

Natural Resources and Other Legislation Amendment Bill 2005

Explanatory Notes

General Outline

Title of the Bill

Natural Resources and Other Legislation Amendment Bill 2005.

Objectives of the Bill

The Bill amends the *Coal Mining Safety and Health Act 1999*, *Geothermal Exploration Act 2004*, *Land Act 1994*, *Land Protection (Pest and Stock Route Management) Act 2002*, *Land Title Act 1994*, *Integrated Resort Development Act 1987*, *Local Government Act 1993*, *Mineral Resources Act 1989*, *Mining and Quarrying Safety and Health Act 1999*, *Petroleum and Gas (Production and Safety) Act 2004*, *Petroleum Act 1923*, *Property Law Act 1974*, *Survey and Mapping Infrastructure Act 2003*, *Surveyors Act 2003*, *Transport Infrastructure Act 1994*, *Valuation of Land Act 1944*, *Valuers Registration Act 1992* and *Water Act 2000*.

The amendments to the *Land Title Act 1994* aim to improve the operation of this Act which provides for the Torrens system of freehold land title in Queensland, in relation to the conduct of inquiries into fraud and errors in the freehold land register, correction of the freehold land register, information kept in the freehold land register and registration of plans, and in dealing with caveats, easements, adverse possession and statutory covenants and to reduce the State's exposure to claims for payment of compensation for land title related frauds in circumstances where reasonable due diligence measures were not taken by a mortgagee. The amendments also provide for a stay on the registration of plans with tidal boundaries.

The amendments to the *Land Act 1994* provide for the Governor-in-Council to direct the amendment of leasehold or freehold titles in certain instances where easements were compulsorily acquired for public infrastructure but were not registered and further align the registration

provisions of this Act with those of the *Land Title Act 1994* to meet contemporary operating requirements. The amendments also provide for a stay on the registration of plans with tidal boundaries. There are also some minor technical amendments.

Amendments to the *Integrated Resort Development Act 1987*, *Local Government Act 1993*, *Property Law Act 1974* and *Transport Infrastructure Act 1994* aim to make necessary changes to provisions in those Acts that directly impact on or complement provisions in the *Land Title Act 1994* or the *Land Act 1994*, or that depend on some aspect of the Department of Natural Resources and Mines (NR&M) land registry operations.

Amendments to the *Valuers Registration Act 1992* will provide for greater powers to the Valuers Registration Board of Queensland (the Board) in respect to disciplinary matters and setting of standards and otherwise clarify the operation of the legislation.

Amendments to the *Coal Mining Safety and Health Act 1999* and the *Mining and Quarrying Safety and Health Act 1999* will implement reforms identified by a recent review of the Mines Inspectorate. These reforms particularly relate to improving the enforcement function of the Inspectorate and enhancing the Inspectorate's capabilities to meet the challenges of safety and health regulation of the mining industry.

There are minor technical amendments to the *Geothermal Exploration Act 2004*, *Land Protection (Pest and Stock Route Management) Act 2002*, *Mineral Resources Act 1989*, *Petroleum Act 1923*, *Petroleum and Gas (Production and Safety) Act 2004*, *Survey and Mapping Infrastructure Act 2003*, *Surveyors Act 2003*, *Valuation of Land Act 1944* and *Water Act 2000*.

Reasons for the Bill

Amendments to Land Title Act 1994 and Land Act 1994 and related amendments to other Acts— Parts 3, 4, 5, 6, 8 and 9 of the Bill

The amendments arise from extensive review of operational and business issues and consultation with stakeholders. The amendments are necessary to clarify and update aspects of the legislation, and to improve the operation of the *Land Title Act 1994* and the *Land Act 1994* by providing a safeguard against identity fraud in the mortgaging of land, providing for easements to be created in favour of the State or a local authority to allow public access across private (freehold or leasehold) land, providing for the

amendment of particulars in the freehold or leasehold land register to include public utility easements in defined instances and embodying in legislation the policy that all land dedicated as public use land must have access unless the Minister determines otherwise. These amendments will not impact on the objectives of the Acts.

Amendments to the *Valuers Registration Act 1992 – Part 10 of the Bill*

Amendments to the *Valuers Registration Act 1992* arise from concerns raised by the Valuers Registration Board of Queensland (the Board) and are necessary to expand the Board's powers to set professional conduct, educational and professional development standards, provide more flexibility in relation to the application of disciplinary provisions and to provide a means for the Board to investigate the suitability of a valuer for registration. There are also a number of other amendments to improve the effectiveness and efficiency of the Act. These amendments will not impact on the objective of the Act.

Amendments to the *Coal Mining Safety and Health Act 1999* and the *Mining and Quarrying Safety and Health Act 1999*

These amendments arise from an extensive review of the Mines Inspectorate, in consultation with stakeholders. The amendments reflect the recommendations of the review that have been approved as government policy. These amendments will not impact on the objectives of the Acts.

How the policy objectives will be achieved

The Bill achieves the objectives by:

Amending the *Land Title Act 1994* (“*LTA*”) to:

- clarify what information may be kept in the land registry and the status of the information
- give statutory recognition to the manual of land title practice maintained by the registrar of titles (“the registrar”)
- consolidate the registrar's power to make practice directions for lodging or depositing instruments under the *LTA*
- provide for obligations of lenders to identify a mortgagor before taking a mortgage over freehold land and to retain records, and introduce an exception to indefeasibility of title where a mortgagee has not fulfilled these obligations and its mortgage was fraudulently executed.

- clarify that the registrar has power to correct the register to include an omitted easement which is an exception to indefeasible title, where fraud has occurred and the rights of the holder of an interest will not be prejudiced, or if ordered to do so by the court
- provide for additional circumstances in which the registrar may lodge a caveat under section 17 and provide that such a caveat may be lodged over an interest in a lot
- expand the power of the registrar to conduct inquiries into fraud and other issues arising from the lodgment or registration of an instrument, to require a greater range of persons to attend as witnesses and to refer findings from an inquiry to the Supreme Court for an order
- provide for notice to be given to a person, either by the registrar or by a person who has lodged a plan of survey for registration, where the person's interest may be affected by registration of the plan
- update the *LTA* regarding the registrar's procedures on lodgment and registration of instruments
- provide for more flexible arrangements than those currently available under the Act, for the provision of information from the freehold land register other than the information currently available by search
- provide that an easement for right of way will be extinguished by dedication of a road to the extent the road is over the same area
- provide that a plan of subdivision providing for public use land (other than road) may not be registered unless access is provided to the public use land, unless the Minister determines otherwise
- clarify the provisions relating to registration, extinguishment and partial extinguishment of building management statements, including better defining the lots/area which may be made subject to a building management statement and clarifying issues arising in relation to community titles schemes, and provide that proposed future development may be included in a building management statement

- provide that a mortgage cannot itself be mortgaged under the *LTA*
- provide for an additional category of public utility easement to be registered in favour of the State or a local government, namely a “public thoroughfare easement”
- provide that a mortgagee in possession may sign an instrument of surrender of an easement
- clarify the provisions relating to the content and effect of covenants which may be registered under section 97A, in line with the original intent of the provisions and the interpretation of the provisions by the Court of Appeal in *Townsville Port Authority v Max Locke, Registrar of Titles* [2004] QCA 294.
- clarify that the *LTA* made no substantive change in the law relating to applications for adverse possession by inserting provisions regarding enclosures/encroachments and interests held by local governments and others similar to provisions in the *Real Property Acts Amendment Act 1952*; and further clarifying and improving the operation of the relevant provisions with respect to parts of lots and information to be provided by applicants.
- increase to \$300,000 the value of an intestate estate for which a lot or an interest in a lot may be transferred to a personal representative without letters of administration
- improve the operation of provisions under which a personal representative may apply to be registered as holder of an interest, to address issues arising where the personal representative is an artificial person in another jurisdiction
- clarify that a caveat cannot be lodged on the same grounds as an earlier caveat without the leave of the court while the earlier caveat still has effect
- provide for how acts may be done for minors under the Act, to address a gap in the legislation after the omission of section 136 by the *Guardianship and Administration Act 2000*, and clarify the provisions relating to acts done for persons with impaired capacity
- allow additional exemptions from the requirement to lodge a certificate of title with an instrument lodged for registration,

namely for instruments of amendment, extinguishment or partial extinguishment of a building management statement (where certain evidence is provided) and a request to record a statutory vesting

- update the provision relating to correction of unregistered instruments in line with current practice for the computerised freehold land register
- expand the range of persons to whom requisitions may be issued to allow, for example, a requisition to be issued to a witness of a signature on an instrument lodged for registration
- clarify that a certificate of title issued under section 42 of the *LTA* need not be copied before it is destroyed and clarify the provisions relating to return of a cancelled duplicate certificate of title or deed of grant
- further clarify the meaning of “omitted or misdescribed” easements which are exceptions to indefeasible title
- clarify that compensation payable under the Act for loss or damage cannot include any compensation for personal injury
- re-introduce a time limit for compensation claims
- provide that insurers cannot be subrogated to the rights of another person to claim compensation from the State under the Act
- disallow from obtaining compensation a mortgagee that has not fulfilled its obligation to properly identify the mortgagor and has suffered loss because of a relevant occurrence of fraud
- clarify that no compensation is payable in respect of an omitted or misdescribed easement which is an exception to indefeasible title
- provide that no compensation is payable because of the recording or keeping of information under other Acts or unrelated to interests registered under the *LTA*
- limit the rate of interest and costs recoverable by a mortgagee exercising power of sale where the execution of the mortgage involved fraud and a registered proprietor is entitled to compensation

- extend the State's right of subrogation to recover compensation paid to a more extensive range of claims the compensated person may have
- empower the registrar to enter into agreements to provide statistical data derived from information in the land registry
- provide that a standard terms document registered under the *Land Act 1994* is taken to be a standard terms document registered under the *LTA*
- provide for a three year stay on the registration of new tidal boundary plans of subdivision with provision for the chief executive to register such plans in specific circumstances with the approval of the Minister
- facilitate the imposition of this stay by the insertion of several new definitions

Amending the *Land Act 1994* ("*Land Act*") to:

- delete provisions about the commencement of the *Land Act* (these provisions being no longer required)
- provide for the Governor-in-Council to direct the registrar or the chief executive to correct particulars of a title in appropriate cases where a public utility easement was compulsorily acquired from leased non-freehold land, but was not registered on the lease and, in respect of land later granted in fee simple, was not brought forward on to the Deed of Grant
- clarify what information may be kept under the *Land Act* and indemnify the State against any claim arising out of the accuracy or inaccuracy of "deposited" information kept at the discretion of the chief executive
- align provisions of the *Land Act* with corresponding provisions of the *LTA* relating to
 - recognition of a manual of land practice maintained by the chief executive
 - the making of practice directions
 - notice to be given to a person when a plan of survey is lodged for registration, which may affect the person's interest

- procedures on lodgment and registration of instruments
- more flexible arrangements than those currently available, for the provision of information by the chief executive from the registers kept under the Act
- registration, extinguishment and partial extinguishment of building management statements, including better defining the lots/area which may be made subject to a building management statement, and providing that proposed future development may be included in a building management statement
- an additional category of public utility easement to be registered in favour of the State or a local government, namely a “public thoroughfare easement”
- signing by a mortgagee in possession of an instrument of surrender of an easement
- the content and effect of covenants which may be registered under section 373A
- the value of an intestate estate for which an interest under the *Land Act* may be transferred to a personal representative without letters of administration (increased to \$300,000)
- the recording of an artificial person in another jurisdiction as the holder of an interest as personal representative
- exemptions from the requirement to lodge a tenure document with an instrument lodged for registration, namely for instruments of amendment, extinguishment or partial extinguishment of a building management statement (where certain evidence is provided) and a request to record a vesting in favour of the State
- the correction of unregistered instruments (amended in line with current practice for the computerised land register)
- the power of the chief executive to enter into agreements to provide statistical data derived from information in the land registry
- standard terms document (a standard terms document registered under the *LTA* is taken to be a standard terms document registered under the *Land Act*)

- the ending of an easement over a sub-lease ends when the sub-lease ends
- power of the chief executive to require a plan of survey to be lodged where a lessee proposes to deal with all or part of the lease in a manner permitted under the *Land Act*
- the definitions of “deposit” and “lopping”
- provide for a three year stay on the registration of new tidal boundary plans of subdivision with provision for the chief executive to register such plans in specific circumstances with the approval of the Minister
- stay the application of s.358(2)(b) of the *Land Act* relating to the surrender of land due to boundaries changing because of erosion or by gradual and imperceptible degrees for the duration of the three year stay
- facilitate the imposition of this stay by the insertion of several new definitions

Amending the *Property Law Act 1974* to update a provision which refers to settlement of land sale contracts at an office of the land registry, in view of the closure of offices on some business days.

Amending the *Local Government Act 1993* to provide for responsibility for public thoroughfare easements (a new type of public utility easement under the amended *LTA* and *Land Act*) registered in favour of a local government.

Amending the *Transport Infrastructure Act 1994* to provide for responsibility for public thoroughfare easements (a new type of public utility easement under the amended *LTA* and *Land Act 1994*) registered in favour of the State.

Amending the *Valuers Registration Act 1992* to give greater powers to the Board in respect to disciplinary matters, accessing the criminal history of applicants for registration as a valuer and existing valuers on renewal of registration, setting of educational and professional development standards and to otherwise clarify the operation of the legislation.

Amending the *Coal Mining Safety and Health Act 1999* and the *Mining and Quarrying Safety and Health Act 1999* to:

- vest the power to prosecute for offences under the respective Acts only in the Chief Executive;

- remove the statutory power vested in the Chief Inspector to prosecute;
- remove the power of the Minister or Attorney-General to authorise someone else to start a prosecution under the respective Acts;
- extend protection to the Chief Executive from civil liability for acts or omissions done honestly and without negligence in the exercise of a function or power;
- remove the mandatory eligibility requirement of a professional engineering qualification for appointment as an Inspector; and
- allow the Chief Executive to appoint a person as an Inspector only if the Chief Executive considers the person has appropriate competencies and adequate experience to effectively perform an Inspector's functions under the respective Acts.

Amending the *Geothermal Exploration Act 2004* to omit a redundant definition.

Amending the *Integrated Resort Development Act 1987* to update references.

Amending the *Land Protection (Pest and Stock Route Management) Act 2002* to update cross-references.

Amending the *Mineral Resources Act 1989* to update a cross-reference and omit a redundant definition.

Amending the *Petroleum Act 1923* to update references, a section heading and part heading.

Amending the *Petroleum and Gas (Production and Safety) Act 2004* to update provisions.

Amending the *Survey and Mapping Infrastructure Act 2003* to update cross-references.

Amending the *Surveyors Act 2003* to omit redundant words.

Amending the *Valuation of Land Act 1944* to update a cross-reference.

Amending the *Water Act 2000* to define a term used in the Act.

Alternative ways of achieving the objectives

There is no alternative way of achieving the policy objectives other than the Bill.

Estimated cost to government of implementation

Implementation of the Bill will be met from departmental resources.

Fundamental Legislative Principles

The Bill conforms with fundamental legislative principles.

Amendments to Land Title Act 1994 and Land Act 1994 and related amendments to other Acts– Parts 3, 4, 5, 6, 8 and 9 of the Bill

Power to correct re omitted public utility easements not within section 185(1)(c) of the LTA

An amendment to the *Land Act* gives a power to the Governor in Council to direct that the particulars of a title in the freehold or leasehold land register be corrected to include an omitted easement outside the scope of section 185(3) of the *LTA*.

The easements were properly compulsorily acquired under legislation for public utility infrastructure and the interest in the land vested at law in the then appropriate constructing authority, and in most cases have continued to be used for their intended purpose. As it was through administrative oversight that the easements were not registered, it is considered that property rights are not infringed by the amendment.

As the required compensation processes for the acquisition were followed, there is no breach of fundamental legislative principles in this respect.

Governor in Council approval must be given, thereby ensuring that the appropriate level of consideration is given to any proposed correction to a register under this amendment. An adequate review mechanism of a decision to correct a register is provided under the *Judicial Review Act 1991*.

Power to correct re omitted easements within section 185(1)(c) of the LTA

An amendment clarifies that the registrar's power to correct the freehold land register includes power to record that a lot is burdened by an easement

the particulars of which have been omitted from, or misdescribed in, the register. Such an easement is, and always has been, a statutory exception to indefeasibility of title and therefore no property rights are affected.

Onus of proof for specific purpose

An amendment to section 185 of the *LTA* places the onus of proof on a mortgagee where an issue arises in a proceeding as to whether the exception to indefeasibility in section 185(1A) applies, that is where a mortgage was not executed by the registered owner and the mortgagee did not exercise due diligence in identifying the person who signed as mortgagor. This is justified as the mortgagee is in the best position to prove that it took reasonable steps to identify the mortgagor in accordance with the obligation in the new section 11A or 11B. In fact, section 11A or 11B imposes an obligation on the mortgagee to keep a record of the steps taken and to produce this record to the Registrar if requested to do so.

Amendments to the *Valuers Registration Act 1992 – Part 10 of the Bill*

An investigator appointed under section 44 of the *VRA* is being included under a definition of ‘officer’ of the Board. This confers the protection from liability contained in section 22 to an investigator. This is justified as the section 22 protection only applies when an act or omission is done honestly and without negligence under, or for the purposes of the *VRA*.

Amendments to the *Coal Mining Safety and Health Act 1999* and the *Mining and Quarrying Safety and Health Act 1999 – (Parts 2 and 7 of the Bill)*

It is considered that sufficient regard has been given to relevant fundamental legislative principles.

Restricting the power to prosecute to the Chief Executive does not confer immunity from prosecution. The decision to prosecute must be exercised impartially and transparently having sufficient regard to the rights and liberties of individuals.

The power to prosecute under the respective Acts can be delegated to an appropriately qualified public service employee.

Consultation

The following State agencies were consulted during preparation of the Bill:

- Department of the Premier and Cabinet
- Office of Queensland Parliamentary Counsel

- Department of Local Government, Planning, Sport and Recreation
- Department of Justice and Attorney-General
- Queensland Treasury
- Queensland Transport
- Queensland Police Service
- Department of Main Roads
- Department of State Development Trade and Innovation
- Department of Primary Industries and Fisheries
- Department of Public Works
- Department of Housing
- Environmental Protection Agency
- Department of Tourism, Fair Trading and Wine Industry Development
- Department of Communities

The following stakeholders and other external organisations or persons were consulted during preparation of the Bill:

- Local Government Association of Queensland
- Urban Development Institute of Australia
- Australian Finance Conference (representing banking industry, mortgage industry, credit unions etc)
- Australian Bankers Association
- National Credit Union Association
- Queensland Law Society
- SunWater
- Construction Forestry Mining and Energy Union (CFMEU)–
- Australian Worker’s Union (AWU)
- Queensland Resources Council (QRC)
- Valuers Registration Board of Queensland
- Queensland University of Technology’s School of Law

Notes on Provisions

Part 1 Preliminary

Short Title

Clause 1 sets out the short title of the Act.

Commencement

Clause 2 states that the Act commences on a day to be fixed by proclamation.

Part 2 Amendment of Coal Mining Safety and Health Act 1999

Act amended in pt 2

Clause 3 specifies that this part amends the *Coal Mining Safety and Health Act 1999*.

Amendment of s 126 (Qualifications for appointment as inspector)

Clause 4 amends section 126 by removing the mandatory eligibility requirement of a professional engineering qualification relevant to coal mining operations for appointment as an Inspector, and providing that the Chief Executive may appoint a person as an Inspector only if the Chief Executive considers the person has appropriate competencies and adequate experience to effectively perform an Inspector's functions under this Act. The previous statutory qualifications are no longer considered necessary for all Inspectors.

Amendment of s 129 (Further functions of inspectors)

Clause 5 amends section 129(b) to provide that an additional function of Inspectors is to make recommendations to the Chief Executive about

prosecutions under the Act. This amendment is consistent with the vesting of the power to prosecute in the Chief Executive.

Amendment of s 160 (Additional powers of chief inspector)

Clause 6 amends section 160(a) to remove the power to initiate prosecutions for offences under the Act from the Chief Inspector. This amendment is consistent with the vesting of the power to prosecute in the Chief Executive.

Amendment of s 255 (Proceedings for offences)

Clause 7 amends section 255(5) by vesting the power to prosecute for an offence against the Act in the Chief Executive and removing the power of the Minister or the Attorney-General to authorise someone else to start a prosecution.

This Clause also amends section 255(6) to provide that a “person dissatisfied with a decision” means a party to the proceeding or a person bound by the decision.

Amendment of s 256 (Recommendation to prosecute)

Clause 8 amends section 256(1) to provide that an Inspector, Industry Safety and Health Representative, Site Senior Executive or Chief Inspector may recommend to the Chief Executive that there be a prosecution for an offence against the Act.

This Clause also amends section 256(2) to provide that section 256(1) does not limit the Chief Executive’s power to prosecute for offences under the Act. For example where a recommendation is made that there be a prosecution under s.256(1), the Chief Executive is not in any way bound by such recommendation.

Amendment of s 276 (Protection from liability)

Clause 9 amends section 276 to include the Chief Executive in the meaning of “official”; so that the Chief Executive does not incur civil liability for an act done, or omission made, honestly and without negligence under this Act.

Part 3 Amendment of Land Act 1994

Act amended in pt 2

Clause 10 specifies that this part amends the *Land Act*.

Omission of s 2 (Commencement)

Clause 11 omits section 2 dealing with commencement of the *Land Act*. The information about commencement is available in the endnotes and the cross-references in section 2 are misleading because of amendments to the Act since commencement.

Amendment of s 275 (Registers comprising land registry)

Clause 12 amends section 275 to better provide for information required to be kept by the chief executive in the land registry, by other Acts.

Amendment of s 276 (Registers to be kept by chief executive)

Clause 13 amends section 276 to better provide for the registers required, or which may in the future be required, to be kept by the chief executive by this or other Acts.

Amendment of s 281 (Other information may be kept)

Clause 14 clarifies and expands the power of the chief executive to keep information under section 281. As the information is not input by the chief executive (and the chief executive has no control over its accuracy), the amendment provides a statutory indemnity for the chief executive, the Minister and the State for matters arising out of the keeping of the information. This amendment is in line with the amendment to section 34 of the *LTA*.

Replacement of s 282 (Chief executive's procedures on lodgement and registration of document)

Clause 15 replaces section 282 with a new section 282 which gives details of the particulars the chief executive must record on lodgment and registration of dealings. This amendment is in line with the replacement of section 32 of the *LTA*.

Amendment of s 284 (Entitlement to search register)

Clause 16 amends section 284 to recognise that searches under the *Land Act* may be obtained online through an entity engaged by the chief executive. It will also provide for a new, alternative search, that is, a search to obtain only part of the information about a lease, licence, permit or reserve. This amendment is in line with the amendments to section 35 of the *LTA*.

Insertion of new s 285A

Clause 17 inserts a new section 285A to facilitate the aggregation and sale of statistical data from the land registry.

The *Land Act* in its present form does not specifically allow either for the extraction of such statistical information or the sale of any statistical data. The amendment gives the chief executive power to enter into agreements to supply statistical data derived from the land registry, within the terms of the section. It is intended that, if there is any unauthorised use of the data, the chief executive will immediately suspend the agreement.

The new section provides that this statistical data is not information searchable under section 284 and will not identify persons or disclose lot descriptions that might identify persons. This amendment is in line with the insertion of the new section 198A inserted into the *LTA*.

Insertion of new ss 286A and 286B

Clause 18 inserts new sections 286A and 286B into the Act.

The new section 286A gives statutory recognition to a manual, which may be maintained by the chief executive for the information and guidance of departmental staff and persons preparing documents for lodgment or otherwise dealing with the land registry. It is envisaged that such a manual will be maintained and published by the registrar as delegate of the chief executive, with the manual referred to in section 9A of the *LTA*. The policy underlying the maintenance of a manual under this section is to minimise the issuing of requisitions under section 305 of the *Land Act* in relation to lodged documents.

The new section 286B is similar to section 165 of the *LTA*, giving power to the chief executive to require a plan of survey to be lodged in the circumstances provided.

There is a need to accurately define the extent of covenants and profits a prendre, which were introduced into the *Land Act* in 1997 and 2004 respectively. Also, a lot or part of a lot may be required to be accurately identified by survey because an interest in the lot is being dealt with in some manner permitted by the Act. The Act provides for the various types of plans of survey however if such a survey is required the survey would have to comply with the *Survey and Mapping Infrastructure Act 2003* and be certified as accurate by a cadastral surveyor within the meaning of the *Surveyors Act 2003*.

Amendment of s 287 (Registered documents must be in the appropriate form)

Clause 19 consolidates into one section (section 287) references to directions made by the chief executive about the form of documents and the provision of information required under the *Land Act*.

The amendment is intended to eliminate any confusion that may exist about the directions, particularly in respect of plans of survey and plans of subdivision, as well as concisely providing for power of the chief executive to give directions.

This amendment is in line with the amendment to section 10 of the *LTA*.

Insertion of new ss 288A to 288C

Clause 20 inserts new sections 288A to 288C into the Act.

The new sections 288A and 288B are in line with the new sections 11A and 11B inserted into the *LTA*, imposing a requirement on mortgagees to take steps to ensure that they deal with the true owner of land/mortgagor, to compile a written record of the steps taken before the mortgage is lodged for registration, and to produce this record if required to do so by the registrar within 7 years of registration of the mortgagee's interest.

Although there is no statutory indefeasibility for interests under the *Land Act*, these provisions have been introduced for consistency with the *LTA*, and will be relevant to the operation of other provisions of the *LTA* in cases where a leasehold interest under the *Land Act* is freeholded. The new section 288C provides for the obligations under the preceding sections to continue where a mortgage is "carried forward" onto an indefeasible title under the *LTA*.

Amendment of s 290D (Explanatory format plan)

Clause 21 omits from section 290D subsections which are now unnecessary in view of the amendments to section 287 (Form of instruments). This amendment is in line with the amendments to section 48E of the *LTA*.

Amendment of s 290J (Requirements for registration of plan of subdivision)

Clause 22 amends section 290J to remove a reference about directions of the chief executive in view of the amendment to section 287, in line with the amendment to section 50 of the *LTA*.

Insertion of new s 291A

Clause 23 inserts a new section 291A which provides for the correction of the leasehold land register to include an omitted easement, similar to the power of the registrar under section 15(3)(a) of the *LTA* to correct the freehold land register to include an omitted easement.

Amendment of s 294B (Building management statement may be registered)

Clause 24 amends section 294B to clarify that a building management statement (BMS) can apply to more than one building, such as a development comprising multiple buildings on one site, and that the BMS applies to new lots created by the subdivision of lots subject to the BMS.

A further amendment extends the potential ambit of a BMS. Provided at least one of the lots to which the BMS applies is wholly or partly contained in, or containing, a building, the BMS may also apply to a vacant lot where a development approval exists which contemplates the construction of a building or part of a building on that lot subsequently. This amendment is in line with the amendments made to section 54A of the *LTA*.

Insertion of new s 294BA

Clause 25 inserts a new section 294BA to clarify the extent of land to which a BMS may apply and allows the chief executive some discretion in determining this. This is similar to the new section 54AA inserted into the *LTA*.

Amendment of s 294C (Circumstances under which building management statement may be registered)

Clause 26 amends section 294C to delete a reference to directions of the chief executive in view of the amendment to section 287, in line with the amendment made to section 54B of the *Land Title Act 1994*.

Amendment of s 294D (Content of building management statement)

Clause 27 amends section 294D to allow provisions about staged or future development or redevelopment to be included in a BMS. This amendment is in line with the amendment to section 54C of the *LTA*.

Amendment of s 294I (Extinguishing a building management statement)

Clause 28 amends section 294I to provide for the partial extinguishment of a BMS in relation to part of a lot which does not contain a building. This amendment is in line with the amendments to section 54H of the *LTA*.

Amendment of s 295 (Right to have interest registered)

Clause 29 amends section 295 to introduce a provision similar to section 30(1)(b) of the *LTA*. A further amendment allows the chief executive to give notice, or to require the giving of notice, to the holder of an interest in a lot that may be affected by a plan of survey lodged for registration which is inconsistent with another plan of survey. This amendment is in line with the amendments to section 30 of the *LTA*.

Amendment of s 296 (Tenure document to be returned to land registry)

Clause 30 amends section 296 to provide an exception from the requirement to produce a tenure document to allow registration of a document, for a request to record a vesting in the State. A statute may provide for the statutory vesting of land or an interest in land, for example, on commencement of the *Housing Act 2003*, land and interests in land held by the now non-existing Queensland Housing Commission vested in the State. In such cases the production of tenure documents can be problematic and the amendment to section 296 simplifies the process. This amendment is in line with an amendment made to section 154 of the *LTA*.

Amendment of s 302 (Effect of registration on interest)

Clause 31 amends section 302 to clarify the priority of registered interests under the *Land Act*. The amendment provides that the rights and interests of the State as owner of the land take priority over registered interests. However, where the State is itself the holder of a registered interest, for example a mortgage, the normal rule of priority according to time of registration will apply.

Amendment of s 304 (Correcting unregistered documents)

Clause 32 amends section 304 to properly provide for the way corrections to documents are recorded under current registry practice.

Entries in the land register presently originate from imaged paper documents and are entered onto a computer database. The current section 304 only describes the process for correction of a paper document; other corrections are noted in the database, but not on the electronic form of the document. Furthermore, in preparation for the receiving of some instruments in digital form, the chief executive requires power to correct digital information. This amendment is in line with the amendment to section 155 of the *LTA*.

Amendment of s 305 (Requisitions)

Clause 33 amends section 305 to expand the chief executive's power of requisition and to make minor changes to the wording of the section to improve clarity.

The chief executive is empowered to request information about a lodged or deposited document from the lodger or from a person other than the lodger whom the chief executive reasonably believes may be able to provide information about the document. The power could be used, for example, to elicit information about execution and witnessing of documents. Section 305 is amended to state that a requisition may require action by a person other than the lodger. These amendments are in line with the amendments made to section 156 of the *LTA*.

Amendment of s 314 (Dispensing with production of document)

Clause 34 amends section 314 in relation to terms used in the section.

Insertion of new s 317A

Clause 35 inserts a new section 317A providing that a reference to a standard terms document includes one registered or taken to be registered under the *LTA*. This is a reciprocal provision to the amended section 172 of the *LTA*.

Amendment of s 321 (Withdrawal or cancellation of standard terms document)

Clause 36 makes a consequential amendment to section 321.

Insertion of new ss 358A and 358B

Clause 37 inserts new sections 358A and 358B.

The new section 358A allows, in limited circumstances, an easement to be recorded which has been compulsorily acquired from freehold or leasehold land but was never registered.

There are a number of known instances where easements in gross, now known as public utility easements, were compulsorily acquired from estates held in fee simple (including fee simple in trust) or from leases of non-freehold land. These acquisitions were pursuant to either the *Acquisition of Land Act 1967*, the now repealed *Land Act 1962* or another Act authorising such an acquisition. In some circumstances, for unknown reasons, the acquired easement was not registered against the interest as part of the acquisition process. In relation to leased land which has now been granted in fee simple under the *Land Act*, the easement was not included on the deed of grant as an interest in the land and the particulars of the easement were not recorded in the freehold land register.

Investigations have indicated that the easements had been properly acquired and the interest in the land vested in the then appropriate constructing authority under the applicable legislation. In most instances, public utility infrastructure has been erected on the land by the appropriate constructing authority.

The failure to register the easement in the appropriate register has resulted in leaving the acquired interest in “limbo”, which arguably makes the current land registers incomplete and inaccurate.

In light of the exceptions to indefeasibility, the registrar has no authority to record in the freehold land register details of an easement that has not been registered in the freehold land register. The registrar, as the delegate of the

chief executive, has no authority to record in the leasehold land register details of an easement that has not been registered in the leasehold land register. Although leasehold titles are not granted indefeasibility, the *Land Act* does support the position that a lease is not subject to an interest unless details of the document that creates that interest have been recorded in the leasehold land register.

It is arguable that an easement acquired under the *Acquisition of Land Act 1967*, the *Land Act 1962* or other authorising Act and vested in the constructing authority does not create a legal interest until the acquisition notice has been registered. Nevertheless, in light of the legislative requirement, the fact that the landholder was on notice about the resumption and compensation processes for the acquisition were followed, and the fact public utility infrastructure has probably been erected on the land, lessees and owners are more than likely to have constructive knowledge of the acquired easements. The position of these easements needs to be put beyond doubt.

To allow the land registers under the *LTA* and the *Land Act* to be corrected and to give effect to the original resumption, the Governor in Council is empowered to direct the correction of particulars in the leasehold or freehold land register to include an unregistered acquired easement provided evidence of the taking of the easement and its current use is adduced to the Governor in Council.

The new section does not give any new power to deprive a landowner of an interest in land, but is a provision necessary to correct an administrative oversight. It is envisaged that the Governor in Council will only direct correction of a register if there has previously been a formal process under an acquisition Act and the processes under the acquisition Act for compensation have been exhausted.

The new section 358B provides that no further compensation will be payable in such cases, as the correction will only be made if evidence is provided that the compensation processes under the acquisition Act were followed.

Amendment of s 361 (Definitions)

Clause 38 inserts in section 361 a new definition for *public thoroughfare easement*, as a new type of public utility easement and also makes a minor amendment to clarify the definition of *public utility provider*. These amendments are in line with the amendments to section 81A of the *LTA*.

Amendment of s 362 (Easements may be created only by registration)

Clause 39 amends section 362 to clarify that an easement may be granted over a lease or sublease of non-freehold land.

Amendment of s 366 (Rights and liabilities created on registration of document)

Clause 40 makes a consequential amendment to section 366.

Amendment of s 369 (Public utility easements)

Clause 41 inserts new subsections (4) to (8) into section 369 to provide for a new type of public utility easement, the *public thoroughfare easement*.

This amendment is necessary to overcome the problem that local government use of public utility easements for public access is not sanctioned as a recognised easement purpose by statute. The amendment will allow this type of easement (i.e. an easement in gross for public access) to be registered. The amendments are not intended to retrospectively apply to any currently registered easements, nor to alter any existing rights.

The new subsection (4) provides that a public thoroughfare easement must be in favour of the State or a local government and for pedestrian use only.

The new subsections (5) to (8) limit the matters to be provided for in a public thoroughfare easement, require a public thoroughfare easement to comply with other legislation, namely the *Local Government Act 1993* (“*LG Act*”) and the *Transport Infrastructure Act 1994* (“*TI Act*”) and give the chief executive some discretion as to the registration of these easements

The Bill amends the *LG Act* (Part 6 of the Bill) and the *TI Act* (Part 9 of the Bill) to provide that the local government or the State (whichever in a particular case is the grantee of the easement) will have control of the easement land and responsibility for the easement. Effectively, responsibility for public thoroughfare easements is in line with responsibility for public roads. These amendments are in line with the amendments to section 89 of the *LTA*.

Amendment of s 371 (Surrendering an easement)

Clause 42 amends section 371 to allow a mortgagee in possession to sign an instrument of surrender of an easement, for example, if needed to complete a subdivision. This amendment is in line with the amendment to section 90 of the *LTA*.

Amendment of s 372 (End and continuation of easements)

Clause 43 amends section 372 to clarify that an easement over a sublease ends when the sublease ends.

Amendment of s 373A (Covenant by registration)

Clause 44 amends section 373A to clarify aspects of the law relating to statutory covenants.

A minor amendment is also made to subsection (2) for consistency with other provisions of the *Land Act*.

Purposes for which covenants may be registered.

The policy intent of the covenant provisions in the *Land Act* was that a covenant under section 373A(4)(a) must relate to a purpose for which a building or a building proposed to be built on the land can be used or otherwise be related to a use to be made or not to be made of that land.

Covenants were never intended to be a notification device for local government development approvals and infrastructure agreements under the *Integrated Planning Act 1997* (“*IPA*”). Under the *IPA*, development approvals and infrastructure agreements statutorily run with the land and are binding on successors in title. Provisions in the *IPA* seek to prevent local governments from using covenants as a de facto means of planning control or planning scheme outside the *IPA*.

The amendments to subsections (4) to (9) are aimed at statutorily confining registration of covenants to their intended purpose.

Covenants for “conservation”

An amendment clarifies what type of covenant is provided for in section 373A(4)(b).

The intent of the provision was that it would be used as a tool to assist in conservation of native animals and plants and features of cultural or scientific significance, and the amendment gives effect to this intent.

An example of a covenant within the meaning of this paragraph would be one imposing an obligation not to remove vegetation or not to disturb a bora ring. An example which would not be within section 373A(4)(b) would be a covenant providing that earthworks on a parcel of land shall not exceed a maximum height of 2.0 metres.

Covenants relating to “use”

The current definition of “use” merely contains a limitation as to what the term does not include (section 373A(7)). It was never intended to include in covenants ancillary aspects of a development approval, such as providing “environmental toilets”, “preserving amenity” and the purported prevention of a right to object to noxious fumes coming from an industrial area over an adjacent residential development.

In the Queensland Court of Appeal in *Townsville Port Authority- v- Max Locke, Registrar of Titles* [2004] QCA 294, Williams J said that “to be registrable the covenant must relate to a purpose for which a building proposed to be built on the lot can be used or otherwise be related to a use to be made or not to be made of that land. That was also the approach taken by, and conclusion reached by, the learned judge at first instance.”

The clear intention of the provisions was in accordance with the interpretation of Williams J, as evidenced by the examples given by the then Minister in his Second Reading Speech when the covenant provisions were amended by the *Natural Resources and Other Legislation Amendment Bill 1999*.

Consequently, the new subsection (8) sets out when a covenant relates to the use of the land, part of the land or a building to encompass what was determined by the Court and to clarify the meaning of “use”. This amendment is supported by the new subsection (9) which sets out particular types of provisions that do **not** relate to the use of the land etc. These are:

- (a) an architectural, construction or landscaping standard
- (b) a statement, acknowledgement or obligation relating to the use of other land
- (c) a condition precedent to using the land for a stated purpose or any purpose
- (d) regulation of conduct of the owner of the land that is unrelated to, or is ancillary to, use of the land.

Examples of provisions within each paragraph are given in the subsection, all of which are drawn from covenants lodged for registration. Further examples are:

- an obligation to ensure that vehicular access to the land is gained from a named street (regulating conduct ancillary to use of the lot)
- an obligation to keep a fence painted blue (a landscaping standard)
- an obligation to construct any house on the land within a stated height limit, facing a particular direction or using split level or elevated construction techniques (construction or architectural standard and/or regulating conduct ancillary to use of the lot)
- an obligation not to use the land for residential purposes until it is connected to water services (condition precedent)

Matters capable of being the subject of an easement

A further amendment provides that a covenant must not provide for anything capable of being the subject of an easement. This issue was referred to in the Second Reading Speech of the then Minister in relation to the *Natural Resources and Other Legislation Amendment Bill 1999*. The Minister stated that matters recognised at law as capable of being the subject of an easement would not be acceptable as a covenant. It is considered necessary to specifically legislate to deal with this issue because of continuing attempts to use covenants for purposes for which an easement is the appropriate tool. These amendments are in line with the amendments made to section 97A of the *LTA*.

Insertion of new s 373AA (Compliance with s 373A)

Clause 45 inserts a new section 373AA which is linked to the amendments to section 373A and is intended to assist in achieving the policy aims described in relation to those amendments.

Subsection (1) provides that a registered covenant is taken not to be registered to the extent it is inconsistent with section 373A. This provision is intended to remove any perception of a positive link, regardless of the terms of a covenant, between registration and the efficacy and enforceability of those terms. This is similar to the new section 97AA inserted into the *LTA*.

Amendment of s 377 (Registering personal representative)

Clause 46 amends section 377 to increase the value of a small intestate estate which may be dealt with under the *Land Act* without letters of administration from \$150,000 to \$300,000.

A further amendment will allow artificial persons in other jurisdictions, that are not trustee companies, to be recorded as personal representatives or to consent as personal representatives.

In Queensland the transmission of realty does not require a grant of representation to be obtained. However, if a grant of representation in Queensland or a resale in Queensland of a grant of representation obtained elsewhere has not been obtained and the deceased died leaving a will, the chief executive under section 377 of the *Land Act* can only record a person as a personal representative “if the chief executive is of the opinion that the person would succeed in an application for a grant of representation”.

A problem has arisen in a number of cases involving artificial persons in other jurisdictions that are not trustee companies within the meaning of the *Trustee Companies Act 1968* (Qld) but who have been appointed executor or substituted executor under the deceased’s will, for example the Public Trustee of New South Wales. Such artificial persons will not obtain a grant of representation from the Supreme Court of Queensland, therefore under the existing section 377(2)(c), such artificial persons are not entitled to be recorded as personal representatives. These amendments are in line with the amendments made to section 111 of the *LTA*.

Amendment of s 379 (Registering beneficiary)

Clause 47 amends section 379(2)(a) to make the wording consistent with section 377(2)(c).

This amendment is in line with the amendments made to section 112 of the *LTA*.

Insertion of new Part 3B (Tidal boundary plans of subdivision)

Clause 48 inserts a new Part, Part 3B into the *Land Act*. Part 3B comprises several new sections.

Section 431NA provides for definitions of ‘tidal boundary’ and ‘tidal boundary plan of subdivision’ for the new Part 3B. The definition of ‘tidal boundary’ comprises two parts. Firstly the boundary of land must be identified, expressly or impliedly, with reference to tidal water and

secondly, having regard to how the boundary is identified, cannot be represented on a plan as a straight line boundary. Both parts of this statutory definition need to be established. The 'tidal boundary plan of subdivision' means a plan of subdivision that includes a section of tidal boundary.

Section 431NB specifically provides for the circumstances to which the new Part 3B will apply. It comprises three parts all of which must be satisfied before this new Part 3B will apply. Firstly, it applies to any tidal boundary plan of subdivision (the new plan of subdivision) lodged for registration between 8 November 2005 and 7 November 2008 inclusive, regardless of when Part 3B commences. Secondly, it will apply where any section of tidal boundary on the new plan of subdivision is in a different location to that as shown on the current registered plan of subdivision (the earlier plan of subdivision). And thirdly, if the new plan of subdivision is registered the earlier plan of subdivision will be cancelled at least to the extent of the inconsistency in tidal boundary location.

Section 431NC provides that the chief executive requires the Minister's approval to register the new plan of subdivision under Part 3B. It further provides that where the chief executive refuses under Part 3B to register the new plan of subdivision on or after 8 November 2005 but before the commencement of this section such refusal is valid.

Section 431ND provides that the Minister may approve registration of the new plan of survey where the tidal boundary on the earlier plan of subdivision was surveyed consistently with any surveying directions or instructions applicable at the material time and two other circumstances apply. Firstly the Minister must be satisfied that the difference between the earlier and new plans of subdivision can be explained, according to relevant legal principles, by accretion or erosion and secondly the Minister must be satisfied that the registration of the new plan of subdivision will not, in practical terms, be contrary to the public interest.

Section 431NE provides two further circumstances where the Minister may approve registration of the new plan of survey. This section will apply to two cases. It applies where the part of the tidal boundary on the earlier plan of subdivision was located in the wrong place due to the survey being conducted in a way which was inconsistent with any surveying directions or instructions applicable at the material time. It also applies if there were no directions or instructions applicable at the material time. In either of these cases the Minister may approve registration of the new plan if the

Minister is satisfied that the registration of the new plan of subdivision will not, in practical terms, be contrary to the public interest.

Section 431NF provides that section 358(2)(b) does not apply to a tidal boundary between 8 November 2005 and 7 November 2008 inclusive.

Section 431NG provides that a person will not be entitled to compensation from the State, on any basis, because of the operation of Part 3B.

Amendment of sch 6 (Dictionary)

Clause 49 inserts a definition of “**deposit**” in Schedule 6. The term “deposit” or “deposited” is used extensively to relate to the production of supporting or other required documents that are themselves not registered. The definition will be similar to that in the *LTA*. A further amendment updates the definition of “**lopping**” a tree.

This clause also inserts several new terms into Schedule, namely ‘**earlier plan of subdivision**’, ‘**new plan of subdivision**’, ‘**relevant section**’, ‘**tidal boundary**’ and ‘**tidal boundary plan of subdivision**’ that are defined in the new Part 3B.

Part 4 Amendment of Land Title Act 1994

Act amended in pt 4

Clause 50 specifies that this part amends the *LTA*.

Insertion of new s 9A (Land title practice manual)

Clause 51 inserts a new section 9A to give statutory recognition to the manual, currently called the *Land Title Practice Manual*, which has been maintained by the registrar for many years for the information and guidance of land registry staff and persons preparing documents for lodgment or otherwise dealing with the land registry. At the time of introduction of the Bill, the *Land Title Practice Manual* is published by the Queensland Law Society pursuant to an agreement with the registrar and copies are available for purchase from the Society. The new section provides that a copy of the manual is to be available for perusal free of charge at each office of the land registry.

This amendment gives a more formal basis to existing arrangements for properly regulating the practices and procedures of the land registry and for informing and guiding registry staff, conveyancing practitioners and the public generally. The policy underlying the existence of the *Land Title Practice Manual* is to assist in the effective and efficient operation of the land registry by minimising the issuing of requisitions under section 156 in relation to lodged instruments. The registrar has power under that section to require, among other things, re-execution of instruments, provision of further information and the verification of an instrument or information by statutory declaration. Many dealings and situations are not dealt with in the *LTA* itself, for example what is required to allow land to be transferred into the name of a beneficiary under a will.

The *Land Title Practice Manual* does not purport to be the final word on what must be lodged, but to provide directions, practices, guidance and information. Persons lodging instruments in the land registry and those acquiring interests in land benefit in terms of lower costs and more prompt registration from the guidance provided in the *Land Title Practice Manual* in relation to instruments and accompanying documents and information.

Amendment of s 10 (Form of instruments)

Clause 52 consolidates into one section (section 10) references to directions made by the registrar about the form of documents and the provision of information required under the Act.

The current *LTA* contains a number of provisions (section 48E(2), section 48E(3), section 49C(4) and section 50 (i)) that refer to the “directions” of the registrar about plans of survey and plans of subdivision. In addition the registrar has power to make directions about building management statements (section 54B) and community management statements (section 115K).

The amendment is intended to eliminate any confusion that may exist about the directions, particularly in respect of plans of survey and plans of subdivision, as well as concisely providing for power of the registrar to give directions.

Insertion of new ss 11A and 11B

Clause 53 introduces some of a range of amendments aimed at mitigating the State’s exposure to land title fraud, by inserting new sections 11A and 11B. Related amendments are dealt with in clauses 101, 107 and 108.

One matter which has the potential to expose the State to payment of compensation is the action of mortgagees or their agents where they fail to take reasonable steps to ascertain the true identity of the mortgagor. When the mortgage is subsequently registered, it has indefeasibility if the mortgagee has not been fraudulent within the meaning of the Act, notwithstanding that there was identity fraud in the obtaining of the mortgage.

The new section 11A introduces a requirement for mortgagees to take reasonable steps to ensure that they deal with the true owner of land/mortgagor and to compile a written record of the steps taken before the mortgage is lodged for registration and retain this for 7 years. The record must be produced to the registrar if requested. Section 11B places similar obligations on a transferee of a registered mortgage.

It is considered that “reasonable steps” within the section would generally be similar to the steps required to be taken under the *Financial Transaction Reports Act 1988* (Cwlth) (FTR Act) and the *Financial Transactions Reports Regulations 1990* (Cwlth) (FTR Regulations) for the verification of identity of account signatories by cash dealers. The FTR Act and FTR Regulations require a “100 point” score for identification in accordance with the scores allocated to different types of documents produced by the intended signatory. Banks and some other financial institutions are, in fact, obliged to comply with the *FTR Act* for the opening of accounts.

Presently, most reputable lenders have in place stringent identification procedures for identifying borrowers/mortgagors and the reasonable steps required under section 11A or section 11B would be equivalent to current industry best practice.

The amendment targets the practices of some “lenders of last resort” who engage in high-risk lending at very high interest rates. Some of these lenders openly advertise that they will lend, on the security of a mortgage over real property, to persons with poor credit ratings and/or who cannot provide proof of their ability to repay the loan. Several instances have come to light where such lenders made little or no attempt to ensure that the person they were dealing with and/or the person who signed the mortgage documents was, in fact, the registered owner of the property over which security was taken.

Amendments to sections 185 and 189 (introduced by clauses 101 and 107) deal with the consequences, with respect to indefeasibility and

compensation provisions of the Act, of a mortgagee's failure to comply with sections 11A and 11B.

Amendment of s 15 (Registrar may correct registers)

Clause 54 amends section 15 to ensure that the registrar's power to correct registers is broad enough to deal with all the types of corrections arising out of the registrar's functions and powers under the Act, and to give effect to other provisions of the Act.

A further amendment extends the application of the section to correcting errors arising in the process of registration, for example incorrect names or incorrect registration of a discharge of mortgage.

Correction after inquiry or by order of court

A further amendment will expand the power of the registrar to correct the register to situations where the Registrar has conducted an inquiry and determined that the register is incorrect, and where ordered by the Court to do so. Except where the Court has ordered the correction, the registrar's power will continue to be limited to corrections which will not prejudice the rights of the holder of an interest recorded in the register.

Correction re omitted/misdescribed easements

The indefeasibility provisions of the *LTA* provide that an omitted easement is an exception to indefeasibility. To remove any doubt, clause 54 amends section 15 to specifically declare that the power of correction includes correction of the register for omitted easements, whether or not any registered proprietor has knowledge of the easement.

Omission of examples

The examples relating to section 15(5) are omitted by clause 54. They are of little assistance in interpreting subsection (5) and are considered by some commentators to be misleading.

Amendment of s 17 (Registrar may prepare and register caveat)

Clause 55 amends section 17 to clarify and expand the registrar's power to lodge a caveat in favour of a person (not just a person who has an interest in a lot), where the interests of a State other than Queensland may be prejudiced, and where a notice is given, or required to be given, to a person under section 30 (an amendment being concurrently introduced).

Amendment of s 19 (Registrar may decide to hold inquiry)

Clause 56 amends section 19 to expand the registrar's power to hold an inquiry, including to consider whether there has been fraud affecting the land registry or to consider an issue arising from the lodgment or registration of an instrument.

Amendment of s 23 (Notice to witness)

Clause 57 amends section 23 to clarify that the registrar has power to require a wide range of persons to attend an inquiry as witnesses and that the power is not in any way restricted by the terms of section 19.

Amendment of s 26 (Other referrals by the registrar to the Supreme Court)

Clause 58 amends section 26 to give the registrar power to refer a finding from an inquiry to the Supreme Court for an order.

Amendment of s 30 (Registrar must register instruments)

Clause 59 amends section 30 to clarify the meaning of subparagraph (1)(b). A further amendment relates to the situation where a plan of survey lodged for registration is inconsistent with another plan of survey and allows the registrar to give notice, or to require the giving of notice, to the registered proprietor of a lot that may be affected by the plan.

Replacement of s 32 (Registrar must give distinguishing reference to each instrument)

Clause 60 replaces the previous section 32 with a new section 32 which gives details of the particulars the registrar must record on lodgment and registration of dealings.

Amendment of s 34 (Other information not part of the freehold land register)

Clause 61 clarifies and expands the power of the registrar to keep information under section 34. As the information is not input by the registrar (and the registrar has no control over its accuracy), the amendment provides a statutory indemnity for the registrar, the chief executive, the Minister and the State for matters arising out of the keeping of the information.

Amendment of s 35 (Entitlement to search register)

Clause 62 amends section 35 to recognise that searches of the freehold land register may be obtained online through an entity engaged by the chief executive. It will also provide for a new, alternative search, that is a search to obtain only part of the information about a lot.

A further amendment allows the registrar to enter into an arrangement with another department for carrying out searches, or obtaining copies of instruments. The registrar must be reasonably satisfied that the information or copy will not be used for a commercial purpose or included in another database without the registrar's approval. It is intended that, if there is any unauthorised use, the registrar will immediately suspend the arrangement.

Amendment of s 48E (Explanatory format plan)

Clause 63 omits from section 48E subsections which are now unnecessary in view of the amendments to section 10 (Form of instruments) introduced by clause 52.

Amendment of s 49C (Building format plan of subdivision)

Clause 64 amends section 49C to change a reference about directions of the registrar in view of the amendment to section 10 (Form of instruments) introduced by clause 52.

Amendment of s 50 (Requirements for registration of plan of subdivision)

Clause 65 amends section 50 to change a reference about directions of the registrar in view of the amendment to section 10 (Form of instruments) introduced by clause 52.

Amendment of s 51 (Dedication of public use land in plan)

Clause 66 amends section 51 to clarify that easements for right of way or access are automatically extinguished by the dedication of a road over the area of the easement.

The amendment has no effect on other easements, for example, for drainage. These will only be able to be extinguished by surrender.

Insertion of new s 51A

Clause 67 inserts a new section 51A which applies to plans of subdivision providing for the dedication of a lot to public use, other than as road.

The amendment gives legislative support to policy by including a provision that requires all public use land dedicated in a plan of subdivision, other than road, to have access unless the Minister administering the *Land Act* determines otherwise. This will allow for more effective and efficient management of these assets by the State.

Amendment of s 54A (Building management statement may be registered)

Clause 68 amends section 54A to clarify that a building management statement (BMS) can apply to more than one building, such as a development comprising multiple buildings on one site, and that the BMS applies to new lots created by the subdivision of lots subject to the BMS.

A further amendment extends the potential ambit of a BMS. Provided at least one of the lots to which the BMS applies is wholly or partly contained in, or containing, a building, the BMS may also apply to a vacant lot where a development approval exists which contemplates the construction of a building or part of a building on that lot subsequently.

Insertion of new s 54AA

Clause 69 inserts a new section 54AA to clarify the extent of land to which a BMS may apply and allows the registrar some discretion in determining this.

Amendment of s 54B (Circumstances under which building management statement may be registered)

Clause 70 amends section 54B to omit a reference to directions of the registrar in view of the amendment to section 10 (Form of instruments) introduced by clause 52.

Amendment of s 54C (Content of building management statement)

Clause 71 amends section 54C to allow provisions about staged or future development or redevelopment to be included in a BMS.

It is intended that the inclusion of such information in the BMS would operate to inform lot owners in a staged or progressive development that lots in a future constructed building or buildings may be subject to a BMS. It is envisaged that the developer of a staged development would include sufficient information to identify buildings to be subject to a BMS.

Amendment of s 54H (Extinguishing a building management statement)

Clause 72 amends section 54H to provide for the partial extinguishment of a BMS in relation to part of a lot which does not contain a building, arising from circumstances such as a resumption or a minor encroachment which cannot be dealt with under the current legislation.

Amendment of s 54I (Lots constituted by community title scheme)

Clause 73 amends section 54I to clarify some issues about building management statements that apply to community titles schemes.

One amendment clarifies the appropriate signatory to a BMS or related instrument where there is a layered scheme.

Where a layered scheme is benefited and burdened by a BMS, it is the principal scheme, as it is representative of all the subsidiary schemes, that is the decision-making body corporate for the purposes of the section.

Where the only scheme benefited or burdened by the BMS is a subsidiary scheme or a basic scheme then it is the body corporate for that scheme, not a higher scheme, that is the lot for the purposes of the BMS.

A further amendment clarifies that where a BMS applies to scheme land for a community titles scheme, the BMS is binding on the community titles scheme, any decision made by a management group established under the BMS is binding on the community titles scheme, and registration of the BMS does not give the body corporate of the community titles scheme an interest in any lot in the scheme.

Amendment of s 72 (Mortgaging lot etc. by registration)

Clause 74 amends section 72 to provide that a mortgage cannot itself be mortgaged.

Amendment of s 81A (Definitions for div 4)

Clause 75 inserts in section 81A a new definition for *public thoroughfare easement*, as a new type of public utility easement and also makes a minor amendment to the definition of *public utility provider* for consistency with other provisions of the *LTA*.

Amendment of s 85B (Rights and liabilities created on registration of instrument)

Clause 76 makes a consequential amendment to section 85B in recognition of provisions relating to maintenance of public thoroughfare easements introduced by the Bill.

Amendment of s 89 (Easements for public utility providers)

Clause 77 inserts new subsections (3) to (7) into section 89 to provide for a new type of public utility easement, the *public thoroughfare easement*.

This amendment is necessary to overcome the problem that local government use of public utility easements for public access is not sanctioned as a recognised easement purpose by statute. The amendment will allow this type of easement (i.e. an easement in gross for public access) to be registered. The amendments are not intended to retrospectively apply to any currently registered easements, nor to alter any existing rights.

The new subsection (3) provides that a public thoroughfare easement must be in favour of the State or a local government and for pedestrian use only.

The new subsections (4) to (6) limit the matters to be provided for in a public thoroughfare easement, require a public thoroughfare easement to comply with other legislation, namely the *Local Government Act 1993* (“*LG Act*”) and the *Transport Infrastructure Act 1994* (“*TI Act*”) and give the registrar some discretion as to the registration of these easements.

The Bill amends the *LG Act* (part 6 of the Bill) and the *TI Act* (Part 9 of the Bill) to provide that the local government or the State (whichever in a particular case is the grantee of the easement) will have control of the easement land and responsibility for the easement. Effectively, responsibility for public thoroughfare easements is in line with responsibility for public roads.

Amendment of s 90 (Surrendering an easement)

Clause 78 amends section 90 to allow a mortgagee in possession to sign an instrument of surrender of an easement, for example, if needed to complete a subdivision.

Amendment of s 97A (Covenant by registration)

Clause 79 amends section 97A to clarify aspects of the law relating to statutory covenants.

A minor amendment is also made to subsection (2) for consistency with other provisions of the Act.

Purposes for which covenants may be registered.

The policy intent of the covenant provisions in the *LTA* was that a covenant under section 97A(3)(a) must relate to a purpose for which a building or a building proposed to be built on the lot can be used or otherwise be related to a use to be made or not to be made of that land.

Covenants were never intended to be a notification device on the indefeasible title for local government development approvals and infrastructure agreements under the *Integrated Planning Act 1997* (“*IPA*”). Under the *IPA*, development approvals and infrastructure agreements statutorily run with the land and are binding on successors in title. Provisions in the *IPA* seek to prevent local governments from using covenants as a de facto means of planning control or planning scheme outside the *IPA*.

The amendments to subsections (3) to (8) are aimed at statutorily confining registration of covenants to their intended purpose.

Covenants for “conservation”

A further amendment clarifies what type of covenant is provided for in subsection (3)(b).

The intent of the provision was that it would be used as a tool to assist in conservation of native animals and plants and features of cultural or scientific significance, and the amendment gives effect to this intent.

An example of a covenant within this paragraph would be one imposing an obligation not to remove vegetation or not to disturb a bora ring. An example which would not be within section 97A(3)(b) would be a covenant providing that earthworks on a lot shall not exceed a maximum height of 2.0 metres.

Covenants relating to “use”

The current definition of “use” merely contains a limitation as to what the term does not include (section 97A(6)). It was never intended to include in covenants ancillary aspects of a development approval, such as providing “environmental toilets”, “preserving amenity” and the purported prevention of a right to object to noxious fumes coming from an industrial area over an adjacent residential development.

In the Queensland Court of Appeal in *Townsville Port Authority- v- Max Locke, Registrar of Titles* [2004] QCA 294, Williams J said that “to be registrable the covenant must relate to a purpose for which a building proposed to be built on the lot can be used or otherwise be related to a use to be made or not to be made of that land. That was also the approach taken by, and conclusion reached by, the learned judge at first instance.”

The clear intention of the provisions was in accordance with the interpretation of Williams J, as evidenced by the examples given by the then Minister in his Second Reading Speech when the covenant provisions were amended by the *Natural Resources and Other Legislation Amendment Bill 1999*.

Consequently the new subsection (7) sets out when a covenant relates to the use of a lot, part of a lot or a building to encompass what was determined by the Court and to clarify the meaning of “use”. This amendment is supported by the new subsection (8) which sets out particular types of provisions that do **not** relate to the use of a lot etc. These are:

- (e) an architectural, construction or landscaping standard
- (f) a statement, acknowledgement or obligation relating to the use of other land
- (g) a condition precedent to using the lot for a stated purpose or any purpose
- (h) regulation of conduct of the owner of the lot that is unrelated to, or is ancillary to, use of the lot.

Examples of provisions within each paragraph are given in the subsection, all of which are drawn from covenants lodged for registration. Further examples are:

- an obligation to ensure that vehicular access to a lot is gained from a named street (regulating conduct ancillary to use of the lot)

- an obligation to keep a fence painted blue (a landscaping standard)
- an obligation to construct any house on the lot within a stated height limit, facing a particular direction or using split level or elevated construction techniques (construction or architectural standard and/or regulating conduct ancillary to use of the lot)
- an obligation not to use a lot for residential purposes until it is connected to water services (condition precedent)

Matters capable of being the subject of an easement

A further amendment provides that a covenant must not provide for anything capable of being the subject of an easement.

This issue was referred to in the Second Reading Speech of the then Minister in relation to the *Natural Resources and Other Legislation Amendment Bill 1999*. The Minister stated that matters recognised at law as capable of being the subject of an easement would not be acceptable as a covenant. It is considered necessary to specifically legislate to deal with this issue because of continuing attempts to use covenants for purposes for which an easement is the appropriate tool.

Insertion of new s 97AA

Clause 80 inserts a new section 97AA which is linked to the amendments to section 97A and is intended to assist in achieving the policy aims described in relation to those amendments.

Subsection (1) provides that a registered covenant is taken not to be registered to the extent it is inconsistent with section 97A. This provision is intended to remove any perception of a positive link, regardless of the terms of a covenant, between registration and the efficacy and enforceability of those terms.

Under this section, the examples given in relation to section 97A of obligations pertaining to ancillary matters, landscaping and construction standards etc would have no effect merely because of registration. Such obligations may, of course, be conditions of development approval or contained in a local government's building code, but these are matters which depend on *IPA* and are outside the scope of the *LTA*.

Subsection (3) gives the registrar discretion to refuse to register a non-complying covenant.

Replacement of s 98

Clause 81 replaces section 98 with a new section to clarify certain matters relating to applications for title by adverse possession, including effectively re-instating provisions from earlier legislation which were never intended to be repealed (and which may have been impliedly re-enacted).

The new subsection (1) provides that an application may not be made if it is for a lot of which the State or a local government is the registered owner. This was the effect of a provision contained in the *Real Property Acts* that was repealed by the *LTA* although no substantive change to the law was intended.

The new subsection (2) confirms that an application may not relate to only part of a lot or relate to an encroachment as defined in the subsection. For example, an application will not be possible where possession is claimed over a strip of land arising from the positioning of a boundary fence on the incorrect line.

Amendment of s 99 (Application for registration)

Clause 82 amends section 99 to require an applicant for title by adverse possession to provide, at the time of making the application, details of registered proprietors and occupiers of adjoining lots to facilitate the serving of notices. In practice, an applicant has always been asked by the registrar to provide information about and/or declarations from occupiers of adjoining land. The amendment merely makes this a statutory obligation and ensures that the information is provided at an early stage.

Amendment of s 105 (Lapsing of caveat)

Clause 83 amends section 105 to make the meaning of the section clearer by expressing the intent without using the current double negative expression.

Replacement of s 106 (Further caveat)

Clause 84 replaces the existing section 106 with a new section 106 (Further caveat) to clarify that a further caveat cannot be lodged on the same, or substantially the same, grounds without the leave of the Court. This section relates to a caveat lodged by a person who claims to have an interest in a lot in respect of which another person has lodged an application for

title by adverse possession. The amendment is for the same reason as the similar amendment to section 129 (Caveats).

Amendment of s 107 (Refusing or compromising application)

Clause 85 amends section 107 to clarify the meaning of the section and to provide that a caveator who commences a legal proceeding under the section must give notice to the registrar within one month.

Amendment of s 108 (Registering adverse possessor as owner)

Clause 86 makes a consequential amendment to section 108.

Insertion of new ss 108A and 108B

Clause 87 inserts new sections 108A and 108B to provide for procedural matters where the registrar is satisfied that the applicant is an adverse possessor of part of a lot.

Section 108A provides for a plan of subdivision in cases where the registrar proposes to register an applicant as owner of only part of a lot. This is likely to happen very rarely, for example a small part of a lot, separated by a natural or artificial boundary, may be subject to a claim for adverse possession by another person.

Section 108B in effect re-instates provisions contained in the *Real Property Acts Amendment Act 1952* that have no equivalent in the *LTA*, although there was no intention to repeal these provisions. This makes it clear that registration of a person under the division is subject to the continuance of certain interests in the lot, for example easements.

Amendment of s 111 (Registering personal representative)

Clause 88 amends section 111 to increase the value of a small intestate estate which may be dealt with under the Act without letters of administration from \$150,000 to \$300,000.

A further amendment will allow artificial persons in other jurisdictions, that are not trustee companies, to be recorded as personal representatives or to consent as personal representatives.

In Queensland the transmission of realty does not require a grant of representation to be obtained. However, if a grant of representation in Queensland or a resale in Queensland of a grant of representation obtained

elsewhere has not been obtained and the deceased died leaving a will, the registrar under section 111 of the *LTA* can only record a person as a personal representative “if the registrar is of the opinion that the person would succeed in an application for a grant of representation”.

A problem has arisen in a number of cases involving artificial persons in other jurisdictions that are not trustee companies within the meaning of the *Trustee Companies Act 1968* (Qld) but who have been appointed executor or substituted executor under the deceased’s will, for example the Public Trustee of New South Wales. Such artificial persons will not obtain a grant of representation from the Supreme Court of Queensland, therefore under the existing section 111(2)(c), such artificial persons are not entitled to be recorded as personal representatives.

Amendment of s 112 (Registering beneficiary)

Clause 89 amends section 112(2)(a) to make the wording consistent with section 111(2)(c).

Amendment of s 115K (Recording community management statements)

Clause 90 amends section 115K to delete a reference about directions of the registrar in view of the amendment to section 10 (Form of instruments) introduced by clause 52.

Amendment of s 121 (Requirements of caveats)

Clause 91 amends section 121 to provide that the section does not apply to a registrar’s caveat lodged under section 17. In view of the grounds provided for in section 17 for a registrar’s caveat, the statements and information required from other caveators are inappropriate and irrelevant for a registrar’s caveat.

Replacement of s 129

Clause 92 inserts a new section 129 which makes it clear that the section applies in cases where a caveat is still in effect, as was always the intent behind the provision, as well as where a caveat has been withdrawn, cancelled or removed, or rejected under section 157.

Replacement of s 137 with new ss 136 and 137

Clause 94 replaces the existing section 137 with new sections 136 and 137.

Section 136 was omitted from the *LTA* on 1 July 2000 by the *Guardianship and Administration Act 2000*. It is unclear why the section was removed. Presumably it was because it was considered that the *Guardianship and Administration Act 2000* specifically dealt with the management of the affairs of incapacitated persons. That Act however only applies to adults.

Apart from section 137, the *LTA* does not specifically address the question of the execution of instruments in respect of interests held by minors. The current section 137 does not provide any real assistance in determining who can execute instruments that deal with the minor's interests in land. No other Act, for example the *Public Trustee Act 1978*, the *Child Protection Act 1999* nor the *Family Law Act 1975* deals with this issue.

The new section 136 provides that a person suitably authorised by the Court may act for a minor.

The new section 137 deals with acts for persons with impaired capacity other than minors and has been updated to take account of other legislative changes since the commencement of the *LTA*.

Replacement of s 146

Clause 94 replaces section 146 for a similar purpose to the replacement of section 129 (Further caveat). That is, the new section 146 makes it clear that a further settlement notice may not be deposited in relation to the same transaction without the leave of the court where a settlement notice is still in effect, as was always the intent behind the provision.

Amendment of s 154 (Lodging certificate of title)

Clause 95 amends section 154 to provide further exceptions from the requirement to produce a certificate of title to allow registration of an instrument. The further exceptions are:- any caveat; an instrument amending or extinguishing a BMS where evidence to the standard required by the registrar in the registrar's directions is produced to the registrar; and a request to record a vesting in the State.

A statute may provide for the statutory vesting of land or an interest in land, eg, on commencement of the *Housing Act 2003*, land and interests in land held by the now non-existing Queensland Housing Commission vested in

the State. In such cases the production of issued certificates of title can be problematic and the amendment to section 154 simplifies the process.

Amendment of s 155 (Correcting unregistered instruments)

Clause 96 amends section 155 to properly provide for the way corrections to documents are recorded under current registry practice.

Entries in the land register presently originate from imaged paper documents and are entered onto a computer database. The current section 304 only describes the process for correction of a paper document; other corrections are noted in the database, but not on the electronic form of the document. Furthermore, in preparation for the receiving of some instruments in digital form, the registrar requires power to correct digital information.

Amendment of s 156 (Requisitions)

Clause 97 amends section 156 to expand the registrar's power of requisition and to make minor changes to the wording of the section to improve clarity.

The registrar is empowered to request information about a lodged or deposited instrument or document from the lodger or from a person other than the lodger whom the registrar reasonably believes may be able to provide information about the instrument or document. The power could be used, for example, to elicit information about execution and witnessing of instruments. Section 156 is amended to state that a requisition may require action by a person other than the lodger.

Amendment of s 166 (Destroying instrument in certain circumstances)

Clause 98 amends section 166 to make an exception to the requirement for copying for certificates of title issued after 24 April 1994.

Since the commencement of the *LTA* on 24 April 1994, the certificate of title, provided on request under section 42, is a point in time computer generated copy of the information in the indefeasible title in the land registry. Copying a certificate of title issued under section 42 on its return is a duplication of information already in the freehold land register and serves no purpose in the registry. Duplicates issued prior to 24 April 1994,

on the other hand, are of the old hard copy type that many people wish to have returned to them on cancellation. That practice is to continue.

A further amendment clarifies when a cancelled deed of grant or duplicate certificate of title may be given to a person.

Insertion of new s 168A

Clause 99 inserts a new section 168A to allow standard terms documents lodged under the *Land Act* to be used for the purposes of the *LTA*. This means that it will no longer be necessary for two documents, in almost identical terms, to be lodged, for example for mortgages.

Amendment of s 172 (Withdrawal or cancellation of standard terms document)

Clause 100 makes a consequential amendment to section 172.

Amendment of s 185 (Exceptions to s 184)

Clause 101 amends section 185 to include as an exception to indefeasibility the interest of a registered mortgagee if the mortgagee has not complied with section 11A or 11B and the mortgage has been forged (i.e. executed by a person other than the registered owner).

The policy underlying the amendment is that a registered owner should not be deprived of their unencumbered interest and the government should not compensate for a fraud where a mortgagee has not taken adequate steps to prevent the possibility of fraud.

In support of this amendment a further amendment is made to section 189 (Matters for which there is no entitlement to compensation) – see clause 107.

The amendments introduced by clauses 101 and 107 will not in any way alter the position of a mortgagee following registration where there has been fraud, and where the mortgagee is not a party to the fraud and has complied with the obligations in sections 11A and 11B to take reasonable steps to ascertain the identity of the mortgagor. The mortgagee will have indefeasibility of its interest.

Omitted Easement

Clause 101 amends section 185 to further clarify the circumstances in which this exception applies, namely:

- where the easement existed at general law (old system) and was omitted from the current particulars when the land was first registered under the Torrens system;
- where the easement was registered and has subsequently been omitted from the register (other than by surrender); and
- where an instrument of easement is lodged for registration but through some error on the part of the registrar the instrument is never registered.

The amendment confirms that the exception applies, whether or not the lot burdened by the easement has been transferred or otherwise dealt with.

It is not intended, and was never intended, that there be an exception where an instrument of grant of easement was executed after the servient tenement was brought under the provisions of the Torrens system but the instrument was never lodged for registration.

Amendment of s 187 (Orders by Supreme Court about fraud and competing interests)

Clause 102 makes a minor editorial amendment to section 187 and also includes a reference to the new subsection (1A) of section 187 in the list of matters about which the Supreme Court may make an order.

Amendment of pt 9, div 2, sdiv C, heading

Clause 103 amends the heading to Part 9, Division 2, Subdivision C to more accurately describe the contents of the subdivision.

Insertion of new s 188AA

Clause 104 inserts a new section 188AA in Part 9, Division 2, Subdivision C which provides that compensation payable under section 188 or section 188A cannot include compensation for personal injury.

The principle behind the compensation provisions is that the person entitled to compensation should be restored to the same position as before the fraud, mistake etc. occurred. The decided law relating to compensation

under the *LTA* and the repealed *Real Property Acts 1861* has never included a component for personal injury. This amendment clarifies that the words “loss or damage” in section 188A cannot include loss or damage claimed to arise from personal injuries such as for example “pain and suffering and nervous shock”. A brief inclusive definition is included in the new section.

Amendment of s 188B (Order by Supreme Court about deprivation, loss or damage)

Clause 105 amends section 188B to provide that the court may join a person as a party in a proceeding under the section. It is envisaged that the State may request the court to join a person as a party where there is evidence (perhaps shown by a registrar’s inquiry or police investigation), of contributory actions by solicitors, mortgagees and their agents or other persons that contributed to the deprivation or loss or damage.

Insertion of new ss 188C and 188D

Clause 106 inserts two new sections into Part 9, Division 2, Subdivision C.

The new section 188C re-introduces into the *LTA* a time limit in which applications for compensation under section 188 and section 188A can be made. The prescribed time limit may be extended by the court, and it is expected that the court would have regard to the principles applying under the *Limitation of Actions Act 1974* for such extensions of time.

The new section 188D provides that insurers cannot be subrogated to an insured person in relation to that person’s right to claim compensation under the subdivision. The activities of title insurers will mainly be affected by the new provision, although it applies to all insurers.

Amendment of s 189 (Matters for which there is no entitlement to compensation)

Clause 107 amends section 189 to provide that there is no entitlement to compensation for a mortgagee who has failed to exercise due diligence in identifying the mortgagor where the execution of the mortgage was fraudulent. This amendment is complementary to the amendment to section 185 by clause 101.

A further amendment clarifies that no compensation is payable because of the omission or misdescription of an easement of a type referred to in section 185. An omitted easement is a recognised exception to

indefeasibility and consequently not something for which the State should pay compensation under section 188 or 188A.

A further amendment provides that no compensation is payable because information recorded or kept by the registrar under certain provisions of the Act is incorrect, where the information was provided by another entity and the incorrectness is not because of an error of the registrar. This information includes “administrative advices” and other information kept by the registrar under sections 28(2) and 34 or required by legislation administered by other State and Commonwealth departments to be recorded in the freehold land register. The entitlement to compensation is tied to indefeasibility under the *LTA* and the recording of information under these sections is not registration of a dealing which creates an indefeasible interest.

Insertion of new s 189A

Clause 108 introduces a new section 189A which limits the amount recoverable for interest and costs by a mortgagee exercising its rights of power of sale under the mortgage, in cases where the execution of the mortgage involved fraud against a registered proprietor. This section will mainly apply to lenders of last resort.

This is one of several amendments aimed at protecting defrauded owners and limiting the compensation paid by the State in cases where a mortgage is registered to secure a high interest loan.

In cases where a mortgagee does have indefeasibility of its interest (i.e. the exception introduced by clause 101 does not apply), the mortgagee will be unable to recover exorbitant interest rates when exercising power of sale.

In most such cases, the registered owner wishes to keep the property as it is their principal residence. This amendment will allow the registrar to negotiate, on behalf of the State, to pay an amount of compensation to the registered owner which can be used to pay out the mortgage and obtain a discharge/release. The mortgagee may therefore receive the same amount of money it would receive on sale of the property, without having to take action to recover possession and arrange for the sale etc. The amendment will prevent the situation where an exorbitant interest rate claimed by a mortgagee stops the State from negotiating an outcome which is beneficial to the defrauded registered proprietor. This occurs at present because of the disparity between what a defrauded person can be paid by way of compensation under the Act and what a mortgagee may possibly retain from the proceeds of a sale.

The amendment will not disadvantage the mainstream lending industry as the recoverable moneys under the security will be the capital sum lent, interest up to 2% above the day bank bill rate, and the costs of directly protecting the mortgagee's security, such as rates and insurance premiums paid by the mortgagee.

Amendment of s 190 (State's right of subrogation)

Clause 109 amends section 190 to expand the State's right of subrogation where compensation has been paid under the Act.

The policy intention of the amendment is to allow the State to recover the compensation paid under section 188 or 188A, as well as associated costs, from any person against whom the compensated person would have a claim in relation to their loss. This will go beyond persons who caused or contributed to the fraud, and include persons against whom there could be, for example, a claim in negligence.

Insertion of new Part 10A (Tidal boundary plans of subdivision)

Clause 110 inserts a new Part 10A into the *Land Title Act*. Part 10A comprises several new sections.

Section 191A provides for definitions of 'public interest', 'tidal boundary' and 'tidal boundary plan of subdivision' for the new Part 10A. The definition of 'tidal boundary' comprises two parts. Firstly the boundary of land must be identified, expressly or impliedly, with reference to tidal water and secondly, having regard to how the boundary is identified, cannot be represented on a plan as a straight line boundary. Both parts of this statutory definition need to be established. The 'tidal boundary plan of subdivision' means a plan of subdivision that includes a section of tidal boundary.

Section 191B specifically provides for the circumstances to which this new Part 10A will apply. It comprises three parts all of which must be satisfied before this new Part 10A will apply. Firstly, it applies to any tidal boundary plan of subdivision (the new plan of subdivision) lodged for registration between 8 November 2005 and 7 November 2008 inclusive, regardless of when Part 10A commences. Secondly, it will apply where any section of tidal boundary on the new plan of subdivision is in a different location to that as shown on the current registered plan of subdivision (the earlier plan of subdivision). And thirdly, if the new plan of subdivision is registered the earlier plan of subdivision will be cancelled at

least to the extent of the inconsistency in tidal boundary location. Part 10A does not apply to plans approved under section 3.7.6 of the *Integrated Planning Act 1997* (IPA) before 8 November 2005.

Section 191C provides that the chief executive requires the Minister's approval to register the new plan of subdivision under Part 10A. It further provides that where the chief executive refuses under Part 10A to register the new plan of subdivision on or after 8 November 2005 but before the commencement of this section such refusal is valid.

Section 191D provides that the Minister may approve registration of the new plan of survey where the tidal boundary on the earlier plan of subdivision was surveyed consistently with any surveying directions or instructions applicable at the material time and two other circumstances apply. Firstly, the Minister must be satisfied that the difference between the earlier and new plans of subdivision can be explained, according to relevant legal principles, by accretion or erosion and secondly, the Minister is satisfied either that the registration of the new plan of subdivision will not, in practical terms, be contrary to the public interest or that the public interest will be protected by a development condition under the IPA.

Section 191E provides two further circumstances where the Minister may approve registration of the new plan of survey. This section applies where the part of the tidal boundary on the earlier plan of subdivision was located in the wrong place due to the survey being conducted in a way which was inconsistent with any surveying directions or instructions applicable at the material time. It also applies if there were no directions or instructions applicable at the material time. In either of these cases the Minister may approve registration of the new plan if the Minister is satisfied either that the registration of the new plan of subdivision will not, in practical terms, be contrary to the public interest or that the public interest will be protected by a development condition under the IPA.

Section 191F provides that a person will not be entitled to compensation from the State, on any basis, because of the operation of Part 10A.

Insertion of new s 198A

Clause 111 inserts a new section 198A to facilitate the aggregation and sale of statistical data from the land registry.

The *LTA* in its present form does not specifically allow either for the extraction of such statistical information or the sale of any statistical. The amendment gives the registrar power to enter into agreements to supply

Amendment of s 123 (Qualifications for appointment as inspector)

Clause 119 amends section 123 by removing the mandatory eligibility requirement of a professional engineering qualification for appointment as an Inspector and providing that the Chief Executive may appoint a person as an Inspector only if the Chief Executive considers the person has appropriate competencies and adequate experience to effectively perform an Inspector's functions under this Act. The previous statutory qualifications are no longer considered necessary for all Inspectors.

Amendment of s 126 (Further functions of inspectors)

Clause 120 amends section 126(b) to provide that an additional function of Inspectors is to make recommendations to the Chief Executive about prosecutions under the Act. This amendment is consistent with the vesting of the power to prosecute in the Chief Executive.

Amendment of s 157 (Additional powers of chief inspector)

Clause 121 amends section 157(a) to remove the power to initiate prosecutions for offences under the Act from the Chief Inspector. This amendment is consistent with the vesting of the power to prosecute in the Chief Executive.

Amendment of s 234 (Proceedings for offences)

Clause 122 amends section 234(5) by vesting the power to prosecute for an offence against the Act in the Chief Executive and removing the power of the Minister or the Attorney-General to authorise someone else to start a prosecution.

This Clause also amends section 234(6) to provide that a "person dissatisfied with a decision" means a party to the proceeding or a person bound by the decision.

Amendment of s 235 (Recommendation to prosecute)

Clause 123 amends section 235(1) to provide that an Inspector, District Workers' Representative, Site Senior Executive or Chief Inspector may recommend to the Chief Executive that there be a prosecution for an offence against the Act.

This Clause also amends section 235(2) to provide that section 235(1) does not limit the Chief Executive's power to prosecute for offences under the Act. For example where a recommendation is made that there be a prosecution under s.235(1), the Chief Executive is not in any way bound by such recommendation.

Amendment of s 256 (Protection from liability)

Clause 124 amends section 256 to include the Chief Executive in the meaning of "official"; so that the Chief Executive does not incur civil liability for an act done, or omission made, honestly and without negligence under this Act.

Part 8 Amendment of Property Law Act 1974

Act amended in pt 8

Clause 125 specifies that this part amends the *Property Law Act 1974*.

Amendment of s 61 (Conditions of sale of land)

Clause 126 amends section 61 to accommodate the occasions when, for business reasons, the offices of the land registry are closed on a business day, for example, government direction for closure of offices during the Christmas - New Year period. Section 61 names the "office of the land registry" as the default place of settlement for land sale contracts.

Part 9 Amendment of Transport Infrastructure Act 1994

Act amended in pt 9

Clause 127 specifies that this part amends the *Transport Infrastructure Act 1994*.

Insertion of new chapter 6, part 8

Clause 128 inserts in the Act a new Chapter 6, Part 8 which is complementary to the amendments made by clauses 75, 76 and 77 of this

Bill to sections 81A, 85B and 89 of the *LTA* and to corresponding amendments to the *Land Act*. Those amendments provide for public thoroughfare easements to be registered in favour of public utility providers. The new Part relates to easements granted in favour of the State. It is provided that the State has control over, and responsibility for, the easement land. The policy behind these amendments is that the owner of the land burdened by the easement will not be responsible for maintenance of the easement land, nor bear liability for any injury, loss or damage occurring on the easement land merely because of ownership.

Amendment of schedule 6 (Dictionary)

Clause 129 inserts in Schedule 6 (Dictionary) a definition of ‘public thoroughfare easement’ and amends the definition of ‘road’ to specifically exclude a public thoroughfare easement.

Part 10 Amendment of *Valuers Registration Act 1992*

Act amended in pt 10

Clause 130 specifies that this part amends the *Valuers Registration Act 1992 (VRA)*.

Amendment of s 3 (definitions)

Clause 131 amends the definitions contained in section 3 by inserting a definition of an *officer* of the board that includes a person authorised to carry out an investigation under section 44. Currently an investigator, appointed by the Valuers Registration Board of Queensland (the Board) to review the valuation practices of a valuer, has no protection from having a civil action brought by the valuer who is the subject of the investigation. As an officer of the Board, the investigator will receive the protection from liability provided by section 22.

Amendment of s 18 (Meetings of board)

Clause 132 amends section 18 to provide that only the chairperson may adjourn a meeting of the Board. The current section 18 allows for a

member of the Board to adjourn a meeting rather than the chairperson, which is not normal meeting practice.

Amendment of s 27 (Inspection of register)

Clause 133 removes the requirement for a person to pay a prescribed fee to make an inspection of the register of valuers maintained by the Board. The Board has created a web page that allows a member of the public to carry out a search for a registered valuer either by surname or by location. This information is being provided at no charge as part of the transparent operations of the Board. The Board will still make the register available for search at its office.

Amendment of s 28 (Publication of names of registered valuers)

Clause 134 introduces the requirement for the Board to publish the register of valuers on the Board's website. This will provide another method of access to the register for consumers of valuation services.

Amendment of s 29 (Applications for registration)

Clause 135 removes the requirement for an applicant for registration as a valuer, to give notice of the application in a newspaper circulating throughout the State and also removes the associated objection provisions. The Board has advised that advertisements made by an applicant are seen as being of little value and are therefore an unnecessary cost for the applicant. The clause also logically rearranges existing provisions to include in this section the powers for the Board to seek further information or documents from an applicant for registration and/or to require the applicant to appear before the Board to provide further information. The existing provisions don't allow the Board to seek further information without requiring attendance of the applicant as well. The Board will now have the flexibility to request the supply of further information without requiring attendance – minimising disruption for applicants.

It also introduces the requirement for a reasonable period to be allowed for the information to be provided and allows the Board to request a statutory declaration to verify the information. The existing provisions allow the Board to refuse an application if an applicant failed to provide information or attend as required. This clause recasts the existing provision to provide that an application is taken to have been withdrawn if an applicant fails to

provide information or attend. However, it introduces the flexibility for the Board to extend the period it allows for the supply of information or to set a later date for attendance by an applicant, if the Board is satisfied with the applicant's reasons for non-compliance. This provides for extenuating circumstances.

The existing provision requires the Board to either approve or refuse an application and this requirement is reflected in this clause. However, in the interests of operational transparency, this clause introduces the requirement that prior to refusing an application, the Board must provide an applicant with the reasons for the proposed refusal, allow the applicant 30 days to respond and consider any submissions made.

Replacement of s 31 with new ss 31, 31A and 31B

Clause 136 deletes the requirement for an applicant for registration as a valuer to provide further information as requested by the Board and to attend a meeting before the Board as these requirements have been recast in *Clause 135*.

The *VRA* currently states that a registered valuer convicted of an indictable offence may have their registration cancelled by the Board. This provision exists to prevent consumers of valuation services being subject to fraudulent practises by a convicted person, potentially resulting in financial loss. However, there is currently no mechanism that allows the Board to identify prior convictions. The *VRA* also requires that a person applying for registration as a valuer is of good fame and character but provides no mechanism for the Board to determine this.

The new section 31 allows the Board to make investigations about an applicant for registration as a valuer or renewal of registration as a valuer, to determine if the applicant is a suitable person to be registered as a valuer. To provide for appropriate investigations, the new section 31 allows the Board to request the police for a report about the applicant's criminal history.

When reviewing an applicant's criminal history to determine if the applicant is a suitable person to be registered as a valuer, under the new section 31A the board will also be required to consider the nature of an offence and its relevance to the applicant's suitability to be registered as a valuer.

The new section 31B also provides for the confidentiality of the information contained in the criminal history report, penalties for

inappropriate disclosure and a requirement for the Board to destroy the report as soon as practicable. The section does allow for authorised disclosure in appropriate circumstances.

Amendment of s 36B (Renewal of registration – statement or certificate about CPD)

Clause 137 reduces the period for which a valuer must undertake continuing professional development (CPD) activities for renewal of registration from 18 months to 12 months. The Board considers that the current period of 18 months for a valuer to undertake CPD activities is too long and does not encourage a valuer to remain proficient with the latest thinking or practices. The Board believes that reducing the period will also encourage greater networking and sharing of knowledge.

Currently, valuers can provide a simple statement as to CPD activities undertaken. Some valuers have taken this literally and provided a bland statement with no supporting documentation. The Board has had no authority to request any details about the activities undertaken. This clause introduces a requirement for a valuer to provide details of and documents to support the CPD activities undertaken.

Amendment of s 39 (Cancellation of registration)

Clause 138 clarifies that where the Board cancels a valuer's registration under this section, the Board must also remove the valuer's name from the register. Previously, this section provided for the cancellation of registration but did not specify that the name should be removed from the register. This clause also introduces a requirement that where the Board cancels a valuer's registration and removes the valuer's name from the register, it must also publish notice of the removal in a newspaper circulating in Queensland and on its website. The Board believes that the names should be published so that consumers of valuation services are aware that a valuer's registration has been cancelled.

Amendment of s 42FA (Renewal of recording of registered valuer on list of specialist retail valuers)

Clause 139 mirrors the requirements of *clause 137* in relation to the period of continuing professional development (CPD) for specialist retail valuers and the requirement to provide supporting details and documentation.

Amendment of s 44 (Board may authorise investigation)

Clause 140 allows the Board to authorise an investigator to continue an investigation into the conduct of a registered valuer even if the original complaint that caused the authorisation of the investigation has been withdrawn. Currently the Board may receive a complaint about the conduct of a registered valuer that it considers should be investigated. However, the Board is concerned that if the complaint is withdrawn, the Board is unable to continue the investigation.

Amendment of s 50 (Disciplinary charges may be laid)

Clause 141 requires that as well as notifying a registered valuer subject to disciplinary action of the time, day and place of a proceeding, the Board must also notify the valuer that they must attend the proceeding. The *VRA* currently provides that a valuer who is the subject of disciplinary action must be given the opportunity of defending all allegations either in person or by counsel or solicitor. This option does not require the valuer to attend if represented and the Board is concerned that this may result in a proceeding having to be adjourned while clarification or additional information is sought.

Amendment of s 54 (Representation)

Clause 142 requires that where previously a registered valuer could either attend a disciplinary proceeding in person or be represented by counsel or solicitor, the valuer must now attend the proceeding. The valuer may still be accompanied by a solicitor or agent and be represented by the solicitor or agent. As described in clause 141, the Board is concerned that where a valuer does not attend a proceeding, the proceeding may have to be adjourned while clarification or additional information is sought.

Amendment of s 57 (Offences – proceedings)

Clause 143 requires that a person appearing as a witness in a disciplinary proceeding must answer questions asked by members of the disciplinary committee. Currently the person is only required to answer a question if asked by the chairperson. To improve the efficiency of proceedings, the board believes that a person should be required to also answer a question asked by a member of the committee.

Amendment of s 59 (Committee may order cancellation of registration, etc.)

Clause 144 allows that, where a disciplinary committee finds a registered valuer guilty of a charge, the committee may implement one or more of the penalties currently available, from admonishing or reprimanding the valuer through to cancelling the valuer's registration. The Board is concerned that a disciplinary committee is currently unable to apply more than one of the available penalties. A committee is unable to both "order the valuer to pay to the Board a penalty amount..." and "order that the valuer's registration be suspended for up to 12 months." The Board has had situations where a committee has wanted to apply a combination of the penalties available. For example, a committee suspended a valuer for 12 months and due to the nature and extent of the investigation, wished to impose a fine as well but was unable to do so.

This clause also restructures and re-numbers existing provisions in the section to provide that where a valuer's registration is cancelled as a result of not paying a penalty or costs ordered by a complaints and disciplinary committee within the stated time, the Board must remove the valuer's name from the register.

This clause also introduces a requirement that where the Board removes a valuer's name from the register as a result of the valuer's registration being cancelled under this section, the Board must publish notice of the removal on its website and in a newspaper circulating in Queensland. It provides that the Board may also publish details of other penalties, including suspension, imposed by a committee on a valuer. The Board believes that the names of valuers who have had their registration cancelled and details of other penalties imposed by a disciplinary committee, depending on their severity, should be published to provide protection for consumers of valuation services.

Amendment of s 61 (Appeals)

Clause 145 provides for a person aggrieved by an order for the cancellation of their registration under section 39, to appeal the order under this section. Previously, section 39 stated that a person could appeal against an order for cancellation of their registration under section 61, but section 61 did not include the order as a valid reason for an appeal. The clause also re-numbers a reference in this section due to the re-numbering of the referenced section in clause 144.

Replacement of pt 6, hdg (Transitional provisions for Valuers Registration Act 1992)

Clause 146 replaces the existing specific transitional provisions heading with a more general heading that will include all transitional provisions in this part. This clause also introduces a new sub-heading (Division 1) for the existing transitional provisions for the *VRA*.

Replacement of pt 7, hdg (Transitional provisions for Valuers Registration Amendment Act 2001)

Clause 147 replaces the ‘Part 7’ heading with a new sub-heading (Division 2) for the existing transitional provisions for the *Valuers Registration Amendment Act 2001*.

Replacement of s 72 (Definitions for pt 7)

Clause 148 simply refers the existing definition for the *amending Act* to the new Division 2 sub-heading.

Insertion of new pt 6, div 3

Clause 149 inserts the transitional provisions required for this Act under a new sub-heading (Division 3). It defines the *amending Act* for this division as the *Natural Resources and Other Legislation Amendment Act 2005* (this Bill). These transitional provisions will ensure that the continuing professional development (CPD) requirements for registered valuers and specialist retail valuers, as existing prior to the amending Act, will continue in force for the 2006/2007 financial year period of registration. This will enable the Board to provide registered valuers with a reasonable period of notice of the new CPD requirements prior to their actual introduction.

Part 11 Minor amendment of Acts

Part 11 of the Bill includes a number of minor amendments to various Acts in a Schedule.

Clause 150 provides that the Acts mentioned in the Schedule are amended.

Geothermal Exploration Act 2004

Amendment 1 omits a redundant definition from the dictionary.

Land Protection (Pest and Stock Route Management) Act 2002

Amendment 1 updates a cross-reference.

Amendment 2 updates a cross-reference.

Mineral Resources Act 1989

Amendment 1 updates a cross-reference.

Amendment 2 omits a redundant definition from the dictionary.

Petroleum Act 1923

Amendment 1 updates a cross-reference.

Amendment 2 updates a section heading to better reflect the nature of the section.

Amendment 3 updates a part heading to better reflect the nature of the part.

Amendment 4 updates a reference to the relevant tenure.

Petroleum and Gas (Production and Safety) Act 2004

Amendment 1 updates a provision in accordance with current legislative drafting practice.

Amendment 2 updates a provision in accordance with current legislative drafting practice.

Amendment 3 updates a cross-reference.

Amendment 4 updates a provision in accordance with current legislative drafting practice.

Amendment 5 updates a cross-reference.

Amendment 6 omits redundant words from a subdivision heading.

Amendment 7 omits redundant words to update a reference to the relevant tenure.

Amendment 8 updates a cross-reference and updates a reference to the relevant tenure.

Amendment 9 corrects a typographical error.

Amendment 10 updates a cross-reference.

Amendment 11 updates a provision in accordance with current legislative drafting practice.

Amendment 12 updates a provision in accordance with current legislative drafting practice.

Amendment 13 updates a cross-reference.

Amendment 14 inserts, into the dictionary, a definition of a term that is used throughout the Act.

Survey and Mapping Infrastructure Act 2003

Amendment 1 updates a cross-reference.

Surveyors Act 2003

Amendment 1 omits redundant words from a part heading.

Valuation of Land Act 1944

Amendment 1 replaces the definition of *SunWater* to update the cross-reference to refer to the regulation under which the entity is now continued in existence.

Water Act 2000

Amendment 1 inserts, into a section, a definition of a term that is used in the section.