



COVER SHEET

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How the *Land Title Act* might be amended to create a better means of protecting unregistered interests*

HAS THE USE OF CAVEATS TO GIVE NOTICE OF THE EXISTENCE UNREGISTERED INTERESTS BEEN A SUCCESS?

One area not addressed in the recent reforms made in the *Natural Resources and Other Legislation Amendment Act 2005* (Qld) is the appropriateness of the use of caveats under the *Land Title Act 1994* (Qld) as a means of protecting unregistered interests.

While it is the policy of the Land Titles Office to encourage people to register interests in land, there are a number of interests that cannot be registered and a number of different circumstances where lodgment of a caveat to give notice of the existence of an unregistered interest is necessary.

It is clear from the legislation that the primary function of a caveat is to temporarily suspend dealings with the register to protect an unregistered interest in anticipation of legal proceedings. Practitioners should also be aware of the need to lodge a caveat to give notice of the existence of an unregistered interest at the time the interest is created in order to protect the interest (the secondary function of a caveat).¹ If there is a delay in executing instruments, if the interest is one that is not capable of being registered, or if the interest is created other than by the execution of an instrument in registrable form, the interest should be protected by lodging a caveat.

However, the case law indicates that it is not uncommon for the holders of unregistered interests to fail to lodge a caveat to publicise the existence of their interests at the time they are created, where the consequences of failing to do so, more likely than not, will result in those interests being postponed. This could possibly be a result of citizens and solicitors not being aware of the circumstances in which a need to lodge a caveat arises.

It would appear to be common practice to lodge a caveat only where there is an imminent danger of a competing interest in the land being registered that would extinguish the unregistered interest. Unfortunately, by the time an imminent danger arises, it is likely to be too late to lodge a caveat to effectively protect the unregistered interest. Given that the practice of lodging a caveat to give notice of an unregistered interest has not been universally adopted, it would seem appropriate to develop a better way of encouraging people to give notice of the existence of their unregistered interests so that the register may better reflect the state of title.

* This is an adaptation of an earlier article I wrote entitled "A dedicated means of giving notice of the existence of unregistered interests under Torrens" (2006) 12 *Australian Property Law Journal* 244.

¹ *Butler v Fairclough* (1917) 23 CLR 78; 23 ALR 62; *Clark v Raymor (Brisbane) Pty Ltd* (No 2) [1982] Qd R 790; *Heid v Reliance Finance Corp Pty Ltd* (1983) 154 CLR 326; 49 ALR 229.

A NOTICE OF AN INTEREST AFFECTING TITLE

One way Parliament could promote the need for people to better protect their unregistered interests would be to step in and create an instrument dedicated to the purpose of giving notice of the existence and nature of an unregistered interest to the world at large. Such an instrument might be called a 'notice of an interest affecting title'.

Widespread use of a notice of an interest affecting title would allow the register to better reflect the state of title and thereby give greater certainty to those having dealings with land. This would reduce the number of disputes occurring between holders of unregistered interests because there would be fewer interests created in ignorance of the existence of competing interests created earlier in time.

The existence of a notice of an interest affecting title, like a caveat, would not create or improve an interest in land. Further, it would not automatically give priority to the first person to lodge a notice. It would merely enable anyone who searches the register to discover the notice and be given actual notice that the interest affecting the lot in question has been claimed. The courts would still use general equitable principles to determine priority. It would also provide constructive or imputed notice to anyone, or their legal representatives, who ought to search the register.

Unlike a caveat, a notice of an interest affecting title upon the register would not freeze the register and prevent the registration of an instrument. So, even in cases where a notice of an interest affecting title has been lodged, a subsequent purchaser, a mortgagee or anyone else having dealings with the land, who knows of the existence of the notice, is able to obtain registration, and upon doing so, that person's title would be indefeasible.

Where there is an imminent danger to an unregistered interest by the possible registration of an instrument and dealing with the register need to be suspended, a caveat would be the appropriate instrument to lodge.

There would be no need for a notice of an interest affecting title to lapse after a period of time in the way a caveat lapses. The notice would continue to have effect for as long as it remains on the register and the interest it claims remains in existence. Once an unregistered interest has been extinguished, the notice would be of no effect and should be removed to avoid cluttering the register.

The fees required for lodging a notice of an interest affecting title should be similar to, but cheaper than those required to lodge a caveat. It is anticipated that the introduction of a notice of an interest affecting title would not place additional significant demands on the time and resources of the registrar. It is envisaged that there would be no requirement for the registrar to notify anyone affected by the notice, other than the registered owner.

The registrar would not be required to notify a person who has lodged a notice of an interest affecting title when an instrument affecting the interest claimed is lodged for registration. This is for the reason that a registered interest that is inconsistent with an unregistered interest will extinguish the unregistered interest to the extent of the

inconsistency, regardless of whether the registered proprietor of the interest had knowledge of the existence of the unregistered interest.² Additionally, with the trend towards electronic conveyancing, the time delay between lodgment and registration will be whittled away, so alerting the lodger of a notice would be pointless if there is not enough time for the lodger of the notice to lodge a caveat to prevent registration.

There would be no need for the registrar to examine the substantive validity of a notice of an interest affecting title because a notice lodged that is not properly based on a valid equitable interest would be of no effect and should be disregarded by anyone having dealings with the land. Notices that are not drafted in accordance with formal requirements or which do not claim a recognised interest in land should naturally be requisitioned.

Anyone wishing to have dealings with land affected by a notice should conduct a title search prior to those dealings and thereby discover the notice. That person may then independently inquire into the validity of an interest claimed in a notice that appears on the title. The existence of a notice wrongly placed on the register would not adversely affect any legitimate interests because the mere lodging of a notice would not create an interest in land.

It is not suggested the notice-giving role of the caveat be replaced by a system by which priority is conferred automatically upon lodging a caveat in the same way priority is conferred under registration of deeds statutes that exist in respect of old system title.³ While such a model would provide greater legal certainty, it would not necessarily lead to just outcomes, as it blindly prefers the first in time, regardless of where the better equity lies.

GROUNDINGS UPON WHICH A NOTICE COULD BE LODGED

The requirement to lodge a notice would be the same as required to lodge a caveat, being that the lodger hold a legal or equitable estate or interest in the land at the time of lodgment, rather than a mere contractual or personal right.⁴

A notice should state the name of the person lodging the notice, information sufficient to enable a person searching the register to contact the person lodging the notice, the registered interest affected by the notice, the interest claimed by the person lodging the notice and the grounds on which the interest is claimed. It is important that the register contain information sufficient to enable a person conducting a search to contact the lodger of the notice so that the person searching can determine whether the interest is still in existence.

² *Land Title Act 1994* (Qld), s 184.

³ See McCrimmon L, "Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title" (1994) 20 *Mon LR* 300; Griggs L, "Torrens Title – Arise the Registered and Unregistered, Befall the Legal and Equitable" (1997-2000) 4 (1) *Deakin Law Review* 35 at 46-7; Law Reform Commission of Victoria, *Priorities*, Report No 22 (April 1989) at 12.

⁴ *Land Title Act 1994* (Qld), s 122(1)(a); *Queensland Estates Pty Ltd v Collas* [1971] Qd R 75.

THE EFFECT OF LODGING A NOTICE

Lodging a notice would not be determinative of the existence of the interest claimed in the notice. It would operate only to publicise that an interest in the land has been claimed and that further investigation should be conducted to determine the veracity of that claim and whether the interest is still in existence.

Allowing a person claiming an unregistered interest in land to lodge a notice of an interest affecting title initially upon creation of the interest, rather than having to lodge a caveat at that time, would avoid the difficulties that may arise when there is subsequently a need to lodge a caveat to freeze the register to prevent registration of an instrument lodged by another. This would avoid any arguments of a second caveat being lodged on the same or substantially the same grounds (ie claiming the same interest in the land)⁵ and would not require leave of the court, since only one caveat would be needed.

Consider this scenario. An unregistered interest is created. The holder of the interest immediately lodges a first caveat to give notice of the existence of the unregistered interest. The caveat lapses after three months in accordance with s 126. Then the holder of the interest becomes aware of a threat of a dealing with the register that will extinguish the unregistered interest. This creates a need to lodge a second caveat on the same grounds to freeze the register pending court proceedings to resolve the competition between equitable interests. Lodging a second caveat requires a court order.

The benefit of being able to use a notice of an interest affecting title in this scenario, would be that lodging a notice instead of the first caveat would remove the need to obtain leave of the court when the need to freeze the register arises.

REMOVAL OR WITHDRAWAL OF A NOTICE

In the event that a notice is wrongly placed on the register, the registered proprietor or anyone else affected by the notice could take steps to have the notice removed.

A person lodging a notice of an interest affecting title would have the power to request that the registrar remove the notice for any reason. It is envisaged that this would be done voluntarily by the lodger when the interest claimed in the notice has expired, or where the lodger realises that the interest was improperly claimed.

It is anticipated that notices could be improperly lodged or not removed once the interest supporting them has lapsed. As such, a procedure by which the registered proprietor of an interest in a lot could apply to the registrar to have a notice removed is also necessary.

Finally, a notice would need to be automatically removed by the registrar when the unregistered interest supporting the notice is extinguished by the registration of a

⁵ *Land Title Act 1994* (Qld), s 129.

dealing with the land which is inconsistent with the continued existence of the interest, such as the registration of a transfer.

COMPENSATION FOR IMPROPER LODGMENT

The courts should be given the power to award ordinary damages to anyone who suffers loss or damage as a result of an improper lodgment.

CONCLUSION

To introduce a notice of an interest affecting title would not require a major overhaul of the *Land Title Act 1994* (Qld). It would only require a minor statutory modification by the creation of a new instrument that in many ways is similar to the caveat. Also, it would not necessarily require a drastic reconsideration of the existing case law involving priority disputes, given the similarity of the notice-giving aspects to those of a caveat.

Introducing the notice would be a helpful way to give greater certainty to those having dealings with land, reduce the number of disputes between holders of unregistered interests (including those who have lodged documents and are awaiting registration) and would not place an addition burden on the Land Titles Office.

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