

# LEGISLATING FOR SUSTAINABILITY: A FRAMEWORK FOR MANAGING STATUTORY RIGHTS, OBLIGATIONS AND RESTRICTIONS AFFECTING PRIVATE LAND

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*The ad hoc growth of administrative controls on land use has produced an information management problem. Land registries face growing demands to record on the Torrens register particulars of rights, obligations and restrictions created under public law statutes, in order to reduce information costs, promote compliance and inform planning. As sustainable management of land and natural resources will require more legislative regulation, this paper proposes a framework of principles for the more coherent and consistent management of public law controls on private land use.*

## I INTRODUCTION

Statutory encumbrances are rights, obligations and restrictions which are imposed on land either directly by statute, or by administrative decisions made under statute, and which are enforceable against the landowner and his or her successors. A statute may authorise the creation of a *right* such as a charge on land to secure the cost of complying with a pest control notice,<sup>1</sup> an *obligation* such as a land management notice which requires a landowner to improve land management practices,<sup>2</sup> or a *restriction* such as a ban or restriction on specific uses of land which has been declared a nature refuge.<sup>3</sup> Due to the increasing need for regulation of land and natural resources to achieve environmental and social objectives, the number and diversity of statutory encumbrances on land continue to grow. Climate change, the sustainable management of water and other natural resources, loss of biodiversity, reduction of carbon emissions and the degradation of land through salinity are among the many environmental challenges that are likely to require further legislative interventions into the use of freehold land.<sup>4</sup>

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1 *Land Protection (Pest and Stock Route Management Act) 2002* (Qld) ss 77-85.

2 *Catchment and Land Protection Act 1994* (Vic) ss 37-41. The notice binds the landowner and successors in title: s 40.

3 *Nature Conservation Act 1992* (Qld) s 45, which deals with conservation agreements binding the landowner and his or her successors.

4 Rohan Bennett, Jude Wallace and Ian Williamson, 'Organising Land Information for Sustainable Land Administration' (2008) 25 *Land Use Policy* 126, 126-7.

Regulation for sustainability, and the consequent need for further controls on land use, heightens the need for an effective information management system for statutory encumbrances. Better information about all encumbrances affecting specific land would benefit prospective purchasers, as well as government agencies and private bodies engaged in environmental and land use planning.<sup>5</sup> Recording the existence of statutory encumbrances is a key strategy for improving access to information, but there is a lack of consistency in the provisions for recording. Some statutes require encumbrances to be recorded in the land register maintained under the Torrens land registration statute for the relevant jurisdiction,<sup>6</sup> with reference to the affected land parcels ('the parcel register'). Other statutes require that encumbrances be recorded in separate registers maintained by the agencies responsible for administering the statute ('the agency register'). Some encumbrances, particularly those that affect a widespread area, may not be recorded at all with reference to affected parcels.<sup>7</sup> No Australian jurisdiction has an explicit framework of principles to guide the drafting of legislative provisions specifying when, where, how or by whom statutory controls or encumbrances should be recorded and with what legal effects.

The ad hoc and unsystematic approach to recording statutory encumbrances imposes transaction costs upon persons who deal with land. Purchasers incur costs in obtaining comprehensive, accurate and current information about statutory encumbrances affecting the parcel. The number of encumbrances and diversity of information sources make it uneconomic for purchasers to search for all but the most common types.<sup>8</sup> Even where the existence of an encumbrance is discovered, it is not always clear whether it runs with the land and binds subsequent owners (*in rem* operation), or whether it affects only the owner of the land for the time being (*in personam* operation).

The information burden resulting from statutory controls on land use and government encumbrances on land title is not new, but has become more pressing as the number of such provisions continues to grow in response to the need for more environmental regulation. At the same time, the States have undertaken to reduce the regulatory burden on businesses and the public.<sup>9</sup> One way of

5 The Victorian Law Reform Commission ('VLRC') found that 'efficiency in conveyancing and in Government administration is impeded by the lack of an integrated network of land-related information': VLRC, *The Torrens Register Book*, No 12 (1987) viii.

6 The Torrens statutes are: *Real Property Act 1900* (NSW); *Land Title Act 1994* (Qld); *Real Property Act 1886* (SA); *Land Titles Act 1980* (Tas); *Transfer of Land Act 1958* (Vic); *Transfer of Land Act 1893* (WA); *Land Titles Act 1925* (ACT); *Land Title Act* (NT).

7 Rohan Bennett, Jude Wallace and Ian Williamson, 'Achieving Sustainable Development Objectives through Better Management of Property Rights, Restrictions and Responsibilities' (Paper presented at the Expert Group Meeting on Incorporating Sustainable Development Objectives into ICT Enabled Land Administration Systems, University of Melbourne, 9-11 November 2005) 9.

8 The VLRC observed that 'extraordinary effort' is required to discover all decisions which affect or encumber land: VLRC, above n 5, 6. The position in Victoria has since improved with the development of Landata's property information facility: see Part V(A) below.

9 As part of its national reform agenda, the Council of Australian Governments ('COAG') has adopted a plan for regulatory reform which includes measures to reduce the burden of regulation on businesses and individuals: COAG, *Regulatory Reform Plan April 2007* (2007) <[http://www.coag.gov.au/coag\\_meeting\\_outcomes/2007-04-13/docs/coag\\_nra\\_regulatory\\_reform.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2007-04-13/docs/coag_nra_regulatory_reform.pdf)> at 9 October 2009.

reconciling these conflicting imperatives is to reduce the information costs of environmental regulation by providing better access to information about the existence of statutory encumbrances affecting individual land parcels.

This article proposes an integrated framework of principles to guide the drafting of legislation which authorises the imposition of statutory encumbrances on land. We commence, in Part II, by analysing the nature of the information burden resulting from statutory encumbrances on land. Part III reviews the results of previous research on the number and types of rights, obligations and restrictions, in order to measure the extent of the problem and to profile the types which are of most concern. Since effective recording is the main strategy for reducing information costs, we discuss in Part IV the different ways of recording or registering encumbrances with diverse legal effect and, in Part V, the potential of spatial data infrastructure projects to lower recording and search costs. Part VI examines methods for limiting the number of statutory encumbrances which operate *in rem*. In Part VII, we propose a framework of 10 principles to guide the drafting of statutes which authorise the creation of statutory encumbrances.

## II THE PROBLEM OF STATUTORY ENCUMBRANCES

### A Types of Statutory Encumbrances – A Note on Terminology

The statutory encumbrances upon land with which we are concerned are commonly referred to in the land administration literature as ‘rights, obligations and restrictions’ (or ‘rights, restrictions and responsibilities’). The category of ‘rights’ includes statutory provisions which confer on an administering agency the power to create an express right that runs with the land. An example is a provision that a debt incurred by a landowner under the Act becomes a charge on the land, or that it creates an ‘interest’ in the land.<sup>10</sup> Alternatively, the statute may specify the consequences of an administrative decision in such a way as to mimic the effects of a property right but without expressly classifying it as such.<sup>11</sup> The right may

10 In legal discourse, an ‘interest’ normally means a property right: Peter Birks, ‘Before We Begin: Five Keys to Land Law’ in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (1998) 457, 460; however, the interpretation legislation of some jurisdictions gives the word an extended meaning. For example, the *Acts Interpretation Act 1954* (Qld) s 36 defines ‘interest’ in land to include not only a legal or equitable estate but also a ‘right, power or privilege over, or in relation to, the land’.

11 Law Reform Commission of the Australian Capital Territory (‘ACT’) gives the following example taken from the *Rates Ordinance 1926* (ACT): ‘Section 15(2) places the liability for unpaid rates on the person who is the owner of the land for the time being; s 18 empowers the Minister to take possession, hold and lease the land if the rates are unpaid for thirty days; and s 19 enables the Minister to apply to the court for an order for sale if they are unpaid for a year’. As the Commission points out, the word ‘charge’ is not used but every legal consequence of a charge is specified: ACT, *Report on the Law Relating to Conveyancing / Law Reform Commission of the ACT*, Parl Paper No 52 (1977) 56 [4.210].

conform to a recognised class of property rights (eg, an easement),<sup>12</sup> or it may be a novel statutory right which runs with the land and is enforceable against the current landowner and his or her successors. Otherwise expressed, we are concerned with rights which are enforceable not only *in personam*, but also *in rem*.<sup>13</sup>

Other types of statutory provisions authorise an administering agency to impose a restriction on the user of land, or a positive obligation on the landowner and his or her successors, without expressly conferring a corresponding right on anybody. This is not to say that the restriction or obligation is unenforceable. The statute may confer a power of enforcement on an administering agency; otherwise, or in default of action by the agency, an obligation or restriction, once created, may be enforced by a plaintiff with the fiat of the Attorney-General, or by a plaintiff who can satisfy standing requirements to apply to a court for an injunction or declaration.<sup>14</sup>

The existence of statutory encumbrances created by other statutes presents two kinds of information problem for purchasers. The first is to obtain full, accurate and timely information about all encumbrances subsisting over a specified land parcel. In some cases there may be a further problem in interpreting the authorising statute to determine whether an encumbrance operates *in rem* and binds a purchaser. These two issues are examined in sections B and C below.

## **B Statutory Encumbrances and the Problem of Information Costs**

Statutory encumbrances that run with the land potentially impose information costs on prospective acquirers, who must either incur the cost of searching for them, or assume the risk of failing to discover them. Both information costs and the assumption of the risk of undiscovered information are forms of transaction cost.<sup>15</sup> The adverse effect of transaction costs upon the ability of markets to

12 Rudden and other authors have observed that while English common law lacks the *numerus clausus* introduced by European Civil Codes, it actually recognises only a limited and relatively unchanging list of types of property right: Bernard Rudden, 'Economic Theory v Property Law: The *Numerus Clausus* Problem' in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence: Third Series* (1987) 239, 241-4; Thomas Merrill and Henry Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 *Yale Law Journal* 1; Brendan Edgeworth, 'The *Numerus Clausus* Principle in Contemporary Australian Land Law' (2006) 32 *Monash University Law Review* 387; *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 509 (Dixon J).

13 On the distinction between rights *in personam* and rights *in rem*, see Birks, above n 10, 473; Thomas Merrill and Henry Smith, 'What Happened to Property in Law and Economics?' (2001) 111 *Yale Law Journal* 357, 361-6.

14 A plaintiff will have standing to vindicate a public right by applying for equitable relief where he or she would be adversely affected by a failure to comply with statutory provisions: *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefits Fund Pty Ltd* (1998) 194 CLR 247. For example, a neighbour may have standing to enforce a landowner's compliance with a statutory duty to mitigate emissions or control migratory pests.

15 Otomunde Johnson, 'Economic Analysis, the Legal Framework and Land Tenure Systems' (1972) 15 *Journal of Law and Economics* 259, 261-3.

allocate resources efficiently is a basic premise of economics,<sup>16</sup> and is of concern to regulators.

Although government agencies generally fail to acknowledge it, it is inefficient for conveyancers to search for all statutory encumbrances that might potentially exist over a given land parcel. Like title searching under the pre-Torrens general law system, searching for encumbrances is subject to a law of diminishing returns.<sup>17</sup> This is due to the diminishing margin of increased certainty resulting from further searches relative to the opportunity cost of resources committed to the additional search activity.<sup>18</sup> Some types of encumbrances, such as charges for rates and land taxes, are so common that conveyancers generally search for them as a matter of course. Other searches may not survive a cost-benefit analysis. In determining which types of encumbrances to search for, conveyancers can be expected to weigh considerations such as the likelihood that the encumbrance exists, the cost of searches (including the fee charged by the agency to whom the enquiry must be directed), and the impact the encumbrance will have upon the purchaser's rights if it exists.

It follows that it is efficient for conveyancers to adopt a mixed strategy of risk avoidance – by searching for some types of encumbrances, and risk assumption (or risk retention) – by omitting other searches and retaining the risk of an undiscovered encumbrance. Conveyancers usually seek instructions from their client as to which searches to omit to ensure that the retained risks are not transferred to them in the form of professional liability. Conveyancers will also have regard to any requirements of their professional indemnity insurer as to which searches must be undertaken and which can be omitted on instructions from their client.<sup>19</sup>

## 1 Making Requisitions on Title

The encumbrances which cause most concern are those for which it is generally more efficient *not* to search. Purchasers attempt to both avoid and transfer risks by making requisitions on title before settlement to enquire about the existence of statutory obligations.<sup>20</sup> As a risk avoidance measure, requisitions are of limited use

16 Coase showed that positive transaction costs impair the allocative efficiency of exchange and include information costs, viz, the cost of investigating and appraising the rights offered: Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1.

17 Matthew Baker et al, 'Optimal Title Search' (2002) 31 *Journal of Legal Studies* 139, 145; Johnson, above n 15, 261.

18 Johnson, above n 15, 261, explaining the economics of title searching. The same principle applies to searches for administrative encumbrances.

19 In Queensland a legal practitioner will also take into account the requirements of the professional indemnity insurer Lexon's *Queensland Conveyancing Protocol* which specifies certain mandatory searches on behalf of buyers. The searches specified as mandatory are those where a buyer may have a right to terminate the contract before settlement if an adverse result is returned: Lexon Insurance, *Queensland Conveyancing Protocol*, version 3, 10 September 2008, 5-6 (copy on file with the authors).

20 *Carlsh v Salt* [1906] 1 Ch 335; *Godfrey v Abas Investments Pty Ltd* (1983) Q Conv R 54-083 (notice from local authority to sewer premises); *Holland v Goltrans Pty Ltd* (1984) Q Conv R 54-149 (notice from local authority to remove noxious weeds).

because the vendor is only required to answer to the best of his or her knowledge and belief. The vendor is not obliged to make searches before replying, and need not answer ‘requisitions’ which do not relate to matters of title.<sup>21</sup>

Requisitions are only partially effective as a means of transferring retained risks, as, although the vendor may be personally liable to the purchaser for a false answer to requisitions, the purchaser still takes subject to the encumbrance.<sup>22</sup> Evasive and vague answers to requisitions, which merely invite the purchaser to conduct their own searches are common and, to a considerable extent in practice, not easily actionable by purchasers.<sup>23</sup> This has led to the practice of purchasers making their own searches and not relying upon the vendor’s answers to requisitions.

## 2 Vendor Disclosure Regimes

Since the strategy of risk transfer by means of requisitions is easily circumvented by vendors, alternative strategies to lower purchasers’ information costs have been adopted in some jurisdictions.<sup>24</sup> In Queensland, a non-statutory vendor disclosure regime was introduced through amendments to the Real Estate Institute of Queensland’s standard form of contract for the sale of land. The purchaser’s contractual right to make requisitions on title has been abolished, and instead the vendor gives warranties in relation to the vendor’s capacity to transfer title subject only to registered encumbrances, the absence of contamination and the absence of statutory charges, orders or other interests that may affect the land. Breach of a warranty entitles the purchaser to rescind the contract, but as the right lapses upon acceptance of the vendor’s title, the purchaser is not relieved of the need to make their own enquiries before settlement.<sup>25</sup>

Statutory disclosure regimes are subject to similar limitations. The most extensive vendor disclosure laws are found in Victoria and New South Wales.<sup>26</sup> In Victoria, a vendor must give to the purchaser before entry into the contract a statement

- 21 The Property Law Revision Committee (‘PLRC’) of New South Wales noted that requisitions were often answered in a perfunctory and minimal way: PLRC, *Statutory Obligations Affecting Land* (1955) 11; *Harris v Weaver* [1980] 2 NZLR 437 (general enquiry concerning town planning not going to title); *TLL Management Pty Ltd v Nufate Pty Ltd* [1988] 1 Qd R 717 (general enquiry concerning affairs of strata title management).
- 22 PLRC, above n 21, 11; *Kahlbetzer v Cincotta* (1983) NSW ConvR 55-105 (allegation that solicitor falsely answered requisition that property was unoccupied).
- 23 The failure to properly answer a true requisition on title may affect only the vendor’s ability to issue a notice to complete and obtain a decree for specific performance against the purchaser, but little else: *Re Bayley-Worthington and Cohen’s Contract* [1909] 1 Ch 648, 656-7. Solicitors who draft incorrect answers to requisitions may be liable to their client who suffers loss as a result: *Mallesons Stephen Jacques v Trenorth Ltd* [1999] 1 VR 727.
- 24 Legislation in New South Wales, Victoria, South Australia and the Australian Capital Territory requires vendors to disclose details of specified statutory encumbrances. The schemes are compared in: Tasmanian Law Reform Institute, *Vendor Disclosure – Final Report*, Report No 5 (2004).
- 25 *Queensland Conveyancing Protocol*, above n 19, 5-6 states that solicitors acting for purchasers should undertake their own searches before settlement and compare the results with what the seller has disclosed in the contract. See also: Real Estate Institute of Queensland, *Contract for the Sale of Houses and Land*, cl 7 (copy on file with the authors).
- 26 *Conveyancing Act 1919* (NSW) s 52A; *Transfer of Land Act 1958* (Vic) s 32. These schemes, unlike the South Australian and Australian Capital Territory provisions, apply to sales of all land.

disclosing, inter alia, particulars of specified types of statutory charges, planning instruments, rates and taxes, and proposals, together with any notice, order, declaration, report or recommendation of a public body or government department affecting the land.<sup>27</sup> Where the vendor fails to comply with the disclosure requirements, the purchaser is entitled to rescind prior to settlement.<sup>28</sup> New South Wales has broadly similar provisions.<sup>29</sup> As in Queensland, the purchaser's right to rescind a contract for non-disclosure or for the failure of a warranty is limited to the time prior to acceptance of the vendor's title at settlement.<sup>30</sup>

### 3 Insurance

A further option for purchasers is to transfer and distribute the risks of undiscovered encumbrances through insurance. Private title insurers now offer owner's policies which allow purchasers to omit searches and insure against the risks of encumbrances on land that secure sums of money due to local and public authorities.<sup>31</sup> The cover also extends to:

any affectations, proposals, instruments or notices relating to the land by a government, statutory or local authority that is recorded in public records and would have been disclosed if a public authority report had been obtained.<sup>32</sup>

The policies generally limit the cover to encumbrances that existed at the date of registration but were neither mentioned in the sale contract nor actually known to the insured at the date of settlement.<sup>33</sup> While the insurer is subrogated to any rights of the insured, conveyancers acting for an insured purchaser may obtain a written waiver from the title insurer, which will allow them to omit off-register searches for encumbrances if their client so instructs.<sup>34</sup> Owners' policies have been slow to take off in the Australian market, and seem destined to play a minor part in managing the problem of statutory obligations.

27 *Sale of Land Act 1962* (Vic) s 32.

28 *Sale of Land Act 1962* (Vic) ss 5-7. Note that the court has discretion to excuse the breach and deny rescission: s 7.

29 *Conveyancing Act 1919* (NSW) s 52A. The documents to be attached to the contract are prescribed by *Conveyancing (Sale of Land) Regulation 2005* (NSW) ch 4, sch 1. The purchaser has a qualified right to rescind where the vendor fails to attach to the contract the documents prescribed: r 19.

30 *Conveyancing (Sale of Land) Regulation 2005* (NSW) r 19; *Sale of Land Act 1962* (Vic) s 32(5); *Conveyancing (Sale of Land) Regulation 2005* (Qld) r 20.

31 Pamela O'Connor, 'Double Indemnity: Title Insurance and the Torrens System' (2003) 3 *Queensland University of Technology Law and Justice Journal* 141, 155-6 citing First Title's Home Ownership Protection Policy 0601 cl 1.5(g).

32 Pamela O'Connor, 'Title Insurance: Is There a Catch?' (2003) 10 *Australian Property Law Journal* 120, 127 citing First Title's Home Ownership Protection Policy 0601 cl 1.5(u) and noting that Stewart Title's residential purchaser's policy was in similar terms.

33 O'Connor, 'Double Indemnity: Title Insurance and the Torrens System', above n 31, 156 citing First Title's Home Ownership Protection Policy 0601 cl 2.2(b), (c).

34 *Ibid* 147 citing First Title's Home Ownership Protection Policy 0601 cl 2.3(a).

#### 4 Conclusion on Methods of Risk Transfer

In sum, there are limited opportunities for purchasers to lower the information costs of statutory encumbrances by risk transfer. Requisitions are ineffective as vendors often answer evasively. Title insurance offers interesting possibilities but is largely untested in Australia. A vendor disclosure regime can effectively transfer the risk of the specified types of encumbrance if the vendor is required to append to the contract recent certificates as to encumbrances issued by the administering agencies and the purchaser has a right to rescind for breach of the vendor's duty. The Queensland regime, where the vendor provides warranties rather than certificates, does not relieve purchasers of the need to make their own searches before settlement.

Where the vendor is required to append search certificates, as in Victoria and New South Wales, the list is normally confined to those searches which purchasers would commonly require. With respect to all other types of statutory encumbrances which might potentially affect the land, the purchaser must choose whether to avoid the risk by searching or to retain the risk by omitting searches.

#### C Determining Whether the Encumbrance Operates in Rem

Once the existence of an encumbrance has been discovered, its legal effect must be ascertained. It is not always clear whether an obligation imposed by a statute binds only the owner for the time being, or whether it runs with the land and affects successive owners. Uncertainty exists because of drafting ambiguities and an approach to statutory interpretation which seeks to reconcile other statutes with the Torrens statutes.

Where a statute provides for an encumbrance to operate *in rem* without being recorded on the Torrens register, there is a conflict with the 'paramouncy' provision in the Torrens statutes, which typically provides that a registered proprietor 'takes absolutely free from all encumbrances whatsoever' except for those specified.<sup>35</sup> Rights enforceable against the registered proprietor *in personam* have been held to constitute a further non-statutory exception.<sup>36</sup> A statute that provides for an unrecorded encumbrance to operate only *in personam* is said to pose no inconsistency with the paramouncy provision,<sup>37</sup> while a statute that provides for such an encumbrance to operate *in rem* presents actual contrariety, and will be taken to impliedly repeal the paramouncy provision *pro tanto* if the statute is a later enactment,<sup>38</sup> or if it is a special measure which Parliament

35 See, eg, s 42(1) of the *Transfer of Land Act 1958* (Vic). Whalan uses the term 'paramouncy provision' but does not claim to have coined it: Douglas Whalan, *The Torrens System in Australia* (1982) 293.

36 *Frazer v Walker* [1967] 1 AC 569, 584 (Wilberforce LJ). Note that *in personam* rights are express statutory exceptions in Queensland and the Northern Territory.

37 *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472 [54] (McHugh ACJ, Hayne and Heydon JJ).

38 *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603.

enacted to deal with a special subject matter.<sup>39</sup> Since there is a presumption that the legislature did not intend to contradict itself, an interpretation which allows both Acts to operate is preferred ‘unless actual contrariety is clearly apparent’.<sup>40</sup>

The application of these principles has led to divergence of judicial opinion in some New South Wales cases. In *Hillpalm Pty Ltd v Heaven’s Door Pty Ltd*,<sup>41</sup> the High Court held by a majority (McHugh ACJ, Hayne and Heydon JJ) that if a condition requiring the grant of an easement had been imposed by a council in giving consent to a development under s 123 of the *Environmental Planning and Assessment Act 1979* (NSW), the condition would have been enforceable only against the developer who was originally responsible for the breach, not his successors in title. Their Honours said that as the right in question was ‘a personal right, not a right *in rem*’, there was no inconsistency with the *Real Property Act 1900* (NSW).<sup>42</sup> Kirby and Callinan JJ, in dissent, held that the condition was enforceable against the developer’s successors in title.<sup>43</sup> The dissenting judges’ interpretation was consistent with that of the judge at first instance and the Court of Appeal.

In response to this and other cases which raised controversies about whether statutory rights operated *in rem* or only *in personam*, New South Wales legislated in 2009 to shield the paramountcy provision, s 42 of the *Real Property Act 1900* (NSW), from implied repeal by adding the following new subsection:

(3) This section prevails over any inconsistent provision of any other Act or law unless the inconsistent provision expressly provides that it is to have effect despite anything contained in this section.

The intended effect of the new subsection is that legislation purporting to override the paramountcy provision in s 42(1) will need to indicate that intention expressly.<sup>44</sup> While the idea of inserting such a provision is not new, the novel aspect of the New South Wales provision is that it applies to earlier statutes as well as those enacted subsequently.

A similar provision was considered by the High Court in *South-Eastern Drainage Board (SA) v Savings Bank of South Australia*.<sup>45</sup> Section 6 of the *Real Property Act 1886* (SA) provided that any *later* Act inconsistent with it was not to apply to land under the Torrens System unless expressed to be enacted ‘notwithstanding the provisions of the *Real Property Act 1886*’. The High Court held (Evatt J dissenting) that, despite the absence of a provision such as that required by s 6, a

39 See, eg, *Miller v Minister of Mines* [1963] AC 484, where mining licences issued under an earlier statute were held to prevail against an interest registered under the Torrens statute.

40 *Butler v A-G (Vic)* (1981) 106 CLR 268, 276 (Fullagar J).

41 (2004) 220 CLR 472.

42 *Ibid* [54].

43 *Ibid* [74]-[82] (Kirby J); [128] (Callinan J).

44 Butt observes that while a few overriding statutes expressly state the intention to override the indefeasibility provisions, it is more common for them to produce that effect by implication: Peter Butt, *Land Law* (5th ed, 2006) [20116].

45 (1939) 62 CLR 603. The South Australian provision was limited to later statutes, while the proposed New South Wales provision is not so limited.

later Act which created unregistrable statutory charges on land was inconsistent with the *Real Property Act 1886* (SA) and prevailed over it. While the existence of a provision such as s 6 was relevant in interpreting a later Act, the later Act would override the *Real Property Act 1886* (SA) if it manifested a clear intention to do so, even if the form of wording required by s 6 was omitted. Dixon J expressed it thus:

if the later enactment contains clear language from which it is plain that its provisions were intended to apply in a manner inconsistent with the *Real Property Act*, then they must operate according to their meaning. For the later enactment of the Legislature must be given effect at the expense of the former.<sup>46</sup>

Accordingly a provision such as s 42(3) of the *Real Property Act 1900* (NSW) will be relevant and may even be decisive in interpreting doubtful provisions, but will not prevent a later statute operating according to its terms if it manifests a clear intention that an encumbrance operates *in rem* without registration, even if it does not use the words indicated by s 42(3).

### III MEASURING THE EXTENT OF THE PROBLEM

Despite the risk transfer methods discussed in the previous Part, statutory encumbrances not recorded on the land title represent an information cost for anyone dealing with private land. The existence of the problem has been recognised for at least 90 years,<sup>47</sup> but its extent is difficult to measure. There is no agreed definition or taxonomy of statutory encumbrances and no established methodology for measuring the numbers in force at any given time. Since they are not centrally recorded and it would be very costly to search all records held by Commonwealth, State and local authorities, even within a limited jurisdictional area, there is a lack of published data on the number and types of statutory encumbrances actually in existence in any jurisdiction.

Several studies have attempted to quantify the number of different types of encumbrances which could potentially affect a land parcel within a relevant area or jurisdiction, through the rough proxy measure of counting the number of legislative provisions which authorise the imposition of statutory obligations on private land. In 1955, the Property Law Revision Committee ('PLRC') of New South Wales listed a number of provisions extracted from some 21 Acts of New South Wales which the Committee said was sufficient to demonstrate 'the virtual impossibility for a solicitor to make all the enquiries which would be appropriate in every case'.<sup>48</sup> Western Australia's Department of Land Administration reported in 2003 that it had identified over 180 'interests' affecting land which are not presently recorded

46 Ibid 625.

47 The PLRC noted that, as early as 1919, the number of enactments which authorised the creation of unrecorded statutory obligations had already 'attained considerable proportions and had become a source of public inconvenience': PLRC, above n 21, 10.

48 Ibid 11, app D.

on certificates of title, including ‘native title claims, planning and conservation policies, heritage listing, salinity issues and contaminated sites’.<sup>49</sup>

A recent study of Victorian statutes has been undertaken by Bennett, Wallace and Williamson to estimate the number of provisions which authorise the creation of statutory encumbrances, and to provide a system for classifying them.<sup>50</sup> Bennett, Wallace and Williamson selected an administrative area and date (the City of Moreland in metropolitan Melbourne as at August 2005) and examined all Commonwealth and Victorian legislation and local laws to identify all provisions which authorised the creation of what the researchers termed ‘property rights, restrictions or responsibilities’, or ‘RRR’.<sup>51</sup> The study identified 514 Federal Acts, 620 Victorian Acts and 11 local laws which authorised the creation of types of RRR.<sup>52</sup> The researchers then undertook a detailed, multi-factor analysis of the RRR, with a view to profiling the types which were suitable for recording in land registries. One of the criteria used was spatial extent. The primary distinction was between RRR that were parcel-based and those that were not. Within the parcel-based category, they further distinguished RRR that applied to a specific parcel or small number of parcels in a small area (for example, statutes dealing with a particular site or reserve); ‘patchwork’ RRR that apply to parcels on a case-by-case basis (for example, heritage protection controls); and RRR that apply on a ‘blanket’ basis to all parcels uniformly (for example, liability to compulsory acquisition).<sup>53</sup> The non-parcel category includes RRR that apply to chattels or sites rather than parcels (for example, Aboriginal heritage laws); those which relate to infrastructure, such as roads and pipelines, and those which apply to shifting geographic areas (for example, laws relating to protection of wildlife). The significance of this analysis is that it shows that the types of RRR that purchasers would need to discover are a subset of all the RRR provided for in legislation. They fall into the spatial extent category designated by Bennett, Wallace and Williamson as ‘parcel-based – patchwork’.<sup>54</sup>

49 Standing Committee on Public Administration and Finance, Parliament of Western Australia, *The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia* (2004) 527 citing a letter from Mr Graham Searle, April 24 2003.

50 The results of this research are reported in Bennett, Wallace and Williamson, ‘Organising Land Information for Sustainable Land Administration’, above n 4; see also Bennett, Wallace and Williamson, ‘Achieving Sustainable Development Objectives through Better Management of Property Rights, Restrictions and Responsibilities’, above n 7, 5-6, 12.

51 It is apparent that Bennett, Wallace and Williamson base their classification of property rights on the reductive ‘bundle of rights’ conception favoured by economists: Bennett, Wallace and Williamson, ‘Organising Land Information for Sustainable Land Administration’, above n 4, 128. Thus, for example, they class the statutory right of a surveyor to enter upon private land as a property right, because access to land is one of the rights that may be included in the ‘bundle’ of a landowner’s rights: *ibid* 127, referring to *Surveying Act 2004* (Vic) s 58. Merrill and Smith suggest that the economists’ understanding of property is based on a misapplication of Hohfeld’s ‘bundle of rights’ metaphor, and overlooks the distinctive character of property as an *in rem* right enforceable against the world: Merrill and Smith, ‘What Happened to Property in Law and Economics?’, above n 13, 357-8, 364-6.

52 Bennett, Wallace and Williamson, ‘Achieving Sustainable Development Objectives through Better Management of Property Rights, Restrictions and Responsibilities’, above n 7, 2.

53 *Ibid* 11-12; Bennett, Wallace and Williamson, ‘Organising Land Information for Sustainable Land Administration’, above n 4, 131-2.

54 Bennett, Wallace and Williamson, ‘Achieving Sustainable Development Objectives through Better Management of Property Rights, Restrictions and Responsibilities’, above n 7, 11-12.

Other criteria proposed by Bennett, Wallace and Williamson that can be used to further define the RRR of interest to conveyancers are: the particular powers or rights conferred or restricted (for example, rights of access, use, management, removal of natural resources, exclusion, alienation);<sup>55</sup> and the duration (for example, single occasion, repeating, indefinite or defined in the instrument that created the RRR).<sup>56</sup> The key distinguishing criterion – whether the RRR operates *in rem* or only *in personam* – is not mentioned by Bennett, Wallace and Williamson. By layering the criteria in a matrix, it is possible for researchers to identify the characteristics of the RRR that are of most concern to conveyancers and purchasers. The criteria, together with predictions as to the likelihood of a positive result, are factored into the judgments that conveyancers make about which searches to make and which to omit. As discussed in Part IV below, Bennett, Wallace and Williamson have proposed that the criteria be used to identify the types of RRR which are suitable for recording in land registers.<sup>57</sup>

## IV METHODS OF RECORDING STATUTORY OBLIGATIONS

### A Registration with Indefeasibility

The principal method of reducing the information cost of encumbrances is to record them on registers which are readily and cheaply searchable by purchasers. Encumbrances may be recorded in land registers in different ways and with different consequences. The first method is what may be termed ‘registration with indefeasibility’ or simply ‘registration’. The encumbrance is registered with the same legal consequence as for a registered estate or interest in land. Registration with indefeasibility is usually reserved for administratively created rights of ownership or trusteeship, such as the result of an exercise of powers of compulsory acquisition,<sup>58</sup> the transmission of title to a Trustee in Bankruptcy by operation of the *Bankruptcy Act 1966* (Cth),<sup>59</sup> or the confiscation of interests in land under the *Proceeds of Crime* legislation.<sup>60</sup>

It should be noted in passing that a few statutes create new types of registrable interests in land which can be registered with indefeasibility, such as sugar access

55 Ibid 4.

56 Ibid 5.

57 Answering this question is in fact the object of the classification exercise undertaken by Bennett, Wallace and Williamson: *ibid* 7; Bennett, Wallace and Williamson, ‘Organising Land Information for Sustainable Land Administration’, *above* n 4, 134.

58 See, eg, *Transfer of Land Act 1958* (Vic). Section 54 provides that where any land vests in an acquiring authority under a statute without transfer, the acquiring authority shall on application be registered as proprietor of the land.

59 *Bankruptcy Act 1966* (Cth) s 58(1)-(2) provides that, upon bankruptcy, the real property of the debtor vests in the Official Trustee in equity, but does not vest at law until the transmission is registered.

60 *Proceeds of Crime Act 2002* (Cth). Section 67(1) similarly provides that where property specified in a forfeiture order is registrable property (that is, property to which title passes by registration under the law of a State), the property vests in the Commonwealth in equity but does not vest at law until registration.

easements under s 71 of the *Sugar Industry Act 1999* (Qld), and agreements about natural resource products under s 61J of the *Forestry Act 1959* (Qld).<sup>61</sup> These statutory creations are novel private property rights; they do not fall within the class of statutory encumbrances created by administering agencies with which this article is concerned.

## **B Recording with Specified Legal Effects**

Administratively-created encumbrances upon land are rarely registered with indefeasibility. Under different statutes they are variously ‘recorded’, ‘noted’, ‘notified’ or even ‘registered’. The terms are not used in the legislation in any consistent or systematic way, and it is not unusual to find a statute using more than one of the terms interchangeably to refer to the same mode of recording.<sup>62</sup> It is submitted that it is convenient to reserve the term ‘registration’ for entries that confer indefeasible title to the interests shown, ‘recording’ for other entries on the register, and ‘notification’ for the provision of information by a government entity to the Registrar which prompts the Registrar to make a recording.<sup>63</sup> This terminology is used below, except where citing legislation which uses different terms. Types of recording can be further subdivided according to whether the entry is for information only and has no legal effects, or whether recording is required for the burden to run with the land and be enforceable *in rem*.

### **1 Recording for Information – Overriding Statutes**

As noted above, many statutory obligations operate *in rem* by force of an overriding statute. Most Australian jurisdictions provide mechanisms for various types of encumbrances to be recorded in land registries, in order to save purchasers the need to direct their enquiries to a multiplicity of agencies. Wallace and Williamson observe the trend of providing two recording fields in Australian Torrens registers: one field ‘above the line’ to register interests with indefeasibility and one ‘below the line’ to record any other information which might be useful to government or transacting parties.<sup>64</sup>

61 The benefited person’s rights to the natural resource product are deemed to be a *profit à prendre* for the *Land Title Act 1994* (Qld): *Forestry Act 1959* (Qld) s 61J(5). See also *Conveyancing Act 1919* (NSW) ss 87A, 88AA, 88AB, deeming a ‘forestry right’ to be a *profit à prendre*.

62 See, eg, the *Forestry Rights Act 1996* (Vic) s 8, which refers to ‘registration’ of a forestry rights agreement, and s 9, which deals with the effect of ‘making a recording’ of the agreement.

63 Canada’s Joint Land Titles Committee proposed that the term ‘registration’ should be reserved for a register entry that confers indefeasibility: Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (1990) 8-9. The PLRC also recommended standardisation of terminology, although it proposed to use the term ‘notification’ to mean a recording which does not confer title: PLRC, above n 21, 39. What matters is that the terminology should be defined and consistently applied.

64 Jude Wallace and Ian Williamson, ‘Registration of Marine Interests in Asia-Pacific Region’ (2005) 30 *Marine Policy* 207, 209.

The Torrens statutes of the Australian Capital Territory,<sup>65</sup> Northern Territory,<sup>66</sup> Western Australia<sup>67</sup> and Queensland<sup>68</sup> each contain a provision authorising the Registrar to record statutory obligations on the folio or parcel register. The Queensland Act also provides for the recording of statutory obligations in a separate register maintained by the Registrar of Titles and searchable by the public.<sup>69</sup> In New South Wales, ‘orders, awards, determinations, notifications, and charges’<sup>70</sup> affecting registered land may be registered in the General Register of Deeds only if they would be effective without any recording in the Torrens register.<sup>71</sup> Recording under these provisions is for information only. The validity or enforceability of the statutory obligations is conferred by the statute, under which they are created, and is not affected by recording or non-recording. The difficulty with recording provisions of this type is that the agencies which create the statutory obligations have little incentive to record them if recording does not affect enforceability. The incentive to record is even weaker when the provision expressly exonerates the agency from any civil liability for failing to do so.<sup>72</sup> A further disincentive for agencies to record obligations is that they bear the cost of developing and operating a business system for notifying the Registrar to update the record and remove spent entries.

## 2 Recording as a Precondition to Effect

Government agencies have a greater incentive to notify their statutory encumbrances if the enabling legislation provides that the encumbrances take effect only when recorded. The New Zealand Law Commission has suggested the inclusion of such a provision in guidelines for new legislation.<sup>73</sup> The Law Reform Commission of the Australian Capital Territory has recommended that it should

65 *Land Title Act 1925* (ACT) pt 8A deals with the recording of administrative interests in the register. The Act specifies no legal consequences of recording.

66 *Land Title Act 2000 No 2* (NT) ss 6(2)(a), 30(2), 31. Section 35(6) provides that a ‘statutory restrictions notice’ entered in the register under s 35(5) ‘has effect according to the tenor of the statutory restriction to which it refers’.

67 *Transfer of Land Act 1893* (WA) s 70A (added in 1996) provides a mechanism by which local government or public authorities may, at their option, cause the Registrar to place a notation on a certificate of title of ‘a factor affecting the use or enjoyment of the land or part of the land’. No consequences of recording or non-recording are specified.

68 *Land Title Act 1994* (Qld) s 29(2) empowers the Registrar to ‘record in the freehold land register anything that the Registrar considers should be recorded to ensure that the register is an accurate, comprehensive and useable record of freehold land in the State’.

69 *Land Title Act 1994* (Qld) s 34(1) provides for the Registrar to keep separately from the register information considered necessary or desirable for the efficient operation of the register, which may include information given to the Registrar by another entity: s 34(2). This separate register is known as the Administrative Advices Register.

70 *Conveyancing Act 1919* (NSW) s 191.

71 *Conveyancing Act 1919* (NSW) s 187.

72 See, eg, *Land Title Act 1994* (Qld) s 34(4). The *Land Title Act 1925* (ACT) s 69D exonerates both the Registrar and the government agency for errors and omissions subject to a disclaimer requirement.

73 New Zealand Law Commission (‘NZLC’), *Review of the Land Transfer Act 1952*, Issues Paper 10 (2008) [9.45]–[9.47].

be ‘accepted as a matter of inflexible legislative policy’ that no charge should be created other than by registration in the Torrens register.<sup>74</sup>

A more limited approach would allow unrecorded statutory encumbrances to be enforced against the owner at the time they are created, but not against successive owners unless recorded. Otherwise expressed, the restrictions and obligations would be enforceable *in personam* from the time they are created, but recording would be necessary for them to operate *in rem*.<sup>75</sup>

Victoria has a unique provision for recording of statutory rights (but not restrictions and obligations) which makes them operative *in rem*. The *Transfer of Land Act 1958* (Vic) s 88(2) provides that ‘a charge on land or any other right in the nature of a charge or an easement or any other right over or affecting land’ acquired under a Victorian or Commonwealth Act may, if notified to the Registrar by the acquiring agency, be recorded on any relevant folio of the register. Subsection (3) states that the recording of the ‘charge easement or right shall not give it any greater operation than it has under the instrument or Act creating it’. As Whalan put it, the charge, easement or right is recorded ‘for what it is worth’ under this provision.<sup>76</sup> Recording on the folio does not cure invalidities but does give *in rem* effect by operation of the *Transfer of Land Act 1958* (Vic) s 42(1). That subsection provides that the registered proprietor of land shall ‘hold such land subject to such encumbrances as are recorded on the relevant folio of the register’.

Encumbrances may be recorded under s 88(2) only where another Act provides for it. In practice, such Acts usually contain their own enforcement provision, and do not rely solely upon the combined effect of s 88(2) and s 42(1). For example, s 47B of the *Legal Aid Act 1978* (Vic) provides that if Victoria Legal Aid proposes to take a charge over land (to secure repayment of a debt for legal assistance), it must lodge notice of the charge with the Registrar of Titles, who must record it in the register, whereupon the land becomes charged with the amount due under the notice. Similar provisions are found in a few Victorian Acts relating to the creation of statutory agreements between a landowner and a government entity.<sup>77</sup> The effect of these statutes is that the obligation is enforceable *in personam* against the party who entered the agreement or incurred the debt; but it is not enforceable against subsequent registered proprietors of the land unless it is recorded.

74 Law Reform Commission of the Australian Capital Territory, above n 11, [4.212].

75 See, eg, the *Nature Conservation Act 1992* (Qld) s 51(1) which provides that a conservation agreement between the State and a landowner that is ‘registered’ (ie recorded) under s 134 is binding upon the successors in title to the landowner who entered into the agreement.

76 Whalan, above n 35, 111 (referring to restrictive covenants, which are included with other rights in s 88(3) of the *Transfer of Land Act 1958* (Vic)).

77 See, eg, the *Aboriginal Heritage Act 2006* (Vic) s 76, which states that if a cultural heritage agreement provides for the agreement to be registered, the Secretary must apply to the Registrar for it to be recorded. Section 77 states, once recorded, the burden of the agreement runs with the land and can be enforced by the Secretary as if it were a restrictive covenant. See also *Planning and Environment Act 1987* (Vic) ss 173, 181, 183 which make similar provisions with respect to a planning agreement entered into between a planning authority and a landowner relating to the conditions on planning approval and development.

Provisions, which make recording a precondition to *in rem* operation, are uncommon and usually relate to agreements between landowners and government agencies which are used as a method of regulation. Some overriding statutes which create statutory obligations require the acquiring agency to notify the Registrar and the Registrar to record, but do not make the recording a precondition to the validity or *in rem* operation of the encumbrance.<sup>78</sup> Further research is needed to ascertain how effective the provisions are in promoting the recording of encumbrances which run with the land by force of overriding statutes whether recorded or not.

### 3 Avoidance Provisions

Another way of limiting *in rem* enforcement of unrecorded encumbrances against purchasers is to include an ‘avoidance’ provision either in the legislation, under which the burden is created, or in the legislation that establishes the register. An example is found in the provisions establishing Causes, Writs and Orders of Court Register of New South Wales. Part XXIII of the *Conveyancing Act 1919* (NSW) established a single register, kept by the Registrar-General, to simplify searches which previously had to be made by enquiries directed to various agencies.<sup>79</sup> A broadly defined class of statutory obligations was registrable. The avoidance provision in s 188(1) of the Act stated that an ‘order, award, determination, notification or charge’ was void against a purchaser without notice unless the burden was registered at the time of the purchase.

Despite the stringency of this avoidance provision, the PLRC found that there had been ‘extensive neglect’ by government agencies to register their interests,<sup>80</sup> and ‘an inexplicable unwillingness’ by purchasers to invoke the protection of the avoidance provision in s 188.<sup>81</sup> While the failure to register could be explained in part by the overly wide class of registrable encumbrances and the cumbersome indexing provisions, the Committee also found widespread apathy and indifference of government departments to their statutory obligation to register encumbrances and to the inconvenience caused to the public.<sup>82</sup> Even the ‘cloud of invalidity’<sup>83</sup> hanging over their unrecorded encumbrances did not provide sufficient incentive for them to register.<sup>84</sup> It is possible that government agencies relied upon purchasers having notice of the encumbrances through means other than the register, such

78 See, eg, the *Heritage Act 1995* (Vic) s 47, which provides that the Executive Director must notify the Registrar of Titles of any matter on the Heritage Register which affects land, and the Registrar of Titles must record it in the register for the purpose of bringing it to the attention of persons who search the folio. See also *Infringements Act 2006* (Vic) s 137 which stated that if a Court makes an order under s 136 charging land with money owing, the Sheriff must lodge with the Registrar of Titles a copy of the order and the Registrar must record the charge in the register.

79 PLRC, above n 21, 12 (quoting Mr Justice Harvey, the Royal Commissioner appointed to report on the Conveyancing Bill 1919 (NSW)).

80 *Ibid* 20.

81 *Ibid* 22.

82 *Ibid* 25-6.

83 *Ibid* 26.

84 *Ibid* 25-6.

as through the vendor's disclosure, answers to requisitions, local knowledge or enquiries directed to the relevant departments. The existence of off-register notice may explain the failure of purchasers to invoke the exoneration of s 188(1), although the Committee accepted the submission of the Registrar-General that the failure was due to legal practitioners' ignorance of the provision.<sup>85</sup>

It is now expressly provided by s 188(3) that the avoidance provision in the section does not apply, and shall be deemed never to have applied, in respect of land registered under the *Real Property Act 1900* (NSW). An avoidance provision of this kind, which relies upon the concept of notice, is at odds with the general policy of the Torrens statutes to relieve purchasers from the effects of notice.<sup>86</sup> It is simpler and more certain to deny *in rem* operation to unrecorded encumbrances, whether the purchaser has off-register notice of them or not.

## V RECORDING IN LAND INFORMATION SYSTEMS

Most law reformers who have examined the problem of statutory obligations have called for them to be recorded in a common, centrally held register rather than in separate registers held by the various administering agencies responsible for creating them. The central register may be held by the Torrens Registrar, or take the form of a general register for both registered and unregistered land such as the Causes, Writs and Orders of Court Register of New South Wales.<sup>87</sup>

### A Development of Spatial Data Infrastructure

It is no longer self-evident that information about statutory obligations can be accessed more cheaply through a centralised register. Land information systems that are currently being developed do not rely on centralising the holding of data about encumbrances, but enable the integration and retrieval of data held by administering agencies, by linking data through parcel identifiers such as volume and folio numbers, lots on plans, street addresses and geocodes.<sup>88</sup> The development of an integrated land management system, or 'spatial data infrastructure' ('SDI'), has been prompted largely by the needs of government and business to have comprehensive and integrated land information in order to plan for sustainable development.<sup>89</sup> The provision of better information to purchasers is a subsidiary objective.

85 Ibid 23-4.

86 All Australian Torrens statutes include a section similar to *Transfer of Land Act 1958* (Vic) s 43, which abrogates the doctrine of notice for the benefit of a purchaser dealing with a registered proprietor.

87 The Register is based on the English Land Charges Register: PLRC, above n 21, 13.

88 Mohsen Kalantari et al, 'Spatially Referenced Legal Property Objects' (2008) 25 *Land Use Policy* 173, 179.

89 Ibid 173; Wallace and Williamson, above n 64, 209; Bennett, Wallace and Williamson, 'Organising Land Information for Sustainable Land Administration', above n 4, 127; Jurg Kaufmann and Daniel Steudler, *Cadastre 2014 – A Vision for a Future Cadastral System* (1998) International Federation of Surveyors <<http://www.fig.net/cadastre2014/translation/c2014-english.pdf>> at 4 August 2009.

The development of SDI is a complex and long-term project, requiring substantial investment by the States and Territories in information technology and geocoding of data held by administering agencies.<sup>90</sup> Some States are already able to provide a single point of access that enables online searching and issue of certificates from a number of administering agencies affecting a specified land parcel. Victoria's Landata service offers online ordering of certificates relating to a number of types of encumbrances.<sup>91</sup> At the same time as making a title search, conveyancers are able to select which searches they wish to make for statutory encumbrances and pay for all the certificates ordered through a single online payment. Western Australia's Landgate Conveyancing Channel Interest Enquiry website allows users to order reports on 'interests'<sup>92</sup> recorded by 18 different government agencies, through a single online enquiry.<sup>93</sup> The Landgate Interest Enquiry facility has been enabled by the development of the Shared Land Information Platform which establishes protocols for the exchange and sharing of spatial information by government agencies.<sup>94</sup>

The full deployment of integrated land information systems potentially reduces the information costs of statutory encumbrances. If a large range of statutory rights, obligations and restrictions can potentially be recorded by administering agencies in a way that enables them to be searched via a single online portal, is there any need for them to be recorded on Torrens land registers at all? Wallace and Williamson note a divergence of views on this question.<sup>95</sup> Some jurisdictions are developing a model in which information about statutory obligations is recorded on Torrens registers 'below the line' for information purposes only.<sup>96</sup> In other jurisdictions, governments have limited the role of the Torrens register to private property rights, while improving capacity in other land information databases and using web-enabled information technology to link them to a

90 Bennett, Wallace and Williamson, 'Achieving Sustainable Development Objectives through Better Management of Property Rights, Restrictions and Responsibilities', above n 7, 3.

91 Landata searches currently provide information about the planning scheme as it affects the specified property; VicRoads approved road proposals; the Environment Protection Authority's priority sites register of contaminated sites; land tax due and unpaid; local government rates, charges and notices; building approvals and notices; rates, charges and encumbrances relating to sewerage and water supply affecting the parcel; water, sewerage and drainage connections and easements; catchment and land management information including land use conditions and restrictions; and heritage status (including orders). See Landata, *Title & Property Certificate (TPC) Service* (2009) Landata <[https://www.landata.vic.gov.au/tpc/tpc\\_help\\_about.aspx](https://www.landata.vic.gov.au/tpc/tpc_help_about.aspx)> at 9 October 2009.

92 'Interests' are defined for this purpose as 'anything that affects the use and enjoyment of land, is bound by some form of legislation, and has a recognised government agency as its custodian': Western Australian Land Information Authority, *Landgate Annual Report 2007-08* (2008) 11.

93 The 'interests' include: Aboriginal communities; 'bush forever' areas; control of access on State roads; emergency services levy; heritage places on State register; petroleum tenures; regional planning schemes; mining titles; Aboriginal heritage and Native Title. Landgate plans to extend the Interest Enquiry service to include information relating to 'land tax, rates, zoning, municipal heritage and a range of title and encumbrance details'. The 'Interest Enquiry' portal can be accessed at Landgate, *Conveyancing Channel* (2009) Landgate <<http://www.landgate.wa.gov.au/Corporate.nsf/web/Conveyancing+Channel>> at 9 October 2009.

94 Western Australian Land Information Authority, above n 92, 38.

95 Wallace and Williamson, above n 64, 208.

96 Ibid.

common portal.<sup>97</sup> The full deployment of the SDI is still a long way off in most jurisdictions. The integration of information held in many agency databases requires co-ordination and collaboration across multiple portfolios and agencies. Considerable effort must be invested over a long period of time to achieve interoperability and exchange of information between agency databases which were originally designed to serve only the agency's own needs.<sup>98</sup> The Australian States and Territories are at different stages in developing this infrastructure. Even under a fully operational SDI system, it is still relevant to ask: which classes of statutory rights, obligations and restrictions should be recorded on Torrens land registers?<sup>99</sup>

## **B Which Encumbrances Should Be Recorded on Torrens Registers?**

The answer to this question depends in part on what view one takes of the purpose of the Torrens register. The broadest view, espoused by Scotland's Reid Committee in 1963, is that the land register should mirror, as fully as possible, the state of the title and the statutory obligations to which it is subject.<sup>100</sup> The Scottish Law Commission has recently repudiated this view as 'an impossible ambition'.<sup>101</sup> It notes that land registers on the whole are registers of real rights – interests in land – and are 'not concerned with rights and obligations which derive from public law'.<sup>102</sup> Still less is land registration concerned, in the Commission's view, with recording 'the innumerable use rights disclosed by statute'.<sup>103</sup>

The sheer number and variety of statutory obligations impose a practical constraint on the capacity of Torrens registers to provide a complete record. Western Australia's Department of Land Administration has submitted that 'it would be administratively difficult and cost prohibitive to record all restrictions affecting a block of land on the relevant certificate of title'<sup>104</sup> and that an alternative way of making this information available must be found. Suitable criteria are needed to guide decisions as to which statutory encumbrances ought to be recorded on the Torrens register.

97 Ibid.

98 Kalantari et al, above n 88, 174.

99 This was the question posed by Bennett, Wallace and Williamson, 'Organising Land Information for Sustainable Land Administration', above n 4, 134.

100 Scottish Home and Health Department, *Registration of Title to Land in Scotland*, Cmnd 2032 (1963) [109] ('Reid Report') cited by Scottish Law Commission, *Discussion Paper on Land Registration: Miscellaneous Issues*, Discussion Paper No 130 (2005) [5.6].

101 Scottish Law Commission, above n 100.

102 Ibid [5.7].

103 Ibid. See also VLRC, *The Torrens Register Book*, Discussion Paper No 3 (1986) [13].

104 Standing Committee on Public Administration and Finance, Parliament of Western Australia, *The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia* (May 2004) 1514 citing Department of Land Administration, *Submission No 121* (20 February 2002) 20.

## 1 *The ‘Analogy’ Approach*

If it is accepted that not all statutory encumbrances should appear on Torrens parcel registers, what criteria should guide the selection of those that are recorded there? Bennett, Wallace and Williamson suggest that the criteria should be derived by analogy with the types of ‘ownership rights’ that are currently managed by land registries.<sup>105</sup> They observe that ‘the core function of the registry is to deal with interests that are marketable, dynamic, easily defined spatially and [that can be] held by private people’.<sup>106</sup> They find that these characteristics exist in only 66 of the 620 Victorian Acts that provide for the creation of RRR.<sup>107</sup> As the 66 RRR are not specified, it is unclear which types of statutory rights, obligations and restrictions would satisfy the criteria of being ‘marketable’ and able to be ‘held by private people’, other than private property rights in commodified resources created by statute.<sup>108</sup>

Although the above criteria are proposed by Bennett, Wallace and Williamson to extend the use of the Torrens registers, they are actually more restrictive than current use.<sup>109</sup> If ‘interests currently managed by the registry’ include rights, charges and encumbrances recorded under s 88(2) of the *Transfer of Land Act 1958* (Vic), that class already includes rights and encumbrances held by public agencies which are not marketable or transferable to private people. Even if Bennett, Wallace and Williamson refer to interests that can be registered with indefeasibility, that category is not currently confined to ‘ownership’ rights, but includes certain non-possessory rights such as easements and charges.

## 2 *The ‘Property Rights’ Approach*

Another possible approach would be to record on Torrens registers only those statutory obligations which are cognisable as property rights or interests in specific land parcels. Statutory charges, easements, covenants and other rights affecting the title would be recorded,<sup>110</sup> while restrictions on user and obligations imposed on landowners without a correlative right conferred on another person or agency would not be recorded. This approach is at once too wide and too narrow. It is too wide in that it includes charges to secure rates and land taxes even though, as pointed out below, there is little to be gained by recording these very common charges on land registers.<sup>111</sup> It is also too narrow, in that it excludes substantive obligations that run with land and affect landowners, such

105 Bennett, Wallace and Williamson, ‘Organising Land Information for Sustainable Land Administration’, above n 4, 135.

106 Ibid.

107 Ibid.

108 Water property and carbon rights are specifically mentioned: *ibid.* The category might also include forest property rights created under the *Forestry Rights Act 1996* (Vic) s 5, or the right to natural resource produce created under *Forestry Act 1959* (Qld) s 61J(5) as a registrable *profit à prendre*.

109 Ibid.

110 See, eg, the formulation used in *Transfer of Land Act 1958* (Vic) s 88(2)-(3) to describe the types of statutory obligations that may be recorded on the Torrens register.

111 See below n 131, 132 and accompanying text.

as a determination placing a landowner under a duty to remediate contaminated land.<sup>112</sup> Some statutes currently provide for administrative obligations to bind successors in title only if recorded on the land register.<sup>113</sup>

A further difficulty with relying on the ‘property rights’ criterion is that there is no clear or agreed test for determining what amounts to a property right, beyond the categories already recognised at common law and equity.<sup>114</sup> While statutes can create new types of property right, the intention to do so need not be expressly stated. Therefore, to say that property rights, and only property rights, are to be recorded on land registers provides no clear guidance to owners and purchasers about which types of encumbrances they can expect to find on the land register, and which ones they need to look for elsewhere.

### **3 A Functional Approach**

The key requirement is that all statutory rights, obligations and restrictions that operate *in rem* should be recorded in a way that is readily and cheaply searchable at the same time as a title search is undertaken. It is possible that this facility may be provided in various ways, including by recording on the Torrens parcel register, or in an ancillary parcel-indexed register maintained by the Registrar (such as Queensland’s Administrative Advices Register), or in databases maintained by administering agencies that are linked to the parcel register. As the development of SDI leads to closer integration of agency and registry data systems, the need for central recording of information on Torrens parcel registers will diminish. In the meantime, it is likely that decisions about which statutory encumbrances are recorded on the Torrens parcel register will be dictated by the order in which agency data sub-systems are linked to the Torrens register search portal, and the frequency with which recordings need to be updated. In time, the Torrens register may revert to its original function of being a register of essentially private property rights, with information about all statutory encumbrances provided through linked agency data subsystems.

### **4 Conclusions on Criteria for Recording in Torrens Register**

We submit that functional considerations, rather than tenuous analogies with registered interests and recognised property rights, should guide choices as to which encumbrances should be recorded on Torrens parcel registers and which should be recorded on agency registers. A functional approach indicates that the method should be selected which is better suited to providing accurate, complete and current information to enquirers as cheaply as possible. As SDI projects develop and link to an increasing number of agency subsystems, it is likely that

112 See, eg, the process for enforcement of a land management notice under *Catchment and Land Protection Act 1994* (Vic) pt 5 div 1.

113 See above n 77 and accompanying text.

114 Gray observes: ‘the quest for the essential nature of “property” has beguiled thinkers for centuries. The essence of “property” is indeed elusive’: Kevin Gray, ‘Property in Thin Air’ (1991) 50 *Cambridge Law Journal* 252, 292.

the functional considerations will increasingly favour the provision of information through agency databases. Recording provisions in statutes should be drafted in ways which allow for the responsibility to record encumbrances to be devolved from the registry to the administering agency once the agency's data subsystem has been integrated with the online search portal. One kind of encumbrance should continue to be recorded on the Torrens parcel register. Where recording is a statutory precondition to the encumbrance operating *in rem*, the recording should appear on the Torrens register, as this is one search that all purchasers can be expected to make.

## **C Other Issues Relating to Recording on the Register**

### **1 Updating the Recording**

Where a statute provides for an encumbrance to be recorded on the Torrens parcel register, some provision is needed to ensure that the recording is kept up-to-date. One way to achieve it is for the empowering legislation to impose an obligation on the administering agency to notify the Registrar whenever there is an alteration affecting a recorded encumbrance.<sup>115</sup> An alternative approach is to provide a sunset provision to terminate an encumbrance after a period of time unless it is renewed.<sup>116</sup> Sunset provisions are widely used in administrative legislation to ensure that regulatory interventions or encumbrances do not outlive their utility. For example, regulations are in some jurisdictions automatically revoked a specified number of years after they are made.<sup>117</sup>

### **2 Compensation Considerations**

Where a statute provides for recording of an encumbrance in the Torrens register relating to affected land parcels, this may confer an entitlement to compensation for losses resulting from omitted or misdescribed encumbrances. Some statutes impose a duty on the Registrar to record an encumbrance upon notification by an administering agency.<sup>118</sup> Under the compensation provisions of the Torrens statutes, a person who suffers loss or damage through an omission, mistake or misfeasance of the Registrar in carrying out his or her duties may seek damages

115 See, eg, *Heritage Act 1995* (Vic) s 47(2) which requires the Executive Director to notify the Registrar of Titles each time the Heritage Register is amended. Section 47(5) requires the Registrar to make recordings to bring the notice to the attention of persons searching the folios for the affected parcels. A detailed provision for notification and recording is found in the *Land Acquisition and Compensation Act 1986* (Vic) s 10 (notice of intention to acquire).

116 Rohan Bennett, Jude Wallace and Ian Williamson, 'A Toolbox for Mapping and Managing New Interests over Land' (2008) 40 *Survey Review* 43, 47, Table 2.

117 See, eg, *Subordinate Legislation Act 1994* (Vic) s 5 and *Statutory Instruments Act 1992* (Qld) s 54, which revoke statutory rules after 10 years. See also *Law of Property Act* (NT) s 174, which provides for the extinguishment of registered covenants after 20 years.

118 The general recording provision in *Transfer of Land Act 1958* (Vic) s 88(1)-(2) is expressed in terms that empower but do not require the Registrar to make recordings. But some other statutes are expressed in mandatory terms: see, eg, *Heritage Act 1995* (Vic) s 47(5).

or compensation from the Registrar.<sup>119</sup> The loss or damage is not limited to the loss of an interest in land.<sup>120</sup>

Where the legislation empowers but does not require the Registrar to record an encumbrance on the register, or where the omission of an encumbrance from the register is not the fault of the Registrar, a person who suffers loss may be entitled to compensation or damages under an alternative ground. All jurisdictions have a provision that a person who suffers loss through any error, omission or misdescription in the register may claim compensation.<sup>121</sup> New South Wales authorities indicate that to establish an ‘omission’ under this ground it is not necessary to show any default or error on the part of the Registrar: it is enough to show that the interest is ‘not there’.<sup>122</sup> It is therefore possible that, except in Queensland,<sup>123</sup> a compensation claim could be made against the Registrar for loss or damage arising from the failure of an administering agency to notify the Registrar of an encumbrance. Upon payment of compensation, the Registrar is subrogated to the rights of the claimant against the administering agency, either under express statutory provisions,<sup>124</sup> or under the equitable doctrine of subrogation<sup>125</sup> to the extent that the doctrine is not impliedly excluded by the statute.<sup>126</sup>

While it is within the purpose of the Torrens compensation provisions to compensate someone who suffers loss through an error or omission of the registry, it is doubtful that that this provision should extend to errors and omissions resulting from the failure of other agencies to notify. The extension may diminish the already weak incentives for agencies to notify, and burden the Registrar with an enforcement function. These difficulties could be avoided

119 Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (4th ed, 2007) [4.685]. Note that the *Land Title Act 1980* (Tas) s 153(1)(a) limits the ground to mistakes, etc, of the Recorder and staff in carrying out their duties ‘under this Act’. The *Real Property Act 1886* (SA) s 208 refers to ‘error, omission, or misdescription in any certificate, or in any entry or memorial in the Register Book’.

120 Bradbrook, MacCallum and Moore, above n 119, [4.685].

121 *Ibid* [4.670].

122 *Cirino v Registrar-General* (1993) 6 BPR 13,260 [13,263]; see also *Challenger Managed Investments Ltd v Direct Money Corp Pty Ltd* (2003) 59 NSWLR 452, 460-1 (Bryson J); *Voudouris v Registrar-General* (1993) 30 NSWLR 195, 202 (Hodgson J); cf *Trieste Investments v Watson* (1963) 64 SR (NSW) 98, where the Court of Appeal found that the omission of a resumption order from the register was not an ‘error or omission’. In the latter case, there was no power to record the resumption order.

123 See, eg, *Land Title Act 1994* (Qld) s 189(1)(l).

124 *Real Property Act 1900* (NSW) s 133; *Land Title Act 2000 No 2* (NT) s 196; *Land Title Act 1994* (Qld) s 190; *Transfer of Land Act 1958* (Vic) s 109(3)(a).

125 The equitable doctrine of subrogation provides for a transfer of rights by operation of law to a person who discharges the obligation of another, and applies in a range of circumstances where reason and justice demand the remedy: see *Orakpo v Manson Investments Ltd* [1978] AC 95.

126 In *Northside Developments Pty Ltd v Registrar-General* [1987] 11 ACLR 513, Young J made a compensation order against the Registrar-General in proceedings under s 127 of the *Real Property Act 1900* (NSW) (since repealed), and rejected the Registrar-General’s claim to be indemnified by third parties allegedly responsible for the loss. His Honour said that the scheme of the Act excluded any right of subrogation such as that claimed by the Registrar-General. His Honour’s decision was reversed on appeal, on grounds which made it unnecessary to deal with this issue: *Registrar-General v Northside Developments Pty Ltd* (1988) 14 NSWLR 571; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146.

by amending the compensation provisions to exclude compensation for losses resulting from an unrecorded encumbrance where the agency failed to notify. Anybody who suffers loss thereby would be left to pursue his or her remedies against the administering agency directly. An example of such a provision is the *Land Title Act 1994* (Qld) s 189(1)(l), which excludes compensation for loss or damage resulting from incorrect information in the administrative advices register, where the information was given to the Registrar by another entity and the incorrectness was not due to an error by the Registrar in recording.<sup>127</sup>

## VI LIMITING THE PROLIFERATION OF OVERRIDING STATUTES

While recording can reduce information costs, a more comprehensive management model would include measures to limit the number of encumbrances for which separate searches must be made. The law of diminishing returns suggests that for less common encumbrances, purchasers are likely to adopt a strategy of risk retention, even if the cost of search certificates is reasonable. The retained risk is itself a cost to purchasers since they are in effect self-insuring the risk of undiscovered encumbrances.

Law reformers have questioned the need for legislatures to provide for so many statutory encumbrances operating *in rem*. The Law Reform Commission of the Australian Capital Territory suggested that:

no serious loss of revenue or administrative inconvenience would occur if the liability for rates [and other revenue debts] were simply debts enforceable, like any other debt, by execution of civil judgments.<sup>128</sup>

The Commission proposed that a revenue debt should not be charged on land automatically, but only following an administrative determination that the debt had remained unpaid after a specified period of time, and where the charge was registered under the Real Property Ordinance.<sup>129</sup>

While these suggestions have merit in relation to unusual debts,<sup>130</sup> the case for limiting *in rem* enforcement of unrecorded rates and land taxes is less compelling. Canada's Joint Land Titles Committee has concluded that rates are such a universal obligation of landownership that it would not be practical to keep up-to-date information about liabilities on land registers; therefore, purchasers would need to make enquiries of the local authorities to confirm the outstanding balance in any event.<sup>131</sup> The Committee added that rate liabilities are so common

127 Inserted by the *Natural Resources and Other Legislation Amendment Act 2005* (Qld) s 107(2).

128 Law Reform Commission of the ACT, above n 11, [4.211].

129 *Ibid.*

130 Such as the ones imposed under ss 21(2) and 35 of the (since repealed) *Rabbit Destruction Ordinance 1919* (ACT) cited by the Commission: *ibid* [4.210]–[4.213].

131 Joint Land Titles Committee, above n 63, 120.

that purchasers would not be misled by their omission from the land register.<sup>132</sup> In Australia, too, conveyancers routinely obtain certificates as to rates, and both pre-paid rates and rate arrears are adjusted at settlement.

In 1987, the Victorian Law Reform Commission has recommended that before a new administrative interest or control is created, the agency should be requested to demonstrate that specified ‘sunrise’ criteria are satisfied, namely, that the exercise of the agency’s will be impaired if it is confined to personal actions against the landowner; that costs to all parties associated with creating a new burden are justified by the saving in other costs; that the interest will exist in harmony and predictable priority with other administrative and private interests in the land; and the interest can be recorded on the land information network.<sup>133</sup> The Commission has recommended that the same ‘sunrise criteria’ should be applied to existing administrative interests and controls on the use of land.<sup>134</sup>

The process recommended by the Commission has not yet been adopted in Victoria. It is not included in the Business Impact Assessment (‘BIA’) and Regulatory Impact Assessment (‘RIA’) processes currently employed for primary legislation (Bills) and statutory rules respectively.<sup>135</sup> Both assessments use a similar methodology, requiring that the measure be justified by cost-benefit analysis and by comparative evaluation of all the options for achieving the policy objective.<sup>136</sup>

There are other ways to reduce the unnecessary inclusion of *in rem* enforcement mechanisms. Bills might be made subject to scrutiny by a regulatory reform unit within government, Parliamentary Counsel, or a parliamentary committee, under guidelines requiring that the provisions do not authorise *in rem* enforcement of encumbrances if the policy object can be achieved by other means that involve less intrusion upon property rights.

New Zealand has Cabinet consultation rules that require responsible agencies to consult Land Information New Zealand (‘LINZ’) on Bills that contain provisions that may affect title to land.<sup>137</sup> The New Zealand Law Commission has recently found that the rules are sometimes overlooked by agencies, and has suggested that LINZ might issue guidelines.<sup>138</sup> Alternatively, Bills should be scrutinised by the

132 Ibid.

133 VLRC, above n 5, 7, 13-14.

134 Ibid.

135 A BIA is required by Cabinet for any Bill that will have potentially significant effects for business or competition: Department of Treasury and Finance, Victoria, *Victorian Guide to Regulation* (2<sup>nd</sup> ed, 2007) [4.2]. The RIA process is usually required unless the Minister certifies that in his or her opinion, a proposed statutory rule will *not* impose an appreciable economic or social burden on a sector of the public: *Subordinate Legislation Act 1994* (Vic) ss 7, 9(1)(a). Provisions in Bills that authorise the creation of statutory obligations and restrictions over privately owned land fall between the RIA and the BIA requirements. As the provisions are generally included in primary rather than subordinate legislation, they do not require a RIA; nor do they trigger the requirement for a BIA, as they do not have potentially significant effects on business and competition.

136 Department of Treasury and Finance, above n 135, [4.2.2].

137 NZLC, above n 73, [9.46].

138 Ibid [9.47].

Legislation Advisory Committee under amended guidelines which explain the implications of new encumbrances on land and which recommend that statutory rights affecting land should be recorded to be effective.<sup>139</sup> Proposals which seek to limit the creation of new classes of administrative encumbrance have generally met with less enthusiasm from government than proposals to recommend or require the recording of encumbrances.

## VII TEN PRINCIPLES FOR MANAGING STATUTORY ENCUMBRANCES

Although no legislature can bar itself from legislating in a particular way in future, the adoption of legislative drafting standards and processes for scrutiny of legislative proposals can promote a more consistent and principled approach to the management of rights, obligations and restrictions. In order to provide a more consistent, systematic and comprehensive framework for managing the information costs of statutory encumbrances, the following 10 principles are proposed:

- (1) By means of legislative drafting standards, the terminology used in statutes should be standardised to aid clarity. It is suggested that the term ‘registration’ be reserved for the entry in the Torrens register of interests registrable under the Torrens statute. The term ‘recording’ should be used for any entries on Torrens or other registers which do not attract the statutory guarantee of indefeasibility but are required to be recorded either for information or to be effective under other legislation. ‘Notification’ should refer to the action of an administering agency in notifying the Registrar of the creation of an encumbrance affecting specified land.
- (2) Legislative standards and scrutiny processes should be designed to ensure that legislation does not give *in rem* operation to rights, obligations or restrictions affecting particular land parcels unless that effect is necessary to achieve the statutory purpose.
- (3) Where a statute authorises the imposition of a charge on land to secure a debt, the statute should specify the priority of the charge over other private and statutory interests.<sup>140</sup> For example, the statute may state that the charge does not take priority over interests already registered or recorded.
- (4) Subject to principles 5 and 8, statutes authorising the creation of a right, obligation or restriction operating *in rem* should require that it be notified by the agency and recorded on the Torrens register for the affected parcel or parcels, and that, until so recorded, it is either wholly ineffective or,

<sup>139</sup> Ibid [9.48].

<sup>140</sup> The VLRC recommended that administrative interests should have ‘predictable priority’: VLRC, above n 5. Lack of consistency in provisions for priority of statutory land charges has been noted in New Zealand: NZLC, above n 73, [23.4], [23.5], and in England: Law Commission for England and Wales and HM Land Registry, *Land Registration for the Twenty-first Century: A Conveyancing Revolution*, Report No 271 (2001) [7.38], [7.39].

alternatively, enforceable only against persons who hold an estate or interest in the land at the time it is created. No exceptions to this rule should be made on the basis that a subsequent owner took with notice obtained from a source other than the register.

- (5) If it is intended that the right, obligation or restriction authorised by the statute is to operate *in rem* without recording or registration, the statute should expressly state that intention.
- (6) An interpretation rule inserted in the Torrens statute would promote compliance with principle 5 if complemented by legislative drafting guidelines which ensure that new legislation gives the required indication where *in rem* operation is intended. The interpretation provision should apply only to subsequently enacted statutes.<sup>141</sup>
- (7) Where a right, obligation or restriction is recorded ‘below the line’ on the Torrens register for affected land parcels, the statute should allocate responsibility for updating the entry, or provide for automatic expiry after a specified number of years. Where the register is automated, the Registrar should send a warning notice to the administering agency at a specified time interval before the recording is due to expire.
- (8) Subject to principle 5, statutory rights, obligations and restrictions operating *in rem* should not have to be recorded on Torrens registers, where:
  - (a) enquirers can obtain information about them directly from the administering agency’s data subsystem through an online search portal which is also linked to the Torrens parcel register through a parcel identifier;
  - (b) recording is for information and is not a precondition to the encumbrance operating *in rem*.
- (9) The compensation provisions of the Torrens statutes in each jurisdiction should be amended to deny compensation for errors, omissions and misdescription resulting from the failure of an agency to notify the Registrar of an encumbrance for recording or an alteration to a recorded encumbrance.<sup>142</sup> The administering agencies should be liable for their errors and omissions.
- (10) Provision should be made in all jurisdictions to require a vendor of land to disclose to a purchaser before entry into the contract full particulars of any statutory rights, obligations or restrictions affecting the land. The requirement could be made in the authorising legislation<sup>143</sup> or in a general statutory disclosure regime, and should be enforceable against vendors

141 The *Real Property Act 1900* (NSW) s 42(3) applies to the interpretation of all statutes, not just later statutes. This can upset the established relationship between statutes and result in unintended and anomalous effects.

142 See, eg, *Land Title Act 1994* (Qld) s 189(1)(l).

143 See, eg, *Environmental Protection Act 1994* (Qld) s 421 (disclosure that land is on the contaminated land register).

through rescission and damages, and through penalties for knowingly or recklessly supplying false or incomplete information.<sup>144</sup> The disclosure obligation should apply to sales of all land, regardless of the land use, mode of sale or identity of the vendor.<sup>145</sup>

## VIII CONCLUSION

Statutory encumbrances which operate *in rem* impose an information burden on everyone who deals with land. All prospective acquirers must either search for them or retain the risk of undiscovered encumbrances. Because of the number of land parcels potentially affected, the information cost rises exponentially with the increase in the number of types of statutory obligations. Further increase is inevitable, given the serious environmental and natural resource management problems faced by the States and Territories, and the need for administrative controls to promote sustainable use of land and natural resources.

To lower the information costs of statutory encumbrances, Torrens registers have been co-opted to serve a general information function that was not part of their original purpose. Some statutes provide for obligation to be recorded on the parcel register, or in an ancillary register maintained by the Torrens Registrar. In some cases, recording is necessary for the obligation to run with the land, while in other cases the obligation is enforceable against subsequent landowners, whether recorded or not, by force of statutes that override the indefeasibility provisions of the Torrens statute. Certain types of statutory obligations do not appear anywhere on the land register; they can be discovered only by directing enquiries to the agencies which created them. The lack of a consistent and systematic framework for the recording of statutory obligations is a problem that is growing commensurately with their number.

The problem has attracted considerable attention in recent years from disciplines outside the law, from experts in cadastral surveying, information technology and land administration systems. They have proposed that information about government-imposed encumbrances on land could be addressed through the layering of databases of specialist information over the basic cadastre (land title data and land description), linked through a geocode or other parcel identifier, and web-enabled to permit searchers to search the linked databases. Under this SDI model, administering agencies retain responsibility for managing and updating their own records. Some States have invested in these systems over many years, and have made significant progress in reducing information costs.

While SDI projects promise to reduce the costs of recording and searching agency registers, complementary legal measures are required. We have proposed a set of 10 principles to guide the drafting of legislation which authorises the creation of

144 See, eg, *Sale of Land Act 1962* (Vic) s 32(6).

145 The reasons for a disclosure rule of broad application are set out in Tasmanian Law Reform Institute, above n 24, 17-18.

statutory encumbrances. The principles seek to clarify concepts by standardising terminology; to distinguish different modes of recording by reference to their legal effects; to establish scrutiny processes to justify the need for further encumbrances; to make *in rem* operation conditional upon recording (or at least upon unambiguous expression of legislative intent to dispense with recording); to allocate responsibility for notification and updating of information on Torrens registers; to facilitate the transition of recording from Torrens registers to agency data subsystems as SDI capacity develops; and to compel vendor disclosure of encumbrances to purchasers before contract. We submit that the adoption of these principles will reduce the information burden of statutory encumbrances in future legislation directed to promoting sustainable use of land and natural resources.

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