

As easements will still need to be created or reserved in a transfer according to a note in the Consultation Paper, it appears that it will still be possible to insert a substantial amount of text in a transfer. Therefore, the LIV queries why such arrangements cannot continue in respect of covenants.

- b. where only a few lots are to be created e.g. in a five to ten lot plan, the vendor might wish to create restrictions that are more than 450 characters but which would easily fit on a single page or less of a plan of subdivision.

In such circumstances LUV will examine the plan including the wording of the restriction, before the plan is registered. Therefore, the benefits stated in the Consultation Paper of the wording of the covenant being examined "up-front" by LUV and of minimising typographical errors where covenants are instead included in transfers, still apply. The LIV therefore again submits that the extra time and expense involved in creating an MCP is not justified in the case of smaller subdivisions.

Use of MCPs by developers

The LIV notes that many developers do not create restrictions in a plan because they need to be able to enforce covenants using privity of contract gained via a transfer once they no longer own any remaining lots in the plan. The LIV suggests that it would be preferable for LUV to encourage developers to use MCPs in these circumstances rather making such use mandatory.

The LIV is concerned that a note in the Consultation Paper recommends the inclusion of example 2 restrictive covenants in the plan of subdivision rather than each transfer. This concern arises because such a recommendation would prevent the subdivider from enforcing a covenant once it has transferred all lots in the subdivision and no longer retains any land that is expressed to benefit from the covenant. The LIV would not wish to see any such recommendation in the next version of the Registrar's requirements for paper conveyancing.

Proposed wording referring to building scheme

The Consultation Paper sets out the proposed format for the creation of covenants in a transfer of land. The LIV notes that, for most developers, an essential element regarding the enforcement of covenants that burden lots in a plan of subdivision is to establish a building scheme.

The LIV queries whether the proposed wording for a transfer of land (and also for the creation of a restriction) is sufficient to establish this for future reference. In *Re Dennerstein [1963] V.R.688* Hudson J noted the difficulty for purchasers of land in an estate to produce evidence of a building scheme many years after the original sale. In *Re Arcade Hotel Pty Ltd [1962] V.R. 274 at 287* Scholl J suggested the following form of covenant which would seem to be designed to put the matter beyond doubt:

a covenant by the transferee, his heirs, executors, administrators, and transferees, registered proprietor or proprietors for the time being of the burdened land, with the covenantee, his heirs, executors, administrators, and transferees, registered proprietor or proprietors for the time being of the whole of the land comprised in the parent title, other than the burdened land, and as a separate covenant with the registered proprietor for the time being of every other lot in the parent title, whether transferred thereoutbefore or after the burdened land, to the intent that the said covenants may be enforceable by any such persons as part of and for the purpose of effectuating a general building scheme affecting the whole of the aforesaid land.

The LIV queries whether the proposed wording for a transfer or a restriction should include a 2nd option that specifically refers to a building scheme, where this is to be created, as follows:

Transfer

*The transferee for himself, his executors, administrators and transferees to the intent that the burden of the covenants below shall run with and bind the land hereby transferred ("**burdened land**") covenants with the transferor and the registered proprietors for the time being of every*

*lot (other than the burdened land) in plan of subdivision PS..... ("plan") other than lots and on the plan ("**dominant lands**") whether the lots are transferred by the transferor before or after the burdened land, to the intent that the said covenants may be enforceable by the transferor and such persons as part of or for the purpose of effecting a general building scheme affecting all the dominant lands:*

[insert restrictive covenants]

Restriction

For the purpose of effecting a general building scheme affecting all the burdened land, the registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restriction with the intent that the burden of the restriction runs with and binds the burdened land and the benefit of the restriction is annexed to and runs with the benefited land.

Expiry date

Both the proposed wording for creating covenants and restrictions refers to an expiry date. The LIV commends the possible future arrangement referred to towards the end of the Consultation Paper of removing expired restrictive covenants and restrictions from the Register. However, in some cases the vendor will wish the covenant or restriction to apply in perpetuity. The LIV queries whether LUV will allow the word "None" to appear after "expiry date" and whether the approved wording will be inserted as an alternative in any explanatory notes issued by LUV.

Covenants and planning permits

The LIV has concerns about the proposed wording in example 2 for restrictions that the burdened land cannot be used "except in accordance with Planning Permit XYZ". The LIV submits that this could lead to a restriction being void for uncertainty for many reasons. The LIV submits that provisions which could lead to future legal action arising from disputed or uncertain wording should not be inserted in plans of subdivision. Planning permits can be amended, cancelled or otherwise cease to apply to land for various reasons. Also, a planning permit typically contains many conditions and could relate to "subdivision" rather than "use". Many of those conditions are positive in nature and, therefore, would be unenforceable on the basis that "restrictions", although differently named from covenants, must also be negative to enable them to be enforced against subsequent owners of the burdened land.

Furthermore, some permit conditions would typically have to be complied with prior to the issue of the statement of compliance. A reference to a permit in which it was unknown which conditions had been satisfied and which had not, would create problems identifying what purchasers could be required to do once they own the relevant burdened lot. As planning permit conditions run with the land affected by the permit and are creations of planning, not property, law, the LIV submits that there should be no references to planning permits in restrictions. Instead, if a planning permit requires the creation of a restriction, the exact wording of the restriction (revised to satisfy property law requirements where necessary) should be included in the plan of subdivision (or MCP, if required).

Questions in the Consultation Paper

Question 1: Recognising the new requirements may represent a change in practice for you, will you be able to adopt these requirements?

The LIV has detailed above why it considers that the use of MCPs when creating covenants in transfers of land or restrictions on plans of subdivision should not be compulsory. If they are made compulsory, legal practitioners would be forced to comply with them, so the question becomes irrelevant. The LIV considers that compelling the use of MCPs in almost all creations of covenants and restrictions will unnecessarily increase the cost of conveyancing to legal practitioners' clients.

The LIV is also concerned that:

- a. a reference to an MCP creating a covenant or restriction will be easily missed when checking a title search or plan of subdivision. The LIV queries how clear the reference to any MCP will be;
- b. use of MCPs may mislead drafters into creating positive and unenforceable covenants (unless a special form can be devised which contains warnings about this or relevant suggested wording);
- c. where covenants and restrictions have already been registered, it will be necessary to order a copy of the MCP in order to identify the obligations that pass with the burdened land. This will potentially involve additional wastage of paper, additional work (if it is not clear that the MCP should be ordered with a title search) and the additional cost of obtaining a copy of an MCP.

Question 2: If not, please explain in detail:

- a) the scenarios you envisage where the requirements cannot be met; and*
- b) any suggested adjustments to the requirements.*

In view of the response to question 1, the LIV cannot respond to question 2. However, it has outlined above circumstances in which MCPs seem to be unnecessarily burdensome together with changes that the LIV submits should be made to the proposed Registrar's Requirements.

Do you believe that any transitional arrangements above those suggested are necessary? If yes, please detail.

Regarding transitional arrangements, the LIV submits that the proposal in its present form is impractical for the following reasons:

- a. for transfers it is unclear what is meant by them being "signed on or after 1 October 2017". Typically a transfer is signed first by the purchaser and then by the vendor but the transfer remains undated until settlement. Whose signature is relevant for the cut off date and how will the date be proved when only the date of transfer will appear in the document? What will happen if settlement of a transfer of land is delayed beyond 1 October 2017 but the transfer document was prepared in anticipation of not requiring an MCP. The consequences of a refusal to register the transfer, or of settlement not taking place because the transfer did not comply with the Registrar's requirements, would be extremely serious for all parties involved.

A transitional period for compliance could perhaps be based on evidence that a contract of sale was entered into before 1 October 2017 and this required covenants to be included in the transfer of land without reference to an MCP.

- b. for restrictions, a plan of subdivision could have been prepared a very long time before 1 October 2017 without any reference to an MCP but not certified until after that date. Certification is entirely beyond the subdivider's control. A better means of addressing this might be to require evidence of the date of issue of a planning permit for a subdivision and require all plans of subdivision authorised by planning permits dated on or after 1 October 2017 to comply with the new Registrar's requirements.

We would welcome the opportunity to meet with you to discuss the above issues.

In the meantime, please do not hesitate to contact me or Karen Cheng at kcheng@liv.asn.au.

Yours sincerely



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