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| Stakeholder feedback and Land Use Victoria responses to consultation about creating restrictive covenants in transfers and restrictions in plans |
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# Introduction

1. The consultation paper released on 2 December 2016 outlined proposed changes to how restrictive covenants in transfers and restrictions in plans (restrictive covenants/restrictions) are created.
2. The closing date for submissions was 31 January 2017.
3. Eleven submissions were received from conveyancers, councils, land consultants, lawyers, surveyors and representative organisations for conveyancers, lawyers, legal executives and surveyors. Land Use Victoria (LUV) sought further clarification on feedback in one of the submissions.
4. Overall, the submissions supported the proposals in the consultation paper. Three submissions raised no issues.
5. The key issues raised by remaining submissions are outlined in further detail below together with the LUV response to these issues.

| # | Issue/submitter comment | Action taken | Land Use Victoria (LUV) response |
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| 1 | The proposed date for commencement of the requirement needs to provide at least 5-6 months’ transition. | Proposal amended | LUV acknowledges that sufficient lead time is required for customers to meet the new requirements.  The date for commencement will be:   * for transfers, any contract of sale signed on or after 1 July 2018; * for transfers, where there is no contract of sale, any transfer signed on or after 1 July 2018; * for plans, any plan first signed by the licensed surveyor on or after 1 July 2018. |
| 2 | The proposal creates additional work for long settlement matters when documentation is based on an earlier version of creation of restrictive covenant/restriction. | None | The date for commencement will be:   * for transfers, any contract of sale signed on or after 1 July 2018; * for transfers, where there is no contract of sale, any transfer signed on or after 1 July 2018; * for plans, any plan first signed by the licensed surveyor on or after 1 July 2018. |
| 3 | There should be the ability to include more than 450 characters in a restriction in a plan. The difficulty with this limitation is that it requires counting of characters and may cause a defect or ambiguity in language of the restriction.  It should be possible to include a diagram in a plan to ‘illustrate the restriction’. | Proposal amended | The limitation for a short form restriction in a plan will be extended to a single sheet of a plan. The single sheet may include diagram(s).  Standard drafting practices will apply. The font size must be no smaller than 2.5mm. |
| 4 | For larger developments, it is impractical to describe all necessary restrictions in one Memorandum of Common Provisions (MCP). | None | This could be managed by different stage plans referencing different MCPs and/or using different short form restrictions on single sheets per stage plan. |
| 5 | MCPs are not appropriate in some circumstances, e.g. one-off transactions and small lot subdivisions. | None | Restrictions in small lot subdivisions will be able to be created in a single sheet of a plan.  Terms of restrictive covenant/restriction are required to be drafted, irrespective of which document the text is displayed in - either a transfer or a MCP.  Other ways to create restrictive covenants e.g. by agreement recorded under section 88(1) of the *Transfer of Land Act 1958*, will not be amended. |
| 6 | The preferred method to create restrictive covenants/restriction should not be limited to ‘by way of a MCP’ because this will increase the overall cost of conveyancing. | None | Any additional charges and costs will be off-set by the time savings in checking multiple documents. For example, in an estate development, when restrictive covenants are created in a transfer, the transferees’ representatives must prepare the transfer and check that terms are correct against the contract; the developer’s representative must then check each transfer to ensure that it is correct. |
| 7 | There will be an increased cost of a search to obtain a copy MCP and paper wastage. | None | A MCP search fee is currently $4.91 (Government Internet service).  LUV will investigate whether it is possible to automatically supply the MCP with the transfer/plan referencing it. |
| 8 | There may be a chance of missing a MCP reference in a plan. | None | MCPs are already referenced in plans and should be easy to ascertain. |
| 9 | If reference to a planning permit is allowed it should be possible for a Register search to provide a copy of the permit. | None | Copies of planning permit are held by councils. It is not LUV’s role to keep copies of planning permits.  LUV does not recommend use of a planning permit reference because of potential difficulties in, and the cost of, accessing copies of planning permits. |
| 10 | There should be no references to planning permits because this may result in the possibility of a restrictive covenant/restriction being void for uncertainty or disputed for uncertain wording. The exact terms of the planning condition should be contained in the restriction. | None | Some councils currently require planning permits to be specified in restrictions.  LUV does not recommend use of a planning permit reference because of potential difficulties in, and the cost of, accessing copies of planning permits. |
| 11 | Referencing planning permits may be problematic due to the possibility of a permit being amended or re-interpreted. | None | A restrictive covenant/restriction will continue to be interpreted as it is today. Any changes to referenced documents, unless provided for in the wording of the restrictive covenant/restriction, will not alter the meaning or effect of the restrictive covenant/restriction as at the date it was created.  LUV does not recommend use of a planning permit reference because of potential difficulties in, and the cost of, accessing copies of planning permits. |
| 12 | There is a need to broaden the text to include ‘use and development’ and ‘plans endorsed under a planning permit/ development plan/another planning instrument’. | None | LUV does not consider that more detail is required as the restriction should be set out in the planning permit referenced.  LUV does not recommend use of a planning permit reference because of potential difficulties in, and the cost of, accessing copies of planning permits. |
| 13 | The benefit of reference to a subdivision permit (that is) spent on grant of statement of compliance is queried. | None | It may be more appropriate to reference the development permit rather than a subdivision permit, unless the subdivision permit also contains restrictions. |
| 14 | The ability to modify a plan up until statement of compliance should not be lost. | None | All restrictions should be settled before contract and certification of a plan by council.  There should be no change to a restriction or a MCP number following certification. If the restriction or MCP number is required to be changed, the plan will require re-certification. |
| 15 | It needs to be possible to vary the short form of restriction. | None | All restrictions should be settled before contract and certification of a plan by council. There should be no change to a restriction or a MCP number following certification. If the restriction or MCP number is required to be changed, the plan will require re-certification.  There appears to be some confusion about how restrictive covenants/restrictions referencing a MCP can be varied or removed. Use of a MCP will not change the way any recorded restrictive covenant/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 LUV.  A MCP does not itself create a restrictive covenant/restriction. A MCP cannot be varied or removed after it is recorded.  Any variation or removal of a restrictive covenant/restriction continues to be either:   * under the *Subdivision Act 1988* – by a plan under that Act, including following a planning scheme or planning permit; or * under section 88 of the *Transfer of Land Act 1958* – by agreement of all registered proprietors of the land to be affected by the restrictive covenant and the relevant mortgagees or following a court order under section 84 of the *Property Law Act 1958*. |
| 16 | Developers may not be able to finalise the wording of a restrictive covenant/restriction until plan referral and approval processes are complete. | None | All restrictions should be settled before contract and certification of a plan by council.  There should be no change to a restriction or a MCP number following certification without re-certification of the plan. |
| 17 | Further discussion on expiry dates is required when the calculation of a date is dependent on an event (e.g. an event in a planning permit or a certificate of occupancy), and where there are multiple expiry dates. | None | Wherever possible, dates should be included to provide certainty. The expiry of a restrictive covenant/restriction related to an event does not provide certainty and is unhelpful to users of this information.  The latest possible expiry date should be stated if there are multiple restrictions and expiry dates. Customers will be advised on this in a guide. |
| 18 | It should be possible to create a restrictive covenant/restriction in perpetuity. | None | The proposed change does not alter the ability to create a restrictive covenant/restriction in perpetuity. If no expiry date is contained in the restrictive covenant/restriction, no date will be displayed in the endorsement. |
| 19 | Developers may wish to be able to enforce restrictive covenants/restrictions when they no longer own any land in the development. LUV should therefore not recommend inclusion of restrictive covenants/restrictions in plans over transfers. | None | Even if the restrictive covenant/restriction is created in a transfer, the developer is no longer able to enforce it when both the developer and the original transferee no longer hold land in the development.  Because the restrictive covenants/restrictions are usually contained in the contract, it would be possible to state in the contract that they do not merge on settlement. This means that plans can be used.  The use of MCPs has no effect on this issue because the terms in the MCP are incorporated into the creation of a restrictive covenant/restriction. |
| 20 | The responsibility for enforcement of restrictive covenants/restrictions will be moved to councils if they are required to be created as restrictions in plans. | None | There will be no movement of responsibility for enforcement because only the owners of the benefitted land are entitled to enforce the restrictive covenants/restrictions (unless contractual obligations still apply between the original parties to the covenant – see issue 19 above). |
| 21 | LUV’s proposed standard wording for the creation of a restrictive covenant/restriction does not sufficiently create a building scheme. | None | Because not all creations of restrictive covenants/restrictions create a building scheme, the intention to create a building scheme should be set out in the relevant MCP or short form restriction. |
| 22 | Positive and unenforceable covenants may be included. | None | This occurs today in the creation of a restrictive covenant/restriction in both transfers or plans. 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.  It is for conveyancers and lawyers to advise whether a particular restrictive covenant/restriction is enforceable. |
| 23 | LUV should maintain current practices developed relating to the ability to depict building envelopes. | None | LUV considers it more appropriate to include building envelope diagrams in section 173 of the *Planning and Environment Act 1987* agreements. |
| 24 | All restrictive covenants/restrictions should appear on the face of a title search like the current restrictive COVENANT notation, together with an expiry date. | None | The current form of the endorsement, when either the transfer or plan dealing number creating the restrictive covenant/restriction is set out including an expiry date (where relevant), will continue. |
| 25 | Is a change proposed to easement creation in a transfer? | None | No, the proposed change is not applicable to easements.  Typically, easements are not created in transfers. |