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GUIDELINE B2

ALLOCATION, REGULATION AND MANAGEMENT – THREE APPROACHES TO RESOURCE SUSTAINABILITY

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Purpose of this Paper

This paper outlines a conceptual framework for understanding how land use in Queensland is administered.

The paper has been written for readers including international readers who would like an overview of the tools available in Queensland for managing natural resources, specifically land..

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Abstract

This paper establishes a conceptual framework for understanding how land use in Queensland is administered.

The Australian States' interest in land is derived from two distinct sources: the *sovereign* power, by which the State legislates; and the *proprietorial* power, by which the State acting as a 'landlord' conditionally disposes of its assets.

Historically, a resource such as land is made available for development when the owner (originally the State) *allocates* it to a potential user. A public authority then *regulates* the use of the resource; and the holder of the resource *manages* it to achieve personal goals. The various mechanisms by which these functions are performed are not interchangeable: each kind has its own intrinsic features which derive from its conceptual origin.

Land policies in Queensland have a number of features of national and theoretical interest. This paper discusses in particular the capacity of privately managed leasehold to achieve the public interest objective of sustainability, though there are occasional references to other States, resources other than land and other forms of tenure. It argues that the tenure-related mechanisms of allocation continue to be relevant, despite a contemporary lack of appreciation of them.

National Context

Explorer and public servant Lieutenant James Cook took possession of eastern Australia in 1770 in the name of King George III. From the establishment of a new colony in 1788, settlement proceeded on the assumption that the Crown held all the land and would allocate it according to law and policy. During the nineteenth century land policy evolved in several loci as the one colony became six, they gained responsible government and in 1901 federated. Land policy in the other five Australian States and the territories is similar to that in Queensland.

Queensland's land law and policies have a number of features of national and theoretical interest. This paper focuses on the essential nature of the mechanisms available to achieve the public interest objective of sustainability on privately managed land. The ex-convicts and settlers who took up land held bitter memories of the subservience of landless peasants to their landlords in England and Ireland. Eventually land law in their new homeland came to be flavoured with an objective of social justice, an intention which has persisted to the present day and is now supplemented by an objective of environmental sustainability.

Significance and Purpose

Land law and policy in Queensland is under reform on several fronts. Relentlessly declining terms of trade mean that a pastoral holding which was once a viable family farm may now be scarcely a front paddock, so many enterprises (mostly leasehold) are being restructured. For environmental reasons, the State Government in the mid-1990s tightened restrictions on the clearing of natural vegetation on leasehold land (c.250,000 ha cleared annually), restrictions which derived from the State's ownership of the vegetation. These were supplemented in 1999 with restrictions on clearing of freehold land, these restrictions deriving from the State's regulatory powers. Public controversy over clearing and native title has affected the confidence which graziers have traditionally held in leasehold tenure. For various reasons there has been increasing general suspicion of governments and this has strengthened popular advocacy for voluntary mechanisms to achieve sustainable management. On the other hand, the pressure from informed opinion for stronger regulation is also growing, in the light of incontrovertible evidence of the seriousness of land degradation. Separately, local governments are introducing a range of measures such as property agreements and rate concessions to encourage conservation on private land, a trend given momentum by heightened environmental pressure from urban electors. Finally, the legislation and policy relating to natural resources is inevitably caught up in the modern wide-ranging program of public sector reform.

An understanding of the conceptual origins of controls over the use of natural resources is necessary for three main reasons. First, it allows practitioners and stakeholders to make sense of the plethora of different mechanisms available. This knowledge is necessary if case officers are to choose the most

suitable mechanisms and is also an essential prerequisite of effective reform. Second, planning by different public authorities can be better integrated and more tightly focused if the instruments available to implement them are better understood. Third, moves to coordinate between mechanisms by 'reducing overlap' can be doomed if they try to yoke together fundamentally distinct instruments.

Pioneering work by Binning, Cripps and Young (such as Cripps et al. 1999) in explaining the non-tenure mechanisms available to local governments and their communities to conserve natural resources is stimulating the creation of new instruments for management. Comparable accounts exploring the contemporary usefulness of tenure instruments are scarce, apart from the definitive Else-Mitchell (1973, 1976) and the original work of Holmes (1994, 1996) focused on pastoralism. Another notable exception is that Canberra, the national capital, still operates on a leasehold system and is able to achieve an orderly conversion of rural land to residential and commercial as the city expands. Otherwise, land tenure nowadays is widely regarded as a relic of the settlement era and is little understood except by staff of the departments administering it.

Conceptual Background

A Classification of Mechanisms

Historically, a resource is made available for development – which is an increase in the intensity of use – according to this sequence:

- the owner of the resource (originally the State, now subject to native title) *allocates* it to a potential user, by *proprietorial* or *tenure-related* mechanisms such as leasehold or freehold or statutory covenants, which *authorise occupation of the resource*;
- a State department, local government or other public authority *regulates* the *use* of the resource by its holders, through *regulatory* mechanisms such as planning schemes and by-laws;
- the holder of the resource *manages* it to *achieve personal goals*, by voluntary *management* mechanisms, such as property management planning or landcare.

These terms are not unambiguous. For example, the term *tenure* strictly refers to legal 'interests' which convey secure *possession*, such as leases. In this paper the term is used broadly, to also include occupations such as road licences and reserves which convey rights to *use* and not to possess. The term *regulation* is often used more broadly than here, to describe any action by governments.

The term *management* is particularly fluid. In addition to the primary sense of *custodial management* by the holder of a resource as intended above, the roles of *facilitating development* and *advice* commonly undertaken by government to assist other landholders to manage better also fall within the description of 'management' tools.

Sources of Confusion

There are several reasons why the fundamental distinctions between the classes of mechanism are often not understood:

- *the sequence is not always obvious*. For example, a person who buys a freehold property on the commercial market is usually not aware of the historical original grant of the land;
- *some controls are not easily categorised*. For example, the State can exercise the (regulatory) power to regain proprietorship, through voluntary or compulsory acquisition. The State controls the (regulatory) Torrens system of registration of land, by which it guarantees the validity of freehold titles. These controls might at first appear to be tenure ones. For another example, statutory covenants which are registered on title are considered to affect the tenure of the land and modify the allocation, but unregistered agreements are management mechanisms;
- *regulatory controls may*, through feedback, *affect proprietorship*. For example, a State reserve may be zoned by the local government in the planning scheme as open space and this inhibits the State from selling it for a tourist resort;

- *proprietorial mechanisms may be conditional*: for example, an industry might be given permission to divert water (proprietorial) provided it meets defined standards for its effluent (regulatory);
- there is an *overlap in the considerations* which are investigated when applying each mechanism. Planners must assess similar attributes and evaluate similar environmental, economic and social trends.

Despite these complexities, the distinctions remain; and the procedures for applying the various mechanisms unavoidably travel down different routes within government.

Origin of Powers

In the Australian federation, the responsibility for land administration, natural resource management and statutory ('town') planning lies with the States. Statutory planning is largely devolved to local governments which are creatures of the States. The Commonwealth has a jurisdiction in the territories and under the Constitution's external treaties power in fields such as world heritage. The States' interest in land is derived from two distinct sources. The more basic is the *sovereign* power, by which the State exercises authority to legislate on behalf of its people. The second is the *proprietorial* power, by which the State acting as a 'landlord' allocates its resources according to law to those who can use them.

The power of lessees to manage their property derives generally from the legislation governing leases and specifically from the terms of the lease. The power of owners of freehold land to manage their property derives from common law. They have every right to manage, except those removed by regulation and common law obligations.

Tenure-related mechanisms are direct and simple. The form and conditions of tenure specify at the outset the rights of the landholder and *withhold* those which remain with the State. Regulatory controls then moderate the landholder's rights by *withdrawing* those which would otherwise be associated with the respective form of tenure (Holmes 1996). It is more contentious to *withdraw* rights than to *withhold* them. This is a case for retaining tenure powers where re-assignment of a resource in some different way at a future time could achieve a substantial public policy outcome.

Put somewhat loosely, leasehold enables the State to set *positive* obligations by specifying which forms of development and use are permissible or even mandatory; whereas regulatory controls may set *negative* obligations by specifying what the landowner is not permitted to do. Another loose generality is that the tenure-related controls tend to be focused on the intrinsic condition and operation of the landholding, whereas regulatory controls may be more tightly limited to concern about externalities, that is, with negative outcomes on neighbouring holdings or the community.

Who is the Custodian?

Who is or should be responsible for ensuring that properties are managed sustainably, for translating the national policy on 'ecologically sustainable development' into personal, property-specific terms? This can amount to asking which is the most appropriate mechanism to apply. The conceptual basis outlined above indicates that responsibilities are shared. The authority *allocating* a resource is responsible for doing so only under conditions which achieve sustainability; the *regulatory* powers of a range of public authorities can be progressively amended to embed sustainability objectives; and the landholder is responsible for sustainable custodianship or *management*. Even in this last apparently simple statement, however, are philosophical and semantic traps. Governments are ultimately responsible for the welfare of the community and thus cannot escape a vicarious responsibility for the condition of all lands in their State.

Appeal Rights Flow From Origins

The civil courts have traditionally had the role of protecting individuals' rights against arbitrary or unjust exercise of official power. This role was strengthened by the *Judicial Review Act 1991* which provides a general right of appeal on the grounds of want of 'procedural fairness' or natural justice in the *process* by which administrative decisions are made by the State and local governments.

As to the substantive *merits* of decisions, most regulatory controls provide for appeals to a court of law or expert tribunal, because of their potential to reduce or *withdraw* existing rights to develop property. However, allocation is different: tenure is a privilege not a right and applicants have only a right to apply, not a right to the resource. In Queensland, decisions of the Minister to *withhold* State land, minerals or forest products are not subject to appeal on their merits. To grant an appeal by an unsuccessful applicant would amount to forcibly removing ownership of the natural resource from the State. Of course, appeals are available if the State proposes later to *withdraw* an existing tenure.

Tenure-related Mechanisms

The State may choose to release a resource in part only, for example when a lease is issued for defined purposes. Even freehold land is not conveyed absolutely: in all States the Crown retains the rights to minerals and petroleum (and fauna) on freehold, even though most other resources (including vegetation) now pass to the purchaser. Early grants reserved indigenous timber for building ships and bridges and it is technically possible for the State even to reserve the right to receive rent (Else-Mitchell 1973:40). In Queensland, the right to land for a road may be 'reserved' to the State and all freehold deeds of grant issued since 1992 have reserved the right to quarry materials. Freehold land granted under the *Aboriginal Land Act* and the *Torres Strait Islander Land Act* cannot be sold by the owners. From this perspective, freehold and leasehold differ in degree rather than in kind.

The main forms of tenure available in Queensland (173,660,000 ha) approximately in order of decreasing State interest and increasing private interest are: unallocated State land, national parks and conservation parks, State forests, roads, State reserves, deeds of grant in trust, licences, permits to occupy, profits à prendre, term leases, perpetual leases, Aboriginal and Torres Strait Islander land and freehold. Native title, although strictly a collection of rights rather than a form of tenure, will be specifically mentioned because of its national and international interest. Statutory covenants can be placed (voluntarily) on freehold or leasehold land after allocation and upon registration on title modify the proprietorial rights.

Sixty-six percent of Queensland is leased, so the leasehold system – applied to facilitate rural development and closer settlement in the pioneering era, and as recently as the Brigalow Scheme 1962-74 – is now available to facilitate other public policy objectives such as sustainability. In States such as Victoria where most land is freehold, greater reliance must be placed on regulatory mechanisms, unless the State retrieves ownership through purchase and then re-issues leasehold or conditional freehold.

Native Title

In June 1992, the High Court ruled in the *Mabo* decision that Australia's common law recognised a form of native title to the land. The common law provided that governments could extinguish native title by valid exercise of their sovereign power: by legislation, granting a tenure (such as private freehold) or using the land in a manner which is inconsistent with the continued existence of native title. Further, in 1996, the High Court in *Wik* held that pastoral leases did not necessarily extinguish and may co-exist with native title. However, if there were any inconsistency, the native title rights and interests must yield to that extent to the pastoralists' rights.

The Commonwealth and Queensland Governments responded to Mabo and Wik by passing legislation in 1993 and 1998. A more secure tenure cannot be issued without clarifying native title status.

Sustainable Management Through Leasehold Tenure

The main obligations upon lessees to manage sustainably are set out in Queensland's *Land Act 1994*:

- a duty of care for the land is upon all lessees. This condition was inserted by the Act into all leases retrospectively without compensation;
- lessees must keep noxious plants under control;
- lessees require a permit to destroy 'trees' (defined broadly). Applicants may be required to submit a 'tree management plan';
- lessees must give the Minister information, such as a report upon the condition of the land, when asked;

- the Minister may approve an application by a lessee that a lease be used for additional purposes. So 'nature conservation' or similar could be added to the purpose of a lease issued for grazing;
- the Minister may conduct a review of leases issued under the 1994 Act every 15 years. As a result of the review, a condition about protection and sustainability can be changed *with or without* the lessee's agreement (but this decision may be appealable);
- the Minister may issue a *remedial action notice* to protect land at risk of serious degradation, or if the duty of care is being breached, or if the land is being used beyond its capability.

Lessees are entitled to peaceable occupation for the term of their leases provided that they pay the rent and observe the purpose and conditions. In the absence of the lessee's agreement, conditions cannot be changed except as indicated above. But as leases are a contract between two parties, special conditions can by agreement be inserted at the time of issue or subsequently. For example, a condition could specify that riverbanks be fenced from grazing, or that the lessee adhere to detailed provisions spelt out in a defined property management plan. Few leases include such sustainability conditions. Indeed many current pastoral leases were written early this century in the settlement era and explicitly require tree clearing and other forms of development.

Inclusion of sustainability conditions beyond the general statutory duty of care would mostly require property-specific negotiations. Generally, lessees will oppose limitations on management practices, because the protection of their independence is an article of faith among landholders. However, many lessees lack only the funds or technical knowledge about how to manage sustainably, not the willingness to do it. Further, rural industry is on notice to minimise degradation voluntarily or it runs the risk of more severe regulation. Third, new sustainability conditions could be a trade-off for some other benefit, such as a more secure form of tenure, or (as in South Australia) a roll-over for a new term. Indeed, the main obstacle to updating leases in this way may be not reluctance of landholders but practicalities such as stamp duty and lease administration fees (on a lessee's side) and an absence of experienced land officers (on the government's side).

Regulatory Mechanisms

Regulatory mechanisms place restrictions upon the method by which the resource is developed. Examples include:

- statutory planning schemes. In most Australian states these are the primary mechanism for development control;
- declaration of catchments or flood plains within which certain kinds of development are prohibited;
- pest management orders or entry notices;
- vegetation management controls on freehold land (the *Vegetation Management Act 1999*);
- restrictions on clearing vegetation or damaging the physical form within a watercourse;
- local laws (formerly called 'by-laws'), under the *Local Government Act 1993*; including vegetation protection orders (VPOs) to protect valuable and significant vegetation. The power to write local laws for development-control purposes like this was removed by the *Integrated Planning Act 1997* but pre-existing VPOs remain in force;
- property taxation (rates, land tax);
- restrictions on disturbing marine plants (e.g. sea-grasses, mangroves and salt couch) under the *Fisheries Act 1994*, by the Queensland Fisheries Service.

Unlike the tenure powers, these mechanisms are not really suitable for arranging a direct preventative positive obligation such as fencing. Some regulatory tools such as the first two depend upon a prior district-wide planning process and imposition of a spatially explicit plan under which applications are evaluated. Most such as the first two are applied when a change of land use is contemplated; in other words, the landholder applies for a permit. Others such as the third are applied to current management practices. Also, most operate by setting a threshold below which a permit is not needed.

The Queensland Statutory Planning System

Statutory planning under the *Integrated Planning Act 1997* is the primary mechanism for development control in Queensland. A range of explanatory materials about the system, introduced in March 1998, is

available so this account will be brief.

The objective of statutory planning is to achieve ESD. This is to be achieved by co-ordinating and integrating local, State and regional dimensions; and by managing both the process by which development takes place and the effects of development. The system is administered by local governments. The primary mechanism for achieving these outcomes is the planning scheme. The scheme has two parts: the plan and the development assessment process.

The plan outlines the preferred future direction for land uses in the local government area. It does this by setting out the outcomes that will be sought through the development assessment process and mapping out the future distribution of land uses.

The engine of the scheme is the development assessment process which comprises the rules that guide how the environmental effects of development will be assessed and, where appropriate (and where possible) mitigated. It is proposed that the primary mechanism for doing this will be through codes which encapsulate those decision rules which apply to the assessment of the environmental effects of development. These codes can be specific to a particular development; or they can apply to a range of developments or to areas in which development may take place. Two important features of codes are first, that they are performance-based, meaning that assessment is based on the extent to which the proposal meets the requirements of the code; and second they are meant to integrate the large-scale objectives of the plan as set out in the desirable environmental outcomes. Also forming part of the development assessment process is an impact assessment process that addresses development where the environmental effects cannot be accurately predicted.

Some features of the statutory planning system include:

- existing lawful management practices can continue without a permit: the planning controls are triggered only when an applicant wishes to change land use or reconfigure (e.g. subdivide) an allotment;
- council can adopt an infrastructure charges code which levies developer contributions at the time of subdivision for funds to purchase land for local community purposes – such as public park. This power could be used to retrieve a strip of land along (say) a river;
- council can adopt planning scheme policies and codes for each of a number of industries or activities (such as gravel extraction, timber harvesting, vegetation clearing), to set out standards which applications much satisfy in order to justify approval.

The system has a significant unrealised potential to achieve the objectives of community-based natural resource management, but this requires an investment of time and energy by community groups as well as by the authorities.

Management Mechanisms

The proprietorial and regulatory controls together lay down a broad framework within which the landholder is free to manage the resource; that is, to use and develop it. At that stage government is involved mainly by way of information and advice. Four common mechanisms are:

- the *property management plan*, a personal, documentary tool which captures the landholder's intentions. The term embraces four main components: *land management*, *enterprise* (stock/crop) *management*, *financial management* and *personal goals*. The term is most commonly associated with rural private land but it can apply to properties of all kinds, including public land (where it may be called a master plan, a facilities plan, a recreation plan or a capital works plan). The Queensland program to promote property management planning is called Future*profit*;
- ESD, organic or environmental *accreditation*, such as by an environmental management system, observance of ISO 14000, the proposed Australian Land Management System or similar. While voluntary, these can potentially be linked to satisfaction of regulatory requirements or concessions on rates, rents or taxes;
- the *landcare* movement, which has grown from nothing in 1986 to an Australia-wide network of some 4300 local groups spreading knowledge of sustainable practices and marrying nature

conservation, farming and science. Originally focused on agricultural lands, it may also embrace urban lands, and has spawned programs such as *coastcare*, *bushcare* and *backyard conservation*;

- *voluntary management agreements*, between a public authority and a landholder to specify mutually desirable protective practices. These (unlike *statutory covenants*) do not run with the land and are based on contract law;
- *Land for Wildlife*, a voluntary and free registration of interest in conserving nature on one's property. Participants join a network of like-minded landholders, receive a quarterly informative newsletter and can attend field days such as those run by *NatureSearch*;
- *market* mechanisms, such as *insurance*, although to be workable some of these require such a strong statutory framework that they are more truthfully described as regulatory mechanisms.

Duty of Care

The common law duty of care requires that every person take all reasonable and practicable steps to avoid causing foreseeable harm to another person's land or their use or enjoyment of that land. Duty of care is well established in common law, particularly in cases of injury to persons or property, but is not so well established for remedying harm to the environment.

State legislation (*Environmental Protection Act 1994*) extends the common law responsibility into a regulatory requirement upon everyone in Queensland, to exercise a general duty of care to prevent harm to the environment. To show that an environmental duty of care has been met, an individual must be able to show 'due diligence', that they have assessed potential risks to the environment from their activities and then have taken reasonable and practicable measures to avoid, or at least, to minimise those risks. As well, there is a statutory duty of care upon all State lessees.

Adherence to a separate statutory or voluntary code of management practice could be taken as *prima facie* evidence of compliance with these responsibilities. A number of industries are developing voluntary 'codes of practice' to guide their members in management of their properties. For example, Queensland has adopted a code of practice for agriculture.

Different Aspects of Management

In some other publications, notably Guidelines G100A and J1, 'management' is usefully separated into three distinct aspects: *custodial management*, by the person or body in lawful occupation of the resource; *development facilitation* on others' land, including the provision of infrastructure by public authorities; and *advice* including capacity building.

Is Tenure Irrelevant?

Co-operative or Coercive?

Contrary to first impressions, the tenure-based controls such as leasing or the writing of statutory covenants are not coercive but are more-or-less voluntary, in the sense that the terms and conditions are accepted voluntarily when the instrument is offered. Their nature is *contractual.* By contrast, the regulatory mechanisms are introduced in their broad form without landholders' consent, although specific applications can be negotiated. They are *coercive.* Most management mechanisms are of course by definition *voluntary*.

It is sometimes argued that in the 1990s the 'free-market' outlook could lead governments to dispense with tenure controls, to allow conversion of leasehold to freehold, and to rely on regulatory planning schemes to achieve the necessary control of land use. However, the leasehold system with its *voluntary* acceptance of *individually tailored contracts* spelling out *direct* and *transparent* mutual obligations in a landlord-tenant relationship may be more closely aligned in its essence to the free-market approach than a system of *government regulation* imposed by *third party* authorities regardless of tenure. Commercial property is widely held under leasehold from private landlords and is understood in this light.

The Difference Between Freehold and Leasehold

Subject to any land over which native title has been established, the State is the paramount title holder of all land in Queensland including that which it alienates, whether by grant or other means. Put another way, land is the 'eminent domain' of the State. This principle is evidenced when land is 'resumed' by the State and vested in an authority or when land reverts to the State upon the death of a freehold owner leaving no traceable heir or successor or next-of-kin. Thus the various forms of tenure in which land rights may be granted or allocated by the State reflect only the extent to which those rights are granted or allocated.

It follows that, from the *perspective of sovereignty*, and notwithstanding perceptions in the landholding community, freehold and leasehold differ in degree rather than in kind. The State in issuing freehold tenure can and usually does reserve certain rights (specifically to minerals, petroleum and quarry materials) to itself and these do not pass to the freehold owner. In issuing a lease, the State in effect reserves a greater range of rights to itself but, subject to native title, the lessee is entitled to peaceable occupation for the term of the lease.

Viewed from the *perspective of land use*, however, there is a clear distinction between the two types of tenure. After land is freeholded, the State has no proprietorial involvement in the use of the land whereas the holder of a State lease may use it only for the purposes for which it has been leased. Even a perpetual lease, while offering indefinite security, is still issued for a given purpose or a limited range of purposes.

Justification for Leasehold

The leasehold system of land tenure was adopted to achieve this by allowing land settlement to proceed in an orderly way with suitable conditions of use being set. Is this still relevant?

As community expectations about resource management have become more complex, governments have used their sovereign powers of *regulation* to amend the rights and obligations attached to private property, regardless of the form of tenure. And voluntary *management* mechanisms which also apply to all tenures are increasing in number and versatility. The difference between the corpus of provisions applying to freehold and that applying to leasehold is therefore narrowing. But neither this convergence nor the fact that leasehold and freehold simply represent different positions on a continuum of possessory rights equate to a conclusion that tenure is irrelevant.

The justification for leasehold has not rested on any notion that the State is a 'better manager' than private landholders, for a lessee is unquestionably the manager. Rather the justification rests on the capacity of leasehold to serve public policy objectives which cannot be satisfied through market forces. The public interest dimension and accountability to a public landlord make leasehold arrangements over State land different from the primarily economic relationship between a private landlord and tenant over freehold land.

The leasehold system has five main features which distinguish it from freehold in their normal forms and which underpin its contemporary relevance in the sustainability era:

Financial Incentive

The State receives rent for land and royalties for water, minerals, timber and gravel. The level of rent can be set to achieve policy objectives. For example, in Queensland's pastoral districts it has been historically low to encourage settlement and compensate for disadvantage. Even now it is only 0.8% of unimproved capital value.

Facilitating Development

In the early days of settlement, leasehold facilitated private occupation of land at low capital cost for defined purposes, while allowing the State the flexibility to allocate the land to other uses at some future time. This was particularly important in the early pioneering days, to encourage land settlement or development of infrastructure. There are localities in Queensland where patterns of land occupation have not yet matured and there are still opportunities for the State to direct development in this way.

Through leasing, land can be made available for, say, tourist developments without the need for up-front capital costs of purchasing land. Land may be returned to the State for re-allocation should the original purpose become redundant. Further, by allowing sites to be retrieved for re-allocation if projects do not proceed, the leasehold system ensures that prime developmental sites are not locked up in inadequately financed or poorly planned projects.

Influencing Land Use

Lessees have certain defined responsibilities. The State determines the form and intensity of use so retains control over income-earning activities not specified and can exclude inappropriate uses. Even a perpetual lease, while offering indefinite security, is issued for a limited range of purposes. Leasehold is a direct, convenient method of development control. Of course, upon application by the lessee, the purpose can be changed (provided that it does not allow an inappropriate intensification of land use) or added (provided that it is ancillary to the head purpose). So 'ecotourism' or similar could be added to the purpose of a lease issued for grazing.

The leasehold system can act as a brake upon the subdivision of holdings to unviable sizes. Land can be retrieved from term leases at expiry, without compensation for land value, for public purposes such as national parks and schools. Further, the boundaries of many pastoral leases were set in the last century, some in the squatting era. The State in partnership with lessees can reconfigure leases at expiry or conversion, or restructure with neighbouring leases, in line with economic viability and modern principles of catchment management derived from regional resource planning, resulting in more sensible and 'sustainable' boundaries.

Noting that using land for residential purposes, unlike other purposes, represents a form of "final consumption" by households (Else-Mitchell 1973: 49), there is a solid argument in favour of moving to freehold with its simpler registration and transfer procedures where land is to be used for residential purposes.

Constraining Speculation

Lessees are entitled to sell their leases and to benefit from any improvements they make (although improvements revert to the lessor at expiry). However, they do not have a right to subdivide or change purpose and are not entitled to reap unearned 'windfall' profits arising from district-wide intensification of land use. Else-Mitchell (1973:14-16) explained that the value of land comprises two components, *use value* reflecting the benefit of using it; and *development value*, reflecting the benefit from holding it in expectation of realising a different purpose. While land remains under lease, the development value associated both with planning decisions and with the growth of the community accrues to the community via the State as lessor, not unearned to the lessee. Increments of value can in principle be appropriated through regular adjustment to rents (Else-Mitchell 1973:38).

Environmental Policy

Although the evidence as to whether rural leasehold properties are less or more degraded than comparable freehold properties is largely anecdotal and non-conclusive, leasehold offers the potential in future to apply the State's technical knowledge in a coherent policy framework on a case-by-case basis. The Government is able to use conditions of tenure to achieve specific policy objectives, such as by controlling the clearing of vegetation.

Applying Various Mechanisms

A person seeking to develop land requires permission under *all* relevant statutes. The absence of a single one may be fatal to the proposal. A lease, for example, may allow a certain business to be conducted; but this will be negated if the planning scheme prohibits that business.

Most tenure-related and regulatory controls operate by setting a threshold below which a permit is not needed. For example, approval is not needed under a planning scheme to continue current or long-standing legal uses.

A landholder may voluntarily undertake a *less intensive* use than is permissible under law, such as to conserve some natural feature, and can enter into a covenant with another party to secure this practice. However, none of the available management mechanisms allow a landholder to undertake a *more intensive* use than is legally permissible, or to contract out of obligations to comply with relevant Commonwealth, State or local legislation, such as fire protection notices or planning schemes.

Conclusions

Although the suite of mechanisms is not and may never be complete, clearly there are existing powers which are not utilised. The greatest obstacle to sustainable management is not a lack of legislative power but a lack of sustained application of existing powers.

A wide range of mechanisms is available to either enforce or encourage sustainable land management practices. Some are tenure-specific, some are tenure-blind. Sustainable management requires the application of all three classes of mechanism.

The rights to develop land are not inherent to the soil but are conferred by society. The prerogative of society in the public interest to set conditions on development should not be disputed. When considering which mechanisms to use, the issue is whether to use a direct tenure-related method of exercising that prerogative (if it is still available), or the indirect method of moderating previously granted rights.

It is hoped that a better understanding of the range of mechanisms available may encourage relevant departments, community leaders and landholders to apply the tools at their disposal with confidence, and to work to complete the suite of tools where there are identifiable gaps.

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For further information see the Handbook of Resource Planning Guidelines, published on the Department's website*:* *http://nrm.dnr.qld.gov.au/land/planning/pdf/guide/b2alreg.pdf*

End of Guideline B2
Minor edits on 6 August 2002 to reflect NR&M website alterations.