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RESTRICTIVE COVENANTS AND THE *REAL PROPERTY ACT 1886* (SA): TIME FOR REFORM?

Abstract

The *Real Property Act 1886* (SA) ('*RPA*') does not recognise the restrictive covenant as an interest in land. This is despite the reality that for approximately the last 100 years lawyers and conveyancers have adopted a practice of attaching restrictive covenants to other registerable instruments that are registered pursuant to what is now s 128B of the *RPA*. The practice has been upheld in a number of decisions of the Supreme Court of South Australia and in one decision of the High Court of Australia. In other Australian jurisdictions (other than the Australian Capital Territory), the equivalent conveyancing practice prompted legislative recognition of restrictive covenants, to varying degrees, enabling their registration or notification on the certificate of title to the burdened land. This article argues for similar legislative recognition in South Australia to ensure certainty and clarity in the use of restrictive covenants. It examines the common law and equitable origins of the restrictive covenant, considers the ways Australian Torrens title systems deal with restrictive covenants, and concludes with recommendations for the reform of the law in relation to restrictive covenants in South Australia.

I Introduction

The law on restrictive covenants has been described as a 'morass of technicalities, inconsistencies and uncertainties'.[1] The position in South Australia would seem to be no exception. Restrictive covenants have their roots in contract law, principles of equity, and today — in most Australian jurisdictions — feature in

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1 Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, 3rd ed, 2011) 283. See also Sharon Christensen and W D Duncan, 'Is It Time for a National Review of the Torrens' System? The Eccentric Position of Private Restrictive Covenants' (2005) 12(2) *Australian Property Law Journal* 104, 120.

Torrens title legislation and case law.[2] Their origins lie in a desire to regulate land use by private means; however, this function can conflict with statutory land use planning schemes.

The *Real Property Act 1886* (SA) ('*RPA*') — South Australia's Torrens title legislation — has never recognised the restrictive covenant as a registrable interest in land.[3] In this regard, the South Australian Torrens title scheme is unlike its equivalents in most Australian jurisdictions.

While the *RPA* does not recognise restrictive covenants, the use in South Australia of a conveyancing practice — which has been endorsed by a number of judicial decisions to create, notify on the Register and thereby attempt to enforce restrictive covenants — suggests that they are an important feature of land transactions and property development in South Australia. This article argues that the law in relation to restrictive covenants in South Australia is unsatisfactory and that reform is needed to reduce the complexity and uncertainty in this area of property law and, in addition, to bring the South Australian Torrens title scheme closer to the Torrens scheme in other Australian jurisdictions.

First, this article considers the common law's treatment of restrictive covenants and then how, with the landmark decision of *Tulk v Moxhay* ('*Moxhay*') in 1848,[4] the courts of equity created the rules for the enforcement of restrictive covenants.

Second, this article considers the particular approach of Australia's Torrens title schemes to restrictive covenants and highlights their key features and considerations. Third, this article will examine a series of six reported decisions from the Supreme Court of South Australia and one further decision of the High Court of Australia concerning the enforceability of a restrictive covenant in South Australia.

Fourth, this article concludes that the law concerning restrictive covenants ought to be reformed in South Australia to allow their recognition, in some form, on the Register. The paper also sets out other related matters that need to be considered in light of this recommendation.

II Background

Unlike most of its Australian counterparts, the *RPA* does not contain any explicit references to restrictive covenants.[5] Nevertheless, in South Australia — at least

2 See generally: Bradbrook and MacCallum (n 1); 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; Christensen and Duncan (n 1).

3 See generally *Real Property Act 1886* (SA) ('*RPA*').

4 (1848) 48 ER 1143 ('*Moxhay*').

5 See, e.g., *RPA* (n 3) s 128B. This section omits any reference to restrictive covenants but provides for the registration of other interests in land such as a rent charge.

by 1928[6] — a conveyancing practice had been developed whereby a restrictive covenant was included in an encumbrance which was registered on the certificate of title land securing what was often merely a nominal rent charge.[7]

This practice is based on what is now s 128B(1) of the *RPA* which 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.[8]

It is the registered rent charge in the encumbrance rather than the restrictive covenant itself that creates the interest in the land.[9] This means that the status of the unregistered equitable restrictive covenant does not sit well with the fundamental Torrens principle that registered proprietors are subject only to other interests that are registered or that fall within the scope of an in personam exception to indefeasibility.[10]

These challenges are evident in the seven reported decisions examined in this article. On the one hand, the fact that there are so many decisions concerning the status of restrictive covenants in South Australia is odd given the silence of the Torrens system in South Australia. On the other hand, these cases may instead suggest that the law needs reform.

The most recent of these decisions, *Re Rayo* ('*Rayo*'),[11] follows a line of cases that accept the s 128B conveyancing practice as valid. These cases stem from the decision in *Blacks Ltd v Rix* ('*Blacks*'),[12] where the Supreme Court of South Australia enforced — against a successor in title of an original encumbrancer — certain restrictive covenants contained in a registered encumbrance created in 1928 that established a common building scheme.[13]

The decision in *Blacks* has been criticised by academic commentators,[14] and by other decisions of the South Australian Supreme Court,[15] but it has not been overruled. Indeed, as noted below, the practice was endorsed by the High Court of

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6 *Blacks Ltd v Rix* [1962] SASR 161, 162 (Napier CJ) ('*Blacks*').

7 *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382, 386 (Debelle J) ('*Burke*').

8 *RPA* (n 3) s 128B(1).

9 *Deguisa v Lynn* (2020) 268 CLR 638, 648 ('*Deguisa*').

10 Bradbrook and MacCallum (n 1) 455. See also *RPA* (n 3) ss 67, 69.

11 [2024] SASC 3 ('*Rayo*').

12 *Blacks* (n 6).

13 Ibid 164–5 (Napier CJ).

14 See, e.g., Bradbrook and MacCallum (n 1) 455–7.

15 *Clem Smith Nominees Pty Ltd v Farrelly* (1978) 20 SASR 227, 255 (Zelling J) ('*Clem Smith*'); *Netherby Properties Pty Ltd v Tower Trust Ltd* (1999) 76 SASR 9, 18–19 (Perry J) ('*Netherby Properties*').

Australia in 2020 with *Deguisa v Lynn* ('*Deguisa*'),[16] and by the Supreme Court of South Australia in 2023 with *Jaggumantri v Registrar-General* ('*Jaggumantri*'),[17] and then in 2024 with *Rayo*.[18] In order to understand these cases, it is important to recognise the origins of the restrictive covenant and its treatment by the common law and by equity. These issues are considered below.

III Restrictive Covenants and the Common Law

In essence, a covenant is a promise contained in a deed, enforceable even in the absence of consideration.[19] For the purposes of this article, however, the term restrictive covenant can be more loosely understood as 'an obligation affecting a landowner'.[20] This obligation — the restrictive covenant — is a contract between landowners that, when specific criteria have been met, becomes a proprietary interest in the land to which the agreement relates and which can be enforced by subsequent owners of the land, notwithstanding the fact that they were not parties to the original contract.[21]

Emerging in the 14th century,[22] restrictive covenants became particular features of urban development in the reign of George III (1760–1820).[23] At this time, as Adrian Bradbrook and Susan MacCallum explain, it became common in larger English cities for landowners to develop large areas of their land in lots for building estates, often in the 'form of an open square with building lots around it'.[24] Lots were then leased out or the fee simple then sold.[25]

In order to preserve the various attractive features that underpinned the building estate's value, purchasers or lessees were required to enter into certain covenants

16 *Deguisa* (n 9).

17 [2023] SASC 74 ('*Jaggumantri*').

18 *Rayo* (n 11).

19 Bradbrook and MacCallum (n 1) 279. The formalities of deeds are now governed in Australia by statute: *Conveyancing Act 1919* (NSW) s 38 ('*Conveyancing Act*'); *Property Law Act 1958* (Vic) ss 73, 73A, 73B ('*PLA* (Vic)'); *Property Law Act 1974* (Qld) ss 45–7; *Law of Property Act 1936* (SA) ss 41, 41AA; *Property Law Act 1969* (WA) ss 9, 10; *Conveyancing and Law of Property Act 1884* (Tas) s 63 ('*CLPA*'); *Civil Law (Property) Act 2006* (ACT) s 219; *Law of Property Act* (NT) pt 6 div 1.

20 Brendan Edgeworth, *Butt's Land Law* (LawBook, 7th ed, 2017) 598.

21 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* 235, 243.

22 *The Prior's Case* (1368) YB 42 Ed III; Co Litt 384a; Grigg and Esmaeili (n 21) 244.

23 Bradbrook and MacCallum (n 1) 280; Patrick Polden 'Private Estate Planning and the Public Interest' (1986) 49 *Modern Law Review* 195, 195.

24 Bradbrook and MacCallum (n 1) 280.

25 Ibid.

restricting their use of the land.[26] Privity of estate ensured that the covenants of a lease could be enforced against assignees of the original lessee, but when the original covenantor was the owner of a fee simple interest, the position was altogether different.[27]

A *At Common Law: The Burden of a Restrictive Covenant*

Historically, the doctrine of privity of contract meant that a covenant could be enforced between the original covenantor and covenantee.[28] However, when either or both of the original parties to the covenant had transferred the land to successors in title and were no longer the owners of the parcels of land to which the covenant related, privity of contract was absent and privity of estate was lacking,[29] preventing enforcement against successors in title.[30]

At common law a successor to the original covenantor is 'simply not bound'[31] to observe a covenant entered into by the original covenantor.[32] Brendan Edgeworth has described this as an 'immutable rule, to which there are almost no exceptions'.[33] This position evinces a 'firm pro-development policy' as it ensures that purchasers are not fettered by plans developed by predecessors in title, even if they have notice of them and are free to develop their land as they see fit.[34]

B *At Common Law: The Benefit of a Restrictive Covenant*

In contrast to the position with the burden of a restrictive covenant, the common law allows the benefit of covenants to run with the benefitted land if two conditions are met: (1) the covenant must touch and concern the land;[35] and (2) there must be an intention that the benefit should run with the benefitted land.[36] This concept is also described as an annexation to the land.[37]

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26 Ibid.

27 *Beswick v Beswick* [1968] AC 58 ('*Beswick*'). See also Bradbrook and MacCallum (n 1) 280.

28 *Beswick* (n 27).

29 Ibid.

30 Bradbrook and MacCallum (n 1) 280.

31 Edgeworth (n 20) 599. See *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750, 781–4 ('*Austerberry*').

32 *Austerberry* (n 31) 781–4.

33 Ibid; Edgeworth (n 20) 599.

34 Edgeworth (n 20) 600.

35 *Rogers v Hosegood* [1900] 2 Ch 388, 395 ('*Rogers*').

36 *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500, 506, 511 ('*Smith and Snipes*').

37 *Rogers* (n 35) 395.

The term 'touch and concern the land' refers to the requirement that the covenant benefit the land rather than be merely a personal benefit to the covenantee.[38] In *Rogers v Hosegood*,[39] the rule was stated as follows:

> the covenant must either affect the land as regards [its] mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land.[40]

The intention requirement is satisfied if it can be shown that when creating the covenant, the covenantee and covenantor intended that the benefit of the covenant should run with the covenantee's land such that it could be enforced by the covenantee's successors in title.[41]

Where these conditions are met the covenantee's successors in title may enforce the covenant against the original covenantor, but not successors in title to the original covenantor.[42] As Edgeworth suggests, this position is not inconsistent with a policy that ensures land is unfettered, because it is only the original covenantor who is bound personally by the promise they have made.[43]

IV Restrictive Covenants and Equity

The 'immutable rule' that the common law would not permit the burden of a covenant to bind successors in title to the original covenantor had the potential to frustrate private land use planning arrangements by compromising the integrity and value of developments planned out in reliance on these controls.[44] One such development was the subject of the decision in *Moxhay*.[45] This decision led to the development of the equitable rules which mean that where certain conditions are met, the burden of a restrictive covenant can bind a covenantor's successors in title.

A *In Equity: The Burden of a Restrictive Covenant*

Moxhay concerned one of the parcels of land owned by Mr Tulk which had been sold to another on terms that included a covenant which meant the purchaser would

38 Ibid.

39 Ibid.

40 Ibid.

41 *Smith and Snipes* (n 36) 506, 511.

42 *Austerberry* (n 31) 781–4.

43 Edgeworth (n 20) 600.

44 Ibid 599.

45 *Moxhay* (n 4).

> 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.[46]

That land was then sold a number of times before being acquired by Mr Moxhay who, aware of the restriction, nevertheless proposed to build on the land. At common law, Mr Moxhay was not bound by the covenant. However, the Court of Chancery granted an injunction restraining Mr Moxhay from building on the land. Lord Chancellor Cottenham stated:

> If an equity is attached to 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.[47]

Subsequent authorities have narrowed the application of the doctrine to negative covenants only,[48] perhaps reflecting a view that allowing positive covenants to run would have inhibited adaptable land use in the context of rapid 19th century urbanisation.[49]

In addition to the application only to negative covenants, equity requires that: (1) the covenant must be intended to benefit the land of the covenantee rather than the covenantee personally;[50] and (2) it have been intended to run with the benefitted land rather than intended to be personal to the original covenantor alone.[51]

B *In Equity: The Benefit of a Restrictive Covenant*

In equity, the benefit of a restrictive covenant may run with the benefitted land. This is so that a covenantee's successors in title may enforce the covenant against a covenantor and the covenantor's successors in title. This is because, as discussed above, equity allows the burden of a covenant to run with the land.[52] However, as Edgeworth explains, equity requires that the covenantee must not have disposed of the benefitted land before the covenant was created,[53] and that the person seeking

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46 Ibid 1143.

47 Ibid 1144.

48 See generally: *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; *Westpoint Corporation Pty Ltd v Registrar of Titles* [2004] WASC 189.

49 Edgeworth (n 20) 617.

50 *London County Council v Allen* [1914] 3 KB 642, 654–5, 660, 672; *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, 121–2; *Clem Smith* (n 15) 234–5.

51 *Re Contract between Fawcett and Holmes* (1889) 42 Ch D 150, 155; *Re Royal Victoria Pavillion, Ramsgate* [1961] Ch 581.

52 *Rogers* (n 35).

53 Edgeworth (n 20) 623.

to enforce the covenant must retain title to some part of the benefitted land.[54] The benefit must also either have been annexed to the covenantee's land or, if not annexed, the benefit needs to have been assigned in accordance with the rules for the assignment of a chose in action;[55] or there must be a building scheme in place.[56] The annexation requirements are similar to those required at law: (1) the covenant must touch and concern the covenantee's land;[57] and (2) the instrument creating the covenant must show an intention that the benefit is to run with the land.[58]

The building scheme requirements, which recognised a 'community of interest' that 'imports in equity the reciprocity of obligation which each purchaser contemplates when he [sic] purchases', were also developed by the courts of equity with the leading decision in *Elliston v Reacher*.[59] This meant that covenants were mutually enforceable regardless of the time a lot within the scheme was acquired.[60]

V Restrictive Covenants and the Torrens Title System

Whether it was because the South Australian parliament enacted the first Torrens title legislation only ten years after the decision in *Moxhay*, or whether it was because one of the foundational principles of the Torrens title system is indefeasibility for registered interests,[61] the early Torrens title statutes enacted in Australia omitted references to restrictive covenants. Notwithstanding this omission, the conveyancing practice of noting restrictive covenants in registered encumbrances developed in a range of Australian jurisdictions, including South Australia.[62]

This practice was eventually recognised by amendments to Torrens title legislation in New South Wales,[63] Western Australia,[64] Victoria,[65] and Tasmania.[66] These amendments enabled either the recording or the notification of a restrictive covenant on the Register. Notwithstanding their diversity in approach,[67] these schemes share common features. These features include: (1) the way the restrictive covenant

54 Edgeworth (n 20) 623. See also *Marquess of Zetland v Driver* [1939] Ch 1, 8.

55 Edgeworth (n 20) 625.

56 Bradbrook and MacCallum (n 1) 316.

57 *Rogers* (n 35).

58 *J Sainsbury Plc v Enfield LBC* [1989] 1 WLR 590, 595–7.

59 [1908] 2 Ch 374, 375 (Parker J).

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

61 Edgeworth (n 20) 639. See also Grigg and Esmaeili (n 21) 246.

62 Grigg and Esmaeili (n 21) 246–7.

63 *Conveyancing Act* (n 19) s 88(3).

64 *Transfer of Land Act 1893* (WA) s 129A(1) ('*TLA* (WA)').

65 *Transfer of Land Act 1958* (Vic) s 88 ('*TLA* (Vic)').

66 *Land Titles Act 1980* (Tas) s 102 ('*LTA* (Tas)').

67 Grigg and Esmaeili (n 21) 248–50.

interacts with the Register and with general legal and equitable principles; and (2) the powers to remove or vary the restrictive covenant, whether it be in light of the obsolescence of the restrictive covenant or in light of conflicts between the restrictive covenant and the provisions of statutory planning schemes.

In New South Wales, s 88(3)(a) of the *Conveyancing Act 1919* (NSW) ('*Conveyancing Act*') 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 s 88(1).[68] Section 88(3)(c) provides that a restrictive covenant so recorded becomes an indefeasible interest for the purpose of s 42 of the *Real Property Act 1900* (NSW).[69] However, should the restrictive covenant fail to comply with the requirements of s 88(1) which, among other things, requires the instrument to clearly indicate the benefitted[70] and burdened[71] land, then the covenant does not bind a subsequent purchaser.[72]

In Victoria, s 88 of the *Transfer of Land Act 1958* (Vic) allows the notification of a restrictive covenant on the Register,[73] but s 88(3) 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.[74]

This position 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) states 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.[75] Instead covenants are noted on the burdened land.[76] Bradbrook and MacCallum have noted that these provisions do not clearly explain the effect of such a notation and suggest that the limitation contained in the words 'so far as the law permits' means that equitable principles governing the running of the benefit and burden of restrictive covenants remain applicable.[77]

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68 See *Conveyancing Act* (n 19) ss 88(1)–(3).

69 See *Real Property Act 1900* (NSW) s 42 ('*RPA* (NSW)').

70 *Conveyancing Act* (n 19) s 88(1)(a).

71 Ibid s 88(1)(b).

72 *Re Martyn* (1965) 65 SR (NSW) 387, 394–6 (Walsh J).

73 *TLA* (Vic) (n 65) s 88.

74 Ibid s 88(3). See also *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258, [178]–[179] (Gillard J).

75 *TLA* (Vic) (n 65) s 129A(3).

76 Ibid s 129A(4).

77 Bradbrook and MacCallum (n 1) 466.

The scheme in Tasmania is 'more specific'.[78] Section 102 of the *Land Titles Act 1980* (Tas) ('*LTA* (Tas)') provides that the burden of a restrictive covenant does not run with freehold registered land unless the requirements set out in s 102(2) are met.[79] These 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.[80]

Section 102(3) of the *LTA* (Tas) provides that a covenant which meets the requirements of s 102(2) 'may be enforced in equity',[81] notwithstanding any provision of the aforementioned *LTA* (Tas) 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.[82]

A restrictive covenant that satisfies s 102 is therefore notified and can be enforced in equity, but it is not necessarily an indefeasible interest.[83]

In Queensland only public authorities can register a restrictive covenant.[84] In the Australian Capital Territory the Torrens title legislation is — like that in South Australia — silent about restrictive covenants. The different approaches to restrictive covenants in Australian jurisdictions suggest that they are not as clearly established as other interests in land, such as easements. Nevertheless, their recognition means that restrictive covenants are more established in other states compared to South Australia.

In contrast to the above, the scheme in the Northern Territory creates the greatest level of certainty in that it enables the registration of a 'covenant or a covenant in gross' over both the land to be benefitted and the land to be burdened.[85] Where all requirements of the *Land Title Act 2000* (NT) have been met, a registered covenant becomes a legal interest in relation to both the benefitted and the burdened land.[86]

The restrictive covenant developed as a private land use mechanism at a time when extensive legislated land use planning schemes did not exist.[87] Neither did the

78 Grigg and Esmaeili (n 21) 250.

79 See *LTA* (Tas) (n 66) s 102(2).

80 Ibid ss 102(2)(a)(iii)–(iv).

81 Ibid s 102(3).

82 Ibid.

83 Grigg and Esmaeili (n 21) 250.

84 *Land Title Act 1994* (Qld) s 97A(2).

85 *Land Title Act 2000* (NT) ss 184–5 ('*LTA* (NT)').

86 Ibid. See also Christensen and Duncan (n 1) 122.

87 Grigg and Esmaeili (n 21) 256; Bradbrook and MacCallum (n 1) 290.

potential for conflict between the two types of land use controls.[88] Today, however, in the jurisdictions where restrictive covenants can be registered, noted or recorded, the relevant legislation ensures that 'public planning instruments prevail over private planning instruments'.[89] Edgeworth has described this as a 'public law brake'.[90] For example, s 3.16(2) of the *Environmental Planning and Assessment Act 1979* (NSW) empowers planning authorities to override covenants through planning policies or via the imposition of a consent granted under that legislation.[91] The clear purpose of such a provision is to prevent the sterilisation of land due to outdated limitations imposed by restrictive covenants.[92]

These provisions are in addition to other provisions that enable restrictive covenants to be extinguished for reasons relating to general obsolescence due, for example, to the passage of time and general changes in the circumstances in the area to which the covenants relate. These provisions too are directed at preventing sterilisation of land.[93] In New South Wales, s 89(1) of the *Conveyancing Act* provides a power in the Supreme Court to order the modification or removal of a restrictive covenant where, for example, there has been: (1) a change in the user of the benefitted land; (2) a change in the character of the neighbourhood; or (3) other circumstances that mean that the restrictive covenant is obsolete or would impede reasonable use of the land without providing a practical benefit to the person entitled to it.[94] Equivalent legislative provisions in Victoria[95] and Western Australia[96] involve similar considerations. In Tasmania, the power to make an order modifying or extinguishing a restrictive covenant is vested in the Recorder of Titles, however, the exercise of the power involves similar considerations.[97]

The position in the Northern Territory on the extinguishment of restrictive covenants differs. Legislation in the Northern Territory empowers a person interested in land to apply to the Court to modify or extinguish a restrictive covenant where, for example, the restrictive covenant has become obsolete,[98] or where the continued

88 Grigg and Esmaeili (n 21) 256.

89 Ibid. See also 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.

90 Edgeworth (n 20) 656.

91 See, e.g., *Planning and Environment Act 1987* (Vic) ss 6(2)(g), 60(2).

92 Grigg and Esmaeili (n 21) 256. See, e.g., *Coles Supermarkets Australia Pty Ltd v Minister for Urban Affairs and Planning and Wagga Wagga City Council* (1996) 90 LGERA 341, 354 (Pearlman J).

93 Grigg and Esmaeili (n 21) 251.

94 *Conveyancing Act* (n 19) s 89(1).

95 *TLA* (Vic) (n 65) s 88. See also *Land Legislation Amendment Act 2009* (Vic) s 44.

96 *TLA* (WA) (n 64) s 129C.

97 See: *CLPA* (n 19) ss 84A, 84C(1)(a)–(e); *LTA* (Tas) (n 66) s 4.

98 *Law of Property Act 2000* (NT) s 177(2)(a) ('*LPA* (NT)').

existence of the covenants may impede reasonable use of the land.[99] Significantly, reflecting the security and certainty conferred on the registered restrictive covenant, Northern Territory legislation also provides that a covenant may be extinguished either in accordance with the terms of the 'instrument or plan of subdivision creating the covenant',[100] or upon the expiry of '20 years after the date the covenant was registered'.[101]

The time period of 20 years establishes a limit, beyond which the restrictive covenant is considered to be obsolete, and this statutory time limit provides a level of certainty for landowners of both the benefitted and burdened land for that time period.

Before considering how South Australia might adopt similar positions, the next section examines how a series of judicial decisions have dealt with restrictive covenants in South Australia.

VI Restrictive Covenants in South Australia

Despite the legislative developments in almost all Australian jurisdictions, the South Australian Parliament has not seen fit to alter the scope of South Australia's Torrens title legislation to recognise restrictive covenants.[102] It appears to be content to rely on a practice that is almost a century old:[103] incorporating restrictive covenants in encumbrances registered pursuant to ss 128 and 128B of the *RPA*. The following sections discuss seven judicial decisions from 1962 to 2024 concerning the enforcement of restrictive covenants that have been included in such encumbrances.

A Blacks *and* Clem Smith

The validity of using ss 128 and 128B of the *RPA* as an encumbrance device was considered first in the 1962 decision of *Blacks*.[104] Blacks Ltd had subdivided land and required the purchaser of each allotment to accept a registered encumbrance charging the land with a perpetual nominal annual rent charge and a number of restrictive covenants.[105] The Supreme Court of South Australia held that this arrangement created a building scheme and that the covenants contained in the registered rent charge were enforceable against the original covenantor's successors in title. Chief Justice Napier held that they had acquired their titles

99 Ibid s 177(2)(b).

100 Ibid s 174(1)(a).

101 Ibid s 174(1)(b).

102 *Deguisa* (n 9) 646–7.

103 The encumbrance considered in *Blacks* (n 6) was created in 1928. See also *Burke* (n 7).

104 *Blacks* (n 6).

105 Ibid.

> well knowing that the land had been bought on the faith of restrictive covenants, as covenants running with the land and enuring for the benefit of all purchasers under the building scheme.[106]

Bradbrook and MacCallum have cogently argued that Napier CJ's reasoning runs counter to the 'well-established principle that registered proprietors should be subject only to interests which are registered',[107] or which otherwise constitute an in personam exception to indefeasibility.[108] This was reinforced in the Supreme Court of South Australia's 1978 decision in *Clem Smith*,[109] which concerned a registered encumbrance of land in Mallala which had a nominal rent charge and included covenants prohibiting the use of the land as a motor racing circuit. Ultimately, the Court held that the restrictive covenants were not enforceable because it was not possible to discern the land that the restrictions were intended to benefit.[110] While this decision questioned the Court's prior reasoning in *Blacks*, the decision did not overrule it.

B Burke

Almost thirty years later, the enforceability of a restrictive covenant included in a registered encumbrance was the subject of the decision in *Burke v Yurilla SA Pty Ltd* ('*Burke*').[111] It is a leading authority on the judicial acceptance of the use of the registerable rent charge device to create and enforce a restrictive covenant in South Australia.

In this case, Debelle J noted the criticisms of *Blacks* but declined to overrule it, citing the longevity and established nature of the ss 128 and 128B conveyancing practice and the reliance upon it by people in arranging their affairs as key considerations for endorsing the practice.[112] Justice Debelle indicated a clear concern to avoid jeopardising those arrangements and adversely impacting land values that depended, in part, on their validity.[113]

Justice Debelle concluded that notwithstanding the criticisms of the approach in *Blacks* and the lack of an express provision concerning restrictive covenants in the *RPA*, there was 'nothing' in the operation of the legislation which rendered the covenants contained in the encumbrance unenforceable against the plaintiff.[114] The decision is, therefore, authority for the principle that

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106 Ibid 165 (Napier CJ).

107 Bradbrook and MacCallum (n 1) 455.

108 Ibid.

109 *Clem Smith* (n 15) 254–5 (Zelling J). See also at 241–2 (Bracy CJ).

110 Ibid 239–40.

111 *Burke* (n 7).

112 Ibid 394–5 (Debelle J).

113 Ibid 395.

114 Ibid 396.

> a person who deals with the registered proprietor is deemed to have notice of and will be bound by a restrictive covenant which runs with the land which is contained in a registered encumbrance noted on the original Certificate of Title.[115]

C Netherby Properties

The fundamental inconsistency between notice of a restrictive covenant contained in a registered encumbrance, as the basis for its enforcement, and the Torrens principle that a registered proprietor is not bound by unregistered interests of which they have notice[116] was a theme that emerged again in the single judge decision of Perry J in *Netherby Properties Pty Ltd v Tower Trust Ltd* ('*Netherby Properties*').[117]

This case concerned land that was part of a subdivision at Netherby. At the time of sale, the purchasers of the allotments each entered into an encumbrance in favour of the developer company.[118] That encumbrance was registered on the certificate of title to each allotment and contained a rent charge and a number of restrictive covenants that purported to prohibit a range of things including further subdivision of, and the construction of more than one house on, the allotment.[119] These covenants created a building scheme.[120] The plaintiff later bought an allotment and obtained permission from the local council to subdivide it. The plaintiff commenced proceedings seeking a declaration that the covenants were unenforceable.

Justice Perry noted that the performance of the restrictive covenants was not linked to the enforceability of the rent charge and, in addition, that the consideration for the covenants was the transfer of the land itself.[121] He considered, consistently with principles set out in *Burke,* that the encumbrance and rent charge were validly registered,[122] but that the covenants themselves were not stood alone, and were unrelated to the rent charge.[123]

Contrary to the reasoning expressed in *Burke*, Perry J considered that the inclusion of the restrictive covenants amounted merely to knowledge of them and that this was not enough to 'impair the title' the plaintiff obtained upon becoming the registered proprietor.[124] Nevertheless, Perry J was bound by the Full Court decision in *Burke*.[125] In any event, although he accepted that unregistered covenants could

115 Ibid 389.

116 Bradbrook and MacCallum (n 1) 457.

117 *Netherby Properties* (n 15).

118 Ibid 10 (Perry J).

119 Ibid 11.

120 Ibid 14.

121 Ibid 20.

122 Ibid.

123 Ibid.

124 Ibid.

125 *Burke* (n 7) 396.

be binding, Perry J held that the specific covenants in question were not enforceable because the land that was intended to benefit from them was 'not ascertainable from the covenants themselves, or readily ascertainable from the Register'.[126]

D Deguisa

It was not until the 2020 decision in *Deguisa* that the High Court of Australia considered the status of restrictive covenants in South Australia.[127] It is the most authoritative statement on the acceptability of the ss 128 and 128B device, confirming the position set out in *Burke* on the relevance of notice, and the need to identify the benefitted land. *Deguisa* concerned the enforcement of restrictive covenants in relation to land subdivided in Fulham during the 1960s. The purchasers of all (except two) subdivided allotments entered into an identical encumbrance in favour of the developers encumbering the land with the payment of an annual nominal rent charge. Each encumbrance was registered on the title to each allotment.[128] The encumbrance included restrictive covenants prohibiting the construction of anything other than a single residential dwelling and, specifically, prohibiting flats, home units or multiple dwellings.[129] The developer's conveyancer had added an annotation that the encumbrance formed part of a common building scheme, but there was no indication on the Register which allotments benefitted from the covenants.[130] The appellants were not party to the original covenants but eventually purchased one of the encumbered allotments. They obtained planning permission to subdivide their allotment and to build two townhouses, contrary to the covenant.[131] The executors of the estate of one of the developers commenced action to enforce the restrictive covenants.

The High Court held that the restrictive covenants were not enforceable. This was because the conveyancer's annotation referring to a purported common building scheme did not identify: (1) a registerable dealing; or (2) a subsisting registered encumbrance that would have enabled a search of the Register to identify the allotments that were intended to benefit from the restrictive covenant.[132]

In this regard, the outcome was similar to that in *Netherby Properties*. Unlike that decision, however, the High Court endorsed and accepted the conveyancing practice and use of s 128 of the *RPA*. The High Court noted that the rent charge in the encumbrance creates an interest in land, but a restrictive covenant 'of itself does not'[133] and that the practice

126 *Netherby Properties* (n 15) 26.

127 *Deguisa* (n 9).

128 Ibid 645–6.

129 Ibid 650–1 [30].

130 Ibid 651–2 [31]–[35].

131 Ibid 645.

132 Ibid 666–7 [84]–[85].

133 Ibid 648 [14].

> facilitates the registration of an instrument which gives notice on the certificate of title of the burden of the restrictive covenant and of the other lots in the scheme which benefit from it.[134]

The issue in this case was not whether the use of the encumbrance device to give notice of a restrictive covenant was consistent with the Torrens title scheme, but what constituted notice in the sense contemplated by s 69 of the *RPA*, which relevantly states:

> The 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 Court stated that specifically in the context of a building scheme

> [a] common building scheme can operate consistently with the scheme of the Act in relation to the enforceability of the benefit of a restrictive covenant only if those rights are notified on the certificate of title of the burdened land, or by express reference in a memorial on the certificate of title to other registered instruments which contain that information. Anything less is inconsistent with the natural and ordinary meaning of the text of s 69 and the purpose of the Act.[135]

Here, the land that was to be benefitted by the restrictive covenants could not be ascertained. Accordingly, the Court held that the covenants were not enforceable against the appellants.[136]

Following *Deguisa*, a further two decisions of the Supreme Court of South Australia concerned the enforceability of restrictive covenants. These are considered below.

E Jaggumantri *and* Rayo

In *Jaggumantri*[137] and *Rayo*[138] the Supreme Court of South Australia held that the restrictive covenants concerned were unenforceable because it was not possible to identify the land that was benefitted in the manner required. Both decisions illustrate the effect on a restrictive covenant of obsolescence arising where the original covenantee and developer is: (1) a corporate entity no longer in existence; or (2) no longer involved in the building scheme.[139]

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134 Ibid 647–8 [14].

135 Ibid 668 [88].

136 Ibid.

137 *Jaggumantri* (n 17).

138 *Rayo* (n 11).

139 *Corporations Act 2001* (Cth) s 601AD ('*Corporations Act*'). Section 601AD(2) states that the assets of a corporation are vested in the Australian Securities and Investments Commission ('ASIC') upon deregistration. See also *Jaggumantri* (n 17) [58]–[60].

Jaggumantri concerned one of 61 allotments created in 2005 as part of a land subdivision undertaken by a company called Mirago Pty Ltd ('Mirago').[140] The land was initially transferred to the Defence Housing Authority which agreed to an encumbrance in favour of Mirago that included a rent charge to pay 10 cents (if demanded) to the encumbrancee on 30 June each year for 3,999 years and various restrictive covenants including a prohibition on subdivision and limiting the number of dwellings to no more than one.[141]

It also required the encumbrancer not to transfer the land without first causing the transferee to agree, in another covenant in favour of the encumbrancee, to observe the encumbrance.[142] The Defence Housing Authority did not comply with that requirement when it transferred the property to Ms Jaggumantri in 2008.[143] Mirago applied for a voluntary deregistration and was deregistered in late 2014,[144] meaning that its property was vested in the Australian Securities and Investments Commission ('ASIC').[145] Subsequently Ms Jaggumantri commenced proceedings seeking to have the encumbrance discharged, joining ASIC.[146]

The Court considered that *Deguisa* was directly applicable to determining whether the restrictive covenants were enforceable against Ms Jaggumantri.[147] It might have been possible to infer there was a common building scheme in place given the plans and likely existence of identical encumbrances on all allotments in the subdivision. However, the Court indicated that there was nothing express in any of the registered instruments that enabled the identification of land that was to be benefitted. Accordingly, the restrictive covenant was unenforceable against her.

In *Rayo*, the Supreme Court considered the enforceability of an encumbrance that was registered in 1976 on several titles of land, including that which the applicants acquired in 2009,[148] and sought to have removed, by order of the Court.[149] The original parties to the encumbrance were the then-registered proprietor of the land and a now-deregistered company involved in the development of the Marion shopping centre in Adelaide's southern suburbs.[150] The encumbrance included a nominal rent charge and covenants that prohibited the use of the land for retailing

140 *Jaggumantri* (n 17) [3]–[4].

141 Ibid [8]–[9].

142 Ibid [11].

143 Ibid [16].

144 Ibid [17].

145 *Corporations Act* (n 139) s 601AD(2); *Jaggumantri* (n 17) [58]–[60].

146 *Jaggumantri* (n 17) [22].

147 Ibid [74].

148 *Rayo* (n 11) [8].

149 Ibid [1].

150 Ibid [2], [5], [33].

of goods until 1 April 1983.[151] The Court presumed that the agreement came about because of the development of the shopping centre and that, in order to protect its interest, the encumbrancee sought to prevent adjacent land from being used in competition with it for 15 years.[152]

The Court held that, while the rent charge was registered and enforceable, the covenants themselves, like those considered in *Netherby Properties*,[153] were unrelated to the registered rent charge: they were not linked with its enforceability and the consideration for the covenants was the transfer of the land.[154] In addition, the registered documents also did not permit the identification of the land intended to benefit from the covenants.[155] Therefore, it was unenforceable.

The matter was complicated by the fact that the restrictive covenant had expired almost 40 years before the matter was brought to court. Yet, it remained on the title, potentially in perpetuity,[156] as part of a validly registered encumbrance. Accordingly, the question to be resolved was 'whether the existence of a rent charge, which is undoubtedly registerable and has no end date, prevents the encumbrance from being removed, notwithstanding the expiry and unenforceability of the restrictive covenant'.[157]

The Court construed the terms of the restrictive covenant objectively,[158] having regard to surrounding circumstances and considering the purpose of the agreement: to prevent land near a newly developed shopping centre from being used in competition with it for a period of 15 years. It contained no mechanism for its renewal or extension. The purpose of the agreement was thus spent.[159]

The Court did not question the validity of the ss 128 and 128B conveyancing practice but openly stated that the rent charge was 'never more than a device to permit the registration of the document containing the primary purpose of the agreement'.[160] That purpose was, namely, the imposition of the restrictions on land use.[161] As that purpose had been 'spent',[162] the Court characterised the encumbrance as 'simply a

151 Ibid [4].

152 Ibid [4], [33].

153 *Netherby Properties* (n 15).

154 Ibid 20.

155 *Rayo* (n 11) [26].

156 Ibid [28].

157 Ibid [29].

158 Ibid [32]–[33].

159 Ibid [35].

160 Ibid.

161 Ibid.

162 Ibid.

barnacle on the register book',[163] and indicated that it 'should assist the parties to clean up the register'.[164] It made a declaration that the encumbrance was not binding on the applicants.[165]

The decisions considered above show that judicial acceptance of the use of the ss 128 and 128B encumbrance device is not the same thing as a comprehensive scheme that enables restrictive covenants to be created with certainty and meeting the requirements for identifying the benefitted and burdened land. Nor does it provide a mechanism for the proper consideration of factors that are pertinent for the modification or removal of restrictive covenants. The next Part examines what such a scheme may involve.

VII Justifications and Options for Reform in South Australia

As examined above, restrictive covenants were originally developed by landowners as contractual instruments to protect certain aspects of amenity and the built environment that were essential to the commercial and other values inherent in the way they chose to develop and build on their land. Their later enforcement in equity enabled these contractual interests to 'leap the fence'[166] and become property interests. This took place before both the creation of the Torrens title system in 19th century colonial Australia and the enactment of the comprehensive planning legislation and schemes that have governed land use planning since the early 20th century, largely in the public interest.

The tensions that exist between the flexibility of equitable principles, the security-oriented nature of registered title in the Torrens title system and complex statutory land use planning regimes seem difficult to reconcile, notwithstanding the legislative interventions in the Australian jurisdictions considered above. The South Australian cases analysed above suggest that the inability to notify, record or register a restrictive covenant on the Register has not made the position any clearer in South Australia. To the contrary, this may mean that, like the restrictive covenants in *Netherby Properties*, *Deguisa*, *Jaggumantri* and *Rayo*, many covenants are unenforceable because of an inability to identify the benefitted land.

Ultimately, the desire to protect the various qualities that underpin the commercial value of land developments — whether part of a building scheme or not — through private contractual arrangements, is likely to persist. The *RPA* ought to be amended to recognise, in some capacity, restrictive covenants in South Australia. This could take the form of registration, notification or recording on the Register. Overall, a number of factors lead to this conclusion.

163 Ibid.

164 Ibid.

165 Ibid [38].

166 Brendan Edgeworth, 'The *Numerus Clausus* Principle in Contemporary Australian Property Law' (2006) 32(2) *Monash University Law Review* 387, 395.

First, as is evident from the analysis above, all other Australian jurisdictions except the Australian Capital Territory have recognised the utility of a restrictive covenant by allowing them to be registered, notified or recorded in some way on the Register. There is no reason to suggest that restrictive covenants are not also useful in South Australia. Indeed, the South Australian case law considered earlier in this paper confirms their usefulness to developers. Moreover, the considerations that led Debelle J to refrain from overturning the judicial acceptance of the ss 128 and 128B encumbrance device in *Burke* apply with even stronger force today. Justice Debelle noted that the *RPA* had been amended 22 times since the decision in *Blacks*.[167] While this 'create[d] no presumption that Parliament has sanctioned or approved the practice',[168] his Honour considered that 'the fact that Parliament has not legislated to prohibit the practice is a relevant factor for the Court to take into account when considering whether it should interfere with a practice which is now longstanding'.[169]

Since the decision in *Burke*, the *RPA* has been amended more than 30 times.[170] None of these amendments have resulted in any prohibition of the practice. The significant amendments to the *RPA* in 2016 reconfigured the former s 128 but did not alter its content.

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167 *Burke* (n 7) 394.

168 Ibid 394–5.

169 Ibid 395.

170 *Real Property (Survey Act) Amendment Act 1992* (SA); *Real Property (Transfer of Allotments) Amendment Act 1992* (SA); *Statutes Amendment (Attorney-General's Portfolio) Act 1992* (SA); *Statutes Repeal and Amendment (Development) Act 1993* (SA); *Real Property (Miscellaneous) Amendment Act 1994* (SA); *Real Property (Variation and Extinguishment of Easements) Amendment Act 1994* (SA); *Criminal Law Consolidation (Felonies and Misdemeanours) Amendment Act 1994* (SA); *Real Property (Witnessing and Land Grants) Amendment Act 1995* (SA); *Statutes Amendment (Community Titles) Act 1996* (SA); *Electricity Corporations (Restructuring and Disposal) Act 1999* (SA); *Local Government (Implementation) Act 1999* (SA); *Forest Property Act 2000* (SA); *Statutes Amendment and Repeal (Attorney-General's Portfolio) Act 2000* (SA); *Real Property (Fees) Amendment Act 2001* (SA); *Statutes Amendment (Attorney-General's Portfolio) Act 2002* (SA); *Statute Law Revision Act 2003* (SA); *Justices of the Peace Act 2005* (SA); *Statutes Amendment (New Rules of Civil Procedure) Act 2006* (SA); *Statutes Amendment (Real Property) Act 2008* (SA); *Statutes Amendment (Public Sector Consequential Amendments) Act 2009* (SA); *Water Industry Act 2012* (SA); *Real Property (Access to Information) Amendment Act 2012* (SA); *Aboriginal Lands Trust Act 2013* (SA); *Real Property (Priority Notices and Other Measures) Amendment Act 2015* (SA); *Real Property (Electronic Conveyancing) Amendment Act 2016* (SA); *Statutes Amendment (Budget 2016) Act 2016* (SA); *Statutes Amendment (Planning, Development and Infrastructure) Act 2017* (SA); *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA); *Statutes Amendment and Repeal (Budget Measures) Act 2018* (SA); *Statutes Amendment and Repeal (Simplify) Act 2019* (SA); *Statutes Amendment (Legalisation of Same Sex Marriage Consequential Amendments) Act 2019* (SA); *Statutes Amendment (COVID-19 Permanent Measures) Act 2021* (SA); *Statutes Amendment (Attorney-General's Portfolio and Other Justice Measures) Act 2023* (SA); *Residential Tenancies (Miscellaneous) Amendment Act 2023* (SA).

Second, any judicial concerns such as those expressed by Perry J in *Netherby Properties* about the decision in *Blacks* — a decision of a single judge of the Supreme Court of South Australia — have not been taken up in subsequent decisions, including by the High Court in *Deguisa*. Neither the Full Court of the Supreme Court[171] nor the High Court of Australia[172] have overruled the acceptance of the practice.

Third, the decisions in *Netherby Properties*, *Deguisa*, *Jaggumantri*, and *Rayo* show that many registered encumbrances may now be unenforceable because they fail to meet the necessary legal and equitable requirements; most notably, the requirement to identify the land benefitted by a restrictive covenant. This is despite the fact that the registered encumbrance device has been accepted as valid, without any legislative provisions guiding the drafting of restrictive covenants incorporated in them.

VIII Options for Reform

A *Registered, Notified or Recorded?*

Australian Torrens statutes have each adopted different approaches to restrictive covenants.[173] The Northern Territory scheme affords the most certainty of all the Australian schemes with its registerable,[174] legal and indefeasible[175] restrictive covenant, albeit for a limited timeframe of 20 years.[176] The New South Wales and Victorian schemes are less certain, as they reserve a role for general legal and equitable principles[177] in determining whether a restrictive covenant runs with the land. The position in Tasmania is similar to New South Wales and Victoria albeit more specific,[178] as the legislation specifically provides that the burden of a restrictive covenant will not run with the land unless notice of the covenant is recorded on the title and that the land intended to be benefitted by the covenant is identified in the instrument containing the covenant.[179] Where this requirement is met, the covenant may be enforced in equity.[180]

Reforms for South Australia ought to aim for clarity and certainty. In this regard, the Northern Territory scheme is the most clear and certain. As described above, the statutory maximum of 20 years duration for restrictive covenants reflects a desire to ensure that land is not sterilised from development. Any proposal for South Australia

171 *Burke* (n 7).

172 *Deguisa* (n 9).

173 Grigg and Esmaeili (n 21) 243, 247.

174 *LTA* (NT) (n 85) s 106.

175 Ibid ss 184–5, 188(1)–(2).

176 Ibid s 174(1).

177 *Conveyancing Act* (n 19) s 88(3)(b); *TLA* (Vic) (n 65) s 88(3). See also Grigg and Esmaeili (n 21) 249–50; Bradbrook and MacCallum (n 1) 466.

178 Grigg and Esmaeili (n 21) 250.

179 *LTA* (Tas) (n 66) s 102(2)(a)(iii)–(iv).

180 Ibid s 102(3).

must ensure that, at the very least, the scheme involves the notification of the restrictive covenant on the title to the burdened land and an effective mechanism for the identification of the benefitted land. In this regard, the Tasmanian scheme may be instructive. Similarly, any future oriented reform ought to consider the impact on restrictive covenants that have already been included in registered encumbrances under s 128B of the *RPA*.

B *Modification and Removal*

Regardless of the way in which a restrictive covenant is notified on the Register, any reform must include a mechanism for modification or removal from the Register that clearly addresses questions such as the obsolescence of a restrictive covenant or changes in land use of the land to which it relates. In this respect, s 89(1) of the *Conveyancing Act* could be instructive. It provides for a power to modify or extinguish a restrictive covenant where: (1) there has been a change in the user of the benefitted land such that the burden is no longer justified; (2) there has been a change in the character of the area generally; or (3) for other reasons the restriction has become obsolete or no longer provides practical benefit. The schemes in other jurisdictions contain similar powers.[181] In South Australia such a power could be vested in the Supreme Court or in the Registrar-General, like that which exists for easements.[182]

In the Northern Territory, a restrictive covenant may be extinguished in three ways. Section 177(1) of the *Law of Property Act 2000* (NT) enables a court to modify or extinguish a restrictive covenant upon application by a person who has an interest in the land. The power is similar to s 89(1) of the *Conveyancing Act* noted above. The Northern Territory scheme also allows the owner of the burdened land to apply for removal after five years of ownership of the burdened land.[183] The scheme also provides that a covenant may be extinguished either in accordance with its terms or subdivision plan, or upon expiry of 20 years from its registration.[184] This specific timeframe perhaps balances the security afforded by the legal, indefeasible nature of the restrictive covenant and the potential for the sterilisation of land.

C *Public Land Use Planning Law to Prevail*

A 'public law brake'[185] is also required to ensure that authorities exercising powers under the *Planning Development and Infrastructure Act 2016* (SA) can, in the public interest, override restrictive covenants through the development assessment process through conditions imposed on any development authorisation.[186] In addition, it

181 *PLA* (Vic) (n 19) s 84; *TLA* (WA) (n 64) s 129C; *CLPA* (n 19) s 84C.

182 *RPA* (n 3) s 90B.

183 *LTA* (NT) (n 85) s 112(7).

184 *LPA* (NT) (n 98) s 174(1).

185 Edgeworth (n 20) 656.

186 *Planning Development and Infrastructure Act 2016* (SA) s 3(1) (definition of 'development authorisation').

would be appropriate to allow for the *Planning and Design Code* — the principal planning policy instrument for South Australia[187] — to also override restrictive covenants in the event of inconsistency.

IX Conclusion

Except for those in South Australia and the Australian Capital Territory, all Australian Parliaments have recognised, in different ways, the usefulness of the restrictive covenant as a form of private land use and planning control and have provided for their recognition and, to varying degrees, their protection.

Such reforms have not taken place in South Australia — the birthplace of the Torrens title system — despite the fact that landowners and developers have found restrictive covenants to be useful in protecting amenity values that, in turn, underpin commercial land values and land developments. The conveyancing practice based on s 128B of the *RPA* challenges the principle that under the Torrens system, registered proprietors are subject only to registered interests unless an exception to indefeasibility applies. Nevertheless, a consistent line of decisions, including the 2020 High Court decision in *Deguisa*, has accepted this practice as valid. However, as this paper demonstrates, this is not the same thing as a comprehensive legislated scheme for the creation, registration, modification and removal of restrictive covenants. These matters are all dealt with in the Torrens title legislation of jurisdictions that have schemes for restrictive covenants.

This paper has argued that South Australian law ought to be amended to recognise the restrictive covenant by, at the very least, permitting the notification or recording of a restrictive covenant on the Register. This is a position that is similar to the schemes that operate in New South Wales, Victoria, Tasmania and Western Australia. It is not the same as in the Northern Territory, where the Torrens title legislation permits the registration of restrictive covenants, confers the status of legal and indefeasible interests upon them and provides for their enforceability for a period of 20 years. The Northern Territory scheme is a clearer, more secure and simpler option which could be considered. However, the South Australian Parliament ought to examine whether a time limit is appropriate and, if so, what length would ensure an appropriate balance between security and concerns about sterilisation of land.

Any such reform will also need to carefully consider the position of restrictive covenants that are part of currently registered encumbrances. In addition, whatever policy choice is adopted for the recognition of a restrictive covenant, the scheme must also include provisions for the modification and removal of restrictive covenants in the case of changes in land use, obsolescence or when there is a conflict between the restrictive covenant and public land use planning policies and schemes. The examination of the way these issues are dealt with in other Australian jurisdictions set out in this paper ought to guide these considerations.

187 See ibid pt 5, div 2.