

THE ROLE OF RESTRICTIVE COVENANTS IN FURTHERING THE APPLICATION OF SOLAR ENERGY TECHNOLOGY

1 Introduction

The energy crisis originating in the mid-1970s has been responsible for an increasing concern on the part of the Commonwealth and State governments to foster the development of alternative forms of energy resources and to decrease reliance on fossil fuels to the maximum extent practicable. This concern has largely been responsible for an increased interest and expenditure¹ in the development of the practical application of solar energy technology.²

However, although recent extensive research by mechanical engineers into various solar energy systems has led to the present situation where solar hot water systems are a viable economic option in Australia for home builders and some industrial manufacturers, there has been little research done in Australia to overcome the legal barriers associated with the use of solar appliances.³

The major legal problem associated with the development of solar energy technology is that of guaranteeing access to sunlight for solar collector panels, which are usually erected on north-facing roofs of private houses and factories employing solar appliances. As a general rule direct sunlight is necessary before a solar appliance can operate efficiently. Diffused or reflected sunlight will not suffice.⁴ As the sun is never directly overhead except at certain seasons at midday in tropical latitudes, sunlight will reach solar collector panels at an angle to the vertical. The result of this is that the sun's rays may pass over the property of one or more neighbours before reaching the collector panels

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1 For example, grants by the Western Australian Government to the Solar Energy Research Institute of Western Australia (SERIWA) increased from \$250,000 in 1977/1978 to \$880,000 in 1980/1981. The combined allocation of the various levels of government in Australia to solar energy research in 1980/1981 was \$7.57 million (*The Solar Prospect*, SERIWA, 1982, 4).

2 Although all of the earth's energy resources except nuclear energy are indirect forms of solar energy, "solar energy" in this article is confined to energy from the sun radiated through the electromagnetic spectrum and collected by the direct action of insolation on solar collector panels. For the purposes of this article, other forms of solar energy, such as windpower, biomass conversion and ocean thermal energy conversion are excluded.

3 The only exceptions are a Discussion Paper produced by the Law Reform Committee of South Australia entitled *Solar Energy and the Law in South Australia* (1978), and a document of the Total Environment Centre (NSW), *Solar Access in New South Wales - Legal Report*. Several studies have been undertaken in the United States: see, eg, Hayes, *Solar Access Law: Protecting Access to Sunlight for Solar Energy Systems* (National Technical Information Service, Washington, DC, 1979); and Kraemer, *Solar Law* (Shepard's Inc, Colorado, 1978).

4 Diffused and reflected light can only be gathered in insignificant quantities by the normal solar appliance.

and may be interrupted at certain times of the day by trees or buildings situated on a neighbour's property. This problem increases proportionately to the density of the property development, and is exacerbated by the usual city and suburban environment of small blocks of land and tall buildings.

In recent years a solar manufacturing industry has started to develop in this country.⁵ The bulk of this industry is located in Western Australia and New South Wales.⁶ As at March 1981 the total area of flat plate solar collector panels in use in Australia was 500,000 square metres, the annual rate of production being 150,216 square metres.⁷ If the expansion of this industry is to be encouraged, it is vital that the legal problem of guaranteeing access to direct sunlight is resolved in the near future. Without a suitable guarantee, many private landowners and industries will be deterred from investing in solar appliances if these can be rendered ineffective at the whim of neighbouring property owners. In this event the fledgling solar industry may decline or collapse and exacerbate the current problem of unemployment.

There are many legal avenues which can be explored in order to facilitate solar access. Zoning and planning laws may be used to minimize the problem of shading on an area-wide basis.⁸ The legislation granting local government authorities the power to refuse to seal plans of subdivision⁹ may provide for neighbourhood-scale protection from shading. Block-by-block protection may be obtained by easements, covenants, or by the creation of a new interest in land which may be referred to as a solar proprietary right.¹⁰

This article will focus on the relevance of the laws of restrictive covenants to achieve guaranteed legal access to solar collector panels erected on the roofs of houses or factories. It will consider the existing laws on restrictive covenants from two opposite standpoints. First, it will focus on the problems confronted by the owner of a solar appliance who

5 The major firms are S W Hart & Co Pty Ltd (brand name "Solahart"), Lyons and Peirce Pty Ltd (brand name "Solar King"), Sola-Tec (WA) (brand name "Beasley") and Rheem Australia Ltd (brand name "Rheem").

6 During 1980-1981, 78 per cent of the total Australian production of domestic solar water heaters was in Western Australia and 15 per cent was in New South Wales: Andrews, *Solar Jobs in Victoria: The Economic Impact of the Solar Industry* (Environmentalists for Full Employment, Melbourne, 1982).

7 Information supplied by the Solar Energy Research Institute of WA.

8 See, eg, Kraemer, *supra* n 3 ch 6; Comment, "Comparative Aspects of Access to Sunlight: The United States, Great Britain, and Japan" (1980) 21 Harv Int LJ 687; Eisenstadt, Long and Utton, "A Proposed Solar Zoning Ordinance" (1978) 15 Urban L Ann 211; Miller, "Legal Obstacles to Decentralized Solar Energy Technologies" (1979) 1 Solar Law Reporter 595, 603ff; Zillman and Deeny, "Legal Aspects of Solar Energy Development" (1976) 25 Ariz St LJ 25.

9 See Local Government Act 1958 (Vic) s 569; Planning Act 1982 (SA) s 47; Local Government Act 1936-1980 (Qld) s 34; Local Government Act 1919 (NSW) s 323ff; Town Planning and Development Act 1928-1979 (WA) s 20ff.

10 For legislation creating a solar proprietary right, see eg, the New Mexico Solar Rights Act, NM Laws of 1977, c 169. This legislation is discussed in Hillhouse, "New Mexico's Solar Rights Act: A Cloud Over Solar Rights" (1979) 1 Solar Law Reporter 751; Kerr, "New Mexico's Solar Rights Act: The Meaning of the Statute" (1979) 1 Solar Law Reporter 737; Note, "Access to Sunlight: New Mexico's Solar Rights Act" (1979) 19 Natural Resources J 957; Warren, "Common Problems in Drafting State Solar Legislation" (1979) 1 Solar Law Reporter 157. See also Spivak, *Land-Use Barriers and Incentives to the Use of Solar Energy* (Solar Energy Research Institute, US Department of Energy 1979) 23ff.

wishes to obtain a guaranteed right to sunlight by means of a specially drafted covenant. It will consider the drafting of such a covenant and the extent to which the covenant will be enforceable. Secondly, it will examine the problems caused by various commonly found restrictive covenants controlling the structure and design of buildings or the use of the land which may unintentionally inhibit or impede the application of solar appliances. The article will consider methods by which these covenants may be modified or circumvented either by judicial fiat or by legislation. Finally, based on a discussion of these considerations, suggested reforms to the present laws of restrictive covenants will be advanced with a view to encouraging the present growth of the solar manufacturing industry.

2 Restrictive Covenants Designed To Promote Solar Energy Use

(A) *Preliminary issues*

A preliminary cautionary word should be sounded. Although in theory restrictive covenants can be used in both new and established neighbourhoods to protect the access of direct sunlight to solar collectors, in practice solar covenants are likely to have only a minor role to play in established neighbourhoods.

There are a number of reasons for this. First, unlike in new housing developments where a solar covenant may be imposed by a land developer on all purchasers of blocks of land in a plan of subdivision, in established neighbourhoods such a covenant will need to be individually negotiated. The negotiation of a solar covenant is likely to be too troublesome and expensive to be worthwhile for the average householder. It is only in the case of large-scale installations in factories that a negotiated agreement is likely to be used.¹¹ The conduct of the negotiations will usually require legal assistance, the cost of which may far exceed the projected cost of the savings in using solar appliances.

Secondly, established areas by their very nature have buildings and vegetation of varying sizes and height which were placed with no consideration for the need for solar access. In many cases, even if the parties are willing to negotiate for a solar covenant, it may prove to be physically impossible for the solar user to place the solar collectors so as to avoid these obstructions.

Thirdly, in light of the expense in installing solar appliances and the doubt which exists in the minds of many consumers as to the present economic viability of solar technology, the most likely persons to invest in this venture will be high income earners. These consumers are most likely to reside in affluent established suburbs where covenants inhibiting the practical application of solar energy technology are most likely to be found.¹² Fourthly, depending on the local topography and the size and orientation of the blocks of land, a landowner contemplating the installation of solar appliances may need to take restrictive covenants from more than one neighbour. In the case of the typical 0.1 hectare suburban block oriented in a north-south direction, the solar user would invariably need a covenant limiting the height of vegetation and

11 See Preece, "Solar Energy and the Law" (1981) 6 Queensland Lawyer 83, 89.

12 Wiley, "Private Land Use Controls as Barriers to Solar Development: The Need for State Legislation" (1979) 1 Solar Law Reporter 281, 285.

structures on the neighbouring blocks to the east and west. If the blocks are narrow or if the blocks are zoned so as to permit tall structures to be erected, the solar user may require covenants from the owners of several adjoining properties to the east and west. In addition, and especially if the land slopes uphill in a northerly direction, it may be necessary for a covenant to be obtained from the property lying immediately north of the solar user's land. This will be necessary to safeguard solar access during the winter months when the sun even at midday lies low in the sky and existing vegetation and buildings cast lengthy shadows in a southerly direction. The need to enter into multiple negotiations vastly increases the cost and reduces the likelihood of guaranteed access to sunlight. The refusal by just one landowner to enter into a covenant could reduce the efficiency of the solar appliance to the point where it becomes economically unsound. Further, there is always the danger that neighbouring landowners will insist on an inflated price for their agreement for the necessary covenant.

Finally, aside from the legal issues, it is considerably more expensive to add a solar appliance to an established building (the practice of retrofitting) than to install such an appliance at the time of the erection of the building. The economics of retrofitting are marginal.¹³

For all these reasons, it is in new subdivision and estates rather than in established areas that solar covenants are likely to play a significant role. Land developers anticipating the future use of solar appliances in their subdivisions could include in the restrictions applicable to the land restrictive covenants designed to protect access for direct sunlight to solar collector panels.¹⁴ Covenants of the type which are commonly used to preserve property values (for example, covenants limiting the height of buildings and preventing the removal of vegetation) could, if suitably drafted, be similarly used to protect access to direct sunlight. For the developer, the use of solar covenants may enhance the value of the blocks in the subdivision.¹⁵ For the solar user, the use of solar covenants presents the opportunity for the intelligent planning of neighbourhoods so as to assure the protection of solar access for both the initial building and landscaping stages and for the future development of the land.

The fact that in new developments covenants safeguarding access to direct sunlight for a solar collector can be imposed by the developer

13 See Becker, "Common Law Sun Rights: An Obstacle to Solar Heating and Cooling?" (1976) 3 J Contemp L 19, 33. For a discussion of the potential retrofit market for solar appliances, see Ben-David, Schulze et al, "Near Term Prospects for Solar Energy: An Economic Analysis" (1977) 17 Natural Resources J 169; Randolph, "The Local Energy Future: A Compendium of Community Programs" (1981) 3 Solar Law Reporter 253, 265-266; and *Proceedings of the Consumer Conference on Solar Energy Development* (Albuquerque, New Mexico, October 1976) 394ff and 453ff.

14 See Jaffe, "A Commentary on Solar Access: Less Theory, More Practice" (1980) 2 Solar Law Reporter 769, 779. As stated by Jaffe, in some communities in the United States the practice of filing restrictive covenants against the shading of collectors in the master deed declaration of development is encouraged.

15 The experience in the United States is that land developers have found that a general neighbourhood plan appeals to potential purchasers. As stated by Kraemer, *Solar Law*, supra n 3 at 57:

"Land planners believe that lots on which direct sunlight is guaranteed will bring substantially higher prices in the market place. With a potential profit incentive working, developers look to covenants as the most effective method of selling solar homes at competitive prices."

removes all the problems associated with private negotiations between individual landowners for such covenants in established neighbourhoods. However, various problems associated with these covenants in new subdivisions do exist. Given that "much that presently appears in restrictive covenants may reflect little more than the prejudices of the developer",¹⁶ there is little opportunity for co-ordinated uniform planning in development schemes. This lack of comprehensive planning means that restrictive covenants operating in a new development area may conflict or interfere with later comprehensive zoning proposals. In addition, while landowners within the development are afforded protection by their mutual covenants, those on the fringe of the development may find this is not the case. Landowners immediately outside the development and not subject to restrictions may build structures or allow vegetation to shade the solar collectors of those in the development and thus nullify the effect of the covenants.¹⁷ The only way to overcome this latter problem is to negotiate for a covenant with the offending landowners, which raises the same problems as discussed in the context of established areas.

(B) *The drafting of solar covenants*

Although at first glance the drafting of a solar covenant may seem straightforward, it has been pointed out by a number of writers that to assume that guaranteed solar access can be achieved by the addition of a simple descriptive covenant to the deed of conveyance or land transfer "inaccurately assesses the task".¹⁸ Since the solar collector panels will not be identified on the certificate of title of the land of the covenantee, it is not sufficient merely to draft a clause prohibiting the neighbour from erecting anything on his property to shade his neighbour's collector. As the solar collector panels occupy a segment in space above the land, it will be necessary to identify the area to be protected by reference to a three-dimensional diagram on the certificate of title.

A more complex problem relates to the fact that it is impracticable and unnecessary to outlaw shading of the solar collector panels altogether. It is impracticable in the sense that shortly after sunrise and shortly before sunset when the sun is near the horizon, the shadows cast by objects are so long that to prohibit absolutely the shading of a solar collector would in the case of the average suburban building block impose unreasonable restrictions on the development of the covenantor's block and in some cases would prevent development from occurring altogether. It is unnecessary in that the amount of energy collected by the solar collector panels when the sun is close to the horizon is

16 Kraemer, *supra* n 3.

17 For example, it is common in larger development areas for developers to include a restrictive covenant preventing "any business or industry which by reason of the process involved in the method of manufacture or the nature of the materials or goods used, produced or stored is likely to cause or causes fumes or vapour or causes or discharges dust or other impurities or matter liable to become foul so as to be injurious to persons upon neighbouring lands". While such a covenant is effective within the development, neighbours not subject to such a development may well create conditions which directly interfere with the effective transmission of the sun's rays.

18 Berryhill and Parcell, "Guaranteeing Solar Access in Virginia" (1973) 13 U Richmond L Rev 423, 429. See Also Becker, "Common Law Sun Rights: An Obstacle to Solar Heating and Cooling?" (1976) 3 J Contemp L 19; Kraemer, *supra* n 3 at 57ff.

minimal.¹⁹ The amount of energy obtained by the collector increases as the angle of elevation of the sun above the horizon increases. A suitably drafted solar covenant will permit a certain amount of shading in order to allow the neighbour to develop his property. Such a covenant must strive to achieve a balance between the right of the neighbour to develop his property and the right of the solar user to make economic use of his appliance.²⁰ It is a matter for negotiation between the parties as to how much shading of a collector will be permitted by a neighbour. It is suggested that a reasonable balance between the interests of the respective parties will be achieved if the right of solar access is limited to a continuous period of six hours each day centred on the zenith position of the sun.²¹

This solution is easy to state in principle, but more difficult to implement in practice. Problems of the time arise. It is incorrect to assume that the zenith position of the sun occurs at noon local time. The exact time of solar noon will vary according to the time of the year and the geographical location. The most obvious factor affecting solar noon is daylight-saving time, which results in the sun reaching its zenith an hour later than under standard time. Even discounting daylight-saving time, the sun will only reach its zenith at noon local time at places situated on the standard time longitude meridian. In most parts of Australia, the major towns and cities are located well away from their standard time meridian. For example, the longitude meridian for Australian Central Standard Time, adopted in South Australia and the Northern Territory, is 142° 30'E, whereas in fact the longitude of Adelaide is 138° 36'E. The result of this is that the sun reaches its zenith in Adelaide approximately 16 minutes later than at the standard meridian.²² The further west in South Australia one travels, the greater the discrepancy. For example, in Cook, at the longitude of 130° 24'E, the time discrepancy is approximately 48 minutes. A similar situation exists in the other States. A useful illustration is Melbourne, situated at the longitude of 145° 0'E. As the longitude meridian for Australian Eastern Standard Time is 150° E, this means that the sun reaches its zenith in Melbourne 20 minutes later than at the standard meridian. A further problem is the equation of time. This is an astronomical term which is defined as "the difference between apparent solar time and mean solar time".²³ Due to the eccentricity of the earth's orbit around

19 In the summer months, where in the Southern Hemisphere the sun rises in the south-east and sets in the south-west, no energy at all will be collected by north-facing solar collectors during approximately the first 1½ hours after sunrise and during the same period before sunset. No energy is collected until the arc of the sun's apparent passage across the sky takes it into the northern half of the sky.

20 The problems involved in drafting terms of restriction are often avoided in the United States by covenants creating a controlling organization, such as an architectural review board or home-owners' association, which has the power to settle disputes. The United States' Courts have upheld covenants giving such bodies the power of final approval for all construction plans and specifications for buildings within a sub-division. See Kraemer, *supra* n 3 at 59; Wiley, *supra* n 12 at 283.

21 The optimum for the solar user is eight hours. According to Hayes, *supra* n 3 at 22-24, a solar appliance can still operate efficiently if the right of solar access is limited to a continuous period of six hours each day centred on the zenith position of the sun.

22 For each degree of longitude west of the standard meridian, the sun reaches its zenith four minutes later.

23 Wallenquist, *Dictionary of Astronomical Terms* (Natural History Press, Garden City, New York, 1966) 83.

the sun and the inclination of the ecliptic, at various times of the year the sun reaches its zenith earlier than the mean solar noon while at other times of the year it is retarded. The amount of variation can be as much as 16 minutes before or after mean solar noon. The time of greatest discrepancy is during October and February.

These three problems of time operate cumulatively. Thus, in Adelaide in February the sun does not reach its zenith until 1.32 pm, whereas in October the zenith occurs at 12.00 pm. These problems are too great to ignore completely when drafting a solar covenant. It is suggested that the local standard time and daylight-saving time be taken into account in the wording of the covenant. The equation of time, although significant, is probably too variable, complex and unintelligible for inclusion, however. Provided that the other two problems of time are taken account of, the effect of the equation of time on the problem of solar access is sufficiently minor to be disregarded.

Based on the above discussion, it is suggested that a solar covenant in Adelaide should allow for guaranteed access to sunlight for a period of six hours each day, from 9.16 am to 3.16 pm during Central Standard Time and from 10.16 am to 4.16 pm during Central Daylight-Saving Time. At other locations in South Australia and other States these times need minor adjustments corresponding to the longitude of the position of the solar collector.

Draftsmen of solar covenants will also need to consider possible exemptions for certain types of obstruction the shadows of which do not significantly affect the efficiency of the solar collector. Inconsequential shadows are cast by telegraph poles, television aerials, wires and similar obstructions.²⁴ All these obstructions can be safely exempted. The branches of certain types of deciduous trees, when bare, also cast insignificant shadows. These can also be exempted in some cases, although greater caution should be exercised here by the solar user.

A further drafting problem is raised by Preece in relation to the growth of natural vegetation.²⁵ In order that the solar covenant will be enforceable against a successor-in-title of the covenantor it is essential that the covenant is negative in nature. A positive covenant, although enforceable against the covenantor himself, will not bind his successor-in-title under the rule in *Austerberry v Corporation of Oldham*.²⁶ As stated by Preece a covenant to trim natural vegetation would be a positive obligation and accordingly would not run with the land. In addition, a covenant "not to do any act which would obstruct the passage of solar radiation to a collector" may not bind either the covenantor or his successor-in-title as the growth occurs by nature rather than by the act of either party. A covenant of this type would prevent the covenantor and his successor from planting new vegetation or fertilizing existing vegetation if this later causes the solar collector to be shaded, but would not cover other situations. This problem can be resolved by including in the covenant an express obligation by the covenantor not to plant trees

24 See Hayes, *supra* n 3 at 28.

25 Preece, "Solar Energy and the Law" (1981) 6 Queensland Lawyer 83, 88.

26 (1885) 29 Ch D 750. See Bradbrook and Neave, *Easements and Restrictive Covenants in Australia* (Butterworths, Sydney, 1981) paras 1401ff.

or other natural vegetation which are of such a nature that they are likely to grow so as to obstruct the solar collector panels.

The following is submitted as a suggested draft of a solar covenant. The references to time are designed for use in Adelaide. As discussed earlier, with suitable modifications to time this form of covenant can be used in any location in Australia.

"Not to erect, alter, maintain, plant or cultivate any building, structure, tree or vegetation of any type on any part of the land subject to this covenant in such a manner as to cause shade on that portion of lot 19 on Plan of Subdivision No 112505 identified on the certificate of title of that lot as "shade protected" between the hours of 9.16 am and 3.16 pm during Australian Central Standard Time and between the hours of 10.16 am and 4.16 pm during Australian Central Daylight-Saving Time. PROVIDED THAT nothing contained in this covenant shall prevent or restrict the erection or maintenance of any telegraph poles, telegraph wires, electricity wires, telephone wires or television aerials."²⁷

An alternative form of solar covenant, called the Model Hypothetical Wall Solar Covenant, has been proposed in the United States by Kraemer.²⁸ Kraemer states that this is a simple, novel method of drafting which guarantees access to direct sunlight through that airspace above the covenantor's land necessary to prevent any building or vegetation on that land from casting a shadow on the covenantee's land greater than the shadow cast by a vertical hypothetical wall of a fixed height located on the boundary line between the covenantor's and the covenantee's land between certain hours of the day. The length of the shadow of the hypothetical wall can be calculated by the use of algebra and trigonometry or by actual observation by erecting a post in the place of the hypothetical wall and noting the shadow. His suggested draft form of covenant, drafted in the context of a scheme of development, reads as follows:

"This subdivision has been developed to encourage the active and passive use of solar energy for the heating, cooling, hot water and power systems of residences. Direct unobstructed access to sunlight is necessary for solar energy systems. In furtherance of these purposes, the following lots, hereinafter called "Solar Lots", shall be designated for solar development, at the option of the owner:

Lots 1, 5, 7 and 10, Block A, Sunnyside Estates

Each Solar Lot shall have a Solar Covenant which shall benefit said lot and burden all other lots subject to these covenants. The Solar Covenant shall extend to an infinite height and be described as follows:

That airspace above all lots subject to these covenants necessary to prevent any buildings, improvement, tree or landscaping located on any of said lots from casting a shadow on the protected portions of any Solar Lot as shown on the plat greater than the shadow cast by a hypothetical wall _____ feet high located anywhere along the Solar Lot Lines between the hours of _____ A.M. and _____ P.M. Standard Time.

No building, tree or other obstruction of any kind or nature shall be allowed to encroach within the airspace of each Solar Covenant described herein. Each Solar Covenant is an interest in land, shall run with the land benefited and burdened and shall terminate only on the conditions stated herein or as provided by law. Each Solar Covenant may be enforced by an action for injunctive relief, damages, or both, plus reasonable attorney's fees and costs for enforcement. Each Covenant shall be binding on the heirs, successors and assigns of all parties.

27 If it is desired to exempt one or more deciduous trees from the covenant, the tree or trees should be specifically identified and included in an additional exemption clause.

28 Kraemer, supra n 3 at 70.

Any person holding any interest in a dominant or servient lot subject to these covenants shall have the right to go on any other property affected herein on three (3) days' prior notice, at reasonable times, to measure and determine Solar Covenants established herein. All costs of evaluation shall be at the expense of the evaluator."

It is submitted that this model form is unsatisfactory in a number of respects. It is artificial in its nature and unduly complex in its wording. By arbitrarily prohibiting the shading of a strip of land running the entire length of the block it also imposes a greater burden on the covenantor than is necessary to protect the solar user. Finally, unlike the present suggested form of covenant, the burden of the model hypothetical wall solar covenant cannot be easily assessed by the covenantor. The method of direct observation belies the fact that due to the changing elevation of the sun above the horizon and the changing arc of the sun's passage across the sky during the seasons observations would have to be made over at least a six-month period in order to determine the exact burden. Observations would need to be made both at the summer solstice (21 December), when the elevation of the sun is at its highest and the arc of the sun's passage is at its longest, and at the winter solstice (21 June), when the elevation of the sun is at its lowest and the arc of the sun's passage is at its shortest. This is totally impractical in the context of conveyancing practice. The only alternative is to employ a mathematician, which appears to be an equally unreasonable requirement.

Another possible method of guaranteeing access to direct sunlight by covenant would be to impose a maximum height restriction on any building or vegetation on the covenantor's block. This would have the advantage of simplicity of wording, but if the covenant were applied uniformly across the block it would severely restrict the ability of the covenantor to develop his land. For this reason, a covenant of this nature would be unlikely to be agreed to by a prospective covenantor and would be unlikely to be imposed by a developer in a scheme of development as it could well reduce the value of each block. It would be possible to reduce the burden of the covenant by limiting the area of the covenantor's block which would be subject to the height restriction, but this would make it necessary for the draftsman to calculate the exact length of the shadows which would be cast by possible buildings and vegetation at various seasons on the shade protected area, and in so doing would introduce the various mathematical complexities that this form of covenant is endeavouring to avoid. On balance, it is suggested that this form of solar covenant is not as acceptable as the first-mentioned form.

(C) *The enforcement of solar covenants*

Solar covenants will be enforced in the same manner as other forms of covenant. It is beyond the scope of this article to analyse in detail the general laws relating to the enforceability of restrictive covenants,²⁹ but the following represents an outline of the applicable law relevant in the solar context.

²⁹ For a discussion of the general laws relating to the enforceability of restrictive covenants, see Bradbrook and Neave, *supra* n 26, chapters 13-19; Preston and Newsom, *Restrictive Covenants Affecting Freehold Land* (Sweet and Maxwell, London, 6th edn 1976) chs 2-3.

Any solar covenant entered into by negotiations between two neighbours will be enforceable between the original contracting parties under normal contractual principles. If either party assigns his interest to a third party, the covenant may be enforceable under the doctrine in *Tulk v Moxhay*³⁰ if certain conditions are satisfied. First, the covenant must be restrictive in nature.³¹ Provided that the solar covenant is drafted carefully so as to avoid the problem raised by Preece, the rule should present no difficulties in this context. The second requirement is that both the covenantor and the covenantee must own land,³² which by the very nature of the problem will always be the case in a dispute over access to direct sunlight. The third requirement is that the covenant must "touch and concern" the land.³³ By analogy with various reported decisions construing other forms of covenant it seems fairly clear that a solar covenant, however drafted, will satisfy this third requirement. A particularly useful authority in this context is *Ricketts v Enfield Churchwardens*,³⁴ which held that a covenant not to build on a certain part of the adjoining land touched and concerned the land. If these requirements are satisfied, the benefit of the solar covenant will pass to the successor-in-title of the covenantee if the covenant is expressly annexed to the land.³⁵ If there is no express annexation in certain circumstances the covenant may be expressly assigned by the covenantee to his successor.³⁶ If the three requirements are satisfied, the burden of the solar covenant will pass to the successor-in-title of the covenantor provided that the burden of the covenant was intended by the original contracting parties to pass to successors-in-title when the covenant was originally entered into.³⁷ The question of intention is unlikely to be contentious as legislation in each State now provides for a rebuttable presumption of the necessary intention.³⁸

Where the solar covenant is taken in respect of Torrens land, reference must be made to the relevant provisions of the Torrens legislation in each State.³⁹ In certain respects this legislation modifies the common law rules discussed in the preceding paragraph. In New South Wales,

30 (1848) 2 Ph 774; 41 ER 1143.

31 See Bradbrook and Neave, *supra* n 26, paras 1409ff for a discussion of the meaning of this requirement. Note that in determining whether a covenant imposes positive or negative obligations the Court will consider the substance rather than the form of the covenant: *Shepherd Homes Ltd v Sandham (No 2)* [1971] 2 All ER 1267.

32 Bradbrook and Neave, *supra* n 26, paras 416ff. See, eg, *Kerridge v Foley* (1964) 82 WN (Pt 1) (NSW) 293; *Re Mack and the Conveyancing Act* [1975] 2 NSWLR 623.

33 Bradbrook and Neave, *supra* n 26, paras 1425ff. See, eg, *Rogers v Hosegood* [1900] 2 Ch 388; *Kelly v Barrett* [1924] 2 Ch 379.

34 [1909] 1 Ch 544.

35 See Bradbrook and Neave, *supra* n 26, paras 1327ff for a discussion of express annexation.

36 See Bradbrook and Neave, *supra* n 26, paras 1354ff for a discussion of express assignment.

37 See *Re Royal Victoria Pavilion, Ramsgate* [1961] Ch 581 and the discussion in Bradbrook and Neave, *supra* n 26, paras 1413ff.

38 Property Law Act 1958 (Vic) s 79; Conveyancing Act 1919 (NSW) s 70A; Property Law Act 1974-1978 (Qld) s 53(2); Property Law Act 1969-1979 (WA) s 48; Conveyancing and Law of Property Act 1884 (Tas) s 71A.

39 The Torrens legislation is contained in the Transfer of Land Act 1958 (Vic); Real Property Act 1900 (NSW); Real Property Act 1861-1980 (Qld); Real Property Act 1886-1980 (SA); Transfer of Land Act 1893-1978 (WA); Land Titles Act 1980 (Tas); Real Property Ordinance 1925 (ACT). The relevant provisions of this legislation affecting restrictive covenants are discussed in Bradbrook and Neave, *supra* n 26, ch 17.

Victoria, Western Australia and Tasmania the Torrens legislation provides for the notification by the Registrar of Titles of restrictive covenants as encumbrances on the certificate of title of the burdened land.⁴⁰ The effect of this notification is to prevent a purchaser of the burdened land from relying upon the indefeasibility principle of the Torrens legislation in order to defeat a restrictive covenant notified on his certificate of title. This appears to ensure the same degree of protection to a restrictive covenant under Torrens land as is granted at common law in respect of general law land.

However, in respect of Torrens land the benefit of a restrictive covenant can only be enforced against a successor-in-title to the covenantor where the successor is able to see from the Register the land which will have the benefit of the restrictive covenant.⁴¹ This rule will invariably be satisfied in the case of a benefit passing by express annexation, where the land benefited will be identifiable from the instrument creating the covenant which can be inspected by the purchaser of the burdened land. This may not occur, however, in the case of express assignment of the benefit of a covenant. In these circumstances, a solar covenant, like all other covenants, will not be enforceable against a successor-in-title of the covenantor.

In New South Wales and Tasmania, the need to identify the land to be benefited in the instrument creating the covenant has been enshrined in legislation. The Conveyancing Act 1919 (NSW) s 88(1) states in part:

"a restriction arising under covenant or otherwise as to the user of any land the benefit of which is intended to be annexed to other land, contained in an instrument coming into operation after such commencement, shall not be enforceable against a person interested in the land claimed to be subject to the easement or restriction, and not being party to its creation unless the instrument clearly indicates

- (a) the land to which the benefit of the easement or restriction is appurtenant;
 - (b) the land which is subject to the burden of the easement or restriction;
- ...⁴²

In Queensland and South Australia the Torrens legislation does not expressly authorize the notification of a restrictive covenant as an encumbrance on the certificate to title of the burdened land. In both States, devices have been employed by the legal profession to achieve the registration of covenants. In South Australia, the device employed in *Blacks Ltd v Rix*⁴³ was to register a rentcharge as an encumbrance in

40 Conveyancing Act 1919 (NSW) s 88(3)(a); Transfer of Land Act 1958 (Vic), s 88; Transfer of Land Act 1893-1978 (WA) s 129A; Land Titles Act 1980 (Tas) ss 102-104.

41 See *Re Dennerstein* [1963] VR 688, *infra* nn 54 and 55 and accompanying text.

42 The Land Titles Act 1980 (Tas) s 102(2) reads in part:

"Subject to subsection (3), the burden of a covenant runs with freehold registered land if—

- (a) the covenant was —
 - (i) entered into before the land was brought under this Act or the repealed Act; or
 - (ii) included in a transfer which was registered before the proclaimed date; and —
 - (iii) notice of the covenant is recorded on the folio of the Register constituting the title to the land intended to be burdened; and
 - (iv) the land intended to be benefited by the covenant is identified in the instrument containing the covenant."

43 [1962] SASR 161.

order to achieve the registration of restrictive covenants contained in the encumbrance. The facts of this case involved the sale of land in a scheme of development by the plaintiff company. Every purchaser of land in the scheme was required to accept a transfer subject to a nominal rentcharge created by an encumbrance. This encumbrance also included seven restrictive covenants. Napier CJ assumed that this device was legitimate. This decision has been subject to trenchant academic criticism, however,⁴⁴ and has been questioned by Bray CJ in *Clem Smith Nominees Pty Ltd v Farrelly*.⁴⁵ A similar device was used by the plaintiffs in this case, but Bray CJ suggested that such a device would infringe s 97 of the Real Property Act 1886-1980 (SA). This section reads:

"In every instrument purporting to transfer land mortgaged or encumbered there shall be implied the following covenant by the transferee with the transferor, and so long as such transferee shall remain the registered proprietor, with the mortgagee or encumbrancee, that is to say — That the transferee will pay the principal, interest, and other moneys secured by such mortgage or encumbrance, after the rate and at the time or times specified therein, and will indemnify and keep harmless the transferor from and against such principal, interest, and other moneys and from and against all liability in respect of any of the covenants contained in such mortgage or encumbrance or by this Act implied on the part of the transferor."

It should be noted that the section does not impose liability on the transferee to the mortgagee or encumbrancee to observe any covenants other than the covenant to pay the principal and interest. On Bray CJ's analysis s 97, arguably, impliedly excludes all other restrictive covenants.⁴⁶

The only valid conclusion is that it is an open question in Queensland and South Australia whether the Registrar is entitled to notify a restrictive covenant as an encumbrance.⁴⁷ Assuming that this power does not exist, then although the covenant is enforceable between the original contracting parties the covenantee or his successors-in-title will be unable to enforce the covenant against a successor-in-title of the covenantor, regardless of whether he has notice of the covenant. To this extent the effectiveness of the restrictive covenant as a means of protecting access to direct sunlight in Queensland and South Australia is negated. In these States this situation is partially alleviated by the fact that restrictive covenants can be protected by caveat.⁴⁸ However, although the caveat binds the contracting parties to comply with the terms of the covenant it is still necessary for the covenantee's successor-in-title to lodge a fresh caveat in order to protect his interest.⁴⁹

If the solar covenant is drafted by a developer and forms one of a series of restrictions imposed on the use of each block of land in a new

44 Bradbrook and Neave, *supra* n 26 para 1714.

45 (1978) 20 SASR 227.

46 *Ibid* 241. In Queensland, the device used is to register a bill of encumbrance which subjects the land to an annual charge. This sum is reduced to a nominal figure if the covenants contained in the encumbrance are complied with.

47 This is the conclusion reached by Bradbrook and Neave, *supra* n 26, at para 1716, based on a detailed discussion of the relevant case law.

48 See Bradbrook and Neave, *supra* n 26, paras 1717ff. The relevant legislative provisions are contained in the Real Property Act 1861-1980 (Qld) s 98, and the Real Property Act 1886-1980 (SA) s 191.

49 Note that in Queensland a further problem is that a caveat lodged without the consent of the registered proprietor lapses after three months (Real Property Act 1877-1980 (Qld) s 39).

housing development, the covenant may be enforceable under the doctrine of the scheme of development.⁵⁰ This doctrine was devised to enable earlier purchasers of blocks covered by the scheme to enforce covenants entered into by later purchasers and to enable the benefit of a covenant to pass to a successor-in-title of the covenantee where it has been neither expressly annexed nor expressly assigned.⁵¹ The requirements of a valid scheme of development were stipulated by Parker J in the seminal case of *Elliston v Reacher*:

"In my judgment in order to [prove the existence of the doctrine] it must be proved (1) that both the plaintiffs and defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors."⁵²

A solar covenant imposed in a scheme of development which satisfies these requirements could automatically be enforced by any purchasers of any of the blocks of land in the scheme or their successors-in-title.

Special problems may affect the enforceability of solar covenants taken in respect of schemes of development of land under the Torrens system, as there is some doubt whether the laws concerning schemes of development are recognized in respect of Torrens land.⁵³ The basic difficulty is that as the requirements of a scheme of development outlined in *Elliston v Reacher* do not include the need for the instrument creating the covenant to expressly identify all the lands intended to be benefited by the scheme, a prospective purchaser of title may have to undertake enquiries beyond a search of the Register to discover whether a scheme of development in accordance with the requirements in *Elliston v Reacher* exists and to ascertain which lands are to be benefited by the covenant.

The doubt as to the enforceability of restrictive covenants created in respect of schemes of development under Torrens land arises from the Victorian case of *Re Dennerstein*.⁵⁴ In this case, Hudson J concluded that the notification of a restrictive covenant on the certificate of title would not be effective to bind a transferee of the burdened land "unless not only the existence of the scheme and the nature of the restrictions imposed thereunder, but the lands affected by the scheme (both as to the benefit and burden of the restrictions) are indicated in the notifications

50 Sometimes referred to as the doctrine of building schemes.

51 The doctrine is explained in Bradbrook and Neave, *supra* n 26, paras 1367ff.

52 [1908] 2 Ch 374, 384-385. This dictum has been cited with approval in many Australian cases: see, eg, *Cobbold v Abraham* [1933] VLR 385, 391; *Langdale Pty Ltd v Sollas* [1959] VR 634, 641; *Christie v Dalco Holdings Pty Ltd* [1964] Tas SR 34, 49.

53 The applicability of the doctrine of the scheme of development to Torrens land is discussed in Bradbrook and Neave, *supra* n 26, paras 1737ff.

54 [1963] VR 688.

either directly or by reference to some instrument or other document to which a person searching the register has access.”⁵⁵ Thus, the scheme of development doctrine is recognized as valid provided that a purchaser searching the title of the burdened land could readily discover the existence of the scheme, either from the notification on the certificate of title or from some other document (for example, a transfer) to which the notification directly refers. This will only occur if the covenant has been expressly annexed to the land.

It is submitted that the law is similar in the other States where the Torrens legislation permits the notification of a restrictive covenant on the certificate of title (ie New South Wales, Tasmania and Western Australia). *Re Dennerstein* was followed in Tasmania by Neasey J in *Re Cashmore's Application*.⁵⁶ In New South Wales and Tasmania, the legislation discussed earlier requiring both the burdened and the benefited land to be clearly identified in the instrument creating the covenant applies to schemes of development and appears to produce the same result as the decision in *Re Dennerstein*. There are no relevant statutory or case law authorities in Western Australia, but there appears to be no reason why *Re Dennerstein* should not also apply in that State. As already noted,⁵⁷ in Queensland and South Australia it is doubtful whether restrictive covenants can be entered on the certificate of title of the burdened land. In these States, the only certain method of enforcing a covenant arising under a scheme of development against a successor-in-title of the covenantor is by use of a caveat.

Based on the above discussion of the present law, in the solar context the clear onus is on the land developer seeking to attract solar users to a scheme of development by imposing a solar covenant to ensure that the instrument creating the covenant clearly identifies all the lands to be benefited in the scheme of development.

3 Restrictive Covenants Impeding The Use Of Solar Appliances

(A) *The nature of the problem*

Although restrictive covenants have the potential to provide some protection for solar users, in other respects they also have the potential to impede the practical application of solar appliances.

While restrictive covenants may directly preclude solar energy devices, perhaps the largest hurdle to be faced by the solar user is the restrictive covenant which although not aimed directly at solar devices has the effect of excluding any such installations which are visible to neighbours.⁵⁸ Many illustrations of this can be given from every-day practice in Australia. For example, covenants which preclude “appliances and installation on roofs”, “extensions to existing buildings” or “exterior change or addition” make it difficult if not impossible for the covenantor to install a solar appliance. The following two covenants commonly found in land transfer throughout Australia are further illustrations:

⁵⁵ Ibid 696.

⁵⁶ [1967] Tas SR 217.

⁵⁷ See supra nn 43-49 and accompanying text.

⁵⁸ See Wiley, supra n 12 at 283.

"No dwelling or dwellings or extension to such dwelling or dwellings may be erected on any allotment or any part of any allotment unless the roof or roofs of such dwelling or dwellings are constructed exclusively of tiles".

"No tree or trees shall be removed from any allotment unless such tree or trees shall be less than 18 inches in girth at waist height or unless the removal of such tree or trees shall be necessary for the safe and proper construction of any building or any drainage or services related thereto or for the safe and proper construction of any roads or paths or any drainage or services relating thereto".

Covenants which impose height requirements and/or set-back requirements from the front boundary line may also interfere with the most efficient placement of solar collectors.

(B) *Basic policy conflicts*

It is the decision whether, on the one hand, to enforce these forms of restrictive covenant where they act to the detriment of solar energy applications, or, on the other hand, to restrict, modify or extinguish such covenants in these circumstances that introduces the basic conflicts inherent in the development of solar energy and the enforcement of private land use controls.

A number of arguments can be advanced in favour of restricting, modifying or discharging covenants which inhibit the installation of solar appliances. The major public policy argument is that the use of solar energy can assist in the conservation of fossil fuels and in the long term can make a significant contribution to the nation's total power generation. This will clearly not occur, however, if legal impediments exist. Further advantages to the community from maximizing the number of solar appliances are the reduction in the cost of living and the lowering of pollution levels resulting from conventional sources of energy production. The desirability of promoting self-sufficiency of energy sources, which is assisted by the use of solar energy, is also a goal of a large segment of the community. A final argument is that the covenants cited above which impede the application of solar appliances are invariably not specifically aimed at preventing the installation of solar collectors and only incidentally have this effect. In many instances the covenants were imposed many years before the practical application of solar appliances became a viable option for the average landowner.⁵⁹

Several conflicting policy arguments exist, however. The refusal by the courts to enforce covenants which impede the installation of solar appliances can be said to interfere with the traditional right of landowners to make their own agreements as to the use of their land; in other words, it amounts to an abrogation of the principle of freedom of contract. A more practical objection is the alleged aesthetic injury to the immediate neighbourhood caused by the unattractive appearance of many solar collector panels and the need to install them in prominent positions on roof tops. This injury arguably cannot be justified by the notion of benefit to the community at large of the use of solar energy. Further, as one of the side-effects of minimizing the shading of solar collectors is the need for low-density building development, the wide-scale protection of solar devices has a considerable impact on land use planning and in

⁵⁹ Note, however, the decision in *La Vielle v Seay* (1966) 412 SW 2d 587, where the Kentucky Court of Appeals held that the question whether radio or television towers were known at the time of the creation of a restrictive covenant requiring approval by a Subdivision Committee of all new "structures" was irrelevant.

many instances arguably acts contrary to the community interest in developing towns and cities. Finally, there is the potential for conflict amongst the environmental movement as the use of solar appliances involves the strict control or even destruction of trees. This is in conflict with the environmental goals of a large segment of the community and with commonly found covenants prohibiting the removal of trees.

The question whether existing covenants impeding the practical application of solar appliances should be restricted, modified or discharged is a subjective issue and must ultimately be resolved either by the judiciary by the case law process or (more likely) by the legislature. If the judiciary refuses to recognize the special problems of access to sunlight for solar appliances and refuses to adjust the existing law relating to the enforcement of covenants which incidentally impede solar use, any action to encourage the installation of solar appliances must be taken by the legislature. However, if the judiciary is sympathetic to the development of solar energy, there exist a number of avenues whereby it could circumvent the effect of present covenants which impede solar appliances.

(C) *Circumventing legal impediments to the installation of solar appliances*

(a) *Statutory modification or discharge of existing covenants*

The most obvious avenue open to a court wishing to restrict, modify or discharge a restrictive covenant impeding the use of solar appliances is to invoke the present statutory law relating to the modification and discharge of covenants. This statute law exists throughout Australia (except for South Australia) and gives the Supreme Court of each State the jurisdiction to modify or discharge restrictive covenants.⁶⁰ This State legislation will now be examined to see if its wording is sufficiently broad to justify a court modifying or discharging a covenant in order to further the use of solar appliances.

New South Wales, Victoria and Western Australia

The relevant legislation in New South Wales, Victoria and Western Australia⁶¹ is worded similarly. For example, the Property Law Act 1958 (Vic) s 84(1) reads in part:

"The Court shall have power from time to time on the application of any person interested in any land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) upon being satisfied --

- (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Court deems material the restriction ought to be deemed obsolete or that the continued

60 Conveyancing Act 1919 (NSW) s 89; Property Law Act 1958 (Vic) s 84; Transfer of Land Act 1893-1978 (WA) s 129C; Property Law Act 1974-1978 (Qld) s 181; Conveyancing and Law of Property Act 1884 (Tas) Pt XVA. An alternative procedure exists under the Land Titles Act 1980 (Tas) s 106(2) whereby the Recorder of Titles may cancel a recording of a restrictive covenant in the register if it indicates the existence of a covenant or covenants which do not run with the land.

61 In Western Australia, the Court's power to modify or discharge covenants is restricted to Torrens land (Transfer of Land Act 1893-1978 s 129C(1)).

existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user; or

...

- (c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction".

An examination of each of these various grounds for the modification or discharge of covenants shows that none appears to provide any certain assistance for solar users.

(i) "*Change in the character of the property*"⁶²

It is difficult to envisage any arguments which might be relevant here to the solar user.

(ii) "*Change in the character of the neighbourhood*"⁶³

In light of the earlier discussion on policy issues, it is highly doubtful whether arguments as to the problem of energy supply in Australia and the desirability of encouraging renewable alternative sources of energy will be persuasive to the Court. This is particularly true when the beneficiary of an existing restrictive covenant impeding the installation of solar appliances argues that no change in the surrounding neighbourhood has taken place and that the original purposes of the restriction remain valid.

(iii) "*Or other circumstances of the case which the Court deems material*"⁶⁴

Under this ground it is technically possible for the solar user to advance arguments based on public policy, as discussed later. However, in light of the fact that the Courts in other contexts have indicated their reluctance to declare contracts void based on public policy arguments, this clause is unlikely to be of use to the solar user. It might even be argued that by failing to refer specifically to public policy, the legislature intended the "other circumstances of the case" to refer to the individual circumstances of the litigants rather than introduce arguments based on public policy. If this narrow argument is adopted, the clause will be of no assistance to the solar user.

(iv) "*The restriction ought to be deemed obsolete*"⁶⁵

In relation to all the various forms of covenant discussed earlier which conflict with the installation of solar appliances, as the party supporting the continued validity of the restrictive covenant would validly argue that it was still capable of fulfilment, the Courts would be most reluctant to find such a restriction obsolete, despite the fact that the restriction might impede the development of solar energy.

62 See *Re Greaves' Application* (1965) 17 P & CR 57 for an example of the application of this clause. Cf *Re W Findlay & Co Ltd's Application* (1963) 15 P & CR 94.

63 See *Re Markin* [1966] VR 494 and *Re Davis' Application* (1950) 7 P & CR 1 for examples of the application of this clause.

64 The meaning of this clause was explained in *Perth Construction Pty Ltd v Mount Lawley Pty Ltd* (1955) 57 WALR 41; *Re R K Roseblade and V M Roseblade and the Conveyancing Act* [1964-1965] NSW 2044; and *Re Associated Property Owners Ltd's Application* (1956) 16 P & CR 89.

65 This clause was applied and explained in *Re Truman, Hanbury, Buxton and Co Ltd's Application* [1956] 1 QB 261; *Re Mason and the Conveyancing Act* (1961) 78 WN (NSW) 925; and *Re Robinson* [1972] VR 278.

(v) "Or that the continued existence thereof would impede the reasonable user⁶⁶ of the land without securing practical benefits⁶⁷ to other persons or (as the case may be) would unless modified so impede such user"

While the solar user would argue that he is impeded by the restriction it would seem to be impossible for him to argue that the restriction also fails to secure practical benefits for other persons. Under the wording of the section the public benefit argument would appear to be unacceptable. This question of "practical benefits" is looked at subjectively and the reported cases suggest that an expression by those benefiting from an existing covenant that the construction of solar collector panels in rooftops would destroy the character of the area would be likely to convince the Court that the covenant should remain in effect.⁶⁸

The case law interpreting this legislation shows that the Courts have adopted an extremely conservative attitude to applications to modify or discharge a restrictive covenant.⁶⁹ This in itself reflects the tenor of the legislation, which limits the jurisdiction of the Court to modify or discharge covenants to those cases where the grounds outlined in the legislation are satisfied. Thus, the Courts give precedence to the protection of private rights conferred by existing restrictive covenants and there is little scope for a consideration of the existence of a wider public interest to be served.

In conclusion, in light of the current judicial attitude and the wording of the statutory grounds for modification or discharge of existing covenants, it is extremely doubtful whether the present legislation in New

66 "Reasonable user" was applied and explained in *Re Ghey and Galton's Application* [1957] 2 QB 650; *Heaton v Loblay* (1960) 60 SR (NSW) 332; and *Re Miscamble's Application* [1966] VR 596.

67 See *Re Callanan and the Conveyancing Act* [1970] 2 NSWLR 127; *Re Parimax (SA) Pty Ltd* (1954) 72 WN (NSW) 386; *Re Collett's Application* (1963) 15 P & CR 106; and *Re Munday's Application* (1954) 7 P & CR 130 for a discussion of the meaning of "practical benefits."

68 See especially *Re Chamberlain and the Conveyancing Act* (1969) 90 WN (NSW) (Pt 1) 585.

69 See, eg, the following dictum of Farwell J in *Re Henderson's Conveyance* [1940] Ch 835, 846:

"I do not view this section of the Act as designed to enable a person to expropriate the private rights of another purely for his own profit. I am not suggesting that there may not be cases where it would be right to remove or modify a restriction against the will of the person who has the benefit of that restriction, either with or without compensation, in a case where it seems necessary to do so because it prevents in some way the proper development of the neighbouring property, or for some such reason of that kind; but in my judgment this section of the Act was not designed, at any rate prima facie, to enable one owner to get a benefit by being freed from the restrictions imposed upon his property in favour of a neighbouring owner, merely because, in the view of the person who desired the restriction to go, it would make his property more enjoyable or more convenient for his own private purposes. I do not think the section was designed with a view to benefiting one private individual at the expense of another private individual. At any rate, primarily, that was not in my judgment, the object of this section. If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it, or by reason of a change in the character of the property or the neighbourhood, the restriction is one which is no longer to be enforceable or has become of no value."

This dictum was cited with approval by Romer LJ in *Re Truman, Hanbury, Buxton & Co Ltd's Application* [1956] 1 QB 261, 270, and by Lord Evershed MR in *Re Ghey and Galton's Application* [1957] 2 QB 650, 659.

South Wales, Victoria and Western Australia will prove to be of any assistance to the solar user faced with a conflicting restrictive covenant. This conclusion is reinforced by the fact that there are few cases in any of these three States where a covenant has been entirely discharged pursuant to this legislation. Further, it is doubtful whether the Court when exercising its jurisdiction to modify a covenant has the power to impose conditions.⁷⁰ If the Court had this power it could, for example, modify a covenant restricting the construction of a roof to tiles by allowing the construction of solar collector panels in the roof but requiring the panels to be suitably camouflaged. The availability of a compromise remedy of this nature might encourage the Court to be less conservative in its application of the relevant legislation for the ultimate benefit of the solar user. However, the lack of an express power to impose conditions further reinforces the conclusion that the legislation does not assist a solar user.

Queensland and Tasmania

The relevant legislation in Queensland and Tasmania is more extensive than its counterpart in the other States. In addition to the grounds specified in the Property Law Act 1958 (Vic) s 84(1), Queensland and Tasmania have included a provision permitting the Court to modify or discharge a covenant even where this may cause financial loss to the person entitled to the benefit of the covenant. The provision also gives the Court the power to override private rights in the public interest. The Conveyancing and Law of Property Act 1884 (Tas) s 84C(1)(c) permits the court to modify or discharge a covenant if it is satisfied "that the continued existence of the [covenant] would impede some reasonable user of the land for public or private purposes, ... or, as the case may be, would, unless modified, so impede such a user". This right is qualified by s 84C(6), which reads:

"An overriding interest shall not be extinguished or modified under this section on the grounds referred to in subsection (1)(c) unless the tribunal is satisfied that the interest, in impeding the user of land, either —

- (a) does not secure to persons entitled to the benefit of the interest any practical benefits of substantial value or advantage to them; or
- (b) is contrary to the public interest,

and that money will be an adequate compensation for the loss or disadvantage (if any) that any such person will suffer from the extinguishment or modification."⁷¹

The Queensland and Tasmanian legislation follows the form of the amendments introduced by the Law of Property Act 1969 (UK), which were designed to make the modification or discharge of covenants more readily obtainable. An examination of this legislation shows that it is potentially of more use to the solar user than its counterpart in New South Wales, Victoria and Western Australia.

(i) *"The continued existence of the covenant would impede some reasonable user of the land for public or private purposes"*

Unlike the Victorian, New South Wales and Western Australian legislation, which states that modification or discharge of a covenant can

70 See the discussion of this issue in Bradbrook and Neave, *supra* n 26 para 1940. Conditions were imposed on the modification of a covenant in *Re R K Roseblade and V M Roseblade and the Conveyancing Act* [1964-1965] NSWLR 2044.

71 The relevant Queensland legislation is the Property Law Act 1974-1978, s 181(1).

only occur if it is proved that "reasonable user" of the land has been impeded, the Queensland and Tasmanian legislation merely requires that "some reasonable user" be impeded. This difference in wording is significant. Consider the example of a covenant which requires that a roof be constructed solely of tiles. In Queensland and Tasmania a prospective solar user could claim that *some* reasonable user is impeded as the covenant prevents the erection of solar collector panels. On the other hand, under the Victorian, New South Wales and Western Australian form of legislation an argument of this nature by a prospective solar user would fail as the covenant could not be said to prevent the land being reasonably used for some purposes (for example, occupation as a residence) although the covenant prevents the land being used for other purposes (ie as a solar-heated residence).

Thus, in the solar context, it should be comparatively simple for a solar user to substantiate his claim that his need for access to direct sunlight constitutes "some reasonable user" which is impeded by one or more restrictive covenants. Although the solar user must also show that this user is "for public or private purposes", this requirement does not appear to add anything to the meaning of the legislation and should not be a difficulty.

(ii) *"In impeding the user of the land ... does not secure to persons entitled to the benefit of the interest any practical benefits of substantial value or advantage to them"*⁷²

Unlike the Victorian, New South Wales and Western Australian provision, which merely refers to the "practical benefits" and prevents the Court from modifying or discharging a covenant which bestows any type of benefit, however small, on the covenantee, the Queensland and Tasmanian provision allows the Court to modify or discharge a covenant if the practical benefits to the covenantee are not "of substantial value or advantage". Although "practical benefits" has been held not to be limited to a financial benefit and allows the Court to take account of the subjective personal preferences of the covenantee;⁷³ the additional words "of substantial value or advantage" to a limited extent assist the solar user in arguing his case for a modification or discharge of an existing conflicting covenant and increase the circumstances under which the Court can validly modify or discharge such a covenant.

(iii) *"Is contrary to the public interest"*

This clause has not been interpreted by any reported decision in Queensland and Tasmania. To satisfy the clause it is not sufficient to show that the use of solar appliances is in the public interest; rather, it must be shown that the existing conflicting covenant is contrary to the public interest.⁷⁴ This requirement renders the clause useless in most cases for the solar user as the majority of commonly found conflicting covenants cannot realistically be said to offend the public interest. In many cases the reverse is true; for example, environmentalists would argue that a covenant not to remove a tree exceeding eighteen inches in girth is strongly in the public interest.

⁷² The Property Law Act 1974-1978 (Qld) s 181(1)(b)(i) refers to "practical benefits of substantial value, utility, or advantage."

⁷³ See, eg, *Re Robinson* [1972] VR 278, 283-284 per Adam J.

⁷⁴ See *Re Brierfield's Application* (1978) 35 P & CR 124.

(b) *Public policy*

As the statutory grounds for modification and discharge of conflicting covenants appear to be of only limited use to a solar user, consideration should be given to the extent to which the common law doctrine voiding contracts contrary to public policy are relevant in this context.⁷⁵ This doctrine justifies the Court in striking down any agreement which is against the public interest. The argument put by the solar user would be that there is a public policy in favour of promoting reliance on renewable energy resources and that any restrictive covenant which impedes the installation of solar appliances should be declared void.

The existence of the public policy doctrine is not new to English or Australian law, and has been said to be "supported by decisions in every branch of the law".⁷⁶ As stated by Symmons, "the effect of this doctrine has been the beneficial one of forcing the courts to examine interests that may be affected by their decision beyond that of the actual litigating parties; that is to say the interests of society as a whole".⁷⁷

The judiciary has expressed their understanding of what constitutes this public policy doctrine in a number of ways. For example, Isaacs J stated in *Wilkinson v Osborne*:⁷⁸

"In my opinion, the 'public policy' which a Court is entitled to apply as a test of validity to a contract is in relation to some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life and which the Courts ... can therefore recognize and enforce."⁷⁹

The major difficulty with the argument of public policy made by a solar user is that the judiciary has been reluctant in modern times to extend the doctrine. The most recent illustration of this is the refusal by the English Court of Appeal to accept that the implied easement of necessity is based on public policy.⁸⁰ Public policy has been judicially described as "an unsafe and treacherous ground for legal decision",⁸¹ and as a "vague and unsatisfactory term" leading to the "greatest uncertainty and confusion."⁸² There appears to be two reasons for this. First, a declaration that a contract is void as contrary to public policy conflicts with the principle of freedom of contract.⁸³ Secondly, the Courts generally believe that the determination of public policy is a matter for the legislature. As stated by Cave J in *In re Mirams*:⁸⁴

75 This doctrine is explained in Cheshire and Fifoot, *The Law of Contract* (4th Aust edn 1981, Butterworths, Sydney) ch 14; Treitel, *The Law of Contract* (Stevens, London, 1979) ch 11.

76 *Egerton v Brownlow* (1853) 4 HL Cas 1, 144; 10 ER 359, 417 per Pollock, CB.

77 Symmons, "The Function and Effect of Public Policy in Contemporary Law" (1977) 51 ALJ 185, 185.

78 (1915) 21 CLR 89, 97.

79 Lord Haldane stated in *Rodriguez v Speyer Brothers* [1919] AC 59, 79:

"I think there are many things of which the judges are bound to take judicial notice which lie outside the law properly so called and among those things are what is called public policy and the changes that take place in it. The law itself may become modified by this obligation of the judges."

80 See *Nickerson v Barraclough* [1981] Ch 426.

81 *Janson v Driefontein Consolidated Mines* [1902] AC 484, 500 per Lord Davey.

82 *Egerton v Brownlow* (1853) 4 HL Cas 1, 123; 10 ER 359, 408-409 per Parke B. See also *Fender v St John-Mildmay* [1938] AC 1, 10-11 per Lord Atkin.

83 *Fender v St John-Mildmay* [1938] AC 1, 11 per Lord Atkin.

84 [1891] 1 QB 594, 595.

"It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactment. It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing Courts, from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community."

To date, there has been no reported case in Australia where a solar user has argued that a conflicting restrictive covenant should be declared void on the ground that it is contrary to the public policy of encouraging the development of solar energy. In the United States, arguments of this nature have been made but have failed in the absence of a legislative declaration of public policy. In *Kraye v Old Orchard Association*⁸⁵ a prospective solar user advanced an argument based on public policy to persuade the Superior Court of California to overturn a covenant which prohibited the placing on roof tops of any installations or appliances which are visible from neighbouring properties or adjacent streets. This argument was ultimately successful, but only on the basis of State legislation enacted while the case was in progress which barred the enforcement of a covenant which would effectively impede the use of solar energy. Prior to the introduction of the legislation, the judge had delivered an oral statement indicating that he was unwilling to find that there was a public policy in favour of solar energy development. In *Nicholas v Gurtler*,⁸⁶ the Arizona Superior Court considered a challenge by a prospective solar user against a restrictive covenant prohibiting a structure of any type from unreasonably obstructing the view from other lots in the subdivision. Under the covenant plans of existing houses could not be varied without the approval of a Sub-Divisions Review Board. The defendant argued that this covenant should not be applied in respect of solar collector panels as a matter of public policy. The Court rejected this argument and prevented the defendant from varying the plans of his home to include solar collector panels without the approval of the Sub-Divisions Review Board.

The various authorities discussed above make it clear that in the absence of legislation declaring that solar energy research and development is in the public interest the likelihood of a Court striking down a restrictive covenant inhibiting the application of solar collector panels is remote. The fact that the Commonwealth and State governments all actively encourage solar energy research, development and demonstration and that various government agencies such as the Victorian Solar Energy Council⁸⁷ have been established in order to foster the advancement of non-renewable energy resources is unlikely to be sufficient evidence of public policy to overcome judicial conservatism in this area. The probable attitude of the Australian Courts is that in the absence of legislation any government policy in favour of solar energy is not sufficiently intense or enduring to justify overriding privately negotiated covenants.

85 No C-209453 (13 Sept 1978); (1979) 1 Solar Law Reporter 503.

86 No C-384239; (1979) 1 Solar Law Reporter 251.

87 Established under the Victorian Solar Energy Council Act 1980 (Vic). See also the Solar Energy Research Act 1977 (WA), which established the Solar Energy Research Institute of Western Australia.

(c) *The construction of covenants*⁸⁸

A further possible method of overcoming a covenant which impedes the installation of solar collector panels in roofs is to use the common law rules of construction of documents. If a covenant expressly prohibits the installation of solar collectors, arguments based on construction will be fruitless. However, this is seldom (if ever) the case. As already discussed, the basic problem is covenants which are not directly aimed at solar devices but which have the effect of excluding such installations. It is against covenants of this nature that construction arguments may be useful.

The rules of construction of restrictive covenants are the same as those regulating the construction of legal documents generally. The rules relevant in the solar context are as follows:

(i) The object of interpretation is to discover the intention of the parties as expressed in the document.⁸⁹ To achieve this aim, the surrounding circumstances will be considered,⁹⁰ but no direct evidence as to the actual intention of the parties may be given.

(ii) Unless it appears from the document read as a whole that the words of a covenant should not be given their ordinary meaning, the ordinary meaning will prevail over any technical or legal meaning.⁹¹

(iii) As a last resort, where the wording of a covenant is ambiguous, the covenant will be construed against the covenantor in favour of the covenantee.⁹²

Especially in light of the first rule, the solar user should examine the wording of any conflicting covenant closely, as he may take advantage of any ambiguity by showing that it was not the intention of the original covenantor and covenantee to prevent the installation of solar devices. Thus, for example, if the covenant states that the roof construction shall be *substantially* of tiles, this would probably be held not to be infringed by the installation of solar collector panels in the roof. Similarly, if the covenant prohibits "any exterior addition" to the premises, the solar user could argue that collector panels are not an addition to the roof but are in fact a substitution for part of the tiled surface.

More imaginative arguments have been advanced by other commentators. For example, it has been suggested that a covenant to prevent the placing of installations or appliances on roofs should be interpreted as applying only to apparatus which could be placed elsewhere, such as air-conditioners, television and radio antennae.⁹³ As technological development has not progressed sufficiently to enable solar collector panels to be placed economically anywhere other than on rooftops, the argument runs that to include solar devices within this covenant

88 See generally Bradbrook and Neave, *supra* n 26, ch 15.

89 *Grey v Pearson* (1857) 6 HL Cas 61, 106; 10 ER 1216, 1234 per Lord Wensleydale.

90 See, eg, *Downie v Lockwood* [1965] VR 257; *Tophams Ltd v Earl of Sefton* [1967] 1 AC 50, 63 per Lord Hodson.

91 *Ex parte High Standard Constructions Ltd* (1928) 29 SR (NSW) 274, 278 per Harvey CJ in Eq.

92 See, for example, *Webb v Plummer* (1819) 2 B & Ad 746, 751; 106 ER 537, 539; *New South Wales Sports Club Ltd v Solomon* (1914) 14 SR (NSW) 340.

93 Comment, "Solar Energy and Restrictive Covenants: The Conflict between Public Policy and Private Zoning" (1979) 67 California L Rev 350, 361.

would significantly extend its scope and would increase the burden of the covenant to a degree which could not have reasonably been intended by the parties. It has also been argued that as the Courts in construing a covenant are looking to its purpose and to the degree that that purpose would be achieved by their insisting upon its enforcement,⁹⁴ to enforce a conflicting covenant against a solar appliance would entail higher prevention and administrative costs than the corresponding reduction in nuisance costs, a result that could not have been intended by the parties.

It is submitted that arguments of construction are only of limited use to the solar user. In light of the conservative approach of the Courts in construing covenants, it is unlikely that the imaginative arguments discussed in the preceding paragraph would succeed.

(d) *The damages alternative*⁹⁵

It follows from the discussion above that the majority of restrictive covenants which impede the installation of solar collector panels will not be modified or discharged by any existing principle of common law or by the present State legislation.

As the injunction is the usual remedy for a breach of covenant, any solar user who ignores a conflicting covenant and installs roof-top solar collector panels may well be required by law to remove them. However, in these circumstances the court has a discretion to grant damages in lieu of an injunction as the award of an injunction is not automatic. This discretion is based on State legislation.⁹⁶ In Australia, the Courts exercise their power to award damages in lieu of an injunction conservatively, given the degree of discretion available to them.⁹⁷ The Court has regard to a number of factors in deciding whether an award of damages should be substituted for an injunction. According to A L Smith LJ in *Shelfer v City of London Electric Lighting Co*⁹⁸ it is a "good working rule" that:⁹⁹

- "(1) If the injury to the plaintiff's legal rights is small,
 - (2) And is one which is capable of being estimated in money,
 - (3) And is one which can be adequately compensated by a small money payment,
 - (4) And the case is one in which it would be appropriate to the defendant to grant an injunction:—
- then damages in substitution of an injunction may be given."¹⁰⁰

94 See Ellickson, "Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls" (1973) 40 U Chicago L Rev 681.

95 See generally Bradbrook and Neave, *supra* n 26, paras 1874ff; Meagher, Gummow and Lehane, *Equity - Doctrine and Remedies* (Butterworths, Sydney, 1975) paras 2305ff.

96 Supreme Court Act 1958 (Vic) s 62(3); Supreme Court Act 1970 (NSW) s 68; Supreme Court Act 1935-1978 (WA) s 25(10); Supreme Court Civil Procedure Act 1932 (Tas) s 11(13); Supreme Court Act 1935-1978 (SA) s 30. In Queensland the substance of the Equity Act of 1867, s 62 appears to have survived despite the repeal of that section: see *Conroy v Lowndes* [1958] Qd R 375, 383.

97 The normal remedy remains an injunction (*Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, 861 per Viscount Finlay).

98 [1895] 1 Ch 287, 322ff.

99 This dictum has been cited with approval in many cases. See, eg, *Carpet Import Co Ltd v Beath & Co Ltd* (1927) 46 NZLR 37, 65; *Kelsen v Imperial Tobacco Co Ltd* [1957] 2 QB 334; *Owen v O'Connor* [1964] NSWLR 1312, 1335.

100 In contrast, in the United States damages are awarded more frequently, as injunctions are granted only upon a finding that the resulting benefits outweigh the consequential burden: see eg *Virginia Railway v System Federation No 40* (1937) 300 US 595.

Thus, it is clearly possible for a Court to exercise its discretion and substitute an award of damages for the grant of an injunction to enforce compliance with a covenant prohibiting the installation of solar appliances. For the solar user this would be a satisfactory result as in many cases the damages awarded for breach of a conflicting covenant would be minor in relation to the long-term savings which would flow from the utilization of solar appliances. In this situation the solar user would be able to continue to use his solar appliance.¹⁰¹

Unfortunately, the award of damages is unlikely to emerge as a viable solution for a solar user faced with a conflicting restrictive covenant. A number of problems exist. Given the conservatism of the Australian Courts in exercising their discretion to award damages, it is unlikely that the Courts will consider the benefit to the community resulting from the widespread use of solar appliances. More particularly, the factors which the Court will consider in its decision whether to substitute damages for an injunction are not readily adaptable to the solar energy situation. The assessment of the degree of injury to the covenantee and the damages suffered by him are not easily resolved. In assessing in money terms the extent to which the aesthetic value of the neighbouring property will be impaired by the installation of solar collectors, the Court may have regard to the probable decrease in market value of the property. This, however, may not reflect any "suffering" caused by the neighbour. In fact, the property values may increase as a result of the introduction of solar energy use in the neighbourhood where there is guaranteed access to sunlight, particularly in light of the increased awareness in modern times of the advantages of solar energy systems and savings in the cost of fuel.

In the present context, perhaps the most unsatisfactory feature of the damages alternative is the fact that the solar user will be unable to discover in advance the amount of the damages for which he may be liable if he erects solar collector panels in violation of a conflicting covenant. The indeterminate cost will doubtless be a sufficient deterrent for many potential solar users.¹⁰²

4 Legislative Reform

If the development of solar energy is to be encouraged, it is clear from the preceding discussion that many of the laws relating to restrictive covenants need amendment. Some of the existing impediments to the solar user could be removed without legislation by judicial fiat through the common law case-law process. For example, the development of solar energy could be recognized as part of the State's public policy, and the Courts could exercise their discretion liberally in relation to solar energy when construing the scope of conflicting covenants and when determining whether to award damages in lieu of an injunction. In light of the past record of the Courts, however, it is unrealistic to expect

101 The award of damages in these circumstances has been described by an American commentator as a bargain forced on the parties by the Court, the measure of damages being the "contract price": see Comment, "Solar Energy and Restrictive Covenants: The Conflict between Public Policy and Private Zoning" (1979) 67 California L Rev 350, 361.

102 It has been suggested in the United States that the various legislatures should clarify the power of the Courts to award damages for breach of covenant in an attempt to encourage the installation of solar appliances: see Wiley, *supra* n 12 at 299.

much significant change in these areas. Even if changes to the common law are made by the judiciary, the majority of the problems discussed throughout this article could only be resolved by the enactment of new State legislation. Possible forms of legislation will now be examined in detail.

In some States of the United States, legislation designed to ensure that solar covenants will be recognized as legally valid has been introduced. For example, a recent enactment in Iowa states:

"City councils, city and country zoning commissions and boards of adjustment may include in ordinances relating to subdivisions a provision requiring deeds for property located in new subdivisions to contain restrictive covenants that guarantee reasonable access to solar energy for a solar energy system to and across neighbouring properties."¹⁰³

It is submitted that legislation of this nature is unnecessary in Australia as new types of covenant do not have to be sanctioned by legislation before becoming legally effective. Provided that the solar covenant is drafted clearly and avoids the problems associated with the rules of construction discussed earlier,¹⁰⁴ it will be legally enforceable at common law in the absence of legislation expressly authorizing solar covenants. Unlike in the United States, it has never been the practice in Australia for the State legislatures to expressly authorize the creation of new types of covenants. It has never been suggested that the class of possible covenants is closed.

The enforcement of a solar covenant lies within the discretion of the person or persons entitled to the benefit of the covenant. Through their delay or failure to enforce the covenant, the guaranteed access of sunlight to the solar collector may be lost for all future owners of the benefited land.¹⁰⁵ To remedy this problem, the Texas legislature has enacted legislation which allows a municipality to enforce restrictive covenants in all cases where a private individual might also have brought that action. This legislation was not introduced in order to further the development of solar appliances, but is clearly of relevance in this context. Article 974a-1 the Texas Revised Civil Statute (Supp 1965) states in part:

"1. This Act applies to incorporated cities, towns, and villages in countries having a population of more than 1,000,000 according to the last preceding or any future federal census if the incorporated city, town, or village does not have zoning ordinances.

2. (a) An incorporated city, town, or village may sue in any court of competent jurisdiction to enjoin or abate violation of a restriction contained or incorporated by reference in a duly recorded plan, plat, replat, or other instrument affecting a subdivision inside its boundaries.

(b) As used in this Act, "restriction" means a limitation which affects the use to which real property may be put, fixes the distance buildings or structures must be set back from property lines, street lines, or lot lines, or affects the size of a lot or the size, type, and number of buildings or structures which may be built on the property."

This legislation is designed as a form of planning control as its operation is limited to cities which do not possess zoning ordinances.

103 SF 344 of 1979.

104 See supra n 25 and accompanying text.

105 See Bradbrook and Neave, supra n 26, paras 1889ff for a discussion of the circumstances disentitling the beneficiary of a covenant to relief.

Unfortunately, there is no guarantee that the enforcement of the legislation will be in the public interest. In this respect, two major criticisms of the legislation can be made.¹⁰⁶ First, political pressure may be applied on municipalities to enforce covenants which are not in the interests of the community in light of changed conditions occurring since the drafting of the covenant. Thus, under this type of legislation the issue of which covenants the municipality should enforce in the exercise of its discretion is likely to be extremely controversial. Secondly, and most significantly from the standpoint of solar development, the enforcement of restrictive covenants by the municipality does not take place in accordance with any overall plan. Without any uniform set of requirements as to the circumstances in which a municipality should exercise its power to enforce a covenant, the personal preferences of various officers of each municipality may influence the decision whether or not to enforce a restrictive covenant in a given area. In light of these criticisms, it is suggested that no further consideration should be given to the public enforcement of restrictive covenants.

It is submitted that State governments in Australia and their advisers should restrict their research into possible types of reform to a consideration of various methods of circumventing the application of covenants which impede the installation of solar appliances. This aim may be achieved in three different ways.

First, in order to break down the traditional reluctance of the judiciary to declare contracts void as contrary to public policy, the various State governments could enact a legislative declaration that it is in the public interest that solar energy appliances should be encouraged. An illustration of this is s 801.5 of the Californian Civil Code, which states in part:

"(2) The Legislature hereby finds and declares that:

(a) Solar energy is a renewable, nonpolluting energy source.

(b) The use of solar energy systems will reduce the state's dependence on nonrenewable fossil fuels, supplement existing energy sources, and decrease the air and water pollution which results from the use of conventional energy sources. It is, therefore, the policy of the state to encourage the use of solar energy systems. In order to insure uniform application of this policy in all parts of California, the provisions of this act shall be applicable to charter cities.

(c) The purpose of this act is to promote and encourage the widespread use of solar energy systems and to protect and facilitate adequate access to the sunlight which is necessary to operate solar energy systems."

Secondly, legislation could declare void and unenforceable covenants which impede or expressly prohibit the installation of solar devices. For example, identical legislation in Arizona and California states:

"Any covenant, restriction or addition contained in any deed, contract, security, instrument or other instrument affecting the transfer or sale of or any interest in, real property, which effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable."¹⁰⁷

The Californian provision goes on to exempt "reasonable restrictions" on the installation or use of a solar energy system. The phrase "reasonable

106 See Comment, "Municipal Enforcement of Private Restrictive Covenants: An Innovation in Land Use Control" (1966) 44 Texas L Rev 741, 763ff.

107 Arizona Laws of 1979, ch 39; California Civil Code s 714.

restrictions" is defined as "restrictions which do not significantly increase the cost of the system or significantly decrease its efficiency or which allow for an alternative system of comparable cost and efficiency".

Similar though not identical legislation exists in Colorado and Maryland.¹⁰⁸ Like the Arizona and Californian legislation, the Colorado Act voids "unreasonable" covenants which "effectively prohibit or restrict" solar appliances. The legislation also exempts "reasonable restrictions" and those "which do not significantly increase the cost of a [solar] device". However, unlike the Arizona and Californian legislation, the "reasonable restrictions" provision in Colorado is only directed to aesthetic provisions. The Maryland Act is drafted more simply. Like the legislation in the other States, it also voids "unreasonable" covenants, but leaves this expression totally undefined. It also exempts historic buildings and landmarks from the operation of the legislation and makes it clear that the Act has no retrospective application. The Maryland provision reads in full:

"Except as provided in this section,

(1) A restrictive covenant regarding land use, which becomes effective after July 1, 1980, may not impose or act to impose unreasonable limitations on the installation of solar collection panels on the roof or exterior walls of improvements.

(2) This section does not apply to a restrictive covenant on historic property that is listed by:

- (i) The Maryland inventory of historic sites; or
- (ii) The Maryland landmarks List."

As a final alternative, the existing Australian State legislation on the modification and discharge of restrictive covenants¹⁰⁹ could be amended in order to override covenants which impede the installation of solar devices. The relevant legislation in each State could be amended by the addition of the following ground for modification or discharge:¹¹⁰

"that the covenant effectively prohibits or restricts the installation or use of a solar energy system."¹¹¹

The first alternative, the legislative declaration that it is in the public interest that solar energy is encouraged, has the advantage of simplicity, but there is no guarantee that it would result in the Courts declaring void and unenforceable any covenant which impedes the application of solar devices. Given the traditional judicial reluctance to extend the notion of public policy, the legislative declaration under discussion may

108 Colorado Rev Stat s 38-30-168 (Supp 1978); Maryland Laws of 1980, ch 381.

109 Conveyancing Act 1919 (NSW) s 89; Property Law Act 1958 (Vic) s 84; Transfer of Land Act 1893-1978 (WA) s 129C; Property Law Act 1974-1978 (Qld) s 181; Conveyancing and Law of Property Act 1884 (Tas) s 84C. There is no equivalent legislation in South Australia.

110 As a less satisfactory alternative, the legislation in New South Wales, Victoria and Western Australia could be amended to correspond with the Queensland and Tasmanian legislation. The recent amendments to the Queensland and Tasmanian legislation are discussed in nn 70-74 supra, and accompanying text.

111 "Solar energy system" would need to be defined in the definition section of the various State enactments. The following draft, based on Oregon Laws of 1979, ch 671, s 5, is suggested:

" 'Solar energy system' means any device, structure, mechanism or series of mechanisms which uses solar radiation as a source for heating, cooling or electrical energy."

not be sufficient for the Courts to strike down covenants of this nature. Such a declaration may be regarded by the Courts as ineffectual and meaningless. It is submitted that the legislation should deal more specifically with the desired remedy rather than couch the problem in terms of public policy.

The other two forms of legislation both overcome the problems associated with the legislative declaration that solar energy is in the public interest, and either would represent an improvement over that form of legislation and the present state of the law. The major difference is that the second form of legislation would bind the Courts to declare void and unenforceable covenants impeding or expressly prohibiting the installation of solar devices, while the suggested amendment to the present State legislation on the modification and discharge of restrictive covenants would leave the Courts with an unfettered discretion in this matter. It is a value judgment which of these two alternatives should be preferred. In light of the increasing significance of alternative renewable resources of energy in this country and the increasing problems of energy supply, the preference of the writer is to discard the possibility of judicial discretion in this area and to enact legislation similar to that in Arizona, California, Colorado and Maryland declaring void and unenforceable covenants impeding or expressly prohibiting the installation of solar appliances.

Consideration should be given to the issue of whether this suggested legislation should be applied retrospectively. While there is a presumption against the retrospective application of new legislation,¹¹² it is submitted that retrospective legislation is necessary in this situation. Many covenants which presently impede the installation of solar appliances were imposed many decades ago before the harnessing of solar energy became a realistic possibility and have been passed on through the years to bind later purchasers of the land by the principle of express annexation or express assignment. The present State legislation on the statutory modification or discharge of covenants applies regardless of whether the date of origin of the covenant preceded the date of enactment of the law. If the new suggested form of legislation only applies prospectively, it is likely to be many years before it has much practical significance. It is during the next few years before the energy crisis tightens its grip, that the encouragement of the development of solar energy is of prime importance. Thus, for policy reasons the retrospective operation of the legislation would appear to be essential.

If the suggested form of legislation is adopted, it is submitted that buildings of historic significance should be exempted from its scope. The legislature should recognise that special policy considerations attach to historic buildings and should ensure that the legislation exempts restrictive covenants granted for the benefit of a building which falls within the scope of the Historic Buildings Act 1974 (Vic) or its equivalent in other States.¹¹³ However, if the State legislatures decide to amend the existing legislation controlling the statutory modification and discharge of restrictive covenants instead of enacting the suggested form

112 See *Maxwell v Murphy* (1957) 96 CLR 261, 267 per Dixon CJ; and Pearce, *Statutory Interpretation in Australia* (Butterworths, 2nd edn, Sydney 1981) ch 10.

113 See, eg, Heritage Act 1977 (NSW); South Australian Heritage Act 1978-1980 (SA).

of legislation, this exemption is unnecessary as the special position of historic buildings could be taken into account by the Court in the exercise of its discretion whether to modify or discharge a covenant which impedes the application of solar appliances.

Regardless of whether the State legislatures decide to amend the existing legislation controlling the statutory modification and discharge of restrictive covenants or to copy the form of legislation in Arizona, California, Colorado and Maryland discussed above, it is submitted that the legislation should ensure that the Court has the power both to impose conditions in its order modifying or discharging an existing covenant and to award compensation to the person entitled to the benefit of the modified or discharged covenant. The existing law on both these issues is unsatisfactory in certain respects.

In relation to conditional orders, it is only in Queensland and Tasmania that the Courts' power to impose conditions is beyond doubt. For example, the Property Law Act 1974-1978 (Qld) s 181(3) states:

"The power conferred by sub-section (1) to extinguish or modify an easement or restriction includes a power to add such further provisions restricting the user or the building on the land as appear to the Court to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Court may accordingly refuse to modify an easement or restriction without such addition."¹¹⁴

This form of legislation appears to enable the burden of these conditions to run with the land. It should be noted that the conditions must be accepted by the applicant. If the applicant refuses to accept the conditions the Court may simply refuse to modify the restrictive covenant.

In the remaining States the power of the Court to impose conditions when modifying a covenant is doubtful in the absence of legislation. The existence of this power was assumed by Else-Mitchell J in *Re R K Roseblade and V M Roseblade and the Conveyancing Act*.¹¹⁵ This case involved the modification of a covenant which stated that only one dwelling-house could be erected on the land in order to enable the land to be subdivided into three lots. The modification was granted subject to certain conditions limiting the height and floor area of the proposed houses, controlling the set-back from the boundary fences and requiring existing trees to be left standing. Despite this useful precedent, it is clearly desirable that the Court's power to impose conditions should be clarified in New South Wales, Victoria, South Australia and Western Australia by the enactment of legislation similar to that in Queensland and Tasmania.

Compensation is provided for a landowner adversely affected by the modification or discharge of a restrictive covenant under present State legislation in Victoria, Queensland and Tasmania. The Property Law Act 1958 (Vic) s 84(1) states in part:

"no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction unless the person entitled to the benefit of the restriction

¹¹⁴ The relevant Tasmanian legislation is the Conveyancing and Law of Property Act 1884 s 84C(4).

¹¹⁵ [1964-1965] NSWR 2044.

also suffers loss in consequence of the discharge or modification nor shall any compensation be payable in excess of such loss, but this provision shall not affect any right to compensation where the person claiming the compensation proves that by reason of the imposition of the restriction the amount of consideration payable for the acquisition of the land was reduced."

In Queensland and Tasmania,¹¹⁶ compensation may be awarded (if money is an adequate compensation) to any person suffering any loss or disadvantage from the modification or discharge of a covenant on the grounds specified in the relevant legislation. These forms of legislation do not require compensation to be paid in all circumstances, as if the covenant is obsolete or fails to secure practical benefits the beneficiary will not be able to show that he would suffer financial loss or disadvantage as a result of the modification or discharge of the covenant.

No compensation is provided for in these circumstances in New South Wales, Western Australia or South Australia. It is submitted that the legislation in these States needs amendment in this respect as the provision of compensation would appear to be a matter of basic justice if financial loss is suffered by the beneficiary of a covenant on its modification or discharge. If the present system in each State (except South Australia) giving the Court a discretion whether to modify or discharge a covenant is continued, the absence of a provision for compensation may act to the detriment of a solar user as the Court may refuse to exercise its discretion in favour of modifying or discharging a covenant which impedes the application of solar appliances out of sympathy for the beneficiary of the covenant.

Finally, consideration should be given to removing by legislative amendment the problems caused to the enforceability of solar covenants by the Torrens legislation in each State.¹¹⁷ This raises a difficult policy issue as the problems associated with the enforceability of covenants discussed earlier in relation to both privately negotiated agreements and schemes of development apply equally to all types of covenants and do not adversely affect solar users more than the beneficiaries of any other covenant. It would be possible to give a special status to solar covenants by amending the Torrens legislation in such a way as to apply special privileged rules to solar covenants and to leave the laws relating to other types of covenants untouched. However, such a suggestion would be likely to cause considerable opposition and would be seen by many as an unwarranted protection for solar users, who remain a minority group within the community. For this reason it is submitted that any changes to the Torrens legislation would need to be made applicable to the law of covenants as a whole.

The following two generally applicable reforms are advanced. These reforms should incidentally benefit solar users anxious to ensure that covenants protecting their right of access to direct sunlight will be enforceable in the event of a sale of the burdened land to a third party.

First, it is suggested that the law of Queensland and South Australia should be brought into line with that of the other States by the

116 Conveyancing and Law of Property Act 1884 (Tas) s 84C(6); Property Law Act 1974-1978 (Qld) s 181(1)(b).

117 These problems are discussed in nn 39-49 and 53-57 supra, and accompanying text.

enactment of legislation expressly authorizing the Registrar to notify restrictive covenants on the certificate of title of the burdened land. This would remove the limitations and difficulties associated with the present method of protection by caveat.

Secondly, the present legislation in Victoria and Western Australia authorising the Registrar to notify a restrictive covenant on the certificate of title of the burdened land¹¹⁸ should be amended to include a provision similar to the Conveyancing Act 1919 (NSW) s 88(1) and the Land Titles Act 1980 (Tas) s 102(2), whereby the land or lands intended to be benefited and burdened by the covenant must be identified in the instrument creating the covenant before they are enforceable. A similar reform should also be made in Queensland and South Australia if the Legislatures in these States adopt similar legislation to that in the other four States authorising the Registrar to notify a restrictive covenant on the certificate of title of the burdened land. Legislation of this nature would clarify the present uncertainty over the enforceability of restrictive covenants against successors-in-title of the burdened land and should be sufficient to alert the draftsmen of solar and other covenants to the need to clearly identify in the transfer document the land intended to be benefited by the covenant.

118 Transfer of Land Act 1958 (Vic) s 88; Transfer of Land Act 1893-1978 (WA) s 129A.