PROTECTING A VIEW IN AUSTRALIA: COMMON LAW PRINCIPLES, RESTRICTIVE COVENANTS AND PLANNING LAW

BRENDAN GRIGG* AND HOSSEIN ESMAEILI**

Views over land and waters may significantly enhance a property's value. The common law has declined, however, to recognise the proprietary nature of a view, regarding it as a matter only of delight. This article evaluates the Australian position on the right to a view and considers mechanisms for its protection. It first examines the difficulties in using easements to protect a view. Then it considers the restrictive covenant as a basis for protecting a view, notwithstanding complications under Australian Torrens title systems and contemporary public planning schemes in most Australian jurisdictions that can override restrictive covenants. It then considers public land use planning law and concludes that it may be the most effective legal avenue for protecting a view in Australia, though it notes that the settings of the relevant planning instrument will be crucial in determining whether a particular right to a view will be protected.

'Put simply, you can buy a room with a view, but you cannot buy a view.'[1]

I INTRODUCTION

Views, and in particular views over water and coastal areas, are prized features of real estate and can significantly increase the value of the land from which they are enjoyed. Increased urban density and other developments in Australian cities threaten the availability of views and the economic value that they add. For example, the economic value of a view over Sydney Harbour, the Opera House and the Harbour Bridge, described as 'that most characteristic of Sydney fixations',[2] was demonstrated in December 2018 in the decision of the New South Wales

* BEc, LLB(Hons), BA(Hons), MCompLaw (Adelaide); Senior Lecturer, College of Business, Government and Law, Flinders University.

** LLM, PhD (UNSW), Associate Professor, College of Business, Government and Law, Flinders University. This article is based on a presentation given by the authors at the 13th Australasian Property Law Teachers' Conference held at the University of Canterbury Law School in April 2016. Both authors gratefully acknowledge the research assistance of Dr Rhys Aston and Mr Lewis Lock-Weir and the insightful comments provided by the anonymous reviewers of an earlier version of this article.

1 *Dunn v Minister for Planning and Dandara* [2009] JRC 237, [10].

2 *Crown Sydney Property v Barangaroo Delivery Authority* [2018] NSWSC 1931, [1] (McDougall J).

Supreme Court in a dispute between a developer of harbourside land at Barangaroo and the New South Wales government.

The importance of a view is not limited to harbourside Sydney. In early February 2022, a number of community protests took place in Wheatland Street in Seacliff, a beachside suburb of Adelaide, to protest the grant of planning approval for, and the construction of, a 4.8 metre high, 60 square metre shed located at the rear of a house located on adjacent land at Marine Parade.[3] The Holdfast Bay Council had approved the shed pursuant to the planning scheme established under the *Planning Development and Infrastructure Act 2016* (SA) ('*SA PDI Act*') and *Planning and Design Code* ('*SA Code*'),[4] which, when it commenced operation for metropolitan Adelaide in March 2021, became fully operational in South Australia.[5]

The shed was built directly in front of the lounge room windows of the Wheatland Street property, obliterating the views towards the beach and the Gulf of St Vincent that the owners had enjoyed for 21 years. The approval appalled many in the local community.[6]

The relative scarcity of views and the values attached to them present a climate primed for legal actions for their protection. Despite the aesthetic and commercial significance of a view, the general common law position is that owners of land are free to build on their land despite the fact that doing so may interfere with a neighbour's enjoyment of their land.[7] Other common law rules, such as nuisance, play only a very minor role in limiting developments that encroach on a landowner's view.[8] However, two property rights – incorporeal hereditaments – in the form of easements and restrictive covenants, provide landowners with avenues to protect their views. In addition, modern land use planning controls also offer some protection for a view.

This article analyses these legal means available to protect a view in Australia. In Part II, it examines the origins and justifications of the common law position concerning a view. Part III examines the scope for the easement, in particular the negative easement to protect a view. It argues that the reluctance of the common law to accept novel negative easements is likely to inhibit the use of the easement to protect a view. As Part IV illustrates, these difficulties do not apply to the restrictive covenant. In Australia, however, the Torrens title system presents particular challenges to protecting a view using a restrictive covenant due to the

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3 Emily Jarvis, 'Outraged Seacliff Community Protest Shed Built without Public Consultation under State Government's *Planning and Design Code*', *Adelaide Now* (online, 5 February 2022) <https://www.adelaidenow.com.au/messenger/south/outraged-seacliff-community-protest-shed-built-without-public-consultation-under-state-governments-planning-and-design-code/news-story/29909069e26863d859c7184c9b7be50d>.

4 'South Australia's Online *Planning and Design Code*', *PlanSA* (Web Page) <https://code.plan.sa.gov.au/>.

5 South Australia, *South Australian Government Gazette*, No 14, 4 March 2021, 822–4. *Planning, Development and Infrastructure Act (Commencement) Proclamation 2021* (SA); *Statutes Amendment (Planning, Development and Infrastructure) Act (Commencement) Proclamation 2021* (SA); *Planning, Development and Infrastructure (Designated Day) Proclamation 2021* (SA).

6 Jarvis (n 3).

7 *Hunter v Canary Wharf Ltd* [1997] AC 655, 685 (Goff LJ) ('*Hunter*').

8 Sharon Christensen and WD Duncan, 'Is It Time for a National Review of the Torrens' System? The Eccentric Position of Private Restrictive Covenants' (2005) 12 *Australian Property Law Journal* 104, 107.

fact that some Australian jurisdictions do not permit the registration of restrictive covenants and others only allow them to be noted on the register.

Protecting a view using a restrictive covenant is likely to employ a range of built environment controls that, today, are commonplace in land use planning schemes. Part V explores the ways in which legislatures around Australia have dealt with the potential for conflict between restrictive covenants and land use planning schemes. It demonstrates a clear legislative preference for public land use planning controls over private forms of planning where the latter would 'impede land development'.[9]

As a result, Part VI examines the ways in which land use planning law in selected Australian jurisdictions can act when a view is threatened by a proposed development, through an analysis of key planning appeal decisions. It illustrates that a view can be protected by planning policies but concludes that this will, largely, depend on the settings of the relevant planning laws and policies.

II THE RIGHT TO A VIEW UNDER COMMON LAW

Since as long ago as the 1587 decision in *Bland v Mosely*,[10] English common law has refused to recognise any property interest in, or a right to, a view. In that case, a plaintiff sought an injunction to restrain a neighbour from building in a way that obstructed the view from the windows of the plaintiff's house. The Court stated that in the absence of an easement, there was no cause of action for the obstruction of a view.[11]

The reason for the reluctance of the common law to protect a view was alluded to, in obiter dictum, in the 1610 decision in *Aldred v Benton* ('*William Aldred's Case*') by Wray CJ who explained that 'for [a] prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof … the law does not give an action for such things of delight'.[12]

Gillespie has, perhaps accurately, suggested that in the context of life at the time and

> [c]ompared to the misery caused by the stench of pigsties, obstruction of sunlight or smoke from coal fires, an obstruction of a view must have appeared to the judiciary to be merely the loss of an elegant refinement of life, and not an interference with the more substantial wholesome habitation of land.[13]

Courts in the United Kingdom have, for example, refused to injunct buildings that spoil a neighbour's view;[14] that may restrict the flow of air onto a neighbour's

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9 Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th ed, 2017) 656.

10 (England Court of King's Bench, Wray CJ, 1587) ('*Bland*'), cited in *Aldred v Benton* (1610) 9 Co Rep 57b; 77 ER 816, 817 (Wray CJ) ('*William Aldred's Case*').

11 *Bland* (n 10), cited in *William Aldred's Case* (n 10) 820–1.

12 *William Aldred's Case* (n 10) 821.

13 John Gillespie, 'Private Nuisance as a Means of Protecting Views from Obstruction' (1989) 6(2) *Environmental and Planning Law Journal* 94, 98.

14 See *A-G ex rel Gray's Inn Society v Doughty* (1752) 2 Ves Sen 453; *Fishmongers' Co v East India Co* (1752) 1 Dick 163.

land;[15] and, again in the absence of an easement, that may take away light from a neighbour's windows.[16]

In 1937, the Australian High Court decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* endorsed the common law position in the context of a claim in nuisance by the operator of a racecourse who alleged that it suffered damages because the owner of adjoining land had allowed the erection of a platform from which the races were able to be observed and the results broadcast to a radio audience.[17] This decreased attendances at the racecourse. The case is widely referred to as an authority for the proposition that there is no property right in a spectacle.[18] In his judgment, Dixon J discussed the interaction between a view and privacy as follows:

> English law is, rightly or wrongly, clear that the natural rights of an occupier do not include freedom from the view and inspection of neighbouring occupiers or of other persons who enable themselves to overlook the premises. An occupier of land is at liberty to exclude his neighbour's view by any physical means he can adopt. But while it is not wrongful act on his part to block the prospect from adjacent land, it is no wrongful act on the part of any person on such land to avail himself of what prospect exists or can be obtained.[19]

The fact that the destruction of a view that has been previously enjoyed from land may detract, and even substantially so, from the value of that land has been repeatedly acknowledged by courts in cases where the issue has arisen. In the 1964 decision in *Phipps v Pears* ('*Phipps*'), for example, the position was framed as follows:

> Suppose you have a fine view from your house. You have enjoyed the view for many years. It adds greatly to the value of your house. But if your neighbour chooses to despoil it, by building up and blocking it, you have no redress. There is no such right known to the law as a right to a prospect or view.[20]

In more recent years, in Australia, in *Robson v Lieshcke*, Preston CJ also acknowledged the issue, stating:

> [A] defendant may erect a building or other structure such as a fence or plant a tree on his or her land which interferes with the neighbour's enjoyment of their land. The building, structure, or tree may … spoil the neighbour's view … yet such interferences are not actionable as a nuisance.[21]

Despite the common law's reluctance to recognise the significance of a view as a property right, booming property markets and waves of internal migration in Australia from capital cities to rural and regional areas, prompted by the COVID-19 pandemic,[22] may mean that landowners may look to various legal avenues in order to protect the intrinsic and financial value that views possess. These legal

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15 *Bland* (n 10).

16 *Dalton v Angus & Co* (1881) 6 App Cas 740, 794–5 (Lord Selborne LC), 823 (Lord Blackburn). See also *Hunter* (n 7) 685 (Goff LJ).

17 (1937) 58 CLR 479.

18 Ibid 496–8 (Latham CJ).

19 Ibid 507 (Dixon J).

20 [1965] 1 QB 76, 83 (Lord Denning), citing *Bland* (n 10) ('*Phipps*').

21 (2008) 72 NSWLR 98, 118 [86].

22 Rhiana Whitson, 'Will the Housing Boom Be Over in 2022? We Ask the Experts', *ABC News* (online, 30 December 2021) <https://www.abc.net.au/news/2021-12-30/house-prices-property-boom/100729660>.

avenues are likely to include recourse to private law remedies based on the law of easements, restrictive covenants, and to public land use planning schemes. These are analysed below.

III PROTECTING A RIGHT TO A VIEW VIA EASEMENTS

Easements, and particularly negative easements, are a proprietary interest that may provide a limited protection of a view. An easement typically confers a right on an owner of land to do something on another's nearby land, such as a right to access and cross that land. In 1905, the High Court of Australia accepted that

> [a]n easement may be defined to be a privilege without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged 'to suffer or not to do' something on his own land, for the advantage of the dominant owner.[23]

Four essential characteristics of an easement were laid down in the landmark decision *Re Ellenborough Park v Maddison* ('*Re Ellenborough Park*').[24] These criteria were accepted and applied in the key Australian authority *Riley v Pentila*.[25] These are, first, that there must be a dominant and servient tenement, and second, that these tenements be owned by different persons. Third, the easement must accommodate the dominant tenement. Finally, a right over land cannot constitute an easement unless it is capable of forming the subject matter of a grant.[26] A further line of authorities add a fifth criteria: that if the purported easement confers a right of exclusive use of the servient tenement, then the right cannot be a valid easement.[27]

Rather than entitling a landowner to undertake an activity on another's land, a right arising under a negative easement entitles a landowner to prevent a neighbour from undertaking an activity on that neighbour's land.[28] Common negative easements involve rights to light and to support from neighbouring land.[29] A negative easement clearly has the capacity to prevent building or other activities on land so that the owners of land in the vicinity may continue to enjoy the benefit of a view.

There are, however, conflicting authorities on the validity of novel easements in Australia and this makes the application of the law of easements not as straightforward as the application of the law of restrictive covenants. The problem

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23 *Municipal District of Concord v Coles* (1905) 3 CLR 96, 110 (Barton J), quoting Charles James Gale and George Cave, *Treatise on the Law of Easements* (Sweet and Maxwell, 7th ed, 1899) 6. See also *City of Mitcham v Clothier* (1994) 62 SASR 394, 397 (Olsson J); Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, 3rd ed, 2011) 2.

24 [1956] 1 Ch 131 ('*Re Ellenborough Park*').

25 [1974] VR 547.

26 *Re Ellenborough Park* (n 24) 163.

27 *Reilly v Booth* (1890) 44 Ch D 12, 26 (Lopes LJ); *Thorpe v Brumfitt* (1873) LR 8 Ch App 650, 656 (James LJ); *Pluim v Willis* (2007) 55 SR (WA) 193, 197 [25] (Senior Member Raymond).

28 Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7th ed, 2020) 845.

29 *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283.

is the *numerus clausus* principle, one of the 'key metaprinciples'[30] of property law in the common law world. It means that 'landowners are not at liberty to customise land rights, in the sense of re-working them in an entirely novel way to suit their particular individual needs and circumstances'.[31] Instead, the law will only recognise a right in land if it fits 'within firmly established pigeonholes, of which the law permits only a small and finite number'.[32] This means that the law is unlikely to recognise an easement to protect a view because it is 'too vague and indefinite, and thus is incapable of forming the subject matter of a grant'.[33] This view is reflected in the 1834 decision of *Keppell v Bailey*, where Lord Brougham considered that while it was possible to imagine that 'incidents of a novel kind [could] be devised and attached to property at the fancy or caprice of any owner', it would be 'clearly inconvenient both to the science of the law and to the public weal' to recognise them.[34]

In contrast, in the 1852 decision of *Dyce v Hay*,[35] Lord St Leonards stated that '[t]he category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind'.[36]

This view was also expressed in *Attorney-General of Southern Nigeria v John Holt & Co (Liverpool) Ltd* ('*Attorney-General of Southern Nigeria*') by Shaw LJ,[37] who stated that the 'law must adapt itself to the conditions of modern society and trade',[38] and affirmed by the High Court of Australia in *Commonwealth v Registrar of Titles for Victoria* ('*Registrar of Titles for Victoria*'),[39] where Griffith CJ, in dicta, illustrated the point, suggesting that

> an easement or servitude for the passage of aeroplanes through the superjacent air of the servient tenement to a landing-place, for the passage of an electric current through suspended wires passing through that air, for the free passage of the flash from a heliograph station

would all be examples of novel easements that passed through the column of air above land, which was to be considered as part of the land.[40]

Despite this, the later decision in *Phipps*[41] is often referred to as authority for the principle that the list of negative easements is closed.[42] *Phipps* concerned a claim that an easement to protect a house from the weather had arisen, by prescription, because the neighbouring house had been positioned so close to it so as to mean that it did not need to be weatherproofed. The right claimed was a

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30 Brendan Edgeworth, 'The *Numerus Clausus* Principle in Contemporary Australian Property Law' (2006) 32(2) *Monash University Law Review* 387, 387 ('The *Numerus Clausus* Principle').
31 Ibid.
32 Ibid.
33 Bradbrook and MacCallum (n 23) 36.
34 (1834) 39 ER 1042, 1049.
35 (1852) 1 Macq 305.
36 Ibid 312–13.
37 [1915] AC 599 ('*A-G of Southern Nigeria*').
38 Ibid 617.
39 (1918) 24 CLR 348 ('*Registrar of Titles for Victoria*').
40 Ibid 353.
41 *Phipps* (n 20).
42 See, eg, *Rees v Skerrett* [2001] 1 WLR 1541, 1548–9 [19]–[21] (Lloyd J).

negative easement and attracted a cautionary warning from Lord Denning who, possibly basing his view on the potential for negative easements to restrict the development of property,[43] in dicta, stated: 'Seeing that it is a negative easement, it must be looked at with caution, because the law has been very chary of creating any new easements.'[44]

In Australia, the Supreme Court of New South Wales has held that an easement that purported to entitle the owner of the dominant land exclusive rights to plant out and cultivate a vineyard on the servient land and to harvest its grapes was not a valid easement because it amounted to the creation of 'a novel scheme of ownership' not known to have ever existed in Australian property law.[45]

Notwithstanding Lord Denning's warning, Bradbrook and MacCallum advance a number of reasons for accepting novel negative easements.[46] They suggest that the arguments against the creation of new negative easements are weak; that there is no Australian authority that specifically prohibits the creation of a novel negative easements; that the creation of a distinction between positive and negatives easements ought to be avoided as no compelling reason for such a division exists; that novel easements of a negative kind have been accepted in English courts since *Phipps* was decided;[47] and that Lord Denning's view is inconsistent with the statement of general principle set out in both *Attorney-General of Southern Nigeria*[48] and *Registrar of Titles for Victoria*.[49]

These arguments suggest that the law of easements should adapt to changing circumstances and available technology. This is not dissimilar to relevant examples of statutory intervention in relation to wind power generation,[50] and carbon abatement interests.[51] To this list, Edgeworth has added the argument that in light of the operation in all Australian jurisdictions of a cheap, efficient and accessible system of title registration in the form of the Torrens title system, the problems that the *numerus clausus* principle is designed to solve are significantly diminished.[52]

Regardless of these arguments, it is clear that legislatures in a number of Australian jurisdictions have been acutely aware of the potential for negative easements to restrict development given that they have abolished the creation by prescription of easements of light or easements of air.[53] As Babie has noted,

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43 *Phipps* (n 20) 38.

44 Ibid 37.

45 *Clos Farming Estates Pty Ltd v Easton* (2001) 10 BPR 18,845, 18,860 [50] (Bryson J).

46 Bradbrook and MacCallum (n 23) 33–4. See also Adrian J Bradbrook, 'The Development of an Easement of Solar Access' (1982) 5 *University of New South Wales Law Journal* 229, 236.

47 See *Rance v Elvin* (1985) 49 P & CR 9 (CA).

48 *A-G of Southern Nigeria* (n 37).

49 *Registrar of Titles for Victoria* (n 39).

50 See, eg, Adrian J Bradbrook, 'The Access to Wind Generators' (1984) *AMPLA Yearbook* 433; Adrian J Bradbrook, 'Liability in Nuisance for the Operation of Wind Generators' (1984) 1(2) *Environmental and Planning Law Journal* 128.

51 See, eg, *Land Title Act 1994* (Qld) pt 6 div 4C ('*Qld Land Title Act*').

52 Edgeworth, 'The *Numerus Clausus* Principle' (n 30) 387–9.

53 *Conveyancing Act 1919* (NSW) s 179 ('*NSW Conveyancing Act*'); *Property Law Act 1974* (Qld) s 178; *Law of Property Act 1936* (SA) s 22; *Property Law Act 1958* (Vic) ss 195–6 ('*Vic Property Law Act*'); *Property Law Act 1969* (WA) s 121.

however, easements conferring a right to light or air may still be created by express or implied grant; the nature of the dominant tenement, its buildings and their uses is likely to determine how much light or air is granted.[54]

The potential for a view protected by an easement to inhibit development was specifically considered by the Tasmania Law Reform Institute in its 2010 report on easements.[55] The Tasmania Law Reform Institute received submissions highlighting a range of problematic aspects of protecting a view via an easement. Submissions pointed, for example, to the permanence of an easement in contrast to planning schemes which are regularly reviewed and revised where necessary;[56] to the anti-development nature of a right to a view;[57] to the potential for such right to 'work against good planning and environmental outcomes';[58] and to the vagueness about what was protected and, consequently what could constitute a breach of the right.[59]

The Tasmania Law Reform Institute suggested that the 'nebulous' nature of a right to a view might be overcome by adopting the practice, used in instruments creating restrictive covenants, of using clear express terms limiting the height of buildings.[60] It noted that a right to a view could perform a 'useful social purpose'[61] in an increasingly dense urban environment characterised by 'sprawling concrete jungles'[62] but concluded that there are 'substantial hurdles'[63] in the way of recognising a right to a view as a new category of easement. It referred to the reluctance of courts to recognise novel easements, to the consideration that that '[i]n contrast to solar and wind access easements, a right to a view has arguably less importance in terms of societal value and has a propensity to be vague'[64] and to the express conclusion stated in *Phipps*, referred to above, that '[t]here is no such right known to the law as a right to a prospect or view.'[65]

Ultimately, while there may be sound policy arguments for the common law to accept novel negative easements generally, it is clear that in the specific context of a view, the common law has steadfastly refused protection.[66] Notwithstanding the link between a view and property values, this is likely to remain the case. Even if it is accepted that the law of easements should adapt to changing circumstances and available technology, the argument that, when compared to wind and solar access

54 Paul Babie, 'The Power of Subsidiary Interests in Land to Shape Our World: The Australian Law of Easements' in Hossein Esmaeili and Brendan Grigg (eds), *The Boundaries of Australian Property Law* (Cambridge University Press, 2016) 211, 225.
55 Tasmania Law Reform Institute, *Law of Easements in Tasmania* (Final Report No 12, March 2010).
56 Ibid 37 [1.16.21].
57 Ibid [1.16.18].
58 Ibid [1.16.20].
59 Ibid [1.16.19].
60 Ibid 36 [1.16.15].
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid, quoting *Phipps* (n 20) 37 (Lord Denning).
66 See, eg, *William Aldred's Case* (n 10); *Hunter* (n 7); *Hutchens v City of Holdfast Bay* (2007) 98 SASR 412 ('*Hutchens*').

easements, a view has less importance in terms of social values is a compelling one. It also reflects the view expressed over 400 years ago by Wray CJ in *William Aldred's Case*, that a view is 'a matter only of delight, and not of necessity'.[67] In addition, the fear that a right to a view is something that has a propensity to be vague and therefore to infringe the *Re Ellenborough Park* rule might be better and more flexibly addressed through the use of restrictive covenants or land use planning schemes. These means are examined in the following parts of this article.

IV PROTECTING A RIGHT TO A VIEW VIA RESTRICTIVE COVENANTS

Restrictive covenants are devices that private landowners have employed to control the use and development of land, often 'to restrict undesirable development and preserve neighbourhood amenity'.[68] This can include the protection of a view. In essence, a restrictive covenant is a private, contractual arrangement between landowners that, when specific criteria have been met, becomes a proprietary interest in the land to which it relates and which can be enforced by subsequent owners of the land, even though they were not parties to the original contract.[69] As such they are a form of private, rather than public, land use planning.[70]

This part considers the origins and development of restrictive covenants in Australia and their suitability to protect a view. First, it considers the development of restrictive covenants and the related concept of a building scheme. Then, it considers the provisions of the Torrens title system in each Australian jurisdiction that relate to the creation and, importantly, the enforcement of restrictive covenants and building schemes. It will show that Torrens title systems in Australia treat restrictive covenants and building schemes in different ways. A spectrum of treatment can be observed.

At one end, in the Northern Territory, a restrictive covenant can be registered and this enables it to become a legal and indefeasible property interest. At the other end are the Torrens title schemes in South Australia, Queensland and the Australian Capital Territory ('ACT') which enable the registration of restrictive covenants only in very limited circumstances or not at all. In the middle are the Torrens title systems in New South Wales, Victoria, Western Australian and Tasmania which allow restrictive covenants to be noted on the register, but which stop short of conferring indefeasibility and leave questions about the validity and ultimate enforceability to be answered by general common law principles.

67 *William Aldred's Case* (n 10) 821.

68 Joycey Tooher, 'Restrictive Covenants and Public Planning Legislation: Should the Landowner Feel "Touched and Concerned"?' (1992) 9(2) *Environmental and Planning Law Journal* 63, 63.

69 Ibid.

70 Ibid.

A Development of the Restrictive Covenant and the Building Scheme at Common Law and in Equity

Restrictive covenants were created in the late 14th and early 15th century,[71] and were used by landowners in their contracts to control the use of land. The common law recognised that the benefits of a restrictive covenant could run with the land to bind successors in title, as long as certain requirements are met.[72] These are first that a covenant must touch and concern the land such that it either affects the land as to the way in which it is used or it must of itself affect the value of the land.[73] Second, the benefit of a covenant must also be intended to run with the land.[74]

Despite its preparedness to enforce the benefit of a covenant on successors in title to the original covenantee, the common law refused to recognise the burden of a restrictive covenant. In *Austerberry v Corporation of Oldham* ('*Austerberry*'), a case concerning whether a covenant to maintain a road as a public highway was binding, Lindley LJ stated:

> I am not prepared to say that any covenant which imposes a burden upon land does run with land, unless the covenant does, upon the true construction of the deed containing the covenant, amount to either a grant of an easement, or a rent-charge, or some estate or interest in the land.[75]

While the common law tried to adjust the rigidity of the *Austerberry* rule,[76] it was equity, in the well-known mid-19th century decision in *Tulk v Moxhay* ('*Tulk*'), that 'brazenly resisted'[77] the *numerus clausus* principle and established that the burden of a covenant may run with the land, as long as the successors in title took title with notice of the covenant.[78] The case concerned land, comprising several houses and vacant land, originally owned by Tulk. Tulk sold the vacant land to a purchaser on terms which included a covenant pursuant to which the purchaser undertook to 'keep and maintain the said piece of ground and square garden … in sufficient and proper repair as a square garden and pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order'.[79]

The vacant land was subject to a number of subsequent transactions and was eventually sold to Moxhay who had notice of the original covenant. When Moxhay attempted to build upon the vacant land, Tulk sought an injunction to restrain Moxhay from so building. Moxhay argued that the covenant did not bind him. The Court, however, held that as Moxhay had purchased the land with notice of the covenant, it was binding on him. Granting the injunction restraining Moxhay from building on the land, Lord Chancellor Cottenham stated: 'if an equity is attached to

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71 William Holdsworth, *An Historical Introduction to the Land Law* (Oxford University Press, 1935) 247–8.
72 *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750, 781 (Lindley LJ) ('*Austerberry*').
73 *Rogers v Hosegood* [1900] 2 Ch 388, 395 (Farwell J).
74 *Smith v River Douglas Catchment Board* [1949] 2 KB 500, 506 (Tucker LJ), 511 (Somervell LJ).
75 *Austerberry* (n 72) 781.
76 *Halsall v Brizell* [1957] Ch 169; *Rhone v Stephens* [1994] 2 AC 310; *Wilkinson v Kerdene Ltd* [2013] EWCA Civ 44.
77 Edgeworth, 'The *Numerus Clausus* Principle' (n 30) 395.
78 (1848) 41 ER 1143, 1144 ('*Tulk*').
79 Ibid 1143.

the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased'.[80]

The *Tulk* doctrine was later narrowed by subsequent authorities to negative covenants only.[81]

In the more recent 2009 decision in *Davies v Dennis,*[82] the Court of Appeal of England and Wales recognised that a view can be protected by a restrictive covenant because an infringement of the view amounted to an annoyance which was prohibited by the terms of the relevant restrictive covenant.[83]

The land in question was a residential estate on Heron Island in the River Thames. The trial judge noted that the closeness of the river and the views that this offered were a particular feature of the estate.[84] The relevant provision of the restrictive covenant that the developer included in the transfer of the allotments stated that the owner of any part of the estate undertook '[n]ot … to do or suffer to be done on the Plot or any part thereof anything of whatsoever nature which may be or become a nuisance or annoyance to the owners or occupiers for the time being of the Estate'.[85]

The appellant sought approvals to build a multi-storey extension on his land. Some neighbours objected to the proposal arguing that the extension breached the covenant's prohibition on using or allowing the use of a plot in the estate in a way that 'may be or become a nuisance or annoyance to [other] owners or occupiers'.[86]

The Court of Appeal drew on authorities that indicated that the term annoyance was broader than nuisance,[87] and held that the proposed development amounted to something more than nuisance and constituted annoyance. It therefore denied the appeal. The principle that an annoyance is broad enough in scope to encompass the protection of a view is a significant illustration of the power of a restrictive covenant in this context.

The principles concerning the creation and enforcement, at common law and in equity, such as those developed in *Tulk*, only apply to agreements between the owners of neighbouring land and are incapable of securing the mutual enforceability of covenants between the owners of land that has been developed, subdivided and sold as an estate.[88] Such subdivisions are often laid out on the basis of a scheme of development (also referred to as a building scheme or a common building

80 Ibid 1144.
81 See *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403; *Marquess of Zetland v Driver* [1939] Ch 1; *Hall v Ewin* (1887) 37 Ch D 74; *Pirie v Registrar-General* (1962) 109 CLR 619; *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258 ('*Fitt*'); *Westpoint Corporation Pty Ltd v Registrar of Titles* [2004] WASC 189.
82 [2009] EWCA Civ 1081 ('*Davies*').
83 Ibid [37] (Rimer LJ).
84 Ibid [4].
85 Ibid [8].
86 Ibid.
87 Ibid [27]. See, eg, *Tod-Heatly v Benham* [1888] 40 Ch D 80; *Wood v Cooper* [1894] 3 Ch 671.
88 Edgeworth, *Butt's Land Law* (n 9) 633.

scheme) designed to protect certain desirable physical characteristics upon which the financial value of the subdivision rests.[89]

The courts of equity, too, developed the principles for the enforcement of such a scheme, with the leading decision in *Elliston v Reacher*.[90] Where the requirements of the common building scheme are met, its covenants are mutually enforceable regardless of the time of purchase of a lot within the scheme,[91] thereby overcoming a significant hurdle to the application of the principles referred to above to such subdivisions. There is thus, a 'community of interest' which 'imports in equity the reciprocity of obligation which each purchaser contemplates when he purchases'.[92]

Under general land law terms, and as illustrated by *Davies*, restrictive covenants agreed between neighbours, and the doctrine of the common building scheme that applies to all who own land with the scope of the common building scheme may provide a means of protecting a view. The application of these principles in Australia, however, is made more complex by questions of how a restrictive covenant may be enforced under the Torrens title systems which operate in each Australian jurisdiction. This is considered below.

B Restrictive Covenants and Torrens Title Legislation in Australia

The first Torrens title statutes enacted in Australia omitted references to restrictive covenants. Christensen and Duncan have observed that 'there is no evidence that the notification or registration of restrictive covenants was within Torrens' field of vision'[93] when he developed the scheme in colonial South Australia in 1858, only 10 years after the decision in *Tulk*. More fundamentally, however, Edgeworth suggests that the status of restrictive covenants under the Torrens system has always been 'uncertain'.[94] This is because of their origins in equity, the fact that their enforceability is based on the doctrine of notice and the fact that the Torrens title system is based on indefeasibility for registered interests that is independent of the doctrine of notice.[95]

Despite their omission from the Torrens schemes in Australia, conveyancers found a range of ways to protect restrictive covenants.[96] The practice of noting restrictive covenants in registered encumbrances originated in Victoria,[97] and was adopted in other jurisdictions including in New South Wales, Western Australia

89 *Brunner v Greenslade* [1971] Ch 993, 999 (Megarry J). In this article, the term common building scheme is used.

90 [1908] 2 Ch 374 ('*Elliston*'). See also *Re Dennerstein* [1963] VR 688 ('*Re Dennerstein*'); *Randell v Uhl* [2019] VSC 668, 26–28 [58]–[64] (Derham AsJ).

91 *Re Louis and the Conveyancing Act* [1971] 1 NSWLR 164, 178 (Jacobs JA) ('*Re Louis*').

92 *Elliston* (n 90) 375 (Parker J).

93 Christensen and Duncan (n 8) 104.

94 Edgeworth, *Butt's Land Law* (n 9) 639.

95 Ibid.

96 Ibid.

97 See, eg, *Mayor of Brunswick v Dawson* (1879) 5 VLR (E) 2, 7 (Molesworth J); *Re Arcade Hotel Pty Ltd* [1962] VR 274, 280 (Sholl J); Hossein Esmaeili, 'Restrictive Covenants and the Torrens System' in Hossein Esmaeili and Brendan Grigg (eds), *The Boundaries of Australian Property Law* (Cambridge University Press, 2016) 237, 245; Corey Byrne, 'To the Register and Beyond: Restrictive Covenants after *Westfield Management Ltd v Perpetual Trustee Company Ltd*' (2015) 4 *Property Law Review* 157, 165.

and South Australia.[98] This practice was later recognised by legislation in four jurisdictions: New South Wales in 1930,[99] Western Australia in 1950,[100] Victoria in 1954,[101] and Tasmania in 1962.[102] The result is, however, that Australian Torrens title schemes do not treat restrictive covenants consistently. Indeed, terms such as 'eccentric',[103] 'inconsistent, irreconcilable and piecemeal'[104] have been used to describe the state of the law in Australia in this regard.

It is possible to observe a spectrum that ranges, at one end, from legislation in the Northern Territory that enables the registration of a restrictive covenant which thereby creates a legal, indefeasible interest. Then it can be seen that the Torrens title schemes in New South Wales, Victoria, Tasmania and Western Australia provide that a restrictive covenant may only be notified on the register in circumstances that render the status of such a notification unclear. At the other end of the spectrum lies the Torrens legislation that is, for example in the case of South Australia, totally silent on the ability to register a restrictive covenant or, as is the case in Queensland, only allows public authorities to register restrictive covenants in certain circumstances. In the context of the Torrens title system's scheme of title by registration,[105] the ability for an interest to attract the quality of indefeasibility, most evident in the Northern Territory scheme, is a crucial concern. This spectrum of approaches to restrictive covenants in the Australian Torrens title systems is examined below.

1 Where Restrictive Covenants Are Registerable: Northern Territory

The Northern Territory is the only Australian jurisdiction where restrictive covenants can be registered as legal interests and attract indefeasibility.[106] They are treated similarly to other interests in land such as easements. Section 106 of the *Land Title Act 2000* (NT) ('*NT Land Title Act*') provides that a covenant or a covenant in gross over a lot may be registered over the land to be benefitted and the land to be burdened provided that the requirements of the Act have been met. As such it becomes a legal interest in relation to both the benefitted and the burdened land.[107]

It is significant that despite the fact that a restrictive covenant that is registered in this manner becomes an indefeasible interest, and also a valuable property right, the Northern Territory scheme clearly intends that it is not a permanent interest.

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98 Esmaeili (n 97) 245. See also Victorian Law Reform Commission, *Easements and Covenants* (Final Report No 22, December 2010) 80 [6.58].

99 *NSW Conveyancing Act* (n 53) s 88; Victorian Law Reform Commission (n 98) 80 [6.58].

100 *Transfer of Land Act 1893* (WA) s 129A ('*WA Transfer of Land Act*').

101 *Transfer of Land Act 1958* (Vic) s 88 ('*Vic Transfer of Land Act*'); Victorian Law Reform Commission (n 98) 80 [6.57]

102 *Land Titles Act 1980* (Tas) ss 102–4 ('*Tas Land Titles Act*'); Moore, Grattan and Griggs (n 28) 902.

103 Christensen and Duncan (n 8) 104.

104 Ibid 120.

105 *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ).

106 *Land Title Act 2000* (NT) ss 184–5, 188(1)–(2) ('*NT Land Title Act*'). See also Christensen and Duncan (n 8) 105; Esmaeili (n 97) 248.

107 *NT Land Title Act* (n 106) ss 184–5. See Christensen and Duncan (n 8) 122.

The Northern Territory legislation provides that a restrictive covenant may be extinguished in three ways.

First, section 174(1) of the *Law of Property Act 2000* (NT) ('*NT Law of Property Act*') provides that a covenant may be extinguished either in accordance with the terms of the instrument itself or the plan of subdivision creating the covenant; or upon the expiry of 20 years after the date the covenant was registered. Second, section 112(7) of the *NT Land Title Act* enables the Registrar-General to remove a covenant from the register upon application by the owner of land burdened by a registered covenant for over five years, who has paid the prescribed fee. Third, section 177(1) of the *NT Law of Property Act* provides that a court may modify or extinguish a restrictive covenant upon application by a person who has an interest in the land. The power of a court to make such an order is constrained by a number of factors set out in the legislation. These include the apparent obsolescence of the covenant in light of change of user of the benefitted land;[108] the potential for the continued existence of the covenant to impede the reasonable user of the land;[109] and whether the parties consent to the modification or extinguishment of the covenant.[110] Section 177(3) of the *NT Law of Property Act* also requires a court to take into account the relevant planning scheme applicable to the land in question.

2 Where a Restrictive Covenant Is Notifiable on the Register: New South Wales, Victoria, Western Australia and Tasmania

In New South Wales, Victoria, Western Australia and Tasmania, statutory provisions provide for the creation and notification of restrictive covenants on the respective jurisdiction's register, however the effect of such notification, except in Tasmania, is not clear,[111] and the validity of the restrictive covenant is to be determined in accordance with general principles of common law and equity.[112]

Section 88(3) of the *Conveyancing Act 1919* (NSW) ('*NSW Conveyancing Act*') afforded the first legislative protection to a restrictive covenant in Australia when it became operative in 1931. Thus, in New South Wales restrictive covenants can be recorded on the register, and may be enforced, if they meet certain legislative requirements.

Section 88(3)(a) provides that the Registrar-General has, and has always had, the power to record in the folio of the register for the burdened land a restrictive covenant that fits within the limits of section 88(1). Section 88(3)(c) provides that a restrictive covenant so recorded is to be treated as an interest for the purposes of section 42 of the *Real Property Act 1900* (NSW) ('*NSW Real Property Act*'), meaning that it becomes an indefeasible interest.

It is significant to note, that should the restrictive covenant fail to comply with the requirements of section 88(1) which, for example, include a requirement to

108 *Law of Property Act 2000* (NT) s 177(2)(a).
109 Ibid s 177(2)(b).
110 Ibid s 177(2)(c)(i).
111 Bradbrook and MacCallum (n 23) 465, 467.
112 Ibid 465; Christensen and Duncan (n 8) 115; Byrne (n 97) 169.

clearly indicate the land benefitted[113] and the land burdened,[114] then the covenant does not bind a subsequent purchaser.[115] Failure to comply with the requirements of section 88(1) of the *NSW Conveyancing Act* is thus likely to render the restrictive covenant unenforceable.[116]

In contrast to the position in the Northern Territory where, as considered above, a registered covenant is a registered interest,[117] in New South Wales, a restrictive covenant is not registered. Rather, it is recorded.[118] This has a number of consequences. A recording of the covenant in the register does not warrant its efficacy in the way the indefeasibility of title provisions of the *NSW Real Property Act* warrant the efficacy of a registered interest.[119] Section 88(3)(b) provides that 'a recording in the Register … of any such restriction shall not give the restriction any greater operation than it has under the dealing creating it'. Thus, the covenant 'stands or falls by its own inherent efficacy'[120] and its validity is to be determined with reference to the equitable and legal principles that apply to restrictive covenants generally. Finally, the recording does not convert a restrictive covenant from an equitable interest into a legal interest.[121]

Despite a number of inconsistent decisions by New South Wales courts,[122] it seems that a restrictive covenant relating to a building scheme can be enforced over Torrens title land when the instrument creating the encumbrance meets the requirements of section 88(1) of the *NSW Conveyancing Act* and where there is an expressed intention to confer the benefits of the covenant on every part of the land in the scheme of development.[123] Following the decision of the New South Wales Court of Appeal in *Re Louis and the Conveyancing Act*, courts in New South Wales have held that restrictive covenants contained in schemes of development, notified on the register, can be protected under the Torrens system in New South Wales.[124]

In Victoria, section 88 of the *Transfer of Land Act 1958* (Vic) ('*Vic Transfer of Land Act*') allows the notification of a restrictive covenant on the register.[125] Section 88(3) of the *Vic Transfer of Land Act* provides that the recording of any such restrictive covenant does not give it any greater operation than it has under the instrument or Act that created it.[126] The Victorian Supreme Court has stated

113 *NSW Conveyancing Act* (n 53) s 88(1)(a).
114 Ibid s 88(1)(b).
115 *Re Martyn* (1965) 65 SR (NSW) 387, 394–6 (Walsh J) ('*Re Martyn*').
116 Ibid.
117 *NT Land Title Act* (n 106) ss 184–5. See Christensen and Duncan (n 8) 122. See Edgeworth, *Butt's Land Law* (n 9) 640.
118 *NSW Conveyancing Act* (n 53) s 88(3)(a).
119 *Real Property Act 1900* (NSW) s 42.
120 Edgeworth, *Butt's Land Law* (n 9) 640.
121 *Bohn v Miller Brothers Pty Ltd* [1953] VLR 354, 358 (Smith J); Janice Gray et al, *Property Law in New South Wales* (LexisNexis, 3rd ed, 2012) 624.
122 See, eg, *Re Martyn* (n 115); *Re Louis* (n 91).
123 *Re Louis* (n 91) 177–82 (Jacobs JA).
124 *Hosking v Haas [No 2]* (2009) 14 BPR 27,407; *Re Mack and the Conveyancing Act* [1975] 2 NSWLR 623.
125 *Vic Transfer of Land Act* (n 101) s 88(1).
126 For further discussion of this provision, see Bradbrook and MacCallum (n 23) 466.

that the effect of the recording of a restrictive covenant under section 88 of the *Vic Transfer of Land Act* on the register does no more than notify the existence of a claim that there is a restrictive covenant burdening the land and that it does nothing to establish or validate the restrictive covenant.[127]

Amendments made to the *Vic Transfer of Land Act* in 2009, introduced specific provisions enabling the Registrar to record the removal or variation of a recorded restrictive covenant.[128]

The status of restrictive covenants under the Torrens system in Western Australia is similar to the position in Victoria and New South Wales. Section 129A(1) of the *Transfer of Land Act 1893* (WA) ('*WA Transfer of Land Act*') provides that a restrictive covenant 'may be created and made binding in respect of land under this Act so far as the law permits by instruments in an approved form'. Instruments containing covenants may be registered without entering a memorandum of the covenants on the certificate of title of the benefitted land;[129] however covenants are noted on the burdened land.[130]

As Bradbrook and MacCallum note, these provisions do not explain clearly the effect of such a notation and they presume that the limitation contained in the words 'so far as the law permits' is a reference to the equitable principles governing the running of the benefit and burden of restrictive covenants.[131] As a result, the registration of a restrictive covenant created under this provision does not confer upon it the status of a legal and indefeasible interest.[132]

The position in Tasmania is similar although the legislation is more specific. Pursuant to section 102 of the *Land Titles Act 1980* (Tas) ('*Tas Land Titles Act*') the burden of a restrictive covenant does not run with freehold registered land unless the requirements set out in section 102(2) are met. These requirements include that notice of the covenant is recorded on the folio of the register constituting title to the land intended to be burdened and that the land intended to be benefitted by the covenant is identified in the instrument containing the covenant.[133]

Section 102(3) provides that a covenant which meets the requirements of section 102(2) and thereby runs with freehold registered land 'may be enforced in equity' notwithstanding any provision of the *Tas Land Titles Act* but 'has no greater operation or effect … than it would have if the land which it is intended to burden were not registered land and the registered proprietor of the land were affected in equity by express notice of the covenant'. This provides that a restrictive covenant that meets section 102 can be enforced in equity, but is not necessarily an indefeasible interest. Therefore, the Tasmanian Torrens system legislation permits both notification and the enforcement (in equity) of a restrictive covenant under specific conditions.

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127 *Fitt* (n 81) [178]–[179] (Gillard J).
128 *Land Legislation Amendment Act 2009* (Vic) s 44.
129 *WA Transfer of Land Act* (n 100) s 129A(3).
130 Ibid s 129A(4).
131 Bradbrook and MacCallum (n 23) 466.
132 Law Reform Commission of Western Australia, *Restrictive Covenants* (Report, June 1997) [2.15].
133 *Tas Land Titles Act* (n 102) ss 102(2)(a)(iii)–(iv).

In the four jurisdictions where restrictive covenants can be recorded on the register, there are also mechanisms for their modification and removal. As can be seen from the analysis below, the legislation reveals a key link between restrictive covenants and matters that, today, are accepted as falling squarely within the scope of land use planning matters. This is similar to the legislation, described above, which applies in the Northern Territory. The relevance of changes to land use over time, the potential for obsolescence and the potential for conflict between private and public land use controls is evident.

In New South Wales, the Supreme Court can order the modification or removal of a restrictive covenant if certain conditions are met. These include a change in the user of the land benefitted by the restriction, a change in the character of the neighbourhood or any other circumstances that may mean that the restrictive covenant's continued use would be obsolete or impede the reasonable user of the land without providing practical benefit to the person entitled to its benefit.[134]

In Victoria, the scheme, contained today in section 84 of the *Property Law Act 1958* (Vic) confers a power on the Supreme Court to wholly or partially discharge or modify a restriction on four independent grounds,[135] which have been the subject of extensive judicial consideration.[136] At least one of the grounds must be made out to enliven the Supreme Court's power.[137]

The first ground is where, due to 'changes in the character of the property or the neighbourhood or other circumstances … material to the restriction', it ought to be considered obsolete.[138] The second and third grounds are that the restrictive covenant impedes the reasonable user of the burdened land without securing practical benefits to other parties.[139] Finally, there is a requirement that the proposed discharge or modification of the restrictive covenant 'will not substantially injure the persons entitled to the benefit of the restriction'.[140]

In Western Australia, section 129C of the *WA Transfer of Land Act* creates a similar scheme whereby a person who has an interest in land that is either burdened or benefitted by a restrictive covenant may apply for a court order to wholly or partially extinguish, discharge or modify the restriction, on grounds that are similar to those set out in the New South Wales scheme.

In Tasmania, section 84C of the *Conveyancing and Law of Property Act 1884* (Tas) provides a mechanism for a person with an interest in land subject to a restrictive covenant[141] to apply for an order extinguishing or modifying it. The Tasmanian scheme differs in that the power to make the order is vested in

134 *NSW Conveyancing Act* (n 53) s 89(1).
135 Mark Bender, 'Triple Treat: Legal Options for the Removal or Modification of Restrictive Covenants on Land in Victoria' (2006) 13(2) *Australian Property Law Journal* 179, 184.
136 See Bender (n 135).
137 *Re Alexandra* [1980] VR 55, 57–8 (Menhennitt J).
138 *Vic Property Law Act* (n 53) s 84(1)(a).
139 Ibid.
140 Ibid s 84(1)(c).
141 See *Conveyancing and Law of Property Act 1884* (Tas) s 84A (definition of 'overriding interest') ('*Tas CLP Act*').

the Recorder of Titles ('Recorder').[142] The criteria which enable the Recorder to exercise the power are similar to those described above.[143]

3 Where Torrens Legislation Is Silent: Queensland, South Australia and the ACT

Unlike the jurisdictions analysed above, the Torrens title system in Queensland only enables public authorities to register restrictive covenants.[144] South Australia and the ACT do not allow the registration or notification of restrictive covenants at all. However, as is clear from the analysis below, the Torrens title systems in South Australia may permit restrictive covenants contained in other registerable documents to be registered and enforced. The position in the ACT is similar.

(a) Queensland

It was generally considered that restrictive covenants could not be registered in Queensland until 1997 when legislative amendments provided an express right in the state, a statutory body or a local government authority to register a limited range of statutory covenants.[145] Such restrictive covenants are stated to be subject to section 181 of the *Property Law Act 1974* (Qld) ('*Qld Property Law Act*') which, in turn, confers a power on a court to modify or extinguish a restrictive covenant, in certain circumstances.

Notwithstanding these limited developments, it is not possible to either register or notify restrictive covenants on land owned by private individuals. Section 4 of the *Qld Property Law Act* makes it clear that nothing in that Act 'shall be construed as conferring on any person a right, in respect of registered land, to registration of a restrictive covenant'. Christensen and Duncan explain that section 4 is designed expressly to exclude any argument that section 181 of the *Qld Property Law Act* could support the registration of private restrictive covenants.[146]

(b) South Australia

Section 128B(1)[147] of the *Real Property Act 1886* (SA) ('*SA Real Property Act*') is the basis for the longstanding conveyancing practice of annexing restrictive covenants creating a common building scheme to an encumbrance which is then registered in accordance with section 128B of the *SA Real Property Act*.[148] This

142 Ibid s 34D; *Tas Land Titles Act* (n 102) s 4.

143 *Tas CLP Act* (n 141) ss 84C(1)(a)–(e).

144 *Qld Land Title Act* (n 51) s 97A(2); see also Bradbrook and MacCallum (n 23) 449.

145 *Qld Land Title Act* (n 51) s 97A(2); Carmel MacDonald et al, *Real Property Law in Queensland* (Lawbook, 2nd ed, 2005) 771.

146 Christensen and Duncan (n 8) 113.

147 Formerly *Real Property Act 1886* (SA) s 128. See *Real Property (Electronic Conveyancing) Amendment Act 2016* (SA) s 43.

148 *Deguisa v Lynn* (2020) 268 CLR 638, 647–8 [14] ('*Deguisa*'). *Real Property Act 1886* (SA) section 128B(1) provides that '[i]f land is to be charged with, or made security for, the payment of an annuity, rent-charge or sum of money in favour of a person, an encumbrance in the appropriate form must be executed by the registered proprietor and the person'.

practice has developed because in South Australia the Torrens title scheme has never been amended, unlike in other jurisdictions, to include an express provision either for the registration or for the notification upon the register of a restrictive covenant.[149] The practice contemplates registering an encumbrance which charges the land with a nominal annual rent charge and includes the restrictive covenant or covenants.[150] It is the registered rent charge in the encumbrance that creates the interest in land; rather than the restrictive covenant itself.[151]

The Supreme Court of South Australia has considered this practice in the context of the enforceability of a restrictive covenant creating a common building scheme on a number of occasions since 1962, when it first examined it in the decision in *Blacks Ltd v Rix* ('*Blacks*').[152] The High Court of Australia also considered it in the 2020 decision of *Deguisa v Lynn* ('*Deguisa*')[153]. In *Blacks*, the Full Court of the Supreme Court of South Australia first enforced against a successor in title of an original encumbrancer certain restrictive covenants that established a common building scheme and which were contained in a registered encumbrance.[154] While the decision in *Blacks*[155] has been criticised by academic commentators[156] and by other decisions of the South Australian Supreme Court,[157] it has not been overruled.

In the 1991 decision of *Burke v Yurilla* ('*Burke*'),[158] the Full Court again considered the issue of the enforceability of various restrictive covenants creating a common building scheme contained in an encumbrance that charged land with the payment of a nominal annual rent charge and which was registered pursuant to section 128 of the *SA Real Property Act*. The decision concerned land in the foothills of the Mount Lofty Ranges to the south-east of central Adelaide. This area generally enjoys views over the Adelaide Plains and to the St Vincent Gulf beyond.

The Full Court upheld the covenants contained in the encumbrance and declined to overrule *Blacks*.[159] It justified its position on a number of grounds, including the well-established nature of the conveyancing practice,[160] and the fact that to render such a long-standing practice invalid would cause uncertainty and adversely impact the value of properties that had been purchased on the assumption that the covenants contained in the encumbrances were valid.[161]

The decision in *Burke* is a significant statement on the enforceability of a restrictive covenant in South Australia, notwithstanding the absence of express

149 *Deguisa* (n 148) 646–7 [12].
150 *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382, 386 (Debelle J) ('*Burke*').
151 *Deguisa* (n 148) 648 [14].
152 [1962] SASR 161 ('*Blacks*'); *Clem Smith Nominees Pty Ltd v Farrelly* (1978) 20 SASR 227 ('*Clem Smith Nominees*'); *Netherby Properties Pty Ltd v Tower Trust Ltd* (1999) 76 SASR 9 ('*Netherby Properties*'); *Burke* (n 150).
153 *Deguisa* (n 148).
154 *Blacks* (n 152) 161, 164–5 (Napier CJ).
155 Ibid 161 (Napier CJ).
156 Bradbrook and MacCallum (n 23) 455–7.
157 *Clem Smith Nominees* (n 152) 255 (Zelling J); *Netherby Properties* (n 152) 18–19 (Perry J).
158 *Burke* (n 150).
159 Ibid 396 (Debelle J).
160 Ibid 395–6 (Debelle J).
161 Ibid 396 (Debelle J).

provisions in its Torrens title legislation. The effect of the decision is that when land in South Australia is subdivided and is part of a common building scheme and that restrictive covenants aimed at furthering that building scheme form part of a registered encumbrance, then they are enforceable against successors in title. This is because they benefit from the protection afforded to such registered encumbrances by section 69 of the *SA Real Property Act* which provides, subject to exceptions that are not relevant, that '[t]he title of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests as may be notified on the certificate of title of such land, be absolute and indefeasible'.

The extent to which restrictive covenants contained in a registered encumbrance were 'notified on the certificate of title' was considered by the High Court in the 2020 decision in *Deguisa*.[162] The decision concerned the enforceability of a common building scheme created in the late 1960s when a large parcel of land in the western suburbs of Adelaide was first subdivided and developed. The common building scheme purported, first, to ensure that only one dwelling for private residential purposes and associated outbuildings could be built on the affected allotments and, second, to prohibit the construction of flats, home units or multiple dwellings on those allotments.[163] The covenants were contained in an encumbrance that had been registered on the certificate of title for each allotment. The encumbrance contained an annotation, added by the conveyancer, indicating that the encumbrance formed part of a common building scheme but there was no indication on the register which allotments benefitted from the covenants.[164] The issue of whether the covenants were enforceable arose when the defendant, the owner of an allotment in the subdivision, received planning permission to subdivide the allotment and build two townhouses.

Contrary to submissions made by those who sought to enforce the covenants, the High Court held that in light of the objectives of the Torrens title system established by the *SA Real Property Act* and specifically those of section 69 of the *SA Real Property Act*:

> [A] person dealing with a registered proprietor of land is not to be regarded as having been notified of an encumbrance … that cannot be ascertained from a search of the certificate of title or from a registered instrument referred to in a memorial entered on the Register Book by the Register General.[165]

In this regard, the decision in *Deguisa*[166] is analogous to the High Court's decision in *Westfield Management Ltd v Perpetual Trustee Co Ltd*[167] where the Court held, in the context of a registered easement, that material extraneous to the register could not be taken to have been notified under the equivalent to section 69 of the *SA Real Property Act*.[168]

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162 *Deguisa* (n 148). For commentary on this case, see Christopher Rossiter, 'Indefeasibility, Common Building Schemes and the Torrens System: *Deguisa v Lynn*' (2021) 95 *Australian Law Journal* 670.
163 *Deguisa* (n 148) 650–1 [30].
164 Ibid 651–2 [31]–[35].
165 Ibid 646 [9].
166 *Deguisa* (n 148).
167 (2007) 233 CLR 528.
168 Ibid 539–40 [37], [44].

The High Court also made it clear that it would be unfair, in the context of the *SA Real Property Act*, to fix an owner of burdened land with the notice that might create an equitable interest in the encumbrancee given that the conveyancer's reference to the purported common building scheme failed to identify a registerable dealing or a subsisting registered encumbrance and, as such, could not identify the certificates of title of the allotments that were said to have the benefit of the restrictive covenant.[169] This was consistent with the reasoning in other cases concerning restrictive covenants said to create a common building scheme.[170]

In South Australia, therefore, despite the absence of specific legislation enabling the registration of restrictive covenants, it is possible to protect a view through the use of a registered encumbrance, where the Torrens system requirements are met. This can be extended to common building schemes, as long as the benefitted titles can be discerned from a search of the register.

(c) ACT

In the ACT, section 92 of the *Land Titles Act 1925* (ACT) ('*ACT Land Titles Act*') provides for dealing with encumbrances which the Act's dictionary defines as 'any charge on land created for the purpose of securing the payment of an annuity or sum of money other than a debt'.[171]

This provision of the *ACT Land Titles Act* is similar in effect to section 128B(1) of the *SA Real Property Act*. As a result, Bradbrook and MacCallum suggest that the conveyancing practice endorsed in South Australia may be available in the ACT.[172]

Restrictive covenants are clearly capable of protecting a view. However, as this part shows, their ability to do so may be constrained in the context of the Torrens title systems in Australia. This is because, as discussed, restrictive covenants are largely enforceable as equitable interests within the Torrens title system and, as such, they depend on exceptions to indefeasibility and other equitable means for their enforceability.[173]

Even where the Torrens requirements are met, legislative provisions in force in the jurisdictions which allow for either the registration or notification of restrictive covenants mean that there is a potential for conflict between restrictive covenants and land use planning law and policies that parliaments across Australia have enacted, largely, in the pursuit of orderly, economic, sustainable development and use of land. The following section examines this potential for conflict and the measures which a number of Australian legislatures have enacted to ensure that public land use planning schemes prevail over private land use planning schemes in the form of a restrictive covenant.

169 *Deguisa* (n 148), 666–7 [84]–[85].
170 *Netherby Properties* (n 152); *Re Dennerstein* (n 90).
171 *Land Titles Act 1925* (ACT) s 2 (definition of 'encumbrance').
172 Bradbrook and MacCallum (n 23) 458.
173 See, eg, *Deguisa* (n 148).

V THE RELATIONSHIP BETWEEN LAND USE PLANNING SCHEMES AND RESTRICTIVE COVENANTS

When the decision in *Tulk*[174] created the enforceable restrictive covenant as a form of private land use planning, the extensive legislated land use planning schemes which are a distinct feature of modern life did not exist;[175] nor did the potential for the two forms of land use regulation to overlap or conflict. Today, legislative provisions enable planning authorities to ensure that public planning instruments prevail over private planning instruments. Edgeworth has described these provisions as a 'public law brake'[176] on the exercise of private land use planning controls which, he suggests, give 'expression to the public policy that controls on land use and development are matters of public interest, best left to governments and local authorities charged with acting on behalf of the community, not individual landowners'.[177]

This 'public law brake'[178] means that the protection afforded to a view, via an enforceable restrictive covenant that, for example, prohibits a certain form of building, may be lost. In New South Wales, for example, section 3.16(2) of the *Environmental Planning and Assessment Act 1979* (NSW) ('*NSW EPA Act*')[179] empowers planning authorities to override covenants through planning policies or via the imposition of a consent granted under the *NSW EPA Act*.

A number of decided cases have considered the purpose of this provision. In *Coles Supermarkets Australia Pty Ltd v Minister for Urban Affairs and Planning and Wagga Wagga City Council* ('*Coles Supermarkets Australia*'),[180] Pearlman CJ noted its distinct planning purpose,[181] and that it was designed to prevent the sterilisation of land that may result from outdated limitations on land use.[182] Moreover it has been held that its language is clearly and unambiguously an indication of legislative intent to interfere with private property interests,[183] as may be expected given that it was to be found in 'a modern and comprehensive planning statute with important public objects'.[184] Indeed, as Ireland has pointed out, the very essence of planning is to 'displace private property rights in the public interest' and this provision meets this 'practical necessity which is at the heart of modern environmental planning'.[185]

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174 *Tulk* (n 78).
175 Bradbrook and MacCallum (n 23) 290.
176 Edgeworth, *Butt's Land Law* (n 9) 656.
177 Ibid.
178 Ibid.
179 *Environmental Planning and Assessment Act 1979* (NSW) s 28, later renumbered by *Environmental Planning and Assessment Amendment Act 2017* (NSW) sch 3.2 [4] ('*NSW EPA Act*').
180 (1996) 90 LGERA 341 ('*Coles Supermarkets Australia*').
181 Ibid 354.
182 Ibid.
183 *Wainwright v Canterbury Municipal Council* [1992] NSWLEC 96, 11 (Bignold J).
184 Ibid 12.
185 Clifford Ireland, 'Environmental Planning in the Public Interest and Private Property Rights: The Role of s 28 of the *Environmental Planning and Assessment Act 1979* (NSW)' (2010) 15(3) *Local Government Law Journal* 155, 156.

Bradbrook and Neave suggest that this override mechanism is likely to become a more important means of extinguishing covenants than the mechanism contained in section 89 of the *NSW Conveyancing Act* referred to above. This is because environmental planning instruments frequently include provisions that override covenants.[186] There is no requirement for the environmental planning instrument to identify a specific 'regulatory instrument' to be overridden;[187] it is enough that it identify a category of instrument.[188] However, for the override to operate, the wording of both the environmental planning instrument[189] and the covenant[190] need to be examined, and all formalities concerning the creation of the instrument must be observed.[191]

Decided cases in Victoria have held that planning law considerations are not relevant to the criteria set out in section 84 which is considered above.[192] In contrast, planning law considerations play a significant role in the 1991 amendments that created two mechanisms for the variation or removal of a restrictive covenant though the operation of public planning in Victoria.[193] The first involves an amendment to the planning scheme under section 6(2)(g) of the *Planning and Environment Act 1987* (Vic) ('*Vic Planning and Environment Act*') whereas the second involves an application for a permit under section 60(2) of the *Vic Planning and Environment Act*.

In Victoria, planning schemes are created pursuant to the *Vic Planning and Environment Act* and are stated to be 'the principal way of setting out objectives' of that Act, and its 'policies and controls for the use, development and protection of land'.[194] Section 6(2)(g) of the *Vic Planning and Environment Act* specifically empowers planning schemes, within certain limitations,[195] to regulate or provide for the creation, variation or removal of restrictions using the mechanisms provided by section 23 of the *Subdivision Act 1988* (Vic) ('*Vic Subdivision Act*'). Section 6A(2) of the *Vic Planning and Environment Act* also provides that a planning scheme may require a permit to be obtained before a person proceeds with the mechanism under the *Vic Subdivision Act*.

Applications for a permit to remove or vary a covenant may be made under section 60(5) of the *Vic Planning and Environment Act* if the covenant was created before 25 June 1991 and section 60(2) if the covenant was created on or after 25 June 1991. The two provisions establish different thresholds to enliven the power. For those covenants created on or after 25 June 1991, the responsible authority

186 Bradbrook and MacCallum (n 23) 632; Edgeworth, *Butt's Land Law* (n 9) 656.
187 *Coles Supermarkets Australia* (n 180) 352 (Pearlman CJ).
188 *Donald Crone & Associates Pty Ltd v Bathurst City Council* [1988] NSWLEC 73, 17, 19 (Cripps J).
189 See, eg, *Street v Luna Park Sydney Pty Ltd* (2009) 223 FLR 245.
190 See, eg, *Lennard v Jessica Estates Pty Ltd* (2008) 71 NSWLR 306.
191 *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* (2011) 243 CLR 492, 501 [23] (Gummow ACJ, Hayne, Crennan and Bell JJ).
192 *Greenwood v Burrows* (1992) V ConvR 54-444, 65,186 (Eames J).
193 Tannetje Lien Bryant, 'Removal or Variation of Restrictive Covenants in Victoria' (1996) 1(3) *Local Government Law Journal* 164, 164.
194 *Planning and Environment Act 1987* (Vic) s 4(2)(b) ('*Vic Planning and Environment Act*'). See also at s 6.
195 See also ibid s 6A.

may not grant a permit to vary or extinguish unless it is satisfied that the owner of the benefitted land will, as a consequence of the removal or variation of the restriction, be unlikely to suffer:

- financial loss;[196] or
- loss of amenity;[197] or
- loss arising from change to the character of the neighbourhood;[198] or
- any other material detriment.[199]

Bender has suggested that it will be more difficult to remove or vary a covenant made prior to 25 June 1991 than a covenant made after that date.[200] This is because for such covenants the responsible authority must be satisfied that, as a consequence of the removal or variation of the restriction, the owner of the benefitted land will be unlikely to suffer any detriment of any kind (including any perceived detriment)[201] and that any objection made by the owner is vexatious or not made in good faith.[202]

In Western Australia, the legislature has considered it necessary to ensure that a public planning scheme will prevail by empowering local governments to extinguish or vary a restrictive covenant through a local planning scheme established under the *Planning and Development Act 2005* (WA) ('*WA Planning and Development Act*') and associated subordinate legislation. Section 69(1)(b), section 256(1)(b) and clause 11 of schedule 7 of the *WA Planning and Development Act* mean that a local government can include in its planning scheme a provision that extinguishes or varies any restrictive covenant concerning land. In addition, clause 35 of schedule 1 of the *Planning and Development (Local Planning Schemes) Regulations 2015* (WA) is designated as a model provision which, with limited exceptions, apply to all local planning schemes,[203] and which applies specifically to override a restrictive covenant that contains a more stringent restriction on the number of residential dwellings than that imposed by the relevant planning scheme.

VI LAND USE PLANNING AND PROTECTION OF VIEWS

Part V considered the distinct legislative preference for public land use planning to prevail over private land use controls, given the potential for the latter to sterilise land and inhibit development. Given that preference, this part now considers how land use planning law and policy may protect a view or, alternatively, can allow a view to be interfered with.

196 Ibid s 60(2)(a).
197 Ibid s 60(2)(b).
198 Ibid s 60(2)(c).
199 Ibid s 60(2)(d).
200 Bender (n 135) 193.
201 *Vic Planning and Environment Act* (n 194) s 60(5)(a).
202 Ibid s 60(5)(b).
203 *Planning and Development Act 2005* (WA) s 256(5)(a) ('*WA Planning and Development Act*').

Land use planning's foundations and rationale lie in 'the goals, aspirations, and beliefs of a community'[204] and land use planning law seeks to achieve and implement those goals, aspirations, and beliefs.[205] The stated objects of planning legislation in all Australian jurisdictions seek to regulate planning and development in broadly similar ways.[206] As the reasoning of Pearlman CJ in *Coles Supermarkets Australia*,[207] referred to above, illustrates, a 'public law brake'[208] on the operation of private land use planning is necessary in order to achieve these objectives. For example, the Victorian planning legislation seeks, among other things, 'to provide for the fair, orderly, economic and sustainable use, and development of land',[209] 'to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria'[210] and 'to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value'.[211] In addition to the 'orderly and economic use and development of land',[212] the objects of planning legislation in New South Wales include the promotion of 'the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources',[213] and 'good design and amenity of the built environment'.[214] The equivalent provision in Queensland is defined inclusively to encompass matters such as:

> (i) creating and maintaining well-serviced, healthy, prosperous, liveable and resilient communities with affordable, efficient, safe and sustainable development; and
>
> (ii) conserving or enhancing places of special aesthetic, architectural, cultural, historic, scientific, social or spiritual significance; and
>
> (iii) providing for integrated networks of pleasant and safe public areas for aesthetic enjoyment and cultural, recreational or social interaction.[215]

The connection between a view and the aesthetics or amenity values of a locality means that it is a clear planning matter.[216] The land use planning laws

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204 Leslie A Stein, *Principles of Planning Law* (Oxford University Press, 2008) 1.

205 Ibid.

206 *Planning and Development Act 2007* (ACT) s 6 ('*ACT Planning and Development Act*'); *NSW EPA Act* (n 179) s 1.3; *Planning Act 1999* (NT) s 2A ('*NT Planning Act*'); *Planning Act 2016* (Qld) s 3 ('*Qld Planning Act*'); *Planning Development and Infrastructure Act 2016* (SA) s 12 ('*SA PDI Act*'); *Land Use Planning and Approvals Act 1993* (Tas) sch 1 ('*Tas LUPA Act*'); *Vic Planning and Environment Act* (n 194) s 4; *WA Planning and Development Act* (n 203) s 3.

207 *Coles Supermarkets Australia* (n 180) 354.

208 Edgeworth, *Butt's Land Law* (n 9) 656.

209 *Vic Planning and Environment Act* (n 194) s 4(1)(a).

210 Ibid s 4(1)(c).

211 Ibid s 4(1)(d).

212 *NSW EPA Act* (n 179) s 1.3(c).

213 Ibid s 1.3(a).

214 Ibid s 1.3(g).

215 *Qld Planning Act* (n 206) ss 3(3)(c)(i)–(iii).

216 For example, section 3 of the *SA PDI Act* provides that the 'amenity of a locality or building means any quality, condition or factor that makes, or contributes to making, the locality or building harmonious, pleasant or enjoyable'.

enacted in all Australian states and territories provide for the creation of planning instruments and policies, including through consultation and public participation.[217] These statutory planning policy instruments are forward-looking and regulate the ability to use and develop land.

For example, in South Australia section 65 of the *SA PDI Act* establishes the *SA Code*, referred to in Part I, as a central component of South Australia's land use planning scheme. The *SA Code* must 'set out a comprehensive set of policies, rules and classifications which may be selected and applied in the various parts of the State … for the purposes of development assessment and related matters within the State'.[218] It does this through the creation of a scheme of zones, subzones, and overlays,[219] policies and rules that govern the use and development of an area within a particular class of zone,[220] or which are applicable to the character of a subzone.[221] The extent to which these statutory polices provide, either expressly or by implication,[222] for the protection of views is therefore paramount.

The analysis below considers key caselaw authorities from a number of Australian jurisdictions that consider views in the assessment of a proposed development. The cases present examples of planning policies that are relevant to the protection of a view and illustrate how those policies apply to the assessment of a proposal which would impact a view in some way. The cases clearly restate the common rule that there is no legal right to a view,[223] but offer a flexible and nuanced framework with which to assess the importance of a view and the extent to which it may be encroached upon by a proposed development, if at all.

As illustrated by the analysis of the caselaw below, the framework establishes a qualitative and quantitative assessment of the view to determine whether or not it is to be protected from development that would affect it. In addition, and in contrast to easements and restrictive covenants, land use planning law is able to take into account the wide variety of interests in a view, such as those who seek to protect a view, those over whose land a view is claimed, and the interests of the public generally. The interests of the latter, in particular, are unlikely to be taken into consideration by parties to easements or restrictive covenants. The ability for views to be shared is a theme that can be discerned in key reported decisions.[224]

In *Tenacity Consulting Pty Ltd v Warringah Council* ('*Tenacity Consulting*'),[225] the New South Wales Land and Environment Court considered an appeal against the Warringah Council's refusal to grant development approval to an application

217 *ACT Planning and Development Act* (n 206) ch 5; *NSW EPA Act* (n 179) pt 3; *NT Planning Act* (n 206) pt 2; *Qld Planning Act* (n 206) ch 2; *SA PDI Act* (n 206) pt 5; *Tas LUPA Act* (n 206) pts 3–3B; *Vic Planning and Environment Act* (n 194) pts 1A–3, 3AA–3A; *WA Planning and Development Act* (n 203) pts 3–5.

218 *SA PDI Act* (n 206) s 66(1).

219 Ibid s 66(2)(a).

220 Ibid s 66(2)(b)(i).

221 Ibid s 66(2)(b)(ii).

222 *Hutchens* (n 66) 422–4 (Debelle J).

223 See, eg, *Charlton v Mornington Peninsula SC* [2017] VCAT 1770, [21] (Senior Member Naylor) ('*Charlton*'); *Hutchens* (n 66) 417 (Debelle J).

224 See, eg, *Tenacity Consulting Pty Ltd v Warringah Council* (2004) 134 LGERA 23, 28 (Senior Commissioner Roseth) ('*Tenacity Consulting*'); *Hutchens* (n 66); *Charlton* (n 223).

225 *Tenacity Consulting* (n 224).

to demolish an existing building and to construct a three-storey mixed use building containing commercial space and 18 apartments on land within the Local Retail Centre zone pursuant to the *Warringah Local Environment Plan 2000* ('*LEP*'). The proposal would have had a significant impact on the views towards the ocean and to Manly enjoyed by a neighbouring four-storey apartment building. The height of the proposal was contrary to specific provisions of the *LEP*. Clause 20 of the *LEP*, however, also provided that such an application could be approved if the development was consistent with general principles of development control, the desired future character of the locality and any relevant state environmental planning policy. Clause 39 of the *LEP* required a transition between the built form of development in the local retail centre and adjacent residential development. Clause 61 provided that development was to 'allow for the reasonable sharing of views'.[226]

The Land and Environment Court held that the proposal suffered from two major weaknesses,[227] and dismissed the appeal. First, the height of the proposal meant that it did not comply with the desired future character of the locality. This meant that clause 20 of the *LEP* could not apply.[228] Second, the small setback of the development from its rear boundary meant that the proposal did not adequately address the need for a transition to adjacent residential development required by clause 39 of the *LEP*.[229]

More significantly, the Land and Environment Court developed a four-step process to determine whether or not view sharing was reasonable, in the light of clause 61 of the *LEP*. The Land and Environment Court considered that the notion of sharing of views was invoked when 'a property enjoys existing views and a proposed development would share that view by taking some of it away for its own enjoyment'.[230] This is a recognition that a view forms part of the amenity of a locality and is thus a legitimate planning consideration.

The first step involved an assessment of the views to be affected by a proposed development.[231] This requires an assessment of the type or qualities of the physical features that were encompassed in the view. Thus what the Court described as '[i]conic views',[232] such as the Opera House or the Harbour Bridge would be valued more highly than 'views without icons'.[233] Further, the Court considered that whole views and views of the interface of land and water were examples of views that were to be regarded highly.[234] In terms of the appeal, the Land and Environment Court held that the view enjoyed from neighbouring land toward the ocean and Manly was 'highly valuable'.[235]

226 Ibid 28 (Senior Commissioner Roseth).
227 Ibid 29 (Senior Commissioner Roseth).
228 Ibid 26–7 (Senior Commissioner Roseth).
229 Ibid 27 (Senior Commissioner Roseth).
230 Ibid 28 (Senior Commissioner Roseth).
231 Ibid.
232 Ibid.
233 Ibid.
234 Ibid.
235 Ibid.

The second step required consideration of which part of the affected property the view is enjoyed from.[236] The Court considered that views enjoyed from the front and rear of a property warranted more protection than those enjoyed across the side boundaries of a property.[237] Similarly, the Court contrasted views enjoyed while standing with those enjoyed while sitting. It felt that it was more realistic to expect that the former in contrast to the latter were protected.[238]

The third step required an assessment of the extent of the impact on the view enjoyed from the whole of the property and not just for the view which is to be affected by the proposed development.[239] The Court considered views enjoyed from living areas will be impacted more significantly than views from bedrooms. The Court suggested that while quantitative assessment of the amount of view might be of use, it was more useful to assess the loss of the view qualitatively as 'negligible, minor, moderate, severe or devastating'.[240]

Thus, the Court considered that views enjoyed from three levels on the neighbouring land would be obliterated.[241] Views enjoyed while seated on the fourth floor would also be obliterated and views enjoyed while standing would be reduced. The Court concluded that the impact on those views would be severe.[242]

Finally, it was necessary to assess 'the reasonableness of the proposal that is causing the impact'.[243] Factors to consider at this stage included whether or not the proposed development that would take away a view complied with all relevant planning controls. Where an impact was caused by a proposed development that did not comply, the impact might be considered unreasonable.[244] Even with a proposal that did comply, it might be necessary to consider whether 'a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours'.[245] The Court went on to suggest that if such a redesign were not possible, then the impact on the view would be acceptable and that, as a result, the sharing of the view would be reasonable.[246] Ultimately the Court held that the proposal amounted to a significant and unreasonable reduction in the amenity enjoyed by the owners of adjacent land and it denied the appeal.[247]

In the 2007 decision of the South Australian Supreme Court in *Hutchens v City of Holdfast Bay* ('*Hutchens*'),[248] the Court noted the decision in *Tenacity Consulting*. *Hutchens* endorses the position that the common law will not protect

236 Ibid.
237 Ibid.
238 Ibid.
239 Ibid.
240 Ibid.
241 Ibid.
242 Ibid.
243 Ibid.
244 Ibid.
245 Ibid.
246 Ibid.
247 Ibid 29 (Senior Commissioner Roseth).
248 *Hutchens* (n 66).

a view,[249] but also demonstrates that the protection of views in planning laws or planning policy can be explicit,[250] drawn by reasonable implication from the terms of the relevant planning policy[251] or as part of the protection of amenity, which in coastal areas includes factors such as views of the coast and sea breezes.[252]

Hutchens concerned a third-party appeal against the respondent council's approval of an application for the demolition of a two-storey building on The Esplanade, Seacliff which was used as a shop and for the construction on that site of a three-storey building comprising two dwellings, a shop and car parking.

The land to the east of The Esplanade rises steeply, giving it views over the coast and the Gulf of St Vincent to the west. The appellants resided immediately to the east (and rear) of the subject land and enjoyed views of the site of the proposed development, coast and Gulf. They argued that the proposal would infringe the views enjoyed from their property. There were no easements or restrictive covenants that would have protected a view and thus the appeal was to be determined by the application of the provisions of the relevant planning scheme created pursuant to section 23 the *Development Act 1993* (SA),[253] the Holdfast Bay Development Plan ('Development Plan').[254]

The Court considered that the Development Plan contained a number of principles that supported the preservation of views, whether they were the views that were available to the public; views that were able to be enjoyed both by members of the public and from private land; and views enjoyed only from private land.[255] These included provisions that sought to preserve or protect 'existing attractive environmental conditions and … amenity',[256] to ensure that buildings were sited to take maximum advantage of views,[257] to ensure that development in a residential zone did 'not impair its character or the amenity of the locality as a place in which to live'[258] and to ensure that development take place in a manner which:

> (a) will not interfere with the effective and proper use of any land; and
>
> (b) will have a proper relationship with any continuing use of land or building on the site of that development.[259]

Unlike other zones within the City of Holdfast Bay ('Council') area, the policies that applied to the zone where the proposed development was located did not contain any explicit reference to the protection of views. However, relevant principles that applied expressly to the zone and which permitted residential accommodation of up to three-storeys were expressly stated to be 'subject to

249 Ibid 417 (Debelle J).
250 Ibid 422 (Debelle J).
251 Ibid.
252 Ibid 423–4 (Debelle J).
253 The *Development Act 1993* (SA) has been repealed by the *SA PDI Act 2016*. Section 65 of the *SA PDI Act 2016* creates the *SA Code* which fulfills the role formerly undertaken by the Development Plan.
254 Hutchens (n 66) 415 (Debelle J).
255 Ibid 425 (Debelle J).
256 Ibid.
257 Ibid.
258 Ibid 426 (Debelle J).
259 Ibid 425 (Debelle J).

compliance with the relevant principles of development control'[260] which included the council-wide principles referred to above. The result of this analysis was that an assessment of the application required an assessment of the extent to which the proposal would obstruct views enjoyed by residents of existing dwellings.[261]

The Council's failure to do that meant that the Court allowed the appeal and it determined the appeal rather than remitting it to the Environment Resources and Development Court. In doing so, the Court drew on language used by the New South Wales Land and Environment Court in its *Tenacity Consulting* decision and its approach to the concept of sharing of views.

The Court noted that the appellants enjoyed a clear view of the sea and the horizon, elements which it noted were 'highly regarded and … in keen demand'.[262] The proposal would have led to what the Court described as a 'complete obliteration'[263] of the view that would so adversely affect their amenity that it would be 'entirely inconsistent'[264] with the principles of the Council's Development Plan. The Court stated that while '[n]o one has a monopoly on views', the proponents were not entitled to obliterate the views currently enjoyed by others.[265] This was particularly so, taking into consideration the fact that it would have been possible for the developers to construct a building that would allow them to access the views while permitting those located behind to continue to enjoy the views that they presently enjoyed. Accordingly, the appeal was allowed and the development approval which had been granted was reversed.[266]

Since at least the 1980s Victorian planning appeal decisions have held that there is no legal right to protect views enjoyed by property owners.[267] In *Tashounidis v Shire of Flinders*,[268] the Victorian Administrative Appeals Tribunal set down principles relevant to the protection of views in Victoria. These principles have been considered in subsequent Victorian Civil and Administrative Tribunal ('VCAT') decisions,[269] and, were set out clearly in the VCAT's 2017 decision in *Charlton v Mornington Peninsula Shire Council* ('*Charlton*'). The principles are as follows:

(a) There is no legal right to a view;

(b) Views form part of the existing amenity of a property and their loss is a relevant consideration to take into account;

(c) The availability of views must be considered in light of what constitutes a reasonable sharing of those views;

260 Ibid 428 (Debelle J).
261 Ibid 429 (Debelle J).
262 Ibid 431 (Debelle J).
263 Ibid 432 (Debelle J).
264 Ibid.
265 Ibid.
266 Ibid.
267 *Tashounidis v Shire of Flinders* (1988) 33 APA 427, 430 (Member Buckley) ('*Tashounidis*').
268 Ibid.
269 *Centrum Architects Pty Ltd v Surf Coast Shire Council* [2002] VCAT 155; *Healy v Surf Coast Shire Council* [2005] VCAT 990.

(d) In addressing the concept of 'reasonableness', it is relevant to consider:

i. The importance of the view to be lost within the overall panorama available; and

ii. Whether those objecting have taken all appropriate steps to optimise development of their own properties.

(e) Added emphasis will be placed on principles (b) and (c) above if the issue of views is specifically addressed in the planning scheme.[270]

Although the decision in *Charlton* did not expressly refer to either *Tenacity Consulting* or *Hutchens*, it is clear that in Victoria too, courts have similarly adopted a flexible framework for considering whether a view ought to be protected. Like the considerations expressed in *Tenacity Consulting* or *Hutchens*, the relevant principles in Victoria incorporate considerations such as the close relationship between views and amenity, the extent to which the relevant planning scheme protects views, and the reasonable sharing of views, which itself requires a qualitative and quantitative assessment of the view in question. These, too, seem to be relevant considerations for the assessment of views under planning law in Queensland.[271]

The planning considerations that are relevant to the concept of sharing views respond, in a significant way, to the novel ways landowners may seek to customise land rights so as to suit their individual needs and circumstances in a way that is unconstrained from the rigidity of the *numerus clausus* principle[272] and the Torrens title system requirements that apply to easements and restrictive covenants. The question whether the relevant planning instrument includes provisions that seek explicitly to protect a view or to protect amenity more broadly is, however, paramount.

VII CONCLUSION

Notwithstanding the centuries-old common law position that there is no right to a view, this article illustrates that there are, in Australia today, a number of legal mechanisms that enable landowners to protect a view and, thereby, the commercial, amenity and aesthetic values that inhere in a view, though some are more readily applicable than others.

The traditional common law position that the right to a view is not a proprietary interest may mean that the easement is not a likely vehicle for the protection of a view. This is because such a right amounts to a negative easement, which the common law has traditionally been reluctant to accept. Even if a negative easement to protect a view could be accepted, it would need to be very carefully drafted to

270 *Charlton* (n 223) [27].

271 See, eg, *VG Projects Pty Ltd v Brisbane City Council* [2016] QPELR 404.

272 Edgeworth, 'The *Numerus Clausus* Principle' (n 30) 387.

ensure that it was not so vague as to infringe the requirement that it be capable of forming the subject matter of a grant.[273]

The restrictive covenant, considered in Part IV, does not suffer from the drafting and other legal difficulties that may plague an easement, such as the *numerus clausus* principle. This is evident in the decision of the Court of Appeal of England and Wales in *Davies*,[274] which injuncted a development that would have infringed a view because it would have constituted an annoyance which was prohibited by the terms of the relevant restrictive covenant. As Part IV examined in detail, the general law utility of a restrictive covenant in protecting a view is complicated in Australia by the Torrens title system which, when it was first created in 1858 in South Australia, was silent on the position of restrictive covenants. Indeed, even today, South Australian Torrens title legislation does not acknowledge the restrictive covenant as a registerable property right. In contrast, the Northern Territory's Torrens system permits the registration of a restrictive covenant and makes it a legal and indefeasible interest. The position of the remaining Australian jurisdictions lies at various points on the spectrum between these two extremes, leaving the validity and enforceability of restrictive covenants subject to the range of Torrens principles concerning notice and indefeasibility that can be, as demonstrated by the High Court of Australia's decision in *Deguisa*,[275] hostile to unregistered interests.

Nevertheless, landowners in many Australian jurisdictions have resorted to restrictive covenants to protect characteristics of their property notwithstanding these difficulties. As Part V illustrates, however, attempts to protect a view via a restrictive covenant in the jurisdictions that allow either the registration or the noting of a restrictive covenant on the Torrens register, are also at risk when there is a conflict with a relevant land use planning control. This is due to legislation that expressly enables planning authorities to ensure that planning controls override restrictive covenants. This 'public law brake'[276] is a recognition that a restrictive covenant can become obsolete and lead to the sterilisation of land and, as a result, be anti-development in nature.

As the planning appeals examined in Part VI illustrate, Australian planning schemes do not recognise a right to a view, but offer a flexible framework with which to assess developments that would infringe a view, drawing heavily on the concept of view sharing, developed in cases such as *Tenacity Consulting*[277] and *Tashounidis*.[278] The decision in *Tenacity Consulting*[279] shows that the relevant planning policy settings are important. As the Wheatland Street, Seacliff example illustrates, the settings of the relevant planning policy, the existence of third-party consultation rights and related rights to appeal and challenge decisions are crucial.

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273 *Re Ellenborough Park* (n 24) 163.
274 *Davies* (n 82).
275 *Deguisa* (n 148) 666–7 [84]–[85].
276 Edgeworth, *Butt's Land Law* (n 9) 656.
277 *Tenacity Consulting* (n 224).
278 *Tashounidis* (n 267).
279 *Tenacity Consulting* (n 224).

The settings of the *SA Code* that were relevant to the application to construct the shed strongly supported the development and stand in clear contrast to the provisions of the now-obsolete Development Plan that meant that the *Hutchens* development was refused.

A restrictive covenant is a preferable means of protecting a view compared to an easement, however the potential primacy of public planning law instruments over restrictive covenants means that despite the commercial value of a view, its protection in most Australian jurisdictions relies heavily on the policy settings of public planning instruments. This may be justified for two reasons. First, public planning authorities are likely to be better positioned than private landowners to assess and plan appropriate land uses in the public interest. Second, the flexibility and adaptability over time that the concept of sharing of views permits is unlikely to be matched by private planning instruments, which legislatures have clearly considered may, over time, become obsolete and impede development.

Where the planning policy settings are skewed in favour of development rather than towards the protection of views, then, as the residents of Wheatland Street in Seacliff found, the enjoyment of a view is easily compromised. It seems in Australia today that whether a view remains 'a matter only of delight and not of necessity'[280] is a question that is squarely reserved to state and local government planning authorities to answer.

280 *William Aldred's Case* (n 10) 821 (Wray CJ).