

Restrictive Covenants

Terms of Reference

In 1995, the Commission was asked to review the circumstances, if any, in which restrictive covenants should be used to restrict or regulate the subdivision, development or use of land or to preserve the amenity and aspect of land and, in particular, to consider:

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

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

Background of Reference

At the time of the reference, there was a perception that local governments did not have adequate power to control the development or use of land. There was also some concern over conflicts arising between restrictive covenants and town planning schemes. Ministers of the relevant government portfolios requested that the Attorney-General submit the reference to the Commission for its consideration and advice.

Nature and Extent of Consultation

The Commission initiated public consultation by preparation of a discussion paper that covered a number of issues, including: whether restrictive covenants should be abolished or subject to limitations, how to resolve inconsistencies with town planning schemes and by-laws and whether local authorities required additional powers to control the development or use of land.

During preparation of the discussion paper, the Commission received preliminary submissions from numerous shires and other interested corporations. After its release in June 1995, the Commission invited submissions by the general public to be made by late September 1995. The discussion paper also received media publicity in the form of a radio interview by a Commission research officer. Consequently, the Commission received a large number of written and oral submissions from local authorities, professional associations, members of the general public, academics, legal practitioners, settlement agents, a Member of Parliament and others.

The Commission delivered its final report to the Attorney-General in June 1997.¹

Recommendations

After a comprehensive review of the issues and the interests at stake, the Commission concluded that significant reforms were required. The Commission made 28 recommendations, including:

¹ Law Reform Commission of Western Australia, *Restrictive Covenants*, Project No 91 (1997).

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- Restrictive covenants should not be abolished in general or for particular uses. The uses of restrictive covenants should not be controlled by requiring approval as a pre-requisite to registration or by limiting the duration of restrictive covenants.
- The power to extinguish or modify restrictive covenants should be liberalised and transferred from the Supreme Court to the Town Planning Appeal Tribunal. The local government power to extinguish or vary a restrictive covenant should be restricted to land involved in a guided development scheme, however, local governments should have standing to apply to the Town Planning Appeal Tribunal for the extinguishment or modification of a restrictive covenant.
- The existing means of enforcement are adequate. Local governments should not be given standing to enforce restrictive covenants on behalf of their residents but should, however, have standing, but not be under a duty, to take action to enforce any restrictive covenant.
- Vendors of land encumbered by a restrictive covenant should be required to disclose certain information to the purchaser. The Land Titles Division should be required to send a copy of every registered restrictive covenant to the relevant local government authority.

A number of other consequential recommendations were also made including recommendations pertaining to the operation and discretionary powers of the Town Planning Appeal Tribunal ("the Tribunal"). A comprehensive outline of recommendations may be found at pages 60–93 of the Commission's final report.

Legislative or Other Action Undertaken

The Attorney-General received the final report and released it on 11 July 1997 for further public comment with submissions to be made before the end of November 1997.² No action was taken prior to the receipt of these submissions and implementation of the recommendations was still under consideration in April 1998.³ To date, no action has been taken to implement any of the Commission's recommendations.

Currency of Recommendations

The Commission's recommendations remain both relevant and current and are complemented by present government policy in the areas of Local Government and Planning.⁴ However, uncertainty about the jurisdiction and the future role of the Tribunal may affect the implementation of some of the recommendations. For instance, the Commission's recent *Review of the Criminal and Civil Justice System* (Project No 92) recommended the establishment of a Western Australian Civil and Administrative Tribunal⁵ which could incorporate the present functions of the Tribunal. There has also been some contention regarding the 'dual avenue of appeal', which has seen a number of Bills tabled in recent years.⁶ Those recommendations that relate to a transfer of power from the Supreme Court to the Tribunal would need to be readdressed in the event that any changes to that jurisdiction are made.

² Attorney-General of Western Australia, *Release of WA Law Reform Commission Report*, Press Release No 47 (11 July 1997) 1.

³ Western Australia, *Parliamentary Debates*, Legislative Council, 1 April 1998, 1256 (Mr P Foss, Attorney-General).

⁴ See <<http://www.alp.org.au/policy>>.

⁵ Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia* Project No 92 (1999) paras 33.9–33.15. This report included a recommendation to establish WACAT in order to amalgamate the adjudicative functions of existing Boards and Tribunals.

⁶ The 'dual avenue of appeal' refers to the ability to appeal to either the Tribunal or to the relevant Minister. The primary point of contention has been in regard to the transparency of appeal decisions. See Town Planning and Development Amendment Bill 1997 (WA); Planning Appeals Bill 1999 (WA). The Planning Appeals Amendment Bill 2001, currently before Parliament, would abolish Ministerial appeals and direct all planning appeals to the Tribunal.

Action Required

Legislative action is required to implement the recommendations of the Commission. Many of the recommended reforms are uncontroversial and it is anticipated that these recommendations may be fast-tracked through Parliament. However, those recommendations that relate to the Tribunal cannot be implemented until the role of the Tribunal, or its equivalent, is settled.

Priority – High

This assessment of priority reflects the fact that the recommended reforms are highly desirable and consistent with government policy. However, to implement the full legislative regime recommended by the Commission the initial obstacle posed by the uncertain future of the Tribunal must be overcome.