



Review of the *Real Property Act 1886 (SA)*

Fact Sheet 4 – Restrictive Covenants

What is a Restrictive Covenant?

A restrictive covenant is a covenant (that is, an undertaking given through an agreement),¹ which prohibits the use of a parcel of land, for a purpose which would otherwise be permitted, for the benefit of another parcel of land.² The covenant is imposed by the owner of the parcel of the land which would benefit from the covenant (the benefited land), and it applies to the covenantor, that is the party whose land would be burdened by the application of the covenant (the burdened land).³

For a covenant to be restrictive and annexed to the relevant land, it must be negative in nature (that is, not allowing a certain action or circumstance) and it must affect (expressed as to 'touch and concern') the benefited land.⁴ Whether a covenant is in fact negative is determined by the substance, rather than form, of the relevant agreement.⁵ The benefited land need not be adjacent to the burdened land, though it usually is.⁶

Common restrictions imposed by such covenants concern, but are by no means limited to the number of dwellings to be created on a parcel of land;⁷ the type of, and material to be used for, a fence;⁸ the trade to be conducted by the covenantor on the burdened land;⁹ and the protection of a view.¹⁰

Unlike other Australian jurisdictions, South Australian legislation does not provide that the successor-in-title to the benefiting land shall be entitled to the benefit of the restrictive covenant.¹¹ At common law, however, so long as the covenant is annexed to the land in question, it will pass with ownership of the land.¹² The benefit of a restrictive covenant, at common law, can also be assigned to another.¹³ As the restrictive covenant is an equitable interest, if it is to be modified by an agreement between the covenantor and covenantee, that agreement must be in writing, as required by the *Law of Property Act 1936 (SA)*.¹⁴

¹ Ray Finkelstein et al, *LexisNexis Concise Australian Legal Dictionary* (LexisNexis, Sixth edition, 2021) 169, 582; *Jaggamantri v Registrar-General* [2023] SASC 74 [38]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, Seventh Edition, 2017) [10.10].

² Ray Finkelstein et al, *LexisNexis Concise Australian Legal Dictionary* (LexisNexis, Sixth edition, 2021) 169, 582; Department of Transport and Planning, 'Restrictive Covenants', *Department of Transport and Planning* (Web Page, 1 November 2023) <<https://www.planning.vic.gov.au/guides-and-resources/guides/all-guides/restrictive-covenants>>.

³ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, Seventh Edition, 2017) [7.1270], [10.80]; Department of Transport and Planning, 'Restrictive Covenants', *Department of Transport and Planning* (Web Page, 1 November 2023) <<https://www.planning.vic.gov.au/guides-and-resources/guides/all-guides/restrictive-covenants>>.

⁴ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, Seventh edition, 2020) [18.10]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, Seventh Edition, 2017) [7.1270], [10.150]; *Jaggamantri v Registrar-General* [2023] SASC 74 [39]-[40].

⁵ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, Seventh edition, 2020) [18.15]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, Seventh Edition, 2017) [10.300]; *Shepherd Homes Ltd v Sandham (No 2)* (1971) 2 ER 1267, 1272.

⁶ *Baramon Sales Pty Ltd v Goodman Fielder Mills Ltd* [2001] FCA 1672, [15].

⁷ Department of Planning, Lands and Heritage, *Restrictive Covenants* (Fact Sheet, 2021) 1; Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, Seventh edition, 2020) [18.130]; Department of Transport and Planning, 'Restrictive Covenants', *Department of Transport and Planning* (Web Page, 1 November 2023) <<https://www.planning.vic.gov.au/guides-and-resources/guides/all-guides/restrictive-covenants>>.

⁸ Department of Transport and Planning, 'Restrictive Covenants', *Department of Transport and Planning* (Web Page, 1 November 2023) <<https://www.planning.vic.gov.au/guides-and-resources/guides/all-guides/restrictive-covenants>>; Legal Services Commission South Australia, 'Use of Land', *Legal Services Commission* (Web Page, 30 April 2010) <<https://www.lawhandbook.sa.gov.au/ch31s13.php>>.

⁹ Department of Planning, Lands and Heritage, *Restrictive Covenants* (Fact Sheet, 2021) 1.

¹⁰ Brendan Grigg and Hossein Esmaeili, 'Protecting a View in Australia: Common Law Principles, Restrictive Covenants and Planning Law' (2023) 46(1) *University of New South Wales Law Journal* 243.

¹¹ *Ibid* [18.50].

¹² *Jaggamantri v Registrar-General* [2023] SASC 74 [40]-[41].

¹³ *Ibid* [38].

¹⁴ *Law of Property Act 1936 (SA)* s 29(1)(c).



Where a restrictive covenant has been breached, the benefiting landowner can, as with any contractual breach, seek damages at common law.¹⁵ Additionally, discretionary equitable injunctions can be sought to prevent the breach of a covenant.¹⁶ At common law, being an equitable interest, a restrictive covenant cannot be enforced against a *bona fide* (that is, in good faith) purchaser who had not been given any notice of the covenant.¹⁷

Restrictive Covenants in South Australian Torrens Land

Equitable interests, including restrictive covenants, are not abolished by the Torrens system.¹⁸ Yet, the recognition of such interests causes tension with respect to s 69 of the *Real Property Act 1886* (SA) ('*RPA*'), which requires that the registered proprietor of land be 'notified' on the certificate of title of interests, which would include restrictive covenants. Yet there is no power to register or otherwise notify a restrictive covenant, in its own right, on a certificate of title.¹⁹ Of course, it may be protected by one of the express exceptions to indefeasibility contained in ss 71 and 249 of the *RPA*, or it may be caveated.²⁰

Another stronger, method of protection has become well-established in South Australia, namely the registration of the covenant as a rent charge pursuant to s 128.²¹ In this way, it is the rent charge, rather than the restrictive covenant itself, which creates an interest in the land.²² This approach, though not without its critics, has been adopted as a matter of practice across South Australia.²³

Consultation Questions

1. Is the current position with respect to the notation and protection of a restrictive covenant under the *Real Property Act 1886* (SA) suitable? Why or why not?
2. How should a restrictive covenant be treated by Torrens—as an equitable interest excluded from the Register in its own right or as one of the class of estates and interests capable of registration?
3. How should a restrictive covenant be removed from the Register once its purpose has lapsed or once the original covenantee has ceased to exist?
4. Should a restrictive covenant be included among those interests that are registrable under the *Real Property Act 1886* (SA)? Why or why not? If yes, should the restrictive covenant be registrable on the restricted land, the benefitting land, or both?

SALRI's consultation process will open on 8 July 2024 and close on 4 October 2024.

Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice, we encourage you to speak to a lawyer and/or contact a community legal service.

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¹⁵ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, Seventh edition, 2020) [18.245]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, Seventh Edition, 2017) [10.760].

¹⁶ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, Seventh edition, 2020) [18.250]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, Seventh Edition, 2017) [10.740].

¹⁷ *Jaggamantri v Registrar-General* [2023] SASC 74 [42].

¹⁸ *Real Property Act 1886* (SA) s 249.

¹⁹ Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, Seventh Edition, 2017) [10.700]; Brendan Grigg and Hossein Esmaeili, 'Protecting a View in Australia: Common Law Principles, Restrictive Covenants and Planning Law' (2023) 46(1) *University of New South Wales Law Journal* 243, 252; *Jaggamantri v Registrar-General* [2023] SASC 74 [43].

²⁰ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, Seventh edition, 2020) [18.40].

²¹ *Ibid* [18.35]; Brendan Grigg and Hossein Esmaeili, 'Protecting a View in Australia: Common Law Principles, Restrictive Covenants and Planning Law' (2023) 46(1) *University of New South Wales Law Journal* 243, 252; *Blacks Ltd v Rix* (1962) 161 SASR 162, 164.

²² Brendan Grigg and Hossein Esmaeili, 'Protecting a View in Australia: Common Law Principles, Restrictive Covenants and Planning Law' (2023) 46(1) *University of New South Wales Law Journal* 243, 253.

²³ *Ibid* 252–253; Moore, Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, Seventh edition, 2020) [18.35].