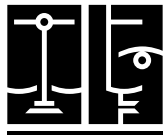

Victorian
Law Reform
Commission

Disputes Between Co-owners

Discussion Paper

Victorian Law Reform Commission

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CALL FOR SUBMISSIONS

The Victorian Law Reform Commission invites your comments on this Discussion Paper and seeks your responses to the questions that are raised. You can send your written submissions by post or email. If you need any assistance with preparing a submission, please contact the Commission.

Please note that all submissions made to the Commission are treated as public documents, unless they are identified otherwise. If you do not want your name to be identified or if you want your submission to be confidential, please make this clear on the document. Members of the public can contact the Commission to obtain copies of other submissions.

Deadline for submissions: 1 August 2001

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Terms of Reference

On 27 April 2001, the Attorney-General, The Honourable Rob Hulls, MP, gave the Victorian Law Reform Commission a reference:

1. To review Part IV of the *Property Law Act 1958*, with a view to introducing simpler and cheaper processes
   - for the resolution of disputes between co-owners
   - for the sale or physical division of co-owned land
2. To consider whether similar processes should be introduced to deal with co-ownership of other forms of property, for example chattels.

Scope of this Discussion Paper

The laws which apply to people who own property together (co-owners) are technical and complex and affect many people. The complexity of the law makes it difficult and expensive for people who own property together to end co-ownership or to resolve disputes without going to court. The Commission has been provided with this reference so that the law can be simplified and clarified. The aim of the reference is to make sale or division of co-owned land easier, to minimise potential disputes, and to spell out mechanisms for resolving any disputes that arise.

This Discussion Paper raises issues that we believe are relevant to such a review, proposes some possible reforms to the law, and seeks feedback from the community before producing a final report. In some parts of this Discussion Paper we have expressed a tentative point of view.

The laws relating to the sale and physical division of property rely on the general principles of co-ownership. In order to clarify and simplify the situation as it relates to sale and division, it is necessary to understand these general principles, and to determine whether they should also be modified. This Discussion Paper therefore contains three preliminary chapters. Chapter 1 explains the two types of co-ownership that exist in Victoria: tenancies in common and joint tenancies. It also briefly examines the Torrens System—the main system of registration of property titles that exists in Victoria. Chapter 2 focuses on the creation of joint tenancies and tenancies in common. Chapter 3 looks at the mechanisms for converting a joint tenancy to a tenancy in common, and also proposes some possible changes to this area.

The area which is most in need of reform relates to the sale or physical division of property. This is the main focus of the Discussion Paper. In Chapter 4 we explain the current law as it relates to the sale or division of land, suggest some changes

to that law and ask for your views on these proposed changes. Chapter 5 looks at other remedies that should be available to co-owners when land is sold or physically divided. Chapter 6 focuses on the principles for ending co-ownership of personal property by division or sale.

Note: Unless otherwise stated, all references to legislation in this Discussion Paper are to Victorian legislation.

Chapter 1
Co-ownership in Victoria: Background

What is Co-ownership?

1.1 Co-ownership exists when two or more people have an interest in property (either land or some other form of property, such as chattels[1]) which entitles them to possess the property at the same time.

1.2 Married couples and de facto partners often become co-owners of land when they buy a house together. People may also become co-owners of land if they buy a house together to live in or for investment purposes, or if they inherit land under a will.

1.3 People can also co-own personal property, for example goods or shares in a company. Co-ownership often occurs when people open a bank account together or when property such as company shares or goods is left to them in a will.

> A and B, who are friends, buy a beach house together. They are co-owners.
>
> T leaves all her property 'to my children'. T's three children become co-owners of the property.

Chattels
Chattels are goods which are not affixed to land, for example a car, white goods, jewellery, a boat or caravan.

Joint tenancy
A joint tenancy exists where two or more people own a single interest in property. If a joint tenant dies, the surviving joint tenant(s) are entitled to the whole of the property.

Tenancy in common
A tenancy in common exists where two or more people have separate interests in property, which entitle them to possession at the same time. Each can leave their separate share to someone by will.

What Types of Co-ownership Exist in Victoria?

1.4 Two forms of co-ownership are recognised in Victoria and other parts of Australia. These are the joint tenancy and the tenancy in common.[2] The most important difference between a tenancy in common and a joint tenancy is that

1 Throughout this Discussion Paper we will define certain technical terms both alongside the terms and in the Glossary. The first time such terms are introduced they will be underlined.

2 The word 'tenancy' does not mean that co-owners are renting the property. It is a technical expression which here simply means they are co-owners.

joint tenants have a right of survivorship. This means that when a joint tenant dies, the property belongs to the remaining joint tenant or joint tenants. The right of survivorship arises because joint tenants are seen as sharing the same interest in the property, rather than as having separate interests. Because each of them is treated as having the same interest in the whole property, a joint tenant's interest in the property simply vanishes when she or he dies. A joint tenant can convert his or her interest into a tenancy in common by selling or giving the interest away while he or she is alive (this is known as severance),[3] but he or she cannot leave it to anyone by will, so as to defeat the right of survivorship.

> X, Y and Z are joint tenants of land. X dies. The land then belongs to Y and Z. This is referred to as survivorship.

1.5 By contrast, tenants in common are seen as having separate (although undivided) shares in the property, which entitle them to possess the property at the same time. When a tenant in common dies, survivorship does not apply. His or her interest in the property passes to the beneficiaries nominated under his or her will, or is distributed under the legal rules governing inheritance when a person dies without a will (intestate).[4]

> X, Y and Z are tenants in common of land. Z dies leaving all his land to P.
>
> P then becomes a tenant in common with X and Y.

3 In certain situations other dealings with the land may also result in severance of the joint tenancy. For a more detailed explanation of severance, see Chapter 3.

4 When a person dies without leaving a will, or leaving a will that does not dispose of all of their property, their property will usually be divided, according to specific rules, amongst any surviving spouse, children or next of kin. See Division 6 of Part I of the *Administration and Probate Act 1958*.

THE TORRENS SYSTEM

1.6 The title to almost all land in Victoria is registered under the Torrens System.[5] The Torrens Register[6] is made up of 'folios of the Register'[7] which are held in the Land Registry (previously known as the Office of Titles). The folio of the Register records the people[8] with interests in the particular piece of land. A person who is registered as the owner (proprietor) of the land holds a certificate of title, which contains the same information as the folio of the Register. It describes all the people with interests in that property.[9] When an interest in land is transferred to another person, the certificate of title must normally be lodged with the Land Registry to enable it to be amended.

Torrens System
The Torrens System is a system of land title which normally provides a guarantee of title to people whose interests in land are registered.

1.7 The Register is now being converted to a computerised record of title. This means that all interests in Torrens land will eventually be recorded on an electronic database. With certain exceptions, the Land Registry expects this process to be completed by November 2001. Once the interests held in a particular property are entered into the database, it is possible to search online to discover what those interests are and who owns them.[10]

---

5 Land registered under the Torrens System ('Torrens land') is to be contrasted with what is called 'general law land', which is treated according to different rules. The Registrar of Titles is directed to convert general law land to Torrens land with 'all reasonable speed': *Transfer of Land Act 1958* s 9. This is an ongoing process presently being undertaken by the Land Registry. Currently, approximately 3% of the marketable parcels of property in Victoria remain unconverted. While this means that there is still general law land in existence, documents dealing with this land can no longer be recorded on the general law register: *Property Law Act 1958* s 6(2). This means that owners of such land have limited protection, creating a further incentive to convert to Torrens land when dealing with the land in any way. It is for these reasons that this Discussion Paper does not discuss general law land.

6 Hereafter simply the 'Register'.

7 *Transfer of Land Act 1958* s 27.

8 We have used the term 'people' to refer to all legal 'persons', including individuals and corporations.

9 Prior to 1989, the folio of the Register was known as the 'original certificate of title', and the certificate of title was the 'duplicate certificate of title'. Although, technically, duplicate certificates of title no longer exist, people often still refer to what is now simply the 'certificate of title' as the 'duplicate certificate of title'.

10 The computerisation of titles may one day lead to electronic conveyancing, thereby eradicating the need for paper certificates of title. This possibility is currently being investigated by the Land Registry. However, at present, paper certificates of title, containing a print-out of the interests in the property, are still provided to the registered owner. These print-outs contain certain security mechanisms, to distinguish them from the print-outs available from online searching of the Register.

1.8 As joint tenants share the same interest in the property, rather than having separate interests, they only receive a single certificate of title between them. The certificate of title may be held by any one of the co-owners. Because tenants in common hold separate interests in the property, they may receive separate certificates, known as 'interest titles'.[11] These certificates set out the exact interest which the tenant in common holds in the property. As a matter of practice, however, interest titles are rarely issued.

11 *Transfer of Land Act 1958* s 30(2).

Chapter 2:
Creation of Tenancies in Common and Joint Tenancies

2.1 It is important to have clear rules to determine whether or not a tenancy in common or a joint tenancy is created, because only joint tenants have a right of survivorship. In this chapter we give a summary of the rules governing the creation of tenancies in common and joint tenancies. We then discuss some possible reforms.

EXISTING LAW

2.2 In the case of land, co-owners usually receive their interest in the property under a document such as a transfer of the land[12] or a will. In the case of other types of property, for example goods, property may be given or sold to co-owners without using a document. If a document is used, it will often specify whether the co-owners are joint tenants or tenants in common. However, if the document does not make this clear, or if no document is used, rules are needed to determine whether the co-owners are joint tenants or tenants in common.

Common law

2.3 There are two bodies of law which affect the nature of a co-owner's interest—common law and equity. For historical reasons, common law favours joint tenancies.[13] This means that if the requirements for a joint tenancy are satisfied and there is no indication that the co-owners are intended to be tenants in common, the law will assume that

Common law
This is a body of law which comes from cases decided by judges, rather than from laws made by parliament. Common law must also be distinguished from equity, another branch of judge-made law that developed differently (see paragraphs 2.5–2.6).

Equity
Equity is a branch of judge-made law which originally developed in different courts from the common law. Equitable principles have historically been concerned with fairness. Today equity is administered by the same courts as the common law.

12 A transfer is the standard form document used to pass an interest in land.

13 One reason that joint tenancies were favoured was because it was easier for prospective purchasers of land to investigate a single title to land, than to investigate the titles of each tenant in common. Today, when title to land is registered under the Torrens System, investigation of title does not present the same difficulties.

they are joint tenants. Survivorship will then apply if one of the joint tenants dies.[14]

2.4 This applies only if requirements known as 'the four unities' are satisfied. The 'four unities' require joint tenants to receive the same interest in the property (unity of interest), at the same time (unity of time), under the same document or transaction (unity of title).[15] Joint tenants must also have the same right to possess the land (unity of possession), an attribute which they share with tenants in common.

> F leaves land in his will to his three children, A, B and C. If the will does not indicate that his children are to take separate interests in the property, the common law will assume they are intended to be joint tenants and survivorship will apply.

Equity

2.5 The assumption that co-owners are joint tenants can sometimes produce unfair results. To overcome this problem, the area of law known as equity may in some situations treat co-owners as tenants in common, even though the common law treats them as joint tenants.[16] In these situations, a person who becomes entitled to the whole of the property by survivorship (ie., the remaining joint tenant) will hold the

14 An indication that the co-owners are intended to be tenants in common usually arises through 'words of severance' which show an intention that the co-owners are to have separate shares. For example, if property is given to parties 'in equal shares', it will be assumed that the intention was to give them the property as tenants in common, not as joint tenants.

15 Where land is left to people by will, it is not required that they become entitled at the same time. For example, if T leaves property by will to her three children when they turn 18, they will become joint tenants when they each turn 18, even though this will happen at different times.

16 As already noted, in the past our laws were developed by two different court systems: the common law courts and the courts of equity. As these systems have now been fused, it has been necessary to develop rules to deal with any conflicting principles that may have arisen over time. These rules are often complex, and subject to various exceptions. For the purpose of this Discussion Paper, however, it is sufficient to note that, as a general rule, the equitable principles will usually prevail. Where one person holds the property at common law and another person holds an equitable interest, a trust is created. That is, the person with the common law interest will hold it on trust for the person that equity deems to be the owner (the person with the equitable interest).

property on trust for those who inherit from the deceased joint tenant (see the examples below).

2.6 There are at least three situations[17] in which equity treats people as tenants in common, even though they may be joint tenants at common law. The first arises where property is purchased by co-owners who are business partners. The second occurs where co-owners contribute unequally to the purchase price of property. The third situation is where co-owners are joint owners of a mortgage. We will examine each of these areas in turn.

Business partners

2.7 Business partners do not normally intend that the principle of survivorship should operate—they do not intend that the partner who lives the longest should become entitled to the whole of the property. Therefore, although they may be joint tenants at common law, equity will generally treat business partners as tenants in common.[18]

> A and B are business partners who buy property together. Because the common law regards them as joint tenants, when A dies, B is entitled to the property. However, equity treats B as holding A's share on trust for those who inherit A's property.

Unequal contribution to purchase price

2.8 When co-owners contribute unequally to the purchase price of property, equity will generally[19] treat them as tenants in common with interests proportionate to their

17 In *Malayan Credit v Jack Chia-MPH Ltd* [1986] 1 AC 549 the Privy Council held that the situations in which equity may find that co-owners hold as tenants in common are not limited to these three situations.

18 *Lake v Craddock* (1733) 3 P Wms 158; 24 ER 1011.

19 Different equitable principles apply if the purchasers are husband and wife. If a husband and wife contribute unequally to property of which they become joint tenants, it is assumed that a contribution of more than half of the purchase price made by the husband was intended to benefit the wife. He may prove this was not his intention. If the wife contributes more than half of the purchase price, it is presumed she intended to retain the benefit of her contribution. Again, it may be established that this was not her intention.

contributions, although at common law they may be joint tenants. Where they contribute *equally*, however, they will be treated as joint tenants in equity as well as at common law.

> A and B purchase land together. A contributes $75,000 and B contributes $25,000. If there is no indication in the transfer of the land to A and B that they are to be tenants in common, then at common law they will be regarded as joint tenants. However, equity will assume they did not intend survivorship to apply, and will treat them as tenants in common in proportions which reflect their contribution to the purchase price (A having a three-quarter interest, B having a quarter interest). If A dies, at common law the interest in the entire property will pass to B under the survivorship principle. In equity, however, B will hold a three-quarter interest on trust for those who inherit A's property.
>
> If A and B each contribute $40,000, they will be joint tenants at common law and in equity. If A dies B will be entitled to the whole of the property.

MORTGAGEES

2.9 The third situation in which equity treats co-owners as tenants in common arises when two or more people lend money on the security of a mortgage over property, and the mortgage is granted to them jointly. This principle applies whether they lend equal or unequal amounts. This means that if one of the investors (mortgagees) dies before the mortgage loan is repaid, the surviving investor will hold the mortgage on trust for those who inherit from the deceased investor, proportionate to the deceased investor's contribution.

F borrows $75,000 from A and $25,000 from B. As security for the loan, A and B jointly take a $100,000 mortgage over F's property. If there is no indication in the mortgage document that A and B are to be tenants in common, then at common law they will be regarded as joint tenants. However, equity will assume they did not intend survivorship to apply, and will treat them as tenants in common in proportions which reflect their contribution to the mortgage loan (A having a three-quarter interest, B having a quarter interest). If A dies, at common law the interest in the entire property will pass to B under the survivorship principle. In equity, however, B will hold a three-quarter interest on trust for those who inherit A's property.

If A and B each contribute $50,000, they will still be considered joint tenants at common law and tenants in common in equity. If A dies, at common law the interest in the entire property will pass to B, but B will hold a half interest on trust for those who inherit A's property.

Legislation: *Transfer of Land Act 1958*

2.10 Common law and equitable principles can be overridden or modified by legislation. As noted above, most land in Victoria is now registered under the Torrens System. The rules that apply to Torrens land are contained in the *Transfer of Land Act 1958*. It is necessary to examine how this Act affects the principles outlined above. In this section we explain the provisions in the *Transfer of Land Act 1958* that refer to the creation of joint tenancies and tenancies in common. We also discuss the protection which the Torrens System provides to purchasers and how this protection applies in the case of co-ownership.

PRESUMPTION OF JOINT TENANCY: *TRANSFER OF LAND ACT 1958* S 33(4)

2.11 The *Transfer of Land Act 1958* contains two provisions relevant to the creation of joint tenancies and tenancies in common: sections 33(4) and 30(2). Section 33(4) provides that

> [a]ny two or more persons named in any instrument as transferees mortgagees lessees or as taking any estate or interest in land shall unless the contrary is expressed be deemed to be entitled jointly and not in shares and every such instrument when registered shall take effect accordingly.

2.12 This section applies the same presumption of joint tenancy which exists under the common law. It means that if a document transferring or mortgaging the land, which is lodged for registration, does not indicate whether the co-owners are joint tenants or tenants in common, they will be registered as joint tenants.

CONSEQUENCES OF REGISTRATION AS A JOINT TENANT: *TRANSFER OF LAND ACT 1958* S 30(2)

2.13 Section 30(2) of the *Transfer of Land Act 1958* provides that

> [t]wo or more persons who are registered as joint proprietors of land shall be deemed to be entitled thereto as joint tenants.

2.14 The precise meaning of this provision has never been tested in the Victorian courts. Taken at face value, this section could be interpreted to mean that if people are registered as joint tenants, they should be treated as joint tenants—regardless of what ordinary equitable principles would apply. This would make the Register determinative of their interests.

A and B purchase a property together. A contributes $100,000 and B contributes $50,000. They register the transfer document, which contains no indication that they are to be tenants in common. According to section 33(4) of the *Transfer of Land Act 1958* they will be deemed to be joint tenants. However, because they contributed unequally to the purchase price, they would ordinarily be tenants in common in equity. If the Register was determinative of their interests, however, it would not matter what the equitable principles were. Because they had been registered as joint tenants, they would be treated as joint tenants.

2.15 To date, however, this provision has not been interpreted in this fashion. Instead, it has been assumed that it should be read in the same way that the equivalent provision in the New South Wales *Real Property Act 1900* [20] has been read: that is, that only people registered as joint tenants under the Torrens System have the same rights as a joint tenant at common law.[21] In other words, section 30(2) is interpreted as meaning that the principle of survivorship will only apply if proprietors are registered as joint tenants, or if the presumption of joint tenancy under section 33(4) of the *Transfer of Land Act 1958* is deemed applicable. In all other cases, survivorship will not apply.

2.16 It follows that the provisions in the *Transfer of Land Act 1958* relating to the creation of tenancies in common and joint tenancies in Torrens land have an identical effect to the principles that operate at common law and in equity.

Effect of registration: protection of purchasers

2.17 As discussed above, the Torrens System is based on a Register that contains folios for most of the land in Victoria. One of the purposes of maintaining such a Register is to

20 See section 100(1), which states that '[t]wo or more persons who may be registered as joint proprietors of an estate or interest in land under the provisions of this Act, shall be deemed to be entitled to the same as joint tenants.'

21 See *Hircock v Windsor Homes (Development) No. 3 Pty Ltd* [1979] 1 NSWLR 501 at 506.

make it easy for people to discover who holds what interests in property they are considering purchasing. The Torrens System is intended to ensure that if a prospective purchaser examines the Register in relation to a certain property, and becomes registered as the owner of an interest in that property, they are normally protected from any future claims made by third parties.[22]

A is registered as the sole owner of a property that P wishes to purchase. P purchases the property from A. P registers the transfer, and becomes the new registered owner of the property. P will be protected from a claim by B that A had stolen the property from her in the past, and had no right to sell it to P.

2.18 This principle applies to people who purchase property from either sole owners or co-owners. It protects a purchaser from a claim that the vendor of the property held it on trust for another person, because there was an equitable tenancy in common. Such a claim could be made by a person who inherits property from a business partner who has died, or by a person who inherits property from a person who has made an unequal contribution to the purchase price of property.

22 There are certain exceptions to this rule, such as fraud, which are not relevant to this Discussion Paper.

A and B purchase a property together. A contributes $25,000 and B contributes $75,000 to the purchase price. The transfer that they register contains no indication that they are to be treated as tenants in common. According to section 33(4) of the *Transfer of Land Act 1958* they are therefore registered as joint tenants. B dies and A is registered as the surviving joint tenant. P wishes to purchase the property. P examines the Register, and discovers that A is now the sole owner of the property, and purchases it from A. Once P registers as the new owner of the property, she will be protected from any future claims made by those who inherit under B's will (B's beneficiaries). The purchaser is protected even though, due to B's contribution to the purchase price, three-quarters of the property should have been held on trust for B's beneficiaries.[23]

2.19 This rule, however, only protects *purchasers* of the property. It does not affect the situation between the co-owners themselves. As noted above,[24] the registration of people as joint tenants does not prevent one of them (or those who inherit from them, prior to any sale of the property) from claiming that, between themselves, they are tenants in common in equity because, for example, unequal contributions to the purchase price of the land were made.[25] In such situations, legal proceedings may be required to determine the interests between the co-owners.

A and B were registered as joint tenants of land. After B died, A became registered as the sole owner. Registration will not prevent C, a beneficiary under B's will, from claiming that A holds a share of the property on trust for him, on the basis that B was a tenant in common in equity.

23 B's beneficiaries may be able to take action against A for breach of trust.

24 See above paras 2.13–2.16.

25 This means that the co-owners would be tenants in common in relation to any dealings which are between themselves, but they would be joint tenants in relation to any dealings with others (eg, a purchaser).

POSSIBLE REFORMS

2.20 The rules which have been discussed above are relatively certain, but they are technical and complex. Although they may be familiar to lawyers, they are unlikely to be well understood by other members of the community. In particular, the interaction between the rules of common law and equity can create complicated situations. It can mean that co-owners are joint tenants at common law, but that they hold the property as trustees for themselves as tenants in common in equity. This can create difficulties upon the death of a joint tenant, as it may be unclear whether the surviving joint tenant(s) will own the property in their own right, or on trust for those who inherit from the deceased. A person who claims that they are a tenant in common in equity may need to go to court to establish that this is the case, a process that can be both expensive and time-consuming.

Trustee
A trustee is a person who holds property on behalf of another person.

2.21 This section proposes some possible reforms which may help clarify the law, and help to prevent disputes between co-owners. First we look at interests in land which can be registered under the Torrens System. In doing so, we deal with the following questions:

- Should specification of the nature of the co-owned interest (ie., joint tenancy or tenancy in common) be required upon registration?
- Should the Register be made determinative of the nature of the interest?
- If the Register is determinative, what exceptions should apply?
- Should the 'four unities' requirement be modified?

2.22 We then focus on interests in land which have not been registered under the Torrens System and on interests in other types of property. In particular, we look at whether there should be a presumption of joint tenancy or tenancy in common.

Interests in land created by registration under the Torrens System

SHOULD SPECIFICATION OF THE NATURE OF THE CO-OWNED INTEREST BE REQUIRED UPON REGISTRATION?

2.23 Co-owners who are buying land may not appreciate the difference between a tenancy in common and a joint tenancy. The transfer or other document which is presented for registration may not describe the nature of their co-ownership interest. Similarly, a person who transfers land to co-owners as a gift may fail to include words in the transfer indicating whether they are joint tenants or tenants in common. The nature of co-owners' interests would be clearer if the *Transfer of Land Act 1958* required instruments which are presented for registration in the Land Registry to specify whether co-owners are intended to be joint tenants or tenants in common.[26]

2.24 It would be helpful if people presenting documents for registration were given information about the differences between a joint tenancy and a tenancy in common. The Land Registry has a pamphlet which describes the difference between these forms of co-ownership, but this may not come to the attention of all those who deal with interests in land. Regulations under the *Transfer of Land Act 1958* could require documents to include a short statement which explains the difference between a joint tenancy and a tenancy in common.[27] It could help to prevent disputes by ensuring that people understood the difference between these two forms of co-ownership.

2.25 When electronic conveyancing is introduced it will be necessary to consider how to modify this requirement to apply to electronic submission of information. In the future, the Land Registry may no longer prescribe forms of documents. Instead, as long as the electronic transaction with

26 In Queensland, when registering an instrument transferring an interest to co-owners, the Registrar must register the co-owners as holding their interests as tenants in common or joint tenants. If the instrument does not show the nature of the co-ownership, the Registrar must register the co-owners as tenants in common: *Land Title Act 1994* (Qld) s 56.

27 *Transfer of Land Act 1958* s 120(2)(h) provides for prescribed forms of documents.

the Land Registry contains the necessary information (eg., precise details of the vendor(s), purchaser(s) and the nature of the transaction) the transaction will be processed. It should, however, be possible to require electronic conveyancing programs to provide basic information to users about the differences between a joint tenancy and a tenancy in common.[28] The Land Registry should also be able to reject any electronic transactions that do not specify the nature of the co-owned interests.

2.26 If information is provided routinely about the nature of co-ownership interests, and the Land Registry rejects transactions which do not specify the nature of such interests, people will be forced to think about the nature of the interest which was intended. The Western Australian Law Reform Commission recommended this approach in its 1994 *Report on Joint Tenancy and Tenancy in Common*.[29] We propose that a similar approach be adopted in Victoria.

Questions

1. Should the *Transfer of Land Act 1958* be amended to require specification of the nature of co-ownership interests on transfers and other documents presented for registration?
2. Should transfers and other documents (or electronic conveyancing programs) contain a short statement explaining the difference between a joint tenancy and a tenancy in common?
3. What other steps should be taken to educate the community about the effect of purchasing land as a co-owner?

28 This will depend on the exact technical specifications of the electronic conveyancing system. As the precise nature of the proposed electronic conveyancing system is still being developed, it is not possible to comment further at this point.

29 Western Australian Law Reform Commission, *Report on Joint Tenancy and Tenancy in Common*, Project No 78 (1994) paras 2.25–2.26.

SHOULD THE REGISTER BE MADE DETERMINATIVE OF THE NATURE OF THE INTEREST?

2.27 If the *Transfer of Land Act 1958* is amended to require the nature of co-owners' interests to be specified in documents lodged for registration, should co-owners who become registered as joint tenants be able to rely on equitable principles to argue that, between themselves, they are tenants in common? For example, should people registered as joint tenants be able to argue that they are tenants in common in equity, because they made unequal contributions to the purchase price of the property?

2.28 Generally speaking, the entry in the Register determines the nature of the interest of a person who is registered. There are limited exceptions to this principle, which prevent a person who is registered as proprietor of an interest in land from relying on the Register. These exceptions include situations where a person becomes registered as the result of his or her fraud,[30] or where a person behaves in such as way as to create an obligation to hold the land for a third party.[31]

2.29 If co-owners were required to specify the nature of their interest upon registration, it may be advantageous to make the entry in the Register determinative.[32] In other words, if co-owners were to specify that they wanted to hold the property as joint tenants, then subject to certain exceptions (see below paragraphs 2.34–2.39) they would hold the property as joint tenants, regardless of the circumstances. Factors such as having made unequal contributions to the purchase price would be irrelevant. This would mean that, in the case of Torrens land, there would no longer be a situation in which a person was a joint tenant at

30 *Transfer of Land Act 1958* ss 42(1), 44.

31 For example, where A contracts to sell the land to B, or declares that they hold it on trust for B, B may be held to own the property in equity, despite the fact that A is listed as the owner in the Register: *Bahr v Nicolay* (1988) 164 CLR 604. There are other exceptions to the principle that the Register determines the nature of the interest of a person who is registered, which are not relevant in this context.

32 Making the Register determinative would only be desirable if it were made necessary to specify the nature of the interest upon registration. In the absence of such a requirement, it would be necessary to maintain the current rules and exceptions to avoid the unjust results that may flow from co-owners not having considered what kind of interest they want to hold.

common law and a tenant in common in equity.[33] An entry on the Register specifying the nature of the co-owner's interests, would be conclusive.

> A contributes $50,000 and B contributes $150,000 to the purchase price of land. They register as joint tenants. B dies. Currently, a person who inherits under B's will (F) would be able to claim that A and B were tenants in common in equity, due to the unequal contribution price, and therefore A would hold a 3/4 share in the property on trust for F. If the Register were made determinative, however, F would be excluded from making such a claim—A would be entitled to the whole of the property.

2.30 Existing exceptions would apply to protect third parties where a person has become registered as a joint tenant as the result of his or her fraud, or where his or her behaviour made it unfair to deny the third party an interest. Other exceptions to the rule could also be created where the general principle seems inappropriate, for example, in the case of mortgagees (see below paragraphs 2.34–2.37).

Advantages and disadvantages

2.31 The two main advantages of such a rule would be simplicity and certainty. As noted above, the current situation is very complicated, due mostly to the complex interaction between common law and equity. If the Register is made determinative, this interaction would no longer be relevant. Those who held a property as joint tenants would know that, subject to any exceptions, they would be viewed as joint tenants, and survivorship would apply. There would be no risk of being declared tenants in common in equity, or having to proceed with potentially costly and time-consuming litigation to prove the matter one way or another.

33 We note that the proposed change would apply only to future dispositions of land to co-owners, once they were registered under the Torrens System. The existing rules would continue to apply to people who were already registered as co-owners of Torrens land, or whose interest was not or could not be registered (see below paras 2.49–2.62).

2.32 These advantages need to be balanced against the possibility of creating injustices. While, ideally, everybody who registers an interest will be fully informed as to the difference between a joint tenancy and a tenancy in common, in practice this will not always be the case. People may register as joint tenants when that is not their actual intention, because they do not know, or understand, the relevant law. Currently, the rules of equity cover some situations where this may create injustice. If the Register were made determinative, however, the scope for equity to fix such problems would be much more limited.

2.33 In addition, although making the Register determinative might simplify certain aspects of the law, the need to expand the necessary exceptions could undermine many of the gains to be made. Not only would it still be necessary to retain the general exceptions relating to fraud, and those situations where a co-owner's behaviour makes it unfair to deny a third party an interest, but specific exceptions in relation to mortgagees and other possible categories of people would also likely need to be specified (see below paragraphs 2.34–2.39). People who feel that they have been treated unfairly might attempt to fit themselves within the scope of these exceptions, offsetting any reduction in litigation that may flow from making the Register determinative.

Question

4. Should the *Transfer of Land Act 1958* be amended to provide that registration as a joint tenant or tenant in common is determinative as to the nature of a co-owner's interest?

Exceptions to making the Register determinative

MORTGAGEES

2.34 One situation in which it may be inappropriate to make the Register determinative relates to mortgages of land, where there are reasons for having investors (mortgagees) register as joint tenants, yet also reasons for having them treated as tenants in common between themselves. In order to protect the borrower of money (the mortgagor), people who join together to invest money on a mortgage loan commonly do so as joint tenants. This protects the borrower because it is usually convenient for them to be able to make repayments to any one of the investors, rather than having to pay each of them separately. If the investors are joint tenants, a borrower who repays money to any one of them is protected from claims made by the others, even if the investor who receives the money does not account to the other investors for their share of the repaid loan. If the investors were tenants in common, the borrower would need to ensure that each received their share of the repayment.

2.35 While there are advantages to borrowers if investors register as joint tenants, it would be unusual if those investing in a mortgage loan intended the principle of survivorship to apply, that is, that in the event of their death, the other investor(s) should be able to recover the entire debt. It would instead be expected that, in the event of death, those who inherit from the deceased investor should be able to recover the deceased investor's share of the loan—a situation which would apply if the investors were viewed as tenants in common.

2.36 Due to these conflicting concerns, people who invest money on mortgages are treated as an exception to the general presumption of joint tenancy. Although they may be joint tenants at common law, they are viewed as being tenants in common in equity.[34] If the Register were made determinative, however, this exception would no longer be available. Those investors who were registered as joint

34 See above para 2.9.

tenants would be treated as joint tenants, both in relation to the borrowers as well as among themselves. This would lead to situations which would be contrary to the intention of the investors. Survivorship would apply in a mortgage situation. Alternatively it would require investors to register as joint tenants, which would disadvantage borrowers.

2.37 To avoid such problems, it is the Commission's current view that, even if registered as joint tenants, investors (mortgagees) should be able to establish that between themselves they are tenants in common. In relation to the borrower (mortgagor) however, they would be joint tenants. Such a position could be created by legislation, whether or not the Register is made determinative. It would simply codify the existing situation.

OTHER EXCEPTIONS

2.38 As noted above, if the Register were to be made determinative of the nature of the interests, it would be necessary to retain the existing exceptions that protect third parties, where a person has become registered as a joint tenant as the result of his or her fraud, or where his or her behaviour makes it unfair to deny the third party an interest. Other general exceptions to the principle that the Register be made determinative may also be required.

2.39 There may also be specific situations, similar to that of mortgagees, in which those who are registered as joint tenants should be treated as tenants in common between themselves. For example, similar policy reasons that apply to mortgagees could also apply to business partners.[35]

35 In its draft Bill on reform to property law, the Northern Territory Law Reform Commission included a similar clause in relation to business partners. Clause 35(3) stated that, subject to any contrary intention, a disposition of property to partners for the purpose of the partnership should be construed as a joint tenancy at common law, and a tenancy in common in equity: 'Bill Prepared by the Northern Territory Law Reform Committee with the Assistance of the Northern Territory Office of Parliamentary Counsel', in Northern Territory Law Reform Committee, *Report on the Law of Property*, Report No 18 (1998).

Questions

5. If registration as joint tenants or tenants in common normally determines the nature of co-owners' interests, should the *Transfer of Land Act 1958* provide that people registered as joint mortgagees are tenants in common as between themselves?
6. Are there any other situations in which the *Transfer of Land Act 1958* should provide that people registered as joint tenants are tenants in common as between themselves?
7. Apart from the situations where registration has been obtained by fraud or where circumstances are such as to create an obligation on a registered proprietor to hold the property on trust for a third person, should there be any other exceptions to the principle that the Register determines the co-owners' interests?

Four unities
The four unities require that:
(1) joint tenants receive the same interest in the property (unity of interest);
(2) the interest be received at the same time (unity of time);
(3) the interest be received under the same document or transaction (unity of title);
(4) the tenants have the same right to possess the land (unity of possession).

SHOULD THE 'FOUR UNITIES' REQUIREMENT BE MODIFIED?

2.40 If the *Transfer of Land Act 1958* is amended to require the specification of the nature of co-ownership interests on transfers and other documents presented for registration, should there also be a change in the requirements for the creation of a joint tenancy? In particular, if co-owners must go through a process of identifying whether they wish to be joint tenants or tenants in common, is there still a need for them to fulfil other requirements—such as receiving the same interest at the same time from the same document—or should it be sufficient for them to choose to be joint tenants? At present, it is necessary for the 'four unities' to be present before co-owners can be joint tenants.[36] This section examines whether this principle should be modified.

36 There are some limited exceptions to this rule, which will not be addressed in this Discussion Paper.

Unity of time and unity of title

2.41 If the *Transfer of Land Act 1958* is amended to require the nature of co-owners' interests to be specified, it may no longer be necessary to require the unities of time and title to be present. This would mean that it would no longer be necessary for the interest to be received under the same document or transaction at the same time. Instead, as long as the co-owners have the same interest in the property, and the same right to possess the whole of the land, then as long as they register as joint tenants, they could be joint tenants.

> A is the sole owner of a property. A marries B, and wants to have an interest in land as a joint tenant with B. Under the present law, A would have to register a transfer to both A and B together (effectively transferring an interest in the property to herself as well as B), so that there would be unity of time and title. Under the proposed reform, A would simply have to register a transfer of an interest to B, and nominate on the form that she intends to create a joint tenancy.

2.42 The main advantage of making such a modification would be to simplify dealings with land. It would no longer be necessary for a person to go through the legal fiction of transferring to her or himself and another person. She or he would simply state on the registration document the nature of the interest which they intended to create. Such a process could also have the effect of ensuring that people put their mind towards the type of interest they wish to create, whenever a situation of co-ownership is created. There may, however, be stamp duty implications in advocating such an approach, which would need further examination.

2.43 While such an approach may be desirable where (i) the interest is one that is registered under the Torrens System, and (ii) there is a requirement to specify the type of interest being registered, we do not believe it should be extended to interests in property other than land under the Torrens System. In relation to property that is not or cannot be registered under the Torrens System,[37] where the presumption of joint tenancy would still exist, we believe that removing the requirement for these two unities would expand the number of joint tenancies beyond those situations where people would expect joint tenancies to be created.[38] In particular, it could lead to survivorship applying when it was never intended to do so.

Questions

8. If the *Transfer of Land Act 1958* is amended to require specification of the nature of co-ownership interests in transactions resulting in registration, should people be able to register as joint tenants without the need for (i) unity of time and/or (ii) unity of title?
9. Are there stamp duty ramifications in removing the requirement for the unity of time and/or title? In particular, would this proposal require changes to the *Stamps Act 1958*, in order to ensure that stamp duty is paid when appropriate?

Unity of interest

2.44 The Law Reform Commission of British Columbia also suggested that the requirement for unity of interest could be removed.[39] The Commission argued that it may be desirable to allow joint tenants to hold different interests (eg., one joint tenant holds a quarter share, the other a

37 See below para 2.49.

38 Joint tenancies would be created wherever there was unity of possession and interest—a far broader category of cases than where all four unities are present.

39 Law Reform Commission of British Columbia, *Report on Co-ownership of Land*, LRC 100 (1988), 40–44.

three-quarter share). While such an idea could be seen to undermine the premise upon which joint tenancies rest, which is that each party holds the same share in the same property, there are certain advantages to such an idea.

2.45 One advantage arises in the context of estate planning. Adult children may transfer an interest in property to themselves and to their elderly parents as joint tenants with the intention of giving the parents a sense of security, as well as the independence associated with owning their own land.[40] Both the parents and the children assume that, if events follow their normal course, the children will ultimately obtain full title to the land due to the principle of survivorship. According to the Land Registry, such planning is common.

2.46 Unfortunately, estate planning creates the possibility for conflict. As the parents are joint tenants in the property, they have the right to dispose of their interest in the property in any way they see fit. If they have an argument with the child they may decide to convert the joint tenancy into a tenancy in common (this is known as severance).[41] As tenants in common, they could then choose to leave their interest to someone other than the child who has given them an interest in the property. The child may be aggrieved that this has occurred. Such a possibility may discourage children from using what is otherwise a useful and flexible tool for planning for their parents' independence and security.

2.47 One way of reducing these difficulties would be to allow for the possibility of co-owners having different joint tenancy interests. A child could, for example, transfer a quarter joint tenancy interest in the property to their parent. This would still allow some measure of security and independence to the parent, while creating less risk for the child. While this change would not prevent the parent from removing the child's right of survivorship by converting their own interest into an interest as tenant in common, the child

40 Alternatively, a parent may transfer property to themselves and a child with the intention that the child should receive the whole interest in the property by survivorship.

41 See Chapter 3.

would only be at risk of losing a quarter interest in the property, rather than a half interest. Similarly, a parent who wished to transfer an interest to a child as a joint tenant, so that the child could benefit from survivorship, might wish to retain the major share in the property during his or her lifetime.

2.48 The main disadvantage to removing the need for unity of interest is that it would increase the complexity in co-ownership law. When specifying the interest held in the property upon registration, it would be necessary to further specify the precise amount of the interest held. There are other techniques which could be used to give the parent an interest in the property for his or her life, which would also protect the child, thus making it unnecessary to modify the principle of unity of interest.[42] The Commission seeks comments on whether it would be appropriate to permit the creation of joint tenancies in which the joint tenants have different shares.

Questions

10. If the *Transfer of Land Act 1958* is amended to require specification of the nature of co-ownership interests on transfers and other documents presented for registration, should people be able to register as joint tenants with unequal interests in the property?
11. If the *Transfer of Land Act 1958* is not amended to require specification of the nature of co-ownership interests, should people still be able to specify that they wish to be joint tenants with unequal interests in the property?

42 Where the child owns the property, he or she could give the parent a 'life interest' in the property, which would come to an end on the death of the parent. Alternatively, a trust could be created with provision for a 'life interest' to be held jointly by the parent and the child, with the property to pass to the survivor on the death of either of them.

Interests in property not created by registration under the Torrens System

2.49 So far, we have discussed interests that have been registered under the Torrens System. There are, however, a number of interests that either cannot be registered under the Torrens System, or have not been registered. These include personal property (for example, goods), general law land, bank accounts, leases, and land left by will that has not yet been registered in the names of the beneficiaries. As it is not possible to rely on the Register to specify the nature of the interests held in such property, it is necessary to examine these forms of property separately.

PRESUMPTION OF JOINT TENANCY OR PRESUMPTION OF TENANCY IN COMMON?

2.50 As discussed above, the common law presumes that where property is transferred to co-owners who acquire the same interest, at the same time and in the same document, a joint tenancy is created. This applies to all interests in property, including those that are not or cannot be registered under the Torrens System. Even if the proposal to make the Register determinative in relation to interests registered under the Torrens System is accepted, this presumption would continue to apply to other types of interest. It is therefore necessary to determine whether this presumption should be changed.[43]

43 In this section we discuss this presumption as it relates to interests that are not or cannot be registered under the Torrens System. The arguments raised, however, can be equally applied to interests registered under the Torrens System, if the proposal to make the Register determinative in relation to such interests is rejected. If this is the case, the presumption of joint tenancy would remain relevant to interests registered under the Torrens System.

Presumption of tenancy in common

2.51 In contrast to the current Victorian position, New South Wales (NSW), Queensland and the Australian Capital Territory (ACT) have legislation which provides that when property is sold, given or left by will to co-owners it is presumed that they are tenants in common, unless the transaction under which they obtain their interest makes it clear that they are joint tenants.[44] The principle applies even if there are no words in the document indicating they are to be tenants in common. The NSW, Queensland and ACT provisions all apply to land and other forms of property.[45]

> H and W are left land by will. In New South Wales the law assumes they are tenants in common, unless the will makes it clear they are joint tenants. If H dies, H's interest passes to the beneficiaries under his will. W does not take the whole property by survivorship.

2.52 The Western Australian Law Reform Commission has recommended that a similar provision should be enacted in that State.[46] It has argued that adoption of a statutory presumption of tenancy in common would give effect to the usual intention of people who dispose of property to co-owners:

> For example, if a testator donates a boat to his adult children, A and B, at common law . . . the children would take as joint tenants, with the consequence that upon the death of one of the children the survivor would remain as sole owner to the exclusion of the deceased

44 *Conveyancing Act 1919* (NSW) s 26; *Property Law Act 1974* (Qld) s 35 (see also *Land Title Act 1994* (Qld) s 56); *Law of Property (Miscellaneous Provisions) Act 1958* (ACT) s 3. The NSW and ACT legislation applies only when a document is used. In Queensland this is not necessary. Certain transactions are excluded from the operation of the presumption in favour of a tenancy in common.

45 There is some doubt whether they apply to what are known as 'rights of action', such as bank accounts.

46 Western Australian Law Reform Commission, above n 29, paras 2.36–2.37. See also the Northern Territory Law Reform Commission, above n 35, in which it was argued in the Explanatory Memoranda to clause 35 that the presumption of joint tenancy 'gives rise to inequity and many de facto relationships favour a tenancy in common'.

> co-owner's estate. Many would view this as unfair and it is unlikely that if the testator at the time of making the will was aware of the legal distinction between joint tenancy and tenancy in common he would have made the grant in joint tenancy.[47]

2.53 Although, as the Western Australian Law Reform Commission argued, a presumption that co-owners receive their interests as tenants in common may give effect to the intention of the person disposing of the property in some situations, it may defeat it in others. One such example may arise where property (including land) is left by will to named co-owners, but one of those co-owners has died prior to the person making the will (the testator).[48] Unless the will specified that the co-owners were intended to be tenants in common,[49] Victorian law now assumes that they are to be joint tenants. Where joint tenants are to inherit under a will, but one has already died, the other joint tenant(s) will be entitled to the whole of the property when the testator dies—which will often be what the testator intended. A different result would apply if the presumption were changed, with most people who inherited under wills then treated as tenants in common. If the NSW presumption applied in Victoria, and if one of the intended beneficiaries died before the person who made the will, his or her share would be redistributed either according to the terms of the testator's will[50] or under the intestacy provisions.[51] This may sometimes result in the particular property passing to a person whom the testator did not intend to benefit.

47 Western Australian Law Reform Commission, above n 29, para 2.36.

48 This problem was not discussed by the Western Australian Law Reform Commission.

49 Through words of severance—see above n 14.

50 For example, if the will specified that A and B were to inherit a particular property, and C would inherit everything else, if A died prior to the person making the will, their share in the property would pass to C.

51 Under the *Wills Act 1997* s 45, property left by will to a child of the deceased who dies before the deceased may pass to the grandchild.

A makes a will leaving all her property to B and C. At common law they are joint tenants. In Victoria, if B dies before A, C inherits all of the property. If the NSW approach were adopted, B and C would be tenants in common. If B died before A, half of A's property would pass under statutory provisions which determine the distribution of intestate property amongst A's family members.

EXCEPTIONS TO THE PRESUMPTION

2.54 Even if Victorian law presumed that co-owners are to be tenants in common, there could be a number of situations that should be excluded from this presumption. In NSW, the presumption does not apply when property is being held by the executors of a will, administrators of a deceased person's estate, or trustees.[52] It is convenient for survivorship to operate in these situations so that if, for example, one of two executors of a will dies, the other executors can administer the deceased person's estate for the purposes specified in their will. For reasons which have already been discussed, the NSW legislation also excludes property which is being held by mortgagees.[53]

2.55 The Western Australian Law Reform Commission also recommended that this presumption should not apply to married co-owners, who are more likely to intend that survivorship should operate between them.[54] It recommended that when married people co-own property, the common law presumption that they are joint tenants should continue to apply. Similarly, the Northern Territory Law Reform Commission recommended an exception in the case of business partners who take property as co-owners for the

52 *Conveyancing Act 1919* (NSW) s 26(2). All of these people hold property for the benefit of others.

53 Ibid.

54 Western Australian Law Reform Commission, above n 29, para 2.37. The Commission did not discuss whether this should also apply to de facto partners.

purposes of the partnership. It recommended that they be treated as joint tenants.[55]

2.56 If Victoria enacted legislation which provided that co-owners are presumed to be tenants in common, these and other exceptions would need to be considered. For example, should the common law presumption of joint tenancy apply to de facto couples or same sex couples as well as those who are married?

Alternative proposal: a modified presumption

2.57 As an alternative to a presumption that co-owners are tenants in common (except in specified situations), a presumption of a tenancy in common could be applied in the situations in which it is most likely that the parties intended a tenancy in common. This presumption would make it unnecessary to rely on equitable principles to establish a tenancy in common in some situations, thereby simplifying the current law.

2.58 As noted above, there are three situations in which the presumption of joint tenancy is overcome by equitable principles: those concerning mortgagees, business partners and unequal contributions to purchase price. As already discussed, there are reasons why treating mortgagees as joint tenants is advantageous. We therefore do not propose modifying the situation as it relates to mortgagees.

2.59 The situation as it relates to business partners is different. It would be rare that business partners would intend the principle of survivorship to apply, and there are fewer advantages to having partners treated as joint tenants. It may therefore be desirable to have legislation provide that, unless otherwise specified, co-owning business partners are

55 See clause 35(2) of 'Bill Prepared by the Northern Territory Law Reform Committee with the Assistance of the Northern Territory Office of Parliamentary Counsel' in Northern Territory Law Reform Commission, above n 35. As noted above, while the Commission believed partners should be an exception to the presumption of tenancy in common, and thereby hold as joint tenants at common law, it also recommended that they should be treated as tenants in common in equity. This would allow people to deal with only one of the partners, whilst not providing for the principle of survivorship between the partners in the case of death.

tenants in common, rather than joint tenants. The precise scope of this presumption would, of course, need to be defined. Some possibilities include:

- Limiting the presumption to business partners who purchase property for the purposes of that partnership;
- Extending the presumption to people who purchase property for the purposes of investment (as opposed to personal use);[56]
- Further extending the presumption to people who purchase property other than in a family, marriage and/or de facto context.

2.60 The distinction between the position of co-owners who make equal and unequal contributions to the purchase price is difficult to justify.[57] Co-owners who purchase property primarily for investment purposes are unlikely to intend survivorship, whether their contributions were equal or unequal. We do not propose retaining this distinction.

2.61 The alternative proposal could therefore be summarised as follows: a presumption of joint tenancy would continue to apply, except in specified cases (for example, business partners), for which there would be a presumption of tenancy in common, whether there were equal or unequal contributions to purchase price. The precise scope of the exceptions would need to be fully defined. People such as mortgagees, executors, administrators or trustees would continue to hold property as joint tenants. Both presumptions (of joint tenancy or tenancy in common) could be overcome by evidence that there was an intention for the situation to be otherwise (eg., that despite being business partners, the co-owners intended to hold the property as joint tenants).

56 This could, however, lead to litigation about the definition of 'investment' and 'personal use'.

57 The historical reason for the distinction was that courts applying equitable principles followed the same principles as common law courts, where they could find no reason for departing from them. Inequality of contribution was used as a reason for departing from the common law.

2.62 It should be remembered that since paragraph 2.49 we have been discussing rules for those property interests that are not or cannot be registered under the Torrens System. If the proposal that the Torrens System be made determinative is accepted, then whatever was stated in the Register would prevail in relation to Torrens land, regardless of whether the co-owners fall within the specified situations or not. If such a reform is not accepted, however, it would be possible to extend this proposal to property registered under the Torrens System as well.

Questions

12. Should the presumption that a disposition of an interest in property to two or more people creates a joint tenancy be modified:

    (i) so that co-owners should be generally presumed to be tenants in common (subject to certain exceptions), in line with the *Conveyancing Act 1919* (NSW) s 26; or

    (ii) so that co-owners should be presumed to be tenants in common in specified situations, such as where property is purchased for investment purposes, or by business partners?

13. If co-owners are generally presumed to be tenants in common (see 12(i) above), what exceptions should there be to this principle? In particular, should dispositions of interests to the following parties be excluded:

    (i) executors of wills, administrators of a deceased estate, and trustees who hold property for the benefit of others;

    (ii) mortgagees;

    (iii) married partners;

    (iv) de facto partners;

    (v) same sex partners;

    (vi) any other co-owners?

Questions

14. If co-owners are presumed to be tenants in common in specified situations (see 12(ii) above), what should those situations be? For example, should business partners, and non-family members who contribute equally or unequally to property, fall within the scope of the presumption?

15. If the Torrens Register is not to be made determinative, should the same presumption of tenancy in common that applies to other property (however modified) also apply to property registered under the Torrens System?

Chapter 3
Converting a Joint Tenancy into a Tenancy in Common

Why Convert a Joint Tenancy into a Tenancy In Common?

3.1 The main reason a joint tenant may want to convert their interest into a tenancy in common is to remove the possibility that the other joint tenant(s) will become entitled to the whole property. In other words, a joint tenant may decide he or she does not want the principle of survivorship to apply.

3.2 There are a number of reasons why people may want to exclude survivorship. Most commonly, a person who is married or in a de facto relationship, and owns property as a joint tenant with their partner, may want to convert their interest to a tenancy in common after separation from their partner. A spouse may apply for division of property under the *Family Law Act 1975* (Cth) and a de facto partner may make a similar application under the *Property Law Act 1958*,[58] but these processes take time and require mutual consent or a court order. While a spouse or de facto partner is negotiating about division of his or her property, he or she may want to convert his or her interest to a tenancy in common. He or she can then make a will leaving the interest in the property to the children or other relatives, in case he or she dies before the property division is finalised.

58 The *Family Law Act 1975* (Cth) enables the Family Court, in the case of spouses, to divide the property between the parties on a just and equitable basis. The *Property Law Act 1958* allows for similar division by a State court, in the case of de facto partners. The Statute Law Amendment (Relationships) Bill 2000, when proclaimed, will extend these provisions to gay and lesbian partners.

3.3 There is often a desire to quickly convert an interest from a joint tenancy to a tenancy in common. For example a joint tenant who is elderly or terminally ill may not wish another joint tenant to become entitled to the property when the first joint tenant dies. This is why it is important to ensure that the rules relating to the conversion process are simple and clear.

WHAT HAPPENS WHEN A JOINT TENANCY IS CONVERTED INTO A TENANCY IN COMMON?

Severance
Severance is the conversion of a joint tenancy into a tenancy in common, so that survivorship no longer applies.

3.4 Conversion of a joint tenancy into a tenancy in common is known as severance—a person 'severs' the joint tenancy. The process is simplest when there are only two co-owners. If one of them severs the joint tenancy, for example, by selling her or his interest to a third party,[59] the co-owners then hold the property as tenants in common, with equal shares in the property.

> X and Y are joint tenants. X sells his interest to P. P and Y become tenants in common. If P dies, her interest passes to the beneficiary nominated in P's will.

3.5 The situation is slightly more complex if there are more than two joint tenants. In such a case, if one of the joint tenants severs his or her interest, he or she will become a tenant in common with the other co-owners, who remain joint tenants. The right of survivorship continues to apply amongst those joint tenants, but does not affect the person who has become a tenant in common.

59 Selling one's interest to a third party will sever a joint tenancy because the four unities will no longer be present. The co-owned interests in the property will have been obtained at different times under different documents. There are a number of other ways of severing a joint tenancy. These are discussed in detail below.

X, Y and Z are joint tenants. X sells his interest to P. P becomes a tenant in common with a one-third interest in the property. Y and Z remain joint tenants of the other two-thirds. If Y dies, Z will become owner of Y's interest by survivorship. Z and P will then be tenants in common, with Z having a two-thirds interest and P having a one-third interest in the property.

How is a Joint Tenancy Converted into a Tenancy In Common?

3.6 In Australia it is clear that a joint tenant cannot sever a joint tenancy of land by simply notifying the other joint tenants of her or his intention to do so.[60] It is probably also impossible to sever a joint tenancy of personal property (for example goods) by expressing an intention to sever.[61] Instead, the joint tenancy must be severed in one of the following six ways:

- transferring the interest to another person by way of sale or as a gift;
- making an enforceable contract of sale or a gift which is recognised as effective in equity;
- transferring the property to a trustee to hold for the benefit of a third party;
- the joint tenant declaring that she or he is a trustee of the property for a third person;
- the joint tenant transferring their interest to himself or herself as a tenant in common; or
- all the co-owners agreeing to sever the joint tenancy.

Each of these is discussed overleaf.

60 *Corin v Patton* (1990) 169 CLR 540; *Patzak v Lytton and the Registrar of Titles* [1984] WAR 353.

61 In England Lord Denning suggested that notice given to the other joint tenants of an intention to sever is sufficient to sever a joint tenancy of goods: see *Burgess v Rawnsley* [1975] Ch 429. However, in the New South Wales case of *Abela v Watson* [1983] NSWLR 308, the wife's intention to sever the joint tenancy of certain articles of furniture was held to be insufficient.

Severance by transferring the interest to another person by way of sale or as a gift

3.7 If a joint tenant sells his or her interest to a third party, or gives his or her interest away, the joint tenancy will be severed.[62] The new owner of the property will be treated as a tenant in common with the other co-owner(s).

3.8 There are certain mechanisms which must be complied with in order to transfer an interest to another person by way of sale or gift. In the case of Torrens land, for example, registration must take place before an interest in the property is passed to a third party.[63] To obtain registration, the joint tenant must sign a document known as a transfer of the land. The transfer must be lodged in the Land Registry along with the certificate of title,[64] so that both the folio of the Register and the certificate can be altered, to specify the new co-owner(s).

3.9 In relation to other types of property, the specific mechanisms required to ensure that the common law interest in that property will pass to a third party will depend on the nature of the property. For example, for company shares, a change of title requires registration of a share transfer. For goods, a joint tenant would need to make a contract with a third person or sign a formal legal document known as a deed in order to transfer his or her interest.[65]

Severance by making an enforceable contract of sale or a gift which is recognised as effective in equity

3.10 Although a joint tenant may intend to transfer her or his interest, the legal formalities for passing the interest may not be completed. For example, a joint tenant may make a

62 A joint tenant with an interest in land may dispose of a lesser interest in it to another person, for example by leasing the land. This Discussion Paper does not discuss the effect of disposing of a lesser interest in the land.

63 An equitable interest can pass prior to registration, as discussed below in para 3.10.

64 As discussed above, the certificate usually will be held by one of the joint tenants. If the land is mortgaged, however, it will be held by the mortgagee.

65 It seems that if a co-owner makes a gift to a third person by simply handing over possession of the goods this may not be sufficient to pass the common law interest in those goods.

contract selling her or his interest in Torrens land to a third person, or may give a person a transfer and the certificate of title, but the transfer may not be registered. If equity treats the transaction as having passed an equitable interest, despite the transfer of the common law interest being unfinished, this will sever the joint tenancy in equity.

A and B are joint tenants of land. A makes an enforceable contract to sell his interest to C. The effect of the contract is to give C an equitable interest in the property. Even before A becomes the registered owner of a common law interest in the land, the joint tenancy will be severed in equity.

Severance by transferring the property to a trustee to hold for the benefit of a third party

3.11 Rather than simply selling the property to a third party or giving it away, it is possible for a joint tenant to transfer his or her interest in the property to a trustee to hold on behalf of a third party. This severs the joint tenancy, making the trustee a tenant in common at common law, and the third party a tenant in common in equity.

3.12 In the case of a joint tenancy of Torrens land, registration of a transfer of the interest to the trustee is sufficient. However, it is not necessary for there to be registration of the transfer before the joint tenancy is severed. It is sufficient for the trustee to be given the signed transfer, as well as access to the certificate of title,[66] so that the transfer can be lodged for registration.[67]

3.13 If there is a joint tenancy of goods, the trust may be created by the joint tenant signing a deed which passes the legal interest in the property to the trustee.

66 For example, if there is a mortgage over the property, and the mortgagee holds the certificate, the joint tenant could request that the mortgagee produce the certificate to enable registration of the transfer. It is not clear whether a request to the other joint tenant to produce the certificate (if they hold the only copy) would be sufficient.

67 *Corin v Patton* (1990) 169 CLR 540.

Severance by declaring oneself trustee of the property for a third party

3.14 Instead of transferring the interest to a trustee to hold on behalf of a third party, a joint tenant may declare that he or she is a trustee for another person.[68] The effect of this transaction is that the joint tenant remains a joint tenant at common law, but the third party has an interest as a tenant in common in equity. This is sufficient to sever the joint tenancy.

3.15 If the co-owned property is land, the declaration of trust must be evidenced in writing.[69] A declaration of trust of personal property can be made orally. However, in the case of a dispute, the fact that such a declaration has been made may be difficult to prove.

Severance by transferring the interest to oneself as a tenant in common

3.16 Section 72 of the *Property Law Act 1958* allows a person to transfer an interest in land to him or herself. The transfer must be registered in the Land Registry. A transfer by a joint tenant to him or herself as a tenant in common has been regarded by the courts as severing a joint tenancy in New Zealand and Ontario, Canada,[70] both of which have legislation similar to section 72 of the *Property Law Act 1958*.[71] While this method of severance has not been discussed in any Australian case, the Land Registry accepts that this severs a joint tenancy.[72]

68 It is doubtful that declaring yourself trustee of the property on your own behalf (ie., you hold the property as trustee for yourself) would be effective to sever a joint tenancy. See Deane J in *Corin v Patton* (1990) 169 CLR 540 at 579.

69 *Property Law Act 1958* s 53(I)(b).

70 See, for example, *Samuel v District Land Registrar* [1984] 2 NZLR 697; *Re Murdoch and Barry* (1975) 64 DLR (3d) 222.

71 See *Property Law Act 1952* (NZ) s 49; *Conveyancing and Law of Property Act*, RSO 1990, c C34, s 41.

72 The Torrens legislation in NSW and Queensland specifically provides for severance by this method: *Real Property Act 1900* (NSW) s 97(1); *Land Titles Act 1994* (Qld) s 59.

3.17 As there is no Victorian legislation which allows a joint tenant of personal property to transfer an interest to herself or himself as tenant in common,[73] this method of severing a joint tenancy is only available in relation to land.

Severance by all the co-owners agreeing to sever the joint tenancy

3.18 If the co-owners agree to sever the joint tenancy this will convert a joint tenancy to a tenancy in common. Severance only occurs if all the joint tenants agree, but the agreement need not be in writing. Such agreement need not be explicit. Behaviour of the joint tenants which shows an intention that they should become tenants in common[74] is sufficient to convert a joint tenancy to a tenancy in common.

WHY REFORM THE LAW IN THIS AREA?

3.19 The methods for converting joint tenancies into tenancies in common are unnecessarily complex. Instead of being able to follow a simple conversion procedure, a joint tenant who wishes to sever the joint tenancy will have to use one of the six methods outlined above. While this will not be a problem when there is agreement between the joint tenants to sever the joint tenancy, it creates complications when one joint tenant cannot persuade the other(s) to do so. In such a situation, a joint tenant will have to either transfer his or her interest to a third party, declare himself or herself trustee for a third party, or transfer the property to himself or herself as a tenant in common. The main problem with transferring the interest to a third party or declaring oneself trustee is that these methods of severance do not allow a joint tenant to retain an equitable interest in the property. The alternative of transferring property to oneself seems unnecessarily convoluted.[75]

73 *Property Law Act 1958* s 72(3) applies only to land.

74 For example, if they write letters to each other which assume that they are now tenants in common. For an example of severance by conduct see *Sprott v Harper* [2000] QCA 391.

75 In addition, although this method of severance is commonly used by the Land Registry, its effectiveness has never been tested by the courts.

3.20 For land under the Torrens System, the most significant problem is that most of the methods of severance require production of the certificate of title. A joint tenant may not be able to register a transfer because the certificate of title is in the possession of another joint tenant. Their desire to sever the joint tenancy may be thwarted by the other joint tenant unreasonably withholding production of the certificate. If the certificate of title is held by a mortgagee (for example a bank which has lent the money to purchase the land), the joint tenant who wishes to sever the tenancy will have to ask the bank to produce the certificate of title for registration. Banks will not automatically do this. It may take some time for a bank to decide whether to produce the duplicate certificate of title.[76] This will create difficulties if a joint tenant wishes to sever the joint tenancy quickly, due to ill health or old age.

3.21 The current requirements often act to defeat the intention of joint tenants to convert their interest into a tenancy in common. There have been several cases in which joint tenants have made unsuccessful attempts to carry out their intention to sever a joint tenancy in land.[77]

76 If the tenant is proposing to transfer his or her interest to a third party, the bank will need to consider whether the third party can repay the mortgage loan. Even if the joint tenant is transferring the property to him or herself, it may take some time for the bank to produce the certificate of title.

77 See, for example, *Corin v Patton* (1990) 169 CLR 540.

P was terminally ill. She and her husband were joint tenants of land. She wanted to sever the joint tenancy, presumably to ensure her children could inherit her interest. She signed a transfer of her interest to her brother, who was to hold it on trust for her, or as she directed. She handed the transfer and the deed of trust to her solicitor. The certificate of title to the land was held by a bank which had a mortgage over it. This certificate had to be provided to the Land Registry, so that the transfer of land could be registered. Neither P nor her solicitor wrote to the bank to ask it to produce the certificate of title. P died without the transfer being registered. The High Court of Australia held that her husband was entitled to the land by survivorship, as P had not succeeded in severing the joint tenancy.[78]

POSSIBLE REFORMS

Severance of joint tenancies of Torrens land

3.22 In relation to Torrens land, two main reforms have been discussed in other jurisdictions:[79] severance by service of a written notice and severance by registration of a declaration of severance. In this section we will examine each of these proposals, and then briefly consider possible reforms in relation to the severance of joint tenancies of personal property.

SERVICE OF A WRITTEN NOTICE

3.23 To sever a joint tenancy, a joint tenant must dispose of his or her interest by one of six methods mentioned above (see paragraph 3.6). Alternatively, it could be possible for a joint tenant to sever a joint tenancy by simply notifying the other co-owners that he or she wishes to sever the joint tenancy. This proposal has been adopted in England, where a

78 *Corin v Patton* (1990) 169 CLR 540. What P and her solicitor had done was insufficient to pass an equitable interest to her brother.

79 See, for example, Western Australian Law Reform Commission, above n 29, paras 3.34–3.35; New South Wales Law Reform Commission, *Unilateral Severance of a Joint Tenancy*, Report No. 73 (1994) Chapter 7.

joint tenancy can be severed by giving notice in writing to the other joint tenants.[80]

3.24 The main advantages of this proposal is that it is quick, simple and cheap. A joint tenant who is critically ill can sever the joint tenancy without the delay which may occur in registering a document. These advantages led the Western Australian Law Reform Commission to recommend that service of a written notice on the other joint tenants should be effective to sever a joint tenancy in Torrens land in equity.[81] Under this approach, the effect of service of a notice would be that the person would become a tenant in common with the other co-owners, but the co-owners would remain registered as joint tenants.

3.25 One disadvantage of this proposal is that it may create uncertainty as to whether severance has occurred. Notices may be ambiguous, or there may be a dispute about whether a notice has actually been received. This could lead to increased litigation.

3.26 The simplicity of the process could also make it easier for unscrupulous people who are beneficiaries under a will to use fraud to overcome survivorship, by alleging that the joint tenancy had been severed. It was for this reason, as well as the problems outlined above, that the New South Wales Law Reform Commission rejected the introduction of severance of a joint tenancy of Torrens land by service of a notice.[82]

3.27 Another problem with this approach is that it tends to undermine the principle that the Torrens Register should reflect the nature of the interests held by co-owners. Provision for severance by service of a notice could result in an increase in the number of people who are registered as joint tenants, but who are tenants in common in equity.

80 *Law of Property Act 1925* (UK) s 36(2). It should be noted that this only creates an equitable tenancy in common, as common law tenancies in common cannot exist in England.

81 Western Australian Law Reform Commission, above n 29, para 3.34. The Commission recommended that severance should not be effective at common law until a declaration of severance was registered (see below paras 3.29–3.31).

82 New South Wales Law Reform Commission, above n 79, Report No. 73 (1994) paras 7.17–7.20.

3.28 It is the Commission's current view that these disadvantages outweigh the advantages of allowing severance by written notice. We do not recommend that such an approach be introduced for Torrens land in Victoria.

Questions

16. Should it be possible to sever a joint tenancy of Torrens land by service of a written notice?

17. If so, should there be any exceptions or limitations to this approach?

REGISTRATION OF A DECLARATION OF SEVERANCE

3.29 Instead of allowing severance by service of a written notice, provision could be made for a joint tenant to sever his or her interest in Torrens land by registering a 'declaration of severance'. The Land Registry could prescribe a standard form for this purpose, in which a joint tenant declares that he or she wishes to become a tenant in common. This form would then be lodged at the Land Registry, and upon registration the joint tenancy interest would be converted to a tenancy in common.[83] A joint tenancy can be severed in this way in Tasmania.[84]

3.30 This approach would be simpler than the current method of severance. It would allow a joint tenant to sever the joint tenancy without disposing of his or her interest to a third party, or without transferring the interest to him or herself. It avoids the problems of uncertainty raised by allowing severance by service of a written notice. The information required for the declaration could be determined by the Land Registry, circumventing the problem of ambiguity. As the declaration would need to be lodged with

83 If this proposal is accepted, it will be important to ensure that the form and procedure for lodgment are clear and simple.

84 *Land Titles Act 1980* (Tas) s 63. Note that New South Wales and Queensland have legislated to enable a joint tenant to sever by transferring the property to him or herself: *Real Property Act 1900* (NSW) s 97; *Land Title Act 1994* (Qld) s 59.

the Land Registry, there could be no dispute as to whether severance had taken place, or whether that was the intention of the joint tenant.

3.31 However, requiring registration is a slower and more complex means of achieving severance than service of a written notice. This could create difficulties in the case of the terminally ill or aged. If a joint tenant has lodged his or her declaration, but it has not been registered at the time of his or her death, it will need to be decided whether this is sufficient to sever the interest. It is also necessary to decide whether a joint tenant should be required to produce the certificate of title upon registration of the declaration, and whether she or he should be required to notify the other joint tenants of her or his intention to sever the joint tenancy. These issues are discussed overleaf.

Question

18. Should it be possible to sever a joint tenancy of Torrens land by registration of a declaration of severance?

Should lodging a declaration with the Land Registry be sufficient?

3.32 If it becomes possible to sever a joint tenancy of Torrens land by registration of a declaration of severance, it is likely that two issues of timing will arise. It is possible that a joint tenant will complete and sign a declaration of severance form, but not ensure that it is lodged with the Land Registry prior to his or her death. Should this be seen as sufficient indication of his or her intention to sever the joint tenancy? Similarly, a joint tenant may arrange for a form to be lodged with the Land Registry, but due to delays it may not actually be registered by the Land Registry prior to the joint tenant's death. Should this be sufficient to convert the joint tenancy to a tenancy in common?

3.33 It is the Commission's current view that a declaration which has been lodged for registration in the Land Registry, but not yet registered, should sever the joint tenancy prior to actual registration. In such a situation, the joint tenant has performed all the steps they could possibly take, and the matter is out of his or her hands. The joint tenant's intention should not be impeded by the delay of a third body (the Land Registry).

3.34 On the other hand, we do not believe that a declaration which has not been lodged should be effective to sever a joint tenancy. It is possible that a joint tenant may fill out such a form, and then change her or his mind. Until the time she or he actually lodges the form, the decision to sever the joint tenancy should not be viewed as final. To do otherwise may lead to added uncertainty, and increased litigation, as people seek to show whether or not the joint tenant had definitively decided to sever the joint tenancy or not. The requirement that the declaration be lodged also requires the joint tenant to consider carefully the decision to sever.

Questions

19. If it is possible to sever a joint tenancy by registration of a declaration of severance, should a declaration form which is completed and signed, but not lodged or registered in the Land Registry, be effective to sever a joint tenancy?

20. If it is possible to sever a joint tenancy by registration of a declaration of severance, should a declaration form which is lodged, but not registered in the Land Registry, be effective to sever a joint tenancy?

Should a joint tenant be required to produce the certificate of title upon registration?

3.35 In general, the Land Registry requires the production of the certificate of title before altering the nature of an interest in property. There are two reasons for this. First, it allows the Land Registry to ensure that the correct person is dealing with the property, and not someone trying to defraud the true owner. Secondly, it enables the Land Registry to physically modify the certificate to reflect any changes made.

3.36 As noted above, however, requiring production of the certificate of title from a joint tenant can delay severance because only one certificate is issued to joint tenants.

3.37 To avoid these problems, it would be possible to dispense with the need to produce the certificate of title upon registration of a declaration of service. As long as a joint tenant can prove to the Land Registry's satisfaction that she or he is the holder of a joint tenancy interest in the property, she or he could simply fill out the required form and lodge it with the Registry, without producing the certificate of title. This is the current situation in Tasmania,[85] and was also recommended by the New South Wales Law Reform Commission.[86]

3.38 It could be argued that it is desirable for there to be a delay in the severance process, so that people consider its consequences. Another advantage in requiring production of the certificate of title upon registration of a declaration of severance is that this prevents the proliferation of certificates that do not accurately reflect the interests in the property. The requirement to lodge the declaration will, however, ensure that the joint tenant consider carefully his or her decision to sever. In addition, as the actual nature of the interests will be recorded in the Register, and prospective purchasers can easily search the Register to ascertain the

85 *Land Titles Act 1980* (Tas) s 63.

86 New South Wales Law Reform Commission, above n 79, Recommendation 4. The Western Australian Law Reform Commission recommended that the Registrar be given discretion to dispense with the requirement to produce the certificate of title: above n 29, para 3.35.

nature of such interests, failure to modify the certificate is unlikely to cause difficulty. It is therefore the Commission's current view that the certificate of title not be required in order to register a declaration of service.

Question

21. If it is possible to sever a joint tenancy by registration of a declaration of severance, should the Registrar of Titles be able to register the declaration without production of the certificate of title?

Should a joint tenant be required to notify the other joint tenant(s) of his or her intention to sever the joint tenancy?

3.39 At present, it is possible for a joint tenant to sever a joint tenancy without notifying the other joint tenants that he or she is doing so. He or she can sell the interest to a third party, or declare that he or she holds the interest on trust for another. In some situations this may seem unfair to the other joint tenants. For example, if a joint tenancy has been used for estate planning purposes,[87] parties who are relying on the fact of the joint tenancy[88] may wish to know in advance that the joint tenancy is to be severed, so that they can make alternative arrangements.

3.40 One way of overcoming such a problem would be to require a joint tenant to notify the other joint tenants of his or her intention to sever the joint tenancy, prior to any such severance. This would then give the other joint tenants a chance to object to any such severance before it occurred. This is the case in Queensland, where the Registrar may only register the declaration of severance if he or she is satisfied that a copy of the declaration has been given to all other joint tenants.[89]

87 See above para 2.45.

88 That is, people who expect the principle of survivorship to operate in their favour.

89 *Land Title Act 1994* (Qld) s 59(2).

3.41 The Western Australian Law Reform Commission supported such a proposal, recommending that unilateral severance of a joint tenancy should not be effective without written notice to the other joint tenants and that 'existing methods of severance could continue to be used, but would not be effective until notice is given to the other joint tenants'.[90] It argued that it was unfair to permit unilateral severance without notice, because a joint tenant may have planned her or his financial affairs on the basis that if the joint tenant outlives the other joint tenants she or he will take the whole of the property by survivorship.[91] As the severance of the joint tenancy will affect all other joint tenants, they should at least be given a warning that their situation is about to change.

3.42 Requiring notification prior to severance would obviously lead to delays in obtaining severance. This may be especially problematic if a joint tenant has lost contact with one or more of the other joint tenants. It may also defeat the intention of a joint tenant. For example, one effect of the Western Australian Law Reform Commission's recommendation would be that if a joint tenant died after signing a transfer to a third party, but before notifying the other co-owners, the joint tenancy would not be severed and survivorship would operate.

3.43 As an alternative, it would be possible to require the Registrar to notify the other joint tenant(s) after severance has taken place. If severance were to be allowed upon registration of a declaration, notification could be sent to the other joint tenant(s)' last known addresses when the declaration is registered. This avoids the problems of delay, while ensuring that the joint tenant(s) are made aware that the nature of their interest has changed. Although they will not be able to object to the severance prior to it taking place, if necessary they will be able to seek a declaration in court that they are entitled to a different interest.[92] Such a system

90 Western Australian Law Reform Commission, above n 29, para 3.34.

91 Ibid para 3.32.

92 For example, a co-owner who provided a greater share of the contribution price could seek a declaration that his or her share of the new tenancy in common should be proportionately greater than that of the other co-owner.

currently exists in Tasmania,[93] and was recommended by both the New South Wales Law Reform Commission[94] and the Law Reform Commission of British Columbia.[95]

3.44 Legislation which has recently been passed in NSW requires a joint tenant to provide the names and addresses of the other joint tenants to the Registrar-General, and for the Registrar-General to notify the other joint tenants of a transaction which will sever the joint tenancy.[96] We currently support this proposal.

Questions

22. Should a joint tenant be required to notify the other joint tenant(s) of his or her intention to sever the joint tenancy prior to severance taking place?

23. Alternatively, should the Registrar be required to notify the other joint tenant(s) after severance has taken place?

Severance of joint tenancies of personal property

3.45 So far, we have discussed severance of joint tenancies of Torrens land. It is also possible that joint tenants of personal property (for example, goods) will wish to convert their interest to a tenancy in common. As conflicts about joint tenancies of goods and other personal property rarely arise, Victorian law in this area is unclear. Although the need for specific provisions in the area will be uncommon, it would still be useful to clarify the situation, in an attempt to avoid future problems.

93 *Land Titles Act 1980* (Tas) s 63(2).

94 New South Wales Law Reform Commission, above n 79, Recommendation 3.

95 Law Reform Commission of British Columbia, above n 39, 54.

96 *Real Property Act 1900* (NSW) s 97.

3.46 The New South Wales Law Reform Commission has recommended that a joint tenant of personal property should be able to sever the joint tenancy by giving a written declaration of severance to the other joint tenants.[97] This is similar to the current situation in England, where the law is not entirely clear, but joint tenancies of goods can probably be severed by notice.[98] Our tentative view is that a procedure similar to that recommended by the New South Wales Law Reform Commission be adopted in Victoria in relation to personal property.

Question

24. Should it be possible for a joint tenancy of personal property to be severed by a written declaration of severance, which is communicated to the other joint tenants?

97 New South Wales Law Reform Commission, above n 79, Recommendation 14.

98 *Burgess v Rawnsley* [1975] 3 All ER 142.

Chapter 4
Ending Co-ownership of Land

4.1 So far, we have discussed the processes for creating a joint tenancy or tenancy in common and for converting a joint tenancy into a tenancy in common. Rather than changing the type of co-ownership, joint tenants or tenants in common of land may want to end co-ownership by selling the land and dividing the proceeds between them, or by physically dividing the land. In the course of ending co-ownership, various other disputes may also arise between co-owners. For example, a co-owner may want to recover the cost of improving or maintaining the land, from the other co-owners. The remainder of this Discussion Paper focuses on the processes for ending co-ownership by sale or physical division of the property (partition).

4.2 Co-owned property can be sold or divided with the agreement of all of the co-owners, but if they disagree, a process is required to authorise sale or division and to resolve other conflicts which may arise between them. The legal rules governing sale and physical partition of land are contained in Part IV of the *Property Law Act 1958*. These rules vary according to the relationship of the co-owners, and are both complex and expensive. In this Chapter we explain the law in relation to the sale or partition of land, and then seek views on possible reforms to the area. In Chapter 5 we investigate other remedies that should be available to co-owners when land is divided or sold. In Chapter 6 we examine the principles for ending co-ownership of personal property by division or sale.

WHEN CAN A CO-OWNER FORCE A PARTITION OR SALE OF CO-OWNED LAND?

4.3 The law draws a distinction between married or de facto partners and other co-owners. It is necessary to examine each situation separately.

Married or de facto partners

4.4 Disputes between married couples about co-owned land usually occur when the couple are separating. The Family Court can make an order dividing property between spouses on a just and equitable basis under section 79 of the *Family Law Act 1975* (Cth). Similarly, Victorian courts can make an order under Part IX of the *Property Law Act 1958*, to divide co-owned property between heterosexual de facto partners. Normally de facto partners who want to apply under Part IX must have lived together for two years, or had a child.[99] The Statute Law Amendment (Relationships) Bill 2000, which was passed by the Victorian Parliament on 5 June 2001, will extend the provisions in Part IX to gay and lesbian partners.

Other co-owners

4.5 There are a variety of co-owners who are not covered by the provisions in the *Family Law Act 1975* (Cth) or Part IX of the *Property Law Act 1958*. This includes family members who have been left the property by will, people who have purchased the property as co-owners for investment purposes, and couples falling outside Part IX of the *Property Law Act 1958*. If these co-owners wish to end the co-ownership, they must apply to the County Court or the Supreme Court for an order dividing or selling the property.

4.6 Sale and division of co-owned land is dealt with by Part IV of the *Property Law Act 1958*. Under these provisions, physical division of the land is the primary remedy for a co-owner who wants to end co-ownership. This means that the court must order division of the land unless the situation

99 *Property Law Act 1958* s 281. An exception applies where it is necessary for the Court to make an order to avoid serious injustice to one of the parties.

4.7 Part IV of the *Property Law Act 1958* allows the County or Supreme Court to order a sale instead of partition in three situations:

1. If a co-owner asks for a sale instead of partition, the Court may order a sale of the land and the division of the proceeds if this would be 'more beneficial' than physical division of the property (section 222);[100]
2. If a co-owner, or more than one co-owner, whose collective interests amount to a share of half or more, asks the Court to direct a sale, the Court is required to order a sale, unless it sees good reason to the contrary (section 223);
3. If a person with an interest in the property asks the Court to direct a sale, the Court may order a sale, unless some or all of the other parties interested in the property undertake to purchase the share of the person requesting a sale (section 224). This provision allows the co-owners to prevent a sale by buying out the person who wants the property to be sold. The court can order a valuation of the property for this purpose.

4.8 In the case of *Perman v Maloney*,[101] the Supreme Court of Victoria decided that these three provisions operate independently of each other. This means that if the application for sale is made under section 223, by co-owners whose collective interests amount to at least a half share in the property, the provision allowing their interests to be bought out by the other co-owners (section 224) does not apply. It is not clear whether the fact that a co-owner is willing to buy out the other co-owners is a good reason for a court to refuse to order a sale to a third party under section 223.

100 This may be because of the nature of the property, the number of people with an interest in it, because a person with an interest is absent or does not have legal capacity (for example if one of the co-owners is a child), or for any other reason.

101 [1939] VLR 376.

REASONS FOR REFORMING PART IV OF THE *PROPERTY LAW ACT 1958*

Archaic language

4.9 Part IV of the *Property Law Act 1958* is based on English partition laws passed in the sixteenth century.[102] These laws were amended in the nineteenth century to give the court power to order sale of the land in certain circumstances.[103] The legislation is drafted in archaic language. For example, the main provision, section 221, says that co-owners are to be 'compellable to make partition . . . in like manner and form as coparceners are compellable to do and with the like incidents consequent upon such partition.' 'Coparcenary' is a form of co-ownership which no longer exists in Australia. There are likely to be very few lawyers, let alone other members of the community, who have any understanding of the meaning of this provision.

Changed circumstances

4.10 When the legislation was passed in the sixteenth century, land was largely used for agricultural purposes. At that time it may have been appropriate for physical division of the land to be the main remedy for a joint tenant or tenant in common who wanted to end the co-ownership. However, today, co-owners are more likely to want the land to be sold and the proceeds divided between them. At present a co-owner who wants the land to be sold may not be able to obtain this remedy.

Expensive, time-consuming and rigid

4.11 Part IV of the *Property Law Act 1958* requires a co-owner who wants the land divided or sold to apply to the Supreme Court or the County Court. The costs of making

102 *Partition Act 1539* (Eng) 31 Hen 8, c 1 and *Partition Act 1540* (Eng) 32 Hen 8, c 32. Further changes were made by *Partition Act 1697* (Eng) 8 & 9 Will 3, c 31.

103 *Partition Act 1868* (UK) 31 & 32 Vict, c 40 and *Partition Act 1876* (UK) 39 & 40 Vict, c 17. For a history of these provisions see Megarry and Wade, *The Law of Real Property* (3rd ed 1966) 439.

an application to the Supreme Court or the County Court are considerable and may prevent a co-owner making a Part IV application. A person who does not have the resources to make an application will be unable to realise their asset, unless all the other co-owners agree. There may also be a significant delay in having the matter heard.

4.12 There will often not be an alternative to proceeding to court. This may be the case if one or more of the co-owners does not have the legal capacity to agree to a sale or division, for example because he or she is a minor. In such circumstances a court order will be necessary. There is no possibility of avoiding court proceedings through use of alternative dispute resolution. There is currently no formal process for resolving disputes between co-owners which may otherwise escalate into proceedings under Part IV.

POSSIBLE REFORMS TO PART IV OF THE *PROPERTY LAW ACT 1958*

What changes should be made to the partition and sale provisions?

4.13 Two main approaches to reform of the partition and sale provisions have been taken in other jurisdictions. The first approach, which has been taken in New South Wales[104] and Queensland,[105] is to give a court the power to appoint trustees to oversee the sale or division of the land. The second approach, which was recommended by the Law Reform Commission of British Columbia in 1988,[106] is to give a court (or some other body) a broad discretion to order division or sale of the land. We will examine each of these approaches in turn.

104 *Conveyancing Act 1919* (NSW) s 66G.

105 *Property Law Act 1974* (Qld) s 38.

106 Law Reform Commission of British Columbia, above n 39.

Appointing trustees to oversee the division or sale of land

4.14 New South Wales reformed its partition and sale procedures many years ago.[107] Under section 66G of the *Conveyancing Act 1919* (NSW), a co-owner of property other than goods can apply to the court to appoint trustees to hold the property on a trust for sale or on a trust for partition. This approach has also been taken in Queensland.[108]

4.15 If trustees for sale are appointed, their primary obligation is to sell the property. When the property is sold, the proceeds are held on trust for the co-owners, and can be distributed among them. The trustees are required to consult the beneficiaries and act according to their wishes as far as is practicable and consistent with the general interests of the trust. If trustees for partition are appointed, the trustees are required to transfer the property to the co-owners and to make a payment of money to equalise the shares.

Advantages and disadvantages of the New South Wales approach

4.16 The New South Wales provisions are simpler than the provisions which apply in Victoria. By making trustees responsible for administering the sale or physical division of the property, they may reduce disputes between co-owners about matters of detail. For example, the trustees can oversee the advertising of the property and decide when the sale should occur. They can also ensure that any proceeds of sale are properly distributed.

4.17 The disadvantage of these provisions is that they establish a complex process for sale or division of the property, which will often be unnecessary. It may be useful to have trustees appointed to oversee the sale or division in some situations. For example, if the relationship between the co-owners has disintegrated so that they cannot agree on details, or if some of the co-owners are minors who cannot manage their own assets, it may be advantageous to have

107 See *Conveyancing (Amendment) Act 1930* (NSW).

108 *Property Law Act 1974* (Qld) s 38.

trustees involved. However, it is not clear why the legislation requires the appointment of trustees in every case of partition and sale. When co-owned land is sold or divided under the *Family Law Act 1975* (Cth) or under Part IX of the *Property Law Act 1958* (Vic), the court generally orders a sale without appointing trustees, though it has power to appoint trustees in appropriate circumstances.[109] In addition to being unnecessary in some cases, the appointment of trustees may sometimes delay realisation of property.

Giving a court or other body a broad discretion to order division or sale of land

4.18 In 1988, the Law Reform Commission of British Columbia recommended simplification and modernisation of the statutory provisions for sale and partition of land.[110] The Report recommended that co-owners should be able to apply to a court for an order that the land be sold or divided.[111] The court would have power to divide the land in proportions which do not correspond to the co-owners interests and to order payment of compensation to take account of this disparity.[112] The court would also have power to order compensation or financial adjustment, and to take account of matters such as expenditure on the land and the payment of outgoings by a co-owner.[113]

109 See, for example, *Property Law Act 1958* s 227.

110 Law Reform Commission of British Columbia, above n 39, 61.

111 Ibid, Draft *Property Law Amendment Act* s 46, 68–9.

112 Section 47.

113 Section 44.

ADVANTAGES AND DISADVANTAGES OF THE BRITISH COLUMBIA APPROACH

4.19 The British Columbia approach is simpler than that which applies in New South Wales. It has no obvious disadvantages. If all the co-owners are adults with full legal capacity, it is cumbersome to require the appointment of trustees for sale or division of the property, as is the case in New South Wales. No such process is required when the Family Court orders sale of property owned by spouses or a State court orders sale of property owned by de facto partners under Part IX of the *Property Law Act 1958* (Vic). There is already a power to appoint trustees under section 227 of the *Property Law Act 1958*, which could be used to deal with the situation where some of the co-owners are minors or are incapable of looking after their own affairs.

4.20 The British Columbia approach also contains a flexibility which is missing from the current Victorian provisions. Instead of restricting the situations in which a court or other body can order a sale of property, it gives such bodies a broad discretion in the matter, allowing them to take into account any relevant factors. This is likely to lead to a fairer outcome.

4.21 Thus, the Commission's tentative view is that the legislation should not require the appointment of trustees for sale or partition of the land as a routine matter. Instead, it should create a power to authorise sale or physical division of the land, with provision for appointment of trustees to administer the sale or sign the instrument of transfer where this is necessary. We also suggest that there should be power to authorise a co-owner to purchase the shares of the other co-owners, and power to postpone a sale in a situation where it would be unfair for the applicant to seek a sale, for example where the applicant is under an obligation to allow a person to live on the property.

Questions

25. Should provision be made allowing co-owners to apply to a court or tribunal to appoint trustees for sale or partition?

26. Alternatively, should Part IV of the *Property Law Act 1958* be amended to give a court or tribunal a broad discretion to order sale or division of property on application of a co-owner?

27. If a court or tribunal is given broad discretion to order sale or division of property on application of a co-owner, what limits, if any, should be imposed on this discretion?

Which body should have power to order partition or sale?

4.22 Under Part IV of the *Property Law Act 1958* an application for division and sale can be made to the Supreme Court or, in the case of land worth less than $200,000, to the County Court.[114] It could be argued that it is unnecessary to require a co-owner to obtain an order for division or sale from a superior court. Both the Magistrates' Court[115] and the Victorian Civil and Administrative Tribunal (VCAT)[116] already have jurisdiction over some disputes relating to land. This jurisdiction could perhaps be expanded to enable either VCAT or the Magistrates' Court to hear applications for division and sale of property.

114 *County Court Act 1958* ss 3, 37(2)(b). With the consent of the parties the County Court can hear claims relating to land of a higher value.

115 The Magistrates' Court can determine disputes between owners of residential units and flats and bodies corporate which are responsible for the administration of the building and for the common areas shared by building occupants: *Subdivision Act 1988* s 38(1).

116 VCAT hears a range of property law matters, including applications for removal of easements and rights of way: see, for example, *Planning and Environment Act 1987* s 60; *Subdivision Act 1988* s 36.

ADVANTAGES AND DISADVANTAGES OF REQUIRING DIVISION AND SALE PROCEEDINGS TO BE HEARD IN A SUPERIOR COURT

4.23 Historically, the rules governing partition and sale of land and other associated remedies were extremely technical. This may have justified the requirement that applications for division and sale be made to the County Court or Supreme Court. Even if the legislation is simplified, it could be argued that these courts should continue to hear such cases, because of the importance and value of interests in land.

4.24 The counter-argument is that the requirement to apply to the Supreme Court or the County Court involves unnecessary expense and delay. Filing fees in the Supreme Court and the County Court are quite expensive,[117] and there can be significant delays in having a matter heard. There are also additional costs for hearing fees and interlocutory orders. Given the complexity and formality of hearings in such courts, legal representation is usually necessary, which further increases the cost. As a general rule, if a party loses a matter in the Supreme Court or County Court, they will also be liable to pay the other party's legal costs, which could make the matter very expensive.

Interlocutory orders
An interlocutory order is an order made by a court to deal with matters provisionally, before it makes a final determination.

4.25 To reduce the problem of costs and delay, it could instead be possible to have proceedings for sale or division of property heard in the Magistrates' Court[118] or in VCAT. The filing fees in the Magistrates' Court and VCAT are much lower than in the Supreme and County Courts,[119] and cases can usually be heard more quickly. Associated fees, such as hearing fees, are also less expensive.

4.26 There appear to be a number of advantages to having VCAT hear these matters, rather than one of the courts. One advantage relates to costs. Not only is it likely the filing fee and associated costs will be cheaper at VCAT than in the courts (including the Magistrates' Court), but the informality of the proceedings makes it easier for applicants to apply on

117 As at May 2001, the filing fee in the Supreme Court is $650 and in the County Court is $419.

118 This would require a change to the jurisdictional limits of the Magistrates' Court, which, as at May 2001, is $40,000.

119 As at May 2001, the filing fee in the Magistrates' Court for a matter worth in excess of $10,000 is $223.50. The filing fee at VCAT varies depending on the nature of the matter. Applications to hear matters in the Real Property List range from $23–$170.

their own behalf, without the need for legal representation. There is also no general rule in VCAT that the party who loses the matter must pay the other party's costs.[120]

4.27 Another advantage is the availability of alternative dispute resolution procedures at VCAT.[121] The use of such procedures could significantly reduce the time, cost and complexity of such proceedings. VCAT may also have the capacity to provide for such alternative dispute resolution procedures to take place prior to the making of an application, so that it would not even be necessary to institute formal proceedings at all.[122]

4.28 A third advantage of having VCAT hear these matters results from the expertise of members of VCAT. While the Magistrates' Court hears a wide variety of matters, VCAT is divided into a number of specialist lists, such as the Anti-Discrimination List, Taxation List and Planning List. Those hearing the matters in these lists generally have wide experience in that area. Given the potential complexity of matters relating to sale or division of property, it would be advantageous to have experts determine these matters

4.29 The Commission's tentative view is that applications for partition and sale of land should be heard by VCAT, where they could be included in the Real Property List. Any appeals should go to the Supreme Court on questions of law alone.

Questions

28. Should the jurisdiction of the Victorian Civil and Administrative Tribunal be expanded to include hearing applications for sale and partition of land?
29. If so, should these matters be included in the Real Property List?
30. Alternatively, should the Magistrates' Court be able to hear applications for sale and partition of land?

120 In most areas, VCAT does have the power to order such costs when appropriate.

121 These include compulsory conferences and mediation of disputes: *Victorian Civil and Administrative Tribunal Act 1998* ss 83–93.

122 For a more detailed analysis of alternative dispute resolution processes, see below paras 4.30–4.35.

Alternative dispute resolution

4.30 Co-owners of land often have disputes about minor matters. If such disputes are not resolved quickly, they may lead to applications for division or sale of the land which would not have occurred if the co-owners had been able to resolve their differences. At present there is no formal procedure available for the resolution of such disputes.[123]

4.31 The Commission believes that, regardless of whether the provisions of Part IV of the *Property Law Act 1958* are changed, it would be desirable to give co-owners access to other dispute resolution processes. This could help co-owners avoid protracted disputes, reduce their costs, and relieve the court or tribunal which has power to resolve such disputes of part of its caseload. A power to provide for alternative dispute resolution could be conferred on the same body that is given jurisdiction to make orders for division or sale of co-owned land.[124]

4.32 It may also be desirable to publicise the availability of voluntary alternative dispute resolution services, for example services provided by the Dispute Resolution Centre of Victoria.

WHEN SHOULD ALTERNATIVE DISPUTE RESOLUTION TAKE PLACE?

4.33 If provision is made for the alternative resolution of disputes between co-owners, it will be necessary to determine when such dispute resolution will take place. There are two main possibilities:

- Alternative dispute resolution could be part of the application process. For example, if VCAT had power to order division or sale of co-owned land, a co-owner would make an application for such an order to VCAT. An initial hearing would then be scheduled, in which the matter could be referred to any appropriate alternative dispute resolution avenues;

123 Although the current legal framework does not allow for alternative dispute resolution in this area, there are a number of voluntary alternative dispute resolution services, such as the Dispute Resolution Centre of Victoria, which can be utilised by co-owners who agree to the use of such services.

124 See above paras 4.22–4.29.

- Alternative dispute resolution could be made available to owners prior to making an application. In this case, prior to formally making an application to VCAT, a co-owner could request alternative dispute resolution. If the dispute was not resolved by such a process, the co-owner would then have the option of filing an application.

4.34 The Commission's tentative view is that the body responsible for resolving applications for partition and sale (eg., VCAT) should make alternative dispute resolution services available to co-owners prior to the making of any application. This approach could help co-owners to resolve their disputes and/or to agree to a sale of the property without making an application, thus saving resources which would otherwise be expended on a hearing.

SHOULD ALTERNATIVE DISPUTE RESOLUTION BE VOLUNTARY OR COMPULSORY?

4.35 If alternative dispute resolution processes are instituted, it will also be necessary to determine whether participation in such processes should be voluntary or compulsory. The Commission seeks views on this issue.

Questions

31. Should alternative dispute resolution services be made available to resolve disputes between co-owners?
32. If so, when should alternative dispute resolution be made available? Should it be available prior to making an application, or as part of the application?
33. What type of alternative dispute resolution services would be appropriate for resolving disputes between co-owners?
34. Should alternative dispute resolution be required before any application is heard?
35. What would be the most effective means of publicising the availability of voluntary alternative dispute resolution services to resolve disputes between co-owners?

The relationship between Part IV and other statutory provisions

4.36 As noted above, the law draws a distinction between married or de facto partners and other co-owners. It is foreseeable that this could lead to conflict. For example, a husband may apply for sale of land and division of the proceeds under the *Family Law Act 1975* (Cth), while at the same time his wife applies for partition of land under Part IV of the *Property Law Act 1958*. This section focuses on the procedures for avoiding such conflict.

MARRIED COUPLES

4.37 As far as we are aware, spouses who are co-owners rarely initiate proceedings for partition and sale under Part IV of the *Property Law Act 1958*, though it may be possible to do so. Instead, they are likely to rely on section 79 of the *Family Law Act 1975* (Cth).

4.38 If an application was made by a spouse to a State body[125] under Part IV of the *Property Law Act 1958*, and the matter concerned property of the parties to the marriage, and the proceedings arose 'out of the marital relationship',[126] it is likely that the State body would refuse to hear the application, on the basis that the Family Court had exclusive jurisdiction to hear the dispute. The issue becomes slightly more complex, however, where third parties are involved in the dispute.[127] In such a situation, difficult questions would arise about the relationship between the State body's power to order partition or sale and any proceedings taking place between the married couple in the Family Court.

125 In the Supreme Court or County Court, as required by the current law, or VCAT or the Magistrates' Court as suggested by our proposals above.

126 This is one of the definitions of a 'matrimonial cause' under s 4(1) of the *Family Law Act 1975* (Cth). A 'matrimonial cause' is required in order to bring the matter within the jurisdiction of the Family Court. See section 4(ca)(ii)–(iii) for other definitions of a 'matrimonial cause'.

127 For example, if property was co-owned by a husband, wife and third party.

4.39 Our current view is that the *Property Law Act 1958* should be amended to give the State court or tribunal which hears the application the power to adjourn any Part IV proceedings until the application under section 79 of the *Family Law Act 1975* (Cth) is heard, or the case is otherwise resolved between the spouses.

Questions

36. Do problems arise in practice as the result of the interaction between section 79 of the *Family Law Act 1975* (Cth) and the State law provisions governing partition and sale of co-owned property?

37. If so, should the body with jurisdiction to determine applications for partition and sale have power

    (i) to adjourn or terminate proceedings when the application is made by a party to a marriage and the proceedings arise out of a marital relationship; and/or

    (ii) to adjourn proceedings where the application is made by a person who co-owns property with parties to a marriage?

38. Should the adjournment or termination power apply only when proceedings have already been initiated under section 79 of the *Family Law Act 1975* (Cth), or also apply where such proceedings may be initiated in the future?

DE FACTO PARTNERS

4.40 A co-owner living in a de facto relationship can currently seek sale or division of the property under Part IX of the *Property Law Act 1958*. At the same time, the other de facto partner could seek sale or division of the property under Part IV of the *Property Law Act 1958*. Under the current legislation, both of these applications are likely to be heard by the same court—either the Supreme or County

Court. If jurisdiction to hear applications for division or sale or property were given to the Magistrates' Court or VCAT, however, a situation of conflict could arise.

4.41 In such circumstances, the superior court may wish to hear the application under Part IX, and prevent the other forum from hearing proceedings scheduled to take place under Part IV. Similarly, the Magistrates' Court or VCAT may wish to delay the Part IV proceedings until the Part IX application is heard. If jurisdiction is granted to these bodies, it would be important to develop a mechanism to deal with this problem. The Commission would appreciate comments on any procedural changes which may be necessary.

Questions

39. Are problems likely to arise as the result of the interaction between Part IX of the *Property Law Act 1958* and provisions conferring power to make partition and sale orders on VCAT or the Magistrates' Court?

40. If so, what procedural changes would be necessary to deal with such problems?

Chapter 5
Other Remedies Available when Land is Sold or Divided

5.1 Although co-owners of land have an equal right to possession of the land, it is not uncommon for them to use the land differently. For example, one co-owner may live on the land, while the other lives elsewhere. The co-owner who lives on the land may spend money renovating the property, while the other may not contribute to such improvements. When an application is made for sale or partition of property, one of the co-owners may seek a redistribution of the proceeds of sale or partition. For example, the co-owner who did not live on the property may claim that he or she should be paid rent by the co-owner who has had the advantage of living on the property. The other co-owner may claim he or she should be reimbursed for the improvements made to the property. This chapter examines the rules that have been developed to deal with this situation, and proposes some possible reforms.

EXISTING LAW

5.2 The rules which govern compensation and accounting between co-owners of land vary depending on the situation.[128] In this section we will examine the following questions:

- Does a co-owner who occupies the land have to pay rent to co-owners who do not?
- If a co-owner collects rent from a third party does he or she have to share it with the other co-owners?
- Is a co-owner who spends money on the land entitled to compensation from the other co-owners?
- Does a co-owner have to compensate the other co-owners for damaging the property?

128 The rules governing compensation and accounting between co-owners are comprehensively summarised in the case of *Forgeard v Shanahan* (1994) 35 NSWLR 206.

Does a co-owner who occupies the land have to pay rent to co-owners who do not?

5.3 Co-owners of land have an equal right to possess the whole of the land, which includes the right to live there. Unless physically excluded from the land, co-owners who do not occupy the land are treated as if they have voluntarily chosen not to exercise their rights. Because it is seen as a voluntary choice not to live on the land, the law holds that co-owners who do not live on the land are not entitled to be paid rent by the co-owners who occupy it.

5.4 There are two exceptions to this rule. The first arises when one co-owner excludes another from the land. As the right to occupy the land has not been voluntarily forgone, the co-owner in sole occupation will be liable to pay rent. Such rent is not payable while the co-ownership exists—it can only be ordered when co-ownership is ended, for example by partition or sale.

5.5 The second exception arises when the co-owner in sole occupation claims compensation from the other co-owners for improvements he or she has made to the land.[129] Here it is thought fair to require the claim for a contribution to the cost of improvements to be offset by an amount of rent.

If a co-owner collects rent does he or she have to share it with the other co-owners?

5.6 Section 28A of the *Property Law Act 1958* provides that a co-owner who receives more than his or her share is accountable to the other co-owners. This means that a co-owner who collects the rent must pay the other co-owners the proportion of the rent to which they are entitled.

129 See below paras 5.7–5.11.

Is a co-owner who spends money on the land entitled to compensation from the other co-owners?

Costs of improvements

5.7 A co-owner can claim compensation for money spent on improving land[130] when co-ownership comes to an end, for example when the property is being partitioned or sold.[131] The amount of compensation is normally the cost of the improvements or the increase in the value of the land, whichever amount is the lesser. If there is no increase in the value of the land, no compensation will be payable.

> X and Y are co-owners. X spends $5,000 painting the house on the land a different colour. The value of the land is not increased by virtue of the painting. Y does not have to contribute to the cost of the painting.
>
> X, Y and Z are co-owners of an old house. X spends $10,000 having floorboards laid in the property. The value of the property increases by $6,000. Y and Z will have to contribute their proportionate share of $6,000 (being $2,000 each).

Joint debts

5.8 If co-owners are also joint debtors, a co-owner who repays the whole debt is entitled to reimbursement of his or her proportionate share from the other co-owners. Common examples include when co-owners have joined in a mortgage of the land, or where they are all liable to pay rates. They will be able to recover the other co-owners' share of any money spent on mortgage or rate payments.

130 Costs of 'improvements' are to be contrasted with 'maintenance' costs: see below para 5.9.

131 A claim can also be made if the land is compulsorily acquired: see *Brickwood v Young* (1905) 2 CLR 387.

MAINTENANCE COSTS

5.9 While a co-owner may be able to recover the cost of 'improvements' to property, he or she will not generally be able to recover 'maintenance' costs from the other co-owners. In the case of *Forgeard v Shanahan*,[132] the New South Wales Supreme Court held that a co-owner was not entitled to recover a share of the costs of insurance and pest control from the other co-owners, as these were deemed to be 'maintenance' costs.

OTHER FACTORS

5.10 As noted above, if a claim for compensation for improvements is made by a co-owner in sole occupation of the property, that co-owner may be required to pay the other co-owners a fee for the use of the land.

5.11 A similar situation may arise where a third party rents the property from the co-owners. In such a situation, it is possible that one of the co-owners may pay for improvements that result in an increase in the rents and profits received from the property. If the other co-owners wish to claim a share of the increased rent, they may have to contribute to the actual cost of improvements, even if there has been no increase in the capital value of the land.[133] There is some dispute as to whether this should apply as a general principle whenever there has been an increase in rent and profits,[134] or if it should be limited to the situation where the rent has been used to finance the improvements.[135]

Does a co-owner have to compensate the other co-owners for damaging the property?

5.12 If a co-owner damages the property, he or she will have to compensate the other co-owners for that damage.[136]

132 (1994) 35 NSWLR 206.

133 *Squire v Rogers* (1979) 27 ALR 330; *Forgeard v Shanahan* (1994) 35 NSWLR 206.

134 *Squire v Rogers* (1979) 27 ALR 330.

135 *Forgeard v Shanahan* (1994) 35 NSWLR 206, 224 per Meagher JA.

136 This is known as the 'doctrine of waste'.

PROPOSED REFORMS

5.13 In Chapter 4 we discussed the processes for sale or division of co-owned land. The body which ultimately makes an order for sale or division will also need to have the power to make orders relating to compensation and accounting between co-owners. It therefore makes sense, as part of a general review of the area, to determine whether the rules relating to accounting and compensation should be changed.

Retaining the current law

5.14 One possibility would be to leave the law as it is, allowing the body that orders partition or sale to apply the current rules. This was the approach taken in New South Wales. Although the insertion of section 66G of the *Conveyancing Act 1919* (NSW) altered the law as it related to sale and partition of land (giving the court the power to appoint trustees for sale and partition), it did not alter the traditional rules which govern the other remedies available to co-owners. Thus, although judges have discretion to order sale and partition, they have to revert to the common law principles to examine the issue of compensation or accounting between co-owners.[137]

Codifying the law

5.15 Another possibility would be to codify the existing law. This would involve specifying the principles that regulate the relationship of co-owners in the legislation governing division and sale. The substance of those principles would not be altered—they would simply be clarified in the relevant legislation.

Extending the law

5.16 A third approach would involve not only specifying the principles that regulate the relationship of co-owners, but actually extending those principles beyond their current

137 *Forgeard v Shanahan* (1994) 35 NSWLR 206. This approach was strongly criticised by Kirby P: (1994) 35 NSWLR 206, 211–12.

scope. This would allow remedies to be provided in a broader range of circumstances than is currently permitted.

5.17 This would be consistent with the recommendations of the British Columbia Law Reform Commission. The Commission proposed that, in considering whether an order for accounting or compensation should be made when the property is sold or divided, the Court should consider any relevant matters, including whether:[138]

> (a) a co-owner has excluded another co-owner from the land,
>
> (b) a co-owner has received more than his [sic] just share of the rents from the land or profits from the use or cultivation of land or the removal of its natural resources,
>
> (c) a co-owner has committed waste by an unreasonable use of the land,
>
> (d) a co-owner has made improvements or capital payments that have increased the realizable value of the land,
>
> (e) a co-owner should be compensated for non-capital expenses in respect of the land,
>
> (f) an occupying co-owner claiming non-capital expenses in respect of the land should be required to pay a fair occupation rent,
>
> (g) a co-owner, owing to the default of another co-owner, has been called on to pay and has paid more than his [sic] proportionate share of mortgage money, rent, interest, taxes, insurance, repairs, a purchase money instalment . . . or a payment on a charge where the land may be subject to a forced sale or foreclosure.

5.18 These proposals not only codify existing principles, but extend the rights of co-owners in certain situations. For example, a court can require a co-owner to contribute to the cost of repairs (maintenance costs), as well as to the cost of improvements or capital payments which have increased the value of the land.

138 Law Reform Commission of British Columbia, above n 39, 68–69.

Should the law be retained, codified or extended?

5.19 The Commission's current view is that the rules relating to compensation or accounting between co-owners should, at the very least, be codified. The laws in the area are complex. It is unlikely that they are understood by co-owners. Codifying the law would at least clarify the existing situation, and may help co-owners understand their rights and obligations.

Question

41. Should the principles that regulate the relationship of co-owners be codified in the legislation governing division and sale?

5.20 The more difficult question is whether existing remedies should be extended. It is arguable that the existing rules provide a fair balance between the rights of co-owners. On the other hand, there are at least two situations in which modification of the current law may be desirable. First, when land is divided or sold, it seems appropriate to require a co-owner to contribute to reasonable costs which another co-owner has incurred in maintaining the property. There can be little justification for a rule which allows co-owners to reap the benefit of maintenance costs borne by the other co-owner, except perhaps where the latter has been in exclusive occupation of the property.

5.21 Secondly, there may be a case for allowing a co-owner to recover rent from another co-owner who has been in exclusive occupation of the land, when the land is divided or sold, if it was unreasonable or impracticable for the claimant to have lived on the land. In the case of *Forgeard v Shanahan*, Justice Kirby, then President of the New South Wales Court of Appeal, criticised the rule that a co-owner in exclusive possession of land does not have to pay rent to the other co-owners unless they are excluded from the land or the occupying co-owner claims compensation for

improvements.[139] He said that it was absurd to hold that the law should[140]

> treat a co-owner, not actually ousted or excluded from the property, as a person who has "chosen not to exercise his legal right to occupy the land"? Such a rule would completely fail to take into account the multitude of reasons which may explain a withdrawal from land held in co-ownership after the breakdown of the personal relationship which occasioned the creation of the co-ownership in the first place.

5.22 Allowing a co-owner to recover rent in a broader range of situations would be consistent with the law in England,[141] as well as with the recommendations of the British Columbia Law Reform Commission outlined above.

Questions

42. If the principles that regulate the relationship of co-owners are codified in the legislation governing division and sale, should they simply reflect the current law or be extended in scope?

43. How should the principles be extended (if at all)? In particular:

    (i) Should the body or bodies with jurisdiction to order sale or partition have a power to order payment of compensation to take account of maintenance costs paid by a co-owner?

    (ii) Should compensation be payable in cases of sole occupation by a co-owner, where another co-owner has not been excluded from the land and the occupying co-owner is not claiming compensation for improvements?

    (iii) Are there any other changes which should be made to the rules governing the relationship between co-owners?

139 (1994) 35 NSWLR 206, 215–17.

140 F*orgeard v Shanahan* (1994) 35 NSWLR 206, 212.

141 *Chhokar v Chhokar* [1984] FLR 313; 14 Fam Law 269. See also Gray, *Elements of Land Law* (2nd ed, 1993) 477.

Chapter 6
Sale and Division of Personal Property

6.1 So far, we have discussed sale and division of co-owned land, under Part IV of the *Property Law Act 1958*. These provisions do not apply to other types of property (for example goods, shares and joint bank accounts). This Chapter explains the existing law about division and sale of property other than land and discusses possible reforms.

EXISTING LAW

6.2 Spouses who co-own property other than land can apply for division or sale under the *Family Law Act 1975* (Cth) and heterosexual de facto partners can make a similar application under Part IX of the *Property Law Act*.[142] As far as the Commission is aware, disputes about co-owned property between co-owners other than spouses or domestic partners are relatively rare.

6.3 Where a dispute arises between people who are not married or living together as partners, it will rarely be necessary for a co-owner to apply for an order for sale and division of the property. In most cases co-owners will have little to gain by refusing to agree to end co-ownership. For example, in the case of co-owned shares in a public company, it will be a simple matter to divide the shares between the co-owners. However, in a few situations the parties may be unable to resolve the dispute, because the property cannot easily be divided or because one of the co-owners is unwilling to sell it. Such problems are most likely to concern co-owned goods. Examples include disputes involving co-owned family heirlooms, racehorses or boats.

142 The Statute Law Amendment (Relationships) Bill 2000 aims to extend this to gay and lesbian partners.

6.4 Where the dispute involves co-owned goods, a co-owner may apply for a division of the goods under section 187 of the *Property Law Act 1958*. Section 187 only applies to co-owners who have an interest of half or more in goods.[143] It does not apply to other forms of personal property. Although the section does not explicitly give a court power to order sale, in New South Wales it has been determined that the equivalent provision[144] permits an order of sale to be made.[145]

PROPOSED REFORMS

6.5 Under the current law, different provisions govern the division and sale of co-owned land and goods. There is no obvious reason for maintaining this distinction. We also note that division of goods can only be ordered if the application is made by co-owners with an interest of half or more in the goods. This is not the case with land, where co-owners who are entitled to an interest of less than half may apply for division of the property.

6.6 The Commission's tentative view is that the body which has power to resolve co-ownership disputes relating to land and to order sale or division of land should have similar powers in relation to co-owned goods. It should not be necessary for the application to be made by co-owners with an interest of a half or more, as is the case under the current law.

6.7 We are not aware of a need to enact similar provisions for personal property other than goods. The Commission seeks comments on whether the power to resolve disputes between co-owners and to order sale and division of property should apply to property other than land and goods.

143 In certain situations, goods which are affixed to land are treated for legal purposes as if they are part of the land.

144 *Conveyancing Act 1919* (NSW) s 36A.

145 *Ferrari v Beccaris* [1979] 2 NSWLR 181.

Questions

44. Should the body which has power to order sale or division of land also be able to order sale and division of co-owned goods?

45. Should it be necessary for an application for division or sale of goods to be made by co-owners who have an interest of half or more in the property?

46. Should provisions permitting an order to be made for division or sale of property be extended to all types of co-owned property?

Appendix 1
Glossary

Chattels	Chattels are goods which are not affixed to land, for example a car, white goods, jewellery, a boat or caravan.
Common law	This is a body of law which comes from cases decided by judges, rather than from laws made by Parliament. Common law must also be distinguished from equity, another branch of judge-made law that developed differently.
Equity	Equity is a branch of judge-made law which originally developed in different courts from the common law. Equitable principles have historically been concerned with fairness. Today equity is administered by the same courts as the common law.
Four unities	The four unities require that: (1) joint tenants receive the same interest in the property (unity of interest); (2) the interest be received at the same time (unity of time); (3) the interest be received under the same document or transaction (unity of title); and (4) the tenants have the same right to possess the land (unity of possession).
Interlocutory orders	An interlocutory order is an order made by a court to deal with matters provisionally, before it makes a final determination.
Joint tenancy	A joint tenancy exists where two or more people own a single interest in property. If a joint tenant dies, the surviving joint tenant(s) are entitled to the whole of the property.
Personal property	Personal property includes leases of land, goods, company shares and banking accounts and other debts owed to a creditor.
Severance	Severance is the conversion of a joint tenancy into a tenancy in common, so that survivorship no longer applies.
Tenancy in common	A tenancy in common exists where two or more people have separate interests in property, which entitle them to possession at the same time. Each can leave their separate share to someone by will.
Torrens System	The Torrens System is a system of land title which normally provides a guarantee of title to people whose interests in land are registered.
Trustee	A trustee is a person who holds property on behalf of another person.

Appendix 2
Questions

Chapter 2
Creation of Tenancies in Common and Joint Tenancies

Should specification of the nature of the co-owned interest be required upon registration?

1. Should the *Transfer of Land Act 1958* be amended to require specification of the nature of co-ownership interests on transfers and other documents presented for registration?
2. Should transfers and other documents (or electronic conveyancing programs) contain a short statement explaining the difference between a joint tenancy and a tenancy in common?
3. What other steps should be taken to educate the community about the effect of purchasing land as a co-owner?

Should the Register be made determinative of the nature of the interest?

4. Should the *Transfer of Land Act 1958* be amended to provide that registration as a joint tenant or tenant in common is determinative as to the nature of a co-owner's interest?

Exceptions to making the Register determinative

5. If registration as joint tenants or tenants in common normally determines the nature of co-owners' interests, should the *Transfer of Land Act 1958* provide that people registered as joint mortgagees are tenants in common as between themselves?
6. Are there any other situations in which the *Transfer of Land Act 1958* should provide that people registered as joint tenants are tenants in common as between themselves?
7. Apart from the situations where registration has been obtained by fraud or where circumstances are such as to create an obligation on a registered proprietor to hold the property on trust for a third person, should there be any other exceptions to the principle that the Register determines the co-owners' interests?

Should the 'four unities' requirement be modified?

8. If the *Transfer of Land Act 1958* is amended to require specification of the nature of co-ownership interests in transactions resulting in registration, should people be able to register as joint tenants without the need for (i) unity of time and/or (ii) unity of title?
9. Are there stamp duty ramifications in removing the requirement for the unity of time and/or title? In particular, would this proposal require changes to the *Stamps Act 1958*, in order to ensure that stamp duty is paid when appropriate?
10. If the *Transfer of Land Act 1958* is amended to require specification of the nature of co-ownership interests on transfers and other documents presented for registration, should people be able to register as joint tenants with unequal interests in the property?
11. If the *Transfer of Land Act 1958* is not amended to require specification of the nature of co-ownership interests, should people still be able to specify that they wish to be joint tenants with unequal interests in the property?

Presumption of joint tenancy or presumption of tenancy in common?

12. Should the presumption that a disposition of an interest in property to two or more people creates a joint tenancy be modified:
    (i) so that co-owners should be generally presumed to be tenants in common (subject to certain exceptions), in line with the *Conveyancing Act 1919* (NSW) s 26; or
    (ii) so that co-owners should be presumed to be tenants in common in specified situations, such as where property is purchased for investment purposes, or by business partners?
13. If co-owners are generally presumed to be tenants in common (see 12(i) above), what exceptions should there be to this principle? In particular, should dispositions of interests to the following parties be excluded:
    (i) executors of wills, administrators of a deceased estate, and trustees who hold property for the benefit of others;
    (ii) mortgagees;
    (iii) married partners;
    (iv) de facto partners;
    (v) same sex partners;
    (vi) any other co-owners?

14. If co-owners are presumed to be tenants in common in specified situations (see 12(ii) above), what should those situations be? For example, should business partners, and non-family members who contribute equally or unequally to property, fall within the scope of the presumption?
15. If the Torrens Register is not to be made determinative, should the same presumption of tenancy in common that applies to other property (however modified) also apply to property registered under the Torrens System?

Chapter 3
Converting a Joint Tenancy into a Tenancy in Common

Service of a written notice

16. Should it be possible to sever a joint tenancy of Torrens land by service of a written notice?
17. If so, should there be any exceptions or limitations to this approach?

Registration of a declaration of severance

18. Should it be possible to sever a joint tenancy of Torrens land by registration of a declaration of severance?
19. If it is possible to sever a joint tenancy by registration of a declaration of severance, should a declaration form which is completed and signed, but not lodged or registered in the Land Registry, be effective to sever a joint tenancy?
20. If it is possible to sever a joint tenancy by registration of a declaration of severance, should a declaration form which is lodged, but not registered in the Land Registry, be effective to sever a joint tenancy?
21. If it is possible to sever a joint tenancy by registration of a declaration of severance, should the Registrar of Titles be able to register the declaration without production of the certificate of title?

Notification of severance

22. Should a joint tenant be required to notify the other joint tenant(s) of his or her intention to sever the joint tenancy prior to severance taking place?
23. Alternatively, should the Registrar be required to notify the other joint tenant(s) after severance has taken place?

Severance of joint tenants of personal property

24. Should it be possible for a joint tenancy of personal property to be severed by a written declaration of severance, which is communicated to the other joint tenants?

Chapter 4
Ending Co-ownership of Land

What changes should be made to the partition and sale provisions?

25. Should provision be made allowing co-owners to apply to a court or tribunal to appoint trustees for sale or partition?
26. Alternatively, should Part IV of the *Property Law Act 1958* be amended to give a court or tribunal a broad discretion to order sale or division of property on application of a co-owner?
27. If a court or tribunal is given broad discretion to order sale or division of property on application of a co-owner, what limits, if any, should be imposed on this discretion?

Which body should have power to order partition or sale?

28. Should the jurisdiction of the Victorian Civil and Administrative Tribunal be expanded to include hearing applications for sale and partition of land?
29. If so, should these matters be included in the Real Property List?
30. Alternatively, should the Magistrates' Court be able to hear applications for sale and partition of land?

Alternative dispute resolution

31. Should alternative dispute resolution services be made available to resolve disputes between co-owners?
32. If so, when should alternative dispute resolution be made available? Should it be available prior to making an application, or as part of the application?
33. What type of alternative dispute resolution services would be appropriate for resolving disputes between co-owners?
34. Should alternative dispute resolution be required before any application is heard?
35. What would be the most effective means of publicising the availability of voluntary alternative dispute resolution services to resolve disputes between co-owners?

The relationship between Part IV of the *Property Law Act 1958* and other statutory provisions

36. Do problems arise in practice as the result of the interaction between section 79 of the *Family Law Act 1975* (Cth) and the State law provisions governing partition and sale of co-owned property?

37. If so, should the body with jurisdiction to determine applications for partition and sale have power

    (i) to adjourn or terminate proceedings when the application is made by a party to a marriage and the proceedings arise out of a marital relationship; and/or

    (ii) to adjourn proceedings where the application is made by a person who co-owns property with parties to a marriage?

38. Should the adjournment or termination power apply only when proceedings have already been initiated under section 79 of the *Family Law Act 1975* (Cth), or also apply where such proceedings may be initiated in the future?

39. Are problems likely to arise as the result of the interaction between Part IX of the *Property Law Act 1958* and provisions conferring power to make partition and sale orders on VCAT or the Magistrates' Court?

40. If so, what procedural changes would be necessary to deal with such problems?

Chapter 5
Other Remedies Available when Land is Sold or Divided

Should the law be retained, codified or extended?

41 Should the principles that regulate the relationship of co-owners be codified in the legislation governing division and sale?

42. If the principles that regulate the relationship of co-owners are codified in the legislation governing division and sale, should they simply reflect the current law or be extended in scope?

43. How should the principles be extended (if at all)? In particular:

    (i) Should the body or bodies with jurisdiction to order sale or partition have a power to order payment of compensation to take account of maintenance costs paid by a co-owner?

    (ii) Should compensation be payable in cases of sole occupation by a co-owner, where another co-owner has not been excluded from the land and the occupying co-owner is not claiming compensation for improvements?

    (iii) Are there any other changes which should be made to the rules governing the relationship between co-owners?

Chapter 6
Sale and Division of Personal Property

Proposed reforms

44. Should the body which has power to order sale or division of land also be able to order sale and division of co-owned goods?

45. Should it be necessary for an application for division or sale of goods to be made by co-owners who have an interest of half or more in the property?

46. Should provisions permitting an order to be made for division or sale of property be extended to all types of co-owned property?