

# PROPERTY LAW REVIEW

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## ARTICLES

### **A Law for Modern Times: The Electronic Conveyancing National Law, Forged Mortgages and Immediate Indefeasibility** – *Penny Carruthers and Natalie Skead*

The introduction of the Electronic Conveyancing National Law (ECNL), with its emphasis on the verification of identity (VOI) of the mortgagor by a mortgagee, is expected to reduce the registration of forged mortgages. However, we argue that a major deficiency in the ECNL is the failure to incorporate “careless mortgagee” provisions as appear in the Queensland, New South Wales and Victorian Torrens statutes. The result is that the law in the remaining Australian jurisdictions is uncertain as to the effect of a registered forged mortgage to a non-fraudulent mortgagee who has failed to undertake mortgagor VOI. In Western Australia the divergence in the law is even more pronounced by the enactment of s 105(3)–(5) of the *Transfer of Land Act 1893*. The purpose of this article is to explore the ECNL, the careless mortgagee provisions and s 105(3)–(5) TLA and to consider the potential impact of each on three classic mortgage fraud cases. We conclude that careless mortgagee provisions ought to be included in all jurisdictions and s 105(3)–(5) ought to be repealed. .... 4

### **“A Grade Below Them All”: Real Property Interests on the Reservation of the Eastern Band of Cherokee Indians** – *Jason Jones*

This article reports original research on the intratribal real property laws of the modern Eastern Band of Cherokee Indians, situated in the mountains of Western North Carolina. In his 2006 article Matthew Fletcher propounded a new distinction in Federal Indian law: that between “intertribal” and “intratribal” common law. Intertribal common law is primarily the replication of imported Anglo-American legal constructs. Intratribal common law is characterised by its faithfulness to original indigenous tradition, custom, and culture. Now, more than ever, American Indian tribes’ internal civic functions resemble those of their surrounding Anglo-American municipal, state, and federal governments. However, as Indians have progressed further in their modern attempts at nation-building, there is beginning to be a resurrection of indigenous customs, which can be observed in the laws (now written) of modern tribes. The article concludes that with the influx of income from avenues such as gambling, the historically degraded status of real property ownership among Indian tribes has the potential to be proactively leveraged for their betterment through the very arrangement initially used to restrain them: the federal trust relationship. .... 24

**The Troubled Borderlands of Torrens Indefeasibility: Lessons from Australia and the United States – Paul Babie and John Orth**

Far from providing the certainty intended by a system of title by registration, the operation of indefeasibility exhibits a somewhat more uncertain form than the legislation that creates and the cases that interpret it might at first concede. Rather, using two examples, the article argues that indefeasibility is surrounded by an uncertain or troubled borderlands: first, both spatially and temporally, indefeasibility shifts, alters or, simply, morphs through the doctrines of adverse possession and accretion; or, second, Torrens may simply not be accepted by those to whom it applies and, when that happens, those who resist might suffer injustice at the hands of a system intended, in providing certainty of title, to prevent it. The article contains four parts. Part II provides a very brief overview of the nature of indefeasibility as it is found in Australia and the United States. Part III explores the troubled borderlands: adverse possession, which we refer to as the potential for indefeasibility to morph temporally into defeasibility or nothingness; accretion, which holds the potential to morph spatially, adding to or expanding the physical land to which indefeasibility attaches; and the distressing North Carolina story of resistance to and rejection of indefeasible title itself. Part IV offers brief concluding reflections about the nature of Torrens indefeasibility of title. .... 33

SINGAPORE

**Recent Developments: Fiduciary Duties of Resulting Trustees; Joint Tenancies and the Enforcement of Judgment Debts; Developments in the Doctrine of Part Performance – Kelvin Low**

This update on Singapore law addresses three developments. First, the question of whether resulting trustees are subjected to fiduciary duties and if so, when, as considered by the Singapore Court of Appeal. Second, the controversial question of the susceptibility of co-owned property held under joint tenancies to execution for judgment debts is revived as a matter of Singapore law. Finally, developments in the doctrine of part performance, in particular its apparent extension outside of circumventing noncompliance with formalities for certain contracts, are considered. .... 56

QUEENSLAND

**Instalment Contracts and the Unwary Seller – A Case for Reform – W D Duncan and Sharon Christensen**

Nearly every decision on the subject of Div 4 of Pt 6 of the Property Law Act 1974 (Qld) relating to instalment contracts for the sale of land has arisen in circumstances where a seller has unwittingly contracted in such a way as to make the contract subject to the division. As a result the buyers involved in the litigation have been able to successfully delay settlement or rescind the contract. In most of the instances litigated the contract was not a true instalment contract as contemplated by the legislation. This article examines the most recent of these decisions, *MSD Securities Pty Ltd v MFB Properties (NQ) Pty Ltd (No 2)* against the background of previous litigation involving the division and concludes that to fairly meet the consumer protection objectives of the division extensive reform is required. .... 62

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