Victorian
Law Reform
Commission

REVIEW OF THE PROPERTY LAW ACT 1958

Final Report 20

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Contents

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Terms of Reference

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.

Preface

In August 2009, the Attorney-General asked the Commission to review Victoria's property laws. This report, which concerns the *Property Law Act 1958*, concludes the first component of the reference. The Commission will report on the second component—the law of easements and covenants—later this year.

The Commissioner leading the reference, Associate Professor Pam O'Connor, brought to the task an extensive knowledge of property law and a flair for modernisation.

Many of the provisions in the *Property Law Act 1958* are arcane. Some even baffle the specialists in the field. I congratulate Pam O'Connor and her team for their diligence in de-mystifying the Act and developing clear directions for reform.

This report contains 58 recommendations. Some of them would amend existing legislation; some would repeal it; some would introduce new law; and some call for further review. All contribute to our core recommendation that Victoria should have a new Property Law Act. We have found that 25 per cent of the existing provisions are ripe for repeal, and a further 10 per cent apply only to the small amount of land not yet under the Torrens System. The Act has been amended dozens of times and further amendments would make it even more unwieldy. The report provides an opportunity to overhaul the *Property Law Act 1958* for the first time in 82 years.

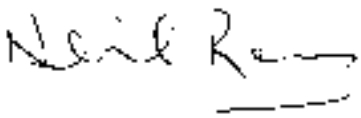
Some parts of the Act, including the provisions dealing with mortgages, leases and dispositions on trusts for sale, have not been reviewed in this report because not all of the relevant legislation is contained in the *Property Law Act 1958*. The outstanding need for review in these areas of the law should not delay the introduction of a new Act.

I wish to thank the many people who gave generously of their time and expertise to assist the Commission. We received valuable assistance in conducting the review from the members of the Expert Consultative Committee comprising the Honourable Justices Clyde Croft and Marcia Neave AO, Ms Jane Allan, Ms Susan Brennan, Associate Professor Sue McCallum, Mr Phil Nolan, Ms Rebecca Leshinsky and Ms Robyn Crozier.

The report has been enhanced by the thoughtful contributions made by those who responded to our Consultation Paper.

I would like to thank fellow Commissioners Judge Felicity Hampel and Professor Sam Ricketson (retired 30 June 2010), who with Pam O'Connor and me comprised the Division of the Commission with responsibility for this reference. My colleagues were asked to read and comment upon significant amounts of material and they made important contributions to our recommendations for reform.

A number of people contributed to the research undertaken for this reference and to the preparation of the final report. The research and policy team was expertly led by Lindy Smith. Hilda Wrixon and Zane Gaylard made major contributions to researching and drafting the report. Julie Bransden gave invaluable assistance in locating library materials; Kathy Karlevski, Vicki Christou and Failelei Siatua provided administrative support; Carlie Jennings was responsible for editing and production; and Merrin Mason has supported the reference team in many ways since joining the Commission as Chief Executive Officer. I thank them all for the commitment and energy they brought to this review.



Professor Neil Rees

Chairperson

30 September 2010

Glossary

Common law	Law derived from judicial decisions as opposed to legislation. More specifically, the traditional body of law developed by English courts other than the Court of Chancery.
Equity	The separate body of judge-made law, developed in the English Court of Chancery, which 'supplements, corrects and controls the rules of common law'.[1] Equity is similar to the common law in that it is law made by judges rather than by the legislature. The rules and forms of orders developed under this body of law are 'equitable rules' and 'equitable relief'.
Fee simple absolute	An unconditional estate in land and the closest estate to ownership. A fee simple is 'absolute' if it is not a modified fee.
Fee tail estate	A freehold estate limited to the (traditionally male) descendants of a grantor.
Folio	The record on the register for an individual lot registered under the *Transfer of Land Act 1958*, showing the land description, registered owner and other interests held in the land. Folios are of three kinds: ordinary, provisional and identified.
Freehold	A freehold estate includes what is commonly thought of as ownership of land (a fee simple estate—the most usual type) as well as life estates and estates in remainder.
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 or a lease 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 *Transfer of Land Act 1958* about a parcel of old system land.
Indefeasibility	As applied to an interest registered under the *Transfer of Land Act 1958*, 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).
Land Victoria	Land Victoria is a business unit within the Department of Sustainability and Environment which incorporates the Registrar and other officers.
Life estate	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 person whose length of life determines the duration of the estate is known as the *cestui que vie*.
Modified fee	A fee simple the duration of which 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 recorded in an ordinary folio or in a provisional folio limited as to dimensions under the *Transfer of Land Act 1958*.
Ordinary folio	An ordinary folio is a folio that is not a provisional or identified folio. Registration of a transfer or other instrument in an ordinary folio confers title to the interest specified in the instrument.[2]
Priority	An interest has priority over another if it takes precedence in enforcement. For example, a first mortgagee's priority over a second mortgagee means that it has first claim to enforce its debt against the mortgaged land.

Privity of contract	A common law doctrine whereby only a party to a contract may enforce an obligation made under that contract.
Provisional folio	A provisional folio is a transitional folio for bringing old system land under the operation of the Transfer of Land Act without full investigation of the dimensions, the owner's title, or subsisting interests affecting the land. A provisional folio is subject to a limitation as to one or more of those matters. After 15 years, the limitation expires and the folio becomes an ordinary folio.
Rentcharge	A money charge on a freehold estate in old system land secured through a periodic rent payable out of the property, which does not create the relationship of landlord and tenant.[3]
Register	The records kept by the Registrar of Titles in accordance with the *Transfer of Land Act 1958*. The register includes the folios for individual lots.
Registered land	Land registered in an ordinary folio or in a provisional folio which is limited only as to dimensions.
Registrar	The Registrar of Titles is an office established by section 5 of the *Transfer of Land Act 1958*.
Registrar-General	The Registrar-General is a statutory office which performs specified functions under the Property Law Act 1958 relating to old system land.
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, the grant of a life estate to A with a remainder to B is a settlement.
Surveyor-General	A statutory office established under Part 6 of the *Surveying Act 2004*.
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.[4]

1 *Butterworths Encyclopaedic Australian Legal Dictionary* [online version], (LexisNexis Australia 9 September 2004).

2 *Transfer of Land Act 1958* (Vic) ss 40–44.

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

4 *Butterworths Encyclopaedic Australian Legal Dictionary* [online version], (LexisNexis Australia 9 September 2004): *National Trustees Executors and Agency Co of Australasia Ltd v FCT* (1954) 91 CLR 540.

Executive Summary

This is the final report of the Commission's review of the *Property Law Act 1958* (Property Law Act). It concludes the first component of our terms of reference. The second component is a review of the law of easements and covenants, which will be completed later this year.

The Property Law Act is a cumbersome document. It is difficult to navigate and contains many references to outdated concepts and practices. It is a repository of fundamental legal principles as well as assorted provisions that have been superseded or forgotten or for which no better location has been found. A number of provisions are retained solely for old system land, which accounts for less than three per cent of land titles. The old system is a form of title based on deeds which predates the introduction of the Torrens system of registered title in 1862.

Victoria needs a new Property Law Act. The current one has been amended 65 times. Further piecemeal changes will make it even more unwieldy. We recommend repealing the current Act and replacing it with a new one. Provisions retained from the current Act would be redrafted in simpler, plainer language. A table of correspondences would provide a reference link between the current and new Acts. The new Act would clearly set out which provisions apply only to old system land, as distinct from registered land.

We have reviewed all of the Act except the provisions on co-owned lands and goods, which the Commission reviewed in 2001–02, and provisions on mortgages, leases and dispositions on trusts for sale, which need to be examined under broader terms of reference because the relevant legislation is not wholly contained in the Property Law Act. Completion of these reviews should not delay the introduction of the new Act.

Each provision of the Act has been examined in turn to identify whether it should be repealed, substantially amended, redrafted for clarity, or retained. A summary of our recommendations for each provision is set out in Appendix A.

No less than 68 sections and two schedules are ripe for repeal. They reflect rare or discontinued practices, such as the use of rentcharges, or refer to legislation that has since been repealed. These provisions are listed in Appendix C.

In the body of the report, we discuss issues that require complex analysis or about which we recommend substantial reform.

We recommend changes to the formalities for creating and assigning property interests. Formal requirements for the disposition of existing equitable interests in personal property would be removed; trusts of land would need to be created in writing by the person disposing of the land or the person's agent rather than being merely 'manifested and proved' by writing; and inconsistencies in the formalities required for creating and disposing of interests in land would be resolved. Our recommendations would simplify procedures, clarify the law and reduce the risk of fraud.

A number of provisions concerning rights and obligations under contracts and conveyances require amendment. We recommend clarifying how implied statutory covenants apply to dealings of registered and unregistered interests, and when a third party can enforce a covenant made between two other parties for his or her benefit.

We also recommend that the circumstances in which a court can exercise its discretion to provide relief against forfeiture of a purchaser's deposit should be clarified.

Some of the recommendations that the Commission made on the rights of co-owners in its 2002 report *Disputes between Co-owners* have not been implemented. We affirm these recommendations, some of which could be implemented under the new Property Law Act.

We discuss several provisions that are outdated and in need of amendment. It has not been possible to create an estate tail in Victoria since 1886. We recommend converting any that still exist to fee simple estates, while ensuring that no vested interests are extinguished.

Although a separate review of the law of leases is needed, we examine a procedure by which tenants can convert certain leases that were originally created for a term of at least 300 years, and have at least 200 years still to run, into fee simple estates. Any such leases are likely to be rare and we recommend that the provision be repealed after a five-year period during which any existing leases can be converted.

We also recommend removing discriminatory rules of inheritance and updating provisions concerning the property rights of non-citizens and married women. In addition, we recommend amending the provisions on presumptions of survivorship and the merger of estates to clarify their meaning and simplify their operation.

Almost all of the provisions in the Act for debt enforcement are out of date. We recommend that the registration of judgment debts against old system land, and the priority given to the execution of debts as against other interests in the land, should be regulated under the *Transfer of Land Act 1958* (Transfer of Land Act). Provisions concerning the sheriff's powers should be transferred to the *Sheriff Act 2009*.

The implications of discrepancies in land boundaries arising from errors in early surveys and subdivisions emerged as an important issue for surveyors during the review. Section 270 provides a useful rule for distributing excess measurements in Crown surveys among equal lots, but there is a need for additional rules to deal with unequal lots, shortages in measurement, errors in boundaries other than Crown survey boundaries and irregularly shaped lots. We recommend empowering the Minister to publish guidelines in the Government Gazette, after consultation with the Surveyor-General, which would apply to both old system and registered land and be acted upon by the Registrar.

We also recommend two new provisions. The first is a building encroachment relief provision, which would enable a court to provide compensation or another form of relief when a building straddles a boundary line. The second is a mistaken improver relief provision, which would enable a court to grant relief where a person has made a lasting improvement on the property of another because of a mistake about either the identity of the land or who owns it. Provisions of this type are found in the property legislation of other States and the Territories.

The new provisions can be introduced without changing the rule under which a landowner can acquire title to adjacent land by at least 15 years' adverse possession. Although we make no recommendation to change the rule, we list some issues for further review.

We examine the provisions for creating life estates, future interests and trusts of land and conclude that it should no longer be possible to create legal life estates and legal future interests. We recommend that life estates and future interests should be able to be created only in equity, as beneficial interests under a trust.

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* (Settled Land Act), were replaced by a single statutory trust system. This is an area requiring significant reform extending beyond the current terms of reference to encompass the Settled Land Act and the relevant provisions in the *Trustee Act 1958* and the *Administration and Probate Act 1958*.

Our terms of reference ask us to report on related issues that may require further investigation. In announcing the reference, the Attorney-General said that it is the first stage of a review of Victoria's property laws and that a second stage will examine aspects of the Transfer of Land Act. In reviewing the Property Law Act, we have identified some issues that could usefully be included in the second stage. These include:

- the protection of beneficiaries of trusts of land under the operation of the Transfer of Land Act
- consistency in the terms of implied covenants under the Transfer of Land Act and the Property Law Act
- the operation of provisions in the Transfer of Land Act concerning part parcel adverse possession.

Recommendations

CHAPTER 2—A NEW PROPERTY LAW ACT

1. The *Property Law Act 1958* should be repealed and replaced with a new Act which retains the title 'Property Law Act'.
2. Provisions of the current Act that are retained in the new Property Law Act should be arranged according to subject; renumbered consecutively; and revised to update and simplify the language, clarify meanings that are in doubt and remove references to obsolete practices.
3. A table of correspondences should be included as a schedule to the new Property Law Act. It should indicate which provisions of the current Act have been copied verbatim; which have been retained with the language updated; which have been subject to minor alterations; and which have been subject to alterations that change their effect.
4. Where a provision that abrogates or modifies a common law rule, presumption, or principle of interpretation is itself repealed, a savings provision should be included in order to prevent revival of the rule, presumption or principle.
5. Provisions which apply solely to old system land should be set out in a separate part of the new Property Law Act.
6. The new Property Law Act should specify that all provisions, other than those which are expressed to apply solely to old system land, apply to land under the operation of the *Transfer of Land Act 1958*, but subject to that Act.

CHAPTER 3—CONTRACTS AND COVENANTS

CREATION AND ASSIGNMENT OF LEGAL AND EQUITABLE INTERESTS

7. A provision setting out the evidentiary requirements for the sale or disposition of an interest in land should be inserted into the new Property Law Act. The provision should be in the same terms as section 126 of the *Instruments Act 1958*, except that the words in subsection (1) relating to guarantees for debts should be omitted. Section 126(1) of the *Instruments Act 1958* should be amended to apply to guarantees only.
8. In order to eliminate ambiguities, overlaps and inconsistencies, section 53 should be amended as follows:
   (a) Section 53(1)(a) should be amended to provide that no legal or equitable interest in land can be created or disposed of except by writing by the person creating or disposing of the interest or by the person's agent.
   (b) Section 53(1)(b) should be amended to provide that a declaration of trust respecting any land or a trust consisting partly of land and partly of personal property must be in writing and signed by the person disposing of the land or by the person's agent.
   (c) Section 53(1)(c) should be repealed, so that no written formalities are required for personal property except as required by section 134 and other legislation.
   (d) A new subsection should be inserted into section 53 providing that, for the purposes of section 53, an agent of a person creating or disposing of an interest in land must be lawfully authorised in writing or by operation of law.
   (e) The above provisions should remain subject to the current exceptions in sections 52(2), 54(2) and 55.
   (f) The above amendments should apply only to conveyances and dispositions created after the commencement of the new provisions.

IMPLIED COVENANTS

9. Sections 76, 77 and Schedule 4 should be retained and amended as follows:
   (a) The phrase 'who conveys and is expressed to convey' in section 76 and Parts I–VI of Schedule 4 should be omitted and the phrase 'who is expressed to convey' should be substituted.
   (b) Subsection 76(3) is obsolete and should be repealed.
   (c) The references to 'committee of a lunatic', in sections 76(1)(f), 76(4) and 77(4), and 'Committee of the Estate of a Lunatic', in Part VI of Schedule 4, should be deleted and replaced with references to an administrator appointed under section 46 of the *Guardianship and Administration Act 1986* or an enduring attorney appointed under Division 2 of Part XIA of the *Instruments Act 1958*.

THIRD PARTY BENEFICIARIES

10. Section 56(1) should be amended to confirm its meaning as interpreted by the courts, namely that:

    (a) It does not apply to an interest in personal property.

    (b) It 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 the conveyance or other instrument purports to grant something, provided that the person was in existence and identifiable at the time the covenant was made.

RETURN OF DEPOSITS

11. Sections 49(1), (2) and (3) should be revised and consolidated into a single provision.

12. Section 49(2) should be amended to provide that, where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, where it is just and equitable to do so, order the repayment of the whole or any part of the deposit, with or without interest.

CHAPTER 4—LAND IDENTIFICATION, BOUNDARIES AND ENCROACHMENT

GUIDELINES FOR BOUNDARY ADJUSTMENT

13. The new Property Law Act should provide that the Minister must, after consultation with the Surveyor-General, publish in the Government Gazette guidelines for the re-establishment, redefinition and adjustment of land boundaries where errors in measurement have occurred in an original survey or in a subdivision.

14. A consequential amendment should be made to section 273 to provide that any guidelines that the Minister issues for the re-establishment, redefinition and adjustment of land boundaries under the new provisions shall:

    (a) apply to land, whether under the operation of the general law or under the operation of the *Transfer of Land Act 1958*

    (b) where applicable, be acted upon by the Registrar in exercising the Registrar's powers and functions under section 102 of the *Transfer of Land Act 1958*.

BUILDING ENCROACHMENT

15. The new Property Law Act should include provisions empowering the Supreme Court, the County Court and the Magistrates' Court to grant discretionary relief in respect to an encroachment by a building.

16. The new building encroachment provisions should describe a building encroachment in the following terms:

    (a) An encroachment arises when a building straddles a boundary line and is partly on a lot owned by one party (the 'encroaching owner') and partly on an adjacent lot owned by another party (the 'adjacent owner').

    (b) A building means a substantial building of permanent character.

    (c) The encroachment may be by overhang of any part of a building as well as by intrusion of any part of a building in the soil.

    (d) The portion of the lot over which the encroachment extends is the 'subject land'.

17. The building encroachment provisions in the new Property Law Act should provide the following procedure for relief:

    (a) Either the encroaching owner or the adjacent owner should be able to apply to a court for relief under the provision.

    (b) An owner means a person who holds an estate in freehold in possession and includes a mortgagee in possession.

    (c) The applicant should be required to give notice of the application to a mortgagee, lessee or any other person who has an estate or interest in the subject land, or any other person to whom the court directs that notice should be given.

    (d) On an application for relief the court should have power to make one or more of the following orders:

        (i) the payment of compensation by the encroaching owner to the adjacent owner

        (ii) that the subject land be included in the title to the encroaching owner's lot by amendment of a boundary

        (iii) that the adjacent owner lease the subject land to the encroaching owner

        (iv) that the adjacent owner grant to the encroaching owner any easement right or privilege in relation to the subject land specified in the order

        (v) that the encroaching owner remove the encroachment.

Recommendations

18. In exercising its discretion under the building encroachment provisions the court should have power to grant or refuse such relief as it thinks just and equitable and to consider:
    (a) the situation and value of the subject land
    (b) the nature and extent of the encroachment
    (c) the character of the encroaching building and the purposes for which it may be used
    (d) the loss and damage which has been or will be incurred by the adjacent owner
    (e) the loss and damage which would be incurred by the encroaching owner if he or she is required to remove the encroachment
    (f) the circumstances in which the encroachment was made.
19. Where, in an application for building encroachment relief, the court makes an order that the subject land is to be included in the title to the encroaching owner's lot, it should have power to direct the Registrar to make all entries on the folio of the register relating to any lot necessary to give effect to the order.
20. In determining the compensation to be paid under the building relief provisions to the adjacent owner in respect of any lease or grant to the encroaching owner or any amendment of a boundary line, the court should have power to determine an amount up to but not exceeding three times the unimproved value of the subject land.
21. In determining whether the compensation for building encroachment should exceed the value of the subject land, the court should have regard to:
    (a) the value, whether improved or unimproved, of the subject land to the adjacent owner
    (b) the loss or damage which has been incurred by the adjacent owner by reason of the encroachment
    (c) the loss or damage which will be incurred by the adjacent owner through the orders which the court proposes to make in favour of the encroaching owner
    (d) the circumstances in which the encroachment was made.
22. It should be provided that nothing in the building encroachment relief provisions affects the operation of Part 1, Division 3 of the *Limitation of Actions Act 1958.*

MISTAKEN IMPROVER

23. The new Property Law Act should empower the Supreme Court, the County Court and the Magistrates' Court to grant discretionary relief where a person has made a lasting improvement upon land owned by another in the genuine but mistaken belief that the land is:
    (a) the person's property, or
    (b) the property of a person on whose behalf the improvement was made or was intended to be made.
24. An improvement for the purpose of mistaken improver relief should be defined as a fixture on land.
25. An application for mistaken improver relief should be able to be made by:
    (a) a person by whom or on behalf of whom the improvement was made (the 'mistaken improver')
    (b) a person who has an estate or interest in the land or part of it on which the improvement or part of it has been made
    (c) a person upon whose land the improvement was intended to be made, or the person's successor in title, mortgagee or lessee, or
    (d) a person claiming to be a party to or to be entitled to any benefit under any mortgage, lease, easement, contract or other instrument relating to the subject land on which the improvement was intended to be made.
26. The applicant for mistaken improver relief should be required to give notice of the application to any person who has an interest in the subject land or who is likely to be affected by an order that the court may make.
27. In exercising its discretion under the mistaken improver relief provision, the court should have power to grant or refuse relief as it sees fit and be able to consider:
    (a) the situation and value of the subject land, and the nature and extent of the improvement
    (b) the character of the improvement and the purposes to which it may be used
    (c) the loss and damage which would likely be incurred by the mistaken improver if he or she were required to remove the improvement
    (d) the circumstances in which the improvement was made.

28. On an application for mistaken improver relief the court should have power to make such order as is just and equitable, and should be able to make one or more of the following orders:

    (a) that a specified person is vested with the whole or any part of the land on which the improvement or any part of the improvement has been made, either with or without any surrounding or adjacent or other land

    (b) that a specified person shall or may remove the improvement or any part of it from the land or any part of it

    (c) that a specified person pay compensation to any other person in respect of any land or part of it, any improvement or part of it, or any loss or damage caused or likely to be caused by the improvement or any order that the court proposed to make

    (d) that any person specified in the order have or give possession of the land or part of it or the improvement or part of it for the period and on the terms that the court specifies.

29. The court should have power under the mistaken improver relief provisions to make orders as follows:

    (a) upon and subject to such terms and conditions as the court thinks fit, whether as to payment by any person of any sum or sums of money including costs or the execution by any person of any mortgage, lease, easement, contract or other instrument, or otherwise

    (b) declaring any estate or interest in the land or any part of the land on which the improvement has been made to be free of any mortgage, lease, easement or other encumbrance, or varying, to such an extent as may be necessary in the circumstances, any mortgage, lease, easement, contract, or other instrument affecting or relating to such land or any part of the land

    (c) ordering any person to produce to any person specified in the order any title deed or other instrument or document relating to any land

    (d) directing a survey to be made of any land and a plan of survey to be prepared.

30. The *Transfer of Land Act 1958* should be amended to provide that, where a vesting order is made on an application for mistaken improver relief and is lodged at the office of the Registrar, the Registrar is required to make all entries on the folios of the affected lots necessary to give effect to the order.

31. The limitation period for bringing actions for relief under the mistaken improver provision should be the same as for an action in detinue.

CHAPTER 5—REFORM OF LEGAL ESTATES AND TRUSTS OF LAND

REDUCTION OF LEGAL ESTATES IN FREEHOLD LAND

32. From the commencement of the new Property Law Act, legal life estates and legal future interests should be capable of creation only in equity as beneficial interests under a trust.

33. From the commencement of the new Property Law Act, the number of legal estates should be reduced to two: the fee simple estate and the leasehold estate. The fee simple estate can be absolute or conditional. These should be the only estates that are registrable under the *Transfer of Land Act 1958*.

34. From the commencement of the new Property Law Act, the creation of a determinable fee should operate to create a conditional fee.

35. Successive interests in land should be capable of creation only in equity, as beneficial interests under a trust. (See recommendations 36 and 37.)

TRUSTS OF LAND

36. All future settlements involving successive interests should be created under a single statutory scheme for a trust of land, replacing both the *Settled Land Act 1958* and the dispositions on trust for sale provisions in Part II Division 1 Subdivision 2 of the *Property Law Act 1958*.

37. All future dispositions of property to minors should be held under the single statutory scheme for a trust of land, instead of under the *Settled Land Act 1958*.

Recommendations

CHAPTER 6—AMENDMENTS TO OUTDATED PROVISIONS

ESTATES TAIL

38. All existing estates tail should be converted by statute to fee simple estates. Section 249 should be retained and amended to provide that:

    (a) From the commencement of the new Property Law Act, any person entitled to an estate tail, whether legal or equitable, in any land shall be deemed to be entitled to an estate in fee simple to the exclusion of any estates or interests limited to take effect after the determination or in defeasance of the estate tail and to the exclusion of all estates or interests in reversion on the estate tail.

    (b) In the situation where any minor is entitled to an estate tail and any estate or interest would pass to another person on the death of the minor who has not attained full age and has no issue, the minor should be deemed to take an estate in fee simple.

    (c) The definition of 'estate tail' should include the estate in fee into which an estate tail is converted where the issue in tail is barred but the persons claiming estates by way of remainder are not barred (a 'base fee'), and an estate in fee voidable or determinable by the entry of the issue in tail.

    (d) The definition of 'estate tail' should exclude the estate of a tenant in tail after possibility of issue extinct.

SPECIAL RULES OF INHERITANCE

39. The special rules of inheritance in Part V should be replaced with a provision that, subject to contrary intention, a disposition other than a will which confers 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 1 Division 6 of the *Administration and Probate Act 1958* and in the same shares.

ENLARGEMENT OF LONG LEASES TO FREEHOLD TITLE

40. The new Property Law Act should contain a sunset provision which provides that the provisions for the enlargement of long leases (in section 153 of the current *Property Law Act 1958*) cease to have effect five years from the commencement of the new Property Law Act.

41. Section 153(7) should be amended to provide that, until the new sunset provisions take effect, a deed of declaration by a lessee shall be registered by the Registrar either:

    (a) under a new Division to be inserted into Part IV of the *Transfer of Land Act 1958*, or

    (b) in the case of old system land, under section 22 of the *Transfer of Land Act 1958*.

42. The definition of 'specified dealing' in section 4(1) of the *Transfer of Land Act 1958* should be amended to include a lessee's deed of declaration under section 153(6) of the *Property Law Act 1958*.

MERGER

43. Section 185 should be retained and provision should be made in the *Transfer of Land Act 1958* for the Registrar, upon the application of the proprietor of interests or estates in the land, to record the merger of the interests or estates.

PRESUMPTIONS OF SURVIVORSHIP

44. Section 184 should be amended to omit the words 'subject to any order of the Court' and to substitute the words 'unless a court otherwise orders'.

ALIEN FRIENDS

45. Section 27, concerning the property rights of alien friends, should be replaced by a provision in the new Property Law Act which:

    (a) provides that a person is not prevented from acquiring, holding or disposing of real or personal property in Victoria by reason only that the person is not an Australian citizen within the meaning of the *Australian Citizenship Act 2007* (Cth)

    (b) includes a note stating that investment by foreign persons is regulated by the Commonwealth under the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

MARRIED WOMEN

46. Sections 167, 168 and 170, concerning the property rights of married women, should be replaced in the new Property Law Act by the provisions that currently appear at sections 156 and 157(1) of the *Marriage Act 1958*. Those provisions should be transferred from the *Marriage Act 1958* to the new Property Law Act and updated.

47. Any restraints on anticipation in dispositions created before the commencement of the *Marriage (Property) Act 1956* and still in operation should be made void. The relief provisions in section 169 of the *Property Law Act 1958* would then be redundant and should be repealed.

DEBT ENFORCEMENT

48. Section 208(1) should be redrafted in modern language.

49. Sections 208(2) and (4), 219 and 220, concerning the powers of the sheriff to seize and dispose of a debtor's property in execution of a debt, should be updated and transferred to the *Sheriff Act 2009*.

50. Section 208(3), concerning the procedures for the sale of a debtor's land by the sheriff, should be revised to be consistent with order 69.06 of the *Supreme Court (General Civil Procedure) Rules 2005* and transferred to the *Sheriff Act 2009*.

51. Sections 209, 210, 211, 212, 214 and 215 of the *Property Law Act 1958* should be repealed and section 52 of the *Transfer of Land Act 1958* should be amended to provide that a judgment, decree, order or process of execution recorded under sections 26E or 26F of that Act has the same effect as to priority of the execution as a recording made under section 52(2) of that Act. As a consequential amendment, section 26I of the *Transfer of Land Act 1958* should be amended to exclude an interest recorded under section 26E or 26F.

52. Sections 213, 216, 217 and 218 should be repealed.

CHAPTER 7—REPEAL OF OBSOLETE PROVISIONS

RENTCHARGES

53. Sections 125–129 should 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.

54. The savings provision, upon the repeal of sections 125–129, should expressly state that the creation of annuities under the *Transfer of Land Act 1958* is not affected.

MINORS' CONTRACTS

55. Section 28B, concerning the validity of contracts with minors, should be repealed. To ensure that a loan contract entered into by a minor member of a co-operative with the co-operative is valid, the *Co-operatives Act 1996* should be amended to provide that section 69(1) of that Act applies notwithstanding anything to the contrary in section 49 of the *Supreme Court Act 1986* or in any rule of common law or equity. If proposed nationally consistent co-operatives legislation is introduced in Victoria, the equivalent provision should carry a similar notation.

REPRESENTED PERSONS WITH A MENTAL ILLNESS

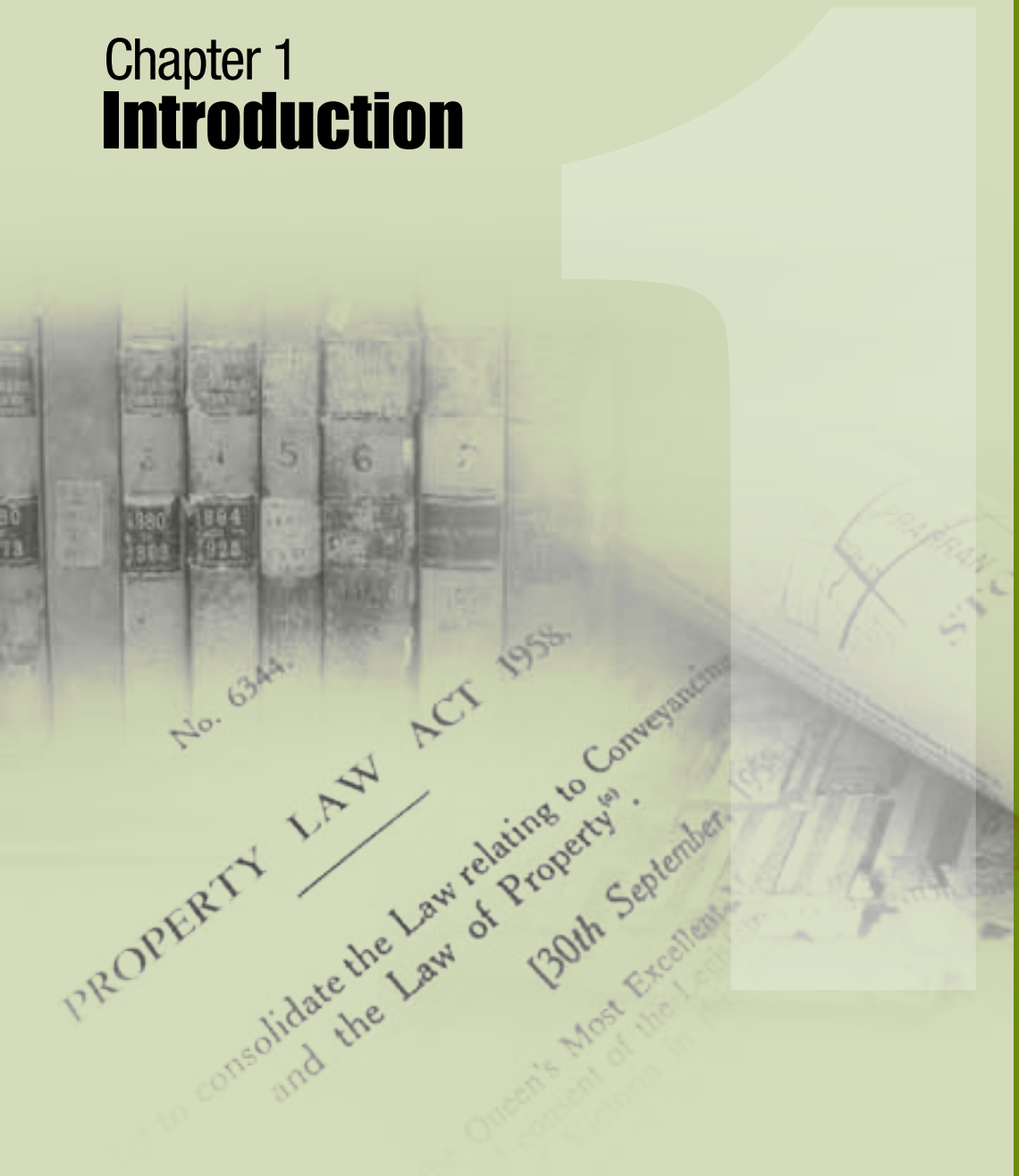
56. Section 30(1), concerning conveyances by an administrator on behalf of a patient within the meaning of the *Mental Health Act 1986*, should be repealed.

57. Section 30(2), concerning land held on trust for sale that is vested in a patient within the meaning of the *Mental Health Act 1986*, should be reviewed in the context of the proposed replacement of the dual trust scheme. (See recommendations 36 and 37.)

OTHER PROVISIONS THAT NO LONGER SERVE A PURPOSE

58. The provisions that are listed at Appendix C, and which are not elsewhere recommended for repeal, are obsolete and should be repealed.

Chapter 1
Introduction



CONTENTS

Chapter 1 Introduction

1.1 In August 2009 the Attorney-General asked the Commission to review Victoria's property laws. The terms of reference contain two components: a review of the *Property Law Act 1958* (Property Law Act) and a review of the law of easements and covenants.

1.2 We are undertaking each component separately. This is the final report of the review of the Property Law Act. We will complete our report on the law of easements and covenants later this year.

1.3 Later in this Chapter we discuss the way we conducted the review and outline the structure of the report. First of all, we provide a brief overview of Victoria's property law.

VICTORIA'S PROPERTY LAW

1.4 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 1958* (Transfer of Land Act). The Transfer of Land Act provides the rules and machinery for the registered land title system, or Torrens System.

1.5 Victoria has two systems of title for land that have been granted by the Crown: 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. Native title stands outside this body of property law and is not affected by any of the recommendations in this report.[1]

1.6 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 all land. It also contains provisions which apply solely to old system land.

1.7 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 1997*, the *Retail Leases Act 2003*, the *Settled Land Act 1958* (Settled Land Act), the *Sale of Land Act 1962*, the *Perpetuities and Accumulations Act 1968*, and the *Landlord and Tenant Act 1958*. This review does not extend to these specialised Acts, except to the extent of any overlap or inconsistency with the Property Law Act.

THE TORRENS SYSTEM

1.8 The Torrens System was introduced to Victoria in October 1862.[2] Each registered parcel of Torrens System land is allocated a unique record or 'folio', on which the Registrar of Titles (Registrar) records the land description, the freehold ownership, leases, mortgages and other interests held in the land.[3] Registered interests are said to be 'indefeasible'. This means that registration confers title to the interest and the registered interest is held free of all other interests which are not recorded on the register or listed as exceptions in section 42 of the Transfer of Land Act.[4]

1.9 The Torrens System was intended to replace the old system of deeds registration,[5] 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.

1.10 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.

THE 1998 CONVERSION REFORMS

1.11 By 1998, all but 35,000 parcels (representing three per cent of private land in Victoria) were held on Torrens title.[6] To speed up the conversion of the remaining old system land, new measures were introduced by the *Transfer of Land (Single Register) Act 1998*. Since 1 January 1999, conveyances and other instruments affecting old system land can only be registered under the Transfer of Land Act.

1.12 Now, once a parcel of old system land is identified, the Registrar is required to create an 'identified folio' for it.[7] This is effectively a 'tag' for the parcel of land. While interests may be recorded on an identified folio, no person is registered as owner and no certificate of title is issued for the land.[8] Subsisting interests in the land are not affected, and their effect and priority is determined by the rules of the old system.[9]

1.13 The lodgement for registration of a 'specified dealing'[10] such as a conveyance of fee simple, a mortgage, an assignment of a possessory interest, or an application by a person entitled to lodge a specified dealing, will result in the creation of a 'provisional folio'.[11]

1.14 A provisional folio is a transitional folio for bringing old system land under the operation of the Transfer of Land Act without full investigation of the title, subsisting interests and the dimensions of the land.

1.15 There are three main types of provisional folio:[12]

- folios that are subject to a qualification in the legal practitioner's certificate
- folios where the title is based on general law documents which have not been investigated by the Registrar and may be subject to subsisting interests (folios 'provisional as to subsisting interests')
- folios where the dimensions of the land are not based on survey information which has been investigated by the Registrar (folios 'provisional as to dimensions').[13]

1 See discussion in Chapter 5.

2 *Real Property Act 1862* (Vic).

3 *Transfer of Land Act 1958* (Vic) s 27 (5)–(7).

4 *Transfer of Land Act 1958* (Vic) ss 40–44; James Hogg, *Registration of Title to Land Throughout the Empire* (Law Book Co of Australasia, 1920) 96, explaining that indefeasibility has a dual operation—both conferring title and giving priority over other interests.

5 *Registration of Deeds Act 1843* (NSW) continued to apply in Victoria after separation from NSW in 1850: Brendan Edgeworth, *Sackville & Neave Australian Property Law* (LexisNexis Butterworths, 2008) [5.7].

6 Hansard (Vic), Parliamentary Debates, Assembly, 14 May 1998, 1783 (The Hon M Tehan, Minister for Conservation and Land Management); Land Victoria, Submission 18, 1.

7 *Transfer of Land Act 1958* (Vic) ss 26E, 26W. Note that the Registrar may, if he thinks it appropriate, create a provisional or ordinary folio instead of an identified folio.

8 *Transfer of Land Act 1958* (Vic) ss 26F, 26G.

9 *Transfer of Land Act 1958* (Vic) ss 26G, 26H, 26I.

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

11 *Transfer of Land Act 1958* (Vic) ss 22–24, 4(1).

12 See the definition of 'provisional folio' in section 4(1) of the Transfer of Land Act, and the associated warnings in Parts II–V of the Fifth Schedule.

13 Land Victoria is aware of only one folio that is provisional on account of a qualification in a legal practitioner's certificate and estimates that there are about 200 that are provisional as to subsisting interests and thousands that are provisional as to dimensions: Submission 18, 1–2.

Chapter 1 Introduction

1.16 Subsisting interests in land held in folios that are subject to qualification in a legal practitioner's certificate or are provisional as to subsisting interests are enforceable in accordance with the rules of the old system.[14] The provisional folio must contain a warning that the title may be subject to subsisting interests under the general law or to a qualification in a legal practitioner's certificate.[15] After 15 years, the warning is removed and the land ceases to be subject to those subsisting interests and qualifications.[16] At this point the folio is no longer a provisional folio, and the registered interests become indefeasible.[17]

1.17 An ordinary folio is 'a folio of the Register that is not a provisional folio or an identified folio'.[18] Registered interests in land held in an ordinary folio are indefeasible.[19] The same applies to registered interests in land in a provisional folio which is limited only as to dimensions.[20]

A NOTE ON TERMINOLOGY

1.18 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.

1.19 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.[21] In this review we use the term 'registered land' to refer to land in ordinary folios and folios that are provisional as to dimensions. We use the term 'old system land' to refer to all other land which has been granted by the Crown, irrespective of whether it is land in an identified or provisional folio.

REVIEW OF THE PROPERTY LAW ACT

GUIDING AIMS AND PRINCIPLES

1.20 To assist in developing and assessing proposals for reform of the Property Law Act, we formulated the following aims and principles from our terms of reference:

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 rights 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 relationship between the Property Law Act and other Acts, including the Transfer of Land Act, should be clarified.

SCOPE

1.21 The review encompasses all of the provisions of the Property Act except:

- Part IV (sections 221–234), concerning co-owned land and goods, which the Commission reviewed in 2001
- Division 3 of Part II (sections 86–124), concerning mortgages
- Division 5 of Part II (sections 136–152), concerning leases and tenancies, and
- Subdivision 2 of Division 1 of Part II (sections 31–40), concerning dispositions on trust for sale.

1.22 As we discuss in Chapter 8, 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 current terms of reference. For this reason, we see a need for a more comprehensive review into these areas of the law.

1.23 In Chapter 5, we recommend that new trust of land provisions replace both the Settled Land Act (which should be retained for existing settlements only) and the provisions in the Property Law Act concerning dispositions on trust for sale. We see the need for a review of trusts of land that encompasses the Settled Land Act together with the relevant provisions in the Property Law Act, the *Trustee Act 1958* and the *Administration and Probate Act 1958*.

CONSULTATION PAPER

1.24 In April 2010, we released a Consultation Paper and sought submissions in response to the issues that it raised. The closing date for submissions was the end of June 2010. In preparing the paper, we examined each provision of the Act in turn, researching its scope, purpose, legislative history and judicial interpretation. We 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 also considered whether the provision currently applies to registered land and whether it should apply.

1.25 We were greatly assisted in our research 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.[22] This is the only section-by-section review of the Property Law Act or its predecessor Acts undertaken for the Victorian government since 1928.[23]

1.26 We 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 instructive.[24] 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 recently undertaken major reviews of their property law statutes and implemented significant reforms.

1.27 The Consultation Paper focused on major themes and posed questions about possible reform. A section-by-section summary of our proposals was set out in an Appendix.

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

15 *Transfer of Land Act 1958* (Vic) s 18, 25 and Parts III and V of the Fifth Schedule.

16 *Transfer of Land Act 1958* (Vic) ss 20, 21, 26C, 26D.

17 *Transfer of Land Act 1958* (Vic) ss 4(1), 42.

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

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

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

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

22 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.

23 Wallace (1984), Ibid 3–4.

24 Wallace (1987), above n 22.

Chapter 1 Introduction

SUBMISSIONS

1.28 In response to the Consultation Paper we received 19 submissions from interested groups and members of the public. They are listed at Appendix D. Some submissions responded to each of the questions asked in the Consultation Paper, while others focused on particular areas of interest to the parties concerned.

1.29 The submissions provided useful insights into the original intent and operation of many of the provisions of the Property Law Act and feedback on the proposals outlined in the Consultation Paper. We contacted some of the parties who made submissions for consultations, which yielded further valuable information, particularly about current practices.

OTHER CONSULTATIONS

1.30 In addition to seeking submissions in response to the Consultation Paper, we consulted throughout the review with legal practitioners, judges, academics, surveyors, government officials, VCAT members and other key stakeholders involved with property law in Victoria.

1.31 We were also assisted by a consultative committee which comprised prominent property law academics and practitioners, including from Land Victoria and the Department of Planning and Community Development, and senior judges. The committee assisted the Commission from a very early stage of the review, providing feedback and guidance in relation to the more complex provisions contained in the Act and proposed reforms. The committee was able to share its expert knowledge and practical experience in property law to help frame the review and to clarify the different issues that were addressed.

OUTLINE OF THIS REPORT

1.32 Discussing the Property Law Act section by section would have provided a disjointed and laborious account of the law. Instead, this report focuses on issues that require complex analysis or about which we recommend substantial reform. Our recommendations for each section of the Act are set out in a table at Appendix A.

1.33 In Chapter 2 we recommend a new Property Law Act. The current Act is an unwieldy document that is due for replacement. Its structure makes it difficult to navigate, its language is hard to understand and its interaction with other legislation is unclear. Almost every provision needs to be overhauled or repealed.

1.34 In Chapters 3–6 we discuss reforms that the new Act would introduce. We recommend in Chapter 3 a number of changes to the formalities for creating and assigning property interests. Our recommendations would simplify procedures, clarify the law and reduce the risk of fraud.

1.35 We then turn to issues concerning the identification and enforcement of rights and obligations under contracts. We recommend clarifying how implied statutory covenants apply to dealings of registered and unregistered interests and when a third party can enforce a covenant made between two other parties for his or her benefit. We also recommend that the circumstances when a court can exercise its discretion to provide relief against forfeiture of a deposit should be clarified. A number of the recommendations that the Commission made in its 2002 report concerning the rights of co-owners have not been implemented. We affirm these recommendations, some of which could be implemented under the new Property Law Act.

1.36 In Chapter 4 we discuss reforms relating to the identification of land and the implications of discrepancies in land boundaries arising from errors in early surveys. We examine section 270, which deals with discrepancies between the original Crown survey boundaries as marked out on the ground and the corresponding area described in title documents. We received submissions from Land Victoria and surveyors indicating a need for additional principles and guidelines for resolving discrepancies and amending boundaries. We recommend the insertion of a new provision in the Property Law Act empowering the Minister to publish guidelines for this purpose after consulting the Surveyor-General.

1.37 We then discuss two new provisions which we recommend be included in the new Property Law Act. The first is a building encroachment relief provision, which would enable a court to provide compensation or another form of relief when a building straddles a boundary line. The second is a mistaken improver relief provision, which would enable a court to grant relief where a person has made a lasting improvement on the property of another because of a mistake about either the identity of the land or who owns it. Provisions of this type are found in property legislation of other States and the Territories.

1.38 The introduction of the two new provisions does not require changing the rule under which a landowner who has been in adverse possession of adjacent land for the limitation period (usually 15 years) becomes the owner of it. We recommend no change to the rule, although in Chapter 8 we identify issues with its operation which require separate review.

1.39 In Chapter 5 we examine the provisions for the creation of life estates, future interests and trusts of land. We conclude that it should no longer be possible to create legal life estates and legal future interests. Life estates and future interests should be able to be created only in equity, as beneficial interests under a trust.

1.40 We also conclude 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, were replaced by a single statutory trust system. This is an area which should also be the subject of further review.

1.41 In Chapter 6 we discuss a variety of archaic provisions in the Property Law Act which we recommend be repealed or updated because they reflect discontinued practices. In Chapter 7 we recommend the repeal of obsolete and redundant provisions as discussed in the chapter and otherwise listed in Appendix C.

1.42 In Chapter 8 we identify the need for the law of mortgages to be reviewed as a whole under broader terms of reference. Although the Property Law Act contains some provisions concerning mortgages, a great deal of the law of mortgages lies in other legislation and our current terms of reference do not extend to a wider examination. For similar reasons, the law of leases also needs to be reviewed as a whole. A number of other issues requiring review have been identified, either by us or in submissions, and we canvass these in Chapter 8 as well.

Chapter 2

A New Property Law Act

CONTENTS

Chapter 2 A New Property Law Act

2.1 Victoria needs a new Property Law Act. The current Act is difficult to navigate and harder to interpret. Many provisions need updating and others need repealing. Further piecemeal amendments would only add to the complexity.

2.2 This report does not contain draft legislation but we recommend in this Chapter a number of features that we think the new Act should have. In later chapters, we identify sections of the current Act that should be amended and included in the new Act and those that should be repealed.

2.3 In addition, the co-ownership provisions should be amended in accordance with the recommendations in Chapters 2 and 3 of the Commission's 2002 report *Disputes between Co-owners*.[1]

2.4 To underscore the introduction of a new Act to replace the old, we suggested in the Consultation Paper that the new Act could have a different name and we invited suggestions as to what it should be.[2] The submissions that addressed the question expressed unanimous support for retaining the title 'Property Law Act'. We agree that the title is appropriate for an Act which deals with both real and personal property.

RECOMMENDATION

1. The *Property Law Act 1958* should be repealed and replaced with a new Act which retains the title 'Property Law Act'.

DIFFICULTIES IN USING THE CURRENT ACT

STRUCTURE

2.5 The *Property Law Act 1958* (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 an assortment of provisions enacted at various times, and on diverse subjects.

2.6 The ordering of the provisions in the current Act has been constrained by a desire to retain the same section numbers as in the English *Law of Property Act 1925*. This is because the original Victorian legislation was closely based on the English Act. Keeping the same section numbers facilitates 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. The English legislation has also been amended in the meantime, so the extent to which it is replicated in Victoria has diminished.

2.7 An example of the difficulty that the current structure creates 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.[3]

2.8 In our Consultation Paper we asked what features should be included in the new Property Law Act in order to make it easier to read, navigate and understand. Most submissions that responded to this question favoured grouping the provisions together in a clear and appropriate manner by topic.

2.9 There is nevertheless caution about introducing new legislation that has little or no connection with the old. One submission put forward the view that there is much to be said for maintaining the same general framework as in the current Act, because practitioners are familiar with it.[4] Two other submissions requested provisions that would make it easier to trace the origin of sections in the new Act to those in the current Property Law Act.[5]

2.10 We agree that the provisions in the new Act should be easily traced to earlier legislation and case law. The Chief Parliamentary Counsel suggested that a table of correspondences be added as a note or appendix in the new Act. We prefer this solution because it enables the provisions in the new Act to be easily traced back as well as allowing leeway in determining how they are structured and numbered.

LANGUAGE

2.11 Many provisions in the current 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 are obscure or unsettled.

2.12 Some provisions have been reformed quite recently, such as Part IV which implements the recommendations in Chapter 4 of the Commission's report *Disputes between Co-owners*.[6] Other provisions can be traced back, virtually unchanged, nearly 200 years.[7]

2.13 The current Act was passed as part of the consolidation of statutory law in 1958 and many of the provisions are from the *Property Law Act 1928* (the 1928 Act). The 1928 Act borrowed extensively from the English *Law of Property Act 1925*. The English legislation, which has been described as 'a vindication of legislative intervention in what was previously a common law field',[8] was passed following a process of reform in England that spanned several decades.

2.14 Scant information exists about the incorporation of the provisions of the English legislation into the 1928 Act. The 1928 Act was 'virtually the single handed and private work'[9] of Sir Leo Cussen, who warned the Joint Statute Law Revision Committee of the Legislative Council and the Legislative Assembly that the changes were too technical for Parliamentary debate. The Act was not debated in detail during its passage through Parliament.[10]

2.15 In examining the provisions of the current Act, we found provisions that may never have been suited to Victorian practice, but may have been included out of caution.[11] As far back as 1921, Sir Leo Cussen described provisions that became Part III of the current Act as 'difficult of transcription'.[12]

2.16 Clearly, the arcane provisions of the Property Law Act should be either repealed if they are obsolete, or updated if they are to be retained.

RECOMMENDATIONS

2. Provisions of the current Act that are retained in the new Property Law Act should be arranged according to subject; renumbered consecutively; and revised to update and simplify the language, clarify meanings that are in doubt and remove references to obsolete practices.

3. A table of correspondences should be included as a schedule to the new Property Law Act. It should indicate which provisions of the current Act have been copied verbatim; which have been retained with the language updated; which have been subject to minor alterations; and which have been subject to alterations that change their effect.

1 Victorian Law Reform Commission, *Disputes between Co-owners: Final Report* (2002).

2 Victorian Law Reform Commission, *Review of the Property Law Act 1958 Consultation Paper* (2010) [2.7].

3 We recommend that this section be repealed. See Appendix C.

4 Mr Michael Macnamara, Submission 2, 1.

5 Law Institute of Victoria, Submission 13, 8; Associate Professor Maureen Tehan et al, Submission 9, 9–10.

6 Victorian Law Reform Commission (2002), above n 1.

7 For example, s 214 is a 42-line sentence that can be traced back to the *New South Wales (Debts) Act 1813*.

8 Jude Wallace, *Review of the Victorian Property Law Act 1958* (1984) 5.

9 Ibid 10.

10 Ibid.

11 For example, the provision in s 153 for enlargement of 300 years leases.

12 Gretchen Kewley, *Report on the Imperial Acts Application Act 1922* (Government Printer, Melbourne, 1975) 71 citing statement by Sir Leo Cussen, *Imperial Acts Application Act 1922*, 79.

Chapter 2 A New Property Law Act

TRANSITIONAL AND SAVINGS PROVISIONS

2.17 When reforming property law, it is important not to upset existing arrangements made in reliance on the current law. With limited exceptions, we recommend that new provisions apply only to transactions and other events that take place after the new Act commences.

2.18 In some cases, we recommend specific transitional arrangements for provisions that should be repealed or amended. 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 Act.

2.19 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 the new Act would be complemented by section 14 of the *Interpretation of Legislation Act 1984* which preserves rights and liabilities accrued under a repealed Act or provision.

2.20 Some provisions of the current Act carry forward old reform provisions from the 19th and 20th centuries that repeal older statutes. Where we have formed the view that one of these provisions has done its work and can now be repealed, its removal would not revive the older statute.[13]

2.21 We take a more cautious approach to provisions which abrogate or modify common law rules or presumptions of interpretation. The common law of property has evolved in the context of changing political, social and economic structures and conditions. A revival of old law could re-create practices that are out of step with contemporary expectations and values. For this reason, we recommend including savings provisions to ensure that common law rules are not revived.

RECOMMENDATION

4. Where a provision that abrogates or modifies a common law rule, presumption, or principle of interpretation is itself repealed, a savings provision should be included in order to prevent revival of the rule, presumption or principle.

APPLICATION OF THE ACT TO REGISTERED LAND

2.22 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
- provisions which apply to personal property as well as real property.

2.23 It is not always clear which type of provision a particular section is intended to be, and particularly whether it applies to registered land. Although some provisions expressly state that they do not apply to land registered under the *Transfer of Land Act 1958* (Transfer of Land Act), the Property Law Act gives no general guidance about how to determine whether other provisions do. Instead, it is necessary to rely on section 3 of the Transfer of Land Act.

2.24 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.*

2.25 This means that an assessment of inconsistency must be made for each provision in the Property Law Act, unless it is 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.

2.26 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 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.[14]

2.27 Some provisions do not apply to registered dealings because of inconsistency with the 'indefeasibility' provisions in sections 40–44 of the Transfer of Land Act, but may apply to unregistered dealings in registered land. For example, the express grant of an easement in registered land is subject to the requirement of a deed in section 52 if the easement is unregistered.[15]

2.28 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 other provisions that apply only to old system land.

2.29 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 should be relocated to a special part of the Act, leaving in the remaining body of the Act only those provisions which have at least some application to registered land, or to personal property, or both.

2.30 As for the provisions in the remainder of the Act, we consider it sufficient to rely on the inconsistency rule in section 3 of the Transfer of Land Act.

2.31 The alternative 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, section 199, which limits the doctrine of constructive notice and was assumed not to apply to registered land because of inconsistency with the 'notice' provision in section 43 of the Transfer of Land Act,[16] has recently been held to apply to unregistered dealings in registered land.[17]

2.32 In our Consultation Paper we proposed that the provisions that do not apply to ordinary folio land under the operation of the Transfer of Land Act should be set out in a schedule to the new Property Law Act. This proposal was unanimously supported in submissions, though Land Victoria pointed out that the provisions should not apply to land in provisional folios limited only as to dimensions either.[18] Accordingly, our recommendation refers to provisions that do not apply to registered land.[19] Following consultations with the Office of Parliamentary Counsel, we note that it would be consistent with modern drafting practices to include the provisions in a separate part of the Act, rather than as a schedule.

13 *Interpretation of Legislation Act 1984* (Vic) s 14(1).

14 Wallace (1984), above n 8, 14.

15 An unregistered easement binds subsequent registered owners of the servient land by force of s 42(2)(e) of the Transfer of Land Act, but only if it is validly created. A registered easement does not require a deed: s 72(2)–(2B); but a registered instrument is deemed to have the effect of a deed: s 40(2).

16 Stanley Robinson, *Property Law Act (Victoria)* (Law Book Co, 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 8, 288–289.

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

18 Land Victoria, Submission 18, 2; see also [1.14]–[1.19] in Chapter 1.

19 See our note on terminology in Chapter 1.

Chapter 2 A New Property Law Act

2.33 The provisions that we have identified as not applying to registered land are listed in Appendix B. It is not a complete list because some of the provisions on leases and mortgages, which we have not reviewed in the current reference, and provisions on trusts for sale, which require further review, may also fall within this category.

RECOMMENDATIONS

5. Provisions which apply solely to old system land should be set out in a separate part of the new Property Law Act.
6. The new Property Law Act should specify that all provisions, other than those which are expressed to apply solely to old system land, apply to land under the operation of the *Transfer of Land Act 1958*, but subject to that Act.

Chapter 3

Contracts and Covenants

CONTENTS

Chapter 3 Contracts and Covenants

CREATION AND ASSIGNMENT OF LEGAL AND EQUITABLE INTERESTS

3.1 The law prescribes certain requirements for the form, execution and witnessing of particular types of legal documents, such as wills, contracts for the sale of land, contracts of guarantee and dispositions of certain types of property. Generally, these formalities are intended to serve functions such as:[1]

- hindering fraud, and preventing and settling disputes, by evidencing the transaction and clarifying its terms
- providing evidence that the signatories had legal capacity and signed voluntarily
- educating parties as to the legal effects of the transaction so that they can make a fully informed decision and know their rights and duties
- generating a document that can be recorded so that it comes to the notice of third parties.

3.2 The provisions in the *Property Law Act 1958* (Property Law Act) which set out the formal requirements for the creation and assignments of interests in both real and personal property are sections 52–55, which deal with the requirements for creating and disposing of interests in land and personal property, and sections 134–135, which deal with the statutory formalities required for the assignment of things in action. We discuss ambiguities and inconsistencies in these provisions below and make recommendations for reform.

WRITING REQUIREMENTS

3.3 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 registered land. They reproduce, with amendments, earlier English legislation which traces back to the *Statute of Frauds 1677* (Imp) (Statute of Frauds) sections 1, 2, 3, 7, 8 and 9.[2]

3.4 Section 4 of the Statute of Frauds provided that a contract for the sale of an interest in land is enforceable only if evidenced in writing. 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(1) 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.

3.5 Section 126 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. The requirement of writing in section 126 of the Instruments Act is evidentiary, while the requirements of writing in sections 52 and 53 of the Property Law Act are substantive requirements for the disposition of interests.[3]

3.6 There is no reason for evidentiary and substantive requirements for disposition of interests in land to be in different statutes. The introduction of a new Property Law Act, as recommended in Chapter 2, provides the opportunity to consolidate the requirements into one Act. We recommend that section 126 (insofar as it applies to contracts for sale of land) be contained in the new Act.

RECOMMENDATION

7. A provision setting out the evidentiary requirements for the sale or disposition of an interest in land should be inserted into the new Property Law Act. The provision should be in the same terms as section 126 of the *Instruments Act 1958,* except that the words in subsection (1) relating to guarantees for debts should be omitted. Section 126(1) of the *Instruments Act 1958* should be amended to apply to guarantees only.

SECTION 52—DEED FOR CONVEYANCES

3.7 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'.[4] 'Conveyance' is defined in section 18 to include mortgages, leases and every other assurance of land by any instrument except a will.

3.8 Section 52(2) sets out a list of exceptions to the rule. Section 52(2)(d) provides that 'leases or tenancies or other assurances' that are not required by law to be made in writing are not required to be made by deed. Nevertheless, if a leasehold estate is assigned, the assignment must be made by deed, even if the lease falls within the exception in section 52(2)(d).[5]

3.9 In our Consultation Paper we asked whether there should no longer be a requirement for the assignment of a lease to be by deed, if the lease itself is not required to be in writing.

3.10 The submissions that addressed this question did not support the idea.[6] It was argued that, where a third party becomes involved in the lease arrangement, as on assignment, the transaction becomes more complex and the writing requirement is appropriate.[7]

3.11 We conclude that the current legislation better protects the interests of all parties and do not recommend amending section 52(2) to exempt assignments of leases.

SECTION 53—OTHER DISPOSITIONS

3.12 Section 53 deals with dispositions requiring writing but not necessarily in the form of a deed. The term 'disposition' is broadly defined in the Property Law Act and includes a devise, a bequest and a 'conveyance'.[8]

3.13 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,[9] including the following:

- It is unclear whether section 53(1)(a) applies to the creation of legal as well as equitable interests in land.[10] If it applies to legal interests, it is difficult to reconcile with section 52(1), which provides that a conveyance of a legal estate in land must be by deed (not just in writing). If it applies to equitable interests, it overlaps with section 53(1)(b) and (c) and is partly inconsistent with those provisions.[11]
- 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).[12]
- An *inter vivos* trust in personal property can be declared orally, without any writing at all,[13] but section 53(1)(c) requires that a disposition of such a trust must be in writing and signed.[14]

1 P Critchley 'Taking Formalities Seriously' in S Bright and J Dewar (eds) *Land Law Themes and Perspectives* (Oxford University Press, 1998) 507, 513–15.

2 Similar provisions are found in other jurisdictions: *Conveyancing Act 1919* (NSW) ss 23B–E; *Property Law Act 1969* (WA) ss 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.

3 C Harpum et al, *Megarry and Wade The Law of Real Property* (Sweet and Maxwell, 7th ed, 2008) [11–046].

4 The provision applies to dealings in registered land but is subject to section 40(2) of the *Transfer of Land Act 1958* (Vic), which provides that an instrument registered under that Act has the effect of a deed.

5 Jude Wallace, *Review of the Victorian Property Law Act 1958* (1984) 98. To overcome this apparent anomaly, Wallace recommended that the words 'or assignment of a leasehold estate' be inserted after 'leases or tenancies' in s 52(2)(d). An identical amendment has since been made in Ireland in 2009: *Land and Conveyancing Law Reform Act 2009* (Ir) s 66.

6 Mr Michael Macnamara, Submission 2, 4; Law Institute of Victoria, Submission 13, 12.

7 Mr Michael Macnamara, Submission 2, 4.

8 *Property Law Act 1958* (Vic) s 18(1).

9 See the list of questions in B J Edgeworth et al, *Sackville and Neave Australian Property Law* (LexisNexis Butterworths 8th ed, 2008) [4.83].

10 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.

11 As Menzies J pointed out in *Adamson v Hayes* (1973) 130 CLR 276, 292.

12 Section 53(1)(b) provides that 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'. 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: *Rochefoucauld v Boustead* [1897] 1 Ch 196, 206.

13 *Grey v Inland Revenue Commissioners* [1958] Ch 690, 708.

14 *Grey v Inland Revenue Commissioners* [1958] Ch 690, 708; *Oughtred v Inland Revenue Commissioners* [1960] AC 206; and see definition of 'disposition' in *Property Law Act 1958* (Vic) s 18(1).

- There are inconsistent references throughout section 53 to the authority of the agent of the person creating or disposing of the interest to sign the writing required. In section 53(1)(b), there is no reference to an agent and the 'person who is able to declare such trust' has been held to mean the owner of the beneficial interest, not that person's agent.[15]

PROPOSED NEW REQUIREMENT FOR DECLARATION OF TRUST

3.14 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.[16] In effect, a lower standard of formality applies to the declaration of a trust in land than to the disposition of a subsisting trust, or indeed to any other disposition to which section 53 applies.

3.15 The unilateral nature of a declaration of trust, coupled with the low level of formality required, creates a risk of fraudulent claims.[17] The risk is present in areas such as family property disputes, bankruptcy proceedings and the administration of pension assets tests where it may be asserted that property vested in 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.[18]

3.16 We suggested in our Consultation Paper 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), and put forward two options for reform.[19]

3.17 The first option was to require the declaration of trust to be by deed, signed by the person disposing of the land. A deed, particularly if required to be witnessed,[20] would provide better evidence as to the terms, subject matter and date of the trust declaration.

3.18 None of the submissions supported this option. One submission reasoned that the requirement for the 'additional formality' of a deed would create an injustice, as would denying the deed's effectiveness due to a lack of a witness.[21] The Law Institute of Victoria submitted that a person declaring a trust in land should have the choice of being able to do so either by deed or in writing signed by the person disposing of the land, but if a deed was required there should be no witnessing requirement.[22]

3.19 The second option was to require a declaration of trust to be in writing and signed by the person disposing of the land. It 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.

3.20 This option received general support and we recommend that it be adopted. Associate Professor Tehan and colleagues submitted that 'there appears to be little justification … for treating the *inter vivos* declaration of trust of land any less restrictively than the disposition of subsisting equitable interests'.[23] In their view 'trustees must … be certain of their obligations, and the formal writing requirements facilitate this policy imperative'.[24]

EFFECT OF E-CONVEYANCING

3.21 Land Victoria raised a general query about the effect of a signed but unregistered electronic transfer during the period between signing and registration.[25] Under electronic conveyancing, electronic instruments are digitally signed by authorised agents on behalf of the parties some time before online settlement and registration takes place.

3.22 Under paper-based conveyancing, the transferee receives the executed instrument of transfer and certificate of title at settlement, but the instrument has no legal effect until registered.[26]

3.23 The position of the parties in an electronic conveyancing would be similar. Until registration, the purchaser would have only the equitable interest (if any) that he or she acquired at the time of entering into a specifically enforceable contract.[27] On registration of the transfer, the purchaser would attain a registered fee simple estate. Since an executed transfer passes no interest prior to registration, it makes no difference that an electronic instrument of transfer is signed by authorised agents instead of by the parties themselves.

3.24 In sum, our recommended reform will have no substantive effect upon the nature or timing of the property rights of transferees in registered land.

STAMP DUTY

3.25 Because declarations of trust are dutiable under section 7(1)(b)(i) of the *Duties Act 2000* (Duties Act), we have examined the implications of our recommended reform for the collection of stamp duty. The Duties Act makes no reference to the form of the declaration. It follows that changing the formalities for a trust of land will not affect liability for duty. The State Revenue Office (SRO) expressed the view in consultations with us that the introduction of written formalities would assist in promoting compliance with the Duties Act.

PERSONAL PROPERTY

3.26 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 a disposition of an equitable interest in personal property to be in writing and signed, even if the interest originally arose under a resulting or constructive trust.[28]

3.27 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'.[29] We consider that it is unnecessary to have to satisfy even this level of formality for the disposition of personal property.

3.28 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.[30]

3.29 Personal property is a highly diverse category. 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) (Copyright Act) which provides that assignment of copyright is only effective if in writing 'signed by or on behalf of the assignor'.[31]

15 See H A J Ford and A J Lee *Principles of the Law of Trusts* (Lawbook Co, 2nd ed, 1990) [607] citing *Tierney v Wood* (1854) 32 ER 377 and *Grey v Inland Revenue Commissioners* [1958] Ch 690, 709. It was held in *Tierney v Wood* that under section 7 of the Statute of Frauds (now section 53(1)(b)) that 'the declaration of trust … must be signed by the beneficial owner, and not by the trustee who has the legal estate'.

16 *Rochefoucauld v Boustead* [1897] 1 Ch 196, 206; *Grey v Inland Revenue Commissioners* [1958] Ch 690, 709.

17 The case of *Owens v Lofthouse* [2007] FCA 1968 highlights some of the issues raised. For a more detailed discussion of *Owens v Lofthouse* see Victorian Law Reform Commission, *Review of the Property Law Act 1958 Consultation Paper* (2010) [8.15].

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

19 Victorian Law Reform Commission (2010), above n 17, [8.16].

20 As currently required in other jurisdictions: *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).

21 Mr Michael Macnamara, Submission 2, 5.

22 Law Institute of Victoria, Submission 13, 12.

23 Associate Professor Maureen Tehan et al, Submission 9, 20.

24 Associate Professor Maureen Tehan et al, Submission 9, 19.

25 Land Victoria, Submission 18, 2.

26 *Transfer of Land Act 1958* (Vic) s 40(1). On registration the transfer is deemed by s 40(2) to have the effect of a deed.

27 The equitable interest is commensurate with the availability of specific performance: *Tanwar Enterprises v Cauchi* (2003) 201 ALR 359, 371; *Stern v McArthur* (1988) 81 ALR 463, 496. See also Adrian Bradbrook et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) [7.130] and Jeremy Giles *New limitations on equitable intervention against vendors* (2005) 79 ALJ 122, 123–124.

28 *Oughtred v Inland Revenue Commissioners* [1960] AC 206; Harpum et al (2008), above n 3, [11–048]. A trust of personal property is enforceable even if it is not evidenced in writing but once the trust is created, 'a disposition of any interest under it is void unless it is in writing': Harpum et al (2008), above n 3, [11–048].

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

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

31 *Copyright Act 1968* (Cth) s 196. See also: *Patents Act 1990* (Cth) s 13; *Trade Marks Act 1995* (Cth) Part 10.

Chapter 3 Contracts and Covenants

3.30 In our Consultation Paper we proposed that no general formalities be prescribed for legal or equitable dispositions of personal property, except as provided by section 134 of the Property Law Act or by other legislation.[32] The writing requirements in section 53(1)(c) for the disposition of an equitable interest in personal property would be abolished.

3.31 Our proposal received general support from the submissions which addressed it,[33] and we recommend that it be adopted. Associate Professor Tehan and colleagues commented that 'the new Act should provide that nothing in the Act imposes any writing requirement on the creation or transfer of interests in personal property or an *inter vivos* declaration of trust in respect of personal property'.[34] While supporting our proposal, this statement does not take account of section 134 which requires statutory formalities for the assignments of things in action.

3.32 Mr Macnamara did not support the proposal. He said that when a third party becomes involved in a disposition of personal property, the transaction becomes more complex and the writing requirement is appropriate.[35] We agree that a disposition in writing may be preferable in many circumstances but we do not consider it necessary in all cases.

PERSONAL PROPERTY SECURITIES ACT 2009 (CTH) (PPSA)

3.33 The PPSA establishes a single national law governing security interests in personal property. As our proposal affects dispositions of personal property, we have reviewed its consistency with the PPSA. We have consulted with relevant officers in Victorian government agencies[36] who have guided and informed our understanding of the law in this area.

3.34 The Law Institute of Victoria supported our proposal, subject to its consistency with the PPSA. It submitted that the creation of a legal or equitable interest in personal property should be consistent with the requirement for registering a security interest in personal property on the PPSA register.[37]

3.35 We do not consider that the formalities required by the Property Law Act need to be consistent with those required by the PPSA. Although the enforceability of security interests against third parties under the PPSA depends upon the existence of a written security agreement,[38] this requirement is imposed by the PPSA and applies regardless of the formal requirements under the Property Law Act. Section 253 of the PPSA states that the Act prevails over other laws in relation to certain requirements concerning the registration and form of security interests, their assignment, attachment and perfection. Section 263(3) further provides that a failure to comply with a formal requirement under a law of a State does not affect the validity, enforceability, or priority, or limit the effect of the security agreement, security interest or the assignment.

3.36 With regard specifically to the implications of our proposed repeal of section 53(1)(c), there is little overlap with the PPSA. Section 53(1)(c) does not specify formalities for the *creation* of interests in personal property. It only applies to the *disposition of existing equitable interests* in personal property. Furthermore, removing the writing requirement under section 53(1)(c) will not prevent registration of the interest under the PPSA because the PPSA does not require a 'security agreement' to be made in writing.[39] Section 53(1)(c) applies to all types of personal property. It is unnecessary to retain the requirement of writing for the benefit of an insignificant overlap within a broad and diverse class of personal property rights.

3.37 Our proposal is that only section 53 will be silent on the issue of formalities required for dispositions of interests in personal property. Provisions contained in section 134 of the Property Law Act and in other legislation such as section 196 of the Copyright Act would still regulate any required formalities.

STAMP DUTY

3.38 The SRO has raised the possibility that our proposal to abolish the writing requirement for the disposition of an equitable interest in personal property in section 53(1)(c) may affect the operation of section 37 of the Duties Act. Section 37 of the Duties Act imposes duty on an instrument which declares a trust over 'non-dutiable' or 'unidentified property'.[40] An example of such an instrument is a family trust deed where the trust does not specifically identify particular property held on trust.

3.39 In the experience of the SRO, most people creating legal or equitable interests in personal property do use writing to prevent uncertainty and future disagreements. The SRO observed that although a small number of transactions will be affected, the proposed reform may reduce the number of instruments used for trusts of non-dutiable and unidentified property.

3.40 We think that any impact of the reform on the operation of section 37 would be negligible. It has always been possible to declare a trust of personal property orally.[41] No writing is required for this purpose.[42] It is only for the disposition of an existing equitable interest or trust of personal property that writing is required under section 53(1)(c).[43] It is difficult to think of any practical situation where the requirement would apply.

3.41 Formalities for dealing with personal property such as debts, shares and intellectual property are already prescribed in section 134 of the Property Law Act and in other legislation.[44] Where the formalities required by these statutes are not complied with, the rules of equity would apply. Such cases are not likely to be governed by section 53(1)(c).

3.42 We are of the view that section 53(1)(c) is redundant and should not be retained.

AGENCY

3.43 The ability of a person's lawfully authorised agent to sign the writing required under section 53 is not consistent throughout the section. Section 53(1)(b) refers to writing signed only by the 'person who is able to declare such trust' whereas sections 53(1)(a) and (c) specifically allow for agents to sign.

3.44 This inconsistency adds to the complexity of the section. There is no reason for drawing distinctions as to the mode of authority of agents. Further, the reference to the concept of appointing an agent by will is inconsistent in provisions dealing with *inter vivos* trusts.

3.45 As part of our proposed new scheme for section 53, we proposed in our Consultation Paper that the references to the authorisation of an agent should be consistent in sections 53(1)(a) and (b). We also proposed that a new subsection be added which would provide that, for the purpose of the section, the agent must be lawfully authorised by writing or by operation of law.

3.46 Associate Professor Tehan and colleagues responded that 'the capacity of "agents" to complete formalities should be treated uniformly in respect of declarations of trust and dispositions of subsisting trusts'.[45] They submitted that section 53(1)(b) should be amended to 'expressly permit the completion of formalities in respect of *inter vivos* declarations of trusts of land "by or on behalf of" the "person who is able to declare such a trust"'. This result is achieved by our recommendation to make the references to agent consistent and insert a new subsection regulating the authority of agents.

32 Victorian Law Reform Commission (2010), above n 17, [8.21], [8.23].

33 Associate Professor Maureen Tehan et al, Submission 9, 18; Law Institute of Victoria, Submission 13, 12.

34 Associate Professor Maureen Tehan et al, Submission 9, 18; Law Institute of Victoria, Submission 13, 18.

35 Mr Michael Macnamara, Submission 2, 4. This is the same reasoning given in respect of our proposal that no deed should be required on assignment of a lease where the original lease is not in writing, see [3.10] above.

36 Department of Justice, Civil Law Policy Unit; State Revenue Office, Policy and Legislation Branch.

37 Law Institute of Victoria, Submission 13.

38 *Personal Property Securities Act 2009* (Cth) s 20.

39 *Personal Property Securities Act 2009* (Cth). Under s 10 a 'security agreement' is: (a) an agreement or act by which a security interest is created, arises or is provided for; or (b) writing evidencing such an agreement or act.

40 A transaction involving the disposition of equitable interests in purely personal property is treated differently to a transaction where it is part of a disposition of real property, and is not subject to sections 7 and 9 of the *Duties Act 2000* (Vic).

41 *Grey v Inland Revenue Commissioners* [1958] Ch 690, 708.

42 E Wolstenholme, *Wolstenholme and Cherry's Conveyancing Statutes* (Oyez, 13th ed, 1972) 131.

43 This would include the declaration of a trust over an existing equitable interest: Ibid.

44 *Property Law Act 1958* (Vic) s 134: 'things in action' are not defined in the Property Law Act, however, a thing in action is very broadly defined in Butterworths Australian legal dictionary as: 'an intangible personal property right which is incapable of physical possession and can only be claimed or enforced by a legal or equitable action—debts, money held at a bank, shares, negotiable instruments, rights under a trust, legacies, policies of insurance, bills of lading, copyright, the right to sue for the performance of contractual promises, and a cause of action in tort'. *Butterworths Encyclopaedic Australian Legal Dictionary* [online version], (LexisNexis Australia 9 September 2004). *Copyright Act 1996* (Cth) s 196; *Patents Act 1990* (Cth) s 13; *Trade Marks Act 1995* (Cth) Part 10.

45 Associate Professor Maureen Tehan et al, Submission 9, 21.

Chapter 3 Contracts and Covenants

RECOMMENDATION

8. In order to eliminate ambiguities, overlaps and inconsistencies, section 53 should be amended as follows:
   - (a) Section 53(1)(a) should be amended to provide that no legal or equitable interest in land can be created or disposed of except by writing by the person creating or disposing of the interest or by the person's agent.
   - (b) Section 53(1)(b) should be amended to provide that a declaration of trust respecting any land or a trust consisting partly of land and partly of personal property must be in writing and signed by the person disposing of the land or by the person's agent.
   - (c) Section 53(1)(c) should be repealed, so that no written formalities are required for personal property except as required by section 134 and other legislation.
   - (d) A new subsection should be inserted into section 53 providing that, for the purposes of section 53, an agent of a person creating or disposing of an interest in land must be lawfully authorised in writing or by operation of law.
   - (e) The above provisions should remain subject to the current exceptions in sections 52(2), 54(2) and 55.
   - (f) The above amendments should apply only to conveyances and dispositions created after the commencement of the new provisions.

ASSIGNMENT OF THINGS IN ACTION

3.47 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'.[46] Examples include a debt, shares or intellectual property rights. Section 134 of the Property Law Act sets out the statutory mechanism for the assignment of a thing in action.[47] Similar statutory provisions exist in other Australian jurisdictions[48] and are almost identical to the Victorian legislation.

3.48 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.

3.49 Queensland passed legislation in 1974 to codify the equitable principles concerning the efficacy in equity of voluntary assignments of both land and things in action.[49] In her 1984 report, Wallace suggested introducing a statutory provision in the Victorian legislation similar to the Queensland provision.[50]

3.50 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.[51]

3.51 Since then, the previous conflict in this area has been resolved and we consider that there is no need to introduce a similar or extended statutory provision in Victoria. Furthermore, as no other Australian jurisdiction has put these principles on a statutory footing, to do so would inhibit harmonisation of the law in this area.[52]

3.52 In our Consultation Paper we asked whether the principles which apply to an assignment in equity should be put on a statutory footing by amending section 134 to include provision for voluntary assignments taking effect only in equity. The submissions addressing the issue agreed with us that section 134 should be retained in its current form and that no provisions relating to the completion of a voluntary assignment in equity are needed.[53]

INTERACTION WITH THE *PERSONAL PROPERTY SECURITIES ACT 2009* (CTH) (PPSA)

3.53 In our research on the interaction of the Property Law Act with the PPSA, we also determined that there are two ways in which section 134 could apply to PPSA security interests. First, PPSA security interests are themselves 'things in action', so section 134 would apply to any assignment of a PPSA security interest. Secondly, a thing in action which is being assigned may be the subject of a PPSA security interest.

3.54 Although there appears to be no inconsistency in the application of the two statutes, it should be noted that section 134 is subject to requirements of the PPSA.

IMPLIED COVENANTS

IMPLIED COVENANTS IN THE PROPERTY LAW ACT

3.55 By operation of section 76 of the Property Law Act, the covenants for title as set out in Parts I–VI of Schedule 4 are implied in a conveyance. Section 77 implies a set of 'mutual indemnity covenants',[54] as specified in Parts VII–X of Schedule 4 , in conveyances subject to rents.

3.56 The scope of the definitions of 'conveyance' and 'property' in section 18 of the Property Law Act means that the implied covenants apply to dealings in personal property as well as land.[55]

3.57 The general purpose of the implied covenants in section 76 and Part I–VI of Schedule 4 is to provide a 'chain of protection'[56] for the purchaser in a conveyance of old system land where defects in title may not be known. The covenants are known as 'implied covenants for title' and were originally put on a statutory footing to shorten the conveyances.[57] Different covenants for title are implied depending on 'the circumstances of the disposition and the capacity in which the person disposing of the property is transferring it'.[58]

3.58 In a conveyance for valuable consideration, where the vendor is expressed as selling 'as beneficial owner', the effect of the use of this phrase is to imply the following covenants:

- The vendor has the power to convey the subject matter of the conveyance.
- The purchaser will have quiet enjoyment of the property.
- The title is free from encumbrances not expressed in the conveyance.
- The vendor will execute further assurances as may be necessary to prove title.

3.59 Depending on the form of the conveyance, additional covenants are implied. For example:

- On the assignment of a lease that the lease is valid and effectual and the rent reserved has been paid in full.
- If the conveyance is in the form of a mortgage, that on default, the mortgagee shall take possession and have quiet enjoyment and any further assurances must be paid for by the mortgagor.[59]

46 *Butterworth's Encyclopaedic Australian Legal Dictionary*, above n 44, citing *National Trustees Executors and Agency Co of Australasia Ltd v FCT* (1954) 91 CLR 540. A thing in action was referred to as a 'chose in action' in earlier times.

47 Historically, it was not possible to assign legal things in action until the English Judicature Act 1873: *Judicature Act 1873* (Eng) s 25; J Starke, *Assignments of Choses in Action in Australia* (Butterworths, 1972) Chapter 4. Section 134 is based on this provision.

48 *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.

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

50 Wallace (1984), above n 5, 217, 218.

51 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.

52 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.

53 Mr Michael Macnamara, Submission 2, 5; Law Institute of Victoria Submission 13, 13.

54 Law Commission [England and Wales], *Transfer of Land: Implied Covenants for Title* Working Paper No. 107 (1988) 13.

55 Law Commission [England and Wales], *Transfer of Land: Implied Covenants for Title* Law Com No 199 (1991) 3.

56 Ibid 9.

57 Stanley Robinson, *Property Law Act (Victoria)* (Lawbook Co, 1992) 161.

58 Law Commission [England and Wales] (1991), above n 55, 3.

59 *Property Law Act 1958* (Vic) Schedule 4 Part II and III; Law Commission [England and Wales] (1988), above n 54, 13.

Chapter 3 Contracts and Covenants

3.60 Although amendments to the *Transfer of Land Act 1958* (Transfer of Land Act) in 1998 had the effect of closing the old system land deeds registry to new registrations,[60] it is still possible to pass both legal and equitable title to land by using deeds of conveyance.[61] As long as this is the case, the implied covenants in the Property Law Act are still required.

IMPLIED COVENANTS IN THE TRANSFER OF LAND ACT

3.61 The Transfer of Land Act does not provide for implied covenants for title because title to registered interests is conferred by operation of statute and not by the instrument of transfer itself.[62]

3.62 Sections 46(2), 67, 71(4) and 75 of the Transfer of Land Act imply covenants into transfers subject to a mortgage or annuity, instruments of leases, transfers of registered leases, sub-leases and mortgages.[63] These covenants do not relate to title but to the ongoing obligations of the parties. They apply to registered dealings in registered land.

APPLICATION OF IMPLIED COVENANTS FOR TITLE TO UNREGISTERED DEALINGS IN REGISTERED LAND

3.63 Wallace, in her 1984 review of the Property Law Act, commented that the 'application of section 76 and section 77 to registered land requires clarification; the sections should be confined to unregistered land.'[64]

3.64 The Australian commentators who discuss the implied covenants in the Property Law Act do so in the context of old system conveyancing only.[65] Robinson only comments that 'at present no covenants for title are included in transfers of land … this could be acceptable if the compensation provisions of the *Transfer of Land Act 1958* were adequate'.[66]

3.65 There may be cases where conveyances are used even in relation to registered land, such as an assignment of possessory rights acquired by a person in adverse possession. The covenants for title implied by section 76 of the Property Law Act would apply to such a conveyance. The application of section 76 to unregistered conveyances in registered land should be preserved.

REVIEW AND AMENDMENT

3.66 We see a need for review of the consistency in the content of covenants implied in instruments relating to transactions in old system land, and in both registered and unregistered dealings in registered land. This review could be undertaken as part of a review of the Transfer of Land Act.[67]

3.67 In the meantime, due to their continued application to old system land, and their possible application to unregistered dealings in registered land, the implied covenants in the Property Law Act should be retained, subject to the minor amendments set out below.

AMENDMENTS TO SECTION 76

3.68 Section 76 states that covenants for title are implied by a person 'who conveys *and* is expressed to convey as beneficial owner'. The effect of these words has been the subject of debate.[68] Early case law and commentators took the view that, if the words mean that the covenants were implied only when a vendor was actually the beneficial owner of the title, the covenants would have little use.[69] It was considered that the purpose of the covenants is to protect purchasers in situations where 'the vendor's title is not as represented, for example where the vendor is not a beneficial owner but a trustee'.[70] Later decisions took a literal interpretation of the statute, leading to uncertainty as to its meaning.[71]

3.69 The view supported by academic commentators and other jurisdictions is that the original intention of these covenants was that a person should only be required to be 'expressed to convey' in a certain capacity (for example, as beneficial owner), regardless of whether they actually have this capacity.[72] Our recommendation below is for an amendment to express this intention more clearly.

3.70 Section 76(3) is obsolete because it is no longer necessary for a husband to confirm a conveyance by his wife.[73] It should be repealed.

3.71 Sections 76(1)(f) and (4) still refer to conveyances made by 'committee of a lunatic'. Jurisdiction to appoint an administrator of a person incapable of managing his or her affairs because of mental illness now rests with VCAT under the *Guardianship and Administration Act 1986*.[74] The reference to 'committee of a lunatic' should be deleted and the provision amended to apply to a conveyance made by an administrator appointed under section 46 of the *Guardianship and Administration Act 1986* or an enduring attorney appointed under Division 2 of Part XIA of the *Instruments Act 1958*.

AMENDMENTS TO SECTION 77 AND SCHEDULE 4

3.72 In our Consultation Paper we suggested that section 77(1)(a), (b) and the associated covenants in Part VII and VIII of Schedule 4 can be repealed if rentcharges are abolished.

3.73 However, our recommendation that rentcharges should no longer be able to be created does not affect rentcharges already in existence. So long as it remains possible to convey old system land subject to a rentcharge,[75] the relevant covenants to be implied into the conveyance should be retained. Section 46(2) of the Transfer of Land Act contains similar implied obligations in respect of land subject to annuities.

3.74 For the reasons outlined above, the references to 'committee of a lunatic' in section 77(4) and 'committee of the estate of a lunatic' in Part VI of Schedule 4 should be deleted and replaced with references to an administrator or an enduring attorney.

RECOMMENDATION

9. Sections 76, 77 and Schedule 4 should be retained and amended as follows:
   (a) The phrase 'who conveys and is expressed to convey' in section 76 and Parts I–VI of Schedule 4 should be omitted and the phrase 'who is expressed to convey' should be substituted.
   (b) Subsection 76(3) is obsolete and should be repealed.
   (c) The references to 'committee of a lunatic', in sections 76(1)(f), 76(4) and 77(4), and 'Committee of the Estate of a Lunatic', in Part VI of Schedule 4, should be deleted and replaced with references to an administrator appointed under section 46 of the *Guardianship and Administration Act 1986* or an enduring attorney appointed under Division 2 of Part XIA of the *Instruments Act 1958*.

60 *Transfer of Land (Single Register) Act 1998* (Vic): see discussion at [2.18]–[2.21] Victorian Law Reform Commission (2010), above n 17.

61 A deed of conveyance can be lodged with the Registrar as a 'specified dealing' under section 22 of the *Transfer of Land Act 1958* (Vic).

62 *Transfer of Land Act 1958* (Vic) ss 40, 42(1).

63 *Transfer of Land Act 1958* (Vic) ss 67(1)(a), 77(1)(a).

64 Wallace (1984), above n 5, 145.

65 Peter Butt, *Land Law* (Lawbook Co 6th ed, 2009) [19.12]–[19.22]; Samantha Hepburn, *Principles of Property Law*, Cavendish Principles Series (Cavendish Publishing, 1998) 156; Halsbury's Laws of Australia, online version current to 25 September 2008.

66 Robinson (1992), above n 57, 161.

67 See Chapter 8.

68 See discussion regarding this debate in Law Commission [England and Wales] (1991), above n 55, 6–7.

69 Megarry and Wade *The Law of Real Property* (Stevens, 3rd ed, 1966) 610.

70 Law Commission [England and Wales] (1988), above n 54, 28 citing Megarry and Wade *The Law of Real Property* (Stevens, 5th ed, 1984) 160.

71 See discussion in Robinson (1992), above n 57, 163; Law Commission [England and Wales] (1991), above n 55, 6–7; Law Commission [England and Wales] (1988), above n 54, 28–29.

72 See Robinson (1992), above n 57, 163; *Conveyancing Act 1919* (NSW) s 78; *Land and Conveyancing Law Reform Act 2009* (Ir), Explanatory Memorandum, 34; Wallace (1984), above n 5,145.

73 Wallace (1984), above n 5, 145; Law Commission [England and Wales] (1991), above n 55, 6.

74 See Chapter 7: [7.33–7.37].

75 The *Transfer of Land (Single Register) Act 1998* (Vic) did not forbid conveyance of old system land by deed, although it removed the means of registering the deed. It remains possible to convey a legal title by deed.

Chapter 3 Contracts and Covenants

THIRD PARTY BENEFICIARIES

3.75 Section 56(1) of the Property Law Act replicates section 56(1) of the English *Law of Property Act 1925*:

> *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.*

3.76 There has been a great deal of confusion about what the subsection means.

3.77 Lord Denning MR interpreted section 56(1) as abrogating the doctrine of privity of contract, according to which only a party to a contract may enforce an obligation made under that contract.[76] On this view, section 56(1) enables a conveyance or other instrument granting someone an interest in property to be enforced by someone who was not a party to that instrument.

3.78 This interpretation was ultimately rejected by the House of Lords in *Beswick v Beswick*[77] and by Australian courts.[78] The House of Lords reasoned that the English *Law of Property Act 1925* consolidated earlier legislation and was not intended to make substantive changes to the law. Section 56(1) should be construed consistently with its predecessor provision, section 5 of the English *Real Property Act 1845*, which was enacted solely to reverse a narrow technical rule of common law. The rule was that an immediate interest in land could not be granted by a deed made *inter partes*[79] unless the grantee was named as a party to the deed. Only a person expressly named as a party to a deed made inter partes could sue on that deed. This rule is distinct from the doctrine of privity.

3.79 It is now settled that section 56(1) does not modify the common law privity rule. It enables a covenant under an instrument made *inter partes* to be enforced by a person who is not named in the instrument but is a person to whom that instrument formally purports to grant something. It does not allow enforcement of a covenant by *any* person who may benefit from it.[80]

3.80 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.[81] However, the person must have existed and be identifiable at the date the covenant was made.[82] 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 a future owner.

REFORM OF THE LAW OF PRIVITY

3.81 We suggested in the Consultation Paper that section 56(1) could be amended, along the lines of Queensland and Northern Territory legislation, to allow a third party beneficiary who was not identified or in existence when the relevant instrument was made to enforce a covenant. This would have modified the doctrine of privity to some extent.

3.82 The submissions we received in response expressed mixed but generally cautious views about this idea. The Law Institute of Victoria agreed with the proposal, but pointed out that the provision should also specify how third party rights are to be exercised and in which circumstances.[83] Another submission from legal practitioners strongly opposed any modification of the doctrine. They pointed out that privity gives a degree of economic and legal certainty and that restricting it would lead to increased litigation and greater uncertainty.[84]

3.83 We are persuaded that it is unwise to expand the scope of section 56(1) independently of a more comprehensive review of the benefits and shortcomings of the law of privity and the need for reform.

3.84 The doctrine of privity has long been criticised and has been reformed in England, New Zealand and, to a lesser extent, Western Australia, Queensland and the Northern Territory. The scope, form and implications of any changes to the doctrine in Victoria need separate review, taking into account laws and implications beyond the boundaries of the Property Law Act and the reach of our current terms of reference. We suggest in Chapter 8 that the government consider reviewing this topic in a broader context.

'OTHER PROPERTY'

3.85 Even though section 56(1) refers to interests in land 'or other property', it has been construed to mean only interests in real property.[85] Again, this interpretation was influenced by the operation of section 5 of the English *Real Property Act 1845*.

3.86 We suggested in the Consultation Paper that the reference in section 56(1) to 'other property' be removed, to clarify that it applies only to interests in real property.[86] This would align the wording with the judicial interpretation of the provision.

3.87 One submission did not support the idea, proposing instead that section 56(1) should be amended to reform the law of privity, along the lines recommended by the Law Revision Committee of England in 1937.[87] We have indicated above that such a general reform of the doctrine of privity should be examined as part of a separate review.

3.88 The other submissions on this question supported the idea of amending section 56(1) to clarify that it applies only to interests in real property.[88]

RECOMMENDATION

10. Section 56(1) should be amended to confirm its meaning as interpreted by the courts, namely that:
    (a) It does not apply to an interest in personal property.
    (b) It 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 the conveyance or other instrument purports to grant something, provided that the person was in existence and identifiable at the time the covenant was made.

RETURN OF DEPOSITS

3.89 Section 49(2) of the Property Law Act concerns contracts for the sale of land.[89] It confers a statutory discretion on the court to 'provide for relief against forfeiture of deposit'[90] in any action for the return of a deposit.[91]

3.90 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.[92] Under section 49(2), the court can provide relief to a purchaser in these situations or in any action for the return of a deposit.

76 *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.

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

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

79 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.

80 *Beswick v Beswick* [1968] AC 58, 76 (Lord Reid); *Bird v Trustees Executors & Agency Co Ltd* [1957] VLR 619; *Doyle v Philips* [1997] NSW ConvR 56 427; *Re Estate of Bristow* [2005] NSWSC 1252.

81 Kevin Gray and Susan Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2008) 244.

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

83 Law Institute of Victoria, Submission 13, 14.

84 Mr James Hope and Dr Paul Vout, Submission 6, 4.

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

86 Victorian Law Reform Commission (2010), above n 17, [10.29].

87 Mr Michael Macnamara, Submission 2.

88 Mr James Hope and Dr Paul Vout, Submission 6; Associate Professor Maureen Tehan et al, Submission 9; Law Institute of Victoria, Submission 13.

89 Section 49(1) sets out the mechanism known as the 'vendor and purchaser summons'. The use of this section is uncontentious. See discussion in Victorian Law Reform Commission (2010), above n 17, [9.3]–[9.4].

90 Don MacCallum, 'Common Misconceptions about Forfeiture of Deposits' (1994) 68 (10) *Law Institute Journal* 960.

91 The provision is equivalent to s 55(2A) of New South Wales legislation: *Conveyancing Act 1919* (NSW). See also s 49(2) *Law of Property Act 1925* (Eng) and the broader application of s 54 of the *Land and Conveyancing Law Reform Act 2009* (Ir).

92 *Re Scott and Alvarez's Contract* [1895] 2 Ch 603. See discussion in Wikramanayake, *Voumard: The Sale of Land in Victoria* (Lawbook Co 1986), 294–295 and Peter Butt, *The Standard Contract for Sale of Land in New South Wales* (LBC Information Services, 2nd ed, 1998) [9.115]–[9.118].

3.91 The authorities diverge on the question of whether the discretion can be exercised in favour of a purchaser who was in default under the contract.

3.92 Some early decisions in England and Victoria held that the provision would not assist a defaulting purchaser.[93] It was said that the subsection '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'.[94]

3.93 The weight of authority in Victoria and New South Wales now supports a more liberal interpretation. In *Zsadony v Pizer,* Dean J said that 'the sub-section is quite general in terms and should not be given a restricted operation'.[95] This judgment was followed in several subsequent decisions, all of which viewed the subsection as assisting a defaulting purchaser.[96]

EXCEPTIONAL CIRCUMSTANCES OR JUST AND EQUITABLE?

3.94 The leading case in Victoria supports the liberal interpretation of the application of section 49(2) view but sets a very high threshold for the exercise of the court's discretion. In *Poort v Development Underwriting (Victoria) Pty Ltd*,[97] Gillard J said 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'.[98]

3.95 In *Lucas & Tait (Investments) Pty Ltd v Victoria Securities Ltd*,[99] Street J considered a similar provision in section 55(2A) of the *Conveyancing Act 1919* (NSW).[100] His Honour said that the exercise of the discretion was to be based on whether it was 'unjust and inequitable' for a vendor to retain the deposit in any particular case.[101]

3.96 The Victorian test has a higher threshold to satisfy. Butt comments that the court in *Poort v Development Underwriting (Victoria) Pty Ltd* adopted a 'stringent view of the provision's operation',[102] and that the 'exceptional circumstances' test of Gillard J is a narrower view than the 'unjust and inequitable' test in New South Wales.[103] Robinson notes that the courts in Victoria 'have been reluctant to find exceptional circumstances'.[104]

3.97 There has been no full examination of section 49(2) by the Victorian Court of Appeal,[105] and Gillard J's judgment has been followed in subsequent Victorian cases.[106]

3.98 In our Consultation Paper we asked whether the test for the exercise of the court's discretion in section 49(2) should be put on a statutory footing and if so whether the test should be an 'exceptional circumstances' test or a 'just and equitable' test.

3.99 We received only three submissions, all of which agreed that the test should be put on a statutory footing.[107] One submission indicated that the 'just and equitable' test is the appropriate one.[108] The Law Institute of Victoria said that the court should be given 'full discretion'.[109] The third submission did not specify which test should be used.[110]

3.100 We propose that the 'just and equitable' test be incorporated into the subsection, as this gives the court a broader discretion than the 'exceptional circumstances' test.

3.101 In determining whether the circumstances are such that it would be just and equitable to return the deposit, the court could have regard to the same 'relevant considerations' which Gillard J considered in *Poort v Development Underwriting (Victoria) Pty Ltd*.[111] These include: the terms of the contract; the conduct of the parties; and whether the vendor can be adequately compensated considering the nature of the property involved.[112]

DEPOSITS IN WHOLE OR IN PART

3.102 Section 49(2) does not expressly allow only part of the deposit to be returned.[113] Butt comments as follows regarding the approach of Gillard J in *Poort v Development Underwriting (Victoria) Pty Ltd* and of Crockett J in *Kadissi v Jankovic*:[114]

> *Much 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.*[115]

3.103 As this approach is already being used by the courts to work around the limitations of the subsection, no significant change would result from extending the court's discretion to return part only of the deposit or to award damages.[116]

3.104 In our Consultation Paper, we asked whether section 49(2) should be extended to allow the court to award part of a deposit or damages. We received three submissions on this point, all of which supported the proposed amendment.[117]

3.105 We also recommend that the court be permitted to award the whole or part of any of the deposit, with or without interest. This is consistent with section 58 of the *Supreme Court Act 1986*, which empowers the court to allow interest to the creditor in proceedings for the recovery of a debt or sum certain.

3.106 Finally, the Law Institute of Victoria submitted that sections 49(1), (2) and (3) should be 'revised and consolidated into one single provision'.[118] We consider that this would assist in the clarity and brevity of the legislation and we recommend accordingly.

RECOMMENDATIONS

11. Sections 49(1), (2) and (3) should be revised and consolidated into a single provision.
12. Section 49(2) should be amended to provide that, where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, where it is just and equitable to do so, order the repayment of the whole or any part of the deposit, with or without interest.

CO-OWNED LAND AND GOODS

3.107 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.

3.108 Chapter 4 of that report set out recommendations about 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.

3.109 The Commission's 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.

93 Butt (1998), Ibid [9.140]. *James Macara Ltd v Barclay* [1944] 2 All ER 31 at 32, *Re Hoobin (dec'd)* [1957] VR 341, 351.

94 MacCallum (1994), above n 90.

95 *Zsadony 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 had earlier been doubted by the Supreme Court of Victoria in *Re Hoobin (dec'd)* [1957] VR.

96 *Mallet v Jones* [1959] VR 122, *Yammouni v Condidiorio* [1959] VR 479, *Kadissi v Jankovic* [1987] VR 255; MacCallum (1994), above n 90.

97 *Poort v Development Underwriting (Victoria) Pty Ltd* [1976] VR 779.

98 *Poort v Development Underwriting (Victoria) Pty Ltd* [1976] VR 779 785–786.

99 *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.

100 *Lucas & Tait (Investments) Pty Ltd v Victoria Securities Ltd* [1973] 2 NSWLR 268.

101 Ibid 272. This criterion is also used to determine the exercise of the statutory discretion in Ireland and has been given legislative recognition: *Land and Conveyancing Law Reform Act 2009* (Ir) s 54.

102 Butt (1998), above n 92, [9.140].

103 Ibid.

104 Robinson (1992), above n 57, 93.

105 The judgment of Gillard J was affirmed by the Full Court on appeal: *Poort v Development Underwriting (Victoria) Pty Ltd* (No. 2) [1977] VR 454 but not discussed: Butt (1998), above n 92, [9.140].

106 *Maniaty v Fenedisto Pty Ltd* [2004] VSC 177; *Aussie Invest Corp Pty Ltd v Pulcesia Pty Ltd* [2005] 13 VR 168.

107 Mr Michael Macnamara, Submission 2, 5; Associate Professor Maureen Tehan et al, Submission 9, 24; Law Institute of Victoria, Submission 13, 13.

108 Mr Michael Macnamara, Submission 2, 5.

109 Law Institute of Victoria, Submission 13, 13.

110 Associate Professor Maureen Tehan et al, Submission 9, 24.

111 [1976] VR 779.

112 *Poort v Development Underwriting (Victoria) Pty Ltd* [1976] VR 779, 786.

113 Wikramanayake (1986), above n 92, 296 citing Vaisey J in *James Macara Ltd v Barclay* [1944] 2 All ER 31.

114 *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.'

115 Butt (1998), above n 92, [9.135].

116 Wallace (1984), above n 5, 89.

117 Mr Michael Macnamara, Submission 2, 5; Associate Professor Maureen Tehan et al, Submission 9, 24; Law Institute of Victoria Submission 13, 13.

118 Law Institute of Victoria, Submission 13, 13.

3.110 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.

3.111 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.

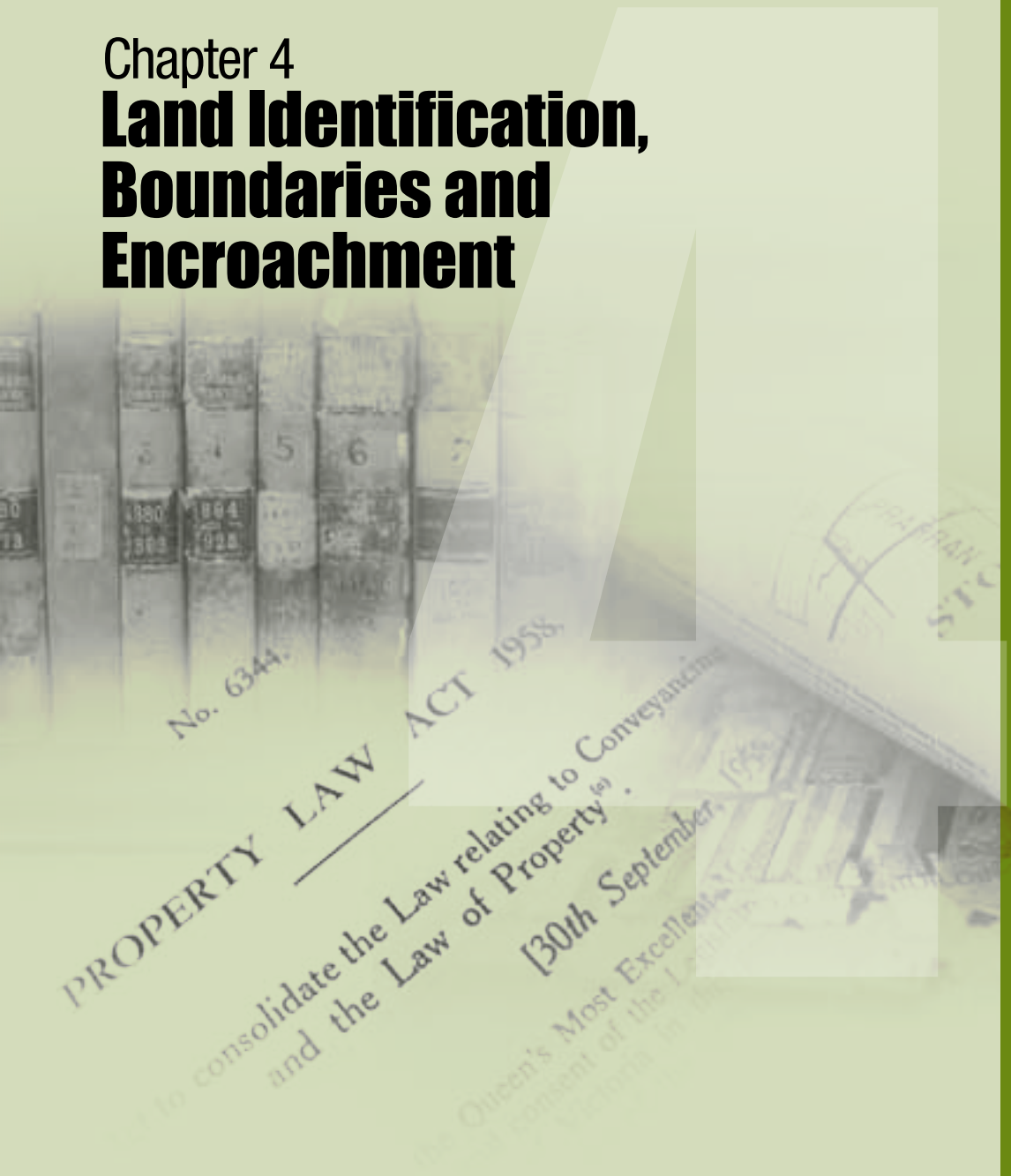
3.112 Recommendation 24 proposed that a provision be inserted into the Property Law Act allowing joint tenancies of goods to be severed by written notice. Recommendations 25–27 dealt with the form and service of notice and the resolution of disputes.

3.113 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).

3.114 We affirm the above recommendations and have not re-examined the area in this review.

Chapter 4

Land Identification, Boundaries and Encroachment



CONTENTS

Chapter 4

Land Identification, Boundaries and Encroachment

SURVEY BOUNDARIES

SECTION 270 OF THE PROPERTY LAW ACT

4.1 Section 270 of the *Property Law Act 1958* (Property Law Act) was introduced to deal with excesses in measurements in original Crown survey boundaries. The excesses resulted from the early practices of government surveyors of using a survey chain that was over the standard length or in some other way adding an extra amount to the boundaries of a lot when conducting the survey.[1]

4.2 The inaccuracies led to a problem where the area marked out on the ground as part of the Crown survey exceeded the total areas of the lots of the Crown subdivision as described in the title documents ('an excess'). The predecessor provision to section 270 was enacted following a review of boundary problems by a Royal Commission in 1885.[2]

4.3 Section 270 provides that, where a Crown section has been subdivided by the Crown into allotments of equal area, the excess area is 'deemed originally distributable' equally among the lots. The provision has a retrospective operation insofar as the excess is deemed to have been distributed equally at the time of the Crown subdivision.

4.4 The section does not confer power on anyone to make a determination to distribute the excess and amend the boundaries. Section 273 of the Property Law Act provides that section 270 shall, where applicable, be acted on by the Registrar in an application to register a lot or to amend a folio as to boundaries, and in any investigation as to boundaries.

SECTION 102 OF THE TRANSFER OF LAND ACT

4.5 When a folio is created, the Registrar must record in it the description of the land.[3] Sometimes an error in measurement in the original survey results in an excess or shortage in the dimensions of the land as recorded in the folio. Where this occurs, section 102(1) of the *Transfer of Land Act 1958* (Transfer of Land Act) provides that the Registrar may create a new folio or 'amend the recordings in the Register to accord with the dimensions marked on the ground or otherwise to adjust equitably the discrepancy'.

4.6 Section 102(2) empowers the Registrar to do the following:

- in appropriate cases make a distribution among the allotments or lots of any surplus area
- where the proprietor of an allotment or lot has been in possession of a surplus for 15 years, include in the folio so much of the surplus held in possession as is attributable to his allotment, or
- in any case, make such adjustments as the Registrar considers equitable and expedient.

4.7 Robinson notes that it is unclear what difference, if any, exists between the power to 'adjust equitably the discrepancy' in section 102(1) and to make an 'adjustment that the Registrar considers equitable and expedient' contained in section 102(2).[4]

4.8 In our Consultation Paper we asked two questions with regard to the operation of section 270. These were:

- whether section 270 should be extended to include shortages
- whether section 270 should be extended to include Crown subdivision into lots of unequal area.

SHORTAGES

CROWN SURVEY MEASUREMENTS

4.9 Three submissions that addressed the question of extending section 270 to shortages supported such an extension, and two raised objections to it.

4.10 The submissions from Mr Macnamara and the Law Institute of Victoria supported the extension of section 270 to deem shortages in Crown surveys to be proportionately distributed among all lots in the subdivision.[5] The Association of Consulting Surveyors suggested that 'the proportioning might be based on parcel frontages rather than on relative parcel areas'.[6]

4.11 Mr Hope and Dr Vout raised the following objections to the proposed extension of section 270 to shortages:[7]

- Where a shortage is distributed to a lot for which a title is already held by a lot owner, it might be viewed as a governmental acquisition of the shortfall.
- If the shortage reduces the lot size it might unfairly penalise the lot owners under planning law. For example, a reduction in lot size might make the lot smaller than the minimum required for some planning requirements, which could restrict the permitted uses.

4.12 Land Victoria indicated in its submission that there are few examples of shortages of measurement and that section 270 should not be extended to apply to them.[8]

4.13 The Association of Consulting Surveyors Victoria said shortages in Crown surveys do exist, although they are 'relatively rare'.[9] Shortages are usually discovered when a re-survey is undertaken for purposes of a subdivision or application for a planning permit. The lot owner generally accepts their proportionate share of the shortage as part of the cost of the subdivision or permit. For example, where a survey for a subdivision reveals a shortage, the plan of subdivision will be lodged incorporating an adjustment which represents the lot's proportionate share of the shortage in the measurements of the section.[10]

4.14 Where shortages in Crown surveys exist, there is a need to deal with the matter by legislation. The preferable approach would be to amend section 102(2) of the Transfer of Land Act to expressly empower the Registrar to make a distribution among the lots concerned of any shortage of area in the measurement of a Crown section in the original Crown survey. In making the distribution and amending boundaries, the Registrar should be required to have regard to any guidelines published by the Minister. The provision for publication of guidelines is discussed below.[11]

PRIVATE SUBDIVISIONS

4.15 We found evidence that there is a problem with shortages in private subdivisions. The Association of Consulting Surveyors Victoria said that discrepancies exist in private subdivisions because 'for almost 100 years it was possible for titles to be created by paper transfers with boundaries being created without a survey'.[12] Even where surveys were conducted, limitations in surveying methods up until the 1960s meant that discrepancies could occur.[13]

4.16 Several submissions said that it would be useful to extend section 270 to discrepancies arising from measurements in boundaries other than Crown boundaries.[14]

4.17 Section 102(2) of the Transfer of Land Act expressly empowers the Registrar to distribute excesses in private subdivisions, but is silent as to shortages. We consider that the Registrar should be expressly empowered to distribute shortages in private subdivisions as well as in Crown survey measurements.

1 Stanley Robinson, *Property Law Act (Victoria)* (Lawbook Co, 1992) 500, citing *Ex parte Rowan* (1883) 9 VLR 286, 287; Mr Peter Davies, Submission 19, 1–2.

2 Mr Peter Davies, Submission 19, 2, referring to the Royal Commission on Land Titles and Surveys 1885.

3 *Transfer of Land Act 1958* (Vic) s 27(7).

4 Stanley Robinson, *Transfer of Land in Victoria* (Lawbook Co, 1979) 398.

5 Mr Michael Macnamara, Submission 2, 6; Law Institute of Victoria, Submission 13, 14.

6 Association of Consulting Surveyors, Submission 15, 3.

7 Mr James Hope and Dr Paul Vout, Submission 6, 5–6.

8 Land Victoria, Submission 18, 3.

9 Association of Consulting Surveyors, Submission 15, 2.

10 Oral communication from Mr Alan Norman and Mr Gerry Shone, Association of Consulting Surveyors, 24 August 2010.

11 See [4.28–4.31].

12 Association of Consulting Surveyors, Submission 15, 2.

13 Oral communication from Alan Norman and Gerry Shone, Association of Consulting Surveyors 24 August 2010.

14 Mr Peter Leitch, Submission 10, 1; Consulting Surveyors Victoria, Submission 15, 2–3; Dr Malcom Park and Mr Peter Burns, Submission 4, 4; Mr Peter Davies, Submission 19, 7.

Chapter 4 Land Identification, Boundaries and Encroachment

COMPENSATION FOR DISTRIBUTION OF SHORTAGES

4.18 The conferral on the Registrar of a power to distribute shortages under section 102 of the Transfer of Land Act raises a question of whether compensation should be payable for the resulting loss or deprivation of property rights to an area of land, and who should be liable.

4.19 The general rule is that boundaries of registered land are not guaranteed,[15] and that the Consolidated Fund is not liable for loss or deprivation caused by misdescription of boundaries.[16] An exception should perhaps be made to the general rule where there is an amendment or adjustment under section 102 of the Transfer of Land Act to distribute a shortage of measurement resulting from inaccuracies in an original Crown survey.

4.20 The question of whether the Consolidated Fund should be made liable for losses resulting from the distribution of shortages in Crown surveys and private subdivisions should be considered as part of a review of the Transfer of Land Act. It raises questions as to the scope and purpose of the compensation provisions in sections 109–111 of the Transfer of Land Act.

DISTRIBUTION OF EXCESS ON SUBDIVISION INTO UNEQUAL LOTS

4.21 All of the submissions we received on the question of extending section 270 to enable proportionate distribution of excesses among lots of unequal area were in favour of the proposal.[17]

4.22 On further examination, we have concluded that section 270 should not be extended to Crown subdivisions involving unequal lots. A retrospective deeming provision is not a suitable vehicle for making complex distributions and adjustments. The distribution of excesses among unequal lots in proportion to their respective area is more complex than equal distribution among equal lots. There may be more than one way in which the adjustments to boundaries required by the section could be made.[18]

4.23 Where the lots are unequal, the distribution of an excess should require a decision by the Registrar and amendment of the boundaries. Any Crown subdivision of land for sale of the lots would require registration of the land, which would empower the Registrar to act under section 102.[19]

EXTENDING SECTION 270 TO SINGLE CROWN ALLOTMENTS

4.24 Land Victoria proposed the extension of section 270 to cover excesses in a single Crown allotment, with the apportionment occurring along each of the lengths of an irregularly shaped boundary in proportion to the lengths.[20]

4.25 A provision for the apportionment of excesses along boundary lengths in irregularly shaped lots is too complex to include in a retrospective deeming provision such as section 270. The deemed distribution would be operative in law before any decision as to how the boundary amendments are to be made. This would create uncertainty as to the effect of the provision when applied to the particular lots.

4.26 The Registrar already has the power under section 102(1) of the Transfer of Land Act to 'adjust equitably the discrepancy' in a single lot arising from an excess or shortage of measurement in the original survey. In the case of an irregularly shaped lot, it is open to the Registrar to follow the method of adjustment proposed in his submission if he considers it equitable to do so.[21]

4.27 We make no recommendation for the amendment of section 270 in relation to irregularly shaped lots.

GUIDELINES FOR BOUNDARY ADJUSTMENTS

4.28 We have concluded that section 270 should not be further extended because it lacks administrative machinery for making determinations. We acknowledge that section 270 does have a normative function in establishing the principle of proportionate distribution of excesses. The surveyors who made submissions indicated that they would welcome the addition of other principles for boundary redefinition in the Property Law Act.

4.29 Most boundary discrepancies are discovered by consulting surveyors, who play an important role in advising the affected landowners. In our consultations with surveying organisations, we learned that there is a need for clear, authoritative and accessible principles to guide surveyors and the public in resolving boundary problems and redefining boundaries. We ascertained from Land Victoria that the Registrar does not make available to the public any guidelines or similar instructions issued for or used by his officers in exercising his powers under section 102.[22]

4.30 We consider that guidelines for the redefinition of boundaries should be established under the Property Law Act, for both old system and registered land, and applied by the Registrar when acting under section 102 of the Transfer of Land Act. The guidelines should deal with discrepancies in boundaries arising from errors of measurement in an original survey or a subdivision. The guidelines should also deal with matters such as distribution of excess measurements among unequal lots and irregularly shaped lots.

4.31 The guidelines should be made by the Minister on the advice of the Surveyor-General and published in the Government Gazette. Advising the Minister on the content of the guidelines fits with the Surveyor-General's statutory functions which include: advising the Minister and the community on surveying matters; responsibility for the correct positioning of Crown boundaries; resolving disputes over boundaries that affect the State cadastre; and performing any other functions conferred on the Surveyor-General under any Act.[23]

RECOMMENDATIONS

13. The new Property Law Act should provide that the Minister must, after consultation with the Surveyor-General, publish in the Government Gazette guidelines for the re-establishment, redefinition and adjustment of land boundaries where errors in measurement have occurred in an original survey or in a subdivision.

14. A consequential amendment should be made to section 273 to provide that any guidelines that the Minister issues for the re-establishment, redefinition and adjustment of land boundaries under the new provisions shall:

    (a) apply to land, whether under the operation of the general law or under the operation of the *Transfer of Land Act 1958*

    (b) where applicable, be acted upon by the Registrar in exercising the Registrar's powers and functions under section 102 of the *Transfer of Land Act 1958*.

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

16 *Transfer of Land Act 1958* (Vic) s 109(2)(c).

17 Land Victoria, Submission 18, 4; Mr James Hope and Dr Paul Vout, Submission 6, 5; Law Institute of Victoria, Submission 13, 15.

18 In his submission, Mr Davies notes that even equal distribution can be problematic where the lots are in irregular shapes, Submission 19, 7–8.

19 *Transfer of Land Act 1958* (Vic) s 8 provides that all unalienated land of the Crown shall, when alienated in fee, be under the operation of the Act.

20 Land Victoria, Submission 18, 4.

21 Submission 18 is from the Executive Director of Land Victoria, who is also the Registrar.

22 The need for surveyors to have this information was raised by Mr Peter Davies, Submission 19, 13–14. The *Freedom of Information Act 1982* (Vic), s 8, requires that any guidelines be made available for inspection and purchase by the public. No guidelines have been made available relating to the exercise of the Registrar's discretionary powers under section 102 of the Transfer of Land Act.

23 *Surveying Act 2004* (Vic) s 42.

Chapter 4

Land Identification, Boundaries and Encroachment

A BUILDING ENCROACHMENT RELIEF PROVISION

4.32 An encroachment arises when a building straddles the boundary between two lots which are owned and occupied by different persons.[24] The 'adjacent owner' owns the lot over which an encroachment extends. The 'encroaching owner' owns the lot adjacent to the boundary beyond which an encroachment extends. In this context, 'building' means a substantial building of permanent character. The encroachment may also be by overhang of part of a building as well as by intrusion of footings of a building. The portion of the adjacent owner's lot over which the encroachment extends is the 'subject land'.

4.33 Building encroachments may arise through a failure to check the location of boundaries before construction. They may also occur through no fault on the part of the encroaching owner whose building extends across the boundary. The encroachment may be due to a deliberate or careless act of a previous owner or a builder, an honest mistake by the encroaching owner or a previous owner or a builder, or even a common mistake by both the affected landowners about where the boundary lies.[25] Inaccuracies in Crown surveys and plans of subdivision, displacement or destruction of survey markers and other boundary discrepancies can also contribute to mistakes by landowners and builders.

4.34 Boundary discrepancies are relatively common in Victoria, although most are of small magnitude. The Surveyor-General has advised he would not be surprised if most re-establishment surveys in urban areas revealed discrepancies of up to 20 cm between boundaries as noted on title and the land as occupied.[26]

4.35 Building encroachments are becoming more common due to higher coverage of sites by buildings. Where landowners build up to the boundary, encroachments are more likely to arise.[27]

4.36 Building encroachments are of particular concern because a highly valuable building might encroach by a very small amount into a neighbouring property. In some cases the loss or detriment which would result from removal or alteration of the building would far exceed the value of any loss or detriment to the owner of the adjacent land from the continuation of the encroachment.

BUILDING ENCROACHMENTS UNDER THE CURRENT LAW

4.37 The owner of an encroaching building commits a trespass to land. On the application of the adjacent owner, a court may grant a mandatory injunction to require the removal of the encroachment. The court has a discretion to refuse an injunction and award damages instead, including damages for a continuing trespass. The court may award damages instead of injunction where the injury caused by the encroachment is small and is capable of being estimated in money and compensated by a small amount of money, and it would be oppressive in the circumstances to grant an injunction.[28] Such an order has the effect of allowing the encroachment to continue, by denying the means of preventing it.[29]

4.38 The discretion to grant an injunction or to award damages instead does not give the courts the full range of powers needed to resolve encroachment problems. Encroaching owners may obtain relief where the court withholds an injunction, but they cannot initiate the proceedings nor ask the court to grant them a property right in the subject land.[30]

4.39 Encroachments should ideally be resolved by negotiation between the affected landowners, perhaps by alteration of a building, or by consensual adjustment of boundaries.[31] In some cases, negotiating a price for allowing the encroachment to continue may be obstructed by strategic bargaining. The value of the building represents a sunk investment by the encroaching owner which inflates his or her valuation of the subject land. Knowing this, the adjacent owner may be tempted to conceal his or her own valuation, in order to extract a share of the encroaching owner's higher valuation.[32] Economists call this 'rent-seeking behaviour'.[33]

4.40 When the New South Wales Parliament enacted Australia's first building encroachment relief provision in 1922, the Minister who introduced the Bill explained that it was directed to controlling rent-seeking by adjacent owners, which he called 'blackmail'.

> *Although encroachments may arise without wrong intent through human error, yet when they are discovered human avarice takes advantage of the opportunity, with the result that innocent men are blackmailed, in respect of an inch or two of land to an unconscionable extent.*[34]

4.41 In our Consultation Paper we asked whether Victoria should have a discretionary relief provision for building encroachments.[35] The majority of the submissions which addressed the question were in favour of such a provision, although some expressed reservations as to how the provision would interact with the law of adverse possession (discussed below).[36] Mr Davies opposed the provision on the ground that it would reward those who encroach due to incompetence or lack of due diligence in building near a boundary without a survey.[37] We discuss the control of this moral hazard problem below.[38]

BUILDING ENCROACHMENT LAWS IN OTHER JURISDICTIONS

4.42 Adopting a building encroachment provision would promote harmonisation of Victorian law with that of other Australian States and Territories. Five Australian jurisdictions and New Zealand have provisions dealing with encroachment by buildings, of which four are based on the *Encroachment of Buildings Act 1922* (NSW).[39] 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.[40] An application may be made by either the landowner whose land is encroached upon or the owner of the encroaching structure.[41]

4.43 The Act sets out a range of discretionary factors to be considered by the court in determining an application, including:[42]

- 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
- the circumstances in which the encroachment was made.

4.44 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'.[43]

24 The terminology used here is taken from the *Encroachment of Buildings Act 1922* (NSW).

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

26 The Surveyor-General as quoted in email communication from the Executive Director of Land Victoria, 1 Sept 2010.

27 Surveying and Spatial Sciences Institute, Submission 11, 1–2.

28 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 322–33. For recent Victorian authority considering the principle see eg, *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* (2007) 20 VR 311.

29 *Jaggard v Sawyer* [1995] 1 WLR 269, 285–286.

30 O'Connor (2007), above n 25, 217.

31 The boundary could in some cases be amended by an unopposed application to the Registrar under section 99 of the Transfer of Land Act.

32 O'Connor (2006), above n 25, 54; TW Merrill 'Property Rules, Liability Rules and Adverse Possession' (1985) 79 *Northwestern University Law Review* 1122, 1131; T J Miceli & C F Sirmans 'An Economic Theory of Adverse Possession' (1995) 15 *International Review of Law and Economics* 161, 163. See eg, *Re Melden Homes (No. 2) Pty Ltd's Land* [1976] Qd R 79, 82.

33 Rent seeking is behaviour that seeks to exploit an economic advantage, such as a monopoly situation, rather than earn income through productive activity and market transactions.

34 NSW Hansard, 13 September 1922 (Mr Ley), as cited in *Googoorewon Pty Ltd v Amatek Ltd* (1991) 25 NSWLR 330, 333–34 (Mahoney JA).

35 Victorian Law Reform Commission, *Review of the Property Law Act 1958: Consultation Paper* (2010) [12.52].

36 Dr Malcolm Park and Mr Peter Burns, Submission 4, 2–3; Mr James Hope and Dr Paul Vout, Submission 6, 7–10; Surveying and Spatial Sciences Institute, Submission 11, 2–3.; Law Institute of Victoria, Submission 13, 14–15; Association of Consulting Surveyors, Submission 15, 3–4; Land Victoria, Submission 18, 4; Mr Peter Davies, Submission 19, 15–16.

37 Mr Peter Davies, Submission 19, 18–19.

38 See [4.63]–[4.69].

39 *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* 2007 (NZ) part 6, subpart 2 (replacing *Property Law Act 1952* (NZ) s 129).

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

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

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

43 Queensland Law Reform Commission, *Report on a Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing* 16 (1973) 104.

Chapter 4 Land Identification, Boundaries and Encroachment

ADJUSTMENT OF BOUNDARIES

4.45 The submission from Land Victoria, while expressing no view on the substantive policy proposals, suggested a modification of the form of an order for transfer of the subject land. Land Victoria said that 'rather than creating a folio that is to be transferred and then may or may not be the subject of a plan of consolidation, a simpler mechanism is for an order to provide for the adjustment of boundaries'.[44] Land Victoria added that this approach would better protect the interests of mortgagees. We have adopted this suggestion in the framing of our recommendation.

4.46 Any boundary adjustments under the provision will need to be incorporated into the State's cadastral mapbase. Our recommendations include provision, similar to that made in other States, for the court to order the Registrar to amend the recordings in the register of the dimensions of the affected lots.

ADVERSE POSSESSION AND BOUNDARY ENCROACHMENT

PART PARCEL ADVERSE POSSESSION

4.47 Disputes about encroaching buildings and the location of dividing fences are currently regulated by the law of trespass and the law of adverse possession. An adjacent owner is entitled to require a 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.

4.48 The right to sue arises when the encroachment or trespass commences but expires if legal proceedings are not commenced before the limitation period expires. The limitation period for an action to recover land is 15 years although it may extend to 30 years if the landowner is under a legal disability.[45] Once the right to sue arises, the running of the limitation period is unaffected by changes in ownership of either property.[46]

4.49 So long as the trespass continues, the encroaching neighbour may be deemed to be in adverse possession of the portion of land on which the encroachment extends. Building on part of a neighbour's land is strong evidence of adverse possession, but all relevant circumstances must be evaluated.[47]

4.50 Once the limitation period expires, the adjacent owner's title to the portion of land under encroachment is automatically extinguished by section 18 of the *Limitation of Actions Act 1958* (Limitation of Actions Act).[48] 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.[49] The rule that allows portions of land to be acquired in this way is 'part parcel adverse possession'.

INTERACTION WITH BUILDING ENCROACHMENT PROVISIONS

4.51 A building encroachment relief provision may be used with or without a rule of part parcel adverse possession. Most jurisdictions do not allow part parcel adverse possession at all,[50] or allow it subject to what is effectively a right of veto by the adjacent owner,[51] or do not allow claims to areas of land which are below the minimum lot size for planning standards.[52] In those jurisdictions, the building encroachment provision may be the only means by which the encroaching owner can have the boundary adjusted to accord with actual occupation without the consent of the adjacent owner.

4.52 The overall result in those jurisdictions is that a court may order an adjustment of the property rights only where the subject land has been built upon by a building that straddles the boundary. Where the land has been merely fenced or enclosed with and used as part of a neighbour's land for any period of time, the neighbour does not acquire title to it.

4.53 Western Australia is the only Australian jurisdiction which has a building encroachment relief provision and also permits acquisition of title by adverse possession without restriction as to area. There has been little judicial consideration of the relationship between the provisions.[53] 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 adjacent owner's title to the subject land is extinguished by operation of law, leaving the encroaching owner with a possessory title. The building is no longer an encroachment, and the relief provision ceases to apply.

4.54 Although our terms of reference require us to consider the desirability of harmonising Victorian property law with the law of other Australian jurisdictions, there is no national consensus on part parcel adverse possession. In its submission, the Property Law Reform Alliance noted that a national approach to property law is needed in order to streamline property transactions and reduce confusion.[54] The Property Law Reform Alliance proposed a draft Uniform Torrens Title Act be adopted, which includes provision for the acquisition of title by adverse possession. It seems that this model would permit adjustment of boundaries on the basis of adverse possession.[55]

4.55 Because of these different approaches to adverse possession, particularly in jurisdictions with building encroachment provisions, we outlined four options in our Consultation Paper for reconciling the doctrine of adverse possession with a building encroachment provision.[56]

4.56 The majority of submissions favoured the option of retaining the rule of part parcel adverse possession and leaving the Limitation of Actions Act unamended. This would have the effect of allowing the relief provision to operate only during the period (usually 15 years) between the commencement of the encroachment and the expiry of the limitation period. This was the preferred option for the Law Institute of Victoria, each of the surveying organisations and some individual surveyors.[57]

4.57 It is not necessary for the purposes of this review to make any recommendation about part parcel adverse possession. A building encroachment relief provision can operate with or without part parcel adverse possession, and has useful work to do in both cases. It has a more limited scope of application if part parcel adverse possession is retained, since relief can no longer be granted after the limitation period has run and the adjacent owner's title to the subject land has been extinguished.

4.58 In order to ensure that part parcel adverse possession continues to operate in conjunction with the building encroachment relief provision, the new Property Law Act should specify that nothing in the Division relating to the building encroachment relief provision affects the operation of Part 1, Division 3 of the Limitation of Actions Act. The effect on the operation of the building encroachment provision would be the same as for Western Australia, as discussed above at paragraph 4.53.

4.59 The relief provision will not apply where a dividing fence or wall positioned off the boundary encloses a portion of a lot with an adjacent lot and no building extends from the adjacent land onto or upon the portion. In such cases there is no 'encroachment'. Property rights to the portion of land will continue to be governed by the law of trespass and part parcel adverse possession.[58]

4.60 It is apparent from the submissions received that there are a number of reform issues relating to part parcel adverse possession that are beyond the scope of the present review, but which need to be examined. We outline the issues in Chapter 8.

44 Land Victoria, Submission 18, 3.

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

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

47 Enclosure of land by fencing is not always sufficient to prove adverse possession. See Adrian Bradbrook et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 684–95.

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

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

50 *Land Title Act 2000* (NT) s 98; *Land Titles Act 1925* (ACT) s 69; Queensland does not allow applications to register title to 'encroachments' acquired by adverse possession, *Land Title Act 1994* (Qld) s 98.

51 *Real Property Act 1886* (SA) s 80F(2); *Land Transfer Amendment Act 1963* (NZ) s 9, 21(e); *Land Registration Act 2002* (Eng) schedule 6 [1–5].

52 *Land Titles Act 1980* (Tas) s 138Y (excludes claims to 'sub-minimum lots'); *Real Property Act 1900* (NSW) ss 45D, 45B(1) (claims can be made in respect to whole parcels only, defined as land that meets minimum planning standards): Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2009)) [22 38].

53 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.

54 Property Law Reform Alliance, Submission 14, 1.

55 Property Law Reform Alliance, Submission 14, Draft Uniform Torrens Title Act Part 18 and Part 3, Division 4.

56 Victorian Law Reform Commission (2010), above 35, [12.45].

57 Law Institute of Victoria, Submission 13; Surveying and Spatial Sciences Institute, Submission 11; Association of Consulting Surveyors, Submission 15; Mr Peter Davies, Submission 19; Oral communication with Mr Alan Norman and Mr Geoff Shone, 24 August 2009; Dr Malcolm Park and Mr Peter Burns, Submission 4, 2–4.

58 The *Fences Act 1968* (Vic) is currently under review by the Department of Justice, in accordance with the Attorney-General's *Justice Statement 2* (2008), Section 1, 16.

Chapter 4

Land Identification, Boundaries and Encroachment

WHO SHOULD BE ENTITLED TO APPLY FOR RELIEF?

4.61 Either the encroaching owner or the adjacent owner should be able to apply to a court for relief under the provision.

4.62 The types of relief that are available under the building encroachment provision should be sufficiently broad, to accommodate the different circumstances in which encroachments can arise.

DISCOURAGING DELIBERATE AND NEGLIGENT ENCROACHMENT

4.63 The law relating to building encroachment should promote two objects: to discourage deliberate or careless encroachment; and to control rent-seeking and minimise losses by limiting the power of adjacent owners to require the removal of a building.[59]

4.64 The relief provisions in other jurisdictions all contain provisions designed to discourage deliberate and negligent (or grossly negligent) encroachment.

4.65 The Western Australian provisions are the most stringent. The encroaching owner is precluded from relief unless he or she proves that the encroachment was not intentional and did not arise from gross negligence, or that he or she did not build the encroachment.[60]

4.66 The New South Wales, Northern Territory, Queensland and South Australia statutes adopt a different approach. The encroaching owner is not precluded from obtaining relief if he or she fails to prove that the encroachment was not intentional and did not arise from gross negligence, but must pay three times the unimproved capital value of the subject land if the court makes an order for compensation for the transfer of an interest in the land to the encroaching owner.[61]

4.67 The mandatory requirement to award three times the unimproved value can cause injustice in some cases.[62] For example, situations could arise where the previous adjacent landowner had permitted or even encouraged the construction of the encroachment. An equity might have arisen against that owner by equitable estoppel,[63] which is not enforceable against a subsequent registered owner of the adjacent land.[64] In this example, the encroachment was intentional, but it may be unjust in the circumstances to require payment of compensation at three times the value.

4.68 In *Gladwell v Steen*,[65] Justice Debelle observed that, while the South Australian provision required the court to order a minimum compensation of three times the unimproved capital value of the land as a penalty for not taking due care in erecting the encroachment:[66]

> *it would be unfair to impose that kind of penalty upon an innocent successor in title who has purchased the land unaware of the encroachment.*

4.69 We consider that it should be left to the discretion of the court to judge in each case whether it is just and equitable in the circumstances that the encroaching owner should pay compensation at a higher rate, not exceeding three times the unimproved capital value.

JURISDICTION

4.70 In our Consultation Paper, we asked which court, courts or tribunal should be given jurisdiction over any new building encroachment provision. The Chief Judge of the County Court, while expressing no view on whether such a provision should be enacted, supported a shared jurisdiction in which the power is vested in the Supreme, County and Magistrates' Courts.[67] The Deputy Chief Magistrate pointed out in his submission that the Magistrates' Court currently deals with applications relating to the position of dividing fences in applications under section 7(1)(c) of the *Fences Act 1968*.[68]

4.71 The view of the Law Institute of Victoria is that the relief provision should be vested in 'a costs jurisdiction with appropriate expertise'.[69] The Institute proposes the establishment of a Land and Environment Court, as in New South Wales, and that jurisdiction under the relief provisions should be exercised by it.[70]

4.72 The question of whether a new court should be established lies outside the Commission's current terms of reference and we list it in Chapter 8 as a matter that requires further consideration.

4.73 The courts already deal with building encroachment cases coming before them as actions for trespass to land or nuisance, or claims based on equitable estoppel. Since encroachment issues may involve related proceedings, we are persuaded that the jurisdiction under the relief provision should be exercised by courts rather than VCAT. The courts have broader jurisdiction to determine any related proceedings.

4.74 The Supreme and County Courts have jurisdiction under the Property Law Act, except for Part IV, unlimited as to the value of the claim.[71] We recommend that the Magistrates' Court be given shared jurisdiction with the Supreme and County Courts under the relief provision. A model of concurrent jurisdiction of the Supreme, County and Magistrates' Court is consistent with Attorney-General's *Justice Statement 1*, which advocates the resolution of matters at the lowest level in order to reduce costs and improve access to justice.[72] It would also be consistent with recent amendments giving the Magistrates' Court jurisdiction to hear and determine matters arising under the Transfer of Land Act.[73]

4.75 We considered three options as to the extent of the Magistrates' Court's jurisdiction:

- Jurisdiction limited as to the value of the subject land or the value of the relief (for example, compensation) sought. The limit could be $100,000, which is currently the limit for the court's jurisdiction in causes of action for debt, damages and liquidated demands or in claims for equitable relief, or it could be a higher figure. In a proceeding involving property, the Court can admit into evidence a certificate of a valuer for the purpose of determining whether the amount claimed or the value of the relief sought is within the jurisdictional limit.[74]
- Jurisdiction limited as to the size of the area of the subject land.[75]
- Jurisdiction without a limit. Where an Act other than the *Magistrates' Court Act 1989* (Magistrates' Court Act) vests jurisdiction in the Court to hear and determine a cause of action, the $100,000 jurisdictional limit does not apply unless special provision is made.[76]

4.76 A monetary jurisdictional limit is difficult to apply where it requires an assessment to be made of the value of a portion of a lot, and the value of the portion is a fact in issue in the proceedings. A jurisdictional limit as to the area of the subject land is simpler and cheaper to apply, since it does not require expert evidence. However, the area of the land may have little relationship to its value or to the complexity of the proceeding.

59 *T J Miceli & C F Sirmans* (1995), above n 32, 161–64, 170.

60 *Property Law Act 1969* (WA) s 122(2).

31 *Encroachment of Buildings Act 1922* (NSW) s 4(1); *Encroachment of Buildings Act 1982* (NT) s 7(1); *Property Law Act 1974* (Qld) s 186(1); *Encroachments Act 1944* (SA) s 5(1).

62 O'Connor (2007), above n 25, 214–216.

63 For an example of an argument that an equitable estoppel had arisen in regard to an encroachment, see *McNeile & Anor v Cluster 3 Pty Ltd* (Supreme Court, NSW 28 May 1997 1194/97) [355] NSW 17.

64 A personal equity against the owner of land can be an exception to the indefeasibility provisions of section 42(1) of the Transfer of Land Act. However, the equity will not be enforceable against a subsequent innocent purchaser of the land. See eg, Butt (2009), above n 52, [20 107]. See also the comments by Bryson J in *Boed Pty Ltd v Seymour and Others* (1989) 15 NSWLR 715, 718–719.

65 (2000) 77 SASR 310 [21].

66 *Gladwell v Steen* (2000) 77 SASR 310 [21].

67 Judge Michael Rozenes, County Court of Victoria, Submission 3.

68 Deputy Chief Magistrate Peter Lauritsen, Magistrates' Court of Victoria, Submission 12.

69 Law Institute of Victoria, Submission 13, 15.

70 Law Institute of Victoria, Submission 13, 14–15.

71 *Property Law Act 1958* (Vic) s 3; *County Court Act 1958* (Vic). The monetary limit on the Court's jurisdiction was abolished by the *Courts Legislation (Jurisdiction) Act 2006* (Vic) (Repealed) s 3(1).

72 Hansard, Assembly, 2 Sept 2009, 2983 (The Hon Mr Batchelor, MLA).

73 See definition of 'court' inserted into s 4(1) of the *Transfer of Land Act 1958* (Vic) by s 3 of the *Land Law Legislation Amendment Act* (Vic) 2009, which commenced 1 May 2010. See discussion in Chapter 8: [8.54].

74 *Magistrates' Court Act 1989* (Vic) s 100(3).

75 A jurisdictional limit of 30 square metres was suggested by the Law Institute of Victoria, Submission 13, 15.

76 *Magistrates' Court Act 1989* (Vic) s 100(1)(d).

Chapter 4 Land Identification, Boundaries and Encroachment

4.77 We consider that it would be preferable to vest jurisdiction in the Magistrates' Court as a statutory cause of action under section 100(1)(d) of the Magistrates' Court Act, unlimited as to jurisdiction. Concurrent jurisdiction would allow applicants to choose the court which they consider most appropriate to hear the application. A designated judicial officer has the power to transfer a proceeding to a higher court which has the appropriate skill, experience and authority to hear it having regard to its gravity, difficulty and importance, where a transfer is just and convenient.[77]

RECOMMENDATIONS

15. The new Property Law Act should include provisions empowering the Supreme Court, the County Court and the Magistrates' Court to grant discretionary relief in respect to an encroachment by a building.
16. The new building encroachment provisions should describe a building encroachment in the following terms:
    (a) An encroachment arises when a building straddles a boundary line and is partly on a lot owned by one party (the 'encroaching owner') and partly on an adjacent lot owned by another party (the 'adjacent owner').
    (b) A building means a substantial building of permanent character.
    (c) The encroachment may be by overhang of any part of a building as well as by intrusion of any part of a building in the soil.
    (d) The portion of the lot over which the encroachment extends is the 'subject land'.
17. The building encroachment provisions in the new Property Law Act should provide the following procedure for relief:
    (a) Either the encroaching owner or the adjacent owner should be able to apply to a court for relief under the provision.
    (b) An owner means a person who holds an estate in freehold in possession and includes a mortgagee in possession.
    (c) The applicant should be required to give notice of the application to a mortgagee, lessee or any other person who has an estate or interest in the subject land, or any other person to whom the court directs that notice should be given.
    (d) On an application for relief the court should have power to make one or more of the following orders:
        (i) the payment of compensation by the encroaching owner to the adjacent owner
        (ii) that the subject land be included in the title to the encroaching owner's lot by amendment of a boundary
        (iii) that the adjacent owner lease the subject land to the encroaching owner
        (iv) that the adjacent owner grant to the encroaching owner any easement right or privilege in relation to the subject land specified in the order
        (v) that the encroaching owner remove the encroachment.

RECOMMENDATIONS

18. In exercising its discretion under the building encroachment provisions the court should have power to grant or refuse such relief as it thinks just and equitable and to consider:
    (a) the situation and value of the subject land
    (b) the nature and extent of the encroachment
    (c) the character of the encroaching building and the purposes for which it may be used
    (d) the loss and damage which has been or will be incurred by the adjacent owner
    (e) the loss and damage which would be incurred by the encroaching owner if he or she is required to remove the encroachment
    (f) the circumstances in which the encroachment was made.
19. Where, in an application for building encroachment relief, the court makes an order that the subject land is to be included in the title to the encroaching owner's lot, it should have power to direct the Registrar to make all entries on the folio of the register relating to any lot necessary to give effect to the order.
20. In determining the compensation to be paid under the building relief provisions to the adjacent owner in respect of any lease or grant to the encroaching owner or any amendment of a boundary line, the court should have power to determine an amount up to but not exceeding three times the unimproved value of the subject land.
21. In determining whether the compensation for building encroachment should exceed the value of the subject land, the court should have regard to:
    (a) the value, whether improved or unimproved, of the subject land to the adjacent owner
    (b) the loss or damage which has been incurred by the adjacent owner by reason of the encroachment
    (c) the loss or damage which will be incurred by the adjacent owner through the orders which the court proposes to make in favour of the encroaching owner
    (d) the circumstances in which the encroachment was made.
22. It should be provided that nothing in the building encroachment relief provisions affects the operation of Part 1, Division 3 of the *Limitation of Actions Act 1958*.

77 *Courts (Case Transfer) Act 1991* (Vic), ss 3(1),16.

Chapter 4

Land Identification, Boundaries and Encroachment

A MISTAKEN IMPROVER RELIEF PROVISION

4.78 When movable objects (chattels) are attached to land or to buildings with the intention that they will be a permanent improvement, they can become a 'fixture'.[78] Fixtures are legally part of the land, and belong to the owner of the land. This common law rule is known as the fixtures rule.

4.79 The rule can cause injustice when a person attaches chattels to the land of another person under a mistake about the ownership or identity of the land. An example is where a contractor installs an air conditioning system in the wrong unit of a multi-owned unit development, or a water tank on the wrong lot. The air conditioning unit or the water tank is brought onto land as a chattel, but may become a fixture when it is attached to land as a permanent improvement.[79] If so, the contractor, on realising the mistake, is not entitled to recover the items from the land without the landowner's consent. The landowner is not liable to pay for the items or the improvement.[80]

4.80 In the leading Victorian case, *Brand v Chris Building Society,*[81] 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 had not contributed to the builder's mistake. The Supreme Court held that it has no jurisdiction to refuse the injunction on the basis that the plaintiff would be unjustly enriched by retaining the improvement on his land.[82]

4.81 Although there have been some developments in the law since *Brand v Chris Building Society* was decided, it is very unlikely that a mistaken improver who makes unsolicited improvements to someone else's land would succeed in a claim for compensation on the basis of unjust enrichment.[83]

MISTAKEN IMPROVER RELIEF PROVISIONS IN OTHER JURISDICTIONS

4.82 Mistaken improver relief provisions have a long history in North America, where they are found in 42 US states and six Canadian provinces.[84] They were originally enacted to encourage settlement and development of land at a time when land records were deficient.[85] Their purpose is to relieve against the unjust enrichment of a landowner who benefits from another's mistaken expenditure.

4.83 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).

4.84 In 1973, the Queensland Law Reform Commission examined the mistaken improver problem and the Victorian decision in *Brand v Chris Building Society*.[86] It concluded that a relief provision was not merely desirable but necessary.[87]

4.85 The 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
- 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.

4.86 The Northern Territory adopted a provision based on the Queensland model in 1982.[88] Western Australia enacted relief provisions, but the relief is limited to mistakes of identity.[89] The Western Australian provision applies where a building has been erected by a landowner because of a mistake as to the identity of a lot.

4.87 The Queensland, Northern Territory and New Zealand provisions are broader and include mistakes as to title as well as mistakes as to identity.[90] An example of a mistake of title occurred in a Queensland case in which a company which had purchased land constructed a home on the land in the belief that it had acquired a beneficial interest from an intermediate vendor.[91] The company lost its interest in the land when the vendor under the head contract defaulted.

4.88 Another example of a mistake of title would be where a person improves land in the belief that they have inherited it, only to find that someone else has a better right under a later will.

PROPOSED MISTAKEN IMPROVER RELIEF PROVISION FOR VICTORIA

4.89 We proposed in the Consultation Paper that a mistaken improver relief provision be included in the new Act.

4.90 Most of the submissions that commented on the proposal were in favour of the introduction of such a provision and said that it should extend to mistakes as to title and mistakes as to identity.[92]

4.91 In their submission, Mr Hope and Dr Vout raised the following objections to a mistaken relief provision:[93]

- The cases involve a dispute between two innocent parties, with the landowner more 'innocent' than the improver.
- An order for compensation could create financial hardship for a landowner who has committed no wrong.
- Technological development in the areas of property registration and identification is a more suitable solution.

4.92 They observe that an order for payment of compensation to an improver may cause financial harm to a landowner whose land has been improved. For example, an improvement which substantially increases the value of land might result in the landowner needing to sell the improved land to pay the compensation award.

4.93 The submission further suggests that if the court is empowered to make a compensation order against a landowner who retains the improvement, the quantum of the compensation should be subject to a discount, because of the landowner's lack of fault, and also to reflect any loss of amenity or opportunity that the landowner might suffer.

4.94 The proposed provision is not intended to disadvantage innocent landowners. It would limit the operation of the fixtures rule to enable mistaken improvers to mitigate their losses and to prevent landowners from being unjustly enriched. Causation, fault, hardship and cost are matters that the court should be able to take into account in determining whether to grant or refuse relief and in shaping the orders.

4.95 We propose that, as in other jurisdictions which have such a provision, the court should have a broad discretion and powers to make an order that is just and equitable in each case. In some cases, it may be just and equitable to allow the mistaken improver to remove the materials from the land and make good any damage. In other cases, justice may require the payment of compensation to the improver by a landowner who wishes to retain the improvement.

78 See eg, Butt (2009), above n 52, [3–03].

79 See eg, *National Australia Bank Ltd v Blacker and Another* (2000) 179 ALR 97, dealing with irrigation equipment; *Belgrave Nominees Pty Ltd v Barlin-Scott Airconditioning (Aust) Pty Ltd* [1984] VR 947, dealing with air-conditioners.

80 Unless the owner of the land has acted unconscionably, such as standing by while the works were going on and not asserting his or her title until after the works were completed: *Brand v Chris Building Society* [1957] VR 625, 629. Allowance for the improvements may also be made as a set-off to a claim for equitable relief. See eg, *MEK Nominees Pty Ltd v Billboard Entertainments Pty Ltd* (1993) V Conv R 54–468, 65, 465–65, 466.

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

82 *Brand v Chris Building Society* [1957] VR 625 at 629. See also, *Chateau Douglas Hunter Valley Vineyards Ltd v Chateau Douglas Hunter Valley Winery and Cellars Ltd* [1978] ACLD 258; *Svenson v Payne* (1945) 71 CLR 531.

83 The cases are reviewed in Simone Degeling and Brendan Edgeworth, 'Improvements to Land Belonging to Another' in Lyria Bennett Moses, et al (eds) *Property and Security: Selected Essays* (Lawbook Co, 2010) 288–90; see also *Roy v Lagona* [2010] VSC 250 [294]–[314], [338]–[342].

84 Six Canadian provinces and 42 US States have a provision of this type: O'Connor (2006), above n 25, 40, fn 53.

85 Ibid 40–41; KH Dickinson 'Mistaken Improvers of Real Estate' (1985) 64 *North Carolina Law Review* 37, 38, 41-41, 52.

86 Queensland Law Reform Commission 16 (1973), above n 43, 105.

87 Queensland Law Reform Commission 16 (1973), above n 43.

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

89 *Property Law Act 1969* (WA) s 123;.

90 *Property Law Act 2007* (NZ) part 6, subpart 2: see definition of 'wrongly placed structure' in s 323.

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

92 Mr Michael Macnamara, Submission 2; Law Institute of Victoria, Submission 13; Associate Professor Maureen Tehan et al, Submission 9; Dr Malcolm Park and Mr Peter Burns, Submission 14, 4. The Association of Consulting Surveyors expressed reservations if the proposal would affect the rule of part parcel adverse possession (which it does not): Submission 15, 3. Mr Davies' objections (Submission 19, 18) appear to be directed to the building encroachment relief provision.

93 Mr James Hope and Dr Paul Vout, Submission 6, 6–7.

Chapter 4 Land Identification, Boundaries and Encroachment

4.96 The assessment of the amount of compensation should be left to the court. A rule requiring a compensation discount would be arbitrary, as there is no sound criterion for determining what the general rate of discount should be.

4.97 As noted in the Consultation Paper, the Queensland model provides a good example of the kinds of relief that a court should be able to grant.

4.98 Finally, with regard to the observation that technological development in the areas of property registration and identification is a more suitable solution than legislative reform, we agree that mistakes are better avoided than remedied. Although technological developments in surveying have improved methods of land identification, mistakes will still occur where works are undertaken without a survey or title search, such as the installation of equipment in existing buildings.

4.99 We have concluded that the new Act should include a mistaken improver provision that is broad enough to encompass both mistakes as to the identity of the land and mistakes as to the title to the land. 'Improvement' would be defined for the purposes of the provision as a fixture. This will limit the application of the Act to instances where the operation of the doctrine of fixtures has created the underlying problem.

LIMITATION PERIOD

4.100 Usually where a person has a right to bring an action in court, the right must be exercised within a limited time. If a mistaken improver relief provision is introduced, a limitation period should be set for it.

4.101 The effect of the mistaken improver provision is to relieve against the operation of the fixtures rule, allowing the improver to recover chattels which have become attached to someone else's land. Apart from the effect of the fixtures rule, the improver would have an action in detinue against the landowner. An action in detinue arises where a person has lawfully acquired possession of goods but has wrongfully refused the plaintiff's lawful request to return them.[94]

4.102 Sometimes it is unclear whether the chattel has become a fixture or not, since there is no single test and much depends on the facts of each case.[95] In doubtful cases it is likely that an application for relief under the provision will be brought in conjunction with an action in detinue, so that the court can grant relief whether the chattel is found to have become a fixture or not.

4.103 Since the limitation period for an action in detinue is six years, it would be consistent to provide the same limitation period for an application under the relief provision.[96]

JURISDICTION

4.104 In our Consultation Paper we asked: if a mistaken improver provision is introduced, which court or courts or VCAT should have jurisdiction? The views of the Law Institute of Victoria on this question were the same as for the building encroachment relief provision as discussed above.

4.105 Cases of mistaken improvement already come before the courts under other types of action. For example, a contractor may sue in detinue for return of chattels used to make an improvement, or a landowner may sue in trespass for damages or in conversion for the return of objects removed from the land. There could also be related proceedings in contract or negligence against third parties, or a claim by a third party who holds a personal property security in chattels that were used to make the improvement.[97]

4.106 Since there may be multiple claims involving different areas of law, we recommend that the mistaken improver relief provision should be exercised by courts rather than VCAT. The courts have broader jurisdiction to determine any related proceedings in tort, contract and equity, and under the *Personal Property Securities Act 2009* (Cth).[98] The new relief provision will complement the existing jurisdiction of the courts, by giving them power to make an order that is just and equitable in the circumstances even if the mistaken improvement is a fixture.

4.107 In relation to the Magistrates' Court, we refer to our comments at paragraph 4.74 in relation to the building encroachment relief provision. We recommend that the three courts should have concurrent jurisdiction under the relief provision.

RECOMMENDATIONS

23. The new Property Law Act should empower the Supreme Court, the County Court and the Magistrates' Court to grant discretionary relief where a person has made a lasting improvement upon land owned by another in the genuine but mistaken belief that the land is:
    (a) the person's property, or
    (b) the property of a person on whose behalf the improvement was made or was intended to be made.
24. An improvement for the purpose of mistaken improver relief should be defined as a fixture on land.
25. An application for mistaken improver relief should be able to be made by:
    (a) a person by whom or on behalf of whom the improvement was made (the 'mistaken improver')
    (b) a person who has an estate or interest in the land or part of it on which the improvement or part of it has been made
    (c) a person upon whose land the improvement was intended to be made, or the person's successor in title, mortgagee or lessee, or
    (d) a person claiming to be a party to or to be entitled to any benefit under any mortgage, lease, easement, contract or other instrument relating to the subject land on which the improvement was intended to be made.
26. The applicant for mistaken improver relief should be required to give notice of the application to any person who has an interest in the subject land or who is likely to be affected by an order that the court may make.
27. In exercising its discretion under the mistaken improver relief provision, the court should have power to grant or refuse relief as it sees fit and be able to consider:
    (a) the situation and value of the subject land, and the nature and extent of the improvement
    (b) the character of the improvement and the purposes to which it may be used
    (c) the loss and damage which would likely be incurred by the mistaken improver if he or she were required to remove the improvement
    (d) the circumstances in which the improvement was made.

94 *John F Goulding Pty Ltd v Victorian Railway Cmrs* [1932] VLR 408.

95 *National Australia Bank Ltd v Blacker* [2000] FCA 1458 [15]–[16] (Conti J): see Bradbrook (2007), above n 47, [16.15]

96 See *Limitation of Actions Act 1958* (Vic) ss 5(1)(a).

97 The *Chattel Securities Act 1987* (Vic) s 6(1) modifies the operation of the fixtures rule. The provision is retained pending a review of the interaction of the *Personal Property Securities Act 2009* (Cth) and the fixtures rule.

98 There is currently a constitutional question as to whether a tribunal which is not a court for purposes of Chapter III of the Australian Constitution can exercise jurisdiction under Commonwealth law: *Trust Company of Australia Ltd v Skiwing Pty Ltd* [2006] NSWCA 185; Duncan Kerr, 'State Tribunals and Chapter III of the Australian Constitution' (2007) 31 *Melbourne University Law Review* 622; Geoffrey Kennett, 'Fault Lines in the Autochthoonous Expedient: The Problem of State Tribunals' (2009) 20 *Public Law Review* 152.

Chapter 4

Land Identification, Boundaries and Encroachment

RECOMMENDATIONS

28. On an application for mistaken improver relief the court should have power to make such order as is just and equitable, and should be able to make one or more of the following orders:
    (a) that a specified person is vested with the whole or any part of the land on which the improvement or any part of the improvement has been made, either with or without any surrounding or adjacent or other land
    (b) that a specified person shall or may remove the improvement or any part of it from the land or any part of it
    (c) that a specified person pay compensation to any other person in respect of any land or part of it, any improvement or part of it, or any loss or damage caused or likely to be caused by the improvement or any order that the court proposed to make
    (d) that any person specified in the order have or give possession of the land or part of it or the improvement or part of it for the period and on the terms that the court specifies.
29. The court should have power under the mistaken improver relief provisions to make orders as follows:
    (a) upon and subject to such terms and conditions as the court thinks fit, whether as to payment by any person of any sum or sums of money including costs or the execution by any person of any mortgage, lease, easement, contract or other instrument, or otherwise
    (b) declaring any estate or interest in the land or any part of the land on which the improvement has been made to be free of any mortgage, lease, easement or other encumbrance, or varying, to such an extent as may be necessary in the circumstances, any mortgage, lease, easement, contract, or other instrument affecting or relating to such land or any part of the land
    (c) ordering any person to produce to any person specified in the order any title deed or other instrument or document relating to any land
    (d) directing a survey to be made of any land and a plan of survey to be prepared.
30. The *Transfer of Land Act 1958* should be amended to provide that, where a vesting order is made on an application for mistaken improver relief and is lodged at the office of the Registrar, the Registrar is required to make all entries on the folios of the affected lots necessary to give effect to the order.
31. The limitation period for bringing actions for relief under the mistaken improver provision should be the same as for an action in detinue.

Chapter 5

Reform of Legal Estates and Trusts of Land

CONTENTS

Chapter 5 Reform of Legal Estates and Trusts of Land

OVERVIEW OF RECOMMENDED REFORMS

5.1 In this Chapter we recommend reducing the types of legal estates that may be created in freehold land and abolishing legal life estates and legal future interests. This is an overdue reform that has been successfully achieved in several other Australian and overseas jurisdictions.[1]

5.2 A consequence of the reduction in legal estates is that a settlement which creates successive estates in land (such as a life estate followed by a remainder) will require the creation of a trust. Victoria has two sets of provisions regulating trusts: the *Settled Land Act 1958* (Settled Land Act), and the trust for sale provisions in sections 31–40 of the *Property Law Act 1958* (Property Law Act). Originally, they served different functions, but the difference has eroded. We recommend their replacement with new provisions for a more flexible statutory trust.

5.3 The introduction of the single statutory trust will affect legislation other than the Property Law Act. Effective implementation will require review of the Settled Land Act, the *Administration and Probate Act 1958* (Administration and Probate Act) and the *Trustee Act 1958* (Trustee Act).

REDUCTION OF LEGAL ESTATES IN FREEHOLD LAND

5.4 The concept of freehold land originates from the old English system of land holding known as the doctrine of tenure, a form of which Australia has inherited.[2] 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.

5.5 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)
- modified fee simple (modified fee).

5.6 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'.[3]

5.7 It is important to note that native title stands outside the principle of tenure and the scheme of estates. At the time the Crown acquired sovereignty, the aboriginal peoples of Victoria enjoyed rights to land under their own legal system. In *Mabo v Queensland [No 2]*,[4] the High Court held that native title rights are recognised by the common law but are not part of it. The nature and content of those rights are defined by the aboriginal laws and customs. The *Native Title Act 1993* (Cth) recognises, protects and enforces native title under Commonwealth law. Our recommendation for reduction of legal estates does not in any way affect native title or aboriginal title as defined in the *Traditional Owner Settlement Act 2010*.

IMPETUS FOR REFORM

5.8 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. 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.[5]

5.9 Victoria had the opportunity to make these 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.

5.10 One of the English reforms that Victoria did not adopt was the reduction of legal estates to just two; the fee simple absolute in possession and the term of years absolute. 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.

5.11 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. According to Wallace, Cussen's reasons for rejecting the simplification of estates was in line with the prevailing view in Australia at the time that the system of conveyancing would be better simplified by extending and improving the system of registered title.[6]

5.12 In recent years, the number of legal estates has been reduced in Queensland and the Northern Territory.[7] Internationally, this issue has been the subject of recent reform in Ireland and New Zealand, and reform proposals in various other jurisdictions including Northern Ireland and Ontario.[8]

5.13 In our Consultation Paper, we proposed that Victoria should now reduce the number of legal estates to 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.[9]

5.14 The reduction of estates will simplify conveyancing by removing the need to retain the 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

5.15 The life estate is an estate in land limited in duration to the life of the grantee or for the life of another person.[10] The holder of a life estate is known as the 'life tenant'.

5.16 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).

5.17 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 give a right to 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 vested interest in remainder until A's death.
- Contingent interests exist where there is an element of uncertainty as to when and in whom they will vest, 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 a vested interest unless and until he marries C. The marriage to C operates as a condition precedent to the interest vesting in B.

1 See discussion at [5.8]–[5.14] below.

2 See Adrian Bradbrook et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) [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.

3 Ibid [2.135]. 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 (see *Transfer of Land Statute Amendment Act 1885* (Vic)); Part VI of the Property Law Act still applies to any fee tail estate created before 1886 that may still exist. The recommended amendments to Part VI are discussed in Chapter 6.

4 (1992) 175 CLR 1.

5 Jude Wallace, *Review of the Victorian Property Law Act 1958* (1984) 30.

6 Jude Wallace, 'Property Law Reform in Australia' (1987) 61 *Australian Law Journal* 174, 177.

7 *Property Law Act 1974* (Qld) s 19; *Law of Property Act 2000 No. 1* (NT) s 18.

8 *Land and Conveyancing Law Reform Act 2009* (Ir); *Property Law Act 2007* (NZ); Northern Ireland Law Commission, *Land Law Consultation Paper* No 2 (2009); Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (1996).

9 This proposal is based upon reforms already enacted in Queensland, the Northern Territory, New Zealand, England and Wales and Ireland: *Property Law Act 1974* (Qld) s 19; *Law of Property Act 2000 No. 1* (NT) s 18; *Property Law Act 2007* (NZ) s 58; *Law of Property Act 1925* (Eng) s 1; *Land and Conveyancing Law Reform Act 2009* (Ir) s 11.

10 The latter type is known as an 'estate *pur autre vie*'.

Chapter 5 Reform of Legal Estates and Trusts of Land

5.18 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.[11] The difficulties associated with the Settled Land Act are discussed in further detail later in this Chapter.

5.19 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 which are created at equity, under a trust. As the land remains vested in the trustees continuously, there is no gap in ownership.[12]

5.20 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.[13]

REFORM IN OTHER JURISDICTIONS

5.21 The scope of reform of this area varies throughout different jurisdictions. Some Australian jurisdictions, including Victoria, have adopted 'remedial legislation'[14] to modify the common law contingent remainder rules.[15] Others have taken the further step of abolishing legal future interests and the contingent remainder rules altogether.

5.22 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.[16] This reflects the 1925 English reforms.[17] Similar reforms have been enacted in the Northern Territory, Ireland and Manitoba,[18] and recommended by law reform commissions in Northern Ireland and Ontario.[19]

PROPOSAL FOR REDUCTION OF LEGAL ESTATES IN VICTORIA

5.23 In our Consultation Paper, we asked whether it should remain possible to create legal life estates and legal future interests. We proposed that successive interests in land should be able to be created only in equity, as beneficial interests under a trust.[20] This proposal 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.

5.24 The proposal is integrally linked with our proposal to introduce a single statutory trust to replace both the Settled Land Act and the trust for sale provisions in the Property Law Act.[21]

5.25 We have received general support from consultees for the proposed reduction of legal estates.[22] One submission confirmed that 'life estates and the like, as a matter of conveyancing practice are invariably dealt with in equity'.[23]

5.26 The support of consultees is qualified to the extent that it is subject to the review and future resolution of one or more issues. The main issue is the protection of holders of unregistered interests, detailed discussion of which is set out in Chapter 8. The other issues raised are: loss of the ability of a tenant for life to use his or her legal life interest as security for borrowing; and the impact of the proposed reforms on Victoria's land tax and estate planning regimes. The position of existing life interests and future interests has also been queried. These issues are discussed in the following paragraphs.

LOSS OF ABILITY TO GRANT A MORTGAGE

5.27 In our Consultation Paper we recognised that there could be some advantage in retaining the current provision for legal life estates, as a life tenant's registered title could potentially be used 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.

5.28 This concern was originally raised in consultations with a committee of property experts. The same concern has also been expressed in a submission from Associate Professor Tehan and colleagues at Melbourne Law School.[24] In our consultations we endeavoured to establish whether lending institutions are in fact accepting a legal life estate as security for loans.

5.29 We consulted with Mr Macnamara, an experienced legal practitioner, who has a history of working with lending institutions. He commented that he had not come across this practice in his experience. We also contacted Perpetual and asked them whether they have any experience of this practice.[25] Perpetual commented that they have not experienced financial institutions lending to life tenants using the life estate as security.

5.30 We consider that the reasoning in our Consultation Paper still applies. The impairment of the life tenant's statutory power to mortgage the land does not appear to 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.[26] If the life interest is created by a statutory trust as we recommend later in this Chapter, it will be open to the settlor to confer powers on the trustees to raise funds by loan for broader purposes.[27]

LAND TAX AND ESTATE PLANNING

5.31 In his submission, Professor Glover expressed concern about the impact of our proposal on Victoria's land tax regime in the context of the *Land Tax Act 2005* (Land Tax Act).[28] He submitted that life interests are increasingly used in estate planning for tax minimisation and that, if their creation is permitted only in equity, this will attract the general land tax surcharge on trusts contained within Part 3 of Schedule 1 to the Land Tax Act.[29] The trust surcharge is discussed later in this Chapter in the context of trusts of land.

5.32 We have reviewed the legislation and have consulted with the State Revenue Office (SRO) in order to establish the tax treatment of life estates. Under the Land Tax Act, the 'owner' of the land is liable for land tax.[30] Section 11 of the Act deems a life tenant in possession to be the owner of the land. The deemed owner pays the general rate of land tax and not the surcharge. The SRO have expressed the view that the deeming provision operates whether the life estate is legal or beneficial and held under a trust.

5.33 We consider that this answers Professor Glover's concerns on this point.

5.34 Professor Glover also submitted that life interests are still used in estate planning as a '(lawful) species of avoidance'.[31] Life interests of a testator are not separately valued by the court in making an order under the Family Provision sections in Part 4 of the Administration and Probate Act.[32]

5.35 We do not consider this a sufficient reason to retain legal life estates, nor does it appear to be in keeping with current taxation or inheritance policy.

11 Richard Eggleston, 'Some Suggestions for Law Reform' (1949) 23 *Australian Law Journal* 222.

12 The creation of future interests both legal and equitable are still, however, 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.

13 This would also allow the repeal of sections 191–193 of the *Property Law Act 1958*, as they would have no application to future interests created under a trust mechanism.

14 Queensland Law Reform Commission, *Report on a Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing* 16 (1973) 25.

15 *Property Law Act 1958* (Vic) ss 191–193; *Conveyancing Act 1919* (NSW) s 16; *Property Law Act 1969* (WA) s 26; *Law of Property Act 1936* (SA) s 25.

16 *Property Law Act 1974* (Qld) s 30.

17 *Law of Property Act 1925* (Eng) s 4(1).

18 *Law of Property Act 2000 No. 1* (NT) s 30; *Land and Conveyancing Law Reform Act 2009* (Ir) ss 15, 16; *The Perpetuities and Accumulations Act 1983* (Manitoba) s 4(1).

19 Northern Ireland Law Commission (2009), above n 8; Ontario Law Reform Commission (1996), above n 8.

20 Victorian Law Reform Commission, *Review of the Property Law Act 1958 Consultation Paper* (2010) [3.19].

21 See discussion in Chapter 4 Ibid. These recommendations are discussed later in this Chapter. In their submission, the Law Institute of Victoria express the need to comprehensively consider the reduction of legal estates in conjunction with review/ repeal of the *Settled Land Act 1958* (Vic): Law Institute of Victoria, Submission 13,9.

22 Associate Professor Maureen Tehan et al, Submission 9, 11; Mr Michael Macnamara Submission 2, 2; Law Institute of Victoria, Submission 13, 9; Land Victoria, Submission 18, 4.

23 Mr Michael Macnamara Submission 2, 2.

24 Associate Professor Maureen Tehan et al, Submission 9, 12.

25 Perpetual Legal, Perpetual. Perpetual (formerly Perpetual Trustees) is an Australian company which provides investment and trustee services in wealth management.

26 *Settled Land Act 1958* (Vic) s 71.

27 *Settled Land Act 1958* (Vic) s 109.

28 Professor John Glover, Submission 1.

29 Professor John Glover, Submission 1, 2.

30 *Land Tax Act 2005* (Vic) s 8.

31 Professor John Glover, Submission 1, 2.

32 *Administration and Probate Act 1958* (Vic) s 97(2).

Chapter 5 Reform of Legal Estates and Trusts of Land

PROSPECTIVE APPLICATION

5.36 Some consultees have queried how existing legal life estates and legal future interests will be affected by our reform proposals.

5.37 Associate Professor Tehan and colleagues have submitted that, although they favour the reduction of legal estates, 'reform should not unfairly prejudice the rights of current holders of life estates and future interests'.[33]

5.38 Land Victoria also generally supported the simplification of legal estates, but queried how existing life interests and remainders which are currently on the register will be dealt with if future interests are to be abolished.[34]

5.39 Our proposal anticipates prospective application to the creation of life interests and future interests from the commencement of the new Property Law Act. These new interests will be created in equity. Legal life interests and future interests created before commencement will continue to exist as legal interests.

PROTECTION OF BENEFICIARIES OF TRUSTS OF REGISTERED LAND

5.40 In our Consultation Paper, we noted 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. In their submission, Associate Professor Tehan and colleagues submitted that reform regarding the reduction of legal estates and the introduction of a single statutory trust of land 'should be considered alongside the possibility of an amendment to the Transfer of Land Act to ensure that equitable interests are afforded greater protection'. They also submitted that 'consideration be given to the possibility of repealing s 37 of the Transfer of Land Act, in order that beneficial interests under a trust be registrable under s 42(1)'.[35]

5.41 The protection for the interests of beneficiaries of trusts is an issue of wider application, which lies outside our present terms of reference. We include it in our list of issues for further review in Chapter 8, but we do not think the recommendations in this Chapter depend upon the outcome of such a review.

MODIFIED FEES

5.42 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).

5.43 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'.[36]

5.44 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'.[37]

5.45 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.[38] A conditional fee, being a fee simple subject to a right of entry or re-entry, does not fall within the definition of 'settlement',[39] and therefore does not attract the Settled Land Act.

MODIFIED FEES IN LAW AND EQUITY

5.46 In Victoria, both kinds of modified 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.

5.47 In our Consultation Paper, we asked whether determinable and conditional fees should only be created in equity. We discussed the following options:

- recognise modified fee simples alongside the fee simple absolute, or
- permit the creation of modified fees in equity only.

5.48 In recent land law reform, Ireland has recognised modified fee simples alongside the fee simple absolute.[40] The view of the Irish Law Reform Commission was that conditional and determinable fees generally do not create a clear succession of interests.[41] 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'.[42] 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.

5.49 The option of permitting creation of modified fees only in equity, would allow this class of interests to be brought within the proposed statutory trust (discussed later in this Chapter), 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.[43]

5.50 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'.[44]

5.51 The English position distinguishes between determinable and conditional fees. Determinable fees can be created only at equity, while conditional fees can exist both in law and equity.

DISTINGUISHING BETWEEN DETERMINABLE FEES AND CONDITIONAL FEES

5.52 In our Consultation Paper we also discussed the distinctions between a determinable fee and a conditional fee. The two estates are very similar but to confuse them in drafting a grant has important consequences.

5.53 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.

5.54 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:[45]

> *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.*

33 Associate Professor Maureen Tehan et al, Submission 9, 11.

34 Land Victoria, Submission 18, 4.

35 Associate Professor Maureen Tehan et al, Submission 9, 15.

36 Bruce Ziff, *Principles of Property Law* (Thomson Carswell, 4th ed, 2006) 223.

37 Ibid 222.

38 *Settled Land Act 1958* (Vic) s 8(1)(b)(iii).

39 *Settled Land Act 1958* (Vic) s 8(1); E Wolstenholme, *Wolstenholme and Cherry's Conveyancing Statutes* (Oyez, 13th ed, 1972) 23.

40 *Land and Conveyancing Law Reform Act 2009* (Ir) s 11(2).

41 Law Reform Commission [Ireland], *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* CP No 34 (2004) 43.

42 Law Reform Commission [Ireland], *Report on Reform and Modernisation of Land Law and Conveyancing Law* No 75 (2005) 47.

43 Ontario Law Reform Commission (1996), above n 8, 54.

44 Wallace (1984), above n 5, 36.

45 Ontario Law Reform Commission (1996), above n 8, 63, citing Professor Glanville Williams, *Language and the Law* (1945) 61 L Q Rev. 71, 79.

5.55 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.[46]

5.56 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.[47] This is a possible option for the treatment of modified fees in Victorian property law.

PROPOSAL TO CONVERT DETERMINABLE FEES TO CONDITIONAL FEES

5.57 In our Consultation Paper, we proposed 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.

5.58 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.

SUBMISSIONS

5.59 We asked consultees whether determinable and conditional fees should be created only in equity and, following on from our discussion of the invalidity issue above, whether determinable fees should be converted to conditional fees. Only two submissions addressed these issues.[48]

5.60 The Law Institute of Victoria agreed with our proposals. Mr Macnamara supported our proposal that determinable and conditional fees should be created only in equity but did not support our proposal regarding conversion of determinable fees to conditional fees. He submitted that 'the determinable fee has generally fared better then the conditional fee' on the basis that the determining event is automatic.[49]

5.61 We consider that the consequences of confusing the two estates in the drafting of grants, and the fact that the right of re-entry is a positive right which can be exercised by a defined person to terminate a prior interest, are strong arguments for preferring conditional fees.

5.62 Mr Macnamara also queried the consistency of our proposal with the rule against perpetuities. Although at common law the rule against perpetuities does not apply to determinable fees,[50] the *Perpetuities and Accumulations Act 1968* has modified this position.[51] Under that Act, the possibility of reverter on the determination of a determinable fee simple is now also subject to the rule against perpetuities. The legislation provides that if the determining event does not happen within the perpetuity period or the right of entry for condition broken is not exercised within this time, then the determinable or conditional fee continues as a fee simple absolute free from any determining event or condition respectively.

5.63 As conditional and determinable fees are treated alike under the perpetuity provisions, determinable fees no longer enjoy any advantage under the perpetuities rule.

RECOMMENDATIONS

32. From the commencement of the new Property Law Act, legal life estates and legal future interests should be capable of creation only in equity as beneficial interests under a trust.
33. From the commencement of the new Property Law Act, the number of legal estates should be reduced to two: the fee simple estate and the leasehold estate. The fee simple estate can be absolute or conditional. These should be the only estates that are registrable under the *Transfer of Land Act 1958*.
34. From the commencement of the new Property Law Act, the creation of a determinable fee should operate to create a conditional fee.
35. Successive interests in land should be capable of creation only in equity, as beneficial interests under a trust. (See recommendations 36 and 37.)

TRUSTS OF LAND

THE DUAL TRUST SCHEME

5.64 The trust for sale provisions in the Property Law Act,[52] in conjunction with the Settled Land Act, constitute a dual scheme of trusts for dispositions of land in Victoria. In our Consultation Paper we proposed replacing this dual scheme with a single, unified and more flexible statutory trust.

5.65 This, together with the reduction in legal estates, are major reforms and our review of the trust for sale provisions requires discussion of the operation of the Settled Land Act. We acknowledge that, as the Settled Land Act is beyond the scope of the present reference, our recommendations are for future reform.

SETTLED LAND ACT

5.66 A settlement in relation to land is created when a deed, will or other instrument provides that land is 'limited'[53] to or in trust for any persons in succession.[54] 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'.

5.67 Historically, settlements operated as a way to keep land within families for successive generations. 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.

5.68 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.[55]

5.69 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.[56]

46 Ontario Law Reform Commission (1996), above n 8.

47 Ibid 64.

48 Mr Michael Macnamara, Submission 2, 2; Law Institute of Victoria, Submission 13, 9.

49 Mr Michael Macnamara, Submission 2, 2.

50 At common law the possibility of reverter which arises in the case of a determinable fee is an exception to the rule against perpetuities whereas the right of entry for condition broken in the case of a conditional fee is not. The application of the rule against perpetuities to 'rights of entry for condition broken attached to a fee simple estate' is established in English case law which has been approved and applied in Victoria; Bradbrook (2007), above n 2, [11.210]–[11.220]; *Re Smith (decd)* [1976] VR 341.

51 *Perpetuities and Accumulations Act 1968* (Vic) s 16(1), (3).

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

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

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

55 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.

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

Chapter 5 Reform of Legal Estates and Trusts of Land

DIFFICULTIES WITH THE SETTLED LAND ACT

5.70 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 Settled Land Act are also reported in many other common law jurisdictions.

5.71 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.[57] The provisions dealing with investments of capital monies and the power to make improvements have been described as 'redolent from another age'.[58] 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'.[59]

5.72 In his submission on this issue, Mr Macnamara described his difficulties in navigating the legislation in trying to establish practical issues in the exercise of a life tenant's power of sale:[60]

> *I found it impossible despite consultation of standard texts … and consultations with the legal branch of the Office of Titles to reach confident conclusions as to the practical issues in the exercise of a life tenant's power of sale under the Settled Land Act. Who should be shown as vendor in the contract of sale? Who should execute the transfer of land when according to the register under the Transfer of Land Act the legal estate is vested in the trustee and not in the life tenant or tenants?*

5.73 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.

5.74 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.[61]

TRUST FOR SALE

5.75 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.

5.76 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.[62] For this reason, equity regarded the trust for sale as a trust of personal property rather than land.

5.77 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.

5.78 In Victoria, the trust for sale is defined in both the Property Law Act and the Settled Land Act in the following terms:[63]

> *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.*

5.79 A power to postpone the sale is implied into every trust for sale unless the contrary intention appears.[64] The distinctiveness of a trust for sale is further muddied 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'[65] and gives the trustees 'an uncontrolled discretion whether to sell or not'.[66]

REFORM OF THE DUAL TRUST SCHEME

5.80 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. Settlors 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.[67] 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)[68] or by obtaining an order of the court.[69]

5.81 In their submission, State Trustees agreed with our view that 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 for both settlors and some legal practitioners. In their experience of administering testamentary trusts, they stated that 'it is often unclear whether the creation of a trust with a mere power to sell was inadvertent or intentional'.[70]

5.82 State Trustees specifically commented as follows on administering trusts with a mere power of sale:[71]

> *In our experience, the difficulty in administering trusts with a mere power of sale arises where the trust is a 'dry' trust i.e. one with no available funds to cover repairs and outgoings, and where the life tenant is obliged under the instrument of trust to effect repairs and refuses to do so. Where the property deteriorates and falls into disrepair, the trustee has no power to force the life tenant to repair and cannot sell the property without an order from the Court. Similarly, where the trustee has an obligation under a trust instrument to effect repairs, insure or pay other outgoings, but has no access to funds, the trustee has no power to sell the property, even where it has fallen into disrepair, without an order from the Court.*

5.83 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.[72]

5.84 The law should make equivalent provision for those not so well advised. In the words of the Ontario Law Reform Commission:[73]

> *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 draftsperson had devised the transaction. This point favours therefore the application of a trust even where the settlor has not so provided.*

57 Eggleston (1949), above n 11.
58 Simon Gannon, 'Unsettling Repercussions' (2010) *Law Institute Journal* 31, 33.
59 Eggleston (1949), above n 11, 226.
60 Mr Michael Macnamara, Submission 2, 2.
61 Gannon (2010), above n 58.
62 Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2009) 217–219.
63 *Property Law Act 1958* (Vic) s 18; *Settled Land Act 1958* (Vic) s 3.
64 *Property Law Act 1958* (Vic) s 32(1).
65 Wikramanayake, *Voumard: The Sale of Land in Victoria* (Lawbook Co 1986), 187.
66 Ibid.
67 Brian Harvey, *Settlement of Land* (Sweet and Maxwell,1973).
68 *Settled Land Act 1958* (Vic) s 93(a).
69 *Settled Land Act 1958* (Vic) s 38.
70 State Trustees, Submission 16, 1.
71 State Trustees, Submission 16, 1.
72 Ontario Law Reform Commission (1996), above n 8, 44.
73 Ibid.

Reform of Legal Estates and Trusts of Land

5.85 State Trustees have supported this view. They believe that the introduction of a single statutory trust 'with provisions that confer on trustees specific powers to deal with trust property, may go some way to resolving this issue'.[74]

5.86 In our Consultation Paper we proposed that substantial simplification of property law could be achieved if all settlements involving successive interests 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.

5.87 We considered the reform options for replacing the Settled Land Act, and noted that any replacement legislation would need to be flexible enough to encompass all the different types of 'settlements' to which the Settled Land Act applies.

5.88 We reviewed previous reform discussions in Victoria,[75] other Australian jurisdictions,[76] and legislative initiatives internationally,[77] and identified four feasible options for reform. These options were:[78]

- amend the Settled Land Act
- repeal the Settled Land Act and replace it with a statutory holding trust for 'settlements'
- repeal the Settled Land Act and replace it with a dual scheme of statutory holding trust and trust for sale mechanisms, or
- replace both the Settled Land Act and the trust for sale provisions with a single statutory trust.

5.89 We asked consultees whether all 'settlements' as defined in the Settled Land Act should be held under a single statutory trust.[79] The response was positive and the fourth option was preferred in all submissions which addressed the issue.[80]

5.90 The fourth option presents a simpler, more flexible approach. 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.

PROSPECTIVE APPLICATION

5.91 Land Victoria supported the simplification of trusts of land, but says that 'consideration should be given to what will happen to those trusts already in existence, some of which are reflected in the Register'.[81]

5.92 State Trustees submitted that consideration should be given to a retrospective approach, providing trustees with the power to bring current settlements under the new legislation.

5.93 Our proposal anticipates prospective application and would apply to interests created after the commencement of the new Act. The trusts currently subsisting would not be affected. This is reflected in our recommendation. Any provision for bringing existing settlements under the new regime voluntarily would need to be considered in future discussions and consultations on the detailed characteristics and operation of the single statutory trust.

LAND TAX ACT 2005

5.94 In conjunction with his concerns regarding the abolition of legal life estates, Professor Glover submitted that the 'abolition of successive interests in property, in this jurisdiction, is mismatched with the Land Tax regime applicable to land-holding trusts'.[82] He expressed the view that a regime of land holding trusts may attract the general land tax surcharge on trusts.[83] Professor Glover submitted that this surcharge was designed to discourage the use of trusts for holding land.[84]

5.95 We consider that the operation of section 46 of the Land Tax Act mitigates Professor Glover's concerns. Where a trust is a fixed trust and beneficial interests are reported to the Commissioner of State Revenue, section 46B removes the trusts surcharge and calculates tax as if the beneficiary owned the land. The SRO has expressed the view that the new single statutory trust would most likely be regarded as a fixed trust for the purposes of the legislation. Such a trust would benefit from section 46B provided the trust and beneficial interests are reported and the beneficiary occupies the land as their principal place of residence.[85]

5.96 The interplay between the proposed new single statutory trust and the applicable tax regime is an issue which will require detailed discussion in any future review of this area.

DETAILS OF A SINGLE STATUTORY TRUST SCHEME

5.97 In our Consultation Paper, we noted that further discussion and consultation will be needed on the specific content of a new single statutory trust regime. This requirement for further detailed review of has been supported by consultees.[86]

5.98 We discussed different models of single statutory trusts in other jusrisdictions. There are variations within the single statutory trust models adopted in these 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.[87]

5.99 In Ireland the model is incorporated in property legislation. In England there is a stand-alone statute. A different approach has been taken in Queensland and Western Australia. In these jurisdictions the settled land legislation has been repealed and settled land has been incorporated into general trustee legislation. In Victoria, the statutory trust provisions could be incorporated into the Property Law Act or alternatively into the Trustee Act.

5.100 In the Western Australian model, contained in the *Trustees Act 1962*, the term 'trust for sale' and its distinction from a trust with a power to sell has been preserved to some extent.[88] The powers conferred by the Western Australian legislation only apply insofar as there is no contrary intention in the terms of the instrument creating the trust, and are subject to that instrument.[89]

5.101 In their submission, State Trustees supported this approach and submitted that 'legislation should also specify that some or all of a trustee's statutory powers apply unless the instrument of trust expressly provides otherwise'.

5.102 The Law Institute of Victoria expressed a preference for the Western Australian model 'as it preserves the term "trust for sale" and the powers conferred by the relevant Act only apply to the extent there is no contrary intention to the terms of the instrument creating the trust and are subject to that instrument'.[90]

5.103 There is a range of different options and elements to be considered in the introduction of a single statutory trust scheme in Victoria. The details of a new statutory trust scheme require a further review of provisions in the Property Law Act, the Settled Land Act, the Trustee Act and the Administration and Probate Act.

74 State Trustees, Submission 16, 2.

75 Eggleston (1949), above n 11; Wallace (1984), above n 5, Chapter 4.

76 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.

77 *Land and Conveyancing Law Reform Act 2009* (Ir) Part IV; *Trusts of Land and Appointment of Trustees Act 1996* (Eng).

78 Victorian Law Reform Commission (2010), above n 20, [4.17]–[4.36].

79 Ibid [4.49].

80 Associate Professor Maureen Tehan et al, Submission 9, 16; Mr Michael Macnamara Submission 2, 3; Law Institute of Victoria, Submission 13, 9; Land Victoria, Submission 18, 5.

81 Land Victoria, Submission 18, 5.

82 Professor John Glover, Submission 1, 2.

83 Professor John Glover, Submission 1, 2; *Land Tax Act 2005* (Vic) Schedule 1, Part 3.

84 Professor John Glover, Submission 1, 2.

85 *Land Tax Act 2005* (Vic) s 46A.

86 Mr Michael Macnamara, Submission 2, 2; State Trustees, Submission 16,1; Law Institute of Victoria, Submission 13, 9; Associate Professor Maureen Tehan et al, Submission 9, 16.

87 See discussion at [4.37]–[4.46] of Victorian Law Reform Commission (2010), above n 20.

88 *Trustees Act 1962* (WA).

89 *Trustees Act 1962* (WA) s 5(2).

90 Law Institute of Victoria, Submission 13, 9.

Chapter 5 Reform of Legal Estates and Trusts of Land

MINORS' PROPERTY

5.104 A related issue which we considered in our Consultation Paper is the status of property held by minors. Currently, the Settled Land Act deems all land held by a minor to be a settlement.[91] The statutory powers of dealing with minors' property are conferred on the trustees of the settlement.[92] 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.

5.105 We considered that 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. We asked consultees whether minors' property should be held under the single statutory trust, instead of under the Settled Land Act.

5.106 Where specifically addressed, the responses from consultees supported our proposal to include minors' property under the umbrella of the single statutory trust.[93]

RECOMMENDATIONS

36. All future settlements involving successive interests should be created under a single statutory scheme for a trust of land, replacing both the *Settled Land Act 1958* and the dispositions on trust for sale provisions in Part II Division 1 Subdivision 2 of the *Property Law Act 1958*.

37. All future dispositions of property to minors should be held under the single statutory scheme for a trust of land, instead of under the *Settled Land Act 1958*.

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

92 *Settled Land Act 1958* (Vic) s 26.

93 Mr Michael Macnamara, Submission 2, 3; Law Institute of Victoria, Submission 13, 9; Associate Professor Maureen Tehan et al, Submission 9, 16.

Chapter 6

Amendments to Outdated Provisions

CONTENTS

Chapter 6 Amendments to Outdated Provisions

ESTATES TAIL

6.1 The different legal estates in freehold land that can be created in Victoria are discussed in Chapter 5.[1]

6.2 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.[2] A fee tail estate was used as a method of keeping property in the same family for generations. It is also known as an 'entailed estate'. Whether created by limitation or by trust, an entailed interest is a 'settlement' which attracts the provisions of the *Settled Land Act 1958* (Settled Land Act).[3]

6.3 It has not been possible to create an estate in fee tail in Victoria since 1886.[4] It is not possible to create a fee tail estate in New South Wales, Queensland, the Northern Territory or Western Australia either.[5] These jurisdictions went further than Victoria and converted existing fee tails to fee simple estates.

6.4 Victoria did not take this extra step, and a fee tail created before 1886 can still exist in this State, subject to provisions in Part VI of the *Property Law Act 1958* (Property Law Act) which allow the tenant for life to 'bar the entail' and convert it into a fee simple estate.[6]

6.5 In 1984, Jude Wallace reported that only two entailed estates in registered land were believed to still exist in Victoria.[7] In order to establish if this is still the case, we have consulted with Land Victoria. They have run searches on the Torrens register but are unable to conclude with certainty whether or not any entailed estates currently exist in Victoria. Perpetual, formerly Perpetual Trustees, has advised us that they know of no entailed estates still in existence in Victoria.[8]

SUBMISSIONS

6.6 In our Consultation Paper we asked whether the remaining estates tail should be left to run their course or, alternatively, whether they should be converted by statute to fee simple estates.[9]

6.7 Of the submissions that addressed the issue, Associate Professor Tehan and colleagues wholly supported conversion to fee simple.[10] The Law Institute of Victoria ultimately supported conversion in the context of modernising and simplifying the law, though they observed that it is not unreasonable to maintain the status quo.[11] Mr Macnamara submitted that, as the extent of the continued existence of estates tail is unknown, the precise effect of the conversion cannot be known.[12]

6.8 We believe that the introduction of a conversion scheme with the limited savings provisions already found in other Australian jurisdictions will address any concerns about the possible adverse effects of converting any existing fee tails.

6.9 Implementing our recommendation will close off extensive transitional arrangements in Part VI which have been in force since the creation of fee tail estates was abolished 125 years ago.

BARRING THE ENTAIL

6.10 To explain the implications of converting existing estates tail to fee simple estates, we first need to give a brief history and explanation of 'barring the entail'.

6.11 The practice of 'barring the entail' has the effect of converting the fee tail to a fee simple and eliminating the interests of successors in tail and the interests of the 'remainderman' and 'reversioner'.[13] The rights of these parties are at the centre of this discussion, as they are the potential beneficiaries of vested future interests.[14]

6.12 Historically, the execution of a 'disentailing assurance' had the effect of barring the entail.[15] There were situations when a lesser interest known as a 'base fee' resulted from barring the entail.[16] The resulting 'base fee' barred the interests of the successors in tail but not the interests of the remainderman and reversioner.[17]

6.13 In the above circumstances, there is still a possibility of an heir ('possibility of issue') to stop the reversion or remainder interests from becoming vested interests. This is because a 'base fee' is an estate which continues 'for so long as the entail would have continued had it not been barred'[18] that is, for so long as the possibility of issue existed. Once the grantee and all issue are dead, the estate reverts to the grantor.[19]

6.14 The problem with automatic conversion of the estate tail to a fee simple estate arises where you have a tenant in tail and there is no possibility of an heir to inherit the estate. This state of affairs is called 'after possibility of issue extinct'. Here, the tenant in tail only has a life estate and cannot bar the entail. In these circumstances, the interests of the remainderman and reversioner are vested future interests which are 'no longer liable to be divested by a disentailing assurance'.[20] Thus any automatic conversion has the effect of depriving the remainderman and the reversioner of their vested interests.

1 See [5.5]–[5.6].

2 For example: 'to A and the heirs of his body'. Section 249 of the *Property Law Act 1958* (Vic) states that if such an estate is created, it is deemed to give the grantee an estate in fee simple.

3 *Settled Land Act 1958* s 8(1)(b)(i); see discussion in Chapter 5. Historically, the use of the fee tail estate was never common in Australia owing to different economic and social circumstances. Some commentators consider that 'the continued recognition of the fee tail estate in some States seems only to reflect a perverse legislative desire not to interfere with antiquities': Adrian Bradbrook et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 51, 477.

4 *Transfer of Land Statute Amendment Act 1885* (Vic).

5 *Conveyancing Act 1919* (NSW) s 19; *Property Law Act 1974* (Qld) s 22; *Law of Property Act 2000* (NT) s 22; *Property Law Act 1969* (WA) s 23.

6 *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: Stanley Robinson, *Property Law Act (Victoria)* (Lawbook Co, 1992) 492. This view is not however supported by other academic texts or Jude Wallace: Bradbrook (2007), above n 3, 52; Brendan Edgeworth, *Sackville & Neave Australian Property Law* (LexisNexis Butterworth, 2008) [3.14]; Jude Wallace, *Review of the Victorian Property Law Act 1958* (1984) 316.

7 Wallace (1984), Ibid. There is a remote possibility that an unbarred entailed estate created prior to 1886 still exists, hence the continued existence of the provisions in Part VI of the *Property Law Act 1958* (Vic).

8 Perpetual Legal, Perpetual. Perpetual is an Australian company which provides investment and trustee services in wealth management.

9 Victorian Law Reform Commission *Review of the Property Law Act 1958* Consultation Paper (2010) [3.52]–[3.58].

10 Associate Professor Maureen Tehan et al, Submission 9, 15.

11 Law Institute of Victoria, Submission13, 9.

12 Mr Michael Macnamara, Submission 2, 2.

13 Northern Ireland Law Commission, *Land Law Consultation Paper* No 2 (2009) 53–55.

14 Vested future 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. See discussion of legal future interests in Chapter 5.

15 Traditionally, the tenant in tail 'barred the entail' through the use of the 'common recovery' or the 'fine'. These methods were put on a statutory footing in the *Fines and Recoveries Act 1833* (Eng) under which a tenant barred the entail on the execution of a 'disentailing assurance'. For a detailed explanation see C Harpum et al, *Megarry and Wade The Law of Real Property* (Sweet and Maxwell, 7th ed) (2008) [3.070]–[3.078].

16 This was due to the use of the less effective 'fine' as a method used to bar the entail or the failure to obtain required consent to bar the entail from a 'protector'.

17 Northern Ireland Law Commission (2009), above n 13, 53–55.

18 Bradbrook (2007), above n 3, 51.

19 Ibid.

20 Northern Ireland Law Commission (2009), above n 13, 53–55.

Chapter 6 Amendments to Outdated Provisions

CONVERSION PROVISION WITH LIMITED SAVINGS PROVISIONS

6.15 The statutory provisions abolishing the creation of estates tail in Queensland, New South Wales, Western Australia and the Northern Territory also provide for the automatic conversion of existing estates tail to fee simple estates.[21]

6.16 The legislation in these jurisdictions operates to automatically convert the 'base fee' to a fee simple estate as there is still a possibility of issue to stop the reversion or remainder interests from vesting. However, the legislation protects the position of the vested future interests by excluding from the conversion provisions the estate of a tenant in tail where there is no possibility of a succeeding heir (or 'after possibility of issue extinct'). We recommend the adoption of similar provisions in the new Property Law Act.[22]

6.17 If similar statutory provisions are adopted in Victoria, any entailed estates which still exist will be converted to fee simple estates. The only interest remaining to be considered will be the life estate of the last tenant in tail where there is no possibility of issue. We recommend this life estate be dealt with entirely under the Settled Land Act, thereby enabling repeal of the remaining estate tail provisions in the Property Law Act.[23]

6.18 The legislative models adopted in Queensland and Western Australia are preferred to the New South Wales model.[24] In addition to the abolition and conversion provisions, the Queensland legislation preserves the remainder interest in the case of minors' property. We submit that preserving the remainder to a third party in this situation is not in keeping with our complete conversion approach.

RECOMMENDATION

38. All existing estates tail should be converted by statute to fee simple estates. Section 249 should be retained and amended to provide that:

    (a) From the commencement of the new Property Law Act, any person entitled to an estate tail, whether legal or equitable, in any land shall be deemed to be entitled to an estate in fee simple to the exclusion of any estates or interests limited to take effect after the determination or in defeasance of the estate tail and to the exclusion of all estates or interests in reversion on the estate tail.

    (b) In the situation where any minor is entitled to an estate tail and any estate or interest would pass to another person on the death of the minor who has not attained full age and has no issue, the minor should be deemed to take an estate in fee simple.

    (c) The definition of 'estate tail' should include the estate in fee into which an estate tail is converted where the issue in tail is barred but the persons claiming estates by way of remainder are not barred (a 'base fee'), and an estate in fee voidable or determinable by the entry of the issue in tail.

    (d) The definition of 'estate tail' should exclude the estate of a tenant in tail after possibility of issue extinct.

SPECIAL RULES OF INHERITANCE

6.19 Part V of the Property Law Act sets out special rules of inheritance for real property which date from the 19th century.[25] 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.

6.20 These sections have 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.[26] The rules in this part are also discriminatory, in that they favour male lines over female lines of inheritance.

6.21 The Scrutiny of Acts and Regulations Committee of the Victorian Parliament recommended in 2005 that Part V should be repealed.[27] 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.[28]

6.22 The function of Part V 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* (Administration and Probate Act) sets out non-discriminatory rules for distributing the residuary estate of a person who dies intestate in Victoria among the deceased's partner or partners and other relatives. 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[29] and has been adopted in New Zealand.[30]

6.23 Application of the intestacy scheme would be consistent with the rule in the *Wills Act 1997* for construing a disposition by will to a person's issue, without limitation as to remoteness. Section 43 of that Act 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.

6.24 In our Consultation Paper, we proposed 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.

6.25 All submissions that addressed the issue supported the proposal.[31] Mr Macnamara commented 'there seems to be no justification for having two separate and not necessarily congruent regimes for "takers in default"'.[32]

RECOMMENDATION

39. The special rules of inheritance in Part V should be replaced with a provision that, subject to contrary intention, a disposition other than a will which confers 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 1 Division 6 of the *Administration and Probate Act 1958* and in the same shares.

21 *Property Law Act 1974* (Qld) s 22; *Conveyancing Act 1919* (NSW) ss 19, 19A; *Property Law Act 1969* (WA) s 23; *Law of Property Act 2000* (NT) s 22; see also *Land and Conveyancing Law Reform Act 2009* (Ir) s 13.

22 There are still provisions in Part VI of the Property Law Act aside from those dealing with barring the entail: *Property Law Act 1958* (Vic) ss 253–266.These cover administrative issues concerning dealings with the land by the tenant in tail or a bankrupt tenant in tail. There is little to no commentary on these provisions: See Robinson (1992), above n 6, 492. Robinson submits that the passing of the *Imperial Acts Application Act 1980* had the effect of both abolishing the creation of the fee tail as well as converting existing fee tail estates to fee simple estates. He therefore provides no commentary on these sections.

23 In Chapter 5 and recommendation 36, we recommend that the Settled Land Act be replaced with the new single statutory trust provisions so far as future settlements are concerned. Existing settlements would continue to be subject to the Settled Land Act.

24 The New South Wales provisions were amended to deal with deficiencies in the legislation and are a little unwieldy. See comment and discussion in Queensland Law Reform Commission, *Report on a Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing* 16 (1973) 17.

25 *Property Law Act 1958* (Vic) ss 235–247.

26 Wallace (1984), above n 6, 312. Entailed estates are very rare and can no longer be created. They will cease to exist altogether if existing fee tails are converted to fee simple estates, as recommended earlier in this Chapter.

27 This followed an inquiry into discrimination in the law: Scrutiny of Acts and Regulations Committee, *Discrimination in the Law: Inquiry under section 207 of the Equal Opportunity Act 1995—Final Report*, September 2005.

28 Scrutiny of Acts and Regulations Committee, *Discrimination in the Law: Inquiry under section 207 of the Equal Opportunity Act 1995*—Government Response tabled in Parliament on 1 March 2006.

29 Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (1996) Chapter 5.

30 *Property Law Act 2007* (NZ), s 65.

31 Mr Michael Macnamara, Submission 2, 3; Associate Professor Maureen Tehan et al, Submission 9, 16; Law Institute of Victoria Submission 13, 10.

32 Mr Michael Macnamara, Submission 2, 3.

Chapter 6 Amendments to Outdated Provisions

THE ENLARGEMENT OF LONG LEASES TO FREEHOLD TITLE

6.26 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.

6.27 The lessee, anyone deriving title under a lessee,[33] and certain interested persons[34] (the 'entitled person') may unilaterally enlarge the leasehold into a fee simple by registering a deed of declaration 'in the office of the Registrar-General'.[35] The fee simple estate is deemed to be created upon registration of the deed.[36]

6.28 The procedure for enlargement of leases is outdated, since the intention of the *Transfer of Land (Single Register) Act 1998* (Single Register Act) was to abolish the registration of deeds in the Office of the Registrar-General.[37] Since 1998, the Registrar-General has not accepted deeds of enlargement lodged in accordance with section 153.

PURPOSE OF SECTION 153

6.29 Section 153 can be traced back to the *Conveyancing and Law of Property Act 1881* (Eng),[38] and is equivalent to section 153 of the English *Law of Property Act 1925*.[39] Apart from Victoria, only two other jurisdictions in Australia have a similar provision: New South Wales and Tasmania.[40]

6.30 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.[41] The leading commentary on the English *Law of Property Act 1925* states:[42]

> *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.*

6.31 Section 153 provides a means of converting leases in circumstances where the tenant cannot acquire freehold title by adverse possession. It applies only to leases which do not reserve the right of forfeiture or re entry for breach of a condition.[43] This means that, even if a lease provides for the tenant to pay rent, the landlord's title is not affected if the tenant fails to pay it.[44]

CURRENT USE OF THE PROVISION

6.32 English and Australian commentators agree that section 153 is rarely used.[45] The Law Institute of Victoria commented in its submission that there are unlikely to be many leases in existence to which the section could apply.[46] Land Victoria is unable to provide an estimate of the number of leases of 300 years or more in existence, although they are believed to be rare.

6.33 The *Duties Act 2000* has recently been amended to ensure that long leases and section 153 are not used to avoid payment of duty. Victoria abolished duty on leases in April 2001. The *Duties Amendment Act 2009* inserted section 7(1)(b)(v) and (va) 'to ensure that duty is chargeable on leasing arrangements which effectively transfer ownership' of the fee simple.[47]

6.34 The new provisions charge duty on the grant of a lease where consideration other than the rent reserved is payable (such as a premium), or where there is an arrangement that the lessee or an associated person obtains an interest in the fee simple. Where duty has been paid under those provisions on a leasing arrangement which provides for enlargement into fee simple under section 153 of the Property Law Act no duty is chargeable on the subsequent enlargement.[48] Otherwise, the enlargement is a dutiable transaction.[49]

6.35 We asked the State Revenue Office if they were aware of how common 300 year leases are in Victoria. They replied:

> *The SRO is not currently aware of any instances of 300 year leases being created or in existence. The longest example that we are aware of is a 299 year lease. However, please note that it is only in recent years, with the amendments to the Duties Act 2000 commencing in 2009 and the relevant policy work taking place from a few years preceding, that the SRO has kept any record of long term leases. Further, until the amendments introduced in 2009, there was no reason for leases to be submitted to the SRO and any that we did look at was as a result of our own research.*

6.36 Although few, if any, leases to which section 153 could apply exist, no one appears to know for sure that the provision no longer serves a purpose. It is still possible to create 300 year leases which are not liable to be determined by re-entry and do not require more than a nominal money value to be paid. If they do exist, they may well have been created in the expectation that they could be converted to freehold. However, if the person entitled to the reversion can be identified, it may not be necessary to rely on the procedure under section 153 because the lease could be enlarged by agreement.

SHOULD THE PROVISION BE RETAINED?

6.37 In our Consultation Paper we asked whether section 153 should be retained and amended to make it effective in its application to registered land. Three submissions agreed that it should be retained and amended,[50] even though there is doubt that many leases would be covered by the provision. Two submissions called for it to be repealed.[51]

6.38 Mr Hope and Dr Vout put the view that section 153 should be replaced with a provision that limits the maximum duration of leases to 99 years. They suggested that this would limit the power of landlords to control land long after their deaths, and ensure that freehold title remains the principal long term estate.

6.39 Land Victoria described section 153 as archaic and commented that the historical considerations underlying the section have no relevance or application to today's system of land registration.[52] Land Victoria further submits that section 153 is inconsistent with the principle that a purchaser ought to be able to rely on the title data in the register.

6.40 Section 42(2)(e) of the *Transfer of Land Act 1958* (Transfer of Land Act) creates an express exception to indefeasibility of title for the interest of a tenant in possession of the land. The scope of the tenant's interest protected by the section is broadly interpreted[53] and may include the statutory right of a tenant in possession to enlarge the lease to freehold under section 153 of the Property Law Act. The tenant's statutory right to enlarge the lease would not appear on the register and is difficult for a purchaser of the reversionary estate to discover.

33 *Property Law Act 1958* (Vic) s 18(1) (definition of 'lessee'—included under definition of 'rent').

34 *Property Law Act 1958* (Vic) s 153(6) extends the right of enlargement to persons beneficially entitled to the lease, trustees and legal personal representatives of a deceased lessee.

35 *Property Law Act 1958* (Vic) s 153(7).

36 *Property Law Act 1958* (Vic) s 153(7).

37 Although some sections of the Property Law Act still provide for books to be kept or records made by the Registrar-General eg, ss 209–210, 214–215.

38 P Young et al, *Annotated Conveyancing and Real Property Legislation New South Wales* (Butterworths, 2009) 209.

39 Wallace (1984), above n 6, 242.

40 *Conveyancing Act 1919* (NSW) s 134; *Conveyancing and Law of Property Act 1884* (Tas) s 83

41 Kevin Gray and Susan Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2008) 425.

42 Edward Wolstenholme, *Wolstenholme and Cherry's Conveyancing Statutes* (Oyez, 13th ed, 1972) Vol 1, 285.

43 *Property Law Act 1958* (Vic) s 153(2).

44 Bradbrook (2007), above n 3, 701 citing *Doe d. Davy v Oxenham* (1840) 7 M & W 131; 151 ER 708.

45 See eg, Bradbrook (2007), above n 3, 512; Young (2009), above n 38, 209.

46 Law Institute of Victoria, Submission 13.

47 State Revenue Office, Victoria, Duties Act Bulletin—Duties Changes July 2009.

48 *Duties Act 2000* (Vic) s 57.

49 *Duties Act 2000* (Vic) s 7(1)(v).

50 Mr Michael Macnamara, Submission 2; Associate Professor Maureen Tehan et al, Submission 9; Law Institute of Victoria, Submission 13.

51 Mr James Hope and Dr Paul Vout, Submission 6; Land Victoria, Submission 18.

52 Land Victoria, Submission 18, 5.

53 See *Downie v Lockwood* [1965] VR 257; *Robertson v Keith* (1870) 1 VLR(E) 11; Edgeworth (2008), above n 6, [5.113], [8.226]–[8.230].

Chapter 6 Amendments to Outdated Provisions

6.41 After considering the submissions, we have concluded that section 153 should be retained for five years and then repealed. It is possible that leases to which the section currently or potentially applies still exist. Lessees would have five years within which to exercise their right to convert the lease to freehold.

6.42 Any applicable long leases that are not converted into freehold once the section is repealed could still be converted by agreement with the person who is entitled to the reversion. Although it might be difficult to identify the reversioner, it should be possible to do so. Any long lease to which the right of enlargement in section 153 still applies must have been created since 1910.

6.43 We think that the separate review of the law of leases, which we suggest in Chapter 8, should examine whether to limit the maximum duration of leases.

IS SECTION 153 STILL OPERATIVE?

6.44 By operation of section 153(7), the leasehold is enlarged into a fee simple upon registration of a deed of declaration in the office of the Registrar-General. Land Victoria has submitted that section 153 is no longer operative because there has been no process for registering a deed in the office of the Registrar-General since the commencement of the Single Register Act.

6.45 Section 22(2) of that Act inserted section 6(2) into the Property Law Act:

> *Despite sub-section (1),*[54] *no deed conveyance or other instrument may be registered in the office of the Registrar-General under that sub-section on and from the commencement of section 6 of the Transfer of Land (Single Register) Act 1998.*

6.46 The amendment creates an apparent conflict between section 6(2) and section 153(7).

6.47 Land Victoria's interpretation is that section 6(2) is inconsistent with section 153(7), with the effect that it forbids the registration of a deed of declaration under section 153(7) and impliedly repeals that provision. On this view, section 153 is inoperative since there is no mechanism by which the lessee can exercise the right to enlarge the lease to freehold title.

6.48 An alternative interpretation is that, in providing for registration of a deed of declaration, section 153(7) is a 'special' provision which overrides the general prohibition on registration of deeds in section 6(2). This interpretation relies on two general principles of statutory interpretation.

6.49 The first principle is that an interpretation is preferred which avoids finding that statutory provisions are inconsistent, 'for Parliament is generally presumed to intend both provisions to operate without there being any such implicit repeal or derogation'.[55] If section 153(7) is read as an exception to section 6(2), both provisions can operate within their respective spheres.

6.50 The second principle is set out in Section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006*:

> *So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.*

6.51 One of the human rights recognised in section 20 of the Charter is that 'A person must not be deprived of his or her property other than in accordance with law.'

6.52 The property right of a lessee under a qualifying lease includes the statutory right to enlarge. If section 6(2) is interpreted as an implied repeal of section 153(7), the lessee is deprived of the right to enlarge. The deprivation would occur in an arbitrary manner, since section 153 confers a statutory right to enlarge while denying any means of exercising it.

6.53 Because it accords with principles of statutory interpretation and preserves existing property rights, we prefer the interpretation that section 153(7) is an exception to the general prohibition on registration of deeds in section 6(2). We therefore do not consider that section 153 has been inoperative since 1998.

TRANSITIONAL PROVISIONS

6.54 Pending the proposed repeal of section 153 in five years time, transitional arrangements are required to enable lessees under any existing qualifying leases to exercise their right to enlarge. Although we see no legal obstacles to the registration of deeds of declaration by the Registrar-General in accordance with the current section 153(7), additional provisions are needed to authorise the Registrar to make the appropriate amendments to the Torrens register.

6.55 The current provision in section 153(7) for registration in the office of Registrar-General should be replaced with other procedures more in conformity with current methods of dealing in both registered and old system land.

6.56 In the case of registered land, provision should be made in the Transfer of Land Act for the deed of declaration to be deemed to be an instrument of transfer of the land, and upon registration to vest the fee simple estate in the person in whom the lease was previously vested.

6.57 In the case of old system land, an additional provision is needed. A deed of declaration should be included in the definition of 'specified dealing' in section 4(1) of the Transfer of Land Act. The amendment will enable the person in whom the lease was previously vested to lodge the deed of declaration with the Registrar under section 22 of the Transfer of Land Act. The lodgement of a specified dealing empowers the Registrar to create under section 24 a folio for the land (provisional as to subsisting interests) showing the lodging party as the registered proprietor in fee simple. The recording of the deed would act as a trigger for conversion of old system land to registered land.

RECOMMENDATIONS

40. The new Property Law Act should contain a sunset provision which provides that the provisions for the enlargement of long leases (in section 153 of the current *Property Law Act 1958*) cease to have effect five years from the commencement of the new Property Law Act.

41. Section 153(7) should be amended to provide that, until the new sunset provisions take effect, a deed of declaration by a lessee shall be registered by the Registrar either:

    (a) under a new Division to be inserted into Part IV of the *Transfer of Land Act 1958,* or

    (b) in the case of old system land, under section 22 of the *Transfer of Land Act 1958.*

42. The definition of 'specified dealing' in section 4(1) of the *Transfer of Land Act 1958* should be amended to include a lessee's deed of declaration under section 153(6) of the *Property Law Act 1958.*

54 Section 6 of the Property Law Act sets out the priority of 'all deeds conveyances and other instruments in writing (except leases for less than three years) of or relating to or in any manner affecting any lands tenements or hereditaments situated lying and being in Victoria' that are registered by the office of the Registrar-General in accordance with the Act. Sections 7–12 of the Property Law Act, which specified the procedures for registering deeds conveyances and other instruments, were repealed by s 22(1) of the Single Register Act.

55 *Horvath v Commonwealth Bank of Australia* (1999) 1 VR 643, 657 Ormiston JA, citing *Saraswati v R* (1991) 172 CLR 1, 17.

Chapter 6 Amendments to Outdated Provisions

MERGER

6.58 Merger can occur when the owner of an estate or interest in land obtains a greater estate or interest in the same land. At common law, the lesser estate or interest merges with the greater estate or interest so that only one, the greater, remains.[56] For example, if a lessee acquires the freehold title, the lease will be extinguished and only the freehold title will remain. Merger can also occur where the holder of a rentcharge acquires the freehold title.

6.59 At common law, merger was automatic, regardless of the intention of the acquirer of the interest or estate. Under equitable principles, merger occurs only where the acquirer of the greater estate or interest intends it.[57] There is an equitable presumption against merger where it would not be in the interest of the acquirer.[58]

SECTION 185

6.60 Section 185 of the Property Law Act provides that:

> *There shall be no merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.*

6.60 This means that there will be no merger at common law unless there would also have been merger under the rules of equity.[59] The effect of section 185 is that merger no longer occurs automatically but only where the acquirer intended it at the time of acquiring the greater interest.

6.60 Section 185 is based on the similarly worded section 185 of the English *Law of Property Act 1925*. Similar provisions have been adopted in all Australian jurisdictions.[60]

6.61 On its face, section 185 appears to be expressly limited to estates in land. Robinson argues that the equitable rule of merger does not extend to interests in land.[61] However, the authorities indicate that the provision does apply to interests in land such as rentcharges.[62]

6.62 The issue of whether or not merger has occurred can become important in certain contexts. One example would be where a lessee acquires a prescriptive easement over a neighbouring property, and then acquires the freehold title to the leased land. The acquirer may want to retain the benefit of the easement for the remainder of the term of the lease.

6.63 It is currently unclear whether an easement that was appurtenant to a leasehold estate survives the merger of that estate. In *Wall v Collins*,[63] an expressly granted easement was held by a tenant who subsequently acquired the freehold. The Court of Appeal for England and Wales held that the easement was not extinguished:[64]

> *Merger of the lease into a larger interest in the dominant tenement is not in itself fatal to the continued existence of the easement, for the period for which it was granted.*

6.64 *Wall v Collins* has not been judicially considered in Australia, and it is uncertain whether it would be followed in Victoria. The decision has been strongly criticised for departing from the previous understanding that an easement or covenant does not survive the extinguishment of the estate to which it was appurtenant.[65]

6.65 If *Wall v Collins* is not followed in Victoria, extinguishment of the lesser estate by merger could destroy a valuable interest which is appurtenant to that estate.

MERGER AND THE TORRENS SYSTEM

6.66 The Torrens statutes modify the application of the rules of merger to registered interests. In *English, Scottish and Australian Bank Ltd v Phillips*,[66] the High Court of Australia held that, where a registered owner acquired a registered mortgage over the land, the mortgage was not merged. The decision turns on the nature of a Torrens mortgage as a 'creature of statute', and the provision of a distinct statutory mechanism for the discharge of registered mortgages. The court also noted that:[67]

> *The question of whether registered interests may without any change in the register be extinguished by merger in estates in land under the system is not necessarily involved in the decision of this appeal.*

6.67 In a subsequent case, *Cooper v Federal Commissioner of Taxation*,[68] the High Court held that, where a registered proprietor of land acquires a registered lease over the land, the lease does not merge so long as it remains registered as a separate estate or interest on the register.

6.68 In *Shell Co of Australia Ltd v Zanelli and Another*,[69] the New South Wales Court of Appeal held that merger does not destroy a lease upon transfer of the fee simple to the lessee, so long as the interest remains on title. However, while finding that there was no merger by mere registration of both interests, merger was found to have occurred when the Registrar subsequently noted on the title that merger had occurred.[70] This had been done after an application by the acquirer of both registered interests.[71]

HOW THE REGISTRAR DEALS WITH MERGER

6.69 The Australian Capital Territory and New South Wales have provisions that allow the Registrar to make entries on the register to reflect a merger.[72] Queensland has a provision dealing specifically with lots being transferred to the mortgagee of the lot.[73]

6.70 The provisions in the Australian Capital Territory and New South Wales are broadly framed to allow the Registrar to give effect to merger. For example, section 12(1)(i) of the *Real Property Act 1900* (NSW) provides that:

> *The Registrar-General may, where the Registrar-General is satisfied that an estate or interest has been extinguished by merger, make such a recording in the Register as the Registrar-General considers appropriate.*

6.71 The practice in New South Wales is that, if a transfer of land or registered lease, mortgage or charge mentions that the transferee holds a lesser estate or interest in the same capacity, the estate or interest is retained in the register.[74] If the lesser interest is not mentioned in the transfer, the Registrar-General notifies the lodging party that a request for merger can be lodged within 28 days. If a request is not lodged, then the interest will remain on the register.[75]

6.72 We recommend that a provision similar to section 12(1)(i) of the *Real Property Act 1900* (NSW) be adopted in Victoria to empower the Registrar to note merger on the folio upon application by the registered proprietor of the interests or estates. Since the application can be made after the greater interest has been registered, the provision will avoid any need to delay registration of dealings to determine whether merger is intended.

RECOMMENDATION

43. Section 185 should be retained and provision should be made in the *Transfer of Land Act 1958* for the Registrar, upon the application of the proprietor of interests or estates in the land, to record the merger of the interests or estates.

56 Halsbury's Laws of Australia (online) [185–1140].

57 Harpum et al (2008), above n 15, 834–35; Robinson (1992), above n 6, 421–22; Halsbury's Laws of Australia (online) [185–1140].

58 Ibid.

59 Section 185 has not been applied to the merger of easements and covenants under the doctrine of unity of seisin or to the severance of a joint tenancy by the acquisition by a joint tenant of a separate and distinct interest in the land (often termed severance by merger).

60 *Law of Property Act 2000* (NT) s 16; *Conveyancing Act 1919* (NSW) s 10; *Property Law Act 1974* (Qld) s 17; *Law of Property Act 1936* (SA) s 13; *Supreme Court Civil Procedure Act 1932* (Tas) s 11(4); *Property Law Act 1969* (WA) s 18; *Civil Law (Property) Act 2006* (ACT) s 206.

61 Robinson (1992), above n 6, 421.

62 See eg, Harpum et al (2008), above n 15, [31–037]; See also Wolstenholme and Cherry's Conveyancing Statutes (Stevens & Sons, 1927 ed) 443; Halsbury's Laws of Australia (online version) [295–8405], [185–1140].

63 [2007] 3 WLR 459.

64 *Wall v Collins* [2007] 3 WLR 459.

65 See eg, *Wall v Collins* [2007] 3 WLR 459 [13] where Carnwath LJ indicates that a legal treatise is incorrect on this point; also cf Halsbury's Laws of Australia (online) [245–4250] noting that covenants are terminated by merger. For criticism of the ruling, see Tristan Ward *Wall v Collins —the effect of mergers of a lease on appurtenant easements* Conv. 2007, Sep/Oct 464–474; Law Commission [England and Wales], *Easements, Covenants and Profits a Prendre: A Consultation Paper* CP No 186 (2008) [5.72]–[5.86].

66 (1938) 57 CLR. 302.

67 *English, Scottish and Australian Bank Ltd v Phillips* (1938) 57 CLR 302, 322.

68 [1958] 100 CLR 131.

69 [1973] 1 NSWLR 216.

70 *Shell Co of Australia Ltd v Zanelli and Another* [1973] 1 NSWLR 216, 221.

71 *Shell Co of Australia Ltd v Zanelli and Another* [1973] 1 NSWLR 216, 220.

72 *Land Titles Act 1925* (ACT), s 14(1)(f); *Real Property Act 1900* (NSW), s 12(1)(i).

73 *Land Title Act 1994* (Qld) s 63. Section 63 of the *Land Titles Act 1994* (Qld) provides that if a lot is transferred to the mortgagee the Registrar must register the mortgagee as the registered owner released from the mortgage unless the mortgagee asks the registrar not to do so. This provision therefore appears to create a *de facto* presumption in favour of merger of mortgages.

74 See eg, Registrar-General's Directions website directions on how to request merger. http://rgdirections.lands.nsw.gov.au/land_dealings/dealing_requirements/requests/merger_lease_mortgage_charge (accessed 6 August 2010).

75 Ibid.

Chapter 6 Amendments to Outdated Provisions

PRESUMPTIONS OF SURVIVORSHIP

6.73 When two or more persons wish to be co-owners of property, they can choose to hold in one of two different ways. If they hold as 'tenants in common' in equal or unequal shares, each co-owner has a distinct interest which will pass to his or her heirs when that owner dies. If the co owners hold as 'joint tenants', they do not own a distinct share which forms part of their estate on death. Instead, the rules of survivorship operate.

6.74 If one of the joint tenants dies, his or her interest is extinguished. Title to the property remains with the surviving joint tenant or tenants, whose interests are 'correspondingly enlarged'.[76] When all but one of the joint tenants has died, the surviving joint tenant becomes sole owner. In a sense, joint tenancy is a lottery of life in which the surviving joint tenant takes all and the heirs of the predeceasing joint tenants receive nothing.

6.75 Where all the joint tenants of property have died, it is necessary to determine the order in which their deaths occurred. In some circumstances it is not possible to determine the order of the deaths as a question of fact. A typical example of this would be in a car crash, where there are multiple fatalities and the joint tenants died at around the same time. In these circumstances, a legal presumption as to the order of the deaths is needed, to give effect to the common intent of the joint tenants that the rules of survivorship should operate.

6.76 Section 184 of the Property Law Act provides that, where the order of deaths is uncertain, the order of deaths will be presumed to be in order of seniority, with the younger having outlived the elder. A similar rule exists in New South Wales, Queensland and Tasmania.[77]

6.77 Currently the relevant portion of section 184 reads:

> *Where … two or more persons have died in circumstances rendering it uncertain which of them survived the others, such deaths shall (subject to any order of the Court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority.*

6.78 In its submission Land Victoria suggested that section 184 be amended to remove ambiguity arising from the words 'subject to any order of the court'.[78] We think the provision was intended to mean that the presumption operates unless the court makes a contrary order. It could be read as meaning that the presumption operates only upon an order of the court.

6.79 The ambiguity would be removed if the words 'subject to any order of the Court' were replaced with the words 'unless a court otherwise orders'. The amendment would make it clear that no court order is required for the operation of the presumption that the younger person survived the elder person. The amendment would also make it clear that the presumption operates *unless* a court makes a contrary order.

RECOMMENDATION

44. Section 184 should be amended to omit the words 'subject to any order of the Court' and to substitute the words 'unless a court otherwise orders'.

ALIEN FRIENDS

6.80 Section 27 of the Property Law Act permits an 'alien friend' living in Victoria to acquire, hold and dispose of 'every description of property whether real or personal' in the same manner as 'a natural born subject of Her Majesty'.

6.81 At common law, an alien cannot acquire, hold or transfer land.[79] Section 27 overrides this rule as it applies to alien friends and ensures that the equality of property rights it confers applies to personal property as well as real property.

6.82 The provision has appeared in Victorian legislation substantially unchanged for 120 years.[80] In the meantime, the Commonwealth of Australia was formed, the concept of Australian citizenship evolved, and foreign investment in property has become increasingly regulated by the Commonwealth Government.

6.83 The section is arcane and needs updating.

MEANING OF TERMS

6.84 Historically, an 'alien' was a person born outside the monarch's dominions.[81] Before and after federation, an alien was a person who was not a British subject.[82] When the Property Law Act commenced, an alien was defined in the *Nationality and Citizenship Act 1948* (Cth)[83] as a person who was not a British subject, citizen of Ireland or living in a British protectorate.[84] Today, Australian citizens are no longer British subjects[85] and British subjects can be aliens.[86] Australia's citizenship and immigration legislation no longer refers to aliens, and the term is not generally used to describe foreign nationals.

6.85 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.

6.86 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.[87] 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.

6.87 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'.[88] Robinson has observed that, insofar as section 27 is limited to residents of Victoria, no one living in Victoria can be an enemy alien.[89]

6.88 The meaning of a 'subject of Her Majesty' has also changed over time, as Australia has emerged as an independent nation. Nowadays it is likely to be interpreted to mean an Australian citizen. The *Property Law Act 1974* (Qld)[90] and the *Aliens Act 1913* (Tas)[91] permit aliens to deal with property on the same basis as Australian citizens.

76 *Wright v Gibbons* (1949) CLR 313, 330 (Latham CJ).

77 *Succession Act 1981* (Qld) s 65; *Presumption of Survivorship Act 1921* (Tas); *Conveyancing Act 1919* (NSW) s 35.

78 Land Victoria, Submission 18.

79 *Re Douyer, Ex parte Bell* (1863) 1 QSCR 91, 95.

80 Section 27 of the *Property Law Act 1958* derives from s 58 of the *Supreme Court Act 1915* and before that, s 3 of the *Aliens Act 1890.*

81 *Calvin's Case* (1609) 77 ER 377, 396.

82 See eg, *Aliens Act 1890* (Vic) ss 5, 9; *Aliens Act 1947* (Cth) s 5.

83 Later renamed the *Australian Citizenship Act 1948* (Cth).

84 *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.

85 *Australian Citizenship Amendment Act 1984* (Cth).

86 In *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 the High Court determined that an 'alien' includes at least anyone born outside Australia (including in the United Kingdom) 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.

87 Robinson (1992), above n 6, 36.

88 *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484, 505–06; *Schaffenious v Godberg* [1916] 1 KB 284.

89 Robinson (1992), above n 6, 36.

90 *Property Law Act 1974* (Qld) s 15A.

91 *Aliens Act 1913* (Tas) s 3.

Chapter 6 Amendments to Outdated Provisions

INTERACTION WITH COMMONWEALTH LEGISLATION

6.89 Section 27 is expressed to apply 'notwithstanding any law or usage to the contrary'. Although it overrides common law rules, it does not override Commonwealth legislation.

6.90 The Commonwealth Parliament has the power under the Constitution to make laws that directly and indirectly determine the rights of aliens.[92] Investment by foreign nationals is regulated under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (Foreign Acquisitions and Takeovers Act). Most foreign investment proposals involve the purchase of real property.[93]

6.91 By operation of 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 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.[94]

6.92 Although it is wide ranging, the Foreign Acquisitions and Takeovers Act does not 'cover the field'. In other words, it does not apply to the exclusion of any State or Territory law that is capable of operating concurrently with it.[95]

6.93 Section 27 of the Property Law Act 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.[96] 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.

6.94 Section 27 is also broader in scope than the Foreign Acquisitions and Takeovers Act because it encompasses all forms of property.

6.95 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.

SUBMISSIONS

6.96 We asked in the Consultation Paper for comments about how the provision should be updated and whether its interaction with the Foreign Acquisitions and Takeovers Act should made clearer.[97]

6.97 The Law Institute of Victoria responded that section 27 should be revised for consistency with the relevant provisions of the Foreign Acquisitions and Takeovers Act. Alternatively, the references to 'a natural born subject of Her Majesty' should be replaced with 'an Australian citizen', and an alien should be identified as any person who is not a citizen.[98]

6.98 The Law Institute of Victoria also observed that section 109 of the Constitution makes it clear that the Foreign Acquisitions and Takeovers Act prevails over the Property Law Act to the extent of any inconsistency and no further clarification in the text of section 27 is necessary. However, it does see value in including a note to section 27 which cross references to the Foreign Acquisitions and Takeovers Act.[99]

6.99 We agree that section 27 should be updated in the context of the Foreign Acquisitions and Takeovers Act but also note that a 'foreign person' for the purposes of that Act is not the same as a non-citizen under the *Australian Citizenship Act 2007* (Australian Citizenship Act). As the purpose of section 27 is to override the common law concerning non citizens, we consider that primacy should be given to ensuring consistency with the Australian Citizenship Act.

6.100 For this reason, we favour updating the wording of section 27 to directly align with the definition of a citizen under the Australian Citizenship Act. The current reference to 'a natural born subject of Her Majesty' would be replaced with a reference to an Australian citizen because this is how the term is likely to be interpreted nowadays. Instead of referring to an alien, the provision would refer to a person who is not an Australian citizen. This definition by exception should encompass any interpretation of the term 'alien' for the purpose of overriding the common law rule.

RECOMMENDATION

45. Section 27, concerning the property rights of alien friends, should be replaced by a provision in the new Property Law Act which:

    (a) provides that a person is not prevented from acquiring, holding or disposing of real or personal property in Victoria by reason only that the person is not an Australian citizen within the meaning of the *Australian Citizenship Act 2007* (Cth)

    (b) includes a note stating that investment by foreign persons is regulated by the Commonwealth under the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

92 *Constitution* ss 51(i), 51(ix), 51(xix), 51(xx), 51(xxvi)–(xxx).

93 Australia's Foreign Investment Policy (September 2009) p 2 www.firb.gov.au/content/policy.asp accessed 4 February 2010.

94 *Foreign Acquisitions and Takeover Act 1975* (Cth) s 17.

95 *Foreign Acquisition and Takeovers Act 1975* (Cth) s 37.

96 *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 5A(1).

97 Victorian Law Reform Commission (2010), above n 9, [7.4]–[7.32].

98 Law Institute of Victoria, Submission 13, 11.

99 Law Institute of Victoria, Submission 13, 11.

Chapter 6 Amendments to Outdated Provisions

MARRIED WOMEN

6.101 The Property Law Act contains a number of provisions protecting the property rights of married women. In most cases, the reason why they are in the Act is to override a common law principle that discriminates against married women because of their marital status. These provisions appear unnecessary nowadays in view of subsequent changes in attitudes and expectations and the widespread removal of discriminatory laws and practices.

6.102 One submission said that provisions of this type are obsolete and that repealing them will not revive the common law.[100] The Scrutiny of Acts and Regulations Committee reached a similar conclusion following its review of similar provisions in the *Marriage Act 1958* (Marriage Act) in 2004. It recommended that the provisions in that Act be repealed and said that it was 'extremely unlikely' that the discriminatory common law principle would be revived as a result.[101]

6.103 We agree that repealing these provisions is unlikely to revive the common law. Section 14(2) of the *Interpretation of Legislation Act 1984* (Interpretation of Legislation Act) states that repealing an Act or provision does not revive anything not in force or existing at the time that the repeal becomes operative, unless the contrary intention expressly appears.

6.104 Nevertheless, the equal status that women now have at law is not uniformly found in the community. The provisions in both the Property Law Act and the Marriage Act put beyond doubt that, regardless of residual discriminatory practices and beliefs in the community, all women have the same rights as men to own, control, deal with and dispose of real and personal property.

6.105 The persistence of discriminatory attitudes in the community, combined with the possibility that common law principles could be revived, fosters a conservative approach to the idea of repealing the provisions. We note that the government declined to agree with the Scrutiny of Acts and Regulations Committee that the similar provisions in the Marriage Act should be repealed. Its response to the Committee's report, tabled in Parliament on 3 May 2005, 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.*

6.106 For this reason, we are cautious about repealing provisions that protect hard won rights and which serve an educative purpose when those rights are challenged. The provisions in the Property Law Act concerning the property rights of married women certainly need updating but the rights they create should continue to be expressly preserved in the new Property Law Act.

HUSBAND AND WIFE TO BE COUNTED AS TWO PERSONS

6.107 Section 21 reverses a common law rule of construction that applied where ownership of 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.

6.108 Section 21 abrogates the rule by providing that, for the purposes of acquisition of any interest in property under a disposition after 1914, the husband and wife are counted as two persons.

6.109 One submission pointed out that repealing the provision would not revive the abolished common law rule of construction because of the operation of section 14(2) of the Interpretation of Legislation Act.[102] Although section 14(2)(c) says that, unless the contrary intention expressly appears, the repeal of an Act or provision does not revive 'anything not in force or existing at the time that the repeal becomes operative', it may not apply to a rule for the construction of instruments. At common law, the repeal of a statute or statutory provision means that the law must be applied as if the provision had never existed.[103]

6.110 Even if section 14(2)(c) of the Interpretation of Legislation Act does apply to rules of construction, repealing section 21 of the Property Law Act could create unnecessary uncertainty as to the share of a husband and wife in co-ownership with a third person. Retaining the provision makes the law clear. For this reason, we consider that section 21 should be retained in the new Property Law Act. The one other submission that commented on this provision agrees.[104]

PROPERTY RIGHTS OF MARRIED WOMEN

6.111 At common law, a woman's identity merged upon marriage with her husband's 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 in Victoria with the passage of the *Married Women's Property Act 1884*. Most of 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.

6.112 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'.

6.113 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,[105] that could not have been imposed on a man.

6.114 The Scrutiny of Acts and Regulations Committee of the Victorian Parliament recommended that sections 156 and 157 of the Marriage Act should be repealed. As an alternative, the Committee said the provisions should be transferred to the Property Law Act.[106] The Government did not support the Committee's recommendation but did support the alternative.[107]

100 Mr Michael Macnamara, Submission 2, 4.

101 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.

102 Mr Michael Macnamara, Submission 2, 4.

103 *Chang Jeeng v Nuffield (Australia) Pty Ltd* (1959) 101 CLR 629 per Dixon CJ.

104 Law Institute of Victoria, Submission 13.

105 These terms are explained below at [6.121]–[6.125].

106 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.

107 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.

Chapter 6 Amendments to Outdated Provisions

6.115 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.

6.116 The introduction of a new Property Law Act would provide the opportunity to rationalise the two sets of provisions. Compared to the equivalent provisions in the Marriage Act, sections 167, 168 and 170 are narrower in scope. The provisions in the Marriage Act can better serve an educative and symbolic purpose because they are expressed as positive rights. Both are out of date and would need to be revised if transferred to the new Act.

6.117 We proposed two options for reform in the Consultation Paper:

- repeal both sets of provisions, with the express intention this will not revive any common law, statutory provisions or presumptions or interpretation, or
- replace sections 167, 168 and 170 of the Property Act with sections 156 and 157(1) of the Marriage Act.

6.118 Of the three responses we received, two favoured the first option[108] and one favoured the second.[109] There is clear agreement that the provisions in the Property Law Act are archaic and should be repealed. We consider that repealing them with a savings provision would ensure that the common law rules are not revived. However, having a clear statement in legislation that married women have the same legal capacity to deal with property as single women (and all men) serves an important educative and normative function.

6.119 Discriminatory practices against women that were once the common law persist in some parts of the community. The fact that they are now unlawful is better specified in legislation than implied from an absence of any provisions permitting them. For example, section 20 of the *Charter of Human Rights and Responsibilities Act 2006* merely states that a person must not be deprived of his or her property 'other than in accordance with the law'. The provisions in the Property Law Act and the Marriage Act concerning the property rights of married women leave no doubt about what the law is.

6.120 In view of the government's decision not to repeal sections 156 and 157 of the Marriage Act, and the benefit in retaining statutory provisions which recognise and protect the property rights of married women, we consider that the provisions in section 156 and 157(1) should be updated as necessary and transferred into the new Property Law Act.

RECOMMENDATION

46. Sections 167, 168 and 170, concerning the property rights of married women, should be replaced in the new Property Law Act by the provisions that currently appear at sections 156 and 157(1) of the *Marriage Act 1958*. Those provisions should be transferred from the *Marriage Act 1958* to the new Property Law Act and updated.

POWER FOR COURT TO BIND INTEREST OF MARRIED WOMAN

6.121 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.

6.122 A restraint on anticipation or alienation of property is a condition imposed only on a married woman. It provided a means of vesting property in a married woman that would be preserved for her benefit free of the influence of her husband to dispose of it. The restraint prevented her from disposing of the property or subjecting it to a liability.

6.123 Restraints of this type have been abolished in all jurisdictions in Australia. In Victoria, section 157(2) of the Marriage Act makes a restraint on anticipation or alienation imposed after the commencement of the *Marriage (Property) Act 1956* void. It does not apply to pre existing restraints. Although, like Victoria, most jurisdictions only abolished future restraints,[110] Western Australia, Queensland and South Australia have now abolished them altogether.[111]

6.124 Under section 169 of the Property Law Act, a woman whose ability to deal with property is restricted by a pre-existing restraint can apply for an order to perform a particular transaction. However, the court is not empowered to make an order removing the restraint.[112] If it does not consider the transaction to be for her benefit, it has the discretion not to make an order at all.

6.125 Few, if any, restraints on anticipation or alienation are likely to exist today. None have been validly created for at least 54 years. The operation of section 169 is at odds with the right to be treated equally before the law.[113] For this reason, we proposed in our Consultation Paper that all restraints on anticipation and alienation should be abolished in Victoria. The submissions we received in response supported the idea.[114]

RECOMMENDATION

47. Any restraints on anticipation in dispositions created before the commencement of the *Marriage (Property) Act 1956* and still in operation should be made void. The relief provisions in section 169 of the *Property Law Act 1958* would then be redundant and should be repealed.

6.126 Restraints on anticipation are mentioned in section 153(6)(a), according to which a married woman with a relevant interest in the property is eligible to apply for enlargement of a long lease without the concurrence of her husband even if she is subject to a restraint. We have recommended that section 153 be repealed, subject to a sunset provision,[115] and see no need for a separate amendment to section 153(6)(a).

108 Mr Michael Macnamara, Submission 2; Law Institute of Victoria, Submission 13.

109 Associate Professor Maureen Tehan et al, Submission 9.

110 *Married Persons (Equality of Status) Act 1996* (NSW) s 10; *Property Law Act 1969* (WA) s 31; *Conveyancing and Law of Property Act 1994* (Tas) s 43; *Married Persons (Equality of Status) Act 1989* (NT) s 3.

111 *Acts Amendment (Equality of Status) Act* 2003 (WA) s 125(3); *Married Women (Restraint upon Anticipation) Act 1952* (Qld) s 4 (repealed); *Law of Property Act 1936* (SA) s 110.

112 Robinson (1992), above n 6, 397 citing *Re Warren's Settlement* (1883) 52 LJ Ch 928.

113 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

114 Mr Michael Macnamara, Submission 2, 4; Law Institute of Victoria, Submission 13, 12.

115 See recommendation 40.

Chapter 6 Amendments to Outdated Provisions

DEBT ENFORCEMENT

6.127 Part III of the Property Law Act, comprising sections 208 to 220, is an assortment of provisions for the enforcement of debt. In most cases, the practices to which they refer no longer exist and the dense language obscures, rather than conveys, the meaning.

6.128 Perhaps because they are arcane, these provisions have been left unexamined when new debt enforcement legislation and practices have been introduced. We have now analysed each of them and assessed whether they should be retained in a new Property Law Act. We have concluded that many can be repealed and the rest should be amended and either retained in the new Act or transferred to the *Sheriff Act 2009* (Sheriff Act).

6.129 We have also examined section 71, concerning the release of part of any land affected by the execution of a judgment, and concluded that it should be repealed (see Appendix A).

MAKING LAND LIABLE TO SATISFY DEBTS

6.130 At common law, a debt due to the Crown operates as a charge on the debtor's property.

6.131 The Crown once had extraordinary powers to enforce and recover its debts. It could seize the body, land, goods and debts and other choses in action of its debtors by a process known as a writ of extent. A writ of extent could be issued immediately on the authority of a judge, on the basis of an affidavit that the debt was in danger of being lost if ordinary methods of recovery were used. A Crown debt was not discharged by bankruptcy and could be enforced even if the property had since passed to someone else.

6.132 A debt between subjects does not operate as a charge, though under English law a debt secured by or arising under a bond or specialty[116] has long been able to be attached to the debtor's land.

6.133 To enforce a debt between subjects, the creditor needs to sue the debtor. However, a judgment by the court in the creditor's favour does not itself operate as a charge on the debtor's property. The court issues a process of execution to direct the sheriff to seize and sell the property of the judgment debtor in order to satisfy the debt. The debtor may then deal with the land only subject to the creditor's rights of execution, and a purchaser or mortgagee takes the land subject to those rights.

SECTION 208(1)

6.134 Section 208(1) makes the whole of a debtor's real property in Victoria and powers liable for the satisfaction of his or her debts, whether owed to the Crown or to anyone else, in the same manner as land was liable for bonds and specialty debts in English law. It applies to 'every possible estate and interest in land of every possible description'.[117] In conjunction with other provisions, it allows a court to issue a warrant for the seizure and sale of a debtor's land, or interests in land, to satisfy the debt.

6.135 Furthermore, this provision makes the remedies and processes for seizing, selling and disposing real property in satisfaction of a debt the same as those that apply to personal property. As a result, there is only one process of execution in Victoria for directing the sheriff to seize and sell property of any type in order to satisfy a judgment debt.[118]

6.136 Section 208(1) should be retained because it continues to serve a purpose, but it needs to be expressed more clearly. The current wording has survived almost unchanged since 1813.[119]

RECOMMENDATION

48. Section 208(1) should be redrafted in modern language.

POWERS AND RESPONSIBILITIES OF THE SHERIFF

6.137 The powers and responsibilities of the sheriff under a process of execution are distributed between the Property Law Act, the Sheriff Act and the *Supreme Court (General Civil Procedure) Rules 2005* (Supreme Court Rules).

6.138 The relevant provisions in the Property Law Act are sections 208(2)–(4), 219 and 220. They apply to old system land as well as to land recorded on ordinary folios.

SECTION 208(2)

6.139 This provision ensures that the debtor's equitable interests are subject to a writ of execution. It empowers the sheriff or other officer to whom any process of execution is made to take any land or other interests in real property that are held in trust for the debtor. The property is taken free of all encumbrances of the person who is in possession of it.

6.140 Section 208(2) was formed from legislation dating back to 1915.[120] It has not been amended since, except to replace a reference to a 'writ' of execution with a 'process of execution' in 1986.[121] In the meantime, the Sheriff Act has been enacted 'to provide a legislative framework for the appointment of the sheriff, deputy sheriff and sheriff's officers and their functions, powers and duties'.[122] Part 3 of that Act, comprising sections 13–33, sets out the sheriff's enforcement functions and powers.

6.141 Section 23 of the Sheriff Act empowers the sheriff to:

> *seize or take possession of recoverable property in accordance with the relevant court and enforcement legislation or a warrant that authorises the seizure of property, regardless of who has possession of the recoverable property.*

6.142 The sheriff is required to exercise the powers under section 23 to seize or take possession of recoverable property in accordance with the warrant or 'court and enforcement legislation'.[123] 'Court and enforcement legislation' includes the Property Law Act.[124] However, in our view section 208(2) of the Property Law Act does not authorise the sheriff to do any more than permitted by section 23 of the Sheriff Act (and the warrant).

6.143 Section 23 of the Sheriff Act seems to empower the sheriff to seize or take possession of a debtor's property if held by someone else for any reason, including where it is held in trust. By comparison, section 208(2) is limited to property held in trust.

6.144 We also note that section 208(2) applies to land and interests in real property, while section 23 applies to 'recoverable property'. 'Recoverable property' is defined as 'the property specified in a warrant that may be lawfully seized under the warrant,' in which case it could be real property, personal property or both. The sheriff could not seize or take possession of property held in trust unless it is specified on the warrant. If it is not specified in the warrant, section 208(2) would not authorise the sheriff to take it.

6.145 Although section 208(2) is expressed to apply to 'any process of execution' directed to the sheriff 'or other officer', nowadays the only type of process of execution issued for the seizure or possession of land and interests in real property is a warrant directed to the sheriff. Having compared the two provisions, we are of the view that section 23 of the Sheriff Act overlaps section 208(2) of the Property Law Act and probably makes it redundant as far as it applies to the sheriff's powers.

116 An obligation under seal securing a debt.

117 Robinson (1992), above n 6, 453.

118 It was once the writ of *fieri facias* and is now the warrant of seizure and sale.

119 *The New South Wales (Debts) Act 1813* (54 Geo 3, c 15) (Imp) s 4. See also *Real Property Act 1915* s 79.

120 It came from s 74(2) of the *Trusts Act 1915* (repealed) except that it does not include a final paragraph which was made obsolete by s 32 of the *Administration and Probate Act 1928* (repealed).

121 *Supreme Court Act 1986* (Vic) s 140(2).

122 *Sheriff Act 2009* (Vic) s 1.

123 *Sheriff Act 2009* (Vic) s 7(1).

124 *Sheriff Act* 2009 (Vic) s 3 and *Sheriff Regulations 2009* r 20(1).

Chapter 6 Amendments to Outdated Provisions

6.146 Nevertheless, section 208(2) continues to serve a purpose because it provides that the property that is held in trust is taken by the sheriff free of all encumbrances of the person who is in possession of it. For this reason we recommend that it be updated rather than repealed.

6.147 As the sheriff's powers, functions and duties are now set out in the Sheriff Act, section 208(2) should be updated and transferred to that Act.

SECTION 208(3)

6.148 Section 208(3) states that the sheriff is under no duty to take possession of the debtor's land before selling it. It adds a proviso that the land cannot be sold until one month after notice of the sale is published in the Government Gazette and local newspapers.

6.149 This provision was drawn from section 123 of the *Real Property Act 1915* (repealed) and section 180 of the *Supreme Court Act 1915* (repealed).[125]

6.150 We said in the Consultation Paper that section 208(3) should be reviewed to ensure consistency with the Supreme Court Rules. None of the submissions we received responded to the suggestion, but the Department of Justice has informed us that it agrees.

6.151 Order 69.06 of the Supreme Court Rules requires the sheriff to advertise the time and place of sale and particulars of seized property (of any type) 'in the manner which seems to the sheriff best to give publicity to the sale' and does not specify any period of notice before the sale takes place. This allows the sheriff to use more modern methods than publication in the Gazette or local papers, such as publishing online, though the advertisement must comply with the Supreme Court Rules concerning form and content.

6.152 Order 69.06 also imposes obligations on the creditor to serve a copy of the warrant on the Registrar (where land is being sold), and a copy of the advertisement on the debtor, and then provide the court and the sheriff with evidence of compliance with these requirements.

6.153 We prefer the procedures contained in order 69.06 of the Supreme Court rules to those in section 208(3) of the Property Law Act. By requiring the sheriff to publicise the sale in what seems to her to be the best manner, attention is given to achieving a satisfactory outcome rather than complying with a prescribed process. We remain of the view that section 208(3) should be revised to be consistent with order 69.06. We also consider that the revised section should be transferred to the Sheriff Act, so that it is co-located with other provisions concerning the execution of warrants.

6.154 Finally, although it is beyond the scope of our current terms of reference, we note that order 69.06 of the Supreme Court Rules, concerning advertising the sale of property seized under a warrant, will need updating, to remove the distinctions it makes between 'land under the operation of the Transfer of Land Act' and 'other land'.

SECTION 208(4)

6.155 Section 208(4) empowers the sheriff to execute a valid and effectual deed of conveyance or transfer of a debtor's land to the purchaser. It was amended in 1986, to replace the reference to a writ of *fieri facias*. It needs updating but remains relevant.

6.156 This provision would be better co-located with related provisions at sections 24 and 25 of the Sheriff Act. Section 24 empowers the sheriff to sell property seized under warrant, and section 25 ensures that the person who buys it in good faith and without notice of any defect or want of title acquires good title.

SECTION 219

6.157 Section 219 gives the sheriff broad powers to seize and sell a judgment debtor's personal property, being money, bank notes, specialties or other securities, for money in execution of the debt. It is related to sections 23 of the Sheriff Act, as discussed above, and section 33(3) of that Act, which deals with the sheriff discharging the debt. For this reason we consider that section 219 should be transferred to the Sheriff Act and the language updated.

SECTION 220

6.158 Section 220 empowers the sheriff to exercise the debtor's powers over property for the benefit of the judgment creditor. This provision could also usefully be transferred to the Sheriff Act rather than incorporated into a new Property Law Act. The language of the section should be updated.

RECOMMENDATIONS

49. Sections 208(2) and (4), 219 and 220, concerning the powers of the sheriff to seize and dispose of a debtor's property in execution of a debt, should be updated and transferred to the *Sheriff Act 2009*.
50. Section 208(3), concerning the procedures for the sale of a debtor's land by the sheriff, should be revised to be consistent with order 69.06 of the *Supreme Court (General Civil Procedure) Rules 2005* and transferred to the *Sheriff Act 2009*.

REGISTRATION OF DEBTS TO BIND LAND

6.159 When a judgment debt binds land, the judgment debtor cannot dispose of it to prevent it from being taken in execution and can only dispose of it subject to the claims of the execution creditor.[126]

6.160 Under the Property Law Act, a judgment will not bind or affect land until a process of execution has been issued. The execution does not have priority over other interests in the land until the warrant is delivered to the sheriff and details about it have been recorded by the Registrar. Purchasers, mortgagees and other judgment creditors are thereby alerted to the priority of the execution over later dealings.

6.161 Sections 209–218 of the Property Law Act apply to old system land. All are outdated and only sections 209–212 remain operative. We discuss them in turn below and conclude that all can be repealed and replaced where necessary by procedures under the Transfer of Land Act.

125 Wallace (1984), above n 6, 296.
126 Robinson (1992), above n 6, 457.

Chapter 6 Amendments to Outdated Provisions

SECTIONS 209–212

6.162 These provisions set out procedures for the Registrar-General to record details about executions. They are outdated because dealings relating to old system land have been recorded by the Registrar, rather than the Registrar-General, ever since the deeds registry was closed to new registrations in 1999.[127]

6.163 The Registrar is now 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. Lodgement of the dealing with the Registrar triggers the creation of an identified folio, if one does not already exist.[128]

6.164 By operation of section 26I of the Transfer of Land Act, the priority of an execution recorded in an identified folio is determined in accordance with section 6 of the Property Law Act. This means that registration of an instrument made and executed *bona fide* and for value gives priority over all other instruments not previously registered.[129]

6.165 While section 6 of the Property Law Act regulates the priority of *recorded* executions, sections 209–212 protect purchasers, mortgagees and judgment creditors from being affected by *unrecorded* executions.

6.166 Section 209 provides that a judgment does not bind land unless a process of execution is issued. However, the execution does not affect the interests of purchasers, mortgagees or other judgment creditors unless details about the execution are recorded by the Registrar General in a publicly available book against the name of the debtor.

6.167 Registration of the execution protects the judgment creditor against the claims of buyers, lenders and other creditors who obtain an interest in the land after registration. To remain effective, sections 210 and 211 require the execution to have been registered or re-registered within five years of the creation of the subsequent competing interest. This saves the subsequent buyer, lender or creditor from searching records further back in time than five years to discover prior judgments.

6.168 Section 212 prevents execution between parties being prejudiced by failure to register.[130] A failure to register an execution does not invalidate it.

6.169 The corresponding provisions for Torrens system land, at section 52 of the Transfer of Land Act, are more straightforward. Rather than giving a proprietary interest to the judgment creditor, registration of the process of execution under the Transfer of Land Act limits the ability of the judgment debtor to deal in the land. After the Registrar records the judgment, order or process of execution, no other instrument dealing with the land can be registered until the land is sold and title transferred under the process of execution, or three months has expired, whichever happens first.

6.170 We asked in the Consultation Paper whether sections 209–212 should be updated to require recording by the Registrar rather than the Registrar-General. Three submissions agreed that they should.[131] Land Victoria pointed out that very few applications are made under these sections and they could be repealed without adverse consequence.[132]

6.171 The alternative suggested by Land Victoria is that, rather than lodging an execution under the Property Law Act, a party would apply to the Registrar under sections 26E or 26F of the Transfer of Land Act (amended as necessary) to record the execution on an identified folio. Section 52 would be amended to provide that a process of execution recorded under sections 26E or 26F has the same effect as to priority as a recording made under section 52.

6.172 We see merit in the suggestion by Land Victoria as it would introduce a simpler system and further catalyse the conversion of old system land to Torrens system land.

SECTIONS 214–215

6.173 Section 214 provides in substance that, so far as any purchasers, mortgagees and judgment creditors are concerned, the Crown's ancient common law and statutory rights to take priority over other debts do not affect any freehold land or lease ('chattel real') unless and until a memorandum containing the required particulars is left with the Registrar-General. The Registrar-General is required to enter the particulars in a book called the 'Index of Debtors and Accountants to the Crown'. The book must be searchable by the public, although a fee for searching it may be charged.

6.174 Section 215 then requires the Crown to re-register the particulars on the same basis as processes of execution must be re-registered under section 210 to remain enforceable against purchasers, mortgagees or execution creditors.

6.175 The Crown's powers of enforcement that are limited by sections 214 and 215 are no longer used. This is not surprising, as these provisions were derived from legislation written nearly 200 years ago.[133] The law relating to the civil proceedings by and against the Crown is now set out in the *Crown Proceedings Act 1958*. Section 17 of the Act provides the general rule that the Crown shall not enforce a demand against a public debtor or against any of the debtor's property 'in any other manner than one subject could enforce a claim against another subject and his property', and shall have 'such and the same lien claim and rights as any subject has and can enforce, and no other'. This rule raises an inference that special procedures for the Crown are abolished.[134]

6.176 The Registrar is unaware of sections 214 and 215 ever being invoked.[135] No 'Index of Debtors and Accountants to the Crown' exists. The Department of Justice has informed us that debts to the Crown are now invariably enforced by warrant. We have found no reason to retain these provisions and received no opposition to our proposal in the Consultation Paper that they be repealed.

6.177 We see no reason why the procedure by which a court order for recovery of a debt may bind land, and the priority it has over other interests, should not be the same for old system land as it is for land recorded in an ordinary folio under the Transfer of Land Act.

RECOMMENDATION

51. Sections 209, 210, 211, 212, 214 and 215 of the *Property Law Act 1958* should be repealed and section 52 of the *Transfer of Land Act 1958* should be amended to provide that a judgment, decree, order or process of execution recorded under sections 26E or 26F of that Act has the same effect as to priority of the execution as a recording made under section 52(2) of that Act. As a consequential amendment, section 26I of the *Transfer of Land Act 1958* should be amended to exclude an interest recorded under section 26E or 26F.

127 *Transfer of Land Act 1958* (Vic) s 126.

128 *Transfer of Land Act 1958* (Vic) ss 26E(1)(a), (4).

129 *Property Law Act 1958* (Vic) s 6(1).

130 Wallace (1984), above n 6, 299.

131 Mr Michael Macnamara Submission 2; Associate Professor Maureen Tehan et al Submission 9; Law Institute of Victoria Submission 13.

132 Land Victoria, Submission 18, 2.

133 *The New South Wales (Debts) Act 1813* (54 Geo 3, c 15) (Imp) s 4.

134 Gretchen Kewley, *Report on the Imperial Acts Application Act 1922* (Government Printer, Melbourne, 1975) 72.

135 Land Victoria, Submission 18, 2.

Chapter 6 Amendments to Outdated Provisions

OTHER OBSOLETE PROVISIONS IN PART III

SECTION 213

6.178 Section 213 provides that a purchaser is not affected by a pending suit to recover or assert title to a property (a *lis pendens*) unless or until a memorandum containing specified information is left with the Registrar-General, who must enter the details into the publicly available book prescribed by section 209.

6.179 Lodging the memorandum is a dealing that triggers the creation of an identified folio for the land, if one does not already exist, under the Transfer of Land Act. Section 52(1) of the Transfer of Land Act states that no *lis pendens* shall bind or affect any land under the operation of that Act except as provided by that Act.

6.180 As the Transfer of Land Act makes no provision for the recording of *lis pendens*, section 213 of the Property Law Act is inconsistent with section 52(1) of the Transfer of Land Act and should be repealed.

SECTIONS 216–218

6.181 Section 216 provides for a 'quietus' to be registered in the 'Index of Debtors and Accountants to the Crown'. A quietus is an instrument acknowledging that a Crown debt has been discharged. A seller who was a debtor or accountant to the Crown could not transfer good title until a quietus was entered on the record.[136]

6.182 Section 217 enables the discharge of the estates of debtors and accountants to the Crown on such terms as are thought to be proper. Section 218 provides that discharging part of the estate of a debtor or accountant to the Crown under section 217 does not affect the Crown's claim on other land liable for the debt.[137]

6.183 The Registrar is unaware of these provisions ever being invoked.[138]

6.184 We proposed in our Consultation Paper that these provisions be repealed. All submissions commenting on the proposal agreed.[139]

RECOMMENDATION

52. Sections 213, 216, 217 and 218 should be repealed.

136 Robinson (1992), above n 6, 464 citing *Wilde v Fort* (1812) 4 Taunt 334; 128 ER 359.

137 Ibid 465.

138 Land Victoria, Submission 18, 2.

139 Mr Michael Macnamara, Submission 2; Associate Professor Maureen Tehan et al, Submission 9; Law Institute of Victoria, Submission 13; Land Victoria, Submission 18.

Chapter 7

Repeal of Obsolete Provisions

CONTENTS

Chapter 7 Repeal of Obsolete Provisions

RENTCHARGES

7.1 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'.[1]

7.2 Sections 125–129 of the *Property Law Act 1958* (Property Law Act) deal with the creation of rentcharges. Land charged with payment of a rentcharge is 'settled land' and is subject to the *Settled Land Act 1958* (Settled Land Act).[2] Wallace argues that rentcharges are obsolete in Victoria and need not be retained, even as equitable interests.[3]

7.3 One possible contemporary use of a rentcharge is to overcome the common law rule in *Austerberry v Oldham Corporation*[4] (the *Austerberry* rule) that the burden of a positive freehold covenant does not run at law.[5] For example, a rentcharge may be imposed to require a purchaser of land to pay an annual sum for the maintenance of a facility. This use of rentcharges is further discussed below in the context of submissions received.

7.4 In our Consultation Paper we asked whether the creation of rentcharges over old system land should be abolished. We proposed that sections 125–129 be repealed with a savings provision for any existing rentcharges. These provisions would 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.[6]

7.5 If rentcharges are abolished, section 70 of the Property Law Act would be redundant. The effect of section 70 is to reverse the common law rule that partial release of land from a rentcharge extinguishes the rentcharge entirely. Although Wallace suggested that the section should be repealed,[7] we recommend that it be retained for the benefit of any subsisting rentcharges.[8]

ANNUITIES

7.6 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'.[9]

7.7 The provisions in the Property Law Act expressly do not apply to annuities charged on land under the Transfer of Land Act.[10] The Transfer of Land Act provides its own scheme for the enforcement of annuities.[11] The abolition of rentcharges would not affect the provisions for annuities registered in relation to land under the operation of the Transfer of Land Act.

7.8 Land charged with payment of an annuity as part of a family arrangement is settled land.[12] Since lawyers generally avoid settlements that attract the Settled Land Act, it is likely that non-commercial annuities charged on registered land are rare.

7.9 In our Consultation Paper we proposed that the abolition of the creation of rentcharges should expressly not affect the creation of annuities under the Transfer of Land Act and that the provisions for the benefit of existing rentcharges[13] should be moved to the new schedules set out in Appendix B.

SUBMISSIONS

7.10 Our proposals received full support from submissions that addressed the issue.[14] Associate Professor Tehan and colleagues submitted that the abolition of the creation of rentcharges on old system land should be considered in conjunction with the review of covenants, 'to ensure that no unintended consequences arise from the reform'.[15]

7.11 Although no 'consequences' were specified in the submission, we note the role of rentcharges in the law of freehold covenants discussed above. The use of rentcharges is more common in England, where developers used rentcharges to impose upon all future lot owners an enforceable obligation to make periodic contributions to the cost of maintaining the common property.[16] In Victoria, an owner's corporation can levy fees on lot owners under the *Owners Corporations Act 2006*.[17] England lacked similar provision until 2004, when the *Commonhold and Leasehold Reform Act 2002* (UK) commenced.

7.12 The use of rentcharges is not common in Victoria and their abolition would not be a significant loss. There is little scope for their use to facilitate common property developments. Such developments require subdivision of land, and in most cases it is necessary to register land before it can be subdivided into separate lots for sale.[18] Rentcharges cannot be created in respect of registered land.

RECOMMENDATIONS

53. Sections 125–129 should 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.
54. The savings provision, upon the repeal of sections 125–129, should expressly state that the creation of annuities under the *Transfer of Land Act 1958* is not affected.

MINORS' CONTRACTS

7.13 Under section 28B, a contract between a specified lending society 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.

7.14 Section 28B operates as an exception to section 49 of the *Supreme Court Act 1986* (Supreme Court Act), which provides that loan contracts entered into by minors are void.

HISTORY OF SECTION 28B

7.15 Section 28B was inserted into the Property Law Act in 1965. It replaced section 28A(2). Section 28A had been inserted into the Property Law Act four years earlier.[19] The age of majority at that time was 21. Section 28A(1) enabled a minor between the ages of 18 and 21 to execute a mortgage by way of security for any moneys borrowed from 'any bank or life assurance society'. Section 28A(2) made any such mortgage binding as if the minor were of full age and prevented the minor from avoiding any obligations or liabilities under it on the basis of his or her minority.

7.16 Section 28A(1) was repealed, and section 28A(2) was replaced with section 28B,[20] to remove doubts that had arisen concerning mortgages by minors to lending institutions.

7.17 Unlike the provision it replaced, section 28B specified that it was an exception to section 69 of the *Supreme Court Act 1958* (now section 49 of the Supreme Court Act). It also broadened and clarified the scope of the exception. Rather than applying to mortgages to secure a loan from 'any bank or life assurance society' section 28B applied to any contract at any time entered by a person under the age of 21 with a financial institution specified in section 28B(1)(a)–(e).

1 Land Law Working Party of the Faculty of Law, Queen's University Belfast, *Survey of the Land Law of Northern Ireland* (1971) [60].
2 *Settled Land Act 1958* (Vic) s 8(1)(e).
3 Jude Wallace, *Review of the Victorian Property Law Act 1958* (1984) 37. The Irish Law Reform Commission has recently recommended that the future creation of rentcharges be abolished as they have become obsolete: Law Reform Commission [Ireland], *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* CP 34 (2004) [7.11–12]. Rentcharges have been abolished in Queensland: *Property Law Act 1974* (Qld) s 176 and most forms of rentcharge were abolished in Northern Ireland in 1997: *The Property (Northern Ireland) Order 1997* art 27.
4 *Austerberry v Oldham Corporation* (1885) 29 Ch D 750.
5 Adrian Bradbrook et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 782.
6 See eg, *Land and Conveyancing Law Reform Act 2009* (Ir) ss 41–42.
7 Wallace (1984), above n 3, 135–136.
8 Queensland has retained the equivalent provision despite prohibiting the creation of rentcharges prospectively: *Property Law Act 1974* (Qld) s 177.
9 *Transfer of Land Act 1958* (Vic) s 4(1).
10 *Transfer of Land Act 1958* (Vic) s 125(6).
11 For most purposes, the Act treats annuities in a similar way to mortgages.
12 *Settled Land Act 1958* (Vic) s 8(1)(e).
13 *Property Law Act 1958* (Vic) ss 70, 77(1)(a),(b), 190(1), (2).
14 Mr Michael Macnamara, Submission 2, 3; Associate Professor Maureen Tehan et al, Submission 9, 16; Law Institute of Victoria Submission 13, 10.
15 Associate Professor Maureen Tehan et al, Submission 9, 16.
16 Law Commission [England and Wales], *Easements, Covenants and Profits a Prendre: A Consultation Paper* CP No 186 (2008) [7.50]–[7.52].
17 *Owners Corporations Act 2006* (Vic), Part III, Div 1.
18 *Sale of Land Act 1962* (Vic) s 9AA.
19 *Property Law (Loans to Minors) Act 1961* (Vic) s 2.
20 *Property Law (Loans to Minors) Act 1965* (Vic) s 2.

Chapter 7 Repeal of Obsolete Provisions

CURRENT OPERATION OF SECTION 28B

7.18 Paragraphs (b)–(e) of section 28B(1) were subsequently repealed by the *Age of Majority Act 1977*.[21] Section 28B now applies only to a loan contract entered by a person under the age of 18 with a lending society specified in section 28B(1)(a).

7.19 Section 28B(1)(a) lists the following four lending societies:

- a building society registered under the *Building Societies Act 1986* (Building Societies Act)
- an industrial and provident society registered under the *Industrial and Provident Societies Act 1958* (Industrial and Provident Societies Act)
- a co-operative housing society registered under the *Co-operative Societies Act 1958* (Co-operative Societies Act)
- a co-operative registered under the *Co-operatives Act 1996* (Co-operatives Act).

7.20 We noted in the consultation paper that the Building Societies Act and the Industrial and Provident Societies Act have been repealed. It follows that the references in section 28B(1)(a) to lending societies registered under those Acts[22] are obsolete and should be repealed.

7.21 Section 28B(1)(a)(iii) refers to a housing society registered under the Co-operative Societies Act. Following changes to the regulation of credit providers, only nine co-operative housing societies still operate in Victoria. None have any members and all are in liquidation.[23] Consequently, this provision no longer serves a purpose and should also be repealed.

7.22 This leaves the reference in section 28B(1)(a)(ii) to a co-operative registered under the Co-operatives Act as the only provision which applies to an existing lending society. Even so, we consider that the reference is redundant.

7.23 When it was inserted into the Property Law Act in 1965, section 28B(1)(a)(ii) referred to a society registered under the *Co-operation Act 1958*. This Act already prevented a member who was a minor from avoiding liabilities. Section 30(4) of that Act provided that:

> *A member of a society shall not at any time be entitled on any ground relating to his infancy or former infancy to avoid any of his obligations or liabilities as a member or under any deed mortgage bill lien charge or other contract instrument or document or otherwise.*

7.24 This provision was broader than section 28B(1)(a)(ii), which is directed only to contracts for loans. The Co-operatives Act contains a similarly broad provision.

7.25 Section 69(1) of the 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.' An identical provision appears in the co-operatives legislation of all other jurisdictions[24] and in the proposed co-operatives national law.[25]

WHY SECTION 28B CAN BE REPEALED

7.26 Inserting a list under section 28B(1) of the financial institutions with which a minor could enter valid and binding loans for money clarified the scope of the exception to the rule under the Supreme Court Act that loan contracts with minors are void. Now that it applies only to co-operatives, which are regulated under an Act that already prevents minors from avoiding their obligations and liabilities under contracts, section 28B serves little purpose.

7.27 Another reason why section 28B has diminished in significance is that lowering the age of majority from 21 to 18 reduced the need for a provision that enables young adults who were likely to be working or starting families to enter into mortgages and similar contracts.

7.28 It may be that the only benefit of retaining section 28B would be to clarify that section 49 of the Supreme Court Act does not apply to loans to a minor by a co-operative registered under the Co-operatives Act. However, even in the absence of section 28B, a co-operative would still be able to exercise a power to sell if a minor defaults on a registered mortgage.

7.29 The law when section 28B was inserted into the Property Law Act was that a mortgagee's interest could be defeated on the grounds that the mortgage instrument was void. If a mortgage contract entered by a minor was void, the lender was unable to exercise a power to sell if the minor defaulted. Since the decision of the Supreme Court in *Horvath v CBA*[26] a mortgage registered by a co-operative is indefeasible, even if the covenant to repay is void. A co-operative would not need to rely on section 28B to ensure that it has the ability to recover money loaned on a registered mortgage to a minor.

7.30 If the mortgage with the minor is not registered, a co-operative's interest in the property would more likely be defeated by operation of section 49 of the Supreme Court Act. In this case, the exclusion specified in section 28B is more significant.

7.31 We raised in the Consultation Paper the overlap between section 28B(1)(a) and other legislation. We received two responses. One favoured dealing with the issue of minors' contracts only in the legislation regulating the financial institutions.[27] The other supported uniform provisions or, alternatively, cross referring notes in each Act.[28]

7.32 As we have since found out that the only overlap in practice is with the Co-operatives Act, we see no need for section 28B to be retained. To remove any doubt that section 69(1) of the Co-operatives Act operates notwithstanding section 49 of the Supreme Court Act, a note to this effect should be inserted into the Co-operatives Act (or the proposed nationally consistent legislation).

RECOMMENDATION

55. Section 28B, concerning the validity of contracts with minors, should be repealed. To ensure that a loan contract entered into by a minor member of a co-operative with the co-operative is valid, the *Co-operatives Act 1996* should be amended to provide that section 69(1) of that Act applies notwithstanding anything to the contrary in section 49 of the *Supreme Court Act 1986* or in any rule of common law or equity. If proposed nationally consistent co-operatives legislation is introduced in Victoria, the equivalent provision should carry a similar notation.

21 Schedule 2.

22 The references are at s 28B(1)(a)(i) and (iv) and s 28B(1)(aa).

23 Information provided by the Department of Treasury and Finance, July 2010.

24 *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.

25 Proposed *Co-operatives National Law Bill* cl 2506. See 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.

26 [1998] VSCA 51.

27 Mr Michael Macnamara, Submission 2, 4.

28 Law Institute of Victoria, Submission 13, 11.

Chapter 7 Repeal of Obsolete Provisions

REPRESENTED PERSONS WITH A MENTAL ILLNESS

CONVEYANCES BY ADMINISTRATOR

7.33 Section 30(1) provides for an administrator appointed under the *Guardianship and Administration Act 1986* (Guardianship 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.

7.34 The section 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'.[29] Before section 30(1) was passed, land was conveyed in the committee's name.[30]

7.35 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.

7.36 The statutory powers of administrators to deal with property on behalf of a represented person are set out in Part 5 of the Guardianship and Administration Act. They include many of the powers that the Public Trustee once exercised. 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.

7.37 We suggested in the Consultation Paper that section 30(1) may be redundant and asked whether it should be repealed. All submissions in response agreed that it should be repealed.[31]

A PATIENT WHO IS A TRUSTEE OF LAND

7.38 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 and 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.

7.39 Section 48 of the *Trustee Act 1958* (Trustee Act) 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). The review of the dual trust system that we recommend in Chapter 5 should consider the operation of section 30(2) of the Property Law Act as it interacts with section 48 of the Trustee Act.

RECOMMENDATIONS

56. Section 30(1), concerning conveyances by an administrator on behalf of a patient within the meaning of the *Mental Health Act 1986*, should be repealed.

57. Section 30(2), concerning land held on trust for sale that is vested in a patient within the meaning of the *Mental Health Act 1986*, should be reviewed in the context of the proposed replacement of the dual trust scheme. (See recommendations 36 and 37.)

OTHER PROVISIONS THAT NO LONGER SERVE A PURPOSE

7.40 We have identified a number of other provisions that no longer serve a purpose. Some are obsolete because they refer to legislation that has been repealed or practices that are no longer followed. Others are redundant because their function is now performed by newer legislation. We have listed all of these provisions in Appendix C and recommend that they be repealed.

RECOMMENDATION

58. The provisions that are listed at Appendix C, and which are not elsewhere recommended for repeal, are obsolete and should be repealed.

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

30 Wallace (1984), above n 3, 260 citing *Re Tugwell* (1884) 27 Ch d 309, 312.

31 Mr Michael Macnamara, Submission 2, 4; Associate Professor Maureen Tehan et al, Submission 9, 17; Law Institute of Victoria, Submission 13, 11; State Trustees, Submission 16, 2.

Chapter 8

Further Review

CONTENTS

Chapter 8 Further Review

8.1 The terms of reference of this review ask the Commission to report on any related issues identified during the course of the review that may warrant further investigation.

8.2 We discussed in Chapter 5 the need for a review of trusts of land that encompasses not only the provisions in the *Property Law Act 1958* (Property Law Act) on dispositions on trust for sale but also the *Settled Land Act 1958* and relevant provisions in the *Trustee Act 1958* and the *Administration and Probate Act 1958*.

8.3 In this Chapter we discuss the other issues for further review that we have identified or which were raised in submissions during the course of the current review.

COMPLETION OF REVIEW OF PROVISIONS IN THE PROPERTY LAW ACT

8.4 Apart from the provisions in the Property Law Act concerning dispositions on trusts for sale, the provisions concerning mortgages and leases also need to be reviewed under terms of reference which encompass other relevant legislation.

MORTGAGES

8.5 The provisions regulating mortgages of land under the operation of the *Transfer of Land Act 1958* (Transfer of Land Act) are split between that Act and the Property Law Act.

8.6 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.[1] These statutory remedies are not available to unregistered mortgagees.[2] 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.[3]

8.7 Division 3 of Part II of the Property Law Act sets out statutory terms for mortgages made by deed.[4] Section 86 of the Property Law Act specifies that, with some exceptions, Division 3 of Part II 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.[5] 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.[6]

8.8 An equitable mortgage can be created over both old system land and Torrens System land without a deed if there is an agreement for the creation of a mortgage which a court of equity will specifically enforce.[7] Subject to the Consumer Credit Code,[8] 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.[9] 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.

8.9 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.[10]

8.10 Certain provisions of the Act relating to mortgages purport to apply to charges or liens over personal property.[11] These provisions need to be reviewed for consistency with the *Personal Property Securities Act 2009* (Cth) (PPSA). 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 which are the subject of the reference of powers.

8.11 The PPSA 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.[12] Provisions of the Property Law Act must be individually assessed to ascertain if there is direct inconsistency with the Commonwealth Act.

8.12 As so much of the law of mortgages lies outside the Property Law Act, we consider that the subject of mortgages as a whole should be reviewed under broader terms of reference.

LEASES

8.13 Victoria has two Acts which provide in detail for specific categories of leasehold interests: the *Residential Tenancies Act 1997* (Residential Tenancies Act) and the *Retail Leases Act 2003* (Retail Leases Act).

8.14 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.

8.15 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, the general law of leases as regulated by the common law, and by legislation other than the Residential Tenancies Act and the Retail Leases Act, should be reviewed under broader terms of reference.

PROTECTION OF BENEFICIARIES OF TRUSTS OF REGISTERED LAND

8.16 Where a 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 recommendation 35 in Chapter 5, the holders of successive estates under the settlement will only be able to hold beneficial interests under a trust.

8.17 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'.

8.18 As noted in Chapter 5, Associate Professor Tehan and colleagues submitted that the reduction of legal estates and the introduction of a single statutory trust should be accompanied by measures to improve the protection of the interests of beneficiaries under a trust, and that these interests should be registrable.[13]

1 *Transfer of Land Act 1958* (Vic), Part IV, Division 9.

2 *Ryan v O'Sullivan* [1956] VLR 99; Edward Sykes and Sally Walker, *The Law of Securities* (Lawbook Co 5th ed, 1993) 317.

3 *Transfer of Land Act 1958* (Vic) s 26M.

4 *Property Law Act 1958* (Vic), Part II, Division 3.

5 Adrian Bradbrook et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) [9.170]; Stanley Robinson, *Property Law Act (Victoria)* (Lawbook Co, 1992) 191.

6 Bradbrook (2007), Ibid [9.170], [9.285].

7 There must be at least a sufficient written note or memorandum to satisfy the requirements of s 126 of the *Instruments Act 1958* (Vic), or sufficient acts of part performance: *Australian and New Zealand Banking Group Ltd v Widin* (1990) 26 FCR 21.

8 The Consumer Credit Code as set out in the appendix to the *Consumer Credit (Queensland) Act 1994* (Qld) 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 s 8 of the Code. An equivalent provision is made in paragraph 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.

9 See eg, *Ryan v O'Sullivan* [1956] VLR 99; *J & JH Just Holdings Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546.

10 Queensland Law Reform Commission, *Report on a Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing* 16 (1973) 58.

11 See definition of 'mortgage' in s 18(1).

12 *Personal Property Securities Act 2009* (Cth) s 254.

13 Associate Professor Maureen Tehan et al, Submission 9, 15.

Chapter 8 Further Review

8.19 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.[14] Section 43 of the Transfer of Land Act provides that the purchaser is not affected by notice of a trust or equitable interest. Only the fraud of the purchaser or the purchaser's agent will prevent a purchaser obtaining registered title free of any prior beneficial interest.[15] Beneficiaries who suffer loss will have no claim under the compensation provisions.[16]

8.20 Although trusts are to be kept off the register and behind a 'curtain',[17] it was never intended that beneficiaries would be left unprotected. The Transfer of Land Act and its predecessors contained a set of provisions which empowered the Registrar to prevent the registration of dealings by trustees acting in breach of trust. Section 37 of the 1958 Act 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'.[18]

8.21 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.

8.22 It was for many years the practice for 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*[19] the High Court of Australia unanimously held that the Registrar for Victoria was 'thoroughly justified'[20] 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.[21]

8.23 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 overrreached by improper dealings by the trustees.[22] 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.[23]

8.24 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.[24] In other cases, the impropriety will be apparent only when the dealing is scrutinised against the terms of the trust deed.

LAND LEGISLATION AMENDMENT ACT 2009

8.25 Registry examiners no longer have access to trust deeds when scrutinising dealings by trustees. Section 22(2) of the *Land Legislation Amendment Act 2009*, which came into operation in May 2010, provided that a trust deed may not be deposited with the Registrar.

8.26 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 r*egistered in the name of*[25] such a person. The previous wording referred more generally to land 'belonging or supposed to belong to such a person'.

8.27 In our Consultation Paper, we said that the amendments had further weakened the protections for beneficiaries of trusts, particularly minors and persons of unsound mind. 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:[26]

> *[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.*

8.28 The caveat system also provides inadequate protection for a beneficiary under a discretionary trust, who 'does not have an interest in the land owned by the trust sufficient to found a caveat'.[27]

8.29 Land Victoria submitted that the 2009 amendments to section 37 are not significant as any trust deeds which are lodged are 'rarely cross-referenced to folios in the Register'.[28] In their view, the amendment has 'removed any "false comfort" a party may feel by depositing a trust deed with the Registrar'.[29]

8.30 In light of this discussion and the relationship of this issue with our reform recommendations in Chapter 5, we consider that there should be a further review of the protection afforded to beneficiaries of trusts of land under the operation of the Transfer of Land Act.

IMPLIED COVENANTS UNDER THE PROPERTY LAW ACT AND THE TRANSFER OF LAND ACT

8.31 Following our discussion in Chapter 3 about implied covenants, the application of implied covenants for title under the Property Law Act to registered land requires clarification. We see a need for review of the consistency in the content of all covenants implied in instruments relating to transactions in old system land, and in both registered and unregistered dealings in registered land.

8.32 This review could be undertaken as part of the second stage of the Commission's review of Victoria's property laws, which is to encompass aspects of the Transfer of Land Act.

14 Douglas Whalan, *The Torrens System in Australia* (Lawbook Co, 1982) 210–11.

15 *Transfer of Land Act 1958* (Vic) ss 42 43.

16 *Transfer of Land Act 1958* (Vic) s 109(2)(a).

17 *Transfer of Land Act 1958* (Vic) s 37 provides that the Registrar shall not record trusts in the Register. Ruoff called this 'the curtain principle': Theodore Ruoff, *An Englishman looks at the Torrens System* (1957) 11.

18 The *Land Legislation Amendment Act 2009* (Vic) s 22(2) inserted s 37(2), which provides that from the commencement of that Act, a trust may not be deposited with the Registrar.

19 (1921) 30 CLR 34.

20 *Templeton v The Leviathan Pty Ltd* (1921) 30 CLR 34, 75 Starke J.

21 *Templeton v The Leviathan Pty Ltd* (1921) 30 CLR 34, 53.

22 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.

23 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.

24 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.

25 Inserted by *Land Legislation Amendment Act 2009* (Vic) s 59(1), emphasis added.

26 Land Victoria, Submission 18, 4–5.

27 *Walter v Registrar of Titles* [2003] VSCA 122, [15]; *R & I Bank of Western Australia v Anchorage Investments Pty Ltd* (1992) 10 WAR 59 (WASC Full Crt).

28 Land Victoria, Submission 18, 4–5.

29 Land Victoria, Submission 18, 5.

Chapter 8 Further Review

BOUNDARY ADJUSTMENT

8.33 In Chapter 4 we noted that submissions had raised a problem with shortages in measurement in Crown surveys and private subdivisions. We explained that there was a need to expressly authorise the Registrar to distribute shortages among lots in a subdivision and amend the recordings in the folios accordingly. The power to distribute shortages and make amendments should be exercised in accordance with guidelines issued by the Minister in consultation with the Surveyor-General.

8.34 Any deprivation of property rights to an area of land resulting from amendment of the land description to distribute a shortage raises an issue of compensation, which should be examined as part of a review of the Transfer of Land Act.

PART PARCEL ADVERSE POSSESSION

8.35 The rule of part parcel adverse possession is explained in Chapter 4.[30]

8.36 Although the rule of adverse possession can be used to acquire titles to whole lots as well as parts of lots, whole parcel adverse possession is generally directed to solving a different problem.

8.37 Most Australian jurisdictions and New Zealand allow whole parcel adverse possession in order to update the register in cases of missing owners. The problem often arises when land is sold or inherited but no dealing is lodged with the Registrar. The registered title may remain in the name of the seller or deceased former owner after someone else has taken possession as owner. Once a lot has been sold off-register, subsequent sales are also likely to be off-register, as owners buy and sell possessory titles using deeds of conveyance. Allowing the owner in possession to upgrade their possessory title to registered title 'aligns possession to proprietorship and regularises the register'.[31]

8.38 Part parcel adverse possession is used to resolve problems resulting from mistakes about the location of boundaries and the placement of improvements.[32] As the submission from the Surveying and Spatial Sciences Institute said:[33]

> *The reality is that occupation seldom accords with title dimensions and it is essential to have a mechanism to deal with boundary repair issues.*

8.39 The adverse possession rule also tends to reduce conveyancing costs. It enables purchasers to some extent to assume that they will acquire title to the land as physically enclosed and occupied, provided that fences and other physical boundaries have been in place for the limitation period.[34] The expectation that 'what you see is what you get' enables purchasers and their mortgagees in most cases to dispense with a re-survey,[35] thereby saving around $900–$1000[36] and avoiding the disputes between vendors and purchasers which a re-survey would tend to stir up if it reveals boundary discrepancies.[37]

8.40 In Chapter 4, we noted that several jurisdictions either do not allow part parcel adverse possession at all, allow it only subject to a right of veto by the registered owner of the subject land, or impose restrictions as to the size of the area that can be claimed. Victoria imposes restrictions as to the ownership by excluding land owned by certain public authorities from the operation of the rule.[38] Based on the different approaches, we identified several options for the relationship between the proposed building encroachment relief provision and adverse possession.

8.41 As we noted in Chapter 4, most submissions supported the retention of the adverse possession rule. Accordingly we make no recommendation for modification of the rule for the purposes of introduction of the building encroachment relief provision.

8.42 The submissions raised various issues and reform proposals relating to the operation of the rule, which could be the subject of a further review. The proposals relate to:

- the possible exclusion of the rule in relation to newly issued titles
- the introduction of a minimum area for claims
- the vesting of jurisdiction in the Magistrates' Court to hear disputed claims
- prevention of deliberate encroachment and enclosing of portions of adjacent land
- reform of procedures to comply with human rights norms.

EXCLUSION OF NEW TITLES

8.43 In the submissions, the most commonly cited reason for retention of part parcel adverse possession was to resolve boundary errors and discrepancies arising from deficiencies in early Crown surveys and past subdivisions. Several submissions pointed out that surveying is now highly accurate, and newly created lots are unlikely to suffer the defects of the past. The Association of Consulting Surveyors submitted:[39]

> *Considering that the current reliability of boundary definition ... is high and current building construction methodologies and practices generally require survey definition of boundaries prior to construction, the Association believes it would be appropriate to consider removal of some adverse possession in relation to newly issued titles.*

8.44 This amounts to a proposal for phasing out part parcel adverse possession by disapplying it to lots created after a specified date.

MINIMUM AREA REQUIREMENT

8.45 The Surveying and Spatial Sciences Institute, while supporting the retention of the rule of adverse possession, saw a need to exclude claims to very small portions of land. They cited an example of a claim to a 50–80 mm strip of land along a side fence which abutted a number of other lots and required amendment of multiple titles.[40]

8.46 Their submission also anticipates a spate of claims to small slivers of land resulting from Clause 54.04 of the Victorian Planning Principles, which provides that buildings constructed within 150mm of a boundary are accepted as 'practically' on the boundary for town planning purposes. The submission states:[41]

> *The legacy of this will be to create a further number of small strips which under the Statute of Limitations Act fifteen years later, can provide common law possessory rights to the adjoining owner of a small strip of land which is unviable to register, causing further inconsistencies to the State Cadastre.*

8.47 The Institute suggests that consideration be given to excluding adverse possession claims to strips of land not exceeding 150 mm, perhaps by amending section 272 of the Property Law Act.[42]

8.48 Section 272 of the Property Law Act provides for a margin of error in the description of boundaries. Under section 272 the boundaries of any parcel of land, as stated in any document of title or on any plan, are construed as though the phrase 'a little more or less' immediately followed the dimensions. The phrase itself is deemed to cover any discrepancy that does not exceed 50 millimetres where the boundary line is less than 40.30 metres and 1/500 of the boundary line where it exceeds 40.30 metres. Section 272 further provides that:

> *No action shall be brought by reason or in respect of such difference (whether excess or deficit) where it does not exceed the aforesaid limits.*

30 See [4.47]–[4.50].

31 Land Victoria, Submission 18, 4.

32 See [4.47]–[4.50] in Chapter 4.

33 Surveying and Spatial Sciences Institute, Submission 11, 2.

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

35 In NSW, where there is no part parcel adverse possession, surveys are routinely conducted prior to the sale of land, often at the requirement of the mortgagee.

36 Lindsay Perry, a consulting surveyor, estimates the average cost of a re-establishment survey at $800–$900 plus GST: oral communication, 14 July 2010.

37 Under the standard form contract of sale, an omission or mistake in the description, measurements or area of the land does not invalidate the sale, and the purchaser is not entitled to make any objection or claim for compensation for any alleged misdescription or deficiency in area or measurements: *Estate Agents (Contracts) Regulations 2008* (Vic), Form 2, Clauses 3.1, 3.2.

38 *Limitation of Actions Act 1958* (Vic) ss 7, 7A, 7AB, 7B.

39 Association of Consulting Surveyors, Submission 15, 4.

40 Surveying and Spatial Sciences Institute, Submission 11, 2.

41 Surveying and Spatial Sciences Institute, Submission 11, 2.

42 Surveying and Spatial Sciences Institute, Submission 11, 1–2.

8.49 The section was judicially interpreted in *PCH Melbourne Pty Ltd v Break Fast Investments*.[43] Smith J held that section 272 would not provide a defence to a claim in trespass by building encroachment. In particular Smith J held that section 272 introduces a margin of error for the dimensions appearing on title documents, but does not introduce a margin of error as to the actual title boundary 'as found by admeasurement on the ground'.[44]

8.50 It would therefore appear that the legal effect of section 272 is to limit claims related to small boundary discrepancies in sales of land,[45] but not to limit claims of adverse possession and trespass arising from boundary discrepancies.[46]

8.51 Therefore, any minimum area requirement for adverse possession claims would be a new provision and not an amendment to section 272.

MAGISTRATES' COURT JURISDICTION

8.52 A person who claims to have acquired title to the whole or part of a registered lot by adverse possession may apply to the Registrar under section 60 of the Transfer of Land Act for an order vesting in him or her a registered title to the relevant land. If a person lodges a caveat under section 61, the Registrar must not make a vesting order until the caveat has been withdrawn or has lapsed or a judgment or order is obtained from a court.[47]

8.53 The Law Institute of Victoria said in its submission that, while it supports the retention of part parcel adverse possession, 'such disputes are very expensive to resolve in the Supreme Court of Victoria'.[48] It proposes that a Court similar to the New South Wales Land and Environment Court be established, or alternatively that a specialist division of the Magistrates' Court with expertise in property law be established and given jurisdiction to determine disputes where the land in question is adjacent to a property boundary and does not exceed 30 square metres.

8.54 Recent amendments to the Transfer of Land Act appear to have given the Magistrates' Court jurisdiction to hear and determine matters under that Act concurrently with the Supreme and County Courts,[49] but it is unclear what the scope of the jurisdiction conferred on the Magistrates' Court is. The amended definition now provides that '"a court" means a court of competent jurisdiction'. On one view, the amendment, read in conjunction with various provisions in the Transfer of Land Act which confer jurisdiction on 'a court', gives the Magistrates' Court unlimited jurisdiction in statutory causes of action.[50] On a narrower reading, the Court is given jurisdiction only in matters to which its jurisdictional limit can apply,[51] such as an action against the Registrar for damages under section 110 of the Transfer of Land Act.

8.55 We consider that the Court's jurisdiction in adverse possession matters under the Transfer of Land Act should be defined consistently with its jurisdiction under the building encroachment relief provision.[52]

8.56 The question of whether a Land and Environment Court or a specialist property law division of the Magistrates' Court should be established warrants further consideration.

REFORM OF THE PROCEDURES

8.57 If part parcel adverse possession is retained, we suggest that it be reviewed to address two major problems with the current law in Victoria.[53]

8.58 The first is the need for additional measures to control the incentives that the rule creates for deliberate encroachment.[54] Mr Leitch submits that prevention of encroachment and building overlaps should be considered.[55]

8.59 The second is the lack of due process for landowners before extinguishment of their title. A rule under which a landowner's property right is automatically extinguished by operation of statute without notice or hearing process is arguably inconsistent with the protection of landowner's human right not to be arbitrarily deprived of their property.[56]

8.60 Other jurisdictions, such as England, have taken steps to address these problems by adjusting their provisions for part parcel adverse possession.[57]

DOCTRINE OF PRIVITY

8.61 In discussing section 56 in our Consultation Paper, we noted that it was once interpreted as modifying the doctrine of privity but has since been found to serve a much narrower purpose. We briefly discussed reforms to the doctrine in other jurisdictions and concluded that any need for change in Victoria requires separate examination and possibly comprehensive legislation setting out the circumstances in which a third party can enforce a contractual term and the remedies available for a breach.

8.62 The comments we received on section 56 indicate that the operation of the doctrine of privity is a live issue and one on which there is no consensus.[58] The Queensland Law Reform Commission examined in detail the effect of the doctrine in its 1973 report on property law.[59] It observed that:[60]

> *[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.*

8.63 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:[61]

> *[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]*

8.64 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, and nor do the common law jurisdictions of the United States.[62] More recently, New Zealand and England have significantly modified the doctrine.

8.65 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.

43 [2007] VSC 87.

44 *PCH Melbourne Pty Ltd v Break Fast* [2007] VSC 87 [31].

45 See Robinson (1992), above n 5, 504, citing *Monaghan v Gleeson* (1887) 13 VLR 384.

46 The Surveying and Spatial Sciences Institute put forward the position that it does prevent such claims; Submission 11, 1.

47 *Transfer of Land Act 1958* (Vic) ss 61, 26R(3).

48 Law Institute of Victoria, Submission 13, 15.

49 See definition of 'court' inserted into s 4(1) of the Transfer of Land Act by s 3 of the *Land Law Legislation Amendment Act* (Vic) 2009, which commenced 1 May 2010.

50 See *Magistrates' Court Act 1989* (Vic) s 100(d).

51 The civil jurisdictional limit of the Court applies only in actions for debt, damages and liquidated demands and in claims for equitable relief, but not in statutory causes of action vested in the Court by other Acts: *Magistrates Court Act 1989* (Vic) s 100(1).

52 See Chapter 4.

53 Associate Professor Maureen Tehan et al, Submission 9.

54 See eg, *Monash City Council v Melville* [2000] VSC 55 where landowners acquired title to a 20 foot strip of council reserve land which they had enclosed with their own land with the intention (as Eames J inferred at [30]) of acquiring title by adverse possession.

55 Mr Peter Leitch, Submission 10.

56 Brendan Edgeworth, 'Adverse Possession, Prescription and their Reform in Australian Law' (2007) 15 *Australian Property Law Journal* 1. United Nations Declaration on Human Rights, art 17(2) provides 'No one shall be arbitrarily deprived of their property'. See also the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20. Victoria's provisions are similar to the provisions of the (repealed) *Land Registration Act 1925* (UK) which were challenged in *J A Pye (Oxford) Land Ltd v the United Kingdom* [2005] ECHR 44302/02. The Court held by a majority that the English provisions breached Article 1 of Protocol 1 of the European Charter of Human Rights. On appeal, the Grand Chamber held by a vote of 10 to 7 that the provisions did not breach Article 1.

57 See eg, 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 44.

58 Mr Michael Macnamara, Submission 2; Mr James Hope and Dr Paul Vout, Submission 6; Associate Professor Maureen Tehan et al, Submission 9; Law Institute of Victoria, Submission 13.

59 Queensland Law Reform Commission (1973), above n 10, 37–41.

60 Ibid 38.

61 Ibid.

62 Ibid 37.

Chapter 8 Further Review

8.66 The fact that other Australian jurisdictions have not introduced similar reforms does not necessarily mean that they should. Mr Hope and Dr Vout pointed out in their submission that, despite the occasional harsh outcome, privity gives a degree of economic and legal certainty and that 'restriction (or, at the extreme end, removal) of privity of contract would almost undoubtedly result in increased litigation'.[63]

8.67 We remain of the view that this issue requires separate review.

CONTRACTS WITH MINORS

8.68 When consulting with consumer affairs experts about section 28B, concerning contracts with minors, our attention was drawn to the fact that the general provisions in the *Supreme Court Act 1986* that determine the validity of contracts with minors are substantially unchanged since the 19th century.

8.69 The law in Victoria, which generally makes minors' contracts void, has not kept pace with developments in other jurisdictions in Australia. Those that had similar provisions have since replaced them with legislation which takes greater account of the maturity of the minor.

8.70 The Victorian law was reviewed in 1970 by the Chief Justice's Law Reform Committee[64] but the recommendations were not implemented.

8.71 There may be scope for reform in this area.

63 Mr James Hope and Dr Paul Vout, Submission 6, 4.

64 Chief Justice's Law Reform Committee Report *Infancy in Relation to Contracts and Property*, Report No 3 (1970).

Appendices


No. 6344.
PROPERTY LAW ACT 1958.
to consolidate the Law relating to Conveyancing
and the Law of Property (so).
[30th September.

Appendix A: Section by section summary of the effect of our recommendations on the Property Law Act 1958

This table summarises the effect of our recommendations on each of the provisions of the current Property Law Act. See page 10 for a list of all of our recommendations.

Some of the provisions in the current Act would be included in a new Property Law Act unchanged, some would be included in an amended form, and others would be repealed.

Because they require separate investigation in conjunction with related provisions in other legislation, we propose no changes at this time to the provisions regulating mortgages, leases and trusts for sale.

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
1	Short title and commencement	Retain the title 'Property Law Act'. See recommendation 1.	Chapter 2
2	Repeals and savings	Retain and update. See also recommendation 4.	Chapter 2
3	Definitions	Retain and merge with definitions in s 18. Omit from the definition of 'Court' in s 3(a) the words 'in relation to property or an estate or interest in property the value of which does not exceed the jurisdictional limit of the County Court'.	
PART I—REGISTRATION OF CONVEYANCES ETC. AFFECTING LAND OTHER THAN LAND UNDER THE TRANSFER OF LAND ACT. DEPOSIT OF DOCUMENTS			
4	*Repealed*	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	*Repealed*	Not applicable.	
13	Fees to be paid on registration	Retain for old system land only.	Appendix B
14	*Repealed*	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		RECOMMENDATION	SEE ALSO
PART II—THE GENERAL LAW OF PROPERTY AND CONVEYANCING			
18	Definitions	Retain, redraft for clarity and merge with definitions in s 3. 'Lease', 'lessor', 'lessee' and 'fine' should be separately defined. Definition of 'land' should be simplified and modernised without change in substance. Definition of 'registered land' should be amended to mean land described in an ordinary folio or in a provisional folio limited only as to title dimensions.[1] Definition of 'tenant for life' and other terms which have the same meaning as in the *Settled Land Act 1958:* 'exchange' should be added to the list of terms. 'Valuable consideration' should be separately defined. The following definitions should be added: • ***assent*** 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 *Administration and Probate Act 1958.* • ***assurance*** includes a conveyance and a disposition made otherwise than by will and ***assure*** has a corresponding meaning.[2] • ***deed*** includes an instrument having under this or any other Act the effect of a deed.[3] • ***unregistered land*** means land that has been alienated by the Crown in fee simple or by way of perpetual lease or for years and is not registered land.	
18A	Land may be assured in fee simple	Retain and redraft for clarity.[4] The provision was inserted in 1980 on the repeal of the imperial *Statute of Quia Emptores.* It ensures the alienability of freehold estates.	

1 See definitions in *Transfer of Land Act 1958* (Vic) s 4(1). A folio provisional as to title dimensions is one for which a warning in accordance with Part IV of the Fifth Schedule is recorded under s 26.

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 the effect of our recommendations on the Property Law Act 1958

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
DIVISION 1—GENERAL PRINCIPLES			
SUBDIVISION 1—MISCELLANEOUS			
19A	Interests in land under the Statute of Uses	Repeal ss 19A(1) and (2) with a savings provision. Retain s 19A(3) for old system land only. The section was added when the Statute of Uses was repealed in 1980. The purpose of subsections (1) and (2) is obscure.[5] Leading texts say the subsections are redundant because interests capable of creation as legal interests were always capable of creation as equitable interests.[6] It is doubtful that the provision has any application to registered land.[7]	Appendix B Appendix C
19	Power to dispose of all rights and interests in land	Repeal if legal life estates and legal remainders are abolished. See recommendation 32. The section abrogates the common law rule against the alienation of contingent remainders.[8] The provision will be redundant if all future interests are equitable, as the interests are alienable in equity.	Chapter 5 Appendix C
20	Satisfied terms, whether created out of freehold or leasehold land, to cease	Repeal with a savings provision. 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.[9]	Appendix C
21	Husband and wife to be counted as two persons	Retain. The section overturns a common law rule of construction of deeds.	Chapter 6
22	Vesting orders etc of legal estates operating as conveyances	Retain. The section makes certain provisions of the *Trustee Act 1958* applicable to orders under Division 1.	

5 Adrian Bradbrook et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 39; B J Edgeworth et al, *Sackville and Neave Australian Property Law* (LexisNexis Butterworths, 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.

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
23	Abstract of title to legal estates	Retain for old system land conveyancing only. The provision relates to the proving of title in unregistered land.	Appendix B
24	Effect of possession of documents	Retain for old system land conveyancing only. The provision relates to the proving of title in unregistered land.	Appendix B
25	Interests of persons in possession	Retain and apply to registered land.[10] This provision protects the possessory title of a person in adverse possession.	
26	Presumption that parties are of full age	Retain.	
27	Alien friends may hold etc real and personal property	Retain and amend in accordance with recommendation 45.	Chapter 6
28	Power for corporations to hold property as joint tenants.	Retain.	
28A	Liability of co-owner to account	Retain. The provision was examined in the Commission's report on co-ownership in 2001, and is incorporated by reference into Part IV.	Chapter 2
28B	Certain contracts of minors to be valid	Repeal in accordance with recommendation 55.	Chapter 7 Appendix C
29	Receipts by married minors	Retain.	
30	Conveyances on behalf of patients	Repeal s 30(1) in accordance with recommendation 56. Retain s 30(2) and review it as part of the replacement of the dual trust scheme. See recommendations 57, 36 and 37.	Chapter 7 Appendix C
SUBDIVISION 2—DISPOSITIONS ON TRUST FOR SALE			
31–40	All provisions on trust for sale	The provisions in the Property Law Act apply also to registered land and involve the *Settled Land Act 1958*, the *Trustee Act 1958* and the *Administration and Probate Act 1958*. The replacement of the current dual trust system with a single, unified and flexible statutory trust requires further review of these Acts. See recommendations 36 and 37.	Chapter 5

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

Appendix A: Section by section summary of the effect of our recommendations on the Property Law Act 1958

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
DIVISION 2—CONTRACTS, CONVEYANCES AND OTHER INSTRUMENTS			
CONTRACTS			
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, apply to registered land and incorporate s 43. The section protects purchasers from contractual terms which shift onto them the vendors' costs of making title.	
43	Application of section 42	Retain and incorporate into s 42.	
44	Statutory commencements of title	Retain for old system land only.	Appendix B
45	Other statutory conditions of sale	Retain for old system land only.	Appendix B
46	Adoption of conditions of sale in Third Schedule	Repeal s 46 and the Third Schedule. The conditions of sale are redundant since the *Estate Agents (Contract) Regulations 2008* prescribes standard forms of contracts of sale. Clause 9 of Form 2 in the schedule to the Regulations provides conditions for a sale of general law land (old system) land.	Appendix C
47	*Repealed*	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 *Trade Practices Act 1974* (Cth) s 47(6) or (7); see Part XIA and the *Competition Policy Reform (Victoria) Act 1995* (Vic), ss 19, 20	
49	Applications to the court by vendor and purchaser	Retain and amend in accordance with recommendations 11 and 12.	Chapter 3
50	Discharge of incumbrances by the Court on sales or exchanges	Retain and apply to registered land.[11] 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 1958*, 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.[12] It can be used to clear a mortgage where the right to redeem has not yet arisen.[13]	

11 Stanley Robinson, *Property Law Act (Victoria)* (Lawbook Co, 1992) 95; cf *Conveyancing Act 1919* (NSW) s 66(5).

12 E Wolstenholme, *Wolstenholme and Cherry's Conveyancing Statutes* (Oyez,13th ed, 1972) 126.

13 P Young et al, *Annotated Conveyancing and Real Property Legislation New South Wales* (Butterworths, 2009) 95.

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
CONVEYANCES AND OTHER INSTRUMENTS			
51	Lands lie in grant only	Retain and redraft for clarity.[14] This provision abolishes archaic common law modes of conveying land.	
52	Conveyances to be by deed	Retain for old system and registered land. Section 52(2) contains a list of well-established exceptions to the requirement in s 52(1). Insert a note referring to s 40(2) of the *Transfer of Land Act 1958*.	Chapter 3
53	Instruments required to be in writing	Retain for both old system land and registered land and amend in accordance with recommendation 8.	Chapter 3
54	Creation of interests in land by parol	Retain. 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.[15] 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 Chapter 8. In the meantime, the section should be retained for old system and registered land.	
55	Savings in regard to sections 53 and 54	Retain for old system land and registered land. The section exempts certain dealings from the requirements of ss 53 and 54.	
56	Persons not named as parties may take interest in land etc	Retain s 56(1) and amend in accordance with recommendation 10. It should apply to registered and unregistered land.	Chapter 3 Appendix C
57	Description of deeds	Retain for old system land and registered land.	
58	Provisions as to supplemental instruments	Retain. The provision should be redrafted for clarity.[16] It applies to instruments affecting all land and personal property.[17]	

14 See eg, *Land and Conveyancing Law Reform Act 2009* (Ir) s 66.

15 *Haselhurst v Elliot* [1945] VLR 153.

16 See eg, *Land and Conveyancing Law Reform Act 2009* (Ir) s 72; Northern Ireland Law Commission (2009), above n 9, 132.

17 Robinson (1992), above n 11, 118.

Appendix A: Section by section summary of the effect of our recommendations on the Property Law Act 1958

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
59	Conditions and certain covenants not implied	Retain for old system land and registered land. Omit reference to partitions, which are redundant.[18] The section applies to deeds that are capable of being noted on the Torrens title register. [19]	
60	Power to dispose of fee simple by deed without words of inheritance	Retain s 60(1) for old system land only. Repeal subsections (2)–(4) with a savings provision, as they are required only for dispositions made before the repeal of the *Statute of Uses* in 1980.[20] Retain s 60(5) as a subsection to s 176. Subsection (5) deals with execution by a corporation sole.	Appendix B Appendix C
61	Definitions of expressions used in deeds and other instruments	Retain and amend to apply to covenants implied in a deed or assent by virtue of the Division. A definition of 'land' should be added which incorporates the definition of 'land' in s 18(1).[21]	
61A	Construction of references to repealed Acts	Retain for all land and personal property. The section is a general principle of interpretation of instruments.	
62	General words implied in conveyances	Retain and 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.[22] The section should apply to registered and unregistered land. See also our Consultation Paper on Easements and Covenants, [6.10]–[6.12].[23]	
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. [24]	Appendix B

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

19 Robinson (1992), above n 11, 119.

20 Wallace (1984), above n 10, 123.

21 Wallace (1984), above n 10, 124–5.

22 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, [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) [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.

23 Victorian Law Reform Commission, *Easement and Covenants Consultation Paper* (2010).

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

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
65	Reservation of legal estates	Retain and redraft for clarity. 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'. Amend to refer to reservation of 'a legal estate or *interest*'. Section 194 should then be repealed.[25] Section 65 should apply to registered and unregistered land.[26]	
66	Confirmation of past transactions	Retain for old system land only.[27] 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.	Appendix B
67	Receipt in deed sufficient	Retain and redraft for clarity. The receipt provisions in ss 67–69 should be retained and amalgamated into a single section.[28] They should be extended to refer to instruments other than deeds.[29] The provisions should apply to all dealings under the Transfer of Land Act, although they principally affect unregistered dealings, as well as dealings in personal property.[30]	
68	Receipt in deed or indorsed evidence	Retain. See s 67.	
69	Receipt in deed or indorsed authority for payment to legal practitioner	Retain. See s 67. The term 'legal practitioner' should be defined to include employees of the legal practitioner's firm or of another firm acting as agent for the legal practitioner.[31]	
70	Partial release of security from rentcharge	Retain for the benefit of existing rentcharges in old system land only.	Appendix B

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

26 Robinson (1992), above n 11, 136.

27 Robinson (1992), above n 11, 140.

28 See eg, *Land and Conveyancing Law Reform Act 2009* (Ir) s77.

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

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

31 See Robinson (1992), above n 11, 445; Wallace (1984), above n 10, 135; See *Land and Conveyancing Law Reform Act 2009* (Ir) s 77(3), (4).

Appendix A: Section by section summary of the effect of our recommendations on the Property Law Act 1958

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
71	Release of part of land affected from a judgment	Repeal.[32] This section provides that releasing part of the land charged with an execution does not affect the charge against the land that is not released. Before 1864, when this provision first came into effect, releasing part of the land charged with an execution extinguished the charge.[33] It allowed for part of a debtor's land to be sold, free of the judgment creditor's claim, and applying the creditor's claim to the remaining portion. The *Subdivision Act 1988* and the *Sale of Land Act 1962* prevent any sale by the sheriff of land not comprising a whole folio.[34] Land cannot be subdivided or consolidated except in accordance with the Subdivision Act.[35] There is no need for a savings or transitional provision. It has not been possible to apply this section for at least 48 years. The provision operates only where an execution is charged on the land. To be enforceable, the execution would need to have been charged on the land within the past five years.	Appendix C
72	Conveyances by a person to himself etc	Retain and redraft for clarity. In order to clarify the meaning and overcome the restrictive interpretation in *Rye v Rye,*[36] the section should be amended by adding the words shown in italics;[37] • s 72(3) should provide that a person may 'convey *or lease* land'.[38] • 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 all* of themselves.	
73	Execution of deeds by an individual	Retain and redraft for clarity. Sections 73–74 should be amalgamated as subsections in a single provision dealing with the execution of deeds by individuals and corporations. The provisions apply to unregistered dealings in registered land as well as old system land.	
73A	Sealing of deeds	Retain and redraft for clarity. See s 73.	
73B	Abrogation of rule that authority to agent to deliver must be under seal	Retain and redraft for clarity. See s 73.	

32 We proposed in the Consultation Paper that s 71 should be retained and expressed to apply to land under the operation of the Transfer of Land Act as well as old system land.

33 *Hancock v Hancock* (1865) 1 Ir Ch R 444.

34 Land Victoria, Submission 18, 5.

35 *Subdivision Act 1988* (Vic) s 5(1).

36 [1962] AC 496.

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

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

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
74	Execution of instruments by or on behalf of corporations	Retain and redraft for clarity. See s 73.	
75	Rights of purchaser as to execution	Retain and redraft for clarity. See s 73.	
COVENANTS			
76	Covenants for title and Parts I to VI of the Fourth Schedule	Retain and amend in accordance with recommendation 9. Section 76 implies into various types of conveyances the covenants for title set out in the Fourth Schedule. These have application to old system land and some also apply to personal property.	Chapter 3 Chapter 8
77	Implied covenants in conveyances subject to rents and Parts VII to X of the Fourth Schedule.	Retain and amend in accordance with recommendation 9. Section 77 implies certain mutual indemnity covenants into conveyances of old system land that are subject to rentcharges and leases. If rentcharges are abolished ss 77(1)(a), (b) and the associated covenants in Schedule 4 will still apply to existing rentcharges. Implied covenants as to leases should be reviewed as part of a review of the law of leases in the second stage of the reference. There is a need for review of the consistency in the content of all covenants implied in instruments relating to transactions in old system land, and in both registered and unregistered dealings in registered land.	Chapter 3 Chapter 8
78	Benefits of covenants relating to land	Retain. Section 78 is a word-saving provision which allows the running of the benefit of covenants that 'touch and concern the land' without express mention of the covenantor's successors in title. Retain for both registered and unregistered land.	
79	Burden of covenants relating to land	Retain. Section 79 makes similar provision to s 78, in relation to the running of the burden of covenants. Retain for both registered and unregistered land.	
79A	Construction of covenants affecting land	Retain. The provision was inserted in 1964 to facilitate the running of freehold covenants under building schemes, following the decision in *Re Arcade Hotel Pty Ltd.*[39] It has been held to have retrospective application to pre-1964 covenants.[40] Retain for both registered and unregistered land.	

39 [1962] VR 274.

40 *Re Miscamble's Application* [1966] VR 596.

Appendix A: Section by section summary of the effect of our recommendations on the Property Law Act 1958

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
80	Covenants binding land	Retain. Section 80(1) provides that a covenant (including an implied covenant), bond or obligation or contract under seal binds the real as well as the personal estate of the covenantor. It overlaps with s 208(1), which provides that a person's real estate in Victoria is liable for the person's debts, duties and demands of all kinds in the same way as it is liable for bonds and specialties. Section 37 of the *Administration and Probate Act 1958* also makes the real estate of a deceased person liable for debts whether by speciality or simple contracts. However, s 80(1) differs in that it allows for a contrary intention to be expressed in the covenant, bond, obligation or contract. Section 80(2) confirms that the benefit and burden of covenants devolve with title. Section 80(3) provides that technical expressions are not needed to make a covenant run with land. This should be retained to prevent arguments against revival of common law technical rules. Section 80(4) does not have operative effect but is definitional for the purposes of the section.	
81	Effect of covenant with two or more jointly	Retain. Section 81 is a useful word-saving provision that avoids the need to insert a separate covenant with each party. The *Transfer of Land Act 1958* s 112(2) makes similar provision for covenants implied by that Act, for registered dealings. The section should apply to unregistered land and 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.[41] It overcomes an inconvenient common law rule that covenants entered into by a person with himself or herself and other persons was void.[42] It should apply to registered land.	
83	Construction of implied covenants	Repeal if s 61 is amended to apply to covenants implied in a deed or assent by virtue of the Division. The provision largely duplicates s 61.[43]	Appendix C

41 Wallace (1984), above n 10, 160.

42 Ibid: *Boyce v Edbrooke* [1903] 1 Ch 836; Wolstenholme (1972), above n 12, Vol 1, 166.

43 Ibid.

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
84	Power for Court to modify etc restrictive covenants affecting land	Retain. Detailed proposals for the amendment of this section will be made in the Commission's forthcoming Report on Easements and Covenants.[44] The section should apply to registered land.	
85	Defendant may apply for order	Retain. See s 84.	
DIVISION 3—MORTGAGES AND RENTCHARGES			
MORTGAGES			
86–124	All provisions on mortgages	As so much of the law of mortgages lies outside the Property Law Act, these provisions should be reviewed under broader terms of reference which include examining their consistency with other legislation such as the *Personal Property Securities Act 2009* (Cth). Repeal section 116, dealing with 'satisfied terms' in mortgages by demise. See s 20 above.	Chapter 8 Appendix C
RENTCHARGES			
125–129	All provisions on rentcharges	Repeal with a savings provision for any existing rentcharges. The provision should provide 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.[45] It should also be provided that the creation of annuities under the *Transfer of Land Act 1958* is not affected. See recommendations 53 and 54.	Chapter 7 Appendix C
DIVISION 4—EFFECT OF CERTAIN LIMITATIONS			
LEGAL ASSIGNMENTS OF THINGS IN ACTION ETC			
130	Abolition of the Rule in Shelley's Case	Retain with the following amendments: • delete references to s 259 and to 'an entailed interest' and • references to the heir or heirs of a person in an *inter vivos* disposition or will should be taken to mean the intestate successors of the person as defined by Part 1, Div 6 of the *Administration and Probate Act 1958*.[46] See recommendation 39. The provision should be retained for old system land only. The rule never applied to registered land.[47]	Appendix B
131	*Repealed*	Not applicable	

44 Victorian Law Reform Commission, *Easement and Covenants Consultation Paper* (2010) Ch 16.

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

46 Ontario Law Reform Commission (1996), above n 22, Ch 5; Law of *Property Act 2007* (NZ) s 65. See also Part V, below.

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

Appendix A: Section by section summary of the effect of our recommendations on the Property Law Act 1958

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
132	Restriction on executory limitations	Retain and amend. All but two Australian jurisdictions have a similar 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.[48]	
132A	Voluntary waste	Retain. If the statutory trust is adopted (see recommendations 36 and 37), this provision will apply to existing settlements under the *Settled Land Act 1958*. In future settlements, trustees' management duties will replace the duty of the life tenant not to commit waste. The section will have continued application to leaseholds, and should be reviewed as part of a broader review of leaseholds.	Chapter 5 Chapter 8
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.	Chapter 3
135	Limitation in the case of certain assignments	Repeal. The section applies s 134 to an Act that has been repealed.	Appendix C
DIVISION 5—LEASES AND TENANCIES			
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, the law of leases should be examined as a whole under broader terms of reference.	Chapter 8
153	Enlargement of residue of long terms into fee simple estates	Retain and amend in accordance with recommendations 40, 41 and 42.	Chapter 6
154	Application of division to existing leases	Retain.	

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

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
DIVISION 5A—REMOVAL OF BUILDINGS AND FIXTURES			
154A	Tenant may remove buildings and fixtures	Retain. The provision was transferred to the Property Law Act from the *Landlord and Tenant Act 1958* in 2010.	
DIVISION 6—POWERS—RENAME POWERS OF APPOINTMENT			
155	Disclaimer of powers	Retain and apply to registered land.[49] The Division deals with legal powers of appointment, not equitable powers that exist behind a trust.[50] 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.	
DIVISION 7—REPEALED			
161–162	*Repealed*	Not applicable	
CHARITABLE DISPOSITIONS BY WILL			
163	Construction of certain dispositions by will to charities	Retain.	
164–166	*Repealed*	Not applicable.	
DIVISION 8—MARRIED WOMEN			
167	Abolition of separate examination of, acknowledgement by married women, and of concurrence of husband	Replace with the provisions that currently appear as ss 156 and 157(1) of the *Marriage Act 1958*. See recommendations 46 and 47.	Chapter 6
168	Disclaimer by married woman	Replace. See s 167.	Chapter 6
169	Power for Court to bind interest of married woman	Replace. See s 167.	Chapter 6
170	Acquisitions and dispositions of trust estates by married women	Replace. See s 167.	Chapter 6

49 Robinson (1992), above n 11, 388.

50 Wallace (1984), above n 10, 246.

Appendix A: Section by section summary of the effect of our recommendations on the Property Law Act 1958

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
DIVISION 8A—PERSONS WHO ARE MENTALLY ILL			
171	Power for Court to settle the beneficial interests of a represented patient	Retain.	
DIVISION 9—VOIDABLE DISPOSITIONS			
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 the 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 *Bankruptcy Act 1966* (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	Repeal. The section is not needed, as it is sufficient to rely on the equitable jurisdiction to set aside on grounds such as fraud, undue influence and other unconscionable conduct.[51]	Appendix C
DIVISION 10—MISCELLANEOUS			
CORPORATIONS			
176	Corporations sole	Retain and incorporate s 60(5). Corporations sole continue to exist in Victoria.	
177	Provision for vacancy	Retain.	
178	Transactions	Retain.	
179	Dissolution of a corporation	Retain.	

51 Northern Ireland Law Commission (2009), above n 9, [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).

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
GENERAL			
180	Protection of legal practitioner and trustees adopting this Part	Retain and redraft for clarity. Sections 180–82 should be unified into a single section without substantive amendment.[52]	
181	Further powers etc admissible	Retain and redraft for clarity. See s 180.	
182	Protection of trustees etc	Retain and redraft for clarity. See s 180.	
183	Fraudulent concealment of documents and falsification of pedigrees	Retain and update.[53] The provision should apply to dealings in registered and unregistered land. Although a purchaser who has registered a dealing without knowledge of fraud obtains an indefeasible title,[54] 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. The words creating an offence and applying a penalty in s 183(1) are not consistent with modern drafting of penal provisions.	
184	Presumption of survivorship in regard to claims to property	Retain and amend in accordance with recommendation 44.	Chapter 6
185	Merger	Retain and add a procedural provision for registered land in accordance with recommendation 43.	Chapter 6
186	Rights of pre-emption capable of release	Repeal. The section, adopting the *Law of Property Act 1925* (Eng) s 186, is unnecessary since a benefit is always capable of being released.[55] In England, rights of pre-emption were registrable as land charges.[56]	Appendix C
187	Power to direct division of chattels	Retain. 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	Retain until there are no longer any relevant proceedings pending in the Supreme or County Court which were commenced before 1 February 2006.[57]	

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

53 See eg, *Land and Conveyancing Law Reform Act 2009* (Ir) s 60.

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

55 Robinson (1992), above n 11, 423.

56 Wolstenholme (1972), above n 12, Vol 1, 311.

57 The Courts have been unable to advise us if there are any proceedings in that category.

Appendix A: Section by section summary of the effect of our recommendations on the Property Law Act 1958

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
188	Indemnities against rents	Repeal. 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,[58] the section is redundant and should be repealed.	Appendix C
189	Enforcement of covenants etc relating to indemnity against rent	Retain. 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 s 77(5), which allows the benefit of implied rent covenants to run with the land of the covenantee.	
REDEMPTION AND APPORTIONMENT OF RENTS &C			
190	Equitable apportionment of rents and remedies for non-payment of breach of covenant	Repeal ss 190(1) and (2) with a savings provision if rentcharges are abolished. See recommendation 53. Retain subsections (3)–(8) and apply to registered land. Subsections(1) and (2) provide for charging of rentcharges on land and remedies for default. Repeal of these subsection will nor affect the provisions for registered annuities in the Transfer of Land Act. Section 190(3) allows the sale of part of leased land at an equitably apportioned rent. Section 190(4) restricts the remedy on default to taking possession of the income of the land. Section 190(5) clarifies the powers of trustees and other fiduciaries to grant the same remedies. Section 190(6) enables the conveyance to override the section. Section 190(7) deals with commencement. Section 190(8) disapplies the rule against perpetuities. The section should be read with s 54 of the *Supreme Court Act 1986,* which provides for apportionment of rents, annuities and other periodic payments.	Chapter 7 Appendix C
CONTINGENT REMAINDERS AND USES			
191–193	All provisions on contingent remainders and uses	Repeal with a savings provision when legal future interests are abolished. See recommendation 32. 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 normally created under a trust for sale, or take effect in equity if created by will.[59] We recommend that all future interests should be able to be created only in equity, except leasehold reversions.[60]	Chapter 5 Appendix C

58 See *Landlord and Tenant Act 1958* (Vic), s 12.

59 Edgeworth et al (2008), above n 5, 230–231.

60 Wallace (1984), above n 10, 278.

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
EASEMENTS			
194	Grant of easements by way of use	Repeal when s 65 is amended to provide for reservation of 'an estate *or interest* in land'. The section provides for creation of easements by way of uses. The concept of uses is redundant.[61]	Appendix C
195	Right not deemed to exist by reason only of enjoyment or presumption of lost grant	Retain.	
196	Grant of easement not be presumed from evidence only of user	Retain.	
197	Certain rights of road made appurtenant	Retain.[62] 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.[63] It is premised on the principle that private easements in gross are not permitted.	
NOTICES			
198	Regulations respecting notices	Retain and amend 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 *Interpretation of Legislation Act 1984* 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	Retain. The section restricts the operation of equitable notice. Section 199(1)(b) confines imputed notice to an agent's knowledge gained in the current transaction. Section 199 applies to unregistered interests in registered land, as well as old system land.[64] Equitable priority rules, which include the concept of notice, are used to resolve conflicts between unregistered dealings.[65] The question of whether equitable priority rules should continue to be used to determine the priority of unregistered interests should be examined as part of a review of the *Transfer of Land Act 1958*.	

61 See eg, *Property Law Act 1974* (Qld) s 9.

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

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

64 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.

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

Appendix A: Section by section summary of the effect of our recommendations on the Property Law Act 1958

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
200	Notice of restrictive covenants and easements	Repeal. 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. 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 *Subdivision Act 1988*.[66] The provision is no longer required for dealings in old system land.	Appendix C
DIVISION 11—JURISDICTION AND GENERAL PROVISIONS			
201	Provisions of Act to apply to incorporeal hereditaments	Retain, redraft for clarity and apply to registered land. 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. The provision should be located in the new Act with other provisions dealing with easements and restrictive covenants. The term 'property' should be substituted for 'hereditament'.	
202	Payment into Court	Retain and apply to registered land. Payment into court exonerates the person from making the payment. Amend the provision to state that the payment does not exonerate the person when the person's liability exceeds the amount paid into court.[67]	
203–204	*Repealed*	Not applicable.	

66 *Sale of Land Act 1962* (Vic), s 8A; *Transfer of Land Act 1958* (Vic) s 26L.

67 Robinson (1992), above n 11, 447–48.

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
205	Orders of Court conclusive	Retain. The provision validates titles under court-ordered sales, making the orders operative *in rem*.[68] It prevents a buyer re-opening an issue already determined in earlier proceedings to which the buyer was not a party. 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.[69] The provision is unnecessary for registered dealings, given the indefeasibility of registered titles, but should apply to unregistered dealings in registered land.	
206	Forms of deeds	Retain for old system land only. The section authorises the use of short forms of deeds of mortgage and conveyance as set out in Schedule 8. The section and the schedule should be retained for old system land only.	Appendix B
207	Application to the Crown	Repeal s 207(1). Retain s 207(2) and amend to state that 'this Part binds the Crown'.[70] 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.	Appendix C
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			
208	Lands etc liable to satisfy debts	Retain and update s 208(1). See recommendation 48. Amend s 208(2)–(4) and transfer to the *Sheriff Act 2009* in accordance with recommendations 49 and 50. These provisions should apply to registered land.	Chapter 6
209	Executions in order to bind land to be registered	Repeal in accordance with recommendation 51. Consequential amendments to the *Transfer of Land Act 1958* are required.	Chapter 6 Appendix C
210	Executions after five years to be re registered	Repeal in accordance with recommendation 51. Consequential amendments to the *Transfer of Land Act 1958* are required.	Chapter 6 Appendix C
211	Provision for re-registration explained	Repeal in accordance with recommendation 51. Consequential amendments to the *Transfer of Land Act 1958* are required.	Chapter 6 Appendix C

68 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).

69 *Jones v Barnett* [1900] 1 Ch 370.

70 Wallace (1984), above n 10, 295.

Appendix A: Section by section summary of the effect of our recommendations on the Property Law Act 1958

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
212	Executions as between parties not to be affected	Repeal in accordance with recommendation 51. Consequential amendments to the *Transfer of Land Act 1958* are required.	Chapter 6 Appendix C
213	Purchasers not to be affected by any lis pendens unless suit duly registered	Repeal in accordance with recommendation 52.	Chapter 6 Appendix C
214	Recognisances entered into not to affect purchasers unless duly registered as directed by this Act	Repeal in accordance with recommendation 51. Consequential amendments to the *Transfer of Land Act 1958* are required.	Chapter 6 Appendix C
215	Crown to re-register	Repeal in accordance with recommendation 51. Consequential amendments to the *Transfer of Land Act 1958* are required.	Chapter 6 Appendix C
216	Quietus to debtors or accountants to the Crown to be registered	Repeal in accordance with recommendation 52.	Chapter 6 Appendix C
217	Discharge of the estates of debtors or accountants to the Crown	Repeal in accordance with recommendation 52.	Chapter 6 Appendix C
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 in accordance with recommendation 52.	Chapter 6 Appendix C
219	Execution by fieri facias etc	Amend and transfer to the *Sherrif Act 2009* in accordance with recommendation 49.	Chapter 6
220	Sheriff may execute debtor's powers	Amend and transfer to the *Sherrif Act 2009* in accordance with recommendation 49.	Chapter 6
PART IV—CO-OWNED LAND AND GOODS			
221–234	All provisions on co-owned land and goods	Retain and implement the recommendations in Chapters 2 and 3 of the Commission's 2001 Report *Disputes between Co-owners.* Some of the recommendations require amendments to the *Transfer of Land Act 1958.*	Chapter 3
PART V—INHERITANCE			
235–247	All provisions on inheritance	Repeal and replace with new provision in accordance with recommendation 39.	Chapter 6 Appendix C

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
PART VI—ESTATES TAIL			
248–266	All provisions on estates tail	Retain s 249 and amend in accordance with recommedation 38. Repeal remaining provisions.	Chapter 6 Appendix C
New		See conversion provision in recommendation 38.	Chapter 6
PART VII—SURVEY BOUNDARIES			
Note: All provisions of this Part are expressed to apply to land under the *Transfer of Land Act 1958*—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 4
270	As to aliquot parts of Crown sections having access to area	Retain.	Chapter 4, 8
271	How Crown survey boundaries may be proved in the absence of survey marks	Retain.	Chapter 4
272	Margin of error allowed in description of boundaries	Retain. The section allows a little latitude in the measurements shown on documents of title.[71] Likely to be considered in any review of the rule of part parcel adverse possession.	Chapter 8
273	Provisions of Part to apply to land under general law and Transfer of Land Act 1958	Retain and amend to include guidelines made by the Minister in consultation with the Surveyor-General in accordance with recommendations 13 and 14.	Chapter 4
New	Mistaken improver and building encroachment	Insert provisions for mistaken improver and building encroachment relief in accordance with recommendations 15–31.	Chapter 4

71 Robinson (1992), above n 11, 504.

Appendix A: Section by section summary of the effect of our recommendations on the Property Law Act 1958

SECTION OF PROPERTY LAW ACT 1958		RECOMMENDATION	SEE ALSO
PART VIII—RECOVERY OF PROPERTY ETC ON DETERMINATION OF A LIFE OR LIVES			
274	Person wrongfully holding over after the determination of a life to be liable in damages	Retain and redraft for clarity.[72] The provision applies in the rare case of an overholding by a legal life tenant of a life estate *pur autre vie*. If, as we propose, all life estates will in future exist in equity only, (recommendation 32) the provision will have transitional application only, to legal life estates already existing.	
PART IX—*REPEALED*			
275–302	*Repealed*	Not applicable	
SCHEDULES			
SCHEDULE 1—Repeals			
SCHEDULE 2—*Repealed*		Not applicable	
SCHEDULE 3—General Conditions of Sale of Land		Repeal. The Schedule sets out general conditions of sale for old system land. It is redundant because the Estate Agent's Contract Regulations prescribe general conditions of sale in Form 2 of the Schedule (including in clause 9 conditions required for old system conveyancing).	Appendix C
SCHEDULE 4—Implied covenants		Retain and amend in accordance with recommendation 9.	See ss 76 and 77.
SCHEDULE 5—Form of Transfer of Mortgage		Retain for old system land only. Schedules 5–8 set out the forms of instruments for various types of transactions in old system land. Their use is authorised by ss 76, 77, 114, 115, 117, 118, 120, 121 and 206.	Appendix B
SCHEDULE 6—Form of Receipt under Seal on Discharge of a Mortgage		Retain for old system land only.	Appendix B
SCHEDULE 7—Statutory Mortgage		Retain for old system land only.	Appendix B
SCHEDULE 8—Short Forms of Deeds		Retain for old system land only.	Appendix B
SCHEDULE 9		Repeal. Schedule 9 is a form of certificate of a judge or other authorised officer on a deed of acknowledgment of debt and is authorised by s 253. The Schedule should be repealed along with Part VI—Estates Tail. See recommendation 38.	Appendix C

72 For an example of an updated version, see *Property Law Act 1974* (Qld) s 27.

Appendix B: Sections with no application to land in ordinary folios or folios provisional as to dimensions

SECTION	TITLE
5	Registrar-General
6	Registration of deeds, conveyances etc
13	Fees to be paid on registration
15	Deeds etc may be deposited with Registrar-General
15A	Deposited documents
15B	Court may order deposit of documents
15C	Person may direct document to be deposited
15D	Deposit of document without instructions
16	Deeds etc. deposited may be inspected etc.
17	False oaths made punishable
19A(3)	Interests in land under the Statute of Uses
23	Abstract of title to legal estates
24	Effect of possession of documents
44	Statutory commencements of title
45	Other statutory conditions of sale
60(1)	Power to dispose of fee-simple by deed without words of inheritance
64	Production and safe custody of documents
66	Confirmation of past transactions
70	Partial release of security from rentcharge
130	Abolition of the Rule in Shelley's Case
190(1),(2)	Equitable apportionment of rents
198	Regulations respecting notices
206	Forms of deeds
209	Executions in order to bind land to be registered
210	Executions after five years to be re-registered
211	Provision for re-registration explained
212	Executions as between parties not to be affected
*SCHEDULE 5—Form of Transfer of Mortgage	
*SCHEDULE 6—Form of Receipt under Seal on Discharge of a Mortgage	
*SCHEDULE 7—Statutory Mortgage	
*SCHEDULE 8—Short Forms of Deeds	

* Pending a future review of mortgages; see discussion in Chapter 8.

Appendix C: Obsolete and redundant provisions of the Property Law Act 1958

We recommend the repeal of the provisions in the table below as they no longer serve a useful purpose (recommendation 58). The table includes provisions that are also the subject of other recommendations.

SECTION	TITLE	RELATED RECOMMENDATIONS
19A(1) and 19A(2)	Interests in land under the Statute of Uses	
19	Power to dispose of all rights and interests in land.	32
20	Satisfied terms, whether created out of freehold or leasehold land, to cease	
28B	Certain contracts with minors to be valid	55
30(1)	Conveyances on behalf of patients	56
46	Adoption of conditions of sale in Third Schedule	
56(2)	Persons not named as parties may take interest in land etc	10
60(2)–(4)	Power to dispose of fee simple by deed without words of inheritance	
71	Release of part of land affected from a judgment	
83	Construction of implied covenants	Amendment to s 61
116	Cesser of mortgage terms	
125	Remedies for the recovery of annual sums charged on land	53 and 54
126	Rule against perpetuities not to apply to powers etc under section 125	53 and 54
127	Creation of rentcharges charged on another rentcharge	53 and 54
128	Power in section 127 to be substituted for remedies in section 125	53 and 54
129	Applications of sections 127 and 128	53 and 54
135	Limitation in the case of certain assignments	
175	Acquisitions of reversions at an under value	
186	Rights of pre-emption capable of release	
188	Indemnities against rents	
190(1) and 190(2)	Equitable apportionment of rents and remedies for non-payment of breach of covenant	53
191	Contingent remainders protected against the premature failure of a preceding estate	32
192	Cases in which contingent remainders capable of taking effect	32
193	Provision for cases of future and contingent uses	32
194	Grant of easements by way of use	Amendment to s 65
200	Notice of restrictive covenants and easements	
207(1)	Application to the Crown	
209	Executions in order to bind land to be registered	51

SECTION	TITLE	RELATED RECOMMENDATIONS
210	Executions after five years to be re-registered	51
211	Provision for re-registration explained	51
212	Executions as between parties not to be affected	51
213	Purchasers not to be affected by any *lis pendens* unless suit duly registered	52
214	Recognisances entered into not to affect purchasers unless duly registered as directed by this Act	51
215	Crown to re-register	51
216	Quietus to debtors or accountants to the Crown to be registered	52
217	Discharge of the estates of debtors or accountants to the Crown	52
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.	52
235	Definitions	39
236	Last owner to be considered purchaser	39
237	Heir entitled under will acquires land by devise and assurance creates estate by purchase	39
238	When heirs take by purchase under limitations to the heirs or their ancestor	39
239	Brothers or sisters shall trace descent through parent	39
240	Lineal ancestor may be heir in preference to collateral persons claiming through him	39
241	The male line to be preferred	39
242	The mother of more remote male ancestor to be preferred to the mother of the less remote male ancestor	39
243	Failure of male maternal ancestor	39
244	Half blood if on the part of a male ancestor to inherit after the whole blood of the same degree if on the part of a female ancestor after her	39
245	After the death of a person attainted his descendants may inherit	39
246	Extent of Part	39
247	Limitation made before the passing of the Real Property Statute 1864	39
248	Definitions	38
250	Where successive life estates are given to parent and child with estate tail to grandchild parent and child may bar the entail as if the estate tail were given to the child	38
251	Power to tenants in tail in possession to dispose of land by specific devise or bequest	38
252	Power to dispose of lands entailed saving the rights of certain persons	38
253	Acknowledgments of deeds	38
254	Certificate to be evidence of acknowledgment	38

Appendix C: Obsolete and redundant provisions of the Property Law Act 1958

SECTION	TITLE	RELATED RECOMMENDATIONS
255	Extent of the estate created by a tenant in tail by way of mortgage or for any other limited purpose	38
256	A voidable estate by a tenant in tail in favour of a purchaser	38
257	Tenant in tail to make a disposition by deed as if seised in fee but not by contract	38
258	Assurance by a tenant in tail to be inoperative unless acknowledged	38
259	Equity excluded from giving any effect to dispositions by tenants in tail which in courts of law would not be effectual	38
260	Trustee in bankruptcy in the case of the bankruptcy of a tenant in tail by deed to dispose of the land of the bankrupt to a purchaser	38
261	A voidable estate created in favour of a purchaser by a tenant in tail becoming bankrupt confirmed by the disposition of the trustee	38
262	Acts of a bankrupt tenant in tail void against any disposition under this Act by the trustee	38
263	The disposition by the trustee of the land of a bankrupt tenant in tail to have operation in the event of his death	38
264	A bankrupt tenant in tail to retain his powers of disposition	38
265	Trustee to recover rents of the lands of a bankrupt of which the trustee has power to make disposition	38
266	Application of previous clauses to lands to be sold where the purchase money is subject to be invested in the purchase of lands to be entailed	38
Schedule 3	General Conditions of Sale of Land	
Schedule 9	Form of certificate authorised by s 253.	38

Appendix D: Submissions

1	Professor John Glover RMIT University
2	Mr Michael F Macnamara Deputy President, VCAT
3	County Court of Victoria
4	Dr Malcolm M Park University of Melbourne - and - Mr Peter M Burns
5	Victorian Rail Track (VicTrack)
6	Mr James Hope - and - Dr Paul Vout
7	Australian Institute of Conveyancers (Victorian Division)
8	Property Council of Australia (Victoria)
9	Associate Professor Maureen Tehan, Dr Matthew Harding, Mr Andrew Godwin, Professor Lee Godden, Mr Owen Webb Melbourne Law School
10	Mr Peter Leitch
11	Surveying & Spatial Sciences institute (Victorian Regional Committee)
12	Magistrates' Court of Victoria
13	Law Institute of Victoria
14	Property Law Reform Alliance
15	Association of Consulting Surveyors Victoria
16	State Trustees Limited
17	Confidential
18	Land Victoria
19	Mr Peter F Davies

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