EARLY LAND GRANTS AND RESERVATIONS: ANY LESSONS FROM THE QUEENSLAND EXPERIENCE FOR THE SUSTAINABILITY CHALLENGE TO LAND OWNERSHIP

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Abstract

Environmentalists have called for a new property paradigm premised on the idea of land ownership as a delegated responsibility to manage land and resources for the public benefit. An examination of Crown freehold grants from the beginnings of settlement in New South Wales and after the separation of the Colony of Queensland until the 1890s shows that fee simple titles were granted subject to express conditions and reservations designed to reserve useful natural resources to the Crown and to promote public purposes. Over time, legislative regulation of landowners' rights rendered obsolete the use of express conditions and reservations in grants. One result of this change was that the inherently limited nature of fee simple ownership, and the communal obligations to which it is subject, are less transparent than in colonial times.

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History, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future.'[2]

I Introduction

Re-orienting our legal institutions and conceptions in ways that promote sustainable development is one of the defining challenges facing our generation.[3] To a greater extent than in the past, landowners will be expected to use their land sustainably and productively, and will be held accountable for the way they manage it. Natural resources that were once part of the landowners' endowment will be uncoupled from landownership, converted to commodities and traded separately from the land, so that they can pass to more productive uses.[4] This process of 'commodification' began with minerals and metals, and has been extended to petroleum and, more recently, water, the rights to trees growing on land, and carbon sequestered by forests.

One of the barriers to the successful integration of property rights and environmental obligations is that many landowners have little idea of the extent to which their rights are subject to restrictions and obligations imposed either directly by legislation (statutory burdens), or by administrative determinations under statutory authority (administrative burdens), for public purposes. It is very difficult for landowners to obtain an accurate picture of the statutory and administrative burdens affecting their land parcels, since many burdens are not recorded on land registers, and some are too general in application to be suitable for recording in parcel-based registers. We have not yet found a way to provide a 'mirror', or accurate and complete snapshot, of all rights and burdens affecting particular land parcels.

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2 B J Cardoza, *The Nature of the Judicial Process* (1921), 53.

3 World Conference on Environment and Development, *Our Common Future* (1987), 44 (commonly referred to as the Brundtland Report). The term 'sustainable development' is most commonly defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.

4 Daniel H Cole, 'New Form of Private Property: Property Rights in Environmental Goods: 1910' in B Bouckaert and G D Geest (eds), *Encyclopedia of Law and Economics* (2000) 274, 275-76..

There was a time when land titles were more informative as to the extent of restrictions and obligations imposed on land for public purposes. In the early years of settlement, when there was much less reliance on statute law to regulate land use, colonial governments imposed conditions on both freehold and Crown leasehold grants which were intended to oblige landowners and lessees to use and manage the land in ways which promoted public purposes, or which reserved to the Crown specified natural resources of the land, such as minerals, metals, timber and gravel. As will be shown below, this method of regulation of land ownership through conditions and reservation in grants gave way over time to statutes and rules of general application. The change in regulatory method masked the extent of actual restrictions on land ownership, as statutory and administrative burdens are much less visible than express reservations and restrictions in land grants.[5] This lack of transparency has sustained or contributed to the perception that a fee simple estate entitled the owner to exercise every act of ownership, including waste,[6] and forestalled the development of a land use paradigm where owners' rights are inherently subject to public or communal rights and obligations.

The colonial land grants schemes incorporated two elements which are integral to contemporary approaches to sustainable land and resources management: first, the idea that landownership rights are inherently subject to communal obligations;[7] and second, that rights to natural resources should be disaggregated from the ownership of the land on which they are found and separately allocated where necessary to promote productive (and sustainable) use of the resources.[8] This article

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5 J Peter Byrne, 'Property and the Environment: Thoughts on an Evolving Relationship' (2005) 28 *Harvard Journal of Law & Public Policy* 679, 683.

6 *Commonwealth v New South Wales* (1923) 33 CLR 1, 42 (Isaacs J), recently applied in *Fejo v Northern Territory of Australia* (1998) 195 CLR 96, 126. Gray & Gray observe that some 19th century judges were exponents of 'property absolutism' — the notion that fee simple owners are entitled to use and enjoy their land without regard for others or the environment, subject to statutory controls: Kevin & Susan Gray, *Land Law* (5th ed, 2007), 420-21.

7 Gray & Gray above n 6 418-24; David Grinlinton, 'Property Rights and the Environment' (1996) 4 *APLJ* 6.

8 Gregory S Alexander, 'Propriety Through Commodity: Why Have Legal Environmentalists Embraced Market-Based Solutions?' in Jacobs (ed)

examines the development of the Crown freehold grants scheme in Queensland, both before and after separation from New South Wales in 1859, showing how the reservations and conditions on grants were moulded to suit public purposes that were considered important at the time of grant. The changing conception of the needs of the colony can be observed by tracking the way in which the terms of the reservations and conditions in Crown deeds of grant changed over time. Since grants are made at a particular point in time, changing public purposes cannot be incorporated into grants already made, but can be imposed through legislation. As the needs of a rapidly growing and developing colony became more complex and dynamic, regulation of land use through conditions and reservations in grants yielded to more flexible methods of regulation based on legislation and administrative determinations. The transparency of the colonial land grants was a casualty of the change in regulatory methods.

II Crown Objectives for the Land Grants Program

Although the High Court in *Mabo v State of Queensland (No 2)*[9] reconceptualised the modern basis of land law in Australia, two established principles from early colonial days did not change. The first principle is the power of the Crown as sovereign to grant land in fee simple and to extinguish other proprietary rights inconsistent with the grant.[10] Secondly, *Mabo* reaffirmed that the doctrine of tenure is the origin of land holding in Australia, establishing the Crown as sovereign owner and entitled to grant land to private persons in such manner and on such conditions as served the Crown's objectives.[11]

The sovereign power of the Crown to grant land to private persons upon whatever terms it deems fit is evident in the instructions provided to the

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Private Property in the 21st Century: The Future of an American Ideal (2004) 75, 77-81; Carol Rose, 'The Several Futures of Property: Of Cyberspace and Folk Tales, Emissions Trades and Ecosystems' (1998-2000) 83 *Minnesota Law Review* 129.

9 (1992) 175 CLR 1; (1992)107 ALR 1.

10 *Randwick Municipal Council v Rutledge* (1959) 102 CLR 54, 71 (Windeyer J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 209–212 (Brennan J); *Spencer v ACT & Ors* [2007] NSWSC 303, [22] (Brereton J).

11 Carmel MacDonald, Les McCrimmon, Anne Wallace, Michael Weir and Sally Sheldon, *Real Property Law in Queensland* (2nd ed., 2005), 6–7.

colonial governors prior to conferral of statutory power by the *Imperial Land Act* 1831. Provision is made in these instructions for the grant of land on terms directed to growing and sustaining the colony. The instructions for Captain-General Arthur Phillip from King George III in *Governor Phillip's Second Commission* were that land grants were to be made available in Australia.[12] The instructions provided:

> Wee do hereby likewise give and grant unto you full power and authority to agree for such lands tenements and hereditaments as shall be in our power to dispose of and them *to grant to any person or persons upon such terms and under such moderate quit rents services and acknowledgements to be thereupon reserved unto us* according to such instructions as shall be given to you under our sign manual which said grants are to pass and be sealed by of our seal of our said territory … shall be good and effectual in law against our heirs and successors. (Emphasis added) [13]

Phillip wanted to ensure that the colony was self sufficient, so as not to be too reliant on intermittent supplies from England.[14] Land grants on appropriate conditions were provided to encourage first, emancipated convicts to remain as free settlers, rather than return to England at the government's expense; second, the emigration of free settlers; and third, the retention in the colony of military personnel.

Each grant was to be on terms that contributed to the sustainability of the colony (as a source of food, population and security).[15]

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12 R J Ryan (ed.), *Land Grants 1788 – 1809: A Record of Registered Grants and Leases in New South Wales and Norfolk Island* (1981), xiii; see also Frederick Watson, *Historical Records of Australia*, (HRA), Series 1, vol 1 (1971) 310 -11.

13 Frederick Watson, *Historical Records of Australia*, (HRA), Series 1, vol 1 (1971), 7, 15.

14 William Epps, *Land Systems in Australasia* (1894), 8–9.

15 A further request for information on 10 July 1789 to British Home Secretary, Lord Sydney, with regard to the land grants for officers and settlers, clearly envisaged the imposition of conditions upon land grants. See 'Governor Phillip to Lord Sydney' Despatch No 5, 10 July 1788, in Watson, above n 12, 65–66, which cited Phillips' statement that 'Land grants to officers or settlers, will, I presume, be on condition of a certain proportion of the lands so granted being cultivated or cleared within a certain time … they must be allowed convicts, who must be maintained at the expense of the Crown'.

To ensure the retention of military personnel, the British Home Secretary Lord Grenville, instructed Phillip on 22 August 1789 that land grants were to be made to marines and non-commissioned officers in a size greater than those provided for emancipated convicts, '*free of all fees, taxes, quit rents, and other acknowledgements for the space of ten years; but after the expiration of that time to be liable to an annual quit rent* of one shilling for every ten acres' (emphasis added).[16] By providing land of greater size to military personnel, even discharged military personnel, the Crown encouraged them to remain in Australia after the completion of their military service and contribute to the external defence of the colony. The offer of free convict labour, as well as their provisions for the first year, was also a successful policy to retain those personnel.[17]

To retain the 'free' population and ensure the sustenance and food security of the colony, grants of land were made *gratis* to free settlers who employed convicts, [18] and the grants varied in proportion to the number of labourers and amount of stock and equipment they brought with them.[19] Grants for agricultural purposes were also made with tax concessions for the early years.[20] The instructions to Phillip in respect of grants to free settlers were similar to those for military personnel, although the former grants were to be made 'without subjecting the public to expence [sic]' and were not to be larger in area than those granted to non-commissioned officers or discharging marines'.[21] To

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16 Watson, ibid 125.

17 Epps, above n 13, 9–10. In addition to the policy to retain the marines, land grants to married men were in greater acreage than those to unmarried men, which could be presumably a policy to increase the birth rate within the colony.

18 Epps, above n 13, 9–10. According to Epps, this policy by Phillip would allow the convicts to be clothed and fed by the private individual, thus relieving the Crown of the expense of such an exercise.

19 Jan Kociumbas, *Oxford History of Australia* (Volume 2, 1992), 122. This formed part of a greater policy push by the colonial leaders, who together with 'associations' which were formed granted land of approximately 200 acres for 'every person who brought out one male and one female emigrant'. However, there is some evidence to suggest Stirling had a 'special interest' in the project of greater colonisation, with significant interests in trading routes, especially as he was the son-in-law to the director of the East India Company.

20 Watson, above n 12,127.

21 Ibid 126.

encourage further growth of the colony, it was not uncommon for grants of land to be given as 'gifts' or 'rewards', usually on the basis of a marriage between settlers, in order to 'promote the due settlement of our said Territory'. An example is a grant of 14 January 1831 to Andrew McDougall of Kelso Place Darlington, and Thomas Wheaton Bowden of George Street Sydney, which was made in recognition of the marriage of their children, James and Elizabeth.[22] In addition, land grants of greater acreage were provided to men who were married, with extra acreage also provided for each additional child.

The gratuitous grants contained the same sort of reservations as other grants of that period, except for the absence of an obligation to pay quit-rents[23] for a specified period of time. The reservations were consistent with the early grants made in the colony (as recorded in the register book), which show that the land was initially granted for a set period of time free from all charges and rents,[24] but with a *reversionary monetary fee* after a set period of time. The terms of the deeds provided that the grant was subject not just to the reservations and conditions specified therein, but to any others that might be determined by the government in the future. The deeds provided that the land was to be held by the grantee and their heirs and successors subject to the conditions and reservations prescribed by 'us our Heirs and Successors … set out by the Governor for the time being'.[25] The practice of providing free grants in recognition of the contribution to expansion of the colony continued until the 1830s.[26]

III The Nature and Purposes of Reservations and Conditions in Land Grants

The initial purpose for the establishment of the colonies of New South Wales and Van Diemen's Land was the accommodation of convicts from Britain. The cultivation of land, as part of the development of

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22 Copy on file with authors.

23 The term 'quit-rent' refers to the payment of a tax on a grant of freehold or leasehold land in lieu of services that were required under feudal tenure.

24 R J Ryan (ed.), *Land Grants 1788 – 1809: A Record of Registered Grants and Leases in New South Wales and Norfolk Island* (1981).

25 Deed of grant on 14 January 1831 to Andrew McDougall of Kelso Place Darlington and Thomas Wheaton Bowden of George Street.

26 Epps, above n 13, 13–14.

the colony of New South Wales, was also at the forefront of Colonial Office plans. In addition, there were definite attempts through land use management to maintain and increase the population, providing for extra land in the grants as an encouragement for people to raise families,[27] as well as supplying women to male convicts to increase the population and thereby to ensure long term viability of the colony.[28] Another method for promoting population growth was a prohibition on the re-sale of land granted by the Crown for a set period of years,[29] thus forcing emancipated convicts to stay as settlers in the colony and not to realise gains upon the sale of their land and return to England.

As already mentioned, the British Crown through its land grants program sought to achieve a variety of objectives, including securing the defence of the colony by retaining military personnel, encouraging population growth and promoting economic development. These public purposes were further served and evidenced by the reservations and conditions in the terms of the grants made at various times.

The effect of a reservation is that the Crown retains all rights to something specifically excluded by the terms of the grant.[30] The most common reservation made in favour of the Crown was to exercise control over specified natural resources such as timber or minerals, with concomitant rights to control the resource for public purposes and receive royalties for their exploitation. The second class of reservation related to the future use of the land which might be required for public purposes.[31] Common to both types of reservation was the need for control of resources, including land, for public purposes. 'Public purposes' was intended to have a wide import, as demonstrated in later *Crown Land Alienation Acts* in Queensland where the Crown was entitled to reserve

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27 Jan Kociumbas, *Oxford History of Australia* (Volume 2, 1992), 16.

28 Ibid 16-17. Although the author notes that this provision was as much about viability of the colony as stopping unwarranted behaviour among the sailors, 14-15; see also Peter Taylor, *Australia: The First Twelve Years* (1982). 102.

29 The Right Hon. Henry Dundas to Lieutenant-Governor Grose, 31st June 1793 [sic], in Frederick Watson, *Historical Records of Australia*, (HRA), Series 1, vol 1 (1971), 441.

30 *Doed Douglas v Lock* (1835) 2 Ad & E 705; 111 ER 271.

31 See, eg, *McGrath v Williams* (1912) 12 SR (NSW) 477, 481- 482 per Simpson CJ. Both classes of reservation were present in the grant considered in this case.

land for 'public purposes' including quays, railways, roads, bridges, ferries, canals, communication works, reservoirs water courses, schools, libraries, parks, hospitals, defence, and police stations.[32] An important public purpose evident in the early grants was access to timber for the naval purposes. It can be inferred that the purpose was to sustain an operational navy. This was an important factor in ensuring the security of the early settlement, especially considering that a large proportion of the population were convicts.[33] Provisioning the fleet was also necessary to establish and maintain trade routes, to guarantee access to imported supplies for the settlers and to protect lines of communication with England. As the importance of naval security waned and economic development increased, the purpose for which timber was reserved in land grants changed to wider public purposes such as the construction of bridges and railways. In addition, the types and breadth of natural resources included in the reservation also expanded to construction materials such as soil, gravel, clay, sand and stone for the construction of public infrastructure.

The changing needs of the colony can be seen in the types of reservation and conditions incorporated into Crown grants at various periods, commencing when Queensland was part of the colony of New South Wales and continuing after the separation of Queensland in 1859.

A *Examples of Land Grants from 1790–1820s*[34]

The first land *grant* in Australia was made by Phillip on 22 February 1792 to an expiree,[35] Mr James Ruse, who had taken possession of his land in November 1789.[36] The conditions of the grant were that the grantee

> *free from all fees, taxes, quit-rents, and other acknowledgements,* for the space of ten years from the date

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32 See *Crown Lands Alienation Act* 1868, s 21 and later *Crown Lands Alienation Act* 1876, s 4 and s 6.

33 Epps, above n 13, 2–3.

34 Due to the fact many of the original grants are no longer available, details of conditions are taken from the register of the grants in R J Ryan (ed.), *Land Grants 1788 – 1809: A Record of Registered Grants and Leases in New South Wales and Norfolk Island* (1981).

35 Emancipated convict.

36 Stephen H. Roberts, *History of Australian Land Settlements 1788 - 1920* (1968), 6.

> of these presents … shall reside within the same and proceed to the improvement and cultivation thereof, such timber as may be growing or to grow hereafter upon the said land which may be deemed fit for naval purposes to be reserved for the use of the Crown, and paying an annual quit-rent … after the expiration of the term or time of ten years before mentioned. (Emphasis added)[37]

This grant explicitly reserved timber for the Crown, which, as noted above, served the public purpose of maintaining a naval fleet. The condition requiring the grantee to improve and cultivate the land was intended to ensure first, that emancipated convicts did not return to England, and second, that they could provide for their own support, thereby freeing the Crown of the need to maintain them, and even contribute to provisioning the colony.[38] That condition was experimental and beyond Phillip's commission to provide, although all such conditions were later validated by statute.[39] The use of this condition resulted, by the second year, in a substantial increase in the area of land under cultivation.[40]

B *Examples of Land Grants after 1820s – until the Introduction of Torrens*

Whilst the administration of grants in the earlier period examined above was *ad hoc*, the 1820s saw an improvement of record keeping in relation to land grants. In this period, grants were made subject to conditions and reservations similar to those made in the early settlement days. For example, land grants numbers 9–12, dated 30 June 1823, contained the following conditions:

> [T]o Clear and Cultivate … acres within the term of … years, Not to sell, aliene [sic], assign, transfer of set over within the said Term, Reserving to Government the Right of Making Public Roads through the same and also Reserving for the use of the Crown the right of such Timber as may be declared fit for Naval purposes'.[41]

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37 Copy of initial grant to made to James Ruse on file with authors.

38 Epps, above n 13, 9–10.

39 See *An Act to Remove Doubt Concerning the Validity of Grants of Land in New South Wales* 1836 (6 Wm IV No 16).

40 Above n 35, 6.

41 Grants were made to Charles Wilson, James Smith, Daniel Sweeney and

In the 1830s, the land grants program was for the first time placed on a statutory footing, with the introduction of legislation regulating the making of land grants.[42] New conditions which benefited the public were introduced into grants in this decade. For example, in the grant made by Governor Bourke to Willoughby Bean on 1 May 1833, the 'clear and cultivation' clause was included, but with an option, in the alternative, 'to expend on improvements' a sum fixed by the grant.[43] Reservations to the Crown were made in relation to an expanded number of natural resources, namely, all stone gravel and sand in addition to indigenous timber required for public or naval purposes.[44] The expansion of the reservations in favour of the Crown to include stone and gravel indicate that the imperatives of the Crown had shifted from protection, defence and viability of the colony to colonial expansion and economic development through the construction of roads and buildings. Other grants made in 1833 contained conditions which prohibited sale, alienation or transfer within a period as fixed by the grant (usually five years). Unlike some earlier grants, the 1833 grants lacked provision

Roger Shea respectively (on file with authors). The later three of these grants did not have as much detail, but referred to the 'including the other conditions above' or words to that effect.

42 Ripon Regulations of 1831 stopped the free land grants and implemented system of land sales; also *An Act for Protecting the Crown Lands of this Colony from Encroachment, Intrusion, and Trespass*, 4 Will. IV, No 10 (1833) which promulgated officials who had authority to protect Crown lands from trespass and vandalism; see also C M H Clark and L J Pryor (eds.) *Selected Documents in Australian History 1788–1850*, 216–256.

43 Copy on file with authors.

44 For example, see Grant to Andrew McDougall and Thomas Wheaton Bowden dated 15 June 1859 for the marriage of their children (on file with authors); see also A Grant of Land (New South Wales) from Victoria granted to James William Boyd 17th October 1817. It should be noted that such conditions remained well after the 1830s, and even during the later part of the 19th century. See for example, deed granted to Sir Charles Nicholson (Deed of grant no. 1 for Queensland), entered in the Registry of Land Purchases A, page 1 of 3rd September 1860 and Register of Land Purchases A, Folio 1, 28th August 1860; See also deed granted to Charles Henry Green, entered into Register of Land Purchases A, Book 28, Folio 33, dated 5th February 1870, and Register Book, Vol 153, Folio 22, dated 14th February, 1870. It must be noted, however, that some latter grants were made under legislation and not government proclamation.

for the land to revert to the Crown on breach of the condition.[45] This coincides with the abolition of free grants[46] and the shift to the grant of leases subject to condition or conditional purchases, where a failure to comply with conditions resulted in a revocation of the lease or purchase.[47] This allowed sales by auction to be absolute although still subject to the usual reservations and conditions of grants at the time.

Express reservations for gold, silver and coal started to appear on a regular basis in grants made after 1835. Prior to this, reservations of minerals and metals appear to be somewhat *ad hoc*, although reservations of gold and silver may have been considered unnecessary as it was already established by case law that gold and silver were owned by the Crown despite a grant of the land to another person.[48] For example, Grant 311 to Robins on 6 June 1835, was conditional upon '[r]eserving a right of way or ways all land within 100 feet of high water mark & all mines of Gold, Silver & Coal, all Stone, gravel required for Naval or Public purposes'.[49] It is likely that the inclusion of coal in the reservations of minerals in grants reflected its growing economic value in an industrial age of increased reliance on steam power.[50]

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45 Deed of grant to D'Arcy Wentworth Esq., grant no 1503 (No 3 Folio 215) from 5 August 1806 until 5 August 1811 (copy on file with authors).

46 Epps, above n 13, 13-14.

47 *Waste Lands Act* 1842 (9 & 10 Vic No 104), which was preceded by a series of legislation, including for example: *Crown Lands Protection Act 1833* (4 Wm 4 c10); *Crown Lands Protection Amendment Act 1834* (5 Wm 4 c12), *Crown Land Claims Act 1835* (6Wm IV c21), *Validity of Grants Act 1836* (6 Wm IV c16), *Crown Lands (Grants) Act 1839* (3 Vic c1). The *Waste Lands Act* 1842 was repealed by the *Australian Waste Lands Act* 1855 (Imp) and regulation of forfeiture of interest in leases was moved to other Land Act legislation.

48 *Case of Mines* (1567) 1 Plowd 310; 75 ER 472; *The Case of Stannaries* 77 ER 1292; 12 Co. Rep. 9; *The Case of the Kings Prerogative in Saltpetre* (1603) 77 ER 1294; (1603) 12 Co. Rep. 12. This presumption was part of the common law as it applied to Australia: see *Woolley v A-G(Vic)* (1877) LR 2 App Cas 163; see also Owen J Morgan, 'The Crown's Right to Gold and Silver in New Zealand', in (1995) 1 *Australian Journal of Legal History* 51, 56–57

49 Copy on file with the authors.

50 Morgan, above n 47, 40, 54-55 in relation to commodification of resources. Further discussion at pages 57–59 of the said piece clarifies ownership of other minerals (for example, tin and copper) and the legislative intervention

C *Summary of Restrictions on Land Use by the Government in Early Australian Settlement*

From the above considerations, it is clear that all grants of land whether gratuitous or by sale were subject to conditions for the public benefit. Certain minerals and other natural resources were commonly reserved for government purposes.[51] It was also common to reserve 'quit-rents' — a form of land tax attached to the grant. Grantees were required to cultivate the land, thus producing provisions to support not only the grantees but the colony at large. The reservation of timber and other materials for 'public works' indicates a greater desire to develop the infrastructure within the colony, and reservations for naval purposes indicate that the defence of the colonies were still important to the Crown. When land was granted by way of conditional purchase after 1831 (or usually by lease), alternative conditions were introduced to require cultivation, although these were likewise related to promoting the growth and development of the colony.

The early colonial grants show that fee simple ownership was expressly subject to obligations imposed for the communal or public good. Conditions and reservations were designed to ensure that the land and its owner would contribute to the protection, growth and sustainability of the colony. The main concern was for the security, defence, economic development and population growth of the colony. Special provision was included for the increasing population, ensuring that people were granted larger parcels of land if they were either married or had children. Granting of convicts to cultivate the land was generally undertaken in the hope of being able to attract and retain settlers.[52] Provision for the future development needs of the colony was made by reservation of a right of resumption for public purposes, in some cases subject to provision for compensation.[53]

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which provided ownership of other minerals to the land owner. Imperial legislation discussed includes 1 Wm & M c30 (1688), ss 3–4 and 5 Wm & M c6 (1694) ss 2–3.

51 Epps, above n 13, 12.

52 Ibid 103–110 discusses how, in Western Australia, the government was required to re-introduce convict labour to induce people to stay on land, as people had begun to leave that settlement.

53 Grant to Andrew McDougall and Thomas Wheaton Bowden dated 15 June 1839 for the marriage of their children (on file with authors); see also A Grant of Land (New South Wales) from Victoria granted to James William

IV A Shifting Paradigm of Regulation

A *Catalysts for Introduction of the Land Legislation*

After the initial period of colonisation, demographic and economic growth prompted changes in land management and regulation. There was a shift from reliance on the exercise of prerogative powers to statutory powers. First, in 1826, came the introduction of legislation for Crown land sales by auction.[54] Second, there was the introduction of the *Australian Courts Act* 1828 (Imp.) which set forth the applicability of British common law in the Australian colonies.[55] Third, there was the abolition of gratuitous grants in 1831,[56] leading to the cessation of the 'old and simple method' of free land grants by the Crown, in favour of grants by purchase.[57] The introduction of the Land Acts in the 1830s marked the beginning of the so-called 'Squatters Age' from 1831-1855.[58] Financially self-supporting and trading settlement had become

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Boyd 17 October 1817.

54 New South Wales Department of Lands, *Crown Lands*, <http://www.lands.nsw.gov.au/land_titles/land_ownership/crown_land> at 13 March 2008. The NSW government website does not provide exact details of the legislation in question, however, there is a series of relevant legislation from this period. These include, for example: *Crown Lands Protection Act 1833* (4 Wm 4 c10); *Crown Lands Protection Amendment Act 1834* (5 Wm 4 c12), *Crown Land Claims Act 1835* (6 Wm IV c21), *Validity of Grants Act 1836* (6 Wm IV c16), *Crown Lands (Grants) Act 1839* (3 Vic c1).

55 *Bone v Mothershaw* [2003] Qd R 600 at [18] - [19], per McPherson JA.

56 New South Wales Department of Lands, *Crown Lands*, <http://www.lands.nsw.gov.au/land_titles/land_ownership/crown_land> at 13 March 2008.

57 Epps, above n 13, 14.

58 Ibid, 13 - 14. The author does not mention which Acts he specifically referred to in his writings, although a relevant list of Acts at the time include: *Crown Lands Protection Act 1833* (4 Wm 4 c10); *Crown Lands Protection Amendment Act 1834* (5 Wm 4 c12), *Crown Land Claims Act 1835* (6 Wm IV c21), *Validity of Grants Act 1836* (6 Wm IV c16), *Crown Lands (Grants) Act 1839* (3 Vic c1). The squatting age is of importance to contemporary understanding of lands regulation, as it was a period that the '… settlers, unwilling longer to submit to the restraints imposed by the Government, took matters into their own hands, and boldly launched out on the vast territory beyond the "limits of settlement" in defiance of all constituted authority, and without being given any right or title even to utilise the grass upon the soil which they occupied. In fact they took possession of the new land, and "squatted" on it'. See also Roberts, above n 35, 161–218 for a general historical discussion of the Squatters Age.

a necessity for economic sustainability.[59] Australia ceased receiving convicts around the middle of the 19th Century,[60] instead preferring free settlers, principally females, whom the government encouraged by assisted passages financed by the sales of Crown land.[61] The next three decades saw much of the expansionist exploration across the various colonies.

Buck suggests that a particular perception of land as an object of commerce was emerging in the colonies immediately prior to the introduction of the Torrens system in the late 1850s and the 1860s.[62] This perception reflected the social and economic distinctiveness of the colony and, to an extent, its reliance upon land as a sustaining construct for agriculture.[63] The concept of land as a commodity now permeated the discussion of reform to allow greater access to ownership of land to the masses rather than restricting it to landed gentry. The question of whom should occupy land and whether it should be put to pastoral or agricultural uses dominated the politics of the later 1850s and early 1860s in New South Wales and Queensland. This became known as the 'land question', the proposed solution to which was to 'open the door to social justice and the realization of the ideal of economic independence'.[64] The goals of maintaining or expanding the land market and promoting ease of dealings with land became key economic imperatives driving land policy.

In response to these economic imperatives, the Torrens legislation, first introduced in South Australia through the *Real Property Act* 1858 (SA),[65]

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59 Epps, ibid 14–15.

60 The date of the final reception of convicts varied from colony to colony. A discussion in regard to this can be found in the Parliament of Australia Senate Publications, *The Origins of Responsible Government*, <www.aph.gov.au/SEnate/pubs/hamer/chap01.htm> at 13 March 2008.

61 Epps, above n 13, 12. Interestingly enough, there was considerable concern about the people that were brought out to the colony as suffering a 'long train of moral evils'. As such, the initial Legislative Council was trying to encourage more virtuous people to arrive in Australia.

62 A R Buck, 'Property Law and the Origins of Australian Egalitarianism' (1995) 1 *Australian Journal of Legal History* 145, 157.

63 Ibid.

64 Robin Gollan, *Radical and Working Class Politics: A Study of Eastern Australia, 1850-1910* (1967), 32.

65 *Real Property Act 1861* (Qld); *Transfer of Land Act 1862* (Vic); *Real*

was aimed not at amending the previous land grants,[66] but reforming the system of land transfer and other dealings.[67] Relevant interests granted prior to the introduction of the Torrens legislation were to be preserved when the existing grants where brought under that legislation.[68]

B *Land Grants after Torrens in Queensland*

1 *Land Grants between 1860 and 1875*

From the time of self-government in Queensland in 1859 until 1875, the conditions and reservations in freehold grants remained largely unchanged. The government of Queensland was authorised, initially by the *Crown Lands Alienation Act* 1860,[69] to grant land in fee simple either through an auction process or by private sale for mining purposes. There was no requirement in this early legislation for the grant of land to be

Property Act 1862 (Tas); *Real Property Act 1863* (NSW); *Transfer of Land Act 1875* (WA).

66 Donald Kerr, *Principles of the Australian Land Titles (Torrens) Systems* (1927), 21. Here it is suggested that the Torrens system inaugurated a new method of conveyancing rather than establishing a new code of substantive real property law, although at 25, Kerr explains that the Common Law was considered to be altered by the Torrens legislation enough to permit the express provisions in the legislation to take effect and operate conductively.

67 Ibid 6. See also James E. Hogg, *The Australian Torrens System* (1905), 38–39, which states that the colony of South Australia adopted the new *Real Property Act* 1860 (SA), which became the basis for the Queensland *Real Property Act* 1861 (25 Vic. No. 14), and very few alterations were made from the South Australian legislation as copied. A novel concept of ejectment was inserted into s 125 of the Queensland legislation; see also McDonald et al, above n 10, 278, which recognises 'Torrens was to be a complete break … through a clear choice of legislative policy'.

68 See for example *Real Property Act* 1861 (Qld) s 17, which provided for existing grants to be brought under the Act. The applicant was required to state the nature of his estate and or every other estate or interest as well as depositing the grant. Later case law clearly indicated that even the 'old' system easements or obligations were to be brought under the Torrens system, and still enforceable: *Beck v Auerbach* (1986) 6 NSWLR 454. This case did not, however, concern land which was granted in the form of a Torrens title.

69 (24 Vic No 15), s 2, and later by the *Crown Lands Alienation Act* 1868 (31 Vic No 46).

subject to conditions or reservations,[70] although in most cases specific reservations of natural resources such as timber, gravel and stone were included. The introduction of the Torrens system and a statutory estate in fee simple did not affect the practice of land being granted by the Crown subject to conditions or reservations. The *Real Property Act* 1861 (Qld), s3 introduced a wide definition of 'land':

> to and includ[ing] messuages, tenements, and hereditaments corporeal and incorporeal of every kind and description whatever may be the estate or interest therein, together will all paths, passages, ways, waters, watercourses, liberties, privileges, easements, plantations, gardens, mines, minerals and quarries, and all trees and timber thereon or thereunder lying or being unless the same are specially excepted.

Under this definition, all grants after 1861 that did not expressly reserve minerals or other natural resources to the Crown effectively passed ownership of these resources to the owner of the fee simple.[71] The conditions in the grants in Queensland, after the colony separated from New South Wales in 1859, depended on the type of land grant made, as well as the period in which the grant was made, but all were subject to conditions and reservations made to the Crown. Our examination of Queensland grants issued in the period from 1860–1875,[72] shows the common conditions for a 'Land Purchase' were:

> WHEREAS in conformity with the *Regulations now in force*[73] for the Sale of Crown Lands in Our Territory of Queensland … Know Ye, That for and in consideration of the said Sum for and on Our behalf, *well and truly paid into the Colonial Treasury of Our said Territory, before these Presents are issued, And in further consideration of the Quit Rent hereinafter Reserved*, We, with the advice of Our Executive Council of Queensland, Have Granted, and for Us,

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70 Contrast with the legislation in the next period from 1876–1899.

71 It is clear from the later Mining Acts (*Mineral Lands Act* 1872 (36 Vic No 15); *Mineral Lands Act* 1882 (46 Vic No 8)) that this was the outcome, as only Crown Land was available for grant or lease for mining purposes.

72 Grants for the forthcoming section were randomly selected samples of Land Purchases from this period obtained in the Register Books held by Queensland State Archives.

73 This language implies not the law as it will change, but the law at the exact point of time at which the grant was made.

> Our Heirs and Successors, Do Hereby Grant unto the said … with all the Rights and Appurtenances whatsoever thereto belonging: To Hold unto the said … his Heirs and Assigns for ever, *Yielding and Paying therefore Yearly unto Us, Our Heirs and Successors, the Quit-Rent of One Peppercorn for ever*, if demanded: Provided Nevertheless, AND WE DO HEREBY RESERVE Unto Us, Our Heirs and Successors, all such parts and so much of the said Land as may hereafter be required for making Public Ways, Canals, or Railroads, in, over, and through the same, *to be set out by Our Governor for the time-being of Our said Territory*, or some person by him authorised in that respect; And Also, all Sand, Clay, Stone, Gravel, and Indigenous Timber, and all other Materials, the natural produce of the said Land, which may be required at any time or times hereafter, for the construction and repair of any Public Ways, Bridges, Canals, and Railroads, or any Fences, Embankments, Dams, Sewers, or Drains, necessary for the same, together with the right of taking and removing all such Materials…' (emphasis added)[74]

The retention of reservations of natural resources for public purposes *post* the introduction of the Torrens legislation in Queensland suggests that the introduction of the Torrens system did not have major practical

[74] Examples of grants in the relevant period from 1860–1875 which have this same condition include the following deeds. Deed granted to Sir Charles Nicholson (Deed of grant no. 1 for Queensland), entered in the Registry of Land Purchases A, page 1 of 3rd September 1860 and Register of Land Purchases A, Folio 1, 28th August 1860. An 1865 example is the deed granted to John Taylor, entered in the Register of Land Purchases A, Book 14, Folio 21, on 21st April 1865 and Registry of Land Purchases A, Book 14, page 75, 8th May 1865. Although the following deeds of grant also have the same condition, it is of interest to note that those listed in 1870 are having land sold pursuant to government proclamation, whilst those dated in 1875 are made pursuant to legislation, including leasing legislation. There is no difference between the conditions despite this. An 1870 example is the deed granted to Charles Henry Green, entered into Register of Land Purchases A, Book 28, Folio 33, dated 5th February 1870, and Register Book, Vol 153, Folio 22, dated 14th February, 1870. An 1875 deeds, made pursuant to legislation not proclamation includes the deed granted to Thomas Hammer, entered into the Register of Land Purchases A, Book 40, Folio 75, on 10th April 1875, and Register Book, Vol 244, Folio 10, on 19th April 1875.

effects on the terms of freehold grants.[75] There was also no difference between the conditions imposed on purchaser of land according to whether the purchaser was a natural person or a company. However, compared to many of the early grants in the colony of New South Wales, the conditions in the Queensland grants were more detailed, in particular listing more specifically the natural resources which were reserved and the uses for which they were reserved.

A notable omission from a number of grants is the reservation to the Crown of gold, silver, coal and other minerals. During the period 1860–1872, the *Crown Land Alienation Acts*[76] authorised the Crown to dispose of land for mining purposes, other than gold, but did not expressly reserve to the Crown any minerals found on the land granted by the Crown in fee simple. Express reservation of royal minerals was not required, but grants that did not contain an express reservation of coal and other minerals to the Crown effectively passed property in those minerals to the fee simple holder.[77] In 1872, the *Mineral Lands Act 1872*[78] authorised the Crown to either grant or lease Crown land for mining purposes[79] and regulate mining activities. While the 1872 Act allowed the Crown to grant land in fee simple for mining purposes, there was no express reservation of property in minerals found on land to the Crown (or to the holder of the grant or lease).

2 *Land Grants from 1875 to End 1890s*

From 1875 until the end of the 1890s, the legislation governing the grants of land gradually became more sophisticated as previously separate legislation relating to grants and leasing of land was amalgamated. During this period, grants and leases of Crown land were regulated by

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75 Of course, Queensland has a substantial proportion of land still under Crown Leases, of which there is much more ease of inserting restrictions for modern day standards. Thus, our concern is with freehold land.

76 The *Crown Lands Alienation Act* 1860 (24 Vic No 15), s 22; *The Crown Lands Alienation Act* 1868 (31 Vic No 46), s 32.

77 Unless it could be argued that the fact the grant was not made for mining purposes as authorised by the relevant *Crown Lands Alienation Act* meant that mining for the minerals was not possible.

78 (1872) 36 Vic No 15, s 13. This Act was later repealed, by the *Mineral Lands Act 1882* (1882) 46 Vic No 8.

79 Repealing s 32 of the *Crown Lands Alienation Act* 1868 (31 Vic No 46).

three Acts: the *Crown Lands Alienation Act* 1876,[80] the *Crown Lands Act 1884*,[81] and the *Land Act* 1897.[82] Each of these Acts authorised the Crown to grant land and introduced a requirement for the grant to be subject to the conditions and reservations authorised by the particular Act. For example, the *Crown Lands Act 1884*, s 8 stated:

> The Governor in Council may, in the name of Her Majesty, and under and subject to the provisions of this Act, grant in fee-simple, or demise for a term of years, any Crown lands within the Colony of Queensland … Every such grant or demise shall be made subject to such reservations and conditions as are authorised by this Act, and subject to no other reservations or conditions.[83]

Part IX of the 1884 Act contained a number of authorised reservations. The only reservation relevant to the grant of freehold was in s 110, which provided that 'All Crown grants issued under this Act shall contain a reservation of all gold in or under the land comprised therein'.

While the *Crown Lands Act 1884* authorised a reservation of gold, it did not imply a reservation in every grant in the absence of express words. In any event, such an express reservation was unnecessary in light of the existing common law reservation of gold to the Crown.[84] This position changed slightly under the *Land Act* 1897[85] which required all grants in fee simple to include a reservation of both gold and silver to the Crown.[86] No other statutory reservations concerning minerals or natural resources were required by the Acts.

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80 (40 Vic No 15), repealing the *Crown Lands Alienation Act* 1868 (31 Vic No 46).

81 (48 Vic No 28), repealing the *Crown Lands Alienation Act* 1876 (40 Vic No 15).

82 (61 Vic No 25).

83 This provision appeared in substantially the same form in the *Crown Lands Alienation Act* 1876 (40 Vic No 15), s 4 and the *Land Act* 1897 (61 Vic No 25), s 12.

84 Refer to the discussion above and *Case of Mines* (1567) 1 Plowd 310; 75 ER 472; *The Case of Stannaries* 77 ER 1292; 12 Co. Rep. 9; *The Case of the Kings Prerogative in Saltpetre* (1603) 77 ER 1294; (1603) 12 Co. Rep. 12. This presumption was part of the common law as it applied to Australia: see *Woolley v A-G(Vic)* (1877) LR 2 App Cas 163.

85 (61 Vic No 25)

86 *Land Act* 1897 (61 Vic No 25), s 13.

In response to this expansion in statutory regulation, the reservations in grants during this period adopted a more general reservation and conditions clause. Every grant examined, no matter for what purpose it was made, provided for the grant to be 'Subject Nevertheless to the several Conditions and Reservations contained and declared in the Laws of Our said Territory'.[87]According to each of the relevant Land Acts,[88] these conditions and reservations could only be the conditions or reservations in the *Land Act* of the time. This presented a significant restriction on the power of the Crown to grant or sell land subject to conditions or reservations. Conditions imposed under the respective *Land Acts* related mainly to leases or conditional selections, with specific conditions required to be met before the grant became an unconditional grant in fee simple.[89] The conditions imposed included positive obligations on the grantee such as erection of fences, clearance of land and residence requirements,[90] not unlike the conditions of residence and cultivation in the initial grants of land in the colony of New South Wales. There were no conditions of grant allowed on the sale of land by auction, and the only relevant authorised reservation was for gold (and after 1897 silver). The majority of grants after 1876 therefore included a specific reservation of gold in the following form: 'And we do hereby

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87 'Deed of Grant for Unconditional Selection — Country or Suburban Lot granted to Patrick O'Sullivan, entered into the Register of Land Purchases A, Book 63, Folio 3 dated 13th April 1880, and also the Register Book, Vol 360, Folio 184, dated 14th April 1880; see also Deed granted to William Pidd, Land Purchases A, Book 63, Folio 207 dated 27th May 1880, and also the Register Book, Vol 372, Folio 200, dated 31st May. A similar condition is found in a 'Deed of Grant. Auction Lands. Country of Suburban Lot' Deed granted to George Edward Forbes and Alexander Maff, entered into the Register of Land Purchases A, Book 63, Folio 144 on 18th May 1880, and Register Book Vol 372, Folio 125, dated 20th May 1880. Conditional Purchase grant: Deed granted to Christopher Thompson, entered into Land Purchases A, Book 87, Folio 84 on 14th February 1885, and Register Book, Vol 530, Folio 96 on 24th February 1885.

88 (1876–1884) *Crown Lands Alienation Act* 1876 (40 Vic No 15), (1884–1897) *Crown Lands Act 1884* (48 Vic No 28) and (1897–1910) *Land Act* 1897 (61 Vic No 25).

89 Legislation for example includes the Queensland *Alienation of Crown Lands Act* (24 Vic. No. 15); Deed granted to Henry Hannant Junior, entered into the Register of Land Purchases A, Book, 87, Folio 2, dated 10th February 1885, and Register Book, Vol 531, Folio 231, dated 16th February 1885.

90 *Crown Lands Act 1884*, s 57–58.

Reserve unto Us, Our Heirs and Successors, all Gold and Mines of Gold lying and being within and under the said Land'.[91]

The attitude to mining rights also changed in this period with the authority to grant land in fee simple for mining purposes being removed by the *Mineral Lands Act* 1882.[92] Under this Act, the Crown was only authorised to lease or licence mining rights on Crown land, reinforcing the position that minerals on land granted in fee simple belonged to the owner of the land. The Act further provided that minerals, except gold, found on or in the land belonged to the holder of the licence or lease. Following the *Mineral Lands (Sales) Act* 1892[93] the Crown was authorised to sell or land within a gold field in a mining district. Any such sale or lease was again subject to a reservation of gold or silver to the Crown and the other conditions imposed by the Act. This was achieved by making the grant subject to the provisions of the 1892 Act.[94] The *Mining Act 1898*[95] continued to allow the Crown to grant leases and licences for mining over Crown land.[96] Only gold found on the land leased or licensed was reserved to the Crown.[97] The reservation of minerals more generally to the Crown on private land did not occur until 1909.

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91 Deed granted to Frederick John Macarthur Bowman, entered into the Register of Land Purchases A, Book 115, Folio 113, 26th February 1890, and Register Book, Vol 777, Folio 75, dated 28th February 1890.; see also 'Deed of Grant of Land Purchase after Auction — Suburban Lot', deed granted to August Band, entered in the Register of Land Purchases A Book 137, Folio 224, on 10th May 1895, and the Register Book Vol 893, Folio 38, on 13th May 1895. See also 'Deed of Grant — Auction — Country Lot' granted to George Poynter Heath, entered into the Register of Land Purchases A Book 137, Folio 263, on 17th June 1895, and the Register Book Vol 893, Folio 69, on 18th June 1895.

92 (46 Vic No 8).

93 (56 Vic No 31). This Act was later repealed by the *Mining Act 1898*, as per the First Schedule.

94 See for example 'Deed of Grant — Auction — Country Lot' granted to George Poynter Heath, entered into the Register of Land Purchases A Book 137, Folio 263, on 17th June 1895, and the Register Book Vol 893, Folio 69, on 18th June 1895 subject to the *Mineral Lands (Sales) Act 1892*.

95 (1898) 62 Vic No. 24, s 4.

96 s 30 (mineral leases); s 17-23 (licences).

97 s 34 (mineral leases); s 17-23 (licences).

The period of 1875-1890s is one of transition in regulatory method, in which Crown grants incorporated the conditions and reservations specifically authorised only by the relevant Land Act of the time. This resulted in a narrowing of the reservations and conditions on grants of land in fee simple.

3 *Land Grants from 1900 to 1910*

The first decade of the 20th century heralded a new approach to reservations and conditions in grants in Queensland. In 1909 the *Mining on Private Land Act* 1909[98] was enacted to be read 'as one with' the *Mining Act* 1898. Section 6 of the Act made several declarations in relation to the ownership of minerals:

1. Gold whether below or on the surface of all land whether alienated in fee simple (no matter when) or not was the property of the Crown;
2. Silver on or below the surface of all land whether alienated in fee simple (no matter when) or not was the property of the Crown (except land alienated for mining purposes under prior legislation);[99]
3. Copper, tin, opal and antimony on or below the surface situated within a gold field or mineral field and has been alienated in fee simple or contracted to be so since 1899 (and also copper etc on Crown land) was the property of the Crown;
4. Coal on or below the surface of land, subject to the *Agricultural Lands Special Purchase Act* 1901, whether alienated in fee simple from the Crown at the commencement of this Act or not, was the property of the Crown; and
5. All other minerals on or below the surface of the Crown land were the property of the Crown.[100]

All land granted in fee simple after the commencement of the *Mining on Private Land Act* 1909 was required to contain a reservation of gold and all other minerals to the Crown and a reservation of a right of access

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98 (9 Edw VII No 15).

99 *Crown Lands Alienation Act* 1860, s 22; *Crown Lands Alienation Act* 1868, s 32; *Mineral Lands Act* 1872, s 21.

100 The ownership of petroleum was not regulated until the *Petroleum Act* 1923 (Qld).

for the purpose of searching for or working on any mines of gold or minerals in any part of the land.[101] The requirement for this reservation was incorporated into the *Land Act* 1910 by s 6 which provided, first that all grants were subject to such reservations and conditions as authorised or prescribed by the Land Act or any other Act and secondly, that the reservations with respect to minerals required to be included in all grants should be declared by the *Mining on Private Land Act* 1909. Therefore, grants of Crown Land after that time were subject to the reservations created by the *Mining on Private Land Act* 1909 whether expressly stated or not. This marked the commencement of the current approach where express reservations were no longer included in grants with the government relying upon statutory reservations of minerals and other natural resources.

V Conclusion

Much of the evolution of land regulation can be explained by the absence of a colonial legislature prior to 1824, and the absence of a body of suitable legislation for many years following. Without the repertoire of laws that we take for granted today (eg, compulsory acquisition, mining laws, planning laws, land taxing and rating Acts) government had little alternative but to impose reservations and conditions on land grants. The reservations and conditions inserted into grants altered over time to reflect the changing needs of the colony. Initially the conditions and reservations reflected a focus on food security, retaining military personnel, emancipees and free settlers, and provisioning the navy; later grants were designed to promote expansion and settlement. The economic sustainability and development of the colony in one form or another was a key consideration, both in the allocation of land grants and in the conditions and reservations expressed or incorporated into them.

The introduction of land legislation and the Torrens system did not spell the end of reservations and conditions on landholders. But by the third quarter of the nineteenth century, more flexible methods of regulating land use came into favour. Legislation pre-defined different sets of conditions and reservation for particular categories of grant. This method enabled the legislature to vary the conditions and reservations after the grant was made.

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[101] *Mining on Private Land Act* 1909, s 6(2).

Statute law provided a more flexible way of updating the restrictions and obligations placed on landowners, and eventually supplanted the use of conditions and reservations in freehold grants. By the late 1880s and 1890s, references to reservations of minerals or natural resources, and the purpose for which they were reserved, had disappeared or were less common in grants of land. Instead, references to grants being subject to specific legislative conditions, or subject to the 'laws of the colony' took their place, including legislation directly relating to minerals.

That land was held subject to conditions and reservations both *pre* and *post* Torrens suggests that, at least in the early period of Torrens, there was no substantive difference in the law or practice of granting land, with the exception that statutory forms were used to initiate transfers of land, in contrast to land being dealt with subject to the exercise of Crown prerogative.[102] What is significant is that the early colonial practice of making freehold grants subject to reservations and conditions for the public benefit involved express recognition that land ownership was subject to broader social and communal obligations. As the framework of laws developed, the Crown came to rely on legislation rather than conditions and reservations in grants to define the obligations of ownership. While this was a rational development in regulatory methods, it made the obligations of ownership less visible to grantees. In contrast, with Crown leases, which continued to impose conditions that could be relatively onerous, freehold titles took on the appearance (but not the substance) of a grant of unconditional rights. In this sense, the early land grants were closer in form to the modern environmentalist ideal of a form of landownership that is expressly subject to obligations to society and to environmental sustainability.

[102] *Bone v Mothershaw* [2003] Qd R 600.