

# PROPERTY LAW REVIEW

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## ARTICLES

### **A cadastral system approach to environmental protection: A focus on Australia** – *Melkamu B Moges*

This article examines the mechanisms whereby cadastral systems could be used to support the effort of environmental protection, with special emphasis on the case of Australia. The article describes three systematic approaches employed in order to address environmental concerns, although most of the discussion is related to the cadastral system approach. Emphasis is given to the manner in which global-wide efforts have been made in order to promote the cadastral system as an essential vehicle for environmental protection. With respect to Australia, the article draws out specific challenges in the continued integration of environmental protection into the cadastral system. In this respect, it calls for renewed efforts to address the challenges and issues identified. .... 75

### **Old meets new: The rule in Shropshire’s case and the Torrens system** – *Glen Anderson*

The following article investigates the judicially untested question of how priorities between competing equitable interests in Torrens land might be resolved where the first in time is a trust beneficiary. This investigation involves consideration of how English cases articulating a special priority rule for beneficiaries might interface with the Torrens system and the law of caveats. On the one hand, it could be argued that the rule in *Shropshire’s case* indicates that a beneficiary of Torrens land will automatically enjoy priority, regardless of whether they have lodged a caveat. Alternatively, it might be argued that a beneficiary’s failure to lodge a caveat may amount to postponing conduct, thereby potentially negating application of the rule in *Shropshire’s case*. The article concludes that a flexible and nuanced approach is necessary when weighing competing equitable interests, and that a first equitable interest holder’s failure to lodge a caveat will not lead to automatic postponement. Furthermore, it is argued that the zealotry with which equity regulates trust relationships indicates that the rule in *Shropshire’s case* would be applied despite a beneficiary’s failure to lodge a caveat. .... 95

## STRATA AND COMMUNITY TITLE – *Michael Kleinschmidt*

### **Equitable jurisdiction of body corporate adjudicators** – *Michael Kleinschmidt*

Application of the law of fiduciaries to the self-dealing of developers of multi-owned properties may provide another potential means of redress for disgruntled owners. A recent decision of the Queensland Civil and Administrative Tribunal provides an example of relief, as well as guidance on how the limits of the equitable jurisdiction of tribunals or body corporate adjudicators may be determined. .... 115

## CONSUMER ISSUES – *Lynden Griggs*

### **My home is my castle: Does this principle yield when I block your view or shade the sun’s rays from you?** – *Lynden Griggs*

The Tasmanian Law Reform Institute is currently looking at the issue of hedges or trees that block the view or solar access of people in the near vicinity. Should Tasmania, as has

already occurred in New South Wales, Queensland and New Zealand, proactively legislate to provide a resolution to this type of dispute between neighbours, or is it a situation where a person should be entitled to do as they please with their land? What we learn from a comparative examination is that the idea that a person’s home is their castle is now being softened as perceived community responsibilities impinge. What any legislative regime must do is sensitively balance a person’s right to privacy with the wishes of a neighbour who wants to retain the aesthetic and economic value of a view or solar access. Drawing such a balance will inevitably bring out divergent opinions and can itself lead to conflict. What must be achieved in any proposed regime is a cure that is not worse than the disease it is seeking to remedy. .... 120

SINGAPORE – *Kelvin Low*

**Recent developments around leases: Non-derogation and quiet enjoyment; Evidence Act and tenancy by estoppel; remedy of distress** – *Kelvin Low*

A number of matters relating to commercial leases have recently been before the courts in Singapore. They explore: the long-running question of the boundary between the non-derogation from grant covenant and the covenant for quiet enjoyment; the evidentiary rules relating to leases by estoppel; and the ambit of the landlord’s remedy – long abolished in many common law jurisdictions – of distress. .... 125

SOUTH AFRICA – *PJ Badenhorst*

**The South African land registration system: A case involving fraud** – *PJ Badenhorst*

Under South Africa’s deeds registration system, registration of a deed is necessary but not sufficient to transfer an interest in land (“real right”). Registration passes title only if there is a valid agreement (“real agreement”) between the parties to grant and receive the real right. In *Nedbank Ltd v Mendelow* 2013 6 SA (130), the registration of a forged mortgage did not create a valid mortgage as there was no real agreement between the landowner and the mortgagee to grant a mortgage. The result is contrasted with the Torrens rule of immediate indefeasibility, which protects the interest of an honest acquirer like the mortgagee in *Nedbank*. .... 129

QUEENSLAND – *Sharon Christensen*

**Modifying easements: Living in the past** – *Stephen Lumb*

In Queensland, an application to modify an easement requires satisfaction of the preconditions contained in s 181 of the *Property Law Act 1974* (Qld). For the reasons outlined, the provision is uncertain, inflexible and ill-suited to addressing the competing concerns of dominant and servient owners, particularly in the context of adding to or varying the terms of an easement. The Queensland Government’s current review of Queensland’s property laws may be an opportune time to adopt a provision better suited to addressing the particular merits of individual disputes. .... 136

SOUTH AUSTRALIA – *Paul Babie*

**Vendors’ statements, the right to cool off and remedies: Le Cornu and Kurda v Place on Brougham Pty Ltd** – *Paul Babie*

*Le Cornu and Kurda v Place on Brougham Pty Ltd* [2013] SADC 32 confirms that a Vendor’s Statement is not invalid due solely to the non-existence of the property the subject of such statement. Yet, once a Vendor’s Statement is rendered invalid on other

grounds, the right to cool off remains open, allowing the purchaser a choice between electing to affirm or rescission. In either case, though, the vendor retains the right to claim estoppel. .... 143

WESTERN AUSTRALIA – *Eileen Webb*

**Recent developments: Selling off the plan (a warning for developers); Retirement Villages Act amendments; adverse possession – *Eileen Webb and Prina Levine***

Property lawyers in Western Australia have been busy keeping up-to-date with several new and interesting cases and some timely amendments to legislation. A recent decision of the Western Australian Court of Appeal has clarified a perplexing and long-uncertain issue involving s 13 of the *Sale of Land Act 1970* (WA) and the validity of “off the plan” contracts when properties are sold prior to the developer becoming registered proprietor. In addition, the Supreme Court has considered a novel case about adverse possession where a plaintiff had acquired a mature possessory title which had not been converted to a registered title before the transfer to a Crown agency. The case is interesting as it considered the operation of both the 1935 and 2005 *Limitation Acts* and their respective operation in such circumstances. Finally, after much discussion and debate, Western Australia’s retirement village legislation has been amended, with further amendments proposed. These legislative changes are not a “magic bullet” but do provide a greater degree of transparency and go some way towards rebalancing rights between residents and village operators. .... 146

