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Dealing with unique interests in Crown Land: A Queensland
perspective¹

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Abstract

Security of tenure is the cornerstone of the land management system in Australia. Freehold title is protected through indefeasibility of title entrenched in legislation² and protection of registrable interests in land is offered through the Statutory Assurance Fund. For those with interests pertaining to Crown Land no such protection is offered, although this position is not uniform across Australia. Notably those with Crown leasehold interests or a *profit a prendre* on Crown Land in Queensland are not protected through registration on the freehold land register and do not have the benefit of indefeasibility of title. The issue of management of interests pertaining to Crown Land has become increasingly relevant due to the complexities associated with balancing public interests including native title with more commercial interests in land generated through carbon sequestration, forestry and mining. This paper considers the framework for the management of Crown Land in Queensland and the adequacy of this framework for commercial interests that pertain to Crown Land.

Keywords: Crown land, tenure, *profit a prendre*, leasehold tenure, land management

¹ An earlier version of this paper was submitted by Ms Craddock as part of her coursework requirements for the LLM (TechLaw) by coursework from the Queensland University of Technology, Brisbane, Queensland.

² Section 184 *Land Titles Act 1994* (Qld)

Introduction

The aim of this paper is to examine the adequacy of the existing legal framework in Queensland in relation to the growing complexities associated with balancing public and commercial interests in land. Interests in Crown land in Queensland are primarily regulated by the *Land Act 1994* ('Act'). The Act seeks to achieve effective stewardship of unallocated State land³ and interests created in that land. It does this by requiring that State lands be managed having regard to the principles of sustainability, evaluation, development, community purpose, protection, consultation and administration.⁴

Lessees have a general duty of care for the land and may only use the land for stated purposes. Prior to the granting of a lease, or other allocation, the chief executive is required to evaluate the land to assess the most appropriate tenure and use.⁵ That evaluation must take account of State, regional and local planning strategies and policies and the seven principles stated above.⁶ The Act is able to fulfill its object due to its statutory nature.⁷ Its requirements must be strictly complied with; otherwise interests may be forfeited.⁸ With the introduction of this Act the Crown assumed the role of steward in managing the land as opposed to its traditional role as land owner.

The paper is structured as follows – Part 1 examines issues of security of tenure for interests in freehold land and Crown land. Part 2 considers the adequacy of security of tenure to address commercial interests whilst protecting public interests. Part 3, through a comparative study, examines how registered interests in Crown land is dealt with in New South Wales. Part 4 seeks to identify the adequacy of the *Land Act 1994* to effectively manage Crown land in Queensland. Part 5 draws conclusions and identifies areas of future research.

1. Security of land tenure in Queensland

Indefeasibility under the Torrens System

In the mid-1800's land tenure arrangements in Australia were based on the feudal system of land ownership then existing in England. The English tenure system involved complicated rules and legal fictions that continued to exist long beyond the social conditions that had created them. Arguably, the tenure system was not suitable for Australia's social or geographical conditions.⁹ Historically, the system relied upon registration of the documents (deeds) dealing with interests in land. It did not deal with the registration of the title to the land itself. In acquiring land, the required process of conveyancing

³ Department of Natural Resources, *Handbook of Land Planning Guidelines* Part G, Chapter G.1

⁴ *Land Act 1994* (Qld) Section 4

⁵ *Ibid.*, Section 16(1)

⁶ *Ibid.*, Section 16(2)

⁷ See - Sections 30 and 40 *Constitution Act 1867* (Qld); *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520; *Bone v Mothershaw* [2003] 2 Qd R 600; *R v Hughes* (1866) LR 1 PC 81

⁸ *Ibid.*, Chapter 5 Part 5

⁹ Butt, 4th edition, p.620

involved complicated and very costly searches, including the checking of documents going back many years to establish that the vendor had a 'good title' to sell to the buyer.¹⁰

A new system of registration of interests in land was devised as a method of simplification of the existing Australian conveyancing and land tenure systems.¹¹ Based on the shipping registration system and the land registration system existing in the Hanseatic towns,¹² a new system was formulated and commenced operation in Australia in 1858.¹³ The new system, named after the man who devised it, Robert Richard Torrens,¹⁴ was a system of title to land by registration and conveyance by instrument. The Torrens system of registration did away with the need for a buyer to conduct lengthy and costly searches to establish a good title in the vendor.

All dealings in respect of a lot of land would be registered on the one certificate of title entered in the Register, with the Register being conclusive evidence of a party's title. The Torrens system provides that a bona fide purchaser for value from a registered proprietor who enters his transfer in the register "... shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title."¹⁵

The Torrens system also provided for a State guarantee of title backed by a State compensation system that, in specified circumstances provides compensation to parties deprived of their interest in land¹⁶. The essence of the State guarantee of title is not that the rightful owner of land who is wrongfully deprived of that interest in land will have it returned, but that they will be compensated for their loss. The right to recover monetary damages replacing the old system right to recover the lost land.¹⁷

The Torrens system of registration existing today in Queensland is embodied in the *Land Titles Act 1994* ("LTA"). The LTA incorporates the system first envisaged by Torrens as well as introducing other methods of protecting *in rem* and *in personam* rights (i.e. caveats).

The object of the LTA can be found in Section 3. In continuing Torrens' work of simplification, the main object of the LTA is to consolidate and reform the law about the registration of freehold land and interests in freehold land. It is not however concerned about the management and use of that freehold land, which is dealt with by other legislation.¹⁸

¹⁰ See *Conveyancing Act 1919* (NSW) Section 53(1) as to the obligations to show title with respect to Old system land in New South Wales

¹¹ Butt, 4th edition, p.620

¹² A term applied to certain commercial cities in Germany whose famous league for mutual defence and commercial association began in a compact between Hamburg and Lubeck in 1241.

¹³ *Real Property Act 1858* (SA)

¹⁴ later Sir Robert

¹⁵ The Privy Council in *Gibbs v Messer* [1891] AC 248 at 254

¹⁶ In Queensland contained in Part 8, Division 2, Subdivision C of the *Land Title Act 1994*

¹⁷ Minister for Conservation and Land Management, and Minister for Energy - NSW Legislative Assembly Hansard at page 9230 18 November 1992

¹⁸ for example – *Nature Conservation Act 1992; Environmental Protection Act 1988 & Integrated Planning Act 1997*

An “interest” in land is defined to be a “... *legal or equitable estate in land, or ... a right, power or privilege over, or in relation to, the land.*”¹⁹ Section 181 provides that “*an instrument does not transfer or create an interest in a lot at law until it is registered*”.

Whilst the separate distinct parcel of land that is a lot is created by the registration of a plan or the recording of an instrument,²⁰ neither a lot nor an interest in a lot is created by the LTA, only the indefeasible title to a lot is created.²¹ The LTA by registration of title to a lot only creates a legal title to that which is already in existence – an interest in land. The LTA therefore does not prevent the creation of, or dealing in, an equitable interest in a lot.

The cornerstone of Torrens is indefeasibility of title of the registered proprietor. Whilst indefeasibility of title is acquired immediately upon registration being effected,²² the general equitable rule regarding competing claims, being “*qui prior est tempore, potior est jure*” (if the merits are equal, priority in time of creation is considered to give the better equity²³), still applies to unregistered documents.

Therefore until a document is registered there is no indefeasibility of title, only priority to become registered. Further, indefeasibility of title is subject to exceptions.

Indefeasibility of title is subject to impeachment under specified exceptions²⁴ including fraud of the registered proprietor, the interest of a lessee under a lease for three years or less and an equity arising from the act of the registered proprietor. Further, if a statute imposes requirements as a condition precedent to acquiring title, those conditions must be fulfilled otherwise that title may be set aside.²⁵

Tenure under the Land Act 1994

The Act is a statutory code, which authorises the creation of interests in, dealings in those interests, and the management of, unallocated State land in Queensland.²⁶ It regulates the rights and obligations of both interested parties and the State. Unlike the LTA, the Act does not contain any provision dealing with the quality of the registered interests created, i.e. it does not grant indefeasibility of title. Neither does it provide for a method of compensating a party for loss arising as a result of that party being deprived of their interest in the land. However the interests it creates are not subject to exceptions in Section 185 of the LTA.

The power to lease unallocated State Land (and thereby to create a lease) is vested in the Governor in Council²⁷. The power to allow a transfer of a lease²⁸ and to create a sub-lease²⁹ is vested in the Minister

¹⁹ Section 36 *Acts Interpretation Act 1954*

²⁰ *Land Title Act 1994* Schedule 2

²¹ *Ibid.*, Section 37

²² *Breskvar v Wall* (1971) 126 CLR 376; *Fraser v Walker* [1967] 1 AC 569

²³ *Latec Investments v Hotel Terrigal* (1965) 113 CLR 265; Kitto J at 276

²⁴ *Land Title Act 1994* Section 184(3) and Section 185 for a complete list

²⁵ *Lugue v Shoalhaven Shire Council* [1979] 1 NSW LR 537

²⁶ *State of Queensland v Litz* [1993] 1 QdR 593 at page 610

²⁷ *Land Act 1994* Section 15

of the Department of Natural Resources and Mines.³⁰ A Crown lease under the Act is a “statutory creature... peculiar to Queensland.”³¹

The Act creates interests in State land by registration of documents in the lease register.³² A document is not effective “... to transfer a lease ... or create a legal interest in a lease until it is registered”.³³ Whilst the terminology is similar to that used in the LTA the effect is not the same. The LTA does not create interests but rather creates a legal indefeasible title by registration. The LTA also does not prohibit or prevent the creation of interests in land at equity. Under the Act however, an interest once registered is a legal interest but until registered no interest is created and there is no equitable protection if not registered before the Minister’s approval lapses.³⁴ Priority is granted to legal interests in order of lodgement for registration.³⁵

The interests created by the Act however are not creations of the common law³⁶ but rather creatures of the statute that created them.³⁷ Under the Act, no interests or rights are recognised until registration is effected³⁸ and then the only rights recognised are those provided for, or created by, the Act. Chapter 6 of the Act³⁹ contains the provisions relating to registration of and dealings in those interests.

Section 283(2) provides that all documents are deemed to form part of the register from the time of lodgement,⁴⁰ as opposed to the time of registration under the LTA.⁴¹ The effect of registration is that the interest vests in the person identified in the document as the person entitled to the interest⁴² irrespective of whether they have given valuable consideration for the interest.⁴³ There is not, however, any provision in the Act dealing with the quality of the interest created upon registration. This is to be contrasted with section 184 of the LTA, by which indefeasibility of title is conferred upon the person registered as the registered proprietor of that interest. On the other hand, there exist exceptions to indefeasibility of title under the Torrens system of registration, whereas there are no exceptions to the interests created by the Act.

²⁸ *Ibid.*, Section 322

²⁹ *Ibid.*, Section 332(1)(a);

³⁰ As the Minister with portfolio responsibility for administering the *Land Title Act 1994*

³¹ Chris Boge, (2007) ‘Rural Leasehold Land – Changes to the Land Act 1994 (Q) as part of the State Rural Leasehold land Strategy’, paper presented at LexisNexis Rural Masterclass Conference, 22 June 2007, p. 7 [http://www.queenslandstatelands.info/State%20Rural%20Leasehold%20Land%20Strategy%20Paper%20\(22%20June%202007\).pdf](http://www.queenslandstatelands.info/State%20Rural%20Leasehold%20Land%20Strategy%20Paper%20(22%20June%202007).pdf) (viewed 01/09/2009)

³² *Land Act 1994* Section 275

³³ *Ibid.*, Section 301; *Jansen v Frexbury* [2008] ACA 286

³⁴ *Kevroy Pty Ltd v Keswick Developments Pty Ltd* [2009] QSC 49

³⁵ Section 298(1) LA

³⁶ *Wik Peoples v Queensland* (1996) 141 ALR 129, Gaudron J at p 204

³⁷ *Ibid.*, Kirby J at p 261

³⁸ *Hamilton Island Enterprises Ltd v Croycom Pty Ltd* (1998) Q Conv R 54-509

³⁹ *Land Act 1994*, 275 to 390 (inclusive)

⁴⁰ *Ibid.*, section 283(2)

⁴¹ *Ibid.*, Section 31

⁴² *Ibid.*, Section 302

⁴³ *Ibid.*, Section 300

Accordingly, the only interests that the Act creates and recognizes are legal interests. As Isaacs J said, in *Davies v Littlejohn*⁴⁴ “Whatever estates, interests or other rights are created by the Crown must owe their origin and existence to the provisions of the statute. In other words, they are statutory or legal estates, interests and rights. They are not and cannot be equitable...”.⁴⁵

2. Balancing commercial and public interests

As mentioned previously the principal tenet behind the management of state land in Queensland is the effective stewardship of land. To some extent there has been a rationalisation of state land following the introduction of the most recent *Land Act 1994* and decisions surrounding the most appropriate tenure for land are very much grounded in land/environmental management considerations. Section 16 of the Land Act introduces the requirement that prior to allocation the land must be evaluated to determine the most appropriate tenure taking account State, regional and local planning policies and strategies, and the object of the Act.

By virtue of the *Land Act 1994* the State controls nearly 71% of Queensland.⁴⁶ As established through the *Wik*⁴⁷ decision the granting of a leasehold interest in state land does not necessarily give rise to exclusive possession. This position is contrary to the legal position in commercial leases.⁴⁸ Much of this land is also subject to dual use arising from alternative legally recognised land uses such as native title and state leases for a variety of agricultural, pastoral, mining and tourism purposes.

To add to the complexity of land management in Queensland is the growth of investment in carbon sequestration rights. The laws surrounding investment in carbon sequestration rights are largely based on the contractual arrangements between the parties and there is an obvious application of consumer protection legislation such as the *Trade Practices Act 1974* (Cth). Beyond this, is the issue of whether the existing system of land tenure in Queensland is adequate to provide security to those commercial investments.

Although the position differs between the various States and Territories, carbon sequestration rights over freehold land in Queensland are protected by indefeasibility of title through s184 of the *Land Title Act 1994* where the carbon sequestration right is considered as an interest in land. The situation is not replicated where carbon sequestration rights exist over state land. In this situation the only option is to view carbon sequestration rights as a personal right enforced through the common law principles of contract law. Alternatively, the carbon sequestration rights may be viewed as a profit a prendre although they fall outside of the current legal understanding of what a profit a prendre entails, being a right to remove or harvest a resource from the land, be it flora or fauna. On the contrary the purpose of carbon sequestration rights is that the vegetation remains on the land to embody carbon dioxide.

⁴⁴ (1923) 34 CLR 174 at pages 187 - 188

⁴⁵ *Davies v Littlejohn* (1923) 34 CLR 174, at p 187

⁴⁶ DERM Land Management <http://nrw.qld.gov.au/land/state/index.html> (viewed 9 October 2009)

⁴⁷ *Wik Peoples v Queensland* (1996) 141 ALR 129

⁴⁸ *Radaich v Smith* (1959) 101 CLR 209

According to section 373G of the *Land Act 1994* the Minister's approval to grant and registration are both required to create the interest in state land. The conceptualisation of carbon sequestration rights as profits a prendre is difficult to bring to reality due to the complexities associated with each of the state leases granted in Queensland and the specificity that leases be used solely for the purpose granted. For a profit a prendre to be appropriate the Lessee must own the trees on the land and the lease must permit the land to be used for the purpose related to the profit, i.e. for timber plantation.

Options to renew a sub-lease of Crown land, do not form part of the registered legal sublease as they are required to be approved by the Minister under Section 332 and do not obtain legal status until so approved and registered. As such, are not granted the protection granted to registered leases under the LTA.⁴⁹

3. Interest in Crown land in New South Wales

The Torrens system of registration in New South Wales is embodied in the *Real Property Act 1900* ("RPA") and since 1981 State land progressively has been brought within the RPA registration system.⁵⁰ This means that the registered holders (i.e. lessees) of interests in New South Wales State land have the same protection and benefits as registered proprietors of freehold land, including indefeasibility of title⁵¹ and access to compensation under the Torrens assurance fund.⁵² This includes compensation for any loss or damage arising out of the land's having been brought under the provisions of the RPA.⁵³

Part 3 of the RPA contains provisions specifically relevant to State land. Those provisions include a mechanism for bringing perpetual leases and other State land interests under the RPA. Perpetual leases, if all conditions have been complied with, are provided with an independent folio,⁵⁴ the equivalent of a title.⁵⁵ In respect of other interests, a folio may be created firstly for the State land in the name of "*The State of New South Wales*" as proprietor, and then the interest is registered against that folio. If the interest is a lease, a further folio may be created in the name of the lessee.⁵⁶

Nevertheless, State land continues to be State land, irrespective of the creation of an indefeasible title/s.⁵⁷ State lessees therefore remain subject to the provisions of the *Crown Lands Act 1989* ("CLA").⁵⁸ A breach by a lessee of any conditions of the CLA renders the State lease liable to forfeiture.⁵⁹ The CLA specifies how interested parties may acquire an interest⁶⁰ in State land, what activities they may

⁴⁹ *Elsafty Enterprises Pty Ltd v Mermaids Café & Bar Pty Ltd* [2007] QSC 394 [66]

⁵⁰ *Real Property (Crown Land Titles) Amendment Act 1980* (NSW) introduced Part 3

⁵¹ *Ibid.*, Section 42(1)

⁵² *Real Property Act 1900* (NSW) Part 14

⁵³ *Ibid.*, Section 129(1)(d)

⁵⁴ *Ibid.*, Section 13B

⁵⁵ *Land Title Act 1994* (Qld) Section 42

⁵⁶ *Real Property Act 1900* (NSW) Section 13D(3)

⁵⁷ *Crown Lands Act 1989* (NSW) Section 3(2)

⁵⁸ Section 6

⁵⁹ *Crown Lands Act 1989* (NSW) Part 6

⁶⁰ *Ibid.*, Part 4

conduct on the land, and how they may deal with their interest.⁶¹ The power to lease and consent to transfers of leases vests in the Minister.⁶²

State land is subject to an assessment before any lease is granted and the objects⁶³ and principles⁶⁴ of the CLA are followed in making that assessment. The objects of the CLA being to ensure that State land is managed for the benefit of the people of New South Wales; in the best interests of the State and consistent with the stated principles. The overall objective being to “...*facilitate sound and efficient land use and management decisions that best meet the government and community needs for the remaining...*” State lands.⁶⁵

The Department of Land and Water Conservation manages State land and its unit, Land NSW, specifically administers State land. Registration of interests⁶⁶ in the Torrens register, which is kept by the Registrar General, is undertaken by the Land Titles Office.

Once it is determined to grant a State lease, Land NSW undertake a cadastral surveys and arrange for the creation of RPA folios, one in the name of the State and the other in the name of the lessee. On registration of the State lease the lessee is given indefeasibility of title. The CLA creates the interest for which the RPA then creates an indefeasible title.

In New South Wales therefore whilst interest holders in State land have the benefits of indefeasibility of title and access to a compensation system as conferred by the Torrens system registration, State land remains subject to the system of management and administration embodied in the CLA.

4. Is something missing from the *Land Act 1994*?

Because the system of registration of interests in State land is not a Torrens system of registration,⁶⁷ does this mean that the Act is deficient in some respect?

It is necessary to bear in mind, that State leases and other interests created under the Act are creatures of statute. As such ordinary general law principles, which may apply to dealings in Torrens system land, to the benefit of lessees, may not apply to interests under the Act. Conversely, in other areas authors argue that the “*general law has, in a sense, a greater role to play under the ... [Act] that under the [LTA] ...*” (Boge, 2009)

It is suggested⁶⁸ that the provisions in the Act, which confer similar rights to those granted by the Torrens system are suggestive of an absence of all Torrens type and equitable rights, because if those

⁶¹ *Ibid.*, Part 3

⁶² *Ibid.*, Sections 34 and 38(a)

⁶³ *Ibid.*, Section 10

⁶⁴ *Ibid.*, Section 11

⁶⁵ Land NSW – Land Assessment, Development Approvals & Native Title

⁶⁶ *Real Property Act 1900* (NSW) Section 32

⁶⁷ *Elsafy Enterprises Pty Ltd v Mermaids Café & Bar Pty Ltd* [2007] QSC 394

⁶⁸ Boge [15.26] p 173

rights applied to interests under the Act, why is it necessary to repeat them? It is necessary for the Act to confer those rights specifically because the general law does not apply to State leases and therefore they would not otherwise exist.⁶⁹

As Gummow J said in *Wik*⁷⁰ "... the statute may appear to have adopted general law principles ...in truth the legislature has done so only on particular terms...".⁷¹ Unlike the general law leases, where equity grants certain rights to prospective transferees and lessees, dealings with land under the previous act⁷² did not attract anything like protection of dealings under the Torrens system.⁷³ This position has not altered under the Act. No rights are conferred under the Act until registration is effected and then only in strict accordance with the provision of the Act.

As stated earlier the only interests, and therefore the only rights, created by the Act are legal ones on registration. Equitable rights do not exist in relation to State land, nor does the Act create them.⁷⁴ Therefore, for example, if the parties do not comply with the requirement to obtain Ministerial consent to a proposed transfer of a lease, there is no passing at either law or equity of any estate or interest in the land.⁷⁵

Does Torrens provide better protection to interest holders? To provide an answer, it is necessary to examine the protection afforded by equity to a bona fide purchaser for value of Torrens land as opposed to that provided to a volunteer.

In respect of a gift of Torrens land, it has been held that, if for any reason, the transfer of the legal title is incomplete (either because a prescribed method of transfer has not been followed or registration has not occurred), equity will not enforce the gift. This is irrespective of the fact that the transferor has done all he can to confer it.⁷⁶

However, a purchaser for value under the terms of the contract for purchase of Torrens system land can, if the obligation to transfer has arisen (i.e. all conditions of the contract have been satisfied) obtain an order for specific performance of the contract⁷⁷ and thus become registered on the title as the registered proprietor. This is irrespective of whether a transfer has been executed. Therefore, in respect of gifts of Torrens land, registration is necessary to perfect the gift. Without registration of the documents necessary to transfer the interest, the gift is ineffective. However, if all that is wanting is registration itself and all documents are in order, equity may provide that a trust for the gift arises in

⁶⁹ Boge [15.26] p 173

⁷⁰ *Wik Peoples v Queensland* (1996) 141 ALR 129

⁷¹ *Ibid.*, at p 242

⁷² *Land Act 1962*

⁷³ *Beard v Wratislaw* [1993] 2 QdR 494, McPherson SPJ at p 500

⁷⁴ *Davies v Littlejohn* (1923) 34 CLR 174, at p 187

⁷⁵ *Roach v Bickle* (1915) 20 CLR 663, at 670-671

⁷⁶ *Anning vAnning* (1907) 4 CLR 1049; *Brunker v Perpetual Trustee Co Ltd* (1937) 57 CLR 555 per Dixon J; *Corin v Patton* (1990) 169 CLR 549 per Brennan J

⁷⁷ *Pianta v National Finance & Trustees Ltd* (1964) 38 ALJR 232

favour of the volunteer to have the transaction completed.⁷⁸ It is submitted that such a trust would be sufficient grounds for a volunteer to lodge a caveat to protect their interest whilst taking court action. Further, section 183 provides that upon lodgement for registration, if the documents are in order the Registrar must register.

Under the Act if the Minister's consent was obtained, and any other conditions of the sale were satisfied, it is submitted that the purchaser also has a right⁷⁹ to require the Registrar to register its transfer in the lease register. Nevertheless, under the Act, without the Minister's consent, no interest is conferred on the purchaser⁸⁰ and therefore no obligation to transfer arises which could be enforced by an order for specific performance. Therefore if the Ministerial consent is lacking a prospective lessee (whether a volunteer or for consideration) has no power to enforce registration.⁸¹ Nor, as the rights created are legal rights only, does the prospective lessee have any protection at equity or ability under the Act to lodge a caveat to protect its interests.

If Ministerial consent is obtained, but the transferee fails to lodge within the required six months⁸² whilst the purchaser may, as against the registered lessee vendor be the beneficial owner of the lease interest⁸³, nevertheless as against the State they have nothing. Without registration of, or at least the granting of Ministerial consent to, the transfer the purchaser is not a lessee and has no rights or benefits under the Act and is unable to insist upon registration being affected.

No-one should be arbitrarily deprived of their property,⁸⁴ and it is submitted that if a person is deprived of their property, then they should be compensated. It has been suggested that the absence of a compensation system from the Act is a further indication of a deliberate intention that the Torrens system of registration does not apply to State land.⁸⁵ This might be so; however it might also be as a result of a policy decision made separately and without any consideration of the Torrens system of registration.

The Act is a code, which regulates creation and dealings in leases. As discussed earlier, a failure to comply with a condition precedent in the Act regarding acquiring title, (i.e. obtaining Ministerial consent to a transfer) means that the title 'acquired' may be set aside.⁸⁶ Therefore, even if the interest holders of State land were given indefeasibility of title, if those interests remained subject to the provisions of the Act, a failure to comply with a condition precedent would mean that no indefeasibility would be

⁷⁸ *Re Rose; Rose v IRC* [1952] Ch 499

⁷⁹ *Land Act 1994* Section 295

⁸⁰ *McWilliam v McWilliams Wines Pty Ltd* (1964) 114 CLR 656

⁸¹ *Brown v Heffer* (1967) 116 CLR 344

⁸² *Land Act 1994* Section 322

⁸³ *Southern Pacific Hotel Corp Energy Pty Ltd v Swan Resources* (unreported, Supreme Court of Western Australia, Brinsden J, 27 July 1981)

⁸⁴ Article 17.2 of the Universal Declaration of Human Rights

⁸⁵ Boge, 301.3A p914/2

⁸⁶ *Lugue v Shoalhaven Shire Council* [1979] 1 NSW LR 537

conferred. The registration could be overturned and it is suggested, as the party had no right to be registered in the first place, no compensation would be payable.

However, what would occur if the registered proprietor had forged the consent and by some means⁸⁷ a transfer to an innocent third party had registered? In this instance it is submitted that the State would be able to overturn the registration of the bona fide purchaser for value because the Minister did not in fact give the consent. The innocent third party whilst deprived of their interest in the land would only be able to take action against the lessee/seller. Under Torrens however, the innocent third party, whilst it may not be able to attain registration, may be entitled to compensation for its loss.

However, if compensation were to be payable under the Act, then in circumstances similar to *Walsteam*⁸⁸ the State might find that, even though no lease documents were executed, it was liable to pay compensation. Where the Governor in Council does not grant a lease where the State or the Department had previously represented that a lease would be granted, it might be able to be suggested that the prospective lessee is deprived of its interest. Where that prospective lessee had expended money on works and structures, the State may be liable to pay compensation, not directly as a consequence of its actions, but through the compensation scheme as a consequence of the prospective lessee's losses arising through the deprivation of interest.

Under the Act whilst the Registrar has the power to correct mistakes,⁸⁹ there is no method for a party to be compensated for any loss arising from such a mistake. Torrens' compensation however is also available where loss arises through a mistake occurring in the Register. If the Registry makes a mistake then it is submitted that they should take responsibility for that mistake and that a party should not suffer loss because of it. In the era of increased emphasis on consumer protection consideration should be given to introducing State lessees to the benefits of the Torrens compensation fund.

5. Conclusion

The significance of the treatment of Crown (State) land in Queensland is evident due to the State's huge land holdings. State land in Queensland is managed by the *Land Act* 1994 and is not protected by common law notions of infeasibility of freehold title which have been embodied in Queensland legislation.⁹⁰ Similarly access to the Statutory Assurance Fund offered to those dispossessed of freehold land interests is not applied to interests in Crown land.

The treatment of Crown land in Queensland has been informed by the state's history and geography but arguably is ill equipped to deal with new interests in land such as those arising out of trade in carbon sequestration rights. An attempt has been made to align such rights with the existing and possibility

⁸⁷ Admittedly an unlikely scenario as it is the Titles Office which also arranges the Ministerial consent to be given, however used here for discussion purposes.

⁸⁸ *Walsteam Pty Ltd v The State of Queensland* (unreported, Supreme Court of Queensland, Horton SM, 29 May 1990)

⁸⁹ *Land Act 1994* Section 291

⁹⁰ Section 184 *Land Title Act 1994* (Qld)

antiquated common law notions such as the *profit a prendre* considered within the existing land management framework. The effectiveness of this as a resolution of the issues is questionable.

The treatment of these new property rights arguably requires a re-conceptualization of property rights to ensure that the interests of investors are adequately protected whilst ensuring land is managed effectively in Queensland. Policy development however takes time as the consultation process necessarily involves a variety of parties including “...government ministers, and public servants, as well as experts such as academics and others in the community...”⁹¹ so that the developed policies are “...built upon consistent principles and underpinned by enduring values.”⁹²

Policy development should involve all relevant parties and follow a clear framework that is implemented rigorously but systematically.⁹³ A useful framework is that as adapted by Edwards from the Bridgman and Davis model. That is a *policy development framework*⁹⁴ that utilises the following stages:

- *Identify issues*
 - *Problem defined*
 - *Problem articulated*
- *Policy analysis*
 - *Collect relevant data and information*
 - *Clarify objectives and resolve key questions*
 - *Develop options and proposals*
- *Undertake consultation*
- *Move towards decisions*
- *Implement*
- *Evaluate*

A resolution of the issues identified will not be developed overnight as any change to the current regime will require consultation both within and without government to ensure appropriate input from all stakeholders. As a starting point government will need to review existing policy to ensure that there is developed an appropriate framework for the future both of sequestration rights and the management of Crown land. Once the appropriate policy is determined only then can amendments to the existing regulatory regime be contemplated.

⁹¹ Meredith Edwards (2001) ‘Social Policy, Public Policy: From problem to practice’ (Allen & Unwin, Crows Nest, NSW) p. 1

⁹² Centre for Policy Development, ‘Reclaiming our Commonwealth: Policies for a Fair and Sustainable Future’, Common Sense Paper No 1, June 2006, ISSN 1835-0070 (<http://cpd.org.au>) (accessed 15 July 2008)

⁹³ Meredith Edwards (2001) ‘Social Policy, Public Policy: From problem to practice’ (Allen & Unwin, Crows Nest, NSW) p. 3

⁹⁴ Meredith Edwards (2001) ‘Social Policy, Public Policy: From problem to practice’ (Allen & Unwin, Crows Nest, NSW) p. 4

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