

# PROPERTY LAW REVIEW

Volume 6, Number 3

July 2017

## ARTICLES

### **Completing the painting: Legislative innovation and the “Australianness” of Australian real property law – *Paul Babie***

This article considers legislative innovations in Australian real property law and the role played by legislators through exercises of Parliamentary sovereignty. The legislative role is equal to that of the judiciary in the creation and modification of new forms of property in relation to land. To demonstrate this thesis, the article examines: (i) the “invention” of Crown perpetual and State leasehold interests, rights to occupy, and strata title; (ii) the decoupling of land ownership from riparian rights, and (iii) the ownership of mines and minerals. The true “Australianness” of Australian real property has been produced not only through judge-made law, but also, and equally importantly, through the legislature, which has altered every aspect of how the common law once viewed land as surface, airspace, and subsurface. It is for this reason that judges and legislators must be viewed as co-equal partners in the creation of “Australian” real property law. .... 157

### **Blockchains, trust and land administration: The return of historical provenance – *Lynden Griggs, Rod Thomas, Rouhshi Low and James Scheibner***

Electronic conveyancing is here. But how will it evolve with the development of blockchains being touted as one means by which fraud in relation to land can be minimised, if not eliminated? With centralised land registries requiring expensive risk minimisation strategies such as a government-funded assurance fund, or the taking out of private title insurance, can blockchains provide a systemic level of security that can improve the land titles system, and lessen the need for other forms of risk minimisation? Advocates of blockchain technology are high on hyperbole with what it can offer to support smart transaction types in a number of fields. For others, blockchains have no great advantage when applied to physical assets such as real property, and are limited in their utility. This article seeks to advance the discussion, particularly in the context of land administration. Against a backdrop of fraud occurring in title by registration systems, the authors explain what blockchain technology is, before testing its validity by outlining four common fraud scenarios within land administration, and asking whether blockchain technology would have eliminated the frauds in question. The findings show that blockchains would have prevented the fraud in two of the scenarios, but not in the remaining two. In addition, the findings note some of the known unknowns that will need to be resolved prior to any enactment of a blockchain solution. The article’s conclusion is that where the process leading to registration is in some way unreliable, blockchains may offer some advantages. However, once the entry of the transaction is registered, blockchains can play no role in testing or checking the veracity of that entry. The authors also consider that, in the context of derivative interests in land, such as easements, mortgages and fee simples, blockchain technology is limited in capacity. Similarly, joint ownership of land is routine, yet the security nuances of blockchains may make joint ownership within a blockchain context difficult. These last two limitations restrict the current applicability of blockchains and make its application questionable for existing, soundly established land administration systems. .... 179

**Verification of identity: As simple as it seems?** – Brett Harding

Fraudulent dealings in land have been increasing since the mid 90s. These frauds have largely occurred due to the failure of lending institutions to properly verify the identity of mortgagors. These failures resulted in a “moral hazard” for lenders – that is, lenders had no real incentive to ensure that the mortgagor was actually the registered proprietor of the land. To overcome this moral hazard, Queensland, Victoria and New South Wales have all adopted “verification of identity” provisions in their respective Torrens statutes. These provisions require a lender to take reasonable steps to verify the authority and identity of the proposed mortgagor to ensure that they are in fact the registered proprietor of the land. Where the failure to verify the identity of the mortgagor leads to a fraud being perpetrated, the lender may lose their registered mortgage interest. While the operation of these provisions seem simple; the opposite is true. ....

195

**Compulsory acquisition without compensation and the Nigerian Land Use Act** – Akintunde Otubu

This article examines the provisions of Nigeria’s *Land Use Act* regarding compulsory acquisition and compensation process in Nigeria vis-à-vis global standards and best practices in the area. It highlights areas of injustice in the law, particularly instances of compulsory acquisitions without compensation. The article evaluates the Act as a piece of expropriatory legislation by pointing out particular instances of compulsory acquisition processes without compensation. The author advocates for a legislative review of the Act, particularly the overbearing regulatory and judicial powers of the Governor. The article also recommends the payment of compensation for revocation of property rights and access to courts for the determination of issues arising therefrom. ....

204

NEW ZEALAND

**Unit titles and bodies corporate: Simple questions and difficult answers** – Thomas Gibbons

The *Unit Titles Act 2010* (NZ) came into force in May 2011, replacing the *Unit Titles Act 1972* (NZ). Since that time, there has been a combination of legislative amendment, proposals for reform, and judicial interpretation of the statute. This short article considers all three, with a focus on recent court decisions that have evaluated the *Unit Titles Act 2010*. These cases demonstrate the courts dealing with some basic questions around unit titles and body corporate issues, but also show that these simple questions can involve difficult answers. ....

211

QUEENSLAND

**Enforcing obligations in development conditions against successors in title: Heaven’s door remains closed** – Sharon Christensen

Positive covenants imposed on existing landowners, even if registered, do not bind their successors in title unless the successor actually agrees to be bound. Many statutes seek to change this common law rule by providing that all covenants, in a particular agreement or approval, “bind successors in title”. *Tighe v Pike* highlights the continuing influence of this common law principle on the interpretation of statutes seeking to bind successors in title to existing obligations and the hidden risks for legislative drafters. ....

215

SOUTH AUSTRALIA

**A never-ending story: Torrens title in South Australia and the 2015-2016 Amendments to the Real Property Act 1886 (SA) – Paul Babie**

This note summarises modifications made to the *Real Property Act 1886* (SA) by two recent amending Acts: the *Real Property (Priority Notices and Other Measures) Amendment Act 2015* (SA) and the *Real Property (Electronic Conveyancing) Amendment Act 2016* (SA). The former introduces Priority Notices both to protect the priority of a dealing prior to registration and to provide notice to a person searching the Register while the transaction is pending. The latter allows for most common conveyancing transactions and financial settlements to be effected through an electronic platform using a digital signature and abolishes Duplicate Certificates of Title. The note suggests that any increased risk of fraudulent transactions that may arise as a result of these amendments is offset by the introduction of Priority Notices, the Title Watch Service and new identity verification standards. .... 219

BOOK REVIEW –

*Urban Agriculture Europe* by Frank Lohrberg, Lilli Lika, Lionella Scazzosi and Axel Timpe ..... 224

---

**VOLUME 6 – 2017**

Table of Authors .....	229
Table of Cases .....	231
Index .....	239