Appeal No 11 of 1994, 37.

³³ *Bunbury Industrial Park Pty Ltd v State Planning Commission* (1994) 12 SR(WA) 134, 139.

(f) Restrictive covenants created under legislation

2.14 There are a number of situations in which restrictive covenants can be entered into in specific circumstances under legislation.³⁴ Under the *City of Perth Parking Facilities Act 1956*, for example, if the Council sells part of the land in a parking station or facility it may do so subject to such restrictions and conditions as the Council, with the approval of the Minister, imposes.³⁵ Where the Minister approves of any restrictions or conditions, he must lodge a memorial of the restrictions and conditions with the Registrar of Titles. The Registrar must enter a memorandum of the memorial in the register book. Every restriction or condition so entered binds the purchaser of the land and his successors in title (including the owners and occupiers for the time being of the land) other than the Council and may be enforced by the Council in any court of competent jurisdiction and the court may make such order as is necessary in that regard. Any restrictions or conditions then applicable to land may, with the approval of the Minister, be varied. Notice of the variation must be given to the Registrar.

3. RESTRICTIVE COVENANTS AND THE *TRANSFER OF LAND ACT 1893*

2.15 The *Transfer of Land Act 1893* provides that the Registrar of Titles is required to show a restrictive covenant as an encumbrance on the title to the land affected by the covenant.³⁶ The Registrar is not required to make an entry relating to a restrictive covenant on the certificate of title of any person entitled to the benefit of it³⁷ and does not do so in practice except in the case of a covenant imposing a height restriction on buildings on the burdened land. Where the covenant is shown as an encumbrance, it binds subsequent registered proprietors if it is a type of covenant the burden of which runs with the land, but it does not convert an equitable interest into a legal interest.³⁸ That is, the equitable rules regulating the running of the benefit and burden of restrictive covenants are still applicable despite notification on the title. In relation to the burden, registration of the covenant denies a person

³⁴ Eg *Aboriginal Heritage Act 1972* s 27; *City of Perth Parking Facilities Act 1956* s 11B; *Country Areas Water Supply Act 1947* s 12EB; *Heritage of Western Australia Act 1990* s 29; *National Trust of Australia (WA) Act 1964* s 21A.

³⁵ *City of Perth Parking Facilities Act 1956* s 11B(2).
The restrictions or conditions may vary as between different purchasers and as between separate occupancies within the same land, building or structure.

³⁶ *Transfer of Land Act 1893* s 69.

³⁷ Id s 129A(3).

³⁸ A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (2nd ed 1997) 18-11.

who acquires a block and becomes the registered proprietor of it the right to rely on the indefeasibility provisions of the *Transfer of Land Act 1893*.³⁹

4. RESTRICTIVE COVENANTS AND THE *PROPERTY LAW ACT 1969*

2.16 Under the *Property Law Act 1969*⁴⁰ a person may take an immediate or other interest in the benefit of any covenant over or respecting land, although he is not named as a party to the conveyance or other instrument that relates to the land. In these circumstances the covenant may also be enforced by third parties, such as a local government, who are neither parties to the covenant nor assignees or other successors-in-title to the parties to the covenant. According to Bradbrook, MacCallum and Moore the provision merely repeals the common law rule that only a person who is expressly named as a party to a covenant may enforce it.⁴¹ According to them "where X covenants with Y and the owners of adjoining land, the owners of the adjoining land may sue to enforce the covenant by virtue" of the provision.⁴² A significant limitation, however, is that the provision only operates in favour of persons who are in existence and identifiable at the date of the covenant. It therefore does not allow a covenant to be enforced by a future owner.

5. DISCHARGE OR MODIFICATION OF RESTRICTIVE COVENANTS

(a) Introduction

2.17 Restrictive covenants may be modified or discharged in five ways -⁴³

³⁹ See ss 58 (which provides that upon registration of an instrument "the estate or interest comprised in the instrument shall pass or as the case may be the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument"), 68 (which provides that "the proprietor of land or of any estate or interest in land under the operation of this Act shall except in case of fraud hold the same subject to such encumbrances as may be notified on the registered certificate of title for the land"), 69 (which provides that the Registrar of Titles shall "endorse as an encumbrance upon all future certificates of title and their duplicates (if any) any special building condition or condition against free alienation or other condition . . . contained in any grant conveyance or other document of title of the land described in such certificate and its duplicate") and 129A(1) (which provides that a restrictive covenant may be created and "made binding" in respect of land under the Act so far as the law permits). See also *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326 and *Whitfords Beach Pty Ltd v Gadsdon* (1992) 6 WAR 537, 552.

⁴⁰ S 11(1).

⁴¹ A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (2nd ed 1997) 18-4.

⁴² Ibid.

⁴³ See generally A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (2nd ed 1997) 18-28 - 18-36. Some restrictive covenants may be expressed to apply only for a limited period of time such as 40 years.

- * agreement;
- * laches or acquiescence;
- * unity of ownership;
- * court order; and
- * operation of a town planning scheme.

The first four ways are discussed briefly below. The fifth way is discussed in the following chapter.⁴⁴

(b) Agreement

2.18 A restrictive covenant may be discharged or modified by agreement by all persons interested in the land affected by the covenant giving their consent to the discharge or modification.⁴⁵ In the case of Torrens system land, a memorandum of the discharge or modification must be entered in the register book.⁴⁶

(c) Laches or acquiescence

2.19 Where a person is guilty of laches or acquiescence, the general equitable rules prevent the plaintiff obtaining relief in the discretion of the court. Laches is an ". . . equitable defence based on undue delay on the part of the plaintiff in bringing a case. It is most likely to succeed where the delay has been prejudicial to the defendant or a third party, and where an inference can be drawn from the delay that the plaintiff acquiesced in the infringement of the right for which he/she now claims relief".⁴⁷ Acquiescence involves assent, either expressed or implied from conduct, to an infringement of rights by which the right to equitable relief is lost.⁴⁸

⁴⁴ Paras 3.20-3.23 below.

⁴⁵ See *Transfer of Land Act 1893* s 129B(1).

⁴⁶ *Transfer of Land Act* s 129B(2).

⁴⁷ *The CCH Macquarie Dictionary of Law* (2nd ed 1993) 99.

⁴⁸ In its report on *Limitation and Notice of Actions* (Project No 36 Part II 1997) the Commission recommended that all equitable claims should be subject to general Limitation Act principles (para 13.62) but that a court should be able to deny the plaintiff the remedy sought on the grounds of laches or acquiescence, even though the appointed limitation period has not expired (paras 13.76-13.78).

(d) Unity of ownership

2.20 If one person acquires a fee simple estate in possession in both the benefited and burdened land, any restrictive covenant affecting it is discharged and does not revive if the burdened land is later sold. This rule does not apply to estate schemes.⁴⁹

(e) Court order

2.21 Where Torrens system land is subject to a restrictive covenant, the Supreme Court may, on the application of any person interested in the burdened land or any local government or public authority benefited by the restriction, order that the covenant be wholly or partially extinguished, discharged or modified.⁵⁰ That may be done if the Court is satisfied that -

1. by reason of any change in the user of any land to which the benefit of the restriction is annexed, or changes in the character of the property or neighbourhood⁵¹ or other material circumstances, the restriction ought to be deemed to have been abandoned or to be obsolete or that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or would, unless modified, so impede such user;
2. the persons entitled to the benefit of the restriction have agreed to it being wholly or partially extinguished, discharged or modified or may reasonably be considered to have waived the benefit of the restriction wholly or in part; or

⁴⁹ See paras 2.5-2.8 above.

⁵⁰ *Transfer of Land Act 1893* s 129C(1).

⁵¹ Various approaches have been adopted to defining the meaning of "neighbourhood". In *Smith v Australian Real Estate & Investment Co Ltd* [1964] WAR 163, 166 Negus J stated that the term means the immediate vicinity of the subject site including lots whose owners might reasonably expect to gain benefits from a restrictive covenant. In *Wall v Australian Real Estate Investment Co Ltd* [1978] WAR 187, 191 Lavan SPJ held that ". . . the meaning of the word 'neighbourhood' will vary according to the facts and circumstances of the case in which the definition is called for. Having regard to the nature of the locality in the vicinity of the subject site, I consider that, in relation to this application, the term extends to cover not merely the lots in the immediate vicinity which are entitled to the benefit of the restriction, but also to the lots within a reasonable radius of such subject site whether subject to the covenant or not."

3. the proposed extinguishment, discharge or modification will not substantially⁵² injure the persons entitled to the benefit of the restriction.

When proceedings are instituted to enforce any rights arising out of the breach of a restrictive covenant affecting Torrens system land, any person against whom the proceedings are instituted may apply in those proceedings to the Court for an order in the above terms.⁵³ The register book must, on application, be amended to give effect to the order in respect of all certificates of title specified in the order.⁵⁴ The costs of and incidental to an application for a court order cannot be awarded against the defendant or respondent in any event.⁵⁵

2.22 In *Kort Pty Ltd v Shaw*⁵⁶ an application was made to discharge or modify a restrictive covenant which provided that the burdened land should be used only for a single residence. At the time of the application the local town planning scheme permitted multiple residences to be built on the block and such a development had been approved by the local council for the block. The discharge or modification of the restriction was refused because there were practical benefits to be gained by neighbouring owners from the continuation of the covenant and the covenant did not impede the reasonable user of the land. The applicant could not establish that discharge would not substantially injure persons entitled to the benefit of the restriction. In another case,⁵⁷ a restrictive covenant which provided that only one dwelling house could be erected on a lot was ordered to be extinguished because those entitled to the benefit of the covenant would not suffer substantial injury. The proposed development was multiple residential in nature and the immediate neighbourhood had been established as the site of multiple residential developments without "impinging on the comfort of the residents of the district".⁵⁸

⁵² In Victoria it has been held that "substantially" involves a dichotomy between "cases involving some, genuinely felt but insubstantial injury, on the one hand, and cases where the injury may truly be described as substantial, on the other": *Greenwood v Burrows* [1993] ANZ Conv R 197, 204. In New South Wales it has been held that "substantially" "connotes injury which has substance in the sense of being real or appreciable": *Webster v Bradac* [1994] ANZ Conv R 260, 262. The injury may, for example, be economic (a reduction in the value of the land benefited), physical (subjection to noise or traffic) or intangible (impairment of views).

⁵³ *Transfer of Land Act 1893* s 129C(2).

⁵⁴ *Id* s 129C(7).

⁵⁵ *Id* s 129C(8).

⁵⁶ [1983] WAR 113. See also *Perth Construction Pty Ltd v Mount Lawley Pty Ltd* (1955) 57 WALR 41, *Smith v Australian Real Estate & Investment Co Ltd* [1964] WAR 163 and *Re Robinson* [1972] VR 278 (discussed at (1972) 46 ALJ 533).

⁵⁷ *Wall v Australian Real Estate Investment Co Ltd* [1978] WAR 187.

⁵⁸ *Id* 192.

2.23 Where an application is made for an order that a covenant be wholly or partially extinguished, discharged or modified, the Court may direct that notice of the application be given to the relevant local government and to any other person as the Court may order.⁵⁹ In practice, it may also be necessary to publish the notice in the public notices column of *The West Australian* newspaper. The application is made by an originating summons to the Supreme Court, returnable before a Registrar. Once the notice has been given and any other directions complied with, where it appears that the application will not be opposed, a Registrar may proceed to deal with the application.⁶⁰ If there is an objection the application is dealt with by a Master.⁶¹

6. ENFORCEMENT OF RESTRICTIVE COVENANTS

2.24 In most cases a restrictive covenant will be enforceable in the Supreme Court in equity.⁶² The remedies available are prohibitory,⁶³ mandatory,⁶⁴ quia timet,⁶⁵ and interlocutory injunctions⁶⁶ to restrain or put right breaches of restrictive covenants, and declarations. Injunctions are discretionary remedies and do not issue as of right. In addition to or in substitution for an injunction, the Court may award equitable damages for a breach of a restrictive covenant.⁶⁷

2.25 The following general rules apply to the question of whether damages should be granted in addition to or in substitution for an injunction -

⁵⁹ *Transfer of Land Act 1893* s 129C(4). The form of the notice is set out in the schedule to Form 12 of the Common Forms of the *Rules of the Supreme Court 1971*.

⁶⁰ *Rules of the Supreme Court 1971* O 58 r 30(2).

⁶¹ The Commission understands that about 10-12 applications are made each year. In most cases there is no objection and the application is granted. Most applications concern cases in which a person wishes to build a duplex or triplex where the covenant restricts the use of the lot to a single residence. It is unusual for applications to be made for the discharge or modification of covenants relating to the amenity of an area.

⁶² That is, in cases other than those where damages may be recovered at law for breach of a covenant by the covenantee or his assignee or successor-in-title to whom the benefit of the covenant has run at law against the covenantor or his personal representative: A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (2nd ed 1997) 18-36.

⁶³ An injunction to restrain a defendant from performing a particular act.

⁶⁴ An injunction to order the defendant to perform a particular act, for example, to demolish a structure built in contravention of a restrictive covenant.

⁶⁵ An injunction "to prevent or restrain an apprehended or threatened wrong": *Butterworths Australian Legal Dictionary* (1997) 972.

⁶⁶ An injunction to prevent the occurrence of specific acts until the rights of the parties are determined at the hearing of the main action.

⁶⁷ *Supreme Court Act 1935* s 25(10). See M J Tilbury *Civil Remedies: Principles of Civil Remedies* (Vol 1 1990) 184-192, B Kercher and M Noone *Remedies* (2nd ed 1990) 213-217, A J Bradbrook and M A Neave *Easements and Restrictive Covenants in Australia* (1981) 348-353 and P M McDermott *Equitable Damages* (1994).

1. A person who commits a wrongful act should not be entitled to ask the court to sanction his doing so by assessing damages to compensate his neighbour for the breach of that person's rights. In such cases the rule is "not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction".⁶⁸
2. However, damages in substitution for an injunction may be awarded if the "plaintiff by his acts or laches has disentitled himself to an injunction".⁶⁹
3. A good working rule is that damages in substitution for an injunction may also be awarded:
 - "(1.) If the injury to the plaintiff's legal rights is small,
 - (2.) And is one which is capable of being estimated in money,
 - (3.) And is one which can be adequately compensated by a small money payment,
 - (4.) And the case is one in which it would be oppressive to the defendant to grant an injunction".⁷⁰
4. Even if the requirements in item 3 exist, a defendant may disentitle himself from asking for damages by his conduct, for example, by "hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights".⁷¹

2.26 One example of damages being given as a substitute for a mandatory injunction is *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*.⁷² In this case, the damages were assessed as the sum of money which might reasonably have been demanded by the plaintiffs from the developer as a quid pro quo for relaxing the covenant. A developer built a number of houses in breach of a covenant preventing it from building except in accordance with a layout plan submitted to and approved by the plaintiffs. The plaintiffs commenced

⁶⁸ *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 322.

⁶⁹ Ibid. On laches see para 2.19 above.

⁷⁰ *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 322-323.

⁷¹ Id 323.

⁷² [1974] 1 WLR 798.

proceedings for an injunction shortly after the building work began but did not seek interlocutory relief. All houses were completed by the date of the trial. The trial judge refused to issue the injunction because it would ". . . be an unpardonable waste of much needed houses to direct that they now be pulled down".⁷³

2.27 Another example is *Jaggard v Sawyer*⁷⁴ where it was decided that it would be oppressive to grant an injunction and the plaintiff was awarded damages based on the price the defendant might reasonably have been required to pay the plaintiff for release from the covenant. That case involved an estate development served by a private road. The defendant built a house on a block which was not part of the estate but was contiguous with a block in the estate and was serviced by the private road through the block which was part of the estate. The defendant believed that the road was a public road. The plaintiff threatened to bring proceedings for an injunction before construction began but did not do so until two months after construction of the house began and when building was at an advanced stage. The judge found that the defendant had not acted in blatant and calculated disregard of the plaintiff's rights. Although the defendant had known of the covenant, he had failed to appreciate its effect. It would have weighed against a finding of oppression if the defendant had acted in blatant and calculated disregard of the plaintiff's rights, of which he was aware.⁷⁵

2.28 If damages are given in addition to an injunction they are to compensate for the injury which has been done. The injunction will prevent its continuance or repetition. If damages are given in substitution for an injunction they cover not only injury already sustained but also injury that would be inflicted in the future by the commission of the threatened act. If no injury has been sustained, the damages will be only for damage to be sustained in the future by injuries which the injunction, if granted, would have prevented.⁷⁶ "The doctrine of res judicata operates to prevent the plaintiff and his successors in title from bringing proceedings thereafter to recover even nominal damages in respect of further wrongs for which the plaintiff has been fully compensated."⁷⁷

⁷³ Id 811. For a case in which alterations to a building carried out in contravention of a covenant were ordered to be demolished see *Post Investments Pty Ltd v Wilson* (1990) 26 NSWLR 598.

⁷⁴ [1995] 1 WLR 269.

⁷⁵ Id 283.

⁷⁶ *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851.

⁷⁷ *Jaggard v Sawyer* [1995] 1 WLR 269, 286.

2.29 Unlike the Supreme Court, the District Court of Western Australia does not have a general equitable jurisdiction. Except in three instances specifically provided for,⁷⁸ claims for equitable relief as principal relief are beyond the jurisdiction of the District Court.⁷⁹ The District Court may, however, grant equitable remedies as an ancillary power of the Court to be exercised in the determination of claims otherwise within the jurisdiction of the Court.⁸⁰ Accordingly, if a claim for damages for breach of covenant were made, injunctive relief could be sought as relief ancillary to that claim. However, if there is no existing breach but merely a threat of breach, then no claim for damages could be made with the consequence that any claim for injunctive or declaratory relief would fall outside the jurisdiction of the District Court.

2.30 Local Courts, like the District Court, do not have a general equitable jurisdiction. Under section 32 of the *Local Courts Act 1904*, Local Courts have jurisdiction to determine an equitable claim or demand in respect of which the only relief sought is the recovery of a sum of money or damages, whether liquidated or unliquidated, and the amount claimed is not more than \$25,000.⁸¹ As damages in lieu of an injunction are, under section 25(10) of the *Supreme Court Act 1935*, a form of equitable claim for damages⁸² section 32 of the *Local Courts Act* confers on Local Courts jurisdiction in respect of such a claim for damages for a breach of a restrictive covenant. For this purpose, section 33 of the *Local Courts Act* gives the Local Courts all the powers of the Supreme Court in its equitable jurisdiction including the power to award damages in lieu of the injunction. The jurisdiction of Local Courts is not limited by their inability to give injunctive relief.⁸³

⁷⁸ *District Court of Western Australia Act 1969* ss 50(1)(b) (relating to partnerships), 50(1)(ba) (relating to deceased estates) and 50(1)(bb) (an action for specific performance).

⁷⁹ *Commercial Developments Pty Ltd (t/as Don Rogers Motors Pty Ltd) v Mercantile Mutual Insurance (Workers' Compensation) Limited* (1991) 5 WAR 208, 217.

⁸⁰ Ibid.

⁸¹ See *Dunlop Olympic Ltd v Ellis* [1986] WAR 8, 15 where one judge, Brinsden J, held that a claim for rent under a void lease of which equity would grant specific performance is an equitable claim within the meaning of s 32.

⁸² See *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245, 256.

⁸³ Ibid. See *Rapoff v Doropoulos* (1990) 3 WAR 451 where it was held that s 32 gave Local Courts jurisdiction where the only relief sought is a money claim notwithstanding that a Local Court could not grant an order for specific performance.

In its report on *Local Courts: Jurisdiction, Procedures and Administration* (Project No 16 Part 1 1988), the Commission noted that it is not clear whether, by virtue of s 33 of the *Local Courts Act 1904*, a Local Court has power to grant equitable remedies as ancillary relief where it is sought to recover a sum of money or damages in an equitable claim under s 32. The Commission recommended at para 4.23(c) that it should be made clear that, for the purpose of determining equitable money claims, Local Courts are deemed to have the equitable jurisdiction of the Supreme Court. The Commission also recommended (at para 4.45) that in regard to any claim within the jurisdiction of Local Courts, whether legal or equitable, the Local Courts should be able to grant equitable remedies as ancillary relief.

2.31 In addition, if both parties agree, by a memorandum, that any specified Local Court shall have jurisdiction to try any action which might be brought in the Supreme Court, that Local Court shall have jurisdiction to try the action.⁸⁴ In doing so, the Court could grant such relief, redress or remedy in as full and ample a manner as might be done in the like case by the Supreme Court⁸⁵ including granting injunctive relief. The Court's power is subject to section 30(2)(b) of the *Local Courts Act 1904* which provides that a Local Court shall not have jurisdiction to hear and determine any action in which the title to land is in question. The exclusion is qualified by the proviso that if the title to land incidentally comes in question in an action, the Court is empowered to decide the claim which it is the immediate object of the action to enforce, but the judgment of the Court is not evidence of title between the parties or their privies in another action in that Court or in any proceedings in any other court.⁸⁶

⁸⁴ *Local Courts Act 1904* s 39. Contrast s 50(1)(e) of the *District Court of Western Australia Act 1969*, under which if the sum claimed is more than \$250,000 the parties may agree by a memorandum that the District Court has power to hear and determine the matter. It appears that this provision does not overcome all jurisdictional limits, but only limits as to the size of the claim.

⁸⁵ *Local Courts Act 1904* s 33.

⁸⁶ *Id* s 30(3).

Chapter 3

PUBLIC REGULATION OF THE DEVELOPMENT OR USE OF LAND

1. MEANS OF REGULATION

(a) Introduction

3.1 There is a series of mechanisms by which public authorities regulate the development or use of land in Western Australia. They apply when new blocks of land are created, when they are developed by building or other works or when they are used for various purposes. Those mechanisms relevant to a discussion of the use of restrictive covenants as a means of private land use control are discussed below.

(b) Control of the creation of blocks of land

3.2 Responsibility for approving plans for the creation of new blocks of land by the subdivision of a block of land lies with the Western Australian Planning Commission.¹ Local governments are not directly responsible for this process. However, where a plan for the subdivision of a block may "affect the powers or functions" of a local government,² the Commission is required to send a plan of subdivision to the authority for "objections or recommendations". The Commission may also refer the plan to other public bodies under this provision. Having considered any objections or recommendations, the Commission may approve the subdivision subject to such conditions as it thinks fit.³ There is a right of appeal from the Commission's decision to the Minister or the Town Planning Appeal Tribunal.⁴ Any conditions imposed should relate to the development and be in accordance with town planning

¹ *Town Planning and Development Act 1928* s 20(1)(a).

² *Id* s 24(1).

³ *Id* s 24(3). The Town Planning Court of Western Australia in *Della-Vedova v Town Planning Board* 8 June 1978 (unreported but cited by C Wheeler *Role of Town Planning Board and Local Authority Policies in Relation to Development Applications* Paper No 3, 9 Law Society of Western Australia Seminar on Town Planning and Local Government (1986)) stated:

"There would seem . . . to be very little point in obliging the Board to refer the applications to these organisations unless it is able to exercise its discretion if it thought fit, based on any objection or recommendation any such organisation may furnish to it."

⁴ *Town Planning and Development Act 1928* ss 26(1)(a) and 39(1).

principles.⁵ They must also be capable of being "carried out before the approval becomes effective."⁶ A condition which survives the effective approval does not meet this criterion and is therefore invalid.⁷ The Registrar of Titles cannot issue a certificate of title for land the subject of a subdivision unless the subdivision has been approved by the Commission.⁸

3.3 The subdivision of land involves the preparation and submission to the Western Australian Planning Commission of a detailed plan of survey setting out details of streets, the blocks to be created, their sizes and frontages to roads, drainage, sewerage and water, underground power, and the provision of public open space. Conditions imposed on the approval of the plan will vary between subdivisions but might include construction of a dual use path network or the provision of a uniform style of fencing along the residential block boundaries abutting any public open space and drainage reserves to the satisfaction of the local government. Generally the conditions imposed on the approval of a plan of subdivision do not relate to or conflict with matters dealt with by restrictive covenants.

(c) Town planning schemes

(i) Creation or amendment

3.4 A town planning scheme is the principal means that a local government has to regulate land in its area for the purpose of restricting or regulating its development or use or preserving its amenity and aspect.⁹ These schemes are made under the *Town Planning and Development Act 1928*. A town planning scheme may be made with the general object of improving and developing land in a local government area and making suitable provision for the use of land for building or other purposes and for all or any of the purposes, provisions, powers or works set out in the First Schedule of the Act.¹⁰

⁵ *Lloyd v Robinson* (1962) 107 CLR 142, 153.

⁶ *Town Planning and Development Act 1928* s 20(1).

⁷ *City Car Park Pty Ltd v Town Planning Board* (1985) 2 SR(WA) 301, 310.

⁸ *Town Planning and Development Act 1928* s 20(2).

⁹ In some circumstances, in the absence of a town planning scheme, the Minister may make an interim development order for regulating, restricting or prohibiting the development of land: *Town Planning and Development Act 1928* s 7B.

¹⁰ S 6.

3.5 In the Perth Metropolitan Region,¹¹ a town planning scheme must be in accordance with and consistent with the Metropolitan Region Scheme (the "MRS").¹² The MRS is a structure plan with broad categories of zonings within which town planning schemes provide local planning detail. Its purpose is to ensure the orderly development of land within the metropolitan region and to set aside land for parks, regional roads and other public purposes. Except as otherwise provided in the MRS, no development of any land within the metropolitan region can be commenced or continued without the written approval of the responsible authority in addition to any other approval required by law.¹³ The authority, "having regard to the purpose for which the land is zoned or reserved under the Scheme, the orderly and proper planning of the locality and the preservation of the amenities of the locality may, in respect of any application for approval to commence development, refuse its approval or may grant its approval subject to such conditions if any as it may deem fit."¹⁴ Conditions of a continuing nature can be imposed¹⁵ and enforced under the *Metropolitan Region Town Planning Scheme Act 1959*.¹⁶

3.6 The preparation or adoption of a town planning scheme or an amendment¹⁷ involves consultation with owners and occupiers of land in the municipality. Once the scheme documents have been prepared the local government must resolve either to adopt the proposed scheme or not to proceed with it.¹⁸ If the local government resolves to proceed with the scheme it must be submitted to the Western Australian Planning Commission which recommends to the Minister whether or not he should give his consent for the scheme to be advertised for public inspection.¹⁹ Where this consent is given, notice of the scheme must be advertised.²⁰ The local government must also make reasonable endeavours to consult such

¹¹ That is, the region described in the Third Schedule of the *Metropolitan Region Town Planning Scheme Act 1959*.

¹² *Metropolitan Region Town Planning Scheme Act 1959* s 34.

¹³ Metropolitan Region Scheme cl 10.

¹⁴ Id cl 30(1).

¹⁵ *City of Perth v Food Plus Pty Ltd* [1983] WAR 382.

¹⁶ S 42. See paras 3.14-3.15 below.

¹⁷ Amendments to schemes prepared by local governments are dealt with in a similar manner. So too are schemes which a local government adopts, with or without modifications, proposed by all or any of the owners of any land with respect to which it might itself have prepared a scheme.

¹⁸ *Town Planning Regulations 1967* reg 13(1).

¹⁹ Id reg 13(2).

²⁰ Id reg 15.

public authorities and persons as appear to the local government to be likely to be affected by the scheme or amendment.²¹

3.7 At the next stage of the process, once the Minister has given his consent for the scheme to be advertised, members of the public may make submissions to the local government, which must consider all submissions.²² After considering any submissions, the local government must either adopt the scheme with or without modification or resolve that it does not wish to proceed with the scheme.²³ The scheme documents must then be forwarded to the Western Australian Planning Commission, together with a schedule of submissions made on the scheme, which must submit the scheme to the Minister with its recommendations.²⁴ Ultimately, the Minister may approve the scheme, refuse to approve it or require the local government to modify it in such manner as he specifies before it is resubmitted for his approval.²⁵ This process is obviously time consuming and complex.

3.8 Under the *Town Planning and Development Act 1928*, the Minister may by regulation prescribe a set of general provisions for carrying out the general objects of town planning schemes, and in particular for dealing with matters set out in the First Schedule.²⁶ Where a town planning scheme is made in respect of an area, the general provisions have effect as part of the scheme, except so far as the scheme provides for the variation or exclusion of a provision.²⁷ Special provisions may also be inserted in a town planning scheme providing for any matters which may be dealt with by general provisions.²⁸ Matters set out in the First Schedule include:

"6. The replanning or reconstruction of the scheme area, or any part thereof, including any provisions necessary for -

²¹ The local government must also comply with procedures involving reference of proposed schemes or amendments to the Environmental Protection Authority: *Town Planning and Development Act 1928* ss 7A1-7A4.

²² *Town Planning Regulations 1967* reg 17(1).

²³ Id reg 17(2).

²⁴ Id reg 19. There is a further opportunity for public comment where the Minister is of opinion that a modification to the scheme is substantial: id reg 20.

²⁵ *Town Planning and Development Act 1928* s 7(2a).

²⁶ Id s 8(1).

The regulations no longer set out these general provisions but the Ministry for Planning provides local governments with a Model Scheme Text. Reg 11(1) of the *Town Planning Regulations 1967* provides that a scheme text ". . . shall be prepared in such manner and form as the Commission may require."

²⁷ *Town Planning and Development Act 1928* s 8(1a).

²⁸ Id s 8(2)(c).

- (f) adjustment of rights between . . . owners or other persons interested in . . . lands, roads, streets, or rights of way;

15. The extinction or variation of any right-of-way or easement, public or private, or of any restrictive covenant or covenants affecting land."

3.9 In preparing or amending a town planning scheme a local government must have due regard to any approved statement of planning policy prepared under the *Town Planning and Development Act 1928*²⁹ by the Western Australian Planning Commission with the approval of the Minister which affects its district.³⁰ If the scheme provides that a specified statement of planning policy shall be read as part of the scheme, the scheme has effect as if the statement of planning policy was set out in full in the scheme.³¹

(ii) *Zones*

3.10 Town planning schemes set zones for land use in the area covered by the scheme. Land may, for example, be zoned residential, commercial, light industrial, rural or special rural. In relation to particular zones certain standards may be set including the minimum size of blocks and other matters such as the minimum setback of buildings from boundaries.

3.11 In the case of residential zones, unless a scheme otherwise provides, uniform conditions are imposed under a Statement of Planning Policy prepared by the Ministry for Planning called the *Residential Planning Codes*.³² This Code deals with single houses, grouped dwellings,³³ multiple dwellings³⁴ and special purpose dwellings.³⁵ Residential land is given a code according to Table 1 of the *Residential Planning Codes*, for example, R10. This code determines the type of residence that can be constructed on a block. If a block is zoned R10, for example, it can be used for a single house or a grouped dwelling. The minimum area of lot per dwelling is 1000 square metres: that is, if the lot is only 1500 square metres only

²⁹ S 5AA which provides for the preparation of statements of planning policy. Statement of Planning Policy No 1 *Residential Planning Codes* (as amended 1991) was published in the Government Gazette on 13 December 1991. It deals with matters such as the area of land required for each kind of dwelling, plot ratios and setbacks from boundaries.

³⁰ *Town Planning and Development Act 1928* s 7(5)(a).

³¹ Id s 7(5)(c).

³² *Government Gazette* 13 December 1991, 6265.

³³ One of two or more dwellings on the same block such that no dwelling is placed wholly or partly vertically above another, except where special conditions of landscape or topography dictate otherwise.

³⁴ A dwelling in a group of more than one where any part of a dwelling is vertically above a part of any other.

³⁵ For example, a dwelling designed for the accommodation of aged or dependent persons.

one residence can be built on the block. At least 60% of the block must be open space and, in the case of a single residence, at least two car parking spaces must be provided for each block.

3.12 The *Residential Planning Codes* also authorise Councils to impose conditions on a development relating to the amenity of the development. Clause 1.7.1 of the Code provides that the Council may impose conditions relating to:

- "(a) the height or location of buildings;
- (b) the preservation of existing trees or areas or buildings of architectural or historical interest;
- (c) building materials and finishes where these relate to the preservation of local character and the amenity of the area generally;
- (d) the dispersal of building bulk in order to minimise its impact;
- (e) an increase in building setbacks where the adjoining land is controlled under a lower density residential code in order to ensure adequate protection for adjoining residents;
- (f) the location and orientation of a building or buildings on a lot in order to achieve higher standards of day-lighting, sunshine or privacy or to avoid visual monotony in the street scene as a whole."

To this end, town planning schemes may provide, for example, that the Council must be satisfied that the appearance of a proposed building will not destroy local amenities and will be in harmony with the exterior designs of adjoining buildings. Town planning schemes may also require plans to be approved showing the landscape of a block including the quantity of shrubs to be planted. They may also control the use of solar heaters or air-conditioners by requiring, for example, that they are sympathetically integrated with the shape or form of the roof and are of a colour which complements the colour of the roof.

3.13 Another category of land zoning is special rural. Special conditions apply to such land depending on its location and physical condition. For example, those conditions might -

- * limit block sizes to a minimum of two hectares;
- * provide that no further subdivision of lots shall be permitted;
- * prohibit the construction of any building unless it is within a prescribed building envelope;
- * provide that the block can be used only for residential or equestrian purposes;
- * prohibit the keeping of livestock and poultry for commercial purposes;

- * require that the land be managed so as to avoid the land being laid bare of vegetation resulting in loose, wind erodible conditions;
- * require the owner to plant and maintain for a period of two years a specified number of trees of a species native to the area; or
- * limit the number of animals such as horses that can be kept on each block.

(iii) *Breaches of town planning schemes*

3.14 A person who contravenes or fails to comply with the provisions of a town planning scheme is guilty of an offence carrying a penalty of \$50,000, and a daily penalty of \$5,000.³⁶ It is also an offence to commence or continue to carry out any development which is required to comply with a town planning scheme otherwise than in accordance with the scheme or with any condition imposed with respect to the development by the responsible authority. A similar provision in the *Metropolitan Region Town Planning Scheme Act 1959*, section 42,³⁷ was considered in *Esther Investment Pty Ltd v Dawson*.³⁸

3.15 The responsible authority also has power, after giving notice, to remove or alter any building or other work which has been commenced or continued which is in contravention of the scheme.³⁹ Any expenses incurred in so doing may be recovered from the person in default.⁴⁰ If any question arises whether any building or work contravenes a town planning scheme, the question can be referred to the Minister as arbitrator whose decision shall be final and conclusive.⁴¹

(iv) *Inconsistencies between town planning schemes and restrictive covenants*

3.16 It is not unusual for there to be inconsistencies between a town planning scheme and a restrictive covenant. This can occur where a restrictive covenant provides, for example, that not more than one residence can be built on a block but the town planning scheme allows for a duplex to be built on it or for the block to be used for commercial purposes. In this case the landowner must comply with both the town planning scheme and the covenant because the

³⁶ *Town Planning and Development Act 1928* s 10(4)(a)(i).

³⁷ See para 5.52 below.

³⁸ (1985) 62 LGRA 53. See para 5.53 below.

³⁹ *Town Planning and Development Act 1928* s 10(1).

⁴⁰ Id s 10(2).

⁴¹ Id s 10(3).

fact that the scheme allows a wider use does not provide a defence to an action for breach of the covenant.⁴²

(d) Planning policies⁴³

3.17 Another means used by a local government to regulate the development or use of land in its area is the adoption of planning policies. In some cases these are adopted under town planning schemes⁴⁴ and set minimum standards for particular areas or districts in the town planning scheme area. In other cases they complement the town planning scheme and apply to the area covered by the scheme.⁴⁵ They may be prepared in conjunction with a developer as an alternative to the use of restrictive covenants. Standards similar to those set out in restrictive covenants can be incorporated in planning policies.⁴⁶ Under the Model Scheme Text, before a policy can become operative, the Council must publicise details of where it may be inspected. Policies which may be inconsistent with the town planning scheme must be submitted to the Western Australian Planning Commission for consideration and advice. The Council must review the policy in the light of any submissions made and advice received. It must then adopt the policy, with or without modifications, or decide not to proceed with it. Where it is adopted, notice of that adoption must be given in a newspaper circulating within the scheme area. A policy does not bind the Council in respect of any application for planning approval but the Council must have due regard to its provisions and objectives before making a decision. Developments in areas covered by planning policies can, therefore, be managed in the same way as other aspects of town planning. A planning policy can be amended in the same way as the policy became operative.

⁴² See A J Bradbrook and M A Neave *Easements and Restrictive Covenants in Australia* (1981) para 1225. In *Hicks v City of Melville and Richards* (unreported) Town Planning Appeal Tribunal of Western Australia Appeal No 10 of 1994 (28 September 1994) the Tribunal at 8 stated that general provisions in town planning schemes which were inconsistent with a restrictive covenant would not have the effect of extinguishing the covenant and the scheme and the covenant would have to be read together.

⁴³ Planning policies which are adopted by local governments should be distinguished from statements of planning policy which are prepared by the Western Australian Planning Commission with the approval of the Minister (para 3.9 above).

⁴⁴ For example, the City of Wanneroo Town Planning Scheme No 1 (as amended) contains provisions for the making of Planning Policies. These provisions are set out in Appendix II. They are based on the Model Scheme Text prepared by the Ministry for Planning. There is no specific power to make planning policies. According to the Model Scheme Text prepared by the Ministry of Planning (May 1994 Revision): "The policies are not written into the Scheme but are given statutory effect by reference to these provisions."

⁴⁵ See eg City of South Perth Planning Policy No P31, *Visual Privacy*.

⁴⁶ In accordance with the provisions in the City of Wanneroo's Town Planning Scheme, design guidelines have been prepared for a number of subdivisions and have been adopted by the Council as policy for applications for building approval in the areas covered by the guidelines.

(e) Building Code of Australia

3.18 Subject to various exemptions, buildings must comply with standards set out in the *Building Code of Australia 1990* (or any variations made in Western Australia) published by the Australian Uniform Building Regulations Co-ordinating Council, now renamed the Australian Building Codes Board.⁴⁷ The Code provides generally that every building must be constructed in a proper and workmanlike manner, using materials that are not faulty or unsuitable for the purpose for which they are intended.⁴⁸ It also sets standards for particular matters including fire resistance of building elements, structure and loads, damp and weatherproofing, light and ventilation, noise transmission and insulation.

2. USE OF RESTRICTIVE COVENANTS IN TOWN PLANNING

3.19 As part of its power to approve subdivisions of land,⁴⁹ the Western Australian Planning Commission has, in exceptional circumstances, required a developer to impose restrictive covenants on an estate development as a condition of the approval of a subdivision. The Town Planning Appeal Tribunal, on an appeal from a decision of the Western Australian Planning Commission, has also from time to time imposed a condition on the approval of a subdivision requiring the imposition of restrictive covenants. This is usually done to provide land management controls where no such controls have been provided under the town planning scheme of the relevant local government. Such a condition can be used, for example, where land is suitable for subdivision as if it were in a special rural zone, with the controls which that zoning involves, but is at the time zoned for general farming. In this case, restrictive covenants can be used to impose special rural zone controls either indefinitely or until the land is rezoned as a special rural zone.⁵⁰ A condition of a continuing nature cannot be imposed on approval of a subdivision. However, a condition requiring the imposition of a restrictive covenant is not regarded as being of a continuing nature even though compliance with the covenant involves the assumption of a continuing obligation. As the local government does not usually have land capable of benefiting from a restrictive covenant, in the past it has been necessary to rely on some device⁵¹ to ensure that the local government has the benefit of the covenant and is therefore in a position to enforce it. Covenants in gross

⁴⁷ The Code was adopted in Western Australia by the *Building Regulations 1989* cl 5(1).

⁴⁸ *Building Code of Australia* A2.1.

⁴⁹ Para 3.2 above.

⁵⁰ See *Falc Pty Ltd v State Planning Commission* (1991) 5 WAR 522, 537 and 540.

⁵¹ Such as those referred to in paras 2.12-2.13 above.

benefiting local governments and public authorities are now provided for in a recent amendment to the *Transfer of Land Act 1893*⁵² and it is no longer necessary to rely on these devices.

3. EXTINGUISHMENT OR MODIFICATION OF RESTRICTIVE COVENANTS BY A TOWN PLANNING SCHEME

3.20 Where a town planning scheme provides for it, a local government has power to extinguish or vary any restrictive covenant affecting land.⁵³ For example, the City of Melville Town Planning Scheme No 3 provides that a restrictive covenant, the effect of which is that the number of residential units that may be constructed on the land is limited to a number less than that permitted by the Scheme, is extinguished or varied to the extent that it is inconsistent with the provisions of the Scheme.⁵⁴ Developers have attempted to avoid the effect of the provision in Melville by using restrictive covenants that prevent the registration of a strata plan in relation to a block. A strata plan is the usual means of creating titles to multiple units on a block, but this does not prevent the construction of attached houses which are not strata titled but where the block is held as an undivided share or "purple" title.

3.21 The Model Scheme Text prepared by the Ministry for Planning⁵⁵ contains a clause relating to restrictive covenants which limits the number of residential units that can be constructed on a block to a number less than that permitted by a town planning scheme. The clause provides that such a restrictive covenant is extinguished or varied to the extent that it is inconsistent with the provisions of the *Residential Planning Codes* which apply to the scheme.⁵⁶ Where a restrictive covenant is so extinguished or varied the Council must not grant planning approval to the development of the land unless the application has been dealt with as an "SA" use⁵⁷ and has complied with prescribed advertising requirements.⁵⁸

⁵² Para 2.11 above.

⁵³ Para 3.8 above.

⁵⁴ Cl 5.14.1. Cl 5.14 is set out in Appendix III. Cl 23A of the City of Gosnells Town Planning Scheme No 1 is in similar terms.

In *Hicks v City of Melville and Richards* (unreported) Town Planning Appeal Tribunal of Western Australia Appeal No 10 of 1994 (28 September 1994) the Tribunal at 8 held that there was no inconsistency between cl 5.14.1 and the *Transfer of Land Act 1893* s 129C (see para 2.21 above) and that they should be read together as alternative methods for the extinguishment or variation of a restrictive covenant.

⁵⁵ See footnote 26 above.

⁵⁶ Model Scheme Text (May 1994 Revision) cl 4.4.1.

⁵⁷ In the case of an "SA" use, the Council must not grant planning approval unless prescribed notice requirements are fulfilled.

⁵⁸ Model Scheme Text (May 1994 Revision) cl 4.4.2. Under cl 6.3.3 one or more of the following must be carried out:

3.22 Where a scheme provision extinguishes or varies a restrictive covenant, the owner of the land which had the benefit of the covenant may be able to obtain compensation because the *Town Planning and Development Act 1928*⁵⁹ provides that any ". . . persons whose land⁶⁰ or property is injuriously affected by the making of a town planning scheme shall . . . be entitled to obtain compensation in respect thereof from the responsible authority". In a decision on a similar provision in New South Wales⁶¹ it was held that the payment of compensation depended on ". . . the general supposition that by virtue of the coming into operation of a prescribed scheme . . . some land to which the scheme applies will be reduced in value. . . . Putting the matter broadly . . . reduction in value is to lead to a payment of compensation".⁶² Any benefit which accrued to the land from the coming into operation of the scheme must also be taken into account in assessing the amount of compensation for injurious affection. Compensation based on a reduction in value of the land will not always be adequate to protect the interests of the owner of land with the benefit of a covenant.⁶³

3.23 Unless the parties agree to some other method of determination, any question as to whether or not -

- * any land is injuriously affected; and, if so,
- * as to the amount of compensation for the injurious affection,

-
- "(a) Notice of the proposed development to be served on the owners and occupiers as likely to be affected by the granting of planning approval stating that submissions may be made to the Council within twenty-one days of the service of such notice.
 - (b) Notice of the proposed development to be published in a newspaper circulating in the Scheme area stating that submissions may be made to the Council within twenty-one days from the publication thereof.
 - (c) A sign or signs displaying notice of the proposed development to be erected in a conspicuous position on the land for a period of twenty-one days from the date of publication of the notice referred to in paragraph (b) of this subclause."

⁵⁹ S 11(1).

⁶⁰ S 5 of the *Interpretation Act 1984* provides that in every written law "land" includes "any estate, interest, easement, servitude or right in or over land".

⁶¹ *Local Government Act 1919* (NSW) s 342AC(1) which provides in part that:

". . . any person -

- (a) who has an estate or interest in land to which a prescribed scheme applies and such estate or interest is injuriously affected -
 - (i) by the coming into operation of any provision contained in the prescribed scheme;

shall . . . be entitled to obtain, from the responsible authority concerned, compensation in respect of such injurious affection".

⁶² *Bingham v Cumberland County Council* (1954) 20 LGR 1, 9.

⁶³ Para 5.27 below.

must be determined by arbitration under and in accordance with the *Commercial Arbitration Act 1985*.⁶⁴

4. THE TOWN PLANNING APPEAL TRIBUNAL

3.24 Various decisions or orders, including the following, may be the subject of an appeal to the Town Planning Appeal Tribunal of Western Australia -⁶⁵

- * decisions relating to the subdivision of land;⁶⁶
- * the exercise of a discretion by a responsible authority in relation to an application for the grant of any consent, permission, approval or other authorization under a town planning scheme;⁶⁷
- * the exercise of a discretionary power by the responsible authority under a town planning scheme;
- * the grant or refusal of approval for a development by the East Perth or Subiaco Redevelopment Authority;
- * a conservation order made by the Minister when he is of opinion that it is necessary or desirable to provide special protection in respect of a place; or
- * a refusal by a local government to approve various determinations under the *Strata Titles Act 1985* including that a development of a parcel as a whole, a building and proposed subdivision of the parcel into lots for separate occupation will not interfere with the existing or likely future amenity of the neighbourhood, having regard to the circumstances of the case and to the public interest.⁶⁸

Unless the Tribunal is hearing an appeal from a decision relating to an environmental condition, the Tribunal must consist of three members -

⁶⁴ *Town Planning and Development Act 1928* s 11(4).

⁶⁵ Id ss 39 and 37.

⁶⁶ Para 3.2 above.

⁶⁷ *Town Planning and Development Act 1928* s 8A(1).

⁶⁸ *Strata Titles Act 1985* s 26.

- (a) a legal practitioner of not less than eight years practice and standing;
- (b) a person having knowledge of and experience in town planning; and
- (c) a person having knowledge of and experience in public administration, commerce or industry.⁶⁹

3.25 The Tribunal may allow an appeal with or without conditions, affix further conditions or dismiss the appeal either in whole or part.⁷⁰ A party may appear before the Tribunal personally or by counsel or a solicitor or an agent.⁷¹ On the hearing of an appeal, the Tribunal must act according to equity and good conscience and the substantial merits of the case without regard to technicalities and is not bound by any rules of evidence. An appeal involves a rehearing as if the original application was before the Tribunal. The Tribunal decides for itself, on the evidence before it, whether or not the application should be granted.⁷² Any party to an appeal aggrieved by a direction, determination or order of the Tribunal may appeal to the Supreme Court if the appeal involves a question of law.⁷³

3.26 A new procedure for dealing with appeals has recently been introduced by the Tribunal. At the first sitting not less than 21 days after an appeal is commenced, the Tribunal will direct that all appeals be set down for mediation by the Tribunal. At the mediation the Tribunal will attempt to resolve the issues or some of the issues between the parties. Parties are expected to participate in good faith at the mediation and the Tribunal may award costs against any party who acts in a manner in respect of the mediation which is unreasonable, frivolous or vexatious. If the issues cannot be resolved at mediation, either party can withdraw without costs and the appeal ends or the issues in dispute will be set down for hearing before the Tribunal. The procedure on the appeal hearing has been simplified in a number of ways including providing that there is to be no examination in chief without leave of the Tribunal where a witness has provided a written statement.

⁶⁹ *Town Planning and Development Act 1928* s 42(2).

⁷⁰ *Id* s 44.

⁷¹ *Id* s 49.

⁷² *Dawe v Town Planning Board* (1979) unreported, Town Planning Appeal Tribunal Appeal No 5 of 1979, 17 December 1979 6-7.

⁷³ *Town Planning and Development Act 1928* s 54B.

Chapter 4

THE LAW AND PROPOSALS FOR REFORM ELSEWHERE

1. INTRODUCTION

4.1 The law relating to restrictive covenants in other Australian states, New Zealand and England is similar to that in Western Australia. For this reason and also because this project is only concerned with a number of aspects of the law of restrictive covenants, this chapter does not contain a comprehensive discussion of the law relating to restrictive covenants in these jurisdictions. Instead it discusses a number of aspects of the law and proposals for reform in these jurisdictions and in Canadian provinces and states in the United States of America which are relevant to the Commission's terms of reference.

2. AUSTRALIA

(a) New South Wales

(i) *Covenants in gross*

4.2 In New South Wales, there is a general provision similar to a number of provisions in Western Australia which enable restrictive covenants to be created for specific purposes.¹ A local authority² may impose a restriction on the use of land not vested in the authority so that the restriction is enforceable by the authority whether or not the benefit of the restriction is annexed to other land.³ No provision is made for payment of compensation to the owner of the land for any injurious effect of the restriction. In the case of Torrens system land⁴ the restriction may be imposed by a memorandum of restriction that is executed by the authority, the registered proprietor of the land and by each other person who has a registered estate or

¹ Para 2.14 above.

² Also the Crown, a public authority constituted by an Act or a prescribed corporation: *Conveyancing Act 1919* (NSW) s 88E(1).

³ Id s 88E(2). The benefit of a covenant may also be annexed to an easement created in favour of the Crown or a local authority: id s 88A(1)(b).

⁴ There is a similar provision relating to "old system" land: id s 88E(4).

interest in the land and is to be bound by the restriction.⁵ Once the memorandum is lodged in the office of the Registrar-General the restriction takes effect when he has made in the Register such recordings with respect to the restriction as he considers appropriate. According to one author⁶ the Land and Environment Court of New South Wales has generally not favoured the use of restrictive covenants as a means of protecting amenity in consents to development and has warned against the use of title registration to supplement planning legislation.

(ii) *Suspension of restrictive covenants which are inconsistent with town planning schemes*

4.3 In New South Wales paramount consideration is given to public interest considerations by providing that where a restrictive covenant is inconsistent with a town planning scheme, the scheme, to the extent of the inconsistency, shall prevail. For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or with relevant consent, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a restrictive covenant specified in the instrument shall not apply to any such development or shall apply subject to the modifications specified in the instrument.⁷ Approval must first be given by the Governor or the responsible Minister.⁸

4.4 The effect of this provision is to suspend the covenant so long as the planning scheme remains unchanged. If the scheme is altered to remove the inconsistency, the covenant revives. For this reason, the New South Wales Land Titles Office does not remove from a title a notification of a covenant which is merely suspended.⁹ However, because banks are reluctant to lend money secured by a title where there is a breach of a covenant shown on the title even though the covenant has been suspended, developers often apply to the Supreme Court to have the covenant extinguished or modified.¹⁰

⁵ *Conveyancing Act 1919* (NSW) s 88E(3)(a) and (b).

⁶ P Ryan *Urban Development: Law and Policy* (1987) 72 and footnote 70.

⁷ *Environmental Planning and Assessment Act 1979* (NSW) s 28(2). See *Coshott v Ludwig* (unreported) Supreme Court of New South Wales - Court of Appeal 13 February 1997 40286 of 1994 (BC 9700201) and P Butt *Restrictive covenants on the wane: Pt 1* (1995) 69 ALJ 482.

⁸ *Environmental Planning and Assessment Act 1979* (NSW) s 28(3) and (4).

⁹ New South Wales Land Titles Office *Review of the Law of Positive Covenants affecting Freehold Land* (Discussion Paper 1994) 25.

¹⁰ *Ibid.* This is done under s 89(1) of the *Conveyancing Act 1919* (NSW).

(b) Queensland

(i) Discharge or modification of restrictive covenants

4.5 In Queensland private property rights and the wider community interest reflected in town planning schemes are balanced by requiring the town plan to be taken into account when an application is made to extinguish or vary a restrictive covenant. In considering whether to extinguish or vary a restrictive covenant, the Supreme Court is required to take into account ". . . the town plan and any declared or ascertainable pattern of the local authority for the grant or refusal of consent, permission or approval to use any land or to erect or use any building or other structure in the relevant area".¹¹ The court is also required to consider ". . . the period at which and the context in which the . . . restriction was created or imposed, and any other material circumstance." Because it must be proved that the covenant is *contrary* to the public interest, this provision does not necessarily see more regard given to public policy considerations. According to Bradbrook, MacCallum and Moore:

"It is not sufficient merely to prove that it is in the public interest that land be developed in a particular manner. The nature of the onus imposed by the legislation is such that the provision is seldom argued in practice."¹²

An order extinguishing or modifying a restriction may direct the applicant to pay to any person entitled to the benefit of the restriction a sum by way of consideration to make up for -

- (a) any loss or disadvantage suffered by that person in consequence of the order;
- or
- (b) any effect the restriction had, at the time it was imposed, in reducing the consideration then received for the land affected by it.¹³

(ii) Approval of subdivision of land by local government

4.6 In the other States the subdivision of land is generally dealt with by local governments,¹⁴ unlike the position in Western Australia where it is dealt with by the Western

¹¹ *Property Law Act 1974* (Qld) s 181(2).

¹² A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (2nd ed 1997) 18-35.

¹³ *Property Law Act 1974* (Qld) s 181(4).

Australian Planning Commission.¹⁵ Generally a local government may approve the application subject to conditions. In Queensland, any conditions imposed by the local government "attach to the land and are binding on successors in title".¹⁶

(c) South Australia

4.7 In South Australia a local government may enter into an agreement with any person relating to the management, preservation or conservation of land, within the area of the local government, and of which that person is the owner.¹⁷ The owner cannot enter into the agreement unless all other persons with a legal interest in the land give their consent. Upon the application of a party to the agreement, the Registrar-General must note the agreement against the relevant instrument of title of the land.¹⁸ Once entered, the agreement is binding on the current owner of the land whether or not the owner was the person with whom the agreement was made.¹⁹ If an agreement has been rescinded or amended, the Registrar-General, upon the application of the council or the owner of the land the subject of the agreement, must enter a note of the rescission or amendment against the instrument of title.²⁰

(d) Tasmania

(i) Covenants in gross and planning agreements

4.8 In Tasmania, notwithstanding any law to the contrary, a covenant without a dominant tenement (a covenant in gross) may be created in favour of the Crown or any public authority or local authority.²¹ A covenant in gross is enforceable between the parties to it, and any person deriving title under any such party, as if the covenant were entered into by a fee simple owner of land for the benefit of adjacent land, held by the relevant authority, that was capable

¹⁴ *Development Act 1993* (SA) s 33; *Subdivision Act 1988* (Vic) s 5; *Local Government (Building and Miscellaneous Provisions) Act 1993* (Tas) Part III; *Environmental Planning and Assessment Act 1979* (NSW) ss 77(3) and 91(1); *Local Government (Planning and Environment) Act 1990* (Qld) s 5.1.

¹⁵ Para 3.2 above.

¹⁶ *Local Government (Planning and Environment) Act 1990* (Qld) s 5.1(8).

¹⁷ *Development Act 1993* (SA) s 57(2).

¹⁸ Id s 57(5).

¹⁹ Id s 57(7).

²⁰ Id s 57(8).

²¹ *Conveyancing and Law of Property Act 1884* (Tas) s 90AB(1).

of being benefited by the covenant and as if that adjacent land continued to be so held by the authority.²²

4.9 In addition, a planning authority may enter into an agreement with an owner of land in the area covered by a planning scheme.²³ An agreement may provide for "the prohibition, restriction or regulation of use or development" of the land.²⁴ An agreement must be registered by the Recorder of Titles.²⁵ After the registration of an agreement the burden of any covenant in the agreement runs with the land to which it relates.²⁶ It is enforceable between the parties to it and any person deriving title under such party.²⁷

(ii) *Discharge or modification of restrictive covenants*

4.10 In Tasmania the Recorder of Titles or the Supreme Court²⁸ may extinguish or modify a restrictive covenant if satisfied that:

". . . the continued existence of the interest would impede a user of the land in accordance with an interim order or planning scheme, or, as the case may be, would, unless modified, so impede such a user."²⁹

An order that a restrictive covenant be extinguished or modified may direct the applicant to pay any person entitled to its benefit such sum by way of compensation or consideration as the Recorder or Court may think just to award under either one of the following heads:

- "(a) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge, extinguishment, or modification; or
- (b) a sum to make up for any effect that the interest had, at the time when it was imposed, in reducing the consideration then received for the land affected by it."³⁰

²² Id s 90AB(2).

²³ *Land Use and Planning Approvals Act 1993* (Tas) s 71(1).

²⁴ Id s 72(2)(a).

²⁵ Id s 78(3).

²⁶ Id s 79(a).

²⁷ Id s 79(b).

²⁸ An application must be made to the Recorder who must determine the application himself unless he considers that it is of such a nature that it should be determined by the Supreme Court: *Conveyancing and Law of Property Act 1884* (Tas) s 84F(1).

²⁹ Id s 84C(1)(b).

³⁰ Id s 84C(7).

(e) Victoria*(i) Covenants in gross and planning agreements*

4.11 In Victoria a planning scheme for an area may regulate or provide for the creation of restrictions³¹ when land is subdivided.³² If it does so, the owner of the land burdened or to be burdened by a restriction must, in accordance with the scheme, lodge a certified plan at the Office of Titles for registration.³³ Upon registration, any restriction is created, varied or removed as specified in the plan.³⁴

4.12 In Victoria a local authority may also enter into an agreement with an owner of land, or with a person in anticipation of that person becoming the owner of land, in the area covered by a planning scheme for which it is a responsible authority.³⁵ The agreement must be under seal and bind the owner to the covenants specified in the agreement.³⁶ The agreement may restrict or regulate the use or development of the land or provide conditions subject to which the land may be used or developed for specified purposes.³⁷ Agreements have been used in circumstances well beyond those normally associated with restrictive covenants. They have been used to -

- * provide public open space;
- * provide infrastructure such as roads and underground power lines;
- * require properties to be rehabilitated;
- * obtain a commitment to maintaining a facility; and
- * as part of a plot ratio bonus system to ensure that a historic building is restored.³⁸

4.13 The local authority may apply to the Registrar of Titles to register the agreement under the *Transfer of Land Act 1958*.³⁹ The Registrar must make a recording of the agreement on

³¹ This power also permits the variation or removal of restrictive covenants and in this respect is the same as a power in Western Australia: para 3.8 above.

³² *Planning and Environment Act 1987* (Vic) s 6(2)(g).

³³ *Subdivision Act 1988* (Vic) s 23(1).

³⁴ Id s 24(2)(d).

³⁵ *Planning and Environment Act 1987* (Vic) s 173.

³⁶ Id s 174(1).

³⁷ Id s 174(2).

³⁸ G Morris, M Barker and T L Bryant *Planning and Environment Service* (Victoria) para 23,521.

³⁹ *Planning and Environment Act 1987* (Vic) s 181(1).

any relevant folio of the Register.⁴⁰ Once registered, the burden of any covenant in the agreement runs with the land affected and the local authority may enforce the covenant against any person deriving title from any person who entered into the covenant as if it were a restrictive covenant despite the fact that it is not for the benefit of any land of the local authority.⁴¹

(ii) *Discharge or modification of restrictive covenants*

4.14 Victoria has made an attempt to balance private property rights embodied in restrictive covenants and the wider community interest reflected in town planning schemes. In 1988 town planning authorities were given ultimate responsibility for land use development by removing the need to apply to a court for the removal or variation of a restrictive covenant. Instead provision was made for the removal or variation of a covenant by either -

1. provision in a planning scheme with a specific direction for the creation, removal or variation of a restrictive covenant;⁴² or
2. in the absence of a specific direction, in the case of a proposal for development requiring planning permission, the town planning authority giving permission upon conditions which required the creation, modification or removal of a restrictive covenant.⁴³

4.15 As a result of doubts cast on whether the legislation empowered a local authority to remove a restrictive covenant when granting a permit,⁴⁴ the legislation was amended in 1991. It now provides that a responsible authority must not grant a permit which would allow the removal or variation of a restriction unless the authority is satisfied that the owner of any land benefited would 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

⁴⁰ Id s 181(3).

⁴¹ Id s 182.

⁴² *Subdivision Act 1988* (Vic) s 23(1) (since amended).

⁴³ See J Toohar *A Setback for Public Planning?* [1991] LIJ 721, 721.

⁴⁴ *P and A Strachan v City of Malvern and W A McLeod* (1990) 5 AATR 295.

- (d) any other material detriment -
as a consequence of the removal or variation of the restriction."⁴⁵

This provision is a retreat from the earlier legislation which allowed precedence to be given to town planning considerations over privately imposed planning restrictions.

4.16 The effect of this provision was considered by the Planning Division of the Victorian Administrative Appeals Tribunal in *Pletes v City of Knox*.⁴⁶ According to the Tribunal, a permit may be granted if planning considerations favour its grant unless it falls foul of the above tests.⁴⁷ Planning considerations do not prevail over the tests, though they may be relevant to the issue of the likelihood of loss or detriment. Nor is it a question of balancing planning considerations in favour of variation or removal against loss to any owner of land benefited by the covenant as a consequence of the proposed variation or removal.⁴⁸ The loss referred to in paragraphs (a), (b) and (c) must be a "material" loss, that is, not a trivial and inconsequential loss, based on an objective standard.⁴⁹ Relevant to this is the purpose and effect of the covenant. The Tribunal decided that a permit should be issued to vary the restrictive covenant to allow a dual occupancy development on the lot of the applicant. It did so because:

". . . the proposed variation did not result in any material loss of amenity to benefited land because the subject site and the access to the proposed dwelling were isolated from any benefited land. It also decided that there was no material loss arising from change to the character of the neighbourhood. This was due to a number of factors: the neighbourhood had remained relatively quiet and pleasant despite the existence of a number of dual occupancy developments; a large proportion of the neighbourhood allotments was not benefited land; and the grant of a permit in this case would not create a precedent. This was ensured by leaving the covenant and its protection intact so far as possible' and this could be done by permitting a variation where practicable, rather than a removal."⁵⁰

⁴⁵ *Planning and Environment Act 1987* (Vic) s 60(2).

⁴⁶ (unreported) Administrative Appeals Tribunal of Victoria 16 March 1993.

⁴⁷ J Tooher "Double Trouble" in *Discharging Restrictive Covenants: Dual Occupancy and the Duality of Forums* (1993) 10 *Environmental and Planning Law Journal* 365, 368.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Id* 369.

3. CANADA

(a) Ontario

(i) *Introduction*

4.17 In Ontario, the Ontario Law Reform Commission conducted a general review of the law relating to covenants in 1989.⁵¹ It made many recommendations including those discussed in the following paragraphs. The Commission's major recommendation was that it would not be sufficient merely to reform the law of restrictive covenants but that a new type of servitude, land obligations, should be created that would encompass both positive and negative obligations.⁵² So far as the Western Australian Law Reform Commission is aware, none of the Ontario Commission's recommendations have been enacted.

(ii) *Land obligations in gross*

4.18 The Ontario Commission recommended that land obligations should be permitted to exist in gross.⁵³ The reasons for this were that:

" . . . there have been a number of situations in which municipalities, because they owned no dominant land, were unable to enforce restrictive covenants against successors in title to lands purchased from them, in circumstances in which it would have been desirable to permit enforcement of the covenants.

Even in situations involving private restrictions, the inability to create a covenant in gross causes difficulties. For example, a homeowners' association under a building scheme would not have the right to enforce any restriction by the scheme unless it owned lands that are benefited by the covenant."⁵⁴

(iii) *Remedies*

4.19 So far as remedies for contraventions of a land obligation are concerned, the Commission recommended that the following remedies should be available for a contravention of an obligation -

⁵¹ *Report on Covenants affecting Freehold Land* (1989).

⁵² Id 104-105.

⁵³ Id 111.

⁵⁴ Id 110.

1. an injunction (including a mandatory injunction) or other equitable relief;
2. damages for moneys due under a land obligation; and
3. damages, both for pecuniary and non-pecuniary⁵⁵ kinds of loss.⁵⁶

However, it recommended that a person should be entitled to a remedy only to the extent to which he is materially prejudiced by the breach. This would mean that where dominant land is benefited by an obligation but the owner suffers no real damage as a result of a breach due to the distance from the servient land, the remedy should be refused. The Commission also concluded that it would be oppressive to make common law damages available against those with insubstantial interests for breach of a restrictive obligation. It therefore recommended that common law damages should be available only against the person who entered into the obligation and his successors in title, a mortgagee and a person who has a right to possession and has a freehold interest.⁵⁷

(iv) *Modification or extinguishment*

4.20 Following generally the existing law in Ontario,⁵⁸ the Commission recommended that there should be automatic extinguishment of land obligations forty years from the date of registration. It considered that after such a period, most land obligations would have ceased to have any substantial utility.⁵⁹ However, in case any obligation might still be of some benefit, it recommended that it should be possible, from time to time, to renew a land obligation.⁶⁰

4.21 In Ontario, according to the Ontario Commission, a court may extinguish or vary a covenant but it is given no statutory guidance as to the circumstances in which that power may be exercised.⁶¹ The Ontario Law Reform Commission concluded that, in the interests of certainty and consistency, specific grounds should be provided. It recommended that those grounds should be as follows:

⁵⁵ That is, where the breach of the obligation results in personal injury: id 130.

⁵⁶ Id 128-129.

⁵⁷ Id 130.

⁵⁸ Id 56-57.

⁵⁹ Id 138.

⁶⁰ Ibid.

⁶¹ Id 141.

- "(1) That the land obligation has become obsolete by reason of changes in the character of the servient land or of the neighbourhood.
- (2) That the change will not injure the persons who have the benefit of the obligation.
- (3) That the persons of full age and capacity who have the benefit of the obligation have expressly or impliedly agreed to the proposed changes.
- (4) That the proposed changes would remove a factor prejudicial to the carrying out of the general purposes of a development scheme; and
 - (a) is for the benefit of the whole or part of the land subject to the scheme, and
 - (b) the prejudice to any person bound by a land obligation under the scheme does not substantially outweigh the benefits it would give that person.
- (5) That the land obligation, other than one requiring the payment of money,
 - (a) impedes some reasonable user of the land, or would do so unless modified,
 - (b) secures no practical value to anyone who has the benefit of it, and
 - (c) the person who has the benefit can be adequately compensated for any loss or disadvantage.
- (6) With respect to positive obligations, that, as a result of a change in circumstances, the obligation
 - (a) has ceased to be reasonably practicable, or
 - (b) has become unreasonably expensive compared to the benefit it confers.
- (7) With respect to development schemes, or any provision contained in a development scheme, that, as a result of a change in circumstances, the scheme or the provision
 - (a) has become obsolete,
 - (b) has ceased to be reasonably practicable, or
 - (c) has become unreasonably expensive compared to the benefit it confers.
- (8) That, in respect of a land obligation in gross, the person who owns the benefit secures no real or substantial benefit from it.
- (9) That a change is made necessary by an order of the court made on any of the other grounds."⁶²

The Commission decided not to recommend a broader power of modification and discharge by inclusion of a public purposes criterion as is the case in England⁶³ because of concern with the:

". . . possibility that, where a land obligation impedes some reasonable user of the land, and is contrary to the public interest, it might be extinguished or varied even though the obligation secures a practical value to the person who has the benefit of it. Specifically, we are concerned with the notion that, in an effort to override private rights, a private individual should be permitted to invoke the public interest. Ordinarily, the public interest is invoked to override private rights only by a public authority, through the exercise of a specific statutory power and in accordance with a process intended to ensure political accountability. In our view, it would be inappropriate for the court to interfere with private rights, at the request of a private party, on the basis of the public interest."⁶⁴

4.22 It also recommended that, as a condition of the variation or extinguishment of a land obligation, the court should be empowered to order the applicant to pay compensation to any person bound by the order for any loss or disadvantage suffered as a result of its terms.⁶⁵ The Commission considered that the fact that the existing statutory provisions did not provide for the payment of compensation had resulted in the power to vary or extinguish restrictive covenants being exercised with "extreme judicial caution".⁶⁶

(b) Alberta

4.23 In Alberta section 52(3) of the *Land Titles Act* provides that:

"[A]ny such condition or covenant may be modified or discharged by order of the court, on proof to the satisfaction of the court that . . . the condition or covenant conflicts with the provisions of a land use by-law or statutory plan under the *Planning Act*, and the modification or discharge is in the public interest."⁶⁷

It has been held that a conflict exists between a covenant and a zoning by-law only if the by-law requires, rather than merely permits, the type of development prohibited by the covenant.⁶⁸

⁶³ Paras 4.24-4.25 below.

⁶⁴ Ontario Law Reform Commission *Report on Covenants affecting Freehold Land* (1989) 144.

⁶⁵ Id 141.

⁶⁶ Ibid.

⁶⁷ Referred to in Ontario Law Reform Commission *Report on Covenants affecting Freehold Land* (1989) 55 footnote 321.

⁶⁸ Id 55.

4. ENGLAND

(a) Discharge or modification of a restrictive covenant

4.24 In England, any person interested in land affected by a restrictive covenant may apply to the Lands Tribunal for an order wholly or partially discharging or modifying the restriction. Such an order may be made if the Tribunal is satisfied that -

- * by reason of changes in the character of the property or the neighbourhood or other circumstances of the case the Lands Tribunal may deem material, the restriction ought to be deemed obsolete; or
- * the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or
- * those entitled to the benefit of the restriction have agreed, either expressly or by implication, by their acts or omissions, to the restriction being discharged or modified; or
- * the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.⁶⁹

4.25 As to the second ground above, some reasonable user of land is impeded if the restriction either does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them or is contrary to the public interest, and money will be an adequate compensation for the loss or any disadvantage which that person will suffer from the discharge or modification.⁷⁰ In determining whether a case is one falling within this ground and in determining whether a restriction ought to be discharged or modified on this ground the Lands Tribunal must:

⁶⁹ *Law of Property Act 1925* (UK) s 84(1).

⁷⁰ *Id* s 84(1A).

". . . take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances."⁷¹

In practice, an application based on public purposes has rarely been successful.⁷² Three possible reasons for this have been advanced -

- * The Tribunal has not accepted that a grant of planning permission implies that the discharge or modification of a restrictive covenant is a positively good thing.⁷³
- * A "restriction which inhibits development is not contrary to the public interest *per se*."⁷⁴
- * The "mere preservation of 'sanctity of contract' (i.e. existing obligations) is itself a public interest and that the applicant therefore requires to show that his proposal is so 'important and immediate' as to 'override all objections', 'the test being that the proposed development should make a material contribution towards meeting a need, which a single house could hardly be said to do.' Thus, he must show that there is a need for housing in the area, that the sort of housing proposed is appropriate to that need and that his contribution will be a significant step towards meeting that need."⁷⁵

4.26 On making an order, the Tribunal may direct the applicant to pay any person entitled to the benefit of the restriction a sum by way of consideration either -

- * to make up for any loss or disadvantage suffered by him in consequence of the discharge or modification; or

⁷¹ Id s 84(1B).

⁷² This ground was recommended by the Law Commission at 21-23 of its report *Transfer of Land: Report on Restrictive Covenants* (Law Com No 11 1967) to enable the Tribunal to "take a broader view of whether the use of land is being unreasonably impeded".

⁷³ P Polden *Private Estate Planning and the Public Interest* (1986) 49 Mod LR 195, 209.

⁷⁴ Ibid.

⁷⁵ Id 210 (footnotes omitted).

- * for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.⁷⁶

4.27 In a report in 1984,⁷⁷ the Law Commission recommended that the second ground for compensation should not be included in a new regime of land obligations, which would replace restrictive and positive covenants relating to land. It recommended that the Lands Tribunal should "have power to order anyone who benefits from its order to compensate anyone bound by it for any loss or disadvantage which he will suffer because of it."⁷⁸ It pointed out that effects of inflation are likely to militate against the effectiveness of the second ground and it is logically no different to other situations to which it does not apply, for example, where one landowner pays another to enter into a covenant or it is the vendor who accepts the burden of a covenant in consideration for a higher price for the land sold.

(b) **Obsolete restrictive covenants**

4.28 The above report, which proposed a new regime of land obligations, did not make any recommendations on existing covenants and in particular on the problems posed by obsolete restrictive covenants. In a subsequent report they were seen as an impediment to conveyancing "both by increasing the time taken for and the expense of property transfer and by hampering the registration of unregistered titles."⁷⁹ To deal with restrictive covenants that had become obsolete, the Law Commission recommended that all restrictive covenants should lapse eighty years after their creation but that any which were not then obsolete should be replaced by a land obligation to the like effect.⁸⁰ There would be some exceptions including covenants imposed under a statute which did not depend for their enforceability against successors in title on the person with the benefit being interested in an identifiable parcel of land.⁸¹

⁷⁶ *Law of Property Act 1925* (UK) s 84(1).

⁷⁷ Law Commission *Transfer of Land: The Law of Positive and Restrictive Covenants* (Law Com No 127) 120-121. The proposals in the report have been accepted in principle by the then United Kingdom government: Law Commission *Law Under Review* (No 39 Winter 1996/97) 59.

⁷⁸ Law Commission *Transfer of Land: The Law of Positive and Restrictive Covenants* (Law Com No 127) 121.

⁷⁹ Law Commission *Transfer of Land: Obsolete Restrictive Covenants* (Law Com No 201 1991) para 1.15.

⁸⁰ *Id* para 3.1.

⁸¹ *Id* para 3.13.

4.29 Any person who wished to replace a lapsed covenant or anyone interested in land intended to benefit from a restrictive covenant⁸² would have to establish that -

- * there was a valid, subsisting covenant;
- * an identified area of land was burdened with it;
- * by reason of his interest in particular land he was entitled to enforce the covenant; and
- * he enjoyed practical benefits of substantial value or advantage from the covenant.⁸³

This report was rejected by the then United Kingdom government⁸⁴

(c) Planning obligations

4.30 In England, any person interested in land in the area of a local planning authority may enter into a planning obligation restricting the development or use of the land in any specified way.⁸⁵ A planning obligation may be unconditional or subject to conditions and impose any restriction either indefinitely or for a specified period.⁸⁶ It is enforceable by means of an injunction by the local planning authority against the person entering into the obligation and any person deriving title from him.⁸⁷ The most common use of planning obligations is in agricultural occupancy where occupation of a dwelling is restricted to those employed in agriculture. They are also used to provide the maximum size of any unit in commercial premises.⁸⁸

4.31 In one case a planning application was made for a house for a farm worker. A planning obligation was entered into which restricted the occupation of the house to a person employed in local agriculture and tied the house to the farm. The farm was sold and the purchasers argued that the Council had exceeded its powers in entering into the agreement and that the agreement was unlawful. These arguments were rejected by the Court. It was held that the Council merely had to have regard to all relevant considerations and must not act

⁸² Id para 3.52.

⁸³ Id paras 3.41 and 3.44.

⁸⁴ Law Commission *Law Under Review* (No 39 Winter 1996/97) 60.

⁸⁵ *Town and Country Planning Act 1990* (UK) s 106(1)(a).

⁸⁶ Id s 106(2).

⁸⁷ Id s 106(3) and (5).

⁸⁸ S Payne *Planning Conditions - Enforcement and Variation* [1993] Conv & Prop Law 119, 120.

unreasonably. A planning obligation need not be fairly and reasonably related to the permitted development.⁸⁹

4.32 A planning obligation may be modified or discharged in the following ways -

1. The local planning authority and any person against whom the obligation is enforceable may agree to modify or discharge it.⁹⁰
2. After the expiry of the relevant period,⁹¹ on the application of a person against whom a planning obligation is enforceable, the authority may modify or discharge the obligation.⁹²
3. On appeal to the Secretary of State from a decision of the authority the Secretary may modify or discharge the obligation.⁹³

5. NEW ZEALAND

4.33 In New Zealand, where land is subject to a restrictive covenant, a court may, on the application of the occupier of land, by order, modify or wholly or partially extinguish the covenant on the following grounds -

- * Since the creation of the covenant, there has been a change in the nature or extent of the user of the land to which the benefit of the covenant is annexed or of the user of the land subject to the covenant or in the character of the neighbourhood or any other circumstances that the court considers relevant.
- * The continued existence of the covenant in its present form would impede the reasonable user of the land subject to the covenant in a different manner or to a different extent from that which could have been reasonably foreseen by the original parties at the time of the creation of the covenant.

⁸⁹ *Good v Epping Forest District Council* [1994] 1 WLR 376.

⁹⁰ *Town and Country Planning Act 1990* (UK) s 106A(1).

⁹¹ A minimum of five years unless some other period is prescribed: id s 106A(4).

⁹² *Town and Country Planning Act 1990* (UK) s 106A(3) and (6).

⁹³ Id s 106B.

- * Every occupier of the land to which the benefit of the covenant is annexed has agreed to the covenant being modified or wholly or partially extinguished or, by his acts or omissions may reasonably be considered to have abandoned or waived the covenant wholly or in part.

- * The proposed modification or extinguishment will not substantially injure the persons entitled to the benefit of the covenant.⁹⁴

4.34 The *Property Law Act* was reviewed by the New Zealand Law Commission in 1994.⁹⁵ The Law Commission recommended that the same grounds be retained.⁹⁶

6. UNITED STATES OF AMERICA

4.35 In the United States of America restrictive covenants have a significant role in the law of property and a considerable body of law has been developed on them from the same origins as the law in Western Australia.⁹⁷ There are many similarities between the law in Western Australia and that in the United States of America including that the remedy for a breach of a covenant is an injunction.⁹⁸

4.36 Some aspects of the law in the United States of America are notable for their different development from that in Western Australia. For example:

"Insofar as covenants tend to curtail or to hinder full use of land, the public policy in favor of alienability of land comes in to urge strict construction; this is the case, at least, wherever ambiguity opens the door for a policy-dictated construction. Thus, public policy may help courts to avoid an alleged construction of a covenant which might extend the covenant's duration, expand the area to which its burden attaches, or enlarge the class of persons subject to it. If the covenant, as construed, entirely prohibits the use of the burdened property, it is unenforceable."⁹⁹

4.37 Unlike the position in Western Australia, courts have not been given statutory guidance as to the modification or extinguishment of restrictive covenants. As a result, unless

⁹⁴ *Property Law Act 1952* (NZ) s 126G(1).

⁹⁵ *A New Property Law Act* (Report No 29).

⁹⁶ Id 182-183.

⁹⁷ See R R Powell and P J Rohan *The Law of Real Property* Vol 5 (1993 revision) § 670[2] and 673.

⁹⁸ Id § 676.

⁹⁹ Id § 674.

expressly stated in the covenant, the courts generally hold that restrictions cannot be amended or terminated without the consent of all parties affected by the restriction or their successors.¹⁰⁰ In some cases the covenants permit modification or termination by a specified percentage of lot owners.¹⁰¹

4.38 The original agreement may set a definite period of duration of the land use covenant or may establish an initial period with provisions for subsequent renewal.¹⁰² Some States have limited the duration of covenants by statute. In Iowa, for example, a covenant restricting the use of land automatically terminates 21 years from its recording unless a verified claim to extend it is filed within the 21 year period.¹⁰³ Recently the California Law Revision Commission recommended that a land use restriction, other than one supported by public policy such as one involving environmental restrictions, should expire 60 years after it is recorded.¹⁰⁴ It could, however, be preserved for another 60 years at a time by recording a statutory notice. These recommendations were made to allow obsolete restrictions to be removed that might otherwise impair the marketability of the property on which they were imposed. The Commission also recommended that a violation of a restriction should be enforceable for a period of five years.¹⁰⁵ Failure to bring an action within five years would not, however, waive the underlying restriction or the right to bring an action for another breach of the restriction.

4.39 Another limitation on restrictive covenants in the United States of America is the "doctrine of changed circumstances" which provides a defence against a person who is seeking injunctive relief when a covenant can be proved to have outlived its usefulness.¹⁰⁶ Injunctive relief for a breach of a covenant cannot be obtained if:

". . . conditions have so changed since the making of the promise as to make it impossible longer to secure in a substantial degree the benefits intended to be secured by the performance of the promise."¹⁰⁷

¹⁰⁰ Id § 677.

¹⁰¹ Ibid.

¹⁰² Id § 678.

¹⁰³ Ibid.

¹⁰⁴ *Marketable Title: Enforcement of Land Use Restrictions* (Vol 26 1996) 291.

¹⁰⁵ Ibid.

¹⁰⁶ R R Powell and P J Rohan *The Law of Real Property* Vol 5 (1993 revision) § 679[2].

¹⁰⁷ American Law Institute *Restatement of the Law of Property: Servitudes* (Vol 5 1944) § 564.

4.40 Courts in the United States of America have had to deal with the situation where a covenant restricting the use of land differs from the use permitted in a zoning ordinance.¹⁰⁸ Covenants have rarely been extinguished by "superseding zoning ordinances".¹⁰⁹ This is because the two do not conflict as the ordinance does not require a particular use of the land. Where the zoning ordinance restriction is less onerous than the restrictive covenant, the ordinance neither nullifies nor supersedes the valid covenant. A conflict arises only when the covenant restricts land to a particular type of use and the ordinance prohibits this type of use. In these cases, the covenant is extinguished to the extent that it conflicts with the ordinance.¹¹⁰

4.41 The law of servitudes, including restrictive covenants, is currently being reviewed by the American Law Institute. Four tentative drafts have been adopted by the Institute dealing with matters such as the creation of servitudes and their interpretation. Matters yet to be addressed are modification, termination and enforcement of servitudes.¹¹¹

7. SUMMARY

(a) Conflicts or inconsistencies between town planning laws and restrictive covenants

4.42 Only one of the jurisdictions studied by the Commission has addressed in legislation the problem of conflicts or inconsistencies between town planning laws and restrictive covenants. In New South Wales, where a restrictive covenant is inconsistent with a town planning scheme, the scheme prevails, to the extent of the inconsistency. The effect of this provision is to suspend the covenant so long as the planning scheme remains unchanged. In the United States of America covenants have been extinguished by courts where the covenant restricts land to a particular type of use and the planning ordinance prohibits this type of use. In these cases, the covenant is extinguished to the extent that it conflicts with the ordinance.

(b) Discharge or modification of restrictive covenants

4.43 All states in Australia, except South Australia, have powers to discharge or modify restrictive covenants. Powers in New South Wales and Victoria are similar to those in

¹⁰⁸ R R Powell and P J Rohan *The Law of Real Property* Vol 5 (1993 revision) § 679[4].

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ S F French *Gallivan Conference: Tradition and Innovation in the New Restatement of Servitudes: A Report from Midpoint* (1994) 27 Conn LR 119.

Western Australia.¹¹² There is an additional power in Victoria which attempts to balance private property rights embodied in restrictive covenants and the wider community interest reflected in town planning schemes. Powers in Alberta, Queensland, Tasmania and England are more liberal than the power in Western Australia in that they allow public interest considerations to be taken into account in some circumstances.¹¹³ In Ontario restrictive covenants are extinguished after the expiration of a prescribed period of time.¹¹⁴

(c) Enforcement of restrictive covenants

4.44 The method of enforcement of restrictive covenants in all the jurisdictions studied by the Commission is similar to that in Western Australia, that is, by means of an injunction. The Commission is not aware of any special means of enforcement elsewhere.

(d) Covenants in gross

4.45 A number of the jurisdictions studied by the Commission have recognised the need to provide for covenants in gross. They have been provided for in New South Wales, South Australia, Tasmania and Victoria¹¹⁵ and their introduction has been recommended in Ontario.¹¹⁶

¹¹² *Conveyancing Act 1919* (NSW) s 89(1); *Property Law Act 1958* (Vic) s 84(1).

¹¹³ Paras 4.23, 4.5, 4.10 and 4.24-4.25 above, respectively.

¹¹⁴ Para 4.20 above.

¹¹⁵ Paras 4.2, 4.7, 4.8 and 4.11 above, respectively.

¹¹⁶ Para 4.18 above.

Chapter 5

RECOMMENDATIONS

1. RETENTION OF RESTRICTIVE COVENANTS

(a) Restrictive covenants should not be abolished

5.1 A fundamental issue raised in the Discussion Paper was whether or not all uses of restrictive covenants should be abolished. For the following reasons, the Commission *recommends* that restrictive covenants should not be abolished -

- * Unless accompanied by a regime of compensation, the abolition of restrictive covenants generally would unfairly prejudice those who enjoy the benefit of a covenant but would provide a windfall for those who were subject to the burden of a covenant.
- * As one commentator pointed out, persons have "ordered their affairs in the expectation that such property rights can be created."
- * There is a role for restrictive covenants in protecting valuable interests such as those which limit the height of buildings on a block to protect a view from another block.
- * Other law reform bodies which have examined restrictive covenants such as the English Law Commission and the Ontario Law Reform Commission have not recommended that they be abolished. The Ontario Commission concluded that "restrictive covenants perform a socially useful function and . . . they should be retained".¹

¹ Ontario Law Reform Commission *Report on Covenants affecting Freehold Land* (1989) 100.

- * The Commission's inquiries indicate that restrictive covenants have not been abolished anywhere in Australia or in New Zealand, England, Canada or the United States of America.²
- * The continued availability of restrictive covenants was supported, with one possible exception, by all of those who commented on the Discussion Paper.

(b) Estate schemes

5.2 The Commission also sought comments in the Discussion Paper on whether or not any particular uses of restrictive covenants should be abolished. Some commentators suggested that estate schemes,³ which could be replaced by planning policies⁴ and local laws,⁵ should be abolished. Although the use of restrictive covenants was initially developed at a time when town planning and building laws did not exist or were rudimentary, the Commission *recommends* that estate schemes should not be abolished. The Commission is satisfied that restrictive covenants still have a useful role to play in this area. Land developers still need to use restrictive covenants to achieve ends which cannot be achieved in planning or building controls and, in doing so, to preserve the economic value of land.⁶ Generally planning controls have a broader application than the detailed nature of restrictions imposed by restrictive covenants in some estate schemes. While some local governments are prepared to deal with this detail in planning policies not all of them would be interested in becoming involved in regulating the interests of adjoining landowners in such fine detail and it would not be reasonable to place a duty on them to do so. Further, landowners would have to rely on

² However, in England, the Royal Commission on Legal Services, which reported in 1979, made the following comments (Vol 1 283):

"Many thousands of words of restrictive covenants clutter the titles of house property and bedevil modern conveyancing. In many cases these covenants are difficult to construe and there is doubt as to whether they are enforceable or whether anyone has power to release them. The restrictions imposed by such covenants constitute separate obligations to which a purchaser must have regard in addition to his general duty to comply with planning legislation. It is doubtful whether estate schemes, in particular, are necessary under modern planning law. The time may have come to make past and present restrictive covenants unenforceable except as between the parties to the original agreement, and perhaps excepting also restrictions necessary to secure privacy provided they are in a suitable standard form authorised by statute and not capable of variation."

In 1984 the English Law Commission rejected the view of the Royal Commission that restrictive covenants "bedevil modern conveyancing" to the extent suggested by the Commission: *Transfer of Land: The Law of Positive and Restrictive Covenants* (Law Com No 127) para 2.4. It acknowledged that there were problems concerning the interpretation of restrictive covenants but concluded that these concerns were not of sufficient magnitude to warrant the prohibition of such covenants: *ibid*.

³ Paras 2.5-2.8 above.

⁴ Para 3.17 above.

⁵ Local laws may be made under s 3.5 of the *Local Government Act 1995*.

⁶ See paras 1.3 and 1.4 above.

local governments to enforce restrictions imposed by planning policies. Landowners might prefer restrictive covenants because they are able to enforce these covenants themselves.

5.3 Recent amendments to the *Transfer of Land Act 1893* allow restrictive covenants to be created on the approval of a plan of subdivision.⁷ As this procedure is comparatively simple, it is likely to replace the old procedure for creating estate schemes.⁸ As the old procedure is likely to fall into a state of desuetude, the Commission does not consider that it is necessary to abolish it.

(c) Restrictive covenants which restrict the use of certain building materials

5.4 Another form of restrictive covenant which it was suggested should be abolished is one which is used to restrict the use of certain building materials, for example, the construction of concrete footings and slab floors is not permitted by a restrictive covenant which requires the use of limestone foundations. This type of covenant has been criticised because it tends to inhibit innovation in construction methods and materials and may also increase building costs. The Commission does not consider that it is necessary to abolish covenants relating to building materials because it recommends below⁹ that the circumstances in which restrictive covenants can be extinguished or modified by a tribunal order should be made more liberal. Where, for example, the materials used would not be out of character with or prejudice the amenity of any land to which the benefit of a restrictive covenant was annexed, an order might be granted to discharge or modify a covenant which would otherwise have prevented their use.

(d) Restrictive covenants which deal with matters usually dealt with in town planning schemes

5.5 Another category of restrictive covenant which it was suggested should be abolished is a covenant which deals with matters usually dealt with in town planning schemes such as the use to which land may be put. A restrictive covenant might limit the use of land to residential use but the scheme might zone the land for commercial use. The Commission does not recommend that this type of restrictive covenant be abolished. Where a local government is concerned that the purposes of its town planning scheme are being impeded by this type of

⁷ Paras 2.9-2.10 above.

⁸ Para 2.9 above.

⁹ Para 5.23.

covenant, an application could be made to the Town Planning Appeal Tribunal for the covenant to be modified or extinguished.¹⁰ In order to ensure that local governments are aware of restrictive covenants of this type, the Commission *recommends* that the Land Titles Division should be required to send a copy of every covenant to the relevant local government at the time it is registered. This would enable the local government to take steps to apply for the modification or extinguishment of a restrictive covenant if it considered that that action was necessary given local conditions and its town planning scheme. Where a landowner is concerned that a restrictive covenant of this type will impede a user of land permitted by a town planning scheme, he could apply to the Town Planning Appeal Tribunal for an order extinguishing or modifying the covenant to the extent necessary to allow that user.¹¹ It is true that at present the grounds upon which a restrictive covenant can be extinguished or modified are relatively narrow but the Commission recommends below¹² that those grounds be widened to allow a restrictive covenant to be extinguished or modified if the covenant would -

- * impede a user or development of the land that is in accordance with the Metropolitan Region Scheme or a town planning scheme, interim development order or any regulation or code made under the *Town Planning and Development Act 1928*; or
- * if, having regard to the Metropolitan Region Scheme or a town planning scheme, interim development order or any regulation or code made under the *Town Planning and Development Act 1928* which applies to the land, retention of the restriction would have the effect of preventing the land being used or developed for any purpose.

Where such an application is successful in an estate scheme, the covenant would remain for the benefit of other landowners in the scheme entitled to the benefit of it.

(e) Restrictive covenants which prevent or restrict the subdivision of land

5.6 It was also suggested to the Commission by the Western Australian Planning Commission that restrictive covenants which prevent or restrict the subdivision of land should

¹⁰ Under the Commission's recommendations in paras 5.28 and 5.23 below.

¹¹ Under the Commission's recommendations in paras 5.18-5.23 below.

¹² Para 5.23.

be abolished. The subdivision of land is controlled by the Western Australian Planning Commission in accordance with policies developed by the Commission and the Town Planning Appeal Tribunal.¹³ The Commission does not consider that it is necessary to make such a provision because it recommends below¹⁴ that the Town Planning Appeal Tribunal on the application of any person interested in the land should be able to make an order wholly or partially extinguishing, discharging or modifying the restriction upon being satisfied that retention of the restriction would prevent a subdivision of land that had been approved, with or without conditions, under section 20 of the *Town Planning and Development Act 1928*.

2. CONTROL OF THE USE OF RESTRICTIVE COVENANTS

(a) Prior approval of restrictive covenants

5.7 Another issue raised in the Discussion Paper was whether or not the use of restrictive covenants should be controlled by requiring those wishing to use covenants¹⁵ to obtain approval for their use as a prerequisite to registration of the restrictive covenant at the Land Titles Division. The mechanism for that control could be similar to that applicable to subdivisions of land. Approval of a body such as the Western Australian Planning Commission could be required before the covenant could be registered on the title of the burdened lot and it could be provided that covenants are invalid or unenforceable unless they are registered. If the body which was required to give approval were the Western Australian Planning Commission, it could be required to consult with the relevant local government as it does with applications for subdivisions of land.

5.8 Prior approval of restrictive covenants could be supported on the following grounds -

- * Some restrictive covenants should not be permitted because they clutter the title, tie up the use of land, diminish the marketability of land or stifle innovation in the use of building materials.
- * Some restrictive covenants should not be permitted on public interest grounds because they contribute to urban sprawl or increase the cost of housing.

¹³ Para 3.2 above.

¹⁴ Para 5.23.

¹⁵ Other than those promoting some public interest such as the protection of a building of historical interest.

- * The same ends could be achieved by other means which may be more flexible, such as planning policies and local laws.

Requiring prior approval of restrictive covenants would provide an opportunity to ensure that restrictive covenants did not conflict with or were not inconsistent with the interests promoted by town planning schemes and local laws. At present the Western Australian Planning Commission sometimes requires that a developer, as a condition of approval of a subdivision, provide a written undertaking that restrictive covenants that limit the number of dwellings which may be constructed on a block will not be placed on the title of any blocks within the application area. This is somewhat haphazard because it is only considered if the Commission happens to learn of the developer's intention. Prior approval could also be used to limit the use of other types of restrictive covenants such as those which stifle innovation in design and housing construction methods, methods which might provide cheaper housing in the future.

5.9 Commentators were almost evenly divided on the question of whether controls should be placed on the use of restrictive covenants. The Commission *recommends* that restrictive covenants should not be controlled by requiring those wishing to use them to obtain approval for their use as a prerequisite to registration at the Land Titles Division for the following reasons -

- * it is not satisfied that there is any compelling need to control the use of restrictive covenants by developers;
- * restrictive covenants are a private matter and developers should be free to regulate the amenity of subdivisions;
- * an approval process might increase costs for developers and delay the completion of projects; and
- * the Commission recommends below¹⁶ that the circumstances in which restrictive covenants can be extinguished or modified be liberalised,

¹⁶ Para 5.23.

particularly in relation to those covenants which conflict with or are inconsistent with town planning schemes or local laws.

(b) Limiting the duration of restrictive covenants

5.10 Another approach to limiting the use of restrictive covenants both present and future raised in the Discussion Paper is to provide that restrictive covenants should only be valid for a limited period of time,¹⁷ say ten years.¹⁸ Time limits have been imposed in Ontario¹⁹ and some states in the United States of America²⁰ and recommended in England.²¹

5.11 Providing that restrictive covenants should be valid for a limited period of time could serve to promote the public interest by ensuring that land is not tied up indefinitely and that new uses of land and innovation in design and construction methods are not stifled indefinitely.²² However, the Commission is not satisfied that it would be appropriate to fix a time limit for all restrictive covenants because -²³

- * a restrictive covenant is an interest in land and therefore should not be extinguished on the expiration of a prescribed period of time; and
- * any time limit would necessarily be arbitrary.

The Commission considered whether or not a time limit could be imposed in respect of certain types of restrictive covenants but not others. It might, for example, be possible to provide that a time limit would apply to restrictive covenants designed to protect the amenity of or standard of housing in an area but not those designed to provide land management controls or otherwise promote some public interest. The Commission does not recommend

¹⁷ At present some restrictive covenants expressly provide that they expire and cease to have effect from a prescribed date. The Commission understands that many estate scheme covenants which are currently being lodged for registration expire in the year 2000 or 2010.

In a preliminary submission to the Commission, the Urban Development Institute of Australia stated that ten years is a commonly adopted term for covenants amongst those involved in the land development industry.

¹⁸ Officers of the Ministry for Planning suggested this period. It was thought that this period was sufficient time for the character of an estate to become established while allowing for flexibility in the longer term.

¹⁹ Para 4.20 above.

²⁰ Para 4.38 above.

²¹ Para 4.28 above.

²² For example, a restrictive covenant which provides that a ". . . house shall not be constructed otherwise than with stone foundation" precludes the use of a concrete slab and footings.

²³ Seven of those who commented on this proposal supported it. It was opposed by 11 commentators.

that this approach be adopted because distinguishing one type of covenant from another for this purpose would often create uncertainty as to which covenants were extinguished after the expiration of the prescribed time. For example, it is not clear whether a covenant that prohibited the erection of buildings on a block other than in a prescribed building envelope could be characterised as one protecting the amenity of a bush setting or as a land management control.

5.12 An alternative to providing that all or some restrictive covenants cease to be valid after the expiration of a prescribed period of time is to provide that a restrictive covenant expires after a limited period of time unless it is renewed by the owner of the benefited block. This option was raised in the Discussion Paper but was opposed by almost all of those who commented on it. Such an approach has been recommended in England but not accepted by the then United Kingdom government.²⁴ It has also been recommended that a similar approach be adopted in California.²⁵ It has the advantage that a restriction which is not considered to be obsolete can be retained if it is renewed. However, it has the following disadvantages -

- * the owner of the benefited block might not know about a still useful and valuable covenant;
- * even if he knew of the covenant, he might be ignorant of the need to apply for re-registration;
- * it would involve extra work for the Land Titles Division and there would be additional cost for the owner of the benefited block; and
- * in the case of estate schemes the value of the restrictive covenant would be reduced if the re-registration did not apply to all the blocks in the scheme. It would be necessary to decide whether all block owners in the scheme should be required to seek re-registration to protect their interest or whether re-registration by one of them should keep the covenants of all of them alive.

²⁴ Para 4.28 above.

²⁵ Para 4.38 above.

Because of these disadvantages the Commission *recommends* that it should not be provided that a restrictive covenant ceases to be valid after the expiration of a prescribed period of time unless it is renewed by the owner of the benefited block.

3. CONFLICT OR INCONSISTENCY BETWEEN A RESTRICTIVE COVENANT AND A TOWN PLANNING SCHEME OR A LOCAL LAW

(a) The problem

5.13 At present difficulties can arise where a restrictive covenant conflicts with or is inconsistent with the provisions of a town planning scheme. A *conflict* involves cases where it is not possible to act consistently with both a scheme or local law and a covenant otherwise than by doing nothing with the land. An *inconsistency* arises where the covenant is either less or more restrictive than the scheme or local law. In either case some form of user or development is possible which is consistent with both the covenant and the scheme or local law. An example of a conflict is the situation which arose in *Perth Construction Pty Ltd v Mount Lawley Pty Ltd*²⁶ where the restriction was that the land "shall not be used for any other purpose than the erection thereon of a private dwelling house with its usual convenience." The zoning by-law had been amended to restrict the use of the land to business purposes and the use for residential purposes was prohibited. The covenant had the effect of preventing the land being used for any purpose whatsoever. An example of an inconsistency is where the covenant limits the use of the land to the construction of a single residence but the town planning scheme permits the construction of a duplex. There may also be conflicts or inconsistencies between what is permitted by a restrictive covenant and what local laws permit or prescribe. An example of an inconsistency is a restrictive covenant which prohibits the use of certain building materials though their use is permitted under the Building Code of Australia²⁷ but the covenant may allow the use of other materials, the use of which is permitted under the Code.

5.14 If a landowner complied with a town planning scheme or building by-laws but did not comply with the provisions of a restrictive covenant those entitled to the benefit of the covenant could take legal proceedings to enforce the covenant. To avoid this, the landowner could apply to the Supreme Court for an order to extinguish, discharge or modify the

²⁶ (1955) 57 WALR 41.

²⁷ Para 3.18 above.

covenant.²⁸ Such an application can be made, for example, by a person who wishes to build more than one house on a block in conformity with the town planning scheme notwithstanding that a covenant prevents such development. However, the objects sought to be achieved by a town planning scheme may be frustrated because the Court is not required to have regard to the scheme in dealing with the application.²⁹

(b) Town planning schemes and local laws should not override restrictive covenants

5.15 In the Discussion Paper the Commission sought comments on whether or not it should be provided that it is not a breach of a restrictive covenant to construct a building in conformity with a town planning scheme or local laws, such as building by-laws, or regulations.³⁰ This sort of approach has been adopted in New South Wales.³¹

5.16 The major reason for allowing town planning schemes or local laws to override restrictive covenants which conflict with or are inconsistent with the provisions of town planning schemes or local laws is that covenants place limits on the use of land which are inconsistent with the public purposes sought to be achieved by such schemes or laws. For example, the medium and high density development permitted in many town planning schemes limits the spread of the urban area. It can be argued that it is incongruous that these public purposes can be frustrated by agreements between private individuals. The overriding of restrictive covenants can also be justified because the use of restrictive covenants as a means of private regulation of land was developed at a time when town planning schemes were not available to control land use and protect land owners.³²

5.17 The Commission does not, however, recommend that provision be made for town planning schemes or local laws to override restrictive covenants for the following reasons -

- * Town planning schemes and local laws generally impose minimum standards on the use and development of land. It is not unreasonable to impose more

²⁸ Unless all those with an interest in the land agree to the discharge or modification of the covenant (para 2.18 above) or a town planning scheme provides for the discharge or variation of a covenant (paras 3.20-3.21 above).

²⁹ Para 2.22 above.

³⁰ Four of those who commented on this proposal supported it. It was opposed by seven commentators.

³¹ Para 4.3 above.

³² Para 1.3 above.

stringent standards by restrictive covenants to improve the amenity of an area or to protect the economic interest of landowners.

- * As with the abolition of all restrictive covenants, the overriding of some covenants would unfairly prejudice those who enjoy the benefit of a covenant but would provide a windfall for those who were subject to the burden of a covenant.
- * Uncertainty would be created as to which covenants were valid and which had been overridden by the town planning scheme or a local law.

In any case, the Commission recommends below that local governments should have standing to apply to the Town Planning Appeal Tribunal for the extinguishment or modification of a restrictive covenant in more liberal circumstances than is presently the case.³³ If implemented, this recommendation would allow a local government to apply to the Tribunal for the extinguishment or modification of a restrictive covenant on a case by case basis if a particular covenant frustrated the purposes sought to be achieved by a town planning scheme or a local law.

(c) Transferring the power to extinguish or modify restrictive covenants from the Supreme Court to the Town Planning Appeal Tribunal

5.18 At present the power to extinguish or modify a restrictive covenant in certain circumstances is conferred on the Supreme Court.³⁴ The Commission *recommends* that this power be transferred to the Town Planning Appeal Tribunal for the following reasons -

- * Its composition and existing jurisdiction³⁵ in relation to town planning matters mean that it has the specialist expertise to exercise the discretion to extinguish or modify restrictive covenants, particularly under the more liberal grounds recommended below³⁶ which involve taking account of town planning matters.

³³ Paras 5.23 and 5.28 below.

³⁴ Para 2.21 above.

³⁵ See para 3.24 above.

³⁶ Para 5.23.

- * The Tribunal's procedure is well suited to dealing with applications with expedition, informality and minimal costs.

- * In some cases, a landowner may wish to appeal to the Tribunal against a decision by a local government on a development proposal and apply for the extinguishment or modification of a restrictive covenant in relation to the same proposal. Adoption of the Commission's recommendation would mean that both matters could be dealt with by one Tribunal at the same time.

5.19 In proceedings to enforce any rights arising out of a breach of a restrictive covenant any person against whom the proceedings are instituted may in such proceedings apply to the court for an order to extinguish or modify the covenant.³⁷ If the power to extinguish or modify a restrictive covenant is transferred to the Town Planning Appeal Tribunal, the Commission *recommends* that the power of the court dealing with proceedings to enforce a covenant to make an order to extinguish or modify the covenant be abolished. A defendant in enforcement proceedings should apply immediately proceedings are commenced, if he has not already done so and wishes to do so, to the Tribunal for the extinguishment or modification of the covenant which is the subject of the proceedings. This would mean that all applications for the extinguishment or modification of a covenant would be dealt with by the Town Planning Appeal Tribunal, which the Commission considers is the most appropriate tribunal to deal with these matters.

5.20 At present, where an application is made to the Supreme Court to extinguish or modify a restrictive covenant, the costs of and incidental to an application cannot be awarded against the defendant or respondent.³⁸ Under the Town Planning Appeal Tribunal's existing appellate jurisdiction each party to an appeal must bear his own costs of the appeal except -

- * where in the opinion of the Tribunal a party to an appeal has behaved unreasonably, vexatiously or frivolously in relation to the appeal, in which case the Tribunal may award such costs as it thinks fit against that party and in favour of any other party; or

³⁷ *Transfer of Land Act 1893* s 129C(2).

³⁸ *Id* s 129C(8).

- * where an appeal is withdrawn, in which case the Tribunal may award such costs as it thinks fit against the appellant in favour of any other party to the appeal.³⁹

To ensure that neither an applicant nor a respondent is inhibited from presenting his case to the Tribunal for fear of an order for costs being made against him, the Commission *recommends* that the same rules should apply to applications to the Tribunal to extinguish or modify a restrictive covenant.

(d) Liberalising the circumstances in which restrictive covenants can be extinguished or modified by the Town Planning Appeal Tribunal

5.21 Although the Commission does not recommend that restrictive covenants should be overridden by town planning schemes or local laws, it does believe that the circumstances in which restrictive covenants can be extinguished or modified by order of the Town Planning Appeal Tribunal should be liberalised to allow the public purposes sought to be achieved in town planning schemes and local laws to be taken into account.⁴⁰ This issue was raised in the Discussion Paper. Most of those who commented on the issue were opposed to liberalisation.

5.22 There are more liberal provisions than in Western Australia in Queensland, England and Tasmania. In Queensland and England the public interest may be taken into account on an application to extinguish or modify a restrictive covenant.⁴¹ In England the Land Tribunals may wholly or partially discharge or modify a restrictive covenant if the continued existence of a restrictive covenant ". . . would impede some reasonable user of the land for public . . . purposes or . . . would unless modified so impede such user".⁴² However, in practice, applications based on public purpose have rarely been successful.⁴³ In Tasmania a restrictive covenant may be extinguished or modified if its continued existence would impede a user of the land in accordance with a planning scheme.⁴⁴

³⁹ *Town Planning and Development Act 1928* s 54C(1)-(3).

⁴⁰ For the circumstances in which restrictive covenants can be extinguished or modified by the Supreme Court see paras 2.21-2.22 above

⁴¹ Paras 4.5, 4.24-4.25 above.

⁴² *Law of Property Act 1925* (UK) s 84(1)(aa).

⁴³ Para 4.25 above.

⁴⁴ Para 4.10 above.

5.23 The Commission considers that more liberal grounds for extinguishing or modifying restrictive covenants on a case by case basis are necessary because the existing grounds do not take into account the public interest in ensuring that land is used in an appropriate manner as reflected in public land use controls and guidelines such as town planning schemes. These controls and guidelines are often designed to promote public interests such as reducing the extent of urban sprawl and associated infrastructure costs by promoting infill developments or higher density use of land. In many cases restrictive covenants which are decades old contain restrictions imposed by those responsible for creating them which are completely outdated by and detrimental to existing public land use policies. More liberal grounds for extinguishing or modifying restrictive covenants are necessary to allow changes in circumstances in land use as reflected in provisions of public land use controls and guidelines to be taken into account. The fact that this approach allows one private party by invoking the public interest to secure the abridgement of the rights of another is not a barrier.⁴⁵ There is no incongruity in allowing individuals to advance the public interest, provided that there is a liberal provision for compensation for those whose private interests may be adversely affected as the Commission recommends below.⁴⁶ Accordingly, the Commission *recommends* that the circumstances in which restrictive covenants can be extinguished or modified should be made more liberal by providing in addition that the Town Planning Appeal Tribunal should, on the application of any person interested in the land, have a discretion by order wholly or partially to extinguish, discharge or modify the restriction upon being satisfied -

- (a) that a user or development proposed by the applicant would not be out of character with or prejudicial to the amenity of any land to which the benefit of the restrictive covenant is annexed whether by reason of the density of the development, the appearance, design, floor area, height, materials or finish of any proposed building or otherwise;
- (b) that the restriction would impede a user or development of the land that is in accordance with the Metropolitan Region Scheme or a town planning scheme, interim development order or any regulation or code made under the *Town Planning and Development Act 1928*;

⁴⁵ See the comments of the Ontario Law Reform Commission at para 4.21 above.

⁴⁶ Para 5.27.

- (c) that, having regard to the Metropolitan Region Scheme or a town planning scheme, interim development order or any regulation or code made under the *Town Planning and Development Act 1928* which applies to the land, retention of the restriction would have the effect of preventing the land being used or developed for any purpose;⁴⁷ or
- (d) that retention of the restriction would prevent a subdivision of a lot or an amalgamation of any lot with any other lot that had been approved, with or without conditions, under section 20 of the *Town Planning and Development Act 1928* or compliance with any condition imposed on the approval of a subdivision or an amalgamation of any lot with any other lot that had been approved under section 20 of the *Town Planning and Development Act 1928*.

In determining an application under paragraphs (a) or (b) above, the Tribunal should be required to take into account -

- (a) a Statement of Planning Policy prepared under section 5AA of the *Town Planning and Development Act 1928*;
- (b) the Metropolitan Region Scheme or a town planning scheme, interim development order or any regulation or code made under the *Town Planning and Development Act 1928* or a planning policy for the area in which the land is situated;
- (c) a local law for the area in which the land is situated;⁴⁸
- (d) the history of the development of the town planning scheme, interim development order or any regulation or code or a planning policy and its objectives;
- (e) any declared policy or ascertainable pattern of the local government in the grant or refusal of approval to use or develop land in the relevant area;

⁴⁷ This clause is meant to cover the situation which arose in *Perth Construction Pty Ltd v Mount Lawley Pty Ltd* (1955) 57 WALR 41: para 5.13 above.

⁴⁸ For example, a local law relating to fencing.

- (f) the time at which and the context in which the restriction was created or imposed; and
- (g) any other material circumstances.⁴⁹

This approach also avoids uncertainty as to which covenants are valid and which have been overridden by the town planning scheme or local law.

5.24 As stated above more liberal provisions in which the public interest may be taken into account have been enacted in other jurisdictions though in at least one, England, the provision does not appear to have been effective. The Commission considers that its recommendation is likely to be effective because it specifically requires that the Tribunal take into account public land use controls such as the Metropolitan Region Scheme and town planning schemes. It is also likely to be more effective than that in England because the Commission recommends below⁵⁰ that a more liberal compensation power be provided in this State.

5.25 At present, where the Supreme Court by order, extinguishes, discharges or modifies a restrictive covenant, the Court has no power to make an order as to compensation. The reason for this may have been because in the limited circumstances in which an order could be made there would be few, if any, cases in which any landowner would suffer injury. However, the Commission is now recommending that the power be widened.

5.26 In such circumstances, those who own land burdened by the covenant might make a significant financial gain while those entitled to the benefit of it might suffer a loss in the value of the benefited land. Other jurisdictions with comparable powers of extinguishment, discharge or modification to those recommended by the Commission have provided a power to award compensation.⁵¹ To protect those who might suffer a loss, an owner of land protected by a restrictive covenant who was adversely affected by it being extinguished, discharged or modified should be given a right to obtain compensation from the person benefiting from that result.⁵² Accordingly, the Commission *recommends* that the Town

⁴⁹ Based on *Property Law Act 1974* (Qld) s 181(2) and *Law of Property Act 1925* (UK) s 84(1B).

⁵⁰ Para 5.27.

⁵¹ See para 4.5 above (Queensland), para 4.10 above (Tasmania) and para 4.26 above (England).

⁵² Most of those who commented on this issue favoured providing for the payment of compensation.

Planning Appeal Tribunal should have power to order anyone who benefits from its order to extinguish, discharge or modify a covenant to pay any person entitled to the benefit of the covenant a sum to make up for any loss suffered by him in consequence of the extinguishment, discharge or modification of the covenant.⁵³

5.27 In some circumstances, the extinguishment, discharge or modification of a restrictive covenant might result in an increase in the value of the land of those entitled to the benefit of the covenant so that no loss will be suffered but the land may otherwise be affected. For example, in an estate scheme where a covenant restricts the number of residences that can be built on all blocks in the scheme, a modification to allow a duplex to be built on one block might increase the value of other blocks because of the potential for the covenant to be modified in relation to those other blocks to allow a duplex to be built on them. Despite this increase in the value of the other blocks, their owners might otherwise be affected by a diminution in the amenity of the area because of the increase in the density of residential development. To allow compensation to be paid for changes which do not result in a loss in value of the land, the Commission *recommends* that the Tribunal should be given a discretion to order the applicant for an order to extinguish, discharge or modify a restrictive covenant to pay compensation, in such other circumstances as the Tribunal considers appropriate, to the owners of other lots in the scheme affected by the extinguishment, discharge or modification of the covenant. Claims for this compensation might, for example, be based on a diminution in the visual amenity of the area or the cost of soundproofing or double glazing to deal with an increase in noise resulting from an increase or likely increase in the density of development in the area.

(e) A local government should have standing to apply to the Town Planning Appeal Tribunal for the extinguishment, discharge or modification of a restrictive covenant

5.28 Circumstances might arise in which a local government considers that a restrictive covenant should be extinguished, discharged or modified because it would otherwise frustrate the purposes sought to be achieved by a local law or a local government's town planning scheme or a development scheme.⁵⁴ To allow a local government to apply for the

⁵³ Such a provision would not be novel because equitable damages can be awarded in addition to or in substitution for an injunction to restrain a breach of a restrictive covenant: paras 2.24-2.28 above.

⁵⁴ A similar recommendation was made by the English Law Commission: para 4.27 above
For example, a restrictive covenant which prevents the registration of a strata plan in relation to a block: para 3.20 above.

extinguishment, discharge or modification of a restrictive covenant, the Commission *recommends* that local governments should have standing, but should be under no duty, to apply to the Town Planning Appeal Tribunal for the extinguishment, discharge or modification of a restrictive covenant on the same grounds as a person interested in the land.⁵⁵

(f) The local government power to extinguish or vary a restrictive covenant in town planning schemes should be restricted to guided development schemes

5.29 At present local governments have power, where a town planning scheme provides for it, to extinguish or vary any restrictive covenant affecting land.⁵⁶ The Commission *recommends* that this power should be abolished, except in relation to guided development schemes,⁵⁷ for the following reasons -⁵⁸

- * A landowner should not be deprived of or have an interest in land modified without a hearing by a body required to observe the rules of natural justice and the procedural safeguards associated with such a tribunal;
- * The existing power is inconsistent with the Commission's recommendations that the circumstances in which a restrictive covenant can be extinguished, discharged or modified be liberalised to allow the public purposes sought to be achieved by town planning schemes or local laws to be taken into account on a case by case basis⁵⁹ and that local governments should have standing to apply to the Town Planning Appeal Tribunal for the extinguishment, discharge or modification of a restrictive covenant.⁶⁰

⁵⁵ Para 5.23 above.

⁵⁶ Para 3.20 above.

⁵⁷ See the *Report of the Committee of Inquiry into Statutory Planning in Western Australia* (1984) 30. Development schemes are schemes which are designed to allow the land of several owners to be amalgamated and resubdivided amongst such owners and such other persons as may be provided for in the scheme. They may involve works, construction or alteration of boundaries but do not involve zoning or classification of land: *Town Planning Regulations 1967* reg 3. In a resumptive development scheme, the local government resumes all the land in the scheme and acts as a developing agent for the owners. In a guided development scheme, the local government coordinates the subdivision of the land in the scheme area and apportions development costs amongst the owners without any land being resumed.

⁵⁸ The restriction of the power in this way will mean that restrictive covenants, other than those on land in a guided development scheme, could not be extinguished or modified in a town planning scheme as was done by the City of Melville: para 3.20 above. It would also make it unnecessary to pass legislation such as the Town Planning and Development Amendment (Menora and Coolbinia) Bill 1996 introduced by Mr Catania, MLA (as he then was) and the Acts Amendment (Restrictive Covenants) Bill 1996, introduced by Dr Hames, MLA.

⁵⁹ Para 5.23 above.

⁶⁰ Para 5.28 above.

- * Given that the existing power has rarely been exercised, there does not appear to be any compelling need to retain it.

The Commission recommends that an exception be made in the case of guided development schemes where all the landowners in the scheme area agree to participate in the scheme because a provision in the scheme is a simple means of extinguishing or varying any restrictive covenants affecting the land in the scheme area. This is merely a convenient way of implementing the present law which enables covenants to be varied or extinguished by agreement. In the case of a resumptive development scheme, restrictive covenants can be extinguished as part of the process of resuming the land for the scheme.⁶¹

5.30 Where a restrictive covenant is extinguished or varied by a guided development scheme it will be necessary for the certificates of title affected by the extinguishment or variation to be amended to remove or vary the covenant. At present the *Transfer of Land Act 1893* authorises the Commissioner of Titles to direct the removal of any "right or interest notified as an encumbrance" on the certificate of title if it has been "fully satisfied extinguished or otherwise determined and no longer affects" the relevant land.⁶² This provision does not provide for a restrictive covenant to be varied in the manner set out in a development scheme. The Commission *recommends* that provision be made for this along the lines of section 129C(7) of the *Transfer of Land Act 1893* so that, on an application being made, the Registrar must make all necessary amendments and entries in the Register to give effect to the extinguishment or variation of the covenant by a guided development scheme.

4. RESTRICTIVE COVENANTS IN GROSS

5.31 Generally, under the existing law, only landowners can have the benefit of a restrictive covenant. Local governments do not have the benefit of a restrictive covenant unless they can be made a party to a covenant by one of the means or devices referred to above.⁶³ As a result of the rule in *London County Council v Allen*,⁶⁴ a local government which is not a party to a restrictive covenant cannot enforce it.

⁶¹ *Town Planning and Development Act 1928* s 13(1)(b) and *Land Acquisition and Public Works Act 1902* s 18.

⁶² S 184.

⁶³ Paras 2.12 and 2.13 above.

⁶⁴ Para 2.4 above.

5.32 The *Final Report of the Commission of Inquiry into Land Tenures*⁶⁵ examined the difficulties created by the rule in *London County Council v Allen*. It pointed out that attempts had been made to overcome the limitation imposed by the rule. For example, covenants have been attached to public roads, but this will normally be ineffective because it is not easy to demonstrate that a limitation on the use of particular land will benefit a particular roadway.⁶⁶ The Report concluded that there was a need for covenants in gross, both positive and restrictive, in favour of a public authority.⁶⁷ It gave the following example of the situations in which a covenant in gross could be useful:

"A council . . . purchases an old building and restores it. It is useful for private purposes and it is desirable that it be resold to permit such use and to recoup the capital outlay. It is also desirable to ensure that the building is not demolished or externally altered, at least without permission. The purchaser is willing to so covenant but the problem is how to make this binding on his successors in title. No other land of the covenantee is affected by the covenant."⁶⁸

5.33 The Report suggested that a provision along the following lines be adopted in each jurisdiction in Australia:⁶⁹

"(1) It shall be, and shall be deemed always to have been, possible to create by covenant, contained in a registered dealing in favour of a prescribed authority, an enforceable obligation or restriction relating to the land referred to in such dealing notwithstanding:

- (a) that there be no land benefited by the said obligation or restriction or that the prescribed authority has no interest in any land benefited thereby;
- (b) that the obligation or restriction requires the doing of some positive act or acts.

(2) Any such obligation or restriction shall be endorsed upon the Certificate of Title of the said land and shall be enforceable by the prescribed authority against the registered proprietor for the time being of the said land as if made between the prescribed authority and the registered proprietor.

⁶⁵ Final Report 1976. This report included an examination of systems of land tenure and the advantages and disadvantages of each system that relate to the acquisition, disposal, development, management and redevelopment of land for urban purposes.

⁶⁶ *Final Report of the Commission of Inquiry into Land Tenures* (1976) paras 4.36-4.38.

⁶⁷ Id para 4.52.

⁶⁸ Id para 4.45(b).

⁶⁹ This is wider than the provisions in Western Australia which apply to particular situations: see para 2.14 above.

(3) In this section the term 'prescribed authority' means the Crown, any statutory body representing the Crown, any public authority constituted by Act of Parliament and any local authority.

(4) This section applies and shall be deemed always to apply to the land under the provisions of the *Real Property Act*, etc. [as the case may be].⁷⁰

Provisions along the lines of that proposed above have been enacted in New South Wales, South Australia, Tasmania and Victoria.⁷¹ The provisions in South Australia and Tasmania allow for both positive and restrictive covenants in gross.

5.34 In the Discussion Paper the Commission raised the question whether a local government should be empowered to enter into a restrictive covenant even though it has no land capable of benefiting from a covenant. This is possible at present in specific circumstances under various Acts of Parliament.⁷² As stated in the previous paragraph, more general powers to create restrictive covenants have been provided in other jurisdictions following the recommendation of the Commission of Inquiry into Land Tenures. A majority of those who commented on the issue supported the proposal.

5.35 The Commission of Inquiry into Land Tenures gave a number of examples of situations in which a restrictive covenant in gross could be useful. One of these, preserving the character of old buildings, is referred to above.⁷³ One commentator favoured the proposal because of a need to provide "site specific requirements that cannot otherwise be controlled by the specific provisions of town planning schemes". An example is where a local government approves the erection of more than one residence on a large rural block on condition that the owner will not seek a subdivision of the block. The local government could enforce the condition by requiring the owner to enter into a restrictive covenant in gross with it as a party to the covenant. The restrictive covenant could also be used in other circumstances, for example, for land preservation, where other means or devices have been used to create restrictive covenants.⁷⁴ Empowering local governments to enter into a restrictive covenant in gross would have two advantages -

⁷⁰ *Final Report of the Commission of Inquiry into Land Tenures* (1976) para 4.52.

⁷¹ New South Wales (para 4.2 above), South Australia (para 4.7 above), Tasmania (para 4.8 above) and Victoria (para 4.11 above).

⁷² Para 2.14 above.

⁷³ Para 5.32 above.

⁷⁴ Paras 2.12 and 2.13 above.

- * it would allow the authority to influence the content of the covenant, for example, where it was to be used for the land management of a subdivision; and
- * it would allow the local government to enforce the covenant, particularly long after the owner or developer had disposed of its interest in the land.

5.36 Since the publication of the Discussion Paper, the *Transfer of Land Amendment Act 1996* has been passed by Parliament. Section 76 of this Act makes provision for local governments and public authorities to enter into restrictive covenants in gross. Because of the need to provide "site specific requirements" the Commission *endorses* this provision.

5. ENFORCEMENT OF RESTRICTIVE COVENANTS

(a) Introduction

5.37 At present, restrictive covenants are generally enforceable in the Supreme Court (in equity, by an injunction and damages in addition to or substitution for an injunction) by a party to the covenant or a successor in title. In the District Court, restrictive covenants may be enforced in limited circumstances.⁷⁵ A Local Court has jurisdiction to deal with claims for damages up to \$25,000.⁷⁶ Injunctive relief is also available in Local Courts if the parties agree, by a memorandum, that any Local Court shall have jurisdiction to determine an application for that relief.⁷⁷

5.38 In the Discussion Paper the Commission put forward a number of other means of enforcing or ensuring compliance with restrictive covenants which could be adopted. These are discussed below.⁷⁸ The Commission does not recommend that any of them should be adopted for the reasons given. The Commission considers that the existing means of enforcement are adequate and *recommends* that landowners should continue to rely on them or use alternative dispute resolution methods such as arbitration or mediation. In at least one case brought to the Commission's attention, community pressure on those in breach of a restrictive covenant was sufficient to coerce them to conform to the covenant. The fact that

⁷⁵ Para 2.29 above.

⁷⁶ Para 2.30 above.

⁷⁷ Para 2.31 above.

⁷⁸ Paras 5.39-5.45.

landowners may be deterred from commencing court proceedings by the cost of doing so is a general problem and not one peculiar to restrictive covenants. Shifting the burden of enforcing restrictive covenants to local governments and thus other ratepayers is inappropriate, except where the local government considers that it is in the public interest to ensure that a covenant is enforced.⁷⁹ In the case of estate schemes, the burden of the cost of instituting legal proceedings could, however, be spread amongst the various landowners if they joined together to commence proceedings or established a community association as has been done in some estate schemes.

(b) Preliminary vetting of restrictive covenants

5.39 One means of ensuring that a building is constructed in conformity with a restrictive covenant would be to provide that the plans for the building must conform to the covenant before they are approved by the relevant local government.⁸⁰ To be effective it would be necessary for the restrictive covenant and modifications of the covenant to be registered with the local government. A fee could be imposed on the registration of the covenant to cover the costs of registration, vetting of plans and enforcement of covenants, including field inspections to ensure construction was in accordance with the approved plans and any legal action which might be required.

5.40 This approach would provide a means of preventing breaches of restrictive covenants in relation to the construction of a building. It would not, of course, provide a means of dealing with breaches of covenants in relation to existing buildings, breaches not related to building plans or breaches which occurred after the building was completed. For these breaches it would be necessary to use other means of enforcement.

5.41 Although most of those who commented on this proposal supported it, the Commission *recommends* that it not be adopted. The main reason for doing so is that it is inappropriate to impose a duty on local governments to vet building plans for compliance

⁷⁹ Para 5.48 below.

⁸⁰ This approach was at one time adopted by at least one local government. At the request of the developer of a subdivision, the Council agreed to withhold the issue of a building licence pending the developer's approval of the proposed building. Once the developer was satisfied that the plans conformed with the covenant, a stamped copy of the plans was sent to the Council. If the plans complied with the Council's requirements, a building licence was then issued. The approach was discontinued because of its subsequent view that a local government does not have authority to withhold a building licence pending vetting of the building plans by the developer.

with restrictive covenants, including interpreting the scope of the covenant, and to render them liable for any breach of that duty when a restrictive covenant is based on an agreement between private individuals. It is also unacceptable because -

- * it would delay the approval of building applications;
- * it would result in additional work for the local government officers; and
- * the cost of the measures would be likely to be disproportionate to the benefit to be derived from them.

5.42 One commentator, who wished to vet building plans of another person to check that they complied with a restrictive covenant, claimed that his local government refused to allow him to see the plans. The Commission considered recommending that landowners in a local government area be given a right to inspect either a planning approval or building plans to ensure that any proposed building or user complied with the restrictive covenant. However, the Commission is satisfied that the right of access to documents created by the *Freedom of Information Act 1992* provides a satisfactory means of gaining access to these documents. Under the Act a person has a right to be given access to the documents of an agency which includes a local government.⁸¹ An agency may refuse access to a document if it is an exempt document, that is, a document that contains exempt matter.⁸² For example, a matter is an exempt matter if its disclosure would reveal trade secrets of a person or would reveal information that has a commercial value to a person and could reasonably be expected to destroy or diminish that commercial value.⁸³ However, if access is sought to a document containing exempt matter and it is practicable to edit it to delete the exempt matter, the agency must give access to an edited copy.⁸⁴

(c) Other enforcement mechanisms

5.43 One possible drawback with existing civil remedies is that the owner of the benefited block bears the onus of instituting court proceedings against the owner of a burdened block

⁸¹ *Freedom of Information Act 1992* s 10(1).

⁸² Id s 23(1).

⁸³ Id Schedule 1 item 4.

⁸⁴ Id s 24. An applicant cannot be given a copy of a document if this would involve an infringement of copyright belonging to a person other than the State: id s 27(2)(c).

whom he alleges has breached or is likely to breach a restrictive covenant. An alternative approach proposed in the Discussion Paper is to allow the owner of a benefited block to apply to the local government for the issue of a written enforcement notice to the owner of the burdened block directing him to -

- * rectify any breach of a restrictive covenant⁸⁵ within a prescribed period, say 21 days; or
- * within the prescribed period, cease or agree not to undertake any development that constitutes a breach of the covenant.

5.44 The owner of the burdened block, on being served with an enforcement notice, could be given the right, within the prescribed period, to apply to a court or tribunal for an order that the direction in the notice be varied or cancelled. On hearing the owner of the burdened block and the owner of the benefited block, the court or tribunal could confirm, vary or cancel the direction or award damages to the owner of the burdened block if he can be compensated adequately in money for the harm done to his interests as a result of the breach of the covenant. Where the direction was confirmed or varied, the owner would be required to comply with the direction as so confirmed or varied within say 21 days of the confirmation or variation or such other period as the court or tribunal should order. If the owner failed to make an application to the court or tribunal or if, on an application, the direction was confirmed or varied, and the owner did not comply with the order within the specified time, the local government would be empowered to carry out whatever works were necessary to secure compliance with the direction. The costs incurred by it in carrying out such works could be recovered from the owner of the burdened block in any court of competent jurisdiction.⁸⁶ Where the breach of a restrictive covenant was not one that could be remedied by necessary work being carried out it could be made an offence to fail to comply with an enforcement notice with a daily penalty for a breach of a continuing nature, for example, keeping a horse on a property where that is prohibited by a restrictive covenant.

⁸⁵ Depending on the breach this might involve pulling down a building or altering it so as to remove the cause of the breach.

⁸⁶ This approach is similar to one in s 401 of the *Local Government (Miscellaneous Provisions) Act 1960* in relation to the construction of buildings which do not comply with the plans and specifications for the building and s 43 of the *Metropolitan Region Town Planning Scheme Act 1959* in relation to the removal of any development commenced, continued or carried on on land in contravention of the Metropolitan Region Scheme.

5.45 The Commission *recommends* that the approach described in the previous paragraph not be adopted because it is inappropriate for local governments to be required to commit their resources to assist one ratepayer to enforce a private agreement against another ratepayer. For the same reason, the Commission *recommends* that it should not be made an offence to contravene or fail to comply with a restrictive covenant.⁸⁷

(d) Giving local governments standing to enforce restrictive covenants

5.46 At present, a local government which does not own land benefited by a restrictive covenant does not have standing to enforce it by taking action in the Supreme Court, the District Court or a Local Court on behalf of one or more of its residents or ratepayers who own land benefited by a covenant. One question raised in the Discussion Paper was whether a local government should be given standing to enforce a restrictive covenant in these courts.⁸⁸

5.47 Arguments for this are -

- * There may be a public interest or benefit in the enforcement of a restrictive covenant, for example, land management controls have been imposed by restrictive covenants where no such controls have been provided under the local government's town planning scheme.⁸⁹ In these cases it might be appropriate for the local government to choose to incur the cost of the proceedings.
- * Although restrictive covenants involve private planning, they are akin to functions which local governments undertake at present in relation to town planning and the construction of buildings in order to protect the amenity of areas in the municipality.

⁸⁷ As is the case with breaches of town planning conditions (para 3.14 above) and restrictions on the use of lots under the *Strata Titles Act 1985*. Where a strata plan is lodged for registration under the *Strata Titles Act 1985* the plan may by an appropriate endorsement restrict the use to which a lot or part of a lot may be put: *Strata Titles Act 1985* s 6(1). Where this occurs, it is an offence for a proprietor, occupier or other resident of the lot to use it, or permit it to be used, in a manner that contravenes the restriction: *id* s 6(2). The system for dealing with breaches of town planning conditions was severely criticised at 103 of the *Report of the Committee of Inquiry into Statutory Planning in Western Australia* (1984).

⁸⁸ Seven commentators favoured this approach. It was opposed by four commentators.

⁸⁹ Para 3.19 above.

- * It might be less prejudicial to relations between neighbours if enforcement action was taken by a public body such as a local government.

5.48 Arguments against giving a local government standing to enforce a restrictive covenant on behalf of a resident or ratepayer who owns land benefited by a covenant are -

- * Restrictive covenants are private arrangements entered into between landowners, which are otherwise enforceable only as between landowners and their successors in title.
- * Local governments may be reluctant to take action in relation to minor breaches, preferring to rely on community education or community pressure against the person who breached the covenant.
- * Local governments may not have adequate funds to undertake proceedings in a court of competent jurisdiction to enforce the covenant.
- * The decision-making processes of local governments may not be well suited to taking timely action to prevent a breach of a covenant.

Having considered these arguments, the Commission has concluded that local governments should not be given standing to enforce restrictive covenants merely as a means of protecting the interests of those who own land benefited by them. However, there may be circumstances in which restrictive covenants have been created to serve a public purpose or interest. In the absence of a provision allowing restrictive covenants in gross, various devices have been used to create restrictive covenants in these circumstances.⁹⁰ To ensure that a local government can enforce a restrictive covenant created to serve a public purpose or interest, the Commission *recommends* that a local government should have standing, but not be under a duty, to take action to enforce a restrictive covenant. In deciding whether to institute proceedings to enforce a covenant a local government will no doubt take into account the cost of undertaking the proceedings and the extent of the public interest in ensuring that the covenant is enforced.

⁹⁰ Paras 2.12-2.13 above.

(e) Options other than restrictive covenants

(i) Introduction

5.49 Another means of avoiding the problems encountered in enforcing restrictive covenants is for other options to be used to achieve the same ends as estate schemes. One option, planning policies, is already used. A second option, cluster titles, exists in other jurisdictions and has previously been recommended for adoption in this State by the Commission. It involves a conventional subdivision of land and a community association with community standards. Both of these options are discussed below.

(ii) Planning policies

5.50 At present, where a town planning scheme provides for it, a local government may adopt a planning policy to regulate the development or use of land in its area. In other cases they complement the town planning scheme.⁹¹ Planning policies set minimum standards for particular areas or districts in the town planning scheme area.⁹² They provide an alternative to restrictive covenants because standards similar to those set out in some estate schemes can be incorporated in planning policies. Local governments are not bound by planning policies but have regard to them in deciding whether to approve a development application. Approval of the application might be conditional on compliance with guidelines set in a planning policy. A breach of the conditions of a development approval can occur if a landowner fails to comply with these conditions.

5.51 Where there is a breach of a condition the situation differs depending upon whether the land concerned is in the Perth metropolitan region or an area outside the region. This is because land in the Perth metropolitan region is governed by both a local government town planning scheme and the Metropolitan Region Scheme but land outside the region is governed only by a local government town planning scheme. Where a local government in the Perth metropolitan region determines a development application it does so under both schemes and issues a single approval. Those local governments outside the region determine applications

⁹¹ Para 3.17 above.

⁹² They should be distinguished from Statements of Planning Policy, such as the *Residential Planning Codes*, made under section 5AA of the *Town Planning and Development Act 1928* by the Western Australian Planning Commission with the approval of the Minister.

under their town planning scheme alone. The result is that if a breach of a condition occurs, an offence may be committed under the *Metropolitan Region Town Planning Scheme Act 1959*, the *Town Planning and Development Act 1928* or both if the land is in the Perth metropolitan region. However, the scope of the offences under these Acts is not the same. The offence under the *Town Planning and Development Act 1928* is narrower than that under the *Metropolitan Region Town Planning Scheme Act 1959*.

5.52 Under the *Town Planning and Development Act 1928*:

"A person who -

- (i) contravenes or fails to comply with the provisions of a town planning scheme; or
- (ii) commences or continues to carry out any development which is required to comply with a town planning scheme otherwise than in accordance with that scheme or otherwise than in accordance with any condition imposed with respect to the development by the responsible authority pursuant to its powers under that scheme,

is guilty of an offence".⁹³

Under the *Metropolitan Region Town Planning Scheme Act 1959*:

"A person who -

- (a) after the Scheme has the force of law commences or continues to carry out any development in any part of the metropolitan region the subject of the Scheme otherwise than in accordance with the provisions of the Scheme [or commences or continues to carry out any such development otherwise than in accordance with any condition imposed by the Commission or a local government pursuant to this Act with respect to the development or otherwise fails to comply with any such condition]; or
- (b) at any time contravenes the provisions of this Act,

commits an offence".⁹⁴

The words in square brackets were inserted in the Act by an amendment in 1979.⁹⁵

⁹³ S 10(4)(a).

⁹⁴ S 42.

⁹⁵ *Metropolitan Region Town Planning Scheme Act Amendment Act (No 2) 1979* s 17(a).

5.53 The application of the *Metropolitan Region Town Planning Scheme Act* offence before it was amended to a breach of a condition that the means of vehicular access from a street to the ground floor of a proposed building be permanently closed, continuing after the building was completed, was considered by the Full Court of the Supreme Court of Western Australia in *Esther Investment Pty Ltd v Dawson*.⁹⁶ Burt CJ held that the section was not directed to the use of a building when and after it had been built. It was confined to the building itself.⁹⁷ Brinsden J reached a similar conclusion:

"Having been completed it seems scarcely reasonable to say that the appellant continued to carry out the development because it erected the building in a form which did not permanently close the ground floor to vehicular access".⁹⁸

However, both judges considered that the words "otherwise fails to comply with any such condition" widened the application of the section to include any condition that applied so long as the use of the development continued and consequently that the appellant had committed an offence under section 42 as amended.⁹⁹ As these words have not been included in the *Town Planning and Development Act* offence, that offence is not as wide as the *Metropolitan Region Town Planning Scheme Act* offence. To encourage the use of planning conditions as an alternative to restrictive covenants, the Commission *recommends* that the scope of the offence in section 10(4)(a)(ii) of the *Town Planning and Development Act 1928* be made the same as the offence in section 42 of the *Metropolitan Region Town Planning Scheme Act 1959*.¹⁰⁰

⁹⁶ (1985) 62 LGRA 53.

⁹⁷ Id 57.

⁹⁸ Id 60.

⁹⁹ Id 57, per Burt CJ and 60-61, per Brinsden J.

¹⁰⁰ Another difference in the enforcement provisions of the two Acts is that s 43A of the *Metropolitan Region Town Planning Scheme Act 1959* provides that the Supreme Court may grant an injunction restraining any person from contravening the Scheme or completing or using any development contrary to any condition imposed on the development. There is no similar provision in the *Town Planning and Development Act 1928*. The Report of the Committee of Inquiry into Statutory Planning in Western Australia (1984) at 104 recommended that the ". . . remedy by way of injunction available for enforcement of the Metropolitan Region Scheme should also be made available for enforcement of provisions in local authority schemes and interim development orders."

Although this recommendation has not been adopted, local governments may be able to apply for an injunction in relation to breaches of conditions under s 9.28 of the *Local Government Act 1995* which provides that a local government may take proceedings in its own name in "any case in which the Attorney General might take proceedings on the relation, or on behalf, or for the benefit of a local government for or with respect to enforcing, securing the observance of, or preventing the breach of a statutory provision administered by the local government". The reference to a "statutory provision administered by the local government" means a provision of the *Local Government Act 1995* or another Act conferring any function on the local government. S 8(2)(b) of the *Town Planning and Development Act 1928* provides that a special provision must be inserted in every town planning scheme defining the local government to be responsible for enforcing the observance of the scheme.

(iii) Cluster titles

5.54 The second option involves making provision for the creation of cluster titles. This form of title can provide an alternative to estate schemes. Under a cluster titles system the registration of a plan at the Land Titles Division would initiate a cluster scheme in which the participants are the proprietors of the freehold lots in the scheme.¹⁰¹ It allows the common property concept and private by-laws to be incorporated in a subdivision of land. There is a body corporate. By-laws may provide for the control, management and administration of the body corporate (called an association), the use of lots and the preservation of the essence or theme of the scheme. The by-laws can be amended by resolution of the proprietors.¹⁰² In New South Wales, for example, section 17(1) of the *Community Land Management Act 1989* provides that by-laws for a scheme may relate to the control or preservation of the essence or theme of the development under the scheme by:

- "(a) limiting occupancy under the scheme to persons of a particular description; or
- (b) fixing the architectural, building or landscaping styles to be permitted; or
- (c) limiting the kind of materials that may be used in buildings and other structures; or
- (d) requiring that specified association property be used only for particular purposes; or
- (e) imposing any other kind of restriction."¹⁰³

A levy may be imposed on members to meet the corporation's expenses. There is a Community Schemes Commissioner and a Community Schemes Board to deal with applications relating to disputes arising under the legislation. The Commissioner or the Board

¹⁰¹ Usually with cluster title systems there is one lot that defines some association property, that is, an area for common use by owners, but that would not be necessary in all subdivisions.

¹⁰² In New South Wales a unanimous resolution is required to amend them. That is a resolution passed at a general meeting of an association without a vote being cast against it: *Community Land Management Act 1989* s 3(1).

¹⁰³ Sch 3 cl 5 of the *Community Land Development Act 1989* (NSW) prohibits inclusion of any by-laws which:

- "(a) affects the keeping on a lot of a dog used as a guide by a completely or partially blind proprietor or occupier of a lot, or
- (b) affects the use of a dog as a guide on a lot, or on association property, by a completely or partially blind person, or
- (c) is based on race or creed, or on ethnic or socio-economic grouping, or
- (d) excludes public housing from a scheme."

may make an order for the settlement of a dispute. The role of the Commissioner includes providing advice and conciliation.

5.55 It is an offence if a person does not do something that an order of a Commissioner or the Board requires the person to do or if a person does something that an order requires the person to refrain from doing.¹⁰⁴ Proceedings for an offence may be brought only by the applicant for the order contravened or an association involved in the order.¹⁰⁵

5.56 In its report on the *Strata Titles Act* in 1982 (Project No 56) the Commission recommended that legislation providing for a cluster titles system be enacted in Western Australia. No such legislation has been enacted as yet. However, in 1995 provision was made for survey-strata plans. A survey-strata plan defines the boundaries of lots and common property in a survey-strata scheme by dimensions and survey information. When a survey-strata plan is lodged for registration a management statement may be lodged for registration with it. The management statement sets out the by-laws of the strata company. The company may make by-laws, not inconsistent with the *Strata Titles Act 1985*, "relating to the management, control, use and enjoyment of the lots and any common property."¹⁰⁶ By laws may also be included in relation to:

- "4. The control or preservation of the essence or theme of the development under the scheme.
- 5. Architectural and landscaping guidelines to be observed by proprietors.
- 6. Plot ratio restrictions and open space requirements.
- ...
- 14. Procedures to be followed for the resolution of disputes as a prerequisite to the making of an application to the referee for relief under this Act".¹⁰⁷

5.57 Survey-strata plans, like cluster titles, are capable of providing an alternative to estate schemes. However, cluster titles are preferable because they are akin to a conventional subdivision of land and involve a conventional title whereas a survey-strata plan involves a strata title. For this reason, the Commission *endorses* the previous recommendation for

¹⁰⁴ *Community Land Management Act 1989* (NSW) s 101(1).

¹⁰⁵ *Id* s 101(2).

¹⁰⁶ *Strata Titles Act 1985* s 42(1)(c).

¹⁰⁷ *Id* ss 5C and 42 and Sch 2A.

legislation providing for cluster titles. If such legislation is introduced, it should make provision for landowners in estate schemes to apply for the scheme to be converted to a cluster titles scheme.

6. IMPOSING CONDITIONS OF A CONTINUING NATURE ON SUBDIVISIONS

5.58 At present neither the Western Australian Planning Commission nor local governments have power to impose conditions of a continuing nature on land on the approval of a subdivision of land. Applications for subdivisions are dealt with by the Western Australian Planning Commission which may impose conditions on its approval of a subdivision, but such conditions must be capable of being carried out before the approval becomes effective.¹⁰⁸ There may, however, be circumstances in which it would be desirable for a condition of a continuing nature to be imposed at the time a subdivision of land is approved. A local government might wish, for example, to have conditions of a continuing nature imposed for the purpose of land management either indefinitely or until the land concerned is rezoned.¹⁰⁹ A restrictive covenant in gross¹¹⁰ is one means of doing this but the landowner must agree to the arrangement.¹¹¹

5.59 In the Discussion Paper the Commission sought comments on whether the Western Australian Planning Commission or a local government should be given an express statutory power at the time of the approval of a subdivision of land to impose conditions of a continuing nature relating to land management which would attach to the land and bind successors in title.¹¹² These conditions could be subject to a right of appeal in the same way as conditions attached to a subdivision by the Western Australian Planning Commission¹¹³ and could be enforced in the same way as town planning conditions.¹¹⁴ If conditions were imposed they could be extinguished once the need for them had passed, for example, if the land was rezoned or the town planning scheme was appropriately amended. With one exception (the Western Australian Planning Commission), all commentators supported this

¹⁰⁸ Para 3.2 above.

¹⁰⁹ For example, it might wish to limit the number of horses that could be kept on a property, prevent or limit the extraction of ground-water or require trees to be maintained on the property.

¹¹⁰ Paras 5.31-5.36 above.

¹¹¹ Though entering into the agreement could be made a condition of the approval of the subdivision by the Western Australian Planning Commission or the Town Planning Appeal Tribunal.

¹¹² Conditions of a continuing nature can be imposed in Queensland: para 4.6 above.

¹¹³ *Town Planning and Development Act 1928* ss 26 and 39.

¹¹⁴ Paras 3.14-3.15 above.

proposal. That Commission argued that conditions of a continuing nature should be included in town planning schemes and that it would not be necessary to impose these conditions at the time of subdivision.

5.60 The Commission is satisfied from the submissions it has received that there is a need to allow conditions of a continuing nature relating to land management to be imposed at the time a subdivision is approved and the Commission *recommends* that such a power be provided. It is true, as the Western Australian Planning Commission argues, that such conditions could be imposed under town planning schemes. However, this is not always practicable because, if the relevant town planning scheme does not contain a suitable condition, the time and process required to amend a town planning scheme may delay the approval of the subdivision for a long time.¹¹⁵ A landowner seeking approval of a subdivision would probably prefer that conditions were imposed as part of the process of approval of a subdivision rather than having the approval process delayed pending an amendment of a town planning scheme. In any case, the Western Australian Planning Commission is under a statutory duty to try to deal with an application for a subdivision by approving it, refusing it or requiring the applicant to comply with such conditions as it thinks fit to impose before approving the scheme within 90 days after the day on which the application was submitted.¹¹⁶ If it does not do so, the applicant may give a written notice of default to the Commission¹¹⁷ and the applicant may appeal to the Minister as if the Commission had refused to approve the plan.¹¹⁸ Where a condition of a continuing nature is imposed, the Western Australian Planning Commission should be required to cause a notification of the condition to be deposited at the Land Titles Division and the Registrar of Titles or the Registrar of Deeds should endorse or note the title and land register in respect of the land with that notification.¹¹⁹ The Western Australian Planning Commission should also have power to cancel a condition of a continuing nature if it is satisfied that it has ceased to be necessary. That may be so because the local government has amended its town planning scheme to deal with the matters dealt with by the condition.

5.61 One of those who supported the proposal did so on the basis that any conditions imposed should be imposed by the Western Australian Planning Commission and not by a

¹¹⁵ For this process see paras 3.6-3.7 above.

¹¹⁶ *Town Planning and Development Act 1928* s 24(4).

¹¹⁷ Id s 26(1)(aa).

¹¹⁸ Id s 26(1)(ab).

¹¹⁹ See *Town Planning and Development Act 1928* s 12A and the *Transfer of Land Act 1893* s 70A.

local government. Allowing a local government to impose conditions in relation to land management at the time of subdivision would involve a departure from the existing system in which applications for subdivisions of land are dealt with by the Western Australian Planning Commission. The present position was reviewed in 1984 in the *Report of the Committee of Inquiry into Statutory Planning in Western Australia*. The Committee did not support delegation of subdivision control to local governments for the following reasons:

- " • the present system of centralised subdivision control is simple, efficient and generally convenient for the applicant;
- the State planning agency is better equipped to administer subdivision control and to carry out the consultations necessary with other State Government departments and instrumentalities;
- Whilst some local authorities may have the resources to administer subdivision control, there would be many local authorities which would not have adequate staff or resources;
- Centralised subdivision control achieves greater uniformity and consistency in procedures, policies and standards;
- Delegation of subdivision responsibility may well lead to delays in the planning process."¹²⁰

5.62 It would also unduly complicate the approval process to give local governments power to impose conditions of a continuing nature relating to land management on subdivisions. Allowing the Western Australian Planning Commission, not a local government, to impose conditions of a continuing nature would supplement the existing subdivision provisions by allowing the imposition of conditions of local interest where existing controls in town planning schemes were inadequate. For these reasons, the Commission *recommends* that the Western Australian Planning Commission and not a local government should have power to impose conditions of a continuing nature relating to land management at the time a subdivision is approved.

7. PROVIDING PURCHASERS WITH INFORMATION ABOUT RESTRICTIVE COVENANTS

5.63 Two commentators on the Discussion Paper suggested that purchasers of blocks burdened by a restrictive covenant should be given information about restrictive covenants.

¹²⁰ *Report of the Committee of Inquiry into Statutory Planning in Western Australia* (1984) 56.

One of the commentators stated that it was important for purchasers to be given "comprehensive unbiased information" regarding covenants and how they work. The consequences for a purchaser who buys land without being aware of the existence or effect of a restrictive covenant can be serious. If, for example, there is a restrictive covenant which provides that not more than one residence can be built on a block or that the land cannot be subdivided, a strata plan or diagram of subdivision which discloses a breach of the covenant cannot be registered at the Land Titles Division until the covenant is extinguished or modified in a suitable manner. As a result, new certificates of title cannot be issued for the new lots in the subdivision. This policy is adopted by the Land Titles Division to avoid a conflict on the register of land titles.

5.64 There is a precedent for giving purchasers of real property information about the property they intend to purchase in the *Strata Titles Act 1985*. That Act provides that a purchaser of a lot in a strata scheme must be given "notifiable information" before he signs a contract to buy the lot.¹²¹ Notifiable information includes information that relates especially to any lot to which the contract relates and the contents of the by-laws for the scheme that are in force.¹²² The vendor of a lot must ensure that the purchaser is given the notifiable information.¹²³ A form is prescribed for use by vendors in giving the notifiable information to the purchaser.¹²⁴ If a vendor fails to give to a purchaser information that substantially complies with the requirements of the Act and at the required time, the purchaser has a right to avoid the contract by notice in writing given to the vendor before the settlement of the contract.¹²⁵ Upon the avoidance of the contract, the vendor is liable to repay to the purchaser all moneys paid by the purchaser under the contract. These moneys are recoverable, by action as for a debt, by the purchaser.¹²⁶

5.65 To ensure that purchasers are aware of the existence of restrictive covenants, the Commission *recommends* that vendors of land encumbered by a restrictive covenant should be required to give the purchaser information about -

- * the existence of the restrictive covenant;
- * a copy of the terms of the covenant; and

¹²¹ *Strata Titles Act 1985* s 69(1).

¹²² *Id* s 69A.

¹²³ *Id* s 69(2).

¹²⁴ *Id* s 69(3). For the forms prescribed see *Strata Titles General Regulations 1996* Forms 28 and 29.

¹²⁵ *Strata Titles Act 1985* s 69D(1).

¹²⁶ *Id* s 69E.

- * a notice to the effect that the purchaser should consider obtaining professional advice as to the effect of the covenant and the means of discharging or modifying the covenant or enforcing it.

The Commission considers that the provisions outlined above under the *Strata Titles Act 1985* provide a satisfactory precedent for the implementation of a notice provision in relation to restrictive covenants except that it *recommends* that the purchaser should have a right to avoid the contract by notice in writing given to the vendor before the settlement¹²⁷ of the contract only if the restrictive covenant materially interferes with his intended use of the land at the time the contract is executed.¹²⁸

¹²⁷ See *Strata Titles Act 1985* s 69D(6).

¹²⁸ The right to avoid the contract would be inconsistent with the Joint Form of General Conditions for the Sale of Land (1994 Revision) which provides in clause 2(2):

"If the land is not vacant land and:-

- (a) there is a restrictive covenant . . . registered on the title to the land which is not specified as an encumbrance in the contract; and
 - (b) the restrictive covenant . . . does not unreasonably interfere with the actual use of the land at the date of the contract;
- then the Purchaser has no right to rescind the contract on the ground that the land is encumbered by the restrictive covenant".

The clause will need to be amended if the Commission's recommendation is adopted.

Chapter 6

SUMMARY OF RECOMMENDATIONS

6.1 The Commission recommends that -

Restrictive covenants should not be abolished

1. Restrictive covenants should not be abolished.

Paragraph 5.1

2. No particular uses of restrictive covenants should be abolished.

Paragraphs 5.2-5.6

3. The Land Titles Division should be required to send a copy of every restrictive covenant registered at the Division to the relevant local government.

Paragraph 5.5

Prior approval of restrictive covenants should not be required

4. Restrictive covenants should not be controlled by requiring those wishing to use them to obtain approval for their use as a prerequisite to registration at the Land Titles Division.

Paragraph 5.9

There should be no statutory limitation on the duration of restrictive covenants

5. It should not be provided that a restrictive covenant ceases to be valid after the expiration of a prescribed period of time unless it is renewed by the owner of the benefited block.

Paragraphs 5.10-5.12

Town planning schemes and local laws should not automatically override restrictive covenants

6. Provision should not be made for town planning schemes or local laws to override restrictive covenants.

Paragraphs 5.15-5.17

The power to extinguish or modify restrictive covenants should be transferred from the Supreme Court to the Town Planning Appeal Tribunal

7. The power to extinguish or modify a restrictive covenant in certain circumstances should be transferred from the Supreme Court to the Town Planning Appeal Tribunal.

Paragraph 5.18

8. The power of a court dealing with proceedings to enforce a restrictive covenant to make an order to extinguish or modify the covenant should be abolished.

Paragraph 5.19

9. Each party to an appeal should bear his own costs of the appeal except -

- * where in the opinion of the Tribunal a party to an appeal has behaved unreasonably, vexatiously or frivolously in relation to the appeal, in which case the Tribunal may award such costs as it thinks fit against that party and in favour of any other party; or
- * where an appeal is withdrawn, in which case the Tribunal may award such costs as it thinks fit against the appellant in favour of any other party to the appeal.

Paragraph 5.20

Liberalising the circumstances in which restrictive covenants can be extinguished or modified by the Town Planning Appeal Tribunal

10. The circumstances in which restrictive covenants can be extinguished or modified should be made more liberal by providing in addition that the Town Planning Appeal Tribunal

should, on the application of any person interested in the land, have a discretion by order wholly or partially extinguish, discharge or modify the restriction upon being satisfied -

- (a) that a user or development proposed by the applicant would not be out of character with or prejudicial to the amenity of any land to which the benefit of the restrictive covenant is annexed whether by reason of the density of the development, the appearance, design, floor area, height, materials or finish of any proposed building or otherwise;
- (b) that the restriction would impede a user or development of the land that is in accordance with the Metropolitan Region Scheme or a town planning scheme, interim development order or any regulation or code made under the *Town Planning and Development Act 1928*;
- (c) that, having regard to the Metropolitan Region Scheme or a town planning scheme, interim development order or any regulation or code made under the *Town Planning and Development Act 1928* which applies to the land, retention of the restriction would have the effect of preventing the land being used or developed for any purpose; or
- (d) that retention of the restriction would prevent a subdivision of a lot or an amalgamation of any lot with any other lot that had been approved, with or without conditions, under section 20 of the *Town Planning and Development Act 1928* or compliance with any condition imposed on the approval of a subdivision or an amalgamation of any lot with any other lot that had been approved under section 20 of the *Town Planning and Development Act 1928*.

In determining an application under paragraphs (a) or (b) above, the Tribunal should be required to take into account -

- (a) a Statement of Planning Policy prepared under section 5AA of the *Town Planning and Development Act 1928*;

- (b) the Metropolitan Region Scheme or a town planning scheme, interim development order or any regulation or code made under the *Town Planning and Development Act 1928* or a planning policy for the area in which the land is situated;
- (c) a local law for the area in which the land is situated;
- (d) the history of the development of the town planning scheme, interim development order or any regulation or code or a planning policy and its objectives;
- (e) any declared policy or ascertainable pattern of the local government in the grant or refusal of approval to use or develop land in the relevant area;
- (f) the time at which and the context in which the restriction was created or imposed; and
- (g) any other material circumstances.

Paragraphs 5.21-5.23

11. The Town Planning Appeal Tribunal should have power to order anyone who benefits from its order to extinguish, discharge or modify a covenant to pay any person entitled to the benefit of the covenant a sum to make up for any loss suffered by him in consequence of the extinguishment, discharge or modification of the covenant or in such other circumstances as the Tribunal considers appropriate.

Paragraphs 5.25-5.27

A local government should have standing to apply to the Town Planning Appeal Tribunal for the extinguishment or modification of a restrictive covenant

12. A local government should have standing, but should be under no duty, to apply to the Town Planning Appeal Tribunal for the extinguishment or modification of a restrictive covenant on the same grounds as a person interested in the land.

Paragraph 5.28

The local government power to extinguish or vary a restrictive covenant should be restricted to guided development schemes

13. The power of a local government in a town planning scheme to extinguish or vary any restrictive covenant affecting land should be restricted to land involved in a guided development scheme.

Paragraph 5.29

14. Provision should be made along the lines of section 129C(7) of the *Transfer of Land Act 1893* so that, on an application being made, the Registrar must make all necessary amendments and entries in the Register to give effect to the extinguishment or variation of a covenant by a guided development scheme.

Paragraph 5.30

Restrictive covenant in gross

15. The Commission endorses section 76 of the *Transfer of Land Amendment Act 1996* which makes provision for local governments and public authorities to enter into restrictive covenants in gross.

Paragraphs 5.31-5.36

Enforcement of restrictive covenants

16. Landowners should continue to rely on the existing means of enforcement of restrictive covenants.

Paragraph 5.38

17. A local government should not be required to vet building plans to ensure that they comply with a restrictive covenant.

Paragraphs 5.39-5.41

18. It should not be possible to enforce a restrictive covenant by a mechanism which allows the owner of the benefited block to apply to the local government for the issue of a written enforcement notice to the owner of the burdened block directing him to -

- * rectify any breach of a restrictive covenant within a prescribed period, say 21 days; or
- * within the prescribed period, cease or agree not to undertake any development that constitutes a breach of the covenant.

Paragraphs 5.43-5.45

19. It should not be an offence to contravene or fail to comply with a restrictive covenant.

Paragraph 5.45

20. A local government should not be given power to remove or alter any building or other work which had been commenced or continued in contravention of a restrictive covenant.

Paragraph 5.45

Giving local governments standing to enforce restrictive covenants

21. A local government should not be given standing to enforce a restrictive covenant on behalf of one of its residents or ratepayers.

Paragraphs 5.46-5.48

22. A local government should, however, have standing, but not be under a duty, to take action to enforce any restrictive covenant.

Paragraph 5.48

Planning policies

23. To ensure that conditions imposed as a result of planning policies on development applications can be effectively enforced, the scope of the offence in section 10(4)(a)(ii) of the *Town Planning and Development Act 1928* should be made the same as the offence in section 42 of the *Metropolitan Region Town Planning Scheme Act 1959*.

Paragraphs 5.50-5.53

Cluster titles

24. To provide an alternative to estate schemes, a cluster titles system should be introduced in Western Australia.

Paragraphs 5.54-5.57

Imposing conditions of a continuing nature on subdivisions

25. The Western Australian Planning Commission, and not a local government, should have power to impose conditions of a continuing nature relating to land management at the time a subdivision is approved.

Paragraphs 5.58-5.62

Providing purchasers with information about restrictive covenants

26. Vendors of land encumbered by a restrictive covenant should be required to give the purchaser information about -

- * the existence of the restrictive covenant;
- * a copy of the terms of the covenant; and
- * a notice to the effect that the purchaser should consider obtaining professional advice as to the effect of the covenant and the means of discharging or modifying the covenant or enforcing it.

Paragraphs 5.63-5.65

27. The purchaser should have the right to avoid the contract by notice in writing given to the vendor before settlement of the contract if the restrictive covenant materially interferes with his intended use of the land at the time the contract is executed.

Paragraph 5.65

Old system land

28. The recommendations in this Report should be applied to old system land.

Paragraph 1.8

W S MARTIN QC, *Chairman*

R E COCK

R L SIMMONDS

9 June 1997

Appendix I

LIST OF THOSE WHO COMMENTED ON THE DISCUSSION PAPER

Agriculture, Department of

Mr and Mrs T Argus

Bassendean, Town of

BGC (Australia) Pty Ltd

Mr J Campbell

Cedar Woods Properties Limited

Mr H C Cowell

Dr J Edwards MLA, Member for Maylands

Mr D W Gadsdon

Mr J Gladstone, Acting Commissioner of Titles, Department of Land Administration

A B Gratwick

Housing Industry Association Limited, Western Australian Division

Mr and Mrs J Kemp

Landcorp (Western Australian Land Authority)

Lawley Ward Ratepayers & Progress Association Inc

Law Society of Western Australia

M Lewi

E Lindsey

McLeod & Co, Barristers and Solicitors

S Metcalf

Mindarie Community Group

Mr B Perry

Promontory Progress Association Incorporated

Property Council of Australia

D & T Rutherford

SANWA Vines Pty Ltd

Settlement Agents Association (Inc)

J Treloar, the former City Planner for the City of Melville

Urban Development Institute of Australia, Western Australian Division Incorporated

Western Australian Planning Commission

Westpoint Corporation Pty Ltd

Appendix II

CITY OF WANNEROO

EXTRACTS FROM TOWN PLANNING SCHEME NO 1 (as amended)

5.11 PLANNING POLICIES (Amendment 647 – 8.10.1993)

- (a) Council may prepare a planning policy (herein called “a Policy”) which may make a provision for any matter generally, or any particular class of matter, related to the planning or development of the Scheme Area, or to one or more parts of the Scheme Area; and may amend or add to or rescind a Policy so prepared.
- (b) A Policy shall become operative only after the following procedures have been completed;
 - (i) Council having prepared and adopted a draft Policy shall publish a notice once a week for two consecutive weeks in a newspaper circulating with the Scheme Area giving details of which it may be inspected and during what period submission may be made; that period being not less than 21 days.
 - (ii) Council shall review the draft policy in the light of any submissions made and then resolve to either finally adopt the draft Policy with or without modification; or not proceed with the draft Policy.
 - (iii) Following final adoption of a Policy’ notification of its adoption shall be published once in a newspaper circulating with the Scheme Area.
- (c) The Council shall keep copies of any Policy with the Scheme documents for public inspection during normal hours.
- (d) An amendment or addition to a Policy may be made after the Policy has become operative and shall be made in the same manner as provided for in subclause 5.4.5(b).
- (e) A Policy may be rescinded by:
 - (i) preparation or final adoption of a new Policy pursuant to this clause, specifically worded to supersede an existing Policy; or
 - (ii) publication of a formal notice of rescission by the Council twice in a local newspaper circulating in the Scheme Area.
- (f) A Policy shall not bind the Council in respect of any application for planning approval but the Council shall have due regard to the provisions of the Policy and the objectives which the Policy is designed to achieve before making its decision.

Appendix III

CITY OF MELVILLE

EXTRACTS FROM TOWN PLANNING SCHEME NO 3 (as amended)

5.14 RESTRICTIVE COVENANTS

5.14.1 Subject to the provisions of Clause 5.14.2, a restrictive covenant affecting any land in the Scheme Area whereby or the effect of which is that the number of residential units that may be constructed on the land is limited or restricted to a number less than that permitted by the Scheme, is hereby extinguished or varied to the extent that it is inconsistent with the provisions of the Scheme, as the case requires.

5.14.2 Where Clause 5.14.1 operates to extinguish or vary a restrictive covenant the Council shall not grant planning consent to the development of the land (in this Clause referred to as "the subject land") which would but for the operation of Clause 5.14.1 have been prohibited unless:

- (a) written notice of the proposed development in a form approved by the Council has been given to:
 - (i) the owners of all lots adjoining the subject land; and
 - (ii) any other person who in the opinion of the Council was entitled to the benefit of or to enforce the restrictive covenant extinguished or varied by that Clause or who would have been so entitled but for the operation of that Clause and is likely to be affected by the proposed development of the subject land;
- (b) the notice referred to in paragraph (a) hereof states that submissions may be made to the Council within the period specified therein (not being less than 21 days after the date of service of the notice);
- (c) any submissions received by the Council are considered by it; and
- (d) the Council is satisfied that the proposed development of the subject land will not be out of character with or prejudicial to the amenity of the locality by reason of the appearance design or height of the proposed building or the materials or finish thereof.