



Victorian  
Law Reform  
Commission

# PROPERTY LAWS

## **REVIEW OF THE PROPERTY LAW ACT 1958** Consultation Paper

## **Published by the Victorian Law Reform Commission**

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Victorian  
Law Reform  
Commission

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### Consultation Paper

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# Contents

<b>Call for Submissions .....</b>	<b>4</b>	<b>Chapter 4: Trusts of Land .....</b>	<b>27</b>
<b>Terms of Reference .....</b>	<b>5</b>	The dual trust scheme.....	28
<b>Executive Summary .....</b>	<b>6</b>	The Settled Land Act.....	28
<b>Chapter 1: The Commission’s Review of Property Laws .....</b>	<b>7</b>	Difficulties with the Settled Land Act.....	29
The two-stage review of Victoria’s property laws .....	8	Trust for sale.....	29
The Property Law Act.....	8	Proposals for reform of the dual trust scheme .....	30
Review of the Property Law Act.....	9	Options for reform.....	30
Guiding aims and principles.....	9	Single statutory trusts in other jurisdictions.....	32
Preparation of this paper.....	9	Irish and English models .....	32
Submissions .....	9	Australian models .....	33
Structure of this paper .....	10	A single statutory trust for Victoria.....	33
<b>Chapter 2: Why Review the Property Law Act?.....</b>	<b>11</b>	Minors’ property.....	34
A new Property Law Act .....	12	<b>Chapter 5: Obsolete Rules.....</b>	<b>35</b>
Repeal and amendment of specific provisions .....	12	Special rules of inheritance.....	36
Savings provisions.....	13	Proposal .....	36
Application of the Act to registered land .....	13	Rentcharges .....	37
The Torrens System .....	13	Proposal .....	37
Difficulties in determining the application of provisions to registered land .....	14	<b>Chapter 6: Procedure for Enlargement of Long Leases.....</b>	<b>39</b>
Proposal.....	15	<b>Chapter 7: Capacity.....</b>	<b>43</b>
Arrangement of provisions.....	16	Alien friends.....	44
Proposal.....	16	What is an alien friend? .....	44
Provisions that we do not examine .....	16	Options for reform.....	45
Mortgages.....	16	Commonwealth Foreign Acquisitions and Takeovers Act ....	46
Leases .....	17	Minors’ contracts .....	47
Co-owned land and goods.....	17	Co-operatives Act .....	48
Easements, covenants and statutory rights of user.....	18	Co-operative Housing Societies Act.....	48
<b>Chapter 3: Legal Estates in Freehold Land.....</b>	<b>19</b>	Represented persons with a mental illness.....	48
Overview of legal estates in Victoria.....	20	Conveyances by administrator.....	48
Impetus for reform.....	20	A patient who is a trustee of land.....	49
Legal life estates and future interests .....	21	Married women .....	49
Reform in other jurisdictions .....	22	Husband and wife to be counted as two persons .....	49
Proposal.....	22	Property rights of married women.....	50
Possible objections to the proposal.....	22	Power of court to bind interests of married woman.....	52
Modified fees.....	24	<b>Chapter 8: Formal Requirements for Creation and Assignment of Interests .....</b>	<b>53</b>
Modified fees in law and equity .....	24	General requirements for writing .....	54
Distinguishing between determinable fees and conditional fees .....	25	Section 52 – Requirement of a deed for conveyances .....	55
Proposal.....	25	Section 53 – Other dispositions.....	55
Estates tail .....	25	Proposed new requirement for declaration of trust .....	56
Options for reform.....	26	Personal property.....	57
		Proposed new scheme.....	58
		Assignment of things in action .....	59
		Legal assignment.....	59
		Assignment in equity.....	59
		Judicial consideration.....	59
		Proposal.....	60
		Limitation in the case of certain assignments.....	60

<b>Chapter 9: Applications to the Court by Vendor and Purchaser</b> .....	<b>61</b>
Vendor and purchaser summons .....	62
Return of deposits.....	62
Exceptional circumstances or just and equitable? .....	63
Deposits in whole or in part.....	64
<b>Chapter 10: Third Party Rights</b> .....	<b>65</b>
Judicial interpretation of section 56(1) .....	66
Criticism of the doctrine of privity.....	67
Reform of the doctrine of privity.....	68
Reform of section 56(1) .....	69
Enforcement by a beneficiary who is not a party to the agreement .....	69
Application to personal property .....	69
Further reform .....	70
<b>Chapter 11: Execution of Judgments</b> .....	<b>71</b>
<b>Chapter 12: Land Identification, Boundaries and Encroachment</b> .....	<b>75</b>
Survey boundaries.....	76
Proposal.....	76
A mistaken improver relief provision .....	76
Mistaken improvers at common law.....	76
Mistaken improver provisions .....	77
Forum .....	77
A building encroachment relief provision .....	78
Provisions for determining and adjusting boundaries .....	78
Boundary disputes under the current law .....	78
Problems with the adverse possession rule in boundary disputes .....	79
Building encroachment laws in other jurisdictions .....	79
Can building encroachment be dealt with under a mistaken improver provision? .....	80
Building encroachment and adverse possession .....	80
Forum .....	82
<b>Questions</b> .....	<b>83</b>
<b>Appendix A: Section by Section Summary of Proposals</b> .....	<b>87</b>
<b>Appendix B: Sections with No Application to Ordinary Folio Land under the Operation of the Transfer of Land Act</b> .....	<b>107</b>
<b>Glossary</b> .....	<b>108</b>

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# Call for Submissions

The Victorian Law Reform Commission invites your comments on this Consultation Paper.

## WHAT IS A SUBMISSION?

Submissions are your ideas or opinions about the law being reviewed. Submissions can be anything from a personal story about how the law has affected you, to a research paper complete with footnotes and bibliography. The commission wants to hear from anyone who has experience with a law under review. It does not matter if you only have one or two points to make; we still want to hear from you.

## WHAT IS MY SUBMISSION USED FOR?

Submissions help the commission understand different views and experiences about the law it is researching. Information in submissions, along with other research and comments from meetings, is used to help develop recommendations. Once the commission has assessed your submission it will be made available on our website and stored at the commission where it will be publicly available.

## PUBLICATION OF SUBMISSIONS

The commission publishes public submissions it receives on our website to encourage discussion and to keep the community informed about our projects.

We try to publish as many submissions as possible. Please keep in mind that submissions containing offensive or defamatory content or that do not relate to the project will not be published and that private information of other people will be de-identified.

The views expressed in the submissions are those of the individuals or organisations who submit them and are not the views of the commission.

## HOW DO I MAKE A SUBMISSION?

Submissions can be made in writing or verbally. There is no particular format you need to follow. However, it would assist us if you addressed the consultation questions listed in the paper.

Submissions can be made by:

- Online form: [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)
- Mail: PO Box 4637, GPO Melbourne Vic 3001
- Email: [law.reform@lawreform.vic.gov.au](mailto:law.reform@lawreform.vic.gov.au)
- Fax: (03) 8619 8600
- Phone: (03) 8619 8619, 1300 666 557 (TTY) or 1300 666 555 (freecall)
- Face-to-face: please contact us to make an appointment with one of our researchers.

## WHAT HAPPENS ONCE I MAKE A SUBMISSION?

Shortly after you make your submission you will receive a letter or email confirming it has been received. You are then asked to confirm your details by replying within seven days.

## ASSISTANCE IN MAKING A SUBMISSION

If you require an interpreter, need assistance to have your views heard or would like a copy of this paper in an accessible format please contact the commission.

## CONFIDENTIALITY

When you make a submission you must decide how you want your submission to be treated. Submissions are either public, anonymous or confidential.

- Public submissions can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the final report. Addresses and contact details are removed from submissions put on our website.
- Anonymous submissions can be referred to in our reports, uploaded to our website and made available to the public to read in our offices but the identity of the author will not be revealed.
- Confidential submissions cannot be referred to in our report or made available to the public.

Please let us know your preference along with your submission. If you do not tell us you want your submission treated confidentially we will treat it as public.

More information about the submission process and this reference is available on our website: [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)

**SUBMISSION DEADLINE**  
**30 JUNE 2010**

# Terms of Reference

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- 1) The Victorian Law Reform Commission is to review and report on the desirability of changes to Victoria's property laws in relation to –
  - a) the *Property Law Act 1958*; and
  - b) easements and covenants.
- 2) In conducting the review, the Commission should have regard to –
  - the aims of the Attorney-General's *Justice Statement 2*, in particular to simplify and modernise the law, and reduce the costs associated with the justice system;
  - relevant, contemporaneous reviews or policies in the field in other jurisdictions, both within Australia and internationally;
  - opportunities for harmonisation with laws of other Australian jurisdictions;
  - developments in technology, including the availability of electronic conveyancing;
  - the scope for reducing the administrative and/or compliance burden imposed on business and the not for profit sector, in line with the Government's Reducing the Regulatory Burden initiative; and
  - social and demographic trends and new approaches to planning and sustainable land use and risk in Victoria.
- 3) The purpose of the review is to ensure that the laws under review are transparent, accessible and support an efficient and effective system of property rights and transactions in Victoria.
- 4) In particular, the Commission should consider –
  - Any necessary changes to ensure that the *Property Law Act 1958* is certain, effective and up to date. This may include, but is not limited to, any reforms required to modernise and/or simplify the language in the Act, clarify meanings that are in doubt, remove obsolete provisions, or improve the overall functioning of the Act.
  - The operation of the law of easements and covenants broadly, and any beneficial changes to streamline planning processes and/or relevant property laws and practices, as well as options to facilitate simpler and cheaper processes. This should incorporate a consideration of the interrelationship, and opportunities for harmonisation and increased clarity across the rules, practices and Acts, including the *Transfer of Land Act 1958*, *Property Law Act 1958*, *Subdivision Act 1988* and *Planning and Environment Act 1987*, amongst others, that govern easements and covenants.

The Commission is also asked to report on any related issues that are identified during the course of the review and that may warrant further investigation.

The Commission is to report regarding the *Property Law Act 1958* by 30 September 2010, and to report regarding easements and covenants by 17 December 2010.

# Executive Summary

The commission's terms of reference comprise two components: a review of the *Property Law Act 1958* and a review of the law of easements and covenants. We are conducting each component separately and have prepared this paper in connection with our review of the Property Law Act.

The purpose of this paper is to encourage submissions on the ideas and questions we raise, and any other comments we should take into account in developing our final report to the Attorney-General.

The Property Law Act is a cumbersome document. It is difficult to navigate and contains many references to outdated concepts and practices. Rather than discussing the legislation section-by-section, which would provide a disjointed and laborious account of the law, this paper focuses on major themes.

In conducting the review and considering options for reform, we are guided by the following aims:

- Simplify the law and procedures.
- Modernise and update the law to serve current and emerging needs.
- Remove overlap and inconsistency with other laws.
- Harmonise Victorian law with the law of other Australian jurisdictions.
- Reduce the administrative and compliance burden on business and the not for profit sector.
- Improve access to justice and dispute resolution services.

The major themes and proposals discussed in the paper are summarised below.

- **A new Act.** We propose the enactment of a new Property Law Act, with redrafting of some provisions in simpler, plainer language, and thematically ordered Parts, divisions and subdivisions.
- **Clarification of interaction with the Transfer of Land Act.** We propose to remove to a schedule those sections which are retained solely for old system land and have no application to land under the *Transfer of Land Act 1958*.
- **Obsolete provisions.** We have identified some 60 sections—around one quarter of the provisions in the Act—plus one schedule, which are ripe for repeal.
- **Reduction of legal estates.** We propose limiting the creation of legal estates in land to just two: the fee simple estate and the leasehold estate. We propose that life estates and remainders should exist only in equity. The proposals will not affect native title.

- **Trusts.** We suggest that the law would be significantly modernised and simplified if the current dual trust system, split between the trust for sale provisions of the Property Law Act and the *Settled Land Act 1958*, were replaced by a single statutory trust mechanism. Our conclusions are preliminary as an examination of the Settled Land Act is beyond our current terms of reference. We propose that the commission be given a further reference to examine this issue.
- **Capacity.** We propose that amendments be made to provisions affecting in various ways the capacity of alien friends, married women, minors and represented persons with a mental illness to deal with property.
- **Statutory formalities.** We propose amendments to the formal requirements in the Act for the creation and assignment of interests in land.
- **Disputes between vendor and purchaser.** We examine the statutory discretion of the court in an action for the return of a deposit and question whether the test for the exercise of the discretion needs to be put on a statutory footing, and whether the court's discretion should be extended.
- **Third party rights.** We invite comments about whether a person who is not a party to a conveyance or other instrument relating to land should be able to enforce a condition or promise which benefits them.
- **Mistaken improver and building encroachment.** We propose the introduction of provisions for mistaken improver and building encroachment relief. We also propose that a person should no longer acquire title by adverse possession to a portion of a neighbour's land by building upon it or enclosing it with the person's own land, for any period of time.

There are other areas of property law which require significant reform but are not discussed in the paper. We have not reviewed the law of mortgages and leases because the relevant legislation is not wholly contained in the Property Law Act and the necessary reform should flow from a review that extends beyond our terms of reference. We propose that the commission be given a further reference to examine these subjects.

We have not reviewed Part IV of the Act, concerning co-owned land and goods, because the commission reported on these provisions in its 2002 report *Disputes between Co-owners*.

A table summarising our proposals for each section of the Act is at Appendix A. We welcome comments on all of our proposals, whether they are discussed in the main body of this paper or appear only in Appendix A.

We also welcome comments on the questions that are posed throughout the paper and also listed on pages 83 and 86.



# Chapter 1

## The Commission's Review of Property Laws

### CONTENTS

The two-stage review of Victoria's property laws.....	8
The Property Law Act.....	8
Review of the Property Law Act.....	9
Guiding aims and principles .....	9
Preparation of this paper .....	9
Submissions .....	9
Structure of this paper .....	10



### THE TWO-STAGE REVIEW OF VICTORIA'S PROPERTY LAWS

- 1.1 In August 2009 the Attorney-General asked the commission to review Victoria's property laws. Announcing the review, he said that the first stage would focus on the *Property Law Act 1958* (Property Law Act) and Victoria's property laws relating to easements and covenants. The second stage of the review will examine the *Transfer of Land Act 1958* (Transfer of Land Act).<sup>1</sup>
- 1.2 The full terms of reference for the first stage of the review are set out on page 5. We expect the outcome of the first stage to influence the terms of reference for the second.
- 1.3 The first stage of the review has two components:
  - a review of the Property Law Act, for report by 30 September 2010; and
  - a review of laws relating to easements and covenants, for report by 17 December 2010.
- 1.4 We are undertaking each component separately. This consultation paper relates only to the review of the Property Law Act.
- 1.5 A consultation paper on the law of easements and covenants will be released in July of this year. We will consider in that paper the provisions in the Property Law Act dealing with easements and freehold covenants, and the statutory rights of user provisions found in some of the property law statutes in other jurisdictions.<sup>2</sup> We will also examine relevant provisions in related legislation, including the Transfer of Land Act, the *Subdivision Act 1988* and the *Planning and Environment Act 1987*.

### THE PROPERTY LAW ACT

- 1.6 Victoria's property law is contained in multiple statutes and fashioned by centuries of case law. The two most important property law statutes of general application are the Property Law Act and the Transfer of Land Act.
- 1.7 Victoria has two systems of land title: the Torrens System and the general law or old system based on registration of deeds. Both systems are superimposed upon the general body of English property law developed over many centuries and received into Australian law.
- 1.8 The Transfer of Land Act regulates land title and dealings in land under the Torrens System. The Property Law Act is of wider application. It contains some provisions which apply to personal property, and some which apply to land under both systems of title. It also contains provisions which apply solely to old system land.
- 1.9 The Property Law Act serves a residual function as a property law statute. It deals with basic principles of property law which find no place in other more specialised Acts, such as the *Residential Tenancies Act 1980*, the *Retail Leases Act 2003*, the *Settled Land Act 1958*, the *Sale of Land Act 1958*, the *Perpetuities and Accumulations Act 1968*, and the *Landlord and Tenant Act 1958*. This review does not extend to the other special Acts, except to the extent of any overlap or inconsistency with the Property Law Act.

## REVIEW OF THE PROPERTY LAW ACT

### GUIDING AIMS AND PRINCIPLES

1.10 To assist in developing and assessing proposals for reform of the Property Law Act, we have developed the following aims and principles:

#### AIMS

- Simplify the law and procedures.
- Modernise and update the law to serve current and emerging needs.
- Remove overlap and inconsistency with other laws.
- Harmonise Victorian law with the law of other Australian jurisdictions.
- Reduce the administrative and compliance burden on business and the not for profit sector.
- Improve access to justice and dispute resolution services.

#### PRINCIPLES

- Redundant provisions should be repealed.
- Redundant categories of property right should be abolished. Any subsisting rights should be preserved by a savings provision.
- Reform provisions enacted long ago to abolish discriminatory legal rules should be repealed. The repeal will not revive the abolished rules.<sup>3</sup>
- The relationship between the Property Law Act and other Acts, including the Transfer of Land Act, should be clarified.

These aims and principles are largely drawn from, and are consistent with, the terms of reference.

### PREPARATION OF THIS PAPER

1.12 In preparing this paper we have been greatly assisted by the work of Ms Jude Wallace who, in 1984, prepared for the Attorney-General a detailed commentary on the Property Law Act with suggestions for reform.<sup>4</sup>

1.13 We have also considered the results of reviews and reforms adopted in other jurisdictions. Because many provisions of the Property Law Act are faithful to the original text of English legislation, commentaries, case law and law reform reports from England and other jurisdictions that adopted English statutes are highly relevant.<sup>5</sup> England and Wales, Ireland, Northern Ireland, Ontario, New Zealand, Queensland, Tasmania, the Northern Territory and the Australian Capital Territory are among the jurisdictions which have in recent years undertaken major reviews of their property law statutes and implemented significant reforms.

1.14 In the preparation of this consultation paper, we have been assisted by a consultative committee of experts in property law. The committee has provided valuable guidance on the identification and evaluation of the issues and reform options.

### SUBMISSIONS

1.15 Our research so far is only the beginning. The purpose of this paper is to encourage submissions about the issues we discuss and the questions we raise. Those submissions will guide our further research and consultations. We will then prepare a final report on the Property Law Act for the Attorney-General by 30 September 2010. Once tabled in Parliament, the report will be made publicly available.

1.16 We invite comments on this paper by 30 June 2010. For information about how to make a submission and our policy on publication, see page 4.

1 Attorney-General, 'Review to look at updating archaic property laws' media release, 15 August 2009 [<http://www.premier.vic.gov.au/component/content/article/7808.html> accessed 22 March 2010].

2 See for example, *Property Law Act 1974* (Qld) s 180.

3 *Interpretation of Legislation Act 1984* (Vic) s 14.

4 Jude Wallace, *Review of the Victorian Property Law Act 1958* (1984); see also Jude Wallace, 'Property Law Reform in Australia' (1987) 61 (*Australian Law Journal* 174.

5 Wallace (1987), *ibid*.

### STRUCTURE OF THIS PAPER

- 1.17 We have focussed in this paper on major themes, to encourage discussion about substantive issues, but each chapter is underpinned by a section-by-section analysis of the Property Law Act that appears at Appendix A. We welcome comments on all of our proposals, whether examined in the body of the paper or only listed in Appendix A.
- 1.18 In Chapter 2, we discuss why the Property Law Act is due for review and we propose that it be replaced with a new Act. Chapter 3 addresses the long recognised need to reduce the number of legal estates which can be created in land. We suggest that they be limited to two: a fee simple estate and a leasehold estate. Legal life estates and legal future interests would be created only in equity, as beneficial interests under a trust.
- 1.19 However, we suggest in Chapter 4 that the current law for the disposition of land by trust in Victoria needs to be overhauled. The trust for sale provisions in the Property Law Act, in conjunction with the Settled Land Act, constitute a dual scheme that is complex and not well understood. We canvass a number of options for reform and form the view that the current scheme should be replaced with a single, unified and more flexible statutory trust. If this idea is supported, further discussion and consultation would be needed on the specific content of the new provisions. Such a broad examination is beyond the terms of reference of this review.
- 1.20 Chapters 5, 6 and 7 focus on various provisions that are outdated. In Chapter 5 we propose the abolition of special rules of inheritance that favour male lines, and provisions regarding rentcharges, which appear to be obsolete in Victoria. In Chapter 6, we question whether there is a need to retain a procedure for converting a lease which has been created for a term of at least 300 years, and has at least 200 years to run, to a fee simple estate. Chapter 7 addresses provisions which restrict the capacity of alien friends, minors, the mentally ill, and married women to hold or deal with property.
- 1.21 We discuss provisions which set out the formal requirements for the creation and assignment of interests in Chapter 8 and make a number of proposals to overcome inconsistencies and anomalies. In particular, we examine section 53, regarding dispositions for which writing is required, noting that a lower standard of formality applies to the declaration of a trust in land than to any other disposition to which that section applies. We propose a new scheme to overcome the problems identified.
- 1.22 We turn our attention in Chapter 9 to the discretion conferred on a court in situations concerning the return of a deposit. We suggest that the threshold test for the exercise of the discretion should be put on a statutory footing and broadened to include awarding only part of the deposit or damages.
- 1.23 In Chapter 10 we examine the rights of beneficiaries of a conveyance or other instrument to which they are not a party. We propose amending section 56 to allow for enforcement by a third party beneficiary who was not identified or in existence at the time the relevant instrument was made.
- 1.24 Further proposals to repeal or update outdated provisions are set out in Chapter 11, where we discuss the execution of judgment debts.
- 1.25 Finally, in Chapter 12 we propose that Victoria follow other jurisdictions in enacting a building encroachment relief provision and limiting the use of adverse possession to adjust boundaries. We also propose a relief provision for persons who improve land in the mistaken belief that the land is their own.

## Chapter 2

# Why Review the Property Law Act?

## CONTENTS

A new Property Law Act.....	12
Repeal and amendment of specific provisions .....	12
Savings provisions.....	13
Application of the Act to registered land.....	13
The Torrens System.....	13
Difficulties in determining the application of provisions to registered land .....	14
Proposal .....	15
Arrangement of provisions.....	16
Proposal .....	16
Provisions that we do not examine .....	16
Mortgages .....	16
Leases .....	17
Co-owned land and goods .....	17
Easements, covenants and statutory rights of user .....	18

## Why Review the Property Law Act?

### A NEW PROPERTY LAW ACT

- 2.1 The Attorney-General recently observed that the Property Law Act is 'one of the most complicated, outdated and archaic pieces of legislation in Victoria and it is crying out for review'.<sup>6</sup>
- 2.2 We see a clear need to enact a new Property Law Act. We will not be proposing draft legislation in this review but in this chapter we identify specific features that we think the new Act should have. In later chapters we discuss proposals to reform particular sections of the current Act.
- 2.3 The Property Law Act differs from most Acts in that there is no integrated statutory scheme. Each provision, or set of related provisions, has its own purpose, scope and legislative history. The Act comprises a miscellaneous collection of provisions enacted at various times and on diverse subjects. Some provisions have been reformed quite recently, such as the recently revised Part IV dealing with co-owned land and goods. Other provisions were originally enacted in the 19th and early 20th centuries to abrogate or simplify common law rules, and have been carried forward through to the current Act without review.
- 2.4 Many provisions in the Act are unintelligible to all but property law specialists. Their mode of drafting assumes specialist knowledge of legal terms and of the background principles of English common law and equity. The purpose, scope and meaning of some of the provisions is obscure or unsettled.
- 2.5 Our review has proceeded by examining each provision of the Act in turn, researching its scope, purpose, legislative history and judicial interpretation. We have provisionally assigned each provision to one of four action categories: repeal; retain with amendments of substance; retain and redraft for clarity; or retain in its present form. We have also considered whether the provision currently applies to Torrens System (registered) land and whether it should apply. Our proposals in relation to each provision are summarised in Appendix A. Where repeal or substantive amendment is proposed, the provision is also discussed in a chapter of this paper.
- 2.6 In this Chapter, we begin by discussing our proposals for repeal and substantive amendment. We then explain the current difficulties with determining which provisions of the Act apply to land registered under the Transfer of Land Act, and how we propose to provide clarification. Then follows some suggestions for improving the structure of the Act. Finally, we outline certain provisions of the Act which we do not examine in this stage of the review.
- 2.7 While we provisionally refer to 'a new Property Law Act', we invite suggestions as to a new title. In other jurisdictions, the residual property statute is variously called the Property Law Act, the Law of Property Act, the Conveyancing and Law of Property Act, the Conveyancing Act, and the Land and Conveyancing Law Reform Act. As can be seen, alternatives to 'Property Law Act' are generally longer. Some of the titles used in other jurisdictions are unsuited to an Act which deals with personal property as well as land.

#### **What do you think should be the title of the new Act?**

### REPEAL AND AMENDMENT OF SPECIFIC PROVISIONS

- 2.8 Many provisions of the Act have been carried forward from the *Property Law Act 1928*, which followed 'with extraordinary exactitude' a number of the reforms made by the English *Law of Property Act 1925*.<sup>7</sup> Little explanatory material survives to indicate the reasons for Victoria's selective adoption of elements of the 1925 English package of property law statutes. Some notes are found in Sir Leo Cussen's Explanatory Papers in the 1928 Consolidation of Victorian Statutes, but these typically provide only a general indication of the principles that guided the selection.<sup>8</sup> With the benefit of hindsight, it seems that some of the provisions adopted from England in 1928 were unnecessary,<sup>9</sup> while others have outlived their usefulness or become redundant due to changes in other laws.
- 2.9 We have identified over 60 sections, about one quarter of the sections in the Act, that we think could be repealed. Some of these sections are already redundant due to changes in other laws or practice since they were first enacted. Some will become redundant if our proposed reforms are adopted. Some are no longer in accordance with government policy or legislative standards (such as provisions which unfairly discriminate against female heirs or married women).

2.10 A second group of provisions are proposed to be retained with amendments. Generally the amendments are proposed to overcome deficiencies in the provisions which have been identified in case law, in commentaries, or in law reports or legislative reviews in other jurisdictions. In some instances we have recommended that provisions be amended to better accord with the established judicial interpretation,<sup>10</sup> or to avoid overlaps or inconsistencies with other statutes.

### SAVINGS PROVISIONS

- 2.11 We propose transitional arrangements for some of the provisions which are listed for repeal or amendment. In most cases it would be sufficient to rely on a broad savings provision, in similar (but simpler) terms to section 2(2) of the current Property Law Act.
- 2.12 Section 2(2) preserves the continuity of the status, operation and effect of dealings, titles, instruments declarations, things, rights etc done, created or arising under repealed legislation prior to the commencement of the current Act. A savings provision such as this in a new Property Law Act would be complemented by section 14 of the *Interpretation of Legislation Act 1984*, (Interpretation of Legislation Act) which preserves rights and liabilities accrued under a repealed Act or provision.
- 2.13 Some provisions of the Property Law Act carry forward old reform provisions from the 19th and 20th centuries, which repeal older statutes. In some cases, we have formed the view that the provisions have done their work and can now be repealed. Their removal would not revive the statutes repealed by the provisions.<sup>11</sup> We take a more cautious approach to provisions which abrogate or modify common law rules or presumptions of interpretation. While the provisions could be repealed with a savings provision to prevent revival of the old rule or presumption, in some cases their retention might serve a useful educative function.<sup>12</sup>

### APPLICATION OF THE ACT TO REGISTERED LAND

2.14 In our analysis of each provision, we have also sought to clarify the application to land registered under the Transfer of Land Act. Before doing so, it is first necessary to explain the conversion regime introduced by the *Transfer of Land (Single Register) Act 1998*, and to define our terms.

### THE TORRENS SYSTEM

- 2.15 Victoria still operates two systems of land title and conveyancing: the Torrens System and the old system (also known as the general law system). The Torrens system was introduced to Victoria in October 1862. Each registered parcel of Torrens System land is allocated a unique record or 'folio', on which the Registrar of Titles (Registrar) records the freehold ownership, leases, mortgages and other interests held in the land. Registration of an interest in land operates to confer title to the interest.
- 2.16 The Torrens System was intended to replace the old system of deeds registration, in which title to land was proved by showing a series of deeds of conveyance tracing back to the original Crown grant. Deeds could be registered in the office of the Registrar-General, but this simply provided evidence of title. Purchasers had to examine the deeds and obtain a legal opinion as to the quality of the title. Conveyancing transactions under the old system were slow and costly.
- 2.17 Since 1862, the Torrens System and the old system have operated in parallel. All private land granted by the Crown after October 1862 is Torrens title, but private land granted earlier remained under the old system unless converted to Torrens title. The legal rules for old system conveyancing were retained in the Property Law Act, while provisions applying only to land registered under the Torrens System are found in the Transfer of Land Act.

- 6 Attorney-General, *Property Review Commissioner Appointed* Media Release, 11 November 2009.
- 7 Wallace (1987), above n 4. The article outlines the history of reform of the Property Law Act and its predecessor statutes in Victoria.
- 8 Wallace (1987), above n 4, 3-4.
- 9 See for example, the commentary in Appendix A on section 186 (release of rights of pre-emption), and on sections 20 and 11 (settled terms in mortgages by demise).
- 10 See for example, the proposed amendment of section 56(1) to remove references to 'other property': Chapter 10.
- 11 *Interpretation of Legislation Act 1984* (Vic) s 14(1).
- 12 See for example, the discussion in Chapter 7 relating to the property rights of married women.



### THE 1998 CONVERSION REFORMS

- 2.18 By 1998, all but 35,000 parcels (representing 3% of private land in Victoria) were held on Torrens title.<sup>13</sup> To speed up the conversion of the remaining old system land, new measures were introduced by amendments to the Transfer of Land Act inserted by the *Transfer of Land (Single Register) Act 1998*. Since 1 January 1999, the deeds registry has been closed, and instruments affecting old system land can be registered only under the Transfer of Land Act.
- 2.19 Now, once a parcel of old system land is identified, the Registrar is required to create an ‘identified folio’ for it.<sup>14</sup> This is effectively a ‘tag’ for the parcel of land. While interests may be recorded, no person is registered as owner and no certificate of title issued for the land.<sup>15</sup> Subsisting interests in the land are not affected, and their effect and priority is determined by the rules of the old system.<sup>16</sup>
- 2.20 The lodgement for registration of a ‘specified dealing’<sup>17</sup> such as a conveyance of fee simple, mortgage or assignment of a possessory interest, or an application by a person entitled to lodge a specified dealing, requires the Registrar to create a ‘provisional folio’.<sup>18</sup> Subsisting interests in land held in a provisional folio are enforceable in accordance with the rules of the old system.<sup>19</sup> The provisional folio must contain a warning that the folio is subject to interests under the general law.<sup>20</sup> After 15 years, the warning is removed and the provisional folio is upgraded to an ordinary folio.<sup>21</sup>
- 2.21 An ordinary folio is ‘a folio of the Register that is not a provisional folio or an identified folio’.<sup>22</sup> The principle of ‘indefeasibility,’ as set out in sections 40–44 of the Transfer of Land Act, applies only to registered interests in land held in an ordinary folio. Indefeasibility means that the registered interest is conferred and validated by registration (except in case of fraud) and is held free of any other interests which are not recorded on the register or listed as exceptions in section 42 of the Transfer of Land Act.<sup>23</sup>

### A NOTE ON TERMINOLOGY

- 2.22 The Property Law Act distinguishes between land registered under the Torrens System and old system land by referring to Torrens System land as land ‘under the operation of the Transfer of Land Act’, and old system land as land which is not under the operation of that Act.
- 2.23 This distinction is no longer accurate, since old system land is deemed to be under the operation of the Transfer of Land Act once an identified or provisional folio has been created for it.<sup>24</sup> In this review we use the term ‘registered land’ to refer to land in ordinary folios. We use the term ‘old system land’ to refer to land which is not subject to sections 40–44 of the Transfer of Land Act, irrespective of whether it is land ‘under the operation of the Transfer of Land Act’ for which an identified or provisional folio has been created.

### DIFFICULTIES IN DETERMINING THE APPLICATION OF PROVISIONS TO REGISTERED LAND

- 2.24 The Property Law Act contains three types of provisions:
- provisions which apply to old system land and conveyancing as well as to registered land;
  - provisions which apply solely to old system land and conveyancing; and
  - provisions which apply to personal property as well as real property.
- 2.25 It is not always clear which type of provision a particular section is intended to be. It can be particularly difficult to determine whether a provision of the Property Law Act applies to registered land.



2.26 In some instances, the Property Law Act expressly states that a provision does not apply to land registered under the Transfer of Land Act. Otherwise, the Act gives no general guidance and it is necessary to turn to the Transfer of Land Act. Section 3 of the Transfer of Land Act provides as follows:

*(1) Except so far as is expressly enacted to the contrary no Act or rule of law, so far as inconsistent with this Act, shall apply or be deemed to apply to land under the operation of this Act; but save as aforesaid any Act or rule of law relating to land, unless otherwise expressly or by necessary implication provided by this or any other Act, shall apply to land under the operation of this Act whether expressed so to apply or not.*

*(2) Save as otherwise expressly provided, Part I of the Property Law Act 1958 does not apply to land which is under the operation of this Act.*

2.27 An assessment of inconsistency must be made for each provision in the Property Law Act, except for those provisions which are expressed not to apply to land under the operation of the Transfer of Land Act. Determining which provisions apply to registered land often requires research beyond the Act itself.

2.28 Some provisions of the Property Law Act do not apply to registered dealings because of inconsistency with the 'indefeasibility' provisions in sections 40–44 of the Transfer of Land Act, but do apply to unregistered dealings in registered land.

2.29 There are provisions of the Property Law Act which are expressed not to apply to registered land; provisions which are expressed to apply; provisions which are generally taken not to apply due to inconsistency with provisions of the Transfer of Land Act; provisions which are thought to be consistent with the Transfer of Land Act and to apply; and provisions which are in doubt due to conflicting views about their consistency.<sup>25</sup> There is at least one provision which is expressed to apply but arguably does not apply due to inconsistency with section 42 of the Transfer of Land Act.<sup>26</sup>

2.30 The ordering of provisions contributes to difficulties in determining the scope of their application. Sections or subsections which apply to registered land are interspersed with provisions that apply only to old system land.

2.31 Since all registered dealings in land are now under the Transfer of Land Act, provisions relating solely to old system conveyancing may be regarded as transitional. These provisions could be relegated to a schedule, leaving in the body of the Act only those provisions which have at least some application to registered land, or to personal property, or both.

2.32 As for the provisions left in the body of the Act, we think it best to retain the inconsistency rule in section 3 of the Transfer of Land Act. The alternative approach would be to declare, in relation to each provision, the extent of its application to registered land. To do so might unduly constrain the development of the law. For example, commentators used to assume that section 199, which limits the doctrine of constructive notice, had no application to registered land due to inconsistency with the 'notice' provision in section 43 of the Transfer of Land Act.<sup>27</sup> Section 199 has recently been held to apply to unregistered dealings in registered land.<sup>28</sup>

## PROPOSAL

2.33 We propose that all of the provisions in the Property Law Act which apply solely to old system land and dealings should be set out in a schedule to the Act. An application provision would state that:

- all provisions of this Act apply to land under the operation of the Transfer of Land Act, but subject to that Act; and
- the provisions in the new schedule do not apply to ordinary folio land under the operation of the Transfer of Land Act.

2.34 In Appendix B we set out our provisional proposals as to which of the existing provisions of the Property Law Act should be expressed not to apply to ordinary folio land under the operation of the Transfer of Land Act.

**Should the provisions listed in Appendix B be expressed not to apply to ordinary folio land?**

13 Hansard (Vic), Parliamentary Debates, Assembly, 14 May 1998, 1783 (The Hon M Tehan, Minister for Conservation and Land Management).

14 *Transfer of Land Act 1958* (Vic) s 26E.

15 *Transfer of Land Act 1958* (Vic) s 26F, 26G.

16 *Transfer of Land Act 1958* (Vic) s 26G, 26H, 26I.

17 As defined in *Transfer of Land Act 1958* (Vic) s 4(1).

18 *Transfer of Land Act 1958* (Vic) ss 22–24.

19 *Transfer of Land Act 1958* (Vic) s 25.

20 *Transfer of Land Act 1958* (Vic) s 25 and Part V of the Fifth Schedule.

21 *Transfer of Land Act 1958* (Vic) s 26C, 26D.

22 *Transfer of Land Act 1958* (Vic) s 4(1).

23 James Hogg, *Registration of Title to Land Throughout the Empire* (1920) 96, explaining that indefeasibility has a dual operation - both conferring title and giving priority over other interests.

24 *Transfer of Land Act 1958* (Vic) s 9(2).

25 Wallace (1984), above n 4, 14.

26 See discussion of section 153 in Chapter 6.

27 Stanley Robinson, *Property Law Act (Victoria)* (1992) 440; *Report on a Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing* QLRC Rep No 16 (1973) 117; *contra* Wallace (1984), above n 4, 288–289.

28 *IGA Distribution Pty Ltd v King & Taylor Pty Ltd and Anor* [2002] VSC 440, para [224]; *Commonwealth Bank of Australia Ltd v Platzer* [1997] 1 Qd R 266



### ARRANGEMENT OF PROVISIONS

- 2.35 The present ordering of the provisions in the Act has been constrained by a desire to retain the same section numbers as the source provisions in the English *Law of Property Act 1925*, to facilitate reference to English commentaries and cases. Over time, with the repeal of some sections and the addition of others, the retention of the English section numbering has led to an increasingly disjointed arrangement of provisions.
- 2.36 The Act would be clearer if the provisions were consistently arranged by subject matter. An example of where this does not occur is the grouping of sections 198–200 under the heading of ‘notices’. Each section uses the term ‘notice’, but in a quite different sense. Section 198 regulates the mode of giving any notice required by a provision of the Act. Section 199 restricts the equitable doctrine of notice, which affects the priority of an interest. Section 200 entitles the purchaser of old system land to require the grantor to provide a memorandum of an easement or restrictive covenant.<sup>29</sup>
- 2.37 Some groups of provisions in Part II of the Act are given a collective heading but are not divided into divisions or sub-divisions. For example, sections 176–79 are grouped under the heading ‘Corporations’. This arrangement is not consistent with current legislative drafting practice.

### PROPOSAL

- 2.38 We propose a new Property Law Act. In preparing the new Act, the nexus between the structure of Victorian and English property legislation should be broken so that the provisions in the new Act can be consistently and logically arranged by subject matter. We propose that the need to relate Victorian provisions to their English counterparts could be served by including a table in the new Act setting out correspondences between sections in the current Act and the new provisions.
- 2.39 We also propose that, where possible, provisions in the current Act that are carried forward to the new Act should be revised to:
- update and simplify the language;
  - clarify meanings that are in doubt; and
  - remove references to obsolete practices.

**What features do you think a new Property Law Act should have, to make it easier to read, navigate and understand?**

### PROVISIONS THAT WE DO NOT EXAMINE

- 2.40 We have excluded a number of provisions from our review of the Property Law Act because they either have been reviewed recently or cannot usefully be reviewed in isolation from other legislation.

### MORTGAGES

- 2.41 The provisions regulating mortgages of land under the operation of the Transfer of Land Act are split between that Act and the Property Law Act.
- 2.42 Division 9 of Part IV of the Transfer of Land Act sets out statutory terms implied into mortgages of land under the operation of that Act, and gives statutory remedies to mortgagees. The statutory remedies are not available to unregistered mortgagees.<sup>30</sup> A mortgage of old system title which has prompted the creation of an ordinary or provisional folio for the land is deemed to be a registered mortgage under section 74 of the Transfer of Land Act.<sup>31</sup>
- 2.43 Division 3 of Part II of the Property Law Act sets out statutory terms for mortgages made by deed. Section 86 specifies that, with some exceptions, Division 3 does not apply to ‘mortgages under the *Transfer of Land Act 1958* effected by instruments of mortgage under that Act’. Commentators have argued that these words establish an exception only for mortgages which are actually registered under the Transfer of Land Act.<sup>32</sup> On this view, unregistered mortgages of Torrens System land made by deed are subject to all of the provisions in Division 3 of Part II of the Property Law Act.<sup>33</sup>

- 2.44 An informal mortgage can be created over both old system land and Torrens System land without a deed if there is a partly performed contract for the creation of a mortgage. Subject to the Consumer Credit Code,<sup>34</sup> an equitable mortgage can arise from a purely oral transaction in which old system title deeds or a certificate of title is deposited with a lender and loan monies are advanced. Where an equitable mortgage is created without a deed, it appears that the statutory terms in Division 3 of Part II of the Property Law Act do not apply.
- 2.45 There are areas of uncertainty in the law arising from the failure of both Acts to provide for unregistered mortgages. It would be desirable to have a single set of provisions dealing systematically with all mortgages, both registered and unregistered, over Torrens System and old system land.<sup>35</sup>
- 2.46 Certain provisions of the Act relating to mortgages purport to apply to charges or liens over personal property.<sup>36</sup> These provisions need to be reviewed for consistency with the *Personal Property Securities Act 2009* (Cth) (Personal Property Securities Act). By the enactment of the *Personal Property Securities (Commonwealth Powers) Act 2009*, Victoria referred to the Commonwealth powers to legislate with respect to security interests in personal property, subject to specified reservations. The Act did not repeal or modify existing provisions of Victorian statutes dealing with the matters the subject of the reference of powers.
- 2.47 The Personal Property Securities Act is not intended to exclude or limit the operation of state law to the extent that it is capable of operating concurrently with the Act.<sup>37</sup> Provisions of the Property Law Act must be individually assessed to ascertain if there is direct inconsistency with the Commonwealth Act.
- 2.48 As so much of the law of mortgages lies outside the Property Law Act, we will recommend in our final report that the commission be given a further reference to examine the subject of mortgages as a whole.

## LEASES

- 2.49 Victoria has two Acts which provide in detail for specific categories of leasehold interests: the *Residential Tenancies Act 1980* and the *Retail Leases Act 2003*.
- 2.50 Provisions relating to leases generally are distributed among three Acts: the Transfer of Land Act deals with registered leases in Torrens System land; and the *Landlord and Tenant Act 1958* and Property Law Act each contain provisions of general application, dealing with discrete areas of the law of leases. Common law and equitable doctrines also play a major role.
- 2.51 While many provisions of the Property Law Act dealing with leases need to be amended or repealed, the benefits of piecemeal reform are limited. For this reason we will recommend in our final report that the commission be given a further reference to examine the law of leases as a whole.

## CO-OWNED LAND AND GOODS

- 2.52 In 2001 the commission reviewed Part IV of the Property Law Act, concerning co-owned land and goods, with a view to introducing simpler and easier processes for the resolution of disputes between co-owners and the sale or physical division of co-owned land. The final report, *Disputes between Co-owners*, was tabled in Parliament on 24 April 2002.
- 2.53 Chapter 4 of that report set out recommendations as to the resolution of disputes between co-owners and the termination of co-ownership of land or goods by an order for sale or division. Part IV of the Property Law Act was substantially amended in 2005 to give effect to these recommendations.
- 2.54 Recommendations relating to the creation of tenancies in common and joint tenancies (Chapter 2), and unilateral conversion of a joint tenancy into a tenancy in common by severance (Chapter 3), have not yet been implemented.
- 2.55 Recommendations 1–8 in Chapter 2 dealt with presumptions as to whether a co ownership interest in land or goods was intended to be a joint tenancy or a tenancy in common. The recommendations included replacement of the obscure provisions in sections 30(2) and 33(4) of the Transfer of Land Act with clear principles. They were also directed to reducing the inconsistency between legal and equitable presumptions.

- 29 We propose that this section be repealed.
- 30 *Ryan v O'Sullivan* [1956] VLR 99; Edward Sykes and Sally Walker, *The Law of Securities* (5th ed) (1993) 317.
- 31 *Transfer of Land Act 1958* (Vic) s 26M.
- 32 Adrian Bradbrook et al, *Australian Real Property Law* (4th ed) (2007) para [9.170]; Robinson (1992), above n 27, 191.
- 33 *Ibid* paras [9.170], [9.285].
- 34 The Consumer Credit Code as set out in the appendix to the Consumer Credit (Queensland) Act still applies in Victoria by force of the *Consumer Credit (Victoria) Act 1995* s 5. Section 38 prescribes writing formalities for the creation of mortgages falling within section 8 of the Code. An equivalent provision is made in para 42 of the National Consumer Code, which is a schedule to the Schedule 1 of the *National Consumer Credit Protection Act 2009* (Cth). Section 20(1) of the *Credit (Commonwealth Powers) Act 2010* (Vic) provides for the repeal of Part 2 of the *Consumer Credit (Victoria) Act 1995* on proclamation.
- 35 Queensland Law Reform Commission Report 16 (1973), above n 27, 58.
- 36 See definition of 'mortgage' in section 18(1).
- 37 *Personal Property Securities Act 2009* (Cth) s 254.



- 2.56 Recommendations 11–27 in Chapter 3 dealt with unilateral severance of a joint tenancy by notice. The central recommendation (recommendation 11) was that a provision be inserted into the Transfer of Land Act enabling a joint tenancy to be converted into a tenancy in common by registration of notice of severance lodged by one or more of the joint tenants. Recommendations 12–22 dealt with the procedure for the notice of severance and its effects on other interest holders and the resolution of disputes.
- 2.57 Recommendation 24 proposed that a provision be inserted into the Property Law Act allowing joint tenancies of goods to be severed by written notice. Recommendations 25–27 dealt with the form and service of notice and the resolution of disputes.
- 2.58 The commission also recommended that a provision be inserted into the Property Law Act stating that, in the absence of a contrary intention, parties with a joint tenancy who divorce are deemed to have severed the joint tenancy (recommendation 23).
- 2.59 The commission affirms the above recommendations in its earlier report and will not re-examine the area in this review.

### **EASEMENTS, COVENANTS AND STATUTORY RIGHTS OF USER.**

- 2.60 We will consider the general law of easements, freehold covenants and statutory rights of user<sup>38</sup> in a further consultation paper.

38 Statutory rights of user are found in some other Australian property law statutes, eg *Property Law Act 1974* (Qld) s 180.

# Chapter 3

## Legal Estates in Freehold Land

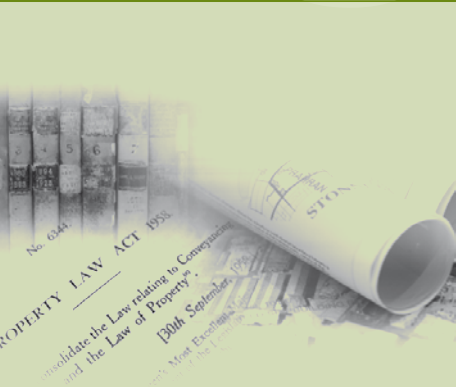
### CONTENTS

Overview of legal estates in Victoria .....	20
Impetus for reform .....	20
Legal life estates and future interests.....	21
Reform in other jurisdictions .....	22
Proposal .....	22
Possible objections to the Proposal .....	22
Modified fees .....	24
Modified fees in law and equity.....	24
Distinguishing between determinable fees and conditional fees .....	25
Proposal .....	25
Estates tail .....	25
Options for reform .....	26

No. 6344.  
**PROPERTY LAW ACT 1958.**

Act to consolidate the Law relating to Conveyancing  
and the Law of Property.  
[30th September, 1958.]

the Queen's Most Excellent Majesty  
by and consent of the Legislature  
of Victoria in the year  
1958.



### OVERVIEW OF LEGAL ESTATES IN VICTORIA

- 3.1 The concept of freehold land originates from the old English system of land holding known as the doctrine of feudal tenure, a form of which Australia has inherited.<sup>39</sup> The ownership of land is defined by reference to how land is held (tenure) and to the duration of ownership (estate). Australia has received from English common law a scheme of legal estates and interests in land. It is important to note that native title stands outside the categories of estates and is not affected by any proposals in this consultation paper.
- 3.2 The closest estate to absolute ownership is the fee simple absolute. It is an unconditional freehold estate in land for an unlimited duration. The other legal estates in freehold land that can be created in Victoria are:
  - life estate and legal future interest (including remainder, reversion, and right of entry and of re-entry); and
  - modified fee simple (modified fee);
- 3.3 Another legal estate that can be created, a term of years absolute, is a leasehold estate. The main difference between a freehold estate and a leasehold estate is that the duration of a leasehold estate must be 'certain or capable of being rendered certain'.<sup>40</sup>
- 3.4 Until 1886, it was also possible to create a fee tail estate, which is a freehold estate limited to the (traditionally male) descendants of a grantor. Although it has not been possible to create an estate in fee tail since then,<sup>41</sup> Part VI of the Property Law Act still applies to any fee tail estate created before 1886 that may still exist.

### IMPETUS FOR REFORM

- 3.5 Jude Wallace recommended in her 1984 review of the Property Law Act that the number of legal estates which can be created in relation to land in Victoria should be reduced.<sup>42</sup> The reduction of legal estates is a major and overdue initiative to simplify and modernise the law and abolish complex and outdated common law rules.
- 3.6 The number of legal estates has been reduced in Queensland<sup>43</sup> and the Northern Territory.<sup>44</sup> Internationally, this issue has been the subject of recent sweeping reform in Ireland<sup>45</sup>, reform in New Zealand,<sup>46</sup> and extensive reform discussion in various other jurisdictions including Northern Ireland<sup>47</sup> and Ontario.<sup>48</sup>
- 3.7 Victoria had the opportunity to make similar reforms when the *Property Law Act 1928* was drafted. England had introduced major reforms to property law in 1925, and many of these reforms were adopted by Victoria in the *Property Law Act 1928* and re-enacted in the current Property Law Act.
- 3.8 One of the English reforms that Victoria did not adopt was the reduction of legal estates. Since 1925, life estates and future interests such as reversions and remainders have been able to exist in England and Wales only in equity, behind a trust.
- 3.9 Sir Leo Cussen reviewed the 1925 English property legislation, to determine which provisions should be adopted in Victoria's 1928 consolidation of the Property Law Act. The prevailing view in Australia at the time was that the system of conveyancing would be better simplified by extending and improving the system of registered title rather than by reforming existing common law estates. Sir Leo Cussen rejected the reduction of legal estates on the grounds that the change would be too drastic and too technical for parliamentary discussion.<sup>49</sup>
- 3.10 In this Chapter we propose that Victoria should now reduce the number of legal estates to just two: the fee simple estate and the leasehold estate. These would be the only estates that would be registrable under the Transfer of Land Act. This proposal is based upon reforms already enacted in Queensland,<sup>50</sup> the Northern Territory,<sup>51</sup> New Zealand,<sup>52</sup> England and Wales<sup>53</sup> and Ireland.<sup>54</sup> In Chapter 4, we will explain how the reduction of estates will simplify conveyancing by removing the need to retain the *Settled Land Act 1958* (Settled Land Act) and the separate trust for sale provisions in the Property Law Act, and by enabling the repeal of other complex rules which apply only to legal estates.

## LEGAL LIFE ESTATES AND FUTURE INTERESTS

- 3.11 The life estate is an estate in land limited in duration to the life of the grantee or for the life of another person (an estate *pur autre vie*). The holder of a life estate is known as a 'life tenant'. Historically, as the holder of a limited estate, a life tenant could not convey an interest greater than the one held. As explained below, the settled land legislation introduced in the 19th century provided extended powers of disposition to the life tenant.
- 3.12 A future interest is an interest granting rights in land to be enjoyed at some time in the future. Future interests include: the interest remaining after the termination of an intermediate interest such as a life estate (a remainder); the residue of the estate owned by the grantor after an intermediate interest has been granted (a reversion); or the right of the grantor to re-enter the land after the condition of the grant of land has been breached (a right of entry or re-entry).
- 3.13 Future interests can be created in both law and equity, and can be either vested or contingent.
- Vested interests are existing property rights which will vest in possession when the intermediate interest (for example, a life estate) granted comes to an end. An example of a vested interest is 'to A for life, remainder to B'. B holds a current interest in land which will vest in possession on A's death.
  - Contingent interests exist where there is an element of uncertainty as to when and in whom they will vest in possession, or which vest upon satisfaction of a condition precedent. An example of a contingent interest is 'to A for life, remainder to B when he marries C'. B does not hold an interest in land unless and until he marries C. The marriage to C operates as a condition precedent to the interest vesting in B. B's interest is a contingent remainder.
- 3.14 Dispositions which create successive estates at law are 'settlements' within the meaning of the Settled Land Act, and are subject to that Act. The Act has long been considered to operate unsatisfactorily.<sup>55</sup> The difficulties associated with the Settled Land Act are discussed in further detail in Chapter 4.
- 3.15 Legal settlements which create future interests are subject to the common law contingent remainder rules, as modified in Victoria by sections 191–193 of the Property Law Act. These arcane rules were originally created to facilitate the collection of feudal dues by avoiding a gap in seisin (ownership), and to prevent the creation of successive interests too far into the future. The rules do not apply to successive interests created at equity, under a trust. As the trustees are continuously vested, there is no gap in ownership.<sup>56</sup>
- 3.16 To avoid the complexities of the Settled Land Act and the contingent remainder rules, it is standard practice for conveyancers to create settlements in equity, behind a trust. It would be most unusual for an experienced practitioner to recommend the creation of a legal settlement. The abolition of legal future interests would remove a method used only by the ill advised.<sup>57</sup>

- 39 See Bradbrook (2007), above n 32, paras [2.20–24] for discussion of the development of the doctrine of tenure in Australia in light of the decision in *Mabo v Queensland (No 2)* (1992)175 CLR 1.
- 40 Bradbrook (2007), above n 32, para [2.135].
- 41 *Transfer of Land Statute Amendment Act 1885* (Vic).
- 42 Wallace (1984), above n 4, 30.
- 43 *Property Law Act 1974* (Qld) s 19.
- 44 *Law of Property Act 2000 No. 1* (NT) s 18.
- 45 *Land and Conveyancing Law Reform Act 2009* (Ir).
- 46 *Property Law Act 2007* (NZ).
- 47 Northern Ireland Law Commission, *Land Law Consultation Paper No 2* (2009).
- 48 Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (1996).
- 49 Wallace (1984), above n 4 citing the Honourable Sir Leo Cussen, Report from the Joint Statute Law Revision Committee of the Legislative Council and the Legislative Assembly on The Consolidation of the Laws, together with Minutes of Evidence and Appendix (Melbourne, Government Printer 13 December 1928) p 5.
- 50 *Property Law Act 1974* (Qld) s 19.
- 51 *Law of Property Act 2000 No. 1* (NT) s 18.
- 52 *Property Law Act 2007* (NZ) s 58.
- 53 *Law of Property Act 1925* (Eng) s 1.
- 54 *Land and Conveyancing Law Reform Act 2009* (Ir) s 11.
- 55 Richard Eggleston, 'Some Suggestions for Law Reform' (1949) 23(*Australian Law Journal* 222.
- 56 The creation of future interests both legal and equitable are still subject to the rule against perpetuities as modified by the *Perpetuities and Accumulations Act 1968* (Vic). For an overview of this legislation and proposals for its reform, see Scrutiny of Acts and Regulations Committee, Review of Redundant and Unclear Legislation *Report concerning the Maintenance Act 1965, Marriage Act 1958 and Perpetuities and Accumulations Act 1968* November 2004, 13.
- 57 This would also allow the repeal of sections 191–193 of the *Property Law Act 1958*, as it would have no application to future interests created under a trust mechanism.



### REFORM IN OTHER JURISDICTIONS

- 3.17 The scope of reform of this area varies throughout different jurisdictions. Some Australian jurisdictions, including Victoria, have adopted 'remedial legislation'<sup>58</sup> to modify the common law contingent remainder rules.<sup>59</sup> Others have taken the further step of abolishing legal future interests and the contingent remainder rules altogether.
- 3.18 In Queensland, the *Property Law Act 1974* now provides that a future interest in land shall take effect as an equitable and not a legal interest.<sup>60</sup> This reflects the 1925 English reforms.<sup>61</sup> The creation of future interests as equitable interests can also be seen in the Northern Territory<sup>62</sup>, Ireland<sup>63</sup> and Manitoba.<sup>64</sup> Similar reforms have been recommended for Northern Ireland<sup>65</sup> and Ontario.<sup>66</sup>

### PROPOSAL

- 3.19 We propose that successive interests in land should be able to be created only in equity, as beneficial interests under a trust. This proposal is integrally linked with the proposal in Chapter 4 to introduce a single statutory trust to replace both the Settled Land Act and the trust for sale provisions in the Property Law Act.
- 3.20 The reason for the proposal is that it would bring the law into line with long-established conveyancing practice, and enable the repeal of archaic and complex laws which are retained only for legal settlements.

### POSSIBLE OBJECTIONS TO THE PROPOSAL

#### PROTECTION FOR HOLDERS OF UNREGISTERED INTERESTS

- 3.21 A possible objection to the abolition of the legal life estate and legal future interests is that the position of the holders of successive interests in registered land will be less well protected than they are as legal estates under a settlement at law. Where the settlement confers a legal life estate and remainder estate in registered land, the life tenant and remainderman are entitled to be registered as owners of their respective estates in land. As registered proprietors, they take an indefeasible title under section 42(1) of the Transfer of Land Act. Under the proposal, the holders of successive estates under the settlement will only be able to hold beneficial interests under a trust.
- 3.22 The Transfer of Land Act provides a much lower standard of protection for trust beneficiaries. Neither their interests, nor the trusts themselves, are capable of registration. Section 37 provides that the Registrar 'shall not record any notice of the trust in the register'. The Torrens System is premised on the idea that purchasers should be able to deal with the trustees as if they are absolute owners, and not be concerned to enquire whether the trustees are acting in breach of trust.<sup>67</sup> Section 43 of the Transfer of Land Act provides that the purchaser is not affected by notice of a trust or equitable interest.<sup>68</sup> Only the fraud of the purchaser or the purchaser's agent will prevent a purchaser obtaining registered title free of any prior beneficial interest. Beneficiaries who suffer loss will have no claim under the compensation provisions.<sup>69</sup>
- 3.23 Although trusts are to be kept off the register and behind a 'curtain',<sup>70</sup> it was never intended that beneficiaries would be left unprotected. The Transfer of Land Act and its predecessors contained a set of provisions designed to empower the Registrar to prevent the registration of dealings by trustees to ensure that they were not in breach of trust. Section 37 provided that a copy of the trust deed could be deposited with the Registrar, and the Registrar was empowered 'to protect in any way he deems advisable the rights of persons for the time being beneficially interested thereunder'.
- 3.24 The Registrar was also empowered by section 106(a) of the Transfer of Land Act to lodge a Queen's caveat on behalf of any minor, person of unsound mind or person absent from Victoria, to prevent any dealing with land belonging to the person or to prevent any fraud or improper dealing.



- 3.25 It was for many years the practice in Victoria, as in other States, for experienced legal examiners in the Registry to examine dealings by trustees and to refuse to register any that were found to be in breach of trust. In *Templeton v The Leviathan Pty Ltd*<sup>71</sup> the High Court of Australia unanimously held that the Registrar for Victoria was 'thoroughly justified'<sup>72</sup> in refusing to register a second mortgage by trustees that was in breach of trust. Knox CJ said that it was the duty of the Registrar not to register a dealing which, to the knowledge of the Registrar, was in breach of trust or in any way improper.<sup>73</sup>
- 3.26 Notwithstanding the benefits of Registry examination as exemplified in *Templeton v The Leviathan Pty Ltd*, leading academic commentators Douglas Whalan and Robert Stein have argued that trust beneficiaries are inadequately protected against being overreached by improper dealings by the trustees.<sup>74</sup> In 1974 the Queensland Law Reform Commission noted the limitations of the legislative machinery for protection of trust beneficiaries, while commending the practice of the Queensland Titles Office in having a senior examiner scrutinise trustee dealings when the office is in possession of the trust deed.<sup>75</sup>
- 3.27 The Torrens System depends on vigilance by the Registrar rather than inquiries by purchasers to protect trust beneficiaries. In some cases the impropriety of a dealing will be apparent to an examiner without the need to refer to a trust deed.<sup>76</sup> In other cases, the impropriety will be apparent only when the dealing is scrutinised against the terms of the trust deed.
- 3.28 Registry examiners will no longer have access to trust deeds when scrutinising dealings by trustees. Section 22(2) of the *Land Legislation Amendment Act 2009*, which comes into operation in May 2010, removes from section 37 the traditional provision that allows trust deeds to be deposited with the Registrar.
- 3.29 The 2009 legislation also amended section 106(a) to alter the nature of the interest in land that can be protected by a Queen's caveat lodged on behalf of a minor or person of unsound mind. The amendment provides that the caveat may be lodged in respect of land *registered in the name of*<sup>77</sup> such a person. The previous wording referred more generally to land 'belonging or supposed to belong to such a person'.
- 3.30 The effect of the amendments is to weaken further the legislative protections for trust beneficiaries. Beneficiaries can lodge a caveat against dealings under section 89 of the Transfer of Land Act, but this requires that they are aware of their interest and have the capacity to lodge a caveat. Whalan comments that:
- [N]one of the present methods of protecting trusts of Torrens system land is adequate to give full protection to beneficiaries; for instance, it must be a rare beneficiary indeed, who is a minor, who knows of the existence of the caveat system.*<sup>78</sup>
- 3.31 The adequacy of the protection for beneficiaries of trusts of registered land is an issue of wider application which lies outside the present terms of reference. Its present relevance is that the reduction of legal estates would relegate some interest holders from their currently well-protected status of registered proprietor to the less secure status of beneficiary under a trust.
- 3.32 Although the full effect of the 2009 amendments are yet to be felt, the weaker protection for holders of beneficial interests appears not to have affected the popularity of settlements behind a trust. Settlers who enjoy the benefit of expert advice overwhelmingly elect to establish their settlements by means of a trust.
- 58 Queensland Law Reform Commission Report 16 (1973), above n 27, 25.
- 59 *Property Law Act 1958* (Vic) s 191–193; *Conveyancing Act 1919* (NSW) s 16; *Property Law Act 1969* (WA) s 26; *Law of Property Act 1936* (SA) s 25.
- 60 *Property Law Act 1974* (Qld) s 30.
- 61 *Law of Property Act 1925* (Eng) s 4(1).
- 62 *Law of Property Act 2000 No. 1* (NT) s 30.
- 63 *Land and Conveyancing Law Reform Act 2009* (Ir) s 15 & 16.
- 64 *The Perpetuities and Accumulations Act 1983* (Manitoba) s 4(1).
- 65 Northern Ireland Law Commission (2009), above n 47.
- 66 Ontario Law Reform Commission (1996), above n 48.
- 67 Douglas Whalan, *The Torrens System in Australia* (1982) 210–11.
- 68 *Transfer of Land Act 1958* (Vic) ss 42–43.
- 69 *Transfer of Land Act 1958* (Vic) s 109(2)(a).
- 70 Ruoff called this 'the curtain principle': Theodore Ruoff, *An Englishman looks at the Torrens System* (1957) 11.
- 71 *Templeton v The Leviathan Pty Ltd* (1921) 30 CLR 34.
- 72 *Templeton v The Leviathan Pty Ltd* (1921) 30 CLR 34, 75 Starke J.
- 73 *Templeton v The Leviathan Pty Ltd* (1921) 30 CLR 34, 53.
- 74 Douglas Whalan, 'Partial Restoration of the integrity of the Torrens System Register: Notation of Trusts and Land Use Planning and Control' (1970) 4(*New Zealand Universities Law Review* 1); Robert Stein, 'Torrens Title: A Case for the Registration of Trusts in New South Wales' (1980–82) 9(*Sydney Law Review* 605.
- 75 Queensland Law Reform Commission, *Working Paper of the Queensland Law Reform Commission on a Bill in Respect of an Act to Reform and Consolidate the Real Property Acts of Queensland* WP 32 (1989), 158.
- 76 This was the case in *Templeton v The Leviathan Pty Ltd*, where the trustees were purporting to grant a second mortgage which was also a contributory mortgage.
- 77 Inserted by section 59(1) *Land Legislation Amendment Act 2009* (Vic) emphasis added.
- 78 Whalan (1982), above n 67, 122.



### LOSS OF ABILITY TO GRANT A MORTGAGE

- 3.33 There is some advantage in retaining the current law in that a life tenant holds a legal title which he or she could potentially use as security for a mortgage loan. A life tenant can, with the consent of the trustees or the court, raise money by mortgaging the land for the purposes permitted by section 71 of the Settled Land Act. If the legal life estate is abolished, lending institutions may be unwilling to lend to the life-tenant who can offer only an equitable interest as security.
- 3.34 The impairment of the life tenant's power to mortgage the land may not be a significant consideration in practice. The power is limited to purposes which preserve the capital assets of the trust, and the mortgage advance is deemed to be capital monies of the settlement.<sup>79</sup> If the life interest is created by a statutory trust (as we discuss in Chapter 4), it will be open to the settlor to confer powers on the trustees to raise funds by loan for broader purposes.<sup>80</sup>

#### Should it remain possible to create legal life estates and legal future interests?

### MODIFIED FEES

- 3.35 A class of freehold interests known as modified fee simple estates (modified fees) also exist at law. These interests fall into the categories of determinable fee, and fee simple subject to a right of entry or re-entry (conditional fee).
- 3.36 An example of a determinable fee is a gift 'to A in fee simple so long as the University of Melbourne functions as a University'. In this instance the grantor retains a possibility of reverter and the estate will revert to him or her on the occurrence of the event. As Ziff puts it, 'the determining event is like a fence post that demarcates the durational extent of the entitlement'.<sup>81</sup>
- 3.37 An example of a conditional fee is a gift 'to A in fee simple on the condition that he does not gamble'. Here, the grantor retains a right of re-entry which may be exercised at the grantor's option on the happening of the event. The condition essentially brings the estate to an end and is like a 'dark cloud that hovers over the fee'.<sup>82</sup>
- 3.38 Dispositions of land which create a determinable fee are deemed to be 'settlements' and are subject to the Settled Land Act, unless created under a trust for sale.<sup>83</sup> A conditional fee, being a fee simple subject to a right of entry or re-entry, does not fall within the definition of 'settlement'<sup>84</sup> and therefore does not attract the Settled Land Act.

### MODIFIED FEES IN LAW AND EQUITY

- 3.39 In Victoria, both kinds of fees can be created as legal estates or as equitable estates under a trust. If an aim of reform is the reduction of legal estates in land, the question is how to treat these modified fees. There are only two options:
1. recognise modified fee simples alongside the fee simple absolute; or
  2. permit the creation of modified fees in equity only.
- 3.40 The first option has been adopted in Ireland in recent land law reform.<sup>85</sup> The view of the Irish Law Reform Commission was that conditional and determinable fees generally do not create a clear succession of interests.<sup>86</sup> This approach recognises the remoteness of the limitation on the fee simple and that the grantee is 'very close to being the full owner of the land'.<sup>87</sup> The remote possibility of a succession of interests is not substantial enough to justify the imposition of settled land provisions or trust law in every case.
- 3.41 The second option, of permitting creation of modified fees only in equity, would allow this class of interests to be brought within the proposed statutory trust (see Chapter 4) and removed entirely from the Settled Land Act. This approach was favoured by the Ontario Law Reform Commission, which proposed that determinable and conditional fees be deemed to be successive interests and held on a statutory trust.<sup>88</sup>
- 3.42 Wallace also commented that the creation of legal limited fees is rarely attempted in Victoria and that 'little practical opportunity would be lost and major simplification achieved if limited fees and their rights of reversion and re-entry were converted into equitable interests'.<sup>89</sup>
- 3.43 The English position distinguishes between determinable and conditional fees. Determinable fees can be created only at equity, whilst conditional fees can exist both in law and equity.

#### Should determinable and conditional fees be created only in equity?

## DISTINGUISHING BETWEEN DETERMINABLE FEES AND CONDITIONAL FEES

- 3.44 The distinction between a determinable fee and a conditional fee appears to be a fine one, but confusing the two has important consequences.
- 3.45 First, if a determinable fee is found to be invalid due, for example, to the determining event being contrary to public policy, then the entire gift fails. By contrast, invalidity of the condition subsequent attaching to a conditional fee results in severance of the condition and the gift being made absolute. A minor drafting error or misinterpretation can therefore frustrate the grantor's intentions.
- 3.46 Secondly, while a disposition subject to a condition subsequent may be void on public policy grounds, the same disposition, if drafted as a determinable fee, would be effective. This is demonstrated by the following example from Professor Glanville Williams as cited by the Ontario Law Reform Commission:<sup>90</sup>
- If A gives property on trust to B, 'but if B marries then to C', the gift to C is struck out because it tends to induce B to remain unmarried, and the procreation of legitimate children is regarded as a public interest. Thus on this form B will take absolutely. But if the words used were 'on trust for B until he marries and thenceforth to C', the gift would be valid and B would lose the property if he were to marry.*
- 3.47 The argument made is that if a disposition is found to be against public policy interests, this should be the case regardless of how it is expressed.<sup>91</sup>
- 3.48 The above considerations prompted the Ontario Law Reform Commission to propose that the distinction between limited fees should be abolished so that, if created, a determinable fee will be deemed a conditional fee.<sup>92</sup> This is a possible option for the treatment of modified fees in Victorian property law.
- 3.49 A variation of this option would be to continue to recognise both determinable and conditional fees, but to introduce a statutory discretionary relief provision. The effect would be that if a court finds a determining event is invalid, it would have a discretion to deem the determinable fee to be a conditional fee. The invalid condition could then be severed so that the conditional fee simple becomes a fee simple absolute.

## PROPOSAL

- 3.50 We propose that determinable fees be converted to conditional fees because this option appears to offer a comprehensive solution to both the invalidity issue and the question of whether they should be created only in equity.
- 3.51 First, determinable fees would no longer fail due to the invalidity of the determining event. Secondly, if all modified fees are deemed to be conditional fees, the need for a trust or Settled Land Act mechanism to enforce the succession becomes unnecessary. Conditional fees, unlike determinable fees, have the right of re-entry which is a clear mechanism for termination and succession. The right of re-entry on the happening of the conditional event is a positive right which can be exercised by a defined person to terminate the prior interest.

### Should determinable fees be converted to conditional fees?

## ESTATES TAIL

- 3.52 A fee tail estate is a freehold estate limited to the (traditionally, male) descendants of a grantor, an example being 'to A and the heirs of his body'. This estate was used as a method of keeping property in the same family for generations. The estate is also known as an 'entailed estate'.
- 3.53 It has not been possible to create an estate in fee tail in Victoria since 1886.<sup>93</sup> Section 249 of the Property Law Act states that, if such an estate is created, it is deemed to give the grantee an estate in fee simple. Whether created by limitation or by trust, an entailed interest is a 'settlement' which attracts the provisions of the Settled Land Act.<sup>94</sup>
- 3.54 The fee tail has also been abolished in New South Wales,<sup>95</sup> Queensland,<sup>96</sup> the Northern Territory<sup>97</sup> and Western Australia.<sup>98</sup> These jurisdictions went further than Victoria and actually converted existing fee tails to fee simple estates. Victoria did not go this extra step, and a fee tail created before 1886 can still exist in this State, subject to provisions which allow the tenant for life to 'bar the entail' and convert it into a fee simple estate.<sup>99</sup> In 1984 Wallace reported that there were two entailed estates in registered land known to exist in Victoria.<sup>100</sup>

- 79 *Settled Land Act 1958* (Vic) s 71.
- 80 *Settled Land Act 1958* (Vic) s 109.
- 81 Bruce Ziff, *Principles of Property Law* (4th ed) (2006) 223.
- 82 *Ibid* 222.
- 83 *Settled Land Act 1958* (Vic) s 8(1)(b)(iii).
- 84 *Settled Land Act 1958* (Vic) s 8(1); E Wolstenholme, *Wolstenholme and Cherry's Conveyancing Statutes* (13th ed) (1972) 23.
- 85 *Land and Conveyancing Law Reform Act* (2009) s 11(2).
- 86 Law Reform Commission [Ireland], *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* CP No 34 (2004) 43.
- 87 Law Reform Commission [Ireland], *Report on Reform and Modernisation of Land Law and Conveyancing Law* No 75 (2005), 47.
- 88 Ontario Law Reform Commission (1996), above n 48, 54.
- 89 Wallace (1984), above n 4, 36.
- 90 Ontario Law Reform Commission (1996), above n 48, 63, citing Professor Glanville Williams, *Language and the Law* (1945) 61 L.Q. Rev. 71, 79.
- 91 Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (1996).
- 92 *Ibid* 64.
- 93 *Transfer of Land Statute Amendment Act 1885* (Vic).
- 94 *Settled Land Act 1958* s 8(1)(b)(i).
- 95 *Conveyancing Act 1919* (NSW) s 19.
- 96 *Property Law Act 1974* (Qld) s 22.
- 97 *Law of Property Act 2000* (NT) s 22.
- 98 *Property Law Act 1969* (WA) s 23.
- 99 *Property Law Act 1958* (Vic) Part VI. Robinson contends that the effect of the *Imperial Acts Applications Act 1980* (Vic) which repealed De Donis Conditionalibus (the imperial statute from which the fee tail estate originates) was to convert any remaining fee tail estates existing in Victoria to fees simple: Robinson (1992), above n 27, 492. This view is not however supported by other academic texts or Jude Wallace: Bradbrook (2007), above n 32, 52; Brendan Edgeworth, Sackville & Neave *Australian Property Law* (2008) para [3.14]; Wallace (1984), above n 4, 316.
- 100 Wallace (1984), above n 4, 316.



### OPTIONS FOR REFORM

3.55 The reform options are as follows:

1. *Maintain the status quo.* This means letting any existing fee tails run their course while continuing to bar the entail. The existing provisions in the Property Law Act, sections 250–266, could be relegated to a schedule or repealed in their entirety with a saving provision applying to any estates tail still in existence at the date of repeal. The provisions of the Settled Land Act would be retained for any entailed estates which still exist; or
2. *Convert the existing fee tail estates to fee simple estates.* Sections 250–266 of the Property Law Act would be repealed and entailed estates would be removed from the operation of the Settled Land Act.

3.56 The attraction of the first option is that it requires little action and preserves the current treatment of existing fee tail estates. As there are few, if any, entailed estates in Victoria, and the legislation already provides for the barring of the entail, this would essentially leave existing entails to run their course.

3.57 The attraction of the second option is that, by repealing essentially obsolete provisions, it modernises and simplifies the law. The transitional provisions for entailed estates created prior to 1886 have been carried forward for over 120 years. We are inclined to support this option. It is time to put the fee tail to rest.

3.58 There is an argument that this type of sweeping conversion, as discussed by the Northern Ireland Law Reform Commission in the context of the European Charter of Human Rights,<sup>101</sup> may operate to deprive potential beneficiaries of vested future interests. However, this argument is weakened by the facts that it is already possible to bar the entail under current Victorian law, and that the fee tail may be substantially changed by the exercise of powers under the Settled Land Act.<sup>102</sup>

#### **Should existing estates tail be converted by statute to fee simple estates?**

<sup>101</sup> Northern Ireland Law Commission (2009), above n 47, 50–51.

<sup>102</sup> Land Law Working Party of the Faculty of Law, Queen's University Belfast, *Survey of the Land Law of Northern Ireland* (1971) para [45].

# Chapter 4

# Trusts of Land

## CONTENTS

The dual trust scheme .....	28
The Settled Land Act .....	28
Difficulties with the Settled Land Act .....	29
Trust for sale .....	29
Proposals for reform of the dual trust scheme .....	30
Options for reform .....	30
Single statutory trusts in other jurisdictions .....	32
Irish and English models .....	32
Australian models .....	33
A single statutory trust for Victoria .....	33
Minors' property .....	34

No. 6344.

**PROPERTY LAW ACT 1958.**

Act to consolidate the Law relating to Conveyancing  
and the Law of Property (s)

**[30th September, 1958.]**

the Queen's Most Excellent Majesty  
and consent of the Legislature  
of Victoria in the



### THE DUAL TRUST SCHEME

- 4.1 The trust for sale provisions in the Property Law Act<sup>103</sup> in conjunction with the Settled Land Act constitute a dual scheme of trusts for dispositions of land in Victoria. Our review of the trust for sale provisions needs to take into account the operation of the Settled Land Act.
- 4.2 In this Chapter, we discuss the major reform issue of whether the dual scheme should be maintained, or replaced with a single, unified and more flexible statutory trust. As the Settled Land Act is beyond the scope of the present reference, our proposals are preliminary and will need to be the subject of another review.

### THE SETTLED LAND ACT

- 4.3 A settlement in relation to land is created when a deed, will or other instrument provides that land is limited<sup>104</sup> to or in trust for any persons in succession.<sup>105</sup> Where there is no trust, and the successive interests are legal interests, the settlement is known as a 'strict settlement'. The person who establishes the settlement is called the 'settlor'.
- 4.4 Historically, settlements operated as a way to keep land within families for successive generations. Land might be limited to A as a tenant for life, with remainder to B. Neither A nor B could dispose of the land as a whole, unless both were of full age and consented.
- 4.5 To ensure that settled land could be disposed of more readily, the *Settled Land Act 1882* (Eng) was introduced. The Act gave the tenant for life powers to dispose of the fee simple absolute and to manage the land, subject to provisions designed to protect the beneficiaries of the settlement.
- 4.6 The equivalent legislation in Victoria is the Settled Land Act, under which the tenant for life has extensive powers to sell or lease the land, effect repairs or maintenance and raise funds by mortgage for limited purposes. The exercise of these powers requires the consent of the trustees of the settlement, or otherwise the consent of the court. Where there is no tenant for life, the powers are conferred on the trustees of the settlement. Proceeds of the sale of the settled land are 'capital monies' which must be paid to trustees of the settlement.
- 4.7 The Settled Land Act applies to a 'settlement' of land, including land under the operation of the Transfer of Land Act. A 'settlement' includes a settlement made at law or by a trust (other than a trust for sale). The definition of 'settlement' goes well beyond the common law meaning of a disposition of successive interests in land. Also included are: determinable fees; fees which are subject to a 'gift over' to somebody else in a specified event; entailed estates; estates charged with the payment of rentcharges and other capital or periodic sums for the benefit of other persons; estates granted to a married woman with a restraint on alienation; and estates limited to or in trust for minors.<sup>106</sup>

## DIFFICULTIES WITH THE SETTLED LAND ACT

- 4.8 Legal practitioners generally try to avoid using the Settled Land Act because its provisions are overly restrictive, anomalous, outdated, complex and difficult to understand. Many administrative matters require an application to the court, which adds to the costs of managing settlements. The problems which affect Victoria's Act are also reported in many other common law jurisdictions.
- 4.9 A major problem is that the Act does not permit the settlor to alter the balance of powers between the trustees and the tenant for life.<sup>107</sup> The provisions dealing with investments of capital monies and the power to make improvements have been described as 'redolent from another age'.<sup>108</sup> Speaking in 1949 about the *Settled Land Act 1928*, which was in substantially similar terms to the 1958 consolidation, Sir Richard Eggleston said that the Act 'requires such careful study for its adequate understanding that most practitioners, although aware of its existence, prefer to regard it merely as an unpleasant nightmare'.<sup>109</sup>
- 4.10 A further issue with the Act is its application to minors' property. Some parents have put land in the names of their minor children, unaware that they would be unable to transfer the land to a purchaser. In some cases it has been necessary to apply to the Court for the appointment of trustees of the settlement of a minor's property.
- 4.11 The scope of operation of the Settled Land Act is so wide that its requirements are easily overlooked by legal practitioners, particularly when drafting wills or administering estates. The result may be to deprive the beneficiaries of their entitlements and expose legal practitioners to liability.<sup>110</sup>

## TRUST FOR SALE

- 4.12 The usual way to create a settlement which avoids the Settled Land Act is to establish a trust for sale, as these trusts are excluded from the operation of the Act by section 9. Trusts for sale are regulated by the Property Law Act and operate free of many of the problems associated with the Settled Land Act.
- 4.13 The legislative distinction between settlements and trusts for sale reflects their functional difference in the 19th century. As Butt explains, the object of the trust for sale was that the trustees would immediately sell the trust property and administer the proceeds as a capital fund to be invested.<sup>111</sup> For this reason, equity regarded the trust for sale as a trust of personal property rather than land.
- 4.14 The once clear functional division between the settlement and the trust for sale has eroded over time as settlors, anxious to avoid the Settled Land Act, established trusts for sale and granted powers to the trustees to postpone the sale.
- 4.15 In Victoria, the trust for sale is defined in both the Property Law Act and the Settled Land Act in the following terms:
- A trust for sale, in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without a power at discretion to postpone the sale.*<sup>112</sup>
- 4.16 A power to postpone the sale is implied into every trust for sale unless the contrary intention appears.<sup>113</sup> The distinctiveness of a trust for sale is further muddled by section 32(4) of the Property Law Act, which provides that where a settlement 'contains a trust either to retain or sell land the same shall be construed as a trust to sell the land with a power to postpone the sale'. This 'falls midway between a trust for sale and the power of sale'<sup>114</sup> and gives the trustees 'an uncontrolled discretion whether to sell or not'.<sup>115</sup>

103 *Property Law Act 1958* (Vic) ss 31–40.

104 A limited interest is an interest in land which is less than a fee simple absolute.

105 *Settled Land Act 1958* (Vic) s 8.

106 *Settled Land Act 1958* (Vic) s 8(1).

107 Eggleston (1949), above n 55.

108 Simon Gannon, 'Unsettling Repercussions' (2010) *Law Institute Journal* 31, 33.

109 Eggleston (1949), above n 55, 226.

110 Gannon (2010), above n 108.

111 Peter Butt, *Land Law* (6th ed) (2009) 217–219.

112 *Property Law Act 1958* (Vic) s 18; *Settled Land Act 1958* (Vic) s 3.

113 *Property Law Act 1958* (Vic) s 32(1).

114 P Wikrama-Nayake, *Voumard—The Sale of Land* (1986) 187.

115 *Ibid* 187.



### PROPOSALS FOR REFORM OF THE DUAL TRUST SCHEME

- 4.17 The distinction between the trust for sale regulated by the Property Law Act, and the trust with a mere power to sell which attracts the Settled Land Act, is confusing. Settlers find it paradoxical that they have a better chance of the land being retained in the family if they place it on a trust for sale.<sup>116</sup> If the settlor gives the trustees a mere power of sale, the Settled Land Act will apply. Under that Act, the tenant for life may sell the land with the consent of the trustees (which consent must not be arbitrarily withheld)<sup>117</sup> or by obtaining an order of the court.<sup>118</sup>
- 4.18 Over many decades, conveyancers and settlors have indicated a clear preference by choosing to establish settlements under a trust for sale. Under a correctly drafted trust mechanism, there is often less need to resort to court applications, as the trustees are usually given extensive powers of management, sale and mortgage.<sup>119</sup> Where the Settled Land Act applies, it requires application to the court to resolve many administrative and management matters.
- 4.19 The law should make equivalent provision for those not so well advised. In the words of the Ontario Law Reform Commission:
- In general, we think that the law should, unless there is a compelling reason to the contrary, provide similar consequences for the settlement created mistakenly or without the benefit of skilled advice as would have occurred if a skilled draftsman had devised the transaction. This point favours therefore the application of a trust even where the settlor has not so provided.*<sup>120</sup>
- 4.20 The law would be significantly modernised and simplified if all settlements involving successive interests for different persons were created under a single statutory trust mechanism, replacing both the Settled Land Act and the trust for sale provisions of the Property Law Act.

### OPTIONS FOR REFORM

- 4.21 If the Settled Land Act were replaced, it is necessary to consider what should be introduced in its stead. Any replacement legislation needs to be flexible enough to encompass all the different types of 'settlements' to which the Settled Land Act applies.
- 4.22 We have reviewed previous reform discussions in Victoria,<sup>121</sup> other Australian jurisdictions,<sup>122</sup> and legislative initiatives internationally,<sup>123</sup> to identify options for reform. Four of the most feasible alternatives are discussed below.

#### OPTION 1: AMEND THE SETTLED LAND ACT

- 4.23 Under this option, reform would be limited to amending the Settled Land Act to address the criticisms outlined above. The trust for sale provisions would be unchanged and a dual system retained.
- 4.24 This option would be premised on the expectation that there is a continued role for the Settled Land Act. Discussions in this area in other jurisdictions, both in Australia and overseas, have not favoured reforming the equivalent of the Settled Land Act. The trend has been to abolish the legislation altogether and replace it with a single statutory trust mechanism. The general view is that the Act is a relic of the conveyancing practices and estate planning preferences of a bygone era.



## OPTION 2: REPEAL THE SETTLED LAND ACT AND REPLACE IT WITH A STATUTORY HOLDING TRUST FOR 'SETTLEMENTS'

- 4.25 The Settled Land Act could be repealed and replaced with a mechanism for creating a statutory holding trust for the 'settlements' defined in section 8 of the current Act. The separate trust for sale provisions in the Property Law Act would be retained.
- 4.26 This option would bring 'settlements' as currently defined under the Settled Land Act under a new statutory holding trust. The scheme would involve giving greater general powers to the trustees, to the exclusion of the tenant for life. It would further be desirable to make at least some of the trustees' powers subject to the provisions in the trust instrument. This would eliminate many of the difficulties that have occurred with the Settled Land Act.<sup>124</sup>
- 4.27 Although it is a step towards a more simple system, this option may not go far enough because it does not take into account that the 'trust for sale' terminology has become a misnomer.
- 4.28 Legally, a 'trust for sale' and 'holding trust' are distinct mechanisms; the former defined by a trustees' duty to sell enforceable by the courts in the absence of consensus between the trustees, the latter requiring trustee unanimity to exercise a power of sale. However, in practice, this distinction has become blurred, and it is no longer useful to retain a major legislative distinction between the two trusts.

## OPTION 3: REPEAL THE SETTLED LAND ACT AND REPLACE IT WITH A DUAL SCHEME OF STATUTORY HOLDING TRUST AND TRUST FOR SALE MECHANISMS

- 4.29 This option occupies the middle ground and was proposed by a Land Law Working Party for Northern Ireland in 1971.<sup>125</sup>
- 4.30 The working party proposed the imposition of a statutory trust on settled land. Legal title would be held by the trustees, who would have the powers of 'a beneficial owner except as limited by legislation'.<sup>126</sup> However, if the settlor specifically created a trust for sale, the trustees would have a mere power to postpone the sale.
- 4.31 The rationale for maintaining the dual trust system is that 'many of the complications attaching to the strict settlement disappear, but at the same time a desirable flexibility will be created by the existence of the choice of methods'.<sup>127</sup>
- 4.32 In this scheme, the differentiation between the two types of trusts lies in the extent of powers exercisable by respective trustees. The statutory trustees would have all the powers of an absolute owner. In a trust for sale, the trustees' powers are those under the general law of trusts and are not as extensive.<sup>128</sup> In order to maintain some continuity with the settled land legislation, the trustees would have the ability to delegate powers to the life tenant. Delegation to life tenants of existing settlements would be 'deemed to have taken place irrevocably'.<sup>129</sup>
- 4.33 While this approach provides certain flexibility to settlors, it perpetuates the traditional dual trust scheme, which premises a major legislative distinction upon a minor functional difference. The working party which proposed this model acknowledged that the two trusts are 'two varieties of what is essentially the same concept'.<sup>130</sup>
- 4.34 England has recently recognised that substantial simplification is possible by abandoning the dual trust. Gray and Gray comment that the impetus behind the introduction of the *Trust of Land and Appointment of Trustees Act 1996* (Eng) (TOLATA) was that in practice the term 'trust for sale' has become a 'legal fiction'.<sup>131</sup> These authors observe that the trust was being used as a 'device of land-holding directed not towards a sale but rather towards the retention of the land concerned—at least for the foreseeable future'.<sup>132</sup> The situation therefore called for 'the replacement of the legal fiction of the trust for sale by some new form of land trust which deliberately eschewed the artificial terminology of 'sale'.<sup>133</sup>

- 116 Brian Harvey, *Settlement of Land* (1973).
- 117 *Settled Land Act 1958* (Vic) s 93(a).
- 118 *Settled Land Act 1958* (Vic) s 38.
- 119 Ontario Law Reform Commission (1996), above n 48, 44.
- 120 Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (1996).
- 121 Eggleston (1949), above n 55; Wallace (1984), above n 4, Chapter 4.
- 122 Queensland Law Reform Commission, *Report on the Law Relating to Trusts, Trustees, Settled Land and Charities* Report 8 (1971). See *Trusts Act 1973* (Qld) Part IV and *Trustees Act 1962* (WA) Part IV.
- 123 *Land and Conveyancing Law Reform Act 2009* (Ir) Part IV; *Trusts of Land and Appointment of Trustees Act 1996* (Eng).
- 124 Eggleston (1949), above n 55, 226.
- 125 Land Law Working Party of the Faculty of Law, Queen's University Belfast (1971), above n 102, Chapter 3.
- 126 Land Law Working Party of the Faculty of Law, Queen's University Belfast (1971), above n 102, 36.
- 127 *Ibid.*
- 128 Land Law Working Party of the Faculty of Law, Queen's University Belfast (1971), above n 102, 40.
- 129 Land Law Working Party of the Faculty of Law, Queen's University Belfast (1971), above n 102, 36.
- 130 *Ibid.*
- 131 Kevin Gray and Susan Gray, *Elements of Land Law* (5th ed) (2008) para [7.5.5].
- 132 *Ibid.*
- 133 *Ibid.*



### OPTION 4: REPLACE BOTH THE SETTLED LAND ACT AND THE TRUST FOR SALE PROVISIONS WITH A SINGLE STATUTORY TRUST

- 4.35 If it is accepted that conferring full powers on the trustees<sup>134</sup> is desirable, then the model to facilitate a simpler, more flexible approach would be the single statutory trust. Under this option, both the Settled Land Act and the trust for sale provisions in the Property Law Act would be repealed. They would be replaced by statutory mechanisms to create a trust which encompasses both holding trusts and trusts for sale and covers all settlements.
- 4.36 This model has recently been adopted in Ireland and England and is discussed more fully in the next section. Queensland and Western Australia have taken different approaches to establishing a single statutory trust, which are also discussed below.

### SINGLE STATUTORY TRUSTS IN OTHER JURISDICTIONS

#### IRISH AND ENGLISH MODELS

- 4.37 In Ireland the statutory trust mechanism replaces the operation of the *Settled Land Acts 1882–90* and covers all forms of settlements and trusts of land.<sup>135</sup> A ‘trust of land’ is broadly defined and includes: a ‘strict settlement’;<sup>136</sup> land held on any kind of trust; or land vested in a minor.<sup>137</sup> A ‘trust’ for the purposes of the provisions includes a trust for sale; express, implied, resulting and constructive trusts; and a bare trust.<sup>138</sup>
- 4.38 The legislation specifies who are to be the trustees of the land, and allows for trustees to be appointed by the court if necessary.<sup>139</sup> Most significantly, the trustees have the powers of an absolute owner in respect of the land, subject to the duties of a trustee and restrictions imposed by any statutory provisions including the Act, the general law of trusts or any other instrument and court order relating to the land.<sup>140</sup>
- 4.39 The Irish Act permits a settlor to expressly restrict the powers of the trustees.<sup>141</sup> Therefore, the trust operates ‘by way of “default” ... applicable unless restricted expressly by the instrument creating the trust’.<sup>142</sup> This differs considerably from the current situation under the Settled Land Act where any attempt to limit the powers of a life tenant under the Act is deemed to be void,<sup>143</sup> and additional powers given to the trustees can be exercised only with the consent of the life tenant.<sup>144</sup>
- 4.40 In England and Wales, the TOLATA establishes the single statutory trust mechanism. Unlike the Irish legislation, the Act preserves the operation of the *Settled Land Act 1925* (Eng), but only for land settled prior to the commencement of the TOLATA. No settlement created after the commencement of the Act is a settlement for the purposes of the 1925 Act.<sup>145</sup> The TOLATA provides that the trustees of land have all the powers of an absolute owner in relation to land.<sup>146</sup> The Act also allows a settlor to exclude the powers conferred by the Act on the trustees.<sup>147</sup>
- 4.41 The English and Irish models have common features. They replace the traditional dual trusts with a single, unitary and flexible trust. They ensure that trustees have the powers necessary for management and alienation of property, while giving scope for the wishes of settlors and testators. The Northern Ireland Law Commission has recommended that a unitary trust of land scheme similar to those introduced in England and Ireland should be introduced in Northern Ireland.<sup>148</sup>

## AUSTRALIAN MODELS

- 4.42 Two States have adopted a single statutory trust in Australia. In Queensland and Western Australia, the settled land legislation has been repealed and settled land has been incorporated into the general trustee legislation which applies to both real and personal property.
- 4.43 In the Queensland *Trusts Act 1973*, in contrast to the English and Irish legislation, the definition of 'trust' does not expressly include 'trust for sale', nor is this type of trust expressly preserved.<sup>149</sup> Instead of giving trustees the powers of an absolute owner, the trust legislation lists the specific powers conferred on trustees to deal with trust property.<sup>150</sup>
- 4.44 Under the Queensland Act, the statutory powers of the trustees apply whether or not a contrary intention is expressed in the trust instrument.<sup>151</sup> This stemmed from concerns of the Queensland Law Reform Commission that to allow the settlor to exclude the statutory powers would result in a return to the situation which existed prior to the introduction of the settled land legislation.<sup>152</sup> It was considered that limits should be imposed on modifications of trustees' powers by the settlor, to ensure that alienation of land is not unduly restricted.
- 4.45 The Western Australian *Trustees Act 1962* is similar to Queensland's, although the term 'trust for sale' and its distinction from a trust with a power to sell has been preserved to some extent.<sup>153</sup> The powers conferred by the Act only apply insofar as there is no contrary intention in the terms of the instrument creating the trust, and are subject to that instrument.<sup>154</sup>
- 4.46 In New South Wales the settled land provisions are still in force but, in practice and in recognition of the fact that 'in modern times... settlements creating successive legal interests are rare',<sup>155</sup> it is more common for a trust mechanism to be used to create successive interests. The current settled land legislation is contained in Part IV of the *Conveyancing and Law of Property Act 1898* which succeeded the *Settled Estates Act 1886 (NSW)*.<sup>156</sup> However, Butt notes that, although a trust creating successive interests in equity is by definition a 'settlement' within the *Conveyancing and Law of Property Act 1898*, the common term of 'trust' is used and 'recourse is had not to the *Conveyancing and Law of Property Act 1898* but rather to the *Conveyancing Act 1919* and the *Trustee Act 1925* to clarify the trustees' powers'.<sup>157</sup>

## A SINGLE STATUTORY TRUST FOR VICTORIA

- 4.47 Substantial simplification of property law could be achieved by repealing both the Settled Land Act and the trust for sale provisions in the Property Law Act, and replacing them with a single statutory trust.
- 4.48 If the idea of a single statutory trust for Victoria is supported by consultees, further discussion and consultation is needed on the specific content of the new provisions. There are variations in the single statutory trust models adopted in other jurisdictions with respect to the powers given to trustees, the extent to which the powers can be augmented or restricted by the settlor, and the Act in which the trust provisions are located.
- 4.49 The statutory trust provisions in the various jurisdictions have been located in different types of enactments. In Ireland they are incorporated in property legislation. In England they are in a stand-alone statute. In Queensland and Western Australia they have been incorporated into the Trustee Acts. In Victoria, the statutory trust provisions could be incorporated into the Property Law Act or alternatively into the *Trustee Act 1958*.

**Should all 'settlements' as defined in the Settled Land Act be held under a single statutory trust?**

- 134 As recommended by Richard Eggleston in 1949: Eggleston (1949), above n 55.
- 135 Law Reform Commission [Ireland] Report 75 (2005), above n 87, 68.
- 136 *Land and Conveyancing Law Reform Act 2009* (Ir) s 18(1)(a). The provision refers to land 'for the time being limited by an instrument...to persons by way of succession limited to persons without the interposition of a trust' as a 'strict settlement'.
- 137 *Land and Conveyancing Law Reform Act 2009* (Ir) s 18(1).
- 138 *Land and Conveyancing Law Reform Act 2009* (Ir) s 18(2)(b). However, direct trusts for charitable purposes are excluded from the application of the Act s 18(9).
- 139 *Land and Conveyancing Law Reform Act 2009* (Ir) s 19.
- 140 *Land and Conveyancing Law Reform Act 2009* (Ir) s 20.
- 141 Law Reform Commission [Ireland] Report 75 (2005), above n 87, 80.
- 142 Law Reform Commission [Ireland] Report 75 (2005), above n 87, 68.
- 143 *Settled Land Act 1958* (Vic) s 106(1).
- 144 *Settled Land Act 1958* (Vic) s 109.
- 145 *Trusts of Land and Appointment of Trustees Act 1996* (Eng) s 2(1).
- 146 *Trusts of Land and Appointment of Trustees Act 1996* (Eng) s 6(1).
- 147 *Trusts of Land and Appointment of Trustees Act 1996* (Eng) s 8(1).
- 148 Northern Ireland Law Commission (2009), above n 47, para [6.9].
- 149 *Trusts Act 1973* s 32(4).
- 150 *Trusts Act 1973* (Qld) Part IV.
- 151 *Trusts Act 1973* (Qld) s 31(1).
- 152 Queensland Law Reform Commission Report 8 (1971), above n 122, 28.
- 153 *Trustees Act 1962* (WA).
- 154 *Trustees Act 1962* (WA) s 5(2).
- 155 Butt (2009), above n 111, para [13 18].
- 156 Butt (2009), above n 111, para [13 11].
- 157 Butt (2009), above n 111, para [13.18].



### MINORS' PROPERTY

- 4.50 A related issue to consider is the status of property held by minors. Currently, the Settled Land Act deems all land held by a minor to be a settlement.<sup>158</sup> The statutory powers of dealing with minors' property are conferred on the trustees of the settlement.<sup>159</sup> Although a minor is capable of holding a legal estate in land, the effect of the Settled Land Act is that the minor's estate is merely equitable, since the legal estate vests in the trustees.
- 4.51 It would be a short step to provide that minors can hold only a beneficial estate in land. The English *Law of Property Act 1925* specifically states that a legal estate is not capable of being held by an infant.<sup>160</sup> This provision was not adopted by Victoria.
- 4.52 If settlements in the sense of dispositions of successive interests in land are removed from the Settled Land Act, a scheme for minors' property would need to be provided. One option would be to retain the Settled Land Act provisions for minors' property. However, if the suggested reforms regarding the creation of the single statutory trust mechanism are followed, it would be logical to adopt a similar approach to the English and Irish legislation, and to include minors' property under the umbrella of the single statutory trust.

#### **Should minors' property be held under the single statutory trust, instead of under the Settled Land Act?**

<sup>158</sup> *Settled Land Act 1958* (Vic) s 8(1)(b).

<sup>159</sup> *Settled Land Act 1958* (Vic) s 26.

<sup>160</sup> *Law of Property Act 1925* (Eng) s 1(6).

# Chapter 5

## Obsolete Rules

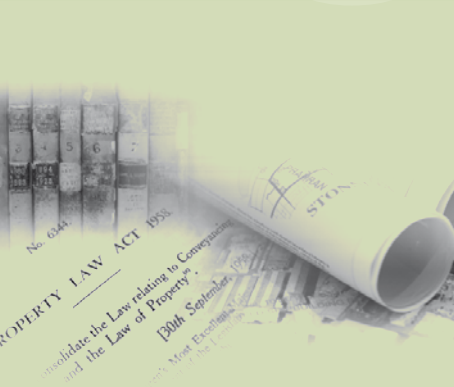
### CONTENTS

Special rules of inheritance .....	36
Proposal .....	36
Rentcharges.....	37
Proposal .....	37

No. 6344.  
**PROPERTY LAW ACT 1958.**

Act to consolidate the Law relating to Conveyancing  
and the Law of Property.  
[30th September, 1958.]

the Queen's Most Excellent Majesty  
by and consent of the Legislature  
of Victoria in this behalf  
enacted.



## SPECIAL RULES OF INHERITANCE

- 5.1 Part V of the Property Law Act, comprising sections 235–247, sets out special rules of inheritance for real property which date from the 19th century. The general purpose of these rules is to ascertain the identity of an heir when a deed or any other instrument is expressed as a grant of land to an heir.
- 5.2 The sections are of very limited application. They apply where an instrument confers an estate or interest in land ‘limited’ to the heirs of a deceased person. In practice this can occur only where an instrument creates an estate in fee tail.<sup>161</sup> Entailed estates are very rare and can no longer be created, and will cease to exist altogether if existing fee tails are converted to fee simple estates, as we have proposed in Chapter 3.
- 5.3 The rules in this part are discriminatory, in that they favour male lines over female lines of inheritance. Following an inquiry into discrimination in the law, the Scrutiny of Acts and Regulations Committee of the Victorian Parliament recommended in 2005 that Part V should be repealed.<sup>162</sup> The government supported the recommendation in principle and said it would consider repealing Part V after an examination of whether it has any continuing operation and whether transitional or other provisions may need to be developed.<sup>163</sup>
- 5.4 We agree that Part V should be repealed. Its function could be served by applying the same rules of inheritance that apply where a person dies intestate (without a valid will covering all of their estate). Part I, Division 6 of the *Administration and Probate Act 1958* sets out non-discriminatory rules for distributing the residuary estate of a person who dies intestate in Victoria. The use of the intestacy provisions for interpreting the term ‘heirs’ and similar words in property instruments was recommended by the Ontario Law Reform Commission<sup>164</sup> and has been adopted in New Zealand.<sup>165</sup>
- 5.5 The proposed application of the intestacy scheme would be consistent with the rule in the *Wills Act 1997* (Vic) for construing a disposition by will to a person’s issue, without limitation as to remoteness. The section provides that, subject to a contrary intention, the disposition must be distributed to that person’s issue in the same manner as if the person had died intestate leaving only issue surviving.

## PROPOSAL

- 5.6 We propose that Part V be replaced with a section which provides that, subject to contrary intention, an instrument conferring an estate or interest in land on the heir or heirs or next of kin or family or relatives of a person should be deemed to confer that estate or interest on the person or persons who would be entitled to take beneficially on intestacy under Part I Division 6 of the *Administration and Probate Act* and in the same shares.

**Should the special rules of inheritance in Part V be replaced with a provision identifying the heirs by reference to the specified person’s intestate successors?**

## RENTCHARGES

- 5.7 A rentcharge is ‘a money charge on freehold property secured through a periodic rent issuing out of the property, which does not create the relationship of landlord and tenant’.<sup>166</sup> Sections 125–129 of the Property Law Act deal with the creation of rentcharges. The provisions expressly do not apply to annuities charged on land under the Transfer of Land Act.<sup>167</sup> Land charged with payment of a rentcharge is ‘settled land’ and is subject to the Settled Land Act.<sup>168</sup>
- 5.8 Wallace argues that rentcharges are obsolete in Victoria and need not be retained, even as equitable interests.<sup>169</sup> The Irish Law Reform Commission has recently recommended that the future creation of rentcharges be abolished as they have become obsolete.<sup>170</sup> Rentcharges have been abolished in Queensland.<sup>171</sup> Most forms of rentcharge were abolished in Northern Ireland in 1997.<sup>172</sup>
- 5.9 One possible contemporary use of a rentcharge is to overcome the common law rule in *Austerberry v Oldham Corporation*<sup>173</sup> that the burden of a positive freehold covenant does not run at law.<sup>174</sup> For example, a rentcharge may be imposed to require a purchaser of land to pay an annual sum for the maintenance of a facility. We are currently considering whether to recommend that the rule in *Austerberry v Oldham Corporation* be overturned by legislation to allow the burden of positive covenants to run. The reform would eliminate the need to resort to the use of the rentcharge to achieve the same end.
- 5.10 The abolition of the rentcharge provisions in the Property Law Act would not affect the provisions for annuities registered in relation to land under the operation of the Transfer of Land Act. An annuity is practically identical in effect to a rentcharge. It is defined as ‘a sum of money payable periodically and charged on land by an instrument of charge’.<sup>175</sup> Despite the essential similarities between a rentcharge and an annuity, the Transfer of Land Act provides its own scheme for the enforcement of annuities. For most purposes, the Act treats annuities in a similar way to mortgages.
- 5.11 Land charged with payment of an annuity as part of a family arrangement is settled land.<sup>176</sup> Since lawyers generally avoid settlements that attract the Settled Land Act, it is likely that non-commercial annuities charged on registered land are rare.
- 5.12 If rentcharges are abolished, section 70 of the Property Law Act would be redundant. The effect of the section is to reverse the common law rule that partial release of land from a rentcharge extinguishes the rentcharge entirely. Although Wallace recommended that the section be repealed,<sup>177</sup> it would be advisable to retain it solely for the benefit of any subsisting rentcharges. Queensland has retained the equivalent provision despite prohibiting the creation of rentcharges prospectively.<sup>178</sup>

## PROPOSAL

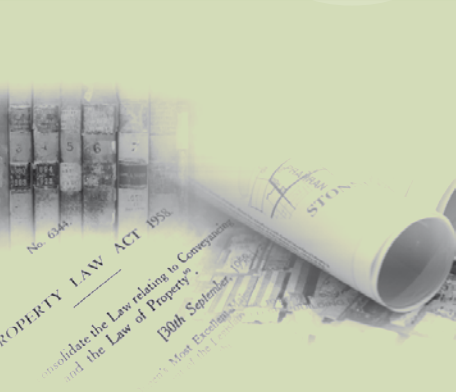
- 5.13 We propose that sections 125–129 be repealed with a savings provision for any existing rentcharges. These provisions should be replaced with a provision that the future creation of legal and equitable rentcharges is prohibited and any such agreement is enforceable only between the original parties as a contract debt.<sup>179</sup>
- 5.14 In addition it should be expressed that the creation of annuities under the Transfer of Land Act is not affected. The provisions for the benefit of existing rentcharges should be moved to the new schedule set out in Appendix B.<sup>180</sup>

### Should the creation of rentcharges on old system land be abolished?

- 161 Wallace (1984), above n 4, 312.
- 162 Scrutiny of Acts and Regulations Committee, *Discrimination in the Law: Inquiry under section 107 of the Equal Opportunity Act 2005—Final Report*, September 2005.
- 163 Scrutiny of Acts and Regulations Committee, *Discrimination in the Law: Inquiry under section 107 of the Equal Opportunity Act 2005—Government Response* tabled in Parliament on 1 March 2006.
- 164 Ontario Law Reform Commission (1996), above n 48, Chapter 5.
- 165 *Property Law Act 2007* (NZ), s 65.
- 166 Land Law Working Party of the Faculty of Law, Queen’s University Belfast (1971), above n 102, para [60].
- 167 *Transfer of Land Act 1958* (Vic) s 125(6).
- 168 *Settled Land Act 1958* (Vic) s 8(1)(e).
- 169 Wallace (1984), above n 4, 37.
- 170 Law Reform Commission [Ireland] Consultation Paper 34 (2004), above n 86, paras [7.11–12].
- 171 *Property Law Act 1974* (Qld) s 176.
- 172 *The Property (Northern Ireland) Order 1997* art 27.
- 173 *Austerberry v Oldham Corporation* (1885) 29 Ch D 750.
- 174 Bradbrook (2007), above n 32, 782.
- 175 *Transfer of Land Act 1958* (Vic) s 4(1).
- 176 *Settled Land Act 1958* (Vic) s 8(1)(e).
- 177 Wallace (1984), above n 4, 135–136.
- 178 *Property Law Act 1974* (Qld) s 177.
- 179 See eg. *Land and Conveyancing Law Reform Act 2009* (Ir) s 41–42.
- 180 Sections 70, 77(1)(a),(b), 190(1), (2)).

## Chapter 5

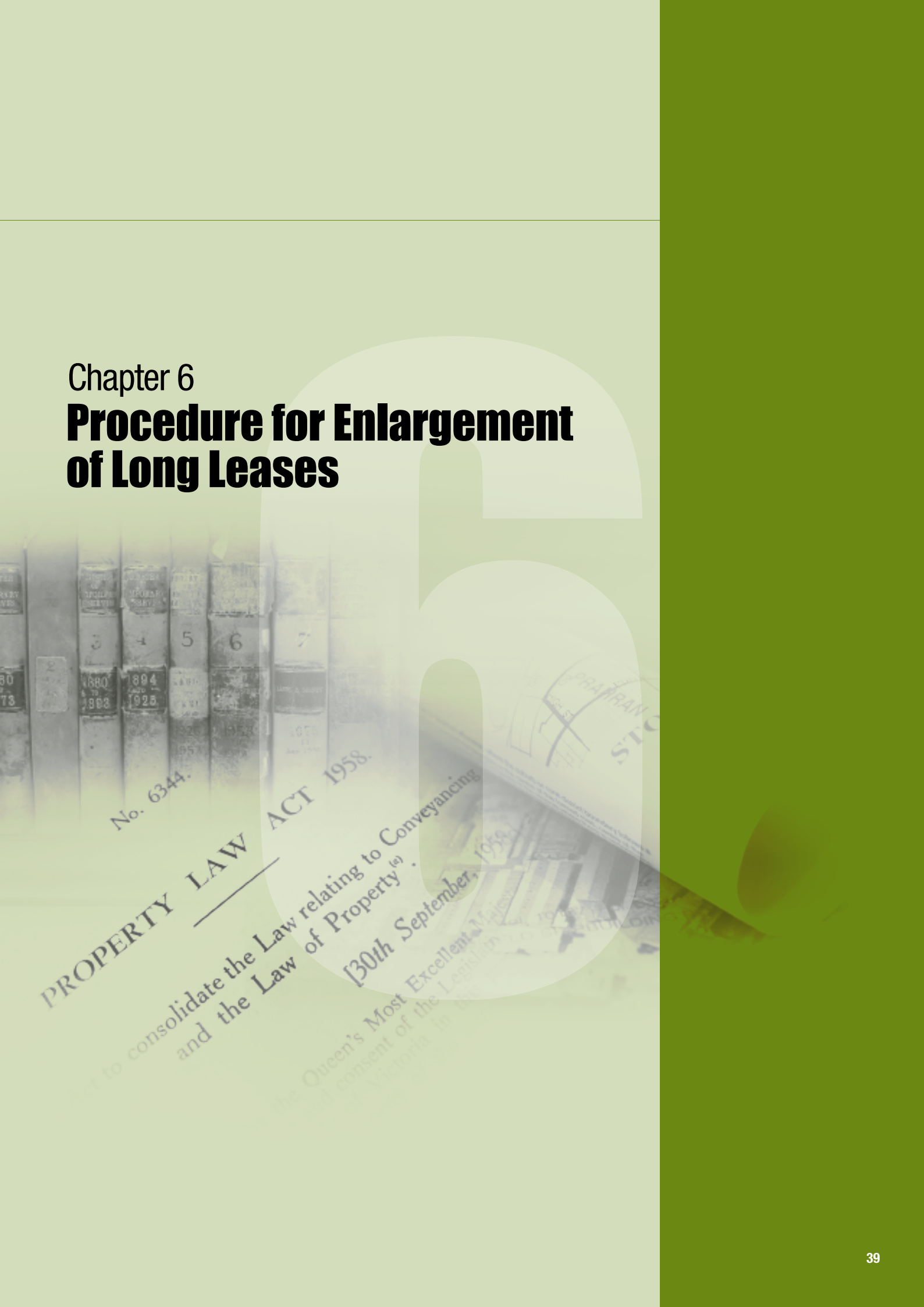
# Obsolete Rules





## Chapter 6

# Procedure for Enlargement of Long Leases





- 6.1 Section 153 of the Property Law Act provides a procedure by which a lease can be enlarged into a freehold (fee simple) estate if the lease was originally created for a term of at least 300 years, and has at least 200 still to run. The lease must not be liable to be determined by re-entry for breach of condition, nor must any rent of more than nominal money value be payable. The tenant may unilaterally enlarge the leasehold into a fee simple by registering a deed of declaration 'in the office of the Registrar-General'.<sup>181</sup> The fee simple estate is created upon registration.
- 6.2 The procedure for enlargement is outdated, since deeds can no longer be registered in the office of the Registrar-General. Although section 136 of the Property Law Act makes section 153 applicable to leases under the Transfer of Land Act, there has been no provision for registration of the deed of declaration since the commencement of the *Transfer of Land (Single Register) Act 1998*. If the section is retained, the procedure in section 153(7) would require amendment to enable the tenant to register a deed of declaration under the Transfer of Land Act.
- 6.3 The more fundamental question is whether the section should be retained. The section can be traced back to the *Conveyancing and Law of Property Act 1881* (Eng),<sup>182</sup> and is equivalent to the English *Law of Property Act 1925* section 153.<sup>183</sup> In Australia, only two States, New South Wales and Tasmania, have an equivalent provision.<sup>184</sup>
- 6.4 The rationale for the provision seems to be that very long term leases with no provision for re-entry, and for which no rent of money value is payable, are practically equivalent to freehold.<sup>185</sup> The leading commentary on the English *Law of Property Act 1925* states:
- The section enables the conversion into a fee simple of a long term in a case where it is practically impossible that evidence of title to the reversion in fee could exist at the expiration of the term, at least where the reversion is not vested in a corporation, and where also if such evidence did not exist the value of the reversion must be infinitesimally small at the time of conversion.*
- 6.5 The same authors explain that section 4 of the *Real Property Act 1845* (Eng), which 'took away the tortious effect of an enfroffment', had the effect of abolishing an earlier doctrine which permitted the conversion of a leasehold term into a freehold estate.<sup>187</sup> It seems that section 153 was intended to replace a much older mechanism for the conversion of long leases.
- 6.6 Section 153 provides a means of converting leases in circumstances where the tenant cannot acquire freehold title by adverse possession. Even if a lease provides for payment of a rent of money value, non-payment by the tenant does not affect the landlord's title.<sup>188</sup> In the case of a lease that provides for re-entry or forfeiture for breach of condition, the landlord's cause of action accrues on the date on which the forfeiture was incurred or the condition was broken.<sup>189</sup> Qualifying leases under section 153 are those which do not reserve the right of forfeiture or re-entry for condition broken.<sup>190</sup>
- 6.7 If section 153 were repealed, there would be no means of converting the relevant leases into freehold except by agreement with the person from time to time entitled to the reversion. As the reversion would be practically valueless and unmarketable, there is a risk that transmission of the reversion on death would not be registered. With the passing of time, it might be difficult or even impossible to identify the person entitled to the reversion.
- 6.8 English and Australian commentators agree that section 153 is rarely used.<sup>191</sup>
- 6.9 English authors suggest that section 153 can be used to avoid the common law restriction on the running of freehold covenants. While both positive and negative covenants can run with a lease and bind assignees, positive covenants cannot be made to bind subsequent owners of land held in freehold. To get around the rule, positive covenants can be made to run by first creating a 300 year lease subject to the covenants, then converting the lease to freehold.<sup>192</sup> After enlargement, the tenant takes the freehold subject to any covenants that applied to the lease.<sup>193</sup>
- 6.10 The use of section 153 as a conveyancing device to make freehold covenants run is untested by the courts.<sup>194</sup> Butt identifies two major obstacles to its use. The first is that most leases contain provision for re-entry on breach of condition, which excludes the operation of section 153. The second is that once the lease is converted to freehold, it seems logical that the reversion disappears, leaving no mechanism for the benefit of the covenants to pass.<sup>195</sup>

- 6.11 The question of whether freehold covenants should be able to run at law is currently under examination by the commission and will be addressed in our forthcoming consultation paper on easements and covenants.
- 6.12 We invite views on whether section 153 should be retained. Although it is rarely used, it provides a means of converting long leases into freehold in circumstances where no other means of enlargement may be available. If it is retained, some amendments would be required to make it effective in its application to registered land.
- 6.13 First, the right of a tenant to enlarge a lease under the section should be expressed to operate as an exception to the indefeasibility of the reversioner's registered title under section 42 of that Act. Although section 136 of the Property Law Act already provides that section 153 'applies to leases and sub-leases of land under the Transfer of Land Act notwithstanding anything in that Act contained', it is not clear that section 136 overrides the inconsistency rule in section 3(1) of the Transfer of Land Act. The surest way of creating an exception to indefeasibility is to insert it into section 42(2) of the Transfer of Land Act.
- 6.14 Second, section 153(7) would need to be amended to enable the tenant to enlarge the leasehold into a fee simple by registering a deed of declaration under the Transfer of Land Act.
- 6.15 If the section is retained, the references to restraints on anticipation in section 153(6) should be omitted (see Chapter 7).

**Should section 153 be retained and amended to make it effective in its application to registered land?**

- 181 *Property Law Act 1958* (Vic) s 153(7).
- 182 P Young et al, *Annotated Conveyancing and Real Property Legislation New South Wales* (2009) 209.
- 183 Wallace (1984), above n 4, 242.
- 184 *Conveyancing Act 1919* (NSW) s 134; *Conveyancing and Law of Property Act 1884* (Tas) s 83
- 185 Gray & Gray (2008), above n 131, 425.
- 186 Wolstenholme (1972), above n 84, Vol 1, 285.
- 187 *Ibid.*
- 188 Adrian Bradbrook et al, *Australian Property Law: Cases and Materials* (3rd ed) (2006), citing *Doe d. Davy v Oxenham* (1840) 7 M & W 131; 151 ER 708
- 189 *Limitation of Actions Act 1958* (Vic) s 12.
- 190 *Property Law Act 1958* (Vic) s 153(2).
- 191 See for example, Bradbrook (2007), above n 32, 512; Young et al (2009), above n 182, 209.
- 192 See Gray & Gray (2008), above n 131, 425.
- 193 *Property Law Act 1958* (Vic) s 139(8).
- 194 Butt (2009), above n 111, para [1711].
- 195 *Ibid.*

## Chapter 6

# Procedure for Enlargement of Long Leases



# Chapter 7

## Capacity

### CONTENTS

Alien friends .....	44
What is an alien friend? .....	44
Options for reform .....	45
Commonwealth Foreign Acquisitions and Takeovers Act .....	46
Minors' contracts .....	47
Co-operatives Act .....	48
Co-operative Housing Societies Act .....	48
Represented persons with a mental illness .....	48
Conveyances by administrator .....	48
A patient who is a trustee of land ..	49
Married women .....	49
Husband and wife to be counted as two persons .....	49
Property rights of married women .....	50
Power of court to bind interests of married woman .....	52

No. 6344.  
**PROPERTY LAW ACT 1958.**

Act to consolidate the Law relating to Conveyancing  
and the Law of Property.  
[30th September, 1958.]

the Queen's Most Excellent Majesty  
by consent of the Legislature  
of Victoria in the  
Year of our Lord one thousand nine hundred and fifty eight



- 7.1 The Property Law Act contains several provisions that restrict the capacity of an individual or organisation to hold or deal with property. They include:
- alien friends—section 27;
  - minors—sections 28B, 29;
  - represented persons with a mental illness—sections 30, 171; and
  - married women—sections 21, 167–170.
- 7.2 For ease of reference and understanding, these provisions, where retained and as amended, could be co-located in a single division of the new Property Law Act entitled ‘Capacity to hold and deal with land’.
- 7.3 In this chapter we examine these provisions and raise questions about whether they need to be retained or amended.

### ALIEN FRIENDS

- 7.4 At common law, an alien could not hold or transfer land.<sup>196</sup> Section 27 overrides the common law as far as it applies to alien friends who are resident in Victoria. It derives from section 58 of the *Supreme Court Act 1915* and, before that, section 3 of the *Aliens Act 1890* (Vic), and is substantially unchanged from the earlier provisions.
- 7.5 It permits an ‘alien friend’ who is resident in Victoria to hold and deal with real and personal property in Victoria in the same manner as if he or she were ‘a natural born subject of Her Majesty’. Conversely, it does not confer the same rights to an alien who lives outside Victoria or who is not an alien friend.
- 7.6 Section 27 purports to apply ‘notwithstanding any law or usage to the contrary’. Nevertheless, Commonwealth legislation prevails over section 27 where inconsistent. In particular, the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (Foreign Acquisitions and Takeovers Act) now regulates a great deal of foreign investment in property in Australia. Before considering the interaction of that legislation with the Property Law Act, it is first necessary to determine, in modern terms, what an ‘alien friend’ is.

### WHAT IS AN ALIEN FRIEND?

- 7.7 Historically, an alien was a person born outside the monarch’s dominions.<sup>197</sup> By permitting an alien friend the right to acquire and deal with property in the same manner as ‘a natural born subject of Her Majesty,’ section 27 indicates that an alien is someone other than a natural born subject of Her Majesty. This terminology is clearly outdated.
- 7.8 As Australia emerged as an independent nation, the definition and concept of Australian citizenship evolved. The distinction between aliens and non-aliens changed accordingly.
- 7.9 Before and after federation, an alien was a person who was not a British subject.<sup>198</sup> When the Property Law Act commenced, an alien was defined in the *Nationality and Citizenship Act 1948* (Cth) (later renamed the *Australian Citizenship Act 1948* (Cth)) as a person who was not a British subject, citizen of Ireland or living in a British protectorate.<sup>199</sup> Today, Australian citizens are no longer British subjects,<sup>200</sup> Australia’s citizenship and immigration legislation no longer refers to ‘aliens’, and the term ‘alien’ is not generally used to describe foreign nationals.
- 7.10 Nevertheless, the meaning of the term remains relevant to determining the Commonwealth Parliament’s powers under the Constitution, including the power under section 51(xix) to make laws with respect to ‘naturalisation and aliens’.
- 7.11 The High Court has determined that an ‘alien’ for the purposes of interpreting the Constitution includes at least anyone born outside Australia to parents who were not Australian citizens and who entered Australia after the commencement of the *Australian Citizenship Act 1948* and has not been naturalised under Australian law. A British subject could be an alien, and a non-alien need not be a natural born subject of Her Majesty.

- 7.12 Certainly the meaning of ‘alien’ is not plain from a reading of the Property Law Act and needs to be construed with reference to subsequent developments in statutory and case law. The distinction between ‘alien friend’ and other aliens – alien enemies – is even more obscure.
- 7.13 It has been said that an alien friend for the purposes of section 27 of the Property Law Act is a subject of a nation with which Victoria is at peace.<sup>202</sup> As Australia has not declared war with another nation since World War II, the distinction between alien friend and alien enemy is either not applicable or impossible to draw with certainty.
- 7.14 Even if a national enemy could be identified, section 27 would not necessarily prevent a subject of the enemy nation from acquiring and dealing with property. At common law, ‘a subject of a State at war with this country, but who is carrying on business here, is not treated as an alien enemy’.<sup>203</sup> Robinson has observed that, insofar as section 27 is limited to residents of Victoria, no one living in Victoria can be an enemy alien.<sup>204</sup>
- 7.15 In *Re Doig*,<sup>205</sup> Hood J considered the rights of an enemy alien under section 58 of the *Supreme Court Act 1915*, on which section 27 of the Property Law Act is based. The issue was whether an Australian born woman, Mrs Gramsch, who had become a German national under the *Imperial Naturalization Act 1870* and an enemy alien upon marrying an unnaturalised German resident in Victoria after the outbreak of war with Germany, could hold property.
- 7.16 Justice Hood observed that the public policy reason for restricting the rights of enemy aliens was to forbid acts which add to the resources available to individuals in the enemy state and thereby increase the enemy’s capacity to prolong hostilities. Noting that it had ‘long been the custom to exonerate alien enemies who have been allowed to remain in this country and are of good behaviour from such restrictions’,<sup>206</sup> he concluded that ‘the old strictness, founded partly on the feudal system, has, I consider, passed away, and the real test is the safety of the realm’.<sup>207</sup> On this basis, he held that Mrs Gramsch was not prevented from holding real and personal property on the same basis as an alien friend, subject to the right of the Crown to intervene if it wished.
- 7.17 It appears that section 27 does not make an effective distinction between the property rights of alien friends, alien enemies and people who are not aliens.

## OPTIONS FOR REFORM

- 7.18 Section 27 of the Property Law Act needs to be updated. We have identified some options for consideration.

### UPDATE REFERENCE TO A ‘NATURAL BORN SUBJECT OF HER MAJESTY’

- 7.19 The reference to a ‘natural born subject of Her Majesty’ could be replaced with a reference to an Australian citizen. Nowadays there is no distinction between the rights of natural born and naturalised subjects, and a ‘subject of Her Majesty’ is likely to be interpreted to mean an Australian citizen. The *Property Law Act 1974* (Qld)<sup>208</sup> and the *Aliens Act 1913* (Tas)<sup>209</sup> permit aliens to deal with property on the same basis as Australian citizens.

**Should the reference to ‘a natural born subject of Her Majesty’ in section 27 be replaced with ‘an Australian citizen’?**

### CLARIFY THE MEANING AND USE OF THE TERM ‘ALIEN’

- 7.20 A definition of ‘alien’ could be inserted. Ideally, it would be aligned with a definition in other relevant legislation so that the meaning could change over time in line with other laws affecting foreign nationals. However, the only relevant legislation that still refers to aliens is the Constitution, which does not contain a definition of the term. Perhaps it is better not to define the term in the Property Law Act but instead be guided by the Court’s interpretation of what it means for the purposes of the Constitution.
- 7.21 Alternatively, the solution may be not to refer to aliens at all, but to identify them by exception. The Property Law Act could simply state that a person is not prevented from acquiring, holding or disposing of property by reason only that he or she is not an Australian citizen.<sup>210</sup>

**Should the Act continue to refer to an ‘alien’? If so, does the word need to be defined?**

- 196 *Re Douyer, Ex parte Bell* (1863) 1 QSCR 91, 95.
- 197 *Calvin’s Case* (1609) 77 ER 377, 396.
- 198 See for example, *Aliens Act 1890* (Vic) ss 5,9; *Aliens Act 1947* (Cth) s 5.
- 199 *Nationality and Citizenship Act 1948* (Cth) s 5. While this Act introduced the distinction between an Australian and a British subject, it continued to define an ‘alien’ with reference to his or her status as a British subject.
- 200 *Australian Citizenship Amendment Act 1984* (Cth).
- 201 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.
- 202 Robinson (1992), above n 27, 36.
- 203 *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484 at 505, 506; *Schaffernious v Godberg* [1916] 1 KB 284.
- 204 Robinson (1992), above n 27, 36.
- 205 *Re Doig* [1916] VLR 698.
- 206 *Re Doig* [1916] VLR 698, 703.
- 207 *Re Doig* [1916] VLR 698, 704.
- 208 *Property Law Act 1974* (Qld) s 15A.
- 209 *Aliens Act 1913* (Tas) s 3.
- 210 Section 146A of the *Conveyancing Act 1919* (NSW) is an example of this formulation. It states that a person is not prevented from acquiring, holding or disposing of property by reason only that he or she is not a British Subject. A British Subject for the purposes of that Act is defined by operation of s 16 of the *Interpretation Act 1987* (NSW) as a person who is an alien within the meaning of the *Australian Citizenship Act 1948* (Cth) as at 1 September 1987 (since repealed).



### REMOVE THE REFERENCE TO AN ALIEN 'FRIEND'

7.22 If the word 'alien' is retained, the reference to an alien 'friend' could be removed. As discussed above, the distinction between an alien friend and an alien enemy is not at all clear. Furthermore, no distinction between alien friends and enemies appears necessary. Of the other Australian jurisdictions, only South Australia provides for an alien friend to deal with property as if a natural born subject of Her Majesty.<sup>211</sup> Like its Victorian equivalent, the South Australian legislation is unchanged since before federation.<sup>212</sup>

#### Should references to an 'alien friend' be removed from the Act?

### COMMONWEALTH FOREIGN ACQUISITIONS AND TAKEOVERS ACT

7.23 The Commonwealth government has the power to make laws that directly and indirectly determine the rights of aliens.<sup>213</sup> Investment by foreign nationals is regulated under the Foreign Acquisitions and Takeovers Act. Most foreign investment proposals involve the purchase of real property.<sup>214</sup>

7.24 Under the Foreign Acquisitions and Takeovers Act, a foreign person cannot acquire a legal or equitable interest in any residential real estate or vacant land, or commercial real estate over a specified value, in Australia without the prior approval of the Treasurer, on the advice of the Foreign Investment Review Board. The Foreign Acquisitions and Takeovers Act also regulates foreign control of certain business enterprises and mineral rights. It applies to all natural persons, whether resident in Australia or not, and all corporations, whether incorporated or carrying on business in Australia or not.<sup>215</sup> The intention is to prevent investments that are contrary to the national interest.

7.25 A foreign person as defined in the Foreign Acquisitions and Takeovers Act can be a natural person or a corporation. The definition includes:

- A natural person not normally resident in Australia
- A corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest
- A corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest
- The trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest
- The trustee of a trust estate in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.<sup>216</sup>

7.26 The interaction of the Foreign Acquisitions and Takeovers Act with State and Territory legislation is expressly accommodated by section 37 of that Act. It states that the Foreign Acquisitions and Takeovers Act is not intended to apply to the exclusion of any State or Territory law to the extent that the law is capable of operating concurrently with it.

7.27 Clearly, State and Territory legislation duplicates and complements the reach of the Foreign Acquisitions and Takeovers Act. For example, section 27 of the Property Law Act permits a resident of Victoria who has applied for permanent residency and is in Australia on a bridging visa while awaiting the outcome of the application, to purchase a house. The house may be new or old and acquired for any purpose. The Foreign Acquisitions and Takeovers Act prohibits that person from buying an established house unless it is to be used as their principal place of residence or is purchased jointly with their Australian spouse.<sup>217</sup>

7.28 By applying to foreign nationals who are not covered by the Foreign Acquisitions and Takeovers Act, section 27 can operate concurrently with it. The Foreign Acquisitions and Takeovers Act does not apply to foreign nationals who are permitted to stay in Australia indefinitely, such as New Zealand citizens and permanent residents, and who have lived in Australia for at least 200 days in the previous 12 months.<sup>218</sup> Section 27 of the Property Law Act ensures that the common law rule that an alien cannot hold or transfer land does not apply to members of this group who live in Victoria.



- 7.29 Section 27 is also broader in scope than the Foreign Acquisitions and Takeovers Act because it encompasses all forms of property.
- 7.30 It appears that, even though its scope has changed, section 27 does have significance today for some foreign nationals. However, the archaic language of the section hampers the task of identifying who those foreign nationals are.

#### OPTIONS FOR REFORM

- 7.31 On its face, section 27 applies: 'notwithstanding any law or usage to the contrary'. For clarity, it could be amended to specify that it is subject to Commonwealth legislation to the contrary. On the other hand, such an amendment is not necessary for the purposes of statutory interpretation because Commonwealth legislation will always prevail by virtue of section 109 of the Constitution.
- 7.32 An alternative would be to include a note to section 27 which cross-refers to the Foreign Acquisitions and Takeovers Act.

#### **Should section 27 be amended to make the interaction with the Foreign Acquisitions and Takeovers Act clearer?**

#### MINORS' CONTRACTS

- 7.33 Section 28B enables certain entities to lend money to minors. It operates as an exception to section 49 of the *Supreme Court Act 1986*, according to which loan contracts entered by minors are void.
- 7.34 Under section 28B, a contract between a specified lender and a minor to repay money lent, and any instrument the minor executes by way of security for the repayment of the loan, is as valid and effectual as if the minor were of full age and capacity at the time.
- 7.35 The minor cannot avoid any obligation under the loan contract or related instrument on the ground that he or she a minor when it was made. Nor does minority provide a valid reason to repudiate any 'contract transfer conveyance or assignment relating to any property charged by any such instrument.'
- 7.36 The loan contracts and related instruments to which section 28B apply include those entered and executed by the minor jointly with another person (whether of full age or not).
- 7.37 Section 28B applies to a contract entered by a minor with any of the following lenders for the repayment of money lent or advanced:
- a building society registered under the *Building Societies Act 1986*;
  - an industrial and provident society registered under the *Industrial and Provident Societies Act 1958*;
  - a co-operative registered under the *Co-operatives Act 1996*; and
  - a co-operative housing society registered under the *Co-operative Housing Societies Act 1958*.
- 7.38 The *Building Societies Act 1986* and *Industrial and Provident Societies Act 1958* have since been repealed. We propose the removal of all references to those Acts in section 28B.<sup>219</sup>
- 7.39 The *Co-operatives Act 1996* and the *Co-operative Housing Societies Act 1958* contain provisions that overlap with section 28B.

- 211 *Law of Property Act 1936 (SA)* s 24.
- 212 See for example, *Aliens Act 1864 (SA)* s 5.
- 213 *Constitution* ss 51(i), 51(ix), 51(xix), 51(xx), 51(xxvi)–(xxx).
- 214 Australia's Foreign Investment Policy (September 2009) p 2 <http://www.firb.gov.au/content/policy.asp> accessed 4 February 2010.
- 215 *Foreign Acquisitions and Takeover Act 1975 (Cth)* s 17.
- 216 *Foreign Acquisitions and Takeover Act 1975 (Cth)* s 5.
- 217 *Foreign Acquisitions and Takeover Regulations 1989* r 3(t) and (w).
- 218 *Foreign Acquisitions and Takeovers Act 1975 (Cth)* s 5A(1).
- 219 s 28B(1)(a)(i) and (iv); s 28B(1)(aa).



### CO-OPERATIVES ACT

- 7.40 Section 69(1) of the *Co-operatives Act 1996* (Co-operatives Act) prevents a member of a co-operative who is a minor from avoiding 'any obligation or liability under any contract, deed or other document entered into as a member on any ground relating to minority'.
- 7.41 An identical provision appears in the co-operatives legislation of all other jurisdictions<sup>220</sup> and in the proposed Co-operatives National Law.<sup>221</sup>
- 7.42 It is broader than section 28B because it refers to a contract other than a contract to repay money, and extends to any deed or other document entered into as a member of a co-operative. These terms appear to encompass a contract made or deed or other document entered jointly with one or more other persons.
- 7.43 Section 69(1) does not explicitly refer to an instrument executed by way of security for the repayment of a loan, such as a mortgage, but could be included in the reference to 'any...other document'.
- 7.44 In view of the breadth of section 69(1), it appears that section 28B of the Property Law Act is redundant to the extent that it applies to the Co-operatives Act. For this reason, perhaps references to the Co-operatives Act in section 28B should be removed.
- 7.45 However, if there is doubt that section 69(1) applies to mortgages and other instruments to secure a loan, and to contracts that the minor has entered jointly with another person, perhaps the references in section 28B should be retained. If so, to avoid confusion, a note could be inserted at section 69(1) referring to section 28B of the Property Law Act.

### CO-OPERATIVE HOUSING SOCIETIES ACT

- 7.46 Section 7(3) of the *Co-operative Housing Societies Act 1958* (Co-operative Housing Societies Act) specifies that a member is not entitled on any ground relating to his or her minority or former minority to avoid 'any obligations or liabilities as a member or under any mortgage given by the society'. It is narrower than section 28B because it does not refer to loan contracts or to other documents that a minor may execute in connection with a loan.
- 7.47 Only a small number of co-operative housing societies are still registered under the Co-operative Housing Societies Act. These schemes are gradually being replaced by corporations.
- 7.48 In view of the narrow wording of section 7(3), it appears prudent to retain the references in section 28B to the Co-operative Housing Societies Act. Otherwise, contracts and documents that are not captured by section 7(3) may be construed as voidable on the ground that the member of the co-operative was not of full age. To help make the law clearer, perhaps a note needs to be inserted at section 7(3) of the Co-operative Housing Societies Act referring to section 28B of the Property Law Act.

**How should the overlap and inconsistency between section 28B and equivalent provisions in the Co-operatives Act and Co-operative Housing Societies Act be corrected?**

## REPRESENTED PERSONS WITH A MENTAL ILLNESS

### CONVEYANCES BY ADMINISTRATOR

- 7.49 Section 30(1) provides for an administrator appointed under the *Guardianship and Administration Act 1986* (Guardian and Administration Act) to convey or create a legal estate on behalf of and in the name of a patient within the meaning of the *Mental Health Act 1986* (Mental Health Act) under an Order of the Court or any statutory power.
- 7.50 This section may be redundant.

- 7.51 Section 30(1) originally provided for conveyances on behalf of a 'lunatic' by 'his committee'. It did not define 'lunatic'. At that time, the Supreme Court had equitable jurisdiction to appoint guardians and committees for people who were incapable of managing their own affairs, including 'lunatics'. In addition, under the *Public Trustee Act 1958*, as amended by the *Mental Health Act 1959*, the Court could appoint the Public Trustee or any other person whom it thought fit to be the committee of a 'lunatic so found'. A 'lunatic so found' was a person whom the Court had determined was 'mentally ill or intellectually defective and incapable of managing his affairs'.<sup>222</sup> Before section 30(1) was passed, land was conveyed in the committee's name.<sup>223</sup>
- 7.52 The Supreme Court no longer has either equitable or statutory jurisdiction to appoint a committee for a person with a mental illness. Section 16 of the *Supreme Court Act 1958*, on which the Court's equitable jurisdiction was based, was repealed by section 96 of the *Constitution Act 1975*. The *Public Trustee Act 1958* has long since been repealed and jurisdiction to appoint an administrator of a person who is incapable of managing his or her affairs because of mental illness rests with VCAT under the Guardianship and Administration Act. Orders concerning the property of a person whose estate is managed by an administrator appointed under that Act are made by VCAT and not by a Court.
- 7.53 The statutory power of administrators to deal with property on behalf of a represented person is set out in Part 5 of the Guardianship and Administration Act. They include many of the powers that formerly were exercised by the Public Trustee. As section 30(1) does not apply to any person who is not both a patient within the meaning of the Mental Health Act and a person whose estate is managed by an administrator appointed under the Guardianship and Administration Act, it merely echoes the powers and responsibilities that are directly conferred on administrators by Part 5 of that Act.

**Should section 30(1), concerning conveyances by an Administrator on behalf of a patient within the meaning of the Mental Health Act, be repealed?**

**A PATIENT WHO IS A TRUSTEE OF LAND**

- 7.54 Section 30(2) applies to a patient within the meaning of the Mental Health Act for whom a guardian has been appointed under the Guardianship Administration Act. It provides that a patient in this situation who is a trustee of land held on trust for sale must be replaced by another trustee or otherwise discharged from the trust. It appears to be a purely mechanical provision to enable the exercise of powers by trustees for sale. It is consistent with the general rule of law that all trustees must concur in the conveyance of a legal estate.
- 7.55 Section 48 of the *Trustee Act 1958* allows the court to appoint a new trustee to replace a trustee who is a patient within the meaning of the Mental Health Act (whether or not a guardian has been appointed). Any review of the dual trust system, as proposed in Chapter 4, should consider the operation of section 30(2) of the Property Law Act as it interacts with section 48 of the *Trustee Act 1958*.

**MARRIED WOMEN**

**HUSBAND AND WIFE TO BE COUNTED AS TWO PERSONS**

- 7.56 Section 21 reverses a common law rule of construction that applied where real or personal property was limited to or held in trust for a husband and wife and a third party. The effect of the common law rule was that the third party got one half, as the husband and wife were counted as one person. Section 21 abrogates the rule by providing that for purposes of acquisition of property under a disposition coming into operation after 1914, the husband and wife are to be counted as two persons. As ambiguity could still arise when dealing with a husband and wife as to their share in co-ownership with a third person, no change to this provision is proposed.
- 7.57 As ambiguity could still arise when dealing with a husband and wife as to their share in co-ownership with a third person, no change to this provision is proposed.

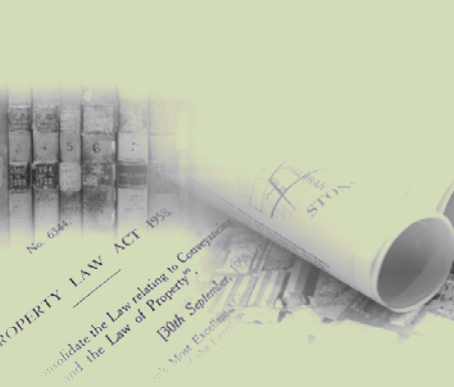
**Should section 21, concerning the acquisition of property by a married couple, be retained?**

220 *Co-operatives Act 1997* (Qld) s 63; *Co-operatives Act 1992* (NSW) s 65; *Co-operatives Act 2002* (ACT) s 64; *Co-operatives Act 1999* (Tas) s 62; *Co-operatives Act 1997* (NT) s 64; *Co-operatives Act 1997* (SA) s 64; *Co-operatives Act 2009* (WA) s 60.

221 Proposed *Co-operatives National Law Bill* cl 2506. See [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au). The proposed Co-operatives National Law will replace the co-operatives legislation of each State and Territory with a single national law. It is planned that New South Wales will enact the national law in 2010. Other States and Territories will then have 12 months to apply the national law or enact consistent legislation.

222 *Public Trustee Act 1958* (repealed) s 34(2).

223 Wallace (1984), above n 4, 260 citing *Re Tugwell* (1884) 27 Ch d 309, 312.



## PROPERTY RIGHTS OF MARRIED WOMEN

### MARRIAGE ACT

- 7.58 At common law, a woman's identity merged upon marriage with that of her husband and all her property transferred to his custody. The restrictions on a married woman's capacity to own and deal with property began to be lifted by the *Married Women's Property Act 1884* (Vic). Most or the remaining restrictions were finally removed by sections 2 and 3 of the *Marriage (Property) Act 1956*, which now appear as sections 156 and 157 of the *Marriage Act 1958* (the Marriage Act).
- 7.59 Section 156(1) of the Marriage Act states that a married woman is capable of acquiring, holding or disposing of any property whatsoever 'as if she were a *femme sole* and whether separately or jointly or in common with any other person including her husband'.
- 7.60 Section 157(1) of the Marriage Act abolished the concepts of separate property and property held for separate use in equity, which had provided some scope for a married woman to control or benefit from property notwithstanding the common law. Section 157(2) ended the ability to impose in future any restrictions on the enjoyment of any property by a woman, or restraints on anticipation or alienation, that could not have been imposed on a man.
- 7.61 In 2004, the Scrutiny of Acts and Regulations Committee of the Victorian Parliament recommended that sections 156 and 157 of the Marriage Act be repealed. During its consultations, concerns had been raised with the Committee that repealing the provisions would revive old common law rules. However, the Committee concluded that retaining them would be 'overly and unnecessarily cautious' for two reasons.
- 7.62 First, section 14(2) of the *Interpretation of Legislation Act 1984* (Vic) provides that the repeal of an Act or provision shall not revive anything not in force or existing at the time that the repeal becomes operative, unless the contrary intention expressly appears.
- 14 Provision as to effect of repeal etc. of Acts*
- (2) *Where an Act or a provision of an Act—*
- (a) *is repealed or amended; or*
- (b) *expires, lapses or otherwise ceases to have effect—*
- the repeal, amendment, expiry, lapsing or ceasing to have effect of that Act or provision shall not, unless the contrary intention expressly appears—*
- (c) *revive anything not in force or existing at the time at which the repeal, amendment, expiry, lapsing or ceasing to have effect becomes operative...*
- 7.63 The second reason why the Committee said it would be overly and unnecessarily cautious not to repeal sections 156 and 157 of the Marriage Act was the passage of time:
- The original principle – that married women were lesser legal entities than single women, and that women had lesser property rights than men – was repealed during the 1880s. A century and a quarter later it is – arguably – extremely unlikely that the repeal of the Act would revive the old common law principles.<sup>224</sup>*
- 7.64 As an alternative, the Committee thought that these provisions should be transferred to the Property Law Act.

7.65 The Government did not support the Committee's recommendation and instead supported the alternative. In its response, tabled in Parliament on 3 May 2005, the Government said:

*These provisions should be retained to ensure that outdated common law rules that prevent married women from exercising their rights cannot be revived.*

*Retaining the provisions would, for example, deter mischievous litigants from attempting to rely on old common law to unnecessarily prolong litigation to their own advantage.*

*These provisions could be transferred to Part 2 Division 8 of the Property Law Act 1958 which also deals with married women's property. This would allow the Marriage Act 1958 to be repealed in its entirety.*

*It is considered that any transitional clauses required as a result of repealing the Marriage Act 1958 should be located in the Act to which the provisions are being transferred (i.e. the Property Law Act 1958).<sup>225</sup>*

224 Scrutiny of Acts and Regulations Committee, Review of Redundant and Unclear Legislation Report concerning the Maintenance Act 1965, Marriage Act 1958 and Perpetuities and Accumulations Act 1968 November 2004, 23.

225 Government Response to the Review of Redundant and Unclear Legislation report concerning the Maintenance Act 1965, Marriage Act 1958 and Perpetuities and Accumulations Act 1968 by the Victoria Parliament Scrutiny of Acts and Regulations Committee 3.

## PROPERTY LAW ACT

7.66 Sections 167, 168 and 170 of the Property Law Act remove the same restrictions as those removed by sections 156 and 157(1) of the Marriage Act.

- Section 167 enables a married woman to dispose of property or property interests without a separate examination, acknowledgement, or her husband's concurrence.
- Section 168 gives a married woman power by deed to disclaim an estate or interest in land without her husband's concurrence
- Section 170 enables a married woman to acquire, hold and dispose of property as a trustee or personal representative.

7.67 Ideally, provisions of this type should not remain on the statutes. They are redolent of a time when women had lesser rights and are now archaic. The equality of rights that has long been established in community values and expectations should be self-evident and not reliant on provisions such as these.

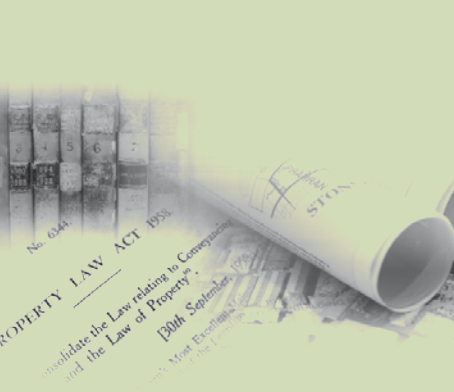
7.68 Nevertheless, the government's reluctance to repeal sections 156 and 157 of the Marriage Act reflects concern about the risk that hard won gains for women's equality of rights could be challenged or that they will appear to have been diminished. In spite of long standing equality at law, inequality of treatment persists within the community and retaining these provisions could serve an educative and symbolic purpose.

## OPTIONS FOR REFORM

7.69 We have identified the following two options:

- Repeal sections 167, 169 and 170 of the Property Law Act, and their equivalent provisions in the Marriage Act. To ensure there is no doubt that the old common law principles cannot be revived, the Property Law Act could expressly provide that the repeal of these provisions does not revive any common law, statutory provisions or presumptions of interpretation that were not in force or existing at the time of the repeal.
- Replace sections 167, 169 and 170 of the Property Act with sections 156 and 157(1) of the Marriage Act, which are more comprehensive and are expressed as positive rights.

**Should sections 167, 168 and 170, concerning the property rights of married women, be repealed? Should they be replaced by sections 156 and 157(1) of the Marriage Act?**



### POWER FOR COURT TO BIND INTEREST OF MARRIED WOMAN

- 7.70 Section 169 gives the court the discretion to empower a married woman who is restrained from anticipation or alienation of her property or interest in property to dispose of or charge it if the transaction appears to be for her benefit.
- 7.71 A restraint on anticipation or alienation of property or a property interest is a condition imposed only on a married woman. It ceases to apply if she becomes widowed or divorced.
- 7.72 Section 157(2) of the Marriage Act makes a restraint on anticipation or alienation imposed after the commencement of the *Marriage (Property) Act 1956* (the Marriage (Property) Act) void.
- 7.73 A woman whose ability to deal with property is restricted by a restraint that pre-dates the Marriage (Property) Act can apply for an order under section 169 of the Property Law Act to perform a particular transaction. However, section 169 does not enable the court to make an order removing the restraint.<sup>226</sup> Furthermore, if it does not consider the transaction is for her benefit, the court has the discretion not to make an order at all.
- 7.74 Few, if any, restraints on anticipation or alienation are likely to exist today. None have been validly created for at least 52 years. The operation of section 169 is at odds with the right to be treated equally before the law.<sup>227</sup>
- 7.75 Restraints on anticipation have been abolished in Queensland, South Australia and Western Australia.

### OPTIONS FOR REFORM

- 7.76 Whether or not it is incorporated into the Property Law Act, we consider that section 157(2) of the Marriage Act should be amended to abolish all restraints on anticipation. Section 169 of the Property Law Act should be repealed.

#### **Should all restraints on anticipation be abolished?**

<sup>226</sup> Stanley Robinson, *Transfer of Land in Victoria* (1979) 397 citing *Re Warren's Settlement* (1883) 52 LJ Ch 928.

<sup>227</sup> *Charter of Human Rights and Responsibilities Act 2006* s 8.

## Chapter 8

# Formal Requirements for Creation and Assignment of Interests

## CONTENTS

General requirements for writing .....	54
Section 52 – Requirement of a deed for conveyances.....	55
Section 53 – Other dispositions.....	55
Proposed new requirement for declaration of trust .....	56
Personal property .....	57
Proposed new scheme.....	58
Assignment of things in action.....	59
Legal assignment .....	59
Assignment in equity.....	59
Judicial consideration.....	59
Proposal .....	60
Limitation in the case of certain assignments.....	60

## Formal Requirements for Creation and Assignment of Interests

- 8.1 There are provisions in the Property Law Act which set out the formal requirements for the creation and assignments of interests in both real and personal property. Sections 52–55 deal with the requirements for creating and disposing of interests in land and personal property and sections 134–135 deal with the statutory formalities required for the assignment of things in action.
- 8.2 This Chapter discusses some of the inconsistencies identified in the legislation in respect of sections 52–55 and possible reform of these sections and of section 134.

### GENERAL REQUIREMENTS FOR WRITING

- 8.3 Sections 52–55 are an interrelated set of provisions dealing with formal requirements for creating and passing various interests in land and personal property. They apply to old system land and to unregistered dealings in land in ordinary folios. They reproduce, with amendments, earlier English legislation which traces back to the *Statute of Frauds 1677* (Imp) sections 1, 2, 3, 7, 8 and 9. Similar provisions are found in other jurisdictions.<sup>228</sup>
- 8.4 The Victorian provision corresponding to section 4 of the Statute of Frauds is not found in property legislation, as it is in other States, but in the *Instruments Act 1958* (Instruments Act). Section 126 of the Instruments Act provides that no action may be brought on a contract for the sale or disposition of land or an interest in land unless the contract, or some note or memorandum thereof, is in writing and signed by the party to be charged or by some person lawfully authorised by that party.
- 8.5 Section 126 of the Instruments Act has a complementary operation to sections 52–55 of the Property Law Act. Section 126 deals with the enforcement of land contracts, while the Property Law Act provisions prescribe formalities of writing for the creation or transfer of interests in land and personal property.<sup>229</sup> Another difference is that the requirement of writing in section 126 of the Instruments Act is merely evidentiary, while the requirements of writing in sections 52 and 53 of the Property Law Act are substantive requirements for the disposition of interests.<sup>230</sup>
- 8.6 The requirements of writing in sections 52–55 are expressly subject to the doctrine of part performance,<sup>231</sup> under which a contract for the creation or transfer of property may be effective to pass an equitable interest, despite the lack of statutory formalities, on the basis that the contract has been partly performed.<sup>232</sup>
- 8.7 In England, the doctrine of part performance no longer applies to most contracts for the sale of, or disposition of an interest in, land.<sup>233</sup> All the agreed terms must be incorporated in one document, or there is no contract. The effect of the change has been that the English courts have tended to apply the doctrine of proprietary estoppel, or to impose a constructive trust, in circumstances where they would, before 1989, have applied the doctrine of part performance.<sup>234</sup>
- 8.8 Law reform bodies in other jurisdictions have reacted with caution to the 1989 English amendment which abolished part performance. The New Zealand Law Commission expressed reservations about following the English reform ‘at least until there has been more opportunity to see how it works in practice’.<sup>235</sup> The Northern Ireland Law Commission and the Irish Law Reform Commission took a similar approach, deferring consideration of the adoption of the English reforms. We agree with this cautious approach.<sup>236</sup>



## SECTION 52—REQUIREMENT OF A DEED FOR CONVEYANCES

- 8.9 Section 52(1) sets out the basic principle that '[a]ll conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed'. 'Conveyance' is defined in section 18 to include mortgages, leases and every other assurance of land by any instrument except a will. The provision applies to dealings in registered land but is subject to section 40(2) of the Transfer of Land Act, which provides that an instrument registered under that Act has the effect of a deed.
- 8.10 Section 52(2) sets out a list of exceptions to the requirement of a deed. Section 52(2)(d) provides that the section does not apply to 'leases or tenancies or other assurances not required by law to be made in writing'. Assignments of leasehold estates must be made by deed, even if the lease is one falling within the exception in section 52(2)(d).<sup>237</sup> To overcome this anomaly, Wallace recommended that the words 'or assignment of a leasehold estate' be inserted after 'leases or tenancies' in s 52(2)(d).<sup>238</sup> An identical amendment has since been made in Ireland in 2009.<sup>239</sup>

**Should assignments of leases be exempted from the requirement of a deed, where the lease is not required to be in writing?**

## SECTION 53—OTHER DISPOSITIONS

- 8.11 Section 53 deals with dispositions for which writing is required, not necessarily in the form of a deed. Section 53(2) preserves the operation of the equitable doctrines of resulting, implied and constructive trusts, which may give proprietary relief even where the requirements of section 53(1) have not been satisfied. Section 55(d) provides that nothing in sections 53 or 54 affects the operation of the doctrine of part performance.
- 8.12 Section 53(1) and corresponding provisions in other jurisdictions have caused significant problems in interpretation, due to overlaps, ambiguities and inconsistencies. There are a number of questions concerning its interpretation,<sup>240</sup> including the following:
- It is unclear whether section 53(1)(a) applies to the creation of legal as well as equitable interests in land.<sup>241</sup> If it applies to legal interests, it is unclear how it relates to section 52(1), which provides that a conveyance of a legal estate in land must be by deed, not just in writing.
  - If section 53(1)(a) applies to equitable interests, it overlaps with section 53(1)(b) and (c) and is partly inconsistent with those provisions.<sup>242</sup>
  - Section 53(1)(b) requires a lower standard of written formalities for the declaration of a trust than for the disposition of a subsisting trust or equitable interest under section 53(1)(c). A declaration of trust respecting an interest in land must be 'manifested and proved by some person who is able to declare such trust or by his will'.<sup>243</sup> The words 'manifested and proved' do not mean that the trust must be declared in writing, but only that evidence of it must exist before any action is brought relating to it.<sup>244</sup> The 'person who is able to declare such trust' means the owner of the beneficial interest, not that person's agent.<sup>245</sup>
  - An *inter vivos* trust in personal property can be declared orally, without any writing at all,<sup>246</sup> but a disposition of such a trust is caught by section 53(1)(c) and must be in writing and signed.<sup>247</sup>

- 228 *Conveyancing Act 1919* (NSW) ss 23B–E; *Property Law Act 1969* (WA) s 32–36; *Law of Property Act 2000* (NT) ss 9–11; *Law of Property Act 1936* (SA) ss 28–31; *Property Law Act 1974* (Qld) ss 10–12; *Conveyancing and Law of Property Act 1884* (Tas) ss 59–60; *Property Law Act 2007* (NZ) ss 24–27.
- 229 An law reform report of an earlier reform body, the Law Reform Commission of Victoria, recommended that section 126 be repealed: Law Reform Commission of Victoria, *Sale of Land Discussion Paper No 8* (1988) 6.
- 230 C Harpum et al, *Megarry and Wade The Law of Real Property* (7th ed) (2008) para 11-146.
- 231 *Property Law Act 1958* (Vic) s 55(d).
- 232 *Maddison v Alderson* (1883) 8 App Cas 467; *Regent v Millett* (1976) 10 ALR 496.
- 233 *Law of Property (Miscellaneous Provisions) Act 1989* (Eng) s 2(1).
- 234 Edward Burn and John Cartwright, *Cheshire and Burn's Modern Law of Real Property* (17th ed) (2006), 875. See also Gray & Gray (2008), above n 131, paras [8.134] – [8.135] and Louise Tee, 'A Merry-Go-Round for the Millennium' (2000) 56(1) *Cambridge Law Journal* 23 for discussion of the decision of *Yaxley v Gotts* (2000) Ch 162 where Beldam LJ 'was satisfied that the proposal to exclude the uncertainties and complexities of part performance did not affect the availability of other equitable remedies'.
- 234 New Zealand Law Commission, *A New Property Law Act Report* 29 (1994) 14.
- 236 Northern Ireland Law Commission (2009), above n 47, 157–158. Law Reform Commission [Ireland] Consultation Paper 34 (2004), above n 86, 10.
- 237 Wallace (1984), above n 4, 98.
- 238 *Ibid.*
- 239 *Land and Conveyancing Law Reform Act 2009* (Ir) s 66.
- 240 See the list of questions in Edgeworth et al (2008), above n 99, para [4.83].
- 241 In *Adamson v Hayes* (1973) 130 CLR 276, Stephen, Walsh and Gibbs JJ disagreed with the proposition, supported by Menzies J, that the Western Australian equivalent of s 53(1)(a) applied only to the creation of legal interests.
- 242 As Menzies J pointed out in *Adamson v Hayes* (1973) 130 CLR 276, 292.
- 243 *Property Law Act 1958* (Vic) s 53(1)(b).
- 244 *Rochefoucauld v Boustead* [1897] 1 Ch 196, 206.
- 245 *Grey v Inland Revenue Commissioners* [1958] Ch 590, 709.
- 246 *Grey v Inland Revenue Commissioners* [1958] Ch 590, 708.
- 247 *Grey v Inland Revenue Commissioners* [1958] Ch 590, 708; *Oughtred v Inland Revenue Commissioners* [1960] AC 206; and see definition of 'disposition' in *Property Law Act 1958* (Vic) s 18(1).

## Formal Requirements for Creation and Assignment of Interests

### PROPOSED NEW REQUIREMENT FOR DECLARATION OF TRUST

- 8.13 It is anomalous that a lower standard of formality applies to the declaration of a trust in land than to the disposition of a subsisting trust, or indeed any other disposition to which section 53 applies. Under section 53(1)(b), as judicially interpreted, a declaration of a trust in land may be 'manifested and proved' by signed writing which came into existence some time after the trust was created, and the writing may be signed by a person beneficially entitled under the trust.<sup>248</sup>
- 8.14 In areas such as family property disputes, bankruptcy and administration of pension assets tests, an issue may arise as to whether certain property apparently owned by a party is in fact held by the party as trustee under an earlier declaration of trust. The date or the terms of the declaration of trust may be in issue.<sup>249</sup> The unilateral nature of a declaration of trust, coupled with the low level of formality required, creates a risk of fraudulent claims. The following case highlights some of the issues which may arise.
- 8.15 In *Owens v Lofthouse*,<sup>250</sup> a bankrupt claimed that she had previously executed a declaration of trust with the effect that, at the date of the bankruptcy, four residential properties were beneficially owned by a family trust. The court was not satisfied that the trust declaration was executed on the date it bore.<sup>251</sup> Moreover, the document was badly drafted and its effect was unclear. The court held that 'even if the declaration of trust were to be regarded as an authentic document, executed on the date that it bears, it does not manifest a sufficiently clear intention to declare a trust'.<sup>252</sup>
- 8.16 It is suggested that a higher standard of written formalities should be required for an *inter vivos* declaration of trust of land, whether of a legal or an equitable estate, than is presently required by section 53(1)(b). There are two options.
1. The declaration of trust would be required to be by deed signed by the person disposing of the land. A deed would provide better evidence as to the terms, subject matter and date of the trust declaration. It would also be beneficial to require that the deed be witnessed, as is currently the requirement in other jurisdictions. This would provide additional evidence of the date of disposition.
  2. A deed would not be required, but the declaration of trust must be made in writing and signed by the person disposing of the land. This option differs from the current law in that the signed writing is necessary to create the trust of land, not merely to evidence it, and a beneficiary's signature would no longer be sufficient.

## PERSONAL PROPERTY

- 8.17 Although there is no general rule that a legal interest in personal property must be created or assigned in writing, section 53(1)(c) requires that a disposition of an equitable interest in personal property be in writing and signed, even if the interest arose under a resulting or constructive trust.<sup>254</sup>
- 8.18 There are other statutory provisions that prescribe formalities for particular classes of personal property. For example, section 134 of the Property Law Act provides that an absolute assignment of a thing in action, to be effective in law, requires an instrument in writing 'under the hand of the assignor'. Another example is section 196 of the *Copyright Act 1968* (Cth) which provides that assignment of copyright is only effective if in writing 'signed by or on behalf of the assignor'.<sup>255</sup>
- 8.19 In Queensland, the standard of the formality required for the equivalent of section 53(1)(c) is lower, as the disposition need only be 'manifested and proved by some writing'.<sup>256</sup> We question whether it is necessary to have to satisfy even this level of formality for the disposition of personal property.
- 8.20 New Zealand has dispensed with the requirement of writing for a disposition of an equitable interest in personal property. However, the disposition of an existing equitable interest in a mixed fund consisting partly of land and partly of personal property must be in writing signed by the person making the disposition.<sup>257</sup>
- 8.21 We propose that no general formalities be prescribed for legal or equitable dispositions of personal property. Personal property is a highly diverse category, and includes chattels which can be transferred by delivery, things in action which require signed writing under section 134, and other forms of property which may be subject to special formalities under other statutes.
- 8.22 If dispositions of interests in land are dealt with in section 53(1)(a), and no general formalities are prescribed for personal property, section 53(1)(c) can be repealed.

248 *Rochefoucauld v Boustead* [1897] 1 Ch 196, 206; *Grey v Inland Revenue Commissioners* [1958] Ch 590, 709.

249 See for example, *Owens v Lofthouse* [2007] FCA 1968; *Shergold v Commissioner of State Revenue* [2006] VCAT 694.

250 *Owens v Lofthouse* [2007] FCA 1968.

251 *Owens v Lofthouse* [2007] FCA 1968 para [42].

252 *Owens v Lofthouse* [2007] FCA 1968 para [73].

253 *Property Law Act 1974* (Qld) s 45(2); *Conveyancing Act 1919* (NSW) s 38(1); *Property Law Act 1969* (WA) s 9 (1)(b); *Law of Property Act 2000* (NT) s 47(3); *Law of Property Act 1936* (SA) s 41(2); *Conveyancing and Law of Property Act 1884* (Tas) s 63(2)(a); *Property Law Act 2007* (NZ) s 9(2); *Land and Conveyancing Law Reform Act 2009* (Ir) s 64(2)(b).

254 *Oughtred v Inland Revenue Commissioners* [1960] AC 206; Harpum et al (2008), above n 230, para [11-048].

255 *Copyright Act 1968* (Cth) s 196.

256 *Property Law Act 1974* (Qld) s 11(1)(c).

257 *Property Law Act 2007* (NZ) s 25(1)(c).

## Formal Requirements for Creation and Assignment of Interests

### PROPOSED NEW SCHEME

8.23 The following scheme is proposed, to maintain continuity with the current sections 52 and 53, while eliminating the ambiguities, overlaps and inconsistencies identified above. The main changes proposed are to impose the requirement of a deed for a declaration of trust of land, and to abolish any general requirement of writing for a trust or disposition of personal property.

- 1 A conveyance of land<sup>258</sup> for the purpose of creating or conferring a legal estate therein, and a declaration of an *inter vivos* trust of land, should be void unless made by deed. The current section 53(1)(b) would be repealed. There should be a witnessing requirement for this deed. Alternatively, if the second option above (para 8.16) is preferred, section 53(1)(b) would be retained and amended to provide that 'a declaration of trust respecting any land must be in writing and signed by the person disposing of the land'.
- 2 There should be a general provision similar to the current section 53(1)(a) that 'no legal or equitable interest in land can be created or disposed of except by writing by the person creating or conveying or disposing of the same or by the person's lawfully authorized agent'. The general provision should be expressed to be subject to the first provision requiring a deed.
- 3 Both of the above provisions should remain subject to the current exceptions in sections 52(2), 54(2) and 55.
- 4 Section 53(1)(c) will be redundant if section 53(1)(a) is amended to apply to 'legal or equitable' interests, and should be repealed.
- 5 There should be a new sub-section in the Property Law Act providing that for the purpose of the above provisions, an agent of a person creating or conveying an interest in land must be lawfully authorised in writing, or by a will or by operation of law.
- 6 No instrument in writing should be required for a declaration of trust of personal property or for the assignment of a legal or equitable interest in personal property, except as provided by section 134 of the Property Law Act or by other legislation.
- 7 The amendments would not be retrospective. They would apply to conveyances and dispositions effected after the commencement of the new provisions.

**Should a deed be required for a declaration of trust of land?**

**Should there be a requirement that the deed of trust be witnessed?**

**Should signed writing be required for creating or passing a legal or equitable interest in personal property?**

## ASSIGNMENT OF THINGS IN ACTION

- 8.24 The statutory formalities for an assignment of a thing in action at law are set out in section 134. The following discussion considers whether the principles which apply to an assignment in equity should be put on a statutory footing.

### LEGAL ASSIGNMENT

- 8.25 A thing in action is 'an intangible personal property right which is incapable of physical possession and can only be claimed or enforced by a legal or equitable action'.<sup>259</sup> Examples include a debt, shares or copyright. Historically, it was not possible to assign legal things in action until the English *Judicature Act 1873*<sup>260</sup> introduced a statutory mechanism for their assignment. Section 134 of the Property Law Act is based on this provision. Similar statutory provisions were introduced in other Australian jurisdictions<sup>261</sup> and are almost identical to the Victorian legislation.

### ASSIGNMENT IN EQUITY

- 8.26 Problems arise when the statutory formalities are not fully complied with. Where the parties have concluded a specifically enforceable contract to assign, the assignment is in many cases effective to pass an equitable title. Where the assignee provides no consideration, the assignment is said to be 'voluntary'. Equity will treat a voluntary assignment as effective even before the statutory formalities have been fully satisfied.
- 8.27 The Queensland legislation<sup>262</sup> attempts to codify the equitable principles concerning the efficacy in equity of voluntary assignments of both land and things in action.<sup>263</sup> In her 1984 report, Wallace suggested introducing a statutory provision in the Victorian legislation similar to the Queensland provision.<sup>264</sup> For the reasons explained below, we think that such an amendment is no longer necessary.

### JUDICIAL CONSIDERATION

- 8.28 The purpose of the Queensland provision was to resolve conflicts in the authorities regarding the extent to which the assignment of a legal thing in action is effective in equity if the statutory formalities required for assignment have not been fully satisfied. There was some debate in earlier case law as to what was required for a gift to be complete in equity.<sup>265</sup>
- 8.29 The judgment of Turner LJ in *Milroy v Lord*<sup>266</sup> laid down the principle that in order for a gift to be complete in equity 'the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him'.<sup>267</sup>
- 8.30 The High Court in *Anning v Anning*<sup>268</sup> was divided on the interpretation of the requirements in *Milroy v Lord* and what this meant in terms of the donor's action or inaction. The view of Griffiths CJ was that a gift is complete in equity if the donor has done all that needs to be done on his or her part to complete the gift. This view was later followed in *Norman v Federal Commissioner of Taxation*<sup>269</sup> and in a joint judgment of Mason CJ and McHugh J in the case of *Corin v Patton*<sup>270</sup> which concerned an attempted gift of Torrens title land. This is also the principle enacted in the Queensland statute.
- 8.31 This principle was however qualified in *Corin v Patton* by Deane J. He considered the requirements for a gift to be complete in equity to be twofold and dependant on 'whether the donor has done all that is necessary to place the vesting of the legal title within the control of the donee and beyond the donor's recall or intervention'.<sup>271</sup>
- 8.32 Although Deane J's test appears to go further than that of Mason CJ and McHugh J, subsequent case law<sup>272</sup> has demonstrated that the Australian courts have placed little weight on the difference in formulation and have treated the principle stated by Deane J as 'effectively the same'<sup>273</sup> as the joint judgment. This test is now seen as the being the 'majority approach'<sup>274</sup> of the court in *Corin v Patton*.<sup>275</sup>

258 'Land' is defined to include an interest in land, *Property Law Act 1958* (Vic) s 18(1).

259 Encyclopedic Australian Legal Dictionary - *National Trustees Executors and Agency Co of Australasia Ltd v FCT* (1954) 91 CLR 540.

260 *Judicature Act 1873* (Eng) s 25; J Starke, *Assignments of Choses in Action in Australia* (1972) Chapter 4.

261 *Law of Property Act 2000* (NT) s 182; *Law of Property Act 1936* (SA) s 15; *Conveyancing and Law of Property Act 1884* (Tas) s 86; *Property Law Act 1969* (WA) s 20; *Property Law Act 1974* (Qld) s 199; *Conveyancing Act 1919* (NSW) s 12.

262 *Property Law Act 1974* (Qld) s 200.

263 See *Milroy v Lord* (1862) 4 De GF & J 264, *Anning v Anning* (1907) 4 CLR 1049, *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, *Corin v Patton* (1990) 92 ALR 1.

264 Wallace (1984), above n 4, 217, 218.

265 See *Milroy v Lord* (1862) 4 De GF & J 264, *Re Rose* (1952) Ch 499 1 All ER 1217, *Anning v Anning* (1907) 4 CLR 1049, *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9.

266 *Milroy v Lord* (1862) 4 De GF & J 264.

267 *Milroy v Lord* (1862) 4 De GF & J 264, 274.

268 *Anning v Anning* (1907) 4 CLR 1049 - Griffiths CJ, Isaacs J. and Higgins J.

269 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9.

270 *Bradbrook* (2007), above n 32, para [7.55].

271 *Corin v Patton* (1990) 92 ALR 1, 32.

272 See *Costin v Costin* (1997) NSW ConvR 55-81 1; *Motor Auction Pty Ltd v John Joyce Wholesale Cars Ltd* (1997) 138 FLR 11; *Marchesi v Apostolou* (2007) FCA 986; *Gardiner v Chief Commissioner of State Revenue* [2004] NSWSC 107.

273 *Marchesi v Apostolou* (2007) FCA 986 para [56].

274 *Costin v Costin* (1997) NSW ConvR 55-81.

275 The recent case law in this area is concerned with the completion in equity of a gift of Torrens title land. These cases build on equitable principles established in earlier cases involving the voluntary assignments of choses in action.

## Formal Requirements for Creation and Assignment of Interests



### PROPOSAL

8.33 The reasoning behind the Queensland provision, as expressed in reform discussions in 1973, was that ‘the time has come for this conflict of authority to be resolved by legislation’.<sup>276</sup> While the approach of the Queensland legislation was helpful in a time of uncertainty, we suggest that, as the previous conflict in this area has been resolved, there is now no need to introduce a similar or extended statutory provision. Furthermore, as no other Australian jurisdiction has put these principles on a statutory footing,<sup>277</sup> to do so would inhibit harmonisation of the law in this area.

8.34 On this basis, we propose that section 134 be retained in its current form and that no provision be added relating to the completion of a voluntary assignment in equity.<sup>278</sup>

**Should section 134, concerning assignment of a thing in action, include provision for voluntary assignments taking effect only in equity?**

### LIMITATION IN THE CASE OF CERTAIN ASSIGNMENTS

8.35 Section 135 provides for an exception from the application of section 134 in that it shall not affect the provisions of section 124 of the Friendly Societies (Victoria) Code. This Code was set out in Schedule 1 of the *Friendly Societies (Victoria) Act 1996* and section 124 deals with the assignment of an entitlement to benefits in a benefit fund of a society under that Act.

8.36 The *Friendly Societies (Victoria) Act 1996* was repealed in its entirety by section 20(2) of the *Financial Sector Reform (Victoria) Act 1999*. Section 135 is therefore no longer applicable and should be repealed.

<sup>276</sup> Queensland Law Reform Commission Report 16 (1973), above n 27,107.

<sup>277</sup> These principles have been codified in New Zealand under sections 48–53 of the *Property Law Act 2007* and were originally proposed by the New Zealand Law Commission in their 1994 Report: New Zealand Law Commission, *A New Property Law Act Report 29* (1994) 14–15.

<sup>278</sup> This proposal is made prior to an analysis of the consistency of section 134 with the *Personal Property Securities Act 2009* (Cth) operative parts of which do not commence until May 2011.

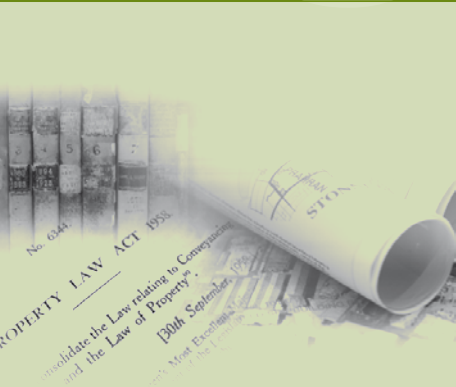
## Chapter 9

# Applications to the Court by Vendor and Purchaser

## CONTENTS

Vendor and purchaser summons.....	62
Return of deposits.....	62
Exceptional circumstances or just and equitable?.....	63
Deposits in whole or in part.....	64

## Applications to the Court by Vendor and Purchaser



- 9.1 In this Chapter we consider sections 49(1) and 49(2). These sections relate to contracts for the sale of land.
- 9.2 A statutory discretion is conferred on the court in sub-section 49(2) in situations concerning the return of a deposit. The interpretation and application of this discretion has been the subject of much case law. The following sections discuss whether judicial tests can be incorporated into the legislation to provide future clarification of the application of the sub-section.

### VENDOR AND PURCHASER SUMMONS

- 9.3 The mechanism known as the ‘vendor and purchaser summons’ is set out in section 49(1). This sub-section is the equivalent of section 49(1) of the English *Law of Property Act 1925*, which reproduces section 9 of the *Vendor and Purchaser Act 1874*.<sup>279</sup> The provision has a general application and parties can apply to court regarding ‘requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract’.<sup>280</sup> These questions cannot concern the existence or validity of the contract. The court in turn can make any order upon the application ‘as to the court may appear just’.<sup>281</sup>
- 9.4 The use of this sub-section is uncontentious and, in addition to England, similar provisions are found in legislation in Queensland, Tasmania, the Northern Territory and Ireland.<sup>282</sup>

### RETURN OF DEPOSITS

- 9.5 Section 49(2) is directed to a problem that arose at equity. There were situations in which equity would not grant a seller specific performance of a contract due to a valid objection by the purchaser to the seller’s title, but could not require the seller to return the deposit.<sup>283</sup>
- 9.6 The sub-section confers a discretion on the court to ‘provide for relief against forfeiture of deposit’<sup>284</sup> in the above situation, or in any action for the return of a deposit. The provision is equivalent to section 55(2A) of New South Wales legislation.<sup>285</sup> The majority of the relevant commentary and case law in New South Wales and Victoria concerns the debate as to both the circumstances and the threshold to be satisfied before a court will exercise this statutory discretion.
- 9.7 A narrow view of the circumstances in which the discretion will be exercised is seen in early decisions in England and Victoria, which took the view that the section would not ‘assist a defaulting purchaser’.<sup>286</sup> It was said that the sub-section ‘was not intended to provide the purchaser in default with a general means of recovering the deposit which was unavailable under the contract itself or ordinary contract law’.<sup>287</sup>
- 9.8 This narrow interpretation of the jurisdiction of the sub-section has given way to a broader interpretation in Victoria. In *Zsadony v Pizer* Dean J was of the view that ‘the sub-section is quite general in terms and should not be given a restricted operation’.<sup>288</sup> This judgment was followed in several subsequent decisions,<sup>289</sup> all of which viewed the sub-section as assisting a defaulting purchaser.<sup>290</sup>



## EXCEPTIONAL CIRCUMSTANCES OR JUST AND EQUITABLE?

- 9.9 As noted by a New South Wales court: 'It is one thing to recognize that there is a wide discretion conferred on the court in this section; it is another thing to determine the guidelines for the exercise of that discretion'.<sup>291</sup>
- 9.10 The leading case in Victoria adopts a liberal interpretation of the application of the sub-section but sets a high threshold for the exercise of the court's discretion. In *Poort v Development Underwriting (Victoria) Pty. Ltd.*<sup>292</sup> Gillard J was of the view that the court would need to be satisfied by a defaulting purchaser 'whether or not there exist...any exceptional circumstances which would justify the exercise of the wide discretion given' and that 'an innocent vendor would not be injured by the exercise of its discretion'.<sup>293</sup>
- 9.11 The leading New South Wales authority on the equivalent section 55(2A) is the case of *Lucas & Tait (Investments) Pty. Ltd. v Victoria Securities Ltd.*<sup>294</sup> Street J agreed with the 'liberal approach'<sup>295</sup> in Victoria, but considered the exercise of the discretion of the court was to be based on whether it was 'unjust and inequitable' for a vendor to retain the deposit in any particular case.<sup>296</sup> This criterion is also used to determine the exercise of the statutory discretion in Ireland and has been given legislative recognition.<sup>297</sup>
- 9.12 Professor Butt comments that the court in *Poort v Development Underwriting (Victoria) Pty. Ltd.* adopted a 'stringent view of the provision's operation',<sup>298</sup> and that the 'exceptional circumstances' test of Gillard J is a narrower view than the 'unjust and inequitable' test in New South Wales.<sup>299</sup>
- 9.13 The Victorian test does have a higher threshold to satisfy, and Gillard J himself considered 'exceptional circumstances' a 'vague and uncertain term'.<sup>300</sup> He did give some guidance in his decision and set out a number of factors (in addition to the contract) that the court should consider.<sup>301</sup> However, it is queried whether the threshold for return of deposit is too high. Robinson notes that the courts in Victoria 'have been reluctant to find exceptional circumstances'.<sup>302</sup>
- 9.14 There has been no full examination of section 49(2) by the Victorian Court of Appeal,<sup>303</sup> nor has there been any departure from Gillard J's judgment. Considering the shift in authorities discussed above, and in order to provide for legal certainty in future, we propose that a threshold test for the exercise of the court's discretion be put on a statutory footing.

**Should the test for the exercise of the court's discretion in section 49(2) be put on a statutory footing? If so, should the test be an 'exceptional circumstances' test or a 'just and equitable' test?**

- 279 Wolstenholme (1972), above n 84, 123.
- 280 *Property Law Act 1958* (Vic) s 49(1).
- 281 *Property Law Act 1958* (Vic) s 49(1).
- 282 *Property Law Act 1974* (Qld) s 70; *Conveyancing and Law of Property Act 1884* (Tas) s 39; *Law of Property Act 2000* (NT) s 72; *Land and Conveyancing Law Reform Act 2009* (Ir) s 55.
- 283 *Re Scott and Alvarez's Contract* [1895] 2 Ch 603. See discussion in Wikrama-Nayake (1986), above n 114, 294–295 and Peter Butt, *The Standard Contract for Sale of Land in New South Wales* (2nd ed) (1998) [9.115]–[9.118].
- 284 Don MacCallum, 'Common Misconceptions about Forfeiture of Deposits' (1994) 68(10) *Law Institute Journal* 960.
- 285 *Conveyancing Act 1919* (NSW). See also section 49(2) *Law of Property Act 1925* (Eng) and the broader application of section 54 of the *Land and Conveyancing Law Reform Act 2009* (Ir).
- 286 Butt (1998), above n 283, para [9.140]. *James Macara Ltd v Barclay* [1944] 2 All ER 31 at 32, *Re Hoobin (dec'd)* [1957] V.R. 341, 351.
- 287 MacCallum (1994), above n 284.
- 288 *Zsodony v Pizer* [1955] VLR 496, 341; *Lucas & Tait (Investments) Pty. Ltd. v Victoria Securities Ltd* [1973] 2 NSWLR 268 at 271 citing Dean J. The view of Dean J was 'doubted' by the Court in *Re Hoobin (dec'd)* [1957] V.R.
- 289 *Mallet v Jones* [1959] VR 122, *Yammouni v Condidorio* [1959] VR 479, *Kadissi v Jankovic* [1987] VR 255.
- 290 MacCallum (1994), above n 284.
- 291 *Lucas & Tait (Investments) Pty. Ltd. v Victoria Securities Ltd* [1973] 2 NSWLR 268, 272.
- 292 *Poort v Development Underwriting (Victoria) Pty. Ltd.* [1976] VR 779.
- 293 *Poort v Development Underwriting (Victoria) Pty. Ltd.* [1976] VR 779 785–786.
- 294 *Lucas & Tait (Investments) Pty. Ltd. v Victoria Securities Ltd* [1973] 2 NSWLR 268. See also *Eighth SRJ Pty Ltd v Merity* (1997) 7 BPR 15, 189.
- 295 *Lucas & Tait (Investments) Pty. Ltd. v Victoria Securities Ltd* [1973] 2 NSWLR 268, 272.
- 296 *Lucas & Tait (Investments) Pty. Ltd. v Victoria Securities Ltd* [1973] 2 NSWLR 268, 272.
- 297 *Land and Conveyancing Law Reform Act 2009* (Ir) s 54.
- 298 Butt (1998), above n 283, para [9.140].
- 299 Ibid.
- 300 *Poort v Development Underwriting (Victoria) Pty. Ltd.* [1976] VR 779, 786.
- 301 Gillard J referred to 'the conduct of the respective parties, whether the vendor can be adequately compensated, particularly having regard to the nature and size of the premises sold and the subsequent history of the premises, and whether, having regard to the same factors, the amount of the deposit can be regarded as a mutually fair and reasonably proportioned security of due performance by the purchaser' *Poort v Development Underwriting (Victoria) Pty. Ltd.* [1976] VR 779, 786.
- 302 Robinson (1992), above n 27, 93.
- 303 Butt (1998), above n 283, para [9.140].

# Applications to the Court by Vendor and Purchaser



### DEPOSITS IN WHOLE OR IN PART

9.15 A related issue is that section 49(2) does not expressly allow only part of the deposit to be returned.<sup>304</sup> As Professor Butt comments regarding the approach of Gillard J in *Poort v Development Underwriting (Victoria) Pty. Ltd.* and of Crockett J in *Kadissi v Jankovic*:<sup>305</sup>

*[m]uch the same result can be reached by ordering repayment of the whole but with a set-off for matters such as damages, agent's commission, legal expenses and the like, incurred by the purchaser's breach.*<sup>306</sup>

9.16 As this approach is already being used by the courts to circumvent the limitations of the sub-section, no significant change would result from extending the court's discretion to return part only of the deposit or to award damages.<sup>307</sup>

**Should section 49(2) be extended to allow the court to award part of a deposit or damages?**

304 Wikrama -Nayake (1986), above n 114, 296 citing Vaisey J in *James Macara Ltd. v Barclay* [1944] 2 All E.R. 31.

305 *Kadissi v Jankovic* [1987] VR 255, 259. The following statement was made by Crockett J: 'If there be no power to order part only of the deposit to be refunded the same result can be achieved by making return of the deposit conditional upon the applicants' paying such damages as would compensate the respondent for loss suffered due to the applicant's default'.

306 Butt (1998), above n 283, para [9.135].

307 Wallace (1984), above n 4, 89.

# Chapter 10

## Third Party Rights

### CONTENTS

Judicial interpretation of section 56(1).....	66
Criticism of the doctrine of privity .....	67
Reform of the doctrine of privity .....	68
Reform of section 56(1) .....	69
Enforcement by a beneficiary who is not a party to the agreement.....	69
Application to personal property....	69
Further reform .....	70

No. 6344.  
**PROPERTY LAW ACT 1958.**

Act to consolidate the Law relating to Conveyancing and the Law of Property (s)  
[30th September, 1958]

the Queen's Most Excellent Majesty  
by the consent of the Legislature  
of Victoria in this first session of the  
thirty-first year of Her Majesty the Queen's Most Excellent Majesty Elizabeth the Second by Her Letters Patent under the Great Seal of Great Britain, bearing date the twenty-third day of August, 1958.

### JUDICIAL INTERPRETATION OF SECTION 56(1)

- 10.1 Section 56(1) of the Property Law Act replicates section 56(1) of the *Law of Property Act 1925* (Eng).
- 56 Persons not named as parties may take interest in land etc.*
- (1) *A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he is not named as a party to the conveyance or other instrument.*
- 10.2 There has been a great deal of confusion about what the section means.
- 10.3 On first reading, section 56(1) seems to make an exception to the doctrine of privity of contract, according to which only a party to a contract may enforce an obligation made under that contract. Thus, if A (the covenantor) covenants with B (the covenantee) to confer a benefit upon C, only B can enforce the covenant.<sup>308</sup> Section 56(1) appears to permit C to enforce the covenant between A and B.
- 10.4 This expansive interpretation was notably advanced by Lord Denning MR, who considered that section 56(1) abrogated the entire doctrine of privity.<sup>309</sup> However, this view was subsequently rejected by the House of Lords in *Beswick v Beswick*<sup>310</sup> and by Australian courts.<sup>311</sup>
- 10.5 In *Beswick v Beswick*, the House of Lords reasoned that the *Law of Property Act 1925* (Eng) consolidated earlier legislation and was not intended to make substantive changes to the law. Section 56(1) replaced section 5 of the *Real Property Act 1845* (Eng), which was enacted solely to reverse a narrow technical rule. At common law, an immediate interest in land could not be granted by a deed made *inter partes*<sup>312</sup> unless the grantee was named as a party to the deed, and only a person expressly named as a party to a deed made *inter partes* could sue on that deed. This rule was distinct from the doctrine of privity.
- 10.6 The House of Lords found that section 56(1) should be construed consistently with section 5 of the *Real Property Act 1845* (Eng). This interpretation is consistent with Australian case law. It is now settled that section 56(1) provides that a covenant under an instrument made *inter partes* may be enforced by a person who, although not named, is a person to whom that conveyance or other instrument formally purports to grant something. It does not apply to any person who may benefit.<sup>313</sup>
- 10.7 It follows that a covenant made with 'the owners for the time being' of identified land can be enforced by any person who falls within that general description.<sup>314</sup> However, the person must have existed and be identifiable at the date the covenant was made.<sup>315</sup> For instance, a positive covenant that purports to grant a benefit to future owners of specified land, such as a promise to make repairs, cannot be enforced by any future owner.
- 10.8 Furthermore, even though section 56(1) refers to land 'or other property', it has been construed to mean only real property.<sup>316</sup> Again, this interpretation was influenced by the operation of section 5 of the *Real Property Act 1845* (Eng).
- 10.9 As Wallace observed, 'judicial interpretation of section 56 is now so far removed from the ordinary meaning of the language as to require replacement of the provision'.<sup>317</sup>
- 10.10 Simply revising section 56(1) to convey its meaning more clearly will not address the shortcomings in the law. Concerns about the narrow interpretation of this provision form part of wider debate about the effect of the doctrine of privity.

## CRITICISM OF THE DOCTRINE OF PRIVITY

10.11 The most compelling criticism of the doctrine of privity is that it prevents the enforcement of a promise by persons who were clearly intended to benefit from it. The Queensland Law Reform Commission examined in detail the effect of the doctrine in its 1973 report on property law.<sup>318</sup> It observed that

*[T]here is little doubt that in general the rule is highly inconvenient and that it defeats the reasonable and justifiable expectations of the parties, enabling persons to escape from obligations which they have, often for value, deliberately undertaken.*<sup>319</sup>

10.12 While conceding that the doctrine occasionally appears to produce a beneficial or just result, the Queensland Law Reform Commission concluded that it is a source of serious injustice:

*[h]ence, a promise given for consideration to discharge the debt of another is unenforceable by the latter ... as is a promise by a man to pay his future son-in-law a sum of money given in consideration of a like promise by another person: ... to a husband to pay his widow an annuity after his death...; or by a partner to pay an annuity to his partner's daughter: ...; a promise by an insurer to pay policy moneys to a relative of the insured...; and a promise by a father to a mother to pay weekly maintenance to his epileptic son. [references omitted]*<sup>320</sup>

10.13 A notable exception to the doctrine of privity was found by the High Court in *Trident General Insurance Co Ltd v McNeice Bros Pty Ltd*.<sup>321</sup> McNeice Bros Pty Ltd successfully sought indemnification under a contract of insurance between Trident General Insurance Co Ltd and Blue Circle Southern Cement Ltd. McNeice was a beneficiary of the contract of insurance but was not a party and had given no consideration. The High Court judges made it clear that the effect of the decision was limited to contracts of insurance and did not affect the general doctrine of privity of contract.<sup>322</sup> Subsequent cases have not extended this exception.<sup>323</sup>

10.14 The retention of the doctrine of privity in Australia is out of step with other legal systems and increasingly differs from other common law jurisdictions. The Queensland Law Reform Commission observed in 1973 that France, Germany and South Africa have no such rule, nor do the common law jurisdictions of the United States.<sup>324</sup> More recently, as discussed below, New Zealand and England have significantly modified the doctrine.

308 A 'covenant' in this context means a promise made in a deed or document under seal.

309 *Smith and Snipes Hall Farm Ltd v River Douglas Catchment board* [1949] 2 KB 500, 517; *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 QB 250, 274; *Beswick v Beswick* [1966] Ch 538, 556G–557C.

310 *Beswick v Beswick* [1968] AC 58.

311 *Bird v Trustees Executors & Agency Co Ltd* [1957] VLR 619; *Doyle v Phillips* [1997] NSW ConvR 56 427; *Re Estate of Bristow* [2005] NSWSC 1252.

312 A deed made *inter partes* is executed by more than one party and is distinct from a deed poll, which is executed unilaterally by one party.

313 *Beswick v Beswick* [1968] AC 58, 76 (Lord Reid).

314 Gray & Gray (2008), above n 131, 244.

315 *Bohn v Miller Bros Pty Ltd* [1953] VLR 354, 358; *Bird v Trustees Executors & Agency Co Ltd* [1957] VR 619.

316 *Beswick v Beswick* [1968] AC 58, 77 (Lords Reid, Hodson and Guest).

317 Wallace (1984), above n 4, 112–113.

318 Queensland Law Reform Commission Report 16 (1973), above n 27, 37–41.

319 Queensland Law Reform Commission Report 16 (1973), above n 27, 38.

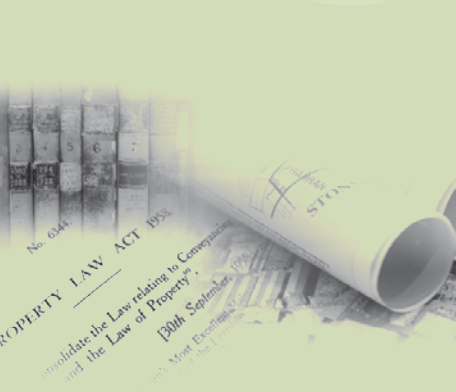
320 *Ibid.*

321 *Trident General Insurance Co Ltd v McNeice Bros Pty Ltd* (1988) 165 CLR 107.

322 The *Insurance Contracts Act 1984* (Cth), ss 48, 48AA, 48A, now enables a third party referred to in a general or life insurance contract as a beneficiary to sue the insurer despite lack of privity and no consideration.

323 For example, in *Cousin v Grant* (1991) 103 FLR 236, 244 (Miles CJ), the ACT Supreme Court concluded that *Trident General Insurance Co Ltd v McNeice Bros Pty Ltd* does not affect the law of restrictive covenants.

324 Queensland Law Reform Commission Report 16 (1973), above n 27, 37.



### REFORM OF THE DOCTRINE OF PRIVACY

10.15 Legislation to reform the law of privity was proposed in England in 1937 by the Law Revision Committee in its Sixth Interim Report. It recommended that:

*Where a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision in his own name, provided that the promisor shall be entitled to raise as against the third party any defence that would have been valid against the promisee. The rights of the third party shall be subject to cancellation of the contract by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct.*<sup>325</sup>

- 10.16 The Law Revision Committee's recommendations were not enacted into legislation but the English Law Commission made similar recommendations in a consultation paper in 1991.<sup>326</sup> This was followed in 1996 by a final report and draft bill.<sup>327</sup> The *Contract (Rights of Third Parties) Act 1999* (Eng), based on the draft bill, now allows a third party beneficiary to enforce a contractual term if specifically authorised by the contract to do so or if the contract purports to confer a benefit on him or her. The Act also gives the third party access to remedies for a breach.
- 10.17 In New Zealand, the *Contracts (Privity) Act 1982* (NZ) similarly empowers a third party to enforce a contractual term which benefits them, whether or not the person is a party to the contract or in existence at the time it was made.
- 10.18 Reform in Australia has been piecemeal and less extensive. Western Australia, Queensland and the Northern Territory have enacted property legislation that abrogates the doctrine of privity of contract but the other jurisdictions have not passed legislation that extends the rights of third party beneficiaries generally.
- 10.19 Section 11(1) of Western Australia's *Property Law Act 1969* is almost the same as section 56(1) of the Victorian legislation. Section 11(2) abrogates the doctrine of privity as it applies to a contract that expressly purports to confer a benefit on a person who is not named as a party – other than a conveyance or other instrument to which section 11(1) applies. Such a contract is directly enforceable by the third party, subject to the promiser being entitled to raise against the third party any defence that would have been valid against the promisee.
- 10.20 Section 55 of the Queensland *Property Law Act 1974* and section 56 of the Northern Territory's *Law of Property Act 2000* impose on a promiser, whose promise benefits a third party, a duty to perform that promise. The third party beneficiary is entitled to enforce the duty. He or she may also be bound by the promise and be subject to a duty enforceable by the promiser. Unlike the Western Australian legislation, under the Queensland and Northern Territory legislation the third party need not have been identified or in existence at the time the promise is given.
- 10.21 There appear to be grounds for reform of the doctrine of privity as it applies in Australia to third party beneficiaries, and any modifications to section 56(1) are likely to abrogate the doctrine to some degree. However we are inclined to agree with the view of the survey of Northern Ireland land law in 1971: 'land law legislation is not the place for dealing with the general doctrine of privity of contract, however much we should like to see the subject reviewed'.<sup>328</sup>
- 10.22 This does not mean that section 56(1) should not be modified independently of a wider reappraisal of the doctrine of privity, but it does mean that we do not propose to recommend general changes to the rights of third party beneficiaries.

## REFORM OF SECTION 56(1)

### ENFORCEMENT BY A BENEFICIARY WHO IS NOT A PARTY TO THE AGREEMENT

10.23 As noted above, section 56(1) does not operate unless the covenant formally purports to be made with the person seeking to rely on it, although the person may fall within a generic description.<sup>329</sup> A person who benefits from the covenant but was not identified or in existence when the agreement was made cannot enforce it.

10.24 The property legislation of New South Wales, the Australian Capital Territory, South Australia, Tasmania and Western Australia contain provisions that are almost the same as section 56(1) of the Victorian legislation.<sup>330</sup> However, as noted above, Queensland and the Northern Territory have passed legislation that modifies the equivalent of section 56(1) to enable a third party beneficiary to enforce a covenant even if not a party to the agreement.<sup>331</sup>

10.25 Section 12 of the Northern Territory *Law of Property Act 2000*, which is similar to section 13 of the Queensland *Property Law Act 1974* but expressed in more modern language, states as follows:

*12. Persons taking who are not parties*

*(1) In respect of a conveyance or other instrument executed after the commencement of this Act, a person may take –*

*(a) an immediate or other interest in land; or*

*(b) the benefit of any condition, right of entry, covenant or agreement over or in respect of land, even though the person may not have executed the conveyance or other instrument, may not be named as a party to the conveyance or other instrument or may not have been identified or in existence at the date of execution of the conveyance or other instrument.*

*(2) A person referred to in subsection (1) may sue, and is entitled to all rights and remedies in respect of the conveyance or other instrument, as if the person had been named as a party to and had executed the conveyance or other instrument*

10.26 We propose that section 56(1) be amended, along the lines of the Queensland and Northern Territory legislation, to allow for enforcement by a third party beneficiary who was not identified or in existence when the relevant instrument was made.

### APPLICATION TO PERSONAL PROPERTY

10.27 Although section 56(1)—and its equivalent provisions in New South Wales, Australian Capital Territory, South Australian, Western Australian and Tasmanian legislation—refers to ‘land or other property’, these words have been interpreted to mean only real property.<sup>332</sup> In view of arguments to extend the rights of third party beneficiaries more generally, section 56(1) could be amended so that it applies to covenants regarding personal property as well.

10.28 This would be a major modification to the doctrine of privity of contract. If the rights of third party beneficiaries are to be extended so far, consideration must be given as to how those rights are to be exercised and in what circumstances. Substantial reform of the doctrine may be desirable, but it requires separate examination and possibly comprehensive legislation such as the *Contract (Rights of Third Parties) Act 1999* (Eng).

10.29 In the meantime, we suggest that section 56(1) could be amended by removing the words ‘or other property’ to more clearly convey the established scope of the provision.

325 Law Revision Committee in its *Sixth Interim Report 1937* (Eng), 30.

326 Law Commission [England and Wales], *Privity of Contract: Contracts for the Benefit of Third Parties* Consultation Paper 121 (1991).

327 Law Commission [England and Wales], *Privity of Contract: Contracts for the Benefit of Third Parties* Report No 242 (1996).

328 Land Law Working Party of the Faculty of Law, Queen's University Belfast (1971), above n 102., 62.

329 Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (2nd ed) (2000) 276.

330 *Conveyancing Act 1919* (NSW) s 36C; *Civil Law (Property) Act 2006* (ACT) s 212; *Law of Property Act 1936* (SA) s 34; *Conveyancing and Law of Property Act 1884* (Tas) s 61(c); *Property Law Act 1969* (WA) s 11(1).

331 According to the explanatory statement of 24 November 2005 s 212 of the *Civil Law (Property) Act 2006* (ACT) applies to a person who is not a party to the agreement. The section enables enforcement by a person ‘even though the person is not a party’ to the agreement. However, the explanatory statement also says that the provision was formerly s 36C of the *Conveyancing Act 1919* (NSW). This provision, which still applies in NSW, is identical to section 56(1) of the Victorian legislation and refers to enforcement by a person who ‘may not be named as a party’. It is not clear that the ACT Parliament intended to change the law.

332 *Beswick v Beswick* [1968] AC 58, 77 (Lords Reid, Hodson and Guest).

# 10

## Chapter 10

## Third Party Rights

### FURTHER REFORM

10.30 During the second phase of this reference, when we will be reviewing easements and restrictive covenants, we will consider the option of a statutory code for the running of benefits and burdens. Such a code would make it unnecessary to rely on section 56(1) to enforce freehold covenants. However, section 56(1) would still have application to real property annuities and subsisting rentcharges.

**Should section 56(1) be amended to remove references to 'other property', and to enable enforcement of a covenant by third party beneficiaries who were not identified or in existence at the time of the conveyance or other instrument?**

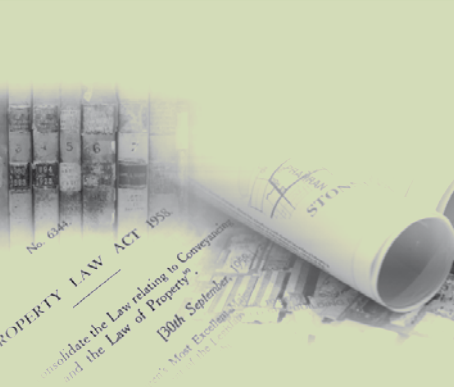




# Chapter 11

## Execution of Judgments





- 11.1 Part III of the Property Law Act includes a number of provisions relating to the execution of judgment debts. The general effect of sections 209–212 is that no court orders or execution process ('executions') shall affect a purchaser, mortgagee or execution creditor of land until recorded by the Registrar-General. Sections 210–211 provide for the executions to expire after 5 years unless re-recorded. Section 213 provides for the recording of pending claims to the land (*'lis pendens'*) in a similar way to executions.
- 11.2 The provisions cannot apply to land in ordinary folios, as they are inconsistent with section 52 of the Transfer of Land Act. Section 52 provides that recording of the executions by the Registrar effectively freezes the register for three months. A transfer by the Sheriff lodged within three months of the recording is to be registered with priority over any other dealing lodged since the recording was made.
- 11.3 The requirements in sections 209–212 for recording of executions by the Registrar-General are outdated.<sup>333</sup> Since the deeds registry was closed in 1999, dealings relating to old system land are recorded by the Registrar.<sup>334</sup> The Registrar is empowered by sections 26E and 26F of the Transfer of Land Act to record in an identified folio a 'judgment, decree, execution or process of a court' affecting an old system land parcel. The lodgement of the dealing triggers the creation of an identified folio, if one does not already exist.<sup>335</sup>
- 11.4 Section 26L of the Transfer of Land Act provides that, where an execution is recorded in an identified folio, the priority of the execution is determined in accordance with section 6 of the Property Law Act as if it were an interest registered under that section.<sup>336</sup> This means that the priority of the execution over other interests is determined by the rule of the old deeds registration system. The rule is that registration of an instrument made and executed *bona fide* and for value gives priority over all other instruments not previously registered.<sup>337</sup> An instrument has been held not to be executed *bona fide* if the person taking under it has notice of a prior unregistered interest.<sup>338</sup>
- 11.5 While section 6 regulates the priority of *recorded* executions affecting old system title, sections 209–212 protect purchasers, mortgagees and judgment creditors from being affected by *unrecorded* executions. Those provisions need to be retained and updated to require recording by the Registrar instead of by the Registrar-General. As they apply only to old system land, they could be relegated to the proposed schedule (see Appendix B).
- 11.6 If sections 209–212 are retained, consequential amendments should be made to r 69.06(2) of the *Supreme Court (General Civil Procedure) Rules 2005*, which requires the Sheriff to provide warrants and certain other documents to the Registrar-General where the land is not under the operation of the Transfer of Land Act.
- 11.7 Section 213, which authorises the recording of *lis pendens* (pending lawsuits relating to specific property) is inconsistent with section 52(1) of the Transfer of Land Act, which provides that, except as provided in the Act, 'no execution or *lis pendens* shall bind or affect any land under the operation of this Act'. Land for which an identified or provisional folio has been created is deemed to be land under the operation of the Act.<sup>339</sup> As the Transfer of Land Act makes no provision for recording of *lis pendens*, we propose that section 213 should be repealed.
- 11.8 Sections 214–218 provide for the recording by the Registrar-General of Crown charges over debtors' land and the discharge of the debts and charges. There are no equivalent provisions in the Transfer of Land Act for land under the operation of that Act. Queensland abolished special Crown rights in 1874, leaving the Crown to the same remedies as an ordinary subject.<sup>340</sup> We propose that sections 214–218 be repealed.
- 11.9 The remaining provisions of Part III, sections 208, 219 and 220, give the Sheriff broad powers to take and sell the real and personal property of a judgment debtor in execution of a judgment debt. These provisions apply to land in ordinary folios. The powers of the Sheriff to seize, sell and deal with property are set out at sections 23–25 of the *Sheriff Act 2009*. Detailed procedures for the exercise of the powers are found in *Supreme Court (General Civil Procedure) Rules 2005*, r 69.

- 11.10 Section 208(1) enables every kind of estate or interest in land to be taken in satisfaction of judgment debts.<sup>341</sup> Subsection (2) makes land held in trust for the debtor liable to be taken in execution of a judgment.<sup>342</sup> The provisions should be retained and redrafted in simpler and clearer language.
- 11.11 Subsection 208(3) provides that the Sheriff is under no duty to take possession of the debtor's land before selling, and adds a proviso that the land shall not be sold until one month after notice of the sale has been published in the Government Gazette and in local newspapers. The proviso should be revised as it is inconsistent with the requirements for advertising a sheriff's sale in the *Supreme Court (General Civil Procedure) Rules* r 69.06. It is also unclear as to whether the provision applies to all sales of real property by the Sheriff.
- 11.12 Subsection 208(4) empowers the Sheriff to execute a valid and effectual deed of conveyance or transfer of the debtor's land to the purchaser. The subsection should be retained.
- 11.13 Section 219 gives the Sheriff broad powers to sell a judgment debtor's personal property being money, bank notes, bonds, specialties or other securities for money in execution of the debt. Section 220 empowers the Sheriff to exercise the debtor's powers over property for the benefit of the judgment creditor. Subject to review for consistency with the *Personal Property Securities Act 2009* (Cth), we provisionally propose that these sections be retained and redrafted in clearer and simpler language.

**Should sections 209–212, concerning execution of judgments, be amended to require recording by the Registrar of Titles?**

**Should sections 213–218, concerning execution of judgments, be repealed?**

- 333 Notwithstanding that the recording by the Registrar-General is to be construed as a direction to the Registrar of Titles: *Transfer of Land Act 1958* (Vic) s 126.
- 334 *Transfer of Land Act 1958* (Vic) s 126.
- 335 *Transfer of Land Act 1958* (Vic) ss 26E(1)(a), (4).
- 336 *Transfer of Land Act 1958* (Vic) s 261.
- 337 *Property Law Act 1958* (Vic) s 6(1).
- 338 *Sydney & Suburban Mutual Permanent Building & Land Investment Association v Lyons* [1894] AC 260; Sykes and Walker (1993), above n 30, 411.
- 339 *Transfer of Land Act 1958* (Vic) s 9(2).
- 340 Wallace (1984), above n 4, 304.
- 341 Robinson (1992), above n 27, 453.
- 342 Robinson (1992), above n 27,

# Chapter 11

## Execution of Judgments



## Chapter 12

# Land Identification, Boundaries and Encroachment

## CONTENTS

Survey boundaries .....	76
Proposal .....	76
A mistaken improver relief provision ....	76
Mistaken improvers at common law .....	76
Mistaken improver provisions .....	77
Forum .....	77
A building encroachment relief provision .....	78
Provisions for determining and adjusting boundaries .....	78
Boundary disputes under the current law .....	78
Problems with the adverse possession rule in boundary disputes .....	79
Building encroachment laws in other jurisdictions .....	79
Can building encroachment be dealt with under a mistaken improver provision? .....	80
Building encroachment and adverse possession .....	80
Forum .....	82

No. 6344.  
**PROPERTY LAW ACT 1958.**

Act to consolidate the Law relating to Conveyancing  
and the Law of Property.  
[30th September, 1958.]

the Queen's Most Excellent Majesty  
by consent of the Legislature  
of Victoria in the  
Year of our Lord one thousand nine hundred and fifty-eight

# Land Identification, Boundaries and Encroachment



### SURVEY BOUNDARIES

- 12.1 Part VII of the Property Law Act preserves reforms originally introduced in 1885 to settle the boundaries of land parcels in cases where the land description in title deeds did not match the Crown survey boundaries marked out on the ground.<sup>343</sup> Discrepancies may arise where there were errors in the original survey, or where survey markers on the ground have been obliterated. Sections 268–270 enable the identity and boundaries of a land parcel to be determined by reference to the survey markings on the ground.
- 12.2 Section 270 was introduced to deal with excessive measurements in original Crown surveys. It seems that it was at one time the practice for government surveyors to use a survey chain that was over the standard length.<sup>344</sup> This led to a problem where the area of the Crown section as marked out on the ground by the survey boundaries exceeded the total of the areas of the individual allotments in the Crown subdivision as described in the title documents. Section 270 provides that where a Crown section has been subdivided by the Crown into allotments of equal area, the excess area is to be distributed equally among the lots.
- 12.3 The Registrar considers that it would be useful to extend section 270 to two cases that are not presently covered. The first case is where the Crown subdivision of a section creates allotments of unequal area. The second is where the area of the Crown section as marked out on the ground is less than the total areas of the allotments in the Crown subdivision.

### PROPOSAL

- 12.4 We propose that the requirement of equal portions or allotments should be removed, and that the rule should be that the excess area or the shortage in area is distributed among the allotments in proportion to their respective areas.

**Should section 270 be extended to enable the distribution of shortages as well as excess of measurement, in proportion to the respective areas of the allotments?**

### A MISTAKEN IMPROVER RELIEF PROVISION

- 12.5 Wallace observes that errors in identification of land in Victoria ‘are inevitable owing to the nature of the country, the impermanence of survey markers, the obliteration of pegs and fences through bushfires and the inaccuracy of original Crown surveys’.<sup>345</sup> Errors can be costly, where they lead to improvements being erected on the wrong land, or across a Crown boundary line.

### MISTAKEN IMPROVERS AT COMMON LAW

- 12.6 In the absence of a statutory relief provision, the improvements become fixtures on the land,<sup>346</sup> and the mistaken improver generally loses all rights to use or remove them, while the landowner receives an undeserved windfall. This is currently the position in Victoria.
- 12.7 In the leading Victorian case, *Brand v Chris Building Society*,<sup>347</sup> the plaintiff was granted an injunction to stop a builder from demolishing a new home which the builder had erected on the plaintiff’s land under an honest mistake as to the identity of the lot. The plaintiff took action as soon as he learned of the construction. The court held that there was no jurisdiction to refuse the injunction on the basis that the plaintiff would be unjustly enriched by retaining the improvement on his land.<sup>348</sup>
- 12.8 Although there have been some developments in the law of unjust enrichment since *Brand v Chris Building Society* was decided, it is very unlikely that a mistaken improver who makes unsolicited improvements to the land of another under a mistake would succeed in a claim for compensation on the basis of unjust enrichment or estoppel.<sup>349</sup>
- 12.9 In 1973, the Queensland Law Reform Commission considered the mistaken improver problem and the Victorian decision in *Brand v Chris Building Society*. The Commission observed that ‘the incidence of building on one allotment in mistake for another is surprisingly large, most practising members of the profession having encountered it on one or more occasions’.<sup>350</sup> It concluded that a relief provision was not merely desirable but necessary.<sup>351</sup>

## MISTAKEN IMPROVER PROVISIONS

- 12.10 The idea for the mistaken improver provisions comes from US States and Canadian provinces, many of which have statutes that empower a court to grant discretionary relief to a person who annexes chattels to the land of another or makes lasting improvements in the mistaken belief that the land is his or her property. The statutes were originally enacted to encourage settlement and development of land at a time when land records were deficient. The statutes are intended to provide relief against the unjust enrichment of a landowner who benefits from another's mistaken expenditure.<sup>352</sup>
- 12.11 Under the Canadian statutes, relief is available both for mistakes of identity (where the improver mistakes someone else's land for his or her own), or for mistakes of title (where the improver wrongly believes that he or she has title to the land).
- 12.12 The Queensland Law Reform Commission's recommendations led to the enactment of Division 2 of Part 11 of the *Property Law Act 1974* (Qld). An application for relief under the Division may be made where a person makes a lasting improvement on land owned by another in the genuine but mistaken belief that the land is the person's property or the property of a person on whose behalf the improvement was intended to be made. If the court thinks it is just and equitable that relief should be granted, it has power to make one or more of the following orders:
- that the whole or part of land on which the improvement stands be vested in the applicant;
  - that the improvement be removed;
  - that compensation be paid to any person; and
  - that a person have or give possession of the land or improvement or part thereof for a specified period and on specified terms and conditions.
- 12.13 The Northern Territory has adopted a provision based on the Queensland model.<sup>353</sup> New Zealand and Western Australia have also enacted relief provisions, but in those jurisdictions the relief is limited to mistakes of identity.<sup>354</sup> The provisions apply where a building has been erected by a landowner because of a mistake as to boundaries or the identity of a piece of land.
- 12.14 The Queensland and Northern Territory provisions are more broadly expressed, and encompass mistakes as to title. An example of a mistake of title occurred in a Queensland case in which a purchaser of land undertook the construction of a home in the mistaken belief that it had acquired a beneficial interest from an intermediate vendor, and lost the land when the vendor defaulted under the head contract.<sup>355</sup>

## FORUM

- 12.15 Jurisdiction to hear applications under a mistaken improver provision could be given to the Real Property List of the Victorian Civil and Administrative Tribunal (VCAT). The Property List of VCAT already has jurisdiction under Part IV of the Act (co-owned land and goods), and for that purpose it must be constituted by or include a member who, in the opinion of the President, has knowledge or experience in property matters.
- 12.16 Alternatively or additionally, jurisdiction could be given to the Supreme and County Courts, or to the Magistrates' Court as well. The shared jurisdiction model would be consistent with the Government's *Justice Statement 1*, which advocates the resolution of matters at the lowest level in order to reduce costs and improve access to justice.<sup>356</sup> It is likely that relatively few applications would fall within the jurisdictional limit of the Magistrates' Court, which is currently \$100,000 in civil matters.

**Should Victoria adopt a mistaken improver relief provision? If so, should it encompass mistakes as to identity as well as mistakes as to title?**

**If Victoria adopts a mistaken improver provision, which court, courts or tribunal should have jurisdiction?**

343 Wallace (1984), above n 4, 317.

344 Robinson (1992), above n 27, 500, citing *Ex parte Rowan* (1883) 9 VLR 286, 287.

345 Wallace (1984), above n 4, 319.

346 See definition of 'land' in s 18 of the *Property Law Act 1958* (Vic).

347 *Brand v Chris Building Society* [1957] VR 625.

348 *Brand v Chris Building Society* [1957] VR 625, 263. See also, *Chateau Douglas Hunter Valley Vineyards Ltd v Chateau Douglas Hunter Valley Winery and Cellars Ltd* [1978] ACLD 258.

349 Simone Degeling and Brendon Edgeworth, 'Improvements to Land Belong to Another' in Lyria Bennett Moses et al (eds) *Property and Security: Selected Essays* (2010) 288–90.

350 Queensland Law Reform Commission 16 (1973), above n 27, 105.

351 *Report on a Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing* QLRC Rep No 16 (1973)

352 Pamela O'Connor, 'The Private Taking of Land: Adverse Possession, Encroachment by Buildings and Improvement Under a Mistake' (2006) 33(1) *The University of Western Australia Law Review* 31 40–42.

353 *Encroachment of Buildings Act 1982* (NT) Part 11.

354 *Property Law Act 1952* (NZ) s 129A; *Property Law Act 1969* (WA) s 123.

355 *Ex parte Karynette Pty Ltd* (1982) 2 Qd R 211.

356 Hansard, Assembly, 2 Sept 2009, 2984 (The Hon Mr Batchelor, MLA).

# 12

## Chapter 12

# Land Identification, Boundaries and Encroachment



### A BUILDING ENCROACHMENT RELIEF PROVISION

- 12.17 As land is becoming more valuable and more densely occupied, disputes over encroachment of buildings, fences, footings and overhangs across parcel boundaries are increasing, and cause disputes between neighbours.
- 12.18 An 'encroachment' means a building that is partly on one piece of land and partly on another piece of land, and crosses a boundary marked out on the Crown survey. It may include an overhang or footings.
- 12.19 Building encroachments may arise through a landowner's deliberate or careless failure to check the location of boundaries before construction. They may also occur through no fault on the part of the landowner whose building encroaches onto neighbouring land. The encroachment may be due to an honest mistake by the current landowner, by the landowner's predecessor, by a builder, or even a common mistake by both the affected landowners about where the Crown boundary lies.<sup>357</sup> Errors in Crown surveys and displacement of survey markers can also contribute to mistakes by landowners and builders.

### PROVISIONS FOR DETERMINING AND ADJUSTING BOUNDARIES

- 12.20 A related type of dispute arises where a dividing fence or wall must be constructed or replaced, and the location and position of the boundary is unclear or disputed. There are several provisions under which the location of a disputed boundary can be determined.
- 12.21 First, there is provision in section 7 of the *Fences Act 1968* (Fences Act) for the Magistrates' Court to determine the position of a dividing fence where the relevant landowners cannot agree, or to appoint an arbitrator to determine the matter. Section 5 of the Fences Act provides for 'the nearest magistrate' to determine the location of dividing fences, and to award compensation for loss of occupation, but the provision applies only where a waterway forms a natural boundary. Claims by adverse possession are excluded in relation to land adjacent to water boundaries only.<sup>358</sup>
- 12.22 Second, under section 271 of the Property Law Act, the Registrar is empowered to shift a boundary from its original position in the Crown survey. The Registrar's power under section 5 is of limited application, and the requirements of the section must be strictly complied with.<sup>359</sup> The power may be exercised where:
- the original survey marks have been removed or obliterated, and
  - for a period of at least 15 years the owners and occupiers of both land parcels have regarded a fence, wall or other building as marking the original boundary.
- 12.23 Third, a landowner who occupies adjacent land under a genuine mistake about the location of the boundary can apply to the Registrar under section 99 of the Transfer of Land Act for amendment of the land description in the register. The Registrar can amend the boundaries, area or position if the registered description is patently in error, or if it differs from the land as 'actually and *bona fide* occupied by [the applicant] and purporting to be so occupied under the title'.<sup>360</sup> The Registrar must first give notice to every person with an interest in the land, and may proceed to make the amendment only if nobody lodges a caveat within a specified time.<sup>361</sup>

### BOUNDARY DISPUTES UNDER THE CURRENT LAW

- 12.24 Apart from the limited provisions summarised above, disputes about encroaching buildings and the location of dividing fences are regulated by the law of trespass and the law of adverse possession.
- 12.25 A landowner is entitled for the first 15 years to require the neighbour to remove an encroaching fence, wall or other structure erected without the landowner's permission, and may sue in trespass for damages or an injunction. The court has a discretion to refuse an injunction and award damages instead, but such an order does not authorise continuation of the encroachment.



12.26 The right to sue arises when the encroachment or trespass commences but expires if legal proceedings are not commenced, and the land is not recovered, before the limitation period expires. In most cases the limitation period is 15 years.<sup>362</sup> The running of the limitation period is unaffected by changes in ownership of the properties.<sup>363</sup>

12.27 So long as the trespass continues, the encroaching neighbour may be deemed to be in adverse possession of the boundary strip or portion of land on which the encroachment extends. Fencing in or building on part of a neighbour's land is strong evidence of adverse possession, but all relevant circumstances must be evaluated.<sup>364</sup>

12.28 Once the limitation period expires, the landowner's title to the portion of land affected by the encroachment is automatically extinguished, without notice or compensation.<sup>365</sup> The adverse possessor can subsequently apply to the Registrar for an order vesting title to the land portion in the applicant, and can have the portion consolidated with his or her adjacent land.<sup>366</sup>

### PROBLEMS WITH THE ADVERSE POSSESSION RULE IN BOUNDARY DISPUTES

12.29 The law of trespass and adverse possession as explained above applies to land upon which a neighbour's building encroaches, and also to portions of land enclosed with a neighbour's land as a result of the misplacement of a dividing fence off-boundary.

12.30 In 1998, the Law Reform Committee of the Parliament of Victoria reported on its review of the Fences Act.<sup>367</sup> Although the Committee's terms of reference did not extend to the rule of adverse possession in disputes relating to the placement of fences, the Committee reported a high level of concern expressed in submissions about the perceived unfairness in the operation of the rule. The Committee said:<sup>368</sup>

*Highly charged emotions may be generated in some fencing disputes by the perception that one neighbour has 'deliberately' or 'fraudulently' positioned the fence to his neighbour's disadvantage and ought not to benefit from such conduct. Conversely, anger may arise from the fact that a mistake in the location of a fence, of which neither party was aware, should become the basis for a claim to ownership of land that forms part of one party's title.*

*It became apparent to the Committee in the course of its Inquiry, not only that members of the public felt threatened by the law of adverse possession and the potentially high costs of contesting a neighbour's claim, but that there is considerable confusion as to how the law applies in certain common situations involving off boundary fences. This is understandable given that the legal principles that are relevant in such cases are complex and highly technical and not always easy to apply to the facts of a given case.*

12.31 The Committee recommended that the desirability of introducing encroachment of buildings provisions into Victorian law be further investigated.<sup>369</sup>

### BUILDING ENCROACHMENT LAWS IN OTHER JURISDICTIONS

12.32 Five Australian jurisdictions and New Zealand have special legislation dealing with encroachment by buildings, of which four are based on the *Encroachment of Buildings Act 1922* (NSW).<sup>370</sup> The Canadian provinces of Manitoba, British Columbia and Nova Scotia also have relief provisions for building encroachments.<sup>371</sup>

12.33 The New South Wales Act confers jurisdiction on the Land and Environment Court to grant or refuse such relief as it deems proper in the circumstances, including an order for the removal of the encroachment, the regularisation of the encroachment through an order for a transfer, lease or easement of the affected land portion, and payment of compensation.<sup>372</sup> An application may be made by either the landowner whose land is encroached upon or the owner of the encroaching structure.<sup>373</sup>

357 O'Connor (2006), above n 352; Pamela O'Connor, 'An Adjudication Rule for Encroachment Disputes: Adverse Possession or a Building Encroachment Statute?' (2007) 4(*Modern Studies in Property Law* 197.

358 *Fences Act 1968* (Vic) s 5(4); compare this with section 7 which does not exclude adverse possession.

359 Wallace (1984), above n 4, 318.

360 *Transfer of Land Act 1958* (Vic) s 99(1) (a).

361 *Transfer of Land Act 1958* (Vic) s 99(2).

362 See Division 3 of Part 1 of the *Limitation of Actions Act 1958* (Vic).

363 *Transfer of Land Act 1958* s 42(2)(b); *Limitation of Actions Act 1958* s 8; *Mulcahy v Curramore Pty Ltd* [1974] 1 NSWLR 737, 746.

364 Enclosure of land by fencing is not always sufficient to prove adverse possession. See Bradbrook (2007), above n 32, 684–95.

365 *Limitation of Actions Act 1958* (Vic) ss 8, 18.

366 *Transfer of Land Act 1958* (Vic) Part IV, Div 5.

367 Parliament of Victoria, Law Reform Committee, *Review of the Fences Act 1968: Report* (1998).

368 Parliament of Victoria, Law Reform Committee, *Review of the Fences Act 1968: Report* (1998) para 6.5.

369 Parliament of Victoria, Law Reform Committee, *Review of the Fences Act 1968: Report* (1998) para 5.47 and rec 65.

370 *Property Law Act 1974* (Qld) Part 11, Div 1; *Encroachment of Buildings Act 1982* (NT); *Property Law Act 1969* (WA) s 122; *Encroachments Act 1944* (SA); *Property Law Act 1952* (NZ) s 129.

371 British Columbia: *Property Law Act, RSBC 1996*, cl 377, s 36; Manitoba: *Law of Property Act, CCSM*, cl L90, s 28; Nova Scotia: *Land Registration Act, S.N.S.2001*, cl 6, s 76(3)

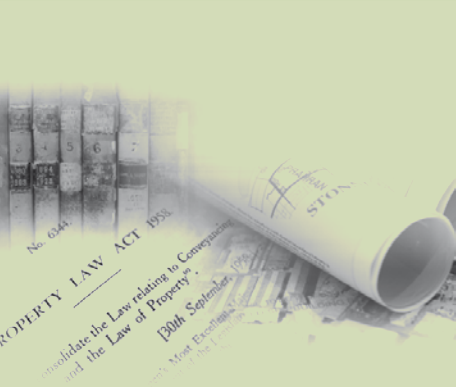
372 *Encroachment of Buildings Act 1922* (NSW) s 3(2).

373 *Encroachment of Buildings Act 1922* (NSW) s 3(1).

# 12

## Chapter 12

# Land Identification, Boundaries and Encroachment



12.34 The Act sets out a range of discretionary factors to be considered by the court in determining an application, including:<sup>374</sup>

- the situation and value of the subject land;
- the nature and extent of the encroachment;
- the character of the encroaching building, and the purposes for which it may be used;
- the loss and damage which has been or will be incurred by the adjacent owner;
- the loss and damage which would be incurred by the encroaching owner if he or she were required to remove the encroachment; and
- the circumstances in which the encroachment was made.

12.35 In 1973, the Queensland Law Reform Commission reviewed the operation of its encroachment of buildings provision, which was based on the New South Wales provision and first enacted in 1955. The Commission reported that the provision ‘worked reasonably well, and few practical problems seem to have arisen in its application and enforcement’.<sup>375</sup>

### CAN BUILDING ENCROACHMENT BE DEALT WITH UNDER A MISTAKEN IMPROVER PROVISION?

12.36 While Ontario has a single relief provision for both mistaken improvers and building encroachments, this arrangement is not ideal.<sup>376</sup> The two types of provision have a different purpose and a different scope of application. A mistaken improver need not be the owner or occupier of neighbouring land, and the mistake may relate to the identity of a land parcel or title to a parcel. For example, the applicant for relief may be a builder who has erected a home on the wrong lot, like the builder in *Brand v Chris Building Society*. The purpose of a mistaken improver provision is to prevent unjust enrichment at the improver’s expense.

12.37 Building encroachment provisions apply where one neighbour has encroached onto a part of a neighbouring land parcel. The quantum of land affected is typically very small, and the loss resulting from removal of the building may be high. The building is usually of no economic benefit to the owner of the land on which it stands, so there is no unjust enrichment. The object of the provisions is to allow a court to give relief to the encroaching neighbour on just terms, while discouraging deliberate or careless encroachment.<sup>377</sup>

### BUILDING ENCROACHMENT AND ADVERSE POSSESSION

12.38 The jurisdictions which have enacted a building encroachment provision usually do not allow the encroaching owner to acquire title to the portion of land or boundary strip by adverse possession. New South Wales allows adverse possession claims as to whole parcels only.<sup>378</sup> Queensland allows applications to register a title acquired by adverse possession but not as to ‘encroachments’.<sup>379</sup> Tasmania does not allow adverse possession claims that would result in the creation or continuation of ‘sub-minimum lots’ without the consent of the council.<sup>380</sup> New Zealand excludes claims made because a fence or other boundary feature is not on the true boundary.<sup>381</sup> The Northern Territory does not allow acquisition of title to whole or part parcels by any period of adverse possession.<sup>382</sup>

12.39 The overall result in those jurisdictions is that a court may in an appropriate case order an adjustment of property rights where the subject land has been built upon. Where the land has been merely enclosed with and used as part of adjacent land for any period of time, the boundary indicated by the Crown survey prevails.

12.40 Western Australia is the only jurisdiction which has both a building encroachment provision and also permits acquisition of title by adverse possession. There has been little judicial consideration of the relationship between the provisions.<sup>383</sup> If the encroaching owner is found to be in adverse possession, it appears that the encroachment relief jurisdiction can be exercised only in the period from the commencement of the encroachment until the expiry of the limitation period. Once the limitation period expires, the building owner has the best title to the subject land and the building is no longer an encroachment.

12.41 The Australian Capital Territory does not allow acquisition of title by adverse possession.<sup>384</sup> South Australia permits the encroaching owner to apply for title to the portion of land on the ground of adverse possession for a specified period, but the application must be refused if the registered owner objects.<sup>385</sup> In practice, this means that the registered owner can veto the application.

12.42 Victoria is the last and only jurisdiction in Australia that relies solely on adverse possession and the *Limitation of Actions Act 1958* (Limitation of Actions Act) to resolve disputes over misplacement of dividing fences and encroachments by buildings.

12.43 There are benefits as well as detriments in retaining the limitation period for actions to recover part parcels as well as whole parcels. It enables purchasers to some extent to assume that the boundaries of the land as physically enclosed and occupied are identical to the Crown survey boundaries, and to save the cost of a re-survey each time the land is purchased.<sup>386</sup> If fences and other boundary markers have been in their current position for at least 15 years, it is likely that any claim by an adjacent landowner for recovery of land is barred by the Limitation of Actions Act.

12.44 Our proposal does not affect the current rules under which title to a whole parcel can be acquired by adverse possession for the limitation period. All Australian States have found it necessary to allow claims based on adverse possession, to deal with the problem of abandoned land and missing owners. As already noted, a number of jurisdictions retain the rule of adverse possession but do not apply it to encroachments. These jurisdictions recognise that encroachments and misplaced dividing fences raise different issues and require separate provisions. We propose that the wider application of the rule of adverse possession should be examined as part of the review of the Transfer of Land Act in the second stage of the property law reference.

12.45 The main options for dealing with part-parcel adverse possession claims, if a building encroachment provision is introduced, can be summarised as follows:

1. Leave the Limitation of Actions Act Part 1, Division 3 unamended. As in Western Australia, the relief provision would generally operate only for the limitation period. Fifteen years after the encroachment commenced, the title of the landowner to the portion of land on which the encroachment extends would be extinguished, and the neighbour in occupation of the building would have the best title to the portion. The building would no longer be an 'encroachment', as it would extend over land to which the building owner has acquired title by adverse possession.
2. Exclude the operation of the limitation provisions in relation to any portion of land over which an encroachment extends. The limitation provisions would continue to apply to a portion of the plaintiff's land on which no encroachment extends. Title could still be acquired by adverse possession where a portion of land has for at least 15 years been enclosed with adjacent land owned or occupied by a neighbour who possesses and uses it as part of his or her land.
3. Exclude the operation of the limitation provisions for actions against the owner or occupier of land adjacent to the plaintiff's land, relating to a portion of the plaintiff's land that is adjacent to the property boundary.
4. Allow the limitation provisions to operate only in relation to whole parcels of land, as in New South Wales.

12.46 Under each of the above options, the provisions in sections 99 and 271 of the Transfer of Land Act which empower the Registrar to adjust boundaries would still apply.<sup>387</sup> The provision in section 7 of the Fences Act for determination of a boundary by a magistrate,<sup>388</sup> would continue to apply, subject to the outcome of a review of that Act announced in the Attorney General's Justice Statement 2.<sup>389</sup>

374 *Encroachment of Buildings Act 1922* (NSW) s 3(3).

375 Queensland Law Reform Commission 16 (1973), above n 27, 104.

376 Ontario: *Conveyancing and Law of Property Act* RSO 1990, c C34, s 37(1).

377 O'Connor (2006), above n 352, 62.

378 *Real Property Act 1900* (NSW) s 45D.

379 *Land Title Act 1994* (Qld) s 98.

380 *Land Titles Act 1980* (Tas) s 138Y. These are lots which do not mean the planning requirements for a lot in an urban or country building area: O'Connor (2006), above n 352, 45.

381 *Land Transfer Amendment Act 1963* (NZ) s 21(e).

382 *Land Title Act 2000* (NT) s 98.

383 In *Executive Seminars Pty Ltd v Peck* [2001] WASC 229 an encroaching owner claimed land on the basis of adverse possession and alternatively sought relief under the encroachment provision. The requirements for adverse possession were not made out on the facts.

384 *Land Titles Act 1925* (ACT) s 198.

385 *Real Property Act 1888* (SA) s 80F.

386 Malcolm Park and Ian Williamson, 'The Need to Provide for Boundary Adjustments in a Registered Title Land System' (2003) 48(*Australian Surveyor* 50–51.

387 See paras 12.22, 12.23.

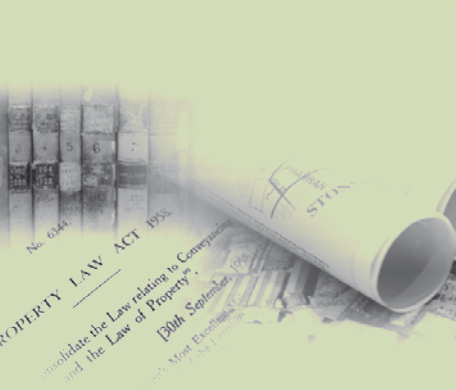
388 See para 12.21.

389 Department of Justice [Victoria], *Attorney General's Justice Statement 2: The Next Chapter* (2008), 16.

# 12

## Chapter 12

# Land Identification, Boundaries and Encroachment



### TRANSITIONAL ARRANGEMENTS

- 12.47 If options 2, 3 or 4 in para 12.45 are adopted, there would need to be a transitional provision. Landowners who have acquired titles at common law by adverse possession for the limitation period should be given a reasonable time to apply to the Registrar for a vesting order under Section 60 of the Transfer of Land Act.
- 12.48 There is a further question as to whether the legislation should preserve the 'immature' possessory rights of persons who have been in adverse possession for less than the limitation period. The effect of preserving the rights would be that, if the landowner fails to institute legal proceedings or recover the portion of land, a limitation period which had commenced before the amendment would continue to run in favour of the person in adverse possession.
- 12.49 The legislative practice in Victoria has been not to preserve all immature possessory rights when restricting the scope of the limitation provisions. The *Limitation of Actions (Adverse Possession) Act 2004* section 3, inserted section 7B into the Limitation of Actions Act, which exempts land owned by a council from claims of adverse possession. Section 7B(2) allowed an application to the Registrar to be made for up to 12 months after section 7B commenced, where the adverse possession was for more than 15 years. Otherwise, the amending Act did not preserve immature possessory rights acquired by adverse possession for less than 15 years. Amending Acts which inserted other exemptions from adverse possession, sections 7A, 7AB and 7C, did not preserve immature possessory rights.

### FORUM

- 12.50 If a building encroachment provision is added to the Act, the question arises as to which court or courts or tribunal is the most appropriate forum to hear the applications. The options are the same as for the mistaken improver provision (see paras 12.15, 12.16).
- 12.51 The Magistrates' Court already deals with trespass claims arising out of building encroachments and misplaced dividing fences. If an encroachment relief provision is introduced, a defendant to an action in trespass may wish to apply for relief under the building encroachment provision. It would be convenient to allow the court to deal with both claims if the value of the portion of land under encroachment is within the court's jurisdictional limit. Otherwise the matter would have to be removed into the County or Supreme Court, which would add to the costs.
- 12.52 The Magistrates' Court requires parties to contested matters to submit the dispute to an alternative dispute resolution process before proceeding to a defended hearing. It is able to refer parties in all areas of Victoria to an appropriate alternative dispute resolution service.

**Should Victoria have a discretionary relief provision for building encroachments?**

**Should the limitation period for recovery of land continue to apply in relation to portions of land adjacent to a property boundary?**

**If the limitation provisions are amended, what provision should be made for persons in adverse possession of portions of land at the time the amendments come into force?**

**If Victoria adopts a building encroachment provision, which court or courts or tribunal should have jurisdiction?**

# Questions

No. 6344.  
**PROPERTY LAW ACT 1958.**

Act to consolidate the Law relating to Conveyancing  
and the Law of Property.<sup>(a)</sup>  
[30th September, 1958.]

the Queen's Most Excellent Majesty  
and consent of the Legislature  
of Victoria in this behalf  
enacted, that the Law relating to  
Conveyancing and the Law of Property  
shall be consolidated as follows:

# Questions

## Chapter 2: Why Review the Property Law Act?

- 1 What do you think should be the title of the new Act to replace Property Law Act?**
- 2 Should the provisions listed in Appendix B be expressed not to apply to ordinary folio land?**
- 3 What features do you think a new Act should have, to make it easier to read, navigate and understand?**

## Chapter 3: Legal Estates in Freehold Land

- 4 Should it remain possible to create legal life estates and legal future interests?**
- 5 Should determinable and conditional fees be created only in equity?**
- 6 Should determinable fees be converted to conditional fees?**
- 7 Should existing estates tail be converted by statute to fee simple estates?**

## Chapter 4: Trusts of Land

- 8 Should all 'settlements' as defined in the *Settled Land Act 1958* be held under a single statutory trust?**
- 9 Should minors' property be held under a single statutory trust, instead of under the *Settled Land Act 1958*?**

## Chapter 5: Obsolete Rules

- 10 Should the special rules of inheritance in Part V be replaced with a provision identifying the heirs by reference to the specified person's intestate successors?**
- 11 Should the creation of rentcharges on old system land be abolished?**

## Chapter 6: Procedure for Enlargement of Long Leases

- 12 Should section 153 be retained and amended to make it effective in its application to registered land?**



Chapter 7: Capacity

- 13 Should the reference to 'a natural born subject of Her Majesty' in section 27 be replaced with 'an Australian citizen'?
- 14 Should the Act continue to refer to an 'alien'? If so, does the word need to be defined?
- 15 Should references to an 'alien friend' be removed from the Act?
- 16 Should section 27 be amended to make the interaction with the *Foreign Acquisitions and Takeovers Act 1975* (Cth) clearer?
- 17 How should the overlap and inconsistency between section 28B and equivalent provisions in the *Co-operatives Act 1996* and *Co-operative Housing Societies Act 1958* be corrected?
- 18 Should section 30(1), concerning conveyances by an administrator on behalf of a patient within the meaning of the *Mental Health Act 1986*, be repealed?
- 19 Should section 21, concerning the acquisition of property by a married couple, be retained?
- 20 Should sections 167, 168 and 170, concerning the property rights of married women, be repealed? Should they be replaced by sections 156 and 157(1) of the *Marriage Act 1958*?
- 21 Should all restraints on anticipation be abolished?

Chapter 8: Formal Requirements for Creation and Assignment of Interests

- 22 Should assignments of leases be exempted from the requirement of a deed, where the lease itself is not required to be in writing?
- 23 Should a deed be required for a declaration of trust of land?
- 24 Should there be a requirement that the deed of trust be witnessed?
- 25 Should signed writing be required for creating or passing a legal or equitable interest in personal property?
- 26 Should section 134, concerning assignment of a thing in action, include provision for voluntary assignments taking effect only in equity?

# Questions

## Chapter 9: Applications to the Court by Vendor and Purchaser

- 27** Should the test for the exercise of the court's discretion in section 49(2) be put on a statutory footing? If so, should the test be an 'exceptional circumstances' test or a 'just and equitable' test?
- 28** Should section 49(2) be extended to allow the court to award part of a deposit or damages?

## Chapter 10: Third Party rights

- 29** Should section 56(1) be amended to remove references to 'other property', and to enable enforcement of a covenant by third party beneficiaries who were not identified or in existence at the time of the conveyance or other instrument?

## Chapter 11: Execution of Judgments

- 30** Should sections 209-212, concerning execution of judgments, be amended to require recording by the Registrar of Titles?
- 31** Should sections 213-218, concerning execution of judgments, be repealed?

## Chapter 12: Land Identification, Boundaries and Encroachment

- 32** Should section 270 be extended to enable the distribution of shortages, as well as excess of measurement, in proportion to the respective areas of the allotments?
- 33** Should Victoria adopt a mistaken improver relief provision? If so, should it encompass mistakes as to identity as well as mistakes as to title?
- 34** If Victoria adopts a mistaken improver provision, which court, courts or tribunal should have jurisdiction?
- 35** Should Victoria have a discretionary relief provision for building encroachments?
- 36** Should the limitation period for recovery of land continue to apply in relation to portions of land adjacent to a property boundary?
- 37** If the limitation provisions are amended, what provision should be made for persons in adverse possession of portions of land at the time the amendments come into force?
- 38** If Victoria adopts a building encroachment provision, which court or courts or tribunal should have jurisdiction?

## Appendix A: Section by Section Summary of Proposals

- 39** Do you agree with the other proposals set out in Appendix A?



# Appendix/Glossary

No. 6344.  
**PROPERTY LAW ACT 1958.**

Act to consolidate the Law relating to Conveyancing  
and the Law of Property.<sup>(a)</sup>  
[30th September, 1958.]

the Queen's Most Excellent Majesty  
and consent of the Legislature  
of Victoria in this behalf  
enacted, that the Law relating to  
Conveyancing and the Law of Property  
shall be consolidated, and the Law  
so consolidated shall be known as  
the Property Law Act, 1958.

# Appendix A: Section by Section Summary of Proposals

We propose a new Property Law Act. Provisions in the current Act which need to be retained would be re-arranged in the new Act according to subject and re numbered consecutively. They would be revised where possible to update and simplify the language, clarify meanings that are in doubt and remove references to obsolete practices.

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
1	Short title and commencement		
2	Repeals and savings	Include in the new Act a broad savings provision, in similar (but simpler) terms to s 2(2) of the current Act.	Chapter 2
3	Definitions	Retain and merge with definitions in s 18.	
<b>New</b>	Application of Act	Insert a schedule of provisions that apply solely to old system land. Insert provisions stating that: <ul style="list-style-type: none"> <li>all provisions of the Property Law Act apply to land under the operation of the Transfer of Land Act, but subject to that Act; and</li> <li>the provisions in the new schedule do not apply to land under the operation of the Transfer of Land Act.</li> </ul>	Chapter 2 Appendix B
<b>PART I—REGISTRATION OF CONVEYANCES ETC. AFFECTING LAND OTHER THAN LAND UNDER THE TRANSFER OF LAND ACT. DEPOSIT OF DOCUMENTS</b>			
4	<i>Repealed</i>	Not applicable.	
5	Registrar-General	Retain for old system land only.	Appendix B
6	Registration of deeds, conveyances etc	Retain for old system land only.	Appendix B
7-12	<i>Repealed</i>	Not applicable.	
13	Fees to be paid on registration	Retain for old system land only.	Appendix B
14	<i>Repealed</i>	Not applicable.	
15	Deeds etc may be deposited with Registrar-General	Retain for old system land only.	Appendix B
15A	Deposited documents	Retain for old system land only.	Appendix B
15B	Court may order deposit of documents	Retain for old system land only.	Appendix B
15C	Person may direct document to be deposited	Retain for old system land only.	Appendix B
15D	Deposit of document without instructions	Retain for old system land only.	Appendix B
16	Deeds etc. deposited may be inspected etc.	Retain for old system land only.	Appendix B
17	False oaths made punishable	Retain for old system land only.	Appendix B

SECTION OF PROPERTY LAW ACT 1958	PROPOSAL	SEE ALSO	
<b>PART II—THE GENERAL LAW OF PROPERTY AND CONVEYANCING</b>			
18	Definitions	<p>Definition of 'rent' should omit reference to rentcharges if these interests are abolished.</p> <p>'Lease', 'lessor', 'lessee' and 'fine' should be separately defined.</p> <p>Definition of 'land' should be simplified and modernised without change in substance.</p> <p>Definition of 'registered land' should be amended to refer to land in an ordinary folio.<sup>1</sup></p> <p>Definition of 'tenant for life' and other terms which have the same meaning as in the Settled Land Act: 'exchange' should be added to the list of terms.</p> <p>'Valuable consideration' should be separately defined and should exclude marriage.</p> <p>The definition of 'possession' should be amended to read: 'when used in reference to land includes the receipt of income therefrom'.</p> <p>The following definitions should be added:</p> <ul style="list-style-type: none"> <li>• <b>assent</b> means an assent by a personal representative to the vesting in a person of an estate or interest in land given under s 41 of the <i>Administration and Probate Act 1958</i></li> <li>• <b>assurance</b> includes a conveyance and a disposition made otherwise than by will and <b>assure</b> has a corresponding meaning<sup>2</sup></li> <li>• <b>deed includes</b> an instrument having under this or any other Act the effect of a deed<sup>3</sup></li> <li>• <b>unregistered land</b> means land that has been granted in fee simple and is not registered land, whether or not it is in an identified or provisional folio under the <i>Transfer of Land Act 1958</i>.</li> </ul>	
18A	Land may be assured in fee simple	The provision was inserted in 1980 on the repeal of the imperial Statute of Quia Emptores. It re-ensures the alienability of freehold estates. It should be retained and redrafted for clarity. <sup>4</sup>	

1 See definition in *Transfer of Land Act 1958* (Vic) s 4(1).

2 This definition is taken from s 235 which is recommended for repeal.

3 A registered instrument has the effect of a deed: *Transfer of Land Act 1958* (Vic) s 40(2).

4 See eg, *Property Law Act 2007* (NZ) s 57.

## Appendix A: Section by Section Summary of Proposals

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
<b>DIVISION 1—GENERAL PRINCIPLES</b>			
<b>SUBDIVISION 1—MISCELLANEOUS</b>			
19A	Interests in land under the Statute of Uses	The section was added when the Statute of Uses was repealed in 1980. The purpose of subsections (1) and (2) is obscure. <sup>5</sup> Leading texts say the subsections are redundant because interests capable of creation as legal interests were always capable of creation as equitable interests. <sup>6</sup> They should be repealed with a savings provision.  It is doubtful that the provision has any application to registered land. <sup>7</sup>	
19	Power to dispose of all rights and interests in land	The section abrogates the common law rule against the alienation of contingent remainders. <sup>8</sup> The provision will be redundant if all future interests are equitable, as the interests are alienable in equity.	Chapter 3
20	Satisfied terms, whether created out of freehold or leasehold land, to cease	A term of years (lease) can be granted out of a freehold or leasehold estate to secure an obligation such as a debt, or the payment of a portion for a younger child. Once the obligation is paid, the term of years becomes a 'satisfied term'. The section provides for the term of years to cease and to merge with the reversion once the term is satisfied, without the need for the mortgagee to surrender the term. The use of a term of years to secure an obligation is rare in Victoria.  See also s 116, which makes similar provision for a mortgage by demise or subdemise. The section is redundant because s 115(1)(b) provides for discharge of a mortgage by demise by indorsed receipt. <sup>9</sup>  Repeal with savings provision.	
21	Husband and wife to be counted as two persons	The section overturns a common law rule of construction of deeds. It is separate from the married women's property provisions. Retain.	
22	Vesting orders etc of legal estates operating as conveyances	Retain.	
23	Abstract of title to legal estates	Retain for old system conveyancing only.	Appendix B
24	Effect of possession of documents	Retain for old system conveyancing only.	Appendix B
25	Interests of persons in possession	This provision protects the possessory title of a person in adverse possession. It should be retained, and made applicable to registered land. <sup>10</sup>	
26	Presumption that parties are of full age	Retain.	

5 Adrian Bradbrook et al, *Australian Real Property Law* (4th ed) (2007), 39; B J Edgeworth et al, *Sackville and Neave Australian Property Law* (8th ed) (2008), 231.

6 Bradbrook (2007), *ibid*; Edgeworth et al (2008), *ibid*.

7 Queensland Law Reform Commission, *Report on a Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing* 16 (1973), 6.

8 Bradbrook (2007), above n 5, 391.

9 Northern Ireland Law Commission, *Consultation Paper Land Law NILC 2* (2009), 188.

10 Jude Wallace, *Review of the Victorian Property Law Act 1958* (1984), 47-48.

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
27	Alien friends may hold etc real and personal property	<p>Include in new division on capacity.</p> <p>There are at least four aspects of s 27 to consider amending.</p> <ul style="list-style-type: none"> <li>Amend to recognise that the provision is subject to Commonwealth legislation to the contrary.</li> <li>Replace reference to a 'natural born subject of Her Majesty' with a reference to an Australian citizen.</li> <li>Clarify what the term 'alien' is intended to mean, or cease using it, because it is an archaic term.</li> <li>If the term 'alien' is retained, remove the reference to an alien 'friend'.</li> </ul>	Chapter 7
28	Power for corporations to hold property as joint tenants.	Retain and include in new division on capacity.	
28A	Liability of co-owner to account	The provision was examined in the commission's report on co-ownership in 2001, and is incorporated by reference into Part IV. Retain.	Chapter 1
28B	Certain contracts of minors to be valid	<p>Include in new division on capacity.</p> <p>Amend in view of the operation of the Co operatives Act and the Co operative Housing Societies Act.</p>	Chapter 7
29	Receipts by married minors	Retain.	
30	Conveyances on behalf of patients	<p>Include in new division on Capacity.</p> <p>Possible repeal of s 30(1) in view of the operation of the Guardianship and Administration Act.</p> <p>Retain 30(2), noting that it needs to be reviewed in the context of any review of the Trustee Act.</p>	Chapter 7
<b>SUBDIVISION 2—DISPOSITIONS ON TRUST FOR SALE</b>			
31-40	All provisions on trust for sale	As the provisions in the Property Law Act apply also to registered land and involve the Settled Land Act, the Trustee Act and the Administration and Probate Act, it is recommended that the commission be given a further reference to review all of the relevant legislation and replace the current dual trust system with a single, unified and more flexible statutory trust scheme.	Chapter 4
<b>DIVISION 2—CONTRACTS, CONVEYANCES AND OTHER INSTRUMENTS</b>			
<b>CONTRACTS</b>			
41	Stipulations in a contract	Retain. The provision applies the equitable rule rather than the legal rule regarding stipulations as to time.	
42	Provisions as to contracts	Retain and apply to registered land. The section protects purchasers from contractual terms which shift onto them the vendors' costs of making title.	
43	Application of section 42	The provision should be incorporated into s 42.	
44	Statutory commencements of title	Retain. Applies to old system land only.	Appendix B

## Appendix A: Section by Section Summary of Proposals

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
45	Other statutory conditions of sale	Retain. Applies to old system land only.	Appendix B
46	Adoption of conditions of sale in Third Schedule	Retain for old system conveyancing. The corresponding conditions of sale for registered land in the Transfer of Land Act have been repealed and are now included in the approved form of contract for sale of land.	Appendix B
47	<i>Repealed</i>	Not applicable.	
48	Stipulations preventing a purchaser etc from employing own legal practitioner to be void	Retain. The stipulations invalidated by the section would likely breach the prohibition on third-line forcing in the <i>Trade Practices Act 1974</i> (Cth) s 47(6) or (7); see Part XIA and the <i>Competition Policy Reform (Victoria) Act 1995</i> (Vic), ss 19, 20.	
49	Applications to the court by vendor and purchaser	Retain. Subsection (2) should be amended to include guidelines or a threshold test for the exercise of the court's discretion and to empower the court to order the repayment of deposits in whole or in part and to award damages.	Chapter 9
50	Discharge of incumbrances by the Court on sales or exchanges	The provision enables land to be sold without disturbing holders of monetary incumbrances such as rentcharges and annuities. Since family charges can be cleared by a life tenant under the Settled Land Act, the trustees under a trust for sale, or a personal representative, the section is likely to be confined to clearing a legal incumbrance that takes priority over the settlement. <sup>11</sup> It can be used to clear a mortgage where the right to redeem has not yet arisen. <sup>12</sup>  The provision should be retained and apply to registered land. <sup>13</sup>	
<b>CONVEYANCES AND OTHER INSTRUMENTS</b>			
51	Lands lie in grant only	This provision abolishes archaic modes of conveying land. Retain and redraft in simpler language. <sup>14</sup>	
52	Conveyances to be by deed	Section 52(2) contains a list of well-established exceptions to the requirement in s 52(1).  We propose that the words 'or assignment of a leasehold estate' be added after 'leases or tenancies' in s 52(2)(d).  Retain for old system land and unregistered dealings in registered land.	Chapter 8
53	Instruments required to be in writing	The section has caused substantial problems in interpretation, due to overlaps, ambiguities and inconsistencies in s 53(1). We invite comments on suggested principles for clarifying the application of the subsection to personal property, and to legal and equitable interests in land.  The section applies to unregistered dealings in registered land.	Chapter 8

<sup>11</sup> E Wolstenholme, *Wolstenholme and Cherry's Conveyancing Statutes* (13th ed) (1972), 126.

<sup>12</sup> P Young et al, *Annotated Conveyancing and Real Property Legislation New South Wales* (2009), 95.

<sup>13</sup> Stanley Robinson, *Property Law Act (Victoria)* (1992), 95; cf *Conveyancing Act 1919* (NSW) s 66(5).

<sup>14</sup> See, for example *Land and Conveyancing Law Reform Act 2009* (Ir) s 66.

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
54	Creation of interests in land by parol	The subsection allows the creation of short term oral leases made on proper commercial terms. The scope of the exception is significantly limited by the phrase 'taking effect in possession', which is taken to mean that the lease must commence immediately upon the making of the agreement. <sup>15</sup> The section applies to registered land. Leases for less than 3 years are not registrable under the Transfer of Land Act but are enforceable against the registered owner under s 42(2)(e). The legal treatment of short term and oral leases should be reviewed as part of the law of leases – see Div 5 below.	Chapter 8
55	Savings in regard to sections 53 and 54	Retain and apply to unregistered dealings in registered land. The section exempts certain dealings from the requirements of ss 53 and 54.	Chapter 8
56	Persons not named as parties may take interest in land etc	Section 56(1) needs to be reviewed in the light of reforms in Queensland, Western Australia and in other jurisdictions. Section 56(2) should be incorporated into s 57, as both deal with requirements for deeds. <sup>16</sup>	Chapter 10
57	<i>Description of deeds</i>	Retain.	
58	Provisions as to supplemental instruments	The provision is useful and should be retained but could be expressed more clearly. <sup>17</sup> It applies to registered land. <sup>18</sup>	
59	Conditions and certain covenants not implied	Retain. Omit reference to partitions. <sup>19</sup> The section applies to deeds that are capable of being noted on the Torrens title register. <sup>20</sup>	
60	Power to dispose of fee-simple by deed without words of inheritance	Section 60(1) should be retained for unregistered land only. Subsections (2)-(4) should be repealed with a savings provision, as they are required only for dispositions made before the repeal of the <i>Statute of Uses</i> in 1980. <sup>21</sup> Subsection (5) deals with execution by a corporation sole. It should be retained as a subsection to s 176.	Appendix B
61	Definitions of expressions used in deeds and other instruments	The definitions are useful and should be retained. A definition of 'land' should be added which incorporates the definition of 'land' in s 18(1). <sup>22</sup>	
61A	Construction of references to repealed Acts	Retain.	

<sup>15</sup> *Haselhurst v Elliot* [1945] VLR 153.

<sup>16</sup> See, for example *Property Law Act 1974* (Qld) s 44.

<sup>17</sup> See, for example *Land and Conveyancing Law Reform Act 2009* (Ir), s 72; Northern Ireland Law Commission (2009), above n 9, 132.

<sup>18</sup> Robinson (1992), above n 13, 118.

<sup>19</sup> Wallace (1984), above n 10, 121 (cf *Law of Property Act 1925* (Eng) and *Land and Conveyancing Law Reform Act 2009* (Ir) s 78).

<sup>20</sup> Robinson (1992), above n 13, 119.

<sup>21</sup> Wallace (1984), above n 10, 123.

<sup>22</sup> Wallace (1984), above n 10, 124-5.

## Appendix A: Section by Section Summary of Proposals

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
62	General words implied in conveyances	Amend to make it clear that the section does not operate to create in respect of or impose on any other land any easements, profits à prendre or similar obligations not previously subsisting. <sup>23</sup> The section should apply to registered land.  This section will be more fully discussed in our forthcoming consultation paper on easements and covenants.	
63	All estate clause implied	Retain. A word-saving provision that passes to the grantee all the estate and interest of the grantor in the property. It should apply to registered land.	
64	Production and safe custody of documents	Retain for old system land only. <sup>24</sup>	Appendix B
65	Reservation of legal estates	The purpose of the section is to allow the grantor to reserve a legal estate without the need for the grantee to execute a separate conveyance or transfer. It is complementary to s 194, which allows express reservation of an easement by way of use. It is unclear if 'estate' in s 65 includes 'interests'. If s 65 is amended to refer to reservation of 'a legal estate or <i>interest</i> ', s 194 can be repealed. <sup>25</sup>  Apply to registered land. <sup>26</sup>	
66	Confirmation of past transactions	The section gives legal effect to a deed by a fee simple owner or lessee for a term of years confirming prior transactions that purport to create an interest in land. It provides a means of curing defective titles. The provision is applicable only to old system conveyances. <sup>27</sup>	Appendix B
67	Receipt in deed sufficient	The receipt provisions in ss 67-69 should be retained and amalgamated into a single section. <sup>28</sup> They should be extended to refer to instruments other than deeds. <sup>29</sup>  The provisions should apply to all dealings under the Transfer of Land Act, although they principally affect unregistered dealings. <sup>30</sup>	
68	Receipt in deed or indorsed evidence	See s 67.	
69	Receipt in deed or indorsed authority for payment to legal practitioner	See s 67. We propose that 'legal practitioner' be defined to include employees of the legal practitioner's firm or of another firm acting as agent for the legal practitioner. <sup>31</sup>	
70	Partial release of security from rentcharge	Retain in the schedule for benefit of existing rentcharges only.	Appendix B

23 In *Wright v McAdam* [1949] 2 KB 749 a licence given by a landlord to a tenant to use a coal shed was, on renewal of the lease, turned into an easement by force of s 62; see also *Hair v Gillman* (2000) 80 P & CR 108. An amendment similar to what is recommended here was recommended by the Law Reform Commission of Victoria, *Easements and Covenants* No 41 (1992) 13-16, Recommendation 5; Northern Ireland Law Commission (2009), above n 9, para [10.20]; Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (1996), 146; Law Commission [England and Wales], *Easements, Covenants and Profits a Prendre: A Consultation Paper* CP No 186 (2008), paras 4.102-4.104, 4.68-4.78, 6.21-6.30; Tasmania Law Reform Institute, *Law of Easements in Tasmania* Final Report No 12 (2010) 21-22, Recommendation 4.

24 Wallace (1984), above n 10, 129-31.

25 Wallace (1984), above n 10, 131-32.

26 Robinson (1992), above n 13, 136.

27 Robinson (1992), above n 13, 140.

28 See, eg. *Land and Conveyancing Law Reform Act 2009* (Ir) s 77.

29 Cf *Property Law Act 1974* (Qld) ss 51, 52.

30 Wallace (1984), above n 10, 135.

31 See Robinson (1992), above n 13, 445; Wallace (1984), above n 10, 135; See *Land and Conveyancing Law Reform Act 2009* (Ir) s 77(3), (4).



SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
71	Release of part of land affected from a judgment	The provision belongs with other provisions dealing with executions (currently Part III). It should be expressed to apply to land under the operation of the Transfer of Land Act, as s 52(1) arguably excludes it. <sup>32</sup> That Act lacks equivalent provision.	
72	Conveyances by a person to himself etc	Retain. To overcome restrictive interpretation in <i>Rye v Rye</i> , <sup>33</sup> Wallace suggests that Victoria follow Queensland in adding the following additional words (shown in italics); <sup>34</sup> <ul style="list-style-type: none"> <li>• s 72(3) should provide that a person may 'convey or <i>lease</i> land'.<sup>35</sup></li> <li>• The words 'or all' should be added to s 72(4) so that it relevantly reads 'Two or more persons ... may convey ... any property vested in them to any one or more or <i>all</i> of themselves.</li> </ul>	
73	Execution of deeds by an individual	Retain. Sections 73-74 could be amalgamated as subsections into a single provision dealing with the execution of deeds by individuals and corporations.  The provisions apply to some unregistered dealings in registered land as well as old system land.	
73A	Sealing of deeds	Retain. See s 73.	
73B	Abrogation of rule that authority to agent to deliver must be under seal	Retain. See s 73.	
74	Execution of instruments by or on behalf of corporations	Retain. See s 73.	
75	Rights of purchaser as to execution	Retain. See s 73.	
<b>COVENANTS</b>			
76	Covenants for title	Application to registered land requires clarification. Wallace suggests that s 76 should apply to property of all kinds. <sup>36</sup>  There should be a consistent set of covenants as to title for all dealings, registered or unregistered. This could be considered as part of a second stage reference encompassing the Transfer of Land Act.	
77	Implied covenants in conveyances subject to rents	Application to registered land requires clarification. The Transfer of Land Act ss 46(2), 67, 71(4) and 75 provides for implied covenants in registered dealings but in narrower terms.  Section 77(1)(a), (b) and the associated covenants in Sched 4 can be repealed if rentcharges are abolished. The implied covenants as to leases should be reviewed as part of the recommended review of the law of leases in the second stage of the reference.	

32 Robinson (1992), above n 13, 146.

33 *Rye v Rye* [1962] AC 496.

34 Wallace (1984), above n 10, 136-38; *Property Law Act 1974* (Qld) s 14(3),(5).

35 Wallace (1984), above n 10, 138.

36 Wallace (1984), above n 10, 143.

## Appendix A: Section by Section Summary of Proposals

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
78	Benefits of covenants relating to land	A word-saving provision which allow the running of the benefit of covenants that 'touch and concern the land' without express mention of the covenantor's successors in title. The provision will be examined in the forthcoming consultation paper on easements and covenants.	
79	Burden of covenants relating to land	Makes similar provision to s 78, in relation to the running of the burden of covenants. It will be reviewed in the easements and covenants consultation paper.	
79A	Construction of covenants affecting land	The provision was inserted in 1964 to facilitate the running of freehold covenants under building schemes, following the decision in <i>Re Arcade Hotel Pty Ltd</i> . <sup>37</sup> It has been held to have retrospective application to pre-1964 covenants. <sup>38</sup> It will be reviewed in the easements and covenants consultation paper.	
80	Covenants binding land	The section extends the covenantor's personal liability under the covenant to the land. The section will be reviewed in the easements and covenants consultation paper.	
81	Effect of covenant with two or more jointly	Retain. It is a useful word-saving provision which avoids the need to insert a separate covenant with each party. The Transfer of Land Act s 112(2) makes similar provision for covenants implied by that Act, for registered dealings. The section should apply to unregistered dealings in registered land.	
82	Where one or more persons enter into covenants etc	Retain. The section was introduced in 1928 as a corollary to s 72, which allows one to convey to oneself. <sup>39</sup> It overcomes an inconvenient common law rule. Apply to registered land.	
83	Construction of implied covenants	The provision largely duplicates s 61. <sup>40</sup> It could be repealed if s 61 is made applicable to covenants implied in a deed or assent by virtue of the Division.	
84	Power for Court to modify etc restrictive covenants affecting land	Extend to easements, and include a power to discharge the covenantor from contractual liability when the covenant is discharged or modified.  Detailed proposals for the amendment of this section will be made in the consultation paper on easements and covenants.  Apply to registered land.	
85	Defendant may apply for order	Retain. Apply to registered land.	

<sup>37</sup> *Re Arcade Hotel Pty Ltd* [1962] VR 274

<sup>38</sup> *Re Miscamble's Application* [1966] VR 596

<sup>39</sup> Wallace (1984), above n 10, 160.

<sup>40</sup> *Ibid.*

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
<b>DIVISION 3—MORTGAGES AND RENTCHARGES</b>			
MORTGAGES			
86-124	All provisions on mortgages	As so much of the law of mortgages lies outside the Property Law Act it is recommended that the Commission be given a further reference to examine the subject of mortgages as a whole. This reference should consider the consistency of these provisions with other legislation such as the <i>Personal Property Securities Act 2009</i> (Cth).  Section 116, dealing with ‘satisfied terms’ in mortgages by demise, can be repealed. See s 20, above.	Chapter 1
RENTCHARGES			
125-129	All provisions on rentcharges	Repeal with a savings provision for any existing rentcharges. Replace with a provision that the future creation of legal and equitable rentcharges is prohibited and any such agreement is enforceable only between the original parties as a contract debt. <sup>41</sup> Also provide that the creation of annuities under the Transfer of Land Act is not affected.	Chapter 5
<b>DIVISION 4—EFFECT OF CERTAIN LIMITATIONS</b>			
LEGAL ASSIGNMENTS OF THINGS IN ACTION ETC			
130	Abolition of the Rule in Shelley’s Case	Retain with the following amendments: <ul style="list-style-type: none"> <li>delete references to s 259 and to ‘an entailed interest’ and</li> <li>references to the heir or heirs of a person in an <i>inter vivos</i> disposition or will should be taken to mean the intestate successors of the person as defined by Part 1, Div 6 of the <i>Administration and Probate Act 1958</i>.<sup>42</sup></li> </ul> The provision should be retained for old system land only. The rule never applied to registered land. <sup>43</sup>	Appendix B
131	<i>Repealed</i>	Not applicable	
132	Restriction on executory limitations	Retain. All but two Australian jurisdictions have such a provision. It provides a rule of construction for dispositions which provide ‘to A in fee simple but if he dies without issue living at his death to B’. The effect of the section is that the gift over to B fails if any of A’s issue attains the age of 21.  The age should be reduced from 21 to 18 years, which is now the age of majority in Victoria. <sup>44</sup>	

41 See eg. *Land and Conveyancing Law Reform Act 2009* (Ir) s 41, 42.

42 Ontario Law Reform Commission (1996), above n 23, Ch 5; *Law of Property Act 2007* (NZ) s 65. See also Part V, below.

43 Bradbrook (2007), above n 5, para [10.85].

44 Wallace (1984), above n 10, 213.

## Appendix A: Section by Section Summary of Proposals

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
132A	Voluntary waste	Retain. If the statutory trust is adopted, the provision will apply to existing settlements under the Settled Land Act. In future settlements, trustees' management duties will replace the duty of life tenant not to commit waste.  The section will have continued application to leaseholds, and can be reviewed as part of the recommended review of leaseholds.	
133	Equitable waste	Retain. See comment about s 132A regarding tenant for life. This provision has no application to leaseholds.	
134	Legal assignment of things in action	Retain without amendment.	Chapter 8
135	Limitation in the case of certain assignments	Repeal. It makes s 134 apply to an Act that has been repealed.	Chapter 8
<b>DIVISION 5—LEASES AND TENANCIES</b>			
136-152	All provisions on leases and tenancies	As provisions concerning leases generally are distributed among the Property Law Act, the Landlord and Tenant Act and the Transfer of Land Act, and specific categories of leases are regulated under the Residential Tenancies Act and the Retail Leases Act, we will recommend that the commission be given a further reference to examine the law of leases as a whole.	Chapter 1
153	Enlargement of residue of long terms into fee simple estates	We invite comments as to whether the provision should be repealed.  If retained, the section should be expressed to operate as an exception to indefeasibility, and a new procedure for registration inserted to replace s 153(7) for registered land. Reference to restraints on anticipation in s 153(6) should be removed.	Chapter 6
154	Application of division to existing leases	Retain.	
<b>DIVISION 6—POWERS – RENAME POWERS OF APPOINTMENT</b>			
155	Disclaimer of powers	The division deals with legal powers of appointment, not equitable powers that exist behind a trust. <sup>45</sup> Retain and apply to registered land. <sup>46</sup> Remove reference in parenthesis to 'married women' in line with recommendations for s 168.	
156	Effect of disclaimer etc	Retain – see s 155.	
157	Protection of purchasers claiming under certain void appointments	Retain – see s 155.	
158	Validation of appointments where objects are excluded or take illusory shares	Retain – see s 155.	
159	Execution of powers not testamentary	Retain – see s 155.	
160	Application of this Division to existing powers	Retain– see s 155.	

<sup>45</sup> Wallace (1984), above n 10, 246.

<sup>46</sup> Robinson (1992), above n 13, 388.

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
<b>DIVISION 7—REPEALED</b>			
161-162	<i>Repealed</i>		Not applicable
<b>CHARITABLE DISPOSITIONS BY WILL</b>			
163	Construction of certain dispositions by will to charities	No change.	
164-166	<i>Repealed</i>	Not applicable.	
<b>DIVISION 8—MARRIED WOMEN</b>			
167	Abolition of separate examination of, acknowledgement by married women, and of concurrence of husband	We invite comments on whether to repeal ss 167, 168 and 170, with a savings provision, or to replace them with ss 156 and 157(1) of the Marriage Act.	Chapter 7
168	Disclaimer by married woman	See s 167.	Chapter 7
169	Power for Court to bind interest of married woman	Repeal, and amend s 157(2) of the Marriage Act.	Chapter 7
170	Acquisitions and dispositions of trust estates by married women	See s 167.	Chapter 7
<b>DIVISION 8A—PERSONS WHO ARE MENTALLY ILL</b>			
171	Power for Court to settle the beneficial interests of a represented patient	We invite comments on whether the section can be repealed in view of the operation of the Guardianship and Administration Act.	Chapter 7
<b>DIVISION 9—VOIDABLE DISPOSITIONS</b>			
172	Voluntary conveyances to defraud creditors	Retain. This provision ensures that a person cannot put property in the name of a third party in order to place it beyond their reach of creditors with the intention of defrauding them. Any person prejudiced by a conveyance with the intention to defraud may set the conveyance aside, even if the person is not a creditor. The person transferring the property need not be insolvent.  Section 121 of the <i>Bankruptcy Act 1966</i> (Cth), which regulates the validity of transfers to defeat creditors by a person who later becomes a bankrupt, overlaps this provision but does not completely displace it.	
173	Voluntary disposition with intent to defraud	Retain.	
174	Subsequent conveyance not to be evidence of intent to defraud	Retain.	
175	Acquisitions of reversions at an under value	The section can be repealed. It is sufficient to rely on the equitable jurisdiction to set aside on grounds such as, fraud, undue influence and other unconscionable conduct. <sup>47</sup>	

<sup>47</sup> Northern Ireland Law Commission (2009), above n 9, para [10.23]; Law Reform Commission [Ireland], *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* CP No 34 (2004) 8.40, implemented by the *Land and Conveyancing Law Reform Act 2009* (Ir).

## Appendix A: Section by Section Summary of Proposals

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
<b>DIVISION 10—MISCELLANEOUS</b>			
CORPORATIONS			
176	Corporations sole	Retain, as corporations sole continue to exist in Victoria.	
177	Provision for vacancy	Retain.	
178	Transactions	Retain.	
179	Dissolution of a corporation	Retain.	
GENERAL			
180	Protection of legal practitioner and trustees adopting this Part	Sections 180-82 should be unified into a single section without substantive amendment. <sup>48</sup>	
181	Further powers etc admissible	See s 180.	
182	Protection of trustees etc	See s 180.	
183	Fraudulent concealment of documents and falsification of pedigrees	<p>The section should be retained and made applicable to dealings in registered land. Although a purchaser who has registered a dealing without knowledge of fraud obtains an indefeasible title,<sup>49</sup> a purchaser may sustain loss while the dealing remains unregistered. Cases may arise in which a purchaser suffers loss which cannot be cured by registration, for example, where the transferor of a mortgage conceals the existence of an unregistered instrument of discharge.</p> <p>The words creating an offence and applying a penalty in s 183(1) are not consistent with modern drafting of penal provisions.</p> <p>The provision as a whole should be redrafted in simpler language.<sup>50</sup></p>	
184	Presumption of survivorship in regard to claims to property	Retain. It has been suggested by Land Victoria that it would be useful to add a procedure and an evidentiary provision for determining when the presumption applies or does not apply.	
185	Merger	<p>No change. The effect of the section is that merger of a lesser with a greater estate, and merger of a charge with the estate, will not occur if an intention not to merge was expressed or can be implied. The section adopts the equitable rule in preference to the rule at common law.</p> <p>It has been suggested to us that it is difficult for the Registrar to determine if there is a contrary intention. The provision may be easier to administer if re-formulated to create a rebuttable presumption of merger.</p>	
186	Rights of pre-emption capable of release	Repeal. The section, adopting the <i>Law of Property Act 1925</i> (Eng) s 186, is unnecessary since a benefit is always capable of being released. <sup>52</sup> In England, rights of pre-emption were registrable as land charges. <sup>53</sup>	

48 As in *Property Law Act 1974* (Qld) s 345.

49 *Transfer of Land Act 1958* (Vic) s 42(1).

50 See for example, *Land and Conveyancing Law Reform Act 2009* (Ir), s 60.

51 Wallace (1984), above n 10, 271.

52 Robinson (1992), above n 13, 423.

53 Wolstenholme (1972), above n 11, Vol 1, 311.

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
187	Power to direct division of chattels	The purpose of the section is supplementary to Part IV, and is intended to preserve the jurisdiction of the Court to deal with the division of any chattels which are not 'goods' within the meaning of Part IV. The definition of 'goods' in s 222 excludes things in action and money.	
187A	Transitional provision—Property (Co ownership) Act 2005	This transitional provision can be repealed if there are no proceedings pending in the Supreme or County Court which were commenced before 1 February 2006.	
188	Indemnities against rents	The provision was originally introduced to resolve doubt as to whether a power of distress given by way of indemnity against rents constituted a bill of sale. Since distress for rent was abolished in 1948, <sup>54</sup> the section is redundant and should be repealed.	
189	Enforcement of covenants etc relating to indemnity against rent	The section provides that the benefit of an indemnity against rents and breaches of covenant is annexed to the estate of the implied covenantee. The section complements ss 77(5), which allows the benefit of implied rent covenants to run with the land of the covenantee. The section should apply to registered land.	
<b>REDEMPTION AND APPORTIONMENT OF RENTS &amp; C</b>			
190	Equitable apportionment of rents and remedies for non-payment of breach of covenant	<p>The section should be read with s 54 of the <i>Supreme Court Act 1986</i> which provides for apportionment of rents, annuities and other periodic payments.</p> <p>Section 190(1) and (2) which provide for charging of rentcharges on land and remedies for default, can be repealed with a savings provision if rentcharges are abolished. The provisions for registered annuities in the Transfer of Land Act will not be affected.</p> <p>S 190(3) allows the sale of part of leased land at an equitably apportioned rent. S 190(4) restricts the remedy on default to taking possession of the income of the land. Subsection (5) clarifies the powers of trustees and other fiduciaries to grant the same remedies. Subsection (6) enables the conveyance to override the section. Subsection (7) deals with commencement. Subsection (8) disapplies the rule against perpetuities.</p> <p>Subsections (3)-(8) should be retained and apply to registered land</p>	
<b>CONTINGENT REMAINDERS AND USES</b>			
191-193	All provisions on contingent remainders and uses	Repeal with savings provision. The provisions reform the legal contingent remainder rules and apply to legal future interests. Although legal contingent remainders can still be created in Victoria, in practice future interests are created under a trust for sale, or take effect in equity if created by will. <sup>55</sup> It is recommended that all future interests should be able to be created only in equity, except leasehold reversions. <sup>56</sup>	Chapter 3

<sup>54</sup> See *Landlord and Tenant Act 1958* (Vic), s 12.

<sup>55</sup> Edgeworth et al (2008), above n 5, 230 -231.

<sup>56</sup> Wallace (1984), above n 10, 278.

## Appendix A: Section by Section Summary of Proposals

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
<b>EASEMENTS</b>			
194	Grant of easements by way of use	The section provides for creation of easements by way of uses. The provision could be more clearly expressed without reference to the concept of a use. <sup>57</sup> Alternatively, if s 65 is amended to provide for reservation of 'an estate or <i>interest</i> in land', s 194 could be repealed.  The forthcoming consultation paper on easements and covenants may propose a new Part dealing with easements, which would replace the section.	
195	Right not deemed to exist by reason only of enjoyment or presumption of lost grant	Retain and apply to registered land.	
196	Grant of easement not be presumed from evidence only of user	Retain and apply to registered land.	
197	Certain rights of road made appurtenant	The section prevents the failure of an easement to use a road or way granted in a deed where the easement is not expressed to be appurtenant to the purchaser's land. <sup>58</sup> It is premised on the principle that private easements in gross are not permitted. It should be retained so long as private easements in gross are not permitted. Apply to registered land. <sup>59</sup>	
<b>NOTICES</b>			
198	Regulations respecting notices	We propose that the provision be amended to apply to service of notices under the Act generally (not just under the Part). The section is expressed not to apply to notices served under the provisions of the Transfer of Land Act.  Section 49(1) of the <i>Interpretation of Legislation Act 1984</i> applies and should be referred to in a note.  The reference to 'regulations' in the section heading is misleading and should be omitted, as the section does not empower the making of regulations.	Appendix B
199	Restrictions on constructive notice	The section restricts the operation of equitable notice. Para 199(1)(b) confines imputed notice to an agent's knowledge gained in the current transaction.  The section should be retained, and expressed to apply to unregistered interests in registered land, as well as old system land. <sup>60</sup> Equitable priority rules, which include the concept of notice, are used to resolve conflicts between unregistered dealings. <sup>61</sup> The question of whether equitable priority rules should continue to be used to determine the priority of unregistered interests could be examined as part of a review of the Transfer of Land Act.	

57 See for example, *Property Law Act 1974* (Qld) s 9.

58 Edgeworth et al (2008), above n 5, paras [10.5], [10.9]; Wallace (1984), above n 10, 284.

59 The provision does not conflict with *Transfer of Land Act 1958* (Vic), s 96, dealing with abutments.

60 The section has been applied to priorities between unregistered interests in registered land: *IGA Distributors Pty Ltd v King & Taylor Pty Ltd* [2002] VSC 440.

61 *Moffett v Dillon* [1999] 2 VR 480; *Commonwealth Bank of Australia Ltd v Platzer* [1997] 1 Qd R 266



SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
200	Notice of restrictive covenants and easements	<p>This provision gives a purchaser of part of the vendor's land the right to have a restrictive covenant or easement recorded on a title document retained by the vendor as part of the common title. The recording ensures that an easement or restrictive covenant granted to the purchaser will come to the notice of anyone who subsequently purchases the land retained by the vendor.</p> <p>Subsection (3) states that the section does not apply to dealings in registered land. It is no longer possible to subdivide and sell old system land. The land must be brought into an ordinary folio and subdivided in accordance with the <i>Subdivision Act 1988</i>.<sup>62</sup> The provision is no longer required for dealings in old system land and should be repealed.</p>	
<b>DIVISION 11—JURISDICTION AND GENERAL PROVISIONS</b>			
201	Provisions of Act to apply to incorporeal hereditaments	<p>The section extends to 'incorporeal hereditaments' (including easements, covenants and profits à prendre) the provisions of the Act that apply to freehold estates, so far as consistent with the nature of the hereditament.</p> <p>The provision should apply to registered land, and should be relocated to a new Part dealing with easements and restrictive covenants. The term 'property' should be substituted for 'hereditament'</p>	
202	Payment into Court	<p>Payment into court exonerates the person from making the payment. It would be useful to amend the provision to state that the payment does not exonerate the person when the person's liability exceeds the amount paid into court.<sup>63</sup></p> <p>The section should be expressed to apply to registered land.</p>	
203-204	<i>Repealed</i>	Not applicable.	
205	Orders of Court conclusive	<p>The provision validates titles under court-ordered sales, making the orders operative <i>in rem</i>.<sup>64</sup> It prevents a buyer re-opening an issue already determined in earlier proceedings to which the buyer was not a party.</p> <p>Case authority indicates an exception. Where the land sold did not belong to the judgment debtor, the provision does not deprive the owner of the property who was a stranger to the proceedings.<sup>65</sup></p> <p>The provision is unnecessary for registered dealings, given the indefeasibility of registered titles, but should apply to unregistered dealings in registered land.</p>	

<sup>62</sup> *Sale of Land Act 1962* (Vic), s 8A; *Transfer of Land Act 1958* (Vic) s 26L.

<sup>63</sup> Robinson (1992), above n 13, 447-48.

<sup>64</sup> It complements *Settled Land Act 1958* (Vic), s 64, *Trustee Act 1958* (Vic) s 63 and, in the case of registered land, *Transfer of Land Act 1958* (Vic) s 42(1).

<sup>65</sup> *Jones v Barnett* [1900] 1 Ch 370.

## Appendix A: Section by Section Summary of Proposals

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
206	Forms of deeds	The section authorises the use of short forms of deeds of mortgage and conveyance as set out in the 8th schedule. The section and the schedule apply to unregistered land only. They should be retained.	Appendix B
207	Application to the Crown	The section was introduced in 1978. Subsection (1), which exempts the Crown from distress, is redundant since the remedy of distress was abolished in 1948. Subsection (2) should be amended to state that 'this Part binds the Crown'. <sup>66</sup>	
<b>PART III—REAL ESTATES LIABLE FOR DEBTS. EFFECT OF JUDGMENTS. LIS PENDENS AND EXECUTION. PROTECTION OF PURCHASERS ETC AGAINST JUDGMENTS ETC. LANDS ETC OF ACCOUNTANTS TO CROWN</b>			
208	Lands etc liable to satisfy debts	Retain and redraft in modern language. The proviso to s 208(3) should be repealed or amended to be consistent with Rules of the Supreme Court r 69.06.	Chapter 11
209	Executions in order to bind land to be registered	Amend to require recording by the Registrar. Sections 209-12 apply to old system land only, due to inconsistency with s 52 of the Transfer of Land Act. Under ss 26E and 26F of that Act, the lodgement of an execution with the Registrar triggers a requirement to create an identified folio.	Chapter 11
210	Executions after five years to be re-registered	Amend to require recording by the Registrar. Applies to land in identified folios.	Chapter 11
211	Provision for re-registration explained	Amend to require recording by the Registrar. Applies to land in identified folios.	Chapter 11
212	Executions as between parties not to be affected	Amend to require recording by the Registrar. Applies to land in identified folios.	Chapter 11
213	Purchasers not to be affected by any lis pendens unless suit duly registered	Repeal.	Chapter 11
214	Recognisances entered into not to affect purchasers unless duly registered as directed by this Act	Repeal.	Chapter 11
215	Crown to re-register	Repeal.	Chapter 11
216	Quietus to debtors or accountants to the Crown to be registered	Repeal.	Chapter 11
217	Discharge of the estates of debtors or accountants to the Crown	Repeal.	Chapter 11
218	Discharge of part of the estate of a debtor or accountant to the Crown not to affect claim of the Crown on other lands liable	Repeal.	Chapter 11
219	Execution by fieri facias etc	Retain and redraft in modern language. Applies only to personal property.	Chapter 11
220	Sheriff may execute debtor's powers	Retain and redraft in modern language. Applies to all property.	Chapter 11

<sup>66</sup> Wallace (1984), above n 10, 295.

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
<b>PART IV—CO-OWNED LAND AND GOODS</b>			
221-234	All provisions on co-owned land and goods	Implement the recommendations in Chapters 2 and 3 of the Commission's 2001 Report <i>Disputes between Co-owners</i> . Some of the recommendations require amendments to the Transfer of Land Act.	Chapter 1
<b>PART V—INHERITANCE</b>			
235-247	All provisions on inheritance	Repeal and replace with provision that the 'heir' 'heirs', 'next of kin', 'family' or 'relatives' of a person upon whom an estate or interest in property is conferred by an instrument are the person's intestate successors under Part 1, Div 6 of the <i>Administration and Probate Act 1958</i> .	Chapter 5 and s 130 above
<b>PART VI—ESTATES TAIL</b>			
248-266	All provisions on estates tail	Repeal.	Chapter 3
<b>New</b>		Provide for existing legal and equitable fee tails to be converted to legal and equitable fee simple estates (as the case may be), without savings provision. Estates and interests in reversion or remainder on the determination or defeasance of an estate tail should also be barred. <sup>67</sup>	Chapter 3
<b>PART VII—SURVEY BOUNDARIES</b>			
Note: All provisions of this Part are expressed to apply to land under the Transfer of Land Act - see s 273			
267	Definition	Retain.	
268	Crown survey boundaries as marked on the ground to be deemed the true boundaries	Retain.	
269	Crown grant or lease to be deemed to convey the land within the survey boundaries	Retain.	Chapter 12
270	As to aliquot parts of Crown sections having access to area	Retain and amend. The requirement of equal portions or allotments should be removed, and the rule should be that the excess area <i>or the shortage in area</i> is distributed among the allotments <i>in proportion to their respective areas</i> .	Chapter 12
271	How Crown survey boundaries may be proved in the absence of survey marks	Retain.	Chapter 12
272	Margin of error allowed in description of boundaries	Retain. The section allows a little latitude in the measurements shown on documents of title. <sup>68</sup>	
273	Provisions of Part to apply to land under general law and Transfer of Land Act 1958	Retain and incorporate into general provision dealing with the application of the Act.	
<b>New</b>	Mistaken improver and building encroachment	Insert provisions for mistaken improver and building encroachment relief. Provisions to apply to registered land.	Chapter 12

67 See Queensland Law Reform Commission Report 16 (1973), above n 7, para [22-23] and cl 22 of the attached Bill.

68 Robinson (1992), above n 13, 504.

## Appendix A: Section by Section Summary of Proposals

SECTION OF PROPERTY LAW ACT 1958		PROPOSAL	SEE ALSO
<b>PART VIII—RECOVERY OF PROPERTY ETC ON DETERMINATION OF A LIFE OR LIVES</b>			
274	Person wrongfully holding over after the determination of a life to be liable in damages	The provision applies in the rare case of an overholding by a legal life tenant of a life estate <i>pur autre vie</i> . If, as we propose, all life estates will in future exist in equity only, the provision will have transitional application only, to legal life estates already existing. The wording should be simplified, <sup>69</sup> and apply to registered land.	
<b>PART IX—REPEALED</b>			
275-302	<i>Repealed</i>		Not applicable
<b>SCHEDULES</b>			
SCHEDULE 1—Repeals			
SCHEDULE 2— <i>Repealed</i>		Not applicable	
SCHEDULE 3—General Conditions of Sale of Land		Retain for old system conveyancing only	Appendix B
SCHEDULE 4—Implied covenants		Retain for old system conveyancing only. Delete Parts VII and VIII (covenants as to rentcharge) if rentcharges are abolished	Appendix B
SCHEDULE 5—Form of Transfer of Mortgage		Retain for old system conveyancing only	Appendix B
SCHEDULE 6—Form of Receipt under Seal on Discharge of a Mortgage		Retain for old system conveyancing only	Appendix B
SCHEDULE 7—Statutory Mortgage		Retain for old system conveyancing only	Appendix B
SCHEDULE 8—Short Forms of Deeds		Retain for old system conveyancing only	Appendix B
SCHEDULE 9		Repeal, if recommendations for abolition of existing fee tails is adopted	
NEW SCHEDULE		Provisions which do not apply to land registered under the Transfer of Land Act.	Appendix B

<sup>69</sup> See *Property Law Act 1974* (Qld) s 27.

# Appendix B: Sections with no application to ordinary folio land under the operation of the Transfer of Land Act

We propose that the new Property Law Act will include, as a schedule, provisions that do not apply to ordinary folio land under the operation of the Transfer of Land Act. Listed below are the provisions that we think the schedule should contain.

The table is preliminary as we have not reviewed the following provisions of Part II of the Act (see pages 16–17):

- Division 1, Subdivision 2 (Dispositions on trust)
- Division 3, (Mortgages)
- Division 5, (Leases and tenancies)

SECTION	TITLE
Section 5	Registrar-General
Section 6	Registration of deeds, conveyances etc
Section 13	Fees to be paid on registration
Section 15	Deeds etc may be deposited with Registrar-General
Section 15A	Deposited documents
Section 15B	Court may order deposit of documents
Section 15C	Person may direct document to be deposited
Section 15D	Deposit of document without instructions
Section 16	Deeds etc. deposited may be inspected etc.
Section 17	False oaths made punishable
Section 23	Abstract of title to legal estates
Section 24	Effect of possession of documents
Section 44	Statutory commencements of title
Section 45	Other statutory conditions of sale
Section 46	Adoption of conditions of sale in Third Schedule
Section 60(1)	Power to dispose of fee-simple by deed without words of inheritance
Section 64	Production and safe custody of documents
Section 66	Confirmation of past transactions
Section 70	Partial release of security from rentcharge
Section 77(1)(a),(b)	Implied covenants in conveyances subject to rents
Section 190(1),(2)	Equitable apportionment of rents
Section 130	Abolition of the Rule in Shelley's Case
Section 206	Forms of deeds
Section 209	Executions in order to bind land to be registered
Section 210	Executions after five years to be re-registered
Section 211	Provision for re-registration explained
Section 212	Executions as between parties not to be affected

# Glossary

Fee simple absolute	An unconditional estate in land and the closest estate to absolute ownership.
Fee tail estate	A freehold estate limited to the (traditionally male) descendants of a grantor.
Future interest	An interest granting rights in land to be enjoyed at some time in the future. Future interests include; the interest remaining after the termination of an intermediate interest such as a life estate (remainder); the residue of the estate owned by the grantor after an intermediate interest has been granted (reversion); or the right of the grantor to re-enter the land after a condition of the grant of land has been breached (right of entry/re-entry).
Identified folio	The record created by the Registrar of Titles under the <i>Transfer of Land Act 1958</i> about a parcel of old system land.
Indefeasibility	As applied to an interest registered under the <i>Transfer of Land Act 1958</i> , it means that the interest is conferred and validated by registration, and is held free of all interests and encumbrances subject to specified exceptions.
Inter vivos	Means 'between the living' (as opposed to a disposition by will).
Life estate	An estate in land limited in duration to the life of the grantee or for the life of another person (an estate <i>pur autre vie</i> ). The person whose length of life determines the duration of the estate is known as the <i>cestui que vie</i> .
Land under the operation of the under the Transfer of Land Act	All land recorded in an ordinary folio, provisional folio or identified folio and, to the extent they are enforceable under the <i>Transfer of Land Act 1958</i> , unregistered interests in ordinary folio land (such as unregistered mortgages).
Modified fee	A fee simple whose duration is limited by a determining event (determinable fee) or which is subject to a condition subsequent (conditional fee).
Old system land	Land which is not registered in an ordinary folio under the <i>Transfer of Land Act 1958</i> , though it may be recorded under that Act in an identified folio or a provisional folio.
Ordinary folio	The record created upon registration of a parcel of land under the <i>Transfer of Land Act 1958</i> by the Registrar of Titles, showing the freehold ownership, leases, mortgages and other interests held in the land. Registration of an interest in land operates to confer title to the interest.
Privity of contract	A common law doctrine whereby only a party to a contract may enforce an obligation made under that contract.
Provisional folio	What an identified folio is converted to by the Registrar of Titles under the <i>Transfer of Land Act 1958</i> when a conveyance of fee simple, mortgage or other specified dealing concerning the land is registered. After 15 years, a provisional folio is upgraded to an ordinary folio.
Rentcharge	A money charge on freehold property secured through a periodic rent issuing out of the property, which does not create the relationship of landlord and tenant. <sup>1</sup>
Registered land	Land registered in an ordinary folio under the <i>Transfer of Land Act 1958</i> .
Registrar	The Registrar of Titles as referred to by section 5 of the <i>Transfer of Land Act 1958</i> .
Registrar-General	As referred to by section 5 of the <i>Property Law Act 1958</i> .
Settlement	A settlement is created when a deed, will or other instrument provides that land is granted to or held in trust for persons in succession, for example, life estate to A, remainder to B.
Thing in action	An intangible personal property right which is incapable of physical possession and can only be claimed or enforced by a legal or equitable action. <sup>2</sup>

1 Land Law Working Party of the Faculty of Law, Queen's University Belfast, *Survey of the Land Law of Northern Ireland* (1971), para [60].

2 Encyclopedic Australian Legal Dictionary - *National Trustees Executors and Agency Co of Australasia Ltd v FCT* (1954) 91 CLR 540.





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