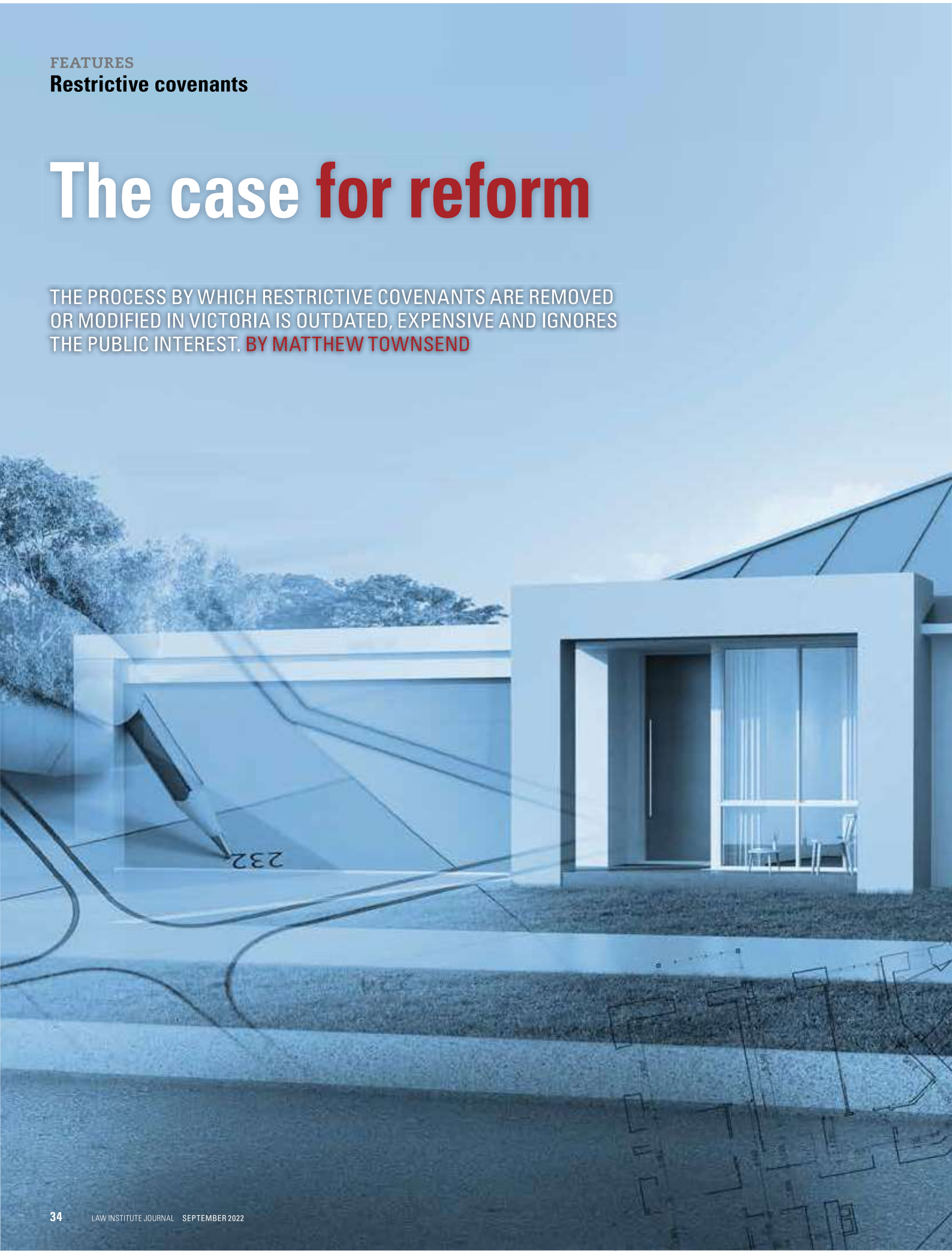
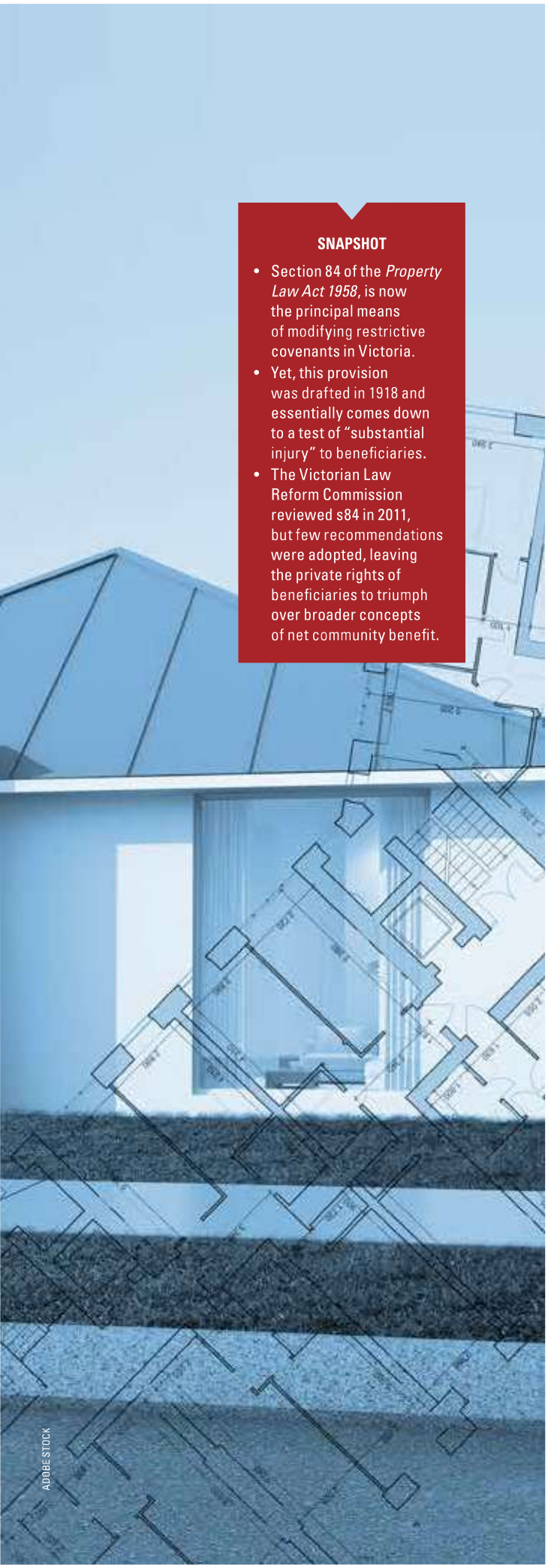
The case for reform

THE PROCESS BY WHICH RESTRICTIVE COVENANTS ARE REMOVED OR MODIFIED IN VICTORIA IS OUTDATED, EXPENSIVE AND IGNORES THE PUBLIC INTEREST. BY MATTHEW TOWNSEND



Restrictive covenants



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SNAPSHOT

- Section 84 of the *Property Law Act 1958*, is now the principal means of modifying restrictive covenants in Victoria.
- Yet, this provision was drafted in 1918 and essentially comes down to a test of "substantial injury" to beneficiaries.
- The Victorian Law Reform Commission reviewed s84 in 2011, but few recommendations were adopted, leaving the private rights of beneficiaries to triumph over broader concepts of net community benefit.

Restrictive covenants were initially conceived as a rudimentary form of land use and development control. For example:

- in *Greenwood & Anor v Burrows & Ors*[1] Eames J described the network of covenants across the Ranelagh Estate in Mt Eliza as intended to establish a residential estate
- in *Prowse v Johnstone & Or*[2] Cavanough J found that a network of single dwelling covenants in Malvern's Coonil Estate was a form of low residential density control
- in *City of Stonnington v Wallish*[3] Ierodiaconou AsJ described the covenants restricting excavation as only making sense "if they are construed having regard to the purpose, being a primitive control on the extract of earth-based resources".

Over time, however, land use and development has become regulated by sophisticated planning controls and policies, such as the new format planning schemes, or Victoria Planning Provisions.

Notwithstanding the development of a modern town planning framework, s84 of the *Property Law Act 1958* (Vic), the "Power for Court to modify etc restrictive covenants affecting land" remains the primary means of amending restrictive covenants in Victoria, despite it first being introduced in 1918.

Section 84 experienced a renaissance in popularity following changes in 2000 to the *Planning and Environment Act 1987* (Vic) preventing the grant of a planning permit where to do so would authorise the breach of a restrictive covenant.

Prior to 2000, few beneficiaries of restrictive covenants had the resources or inclination to protect their property rights in the Supreme Court, providing developers with an opportunity to build in breach of restrictive covenants.

For instance, in 1998, the Victorian Civil and Administrative Tribunal (VCAT) granted a planning permit for the development of three dwellings at 270 Lower Heidelberg Road, Ivanhoe East, notwithstanding the existence of a restrictive covenant on the land restricting development to a single dwelling.[4] Deputy President Byard found that VCAT had no jurisdiction to consider the proprietary legal interests raised by the existence of the restrictive covenant.

Soon after construction works began, a group of beneficiaries commenced proceedings in the Supreme Court to enforce their rights under the covenant and prevent the single dwelling restriction from being breached. William Gillard J determined to grant an injunction to stop the medium density housing development,[5] prompting the defendant to go into liquidation and leaving the beneficiaries out of pocket for their costs.

In response to this turn of events, the Victorian parliament in 2000 enacted the *Planning and Environment (Restrictive Covenants) Act 2000*, prohibiting a planning permit from being issued where it would authorise a breach of a restrictive covenant. Section 61(4) to the *Planning and Environment Act 1987* now provides:

"(4) If the grant of a permit would authorise anything which would result in a breach of a registered restrictive covenant, the responsible authority must refuse to grant the permit unless a permit has been issued, or a decision made to grant a permit, to allow the removal or variation of the covenant".[6]

While s61(4) of the *Planning and Environment Act 1987* was intended to ensure planning permits did not facilitate a breach of a restrictive covenant, it had the effect of directing permit applicants to the Supreme Court to apply for a variation to a restrictive covenant before the planning permit application was commenced.

While one might assume the most suitable forum for the modification or removal of restrictive covenants is the planning list of VCAT:

- s60(5) of the *Planning and Environment Act 1987* prevents the grant of a permit to remove or vary a restriction created before 25 June 1991 unless the responsible authority is satisfied that the owner of land benefited by the restriction is unlikely to suffer detriment of any kind, including any perceived detriment and
- s60(2) only allows the grant of a permit to remove or vary a restriction created after 25 June 1991 where the owner of the benefited land is unlikely to suffer financial loss, loss of amenity, loss arising from change to the character of the neighbourhood or any other material detriment.

The high bar in these provisions means that s84 of the *Property Law Act 1958* has re-emerged as the most popular method for developers seeking to vary or remove restrictive covenants. The Supreme Court of Victoria now bears the lion's share of the burden of reviewing restrictive covenants prior to the commencement of the land development process.

Notwithstanding the skill and efficiency with which the Supreme Court deals with covenant applications (unopposed applications can often be resolved within three months), the focus of the exercise is predominantly on the proprietary interest of beneficiaries rather than net community benefit – the concept that land use and development decisions should be made in interests of the community as a whole.[7]

As Mukhtar AsJ observed in *Re DVC Management & Consulting Pty Ltd*,[8] the Court, in considering s84 applications, is only concerned with impacts on private rights:

"Recent decisions of this Court have it that town planning principles and considerations are not relevant to the Court's consideration of whether an applicant has established a ground under s84: see *Vrakas v Registrar of Titles*[9] and *Prowse v Johnstone*".[10]

Arguably, this wasn't always the intention. In *Stanhill v Jackson* [2005] VSC 169 Morris J conducted a historical analysis of s84 in an endeavour to discover the true purpose of the provision. He summarised that, since at least 1928, the purpose of s84 has been to empower the Court to vary restrictions to better effect the use and development of land in the public interest, thereby remedying the "mischief" of restrictions that inhibited the use or development of land according to reasonable current needs:

"51 This brief historical analysis demonstrates that, at least since 1928, the purpose of section 84 of the Victorian Act has been to empower the court to vary restrictions, subject to the payment of compensation, in broadly defined circumstances, so as to effect the better use and development of land in the *public* interest. The mischief at which the provision was directed was the restriction of the use or development of land by private treaty, often of ancient origin, which inhibited the achievement of reasonable current needs. Hence, this history does not support a narrow construction of the empowering provisions in section 84; rather it is consistent with the grammatical meaning I have set out above".

Morris J concluded that s84 was intended to address circumstances where the use or development of land is restricted in a manner contrary to the public interest:

"52 . . . In carefully defined circumstances, the court is given power to discharge or modify a private restriction in order to serve this public interest. So understood, it is difficult to justify a narrow interpretation of the various circumstances which would enliven the power of the court to make an order discharging or modifying a restriction. On the contrary, the ordinary grammatical meaning of section 84(1), set out above, is reinforced by reference to the policy basis of the section".

However, Morris J's attempt to return the Court's focus back to the words of the statute was met with reproach in some quarters, with Young J writing in the *Australian Law Journal* that although the actual result of the case appears appropriate:

". . . single judges who approach cases on the basis that the majority of previous decisions on the same wording over the past 60 years are misguided, seldom do the public a service. This is because so many precedents have been created, documents drafted, and advice given on the basis of what appeared to be universally accepted propositions, that disturbance other than by the High Court (and perhaps intermediate appellate courts) is usually to be avoided".[11]

But as each year passes, Morris J's analysis appears increasingly prescient, with s84 now being functionally reduced to a test of "substantial injury" with minimal statutory guidance for the exercise of judicial discretion. Compensation for restrictive covenant variations is rarely, if ever, paid except in negotiated settlements, while ss84(1)(a) and 84(1)(b) have atrophied to the point that they are rarely of any practical application.

In 2011, the Victorian Law Reform Commission (VLRC) published an extensive review of the law in relation to restrictive covenants and easements.[12] It found that the most appropriate approach for reform was the regulation of restrictive covenants by state or local planning policies that with planning legislation would modify the operation of covenants, but would not permit their removal:

"7.130 We propose that the provisions in section 23 of the *Subdivision Act* and in the *Planning and Environment Act* for the removal and variation of easements and restrictions should no longer apply to restrictive covenants. The provisions would be retained for easements and statutory restrictions only.

"7.131 Responsible authorities would no longer be able to grant a permit to remove or vary a restrictive covenant. The removal or variation of restrictive covenants without the consent of benefited owners would require an order under section 84(1) of the *Property Law Act*.

"7.132 New provisions in the *Planning and Environment Act* would provide that:

- a planning scheme may specify forms of use or development of land that cannot be prevented by a restrictive covenant.
- a restrictive covenant cannot be enforced to the extent that it is inconsistent with such a specification.

"7.133 The effect of these amendments would be that a specification in a planning scheme could affect the operation of a covenant but not authorise its removal or variation".

The VLRC's report also recommended:

- a new set of conditions that would replace the existing criteria in s84(1)(a)-(c) of the *Property Law Act 1958*
- the introduction of concurrent jurisdiction for the Supreme Court, County Court, Magistrates' Court and VCAT to hear s84 applications:

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"46. The conditions in section 84(1)(a)-(c) of the *Property Law Act 1958* (Vic) should be removed. Instead, the court or VCAT should be required to consider the following matters in deciding whether to grant an application for the discharge or modification of an easement or restrictive covenant:

a) the relevant planning scheme
b) the purpose of the easement or restrictive covenant
c) any changes in circumstances since the easement or restrictive covenant was created (including any change in the character of the dominant or benefited land or the servient or burdened land or the neighbourhood)
d) any increased burden of the easement on the servient land resulting from changes to the dominant land or its mode of use
e) the extent to which the removal or variation of the easement or a restrictive covenant would cause material detriment to a person who has the benefit of the easement or restrictive covenant
f) the extent to which a person who has the benefit of an easement or a restrictive covenant can be adequately compensated for its loss
g) acquiescence by the owner of the dominant land in a breach of the restrictive covenant
h) delay by the dominant owner in commencing legal proceedings to restrain a breach of the restrictive covenant
i) abandonment of the easement by acts or omissions
j) non-use of the easement (other than an easement in gross) for 15 years
k) any other factor the court or VCAT considers to be material".

Notwithstanding the depth and rigour of the VLRC's work, the Victorian government was unmoved by its findings, and few recommendations of the report were adopted.

Therefore, the Supreme Court has been left to apply a 100-year-old provision, against contractual agreements often of a similar vintage, with little if any consideration of contemporary land use and development policies. ■

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1. *Greenwood & Anor v Burrows & Ors* (1992) V ConvR 54–444.
2. [2012] VSC 4.
3. *City of Stonnington v Wallish* [2021] VSC 84.
4. *Luxury Developments v Banyule CC* [1998] VCAT 1310.
5. *Fitt & Anor v Luxury Development Pty Ltd* [2000] VSC 258.
6. *Planning and Environment Act 1987* (Vic), s 61(4).
7. See cl 71.02 Operation of the Planning Policy Framework in the Victoria Planning Provisions.
8. *Re DVC Management & Consulting Pty Ltd* [2018] VSC 814.
9. *Vrakas v Registrar of Titles* [2008] VSC 281.
10. *Prowse v Johnstone* [2012] VSC 4.
11. (2007) 81 ALJ 68.
12. VLRC, Easements and Covenants: Final Report (VLRC 2011), 110.