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CONTENTS

Articles

‘Too little too late?’ When to claim a constructive trust over land
— *Brett Harding* 101

There has been a longstanding debate in Australia about whether a constructive trust is ‘institutional’ or ‘remedial’. If a constructive trust is considered institutional, then the trust arises when the elements of the trust are made out. That means that a person will have a presently existing equitable interest in land. If a constructive trust is considered remedial, then the trust arises at the time of court order. That means that a person has no interest in land until a court orders that such an interest exists. This distinction has created an unnecessary dichotomy between ‘true trustees’ and ‘trustee de son tort’. This distinction had flow on effects for limitation periods with claims often occurring decades before litigation. The recent decision of the Victorian Court of Appeal in *McNab v Graham* shed much needed light on this complex area of the law.

Tidal boundaries and climate change mitigation — The curious case of ponded pastures
— *Justine Bell-James and Catherine E Lovelock* 114

Tidal boundary law in Queensland has been subject to significant legislative amendments, with a complex series of transitional provisions now in operation. An emerging climate change mitigation solution — the reconversion of ponded pastures — is going to raise complex questions of tidal boundaries, and test the strength of these laws. This article will analyse the past and current state of tidal boundary law in Queensland, and consider how these laws will apply to ponded pasture reconversion projects. It will then discuss how different legal approaches will need to be employed to operationalise these projects depending on where a tidal boundary is located. Ultimately, it will conclude that these projects are technically feasible, but landholders and government must take care to fully consider the implications of tidal boundary law at the outset.

Towards a civilised theory of property rights in Australian law
— *P J Badenhorst* 134

In this article a civil law style right analysis of the notion of property rights in Australian property law is undertaken. Blackstone’s famous definition of a ‘right to property’ is used as a starting point. It is shown that Blackstone’s definition contains four important elements required for rights analyses, reflects the dual relationship involved in the case of a property right, and remains relevant to this day. It is argued that the definition remains relevant despite its overtones of a ‘sole’, ‘exclusive’ and ‘despotic power’ which may have caused anxiety amongst some legal scholars. A rights-based system, working with the object of rights as the foundation, is used to set out to identify property rights and to distinguish

property rights from other rights or interests. In line with Blackstone's definition, a property right is defined as the legal relationship between a person and a thing, and the legal relationship between such person and other persons. The basic premises whereupon the distinctions between property rights, personal rights and other rights are based in Australian law are set out, and the weaknesses of these premises are illustrated. It is argued that rights ought to be classified according to the nature of their respective objects and not the features of the right which may also occur with other rights.

How progressive judicial enforcement can alleviate the social cost of excessive land covenants in New Zealand

— *Moshood Abdussalam and Saurav Satyal* 157

This article seeks to contribute to the discussion concerning the adverse impact of land restrictive covenants on housing affordability, which, in turn, has implications for urbanisation and productivity in New Zealand. This article argues that this socio-economic concern can be significantly mitigated if land restrictive covenants are recognised and enforced as private administrative rights aimed at creating local public good, which is what they truly are. In this connection, this article argues that this species of restrictive covenants should not be recognised and treated as property nor contract rights, and as such, legal rules that shape their enforcement should be tailored towards the local public good ends which they are meant to serve.