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ARTICLES

Covenants as regulation – *Pamela O'Connor*

Equity's enforcement of restrictive covenants against successors was a pragmatic response to the delayed development of public planning in the mid 19th century. Yet covenants have persisted as a device for private planning, despite the lack of a coherent doctrinal justification or express provision for them in the original Torrens statutes. They provide a source of private legislative power for developers which is beyond effective control by public or private law. Several Australian jurisdictions allow developers to create, by registration of plans, statutory "restrictions" which are deemed to operate as restrictive covenants. At the same time, many statutes provide for public authorities to regulate through "covenants in gross" which are not recognised by equity. The overextension of the private law restrictive covenant into the realm of public regulation leaves powers inadequately regulated and creates gaps and anomalies in the application of rules. 145

Five years on: Confusion, illusion and township leasing on Aboriginal land – *Leon Terrill*

In 2006, the Australian Government amended the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) to enable the grant of township leases over Aboriginal land in the Northern Territory. It was a reform which attracted considerable debate. This article collates information about the two existing township leases, and examines this against the stated aims of township leasing. It is argued that a high level of confusion has characterised the implementation of these reforms, and that one of the risks of township leases is that they give the impression of doing more than they actually do. The article concludes by arguing that the Australian Government needs to pay greater attention to clarifying the rationale for its Aboriginal land reform policies. 160

Europe, human rights and land law in the 21st century: An English example – *Susan Pascoe*

The central theme of this article is an examination of the influences of Europe and human rights law on English land law. The Supreme Court decisions in *Manchester City Council v Pinnock* and *Hounslow LBC v Powell* are pivotal in aligning English land law with human rights principles in relation to public authority landowners under the *European Convention on Human Rights*. This article analyses six developments in the law: first, the gradual diminution of the "wide margin of appreciation" of national authorities; second, the modification of the stance towards human rights in repossession cases; third, difficulties pertaining to proportionality; fourth, the continuing significance of the *Wednesbury* test of unreasonableness; fifth, the impact of human rights on proprietary certainty in English land law; and last, whether possession proceedings will become based on fair outcomes. 179

The non-restoration of land in South Africa: Practical examples and remaining questions – *Juanita M Pienaar*

Section 25(7) of the South African *Constitution* provides that persons or communities who were dispossessed of their rights in land after 19 June 1913, on a racially discriminatory basis, qualify for restitution or equitable redress. In some instances, however, as set out in s 34 of the *Restitution of Land Rights Act 22 of 1994*, land will not be restored and can be withdrawn from the restitution process, even before the finalisation of claims, if it is in the public interest. The aim of this article is to investigate the instances in South Africa where land has not been restored to claimants, with a focus on s 34 of the Restitution Act. The right to restitution, as provided for in the *Constitution*, is discussed first, followed by an exposition of the relevant legislative framework relating to restitution in general. Specific South African examples of non-restoration are examined. The two pertinent jurisdictional questions embodied in s 34, and how the courts have approached these questions, are highlighted. The South African courts have not embarked on an in-depth analysis of what "public interest" entails, therefore many questions remain inherent in the use of s 34. A successful s 34 application means that claimants are barred from returning to their ancestral lands. In light of this result, the question of whether the public interest may be served by using a mechanism other than s 34 is also addressed. 197

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