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*Property Law Act 1974 (Qld) –
Incorporeal Hereditaments, Rights
of Way, Powers of Appointment &
Perpetuities*

Commercial and Property Law
Research Centre
QUT Law

Preface

The Commercial and Property Law Research Centre (the **Centre**) at the Queensland University of Technology (**QUT**) was established in 2013. The Centre is a specialist network of researchers with a vision of reforming legal and regulatory frameworks in the commercial and property law sector through high impact applied research.

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Property Law Act 1974 (Qld) – Incorporeal Hereditaments, Rights of Way, Powers of Appointment & Perpetuities

Table of Contents

Preface.....	2
How to make a submission	9
Disclaimer.....	10
1. Background.....	11
1.1. Review of Queensland Property Laws.....	11
Part A – Incorporeal hereditaments, appurtenant rights and rights of way	12
2. Sections 176 and 177 – Prohibition Upon Creation of Rent Charges and Release of Part of Land Subject to Rent Charge	12
2.1. Overview and purpose.....	12
2.2. Is there a need for reform?	14
2.3. Other jurisdictions	14
2.3.1. Australia.....	14
2.4. Options	14
3. Sections 178 and 198A – No Presumption of Right to Access or Use of Light or Air (s178) and Prescriptive Right of Way Not Acquired By User (s198A).....	15
3.1. Overview and purpose.....	15
3.1.1. Overview of ‘prescription’ and ‘lost modern grant’	15
3.1.2. Section 178 – No presumption of right to access or use of light or air	17
3.1.3. Section 198A - Prescriptive right of way not acquired by user	18
3.2. Is there a need for reform?	19
3.2.1. Existence of easements by prescription is inconsistent with Torrens system	20
3.2.2. Certainty of rights necessary in an electronic registration and conveyancing regime	21
3.2.3. Uncertainty regarding right of way by prescription against the Crown	21
3.2.4. Use of section 180 of the PLA.....	22
3.3. Other jurisdictions	23
3.3.1. Australia.....	23
3.3.1.1. Light and air	23
3.3.1.2. Prescriptive right of way not acquired by user.....	23

3.3.1.3.	Prescriptive easements generally.....	24
3.3.1.3.1.	Tasmania.....	24
3.3.1.3.2.	South Australia	25
3.3.1.3.3.	New South Wales.....	26
3.3.1.3.4.	Victoria.....	26
3.3.1.3.5.	Western Australia	27
3.3.1.3.6.	Australian Capital Territory	27
3.3.1.3.7.	Northern Territory	27
3.3.2.	New Zealand.....	28
3.3.2.1.	Light and air	28
3.3.2.2.	Easements by prescription	28
3.4.	Options	29
4.	Section 179 – Right to Support of Land and Buildings	30
4.1.	Overview and purpose.....	30
4.2.	Is there a need for reform?	32
4.2.1.	Uncertainty regarding the scope of section 179 of the PLA.....	32
4.2.2.	Is section 179 of the PLA underutilised in practice?.....	35
4.2.3.	Should omissions be covered under section 179 of the PLA?.....	35
4.2.4.	Should the concept of ‘reasonableness’ and ‘fault’ be imported into section 179 of the PLA?	36
4.2.5.	Should a procedure notifying a neighbouring property of an intention be included in section 179 of the PLA?	37
4.3.	Other jurisdictions	39
4.3.1.	Australia.....	39
4.3.1.1.	New South Wales.....	39
4.3.1.2.	Western Australia	40
4.3.2.	New Zealand	40
4.4.	Options	41
5.	Section 180 – Imposition of Statutory Rights of User in Respect of Land.....	43
5.1.	Overview and purpose.....	43
5.2.	Is there a need for reform?	46
5.2.1.	Is there a need to include the term ‘development’ in section 180(1) of the PLA?	46
5.2.2.	Does section 180(4)(a) of the PLA require amendment to clarify the interaction between the words ‘compensation’ or ‘consideration’?.....	48
5.2.3.	Ordering costs against the servient owner in ‘special circumstances’	49

5.2.4.	Broadening the definition of ‘utility’ to cover ‘cables’	50
5.2.5.	Is there a need to amend the definition of ‘statutory right of user’ in section 180(7) of the PLA to explicitly cover airspace?	51
5.3.	Other jurisdictions	51
5.3.1.	Australia	51
5.3.2.	New Zealand	52
5.4.	Options	52
6.	Section 181 – Power to modify or extinguish easements and restrictive covenants	53
6.1.	Overview and purpose.....	53
6.2.	Is there a need for reform?	57
6.2.1.	Section 181(1)(a) – Is it uncertain and inflexible?	57
6.2.2.	Power to ‘modify’	61
6.2.2.1.	Adding terms to existing easements	61
6.2.2.2.	Modifying covenants in Building Management Statements	62
6.2.3.	Other issues associated with the operation of section 181 of the PLA.....	63
6.2.3.1.	Overlap between sections 181(1)(a) and 181(1)(c).....	63
6.2.3.2.	Uncertainty regarding whether s181(1)(d) of the PLA has to be satisfied in addition to one or more of s181(1)(a)-(c)	64
6.3.	Other jurisdictions	65
6.3.1.	Australia	65
6.3.1.1.	New South Wales.....	65
6.3.1.2.	Northern Territory	66
6.3.1.3.	Victoria.....	66
6.3.1.4.	Tasmania.....	67
6.3.1.5.	Western Australia	67
6.3.1.6.	South Australia	68
6.3.2.	New Zealand	68
6.4.	Options	69
	Option 1 – Amend section 181 of the PLA for clarity	69
	Option 2 – Repeal section 181 of the PLA and replace with a simpler provision providing broad discretion to the Court	69
	Annexure A – <i>Property Law Act (2007)</i> (NZ)	70
	Annexure B – Victorian Law Reform Commission: Recommendation 46.....	72
	Part B – Apportionment.....	73
7.	Part 17 – Apportionment (ss 231-233).....	73

7.1.	Overview and purpose.....	73
7.2.	Is there a need for reform?	75
7.2.1.	Part 17 of the PLA not applicable to rent payable in advance	75
7.2.2.	Practical utility of Part 17 of the PLA.....	76
7.3.	Other jurisdictions	77
7.3.1.	Australia.....	77
7.3.2.	New Zealand	78
7.4.	Options	78
	Annexure C – <i>Property Law Act 2007</i> (NZ) sections 45-47	80
	Part C – Powers of appointment and the rule against perpetuities	81
8.	Part 13 – Powers of Appointment (ss 201-205)	81
8.1.	Overview and purpose.....	82
8.1.1.	Section 201 – Application of pt 13.....	82
8.1.2.	Section 202 – Mode of exercise of powers	82
8.1.3.	Section 203 – Validation of appointments where objects are excluded or take illusory shares.....	84
8.1.4.	Section 204 – Protection of purchasers claiming under certain void appointments	85
8.1.5.	Section 205 – Disclaimer etc. of powers.....	86
8.2.	Is there a need for reform?	87
8.3.	Other jurisdictions	87
8.3.1.	New Zealand	87
8.4.	Options	88
	Annexure D – <i>Property Law Act 2007</i> (NZ) sections 45-47	89
9.	Part 14 – Perpetuities and accumulations (ss 206-222)	90
9.1.	Overview and purpose.....	90
9.1.1.	Current law in Queensland – statutory modification of the rule	91
9.1.2.	Section 208 – Powers of appointment	91
9.1.3.	Section 209 – Power to specify perpetuity period	92
9.1.4.	Section 210 – Wait and see rule	92
9.1.5.	Section 212 – Presumptions and evidence as to future parenthood.....	93
9.1.6.	Section 213 – Reduction of age and exclusion of class members to avoid remoteness.....	94
9.1.7.	Section 214 – Unborn husband or wife	94
9.1.8.	Section 215 – Dependent dispositions	95
9.1.9.	Section 216 – Abolition of the rule against double possibilities	95

9.1.10.	Section 217 – Restrictions on the perpetuity rule.....	95
9.1.11.	Section 218 – Options and rights of pre-emption.....	95
9.1.12.	Section 219 – Determinable interests.....	96
9.1.13.	Section 222 – Accumulation of income.....	97
9.2.	Is there a need for reform?	97
9.2.1.	Complexity.....	98
9.2.2.	The appropriateness of the application of the rule to commercial transactions.....	99
9.2.3.	The appropriate location for the relevant provisions	102
9.3.	Other jurisdictions	103
9.3.1.	New South Wales.....	103
9.3.2.	South Australia	104
9.3.3.	Northern Territory.....	105
9.3.4.	United Kingdom.....	105
9.3.5.	New Zealand.....	106
9.3.6.	Ireland.....	106
9.3.7.	Scotland	107
9.4.	Options	108
9.4.1.	Option 1 – Retain the Division in its current form.....	108
9.4.2.	Option 2 – Repeal the Division	108
9.4.3.	Option 3 – Modify the Division.....	110
9.5.	Existing trusts and transitional issues.....	111
9.5.1.	New Zealand transitional approach – prospective only.....	111
9.5.2.	Northern Territory transitional approach – retrospective	112
9.5.3.	UK transitional approach – ‘Opt in’	113
	Resources.....	114
	Section 176-177 – Prohibition upon creation of rent charges and Release of part of land subject to rent charge	114
	Sections 178 & 198A – No presumption of right to access or use of light or air (s178) & Prescriptive right of way not acquired by use (s198A).....	114
	Section 179 – Right to support of land and buildings.....	116
	Section 180 – Imposition of statutory rights of user in respect of land	118
	Section 181 – Power to modify or extinguish easements and restrictive covenants.....	120
	Part 17 – Apportionment (ss231-233)	121
	Part 13 – Powers of appointment.....	123

Part 14 – The rule against perpetuities..... 124

How to make a submission

Written submissions are invited in response to some or all of the issues raised in this Issues Paper.

The issues raised are not intended to be exhaustive. If you think there are other opportunities to improve the sections of the *Property Law Act 1974* (Qld) dealt with in this paper, please include these in your response.

The closing date for submissions is **13 January 2017**.

Where to send your submission

You may lodge your submission by email or post.

The email address for submissions is: propertylawreview@justice.qld.gov.au

Alternatively, you can post your submission to:

Property Law Review
C/- Strategic Policy
Department of Justice and Attorney-General
GPO Box 149
BRISBANE QLD 4001

These submissions will be provided to the Commercial and Property Law Research Centre, QUT Law, which is conducting the review.

Privacy Statement

Any personal information you include in your submission will be collected by the Department of Justice and Attorney-General (the Department) and the Queensland University of Technology for the purpose of undertaking the review of Queensland's property laws. The Department or the Queensland University of Technology may contact you for further consultation regarding the review. Your submission may also be released to other government agencies as part of the consultation process.

Submissions provided to the Department and the Queensland University of Technology in relation to this paper will be treated as public documents. This means that they may be published on the Department's website, together with the name and suburb of each person or entity making a submission. If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly in the submission. However, please note that all submissions may be subject to disclosure under the *Right to Information Act 2009*, and access applications for submissions, including those marked confidential, will be determined in accordance with that Act.

Submissions (or information about their content) may also be provided in due course to a parliamentary committee that considers any legislation resulting from this review.

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1. Background

1.1. Review of Queensland Property Laws

In August 2013, the former Queensland Government engaged the Commercial and Property Law Research Centre (the **Centre**) at the Queensland University of Technology (**QUT**) to conduct an independent and broad-ranging review of Queensland's property laws. The purpose of this review is to identify options for reducing red tape, unnecessary regulation and property law duplication.

A core element of the review includes the options for the modernisation, simplification, clarification and reform of the *Property Law Act 1974* (Qld) (**PLA**) in light of case law, the operation of other related legislation and changes in practice. The review also includes a range of issues involving community titles schemes arising under the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**).

The following papers reviewing seller disclosure and the PLA have been released by the Department of Justice and Attorney-General:

- Issues Paper : *Seller Disclosure in Queensland*;
- Interim Report: *Seller Disclosure in Queensland*;
- Issues Paper 1 – *Property Law Act 1974* (Qld) – Sales of Land and other provisions;
- Issues Paper 2 – *Property Law Act 1974* (Qld) – Part 8 Leases & Tenancies.

This Issues Paper is concerned with a number of different parts of the PLA. These are:

- Part 10 – Incorporeal hereditaments and appurtenant rights: sections 176, 177, 178, 179, 180 and 181;
- Part 11A – Rights of Way: section 198A;
- Part 13 – Powers of appointment: sections 201, 202, 203, 204 and 205;
- Part 14 – Perpetuities and accumulations : sections 206 – 222;
- Part 17 – Apportionment: sections 231, 232 and 233.

Feedback is being sought from stakeholders and other interested parties on the specific questions in this paper. The information obtained as part of this consultation process will be considered and used for the purpose of the final report setting out recommendations in relation to the sections identified above.

Part A – Incorporeal hereditaments, appurtenant rights and rights of way

Part A considers provisions of the PLA which are described in the Act as ‘Incorporeal hereditaments and appurtenant rights’. These sections are:

- section 176 – Prohibition upon creation of rent charges;
- section 177 – Release of part of land subject to rent charge;
- section 178 – No presumption of right to access or use of light or air;
- section 179 – Right to support of land and buildings;
- section 180 – Imposition of statutory rights of user in respect of land;
- section 181 - Power to modify or extinguish easements and restrictive covenants.

Part 11A, Rights of way, which comprises only section 198A is considered in conjunction with section 178 (no presumption of right to access or use of light or air).

2. Sections 176 and 177 – Prohibition Upon Creation of Rent Charges and Release of Part of Land Subject to Rent Charge

2.1. Overview and purpose

Sections 176 and 177 of the PLA provide:

176 Prohibition upon creation of rent charges

No rent charge shall be created after the commencement of this Act, and any rent charge so created shall be void and of no effect.

177 Release of part of land subject to rent charge

The release from a rent charge of part of the land charged with it shall not extinguish the whole rent charge, but shall operate only to bar the right to recover any part of the rent charge out of the land released without prejudice to the rights of all persons interested in the land remaining unreleased and not concurring in or confirming the release.

A rent charge is a device that charges rent over land outside the relationship of landlord and tenant. The charge gives the chargee a right to distrain on the land concerned.¹ The Queensland Law Reform Commission (QLRC) noted in its discussion of rent charges in 1973 that in respect of land under the *Real Property Act 1861* the ‘place of rent charges’ is taken by ‘incumbrances’ which was

¹ The right to distrain for rent was abolished by section 103 of the *Property Law Act 1974* (Qld). That section was omitted in 1992 by the *Statute Law (Miscellaneous Provisions) Act 1992 (No.2)* (Qld).

defined widely under that Act.² The QLRC recognised that rent charges are ‘virtually unknown’ as they could only be created in Queensland in respect of old system land.³

Section 176 of the PLA has the effect of prohibiting the creation of rent charges after the commencement of the PLA. The rationale for the inclusion of section 176 of the PLA was explained by the QLRC in the following way:

...as a measure of simplification of real property law, and because of the general inutility of rent charges under modern conditions, we propose that the creation of rent charges should no longer be possible in the future.⁴

Section 177 of the PLA was introduced to preserve the effect of previous Queensland legislation which reversed the common law position in relation to the release of a rent charge. Under the common law, release from a rent charge of part of the land charged had the effect that the whole of the rent charge was extinguished.⁵ Prior to the enactment of the PLA, section 40 of the *Distress Replevin and Ejectment Act 1867* in Queensland reversed the common law position and provided that the release from a rent charge of part of the land charged did not extinguish the whole rent charge.⁶ The QLRC when considering the proposed clause 177 indicated that:

It is perhaps doubtful whether s 40 applies to, or is necessary for, incumbrances registered under The Real Property Acts. The extent of the identity between an incumbrance and a rent charge is by no means clear despite some dicta in Mahoney v Hoskin (1912) 14 CLR 379, 384. Both because of this, and to preserve s 40 for the benefit of any existing rent charges issuing out of land under the general law, it seems desirable to retain a provision in the form of that in The Distress Replevin and Ejectment Act, which it is proposed will be repealed in toto.⁷

Section 177 of the PLA was therefore enacted to preserve the effect of the previous legislation and to address the wide definition of ‘incumbrance’ in the *Real Property Act 1861*. This definition has not been replicated in the *Land Title Act 1994* (Qld). Section 177 of the PLA only applies to rent charges existing at the time the PLA commenced.⁸

² Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 100.

³ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 100.

⁴ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 100.

⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [10.40].

⁶ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 100.

⁷ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 100.

⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [10.40].

2.2. Is there a need for reform?

The ongoing relevance of both sections 176 and 177 of the PLA is questionable. As noted by the QLRC in 1973, rent charges were ‘virtually unknown’ in Queensland. This position has not changed. Further, to the extent that rent charges could be created, it was only in relation to old system land. The extent of this category of land in Queensland, if any at all, is limited. The utility of a section that is directed at this type of land is therefore questionable. It is arguable that there is no need for any legislation in Queensland to deal with rent charges.

2.3. Other jurisdictions

2.3.1. Australia

The position in other Australian jurisdictions is slightly different because of the ongoing existence of old system land in these jurisdictions.⁹ In this respect, section 176 of the PLA is not replicated in any of the States or Territories. However, each jurisdiction has a provision which has an equivalent effect to section 177 of the PLA.¹⁰

2.4. Options

On the basis that there is no remaining old system land in Queensland and as a rent charge is not an interest registrable under the *Land Title Act 1994* (Qld) or the *Land Act 1994* (Qld), both sections 176 and 177 serve no purpose and should be repealed.

Questions

1. Is there any reason to retain sections 176 and 177?
2. Should sections 176 and 177 be repealed?

⁹ The position in the Northern Territory is different to the other jurisdictions. The *Law of Property Act 2000* (NT) only refers to rent charges in the context of mortgages. A rent charge is included under the definition of mortgage set out in section 4 of the *Law of Property Act 2000* (NT).

¹⁰ *Conveyancing Act 1919* (NSW) s 18, *Property Law Act 1958* (Vic) s 70, *Law of Property Act 1936* (SA) s 38, *Property Law Act 1969* (WA) s 43.

3. Sections 178 and 198A – No Presumption of Right to Access or Use of Light or Air (s178) and Prescriptive Right of Way Not Acquired By User (s198A)

3.1. Overview and purpose

Sections 178 and 198A of the PLA provide:

178 No presumption of right to access or use of light or air

From and after 1 March 1907, no right to the access or use of light or air to or for any building shall be deemed to exist, or to be capable of coming into existence, merely because of the enjoyment of such access or use for any period or of any presumption of lost grant based upon such enjoyment.

198A Prescriptive right of way not acquired by user

- (1) User after the commencement of this Act of a way over land shall not of itself be sufficient evidence of an easement of way or a right of way having been acquired by prescription or by the fiction of a lost grant.
- (2) If at any time it is established that an easement of way or right of way over land existed at the commencement of this Act, the existence and continuance of the easement or right shall not be affected by subsection (1).
- (3) For the purpose of establishing the existence at the commencement of this Act of an easement of way or right of way over land user after such commencement of a way over that land shall be disregarded.

3.1.1. Overview of ‘prescription’ and ‘lost modern grant’

There is significant history underpinning both sections 178 and 198A of the PLA arising from the creation of an easement by prescription. Easements can be created in a variety of ways including by express or implied grant. Another mechanism for creation is by prescription which is premised on long continued use. Prescription has been described in the following way:

...the method by which English law gives legal recognition and effect to various kinds of *de facto* situations in which the relevant state of affairs has continued unchallenged for so long that to deny it legal recognition would, it is said, amount to injustice.¹¹

Generally, any right which is able to exist at law as an easement can be acquired by prescription.¹² At common law, an easement acquired by prescription is a legal proprietary interest in the ‘servient land which would endure in favour of successive owners of the dominant land and would bind

¹¹ Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 129 [5.1] referring to the Law Reform Committee, *Fourteenth Report (Acquisition of Easements and Profits by Prescription)* (Cmnd 3100) (1966) 5.

¹² Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 131 [5.4].

successors in title of the servient land.¹³ The subject matter of a prescriptive easement can vary and the easements are generally categorised as either negative or positive.¹⁴ A negative prescriptive easement may involve a dominant owner restraining the servient owner from 'freely using the servient land'¹⁵ (for example, rights to light). Positive prescriptive easements are rights which 'allow the dominant owner to make use of, or install certain facilities on the servient owner's land'.¹⁶ These types of easements include rights of way and rights to parking.¹⁷

Originally, if an easement had been 'enjoyed since time immemorial' the law presumed that a grant of the easement had been made before 'legal memory began'.¹⁸ The *Statute of Westminster 1275* subsequently altered the 'time immemorial' concept and fixed the legal memory date as the coronation of Richard 1 in 1189.¹⁹ The position in relation to this fixed date also evolved as it became more difficult to establish that the grant had been made prior to 1189.²⁰

The legal fiction of the 'lost modern grant' is another form of prescription by which the common law recognised the creation of an easement. Commentary on this concept has noted that:

This presumption was applied where a claim by prescription failed. The courts, being anxious to protect rights enjoyed peacefully for a long period of time, decided that if the right had been enjoyed for a substantial period (20 years was treated as sufficient) a presumption was raised that the enjoyment had originated in a grant that had subsequently been lost. The justification for the doctrine is that the uninterrupted user for such a length of time cannot otherwise be explained.²¹

The doctrine of lost modern grant enables a claim to a prescriptive easement on the basis of 20 years uninterrupted use and that the 'state of affairs between the parties cannot otherwise be explained.'²² Eventually, in the United Kingdom, the *Prescription Act 1832* was enacted which enabled the acquisition of easements by enjoyment for 20 years without interruption. The Act made the right absolute and indefeasible, subject to some exceptions.²³

¹³ Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 7.

¹⁴ Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 12-13.

¹⁵ Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 12-13.

¹⁶ Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 12.

¹⁷ Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 12.

¹⁸ Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) 681 [15.170].

¹⁹ Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) 681 [15.170].

²⁰ For further detail on this issue see Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) 681 [15.170].

²¹ Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) 681-682 [15-170].

²² Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 10.

²³ Charles Harpum, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1322 [28-094].

However, a rule connected to 1189 was not appropriate for Australia and prescription at common law did not form part of Australian law.²⁴ In Queensland, common law prescriptive rights did not apply as the *Prescription Act 1832 (Imp)* never became part of Queensland law.²⁵ The only way rights of long user could apply in Queensland is by fiction of a lost modern grant where user would have to be shown for a continuous period of 20 years. There is doubt as to whether the doctrine of lost modern grant could apply under the Torrens system in Queensland. It is arguable that it has not applied since 1 December 1975.²⁶

3.1.2. Section 178 – No presumption of right to access or use of light or air

Historically, there is ‘no natural right to light.’²⁷ This meant that an owner of land could build in a way which stopped light entering into the owner’s neighbour’s windows, subject to the existence of an easement of light or other right.²⁸ Long established rights to light are sometimes called ‘ancient lights’.²⁹ An easement of light has been described as ‘perhaps the most difficult easement to acquire by prescription’.³⁰ The *Prescription Act 1832* which was enacted in the United Kingdom includes a specific provision addressing the issue of access to light. Section 3 of that Act provides that the actual enjoyment of the access of light for 20 years without interruption will make the right absolute and indefeasible, subject to some exceptions.³¹

The issue of access to light arose in Australia in the 1904 High Court decision of *Delohery v Permanent Trustee Co of NSW*.³² In that case, the appellant brought proceedings against the respondents seeking an injunction to restrain them from diminishing the light coming into some of the appellant’s windows as a consequence of the construction of a building. One of the key issues before the High Court was whether the law of England as to ancient lights was part of the law introduced into New South Wales either upon settlement of that colony or by virtue of the Statute, 9 Geo IV c 83 which provided that all laws and statutes in force within England at the time of passing the Act in 1828 were in force in New South Wales.³³ The Court decided that the law of prescription

²⁴ Peter Butt, *Land Law* (LawBook Co., 5th ed, 2006) 451 [1667].

²⁵ *Boulter v Jochheim* [1921] St R Qd 105 at 124 and *Miscamble v Phillips* [1936] St R Qd 136 (which primarily dealt with adverse possessory rights).

²⁶ Carmel MacDonald et al *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) 683, [15.170].

²⁷ Charles Harpum, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1258 [27-031] and 1339 [30-010].

²⁸ Charles Harpum, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1339 [30-010].

²⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [10.60].

³⁰ Charles Harpum, Stuart Bridge and Martin Dixon, *the Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1322 [28-094].

³¹ Harpum, Charles, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1322 [28-094] and Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 11.

³² [1904] 1 CLR 283.

³³ *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283, 297. Griffith CJ noted that the question of whether the statute applied in New South Wales was of ‘interest, not only to the State of New South Wales, but also to the States of Victoria and Queensland, which in 1828 formed part of New South Wales, and to the State of Tasmania, to which the Act also applies.’: at 297.

of ancient lights by modern grant applied in New South Wales within the meaning of the Imperial legislation and became part of the law of the colony at that time (1828), even if it had not been brought into that State by the first colonists.³⁴

Following this decision, the *Ancient Lights Declaratory Act 1906* was enacted in Queensland (and New South Wales and Victoria) which provided that from the commencement of the Act (1 March 1907) no right to the access or use of light to or for any building should be capable of coming into existence by reason only of the enjoyment of such access or use for any period.³⁵ Both Victoria and New South Wales subsequently amended the Act to extend it to air. The QLRC noted that this change was made in response to another High Court decision³⁶ which found that ‘a right to the uninterrupted passage of air to the doors and windows of a building was capable of subsisting as an easement created by express grant.’ The potential flow-on effect of this was the possible creation of an easement allowing the uninterrupted passage of air to the doors and windows of a building by long continuous user in accordance with the principle in *Delohery v Permanent Trustee Co of New South Wales*.³⁷ The inclusion of air in the Victorian and New South Wales legislation was intended to address this possible extension.

Section 178 of the PLA replicates the position under the earlier *Ancient Lights Declaratory Act 1906* but with the addition of the words ‘or air’ to the original section which abolished the right of ancient lights.³⁸

3.1.3. Section 198A - Prescriptive right of way not acquired by user

Section 198A of the PLA was added to the Act as an amendment in 1975.³⁹ As indicated in Part 3.1.1 above, the position in Queensland in relation to a right to a prescriptive easement was that there was never a re-enactment of the *Prescription Act 1832* from England⁴⁰ and as of 1 December 1975 when the PLA commenced, common law prescriptive rights applied.⁴¹ However, the common law right of prescription applied to rights of long use prior to 1189 and, as a result, could not have applied in Queensland. Commentary on section 198A notes that:

³⁴ *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283, 313.

³⁵ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 100-101.

³⁶ *Commonwealth v Registrar of Titles* (1918) 24 CLR 348.

³⁷ *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283.

³⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [10.60]. Butt has indicated that section 179 of the *Conveyancing Act 1919* (NSW) (the equivalent provision to section 178 of the PLA) does not affect the ‘applicability of the reasoning in *Delohery’s* case to other prescriptive easements: see Peter Butt, *Land Law* (LawBook Co., 5th ed, 2006) 451 [1668].

³⁹ *Property Law Act Amendment Act 1975* ss 2 and 17.

⁴⁰ See *Boulter v Jochheim* [1921] St R Qd 105 at 124 and *Miscamble v Phillips* [1936] St R Qd 136 (this case dealt primarily with adverse possessory rights).

⁴¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [11A.20].

Therefore, in relation to rights acquired by prescription mentioned in s 198A(1) and (2), the position is purely of academic interest. What may have had application is a right to an easement by way of long user, pursuant to the fiction of a modern lost grant prior to 1 December 1975.⁴²

Section 198A(1) of the PLA has the effect that after the commencement of the PLA, long use alone is not sufficient evidence of an easement of way or a right of way having been acquired by prescription or by the fiction of lost grant. This means that no future prescriptive rights of way may be established in Queensland.⁴³ If it is established that an easement of way or right of way over land existed at the commencement of the PLA, section 198A(2) of the PLA has the effect that the existence and continued existence of the easement or right is not affected by section 198A(1) of the PLA.⁴⁴ Subsection 198A(2) effectively preserves prescriptive rights of way in existence before 1 December 1975.⁴⁵

3.2. Is there a need for reform?

The position in relation to easements of light, air and right of way acquired by prescription is clear under the PLA. In the case of light and air, from 1 March 1907, no such right can come into existence by virtue of long use or relying on the fiction of lost grant.⁴⁶ In the case of easements of right of way, from 1 December 1975 in Queensland, long user is not sufficient to establish an easement of way or right by prescription or fiction of lost grant under section 198A(1) of the PLA. However, that provision does not impact on an easement of right of way which is established as existing as at 1 December 1975. Despite these provisions, there is still significant uncertainty in Queensland in relation to the following matters:

- the application of section 198A(2) of the PLA and its interaction with the *Land Act 1994* (Qld); and
- the existence and relevance of easements created by prescription more generally in Queensland.

Further, the ongoing consistency and relevance of prescription generally in a Torrens system is an issue which should be considered further. These matters are discussed in more detail below.

⁴² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [11A.20].

⁴³ Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 181 [6.24].

⁴⁴ *Property Law Act 1974* (Qld) s 198A(2).

⁴⁵ Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 181 [6.25].

⁴⁶ *Property Law Act 1974* (Qld) s 178.

3.2.1. Existence of easements by prescription is inconsistent with Torrens system

The law of easements acquired by prescription developed and evolved within the framework of old system English conveyancing, where title was acquired through title deeds, rather than by registration.⁴⁷ One commentator has indicated that:

Subject to an exception to be mentioned shortly, the place of prescriptive easements and profits in the Torrens system is conjectural. Prescriptive rights arise by operation of law from the acts of the parties, without formal documentation. Therefore, unless later formalised by the execution of appropriate documents, prescriptive easements and profits are not registrable.⁴⁸

In a Torrens system, ideally, 'interests should not run with land unless they are registered or recorded on title.'⁴⁹ Clearly, the possible existence of an interest which runs with the land but is not registered is inconsistent with the policy underpinning a system of registered title.⁵⁰ Further, these interests have the 'potential to impair' the 'reliability and consistency' of the relevant land register.⁵¹

Burns⁵² highlights two counter arguments to the reasoning above as follows:

- it has been accepted that irrespective of the certainty of registration under the Torrens system, exceptions to indefeasibility or interests that are not listed on the register do exist; and
- prescriptive easements are express exceptions to indefeasibility in Victoria and Western Australia and, arguably, these 'do not pose a significant threat to the integrity of title by registration.'

However, in Queensland, prescriptive easements are not exceptions to indefeasibility. Further, these easements cannot be acquired over Torrens land if they are created after the relevant land is registered.⁵³ Prescriptive easements acquired before land in Queensland was brought under the Torrens system may have fallen within the scope of omitted or misdescribed easements in the freehold land register.⁵⁴

⁴⁷ Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 21.

⁴⁸ Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) 479 [1683].

⁴⁹ Victorian Law Reform Commission, *Easements and Covenants*, Final Report (2010) 51.

⁵⁰ In *Williams v State Transit Authority of New South Wales* (2004) 60 NSWLR 286 the Supreme Court of New South Wales held that prescriptive easements have only a minimal role to play in the Torrens system in that state: see Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 5.

⁵¹ Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 36.

⁵² Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3.

⁵³ Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 271 [11.28] and *Land Title Act 1994* (Qld) ss 185(1)(c) and 185(3).

⁵⁴ *Land Title Act 1994* (Qld) ss 185(1)(c) and 185(3)(a).

3.2.2. Certainty of rights necessary in an electronic registration and conveyancing regime

Certainty of rights is an essential aspect of electronic title registration and electronic conveyancing. A common theme identified in the different law reform reports which have considered the ongoing relevance of easements by prescription has been the need to ensure that the 'land registration reflects to the greatest extent possible the title position of any given parcel of land.'⁵⁵ There are, of course, exceptions to indefeasibility and the scope of these exceptions should be clearly articulated in the relevant legislation.

If an easement is claimed relying on a right of long user, having in place a clear legislative process which enables that claim to be considered and granted, where appropriate, would assist with transparency and clarity of the legal position. Uncertainty in respect of interests which may affect title to property will inevitably have a flow-on effect in an electronic conveyancing environment.

3.2.3. Uncertainty regarding right of way by prescription against the Crown

The position in relation to the application of the doctrine of lost modern grant in relation to Crown land is not completely clear in Queensland. Generally, the view has been that rights of way by prescription cannot be claimed against Crown land.⁵⁶ However, obiter dicta of Master Weld in *Connellan Nominees Pty Ltd v Camerer*⁵⁷ created uncertainty in relation to the possibility of an easement being created by the fiction of lost modern grant in respect of a Crown lessee.⁵⁸ It is unclear if such an easement could be acquired as against the Crown. Master Weld stated that:

Consistently with that view the *Land Act* certainly applies s 282 to the creation of easements by way of registration thereof and the approval of the Minister. It does not necessarily exclude the application of the common law or general law of prescription to land held by lessees from the Crown nor the application of s 198A to such land. It cannot be concluded that it has been demonstrated to the point of clarity that an easement could not be acquired against the first or second defendant in their capacities as lessees from the Crown by virtue of prescription or the doctrine of lost modern grant consistently with s 198A of the *Property Law Act* prior to 1 December 1975 because ss 282 and 283 of the *Land Act* exclude the possibility, and it is quite within the authorities which have been mentioned for an easement so acquired to be regarded as an omitted easement when the second defendant's lease for land held thereunder became the subject of a deed of grant registered under the *Real Property Act*.⁵⁹

⁵⁵ Law Reform Committee of South Australia, *Prescription and Limitation of Actions*, Report 76 (1987) 47 referring to comments made by the Ontario Law Reform Commission in its 1969 Report on Limitation of Actions.

⁵⁶ See Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 182 [6.25] for a discussion of this point and the differing views on it.

⁵⁷ *Connellan Nominees Pty Ltd v Camerer* [1988] 2 Qd R 248.

⁵⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [11A.50].

⁵⁹ *Connellan Nominees Pty Ltd v Camerer* [1988] 2 Qd R 248, 254-255.

If the dicta in *Connellan Nominees Pty Ltd v Camerer* are correct and a right of way based on the doctrine of lost modern grant could exist now, any ousting of the operation of section 198A of the PLA in respect of land under the *Land Act 1994* (Qld) would have the effect of extinguishing an existing right.

However, commentary suggests that:

Apart from the issue of satisfactory evidence being available after such a long time, it is highly likely that the person asserting the right to the easement of right of way would make an application under s 180 of the *Property Law Act 1974* to have a statutory right of user imposed. Although s 180(8) states that the section does not bind the Crown, a right could still be imposed over the interest of a lessee or sublessee from the Crown who is not protected, subject to Ministerial approval of the grant.⁶⁰

As indicated in Part 3.2.2 above, if a right of long user is raised, a clear legislative process should be set out which enables the assessment of such a claim.

3.2.4. Use of section 180 of the PLA

Section 180 of the PLA enables the Supreme Court to impose statutory rights of user over land.⁶¹ A 'statutory right of user' provided for in section 180 includes any right of way over, or access to, or entry upon land and any right to carry and place any utility on, across, over, under, into or through land.⁶² There are a number of matters which the court must be satisfied of before granting an order under section 180 including that the order is consistent with the public interest, that the dominant land should be used in the manner proposed and that the owner of the servient land be adequately compensated for any loss or disadvantage the owner may suffer.⁶³ Section 180 of the PLA does not bind the Crown but it can apply to a lease under the *Land Act 1994* (Qld).⁶⁴

A number of law reform commissions have identified the advantages of utilising judicial power to 'force the creation of easements against unwilling land owners, in circumstances where necessity or reasonable necessity demands'.⁶⁵

Section 180 of the PLA is the subject of detailed analysis as part of this review.

⁶⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [11A.50].

⁶¹ Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 42. Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) 688 [15.270].

⁶² *Property Law Act 1974* (Qld) s 180(7). The word 'utility' is defined in s 180(7) to include any electricity, gas, power, telephone, water, drainage, sewerage and other service pipes or lines etc.

⁶³ *Property Law Act 1974* (Qld) s 180(3)(a) and (b).

⁶⁴ This means that, currently, rights cannot be granted in this way under the *Land Act 1994* (Qld).

⁶⁵ Peter Butt, *Land Law* (Thomson Reuters, 6th ed, 2010) 481 [1686].

3.3. Other jurisdictions

3.3.1. Australia

3.3.1.1. Light and air

New South Wales, South Australia and Victoria have legislative provisions equivalent or similar to section 178 of the PLA.⁶⁶ In Western Australia, the grant or instrument creating a right of access or use of light (or air) for any period of time must be registered against the title of the servient tenement.⁶⁷ The additional requirement in the case of a grant for a term exceeding 21 years is the written consent of the Governor.⁶⁸

New South Wales, Queensland, Western Australian and Victorian provisions also abolish prescriptive easements of air.⁶⁹ The South Australian provision abolishing the future creation of easements of light by prescription does not extend to air.⁷⁰ In Tasmania, both prescriptive easements of air and light were abolished by the *Prescription Act 1934* (Tas).⁷¹

The Northern Territory legislation does not appear to address prescription in any form.

3.3.1.2. Prescriptive right of way not acquired by user

There is significant variation in the other Australian jurisdictions in relation to prescriptive rights of way. In New South Wales, section 178 of the *Conveyancing Act 1919* (NSW) provides that prescriptive rights of way cannot be presumed, asserted or established against the Crown or persons holding lands in trust for any public purposes. The other Australian jurisdictions do not have legislation in force which is similar to either section 198A of the PLA or section 178 of the *Conveyancing Act 1919* (NSW).

⁶⁶ See *Conveyancing Act 1919* (NSW) s 179, *Law of Property Act 1936* (SA) s 22, *Property Law Act 1958* (Vic) ss 195 (light) and 196 (air), *Prescription Act 1934* (Tas) s 9 (repealed by s 22 of the *Land Titles Amendment (Law Reform) Act 2001*) (Tas). Section 138I of the *Land Titles Act 1980* (Tas) provides that the relevant Division supersedes the rules of the common law for the acquisition of easements by prescription and that the doctrine of lost modern grant for the acquisition of easements is abolished. In the case of the Australian Capital Territory, Burns notes that the '*Ancient Lights Declaratory Act 1904* (NSW), the initial legislation which dealt with the issue in NSW, applies to the ACT.': see Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 17.

⁶⁷ *Property Law Act 1969* (WA) s 121(a).

⁶⁸ *Property Law Act 1969* (WA) s 121(b).

⁶⁹ In the case of Victoria, the abolition of prescriptive easements of air is set out under a separate section in the *Property Law Act 1958* (Vic) (s 196).

⁷⁰ The South Australian provision abolishing the future creation of easements of light by prescription does not extend to air. For a discussion on the legal position in South Australia in relation to easements of light, see Adrian J Bradbrook, and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 236-237 [9.5]-[9.6].

⁷¹ *Prescription Act 1934* (Tas) ss 9 and 10. This Act was repealed by s 22 of the *Land Titles Amendment (Law Reform) Act 2001* (Tas). That Act also made amendments to the *Land Titles Act 1980* (Tas) and has re-enacted certain aspects of prescription at common law in a statutory form.

3.3.1.3. Prescriptive easements generally

There is significant variation between the Australian jurisdictions regarding the treatment of prescriptive easements and whether or not these can be acquired over Torrens system land.⁷² The High Court decision of *Delohery v Permanent Trustee Co of NSW*⁷³ confirmed that the doctrine of lost modern grant existed in Australia. As discussed in Part 3.3.1.1 of this paper, various jurisdictions then enacted legislation abolishing the right to ancient lights (and air at a later time) but did not address the issue of the abolition of prescriptive easements more generally.⁷⁴ The *Prescription Act 1832* is recognised as applying in two Australian states. In other jurisdictions, that Act has never been applicable.⁷⁵

Easements acquired by prescription arise through use and are therefore not documented or registered. In some jurisdictions, unregistered easements are exceptions to indefeasibility. In other jurisdictions, these easements are only an exception in limited circumstances. A number of Australian jurisdictions have considered the issue of common law prescriptive easements as part of broader law reviews into easements and covenants. There has not been any significant reform in this area in any of the jurisdictions, apart from in Tasmania. An overview of the position in relation to prescriptive easements in some of these jurisdictions is set out below. The summary illustrates the differences and is not intended to be a comprehensive statement of the law.

3.3.1.3.1. Tasmania

Section 138I(1) of the *Land Titles Act 1980* (Tas) abolishes the doctrine of lost modern grant and expressly provides that the Act supersedes the rules of common law for the acquisition of easements by prescription.⁷⁶ However, the Act has ‘reenacted’ certain aspects of prescription at common law in a statutory form.⁷⁷ The Tasmanian model enables the Recorder to make a vesting order for the creation of an easement. If such an order is made, the easement must be recorded in the register.⁷⁸ If a landowner has for 15 years (or no more than 30 years in the case of a person under disability) exercised rights which may amount to an easement at common law, the landowner can apply to the Recorder for a vesting order.⁷⁹ There are a number of matters which the landowner must establish for the purposes of the application.⁸⁰ These matters have been described as essentially copying the common law rules for the acquisition of an easement by lost modern grant.⁸¹ The landowner is

⁷² Adrian J Bradbrook, and Susan V MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 131 [5.4].

⁷³ (1904) 1 CLR 283, 297.

⁷⁴ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 16.

⁷⁵ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 15. The *Prescription Act 1832* has never applied in New South Wales, Queensland and Victoria.

⁷⁶ *Land Titles Act 1980* (Tas) s 138I(1) and (2).

⁷⁷ Tasmania Law Reform Institute, *Law of Easements in Tasmania*, Issues Paper No. 13 (2009) 27 [3.5.2].

⁷⁸ *Land Titles Act 1980* (Tas) s 138Q.

⁷⁹ *Land Titles Act 1980* (Tas) s 138J(1).

⁸⁰ *Land Titles Act 1980* (Tas) s 138L.

⁸¹ Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 164 [5.58].

required to notify the owner of the servient tenement before lodging an application for an easement.⁸²

The Tasmanian Law Reform Institute reviewed the law of easements in 2009 and 2010. The Issues Paper which was released by the Institute in 2009 sought views on a number of issues relating to prescriptive easements.⁸³ These included whether easements of this type should be permitted in a Torrens land system. Feedback was also sought on the specific arrangements under the *Land Titles Act 1980* (Tas) in relation to claiming an easement based on possession.

The Law Reform Institute made a number of recommendations in its Final Report including that the 'codification of the requirement to claim a prescriptive easement' should remain in the *Land Titles Act 1980* (Tas).⁸⁴ The Institute noted in the Final Report that if the current regime in Tasmania remained in its present form, it was likely that legal practitioners would make greater use of section 84J of the *Conveyancing Law and Property Act 1884* (Tas) which gives the Supreme Court jurisdiction to impose an easement on title in certain circumstances.⁸⁵ This provision operates in a similar way to section 180 of the PLA.

3.3.1.3.2. South Australia

The *Prescription Act 1832* (UK) was not expressly adopted in South Australia. However, case law has established that the Act forms part of the law in South Australia.⁸⁶ In terms of the Torrens system and prescriptive easements, these types of easements are not a general exception to indefeasibility. However, where an easement has been omitted or described incorrectly in any certificate or other instrument of title, the easement prevails subject to the provisions of the Act.⁸⁷

The Law Reform Committee of South Australia considered the issue of easements acquired by prescription and indicated that:

On the whole the Committee is of the view that it would be best to repeal the Prescription Act, abolish the doctrine of lost modern grant, and provide that easements may no longer be created by prescription. There is in our view no reason why a person who wishes to acquire an easement over someone else's land should not adopt the straightforward course of asking for it, and having it registered pursuant to section 88 of the Real Property Act if granted.⁸⁸

⁸² *Land Titles Act 1980* (Tas) s 138K.

⁸³ Tasmania Law Reform Institute, *Law of Easements in Tasmania*, Issues Paper No. 13 (2009) 32 [3.5.12].

⁸⁴ Tasmania Law Reform Institute, *Law of Easements in Tasmania*, Final Report (2010) 47.

⁸⁵ Tasmania Law Reform Institute, *Law of Easements in Tasmania*, Final Report (2010) 46 [3.5.24].

⁸⁶ See Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 153 [5.45] for further discussion on the application of this Act in South Australia.

⁸⁷ *Real Property Act 1886* (SA), s 69(d). This section expressly refers to a right-of-way under the provisions of the *Rights-of-Way Act 1881* as well as 'other' easements. Where a right-of-way easement prevails, it is also subject to the *Rights-of-Way Act 1881*.

⁸⁸ Law Reform Committee of South Australia, *Prescription and Limitation of Actions* Report 76 (1987) 54.

3.3.1.3.3. New South Wales

The position in New South Wales is similar to South Australia. The *Real Property Act 1900* (NSW) has the effect that an easement is not an exception to indefeasibility except where there has been an omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of the Act or validly created at or after that time under the Act or any other Act.⁸⁹ In the case of the creation of new prescriptive easements over Torrens land in New South Wales, the position seems to be that these cannot be created.⁹⁰

3.3.1.3.4. Victoria

All easements in Victoria, including those acquired by prescription, are exceptions to indefeasibility under the *Transfer of Land Act 1958* (Vic).⁹¹ The doctrine of lost modern grant is the 'only rule of prescription under which easements can be acquired in Victoria.'⁹²

In 1989 the Law Reform Commission of Victoria issued a Discussion Paper entitled *Easements and Covenants*.⁹³ That paper proposed the abolition of both the right to obtain an easement by long use and the opportunity to acquire an easement by long use.⁹⁴ The Commission indicated that these easements were appropriate in England where there was no planning control and the 'complexity of conveyancing made formal creation of easements extremely difficult.'⁹⁵ The rationale for the proposal to abolish these types of easements was based on the existence of a good land planning system and a simple, accessible conveyancing process, and on the fact that a person who needed an easement could purchase it from a neighbour.⁹⁶ No further action in relation to the Discussion Paper was taken.

In 2010 the Victorian Law Reform Commission published a Consultation Paper, *Easements and Covenants*.⁹⁷ This paper was followed by a Final Report later in the same year.⁹⁸ The Victorian Law Reform Commission in its Final Report recommended the abolition of the rule of law which enabled a person to acquire an easement by long user under the fiction of lost modern grant.⁹⁹ The Commission also recommended that the Victorian Civil and Administrative Tribunal should be able to order the creation of easements under the *Property Law Act 1958* (Vic) if the easement is:

⁸⁹ *Real Property Act 1900* (NSW) s 42(1)(a1).

⁹⁰ See *Williams v Transit Authority of New South Wales and Ors* (2004) 60 NSWLR 286.

⁹¹ *Transfer of Land Act 1958* (Vic) s 42(2)(d) which refers to 'any easements howsoever acquired subsisting over or upon or affecting the land.'

⁹² Law Reform Commission of Victoria, *Easements and Covenants* Discussion Paper No. 15 (1989) 60 [7.2].

⁹³ Law Reform Commission of Victoria, *Easements and Covenants* Discussion Paper No. 15 (1989).

⁹⁴ Law Reform Commission of Victoria, *Easements and Covenants* Discussion Paper No. 15 (1989) 1, 12 [10]-[11].

⁹⁵ Law Reform Commission of Victoria, *Easements and Covenants* Discussion Paper No. 15 (1989) 12 [10].

⁹⁶ Law Reform Commission of Victoria, *Easements and Covenants* Discussion Paper No. 15 (1989).

⁹⁷ Victorian Law Reform Commission, *Easements and Covenants* Consultation Paper (2010).

⁹⁸ Victorian Law Reform Commission, *Easements and Covenants* Final Report (2010).

⁹⁹ Victorian Law Reform Commission, *Easements and Covenants* Final Report (2010) 55, Recommendation 17.

- reasonably necessary for the effective use or development of other land that will have the benefit of the easement; and
- consistent with the reasonable use and enjoyment of the lot or lots over which the easement is sought.¹⁰⁰

These recommendations have not been adopted in Victoria to date.

3.3.1.3.5. Western Australia

Commentary on the position in Western Australia indicates that the *Prescription Act 1832* (UK) applies but this is due to the operation of an old Imperial statute rather than state legislation.¹⁰¹ Further, the position in Western Australia is similar to Victoria in relation to exceptions to indefeasibility. Under the relevant legislation the exception to indefeasibility extends to ‘any public rights of way and to any easements acquired by enjoyment or user’.¹⁰² A prescriptive easement can still be acquired in Western Australia under the doctrine of lost modern grant.

3.3.1.3.6. Australian Capital Territory

The position in the Australian Capital Territory is unclear in terms of whether prescriptive easements still bind a registered proprietor in the ACT. Section 58(1)(b) of the *Land Titles Act 1925* (ACT) provides that ‘any right of way or other easement created in or existing upon the same land which is not described, or is misdescribed in the relative certificate of title’ is an exception to indefeasibility.¹⁰³

3.3.1.3.7. Northern Territory

The Northern Territory legislation does not address the issue of prescription in any form.¹⁰⁴ Commentary suggests that the better view is that prescriptive easements have no ongoing role in the Northern Territory and that the ‘silence’ on these easements ‘arguably constitutes another form

¹⁰⁰ Victorian Law Reform Commission, *Easements and Covenants*, Final Report (2010) 41, Recommendation 6. Recommendation 7 provides that VCAT is empowered to make an order for the grant of an easement only if satisfied of three matters including that the use of the land having the benefit of the easement will not be inconsistent with the public interest and the owner of the burdened land can be adequately compensated for any loss or disadvantage arising from the imposition of the easement.

¹⁰¹ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 20. The Imperial legislation is 6 Will IV No 4 (1836) (WA). See also Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 153 [5.44].

¹⁰² *Transfer of Land Act 1893* (WA) s 68(1A).

¹⁰³ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 26. Burns indicates that: ‘The language of the provision appears sufficiently wide to include prescriptive easements which existed prior to registration or were subsequently created over the land. On the other hand, the reference to a lack of description may simply refer to easements which were registered, but later omitted.’

¹⁰⁴ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 20.

of indirect abolition of prescriptive easements.¹⁰⁵ The Northern Territory legislation does provide for indefeasibility of title. It also covers the continuing effect of easements that were registered but subsequently omitted and sets out a process of granting and registering easements. However, the legislation does not include a provision which establishes prescriptive easements as an exception to indefeasibility of title.¹⁰⁶

3.3.2. New Zealand

3.3.2.1. Light and air

Easements of light and air can be created under the *Property Law Act 2007* (NZ) but in order to be enforceable the easements must comply with the requirements under sections 299 and 300 of that Act. An easement of light or air is enforceable if:

- the grant is granted on or after 24 November 1927;¹⁰⁷
- the grant is granted by deed or by an instrument registrable under the *Land Transfer Act 1915* or the *Land Transfer Act 1952*;¹⁰⁸
- the deed or instrument accurately defines the area on and over the burdened land to which the right of access of light or air is intended to be provided.¹⁰⁹

Section 300 of the *Property Law Act 2007* (NZ) provides that an easement which is enforceable under section 299 will have effect and continue to have effect even if any of the buildings erected on the dominant tenement are altered or destroyed and replaced by other buildings.¹¹⁰

3.3.2.2. Easements by prescription

Section 296 of the *Property Law Act 2007* (NZ) has the effect that from 1 January 2008 easements cannot be acquired by prescription in New Zealand.¹¹¹ The section also abolishes the fiction of the lost modern grant.¹¹² The rationale for the introduction of section 296 of the *Property Law Act 2007* (NZ) is explained as follows:

... the rules concerning prescription relate only to deeds system land which has not been brought under the *Land Transfer Act 1952*. The new s 222 has the effect of preventing the maturing of further prescriptive rights. That has very little, if any, practical importance as it is unlikely that any such rights are presently in the course of

¹⁰⁵ Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 27-28.

¹⁰⁶ Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 28. See *Land Titles Act 2000* (NT) s188, s189(1)(c).

¹⁰⁷ *Property Law Act 2007* (NZ) s 299(2) – this is the date on which the *Property Law Amendment Act 1927* came into force).

¹⁰⁸ *Property Law Act 2007* (NZ) s 299(3).

¹⁰⁹ *Property Law Act 2007* (NZ) s 299(4).

¹¹⁰ *Property Law Act 2007* (NZ) ss 300(1) and (2).

¹¹¹ *Property Law Act 2007* (NZ) s 296(1).

¹¹² *Property Law Act 2007* (NZ) s 296(2).

arising. Subsection (2) formally abolishes the rule of law relating to the fiction of the lost modern grant. Subsection (3) preserves prescriptive rights which have already matured.¹¹³

3.4. Options

There are clearly some advantages to having a clear statement in Queensland in relation to the status of easements created by prescription (if these still exist at all). Feedback from stakeholders will be useful in determining the approach to be adopted. One possible way to address prescriptive easements may include:

- repealing section 178 and section 198A of the PLA;
- declaring that no interest under either the *Land Title Act 1994* (Qld) or the *Land Act 1994* (Qld) can be created by prescription or through the fiction of lost modern grant irrespective of when created, from the time the amendment is passed;
- providing in legislation that easements may only be sought under section 180 of the PLA as statutory rights of user. Consideration may need to be given to amending section 180 of the PLA to broaden the categories of easements that may fall within the scope of the provision.

Questions

3. What role, if any, should common law prescriptive easements have in a Torrens (registered land) system?
4. Should prescriptive easements be permitted in a Torrens system?
5. Should there be a clear statement in Queensland abolishing the doctrine of lost modern grant (easements acquired by prescription)?
6. Do you see any issues with the abolition of any rights enabling the acquisition of easements acquired by prescription?
7. Do you see any issues with the repeal of sections 178 and 198A of the PLA?
8. Should section 180 of the PLA be expanded and used as a mechanism to 'force the creation of easements against unwilling land owners, in circumstances where necessity or reasonable necessity demands', where appropriate?
9. Do you think there is any basis for the different treatment of prescriptive rights under the *Land Title Act 1994* (Qld) compared to the *Land Act 1994* (Qld) if the comments of Master Weld in *Connellan Nominees Pty v Camerer*¹¹⁴ has any basis?

¹¹³ New Zealand Law Commission, *A New Property Law Act*, Report No. 29 (1994) 384 [680].

¹¹⁴ [1988] 2 Qd R 248.

4. Section 179 – Right to Support of Land and Buildings

4.1. Overview and purpose

Section 179:

179 Right to support of land and buildings

For the benefit of all interests in other land which may be adversely affected by any breach of this section, there shall be attached to any land an obligation not to do anything on or below it that will withdraw support from any other land or from any building, structure or erection that has been placed on or below it.

Section 179 of the PLA was introduced to address a perceived inadequacy of the common law in relation to the right to support of land. At common law, an owner of land is entitled not to have the support to land in its natural state removed.¹¹⁵ This is said to be an ‘incident’ of land itself.¹¹⁶ If the adjoining landowner removes the support by excavating, or some other means, that landowner is liable in nuisance.¹¹⁷ However, there is no natural right at common law for a building to be supported by adjoining land, which means that:

The owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour’s house, if supported by it, to fall in ruins to the ground.¹¹⁸

The common law also does not provide for a right to support of land by water. This has the effect that no right of action is available where drainage from an adjoining property on to neighbouring land causes damage to buildings.¹¹⁹

The QLRC when discussing the rationale for the inclusion of section 179 commented:

We have little doubt that, with advances in modern engineering techniques, an owner both can and should, and in practice almost invariably does, take precautions against damage to his neighbour’s building caused by subsidence arising from excavations on adjoining land, and we share the view of the Law Commission that there should be a legal obligation to avoid damage to buildings as well as to

¹¹⁵ *Dalton v Angus* (1881) 6 App Cas 740, 791.

¹¹⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [10.90].

¹¹⁷ *Dalton v Angus* (1881) 6 App Cas 740.

¹¹⁸ *Dalton v Angus* (1881) 6 App Cas 740, 804. An obligation not to remove support could, of course, be imposed by an easement.

¹¹⁹ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 101.

land deriving natural support from such land. We also agree with the Commission's view that a right to continue to have land naturally supported by water should be recognised, as it is in Scotland.¹²⁰

The position in Queensland now as a result of section 179 of the PLA is that an obligation is attached to 'any land' not to do anything which withdraws support from any other land, building, structure or erection placed on or below the land. The obligation is not restricted to landowners but extends to all persons whose actions result in support being withdrawn.¹²¹ Further, there is no longer a distinction between support for land and buildings and support derived from water or otherwise.¹²² In terms of the right to support of land, section 179 of the PLA has been described as not 'extending the common law rules' and 'merely codifying the status quo.'¹²³

There are no other legislative provisions in Queensland which deal with the right to support of land and buildings. Issues associated with right to support can arise in the context of retaining walls. The *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) (**Dividing Fences Act**) does not directly deal with retaining walls.¹²⁴ However, the issue of retaining walls may arise indirectly where it may be necessary to carry out work on the retaining wall for the purpose of resolving a dispute about a dividing fence.¹²⁵ In this respect, under section 35(1)(f) of the Dividing Fences Act, QCAT has a general power to order that any other work be carried out that is necessary in order to carry out the fencing work ordered under the section. This can include work for a retaining wall. The QLRC has released a Discussion Paper as part of a broader review of the Dividing Fences Act.¹²⁶ One of the issues for consideration set out in its Terms of Reference for that review was whether the 'scope of the Act should be expanded to include disputes about retaining walls built on neighbouring properties' boundaries.'¹²⁷ The resulting QLRC report concluded in the negative.¹²⁸

¹²⁰ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 102.

¹²¹ *De Pasquale Bros Pty Ltd v Cavanah Biggs & Partners Pty Ltd* [2000] 2 Qd R 461, [43]. An engineer's actions on its client's land led to a withdrawal of support of a building on adjoining land. The Court held the professional engineer liable under s 179 to make good the damage.

¹²² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [10.90].

¹²³ Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 200 [7.4].

¹²⁴ The term 'retaining wall' is defined in the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of 'retaining wall').

¹²⁵ Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Discussion Paper No. 72 (June 2015) [2.79].

¹²⁶ Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Discussion Paper No. 72 (June 2015).

¹²⁷ Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Discussion Paper No. 72 (June 2015), Appendix A Terms of Reference. Retaining walls are subject to other requirements under Queensland legislation including the *Building Act 1975* (Qld) and the *Sustainable Planning Act 2009* (Qld). For further detail about these other requirements see Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Discussion Paper No. 72 (June 2015) [2.84].

¹²⁸ Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No. 72 (December 2015). The final report was tabled in Parliament on 11 May 2016.

Section 179 of the PLA has only been considered in detail in one case in Queensland, *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd*.¹²⁹ Chesterman J indicated in that case that because section 179 of the PLA extends the applicability of the common law to buildings:

It would be sensible to construe the section, unless its language clearly prevents such a course, so that the statutory obligation with respect to buildings is the same in scope and content as the common law obligation with respect to natural land.¹³⁰

Applying this reasoning, the person whose actions led to the withdrawal of support is 'liable to make good the damage'.¹³¹ Further, section 179 of the PLA is contravened if a person did something on the relevant land which withdrew support from it or created the nuisance.¹³² It is a question of fact, not of law, whether a person has created a nuisance or has caused the withdrawal of support.¹³³ Chesterman J considered that 'it was evident that the section confers a private right of property' and damages or an injunction may be sought for the breach of the right.¹³⁴ The type of injunctions which may be available include a mandatory injunction requiring something to be done or a *quia timet* injunction which may be available where harm has not yet manifested but is considered to be imminent.¹³⁵

However, at common law nuisance is not actionable per se and actual damage must be proved, subject to some limited exceptions.¹³⁶ In nuisance cases, the harm suffered by the 'plaintiff will generally take the form of either physical injury to land or an interference with personal enjoyment of it.'¹³⁷ Further, the interference with the use and enjoyment of land needs to be 'unreasonable'.¹³⁸ This concept is not considered solely from the defendant's perspective – it is a question of 'whether what has been done is reasonable' from both the defendant's and plaintiff's perspectives.¹³⁹ In the case of the removal of support to a plaintiff's land, liability at common law is strict and it is not necessary to establish fault on the part of the defendant.¹⁴⁰

4.2. Is there a need for reform?

4.2.1. Uncertainty regarding the scope of section 179 of the PLA

As indicated above, there has only been one decision in Queensland considering the application of section 179 of the PLA. The interpretation given to the section in that case is that the provision simply imports the common law obligation with respect to natural land so that it applies to

¹²⁹ [2000] 2 Qd R 461.

¹³⁰ *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461, 472 [48].

¹³¹ *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461, 472 [48].

¹³² *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461, 473 [49].

¹³³ *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461, 473 [52].

¹³⁴ *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461, 473 [53].

¹³⁵ *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245, 248.

¹³⁶ R P Balkin and J L R Davis, *Law of Torts* (Butterworths, 5th ed, 2011) 465 [14.6].

¹³⁷ R P Balkin and J L R Davis, *Law of Torts* (Butterworths, 5th ed, 2011) 479 [14.30].

¹³⁸ Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 189 [5.1.2].

¹³⁹ R P Balkin, J L R Davis, *Law of Torts* (Butterworths, 5th ed, 2011) 474 [14.20].

¹⁴⁰ R P Balkin, J L R Davis, *Law of Torts* (Butterworths, 5th ed, 2011) 464 [14.2].

buildings. However, the precise scope of the section remains untested. For example, it is not clear if the section extends to a reduction of support that is not a complete withdrawal of support.

A number of scenarios are set out below and analysed to assess whether section 179 would apply to the situation based on the interpretation of Chesterman J in the decision of *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd*.¹⁴¹

Scenario 1: The owner of Property A which adjoins Property B (a house) is building four townhouses. Excavation works are undertaken on the boundary of Properties A and B. The owner of Property B is concerned that the excavation works have withdrawn support from her property, although there is no obvious physical damage to her property. An expert opinion she has obtained confirms that support has been withdrawn and that there is potential for damage to her property to appear sometime in the future.

In this situation, section 179 is arguably applicable as it is sufficient that something has been done on Property A that has withdrawn support from Property B. The key issue in this scenario relates to what remedies are available if it is established that section 179 of the PLA has been contravened.

The usual remedy sought for a nuisance action is an injunction, rather than damages. Damages at common law cannot be claimed until damage has been suffered. Injunctions can be mandatory, which requires the doing of a positive act such as reinstating support, or prohibitory, which requires the defendant to refrain from doing an act or cease doing an act.¹⁴² In the case of anticipated harm occurring, a *quia timet* injunction is likely to be sought. This type of injunction is usually framed in mandatory terms requiring the defendant to do something to prevent the damage occurring, although it can also be presented as a negative obligation not to do something.¹⁴³ It is possible to have equitable damages awarded in place of a *quia timet* injunction to compensate for the cost of taking steps to prevent or abate a nuisance.¹⁴⁴ These remedies would be available in the case of a contravention of section 179 of the PLA.

Scenario 2: The owner of Property A which adjoins Property B undertakes excavation work on the boundary of Properties A and B. Engineering reports obtained by the owner of Property A indicate that the excavation will not withdraw support to Property B. Although the work has not yet led to the withdrawal of support on Property B, expert engineering reports obtained by the owner suggest that if further work is carried out, withdrawal of support will be the outcome.

The obligation under section 179 of the PLA is not to do anything which will withdraw support. In this scenario, support has not yet been withdrawn and it is uncertain if the excavation will ultimately lead to the withdrawal of support. It is not clear whether section 179 of the PLA will apply in this case. In a case such as this, an interlocutory injunction is likely to be sought prior to the hearing of the substantive dispute. However, whether one will be granted depends on there being sufficient

¹⁴¹ *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461.

¹⁴² Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 206 [5.1.7.1.1].

¹⁴³ Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 208 [5.1.7.1.3].

¹⁴⁴ *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245; Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 209 [5.1.7.2].

likelihood of success if the matter proceeds to hearing to justify 'preserving the status quo' in the interim.¹⁴⁵

***Scenario 3: The owner of Property A excavates near the common boundary of her property and Property B. She builds a retaining wall to support the land to Property B. There is no building present on Property B. The excavation potentially will 'impede or increase the expense of future building operations on the land.'*¹⁴⁶**

In this scenario it is not clear whether a claim that the obligation imposed on Property A under section 179 of the PLA has been breached would succeed. If at the time of the excavation the owner of Property A built a retaining wall which ensured that the support to Property B was not withdrawn, it is unlikely section 179 has been breached. There is no building erected on the land and section 179 of the PLA does not appear to cover anticipated buildings or structures. The section is framed in terms of buildings that have already been placed on the relevant land. A cause of action in nuisance for withdrawal of support is also unlikely to be available as it does not extend to a right to support of buildings or anticipated buildings.¹⁴⁷

Scenario 4: A retaining wall on the boundary of Property A and Property B has collapsed. The owners of Property A and Property B have not taken any positive actions to maintain the wall. There is no obvious cause of the collapse or any indication that the property owners have acted in a way which has caused the wall to collapse.

Retaining walls located on boundaries are not covered under section 179 of the PLA. Further, as discussed in Part 4.1 above, they also do not fall within the scope of the Dividing Fences Act, except to the extent that a dividing fence is located on the retaining wall. It is not clear what cause of action would be available in this case, if any. It will largely depend on all the relevant factors in the case. The position would be the same if the collapse of the retaining wall then led to the subsidence of the land – that is, section 179 of the PLA would not apply.

As noted above, the QLRC in its review of the Dividing Fences Act concluded that the Act should not be extended to include disputes about retaining walls built on neighbouring properties' boundaries.¹⁴⁸ This paper will not consider the issue of boundary retaining walls beyond the comment above that they fall outside the scope of section 179 of the PLA.

Scenario 5: A retaining wall on the boundary of Property A and Property B collapses onto Property B. The owner of Property A undertook excavation works on her property close to the boundary retaining wall.

As with Scenario 4, section 179 of the PLA will not apply to this situation as the retaining wall is located on the boundary and the obligation not to withdraw support relates to actions on one property which withdraws support from any other land or building (structure or erection). However,

¹⁴⁵ R P Balkin and JLR Davis, *Law of Torts* (Butterworths, 5th ed, 2013) 795 [27.51].

¹⁴⁶ See *Kebewar Pty Ltd v Harkin* (1987) 9 NSWLR 738; Peter Butt, *Land Law* (Law Book Co, 6th ed, 2010) 20 [223].

¹⁴⁷ Peter Butt, *Land Law* (Law Book Co, 6th ed, 2010) 20 [223].

¹⁴⁸ Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No. 72 (December 2015) 56 -57 and Recommendation 2-10.

possible causes of action in this case would include negligence or nuisance, depending on the details of the case, since the acts of the owner of Property A have caused the collapse of the retaining wall.

4.2.2. Is section 179 of the PLA underutilised in practice?

Section 179 of the PLA has only been the subject of limited Supreme Court decisions and was pleaded in addition to a claim for negligence based on the same facts.¹⁴⁹ The absence of case law suggests either that issues associated with support are dealt with between the relevant parties or, as suggested by the QLRC in 1973, that with ‘advances in modern engineering techniques’ an owner of land would in practice take steps to avoid damage to neighbouring properties caused by excavation or other activities which could lead to withdrawal of support on the other property.¹⁵⁰ In the case of commercial building projects in Queensland, it is usual to have underpinning agreements in place between the owner of the proposed new building and the owners of neighbouring commercial buildings to support the land during construction. These agreements effectively operate as temporary easements of support.

4.2.3. Should omissions be covered under section 179 of the PLA?

Currently under section 179 of the PLA, omissions to act do not fall within the scope of the section. An omission in the context of a right of support would include ‘failing to take action to prevent a loss of support from occurring.’¹⁵¹ Conversely, an act of commission covered by section 179 of the PLA would include the excavation of a hole.¹⁵² The New South Wales Law Reform Commission (**NSWLRC**) originally anticipated that the replacement of the common law right to support with a duty of care based in negligence would impose an obligation on a person to take reasonable care that the person ‘does not do or omit to do anything to land which might cause loss or damage by removing the relevant support provided by that land to other land.’¹⁵³ The proposed amendment to the *Conveyancing Act 1919* (NSW) recommended by the Commission expressly included a duty of care not to omit to do anything.¹⁵⁴ The *Conveyancing Amendment (Law of Support) Bill 2000* (NSW) in its original form provided that the duty of care in relation to support for land did not extend to an

¹⁴⁹ *De Pasquale Bros Pty Ltd v Cavanagh Briggs & Partners Pty Ltd* [2000] 2 Qd R 461, [42]. The section was relied upon in the case of *Hulin v Bill Qui Constructions Pty Ltd* [2007] QSC 108 along with alternative claims for damages for nuisance, a mandatory injunction or equitable damages for negligence, or damages for trespass. However, this case dealt with the defendant’s application to have the proceeding heard and determined in the Commercial and Consumer Tribunal, rather than the Supreme Court. Accordingly, the substantive claims in the case were not considered. The proceedings relating to the substantive claims do not appear to have proceeded any further following the decision dismissing the application to have the matter transferred from the Supreme Court.

¹⁵⁰ Queensland Law Reform Commission, *A Bill to Consolidate, Amend And Reform The Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 102.

¹⁵¹ New South Wales, *Hansard*, Legislative Council, 13 April 2000, 4678 (Carmel Tebbutt).

¹⁵² New South Wales, *Hansard*, Legislative Council, 13 April 2000, 4678 (Carmel Tebbutt).

¹⁵³ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) 48 [4.8].

¹⁵⁴ Explanatory Note, *Conveyancing Amendment (Law of Support) Bill 2000* (NSW) [4678]

‘omission’ by the Crown (or by a local or public authority) in relation to supporting land.¹⁵⁵ There was very limited discussion in the report regarding the reasons for the inclusion of acts of omission within the duty of care created in the section. However, omissions were excluded from the Bill during its passage through Parliament.

The following explanation for the exclusion was provided during the introduction of the amendment to the original Bill:

Originally, it was intended that only the Crown would not be liable for omissions to act. Opposition and Independent members expressed concern about putting the Crown in a privileged position in comparison to other parties, and this amendment addresses that concern. The Crown was originally exempted because it was not thought feasible for it to be aware of physical events occurring on all parts of the vast lands that it manages and to take action to stop those physical events from leading to a lack of support for other land. However, it may be just as difficult for other landowners to be aware of such events and to take action, and, accordingly, they will also be exempted.

This is consistent with the situation in Queensland, where section 179 of the Property Law Act imposes a similar duty in relation to acts of commission but not in relation to acts of omission.¹⁵⁶

The issue has been considered judicially in New South Wales and it is now accepted that section 177 of the *Conveyancing Act 1919* (NSW) does not extend to omissions.¹⁵⁷ The New South Wales arrangement in relation to the right to support is discussed in detail in Part 4.3.1.1 below.

It is not clear whether there is a strong policy rationale for the express inclusion in section 179 of the PLA of an omission to act (whatever form the section eventually takes). Withdrawal of support cases where section 179 of the PLA may apply often arise in the context of excavation occurring on property A which causes land to collapse or buildings to be damaged on property B. If nothing is done by the person responsible on property A to shore up support to property B, this will still be characterised as an act which has led to the withdrawal of support for the purposes of section 179 of the PLA. The issue may be more relevant if the position under the PLA reflected the approach of New South Wales and imported a duty of care in relation to the right of support for land.

4.2.4. Should the concept of ‘reasonableness’ and ‘fault’ be imported into section 179 of the PLA?

Section 179 of the PLA is essentially an extended version of the common law position so that the obligation not to withdraw support applies not only to unimproved land but also to any building, structure or erection placed on that land. The section is a strict liability provision so that if support has been withdrawn or will be withdrawn, the provision is contravened. There is no capacity for considering issues of ‘fault’ for the withdrawal of support or reasonableness of the actions taken to provide support.

¹⁵⁵ Explanatory Note, Conveyancing Amendment (Law of Support) Bill 2000 (NSW).

¹⁵⁶ New South Wales, *Hansard*, Legislative Council, 13 April 2000, 4678 (Carmel Tebbutt).

¹⁵⁷ *Piling v Prynew; Nemeth v Prynew* [2008] NSWSC 118.

The NSWLRC identified strict liability in nuisance in support cases as one of the problems with the common law position.¹⁵⁸ The inclusion of concepts of fault and reasonableness of actions would potentially bring the obligation under section 179 of the PLA closer to a ‘negligence-style’ duty of care.¹⁵⁹ The NSWLRC when discussing the possible reform options observed that:

In support cases, the gist of the action is physical damage, or the threat of it, generally occasioned by an isolated unintentional event, rather than an ongoing state of affairs. In this regard it more closely resembles negligence than a typical nuisance case such as emission of noxious fumes from a factory.¹⁶⁰

One limitation of adopting an approach which imposes a duty of care is that the concept of foreseeability will restrict the scope of the duty. The NSWLRC noted that:

In contrast with s 179 of the *Property Law Act 1974* (Qld), the proposed duty of care will not prohibit every withdrawal of support. It seems likely that some degree of support could result, for example, from changes to other land, but in the Commission’s view these should not be actionable if they are of a trivial nature and do not cause any damage to affected land. ... [I]t is not intended that construction of a residence in a predominantly residential area will entail an obligation to maintain support to neighbouring land sufficient to carry the burden of multi-storey buildings which, as a technical possibility, might be built there at some time in the future.¹⁶¹

Further, if the defendant took reasonable steps in relation to addressing the issue of support when undertaking works on his or her land, then it is possible that a duty of care may not have been breached which means the plaintiff will have limited options and potentially will bear the cost of remediation alone.

An advantage of such an approach may be that apportioning damages would be undertaken on the basis of fault so arguably it may be a fairer process for the parties.¹⁶² A further issue which will arise from any amendment of section 179 which incorporates a negligence-style duty of care is addressing the issue of the common law right to bring a cause of action in nuisance in relation to the removal of support to land. New South Wales dealt with this issue by abolishing any common law right to bring such an action in that limited situation.

4.2.5. Should a procedure notifying a neighbouring property of an intention be included in section 179 of the PLA?

The possibility of including a procedure within a statutory provision to regulate the exercise of a statutory right to support was raised when the United Kingdom Law Commission reviewed

¹⁵⁸ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) 46-47 [4.3].

¹⁵⁹ Butt describes section 177 of the *Conveyancing Act 1919* (NSW) as imposing a ‘negligence-style’ duty of care: see Peter Butt, *Land Law* (Law Book Co, 6th ed, 2010) 22 [228].

¹⁶⁰ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) [3.35].

¹⁶¹ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) 52 [4.14].

¹⁶² New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) 49 [4.10].

appurtenant rights in a Working Paper in 1971.¹⁶³ The proposal in the paper was that a right of support of a building by land should exist in a statutory form and that a procedure be included in the legislation to regulate excavations which gave rise to a potential danger of withdrawing support. The details of the procedure were not particularised in the Working Paper but the Law Commission indicated that it could be based on section 50 of the *London Building Acts (Amendment) Act 1939* (UK).¹⁶⁴ An overview of this section is below:

- the procedure in the section is triggered if the owner proposes to erect within a specified distance of an adjoining building a structure with a level lower than the building on the adjoining land;¹⁶⁵
- a notice must be served by the building owner at least one month before the commencement of the building;¹⁶⁶
- the notice must include plans and depth of excavation;
- the adjoining owner can serve notice in writing on the building owner that he or she disputes the necessity of the underpinning or requires more strengthening. The serving of this notice has the effect that a 'difference' has been deemed to have arisen between the parties;¹⁶⁷
- where there is a difference between the owners, the matter is determined by a surveyor's award.¹⁶⁸ A party can appeal to the court against the award;¹⁶⁹
- the building owner must compensate the adjoining owner or occupier for any inconvenience, loss or damage as a result of any work executed;
- the building owner must provide plans of the completed works if requested.

The Law Commission identified some advantages of this approach including ensuring that both the stability of an existing building is not put in unnecessary danger and the development of land is not discouraged by a neighbouring owner's right to support.¹⁷⁰

¹⁶³ Law Commission (UK), *Transfer of Land: Appurtenant Rights*, Working Paper No. 36 (1971) [61]-[62].

¹⁶⁴ Law Commission (UK), *Transfer of Land: Appurtenant Rights*, Working Paper No. 36 (1971) [62].

¹⁶⁵ *London Building Acts (Amendment) Act 1939* (UK) s 50(1).

¹⁶⁶ *London Building Acts (Amendment) Act 1939* (UK) s 50(2).

¹⁶⁷ *London Building Acts (Amendment) Act 1939* (UK) s 50(2).

¹⁶⁸ *London Building Acts (Amendment) Act 1939* (UK) s 55. The parties can either agree on a surveyor or if there is no agreement, appoint a surveyor each and those surveyors will appoint a third surveyor.

¹⁶⁹ *London Building Acts (Amendment) Act 1939* (UK) s 55.

¹⁷⁰ Law Commission (UK), *Transfer of Land: Appurtenant Rights*, Working Paper No. 36 (1971) 31 [62].

4.3. Other jurisdictions

4.3.1. Australia

4.3.1.1. New South Wales

New South Wales is the only other Australian jurisdiction to have altered the common law in relation to the right to support of land. Section 177 of the *Conveyancing Act 1919* (NSW) (**Conveyancing Act**) was added in 2000 following a review of the law relating to the right to support from adjoining land undertaken by the NSWLRC in 1997.¹⁷¹ Prior to 2000 the common law principles relevant to the right to support applied in New South Wales. The NSWLRC identified a number of problems with the common law including:

- it extended only to land in its natural state and did not cover buildings or other improvements;
- there is no right to support by water;
- strict liability in nuisance offended the ‘common notion that liability should be fault based’ and is ‘out of step’ with developments in the law of negligence;
- uncertainty in applying the law of nuisance in right of support for land situations. In particular, whether it should apply to:
 - cases where there is continuing interference with enjoyment of land in addition to isolated cases; and
 - both physical and non-physical damage.¹⁷²

The NSWLRC identified in its report that the common law position was unsuited to modern conditions, other legislative intervention was piecemeal and unsatisfactory and there were anomalies in the application of the common law in relation to where the burden of liability ought to lie.¹⁷³ The NSWLRC recommended, among other things, that the law of nuisance in relation to the withdrawal of support be abolished and that ‘everyone must take reasonable care’ in relation to removing support provided by land to other land.¹⁷⁴

The position in New South Wales is significantly different to the Queensland approach to the right of support for land. In New South Wales any right at common law to bring an action in nuisance in respect of removal of support provided to land has been abolished.¹⁷⁵ An express duty of care now exists in relation to the right of support for land. However, the duty is limited to not doing anything

¹⁷¹ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997).

¹⁷² New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) [4.3] 46-47.

¹⁷³ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) [1.7], [1.8] and [1.9] 3-4.

¹⁷⁴ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) 49-51.

¹⁷⁵ *Conveyancing Act 1919* (NSW) s 177(8).

on or in relation to supporting land¹⁷⁶ that removes the support provided by the supporting land to any other land.¹⁷⁷ Other key features of section 177 of the *Conveyancing Act 1919* (NSW) include:

- the duty of care is owed by any person and is not limited to the owner of the supporting land;
- acts of omission are not covered under the section;¹⁷⁸
- there is no obligation to maintain support;
- support provided by a building or structure on supporting land is not covered under the section except to the extent that the building or structure has replaced the support that the supporting land in its natural or reclaimed state had provided to the supported land,¹⁷⁹ and
- the duty imposed under the section can be excluded or modified by express agreement.¹⁸⁰ If this agreement is included in a registered easement for removal of support relating to that land, the agreement will apply to any successor in title of the supported land.¹⁸¹

4.3.1.2. Western Australia

The Law Reform Commission of Western Australia considered the issue of withdrawal of support as part of a broader review of the rights and obligations of adjoining owners when one alters the ground levels on his or her land.¹⁸² The Commission recommended the enactment of a provision similar to section 179 of the PLA to extend the right of support which currently exists for land of an adjoining owner to buildings and other structures erected upon that land.¹⁸³ However, this recommendation was not adopted in Western Australia.

4.3.2. New Zealand

New Zealand Courts have applied general negligence principles with respect to excavation works that affect neighbouring buildings. The principles in *Dalton v Angus*¹⁸⁴ were not followed in New

¹⁷⁶ 'Supporting land' includes 'the natural surface of the land, the subsoil of the land, any water beneath the land and any part of the land that has been reclaimed.': *Conveyancing Act 1919* (NSW) s 177(3).

¹⁷⁷ *Conveyancing Act 1919* (NSW) s 177(2). The Act also provides that a 'reference to the removal of the support provided by supporting land to supported land includes a reference to any reduction of that support'.

¹⁷⁸ *Piling v Prynew; Nemeth v Prynew* [2008] NSWSC 118, [62]-[63]; Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012) [33780.5].

¹⁷⁹ *Conveyancing Act 1977* (NSW) s 177(4).

¹⁸⁰ *Conveyancing Act 1919* (NSW) s 177(5).

¹⁸¹ *Conveyancing Act 1919* (NSW) s 177(6).

¹⁸² See Law Reform Commission of Western Australia, *Alteration of Ground Levels*, Discussion Paper (Project No. 44) (September 1984) and Law Reform Commission of Western Australia, *Alteration of Ground Levels*, Report (Project No. 44) (February 1986)

¹⁸³ Law Reform Commission of Western Australia, *Alteration of Ground Levels*, Report (Project No. 44) (February 1986) 13 [2.18]. The Commission also made other recommendations which reflected the legislative landscape in Western Australia at that time including an obligation under the *Local Government Act 1960-1985* (WA) which required an owner of land in prescribed circumstances to take certain steps to prevent a building on adjoining land from being damaged due to excavation undertaken as preparation for the building works.

¹⁸⁴ *Dalton v Angus* (1881) 6 App Cas 740

Zealand. The New Zealand Court of Appeal applied the ordinary principles of negligence in the case of *Bognuda v Upton & Shearer Ltd*.¹⁸⁵ In that case, Turner J stated:

The theory of prescriptive acquisition assumes (in England, where prescriptive acquisition is possible) a right in the proprietor of adjoining land to excavate on his own land so as to interrupt the period of enjoyment. And he must be free from any duty, in the conduct of such an excavation, which the law of negligence might otherwise impose upon him. But in New Zealand, where the conditions are totally different, and it is impossible by virtue of the statute for such rights to be acquired by prescription, there would seem to be no reason, if logic and convenience recommend such a course, why the law of negligence should not be held to apply to excavation...¹⁸⁶

The dynamic expansion of negligence as a cause of action led ultimately to a pronouncement by the Lords (in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*) that modern commercial conditions necessitated the recognition of the extension of the action in negligence to misrepresentations, in circumstances where the relationship between representor and representee reasonably gave rise to a duty to take care. I think that the same conditions, and the same kind of legal development, require the same kind of extension in the law of negligence to field of excavation of neighbouring properties.¹⁸⁷

Applying negligence principles in support cases is the accepted approach in New Zealand.

4.4. Options

Consultation on this issue is required in order to determine whether reform in this area is Queensland is required and justified. In this respect, clarification is required in relation to the extent to which section 179 of the PLA is relied upon or has any relevance in practice.

¹⁸⁵ *Bognuda v Upton and Shearer Ltd* [1972] NZLR 741.

¹⁸⁶ *Bognuda v Upton and Shearer Ltd* [1972] NZLR 741, 761.

¹⁸⁷ *Bognuda v Upton and Shearer Ltd* [1972] NZLR 741, 766.

Questions

10. Is section 179 of the PLA relied upon to any great extent in practice?
11. Is section 179 of the PLA underutilised in practice?
12. If section 179 of the PLA is retained in its current form, do you see any advantages or disadvantages to incorporating a procedure to regulate the statutory right to support as discussed in Part 4.2.5?
13. Do you think omissions to act should fall within the scope of any statutory right to support arrangement in place under the PLA?
14. Should section 179 of the PLA be amended to impose a positive obligation to maintain support, in addition to the current obligation, under section 179 of the PLA?
15. Do you think the language of section 179 of the PLA needs to be revised to clarify explicitly whether reduction in support falls within the scope of the section?
16. Should an element of reasonableness be imported into the section, rather than the concept of strict liability?
17. Do you think there is a case for altering section 179 of the PLA so that a negligence-style duty of care replaces the current obligation?
18. Should an action in nuisance be expressly abolished and replaced with a model similar to section 177(8) of the *Conveyancing Act 1919* (NSW) where a duty of care is expressly incorporated in the section?

5. Section 180 – Imposition of Statutory Rights of User in Respect of Land

5.1. Overview and purpose

Section 180 provides:

180 Imposition of statutory rights of user in respect of land

- (1) Where it is reasonably necessary in the interests of effective use in any reasonable manner of any land (the dominant land) that such land, or the owner for the time being of such land, should in respect of any other land (the servient land) have a statutory right of user in respect of that other land, the court may, on the application of the owner of the dominant land but subject to this section, impose upon the servient land, or upon the owner for the time being of such land, an obligation of user or an obligation to permit such user in accordance with that order.
- (2) A statutory right of user imposed under subsection (1) may take the form of an easement, licence or otherwise, and may be declared to be exercisable –
 - (a) by such persons, their servants and agents, in such number, and in such manner and subject to such conditions; and
 - (b) on 1 or more occasions; or
 - (c) until a date certain; or
 - (d) in perpetuity or for some fixed period;as may be specified in the order.
- (3) An order of the kind referred to in subsection (1) shall not be made unless the court is satisfied that –
 - (a) it is consistent with the public interest that the dominant land should be used in the manner proposed; and
 - (b) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and
 - (c) either –
 - (i) the owner of the servient land has refused to agree to accept the imposition of such obligation and the owner's refusal is in all the circumstances unreasonable; or
 - (ii) no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation.
- (4) An order under this section (including an order under this subsection) –
 - (a) shall, except in special circumstances, include provision for payment by the applicant to such person or persons as may be specified in the order of such amount by way of compensation or consideration as in the circumstances appears to the court to be just; and
 - (b) may include such other terms and conditions as may be just; and
 - (c) shall, unless the court otherwise orders, be registered as provided in this section; and
 - (d) may on the application of the owner of the servient tenement or of the dominant tenement be modified or extinguished by order of the court where it is satisfied that –
 - (i) the statutory right of user, or some aspect of it, is no longer reasonably necessary in the interests of effective use of the dominant land; or
 - (ii) some material change in the circumstances has taken place since the order imposing the statutory right of user was made; and

- (e) shall when registered as provided in this section be binding on all persons, whether of full age or capacity or not, then entitled or afterwards becoming entitled to the servient land or the dominant land, whether or not such persons are parties to proceedings or have been served with notice or not.
- (5) The court may –
- (a) direct a survey to be made of any land and a plan of survey to be prepared; and
 - (b) order any person to execute any instrument or instruments in registrable or other form necessary for giving effect to an order made under this section; and
 - (c) order any person to produce to any person specified in the order any title deed or other instrument or document relating to any land; and
 - (d) give directions for the conduct of proceedings; and
 - (e) make orders in respect of the costs of any of the preceding matters and of proceedings generally.
- (6) In any proceedings under this section the court shall not, except in special circumstances, make an order for costs against the servient owner.
- (7) In this section –
- owner** includes any person interested whether presently, contingently or otherwise in land.
- statutory right of user** includes any right of, or in the nature of, a right of way over, or of access to, or of entry upon land, and any right to carry and place any utility upon, over, across, through, under or into land.
- utility** includes any electricity, gas, power, telephone, water, drainage, sewerage and other service pipes or lines, together with all facilities and structures reasonably incidental to the utility.
- (8) This section does not bind the Crown.

Section 180 of the PLA enables the Supreme Court to impose a statutory right of user on servient land where it is reasonably necessary in the interests of the effective use of the dominant land. The section was included in the PLA partly to address problems associated with access to individual residential or commercial properties which required access for services and utilities or to public highways.¹⁸⁸ The QLRC viewed the titles registration system as ‘accentuating’ the problems as it precluded recognition of easements which ‘would ordinarily be implied or imposed at law or in equity.’¹⁸⁹ The QLRC noted that:

There seems to be no reason why the court should not have the power to create such rights in favour of the dominant land and to impose them on the servient land where this is necessary in the interests of effective user of the dominant land.¹⁹⁰

A ‘statutory right of user’ is defined broadly in section 180 to include:

¹⁸⁸ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 102.

¹⁸⁹ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 102.

¹⁹⁰ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 102.

any right of, or in the nature of, a right of way over, or of access to, or of entry upon land, and any right to carry and place any utility upon, over, across, through, under or into land.¹⁹¹

The definition of statutory right of user also refers to placing any 'utility' on the relevant land. A utility under the PLA includes:

any electricity, gas, power, telephone, water, drainage, sewerage and other service pipes or lines, together with all facilities and structures reasonably incidental to the utility.¹⁹²

Section 180 of the PLA operates in the following way:

- on application of the owner of the dominant land, the Supreme Court may impose on the servient land a statutory right of user in the form of an easement or licence etc. where it is reasonably necessary in the interests of effective use in any reasonable manner of the dominant land;¹⁹³
- a statutory right of user shall not be ordered unless the Court is satisfied that:
 - it is consistent with the public interest that the dominant land should be used in the manner proposed;¹⁹⁴ and
 - the owner of the servient land can be adequately recompensed in money for any loss or disadvantage from the imposition of the obligation;¹⁹⁵ and
 - the owner of the servient land has refused to agree to accept the imposition of such obligation and such refusal is unreasonable in the circumstances or there is no one with the capacity to agree to the obligation.¹⁹⁶
- the statutory right of user may take the form of an easement, licence or otherwise;¹⁹⁷
- an order made by the Court must include, except in special circumstances, provision for payment by the applicant of compensation or consideration as in the circumstances appears just.¹⁹⁸ The order must be registered and once this occurs the order is binding on all persons;¹⁹⁹
- the order imposing the obligation can be modified or extinguished where the Court is satisfied that the statutory right of user is no longer reasonably necessary or in the interests of effective use of the dominant land or some material change in circumstances has taken place since the order imposing the order was made;²⁰⁰
- an order for costs against the servient owner must not be made, except in special circumstances;²⁰¹
- the section does not bind the Crown.²⁰²

¹⁹¹ *Property Law Act 1974* (Qld) s 180(7).

¹⁹² *Property Law Act 1974* (Qld) s 180(7).

¹⁹³ *Property Law Act 1974* (Qld) s 180(1).

¹⁹⁴ *Property Law Act 1974* (Qld) s 180(3)(a).

¹⁹⁵ *Property Law Act 1974* (Qld) s 180(3)(b).

¹⁹⁶ *Property Law Act 1974* (Qld) s 180(3)(c).

¹⁹⁷ *Property Law Act 1974* (Qld) s 180(2).

¹⁹⁸ *Property Law Act 1974* (Qld) s 180(4)(a).

¹⁹⁹ *Property Law Act 1974* (Qld) ss 180(4)(c) and (e). The Court can order otherwise in terms of registering the obligation.

²⁰⁰ *Property Law Act 1974* (Qld) s 180(4)(d).

²⁰¹ *Property Law Act 1974* (Qld) s 180(6).

There is significant case law considering the application of section 180 of the PLA. A summary of the key principles to be applied in section 180 cases was set out in the Supreme Court decision of *Lang Parade Pty Ltd v Peluso*.²⁰³ The summary provided by Douglas J is below:

- (a) One should not interfere readily with the proprietary rights of an owner of land.
- (b) The requirement of 'reasonably necessary' does not mean absolute necessity.
- (c) What is 'reasonably necessary' is determined objectively.
- (d) Necessary means something more than mere desirability or preferability over alternative means; it is a question of degree.
- (e) The greater the burden of the imposition that is sought, the stronger the case needed to justify a finding of reasonable necessity.
- (f) For a right of user to be reasonably necessary for a development, the development with the right of user must be (at least) substantially preferable to development without the right of user.
- (g) Regard must be had to the implications or consequences on the other land of imposing a right of user.²⁰⁴

However, despite these principles, section 180 of the PLA has been described in the following way:

Indeed, so many and varied are the applications of the section and its interstate counterparts, and so many and varied the judicial responses to applications, that it is often difficult to predict whether a court will approve an application for the grant of an easement.²⁰⁵

There are still some aspects of section 180 of the PLA which remain uncertain and potentially raise issues of clarity. These issues are identified and discussed in Part 5.2 below.

5.2. Is there a need for reform?

5.2.1. Is there a need to include the term 'development' in section 180(1) of the PLA?

Section 180(1) of the PLA refers to the imposition of a statutory right of user where it is 'reasonably necessary in the interests of effective use in any reasonable manner of any land'. In New South Wales, section 88K(1) of the *Conveyancing Act 1919* (NSW), which is similar in effect to section 180 of the PLA, refers to 'effective use or development'. It is not clear whether the absence of the term 'development' in section 180(1) of the PLA has the effect of narrowing the scope of the section. A Queensland decision which considered a request for a statutory easement for development purposes is *Re Worthston Pty Ltd*.²⁰⁶ The application for a right of statutory user in that case was for an easement which, when the subdivision of the relevant land was completed, would have become a

²⁰² *Property Law Act 1974* (Qld) s 180(8).

²⁰³ *Lang Parade Pty Ltd v Peluso* [2006] 1 Qd R 42, [23]. The summary of the principles to be applied when considering section 180 cases set out by Douglas J in that case has been endorsed in subsequent decisions including *Tran v Cowan* [2006] QSC 136, [37], *Steer v Hemmings* [2010] QSC 460 and by the Queensland Court of Appeal in *The Proprietors Cathedral Village Building Units Plan No 106957 v Cathedral Place Community Body Corporate* [2013] QCA 264.

²⁰⁴ *Lang Parade Pty Ltd v Peluso* [2006] 1 Qd R 42, [23].

²⁰⁵ Peter Butt, 'Compulsory Easements' (2006) 80 *Australian Law Journal* 557, 559.

²⁰⁶ [1987] 1 Qd R 400.

dedicated road. If the statutory right of user was granted the potential purchaser's proposed subdivision could proceed immediately, rather than being subject to a decision of the servient owner.²⁰⁷ Carter J indicated that the section should not 'generally be available as a means of resolving a dispute between competing sub-dividers or to effectively limit or fetter in any way the discretion which a planning authority has in relation to matters of land development.'²⁰⁸ His Honour stated that the wide language of section 180 of the PLA did not preclude the making of an order in the circumstances of the case, but that the circumstances needed to be 'very special ones before an order was made'.²⁰⁹ In his view, the real purpose of the application for the statutory right of user in the case before him was to partly pre-empt the decision of the relevant planning authority and that it was a matter for the Brisbane City Council to decide the issue.²¹⁰

The difference between section 180(1) of the PLA and section 88K of the *Conveyancing Act 1919* (NSW) was discussed in the case of *Tregoyd Gardens Pty Ltd v Jervis*.²¹¹ Hamilton J in that case made the following comments:

The New South Wales Act requires the easement to be 'reasonably necessary for the effective use or development of other land', whereas the Queensland Act requires it to be 'reasonably necessary in the interests of effective use in any reasonable manner of any land'. However, in accordance with the approach taken in the Queensland section, I think the development referred to must be a particular development which is proposed, but I also think that the insertion of the word 'development' in New South Wales emphasises that the Act may be enlivened if the easement is reasonably necessary for any development that is within the law. ... It is plain from the Second Reading speech, that the New South Wales Act was passed as enabling legislation to permit, in effect, confiscation of some proprietary rights, so that purely private development may proceed on other land in circumstances where they would not be able to proceed without the acquisition of those rights, against the provision for compensation to be made.

Both decisions appear to suggest that the absence of the word 'development' in section 180 of the PLA does narrow the scope of the section.

The inclusion of the word 'development' in section 180(1) of the PLA would arguably clarify that the section may be used in circumstances where the imposition of a right of way would lead to the enhancement of the value of privately owned dominant land. However, there is a separate issue as to whether such clarification is required – that is, whether the absence of the word actually create problems in practice.

²⁰⁷ *Re Worthston Pty Ltd* [1987] 1 Qd R 400.

²⁰⁸ *Re Worthston Pty Ltd* [1987] 1 Qd R 400, 408.

²⁰⁹ *Re Worthston Pty Ltd* [1987] 1 Qd R 400, 407.

²¹⁰ *Re Worthston Pty Ltd* [1987] 1 Qd R 400, 407.

²¹¹ (1997) 8 BPR 15,845.

Questions

19. Are you aware of any problems in practice arising from section 180(1) of the PLA simply referring to 'use'?
20. Should section 180(1) be amended to include the word 'development'?
21. What are the benefits of altering section 180(1) of the PLA to include the word 'development'?
22. What are the disadvantages of altering section 180(1) to include the word 'development'?

5.2.2. Does section 180(4)(a) of the PLA require amendment to clarify the interaction between the words compensation or 'consideration'?

Section 180 of the PLA makes provision for the payment of compensation to the owner of servient land where a statutory right of user is granted. However, the basis for the determination of the amount of compensation is not always clear. Section 180(4)(a) of the PLA provides for the payment 'of such amount by way of compensation or consideration as in the circumstances appears to the court to be just.' An issue which has not been completely resolved in the case law is the meaning of the words 'compensation' and 'consideration' and the relevance of any benefit obtained or appreciation in value of the dominant tenement through the imposition of a right of user to the quantification of compensation or consideration payable.²¹² Section 88K(4) of the *Conveyancing Act 1919* (NSW) only refers to 'compensation'. The case law considering this issue in both New South Wales and Queensland is not settled.²¹³ The issue was recently considered in Queensland in the case of *Peulen & Anor v Agius*.²¹⁴ Chief Justice de Jersey expressed the following views in relation to the issue of 'compensation' and 'consideration' in section 180(4)(a) of the PLA:

- the inclusion of the word 'consideration' would be otiose if the term was interpreted to mean 'consideration for loss or damage' as it would be coextensive with 'compensation'. The better approach is that the word 'consideration' justified the court considering the benefit to the dominant tenement in quantifying the value of compensation to be awarded;²¹⁵
- however, this does not mean that the court 'should' consider the benefit to the dominant tenement. Calculating compensation is 'unquestionably' a discretionary decision of the court;²¹⁶

²¹² Bill Dixon, 'Compensation or consideration for a statutory right of user?' (2015) 35 *Queensland Lawyer* 54, 55.

²¹³ *Peulen & Anor v Agius & Anor* [2015] QSC 137, [87].

²¹⁴ [2015] QSC 137.

²¹⁵ *Peulen & Anor v Agius* [2015] QSC 137, [89].

²¹⁶ *Peulen & Anor v Agius* [2015] QSC 137, [90].

- the weight of the case law in New South Wales and Queensland suggests that the ‘primary focus of any award under s180(4)(a) should be compensation for loss, damage or harm.’ In this respect, ‘it would not be common for the court to determine the amount payable to the owner of the servient tenement by reference to the benefit to the owner of the dominant as a result of the imposition of the statutory right of user.’²¹⁷

The Chief Justice noted that although section 88K of the *Conveyancing Act 1919* (NSW) only referred to ‘compensation’, there was still debate in the case law regarding whether benefit to the dominant tenement is a significant factor in quantifying the compensation payable.

Questions

23. Do you think the benefit to the dominant tenement should be taken into account for the purposes of assessing compensation which may be paid to the owner of the servient land under section 180 of the PLA?

24. Are there any other matters which you think should be taken into account (or excluded from consideration) for the purpose of considering the payment of compensation under section 180 of the PLA?

5.2.3. Ordering costs against the servient owner in ‘special circumstances’

Section 180(6) of the PLA expressly provides that costs must not be ordered against the servient owner arising from an order imposing a statutory right of user except in special circumstances. Commentary suggests that special circumstances ‘might only arise where the servient owner has deliberately acted to subvert the process to pursue an ulterior plan consistent with an abuse of process.’²¹⁸ The issue of costs under section 180 has been considered in a number of cases in Queensland.²¹⁹ Although the success of applications for costs in these cases has varied, there are some general comments about ‘special circumstances’ which can be made as follows:

- a dishonest defence of the servient owner may be a special circumstance. In the case of *Tran & Anor v Cowan & Ors*²²⁰ both parties bought their land in full knowledge that they would share a common drive way through an easement over part of the respondent’s land. The registration of the easement was omitted through oversight and the respondent contended dishonestly that they had no knowledge of the easement and defended the

²¹⁷ *Peulen & Anor v Agius* [2015] QSC 137, [90].

²¹⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [10,370].

²¹⁹ See for example, *Re: De Pasquale Bros P/L & NJF Holdings P/L* [2000] QSC, *Graham and Anor v Murphy & Anor* [2013] QSC 21, *Griffiths v Bradshaw (No 2)* [2015] QSC 194 (which did not provide any significant analysis of section 180(6)) and *Tran & Anor v Cowan & Ors* [2006] QSC 162.

²²⁰ [2006] QSC 162.

section 180 application on the basis that ‘their rights of property, innocently acquired, should not be diminished’.²²¹ Indemnity costs were ordered in this case;

- special circumstances existed where, along with other factors, the servient owners were not just relying on their rights under section 180 but actually sought to exploit their position commercially and unrealistically by attempting to extract a higher amount of compensation;²²²
- the fact a respondent is motivated to refuse to accept the imposition of a statutory right of user for reasons unrelated to the subject matter of a section 180 application is not necessarily a ‘special circumstance’.²²³

McMeekin J in *Graham and Anor v Murphy & Anor*,²²⁴ when considering whether an order for costs should be made under section 180(6), indicated that:

The underlying premise of the legislation is that the legislature expected there to be opposition and unreasonable opposition, to requests to impose on the property rights of others. The jealous guarding of one’s rights is all that one might expect in these cases.²²⁵

An order for costs against the servient owner is a discretionary matter for the Court. Whether or not special circumstances exist will depend largely on the circumstances of each case. Further guidance and principles are likely to be extracted from future cases considering the provision.

Question

25. Do you think there is any need to provide guidance around the term ‘special circumstances’ in section 180(6) of the PLA?

5.2.4. Broadening the definition of ‘utility’ to cover ‘cables’

The definition of ‘utility’ in section 180(7) does not expressly refer to cables (for example, computer data cables). However, as it is an inclusive definition it is arguably broad enough to encompass cables, particularly considering the reference in the definition to ‘other service pipes or lines’. There may be some advantages, particularly for purposes of clarity, to expressly include a reference to cables in the definition.²²⁶

²²¹ *Tran & Anor v Cowan & Ors* [2006] QSC 162, [5]. In the case of *Re: De Pasquale Bros P/L & NJF Holdings P/L* [2000] QSC 004 costs were ordered against the servient owner. However, this case was distinguished in the decision of *Graham and Anor v Murphy & Anor* [2013] QSC 21 where McMeekin J noted that the ‘level of perversity in the respondents’ conduct in *De Pasquale*’ was not present in the case before him: at [96].

²²² *Lang Parade Pty Ltd v Peluso* [2004] QSC 133.

²²³ *Griffiths v Bradshaw (No 2)* [2015] QSC 194, [15].

²²⁴ [2013] QSC 21.

²²⁵ *Graham and Anor v Murphy & Anor* [2013] QSC 21, [96].

²²⁶ Schedule 6 of the *Body Corporate and Community Management Act 1997* (Qld) defines the term ‘utility infrastructure’ to mean a number of things including ‘cables, wires, ... by which lots ... are supplied with utility services. The term ‘utility services’ is then defined to mean a number of things including ‘(f) a computer data or television service’.

5.2.5. Is there a need to amend the definition of ‘statutory right of user’ in section 180(7) of the PLA to explicitly cover airspace?

It is not unusual for construction cranes (or scaffolding) to encroach into the airspace of neighbouring properties when larger developments are being undertaken.²²⁷ Section 180 of the PLA has been used in Queensland for the purpose of obtaining a statutory right of user on servient land to enable the use of these cranes for the duration of the relevant development.²²⁸ In the case of section 88K of the *Conveyancing Act 1919* (NSW), one of the reasons for its introduction was to address the issue of the use of cranes for larger developments which inevitably encroach into the airspace of neighbouring land.²²⁹ During the Second Reading speech of the Bill it was acknowledged that:

All that these provisions reflect is a realisation that private development may also be beneficial for the public, and that such developments should not be unreasonably frustrated or held to ransom.²³⁰

There is no explicit reference in section 180 of the PLA to airspace and the term ‘land’ is not defined in the PLA.²³¹ However, it is an accepted principle that land extends to airspace, subject to some limitations. In the *Property Law Act 2007* (NZ), for the purposes of dealing with wrongly placed structures, land is defined to include airspace over land.²³²

Question

26. Do you think there is any need to explicitly refer to ‘airspace’ in section 180 of the PLA?

5.3. Other jurisdictions

5.3.1. Australia

New South Wales introduced section 88K of the *Conveyancing Act 1919* (NSW) in 1995.²³³ The section allows the Supreme Court to make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.²³⁴ The order may be made if the Court is satisfied of the matters set out in section

²²⁷ Bill Dixon, ‘Cranes, Claims and a Statutory Right of User’ (2005) 26 *Queensland Lawyer* 61, 63.

²²⁸ *Lang Parade Pty Ltd v Peluso* [2005] QSC 112.

²²⁹ New South Wales, Second Reading, Legislative Assembly, Property Legislation Amendment (Easements) Bill (4 December 1995) 4000 (JW Shaw).

²³⁰ New South Wales, Second Reading, Legislative Assembly, Property Legislation Amendment (Easements) Bill (4 December 1995) 4000 (JW Shaw).

²³¹ Section 36 of the *Acts Interpretation Act 1954* (Qld) provides that land includes ‘messuages, tenements and hereditaments, corporeal or incorporeal, of any tenure or description, and whatever may be the interest in land.’

²³² *Property Law Act 2007* (NZ) s 321.

²³³ Section 88K was inserted in the *Conveyancing Act 1919* (NSW) by the *Property Legislation Amendment (Easements) Act 1995* (NSW). The section commenced on 12 February 1996.

²³⁴ *Conveyancing Act 1919* (NSW) s 88K(1).

88K(2)(a) to (c), which include that the use of the land in accordance with the easement will not be inconsistent with the public interest. The section also provides for the Court to order the payment of compensation as the Court considers appropriate, unless there are special circumstances.²³⁵

Tasmania and the Northern Territory have provisions in place which allow the relevant Supreme Court to order a statutory right of user in relation to the servient land. The provisions are in a similar form to section 180 of the PLA.²³⁶ Victoria does not have an equivalent provision to section 180 of the PLA, however the Victorian Law Reform Commission did recommend in 2010 that the *Property Law Act 1958* (Vic) should empower the Victorian Civil and Administrative Tribunal to make an order granting an easement over land where, amongst other factors, the easement is reasonably necessary for the effective use or development of other land.²³⁷ This recommendation has not been implemented in Victoria.

5.3.2. New Zealand

The *Property Law Act 2007* (NZ) does not have an equivalent provision to section 180 of the PLA. However, Part 6 of the Act sets out a number of special powers of the court in relation to authorising entry onto or over neighbouring land, granting relief for wrongly placed structures and granting access to landlocked land.²³⁸

5.4. Options

Consultation on section 180 of the PLA is required in order to determine whether amendment of the section is necessary to address some of the issues identified in Part 5.2 above.

²³⁵ *Conveyancing Act 1919* (NSW) s 88K(4).

²³⁶ See *Conveyancing and Law of Property Act 1884* (Tas) s 84J and *Law of Property Act 2000* (NT) ss 163-164.

²³⁷ See Victorian Law Reform Commission, *Easements and Covenants*, Final Report (2010), Recommendations 6 and 7. The Law Reform Commission preferred the New South Wales approach to the imposition of an easement over land. The recommendation has not been implemented to date.

²³⁸ See *Property Law Act 2007* (NZ) ss 319 and 320 (entry onto neighbouring land); ss 321-325 (wrongly placed structures); ss 326-331 (landlocked land).

6. Section 181 – Power to modify or extinguish easements and restrictive covenants

6.1. Overview and purpose

Section 181 provides:

181 Power to modify or extinguish easements and restrictive covenants

- (1) Where land is subject to an easement or to a restriction arising under covenant or otherwise as to the user of the land, the court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement or restriction upon being satisfied:
- (a) that because of change in the user of any land having the benefit of the easement or restriction, or in the character of the neighbourhood or other circumstances of the case which the court may deem material, the easement or restriction ought to be deemed obsolete; or
 - (b) that the continued existence of the easement or restriction would impede some reasonable user of the land subject to the easement or restriction, or that the easement or restriction, in impeding that user, either -
 - (i) does not secure to persons entitled to the benefit of it any practical benefits of substantial value, utility, or advantage to them; or
 - (ii) is contrary to the public interest;
- and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the extinguishment or modification; or
- (c) that the persons of full age and capacity for the time being or from time to time entitled to the easement or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement or the benefit of the restriction is annexed, have agreed to the easement or restriction being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement wholly or in part or waived the benefit of the restriction wholly or in part; or
 - (d) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement, or to the benefit of the restriction.
- (2) In determining whether a case is one falling within subsection (1)(a) or (b), and in determining whether (in such case or otherwise) an easement or restriction ought to be extinguished or modified, the court shall take into account the town plan and any declared or ascertainable pattern of the local government for the grant or refusal of consent, permission or approval to use any land or to erect or use any building or other structure in the relevant area, as well as the period at which and context in which the easement or restriction was created or imposed, and any other material circumstance.
- (3) The power conferred by subsection (1) to extinguish or modify an easement or restriction includes a power to add such further provisions restricting the user or the building on the land as appear to the court to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant, and the court may accordingly refuse to modify an easement or restriction without such addition.
- (4) An order extinguishing or modifying an easement or restriction under subsection (1) may direct the applicant to pay to any person entitled to the benefit of the easement or restriction such sum by way of consideration as the court may think it just to award under one, but not both, of the following heads, that is to say, either –
- (a) a sum to make up for any loss or disadvantage suffered by that person in consequence of the extinguishment or modification; or

- (b) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.
- (5) Where any proceedings by action or otherwise are instituted to enforce an easement or restriction, or to enforce any rights arising out of a breach of any restriction, any person against whom the proceedings are instituted may in such proceedings apply to the court for an order under this section, and such application shall, unless the court otherwise orders, operate to stay such proceedings until determination of the application made under this section.
- (6) The court may in any proceedings under this section on the application of any person interested make an order declaring whether or not in any particular case any land is or would in any given event be affected by an easement or restriction, and the nature and extent of it, and whether the same is or would in any given event be enforceable, and if so by whom.
- (7) Notice of any application made under this section shall, if the court so directs, be given to the local government in whose area the land is situated, and to such other persons and in such manner, whether by advertisement or otherwise, as the court, either generally or in a particular instance, may order.
- (8) An order under this section shall, when registered, entered or endorsed, be binding on all persons, whether of full age or capacity or not, then entitled or afterwards becoming entitled to the easement, or interested in enforcing the restriction and whether such persons are parties to the proceedings or have been served with notice or not.
- (9) The court may –
- (a) direct a survey to be made of any land and a plan of survey to be prepared; and
 - (b) order any person to execute any instrument or instruments in registrable or other form necessary for giving effect to an order made under this section; and
 - (c) order any person to produce to any person specified in the order any title deed or other instrument or document relating to any land; and
 - (d) give such directions for the conduct of proceedings; and
 - (e) make orders in respect of the costs of any of the preceding matters and of proceedings generally.

Section 181 of the PLA enables the Supreme Court to order the modification or extinguishment (whole or partial) of an easement or restrictive covenant on the application of any person interested in the relevant land. The section is modelled on section 84 of the *Law of Property Act 1925 (UK)*.²³⁹ The section applies to both easements and restrictive covenants. Easements can include bare easements which may provide for right of way but which do not include any terms which govern the easement such as repair and maintenance.²⁴⁰ An easement may also include significant detail regarding the terms which are set out in the instrument of easement. Restrictive covenants are not registrable in Queensland. However, certain statutory covenants in favour of the State or a local government and covenants in a building management statement may be registered in certain

²³⁹ Section 84 of the *Law of Property Act 1925 (UK)* was substantially amended by section 28 of the *Law of Property Act 1969 (UK)*. This accounts for the variations between section 181 of the PLA and other jurisdictions such as New South Wales and Victoria where the equivalent provisions were also based on the unamended version of section 84 of the *Law of Property Act 1925 (UK)*.

²⁴⁰ Stephen Lumb, 'Modifying Easements: Living in the Past' (2014) 4 *Property Law Review* 136, 136.

limited circumstances under the *Land Title Act 1994* (Qld).²⁴¹ The use of section 181 of the PLA in relation to restrictive covenants, to date, has been limited. For this reason, this paper will primarily use the term easement when considering section 181 of the PLA. Further discussion regarding the scope of section 181 of the PLA is set out in Part 6.2.

The impact of making an order to extinguish or modify an easement is significant as it may affect a proprietary right of the dominant tenement owner.²⁴² Commentary on the consequences of making an order under the section provides:

This section has the far reaching consequence of permitting a court (intended to be the Local Government Court) exercising the jurisdiction of the Supreme Court, to modify or extinguish what would otherwise be perfectly enforceable agreements, to take account of changes in the use and enjoyment of the land since the creation of those agreements.²⁴³

Judicial comments have noted that the court should take a cautious approach to making an order that modifies or extinguishes an easement.²⁴⁴ Keane JA in the Court of Appeal decision *Averono v Mbuzi & Anor* said:

It is well established that the courts should approach an application for extinguishment of an easement on the footing that it is 'a serious inroad upon the proprietary right which is vested' in the owner of the dominant tenement.²⁴⁵

The court under section 181 of the PLA is able to make an order which:

- extinguishes the covenant or easement in its entirety;²⁴⁶
- partially extinguishes the covenant or easement. For example, reducing the area of a right of way;²⁴⁷
- modifies the covenant or easement. For example, modifying a covenant or easement to enable the construction of a building which would otherwise breach the covenant or affect the easement.²⁴⁸

²⁴¹ The limited situations in which restrictive covenants can be registered are set out in sections 54A and 97A of the *Land Title Act 1994* (Qld). All freehold land in Queensland is registered under the *Land Title Act 1994* (Qld). That Act does not provide for the registration of a restrictive covenant, subject to the limited circumstances discussed previously. See Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) 704 [15.370].

²⁴² Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) [15.370] 705.

²⁴³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [10.530].

²⁴⁴ Queensland cases include *Averono v Mbuzi* [2005] QCA 295, [19] and *Oldfield v Gold Coast City Council* [2010] 1 Qd R 158, [57].

²⁴⁵ [2005] QCA 295, [19].

²⁴⁶ See *Re Eddowes* [1991] 2 Qd R 381 where the court extinguished an easement of way. The easement had not been used for an extended period (years) as it had been fenced off. See Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 583 [19.74].

²⁴⁷ Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 584 [19.74].

²⁴⁸ Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 584 [19.74].

Before the court can exercise its discretion under section 181 of the PLA, one (or more) of the threshold conditions in section 181(1)(a)-(d) must be satisfied. These conditions are:

- the easement 'ought to be deemed' obsolete having regard to the matters in subsection 181(1)(a) including a change in the user of any land having the benefit of the easement or restriction, or in the character of the neighbourhood or other circumstances the court may deem material;²⁴⁹ or
- the continued existence of the easement would impede some reasonable user of the servient tenement; and
 - the easement in impeding that user does not secure to persons entitled to the benefit of it any practical benefits of substantial value, utility, or advantage to them; and
 - money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from extinguishment or modification;²⁵⁰ or
- the continued existence of the easement would impede some reasonable user of the servient tenement; and
 - the easement in impeding that user is contrary to public interest; and
 - money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from extinguishment or modification;²⁵¹ or
- persons of full age and capacity entitled to the easement have agreed to the easement being modified or wholly or partially extinguished;²⁵² or
- persons of full age and capacity entitled to the easement by their acts or omissions may reasonably be considered to have abandoned the easement wholly or in part;²⁵³ or
- the proposed modification or extinguishment will not 'substantially injure' the persons entitled to the easement.²⁵⁴

The court is required to take into account the specified planning material in determining if the case falls within section 181(1)(a) and (b). In addition, the Court is required to take into account the material more generally for the purpose of determining if an easement or restriction should be modified or extinguished.²⁵⁵

Other relevant aspects of section 181 of the PLA include:

²⁴⁹ *Property Law Act 1974* (Qld) s 181(1)(a).

²⁵⁰ *Property Law Act 1974* (Qld) s 181(1)(b)(i).

²⁵¹ *Property Law Act 1974* (Qld) s 181(1)(b)(ii).

²⁵² *Property Law Act 1974* (Qld) s 181(1)(c).

²⁵³ *Property Law Act 1974* (Qld) s 181(1)(c).

²⁵⁴ *Property Law Act 1974* (Qld) s 181(1)(d).

²⁵⁵ *Property Law Act 1974* (Qld) s 181(2).

- the court retains a residual discretion to reject an application to modify or extinguish an easement, even if the applicant has satisfied one of the conditions in section 181(1). This is consistent with the significant impact on proprietary rights that an order under section 181 can have;²⁵⁶
- an order which extinguishes or modifies an easement may also require the applicant to pay any person entitled to the benefit of the easement a sum which the court thinks is just:
 - to compensate that person for any loss or disadvantage suffered as a result of the modification or extinguishment; or
 - to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration being received for the land affected by it;²⁵⁷
- an application for modification or extinguishment will stay proceedings in an action to enforce the easement or covenant until the application for extinguishment or modification has been determined (unless otherwise ordered by the court);²⁵⁸
- the court can make a declaration whether or not land is affected by an easement (or covenant) and the nature and extent of it and whether it is enforceable and if so, by whom. Any person interested can make an application;²⁵⁹
- an order under section 181 is binding on all persons once registered.²⁶⁰

6.2. Is there a need for reform?

Modification and extinguishment cases have generally considered restrictive covenants rather than easements.²⁶¹ Commentary suggests that there are only a limited number of reported cases where applications for modification or extinguishment of restrictive covenants or easements have been successful.²⁶² The discussion below identifies a number of different aspects of section 181 of the PLA which may require clarification.

6.2.1. Section 181(1)(a) – Is it uncertain and inflexible?

Section 181(1)(a) of the PLA requires an applicant to show that because of a change in user of any land having the benefit of the easement or restriction or the character of the neighbourhood or other circumstances of the case considered material, the easement or restriction ought to be

²⁵⁶ For a detailed list of the cases which support the existence of this residual discretion see Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 575 [19.62].

²⁵⁷ *Property Law Act 1974* (Qld) s 181(4).

²⁵⁸ *Property Law Act 1974* (Qld) s 184(5).

²⁵⁹ *Property Law Act 1974* (Qld) s 181(6).

²⁶⁰ *Property Law Act 1974* (Qld) s 181(8).

²⁶¹ Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 570 [19.53].

²⁶² Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 572 [19.55].

deemed obsolete. The term 'obsolete' has been considered in a number of cases. In *Re Rollwell Australia Pty Ltd*²⁶³ de Jersey CJ said:

The ordinary meaning of 'obsolete' is disused, discarded, antiquated; or as put in some cases, no longer relevant to the circumstances presently obtaining.²⁶⁴

In that case, de Jersey CJ accepted that the easement in question had not been used for a very long time but that it had not been 'discarded' or 'abandoned' and that the potential use of the easement prevented a conclusion that it was obsolete.²⁶⁵

Keane JA in the Court of Appeal decision *Averono & Anor v Mbuji & Anor*²⁶⁶ indicated that:

To show merely that rights are not currently exercised to their fullest extent is to fall short of showing that the rights are obsolete. To be successful on this ground it must be shown that the purpose for which the easement was granted can no longer be achieved.

Obsolescence has also been established where a covenant or easement is incapable of fulfilment or 'serves no present useful purpose'.²⁶⁷

There have been a number of cases that have considered either section 181(1)(a) of the PLA or the interstate equivalent provisions. A brief summary of some of these and the outcomes include:

- a restrictive covenant over a lot which was created in 1921 limiting the number of dwellings which could be built on the lot was held not to be obsolete as 'the original purpose for imposing the restriction could still be served' despite the later change of character of the nearby area with the construction of modern housing developments of mixed and varied character. The original purpose for imposing the restriction was to confine the use to residential purposes and control the number of houses that might be constructed on the property;²⁶⁸
- an easement of right of way which had not been used for any purpose since 1964 was held not to be obsolete. There was some suggestion in the case that the original purpose of the easement was to provide access to a water pump but this access was no longer necessary because of town water access which had been available for approximately 30 years. However, the 'dominant tenement submitted that there may be no need to use the easement but it merely needed a potential for use, particularly considering the

²⁶³ (1999) Q ConvR 54-521 [11].

²⁶⁴ *Re Rollwell Australia Pty Ltd* (1999) Q Conv R 60,195 (54-521) [11]; Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [10.550].

²⁶⁵ *Re Rollwell Australia Pty Ltd* (1999) Q Conv R 60,195 (54-521), [11].

²⁶⁶ [2005] QCA 295 [20].

²⁶⁷ See *Effeney v Millar Investments Pty Ltd* [2011] NSWSC 708, [200]; *Re Mason* [1962] NSW 762. For further case law references see Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (LexisNexis, 2012) 168 [32253.10].

²⁶⁸ *Re Pivotal Pty Ltd* [2000] VSC 264. See commentary in Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [10.550] on this case.

redevelopment potential of the dominant tenement.²⁶⁹ The potential use of the easement was sufficient to prevent the court accepting that it was obsolete;

- an access easement to an arterial road granted in 1938 was deemed obsolete following the subdivision of a dominant tenement of 213 acres because it served no practical benefit. The easement was undesirable as a result of increased traffic from the subdivision of the lot into 266 lots and increased traffic. It was found that actual access to that arterial road was ‘impossible or impractical’;²⁷⁰
- a right of way easement was granted in 1970 in favour of land on which a house was constructed. The land subsequently became part of common area. Fifteen years later a wire fence was erected preventing the use of the right of way in order to prevent trespassers. No further use had been made of the easement and the Court granted the application to extinguish on the basis that it was obsolete.²⁷¹

Despite the case law which has considered this issue, it can be difficult to establish that an easement is ‘obsolete’.²⁷² The inclusion of the word ‘obsolete’ in section 181(1)(a) has the potential to create an inflexible provision that is unable to operate in a way intended – that is, to extinguish easements or covenants that should not exist any longer. If the discretion of the Court is not linked to the concept of obsolescence, then there may be greater flexibility in the application of the section to a broader category of easements.

The Victorian Law Reform Commission recommended the removal of the term in the context of section 84 of the *Property Law Act 1958* (Vic) (which is similar to section 181 of the PLA).²⁷³ The word ‘obsolete’ was reviewed by the Commission as part of a broader review of easements and covenants in Victoria in 2010.²⁷⁴ Since 2005 in Victoria, there have been two distinct lines of judicial authority in relation to the meaning of ‘obsolete’ in section 84 of the *Property Law Act 1958* (Vic). The traditional view was that a covenant was obsolete only if ‘its original purpose could no longer be served.’ The Victorian Law Reform Commission noted that the test has been hard to meet and courts have not regarded a covenant as obsolete where the ‘covenant continues to have any value for the persons entitled to the benefit of it.’²⁷⁵ However, in the Supreme Court decision of *Stanhill Pty Ltd v Jackson*²⁷⁶ the word ‘obsolete’ was given its ordinary meaning so that the test is ‘whether the covenant is outmoded or out of date.’²⁷⁷ The Victorian Law Reform Commission noted that:

²⁶⁹ *Re Rollwell Australia Pty Ltd* (1999) Q Conv R 60,195 (54-521), [11] and Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [10.550].

²⁷⁰ *Re Wenck* [2004] QSC 15.

²⁷¹ Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 595 [19.89] discussing *Re Eddowes* [1991] 2 Qd R 381.

²⁷² Peter Butt, *Land Law* (LawBook Co, 6th ed, 2010) 508, [16128].

²⁷³ Victorian Law Reform Commission, *Easements and Covenants*, Final Report 22 (2010) 125-126.

²⁷⁴ Victorian Law Reform Commission, *Easements and Covenants*, Final Report 22 (2010).

²⁷⁵ Victorian Law Reform Commission, *Easements and Covenants*, Final Report 22 (2010) 126.

²⁷⁶ (2005) 12 VR 224.

²⁷⁷ *Stanhill Pty Ltd v Jackson* (2005) 12 VR 224, 237-238.

The 'obsolescence' requirement in section 84 has introduced a higher threshold to be satisfied. We consider that this ambiguous statutory constraint on the equitable doctrine of changed circumstances should be removed.²⁷⁸

The Commission's recommendation that the term be removed has not been adopted to date in Victoria.

In New Zealand, the term 'obsolete' is not used in section 317 of the *Property Law Act 2007* (NZ), which governs the extinguishment or modification of an easement or covenant. Section 317(1)(a) provides:

On an application (made or served in accordance with section 316) for an order under this section, a court may, by order, modify or extinguish (wholly or in part) the easement or covenant to which the application relates (the **easement or covenant**) if satisfied that –

- (a) The easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:
- (i) The nature or extent of the use being made of the benefited land, the burdened land, or both;
 - (ii) The character of the neighbourhood;
 - (iii) Any other circumstance the court considers relevant;

.....

This provision appears to provide a broad discretion to the court to modify or extinguish an easement or covenant if satisfied of one or more of the matters set out in the section, without the requirement to also satisfy a concept such as obsolescence.²⁷⁹

Questions

27. Is the current form of section 181(1)(a) of the PLA too inflexible?

28. Do you think the Court should be provided with greater discretion when considering whether an easement or restriction should be modified or extinguished because of a change in use, or in the character of the neighbourhood or other circumstances deemed material by the Court?

29. Do you think the approach adopted in section 317(1)(a) of the *Property Law Act 2007* (NZ) would assist in creating greater clarity and flexibility in relation to s181(1)(a)?

²⁷⁸ Victorian Law Reform Commission, *Easements and Covenants*, Final Report 22 (2010) 126 [8.86].

²⁷⁹ The *Property Law Act 1952* (NZ) also did not use the term 'obsolete' in section 126G(1) prior to the introduction of the 2007 legislation.

6.2.2. Power to ‘modify’

6.2.2.1. Adding terms to existing easements

Section 181(1) of the PLA gives the Court the power to modify or extinguish an easement or restriction arising under covenant. The power conferred under the section includes a power to add such further provisions restricting the user or building on the land as appears to be reasonable to the Court and as may be accepted by the applicant.²⁸⁰ The court may refuse to modify an easement or restriction without such addition.²⁸¹

The term ‘modify’ has been interpreted in a number of cases. In *Hoy v Allerton* Atkinson J stated that:

The word ‘modify’ has as its primary meaning to “limit or restrain”. In my view, the court’s power to modify an easement is a power to limit or restrain rights given under an easement. ... The word “modify” does not have the same meaning as change, amend or vary.²⁸²

The case law has established that the power to modify does not extend to relocating an easement.²⁸³ The reason for this is that relocation of an easement ‘destroys’ the easement and essentially grants a new one.²⁸⁴

One of the issues relevant to the concept of modification is whether or not the term is broad enough to enable the addition of terms to an existing instrument of easement. This is particularly relevant in the case of a bare easement which may not include any terms regarding obligations associated with the easement. For example, a bare easement for access may not include any information about responsibilities and rights for the upkeep or maintenance of the easement.²⁸⁵ The absence of detail surrounding these responsibilities may lead to disputes. If the owner of the servient tenement wants to add a provision to an easement, for example one which requires both land owners to contribute equally to repairs and maintenance, it is unclear if this is possible through the process in section 181 of the PLA.

It is clear that under section 181(3), the power to modify will also include the power to add restrictive provisions. This section is inclusive and the power to include positive obligations such as repair and maintenance is not expressly excluded. However, as suggested by Lumb, the power to add further restrictive provisions when modifying is unlikely to extend to include ‘new terms as to the use, ownership or maintenance of the servient land.’²⁸⁶ The reason for this view has been articulated in the following way:

²⁸⁰ *Property Law Act 1974* (Qld) s181(3).

²⁸¹ *Property Law Act 1974* (Qld) s181(3).

²⁸² *Hoy v Allerton* (2002) Q Conv R 54-559 [2001] QSC 440 at [29]-[30].

²⁸³ *Lolakis v Konitas* [2002] NSWSC 889 [67].

²⁸⁴ Peter Butt, *Land Law* (LawBook Co, 6th ed, 2010) 509, [16129].

²⁸⁵ Stephen Lumb, ‘Modifying Easements: Living in the Past’ (2014) 4 *Property Law Review* 136, 138.

²⁸⁶ Stephen Lumb, ‘Modifying Easements: Living in the Past’ (2014) 4 *Property Law Review* 136, 139-140.

... this conclusion is fortified by the fact that such an obligation amounts to a positive (personal) covenant and, *ordinarily*, would not run with the land; it does not fall within the ambit of a restriction on the user or the building on the land.²⁸⁷

The position in the Northern Territory regarding the addition of new terms is clear as section 177(4) of the *Law of Property Act* (NT) provides that the power to modify includes a power to include new terms as to the use, ownership or maintenance of the servient land.²⁸⁸ However, the Northern Territory legislation enables the burden of a positive covenant to bind successors in title which may partly explain the broad power under section 177 to add new terms which could extend to positive covenants.

Questions

30. Do you think the power to modify under section 181 of the PLA should also enable new terms to be added to existing easements?

31. Should section 181 of the PLA be amended to enable the addition of positive covenants?

6.2.2.2. Modifying covenants in Building Management Statements

A building management statement (**BMS**) may be registered in Queensland under section 54A(1) of the *Land Title Act 1994* (Qld) (**LTA**). A BMS in Queensland contains provisions benefiting and burdening the lots to which it applies.²⁸⁹ However, the LTA does not expressly provide that these provisions bind successors in title.²⁹⁰ Where rights of access, support or shelter or other rights in the nature of an easement are set out in a BMS these are declared under the LTA to operate according to its terms and may be effective, despite the absence of a formal registered easement establishing the right.²⁹¹ A BMS can be amended, extinguished (or partially extinguished) in certain circumstances. The instrument of amendment or extinguishment must be signed by the registered owner of all lots to which the BMS applies.²⁹² There is no default process set out in the LTA to cover the situation where the signature of the registered owner of all lots cannot be obtained.

²⁸⁷ Stephen Lumb, 'Modifying Easements: Living in the Past' (2014) 4 *Property Law Review* 136, 139.

²⁸⁸ Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 588 [9.78].

²⁸⁹ *Land Title Act 1994* (Qld) s 54A(2)(b).

²⁹⁰ Section 54A(2)(b) of the *Land Title Act 1994* (Qld) includes a statement in relation to a BMS that it contains provisions benefiting and burdening the lots to which it applies. It does not explicitly provide that it binds successors in title. This can be compared to section 97A(4)(b) of the *Land Title Act 1994* (Qld) which expressly provides that a positive or negative covenant is binding on the covenantor and the covenantor's successors in title. These covenants must relate to the lot or a building on, or proposed to be built on, the lot and be aimed at, amongst other things, directly preserving a native animal or a natural feature of the lot that is of cultural or scientific significance.

²⁹¹ *Land Title Act 1994* (Qld) s 54A(3).

²⁹² *Land Title Act 1994* (Qld) s 54E(2) (in the case of amendment) and s 54H(2) in the case of extinguishment. The additional requirement in the case of extinguishment or partial extinguishment is the consent of all registered mortgagees: s 54H(4)(a) and (b).

The position in relation to statutory covenants under section 97A of the LTA is different. There is a provision which expressly provides that a positive or negative covenant is binding on a successor in title. Further, a covenant under section 97A can be released or amended in certain circumstances.²⁹³ Section 97DA of the LTA also expressly provides that section 181 of the PLA applies to a registered covenant.

Questions

32. Do you think there should be a further mechanism available to enable the modification or extinguishment of a BMS where the agreement of the owner/s of all the lots cannot be obtained under section 54E (amendment of BMS) or section 54H (extinguishment of the BMS) of the *Land Title Act 1994* (Qld)? What are the reasons for your view?

33. If a further process is necessary, should:

- (a) a new provision be inserted in the *Land Title Act 1994* (Qld) similar to section 181 of the PLA; or
- (b) section 181 of the PLA be amended to enable it to extend to modification and extinguishment of a BMS where agreement of all the lot owners cannot be obtained?

34. Do you think there should be explicit statutory provision which provides that a BMS binds successors in title?

6.2.3. Other issues associated with the operation of section 181 of the PLA

6.2.3.1. Overlap between sections 181(1)(a) and 181(1)(c)

Commentary on sections 181(1)(a) and 181(1)(c) suggests that the latter section may not have any significant function as section 181(1)(a) potentially covers the field. Section 181(1)(c) is directed at two situations:

- agreement to the easement or restriction being modified or wholly or partially being extinguished; or
- abandonment of the easement by acts or omissions.

Section 181(1)(a) and the meaning of obsolete is discussed in detail in Part 6.2.1 above. Lumb suggests:

In light of the meaning given to the word “obsolete” ... it would be a rare case in which a court could hold that facts which demonstrate that an easement had been “abandoned” for the purposes of s 181(1)(c) do not also justify a conclusion that the easement should be deemed “obsolete” for the purposes of s 181(1)(a) (because it serves no presently useful purpose).²⁹⁴

²⁹³ *Land Title Act 1994* (Qld) s 97C (amendment of covenant) and s 97D (release of a covenant).

²⁹⁴ Stephen Lumb, ‘Modifying Easements: Living in the Past’ (2014) 4 *Property Law Review* 136, 141.

Question

35. Do you think there is a potential overlap between sections 181(1)(a) and 181(1)(c) of the PLA which requires amendment or clarification?

6.2.3.2. Uncertainty regarding whether s181(1)(d) of the PLA has to be satisfied in addition to one or more of s181(1)(a)-(c)

There is a suggestion that section 181(1)(d) of the PLA is a cumulative requirement to some of the other pre-conditions in section 181(1).²⁹⁵ There is some judicial authority which may support this view, specifically the decision of Ambrose J in *Eucalypt Group Pty Ltd v Robin*²⁹⁶ where his Honour indicated that to succeed under section 181(1)(b), section 181(1)(d) must also be satisfied. However, in the judgment when quoting section 181, the 'or' has been left out and MacDonald et al suggest that the view of Ambrose J could be in error.²⁹⁷ In *Hoy v Allerton & Anor*²⁹⁸ there also appears to be an assumption that section 181(1)(d) must be satisfied. However, there is no analysis in that case of any of the other subsections and it may be that section 181(1)(d) was the only precondition that could be satisfied based on the facts in that case.

Commentary on section 181 of the PLA and its interstate equivalents generally supports a view that the preconditions are alternatives – that is, only one of the preconditions needs to be satisfied in order to satisfy section 181(1).²⁹⁹ There is some Queensland case law which supports this approach as well. In *Ex parte Proprietors of "A Veril Court" Building Units Plan No. 200*³⁰⁰ both sections 181(1)(b) and (d) were pleaded in the alternative and relief was ultimately granted on the basis of section 181(d). Matthews J considered that the easement in question did secure 'practical benefits of substantial value' and he was not satisfied that money 'would be an adequate compensation for the loss of it.' Further, his Honour noted that sections 181(1)(b)(i) and 181(1)(d) 'may be considered from different points of view and that s 181(1)(d) has room for application in circumstances not available in respect of the other subsection'.³⁰¹ In *Hilldon P/L v JY Building Material & Construction P/L*³⁰² Martin J indicated that an applicant seeking an order under section 181 of the PLA has the onus of establishing facts 'sufficient to enliven one of the alternatives in s 181(1)' and that the section 'allows for a change to be made to an easement or a restrictive covenant upon demonstrating that the case falls into at least one of the four categories set out in s 181(1) ...'.³⁰³

²⁹⁵ Stephen Lumb, 'Modifying Easements: Living in the Past' (2014) 4 *Property Law Review* 136, 138.

²⁹⁶ [2003] 2 Qd R 488 at [79], [84] and [95].

²⁹⁷ Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010)

²⁹⁸ [2001] QSC 440

²⁹⁹ Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) 711 [15.390].

³⁰⁰ [1983] 1 Qd R 66 at 70.

³⁰¹ *Ex parte Proprietors of "A Veril Court" Building Units Plan No. 200* [1983] 1 Qd R 66 at 70.

³⁰² [2007] QSC 301 [11] and [15]

³⁰³ *Hilldon P/L v JY Building Material & Construction P/L* [2007] QSC 301 [11] and [15]. In *Oldfield v Gold Coast City Council* [2010] 1 Qd R 158, 174 [55] the Court of Appeal acknowledged the alternative nature of the conditions in section 181 when it commented that: 'In the circumstances of this case, even if the appellants

Question

36. Do you think there is any need to amend section 181 of the PLA to clarify that sections 181(1)(a)-(d) are alternative provisions and that section 181(1)(d) is not required to be satisfied in addition to one or more of the other conditions?

6.3. Other jurisdictions

6.3.1. Australia

Each Australian jurisdiction has a provision which addresses the issue of modification or extinguishment of restrictive covenants and/or easements. Victoria was the first State to introduce a section in 1918, with New South Wales following in 1919.³⁰⁴ The Queensland, Tasmanian and Northern Territory provisions were modelled on section 84 of the *Law of Property Act 1925 (UK)*³⁰⁵ following its amendment in 1969. This has resulted in some slight variation among the jurisdictions. A brief overview of the position in each State and Territory is set out below.

6.3.1.1. New South Wales

Section 89 of the *Conveyancing Act 1919 (NSW)* sets out the power of the Supreme Court in New South Wales in relation to making an order to modify or extinguish easements, certain covenants and profits a prendre. The section applies to both land under Torrens and old system title.³⁰⁶

One point of difference in the New South Wales legislation since 2009 is the inclusion of a 'deemed abandonment' provision in section 89(1A) which affects applications made in respect of easements where there is evidence of non-user for a period in excess of 20 years before the application has been made to the court. Queensland does not have an equivalent provision.³⁰⁷ The New South Wales section does not include an equivalent to section 181(3) of the PLA which provides that the power conferred under section 181(1) includes a power to impose further provisions restricting the user or the building on the land.³⁰⁸

had brought themselves within s 181(1)(b) or (d), it would have been appropriate to exercise the Court's discretion against giving the relief sought.'

³⁰⁴ Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 569 [19.51].

³⁰⁵ Section 84 of the *Law of Property Act 1925 (UK)* only applies to restrictive covenants.

³⁰⁶ *Conveyancing Act 1919 (NSW)* s 89(8).

³⁰⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [10.590]. Commentary on this section indicates that the purpose of the 'subsection was clearly to parallel s 49 of the *Real Property Act 1900*, which enables the Registrar-General to treat an easement as abandoned on evidence of 20 years' non-use.': see Peter Butt, *Land Law* (LawBook Co, 6th ed, 2010) 508 [16127].

³⁰⁸ The New South Wales provision was based on the 1925 version of the *Law of Property Act 1925 (UK)* which was amended in 1969 to empower the court to impose restrictive conditions.

6.3.1.2. Northern Territory

Sections 176 to 181 of the *Law of Property Act* (NT) set out the process for modification or extinguishment for covenants and easements in the Northern Territory. The sections generally replicate section 181 of the PLA, although drafted more simply, with some differences including:

- section 177(4) of the Act expressly provides that modification of an easement or covenant includes power to amend the instrument creating the easement or covenant to include new terms as to the use, ownership or maintenance of the servient land. The provision in section 181(3) of the PLA is limited to adding provisions ‘restricting the user or the building on the land’;
- section 177(3) provides that the Court, in determining whether to make the order, is required to take into account the operation of the *Planning Act* and in particular the provisions of the planning scheme, within the meaning of that Act, applying to the land. In Queensland, the court is required to take into account the specified planning material in determining if the case falls within section 181(1)(a) and (b). In addition, the Court is required to take into account the material for the purpose of determining if an easement or restriction should be modified or extinguished.³⁰⁹

6.3.1.3. Victoria

Section 84 of the *Property Law Act 1958* (Vic) is similar in content to Queensland, although it only applies to restrictive covenants. Easements are not covered by the section. The Victorian Law Reform Commission when reviewing the laws surrounding easements and covenants in Victoria in 2010 noted that:

Victoria has had a provision for judicial removal of covenants since 1918. Section 84 ... is based on an English provision that Victoria adopted in 1928, and which is also the parent provision for equivalent legislation in many other jurisdictions. Section 84 has not been updated in line with reform trends in other jurisdictions since 1928.³¹⁰

One of the issues considered during the Victorian Law Reform Commission’s review was whether section 84 should be extended to easements also. In the consultation paper released in 2010 the Commission sought feedback on this issue.³¹¹ The Final Report made a number of recommendations including that section 84 of the *Property Law Act 1958* (Vic) be amended to include the power to remove or vary by order easements created other than by operation of statute.³¹² Other recommendations included providing the court with a broad discretion when deciding whether to grant an order modifying or extinguishing an easement or restrictive covenant taking into account a

³⁰⁹ See *Property Law Act 1974* (Qld) s 181(2).

³¹⁰ Victorian Law Reform Commission, *Easements and Covenants*, Final Report (2010) 116 [8.3].

³¹¹ Victorian Law Reform Commission, *Easements and Covenants*, Consultation Paper 9 (2010) 144 [16.34].

³¹² See Victorian Law Reform Commission, *Easements and Covenants*, Final Report (2010) Recommendation 41. A number of other recommendations were made in relation to amendments to section 84: see Rec 42-47.

number of matters, including ‘any other fact which the court or VCAT considers to be material.’³¹³ The recommendations have not been adopted to date.

6.3.1.4. Tasmania

The process for extinguishing or modifying an easement or covenant in Tasmania is set out in section 84C of the *Conveyancing and Law of Property Act 1884* (Tas). In Tasmania, an application for an order for extinguishment or modification is made to the Recorder of Titles.³¹⁴ A person aggrieved by the decision of the Recorder of Titles may appeal to the Supreme Court.³¹⁵ Further, the Recorder of Titles (or an interested person) may apply to the Supreme Court to have the matter removed to that Court.³¹⁶

Once the Recorder of Titles has received the application, the Recorder can give directions regarding giving notice of the application to specified persons including the manner in which the notices are given.³¹⁷ An application can be made for discharge or modification notwithstanding that there is uncertainty regarding the existence or nature of the overriding interests to which the application relates.³¹⁸ It is prima facie evidence that the relevant interest is obsolete where rights conferred have not been exercised for 20 years.³¹⁹ The provision expressly provides that the power to modify an interest includes a power to create (in addition to or in substitution of the relevant interest) a further overriding interest which has the effect of restricting the user of the land or creating rights over the land which appear to the Recorder to be reasonable in the circumstances and which are accepted by the applicant.³²⁰

In addition to the power to modify or extinguish, the Recorder of Titles also has power to declare whether land is subject to a covenant or easement and to declare the nature and extent of that covenant or easement.³²¹

6.3.1.5. Western Australia

In Western Australia, section 129C of the *Transfer of Land Act 1893* (WA) governs the power of the Supreme Court to extinguish or modify restrictive covenants and easements. The provision applies

³¹³ Victorian Law Reform Commission, *Easements and Covenants*, Final Report 22 (2010) 130, Recommendation 46.

³¹⁴ *Conveyancing and Law of Property Act 1884* (Tas) s 84C(1).

³¹⁵ *Conveyancing and Law of Property Act 1884* (Tas) s 84F(3).

³¹⁶ *Conveyancing and Law of Property Act 1884* (Tas) s 84G(1).

³¹⁷ *Conveyancing and Law of Property Act 1884* (Tas) s 84E(2).

³¹⁸ *Conveyancing and Law of Property Act 1884* (Tas) s 84(2).

³¹⁹ *Conveyancing and Law of Property Act 1884* (Tas) s 84C(3).

³²⁰ *Conveyancing and Law of Property Act 1884* (Tas) s 84C(4). Section 84C(5) sets out the provisions which an order under section 84C(4) may contain including a provision extinguishing all overriding interests to which the land may be subject.

³²¹ *Conveyancing and Law of Property Act 1884* (Tas) s 84B(1).

only to land under the operation of the Torrens system.³²² It is in similar (but not identical) terms to section 181 of the PLA.

6.3.1.6. South Australia

Section 90B of the *Real Property Act 1886* (SA) is limited in scope to easements and applies only to registered land. Under section 90B(1) the Registrar-General may on application by the proprietor of the dominant or servient land or on the Registrar-General's own initiative:

- vary, extend or reduce the extent of an easement over servient land;
- vary an easement by extending the appurtenance of the easement to other land owned by the proprietor of the dominant land; or
- extinguish an easement.

The section is different to the other jurisdictions. For example, the Registrar-General is not permitted to act under section 90B(1) except on the application, or with the written consent of the proprietor of the dominant land and the servient land and with the written consent of all other persons specified in the section. The requirement for consent can be dispensed with in certain circumstances.³²³ There are separate subsections which apply specifically to rights of way.³²⁴

6.3.2. New Zealand

Section 317 of the *Property Law Act 2007* (NZ) gives the court the discretion to modify or extinguish an easement or covenant. The relevant court is either the District Court or the High Court depending on the manner in which the issue arises. The court must be satisfied of one or more of the following matters:

- there has been a change since the creation of the easement or covenant in all or any of the following:
 - the nature or extent of the use being made of the benefited land, the burdened land or both;
 - the character of the neighbourhood; any other circumstance the court considers relevant; or
- the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or
- every person entitled who is of full age and capacity has agreed that the easement or covenant should be modified or extinguished or may reasonably be considered by his or her acts or omissions to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or

³²² *Transfer of Land Act 1893* (WA) s 129C(1).

³²³ *Real Property Act 1886* (SA) s 90B(3).

³²⁴ *Real Property Act 1886* (SA) s 90B(3b)–(3d).

- the proposed modification or extinguishment will not substantially injure any person entitled.

Sections 316 and 317 of the *Property Law Act 2007* (NZ) is extracted at **Annexure A**.

6.4. Options

The current form of section 181 of the PLA may not be flexible enough to cover the different kinds of easements in place or be able to address disputes arising in relation to terms of easements. Some possible options are discussed below if reform of the section is considered appropriate following consultation on the issues raised in Part 6.2 above.

Option 1 – Amend section 181 of the PLA for clarity

This option would involve amending section 181 so that the language is simplified and other issues such as overlaps between conditions and the imposition of terms on existing easements are clarified one way or another.

Option 2 – Repeal section 181 of the PLA and replace with a simpler provision providing broad discretion to the Court

There are a number of approaches which could be adopted if section 181 is redrafted in its entirety. The New Zealand model is one possible approach and the relevant sections of the *Property Law Act 2007* (NZ) are set out at **Annexure A**. The New Zealand provisions are discussed in more detail in Part 6.3.2 above.

Another approach could be modelled on the recommendation of the Victorian Law Reform Commission in its 2010 report on easements and covenants. In essence, that recommendation conferred broad discretion on the relevant court when deciding whether to make an order to modify or extinguish. The court is required to consider a list of matters including ‘any other factor the court or VCAT considers to be material.’³²⁵ The full text of the recommendation is set out at **Annexure B**.

Questions

- 37. If you think reform of section 181 of the PLA is required, do you think the Court should be given a more general discretion under section 181 to extinguish or modify an easement or covenant?**
- 38. What is your view of the New Zealand approach?**
- 39. What is your view of the approach recommended by the Victorian Law Reform Commission set out at Annexure B?**

³²⁵ Victorian Law Reform Commission, *Easements and Covenants*, Final Report (2010) 130, Recommendation 46.

Annexure A – Property Law Act (2007) (NZ)

316 Application for order under section 317

(1) A person bound by an easement, a positive covenant, or a restrictive covenant (including a covenant expressed or implied in an easement) may make an application to a court for an order under section 317 modifying or extinguishing that easement or covenant.

(2) That application may be made in a proceeding brought by that person for the purpose, or in a proceeding brought by any person in relation to, or in relation to land burdened by, that easement or covenant.

(3) That application must be served on the territorial authority in accordance with the relevant rules of court, unless the court directs otherwise on an application for the purpose, and must be served on any other persons, and in any manner, the court directs on an application for the purpose.

317 Court may modify or extinguish easement or covenant

(1) On an application (made and served in accordance with section 316) for an order under this section, a court may, by order, modify or extinguish (wholly or in part) the easement or covenant to which the application relates (the **easement or covenant**) if satisfied that—

(a) the easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:

(i) the nature or extent of the use being made of the benefited land, the burdened land, or both:

(ii) the character of the neighbourhood:

(iii) any other circumstance the court considers relevant; or

(b) the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or

(c) every person entitled who is of full age and capacity—

(i) has agreed that the easement or covenant should be modified or extinguished (wholly or in part);
or

(ii) may reasonably be considered, by his or her or its acts or omissions, to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or

(d) the proposed modification or extinguishment will not substantially injure any person entitled.

(2) An order under this section modifying or extinguishing the easement or covenant may require any person who made an application for the order to pay to any person specified in the order reasonable compensation as determined by the court.

Annexure B – Victorian Law Reform Commission: Recommendation 46

46. The conditions in section 84(1)(a)–(c) of the *Property Law Act 1958* (Vic) should be removed. Instead, the court or VCAT should be required to consider the following matters in deciding whether to grant an application for the discharge or modification of an easement or restrictive covenant:

- a. the relevant planning scheme
- b. the purpose of the easement or restrictive covenant
- c. any changes in circumstances since the easement or restrictive covenant was created (including any change in the character of the dominant or benefited land or the servient or burdened land or the neighbourhood)
- d. any increased burden of the easement on the servient land resulting from changes to the dominant land or its mode of use
- e. the extent to which the removal or variation of the easement or a restrictive covenant would cause material detriment to a person who has the benefit of the easement or restrictive covenant
- f. the extent to which a person who has the benefit of an easement or a restrictive covenant can be adequately compensated for its loss
- g. acquiescence by the owner of the dominant land in a breach of the restrictive covenant
- h. delay by the dominant owner in commencing legal proceedings to restrain a breach of the restrictive covenant
- i. abandonment of the easement by acts or omissions
- j. non-use of the easement (other than an easement in gross) for 15 years
- k. any other factor the court or VCAT considers to be material.

Part B – Apportionment

7. Part 17 – Apportionment (ss 231-233)

7.1. Overview and purpose

Part 17 of the PLA comprises sections 231 to 233. These sections are extracted below.

231 Definitions for pt 17

In this part –

annuities include salaries and pensions.

dividends include (besides dividends strictly so-called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of any company or other body corporate incorporated under any statute, divisible between all, or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise.

rents include rent service, rent charge, and rent seck, and all periodical payments or renderings instead of or in the nature of rent.

232 Rents etc. apportionable in respect of time

- (1) All rents, annuities, dividends, and other periodical payments in the nature of income whether reserved or made payable under an instrument in writing or otherwise shall, like interest on money lent be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.
- (2) The apportioned part of any such rent, annuity, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part, forms part becomes due and payable, and not before, and in the case of a rent annuity or other such payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before.
- (3) All persons and their respective executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies, at law and in equity, for recovering such apportioned parts when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions if entitled to them respectively.
- (4) Despite subsection (3), where any person is liable to pay rent reserved out of or charged on lands, that person and the lands shall not be resorted to for any such apportioned part forming part of an entire or continuing rent specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the person who, if the rent had not been apportionable under this section or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such last person by the executors, administrators, or other parties entitled to it under this section by action or suit.

233 Exceptions and application

- (1) Nothing in this part renders apportionable any annual sums payable under policies of assurance of any description.
- (2) This part does not extend to any case in which it is expressly stipulated that apportionment shall not take place.

At common law, rent and other periodic payments falling due at the periodic intervals are not due and payable until the expiration of the full period in question. This means that if for some reason the full period is never completed, no part of the rent is recoverable in respect of that part of the period which had expired. For example:

... if rent was payable quarterly in arrears, and a landlord ended a tenancy (whether by forfeiture or otherwise) between rent days, or terminated a tenancy at will between rent days, the landlord lost the right to claim any rent for that quarter.³²⁶

This position was viewed as an injustice and was remedied in the United Kingdom by a number of Acts, culminating in the *Apportionment Act 1870* (UK) which is still in force.³²⁷ The first apportionment provision was included in the *Distress for Rent Act 1737* and was reasonably narrow in scope.³²⁸ The scope of the provision was extended in the *Apportionment Act 1834* beyond 'rent' to cover 'Rents, Annuities, Pensions, Dividends ... and all other payments of every Description ... made payable or coming due at fixed periods under any instrument. ...'³²⁹ Commentary has indicated that the 1870 Act was passed 'to try to recast the provisions in more acceptable form.'³³⁰ The object of the Act has been described in the following way:

The real object of the statute was to obliterate technical distinctions between different kinds of fixed income recurring from time to time at stated periods. ... This can be seen from the preamble to the Act, which begins: 'Whereas rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time ...'

The idea is clearly to cover cases where a periodical payment is made on one occasion to A and on the next to B, A's successor, A having died or otherwise ceased to be entitled. The paradigm case is where a landlord dies between rent days, and the tenant on the next rent day pays to his landlord's successor rent, part of which is attributable to the ownership of the deceased landlord. The tenant holds the land throughout, and must at the next rent day pay someone: the apportionment of that payment is by statute made between the two parties involved, the deceased landlord's estate and his successor.³³¹

Part 17 of the PLA is essentially a re-enactment of the *Apportionment Act 1870* (UK). The effect of Part 17 of the PLA is to overcome the common law position and enable apportionment, subject to an express stipulation to the contrary.

Part 17 of the PLA operates in the following way:

³²⁶ Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (Lawbook Exchange 2011) 109.

³²⁷ V G Wellings and G N Huskinson, *Woodfall's Law of Landlord and Tenant* (Law Book Co, 28th ed, 1978) 307 [1-0765].

³²⁸ Paul Matthews, "'Salaries'" in the Apportionment Act 1870' (1982) 2 *Legal Studies* 302. Section 15 of the *Distress for Rent Act 1737* provided that where leases determined on the death of the lessor, the lessor's estate could claim a proportion of the rent that would have been due on the next rent day.': 303.

³²⁹ Extracted from Paul Matthews, "'Salaries'" in the Apportionment Act 1870' (1982) 2 *Legal Studies* 302, 303.

³³⁰ Paul Matthews, "'Salaries'" in the Apportionment Act 1870' (1982) 2 *Legal Studies* 302, 303.

³³¹ Paul Matthews, "'Salaries'" in the Apportionment Act 1870' (1982) 2 *Legal Studies* 302, 303.

- the Part applies to annuities, rents, dividends and other periodical payments but not to rent where it is expressly payable in advance;³³²
- rent, annuities, dividends and other periodical payments are considered as accruing from day to day and are apportionable in respect of time accordingly.³³³ This means, for example, that if a lease determines on a date in between the days specified for payment of the relevant rent, rent is recoverable for that portion up to the point the lease is determined;³³⁴
- the apportioned part of the rent or annuity etc. is payable or recoverable when the entire portion becomes due and payable and not before. In the case of a rent, annuity or other payment determined by re-entry, death or otherwise, it becomes payable when the next entire portion of the same would have been payable as if it had not been determined;³³⁵
- ‘all persons’ will have the same remedies for recovering such apportioned parts as those persons did for recovering entire portions.³³⁶ Common actions for recovery might include recovery of rent on the express or implied covenants in the lease and an action to recover damages for mesne profits for the loss caused by being out of possession;³³⁷
- annual sums payable under policies of assurance are excluded from the scope of Part 17.³³⁸

7.2. Is there a need for reform?

7.2.1. Part 17 of the PLA not applicable to rent payable in advance

As indicated in Part 7.1 above, Part 17 of the PLA does not apply where rent is expressly payable in advance. This position raises some issues as rents are usually now payable in advance.³³⁹ The effect of rent being payable in advance is that it is already due before the event necessitating the apportionment.³⁴⁰ In practical terms, it means that the Part would apply, in relation to leases, in very few cases.

Most land contracts in Queensland are in writing and provide expressly for the adjustment of rent on a daily basis where a property is sold subject to lease. This means that Part 17 would only apply

³³² *Property Law Act 1974* (Qld) s 232(1). These terms are defined in section 231 of the Act.

³³³ *Property Law Act 1974* (Qld) s 232(1).

³³⁴ Queensland Law Reform Commission, *Report of the Law Reform Commission on the Law Relating to Relief From Forfeiture of Leases and to Relief From Forfeiture of an Option to Renew and Certain Aspects of the Law Relating to Landlord and Tenant*, Report No. 1 (1970) 21. The QLRC in its Report also discussed other complications arising from the common law rule in relation to rents due from tenants for life and the death of a tenant for life during the currency of a lease granted by the tenant. For further details on these see [21].

³³⁵ *Property Law Act 1974* (Qld) s 232(2).

³³⁶ *Property Law Act 1974* (Qld) s 232(3). This section is qualified by *Property Law Act 1974* (Qld) s 232(4).

³³⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [17.110]. In relation to rents payable in advance see *Ocelota Ltd & Ors v Water Administration Ministerial Corporation & Anor* [2000] NSWSC 370 and *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2014] EWCA Civ 603.

³³⁸ *Property Law Act 1974* (Qld) s 233(1).

³³⁹ *Ellis v Rowbotham* [1900] 1 QB 740. This principle was followed more recently in New South Wales in *Ocelota Pty Ltd v Water Administration Ministerial Corp* [2000] NSWSC 370.

³⁴⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [17.60].

where there was no express provision for adjustment upon settlement, provided that the lease only required payment in arrears and not in advance. A recent Court of Appeal decision in the United Kingdom has reaffirmed this position. The Court of Appeal in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* held that the equivalent provisions in the *Apportionment Act 1870* (UK) did not apply to enable a lessee to obtain a refund of rent paid in advance.³⁴¹ The lease in that case was terminated under a break clause and the lease did not include an adjustment clause applicable to that situation.³⁴²

New Zealand legislation does not alter this position. However, it does address the issue of rent paid in advance and apportionment following assignment in a limited way under section 47 of the *Property Law Act 2007* (NZ). The effect of section 47 is described below:

Rent payable in advance is apportionable between an assignor and assignee of the reversion and the same is the case where there is an assignment of the lease. A proceeding to recover the rent can only be brought by the person who, if the rent had not been apportioned, would have been entitled to the entire rent, but that person is liable to account for it to the person entitled under the apportionment.³⁴³

There is no similar provision in the PLA.

7.2.2. Practical utility of Part 17 of the PLA

There is limited case law in Queensland in relation to Part 17 of the PLA. The position is similar in the other Australian jurisdictions. This may suggest that the Part is not relied upon very often and other mechanisms may be used. In this respect, Part 17 of the PLA will not apply where it is expressly provided that apportionment will not take place.³⁴⁴ It is common in the leasing context for the lease terms to expressly direct what happens with rent if the lease is determined. Similar provisions may be included in wills dealing with dividends.

The QLRC, when initially considering the issue of apportionments in the context of leases, recommended the adoption of the United Kingdom and New South Wales legislation which included,

³⁴¹ *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2014] EWCA Civ 603. This decision was an appeal from a High Court decision which indicated that a tenant was entitled to recover sums pre-paid for the period following a break date once the lease had ended 'because there was an implied term to that effect in the parties' lease.': See Allyson Colby, 'The Court of Appeal Has Refused to Imply a Term in a Lease That Would Enable the Tenant to Recover Pre-Payments for a Period After a Break Date' *The Estates Gazette* (24 May 2014) 92.

³⁴² The Queensland provisions were considered in *Huntley Management Limited v Australian Olives Limited* [2009] FCA 1549 in the context of a managed investment and management fees which were paid in advance for a full year. One part of the case related to the application of section 232 of the *Property Law Act 1974* (Qld). The Court found that the section did not apply where the payment is made in advance. The relevant management fees payable under the managed investment schemes were not apportionable. This decision was upheld on appeal in *Huntley Management Limited v Australian Olives Limited* [2010] FCAFC 98.

³⁴³ Tom Bennion et al, *New Zealand Law* (Brookers Ltd, 2nd ed, 2009) 567 [8.11.04(13)].

³⁴⁴ *Property Law Act 1974* (Qld) s 233(2). For a discussion on what this requires in practice see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [17.160].

as apportionable sums, 'dividends payable by companies'.³⁴⁵ However, the QLRC in its Final Report noted that:

However, the principal trustee companies operating in Queensland have made strong representations to the Commission against the adoption of a provision which renders such dividends apportionable. In particular, it said that, with the very considerable variety of dividends declared by different companies, it is often extremely difficult to determine in respect of what period a dividend is declared, whether it is in character final or interim only, and, if interim, what is the proper method of dealing with it as between life tenant and remainderman. Such sums are almost invariably small and the time and cost expended upon making the necessary inquiries and calculations is seldom justified in financial terms and simply results in substantial delays and expense in administering estates.³⁴⁶

Although the QLRC accepted these arguments and agreed that dividends from companies should be excluded from the statutory provision of apportionment, dividends were still included in the final version of Part 17 of the PLA when it commenced in 1975.³⁴⁷ Annuities are also included in the Part. These are defined to include salaries and pensions. This is consistent with the approach in all other Australian jurisdictions discussed in Part 7.3. However, the legal landscape in relation to employment matters and corporations law is vastly different since 1870 (and even since 1975). The rationale for the ongoing inclusion of dividends and annuities under Part 17 is unclear.

7.3. Other jurisdictions

7.3.1. Australia

Each State and Territory in Australia has legislation which includes apportionment provisions.³⁴⁸ The form and effect of these provisions is similar to Part 17 of the PLA. Generally, the legislation in each jurisdiction covers rents, annuities and dividends, provides for the apportionment of these categories, identifies when the relevant portion is payable and sets out the remedies for recovering the apportioned parts. Further, each statute expressly enables the parties to exclude the apportionment provisions.

³⁴⁵ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 112.

³⁴⁶ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 112.

³⁴⁷ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 112-113.

³⁴⁸ See *Conveyancing Act 1919* (NSW) ss 142 and 144; *Supreme Court Act 1986* (Vic) ss 53-56; *Law of Property Act 1936* (SA) ss 64-68; *Civil Law (Property) Act 2006* (ACT) ss 248-253; *Law of Property Act* (NT) ss 211-213; *Property Law Act 1969* (WA) ss 130-134; *Apportionment Act 1871* (Tas) ss 211-213.

7.3.2. New Zealand

The relevant apportionment provisions in New Zealand are set out in sections 45 to 47 of the *Property Law Act 2007* (NZ). The provisions operate in a similar way to Part 17 of the PLA, although the language and layout is simplified in comparison to the Queensland provisions. The New Zealand provisions refer to ‘periodical payments’ which covers rent, rent charge, salary, pension, bonus, dividend, interest or outgoing.³⁴⁹ Section 47 of the Act is a new provision which provides for apportionment between a vendor and purchaser of rent payable in advance. The rent is not apportionable as between the lessor and lessee but ‘only as between the parties to the transfer of the interest.’³⁵⁰ Sections 45 to 47 of the *Property Law Act 2007* (NZ) are extracted at **Annexure C**.

7.4. Options

The language used in Part 17 is cumbersome and generally unclear.³⁵¹ At the very least, the sections require amendment to assist with clarity and interpretation of the provisions. Feedback on Part 17 of the PLA is sought from stakeholders in order to assist with determining whether reform is required and if so, the reform options which might be available.

Questions

- 40. Should Part 17 of the PLA be repealed?**
- 41. Should Part 17 of the PLA be retained?**
- 42. Is there a current rationale for the retention of Part 17 of the PLA?**
- 43. Does Part 17 of the PLA in its current form still serve a purpose, particularly as it does not apply to rent payable in advance (which is now the usual process for rent payment)?**
- 44. If Part 17 is retained, should it be limited to ‘rent’ or is there still a rationale for the retention of ‘annuities’ and ‘dividends’ within the Part?**
- 45. Should ‘dividends’ and ‘annuities’ remain in Part 17? Are there other arrangements in place, for example, under other statutes which make the ongoing inclusion in Part 17 of the PLA obsolete?**
- 46. Do sections 45 and 46 of the *Property Law Act 2007* (NZ) (see Annexure C) provide a simpler legislative model which could be adopted (and adapted) in Queensland?**

³⁴⁹ *Property Law Act 2007* (NZ) s 4.

³⁵⁰ Law Commission (NZ), *A New Property Law Act*, Report No. 29 (1994), 405 [752]. The issue regarding rent payable in advance was discussed by the Law Commission (NZ). The Commission indicated that ‘it could be made clear that, where interests in land, either freehold or leasehold, are changing hands, rent receivable or payable by the owners of those interests is apportionable between the vendor and purchaser regardless of whether it is payable in advance. This now has to be dealt with by specific provision in the agreement for sale and purchase’: see Law Commission (NZ), *The Property Law Act 1952 – A Discussion Paper*, Preliminary Paper No. 16 (1991) 51 [165].

³⁵¹ See for example *Property Law Act 1974* (Qld) s 132(4).

47. If Part 17 of the PLA is retained, should an express provision which provides that rent payable in advance is apportionable between an assignor and assignees of the reversion (and in the case of an assignment of a lease) be included? An example of a provision of this type is set out in section 47 of the *Property Law Act 2007* (NZ) (see Annexure C).

Annexure C – Property Law Act 2007 (NZ) sections 45-47

45 Apportionments in respect of time

(1) This section applies to a periodical payment in respect of a fixed or ascertainable period (whether the payment is reserved or made payable under an instrument or not).

(2) The payment must be regarded as accruing from day to day, and is apportionable in respect of time accordingly, as to both—

- (a) the liability to make the payment; and
- (b) the right to receive it.

(3) Subsection (2) does not apply if a contrary intention is expressed in an instrument.

46 Payment and recovery of apportioned part of periodical payment

(1) An apportioned part of a periodical payment is payable and recoverable,—

(a) for a continuing right to a payment, only when the entire payment becomes payable and recoverable:

(b) for a payment the continuing right to which has ceased because of death, re-entry, or another cause, only when the entire payment would have become payable and recoverable if the continuing right to the payment had not ceased.

(2) A person entitled to an apportioned part of a periodical payment—

(a) has, when the entire payment becomes payable and recoverable, the same remedies for recovering the apportioned part as would have been available in respect of the entire payment; but

(b) must bear a proportionate part of any allowance which should properly be made in respect of the entire payment.

(3) Subsection (2) is subject to section 47(2).

47 Apportionment of rent from property

(1) Rent from property, if payable in advance in respect of a period, is apportionable as between the parties to—

- (a) a transfer or assignment of the property; or
- (b) a transfer or assignment of the right to occupy or use the property.

(2) A proceeding for the recovery of rent reserved out of, or charged upon, land may be brought only by the person who, if the rent had not been apportioned, would have been entitled to the entire rent, but that person is liable for the apportioned part to the person entitled to it under the apportionment.

(3) **Rent**, in this section, includes—

- (a) a rentcharge; and
- (b) a payment in the nature of rent under a lease or a licence to occupy or use any property.

(4) Subsection (2) overrides section 46(2).

Part C – Powers of appointment and the rule against perpetuities

8. Part 13 – Powers of Appointment (ss 201-205)

The owner of property as a settlor or testator (in each case, the **donor**) may confer on another person (the **donee**) a power to appoint the donor's property to beneficiaries as selected by the donee. A **general power of appointment** allows the donee to appoint the donor's property to anyone (including him or herself). A settlement of property '*to my wife for life, remainder to such person or persons as my wife may appoint*'³⁵² is an example of a general power of appointment.

In contrast, a **special power of appointment** allows the donee to appoint the donor's property to a specified person or class of persons. A settlement of property '*to my wife for life, remainder to be divided among my children as my wife may appoint*'³⁵³ is an example of a special power of appointment.

The rule against perpetuities³⁵⁴ may apply to a power of appointment either when the power is *created* (i.e. given by the donor to the donee) or when it is *exercised* (i.e. when the donee appoints the property to a person or persons). Whether the power is a special power or a general power is significant for the purposes of the rule against perpetuities. In the case of a general power, the donee may appoint the property to any person in the world. As such, the ownership is equivalent to absolute ownership. Assuming the power is validly created (within the perpetuity period that applies to the disposition of the power by the donor to the donee) this generally means the rule against perpetuities will only again become relevant when the power is exercised.

With a special power, the donee may appoint the property only to specified person or class of persons. As such, the donee's interest in the property is fettered from the beginning. The disposition of the property remains controlled by the donor and the donee has power only to appoint the property to a limited class.³⁵⁵ In these circumstances (again, assuming the special power has been validly created) the perpetuity period will run from the time the instrument creating the special power of appointment comes into effect. At common law, a special power of appointment will be void for remoteness if there is any possibility that it can be exercised outside the perpetuity period.³⁵⁶ This position is modified by section 208 in Part 14 of the PLA, which is discussed at Part 9 below.

³⁵² Peter Butt, *Land Law* (6th ed, Thomson Reuters, Sydney, 2010), 1284.

³⁵³ Peter Butt, *Land Law* (6th ed, Thomson Reuters, Sydney, 2010), 1284.

³⁵⁴ Discussed at Part 9 below.

³⁵⁵ EH Burn and J Cartwright, *Cheshire and Burn's Modern Law of Real Property* (17th ed, Oxford University Press, 2006), 534, 536.

³⁵⁶ Peter Butt, *Land Law* (6th ed, Thomson Reuters, Sydney, 2010), 1289.

8.1. Overview and purpose

Part 13 of the PLA was taken from the *Law of Property Act 1925* (c. 20) (UK).³⁵⁷ The discussion below outlines each section in turn.

8.1.1. Section 201 – Application of pt 13

Section 201 provides:

This part applies to powers created or arising either before or after the commencement of this Act.

Part 13 will apply to powers created or arising before and after 30 November 1975, which is the date the PLA became effective.

Powers of appointment may be created in a will or in an *inter vivos* instrument. In a will, the power is created on the death of a testator. In an *inter vivos* instrument the power is created upon the settlement of the execution deed.

8.1.2. Section 202 – Mode of exercise of powers

Section 202 provides:

- (1) Where a power of appointment by an instrument other than a will is exercised by deed, executed and attested under this Act, or, in the case of an instrument under the *Land Title Act 1994*, under that Act, such deed or instrument shall, so far as respects the execution and attestation of the instrument, be a valid exercise of the power, even though by the instrument creating the power some additional or other form of execution or attestation or solemnity is required.
- (2) This section does not operate to defeat any direction in the instrument creating the power that—
 - (a) the consent of any particular person is to be necessary to a valid execution; or
 - (b) in order to give validity to any appointment, any act is to be performed having no relation to the mode of executing and attesting the instrument.
- (3) This section does not prevent the donee of a power from executing it under the power by writing, or otherwise than by an instrument executed and attested as a deed, and where a power is so executed this section does not apply.
- (4) This section applies to the exercise after the commencement of this Act of any such power created by an instrument coming into operation before or after the commencement of this Act.

³⁵⁷ *Law of Property Act 1925* (c. 20) (UK) Part VI ss 155-160.

The exercise of a power of appointment occurs when the donee (in this situation, the **appointor**) makes an appointment of property in favour of a person (the **appointee**) or class of person (the objects of the power). A power of appointment may be exercised in a will or in an *inter vivos* instrument such as a deed or an instrument under the *Land Title Act 1994* (Qld). Section 202 of the PLA does not apply to powers of appointment exercised by a will.³⁵⁸

Consider our earlier example of a special power of appointment '*to my wife for life, remainder to be divided among my children as my wife may appoint.*'³⁵⁹ The wife's interest is a life interest and on her death, the remainder goes to the donor's children as the wife appoints. In this situation the exercise of the power (that is, the appointment of the property to the donor's children) will occur in the wife's will. As such, the will exercising the power must be executed in accordance with the provisions of the *Succession Act 1981* (Qld).³⁶⁰

Alternatively, a disposition '*to my wife for life, remainder to such of my children as my brother X may appoint*' is an example of a power of appointment that could be exercised at any time (after the death of the wife) by the brother. The brother could decide to exercise the power in a deed or other *inter vivos* instrument.

At common law, the instrument creating the power of appointment could detail the mode of execution of the power so that the donee would have to follow the exact terms in executing the power.³⁶¹ Consider a disposition that provides '*to my wife for life, remainder to such of my children as my brother X may appoint by deed witnessed by four people.*'

In these circumstances section 202 of the PLA would operate to provide that the exercise of the power of appointment by the brother would be a valid exercise even if the deed was not witnessed by four people, provided the deed was executed and attested under the PLA.³⁶²

This section is designed to avoid difficulties that may be caused by documents providing that a power is only exercisable by a deed if additional forms of execution or solemnity are provided.³⁶³

³⁵⁸ These are covered in the *Succession Act 1981* (Qld).

³⁵⁹ See above at Part 8.

³⁶⁰ *Successions Act 1981* (Qld) s 10. Note section 10(12) which provides that if a power of appointment conferred on a person requires an appointment by will be executed with a particular solemnity, the power will still be exercisable if the will is executed in accordance with section 10.

³⁶¹ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) at [13.80].

³⁶² See *Property Law Act 1974* (Qld) Part 6.

³⁶³ Peter Young et al, *Annotated Conveyancing & Real Property Legislation: New South Wales*, LexisNexis Butterworths, at [30721.1]. The commentary is provided in respect of the *Conveyancing Act 1919* (NSW) s 41 which was the model for PLA s 202. See Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 108.

8.1.3. Section 203 – Validation of appointments where objects are excluded or take illusory shares

Section 203 provides:

- (1) No appointment made in exercise of any power to appoint any property among 2 or more objects shall be invalid on the ground that—
 - (a) an unsubstantial, illusory, or nominal share only is appointed to or left unappointed to devolve upon any 1 or more of the objects of the power; or
 - (b) any object of the power is altogether excluded;but every such appointment shall be valid even though any 1 or more of the objects is not, or in default of appointment, to take any share in the property.
- (2) This section does not affect any provision in the instrument creating the power which declares the amount of any share from which any object of the power is not to be excluded.
- (3) This section applies to appointments made before or after the commencement of this Act.

The operation of this section can best be demonstrated by returning to the example special power of appointment discussed earlier,³⁶⁴ which provides *‘to my wife for life, remainder to be divided among my children as my wife may appoint.’*

It is unclear from the terms of the disposition whether the wife must divide the property among all of the children (i.e. if the power is non-exclusive such that each object must receive a share, no matter how small) or if she is free to exclude some objects (i.e. if the power is exclusive).

If the donor of the power has five children, it may be that he intended for each child to receive 1/5th of the remainder of the property on the death of his wife. However, in exercising the power of appointment, the wife could divide the property so that the vast majority is split among just three of the children, leaving two children with very little or even nothing at all.

At common law, where the power was non-exclusive and the appointment to one or more of the objects of the power was merely nominal, it could be set aside as illusory.³⁶⁵ Section 203 of the PLA provides that an exercise of a power of appointment will be valid even if one or more of the objects receives a nominal share of the property or is excluded altogether. This removes the need to distinguish between exclusive and non-exclusive powers.³⁶⁶

³⁶⁴ See above at Part 8.

³⁶⁵ Peter Young et al, *Annotated Conveyancing & Real Property Legislation: New South Wales*, LexisNexis Butterworths, at [30480.5], referring to *Conveyancing Act 1919 (NSW) s 29*. See also Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) at 108.

³⁶⁶ Peter Young et al, *Annotated Conveyancing & Real Property Legislation: New South Wales*, LexisNexis Butterworths, at [30480.1].

8.1.4. Section 204 – Protection of purchasers claiming under certain void appointments

Section 204 provides:

- (1) An instrument purporting to exercise a power of appointment over property, which, in default of and subject to any appointment, is held in trust for a class or number of persons of whom the appointee is one, shall not be void on the ground of fraud on the power as against a purchaser in good faith.
- (1A) However, if the interest appointed exceeds, in amount or value, the interest in such property to which immediately before the execution of the instrument the appointee was presumptively entitled under the trust in default of appointment, having regard to any advances made in the appointee's favour and to any hotchpot provision, the protection afforded by this section to a purchaser shall not extend to such excess.
- (2) In this section—
a purchaser in good faith means a person dealing with an appointee of the age of not less than 25 years for valuable consideration in money or money's worth, and without notice of the fraud, or of any circumstances from which, if reasonable inquiries had been made, the fraud might have been discovered.
- (3) Persons deriving title under any purchaser entitled to the benefit of this section shall be entitled to the like benefit.
- (4) This section applies only to dealings effected after the commencement of this Act.

Section 204 provides protection for a purchaser in good faith who purchases property from an appointee where the appointment made by the donee is exercised in a way that creates a fraud on a power. Fraud, in this sense, does not necessarily mean a dishonest dealing but where the appointment is beyond the intent of the power.³⁶⁷

A purchaser (or a successor in title to a purchaser) who acquires for valuable consideration the property from the appointee is protected if the appointee is: at least 25 years old; a member of a class entitled to the property upon default of appointment; and has no notice of the fraud.

The protection extends only to the interest in such property to which the appointee was presumptively entitled under the trust in default of appointment³⁶⁸ immediately before the execution of the instrument. It has been suggested that this section probably prevents adverse situations from coming to the attention of the court.

³⁶⁷ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) at 13.140 and Young et al, *Annotated Conveyancing & Real Property Legislation (NSW)*, at [30485.5].

³⁶⁸ Less any advances to the appointee and any reduction due to a hotchpot provision. *Property Law Act 1974* (Qld) s 204(1A).

The purchaser in good faith may also have additional protection if the property in question is real property and after the sale it is registered under the *Land Title Act 1994* (Qld). This is because the land under the PLA is subject to the *Land Title Act 1994* (Qld).³⁶⁹

8.1.5. Section 205 – Disclaimer etc. of powers

Section 205 provides:

- (1) A person to whom any power, whether or not coupled with an interest, is given, may by deed disclaim, release or contract not to exercise the power, and after such disclaimer release or contract shall not be capable of exercising or joining in the exercise of the power.
- (2) On such disclaimer, release, or contract, the power may be exercised by the other person or persons or the survivor or survivors of the other persons to whom the power is given unless the contrary is expressed in the instrument creating the power.
- (3) Where such power is exercisable by any instrument which may or is required to be registered under any Act, the power may be released or disclaimed by a memorandum in the approved form which may be registered.
- (4) This section—
 - (a) does not apply to a power coupled with a duty; and
 - (b) applies to a power created by an instrument coming into operation whether before or after the commencement of this Act.

Section 205 of the PLA is drawn from the equivalent provisions in both the United Kingdom³⁷⁰ and in New South Wales.³⁷¹ The purpose of the section is to allow the donee of a power of appointment to release the power by deed. The section also provides that where necessary, the deed may be registered.

Section 205(4) states that the section does not apply to a power coupled with a duty. This is because it may be a breach of trust to release a duty.³⁷² It has been submitted that even though the equivalent provisions in the United Kingdom do not expressly exclude a power coupled with a duty, such a power cannot be released under the common law.³⁷³

³⁶⁹ *Property Law Act 1974* (Qld) s 5(1)(a).

³⁷⁰ *Law of Property Act 1925* (c. 20) (UK) ss 155-6.

³⁷¹ *Conveyancing Act 1919* (NSW) s 28.

³⁷² Peter Young et al, *Annotated Conveyancing & Real Property Legislation: New South Wales*, LexisNexis Butterworths, at 30470.10, referring to *Conveyancing Act 1919* (NSW) s 28 and citing *Re Wills Trust Deeds* [1964] CH 219; *Re Mills* [1930] 1 Ch 654 at 666.

³⁷³ Peter Young et al, *Annotated Conveyancing & Real Property Legislation: New South Wales*, LexisNexis Butterworths, at 30470.10, referring to *Conveyancing Act 1919* (NSW) s 28 at 30470.15. See also Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 108.

8.2. Is there a need for reform?

The main issue for consideration is to what extent powers of appointment are used in Queensland. There is little judicial consideration of the provisions in Part 13 of the PLA, which indicates either that the provisions work well or that the provisions are not being utilised.

It is understood that special powers of appointment are often used in discretionary trusts. It is also understood that sections 202 and 203 of the PLA are generally superseded by the express terms of the appointment. This means that the provisions are only relevant when the power of appointment itself is drafted in a deficient manner.

Questions

48. In your experience, to what extent are powers of appointment being used in Queensland? Are powers of appointment commonplace or are they rarely seen?

49. Are the current provisions sufficiently understood so that they cause no problems in practice, or are the provisions under-utilised due to being misunderstood?

8.3. Other jurisdictions

The provisions in Queensland, as in other Australian states and territories, are largely drawn from the relevant UK legislation, the *Law of Property Act 1925*.³⁷⁴ New South Wales,³⁷⁵ Victoria,³⁷⁶ the Northern Territory³⁷⁷ and Western Australia³⁷⁸ all have provisions that are virtually identical to the provisions in Queensland. Tasmania,³⁷⁹ South Australia³⁸⁰ and the Australian Capital Territory³⁸¹ each have at least some provisions that are equivalent.

8.3.1. New Zealand

In 2007, following an extensive review of the property law, the *Property Law Act 2007* (NZ) replaced the previous act from 1952.³⁸² The 1952 Act had contained a provision stating that a power of appointment (other than by a will) would be valid when exercised by a deed executed in accordance with the Act, even if the instrument creating the power required some additional form of execution

³⁷⁴ (c. 20) (UK) Part VI ss 155-160.

³⁷⁵ *Conveyancing Act 1919* (NSW) ss 28-29A, 41.

³⁷⁶ *Property Law Act 1958* (Vic) Division 6 ss 155-160.

³⁷⁷ *Law of Property Act* (NT) Part 12 ss 203-207.

³⁷⁸ *Property Law Act 1969* (WA) Part X, ss 93-98.

³⁷⁹ *Conveyancing and Law of Property Act 1884* (Tas) ss 76-78. The Tasmanian provisions are equivalent to PLA s 205 and s 202.

³⁸⁰ *Law of Property Act 1936* (SA) Part 5 ss 57-58. The SA provisions are equivalent to *Property Law Act 1974* (Qld) ss 202-203 and s 205.

³⁸¹ *Civil Law (Property) Act 2006* (ACT) s 222 and Division 2.3.4 ss 228-229. The ACT provisions are equivalent to *Property Law Act 1974* (Qld) ss 202-203.

³⁸² *Property Law Act 1952* (NZ).

(equivalent to PLA s 202(1)). The 1952 Act also provided that a power of appointment would be valid even if some objects do not receive a share of the property (equivalent to PLA s 203).

The 2007 New Zealand Act retained these provisions, but with the language substantially modernised. The relevant provisions have been extracted in the appendix.

8.4. Options

There are three options for Part 13 of the PLA. These are: retain the provisions but with modernised language; repeal the provisions; or modify the provisions.

There is little judicial consideration of the provisions in Part 13 of the PLA. This may indicate that the law is so settled in this area and the provisions are so well understood that there is little need to resort to legal proceedings. However, it may also indicate that the provisions are not understood or that they serve little purpose.

Questions

- 50. Is there a need to retain the existing provision relating to powers of appointment contained in Part 13 of the PLA? Why or why not?**
- 51. If the existing provisions are retained, should the language be modernised to make the provisions easier to understand? Why or why not?**
- 52. Are there any amendments to the provisions of Part 13 that may be appropriate or necessary?**

Annexure D – Property Law Act 2007 (NZ) sections 45-47

NEW ZEALAND PROVISIONS

16 Powers of appointment

- (1) An appointment to be made by deed or writing (but not a will) is valid if it is executed in accordance with the requirements for the execution of a deed.
- (2) Subsection (1) applies even though the instrument conferring the power of appointment requires some additional or other formality.
Compare: 1952 No 51 ss 9, 11

73 Release and disclaimer of powers

- (1) This section—
 - (a) applies to a power to deal with or dispose of property whether or not the person who can exercise the power has an interest in the property to which the power relates; but
 - (b) does not apply to the power if it is a power in the nature of a trust.
- (2) The person who can exercise a power may—
 - (a) release the power by deed or contract; or
 - (b) disclaim the power by deed.
- (3) The release of a power extinguishes the power.
- (4) If a power is disclaimed—
 - (a) the person who disclaimed the power may not exercise or join in the exercise of the power; but
 - (b) any other person who can exercise the power, and who has not disclaimed it, may continue to exercise the power.
- (5) Subsection (4)(b) applies subject to the terms of the instrument creating the power.
Compare: 1952 No 51 s 34

74 Power to appoint among different objects

- (1) If an instrument creates a power to appoint property among several objects, the power may be exercised—
 - (a) to exclude some or all of those objects;
 - (b) to appoint shares of different sizes to 1 or more of them.
- (2) Subsection (1) applies subject to the terms of the instrument creating the power.
Compare: 1952 No 51 s 40

9. Part 14 – Perpetuities and accumulations (ss 206-222)

9.1. Overview and purpose

Part 14 of the *Property Law Act 1974* (Qld) (**PLA**) modifies the common law doctrine known as the rule against perpetuities (the **rule**).³⁸³ In Queensland, the common law rule against perpetuities will apply³⁸⁴ to interests in property that might vest at too late a date. The ‘modern’ rule against perpetuities³⁸⁵ may be better described as the rule against remoteness of vesting. The rule can be summed up as follows:

*No interest in property is valid unless it must vest (take effect), if at all, earlier than 21 years after the death of a person alive at the time the interest was created.*³⁸⁶

The modern rule against perpetuities is ‘as modern as the end of the seventeenth century.’³⁸⁷ It has been described as having an ‘inner consistency’ that allows it to be applied with ‘remorseless logic and predictable outcome’.³⁸⁸

It has been argued that the rule serves at least two important public policy functions. These functions are: limiting ‘dead hand’ control of property by striking a balance between the freedom of disposition (that is, the ability of a person to deal with their property as they wish),³⁸⁹ and protecting the public interest by ensuring that property is not indefinitely tied up in trusts.³⁹⁰

Despite this, the rule is not well understood, even among the legal profession.³⁹¹ The rule has been described as ‘complex’,³⁹² abstruse, unrealistic, capricious and misapplied.³⁹³

³⁸³ For an overview of the rule against perpetuities, see Les McCrimmon, ‘Understanding the Rule Against Perpetuities: Adopting a Five Step Approach to a Perpetuities Problem,’ (1997) 5(2-3) *Australian Property Law Journal*, 130-144.

³⁸⁴ Subject to the statutory modification, discussed below.

³⁸⁵ The modern rule is so called to contrast it with the ‘old rule’ against perpetuities (also known as the rule in *Whitby v Mitchell* (1890) 44 Ch D 85). The old rule was abolished in Queensland by *Property Law Act 1974* (Qld) s 216. For a discussion of the old rule, see Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1202]-[1205].

³⁸⁶ Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No 40, July 2014 at 7.

³⁸⁷ JD Merralls, ‘The Application of the Rule Against Perpetuities to Natural Resources Agreements’ (2007) *Australian Mining and Petroleum Yearbook*, 214-227 at 220.

³⁸⁸ Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1207].

³⁸⁹ Carl Emery, ‘Do We Need a Rule Against Perpetuities?’ (1994) 57 (4) *Modern Law Review*, 602-610 at 602-605.

³⁹⁰ Kellee Clark, ‘The Rule Against Perpetuities,’ (2007) 11(3) *Otago Law Review*, 495-512 at 500-502.

³⁹¹ See Les McCrimmon, ‘Understanding the Rule Against Perpetuities: Adopting a Five Step Approach to a Perpetuities Problem,’ (1997) 5(2-3) *Australian Property Law Journal*, 130-144 at 130.

³⁹² Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1207].

³⁹³ Barton Leach, ‘Perpetuities: Staying the Slaughter of the Innocent,’ (1952) 68 *Law Quarterly Review*, 35-59 at 35.

The common law rule has been modified in all Australian states³⁹⁴ and territories except South Australia where it was abolished completely in 1996.³⁹⁵ A number of jurisdictions overseas have also abolished the rule.³⁹⁶ The discussion below focusses on the operation of the rule as modified by statute in Queensland.³⁹⁷

9.1.1. Current law in Queensland – statutory modification of the rule

In Queensland, the common law rule against perpetuities applies to all dispositions of an interest in property. Where the strict application of the common law rule would result in the interest being invalid, the statutory modifications to the rule contained in Part 14 may operate to ‘save’³⁹⁸ the interest. The provisions of Part 14 were brought across from the *Perpetuities and Accumulations Act 1972 (Qld) (1972 Act)*, which was repealed when the PLA was enacted in 1974.

The 1972 Act modified the common law rule in line with similar modifications then in place in Victoria and Western Australia.³⁹⁹ The 1972 Act was repealed and re-enacted in the PLA. The relevant sections are discussed below.

9.1.2. Section 208 – Powers of appointment

As discussed at Part 8 above, the rule against perpetuities is applicable to the creation and the exercise of a power of appointment.⁴⁰⁰ In regards to the creation of the power (when the power is given by the donor to the donee) at common law, both a general power and a special power will be validly created if the power must become exercisable, if at all, within the perpetuity period.⁴⁰¹

Assuming the power has been validly created, the rule applies differently depending on whether the power is a general power or a special power. For a general power, the perpetuity period will apply from the exercise (i.e. when the property is appointed by the donee to the appointee or the object or objects) of the power. It is irrelevant if the power is or may be exercised outside of the perpetuity period from when the power was created. For a special power, however, the perpetuity will apply from the date the power is created.

³⁹⁴ *Property Law Act 1974 (Qld) ss 206-222; Perpetuities Act 1984 (NSW); Law of Property Act (NT); Perpetuities and Accumulations Act 1968 (Vic); Property Law Act 1969 (WA); Perpetuities and Accumulations Act 1992 (Tas); Perpetuities and Accumulations Act 1985 (ACT).*

³⁹⁵ *Property Law Act 1936 (SA) s 61.*

³⁹⁶ For example, Ireland: *Land and Conveyancing Law Reform Act 2009 (IRE) s 16.* See also New Zealand Law Commission, *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, ‘Perpetuities and the maximum duration of trusts’, at 17.7 and footnote 337.

³⁹⁷ For a discussion of the operation of the rule at common law, see Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, 183-206.

³⁹⁸ See Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, at [7.290].

³⁹⁹ Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No 7, 24 May 1971, 2.

⁴⁰⁰ The rule is also relevant when considering the validity of gifts over in default of appointment. See Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1285] to [1294].

⁴⁰¹ Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1286] and [1290].

This means that characterising the power as general or special is crucial to determine when the property must vest in order to avoid infringing the rule. It has been noted that a power may be special for some purposes and general for others.⁴⁰² This has led to a debate over whether there is in fact a third type of power that is a hybrid power.⁴⁰³ However, the PLA has provisions that eliminate the need to characterise the power.

Section 208 of the PLA provides that a power of appointment will be treated as a special power unless the power is exercisable by one person only and at all times could be exercised by that person to appoint the property to him or herself without the approval of any other person or compliance with any other condition.

Section 208(2) provides that if a power of appointment is only exercisable in a will, the power is to be treated as a general power if it would have been a general power had it been able to be exercised in a deed.

9.1.3. Section 209 – Power to specify perpetuity period

At common law, the perpetuity period is the life of a person or a group of people alive or in the womb at the time the interest is created plus 21 years. If no person or group is specified (or implied) as the life (or lives) in being, the perpetuity period is 21 years after the interest is created.

Section 209 of the PLA allows the instrument creating the interest to specify a period of up to 80 years or to specify a date of vesting (provided it is no more than 80 years from the date the interest is created). If no period or date is stated, the common law period will apply.

9.1.4. Section 210 – Wait and see rule

At common law, if there is any possibility that the interest will vest outside of the perpetuity period, the disposition is void. This is referred to as the ‘initial certainty rule’⁴⁰⁴ and it will apply even if subsequent facts prove that the interest will vest during the perpetuity period.

In the case of *Re Wood, Tullet v Colville*⁴⁰⁵ a testator provided in his will for gravel pits to be worked until exhausted, then sold with the proceeds divided between the testator’s living children. At the death of the testator, the pits were expected to be exhausted in four years (on the facts of the case, they were actually exhausted in six years). However, under the common law, only the facts in existence at the time of the disposition are relevant. At that time, there was a possibility, however unlikely, that the gravel pits would not be exhausted within the perpetuity period. Under the strict

⁴⁰² See, for example, JHC Morris and W Barton Leach, *The Rule Against Perpetuities*, Steven & Sons, (2nd ed, 1962) at 136; Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) 1284.

⁴⁰³ See JHC Morris and W Barton Leach, *The Rule Against Perpetuities*, Steven & Sons, (2nd ed, 1962) 135-138.

⁴⁰⁴ Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1232]-[1235].

⁴⁰⁵ [1894] 3 Ch 381, as discussed in Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, at 7.120.

application of the initial certainty rule, this meant there was no initial certainty and the gift was void.⁴⁰⁶

Section 210 of the PLA modifies this aspect of the common law rule to allow a court to 'wait and see' whether the disposition will vest within the perpetuity period. An interest in property will only be void if it becomes certain that the interest will not vest within the perpetuity period. Section 211 allows a person to apply to the court for a declaration of the validity of the disposition of the property.

9.1.5. Section 212 – Presumptions and evidence as to future parenthood

A further aspect of the initial certainty rule requires that a group of people (or class) that is capable of increasing after the creation of the interest cannot be lives in being for the disposition. Lives in being are the people alive or in the womb at the time the interest in property is created whose lives are used to measure the perpetuity period.⁴⁰⁷ The perpetuity period will be the length of the life of the last member of the class plus 21 years. If the members of the class could increase after the disposition of the interest then it is possible that the interest could vest outside the perpetuity period. As such, there is no initial certainty and the gift will infringe the rule against perpetuities.

This has affected the validity of dispositions that use a person's children as the lives in being. Under the common law, there is a conclusive presumption of fertility which presumes that a person of any age can have a child. This has led to examples of the 'fertile octogenarian' and 'precocious toddler.'⁴⁰⁸ It is at least theoretically possible that a person can beget a child at any age. If the children of a person who is living at the time of the disposition are used as the lives in being, this creates a possibility (however improbable) that the person will have more children and class of lives in being may increase which would mean that the interest could vest outside of the perpetuity period.⁴⁰⁹

Section 212 of the PLA modifies this aspect of the common law rule by providing a rebuttable presumption that a male is able to father a child only if over the age of 12 and that a female is able to have a child between the ages of 12 and 55.

⁴⁰⁶ Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1235] for further discussion of *Re Wood*.

⁴⁰⁷ See Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, at [7.50] to [7.110] and Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1222] – [1228] for further discussion of the concept of life or lives in being.

⁴⁰⁸ See Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1236]; Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, at [7.110].

⁴⁰⁹ No such problem arises if the children of a person who has pre-deceased the appointor or testator are used as the class of lives in being.

9.1.6. Section 213 – Reduction of age and exclusion of class members to avoid remoteness

The gift of an interest in property to a beneficiary upon that person obtaining a specified age may offend the rule against perpetuities if the age is greater than 21 years. Consider the following example:

To such of A's children as shall reach 25 years of age.

In this example A is the life in being. It is possible that A may have a child and then die when that child is less than 4. This would mean the gift to A's children would vest 25 years after A's death which is longer than the 21 years allowable under the common law rule. At common law, this disposition would be void. Section 213(1) of the PLA allows the specified age to be reduced as low as 18 in order to save the disposition from being void for remoteness.

At common law, the class of beneficiaries must be certain at the time the interest is created. This is known as the 'all or nothing rule.'⁴¹⁰ Section 213(3) of the PLA modifies this aspect of the common law rule by excluding potential members of the class of beneficiaries or unborn persons who may become members of the class of beneficiaries if their inclusions would cause the disposition to fail for remoteness. The interest of any excluded members will accrue to the benefit of the members of the class whose interests do vest.⁴¹¹

9.1.7. Section 214 – Unborn husband or wife

The initial certainty rule requires that the life or lives in being must be ascertainable at the time the disposition creating the interest in property comes into effect. This means that at common law, any disposition of a contingent remainder to the children of the widow or widower of a person who is a life in being will be void for offending the rule against perpetuities.⁴¹² Consider the following example:

*To A for life, remainder for life to any wife who survives A, remainder to any children of A living at the death of the survivor of A and that wife.*⁴¹³

In what has been described as the 'unborn widow' issue,⁴¹⁴ there is a possibility that the widow (or widower) of the person who is the life in being (A) for the disposition may not have been born at the time of the disposition. This means that any contingent remainder to the children of that widow or widower could vest outside of the perpetuity period.

⁴¹⁰ See Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1244]; Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, at [7.170]. Note that there are some exceptions to this at common law, referred to as 'class-closing rules'. See Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1246]-[1254]; Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, at [7.180]-[7.220].

⁴¹¹ See Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters at [14.260].

⁴¹² See Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, at [7.350].

⁴¹³ This example taken from Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1234].

⁴¹⁴ See Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1234].

Section 214 of the PLA modifies this aspect of the common law rule by providing that the widow or widower of a person who is a life in being is deemed to be a life in being for any remainder to a charity, class or person who attains their interest on or after the death of the widow or widower or on the occurrence of a contingency during that person's lifetime.

9.1.8. Section 215 – Dependent dispositions

At common law, a subsequent interest, in itself valid, that is dependent on and ulterior to an earlier disposition that is invalid will also be invalid. Consider the following example:

To such of A's children as shall reach the age of 25, but if there is no such child then remainder to B.

As discussed above, the disposition to A's children is invalid at common law which means the subsequent interest to B is also invalid at common law. Section 215 of the PLA modifies this position and provides that an ulterior dependent interest will not be treated as invalid solely on the basis that the earlier interest is void.

9.1.9. Section 216 – Abolition of the rule against double possibilities

Section 216 of the PLA has the effect of abolishing the 'old rule' against perpetuities.⁴¹⁵ The effect of the provision is that a gift of an interest in property can be given to the unborn child of an unborn person, provided the gift will vest within the perpetuity period.

9.1.10. Section 217 – Restrictions on the perpetuity rule

Section 217 of the PLA provides that certain estates and interests in land are excluded from the operation of the rule against perpetuities.⁴¹⁶

9.1.11. Section 218 – Options and rights of pre-emption

At common law, the exercise of an option to acquire the reversionary interest on the term of the lease is void if the option could be exercised more than 21 years after the option was granted.⁴¹⁷ Section 218(1) of the PLA modifies this position and provides that the rule against perpetuities will not apply to such an option if the option is exercisable only by the lessee or the lessee's successors in title and the option ceases to be exercisable at or before one year following the determination of the lease.

⁴¹⁵ Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, at [7.30]. For further discussion of the 'old rule' against perpetuities, Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1202]-[1205].

⁴¹⁶ See Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters at [14.480].

⁴¹⁷ Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No 7 (24 May 1971) at 8; Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters at [14.500].

Section 218(2) deals with options (other than those covered in section 218(1), sometimes referred to as options in gross⁴¹⁸) and rights of pre-emption (sometimes described as a right of first refusal).⁴¹⁹ The effect of section 218(2) is to restrict the exercise of an option in gross or a right of pre-emption to a period of 21 years after that option or right is granted. After 21 years, the option or right is void and no remedy is available in contract or otherwise.

It has been suggested that section 218(2) affirms the common law principle that an option to purchase and a right of pre-emption are subject to the rule at common law.⁴²⁰ However, there are conflicting views as to whether this is correct.⁴²¹

At common law, the rule against perpetuities does not apply to an option to renew a lease.⁴²² This position has been preserved in the PLA.⁴²³

9.1.12. Section 219 – Determinable interests

The disposition of an interest in property may be given in such a manner that the interest created is limited from the outset so that on the occurrence of some specified event (which may never occur) the interest will automatically revert back to the disposer. This is known as a determinable fee simple and the possibility that it may revert back to the disposer is known as a possibility of reverter.⁴²⁴

At common law, the rule against perpetuities did not apply to a possibility of reverter.⁴²⁵ Section 219(1)(a) amends this aspect of the common law rule to provide that a determinable fee simple that does not revert during the perpetuity period becomes a fee simple absolute.

The disposition of an interest in property may be given in such a manner that it is subject to a condition subsequent to the grant. The condition subsequent may be either:

- a condition on which the interest has been disposed of (in which case it may include a right of entry over the land to determine the disposition if the condition has been breached); or
- created by a resulting trust (a trust arising by operation of law where a grantor has not completely disposed of an interest in land and there is not a clear intention to give the beneficial interest to the person who has been given legal title).⁴²⁶

⁴¹⁸ See Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, at [7.410]; Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters at [14.510].

⁴¹⁹ See Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, at [7.410].

⁴²⁰ See Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No 7 (24 May 1971) at 8.

⁴²¹ Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) at 3.44-3.45. This issue is discussed below at 9.2.1.

⁴²² Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1276].

⁴²³ *Property Law Act 1994* (Qld) s 218(2)(b).

⁴²⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters at [14.550].

⁴²⁵ Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No 7 (24 May 1971) at 8; Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, at [4.400] and [7.420].

In either case, the condition subsequent may be void at public policy as a restraint on the alienation of land.⁴²⁷ If the determinable interest in the property is valid, sections 219(1)(b) and 219(1)(c) provide that the determinable interest will become an absolute interest if the resulting trust does not determine or the right of entry (or other right) is not exercised in the perpetuity period.

9.1.13. Section 222 – Accumulation of income

At common law, a settlor was free to provide that the income from property the subject of a disposition is to accumulate and, provided the rule against perpetuities was not infringed, the accumulation of income would be valid. This changed with the introduction of the *Accumulations Act 1800*⁴²⁸ in the United Kingdom. The 1800 UK Act applied in Queensland until 1973⁴²⁹ when the relevant provisions were replaced with the *Perpetuities and Accumulations Act 1972* (Qld). The 1972 Act was repealed and re-enacted in the PLA.

Section 222 of the PLA provides that the income earned from the property that has been settled or disposed of in a disposition may accumulate for the duration of the perpetuity period provided the gift of the accumulated income would itself be valid. This is a return to the common law as applied prior to the 1800 Act.

Section 222(2) of the PLA allows the beneficiary who is presently entitled, or group of people who collectively are entitled to 100% of the beneficial interest of the income being accumulated to apply to a court to stop the accumulation (and take possession) provided the person is 18 years of age (or the group of beneficiaries has closed) and can give a valid discharge.⁴³⁰

9.2. Is there a need for reform?

The *Perpetuities and Accumulations Act 1972* (Qld) amended the common law rule in Queensland and was based on equivalent legislation in the UK enacted in 1964.⁴³¹ The *Perpetuities and Accumulations Act 1972* (Qld) was repealed and the relevant provisions were re-enacted in the PLA in 1974.⁴³² The provisions have not been significantly altered in Queensland since then.

Recently, an increasing number of jurisdictions have, or are currently, reviewing the rule against perpetuities. In its review of the *Trusts Act 1973* (Qld), the QLRC commented that there is merit in

⁴²⁶ Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, at [7.420] citing *Butterworths Australian Property Law Dictionary* (Sydney, Butterworths, 1997) p 214.

⁴²⁷ See Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, at [3.990].

⁴²⁸ (UK) 39 & 40 Geo III c 98. For a discussion of the history behind the *Accumulations Act 1800* (also known as the Thelluson Act) see Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed 2014), at [7.440] to [7.470].

⁴²⁹ See Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No 7 (24 May 1971) at 10-11.

⁴³⁰ This is known as the rule in *Saunders v Vautier*. See Anne Wallace, et al, *Real Property Law in Queensland*, (Lawbook Co., 4th ed), 2014, at [7.480]. For a discussion on the rule in *Saunders v Vautier*, see Paul Matthews, 'The Comparative Importance of the Rule in *Saunders v Vautier*' (2006) 122 *Law Quarterly Review* 266-294.

⁴³¹ *Perpetuities and Accumulations Act 1964* (UK).

⁴³² With effect from 1 December 1975.

reviewing the rule against perpetuities.⁴³³ The QLRC observed that the rule is dealt with in the PLA and is thus outside the scope of a review of the *Trusts Act 1973* (Qld) but specifically mentioned the Centre’s review of the PLA.⁴³⁴

There has been an increasing trend toward modifying and even complete repeal of the rule. The United Kingdom has recently amended the rule to provide a set perpetuity period of 125 years and effectively abolished the rule in respect of commercial arrangements.⁴³⁵ The New Zealand Law Commission (**NZLC**) has recommended that the common law rule be of no application in New Zealand and that there be a set duration of 150 years for all trusts.⁴³⁶ The Northern Territory Law Reform Committee (**NTLRC**) has similarly recommended a set perpetuity period of 150 years.⁴³⁷

The Centre has drawn from a number of existing reviews in Australian and international jurisdictions to identify issues with the operation of the rule.⁴³⁸ In Queensland, key areas for consideration are: the complexity of the common law and statutory modifications; the appropriateness of the application of the rule to commercial transactions; and the appropriate location for the relevant provisions. Each of these issues is discussed further below. The Centre invites comments on these issues and any others that may be relevant in the Queensland context.

9.2.1. Complexity

The UK Law Commission in its 2000 review of the rule against perpetuities⁴³⁹ noted that the goal of reform should be to restrict the operation of the rule to situations where it still performs an essential role and to simplify the law to make it easier to understand and apply. It has also been noted that a central tenet of law reform is to simplify the law and that where the law is complex, the justification for retaining complexity must be compelling.⁴⁴⁰

⁴³³ Queensland Law Reform Commission, *A Review of the Trusts Act 1973*, Report No 71 (December 2013) chapter 3, at [33].

⁴³⁴ The QLRC noted that the *Property Law Act 1974* (Qld) is under review by the Centre. See Queensland Law Reform Commission, *A Review of the Trusts Act 1973*, Report No 71 (December 2013) chapter 3, at [33].

⁴³⁵ *Perpetuities and Accumulations Act 2009* (UK) (c 18).

⁴³⁶ New Zealand Law Commission, *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, ‘Perpetuities and the Maximum Duration of Trusts’, at R49.

⁴³⁷ Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No 40, July 2014 at 24.

⁴³⁸ These include the Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No 40, July 2014; New Zealand Law Commission, *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, ‘Perpetuities and the Maximum Duration of Trusts’; Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations*, 1998; Law Reform Commission New South Wales, *Report on Perpetuities and Accumulations*, LRC 26, 1976 ; Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000; Law Reform Committee of South Australia, *Seventy-Third Report of the Law Reform Committee of South Australia Relating to the Reform of the Law of Perpetuities*, (1984); Scottish Law Commission, *Discussion Paper on Accumulation of Income and Lifetime of Private Trusts*, Discussion Paper No 142 (January 2010).

⁴³⁹ Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations* (1998), at 2, para [1.3].

⁴⁴⁰ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000, 50 at [4.01].

The rule is not well understood, even among the legal profession.⁴⁴¹ It has been described as ‘complex’,⁴⁴² abstruse, unrealistic, capricious and misapplied.⁴⁴³ A number of jurisdictions have abolished the rule⁴⁴⁴ and others have simplified its operation by providing for a set perpetuity period⁴⁴⁵ (removing the requirement for reference to a life or lives in being).

It has been argued that the complexity generated by the rule and its statutory modifications is no longer necessary. Reforms such as abolishing the common law rule and relying solely on statute based rules with a fixed perpetuity period may go a long way to removing the complexity and uncertainty.⁴⁴⁶ The complexity of the rule may also be reduced by modifying the provisions (as discussed in sections 9.2.2 to 9.2.3 below) or by complete repeal of the rule (discussed at Option 2 in Part 9.4.2 below).

9.2.2. The appropriateness of the application of the rule to commercial transactions

The rule against perpetuities evolved in the context of family settlements. Over time it was extended to rights over property unconnected to family settlements. This has been described as a principal shortcoming of the rule because a sustainable rationale for the application is absent.⁴⁴⁷

In Queensland, the PLA limits the duration of options in gross and rights of pre-emption⁴⁴⁸ to a term of 21 years after the creation of the right.⁴⁴⁹ At the time this provision was drafted, the QLRC stated that it merely affirmed the common law principle that such options and rights are within the rule if they are not exercised within 21 years from being granted (and have not been exercised in that period).⁴⁵⁰ The relevant section of the PLA also expressly provides that after the 21 year period, no remedy is available in contract or otherwise for giving effect to the option or pre-emption or making

⁴⁴¹ See Les McCrimmon, ‘Understanding the Rule Against Perpetuities: Adopting a Five Step Approach to a Perpetuities Problem,’ (1997) 5(2-3) *Australian Property Law Journal*, 130-144 at 130.

⁴⁴² Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1207]

⁴⁴³ Barton Leach, ‘Perpetuities: Staying the Slaughter of the Innocent (1952) 68, *Law Quarterly Review*, 35-59 at 35(cited in Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No 40 (July 2014) at 7).

⁴⁴⁴ See New Zealand Law Commission Report 130, Chapter 17, ‘Perpetuities and the Maximum Duration of Trusts’, at 17.7 and footnote 337.

⁴⁴⁵ Such as the 80 year period in NSW: *Perpetuities Act 1984* (NSW) s 7.

⁴⁴⁶ Peter Sparkes, ‘How to Simplify Perpetuities’ (1995), *Conveyancer and Property Lawyer* (May-Jun), 212-223; Carl Emery, ‘Do We Need a Rule Against Perpetuities?’ (1994) 57(4) *Modern Law Review*, 602-610.

⁴⁴⁷ Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations* (1998), at 1.1, 1.11.

⁴⁴⁸ An option in gross or a right of pre-emption conferred by a will, or contained in a lease or an agreement for a lease is excluded: *Property Law Act 1974* (Qld) s 218(2)(a)-(b).

⁴⁴⁹ *Property Law Act 1974* (Qld) s 218(2).

⁴⁵⁰ Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No 7 (24 May 1971) at 8. However, see Peter Allen and Richard Cottee, ‘The Effect of the Rule Against Perpetuities on Pre-emptive Rights in Joint Ventures’ (1982) 4(1) *Australian Mining and Petroleum Law Journal*, 190-200 at 194 where it is argued that rights of pre-emption do not give rise to a proprietary interest and are merely contractual. It is also noted by the UK Law Commission in Report No 251 that it is unclear whether the rule against perpetuities applies to pre-emptive rights at common law: Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations* (1998), para 3.45

restitution for its lack of effect.⁴⁵¹ The QLRC noted that this was a reversal of the common law position which allowed a remedy in the form of damages or specific performance against the giver of the option.⁴⁵²

The 21 year duration is of particular concern in the context of joint venture agreements.⁴⁵³ Generally, a joint venture agreement will contain a right of pre-emption that requires any party to the joint venture to offer to sell their interest to the other joint venture participants prior to taking the sale to the open market. If the other parties in the joint venture decide not to accept the offer, the selling party is free to sell the interest elsewhere (hence the reason this right is sometimes referred to as a first right of refusal). This 21 year restriction serves no commercial purpose in the context of the operation of large resource joint ventures, which may be conducted over a period well in excess of 21 years.

It has been argued that there is a distinction between an option in gross and a right of pre-emption. For an option in gross, the grantee of the option has the right to exercise the option and call for the conveyance of the property. Options in gross are part personal contract⁴⁵⁴ and part property interest. A right of pre-emption, on the other hand, is different as the grantee of the right has no ability to call for the conveyance of the property.⁴⁵⁵ It has been argued that a right of pre-emption is a contractual right that could be an interest in land only from the time it is exercisable⁴⁵⁶ and thus should not be subject to the rule against perpetuities or limited to a time period.

New South Wales does not apply the rule against perpetuities to options or rights of pre-emption. The *Perpetuities Act 1984* (NSW) takes an exclusionary approach and provides that the rule against perpetuities does not apply to:

- any option to renew a lease of property;
- any option to acquire the reversionary interest in the property the subject of the lease;
- any right of pre-emption given for valuable consideration or in a will in respect of property; or
- any other option given for valuable consideration or by will to acquire an interest in property.⁴⁵⁷

⁴⁵¹ *Property Law Act 1974* (Qld) s 281(2).

⁴⁵² Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No 7, 24 May 1971, at 8.

⁴⁵³ JD Merralls, 'The Application of the Rule Against Perpetuities to Natural Resources Agreements' (2007) *Australian Mining and Petroleum Yearbook*, 214-227; Peter Allen and Richard Cottee, 'The Effect of the Rule Against Perpetuities on Pre-emptive Rights in Joint Ventures' (1982) 4(1) *Australian Mining and Petroleum Law Journal*, (1982) 4(1) pp 190-200.

⁴⁵⁴ To which the rule against perpetuities will not apply. See Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at [1277].

⁴⁵⁵ Peter Allen and Richard Cottee, 'The Effect of the Rule Against Perpetuities on Pre-emptive Rights in Joint Ventures' (1982) 4(1) *Australian Mining and Petroleum Law Journal*, 190-200 at 192-193.

⁴⁵⁶ JD Merralls, 'The Application of the Rule Against Perpetuities to Natural Resources Agreements' (2007) *Australian Mining and Petroleum Yearbook* 214-227 at 215.

⁴⁵⁷ *Perpetuities Act 1984* (NSW) s 15.

This section was included in the NSW legislation specifically to ensure that the rule against perpetuities would not apply to arrangements of a commercial nature.⁴⁵⁸

Until 2010, the UK legislation contained similar limitations to those in place in Queensland.⁴⁵⁹ In its 1998 review of the rule against perpetuities, the UK Law Commission recommended that the rule should not apply to commercial arrangements such as options, rights of pre-emption and similar rights in respect of land of a commercial nature.⁴⁶⁰ Rather than define 'commercial arrangements', the UK Law Commission recommended an inclusionary approach to the application of the rule that would operate by defining 'those interests to which the rule should apply rather than those to which it should not.'⁴⁶¹ This recommendation was accepted in the UK and as a result, most commercial interests are not caught by the application of the rule in the *Perpetuities and Accumulations Act 2009* (UK).⁴⁶²

It has been argued that the provisions in Queensland in relation to pre-emptive rights and options in gross should be removed or clarified. This may take the form of exempting options in gross and pre-emptive rights from the perpetuity period, as has been done in NSW. Alternatively, the term of validity for these types of rights, currently 21 years, could be extended to some other longer period such as 80 years or the full length of the perpetuity period. A third, and more radical approach (which is dependent on the any other changes to the rule as discussed below) is to follow the UK approach and completely re-think the rule against perpetuities in such a way that the rule no longer operates in relation to most commercial transactions.

⁴⁵⁸ Law Reform Commission New South Wales, *Report on Perpetuities and Accumulations*, LRC 26 (1976) at 60-61.

⁴⁵⁹ Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) at 3.34 to 3.46.

⁴⁶⁰ Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) at 7.35.

⁴⁶¹ Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) at 7.21.

⁴⁶² The UK approach is to list the interests to which the rule against perpetuities will apply. There are some exceptions and a power to specify exemptions in the future: *Perpetuities and Accumulations Act 2009* (UK) (c 18) ss 1-3.

Questions

53. Should the rule against perpetuities apply to options in gross and rights of pre-emption? Why or why not?
54. If the rule should continue to apply to options in gross and rights of pre-emption, should the length of time (currently 21 years) be extended to some other period (for example 80 years, or the full length of the perpetuity period)?
55. Should the rule against perpetuities apply to other commercial transactions? Why or why not?
56. If the rule should not apply to commercial transactions, should Queensland use an exclusionary approach (excluding specific property interests from the operation of the rule as in NSW) or an inclusionary approach (applying the rule only to specific, enumerated property interests, as in the UK)?

9.2.3. The appropriate location for the relevant provisions

Prior to being incorporated in the PLA, the provisions in Part 14 were located in a stand-alone act called the *Perpetuities and Accumulations Act 1972* (Qld). When the PLA was drafted, the QLRC thought it preferable that the relevant provisions be incorporated in the PLA.⁴⁶³

Dispositions of property to unborn people in Queensland, if they are made, usually arise in the case of testamentary trusts. Inter vivos settlements where such a disposition would be made in contemporary Queensland are extremely rare if not unknown.

Given this, there is a strong argument that the provisions governing and modifying the operation of the rule in Queensland belong either in the trusts legislation or in their own act. While the rule is concerned with property (hence the inclusion in the PLA) the rule only applies to property that is held on trust (held by a person for the benefit of another person). According to the QLRC, the Queensland Law Society has submitted that the rule against perpetuities should be dealt with in the trusts legislation, not in the PLA.⁴⁶⁴

The provisions relating to the rule could be placed into a stand-alone act dealing with perpetuities and accumulation of income as has been done in NSW,⁴⁶⁵ Victoria,⁴⁶⁶ Tasmania⁴⁶⁷ and the Australian Capital Territory.⁴⁶⁸

⁴⁶³ Two reasons were given: first, to accord with the approach in other states and second, because the PLA was designed to embrace all property rights in general. See Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109.

⁴⁶⁴ Queensland Law Reform Commission, *A Review of the Trusts Act 1973*, Report No 71 (December 2013), chapter 3, at [30].

⁴⁶⁵ *Perpetuities and Accumulations Act 1984* (NSW).

⁴⁶⁶ *Perpetuities and Accumulations Act 1968* (Vic).

Questions

57. Should the provisions relating to perpetuities remain in the PLA?

58. If not, should the provisions be in a stand-alone act or part of the relevant trusts legislation?

9.3. Other jurisdictions

As discussed, many jurisdictions both overseas and in Australia have recently reviewed, or are currently reviewing, the operation of the rule against perpetuities. Both the Northern Territory⁴⁶⁹ and New Zealand⁴⁷⁰ have recently released discussion papers considering the operation of the rule against perpetuities and recommending a fixed perpetuity period. In the UK, the law in relation to perpetuities was significantly amended in 2009.⁴⁷¹

In 1976, the Law Reform Commission NSW said of the rule that ‘we know of no considerable body of opinion calling for its abolition.’⁴⁷² In the nearly 40 years since that report, however, this has changed significantly. South Australia abolished the rule completely in 1994⁴⁷³ and an increasing number of law reform bodies have called for the abolition of the rule,⁴⁷⁴ including Ireland.⁴⁷⁵

The following parts of this section outline modifications to the rule that have been implemented or suggested in a number of these jurisdictions.

9.3.1. New South Wales

NSW enacted the *Perpetuities Act 1984* (NSW) (**NSW Act**) to modify the application of the rule. The NSW Act contains many of the same statutory modifications as are contained in the PLA, including a ‘wait and see’ period,⁴⁷⁶ age reduction and class closing provisions.⁴⁷⁷

Unlike Queensland, where the settlor can choose either an 80 year fixed period or use a life in being plus 21 years, in NSW the perpetuity period is for a fixed period of 80 years.⁴⁷⁸ This means that the

⁴⁶⁷ *Perpetuities and Accumulations Act 1992* (Tas).

⁴⁶⁸ *Perpetuities and Accumulations Act 1985* (ACT).

⁴⁶⁹ Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No 40 (July 2014).

⁴⁷⁰ New Zealand Law Commission, *Review of the Law of Trusts*, Report 130, Chapter 17, ‘Perpetuities and the Maximum Duration of Trusts’ (2013).

⁴⁷¹ *Perpetuities and Accumulations Act 2009* (UK) (c. 18).

⁴⁷² Law Reform Commission New South Wales, *Report on Perpetuities and Accumulations*, LRC 26 (1976) 11 at 2.4.

⁴⁷³ *Law of Property Act 1936* (SA) s 61.

⁴⁷⁴ See Kellee Clark, ‘The Rule Against Perpetuities,’ (2007) 11(3) *Otago Law Review*, 495-512 at 507.

⁴⁷⁵ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000.

⁴⁷⁶ *Perpetuities Act 1984* (NSW) s 8.

⁴⁷⁷ *Perpetuities Act 1984* (NSW) s 9.

⁴⁷⁸ *Perpetuities Act 1984* (NSW) s 7.

concept of a life or lives in being is irrelevant for determining the perpetuity period.⁴⁷⁹ This approach was adopted for several reasons,⁴⁸⁰ including that it approximates the common law period and that it avoids the need for provisions directed at the 'unborn spouse' or presumptions as to parenthood.⁴⁸¹

As discussed above, in NSW the rule against perpetuities does not apply to options or to rights of pre-emption.

9.3.2. South Australia

Following the recommendation of the Law Reform Committee of South Australia (**LRC SA**),⁴⁸² the South Australian government abolished the rule in 1994.⁴⁸³ It was felt that other legislation made it unlikely that a trust would endure for over one hundred years and that the rationale of limiting dead hand control of property was not sufficient to justify retaining the rule.⁴⁸⁴ The LRC SA noted that the *Trustee Act 1936* (SA)⁴⁸⁵ gives the court wide powers to authorise a trustee to deal with property and do or abstain from doing an act or thing which, if not for the authorisation of the court, would be a breach of duty. The legislation further gives the court wide powers to vary or revoke a trust and distribute the property or resettle the trust property.⁴⁸⁶

In addition, to compensate for the abolition of the rule, South Australia enacted increased powers for the court, on application by specified parties, to:

- vary the terms of a disposition if, after 80 or more years, there remain interests that have not vested, so that those interests vest immediately; or
- if the interests cannot, or are unlikely to, vest within 80 years after being created, to vary the disposition so that the interests will vest within that period.⁴⁸⁷

The South Australian legislation retained class closing rules⁴⁸⁸ and gives the court powers to include members in a class who would be excluded by the operation of the statutory rules.⁴⁸⁹ These provisions are in place to ensure that the person or class of persons entitled to an interest under a trust can be ascertained.

⁴⁷⁹ The Commission initially recommended allowing the settlor to choose the common law period or a fixed 80 year period: Law Reform Commission New South Wales, *Report on Perpetuities and Accumulations*, LRC 26, (1976) at 27.

⁴⁸⁰ See, Mr Gordon, Legislative Assembly NSW, 21 September 1983 at 1050-1051.

⁴⁸¹ As contained in the *Property Law Act 1974* (Qld) at ss 212 and 214.

⁴⁸² Law Reform Committee of South Australia, *Seventy-Third Report of the Law Reform Committee of South Australia Relating to the Reform of the Law of Perpetuities* (1984).

⁴⁸³ *Law of Property Act 1936* (SA) s 61.

⁴⁸⁴ Law Reform Committee of South Australia, *Seventy-Third Report of the Law Reform Committee of South Australia Relating to the Reform of the Law of Perpetuities* (1984) at 12.

⁴⁸⁵ Section 59B.

⁴⁸⁶ *Trustee Act 1936* (SA) s 59C.

⁴⁸⁷ *Law of Property Act 1936* (SA) s 62.

⁴⁸⁸ *Law of Property Act 1936* (SA) s 60.

⁴⁸⁹ *Law of Property Act 1936* (SA) s 60A.

9.3.3. Northern Territory

The rule against perpetuities in the Northern Territory is largely in line with Queensland and other Australian states and territories in terms of containing a wait and see period, class closing provisions and a choice between the common law (life in being plus 21 years) or an 80 year perpetuity period.⁴⁹⁰

In July 2014, the NTLRC released its *Report on Perpetuities*⁴⁹¹ (**NTLRC Report No 40**) which considered the options of reform or abolition of the rule. The NTLRC Report No 40 surveys a number of reviews which have taken place in international jurisdictions before recommending that it is time to abolish reference to the common law and to provide for a fixed perpetuity period of 150 years.⁴⁹²

9.3.4. United Kingdom

Prior to 2010, the legislation relating to perpetuities in the UK was very similar to that which is currently in place in Queensland.⁴⁹³ The relevant legislation provided for a choice between the common law (life in being plus 21 years) or an 80 year perpetuity period, wait and see provisions and included class closing and age-reduction provisions.⁴⁹⁴

In 1998, the UK Law Commission released *Report No 251: The rules against perpetuities and excessive accumulations*⁴⁹⁵ which considered the rule against perpetuities. The UK Law Commission considered a number of submissions from interested parties in making recommendations for reform (rather than a complete abolition).⁴⁹⁶

Following the UK Law Commission's recommendations, the *Perpetuities and Accumulations Act 2009* (UK) has significantly amended the relevant legislation to exclude most commercial transactions,⁴⁹⁷ and most significantly, to provide for a set perpetuity period of 125 years.⁴⁹⁸

Generally, the previous legislation and the common law continue to apply to trusts executed prior to the commencement of the *Perpetuities and Accumulations Act 2009* (UK) although there is an 'opt in' provision which allows a trustee of an existing trust to choose a 100 year perpetuity period if it is not reasonably practicable to ascertain whether the lives in being have ended.⁴⁹⁹

⁴⁹⁰ *Law of Property Act* (NT) part 11 (ss 183-202).

⁴⁹¹ Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No 40 (July 2014).

⁴⁹² Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No 40 (July 2014) at 17.

⁴⁹³ As discussed above at 9.1.2 to 9.1.13. Note that one significant difference relates to the rules against accumulations (*Property Law Act 1974* (Qld) s 222). In the UK income could not accumulate for the whole of the perpetuity period.

⁴⁹⁴ Anna Heywood, 'Perpetuities and Accumulations' (2010) 42 *Bracton Law Journal* 68-76 at 70-71.

⁴⁹⁵ Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations*, 1998.

⁴⁹⁶ Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations*, 1998, at 8, para [1.18].

⁴⁹⁷ See discussion above at Part 9.2.2.

⁴⁹⁸ *Perpetuities and Accumulations Act 2009* (UK) (c. 18) s 5.

⁴⁹⁹ *Perpetuities and Accumulations Act 2009* (UK) (c. 18) s 12.

9.3.5. New Zealand

In New Zealand, the statutory modifications relating to the rule are similar to those in place in Queensland and the other jurisdictions discussed above.⁵⁰⁰

In 2013, the NZLC released *Review of the Law of Trusts: A Trusts Act for New Zealand*.⁵⁰¹ The NZLC noted a number of problems with the existing law but declined to recommend abolition of the rule as it was felt that the tax system in New Zealand does not discourage trusts of long duration.⁵⁰²

Despite this, the NZLC felt that an appropriate way to address some of the current issues is to modify the rule against perpetuities and provide for an extended perpetuity period of 150 years.⁵⁰³ While it was recommended that this new period apply to new and existing trusts, the NZLC recommended that existing trusts not automatically be able to extend the duration of the trust unless this is done according to the terms of the trust deed, by agreement of the beneficiaries or by applying to the court for an approval of the variation.⁵⁰⁴

The recommendations of the NZLC have not been implemented in legislation to date.

9.3.6. Ireland

Ireland abolished the rule against perpetuities in 2009⁵⁰⁵ following a report of the Irish Law Reform Commission (ILRC).⁵⁰⁶ The ILRC's recommendations in relation to the rule against perpetuities were supported by further recommendations for greater powers allowing the variation of trust deeds.⁵⁰⁷ It was felt that the purposes served by the rule in the modern world are at best slight.⁵⁰⁸ The ILRC felt that the introduction of a 'wait and see' period would create as many problems as it solved.⁵⁰⁹

The ILRC considered and dismissed the key rationales generally used to support the rule's existence and further identified a number of arguments against the rule.⁵¹⁰ It was noted that operation of the rule generally catches ordinary, reasonable plans from people whose will breaches the rules due to

⁵⁰⁰ *Perpetuities Act 1964 (NZ)* ss 6-8.

⁵⁰¹ New Zealand Law Commission, *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, 'Perpetuities and the Maximum Duration of Trusts'.

⁵⁰² New Zealand Law Commission, *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, 'Perpetuities and the Maximum Duration of Trusts', 220 at [17.7]

⁵⁰³ New Zealand Law Commission, *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, 'Perpetuities and the Maximum Duration of Trusts', Recommendation R49.

⁵⁰⁴ Unlike the UK position, in the New Zealand Law Commission did not feel that trustees should be able to unilaterally adopt a new vesting date. See New Zealand Law Commission, *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, 'Perpetuities and the Maximum Duration of Trusts', at paras [17.26-17.30].

⁵⁰⁵ *Land and Conveyancing Law Reform Act 2009 (IRE)* s 16.

⁵⁰⁶ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000.

⁵⁰⁷ Irish Law Reform Commission, *Report on the Variation of Trusts*, LRC 63-2000.

⁵⁰⁸ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000 at 50.

⁵⁰⁹ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000 at 21, para [2.23].

⁵¹⁰ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000 at 50-61.

the ignorance or oversight of the solicitor preparing the will. The result is that perfectly reasonable objectives are held invalid.⁵¹¹

The ILRC noted several further reasons in support of abolishing the rule. First, the socio-economic background in Ireland is different to that in England. Ireland does not have the same 'long established landed gentry'.⁵¹² It was further noted that the taxation of discretionary trusts acts as a further deterrent against the establishment of lengthy trusts.⁵¹³ According to the ILRC, discretionary trusts are taxed at a 6% one-off charge on the value of the assets with a 1% annual charge thereafter.⁵¹⁴

9.3.7. Scotland

Scotland has never had a rule against perpetuities. The UK Law Commission commented on this in its 2000 review of the rule where it was noted that just because settlors may create perpetual trusts does not mean that they will.⁵¹⁵ Although perpetual trusts can be created in Scotland, the UK Law Commission noted that these were generally for some public purpose. Reference was made to a private perpetual trust created in the 18th century that eventually became impossible to administer as the identity of the beneficiaries became uncertain.⁵¹⁶

According to the UK Law Commission, Scotland has other limits on the duration of trust property.⁵¹⁷ This includes rules restricting the accumulation of income⁵¹⁸ and legislation that prohibits 'successive liferents'. A liferent is broadly equivalent to a life interest.⁵¹⁹ In Scotland, if the life interest is created in favour of a person who is not yet alive or in utero at the time the interest is created, then the life interest will be treated as absolute once the first person comes into possession and is of full age.⁵²⁰

⁵¹¹ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000 at pp 55-56.

⁵¹² Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000 at 57, para 4.20.

⁵¹³ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000 at 57.

⁵¹⁴ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000 at 57, para 4.21.

⁵¹⁵ Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) 20-23.

⁵¹⁶ Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) at 22, para 2.36

⁵¹⁷ Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) at 21, para 2.34

⁵¹⁸ These rules play a greater role in limiting perpetual trusts than is the case in the UK: Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) 21 at [2.35].

⁵¹⁹ Scottish Law Commission, *Discussion Paper on Accumulation of Income and Lifetime of Private Trusts*, Discussion Paper No 142 (January 2010), 2.

⁵²⁰ For a discussion of the Scottish approach to life interests, see Scottish Law Commission, *Discussion Paper on Accumulation of Income and Lifetime of Private Trusts*, Discussion Paper No 142 (January 2010), 23-32.

The Scottish Law Commission has recently considered the operations of provisions relating to the duration of trusts and has recommended repealing the rules restricting successive liferents. However, they have also recommended against adopting a rule against perpetuities.⁵²¹

9.4. Options

Essentially, there are three options to address the issues identified with the rule in Queensland. These options are: to retain the division in its current form; repeal the division (abolish the rule), possibly replacing it with something else or a web of legislation across various areas to limit the length of trusts (if this is determined to be a desirable objective); or finally, to modify the division.

9.4.1. Option 1 – Retain the Division in its current form

The first option is to leave the rule, and the existing statutory modifications as contained in the PLA, as is. The provisions have been unchanged since 1972 and are a re-enactment of the 1964 UK provisions. There have been very few cases that consider the operation of these provisions. This may be an indication that the rules, though complex, are at least sufficiently understood to avoid creating many problems.

Consider the example of a disposition in a will:

To A for life, then to such of A's children as shall reach 21 years of age.

The interest in this disposition does not infringe the common law rule, as any interest to A's children must vest (if at all) within 21 years after A's death. A is deemed to be the life in being for the gift. It is valid in Queensland and recourse to the statutory provisions of the PLA is not needed.

If there is no change to the rule, such dispositions will continue to be valid according to the common law rules and the statutory modifications will remain to save the gift in particular situations (as discussed at 9.1.2 to 9.1.13 above).

Question

59. Should the rule against perpetuities (and its statutory modifications in the PLA) be retained in its current form in Queensland?

9.4.2. Option 2 – Repeal the Division

A second option is to repeal the rule. While this is a somewhat radical approach to the issue, there are an increasing number of jurisdictions around the world that have adopted this approach.

⁵²¹ Scottish Law Commission, *Discussion Paper on Accumulation of Income and Lifetime of Private Trusts*, Discussion Paper No 142 (January 2010), 99.

Repealing the rule would mean that property held on trust could be held indefinitely, or in perpetuity. Any income produced by the property could be accumulated during that time.⁵²²

It has been noted that just because it is possible to create a perpetual trust does not mean that people will. Scotland has never had a rule against perpetuities and is now considering removing the remaining obstacles that would prevent the creation of perpetual private trusts.⁵²³

The UK Law Commission decided against recommending the repeal of the rule, largely based on the rationale that dead hand control of property into the future is undesirable (even if the economic consequences of abolition or removal of the rule are unknown).⁵²⁴ However, the UK Law Commission felt that the rule should operate as 'no more than a backstop to prevent unreasonable dispositions.'⁵²⁵

An express abolition of the rule may require other legislative changes to limit remote vesting of property. For example, it may be necessary expand the powers of the courts to vary trusts.

Under the existing trusts legislation in Queensland, the court has the ability to give trustees additional powers⁵²⁶ and to order the variation of trusts.⁵²⁷ Additionally, the PLA codifies the common law rule known as the rule in *Saunders v Vautier*,⁵²⁸ which allows the beneficiaries of a trust who are presently entitled to 100% of the trust property and are all of legal age to apply to the court to end the accumulation of income in the trust and to take a transfer of the capital and the accumulated income.

However, if the rule against perpetuities is abolished or repealed, it may be desirable to follow the South Australian approach and give the court the power to order the immediate vesting of property that has not vested within a specified period of time (such as 80 years or 100 years) or to order the future vesting of property that is unlikely to vest within the set time.⁵²⁹

Alternatively, the Scottish Law Commission has proposed allowing the courts (on application) to review a trust after a set period of time (such as 25 years) to take account of materially changed

⁵²² The rule in *Saunders v Vautier*, as part of the common law, would continue to allow those beneficiaries under a trust that are presently entitled to 100% of the benefit of the trust to seek a court order to end the accumulation of income and distribute the property.

⁵²³ Scottish Law Commission, *Discussion Paper on Accumulation of Income and Lifetime of Private Trusts*, Discussion Paper No 142 (January 2010), 99.

⁵²⁴ Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) at 20, para [2.32]. This approach has been criticised. See TP Gallanis, 'The Rule Against Perpetuities and the Law Commission's Flawed Philosophy,' (2000) 59(2)*Cambridge Law Journal* July 2000 pp 284-293.

⁵²⁵ Law Commission (United Kingdom), *Report No 251: The Rules Against Perpetuities and Excessive Accumulations*, 1998, at 22, para [2.37].

⁵²⁶ *Trusts Act 1973* (Qld) s 94.

⁵²⁷ *Trusts Act 1973* (Qld) s 95.

⁵²⁸ *Property Law Act 1974* (Qld) s 222(2), discussed above at 9.1.13.

⁵²⁹ As implemented in South Australia *Law of Property Act 1936* (SA) s 62.

circumstances.⁵³⁰ This power is proposed as an alternative to introducing a rule against perpetuities or a set perpetuity period.⁵³¹

In addition to expanding the powers of the court, new taxation structures could be implemented to discourage trusts of overly long duration.⁵³² For example, consideration may be given to following the Irish approach to taxing discretionary trusts with both an initial and annual percentage based on the value of the assets.⁵³³

Questions

60. Should the rule against perpetuities be abolished? Why or why not?

61. If yes, are there any other legislative modifications (to any area of law) that are necessary or desirable to achieve a similar objective as the rule is intended to achieve?

62. Should the courts be given increased powers to order the variation of a trust deed and order the vesting of property?

9.4.3. Option 3 – Modify the Division

A third option is to modify the division. This could involve a range of simple modifications to the existing legislation or sweeping changes that effectively re-write the rule but leave the basic principle limiting the time in which property interests must vest.

For example, it will require very little legislative drafting to achieve the result of excluding options in gross or pre-emptive rights from the operation of the rule.⁵³⁴ Similarly, it may require little legislative drafting to extend the maximum perpetuity period⁵³⁵ or provide a single period of a set number of years (effectively making reference to a life in being unnecessary as adopted in NSW). These changes would have a significant practical effect but could be achieved with very little modification to the existing provisions.

Alternatively, the division could be significantly modified in terms of the aims and objectives to be achieved. This could involve moving the provisions to a stand-alone act or incorporating them into the relevant trusts legislation (as discussed above at 9.2.3). It could also involve increasing the powers of a court to vary the terms of a trust in order to achieve the aims of the settlor or avoid remote vesting of property (as discussed above at 9.4.2).

⁵³⁰ Scottish Law Commission, *Discussion Paper on Accumulation of Income and Lifetime of Private Trusts*, Discussion Paper No 142 (January 2010) 86, para [5.26].

⁵³¹ Scottish Law Commission, *Discussion Paper on Accumulation of Income and Lifetime of Private Trusts*, Discussion Paper No 142 (January 2010), 84-92.

⁵³² This may require coordination with the Federal Government.

⁵³³ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000 at 57, para 4.21.

⁵³⁴ As discussed at 9.2.1 above.

⁵³⁵ As adopted in the UK and as proposed in the Northern Territory and New Zealand.

Questions

63. If the rule is to be retained but in modified form, should the maximum length of the specified perpetuity period be extended beyond 80 years? If yes, what length of time would be appropriate?
64. Should the rule be modified to provide for one, and one only perpetuity period of a set number of years, effectively doing away with the need for a life or lives in being?
65. If the rule is modified, should the courts be given increased powers to order the variation of a trust deed and vesting of property?
66. Are there any other modifications to the rule that are necessary or desirable? What are they and why should they be considered?
67. To the extent that the rule is retained, should the provisions: remain in the PLA; be re-located to a stand-alone act; or incorporated into the relevant trusts legislation?

9.5. Existing trusts and transitional issues

Any consideration of abolishing or modifying the rule against perpetuities must consider the effect that this will have on existing trusts and dispositions that have been made but have not yet become effective. One approach is to be prospective so that the new provisions will apply going forward to dispositions made after the changes come into effect. Another approach is to be retrospective so that the new provisions will apply to dispositions made prior to the new provisions coming into effect. A third approach is to be prospective but have an 'opt in' for existing dispositions.

The following sections discuss the approach taken or suggested in New Zealand, the Northern Territory and the UK.

9.5.1. New Zealand transitional approach – prospective only

The NZLC considered the issue of application of a new perpetuity period to existing settlements.⁵³⁶ The NZLC argued that it would not be appropriate to allow trustees to change the duration of the trust (unless the trust deed provided for such a change) or to provide a lower threshold for the court to extend the duration.⁵³⁷

⁵³⁶ New Zealand Law Commission, *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, 'Perpetuities and the Maximum Duration of Trusts', at 17.26-17.30

⁵³⁷ New Zealand Law Commission, *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, 'Perpetuities and the Maximum Duration of Trusts', at 17.29.

This approach means that the duration of existing trusts will continue to be determined by the existing trust deed and will not change unless: there is a provision in the trust deed; all the beneficiaries agree; or a court approves the variation.⁵³⁸

In Queensland, a prospective approach could result in four versions of the rule, depending on when the will or document creating the trust became effective. The common law rule would apply to dispositions or settlements prior to 1972; the common law rule as modified by the 1972 Act would apply to dispositions and settlements made from the commencement of the 1972 Act until the commencement of the PLA; the rule as modified by Part 14 of the PLA would apply to dispositions and settlements from the commencement of the PLA; and a fourth version of the rule would apply to dispositions or settlements after the commencement of any change to the rule arising from this review.

9.5.2. Northern Territory transitional approach – retrospective

The NTLRC recommended a retrospective approach in that the changed duration would apply to existing trusts automatically in some situations. The NTLRC considered the application of an increased perpetuity period of 150 years to existing trusts in several situations⁵³⁹ where the settlor has:

- used the common law perpetuity period of a life or lives in being plus 21 years;
- not specified a perpetuity period (in which case the default period of 80 years applies);
- specified the maximum perpetuity period of 80 years; or
- specified a perpetuity period shorter than the 80 year maximum.

In the first two situations the NTLRC recommended that the new perpetuity period of 150 years should apply, subject to a right for a party aggrieved by the change to apply to the court to adjust the settlement or its duration to do justice between interested parties on the basis of the change. In the third situation, an interested party would have the ability to apply to the court to increase the duration and in the fourth situation, the specified duration would remain unchanged.⁵⁴⁰ It was felt that only a small number of cases of negative impact would arise and therefore, recourse to the courts could mitigate the potential negative impact of these changes.⁵⁴¹

In Queensland, a retrospective approach may result in some property settling outside of the period anticipated by the settlor or testator. This delayed settlement could leave some beneficiaries, who may have been entitled to take possession of property, deprived of the opportunity to take possession.

⁵³⁸ New Zealand Law Commission, *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, 'Perpetuities and the Maximum Duration of Trusts', at 17.29.

⁵³⁹ Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No 40, July 2014, at 17-23.

⁵⁴⁰ Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No 40, July 2014, at 23.

⁵⁴¹ Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No 40, July 2014, at 21 and 23.

9.5.3. UK transitional approach – ‘Opt in’

In the UK, the 2009 amendment of the rule is prospective in that it applies only to trusts established after the commencement of the legislation. This means that there are effectively three regimes in relation to the rule in the UK: the common law which applies to dispositions made prior to 1964; the *Perpetuities and Accumulations Act 1964* (UK), which applies to trusts executed after 15 July 1964; and the *Perpetuities and Accumulations Act 2009* (UK), which applies to trusts executed from 6 April 2010.

However, the *Perpetuities and Accumulations Act 2009* (UK) allows an exception for existing trusts. If it is difficult or not reasonably practicable to determine whether the life or lives in being of an existing disposition or settlement have ended,⁵⁴² the trustee may be able to ‘opt-in’ to a 100 year perpetuity period.

This is shorter than the 125 year perpetuity period allowed for new trusts but allows existing trusts to avoid what may be a costly, time consuming and uncertain effort to determine 21 years after the death of the last member of a class of lives in being for the trust.

Question

68. If the rule is abolished or modified, how should existing trusts be dealt with?

⁵⁴² *Perpetuities and Accumulations Act 2009* (UK) (c 18) s 12.

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