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| Creating restrictive covenants in transfers and restrictions in plans –  how it will work |

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# Introduction

The Consultation Paper released on 2 December 2016 outlined proposed changes to creating restrictive covenants in transfers and restrictions in plans. Following stakeholder feedback, the proposal has been revised as shown below.

This revised proposal will be included in the Registrar’s requirements for paper conveyancing transactions.

## Transfers under the *Transfer of Land Act 1958*

The date for commencement for transfers will be:

* any contract of sale signed on or after 1 July 2018
* where there is no contract of sale any transfer signed on or after 1 July 2018.

The details of any restrictive covenants to be created must be contained in a Memorandum of Common Provisions (MCP) and referred to in the transfer by the MCP number. One or more MCP can be referenced in a transfer. Standard operative wording, and details of the burdened land and benefited land will be required to be set out in a panel in the transfer.

The proposed format is:

The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restrictive covenant with the intent that the burden of the restrictive covenant runs with and binds the burdened land and the benefit of the restrictive covenant is annexed to and runs with the benefited land.

Burdened land: the Land

Benefited land: [*set out*]

Restrictive covenant: MCP [*set out MCP number(s)*]

Expiry date: [*set out*]

The provisions of sections 78 and 79 of the *Property Law Act 1958* mean that successors in law of the registered proprietors of both the benefited and burdened land do not need to be set out.

If a building scheme is to be created this should be set out in the MCP.

Note: a separate form of transfer will be retained for the creation and/or reservation of easements.

### Examples of proposed format

#### Example 1 – restrictive covenant created by two adjoining owners

The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restrictive covenant with the intent that the burden of the restrictive covenant runs with and binds the burdened land and the benefit of the restrictive covenant is annexed to and runs with the benefited land.

Burdened land: the Land

Benefited land: Volume 11755 Folio 994

Restrictive covenant: MCP AA4990

Expiry date: 1 December 2026

#### Example 2 – restrictive covenant created to burden and benefit multiple lots in a subdivision

The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restrictive covenant with the intent that the burden of the restrictive covenant runs with and binds the burdened land and the benefit of the restrictive covenant is annexed to and runs with the benefited land.

Burdened land: the Land

Benefited land: see MCP AA4980

Restrictive covenant: MCP AA4980 MCP AA4981

Expiry date: 1 December 2026

Note: The Registrar recommends that Example 2 restrictive covenants are included in the plan of subdivision rather than each transfer. The benefited land, burdened land and the restrictive covenant are more easily accessed because the plan can be searched rather than each individual transfer.

## Plans under the *Subdivision Act 1988*

The date for commencement for plans will be:

* any plan first signed by the licensed surveyor on or after 1 July 2018.

There will be three options for plans, where the restriction can:

* be in one or more MCP (recorded under the *Transfer of Land Act 1958*) or
* be a short-form restriction or
* contain a reference to a planning permit.

Standard operative wording, and details of the burdened land and benefited land will be required to be set out in the plan.

The Registrar recognises that there may be instances where a restriction is only a single purpose restriction and could be in short form, e.g. to not build with a floor level lower than (specified height) or to limit any building to a single storey.

The proposed format is:

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.

Burdened land: [*set out*]

Benefited land: [*set out*]

Restriction (one of):

The burdened land cannot be used, except in accordance with Planning Permit [set out reference.]

or

The burdened land cannot be used except in accordance with the provisions recorded in MCP [set out MCP number.]

and/or

Set out the details of the restriction up to a maximum of a single sheet of a plan. The single sheet may also include diagram(s). Standard drafting practices will apply. The font size must be no smaller than 2.5mm.

Expiry date: [set out]

The provisions of sections 78 and 79 of the *Property Law Act 1958* mean that successors in law of the registered proprietors of both the benefited and burdened land do not need to be set out.

If a building scheme is to be created this fact should be set out in the MCP or short form restriction.

LUV does not recommend use of a planning permit reference because of potential difficulties in, and the cost of, accessing copies of planning permits.

### Examples of proposed format

#### Example 1 – the burdened land cannot be used except in accordance with the provisions recorded in a MCP

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.

Burdened land: Lots 4303-4314, 432, 4325 to 4333

Benefited land: Lots 4303-4314, 432, 4325 to 4333

Restriction: The burdened land cannot be used except in accordance with the provisions recorded in MCP AA4980.

Expiry date: 1 December 2026

#### Example 2. – short form restriction

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.

Burdened land: Lots 4303-4314, 432, 4325 to 4333

Benefited land: Lots 4303-4314, 432, 4325 to 4333

Restriction: Not more than a single dwelling shall be built on each lot described under the burdened land.

Expiry date: 1 December 2026

#### Example 3. – the burdened land cannot be used except in accordance with the provisions recorded in a MCP and a short form restriction

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.

Burdened land: Lots 4303-4314, 432, 4325 to 4333

Benefited land: Lots 4303-4314, 432, 4325 to 4333

Restriction:

The burdened land cannot be used except in accordance with the provisions recorded in MCP AA4980.

Not more than a single dwelling shall be built on each lot described under the burdened land.

Expiry date: 1 December 2026

#### Example 4. – the burdened land cannot be used except in accordance with Planning Permit

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.

Burdened land: Lots 4303-4314, 432, 4325 to 4333

Benefited land: Lots 4303-4314, 432, 4325 to 4333

Restriction: The burdened land cannot be used except in accordance with Planning Permit XYZ.

Expiry date: 1 December 2026

## Expiry dates

The Registrar understands that individual restrictive covenants or restrictions within an overall creation of restrictive covenant or restriction may have differing expiry dates. The date that should be included under ‘Expiry Date’ should be the last possible expiry date. In the future, the Registrar anticipates automatically removing expired restrictive covenants and restrictions once this date is past.

Wherever possible dates should be included to provide certainty. The expiry of a restrictive covenant or restriction related to an event does not provide certainty and is not helpful to users of this information.

## Variation or removal of restrictive covenants and restrictions

There appears to be some confusion as to how restrictive covenants and restrictions referencing a MCP can be varied or removed.

Use of a MCP will not change the way any recorded restrictive covenant or restriction is varied or removed. A MCP is simply a document containing provisions that can be incorporated by reference into instruments and plans subsequently lodged at Land Use Victoria. A MCP does not itself create a restrictive covenant or a restriction. A MCP cannot be varied or removed after it is recorded.

Any variation or removal of a restrictive covenant or a restriction continues to be either:

* under the *Subdivision Act 1988* by a plan under that Act, including following a planning scheme amendment or planning permit; or
* under section 88 of the *Transfer of Land Act 1958* – by agreement of all of the registered proprietors of the land to be affected by the covenant and the relevant mortgagees or following a court order under section 84 of the *Property Law Act 1958*.

Under section 88(3) of the *Transfer of Land Act 1958* a restrictive covenant/restriction has no greater effect than it has under the instrument creating it (i.e. at the common law) or the Act creating it.

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